Pennsylvanians' Right To Trial By Jury In Peril?
The Tale of Three Appeals

Thomas J Foley, III
The three referenced appeals — Cornelius, Cordes and Noel — all intersect at a critical juncture, the fundamental Pennsylvania Constitutional right to “Trial by jury...” Pa. Const., art. I, §6. At its living, beating heart, the prerequisite of the enjoyment of the right to “Trial by jury...” is the jury panel itself, fair and impartial from the first through the last man. In 1936, two years before his death, Clarence Darrow himself, with perhaps some small exaggeration, stated: “Never forget, almost every case has been won or lost when the jury is sworn.”

In Cornelius, a medical malpractice case out of Monroe County, one issue is the trial court’s allegedly improper denial of the plaintiffs-appellants’ strikes for cause, resulting in the seating of potentially prejudiced jurors on the panel, after the exhaustion of the allotted four peremptory challenges for a civil trial. The empaneled jury included two nurses who worked with the defendant doctor, one of them at the very hospital where some of the relevant events transpired. Not to mention patients and family members of patients of the defendant doctor.1

In Cordes, another medical malpractice case, originating in Beaver County, one issue is likewise the allegedly improper denial of the plaintiffs-appellants’ strikes for cause, with the seating of potentially prejudiced jurors after exhaustion of four peremptories. The empaneled jury in Cordes included: a husband of a patient of the defendant doctor; the daughter of a patient of the defendant doctor; and an employee of the parent medical corporation whose subsidiary employed the defendant doctor.2

And in Noel, a Philadelphia County criminal case, the issue is the forced exhaustion of the criminal defendant’s allotted seven peremptories on day one of a two-day jury selection, in violation of Pa.R.Crim.P. 631(E) (2) List System of Challenges. The trial court employed a “use ‘em or lose ‘em” policy, ruling that the “Day 1” prospective jurors would not be called back for “Day 2.” And if the prospective jurors were not struck then and there, on “Day 1,” they would be seated on the panel on “Day 2.” The defendant understandably followed the principle of the “devil you know,” and utilized all seven of his peremptories on “Day 1.” Then, the second day of jury selection came, and a “Day 2 juror” — a police officer’s sister — was seated on the panel, after the trial court rejected the defendant’s challenge for cause.

Thus, all three cases involve the exhaustion of peremptories, and the seating of at least one objected to (and at least one potentially if not presumptively prejudiced) juror on the panel. The underlying force unifying all three appeals is the possibility, if not the fact, of “jury nullification” — the sometimes ally and sometimes opponent of all who entrust their case to a jury.

The issue has long perplexed the courts. Compare, e.g., Bushell’s Case, Howell’s State Trials, 6:999 (1670)(relating to charges against the juror who refused to convict William Penn); Kane v. Commonwealth, 89 Pa. 522, 525 (1879)(endorsing jury nullification); Commonwealth v. Castellana, 277 Pa. 117, 120-122, 121 A.2d 50, 50-51(1923) (disapproving express instruction by judge re: power of jury nullification); and In re Schofield, 362 Pa. 251, 261, 66 A.2d 675, 683 (1949)(attorney disciplined for advocating jury nullification to jury).

One may be for jury nullification. Or one may be against jury nullification. But one cannot deny the existence of jury nullification — it is a fact beyond dispute. As Justice Oliver Wendell Holmes, Jr. acknowledged in Horning v. District of Columbia, 254 U.S. 135, 138 (1920), where “the judge has not the power to direct a verdict...the jury has the power to bring in a verdict in the teeth of both law and facts.” See generally, Clay S. Conrad, Jury Nullification — The Evolution of a Doctrine (2nd ed., CATO Institute 2014); David Tunno, Fixing the Engine of Justice: Diagnosis and Repair of Our Jury System (iUniverse, Inc. 2012) at Chapter 3, Bias and Misconduct; Jerome Frank, Courts on Trial: Myth and Reality in American Justice (Princeton University Press, 1950), at Chapter VIII, The Jury System. Like carbon monoxide, jury nullification can suffocate the life out of a case; or like helium, it can give it a lift. Invisibly. Silently. In the jury room.

Some may ask the question: “So what?” I would respectfully reply that if there is any reasonable doubt that any prospective juror cannot be fair and impartial, the juror must be disqualified. “A jury should be as neutral as a thermometer and as detached as an almanac.” Finney v. G. C. Murphy Co., 400 Pa. 46, 50, 161 A.2d 385, 387 (1960). If there is any doubt whatsoever that a jury rendering a verdict was not to a man at least ostensibly fair and
impartial, the verdict should be rejected, and a new trial awarded. As Justice Bradley wrote in *Boyd v. United States*, 116 U.S. 616 (1886):

> [I]llegal and unconstitutional practices get their first footing by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions ... should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*

*Boyd*, 116 U.S. at 635. *Obsta principiis* — resist the encroachments.

I am reminded of Chief Justice Castille’s speech at his Installation on January 14, 2008:

> We only dispense justice, and any power that we have derives from that single beneficence as directed by the Constitution and the laws of the Commonwealth. While we are dependent upon the other branches of government, we are not subservient to those branches. As an equal branch, our true power derives from the moral authority arising out of our jurisprudential decisions. We command only by the force of this moral authority, and that force is clearly derived from the citizens’ support for the law and from those elected and appointed leaders who believe in the rule of law.

...We are simply elected to serve a higher calling: Justice. This Court is here to serve all the citizens of this Commonwealth — to dispense *fair and impartial justice to all* — justice for the most favored in our society, and *even justice for the most hated and despised in our society.* [Underlining in original; bolding added.]

No truer words were ever spoken. They are infused with the same moral authority with which the great Sir William Blackstone in 1765 stated: “It is better that ten guilty persons escape than that one innocent one suffer.”

“Experience has shown that one of the most effective means to free the jury box from men unfit to be there is the exercise of the peremptory challenge.” *Hayes v. Missouri*, 120 U.S. 68, 70 (1887). “[T]he peremptory challenge fosters both the perception and reality of an impartial jury.” *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614, 633 (1991) (O’Connor, J., Dissenting). The Pennsylvania Supreme Court has held that “wrongful deprivation of one or more of the number of peremptory challenges provided for by statute or rule of court is clearly an impairment of the...right to peremptory challenges.” *Commonwealth v. Ingraham*, 516 Pa. 2, 11, 531 A.2d 1101, 1105 (1987) (citing *Harrison v. United States*, 163 U.S. 140 (1896)).

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**“Never forget, almost every case has been won or lost when the jury is sworn.”**

*Clarence Darrow* (1936)

Wrongful denial by a trial court of a challenge for cause, such as is suggested to have occurred in *Cornellius v. Cordes* and *Noel*, and improperly forcing the exercise of even one of a litigant’s allotted peremptory challenges, should not be countenanced. The Pennsylvania Constitution *guarantees* “an ample right of challenge both for cause and peremptory.” *Commonwealth v. Fugman*, 330 Pa. 4, 28-31, 198 A. 99, 111-112 (1938). And, the wrongful denial of the right to “intelligently exercise peremptory challenges,” such as occurred in *Noel*, as well as in *Cornellius* and *Cordes*, should likewise not be affirmed. See, e.g., *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, 143-144 (1994); *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 602 (1976); *United States v. Eufrasio*, 935 F.2d 553, 574 (3rd Cir. 1991); *Commonwealth v. England*, 474 Pa. 1, 25, 375 A.2d 1292, 1304 (1977) (Manderino, J., Dissenting).

Such an error is not harmless because the litigant was forced to use at least one of his peremptory challenges to excuse an objectionable juror, and the litigant exhausted his peremptories before the jury was seated. See, *Commonwealth v. Johnson*, 299 Pa.Super. 172, 182, 445 A.2d 509, 514 (1982) (citing cases); see also, *Commonwealth v. Noel*, 53 A.3d 848, 859 (Pa.Super. 2012) (Wecht, J., Dissenting).

Some might ask: "But at what cost?" And I would answer: Only the cost of as little as $9.00 per day per prospective juror. See, 42 Pa.C.S. § 4561, *Compensation of and travel allowance for jurors*. Is this too high a price to pay to ensure that "the right to trial by an impartial jury... remains inviolate?" *Bruckshaw v. Franklin Hosp. of City of Philadelphia*, 58 A.3d 102, 108-109 (Pa., 2012). Too high a price to guard "the rights of the litigants and ensure continued acceptance of the laws by all the people"? *Edmondson, supra*, 500 U.S. at 628. I respectfully submit it is not.

“The right of trial by jury cannot be guarded with too much vigilance, nor defended with too much ardor. If the people surrender it, their other rights will inevitably follow.” Joseph Towers (1764). "Trial by jury must be preserved. It is the best system ever invented for a free people in the world’s history." John Henry Wigmore (1929).

On March 12, 2014, the Pennsylvania Superior Court sitting en banc issued three opinions in *Cordes v. Associates of Internal Medicine, _____A.3d____*, 2014 WL 971332, 2014 Pa Super 52 (Pa. Super. March 12, 2014). The first was a 35-page Opinion in Support of Reversal (and remand for new trial), authored by the Honorable David N. Wecht, and joined by Judge John T. Bender, with Judge Mary Jane Bowes and President Judge Susan Peikes Ganntman concurring in the result. The second was a 16-page Opinion in Support of Reversal authored by the Honorable Christine L. Donohue, joined by President Judge Gantman and Judge Pamela Francisco Ott, with Judge Bowes again concurring in the result. And, the third was a 36-page Dissenting Opinion (in support of affirmance and denial of a new trial) by the Honorable Judith Ferrenese Olson, joined by Judge Cheryl Lynn Allen.

How does one make consumstantial sense of these three *Cordes* opinions, totaling 87 pages (107 pages if one includes the prior panel opinions), with at least four seemingly separate views of the law? (Remember, the Honorable Mary Jane Bowes concurred in the results only on the two Opinions in Support of Reversal.) I believe it can be done. All of the judges are in important respects correct. To paraphrase Joseph Conrad in *Heart of Darkness*: the three seemingly separate opinions "mingle[] at last and suggest[] the theme of the story — the indissoluble and organic oneness...that underlies the surface of contradictions." The theme of that story yields what Conrad called "decisive truths," and turns darkness into light.

The Pennsylvania Constitution provides at Article I, Section 6 as follows: “Trial by jury shall be as heretofore, and the right thereto shall remain inviolate.” (Emphasis added). Simple...clear...the Constitution. “Heretofore... not "heretoference." Judges Wecht and Donohue followed this constitutional precept, and looked to the "old cases," going back to the early 1900s. Justice Holmes himself also directed us along this “path of the law,” stating that “[a] page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

So I followed their lead and looked even further back, and found a decision issued
by the Pennsylvania Supreme Court in 1794, which states: “A juror should be as white paper, superior to all suspicion of partiality. 1 Bl. Rep. 481.” Goodright v. M’Causland, 1 Yeates 372, 1794 WL 615, 2, 1 Am.Dec. 306 (Pa. 1794) (emphasis added). The citation to “Bl. Rep.” references Blackstone’s Reports (1765-80) which predate Article 9, Section 6 of our Pennsylvania Constitution of 1790 — which itself provided: “Trial by jury shall remain as heretofore, and the right thereof shall remain inviolate.” (Emphasis added). M’Causland was decided four years after enactment of the Pennsylvania Constitution of 1790.

M’Causland accords with Judge Wecht’s view that the goal of voir dire is a jury with “a clean slate and an open mind.” (Wecht, J., Slip Opinion in Support of Reversal at p. 31.) It also accords with Judge Donohue’s views, including her:

“emphatic agreement with Judge Wecht that ‘[t]he critical consideration that animates our ruling regarding all three jurors in this case is the importance of ensuring not only a jury that is impartial in fact, but one that appears to be free of the taint of partiality to a disinterested observer...Contrary to this overarching consideration, too often trial courts almost inexcusably find it necessary to shoehorn certain prospective jurors into the jury box when faced with information that at the very least gives the appearance of an inability to be impartial.

[FN1] [Author’s Note: Compare, Walls v. Kim, 549 S.E.2d 797 (Ga.App. 2001), excerpt of same at following endnote.]

In my view, we must be guided by the jury selection principle articulated by our Supreme Court that ‘no person should be permitted to serve on a jury who stands in any relation to a party to the cause that would carry with it prima facie evident marks of suspicion of favor.” Seeherman v. Wilkes-Barre Co., 255 Pa. 11, 14, 99 A. 174, [175] (1916) (emphasis added) (internal quotation marks omitted). As succinctly stated by the Seeherman Court: “[T]he cause should be tried by persons free even from the suspicion of partiality.” Id. at 14-15, 99 A. at [176].

[FN1] I recognize that there are financial considerations associated with bringing citizens to the courthouse to participate in the jury selection process. In my view, however, such considerations do not trump the guarantee provided by both the United States and Pennsylvania Constitutions of a trial “by an impartial jury [.]” U.S. Const. amend. 6; Pa. Const. art. I §9; see also Pa. Const. art. I §6 (“Trial by jury shall be as heretofore, and the right thereof remain inviolate.”). Thus, I do not believe that presumptively partial and unfair jurors should be seated if there was no other way to empanel a jury. A trial is either fair or it is not, and the litigants are entitled to a jury free from bias and prejudice.

(Donohue, J., Slip Opinion in Support of Reversal at pp. 2-3) (Emphasis in original).

“[T]he objective of jury selection proceedings is to determine representation on a governmental body.” Edmondson v. Leesville Concrete Co., 500 U.S. 614, 626 (1991). As was observed therein by the United States Supreme Court:

Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds. Within the courtroom, the government invokes its laws to determine the rights of those who stand before it. In full view of the public, litigants press their cases, witnesses give testimony, juries render verdicts, and judges act with the utmost care to ensure that justice is done. Edmondson, 500 U.S. at 628 (emphasis added).

“[T]he jury system performs the critical governmental functions of guarding the rights of litigants and ‘ensur[ing] continued acceptance of the laws by all the people’ Edmondson, 500 U.S. at 628 (quoting Powers v. Ohio, 499 U.S. 400, 407 (1991)) (emphasis added). In other words, acceptance by the parties and by the public at large.

Thus, the Pennsylvania Supreme Court observed in Commonwealth v. Dinwiddie, 529 Pa. 66, 601 A.2d 1216 (1992):

“[T]he purpose of the jury system is to impress upon the [litigants] and the community as a whole that a verdict ...is given in accordance with the law by persons who are fair. The verdict will not be accepted or understood on these terms if the jury is chosen by unlawful means at the outset.


“The jury is more than just a judicial instrument, it is a political institution which should not be hastily infringed upon in particular and difficult cases lest the generality of freedom which it purports to represent be undermined without planned substitute.” Commonwealth v. Panetta, 387 Pa. 452, 479, 128 A.2d 81, 94 (1957) (quoting Commonwealth v. Franklin, 172 Pa.Super. 152, 193, 92 A.2d 272, 92 (1952)). See also, Leonard R. Levy, The Palladium of Justice – Origins of Trial by Jury (Ivan R. Dee, 1999) at p. 53 (In England, “[t]rial by jury became a form of democratic involvement in the administration of criminal justice.”)

Returning to the goal of a jury like “white paper,” one with a “clean slate and an open mind,” another “ancient case,” the 1844 decision of the Pennsylvania Supreme Court in Commonwealth v. Flanagan, 7 Watts & Serg. 415, 1844 WL 5033, 1 Am.Dec. 306 (Pa.

...and to base your verdict on the evidence and the law?"
Thus, in the prospective panel. All in [both] an obligation and a privilege of citizenship.” See, Pennsylvanians for Modern Courts, The Jury System, Duty (available at: http://www.pmconline.org/node/33) (emphasis added). The Constitution of Pennsylvania, at Article I, Section 25, Reservation of powers in people, provides:

“A jury should be as neutral as a thermometer and as detached as an almanac.”
PA Supreme Court (1960)

To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate. Pa. Const. art. I, Declaration of Rights, §25. To paraphrase President Judge Roger N. Nanovic in Leskin v. Christman, 78 Pa.D.C.4th 152 (C.P Carbon 2006):

An uncertain right, or one which purports to be certain but results in widely varying applications by the courts, is little better than no right at all. Consequently, when a right is properly invoked, unless the purpose of the right would be frustrated by its enforcement or extraordinary circumstances exist, the right and the public policy underlying the right must not be unpredictably discarded. Even then, when the interests protected by the right are relaxed or outweighed, the exceptions engraved on the right are confined to rare and exceptional circumstances, or...narrowly limited to the exigencies presented...rather than a wholesale divestiture...Leskin, 78 Pa.D.C.4th at 160-161. See also, e.g., In re A.C, 991 A.2d 884, 894 (Pa.Super. 2010). Judge Donohue astutely raised the issue of the cost to the taxpayers of “bringing citizens to the courthouse to participate in the jury selection process.” The cost is minimal to the courts, less so to the citizens called to serve, who are only paid $9.00 a day. The latter, in and of itself, is an outrage. That Pennsylvania’s citizens with real financial issues should be unnecessarily excluded from participation in this, our most democratic institution of government, the jury, by reason of the need to provide for their families —which they cannot do on $9.00 a day — is incomprehensible. This is an unconstitutional denial of the right to serve on a jury, not to mention a potential denial of the right to a “jury of one’s peers.” Judge Olson was also correct in her Dissenting Opinion that under the current regime imposed by the 2001 Superior Court panel decision in McHugh, supra, as well as the combined effect of the two Opinions in Support of Reversal in Cordes, “a trial judge will [not] be able to discriminate between cases that involve a juror/non-party relationship that is so indirect or mediated that exclusion should remain a matter within the court’s discretion and cases that involve such “sufficiently close” relationship that exclusion is compelled as a matter of law.” (Olson, J., Slip Dissenting Opinion at p. 21) (Emphasis added). (However, I respectfully disagree with Judge Olson’s opinion to the extent that it poses such cases lie within the proper parameters of a trial judge’s “exercise of discretion.”)¹²

The current lack of a “bright line rule” raises the haughty spectre of post-trial motion on top of post-trial motion, and appeal after appeal, such as in Cordes, Cornelius, and Noel. All of the Cordes judges are correct that this must be avoided, even at a cost of as much as $9.00 per day for each prospective juror. It must be avoided, or the financial and psychological costs to the litigants, and the costs to the reputation of our courts themselves for “justice,” will bankrupt them all.

Perhaps this is why Judge Bowes concurred in the result, but not the incomplete narratives, of either of the Opinions in Support of Reversal authored by Judges Wecht and Donohue. But she did not say. That question will have to be answered another day. (It is noted that Judge Bowes did not say that she concurred “in the result only” of those two scholarly opinions). Judge Bowes is justifiably wary of decisions old and new. She wrote in Commonwealth v. Taylor, 65 A.3d 462 (Pa.Super. 2013): “As our Supreme Court has observed, ‘[t]he doctrine of stare decisis is not a vehicle for perpetuating error, but rather a legal concept which responds to the demands of justice and, thus, permits the orderly growth processes of the law to flourish.’” Cooper v. Schoffstall, 905 A.2d 482, 493-494 (Pa. 2006). Commonwealth v. Taylor, 65 A.3d at 467.

Precedents past lay clear the path of the law for the courts to extricate themselves from the bramble bush. Return to the “bright white rule” of the “old days” and the “old ways,” the Constitutional ways. See generally, Dean Ken Gormley, et al., The Pennsylvania Constitution — A Treatise on Rights and Liberties (George T. Bisel Co., Inc., 2004),
at the Foreword written by former Chief Justice Cappy (“This jurisprudence...is not of recent vintage. As former Chief Justice John P. Flaherty was fond of saying: ‘State Constitutional law is nothing new.”).

The Courts should return to empaneling only jurors that are like “white paper,” jurors with a “clean slate and an open mind,” as nearly as reasonably possible. Jurors, like judges, should be both expected and permitted to avoid even the appearance of impropriety. No party, and no jurist, has the right to impose upon a prospective juror the Hobson’s choice of the embarrassment of admitting they cannot be “fair and impartial” in open court, or of the dishonor of serving on the panel as a “stealth juror.” Compare, e.g., Walls v. Kim, 549 S.E.2d 797 (Ga.App. 2001) (6-1 decision) (trial court improperly itself did preemptive, rehabilitative questioning of prospective jurors), with Bruckshaw v. Frankford Hosp. of City of Philadelphia, 58 A.3d 102, 108 (Pa. 2012) (no party is entitled to the services of any particular juror).

To hold otherwise will force the appellate courts of this Commonwealth to repeatedly grapple with, if not wallow in, difficult, time-wasting controversies regarding which jurors were properly seated on the panel, and which were not. It will force the courts to engage in retrospective confabulation. And the taint will have an unbearable stink about it. At this point, the rot has only just begun to set in. It must be excised from the “body judicial.”

Would the Courts rather endure a manageable number of reversals for new trials now, or an unmanageable number of same later on, if the United States Supreme Court takes up the matters under the Due Process Clause of the 14th Amendment to the United States Constitution? See, e.g., Ross v. Oklahoma, 487 U.S. 81, 89 (1988) (due process concerns implicated where a court has denied or impaire the right to peremptory challenges as provided by state law). See generally, Gormley, et al., supra, at Chapter 9, Trial By Jury, Article I, Section 6, § 9.1 Introduction (“Because the right to a trial by an impartial jury is considered a fundamental right, the provisions of the Sixth Amendment are binding on the states through the Due Process Clause of the Fourteenth Amendment. [Duncan v. Louisiana, 391 U.S. 145, 158-59 (1968).] Yet the state constitutional provision has its own unique history and jurisprudence attached to it.”).

The Courts should avert the embarrassment to the oldest sitting Supreme Court in the Nation, an institution of more than 328 years (predating even the “junior Supreme Court,” the United States Supreme Court, by 67 years).

Pennsylvania State Archives — RG-33 Records Of The Supreme Court Of Pennsylvania — Agency History. The embarrassment is now only a faint rosy glow on the cheeks — but could become a painful red protuberance. The man installed under Pennsylvania’s Unified Judicial System as the first true Chief Justice of Pennsylvania, Michael J. Eagen, is rolling over in his grave at the thought.


Further, as Judge Wecht observed in his Dissenting Opinion in Noel, “peremptory challenge is a necessary part of trial by jury.” Noel, 53 A.3d at 862 (Wecht, J. Dissenting) (quoting Swain v. Alabama, 380 U.S. 202, 219 (1965)). It is worth noting that in the “Frame of Government of Pennsylvania, issued by William Penn in 1682, he declared: “the power of necessity...is a solicitor that will take no denial.” And, to paraphrase Judge Wecht, it cannot be denied that Pennsylvania law protects peremptory challenges to a greater extent than federal law. Noel, 53 A.3d at 864-865 (Wecht, J., Dissenting).

There is no express cognate in the federal Constitution for the phrase in Article 1, Section 6 of the Pennsylvania Constitution that “Trial by jury shall be as heretofore, and the right thereof remain inviolate.” Thus, it would truly be mortifying if the “junior” Supreme Court (of the United States) has to rise to the rescue of a fundamental Pennsylvania Constitutional right. A right which existed since Pennsylvania courts are “free to interpret the Pennsylvania Constitution in a more generous manner than the federal courts” interpret the United States Constitution. Fisher v. Department of Public Welfare, 509 Pa. 293, 305-306, 502 A.2d 114, 121 (1985). See also, discussion of Fisher by Dean Ken Gormley, et al., supra, at § 4.2[c] Due Process And Equal Protection. Lesser generosity of any stripe is another matter entirely.

Certainly you’re entitled to justice, if you can show that you deserve it.”
Will the Courts shine the bright white light of "fair and impartial justice to all" upon the citizens of Pennsylvania, and release their right to "Trial by jury..." from the "Heart of Darkness?" Will the Courts dispense justice even "for the most hated and despised in our society," such as the criminal defendant in Noel, and the personal injury plaintiffs in Cordes and Cornelius? Will the Courts obsta principiis?

Time will tell the tale.

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1 One should also be aware that in Cornelius, there were 350 total prospective jurors in the Monroe County Courthouse. 40 of these were called to Courtroom #5 for jury selection in this case. 310 were left in Courtroom #1 waiting for something to do.

2 It is noteworthy that the renowned insurance defense firm of Weber, Gallagher, Simpson, Stapleton, Fires & Newby, LLP represents the medical provider defendants in both of these high stakes medical malpractice cases, Cornelius and Cordes. The stakes are so high in Cornelius that Weber, Gallagher was compelled to retain as co-counsel the even more highly esteemed appellate services of Lamb McErlane, PC.


The Court, however, acknowledges that a few decisions running contrary to the foregoing principles have issued from our Honorable Courts. See, e.g., Commonwealth v. Tedford, 960 A.2d 1, 20 (Pa. 2008) ("peremptory challenges are not constitutionally required"). These decisions are universally subject to the fatal diathesis of being derived from decisions of our Federal Courts interpreting the Constitution of the United States. But they are only sometimes openly so; a relatively recent example is Commonwealth v. Rico, 662 A.2d 1076, 1083-1084 (Pa. Super. 1995). The Rico decision itself, and other such Pennsylvania decisions beg the question: What are the Pennsylvania "state-created" means to the Constitutional end of an impartial jury and a fair trial? The answer lies in Pa. Const. art. I, §6: "Trial by jury shall be as heretofore, and the right thereof remain inviolate." There is no express cognate in the federal Constitution, and, thus, the federal decisions provide no binding guidance on this issue.

"A trial court should empanel only jurors like 'white paper,' with a 'clean slate and an open mind.'"

3 As observed by President Judge Johnson of the Georgia Court of Appeals, in writing for a seven member court in Walls v. Kim, 549 S.E.2d 797 (Ga.App. 2001) (6-1 decision):

Many judges on this court have served as trial judges and wholeheartedly agree with the principle that trial judges must have significant discretion in deciding whether to excuse jurors for cause. Just as wholeheartedly, we disagree with the way that the "rehabilitation" question has become something of a talisman relied upon by trial and appellate judges to justify retaining biased jurors. Especially when the better practice is for judges simply to use their discretion to remove such partial jurors, even when the question of a particular juror's impartiality is a very close call.

A trial judge should err on the side of caution by dismissing, rather than trying to rehabilitate, biased jurors because, in reality, the judge is the only person in a courtroom whose primary concern, indeed primary duty, is to ensure the selection of a fair and impartial jury. While the parties to litigation operate under the guise of selecting an impartial jury, the truth is that having a jury which is truly fair and impartial is not their primary desire. Instead, their goal is to select a jury which, because of background or experience or whatever other reason, is inclined to favor their particular side of the case. The trial judge, in seeking to balance the parties' competing interests, must be guided not only by the need for an impartial jury, but also by the principle that no party to any case has a right to have any particular person on their jury. Walls, 549 S.E.2d at 799.

Questions requiring jurors' subjective evaluation of their ability to be fair and impartial have consistently been held to be an inadequate basis upon which to assess jurors' qualifications. See, e.g., Morgan v. Illinois, 504 U.S. 719(1992); Murphy v. Florida, 421 U.S. 794 (1975); Irvin v. Dowd, 366 U.S. 717 (1961); U.S. v. Davis, 583 F.2d 190, 197 (5th Cir. 1978); U.S. v. Polizzi, 500 F.2d 856, 879 (9th Cir. 1974); Government of Virgin Islands v. Dowling, 814 F.2d 134, 141 (3d Cir. 1987); Silverthorne v. U.S., 400 F.2d 627, 639 (9th Cir. 1968); Patriarca v. U.S., 402 F.2d 314, 318 (1st Cir. 1968); U.S. v. Bloeth v. Denno, 313 F.2d 364, 372 (2d Cir. 1963); Murphy v. Wheeler, D.O., 671 S.E.2d 714 (W.Va. 2008).

Voir dire must not simply call for the jurors' subjective assessments of their own impartiality. Scientific case studies document minimization dynamics and inconsistency in jurors' self-reports of attitudes, contradicting the commonly held judicial view that superficial questioning is sufficient to uncover prejudice. See, e.g., Vidmar, Case Studies of Pre and Midtrial Prejudice in Criminal and Civil Litigation, 26 Law and Human Behavior 73 (2002).

Furthermore, when it is the trial court rather than opposing counsel asking the "rehabilitative questions," it is incumbent upon the trial court to do so with extreme care and caution to avoid its authority from pressuring the juror to answer in a particular way. Cf. Commonwealth v. Laws, 474 Pa. 318, 378 A.2d 812 (1977) (court must exercise its authority with care and refrain from questioning which may pressure a witness to answer in a particular way);[Commonwealth v. Brown, 309 Pa. 515, 164 A.726 (1933) (it is improper for a judge to offer rebuttal testimony).
In The Palladium of Justice — Origins of Trial by Jury, by Leonard R. Levy (Ivan R. Dee, 1999) at p. 55, Professor Levy noted: “In 1998, a public opinion poll revealed that most Americans eligible to serve on a jury asserted that they would act on their own beliefs as to right and wrong, regardless of a judge’s instructions on the law of a case. Had a similar poll been taken three and a half centuries earlier, the results would have been the same. Jury verdicts then and now reflected jury opinions.”

The citation to “Bl.Rep.” references Blackstone’s Reports (1746-80) and that to “Bul.N.P.” references Sir Francis Buller’s An Introduction to the Law, Relative to Trials at Nisi Prius (1788) (originally published in the 1700s), both of which predate Article I, Section 6 of our Pennsylvania Constitution of 1790, which provided that “Trial by jury shall remain as heretofore, and the right thereof shall remain inviolate.” (Emphasis added.)


See also, e.g., Haig v. Agee, 453 U.S. 280, 318 (1981) (Brennan, J. Dissenting, joined by Marshall, J.) (This is “an area fraught with important constitutional rights, and...the Court should therefore “construe narrowly all delegated powers that curtail or dilute them.”); Attorney General Of New York v. Soto-Lopez, 476 U.S. 898, 918-919 (1986) (O’Connor, J., Dissenting, joined by Justices Rehnquist and Stevens) (because this “penalizes” appellees’ constitutional right...the preference...must be subjected to heightened scrutiny, which it does not survive because it is insufficiently narrowly tailored to serve its asserted purposes.”); Oregon v. Elstadt, 470 U.S. 298, 365 (1985) (Stevens, J., Dissenting) (“I nevertheless dissent because even such a narrowly confined exception is inconsistent with the Court’s prior cases, because the attempt to identify its boundaries in future cases will breed confusion and uncertainty in the administration of...justice, and because it denigrates the importance of one of the core constitutional rights that protects every American citizen from the kind of tyranny that has flourished in other societies.”) See, generally, 16A Am.Jur.2d Constitutional Law § 403. Constitutional guarantees—Application of strict scrutiny test.

See also Pa. Const. art. I, § 11: Courts to be open... “All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay...” (Emphasis added.) In light of this provision, how do we end up with sometimes anonymous jurors in the opinions and transcripts of our courts? The right to a public jury trial attaches when the jury trial begins, and applies to voir dire proceedings — the guarantee of a public trial means that the process of selecting the jury must be public. Commonwealth v. Phillips, 946 A.2d 103 (Pa. Super., 2008); Commonwealth v. Constant, 925 A.2d 810 (Pa.Super. 2007); Presley v. Georgia, 558 U.S. 209 (2010). When a court effectively closes voir dire to the public, in whole or in part, the particular interest, and the threat to that interest, must be articulated with findings specific enough that an appellate court can determine whether the closure order was constitutionally entered. See, e.g., Presley v. Georgia, 558 U.S. 209 (2010). The constitutional right to a public trial, including public voir dire, is maintained if and only if: (a) voir dire is openly conducted in the Courtroom and/or (b) a full and complete transcript of the proceedings was made, and it is later made a matter of public record. See, e.g., Commonwealth v. Briggs, 12 A.2d 291 (Pa. 2011), cert denied, 132 S.Ct. 267 (2011); Commonwealth v. Hartman, 638 A.2d 968 (1994); Commonwealth v. Harris, 703 A.2d 441 (Pa. 1997). See also, generally, Commonwealth v. Winfield, 464 Mass. 672, 685, n.2 (Mass. 2013).

The Courts of the Commonwealth should recognize, “[a]t the outset, [that] the standard of review when considering [such] constitutional challenges is plenary, as these challenges involve pure questions of law.” Commonwealth v. Ledington, 908 A.2d 328, 331 (Pa.Super. 2006).


“[I]n reviewing an exercise of “discretion, we must always ask an antecedent question: Is this decision truly discretionary?” Matter of Gary Aircraft Corp., 698 F.2d 775, 780-781 (5th Cir. 1983). Looking to the writings of the Honorable Ruggero Aldisert of the Third Circuit, the Utah Court of Appeals has written:

Discretion “encompass[es] the power of choice among several courses of action, each of which is considered permissible....” R. Aldisert, The Judicial Process 759 (1976). Tribunals may exercise discretion in many matters where there are no hard and fast rules of law and the tribunal is in an advantaged position to make the correct decision. Discretion, however, “is limited in that it must be exercised within the confines of the legal standards set by appellate courts...” Discretion may also be confined by statute. Tolman v. Salt Lake County Attorney, 818 P.2d 23, 26 (Utah App.1991) (case citation omitted). See also, People v. Riggs, 87 P.3d
experience." O. Holmes, The Common Law 5 (M. Howe ed. 1968). As experience with an area of the law develops, what was once discretionary may become restricted by a general rule, then qualified by exceptions, and then littered with exceptions to the exceptions.

Discretion in areas of the law existing due to those areas’ immaturity we shall call "discretion by default." Matter of Gary Aircraft Corp., 698 F.2d at 780 - 781.

A “palpable” abuse of discretion, in the sense of a prerequisite to remedial appellate action, is all too frequently nothing more than a “Pinnochiosm,” a long-nosed excuse for failure of appellate action. As all women, and most men now know, cancerous actors work to cause many deaths long before they become “palpable” masses. Our appellate courts should scan for such abuses — masses in the “body judicial” — with the precision guided certainty of an MRI machine. An abuse of discretion is either malignant or not, and if it is, the abuse must be eradicated, finally and fully, with no trace, past, present or future left behind.

This long-standing principle conforms to the closely related standard for judicial recusal. The inquiry for a judge is not whether he or she is actually biased or prejudiced, but whether "a significant minority of the lay community could reasonably question the court's impartiality," based on the appearance of impropriety. Commonwealth v. Darush, 501 Pa. 15, 24, 459 A.2d 727, 732 (1983); In the interest of McFall, 533 Pa. 24, 31, 617 A.2d 707, 711 (1992).

A properly constituted and functioning court must be viewed as a tri-partite entity consisting of the judge, jury and counsel, and all are should be subject to the mandate of avoidance of the appearance of improprieties. See, Reese v. Danforth, 486 Pa. 479, 498, 406 A.2d 735, 745 (1979).

This forced dishonor is what is alleged to have occurred in Monroe County in Cornelius.

Available at: http://www.phmc.state.pa.us/bah/dam/rf/rf33ahr.htm.


He was also known as just plain “Gramps” to his grandchildren, the Author being the eldest amongst them. But “Just Plain Mike” could be tough when circumstances warranted. See, e.g., Fight Against Corruption Gives Young Lawyer Long Career, News — The Times-Tribune, by Cheryl A. Kashuba, Times-Tribune Staff Writer, Published March 4, 2012, available at: http://thetimes-tribune.com/news/fight-against-corruption-gives-young-lawyer-long-career-1.1280742.

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