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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

BRYAN ALLEN, Petitioner.

BRIEF OF AMICUS CURIAE  
WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

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## I. INTEREST OF AMICUS CURIAE

The Washington Association of Prosecuting Attorneys ("WAPA") represents the elected prosecuting attorneys of Washington State. Those persons are responsible by law for the prosecution of all felony cases in this state and of all gross misdemeanors and misdemeanors charged under state statutes. WAPA is interested in cases, such as this, that will determine whether the mandatory provisions of the Washington Constitution will continue to be honored.

## II. ISSUES PRESENTED

1. Whether the Washington Constitution's mandatory prohibition upon judicial comment must be honored by this Court?
2. Whether the rule prohibiting judges from assuming the role of witness should be reaffirmed?

## III. STATEMENT OF FACTS

The facts of these two cases are discussed in detail in the briefs of the parties and will not be addressed here.

## IV. ARGUMENT

### A. JUDGES MAY NOT COMMENT ON FACTUAL ISSUES

Who is better able to make reliable decisions on factual issues: judges or juries? This question has been debated in the Anglo-American

legal system for centuries.<sup>1</sup> In Washington, however the answer is clear. Constitution art. 4, sec. 16 expressly prohibits judges from commenting on the evidence.

All people have biases, judges and juries alike. If the judge can advise jurors on factual matters, this may help overcome the jurors' biases. But in doing so, the judge will introduce his or her own biases into the jury deliberations. Because of the respect that jurors give to the judge's views, the judge's biases may be given heavy weight. Will this intervention improve the reliability of the jury's decision or harm it?

English law provided a clear answer to this question. Courts considered it necessary for juries to have the benefit of the judges' "superior knowledge." Judges' ability to comment on the evidence was considered essential for fair trials. 9 John H. Wigmore, *Evidence* 2551, 504 (3d ed. 1946); Matthew Hale, *The History of the Common Law of England* 164-65 (Charles M. Gray ed., Univ. of Chicago Press 3d ed. 1971) (1739).

In the United States, however, people were more skeptical of the "wisdom" of judges. During the pre-revolutionary period, judges had

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<sup>1</sup>Curtis Wright discusses the historical developments of the judge's power to comment as to facts in various states, in particular California, Colorado, Illinois, Maryland, Michigan, New Mexico, North Carolina, South Carolina, South Dakota and Utah. In addition, he provides a detailed map of the United States highlighting the states which have adopted the federal practice, the states which completely restrict the comment power, and states which fall somewhere in between. Curtis Wright, Jr., *The Invasion of Jury: Temperature of the War*, 27 Temp. L.Q. 137 (1953).

functioned as instrumentalities of the British government. Many people came to view judges as oppressors, not protectors. Rather than wanting judges to protect them from the mistakes of juries, people viewed juries as necessary to protect them from the dictatorial tendencies of judges.<sup>2</sup>

This subject was debated on the floor of the Washington Constitutional Convention. The Judiciary Committee reported out a proposal that ultimately became article 4, section 16: "Judges shall not charge juries with respect to matters of fact nor comment thereon, but shall declare the law." A delegate moved to strike out the words "nor comment thereon."<sup>3</sup> This amendment would have allowed judges to comment on the evidence.

Proponents of the amendment argued that judicial comments were necessary for fair trials. As one delegate put it, "the judge ought to be

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<sup>2</sup>See, e.g., L. Foster, *Nobles v. Casebier 1 and Judicial Comments on the Evidence in Arkansas*, 51 Ark. L. Rev. 801, 810 (1998) ("Initially, American judges had the power to comment on the evidence and to express an opinion on the credibility of the witnesses like their common law and federal counterparts. However, following the American Revolution, the colonial judges became increasingly unpopular. Often, the judge utilized coercive tactics in order to force the jury to favor the Crown in their decision. Hostility toward the colonial judges led several states to restrict judicial authority, particularly the power to comment upon the evidence." [Footnotes omitted.]); G.L. Reinhard, *The Jury as Judges of the Law*, 1 Ind. L.J. 182 (1898) ("In the days of colonial judges, just prior to the Revolution, ... officers became so tyrannical in the exercise of their functions that the people felt called upon to do something that would protect them from the encroachments of venal judges who were the creatures of a venal and despotic monarch.").

<sup>3</sup>B. Rosenow, *The Journal of the Washington State Constitutional Convention 1889*, at 622 (1962).

allowed to protect the jury from lawyers who tried to befuddle them.”<sup>4</sup> Opponents of the amendment argued that judicial comments would interfere with the proper functioning of the jury. As one delegate said: “After both attorneys had commented on the facts, the only effect of the judge doing so is ... to give one side or the other an extra attorney according to which side the judge happens to incline to.”<sup>5</sup> Another said that “if judges were to comment on facts juries might as well be abolished for the judge would carry nine cases out of ten.”<sup>6</sup>

After hearing this debate, the Convention voted by a large margin to reject the amendment.<sup>7</sup> The Convention thus made a deliberate decision that judicial comments are harmful to the jury's deliberative process. That decision was later adopted by the people. It remains unchanged to this day.<sup>8</sup>

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<sup>4</sup>Spokane Falls Review, July 20, 1889, P.4, Col. 2 (quoting D. Buchannan), reproduced in Univ. of Wash., *Washington State Constitutional Convention 1889: Contemporary Newspaper Articles*, at 3-31 (1999). A transcription of this article appears in appendix A.

Similar sentiments were expressed during the debate by Judge Turner. See Tacoma Daily Ledger, July 21, 1889, P.4, Col. 2, reproduced in Univ. of Wash., *Washington State Constitutional Convention 1889: Contemporary Newspaper Articles*, at 4-39 (1999). A transcription of this article appears in appendix B.

<sup>5</sup>Spokane Falls Review, July 20, 1889, P.4, Col. 2 (quoting Mr. Sullivan of Whitman).

<sup>6</sup>Spokane Falls Review, July 20, 1889, P.4, Col. 2 (quoting R. O. Dunbar).

<sup>7</sup>Only ten ayes were cast in favor of the amendment. See B. Rosenow, *supra* at 622. The full contingent of delegates numbered 75. *Id.*, at iv and 465-490.

<sup>8</sup>Washington was apparently immune to the American Bar Association's "reform program" that led to the amendment of the California Constitutional provision that Wash. Const. art. 4, § 16 was based upon. See generally Curtis Wright, *The Invasion of Jury: Temperature of the War*, 27 Temple L. Quarterly 137 (1953).

The underlying debate continues to divide this nation. In Federal courts, judges are allowed to comment on the evidence.<sup>9</sup> The same is true in a majority of states.<sup>10</sup> On the other hand, six states have constitutional provisions similar to that of Washington.<sup>11</sup> None of these jurisdictions authorize the use of cross-racial identification jury instructions.<sup>12</sup>

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<sup>9</sup>See, e.g., *Quercia v. United States*, 289 U.S. 466, 469, 53 S. Ct. 698, 77 L. Ed. 1321 (1933) (“In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important; and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination.”).

<sup>10</sup>California, Massachusetts, and New Jersey are all part of this majority. See Cal Const, art. VI § 10 (“The court may make any comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause.”). Massachusetts allows judges to state the testimony. See ALM GL ch. 231, § 81 (courts “may state the testimony and the law.”). In New Jersey, “[i]t is the right and duty of a judge to comment upon the evidence, and in cases where he thinks it required for the promotion of justice, to give his views upon the weight of it, provided he leaves it to them to decide, upon their own views of it. This is too well settled by repeated decisions, to be now called in question.” *Castner v. Sliker*, 33 N.J.L. 507, 512 (1869). This rule is adhered to in both criminal and civil cases. See *Ivins v. Andres*, 117 N.J.L. 311, 187 A. 385, 386 (1936).

<sup>11</sup>Five of the states have language that is less restrictive than that of Wash. Const. art. 4, § 16. See Ark. Const. art. 7, § 23 (“Judges shall not charge juries with regard to matters of fact, but shall declare the law.”); Del. Const. art. 4, § 19 (“Judges shall not charge juries with respect to matters of fact, but may state the questions of fact in issue and declare the law.”); Nevada Const., art. 6, § 12 (“Judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law.”); S.C. Const. art. 5, § 21. (“Judges shall not charge juries in respect to matters of fact, but shall declare the law.”); Tenn. const., art. 6, § 9 (“The Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law.”). Only Arizona’s constitution is as restrictive as Wash. Const. art. 4, § 16. See Ariz. Const. art. 6, § 27 (“Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.”).

<sup>12</sup>Arizona, Arkansas, and South Carolina have specifically rejected instructions on eyewitness testimony as comments on the evidence. See generally *State v. Valencia*, 118 Ariz. 136, 575 P.2d 335, 336-37 (1977); *Conley v. State*, 270 Ark. 886, 607 S.W.2d 328, 330 (1980); *Hopson v. State*, 327 Ark. 749, 940 S.W.2d 479, 480-81 (1997); *State v. Robinson*, 274 S.C. 198, 262 S.E.2d 729, 731 (1980); *State v. Patterson*, 337 S.C. 215, 522 S.E.2d 845,

Whatever the rule may be in other jurisdictions, in Washington the restriction is clear. Until the people decide to amend the Constitution, judges may not comment on the evidence. Judges often believe that they are wiser or more informed than jurors. They may feel that the jury's decision-making process would improve if juries had the "benefit" of this "wisdom." But the Washington Constitution takes the opposite view: with regard to factual issues, juries are wiser than judges.<sup>13</sup> Hearing the judge's views would not

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854-55 (1999).

Delaware rejected a cross-racial jury instruction, stating that the proposed instruction came "perilously close to a comment on the evidence contrary to the constitutional restriction. Delaware Constitution of 1897, art IV § 19". *Garden v. State*, 815 A.2d 327, 341 (Del. 2003).

Tennessee has rejected a *United States v. Telfaire*, 152 U.S. App. D.C. 146, 469 F.2d 552, 557 (D.C. Cir. 1972),-based instruction as an impermissible comment on the evidence. The court, however, adopted an instruction that it believed complies with the Tennessee Constitutional restrictions. *See generally State v. Dyle*, 899 S.W.2d 607, 612 (Tenn. 1995). The use of a Tennessee-like instruction was held to be reversible error by the Georgia Supreme Court on the grounds that one of the listed factors was undermined by the scientific literature. *See Brodes v. State*, 279 Ga. 435, 614 S.E.2d 766 (2005).

Nevada holds that specific eyewitness identification instructions need not be given, as such instructions are duplicative of the general instructions on credibility of witnesses and proof beyond a reasonable doubt. *See Nevius v. State*, 101 Nev. 238, 699 P.2d 1053, 1060 (1985).

<sup>13</sup>The position enshrined in our constitution finds support in a number of cases. *See, e.g., In re United States Fin. Sec. Litig.*, 609 F.2d 411, 431 (9th Cir. 1979) ("No one has yet demonstrated how one judge can be a superior factfinder to the knowledge and experience that citizen-jurors bring to bear on a case. We do not accept the underlying premise of appellees' argument 'that a single judge is brighter than the jurors collectively functioning together.'"); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. 889, 935 (E.D. Pa. 1979) ("Our view is that a jury, applying its collective wisdom, judgment and common sense to the facts of a case . . . is brighter, more astute, and more perceptive than a single judge, even in a complex or technical case; at least it is not less so."), *vacated sub nom, In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980).

benefit the process, but harm it. It is the duty of this court to protect the jury process from judicial interference.

Mr. Allen contends that neither of his proposed jury instructions are “comments on the evidence” because neither instruction conveys the court’s attitude towards disputed facts. *Supplemental Brief of Petitioner*, at 15-21. The plain language of his proposed instructions, however, refutes this position. When a jury instruction tells a jury what “laboratory study reveals”, that instruction places the judge’s imprimatur on the statement. *See State v. Henderson*, 208 N.J. 208, 27 A.3d 872, 925 (2011) (jury instructions that contain information about social science research regarding eyewitness testimony are authoritative because they are a statement of the judge). It matters not to the jury whether the judge personally believes the studies— all the jury knows is that it is getting the information from the judge and it must accept the information as given. *See* WPIC 1.02 (“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.”).

Mr. Allen contends that the federal Due Process clause requires this Court to suspend Const. art. 4, sec. 16, because of the inherent unreliability of eyewitness identification. *See Supplemental Brief of Petitioner*, at 13-15.

United States Supreme Court precedent rejects this position. The Due Process Clause only requires special procedures with respect to the admission of eyewitness testimony when the police used an unnecessarily suggestive identification procedure. *Perry v. New Hampshire*, No. 10-8974, slip op. at 2 (Jan. 11, 2012).<sup>14</sup> In all other cases, the defendant's due process rights are satisfied by the defendant's Sixth Amendment rights to counsel, the defendant's right to compulsory process, and the defendant's right to confrontation plus cross-examination of witnesses. *Id.*, slip op. at 6-7. The Washington Constitution affords all of these protections to a defendant in a cross-racial identification case. Our case law, moreover, establishes that the defendant's right to compulsory process includes, when relevant, the ability to call experts regarding cross-racial identification. *See State v. Cheatam*, 150 Wn.2d 626, 81 P.3d 830 (2003). Because Washington's current practice complies fully with both the federal and state constitutions, Mr. Allen's proposed jury instructions were properly rejected by the trial court.

B. IT IS IMPROPER FOR A JUDGE TO ASSUME THE ROLE OF A WITNESS

Mr. Allen, the Fred T. Korematsu Center for Law and Equality, and Judge Ellington all opine that incorporating information regarding cross-

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<sup>14</sup>In *Perry*, the Court notes that many jurisdictions utilize eyewitness-specific jury instructions. *Perry*, at slip op. 16. The Court, however, did not hold that such instructions are required by the federal Constitution.

racial identification into a jury instruction can serve as a substitute for expensive and sometimes unavailable expert testimony.<sup>15</sup> Consistent with this position, both of the instructions proposed by Mr. Allen contained information regarding cross-racial identification that was not supported by either expert or lay testimony.<sup>16</sup>

Both of Mr. Allen's proposed instructions violate settled principles of law. Even in those jurisdictions in which a judge may comment on the evidence, the judge "may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it." *Quercia v. United States*, 289 U.S. 466, 470, 53 S. Ct. 698, 77 L. Ed. 1321 (1933).

A judge commits clear error when she "charge[s] a jury upon a supposed or conjectural state of facts, of which no evidence has been offered." *United States v. Breitling*, 20 How. 252, 254-255 (1858). When an instruction presupposes that there is some evidence that is sufficient to establish the facts assumed in the opinion of the court, and if no such

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<sup>15</sup>See *State of Washington v. Bryan Allen*, No. 86119-6, Supplemental Brief of Petitioner, at 1 and 12 (Dec. 8, 2011); *State of Washington v. Bryan Allen*, No. 86119-6, [Corrected] Memorandum of *Amicus Curiae* Fred T. Korematsu Center for Law and Equality in Support of Petition for Review, at 6-7 (Aug. 22, 2011); *State v. Allen*, 161 Wn. App. 721, 757, 255 P.3d 784, review granted, 172 Wn.2d 1014 (2011) (Ellington, J., concurring).

<sup>16</sup>See CP 61 (proposed cross-racial identification instruction containing a "summary" of psychological studies); CP 62 (proposed cross-racial identification instruction summarizing "ordinary human experience"). Both proposed instructions are reproduced in Appendix B of the Supplemental Brief of Petition.

evidence was admitted, then the charge does not aid them in coming to correct conclusions. Instead, the charge tends to mislead the jury and it may induce them to indulge in conjecture, instead of weighing the testimony. *Id.*

The rule announced in *Quercia* has been incorporated into the rules of evidence. ER 605 states that “[t]he judge presiding at the trial may not testify in that trial as a witness.” This rule is violated when a trial judge's comments are based upon his own personal knowledge of matters external to the trial. *See, e.g., United States v. Nickl*, 427 F.3d 1286, 1293 (10th Cir. 2005).

Rule 605's prohibition on judicial testimony eliminates difficult questions “which arise when the judge abandons the bench for the witness stand. Who rules on objections? Who compels him to answer? Can he rule impartially on the weight and admissibility of his own testimony? Can he be impeached or cross-examined effectively?” Fed. R. Evid. 605 advisory committee's note.

These questions are compounded when the judge offers expert testimony. Can the judge be forced to disclose the underlying facts or data? *See* ER 705. Is the judge's training and experience fair game? *See* WPIC 6.51.

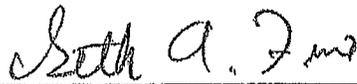
These questions establish the wisdom of the existing prohibition upon jury instructions related to cross-racial identification. Where specialized

knowledge regarding cross-racial identification or any other matter will assist the trier of fact, it should be conveyed through the testimony of a qualified expert, rather than in a jury instruction.

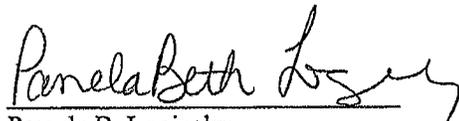
V. CONCLUSION

“Until we are ready to discard the wisdom of our fathers and substitute one man's judgments for the jury system we must not extend the power of the trial judge to impress their views of the facts on the jury.” W.A. Shumaker, *Remarks at the Judicial Administration Section of the American Bar Association convened at Atlantic City, New Jersey, in The Right of a Judge to Comment on the Evidence in His Charge to the Jury*, 6 F.R.D. 317, 330-31 (1947). This Court must, in accordance with the requirements of Washington Const. art. 4, sec. 16, reject the request for a cross-racial identification jury instruction.

Respectfully submitted this 13th day of January, 2012.



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## **Appendix A**

**Spokane Falls Review, July 21,  
1889, P.1, Cols. 4-7**

Spokane Falls Review, July 21, 1889, P.1, Cols. 4-7:

Section 16 says: "Judges shall not charge juries with respect to matters of fact nor comment thereon, but shall declare the law." Mr. Sudksdorf <sup>[17]</sup> moved to strike out the words "nor comment thereon."

Mr. Crowley was very much opposed to this amendment. It is the duty of a judge to declare the law, and of a jury to decide the facts. Judges sometimes seem to desire to control the verdict and state the facts in a way in which they should not. Hence this provision which is to keep distinct and separate the functions of court and jury.

Mr. Turner said he had stood by the committee report, when other members have been deserting, and he thought he should stand by it now. Still he should be not sorry if the (unreadable). As it stood the section was likely to embarrass the judge. It was necessary to refer to the facts in order to make the law plain to the jury.

Mr. Hoyt advanced similar views and favored the amendment.

Mr. Dunbar proposed to stand by the report in spirit as well as in letter. He opposed the amendment. Juries generally (unreadable) to get the opinion of the judge and go by that, which is all wrong. He did not believe judges would have any trouble in explaining the law of a case without commenting on the facts.

Mr. Dyer offered an amendment to the effect that judges may state the testimony as well as declare the law and this was accepted by Mr. Sudksdorf.

Mr. Dunbar didn't know why the judge should state the testimony. The jury were there for that purpose.

Mr. Sullivan of Tacoma thought, the last amendment worse than the first and opposed them both.

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<sup>17</sup>B. Rosenow, *Journal of the Washington State Constitutional Convention 1889*, at 4 (1962), contains a different spelling of this delegate's name. This transcript uses the spelling contained in the newspaper article.

Mr. Moore favored the amendment. It was from the California Constitution<sup>[18]</sup> and we were adopting

#### THE CALIFORNIA SYSTEM.

Judges should be active factors, not mere figureheads in the trial of cases. English judges have always instructed juries in both fact and law and (unreadable) they ought to do so to prevent mistrials.

Mr. Sullivan of Whitman opposed the amendment. He didn't believe that judges had any business with the facts, or that a right minded judge would attempt to influence juries as to them. After both attorneys had commented fully on the facts, the only effect of the judge doing so is to give him the last word and to give one side or the other an extra attorney according to which side the judge happens to incline to. The juries are, and should be, the sole judges of the credibility of witnesses and the facts in the case.

Mr. Godman opposed the amendment. Facts and testimony were not necessarily the same. The judges may state the testimony under the present law, but we do not wish them to comment upon it. The section is right as it stands.

Mr. Sudksdorf said this amendment was in the interest of the (unreadable) of the people who paid the costs of litigation.

Mr. Buchanan feared we were in danger of going too far, and thought the judge ought to be allowed to

#### PROTECT THE JURY

from lawyers who tried to befuddle them when they were on a doubtful (unreadable).

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<sup>18</sup>The reference in this newspaper article would have been to Cal. Const. 1879 Art. VI, sec. 19. That section provided "[j]udges shall not charge juries with respect to matters of fact." *People v. Guivan*, 18 Cal. 4th 558, 957 P.2d 928, 932, 76 Cal. Rptr. 2d 239 (1998). "In 1934, the California Constitution was amended through the addition to article VI of former section 19, present section 10, which provides in its current wording that a trial court 'may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause.'" *Guivan*, 957 P.2d at 933.

Mr. Kinnear favored the section just as the committee had reported it. (unreadable) wanted to keep judges and juries each to their functions.

Mr. Jones objected to allowing the judge to state the testimony (unreadable) he could only state it as it appeared to him.

Mr. Dunbar thought if judges were to comment on facts juries might as well be abolished for the judge would carry nine cases out of ten.

Mr. Moore said the law had been better administered in Washington and Idaho than in any state with which he was familiar and that it (unreadable) more dangerous to commit a crime than in any of the states owing to the efficiency in the enforcement of the law, and this he attributed very largely to the power enjoyed by judges under the federal statutes of commenting on the testimony in order to assist juries to arrive at correct conclusions.

Mr. Griffiths believed that the gentlemen who opposed this amendment did so because from their own experience they were satisfied with the evil of allowing the judge to interfere in the (unreadable).

Mr. Turner did not remember a case where a judge had induced a jury to render an erroneous verdict by what he said on the facts, but he had known

#### ARTFUL LAWYERS

to try to get erroneous verdicts by false logic or misstatement and had seen the judge lead the jury back to the true position by a calm statement of the fact afterward. He opposed the amendment and wished the section left as the committee had left it.

Mr. Dyer said the jury system had been established as a protection from judges who attempted to carry out through the courts the corrupt desires of English Kings. This course here proposed was held wise and necessary in California and would be wise here.

Mr. Dyer's motion failed by ayes to noes, too many to need

counting in the opinion of the chair.

Mr. Sudksdorf moved that the word "disputed" be inserted, so that judges might be allowed to state the bearing of facts which were not disputed. Lost by a decided vote.

The section was adopted without amendment.

Univ. of Wash., *Washington State Constitutional Convention 1889: Contemporary Newspaper Articles*, at 3-31 (1999) (Spokane Falls Review, July 20, 1889, P.4, Cols. 1-4).

## **Appendix B**

**Tacoma Daily Ledger, July 21,  
1889, P.4, Cols. 1-4**

Tacoma Daily Ledger, July 21, 1889, P.4, Cols. 1-4

The Committee of the Whole

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Work Resumed on the Judicial Clause and Completed  
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The convention now resumed, in committee of the whole, consideration of the judicial clause.

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Section 16. "That judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law," occasioned some debate.

Suksdorf moved that the words "nor comment thereon" be stricken out.

Mr. Crowley spoke against the amendment, because he thought that facts should be left to the jury. Many judges are too anxious to control the juries. He believed that the functions of judge and jury should be separate.

Judge Turner said he stood by the report while other members of the committee were deserting. He now though in connection with this section, he would become a deserter, as he was of the opinion that judges should have the right to refer to facts.

Judge Hoyt said the necessity of referring to facts was continually occurring. He thought the first part of the section would be sufficient safeguard without the words which would be stricken out if the amendment were adopted.

Mr. Dunbar considered it important that the amendment should be lost. He thought it would be dangerous to give judges the right to comment on facts to a jury. If the jury is to be the judge of the testimony let it have exclusive cognizance thereof.

Judges, he said, were too much inclined to instruct the jury how to bring in the verdict.

Mr. Dyer offered as an amendment to the amendment that the section be altered to read as follows” “Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law.”

#### AMENDMENT ACCEPTED

Mr. Suksdorf accepted the amendment.

Mr. Dunbar said he thought the change was worse than the original amendment. The judge has no right to state the testimony.

P.C. Sullivan was opposed to the amendment. This restriction is intended to prevent judges from letting the jury know how they want them to go. It was too often the case that verdicts of juries were wholly controlled by judges.

Mr. Moore thought it better to follow the California constitution<sup>[19]</sup> throughout. He favored the substitute because he thought judges should not be mere figureheads. He did not think that juries should go out under a misapprehension of facts and bring in verdicts that would have to be set aside. In civil cases a judge sitting alone decides on questions of fact and law, and he did not, therefore, see why there should be any great occasion for alarm if the judge in criminal cases is allowed to instruct the jury. In cases where the judge instructs the jury was to matters of fact verdicts are seldom set aside.

E. H. Sullivan said he had heard judges comment on facts to such a ridiculous extent that laughter has been occasioned. He opposed the amendment.

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<sup>19</sup>The reference in this newspaper article would have been to Cal. Const. 1879 Art. VI, sec. 19. That section provided “[j]udges shall not charge juries with respect to matters of fact.” *People v. Guivan*, 18 Cal. 4th 558, 957 P.2d 928, 932, 76 Cal. Rptr. 2d 239 (1998). “In 1934, the California Constitution was amended through the addition to article VI of former section 19, present section 10, which provides in its current wording that a trial court ‘may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause.’” *Guivan*, 957 P.2d at 933.

## THOUGHT IT USELESS

Mr. Godman opposed the amendment because he thought it useless. Members had conflicted "testimony" with "facts." "Testimony" is what is related by witnesses on the stand, and "facts" are the truth. Under the section, as it stands, the judge can allude to the testimony and facts, but cannot comment on the facts.

Mr. Suksdorf spoke in favor of the amendment. Kinnear opposed it and (unreadable) did Mr. Buchanan, who thought juries as a rule ignorant and much in need of advice from the judge.

Mr. Jones said it is presumed that juries are composed of intelligent men qualified to render verdicts. If the judge is allowed such broad privileges (unreadable) could become judge and jury.

## (UNREADABLE) THE JUDGE'S INFLUENCE

(unreadable) a judge might send testimony to the jury with his views as (unreadable) and credibility by witnesses and (unreadable) influence the minds of the jury-(unreadable) thought jurymen competent (unreadable) this territory better satisfaction is given than in places where the judge is restricted. It is more dangerous to commit a crime when judges are allowed latitude in instructing juries. There is a larger proportion of criminals in this territory than in the states, and therefore the law should be terrible to evil doers. He regarded the section as reported as an innovation and as stripping judges of their proper prerogative.

Mr. Griffiths opposed the amendment because he had seen cases talked out of court by judges commenting upon facts. The respect for the judge make the jury disregard important testimony.

## ARTFUL LAWYERS

Judge Turner did not know of a case where a judge had induced a jury to give an erroneous verdict. Artful lawyers, however, have by sophistry clouded the minds of juries, and a calm and impartial judge has made the matter clear to them. He did not favor the amendment as it stood, but would like to see the words "nor comment thereon" stricken out.

The amendment was voted down.

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MORE AMENDMENTS  
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Set Up Only to Be Knocked Down After Long Discussion  
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Mr. Stiles moved that the word "disputed" be placed before the word "matters" in the section, making it read that "judges shall not charge juries with respect to disputed matters of fact." Lost.

Section 16 was then approved.

Univ. of Wash., *Washington State Constitutional Convention 1889: Contemporary Newspaper Articles*, at 4-39 (1999) (Tacoma Daily Ledger, July 21, 1889, P.4, Cols. 1-4).