IN THE SUPREME COURT OF FLORIDA

Case No. SC16-547
L.T. Case No 5D16-516

LARRY DARNELL PERRY

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Discretionary Review from the Fifth District Court of Appeal, Case Number 5D16-516

BRIEF ON THE ISSUE OF JURY UNANIMITY OF THE TENTH JUDICIAL CIRCUIT PUBLIC DEFENDER, AS AMICUS CURIAE, IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF AMICUS - Movant is the elected constitutional officer charged with the operation of the Tenth Judicial Circuit Public Defender Office in the public interest. He has been a criminal trial lawyer for 38 years, is death-qualified, and has tried several death penalty cases to verdict. He employs several other death-qualified trial lawyers who represent many defendants who are subject to the death penalty in three central Florida counties, as well as several death-qualified appellate attorneys who regularly appear in this Court on behalf of death-sentenced defendants in the 14-county Second District Court of appeal region. Movant's trial and appellate clients have a profound interest in the issue of jury unanimity in death penalty cases. Movant has the experience and resources to support Petitioner and assist this Court to understand this difficult issue of great public importance.

SUMMARY OF ARGUMENT - The Florida and United States Constitutions require juror unanimity in death penalty cases. The 5-4 Johnson and Apodaca decisions - - that concerned Louisiana and Oregon laws which expressly retained the requirement of unanimity in capital cases - - do not hold otherwise.

THE PROVISION WITHIN SECTION 921.141(2)(c), FLORIDA STATUTES(2016), CHAPTER 2016-13, LAWS OF FLORIDA, REQUIRING THAT "AT LEAST 10 JURORS DETERMINE THAT THE DEFENDANT SHOULD BE SENTENCED TO DEATH" IS UNCONSTITUTIONAL UNDER THE FLORIDA AND UNITED STATES CONSTITUTIONS

In Hurst v. Florida, 136 S.Ct. 616(2016), the United States Supreme Court made it crystal clear that Florida must base any death sentence "on a jury's verdict, not a judge's factfinding"[1] (136 S.Ct. at 624) and an advisory recommendation will not suffice (Id., at 622). While this Court, both prior to Ring v. Arizona, 536 U.S. 584(2002) and, later, in the mistaken belief that Ring did not apply in Florida, had approved bare majority "advisory recommendations" - - a position which all seven members were beginning to reassess by the time of State v. Steele, 921 So.2d 538,548-50,553(Fla.2005) - - Florida law has never permitted nonunanimous jury verdicts. As Justice Anstead recognized in 2002:

> Of course, Florida has long required unanimous verdicts in all criminal cases including capital cases. Florida Rule of Criminal Procedure 3.440 states that no jury verdict may be rendered unless all jurors agree. Furthermore, in Jones v. State, 92 So.2d 261(Fla.1956), this Court held that any interference with the right to a unanimous verdict denies the defendant a fair trial. However, in Florida, the jury's advisory recommendation in a capital case is not statutorily required to be by

[1] While the state might try to characterize the weighing decision as something other than "factfinding", the weighing decision cannot be made without factfinding. In order to weigh the mitigating circumstances against the aggravating circumstances, one must first determine what mitigating circumstances exist, and this often requires credibility determinations which (1) constitute "factfinding", and (2) are traditionally the province of the jury. For this and other reasons, the Supreme Courts of Arizona, Colorado, and Missouri have each concluded that Ring (and now, by logical extension, Hurst) require that the weighing determination be made by the jury. See State v. Ring, 65 P.3d 915,946 (Ariz.2003); Woldt v. People, 64 P.3d 256,265 (Colo.2003); State v. Whitfield, 107 S.W. 3d 253,261 (Mo.2003).

> unanimous vote. The jury's advisory recommendation may be by mere majority vote. This would appear to constitute another visible constitutional flaw in Florida's scheme when the Sixth Amendment right to a jury trial is applied as it was in Apprendi and Ring.

Bottoson v. Moore, 833 So.2d 693,710 (Fla.2002)(Anstead, C.J., concurring in result only)

And as Justice Shaw wrote in the same case, "[the] requirement of unanimity has been an inviolate tenet of Florida jurisprudence since the State was created." Bottoson v. Moore, 833 So.2d at 714 (Shaw, J., concurring in result only)(footnote omitted).

In Jones v. State, 92 So.2d 261 (Fla. 1956), cited by Justice Anstead in Bottoson, this Court recognized that deprivation of a defendant's right to a unanimous jury verdict would deny him the fair and impartial trial guaranteed by Section 11 of the Florida Constitution's Declaration of Rights. [The current Article 1, Section 16 of the Florida Constitution is framed in the same language as the former Section 11 discussed in Jones. See State v. Tait, 387 So.2d 338,340 (Fla.1980); Grant v. State, 780 So.2d 131, 134 (Fla. 4th DCA 2000)(Warner, C.J., dissenting)].

Moreover, the United States Supreme Court has never approved a less-than-unanimous verdict in a death penalty case, as to either conviction or sentence. Louisiana and Oregon are presently the only states that allow a non-capital felony conviction based on a nonunanimous jury verdict. See State v. Webb, 133 So.2d 258,285 (La.App.2014). In 1972, in the companion cases of Johnson v. Louisiana, 406 U.S. 356 (1972) and Apodaca v. Oregon, 406 U.S. 404 (1972) the Supreme Court, in 5-4 decisions, concluded that the 1898 Louisiana state constitutional provision and statute which allowed a 9-3 verdict in non-capital cases [see Johnson, 406 U.S. at 357,

n.1] and the 1934 Oregon state constitutional provision which allowed a 10-2 verdict in non-capital cases [see Apodaca, 406 U.S. at 406 n.1] did not violate federal constitutional requirements. 44 years later, Louisiana and Oregon are still the outliers.[2] See Burch v. Louisiana, 441 U.S. 130,138 (1979)("[the] near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not").

The Louisiana and Oregon laws at issue in Johnson and Apodaca were of curious and suspect origins. The nineteenth century antecedents of nonunanimous juries include racism and anti-Semitism. In Louisiana, this legal oddity was born of a post-Civil War desire to replace freed slaves and to disenfranchise blacks on juries. In Oregon, the majority-rule quirk became law because of a campaign promoted by the Ku Klux Klan.

Louisiana's slave-dependent economy was crippled after the war. That state had experimented with convict-leasing in the 1840s when the prison population was predominantly white. "The abolition of slavery changed the penitentiary from a predominantly white institution to one that was majority black. It changed the direction of prison work from industrial to agricultural labor, as white politicians sought to reinstitute a form of control over its newly freed workforce." Thomas Aiello, Jim Crow's Last Stand: The Non-

[2] Louisiana, in 1973, changed the required number of jurors from nine out of twelve to ten out of twelve. It retained the provision that in capital cases all twelve jurors must concur to render a verdict. State v. Hankton, 122 So.3d 1028 (La.App.2013); La.Const., art. 1, section 17(A); La.C.Cr.P. art. 782.

unanimous Jury Verdict in Louisiana, Location 242 (Louisiana State University Press)(Kindle Edition)(2015).

Beginning in the 1880s, Louisiana laws allowed criminal defendants to be convicted by nine of twelve jurors. "It was a law designed to increase convictions to feed the state's burgeoning convict lease system ..." (Aiello, Location 41). "[T]he legislation wasn't designed to streamline the trial system. It was designed to create de facto slaves." (Aiello, Location 373). "The proposed legislation, known as House Bill 101, would ...make criminal convictions easier for prosecutors, and it would ensure that more and more black convicts would be available for 're-enslavement.'" (Aiello Location 349).

In 1898 Louisiana amended its constitution, and thereby "elevated" the majority rule verdicts and disenfranchisement of African American voters. See State v. Hankton, 122 So.3d 1028,1037 (La.App.4 Cir.2013). Louisiana's constitutional "'...adoption of nonunanimous jury verdicts was substantially motivated by racial ill will' that 'saturated the proceedings of the Constitutional Convention of 1898 through and through...'" Andrew Cohen, Will the Supreme Court Address Louisiana's Flawed Jury System?, The Atlantic, April 23, 2014, at theatlantic.com/national/archive/2014/04/Louisiana/360726/.

In the 1930s, after prosecutors could not get a murder conviction against a Jewish defendant, Oregon adopted nonunanimous jury verdicts in an atmosphere of "...bigotry and fear of minority groups..." spurred on by the Ku Klux Klan. (Aiello, Location 761). Jacob Silverman was charged with first-degree murder, convicted of

manslaughter, and sentenced to three years prison. State v. Silverman, 148 Or.296 (1934). The public was incensed at the outcome because of one hold-out juror. "[T]he outrage provoked in the Oregon public pushed the creation of the new constitutional amendment" that permitted nonunanimous jury verdicts in criminal cases. (Aiello, Location 785).

In view of the heightened need for reliability in death penalty decisions, and the importance of eliminating the appearance and reality of racial bias from these life-or-death decisions, the Florida and U.S. Constitutions require full and fair jury deliberations resulting in a unanimous verdict; not a mere straw vote. See also Kim Taylor-Thompson, Empty Votes in Jury Deliberations, 113 Harv.L.Rev.1261,1264 (2000).

Regardless of whether or not the U.S. Supreme Court would decide Johnson and Apodaca the same way today, those decisions are obviously not controlling in the death penalty context, and they shed little light on whether the Sixth, Eighth, and Fourteenth Amendments require unanimity in capital guilt and penalty decisions (and no light on the Florida constitutional issue). And, as this Court has recognized, the qualitative difference between death and lesser punishments results in a "corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case". Allen v. Butterworth, 756 So.2d 52,59 (Fla.2000), quoting Woodson v. North Carolina, 428 U.S. 280,305 (1978)(plurality opinion).

The importance of unanimity as a safeguard of reliability was

recognized by the Supreme Court of Connecticut in State v. Daniels, 542 A.2d 306,314-15 (Conn.1988)(quoted with approval by this court in State v. Steele, 921 So.2d at 549). Daniels held that jury verdicts in the penalty phase of a capital case must comport with the guidelines that govern the validity of jury verdicts generally, including the requirement of unanimity. Rejecting the state's argument to the contrary, the Daniels court wrote:

> Two principal reasons compel us to disagree with the state. We first are persuaded that the functions performed by guilt and penalty phase juries are sufficiently similar so as to warrant the application of the unanimous verdict rule to the latter. Each jury receives evidence at an adversarial hearing where the chief engine of truth-seeking, the power to cross-examine witnesses, is fully present. At the close of the evidence, each jury is instructed on the law by the court. Finally, in returning a verdict, each jury has the power to "acquit": in the guilt phase, of criminal liability, and in the penalty phase, of the death sentence.
>
> Second, we perceive a special need for jury unanimity in capital sentencing. Under ordinary circumstances, the requirement of unanimity induces a jury to deliberate thoroughly and helps assure the reliability of the ultimate verdict. A. Spinella, Connecticut Criminal Procedure (1985) pp. 690-92. The "heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate"; Summer v. Shuman, 483 U.S. 66,107 S.Ct. 2716,2720, 97 L.Ed.2d 56 (1987); convinces us that jury unanimity is an especially important safeguard at a capital sentencing hearing. In its death penalty decisions since the mid-1970s, the United States Supreme Court has emphasized the importance of ensuring reliable and informed judgments. Beck v. Alabama, 447 U.S. 625, 637-39, 100 S.Ct. 2382,2388-90, 65 L.Ed.2d 392 (1980); Lockett v. Ohio, 438 U.S. 586,604-05, 98 S.Ct. 2954, 2964-65, 57 L.Ed.2d 973 (1978); Gardner v. Florida, 430 U.S. 349,359-60, 97 S.Ct. 1197-1205, 51 L.Ed.2d 393 (1977); Woodson v. North Carolina, supra, 428 So.2d at 304-306, 96 S.Ct. at 2990-91. These cases stand for the general proposition that the "reliability" of death sentences depends on adhering to guided procedures that promote a reasoned judgment by the trier of fact. The requirement of a unanimous verdict can only assist the capital sentencing jury in reaching such a reasoned decision.

See also Raoul G. Cantero and Robert M. Kline, Death is Different: The Need for Jury Unanimity in Death Penalty Cases, 22 St. Thomas L.Rev.4 (Fall 2009).

Unlike the historical accident of jury size, the requirement of unanimity "relates directly [to] the deliberative function of the jury". United States v. Scalzitti, 578 F.2d 507,512 (3d Cir.1978); see McKoy v. North Carolina, 494 U.S. 433,452 (1990) (Kennedy, J., concurring)(jury unanimity "is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community"); State v. McCarver, 462 S.E. 2d 25,39 (N.C.1995)(emphasis in opinion)("[t]houghtful and full deliberation in a effort to achieve unanimity has only a salutary effect on our judicial system: [i]t tends to prevent arbitrary and capricious sentence recommendations").

See also Scott E. Sundby, War and Peace in the Jury Room: How Capital Juries Reach Unanimity, 62 Hastings L.J.103 (Nov.2010).

A right guaranteed by the Florida and United States Constitutions cannot be bargained away by a legislative compromise. The Florida Senate had advanced a bill which would have preserved the right to a unanimous jury determination before the death penalty could be imposed; the House passed a version allowing a 9-3 death verdict; and a 10-2 "compromise" is what was ultimately settled upon and signed into law the by Governor. To allow a nonunanimous verdict only in cases where the ultimate penalty is to be decided stands the Eighth Amendment "death is different" principle on its head. [To the extent that the state may have succeeded in persuad-

ing the legislature that the unanimity requirement would permit a "rogue" juror or nullifier to block a death sentence based on his or her inability or unwillingness to follow the law, it should be recognized that (1) this speculative risk is inherent in any kind of jury trial, and (2) the risk is actually reduced in capital cases by the "death-qualification" process, which enables the state to strike for cause any juror whose opposition to the death penalty would impair his or her ability to fairly consider both the death and life imprisonment options [see e.g. Wainwright v. Witt, 469 U.S. 412 (1985); Rodgers v. State, 948 So.2d 655,662 (Fla.2006)], and to peremptorily strike jurors whom the state believes are "weak" on the death penalty [see Poole v. State, 151 So.3d 402,410-413 (Fla.2014)].

Even before Hurst, Florida was the outlier [State v. Steele, 921 So.2d at 550]; on an island with Alabama and Delaware. Alabama's and Delaware's death penalty statutes are in extreme jeopardy of being declared unconstitutional, either by those states' highest appellate courts or by the United States Supreme Court. [The U.S. Supreme Court has recently vacated a death sentence and remanded the case to the Court of Criminal Appeals of Alabama for further reconsideration in light of Hurst. Johnson v. Alabama, __S.Ct.__(2016)(2016 WL 1723290). The Supreme Court of Delaware is scheduled to hear oral argument on June 15, 2016 on five certified questions of law involving Hurst-generated constitutional issues, including whether a unanimous jury determination that the aggravating circumstances outweigh the mitigating circumstances is required. See State v. Rauf, 2016 WL 320094 (Del.Super.2016)]. Ala-

bama's and Delaware's nonunanimous death penalty recommendations are - - like Florida's was under the statutory scheme declared unconstitutional in Hurst - - advisory only. See, e.g., Ex Parte Stephens, 982 So.2d 1148,1149,1151 (Ala.2006); Ploof v. State, 75 A.3d 840,858 (Del.2013). Therefore, there is no reason to believe that those states' capital sentencing schemes will survive Hurst. Maybe Delaware will re-enact a death penalty statute to try to comply with Hurst, or maybe it won't. [3] If the legislatures of Delaware and/or Alabama enact new statutes, hopefully they won't make the same error as the Florida legislature did by compromising away the constitutional requirement of a unanimous death penalty verdict. In any event, the Florida legislature has once again chosen to make Florida the outlier; whether it will again be accompanied on that island by Alabama and Delaware remains to be seen. The U.S. Supreme Court's warning in Burch v. Louisiana, 441 U.S. at 138, that "[the] near uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not" remains apt.

CONCLUSION - The Florida and United States Constitutions require jury unanimity in capital sentencing verdicts.

[3] The unconstitutionality of Delaware's death penalty scheme - - which was largely modeled on Florida's [see Garden v. State, 844 A.2d 311,313 (Del.2004)] - - was nearly rendered moot in 2015 when that state's Senate voted to abolish its death penalty, and Governor Markell announced that he would sign such a bill if passed by the legislature. However, Delaware's House of Representatives narrowly rejected the measure.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original was e-filed with the Court and copies served by e-filing portal on: Mr. J. Edwin Mills, Esq., at JEMillsaw@hotmail.com, and to Mr. Frank J. Bankowitz, Esq., at fjb@Bankowitzlaw.com, attorneys for Petitioner, and to Office of the Attorney General at capapp@myfloridalegal.com, and vivian.singleton@myfloridalegal.com, this 17th day of May 2016.

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