

1 HB408
2 173277-3
3 By Representative McClammy
4 RFD: Judiciary
5 First Read: 15-MAR-16

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8 SYNOPSIS: Existing law does not specifically require
9 the court in a criminal proceeding tried before a
10 jury to permit the defense to inform the jury of
11 its right to judge the facts and the application of
12 the law in relation to the facts in controversy.

13 This bill would require the court in a
14 criminal proceeding tried before a jury to permit
15 the defense to inform the jury of its right to
16 judge the facts and the application of the law in
17 relation to the facts in controversy.

18 This bill would require posting in each
19 courthouse and courtroom therein of the right of a
20 jury to judge the facts and the application of the
21 law in relation to the facts in controversy.

22 This bill would provide a criminal penalty
23 for a violation.

24 Amendment 621 of the Constitution of Alabama
25 of 1901, now appearing as Section 111.05 of the
26 Official Recompilation of the Constitution of
27 Alabama of 1901, as amended, prohibits a general

1 law whose purpose or effect would be to require a
2 new or increased expenditure of local funds from
3 becoming effective with regard to a local
4 governmental entity without enactment by a 2/3 vote
5 unless: it comes within one of a number of
6 specified exceptions; it is approved by the
7 affected entity; or the Legislature appropriates
8 funds, or provides a local source of revenue, to
9 the entity for the purpose.

10 The purpose or effect of this bill would be
11 to require a new or increased expenditure of local
12 funds within the meaning of the amendment. However,
13 the bill does not require approval of a local
14 governmental entity or enactment by a 2/3 vote to
15 become effective because it comes within one of the
16 specified exceptions contained in the amendment.

17
18 A BILL
19 TO BE ENTITLED
20 AN ACT
21

22 Relating to juries; to require the court in a
23 criminal proceeding tried before a jury to permit the defense
24 to inform the jury of its right to judge the facts and the
25 application of the law in relation to the facts in
26 controversy; to require posting in each courthouse and
27 courtroom therein of the right of a jury to judge the facts

1 and the application of the law in relation to the facts in
2 controversy; and to provide for a criminal penalty.

3 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

4 Section 1. The Legislature finds and declares the
5 following:

6 (1) While it is one thing for a Legislature to enact
7 a statute, it is often another thing entirely to insure that
8 the statute is properly administered free of judicial
9 rewriting.

10 (2) In *Standard Oil Co. v. United States*, 31 S.Ct.
11 502, 533 (1910) (Justice Harlan, concurring in part and
12 dissenting in part) wrote: "After many years of public service
13 at the national capital, and after a somewhat close
14 observation of the conduct of public affairs, I am impelled to
15 say that there is abroad in our land a most harmful tendency
16 to bring about the amending of constitutions and legislative
17 enactments by means alone of judicial construction."

18 (3) The Legislature, both at the federal and state
19 levels, has the power to rein in such judicial misbehavior.

20 (4) A principle of preeminence in federal
21 jurisprudence is that federal courts are courts of limited
22 jurisdiction; the exercise of federal jurisdiction is proper
23 only when prescribed by Congress. *fn4 *Chicot County Drainage*
24 *District v. Baxter State Bank*, 308 U.S. 371, 376, 60 S. Ct.
25 317, 319, 84 L. Ed. 329 (1940); *Edwards v. Selective Service*
26 *Local Board No. 111*, 432 F.2d 287, 290 (5th Cir. 1970), Cert.
27 denied, 402 U.S. 952, 91 S. Ct. 1637, 29 L. Ed. 2d 122 (1971).

1 A corollary to this principle is that Congress may withhold
2 from the federal courts jurisdiction over a class of cases
3 even though the judicial power of the United States, as
4 described in article III, § 2 of the Constitution, includes
5 that class. *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 12 L. Ed.
6 1147 (1850); *Turner v. Bank of North America*, 4 U.S. (4 Dall.)
7 8, 1 L. Ed. 718 (1799). *Marshall v. Gibson's Products Inc.*,
8 584 F.2d 668 (5th Cir. 1978).

9 (5) The Alabama Legislature has the same power to
10 prescribe the jurisdiction of the state's courts because,
11 under the new Judicial Article of our Constitution, the
12 circuit court has original jurisdiction in all cases, criminal
13 and civil, unless the Legislature provides otherwise. *Rex M.*
14 *Henderson v. State*, 616 So. 2d 406 (Ala. 1993)

15 (6) Only the Legislature has the authority to alter
16 the jurisdiction of circuit courts. *Ex parte Gunn*, No. 1051754
17 (Ala. 2007).

18 (7) Some of the history and comments regarding jury
19 nullification bear repeating. "Jury nullification" simply
20 means the power of the jury to reject a law or the judge's
21 instructions and return a "not guilty" verdict if they are so
22 inclined, and prior to our Civil War, this power was
23 well-known.

24 (8) An attorney could argue law to the jury before
25 the court gave instructions. *Stettinius v. United States*, Fed
26 Car. No. 13, 387 (C.Ct.D.C. 1839) 22 Fed. Car. 1322, 1333
27 quoting *U.S. v. Fenwick* Fed Car. No. 15, 086 (1836). Judges in

1 some western and southern states were not allowed to state law
2 (to overcome judicial interference). 5 The Law Reporter 1, 10
3 (1842).

4 (9) The United States Supreme Court later ruled that
5 jurors did not have to be informed of their right to nullify
6 bad laws and unjust convictions. Sparf and Hansen v. United
7 States, 15 S.Ct. 273 (1895) (i.e., the judges were entitled to
8 conceal that fact from the jury).

9 (10) A later Supreme Court, Horning v. District of
10 Columbia, 41 S.Ct. 53, 54 (1920), admitted that jury has the
11 power to bring in verdict in the teeth of both law and facts.

12 (11) Later courts perpetrated the concealment
13 doctrine such as U.S. v. Calhoun, 49 F.3d 231, 236 n.6 (6th
14 Cir. 1995), jurors do not have to be informed of power or
15 possible sentence; even defense counsel is "muzzled" in this
16 regard, Scarpa v. Dubois, 38 F.3d 1, 11 (1st Cir. 1994),
17 Jurors possess raw power...defense counsel may not press for
18 [W]here a matter of law is complicated with matter of fact,
19 the jury have a right to determine both. Andrew Hamilton,
20 quoted in The World's Best Orations, Volume 6, page 341
21 (1923).

22 (12) What judges today are careful to conceal from
23 jury members is that judges are the chief competition to the
24 jury. Moore, The Jury, Tool of Kings, Palladium of Liberty,
25 page 159 (1973).

26 (13) The jury is, above all, a political
27 institution, and it must be regarded in this light in order to

1 be duly appreciated. Alexis de Tocqueville, Democracy in
2 America 293 (P. Bradley rev. ed. 1945) (1835).

3 Section 2. (a) In all criminal proceedings tried
4 before a jury, the court shall permit the defense to inform
5 the jury of its right to judge the facts and the application
6 of the law in relation to the facts in controversy.

7 (b) In order to insure judicial compliance with this
8 act, the following shall be applicable:

9 (1) This statute shall be prominently displayed in
10 every courthouse and every courtroom in this state.

11 (2) Each judge shall instruct the jury as follows:

12 "The laws of this state are established by the vote
13 of the duly elected representatives of your Legislature and
14 are to be presumed as being representative of the will and
15 purpose of the people of this state. As the will and purpose
16 of the people change, our system of government assumes that
17 the representatives of the people will adjust the laws
18 governing the people accordingly. Sometimes, however, laws are
19 passed that do not represent the will of the people, or laws
20 are interpreted in ways that exceed the original scope and
21 intention of the law when it was created. If you as the jury
22 find the evidence shows the defendant violated the law, but
23 you disagree with the law you are being asked to consider as
24 part of your deliberations, and believe such a law should not
25 be enforced, then you have the legal authority to return a
26 verdict of not guilty on the ground of Jury Nullification.

1 "Jury nullification is nothing less than a rejection
2 of a law of this state that has been passed by the state
3 Legislature and signed by the Governor, and for this reason it
4 should never be undertaken lightly. Nevertheless, jury
5 nullification also provides an opportunity for you, as
6 citizens of this state, to inform your government that the
7 laws the defendant is charged with violating exceeds what you
8 consider appropriate and acceptable in our society and should
9 be either repealed or revised.

10 "If you choose to find the defendant not guilty by
11 reason of jury nullification, then you should check the box
12 marked jury nullification on the verdict form."

13 (3) Failure to give this instruction shall result in
14 a mistrial.

15 (4) Failure to give such an instruction shall be a
16 Class C misdemeanor which shall result in prosecution and a
17 minimum three-day jail sentence which shall be mandatory, and
18 may not be suspended.

19 (5) Failure to give such an instruction shall be an
20 impeachable offense.

21 (6) No Alabama State Supreme Court Justice,
22 Appellate Court Judge, or Circuit Court Judge may interpret
23 this statute.

24 (c) Each justice and judge of this state shall read
25 the following and by oath or affirmation confirm that they
26 understand the following concerning jury nullification,
27 namely:

1 (1) "Tis most true, Jurors are Judges of matters of
2 Fact that is their proper Province, their chief business but
3 yet not excluding the consideration of matter of Law, as it
4 arises out of, or is complicated with, and influences the
5 Fact. For to say, they are not at all to meddle with, or have
6 respect to Law in giving their Verdicts, is not only a false
7 position, and contradicted by every days experience but also a
8 very dangerous and pernicious one, tending to defeat the
9 principal end of the Institution of Juries, and so subtilly to
10 undermine that which was too strong to be batter'd down." Sir
11 John Hawles, The English-man's Right, pp. 10-11 (1680).

12 (2) "The office of a judge is...not to make any law
13 by strains of wit, or forced Interpretations; but plainly and
14 impartially to declare the Law already established." Sir John
15 Hawles, The English-man's Right, p. 10 (1680).

16 (3) "[T]he office of a Judg (as Cook well observes)
17 is jus dicere, not jus dare; not to make any Laws by strains
18 of wit, or forced Interpretations; but plainly and impartially
19 to declare the Law already establisht." Sir John Hawles, The
20 English-mans Right, p. 10 (1680).

21 (4) "But if by finding against the Direction of the
22 Court in matter of Law, shall be understood, that if the Judge
23 having heard the Evidence given in Court, (for he can
24 regularly know no other, though the Jury may) shall tell the
25 Jury upon this Evidence, the Law is for the Plaintiff, or the
26 Defendant, and the Jury are under pain of Fine and
27 Imprisonment to Find accordingly; then 'tis plain the Jury

1 ought of Duty so to do. Now if this were true, who sees not
2 that the Jury is but a troublesome Delay, of great Charge,
3 much Formality, and no real use in determining right and
4 wrong, but meer Ecchos to sound back the pleasure of the
5 Court; and consequently that Tryals by them might be better
6 abolish'd than continued? which is at once to spit Folly in
7 the Faces of our Venerable Ancestors, and enslave our
8 Posterity." Sir John Hawles, The English-man's Right, pp.
9 28-29.

10 (5) "[F]or the Law of England hath not placed Tryals
11 by Juries to stand between men and Death or Destruction to so
12 little purpose as to Pronounce men Guilty, without regard to
13 the nature of the Offence, or to what is to be Inflicted
14 thereupon." Sir John Hawles, The English-man's Right, p. 39.

15 Section 3. Although this bill would have as its
16 purpose or effect the requirement of a new or increased
17 expenditure of local funds, the bill is excluded from further
18 requirements and application under Amendment 621, now
19 appearing as Section 111.05 of the Official Recompilation of
20 the Constitution of Alabama of 1901, as amended, because the
21 bill defines a new crime or amends the definition of an
22 existing crime.

23 Section 4. This act shall become effective on the
24 first day of the third month following its passage and
25 approval by the Governor, or its otherwise becoming law.