NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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February 16, 2023

LETTER OPINION

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Re: *Commonwealth of Virginia v. Zackary Thomas Burkard*
Case No. FE-2021-475

Dear Counsel:

The Court hereby details why the Defendant, who requested jury sentencing pursuant to Virginia Code § 19.2-295, was afforded the choice to withdraw such request at the conclusion of the trial's guilt phase.

OPINION LETTER

The plain language of § 19.2-295 is silent regarding whether a defendant may subsequently withdraw an election for jury sentencing after first requesting to have punishment ascertained by a jury. This silence creates an ambiguity, which compels the Court to resort to a four-part analysis to determine the General Assembly's intent on the question presented. First, in reviewing surrounding statutes, this Court finds the thirty-day provision within § 19.2-295 is analogous to other notice provisions and to § 19.2-262, which details how criminal defendants may waive the right to a jury trial. Because Virginia precedent allows defendants to later withdraw their waiver of a jury trial, the parallels between § 19.2-295 and § 19.2-262 dictate the General Assembly's intent to permit defendants to withdraw their waiver of sentencing by a judge. Second, the legislative history of § 19.2-295 closely aligns with the previous analysis in focusing on the rights of the accused, as there is no indication therein that the General Assembly ever meant for the thirty-day notice requirement to restrict a defendant's subsequent choice to be sentenced by a judge. Third, the rule of lenity and the mischief rule further persuade the Court that a defendant has a right to withdraw the request for jury sentencing. Fourth, precedent dictates that whether to permit the withdrawal of a defendant's jury trial waiver is within the Court's sound discretion, and the Court finds this standard equally applicable to a defendant's withdrawal of a jury sentencing request.

Consequently, the Court properly afforded the Defendant the opportunity to withdraw his request for jury sentencing after the guilt phase of trial because such withdrawal would not have created undue delay or an impediment to justice.

BACKGROUND

Zackary Burkard ("Burkard" or "Defendant") was arrested on April 25, 2021, for causing the deaths of Ersheen Elaiaiser and Calvin Van Pelt. A grand jury later indicted Burkard on two counts of first-degree murder and two counts of using a firearm in the commission of a felony. The Defendant was arraigned upon his indictment and entered a plea of not guilty. On July 5, 2022, his counsel notified the Commonwealth and this Court of the Defendant's request to be sentenced by a jury if found guilty of any offense. This written notice stated, "Mr. Burkard reserves the right to withdraw his request for a jury recommendation at any time before the start of the sentencing phase."

The trial began on August 9, 2022. On the first day of trial, the Court asked the Commonwealth its view on whether the Defendant could elect to be sentenced by a jury but withhold a right to withdraw said election. The Commonwealth stated while it did not file a motion challenging the Defendant's election and ability to withdraw his request, its general position was that a defendant could not withdraw an earlier request for jury sentencing. During the plea colloquy, the Court determined the Defendant understood the jury would decide guilt and recommend a punishment, and ruled the Defendant could still elect to be sentenced by the judge if he did so before the sentencing phase began. The Defendant indicated he understood all questions, and the Court accepted his plea of not guilty.

After the presentation of evidence over six days, the jury retired to deliberate. On August 22, 2022, the jury delivered a guilty verdict on two counts of the lesser included offense of manslaughter. The jury also found the Defendant not guilty of two counts of

using a firearm in the commission of a felony, as manslaughter is not a predicate felony under the weapons charge. The Court then inquired whether the Defendant wished to withdraw his election of jury sentencing. The Defendant reiterated his choice to have his punishment ascertained by the jury. After this, the sentencing phase began, and the jury entertained evidence regarding the issue of punishment. The jury began deliberations and returned the following day to deliver its verdict. The jury assessed ten years of imprisonment for each count of manslaughter. The Court referred the case to the District Probation Officer for preparation of sentencing guidelines only and continued the sentencing hearing to January 19, 2023. At the sentencing hearing, the Court imposed the sentence ascertained by the jury for twenty years in the penitentiary, consecutively, along with three years of imprisonment, all suspended, for post-release supervision.

ANALYSIS

For over 224 years, jury sentencing was the norm in Virginia. *See* Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 Va. L. Rev. 311, 317, 374 (2003). In 2020, the General Assembly amended § 19.2-295 to "reverse the former longstanding practice of jury sentencing by default." *Commonwealth v. Green*, No. FE-2019-802, 2020 WL 13430183, at *1 (Va. Cir. Ct. July 1, 2020). The statute now states that "[w]ithin the limits prescribed by law, the court shall ascertain the term of confinement . . . unless the accused is tried by a jury and has requested that the jury ascertain punishment." § 19.2-295(A). A request for jury sentencing "shall be filed as a written pleading with the court at least [thirty] days prior to trial." *Id.* While the statute clearly states sentencing by judges is the new default in Virginia, the question remains whether the statutory language

mandating a defendant request jury sentencing thirty days before trial also implies a defendant cannot subsequently withdraw such an election.[1]

I. Virginia Code § 19.2-295 Is Ambiguous Respecting Whether a Defendant's Request for Jury Sentencing Is Irrevocable Because the Statute Is Silent as to Any Events After a Request Is Made for the Jury to Ascertain Punishment, and the Surrounding Statutes Do Not Show the Legislature Intended to Bar Defendants from Withdrawing a Request for Jury Sentencing

While § 19.2-295 clearly states how a defendant may request jury sentencing, the question arises whether and how a defendant might subsequently revoke this request. When interpreting a statute, "courts apply the plain language . . . unless the terms are

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[1] A recent case from the Court of Appeals of Virginia considered the corollary issue of the parties' statutory rights to inform the jury of the applicable penalty ranges during voir dire, holding a defendant does not have such right when there has been no request for jury sentencing. *Rock v. Commonwealth*, No. 0343-22-3, 2023 WL 362139, at *7 (Va. Ct. App. Jan. 24, 2023) ("Code § 19.2-262.01's provision allowing the parties to inform jurors of the 'potential range of punishment' applies only when a defendant 'is tried by a jury and has requested that the jury ascertain punishment' under Code § 19.2-295."). Unlike evaluation of § 19.2-295, the *Rock* court easily resolved the question presented due to the plain language of the examined statute:

> *By its own terms*, Code § 19.2-262.01 allows the court or parties to notify "any person who is called as a juror" of the sentencing range for a single, specific purpose: "to ascertain if the . . . juror can sit impartially in the sentencing phase of the case." Appellant, however, never requested that a jury sentence him. In such a case, the court determines sentencing. The court and parties therefore had no need to ascertain whether the jurors could "sit impartially in the sentencing phase of the case."

Id. at *5 (emphasis added) (citation omitted). The holding in *Rock* did not turn on extraneous policy considerations, such as prejudice to the Commonwealth, but was limited to applying the statute's unambiguous language. *See id.* at *5-*6. *Rock* merely imparts that if a defendant has not elected jury sentencing, the parties have no statutory right to inform prospective jurors about a potential sentence. *Id.* at *6. Thus, the decision did not speak to whether the trial court can permit a defendant to withdraw a request for jury sentencing. One envisioned criticism of allowing a defendant to withdraw a jury sentencing request after voir dire is that this could create a means to dodge the holding in *Rock* by allowing courts to inform the jury of the penalty ranges, with the defendant thereafter returning to the trial judge ascertaining punishment. However, courts can only enforce parties' statutory rights when those have ripened, as opposed to legislating policy regarding contingencies for which the statutory scheme has not accounted. Additionally, any concern about jury nullification would be moot if the jury finds the accused guilty and, subsequently, the defendant requests to withdraw the jury sentencing election. While the Commonwealth is free to raise arguments regarding prejudice when the trial court evaluates whether it should exercise its discretion to allow the defendant to withdraw a jury sentencing request, the limited holding in *Rock* does not address or call into question the *existence* of such judicial discretion. *See id.* at *7.

ambiguous . . . or applying the plain language would lead to an absurd result." *Boynton v. Kilgore*, 271 Va. 220, 227 (2006). Therefore, an analysis of whether defendants are bound by their initial request for jury sentencing must begin with determining if the statute is ambiguous.

A. The Plain Language in Virginia Code § 19.2-295 Is Unclear Because It Can Be Understood in More Than One Way

The rules of statutory construction require courts to "infer the legislature's intent from the plain meaning of the language used." *Meeks v. Commonwealth*, 274 Va. 798, 802 (2007) (quoting *Hubbard v. Henrico Ltd. P'ship*, 255 Va. 335, 340 (1998)). In doing so, courts must presume "the legislature chose, with care, the words it used when it enacted the relevant statute" and are not permitted to add or subtract words. *Williams v. Commonwealth*, 61 Va. App. 1, 7 (2012) (quoting *Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295 (1990)). Further, a court must "examine a statute in its entirety, rather than by isolating particular words or phrases." *Schwartz v. Commonwealth*, 45 Va. App. 407, 450 (2005) (quoting *Cummings v. Fulghum*, 261 Va. 73, 77 (2001)). When the words of a statute have a plain meaning, "courts cannot give those words a construction that [implies] the General Assembly meant something other than that which it actually expressed." *Coles v. Commonwealth*, 44 Va. App. 549, 557 (2004) (quoting *Beck v. Shelton*, 267 Va. 482, 488 (2004)). Thus, "[i]f the legislature's intent is discernable from the plain meaning of the words in the statute, [courts may] look no further." *Street v. Commonwealth*, 75 Va. App. 298, 306 (2022).

Ordinarily, the legislature's intent is evident based on the statutory language employed, but sometimes the utilized terms are ambiguous. *Boynton*, 271 Va. at 227. If

the language can be "understood in more than one way[,] . . . is difficult to comprehend, is of doubtful import, or lacks clearness or definiteness," then it is ambiguous. *Id.* at 227 n.8 (quoting *Brown v. Lukhard*, 229 Va. 316, 321 (1985)). The statute at issue reads as follows:

> Within the limits prescribed by law, the court shall ascertain the term of confinement in the state correctional facility or in jail and the amount of fine, if any, when a person is convicted of a criminal offense, unless the accused is tried by a jury and has requested that the jury ascertain punishment. Such request for a jury to ascertain punishment shall be filed as a written pleading with the court at least [thirty] days prior to trial.

§ 19.2-295(A).

The Court must analyze two phrases of import within the statute. The first is that "the court shall ascertain the [punishment] . . . unless the accused is tried by a jury and has requested that the jury ascertain punishment." *Id.* This phrase implies defendants will be sentenced by the court, subject to certain procedural limitations. These limitations include when a defendant, tried by a jury, also requests to be sentenced by the jury. The statute's second important phrase details the requirements for this request, namely that it "shall be filed as a written pleading with the court at least [thirty] days prior to trial." *Id.* This portion of the statute speaks to a procedural requirement placed on the shoulders of defendants.

When interpreting a statute, courts "construe 'may' and 'shall' as permissive or mandatory in accordance with the subject matter and context." *Ross v. Craw*, 231 Va. 206, 212 (1986) (quoting *Pettus v. Hendricks*, 113 Va. 326, 330 (1912)). The Supreme Court of Virginia has repeatedly held "[t]he use of 'shall,' in a statute requiring action by a public official, is directory and not mandatory unless the statute manifests a contrary

intent." *Jamborsky v. Baskins*, 247 Va. 506, 511 (1994). The court has analyzed various provisions "to determine whether they impart a substantive right . . . or merely impose a procedural requirement." *Id.* at 509. Courts have described § 19.2-295 as creating a statutory right. *Webb v. Commonwealth*, 64 Va. App. 371, 377 (2015). However, the statutory right in § 19.2-295 merely "directs the mode of proceeding" by which a defendant will be sentenced. *See Harris v. Commonwealth*, 52 Va. App. 735, 744 (2008). While no court has considered whether § 19.2-295 is procedural, many cases have discussed its companion statute § 19.2-295.1 and found it to be procedural. *See Pierce v. Commonwealth*, 21 Va. App. 581, 584 (1996) ("Code § 19.2–295.1 is a procedural statute, governing the ascertainment of punishment in a criminal jury trial."); *Lebedun v. Commonwealth*, 27 Va. App. 697, 717-18 (1998); *Riley v. Commonwealth*, 21 Va. App. 330, 337-38 (1995). Thus, the statutory right to judge sentencing in § 19.2-295 is not substantive but procedural.

There is also no "prohibitory or limiting" language in § 19.2-295. *See Harris*, 52 Va. App. at 744. The statute does not expressly prohibit courts from allowing a defendant to withdraw a request for jury sentencing, nor is there "any language in the statute that renders [such a decision] invalid." *Id.* The General Assembly used the term "unless" in § 19.2-295 to show what limitations exist on the procedural right to be sentenced by a judge. *See* § 19.2-295(A). The explanation of how and when to file a request to have punishment ascertained by a jury describes the steps needed to invoke this exception.

Neither of the statutory phrases discussed heretofore show legislative intent to thwart a *court's* ability to accept a defendant's withdrawal of a jury sentencing request. A

"request" is an "act or an instance of asking for something." *Request*, Merriam-Webster, https://www.merriam-webster.com/dictionary/request (last updated Feb. 3, 2023). The term "implies" a degree of "formality and courtesy." *Id.* Thus, a request is not a self-executing assertion but rather an entreaty for another party to complete a solicited action. The usage of "request" in the statute does not imply a binding decision; instead, the "request" is simply an expression of a defendant's desire to be sentenced by the jury, which may or may not continue for the duration of the trial, and one which the defendant may seek to withdraw. Hence, there is no "manifestation of a contrary intent in the statute," and the term "shall" in § 19.2-295 is "directory and procedural, rather than mandatory and jurisdictional." *Harris*, 52 Va. App. at 744; *see also Commonwealth v. Wilks*, 260 Va. 194, 200 (2000); *Lebedun*, 27 Va. App. at 717-18; *Jackson v. Commonwealth*, 255 Va. 625, 643 (1998); *Carmon v. Commonwealth*, 21 Va. App. 749, 754 (1996); *Riley*, 21 Va. App. at 337-38; *J.B. v. Brunty*, 21 Va. App. 300, 305 (1995); *Turner v. Commonwealth*, 216 Va. 666, 669 (1976). Therefore, the Court is not bound by the statutory language to enforce a defendant's initial request for jury sentencing when the defendant later wishes to withdraw such request.

Despite this, there has been at least one restrictive interpretation of § 19.2-295. In *Commonwealth v. Green*, the court describes the statute as creating "a dichotomous decision" where the request for jury sentencing "alters the trajectory of the . . . case from judge sentencing to jury sentencing *without the ability to return to the previous course of*

sentencing by a judge."[2] However, the request cannot, on its face, be seen as a dichotomous decision that alters the case's trajectory in all instances. By requiring a defendant to be tried by a jury *and* request jury sentencing, the statute envisions a situation where sentencing by a judge still prevails after a defendant has requested jury sentencing. *See* § 19.2-295(A). If the Commonwealth did not pray for a jury trial, and the defendant initially asserted the right to a jury trial while requesting jury sentencing, precedent would still allow the defendant to request a *bench* trial thereafter. *See, e.g.*, *Thomas v. Commonwealth*, 218 Va. 553, 556 (1977). If the court accepted the change,[3]

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[2] 2020 WL 13430183 at *2 (emphasis added). The court in *Green* based its decision on reading the statute as unambiguous. *Id.* Nevertheless, the decision goes on to recite "practical considerations" to support the view that defendants should not be allowed to retract a request for jury sentencing. *Id.* The points against enabling the defendant to withdraw a jury sentencing request include that the plea colloquy process would be tainted with uncertainty, the Commonwealth's strategy might be negatively impacted by withholding a witness from the guilt phase in the thwarted expectation of presenting this evidence in the sentencing phase, and the change could result in "the unfair elimination of jurors who would be perfect for the guilt phase but biased as to the sentencing phase." *Id.* at *3.

The theoretical concerns expressed in *Green* have not materialized in the experience of the undersigned judge. The plea colloquy is equally certain if the court advises defendants that they may withdraw their jury sentencing requests. Additionally, the Commonwealth can present witnesses during the guilt phase of the trial and then recall such witnesses if relevant to the sentencing phase. Concerning voir dire, *Green* identifies no empirical evidence suggesting the Commonwealth selects different juror profiles depending on whether there is jury sentencing. Beginning in September 2017, and before this became a mandated right of parties in criminal cases, the Court repeatedly exercised its discretion to inform sentencing juries of the penalty ranges during voir dire for the reasons expressed in *Commonwealth v. Barela,* 96 Va. Cir. 404 (Fairfax Cnty. 2017). In implementing this practice, the Court encountered *no* resulting prejudice to the Commonwealth or defendants. To the contrary, preventing mistrials experienced by other judges that occurred due to the previous lack of transparency, and identifying jurors who express sentencing bias and are thus unsuitable for the guilt phase because they are unwilling to follow instructions, have been among the benefits observed. In fact, there have been instances since September 2017 where the Court has seen the Commonwealth benefit from excluding jurors who, when informed of penalty ranges, were unwilling to follow the instructions of the Court. At the same time, the Court has experienced no instances of jury nullification resulting from the Court informing juries of the applicable penalty ranges during voir dire. In sum, defendants would gain no additional advantage over the Commonwealth from having a jury learn the penalty ranges if not intending to have the jury ascertain punishment, and the Court's experience demonstrates the Commonwealth would be subject to no significant detriment even if a defendant altered course at trial and withdrew the request for jury sentencing.

[3] *Carter v. Commonwealth*, 2 Va. App. 392, 398 (1986) ("If defense counsel declines — or is unable because his client has not made the decision — to advise the court as to whether the defendant will waive

the judge would then be tasked with sentencing despite the defendant's initial request for a jury to ascertain punishment.

As argued in *Commonwealth v. Green*, "[t]he statutory text does not suggest either explicitly or implicitly that the accused may request a jury sentencing *and* reserve the right to a sentencing by the judge." 2020 WL 13430183 at *2 (emphasis in original). Conversely, the statute does not indicate, explicitly or implicitly, that a defendant is *barred* from exercising the right to be sentenced by a judge after electing jury sentencing. *See* § 19.2-295(A). The statute merely prescribes how and when a defendant must make the request; it does not address any events which may come after the request, such as a defendant deciding to withdraw the previous election.[4] As already noted, courts may not "add or subtract words" from a statute. *Williams*, 61 Va. App. at 7. Therefore, for this Court to state a defendant may or may not withdraw the request based solely on the statutory language would be an "effective rewriting of the statute" and "outside the proper role of

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trial by jury, Code § 19.2-257 provides a vehicle to prevent the reoccurrence of the delay caused by a defendant's last hour election. Pursuant to that code section, the court or the Commonwealth may demand that a jury be present on the date the matter is scheduled to be heard. There then will be no cause for delay on the trial date as a result of a last[-]minute request or waiver.").

[4] *Id.* In a 2016 case, the Supreme Court of Virginia interpreted a statute that described the steps to reinstate a case previously dismissed. *JSR Mech., Inc. v. Aireco Supply, Inc.*, 291 Va. 377, 383 (2016) ("The disputed portion of Code § 8.01–335(B) provides: 'Any case discontinued or dismissed under the provisions of this subsection may be reinstated, on motion, after notice to the parties in interest, if known, or their counsel of record within one year from the date of such order but not after.'"). The court found the meaning of the subsection was unclear based on its plain language. *Id.* at 384. While the language was clear as to when and how a party must act, "the subsection [was] silent as to the issue of whether the judge should have discretion to reinstate a case when proper notice has been timely given." *Id.* Although the statute requires a party to file a motion and provide notice to parties of interest within one year of dismissal, it does not state what happens *after* a party meets these requirements, leaving open the question of whether a judge must allow the reinstatement or has the discretion to deny the motion. *See id.* In comparison, the statute at issue in the instant case states how and when a party must act to make an initial request for jury sentencing but does not limit a defendant's ability to change course post-request or a court's ability to accept or reject a defendant's withdrawal. *See* § 19.2-295(A).

the judiciary because it [would] amount[] to legislating from the bench." *Morris v. Commonwealth*, 75 Va. App. 257, 290 (Russell, J., dissenting), *reh'g en banc granted, mandate stayed*, 75 Va. App. 581 (2022).

Hence, the statute is silent on whether a defendant may withdraw a request for jury sentencing because the legislature's meaning can be "understood in more than one way[,] . . . is of doubtful import, [and] lacks clearness or definiteness." *See Boynton*, 271 Va. at 227 n.8 (quoting *Brown*, 229 Va. at 321); *see also JSR Mech., Inc.*, 291 Va. at 384. Thus, if this Court is to find clear meaning in § 19.2-295, it must look to other sources.

B. Surrounding Statutes Illustrate That § 19.2-295 Functions as a Mere Notice Provision Instructing Defendants How to Waive the Statutory Right to Sentencing by the Court

In addition to a law's text, courts may consider surrounding statutes to infer legislative intent. *Prillaman v. Commonwealth*, 199 Va. 401, 405 (1957) ("[S]tatutes are not to be considered as isolated fragments of law, but as a whole, or as parts of a great connected, homogeneous system, or a single and complete statutory arrangement."). When the General Assembly omits language from a statute that is present in surrounding statutes, it is "'an unambiguous manifestation of contrary intention.'" *Cuccinelli v. Rector & Visitors of the Univ. of Virginia*, 283 Va. 420, 428 (2012) (quoting *Halifax Corp. v. Wachovia Bank*, 268 Va. 641, 654 (2004)). Additionally, when the legislature invokes two different terms within the same act, "those terms are presumed to have distinct and different meanings." *Indus. Dev. Auth. v. Bd. of Supervisors*, 263 Va. 349, 353 (2002). If a proposed construction would create "functional inconsistencies" within a statute, *Cuccinelli*, 283 Va. at 430, courts must select the definition that allows the statute to be

viewed "as a consistent and harmonious whole so as to effectuate the legislative goal." *Virginia Elec. & Power Co. v. Bd. of Cnty. Supervisors*, 226 Va. 382, 387-88 (1983).

The thirty-day written pleading provision of § 19.2-295 can be understood in two ways. First, the provision operates as a notice requirement, so the Commonwealth may prepare additional materials for jury sentencing, which would not be necessary for a sentencing proceeding by the court. Second, the provision instructs the defendant how to waive their statutory right to be sentenced by a judge. Therefore, this Court looks to other notice provisions and waivers of statutory rights within the penal code to determine legislative intent.

i. While Comparable Statutes Do Require Notice Before a Party May Argue an Issue, These Provisions Do Not Compel a Party to Argue a Matter Once Notice Is Given

The penal code is replete with statutory notices that a party must give when electing a particular course of action. However, requiring a party to give *notice* of certain evidence it might utilize, or a type of argument it might make, cannot subsequently force the party to present the same evidence or argument at trial. Once notice is given, a court cannot generally compel litigants to follow through with their election, as the court cannot unduly enforce the continued preservation of a right. Parties may "voluntar[il]y abandon[] . . . known legal right[s], advantage[s], or privilege[s]." *Covington Virginian, Inc. v. Woods*, 182 Va. 538, 547 (1944).

As an example, one of the companion statutes of § 19.2-295 states "[t]he Commonwealth shall provide to the defendant [fourteen] days prior to trial notice of its intention to introduce copies of final orders evidencing the defendant's prior criminal

history." § 19.2-295.1. However, "[a]fter the Commonwealth has introduced in its case-in-chief of the sentencing phase such evidence of prior convictions . . . *or if no such evidence is introduced*, the defendant may introduce relevant, admissible evidence related to punishment." *Id.* (emphasis added). This Code section clearly states that while the Commonwealth must provide *notice* of its choice, the Commonwealth can change course without a court forcing it to introduce evidence of the defendant's criminal history. *See id.*

Similarly, another statute requires a defendant to give written notice to the Commonwealth of any intention to present evidence of insanity sixty days before trial. § 19.2-168. If the defendant's notice is not timely, the court "may in its discretion, either allow the Commonwealth a continuance or, under appropriate circumstances, bar the defendant from presenting such evidence." *Id.* While giving this notice results in other requirements, such as the defendant submitting to a psychological evaluation if the Commonwealth so requests, the defendant is not bound to present an insanity defense at trial. § 19.2-168.1(A). Additionally, certain pre-trial motions, such as a motion to suppress,

> shall be raised in writing, before trial. The motions or objections shall be filed, and notice given to opposing counsel not later than seven days before trial in [the] circuit court . . . . The circuit court may, however, for good cause shown and in the interest of justice, permit the motions or objections to be raised later.

§ 19.2-266.2(B). The statute does not limit a defendant's ability to withdraw any pre-trial motions after giving notice but before the court hears the motions. *See id.*

Various other provisions in the penal code allow a litigant to notify opposing counsel of an intent to present evidence or argument but do not subsequently compel the

presentation of those matters at trial. *See, e.g.*, § 19.2-297.1(B) ("The Commonwealth shall notify the defendant in writing, at least thirty days prior to trial, of its intention to seek punishment [of any person convicted of two or more separate acts of violence] pursuant to this section."); § 19.2-270.5 ("At least twenty-one days prior to commencement of the proceeding in which the results of a DNA analysis will be offered as evidence, the party intending to offer the evidence shall notify the opposing party, in writing, of the intent to offer the analysis . . . . In the event that such notice is not given, and the person proffers such evidence, then the court may in its discretion either allow the opposing party a continuance or, under appropriate circumstances, bar the person from presenting such evidence."); § 19.2-268.3(C) ("At least [fourteen] days prior to the commencement of the proceeding [regarding an offense against children] in which a statement [by a child] will be offered as evidence, the party intending to offer the statement shall notify the opposing party, in writing, of the intent to offer the statement . . . .").

Most of these provisions use "notice" or "notify." However, "notice" and notify" are not used in § 19.2-295; instead, the statute refers to the document as a "written pleading" a defendant must file with the court thirty days before trial. § 19.2-295. As stated above, when statutes invoke two different terms, courts deem the terms to have "distinct and different meanings." *Indus. Dev. Auth.*, 263 Va. at 353. From this, one might infer the General Assembly's use of different terms implies the language in § 19.2-295 is not a notice provision.

At the same time, multiple provisions within the penal code function as notice requirements but do not include the terms "notice" and "notify." For example, one statute states that

> a certificate of analysis . . . shall be admissible in evidence . . . provided that . . . the certificate of analysis is filed with the clerk of the court hearing the case at least seven days prior to the proceeding if the attorney for the Commonwealth intends to offer it into evidence in a preliminary hearing or the accused intends to offer it into evidence in any hearing or trial.

§ 19.2-187(A). This statute functions as a notice requirement as the party seeking to introduce the certificate of analysis must file it with the court within a certain amount of time before trial. *Id.* It is particularly relevant that this provision functions much like § 19.2-295; the party electing to introduce a certificate of analysis must file the document with the court in the same way a defendant electing to be sentenced by the jury must file a written pleading with the court. *See id.*; § 19.2-295(A).

An additional example comes in § 19.2-299.1, another statute regarding sentencing procedures. The statute states that a copy of the victim impact statement "shall be made available to the defendant or counsel for the defendant without court order at least five days prior to the sentencing hearing." § 19.2-299.1. This statute is wholly without the terms "notice" and "notify" but still acts as a notice requirement; the Commonwealth must provide copies of a victim impact statement to the defendant at least five days before sentencing, or it is, presumably, barred from presenting that statement. *See id.* While acting as notice requirements, neither of these statutes compel the party giving notice to introduce these documents at trial or during sentencing. *See id.*; § 19.2-

187(A). These requirements only preserve a party's *ability* to present certain evidence and argument.

Because these two statutes exist without the terms "notice" and "notify" but function as notice requirements, holding the thirty-day provision in § 19.2-295 cannot also be a notice requirement merely for not mentioning the term "notice" or "notify," would create "functional inconsistencies" between statutes. *Cuccinelli*, 283 Va. at 430. Further, treating § 19.2-295 differently than other notice provisions by interpreting the election of jury sentencing as irrevocable would create a unique provision within the penal code. As stated by the Supreme Court of Virginia, the interpretation that allows statutes to be viewed "as a consistent and harmonious whole" will better "effectuate the legislative goal" and, thus, should be the interpretation adopted by this Court. *Virginia Elec. & Power Co.*, 226 Va. at 387-88.

ii. A Waiver of the Statutory Right to a Jury Trial Can Be Withdrawn Based on the Circumstances Involved in the Case, Which Is Analogous to Permitting Withdrawal of the Request for Jury Sentencing

The thirty-day provision in § 19.2-295 can also be viewed as instructing defendants how to waive their statutory right to be sentenced by the court. Section 19.2-295 previously read, "the term of confinement . . . shall be ascertained by the jury, or by the court in cases tried without a jury." § 19.2-295(A) (2007) (amended 2021). When considering this previous version, the Court of Appeals of Virginia found "upon the election of trial by jury, a defendant has a statutory right . . . to have his punishment ascertained by a jury." *Webb*, 64 Va. App. at 377. From this, it follows the amended language stating, "the court shall ascertain the term of confinement . . . unless the

accused is tried by a jury and has requested that the jury ascertain punishment," creates a statutory right to be sentenced by a judge unless the defendant was tried by a jury and requests jury sentencing. § 19.2-295(A); *see Webb*, 64 Va. App. at 377. Though there are exceptions, "most legal rights — whether common law, statutory, or constitutional — can be waived if the requisite formalities are observed." *Congdon v. Commonwealth*, 57 Va. App. 692, 695 (2011). Such is the case here, where the statute specifies the "requisite formalities" a defendant must observe to waive the right to sentencing by a judge and, instead, elect jury sentencing. *Id.*; *see* § 19.2-295(A). Thus, the statute's language can be seen as the legislature's grant of a statutory right and how one might waive this right.

The most analogous statute to § 19.2-295 within the penal code is the statutory right to a jury trial. Criminal defendants have a constitutional right to a trial by jury. U.S. Const. amend. VI; Va. Const. art. I, § 8. However, the General Assembly has also granted defendants a *statutory* right to a jury trial. § 8.01-336(A) ("The right of trial by jury . . . shall be preserved inviolate to the parties."); § 19.2-260 (providing trial by jury in criminal cases is regulated by § 8.01-336 et seq.). Other statutes detail the procedures involved in a defendant waiving the right to a jury trial. § 19.2-262(A) ("In any criminal case in which trial by jury is dispensed with as provided by law, the whole matter of law and fact shall be heard and judgment given by the court."); § 19.2-257 ("[I]f the accused plead not guilty, with his consent after being advised by counsel and the concurrence of the attorney for the Commonwealth and of the court entered of record, the court shall hear and determine the case without the intervention of a jury."). The language is quite clear: once a "trial by jury is dispensed with as provided by law," the matter *shall* be heard by the court. § 19.2-

262(A). As stated, the triggering event for this is when a defendant pleads not guilty and consents to a bench trial after being advised by counsel, and the Commonwealth and the court acquiesce to such decision. § 19.2-257.

There is no mention of a defendant's ability to thereafter revoke a waiver of the right to a jury trial. *See id.*; § 19.2-262(A). Despite this, courts have held defendants *may* withdraw their waiver of a jury trial before the trial's commencement when "'there is no showing that granting the motion would unduly delay the trial or would otherwise impede justice.'" *Cokes v. Commonwealth*, 280 Va. 92, 97 (2010) (quoting *Commonwealth v. Williams*, 262 Va. 661, 670 (2001)). In comparison, § 19.2-295 states that, while a defendant has a right to be sentenced by a judge, once a defendant requests jury sentencing, the jury will ascertain punishment. § 19.2-295(A). The triggering event is when a defendant files a written pleading requesting sentencing by jury at least thirty days before trial. *Id.* Similarly to § 19.2-262, no language in § 19.2-295 expressly allows the defendant to withdraw a waiver of the right to be sentenced by a judge. *See id.* This harmony between the statutes imparts the thirty-day provision in § 19.2-295 does not mean a defendant cannot subsequently withdraw the election of jury sentencing. *See id.*; § 19.2-262(A); § 19.2-257.

The language utilized in § 19.2-295 can, thus, be interpreted in various ways when compared to surrounding statutes. After analyzing the statutory scheme, the most likely answer is that the thirty-day provision in § 19.2-295 does not bar the defendant from changing course after making an election for jury sentencing. If the statute is interpreted as a notice provision, providing notice of an intent to carry out a particular action does not

mean courts may force litigants to complete the action. If the statute instead instructs defendants how to waive their statutory right to be sentenced by a judge, there are cases, as delineated herein, in which courts will grant a withdrawal of that waiver. From these comparisons, the Court infers the legislative intent was not to constrain defendants from changing course after electing jury sentencing but to provide timely notice to the Commonwealth and to describe how defendants might waive their statutory right to be sentenced by the court.

II. Interpreting Virginia Code § 19.2-295 to Permit the Court to Allow the Defendant to Retract a Jury Sentencing Request Is Harmonious with the Statute's Legislative History

When a "statute is not a model of clarity," it is appropriate to consider "canons of construction and its legislative history." *See Virginia Broad. Corp. v. Commonwealth*, 286 Va. 239, 249 (2013); *see also Graves v. Commonwealth*, 294 Va. 196, 202 (2017) (finding that if a provision creates an unaddressed gap in its terms, it is appropriate for a court to examine the relevant legislative history "[t]o fill this lacuna and resolve the conundrum of legislative intent."). The Court's review "can include an analysis of legislative and jurisprudential history." *See Jones v. Phillips*, 299 Va. 285, 320 (2020) (Goodwyn, J., dissenting) (citing *Virginia-American Water Co. v. Prince William Cty. Serv. Auth.*, 246 Va. 509, 514 (1993)). At times, reviewing an enactment's legislative history may be "particularly informative in resolving [the] statute's ambiguity." *See JSR Mech., Inc.*, 291 Va. at 385 (citing *Newberry Station Homeowners Ass'n v. Bd. of Supervisors*, 285 Va. 604, 614 (2013)). When consideration of legislative history is appropriate, courts may also consider the "policy behind the . . . primary statutes." *See L.F. v. Breit*, 285 Va. 163, 174

(2013). Even when considering legislative history to resolve competing interpretations, courts must prefer a "plain, obvious, and rational" interpretation "over any curious, narrow, or strained construction." *Meeks*, 274 Va. at 802.

From 1796 to 2020, defendants in Virginia tried by a jury were statutorily required to be sentenced by a jury. *See* Ned Oliver, *Virginia Lawmakers Vote to Reform 224-Year-Old Jury Sentencing Law*, Virginia Mercury (Oct. 17, 2020, 12:12 AM), https://www.virginiamercury.com/2020/10/17/a-revolutionary-change-va-lawmakers-vote-to-reform-224-year-old-jury-sentencing-law/. The statute's previous language stated, "the term of confinement . . . shall be ascertained by the jury, or by the court in cases tried without a jury." § 19.2-295(A) (2007) (amended 2021). Under the previous iteration of the statute, Virginia prosecutors could ask the court for a jury trial and therefore ensure a jury would sentence a defendant.[5]

In 2020, the General Assembly passed a reform placing the responsibility for sentencing mainly in judges' hands. *Id.* The bill's author, Senator Joe Morrissey, stated the reform would "result [in] an end to excessive sentencing in the Commonwealth of Virginia." *Id.* Another proponent of the measure, Senator Scott Surovell, opined that "once [there is] a system that has some actual balance to it, where both sides have a decent amount of leverage, [prosecutors will] offer some fair dispositions . . . . Right now[,] we have a system where one side has a sledgehammer[,] and the other side has some talking

[5] *See* § 19.2-257 (stating a defendant could consent to be tried by a judge "after being advised by counsel and [with] the concurrence of the attorney for the Commonwealth and of the court"). Since juries in Virginia "exceeded sentencing guidelines in half of the cases they heard in 2018 . . . [l]awmakers and advocates [said] prosecutors often [took] advantage of the arrangement by tacking on charges with steep mandatory penalties and threatening to demand a jury trial if the defendant [didn't] accept a plea agreement." Oliver, *supra*.

points." *Id.* Delegate Don Scott called the reform "a revolutionary change in the way we do sentencing," accentuating his and other legislators' arguments that the former version of the statute gave prosecutors leverage which might have contributed to Virginia's high incarceration rates.[6] Delegate Scott further stated the reform would "level the playing field for defendants against the overwhelming power of the state, [which] has all the resources at [its] disposal." Brian Carlton, *No More Jury Sentencing. General Assembly Reshapes Virginia's Legal System.*, Dogwood (Nov. 6, 2020, 2:52 AM), https://vadogwood.com/2020/10/17/no-more-jury-sentencing-general-assembly-reshapes-virginias-legal-system/. Senator John Edwards remarked the choice between judge or jury sentencing should be solely in the hands of defendants. *Id.* ("Let the defense make the call on whether it's a judge or jury sentencing."). Crucially, none of these comments refer to the thirty-day provision's purpose, let alone in a restrictive fashion.

An earlier version of the reform passed in the Virginia Senate during the 2020 Regular Session but failed to make it out of the House of Delegates Courts of Justice Criminal Subcommittee. *See* S.B. 811, 161st Gen. Assemb., Reg. Sess. (Va. 2020), https://legiscan.com/VA/bill/SB811/2020. The earliest version proposed by Senator Morrissey amended § 19.2-295.1 and § 19.2-295.3. The main changes included inserting the language that in cases of trial by jury,

> in which the charged offense is not punishable by death and in which a defendant has testified in his case-in-chief, a court shall submit the issue of

[6] *Id.* The stated opposition to the reform mainly revolved around the expense that could result from increased jury trials and the purported risk to the community from more lenient sentences. *See id.*; Mike Still, *Virginia Prosecutors Oppose Bill That Could Keep Juries Out of Criminal Sentencing Process*, TimesNews (Sept. 30, 2020), https://www.timesnews.net/news/local-news/virginia-prosecutors-oppose-bill-that-could-keep-juries-out-of-criminal-sentencing-process/article_32adfaec-036b-11eb-ba58-9f1b35a31754.html.

> guilt or innocence of the defendant and the ascertainment [of] punishment together for deliberation by such jury. The jury shall render its verdict and its recommended sentence, if applicable, at the same time.

Id. The Senate Judiciary Committee first mentioned a thirty-day requirement in a revision, which proposed § 19.2-295 should state "the court shall ascertain the term of confinement . . . unless the accused is tried by a jury and has requested that the jury ascertain punishment at least [thirty] days prior to trial." *Id.* The bill was reintroduced months later, proposing the following language:

> [T]he court shall ascertain the term of confinement . . . when a person is convicted of a criminal offense, unless the accused is tried by a jury and has requested that the jury ascertain punishment. The accused must request sentencing by a jury before the jury is dismissed by the court after ascertaining guilt.

S.B. 5007, 161st Gen. Assemb., 1st Spec. Sess. (Va. 2020), https://legiscan.com/VA/bill/SB5007/2020/X1. The General Assembly eventually replaced this language with the requirement that a defendant file a written pleading with the court requesting jury sentencing at least thirty days before trial. *Id.*

The history of the reform's passage does not impart the legislature intended the jury sentencing request to be irrevocable. The initial version of the reform's predecessor did not amend § 19.2-295. Va. S.B. 811. The Senate Judiciary Committee's proposed amendment to S.B. 811 is essentially the same as § 19.2-295, outside of the requirement a defendant file a written pleading. *Id.* The unenacted version of S.B. 5007 does not contain such language. Va. S.B. 5007. Instead, it required a defendant to request jury

sentencing before the court dismissed the jury after ascertaining guilt.[7] Further, the unenacted version of S.B. 5007 did not require *any* prior notice to allow the Commonwealth to prepare for jury sentencing. *Id.* The requirement that defendants make their requests through a written pleading filed thirty days before trial ultimately replaced this language. *See* § 19.2-295(A).

The revision could potentially show the legislature's intent to require a final sentencing decision before the trial begins. However, that understanding creates a stark contrast between the initial version of S.B. 5007 and the language which eventually became law. *See id.*; Va. S.B. 5007. The first mention of an issue with S.B. 5007's language allowing a defendant to request jury sentencing up until the court dismisses the jury, came in a Senate Judiciary Committee hearing on August 20, 2020. *Hearing on S.B. 5007 Before the S. Comm. on the Judiciary*, 161st Gen. Assemb., 1st Spec. Sess. (Va. Aug. 20, 2020), https://virginia-senate.granicus.com/MediaPlayer.php?view_id=3&clip_id=3396. During this hearing, Steven D. Benjamin, Special Counsel to the Virginia Senate Judiciary Committee, suggested that this language would create problems for the Commonwealth by permitting a defendant to "withhold his decision as to who will do the sentencing until the very last moment."[8] He recommended an amendment requiring the

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[7] *See* Va. S.B. 5007. The unenacted version of S.B. 5007 is the only direct evidence in the legislative record bearing on when the General Assembly intended for defendants to make a *final* decision regarding the method of sentencing. *Id.*

[8] *Id.* Benjamin asserted that this would create an inconsistency with the language in § 19.2-295.1, which requires the Commonwealth to provide notice fourteen days before trial of the defendant's criminal convictions that may be introduced during sentencing. *Id.* He also stated that the Commonwealth might have to ask a victim to remain in the courthouse on standby due to the lack of clarity regarding the method of sentencing. *Id.*

defendant to "elect . . . no less than twenty-eight days prior to the commencement of trial whether to have the jury do the sentencing." *Id.* Benjamin's analysis encompassed considerations for providing the Commonwealth with timely *notice* to prepare for jury sentencing. He never mentioned restricting the defendant's right to withdraw the request to be sentenced by a jury.

Despite Benjamin's suggestion, no further discussion of when a defendant must elect jury sentencing occurred at the August 20, 2020 hearing. *Id.* The next mention of this provision occurred at a Senate Finance and Appropriations Committee meeting on September 3, 2020. *Hearing on S.B. 5007 Before the S. Comm. on Fin. and Appropriations*, 161st Gen. Assemb., 1st Spec. Sess. (Va. Sept. 3, 2020), https://virginia-senate.granicus.com/MediaPlayer.php?view_id=3&clip_id=3470. The thirty-day provision was proposed at this hearing as an amendment to S.B. 5007. *Id.* The amendment was described to Senators as changing the language that would allow "the defendant [to] elect[] to have the jury sentence basically at any time until the jury was dismissed." *Id.* The new language would require the request "to be done thirty days before trial and by a written motion." *Id.* Critically, Senator R. Creigh Deeds, who proposed the amendment, stated it "would give the prosecutor thirty-days written *notice*" of jury sentencing. *Id.* (emphasis added). The Committee subsequently adopted this amendment at the hearing. *Id.* Senator Deeds never stated such notice operated as a choice the defendant could not later withdraw.

No legislator who spoke about the thirty-day provision on the record voiced a clear intent to restrict defendants from subsequently withdrawing a jury sentencing request.

See id.; Oliver, *supra*; Carlton, *supra*. In contrast, legislators *did* voice concerns with the lack of a notice requirement in the initial version of S.B. 5007 and specifically referred to the amendment adding the thirty-day provision as "giv[ing] . . . prosecutor[s] thirty-days written notice." *Hearing on S.B. 5007 Before the S. Comm. on Fin. and Appropriations*; *see also Hearing on S.B. 5007 Before the S. Comm. on the Judiciary*. The earlier absence of notice language from the adopted statute could have negatively impacted the Commonwealth's ability to prepare for jury sentencing. *See id.* However, as already discussed, adding a mere *notice* requirement does not preclude courts from allowing a final decision to withdraw a jury sentencing request thereafter.

Further, it is clear from the statements of various legislators that the main purpose of the reform was to combat excessive sentencing by creating a statutory right to be sentenced by judges. *See id.*; Oliver, *supra*, Carlton, *supra*. As already delineated, the reform creates a statutory right to be sentenced by a judge unless the defendant has been tried by a jury and requested jury sentencing. § 19.2-295(A); *see Webb*, 64 Va. App. at 377. Though there are exceptions, "most legal rights — whether common law, statutory, or constitutional — can be waived if the requisite formalities are observed." *Congdon*, 57 Va. App. at 695. Such is the case here, where the statute specifies the "requisite formalities" the defendant must observe to waive the right to sentencing by a judge and, instead, elect for the jury to ascertain punishment. *Id.*; *see* § 19.2-295(A). Thus, the statute's language can be seen as the legislature's grant of a statutory right and how the defendant might waive this right.

A secondary purpose of the reform was to limit prosecutors' influence over the method of sentencing because the legislature determined the prior scheme was unfair and detrimental to the accused. *See* Oliver, *supra*; Carlton, *supra*. In the past, a defendant being tried by a jury automatically triggered jury sentencing. § 19.2-295(A) (2007) (amended 2021). A defendant could elect a bench trial and thus be sentenced by the court, but the prosecutor also had to concur with this request. § 19.2-257.

Under the reformed statute, the defendant enjoys a greater degree of choice over the method of sentencing: a judge sentences the defendant unless the accused requests jury sentencing at least thirty days before trial. § 19.2-295(A). Interpreting this request for jury sentencing as irrevocable would again allow prosecutors to block a defendant's sentencing choice by failing to consent to the accused's retraction of a jury sentencing request. Before 2020, a defendant's initial choice not to be tried by a jury would result in jury sentencing if the prosecutor did not acquiesce to a bench trial. § 19.2-257. After 2020, a prosecutor may argue defendants cannot revoke their initial election for jury sentencing. *See* § 19.2-295(A). If the statute is interpreted as giving the Commonwealth an effective veto over a defendant's withdrawal of the request for jury sentencing, the post-reform defendant would still be barred from being sentenced by a judge much in the same way as the pre-reform defendant. Consequently, it is unclear why the legislature would intend for the requests to be irrevocable while attempting to place the ultimate sentencing choice in defendants' hands. *See* Carlton, *supra* ("Let the defense make the call on whether it's a judge or jury sentencing."). Instead, it is more likely the written request for jury

sentencing thirty days prior to trial acts as a notice requirement so the Commonwealth may prepare accordingly.

Thus, the legislative history shows the General Assembly's intent to dispossess the Commonwealth of power over a defendant's sentencing choice. Allowing the Commonwealth to bar the accused's decision to withdraw the jury sentencing election is a direct departure from this legislative intent. Therefore, § 19.2-295 does not force defendants to make a *final* decision regarding sentencing thirty days before trial. Instead, it requires defendants to give thirty days' *notice* of their intention to be sentenced by a jury. Accordingly, the statute does not disallow a defendant from subsequently changing course and withdrawing a waiver of the statutory right to be sentenced by the judge.

III. Being Both Penal and Remedial in Nature, Various Rules of Statutory Construction Provide Guidance to the Proper Interpretation of Virginia Code § 19.2-295

While the Court has largely resolved the ambiguity within § 19.2-295 by comparing it to surrounding statutes and analyzing legislative history, this Court turns to additional sources to confirm this meaning. As stated above, if a statute is unclear, it is appropriate to consider "canons of construction." *See Virginia Broad. Corp.*, 286 Va. at 249. When ambiguity remains after considering the plain language and surrounding statutes, courts may turn to these canons, such as the rule of lenity in criminal cases. *De'Armond v. Commonwealth*, 51 Va. App. 26, 34 (2007). This rule exists solely to "resolve genuine, plausible ambiguities and 'does not abrogate the well[-]recognized canon that a statute . . . should be read and applied so as to accord with the purpose intended and attain the

objects desired if that may be accomplished without doing harm to its language.'" *Id.* at 35 (quoting *Cartwright v. Commonwealth*, 223 Va. 368, 372 (1982)).

The rule of lenity dictates "penal statutes must be strictly construed . . . and, if the language of the statute permits two '*reasonable* but contradictory constructions,' the statutory construction favorable to the accused should be applied." *Blake v. Commonwealth,* 288 Va. 375, 386 (2014) (quoting *Wesley v. Commonwealth*, 190 Va. 268, 276 (1949)). The rule grants a defendant "the benefit of any reasonable doubt about the construction." *Foley v. Commonwealth*, 63 Va. App. 186, 198 (2014) (quoting *Harris v. Commonwealth*, 274 Va. 409, 415 (2007)). Nevertheless, when resorting to the rule of lenity, a court must not "apply 'an unreasonably restrictive interpretation of the statute' that would subvert the legislative intent expressed therein." *Armstrong v. Commonwealth*, 263 Va. 573, 581 (2002) (quoting *Ansell v. Commonwealth*, 219 Va. 759, 761 (1979)).

The Court of Appeals of Virginia has stated that "[i]n order for a statute to be construed as penal, it must impose some type of punishment or sanction." *Coffman v. Commonwealth*, 67 Va. App. 163, 170 n.6 (2017) (citing 3 Norman J. Singer & J.D. Shambie Singer, *Sutherland on Statutory Construction* § 59.1 (7th ed. 2008)). In *Coffman*, the court found "[t]he statute at issue . . . implicate[d] no liberty interest and [did] not impose a punishment or sanction; it simply set[] out the procedure for the collection of evidence." *Id.* As a result, the court found the statute was not penal, and the rule of lenity did not apply. *Id.*

While this would seemingly preclude the application of the rule of lenity to a procedural statute within the penal code, other cases have applied the rule to criminal

procedure statutes or implied the rule *would* apply to such provisions if the court considered the question. In *Cox v. Commonwealth*, for example, the court sought to interpret § 19.2-301, which "falls under the sentencing chapter of Virginia's Code of Criminal Procedure." 73 Va. App. 339, 345 (2021). While the court did not reach the issue of whether the rule of lenity applied because it found the statute's plain meaning clear, it is implied the court would have seen the statute, which governs court-ordered psychological evaluations, to be penal in nature. *See id.* at 345-46. Similarly, in *Pierce v. Commonwealth*, the court found the companion statute to § 19.2-295, § 19.2-295.1, was "a procedural statute, governing the ascertainment of punishment in a criminal jury trial," and that "[s]tatutes regarding criminal procedure generally are construed strictly against the Commonwealth." 21 Va. App. 581, 584 (1996). This conclusion is in line with various other cases which have applied the rule of lenity to criminal procedure statutes. *See, e.g.*, *Dean v. Commonwealth*, 61 Va. App. 209, 213-14 (2012); *Auer v. Commonwealth*, 46 Va. App. 637, 647-48 (2005); *Gilliam v. Commonwealth*, 21 Va. App. 519, 523-25 (1996); *Petit Frere v. Commonwealth*, 19 Va. App. 460, 464-65 (1995).

Based on such precedent, it is likely the rule of lenity applies to § 19.2-295 since it is a criminal procedure statute of the type "generally . . . construed strictly against the Commonwealth." *Pierce*, 21 Va. App. at 584. Because the rule of lenity applies in this case and grants a defendant "the benefit of any reasonable doubt about [its] construction," *Foley*, 63 Va. App. at 198, this Court must apply the interpretation of § 19.2-295 most favorable to the accused, *Blake*, 288 Va. at 386, unless this "would subvert the legislative intent expressed therein." *Armstrong*, 263 Va. at 581. This Court can reasonably interpret

the thirty-day provision in § 19.2-295 to allow defendants to change course once they have elected jury sentencing. Since this understanding of § 19.2-295 would not "subvert the legislative intent," the rule of lenity dictates this interpretation should prevail. *See id.*

Even if the rule of lenity did not apply to the instant case, Virginia follows the "'mischief rule' of statutory construction." *Rector & Visitors of Univ. of Virginia v. Harris*, 239 Va. 119, 124 (1990). Remedial statutes must be "'construed liberally, so as to *suppress the mischief* and advance the remedy' in accordance with the legislature's intended purpose." *Id.* (emphasis in original) (citation omitted); *see Greenberg v. Commonwealth ex. rel. Att'y Gen. of Virginia*, 255 Va. 594, 600 (1998).

The Court of Appeals of Virginia considered a statute allowing the amendment of a criminal indictment and found "[t]he statute is remedial in nature and is to be liberally construed in order to achieve the laudable purpose of avoiding further unnecessary delay in the criminal justice process by allowing amendment, rather than requiring reindictment by a grand jury." *Willis v. Commonwealth*, 10 Va. App. 430, 437 (1990) (quoting *Sullivan v. Commonwealth*, 157 Va. 867, 876-77 (1931)). The dual purposes of the sentencing reform were to create a statutory right to judge sentencing for defendants and to limit the Commonwealth's influence over the accused's sentencing choice. *See* Oliver, *supra*; Carlton, *supra*. The "mischief" the General Assembly wished to remedy was the Commonwealth's ability to force a defendant into being sentenced by a jury and, thus, being subjected to unduly harsh sentences. *See id.* As this Court has discussed above, interpreting the statute's thirty-day provision as the defendant's final choice regarding sentencing continues to provide the Commonwealth an unintended influence over the

accused's sentencing choice. Thus, the more appropriate construction of the statute, in line with the legislature's intent to remedy the alleged "mischief," is that the thirty-day provision acts as a notice requirement and details the proper way to waive the defendant's right to sentencing by the court, and no more.

IV. The Decision to Accept or Reject a Defendant's Withdrawal of a Jury Sentencing Request Is Left to the Trial Judge's Sound Determination, Circumscribed Only by the Abuse of Discretion Standard

The drafters of the sentencing reform often mentioned the link between a person's right to a jury trial and the defendant's ability to decide how they wish to be sentenced. *See Hearing on S.B. 5007 Before the S. Comm. on the Judiciary*; Oliver, *supra*; Carlton, *supra*. Further, the statutes regarding a waiver of jury trial and § 19.2-295 are very similar. *See* § 19.2-257; § 19.2-295(A). Because of this, it is instructive to look to the case law surrounding a defendant's withdrawal of a waiver of the right to a jury trial to determine when a court must allow a defendant's similar request to withdraw a jury sentencing selection.

The Court of Appeals of Virginia has held there is no automatic constitutional right to withdraw a waiver of a jury trial. *Carter*, 2 Va. App. at 398-99. Notwithstanding that, in some cases, it is an abuse of discretion to disallow the accused's withdrawal of such a waiver. *Thomas*, 218 Va. at 556 (holding it was an abuse of discretion to deny withdrawal of the waiver of jury trial because the defendant made his request eleven days before trial, and there was no showing of undue delay or impediment to justice). In contrast, most "authorities are uniform[] . . . that a motion for withdrawal of waiver [of a jury trial] made

after the commencement of the trial is not timely and should not be allowed." *Cokes*, 280 Va. at 97 (quoting *Williams*, 262 Va. at 670).

Whether to permit the withdrawal of such a waiver is, therefore, a fact-specific analysis. *See id.* at 98. For example, in *Williams*, the court did not abuse its discretion when it denied the withdrawal of the waiver because the defendant made the request "shortly after the trial was to begin," and any delay caused by impaneling a jury would lead to an impediment to justice, as one of the witnesses had to leave the country soon after trial was to commence. 262 Va. at 671. Thus, the question of whether to permit a defendant to withdraw a waiver of a jury trial is governed only by the abuse of discretion standard.[9] Courts usually grant the motion to withdraw the waiver of jury trial when there is "no showing that granting the motion would unduly delay the trial or would otherwise impede justice." *Williams*, 262 Va. at 671.

The same limiting principle governing withdrawal of a jury trial waiver should apply with equal force to the retraction of an accused's more discrete jury sentencing election. Thus, unless there is reason to believe the change will cause undue delay or impede justice, courts should usually grant a defendant's request to withdraw the jury sentencing election. However, if a court, in its sound discretion, finds that allowing the withdrawal would cause undue delay or an impediment to justice, the court may deny the request.

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[9] *See id.* at 672; *see also Kenner v. Commonwealth*, 299 Va. 414, 423 (2021) (quoting *Commonwealth v. Proffitt*, 292 Va. 626, 634 (2006) ("An abuse of discretion can occur in three principal ways: when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; and when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.").

In this case, the Defendant reserved the right to withdraw his request for jury sentencing in his written pleading. This Court finds such a reservation is a proper means to seek this Court's ruling during the plea colloquy before the impaneling of a jury, on whether and when, the Defendant could withdraw his election.[10] Further, the Court finds there would have been no undue delay or impediment to justice that would require the Court to deny the Defendant the choice to withdraw his request to have a jury ascertain punishment.

CONCLUSION

The Court has herein detailed why the Defendant, who requested jury sentencing pursuant to Virginia Code § 19.2-295, was afforded the choice to withdraw such request at the conclusion of the trial's guilt phase.

The plain language of § 19.2-295 is silent regarding whether a defendant may subsequently withdraw an election for jury sentencing after first requesting to have punishment ascertained by a jury. This silence creates an ambiguity, which compels the Court to resort to a four-part analysis to determine the General Assembly's intent on the question presented. First, in reviewing surrounding statutes, this Court finds the thirty-day

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[10] For the waiver of the right to a jury trial to be valid, the court must "determine before trial that the accused's consent was voluntarily and intelligently given, and his consent and the concurrence of the court and the Commonwealth's attorney must be entered of record." Va. Sup. Ct. R. 3A:13(B). While the statute affording defendants the right to be sentenced by a judge is too new for any appellate guidance on what information a court must give defendants in a plea colloquy, it nevertheless follows that when defendants elect to forego such right by requesting jury sentencing, courts may have some responsibility to determine if the waiver is "voluntarily and intelligently" tendered. *See id.* It is an open question whether the defendant's election to be sentenced by a jury is fully knowing and voluntary if the defendant is under the mistaken belief the request may be withdrawn, particularly when there is no judicial consensus about when and whether a defendant may retract such a request. This issue was foreclosed in the instant case by the Court's ruling during the plea colloquy, informing the Defendant that he could withdraw his request for jury sentencing at any point before the jury sentencing phase began.

provision within § 19.2-295 is analogous to other notice provisions and to § 19.2-262, which details how criminal defendants may waive the right to a jury trial. Because Virginia precedent allows defendants to later withdraw their waiver of a jury trial, the parallels between § 19.2-295 and § 19.2-262 dictate the General Assembly's intent to permit defendants to withdraw their waiver of sentencing by a judge. Second, the legislative history of § 19.2-295 closely aligns with the previous analysis in focusing on the rights of the accused, as there is no indication therein that the General Assembly ever meant for the thirty-day notice requirement to restrict a defendant's subsequent choice to be sentenced by a judge. Third, the rule of lenity and the mischief rule further persuade the Court that a defendant has a right to withdraw the request for jury sentencing. Fourth, precedent dictates that whether to permit the withdrawal of a defendant's jury trial waiver is within the Court's sound discretion, and the Court finds this standard equally applicable to a defendant's withdrawal of a jury sentencing request.

Accordingly, the Court properly afforded the Defendant the opportunity to withdraw his request for jury sentencing after the guilt phase of trial because such withdrawal would not have created undue delay or an impediment to justice.

Sincerely,

[redacted]

David Bernhard
Judge, Fairfax Circuit Court

OPINION LETTER