HOUSE BILL NO. 463

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SECOND LEGISLATURE - SECOND SESSION

BY REPRESENTATIVES COGHILL, Hayes, James

Introduced: 2/19/02
Referred: Judiciary

A BILL

FOR AN ACT ENTITLED

"An Act relating to juries; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

*** Section 1.** AS 09.20 is amended by adding a new section to read:

Sec. 09.20.085. Role of jury. (a) Except as otherwise provided by law, the jury is the exclusive judge of the facts. The jury is bound to receive the law from the court and be governed thereby, except if a jury determines that a defendant is guilty according to the law and that the law is unjustly applied to the defendant, the jury may determine not to apply the law to the defendant and find the defendant not guilty or guilty of a lesser included offense.

(b) A defendant has the right to inform the jury of the jury's power to judge the just application of the law and to vote on the verdict according to conscience. Failure to allow the defendant to inform the jury of the jury's power is grounds for a mistrial.

(c) Notwithstanding any other law, the court shall allow the defendant to present to the jury, for its consideration, evidence and testimony relevant to the

exercise of the jury's power under this section.

(d) The state may rebut any evidence introduced under this section with evidence of a similar nature.

(e) This section applies only to an action tried to a jury under applicable law. This section does not create a right to a jury.

(f) A potential juror may not be excused or disqualified from serving on a jury because the juror expresses a willingness to exercise a power granted to the jury under this section.

*** Sec. 2.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. This Act applies to juries impaneled on or after the effective date of this Act.

*** Sec. 3.** This Act takes effect immediately under AS 01.10.070(c).

instead, HB 396 focuses on collecting funds to purchase equipment that would assist law enforcement agencies in fighting alcohol-related crime. He opined that in addition to assisting law enforcement officers, a lot of the equipment that would be purchased with HB 396's surcharge monies could also shorten the time and frequency, and therefore the expense, of going to trial, because better evidence will be collected. With regard to the amount of the surcharge proposed in HB 396, he offered that the APD does not feel that $100 is too much. People who go out drinking often spend $100 very quickly, he observed; therefore, if people can afford to spend $100 on alcohol, they can afford the surcharge, and if for some reason they can't, there is the option of performing community work service. He asked the committee to continue its work on HB 396 so that the bill can become an effective law.

CHAIR ROKEBERG announced that HB 396 would be held over.

HB 463 - INFORMED JURY

Number 2001

CHAIR ROKEBERG announced that the last order of business would be HOUSE BILL NO. 463, "An Act relating to juries; and providing for an effective date."

Number 1982

REPRESENTATIVE COGHILL, speaking as the sponsor, explained that HB 463 addresses the role of the jury and what has come to be known as "jury nullification." He relayed that Section 3 of the [Alaska Statehood Act] says, "The constitution of the State of Alaska shall always be republican in form and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence"; that the Constitution of the United States starts out with the words, "We the People"; and that the Declaration of Independence states, "[all men ...] are endowed by their Creator with certain unalienable Rights," which, he inferred, included forming governments "for justice and for the various other things that were declared." He opined that in order to bring [about] a republican form of government, "we want a constitution, and we want the people to have the right to maintain their government," adding that there were several ways to accomplish that: "we do it by voting; we do it through referendums; [and] we do it through this legislative body, the judicial body - through the three branches of government."

REPRESENTATIVE COGHILL then remarked, "We also have the people having the right to, really, judge the law, if you think about it." Quoting from the Declaration of Independence, he said: "... Men, deriving their just powers from the consent of the governed, ... it is the Right of the People to alter or abolish it...." He observed that "the way we stay engaged, quite often, is through the jury process." He said that via HB 463, he is asking that Alaska consider the proposition that the jury is the exclusive judge of the facts, that a jury may determine not to apply the law to the defendant under the condition that the jurors feel the law "is unjustly applied," that the defendant has the right to inform the jury of that particular right, and that - per statute - the court allow the defendant to do so. He noted that HB 463 has some safeguards built in: for example, the state may rebut the evidence, it only applies to an action tried [by] a jury, and a juror can't be excused if he/she is willing to exercise his/her "powers." Representative Coghill said that HB 463 is coming from [his] deep-seated belief that "our constitution" needs continual maintenance and protection.

Number 1816

CHARLES KEY, Executive Director, Fully Informed Jury Association (FIJA), testified via teleconference in support of HB 463. After mentioning that he was an Oklahoma State Representative from 1986 to 1998, he noted that he'd proposed similar legislation in Oklahoma. He said that HB 463 is important because it allows the citizens on a jury panel to fully exercise and understand their role and responsibility when serving. He remarked that the history of jurors' rights is very well established and [those rights have] been affirmed by federal and state courts time and time again in various decisions and statements.

MR. KEY said:

> The benefits of the jury being able to know and use this right and this power has many other residual benefits, which would include allowing legislators ... to know what the community ... thinks about certain laws from time to time. Some historical examples of that would include the fugitive slave laws in the early 1800s, and other laws related to slavery; it was juries - mostly white Americans - that continued to bring in "not guilty" verdicts regarding people that were actually guilty of breaking the law and harboring

runaway fugitive slaves. Some other examples would be Prohibition, and we could point [to] others in which the conscience of the community, the conscience of the citizenry, was brought to bear on the system to bring about important changes. I would urge you to support this legislation; I think it would be very beneficial and pay great residual benefits to the state of Alaska. And, hopefully, it will have an affect on the rest of the nation.

Number 1656

LARRY PRATT, Executive Director, Gun Owners of America, testified via teleconference in support of HB 463. He described the case of a man who defended himself from four armed attackers, with a gun he did not have permit for. He was convicted, after which three of the jurors went to the defense attorney and relayed that they felt they were forced into handing down a conviction because the judge commanded the jury to follow his [instructions] regarding the law. Had those jurors been informed about [jury nullification], he surmised, they would have been able to make a decision based on their conscience.

Number 1520

NANCY LORD JOHNSON, M.D., J.D.; Member, Board of Directors, Fully Informed Jury Association (FIJA), testified via teleconference in support of HB 463. After noting that she is a private attorney in Pahrump, Nevada, she said she finds HB 463 to be an excellent bill. She elaborated:

It addresses the problem faced in courts today when jurors are deprived of their traditional right to prevent the oppression by the government, even when they learn of this right from outside sources. The general trend has been to inform jurors they have a duty to follow the court's instruction, and leave them to learn [of] their right to jury nullification to informal or unofficial sources; this has been documented in numerous cases. Unfortunately, over the past few years, there have been several attempts around the country to prosecute persons for even distributing this truthful information on the jury's historic right, and this legislation would put an end to that, at least in Alaska.

There was a case in Colorado where a juror was prosecuted, allegedly for failing to volunteer her potential bias against a particular law, and she was charged with that; well, the real reason is that she gave jury information to her fellow jurors. In another case that I tried in Pennsylvania, the foreman attempted to get a juror off the jury because he claimed that she indicated she would not follow the law - when, in fact, she had a problem with the government's facts, which was her duty as a juror.

We have a lot of unfair laws about firearms. Now, what is a firearm? A firearm should be a gun that shoots, but people have been prosecuted for "kits" and for other guns that couldn't be fired, and the deficiencies get instructed away by the prosecution. I tried a hemp case several years ago where people were prosecuted for planting seeds that were just bird food; the inability to reproduce was defined as inability to sprout, and that distinction was, again, instructed away, and they were only saved from conviction because one of the jurors happened to be a biologist.

Number 1462

MS. JOHNSON continued:

I do a lot of work with the [Food and Drug Administration (FDA)], and we get charges of unapproved new drugs when people are selling vitamins. There was also a case in Texas where a doctor was prosecuted for innovative products that had saved the lives of children with brain tumors. And then we have conspiracy - as (indisc.) once wrote, "the darling of the prosecutor's nursery".... And in all of those cases jurors had a gut sense - they found it on their own factual findings - that the person had done nothing morally or legally wrong, but the instructions get so technical that only a very highly skilled trial attorney and strong-willed jurors can fight the judicial pressure to convict.

It sometimes becomes, almost, directing a verdict of conviction. This bill would make that impossible. The power of the jury to nullify is well recognized; it's been established for centuries. Three states -

Georgia, Maryland, and Indiana - specifically mention this power and allow the lawyers to argue that the juror can judge the law as well as the facts, and this has not resulted in any disruption of their court proceedings.

The bill would remove Alaska from the number of jurisdictions that do not permit specific jury instructions regarding nullification. And I think it's a very good bill and would benefit Alaska enormously. This is a power that has been recognized uniformly throughout the country, and while it's been questioned, there is no means to compel a juror to convict. This would only make the rule clear. The jurors would be told exactly what their rights and powers are, and it would eliminate the confusion and some of the litigation we've had concerning the historic role of juries.

Number 1331

DAVID C. BRODY, J.D., Ph.D.; Associate Professor and Coordinator, Criminal Justice Program, Department of Political Science, Washington State University Spokane, testified via teleconference in support of HB 463. He said:

Through my graduate school training and my work as a professor, I've done a great deal of research, both legally and social-scientifically, regarding the issue of jury nullification. And I don't belong to any organization; I'm just going to ... speak about what my research has shown and what the general research has shown regarding the effects of such a bill as is being considered today. Without getting into whether or not it's legally appropriate to instruct juries regarding nullification - because I think it is mandated, but regardless of that point - I think that almost every one would agree that there are times when we want juries to nullify. There are appropriate times where laws aren't fair when applied and are inappropriate, or prosecutors have overcharged. And in those instances, which are quite rare, we want the jury to do the right thing and say, "Not guilty."

As it stands now, we're rolling the dice hoping that, in such cases, [the] jurors know that they have that right - that they'll figure it out themselves. And

the reality of the situation is, they don't know that. I've conducted research in New York state, where we did a survey of residents regarding whether or not they knew of jury nullification. And it wasn't worded that inartistically, but that's essentially what it came down to. And the vast majority of people had no idea what jury nullification is: they had no idea that they could find someone not guilty for various reasons or no reason whatsoever.

Number 1098

MR. BRODY continued:

So, when we put jurors in a situation where we want them to do something, without telling them what to do, we're essentially causing them a great deal of frustration and defeating the purposes of what the jury system is all about. The jury system is [designed] to put the individual citizen in a position to judge his peers and to be the conscience of the community, and to be able to do that, they have to know exactly what they can do. In reality, just because jurors are told that they have the power to nullify, it's very, very, very rare that they're going to do it. There aren't too many people that support murderers or rapists and things of that nature, where they're going to find, because they feel like it. It's not going to happen. And it's especially not going happen when you have unanimous-verdict requirements, where you have to have 12 jurors agree on acquittal.

In my opinion, if you have 12 people agree that a law is unjust, that is the conscience of the community, and that should tell the legislature - or, more specifically, the prosecutor - something. An important aspect of this, which a lot of people have concerns over, is you'll end up with jurors that will let drug defendants off or abortion protestors off or things of that nature, just because they don't feel [the] laws are just. Well, we have jury selection processes that deal with that: prosecutors have a duty to "voir dire the jury" and find out whether someone is in favor of marijuana being legalized, or something of that nature. And if they find that out, I'm sure they will use a preemptory challenge or

challenge for cause to remove that juror. So, the concern that runaway juries with specific agendas will take place, I find [that to be] kind of a specious argument because the people with true agendas can be weeded out through the jury selection process.

MR. BRODY, in summation, said of HB 463:

There is very little risk of harm involved in it. It will only affect a minority of cases, and it won't lead to an abundant number of acquittals; it won't lead to anarchy. There is very little harm that can be done, but for individual people and individual cases, it can be the difference between being free and being in prison. And the last item I mention is kind of political-scientific. It is: giving juries this power and letting them know they have this power is a good message to society and the community, and it gives people an increased sense of trust in the government - an increased sense of trust in the court system. [It] makes them feel part of it, which increases social capital, which can increase the community ... development and make society a much more healthy place for people to live. Thank you.

Number 1054

REPRESENTATIVE JAMES asked why jury nullification was suppressed.

MR. BRODY said that there are a lot of theories regarding that phenomenon. He offered that the cynic would say that judges and lawyers didn't trust individuals and thus wanted to keep the power in their own hands; they didn't want outsiders to have this power. Essentially, nullification instructions were required up until the late 1800s, when, in the case of Sparf and Hansen v. U.S. [156 U.S. 51 (1895)], the [U.S.] Supreme Court said that jurors do not have the right to nullify. Up until then, they did, he explained. He noted that the leading case nowadays is the [1972] case, U.S. v. Dougherty, and essentially the argument used is that [jury nullification] will lead to anarchy, that juries will be acquitting defendants left and right because they feel like it, and won't be reigned in. No research has ever shown that would ever occur, he argued, adding that in Maryland and Indiana, where jurors have been instructed consistently about the right of jury nullification, with the

exception of "post Final Four riots" such practice has not created a problem.

CHAIR ROKEBERG noted that according to information in members' packets, 23 states have jury nullification provisions in their constitutions specifically related to libel/sedition cases. He asked Mr. Brody to comment.

MR. BRODY said that those provisions in those constitutions are specifically limited to libel and sedition cases. He noted, however, that some constitutions have general jury nullification provisions; for example, the Maryland constitution requires that jurors be the judge of both law and fact. He did acknowledge, however, that in the 1980s, the Maryland supreme court essentially got rid of that provision by saying that it only applied to cases in which the supreme court hadn't previously decided what the law is. States have not applied [jury nullification provisions] to criminal prosecutions, he observed, and in states where those provisions are part of the constitution, jurors' ability to [engage in jury nullification] has been reduced over time.

Number 0779

JACK POLSTER, Member, Fully Informed Jury Association (FIJA), testified via teleconference in support of HB 463. He said he would suggest that jurors have both the right and the power to nullify law, but that they have simply not been made aware of that fact in the recent past. He noted that formerly, churches and private schools routinely informed the citizen of the right and the obligation to nullify. Back then, he observed, society considered it an obligation to "apply nullification to conscience when appropriate." According to his understanding of the Sparf [and Hansen] decision, he said, it was determined that the court no longer had the obligation to inform jurors that they had the right to nullify law; instead, jurors were effectively told that they were expected to come to court as informed jurors, already aware of their rights. He posited that it is still questionable whether the courts have determined that the right to nullify does not exist.

MR. POLSTER relayed that he occasionally goes to the courthouse when jurors have been called to serve, and hands out brochures to them before they have been impaneled; these brochures are put out by FIJA and provide basically the same information being presented to the committee regarding jury nullification. He noted others [in the community] routinely handout these

brochures, and they do it politely and without obstructing traffic. He said he has noticed that after being handed a brochure, many people are "put out" because they have never been informed about jury nullification; the schools have failed in that regard. He remarked that this failure on the part of government schools to provide this information is something that he would expect. The purpose of FIJA, he explained, is to provide information about the right to nullify and its importance; in addition to providing brochures, FIJA also conducts speaking engagements for small groups.

MR. POLSTER provided the following example of jury nullification:

> Way back when, a large group got together and convinced Congress that drinking of alcohol - actually, it was the selling, manufacturing, and distributing of alcohol - was inappropriate. After a while, the feds became so unsuccessful in their convictions - because of the fact that jurors, conscious or unconsciously, were aware of the possibility of jury nullification, [and] were sitting on juries and saw that their friends and relatives were in effect selling, manufacturing, [and] distributing in violation of the law and yet they were not truly a threat to the community. And they chose to acquit on that basis. And effectively the feds had to come back to the states and beg to get that monkey off their back, which eventually occurred, as you know. I'm not a drinker, I don't approve of it, [and] I'm rather neutral on the issue, but I am very definitely in favor of the concept of jury nullification appropriately applied.

CHAIR ROKEBERG asked Mr. Polster whether there was a particular incident that generated his interest in this subject.

MR. POLSTER said: "No, I've never been in court; I am a member of the Libertarian Party, [and] I would think the purpose of government is to protect rights rather than grant privilege...."

Number 0507

RUDY VETTER testified via teleconference in support of HB 463. He said that he agrees 100 percent with everything Ms. Johnson and Mr. Key said about jury nullification. He remarked that back when everyone was told that the law was the divine right of

kings, the Magna Carta gave the people of the world the freedom to contradict [laws] that constitute a breach of conscience.

Number 0414

FRANK TURNEY, Member, Fully Informed Jury Association (FIJA), testified via teleconference in support of HB 463. After thanking Representatives Coghill and Hayes for bring HB 463 forth, he mentioned that he'd provided the committee with a web site [address] by which to retrieve an essay by Lysander Spooner - "Trial by Jury" - and remarked that Mr. Spooner is one of the great historians with regard to the role of the jury. He also noted that he'd sent the committee some quotations from the Founding Fathers and the courts regarding the role of the jury. He acknowledged that the Fairbanks city founders had introduced and passed a resolution similar to HB 463 a number of years ago regarding the rights of the jury, although the Fairbanks [North Star] Borough assembly failed - by three votes - to pass a similar resolution.

MR. TURNEY mentioned that to William Penn one could attribute many of the freedoms enjoyed today: freedom of speech, freedom of assembly, freedom of religion, and freedom of the press. He acknowledged and thanked Mr. Key and Ms. Johnson for their testimony regarding jury nullification. Mr. Turney said that in addition to supporting HB 463, he is in support of any legislation that calls for informing the jury of its true rights, powers, and responsibilities. He opined that what is needed is a re-education of the citizens with regard to this issue. Referring to [subsection] (f), which says, "A potential juror may not be excused or disqualified from serving on a jury because the juror expresses a willingness to exercise a power granted to the jury under this section", he indicated that this [subsection] in particular is badly needed. He mentioned that he hoped the committee would pass HB 463.

Number 0190

SENATOR DAVE DONLEY, Alaska State Legislature, testified in support of HB 463. He opined that as society gets more complex, it seems as though governments are more often telling American citizens what to do rather than the other way around. He expressed concern that the judicial branch, over the years, is driving a wedge between [current practice] and the true meaning and original purpose of the jury system.

CHAIR ROKEBERG asked Senator Donley what value the legislature has, then, with regard to turning over to the public the determination of criminal matters.

SENATOR DONLEY said:

> I believe in the theory of jury nullification. I do believe that when government goes too far, I believe [that] the jury should have the option to make that decision. I believe it's the ultimate safeguard between a tyrannical government and justice and fairness within the judicial system. I'm also very concerned about the development where lawyers, more and more, become like a ruling oligarchy in our society in that they control the courts and the courts really have been more and more acting without limits or bounds that were originally intended under the United States Constitution. And as they absorb more and more of the power to themselves, they've tried to reduce the role of the jury more and more and increase the role of lawyers and judges. And I find that very concerning, and I think that a fully informed jury is just a very small, but meaningful, step towards creating a better balance in that system.

CHAIR ROKEBERG said: "So you don't think we're ceding any of our legislative authority by doing this, because the usurpation of our authority by the courts is more egregious than giving the average citizen - as a juror - the right to nullify a law. Is that correct?"

SENATOR DONLEY said: "Especially in this state ... where we don't elect our judges and we don't confirm our judges." He opined that states which do elect their judges [and/or] confirm their judges - as is done at the federal level - have an additional check and balance in place.

TAPE 02-41, SIDE A
Number 0001

SENATOR DONLEY mentioned that he thinks this leads to difficulty in achieving a separation of powers with the judiciary. He opined, however, that the issue is not so much one of separation of powers as it is one of the powers of the citizens versus their government. He said he believed that [having] a fully informed jury is a very reasonable proposal and allows citizens to have a final say in what is fair.

REPRESENTATIVE JAMES mentioned that it appears as though one of the court system's concerns is that costs will go up because, since the public will be aware of nullification, no one will be willing to plea bargain, and so everything will have to go all the way through the court system.

SENATOR DONLEY said:

> Obviously, the courts have the best of all worlds now: ... they get to determine what their powers are. And the lawyers: you know, we all have a license to practice law, and that gets us past the bar and makes us, ... within the judicial system ..., more influential than the average citizen. And I'm very concerned about that. And I can see where the judges and the lawyers don't want their power taken away from them, but I really believe that this is a democracy and not an oligarchy, and it shouldn't be an oligarchy run by just lawyers: it should be run by the people. ... I think this is a fair proposal. ... When you go back over the history of time, ... the juries have become almost the opposite of what they're intended to be in the first place. ...
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> When the juries were first created in the English system, they were typically people who knew something about the case - they were people who were witnesses, they were people who knew the parties in the case - that's how they were selected. And over time, as the judiciary wanted to exert its power more and more over the citizens, that whole philosophy changed. And now, my goodness, if you know anything about the case, that becomes grounds for you not being allowed to even sit on the case or to be a citizen that participates in the jury process. It's come full circle from where it was originally intended to be, and I don't necessarily support that.

SENATOR DONLEY concluded:

> I think there are reasonable controls over who should sit on juries and [to] prevent conflicts of interest and ensure fairness; at the same time, if you look systemically back over time, you can see how we got here. And I don't think it's [necessarily] the best solution ... to keep the jury from knowing relevant,

appropriate facts. And it seems lawyers more and more want to manipulate the system to do that, and I just simply disagree with it. I support the legislation.

Number 0280

KEANE-ALEXANDER CRAWFORD testified via teleconference in support of HB 463. He said:

> First, and I mean this with absolute deference and the utmost respect, the legislature doesn't make law and really can't make law, any more than a gold miner makes gold. All laws are, already - and Representative Coghill mentioned it and it's mentioned throughout our Declaration if Independence - the laws of nature and nature's god already exist. And all I can ask you as the legislature to do is to choose to recognize that law. This bill really isn't going to give anybody any rights if it passes; all it's going to do is recognize the right that does exist, has existed, and will always exist 'til the end of time while there's people on this earth. ... It's the last barrier the citizen has.... And trial by jury is very important, and [HB 463] won't really do everything - there's lots of little ... [problems to solve] - but it's good, and I like it, and I'd really appreciate it if the legislature took their time to recognize this right. Thank you.

Number 0420

MARY JANE OWENS testified via teleconference in support of HB 463. She said simply that it is bound to be a benefit to the citizenship and to the [legislature] in being able to evaluate "what you're doing." "You can't really say you have a government by the people when the people are not allowed their voice in such a basic matter," she added.

Number 0480

PATRICIA MICHL, J.D.; Member Board of Directors, Fully Informed Jury Association (FIJA), testified via teleconference in support of HB 463. She commended Representative Coghill [for sponsoring HB 463], said she fully supported it, and urged the committee to do so as well. She said:

First of all, I'd like to point out that in our country today, many people feel disenfranchised and disconnected from their government. This legislation will help citizens feel prouder to be citizens and to serve on juries. This legislation preserves the integrity of the jury system, which has been eroded - as has been pointed out numerous times in this testimony today. Specifically, in subsection (f), we refer to the fact that a potential juror cannot be disqualified or excused because of their willingness to exercise this power.

Right now what we're doing is we are taking people off juries because they exhibit a willingness to judge the law, or a propensity to judge the law or be critical of the law; we're actually losing our very best and most conscientious jurors because of the present voir dire practices, and subsection (f) would eliminate that. Also, regarding the judge, I think there's been some concern expressed by the committee about the role of the judge [and] the legislature. This statute does not allow the jury to repeal laws; it merely allows the jury to sit in judgment of one defendant on one case. But, of course, if you have a series of acquittals or hung juries in a particular area of the law, then we have a very institutionalized message being sent you, the legislators, so you can take appropriate action on that law.

And also I'd like to point out that we already have jury nullification codified in almost every state: our self-defense laws, right now, are actually jury nullification. They're saying that, yes, there was a crime committed, technically, but there was a very good reason for that crime being committed and, therefore, the defendant should be blameless. We also have the privilege of necessity; we have the battered woman's syndrome - that usually is where a battered person has assaulted the abuser or killed the abuser, and the person is allowed to make arguments to the jury regarding the reasons for doing that - and that is really jury nullification. So it's nothing new.

Number 0667

MS. MICHL concluded:

And in the state of Washington we have, actually, a nullification statute that allows ... - for many reasons, like I think there are approximately 12 reasons stated in the statute - for prosecutors not to prosecute a case even though the statutory elements have been met. So the prosecutors are allowed to exercise mercy, and I feel the jurors should be allowed to exercise mercy also. The jury is really the forth branch of government. It's one of the very important safeguards that we have regarding our laws, and I urge you to support this measure. Thank you.

CHAIR ROKEBERG asked Ms. Michl to comment on the U.S. Supreme Court's current position in light of the Sparf and Hansen and Dougherty decisions.

MS. MICHL said:

I believe in Sparf and Hansen the Supreme Court said that the jury has the power to nullify the law, but not the right; in other words ... they shouldn't be told about it, but they always have the power to do that. And then [in] Dougherty, the U.S. Supreme Court said ..., "We don't need to inform the jury about their right or their power to judge the law because they already know about it; it's just inherent in the process of being part of the jury." And of course this is very fallacious reasoning, and this is not really good law; it's not healthy for our country.

CHAIR ROKEBERG asked if there have since been other such cases before the Supreme Court.

MS. MICHL said that there have been other cases, among them a federal case that came out of New York, but acknowledged that "none of them have been positive cases - they've been bad cases - that's why we're urging you to turn the corner here." She explained that the New York case involved the court's invading the privacy and the sanctity of the jury room, and actually yanking a juror off the jury because he declared in the jury room, during the deliberations, that he was not going to apply the law because he didn't believe the law was a just law. And the court actually took this person off the jury - in the case of U.S. v. Thomas - and the jury came in with a verdict with only [11] jurors. She noted that there was also a case in California - People v. Williams - in which the verdict was delivered with only 11 jurors because of one juror's willingness

- and expressing that willingness - to judge the law. She opined that these are examples of very bad tendencies, which HB 463 would correct - at least in Alaska.

Number 0900

THOMAS STAHL, Member, Board of Directors, Fully Informed Jury Association (FIJA), testified via teleconference in support of HB 463. He first clarified that "Sparf [and Hansen] is the United States Supreme Court's last word, the Dougherty case was a DC Circuit case, and the U.S. [v.] Thomas is a Second Circuit case." Thus, the U.S. [Supreme] Court's last official word is Sparf and Hansen, 1895. He then mentioned that he is a retired attorney who formerly practiced in Massachusetts, where he first became involved with FIJA during the time of the Roberta Shaffer (ph) trial. He recounted that Ms. Shaffer killed an attacker and was charged with first degree murder, but the jury convicted her of second degree murder. The trial judge, however, forbade Ms. Shaffer from raising a self-defense argument, and this judge's decision was upheld during the appeal process. Because of this decision, Ms. Shaffer "went away for 20 years" for something that she would probably never have even been charged with in Alaska or Washington. He said that after seeing the conscience of the community violated in that manner he became involved with the FIJA.

MR. STAHL said HB 463 stands for the proposition that defendants get to tell their whole story - not that defendants shouldn't be convicted after they tell their whole story, he admitted, but they should at least have that right; the jurors should come away from the process feeling like they have at least heard the whole story and like their verdict really represents their true decision. He opined that HB 463 accomplishes those goals, and that passing it will serve to validate the [judicial] system. He posited that jurors' interpretation of the law is probably closer to what the legislature's intent is than what the judiciary interprets it to be.

Number 1077

MR. STAHL pointed out that there are still a lot of jury nullification provisions in the state constitutions. There are four explicit ones in Maryland, Indiana, Georgia, and Oregon that say that the jury should determine the law in all criminal cases. Granted, he added, the courts do not apply those provisions, but they are still on the books. He noted that there are 20 other states that have declared that the jury shall

judge the law in "seditious libel" cases, which are free-speech cases or First Amendment cases, in which someone is criticizing the government. He relayed that with regard to seditious libel cases, the constitutions of Delaware, North Dakota, Kentucky, Pennsylvania, and Texas have an additional phrase which says, "as in all other cases." He surmised this to mean that the jury would judge the law in seditious libel cases, as in all other cases. He added that Tennessee's constitution uses the phrase, "as in other criminal cases."

MR. STAHL opined that the language in the aforementioned constitutions is a strong indication that jury nullification had a very high value among early Americans. He offered that by just taking the words in those constitutions "on their face," jury nullification still exists as a right, and the judicial interpretations are wrong. He said that HB 463 provides Alaska's legislature with the chance to fulfill the original intent of the framers of several constitutions, which was that juries should judge both law and fact.

MR. STAHL, on the issue of whether HB 463 will increase costs, offered that it will save a lot of money because "prosecutors will quickly learn that they shouldn't even bring cases [to trial] that the community does not support." He opined that had jury nullification been explicitly provided for in Massachusetts in 1975, Ms. Shaffer would never have even been charged when she defended herself and her small children against "a psychopath with a knife." He said that HB 463 will also save money because there will be fewer appeals from defendants, since they will have had their full say during the original jury trial, including offering their own instructions to the jury.

CHAIR ROKEBERG instructed teleconference participants to fax any written testimony to the committee. [Per these instructions, Patrick Dalton, Sharon V. Dalton, and Seymour Mills provided written testimony.]

Number 1248

SIDNEY K. BILLINGSLEA, Attorney; President, Board of Governors, Alaska Academy of Trial [Lawyers] (AATL), testified via teleconference in opposition to HB 463. She said:

> The way the law presently works, the way the system presently works, is that the police arrest somebody - they charge somebody with a crime that's in the statute books. The district attorney's office screens

what the police officers propose to them, and they elect which charges to bring against an individual, from the statute book. The defense really is in a reactionary posture at that point. If the defendant chooses to try the case, the jury, then, is legally the judge of the facts and whether the facts meet the laws - the same laws that you all are down there working on creating. If the facts meet the laws, as charged, the person is generally convicted; if they don't, then the person is generally acquitted or convicted of a lesser included offense. We already have a mechanism for convicting somebody who's accused of a lesser included offense [rather] than the one that they were brought to court on, and that provides some safeguard.

What this [proposed] law generally does is codify jury nullification, which essentially makes a trial a popularity contest. It eliminates the rule of law, and it adds a chaotic element to equal protection for every individual under the Constitution - which equal protection is a constitutional right. It permits verdicts based on subjective reasons which ignore the law, and in Alaska especially, which is such a small state with such small towns and villages, that could be a disaster where individuals are well known. In other words, they could be judged on merits or demerits that have nothing to do with the fact situation that brought them before the jury in the first place.

When I heard the word that jurors should be allowed to discriminate about whether or not they should apply the law or not, it rang a bell to me - a different kind of bell, though, than the Senator. Discrimination is one reason why we have laws; it's the one reason why we have a constitution. People, [as] individuals, are protected by our constitutional laws and our criminal laws from ... the tyranny of the majority. This sort of - especially, again, in small towns - ... would erase that. Another thing that this particular proposal does is it sets up a cognitive dissonance where lawyers and judges who are sworn to uphold the law of the constitution are also ordered, at the same time, to tell jurors that they can ignore the law or the constitution if they feel like it's the right thing to do at that particular time.

Number 1402

MS. BILLINGSLEA continued:

> Subsection (c) and (d) is sort of the free-for-all area of this [proposed] law. It subverts the Alaska Rules of Evidence, most specifically rules 401, 402, 403, and 404, which have to do with the admission of relevant evidence before a jury. ... I can see instances or hypothecate instances where a jury trial could turn into something that looked like the Jerry Springer Show - on both sides: the defense gets to talk about all the things that he has done that merit the jury's consideration for, like, a vote, and the prosecution then gets to back up the dump truck and bring in all the things that are not so pleasant. And pretty soon the jury, hypothetically, has forgotten why they're there in the first place, which is to determine whether one galvanizing incident is a crime or not a crime.
>
> What I can see is that's setting up the opportunity for a lot more hung juries, because people will [then be] permitted to nullify a verdict and, with a lot more hung juries, that means a lot more retrials and that means a lot more prosecution resources going to retrials as opposed to initiation of prosecutions. I think where people need to change the law is legislatively [and] I think where people need to vote is in the voting booth - and not in the jury room. If there's a problem with statutes, we have, again, such a small state and such a small legislature that they are capable of being fairly responsive, on fairly short turnaround time, to problems that are perceived in the jury system. So, I really don't support - I can't support - jury nullification in this [manner].

Number 1509

ANNE CARPENETI, Assistant Attorney General, Legal Services Section-Juneau, Criminal Division, Department of Law (DOL), said DOL is opposed to HB 463 for a number of reasons. She elaborated:

> As legislators, you are elected by all the people of the state to make laws that create an orderly society

for us all. You do so after considering legislation in public hearings, and debating and compromising and coming to a reasonable and just conclusion. After you do that, you expect that people who are responsible for enforcing the laws and judging the facts will do so according to your enactments. I would note that I have heard, occasionally, discouraging comments in these halls about judges who (indisc.) [might] not be applying the law as you wrote it and intended it. After all the work and debate and thought over what our laws should be, I don't understand why you would want to pass a bill that authorizes a jury to disregard the law in every case, and even encourages it to do so.

If this bill were passed ... - and I'm talking about criminal cases because in criminal cases you have to have a unanimous verdict in order to convict a person - one person [on a jury], believing that domestic violence is really an issue that should be addressed at home, could prevent the verdict of conviction in a serious assault case. One person, believing that because a drunk driver did not cause damage to an individual or physical damage when he or she drove drunk for the third time, could ... prevent a verdict of guilty for a felony, or could decide that it ought to be a misdemeanor and, therefore, come back with a misdemeanor verdict or no crime at all. Or one person on a jury, believing that consensual sex between two people is not an issue that the state should be interested in, could refuse to return a guilty verdict when [an] adult engages in, quote, "consensual sex" with a fifteen-year-old or a thirteen-year-old or a ten-year-old. Also, one person, believing that the best approach to the drug problem in this state is to legalize drugs, could refuse to return a verdict of guilty in any drug case.

Number 1602

MS. CARPENETI continued:

These are just some examples. ... The examples given [regarding] murder cases and cases like that are not as troublesome as cases where the law is not as easy to enforce and to apply. Everybody agrees that you shouldn't kill somebody else, [whereas] you have

adopted laws that say the third time drunk driving should be a felony because of the disaster of drunk drivers on our roads. And those are the cases that go to trial that will be problematic in this area. The people of Alaska entrust you to enact laws based on your experience and the knowledge of the public [issues] facing the state. You do so after public hearings, debate, negotiations, and compromise. To then allow and even encourage a single person, in the secrecy of the jury room, to decide that he or she disagrees with you and doesn't want to apply the laws as instructed, is a very bad idea.

If people don't agree with the law, there is orderly procedure to attempt to change it, and one of the hallmarks of civilized society is that we have procedures like this one here, where everybody gets [a] chance to participate publicly before we enact laws. To undermine the law by allowing one person to disagree in the secrecy of a jury room would create chaos.

REPRESENTATIVE JAMES, referring to the examples Ms. Carpeneti spoke of, asked, "Don't you think that those tendencies would be found out in the jury selection?" She recounted that her husband had been called to serve on the jury in a domestic violence case; when asked how he felt about [domestic violence], his reply that he did not think it was right for a man to hit a woman - anytime, anywhere, for any reason - resulted in his being discharged from the jury. She opined that the questions asked of prospective jury members are very revealing.

MS. CARPENETI pointed out that the way HB 463 is drafted, jurors could not be excused if they express the opinion that "they would like to exercise their rights under this [proposed] law."

REPRESENTATIVE JAMES argued that "that's not the only question they're going to ask them; they're going to ask them another list [of questions], and everyone has a right to discharge people based on a lot of different things."

Number 1727

MS. CARPENETI, in response, again pointed out that HB 463 says, "A potential juror may not be excused or disqualified from serving on a jury because the [juror] expresses a willingness to exercise a power granted to the jury under this section" - that

power being the ability to nullify the law that the legislature has adopted. In response to a question, she said that under HB 463, a juror could still be excused with a preemptory challenge, but the types of preemptory challenges that could then be used would be very limited. In response to another question, she indicated that HB 463 raises concerns that "in tough cases," one juror could "return a hung verdict" because of the requirement that everyone on a jury must be convinced beyond a reasonable doubt that the defendant violated the law - as enacted by the legislature through the legislative process. She opined that [the provisions of HB 463] would counteract "all the good work that is done in these halls."

REPRESENTATIVE JAMES asked, "Isn't it true that that can happen now if there is some flaw or some little loophole in the case, that somebody could just refuse to go along with that issue, whether or not they were doing it on their own? What would keep them from doing it now?"

MS. CARPENETI said that juries do nullify prosecutions occasionally: [jurors] take an oath, before they hear evidence, that they will follow the law as the court instructs, but there are times when jurors go outside of that oath and return a verdict according to procedures or laws other than what they are instructed [on]. "It's not a perfect system, but it's the best that we know yet," she added.

REPRESENTATIVE JAMES referred to a piece of legislation that was heard on the House floor earlier that day, and opined that if the provisions of HB 463 were in place, then a jury could decide on the applicability of any broad provisions encompassed in the aforementioned legislation. She offered that legislation would not have to contain such specific definitions if jury nullification provisions were adopted.

CHAIR ROKEBERG said he was not in favor passing "sloppier law" just because the jury could be called upon to "figure it out."

REPRESENTATIVE COGHILL offered that [HB 463] highlights the classic struggle that occurs among the three branches of government as each seeks to fulfill its constitutional duties; each branch of government will always argue that it does not want to give up its power to either of the other two branches. He pointed out, however, that regardless of this inherent struggle, all government originates with the people, and thus it is wrong to hold a condescending view towards the people who serve on juries. He remarked that [via HB 463], he is merely

standing up for the rights of the jury, and does not presume that a jury "is going to get it all right ... every time," any more than any branch of government will. He opined that juries have become blind operatives of the court, and that HB 463 seeks to reverse that trend.

Number 2007

DOUG WOOLIVER, Administrative Attorney, Administrative Staff, Office of the Administrative Director, Alaska Court System (ACS), said that he just wanted to comment on remarks made earlier that [implied] judges are opposed to legislation such as HB 463 because they fear it "undermines their ever-expanding, illegitimate role in society." He pointed out, first of all, that the ACS has not taken a position on HB 463 and, second, that a person is charged with a crime because he/she is alleged to have violated one of the statutes that the legislature has passed, not a statute that judges have passed. Thus, if a jury decides that it is unfair, for example, to convict somebody of a felony just because it's his/her third DWI (driving while intoxicated) but no one was actually hurt, it may undermine the power of one branch of government, but it won't be the judicial branch: it will be the legislative branch's power that is undermined.

MR. WOOLIVER, referring to comments regarding the ACS's fiscal note, clarified:

> We're not asking for any money for this; we're not alleging a flood of new jury trials. Our fiscal note merely states the obvious, which is, under this law, there would be an incentive to go to a jury with a case where you would otherwise plead guilty because you did violate the law - but now you'll have the opportunity to argue that, in your case, the law is unfair. That's an incentive to go to a jury trial; our [fiscal] note merely reflects the fact that we may see more jury trials because of that, but we are not asking for any money in our fiscal note.

CHAIR ROKEBERG announced that HB 463 would be held over.

ADJOURNMENT

Number 2100

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:30 p.m.