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Some Thoughts on Bifurcated Sentencing in Non-Capital Felony Cases in Virginia

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ESSAY

SOME THOUGHTS ON BIFURCATED SENTENCING IN NON-CAPITAL FELONY CASES IN VIRGINIA

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The punishment stage of a jury trial poses a difficult test for the conflicting attitudes and opinions of individual jurors. In the search for a mature, well-reasoned, and educated verdict, an understanding of the sentencing process by those controlling the flow of information is the best insurance against decisions which spring from passion, prejudice, and personal bias.[1] Given recent legislative changes affecting sentencing in non-capital felony cases, such an understanding is not susceptible to hornbook solutions. This paper will attempt to put those changes in the context of existing sentencing practices and of related evidentiary issues. It is hoped that it will help stimulate critical thought and serve as a helpful guide.

The role of the jury in determining punishment was unknown at common law.[2] In Virginia, while the jury will establish an appropriate statutory sanction, the ultimate sentencing decision remains the function of the trial judge. As the Virginia Court of Appeals noted,

> the punishment as fixed by the jury is not final or absolute,

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1. See Bruce v. Commonwealth, 387 S.E.2d 279, 281 (Va. Ct. App. 1990).

2. 1 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 119 (1974).

> since its finding on the proper punishment is subject to suspension by the trial judge, in whole or in part, on the basis of any mitigating facts that the convicted defendant can marshall. The verdict of the jury is the fixing of the maximum punishment that may be served. Under such practice, the convicted criminal defendant is entitled to "two decisions" on the sentence, one by the jury and the other by the trial judge in the exercise of his statutory right to suspend; his 'ultimate sentence . . . does not [therefore] rest with the jury' alone but is always subject to the control of the trial judge. This procedure makes the jury's finding little more than an advisory or first-step decision. Any criticism of jury sentencing because it lacks the objectivity and principled decision of a judge is thus overcome by the existence of the power in the trial judge to bring his so-called superior judgment to bear upon the issue of proper punishment in reaching his decision whether to suspend the sentence or not.[3]

Pre-sentence reports, boot camp, substance abuse and youthful offender evaluations, and a host of other mitigating and rehabilitative services available to an offender are not a proper subject for consideration by the jury.[4] Similarly, sentencing guidelines are not given to the jury even though the impact of such guidelines on the eventual sentence may be substantial.[5] A defendant's right to allocution prior to sentencing by the trial judge does not apply at the punishment stage of a jury trial.[6] Only relevant, admissible evidence *related to punishment* may be considered by the jury.

Being in derogation of the common law, statutes granting to the jury the power to determine punishment are subject to the rule of strict construction.[7] Prior to recent statutory changes relating to bifurcated sentencing in felony jury trials, the punishment fixed by the jury was to reflect only the nature of the

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3. Duncan v. Commonwealth, 343 S.E.2d 392, 394 (Va. Ct. App. 1986) (quoting Vines v. Muncy, 553 F.2d 342, 349 (4th Cir.), *cert. denied*, 434 U.S. 851 (1977)).

4. *See* VA. CODE ANN. §§ 19.2-295 to -316.3 (Michie 1995).

5. *See* VA. CODE ANN. § 19.2-298.01 (Michie 1995).

6. VA. CODE ANN. § 19.2-298 (Michie 1995); Bassett v. Commonwealth, 284 S.E.2d 844, 853 (Va. 1981) (holding that a defendant has no right to allocution to jury).

7. 17 M.J. *Statutes* § 70 (1994).

crime and "contemporary values."[8] Thus, absent a legislative mandate, separate evidence of aggravating or mitigating factors was left for the singular consideration of the trial judge. Recent legislative changes are likely a reflection of the Virginia General Assembly's concern that informed decisions relative to "contemporary values" should include certain probative evidence which, given its prejudicial character, could not, absent bifurcation, properly be placed before the jury. Bifurcation was not intended as a substitute for the court's power to mitigate punishment. However, the impact upon trial strategy brought about by such legislative changes may directly or indirectly lead to greater uniformity in sentencing practices, consistent with the desire to establish meaningful and effective voluntary sentencing guidelines.

In 1994, the General Assembly of Virginia enacted section 19.2-295.1 entitled "Sentencing proceeding by the jury after conviction of a felony." This change in the method of determining punishment is procedural only and thus would apply to offenses committed both before and after the enactment date.[9] It is clear that the legislature intended to use the words "punishment" and "sentencing" interchangeably when describing the role of the jury in the decision making process. Bifurcation was not intended as a substitute for the ultimate sentencing decision of the trial judge. As noted earlier, the General Assembly did not provide for, or intend, that the jury would in some way usurp the obligation of the trial court to impose the ultimate sentence. These changes were an attempt to make jury verdicts more enlightened. However, the greatest impact of these changes may be in the way in which counsel approach criminal trials.

In a non-bifurcated jury trial, a defendant could use the jury trial as a means of sheltering himself from the adverse effects of a prior criminal history. Contrariwise, the Commonwealth could use punishment decisionmaking with blinders to powerfully argue a substantial prison term for serious offenses.

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8. Duncan, 343 S.E.2d at 394.

9. Evans v. Commonwealth, 323 S.E.2d 114 (Va. 1984) (holding an emergency change in the statute relative to the same jury fixing punishment in capital cases was "ameliorative" of prior law); Riley v. Commonwealth, 464 S.E.2d 508 (Va. App. 1995).

Based upon the scant information available on bifurcated proceedings which have been conducted under the statute, judges have reported that the punishment decisions by juries have, in large measure, reflected consideration of periods of confinement of less than, or equal to, verdicts prior to the enactment of section 19.2-295.1. These findings would seem to indicate that juries (1) give great weight to the nature of the offense in the decision making process, and (2) tend to give greater weight to evidence in mitigation, as opposed to aggravation, when confronted with a separate proceeding relating to punishment.

Jury verdicts relating to punishment, unlike those relating to guilt or innocence, are advisory only. Although they serve to limit the punishment which the Court may impose, they are not entitled to the same weight as a damage verdict or condemnation award. However, the impact of such verdicts upon the criminal justice system, particularly in high profile cases, cannot be minimized. It is a matter of judicial discretion as to whether the punishment will be mitigated or alternatives to incarceration will be explored.

What follows is a sentence by sentence analysis of the provisions of section 19.2-295.1. While a number of questions are raised by the review, it is not intended to be exhaustive of the many problems which may face the trial judge or advocate during the punishment phase of a bifurcated proceeding.[10]

In cases of trial by jury, upon a finding that the defendant is guilty of a felony, a separate proceeding limited to the ascertainment of punishment shall be held as soon as practicable before the same jury.[11]

It should be kept in mind that bifurcated punishment proceedings are limited to felony convictions. Misdemeanor trials

10. The Advisory Committee on Rules of Court has considered a proposed new Rule 3A:17.1 which has been forwarded to the Virginia Supreme Court. The Committee has recommended two alternatives as to when an accused may plead guilty. One version would permit the accused to change his plea to guilty at any time until the jury returns a verdict on the issue of guilt or innocence. The other would permit such a change of pleas at any time prior to the return of a verdict as to punishment. See, 10 VA. L. WEEK 517 (October 23, 1995).

11. VA. CODE ANN. § 19.2-295.1 (Michie 1995).

continue to be handled as in the past. Where a person is convicted of capital murder and another non-capital felony, the court will be required to conduct a trifurcated proceeding consisting of two penalty phases, one as to the capital murder charge and the other under the new bifurcated proceeding.[12] Whether a misdemeanor charge is tried by itself, or with other felonies or misdemeanors, the jury is instructed at the same time as to the elements of the misdemeanor offense and the permissible range of punishments.

In a bifurcated trial, the same jury which determined guilt is also called upon to fix an appropriate punishment. The punishment phase should commence as soon as possible after a jury finding of guilt.[13] Prior to any additional argument by counsel, instructions on the permissible range of punishment are given by the court. It is suggested that, for the same reasons quotient verdicts are discredited in civil cases, they are prohibited in the punishment phase of a criminal case. Accordingly, in certain situations, the trial judge and counsel may wish to consider an instruction relating to the method by which the jury is to consider the evidence. It is reasonable to assume that a jury may ask for guidance as to how they are to (1) consider the evidence and (2) reach a consensus. This level of inquiry may be heightened by the prior instructions relating to the burden of proof and reasonable doubt applicable to the determination of guilt.

It is helpful in considering the issue of bifurcated criminal jury trials to keep in mind that the "burden of proof" consists of two elements: a burden of persuasion and a burden of going forward with the evidence. In determining guilt or innocence, a jury will apply the "beyond a reasonable doubt" standard to the evidence introduced by the Commonwealth. This burden of persuasion never shifts to the defendant. The burden of going forward with the evidence requires that a party produce evidence which a reasonable mind could accept as proof of a fact in issue. Failure to do so will result in an adverse ruling

12. VA. CODE ANN. §§ 19.2-264, 19.2-295.1 (Michie 1995).

13. VA. SUP. CT. R. 3A:18 (in capital cases as a "continuation of the original trial").

on the issue upon which the party has the burden of producing evidence.[14]

The distinction between the burden of persuasion and the burden of going forward with the evidence blurs the burden of proof within the context of a bifurcated felony jury trial. It can be argued that neither party bears the burden of persuasion at the sentencing stage. Should the Commonwealth elect not to introduce the prior record of the defendant, or should the defendant have no prior record, the burden of producing evidence relevant to punishment does not necessarily shift to the defendant. Accordingly, while the orderly trial of the case might command that the Commonwealth should have the opportunity to open and close in argument, it does not follow that the prosecution would be given the opportunity of rebuttal.

An instruction along the following lines would be helpful to a jury in guiding their deliberations. The jury should be charged with such an instruction only when the guidance of the court is requested. Relevant portions of the instruction could be tailored to the specific inquiry of the jury. The instruction might read as follows:

> The Court instructs the jury that, as you have found the defendant guilty of the offense charged against him, you must now fix a specific punishment within the limits described for you in another instruction of the Court. In determining punishment your verdict must be unanimous. You should impose such punishment as you feel is just under the evidence and the instructions of the Court after a full and fair consideration of the evidence. You are not to concern yourself with what may happen afterwards. In reaching a verdict you may not agree in advance of your deliberations to be bound by a quotient verdict. That is, you may not agree in advance to fix the average of your individual opinions as to punishment.[15]

The penalty phase of a criminal proceeding is unlike the trial of guilt or innocence. There is no default loser or party who must carry the burden of proof. Neither party may be in a

14. Westmoreland Coal Co. v. Campbell, 372 S.E.2d 411 (Va. Ct. App. 1988).

15. Virginia Elec. v. Marks, 78 S.E.2d 677 (Va. 1953); VIRGINIA MODEL JURY INSTRUCTIONS, No. 2.700 (1994).

position to produce any evidence. In such cases, the jury is not left powerless to return a verdict. Their decision will, in such cases, reflect the severity of the offense and contemporary values. The fact that the parties have not sought to introduce evidence would seem of little consequence to the Court's consideration of the weight to be accorded the jury verdict at the time of sentencing. While the penalty phase of a non-capital felony is described as a separate "proceeding," it is nevertheless dependent upon a finding of guilt. It is suggested that the trial court cannot limit voir dire or opening statements from a discussion of the limits of punishment. A court cannot reopen voir dire to examine the conscience of the jurors as to a given range of punishments.

At such proceeding, the Commonwealth shall present the defendant's prior criminal convictions by certified, attested or exemplified copies of the record of conviction, including adult convictions and juvenile convictions and adjudications of delinquency under the laws of any state, the District of Columbia, the United States or its territories. The Commonwealth shall provide to the defendant fourteen days prior to trial notice of its intention to introduce evidence of the defendant's criminal convictions. Such notice shall include (i) the date of each prior conviction, (ii) the name and jurisdiction of the court where each prior conviction was had and (iii) each offense of which he was convicted.[16]

The license granted the Commonwealth to present evidence of a defendant's prior history of convictions constitutes perhaps the most dramatic change in the criminal jury system brought about by the enactment of section 19.2-295.1. As noted earlier, the provisions of the statute must be narrowly construed. The statute does not speak to any record of prior criminal involvement, other than convictions. Prior convictions on appeal may be used.[17] A conviction may not be used where the defendant has been found guilty on a plea of not guilty but not sentenced.[18] However, a conviction may be used where a defen-

16. VA. CODE ANN. § 19.2-295.1 (Michie 1995).
17. Peterson v. Commonwealth, 302 S.E.2d 520 (Va. 1983) (capital case).
18. Dowell v. Commonwealth, 408 S.E.2d 263 (Va. Ct. App. 1991) (holding such a

dant has pled guilty but has not been sentenced.[19] A recent decision of the Court of Appeals would appear to permit consideration of prior uncounseled convictions, whether or not such convictions resulted in confinement.[20] Although an argument may be fashioned that sentencing information which may be contained in court orders constituting records of conviction is both irrelevant and prejudicial; a panel of the Court of Appeals has approved of the admission of records containing both evidence of the conviction and of the sentence.[21] However, trial judges must be cautioned as to sentencing information which contains material other than the punishment imposed. As noted earlier, probation, parole, drug treatment, boot camp, and a myriad of other tools available to the trial judge at the time of sentencing are not a concern of the jury.

Records of prior convictions should be redacted to omit sentencing information and any other information, the prejudicial effect of which outweighs its probative value. A review of cases dealing with enhanced punishment statutes, while not directly on point, supports this view.[22] A record of criminal convictions, to be admissible, must be certified, attested, or exemplified. The Court of Appeals has spoken to the significance of the limitations on these terms in a different context.[23]

Records of criminal convictions are not admissible unless notice to the defendant is given at least fourteen days prior to the date of the trial. The notice must include the date of each prior conviction, the name and jurisdiction of the court in which the defendant was convicted, and the specific offense of which he was convicted. There is no filing requirement set forth in

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conviction not "final" for use for impeachment purposes).

19. Fields v. Commonwealth, 383 S.E.2d 767 (Va. Ct. App. 1987) (holding such a conviction "final" for use for impeachment purposes).

20. Griswold v. Commonwealth, 453 S.E.2d 289 (Va. Ct. App. 1995).

21. Gilliam v. Commonwealth, 465 S.E.2d 592 (Va. App. 1996).

22. Hudson v. Commonwealth, 383 S.E.2d 767 (Va. Ct. App. 1989) (redacting sentences in unitary trial where prejudicial to the defendant); *cf. Bassett*, 284 S.E.2d at 853 (holding that in bifurcated capital murder trial where guilt established, sentence as a result of prior conviction need not be deleted because sentence reflects the gravity of the offense and the offender's propensity towards violence).

23. *See* Owens v. Commonwealth, 391 S.E.2d 605 (Va. Ct. App. 1994); Untiedt v. Commonwealth, 447 S.E.2d 537 (Va. Ct. App. 1994); Nesselrodt v. Commonwealth, 452 S.E.2d 676 (Va. Ct. App. 1994); Driggs v. City of Martinsville, 1995 Va. App. LEXIS 571 (July 11, 1995).

the statute.[24] Accordingly, notice is governed by the general provisions of sections 1-13.3 and 1-13.3:1, strict conformity to the notice requirements is required.

Counsel and the court may find it helpful to require that counsel appear at a conference in advance of trial to consider the records of conviction, adequacy of notice, and any limitation on the use of the records at trial. Such a conference may address the evidence the defendant and the Commonwealth seek to introduce relative to punishment. Both parties may, by motion *in limine*, or otherwise, narrow the issues relating to the conviction records. However, it is only "prior to the commencement of the trial" that the Commonwealth is required to provide the actual photocopies of the certified copies of the defendant's prior criminal convictions.

Prior to commencement of the trial, the Commonwealth shall provide to the defendant photocopies of certified copies of the defendant's prior criminal convictions which it intends to introduce at sentencing.[25]

It is interesting to note that the legislature has at this point used the terms "punishment" and "sentencing" interchangeably. This use of words is consistent with the statutory language used in bifurcated sentencing proceedings in motor vehicle cases, which states: "When any person is found guilty of a traffic offense, the court *or the jury* trying the case may consider the prior traffic record of the defendant before imposing *sentence* as provided by law."[26]

The Court has historically had access to conviction records, including a detailed pre-sentence report, prior to sentencing.

After the Commonwealth has introduced such evidence of prior convictions, or if no such evidence is introduced, the defendant

24. VA. CODE ANN. § 19.2-187 (Michie 1995).
25. VA. CODE ANN. § 19.2-295.1 (Michie 1995).
26. VA. CODE ANN. § 46.2-943 (Michie 1995) (emphasis added).

may introduce relevant, admissible evidence related to punishment.[27]

The provision regarding the admission of evidence related to punishment will be the most troubling for the trial court. The changes to the statute effective July 1, 1995, clarify the issue of whether the defendant may, absent the introduction of the prior record of the defendant, introduce evidence at the penalty phase. Nevertheless, the task of determining what is relevant and admissible is not made any easier.

Although more relaxed rules of evidence are applicable to the sentencing phase of a criminal trial and to probation revocation proceedings, the statute does not admit of the use of anything other than "relevant, admissible evidence relating to punishment" at the penalty phase.[28]

The first question to be asked is, what is relevant? Clearly, anything which would serve to explain or rebut the prior criminal record of the defendant which is introduced by the Commonwealth is relevant. However, the statute also allows the defendant to introduce evidence even absent the introduction of such a record. The rule of relevancy applicable in the penalty phase of a traffic proceeding stands in mark contrast to that which was not specifically addressed in felony cases prior to July 1, 1995, and after that date, is covered by the general rubric of relevancy to punishment. Thus, the statute governing traffic proceedings provides that, "[a]fter the prior traffic record of the defendant has been introduced, the defendant may be afforded an opportunity to present evidence limited to showing the nature of his prior convictions, suspensions, and revocations."[29] Had the legislature intended to similarly limit the right of the defendant to introduce evidence or the Commonwealth's right to rebut, it is suggested that it would have said so.

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27. VA. CODE ANN. § 19.2-295.1 (Michie 1995).

28. Davis v. Commonwealth, 402 S.E.2d 684 (Va. Ct. App. 1991) (holding hearsay evidence admissible in probation violation hearings); Anderson v. Commonwealth, 457 S.E.2d 396 (Va. Ct. App. 1995) (holding exclusionary rule not extended to secondary proceedings, i.e. probation revocation cases, except where officer acts in bad faith).

29. VA. CODE ANN. § 46.2-943 (Michie 1994).

Evidence to be considered must relate to punishment. As noted earlier, the term "punishment" and "sentence" are used interchangeably in the statute. Courts have historically considered a number of factors in the sentencing. These factors generally relate to the nature of the offense, the characteristics of the offender, programs available to the defendant, the likelihood of recidivism, restitution, and sentences in similar cases. The jury may not consider parole or the use of sentencing guidelines. They are limited in their deliberations to the consideration of the permissible punishments provided by statute for the offense. Thus, evidence of sentencing alternatives is not a proper subject for consideration by the jury.[30]

However, there are no specific limitations with respect to certain other matters before the court at the punishment stage. One might consider relevant upon the defendant's evidence or the Commonwealth's rebuttal, if raised by the defendant, such factors as the range of punishment established by the legislature, the injury to the victim, the use of a weapon, the extent of the offender's participation in the offense, the offender's motive in committing the offense, prior record and rehabilitative efforts, drug and alcohol use, and age, health, and education.[31]

In addition to the requirement that such evidence be relevant, it must also be admissible. The statute does not provide for a relaxation of the rules of evidence such as in medical malpractice review panels.[32] Accordingly, subject to the notice provisions of the statute, the traditional rules of evidence would control the conduct of the penalty phase.

A review of other states' bifurcated sentencing statutes is helpful in identifying relevant evidence. In Texas, the State and the defendant may present evidence,

> as to any matter the court deems relevant to sentencing, including but not limited to the prior criminal record of the defendant, his general reputation, his character, an opinion regarding his character, the circumstances of the offense for which he is being tried, and . . . any other evidence of an

30. *See, e.g.*, VA. CODE ANN. § 19.2-311 (youthful offender), § 19.2-316.1 (boot camp), § 18.2-254 (drug and alcohol rehabilitation) (Michie 1995).

31. *See* VIRGINIA CIRCUIT COURT JUDGES BENCHBOOK, CRIMINAL 241 (1992).

32. VA. CODE ANN. § 8.01-581.6(2) (Michie 1992).

> extraneous crime or bad act that it is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act . . . [a]dditionally . . . evidence may be offered . . . of an adjudication of delinquency . . . ."[33]

The Texas courts have treated factors to be introduced "in mitigation of punishment" to be those which have a relationship to the circumstances of the offense or to the defendant before or at the time of the offense, and have excluded factors arising after the offense.[34]

Tennessee's statute utilizes a scheme of enumerated "enhancement factors" and "mitigating factors."[35] Among the mitigating factors is " . . . [a]ny other factor consistent with the purposes of this chapter . . . "[36]

The penalty phase is described as a "separate proceeding" in the Virginia statute. Thus, it would appear that witnesses in the penalty phase would not be precluded from testifying even though they may have been present in court after a rule on witnesses had been requested at the trial on the merits of the charge. The separate nature of the proceedings would also permit counsel to make an opening and closing statement with respect to the evidence. However, it is clear that the statutory mandate that the same jury which heard the case should decide punishment would suggest that voir dire with respect to punishment should be conducted prior to the trial on the merits. This would likewise permit reference to sentencing ranges in the opening statement. It is suggested that in the event the defendant offers no rebuttal to the criminal history or elects not to testify, he would be entitled to an instruction to the effect that his silence in the sentencing phase should not be held against him, even though he testified in the case in chief.[37]

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33. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3 (West 1996).
34. Brown v. State, 674 S.W.2d 443, 447 (Tex. Ct. App. 1984).
35. TENN. CODE ANN. §§ 40-35-113, -114, -201 (1995).
36. TENN. CODE ANN. § 40-35-113 (13) (1995).
37. Stewart v. State, 666 S.W.2d 548 (Tex. Ct. App. 1984).

With the abolition of parole and the requirement that sentenced prisoners serve a minimum specified period of the sentence imposed, the court may be asked to inform the jury that a defendant will be required to serve a minimum portion of his sentence prior to release. This is to be distinguished from the mandate that the jury may not consider parole or the sentencing guidelines.[38] Such a consideration is not relevant to the jury's responsibility to determine an appropriate punishment and should not be given. Had the legislature intended that the jury might consider something other than the limits of punishment provided by law for an individual offense, it would have said so.[39]

Nothing in this section shall prevent the Commonwealth or the defendant from introducing relevant, admissible evidence in rebuttal.[40]

The rules of evidence with respect to the penalty phase are the same as those applicable to the trial on the merits of the charge.[41] Thus, misconduct for which there is no record of conviction may be introduced where otherwise admissible under existing case law.

Counsel may argue that the use of the word "prior" is descriptive of the time another offense was committed rather than the date of a conviction. The Commonwealth may wish in rebuttal to reiterate evidence from the guilt phase of the trial. Both arguments must fail. As noted earlier, "prior," within the context of the notice given by the Commonwealth, relates to convictions, and not to offenses.

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38. Eaton v. Commonwealth, 397 S.E.2d 385 (Va. 1990).

39. *Cf.* Simmons v. South Carolina, 114 S. Ct. 2187 (1994) (holding that a jury in capital murder case is entitled to know the possibility of parole on conviction because it is relevant to issue of further dangerousness); Wright v. Commonwealth, 450 S.E.2d 361 (Va. 1994); Ramdass v. Commonwealth, 450 S.E.2d 360 (Va. 1994) (holding an instruction in a capital murder case as to parole eligibility is not required as defendant upon conviction not eligible for parole).

40. VA. CODE ANN. § 19.2-295.1 (Michie 1995).

41. Williams v. New York, 337 U.S. 241 (1949) (holding that evidence of unadjudicated misconduct not constitutionally forbidden); Yeatts v. Commonwealth, 410 S.E.2d 254 (Va. 1991) (holding that evidence of unadjudicated misconduct is permitted in capital murder cases).

The penalty phase is not a separate trial, but instead, a separate proceeding. Any attempt by a party to introduce evidence previously presented at the guilt stage must fail. However, counsel would be free to argue such evidence at the penalty phase of the trial as the jury is permitted to consider evidence introduced at the merits stage.

If the defendant is found guilty of an offense other than a felony, punishment shall be fixed as otherwise provided by law.[42]

This reiterates the intent of the legislature to permit a separate penalty phase, including consideration of the prior record of the defendant and other relevant and admissible evidence as to punishment, in the case of a conviction of a felony. Should the defendant be convicted of a lesser included misdemeanor offense, the Court would proceed to promptly instruct the jury on the permitted range of punishments. Its decision would then be guided by the nature of the offense and contemporary values. However, as counsel have not had the opportunity to argue the issue of punishment, it would appear appropriate to permit both sides to argue, with the Commonwealth opening.

If the sentence on appeal is subsequently set aside or found invalid solely due to an error in the sentencing proceeding, the court shall impanel a different jury to ascertain punishment, unless the defendant, the attorney for the Commonwealth and the court agree, in the manner provided in §19.2-257, that the court shall fix punishment.[43]

Upon the trial of a bifurcated sentencing proceeding, the statute limits consideration of punishment at the penalty phase to the same jury which originally heard the case. Errors confined to the sentencing proceeding do not require reversal of the conviction.[44]

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42. VA. CODE ANN. § 19.2-295.1 (Michie 1995).

43. *Id.*

44. Snider v. Cox, 181 S.E.2d 617 (Va. 1971); Harris v. Commonwealth, 408 S.E.2d 599 (Va. Ct. App. 1991).

A different jury is empaneled to impose punishment in the event of such a reversal either on a motion after verdict or appeal. Evidence relating to the offense might then be offered in such a trial where the jury had not heard the evidence in the case.

May a defendant change his plea to guilty or *nolo contendere* after the jury has returned a finding of guilt but before the commencement of the penalty phase? In a recent decision, the Court of Appeals appears to have answered this question in the negative.[45] Article 1, section 8 of the Constitution of Virginia commands that "[i]n criminal cases, the accused may plead guilty."[46] Thus, it may be argued that so long as the court finds such plea to have been voluntary and intelligently made, the Defendant should be permitted to tender such plea and have it accepted, even though the jury has found the defendant guilty.[47]

Conclusion

In this paper an attempt has been made to raise issues which may interest the reader in a more thorough and thoughtful consideration of the issue of bifurcation in non-capital felony jury trials. When the jury returns with its punishment decision, it will hopefully reflect a more balanced decision—a decision which has been carefully crafted as a result of the application of the adversarial process to a separate assessment of the offender and of the offense. It is important that the judge and the lawyers involved in the trial of felony cases in Virginia realize that they have an obligation to insure that application of the adversarial process to sentencing is conducted in a forum which meets both statutory and Constitutional requirements, and eliminates personal bias and prejudice from the ultimate

45. VA. CONST. art. 1, § 8.

46. Daye v. Commonwealth, No. 2125-94-1, 1996 WL 70203 (Va. Ct. App. Feb. 20, 1996).

47. Dixon v. Commonwealth, 172 S.E. 277 (Va. 1934) ("[t]he court had no more authority to submit the degree of guilt *and the question of punishment* to be inflicted upon the accused to a jury for its determination that it had to submit these questions to any other bystanders for determination." (emphasis added)).

determination of the limits of punishment for offenders in non-capital felony prosecutions.