

Bob Hurt Publishing

# The Tabaka Road to Jury Nullification

New Tools for Attacking Bad Law

Bob Hurt



2012

2460 Persian Drive #70, Clearwater, Florida USA

# The Tabaka Road to Jury Nullification

## New Tools for Attacking Bad Law

Copyright © 3 November 2012 by [Bob Hurt](#). All rights reserved

### Table of Contents

Executive Summary.....	1
Rules of Evidence and Hearsay.....	2
The 6 <sup>th</sup> Amendment Right to Confront Adverse Witnesses .....	3
Recent Court Views on Witness Confrontation.....	4
The Defense Gains New Power from Tabaka.....	5
The Judicial Thorn of Jury Nullification .....	6
The Right of Juries to Strike Down Unknowable Law .....	6
The Importance of Challenging Bad Law .....	7
Using Tabak to Challenge a Law’s Existence and Authenticity.....	7
The First Law to Challenge with Tabaka.....	8
The Tabaka Road to Jury Nullification.....	9

### Executive Summary

US Courts tended for years to admit into evidence records that no eye-witness corroborated. Even worse, they tended to admit into evidence the NON-existence of records. Courts across America convicted many potentially innocent defendants using such inadmissible evidence. Finally the Supreme Court of the United States (SCOTUS) and lower courts began to condemn this practice.

This article touches on the issues, and attempts to expand the reader’s extension of the associated principles to the question of Jury Nullification - the unquestionable, but often challenged, right of the jury to determine the law as well as the facts of a case.

## Rules of Evidence and Hearsay

The [Federal Rules of Evidence](#) and corresponding rules in the Several States have a statutory basis. For example, see the Federal Rules Enabling Act [28 USC 2071-2077](#). Federal judges MUST comply with these rules. The court may admit authenticated evidence as indications of facts only in accordance with the foregoing rules.

Litigants, in their heated urgency to win the case, work assiduously to admit into evidence that which bolsters their case, and to block from admission into evidence that which hurts their case. The rules determine what the court may suppress or admit. But many means exist to subvert the rules and suborn the judge.

The Hearsay rule (#8) arguably has become the most important of all evidentiary rules. The court may admit only authenticated evidence, with certain exceptions. Hearsay does not have an authenticated nature. Example: LaTarsha testifies “Mary told me John said Fred saw Joan twirling the loaded pistol.” The court shall not admit LaTarsha’s testimony as evidence because it violates the hearsay rule:

***“Hearsay is not admissible unless a federal statute, these rules, or other rules prescribed by the Supreme Court provides otherwise.”***

Oops. That does not seem very enlightening, does it? What does “Hearsay” actually mean? Black’s Law Dictionary, Eighth Edition (2004) page 2112, provides insight into the meanings of hearsay, the hearsay rule, exceptions to it, using it to abuse justice.

**hearsay.** 1. Traditionally, testimony that is given by a witness who relates not what he or she knows personally, but what others have said, and that is therefore dependent on the credibility of someone other than the witness. • Such testimony is generally inadmissible under the rules of evidence. 2. In federal law, a statement (either a verbal assertion or nonverbal assertive conduct), other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Fed. R. Evid. 801(c). — Also termed hearsay evidence; secondhand evidence. Cf. original evidence under EVIDENCE. [Cases: Criminal Law 419; Evidence 314–324. C.J.S. Criminal Law § 856; Evidence §§ 227–228, 234, 259–266, 268–284, 319, 505–506.]

**double hearsay.** A hearsay statement that contains further hearsay statements within it, none of which is admissible unless exceptions to the rule against hearsay can be applied to each level <the double hearsay was the investigation's report stating that Amy admitted to running the red light>. Fed. R. Evid. 805. — Also termed multiple hearsay; hearsay within hearsay. [Cases: Criminal Law 419(13); Evidence 314–324.]

**hearsay exception.** Any of several deviations from the hearsay rule, allowing the admission of otherwise inadmissible statements because the circumstances surrounding the statements provide a basis for considering the statements reliable.

**tender-years hearsay exception.** A hearsay exception for an out-of-court statement by a child ten years of age or younger, usu. describing an act of physical or sexual abuse, when the child is unavailable to testify and the court determines that the time, content, and circumstances of the statement make it reliable.

**hearsay rule.** The rule that no assertion offered as testimony can be received unless it is or has been open to test by cross-examination or an opportunity for cross-examination, except as provided otherwise by the rules of evidence, by court rules, or by statute. • The chief reasons for the rule are that out-of-court statements amounting to hearsay are not made under oath and are not subject to cross-examination. Fed. R. Evid. 802. Rule 803 provides 23 explicit exceptions to the hearsay rule, regardless of whether the out-of-court declarant is available to testify, and Rule 804 provides five more exceptions for situations in which the declarant is unavailable to testify. [Cases: Criminal Law 419; Evidence 314–324. C.J.S. Criminal Law § 856; Evidence §§ 227–228, 234, 259–266, 268–284, 319, 505–506.]

**hearsay abuse.** “[T]he great hearsay rule ... is a fundamental rule of safety, but one over-enforced and abused, — the spoiled child of the family, — proudest scion of our jury-trial rules of evidence, but so petted and indulged that it has become a nuisance and an obstruction to speedy and efficient trials.” John H. Wigmore, A Students' Textbook of the Law of Evidence 238 (1935).

## The 6<sup>th</sup> Amendment Right to Confront Adverse Witnesses

Naturally, the reader wants to know precisely what provision in the Constitution for the United States of America (CUSA) provides the basis for the hearsay rule.

The CUSA's 6<sup>th</sup> Amendment provides this gem of protection from prosecutorial abuse:

***“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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.”***

Thus, testimony reliably satisfies the Constitution's demands only when the accused directly confronts the eye-witness. That explains why the hearsay rule exists. The hearsay testifier does not constitute an actual witness. The defendant can examine the testifier, but the testifier has no first-hand knowledge of the matter the testifier asserted. So the court violates the defendant's 6<sup>th</sup> Amendment rights by admitting hearsay testimony into the evidence record.

The reader should study the [Confrontation Clause at Wikipedia](#) for more insight into the right to confront one's accuser.

## Recent Court Views on Witness Confrontation

And the reader should study the three main opinions that have defanged various prosecutorial ruses to deceive the court into admitting inadmissible hearsay evidence that violates the 6<sup>th</sup> Amendment.

1. [Crawford v. Washington](#) 541 U.S. 36 (2004) SCOTUS
  - a. Inadmissible recording of wife testimony of husband stabbing of rapist
  - b. [http://scholar.google.com/scholar\\_case?case=7792517891204110362](http://scholar.google.com/scholar_case?case=7792517891204110362)
2. [Melendez-Diaz v. Massachusetts](#) 129 S.Ct. 2527 (2009) SCOTUS
  - a. Inadmissible cocaine affidavit and CNR of firearm registration  
[http://scholar.google.com/scholar\\_case?case=7136706767059629384384](http://scholar.google.com/scholar_case?case=7136706767059629384384)
3. [Tabaka v. District of Columbia](#) – 976 A.2d 173 (2009) DCCA
  - a. Inadmissible Certificate of Non-existence of Record (CNR) of driver's permit
  - b. [http://scholar.google.com/scholar\\_case?case=10010559081648562496](http://scholar.google.com/scholar_case?case=10010559081648562496)

In the three cases above, the courts have carried the 6<sup>th</sup> Amendment protection against hearsay to an extreme some might consider rabid. Many others, like this author, believe such extremes long overdue, particularly in light of the rabid, rapacious lunacy of over-eager State and Federal prosecutions, particularly those that amount to nothing more than persecutions of political prisoners and victimless "criminals."

The Melendez-Diaz and Tabak courts' opinions on CNRs (Certificates of Non-existence of Records) descended from Crawford. Their power seems especially interesting. The Tabaka court opined:

***The Supreme Court's analysis [in Melendez-Diaz] conclusively shows that the CNR in this case, "a clerk's certificate attesting to the fact that the clerk searched for a particular relevant record and failed to find it," was inadmissible over objection without corroborating testimony by the DMV official who had performed the search. The***

***contrary conclusion reached by a division of this court in an analogous setting, (attesting to no record of license to carry a pistol or registration of firearm not "testimonial"), cannot survive the holding and analysis of Melendez-Diaz. And, because the CNR was the sole and sufficient proof of appellant's non-licensure to operate a motor vehicle, her conviction for that offense cannot stand.***

## The Defense Gains New Power from Tabaka

In the past the courts' admission of CNRs into evidence led to the convictions of many defendants. For example, if the court admits into evidence the Government's a CNR of an alien's request for permission to reenter the country, the court would convict the defendant as an "illegal" alien.

But now courts may no longer accept a stand-alone, unauthenticated CNR into evidence. The person who searched and failed to find the record must submit to examination and cross-examination in the witness chair. And because that submission could become fatal to the prosecutor's case, it has profound importance to those falsely accused by over-eager prosecutors.

The defense counsel can ask a number of embarrassing questions of the CNR certifier.

- Where does the government keep the records?
- How does one access them?
- Who controls access to them?
- What safeguard exists against unauthorized access?
- How do you detect unauthorized access?
- How do you detect tampering with the record?
- What is your regular habit or practice in accessing the records?
- Who trained you to access the records?
- What does the training consist of?
- Who authorized the training?
- Have you ever ignored any rules or training requirements regarding records?
- How do you know the record never existed?
- How do you know that nobody removed the record from the files without a trace?

And so on. Such interrogation can open a Pandora's Box of insecure record-keeping that invites evidence tampering and could make the records inadmissible in spite of eye-witness testimony by the CNR certifier.

Courts have held that the CNR violates a prisoner's 6<sup>th</sup> Amendment right to confront the adverse witness, the person who searched for and failed to find the record.

All three of the above cases dealt with the CNR and its use as a means of accusing the defendant without the corroborating testimony an actual eye-witness to the search.

The crux of the CNR issue lies in the age-old maxim that the CNR itself cannot stand as evidence. The person who performed the search has in effect become the accusing witness. And, the defendant has the 6<sup>th</sup> Amendment right to confront that accuser.

One can gain stronger confidence in these rulings by clicking the *How Cited* tab at Google Scholar links cited above. Many other court opinions have cited the above holdings.

## The Judicial Thorn of Jury Nullification

*Jury Nullification* means the jury can nullify, ignore, disagree with, or refuse to obey the judge's instructions, orders, or ruling. Different jurisdictions or courts have differing official positions on the issue. The defense counsel nearly always wants the jurors universally to recognize that they have the right and power to nullify the judge if and as they deem the law and facts warrant it. Judges usually have bull-headed attitude about their purpose, function, and power. Certainly they think they know the law better than the jurors do.

But the jury also ought to know that many judges disagree about the meaning of the law or its application to the facts. Panel courts that handle appeal, including the Supreme Courts of the States and the USA often hand down split decisions. Many jurors probably do not have awareness of this uncomfortable reality. Split (non-unanimous) decisions mean even judges do not correctly know the meaning or application of the law.

Do defendants have a legal duty to obey an unknowable or inscrutable law?

Unfortunately, our courts (judges) behave as though the opinion of the majority of the judges in a panel ruling becomes the meaning of the law and the obligation of all people affected by it to obey it.

The American system of law does not require the Legislature to go back into session and issue an immediate revision or restatement of the law so as to nullify or clarify the majority opinion in panel court rulings. Often the Legislature does clarify or nullify, but no provision of the Constitution requires it. And Supreme Courts often ignore sticky or embarrassing questions of law, leaving it to lower appeal courts to establish the meaning of the law, even though many confusing rulings leave the people wondering what the law means.

## The Right of Juries to Strike Down Unknowable Law

Political preferences and related "public policy" cause many if not most non-unanimous panel court rulings. As a consequence, jurors might well have a diametrically opposite political opinion from the panel courts.

This cold reality leaves it up to juries to settle the matter for the confused and disputing judges. They can righteously flout non-unanimous panel rulings at will. But only a good-hearted judge will stand idly by while that happens. Usually, the judge will use an iron hand to override the jury and make nothing of their determination in such cases.

Furthermore, judges nearly always instruct the jury that the judge, not the jurors, determine the existence and meaning of the law. It takes a feisty, resolute jury to stand up effectively against such judicial high-handedness.

## The Importance of Challenging Bad Law

Now let us address the issue of some accusation that *you* violated a criminal law. The Legislature or Congress allegedly enacted some criminal law. Some alleged accuser swore an affidavit of probable cause justifying your arrest. Some alleged magistrate or judge, on the basis of the affidavit of probable cause, signed and issued the arrest warrant. Some individual or group of law enforcers, warrant in hand, or on their personal observation of the crime, arrested you, snatching alleged evidence in the process. Law enforcers registered the evidence and signed it into the evidence room where some officer locked it away for the trial. You get a public defender or lawyer to defend you.

A flurry of motions and discovery activities and pre-trial hearings ensues. The prosecutor and your lawyer select jurors and the judge empanels and instructs the jury. Generally, the judge will tell your jury what the law IS and what it MEANS. You might not agree with the existence and meaning of the alleged law, but what can you do about it?

According to the opinions in Crawford, Melendez-Diaz, and Tabaka, you have the right to face your accuser in court and to cross-examine the accuser. You have several serious elements of the accusation to challenge:

1. Does the alleged law actually exist?
2. What eye-witness will testify to the existence of the law?
3. What does the law mean?
4. What alleged facts have relevance to accusation of violation of the law?
5. How does the alleged law apply to the alleged facts?

## Using Tabak to Challenge a Law's Existence and Authenticity

Crawford, Melendez-Diaz, and Tabaka compel courts to allow the defendant to command production of an eye-witness who must testify to first-hand knowledge of the existence and authenticity of any document that constitutes the basis of a crime accusation. That can include the challenge of the existence and authenticity of a law.

Accordingly, the defense can challenge the legitimacy and constitutionality of the process by which the alleged law allegedly came into existence. Such a challenge can include the following questions, and possibly many more.

1. Was the Legislature actually in session in accordance with legislative rules?
2. Did the Legislature/Congress have a quorum at the enactment?
3. Did the Legislature properly follow the enactment process?
4. Did any illegal influences affect, cause, or restrain the votes of any legislators?
5. Does the language of the law embody the actual intent of the Legislature?
6. Did the Executive properly sign the act into law?

Can you use the rulings in Crawford, Melendez-Diaz, or Tabaka to require the FACT of the EXISTENCE of the LAW to come before the jury for determination OR nullification on the basis of "WHO SAYS IT'S THE LAW?" In other words, DOES A STATEMENT OF WHAT THE LAW IS without a CORROBORATING EYE-WITNESS constitute TESTIMONIAL HEARSAY?

This author believes the time has arrived for American juries to challenge all laws that the prosecutor cannot prove with eye witness testimony actually exists and actually has an authentic nature. And that challenge should require picayunish examination of legislative and other records by eye-witnesses and non-government investigators into questions of government malfeasance.

### The First Law to Challenge with Tabaka

One crystal clear example lies in the enactment of the 16<sup>th</sup> Amendment. Many tax attorneys believe it authorizes a direct income tax, while others embrace the Supreme Court opinion that it firmly makes the income tax an excise. But clearly, the IRS uses it to justify unjust and illegal confiscation of money and other assets from the people of the USA.

The basis of the complaints against the 16<sup>th</sup> Amendment stem from the fact that a 2/3 majority of ratification by state legislatures never occurred, and that operatives associated with its registration as an amendment flat lied.

The upshot: SCOTUS has denied any obligation to settle disputes over it, claiming it a "political" matter. See U.S. v Stahl (1986), 792 F2d 1438:

***"[Defendant] Stahl's claim that ratification of the 16th Amendment was fraudulently certified constitutes a political question because we could not undertake independent resolution of this issue without expressing lack of respect due coordinate branches of government...."***

And now seventy years of income tax abuse have brainwashed the ignorant rank-and-file robotic American into believing they actually owe the tax when in reality they do not. Therefore, they will never coalesce into a political force to eradicate the illegal and bogus 16<sup>th</sup> Amendment OR to stomp out the abusive, Communistic progressive income tax.

## The Tabaka Road to Jury Nullification

This author believes the time has come to force the courts to examine the legality of the certification of the 16<sup>th</sup> Amendment and many other crooked and inscrutable laws. Crawford, Melendez-Diaz, and Tabaka provide the perfect opportunity and reason to challenge the existence of such outrageously unconscionable and abusive laws.

On the basis of utterly failed demonstration of authenticity and validity, American juries should nullify the pressure by judicial oligarchies and cast those laws into the ignominious oblivion they rightly deserve. The author believes these important rulings constitute “***The Tabaka Road to Jury Nullification.***”

Consult a well-qualified attorney in all questions of legality or law.

###



**Bob Hurt**

Contact: [Email](#) [bh](#) [f](#) [t](#) •

Blogs: [1](#) [2](#) [3](#) •

Law: [E-letter](#) [Subscribe](#) [Donate](#) [Learn](#)

2460 Persian Drive #70, Clearwater, Florida 33763 •

[727 669 5511](#)