

All Evidence to the Contrary

Chief Judge Ann Bailey Smith

“Do you swear or affirm that you will impartially try the case between the parties and give a true verdict according to the evidence and the law, unless dismissed by the court?” This is the oath administered by the clerk of the court to all petit juries in Kentucky as required by Administrative Procedures II, Section 28. As lawyers and trial judges we are familiar with this oath and we expect jurors to take this oath seriously as they deliberate the case. But we are also aware of the concept of jury nullification whereby a juror ignores the law and/or the evidence and returns a verdict which appears to violate the oath. Some of the reasons for returning a verdict against the evidence may include civil disobedience, a political statement against a specific law or feelings of sympathy for the accused. It is difficult to say how frequently this occurs but if you're familiar with very many trials then you can probably think of one where jury nullification appears to have dictated the verdict.

Consider both the state and federal prosecutions of Luigi Mangione, the 26-year-old man who has been charged with killing United Healthcare's CEO, Brian Thompson, on December 4, 2024, outside the New York Hilton Midtown in New York City. Thompson had worked for United Healthcare since 2004 and had been its CEO since 2021. At the time of his death, United Healthcare was the largest health insurer in the United States. Under Thompson's leadership, the company's profits increased by \$4 billion. On December 4, Thompson was about to enter the hotel where he was to speak at an annual investors meeting when he was shot in the back by a masked assailant who left the scene on an e-bike into Central Park.

Luigi Mangione was arrested five days later at a McDonald's in Pennsylvania. In addition to the murder charges he is facing in state and federal courts, he also has charges from his arrest in Pennsylvania for firearm violations. At the time of Mangione's arrest, police recovered from his belongings a 262-word handwritten document which, in part,

criticized the American healthcare system. It has been reported that Mangione suffers from spondylolisthesis (a stress fracture in a vertebra which, due to weakening, has caused the vertebra to slip) and Lyme disease. Police have reported that Mangione was not insured by United Healthcare.

Since his arrest, Mangione has been described as a folk hero and he has garnered a number of supporters who are frustrated with the healthcare system, including the cost of healthcare as well as the denial of treatment by the insurance industry. Authorities have revealed that spent casings and an ejected cartridge recovered at the scene of the shooting contained the words “delay,” “deny” and “depose” which are similar to a known phrase in the insurance industry “delay, deny, defend” which translates to denying medical coverage to insureds. Supporters have gathered at Mangione's court appearances wearing Luigi apparel (of Mario Brothers fame); billboards reading “Free Luigi” have appeared in a number of cities; a look-alike contest was held in Florida; Mangione has been inundated with fan mail while incarcerated; and an online site has raised more than \$600,000 for Mangione's legal defense. As such, the stage is set for the possibility of at least one juror refusing to vote guilty, not based on the lack of persuasive evidence, but on hostility toward the profit-based healthcare system and for those who have suffered or even died from the denial of healthcare coverage for treatments.

The Kentucky Court of Appeals, in the case of *Johnson v. Commonwealth, Ky App.*, 659 S.W. 3d 832 (2021), recognized jury nullification as a “longstanding common law tradition, now constitutionalized,

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that the jury always has the option of disbelieving the evidence offered to prove guilt and returning a ‘not guilty’ verdict,” citing *Medley v. Commonwealth*, 704 S.W. 2d 190, 191 (Ky. 1985). The court was quick to state, however, that it would be error to instruct a jury that it has a right to find a defendant not guilty even though the evidence establishes his guilt beyond a reasonable doubt. Likewise, a defense attorney cannot argue to a jury that it can disregard the evidence if it doesn't agree with the law or with the penalty range. Additionally, the Court of Appeals held that in responding to a jury question about nullification, a defendant does not have the right for the court to respond about the jury's nullification power. “Ultimately, whether a jury may be informed of their nullification power is a question for the legislators of the General Assembly or the Kentucky Supreme Court.” *Johnson* at 839.

The jury selection process should cull from the panel of prospective jurors those who cannot follow the law or who would refuse to convict in spite of evidence which rises to the level of proof beyond a reasonable doubt. Litigators know, however, that there are almost always those members of the jury panel who do not answer a single question during voir dire or answer with a monosyllabic response which provides little insight into the juror's beliefs. But, as stated by President John Adams in 1771, “It is not only his right but his Duty in that case to find the Verdict according to his own best Understanding, Judgment and Conscience, this in Direct opposition to the Direction of the Court.” It's difficult to square this statement of one of the Founding Fathers with the oath taken by a juror. It remains to be seen whether a juror or jurors will vote to acquit Mangione of murder because of feelings of anger and frustration against the American health insurance system.

Chief Judge Ann Bailey Smith presides in Division 13 of Jefferson Circuit Court. ■



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