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OF WEST VIRGINIA

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No. 25822—*State of West Virginia v. Eric J. Lightner*

McGraw, J., dissenting:

In clear contrast to the view of the majority of this Court, I view a defendant's right to a jury of twelve as a fundamental constitutional privilege. Indeed, the express directive contained in Article III, § 14 of the West Virginia Constitution, which commands that all criminal trials "shall be by a jury of twelve," leaves room for no other conclusion. Thus, any deviation from this constitutional requirement must be accomplished through a knowing and intelligent waiver.[1]

This Court has consistently adhered to the view that "[c]ertain constitutional rights are so inherently personal and so tied to fundamental concepts of justice that their

[1]It bears emphasizing that under the unique facts of this case, the Court is dealing with the issue whether a jury composed of thirteen persons constitutes plain error under W. Va. R. Crim. P. 52(b), rather than the propriety of an identified alternate's participation in jury deliberations. Even under the approach taken by the majority, the latter circumstance would clearly warrant reversal. *See People v. Babbington*, 286 Ill. App. 3d 724, 222 Ill. Dec. 122, 676 N.E.2d 1326 (1997) (alternate's participation in deliberations, signing of verdict form, and participation in polling of the jury denied defendant right to fair trial); *United States v. Ottersburg*, 76 F.3d 137 (7th Cir. 1996) (recognizing plain error where alternates deliberated with regular jurors); *see also United States v. Olano*, 507 U.S. 725, 739, 113 S. Ct. 1770, 1780, 123 L. Ed. 2d 508 (1993) (prejudice may arise "either because the alternates actually participated in the deliberations, verbally or through 'body language'; or because the alternates' presence exerted a 'chilling' effect on the regular jurors") (citations omitted).

surrender by anyone other than the accused acting voluntarily, knowingly, and intelligently would call into question the fairness of a criminal trial." Syl. pt. 5, *State v. Neuman*, 179 W. Va. 580, 371 S.E.2d 77 (1988). There can be no dispute that a criminal defendant has a fundamental constitutional right to trial by jury, which may only be surrendered by a knowing and intelligent waiver. *See, e.g.*, *State ex rel. Fountain v. King*, 149 W. Va. 511, 513, 142 S.E.2d 59, 60 (1965) ("A person accused of a crime may waive his . . . constitutional right to trial by jury, if such waivers are made intelligently and understandingly."). In accord with this position, we long ago recognized in *State v. Hudkins*, 35 W. Va. 247, 13 S.E. 367 (1891), that the right to a jury of twelve is a fundamental right that cannot be forfeited through inadvertence: "Even if the benefit of [Article III, § 14] . . . could be waived by a prisoner in a felony case, such waiver would have to appear clearly and affirmatively by the record." 35 W. Va. at 250, 13 S.E. at 367. I see no sound reasoning behind the Court's retreat from this position.

The majority may be correct in its abstract observation that increasing the size of the jury *generally* decreases the odds of a guilty verdict being returned. (Of course, it also logically follows that the likelihood of an acquittal is similarly attenuated.) What is impossible to gauge in individual cases, however, is the impact that the addition of a single juror will have on the outcome of a trial. The Court's conclusion that the insertion of a thirteenth juror invariably benefits the defense presumes that jurors do not exchange thoughts or opinions during their deliberations. Such a premise is obviously flawed, as the cinematic

portrayal of deliberations in *Twelve Angry Men* (United Artists 1957) brings home with considerable force. We simply cannot discount the potential influence that one individual juror might have on the jury as a whole.

Adding a juror beyond the twelve mandated by the West Virginia Constitution is therefore likely to affect the dynamics of a jury just as much as eliminating a juror. In the latter context, Rule 23(b) of the West Virginia Rules of Criminal Procedure mandates that the parties stipulate in writing to a jury of less than twelve—effectively requiring evidence on the record of a defendant's knowing and intelligent waiver of the right to a jury of twelve.[2] It defies logic to require a written waiver in circumstances where the size of the jury is diminished, but to reject such a requirement when it is increased.

I do not necessarily dispute the contention that "the fact that the jury at common law was composed of 12 is a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance 'except to mystics.'" *Williams v. Florida*, 399 U.S. 78, 102-3, 90 S. Ct. 1893, 1907, 26 L. Ed. 2d 446 (1970) (holding that it is constitutionally permissible for a state to use jury of six in criminal cases) (citation omitted).

[2]Rule 23(b) is in accord with our holding in *State v. Wyndham*, 80 W. Va. 482, 92 S.E.2d 687 (1917), where we held that Article III, § 14 precludes a conviction based upon a verdict returned by a jury of less than twelve. Significantly, W. Va. R. Crim. P. 23(b) differs from its federal counterpart, Fed. R. Crim. P. 23(b), to the extent that only the latter allows a valid verdict to be returned by a jury of eleven where a juror has been excused for cause after the jury has retired to consider its verdict.

Yet, under the West Virginia Constitution twelve is indeed the "magic number," *see United States v. Virginia Erection Corp.*, 335 F.2d 868, 871 (1964), *abrogated by United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993), and this Court should be loath to tinker with such a stable and predictable fixture of our criminal jurisprudence.

For the reasons stated, I respectfully dissent. I am authorized to state that Chief Justice Starcher joins me in this dissent.