NO. 302563-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

VANCE LYNN BAKER, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 08-1-01152-0

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

On October 18, 2008, 13-year-old L.L.B. disclosed to family that her uncle "Vance" had been molesting her. (CP 150). The police were called and L.L.B was first interviewed by Deputy Benetiz. (CP 150). L.L.B. disclosed acts of Child Molestation. (CP 150). A 72-hr hold was approved by the Benton County Prosecutor's office and the whereabouts of the defendant were unknown. (CP 150). The case was assigned to Detective Brockman. (CP 150). On November 5, 2008, L.L.B. was interviewed by Det. Brockman, and she disclosed acts of child molestation. (CP 150-51).

The defendant was later arrested on November 11, 2008. (CP 151). On November 20, 2008, the defendant entered a plea of not guilty to one count of Child Molestation in the Second Degree. (CP 151). For the next year and a half, the defendant went through three different defense attorneys. (CP 151). With each attorney, the court granted defense requests to continue the matter so they could get up to speed on the case. (CP 151). Most of these continuances were granted over the State's objections. (CP 151).

In December of 2009, M.J.B., the defendant's seventeen-year-old daughter, disclosed to family members that she was also sexually abused

by the defendant. (CP 151). On January 13, 2010, M.J.B. was interviewed at Kids Haven where she disclosed sexual molestation. (CP 151). She further indicated that her cousin L.L.B. had since disclosed to her that the defendant not only touched her, but inserted his fingers in her vagina. (CP 151). On January 19, 2010, L.L.B. was interviewed at Kids Haven and disclosed molestation and penetration of her vagina by the finger of the defendant. (CP 151).

On February 8, 2010, the State filed an Amended Information to add Child Molestation in the First Degree for the abuse against M.J.B. (CP 151). The State attempted to negotiate out further rape and molestation charges to no avail. (CP 151). There have been a total of four Informations filed in this case. (CP 1-2, 54-55, 144-46, 147-49). The charge of Child Molestation in the Second Degree, with the victim being L.L.B. is the one charge that remained constant throughout the charging documents. *Id.* The documents give the time frame for that incident as follows:

- Information: "between the 25th day of May, 2007, and the 25th day of May, 2008." (CP 1-2).
- First Amended Information: "between the 25th day of May, 2007, and the 25th day of May, 2008." (CP 54-55).

- Second Amended Information: "between the 25th day of May, 2007, and the 1st day of November, 2008." (CP 144-45).
- Third Amended Information: "between the 25th day of May, 2004, and the 24th day of May, 2007." (CP 147-48).

L.L.B. turned twelve on May 25, 2007. (RP[1] 123).

The defendant proceeded to trial. As part of the State's Motions in Limine, the State moved to exclude references to a call made to the police by a party who was not L.L.B., reporting a burglary and a rape at L.L.B.'s home, with L.L.B. as the victim. (CP 152). This motion was granted, subject to a hearing in which the defendant might prove the relevance and existence of the phone call. (RP 102-03). This hearing was held, with the victim being called to the stand. (RP 175). The victim revealed in testimony that the defendant had characterized the events wrongly throughout the process. L.L.B. never called the police. (RP 180). Rather, she revealed some of the abuse Mr. Baker had subjected her to in the past to a friend named Dillon. (RP 179-80). Dillon contacted the police, apparently mistakenly believing that L.L.B.'s abuse was current, rather than past, and the result of a break-in. (RP 179-81). As a note, the defendant continues to mischaracterize this incident, claiming that L.L.B.

admitted to calling the police, and admitted the rape report was false. (Appellant's Brief at 10).

II. ARGUMENT

1. THE MISTAKEN DATE IN THE THIRD AMENDED INFORMATION WAS AN ERROR, BUT ONE WITHOUT PREJUDICIAL EFFECT, AND IS NOT SUFFICIENT GROUNDS FOR REVERSAL.

It is clear from the chain of Informations filed in this case, as well as the instructions given to the jury, and the victim's age, that the date given in the Third Amended Information was in error. The victim turned 12 on May 25, 2007. (RP 123). The Third Amended Information provided a date range of the 25th of May 2004, to the 24th of May 2007. (CP 147-49). The charge of Child Molestation in the Second Degree requires that the victim be older than 12 at the time of the crime. RCW 9A.44.086. As a result, the defendant could not be charged with Child Molestation in the Second Degree for crimes in that time frame. The question before the Court is if a mistaken date in an Information is fatal to a conviction predicated upon that charging document.

The information provided the defendant with notice of all statutory

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[1] Unless dated, "RP" refers to the trial transcripts of May 16-20, 2011, by Court Reporter John McLaughlin.

elements of the crime. It reads:

> That the said Vance Lynn Baker, in the County of Benton, State of Washington, during the time intervening between the 25th day of May, 2004, and the 24th Day of May, 207, in violation of RCW 9A.44.086, did engage in sexual contact with and was at least thirty-six months older then L.L.B. DOB 5-25-1995, a person who was at least twelve years of age but less then fourteen years of age and not married to the accused, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Washington.

(CP 148).

Even with the wrong dates, the defendant was apprised of the elements of the crime. The defendant argues that that the time of the offenses is a material element of the crime, but that is clearly not the case. The Statute does not require that the molestation take place within a certain date range. Rather, it requires the victim to be between the ages of 12 and 14, which the Third Amended Information clearly states. (CP 148). RCW 9A.44.086.

In *State v. Hayes*, 81 Wn. App. 425, 433, 914 P.2d 788 (1996), the Court very clearly ruled that time is not an element of crimes regarding child sexual abuse. The defendant there made the same arguments that the defendant in the current case makes.

The defendant relies heavily on *State v. Goldsmith,* 147 Wn. App. 317, 195 P.3d 98 (2008) in his analysis. However, *Goldsmith* is not on

point. *Goldsmith* deals with a very specific fact pattern. The State, in *Goldsmith*, charged Mr. Goldsmith with a violation of RCW 9A.44.083. *Id.* at 322. RCW 9A.44.083 is a statute that provides two disjunctive means of committing the crime proscribed. In *Goldsmith,* through an apparent error, the State charged the defendant with one, and only one, means of committing a crime, and proceeded to only offer proof showing that the other means was the one actually committed. *Id.* As a result, the Information was valid on its face, it simply charged a different crime than the one the State actually proved. *Id.* This case is obviously different. The defendant alleges that the time frame in the Third Amended Information renders this crime a legally distinct one from that which was proved. However, the defendant here was charged with an Information that provided all the statutory elements of the crime, all of which were proved at trial, and of which the jury were informed of. It also provided information beyond the elements of the crime. For instance, the date range of the crime, and that the crime took place in Benton County. Their inclusion in the Information does not render them elements of the crime. The State proved each and every element of the crime of Child Molestation in the Second Degree, as charged, at trial. The error in the dates had no impact upon what the elements of the crime were. As a result, *Goldsmith* cannot be said to be controlling.

The Court has drawn a firm line between errors in a charging document with regards to the elements, and errors in a charging document with regards to extraneous information.

> Convictions based on charging documents which contain only technical defects (such as an error in the statutory citation number or the date of the crime or the specification of a different manner of committing the crime charged) usually need not be reversed. However, omission of an essential statutory element cannot be considered a mere technical error.

State v. Vangerpen, 125 Wn.2d 782, 790, 888 P.2d 1177 (1995).

If the defendant could show some prejudice, the date might be sufficient for reversal. However, the defendant cannot. The defendant's defense was general denial throughout the case. The defendant elected to proceed upon the theory that the victims, particularly L.L.B., were untrustworthy, and that the jury should discount their testimony. (RP 114-123). The defendant never indicated that he wished to present an alibi defense, and never presented one. Nor was his defense predicated on the State sticking to the dates listed. If his defense had been "I molested L.L.B., but only in 2004 to 2007 as charged, and she wasn't 12," the State would see some prejudice. However, that is not the case. Furthermore, the previous Informations made clear what the actual charged dates were.

The defendant suffered no prejudice because of the technical defect in the Third Amended Information. Neither *Goldsmith*, or any

other case demands reversal in this matter. *Vangerpen* establishes the rule that generally, the exact error the defendant claims is insufficient to reverse, without some further prejudice. The defendant has not argued any such prejudice, and the State fails to see any established in the record.

2. THE EVIDENCE OF THE ALLEGED "RAPE COMPLAINT" WAS PROPERLY EXCLUDED UNDER ER 609.

The defendant argues that he should have been allowed to present evidence of a prior rape complaint to attack L.L.B.'s credibility. From the outset, the State will note that the defendant mistakes the court's ruling, conflating the exclusions of extrinsic evidence of a reported rape, with the exclusion of that testimony on cross examination of the alleged reporting party. There were two separate rulings made at different times and on different grounds. One ruling was that the defendant could not prove the incident through extrinsic evidence. (RP 174). ER 608(b) indicates that the judge was entirely correct to forbid the attacking of L.L.B.'s credibility through extrinsic testimony or evidence of a particular event. (RP 174-75). As *State v. Harris,* 97 Wn. App. 865, 873, 989 P.2d 553 (1999) held, even in cases exactly like the one before the Court, extrinsic evidence is not allowed to prove a particular act did not occur. As a result, the defendant was stuck with the event as described by the victim, L.L.B. As such, the ruling determining that the probative value of any questions

about this alleged rape report was the probative value of the testimony, as L.L.B. gave it.

In short, the court did not rule that a false report of rape and burglary would have had little to no probative value. Rather, the court ruled that the testimony given by L.L.B. had no probative value as to her truthfulness. (RP 181). A review of that testimony demonstrates why. L.L.B.'s memory of the event was obviously unclear. (RP 175). However, L.L.B. was able to give a brief summary of the event. In essence, she never called the police. (RP 177). Her friend Dillon called the police. *Id.* L.L.B. was communicating with Dillon on Instant Messenger. (RP 179). L.L.B. told Dillon about some of the abuse Vance Lynn Baker had subjected her to. (RP 179-80). Dillon then called the police. (RP 180).

It became clear from the testimony that L.L.B. did not remember the incident very well. Furthermore, it became obvious that the defendant's characterization of it was false. Rather than L.L.B. lying, it appears there was something in the nature of a miscommunication between L.L.B. and Dillon. When that miscommunication was relayed to the police, they immediately responded to her residence, where they discovered no burglary or rape in progress. The court considered these

events, and concluded that they said virtually nothing about the credibility of L.L.B.

The defendant is correct in stating that evidence that proves the defendant's theory of the case should be considered relevant. *State v. Sheets*, 128 Wn .App. 149, 156, 115 P.3d 1004 (2005). However, the evidence presented has to actually support that theory. It is not sufficient for the defendant to argue that the evidence 'should' be something, and try to use their view of what the evidence should say to admit it. Reviewing the actual evidence the defense was attempting to present, it appears to have no probative value whatsoever. The false report Mr. Baker wanted to present was shown nowhere in the record.

3. THE WORDING OF THE 'TO-CONVICT' INSTRUCTION WAS ENTIRELY CORRECT.

A. Nullification in the State of Washington and the Federal System

The defendant argues that the 'to-convict' instruction informed the jury of its rights and powers incorrectly. The defendant frames his argument as a claim that the 'to-convict' instruction created a duty to convict, when there was none. "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." (Appellant's brief, 34). The implication of his argument is that even when the jury

believes that the State has met its burden and satisfied the jury beyond a reasonable doubt, the jury may still acquit. Jury nullification is defined as: "Nullifcation is a juror's knowing and deliberate rejection of the evidence or refusal to apply the law ... because the result dictated by law is contrary to the [juror's] sense of justice, morality, or fairness." BLACK'S LAW DICTIONARY 875 (8th ed.2004). *State v. Elmore*, 155 Wn. 2d 758, 761, 123 P.3d 72, 73 (2005). The defendant argues in favor of jury nullification. There is no other term for a jury's refusal to convict when every legal element of a crime has been satisfied beyond a reasonable doubt.

The defendant's arguments are presupposed on the notion that the jury has the right to ignore the laws of the State of Washington and the instructions of the court, and do as they will. Jury nullification has long been considered a power of the jury, but it is not a right of either the jury or the defendant, nor has it ever been seen as something to be protected. The jury, just as all the actors in the court room, is bound by the rules and laws of the State of Washington, and may not do as it pleases. The defendant requests that this Court overrule *State v. Meggyesy,* 90 Wn. App. 693, 958 P.2d 319 (1998) and *State v. Bonisisio*, 92 Wn. App. 783, 964 P.2d 1222 (1998), and find the wording used in the WPICs unconstitutional.

The defendant cites many cases which he claims show that the power of nullification is a protected constitutional right. However, the defendant's understanding is based on a fundamental misconception of those cases. He mistakes the power of the jury to judge the facts of the case entirely according to its view for the power to ignore the law and the facts, deciding based upon moral or ethical rules. It is entirely the province of the jury to determine the credibility of witnesses and the other factual matters of the case. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003). However, it is the duty of the court, through the instructions, to provide the jury with the law. *State v. Byrd*, 72 Wn. App. 774, 780, 868 P.2d 158 (1994). When a jury believes that the State has shown that a defendant committed an act the statute terms illegal beyond a reasonable doubt, but elects not to convict, it engages in jury nullification. *State v. Meggyesy*, 90 Wn. App. 693, Footnote 8 (1998). This is completely separate and distinct from the jury's power to say "the evidence does not show that an element of the crime has been met, beyond a reasonable doubt" no matter what that evidence might be.

The defendant cites *State v. Primrose* as showing that the jury has the power to return a verdict of not guilty when the State has properly met their burden. *State v. Primrose*, 32 Wn. App. 1, 645 P.2d 714 (1982). The defendant misreads the import of that case. The facts of *Primrose* were

that the lower court gave the jury instruction: "As a matter of law the defendant has not introduced evidence concerning a lawful excuse for his failure to appear." *Id.*. at 2. The Appellate Court decided this instruction was improper, as it impermissibly removed the State's burden of proving beyond a reasonable doubt that Primrose had no lawful excuse. *Id.* at 4. Thus, it removed the ability of the jury to decide if the excuses presented by the defendant were in fact lawful, as RCW 9A.76.170 required. *Id.* The Court in *Primrose* decided for the jury that the excuses were not, stripping them of their ability to evaluate those facts. *Id.* The 'jury's pardon' or 'veto' referred to in the case is not the power of jury nullification, but the right of the jury to resolve factual issues based upon their view of the evidence, no matter the court's belief of how flimsy that evidence is. *Id.* The jury is the trier of fact, and any intrusion into its province as such constitutes interference with the jury trial right. However, once the jury determines that a defendant has committed an offense beyond a reasonable doubt, their duties as the trier of fact cease. They do not have the right to then decide not to convict based upon their personal feelings. That is jury nullification, and a violation of their oath to the court.

The defendant also cites *State v. Salazar,* 59 Wn. App. 202, 796 P.2d 773 (1990) as creating a power of nullification. *State v. Salazar* is in

no way a ringing endorsement of nullification. The facts of *Salazar* are that a trial court allowed the State to mention that a search performed on defendant Salazar's automobile was based upon a warrant, over the objection of the defense. *Id.* at 210. The court was worried that the jury, if it believed that the search was without legal basis, would find convicting on that evidence ethically difficult. *Id.* at 210-11. Thus, the court was allowed to reduce the chance of nullification by admitting the evidence. *Id.* at 211. The case in no way states that jury nullification is legal. The point is simply that it is possible, and that the court's worries about it are justified. *Id. State v. Salazar* mimics the federal systems position in most regards. Rather than jury nullification being a protected right, it is something the courts have a duty to reduce the chance of. *Merced v. Mcgrath*, 426 F.3d 1076, 1079 (9thCir. 2005).

The defendant states that if there is a duty to convict, the court lacks any means to enforce it. This is simply not true. If the court has reason to believe a juror is involved in jury nullification, the court has the power to perform an investigation into the conduct. *State v. Elmore*, 155 Wn.2d 758, 761, 123 P.3d 72 (2005). If it is uncovered that a juror is engaging in nullification, even during the deliberations, the court has the power to dismiss the juror. *Id.* The evidentiary bar for the procedure is high, but this is not because of some respect for jury nullification. Rather,

the court requires specific proof that the juror's inability to convict is not based upon factual matters. *Id.* at 771. The court has the duty and power to prevent jury nullification where it may. Furthermore, the Washington Pattern Jury Instructions contain the following admonition:

> As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you, and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially, with an earnest desire to reach a proper verdict.

WPIC 1.02.

This instruction has been approved by the courts numerous times, as invoking the juror's solemn duty to not invoke emotional sympathies or such when making a decision. *State v. Lord*, 161 Wn.2d 276, 279 (footnote 2), 165 P.3d 1251 (2007). The defendant does not challenge the propriety of giving this instruction. This, no less than the to-convict instruction, charges the jury with a duty to decide the guilt of the defendant based upon the facts as proved to them and the law given to them. The language of WPIC 1.02 and the 'to-convict' language appealed here are attempts to prevent jury nullification, reminding the jurors of their oath to the court.

The Federal Courts are in accord with this view of nullification. It is a power, not a right. E.g., *Merced v. Mcgrath*, 426 F.3d at 1079. It

arises out of the rights the defendant and the jury have, an unfortunate side effect of the valuable goals the rights serve to protect. *Id.* Double jeopardy, the protection against coercion, the secrecy of the jury room, all of these protect the ability of the jury to nullify. But they do so to ensure that the defendant is given a hearing by a fair and impartial jury, not because nullification is some inherent good. As *Mcgrath* notes, a juror who elects to engage in nullification has broken his sworn, solemn oath to the court. *Id.* Indeed, *Mcgrath* explains the contradiction that arises if the defendant's position is correct. If jury nullification is ensconced in the right to a jury trial, why is it allowed in both the courts of Washington and the Federal Courts to eject a juror who is nullifying? *State v. Elmore*, 155 Wn.2d at 761); *Merced v. Mcgrath*, 426 F.3d at 1079. The answer is because there is no right to nullification. Indeed, it is a perversion of the system, and the court has a duty to stop it from occurring.

> [i]nasmuch as no juror has a right to engage in nullification-and, on the contrary, it is a violation of a juror's sworn duty to follow the law as instructed by the court-trial courts have the duty to forestall or prevent such conduct, whether by firm instruction or admonition or, where it does not interfere with guaranteed rights or the need to protect the secrecy of jury deliberations, ... by dismissal of an offending juror from the venire or the jury.

Merced v. Mcgrath, 426 F.3d at 1079-1080 (citing *United States v. Thomas*, 116 F.3d 606, 615 (2nd.Circuit 1997)).

As far back as 1895, the Supreme Court of the United States declared the danger of jury nullification and the consequences of ensconcing it within the constitutional fabric, in *Sparf v. U.S.*, 156 U.S. 51, 101-103, 15 S. Ct. 273, 293, 39 L. Ed. 343 (1895).

> Public and private safety alike would be in peril if the principle be established that juries in criminal cases may, of right, disregard the law as expounded to them by the court, and become a law unto themselves. Under such a system, the principal function of the judge would be to preside and keep order while jurymen, untrained in the law, would determine questions affecting life, liberty, or property according to such legal principles as, in their judgment, were applicable to the particular case being tried. If because, generally speaking, it is the function of the jury to determine the guilt or innocence of the accused according to the evidence, of the truth or weight of which they are to judge, the court should be held bound to instruct them upon a point in respect to which there was no evidence whatever, or to forbear stating what the law is upon a given state of facts, the result would be that the enforcement of the law against criminals, and the protection of citizens against unjust and groundless prosecutions, would depend entirely upon juries uncontrolled by any settled, fixed, legal principles.

Id.

Sparf takes up the examination of the notion of jury nullification as a vaunted tradition under the common law, and firmly debunks any notion that the courts of England, from whom the common law tradition derives (and whom the defendant cites in his brief) believed that such behavior by the jury was to be encouraged. *Id.* at 86-99.

There is no justification in the common law of Washington or of our nation to view jury nullification as a right, protected in its own regard by the constitution. Rather, it is a power that arises out of the confluence of several rules that are constitutionally protected i.e., the defendant's right to have his guilt determined by a jury of his peers, the right of the jury to adjudge the facts as they will, the right to make their decision uncoerced, and the right to have their deliberations kept secret. That these rights exist does not mean the court must give the constitutional protection to jury nullification. Rather, it is a power which arises out of them, the use of which threatens anarchy within the court system, and one whose exercise the court has the duty to stop if it may by any means that do not impede either parties exercise of those rights.

B. *State v. Meggyesy* and the *Gunwall*[2] analysis

The defendant asks the Court to ignore *State v. Meggyesy* and *State v. Bonisisio*, decisions by Divisions I and II of the Washington State Court of Appeals that accord with the State's position. The defendant characterizes their analysis as poor. The State disagrees with this contention. *Meggyesy* is primarily a *Gunwall* analysis of the right to trial by jury in the State of Washington, and whether the State Constitution is

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

more protective then the Federal. *Meggyesy*, 90 Wn. App. at 704. A brief review and comparison of the defendant's analysis, as compared to the *Meggyesy* Court's will demonstrate why the State finds the *Meggyesy* analysis so much more convincing.

As *Meggyesy* is in large part a *Gunwall* analysis, a review of what the *Gunwall* factors are is necessary for an understanding of the case to emerge. The *Gunwall* Court gave the six factors, along with their accompanying definitions, as such:

> 1. *The textual language of the State Constitution.* The text of the state constitution may provide cogent grounds for a decision different from that which would be arrived at under the Federal Constitution. It may be more explicit or it may have no precise federal counterpart at all.
>
> 2. *Significant differences in the texts of parallel provisions of the federal and state constitutions.* Such differences may also warrant reliance on the state constitution. Even where parallel provisions of the two constitutions do not have meaningful differences, other relevant provisions of the state constitution may require that the state constitution be interpreted differently.
>
> 3. *State constitutional and common law history.* This may reflect an intention to confer greater protection from the state government than the Federal Constitution affords from the federal government. The history of the adoption of a particular state constitutional provision may reveal an intention that will support reading the provision independently of federal law.
>
> 4. *Preexisting state law.* Previously established bodies of state law, including statutory law, may also bear on the granting of distinctive state constitutional rights. State law

> may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims. Preexisting law can thus help to define the scope of a constitutional right later established.
>
> 5. *Differences in structure between the federal and state constitutions.* The former is a grant of enumerated powers to the federal government, and the latter serves to limit the sovereign power which inheres directly in the people and indirectly in their elected representatives. Hence the explicit affirmation of fundamental rights in our state constitution may be seen as a guarantee of those rights rather than as a restriction on them.
>
> 6. *Matters of particular state interest or local concern.* Is the subject matter local in character, or does there appear to be a need for national uniformity? The former may be more appropriately addressed by resorting to the state constitution.

State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

With respect to the first and second *Gunwall* factors, which both concern the textual language of the constitutional provisions at issue, the State finds the defendant's arguments unconvincing. The defendant argues that differences in phrasing in any portion of the language indicate a different intent as to the right by jury trial. The State respectfully disagrees. In *Gunwall,* what mattered was the impact the wording had on the meaning of the provision and how that related to the way the issue at hand should be judged. *Id. at* 65. The defendant is unable to cite how the differences in wording suggest different meanings or relate to the issue at hand. Indeed, the meaning the defendant derives from the differences in

wording he cites is: "the right to a jury trial is so fundamental that any infringement violates the constitution." The simple fact is that statement is a truism, applying to any constitution that includes a right to a jury trial. The Sixth Amendment right to a jury trial is just as fundamental, and any infringement violates the Sixth Amendment. Now, one can debate what constitutes an 'infringement,' but the defendant's brief points out no relevant differences suggested by the language of the Constitution. *Meggyesy* is correct. The first and second factors suggest no difference.

The defendant's argument about the third factor, *State constitutional history*, is almost word for word as what was presented to the *Meggyesy* Court, and the analysis is still just as unconvincing. *Meggyesy*, 90 Wn. App. at 704. The simple fact that the State of Washington used other State Constitutions, rather than the Federal Constitution as its model does not mean that the third factor supports a broader right in the State Constitution. Indeed, *Gunwall* itself supplies the reason why Washington did this. The Federal Constitution is an empowering document, which grants the federal government authority in certain respects. *Gunwall*, 106 Wn.2d at 61. In contrast, the State Constitution is a limiting document, determining what rights the government shall not trespass on. *Id.* As such, the documents have entirely different purposes. The State of Washington did not model itself

after the Federal Constitution, because the Federal Constitution was an entirely inappropriate model. The fifth factor of *Gunwall* is the proper place in the analysis for this. If the facts which the defendant cites are sufficient to determine the third factor, then it would be entirely redundant with the fifth. Instead, what the third factor asks is that an inquiry be made into what the intent and goals were when the provision at issue was being adopted. The defendant makes no analysis of such. *Meggyesy* correctly states that the Supreme Court has weighed in on this issue, stating that the constitutional history of the right to jury trial is not broader *Meggyesy*, 90 Wn. App. at 704 (citing *State v. Brown*, 132 Wn.2d 529, 596 (1997)).

The defendant accuses the *Meggyesy* Court of misunderstanding *Leonard v. Territory*, 2 Wn. Terr. 381, 7 P. 872 (1885). The defendant is the one who misunderstands. The defendant argues that *Leonard* is support for the fact that State law at the time of the constitutions adoption was that the use of the 'duty to convict' language was viewed as illegitimate. *Leonard* contains no support for this proposition. *Leonard* doesn't comment on the distinction between 'may' and 'duty to convict.' At most, *Leonard* suggests that the court would be justified in giving an instruction containing "may," not that a court must give an instruction containing "may." The defendant does not answer the analysis of *State v.*

Wilson[3] in *Meggyesy*. *Wilson* is a case affirming the use of "duty to convict" directly. *State v. Wilson*, 9 Wn. 16, 36, 36 P. 967 (1894). The defendant has failed to show the third factor supports a differing interpretation in any way.

In regards to the fourth *Gunwall* factor, the defendant attempts to use *Hartigan v. Washington,* 1 Wn. Terr. 447 (1874) to suggest that "may" is an inherent part of our State law. The defendant mischaracterizes the holding of *Hartigan*. The case simply states that there is no remedy for nullification, once the jury has found a verdict of not guilty. *Id.* at 449. It doesn't say that the jury's ability to do so is protected by anything other than double jeopardy.

The fifth factor supports differing interpretations, as it always does. As the defendant notes, *Gunwall* indicates this will always be the case.

On the sixth factor, the defense states baldly that the conduct of trials in State Court is of particular local concern. It provides no reasoning for this, just claiming it so. The *Meggyesy* Court noted the defendants likewise did not provide any reasoning. The federal government is just as interested in the integrity of the criminal justice system as the State, and

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[3] *State v. Wilson*, 9 Wn. 16, 36 P.967 (1894).

the protection of the jury trial right enshrined in the Sixth Amendment. *Gunwall* looks not for bald assertions, but reasoning. In *Gunwall*, the long standing and specific protections of the State of Washington for telephonic communications were the overriding factor. *State v. Gunwall*, 106 Wn.2d at 66. There is no indication that jury trial right is something of particular and specific attention in the State of Washington.

The analysis of *Meggysey* Court is correct. There is no reason to consider the protection of the jury trial right, especially pertaining to the ability of the jury to nullify, is any stronger in the State of Washington then it is in the Federal Constitution. The WPICs correctly articulate the standard that if one believes the facts demonstrate an individual's guilt, a duty arises from that belief. A jury judges the facts. It is not empowered to disregard the law. If a juror engages in such conduct, the court has the power to eject him from the jury. *State v. Elmore*, 155 Wn.2d 758, 761, 123 P.3d 72 (2005).

4. THE STATE CONCEDES THAT THE PROPER TERM OF COMMUNITY CUSTODY IS NOT 48 MONTHS, BUT NEITHER IS IT 36 MONTHS.

The defendant correctly cites the statutory provisions regarding community custody in effect at the moment. If Mr. Baker sexually assaulted a child today and was not subject to an indeterminate

sentence as laid out on RCW 9.94A.507, he would be subject to 36 months of community custody. However, the defendant's assault of the victims in this case did not take place today. The defendant was convicted of crimes that took place in 1996 and 2007 according to the Judgment and Sentence. (CP 293). "Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed." RCW 9.94A.345. Looking at the community custody statutes in effect at the dates of offense, the 1996 and 2007 crimes are each governed by separate provisions.

The relevant section of former RCW 9.94A.120(9)(b), as it was in 1996, read:

> When a court sentences a person to a term of total confinement to the custody of the department of corrections for an offense categorized as a sex offense or serious violent offense committed on or after July 1, 1990, the court shall in addition to other terms of the sentence, sentence the offender to community placement for two years or up to the period of earned early release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer.

For both crimes in 1996 then, the defendant, on top of his confinement, would need to serve two years of community custody, or the amount of early release time, whichever was longer.

For the crimes in 2007, the community custody process was different. Former RCW 9.94A.715(1) read:

> When a court sentences a person to the custody of the department for a sex offense not sentenced under RCW 9.94A.712, a violent offense, any crime against persons under RCW 9.94A.411(2), or a felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 2000, or when a court sentences a person to a term of confinement of one year or less for a violation of RCW 9A.44.130(10)(a) committed on or after June 7, 2006, the court shall in addition to the other terms of the sentence, sentence the offender to community custody for the community custody range established under RCW 9.94A.850 or up to the period of earned release awarded pursuant to RCW 9.94A.728 (1) and (2), whichever is longer.

Former RCW 9.94A.712 read:

> (1) An offender who is not a persistent offender shall be sentenced under this section if the offender:
>
> (a) Is convicted of:
>
> (i) Rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion;
>
> (ii) Any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree, or burglary in the first degree; or
>
> (iii) An attempt to commit any crime listed in this subsection (1)(a);
>
> committed on or after September 1, 2001; or

> (b) Has a prior conviction for an offense listed in RCW 9.94A.030(33)(b), and is convicted of any sex offense which was committed after September 1, 2001.
>
> For purposes of this subsection (1)(b), failure to register is not a sex offense.

As sentencing under Former RCW 9.94A.712 would not have been appropriate, as only the Child Molestation in the Second Degree was after its effective date, the period provided for by RCW 9.94A.850, or the period of early release time, whichever was longer, was the appropriate community custody period. Former RCW 9.94A.850(5) provided:

> (5)(a) Not later than December 31, 1999, the commission shall propose to the legislature the initial community custody ranges to be included in sentences under RCW 9.94A.715 for crimes committed on or after July 1, 2000. Not later than December 31 of each year, the commission may propose modifications to the ranges. The ranges shall be based on the principles in RCW 9.94A.010, and shall take into account the funds available to the department for community custody. The minimum term in each range shall not be less than one-half of the maximum term.
>
> (b) The legislature may, by enactment of a legislative bill, adopt or modify the community custody ranges proposed by the commission. If the legislature fails to adopt or modify the initial ranges in its next regular session after they are proposed, the proposed ranges shall take effect without legislative approval for crimes committed on or after July 1, 2000.
>
> (c) When the commission proposes modifications to ranges pursuant to this subsection, the legislature may, by enactment of a bill, adopt or modify the ranges proposed by the commission for crimes committed on or after July 1 of the year after they were proposed. Unless the legislature

> adopts or modifies the commission's proposal in its next regular session, the proposed ranges shall not take effect.

WAC 437-20-010 provides that the appropriate term of community custody for a sex offense is 36-48 months. As a result, the State does admit that the community custody period listed upon the Judgment and Sentence is incorrect. Mr. Baker should not have been given a community custody period of 48 months straight. The appropriate sentence was 36-48 months, as provided by WAC 437-20-010, or the period of early release, whichever was longer. As a note, RCW 9.92.151 provides that an offender convicted of a sex offense that is a class A felony, like Child Molestation in the First Degree, may not have his sentence reduced by more than 15 percent. RCW 9A.44.083. Mr. Baker received 120 months on both counts III, and IV. (CP 298). That gives him an early release maximum of 18 months. As a result, the alternative condition is irrelevant unless the law changes.

III. CONCLUSION

With the sole exception of the error in the community custody time, the defendant has failed to assign error to anything meriting reversal. As a result, the State requests that this Court remand the case to Benton

County Superior Court to alter the community custody provisions to reflect the appropriate sentence of 36-48 months.

RESPECTFULLY SUBMITTED this 2nd day of July 2013.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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