IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

STATE OF FLORIDA, **CASE NO. F01-128535**

Plaintiff,

v.

KARON GAITER,

Defendant.
_____/

ORDER ON DEFENDANT'S MOTION
TO DECLARE FLORIDA STATUTE § 921.141 UNCONSTITUTIONAL

Defendant Karon Gaiter is charged with one count of first-degree murder. The prosecution has given notice of its intent to seek the death penalty. By virtue of recent statutory changes, a penalty-phase jury's non-unanimous verdict of death is a sufficient basis in law for the imposition of the death penalty. Mr. Gaiter challenges these statutory changes, claiming that he cannot be put to death upon a less-than-unanimous verdict.

Introduction

It is a core principle of American constitutional jurisprudence generally, and of Florida constitutional jurisprudence specifically, that, "When called upon to decide matters of fundamental rights, ... state courts are bound under ... principles [of federalism] to give primacy to [the] state constitution." *Traylor v. State*, 596 So.2d 957, 962 (Fla. 1992). If a Florida court can decide a question as a matter of Florida constitutional law, it must do so; it must do so without relying upon federal law. The Florida court is not to look to federal constitutional law unless the question before it is not susceptible of resolution by reference to Florida law. *See, e.g., State v. Owen*, 696 So.2d

715, 719 (Fla. 1997); *Soca v. State*, 673 So.2d 24, 26-27 (Fla. 1996); *Allred v. State*, 622 So.2d 984, 986-87 (Fla. 1993); *Peoples v. State*, 612 So.2d 555, 556 (Fla. 1992); *State v. Jones*, 849 So.2d 438, 443 n. 1 (Fla. 3d DCA 2003). This expression of federalism is the mirror image of the principle that federal courts will not adjudicate a question of constitutional law emanating from a state-court system if the question has been resolved on the basis of adequate and independent state-law grounds. *See, e.g., Michigan v. Long*, 463 U.S. 1032 (1983); *see gen'ly Ashwander v. TVA*, 297 U.S. 288, 347 *et. seq.* (1936) (Brandeis, J., concurring).

The narrow question before me can and must be resolved exclusively as a matter of Florida law. Ample and more than ample Florida jurisprudence, constitutional and common-law, determine the outcome here.[1]

The law of Florida as to the requirement of jury unanimity

Trial by jury, said Winston Churchill, is "the supreme protection invented by the English people for ordinary individuals against the state." And he added:

> The power of the Executive to cast a man into prison without formulating any charge known to the law, *and particularly to deny him the judgment of his peers*, is in the highest degree odious and is the foundation of all totalitarian government whether Nazi or Communist.

A. W. Brian Simpson, In the Highest Degree Odious: Detention Without Trial in Wartime Britain 391 (Oxford Univ. Press 1992) (emphasis added).[2]

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[1] I therefore do not adjudicate, or even consider, Mr. Gaiter's claims made under the Sixth or Eighth Amendments to the United States Constitution.

[2] A fascinating and scholarly discussion of wartime detention in England, and the triumph of the right to trial by jury, appears in Lord Bingham of Cornhill, "The Case of *Liversidge v. Anderson*: The Rule of Law Amid the Clash of Arms," 43 The International Lawyer 33 (Spring 2009).

This sense of reverence for trial by jury is one that Americans have shared since, and even before, the birth of our republic. If we ask the source of this reverence – if we ask lawyers or laymen, it matters not which – the answer will be found in the requirement of jury unanimity. We recognize that the guilty man must be pointed out and condemned. But we recognize too that the power of government to point and to condemn is so great that it may reach even the innocent man. We therefore insist that only when a jury of the accused's peers concurs in his guilt – only when each and all of them concur in his guilt – will we mark him down as guilty. In this sense, the requirement of a unanimous jury verdict is a compromise between a free society's need to protect itself from crime and a free society's need to protect itself from injustice. It is a compromise that an unfree society need never make.

Decisions consigned to the political branches of government are customarily made by majority rule. For such purposes, majority rule is sufficient. We do not ask that the decisions of the school board, or the city commission, or the state legislature, be, in any sense, perfect. We ask only that such decisions reflect the will of the many rather than the will of the few. But for the ultimate decisions made within the judicial branch of government – guilty or not guilty, life or death – majority rule is insufficient. We do ask, indeed we insist, that the decisions of capital juries be, in some sense, perfect; for they are, in some sense, final. We ask, indeed we insist, that they reflect the will of all rather than the will of the few or even of the many. Only when the jury agrees to its verdict unanimously can we demand that society accept that verdict unanimously. However outrageous a crime, however controversial a case, as Floridians and Americans we will accede to an outcome as to which it can be said that the jury has spoken. We cannot accede, we will not accede, we have never acceded, to outcomes as to which no more can be said than that *some* jurors have

spoken.

The common law

"For over six hundred years, the unanimous verdict has stood as a distinctive and defining feature of jury trials." Jeffrey Abramson, We, The Jury: The Jury System and the Ideal of Democracy 179 (Harvard Univ. Press 1994). At common law, trial by jury required a unanimous verdict. William Blackstone, 4 Commentaries on the Laws of England 343 (Univ. of Chicago Press 1979) (1765) (verdict must be result of "unanimous suffrage of twelve of [the defendant's] equals and neighbors"). *See, e.g., 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"); *Pitcher v. Lakes Amusement Co.*, 236 N.W. 2d 333, 335 (Iowa 1975) (quoting *Patton v. United States*, 281 U.S. 276, 288 (1930)); *People v. Hall*, 60 P.3d 728, 734 (Colo. App. 2002) (citing *George v. People*, 47 N.E. 741, 743-44 (Ill. 1897)); *People v. Sanabria*, 42 Misc. 2d 464, 470 (N.Y. App. 1964). By operation of the "common-law savings clause," Fla. Stat. § 2.01, every Floridian is entitled to rights secured by the common law unless those rights have been expressly abrogated by positive law.

At no time in Florida history, prior to the enactment of the statute challenged here, has the common-law requirement of a unanimous verdict ever been supplanted by legislative or judicial enactment. "Unanimity of verdicts has always been part of Florida's common law." *Butler v. State*, 842 So.2d 817, 837 (Fla. 2003) (Pariente, J., concurring in part and dissenting in part) (citing *Motion to call Circuit Judge to Bench*, 8 Fla. 459, 482 (1859) ("The common law wisely requires the verdict of a petit jury to be unanimous")). Expressions of the requirement of unanimity have always

appeared and continue to appear throughout Florida criminal procedure. Rule 3.440, Fla. R. Crim. P., captioned, "Rendition of Verdict; Reception and Recording," provides:

> When the jurors have agreed upon a verdict they shall be conducted into the courtroom by the officer having them in charge. The court shall ask the foreperson if an agreement has been reached on a verdict. If the foreperson answers in the affirmative, the judge shall call on the foreperson to deliver the verdict in writing to the clerk. The court may then examine the verdict and correct it as to matters of form with the unanimous consent of the jurors. The clerk shall then read the verdict to the jurors and, unless disagreement is expressed by one or more of them or the jury is polled, the verdict shall be entered of record, and the jurors discharged from the cause. *No verdict may be rendered unless all of the trial jurors concur in it.*

(Emphasis added.) To the same effect, *see* 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.").[3]

The former provisions of Fla. Stat. § 921.141(2), even before they were found unconstitutional in *Hurst v. Florida*, 136 S. Ct. 616 (2016), were no precedent for the use of less-

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[3] So strictly has the requirement of unanimity as to criminal verdicts been treated by the law of Florida that a

> unanimous jury finding is also required in order to increase the authorized punishment for the use of a weapon or firearm during a felony under § 775.087(1) ... . Statutes governing several substantive crimes also raise the maximum potential sentence based on guilt-phase, unanimous jury findings of aggravating circumstances. *See* §§ 794.011 (sexual battery); 810.02 (burglary); 810.08 (trespass); 812.13 (robbery).

Butler v. State, 842 So.2d 817, 838 (Fla. 2003) (Pariente, J., concurring in part and dissenting in part).

than-unanimous jury verdicts in Florida. A verdict is conclusive of the ultimate issue of fact. It is sufficient to support an order of judgment and sentence. The "advisory sentence by the jury" formerly called for by Fla. Stat. § 921.141(2) was conclusive of nothing. It was insufficient to support an order of judgment and sentence – indeed that was precisely why it was found unconstitutional. *Hurst*, 136 S. Ct. at 619 ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough"). It was not a verdict. It 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. In substance, the trial judge said to the jury, "I'm going to decide whether to sentence the defendant to death, but I'm willing to consider your views on the matter." What ensued could be called – in the language of the statute, *was* called – "advisory," but it could not be called a verdict. *Hurst*, 136 S. Ct. at 622 ("Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts ... [a]lthough Florida incorporates an advisory jury verdict").

Consistent with the command of *Hurst*, § 921.141 as presently amended calls, not for a straw poll, but for an actual verdict. Fla. Stat. § 921.141(3)(a)2. The decision of the jury is conclusive of the ultimate issue. It is sufficient, without more, to support a sentence. If ten jurors vote for death, the law requires no more in order for the defendant to be put to death. True, the presiding judge can determine not to impose the sentence called for by the verdict, *id.*, but that is always the case. *See, e.g.*, Fla. R. Crim. P. 3.380(c) (judge may grant motion for judgment of acquittal after verdict); Fla. R. Crim. P. 3.580 (judge may grant new trial after verdict); Fla. R. Crim. P. 3.610 (judge may arrest judgment after verdict). Neither in the present nor in any other context does the exercise of this

judicial power render the jury's decision any less a verdict.

Using the word "verdict" in its proper sense – the sense in which it is *now* used in Fla. Stat. § 921.141 – the criminal law of Florida has never, in any instance, tolerated less than unanimous verdicts. Of course the legislature, upon a sufficiently specific expression of its will, can deracinate the common law. Here, however, the common law and the constitutional law of Florida speak with one voice.

The Florida constitutional law

So fixed in the jurisprudence of Florida is the requirement of a unanimous jury verdict in a criminal case that it is difficult to say where the common law as to this requirement ends and the constitutional law begins. Admittedly, there is relatively little decisional law that could be described as strictly and exclusively based in the state constitution and not at all in the state common law. But a "principle of [constitutional] law is not unimportant because we never hear of it; indeed we may say that the most efficient rules are those of which we hear least, they are so efficient that they are not broken." F. W. Maitland, The Constitutional History of England pp. 481-82 (Cambridge Univ. Press 1911).

Article I § 22 of the Florida Constitution guarantees the right to trial by jury. Those Florida courts that have construed it have without exception treated this constitutional guarantee as subsuming the right to a unanimous verdict. *See, e.g., Bottoson v. Moore*, 833 So.2d 693, 709-10 (Fla. 2002) (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)). There is no Florida constitutional jurisprudence that takes a contrary position. There is no Florida constitutional jurisprudence that even hints at a contrary position.

At common law, the right to trial by jury also subsumed the right to a jury of 12. To depart from that requirement, it was thought necessary to amend the Florida Constitution, *see* Art. I. § 22 (providing for juries of six). 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. No such amendment has ever been made or offered. Absent such an amendment, both the constitutional and the common law of this state are clear: a jury verdict in a criminal case must be unanimous.

It is true that our 19th-century forebears -- the framers of the Florida Constitution of 1838, say, or the justices who wrote the opinions in *Grant, supra,* in 1894, or *Patrick v. Young, supra,* in 1881 -- never bothered to explain that the right to trial by jury to which they referred meant, as a matter of simple tautology, the right to a unanimous verdict. It was precisely because it was tautologous that they felt no need to mention it; they would have thought it redundant to the point of silliness to have done so. For centuries, throughout the English-speaking world and certainly in America, trial by jury was universally and without exception understood to include and require a unanimous jury verdict. It was that centuries-old, universally-established right that 19th century Floridians ensconced in their constitutions and their jurisprudence. Art. I § 22 does not provide that, "The right of trial by jury shall be preserved to all and remain inviolate, *and by the way, when we say the right to 'trial by jury,' we include the right to a unanimous jury verdict*" for the same reason that Art. I § 3 does not provide that, "There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof, *and by the way, when we say 'religion' we include going to church, and praying, and worshiping God.*" A 21st-century Floridian seeking to argue that the right purported to be protected by Art. I § 22 does *not* include the requirement of a unanimous verdict must be prepared to rebut the unequivocal expression of the common law, the received

wisdom of 19th-century Florida lawyers and judges, a handful of reported Florida opinions, and a century-and-a-half of shared understanding. And he must be prepared to do so without any ammunition at all, for he will find no Florida cases, no Florida law-review articles, and no Florida history to support his position.

Some words admit of no modification. A decedent cannot be more or less dead. An expectant mother cannot be more or less pregnant. And a jury cannot be more or less unanimous. Every verdict in every criminal case in Florida requires the concurrence, not of some, not of most, but of all jurors – every single one of them.

* * *

That the requirement of jury unanimity was and is part of the common law of Florida; that the requirement of jury unanimity was and is part of the constitutional law of Florida; is not in doubt. Why this requirement should enjoy such a firmly-entrenched status in our jurisprudence was explained by a distinguished former justice of the Florida Supreme Court:

> [U]nlike majority rule, "[t]he unanimous verdict rule gives concrete expression to a different set of democratic aspirations – keyed to deliberation rather than voting and to consensus rather than division." Perhaps more important, a unanimous verdict provides symbolic importance. A unanimous jury verdict in a criminal trial "affixes a stamp of legitimacy to the outcome of the criminal process."
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> The unanimity requirement also gives meaning to each juror's vote, thereby preventing a simple majority of the jury from ignoring an individual juror's voice when imposing a death sentence against a fellow citizen. Put another way, courts that allow a non-unanimous jury to render a verdict invariably empower superficial, narrow, and prejudiced arguments that appeal only to certain groups. Unanimous verdicts ensure that defendants are convicted on the merits and not merely on the whims of a majority.
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> ... Unanimous verdicts are more likely to fulfill the jury's role as the

> voice of the community's conscience. When less than a unanimous jury is allowed to speak for the community, the likelihood increases that the jury will misrepresent community values.
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> Perhaps most importantly, several scholars assert that unanimous juries tend to perform more thorough deliberations and therefore achieve the "correct" result more often than juries that render decisions by a majority. Empirical evidence suggests that majority-rule juries vote too soon and render verdicts too quickly. Specifically, majority-rule juries tend to adopt a verdict-driven deliberation style, in which jurors vote early and conduct discussions in an adversarial manner, rather than an evidence-driven style, in which jurors first discuss the evidence as one group and vote later.

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, 31-32 (Fall 2009) (footnotes and internal citations omitted). Justice Cantero seems to identify two general categories of justifications for the unanimity requirement: those concerning the role and significance of the jury, and of the verdict, in our criminal-justice (and particularly our death-penalty) system; and those concerning the accuracy and integrity of the jury's fact-finding process.

Those concerning the role and significance of the jury and of the verdict

The centrality of the lay jury – a jury of the defendant's peers – to Anglo-American notions of criminal justice is the stuff of lore, legend, and literature. The jury is said to be the conscience of the community – not 12 separate consciences, but one collective conscience. The verdict is the jury's pronouncement – not 12 separate pronouncements, but one collective pronouncement. *Cf.* Fla. Std. Jury Instr. (Crim) 3.13 ("The verdict must be the verdict of each juror, as well as of the jury as a whole."). Because the verdict is unanimous it subsumes all disparate views, resolves all disparate doubts. A unanimous verdict bespeaks finality in a way that a mere majority verdict never can. A unanimous verdict commands respect and inspires confidence in a way that a mere majority verdict

never will.

> One of the key functions of the criminal justice system is to legitimize, in the eyes of the community, the state's use of its coercive powers. The jury gives legitimacy to an accused's imprisonment, even execution, because ordinary persons like ourselves give the verdict. But the jury's ability to maintain public confidence in the administration of justice is fragile. It depends in part on drawing the jury from the community at large so that all groups have a potential say in how justice is done. It depends also on public confidence that jury verdicts are just, accurate, and true. The strongest argument for retaining the unanimous verdict is that it is central to the legitimacy of jury verdicts.

Jeffrey Abramson, We, The Jury: The Jury System and the Ideal of Democracy 202-03 (Harvard Univ. Press 1994).[4] It is true that the requirement of unanimity empowers a single balky juror to frustrate the efforts of his fellow-jurors – and of the judge and lawyers – to bring the trial to a final conclusion. But this is no criticism of the unanimity requirement. On the contrary; it is entirely

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[4] *See also id.* at 200:

> [E]mpirical studies show[] that jurors returning nonunanimous verdicts felt far less certain of their conclusions than did their counterparts on unanimous verdict juries. ... [T]he holdouts left the trial feeling that the majority did not even listen to them seriously.
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> ...
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> These research findings suggest that the quality of jury deliberation is ... tied to the practice of unanimous verdicts ... . Moreover, because popular acceptance of the jury system is formulated, in part, by what former jurors say about it, jurors' satisfaction is not without its importance. All studies to date verify that juror satisfaction sours under nonunanimous verdict conditions. To this extent, the unanimous verdict rule must be seen as a core ingredient underwriting the jury's ability to legitimate justice in the eyes of the community.

(Quotations omitted.)

reflective of the proper role of the jurors, collectively and individually. In the words of a great English judge of the 19th century:

> If it be alleged that an obstinate juror may, in defiance of the truth, and in disregard of his oath, suffer the guilty to escape, from party or from personal bias, it must, on the other hand, be borne in mind, that this is a small price to pay for the perfect security which a jury affords to all men, even the humblest, against the ruin that power and its minions might bring upon them.

Henry, Lord Brougham, Works 127 (Adam & Charles eds.1873).

Those concerning the accuracy and integrity of the jury's fact-finding process

A majority or super-majority rule discourages a careful sifting of the evidence and of the arguments of counsel. "The dynamics of the jury process are such that often only one or two members express doubt as to views held by a majority at the outset of deliberations." *United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978). Where unanimity is required, the majority or super-majority must win over those who doubt or dissent. In the process those in the majority must justify and defend their own analysis, both to their fellow jurors and to themselves. "A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury. The requirement of jury unanimity thus has a precise effect on the fact-finding process." *Lopez*, 581 F.2d at 1341. Under a super-majority rule, arguments – however forcible, however logical – can be ignored entirely if ten members of the jury simply prefer to ignore them. Under a unanimity rule, no verdict can be returned till those arguments have been resolved and their proponents satisfied with the resolution.

Only hinted at in Justice Cantero's remarks *supra* is an uglier and more insidious feature of death-penalty verdicts reached by majority or super-majority. "The non-unanimous jury rule permits

prosecutors to allow unconstitutional racial disparity to slink back into jury selection. It enables them to put just enough minority jurors on a particular jury to avoid violations of the Supreme Court's rule in *Batson v. Kentucky*[,]" 476 U.S. 79 (1986), or its Florida congeners, *e.g.*, *Melbourne v. State*, 679 So.2d 759 (Fla. 1996), "but not enough to prevent the possible conviction of the defendant by a juror or jurors who might – justifiably or not – be more skeptical of the state's evidence and witnesses or more willing to believe the defendant's story." Andrew Cohen, *Will the Supreme Court Address Louisiana's Flawed Jury System?* The Atlantic, April 23, 2014 p. *4. The customary disclaimer – that the overwhelming majority of Florida prosecutors are honorable lawyers who would never attempt to circumvent the limitations of the *State v. Neil*, 457 So.2d 481 (Fla. 1984)/*State v. Slappy*, 522 So.2d 18 (Fla. 1988)/*Melbourne v. State*, 679 So.2d 759 (Fla. 1996) line of cases by, for example, placing two, but not more than two, African-American jurors on an African-American defendant's jury, in confident reliance upon the ten other jurors to return a verdict of death – is entirely true, and entirely beside the point. There is support for the notion that the 19th-century adoption in Louisiana of non-unanimous jury verdicts – a sharp and stunning break with common law – was undertaken expressly to foster or facilitate these sorts of facinorous practices. The Atlantic article cited *supra* quotes Tulane University Professor Emeritus of History Lawrence Powell for that very proposition.[5] And Professor Abramson notes:

> The requirement of unanimity is indispensable to sending the right cue to jurors about what we expect of them. It surely contributes to an understanding among jurors that their function is to persuade, not to outvote, one another. When jurors behave in this way, they contribute knowledge to the ongoing discussion. And the jury

[5] At present, however, even Louisiana requires a unanimous death-penalty verdict. *See* LA Code Crim Pro 905.6 ("A sentence of death shall be imposed only upon a unanimous determination of the jury").

> distinctively achieves collective wisdom through deliberation, rather than collapsing into a body where jurors behave as if their function were to represent the preconceptions and interests of their own kind.

Jeffrey Abramson, We, The Jury: The Jury System and the Ideal of Democracy 195-96 (Harvard Univ. Press 1994).

It is in memory yet green that peremptory challenges could be, and were, used in Florida trials to eliminate potential jurors on the basis of race, ethnicity, or gender. In reliance on the Art. I §16(a) guarantee in the Florida Constitution of the right of an accused person to trial before an impartial jury, Florida courts have gone to lengths exceeding even those of their federal counterparts to eliminate such shameful practices. It would be ironic if the Art. I § 22 promise of trial by jury were to be so interpreted as to undermine and hobble the justice done by the now-prevailing interpretation of Art. I § 16(a). No; it would be worse, much worse, than merely ironic. If the important reforms made in the law of jury selection are not to be reduced to empty promises and tokenism, Florida courts must be mindful of the crucial role played by jury unanimity in assuring fair and impartial jury deliberations and decisions.

The argument is made that many of the very worst criminals, those criminals well deserving of the death penalty, were sentenced to death on jury votes of no more than ten to two; and that, had unanimity been required, these malefactors would have received less punishment than they surely deserved. The short answer to this argument is that it bears not at all upon the constitutional question posed by the motion at bar: if a statutory procedure is unconstitutional, it is not rendered constitutional by its consequences. But even on its own terms, this argument is no better than surmise. The juries that returned ten-to-two (or nine-to-three, or eight-to-four) verdicts in the cases upon which this argument is based were expressly instructed that they need not return unanimous

verdicts, and that in any event the final decision as to penalty was in the hands of the judge. Whether those same juries, had they been instructed that their verdicts must be true verdicts and not merely recommendations – had they, in other words, been instructed that their verdicts must be unanimous and would be dispositive of the issue of life or death – would have returned the same split decisions, can be no more than a matter of speculation.

* * *

Although the foregoing rationales for the unanimity requirement are all very telling, perhaps the requirement is simply one of the *grundnormen* of our law, so axiomatic as to call for no rationale. *See, e.g., American Publishing Co. v. Fisher*, 166 U.S. 464, 468 (1897) ("Now unanimity was one of the peculiar and essential features of trial by jury at the common law. No authorities are needed to sustain this proposition."). "[A]s mathematicians do not demonstrate axioms, neither do judges or lawyers always deem it necessary to prove propositions, the truth of which is universally admitted." Chief Justice John Marshall, *A Friend of the Constitution No. II*, Alexandria Gazette, July 1, 1819, in John Marshall's Defense of McCulloch v. Maryland 162 (G. Gunther ed. 1969).

A number of courts have concluded that the unanimity rule, the presumption of innocence, and the reasonable doubt principle are "as [three] vials of [one] sacred blood/Or [three] fair branches springing from one root." William Shakespeare, Richard II Act I, sc. 2. *See, e.g., Rice v. Maryland*, 532 A.2d 1357, 1366 n. 5 (Md. Ct. App. 1987) (citing *Scarborough v. United States*, 522 A.2d 869, 872 (D.C. 1987)). *See also United States v. Gipson*, 553 F.2d 453, 457 n. 7 (5th Cir. 1977) (unanimity rule "helps effectuate the reasonable doubt standard"). "The rule that the jury of twelve must be unanimous in order to return a verdict helps to ensure that the case is proved beyond reasonable doubt." Glanville Williams, The Proof of Guilt: A Study of the English Criminal Trial

p. 248 (Stevens & Sons Ltd. 1955).

These three axioms of our law – the unanimity rule, the presumption of innocence, and the requirement of proof beyond reasonable doubt – are joined, not only in their origin and their development, but also in their purpose. They reflect the common law's admirable epistemological modesty – a recognition that a criminal justice system designed and operated by imperfect human beings can never be better than imperfect, and that we ought to act with restraint and discretion when we act upon the imperfect conclusions of that system. We will take no Floridian's liberty upon a less-than-unanimous verdict,[6] although the liberty taken today can be restored tomorrow. We dare take no Floridian's life upon a less-than-unanimous verdict. The life taken today can never be restored.

Perhaps nothing in all four volumes of Blackstone's oft-cited Commentaries is as well-remembered as the so-called "Blackstone ratio": "[F]or the law holds, that it is better that ten guilty persons escape, than that one innocent suffer." William Blackstone, 4 Commentaries on the Laws of England 352 (Univ. of Chicago Press 1979) (1765). This principle is routinely traced to Genesis 18:20-32, in which God proposes to destroy the people of Sodom and Gomorrah for their wickedness, but concedes that if as few as ten righteous men are found in the cities, He will spare

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[6] A Floridian charged with the offense of building a bonfire, Fla. Stat. § 823.02 – a second-degree misdemeanor punishable by not more than 60 days in the county jail, Fla. Stat. §775.082(4)(b) – cannot be convicted except upon the unanimous verdict of a jury of his peers. A Floridian charged with "unlawful possession of a fifth wheel," Fla. Stat. § 812.0147; or with "dispos[ing] of the carcass of any domestic animal by dumping such carcass on any public road ... or in any place where such carcass can be devoured by beast or bird," Fla. Stat. § 823.041(2); or with "abandon[ing] or discard[ing] ... any icebox, refrigerator ... clothes washer [or] clothes dryer," Fla. Stat. § 823.09 – all second-degree misdemeanors, all punishable by not more than 60 days in the county jail – cannot be convicted except upon the unanimous verdict of a jury of his peers.

the cities for the sake of the ten. Thus the antecedents of the interlaced principles of juror unanimity, the presumption of innocence, and proof beyond reasonable doubt are ancient and honorable.

These hallowed and inseparable principles are preached with ease and practiced with difficulty. Capital murder is the most horrible of crimes. It evokes our rage and our desire for righteous vengeance. But our commitment to the principle that no Floridian shall be sentenced to the maximum penalty provided by law unless his guilt is made manifest beyond reasonable doubt to a unanimous jury of his peers is not to be measured in cases involving charges of dumping a dead cat by the side of a dirt road, Fla. Stat. § 823.041(2), or in cases involving charges of abandoning a used washing machine, Fla. Stat. § 823.09. It is to be measured in cases involving the most horrible of crimes. It is to be measured in cases that most evoke our rage and our desire for vengeance.

I am well aware that, subject to constitutional limitations – always subject to constitutional limitations – the legislature is free to enact its will as law. I am well aware, too, that, stripped of all historical and conceptual context, the notion that the assent of ten jurors rather than twelve should be sufficient to support a verdict and sentence seems inoffensive. Arithmetically the difference between twelve and ten is slight; so, for that matter, is the difference between twelve and nine, or twelve and eight. But the question before me is not a question of arithmetic. It is a question of constitutional law. It is a question of justice.

Alone in a wilderness, the prophet Elijah stood on a barren hilltop.

> [A]nd a great and strong wind rent the mountains, and broke in pieces the rocks before the Lord; but the Lord was not in the wind. And after the wind an earthquake; but the Lord was not in the earthquake.
>
> And after the earthquake a fire; but the Lord was not in the fire.
>
> And after the fire, a still small voice.

I Kings 19:11-12.

For us as Floridians and Americans – for each and all of us – the voice of the jurors – *each* and *all* of the jurors – is the still small voice of justice.

Conclusion

Defendant's motion to declare Florida Statute § 921.141 unconstitutional is respectfully GRANTED.

SO ORDERED in chambers in Miami, Miami-Dade County, Florida, this 9th day of May, 2016.

MILTON HIRSCH
CIRCUIT COURT JUDGE

Copies to:
All counsel of record