18-3430

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

IN RE: UNITED STATES OF AMERICA,

Petitioner.

UNITED STATES OF AMERICA,

Petitioner,

v.

YEHUDI MANZANO,

Respondent.

On Petition for Writ of Mandamus in Case No. 3:18-cr-00095 (SRU)

BRIEF OF *AMICUS CURIAE* THE FULLY INFORMED JURY ASSOCIATION IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

TIMOTHY LYNCH
Attorney for Amicus Curiae
The Fully Informed Jury Association
P.O. Box 5570
Helena, Montana 59858
(406) 442-7800

CORPORATE DISCLOSURE STATEMENT

Amicus curiae The Fully Informed Jury Association is a 501(c)(3) entity that does not have a parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

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INTEREST OF *AMICUS CURIAE*[1]

The Fully Informed Jury Association (FIJA) is a non-profit educational organization dedicated to informing the public about their rights and responsibilities as jurors in delivering just verdicts. To further those ends, FIJA publishes educational literature, hosts educational programs, and files *amicus curiae* briefs in cases that involve the constitutional provisions regarding trial by jury.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4), Amicus states that (1) no counsel for a party authored this brief in whole or in part, (2) no party or counsel for a party contributed money intended to fund the preparation or submission of this brief; and (3) no persons or entities other than amicus, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

Argument

I. This Court should not bar the district court from allowing arguments for jury nullification.

A. The Meaning of Jury Nullification

The Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. Amend. VI. The accused is also "to have the assistance of counsel for his defense." *Id*. In this case, the government is seeking to completely bar an important defense, *viz.*, an appeal for "jury nullification," a defense argument that was indisputably available to Americans when the Bill of Rights was ratified in 1791. The petition should be denied.

Since the doctrine of "jury nullification" is controversial, it will be useful to make a few brief observations before analyzing the key issues that are posed by the petition. Most discussions of jury nullification are surprisingly vague about the concept, and even judges and academics fail to define the doctrine with precision. If the constitutional issues are to be resolved properly, a more rigorous approach is necessary. "Jury nullification" (or "jury independence") is best understood to refer to situations in which the jury is persuaded, beyond a reasonable doubt, that the defendant's conduct violated a criminal statute but nonetheless returns a "not

guilty" verdict because it has conscientiously concluded that that is a just resolution of the case.

The expression "jury nullification" is, in truth, a pejorative misnomer because it does not accurately describe the jury's actions. The jury does not "nullify" the underlying criminal statute or have any other effect on the substantive law. *See* Annual Judicial Conference, Second Judicial Circuit of the United States, reprinted in 141 F.R.D. 573, 662 (1991). No one claims that the jury has the power to invalidate a statute or that the jury should have a role in deciding whether evidence is admissible, whether the court has jurisdiction, or whether certain defendants should be tried together or separately. The source of the jury's authority stems from its ability to resolve blended questions of law and fact by returning a general verdict of "not guilty." A "not guilty" verdict disposes of a single case and nothing more.

Critics of jury nullification sometimes claim the doctrine "subverts the law," but that argument suffers from circularity. If the Sixth Amendment's safeguards include the jury's ability to decide the law and the facts "complicately"—that is, in combination—by its general "not guilty" verdict, then a key legal tenet has been established; it is a part of the law. *See* Thomas Regnier, Restoring the Founders' Ideal of the Independent Jury in Criminal Cases, 51 Santa Clara L. Rev. 775, 776-780 (2011). The question then becomes a matter of whether one agrees or

disagrees with the verdict in a particular case. One might analogize here to presidential pardons, which can be applauded or condemned depending upon the circumstances, but the pardon power is grounded in the Constitution itself. U.S. Const., Art. II, sec. 2. The criminal jury's power to determine both the law and the fact is similarly grounded. *United States v. Gaudin*, 515 U.S. 506, 512-514 (1995). To be clear, the trial court retains the authority to set aside an unwarranted conviction. That is because the due process safeguard will sometimes require a new trial, or judgment of acquittal.

B. The Origins of Jury Independence

The government's petition draws upon various dicta to make sweeping legal claims about jury independence in American jurisprudence—all negative. That portrait is inaccurate. A rigorous analysis of the constitutional guaranty of trial by jury must not overlook the prosecution of John Peter Zenger in 1735, one of the most celebrated cases in American history. *See* Albert Alschuler & Andrew G. Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 871-874 (1994).

Zenger published the *New York Weekly Journal*, which was the first newspaper of political criticism in the colonies. The *Journal* attacked New York Governor William Cosby for both his pomposity and malfeasance in office. The

seditious libel laws of that era made criticism of the government a criminal offense, so Zenger was indicted for libel. *Id.*

The prosecution was closely watched because Zenger's wife kept publishing the *Journal* while he was imprisoned in the months leading up to the trial. Zenger's cause seemed hopeless for several reasons. First, the court disbarred his two defense attorneys on the very first day of the proceeding. *Id.* Second, the court tried to stack the jury with Cosby supporters. Third, and most important, the law and evidence were overwhelmingly against him. Under then-existing law, the question of the libel was for court, not the jury. *Id.* Thus, all the prosecutor had to prove to the jury was that Zenger published certain issues of the *Journal*. Since Zenger's name appeared on the masthead of the *Journal*, the prosecutor had good reasons to be confident about his chances of securing a conviction. *Id.*

Just when Zenger's defense seemed to be failing, the most respected lawyer in the colonies, Andrew Hamilton, emerged from the gallery of spectators to argue on Zenger's behalf. When the prosecutor called his first witness, Hamilton shocked everyone in the courtroom by announcing that such witnesses were unnecessary because he was ready to admit that Zenger had published the newspapers that were complained of. *Id.*

Hamilton proceeded to argue that the criticisms that were leveled at the Governor Cosby were true. The court interrupted Hamilton to say that, under the

law, the truth could not justify a libel, and that the jury should only focus on whether Zenger had published the *Journal.* Here is Hamilton's famous reply:

> I know they have the right, beyond all dispute, to determine both the law and the fact; and where they do not doubt of the law, they ought to do so…Leaving it to the judgment of the Court, whether the words are libelous or not, in effect renders juries useless.

Hamilton then turned to the jury and said:

> A proper confidence in a court is commendable; but as the verdict (whatever it is) will be yours, you ought to refer no part of your duty to the direction of other persons. If you should be of opinion, that there is no falsehood in Mr. Zenger's papers, you will, nay, (pardon me for the expression) you ought to say so; because you don't know whether others (I mean the court) may be of that opinion. It is your right to do so, and there is much depending upon your resolution, as well as upon your integrity.

Clay S. Conrad, *Jury Nullification* (1998), at 35 (citation omitted). When the jury returned with a "not guilty" verdict after only a few minutes of deliberation, the courtroom erupted in cheers.

Ironically, this celebrated case set no precedent with respect to libel or whether attorneys can remind jurors that they can determine the law and the facts by their general verdict, but the transcript of the trial was published in a pamphlet and in the five decades between Zenger's trial and the ratification of the Sixth Amendment, that pamphlet was reprinted over and over again. "More than any formal law book, it became the American primer on the role and duties of jurors." Alschuler & Deiss, at 874. *See also United States v. Thomas,* 116 F.3d 606, 614 (2d Cir. 1997)(acknowledging the historic case); *United States v. Dougherty,* 473

F.2d 1113, 1130 (D.C. Cir. 1972)(same). Both before and after the ratification of the Bill of Rights, defense attorneys were regularly arguing the law to juries and appealing to them to return just verdicts. *United States v. Courtney*, 960 F.Supp.2d 1152, 1196 (D.N.M. 2013).

It is also worth noting that during his 1805 impeachment proceedings, when Supreme Court Justice Samuel Chase was accused of not allowing criminal defendants (through counsel) to argue the law, in cases he was hearing while riding circuit, his response was telling: He did not invoke potential oath violations by jurors in order to justify preventative actions. Rather, Justice Chase responded by offering proof that he had told jurors that they could determine both the law and the facts. *See Gaudin, supra*, at 513. Thus, "[t]he rule in the early federal courts was unequivocal; it was admitted on all hands that jurors in criminal trials were the rightful judges of both facts and law." Conrad, *supra*, at 59.

It is true, of course, that published opinions regarding jury independence have shifted from glowing enthusiasm to a grudging acceptance. *See Sparf v. United States*, 156 U.S. 1 (1895); *United States v. DeBartolo*, 790 F.3d 775, 779 (7th Cir. 2015); *United States v. Thomas, supra; United States v. Moylan*, 417 F.2d 1002, 1005-1007 (4th Cir. 1969). Even still, the Supreme Court has noted that the jury's role is not limited to fact-finding. *Gaudin*, at 512-514; *United States v. Morissette*, 342 U.S. 246, 274-276 (1952). Indeed, the Court continues to

acknowledge that a special function of the criminal jury is to operate as a "check" on overweening government by rendering verdicts according to conscience. *Duncan v. Louisiana*, 391 U.S. 145, 155-156 (1968); *Batson v. Kentucky*, 476 U.S. 79, 86-87 n. 8 (1986); *United States v. Toth*, 350 U.S. 11, 18-19 (1955) (commending jurors who "stood up in defense of liberty against the importunities of judges."). Note also *United States v. Rosenthal*, 454 F.3d 943 (9th Cir. 2006) (new trial ordered because a juror feared "trouble" if she strayed from the trial court's instructions).

C. An Order Precluding Attorney Argument Would Contravene Both Precedent and the Original Understanding of the Sixth Amendment

Under the All Writs Act, 28 U.S.C. §1651(a), this Court may only issue a writ of mandamus in "extraordinary cases" where a party has a "clear and indisputable" right to relief. *Kerr v. United States Dist. Court*, 426 U.S. 394, 403 (1976). The government's petition begins with the assertion that "established law" precludes defense arguments for jury independence, *Pet.* at 2, but then later admits that this Court has not "held that a defendant may not argue for nullification." *Pet.* at 27. That concession can end this matter straight-away. Without a clear precedent, issuance of the writ would be inappropriate in these circumstances. *Kerr* at 403.

The government's argument fails even absent the high legal threshold in place for the issuance of writs of mandamus. Since 1972, the federal circuits have coalesced around the rule that criminal defendants are not entitled to address the jury directly, as Andrew Hamilton did in the Zenger case, but the modern rule is trial court *discretion*, not *prohibition*. That is, defense arguments are currently left to the sound discretion of the trial courts. *See United States v. Krzyske,* 836 F.2d 1013, 1021 (6th Cir. 1988) (noting that arguments were allowed at trial); *United States v. Burkhart,* 501 F.2d 993, 997 n. 3 (6th Cir. 1974) (noting that arguments were allowed at trial); *United States v. Sawyer,* 443 F.2d 712, 713-714 (D.C. Cir. 1971) (scope of defense arguments a matter of trial court discretion); *United States v. Sloan,* 704 F.Supp. 880, 884 (N.D. Ind. 1989) (arguments were denied at trial); *United States v. Brown,* 548 F.2d 204, 210 (7th Cir. 1977) (arguments were denied at trial). *See also Nel v. State,* 557 S.E.2d 44, 49 (Ga. 2001) (nullification argument may be appropriate for defense closing argument); *State v. Bonacorsi*, 648 A.2d 469, 471 (N.H. 1994) (arguments were allowed at trial); *State v. Mayo,* 480 A.2d 85, 87 (N.H. 1984) (arguments were allowed at trial).

The plea that the government must have a writ because it has no other adequate remedy presupposes that trial courts lack discretion to allow defense arguments, which is incorrect. Further, an acquittal is, of course, conceivable in every criminal case that proceeds to trial. The government is no more

disadvantaged at this juncture than an array of circumstances in which the prosecution experiences adverse rulings during trial. That is why the writ of mandamus is reserved for truly extraordinary circumstances. *See In re Roman Catholic Diocese of Albany New York Inc.*, 745 F.3d 30, 37 (2nd Cir. 2014)(per curiam)(no abuse of discretion where the trial court ruling can be located within the range of permissive decisions.).

Nonetheless, it must be acknowledged that a few jurisdictions have embraced a rule of prohibition. *See e.g. United States v. Sepulveda*, 15 F.3d 1161 (1st Cir. 1993); *United States v. Trujillo*, 714 F.2d 102 (11th Cir. 1983). *Sepulveda* and *Trujillo*, however, rest upon an incorrect reading of both *Sparf, supra,* and *Dougherty, supra*, which held that arguments and instructions were matters for trial court discretion. *See United States v. Powell*, 936 F.2d 1056, 1062-1063 (9th Cir. 1991). Note also *Wyley v. Warden, Maryland Penitentiary*, 372 F.2d 742, 743 n.1 (4th Cir. 1967) (advisory jury nullification instructions comport with federal constitutional law).

The rule most consonant with the Sixth Amendment would be one that respects the prerogative of the accused, through counsel, to appeal to the jury for a just resolution of his or her case. There is scant support for this rule in the more modern precedents, so prudence dictates that this principle should be preserved for possible review by the Supreme Court in the event of an adverse ruling here.

Amicus curiae will not burden the Court by repeating the arguments that have already been fully developed by Judge Browning. *See United States v. Courtney*, 960 F.Supp.2d 1152, 1179 (D.N.M. 2013) (current "requirements to keep out any mention of the jury's ability to nullify and to prevent any lawyer from mentioning to the jury that it can mitigate or nullify its verdict is inconsistent with the Framers' intent in preserving the jury trial right in the Sixth Amendment.").

II. This Court should not bar the district court from allowing evidence related to the applicable mandatory minimum penalty in this case.

The government's petition also seeks a writ of mandamus that would "preclude the admission of any evidence related to the applicable mandatory minimum penalty in this case." *Pet.* at 3. As noted above, in order for a writ to issue, the government must have a "clear and indisputable" right to relief. Here too, the government cannot overcome the high legal threshold for the issuance of the writ. *Kerr*, 426 U.S. at 403.

The government places heavy reliance upon *Shannon v. United States*, 512 U.S. 573 (1994), which relates the familiar division of labor between judge and jury. However, on closer inspection, that case does not provide the "clear and indisputable" rule that is required for a mandamus writ. First, in its discussion of instructions as a matter of general federal practice, the *Shannon* Court stated that its holding was not meant to be an "absolute prohibition" on instructing the jury

about the consequences of its verdict. *Id.* at 587-588. "[A]n instruction of some form may be necessary under certain limited circumstances." *Id.* The government's petition focuses on the single example that the Court mentioned, *viz.*, a misstatement regarding sentencing made in the presence of the jury. *Pet.* at 32. There may be other circumstances, admittedly limited, where the district court can exercise its discretion. *United States v. Pabon-Cruz*, 391 F.3d 86, 95 n. 11 (2nd Cir. 2004). The key point here is that it would be inappropriate to preempt the district court, prior to trial, with the "absolute prohibition" the Supreme Court very plainly rejected. *United States v. Polouizzi*, 564 F.3d 142, 161-162 (2nd Cir. 2009).

Second, *Shannon*, *Polouizzi*, and *Pabon-Cruz* concerned judicial instructions, not trial evidence. Those cases did not discuss the Federal Rules of Evidence or the defendant's constitutional right to present a defense. *See Chambers v. Mississippi*, 410 U.S. 284, 302-303 (1973) (trial court's evidentiary rulings violated due process by defeating the ends of justice); *Washington v. Texas*, 388 U.S. 14, 19 (1967). Judge Underhill recognized this and simply refrained from making pre-trial decisions in order to await more specific and concrete developments, such as the defense's cross-examination of witnesses, as events unfolded at trial. *See United States v. Sanusi*, 813 F.Supp. 149, 160 (E.D.N.Y. 1992) (trial judges should refrain from second-guessing counsel's determination of the need for evidence). The government complains that it is unaware of any

applicable defense, *Pet.* at 19, 35, but that point has no merit. To be sure, some defenses, such as an alibi, must be disclosed prior to trial, but not all. Thus, a writ of mandamus is too blunt an instrument at this stage of the case.

Finally, and most importantly, the *Shannon* Court did not hear arguments on the constitutional question concerning the disclosure of sentencing information. This is profoundly important because the Supreme Court has repeatedly noted that a central purpose of the jury in criminal cases is to operate as a "check" on the government and prevent excessive punishment and oppression. *Duncan v. Louisiana,* 391 U.S. 145, 155-156 (1968); *Ballew v. Georgia*, 435 U.S. 223, 229 (1978); *United States v. Powell,* 469 U.S. 57, 65-66 (1984) (referencing, with approval, jury lenity). If the defendant is barred from alerting the jury to the applicable sentence, the jury's wings are essentially clipped; it will be ill-equipped to function as designed. To borrow Andrew Hamilton's phrase, juries are rendered "useless" if they don't have the information they need to apply the brakes to a prosecution and exercise lenity.

The government maintains that a writ of mandamus is necessary "to promote respect for the judicial system and the trial process," *Pet.* at 36, but that line of argument seems downright Orwellian. How would rendering the jury, the representatives of the people, ignorant about the ramifications of its verdict strengthen the integrity of our legal system and promote respect? Nondisclosure

only generates suspicion, backlash, and resentment. Instead of seeking "emergency" motions to bar disclosure, the government should get to work, do more case preparation, and try to persuade jurors that there is nothing amiss in its prosecutions. As Judge Wiseman keenly observed, "Arguments against allowing the jury to hear information that might lead to nullification evinces a fear that the jury might actually serve its primary purpose, that is, it evinces a fear that the community might in fact think a law unjust." *United States v. Datcher*, 830 F.Supp. 411, 415 (M.D. Tenn. 1993).

It must be acknowledged that there is scant support in the more modern authorities for the broader constitutional argument advanced here, so prudence dictates that this issue simply be registered and preserved for possible review by the Supreme Court in the event of an adverse ruling here. *Amicus curiae* will not burden this Court by repeating the arguments that have been fully developed by Judge Browning. *See United States v. Courtney*, 960 F.Supp.2d 1152, 1188 (D.N.M. 2013) ("To keep the jury ignorant of sentencing ramifications is not consistent with the concept of a jury trial at the Founders' time. To fully protect the defendant's right to a jury trial, it appears necessary to allow him or her to advise the jury about the sentencing ramifications of its verdict.").

Conclusion

For the foregoing reasons, *amicus curiae* respectfully requests that the Court decline the government's petition for a writ of mandamus or prohibition in this matter.

Dated: December 19, 2018

Respectfully submitted,

/S/ Timothy Lynch
TIMOTHY LYNCH
Counsel of Record
The Fully Informed Jury Association
P. O. Box 5570
Helena, Montana 59858
(406) 442-7800

Certificate of Compliance with FRAP 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,328 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: December 19, 2018

Respectfully submitted,

/S/ Timothy Lynch
TIMOTHY LYNCH
Counsel of Record
The Fully Informed Jury Association
P.O. Box 5570
Helena, Montana 59858
(406) 442-7800