IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

THE STATE	)	
	)	Indictment No. 14SC126099
v.	)	
	)	
JARVIS TAYLOR	)	
	)	
Defendant	)	

ORDER DENYING MOTION FOR RECONSIDERATION OF ORDER DENYING MOTION FOR DISQUALIFICATION OF JUDGE

The above matter is before the Court on the State's Motion for Reconsideration of the Order Denying the State's Motion for Disqualification of Judge. In the Motion for Reconsideration, the State alleges that the Court is biased because it expressed the opinion that the mandatory sentence of life in prison without the possibility of parole is too long for a defendant charged with armed robbery by use of an air gun (not a deadly weapon), even though he has three prior felony convictions. The prior felony convictions are Theft by Receiving Stolen Property (auto), Possession of a Tool for Commission of a Crime (screwdriver), and Aggravated Assault (during a jail riot).

The State also alleges that the Court's information about sentencing comes from an extrajudicial source, namely the Court's knowledge of the law. The State appears to argue that judges are precluded from holding a personal opinion about a law. This Court declines to find that this judge is required to recuse for holding a personal opinion about the advisability of a particular sentencing statute as applied to a particular case.

The Motion for Disqualification of Judge arose after the State objected to the Court's charge to the jury informing them of the mandatory sentence the Defendant must receive should the jury convict him of armed robbery (with an air gun.) The Court notes that the State requested

that the Court charge the jury that it could consider the lesser included offense of robbery by intimidation, providing the jury with a choice between armed robbery and robbery. Had the jury convicted the Defendant of armed robbery, the Court would have been required by law to sentence the Defendant to life in prison without the possibility of parole. The jury found the Defendant guilty of robbery, not armed robbery, and was sentenced to 30 years to serve 10 years in prison. Because of mandatory sentencing, he is not eligible for parole.

The State argues that the Court violated the law by informing the jury of the sentence, even though the jury verdict mandates the sentence. The Court finds that this area of the law is not settled. General practice is that the jurors are not informed about punishment, at least in non-capital cases (even when the sentence is the same as a capital sentence). The primary rationale for this practice is the separation of powers in the courtroom, allowing the jury to determine guilt and the judge to determine the sentence. However, this rationale makes no sense in cases involving mandatory sentencing, where the traditional and interpretive power of the judge in sentencing is completely removed by the legislature. In these cases, the jury actually determines the sentence by convicting the defendant. The question then becomes: Should the jury know the punishment that they are determining with their verdict, or should they be kept in the dark regarding the consequences of their verdict?

A. The right of the Jury to consider mandatory sentencing is grounded in their role as the judges of the law and the facts under the Georgia Constitution

Under the Georgia Constitution: "In criminal cases, the defendant shall have a public and speedy trial by an impartial jury; and the jury shall be the judges of the law and the facts."[1] In the case at bar, the jury's verdict can impose a mandatory sentence under a law of which the jury is

[1] G.A. Const. art. § 1 para. XI(a).

unaware. When the jury's decision mandates the punishment, the jury should be informed of the effect of their verdict.

The State cites *Lewis v. State* for the proposition that "it is error to instruct the jury as to a possible sentence in a felony case before the jury has determined the question of guilt or innocence."[2] The opinion in *Lewis* relies on the premise that "the judge, not the jury, determines the sentence" and that "the failure to give a charge with regard to sentencing matters is not error."[3] In the case at bar, the judge would not determine the sentence as to armed robbery; the sentence would be imposed by the jury's verdict alone. As the only safeguard against the unbridled power of the State, the jury needed to be informed of the consequences of its decision. Further, the case law relied upon by *Lewis* dates back to a time before judge sentencing replaced the bifurcated trial procedure.[4] Under the bifurcated procedure, the jury would have some discretion in the sentence it imposed. Now, with mandatory sentencing, neither the judge nor the jury has discretion in the sentence beyond the jury's determination of the verdict of guilt.

As the judge of the law and the facts under the Georgia Constitution, the jury should be informed when its verdict automatically imposes, by law, a mandatory sentence.

B. Jury power over sentencing was historically established under the Sixth Amendment as an intrinsic component of their function as a check on overreaching government.

In providing all criminal defendants the right to a "speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed," the Sixth Amendment to the U.S. Constitution sets the foundation for the role of the jury as the institution interposed between the accused and the government.[5] The Supreme Court has long upheld the

---

[2] *Lewis v. State*, 158 Ga. App. 575 (1981)
[3] *Id.* at 575
[4] *See: Ford v. State*, 232 Ga. 511, 518 (1974), *Moore v. State*, 228 Ga. 662
[5] U.S. Const. amend. VI.

concept that community oversight of criminal prosecution is the primary purpose of a jury trial, describing the jury as "the conscience of the community in our criminal justice system,"[6] and necessary "to prevent oppression by the Government."[7] This concept reflects the contemporary purpose of the Founders in enacting the amendment. In the Federalist Papers, Alexander Hamilton elaborated on the purposes of the right to trial by jury, stating, "[a]rbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions have ever appeared to me the great engine of judicial despotism; and these have all relation to criminal proceedings."[8] During the ratification of the amendment, the right to a jury trial was heralded as "a valuable safeguard to liberty" and "the very palladium of free government."[9]

In exercising their function, juries in early American criminal cases were assumed to have knowledge of any harsh mandatory sentencing and were allowed to consider it when weighing the evidence.[10] Vicinage and property requirements for jurors guaranteed they had some stake in the community and awareness of the law and penalties for violating it.[11] In fact, irregularities in jury composition and jury ignorance of the law were often grounds for appeal.[12] That colonial juries were heavily informed about the law is demonstrated by the then common practice of counsel to highlight law of the case, over the weight of the evidence, in their closing statements.[13]

Jury powers in colonial America were so pervasive as to give juries the right to decide how the law would apply to each case. It was not uncommon for juries to convict guilty

---

[6] *Witherspoon v. Illinois,* 291 U.S. 24, 31 (1965)
[7] *Williams v. Florida*, 399 U.S. 78, 100 (1970)
[8] The Federalist No. 83 (Alexander Hamilton)
[9] *Id.*
[10] *United States v. Polouizzi*, 687 F. Supp. 2d 133 (E.D.N.Y. 2010), reversed on other grounds
[11] *Id.* at 171(citing Julius Goebel, Jr. & T. Raymond Naughton, *Law Enforcement in Colonial New York* (1944))
[12] Julius Goebel, Jr. at 604
[13] *Id.* at 660

defendants on a lesser charge, often motivated by the desire to mitigate overly harsh sentencing.[14] Juries also had the ability to alleviate the severity of the law and its implications on the defendant's family by finding the defendant "penniless."[15] Finally, the jury could acquit a guilty defendant – a right that became the basis for the modern day process of jury nullification.[16] The recognition of the jury's right to decide the law and how it is to be applied to particular defendants was expressly recognized by the Supreme Court in 1794 in *Georgia v. Brailsford* after reminding the jury that, generally, they rule on questions of fact and the court rules on questions of law: "By the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge both, and to determine the law as well as the fact in controversy… both objects are lawfully, within your power of decision."[17]

Beginning in the 19th century, modern courts have restricted the rights of the jury under the Sixth Amendment. Cases limiting jury discretion largely rely on a Supreme Court decision from 1895, *Sparf v. United States,* which prevented the jury from finding a defendant who was charged with murder as guilty of the lesser crime of manslaughter, despite this being a common jury function.[18] In the opinion, Justice Harlan says, "until nearly forty years after the adoption of the Constitution of the United States, not a single decision… has been found, denying the right of the jury upon the general issue in a criminal case to decide, according to their own judgment and consciences, the law involved in that issue."[19] Despite this clear acknowledgment of the established power of the jury, he goes on to say that beginning in the 1930s, "the general

---

[14] *United States v. Polouizzi*, 687 F. Supp. 2d at 173 (citing Jeffrey Abramson, *We, The Jury: The Jury System and the Ideal of Democracy* (1994))
[15] Julius Goebel, Jr. at 676
[16] *Id.* at 670
[17] 3 U.S. 1 (1974)
[18] *Sparf v. United States*, 156 U.S. 51 (1895)
[19] *Id.* at 168

tendency of decision in this country… has been against the right of the jury."[20] While generally viewed as the original precedent against jury nullification, *Sparf v. United States* adopts no such ruling. Many courts now erroneously rely on *Sparf* to refuse to inform juries of their full powers.[21]

C. The Supreme Court is willing to strike down precedent that has eroded the historical functions of the jury as reflected in the original meaning of the Sixth Amendment.

In a recent line of sentencing decisions, the Supreme Court has stressed the importance of returning to the jury its appropriate constitutional powers and essential role within the Constitution's system of checks and balances.[22] In each case, the Court stressed that allowing a judge to make a factual determination that increases the consequence of the guilty verdict inherently infringes on the historically founded right of the jury to "guard against a spirit of oppression and tyranny on the part of rulers"[23] and "ensure [the people's] ultimate control in the judiciary."[24]

In these decisions, the Court concludes that the Framer's intention to use the jury as a check on judicial power prevents it from allowing judges to impose higher penalties based on judicial fact finding. Each decision is largely founded on the Court's interpretation of the jury's role in sentencing in early American and English cases.[25] Through an examination of the case law of that period on jury power, especially its power to find the law and refuse to convict, the Court determined that the jury's power over sentencing under the Sixth Amendment was then well-

---

[20] *Id.* at 168
[21] *See, e.g., Sparf v. United States*, 156 U.S. 51 (1895), *United States v. James,* 2000 U.S. App. LEXIS 1738 (11th Cir. 2000), *United States v. Thomas*, 116 F.3d 606 (2nd Cir. 1997)
[22] *Jones v. United States*, 526 U.S. 227, 262 (1999), *U.S. v. Booker*, 543 U.S. 220, 255 (2005), *Apprendi v. New Jersey*, 530 U.S. 466, 568 (2000), *Blakely v. Washington*, 542 U.S. 296 (2004)
[23] *Apprendi v. New Jersey*, 530 U.S. at 477
[24] *Blakely v. Washington*, 542 U.S. at 306
[25] *United States v. Polouizzi*, 687 F. Supp. 2d at 186

established.[26] Individually, and even more strongly as a group, the decisions show the Court's willingness to strike down precedent that has eroded the historical functions of the jury in order to "return to the status quo ante – the status quo that reflects the original meaning of the Fifth and Sixth Amendments."[27]

These cases demonstrate that the Supreme Court is so committed to returning to the jury its originally accepted Sixth Amendment powers that it is willing to invalidate widespread sentencing practices. Further, the Supreme Court's acknowledgement of the ramifications of these decisions on both efficiency and established practice indicates its anticipation that they would be used to strike down any precedent that has eroded the jury's historical function. Dissenting in *Apprendi v. New Jersey*, Justice Breyer argues the majority's solution would be inefficient and unworkable. In response, Justice Scalia noted that even a "better" or "more efficient" system does not devalue that system which was envisioned by the Constitution which "has never been efficient; but it has always been free".[28] He goes on to say that the "founders of the American Republic were not prepared to leave [criminal justice] to the State" and that "it is sometimes necessary [for Judges] to remind ourselves [we] are part of the State – and an increasingly bureaucratic part of it, at that."[29]

Justice Scalia's majority opinion in *Blakely* reiterated that concern about difficulties spawned by changes in practice, and that precedent is not a ground for ignoring the Constitution. The Court's decision "cannot turn on whether or to what degree [the decision] impairs the efficiency or fairness of criminal justice," when "there is not one shred of doubt… about the Framers' paradigm for criminal justice… [grounded in the] common-law ideal of limited state

---

[26] *Id.* at 186
[27] *Apprendi v. New Jersey*, 530 U.S. at 518
[28] *Id.* at 499
[29] *Id.* at 498

power."[30] In each case, the Court maintained its priority of returning to the jury its historical powers despite, as one commentator put it, "disrupting nearly every (seemingly established) aspect of current sentencing law and practice."[31] Through these decisions, the Court has established its willingness to overturn any modern practice that has eroded a right historically reserved to the jury – including its ability to refuse to convict or to modify its decisions based upon its knowledge of overly harsh sentencing. In essence, through the *Apprendi* line of cases, the Supreme Court guaranteed that efficiency and established practice do not "trump the Constitution."[32]

D. The jury has a right to be informed about mandatory sentencing in light of its intended role of political oversight.

One of the main rationales behind the general rule against informing the jury of the potential punishment resulting from a guilty verdict is based in the separation of powers or responsibilities within the court system. The State is alleging that informing the jury about punishment introduces extraneous information that might improperly influence its decision.[33] When sentencing is solely the responsibility of the court, the jury must rely on the court to mitigate sentencing as appropriate on a case-by-case basis. However, in cases such as this one, where the Court is bound by the statutory term of imprisonment, the jury essentially determines both the verdict and the sentence. The Legislature has given the prosecutors the right to set the sentence with its mandatory sentences and recidivist punishment under the appropriate statutes. When the prosecution does not use this power carefully and equitably, and the judge is removed from sentencing decisions, the only thing that stands between the individual and the awesome power of the State is the jury system. To keep the jury in the dark about the significance of its verdict

---

[30] *Blakely v. Washington,* 542 U.S. at 313
[31] Douglas Berman, *Supreme Court Cleanup in Aisle Four: Blakely is Too Big and Too Messy to Ignore*, Slate, 2004
[32] *United States v. Polouizzi*, 687 F. Supp. 2d at 187
[33] *Id.* at 415.

when a mandatory sentence of life without parole is on the line is to deprive the jury of the knowledge needed to do justice and balance the power of the State.

In order to preserve the rights of criminal defendants and the role of the jury as created by the Sixth Amendment, juries should be, in some circumstances, informed of the mandatory sentence. In at least three cases, district court judges have used this reasoning to find that the Constitution mandated the jury's right to be informed of the statutorily imposed sentences in their special situations: *United States v. Datcher* in 1993, *United Sates v. Pabon-Cruz* in 2003, and *United States v. Polouizzi* in 2008.[34] These cases were reversed on other grounds.

In the case at bar, the State cites to *Shannon v. United States*,

> "It is well established that when a jury has no sentencing function, it should be admonished to 'reach its verdict without regard to what sentence might be imposed.' The principle that juries are not to consider the consequences of their verdicts is a reflection of the basic division of labor in our legal system between judge and jury."[35]

Here, the jury has a sentencing function because their verdict mandates the sentence and there is no division of labor between the judge and the jury because the judge has no discretion in sentencing. Thus under the plain language of *Shannon*, the jury should have been informed of the mandatory sentence in this case.

With the evolution of sentencing to include an increasing number of mandatory sentencing schemes, it becomes more and more important for the jury, when deciding whether to convict under one of these schemes, to be aware of the statutory consequences of their decision.

---

[34] *United States v. Datcher*, 830 F. Supp. 411 (M.D. Tenn 1993), *United States v. Pabon-Cruz*, 255 F. Supp. 200 (S.D.N.Y. 2003)

[35] *Shannon v. United States*, 512 U.S. 573, 579 (1994)

This Court holds that as the judge of the law and the facts under the Georgia Constitution, the jury should be informed when their verdict automatically imposes, by law, a mandatory sentence. The Sixth Amendment's right to a jury trial was designed to provide the opportunity and power of the community to mediate punishment through the jury itself. Following the Supreme Court's recent invalidation of statutory sentencing schemes eroding jury power, this Court is applying the same analysis to return to the jury the rights it was intended to have, and historically enjoyed, under the Constitution of the United States.

SO ORDERED, this 26th day of March, 2015.

Wendy L. Shoob, Judge A.J.C.
Superior Court of Fulton County

Copies to: ADA

Defense Attorney