JURY PARDON ?
JURY NULLIFICATION ?
CLOSING ARGUMENT

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"[T]he jury has the power to bring in a verdict in the teeth of both the law and the facts." Horning v. District of Columbia, 254 U.S. 135, 137-40, 41 S.Ct. 53, 54, 65 L.Ed. 185 (1920). "Whether a jury has the right to acquit in spite of the law and the evidence may be debated...That the jury has the power to acquit in those circumstances, and that we for two hundred years have preserved the accused's right to a trial by jury having the power, can not be doubted." Beckwith, et al v. State, 386 So.2d 836, 842 (Fla 1st DCA 1980). "A jury has the power to acquit a defendant on the basis of conscience even when the defendant is technically guilty in light of the judge's instructions defining the law and the jury's finding of the facts. This power constitutes jury nullification. State of Wisconsin v. Moore, 152 Wis. 2nd 406, 449 N.W. 2nd 338, 1989 WL 143052 (Wis. App. 1989).

The rest of the information that you will hear about closing argument, jury pardon and jury nullification is NOT GOOD NEWS. In fact, if you cross the line in closing argument you may be inviting further disaster. The line is very fine.

If you practice in federal court in Florida, I am sure you are not surprised at the position of the United States Court of Appeal, 11th Circuit. In United States v. Funches, 135 F.3rd 1405 (11th Cir. 1998) Funches was convicted of possession of a firearm by a felon. Funches served time on a state conviction in the Florida Department of Corrections (DOC) and claims he was informed that losing his civil rights included the loss of the right to own or possess a firearm. However, upon release, Funches also claimed to have specifically inquired about the restoration of his civil rights and was informed by some employee of the DOC that his civil rights were automatically restored.

Accordingly, he believed he could own and possess a firearm and that this constituted a defense to the federal crime charged. Funches filed a proposed instruction alleging such a defense. The defendant was alleging entrapment - by-estoppel, an affirmative defense, which provides a narrow exception to the general rule ignorance of the law is no defense. The district court concluded that it was not applicable where the state incorrectly advises a person and then the federal government prosecutes. The court concluded that for the defense of estoppel-by-entrapment to have application required reliance upon a misstatement by an official or agent of the federal government. The appellate court found that the instruction was properly rejected by the district court. The 11th Circuit Court stated,

> "Juries sometimes assume the power of nullification; still, nullification is no right of the jury. Instead the absence of remedial procedures by which the Government may appeal an acquittal 'permits juries to acquit out of compassion or compromise or because of their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.' Standefer v. United States, 447 U.S. 10, 22, 100 S.Ct. 1999, 2007, 64 L.Ed. 2nd 689 (1980)."

The court also cited the opinion of the District of Columbia,

> "A jury has no more 'right' to find a 'guilty'defendant 'not guilty' than it has to find a 'not guilty' defendant 'guilty,' and the fact that the former cannot be corrected by a court, while the latter can be does not create a right out of the power to misapply law. Such verdicts are lawless, a denial of due process can constitute an exercise of erroneously seized power." United States v. Washington, 705 F.2d 489, 494 (D.C. Cir. 1983).

The court further concluded that a defendant is not entitled to a jury instruction which alerts the jury of its de facto power and, further, the defense counsel may not argue nullification during closing argument.

A gentleman by the name of Trujillo was arrested at the Miami International Airport in 1982

with cocaine in his luggage. Mr. Trujillo agreed to cooperate with customs by following through with the plan to deliver the cocaine to his contact person in Miami. Trujillo was subsequently indicted on three counts, conspiracy to possess with intent to distribute, distribution and importation. Defense counsel was prohibited from arguing jury nullification in his closing statement. Defense counsel sought to argue that notwithstanding the law Trujillo's governmental cooperation in effecting the controlled delivery entitled him to a not guilty verdict. Again, while the court recognized that the jury may render a verdict at odds with the evidence or the law, the court noted "In arguing the law to the jury, counsel is confined to the principles that will later be incorporated and charged to the jury. United States v. Sawyer, 443 F.2d 712, 714 & n. 11(D.C. Cir. 1971)" The court further stated, "We therefore join with those courts which hold that defense counsel may not argue nullification during argument." 714 F.2d 102, 106

The news could even be worse. An example is United States v. Abbell, 271 F.3rd 1286 (11th Cir. 2001) cert. denied 537 U.S. 813, 123 S.Ct. 74, 154 L.Ed. 2d 16 (Oct 7, 2002). I am sure many of you who practice in federal court are familiar with Mr. Abell's and Mr. Moran's case. In 1996 Abell, Moran and over seventy codefendants were charged with participating in a RICO conspiracy, engaging in substantive RICO violations, participating in a conspiracy to import cocaine, participating in a conspiracy to import and distribute cocaine, and participating in a conspiracy to launder money. Mr. Abbell and Mr. Moran, both lawyers, were prosecuted at trial beginning in 1996 and after a five month trial were acquitted of substantive RICO count 2. The jury could not reach a verdict on the other counts and a mistrial was declared. The Government tried Moran and Abbell a second time in 1998. During jury deliberations the court received information that one of the jurors was behaving improperly and refusing to obey the law or to obey the jury's instructions. The court gave the instructions to the jury about the illegality of the nullification and the jury's duty

to apply the law as instructed by the court. After more complaints from some of the jurors the court conducted an inquiry into the conduct of one of the jurors. The National Association of Criminal Defense Lawyers (NACDL) filed an amicus brief urging the 11th Circuit to grant a rehearing en banc. 2002 WL 32116890. NACDL noted in its brief, "After twenty hours of deliberation, on the basis of the note from two jurors (Gorden and Sebastian) to the effect that another juror (Alphonso) had made up her mind about the case and would not consider contrary evidence (R164-8525-26), the district court launched an investigation that ultimately consumed four days and entailed interviews (in some instances, multiple interviews) of all the jurors, in which they were asked probing questions about Juror Alphonso's statements and opinions. The district court's lengthy interrogation of Alphonso herself is particularly troubling (R165-8845-68); the court asked her repeatedly whether she would follow the law, apparently refusing to accept her insistence that she would, even when asked her at one point "what is your concept of the word 'reality'".

In Abbell the 11th Circuit upheld the conviction of Abbell and Moran, and reinstated one conviction for which the court had granted a post-trial judgment of acquittal.

The 11th Circuit noted the standard,

> "Because of the danger that a dissenting juror might be excused under the mistaken view that the juror is engaging in impermissible nullification, we must apply a tough legal standard. In these kind of circumstances, a juror should be excused only when no 'substantial possibility' exists that she is basing her decision on the sufficiency of the evidence...We mean for this standard to be basically a 'beyond a reasonable doubt' standard." 271 F.3d 1286, 1303

The court noted,

> "Briefly stated, our view of the record shows the following. All jurors agree that early in the process Juror Alphonso, in some way, made comments that she did not have to follow the law and that the court's instructions were only advisory and not binding on the jury. After this information came to light, the trial court gave more

> instructions about the jury's duty to apply the law and to obey the court's instructions. After the additional instruction, Alphonso made no more direct statements about her intention not to follow the law. The majority of jurors, however, said that she still was not engaging in deliberations, would not consider evidence nor discuss the applicable law. Some jurors indicated that they were outraged by Alphonso's decision to do her nails during deliberations." 271 F.3rd 286, 1303, 1304

The court then applying the clearly erroneous standard found that the district court's determination that Juror Alphonso was not basing her decision on the sufficiency of the evidence was not clearly erroneous.

While Horning v. District of Columbia, supra, is often cited for the language, "...the jury has the power to bring in a verdict in the teeth of both the law and the facts." However, a careful read of the case is somewhat disturbing. It appears that the facts were not in dispute. The court said where the facts were established by the testimony of both the prosecution and the defendant and established a violation of the law; an instruction that the jury could not capriciously say that testimony was not true, that it was their duty to accept the court's exposition of the law, that the court could not peremptorily instruct them to find the defendant guilty, but that he would if he could, and that the failure to bring in a verdict of guilt would arise only from a flagrant disregard of the evidence, the law and their obligations as jurors.

It was in that context that Justice Holmes noted, "The judge can not direct a verdict it is true, and the jury has the power to bring in a verdict in the teeth of both the law and the facts. But, the judge always has the right and duty to tell them what the law is upon this or that state of facts that may be found, and he can do the same none the less when the facts are agreed. The court also noted, "If the defendant suffered any wrong it was purely formal, since we have said, on the facts admitted there was no doubt of his guilt." 254 U.S. 135, 138, 139.

The jurors have the power not the right. You can not tell them that directly. What is permissible? You will have to use your own ingenuity and imagination in addressing the jury within the confines of the facts of the case and court's instructions. You do have some leeway in your closing argument which is both ethical and within the bounds of the law. Hopefully, this seminar will help you deal with this in closing argument.

I have found over the years that jurors really do want to "believe" that their decision is based upon the law and facts without consideration of sympathy, prejudice or bias. In spite of efforts jury verdicts are found for or against your client based upon sympathy, prejudice, bias and sometimes disregard of the law. That is the power of a jury.

THOUGHTS FOR CLOSING ARGUMENT

1. Be yourself.
2. Use every advantage you have in closing argument.
3. If a certain system has worked for you and makes you confident use it. In a long trial I go from dark suits to light suits. I have another friend who only tries cases in bow ties.
4. Dress for success. Do not be arrogant.
5. It does not help if the jurors like you.
6. It only helps if they like your client.
7. Pay attention to the jurors throughout the trial. Some may be on your side.
8. Closing statement begins when you get the case.
9. What is the typical issue (?), the proceed typical issue(?)
10. Keep a list during trial of points you might want to raise or add to your closing argument.
11. Simplify the case, do not talk too long. Get your important points out before you lose them.
12. The jury determines the facts. The jury applies the law as they see it fits the facts. The jury, not the judge, not the prosecutor determines guilt or innocence.
13. The judge is the referee. Anything he may have said or done during the course of the trial did not influence you to indicate that the judge believes one way or another whether or not the defendant is guilty or innocent.
14. You stand between the Government and the citizen. The prosecutor represents the Government. The defense represents the citizen.

15. In Florida the courts give an instruction at the conclusion of the case "deciding a verdict is exclusively your job. I can not participate in that decision in any way. Disregard anything I may have said or done that made you think I preferred one verdict over another."