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NO. 68764-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

REC'D  
MAR 25 2013  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

EMILIO HERNANDEZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Catherine Shaffer, Judge

BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENT OF ERROR</u> .....	1
<u>Issue Pertaining to Assignment of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. <u>Charges and verdicts</u> .....	1
2. <u>Trial testimony</u> .....	2
C. <u>ARGUMENT</u> .....	4
<u>THE TRIAL COURT ERRED BY INSTRUCTING THE JURY THAT IT HAD A "DUTY" TO RETURN A VERDICT OF GUILTY.</u> ....	4
a. <u>The United States Constitution</u> .....	5
b. <u>Washington Constitution</u> .....	6
c. <u>State Constitutional and Common Law History</u> .....	8
d. <u>Preexisting State Law</u> .....	8
e. <u>Differences in Federal and State Constitutions' Structure</u> .....	9
f. <u>Matters of Particular State Inrerest or Local Concern</u> .....	10
g. <u>Jury's Power to Acquit</u> .....	10
h. <u>Scopoe of Jury's Role Regarding Fact and Law</u> .....	13
D. <u>CONCLUSION</u> .....	16

## TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Leonard v. Territory</u> 2 Wash. Terr. 381, 7 Pac. 872 (1885).....	8, 9
<u>Pasco v. Mace</u> 98 Wn.2d 87, 653 P.2d 618 (1982).....	5, 6, 8, 9, 10
<u>Sofie v. Fibreboard Corp.</u> 112 Wn.2d 636, 771 P.2d 711 (1989).....	6, 8, 9
<u>State v. Black</u> 109 Wn.2d 336, 745 P.2d 12 (1987).....	7
<u>State v. Byrd</u> 72 Wn. App. 774, 868 P.2d 158 (1994) <u>affirmed</u> , 125 Wn. 2d 707, 887 P.2d 396 (1995).....	12
<u>State v. Earls</u> 116 Wn.2d 364, 805 P.2d 211 (1991).....	8
<u>State v. Gibbons</u> 118 Wash. 171, 203 P. 390 (1922) .....	10
<u>State v. Holmes</u> 68 Wash. 7, 122 Pac. 345 (1912).....	10
<u>State v. Jukich</u> 135 Wash. 682, 239 P. 207 (1925) .....	14
<u>State v. Meggyesy</u> 90 Wn. App. 693, 958 P.2d 319 <u>review denied</u> , 136 Wn.2d 1028 (1998) .....	7, 9
<u>State v. Primrose</u> 32 Wn. App. 1, 645 P.2d 714 (1982).....	12
<u>State v. Recuenco</u> 154 Wn.2d 156, 110 P.3d 188 (2005).....	1, 7

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Russell</u> 125 Wn.2d 24, 882 P.2d 747 (1994) <u>cert. denied</u> , 514 U.S. 1129 (1995).....	10
<u>State v. Salazar</u> 59 Wn. App. 202, 796 P.2d 773 (1990).....	12
<u>State v. Scott</u> 110 Wn.2d 682, 757 P.2d 492 (1988).....	12
<u>State v. Strasburg</u> 60 Wash. 106, 110 P. 1020 (1910) .....	7
<u>United States v. Gaudin</u> 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995).....	10, 13
 <b><u>FEDERAL CASES</u></b>	
<u>Duncan v. Louisiana</u> 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).....	5, 6
<u>Franks v. Delaware</u> 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).....	2, 4
<u>Gideon v. Wainwright</u> 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).....	10
<u>Jackson v. Virginia</u> 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).....	14
<u>United States v. Garaway</u> 425 F.2d 185 (9th Cir. 1970) .....	10

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>United States v. Moylan</u> 417 F.2d 1002 (4th Cir. 1969) <u>cert. denied</u> , 397 U.S. 910 (1970) .....	12
<u>United States v. Powell</u> 955 F.2d 1206 (9th Cir. 1991) .....	13
 <u>OTHER JURISDICTIONS</u>	
<u>Allen v. State</u> 192 Md.App. 625, 995 A.2d 1013 (2010) .....	11
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
Alschuler & Deiss <u>A Brief History of the Criminal Jury in the United States</u> 61 U. Chi. L.Rev. 867 (1994) .....	11
<u>Bushell's Case</u> Vaughan 135, 124 Eng. Rep. 1006 (1671) .....	11
Hon. Robert F. Utter <u>Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights</u> 7 U. Puget Sound L. (1984) .....	7
John H. Wigmore <u>"A Program for the Trial of a Jury"</u> 12 Am. Jud. Soc. 166 (1929) .....	14
<u>The Papers of Thomas Jefferson</u> (Princeton Univ. Press, 1958) .....	5
Utter & Pitler <u>"Presenting a State Constitutional Argument: Comment on Theory and Technique,"</u> 20 Ind. L. (1987).....	9
CrR 3.6.....	2

**TABLE OF AUTHORITIES (CONT'D)**

	Page
RAP 2.5.....	12
U.S. Const. amend. 5 .....	5, 11
U. S. Const. amend. 6 .....	5
U.S. Const. amend. 7 .....	5
U.S. Const. amend. 14 .....	5, 10
U.S. Const. art. 3, § 2.....	5
U.S. Const. art. 3, § 3.....	5
Wash. Const. art. I, § 9 .....	11
Wash. Const. art. 1, § 21 .....	6, 9
Wash. Const. art. 1, § 22.....	6
Wash. Const. art. 4, § 16.....	7
WPIC 37.02 .....	4
WPIC 40.02 .....	4
WPIC 41.02 .....	4

A. ASSIGNMENT OF ERROR

Each "to convict" instruction erroneously stated the jury had a duty to return a guilty verdict if it found each element proven beyond a reasonable doubt.<sup>1</sup>

Issue Pertaining to Assignment of Error

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?

B. STATEMENT OF THE CASE<sup>2</sup>

1. Charges and verdicts

The State charged Emilio Hernandez with first degree rape and first degree robbery. CP 10-11.

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<sup>1</sup> This Court rejected the arguments raised here in State v. Meggyesy, 90 Wn. App. 693, 958 P.2d 319, review denied, 136 Wn.2d 1028 (1998), abrogated on other grounds by State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005). Counsel respectfully contends Meggyesy was incorrectly decided. Because Hernandez must include a Gunwall analysis or risk waiver of the issue, the Meggyesy argument is included in its entirety.

<sup>2</sup> The brief refers to the verbatim reports as follows: 1RP – 3/19/12; 2RP – 3/20/12; 3RP – 3/21/12; 4RP – 3/22/12; 5RP – 3/26/12; 6RP – 3/27/12; 7RP – 3/28/12; 8RP – 3/29/12; 9RP – 4/2/12; 10RP – 4/3/12; 11RP – 4/4/12; 12RP – 4/5/12; and 13RP – 5/4/12.

The trial court denied Hernandez's motion to suppress evidence under CrR 3.6 and Franks v. Delaware,<sup>3</sup> and a jury found him guilty as charged. CP 167, 194-201; 1RP 26-98 and 2RP 5-111 (Franks hearing and oral ruling).

The court sentenced Hernandez to concurrent standard range sentences totaling 160 months to life. Hernandez timely appeals. CP 241-48.

2. Trial testimony

X.S. was attacked, and her purse stolen, while she was walking home from her bus stop. 7RP 14-15. X.S.'s attacker repeatedly struck her in the face, threw her on the ground in the yard of an abandoned house, and penetrated her vagina with a gloved finger. 7RP 20-27. X.S. tried to bite her attacker's hand but did not think she succeeded because he was wearing gloves. 7RP 30; 8RP 89. X.S.'s face was swollen after the incident and she suffered from a variety of aches and pains for weeks afterward. 6RP 111; 7RP 57-60. Police later located the strap of X.S.'s purse, which appeared to have been torn off, in the yard of the vacant house. 5RP 42-43, 46; 6RP 146-47; 7RP 31.

After the incident, X.S. flagged down a United Parcel Service driver, who called 911. 7RP 28. X.S. described her attacker to the first

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<sup>3</sup> 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

responding officer as a “clean-shaven” black male wearing a light blue jacket. X.S., however, had trouble communicating in English. 5RP 50, 52-54. The UPS driver saw a light-skinned black male in a tan Carhartt-style jacket walking away from the scene. 5RP 87.

X.S. later described her attacker as Hispanic or mixed race. 7RP 106. She also told police he was wearing a beige or tan jacket. 7RP 107; 8RP 47. A few days after the incident, X.S. worked with a police artist to create a sketch of her attacker. 7RP 118. X.S. did not recall any facial hair. But Hernandez was known to have a prominent mustache at the time of the attack. 7RP 118; 8RP 127; 10RP 110.

Shortly after the incident, X.S. went to Harborview for a sexual assault examination. 8RP 82-83, 100. Police sent samples obtained during the examination, as well as X.S.’s clothes, to the State crime lab for forensic testing. 6RP 35-37, 156-57; 9RP 40-42. A few months later, the primary detective learned Hernandez, who lived near the scene of the attack, was a “possible contributor” to a mixed DNA sample from X.S.’s shirt. 8RP 59-60; 9RP 82, 87-88. After obtaining a search warrant,<sup>4</sup>

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<sup>4</sup> Despite the lab’s assessment that Hernandez was a *possible* contributor, the primary detective’s affidavit referred to a DNA “match.” Supp. CP \_\_\_ (sub no. 41, Motion to Suppress). In his motion to suppress, Hernandez argued that the detective intentionally or recklessly misrepresented this fact in her affidavit, in violation of Franks v.

police found two tan jackets in Hernandez's bedroom. 8RP 29-34, 72-74. Additional DNA testing revealed one of the jackets was stained with X.S.'s blood. 9RP 130-34.

Hernandez did not deny the jacket was his, but testified he did not attack X.S. and was, instead, busy with holiday-related activities around the time of the attack. 10RP 111-13, 117.

C. ARGUMENT

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY THAT IT HAD A "DUTY" TO RETURN A VERDICT OF GUILTY.

As part of the "to convict" instructions used to convict Mr. Hernandez, 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 . . . .

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of [these elements], then it will be your duty to return a verdict of not guilty. . . .

CP 179, 184, 187. This is standard language from the pattern instructions. WPIC 40.02; WPIC 41.02; WPIC 37.02. Hernandez contends there is no constitutional "duty to convict" and that the instructions therefore misstate

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Delaware, and its progeny. The court denied Hernandez's motion. CP 194-201.

the law. Accordingly, the instructions violated Hernandez's right to a properly instructed jury.

a. The United States Constitution

The right to jury trial in a criminal case was one of the few guarantees of individual rights enumerated 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, 391 U.S. at 156.<sup>5</sup>

b. Washington Constitution

The drafters of our state constitution granted the right to a jury trial and expressly declared the right "inviolable." Const. art. 1, §§ 21, 22.

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

Article 1, section 21 "preserves the right [to jury trial] as it existed in the territory at the time of its adoption." Mace, 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 inviolable." Id.

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<sup>5</sup> In Sofie v. Fibreboard Corp., a majority of state Supreme Court justices viewed 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).

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.<sup>6</sup> 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 is also protected by the due process clause of article I, section 3.

While this Court in Meggyesy<sup>7</sup> may have been correct when it found there is no specific constitutional language that addresses this precise issue, what language there is indicates the right to a jury trial is so fundamental that any infringement violates the constitution.

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<sup>6</sup> "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

<sup>7</sup> State v. Meggyesy, 90 Wn. App. 693, 958 P.2d 319, review denied, 136 Wn.2d 1028 (1998), abrogated on other grounds by State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005).

c. State Constitutional and Common Law History

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. Earls, 116 Wn.2d 364, 392, 805 P.2d 211 (1991). This difference supports an independent reading of the Washington Constitution.

d. Preexisting State Law

Since article I, section 21, "preserves the right [to jury trial] as it existed in the territory at the time of its adoption," it is helpful to look at the preexisting state law. Sofie, 112 Wn.2d at 645; Mace, 98 Wn.2d at 96. In Leonard v. Territory, the Supreme Court reversed a murder conviction and set out in some detail the jury instructions given in the case. 2 Wash. Terr. 381, 7 Pac. 872 (1885). The language of those instructions provides a view of the law before the adoption of the Constitution:

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 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).

The courts thus acknowledged, and incorporated into the jury instructions, the threshold requirement that each element be proved beyond a reasonable doubt to permit a conviction; but any reasonable

doubt required an acquittal. Because this was the law regarding the scope of the jury's authority at the time of the adoption of the Constitution, it was incorporated into Const. art. 1, § 21, and remains inviolate. Sofie, 112 Wn.2d at 656; Mace, 98 Wn.2d at 93, 96.

This Court distinguished Leonard on the basis that the Leonard court "simply quoted the relevant instruction. . . ." Meggyesy, 90 Wn. App. at 703. This 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.

e. Differences in Federal and State Constitutions' Structure

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.

It is evident, therefore, that the "inviolable" Washington right to trial by jury was more extensive than that which was protected by the federal constitution when it was adopted in 1789. Mace, 98 Wn.2d at 99.

f. Matters of Particular State Interest or Local Concern

Criminal law is a local matter. State v. Russell, 125 Wn.2d 24, 61, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995). There is no need for national uniformity in criminal law. Until the Fourteenth Amendment was interpreted to apply the federal Bill of Rights in state court proceedings, all matters of criminal procedure were considered a matter of state law. See, e.g., Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); State v. Gibbons, 118 Wash. 171, 203 P. 390 (1922).

g. 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); State v. Holmes, 68 Wash. 7, 12-13, 122 Pac. 345 (1912). 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 Allen v. State, 192 Md.App. 625, 640-48, 995 A.2d 1013 (2010) (synthesizing over 40 years of case law and rejecting government's use of collateral estoppel to establish an element of the crime).

The constitutional protections against double jeopardy also safeguard the right to a jury trial by prohibiting a retrial after a verdict of acquittal. U.S. Const. amend. 5; Const. art. I, § 9.<sup>8</sup> A jury verdict of not guilty is thus non-reviewable.

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

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<sup>8</sup> "No person shall be . . . twice put in jeopardy for the same offense."

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.<sup>9</sup>

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).

Washington courts have also recognized that a jury may always vote to acquit. 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

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<sup>9</sup> Hernandez did not make this argument to the trial court. He may nevertheless raise it for the first time on appeal as an issue of constitutional magnitude. RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988); State v. Byrd, 72 Wn. App. 774, 782, 868 P.2d 158 (1994), affirmed, 125 Wn. 2d 707, 887 P.2d 396 (1995).

"constitutional prerogative to acquit" as basis for upholding admission of evidence).

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.

h. Scope of Jury's Role Regarding 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. The jury's role has historically never been so limited: "[O]ur decision in no way undermined 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." Id. at 514.

Professor 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. Jukich, 135 Wash. 682, 687, 239 P. 207 (1925).

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.

The instructions given in Hernandez's case did not contain a correct statement of the law. They provided a level of coercion for the jury to return a guilty verdict. When the trial court instructed the jury it had a duty to return a verdict of guilty based merely on finding certain facts, the court took from the jury its constitutional authority to apply the law to the facts to reach its general verdict. The instructions creating a "duty" to return a verdict of guilty were an incorrect statement of law and violated Hernandez's right to a jury trial as to both counts.

D. CONCLUSION

The trial court's "to convict" instructions, which created a "duty" to return a verdict of guilty, incorrectly stated the law and violated Hernandez's right to a jury trial. Hernandez's convictions should be reversed.

DATED this 25<sup>TH</sup> day of March, 2013.

Respectfully submitted,

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