NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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JAN L. BRODIE

RETIRED JUDGES

December 20, 2020

LETTER OPINION

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Re: *Commonwealth of Virginia v. Terrance Shipp, Jr.*
Case No. FE-2020-8

The Court has before it the question whether it should permit a jury trial to take place in a courtroom gilded with portraits of jurists, particularly when they are overwhelmingly of white individuals peering down on an African American defendant whose liberty is the object of adjudication in this cause. At issue is not the narrow inquiry

whether the portraits depict judges who have exhibited overt personal racial animus towards African Americans. Rather, the broader concern is whether in a justice system where criminal defendants are disproportionately of color and judges disproportionately white, it is appropriate for the symbols that ornament the hallowed courtrooms of justice to favor a particular race or color. Evaluation of this matter is left at present to the sound discretion of each presiding judge. There may be contrary views holding the dignity of the Court process is not offended by celebrating the service of prior judges with display of their portraits. However, in weighing the interests of honoring past colleagues against the right of a defendant to a fair trial, the Court is concerned the portraits may serve as unintended but implicit symbols that suggest the courtroom may be a place historically administered by whites for whites, and that others are thus of lesser standing in the dispensing of justice. The Defendant's constitutional right to a fair jury trial stands paramount over the countervailing interest of paying homage to the tradition of adorning courtrooms with portraits that honor past jurists.

Consequently, the jury trial of the Defendant, and of any other defendant tried before the undersigned judge, shall henceforth proceed in a courtroom devoid of portraits in the furtherance of justice.[1]

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[1] The undersigned judge has not permitted portraits in his assigned courtroom since taking the bench on July 1, 2017. However, due to the COVID-19 pandemic and the need to reestablish jury trials in a safe manner pursuant to a plan approved by the Supreme Court of Virginia, such trials are now being conducted in several of the larger courtrooms of the Fairfax Circuit Court, all containing portraits. The issuance of this opinion should not imply that other judges of this Court have taken a particular public position for or against the reasoning delineated herein. What is certain is that all of the current Fairfax Circuit Court judges, as accentuated by the recent collective issuance of an "Initial Plan of Action to Address Systemic Racism and Enhance Civic Engagement With Our Community," have committed to "self-examination and civic engagement to ensure systemic racism has no place in the Fairfax judicial system." The undersigned judge further does not purport to speak for or impose his exercise of discretion on others. Nevertheless, ingrained custom to the contrary respecting use of some of the courtrooms of the Fairfax Circuit Court should not

BACKGROUND

The Defendant, who is African American, is scheduled to appear for a criminal jury trial before the undersigned judge on January 4, 2021. He has filed a "Motion to Remove Portraiture Overwhelmingly Depicting White Jurists Hanging in Trial Courtroom." Because of the COVID-19 pandemic, extraordinary measures have been taken to enact a plan approved by the Supreme Court of Virginia to restore jury trials in a manner that keeps all participants safe. Among the measures instituted are that trials are to only take place in the largest courtrooms of the Fairfax Circuit Court, thereby enabling social distancing and a safe environment that abates the danger of serving as a vector for transmission of the disease. The Defendant's jury trial will be the first trial of this type in which the undersigned judge will preside since the declaration of the judicial emergency which curtails the use of his normally designated courtroom. The Motion of the Defendant has for the undersigned judge, who normally presides in his assigned courtroom devoid of portraits, brought to the fore whether to conduct trial as a matter of expediency in a courtroom replete with portraits of past white jurists, or instead grant the Motion of the Defendant to remove such portraits for the duration of trial. The Commonwealth's Attorney has stated he does not oppose the granting of the Motion made by the Defendant.

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deter early consideration of whether the undersigned judge should continue conducting jury trials in a courtroom devoid of portraits consistent with his practice when in possession of his normally assigned courtroom.

ANALYSIS

We stand at a point in judicial history where the moment calls for heightened attention to the past inequities visited upon persons of color and minorities. On August 14, 2020, the fifteen current judges of the Fairfax Circuit Court, seizing on that moment, unanimously affixed their signature to a collective landmark "Initial Plan of Action to Address Systemic Racism and Enhance Civic Engagement With Our Community."[2] The Initial Plan of Action referenced the following inspirational guidance from the Supreme Court of Virginia:

> On June 16, 2020, in a letter to the Judiciary and Bar of Virginia addressing the problem of racism, the Supreme Court of Virginia stated judges "must take all reasonable steps to ensure that in the courtrooms of the Commonwealth, all people are treated equally and fairly with dignity under the law."

As it concerns the question herein presented, the third point of this Court's nine-point Initial Plan of Action states as follows: "Identify whether there are symbols in the courthouse and courthouse grounds that carry implications of racism, such as public displays of historical figures who have demonstrated racial hostility." The prevalence of portraits of white judges in the courtrooms of the Fairfax Circuit Court, which constitute some forty-five (45) out of forty-seven (47) individuals, while not emblematic of racism on the part of presiding judges, certainly highlights that until the more recent historical past, African Americans were not extended an encouraging hand to stand as judicial candidates. Only three African American judges have been elected to the Fairfax Circuit

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[2] The Plan may be accessed here: https://www.fairfaxcounty.gov/circuit/sites/circuit/files/assets/documents/pdf/fairfax-cir-ct-plan-address-racism-enhance-civic-engagement.pdf

Court bench.[3] The first African American Circuit Court judge, Marcus D. Williams, was not elected until 1990 and served until his retirement in 2012. The second African American judge, Gerald Bruce Lee, was elected in 1992 and served until 1998, when he became a federal District Court judge. The third African American judge, Dontaè L. Bugg, was elected in 2019.

The low hanging rotten fruit of overt racism is easily identified and picked off to strengthen the tree of society. The more conventional symbols which to some impart tradition, and to others subtle oppression, are less comfortably addressed. The ubiquitous portraits of white judges are such symbols. When they were hung in the more recent past, negative connotations thereof were not a consideration. To the public at large making use of the courthouse, other than some attorneys who might have appeared before the judges portrayed, there is no context to learn about who is depicted. The portraits in sum, are of benefit to only a few insiders who might fondly remember appearing before a particular judge or to a retired judge's family making a rare visit to the courthouse. To the public seeking justice inside the courtrooms, thus, the sea of portraits of white judges can at best yield indifference, and at worst, logically, a lack of confidence that the judiciary is there to preside equally no matter the race of the participants.

The Preamble to the Canons of Judicial Conduct for the Commonwealth of Virginia ("Canons") governing the ethical conduct of judges sets forth the high aspirational goals to which all judges must adhere:

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[3] On December 8, 2020, Tania M. L. Saylor, the first woman of color slated to hold the job, was recommended by the Fairfax Legislative Delegation for election as a judge of the Fairfax Circuit Court in contemplation of a vacancy occurring on July 1, 2021.

> The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of these Canons are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and *strive to enhance and maintain confidence in our legal system.*

Va. Sup. Ct. R., Part 6, § III, Preamble (emphasis added). Conducting jury trials in a venue devoid of portraits certainly does not detract from public confidence in the judiciary, but if anything, removes symbols that could be misconstrued as an expression that the current justice system is as in the more distant past, of disfavor to persons of color. Both the Preamble and this Court's Initial Plan of Action discussed above, are consistent with a trial devoid of portraits.

The heightened duty of a judge to preside in a manner that should not be perceived as discriminatory, irrespective of lack of subjective intent, is also specified in the Canons:

> A judge shall not, in the performance of judicial duties, by words or *conduct* manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

Va. Sup. Ct. R., Part 6, § III, Canon 3 (emphasis added). While the Canon here addresses at minimum overt conduct by a judge, arguably, conduct may also be viewed as permitting what should not be permitted, i.e., the failure to act. The legitimacy of the judiciary is directly tied to the degree of fairness of process afforded. As has been stated by others, attention to process is often appreciated more than the result, for a good process tends to yield the most just result.

While to some the issue of portraits may be a trivial matter, to those subject to the justice system this is far from the case. In a best-selling book, *The Sun Does Shine: How*

I Found Life, Freedom, and Justice, recounting his trial and nearly three decades spent on death row before his conviction was reversed unanimously by the United States Supreme Court, Anthony Ray Hinton describes his searing impression upon entering the Jefferson County, Alabama courthouse on December 15, 1986, to be subjected to appalling injustice. His powerful words speak volumes as to why portraits on the walls of the trial courtroom may impart a sense of unfairness in the judicial process:

> It was nothing less than a lynching—a legal lynching—but a lynching all the same. The anger I had tried so hard to stuff down and pray away was in full force. My only crime was being born black, or being born black in Alabama. Everywhere I looked in this courtroom, I saw white faces—a sea of white faces. Wood walls, wood furniture, and white faces. The courtroom was impressive and intimidating. I felt like an uninvited guest in a rich man's library. It's hard to explain exactly what it feels like to be judged. There's shame to it. Even when you know you're innocent. It still feels like you are coated in something dirty and evil. It made me feel guilty. It made me feel like my very soul was put on trial and found lacking.

Anthony Ray Hinton, *The Sun Does Shine: How I Found Life, Freedom, and Justice* 6 (2019). Wood surfaces and impressive courtrooms are present in the Fairfax Circuit Court. However, that is where the Fairfax Circuit Court parts company with the Jefferson County, Alabama courthouse of 1986, as depicted in the *Hinton* case. The Fairfax Circuit Court's Initial Plan of Action is designed in large part to make clear to the public that their confidence in justice being dispensed fairly in the Court is well-placed. In that vein, the Court does not desire to risk the misperception of any defendant that while being tried, he or she is "an uninvited guest in a rich man's library." Perception is often deemed reality to those participating in the justice system.

In a jury trial, "[t]he court must afford a party a full and fair opportunity to ascertain whether prospective jurors 'stand indifferent in the cause' . . . ." *Lawlor v. Commonwealth*,

285 Va. 187, 214 (2013) (internal citations omitted). The Court may also exercise a concurrent right to make such inquiry of jurors, and implicit in how voir dire is to be conducted is the duty of the Court to assure impaneling of a jury that is free from bias and prejudice. *See* Va. Code § 19.2-262.01. By permitting portraits, the Court adds one additional unnecessary potential wrinkle for inquiry by both the defense and prosecution: determination of whether the portraits bias the jury for or against the defendant, and for that matter, for or against the alleged victim of a particular crime that is being tried.

Portraits that overwhelmingly imply justice is the province of administration by whites also arguably increase the danger of jury nullification[4] when the victim is of color and the accused white. This Court has previously analyzed the early presence of jury nullification in the history of the United States in the context of an opinion regarding transparency in the examination of jurors during voir dire, whose holding has now been eclipsed by the adoption of legislation enshrining even greater rights of the parties to examine jurors directly about sentencing bias. *See Commonwealth v. Barela*, 96 Va. Cir. 404 (2017); Va. Code § 19.2-262.01 (effective July 1, 2020). Though the historical power of jury nullification exists, the danger of its use in promoting unfairness is of concern in

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4 "[N]ullification" can cover a number of distinct, though related, phenomena, encompassing in one word conduct that takes place for a variety of different reasons; jurors may nullify, for example, because of the identity of a party, a disapprobation of the particular prosecution at issue, or a more general opposition to the applicable criminal law or laws. We recognize, too, that nullification may at times manifest itself as a form of civil disobedience that some may regard as tolerable. The case of John Peter Zenger, the publisher of the *New York Weekly Journal* acquitted of criminal libel in 1735, and the nineteenth-century acquittals in prosecutions under the fugitive slave laws, are perhaps our country's most renowned examples of "benevolent" nullification.

United States v. Thomas, 116 F.3d 606, 614 (2d Cir. 1997).

the modern context of justice. As stated in *United States v. Washington* by an eminent panel including the late Spottswood W. Robinson, III and Ruth Bader Ginsburg:

> A jury has no more *"right"* to find a "guilty" defendant "not guilty" than it has to find a "not guilty" defendant guilty, and the fact that the former cannot be corrected by a court, while the latter can be, does not create a right out of the power to misapply the law. Such verdicts are lawless, a denial of due process and constitute an exercise of erroneously seized power. Any arguably salutary functions served by *inexplicable* jury acquittals would be lost if that prerogative were frequently exercised; indeed, calling attention to that power could encourage the substitution of individual standards for openly developed community rules.

United States v. Washington, 705 F.2d 489, 494 (D.C. Cir. 1983) (per curiam) (emphasis in original). The United States Court of Appeals for the Second Circuit elaborated further in support of such holding by stating:

> Moreover, although the early history of our country includes the occasional *Zenger* trial[5] or acquittals in fugitive slave cases, more recent history presents numerous and notorious examples of jurors nullifying-cases that reveal the destructive potential of a practice Professor Randall Kennedy of the Harvard Law School has rightly termed a "sabotage of justice." Randall Kennedy, *The Angry Juror,* WALL ST. J., Sept. 30, 1994, at A12. Consider, for example, the two hung juries in the 1964 trials of Byron De La Beckwith in Mississippi for the murder of NAACP field secretary Medgar Evers, or the 1955 acquittal of J.W. Millam and Roy Bryant for the murder of fourteen-year-old Emmett Till, *see* DAVID HALBERSTAM, THE FIFTIES 431-41 (1993); RANDALL KENNEDY, RACE, CRIME AND THE LAW 60-63, 250 (1997); JUAN WILLIAMS, EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954-1965, at 38-57, 221-25 (1987)—shameful examples of how nullification has been used to sanction murder and lynching.

Thomas, 116 F.3d at 616.

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[5] *See supra* note 4 for an explanation of what constitutes a *Zenger* trial.

The same concern about the misperception of justice previously discussed in reference to defendants holds true for victims as well. The Virginia Constitution enshrines a duty of fairness towards victims of crime appearing before the courts:

> That in criminal prosecutions, *the victim shall be accorded fairness*, dignity and respect by the officers, employees and agents of the Commonwealth and its political subdivisions and officers of the courts and, as the General Assembly may define and provide by law, may be accorded rights to reasonable and appropriate notice, information, restitution, protection, and access to a meaningful role in the criminal justice process.

Va. Const. art. I § 8-A (emphasis added). The perception of unfairness while being tried surrounded by a sea of white faces expressed by Anthony Ray Hinton, is also applicable to victims, particularly when of color, surrounded by portraits of white judges.

The display of portraits of judges in courtrooms of the Fairfax Courthouse is based on a non-racial principle, yet yields a racial result. The risk of fostering the perception of injustice or bias on the part of a jury, be it respecting a defendant or victim of color, weighs against permitting the showing of portraits during the jury trial of the Defendant, particularly when the portraits can be easily removed for the duration of the jury trial and later redisplayed without offense to those, if any, who may be of a different opinion.

CONCLUSION

The Court has considered the question of whether it should permit a jury trial to take place in a courtroom gilded with portraits of jurists, particularly when they are overwhelmingly of white individuals peering down on an African American defendant whose liberty is the object of adjudication in this cause. At issue is not the narrow inquiry whether the portraits depict judges who have exhibited overt personal racial animus

towards African Americans. Rather, the broader concern is whether in a justice system where criminal defendants are disproportionately of color and judges disproportionately white, it is appropriate for the symbols that ornament the hallowed courtrooms of justice to favor a particular race or color. Evaluation of this matter is left at present to the sound discretion of each presiding judge. There may be contrary views holding the dignity of the Court process is not offended by celebrating the service of prior judges with display of their portraits. However, in weighing the interests of honoring past colleagues against the right of a defendant to a fair trial, the Court is concerned the portraits may serve as unintended but implicit symbols that suggest the courtroom may be a place historically administered by whites for whites, and that others are thus of lesser standing in the dispensing of justice. The Defendant's constitutional right to a fair jury trial stands paramount over the countervailing interest of paying homage to the tradition of adorning courtrooms with portraits that honor past jurists.

Consequently, the jury trial of the Defendant, and of any other defendant tried before the undersigned judge, shall henceforth proceed in a courtroom devoid of portraits in the furtherance of justice. The Court shall enter a separate order incorporating the ruling herein, and this cause continues.

Sincerely,

[redacted]

David Bernhard
Judge, Fairfax Circuit Court