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Nullifying Nullification: Will the Second Circuit Prohibit a Defendant's Jury Nullification Defense?

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A petition for a writ of mandamus currently pending before the Second Circuit has reignited an ancient debate over jury nullification—specifically, whether a jury may ever be informed of its power to nullify. In *United States v. Manzano*, the government has asked the Court of Appeals to command District of Connecticut Judge Stefan Underhill to: (1) bar defense counsel from arguing for jury nullification; and (2) preclude any mention of the applicable mandatory minimum sentences, which mention might itself prompt the jury to nullify.

The defendant in *Manzano* is charged with producing and transporting child pornography. The charges carry mandatory minimum prison terms of 15 years and 5 years, respectively, and arise from a year-long sexual relationship between the defendant and a 15-year-old. Originally prosecuted as statutory rape in state court, the defendant was indicted on the child pornography charges after the victim informed state authorities that she and the defendant had recorded themselves on the defendant's phone having sex. Although the defendant had deleted the video from his phone, and is not alleged to have shared it with anyone or placed it on the Internet (the type of conduct Congress had in mind when it enacted the mandatory minimums at issue in this case), he failed to delete it from the phone's back-up Google cloud account, where it was discovered by law enforcement.

Prior to trial, which was scheduled to begin in October 2018, Judge Underhill denied the defendant's request for a nullification instruction and explained that the jury would be instructed to apply the law as given to it by the court. However, Judge Underhill refused to foreclose the possibility that evidence and argument regarding the mandatory minimums might be received at trial. He also expressed his displeasure with the government's charging decision, stating, "This is a case that calls for jury nullification." After the jury was selected, but before it was sworn, the government obtained an adjournment and petitioned the Second Circuit to compel Judge Underhill to prevent defense counsel from pursuing a nullification defense. Interestingly, Judge Underhill appeared (through his attorney, former EDNY Judge John Gleeson) as amicus in the Second Circuit proceedings.

The Second Circuit heard oral argument on Feb. 14, 2019. It has not yet rendered a decision. When it does, it may address whether and in what manner defense counsel may urge a jury to nullify. Although jury nullification is as old as our criminal justice system, the Second Circuit has never expressly held either that a defendant may or may not argue for nullification. On the one hand, courts recognize "the jury's historic function, in criminal trials, as a check against arbitrary or oppressive exercises of power by the Executive Branch." *United States v. Powell*, 469 U.S. 57, 65 (1984). On the other hand, they "categorically reject the idea that, in a society committed to the rule of law, jury nullification is desirable." *United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997).

There is no question that juries can and do nullify. Indeed, the Supreme Court has recognized "the unreviewable power of a jury to return a verdict of not guilty for impermissible reasons." *Harris v. Rivera*, 454 U.S. 339, 346 (1981). And jury nullification has a rich and controversial history. It has been a form of civil disobedience employed by juries for centuries to prevent prosecutions perceived as unjust. English courts recognized this power as far back as 1670 in *Bushell's Case*, where a jury refused to convict William Penn for violating a law prohibiting religious assemblies outside the auspices of the Church of England. The trial judge imprisoned the jurors for contempt when they refused to convict Penn despite his factual guilt. The Court of Common Pleas, however, held that the jury could not be punished simply on account of the verdict it returned.

American colonists continued this tradition. Most famously, in 1735, the lawyer for John Peter Zenger, who was charged with seditious libel for printing harsh critiques of the royally appointed colonial governor of New York, successfully convinced jurors to acquit on the grounds that the law itself was wrong. Our Founders celebrated this type of check on government power. Indeed, John Adams proclaimed that "[i]t is not only [the juror's] right, but his duty … to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court." 2 John Adams, *The Works of John Adams* 254-55 (1850). In the 1800s, juries across the North acquitted fugitive slaves and abolitionists charged with violating the Fugitive Slave Act. In more modern times, juries have used their power to nullify in unpopular prosecutions involving, inter alia, Prohibition-era alcohol laws, marijuana possession, assisted suicide, and anti-war protests. Clay Conrad, *Jury Nullification: The Evolution of a Doctrine*, Cato Institute Press (2014). Juries also occasionally engage in a lighter form of nullification by issuing "compromise" verdicts when a conviction on the most serious charge would be unjust, though factually warranted.

But jury nullification is not always benevolent. It can be, and has been, used to allow the victimization of persecuted groups. For instance, jury nullification has been cited in cases where, despite overwhelming evidence of guilt, all-white juries acquitted white defendants charged with lynching and other crimes against black victims. Id.

The Second Circuit has grudgingly accepted the jury's power to nullify, but it has refused to encourage the practice and has empowered judges to prevent it. Most notably, in *United States v. Thomas*, the Court held that a trial judge may properly remove for cause a juror who refuses to follow the law, so long as the record leaves no doubt that the juror intended to nullify. *Thomas* does not necessarily foreclose Manzano's attempt to argue for jury nullification because the question whether a district court has the discretion, in an appropriate case, to permit defense counsel to argue for nullification was not before the Court. Nevertheless, the strong anti-nullification language found in *Thomas* does not bode well for Manzano. Specifically, the Court stated that "the power of juries to 'nullify' … is by no means a right or something that a judge should encourage or permit if it is within his authority to prevent," and that "trial courts have the duty to forestall or prevent" nullification. 116 F.3d 606, 615-16 (2d Cir. 1997).

It remains to be seen whether the Second Circuit will follow the dicta in *Thomas* and compel Judge Underhill to exercise his "authority to prevent" nullification. If it does, it will be the first circuit to issue such a command, though not the first to conclude that jury nullification arguments are improper (the First, Fourth, and Eleventh Circuits have already so concluded). If the Court declines to issue a writ and leaves Manzano room to argue for nullification, that will raise

difficult questions, which the Court may or may not resolve, such as: Does a trial judge have discretion to allow such arguments? If so, what factors should guide that discretion? And what are the limits, if any, of a permissible nullification argument?

Regardless of whether the Second Circuit allows jury nullification arguments in the abstract, it could significantly weaken Manzano's ability to make such an argument by prohibiting any evidence or mention of the mandatory minimum sentences he faces. However, although sentencing consequences are generally inadmissible at trial, there is no absolute prohibition against their introduction, *Shannon v. United States*, 512 U.S. 573, 587-88 (1994), and the Second Circuit might be hesitant to attempt to determine pre-trial whether exceptional circumstances could arise during trial to justify their introduction.

Of course, the Second Circuit may sidestep the nullification question altogether by ruling that this case does not present a "really extraordinary cause[]" warranting mandamus, or by concluding that the government either has "other adequate means to attain the relief" it seeks or lacks a "clear and indisputable" right to that relief. *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004). In any event, it is possible the Court will issue a decision that sheds important light on the contours of jury nullification, the circumstances under which mandamus is appropriate, and/or the admissibility at trial of sentencing consequences.