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Court of Appeals
Division III
State of Washington

No. 30734-4-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

GREGORIO LUNA LUNA ,

Defendant/Appellant.

BRIEF OF APPELLANT

DAVID N. GASCH
WSBA No. 18270
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....8

B ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....8

C. STATEMENT OF THE CASE.....8

D. ARGUMENT.....10

 1. The State violated the Fourth Amendment and/or article I, section 7 when it procured a sample of Luna Luna's DNA pursuant to a court order without having a clear indication that the desired evidence would be found.....10

 2. Mr. Luna Luna’s constitutional right to a jury trial was violated by the court’s instructions, which affirmatively misled the jury about its power to acquit.....17

E. CONCLUSION.....35

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Duncan v. Louisiana</i> , 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).....	18, 19
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S. Ct. 2781 61 L. Ed. 2d 560 (1979).....	28
<i>Neder v. United States</i> , 527 U.S. 1, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999).....	25
<i>Schmerber v. California</i> , 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).....	12, 13, 14
<i>Skinner v. Ry. Labor Executives' Ass'n</i> , 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989).....	12
<i>Sullivan v. Louisiana</i> , 508 U.S. 275, 124 L.Ed.2d 182, 113 S.Ct. 2078 (1993).....	33
<i>United States v. Gaudin</i> , 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995).....	25, 27
<i>Whiteley v. Warden, Wyo. State Penitentiary</i> , 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971).....	13
<i>United States v. Garaway</i> , 425 F.2d 185 (9th Cir. 1970).....	24
<i>United States v. Moylan</i> , 417 F.2d 1002 (4th Cir. 1969), <i>cert. denied</i> , 397 U.S. 910 (1970).....	23, 26
<i>United States v. Powell</i> , 955 F.2d 1206 (9th Cir. 1991).....	27, 32
<i>Bellevue School Dist. v. E.S.</i> , 171 Wn.2d 695, 257 P.3d 570 (2011).....	17
<i>Hartigan v. Washington Territory</i> , 1 Wash.Terr. 447 (1874).....	23, 26, 35
<i>In re Det. of Petersen v. State</i> , 145 Wn.2d 789, 42 P.3d 952 (2002).....	11

<i>Leonard v. Territory</i> , 2 Wash.Terr. 381, 7 Pac. 872 (Wash.Terr.1885).....	21, 22, 29, 30, 34, 35
<i>Miller v. Territory</i> , 3 Wash.Terr. 554, 19 P. 50 (Wash.Terr.1888).....	22
<i>Pasco v. Mace</i> , 98 Wn.2d 87, 653 P.2d 618 (1982).....	18, 19
<i>Sofie v. Fiberboard Corp.</i> , 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260 (1989).....	19
<i>State v. Bennett</i> , 161 Wn.2d 303, 165 P.3d 1241 (2007).....	17
<i>State v. Black</i> , 109 Wn.2d 336, 745 P.2d 12 (1987).....	20
<i>State v. Bonisisio</i> , 92 Wn. App. 783, 964 P.2d 1222 (1998) <i>rev. denied</i> , 137 Wn.2d 1024 (1999).....	31, 34
<i>State v. Boogaard</i> , 90 Wn.2d 733, 585 P.2d 789 (1978).....	30
<i>State v. Brown</i> , 130 Wn. App. 767, 124 P.3d 663 (2005).....	31, 33
<i>State v. Carlson</i> , 65 Wn. App. 153, 828 P.2d 30 <i>rev. denied</i> , 119 Wn.2d 1022 (1992).....	29
<i>State v. Christiansen</i> , 161 Wash. 530, 297 P. 151 (1931).....	23
<i>State v. Duncan</i> , 146 Wn.2d 166, 43 P.3d 513 (2002).....	11
<i>State v. Eisfeldt</i> , 163 Wn.2d 628, 185 P.3d 580 (2008).....	11
<i>State v. Garcia-Salgado</i> , 170 Wn.2d 176, 240 P.3d 153, (2010).....	12-16
<i>State v. Garvin</i> , 166 Wn.2d 242, 207 P.3d 1266 (2009).....	11, 12, 16
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	28
<i>State v. Gregory</i> , 158 Wn.2d 759, 147 P.3d 1201 (2006).....	10, 11, 15
<i>State v. Gunwall</i> , 106 Wn.2d 54, 720 P.2d 808 (1986).....	19, 24

<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	13
<i>State v. Hobble</i> , 126 Wn.2d 283, 892 P.2d 85 (1995).....	21
<i>State v. Holmes</i> , 68 Wash. 7, 122 Pac. 345 (1912).....	23, 24
<i>State v. Kitchen</i> , 46 Wn. App. 232, 730 P.2d 103 (1986).....	22
<i>State v. Kyllo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009).....	17, 27, 34
<i>State v. Maddox</i> , 152 Wn.2d 499, 98 P.3d 1199 (2004).....	13
<i>State v. Meggyesy</i> , 90 Wn. App. 693, 958 P.2d 319, rev denied, 136 Wn.2d 1028 (1998).....	17, 21, 22, 31, 32
<i>State v. Murray</i> , 110 Wn.2d 706, 757 P.2d 487 (1988).....	13
<i>State v. Nunez</i> , 174 Wn.2d 707, 285 P.3d 21 (2012).....	31
<i>State v. Ortiz</i> , 119 Wn.2d 294, 831 P.2d 1060 (1992).....	24
<i>State v. Parker</i> , 139 Wn.2d 486, 987 P.2d 73 (1999).....	11
<i>State v. Primrose</i> , 32 Wn. App. 1, 645 P.2d 714 (1982).....	26
<i>State v. Recuenco</i> , 154 Wn.2d 156, 110 P.3d 188 (2005).....	17
<i>State v. Russell</i> , 125 Wn.2d 24, 61, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995).....	24
<i>State v. Salazar</i> , 59 Wn. App. 202, 796 P.2d 773 (1990).....	26
<i>State v. Silva</i> , 107 Wn. App. 605, 27 P.3d 663 (2001).....	21
<i>State v. Smith</i> , 150 Wn.2d 135, 75 P.3d 934 (2003).....	24
<i>State v. Strasburg</i> , 60 Wash. 106, 110 P. 1020 (1910).....	20
<i>State v. Winterstein</i> , 167 Wn.2d 620, 220 P.3d 1226 (2009).....	13

<i>State v. Yates</i> , 111 Wn.2d 793, 765 P.2d 291 (1988).....	10
<i>White v. Territory</i> , 3 Wash.Terr. 397, 19 P. 37 (Wash.Terr.1888).....	22

Constitutional Provisions and Statutes

U.S. Const. amend. 4.....	10, 11, 13
U.S. Const. amend. 5.....	18, 25
U. S. Const. amend. 6.....	18
U.S. Const. amend. 7.....	18
U.S. Const. amend. 14.....	18
U.S. Const. art. 3, § 2, ¶ 3.....	18
Const. art. 1 § 3.....	20
Const. art. I, § 7.....	10, 11
Const. art. I, § 9.....	25
Const. art. 1, § 21.....	19
Const. art. 1, § 22.....	19
Const. art. 4, § 16.....	20

Court Rules

CrR 2.3.....14

CrR 4.7(b)(2).....10

CrR 4.7(b)(2)(vi).....10, 14

Other Resources

Alschuler & Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 912-13 (1994).....26

The American Heritage Dictionary (Fourth Ed., 2000, Houghton Mifflin Company).....34

Bushell's Case, Vaughan 135, 124 Eng. Rep. 1006 (1671).....25

Ninth Circuit Model Criminal Jury Instructions.....33

The Papers of Thomas Jefferson, Vol. 15, p. 269 (Princeton Univ. Press, 1958).....18

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) (Utter).....20, 21, 23

Utter & Pitler, "Presenting a State Constitutional Argument: Comment on Theory and Technique," 20 Ind. L. Rev. 637, 636 (1987).....23

John H. Wigmore, "A Program for the Trial of a Jury", 12 Am. Jud. Soc.166 (1929).....28

WPIC 160.00.....30

A. ASSIGNMENTS OF ERROR

1. The trial court erred in ordering Mr. Luna Luna to provide a DNA sample without having a clear indication that the desired evidence would be found.

2. The “to-convict” instructions erroneously stated the jury had a “duty to return a verdict of guilty” if it found each element proven beyond a reasonable doubt.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the State violate the Fourth Amendment and/or article I, section 7 when it procured a sample of Mr. Luna Luna's DNA pursuant to a court order without having a clear indication that the desired evidence would be found?

2. In a criminal trial, does a “to-convict” instruction, which informs the jury it has a duty to return a verdict of guilty if it finds the elements have been proven 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?

C. STATEMENT OF THE CASE

Gregorio Luna Luna was convicted by a jury of first degree aggravated murder for the death of his girlfriend who died from a stab

wound. 2/22/12 RP 713-26; CP 24, 34-37. At his arraignment, Mr. Luna Luna objected to the State's request for a court order to take DNA bucal swabs from his person. 6/17/10 RP 6. The Court requested testimony before making its ruling. 6/17/10 RP 7. Detective Scott Warren testified the police had obtained what appeared to be blood samples from the crime scene and had evidence that Mr. Luna Luna had been injured from a fight and bled. 6/17/10 RP 8-9. No presumptive testing had been done on these samples to determine if the substance was in fact blood or if there were any usable DNA profiles. 6/17/10 RP 10.

The Court signed the order allowing the DNA bucal swabs to be taken from Mr. Luna Luna. *Id.* Prior to trial, Mr. Luna Luna moved to suppress the bucal swab DNA results. The Court denied the motion. 12/22/11 RP 6-14. Testimony during the trial revealed that DNA samples extracted from the handle of a knife found by the victim's body matched Mr. Luna Luna's DNA extracted from the bucal swabs. 2/22/12 RP 752-53.

The jury was given a "to convict" instruction for first degree murder containing the language, "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.” CP. 51. This appeal followed. CP 11-12.

D. ARGUMENT

1. The State violated the Fourth Amendment and/or article I, section 7 when it procured a sample of Luna Luna's DNA pursuant to a court order without having a clear indication that the desired evidence would be found.

By court rule, a trial court may order a criminal defendant to permit the State to take samples from the defendant's body. CrR 4.7(b)(2)(vi). However, the court's power is explicitly “subject to constitutional limitations.” CrR 4.7(b)(2). Mr. Luna Luna asserts that the cheek swab in this case violated the Fourth Amendment and article I, section 7 because the court's order that he submit to the cheek swab was made without having a clear indication that the desired evidence would be found.

“Generally, a trial court's decisions regarding discovery under CrR 4.7 will not be disturbed absent manifest abuse of discretion.” *State v. Gregory*, 158 Wn.2d 759, 822, 147 P.3d 1201 (2006) (citing *State v. Yates*, 111 Wn.2d 793, 797, 765 P.2d 291 (1988)). However, “while the determination of historical facts relevant to the establishment of probable cause is subject to the abuse of discretion standard, the legal determination

of whether qualifying information as a whole amounts to probable cause is subject to de novo review.” *Id.* (citing *In re Det. of Petersen v. State*, 145 Wn.2d 789, 799–801, 42 P.3d 952 (2002)).

The Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” Similarly, article I, section 7 provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” While the protections guaranteed by the Fourth Amendment and article I, section 7 are qualitatively different, the provisions protect similar interests. *State v. Eiszfeldt*, 163 Wn.2d 628, 634, 185 P.3d 580 (2008). In some cases, article I, section 7 may provide greater protection than the Fourth Amendment; however, article I, section 7 “necessarily encompasses those legitimate expectations of privacy protected by the Fourth Amendment.” *State v. Parker*, 139 Wn.2d 486, 493–94, 987 P.2d 73 (1999).

Generally, warrantless searches are per se unreasonable under both the Fourth Amendment and article I, section 7. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009) (citing *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002)). There are limited exceptions to the warrant requirement, and the State bears the burden of establishing that

one of these narrowly drawn exceptions applies. *Id.* at 249–50, 207 P.3d 1266.

Swabbing a cheek to procure a DNA sample constitutes a search under the Fourth Amendment and article I, section 7 of the Washington Constitution. The United States Supreme Court has recognized “that a ‘compelled intrusio[n] into the body for blood to be analyzed for alcohol content’ ” is a search. *State v. Garcia-Salgado*, 170 Wn.2d 176, 184, 240 P.3d 153, (2010) (citing *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) (alteration in original) (quoting *Schmerber v. California*, 384 U.S. 757, 768, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966))). Similarly, the Court found Breathalyzer tests to “implicate[] similar concerns about bodily integrity” and constitute searches as well. *Skinner* at 617, 109 S.Ct. 1402.

The *Garcia-Salgado* Court found that the swabbing of a person's cheek for the purposes of collecting DNA evidence is a similar intrusion into the body and constitutes a search for the purposes of the Fourth Amendment and article I, section 7. *Garcia-Salgado*, 170 Wn.2d at 184, 240 P.3d 153.

Because a cheek swab to procure a DNA sample is a search, the search must be supported by a warrant unless the search meets one of the “

‘jealously and carefully drawn’ ” exceptions to the warrant requirement. *Id.* (citing *State v. Winterstein*, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009) (internal quotations omitted) (quoting *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996)); *Schmerber*, 384 U.S. at 770, 86 S.Ct. 1826 (“Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned.”)). A warrant may issue only where (1) a neutral and detached magistrate (2) makes a determination of probable cause based on oath or affirmation and (3) the warrant particularly describes the place to be searched and the items to be seized. *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004) (citing U.S. Const. amend. IV).

When adjudging the validity of a search warrant, courts consider *only* the information that was brought to the attention of the issuing judge or magistrate at the time the warrant was requested. *State v. Murray*, 110 Wn.2d 706, 709–10, 757 P.2d 487 (1988) (citing *Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 565 n. 8, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971)).

In the context of searches that intrude into the body, the United States Supreme Court has held that the “interests in human dignity and

privacy which the Fourth Amendment protects” require three showings in addition to a warrant. *Schmerber*, 384 U.S. at 769–70, 86 S.Ct. 1826. First, there must be a “clear indication” that the desired evidence will be found if the search is performed. *Id.* at 770, 86 S.Ct. 1826. Second, the method of searching must be reasonable. *Id.* at 771, 86 S.Ct. 1826. Third, the search must be performed in a reasonable manner. *Id.* at 772, 86 S.Ct. 1826.

While a cheek swab for DNA is a search and requires a warrant absent the existence of an exception, the warrant requirement of the Fourth Amendment and article I, section 7 may be satisfied by a court order. *Garcia-Salgado*, 170 Wn.2d at 186, 240 P.3d 153. Normally, a warrant in Washington State is issued under CrR 2.3, but neither the state constitution nor federal constitution limits warrants to only those issued under CrR 2.3. A court order may function as a warrant as long as it meets constitutional requirements. *Id.* In the case of a search that intrudes into the body, such an order must meet both the requirements of a warrant and the additional requirements announced in *Schmerber*. *Id.* Therefore, to support a search that intrudes into the body, a CrR 4.7(b)(2)(vi) order must be entered by a neutral and detached magistrate, must describe the place to be searched and items to be seized, must be supported by probable cause based on oath

or affirmation, and there must be a clear indication that the desired evidence will be found, the method of intrusion must be reasonable, and the intrusion must be performed in a reasonable manner. *Id.*

At issue, herein, is the “clear indication that the desired evidence will be found.” The other required conditions were met.

In *Gregory*, the Washington Supreme Court upheld a search that intruded into the body made pursuant to a CrR 4.7 order. Gregory was convicted of three counts of first degree rape and, in a separate trial, one count of aggravated first degree murder. *Gregory*, 158 Wn.2d at 777, 147 P.3d 1201. Prior to his conviction on the rape charges, the trial court ordered Gregory to permit the State to take blood samples for the purpose of comparing Gregory's DNA with the DNA evidence discovered in a rape kit examination of the victim. *Id.* at 820, 147 P.3d 1201. On appeal, Gregory challenged the collection of his DNA. *Id.* at 821–22, 147 P.3d 1201.

The Court upheld the search as valid because the order met the requirements of a search warrant. Of significance herein, was the Court’s finding that the evidence established a clear indication that Gregory's DNA *would match the DNA recovered in the rape kit.* *Id.* at 822–825, 147 P.3d 1201 (emphasis added). The likelihood of a match between a defendant’s

DNA and DNA recovered from the crime is what our Courts mean by “a clear indication that the desired evidence will be found.” See *Garcia-Salgado*, 170 Wn.2d at 187, 240 P.3d 153.

By contrast, in the present case there was no clear indication that Mr. Luna Luna’s DNA would match DNA recovered at the murder scene *because no DNA was recovered at the murder scene*. Detective Scott Warren testified the police had obtained what appeared to be blood samples from the crime scene, but no presumptive testing had been done on these samples to determine if the substance was in fact blood or if there were any usable DNA profiles. 6/17/10 RP 10. Therefore, since no DNA was recovered from the murder scene, there was no “clear indication that the desired evidence would be found” by procuring Mr. Luna Luna’s DNA.

Accordingly, this condition of the warrant requirement was not satisfied. It is the State's burden to establish that an exception to the warrant requirement has been met. *Garvin*, 166 Wn.2d at 250, 207 P.3d 1266. The State has not established an exception in this case. Therefore, evidence that Mr. Luna Luna’s DNA matched certain DNA recovered from the crime scene was improperly admitted. For these reasons the conviction must be reversed.

2. Mr. Luna Luna's constitutional right to a jury trial was violated by the court's instructions, which affirmatively misled the jury about its power to acquit.

As part of the "to-convict" instructions used to convict Luna Luna, the trial court instructed the jury as follows: "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." CP 51. Luna Luna contends there is no constitutional "duty to convict" and that the instruction accordingly misstates the law. The instruction violated Luna Luna's right to a properly instructed jury.¹

a. Standard of review. Constitutional violations are reviewed de novo. *Bellevue School Dist. v. E.S.*, 171 Wn.2d 695, 702, 257 P.3d 570 (2011). Jury instructions are reviewed de novo. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Killo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

b. The United States Constitution. The right to jury trial in a criminal case was one of the few guarantees of individual rights enumerated

¹ Division One of the Court of Appeals rejected the arguments raised here in its decision in *State v. Meggyesy*, 90 Wn. App. 693, 958 P.2d 319, rev denied, 136 Wn.2d 1028 (1998), abrogated on other grounds by *State v. Recuenco*, 154 Wn.2d 156, 110 P.3d 188 (2005). Counsel respectfully contends *Meggyesy* was incorrectly decided.

in the United States Constitution of 1789. It was the only guarantee to appear in both the original document and the Bill of Rights. U.S. Const. art. 3, § 2, ¶ 3; U. S. Const. amend. 6; U.S. Const. amend. 7. Thomas Jefferson wrote of the importance of this right in a letter to Thomas Paine in 1789: "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." *The Papers of Thomas Jefferson*, Vol. 15, p. 269 (Princeton Univ. Press, 1958).

In criminal trials, the right to 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 crime, but was also an allocation of political power to the citizenry.

[T]he 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 v. Louisiana, 391 U.S. at 156.²

c. Washington Constitution. The Washington Constitution provides greater protection to its citizens in some areas than does the United States Constitution. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

Under the *Gunwall* analysis, it is clear that the right to jury trial is such an area. *Pasco v. Mace*, supra; *Sofie v. Fiberboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989).

i. The textual language of the state constitution.

The drafters of our state constitution not only granted the right to a jury trial, Const. art. 1, § 22,³ they expressly declared it “shall remain inviolate.”

Const. art. 1, § 21.⁴

The term “inviolable” connotes 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 inviolable, it must not diminish over time and must be protected from all assault to its essential guarantees.

Sofie, 112 Wn.2d at 656. Article 1, section 21 “preserves the right [to jury trial] as it existed in the territory at the time of its adoption.” *Pasco v. Mace*,

² In *Sofie v. Fibreboard Corp.*, the majority saw this allocation of political power to the citizens as a limit on the power of the legislature. 112 Wn.2d 636, 650-53, 771 P.2d 711, 780 P.2d 260 (1989). Two of the dissenting members of the court acknowledged the allocation of power, but interpreted it rather as a limit on the power of the judiciary. *Sofie*, 112 Wn.2d at 676 (Callow, C.J., joined by Dolliver, J., dissenting).

³ Rights of Accused Persons. 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 . . .

98 Wn.2d at 96; *State v. Strasburg*, 60 Wash. 106, 115, 110 P. 1020 (1910).

The right to trial by jury "should be continued unimpaired and inviolate."

Strasburg, 60 Wash. at 115.

The difference in language suggests the drafters meant something different from the federal 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) (Utter).

The framers added other constitutional protections to this right. A court is not permitted to convey to the jury its own impression of the evidence. Const. art. 4, § 16.⁵ Even a witness may not invade the province of the jury. *State v. Black*, 109 Wn.2d 336, 350, 745 P.2d 12 (1987). The right to jury trial also is protected by the due process clause of article I, section 3.

While the Court in *State v. Meggyesy* may have been correct when it found there is no specific constitutional language that addresses this precise issue, the language that *is* there indicates the right to a jury trial is

⁴ "The right of trial by jury shall remain inviolate"

⁵ "Judges shall not charge juries with respect to matters of fact, not comment thereon, but shall declare the law."

so fundamental that any infringement violates the constitution. *Meggyesy*, 90 Wn. App. at 701

ii. State constitutional and common law history.

State constitutional history favors an independent application of Article I, Sections 21 and 22. In 1889 (when the constitution was adopted), the Sixth Amendment did not apply to the states. Instead, 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), *citing* Utter, 7 U. Puget Sound Law Review at 497. This difference supports an independent reading of the Washington Constitution.

State common law history also favors an independent application. 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 v. Mace*, 98 Wn.2d at 96; see also *State v. Hobble*, 126 Wn.2d 283, 299, 892 P.2d 85 (1995).

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 Pac. 872 (Wash.Terr.1885). In *Leonard*, the Supreme Court reversed a murder

conviction and set out in some detail the jury instructions given in the case. The court 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.⁶ *Leonard*, at 398-399. Thus the common law practice *required* the jury to acquit upon a failure of proof, and *allowed* the jury to acquit even if the proof was sufficient.⁷ *Id.*

The Court of Appeals in *Meggyesy* attempted to distinguish *Leonard* on the basis that the *Leonard* court “simply quoted the relevant instruction. . . .” *Meggyesy*, 90 Wn. App. at 703. But the *Meggyesy* court missed the point—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.

iii. Preexisting state law.

In criminal cases, 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

⁶ The trial court’s instructions were found erroneous on other grounds.

⁷ Furthermore, the territorial court reversed all criminal convictions that resulted from erroneous jury instructions (unless the instructions favored the defense). See, e.g., *Miller v. Territory*, 3 Wash.Terr. 554, 19 P. 50 (Wash.Terr.1888); *White v. Territory*, 3 Wash.Terr. 397, 19 P. 37 (Wash.Terr.1888); *Leonard*, *supra*.

(1986); see also *State v. Holmes*, 68 Wash. 7, 122 P. 345 (1912); *State v. Christiansen*, 161 Wash. 530, 297 P. 151 (1931). This rule applies even where the jury ignores applicable law. See, e.g., *Hartigan v. Washington Territory*, 1 Wash.Terr. 447, 449 (1874) (“[T]he 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.”)⁸

iv. Differences in federal and state constitutions' structures.

State constitutions were originally intended to be the primary devices to protect individual rights, with the United States Constitution a secondary layer of protection. Utter, 7 U. Puget Sound L. Rev. at 497; Utter & Pitler, "Presenting a State Constitutional Argument: Comment on Theory and Technique," 20 Ind. L. Rev. 637, 636 (1987). Accordingly, state constitutions were intended to give broader protection than the federal constitution. An independent interpretation is necessary to accomplish this end. *Gunwall* indicates that this factor will always support an independent interpretation of the state constitution because the

⁸ This is likewise true in the federal system. See, e.g., *United States v. Moylan*, 417 F.2d 1002, 1006 (4th Cir. 1969).

difference in structure is a constant. *Gunwall*, 106 Wn.2d at 62, 66; see also *State v. Ortiz*, 119 Wn.2d 294, 303, 831 P.2d 1060 (1992).

v. Matters of particular state interest or local concern.

The manner of conducting criminal trials in state court is of particular local concern, and does not require adherence to a national standard. See, e.g., *State v. Smith*, 150 Wn.2d 135, 152, 75 P.3d 934 (2003); *State v. Russell*, 125 Wn.2d 24, 61, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). *Gunwall* factor number six thus also requires an independent application of the state constitutional provision in this case.

vi. An independent analysis is warranted.

All six *Gunwall* factors favor an independent application of Article I, Sections 21 and 22 of the Washington Constitution in this case. The state constitution provides greater protection than the federal constitution, and prohibits a trial court from affirmatively misleading a jury about its power to acquit.

d. Jury's power to acquit. 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 of guilty 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 jury 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); see *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).

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. 5; Const. art. I, § 9.⁹ 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

⁹ "No person shall be ... twice put in jeopardy for the same offense."

their verdicts. See generally Alschuler & Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 912-13 (1994).

If 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, there can be no "duty to return a verdict of guilty." Indeed, there is no authority in law that suggests such a duty.

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... If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision.

United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969), cert. denied, 397 U.S. 910 (1970).

Under Washington law, juries have always had the ability to deliver a verdict of acquittal that is against the evidence. *Hartigan*, supra. 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. *Kyllo*, 166 Wn.2d at 864.

This is not to say there is a right to instruct a jury that it may disregard the law in reaching its verdict. See, e.g., *United States v. Powell*, 955 F.2d 1206, 1213 (9th Cir. 1991) (reversing conviction on other grounds). However, if the court may not tell the jury it may disregard the law, it is at least equally wrong for the court to direct the jury that it has a duty to return a verdict of guilty if it finds certain facts to be proved.

e. Scope of jury's role re: fact and law. Although a jury may not strictly determine what the law is, it does have a role in applying the law of the case that goes beyond mere fact-finding. In *Gaudin*, the Court rejected limiting the jury's role to merely finding facts. *Gaudin*, 515 U.S. at 514-15. Historically the jury's role has never been so limited: "[O]ur decision in no way undermine[s] the historical and constitutionally guaranteed right of a criminal defendant to demand that the jury decide guilt or innocence on every issue, which includes application of the law to the facts." *Gaudin*, 515 U.S. at 514.

Prof. Wigmore described the roles of the law and the jury in our system:

Law and Justice are from time to time inevitably in conflict. That is because law is a general rule (even the stated exceptions to the rules are general exceptions); while justice is the fairness of this precise case under all its circumstances. And as a rule of law only takes account of broadly typical conditions, and is aimed at average results, law and justice every so often do not coincide. ... We want justice, and we think we are going to get it through 'the law' and when we do not, we blame the law. Now this is where the jury comes in. The jury, in the privacy of its retirement, adjusts the general rule of law to the justice of the particular case. Thus the odium of inflexible rules of law is avoided, and popular satisfaction is preserved. ... That is what a jury trial does. It supplies that flexibility of legal rules which is essential to justice and popular contentment. ... The jury, and the secrecy of the jury room, are the indispensable elements in popular justice.

John H. Wigmore, "A Program for the Trial of a Jury", 12 Am. Jud. Soc. 166 (1929).

Furthermore, if such a "duty" to convict existed, the law lacks any method of enforcing it. If a jury acquits, the case is over, the charge dismissed, and there is no further review. In contrast, if a jury convicts when the evidence is insufficient, the court has a legally enforceable duty 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); *State v.*

Carlson, 65 Wn. App. 153, 828 P.2d 30, rev. denied, 119 Wn.2d 1022 (1992).

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; however, it may return a verdict of guilty if, and only if, it finds every element proven beyond a reasonable doubt.

f. Current example of correct legal standard in instructions. The duty to acquit and permission to convict is well-reflected in the instruction 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 (emphasis added). This was the law as given to the jury in murder trials in 1885, just four years before the adoption of the Washington Constitution. This allocation of the power of the jury "shall remain inviolate."

The Washington Pattern Jury Instruction Committee has adopted accurate language consistent with *Leonard* for considering a special verdict. See WPIC 160.00, the concluding instruction for a special verdict, in which the burden of proof is precisely the same:

... In order to answer the special verdict form “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. ... If you unanimously have a reasonable doubt as to this question, you must answer “no”.

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 it at no time imposes 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. As such, 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*, supra; *State v. Boogaard*, 90 Wn.2d 733, 585 P.2d 789 (1978).

g. Contrary case law is based on a poor analysis; this Court should decide the issue differently.¹⁰ In *Meggyesy*, the appellant challenged the WPIC’s “duty to return a verdict of guilty” language. The court held the federal and state constitutions did not “preclude” this language, and so affirmed. *Meggyesy*, 90 Wn. App. at 696.

In its analysis, Division One of the Court of Appeals 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 spent much of its opinion concluding there was no legal authority requiring it to instruct a jury it had the power to acquit against the evidence.

Division Two has followed the *Meggyesy* holding. *State v. Bonisisio*, 92 Wn. App. 783, 964 P.2d 1222 (1998), rev. denied, 137 Wn.2d 1024 (1999); *State v. Brown*, 130 Wn. App. 767, 124 P.3d 663 (2005). Without much further analysis, Division Two echoed Division One’s concerns that instructing with the language “may” was tantamount to instructing on jury nullification.

¹⁰ A decision is incorrect if the authority on which it relies does not support it. *State v. Nunez*, 174 Wn.2d 707, 719, 285 P.3d 21 (2012).

Appellant respectfully submits the *Meggyesy* analysis addressed a different issue. “Duty” is the challenged language herein. By focusing on the proposed remedy, the *Meggyesy* court side-stepped the underlying issue raised by its 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.

However, portions of the *Meggyesy* decision are relevant. The court 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 verdict. But the power to acquit does not require any instruction telling the jury that it may do so.” *Id.* at 700 (foot notes 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. See, *Meggyesy*, 90 Wn. App. at 698 fn. 5.^{11, 12} These concepts support Luna Luna’s position and do not contradict the arguments set forth herein.

¹¹ E.g., *United States v. Powell*, 955 F.2d 1206, 1209 (9th Cir.1991) (“In order for the Powells to be convicted, the government must have proved, beyond a reasonable doubt, that the Powells had failed to file their returns.”).

The *Meggyesy* court incorrectly stated the issue. The question is not whether the court is required to tell the jury it can acquit despite finding each element has been proven 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 it does. And an instruction that says it has such a duty impermissibly directs a verdict. *Sullivan v. Louisiana*, 508 U.S. 275, 124 L.Ed.2d 182, 113 S.Ct. 2078 (1993).

Unlike the appellant in *Meggyesy*,¹³ Luna Luna 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 either *Meggyesy* or *Bonisisio*; thus the holding of *Meggyesy* should not govern here. The *Brown* court erroneously found that there was “no meaningful difference” between the two arguments. *Brown*, 130 Wn. App. at 771. *Meggyesy* and its progeny should be reconsidered, and the issue should be analyzed on its merits.

¹² Indeed, the federal courts do not instruct the jury it “has a duty to return a verdict of guilty” if it finds each element proven beyond a reasonable doubt. See Ninth Circuit Model Criminal Jury Instructions:

In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt: ...

h. 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 instruction given in Luna Luna's case 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 convict the defendant if the elements were proved beyond a reasonable doubt. RP 163, 166, 168. A duty is "[a]n act or a course of action that is required of one by... law." *The American Heritage Dictionary* (Fourth Ed., 2000, Houghton Mifflin Company). The court's use of the word "duty" in the "to-convict" instruction conveyed to the jury that it *could not* acquit if the elements had been established. 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, *Leonard, supra*, 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.

¹³ And the appellant in *Bonisisio*.

The instruction creating a "duty" to return a verdict of guilty was an incorrect statement of law. The error violated Luna Luna's state and federal constitutional right to a jury trial. Accordingly, his convictions must be reversed and the case remanded for a new trial. *Hartigan*, supra; *Leonard*, supra.

E. CONCLUSION

For the reasons stated, the convictions should be reversed.

Respectfully submitted February 22, 2013,

s/David N. Gasch
Attorney for Appellant

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on February 22, 2013, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the brief of appellant:

Gregorio Luna Luna
#357091
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay WA 98326-9723

E-mail: prosecuting@co.benton.wa.us
Andrew Kelvin Miller
Benton County Prosecutors Office
7122 W. Okanogan Place, Bldg. A
Kennewick WA 99336-2359

s/David N. Gasch, WSBA #18270
Gasch Law Office
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX: None
gaschlaw@msn.com