NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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July 6, 2022

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Re: *Commonwealth v. Steven Green*
Case No. FE-2019-802[1]

Dear Counsel:

The question before the Court is whether a criminal defendant may request a jury sentencing pursuant to Virginia Code § 19.2-295, yet reserve the right to change his mind and revoke his request after the trial commences in favor of a judge sentencing.

The Court holds a criminal defendant who requests a jury sentencing has no statutory right to revoke that request with one exception—the revocation occurs thirty days prior to trial. The Court declares that Defendant Steven Green has requested a jury sentencing. His statement of a purported right to revoke his request has no legal effect.

[1] The Court issued this Opinion Letter July 1, 2022. It reissues it today to fix some typographical errors.

OPINION LETTER

I. OVERVIEW.

A grand jury indicted Defendant Steven Green ("Green") on charges of Murder, Maiming, and Using a Firearm in the Commission of a Felony. On May 6, 2022, Mr. Green filed a "Notice of Jury Sentencing" ("Notice") pursuant to Virginia Code § 19.2-295(A). However, appended to the Notice was a statement reading: "Mr. Green reserves the right to withdraw his request for a jury recommendation [of his sentence] at any time before the start of the sentencing phase." In response, the Commonwealth filed a Motion *In Limine* to Strike Defendant's Notice as improperly pled.

The Court orally ruled that Mr. Green demanded a jury sentencing. However, this being a case of first impression, and without objection by the Commonwealth, the Court ruled he could revoke his demand any time before his arraignment and entry of a plea. The Court now revises and extends its reasons for the ruling.

II. A DEFENDANT WHO REQUESTS A JURY SENTENCING HAS NO STATUTORY RIGHT TO REVOKE HIS REQUEST.

By default, juries have no role in punishment sentencing in Virginia. VA. CODE ANN. § 19.2-295(A). Judges typically ascertain punishment, alone. *Id.*; VA. CODE ANN. § 19.2-303. However, a criminal defendant may request that a jury ascertain punishment. When this happens a jury initially ascertains punishment.[2] *Id.* The relevant statute reads in full:

> 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 30 days prior to trial.
>
> (emphasis added). *Id.*

As this is a case of first impression, no controlling authority exists to guide the Court's interpretation of Virginia Code § 19.2-295, which was newly amended in 2020 to reverse the former longstanding practice of jury sentencing by default. To interpret the statute, the Court must apply its plain meaning, unless the text is ambiguous or applying the plain meaning would lead to an absurd result. *See Emmanuel Worship Ctr. v. City of Petersburg*, 300 Va. 393, 405 (2022); *Boynton v. Kilgore*, 271 Va. 220, 227 (2006). Ambiguity exists when "the text can be

[2] Technically, the trial judge always conducts the sentencing of a defendant and has full control of the sentence. VA. CODE ANN. § 19.2-303; *Batts v. Commonwealth*, 30 Va. App. 1, 15-16 (1999) (when juries are involved in ascertaining punishment a two-phase process ensues. First, the jury issues an "advisory opinion" as to the punishment. That becomes the maximum penalty. Second, the judge imposes the final sentence, which may be lower than the jury recommendation). In this Opinion Letter, the Court uses the more colloquial terms of "jury sentencing" and "judge sentencing."

understood in more than one way or refers to two or more things simultaneously or when the language is difficult to understand, is of doubtful import, or lacks clearness or definiteness." *Boynton*, 271 Va. at 227 n.8 (citations, internal quotation marks, and alteration omitted). An absurdity occurs when applying the plain language of the statute leads to an illogical or anomalous result. *See Emmanuel Worship Ctr.*, 300 Va. at 405; *Baker v. Commonwealth*, 284 Va. 572, 576 (2012).

The plain language of Virginia Code § 19.2-295 permits the accused to request that the "jury ascertain punishment" *i.e.*, request jury sentencing, through a written pleading. VA. CODE ANN. § 19.2-295(A). The 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. Rather, the text allows for the accused to make only a dichotomous decision – sentencing by a judge or sentencing by a jury. As an analogy, imagine a switch on a railroad track that changes the course of the train from one track to another track. Once the switch has been pulled, the train leaves the previous track, and its trajectory is permanently altered. The train is subsequently unable to return to its previous course. Following this analogy, Virginia Code § 19.2-295(A) is the switch that alters the trajectory of the present case from judge sentencing to jury sentencing without the ability to return to the previous course of sentencing by a judge.

The Court finds no ambiguity in Virginia Code § 19.2-295(A). One cannot read it in two ways at once. It is not open to multiple interpretations and is clear in its instruction. The statute merely requires affirmative notice to exercise a statutory right and delineates the deadline to submit the request. *Id.* Moreover, the result of requiring notice and the deadline is neither illogical nor anomalous.[3] Because the statute in question is unambiguous, the Court is "not free to add language, nor ignore language" contained within it. *SIGNAL Corp. v. Kean Fed. Sys., Inc.*, 265 Va. 38, 46-47 (2003). Thus, the Court is guided by canons of interpretation to find that Virginia Code § 19.2-295(A) does not permit the accused to reserve the right to a judge held sentencing trial after submitting a plea for jury sentencing.[4]

Time limits on a defendant's choice between jury sentencing and judge sentencing are nothing new. Under the former law, when jury sentencing was the default rule rather than judge sentencing, a defendant who demanded a trial by jury effectively waived his chance to avoid jury sentencing after a guilty verdict but before the start of the sentencing phase. *Daye v. Commonwealth*, 21 Va. App. 688, 692-93 (1996).

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[3] Notice provisions with deadlines are ubiquitous in the Virginia Code. *See, e.g.,* VA. CODE ANN. §§ 8.01-195.6, 8.01-286.1, and 8.01-629.

[4] A long-standing statutory construction principle strengthens the Court's position. The principle asserts that a legislature's intent may be found in unambiguous statutory text. *See Halifax Corp. v. First Union Nat'l Bank*, 262 Va. 91, 99-100 (2001). The Court "must assume that the General Assembly chose, with care, the words it used in enacting the statute, and we are bound by those words when we apply the statute." *Id.* at 100. Therefore, Virginia Code § 19.2-295's unambiguous text requires the Court to implement the apparent legislative will found within. Consequently, the Court is enforcing not only the statutory text but also the legislative intent evinced therein by finding an accused may not reserve the right to revoke a plea for jury sentencing prior to the sentencing phase.

Practical considerations also counsel rejecting Defendant's interpretation of Virginia Code § 19.2-295(A). A fluid right to waive a jury sentencing request could be prejudicial to both sides, perverting effective trial strategy into a game of chance.

First, if the Court allowed the practice of reserving the right to revoke a request for jury sentencing, the plea colloquy would be tainted by uncertainty. The Court is required during the plea colloquy to verify that a defendant's plea is "made voluntarily with an understanding of the nature of the charge and the consequences of the plea." Va. Sup. Ct. R. 3A:8(b). How could a judge discern if the defendant fully understood the consequences of a plea if the judge himself was unsure whether the sentencing would proceed to the jury or be reserved for the judge, alone? Compounding this complexity is the fact that not even the defendant may be certain that a jury sentencing will occur until after the guilt phase is completed. Both the defendant and judge would be ill-served by this defendant-created ambiguity during the plea colloquy.

Second, the voir dire process could result in the unnecessary and unfair elimination of good jurors. Virginia Code § 19.2-262.01, which sets voir dire examination parameters, states in relevant part:

> In any criminal case, the court and counsel for either party shall have the right to examine under oath any person who is called as a juror therein and shall have the right to ask such person or juror directly any relevant question to ascertain whether the juror can sit impartially in either *the guilt or sentencing phase of the case. . . .* The court and counsel for *either party may inform any such person or juror as to the potential range of punishment to ascertain if the person or juror can sit impartially in the sentencing phase of the case.*

(emphasis added). Consequently, if the defendant opts for jury sentencing, questions directed at the jurors concerning sentencing ranges are relevant. However, if the jury has no role in sentencing, those questions are clearly irrelevant. If the criminal defendant could unilaterally revoke a jury sentencing request after jury selection, neither he nor the Commonwealth would know what questions to ask in voir dire, and would have to assume every potential juror could be a sentencing juror—or not. This could result in the unfair elimination of jurors who would be perfect for the guilt phase but biased as to the sentencing phase.

Assume a hypothetical juror is strongly desired by one side and could not be stricken for cause by the other as to the guilt phase. However, since the defendant might revoke his jury sentencing request at some later point during the trial, the parties must ask about the juror's sentencing biases. If this otherwise perfect juror expresses a sentencing bias, and if the defendant subsequently revokes his jury sentencing demand, one side unfairly loses this otherwise perfect juror, and the other side effectively wins an extra preemptory strike.

Third, a defendant's late revocation of a jury sentencing request could unfairly impact a party's witness strategy. For instance, a party may, for strategic reasons, wish to save a particular

witness for the jury sentencing phase that he would otherwise use in the guilt phase. As a result, witness strategy becomes a shell game with an unwitting party put in the unfortunate position of guessing what the legal procedure will be at the end of the trial.

These three inequities are easily avoided if the Court simply enforces the plain language of the statute. Mr. Green raises excellent policy reasons for permitting a criminal defendant to have the right to withdraw a jury sentencing request at various times during the trial. For example, in this case, some of the charges in Mr. Green's Indictment carry minimum sentences. However, a jury could find him guilty of a lesser offense with no minimum sentence. A defendant in this situation may desire jury sentencing for the lesser offense once the offense carrying a minimum sentence is eliminated. However, a court should not exercise a raw policy choice that only our legislature has the right to make so long as their choice is constitutional.[5] The General Assembly can weight a different policy's benefits to criminal defendants against any prejudice to the Commonwealth and change the law. Unless they do so, however, the current law is clear—a defendant cannot revoke his jury sentencing request.

There is one logical exception to this bright-line rule. Where a criminal defendant makes his jury request early—more than thirty days prior to trial—he may revoke it more than thirty days before trial. Trial dates can be fluid. When a date is changed after a jury sentencing request, the defendant's timeline can effectively change from thirty days before trial to a few months before trial. This conflicts with a plain reading of the statute. Under the law, the parties and the trial court simply need to know whether there will be a possible jury sentencing phase or not thirty days prior to the actual trial date, not before a previously scheduled trial date.

In the present case, the Court recognizes that this is a question of first impression of a new law. And, there having been no objection by the Commonwealth, the Court will grant Mr. Green the option to withdraw his jury sentencing request any time prior to his arraignment and entry of a plea.

III. CONCLUSION.

The Court holds a defendant may not revoke a previously requested jury sentencing under Virginia Code § 19.2-295 unless the revocation is more than thirty days before trial. In this case the Court will treat the Defendant's request as the exercise of his statutory choice to jury sentencing and will hold him to his selection, despite his purported qualification of a non-existent right to revoke.[6] Nevertheless, in this case of first impression, if the Defendant

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[5] *See*, fn. 3, *supra*.

[6] Mr. Green's strategy of filing his jury sentencing request with his qualification would be very risky for one who really wants a judge sentencing. Virginia Code § 19.2-295 directs a defendant to file a written pleading requesting a jury sentencing, or else the judge sentencing default rule applies. Plainly speaking, the pleading must effectively read: "I want a jury sentencing." It cannot read: "I maybe want a jury sentencing." The former is a declaration of a right. The latter is equivocation that could be treated—as in the present case—as a binding demand for jury sentencing with the qualification treated as irrelevant. When asked about this in oral argument, Mr. Green's counsel

withdraws his request prior to arraignment and entry of a plea, the Court will treat the request as revoked.

The Court avouches its June 22, 2022, Order, as revised and extended herein.

Kind regards,

[redacted]

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

Enclosure.

asserted his intent to request a jury sentencing and asked the Court to so read his filed request. Without objection by the Commonwealth, the Court takes that interpretation in the present case.