

## Senate Judiciary Committee

*Jennifer Horgan 271-3092*

**HB 133**, relative to a jury's determination as to the applicability of law.

**Hearing Date:** April 25, 2017

**Time Opened:** 9:50 a.m.

**Time Closed:** 10:53 a.m.

**Members of the Committee Present:** Senators Carson, Lasky, French, Gannon and Hennessey

**Members of the Committee Absent :** None

**Bill Analysis:** This bill requires the court to instruct the jurors that the jury determines the applicability of the law to the facts of the case.

**Sponsors :**

Rep. Itse  
Sen. Daniels

Rep. Hoell  
Sen. Reagan

Rep. Phinney

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**Who supports the bill:** Representative Itse; Senator Daniels; Representative Baldasaro; Daryl W. Perry (Liberty Lobby LLC); Ian Freeman (NH Jury Rights); Dan McGuire (NH Liberty Alliance); Jay Noone; Will Anderson; Bill Alleman;

**Who opposes the bill:** Representative Keans; Representative Horrigan; Elizabeth Woodcock (Attorney General's Office); Joseph D. Tessier (Hudson Police)

**Who is neutral on the bill:** Howard Zibel (Judicial Branch)

**Summary of testimony presented in support:**

**Representative Itse**

- This bill attempts to correct what happened as a result of legislation passed in 2012.
- That 2012 legislation authorized defendants or their attorney to inform juries of their power to ensure that justice is executed.
- That instruction has ceased to be functional.
- This bill will, instead, inform the judge of what the instruction is to look like.
- The first part is the Wentworth Decision followed by "However if you find that the state has proved all the elements of the offense charged beyond a reasonable doubt, you should find the defendant guilty. Even if you find that the state has proved all of the elements of the offense charged beyond a reasonable doubt, you may still find that based upon the facts of this case a guilty verdict will yield an unjust result, and you may find the defendant not guilty."
- There is a difference between 'should' and 'shall', which is a very important concept.
- The legislature makes laws that are generally applicable, but we are not so wise that we can craft laws to be perfectly applicable to every situation.
- This bill reminds the jury that they have the common law power to say that, that despite everything this is not what they want done in their name.
- In the application of laws, we must ensure justice is not forgotten.

- Senator Lasky asked if this based on the premise that juries don't know the difference between 'shall' and 'should'.
  - When being read juror instruction, the emphasis used can have a huge impact. We often miss the subtleties of the english language and this ensures that the jury is well aware of its power to ensure that justice is done.
- Senator Hennessey asked for an example of when this would apply.
  - Imagine an elderly husband and wife. The wife is suffering from Stage 4 cancer and she begs her husband for more than the regular dose of medication and she dies. Did the husband in fact do something that could be considered murder? Yes, but would it be just to put him in prison?
- Senator Hennessey asked if this asking the jury to make an ethical decision rather than a legal one.
  - Historically, the jury is the trier of fact and one of those facts can be, 'does the law apply to the situation?' A judge knows that they can say that the law doesn't apply to a situation, and we need to ensure that if the jury sees that the law doesn't apply to the situation in fact or because it will yield an unjust result, they know that they have that power.
- Senator Gannon asked if there is already a process in place for the judge throw a jury decision in equity.
  - The judge can, but that is not the will of the community. A jury is justice by our peers, as opposed to resting with an individual.
- Senator Gannon raised concerns over the word 'may' and this resulting in similarly situated individuals receiving different results.
  - The word 'may' is because it is a judgment call by the jury. It is a permissive power. Would not object amending it to say 'shall'.
- Senator French pointed out that this has been used in the past and therefore asked why does it need to be in statute.
  - The 2012 law is not being universally applied.
- Senator Gannon asked if he wants the jury to be the trier of fact and trier of law.
  - Traditionally, the jury is the trier of both. In a limited sense they are the judges of who gets put in office, who makes the laws. There can be an archaic law that the legislature has not amended, but the will of the community is something different. The legislature makes static laws to apply to the vast majority of cases. May be perfect in application of 99.9% cases, but what about that .1% where the law is not adequate.
- Senator Carson asked what is passing another law going to achieve if the courts are already not obeying the 2012 law.
  - The 2012 law requires the judge to allow instruction from the defendant and this puts it in the hands of the judge to explain it.
- Senator Carson asked for statistics of this not happening.
  - After the 2012 law there were some very visible applications of the jury nullification power, and as a result knows certain individuals were not allowed to give that instruction. Will dig that up.
- Senator Carson asked if any complaints have been filed.
  - Not aware of any.

**Ian Freeman** (NH Jury Rights Association)

- Attorneys in NH have the ability to talk about jury nullification, which is not the case in many states.
- During the *Paul* case, when the judge gave his instructions to the jury, the way he

read it was very telling and he put emphasis on certain words.

- Even though the lawyer can make the argument, the judge gets to give the final instruction.
- The jury is going to pay a lot more attention to the judge.
- Under this bill, this instruction is given only if the defense requests it.
- The jury needs to apply their conscience and be informed of their right to use their conscience.
- The point of a jury is to be the final check on an out of control government.
- There are laws in the past that are wrong.
- NH has a law that prohibits sports from being played on a Sunday.
- Right now the deck is stacked against the defendant because the judge and prosecutor are being paid by the state, who have a vested interest in protecting the status quo.
- Bob Constantine was growing marijuana to use for medical purposes and the jury was able to nullify his decision, bringing him down from drug manufacturing to a simple possession charge.

#### **Jay Noone**

- The jury determining the application of the law is a very important element of jury nullification.
- Supreme Court Justices, as far back as John Jay, are quoted to say that the jury has the right to judge both the law and the fact in controversy.
- Justice Harlan F. Stone stated in 1941 that, "the law itself is on trial as much as the cause, which is to be decided"
- This bill clarifies that the jury may determine the application of the law.
- Many jurors are unaware of what jury nullification is.
- The jury is the final check against tyrannical laws.

#### **Dan McGuire** (NH Liberty Alliance) (provided written testimony)

- The historical basis of this can be traced back to a case which was instrumental in the recognition of freedom of religion, freedom of assembly, and jury rights.
- In 1670, William Penn was a Quaker and he and his friend were preaching about their religion, which was against the law.
- The judge in the case directed the jury to bring a guilty verdict, but the jury found them not guilty.
- The judge put the jury in jail for two days without food or water.
- After those two days they still refused to find Mr. Penn guilty and so, the judge fined the jury a large amount of money and put them in prison.
- The jury got a trial and that new judge wrote a ruling which established that jurors could not be put in jail for disagreeing.
- This bill contains the current set of instructions with one additional sentence.
- Does not see why we would want to be vague to a jury about what their powers and duties are.
- The final sentence says that if the facts of a case says the guilty verdict is correct, the jury can find the defendant not guilty
- Legislators cannot possibly know every single case and all the outliers.
- In terms of one jury making a different decision than another is already inherent in the system, which is the reason why we have a 12 person jury and require a unanimous decision.
- Wants juries to know what their powers are and wants them to make the just decision.

## Summary of testimony presented in opposition :

### Representative Horrigan

- This power has existed since the dawn of the legal system
- Jury nullification is a good thing, but is not sure if we should encourage juries to disregard the law.
- Sympathetic defendants and unsympathetic defendants could be treated differently.
- There is no way to know how the jury is going to feel about it, so it is best to ask them to be dispassionate about it and apply the law the way it is.
- The sentencing trial can address some of these concerns about justice.
- The Wentworth Case dates back to 1977 where a defendant in criminal trespass trial was involved in a protest against a secret nuclear power plant.
- Not sure this is something that needs to be hardwired into the laws.
- There are some issues with it and doesn't think the statute should be changed.
- Currently, a judge cannot stop the defense from making this argument.
- Should encourage juries to obey the law.
- Senator Gannon asked if this would act as a double safety valve and questioned if he does not trust the wisdom of his peers.
  - Trusts them and the jury does have the right to acquit. Not sure how adding this language will help them in their job.

### Elizabeth Woodcock (Attorney General's Office) (provided written testimony)

- Preamble of the bill says "the only location for this consent is the jury"; that is wrong.
- Part 1, Article 12 says the location for this consent is with the legislature.
- The legislature is who is meant to respond to the will of the people.
- Juries are not elected by the people.
- The Supreme Court came out with a decision in *State v. Paul* on RSA 519:23-a, which strongly suggested that the court might have found constitutional issues if it was a nullification statute.
- "Construing RSA 519:23-a as merely codifying existing law, rather than conferring on the jury a right to judge or nullify the law, is consistent with the doctrine of constitutional avoidance. This well-established doctrine requires us, whenever reasonably possible, to construe a statute so as to avoid bringing it into conflict with the constitution. Were RSA 519:23-a interpreted to grant juries the right to judge or nullify the law, there would be significant question as to its constitutionality."
- Cannot say if the Supreme Court would rule this unconstitutional, but they do not usually use language like that when interpreting statute.
- In terms of the small minority of cases alluded to where courts refuse to give instruction from the 2012 legislation, one of the duties of the Attorney General's Office is to handle appellant cases.
- If court refuses to give an instruction that becomes an issue a defendant can raise in his appeal.
- If a court refused to give an instruction, cannot say what the Supreme Court would do with that, but suspects they would take a dim view of a judge who refused to instruct as required by the RSAs.
- Has been handling appeals for almost 9 years and has not seen one appeal on this RSA.
- Not sure this pandemic really exists.
- Would encourage faith in the people who take the oath.

### Joseph Tessier (Hudson Police Department)

- Is a police prosecutor.
- Concerned that the bill empowers a jury to sit in judgment of the law or ignore the law.
- The Wentworth instruction is subtle and it needs to be because anything more would encourage waiver of statutes.
- When there is obvious injustice that subtly becomes persuasive.
- Protections against injustice could be changing the laws, judgment notwithstanding the verdict, or prosecutorial discretion.
- The Wentworth decision cautions any further refinement of its instruction.
- Anything more than the Wentworth instruction encourages waivers of law.
- This will allow juries to evaluate whether a result will be just or unjust and the jury may not have the whole picture. They could be missing a history of behavior.

#### **Neutral Information Presented:**

##### **Howard Zibel (Judicial Branch)**

- The Court has no position on this bill.
- If this passes, it is likely to be challenged.
- *State v. Carter*, 2014-0167 NH page 161, dealt with the separation of powers and the boundary between court rules and statutes.
- Page 170 of the decision states “statutory enactment prevails over conflicting court rules, unless those enactments compromise the core adjudicatory functions of the judiciary.”
- Therefore, if HB133 passes the question becomes whether or not this statute compromises the core adjudicatory function of the judiciary.
- Cannot answer that only the court can.
- The jury nullification is not a court rule and came from the 1978 case of *State v. Wentworth*.
- *Wentworth* arose out of demonstrations against the Seabrook nuclear power plant.
- Under the Supreme Court’s statutory power, in RSA 490:4, they required the following jury instruction, “the test you must use is this, if you have a reasonable doubt as to whether the state has proven any one or more elements of the crime charged you must find the defendant not guilty. However, if you find that the state has proved all elements of the offense charged beyond a reasonable doubt, you should find the defendant guilty.”
- There is a subtle distinction between ‘you must’ and ‘you should’.
- In an appropriate case, there is nothing wrong with a lawyer explaining this in their closing arguments.
- No judge is going to stop that argument.
- A lawyer will only use this in an appropriate case.
- *State v. Paul* construed the 2012 law to not be a jury nullification.
- If it was construed as a jury nullification, there would be questions as to its constitutionality.
- *Paul* cites an 1843 case, *Pierce v. State* where the decision states “it is inconsistent with the spirit of the constitution that questions of law should be decided by the verdict of the jury.”
- *Paul* also cites *State v. Hodge* an 1869 case which said that “judging law by the jury is held to be illegal and unconstitutional”
- Courts don’t normally cite 150 year old precedence unless they are sending a message.

- Senator Gannon asked if the word “may” on line 14 would be more open ended.
  - There is a subtle difference between “may” and “should”. This is not in current instruction, but in appropriate cases a lawyer can draw a jury’s attention to this.

**Future Action:** Pending

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Date Hearing Report completed: April 28, 2017