

PROTECTING THE JURY
PREVENTING THE DISMISSAL OF YOUR HOLDOUT JUROR

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Introduction

The goal of a criminal defense attorney is obviously to have her client acquitted of all charges. Failing that, a secondary goal is to prevent the conviction of one's client. Oftentimes an attorney is faced with a case in which there is little hope for outright acquittal at trial. In such a case, if an attorney can connect with one juror who connects with the defendant or defense theory of the case emotionally, intellectually, or morally, and has the fortitude to withstand the pressure from her fellow jurors, a hung jury may be obtained. In many cases, such a result should be considered a victory.

While this is a victory for the defendant and his counsel, it is viewed as a travesty by the prosecution, and more importantly, the court. Assuming that the prosecuting attorney and the trial judge are convinced of the defendant's guilt, and assume that 11 other jurors concur, having to deal with a single holdout juror who threatens to damage the prosecutor's trial statistics and bog down the judge's calendar, it is highly probable that attempts will be made to remove the sole roadblock to conviction.

With these goals in mind, the courts have provided prosecutors and judges with several tools for achieving this aim. Several states have eliminated the requirement for unanimous verdicts in criminal trial. Dynamite charges, aimed at blowing apart deadlocked juries are given on a daily basis across the nation.

An area that has become hotly contested in legal and academic circles over the last five years involves the removal of holdout jurors who are thought to be partaking in jury nullification. This has forced courts to balance the desire to remove jurors who refuse to follow the court's instructions – the "law" – and the critical matter of protecting the privacy of the jury's deliberations. Since 1997, several federal circuit courts of appeal have faced this issue head on. These courts have been largely consistent in their view that the privacy of jury deliberations is paramount to removing a nullifying (non-deliberating) juror.

As a holdout juror is the only thing keeping a defendant from being convicted, it is critical for an attorney to do all she can to protect the holdout and prevent her removal. In this session I will discuss how to do just that. Specifically, I will discuss:

- The standards for removing a non-deliberating juror.
- The inquiry and investigation the court can make into the jury's deliberations
- What specific steps an attorney can do to protect the jury as well as his client on appellate and habeas review.

**Is a Juror Basing His/Her Verdict Contrary to the Court's
Instructions Grounds for the Juror's Dismissal?**

In sum, yes.

Federal Rule of Criminal Procedure 23(b) provides:

Removal permitted for "just cause"

A juror unable to perform his duties is just cause for removal

The inability or refusal to follow the court's instructions or to deliberate is just cause for removal.

U.S. v. Thomas, 116 F.3d 606 (2nd Cir 1997)

U.S. v. Symington 195 F.3d 1080 (9th Cir.1999)

HOWEVER

Appellate courts have expressed great concern over the **possibility** of removing a holdout juror simply because she disagrees with the majority. To do so removes the right to a unanimous verdict by a 12-person jury.

Courts have tried to balance the defendant's Sixth Amendment rights with the court's desire for efficiency.

As a result of this concern several federal appellate courts have set a high standard for the removal of a juror for nullifying or refusing to deliberate.

- "If the record discloses **any possibility** that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request." US v. Thomas (2nd Cir.)
- If the evidence discloses **any reasonable possibility** that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror." US v. Symington (9th Cir.)
- A juror should be excused only when **no "substantial possibility"** exists that she is basing her decision on the sufficiency of the evidence. US v. Abbell (11th Cir.)
- These standards have been equated to **beyond a reasonable doubt**.

These standards are likely to be applied by courts faced with the issue. The court in People v. Kriho praised these standards because they are precise, non-speculative, and provide a bright line rule for trial courts.

In dealing with an allegation of a holdout juror, it is important to note that whether or not a juror is refusing to deliberate is considered a finding of fact, subject to a **clearly erroneous standard**. As such, winning at the trial court is critical.

How can a Court Determine if a Juror is Refusing to Deliberate

Realistically, there are a limited number of ways a judge can determine whether a juror is nullifying.

1. Question foreperson
2. Question holdout
3. Question other jurors

Each of these options breaks the veil of secrecy of the jury's deliberations, which the appellate courts have taken quite seriously.

The Importance of the Secrecy of Jury Deliberations in the Analysis

Courts that have considered the issue have expressed great concern about invading the secrecy of deliberations. The following statements are pulled for US v. Thomas and US v. Symington.

- The secrecy of deliberations is the cornerstone of the modern Anglo-American jury system.
- Indeed, courts and commentators alike recognize that the secrecy of deliberations is essential to the proper functioning of juries.
- It is well understood, for example, that disclosure of the substance of jury deliberations may undermine public confidence in the jury system.
- Especially troublesome is the danger that such disclosure presents to the operation of the deliberative process itself.
- The jury as we know it is supposed to reach its decisions in the mystery and security of secrecy; objections to the secrecy of jury deliberations are nothing less than objections to the jury system itself.

- It is the historic duty of a trial judge to safeguard the secrecy of the deliberative process that lies at the heart of our system of justice.

The following statements from Thomas further illustrate the importance of protecting the jury's privacy in cases with a holdout juror.

Quoting from a Harvard Law Review Note, the court wrote

Juror privacy is a prerequisite of free debate, without which the decision making process would be crippled. The precise value of throwing together in a jury room a representative cross-section of the community is that a just consensus is reached through a thoroughgoing exchange of ideas and impressions. For the process to work according to theory, the participants must feel completely free to dissect the credibility, motivations, and just deserts of other people. Sensitive jurors will not engage in such a dialogue without some assurance that it will never reach a larger audience.

The court went on to state:

The mental processes of a deliberating juror with respect to the merits of the case at hand must remain largely beyond examination and second-guessing, shielded from scrutiny by the court as much as from the eyes and ears of the parties and the public. Were a district judge permitted to conduct intrusive inquiries into--and make extensive findings of fact concerning--the reasoning behind a juror's view of the case, or the particulars of a juror's (likely imperfect) understanding or interpretation of the law as stated by the judge, this would not only seriously breach the principle of the secrecy of jury deliberations, but it would invite trial judges to second-guess and influence the work of the jury.

Where ... a presiding judge receives reports that a deliberating juror is intent on defying the court's instructions on the law, the judge may well have no means of investigating the allegation without unduly breaching the secrecy of deliberations Rather, to determine whether a juror is bent on defiant disregard of the applicable law, the court would generally need to intrude into the juror's thought processes. Such an investigation must be subject to strict limitations.

Without such an inquiry, however, the court will have little evidence with which to make the often difficult distinction between the juror who favors acquittal because he is purposefully disregarding the court's instructions on the law, and the juror who is simply unpersuaded by the Government's evidence. Yet this distinction is a critical one, for to remove a juror because he is unpersuaded by the Government's case is to deny the defendant his right to a unanimous verdict.

In a case (United States v. Brown) involving a juror's own request to be dismissed from duty because of what the prosecution interpreted to be an

unwillingness to apply the law as instructed, Judge Mikva, in an opinion joined by Judge Bork and Judge Douglas H. Ginsburg, observed:

"[A] court may not delve deeply into a juror's motivations because it may not intrude on the secrecy of the jury's deliberations. Thus, unless the initial request for [a juror's] dismissal is transparent, the court will likely prove unable to establish conclusively the reasons underlying it. Given these circumstances, we must hold that if the record evidence discloses any possibility that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request."

These concerns have led to the following limitations on the ability of the trial court to uncover a nullifying juror:

"[A] court may not delve deeply into a juror's motivations because it may not intrude on the secrecy of the jury's deliberations. Thus, unless the initial request for [a juror's] dismissal is transparent, the court will likely prove unable to establish conclusively the reasons underlying it.

– US v. Thomas quoting from US v Brown.

The court went on to state:

A presiding judge faced with anything but unambiguous evidence that a juror refuses to apply the law as instructed need go no further in his investigation of the alleged nullification; in such circumstances, the juror is not subject to dismissal on the basis of his alleged refusal to follow the court's instructions.

US v. Thomas

How to Apply the Standards

The following note was sent to the court by the jury in People v. Cleveland:

"We request an alternate to replace one juror. One juror does not agree with the charge and does not show a willingness to apply the law. One juror will not abide the facts and apply the law. Please provide direction in this matter."

Given the standards stated by the federal courts, what should you do if such a situation should arise?

1. Request judge let jury continue its deliberations.
2. Accept her reinstructing the jury of their duty to deliberate, but make sure that the reinstruction contains language that juror should not give up his convictions just to reach a verdict.
3. Be prepared for when second note comes: Prepare questions you want to ask holdout to keep him on jury.

When the second note complaining about the holdout comes:

1. Move for a mistrial based on the deadlock.
2. Object to the removal of the holdout.
3. Object to any questioning of jurors.

Bring the following items up to the court:

- The no possibility standard set by the appellate courts for removal of the holdout
- The appellate courts' uneasiness with any investigation of the jury's deliberations and the mental processes of individual jurors.
- The repeated occurrences of mistaken claims that a juror is nullifying.
- The chilling effect an investigation will have on the holdout and on public perceptions of the court system.
- Make sure the judge acknowledges that juries hang for a number of reasons.

Specific examples are

1. Weak Evidence
2. Police Credibility
3. Case Complexity
4. Dysfunctional Deliberation Process
5. Concerns about fairness of law
 - Law in general
 - Law as applied in this case

If there is **any possibility** that the holdout jurors are not doing so because of concern about fairness, there is no just cause to remove juror.

- It is also possible that personality conflicts, short tempers, and communication problems may have an impact on the way the majority of jurors view the actions of the holdout. The NCSC study on hung juries found that negative perceptions of their fellow jurors were present among members of juries that failed to reach a verdict.

Jurors' Attitudes in Verdict and Hung Jury Cases

	Verdict	Hung
Surprised by others' verdict preferences	3.21	3.96
Open-mindedness of other jurors?	5.75	4.49
There were unreasonable people on jury	2.64	4.60

Measured on a 1-7 Scale

Argue that the jury is simply angry at your holdout for doing his duty in judging the case based on his convictions and will not cave in to pressure.

If the judge still wants to investigate consider doing the following:

- Object to any questioning of jurors
- If (when) he insists on investigating:
 - Request permission to question jurors, especially your holdout
 - Request the judge ask questions prepared by counsel and presented to her in writing.
 - Make sure any investigation focuses on juror's refusal to deliberate/follow the law.

Remember, your goals at this point should be to:

1. Show that the holdout did deliberate; and
2. Show that he has a reasonable basis for his refusal to convict.

To do this, it is necessary to understand what is meant by refusing to deliberate. In People v. Cleveland 106 Cal.Rptr.2d 313 (2001), the court stated:

"A refusal to deliberate consists of a juror's unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views."

The court explained that examples of refusal to deliberate include,

- Expressing a fixed conclusion at the beginning of deliberations
- Refusing to consider other points of view
- Refusing to speak to other jurors
- Attempting to separate oneself physically from the remainder of the jury.

BUT

On the other hand, the Cleveland court described characteristics that **do not** show a refusal to deliberate:

- A juror disagrees with the majority of the jury as to what the evidence shows
- A juror disagrees with the majority of the jury as to how the law should be applied to the facts
- A juror disagrees with the majority of the jury as to the manner in which deliberations should be conducted

Importantly, the court also stated that:

- "A juror's inarticulateness in explaining his position .. is not a ground for discharge."
- A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate, simply because the juror expresses the belief that further discussion will not alter his or her views.

The Testimony of the Holdout

When the holdout is called to testify, your questions, which you have prepared and submitted to the court, should focus on the relevant items that illustrate that he did in fact deliberate. For example,

- Did she consider other points of view?
- Did she speak to other jurors?
- Did the credibility of _____ affect her opinion?

Also ask

- Is his opinion based on the facts and law?
- What specific pieces of evidence or credibility of witnesses entered into his decision?
- Is there a problem with the jury?

You may want to treat the holdout, who the court and prosecutor want removed, as the judge would treat a pro-prosecution witness during voir dire. Rather than excuse the juror for cause during voir dire after a pro-prosecution bias has become apparent, the judge will likely ask the juror:

"If the court were to tell you that you must decide the case based on the law and evidence, would you be able to do that?"

You should ask your holdout the same thing. In fact, obtain a transcript from a voir dire (in the current case or a past case) where the judge blatantly rehabilitated a biased juror, and use the same language used by the judge to rehabilitate your juror.

If following the questioning of the holdout the judge insists on questioning other jurors, object to any leading questions asked by the court. Remember, everyone else wants the holdout to be removed and will work on developing evidence to ensure that happens. During the jurors' testimony, look for any inconsistencies in their description of the holdout's conduct. Such discrepancies may be your reasonable doubt.

Arguing to the Court

Following testimony of the jurors be prepared to argue strenuously for a mistrial and against the removal of the holdout juror. If possible, have a written memorandum covering the items discussed in the session including specific items from your present case and relevant jurisdictional authority. Base your arguments on the strongest points of your case upon which the juror may be basing his verdict. Emphasize the reasonable doubt standard and the sanctity of the jury system.

I hope this information helps. If you have a situation such as covered in this session arise, please let me know. Below is a list of several cases, articles, and studies which have either been cited in the session or are useful resources.

Materials of Interest

- U.S. v. Brown, 823 F.2d 591 (D.C. Cir. 1987)
- U.S. v. Thomas, 116 F.3d 606 (2nd Cir 1997)*
- U.S. v. Symington 195 F.3d 1080 (9th Cir.1999)*
- U.S. v. Abbell, 271 F. 3d 1286 (11th Cir. 2001)*
- U.S. v. Baker, 262 F.3d 124 (2nd Cir. 2001)*
- US v. Olano 507 U.S. 725 (1993)*
- U.S. v. Prosperj, 201 F3d 1335 (11th Cir. 2000)*
- U.S. v. Edwards, 303 F.3d 606 (11th Cir. 2002)*
- Tanner v. US, 483 US 107 (1987)
- Clark v. U.S., 289 U.S. 1 (1933)
- People v. Engleman 121 CalRptr.2d 862 (2002)*
- People v. Cleveland 106 Cal.Rptr.2d 313 (2001)
- People v. Kriho, 996 P.2d 158 (ColApp. 1999)
- National Center for State Courts (2002), Are Hung Juries A Problem? . Available online at http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesPub.pdf
- Hannaford-Agor, P. and V.P. Hans. "Nullification at Work? A Glimpse From the National Center for State Courts Study of Hung Juries," 78 Chi.-Kent L. Rev. 1249 (2003).
- King, N.J. "Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom, 65 U. Chi. L. Rev. 433 (1998).
- Marder, N.S. "The Myth of the Nullifying Juror," 93 Nw. U. L. Rev. 877 (1999).
- Note, "Public Disclosures of Jury Deliberations," 96 Harv. L. Rev. 886 (1983).
- Schijanovich, R.Z. "The Second Circuit's Attack on Jury Nullification in United States v. Thomas: In Disregard of the Law and the Evidence," 20 Cardozo L. Rev. 1275 (1999).

* Appellate Briefs available on Westlaw.

PROTECTING THE JURY

What Jurors Know about Nullification
A Study

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Table 1
Knowledge of Possible Sanction of Partaking in Jury Nullification

Question: If a juror in a criminal trial were to find a defendant not guilty, even though the juror believes the evidence has proved guilt beyond a reasonable doubt, which, if any, of the following sanctions or penalties might the juror face under the law? Please answer either yes or no for each possible sanction.

Sanction	Responses	
	Yes	No
1. Could the juror be charged with a misdemeanor? (n=77)	44 (57%)	33 (43%)
2. Could the juror be charged with a felony? (n=75)	27 (36%)	48 (64%)
3. Could the juror be held in contempt? (n=78)	58 (74%)	20 (26%)
4. Could the juror be reported to the jury commissioner for further action? (n=78)	64 (82%)	14 (18%)

Overall result of the combined questions regarding the legality of sanctions: "No" to all of the aforementioned questions indicates one aspect of knowledge of **Jury Nullification**.

Positive response to any of the four questions:
* 90% indicated that they do not know about this aspect of Jury Nullification.

Negative responses to all four questions
* 10% indicated that they do know about this aspect of Jury Nullification.

Table 2
Knowledge of Jurors' Absolute Right to Acquit

Question: Under the law, which of the following describes what a jury can do in returning a verdict?

Action by Juror	Responses	
	Yes	No
1. Disregard the written law and overwhelming evidence of guilt and find the defendant not guilty based upon community standards of right or wrong? (n=77)	20 (26%)	57 (74%)
2. Disregard the written law and overwhelming evidence of guilt and find the defendant not guilty, because the police wrongfully assaulted the defendant after he was arrested? (n=78)	18 (23%)	60 (77%)
3. Disregard the written law and overwhelming evidence of guilt and find the defendant not guilty, because the juror feels the defendant did not commit a moral crime in the juror's eyes? (n=76)	23 (30%)	53 (70%)
4. Disregard the written law and overwhelming evidence of guilt and find the defendant not guilty, because the law isn't fair in this particular case? (n=75)	18 (24%)	57 (76%)

Overall result of the combined questions examining rationales for disregarding the written law and overwhelming evidence of guilt: "Yes" to all of the aforementioned questions indicated another aspect of knowledge of **Jury Nullification**.

Negative response to any of the four questions:
* 92% indicated that they do not know about this aspect of Jury Nullification.

Positive responses to all four questions:
* 8% indicated that they do know about this aspect of Jury Nullification.

Table 3
Summary of Respondents' Knowledge of Jury Nullification

	Knowledge	Lack of Knowledge
Knowledge of Jury Nullification according to sanctioning questions (Table 1).	10%	90%
Knowledge of Jury Nullification according to questions pertaining to jury's ability to disregard the written law in different situations (Table 2).	8%	92%
Full knowledge of Jury Nullification, taking into account both previous questions.	0%	100%

Table 4
Knowledge of Possible Sanctions for Partaking in Jury Nullification

Question: If a juror in a criminal trial were to find a defendant not guilty, even though the juror believes the evidence has proved guilt beyond a reasonable doubt, which, if any, of the following sanctions or penalties might the juror face under the law? Please answer either yes or no for each possible sanction.

Sanction	Responses	
	Yes	No
1. Could the juror be charged with a misdemeanor? (n=320)	122 (38%)	198 (62%)
2. Could the juror be charged with a felony? (n=320)	77 (24%)	243 (76%)
3. Could the juror be held in contempt? (n=323)	180 (56%)	143 (44%)
4. Could the juror be reported to the jury commissioner for further action? (n=323)	207 (64%)	116 (36%)
Overall result of the combined regarding the legality of sanctions: "No" to all of the aforementioned questions indicates one aspect of knowledge of Jury Nullification.		
Positive response to any of the four questions:		
231		
Positive responses to all four questions:		
89		
* 72% indicated that they do not know about this aspect of Jury Nullification.	* 28% indicated that they do know about this aspect of Jury Nullification.	

Table 5
Knowledge of Juror's Absolute Right to Acquit

Question: Under the law, which of the following describes what a jury can do in returning a verdict?

Action by Juror	Responses	
	Yes	No
1. Disregard the written law and overwhelming evidence of guilt and find the defendant not guilty based upon community standards of right or wrong? (n=325)	80 (25%)	245 (75%)
2. Disregard the written law and overwhelming evidence of guilt and find the defendant not guilty, because the police wrongfully assaulted the defendant after he was arrested? (n=325)	106 (33%)	219 (67%)
3. Disregard the written law and overwhelming evidence of guilt and find the defendant not guilty, because the juror feels the defendant did not commit a moral crime in the juror's eyes? (n=325)	81 (25%)	244 (75%)
4. Disregard the written law and overwhelming evidence of guilt and find the defendant not guilty, because the law isn't fair in the particular case? (n=325)	100 (31%)	225 (69%)
Overall result of the combined questions examining rationales for disregarding the written law and overwhelming evidence of guilt: "Yes" to all of the aforementioned questions indicates another aspect of knowledge of Jury Nullification .		
<div> <div>Negative response to any of the four questions: 283</div> <div>Positive responses to all four questions: 42</div> </div>		
<div> <div>* 87% indicated that they do not know about this aspect of Jury Nullification.</div> <div>* 13% indicated that they do know about this aspect of Jury Nullification.</div> </div>		

Table 6
Summary of Respondents' Knowledge of Jury Nullification

	Knowledge	Lack of Knowledge
Knowledge of Jury Nullification according to sanctioning questions (Table 4) (n=320)	89 (28%)	231 (72%)
Knowledge of Jury Nullification according to questions pertaining to jury's ability to disregard the written law in different situations (Table 5) (n=325)	42 (13%)	283 (87%)
Full knowledge of Jury Nullification, taking into account both previous questions. (n=320)	19 (6%)	301 (94%)

