Using Theories and Themes to Acquit the Guilty

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You can't earn a living defending innocent people.
Maurice Nadjari

One of the first things I learned practicing law was that if you only win cases you should win, you are not much of a lawyer. We all lose some cases we should have won (generally when a judge is making the decision, such as on a motion to suppress) - and we all win some cases we really should have lost (generally when a jury is making the decision). As lawyers, we want to win every case. Even the worst facts can and must be put in a winning light. Communicating bad facts in a way that acquits your client is part of the lawyer's art.

When we talk about acquitting the guilty, we are talking about two things: establishing reasonable doubt, and convincing juries not to enforce the law. These two factors are usually thought of as distinct, but in practice are interrelated. Reasonable doubt being a subjective standard, juries are far more likely to have reasonable doubts when they want to acquit. Additionally, juries are more likely to nullify when the evidence has been degraded by an aggressive defense. The bottom line: incorporating equitable issues into a "traditional" defense can breathe life into an otherwise moribund case.

Many criminal defense lawyers think there is no reason to learn about jury nullification, because it hardly ever occurs.[2] Jury researchers find that 3%-4% of criminal jury trials end with nullification verdicts.[3] This accounts for a greater percentage of defense verdicts than conventional pleas of entrapment, necessity or self-defense. A 1998 National Law Journal/DecisionQuest survey showed 75% of potential jurors queried would vote their conscience if they believed following instructions would lead to an unjust result.

In spite of conventional wisdom, there are creative ways to tell juries about their prerogative to nullify. Sadly, there have been too few discussions among the defense bar about how to seek jury nullification. I will discuss some techniques and strategies collected[4] from better lawyers to let juries know that whatever the facts, they do not have to convict.

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[2] The other side of this coin is that prosecutors tend to believe that jury nullification occurs far more frequently than it does. This is because defense lawyers want to believe that they have created objectively reasonable doubts in the minds of the jurors; prosecutors want to believe that they have proven their case beyond any objectively reasonable doubt.

[3] Harry Kalven, Jr., & Hans Zeisel, *The American Jury*, 55-62 (1966).

[4] Collected, *verb*: stolen, borrowed, absconded, pilfered, filched, plundered, harrowed, looted, snatched, converted, seized, purloined, appropriated, pillaged, grabbed, nabbed or thieved.

There is an old saw wherein a conservative young woman, having met an attractive man in a nightclub, tells him "I have very good morals. Let's use yours." That young woman would make the ideal State's juror. Most people are willing to surrender their moral convictions to authority - even when that authority is seen as malevolent. Accordingly, once an authority figure tells us that something which violates our conscience is the right - or even worse, the required - thing to do, we are often willing to obey, even when obedience means doing something that we strongly believe is unjust, immoral or unconscionable. While we might lose sleep tomorrow and we might not feel good about ourselves as we are acting, at the moment of taking action we fear the responsibility of exerting moral independence and going against established authority far more urgently than we fear the pangs of conscience.

Moreover, once action has been taken, we are adept at rationalizing away personal responsibility for the consequences of our action by blaming the same authority figures to which we had bowed down and surrendered our judgment.[5] The willingness of Americans to defer to authority figures on questions of moral judgment is one of the greatest obstacle to obtaining acquittals in criminal cases[6] - but, if you are aware what you are up against, it is not unconquerable.[7]

The most significant balance to the willingness to obey malevolent authority may be the group dynamic of jury deliberations. Unfortunately, this is an aspect of jury duty that social scientists have not adequately researched.[8] It is logical that because juries deliberate there is an opportunity for the

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5 A majority of test subjects in Stanley Milgram's historic experiments were willing to commit acts that violated their personal conscientious convictions, on the authority of a college researcher. Stanley Milgram, *On Obedience to Authority: An Experimental View* (Harper, 1974). According to Milgram, the cues for overcoming autonomous behavior or 'conscience' consist of the institutionally sanctioned commands, orders, or signals of the institutionally legitimated authorities characteristic of human hierarchical organization. Id., 123-164. Few authority figures could carry more weight under this paradigm than a robed judge sitting behind an elevated bench in an austere courtroom.

6 It must be remembered that many jurors consider prosecutors to be authority figures.

7 The Milgram experiments also provide insights into jury behavior in capital sentencing that are beyond the scope of this article. *See* Ursula Bentele, William J. Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 BROOK. L. REV. 1011, 1058-1060 (2001).

8 It is crucial to note that the Milgram experiments involved the decision-making of isolated individuals, and not the group dynamics of the jury room. One pre-eminent jury researcher, Shari Seidman Diamond, has insisted in a conversation with this author that the consensus driven decision-making of the jury is an effective counter to the tendency of individuals to obey authority. In the opinion of this author, this group dynamic may either liberate jurors, or encourage them to further subordinate their judgment, depending on the mix of individuals on the jury, the number of jurors in dissent, and the position and status the objecting juror or jurors have within the group.

Unfortunately, no jury researchers have attempted to replicate the Milgram experiments in a courtroom setting. Irwin Horowitz has done a great deal of research on the effect of jury nullification instructions on jury deliberations, which shed some insight into this phenomenon. See Horowitz, *the Effect of Jury Nullification Instruction on Verdicts and Jury Functioning in Criminal Trials*, 9 LAW & HUM. BEHAV. 25 (1985); Horowitz, *Jury Nullification: the Impact of Judicial Instructions, Arguments, and Challenges on Jury Decision Making*, 12 LAW & HUM. BEHAV. 439 (1988); Horowitz & Willging, *Changing Views of Jury Power: The Nullification Debate*,

adhesion of the group to counter the willingness of its members to obediently defer to authority figures. However, the group may also act to chasten and dominate otherwise independent jurors. Jurors must enter deliberations with information that will liberate them from their tendency to obey. Jurors must be sensitized to the necessity of following their independent judgment. Informing them as to their personal moral responsibility for their decision, the permissibility of disagreeing with the judge, the prosecutor, and each other, is a major step in that direction.

One technique used is to inform jurors as to the consequence of failing to follow instructions. "I want you to understand that your instructions must be taken seriously. If you fail to follow them, and the judge learns of it, you may be chastised or removed from the jury." This is true, accurately states the law, and implicitly informs jurors that the consequences for independent action are minimal - a scolding and removal from the jury, *if* the judge learns of it. However, at face value it is merely a loyal lawyer informing jurors as to the importance of not nullifying the law.

Jury Nullification as an Affirmative Defense

It is useful to think of jury nullification as the affirmative defense that the law is unjust (or unjustly applied), and a conviction for violating the law is unconscionable. In *Old Chief*, the United States Supreme Court recognized that prosecutors may put on evidence that a conviction is morally justified - evidence that supports the moral underpinnings of the law.[9] Should defense lawyers not be allowed, conversely, to introduce evidence that a conviction is unconscionable? If a judge would allow in evidence that a drug dealer was selling to particularly vulnerable buyers such as school children, then should he not equally rationally allow in evidence that a marijuana dealer was selling to individuals who were not likely to be harmed at all - i.e., seriously ill patients smoking marijuana on their doctor's advice?

When is a jury nullification defense viable? Some cases may include:

Medical marijuana, or other small-quantity, victimless drug possession cases
Parked car DWI or DUI cases
Obscenity, prostitution and pornography cases
Statutory rape and sodomy cases
Peaceable gun possession - including sympathetic "felon in possession" cases
Motorcycle helmet law cases
Euthanasia cases
Tax protest cases

1787-1988, 15 LAW & HUM. BEHAV. 165 (1991); Horowitz, Kerr & Neidermeier, *Jury Nullification: Legal and Psychological Perspectives*, 66 BROOK L. REV. 1207 (2001).

9 *Old Chief v. U.S.*, 519 U.S. 172, 188, 117 S.Ct. 644, 654, 136 L.Ed.2d 574 (1997)("Thus, the prosecution may fairly seek to place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt, to convince the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant's legal fault.")

Cases in which battered women kill their abusers
Political protests cases
Death penalty sentencing
Cases where police brutality, a really dirty snitch or a really dirty cop are involved
Cases where the police investigation was haphazard or sloppy
Cases where you can show, or where the general public knows, that the penalties are excessive (e.g., federal drug and "three strikes" cases)

There are others. How to seek an acquittal will depend on the facts of the particular case.

Developing a Theory of the Case

Part of preparing for any trial is developing a theory of the case, and themes for communicating that theory to the jury. The theory and themes develop the story for the jury, and allow you to tell a living story of what happened, how, and why.

The theory is a short, concise telling of the factual, moral, emotional and legal grounds for acquittal (or conviction on a lesser charge.) The theory recites a story in which the accused is innocent, or at least less culpable than on the indictment. A good theory should blend facts, logic, law, morality and emotions into a common-sense conclusion that your client should not be convicted.

Some examples from real cases:

> Mr. S had been in business for many years before police came in, weapons drawn, to shut him down for alleged regulatory violations he never had reason to suspect, and which the agency responsible for had chosen not to publish.
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> Mr. M had been prescribed strong drugs to fight his AIDS infection. These drugs caused vomiting he could not control even with anti-nausea drugs, so they were not being digested and did little good until his doctor recommended he use marijuana before taking his pills. Mr. M did not intend to possess marijuana, only to digest his life-saving medicine so he could stay alive.
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> Mrs. N had been beaten, raped, forced to prostitute herself and sleep on the floor because, to her husband, she was no better than a dog. He promised to kill her, her parents and children if she left. Calling police only further enraged him. Finally, with no other way out, she shot her husband while he slept, with the gun he always kept at his side.

Each theory has factual and emotional elements. The theory explains why the defendant is the good guy, and the Government or some other actor the bad guy. Percy Foreman said to get an acquittal, you must give the jury someone in the courtroom they can hate more than they hate your client. Your theory must deflect the jury's anger to a place where it cannot hurt your client. There must be something someone in the case has done that is worse than, or that led to, what your client did.

Your theory must be easy to communicate, remember, and use. You are relating a common sense human drama, and it should be as simple as a fairy tale. If it is so complex that it confuses a school-age child, start over. Your theory is the blueprint for opening and closing arguments. The jury should not have to think about it. It should be immediately absorbed, and reinforced throughout trial.

A theory must pass the "smell test" and acknowledge any facts beyond change. Facts beyond change are facts you cannot credibly dispute. You will be destroyed if the facts undermine your theory. If Mrs. N above shot two previous husbands, you probably cannot paint her as a victim who killed in self-defense.[10]

Your theory must be compelling, and consistent with common sense and experience. It must focus the jury on the *moral and viscerally emotional* aspects of the case. The jury must become personally involved. If your theory leaves the jury with an abstract, impersonal puzzle, they are unlikely to buck the system and acquit.

Your theory must be persuasive and motivational, and provide legal justifications for acquittal. It should use compelling facts, in a vivid, concrete way. It should invoke strong emotions, and focus the jury on the client, not the crime. It must be believable and make good sense. The theory must tell a story about why your client should be set free - and why a conviction of your client would be not merely regrettable, but unconscionable, shocking, outrageous, repellant, and/or immoral.

With your theory in hand you can evaluate what attitudes and values you need in the jurors. During voir dire, you can evaluate how the jurors respond to your theory, and use the theory to frame what you consider to be the important issues in the case. If you are arguing the investigation was haphazard and the jurors should not trust its outcome, you want people who are offended by disorder, sloppiness and carelessness. If you have a medical marijuana case, you want people who believe that nothing (including the law) is more important than their health.

Some good questions in a medical marijuana case may be to ask a juror who is in management whether they would fire someone who was out sick after they'd used up their sick time; whether (and why) they thought a doctor's excuse would trump their obligation to appear for jury duty; and whether they'd ever quit a job, moved, or made any other dramatic life changes for health reasons.

Try to get permission from the Court to use a jury questionnaire. Not only will venire members answer written questions more candidly than oral ones, but they will be able to do so without first hearing the responses of other venire members. Further, all venire members will answer all (or at least most of) the questions - something that is generally unobtainable during voir dire. Many people will give directly disqualifying answers on a questionnaire where they would tend to give more neutral, limited or qualified answers in oral questioning.

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[10] You could always attempt to prove that Mrs. N pathologically continues to choose dangerously abusive relationships, and that any one of her husbands was likely to kill her at any time.

Incorporating a Shadow Defense

The key to a winning nullification defense is, paradoxically, to provide the jury with legal reasons to acquit. A fact or law based defense, in combinations with equitable reasons to acquit, gives jurors a way to acquit without openly defying the judge or the law - something few jurors have the testicular fortitude to do. The key to a winning fact or law based defense is often to provide the jury with reasons to want to acquit. Combining equitable issues with fact based defenses gives jurors reasons to want to rule your way on close facts. A "shadow defense" should be developed to work with any nullification defense. Conversely, the equitable issues favoring acquittal should be developed to work with conventional defenses. No matter how strong your case, you want the jury to want to acquit.

Your shadow defense should be chosen in light of the evidence you need to have admitted. If the Defendant's marijuana is for medical purposes, the jury needs to know about the Defendant's illness and how marijuana helps him. You have to make the illness relevant. The fact that it may justify nullification is not grounds for exclusion so long as the evidence is material to a legal issue in the case.[11] Pick a shadow defense that opens the door to your evidence, and encompass it into your theory. Then use that theory during *voir dire* to get your facts to the jury as early as possible.

Shadow defenses of duress and self-defense open the door to the character and history of whoever forced or threatened the defendant. Entrapment opens the door to the behavior of police and informants. Lack of intent and necessity open the door to consequences a defendant would have faced had he acted differently. "Evidence was planted" and chain of custody questions allow you to present evidence on police misconduct and the failure of police to follow procedures. A shadow defense should be compatible with facts beyond change, and justify the evidence you need.

Get a jury instruction authorizing the jury to acquit on your theory of defense. The evidence need not be strong to justify the instruction - so long as there is some evidence that, if believed, would justify the instruction you are entitled to one. It is reversible error for a trial court to refuse a jury instruction on a theory of defense after a defendant makes a threshold showing as to each element of the defense.[12] With an official, judicially sanctioned instruction as to the defendant's theory, the jury has received formal authorization that they are entitled to acquit on that basis. The likelihood of their acquitting on that basis will be directly related to their motivation to do so.

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11 Hon. Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law To Do Justice*, 30 AM. CRIM. L.REV. 239, 251 (1993)(judges should construe relevance liberally to permit argument for nullification); see also Hon. Kenneth M. Hoyt, *What Juries Know: a Trial Judge's Perspective*, 40 S.Tex. L.R. 907, 914-915 (1999)("the justice system must be flexible enough to permit acts of mercy by a jury where the facts dictate morally and ethically that mercy is appropriate.") On the other hand, evidence which is not material to a legal issue in the case and which goes only or primarily to motivate the jury to nullify may be excluded. *U.S. v. Johnson*, 62 F.3d 849, 851 (6th Cir. 1995); *U.S. v. Malpeso*, 115 F.3d 155, 162 (2nd Cir. 1997)(excluding defense evidence as more prejudicial than probative, under Fed.R.Ev. 403.

12 *U.S. v. Adams*, 271 F.3d 1236, 1243 (10th Cir. 2001).

A 1995 law journal article by Professors David Dorfman and Chris Iijama[13] argues that juries often nullify without being consciously aware they are doing so. For example, if jurors want to acquit, they may rationalize an implicit element into the offense - an element no evidence supports such as a requirement that the defendant intended on using his gun in a felon in possession weapons case or that the defendant moved his vehicle in a DWI case. The non-existent element then justifies the desired verdict. The jury nullifies, but having used common-sense judgment as to what the law should be, the jurors sincerely believe they followed instructions.

Knowing juries do this, you can plan your defense to emphasize an element jurors may believe *should* be present. A common way to do this is to morph the element of intent by emphasizing the absence of a specific intent on which the prosecution has no evidence, and arguing that without that intent there was no crime. This is how Geoff Feiger got Dr. Jack Kevorkian acquitted of assisting suicide.[14] Feiger argued there was no intent to assist the patient in ending his life - just in ending his pain. Death was the result, not the intent. However, the "intent" emphasized is more accurately characterized as motive - and motive was not an element of the offense. Kevorkian knew the consequences of his actions and was aware his patient would end his life. The reasons the patient had for doing so were immaterial *as a matter of law* - but they were compelling to the jury.

Using Themes to Communicate the Theory to the Jury

A theme is a phrase or image which is constantly reinforced and repeated throughout trial. While the theory represents the story you want the jury to adopt, the themes are the language used to communicate that story. Themes, through repetition, remind the jury of your theory and cement it in their minds. Your themes need to embody the important facts and emotions, marrying the jurors to your theory. You want your themes to become so intertwined with the evidence that when jurors recall the evidence, they use your themes and thus recall and adopt your theory of the case.

Some examples of jury nullification themes include:
Unwilling participant
A no-win situation
Trying to protect her family the only way she knew
Doing everything he could to comply with the law
The police didn't care about [client's] rights
Unaccountable regulatory agency
(Government actor) out of control
The only person hurt in this case is the defendant
Caused no harm
Defendant never intended to break the law

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[13] David N. Dorfman and Chris K. Iijima, Fictions, *Faults and Forgiveness: Jury Nullification in a New Context*, 28 U. MICH. J. OF L.R. 861, 864 (1995).

[14] Cory Franklin, M.D., *Physician-assisted Suicide: Misconceptions and Implications from a Physician's Perspective*, 1 DEPAUL J. HEALTH CARE L. 579, 581 (1997).

Everyone who trusts Snitch suffers
That is up to the jury to decide; the jury alone can say

While a case should only have one theory, it should have more than one theme - but no more than a handful, depending on the length and complexity of the case, or they'll lose focus and power. The themes must be repeated throughout every stage of the case. Use your themes in the jury questionnaire and in voir dire. The themes are the foundation of opening statement and closing argument. They come from the mouths of witnesses or are agreed to by them. The repetition of themes draws the jury to your theory, orienting them to acquittal. If the themes are strong enough, the prosecution can be manipulated into arguing against your theory, using your themes, and not pursuing their own. Strong themes are easily remembered, surviving the government's argument and persisting throughout deliberations.

Applying these Tools to Acquit the Guilty

How do you use these tools in a criminal case? Assuming you have selected an appropriate theory and punchy themes, you need to focus the jury's attention on the injustice of a conviction. Maybe the law is unjust, the defendant's motives were proper, the sentence is draconian, the law is selectively enforced, or the defendant has suffered enough. You need to focus on why the law is unjust *in your case*, and communicate that injustice to the jury.

Next, you must empower the jurors and shield them from the influence of the judge and prosecutor. This means you must make them at least subliminally aware of their power to nullify the law. The media can (and in appropriate cases, should) be effectively used to make members of the jury pool aware of their independence and the moral and equitable problems with the Government's case.

Legal history is a primary resource. Few judges will shut a lawyer down when he is weaving history into his arguments. I have included many historical references in my book[15] if you want to look there.

Talk about justice and fairness. It is important to recognize that juries take justice far more seriously than legal professionals do - it is more important for them than the law. It is hard for a prosecutor to object to your asking for a just and fair result. If they do, you can make great theater out of it. Apologize: "Your Honor, I must apologize. I have been under the misconception we were here to seek justice. I stand corrected." Act shocked: "Your Honor, is the Government's arguing I'm not allowed to seek justice for my client?" Be nonchalant: "Having seen their case, I understand why the Government objects to my asking for justice."

Inoculate the jury against the prosecutor's argument that they mechanically follow the law. Inoculation is the process of successfully attacking a weakened form of an argument, increasing the jury's resistance to persuasion from the stronger form of the argument. "The State claims Mr.

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15 Clay S. Conrad, *Jury Nullification: The Evolution of a Doctrine* (Carolina Academic Press, 1998)

Meanant's actions were criminal. The judge has told you what the law is, and the judge has said it is your job to apply the facts to the law. The judge has also told you that if you find that (theory of defense) applies in this case, you must acquit the Defendant. Of course, you determine what the facts are, and whether or not, and to what extent, the law in your charge applies to those facts. The application of law to facts is your job. You have absolute discretion to decide the facts, and only after deciding what evidence you choose to believe can you decide which of your instructions apply. In doing your job, you must decide where truth and justice lie. You may decide that the evidence before you simply does not legally or morally justify a finding of guilty. And with the evidence you have heard, *not guilty* is the only verdict that will do justice in this case."

The standard instruction is that a reasonable doubt is a doubt that would make jurors hesitate in the most important of their own affairs. Hesitation is key. While hesitation on a reasonable doubt is not the same thing as hesitation based on moral qualms, that distinction can be dissolved in argument. "If you find yourself hesitating you have to ask yourself: is there a reason for my hesitation? If you are reasonable, and you would hesitate to act on this evidence in the most important of your own affairs, you cannot vote to convict. And that requires some pretty serious introspection. Is that level of hesitation there? You've got to look deep inside. What level of confidence do you have?

"Let's assume you have a young daughter in intensive care. The government comes to you with this evidence, and says it is time to disconnect life support - there is no hope. Could you, would you, without hesitation, disconnect your daughter's life support on the evidence here - or would you want a second opinion? If you'd seek a second opinion, if you've got that hesitation, you've got to acquit. That hesitation is a sign that voting to convict my client would be wrong, something immoral and unjust, and something you cannot correct once you've made that horrible mistake. If you look deep inside and you find that hesitation, you cannot convict and you have to find my client not guilty. "

Courts treat jurors like rubber stamps or automatons. Professor Glenn Harlan Reynolds has noted we only pretend juries and judges are equal. He suggested we look at the opulence of the typical judges chambers, and compare that to the squalor of the typical jury room.[16] Clearly, we do not give jurors the respect and accommodation we give judges. We treat jurors like it is normal that they should sit down, shut up, and take orders - for the princely sum of $6.00 or so a day. Show jurors they deserve better. Remind them of their independence. Tell them that without juries, the could would have to have trial by judge - essentially, trial by government - that juries are the bulwark of liberty, that they are to prevent oppression by government, and that government excesses cannot be controlled without citizens willing and able to stand up to them. Americans do not trust the Government or its judges to make these decisions. As bad as their treatment as jurors is, it could be worse. They could be Defendants.

Jurors should be made aware that everything about jury duty that irritates them is being done by the Government that you and your client have no control over. And remember, the prosecutor is always referred to as the Government. It's his fault!

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16 Glenn Harlan Reynolds, *On Discretion and Dissent*, 9 CORNELL JRL. L. & PUB. POL'Y 685, 693 (2000)

Pay No Attention to the Man Behind the Gavel

Because the system treats jurors like ignorant stepchildren, it discourages them from acting independently, thinking independently, or making bold decisions. Jurors are treated more like a troublesome tour group condescendingly tolerated in an austere courtroom than like the Lords of the Manor. The last thing these twelve tourists are tempted to do is to upset the workings of a system they know they are not "really" part of. It is easy to see why so many jurors defer to the professionals and try to give the judge the verdict they think he would approve of. Jurors want to bond with the judge, who they view as benevolent, wise, all-powerful and all knowing, like Dorothy thought of the Wizard of Oz. We need to yap like Toto and pull the curtain on the judge.

Remind jurors not to try to guess what verdict the trial court judge would want or think right. According to Justice White's opinion in *Duncan v. Louisiana*, when jurors disagree with the judge they are often doing the job juries are intended to perform.[17] If a "correct" verdict is the judge's verdict, why did our Founders guarantee trial by jury in the Constitution *three times*? Americans do not trust jaded judges, biased experts or government officials to make decisions that important. We want twelve fair, just, neutral, conscientious people to unanimously decide when a case merits a conviction - and if all twelve cannot reach into then own conscience and say a defendant deserves to be punished, then he does not. It is not "close enough for government work." It takes all twelve jurors, individually, to reach into their own hearts and decide where justice lies.

We need to fight jury compromise. Jury compromise is pervasive. Some instructions, and many judges, encourage jury compromise.[18] As roughly 80% of criminal trials end in conviction, jury compromise is most likely working against your clients. In voir dire, ask jurors if they would be willing to compromise if deliberations went on for days, they were the only juror voting not guilty, everyone else was angry at them, but they believed a conviction was not justified by the facts of the case. Anyone who would compromise would not follow instructions, and should be challenged for cause. Also ask how they'd deal with a juror who was hanging the panel, if they wanted to go home and one juror was refusing to compromise. You to prevent jurors from compromising, and also to reduce the pressure to compromise the majority jurors are likely to put on dissenters.

Remind jurors it is their judgment you want, and they promised in voir dire to use their own judgment and not compromise. People want to be reasonable, and being reasonable usually means being open to compromise. Reasonable people sometimes agree to disagree, and if the jurors are in that position it may not be the result they wanted - but it is better than compromise. Jurors have a right to disagree - but they do not have a right to compromise away a Defendant's liberty.

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17 391 U.S. 145, 157 (1968).

18 Promoting compromise was the original intent of the *Allen* charge. *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896). See also *Connecticut v. Sawyer*, 227 Conn. 566, 588, 630 A.2d 1064, 1075 (Conn. 1993)(Associate Justice Katz, dissenting)("To limit jury deliberations, in effect, to one charge . . . impedes the jury's ability to reach a verdict and indiscriminately prevents desirable compromise.")

Beware of the dreaded "*Allen*" charge.[19] You needn't sit still while the Court dynamites away your hung jury. Be prepared with written objections, and make a record.[20] If the judge insists on a dynamite charge, request an opportunity to argue the application of the law in that charge to the jury.

Your opponent is not "my learned adversary," "my friend," "the prosecutor," and NEVER the People. The opponent is THE GOVERNMENT (even if he's a state prosecutor.) Take jabs at Government. Trust me, I'm from the Government. I'm from the Government, I'm here to help you. Would the Government lie to you?

If the prosecutor calls himself "the people" object. If he claims to represent "the people," object. The jury represents the people, not the prosecutor, who is merely a paid government apparatchik. By calling himself "the people" he is attempting to usurp your moral high ground. Even if the objection is overruled, it can be raised in closing - "you may want to know why I objected to Mr. Himmler referring to himself as "the people." That is a convention in our courts, but it is misleading and unfair. Mr. Himmler is trying to pretend he represents you and your neighbors. He doesn't. He represents the government. He wasn't elected by anyone. (Unless the prosecutor is the elected DA) He no more represents you than the clerk at the driver's license office. You don't need someone to represent you - you are the jury. You are quite capable of representing yourselves, and in doing so it is you who represent your neighbors. The jury serves as the conscience of the community, and in doing so the jury represents the judgment of the people of this State."

Jury Trial as a Bonding Experience

Finally, you have to provoke the empathy of the jury. Humanize your client. Touch him in court. Help him figure out how to dress, groom, and behave in court. Do not have him look too polished or too messy. Identify the dominant juror, if possible, and have the defendant's appearance be something that juror can relate to. Be seen speaking and consulting with your client often. Have his family there, and make sure they are well-groomed and well (but not luxuriously) dressed. If your client is married, make sure he wears his wedding ring every day, and have his wife, parents, siblings or children in court looking concerned and vulnerable. Have the client say more than "hello" - prepare him to say a few sentences to the jurors during voir dire, so you can humanize him from the start. Jurors must want to acquit, and they must emotionally experience the defendant's plight. A passive recognition that conviction would be unjust will lead to a passive jury passively convicting your client, with all the compassion given to a frog in a high school biology class. The jurors must become your client's fan club. The legendary Tony Serra once said if they aren't crying, you aren't winning. Your theories and themes must be visceral for you to succeed.

Sometimes, with some clients, it makes sense for them to appear pro se with standby counsel, or to employ hybrid representation in which you are basically co-counsel. Many Vietnam War protest

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19 *Allen v. United States, supra* note 14. Many courts have limited or abandoned the *Allen* instruction, holding the instruction is coercive for almost all purposes.

20 Gonzales, *Protecting the Record Prior to an Allen Charge*, 24 VOICE FOR THE DEFENSE 8, p. 34 (Oct. 1995)

cases involved this sort of hybrid representation. This is a dangerous strategy, but with an intelligent, articulate client it can be extremely powerful. It allows the client to spend hours speaking with the jury without cross-examination, and it allows the client to impress the jury with his humanity, vulnerability, sincerity, and value as a human being. Additionally, pro se litigants can often stretch the rules of evidence and of courtroom decorum in ways you would never be allowed to.

The fruit of your presentation is to communicate three concepts to the jury - injustice being done, jury empowered to protect defendant, jury must act to save defendant from injustice. For example:

Mr. Client comes to you today as his only protection against this arbitrary and misguided prosecution.

Mr. Client comes to you, hat in hand, seeking an acquittal which only this jury can give him.

Now, the Government has outlawed Mr. Client's medicine and wants him to die in prison. Mr. Client's future lies in your hands.

Usually, pleas to the jury are not among the themes of a case. In a nullification case, you want to make the role of the jury a consistent theme and return to it over and over again. Only the jury can decide. That's up to the jury. The jurors need to feel empowered, and equal or superior to the judge.

Remind the jury that they are in control. "Officer Krupke testified he counted 1200 marijuana plants. Do you believe that? That is entirely up to you to decide. The Government wants you to find there were over a thousand plants. However, if you choose you can find that there were only a few hundred, or only a few dozen, or none at all. The law gives you the complete and unfettered right and discretion to decide how many plants you believe my client is to be held responsible for, if any."

Your job, in seeking acquittal for guilty clients, is to divide the jury from the judge, empower them, and get them on your side with your clients. Reminding the jury that only they can decide the case is part of that. That is the tremendous importance of trial by jury: that a group of ordinary citizens can act as a bulwark of liberty between the enormous power of government and our hapless clients. And that is what you are invoking when you exercise the right to trial by jury.

A trial is perhaps the most awkward conceivable way to tell a group of twelve people a story, but story-telling is what trials are about. Every case has a plot, and sometimes it's hard to figure out what the plot is. Every case has characters, and sometimes its hard to figure out who are the good guys and who are the bad guys. Finally, every case has a moral. And it is that last part - the moral - that only the jury can decide. Seeking jury nullification is all about putting the jurors in a position where they understand that they are responsible for and in control of this moral, and about giving them reasons to believe the moral should be "the defendant did nothing wrong."

Good luck!

prejudicial.
THE COURT: Again but with the defendant admitting that it's his marijuana --
MR. KAIGH: He didn't admit anything about a drug dog. Excuse me, Mr. Wynne.
MR. WYNNE: --
THE COURT: Wait a minute -- wait a minute, Mr. Wynne. Let me Kaigh finish.
MR. KAIGH: Judge, the defendant's statement doesn't speak at all about a drug dog. It doesn't speak at all about the authorities in Arizona thinking it suspicious. And it's wrong. There's no way it's coming in this case.
THE COURT: I'm going to give a curative instruction.
MR. KAIGH: Thank you, Judge.
THE COURT: Okay mistrial motion is denied.
MR. WYNNE: If -- if -- if I could, Judge.
THE COURT: Yes, if you don't --
MR. WYNNE: If I don't produce evidence.
THE COURT: If you don't produce evidence.
(Side-bar Concluded)
THE COURT: Do you wish to make an opening statement, Mr. Forchion?
MR. FORCHION: Yes. I'd like to say to the

jury, I'm glad you people did decide to participate in the American system of justice by being part of the jury system. The state has made some very serious accusations against me. I do admit that I do use marijuana. I have admitted to using marijuana for years. I admit that I -- that I have actively, while I lived in Arizona, participated in different efforts to legalize marijuana. I have felt that the State of Arizona -- well the United States Government irrationally imprisons people from a harmless substance. I believe marijuana -- I believe marijuana's beneficial. I do not hide the fact.
As to this particular accusation there's a -- there's a lot more that's going to come out in trial. I want to take into -- I want the jury to take in the fact that I actually did not possess any marijuana here in the State of New Jersey. You know, ultimately it will be up to the jurors whether you convict me or not. Whether you convict me or not my opinions of marijuana will not change.
As to some of the statements Mr. Wynne made -- some of the statements he just said that I said, I have disputed making those statements all the time. There is a lot of circumstantial evidence here. I don't dispute the circumstantial evidence. I'm

basically begging for you 13 people to save my life. That's how I look at this. Whether you -- whether you feel that I actually had the marijuana or you feel I'm guilty of it or not that's not what I'm asking. The state may be, but that's not what I'm asking. I'm asking you to save my life. I know a jury's empowered to do that. No matter what instructions you're going to be given here ultimately the jury has the power to judge the law as well as evidence.

I believe, maybe some of you believe, that marijuana is a relatively harmless substance especially in light of tobacco and alcohol. I believe that marijuana is beneficial to plenty of people. I've always used it. I would like to have brought in some of my medical history, but it was forbidden from this court. When -- when Mr. Wynne just referred to people in -- in Philadelphia may possibly have been getting this marijuana I will admit to the jury I'm not sure if I can admit this into evidence now, but as a coast to coast truck driver at the time early in 1994, you know, with my feelings about marijuana already, as a coast to coast truck driver in 1994 I ran into different individuals who were actively in the State of Arizona participating -- petitioning to change the marijuana laws in Arizona, and I joined with groups. I felt the

same way. I've always felt the same way.

I didn't realize at the time that one day I'd be facing, you know, decades in jail for it, for my views. I've never felt the government had the authority to regulate individual citizen's body. I myself don't smoke cigarettes, don't drink alcohol, don't eat some of the things you eat. But I do choose to use marijuana, and I don't feel anybody should be in prison for marijuana.

I've always felt that the marijuana laws are about the biggest political lull in this country. I feel that for political reasons marijuana is not illegal -- is not legal. I, you know, I don't know if any of you's have heard -- and you all have said you didn't have heard that I am running for office. I'm running for office more of a protest, I don't expect to win. I never expected to win. I'm running for office under the Legalize Marijuana Party for the sole purpose of swinging public opinion.

Juries in this country have always been used as a means to test -- to test societal norms. If I -- I usually hear prosecutors say things like I'm going to put somebody in front of a jury and let the jury decide, you know, when it's a heinous crime like pedophilia or something like that the jury -- the jury

is used by the state to enact societal norms, societal views. I have chosen to come before this Court in the exact same way. I actually hope -- I actually hopefully hope that the -- you jurors knowing everything else about me, how I feel about marijuana regardless if you send me to prison or not, when I get out I'm still going to feel the same way. In fact, I may be in jail so long it may be legal by the time I get out.

There are plenty -- I don't know if you pay attention to the news on the west coast -- in the west coast there are states that have -- they're initiative states where people can put things on the ballot. The people go and get things put on the ballot. That's why if you notice in eight states now marijuana is legal for medical -- for medical use. This state is not an initiative state. There's no way you can get something like that on the ballot in this state. The only way that you can do that is the governor places it there or two thirds of the state legislature places it there.

The democratic and republican parties they wage war. They call it a war on drugs. It's on a war on people like me. I've never hurt anybody. I use marijuana. I admit it. I don't hide it. I don't even hide it. I'm glad I don't smoke cigarettes. My major

fear all the time, I know people who spoke cigarettes, they always fear cancer things like that. As a matter of fact, my sister right now has cancer. She's been smoking marijuana -- she's been smoking tobacco for 18, 19 years. I've always feared the police. I've never feared getting -- having a problem. I've always feared being arrested and this happened to my life over marijuana.

I know the amount sounds like a lot, but you have to remember I never sold marijuana on the street. The state will never be able to bring any -- any testimony that I sold marijuana on the street. I was a coast to coast truck driver. I, you know, as a coast to coast truck driver there are times when you get involved in things. A lot of times they're bad. Sometimes they're good. I believe what I was doing was good. At the time of this particular arrest I was not driving my truck. At the time of this particular arrest I was in Arizona and had to planned to stay in Arizona through the Thanksgiving Day weekend. And, yes, I did come home after I got a call something went wrong.

And basically I'm risking my whole life on a gamble. Maybe there's some people on this jury who feels the same way about marijuana. People told me

that I'm being a fool. My own legal adviser there has been begging me to take a plea bargain. I just can't do it. I can't sign a piece of paper to leave my son. I can't sign a piece of paper to leave my kids. So I'm asking you to do it. Do you have water?

MR. WYNNE: Here you go.

MR. FORCHION: I'll take a tissue.

MR. WYNNE: Okay. Here you go.

MR. FORCHION: It's not a joke.

MR. WYNNE: I'm not saying it's a joke.

MR. FORCHION: I see you smiling. It's not a joke to me. I've been waiting three years for this day to get in front of you to say this. Everything I planned on saying I can't even remember it. I know no matter -- again, no matter what -- what happens I guess I did it. You know, I got myself in this position. I didn't have to be in front of a jury. I had two co-defendants two years ago took plea bargains. They did their time and got out, did other things. I didn't want to do other things. Why should I put myself -- why should I put someone else in the position that I'm in. You know, I feel like I've always been a compassionate person. The things I've going through right now both financially and emotionally I couldn't do it to somebody else though. I couldn't do the

things the state wanted me to do in order to have these things disappear.

But, you know, I've always been considered a little nerd. My friends have always considered me a little nerd because I read a lot, I study things. On my own. I didn't go to college. I always read things. Why, I don't know. The one thing I've always respected the -- the law except for marijuana. You know, Mr. Wynne, couldn't tell you about me being a criminal, he'd probably tell you I'm a nice guy. You know, other than the fact my views on marijuana, which are strong. I have the same views on abortion, you know. I ain't changing, you know, no matter what. I always view abortion as illegal -- as -- as -- as wrong, and I view the government's persecution of people who choose -- freely choose to use marijuana as wrong.

There are, you know, there are -- there are people -- there are people like me, you know, for pain medication I'd much rather use marijuana to sit back and pop Percocets. I wasn't being arrogant earlier standing up while the judge was talking what he was doing my back was hurting. I've had my -- I've had my ups and downs with my emotions. I've been prescribed different drugs, Zoloft, Paxil, marijuana works better. I've had doctors say that. All my doctors know

everything about me. I don't hide it from anybody. My parents they've always been concerned I was going to get arrested. You know, it took till I was 33 for it to happen. I've been smoking since I was a teenager. And, yes, I did discover marijuana by accident. You know, it didn't accidently fall in my mouth, but I mean accident -- like I did it recreationally with everybody else. And I realized there were benefits to it.

Most people by the time they're 35, 30 they stop using marijuana for one reason or another. For whatever reason it always -- it always worked for me. I knew ten years ago the government lies about marijuana. Every single person that's going to come in here is going to have to swear to tell the truth, the whole truth, and nothing but the truth except for the state. The state lies about marijuana. The state says marijuana's addictive. I probably could bring out all kinds of information and reports to show it's not, but it won't be admitted as evidence. The state says marijuana's dangerous. Does anybody know anybody that died of marijuana? All these things are used to justify making marijuana illegal and justify throwing people in jail for marijuana. When in fact they're lies.

The state, according to the State of New

Jersey, 2C-35, which I'm being prosecuted under, marijuana has zero, absolutely zero value. There's no value to marijuana other than recreational use and anyone no matter what circumstances they're in, engaged in use, possession, distribution of marijuana are criminals. A matter of geography actually. If I happen to be in California or Arizona it's a medicine. It's a Schedule II drug. In New Jersey it's a Schedule I drug.

Certain states, certain countries I'm sure you read, have heard different reports about marijuana. Marijuana's good for plenty of things. It's the state that lies and says it's not good for anything. Does it come down to did I possess marijuana, did I break the law? At some point people have to break the law to change the law. You know, during, you know, I can name different eras in American history where people had to break the law to change the law. People like Rosa Parks, people like John Brown -- people like John Brown purposely broke the slavery laws, purposely helped slaves, purposely did things like that. But it was against the law what he did, but I don't think there's too many people in here that would say John Brown was wrong. I don't think there's too many people say Rosa Parks was wrong. Rosa Parks was -- she committed a

crime. She broke the law.

Do I break the law on a regular basis? Yeah, once or twice a day I smoke a joint, my own business, don't hurt nobody. Some people will tell you how I am when I don't smoke marijuana. I heard people tell me that I -- dude I didn't know you were like that when you didn't smoke marijuana, you know. This is more how I am. I smoked a joint this morning before I came to court. I started to do it at lunch time too, but I didn't want to be that obvious.

You know, I'm putting a lot of pressure on you, and I hope you give it a good hard thought. Hope you realize the American jury system is set up like this -- it was set up like this on purpose. You know, being a, you know, like I said I read a lot. I've read a lot of Thomas Jefferson. I've read a lot of the fore fathers -- the founding fathers of this country's statements. And there was a reason why the jury system was placed here. It was placed here because of different persecution to people and individuals had in other countries. And one of the things they made sure that happened in this country was you had a jury of your peers so the jury -- that's why the jury's — empowered to judge the laws as well as evidence.

So Mr. Wynne is going to be trying to tell

you to judge -- to judge the evidence. I'm trying to tell you to judge the law. Is the law right, law wrong, is there any in between? Nope. It's all or nothing for me. There's no in between. I either walk out the door Friday or I don't. And when I say I don't, there's a little boy who'll probably be driving when I get home. I got a teenage daughter, who knows, I might be a grandfather by the time I get home.

I don't know if I'm allowed to talk about different things that I've been associated with. I guess I'll try until Mr. Wynne cuts me off. This happens to be members of the group that I had got myself associated with back in 1994, a group called Critical Past. It's -- basically it's an age project. If you have -- they operate in Philadelphia. Actually they have an operation in Toms River, New Jersey too. But they have what they call a transcendental -- Transcendental Cannabis Buyers Club. That's another term for marijuana. It's called cannabis.

And I'm sure everyone's heard the different things -- different benefits marijuana happens to, you know, have on people with AIDS, or cancer. It doesn't -- I don't believe you have to have AIDS or cancer to be dying to use marijuana medicinally, but this particular group received marijuana on a regular basis

for at least four years I know of. No one ever got busted. No one ever got arrested. They almost operate openly, but they're just across the river so Mr. Wynne's not going to go arrest them, but I wouldn't want him to arrest them.

When I was in Arizona -- I lived in Tucson, Arizona. Matter of fact, at the time I was arrested my official -- when I got arrested here in New Jersey my official legal residence was still the State of -- Arizona. I still carry an Arizona driver's license. In Arizona -- California probably makes more news, but there are openly buyers club they call them, medical marijuana clubs, in Arizona. You know, being a person like I was in 1994 it was a shock when I ran into people that felt like I did. And, you know, again being a truck driver it wasn't long to put two and two together. I don't know if any of you's are on the internet and see how there is a huge marijuana reform movement, there's a huge movement to legalize marijuana to the point that people just have acts of civil disobedience. People are just disregarding the law. There are several states that are fighting the Federal Government over their Tenth Amendment rights to regulate their own selves.

You know, states like California. Their

citizens there went and voted. They voted to legalize marijuana. And the Federal Government refuses to acknowledge it. So you have some counties with a Prosecutor like Mr. Wynne, maybe agree they don't arrest nobody in the county. The next county over that Prosecutor says the hell with that the Federal law says this and they still arrest. So some states are going through a big battle over marijuana and it's spreading here.

For 30 or 40 years the tobacco industry claimed that tobacco was not dangerous, and everyone knew it was a lie. It took the scientists coming out -- different scientists presented information to the point where the tobacco industry had to concede that tobacco was dangerous, tobacco was killing people. And what did the state do? They didn't say well tobacco's dangerous. The government do -- they didn't say tobacco was illegal and ban it. You know, 400,000 people die every year of tobacco, but because of the interest -- rich interest, people with money, power, and influence are invested into the tobacco industry that death and destruction is not viewed as a criminal act.

Whereas marijuana, like I said, you know, hundreds of thousands of people view marijuana total,

total different. I believe we know the truth. We speak the truth. The scientists are coming out on our side the same way that they did for the -- against the tobacco industry. We even have government reports now coming out.

Again, I don't know if Mr. Wynne's going to let me produce this, but this report right here, it's called -- this was released last year, March 1999. It's called Marijuana and Medicine. It was put out by the Institute of Medicine as a Department of the State -- of the Federal Health and Human Services Department.

In 1996 after California and Arizona legalized marijuana -- made marijuana from a Schedule I drug to a Schedule II drug the government -- federal government decided to investigate this to -- they wanted the drugs are at the time governor, I mean General McCaffrey he called it Cheech and Chong's medicine. He felt that he was going to get the Institute of Medicine to check this -- put this myth to rest. And when he did two years later the Institute of Health -- the Institute of Medicine, the government scientists themselves they listed all the things that marijuana is good for. Several of which I use it for.

It came into question now the scheduling definitions. The reason why I'm here now is because

marijuana under New Jersey law is a Schedule I drug that is the drug or other substance has high potential for abuse. That's the number one reason. And that's questionable as to what do you call abuse. I call it use not abuse. I do know that there are kids who abuse it. I believe kids should not -- I believe marijuana should be regulated the same way alcohol is or tobacco for that matter. But as an adult who chooses to use marijuana that's what it is, it's use not abuse.

The number two reason that level two definition of a Schedule I drug is the drug or other substance has no currently accepted medical use in the treatment in the United States or in this instance the State of New Jersey. You read the paper, watch TV, you see it every couple weeks you see something else that some scientist, some doctor group, or somebody says hey marijuana is good for this, marijuana is good for that. Look at the state. In this state right here. This state in North Jersey there's plenty of pharmaceutical companies that operate in this state. The drug Marinol is produced in this state. Marinol is a derivative, is a synthetic derivative of marijuana. So the state says marijuana has no me dismal value but it allows a company to make a synthetic version of marijuana -- a fake version of marijuana. So you can actually get

marijuana -- Marinol. I've had Marinol pills. You can get Marinol, which is the fake stuff as opposed to the real stuff. It's like you had a choice between - drinking Tang and fresh squeezed orange juice, what would you take? That's how I feel. Why should I have to use Marinol. Why should anybody have to use Marinol. Marinol in itself has its own side effects.

It says -- there's also a third reason -- it says there's a lack of accepted safety for the use of the drug or substance other than medical supervision. I already told you my doctors all know I use marijuana. I have two doctors who probably would have testified here for me, but I'm not here for a possession charge. I'm here for conspiracy to distribute charge. I don't know I just hope. That's all I can do is hope. I feel I'm here -- I'm the one being persecuted here. I feel like the victim. The state calls itself the victim. If I asked right now the Court who's the victim here and he say the state was. But I'm the one who lost everything. At the verge of losing the most valuable thing I possess, my freedom, unless you step up and stop it. You have the power to do that. You know, that's all I can -- that's all I can really say. You have the power to do that. It's perfectly legal. No way anybody could get in trouble for saying the law's

wrong. You can say that. You know, where do you go now.

Everyone has their opinion on marijuana. There is a big opinion on marijuana. And again I guess it depends on where you stand on it. You know, I had my reasons; other people have their reasons. In the instance -- I don't really know if I should go into my particular case right here. I think I take it under advisement not to go into it right now. But that's how I look at this case. I look at this case as your opportunity to judge the law. The state looks at it as you only have a right to judge the evidence. I tell you Mr. Wynne himself has argued to me that although the jury has the -- is constitutionally empowered to judge the law that information should not be advertised to the jury. And I'm shocked that he hasn't stopped me from talking now.

THE COURT: So am I.

MR. FORCHION: It's unbelievable. I didn't think I'd get half of this out. But everything I say is true. You know, that's another thing. You know, you all are residents of New Jersey. I don't know if you ever read the constitution of New Jersey. I'm probably one of the few truck driving pot heads who read the constitution of New Jersey and can quote

certain things out of it. You know, but I know in the New Jersey Constitution it gives you the right, it says all evidence may -- all evidence -- I mean truth may be presented as evidence in all prosecutions or indictments. And that's all I feel I'm doing. I'm presenting the truth. I can present, you know, if I was allowed to I can present a lot of things. I don't think I'd be allowed to go any further than what I've already gotten.

But I'm not changing my views on marijuana whether I spend countless years in jail or not. And it's more than just me. You know, it's my family. I already ruined a lot of things with my family. I never expected to go through all this. You know, at this point I was figuring I'd be saving up for my child -- for my oldest daughter's college. I lost my house last year. You know, college it's not even on the horizon. You know, I'm just thinking of freedom and hoping I'm there for her graduation. Things like that now. Do I regret some of the things I've gotten myself into? I admit I got myself into it. Yep, sure do. I never expected to be running around, how do we legalize marijuana? It was a private thing with me. It was a private thing all the way until that day.

All my friends, you know, some of my friends

smoke, some of them didn't. But the ones who didn't all bailed on me. Think I'm crazy. They think I ruined their life -- ruined my life, they don't want to be associated with me because they don't want, you know, it could happen to them. You know, just like the saying says I love my country, I fear my government. A lot of people -- a lot of people feel that way. You know, I have my friends who every once in a while call me and say hi, and then they're worried that their phone is tapped.

I think I might have to end it there. Again I hope you heard everything I said. I hope you can feel for me a little bit. I know that's also within the power of a jury. The jury can vote its conscience. If your conscience tells you something you're allowed to follow your conscience. You know, before there is -- I mean I look at things like court cases in this country decide plenty of things. Court cases have changed the whole landscape of this country. Roe v. Wade, that's a court case. That was a court case that made it to Supreme Court. It was in Roe's favor. Abortion's now legal. No matter what else anybody -- what anybody thinks about abortion, abortion's legal based on a court case. You know, you can name countless -- countless court cases. I know I'm not

trying to put myself in that same position, but it can set an example.

You know, there are things that are happening on the west coast. There are some places on the west coast, some places even in Florida, Mr. Wynne wouldn't even attempt to put a person on trial for a marijuana charge. You know, I believe it should start here in New Jersey. Maybe I should have stayed my butt in Arizona. You know, at one point, you know, I was. But I had planned to. But again I have a 14 year old now. At the time she was eight when I decided to move back to New Jersey. But I kept my contacts in Arizona.

I traveled a lot. All that's gone. I mean I traveled in my car, I traveled in my truck. I had a little extra money. Not because I sold drugs, because I didn't. I had a little extra money because I had worked hard. I bought my own truck, had my own company. You know, I used my money the way I wanted to you. You know, I gambled a lot, you know. I would drive hard for two, three months, come home for a month, take my money, decide to go somewhere. And I, you know, I've been to Disney Land, been to different historic spots. I've been to all the wonders of the U.S., Mount Rushmore. All those things. All of them I did under the influences of marijuana. Didn't hurt

nobody. There's not one per -- you'd have a hard time finding anybody who doesn't like me other than people who don't like what I say. But you won't find anybody that say that guy did this, that guy do that. I don't believe I'm a criminal. I really don't believe I'm a criminal. I admit that I use marijuana. I don't think I'm a criminal.

I watch TV shows like OZ, terrifies me. Before I would have watched it and would it have been something humorous. Now I watch shows like that and it's like man one day I might be in there. You know, I don't want to go to jail. And I don't want to go to prison. I don't want to go to a POW Camp that's what I call. There's a war on drugs and anybody in prison for drug charges are prisoners of war. I don't want to be a prisoner of war. There's too many people in prison now. 1.4 million of them are in jail for drug charges, not even for violent offenses. I don't think I did anything violent. In fact, I'm not even capable of doing anything violent. Most people who have -- most people of my -- well it's a different story -- but, yeah, I guess I better end.

Thank you for listening. Thank you, Mr. Wynne, for allowing me to talk. Thank you, Your Honor, for allowing me to talk.

THE COURT: Okay. Mr. Forchion.
MR. WYNNE: The state calls Russell Forchion.
THE COURT: You can step right up here, Mr. Forchion, please.
THE CLERK: State your name.
THE WITNESS: Russell Forchion.
R U S S E L L F O R C H I O N, STATE'S WITNESS, SWORN
DIRECT EXAMINATION BY MR. WYNNE:
Q Mr. Forchion, you're the brother of the defendant on trial here, Edward Forchion, is that correct?
A Yes.
Q Back on November 24th of 1997, you were arrested in a white van with 45 pounds of marijuana, is that correct?
A I believe it was 39 pounds, yes.
Q It was more than 25 pounds, right?
A Yes.
Q Okay. And whose marijuana was that?
A That was mine.
Q And how did it come to come to New Jersey -- Bellmawr, New Jersey?
A It was shipped.
Q And who shipped it?
A People in Arizona.

Q And who made the arrangements to ship the 39 pounds of marijuana from Arizona to New Jersey?
A Well I made the arrangements and another guy who accompanied the money out there, he made the arrangements also.
Q And who was that?
A Donald.
Q Donald?
A Yes.
Q Donald what?
A DeBruce (phonetic).
Q DeBruce. I see. Now when you made these arrangements in Arizona did you go out to Arizona?
A No, I didn't.
Q Donald DeBruce did?
A Yes, he did.
Q I see. And at that time when Donald DeBruce went out to marijuana -- to Arizona to make the arrangements for the 39 pounds of marijuana where was your brother, Edward?
A I believe he had a girlfriend or something out there. He might have been out there at the time.
Q He was living in Arizona at the time?
A Well he was kind of going back and forth from Jersey to Arizona.

I drafted this instruction, thinking that no court would ever agree to give it because by its nature it does increase the likelihood of a hung jury. However, the first time this charge was proposed to a court (Travis County Court at Law Number 4, Hon. Mike Denton, presiding), it was given enthusiastically. This instruction is intended to address a real problem that often occurs in jury deliberations, and which is very difficult to root out.

Because most criminal trials, sadly, end in convictions, it is likely that any jury compromise occurring is hurting your clients. This instruction should address that problem in two ways: first, it should actively instruct the jurors themselves not to compromise. Secondly, and most importantly, it should reduce any pressure jurors put on each other to compromise.

Finally, if this charge is given, it can be used in argument to keep the jurors on your side from slipping away. While it might not help in all cases (and in cases where the majority is on your side, it could even hurt), in many close or controversial cases this instruction may forestall a conviction – albeit with a hung jury, not an acquittal.

While the Motion is written in terms of Texas law, it is not limited to Texas concepts. It may be used in any State with a little additional research. While anti-compromise instructions are more often sought than obtained, the search should not be abandoned. On the principal that your client and you are both better off with a hung jury than with a conviction, this motion is presented.

Sincerely,
Clay S. Conrad[1]

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[1] J.D. *cum laude*, University of Texas, 1995; B.S., Franklin Pierce College, 1994; Shareholder, Lamson & Looney, P.C., Houston, Texas; author, *Jury Nullification: The Evolution of a Doctrine* (Carolina Academic Press, 1998). Mr. Conrad is a former staff attorney with the Texas Criminal Defense Lawyers Association, and is a frequent presenter at continuing legal education seminars and academic symposia on the jury system. He is nationally recognized as an authority on the history and role of the criminal trial jury. Mr. Conrad concentrates his practice on State and Federal criminal appellate litigation.

CAUSE NO. 2003-0666

THE STATE OF TEXAS	§	IN THE 666th DISTRICT
V.	§	COURT OF
AVERY GIL T. SOMBISH	§	TYRANNY COUNTY, TEXAS

DEFENDANT'S PROPOSED JURY INSTRUCTION ON THE SUBJECT OF JURY COMPROMISE

TO THE HONORABLE JUDGE OF SAID COURT:

AVERY GIL T. SOMBISH, Defendant, hereby requests that the following instruction be given to his jury:

> This trial has required time, effort and money from both the defense and the government. It is your duty as jurors to consult with each other and deliberate with a view to reaching a verdict if you can do so without violence to your individual judgment. In order to reach a unanimous verdict, each juror must agree with each of the other jurors, either that there exists a reasonable doubt as to whether Mr. Sombish is guilty, or that each and every element of the offense has been proven beyond a reasonable doubt. Each of you must decide the case for yourself, but you should do so only after a consideration of the evidence in the case with your fellow jurors. You should not hesitate to reexamine your own views and change your opinion if convinced it is erroneous.
>
> You must remember that you may not under any circumstances compromise as a juror. Your judgment cannot be compromised, it can only be followed or abandoned. Remember at all times that no juror is expected to yield a conscientious belief he or she may have as to the weight or effect of evidence. Remember too, if the evidence in the case fails to establish in your mind the defendant's guilt beyond a reasonable doubt, he should have your unhesitating vote of "not guilty," regardless of how other jurors may vote.
>
> After consulting with your fellow jurors, you must vote your own judgment and are not permitted to compromise, and you should not encourage or ask your fellow jurors to compromise. You should seek to reach unanimous agreement; but if after considering the evidence in light of your instructions you cannot agree, you must each of you vote your individual judgment. Unless your final conscientious appraisal of the evidence in the case agrees with that of your fellow jurors, you should not vote along with them. There is no rule of law that the majority of the jurors are right, or the minority of jurors wrong. A defendant cannot be unanimously acquitted or convicted unless all members of the jury are individually convinced that the verdict is correct.

1. Various studies into the behavior of juries have determined that jury compromise is pervasive. See Harry Kalven & Hans Zeisel, *The American Jury* (1966); Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* 203-205 (1994); David S. Rutkowski, *A Coercion Defense for the Street Gang Criminal: Plugging the Moral Gap in Existing Law*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 137, 217 (1996) ("Experience has shown that, when the opportunity presents itself in difficult cases, juries tend to reach compromise verdicts"); Joseph P. Liu, *Federal Jury Instructions and the Consequences of a Successful Insanity Defense*, 93 COLUM. L. REV. 1223, 1247 (1993) ("The best way to prevent [jury compromise] from happening is to instruct the jury not to take this route. Since jury compromise is a conscious choice, an explicit instruction can serve to guide the jury's actions.") As Professor Eric L. Muller has noted:

> More important, determining who is harmed by jury compromise requires no speculation, for the defendant is always harmed. A negotiated verdict is a compromise of the reasonable doubt standard; accordingly, a verdict of conviction reached through compromise is a verdict of guilty not supported by belief beyond a reasonable doubt. This is of course true of the negotiated acquittal as well, so it might be said that a compromise verdict disadvantages both the government and the defendant. But the defendant's injury is unique. The reasonable doubt standard is designed to protect the defendant, not the government. Thus, while a compromise verdict burdens the defendant and the government simultaneously, it does not burden them equally.

Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771, 796 (1998).

2. It is beyond cavil that jury compromise is improper under the law. Tex.Code Crim.Proc. Chapter 37. This instruction seeks to warn the jury concerning a decision making process that is not permissible, as a matter of law, where there exists a pervasive danger that, without such an instruction, the jury may engage in the improper process.

3. A Defendant has the right beyond question not to be convicted unless each and every member of his jury is personally persuaded, beyond reasonable doubt, that the Defendant is guilty. Tex.Code Crim.Proc. Art. 36.31 (no verdict unless all jurors agree). A juror who

would be willing to cast a vote of "guilty" in spite of their reasonable doubts would be violating their oath. Tex. Code Crim. Proc. Art. 35.22. Such a verdict would be impeached should it later be shown that some of the jurors voted for a conviction for the sake of expedience or amity, without first being convinced beyond a reasonable doubt as to the Defendant's guilt.

4. Texas Rule of Appellate Procedure 21.3(c) provides that a defendant must be granted a new trial "when the verdict has been decided by lot or in any manner other than a fair expression of the jurors' opinion." See also *Thomas v. State*, 750 S.W.2d 234, 235 (Tex.App.-Dallas,1986)("[W]e feel constrained to note that compromise verdicts are improper under Texas law and, when discovered, warrant a new trial.") The requested instruction seeks to forestall and prevent an improper and illegal verdict which is not a fair expression of the unanimous opinion of the jurors from being rendered in this cause.

5. Because jury compromise is pervasive, and because the Defendant is entitled not to be convicted unless every member of the jury is persuaded of guilt beyond a reasonable doubt, the Defendant requests that the jury be formally instructed not to compromise. Jurors may feel pressure, both from the nature of the proceedings and from fellow jurors, to return a verdict as expeditiously as possible. Without an instruction that jury compromise is improper, there exists a pervasive risk that the jury in this case may convict Mr. Sombish without first being unanimously convinced beyond reasonable doubt that he is guilty.

6. Reasonable minds sometimes must agree to disagree. In daily life, reasonable people often (and quite appropriately) compromise once an impasse is reached. In fact, the very phrase "be reasonable" is often used in order to induce or encourage compromise - and outside of jury duty, such compromises are often praiseworthy. Jury duty, however, is not a situation that is logically or legally amenable to compromise. While the Defendant has no interest in obtaining a mistrial, it is beyond dispute that he may not be convicted by a non-unanimous jury in which the dissenters have compromised away the Defendant's rights. It is not

controversial to state that a mistrial is a preferable result to an illegal or improper verdict achieved through a process that is at odds with the law.

7. The requested instruction seeks to have the jury instructed that they may not reach a verdict by way of compromise, horse-trading, vote-swapping, log-rolling or other improper means. It is far more acceptable to the law that the jurors return a mistrial than that they convict on a lesser included offense by way of compromise, that dissenting jurors agree to convict based on an agreement by majority jurors to give probation, or that dissenting jurors are simply worn down into agreeing to a verdict by weight of numbers and the passage of time.[2]

8. All citizens have a "profound interest in protecting the constitutional right to a jury trial in that 'no other institution of government rivals the jury in placing power so directly in the hands of citizens.' " *Hamlin v. Sourwine*, 666 N.E.2d 404, 410 (Ind.Ct.App.1996) (quoting Jeffrey Abramson, *We, the Jury: the Jury System and the Ideal of Democracy* 1 (1994)). The jury in this case has the supreme power over the Defendant to decide whether or not he is guilty of a serious criminal offense. That role is not protected if it is allowed to be diluted through compromise. The verdict, either way, must be the result of the unanimous agreement of all the jurors - or the institution of trial by jury is diminished and the Accused is denied a fair trial and due course of law.

9. This attorney has found no direct authority on the giving of "anti-compromise" instructions. However, an analogous situation can be found in the giving of "*Allen* Charge" instructions. See *Allen v. United States*, 164 U.S. 492, 501, 17 S.Ct. 154, 41 L.Ed. 528 (1896) and its progeny. *Allen* charges are routinely given to deadlocked juries, informing them that they should continue to deliberate, and ordering them to consider all sides of the issue. Such charges urge jurors to consider both sides of every issue and to remain open to persuasion,

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[2] The author of this Motion has interviewed numerous jurors, and has learned of several cases in which verdicts have been reached through these methods.

but do not request or recommend that the jury seek to or consider compromise as a way out of their disagreements.

10. The instant instruction mirrors the *Allen* charge, save that it is requested regardless of whether the jury reports to this Honorable Court that they are deadlocked. This is crucial, as the jury may well compromise without any disagreement or deadlock being reported to the Court. Should they do so, the Defendant's rights would be compromised without this Honorable Court ever having the opportunity to prevent the Defendant's conviction by a non-unanimous jury.

11. Similar to a proper *Allen* charge, this charge therefore encourages the jurors to attempt to reach consensus, to consider all sides of every issue, and to deliberate in good faith and to remain amenable to persuasion - while admonishing the jurors that compromise is an improper route to a verdict. Due to the pervasive nature of jury compromise, it is crucial that such a charge be given.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that the foregoing jury instruction be delivered to the Jury for its deliberations in this cause.

Respectfully submitted,

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