

LEGAL SERVICES

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MEMORANDUM

February 26, 2014

SUBJECT: Jury Nullification; HB 315 (Work Order No. 28-LS1467\U)

TO: Representative Tammie Wilson
Attn: Barbara Barnes

FROM: Doug Gardner
Director

You provided an e-mail attachment of a bill from New Hampshire described as N.H. Rev. Stat. sec. 519:23-b, which provides that a court shall provide the following jury instruction during a trial:

The concept of jury nullification is well established in this country. If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision.

This statute also provides that if this instruction is not given by the court to the jury in a criminal trial, that a mistrial shall be declared.

Jury nullification is not the law in Alaska, and was rejected in *Harley v. State*, 653 P.2d 1052 (Alaska App. 1982). In *Turney v. State*, 2000 WL 422636, p.4 (Alaska App.), Court of Appeals Judge David Mannheimer provided the following discussion regarding jury nullification, summarizing the arguments some persons make in support of jury nullification, and the argument others provide against it:

The first principle is that all persons are entitled to have their cases decided by unbiased juries and judges, based on established rules of law and the evidence presented in court. Not just litigants, but all members of society have a right to demand that court decisions be based on the merits of the case, not on the personal prejudices or private interests of the decision-makers. To ensure that the people who decide the outcome of trials are not swayed from their duty, society has enacted laws to deter and punish those who would exert outside influence on juries and judges.

The competing principle is that citizens have a right to speak out against perceived injustices in our system of government. The First Amendment

guarantees the right to condemn unfair laws and to protest unfair actions taken by public officials. Legal proceedings often become the focal point of disputes concerning the fairness or adequacy of our laws, or the wisdom or justice of particular government actions or policies. For this reason, courthouses have traditionally been the site of speeches, demonstrations, and protests.

With this backdrop, and the policy considerations summarized above, which are for the legislature to decide, I turn to your question. In my view, your question involves policy and judgment regarding whether the New Hampshire statutory language should in whole, or part, be used to amend HB 315. It seems to me, that there are three points on which HB 315 and the New Hampshire statute differ, and choices could be made by the legislature regarding concepts to include in HB 315.

First, the New Hampshire statute requires that a court provide a jury instruction, as set out above, regarding jury nullification in all criminal cases.¹ HB 315 provides that nullification is a matter that can be addressed, not by way of a jury instruction, but by way of evidence the *defendant* chooses to introduce at trial, or during jury selection. So, under HB 315, nullification is in the control of the defendant, and is not an issue raised by the court or the state. I also note that HB 315 prevents jurors from being excused or disqualified from serving on a criminal jury based on their views regarding nullification.

If you would like to include the instruction to the jury on nullification in the same manner as N.H. Rev. Stat. sec. 519:23-b, at a minimum, a bill draft would require a direct court rule amendment, amending Criminal Rule 30, to provide that the court must advise the jury on nullification in all criminal cases, and would also require an amendment to Criminal Rule 24 providing that jurors can not be challenged for cause, or removed by exercise of a preemptory challenge, for expressing a view on jury nullification. A direct court rule amendment requires a vote of two thirds of each body, as provided in art. IV, sec. 15, Constitution of the State of Alaska.

In addition to the court rule amendments that would be required to add the jury instruction and juror disqualification aspects from N.H. Rev. Stat. sec. 519:23-b, and the two-thirds vote, I want to also note, a limitation on legislative power to amend rules that involve the court's inherent judicial power under art. IV, sec. 1 of the Constitution of the State of Alaska. If the Alaska Supreme Court or Alaska Court of Appeals reviewed the court rule changes required as discussed above, and determined that advising the jury and providing jury instructions as required for the unique facts of a criminal jury trial is

¹ In *State v. Prudent*, 13 A.3d 181, 184 (N.H. 2010), I note that a case was appealed by a defendant where the court presented a substantial discussion of jury nullification. The defendant argued that the discussion went beyond what was necessary under New Hampshire law, and "chilled" the jury's ability to nullify. For this reason, the legislature might want to provide specific language for the court to read to the jury in nullification cases to avoid such disputes.

within the inherent judicial power of the court under art. IV, sec. 1, Constitution of the State of Alaska, incorporating the jury nullification language into the jury instructions under Criminal Rule 30, would be beyond the legislative power of amendment, and unconstitutional. See generally, *Citizens for Tort Reform v. McAlpine*, 810 P.2d 162 (Alaska 1991); *In re Stephenson*, 511 P.2d 136 (Alaska 1973).

Second, in HB 315, once the defendant raises the issue of jury nullification by admitting evidence in support of a nullification argument, HB 315 allows the state to respond in rebuttal with similar evidence. The New Hampshire statute is silent on this matter. Generally, when one party is allowed to present evidence and open the door to areas on inquiry, such as evidence in support of nullification, the state is allowed to rebut this evidence as allowed by the court.²

Third, the New Hampshire bill provides that it is automatic grounds for a mistrial if during a criminal trial, the court fails to advise the jury on nullification as set out above.

Because jury nullification encourages jurors to disregard the law and apply their own sense of justice in criminal cases, and because jury nullification is contrary to the law in Alaska, it is hard for me to advise you on which, if any, of the provisions in the New Hampshire bill should be included in HB 315. These choices seem to me to be policy considerations. Please let me know if you would like any proposed amendments to the bill, or a proposed committee substitute incorporating any of these policy decisions in a new version.

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² In *State v. Mueller*, 2014 WL521390, N.H. June 30, 2014, the defendant presented an argument on nullification, and the state responded, arguing that the comments made by the defendant regarding nullification amounted to an admission that the defendant had committed the offense charged. The trial court appears to have allowed the state to respond and rebut the defendant's argument. The appellate court reversed the conviction, holding that the state took the defendant's nullification remarks too far, and incorrectly argued to the jury that the defendant's nullification argument was a confession to the offense. In short, this case suggests that nullification raises issues that are not otherwise admissible, and that may cause the state, in response, to rely on arguments and possibly rebuttal evidence that can be highly prejudicial. The *Mueller* case suggests that once nullification arguments are raised, it may be difficult for the court to prevent prejudice to the defendant as the state responds to the defendant's arguments.