Virginia Association of Criminal Defense Lawyers

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Steven Dalle Mura
Office of the Executive Secretary
Supreme Court of Virginia
100 North Ninth Street
Richmond, VA 23219

RE: Proposed Rule 3A:14.1

Dear Mr. Mura:

The Advisory Committee on Rules of Court has invited comment on proposed Rule 3A:14.1 which provides for the anonymity of jurors during *voir dire* and throughout the trial. Please accept this letter as the official position of the 395 members of the Virginia Association of Criminal Defense Lawyers (VACDL).

The Rule, in subsection (A), proposes the assignment of numbers to individual jurors during criminal trials and proposes doing this for all criminal trials "to avoid any implication that this anonymous procedure is being undertaken in any specific case because of the dangerousness of that specific defendant - an inference that jurors might otherwise draw if the procedure is used selectively or on a discretionary basis."

Similarly, subsection (B) is mandatory and deprives the individual trial court with discretion concerning identifying information of jurors. This subsection requires all such identifying information provided to trial counsel be returned to the court and be placed under seal. It is not to be unsealed except upon a showing of good cause.

The Advisory Committee reports it focused upon the plain language of Section 19.2-263.3 of the Virginia Code which was adopted by the 2008 session of the General Assembly and focuses on juror information confidentiality. Va. Code Ann. § 19.2-263.3. It also looked at rules and statutes from other jurisdictions addressing these concerns.

There is no reference to *U.S. v. Krout*, 66 F.3d 1420 (5th Cir. 1995), *U.S. v. Paccione*, 949 F.2d 1183 (2d Cir. 1991), and other federal court decisions addressing the validity of anonymous jury impanelment. These comments will explore the implications of U.S. v. *Krout, supra.*

U.S. v. Krout, supra was a case of first impression in the 5th Circuit. It upheld the impanelment of an anonymous jury and adopted an abuse of discretion standard of review in keeping with the 2d, 3d, 7th, and 11th Circuits. (There is no appellate decision on the issue in Virginia and only one case in the 4th Circuit which cites *Krout*, for another proposition.)

The 5th Circuit in *Krout* said:

> Moving to the merits of the decision to empanel an anonymous jury, it must be emphasized that this is a drastic measure, which should be undertaken only in limited and carefully delineated circumstances. *United States v. Ross*, 33 F.3d 1507 (11th Cir.1994). Courts that have upheld this form of juror protection have reasoned that it is constitutional when needed to ensure against a serious threat to juror safety, if the courts also protect the defendants' interest in conducting effective voir dire and maintaining the presumption of innocence. . . . "These competing individual and institutional interests are reasonably accommodated, and the use of an anonymous jury is constitutional when, 'there is strong reason to believe the jury needs protection' and the district court 'tak[es] reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that his fundamental rights are protected'". *United States v. Wong*, 40 F.3d at 1376 (internal citations omitted).

U.S. v. Krout, 66 F.3d at 1427 (internal citations omitted).

Having found the use of anonymous juries to be a drastic step that is constitutional on the basis it is used to protect the safety of jurors, the 5th Circuit went on to identify five factors which may be used to justify the trial court's exercise of discretion in granting such a motion. Those five factors include, but are apparently not limited to, the following:

> (1) the defendants' involvement in organized crime; (2) the defendants' participation in a group with the capacity to harm jurors; (3) the defendants' past attempts to interfere with the judicial process or witnesses; (4) the potential that, if convicted, the defendants will suffer a lengthy incarceration and substantial monetary penalties; and, (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment. . . . Furthermore, as a caution that use of anonymous juries will remain **a device of last resort**, it is necessary that the district court base its decision on more than mere allegations or inferences of potential risk.

U.S. v. Krout, 66 F.3d at 1427 (internal citations omitted) (emphasis added).

Rule 3A:14.1(A) and (B) deprive the trial courts of Virginia of the discretion five Federal Circuit Courts of Appeal say they enjoy. These provisions also fail to evaluate the five factors enunciated in *Krout*. They also elevate the use of an anonymous criminal jury from a "device of last resort" which is constitutional only upon a showing of actual danger to jurors' safety to a matter of routine. Such action would not appear to pass constitutional muster in the 2d, 3d, 5th, 7th, and 11th Circuits. It should not be adopted in the Commonwealth of Virginia.

Subsections (A) and (B) also reduce the level of respect the legal system should accord citizens fulfilling an important, "traditional function of government." *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 624, 111 S. Ct. 2077, 2085, 114 L.Ed.2d 660, 676 (1991). Currently, the judicial system tends to casually attend to the needs of venire persons and often reduces their participation to herding them from courtroom to courtroom as if they were cattle. Assigning numbers amounts to branding the venire in the same fashion as cattle. We risk

mistreating the very people who perform "the critical governmental functions of guarding the rights of litigants and 'ensuring continued acceptance of the laws by all of the people.'" *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. at 624 (citing *Powers v. Ohio*, 499 U.S. 400, 407).

By assigning the venire numbers, the system also reduces the sense of importance the jurors should feel as they sit as the triers of fact. This sense of unimportance is heightened when counsel are addressing the trial court as "Your Honor" or "Judge" and each other as Mr. or Ms. Referring to the most important people in the room as Juror 1 or Juror 2 is belittling and demeaning at a time when they should be reminded of their importance.

The routine use of numbers creates the implication all individuals accused of a crime are guilty and dangerous. If this were not so, the jurors could reasonably ask themselves: "Why does the judge need to give me a number?"

The provisions of Subsections (A) and (B) also create a false sense of security when one remembers all criminal juries are public. Unless the physical identity of the jurors is shielded from the gallery, the potential jurors are provided a separate entrance to the courthouse from a secluded parking area, and the jurors are given escorts to the courtroom, it is a simple matter for an individual intent on harming one or more of them to follow them from the courtroom to the street where they may be followed to their homes or work places. Such a false sense of security is a disservice to the people the judicial system needs to fulfill its function.

This sense of false security is heightened when one remembers the majority of Virginia's communities are still small, rural areas where everyone knows one another. The intimacy of many of Virginia's communities, like Pulaski and Craig Counties, renders the use of numbers and the confidentiality of juror information meaningless.

Our government is a government of checks and balances. Depriving the press and the balance of the community of the identity of the jurors who sit in judgment of their neighbors deprives society the requisite check on their authority. It is important jurors remain accountable to their community if they are to represent the community in fulfilling the critical, traditional function of government identified in *Powers v. Ohio,* 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) and *Edmonson v. Leesville Concrete Co., Inc., supra*. Knowing who the jurors are is the only way to achieve this goal.

The United States Supreme Court has said, "Voir dire permits a party to establish a relation, if not a bond of trust, with the jurors. This relations continues throughout the entire trial and may in some cases extend to the sentencing as well." *Powers v. Ohio*, 499 U.S. 400, 413, 111 S.Ct. 1364, 1372, 113 L.Ed.2d 411, 427 (1991). Juror anonymity through the use of numbers inhibits the ability of counsel to develop this rapport with the very people they depend upon to decide the fate of their client, be it the accused or the people of the Commonwealth.

The adoption of Subsection (B) also implicates the freedom of press. Members of the press maintain they are the watchdogs of government and it is necessary they have access to jurors' identities if they are to fulfill this role.

The trial of John Gotti in New York is offered as an example. In that trial, the judge

empaneled an anonymous jury. One of the jurors, with purported ties to an Irish-American organized crime group, approached Gotti's attorneys, accepted a bribe, and arranged for an acquittal. The press believes if it had had access to the jurors' identities it would have learned of the juror's connections to a crime group and alerted the judicial system with a story on the trial. (See Secret Justice: Anonymous Juries, Ashley Gauthier, http://www.rcfp.org/secretjustice/anonymousjuries/trend.html).

Such an event highlights the perils associated with anonymous juries and the ease of bribery and jury tampering in the absence of the community, individually or through the press, knowing who is serving as jurors.

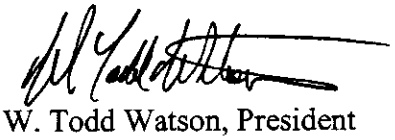
Restrictions on counsel's access to juror information inhibits counsel's ability to exercise due diligence in his efforts to determine if all members of the venire are of the accused's vicinage.

The provisions of Subsection (B) also inhibit the ability of counsel to investigate allegations of juror misconduct and issues involved in death penalty cases.

Subsections (A) and (B) create "a slippery slope toward a judicial process cloaked in secrecy. If courts can permit juror anonymity over concerns of safety, will some judges permit fearful witnesses to testify anonymously? Such a rule would do away with the [accused's] right to face the accuser and would make it impossible for a jury to evaluate the witness' credibility." (Secret Justice: Anonymous Juries, **supra**).

VACDL suggests Subsections (A) and (B) of proposed Rule 3A:14.1 be deleted. If a new Rule is required proposed Subsection C should be the only provision adopted and it should be rewritten to include the factors enunciated in *Krout*. Such a resolution preserves the trial court's discretion to make an individualized decision as required by the United States and Virginia Constitutions.

Sincerely,



W. Todd Watson, President
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