



The Hershberger Trial and Jury Nullification

Pete Kennedy – February 24, 2012

Sometime later this year Loganville, Wisconsin dairy farmer Vernon Hershberger will be tried before a jury in Sauk County Circuit Court on four criminal misdemeanor counts accusing him of violating the state Food and Dairy Code. The case has drawn widespread attention in Wisconsin, with Hershberger's supporters rallying to his cause.

A question that has been raised about the trial is: can the jury hearing the case legally engage in *jury nullification* and return a verdict of not guilty on the charges no matter what the facts and the law of the case are? The answer is yes.

Hershberger has been charged with operating a retail food establishment without a license, operating a dairy farm as a milk producer without a license, operating a dairy plant without a license and violating a holding order issued by the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP). The holding order prohibited anyone from removing food products from refrigerators and freezers that had been taped at Hershberger's farm store. The farmer broke the tape and sold products in the refrigerator shortly after the order was issued.

Hershberger has private contractual arrangements with food buyers clubs to provide food to club members. His position is that these arrangements are not under DATCP's jurisdiction. DATCP has taken a broad interpretation of the Wisconsin Food and Dairy Code and views any transaction where milk and milk products leave the farm as being within its jurisdiction. The department referred the case to both the Sauk County District Attorney and the State Attorney General's office. The county DA and the state AG's office are working together in prosecuting the case which is unusual in Wisconsin; typically, either the state or the county would handle the matter on their own.

Wisconsin courts have recognized that juries "have always had the inherent and fundamental power to return a verdict of not guilty irrespective of the evidence" [1]. They have acknowledged that juries have "nullification" powers "in the sense that they may acquit a defendant in a criminal case on the basis of extraneous considerations, even when the defendant may be objectively guilty in light of the facts of the case and the courts instructions" [2].

In the case of *State v. Thomas*, a Wisconsin Appellate Court explained the reason jury nullification is necessary:

The purpose of a jury is to guard against the exercise of arbitrary power – to make available the common-sense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or . . . biased response of a judge. [3]

While courts in Wisconsin and elsewhere have recognized the jury's power to acquit the defendant even though the law and the facts of the case point towards the defendant's guilt, the defendant has no right to demand that the jury exercise its power of nullification. In the case of *State v. Bjerkaas*, the appellate court upheld the trial court's refusal to allow defense counsel to argue "that the jury had the right to 'discard the court's instructions and the law and find [Bjerkaas] not guilty because it seems fair'" [4]. Courts have overwhelmingly rejected any attempt



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to issue an instruction on jury nullification [5]. Since judges usually will not inform jurors that they possess this power, jurors are going to have to become aware of jury nullification outside the courtroom.

During the jury selection process (*voir dire*), a prosecutor in Wisconsin is allowed to ask potential jurors about their views on jury nullification in general and as applied to the case the jury will be hearing. Prosecutors and criminal defense attorneys in Wisconsin are each allowed to disqualify, as a matter of right, up to three people from the jury pool. After either the prosecution or the defense has disqualified three potential jurors as a matter of right, that side can only have anyone else disqualified for cause. The question is: does the fear that jurors will exercise their lawful power to nullify constitute cause?

If Hershberger is convicted of the charges against him, it could have a chilling effect on consumer access to raw milk for those who don't own and board their own cows. The farmer currently is leasing his cows to the Right to Choose Healthy Food Buyers Club. Last year, a Dane County Circuit Court Judge ruled that owners of cows boarded at the Zinniker farm in Elkhorn, could not legally obtain raw milk produced by their own cows at the farm. Wisconsin has a statute allowing the "incidental sale" of raw milk on the farm but DATCP interprets "incidental" to mean that a consumer can only purchase raw milk once from any one producer. There has always been a legal right to consume raw milk in Wisconsin; DATCP is attempting to leave the great majority of the state's raw milk consumers without a lawful way to exercise this right [see "[Wisconsin - How DATCP Denies Raw Milk Consumers Their Rights](#)"].

If the judge in the Hershberger case adopts DATCP's position that the department even has jurisdiction over raw milk and other food products distributed through private contractual arrangements, jury nullification could be the only way for Hershberger to be acquitted.

Courts throughout the country instruct juries in criminal cases that if the jury is satisfied the state has proven its case beyond a reasonable doubt it "should" find the defendant guilty of the charged crimes [6]. "Should" is not "must"; moreover, even if a judge's instruction were that the jury must convict if the state proves its case beyond a reasonable doubt, the jury's power to engage in nullification remains.

A jury educated about the power of jury nullification could acquit Vernon Hershberger even if the facts of the case and the judge's instruction on the law were not in his favor. The American people have wrongly been kept uninformed about jury nullification. To find out more about this power, go to the website of the Fully Informed Jury Association (www.fija.org).

Vernon Hershberger's next hearing is scheduled for 1:00 p.m. March 2 at the Sauk County Courthouse. From 11:00 a.m. to 1:00 p.m. that day, there will be a **Food Freedom Rally** outside the courthouse in support of Hershberger. The day prior to the hearing, there will be a **Rights Workshop** where those attending can learn about standing up for and protecting the right to obtain the foods of your choice from the source of your choice. Those interested in finding out more about the [rally and workshop](#) can go to www.rawmilkfreedomriders.com.



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1. *State v. Thomas*, 161 Wis.2d 616, 631 (Ct. App. 1991), 468 N.W.2d 729
 2. *State v. Bjerkaas*, 163 Wis.2d 949, 960 (Ct.App. 1991), 472 N.W.2d 615
 3. *Thomas*, 161 Wis. 2d at 631 [quoting Taylor v. Louisiana, 419 U.S. 522, 530 (1975)]
 4. *Bjerkaas*, 163 Wis.2d at 952
 5. Id. at 963 (fn4)
 6. *Thomas*, 161 Wis. 2d at 631

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Hyperlinks for PDF

Wisconsin - How DATCP Denies Raw Milk Consumers Their Rights - Pete Kennedy article, 10 Feb. 2010 =
<http://farmtoconsumer.org/news/news-10feb2010-wi.htm>

State v. Thomas - a case in the Wisconsin Court of Appeals =
<http://www.farmtoconsumer.org/docs/JuryNull-State-v-Thomas.pdf>

State v. Bjerkaas - a case in the Wisconsin Court of Appeals =
<http://www.farmtoconsumer.org/docs/JuryNull-State-v-Bjerkaas.pdf>

www.fija.org – website for the Fully Informed Jury Association

rally and workshop – one-page information sheet on March 1 & 2 events =
<http://www.farmtoconsumer.org/docs/Two-Day-Event-Hershberger-2012March.pdf>

www.rawmilkfreedomriders.com – website for Raw Milk Freedom Riders