
Natasha Shekdar Black
A IS NOT A: WASHINGTON'S UNCONSTITUTIONAL LAW OF SINGLE-COUNT, SINGLE-DEFENDANT INCONSISTENT VERDICTS IN STATE V. GOINS

Natasha Shekdar Black, M.S.

Abstract: In State v. Goins, Division I of the Washington State Court of Appeals upheld inconsistent general and special verdicts on the same charge, even though the special verdict finding negated an element of the crime. The Goins court reasoned that the United States Supreme Court and the Washington State Supreme Court had previously upheld inconsistent verdicts in various contexts because the verdicts could have been the result of jury lenity. Therefore, overruuling existing precedent, the Goins court upheld the inconsistent verdicts on the ground that distinguishing the Goins context would be elevating form over substance. This Note argues that the Goins decision is incorrect because the court failed to follow prior precedent and instead extended inapplicable case law beyond its reach, thereby depriving the defendant of his due process right to have the state prove all elements of the crime charged beyond a reasonable doubt. Further, this Note proposes remedial measures that would direct at least a mistrial in this context.

In the early morning of May 18, 2000, Matthew Goins went to Angela Z's apartment. While there he tried to kiss Z, but she rebuffed him. They later fought. Goins claimed that Z attacked him, while Z said that Goins tried to rape her. Z called the police, and Goins was arrested and charged with second-degree assault with intent to commit indecent liberties. The crime of second degree assault with intent to commit indecent liberties is not a statutory sex offense in Washington. However, a felony committed with sexual motivation is a sex offense. Thus, in order to make the crime a sex offense the prosecutor had to, and did,
separately charge that Goins acted with sexual motivation, even though sexual motivation is a recognized element of second-degree assault with intent to commit indecent liberties. The jury found Goins guilty of second-degree assault with intent to commit indecent liberties, but by special verdict found that he did not act with sexual motivation.

On appeal, Goins argued that these verdicts were irreconcilably inconsistent—no jury could have found that he acted both with and without sexual motivation. In *State v. Goins*, Division I of the Washington State Court of Appeals agreed. Nevertheless, it upheld his conviction. Citing cases that protect the unreviewable exercise of jury lenity, the court held that Goins could only have his guilty verdict reviewed for sufficiency of the evidence. This remedy is available to all criminal defendants, without regard to any inconsistency in the verdict, and presents a low standard: the reviewing court need only find sufficient evidence presented at trial to permit a trier of fact to rationally reach a guilty verdict. Because the appellate court concluded that the jury could have believed Z's testimony, Goins' inconsistent verdicts stood.

This Note argues that Division I of the Washington State Court of Appeals incorrectly decided *Goins* because it failed to follow applicable precedent and inappropriately extended prior case law beyond its scope, thereby denying the defendant his constitutional right to have every element of the crime charged proven beyond a reasonable doubt. Part I sets forth the due process requirement of proof beyond a reasonable doubt, presents an overview of jury verdicts, and explains the extent to which criminal jury verdicts are reviewable. Part II summarizes U.S. Supreme Court and Washington case law on inconsistent criminal verdicts in the various contexts in which they appear. Part III details the *Goins* decision. Part IV describes the Washington statute on inconsistent verdicts in the civil context. Part V argues that the *Goins* decision was

11. Id. at 729–30, 54 P.3d at 726.
12. Id. at 729, 54 P.3d at 726.
13. Id. at 726, 54 P.3d at 724.
14. Id. at 725, 54 P.3d at 724.
16. Id. at 730, 54 P.3d at 726.
17. Id. at 725, 54 P.3d at 724.
18. Id. at 742, 54 P.3d at 733.
19. See infra Part I.C.
both unconstitutional and out of line with precedent, and recommends a remedial framework. This Note concludes that under the due process requirement of proof beyond a reasonable doubt, and applicable Washington case law on inconsistent verdicts, defendants in cases such as *Goins* are entitled to at least a mistrial, and at most a judgment of acquittal.

I. CONVICTIONS IN WASHINGTON JURY TRIALS MUST RESULT FROM PROOF BEYOND A REASONABLE DOUBT AND ARE SUBJECT TO LIMITED REVIEW

In order to obtain a conviction at trial, the state is required to prove each element of the crime charged beyond a reasonable doubt.\(^2\) Juries in Washington criminal trials return their verdicts through general and special verdict forms.\(^2\) Once the jury returns its verdict, the verdict is subject to limited review.\(^2\) The defendant may challenge the sufficiency of the evidence for any conviction.\(^2\) However, because of the constitutional guarantee against double jeopardy,\(^2\) the state may not seek review of an acquittal.\(^2\)

A. The State Must Prove All Elements of a Crime Charged Beyond a Reasonable Doubt

In *In re Winship*,\(^2\) the U.S. Supreme Court held that the Due Process clause of the Fourteenth Amendment “protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”\(^2\) The Court cited two key considerations in upholding the requirement of proof beyond a reasonable doubt in criminal proceedings. First, the interests of the accused are of “immense importance” because conviction may result in loss of liberty and social stigma.\(^2\) A high standard of proof reduces

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22. WASH. SUP. CT. CRIM. R. 6.16(c).
23. See infra Part I.C.
25. See infra Part I.C.
29. Id. at 363.
the risk of convictions based on factual error.\textsuperscript{30} Second, “use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.”\textsuperscript{31} Without this respect and confidence, the “moral force of the criminal law” would be diluted by doubt.\textsuperscript{32} Following the lead of \textit{Winship}, the Washington State Supreme Court and the Washington State Legislature both require proof of every element of a crime charged beyond a reasonable doubt.\textsuperscript{33} Further, the state must also prove all allegations on special verdict forms beyond a reasonable doubt.\textsuperscript{34}

\textbf{B. Special and General Jury Verdicts in Washington}

Washington juries may return both general and special verdicts. A verdict is a jury’s finding or decision on the factual issues of a case.\textsuperscript{35} A general verdict is a verdict by which the jury finds in favor of one party or the other,\textsuperscript{36} such as when a jury finds the defendant guilty or not guilty.\textsuperscript{37} A special verdict\textsuperscript{38} is a verdict in which a jury gives a written finding for a specific question of fact.\textsuperscript{39} For example, when a prosecutor in Washington charges a defendant with a crime and there is sufficient evidence for a jury to find that the crime was committed with sexual motivation, the prosecutor is statutorily required to file a special allegation of sexual motivation.\textsuperscript{40} In such cases, if the jury finds the defendant guilty of the principal offense, it must return a special verdict as to whether the defendant committed the crime with a sexual motivation.\textsuperscript{41} Under Washington law, any felony with a finding of sexual

\textsuperscript{30} \textit{Id. at 364.}
\textsuperscript{31} \textit{Id.}
\textsuperscript{32} \textit{Id.}
\textsuperscript{35} \textit{BLACK'S LAW DICTIONARY} 1554 (7th ed. 1999).
\textsuperscript{36} \textit{Id. at 1555.}
\textsuperscript{37} \textit{See WASH. SUP. CT. CRIM. R. 6.16(c).}
\textsuperscript{39} \textit{BLACK'S LAW DICTIONARY}, supra note 35, at 1554.
\textsuperscript{40} \textit{WASH. REV. CODE § 9.94A.835(1)} (2002). The special allegation is not required for crimes that are inherently sexual offenses. \textit{Id.}
\textsuperscript{41} \textit{Id. § 9.94A.835(2).}
motivation is a sex offense, and anyone convicted of a sex offense must register as a sex offender. Indeed, sexual motivation is one of the primary situations in which a criminal jury must decide a special verdict in Washington.

C. Permissible Scope of Review of Jury Verdicts

Criminal defendants can seek to have guilty verdicts reviewed for sufficiency of the evidence. For this review, the appellate court determines "whether the evidence adduced at trial could support any rational determination of guilt beyond a reasonable doubt," viewing the evidence in the light most favorable to the state. The court reviews the sufficiency of the evidence independently for each count on which the defendant was convicted. Courts seldom examine jury verdicts beyond sufficiency of the evidence because of the need for finality in the criminal process.

The state, however, may not seek review of an acquittal. The Double Jeopardy clause of the Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." A defendant is "in jeopardy" once the jury is impaneled and sworn, or when the court begins to hear evidence in a bench trial. Since the U.S. Supreme Court decision in United States v. Ball in 1896, it has been clear that the state may not prosecute a defendant twice for

42. Id. § 9.94A.030(38)(c).
43. Id. § 9A.44.130(1).
44. Another common situation when the court will give the jury a special verdict form is when the state alleges that a defendant or an accomplice was armed with a deadly weapon during the commission of the principal crime. Id. § 9.94A.602. If the jury finds that the defendant was armed, the defendant will face a sentence enhancement. Id. § 9.94A.510(3) (for firearms); id. § 9.94A.510(4) (for deadly weapons other than firearms).
45. United States v. Powell, 469 U.S. 57, 67 (1984). See State v. Salinas, 119 Wash. 2d 192, 201, 829 P.2d 1068, 1074 (1992). There are other questions that criminal defendants may raise on appeal, but only sufficiency of the evidence review is relevant to this Note.
46. Powell, 469 U.S. at 67.
47. Salinas, 119 Wash. 2d at 201, 829 P.2d at 1074.
49. Id.
51. U.S. CONST. amend. V.
54. 163 U.S. 662 (1896).

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the same offense. Therefore, once the jury has rendered a verdict of acquittal, the state cannot appeal or challenge the verdict.

II. INCONSISTENT VERDICTS: CAUSES, CONTEXTS, AND RESOLUTIONS

When one of the jury’s general or special verdicts contradicts another of its general or special verdicts, the verdicts are inconsistent. If the verdicts can be liberally construed in a manner that makes them consistent, courts will hold that there is no irreconcilable inconsistency. The commonly recognized causes of inconsistent verdicts are mistake or confusion, jury lenity, and compromise. Inconsistent verdicts arise in three contexts. First, inconsistent verdicts can occur when multiple defendants are tried jointly, and the acquittal of one defendant is inconsistent with the conviction of the other. Second, inconsistent verdicts can arise when one defendant is tried on multiple charges in a single trial and there is an inconsistency between the general verdicts, or between a special verdict on one charge and a general verdict on another charge. In both of these situations, courts will uphold the inconsistent verdicts as long as the conviction is supported by sufficient evidence because in each case the jury may have acquitted the defendant by exercising jury lenity. In the third context, inconsistent verdicts arise when a single defendant is tried on a single charge, and the special verdict on that charge is inconsistent with the general verdict on the same charge. Prior to State v. Goins, Washington courts facing this last situation had reversed the conviction that was inconsistent with a special verdict on the same count and granted a mistrial.

55. Id. at 669.
57. See infra Part II.A.
58. See infra Part II.A.
59. See infra Part II.B.
60. See infra Part II.C.1.
61. See infra Part II.C.2.
62. See infra Parts II.C.1, II.C.2.
63. See infra Part II.C.3.
64. A year prior to the Goins decision, Division II of the Washington Court of Appeals decided State v. Holmes, which, in dicta, explicitly questioned granting a mistrial when the conviction was inconsistent with a special verdict on the same count. See 106 Wash. App. 775, 781 n.2, 24 P.3d 1118, 1122 n.2 (2001); see also infra notes 165-70 and accompanying text. It was not until the Goins decision that there was a contrary holding. See infra Part II.C.3.
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A. Potentially Inconsistent Verdicts are Deemed Consistent Unless They Cannot be Reconciled

In Washington, inconsistent verdicts exist only when the verdicts cannot be construed to be consistent. When a special verdict is amenable to multiple interpretations, the court will adopt the interpretation that supports the general verdict. Yet, even when two verdicts are logically inconsistent, it may be possible to reconcile them by liberal construction. Once reconciled, the two potentially inconsistent verdicts are deemed consistent.

For example, in State v. Peerson, Division I of the Washington State Court of Appeals upheld a conviction because it was able to reconcile arguably inconsistent verdicts through liberal construction. In Peerson, the defendant was charged with two counts of aggravated first-degree murder. For each murder charge, the court gave the jury an aggravating circumstance special verdict form that asked if the murder was committed in the course of a common scheme or plan. By definition, a common scheme or plan must result in more than one death in order for the jury to find that the aggravating circumstance existed. However, although the jury found that only one of the murders was committed as part of a common scheme or plan, it convicted the defendant of both counts of aggravated first-degree murder. The Peerson court was able to reconcile these verdicts in two ways. First, it reasoned that the jury could have understood the instructions to mean that a common scheme or plan was not technically complete until both the victims were dead. Second, the court noted that the instructions allowed the jury to convict

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66. Robinson, 84 Wash. 2d at 45, 523 P.2d at 1195 (citing McCorkle v. Mallory, 30 Wash. 632, 71 P. 186 (1903)).
67. Id.
68. Id.
70. Id. at 766, 816 P.2d at 50.
71. Id. at 764, 816 P.2d at 49.
72. Id. at 765, 816 P.2d at 50.
73. Id. at 764, 816 P.2d at 49–50.
74. Id. at 758, 816 P.2d at 46.
75. Id. at 766, 816 P.2d at 50.
76. Id.
on an alternative aggravating circumstance. Therefore, the Peerson court upheld both convictions through liberal construction.

**B. Causes of Inconsistent Verdicts**

Inconsistent verdicts typically arise from mistake or confusion, jury lenity, or compromise. In cases involving potential jury mistake or confusion, the court will find the inconsistent verdicts reconcilable. In *State v. Burke,* for example, the state alleged accomplice liability for two co-defendants in a crime involving only one weapon. The trial court instructed the jury that if either defendant possessed a weapon, both were *legally deemed* to have possessed the weapon. The jury found by special verdict that one of the defendants, but not both, was armed with a weapon. To reconcile the verdicts, the appellate court reasoned that the jury might not have understood the legal fiction of constructive possession. Because the jury may have misunderstood the court’s instruction, the court construed the special verdict to be consistent with the general verdict.

Another cause of inconsistent verdicts is the exercise of jury lenity. Jury lenity is the jury’s unreviewable power to refuse to enforce the law. Courts and commentators refer to this power alternatively as jury nullification, jury mercy, jury lawlessness, jury justice, and jury veto power. The U.S. Supreme Court has endorsed the exercise of jury lenity as “recognition of the jury’s historic function, in criminal trials, as a check against arbitrary or oppressive exercises of power by the Executive Branch.” Although the Court has recognized that through jury lenity the

77. *Id.*
78. *Id.*
80. *Id.* at 382, 952 P.2d at 621.
81. *Id.* at 383, 952 P.2d at 621.
82. *Id.*
83. *Id.* at 387, 952 P.2d at 623.
84. *Id.* at 388, 952 P.2d at 623.
86. *Id.*
88. *Powell,* 469 U.S. at 65. Despite this judicial characterization of jury lenity as a benign power, the jury has historically been able to use this power to the detriment of criminal defendants. See Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts,* 111 HARV. L. REV. 771, 803–06 (1998).
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jury is exercising a power it does not have,\(^8^9\) and is "return[ing] a verdict of not guilty for impermissible reasons,"\(^9^0\) the Court has maintained that inconsistent verdicts possibly resulting from jury lenity are not subject to review on that ground.\(^9^1\) The exercise of jury lenity has led one observer to note that the phenomenon is "not only unpunishable, but irreviewable and absolute."\(^9^2\)

Jury lenity has a similar effect in Washington. In \textit{State v. Ng},\(^9^3\) for example, the jury acquitted the defendant of thirteen counts of felony-murder, but convicted him of the thirteen underlying robbery felonies.\(^9^4\) The court decided that because the defendant had admitted to the killings, the jury was inconsistent in acquitting him of the felony-murders while convicting him of the robberies.\(^9^5\) The court attributed the inconsistency to jury lenity.\(^9^6\)

Finally, inconsistent verdicts can arise through compromise when a deadlocked jury negotiates some mix of convictions and acquittals. For example, in a conspiracy charge, one half of the jury may think both defendants are guilty beyond a reasonable doubt while the other half may think both are innocent.\(^9^7\) Instead of deadlocking, the jury may decide to compromise by convicting one defendant and acquitting the other. According to one commentator, compromise is not within the power of the jury and undermines the integrity of the judicial system.\(^9^8\) However, because it is not possible to accurately separate inconsistent verdicts that result from compromise and those that result from jury lenity, the same umbrella that protects jury lenity also shades compromise verdicts from appellate review.\(^9^9\) Therefore, although compromise verdicts potentially eviscerate the requirement of proof beyond a reasonable doubt\(^1^0^0\) and the

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\(^8^9\) \textit{Powell}, 469 U.S. at 66 (citing Dunn v. United States, 284 U.S. 390 (1932)).
\(^9^0\) \textit{Id.} at 63 (quoting \textit{Harris v. Rivera}, 454 U.S. 339, 346 (1981)) (internal quotations omitted).
\(^9^1\) \textit{Id.}
\(^9^2\) \textit{CONRAD}, supra note 87, at 9.
\(^9^4\) \textit{Id.} at 36, 750 P.2d at 634.
\(^9^5\) \textit{Id.} at 45, 750 P.2d at 639.
\(^9^7\) Hypothetical created by author.
\(^9^8\) \textit{See} Muller, supra note 88, at 784.
\(^9^9\) \textit{See}, e.g., \textit{Steckler v. United States}, 7 F.2d 59, 60 (2d Cir. 1925).
\(^1^0^0\) \textit{See supra} Part I.A.
requirement of unanimity, they are not reviewable when the verdicts could also be interpreted as the product of jury lenity.

C. Inconsistent Verdicts Arise in Three Contexts

Inconsistent verdicts can arise whenever the jury is asked to return more than a single verdict. This happens in three contexts. First, an inconsistent verdict can arise when two defendants are tried together, and one of the defendants is acquitted. In the second context, there is only one defendant, but an inconsistency exists on the multiple counts charged against the defendant. In these two contexts, both federal and Washington jurisprudence dictate that sufficiency of the evidence review is adequate to determine the validity of the verdicts, and that considerations of jury lenity limit further review.

In the final context, there is only one count charged against one defendant, but the inconsistency arises when general and special verdicts on that count conflict. Prior to Goins, Washington courts reversed the conviction in this context and granted a mistrial.

1. Multiple-Defendant Inconsistent Verdicts

A defendant cannot challenge his or her conviction on the ground that it is inconsistent with the acquittal of a co-defendant. In multiple-defendant cases, an inconsistent verdict may arise when the jury acquits one defendant but convicts the other in a case where logic requires that all defendants receive the same verdict. Appellate review of multiple-defendant inconsistent verdicts is limited to determining whether the conviction was supported by sufficient evidence and resulted from a fair trial.

101. WASH. SUP. CT. CRIM. R. 6.16(2).
102. See United States v. Dotterweich, 320 U.S. 277, 279 (1943) (citing Dunn v. United States, 284 U.S. 390 (1932)) ("Whether the jury's verdict was the result of carelessness or compromise or [nullification] ... is immaterial. Juries may indulge in precisely such motives or vagaries.").
103. See infra Part II.C.2.
104. See infra Parts II.C.1., II.C.2.
105. See infra Part II.C.3.
106. See infra Part II.C.3.
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In *Harris v. Rivera*,\(^{110}\) three defendants were each charged with crimes arising from an apartment robbery.\(^{111}\) The U.S. Supreme Court conceded that either all three defendants should have been acquitted or all three defendants should have been convicted.\(^{112}\) However, the Court held that a convicted defendant cannot challenge the conviction on the ground that it is inconsistent with the acquittal of a co-defendant.\(^{113}\) Citing considerations of lenity, the Court held that such a conviction is constitutional as long as it is supported by sufficient evidence and resulted from a fair trial.\(^{114}\)

2. *Multiple-Count, Single-Defendant Inconsistent Verdicts*

Most jurisprudence on inconsistent verdicts has developed in the multiple-count, single-defendant context. Such inconsistencies can arise between general verdicts on multiple counts,\(^{115}\) or between the general verdict on one count and a special verdict on another count.\(^{116}\) There is no federal constitutional right to a consistent verdict in a criminal trial involving inconsistent verdicts for a single defendant charged with multiple counts.\(^{117}\) Similarly, there is also no such state constitutional right, as Washington courts have followed the U.S. Supreme Court and held that such inconsistent verdicts may have resulted from jury lenity.\(^{118}\) Therefore, Washington courts have reasoned that inconsistent multiple-count, single-defendant verdicts are not subject to reversal simply because they are inconsistent.\(^{119}\) Both U.S. Supreme Court and Washington precedents limit review of multiple-count, single-defendant inconsistent verdicts to the sufficiency of the evidence on the count for which the defendant was convicted.\(^{120}\)

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111. *Id.* at 340.
112. Although this was a non-jury trial, the Court found the reasoning was parallel as between jury and non-jury trials, and that the judge, like the jury, may exercise lenity. *Id.* at 346–48.
113. *Id.* at 348.
114. *Id.* at 344.
117. Powell, 469 U.S. at 69.
118. See, e.g., Ng, 110 Wash. 2d at 48, 750 P.2d at 640.
119. *Id.*
120. Powell, 469 U.S. at 67; Ng, 110 Wash. 2d at 48, 750 P.2d at 640.
In *United States v. Powell*, the U.S. Supreme Court held that defendants who challenge inconsistent multiple-count verdicts are entitled only to a sufficiency of the evidence review. The inconsistency in *Powell* arose when the jury acquitted the defendant of an underlying felony—conspiracy to possess cocaine with intent to distribute—but convicted her of using a telephone to facilitate that felony. Because proof of possession was an element of the facilitation charge, the defendant’s conviction on facilitation was inconsistent with her acquittal on possession. Although the Court noted that the potentially conflicting results might indicate that the jury failed to express its true conclusions, it reasoned that such results do not necessarily show that the jury did not find guilt with respect to the conviction.

While the Court acknowledged that some error must have occurred to cause the inconsistent verdicts, it reasoned that the inconsistency could favor either the state or the defendant. As the Court explained, although it was possible that the conviction was the incorrect result—as the defendant claimed—the acquittal, instead, could have been the incorrect result. The jury could have properly reached its verdict of conviction on the facilitation, and then improperly—through mistake, confusion, or lenity—reached its result on the underlying felony. The Court noted that the constitutional guarantee against double jeopardy prohibited the state from challenging an acquittal, and reasoned that it would be “hardly satisfactory” to allow the defendant to challenge the inconsistency when the state could not. The Court held that the possibility of jury lenity, along with the government’s inability to invoke review of the acquittal on the ground that it favored the defendant, made the verdicts unreviewable. Although sufficiency of the evidence review determines only whether the evidence presented at trial could support each conviction when considered independently from the verdicts on other counts, the Court cited the need for finality in criminal

122. Id. at 67.
123. Id. at 60.
124. Id. The government conceded the inconsistency for the purposes of review. Id. at 61 n.5.
125. Id. at 64–65 (citing *Dunn v. United States*, 284 U.S. 390 (1932)).
126. Id. at 65.
127. Id.
128. Id. See *supra* notes 50–56 and accompanying text; see also *CONRAD*, *supra* note 87, at 7–9.
130. Id. at 66.
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matters and concluded that such review was a sufficient safeguard against jury irrationality. 131

Washington law similarly requires only that sufficient evidence support a single defendant’s guilty verdict when the inconsistency arises between an acquittal and a conviction because such an inconsistency can be attributed to jury lenity. 132 In Ng, for example, an inconsistency arose when the jury convicted the defendant of first-degree robbery on thirteen counts but acquitted him of felony murder on thirteen counts. 133 Because the defendant did not dispute that the killings occurred, 134 he argued that the guilty verdicts on the robberies required that the jury also find him guilty of the felony murders. 135 Therefore, the defendant reasoned that the convictions on first-degree robbery were void because they were inconsistent with the acquittals on felony murder. 136 The Washington State Supreme Court, however, upheld the verdicts, holding that concerns with second-guessing a jury’s verdict of acquittal and considerations of jury lenity dictated that the verdicts be affirmed. 137 In such cases, the Ng court held that sufficiency of the evidence review is an adequate remedy. 138

The Washington State Supreme Court has also held that consistency between multiple convictions is not required as long as sufficient evidence supports each guilty verdict. 139 In State v. McNeal, 140 the defendant was charged with vehicular homicide and vehicular assault after he caused a fatal car accident. 141 A blood test showed evidence of methamphetamine. 142 To prove vehicular assault, the state had to show

131. Id. at 67.
133. Id. at 36, 750 P.2d at 634. The court “instructed the jury that it could find Ng guilty of first degree robbery as a lesser included offense to felony murder.” Id. An offense is a lesser-included offense when “each of the elements of the lesser offense [is] a necessary element of the offense charged” and “the evidence in the case . . . support[s] an inference that the lesser crime was committed.” State v. Berlin, 133 Wash. 2d 541, 550, 947 P.2d 700, 704 (1997) (citing State v. Workman, 90 Wash. 2d 433, 447–48, 584 P.2d 382, 385 (1978)) (internal quotations omitted) (emphasis in original).
134. Ng, 110 Wash. 2d at 47–48, 750 P.2d at 640.
135. Id. at 45, 750 P.2d at 639.
136. Id.
137. Id. at 48, 750 P.2d at 640.
138. Id.
140. 145 Wash. 2d 352, 37 P.3d 280 (2002).
141. Id. at 355, 37 P.3d at 282.
142. Id. at 356, 37 P.3d at 282.
that the defendant operated his car while “under the influence of drugs.”\textsuperscript{143} For the vehicular homicide charge, the jury was asked by special verdict to find whether the defendant was “operating the motor vehicle . . . while under the influence of drugs.”\textsuperscript{144} The jury answered no to the special verdict form, yet convicted the defendant on all counts.\textsuperscript{145} In effect, the jury found that the defendant both was and was not under the influence of drugs at the time of the accident. The \textit{McNeal} court held that where there is an inconsistency between guilty verdicts on two different counts, and the inconsistency arises between general and special verdicts or between two general verdicts, the court will review each conviction independently for sufficiency of the evidence.\textsuperscript{146} Therefore, the Washington State Supreme Court in \textit{McNeal} upheld the vehicular assault conviction because there was sufficient evidence to support it.\textsuperscript{147}

Justice Sanders’ dissent in \textit{McNeal}, however, stressed the distinction between the inconsistent verdicts in \textit{McNeal}, arising between multiple convictions, and the inconsistent verdicts in \textit{Powell} and \textit{Ng}, arising between convictions and acquittals.\textsuperscript{148} The dissent argued that jury lenity cannot play a role when the jury convicts on all counts.\textsuperscript{149} The \textit{McNeal} majority disagreed, noting that the defendant would have faced an increased standard sentence had the jury found by special verdict that the defendant was under the influence of drugs.\textsuperscript{150} Further, the \textit{McNeal} majority reasoned that the jury may have understood the jury instructions to mean that it could find guilt of vehicular assault on two separate grounds: either that the defendant was under the influence of drugs, or that the defendant operated a motor vehicle with disregard for the safety of others.\textsuperscript{151} The \textit{McNeal} court reasoned that the jury could have thought that finding guilt on the latter ground implied less culpability than finding that he was under the influence of drugs.\textsuperscript{152} Therefore, the court

\begin{footnotes}
\footnotetext[143]{Id.}
\footnotetext[144]{Id. A special finding that the defendant was under the influence of drugs increases the seriousness level of the underlying offense. \textit{Id.} at 359 n.3, 37 P.3d at 284 n.3.}
\footnotetext[145]{Id.}
\footnotetext[146]{Id. at 359, 37 P.3d at 283–84.}
\footnotetext[147]{Id.}
\footnotetext[148]{Id. at 365, 37 P.3d at 286 (Sanders, J., dissenting).}
\footnotetext[149]{Id. at 366, 37 P.3d at 287 (Sanders, J., dissenting).}
\footnotetext[150]{Id. at 359 n.3, 37 P.3d at 284 n.3.}
\footnotetext[151]{Id. at 361, 37 P.3d at 285.}
\footnotetext[152]{Id.}
\end{footnotes}
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held that considerations of jury lenity can exist even when the jury
convicts the defendant on all counts.¹⁵³


Prior to the Washington State Court of Appeals Division I decision in
Goins,¹⁵⁴ Washington courts reversed the conviction of a single
defendant with a single charge when a jury returned a special verdict
negating an element of the crime charged.¹⁵⁵ Single-count, single-
defendant inconsistent verdicts arise where there is an inconsistency
between a general verdict and a special verdict on a single count. In State
v. Hurley,¹⁵⁶ for example, a guilty robbery verdict was inconsistent with a
special verdict finding that the defendant was not armed with a deadly
weapon.¹⁵⁷ The trial court's robbery instruction stated that to convict the
defendant, the jury had to find that the defendant was armed with a
deadly weapon at the time the robbery was committed.¹⁵⁸ Division III of
the Washington State Court of Appeals reasoned that under the trial
court's instructions, being armed with a deadly weapon was an element
of the robbery charge.¹⁵⁹ Thus, the appellate court reversed the
defendant's robbery conviction because the internal inconsistency
between the general and special verdicts was irreconcilable.¹⁶⁰

Similarly, in State v. Wedner,¹⁶¹ Division I of the Washington State
Court of Appeals reversed a defendant's conviction for second-degree
assault because the jury found by special verdict that the defendant was
not armed with a deadly weapon.¹⁶² The jury had been instructed that to
convict the defendant of assault, the state had to prove that he was
armed.¹⁶³ Because of the irreconcilable internal inconsistency between

¹⁵³. Id. at 359 n.3, 37 P.3d at 284 n.3.
¹⁵⁴. See infra Part III for a discussion of the Goins decision.
¹⁵⁷. Id. at 783, 483 P.2d at 1275.
¹⁵⁸. Id. at 782, 483 P.2d at 1275. The court noted that this was an inaccurate statement of the law,
but became the law of the case because there was no objection to the instruction. Id. at 783, 483 P.2d
at 1275.
¹⁵⁹. Id. at 783, 483 P.2d at 1275. The court distinguished three prior cases in which being armed
with a deadly weapon was not an element of the crime charged. Id.
¹⁶⁰. Id. at 784, 483 P.2d at 1276.
¹⁶². Id.
¹⁶³. Id. at 347, 601 P.2d at 951.
the special verdict and the general verdict, the court voided the judgment and granted a new trial.\textsuperscript{164}

Recently, Division II of the Washington State Court of Appeals explicitly questioned the continuing vitality of \textit{Hurley} and \textit{Wedner} in \textit{State v. Holmes}.\textsuperscript{165} The jury in \textit{Holmes} convicted the defendant of first-degree robbery, but found by special verdict that he was not armed with a deadly weapon at the time of the crime—an element of robbery.\textsuperscript{166} The \textit{Holmes} court upheld the conviction, holding that the verdicts were not irreconcilably inconsistent.\textsuperscript{167} The court explained that the trial court had given the jury two different definitions of “deadly weapon” which made it possible for the jury to find that the defendant was armed as defined in the robbery instruction, but not armed for the deadly weapon enhancement.\textsuperscript{168} Although the court cited \textit{Hurley} and \textit{Wedner} as contrary authority,\textsuperscript{169} it did not reconcile them. The court simply noted that \textit{Hurley} and \textit{Wedner} were decided when “inconsistent verdicts constituted reversible error,”\textsuperscript{170} thus questioning their authority and citing \textit{Ng} for support.

In sum, the U.S. Supreme Court has held that inconsistent verdicts involving two defendants are attributable to considerations of jury lenity and are not reversible purely because they are inconsistent. In the multiple-count, single-defendant context, Washington law parallels federal law and inconsistent verdicts are upheld out of concerns of jury lenity. Washington courts will uphold convictions in both of these situations if the convictions are supported by sufficient evidence—the same level of review available for all criminal defendants. Prior to \textit{Goins}, however, a single defendant convicted inconsistently on a single count was granted a mistrial.

\begin{enumerate}
\item \textsuperscript{164} \textit{Id.} at 347, 601 P.2d at 950.
\item \textsuperscript{165} 106 Wash. App. 775, 781 n.2, 24 P.3d 1118, 1122 n.2 (2001).
\item \textsuperscript{166} \textit{Id.} at 778, 24 P.3d at 1120.
\item \textsuperscript{167} \textit{Id.} at 780, 24 P.3d at 1121.
\item \textsuperscript{168} \textit{Id.}
\item \textsuperscript{169} \textit{Id.} at 780–81, 24 P.3d at 1121–22.
\item \textsuperscript{170} \textit{Id.} at 781 n.2, 24 P.3d at 1122 n.2.
\end{enumerate}
Inconsistent Verdicts

III. IN STATE V. GOINS, DIVISION I OF THE WASHINGTON STATE COURT OF APPEALS UPHELD IRRECONCILABLY INCONSISTENT VERDICTS IN THE SINGLE-COUNT, SINGLE-DEFENDANT CONTEXT

Matthew Goins and his friend Steve Haworth went out drinking in May, 2000 and visited the victim’s (Z) apartment. Haworth went into the bathroom and passed out. Z testified that Goins approached her and tried to kiss her twice. She said he retreated the first time when she pushed him away, but the second time he forced her into the bedroom, pinned her on the bed, and tried to lift up her shirt and touch her. She fought back and screamed. Her screams roused Haworth who entered the bedroom, at which point Goins fled. Later, Goins admitted that he tried to kiss Z, and that he might have touched her shoulder. But, he said that Z unexpectedly punched him and he had to grab her to stop her attack. Although he admitted to pushing her on the bed, he said it was an accident.

The state charged Goins with one count of second-degree assault with intent to commit indecent liberties. In addition, the state charged that Goins committed the crime with sexual motivation. The trial court instructed the jury that to convict Goins, it must find beyond a reasonable doubt “[t]hat the assault was committed with intent to commit Indecent Liberties.” The court defined indecent liberties as occurring when a person “knowingly causes another person who is not his spouse to have sexual contact with him or another by forcible compulsion.” “Sexual contact” was defined as “any touching of the sexual or other intimate

172.  Id. at 726, 54 P.3d at 724–25.
173.  Id. at 726, 54 P.3d at 724.
174.  Id. at 726, 54 P.3d at 724–25.
175.  Id. at 726, 54 P.3d at 725.
176.  Id. at 726–27, 54 P.3d at 725.
177.  Id. at 727, 54 P.3d at 725.
178.  Id.
179.  Id.
180.  Id.
181.  Id. at 727–28, 54 P.3d at 725.
182.  Id. at 728, 54 P.3d at 725.
183.  Id.
parts of a person done for the purpose of gratifying sexual desire of either party."

The trial court judge also gave the jury a special verdict form that asked if the crime was committed with sexual motivation, pursuant to Revised Code of Washington section 9.94A.835. The court instructed the jury that "[s]exual motivation means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification." Although the jury convicted Goins of second-degree assault with intent to commit indecent liberties, it acquitted him of committing the crime with sexual motivation.

Division I of the Washington State Court of Appeals noted that "the verdicts [were] irreconcilably inconsistent because Goins either committed the assault for the purpose of sexual gratification or he did not." Enumerating the three contexts in which inconsistent verdicts can arise involving a single defendant, the Goins court identified the case as one where a guilty verdict on one charge is inconsistent with a special verdict on the same charge. Thus, Goins argued that the Hurley and Wedner cases governed the facts of his case, mandating a mistrial. The court acknowledged the Hurley and Wedner cases and noted that "[u]ntil quite recently, it appeared to be settled law in Washington that, where the jury returns a general verdict of guilt accompanied by an irreconcilably inconsistent special interrogatory on the same charge, the remedy is to declare the inconsistent verdicts void and remand for a new trial." The court reasoned, however, that the Washington State Supreme Court's decisions in Ng and McNeal demonstrated an adoption of the U.S. Supreme Court's decision in Powell, expanding judicial acceptance

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184. Id.
185. Id. See also supra Part I.B.
187. Id. at 729, 54 P.3d at 726.
188. Id. at 730, 54 P.3d at 726.
189. Id. at 730-32, 54 P.3d at 726-27.
190. Id. at 732, 54 P.3d at 727.
191. Id. at 736, 54 P.3d at 729. Goins also claimed that Revised Code of Washington section 4.44.440 mandated that the special verdict controlled and therefore that his conviction was void. Id. The court found that Revised Code of Washington section 4.44.440 does not apply to the criminal context. Id. See infra Part IV for a summary of the Goins court's response to this argument. Finally, Goins claimed that his counsel was ineffective in not preserving his right to appeal the inconsistent verdicts. Goins, 113 Wash. App. at 743, 54 P.3d at 733. The court dismissed this argument by showing that Goins' counsel might have strategically refrained from objecting to the inconsistent verdicts. Id. at 744, 54 P.3d at 733.
of inconsistent verdicts.\textsuperscript{193} The \textit{Goins} court suggested that the \textit{Hurley} and \textit{Wedner} decisions may have been implicitly overruled by this acceptance.\textsuperscript{194} With \textit{Hurley} and \textit{Wedner} called into question, the \textit{Goins} court extended the \textit{Ng} and \textit{McNeal} decisions, holding that in the single-defendant context “where the inconsistency is between the general verdict and a special verdict relating to that same count, the general verdict will stand if it is supported by substantial evidence.”\textsuperscript{195}

Although Goins argued that the \textit{McNeal} decision applied only to multiple-count inconsistent verdicts,\textsuperscript{196} the court disagreed and reasoned that the \textit{McNeal} decision extended the \textit{Ng} rule to inconsistencies between a special and a general verdict in any context.\textsuperscript{197} The \textit{Goins} court’s decision to extend the doctrine was based on several earlier cases,\textsuperscript{198} including \textit{Peerson}.\textsuperscript{199} The \textit{Goins} court cited the \textit{McNeal} court’s reliance on \textit{Peerson} for the proposition that sufficiency of the evidence review was applicable to inconsistencies between special and general verdicts.\textsuperscript{200} The \textit{Goins} court noted that on appeal, the prosecution argued that \textit{Peerson} supported the proposition that inconsistent verdicts in any context must stand when sufficient evidence supports the guilty verdict.\textsuperscript{201} Without passing judgment on the prosecution’s argument, the \textit{Goins} court recognized that the \textit{Hurley} and \textit{Wedner} decisions were based on the concern that a special verdict that was inconsistent with a general verdict on a single count cast doubt on whether the state had proved its case beyond a reasonable doubt.\textsuperscript{202} But, ultimately, the \textit{Goins} court concluded that voiding Goins’ conviction in light of the decision to uphold inconsistent verdicts in \textit{Ng}, \textit{McNeal}, and \textit{Peerson} would be “to elevate form over substance.”\textsuperscript{203} Consequently, the court applied the

\begin{thebibliography}{99}
\item\textsuperscript{193} Id. at 734, 54 P.3d at 728.
\item\textsuperscript{194} Id. at 735, 54 P.3d at 729. See supra notes 165–70 and accompanying text.
\item\textsuperscript{195} \textit{Goins}, 113 Wash. App. at 742, 54 P.3d at 733. Although the \textit{Goins} court used the terms “substantial evidence” rather than “sufficient evidence,” it seems to have used “substantial” in the same way as the \textit{Ng} and \textit{McNeal} courts used “sufficient.” The \textit{Goins} court did not distinguish between the two terms, or note the discrepancy.
\item\textsuperscript{196} Id. at 736, 54 P.3d at 729.
\item\textsuperscript{197} Id. at 741–42, 54 P.3d at 732.
\item\textsuperscript{199} \textit{Goins}, 113 Wash. App. at 741–42, 54 P.3d at 732.
\item\textsuperscript{200} Id.
\item\textsuperscript{201} Id. at 740–41, 54 P.3d at 732.
\item\textsuperscript{202} Id. at 742, 54 P.3d at 732.
\item\textsuperscript{203} Id. at 742, 54 P.3d at 732–33.
\end{thebibliography}
same standard of review and held that there was substantial evidence to support the guilty verdict.\textsuperscript{204}

Judge Ellington dissented to the extension of \textit{Ng}, \textit{McNeal}, and \textit{Peerson} to the context of single-count, single-defendant inconsistent verdicts.\textsuperscript{205} Citing the policy and language of \textit{Powell}, she agreed with the majority that where two general verdicts are inconsistent, considering the sufficiency of evidence is a valid and adequate remedy.\textsuperscript{206} However, she argued that “lenity offers no explanation for an inconsistent special verdict on the same count.”\textsuperscript{207} In this context, she added, “the integrity of the general verdict is called into question.”\textsuperscript{208} Thus, Judge Ellington would not apply a rule that arose from inconsistencies in different counts to cases where the inconsistency was within a single count.\textsuperscript{209} Thus, Judge Ellington recommended remanding the conviction for retrial.\textsuperscript{210}

\section*{IV. \textbf{WASHINGTON’S CRIMINAL COURT RULES AND CIVIL CODE FAIL TO RESOLVE IRRECONcilABLY INCONSISTENT CRIMINAL VERDICTS}}

Washington has a criminal court rule acknowledging the issue of inconsistencies between special and general verdicts in criminal trials.\textsuperscript{211} However, this rule does not provide a solution in the case of irreconcilably inconsistent verdicts because it only allows the judge to ask the jury to deliberate further.\textsuperscript{212} In addition, the Washington statute giving preference to special verdicts over the general verdicts in civil trials\textsuperscript{213} fails to resolve the issue in criminal trials.\textsuperscript{214} Consequently, Washington’s court rules and code leave the issue of irreconcilably inconsistent verdicts in criminal trials unresolved.

Washington Superior Court Criminal Rule 6.16(b), promulgated by the Washington State Supreme Court, acknowledges that inconsistencies between general and special criminal verdicts exist. The rule provides

\begin{itemize}
\item \textsuperscript{204} \textit{Id.} at 743, 54 P.3d at 733.
\item \textsuperscript{205} \textit{Id.} at 745, 54 P.3d at 734 (Ellington, J., dissenting).
\item \textsuperscript{206} \textit{Id.}
\item \textsuperscript{207} \textit{Id.}
\item \textsuperscript{208} \textit{Id.}
\item \textsuperscript{209} \textit{Id.}
\item \textsuperscript{210} \textit{Id.}
\item \textsuperscript{211} \textsc{Wash. Sup. Ct. Crim. R.} 6.16(b).
\item \textsuperscript{212} \textit{Id.}
\item \textsuperscript{213} \textsc{Wash. Rev. Code} § 4.44.440 (2002).
\item \textsuperscript{214} \textit{Goins}, 113 Wash. App. at 740, 54 P.3d at 732.
\end{itemize}
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that "[w]hen a special finding is inconsistent with another special finding or with the general verdict, the court may order the jury to retire for further consideration." However, the rule fails to identify appropriate judicial action if the jury is unable to reconcile the two verdicts. Thus, the court rules fail to resolve the issue of irreconcilably inconsistent criminal verdicts.

The Revised Code of Washington section 4.44.440 (section 4.44.440) provides a statutory remedy for inconsistent civil verdicts in Washington. Under section 4.44.440, "[w]hen a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly." Consequently, in civil cases involving inconsistent verdicts, Washington judges are instructed to enforce the jury's special verdict and not the general verdict. Although section 4.44.440 is located in the title on civil procedure, if it was applied to a criminal case, it would render the general verdict void when the general verdict directly contradicted the special verdict.

The Goins court held that section 4.44.440 does not apply in the criminal context. Until Goins, Washington courts had not determined whether section 4.44.440 applied to criminal proceedings. Although two appellate courts had been confronted with the issue, neither had ruled on the issue. The Goins court conceded that if section 4.44.440 applied the defendant's conviction would be overturned. Then, the court reasoned that section 4.44.440 did not apply because it is in the civil procedure title of the Revised Code of Washington, and no case law had held that it applies in the criminal context. The court further noted that under prior Washington law, the remedy for single-count, single-defendant inconsistent verdicts was a mistrial, not an acquittal, as section 4.44.440 would direct. Therefore, the Goins court held that section 4.44.440 does not apply to criminal proceedings.

215. WASH. SUP. CT. CRIM. R. 6.16(b).
216. WASH. REV. CODE § 4.44.440.
220. Id. at 736, 54 P.3d at 730.
221. Id.
222. Id. at 739, 54 P.3d at 731.
223. Id. at 740, 54 P.3d at 732.
In sum, while the Washington State Legislature has addressed the inconsistent verdict issue in the civil context in section 4.44.440, indicating that the special verdict controls over the general verdict when the two are inconsistent, it has not specifically addressed the issue in the criminal context. Further, the Goins court has held that section 4.44.440 does not apply to criminal trials. The Washington criminal court rule allowing the court to send the jury back for further deliberation does not clarify the appropriate judicial action if the jury remains unable to return a consistent verdict. Thus, neither section 4.44.440 nor the Washington court rules resolve the issue of irreconcilably inconsistent criminal verdicts.

V. THE GOINS DECISION IS FLAWED BECAUSE THE COURT FAILED TO FOLLOW PRECEDENT AND EXTENDED INAPPROPRIATE CASE LAW BEYOND ITS CONSTITUTIONAL REACH

The majority decision in Goins is flawed for three reasons. First, the court did not follow the Hurley and Wedner cases, which were directly on point and binding. Second, the court extended Ng and McNeal to the single-count, single-defendant context, where these cases do not apply. Third, by extending Ng and McNeal to this context, the court reached a conclusion that violates the Due Process clause of the Fourteenth Amendment by allowing a conviction to stand when an element of the charged crime has not been proven beyond a reasonable doubt.

If the court had properly followed Hurley and Wedner, it would have reached a constitutional result. The Washington State Supreme Court should reverse the Goins decision and apply Hurley and Wedner to the single-count, single-defendant inconsistent verdict context. The court should also modify its existing criminal court rule to provide a remedy when the jury provides an irreconcilably inconsistent verdict in the single-count, single-defendant context. If the court fails to provide a remedy, the legislature should act to prevent this unconstitutional result from recurring. The legislature should adopt a criminal statute specifically applying to single-count, single-defendant inconsistent verdicts.

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224. See infra Part V.A.
225. See infra Part V.B.
226. See infra Part V.C.
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verdicts mandating at least a mistrial, and at most an acquittal, if the inconsistency cannot be resolved.

A. The Goins Court Should Have Applied Hurley and Wedner, Which Were Directly on Point and Had Not Been Overruled

The Hurley and Wedner decisions are directly on point, and mandated a mistrial in Goins. All three cases involved an inconsistent special verdict and general verdict on the same count. In Hurley, the special verdict finding that the defendant was not armed negated an element of robbery.227 Similarly, in Wedner, the special verdict finding that the defendant was not armed negated an element of second-degree assault.228 In Goins, the special verdict finding that there was no sexual motivation negated an element of second-degree assault with intent to commit indecent liberties.229 Thus, in all three cases the special verdict was irreconcilably inconsistent with the guilty general verdict because the special verdict negated one of the elements of the crime. The trial courts’ resolution in Hurley and Wedner was to grant each defendant a mistrial.230 Because the Hurley and Wedner decisions are directly on point, the Goins court should also have granted the defendant a mistrial.

At the time Division I of the Washington State Court of Appeals heard Goins, the Hurley and Wedner decisions had not been overturned. The Goins appellate court conceded that “until recently,” the Hurley and Wedner decisions controlled where the jury returned a guilty general verdict with an irreconcilably inconsistent special verdict on the same charge, directing a new trial.231 The court reasoned that the Hurley and Wedner decisions were called into doubt by recent cases, citing Ng, McNeal, State v. Barnes,232 Burke, and Holmes.233 However, none of these cases arose in the same context as the Hurley or Wedner cases. The Ng case involved an inconsistency between an acquittal and a conviction,234 not an internal inconsistency between a general and special

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227. See supra Part II.C.3.
228. See supra Part II.C.3.
verdict on the same count. The McNeal case involved an inconsistency between a conviction and an inconsistent special verdict on a different count—again, not an inconsistency between verdicts on the same count. The Barnes court addressed the procedural right to raise the issue of an inconsistent verdict on appeal if no objection was made at trial, not the substantive right to a new trial in the face of an internally inconsistent verdict. The Burke court also addressed this procedural issue, then proceeded to reconcile the verdicts while approvingly citing Wedner. Finally, the Holmes court was also able to reconcile the potentially inconsistent verdicts because of different ways the jury instructions could be interpreted.

Although the Holmes court went on to question the continuing vitality of the Hurley and Wedner cases, it questioned the cases based on the Ng decision. But, Ng did not involve an internal inconsistency between verdicts on the same count, and therefore did not arise in the same context as the Hurley or Wedner cases.

In sum, the Hurley and Wedner decisions are directly on point in the single-count, single-defendant Goins context. If the appellate court had correctly applied Hurley and Wedner, it would have reversed Goins' conviction. At the time of the Goins decision, the rule pronounced by Hurley and Wedner had not been overruled. Although the Goins court noted that some doubt existed as to the Hurley and Wedner decisions' continuing authority, none of the cases it cited implicitly or explicitly overruled either the Hurley or the Wedner decision. Therefore, the Hurley and Wedner decisions controlled in the Goins single-count, single-defendant inconsistent verdict context, and the Goins court erred in not adhering to precedent.

B. The Goins Court Erred by Extending Inapposite Case Law

There is a fundamental difference between irreconcilable inconsistencies between a general and special verdict in the single-count, single-defendant context, such as in Goins, and inconsistencies in any other context. In the single-count, single-defendant context, a special verdict can be irreconcilably inconsistent with the general verdict only

239. Id. at 781 n.2, 24 P.3d at 1122 n.2.
when the special verdict finding negates an element of the crime asserted by the general verdict. In any other inconsistent verdict context, such as inconsistencies between verdicts on different counts or different defendants, the existence of an inconsistent verdict does not per se negate an element of the crime charged.

The Goins court's reliance on Ng and McNeal as precedent to justify acceptance of inconsistencies in the single-count, single-defendant context is misplaced because the Ng and McNeal decisions applied to different contexts. The Ng decision upheld an inconsistency between multiple convictions and acquittals on multiple counts.241 The McNeal court upheld an inconsistency between a special verdict on one count and a conviction on another count.242 In both of these cases, the inconsistencies were between verdicts on multiple counts. In contrast, the Goins case involved internally inconsistent verdicts on a single count.243 Neither the Ng nor the McNeal decision involved an internal inconsistency on the same count. Because of the fundamental difference between internally inconsistent verdicts and inconsistent verdicts in any other contexts, neither the Ng nor the McNeal decision should control the outcome in the single-count, single-defendant inconsistent verdict context.

The mere existence of a logical inconsistency in all three cases does not justify upholding Goins' conviction. The Goins court conceded that Goins logically could not have committed the assault both with and without sexual motivation,244 but noted that logically similar inconsistencies existed in Ng and McNeal.245 The court concluded that because all three cases contained logical inconsistencies, the resolution of each should be the same.246 However, the rationale behind Ng and McNeal does not transfer to the Goins context because the Ng and McNeal cases, unlike the Goins case, involved inconsistent verdicts on more than one count.247 In Goins, an inconsistent special verdict negated

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241. Id.
244. Id. at 730, 54 P.3d at 726.
245. As the Goins court noted, in McNeal, the defendant could not simultaneously have been and not been under the influence of drugs, and in Ng, the defendant could not simultaneously have been guilty of armed robbery and not guilty of felony-murder. Id. at 742, 54 P.3d at 732.
246. Id. at 742, 54 P.3d at 732–33.
247. State v. Ng, 110 Wash. 2d 32, 45, 750 P.2d 632, 639 (1988); McNeal, 145 Wash. 2d at 357, 37 P.3d at 282.
an element of the same crime on the same count on which the general verdict found the defendant guilty.248 Neither the Ng nor the McNeal court dealt with this context.

Further, concerns of jury leniency do not justify extending the Ng and McNeal holdings to the single-count, single-defendant context. In Ng, the court found that because the verdicts were a mixture of convictions and acquittals, jury leniency might have played an important role.249 In McNeal, the court found a possible showing of jury leniency in the inconsistent verdicts, noting first that a consistent special verdict would have increased the defendant’s standard sentence range,250 and also that the jury might have tried to find the defendant guilty on a basis that they thought would imply less culpability.251 In a footnote to its opinion, the Goins court commented that had the jury specially found that Goins had a sexual motivation, he would have been subject to sexual offender registration requirements.252 Thus, it is possible to argue that the jury was exercising leniency by refusing to specially find sexual motivation. However, this is unlikely because when the jury specifically asked the court about the purpose of the special verdict form, the court gave no explanation.253 Therefore, the jury was most likely unaware of the consequences of the special finding. In both Ng and McNeal, the record did not indicate whether the jury was aware of the punitive consequences of its findings. Because the record was silent, the court could reasonably assume that the Ng and McNeal juries were aware of the punitive consequences, and could therefore attribute its inconsistent findings to considerations of jury leniency. But, when a court like the one in Goins knows that the jury was probably unaware that its verdict might mitigate the defendant’s punishment, it would be disingenuous to resolve the inconsistency by assuming it was caused by jury leniency.

Finally, the Peerson case does not support the proposition that inconsistencies in the single-count context should be treated in the same manner as inconsistencies in the multiple-count context. The Goins court noted that the Peerson decision provided an example of a case upholding inconsistencies between a special and a general verdict.254 But the

249. Ng, 110 Wash. 2d at 48, 750 P.2d at 640.
250. McNeal, 145 Wash. 2d at 359 n.3, 37 P.3d at 284 n.3.
251. Id. at 361, 37 P.3d at 285.
253. Id. at 729, 54 P.3d at 726.
254. Id. at 741–42, 54 P.3d at 732 (citing McNeal, 145 Wash. 2d at 359, 37 P.3d at 283–84).
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comparison to the Peerson decision is inapposite. The Peerson court actually reconciled the verdicts through liberal construction.\textsuperscript{255} Further, the alleged inconsistency in Peerson arose between a special verdict on one count and the general verdict on a second count.\textsuperscript{256} Therefore, the Peerson case neither presented irreconcilably inconsistent verdicts, as did the Goins case, nor considered the single-count context, as did the Goins case.

In sum, the Ng and McNeal cases present a rule that is inapplicable to the single-count, single-defendant context of Goins. The multiple-count context in which the Ng and McNeal decisions arose is fundamentally different from the single-count context. The mere existence of a logical inconsistency between the verdicts in all three cases does not justify extending the rationale of the Ng and McNeal cases to the single-count context. Furthermore, considerations of jury lenity underpinning the rationale in both Ng and McNeal are not present in Goins. The Goins court's reliance on Peerson is also misplaced because that case fails to provide any support for the contention that inconsistent verdicts should be treated alike regardless of the context in which they arise. Therefore, there is no basis on which to extend the rationale and rule of Ng or McNeal to Goins.

C. The Goins Decision Unconstitutionally Allows a Conviction to Stand When All the Elements of a Crime Have Not Been Proven Beyond a Reasonable Doubt

The state failed to meet its constitutionally mandated burden of proof beyond a reasonable doubt in Goins. As the U.S. Supreme Court held in Winship, the state must prove every element of a crime charged beyond a reasonable doubt.\textsuperscript{257} In Goins, one of the elements to be proven was that the assault was committed \textit{with} intent to commit indecent liberties.\textsuperscript{258} "Indecent liberties" is committed when one person forces another to have sexual contact.\textsuperscript{259} Intent to commit indecent liberties, therefore, is an intent to force such sexual contact. As the Goins majority conceded, this is a sexually motivated crime.\textsuperscript{260} Thus, sexual motivation is an element of

\begin{itemize}
  \item \textsuperscript{256} Id. at 765, 816 P.2d at 50.
  \item \textsuperscript{257} In re Winship, 397 U.S. 358, 364 (1970).
  \item \textsuperscript{258} Goins, 113 Wash. App. at 728, 54 P.3d at 725.
  \item \textsuperscript{259} Id.
  \item \textsuperscript{260} Id. at 729–30, 54 P.3d at 726.
\end{itemize}
the assault charge in the *Goins* case. Yet, when the jury in *Goins* was asked whether the defendant committed the assault with sexual motivation, 261 it answered that he did not. 262 Therefore, not only did the state not prove that the defendant was sexually motivated, the jury explicitly found that the state had failed to meet its burden of proof. Despite this finding, the jury convicted Goins of the assault. 263 Under *Winship*, Goins’ conviction was void, because a finding of sexual motivation was necessary to prove the crime charged.

Permitting Goins’ conviction to stand violates the constitutional requirement that the state must prove every element of the crime charged beyond a reasonable doubt. 264 The *Goins* decision extends the acceptance of inconsistent verdicts 265 beyond its constitutionally permissible reach. Before *Goins*, Washington courts reversed convictions when the jury in effect informed the court, through an inconsistent special verdict on the same crime on which it convicted the defendant, that it did not believe that the state had proven all elements of the crime charged beyond a reasonable doubt. 266 In fact, several earlier cases upholding inconsistent verdicts in other contexts specifically noted that the inconsistent finding was *not* an element of the offense charged. 267 In *Goins*, however, the court upheld a jury verdict despite the jury’s effective statement that the state had not met its burden of proof. 268 Once it is clear, as it was in *Goins*, that the standard of proof has not been met, conviction is unconstitutional. Although easier to apply, sufficiency of the evidence review standard is inapposite when the state has failed to prove every element of the crime charged beyond a reasonable doubt.

The constitutional guarantee of proof beyond a reasonable doubt outweighs policy justifications for jury lenity. The U.S. Supreme Court

261. *Id.* at 728, 54 P.3d at 725.
262. *Id.* at 729, 54 P.3d at 726.
263. *Id.*
265. There is arguably cause to be concerned about the collective reasoning of the U.S. Supreme Court and Washington State Supreme Court on the topic of inconsistent verdicts in general. See Muller, *supra* note 88, at 794–820 (discussing the inadequacy of the current response to inconsistent verdicts).
Inconsistent Verdicts

In *Powell* upheld jury leniency as an exercise of the jury's power to check the exercise of the executive power.269 Both the *Ng* and *McNeal* decisions relied on the reasoning of *Powell* to support the strong policy favoring the exercise of jury leniency.270 However, while the jury can refuse to convict a defendant *despite* the production of proof beyond a reasonable doubt that the defendant is guilty by exercising leniency, allowing the jury to convict when the state has *failed* to meet its burden of proof violates due process. Because the *Goins* jury could not agree beyond a reasonable doubt that the defendant was sexually motivated, its conviction is unconstitutional. Internally inconsistent verdicts arising in the single-count, single-defendant context are distinct from those in other contexts. The jury cannot constitutionally convict a defendant in spite of the state's failure to prove guilt beyond a reasonable doubt—to allow such convictions in the name of jury leniency is nonsensical. No amount of respect for the jury's power to be lenient justifies depriving the defendant of liberty by convicting the defendant on proof that is less than what is constitutionally required.

D. Either the Washington State Supreme Court or the Washington State Legislature Should Provide a Remedy to Address the Concerns Raised by the *Goins* Decision

The Washington State Supreme Court should strike down the *Goins* decision and reaffirm the *Hurley* and *Wedner* decisions by granting the defendant a mistrial. The court should do this because the *Goins* decision violated the defendant's due process right to be convicted by proof beyond a reasonable doubt. However, it could be further argued that in cases such as *Goins*, allowing a mistrial where the jury has exposed the state's failure to meet its burden of proof could violate the Double Jeopardy clause which prevents the state from retrying the defendant for the same crime. If this is true, then the remedy would be acquittal rather than mistrial. Prior to the *Goins* decision, Washington law directed a mistrial, not an acquittal, as the remedy for single-count, single-defendant inconsistent verdicts.271 The *Hurley* court addressed this issue directly: "we do not find [the] defendant entitled to a judgment

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notwithstanding the verdict [an acquittal]. The verdict was void... The posture of the case was the same as if the jury had returned no verdict at all and a mistrial had been declared. Hence, the judgment and sentence was a nullity.”272 In overruling the Goins decision, the court should affirm the Hurley and Wedner cases, and grant the defendant at the least a mistrial, and at the most an acquittal.

Further, the Washington State Supreme Court should modify the criminal court rules to provide at least a mistrial in the event that the jury cannot provide consistent verdicts in the single-count, single-defendant context. The court should do this in order to clarify the law and prevent recurrence of the due process violation found in the Goins decision. A modified criminal rule could read in relevant part (with additions underlined):

When a special verdict is irreconcilably inconsistent with another special verdict or with the general verdict, the court may order the jury to retire for further consideration. If the jury is unable to return a consistent verdict in the single-count, single-defendant context, the court shall declare a mistrial or enter a judgment of acquittal.

Adopting such a court rule would provide trial courts with guidance and preserve defendants’ constitutional rights.

If the Washington State Supreme Court fails to provide a remedy for this violation, the Washington State Legislature should promulgate a statute to correct this unconstitutional result. Although Revised Code of Washington section 4.44.440 is inapplicable to the criminal context,273 the statute provides a good framework for a parallel criminal statute. The proposed criminal statute should have language with an effect similar to that of the proposed criminal court rule.

VI. CONCLUSION

Division I of the Washington State Court of Appeals wrongly upheld the conviction in Goins. As a result, the defendant in Goins was denied his liberty even though the state failed to meet its constitutionally required burden of proof beyond a reasonable doubt. The Goins court overturned precedent that would have granted him a mistrial and instead applied inapposite case law involving inconsistent verdicts in different contexts under the justification of jury lenity. However, jury lenity

273. See supra Part IV.
considerations are absent in the *Goins* case, and even if they existed they would be trumped by the defendant’s due process rights. The Washington State Supreme Court should reverse the decision in *Goins*. Further, the court should modify the criminal court rule to reflect a remedy of at least a mistrial and at most an acquittal in the single-count, single-defendant context. If the court fails to reverse the *Goins* decision and modify the criminal court rules to uphold the defendant’s constitutional rights, then the Washington State Legislature should intervene and promulgate a statute to that end.