State of New Hampshire
Supreme Court

NO. 2013-0426

2014 TERM

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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QUESTIONS PRESENTED

1. Did the court err in giving an instruction that contradicted and undermined the defendant's apprisal of the jury's nullification right, and should the court instead have given a consistent instruction?

   Preserved: DEFENDANTS MOTION FOR JURY INSTRUCTION (Apr. 8, 2013), *Appx.* at 18.

2. Does the nullification statute modify the standard reasonable doubt jury instructions which are not an adequate apprisal of the jury's nullification right?

   Preserved: DEFENDANTS MOTION FOR JURY INSTRUCTION (Apr. 8, 2013), *Appx.* at 18.

STATEMENT OF FACTS

I. Richard Paul is a Keene Marijuana Activist

After college Richard Paul was a successful computer programmer, working for a startup and then a large banking institution. *Sent. Hrg.* at 10. When his long-time girlfriend was diagnosed with cervical cancer, he "became her caregiver …, [e]xpended 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). Mr. Paul said "it 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). After his girlfriend died, Mr. Paul quit his job and moved to New Hampshire as part of the Free State Project.[1]

Mr. Paul believes marijuana is harmless and has medical benefits, and that prohibition is bad policy that creates more problems than it solves. *Trial Trn. Day 3* at 310; *Sent. Hrg.* at 11, 28-30. The State's expert acknowledged the irony that drugs are controlled by federal law when they have no medical application,[2] but that many states including New Hampshire have legalized medical marijuana. *Trial Trn. Day 2* at 284-85; *see* RSA 126-X.

Mr. Paul regards his drug sales and willingness to be incarcerated as a form of social protest in the tradition of civil disobedience. *Sent. Hrg.* at 13-14; *see, e,g., State v. Wentworth*, 118 N.H. 832, 834 (1978) (Seabrook protests). His recent criminal history reflects participation in marijuana legalization demonstrations. DEFENDANT'S MOTION IN LIMINE TO EXCLUDE MENTION OF POLITICAL ACTIVITIES (Mar. 26, 2013), *Appx.* at 12; OBJECTION TO DEFENDANT'S MOTION IN

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[1]The Free State Project is a national movement seeking to recruit at least 20,000 people to move to New Hampshire and create a libertarian political society. *See, e.g.,* <http://en.wikipedia.org/wiki/Free_State_Project>.

[2]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.").

LIMINE TO EXCLUDE MENTION OF POLITICAL ACTIVITIES) (Apr. 4, 2013), *Appx.* at 15; ORDER (Apr. 15, 2013), *Appx.* at 24 (denying motion); *Trial Trn. Day 3* at 335.

II. Federal, State, Local Cooperation

The Keene police had an informant with pending heroin charges who had cooperated with them in 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), *Appx.* at 12; OBJECTION TO DEFENDANT'S MOTION IN LIMINE TO EXCLUDE MENTION OF POLITICAL ACTIVITIES) (Apr. 4, 2013), *Appx.* at 15; ORDER (Apr. 15, 2013), *Appx.* at 24. Meanwhile, federal authorities were possibly investigating the Free State Project and its outpost at the Keene Activist Center, *Sent. Hrg.* at 26-27, although the FBI refused to answer questions about its inquiries. *Trial Trn. Day 1* at 114-18.

Thus 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 marijuana activist or posed any danger, Mr. Paul was surveilled by the Federal Bureau of Investigation, the Joint Terrorism Task Force, the State 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, 232-33.

III. Drug Buys and Arrest

The informant was wired for video and sound, and made four well-documented drug 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, and is protective only of his 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 day of his arrest, the informant was to lure Mr. Paul away from the Keene Activist Center. *Trial Trn. Day 2* at 192-93. When the informant made an unexpected turn, there were so many police 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.

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

Mr. Paul stood trial and was convicted. In allocution he told 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.

Sent. Hrg. at 32.

STATEMENT OF THE CASE

Mr. Paul was charged with 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. Before trial both Mr. Paul and the State asked the court to give an instruction apprising the jury of its power to acquit even if the state proved the elements beyond a reasonable doubt. DEFENDANT'S MOTION FOR JURY INSTRUCTION (Apr. 8, 2013), *Appx.* at 18; PARTIAL OBJECTION TO DEFENDANT'S MOTION FOR JURY INSTRUCTION (Apr. 12, 2013), *Appx.* at 22. The State's suggested informed-jury 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), *Appx.* at 22.

After a two-day trial, the Cheshire County Superior Court (*John Kissinger*, J.) ruled from the bench that giving the informed-jury instruction was within the court's discretion, but declined to give it. The court did allow Mr. Paul's lawyer to assert nullification in her closing. *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.

The court then issued its instructions to the jury.[3] In addition to describing the elements of the charges and giving directions on other matters, the court told the jury:

- "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 a[] 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).

[3]The instructions in their entirety are addended to this brief, *infra,* at page 37.

- "*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."

  JURY INSTRUCTIONS, *Trial Trn. Day 3* at 318, ln. 7-11 (emphasis added).

- "*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. 12-17 (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).

After deliberation, the jury convicted Mr. Paul of all charges. The court sentenced him to 12 months committed to the House of Corrections on two of the marijuana sales and the LSD charge to be served concurrently, and 1½ -3 years prison all suspended on the remaining sale and possession with intent to sell marijuana. The court fined Mr. Paul $2,500, and recommended drug counseling. Mr. Paul has completed serving the committed portion of his sentence.

SUMMARY OF ARGUMENT

Richard Paul first demonstrates the trial court's instructions contravened 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. RSA 519:23-a.

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 contravene 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 to rest any fear that nullification leads to anarchy.

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

ARGUMENT

I. Court's Instructions Contravened 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 contravened – 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."
- "These instructions will explain the law as to these and other matters so that you can reach a fair and just verdict."
- "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."
- "You must decide this case solely on … the law as I explain it to you."
- "You should base your verdict only on … 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."

On this seventh and final time, the judge plainly told the jury that only the court's version of the law could be rightfully considered. This it said with clarity and specificity, without 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 (emphasis added).

Individually and collectively, these instructions directly contravened and countermanded

Mr. Paul's attempt to inform the jury of its full function. Nothing in the remainder of the instructions, viewed as a whole, undoes or mitigates the explicit undermining.

Thus the court first forced Mr. Paul's lawyer to persuade the jury of its own authority. It then made the lawyer look to the jury as 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 exercised its nullification power, and thus the court's error is not harmless.

II. Language of New Hampshire's Nullification Statute Demands it be Broadly Construed

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). Recently the New Hampshire legislature enacted a nullification statute, which provides:

> **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.

The operation section of the statute is relatively narrow, requiring only that "the court shall permit the defense to inform the jury" of its nullification power, RSA 519:23-a, and Mr. Paul was allowed to make a nullification argument here.

But the intent section is much broader:

- It finds that the jury "functions at its best when it is fully informed of [its] prerogatives";
- It justifies nullification as "preserving the rights of … criminal defendant[s]";
- It construes New Hampshire law, Federal law, and named portions of the New Hampshire constitution, to mean that "the jury has the right to judge the facts and the application of the law in relationship to the facts in controversy";
- It "wishes to perpetuate and reiterate the rights of the jury" as proclaimed in these sources of law.

Thus the statute's sweeping intent section contrasts with its relatively narrow operation section. Reconciling them means 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 New Hampshire law. *See, e.g., In re Donovan*, 152 N.H. 55 (2005) (statute on parental college contribution forced abandonment of long-established case law).

A. Statute Removes Discretion to Refuse Defendant Permission to Argue Nullification

First and most obviously, the statute removes the court's discretion regarding whether a defendant must beg to argue nullification in closing. RSA 519:23-a ("court shall permit the defense to inform the jury of its right").

This Court has held that because nullification is neither a valid defense nor a right of the defendant, the defendant has no right to argue nullification, *Sanchez*, 152 N.H. at 625; *State v. Hokanson*, 140 N.H. 719 (1996); *State v. Paris*, 137 N.H. 322 (1993); *Haas*, 134 N.H. at 480; *State v. Vanguilder*, 126 N.H. 326 (1985); *State v. Mayo*, 125 N.H. 200 (1984); *State v. Weitzman*, 121 N.H. 83 (1981), and that the trial court retains discretion over whether the defendant is

allowed to argue it. *State v. Bonacorsi*, 139 N.H. 28 (1994); *State v. Mayo*, 125 N.H. at 200.

The statute directly overturns those precedents.

B. Court Cannot Discourage the Defendant's Nullification Argument

Second, the statute affects what happens after a defendant makes a nullification argument.

In cases where the defendant was allowed to make a nullification argument, this Court has approved the trial court's subsequent instructions which tended to chill or undermine the defendant's argument. *State v. Prudent*, 161 N.H. 320 (2010); *Bonacorsi*, 139 N.H. at 28 (warning defendant that emphasizing nullification "too strenuously" would result in anti-nullification instruction); *Mayo*, 125 N.H. at 200.

The statute overrules those precedents. Upon a defendant arguing nullification, in its subsequent instructions the trial judge must reflect the broad intent section of the statue. It cannot contravene or undermine the right the statute guarantees. Thus the court must give instructions consistent with nullification.

C. *Wentworth* "Must" and "Should" Distinction Does Not Adequately Apprise the Jury of its Nullification Power

Third, the statute affects a portion of the standard recommended reasonable doubt instruction.

The "*Wentworth* instruction"[4] defining reasonable doubt, which this Court has recommended in all criminal cases, and which was given to the jury here, says:

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[4]*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, e.g., 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*.

> 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," acknowledges the existence of and sufficiently apprises the jury – however subtly – of its nullification authority. *Sanchez*, 152 N.H. at 625; *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, Prudent*, 161 N.H. at 320, 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 apprised 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).

The mere existence of the statute demonstrates the New Hampshire legislature did not agree. Moreover, during legislative debates, witnesses testified regarding the *Wentworth* must/should distinction, noting this Court had held it is an adequate apprisal. NOTES OF TESTIMONY BY ANN RICE, ASSOCIATE ATTORNEY GENERAL, TO HOUSE JUDICIARY COMMITTEE (Jan. 27, 2011), *Appx.* at 32; EMAIL FROM HOWARD ZIBEL, ADMINISTRATIVE OFFICE OF THE COURTS, TO SENATE JUDICIARY COMMITTEE (Aug. 9, 2011), *Appx.* at 69. Yet the legislature cautioned that the "[t]he jury system functions at its best when it is *fully* informed

of the jury's prerogatives," thus indicating the *Wentworth* instruction does not"fully inform."

Accordingly, the statute modifies that aspect of *Wentworth* and this Court's subsequent jurisprudence.

D. Statute Alters When Trial Court May Refuse to Give a Nullification Instruction

Fourth, the statute changes the discretion of the trial court regarding when it must give a nullification instruction.

This Court has held that the trial court has discretion to decline giving a nullification instruction. *Sanchez*, 152 N.H. at 625 (2005); *Haas*, 134 N.H. at 480; *Cote*, 129 N.H. at 358; *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). Because the statute does not go so far as to mandate a court-given nullification instruction whenever requested, the statute does not directly affect that aspect of those precedents.

But the statute is not silent on the matter. 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." The statute thus lowers the bar as to when discretion to give a nullification instruction must be exercised, and affects this Court's precedents.

In *Sanchez*, 152 N.H. at 625, for instance, the defendant was charged with murder for hire of her aunt. The court refused a nullification instruction, and the statute would probably not affect that. In *Bonacorsi*, 139 N.H. at 30, however, the trial 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 demonstrating its confusion, the judge told the jury to "follow the court's instructions," and this Court affirmed. *Bonacorsi* would likely be decided differently today.

E. Statute Makes Nullification a Recognized Defense

Fifth, nullification is now a recognized defense. This means that when the evidence suggests the defense or the defendant presents it, the court is obligated to allow evidence of it, and 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).

This Court has held that because nullification is not a recognized defense, it need not be treated as one. *Sanchez*, 152 N.H. at 625; *Hokanson*, 140 N.H. at 719; *Paris*, 137 N.H. at 322; *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. at 200; *Preston*, 122 N.H. at 153; *Weitzman*, 121 N.H. at 83. Even when the defendant or the evidence suggests nullification, this Court has held the trial court has no obligation to instruct the jury on it. *Mayo*, 125 N.H. at 200 (possession of very small quantity of marijuana); *see also Hokanson*, 140 N.H. at 719 (court disallowed expert testimony on medical marijuana).

The statute, however, says that the jury "has the *right* to judge the facts and the application of the law in relationship to the facts in controversy," and that the legislature "wishes to perpetuate and reiterate the *right*." This is in order to "preserv[e] the *rights* of a criminal defendant." And by citing the New Hampshire Constitution, the statute puts nullification rights in the realm of essential liberties. The statute thus recognizes nullification as a valid defense and overturns precedent to the contrary.

Accordingly, when 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 a instruction for any other recognized defense.

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

This Court reviews the adequacy of jury instructions as a matter of law, and whether a case requires a particular instruction as a matter of fact.

> The purpose of the trial court's charge is to state and explain to the jury, in clear and intelligible language, the rules of law applicable to the case. When reviewing jury instructions, we evaluate allegations of error by interpreting the disputed instructions in their entirety, as a reasonable juror would have understood them, and in light of all the evidence in the case. We determine if the jury instructions adequately and accurately explain each element of the offense and reverse only if the instructions did not fairly cover the issues of law in the case. Whether or not a particular jury instruction is necessary, the scope and wording of jury instructions, and the response to a question from the jury are all within the sound discretion of the trial court, and we review the trial court's decisions on these matters for an unsustainable exercise of discretion.

State v. Littlefield, 152 N.H. 331, 333-34 (2005) (quotations and citations omitted).

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, by instructing:

> 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.

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 contravening the defendant's argument in this fashion violated the intent of the statute. Because the instruction was unlawful in light of RSA 519:23-a, 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 trial court erred as a matter of law, and therefore this Court must reverse.

Finally, the court should have specifically issued a nullification instruction. Mr. Paul did not contest his unlawful conduct, and he put on a nullification defense. Even the State acknowledged this case called for a nullification instruction and filed a pleading with suggested language. Thus the jury should have been fully informed with a nullification instruction, and this Court should reverse.

IV. Nullification is Not Anarchy

A common objection to nullification is that it is lawlessness and tantamount to 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), *Appx.* at 32.

Nullification 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).

A. New Hampshire's Nullification Statute Does not Undermine Criminal Justice

New Hampshire's nullification 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.

Even when the jury has been apprised of its nullification power, defendants are convicted. Mr. Paul is 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. *See, e.g., 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). Because nullification is inconsistent with all *actus reus* and *mens rea* defenses, it is a risky gamble for defendants in conventional criminal prosecutions. Again Mr. Paul is an example.

B. Nullification Doctrine Historically Applies in Limited Situations

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.

Clay S. Conrad, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE (1998) (reprinted 2014) at 108.[5] 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 nineteenth century. 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 thus 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), where the defendants ransacked the company that made napalm. More recently, Dr. Jack Kevorkian was

[5]Much 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 in the stacks at the University of New Hampshire Law School library.

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 may become like Prohibition, given that 58 percent of the public favor legalizing it nationally and in New Hampshire. <http://www.gallup.com/poll/165539/first-time- americans-favor-legalizing-marijuana.aspx>; WMUR Granite State Poll / UNH Survey Center (Apr. 22, 2013), available at <http://cola.unh.edu/sites/cola.unh.edu/files/research_publications/gsp2013_spring_marijuana042213.pdf>. A few years ago in Montana, a trial court was unable to seat a jury in a 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>.

But "[c]riminal 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.

C. Nullification Does not Violate the Jurors' Oath

A common objection to nullification is that it violates the jurors' oath. *See, e.g.,* NOTES OF TESTIMONY BY ANN RICE, ASSOCIATE ATTORNEY GENERAL, TO HOUSE JUDICIARY COMMITTEE (Jan. 27, 2011), *Appx.* at 32.

The statutorily required oath of jurors is:

> The following oath shall be administered to petit jurors in criminal cases: You solemnly swear or affirm that you will carefully consider the evidence and the law presented to you in this case and that you will deliver a *fair* and true verdict as to the charge or charges against the defendant. So help you God.

RSA 602:2 (emphasis added). Jurors are expected to deliver a "fair" verdict. Fairness is not robotic, but mitigated by human circumstances, and allows occasional nullification. *See generally,* CONRAD ch. 9 at 239-265. Even if the nullification statute can be said to violate the oath, the oath is statutory, *State v. Rollins*, 22 N.H. 528, 532 (1851), and thus may be modified by subsequent legislation.

D. Jurors Tend Not to Know Their Rights

It is often said that jurors are aware of their nullification power, and also aware they suffer no consequences for exercising it, such that they *sua sponte* apply it without apprisal or instruction in appropriate cases "even if they don't know what to call it." NOTES OF TESTIMONY FROM ANN RICE, ASSOCIATE ATTORNEY GENERAL (Jan. 27, 2011), *Appx.* at 32.

In former times, jurors tended to be aware of their power to nullify because it was part of the political culture, and eighteenth and nineteenth century Americans knew it instinctively. CONRAD at 45. These days however, there is nearly universal lack of knowledge that jurors can *sua sponte* nullify and suffer no consequences. David Brody & Craig Rivera, *Examining the Dougherty 'All-Knowing Assumption': Do Jurors Know About Their Nullification Power?*, 33 CRIM. L. BULL. 151 (1997).

V. Legal and Legislative History Supports Nullification Statute Having Broad Intent

The significance to this case of both old legal history and the legislative record is that together they inform the breadth of the statute's intent section. The drafters of the statute had before them Revolutionary-era history. Their intent, to "perpetuate and reiterate the rights of the jury, as ordained under common law and recognized in the American jurisprudence"; their citations to "decisions of … the United States Supreme Court"; and their invocation of "the rights of a criminal defendant, as enumerated in part 1, articles 15 and 20, New Hampshire Bill of Rights," make little sense without that historical background. Moreover, insofar as contrasting the expansive intent section with the narrower operation section indicates ambiguity in the statute, its legislative record offers an explanation.

A. Originalist Intent of Jury Nullification is Very Broad

The history of jury nullification is long, 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 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. CONRAD at 13. 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 at 45-46, 53. Contemporary legal dictionaries defined jurors as judges of law as well as fact. 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).

Perhaps the best statement of juror's rights appears in *Georgia v. Brailsford*, 3 U.S. 1 (1794), where, in a rare jury trial in front of the United States Supreme Court, Chief Justice John Jay issued this instruction:

> The facts comprehended in the case, are agreed; the only point that remains, is to settle what is the law of the land arising from those facts; and on that point, it is proper, that the opinion of the court should be given. It is fortunate on the present, as it must be on every occasion, to find the opinion of the court unanimous: We entertain no diversity of sentiment; and we have experienced no difficulty in uniting in the charge, which it is my province to deliver.
> …
> It may not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this, and on every other occasion, however, we have no doubt, you will pay that respect, which is due to the opinion of the court: For, as on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of law. But still both objects are lawfully, within your power of decision.

Georgia v. Brailsford, 3 U.S. at 3-4.

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 Revolutionary-era attitude toward juries may serve as a good guide to what the Sixth Amendment means, CONRAD at 46-47, and what New Hampshire's Bill of Rights means as well.

During the nineteenth century courts reined in expansive jury nullification, with New Hampshire among the first to abandon the Revolutionary outlook. *Pierce v. State*, 13 N.H. 536 (1843); 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).[6] "[T]he revolutionary zeal for independence and citizen participation in the administration of justice had given way to efficiency, consistency, and

[6]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.
>
> "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.

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.

Thus the view developed that judges are the givers of law and jurors the evaluators of facts only. *Sparf v. United States*, 156 U.S. 51 (1895) (*Harlan*, J.). The New Hampshire Supreme Court abandoned broad jury nullification in 1843, and the United States Supreme Court in 1895. *Pierce v. State*, 13 N.H. 536 (1843); *Sparf v. United States*, 156 U.S. 51 (1895). This restrictive view became the prevailing view after *Sparf*. *See* CONRAD at 117.

Noting again that the intent section of New Hampshire's nullification statute specifically cites pre-*Sparf* and pre-*Pierce* sources, the legislature rejected the nineteenth century's loss of faith in juries. Rather, it demonstrates a broad common law view of juror's rights, harkening back to the founders' original conception of the function of juries. It thus resurrected originalist conceptions, and reestablished the jury's checks-and-balances function.

B. Statute's Legislative History Shows Broad Intent

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 27 (emphasis added).

The House Judiciary Committee 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 version), *Appx.* at 37. 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 35.

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 version), *Appx.* at 37.

The 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 32. Attorney Rice 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 apprising 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 a sufficient apprisal of the jury's prerogative. *Id.* Attorney Rice acknowledged that, after conducting juror interviews, the State was aware jurors sometimes exercise their right to nullify "even if they don't know what to call it." *Id.*, *see also* CLERK'S NOTES OF PUBLIC HEARING IN HOUSE JUDICIARY COMMITTEE ON HB 146 (Jan. 27, 2011), *Appx.* at 37.

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 39; REPORT OF HOUSE JUDICIARY COMMITTEE ON HB 146 (Feb. 16, 2011), *Appx.* at 41.

The bill was reconsidered, however, possibly because jury nullification was 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 43; EXECUTIVE SESSION OF HOUSE JUDICIARY COMMITTEE - OUGHT TO PASS AS AMENDED (Mar. 9, 2011), *Appx.* at 55; 2011 HOUSE JOURNAL at 718.

The bill then went to the Senate. The Senate Judiciary Committee heard testimony in April 2011, 2011 SENATE JOURNAL at 190, including much of the same Revolutionary-era and nineteenth century legal history, arguments for and against nullification generally, and also the impact and implications of the *Wentworth* must/should distinction. JUDICIARY COMMITTEE HEARING REPORT (Apr. 14, 2011), *Appx.* at 64; EMAIL FROM PENNY DEAN TO SENATE JUDICIARY COMMITTEE (Apr. 27, 2011), *Appx.* at 62; EMAIL FROM HOWARD ZIBEL, ADMINISTRATIVE OFFICE OF THE COURTS, TO SENATE JUDICIARY COMMITTEE (Aug. 9, 2011), *Appx.* at 69.

Initially the Committee found it inexpedient to legislate on a tie vote. REPORT OF THE SENATE JUDICIARY COMMITTEE (May 25, 2011), *Appx.* at 68. 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, AMENDMENT TO HB 146 BY SENATE JUDICIARY COMMITTEE (Dec. 21, 2011), *Appx.* at 71; REPORT OF SENATE JUDICIARY COMMITTEE (Dec. 22, 2011), *Appx.* at 77, which the full Senate adopted. 2012 SENATE JOURNAL at 65.

The Senate's amended version maintained the House's broad intent section, but narrowed the operation section to what it reads today:

> 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.

SENATE JUDICIARY COMMITTEE AMENDMENT TO HB 146 (Dec. 21, 2011), *Appx.* at 76; 2012 SENATE JOURNAL at 65 ("ought to pass with amendment). The Senate thus limited the operation 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. 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 30, available at <http://gencourt.state.nh.us/bill_status/bill_docket.aspx?lsr=91&sy=2012&sortoption=&txtsessionyear=2012&txtbillnumber= hb146&q=1>.

C. Legislature's Intent Based on Originalist Understanding of Legal History

This legal and exhaustive legislative history makes two points.

First, the drafters of New Hampshire's current nullification statute were aware of Revolutionary-era attitudes toward jury nullification, nineteenth century New Hampshire Supreme Court and United States Supreme Court precedents narrowing it, and this Court's recent cases restricting jurors' ability to be fully informed about their nullification rights. This suggests the inclusion of citations to pre-*Sparf* and pre-*Pierce* precedent was not accidental, but was intended to show an originalist intent of broad nullification.

Second, the legislative history shows how the legislature arrived at seemingly contrasting sections of the statute. In conference committee, the House maintained broad intent, while the Senate insisted on narrow operation. This suggests the intention of the legislature was a broad construction of the statute.

CONCLUSION

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

Counsel for Mr. Paul requests that Attorney Joshua L. Gordon be allowed 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.

Respectfully submitted,

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By his Attorney,

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Dated: January 28, 2014

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SERVICE & CERTIFICATIONS

I hereby certify that the convictions being appealed are addended to this brief, but that there was no written decision on the nullification instruction. I further certify that on January 28, 2014, copies of the foregoing will be forwarded to the Office of the Attorney General.

Dated: January 28, 2014

Joshua L. Gordon, Esq.