NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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LETTER OPINION

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RE: *Commonwealth v. Susan Marie Hockett Barela*
Case No. MI-2017-4

Dear Counsel:

This cause presented the Court with consideration of whether it has the discretion to inform the jury panel during *voir dire* of the penalty ranges applicable to the accused and further, whether even if there is such discretion, the exercise thereof is just and prudent. The Court concluded it both has the discretion and should exercise the

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same in favor of permitting the jury to be informed of the applicable penalty ranges in this cause.[1]

I. Scope of Discretionary Authority of the Court

The Supreme Court of Virginia has offered some guidance on the question presented herein by addressing the issue from the perspective of the rights of the litigants. The Court held:

> [N]either the defendant nor the Commonwealth in a non-capital criminal prosecution has a constitutional or statutory right to ask the members of a jury panel questions about the range of punishment that may be imposed upon a defendant if he is ultimately convicted of the crimes charged or of lesser included offenses.

Commonwealth v. Hill, 264 Va. 315, 320, 568 S.E.2d 673, 676 (2002).

By this precedent the Court thus guided that *the parties* may not compel the trial court to instruct the jury during the guilt-phase of a trial as to the range of punishment applicable in the sentencing phase. In its holding the Supreme Court of Virginia seemingly committed the decision whether thus to instruct the jury to the sound discretion of the trial court. However, the Court's dicta underpinning its holding also arguably suggests the view the trial judge's discretion is aspirationally circumscribed:

> Questions about the range of punishment are not relevant to any of the factors prescribed in Code § 8.01-358, those factors being relationship to the parties, interest in the cause, the formation of any opinions about the cause, or bias or prejudice therein. Rather, questions about the range of punishment during *voir dire* examination will only result in speculation by jury panel members. Their responses to questions about the range of punishment would be speculative because the jurors would be required to answer these questions in a factual vacuum, without the benefit of the

1 The facts in this misdemeanor cause of Assault and Battery are not set forth herein for the Court's ruling encompasses analysis of the generalized legal concept of the exercise of judicial discretion to inform jurors in *voir dire* of the penalty range applicable in criminal trials.

> evidence that would be presented to them during the guilt and sentencing phases of the trial. For example, the members of the jury panel would be required to answer these questions without knowledge of the facts surrounding the charged crimes and the defendant's criminal history or lack thereof.

Hill, 264 Va. at 319-320, 568 S.E.2d at 676.

In its holding notwithstanding, the Court addresses the parties "questions about the range of punishment" as opposed to directly addressing the range of punishment itself. The distinction is subtle but of significance. The Supreme Court rightly suggests that by allowing the parties the right to introduce questions about the range of punishment, a string of irrelevant questions may ensue which do not address bias but instead serve to engender speculation in a factual vacuum. The Court entirely focused its opinion on the rights of the parties and the attendant dangers of providing such parties blanket authority not granted by statute.

The General Assembly has provided prosecutors and defendants a heightened level of due process in allowing the parties the statutory right of direct examination of jurors during *voir dire* to probe bias. Va. Code Ann. § 8.01-358 (2017). This is a system that has served justice particularly well, for a judge has only a limited factual perspective and vantage point from which to determine which facts from the attendant case might be relevant to questions of juror bias. The Court in *Hill* interpreted and provided binding precedent that the statute does not, however, create a broader right for the parties to inform jurors of the penalty range.

The unanswered question thus remains to what extent the Supreme Court in *Hill* and the General Assembly by statute, intended to bind the hands of trial judges to

inform juries of penalty ranges at the outset of trial. This Court concludes the trial court's discretion is not circumscribed except as it always is, by the abuse of discretion standard. The appellate jurisprudence suggests that in those areas where *voir dire* by the parties is not explicitly delimited by precedent, the trial court retains wide latitude to act discretionarily in a manner that ensures justice:

> The circuit court is required to provide each party a full and fair opportunity to determine whether prospective jurors "stand indifferent in the cause." *LeVasseur v. Commonwealth*, 225 Va. 564, 581, 304 S.E.2d 644, 653 (1983); *see Roberts*, 279 Va. at 116, 688 S.E.2d at 181. However, the circuit court retains the discretion to determine whether the parties have had sufficient opportunity to question the prospective jurors. *Juniper*, 271 Va. at 396, 626 S.E.2d at 405; *LeVasseur*, 225 Va. at 581, 304 S.E.2d at 653. Also, the circuit court retains the discretion to determine whether the parties should be permitted to question prospective jurors outside the presence of the others. *Tuggle v. Commonwealth*, 228 Va. 493, 505, 323 S.E.2d 539, 546 (1984). Finally, when this Court reviews a circuit court's ruling on the seating of a juror, we consider the voir dire of that juror as a whole, and do not consider the juror's isolated statements. *Juniper*, 271 Va. at 401, 626 S.E.2d at 408; *Jackson v. Commonwealth*, 267 Va. 178, 191, 590 S.E. 2d 520, 527 (2004); *Green v. Commonwealth*, 262 Va. at 116, 546 S.E.2d at 451.

Hawthorne v. VanMarter, 279 Va. 566, 583, 692 S.E.2d 226, 237 (2010).

The seeming thread of precedential deference to discretion exercised by the trial court in such matters arguably flows from the recognition that a trial judge's duties require the exercise of judgment whilst interacting with the parties and evidence, which is not easily prescribed by legal precedent. In *Hill,* the Supreme Court of Virginia had the opportunity to restrict the trial court itself from addressing the penalty range in *voir dire* but wisely declined to do so. It is unclear from the context of *Hill* whether all the factors a judge might consider in deciding to address the issue to jurors were brought to the fore and to the attention of the trial judge. For instance, the issue of potential

sentencing bias against either of the parties seemed to be an unaddressed consideration in the Supreme Court's analysis of what might be relevant in a given context.

This Court finds that the Supreme Court in *Hill* never restricted the sound discretion of the trial court to address the penalty range to jurors in *voir dire*, if the trial court finds just and sound reasons to do so. Similarly, the General Assembly in enacting Code § 8.01-358, did not restrict the trial judge's discretion thus to address the penalty range. As it did in *Hill*, the Supreme Court of Virginia has in the past delineated the vast difference between the statutory rights of the parties, and the discretion vested in a Circuit Court Judge by virtue of his or her Constitutional office:

> Thus, "[i]f an answer to the question would necessarily disclose, or clearly lead to the disclosure of the statutory factors of relationship, interest, opinion, or prejudice, it must be permitted. Questions which go beyond this standard are entirely within the trial court's discretion." *LeVasseur v. Commonwealth*, 225 Va. 564, 581, 304 S.E.2d 644, 653 (1983), *cert. denied*, 464 U.S 1063 (1984).

Juniper v. Commonwealth, 271 Va. 362, 396, 626 S.E.2d 383, 405 (2006).

This Court holds it has the discretion, by precedent, statute and its inherent Constitutional authority to address the applicable penalty range to the jury panel in *voir dire* to ensure jurors "stand indifferent in the cause." Va. Con. Art. 6 § 7 (1971); Va. Code Ann. § 8.01-358 (2017).

II. The Exercise of Discretion

Having addressed the threshold issue that this Court has the discretionary authority to address the penalty range to the jury panel in the context of *voir dire,* the

next question is whether it is wise to exercise such authority. This Courts discretion is by no means unbounded but the Supreme Court has long held in a myriad of cases that such discretion is entitled great deference. Judicial discretion "when applied to a court of justice, means *sound* discretion *guided by law.* It must be governed by rule; it must not be arbitrary, vague and fanciful, but legal and regular." *Harris v. Harris*, 31 Gratt. (72 Va.) 13 (1878). *See Richmond v. County of Henrico,* 185 Va. 859, 868, 41 S.E.2d 35, 41 (1947).

In the context of the exercise of "sound discretion", this Court must examine the reasons for and against addressing the penalty range in *voir dire:*

A) Jury Nullification Considerations

It is clear in most cases that an impermissible reason the defense may want to address the penalty range, and particularly in the context of mandatory minimum penalties, is to secure a verdict of "not guilty" based on juror comparison of the ratio of the conduct alleged to the consequent penalty. Jury nullification as a phenomenon extant in our legal system has been with us since colonial times.[2] The ambiguity of the Jury's role beyond mere fact finder in certain historical contexts is perhaps a product to some extent of the guidance from a number of founding fathers of this nation about the

2 Jury nullification can be traced to an early English case wherein jurors acquitted Quakers of violating a law which restricted religious assemblies to only those conducted under the ambit of the Church of England. *Bushell's Case*, 6 Howell's State Trials 999 (1670). The jury's effective right to nullify application of a criminal law flows from the interplay between the giving of the verdict in general form and the Double Jeopardy clause. Consequently, a jury verdict of "not guilty" is generally settled and unquestioned in most instances. Jury nullification has undoubtedly led to unjust laws being unenforced and also disturbingly, just laws being ignored, such as during trials of lynchings in the south during civil rights struggles.

lofty aspirations they had for the jury system.[3] The Court of Appeals of Virginia well stated the obligation of a juror:

> A juror's sworn obligation is to follow the law, not question it. While we are not naive enough to think jury nullification never occurs (it "undoubtedly" does in some cases, *Walls v. Commonwealth*, 38 Va. App. 273, 282, 563 S.E.2d 384, 388 (2002)), no principle of constitutional import entitles "a party to encourage such behavior," *id.*, or to even imply its legitimacy.

Lilly v. Commonwealth, 50 Va. App. 173, 185-186, 647 S.E.2d 517, 523 (2007). The issue of jury nullification arises for example in assault and battery on a law enforcement officer cases wherein a fairly minor offensive touching, upon a finding of guilt, requires

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3 In *Sparf and Hansen v. United States*, 156 U.S. 51 (1895), the United States Supreme Court held that a trial judge has no responsibility to inform the jury of the right to nullify laws. This ruling has led directly to judges discouraging the practice by preventing the parties from making a direct appeal for a verdict that is contrary to the law and the evidence. Yet because Jury nullification exists as an effective course of action by jurors, the tension between the existence of the right and discouragement thereof as necessary for a properly functioning legal system, remains. While the practice of jury nullification is to be discouraged by modern legal precedent, the traditions underpinning the legal system dating back to the founding fathers juxtapose the differing earlier view as illustrated in the below-cited excerpts from Goodloe, Justice William, *Empowering the Jury as the Fourth Branch of Government* (1996), Essays & Editorials, Fully Informed Jury Association (reprinted April 10, 2009), pp.4-5:

> "I consider trial by jury as the only anchor, ever yet imagined by man, by which a government can be held to the principles of it's constitution." Thomas Jefferson, drafter of the Declaration of Independence and Third President, in a letter to Thomas Paine, 1789, *The Papers of Thomas Jefferson*, Vol. 15, p. 269, Princeton University Press, 1958.
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> "It is not only his right [the juror's], but his duty ... to find the verdict according to his own best understanding, judgment, and conscience even though in direct opposition to the direction of the court." John Adams, first proponent of the Declaration of Independence and Second President, 1771, 2 *Life and Works of John Adams* 253-255 (C.F. Adams ed. 1856).
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> "You [the jurors] have, nevertheless, a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy." John Jay, first Chief Justice of the United States Supreme Court, charging the jury in *Georgia v. Brailsford*, 3 Dallas 1, 4 (U.S. 1794).
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> "That in criminal cases, the law and fact being always blended, the jury, for reasons of a political and peculiar nature, for the security of life and liberty, is intrusted with the power of deciding both law and fact." Alexander Hamilton, first Secretary of the Treasury[,] *People v. Croswell*, 3 Johns Cas. 361, 362 (1804) as reprinted in *Sparf and Hansen v. United States*, 156 U.S. at 147-148, dissenting opinion, (1895).

jurors to impose a mandatory minimum penalty of six months. Va. Code Ann. § 18.2-57(C) (2017). This danger is recognized in that a court may exclude a juror when

> he or she would be unwilling or unable to follow the law. Such a juror might attempt to undermine the proper functioning of the courts by engaging in jury nullification. Thus, such a juror can be excluded from a jury panel without violating the defendant's right to a fair and impartial jury.

Poyner v. Commonwealth, 229 Va. 401, 414, 329 S.E.2d 815, 825-26 (1985).

The danger of jury nullification though is a two edged sword, for it may operate for or against any party. In not being allowed to inquire whether a juror can consider the full penalty range in a given case, the Commonwealth is divested of probing "[i]f an answer to the question would necessarily disclose, or clearly lead to the disclosure of...opinion, or prejudice" against the prosecution. *LeVasseur v. Commonwealth*, 225 Va. 564, 581, 304 S.E.2d 644, 653 (1983), *cert. denied*, 464 U.S 1063 (1984). A juror who cannot consider fairly the penalty range to be imposed may also be a juror already predisposed against the Commonwealth. There is therefore benefit in this cause to ensure such issue is explored with sufficient particularity to ensure the juror "stands indifferent in the cause". As the Supreme Court identified in *Hill*, this may require the trial court in exercising its discretion to grant some latitude to the parties to give jurors a thumb nail sketch of the relevant facts necessary to expose such bias.

B) The Danger of Mistrial and of Engendering a Corrosive Effect on Jury Service

The anecdotal record of cases is alive with instances where jurors find a defendant guilty in a compromise verdict, with the speculative intention of not imposing a sentence in the range of the mandatory term, becoming thereafter embittered at

feeling induced by systemic opacity into doing something they had no intention to do. In some instances juries take it a step further and impose an illegal sentence in derogation of their instructions, which then calls upon the trial judge to declare a mistrial and impanel a new sentencing jury. *See Commonwealth v. Greer,* 63 Va. App. 561, 579, 760 S.E.2d 132, 141-42 (2014) (two year sentence imposed in a five year mandatory minimum case necessitating the impaneling of a new sentencing jury).

Keeping jurors in the dark at the outset about the sentence they are called upon to impose arguably poses three oft seen dangers for our legal system. First, the confidence in and willingness of jurors to participate is degraded by an embittering experience. Jurors are already called upon to leave the regularity of their lives and devote themselves to the sometimes difficult job of considering jarring evidence and judging another human being. To do so in the darkness of what they will be called upon to do has an arguably corrosive effect on the system of justice in some cases. The Court has trust that in the sunlight of transparency about the sentencing process, jurors who are after all called upon to serve as the voice of the community in our justice system, will generally do the right thing and not ignore the law and the evidence, or otherwise do violence to their oath.

Second, informing jurors at the outset of the penalty range of offenses charged prevents the jury from speculating in the guilt phase in trepidation about the punishment they might be called upon to impose in the event of a conviction.

Third, the Court considers the danger of a potential mistrial resultant from jurors unwilling to impose a sentence with which they disagree to outweigh any benefit of

potentially minimizing jury nullification. As already stated, identifying those jurors unwilling to sentence the defendant according to the law in *voir dire* is more likely to prevent jury nullification than to generate the same.

C) Juror Sentencing Bias

Both parties are entitled to a jury that "stands indifferent in the cause", not just in the context of guilt but also in terms of being able to consider the full sentencing range applicable. "The right of an accused to a trial by an impartial jury is a right guaranteed by the Constitution of the United States and the Constitution of Virginia. U.S. Const. amends. VI and XIV; Va. Const. art. I, § 8." *Hill,* 264 Va. at 318, 568 S.E.2d at 675. The trial Court has a duty to ensure the jury is impartial and not biased before the consideration of any evidence. The *Hill* Court never had before it direct consideration of the issue of preconceived sentencing bias. This Court, however, considers its duties to encompass ensuring that the jury impaneled be free of such bias that would prevent a full and proper consideration of the sentencing range. In the context of sentencing, it is relevant as already discussed, to determine whether jurors are biased against the imposition of a mandatory minimum sentence which could cause a mistrial. Interrogation about jurors' willingness to consider the full sentencing range could lead to the disclosure upon further questioning of bias against the prosecution generally. Also relevant is the issue of whether a jury would as a result of the presence of a mandatory minimum be predisposed to impose a much greater sentence than the minimum before having heard any evidence.

Jurors who are kept in the dark about the sentencing scheme to be applied after a finding of guilt logically may speculate and factor such speculation into their decision-making in the guilt-phase. The Court is concerned that by keeping jurors in obscurity as to the sentencing range, the issue of jury sentencing bias will remain unexplored, increasing the likelihood that in some cases the jury will be impermissibly biased against one of the parties. In addressing the jury in a transparent manner, the negative risks of inquiry by the Court appear minimal when compared to the benefits to both parties obtained from such questioning in removing those jurors who do not before having heard evidence, stand indifferent in the cause.

CONCLUSION

After full consideration of the relevant law and facts, and for the reasons already stated, this Court holds that it has the discretion to inform the jury of the penalty range applicable in this cause at the outset of the case, discretion it chose to exercise. The Court further finds that pursuant to the precedent in *Hill* it is not required to afford the parties directly, the opportunity to address to the jury sentencing matters in *voir dire*. Accordingly, in balancing the considerations herein addressed, including abatement of the risk of mistrial flowing from a jury uninformed of the penalty sentencing range and soured by a lack of transparency, with concerns about misuse of the *voir dire* process by the parties, the Court reserved unto itself exclusively, the practice of addressing the

sentencing range to jurors and related relevant questions not inconsistent with this opinion.

AND THIS CAUSE CONTINUES.

Sincerely,

[redacted]

David Bernhard
Judge, Fairfax Circuit Court

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