IN
THE

SUPREME COURT OF FLORIDA

LARRY DARNELL PERRY, Petitioner, v. STATE OF FLORIDA, Respondent.	Case No. SC 16-547

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION OF FLORIDA IN SUPPORT OF PETITIONER PERRY

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TABLE OF CONTENTS

CITATIONS OF AUTHORITY ii

PRELIMINARY STATEMENT v

ARGUMENT 3

I. At the time Florida's Constitution was adopted and became effective, no person could be executed by the State without the unanimous assent of the jury, and the jury's role in determining who lived and who died was both well established and historically-grounded. 3

II. The singular sentencing role the Legislature has assigned the jury in the new capital statute only fortifies the conclusion that the jury's life and death decision must be unanimous. 9

III. The right to a unanimous jury verdict in criminal cases was well established when the Florida Constitution was adopted and widely understood to be part of its jury trial guarantee. 12

A. Florida courts have interpreted the right to a trial by jury to include the common-law right to a unanimous jury verdict. 12

B. Florida courts have similarly understood that the Florida Constitution adopts the common law and encompasses unanimity. 14

C. At common law, the unanimity of a jury verdict was inherent in the right to a trial by jury, as equally understood by the Nation's founders. 15

D. Early decisions by state courts demonstrate the universal understanding that unanimity was inherent in the jury right. 18

CONCLUSION 21

CITATIONS OF AUTHORITY

Page(s)

Cases

In re 1978 Chevrolet Van, 493 So. 2d 433 (Fla.1986) 3

Andres v. United States, 333 U.S. 740 (1948) 20

Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002) 9, 14

Butler v. State, 842 So. 2d 817 (Fla. 2003) 13

Cato v. State, 9 Fla. 163 (1860) 5

Florida v. Gaiter, No. F01-128535, slip op. (Fla. Cir. Ct. May 9, 2016) ..... *passim*

Hildwin v. State, 531 So. 2d 124 (Fla. 1988), *cert. granted, judgment aff'd*, 490 U.S. 638 (1989), *overruled by Hurst v. Florida*, 136 S. Ct. 616 (2016) 9

Holland v. Florida, 560 U.S. 631 (2010) vi

Holten v. State, 2 Fla. 476 (1849) 6

Hurst v. Florida, 136 S. Ct. 616 (2016) ..... vi, 2, 13

Inhabitants of Mendon v. Worcester Cnty., 27 Mass. 235 (1830) 19

Jones v. United States, 526 U.S. 227 (1999) 7

Lawrence v. Florida, 549 U.S. 327 (2007) vi

Estate of McCall v. United States, 134 So. 3d 894 (Fla. 2014) 3

McGautha v. California, 402 U.S. 183 (1971) 6, 7, 8

Monroe v. State, 5 Ga. 85 (1848) 20

Rouse v. State, 4 Ga. 136 (1848) 19

Spaziano v. State, 433 So. 2d 508 (Fla. 1983), *aff'd*, 468 U.S. 447 (1984) 9, 10

State v. Christmas, 20 N.C. 545 (1839) 19, 20

State v. Dixon, 283 So. 2d 1 (Fla. 1973) 11

United States v. Perez, 22 U.S. 579 (1824) 20

Walton v. Arizona, 497 U.S. 639 (1990) 7

Woodson v. North Carolina, 428 U.S. 280 (1976) 6, 16

Work v. State, 2 Ohio St. 296 (1853) 20

Constitutional Provisions

U.S. Constitution ..... *passim*

Florida Constitution (Westlaw 2016) ..... *passim*

Florida Constitution of 1838 ..... *passim*

Georgia Constitution of 1798 18

Statutes

1872 Fla. Sess. Laws, Chap. 1877 ..... 4, 5

Fla. Stat. § 2.01 (West 2016) 6, 13, 19

Fla. Stat. § 921.141 ..... *passim*

1 John P. Duval, *Compilation of the Public Acts of the Council of the Territory of Florida Passed Prior to 1839* ..... *passim*

1 Leslie A. Thompson, *A Manual or Digest of the Statute Law of the State of Florida: Of A General and Public Character, In Force at the End of the Second Session of the General Assembly of the State, On the Sixth Day of January, 1847* (1847) *5*

Other Authorities

Fla. R. Crim. P. Rule 3.440 13

Jeffrey Abramson, *We, The Jury: The Jury System and the Ideal of Democracy* 217 (Basic 1994) 7

Thomas Andrew Green, *The Jury and the English Law of Homicide, 1200* 74 Mich. L. Rev. 413 (1976)..... 7

Thomas Andrew Green, *Verdict According to Conscience: Perspectives*

William Blackstone, 4 *Commentaries on the Laws of England* 343 (Univ. of Chicago Press 1979) (1765) 12

PRELIMINARY STATEMENT

This brief is being filed by the American Civil Liberties Union Capital Punishment Project (ACLU-CPP) and the American Civil Liberties Union of Florida (ACLU-FL), in support of the Petitioner, LARRY DARNELL PERRY.

The ACLU is a nationwide nonpartisan organization of nearly 500,000 members dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the state and federal Constitutions, while the ACLU's Capital Punishment Project focuses on upholding those rights in the context of death-penalty cases. The ACLU of Florida is the ACLU's state affiliate and has approximately 15,000 members in the State of Florida equally dedicated to the principles of liberty and equality embodied in the United States Constitution and the Florida Constitution.

Both the ACLU-CPP and the ACLU-FL have long been committed to protecting the constitutional rights of persons facing the death penalty. Both have filed amicus curiae briefs in the United States Supreme Court in recent death penalty cases. *See, e.g.*, *Hurst v. Florida*, 136 S. Ct. 616 (2016); *Holland v. Florida*, 560 U.S. 631 (2010); *Lawrence v. Florida*, 549 U.S. 327 (2007). Jointly, both currently represent a Florida death-row prisoner on direct appeal.

SUMMARY OF ARGUMENT

Florida's Constitution enshrines the "right of trial by jury" as "secure to all" and "inviolate," Fl. Const. art. I, § 22, including of course in "all criminal prosecutions." Fla. Const. art. I, § 16. At the time Florida was admitted to the United States in 1845, and her Constitution therefore became effective,[1] the notion that a person could be executed without the *unanimous* assent of a jury would have been regarded as inconsistent with both tradition and practice. As shown in this brief, because of this history, because of common-law's protection of the unanimous jury right, and because of the decisive role the jury plays under the Legislature's new capital-sentencing statute,[2] the permission the new statute grants the State to execute absent a unanimous jury vote violates the Florida Constitution.

This Court has issued an order in this case directing the parties to "address whether the provisions within" the new capital sentencing statute "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 their briefing, Petitioner Perry and his amici have ably shown why this provision violates the Sixth and Eighth Amendments to the United States

[1] Florida's founders had placed virtually identical protections in the then controlling 1838 Constitution of Territorial Florida. *See* 1838 Fla. Const. art. I, §§ 6 (jury right), 10 (rights of accused in all criminal prosecutions).

[2] *See* Florida Statutes (2016), Chapter 2016-13, Laws of Florida (hereafter "the new capital sentencing statute," or "new statute").

Constitution. Petitioner and his amici have also demonstrated the powerful policy reasons supporting the constitutional rights to a unanimous jury in capital sentencing. Petitioner has further shown that the work of the jury under the new capital sentencing statute is fact-finding of elements necessary for a sentence of death under *Hurst v. Florida*, 136 S. Ct. 616 (2016), including the determination of whether sufficient aggravating factors exist, the finding of mitigating circumstances, and the weighing of the aggravating factors against the mitigating circumstances. Amici will not here rehearse these meritorious arguments.

Instead, this amicus curiae brief will address what appears to be a gap in the briefing – the history in Florida resolving whether the Florida Constitution bars the non-unanimous jury sentencing the new sentencing statute allows. In particular, this brief will fill the gap the State has left in the historical record in its briefing on this subject. *See* Appellee's Resp. Br., May 17, 2016. This brief will show that the understanding of the jury right at the time Florida's Constitution became effective was inherited from British common law, and indisputably required the jury's *unanimous* assent before the State could impose the most severe criminal punishment of execution.

ARGUMENT

I. At the time Florida's Constitution was adopted and became effective, no person could be executed by the State without the unanimous assent of the jury, and the jury's role in determining who lived and who died was both well established and historically-grounded.

Article I, section 22 of the Florida Constitution provides that "[t]he right of trial by jury shall be secure to all and remain inviolate." Florida's "first constitution of 1838, which became effective upon Florida's admittance to the Union in 1845, and all subsequent constitutions have contained similar provisions." *In re 1978 Chevrolet Van*, 493 So. 2d 433, 434 (Fla.1986). The same is true for the jury right of the accused in criminal prosecutions currently set forth in Article I, section 16 of the Florida Constitution, and originally set forth in Article I, section 10. As this Court has held, the current Constitution "'guarantees the right to trial by jury in those cases in which the right was enjoyed at the time this state's first constitution became effective in 1845.'" *Estate of McCall v. United States*, 134 So. 3d 894, 936-37 (Fla. 2014) (quoting *In re 1978 Chevrolet Van*, 493 So. 2d at 434). With this much, at least, the State agrees. Appellee's Resp. Br. at 1.

The State diverges with a historical analysis that begins with a Florida law that allowed a majority of the jury to recommend mercy, once the accused was duly convicted of a capital crime with an otherwise mandatory death sentence. *See* Appellee's Resp. Br. at 2-3 (discussing Title 2, Chapter 2, §§ 2923, 2924, Rev. Stat. (1892) and professing an inability "to confirm that the Section . . . existed in

1845"). The State nevertheless concludes from this statute that "the fact that the recommendation was made by majority vote rather than unanimously demonstrates that any jury right based on this provision and therefore encompassed within Florida's current constitutional right to trial does not require unanimity." Appellee's Resp. Br. at 3.

But the State is wrong in both its supposition and its conclusion. The fact is that the Florida Legislature did not enact the provision on which the State now relies until 1872,[3] 34 years after Florida's first Constitution of 1838, and 27 years after the Constitution became effective in 1845. As shown below, the conclusions the State draws are equally faulty.

In fact, at the time Florida adopted its first Constitution in 1838 and the Constitution became effective in 1845, the jury's decision to convict the accused of a capital crime was also conclusive as to punishment. The death penalty, in this era, was *mandatory* for capital crimes, as shown in several statutes chronologically bracketing the adoption and effective date of the Florida Constitution.[4] Contrary to

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[3] *See* 1872 Fla. Sess. Laws, Chap. 1877, § 1, Feb. 27, 1872.

[4] *See*, *e.g.*, 1 John P. Duval, *Compilation of the Public Acts of the Council of the Territory of Florida Passed Prior to1839,* 113 (setting forth "An Act relating to Crimes and Misdemeanors," approved Feb. 10, 1832, at Section 2, stating "That any person convicted of the crime of murder, rape, or arson, shall be punished with death."); 1 Leslie A. Thompson, *A Manual or Digest of the Statute of the State of Florida of a General and Public*, 537 (1847) (setting forth (racially discriminatory and abhorrent) Act Nov. 21, 1828, Sec. 34, Duval, stating: "If any

the State's supposition, there was no provision for a *non-unanimous* jury to disrupt the mandatory punishment of death. And, as the State does not dispute, in this era, the jury right protecting all accused facing such capital charges was a right to a unanimous jury. *See also* Point III, *infra*.

Significantly, the juries in this era deciding whether the accused was guilty or not of the charged capital offense *knew* they were equally deciding if the accused would live or die. They knew it because judges expressly instructed the jury on the punishment that would result from a capital conviction. *See, e.g.*, *Cato v. State*, 9 Fla. 163, 165-66 (1860) (quoting the following jury instructions from trial court in rape case: "You now hold in your hands . . . the issue of life and death, and you will not fail seriously to contemplate the grave and momentous consequences which will result from the verdict which you shall render in this case. . . . The laws of this State affix the death penalty to the crime of rape . . ."). Indeed, in this era, this Court itself described the potential verdict in a capital case

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negro or other slave shall at any time consult, advise insurrection, or conspire, to rebel or make insurrection, or shall plot or conspire . . . [to the] murder of any free white person or persons whatsoever, every to murder, such consulting, plotting, or conspiracy, shall be adjudged and deemed felony, and the slave or slaves convicted thereof *shall suffer death*.") (emphasis added);1868 Fla. Sess. Laws, Chap. 3, § 2 (stating person convicted of first-degree murder, "perpetrated from a premeditated design to effect the death of the person killed" . . . "*shall suffer the punishment of death*") (emphasis added).

of a petit jury as "'guilty for which the court adjudge death.'" *Holten v. State*, 2 Fla. 476, 487 (1849).

Further, as recognized by the U.S. Supreme Court in its extensive discussion of automatic death sentences in two different opinions, jurors from this early era not only *knew* of the consequence of a capital conviction, but specifically refused to convict in cases where they did not think a death sentence was warranted. *See generally Woodson v. North Carolina*, 428 U.S. 280, 289 (1976) (plurality opinion); *McGautha v. California*, 402 U.S. 183, 197-98 (1971). In *Woodson*, the Court observed that at "least since the Revolution, American jurors have, with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict." 428 U.S. at 293. Juries' refusals to return verdicts of guilty to avoid the consequence of execution drove the movement behind reducing "the number of capital offenses and to separate murder into degrees." *Id.*

These early jurors followed a tradition started in the British common-law legal system that gave rise to our own, and continues to give meaning to the Florida common law. *See* Fla. Stat. § 2.01 (West 2016). Professor Thomas Green has proven, in his authoritative analysis of early English juries, that, as early as the thirteenth Century, jurors refused to convict on capital charges when they believed the crimes were unworthy of execution. Thomas Andrew Green, *Verdict According*

to Conscience: Perspectives on the English Criminal Trial Jury 1200-1800 28-64 (1985) (hereafter Green); Jeffrey Abramson, *We, The Jury: The Jury System and the Ideal of Democracy* 217 (Basic 1994) (citing Green). *Cf. Jones v. United States*, 526 U.S. 227, 246 (1999) (citing Green's work); *Walton v. Arizona*, 497 U.S. 639, 711 n.3 (1990) (Stevens, J., dissenting) (citing Green's work), *overruled by Ring v. Arizona*, 536 U.S. 586, 609 (2002).

Green's work teaches that British juries' "power to determine the defendant's fate was virtually absolute." *Id.* at 19. Those acquitted were released. Id. "The guilty were hanged almost immediately." *Id.* Indeed, the judgment of conviction was termed "'suspendatus est,' ('he is hanged.')." Green, *The Jury and the English Law of Homicide, 1200-1600*, 74 Mich. L. Rev. 413, 424 (1976). Juries in effect were deciding the "appropriate circumstances under which a person's life might be surrendered to the Crown." Green, *supra*, at 20.

One of the early juries' tools was to find self-defense, which allowed them to limit capital convictions to the "most culpable homicides." Green, *The Jury and the English Law of Homicide*, 1200-1600, 74 Mich. L. Rev. at 431. *See also id.* at 416 (finding "the local community considered" execution "appropriate mainly for the real evildoer: the stealthy slayer who took his victim by surprise and without provocation"); *McGautha*, 402 U.S. at 197 (recounting this history).

A later tool of the early British jurors was to afford the accused the "benefit of clergy," available for anyone literate enough to recite a Bible verse. Green, *supra*, at 117. The jury's role was to decide if the crime qualified for the benefit, which would result in branding of the convicted and a year's imprisonment. *Id.* at 118. In homicide cases, that meant deciding whether the crime was manslaughter or murder. *Id.* at 121-22. As jurors "recognize[ed] that benefit of clergy provided an alternative sanction [to execution] for simple homicide," the conviction rate went up, and the previously high rate of self-defense verdicts went down. *Id.* at 122. The percentage of offenders condemned to death, over this period, "remained about the same," *id.* at 122, preserving over time the jury's unique role as arbiter of community sentiment. *See Ring*, 536 U.S. at 615 (Breyer, J., concurring). *See also McGautha*, 402 U.S. at 197-98 (recounting this same history).

The role of the jury in capital cases at the time Florida's Constitution became effective was thus clear. The jury of course decided whether the accused was guilty as charged, but it also did so based on the punishment it *knew* would ultimately result. This, in turn, followed centuries-old common law practices, also evident in Florida's many sister states. Although the Legislature has in modern times moved the sentencing decision to a separate phase, that legislative action cannot upend the right afforded at the time the Florida Constitution became

effective.[5] Notably, the jurors exercising this life and death authority throughout history were always unanimous. Indeed, as shown further in Point III of this brief, the common-law jury right the Florida Constitution embraces is, was, and always has been that of the unanimous jury.

II. The singular sentencing role the Legislature has assigned the jury in the new capital statute only fortifies the conclusion that the jury's life and death decision must be unanimous.

Citing *Grant v. State*, 14 So. 757, 758 (Fla. 1894) and *Bottoson v. Moore*, 833 So. 2d 693, 714-15 (Fla. 2002) (Shaw, J., concurring in result only), the State *concedes* that "Florida law favors unanimity *if* the jury is returning a binding legal verdict in a criminal case." Appellee's Resp. Br. at 3 (emphasis in original). Notwithstanding that the new statute does not use the term "verdict" – a State's argument clinging to fleeting form over hard substance, *id.* at 3-4 – the jury under the new statute surely does return a binding verdict. When the jury recommends a sentence of life imprisonment under subdivision (3) of the new Section 921.141, Florida Statues, that recommendation is now *binding*. *See* § 921.141, Fla. Stat.,

[5] Amici acknowledge prior decisions of this Court suggest there is no constitutional right to jury sentencing on the issue of capital punishment. *See, e.g.*, *Spaziano v. State*, 433 So. 2d 508, 509 (Fla. 1983), *aff'd*, 468 U.S. 447 (1984). But neither *Spaziano* nor any of the other decisions in which this issue has been specifically addressed appear to have addressed the Florida constitutional arguments set forth in this brief. Indeed, most decisions touching on this issue appear specifically to address the Sixth Amendment to the United States Constitution. *See, e.g.*, *Hildwin v. State*, 531 So. 2d 124, 129 (Fla. 1988), *cert. granted, judgment aff'd*, 490 U.S. 638 (1989), *overruled by Hurst v. Florida*, 136 S. Ct. 616 (2016).

(3)(a) ("If the jury has recommended a sentence of . . . (1) Life Imprisonment without the possibility of parole, the court *shall* impose the recommended sentence.") (emphasis added). And, if and only if the jury "recommends" a sentence of death, may the trial court impose such a sentence. § 921.141, Fla. Stat., (3)(b) ("If the jury has recommended a sentence of . . . (2) Death, the court . . . may impose a sentence of life imprisonment without the possibility of parole or a sentence of death.").

Under the new statute, then, *no person may be sentenced to death in the State of Florida without the jury's assent*. The Legislature had certainly not afforded the jury anything close to such conclusive power in its prior statute. *See, e.g.*, *Spaziano*, 433 So. 2d at 512 ("[T]he jury's function under the Florida death penalty statute is advisory only."). In addition to this power, the jury must, before even recommending a death sentence, unanimously find at least one aggravating factor, determine whether "sufficient aggravating factors exist[,]" whether "aggravating factors exist which outweigh the mitigating circumstances found to exist[,]" and whether "the defendant should be sentenced to life imprisonment without the possibility of parole or to death." § 921.141, Fla. Stat., (2).

While it is true that, after these steps, the jury's assent to execute though necessary under the new statute is not *sufficient*, for the judge may nevertheless impose a life sentence, § 921.141, Fla. Stat., (3)(a)(2), that is of no constitutional

significance. The judge's important role is to dispense mercy and prevent arbitrary executions, even where the jury has failed to do so. *See State v. Dixon*, 283 So. 2d 1, 8 (Fla. 1973) (observing that judge's role under old statute "provides an additional safeguard for the defendant sentenced to death in that it provides a standard for life imprisonment against which to measure the standard for death established in the defendant's case, and again avoids the possibility of discriminatory sentences of death").[6] The judicial safeguard in the new statute in no way diminishes the jury's singular, largely controlling role.

Whether its decision is called a recommendation, a verdict, or Mary Jane, the determination the jury makes under the new statute is, as it was through history, decisive as to whom the State may execute. The decisions a jury makes on this life and death question must therefore be unanimous under the Florida Constitution. *See* Fla. Const. art. I, §§ 16, 22. As shall be seen below, unanimity has through our common-law and Florida history always been part of the jury right, especially protected in capital cases.

[6] Although the Supreme Court in *Hurst* and the Legislature have now determined that the judge's role went too far under the old statute, this salutary *theory* behind the prior design retains considerable merit and force even now.

III. The right to a unanimous jury verdict in criminal cases was well established when the Florida Constitution was adopted and widely understood to be part of its jury trial guarantee.

The State argues that the Florida Constitution "does not expressly require a jury to be unanimous[,]" Appellee's Resp. Br. at 3, and otherwise downplays or ignores the role of unanimity in the jury right. Appellee's Resp. Br. at 3-6. But the history shows that in criminal cases, and especially in capital cases, the jury right has always been understood to encompass unanimity.

A. Florida courts have interpreted the right to a trial by jury to include the common-law right to a unanimous jury verdict.

At common law—the foundation of American and Florida jurisprudence—trial by jury required a unanimous verdict. *See, e.g.*, William Blackstone, 4 *Commentaries on the Laws of England* 343 (Univ. of Chicago Press 1979) (1765); Green, *supra*, at 18; Abramson, *supra*, at 72. As discussed *infra*, state courts throughout the United States have repeatedly acknowledged the common law source underlying the state right to a unanimous verdict in criminal cases. *See Florida v. Gaiter*, No. F01-128535, slip op. at 4 (Fla. Cir. Ct. May 9, 2016) (*collecting People v. Cooks*, 521 N.W. 2d 275, 278 (Mich. 1994) ("At common law ... criminal defendants were entitled to unanimous jury verdicts.") (citing *McRae v. Grand Rapids, L & DR Co.*, 53 N.W. 561 (Mich. 1892)); *Williams v. James*, 552 A.2d 153, 156 (N.J. 1989) (referring to "the historic common-law requirement of unanimity of jury verdicts"); *People v. Hall*, 60 P.3d 728, 734 (Colo. App. 2002)

(citing *George v. People*, 47 N.E. 741, 743-44 (Ill. 1897))). And in Florida, a centuries-old statute provides that common laws of England "are declared to be in force in this state" unless inconsistent with subsequent acts of the Florida legislature. Fla. Stat. § 2.01 (West 2016); *see also Gaiter*, slip op. at 4.

From the time the Legislature enacted § 2.01 in 1829 until the passage of Fla. Stat. § 921.141 earlier this year, no legislature or court in Florida had ever altered the common law requirement of a unanimous jury. *See Butler v. State*, 842 So. 2d 817, 837 (Fla. 2003) ("Unanimity of verdicts has always been part of Florida's common law.") (Pariente, J., concurring in part and dissenting in part) (internal citations omitted). Florida criminal procedure and jury instructions have also reinforced the unanimity requirement. *See e.g.*, Fla. R. Crim. P. Rule 3.440; Fla. Std. Jury Instr. (Crim) 3.10 ("Whatever verdict you render must be unanimous, that is, each juror must agree to the same verdict."); Fla. Std. Jury Instr. (Crim) 3.13 ("Your verdict finding the defendant either guilty or not guilty must be unanimous. The verdict must be the verdict of each juror, as well as of the jury as a whole.").

Finally, as discussed at length in the well-researched *Gaiter* decision, even the unconstitutional provisions of the previous version of Fla. Stat. § 921.141(2) invalidated in *Hurst v. Florida*, 136 S. Ct. 616 (2016), did not require a less-than-unanimous jury verdict because that law only required an "advisory sentence by

the jury" rather than an actual verdict, which is "conclusive of the ultimate issue of fact." *Gaiter*, slip op. at 6 (stating the jury's recommendation "was, in effect, a straw poll, and the jurors were told as much; they were instructed that the reason their decision need not be unanimous was because it was not a decision").

B. Florida courts have similarly understood that the Florida Constitution adopts the common law and encompasses unanimity.

This Court has repeatedly construed the right to a trial by jury in the Florida Constitution as inclusive of the right to a unanimous jury verdict, "without exception." *Gaiter*, slip op. at 7 (collecting *Bottoson*, 833 So. 2d at 709-10 (Shaw, J., concurring) (citing *Jones v. State*, 92 So. 2d 261, 261 (Fla. 1956); *Grant v. State*, 14 So. 757, 758 (Fla. 1894); *Patrick v. Young*, 18 Fla. 50, 50 (Fla.1881)). As the circuit judge in *Gaiter* observed, "There is no Florida constitutional jurisprudence that takes a contrary position. There is no Florida constitutional jurisprudence that even hints at a contrary position." *Id.*

The original Florida Constitution drafted in 1838 stated succinctly "[t]hat the right of the trial by jury shall forever remain inviolate." Fla. Const. of 1838 § 6. It made no mention of the size of the jury, as the common law consistently provided that the right to a trial by jury encompasses a jury of twelve persons. *See* 4 Blackstone Commentaries at 343. The current constitutional provision in Art. I § 22 that the number of jurors cannot be "fewer than six" was added by

constitutional amendment in 1965, suggesting that "it was thought necessary to amend the Florida Constitution" to deviate from the common-law definition. *Gaiter*, slip op. at 8. "By a parity of reasoning, it would be necessary to amend the state constitution to eliminate or modify the requirement of unanimous verdicts in criminal cases." *Id.* This logic is impeccable.

Thus, as the court in *Gaiter* correctly held, the correct interpretation of the right to a trial by jury in the Florida Constitution is one that is consistent with the centuries-old common law tradition (reviewed below), the interpretation of the Founding Fathers and early sister state courts (also reviewed below), and all of this Court's precedent—that a criminal jury verdict *must* be unanimous.

C. At common law, the unanimity of a jury verdict was inherent in the right to a trial by jury, as equally understood by the Nation's founders.

The Florida practice and tradition merely followed that of the common-law jury right. By the founding of our Nation, unanimity had been integral to the English jury right for centuries. *See* 4 Blackstone Commentaries at 343 (verdict must be result of "unanimous suffrage of twelve of [the defendant's] equals and neighbors"). Blackstone is perhaps the most famous of those describing the English jury right to include unanimity. He explained that "the founders of English law have with excellent forecast contrived" that no man should be convicted except upon an indictment "confirmed by the unanimous suffrage of twelve of his equals

and neighbors, indifferently chosen, and superior to all suspicion." *Id.* The protection of unanimous juries had life and death consequences in founding era England, where "more than 200 offenses [were] then punishable by death[.]" *Woodson*, 428 U.S. at 289.

The unanimity requirement dates back centuries, first arising in the Middle Ages, and was a cornerstone of the jury trial by the time the U.S. Constitution and Bill of Rights were drafted and ratified. Historians record the first "instance of a unanimous verdict . . . in 1367, when an English Court refused to accept an 11-1 guilty vote after the lone holdout stated he would rather die in prison than consent to convict." Abramson, *supra,* at 179. In 1670, the Crown tried William Penn—an influential founder of the Commonwealth of Pennsylvania—on charges of speaking and preaching on a street and thereby causing "a great concourse and tumult of people in the street," but the twelve jurors deadlocked twice, and twice were sent back for further deliberations before ultimately reaching a unanimous verdict of not guilty. Green, *supra*, at 222-225. The course of history for this early colonial leader thus may well have turned on the protection of a unanimous jury verdict. Unanimity was part of the proud jury tradition brought to this land.

Thus, that tradition was well-understood by the Nation's Founders, including Justice Wilson, one of the few who signed both the Declaration of Independence and the original U.S. Constitution. Wilson lectured on the role of juries at the time

the Bill of Rights was being ratified, and he repeatedly stated that unanimity was of "indispensable" significance in criminal cases. Lectures of Justice James Wilson (1791) in 2 *Collected Works of James Wilson* 970, 962-78, 984-989, 991-92, 1010-11 (K. Hall & M. Hall eds., 2007). Justice Wilson described unanimity as an answer to society's dilemma of how to determine whether one of its members has committed a crime. He recognized that society as a *whole* cannot make that determination. *Id.* at 960. If society as a whole *were* available to make the determination, he posited, then the accused's "fate must, from the very nature of society, be decided by the voice of the majority[.]" *Id.* But, since only *representatives* of society are available it is "reasonable" to demand that "the unanimous voice of those who represent parties . . . should be necessary to warrant a sentence of condemnation." *Id.*

Wilson then declared, "*It cannot have escaped you, that I have been describing the principles of our well known trial by jury*." *Id.* at 962 (emphasis added). For Justice Wilson, unanimity was not separate from the right to jury, but part of its foundation. In his lecture, Justice Wilson further showed particular concern for unanimity in capital cases. In such "transaction[s], of all human transactions the most important," he taught, jurors must "form[] the[ir] *collected verdict of the whole from the separate judgment of each*." *Id.* (emphasis added). Nowhere is this more important than when a person is "'judged to death.'" *Id.*

Justice Wilson covered other topics in his lecture on the jury right. But he showed his particular admiration for the "criminal" and "capital" jury by describing the right in his closing words as "sublime" and comparing it to an "edifice" with "strong and lofty" walls, and within which "freedom enjoys protection, and innocence rests secure." *Id.* at 1011. As his lecture showed, unanimity, for this Founder, served as the structure's cornerstone.

D. Early decisions by state courts demonstrate the universal understanding that unanimity was inherent in the jury right.

Interpretations of the similarly-worded jury right within in other state constitutions, near in time to the Florida Constitution of 1838, provide yet further evidence of the meaning of the jury right in Florida. For example, none of the state constitutions of New Hampshire, Ohio, or Georgia explicitly mentioned unanimity as part of the jury right, but their high courts found it integral to the jury right in decisions handed down in this early era.

The Georgia Constitution contains language almost identical to the original Florida Constitution's proclamation of the right to a jury trial. *Compare* Ga. Const. of 1798 § 6 ([T]rial by jury . . . shall remain inviolate."), *with* Fla. Const. of 1838 § 6 ("The right to a trial by jury shall be secure to all and remain inviolate."). In 1848, the Georgia Supreme Court concluded that the "sum and substance of this trial by jury" is that every accusation must be "confirmed by the unanimous

suffrage of twelve of the prisoner's equals and neighbors . . . ." *Rouse v. State*, 4 Ga. 136, 147 (1848). The court found it "obvious that the framers of [Georgia's 1798] Constitution, instead of incorporating" the whole of Blackstone's definition (which included unanimity) "simply declare that the trial by jury, as therein delineated, shall remain inviolate." *Id. See also Inhabitants of Mendon v. Worcester Cnty.*, 27 Mass. 235, 246-47 (1830) (calling unanimity "one of the known incidents of a jury trial"); *State v. Christmas*, 20 N.C. 545, 411-12 (1839) (noting that unanimity required in state constitution based on common-law jury right). Surely the drafters of the Florida Constitution at the time shared this understanding of the "common and statute laws of England" that the Florida legislature had declared "to be of force in this state" just nine years earlier. Fla. Stat. § 2.01 (West 2016) (originally enacted Nov. 6, 1829).

In New Hampshire, the legislature asked the high court whether it could permit non-unanimous jury verdicts or juries of less than twelve. *Opinion of Justices*, 41 N.H. 550, 550 (1860). The court's unanimous answer was no, on both counts. The court noted that no right was "more strenuously insisted upon" by the Founders than the jury trial right, which had a well-settled single meaning, in "[a]ll the books of the law," and "always to be understood and explained in that sense in which it was used at the time when the constitution and the laws were adopted." *Id.* at 551. Because "no such thing as a jury of less than twelve men, or a jury deciding

by less than twelve voices had ever been known, or ever been the subject of discussion in any country of the common law" the court held that the legislature had no power to enact legislation along these lines. *Id.* at 551-52.

The Ohio Supreme Court reached the identical conclusion about a state statute, with virtually the identical reasoning. The court observed that the jury trial right is "sufficiently understood, and referred to as a matter already familiar[,] definite as any other in the whole range of legal learning." *Work v. State*, 2 Ohio St. 296, 302 (1853). Extolling this "bulwark of the liberties of Englishmen," the court found it "beyond controversy" that its "number must be twelve, they must be impartially selected, and must unanimously concur . . . ." *Id.* at 304. The court therefore concluded that the legislature could not authorize non-unanimous criminal juries. *Id.* at 304. And nowhere did the early courts express greater concern for unanimity than in capital cases.[7]

[7] *See United States v. Perez*, 22 U.S. 579, 580 (1824) (Story, J.) (stating regarding hung juries that "in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner"); *Monroe v. State*, 5 Ga. 85, 148 (1848) (reversing capital murder conviction due to sequestration arrangements that undermined unanimity and stating: "God forbid that the prisoner should be sent to pray of the mercy of the Executive, a reprieve for an offence of which he has not been legally convicted."). *See also Andres v. United States*, 333 U.S. 740, 752 (1948) (noting that an "instruction that a juror should not join a verdict of guilty, without qualification" of the statutory mercy recommendation "if he is convinced that capital punishment should not be inflicted" would be proper under federal capital statute).

Florida's sister state courts of the era, then, shared in the understanding that the right to a jury meant the right to a unanimous jury. As those who ratified the Florida Constitution would have understood, nothing in these authorities permitted non-unanimous jury decisions in serious criminal matters, let alone when determining whether to impose a death sentence.

CONCLUSION

For the foregoing reasons, and those submitted in Petitioner Perry's briefing, the Court should hold the new capital sentencing statute violates the jury rights protected by the Florida Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that a true and correct copy of the foregoing has been furnished to Carol Marie Dittmar, counsel for respondent, and to counsel for Petitioner Perry, through the Florida Electronic Portal, this the 3rd day of June, 2016.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this computer-generated amicus curiae brief is in compliance with Florida Rules of Appellate Procedure 9.210 and 9.370.

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