State of New Hampshire
Supreme Court

NO. 2013-0426

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JANUARY SESSION

State of New Hampshire v. Richard Paul

RULE 7 APPEAL OF FINAL DECISION OF THE
CHESHIRE COUNTY SUPERIOR COURT

BRIEF OF DEFENDANT RICHARD PAUL

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STATEMENT OF FACTS

I. Richard Paul is a Keene Pot Activist

Quoting from Richard Paul's allocution before sentencing:

> The reason that I became an activist in the area of marijuana is an amalgam of things. First off, I spent 22 years going to Alcoholics Anonymous, and during that time I learned about codependency. And codependency is a disease suffered by people who love alcoholics. And they try to help these alcoholics through nagging, through hiding their supply sometimes through physical violence, trying to do anything to prevent the alcoholic from using his drug of choice. The problem is that this is counterproductive. And in the program of Al-Anon, which is the companion program to Alcoholics Anonymous, it's recommended that people stop doing that and let the alcoholic get ready to recover in his own time.
>
> What I recognized is that the war on drugs is the pathology of codependency transformed into a national policy. It's taking a disease and making it law, where the law does exactly what the codependent does. It nags through public service announcements, it attempts violence against people who use drugs that it doesn't believe they should be using. It does all the things that … codependents do, and it does nobody any good. That's where it started.
>
> Also, during this time I would see kids get arrested – and, you know, these are mostly 18, 19, 20-year-old kids. And you'd see them, they'd get arrested and they'd start going to meetings. You know? And they'd be these nice kids, they'd sober up, they'd be great, you'd have a good time with them, and then eventually their charges would catch up with them and they'd go off to prison. And when they went to prison, they came back wrong. It was like they'd been – if you've read Stephen King, it was like they have been buried in the pet cemetery. They came back wrong. And it was very difficult for us to help these kids when they'd been to prison, they'd been victims of violence. In many cases they'd been sexually assaulted in prison. It's very difficult to put Humpty Dumpty back together again. And I wanted to tell these kids that you have to stand up against the system.… It was the best thing for society for somebody to stand up and say, "This is wrong."

Sent. Hrg. at 28-30 (defendant's allocution). Needs proofreading.

After college, before Mr. Paul came to New Hampshire, he was a successful computer programmer, working for a large banking institution, and then a startup. *Sent. Hrg.* at 10. When his long-time girlfriend was diagnosed with cervical cancer, his father told the sentencing court, Mr. Paul "became her caregiver, while he was working. Expended all of his money, his savings, because the young lady had no healthcare. And she died in nine months." *Sent. Hrg.* at 18 (statement of Mr. Paul's father). Richard Paul, continuing his allocution, said: "And then there was Julie. … [I]t was recommended that she take medical marijuana. And that was not available to her, because of the law." *Sent. Hrg.* at 30 (defendant's allocution).

Mr. Paul quit his job and moved to New Hampshire as part of the Free State Project, sold drugs and was caught, stood trial and was convicted.

The State's expert acknowledged, *Trial Trn. Day 2* at 284-85, the irony that substances are controlled by the federal government when they have no medical application, *see* 21 U.S.C. § 812(b)(1)(B) ("The drug or other substance has no currently accepted medical use in treatment in the United States."), but many United States jurisdictions have deemed marijuana has medical application. *See* <http://en.wikipedia.org/wiki/Places_that_have_decriminalized_non-medical_cannabis_in_the_United_States>.

Mr. Paul believes marijuana is harmless, *Trial Trn. Day 3* at 310, and even that his self-medication for ADD or whatever is beneficial. *Sent. Hrg.* at 11.

Mr. Paul has participated in marijuana legalization demonstrations, DEFENDANT'S MOTION IN LIMINE TO EXCLUDE MENTION OF POLITICAL ACTIVITIES (Mar. 26, 2013); OBJECTION TO DEFENDANT'S MOTION IN LIMINE TO EXCLUDE MENTION OF POLITICAL

ACTIVITIES) (Apr. 4, 2013); ORDER (Apr. 15, 2013) (denying motion), and his recent criminal history is associated with that. *Trial Trn. Day 3* at 335.

Given his background and beliefs, Mr. Paul regards his drug sales and willingness to be incarcerated as a form of protest, in the tradition of civil disobedience. *Sent. Hrg.* at 13-14; *see e,g., State v. Wentworth*, 118 N.H. 832, 834 (1978) ("The defendant was arrested along with about 1,400 other protesters at the May 1977 occupation of the Seabrook Nuclear Power Plant site," and sentenced to 4 months in jail); *Wyman v. Uphaus*, 100 N.H. 436, *vacated and remanded*, 355 U.S. 16 (1957), *and adhered to*, 101 N.H. 139 (1957), *aff'd*, 360 U.S. 72 (1959) (civil contempt for refusal to disclose names of alleged communists). Thus Richard Paul finished his allocution to the sentencing court:

> I plan to head for Michigan or Colorado once I am free to do so, where I can, as I say, take medical marijuana and be about my business. And now that I have this possibly Quixotic quest out of my system, I intend to go back to programming a computer, because I was good at it and I believe, with the aid of medical marijuana, that I can be good at it again. And I realize that I talked for a long time, and I thank you for your patience.

Sent. Hrg. at 32.

II. Federal, State, Local Cooperation

The Keene police had an informant with heroin charges pending who had cooperated with the police on other cases in exchange for money and leniency. *Trial Trn. Day 1* at 24-25; *Trial Trn. Day 2* at 231, 253. The informant knew Mr. Paul because they had met at "420 marijuana activist rallies in Keene." DEFENDANT'S MOTION IN LIMINE TO EXCLUDE MENTION OF POLITICAL ACTIVITIES (Mar. 26, 2013); OBJECTION TO DEFENDANT'S MOTION IN LIMINE

TO EXCLUDE MENTION OF POLITICAL ACTIVITIES) (Apr. 4, 2013); ORDER (Apr. 15, 2013) (denying motion).

Meanwhile, federal authorities were maybe investigating the Free State Project and its outpost the Keene Activist Center, *Sent. Hrg.* at 26-27, although the FBI refused to answer questions about it. *Trial Trn. Day 1* at 114-18. *See generally*, <http://freestate project.org/>; <http://freekeene.com/come-to-keene/kac/>. In any event, federal, state, and local authorities found overlapping interests in Mr. Paul. *Trial Trn. Day 2* at 169-70 (testimony of DTF detective) ("What I do know is that they were working on their own investigation that I'm not privy to the information there. And it worked out that where we were working our own investigation, as it turns out we were able to work – it made sense to come together and work together to sort of investigate alleged crimes."). Without allegation that he was anything but a pot activist or posed any danger, Mr. Paul was surveilled by the Federal Bureau of Investigation, the Joint Terrorism Task Force, the Attorney General's Drug Task Force, as well as the Keene Police Department. *Trial Trn. Day 1* at 26, 68, 81-82, 86-98, 95-96; *Trial Trn. Day 2* at 206, 209-210, 132-33.

The informant was wired for video and sound, and made four well-documented buys from Mr. Paul over two months. *Trial Trn. Day 2* at 231-50. The informant used FBI money, *Trial Trn. Day 2* at 151, 185-86, and the local police were impressed with the federal's up-to-date equipment. *Trial Trn. Day 1* at 26, 100; *Trial Trn. Day 2* at 129-30, 135-36.

Mr. Paul readily admits the conduct. He protested only that his sales were with honor. *Sent. Hrg.* at 21-22 (Defendant: "[T]wo things … came up in the trial that made it look like I

might have done something that was dishonorable as well as illegal.... [W]hat was delivered was what the customer expected. It probably doesn't matter to you very much, but just to maintain my reputation as a fair trader." The court: "You weren't shorting anybody on your –." Defendant: "Exactly. I did not defraud anyone.").

On the occasion of Mr. Paul's arrest, the informant was to lure Mr. Paul away from the Keene Activist Center. *Trial Trn. Day 1* at 192-93. When the informant made an unexpected turn, there were so many law enforcement vehicles following that agents feared looking obvious. *Trial Trn. Day 2* at 151 (Q: "So you don't have a whole caravan turning around? A: "We didn't want to make a whole bunch of U-turns in front of Mr. Paul."); *Trial Trn. Day 2* at 189 (as many as 10 officers – what one called a "cast of law enforcement" – participated in the arrest). Overall, one Trooper testified, it was an "unusual" case. *Trial Trn. Day 2* at 130.

Upon being arrested, the government offered Mr. Paul a no-time deal and tried to use him to further its investigation, but he refused. *Trial Trn. Day 1* at 108, 114; *Sent. Hrg.* at 11, 15.

III. Defendant's Argument, State's Argument, and Court's Instruction

In this context, both Mr. Paul and the State asked the court to give an instruction apprising the jury of its right to acquit even if the state proved the elements beyond a reasonable doubt. DEFENDANT'S MOTION FOR JURY INSTRUCTION (Apr. 8, 2013); PARTIAL OBJECTION TO DEFENDANT'S MOTION FOR JURY INSTRUCTION (Apr. 12, 2013). The State's suggested instruction was:

> We are a nation governed by laws. You should follow the instruction on the law as I give it to you, including the instruction that you should find the defendant guilty if the state has established guilt beyond a reasonable doubt. However, if

> finding the defendant guilty is repugnant to your sense of justice, and you feel that a conviction would not be a fair or just result in this case, it is within your power to acquit even if you find the state has met its burden of proof.

PARTIAL OBJECTION TO DEFENDANT'S MOTION FOR JURY INSTRUCTION (Apr. 12, 2013). This is known as jury nullification, or as an informed-jury instruction , under New Hampshire's new statute. RSA 519:23-a ("In all criminal proceedings the court shall permit the defense to inform the jury of its right to judge the facts and the application of the law in relation to the facts in controversy.") (eff. Jan. 1, 2013).

After a two-day trial, the Cheshire County Superior Court (*John Kissinger*, J.) ruled that giving the informed-jury instruction was within the discretion of the trial court, declined to give it, but suggested the defendant could argue for nullification. *Trial Trn. Day 3* at 297.

Thus Mr. Paul's attorney began her closing argument by saying, "Good morning. You have the power to judge the facts and to judge the law." *Trial Trn. Day 3* at 302. Later she suggested the jury:

> [A]sk yourself whether this law makes sense to you, that on one hand something has no medical application, yet, on the other hand there are several governments who are allowing it to be medically applied. Does that make sense to you, for a law like that to be used as a sword against Mr. Paul?

Trial Trn. Day 3 at 310.

She ended her closing by saying:

> The Judge is going to give you some instructions in this case. You should listen to his instructions. But the other thing you should know is that you are not required to convict Mr. Paul even if the State proves its case beyond a reasonable doubt, that's the elements of the charges in this case.…
>
> But if you feel that your sense of fairness and justice in this case, and the way this

> case was handled, and the way Mr. Paul was treated, but if you feel[] it's unjust or unfair to apply the law to him, you can acquit him even if you think the State has proven its case beyond a reasonable doubt as to the charges.
>
> The Judge is going to give you an instruction that's going to say – and it's going to sound confusing, and I'm going to explain it to you, maybe. I'm not trying to patronize anybody, but it's confusing to a lot of people. He's going to tell you that the State has met its burden beyond a reasonable – if the State has not met its burden beyond a reasonable doubt, you must acquit Mr. Paul, if they have not met the burden of the elements. If the State has met its burden beyond a reasonable doubt, you should – it's a very subtle difference. You must acquit if they have not proven their case to you beyond a reasonable doubt. You should, you don't have to acquit [sic], even if they have proven the case beyond a reasonable doubt.
>
> In this case, with this man, in these circumstances, the fair and just verdict is not guilty.

Trial Trn. Day 3 at 311-12.

> During its closing the State acknowledged:
>
> I want to make it clear that the Defense is correct, okay, that you do have the power to acquit the Defendant even if you decide the State has met its burden to prove the elements of the charges beyond a reasonable doubt. That is true. If you find it repugnant to your sense of justice, if you feel a conviction would be unfair, you have the power to acquit. That is true. That is inherent in the nature of what you do.

Trial Trn. Day 3 at 313.

After these arguments the court issued its instructions to the jury, portions of which are noted here. In addition to describing the elements of the charges and giving directions on other matters, the court instructed the jury[1]:

[1]The entire instructions the court gave the jury are included in the appendix to this brief, *Appx*. at xx.

- "I will now *instruct you as to the law* that applies in this case."
  JURY INSTRUCTIONS, *Trial Trn. Day 3* at 316, ln. 20-21 (emphasis added).

- "In order to reach and fair and just verdict, you *must* understand and *follow the law as I explain it to you*."
  JURY INSTRUCTIONS, *Trial Trn. Day 3* at 316, ln. 25 to 317, ln. 1 (emphasis added).

- "*These instructions will explain the law* as to these and other matters so that you can reach a fair and just verdict."
  JURY INSTRUCTIONS, *Trial Trn. Day 3* at 317, ln. 6-8 (emphasis added).

- "It is your duty as jurors to *follow all the instructions I am about to give you*. You should *follow the law as I explain it regardless of any opinion you may have as to what the law ought to be.* It is up to you to determine the facts of this case. You must decide this case solely on the evidence presented at trial and *the law as I explain it to you* to reach a fair and just verdict without prejudice, without fear, and *without sympathy*."
  JURY INSTRUCTIONS, *Trial Trn. Day 3* at 317, ln. 9-16 (emphasis added).

- "The possible punishment the Defendant may receive if you return a guilty verdict *should not influence your decision*. The duty of imposing sentence is for the Judge. You should *base your verdict only on* the evidence and *the law* without considering the possible punishment. *You have heard the lawyers discuss* the facts and *the law* in their arguments to you. These arguments are not evidence. Their purpose is to help you understand the evidence and the law. *If the lawyers state the law differently from the law as I explain it to you, then you must follow my instructions and ignore the statements of the lawyers*."
  JURY INSTRUCTIONS, *Trial Trn. Day 3* at 318, ln. 7-20 (emphasis added).

- "The test you *must* use is this. If you have a reasonable doubt as to whether the State has proved any one or more of the elements of the crime charged, you *must* find the Defendant not guilty. However, if you find that the State has proved all the elements of the crime charged beyond a reasonable doubt, you *should* find the Defendant guilty."
  JURY INSTRUCTIONS, *Trial Trn. Day 3* at 323, ln. 21 to 324 ln. 1 (emphasis added).

- "Ladies and gentlemen, this case is important to both of the parties, the State and the Defendant. In your deliberations you *should* follow these instructions which the Court has given you. You *should not decide this case out of* bias or *sympathy*, but with honesty and understanding. You should make a conscientious effort to determine what a fair and just result is in this case,

because that is your highest duty as officers of this Court."

JURY INSTRUCTIONS, *Trial Trn. Day 3* at 328, ln. 2-9 (emphasis added).

- "If you have a reasonable doubt as to whether the State has proven any one or more of the elements of the offense charged, you *must* find the Defendant not guilty. On the other hand, if you find that the State has proven all of the elements of the offense charged beyond a reasonable doubt, then you *should* find the Defendant guilty."

  JURY INSTRUCTIONS, *Trial Trn. Day 3* at 329, ln. 2-8 (emphasis added).

Jury instruction quotes need proofreading

STATEMENT OF THE CASE

After deliberation, the jury convicted Mr. Paul of five felonies: three counts of marijuana sales, one count of sale of a substance represented to be LSD, and one count of possessing marijuana with intent to sell. The court sentenced him to 12 months committed to the House of Corrections on two of the marijuana sales and the LSD charge concurrent, which Mr. Paul has already served, and 1½ -3 years prison all suspended on the remaining sale and possession with intent to sell marijuana. The court fined Mr. Paul a total of $2,500, and recommended drug counseling.

SUMMARY OF ARGUMENT

Richard Paul first demonstrates the court's instructions contradicted his attempt to apprise the jury of its right to acquit in the face of sufficient evidence to convict. He then reviews both New Hampshire's jury nullification jurisprudence and the history of the issue more generally, and in this context discusses the legislative record of New Hampshire's new nullification law.

Drawing on these, he concludes that the statute must be construed broadly, and that compliance with it means three things: First the court must allow the defendant to make a nullification argument to the jury; second, the court must not contradict or undermine the defendant's argument; and third, the court must give a consistent or amplified nullification instruction when the facts and circumstances of the case demands. Mr. Paul then puts at rest any fear that nullification leads to anarchy.

Finally, he points out the error of the court's contradicting instruction here, and argues that his jury should have heard both a non-contradicting general instruction, and also a specific nullification instruction.

ARGUMENT

I. Court's Instructions Contradicted Defendant's Apprisal of the Jury's Nullification Function

The court allowed the defense to apprise the jury of its authority, but moments later in its instructions flatly contradicted – in what appears to be a systematic way – the defendant's attempt to have the jury fully informed.

At least seven times the court instructed the jury that, regardless of what the lawyers say, the jury must listen to the law as given by the court, repeatedly telling the jury to ignore contrary advice given by the lawyers:

- "I will now instruct you as to the law that applies in this case."
  JURY INSTRUCTIONS, *Trial Trn. Day 3* at 316, ln. 20-21.

- "These instructions will explain the law as to these and other matters so that you can reach a fair and just verdict."
  JURY INSTRUCTIONS, *Trial Trn. Day 3* at 317, ln. 6-8.

- "It is your duty as jurors to follow all the instructions I am about to give you."
  JURY INSTRUCTIONS, *Trial Trn. Day 3* at 317, ln. 9-16.

- "You should follow the law as I explain it."
  JURY INSTRUCTIONS, *Trial Trn. Day 3* at 317, ln. 9-16.

- "You must decide this case solely on … the law as I explain it to you."
  JURY INSTRUCTIONS, *Trial Trn. Day 3* at 317, ln. 9-16 (emphasis added).

- "You should base your verdict only on … the law."
  JURY INSTRUCTIONS, *Trial Trn. Day 3* at 318, ln. 7-20.

- "If the lawyers state the law differently from the law as I explain it to you, then you must follow my instructions and ignore the statements of the lawyers."
  JURY INSTRUCTIONS, *Trial Trn. Day 3* at 318, ln. 7-20.

This seventh and final time the court told the jury that only its version of the law could be rightfully considered, it said so with clarity and specificity, with no subtlety or ambiguity:

> If the lawyers state the law differently from the law as I explain it to you, then you *must* follow my instructions and *ignore the statements of the lawyers*."

JURY INSTRUCTIONS, *Trial Trn. Day 3* at 318, ln. 7-20 (emphasis added).

Individually and collectively, these instructions contradicted and countermanded Mr. Paul's attempt to inform the jury of its full function.

The court first forced Mr. Paul's lawyer to persuade the jury of its own authority, and then made her look to the jury either dumbly ignorant, or purposely misleading. The court undermined both the lawyer's credibility and the defendant's strategy. By raising the issue only to have it so thoroughly dashed by the court, perversely the jury may have been even less confident it possessed the authority Mr. Paul was trying to highlight. Had the jury been accurately instructed, it may have either hung or acquitted, and thus the error is not harmless.

II. New Hampshire Nullification Case Jurisprudence

Jury nullification is "the act by which a jury acquits a defendant even if its verdict is contrary to the law and the facts." *State v. Haas*, 134 N.H. 480, 486 (1991). That the jury has the power to nullify is "undisputed." *State v. Sanchez*, 152 N.H. 625, 629 (2005).

> The concept of jury nullification is well established in this country. 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.

State v. Cote, 129 N.H. 358, 368 (1987) (quotations and citations omitted).

New Hampshire Supreme Court precedent has nonetheless been consistently hostile to informing the jury of its authority. Nullification is held not a valid defense, nor a right of the defendant; thus the defendant has no right to argue nullification, nor to demand a nullification instruction. *State v. Sanchez*, 152 N.H. 625 (2005); *State v. Hokanson*, 140 N.H. 719 (1996); *State v. Paris*, 137 N.H. 322 (1993); *State v. Haas*, 134 N.H. 480 (1991); *State v. Vanguilder*, 126 N.H. 326 (1985); *State v. Mayo*, 125 N.H. 200 (1984); *State v. Weitzman*, 121 N.H. 83 (1981). This is so whether or not the facts of the case suggest nullification, *Mayo*, 125 N.H. at 200 (possession of very small quantity of marijuana); *Sanchez*, 152 N.H. at 625 (murder for hire), and even when nullification is the crux of the defendant's argument. *Hokanson*, 140 N.H. at 719 (medical marijuana). Thus this Court has held it is in the discretion of the trial court whether the defendant may be allowed to argue nullification in closing argument, *see State v. Bonacorsi*, 139 N.H. 28 (1994); *Mayo*, 125 N.H. at 200, or get a nullification instruction. *Sanchez*, 152 N.H. at 625; *Haas*, 134 N.H. at 480; *State v. Cote*, 129 N.H. 358 (1987); *Vanguilder*, 126 N.H. at 326;

State v. Maloney, 126 N.H. 235 (1985); *Mayo*, 125 N.H. at 200; *State v. Preston*, 122 N.H. 153 (1982). Even when the jury specifically asks about nullification, the court can refuse to fully inform it of its traditional power and authority. *Bonacorsi*, 139 N.H. at 28.

The standard "*Wentworth* instruction" defining reasonable doubt, which this Court has recommended in all criminal cases, and which was given to the jury here, instructs:

> The test you must use is this: If you have a reasonable doubt as to whether the State has proved any one or more of the elements of the crime charged, you *must* find the defendant not guilty. However, if you find that the State has proved all of the elements of the offense charged beyond a reasonable doubt, you *should* find the defendant guilty.

State v. Wentworth, 118 N.H. 832, 839 (1978) (emphasis added). This Court has held that the *Wentworth* instruction, with its differing use of "must" and "should," sufficiently acknowledges the existence of and apprises the jury – however subtly – of its nullification authority. *State v. Sanchez*, 152 N.H. 625 (2005); *Hokanson*, 140 N.H. at 719; *Paris*, 137 N.H. at 322; *State v. Brown*, 132 N.H. 520 (1989); *State v. Surette*, 130 N.H. 531 (1988). This Court has further held that the *Wentworth* instruction does not undermine a more explicit nullification argument when the defendant has been allowed to make one, *State v. Mayo*, 125 N.H. at 200; *see also, State v. Prudent*, 161 N.H. 320 (2010), even though the only empirical evidence on point is that juries do not understand the subtlety of the must/should distinction. *Bonacorsi*, 139 N.H. at 28 (jury demonstrating confusion about its authority to nullify: defense apprized jury of nullification authority during closing argument, trial court gave *Wentworth* instruction but refused explicit nullification instruction, jury later asked court question about authority to nullify).

In short, this Court's precedent is squarely against Mr. Paul's and the State's joint

request that the trial court should have given a nullification instruction.

III. 799 Years of Jury Nullification

In the "findings and intent" section of the new nullification statute, the legislature referenced the "United States Supreme Court," the "common law," and "American jurisprudence." It is thus apparent the legislature was referring to history more broadly than only New Hampshire's recent case law. Indeed the history of jury nullification is very long – more than can be canvassed here – and reference must be made to the enormous literature on the topic. *See* Teresa L. Conway et al., *Jury Nullification: A Selective, Annotated Bibliography*, 39 VAL. U. L. REV. 393 (2004) (summarizing hundreds [count them] of secondary and primary sources).

When the English populace wrested power from the King culminating with the Magna Carta in 1215, there was little written law, and the jury was largely a "court of conscience" – both finders and appliers of the law. Clay S. Conrad, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE (1998) (reprinted 2014) at 13.[2] Subsequently, juries routinely nullified because in England a plethora of minor crimes were punishable by death.

Colonial Americans had a long record of nullification as a method of peacefully opposing British control. At the time of the Revolution, "natural law" was part of the popular legal culture, meaning that any well-intentioned citizen could derive the appropriate legal rule. Judges had no more training than typical jurors, who were generally white landowning men. CONRAD

[2]Most of the historical background presented here is liberally lifted from Clay S. Conrad, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE (1998) (reprinted 2014). The 1998 edition of the book is available at the University of New Hampshire Law School library. Numerous citations herein to "CONRAD" are to the 2014 reprint. In his book Clay Conrad systematically dismantles most arguments posed against jury nullification, and reference to the book is urged.

at 45-46, 53. Contemporary legal dictionaries defined jurors as judges of law as well as fact, and there is a good argument the Sixth Amendment meant this. CONRAD at 46-47. "[F]or almost five decades following the adoption of the Bill of Rights, the right of jurors to judge both law and fact was uncontroversially accepted." CONRAD at 60 (citing cases).

The jury was regarded as part of the checks-and-balances of the American legal system, guarding against both overzealous legislatures and overzealous prosecutors. CONRAD at 57, 105. Being the most intimate citizen involvement in the liberty of a particular person – a direct illustration of "We the People" – the jury "serve[d] as a buffer between the accused and unjust application of the law." CONRAD at 105. In *State v. Hodge*, 50 N.H. 510, 523 (1869), New Hampshire Supreme Court Chief Justice Charles Doe pointed that out that before *Pierce v. State*, 13 N.H. 536 (1843), jurors in New Hampshire judged both fact and law.

The modern view has been far more constrained, with New Hampshire among the first to abandon, in *Pierce v. State*, the Revolutionary outlook. CONRAD at 60, 71-75, 94-95. This occurred for several reasons. "Americans no longer had unjust laws foisted on them by a foreign power across the sea" and thus there was a "reduced perception of a need for jury independence." CONRAD at 65. Judges, who had become more educated and professionalized, wanted to exercise more control. CONRAD at 65; *see e.g.*, *State v. Wright*, 53 Me. 328, 329-30 (1865).[3] "[T]he revolutionary zeal for independence and citizen participation in the

[3]In *State v. Wright*, 53 Me. 328, 329-30 (1865), the Maine Supreme Judicial Court in starkly elitist terms said:

> "The most important question raised … in this case is whether, in the trial of criminal cases, the jury may rightfully disregard the instructions of the Court, in matters of law, and, if they think the instructions wrong, convict or acquit contrary to such instructions. In other words, whether they are the ultimate, rightful and paramount judges of the law as well as the facts.

(continued...)

administration of justice had given way to efficiency, consistency, and administrative concerns."

CONRAD at 65, 95, 104. And juries had changed:

> The jury, formerly an elite group of well-educated and affluent white men who could be relied on to support the prevailing institutions and division of power, had come much closer to the hypothetical cross-section of society.... The melting pot had spilled over into the jury pool.

CONRAD at 104.

The restrictive view became the prevailing view after the United States Supreme Court decision in *Sparf v. United States*, 156 U.S. 51 (1895) (*Harlan*, J.), although the dissent is an accurate recitation of the role of juries:

> There may be less danger of prejudice or oppression from judges appointed by the president elected by the people than from judges appointed by an hereditary monarch. But, as the experience of history shows, it cannot be assumed that judges will always be just and impartial, and free from the inclination, to which even the most upright and learned magistrates have been known to yield,—from the most patriotic motives, and with the most honest intent to promote symmetry and accuracy in the law,—of amplifying their own jurisdiction and powers at the expense of those intrusted by the constitution to other bodies. And there is surely no reason why the chief security of the liberty of the citizen—the judgment of his peers—should be held less sacred in a republic than in a monarchy.
>
> Upon these considerations, we are of opinion that the learned judge erred in instructing the jury that they were bound to accept the law as stated in his instructions, and that this error requires the verdict to be set aside as to both defendants.

Sparf, 156 U.S. at 176-77 (1895) (*Gray*, J., dissenting).

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[3](...continued)

> "Our conclusion is that such a doctrine cannot be maintained; that it is ... contrary to reason and fitness, in withdrawing the interpretation of the laws from those who make it the business and the study of their lives to understand them, and committing it to a class of men who, being drawn from non-professional life for occasional and temporary service only, possess no such qualifications, and whose decisions would be certain to be conflicting in all doubtful cases, and would therefore lead to endless confusion and perpetual uncertainty.

> Since then, nullification has been most emphatic at particular times in American history.
>
> > Jury independence is a sunspot in the law, appropriately flaring up when the criminal law exceeds the limits of social consensus, dying away when the law has been reformed, only to flare up anew when legislative ambition again overtakes its legitimate bounds.

CONRAD at 108. Successful prosecutions were nearly impossible, for instance, among northern juries under the Fugitive Slave Act of 1850, CONRAD at 75-88, and increasingly difficult in labor cases at the end of the 1900s. CONRAD at 106. Later, prohibition prosecutions were "routinely rejected" by nullifying juries, with as many as 60 percent of alcohol-related prosecutions ending in acquittal, and this nullification probably played a role in its repeal. CONRAD at 108-09. It arose again during the Vietnam war, CONRAD at 124-30, perhaps most emblematically in *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972), in which the defendants ransacked the company that made napalm, and which is the most widely cited nullification case in New Hampshire and elsewhere. *See e.g.*, *State v. Bonacorsi*, 139 N.H. 28, 31, 32 (1994); *State v. Mayo*, 125 N.H. 200, 203 (1984); *State v. Preston*, 122 N.H. 153, 160 (1982); *State v. Weitzman*, 121 N.H. 83, 89, 90 (1981); *State v. Cote*, 129 N.H. 358, 368 (1987). More recently, Dr. Kevorkian was acquitted of assisted suicide. Marvin Zalman et. al., *Michigan's Assisted Suicide Three Ring Circus-an Intersection of Law and Politics*, 23 OHIO N.U. L. REV. 863, 919 (1997) ("Without belaboring the point, we take it as obvious that the three prosecutions and acquittals of Dr. Kevorkian fit the classic model of political trials in the Anglo-American tradition where juries, either in the space created by ambiguous legal rules or by exercising their nullifying power, speak powerfully for community sentiment.").

It is possible that marijuana prosecutions are becoming like prohibition, given that 58 percent of the public favor legalizing it. <http://www.gallup.com/poll/165539/first-time-americans-favor-legalizing-marijuana.aspx>. A few years ago in Montana, a trial court was literally unable to seat a jury in case involving a small quantity of marijuana. Gwen Florio, *Missoula District Court: Jury Pool in Marijuana Case Stages 'Mutiny'* (Montana) Missourian (Dec. 19, 2010), available at <http://missoulian.com/news/local/article_464bdc0a-0b36-11e0-a594-001cc4c03286.html>.

In former times, jurors tended to be aware of their power to nullify. Eighteenth and nineteenth century Americans knew it instinctively. CONRAD at 45. These days, probably less than 10 percent of jurors are knowledgeable enough to know they can *sua sponte* nullify. David Brody & Craig Rivera, *Examining the Dougherty 'All-Knowing Assumption': Do Jurors Know About Their Nullification Power?*, 33 CRIM. L. BULL. 151 (1997). Chk availability @ NHLL/FPLC

IV. New Hampshire's Jury Nullification Statute

The new nullification statute has an expansive intent section, but a relatively narrow operation section. Its legislative record shows why, and points to how it must be interpreted.

A. Statute's Legislative History

As introduced, House Bill 146 was very broad. The "Findings and Intent of the General Court" were:

> Under the decisions of both the New Hampshire supreme court and the United States Supreme Court, the jury has an undeniable right to judge both the law and the facts in controversy. The jury system functions at its best when it is fully informed of the jury's prerogatives. The general court wishes to perpetuate and reiterate the rights of the jury, as ordained under common law and recognized in the American jurisprudence, while preserving the rights of a criminal defendant, as enumerated in part 1, articles 15 and 20, New Hampshire Bill of Rights, and the Seventh Amendment of the Constitution for the United States of America.

The second half of the proposed legislation was:

> 519:23-a Right of Accused. In all court proceedings *the court shall instruct the jury of its inherent right to judge the law as well as the facts and to nullify any and all actions they find to be unjust*. The court is mandated to permit the defendant or counsel for the defendant to explain this right of jury nullification to the jury.

HB 146 AS INTRODUCED (Jan. 6, 2011), *Appx.* at xx (emphasis added).

The bill was referred to the House Judiciary Committee, which heard testimony in January 2011. Citizens testified in favor. CLERK'S NOTES OF PUBLIC HEARING IN HOUSE JUDICIARY COMMITTEE ON HB 146 (Jan. 27, 2011) (typed and handwritten versions), *Appx.* at xx. A pamphlet by the Fully Informed Jury Association (FIJA) was submitted, which summarized the history and effect of jury nullification, and the rights and authority of jurors to "refus[e] to enforce bad laws." FIJA PAMPHLET (submitted Jan. 27, 2011), *Appx.* at xx.

Only the Attorney General and the Administrative Office of the Courts testified in opposition. Howard Zibel of the AOC testified "This is a bill in search of a problem that doesn't exist." CLERK'S NOTES OF PUBLIC HEARING IN HOUSE JUDICIARY COMMITTEE ON HB 146 (Jan. 27, 2011) (typed and handwritten versions), *Appx.* at xx.

Ann Rice, Associate Attorney General, competently made all the conventional arguments against jury nullification. NOTES OF TESTIMONY BY ANN RICE, ASSOCIATE ATTORNEY GENERAL (Jan. 27, 2011), *Appx.* at xx. She told legislators that even though jurors "have the power to nullify in the sanctity of the jury deliberation room," it is a violation of their oath. *Id.* She testified that apprizing jurors of their authority "would be devastating to the criminal justice system" and would "undermine a fundamental premise of our form of gov[ernmen]t – that we are a society of laws." *Id.* Attorney Rice quoted *Wentworth,* noting its distinction between "must" and "should," and saying, as this Court has in *Surette*, *Brown*, *Paris*, *Hokanson*, and *Sanchez*, that the subtle difference between the words is sufficient apprisal of the jury's prerogative. *Id.* Attorney Rice acknowledged that after conducting juror interviews the State is aware they sometimes exercise their right to nullify "even if they don't know what to call it," but did not explain how the criminal justice system would collapse if they were instructed as to its existence and formal name. *Id.*, *see also* CLERK'S NOTES OF PUBLIC HEARING IN HOUSE JUDICIARY COMMITTEE ON HB 146 (Jan. 27, 2011), *Appx.* at xx.

Attorneys Zibel and Rice were apparently at first persuasive, as a subcommittee and then the full House Judiciary Committee voted the bill "inexpedient to legislate." REPORT OF SUBCOMMITTEE OF HOUSE JUDICIARY COMMITTEE WORK SESSION ON HB 146 (Feb. 10,

2011), *Appx.* at xx; REPORT OF HOUSE JUDICIARY COMMITTEE ON HB 146 (Feb. 16, 2011), *Appx.* at xx.

The bill was reconsidered, however, possibly because jury nullification is a plank of the New Hampshire Republican Party, which controlled the House at the time. *See* Shawne K. Wickham, *Lawyers: 'Nullify' to be Common Refrain in Criminal Court Cases*, NEW HAMPSHIRE SUNDAY NEWS (Sept. 23, 2012) ("'What changed was that somebody pointed out that it was in the Republican platform that we're for jury nullification,' recalled Rep. Gregory Sorg, R-Easton, who was vice chairman of the committee at the time. 'I guess it came down from Republican leadership they didn't like that result.'"), available at <http://www.unionleader.com/article/20120923/NEWS03/709239880>. After reconsideration, the Judiciary Committee recommended a slightly altered version to the full House, which passed it on a voice vote. EXECUTIVE SESSION OF HOUSE JUDICIARY COMMITTEE - RECONSIDERATION (Mar. 9, 2011), *Appx.* at xx; EXECUTIVE SESSION OF HOUSE JUDICIARY COMMITTEE - OUGHT TO PASS AS AMENDED (Mar. 9, 2011), *Appx.* at xx; 2011 HOUSE JOURNAL at 718.

The bill then went to the Senate, and was referred to the Senate Judiciary Committee. 2011 SENATE JOURNAL at 190. Initially the Committee found it inexpedient to legislate on a tie vote. The full Senate, however, rejected the committee recommendation, and sent it back to the committee for further consideration. 2011 SENATE JOURNAL at 520. In December the committee recommended the bill pass with an amendment, which the full Senate adopted. 2012 SENATE JOURNAL at 65.

The Senate's amended version maintained the House's broad intent section. It limited

the operation section, however, to criminal cases, stripped the requirement that the *court* give a nullification instruction, and required the defendant be allowed to "inform the jury" of its authority. SENATE JUDICIARY COMMITTEE AMENDMENT TO HB 146 (Dec. 21, 2011), *Appx.* at xx; 2012 SENATE JOURNAL at 65 ("ought to pass with amendment). A committee of conference agreed to the Senate version, which passed both houses and was signed by Governor Lynch in June 2012. *See generally*, NEW HAMPSHIRE GENERAL COURT, DOCKET OF HB 146 , *Appx.* at xx, available at <http://gencourt.state.nh.us/bill_status/bill_docket.aspx?lsr=91&sy=2012&sortoption=&txtsessionyear=2012&txtbillnumber=hb146&q=1>.

B. Compromise: Intent Clause Versus Operation Clause

Thus the law is a product of compromise. While the operations language is relatively narrow, requiring only that "the court shall permit the defense to inform the jury" of its authority, the law maintains the sweeping intent section written by the House and approved by the Senate. RSA 519:23-a; LAWS 2012, 243, *Appx. at xx* at xx.[4]

The intent section calls nullification a "right" of the jury, and not some lesser privilege or prerogative. It demands the jury be "fully" informed, and not something less. It defines the jury's right as judging both "the *facts* and the *application of the law*." It does this to "preserve" defendants' rights.

This is a broad originalist view of the common law, harkening back to our constitutions' founders' original conception of the function of juries. As noted, the New Hampshire Supreme Court abandoned such broad jury nullification in 1843, and the United States Supreme Court

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[4]As enacted the statute provides in full:

> **243:1 Findings and Intent of the General Court**. Under the decisions of both the New Hampshire supreme court and the United States Supreme Court, the jury has the right to judge the facts and the application of the law in relationship to the facts in controversy. The jury system functions at its best when it is fully informed of the jury's prerogatives. The general court wishes to perpetuate and reiterate the rights of the jury, as ordained under common law and recognized in the American jurisprudence, while preserving the rights of a criminal defendant, as enumerated in part 1, articles 15 and 20, New Hampshire Bill of Rights.
>
> **243:2 New Section; Right of Accused; Jury Instruction**. Amend RSA 519 by inserting after section 23 the following new section:
>
> **519:23-a Right of Accused**. In all criminal proceedings the court shall permit the defense to inform the jury of its right to judge the facts and the application of the law in relation to the facts in controversy.
>
> **243:3 Effective Date**. This act shall take effect January 1, 2013

LAWS 2012, 243:1 - 243:3 (a copy of the original is contained in the appendix to this brief at page xxx).

in 1895. *Pierce v. State*, 13 N.H. 536 (1843); *Sparf v. United States*, 156 U.S. 51 (1895). But the legislature, by specifically citing the right-to-trial-by-jury provisions of both the New Hampshire and federal constitutions, rejected the 19th Century's loss of faith in juries, resurrected originalist conceptions, and reestablished the jury's checks-and-balances function.

V. Construction and Application of the Nullification Statute

The language of the nullification statute demands it be broadly construed, but its application is naturally limited to a small set of cases.

A. Nullification Statute Must be Broadly Construed

The sweeping intent section contrasts with the statute's relatively narrow operation section. Reconciling them, however, means only that the operation section must be construed broadly in light of the statute's intent. *See e.g., Lamy v. New Hampshire PUC*, 152 N.H. 106, 108 (2005) ("To advance the purposes of the Right–to–Know Law, we construe provisions favoring disclosure broadly.").

This implies several specific changes to existing case law, some of which are listed here. *See e.g., In re Donovan*, 152 N.H. 55 (2005) (statute on parental college contribution forced abandonment of long-established case law).

First and most obviously, the statute removes the court's discretion regarding whether a defendant need beg nullification in closing. RSA 519:23-a ("court shall permit the defense to inform the jury of its right"). In that regard, it directly overturns this Court's precedent which suggests discretion. *See State v. Bonacorsi*, 139 N.H. 28 (1994); *State v. Mayo*, 125 N.H. 200 (1984).

Second, the statute affects what happens after a defendant makes a nullification argument. Upon a defendant arguing nullification, in its subsequent instructions the trial judge must reflect the broad intent section of the statue. The court must encourage, and be careful to not discourage, the defendant's nullification defense. In several cases this Court approved

subsequent instructions which tended to chill the defendant's nullification argument, and to that extent the statute overrules them. *State v. Prudent*, 161 N.H. 320 (2010); *Bonacorsi*, 139 N.H. at 28 (court warned that defendant emphasizing nullification "too strenuously" in closing would result in anti-nullification instruction); *Mayo*, 125 N.H. at 200.

Third, this Court has several times noted that the *Wentworth* must/should distinction sufficiently apprizes the jury of its nullification power. *State v. Sanchez*, 152 N.H. 625 (2005); *State v. Hokanson*, 140 N.H. 719 (1996); *State v. Paris*, 137 N.H. 322 (1993); *State v. Brown*, 132 N.H. 520 (1989); *State v. Surette*, 130 N.H. 531 (1988). The mere existence of the statute demonstrates the lawmaking branches did not agree. Moreover, even after the Attorney General's testimony that the *Wentworth* must/should distinction was adequate, the legislature cautioned that the "[t]he jury system functions at its best when it is *fully* informed of the jury's prerogatives," thus presuming that the *Wentworth* instruction is not"fully." Accordingly, the statute overturns that aspect of *Wentworth*[5] and this Court's subsequent jurisprudence.

Fourth, because the Senate did not agree with the House's initial proposal which would have mandated a court-given nullification instruction whenever requested, the statute does not affect that aspect of several cases. *Sanchez*, 152 N.H. at 625 (2005); *State v. Haas*, 134 N.H. 480 (1991); *State v. Cote*, 129 N.H. 358 (1987); *State v. Vanguilder*, 126 N.H. 326 (1985); *State v. Maloney*, 126 N.H. 235 (1985); *Mayo*, 125 N.H. at 200. This Court has held that the trial court has discretion to not give a nullification instruction, and the statute likewise does not change

[5]*Wentworth* is best known for it definitions of "burden of proof, presumption of innocence, and reasonable doubt." *State v. Wentworth*, 118 N.H. 832, 838 (1978); *see recently, State v. Addison*, Slip Op. 2008-0945 at 66-70, __ N.H. __ (N.H. Nov. 6, 2013). The statute does not affect those aspects of *Wentworth*.

that. *Sanchez*, 152 N.H. at 625; *Haas*, 134 N.H. at 480; *Cote*, 129 N.H. at 358; *Vanguilder*, 126 N.H. at 326; *Maloney*, 126 N.H. at 235; *Mayo*, 125 N.H. 200; *State v. Preston*, 122 N.H. 153 (1982).

But the statute is not silent on these matters. The intent portion says the jury "has an undeniable right to judge both the law and the facts," and "functions at its best when it is fully informed." Thus the statute substantially lowers the bar as to when discretion to give a nullification instruction must be exercised. In *Bonacorsi*, 139 N.H. at 30, for instance, the court allowed the defendant to argue nullification in his closing, but refused an explicit nullification instruction and gave *Wentworth* instead. Later when the jury asked a question betraying its confusion, the court told the jury to "follow the court's instructions," and this Court affirmed. *Bonacorsi* would have to be decided differently today.

Fifth and relatedly, nullification is now a recognized defense, overturning *State v. Mayo*, 125 N.H. 200 (1984). A recognized defense means that when the evidence suggests it or the defendant presents it, the court is obligated to "instruct the jury" on the law of the defense. *State v. Soucy*, 139 N.H. 349, 352 (1995) (supervening cause defense); *State v. Mendola*, 160 N.H. 550 (2010) ("For a defendant to be entitled to an instruction on a specific defense, there must be some evidence to support a rational finding in favor of that defense.") (entrapment defense). Thus, when either the defendant pursues a nullification defense, or the evidence suggests an instruction might be beneficial to the defendant, the court is obligated to give a nullification instruction, in the same manner as it must give any other affirmative defense instruction when the facts of the case demand.

B. Jury independence is a Doctrine of Lenity, not of Anarchy

Its opponents call nullification anarchy. On the bill that became RSA 519:23-a, the Attorney General's office testified passage would "undermine a fundamental premise of our form of gov[ernmen]t – that we are a society of laws." NOTES OF TESTIMONY FROM ANN RICE, ASSOCIATE ATTORNEY GENERAL (Jan. 27, 2011).

Modern nullification doctrine is so limited as a practical matter, however, that there is little danger. "Jury nullification is the undisputed power of the jury" merely "to acquit, even if its verdict is … contrary to the evidence." *State v. Sanchez*, 152 N.H. 625, 629 (2005),

The statute involves only the application of law to a particular defendant and a particular crime. It does not apply outside of a single jury in a single case. It does not create precedent. It does not apply in civil cases. It does not hamper judicial interpretation of the law. It does not give juries power to make evidentiary rulings or determine the elements of the crime. It does not violate the jurors' oath, in which they swear to "deliver a *fair* and true verdict." RSA 606:2 (emphasis added); *See* CONRAD at 239.

Even when the jury has been apprised of its power, defendants are convicted – Richard Paul being an example. *See also*, *State v. Hokanson*, 140 N.H. 719 (1996) (conviction after court gave nullification instruction); *State v. Richards*, 129 N.H. 669 (1987) (same); *State v. Mayo*, 125 N.H. 200 (1984) (conviction after defendant apprised court of nullification power).

Nullification applies only when the defendant concedes the elements of the crime charged. Because it is inconsistent with all *actus reus* and *mens rea* defenses, nullification is a risky gamble for defendants in conventional criminal prosecutions. Richard Paul is an example.

See also, *Pierce v. State*, 13 N.H. 536, 537 (1843) ("The counsel for the state introduced evidence to prove the sale of the gin, as set forth in the indictment; and it was proved, and *admitted by the defendants*, that they sold to said Aaron Sias, on the day alleged in the indictment, one barrel of American gin, for the price of $11.85, and took from said Sias his promissory note, including that sum.") (emphasis added).

"Criminal laws that are supported by a wide consensus of the population are in little danger of being rejected by the average trial jury." CONRAD at 143 Thus nullification is necessarily rare, arising in only a handful of situations: widely unpopular laws, idiosyncratic defendants, political causes, or overzealous prosecutions. It occurs only in those singular situations that defy the close connection between law and justice: once in a while the letter of the law does not fit a peculiarity.

The State's worry that nullification begets anarchy betrays little faith in the wisdom of juries – the faith upon which our criminal justice system is constitutionally founded. "Jury independence is a doctrine of lenity, not of anarchy." CONRAD at 143.

VI. Court Erred in Contradicting Defendant's Nullification Argument, and Should have Issued a Nullification Instruction

In Mr. Paul's case the court allowed his lawyer to make a nullification argument in closing. But moments later, the court thoroughly undermined it, including the instruction:

> If the lawyers state the law differently from the law as I explain it to you, then you must follow my instructions and ignore the statements of the lawyers."

JURY INSTRUCTIONS, *Trial Trn. Day 3* at 318, ln. 7-20.

Over and over the court told the jury to ignore Mr. Paul's nullification argument and pay attention only to the court's instructions. Undermining and contradicting the defendant's argument in this fashion violated the intent section of the statute, and therefore this Court must reverse.

The closest the court came to a fair instruction was the *Wentworth* must/should distinction. But because the legislature's explicit intent is at odds with the subtlety of the *Wentworth* distinction, and *Wentworth* is no longer sufficient, the court erred, and therefore this Court must reverse.

Finally, the court should have specifically issued a nullification instruction. Mr. Paul did not contest the unlawful conduct, and he put on a nullification defense. Even the State acknowledged this case called for a nullification instruction. Thus, as with any other defense, the jury should have heard a nullification instruction, and this Court should thus reverse.

CONCLUSION

Nullification is now a recognized defense that the court cannot cripple, and must amplify, when the defendant raises it. Richard Paul did that. Yet the trial court contradicted his defense, undermined it, and then refused an explicit instruction. Accordingly, this Court should reverse Mr. Paul's conviction.

Respectfully submitted,

Richard G. Paul
By his Attorney,

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Dated: January 20, 2014

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for Richard Paul requests that Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because this case involves a new statute, an issue of first impression, and a matter of interest to all potential victims, defendants, and jurors in New Hampshire.

I hereby certify that the decision being appealed is addended to this brief/is not addended because it was not written. I further certify that on January 20, 2014, copies of the foregoing will be forwarded to the Office of the Attorney General.

Dated: January 20, 2014

Joshua L. Gordon, Esq.

ADDENDUM

ORDER (Sxxxxxxxx2). 37