9-2013

Appellant's Response to the Court's Invitation to Address Any Empirical Analysies of Jury Polls, Glenn Verser v. Jeffrey Barfield, et al, Docket No. 11-02091, 741 F.3d 734 (7th Circuit Court of Appeals 2013)

Steven D. Schwinn
John Marshall Law School, schwinn@uic.edu

No. 11-2091

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Glenn Verser,

Plaintiff-Appellant,

v.

Jeffrey Barfield, Douglas Gooding,
Ryan Robinson, and Chris W. Davis,

Defendants-Appellees.

Appeal From the United States District Court
For the Central District of Illinois,
Case Number 07-3293
The Honorable Judge Harold A. Baker

APPELLANT'S RESPONSE TO THE COURT'S INVITATION TO ADDRESS ANY EMPIRICAL ANALYSES OF JURY POLLS

Plaintiff-Appellant Glenn Verser, by and through his attorney Steven D. Schwinn, responds to the court's order of September 11, 2013, inviting the parties to file memoranda addressing any empirical analyses of jury polls.

The Plaintiff-Appellant has found just one empirical study only very loosely touching on the court's request: a May 21, 2009, report of the Oregon Public Defense Services Commission, titled "On the Frequency of Non-Unanimous Felony Verdicts In Oregon," appended hereto and available at http://www.oregon.gov/OPDS/docs/Reports/PDSCReportNonUnanJuries.pdf. (Last visited on September 25, 2013.)

According to the study, of the 662 sample cases, jury polling occurred in 63%. Report at 4. Where the record reflected a jury vote, "65.5% of all cases included a non-unanimous verdict on at least one count." Report at 4. The report concluded: "the data indicate[] that non-unanimous juries occur with great frequency in felony trials throughout the state. Even if we were to assume that in all the unknown cases, wherein polling was not conducted, a unanimous verdict was the result, non-unanimity would still be present in over 40% of all felony jury verdicts." Report at 5.

The Plaintiff-Appellant fully recognizes the limits of this study, but it was all we could find.

Respectfully Submitted,

s/ Steven D. Schwinn

Steven D. Schwinn
Associate Professor of Law
The John Marshall Law School
315 South Plymouth Court
Chicago, Illinois 60604
(630) 848.2005
sschwinn@jmls.edu

Counsel for the Plaintiff-Appellant

PROOF OF SERVICE

I hereby certify that on September 25, 2013, I electronically filed the foregoing Appellant's Response to the Court's Invitation to Address any Empirical Analyses of Jury Polls with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Steven D. Schwinn
Steven D. Schwinn
Counsel for the Plaintiff-Appellant

Dated: September 25, 2013

On the Frequency of Non-Unanimous Felony Verdicts In Oregon

A Preliminary Report to the Oregon Public Defense Services Commission

May 21, 2009

Overview

The following is a preliminary report developed by the Oregon Office of Public Defense Service Appellate Division for the benefit of the Oregon Public Defense Services Commission regarding Oregon's non-unanimous jury system, its current uses, and effects. This report represents initial findings, and may be subject to change as further data becomes available.

Background

Oregon is but one of two states allowing for felony conviction by less than a unanimous vote of the jury.[1] As originally ratified, Article I, section 11, of the Oregon Constitution stated:

> "In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor."

In 1934, the electorate approved Ballot Measure 302-03 (which the 1933 Legislature referred to the electorate). The measure was, in some part, motivated by concerns of mobster-era jury fixing resulting in hung juries. The constitutional change faced no organized opposition. Passage of the amendment inserted the following language just before the period at the end of the Article I, section 11:

> ";provided, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise[.]"

The official ballot for Measure 302-03 stated:

> "CRIMINAL TRIAL WITHOUT JURY AND NON-UNANIMOUS VERDICT CONSTITUTIONAL AMENDMENT— Purpose: To provide by constitutional amendment that in criminal trials any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the

[1] Louisiana also provides for non-unanimous felony verdicts

judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only, by a unanimous verdict, and not otherwise."

The most relevant portion of the voter's pamphlet explained the measure as follows:

> "The laws of Oregon now prohibit the court from commenting on the fact that the accused in a criminal case has failed to take the witness stand and testify in his own defense, and the judge is also prevented from commenting on the value of the evidence introduced on behalf of the defendant no matter how flimsy the defense of the accused may be. Our laws also require that the evidence against the defendant must be so conclusive as to the culprit's guilt that the jury must be convinced beyond any reasonable doubt or to a moral certainty of that guilt before it is privileged to find a verdict of guilty. Twelve jurors trying a criminal case must be unanimous in their decision before the defendant may be found guilty. The proposed constitutional amendment is to prevent one or two jurors from controlling the verdict or causing a disagreement. The amendment has been endorsed by the district attorney's association of this state and is approved by the commission appointed by the governor to make recommendations amending criminal procedure. Disagreements not only place the taxpayers to the expense of retrial which may again result in another disagreement, but congest the trial docket of the courts.
>
> * * *
>
> Disagreements occasioned by one or two jurors refusing to agree with 10 or 11 other jurors is a frequent occurrence. One unreasonable juror of the 12, or one not understanding the instructions of the court can prevent a verdict either of guilt or innocence.

Voters' Pamphlet, Special Election May 18, 1934, p. 7.

The Oregon Supreme Court subsequently held that, "It clearly appears from the argument in the Voters' Pamphlet that the amendment was intended to make it easier to obtain convictions." *State ex rel Smith v. Sawyer*, 263 Or 136, 138, 501 P2d 792 (1963).

Purpose of the Inquiry

While engaged in discussions with the public about the effect of Oregon's non-unanimous jury system, the Office of Public Defense Services became aware of widely differing opinions on the frequency of non-unanimous verdicts. Some legal practitioners believed non-unanimity was a rarity, while others shared anecdotal experiences

indicating non-unanimity was the norm. It became apparent that no attempt had been made to collect and analyze quantifiable data relating to the frequency of non-unanimous verdicts. OPDS undertook the task, and this report is the result of that effort.

Data Set and Methodology

This report confined itself to two calendar years, 2007 and 2008. According to the official data of the Oregon Judicial Information Network (OJIN), in 2007, 833 felony jury trials reached the verdict stage. In 2008, 588 felony jury trials reached the verdict stage, for a total of 1421 trials over the 2007-2008 period.

Those 1421 trials generated 662 indigent appeal requests handled by OPDS Appellate Division, 320 for 2007, and 342 for 2008. Those 662 appeals, amounting to 46.5% of all felony jury trials, represented the sample size of the inquiry. OPDS attorneys physically reviewed the entire record of all 662 cases and categorized the cases as either

a) Unanimous jury verdict;
b) Non-unanimous jury verdict, or;
c) Unclear from the record

In classifying a case, the reviewing attorneys looked to the jury verdict form, the judgment, and transcript recordation of the polling of the jury.

Findings

Jury Polling

Of the 662 sample cases, jury polling occurred in 63%. In the remaining 37% either polling was not requested by defense counsel, or was conducted in secret, with the results not part of the public record.

Frequency of Non-Unanimous Verdicts

Where the record reflected the jury vote, 65.5% of all cases included a non-unanimous verdict on at least one count.

Hung Juries

Working with data from OJIN, we determined that 27 of 833 felony jury trials in Oregon for 2007 resulted in a hung jury, yielding a hung jury rate of 3.2%.

15 of the 588 felony jury trials in Oregon for 2008 resulted in a hung jury, yielding a hung jury rate of 2.5%.

Conclusions

Because this inquiry involved extrapolation from a sample size, and was limited to only two years of data, the results cannot be certified with absolute accuracy. Nevertheless, the data indicates that non-unanimous juries occur with great frequency in felony trials throughout the state. Even if we were to assume that in all the unknown cases, wherein polling was not conducted, a unanimous verdict was the result, non-unanimity would still be present in over 40% of all felony jury verdicts. Clearly, Oregon juries are frequently utilizing the non-unanimous option.

Going forward, interested parties may wish to compare the hung jury rate to the national average. Because avoidance of hung juries was a principle rationale for passage of the non-unanimous verdict initiative, a state hung jury rate at or above the average would be a strong indication that despite frequent use, the constitutional provision is not yielding the intended result.

Submitted, May 21, 2009
Office of Public Defense Services
Appellate Division