University of Baltimore Law Review

Volume 7
Issue 1 *Fall 1977*

Article 7

1977

Casenotes: Constitutional Law — Criminal Law — Maryland Declaration of Rights Requires Unanimous Jury Verdict, Unless Defendant Waives Right Effectively. State v. Mckay, 280 Md. 558, 375 A.2d 228 (1977)

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CONSTITUTIONAL LAW — CRIMINAL LAW — MARYLAND DECLARATION OF RIGHTS REQUIRES UNANIMOUS JURY VERDICT, UNLESS DEFENDANT WAIVES RIGHT EFFECTIVELY. *STATE v. MCKAY,* 280 Md. 558, 375 A.2d 228 (1977).

I. INTRODUCTION

The court of appeals, in *State v. McKay,*[1] decided that an accused may be convicted by a less-than-unanimous verdict where he has waived the right to juror unanimity guaranteed by Maryland's Declaration of Rights.[2] Both the court and the prosecution must agree to the waiver; further, it must meet constitutional standards.[3]

Johnny McKay, indicted for armed robbery and seven related offenses, was tried before a jury in the Criminal Court of Baltimore City. Judgment of acquittal was granted, at the close of the state's case, on five of the eight charges. The three remaining counts were submitted to the jury at the close of the defendant's case: the first count (armed robbery); the third count (robbery); and the eighth count (use of a handgun in the commission of a crime of violence).

After approximately one hour of deliberation, the jury returned. The forelady announced that the jury had found the defendant "not guilty" on count one, but was unable to reach a unanimous agreement on the third count. Before the decision with respect to count eight could be announced, the judge admonished the jury that it was required to reach accord on all counts. Thereafter, the jury was sent back for further deliberation. It returned ninety minutes later and informed the court that a unanimous verdict still could not be reached on the third count.[4]

After consultation with his attorney, the defendant decided that he would accept a majority vote on the third count. The following colloquy ensued:

> THE COURT: . . . Under the law of this State you have a right to insist upon a unanimous vote and if they do not

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1. 280 Md. 558, 375 A.2d 228 (1977).
2. MD. DEC. OF RIGHTS art. 21, which provides:
   > That in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defence; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath; and to a speedy trial by an impartial jury, *without whose unanimous consent he ought not to be found guilty.*

   (Emphasis supplied).
3. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938), where waiver is defined as "an intentional relinquishment or abandonment of a known right or privilege."
4. Although it is not readily apparent from the court of appeals' opinion, the trial court was informed at this time that a decision had been reached on the eighth count. Record at 105-06.

> come in with a unanimous vote you have a right for retrial, that is your constitutional right.
> DEFENDANT MCKAY: What will that mean, I'll have to be tried again?
> THE COURT: Yes.
> DEFENDANT MCKAY: The whole trial?
> MR. BROCKMAN [Defendant's attorney]: The whole trial.[5]

And, later:

> THE COURT: . . . I want to explain everything to you because you have an absolute right under the law to have the whole trial tried all over again if you want to.[6]

McKay, obviously under the mistaken impression that a new trial would be required on at least three — or possibly all eight — counts if the jury hung only on count three,[7] announced that he would accept a majority vote. Inquiry was again made of the jury. The forelady declared the verdict to be "not guilty" on count one, nine-to-three for conviction on count three, and "not guilty" on count eight. The defendant was sentenced to ten years on the third count; from this judgment he sought relief in the court of special appeals.

There, the defendant's conviction was reversed.[8] The court of special appeals conceded that, by virtue of the Supreme Court's decisions in *Apodaca v. Oregon*[9] and *Johnson v. Louisiana,*[10] state legislatures could constitutionally provide for non-unanimous criminal jury verdicts.[11] The issue, as the court perceived it, was whether Maryland law so provided.

Two provisions of the Declaration of Rights govern trial by jury. Article 5 asserts that: "[T]he Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law."[12] Article 21 provides: "That in all criminal

5. 280 Md. 558, 560, 375 A.2d 228, 229 n.2 (1977).
6. McKay v. State, 32 Md. App. 451, 454, 362 A.2d 666, 669 (1976).
7. *See* Pugh v. State, 271 Md. 701, 319 A.2d 542 (1974), holding that once the trier of fact in a criminal case has intentionally rendered a "not guilty" verdict, the judgment is final, and an accused may not be retried on the same charge.
8. McKay v. State, 32 Md. App. 451, 362 A.2d 666 (1976).
9. 406 U.S. 404 (1972).
10. 406 U.S. 356 (1972).
11. The Oregon provision upheld in *Apodaca* allowed ten members of a jury to convict in cases other than first-degree murder, where unanimity was required. ORE. CONST. art. I, § 11. In *Johnson,* the controversy concerned a provision which permitted a nine-twelfths verdict to convict, where the punishment for the crime alleged was imprisonment at hard labor. Capital cases required a unanimous twelve-man verdict; cases where the punishment imposed might be imprisonment at hard labor required unanimity of a five-man jury. LA. CONST. of 1921, art. VII, § 41 (1974); LA. CODE CRIM. PROC. art. 782 (1966) (amended 1974).
12. MD. DEC. OF RIGHTS art. 5, which reads in full:
> That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law, and

prosecutions, every man hath a right . . . to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty."[13] After a consideration of the federal constitutional standards relating to criminal juries,[14] as well as the aforementioned Maryland provisions, the court held that the unanimous verdict was not merely a right possessed by a Maryland criminal defendant, but an absolute requirement that could not be waived.[15]

On certiorari, the court of appeals agreed that the defendant's conviction should be set aside,[16] but not upon the court of special appeals' rationale. Instead, Judge Levine, writing for the court, said: "Although we think a unanimous jury verdict is a right guaranteed the accused, which he can waive, we affirm the judgment of the Court of Special Appeals because in this instance the waiver did not meet constitutional standards."[17]

The court of appeals considered the decisions in *Apodaca*[18] and *Johnson*[19] to be of especial significance, although these cases construed requirements of the federal constitution.[20] The court

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to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity; and also of all Acts of Assembly in force on the first day of June, eighteen hundred and sixty-seven; except such as may have since expired, or may be inconsistent with the provisions of this Constitution; subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of this State. And the Inhabitants of Maryland are also entitled to all property derived to them from, or under the Charter granted by His Majesty Charles the First to Caecilius Calvert, Baron of Baltimore.

13. MD. DEC. OF RIGHTS art. 21.
14. Art. III, § 2, cl. 3 of the federal constitution provides: "The Trial of all Crimes, except in cases of Impeachment, shall be by jury." The sixth amendment asserts: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."
15. In a footnote discussion near the end of its opinion, the court of special appeals presaged the decision of the court of appeals when it said:

    We observe that even if unanimity of the jury were a right which could be waived by a defendant, we would have serious doubts that McKay's actions constituted a valid waiver. . . . McKay sought to be bound by a majority verdict of the jury because he was told by the court that the alternative was "to have the whole trial tried all over again." He obviously did not want to be retried on the armed robbery count . . . . But once the jury, by unanimous verdict, acquitted him of that offense, he could not be retried thereon. In the circumstances, we do not believe that McKay can be said to have made an intelligent waiver.

    32 Md. App. 451, 463 n.15, 362 A.2d 666, 675 n.15 (1976).
16. State v. McKay, 280 Md. 558, 375 A.2d 228 (1977).
17. *Id.* at 559, 375 A.2d at 228-29.
18. 406 U.S. 404 (1972).
19. 406 U.S. 356 (1972).
20. The appellant in *Johnson* relied primarily on the due process clause of the fourteenth amendment in arguing that the Louisiana provisions at issue did not satisfy the "reasonable doubt" standard applicable to state criminal proceedings. *Apodaca,* unlike *Johnson,* was tried after the Supreme Court's decision in

maintained that since the federal constitution permits the states to ordain less-than-unanimous verdicts even where an accused does not give his consent, then the result should be no different where a defendant does give his consent. Nonetheless, the applicable Maryland constitutional provisions had to be addressed before the court could resolve the issue facing it.

Initially, the court examined Article 5, providing for trial by jury according to the English common law. According to the court, the essential elements of the common law jury in England, at the time the federal constitution was adopted in 1787, were thought to be:

> 1) That the jury should consist of twelve men, neither more nor less; 2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and 3) that the verdict shall be unanimous.[21]

Moreover, waiver of jury trial was not permitted at English common law.[22]

The court of appeals, however, was cognizant of the judicial gloss its predecessors had given Article 5 in the early case of *State v. Buchanan*:[23]

> [Article 5] has no reference to adjudications in England anterior to the colonization, or to judicial adoptions here, of any part of the common law, during the continuance of the colonial government, but to the common law in mass, *as it existed here, either potentially, or practically,* and as it prevailed in England at the time, except such portions of it as are inconsistent with the spirit of [the Declaration of Rights].[24]

Article 21, according to the court, was drafted in the context of Maryland's colonial experience. During the colonial period, waiver of the right to trial by jury was exercised as a matter of course; recorded instances of such practice date back to a general assembly act of 1642.[25] The court pointed out that ten- and eleven-man juries

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Duncan v. Louisiana, 391 U.S. 145 (1968), which held the sixth amendment's guarantee of the right to trial by jury in federal criminal proceedings applicable to the states by virtue of the due process clause of the fourteenth amendment. The appellant in *Apodaca* therefore rested his argument on sixth amendment grounds. The *Apodaca* court split four-to-four over whether the sixth amendment required jury unanimity in both state and federal criminal cases; Justice Powell, the swing vote, thought unanimity to be a requisite only in federal prosecutions.

21. These essential elements were stated by the Supreme Court in Patton v. United States, 281 U.S. 276, 288 (1930).
22. *See* Singer v. United States, 380 U.S. at 27-31 (1965).
23. 5 H. & J. 317 (1821).
24. *Id.* at 358 (emphasis supplied).
25. I Archives of Maryland 151, 186 (1642).

sat occasionally to try civil cases in colonial Maryland and concluded: "Thus, by 1776, Maryland had long since departed from the English common law . . . in permitting waiver of not only trial by jury, but also at least one of its traditional elements, the 12-man jury."[26] The court observed that "there is no historical support . . . for an interpretation of Article 21 that would make jury unanimity an imperative requirement as opposed to a right which can be waived."[27] The court cited other state constitutional provisions that are waivable, provided the waiver is knowing and competent: the right against self-incrimination;[28] the right to trial by jury;[29] the right to a poll of the jury after verdict;[30] the right to exclusion of illegally seized evidence;[31] the right to counsel;[32] the right to confrontation;[33] and the right to a speedy trial.[34] Judge Levine's opinion continued: "If, therefore, all these fundamental rights can be waived by the accused, there is no rationale for an interpretation denying him waiver of unanimity, which, like all the rights just enumerated, is generally regarded as existing primarily for his benefit."[35]

The question of whether a criminal defendant might waive his right to a unanimous verdict was one of first impression in Maryland.[36] In a civil action, the Maryland Rules permit the parties to "stipulate that . . . a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury."[37]

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26. 280 Md. at 568, 375 A.2d at 233.
27. *Id.* at 569, 375 A.2d at 234.
28. Allen v. State, 183 Md. 603, 612, 39 A.2d 820, 824 (1944).
29. State v. Zimmerman, 261 Md. 11, 14-19, 273 A.2d 156, 158-60 (1971).
30. Ross v. State, 24 Md. App. 246, 253, 330 A.2d 507, 511 (1975).
31. Jenkins v. State, 232 Md. 529, 523-33, 194 A.2d 618, 620-21 (1963); Porter v. State, 230 Md. 535, 536-37, 187 A.2d 870-71 (1963).
32. State v. Blizzard, 278 Md. 556, 575, 366 A.2d 1026, 1037 (1976). *See* State v. Fowler, 259 Md. 95, 103-04, 267 A.2d 228, 233 (1970).
33. State v. Collins, 265 Md. 70, 79-81, 288 A.2d 163, 168-69 (1972).
34. Bonner v. Director, 237 Md. 445, 447, 206 A.2d 708, 709 (1965).
35. 280 Md. at 570, 375 A.2d at 235.
36. The unanimity requirement has, however, been discussed in dicta in several prior decisions. In Ford v. State, 12 Md. 514 (1859), the jury foreman, upon being polled after a "guilty" verdict had been rendered, responded: "Guilty of murder in the first degree." *Id.* at 548. Thereafter, the eleven remaining jurors responded merely, "guilty," without specifying degree. The court of appeals reversed the defendant's conviction, reasoning: "Unanimity is indispensable to the sufficiency of the verdict, and this, we have seen, has not been in the case before us." *Id.* at 548-49.

    Williams v. State, 60 Md. 402 (1883) was decided upon a factual situation not unlike that in *Ford:* a juror poll which was not specific as to the decided-upon degree of murder. The court said the defendant "could not be convicted, except upon the concurrence of each juror." *Id.* at 403.
37. Md. Rule 544, not applicable to criminal proceedings (*see* Md. Rule 1(a)(1)).

Where trial is by a multi-judge panel,[38] unanimity is not indispensable to a Maryland criminal verdict. In *League v. State,*[39] the defendant was indicted for murder and tried by jury. The jurors could not reach agreement, and were discharged. Upon reindictment, the defendant elected trial by the court. A two-judge panel was unable to agree upon a verdict. The defendant then moved for dismissal, contending that the court's failure to agree constituted a judgment of acquittal. The motion was denied, and upon yet another trial a jury found the defendant guilty of manslaughter. Affirmance of the defendant's conviction was predicated on the grounds that:

> [T]o make a legal verdict all the jurors must agree; but where the matter is traversed before the court, if it is composed of two or more members, a majority of them must concur in rendering the judgment; and where there is an equal division among them and no judgment is rendered, the party is left in the same position as if no trial had taken place.[40]

Sherrill v. State,[41] on the authority of *League,* held that a three-judge panel, unlike a jury, need not reach a unanimous decision in order to convict. The *Sherrill* court said: "Nothing in [Article 21] supports the argument that a defendant who waives a jury trial retains the right to a unanimous decision should he elect trial before a multiple-judge court."[42]

II. THE LAW IN OTHER JURISDICTIONS

Two other states — Texas and Kentucky — and the United States Court of Appeals for the Sixth Circuit have been confronted with the problem that faced the court of appeals in *McKay.*

Archer v. State[43] is the earliest case. Perhaps owing to its brevity, it has been omitted from discussion in subsequent decisions, and was not cited by either Maryland appellate court in *McKay.*

In *Archer,* the defendant was tried for disturbing Sunday school.[44] The jury was unable to reach accord. Thereafter, both the state and the defense stipulated to abide by a majority decision. Four of the jurors voted for conviction, and two for acquittal. The Texas Court of Criminal Appeals reversed the defendant's conviction,

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38. *See* Comment, *Unanimous Criminal Verdicts and Proof Beyond a Reasonable Doubt,* 112 U. PA. L. REV. 769 (1964), emphasizing that different considerations are at work when trial is by a panel of judges, and suggesting that one reason unanimity among judges is not required is because they are likely to weigh the evidence more carefully than juries.
39. 36 Md. 257 (1872).
40. *Id.* at 266.
41. 14 Md. App. 146, 286 A.2d 528 (1972).
42. *Id.* at 157, 286 A.2d at 534.
43. 51 Tex. Crim. 46, 100 S.W. 769 (1907).
44. Punishment for this heinous crime was a fine of $25.

asserting tersely: "There is no authority in Texas for less than a full jury rendering a verdict in either a civil or criminal case."[45]

In *Hibdon v. United States*,[46] a two-count federal felony prosecution, the jury returned after twenty-seven minutes of deliberation, unable to agree on the defendant's guilt or innocence. At the suggestion of the judge, both sides consented to a majority verdict. Thereafter, the defendant was found guilty on both counts, one by nine-to-three vote, and the other by ten-to-two.

In reversing the convictions on due process grounds,[47] the United States Court of Appeals for the Sixth Circuit adopted the "entity" theory of jury verdicts[48] (an approach since explicitly rejected by the Supreme Court in *Johnson*[49]):

> [T]here cannot be a verdict supported by proof beyond a reasonable doubt if one or more jurors remains reasonably in doubt as to guilt. It would be a contradiction in terms . . . . The right to a unanimous verdict cannot under any circumstances be waived . . . . [I]t is of the very essence of our traditional concept of due process in criminal cases.[50]

The *Hibdon* court acknowledged the imperative construction of Rule 31(a) of the Federal Rules of Criminal Procedure,[51] providing: "The verdict shall be unanimous." It noted that this rule was promulgated sixteen years after *Patton v. United States*,[52] in which the Supreme Court stated, in dicta, that the jury trial guaranteed by the sixth amendment "means a trial by jury as understood and applied at common law,"[53] including the requirement of a unanimous verdict. Further, the *Hibdon* court noted that proposed Rule 29(a) of the First Preliminary Draft of the Federal Rules had provided for

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45. 51 Tex. Crim. at 46, 100 S.W. at 770.
46. 204 F.2d 834 (6th Cir. 1953).
47. Judge Simons, who wrote the *Hibdon* opinion, never expressly mentioned the fifth amendment, but made frequent reference to the constitutional requirement of due process in federal criminal cases.
48. The entity theory treats the jury as an indivisible unit; "reasonable doubt" on the part of even one juror is sufficient to pervade the entire jury and thus prevent conviction. There is a logical inconsistency in this theory. If one juror's reasonable doubt means the entire jury is reasonably in doubt, the defendant should be acquitted. Instead, there is only a hung jury, and the defendant may be retried.
49. 406 U.S. 356 (1972). The Supreme Court observed:
> [T]his court has never held jury unanimity to be a requisite of due process of law. Indeed, the Court has more than once expressly said that "[I]n criminal cases due process of law is not denied by a state law . . . which dispenses with the necessity of a jury of twelve, or unanimity in the verdict."

Id. at 359 (citations omitted).
50. 204 F.2d at 838.
51. FED. R. CIV. P. 31(a).
52. 281 U.S. 276 (1930).
53. *Id.* at 288.

written stipulation by the parties to a majority verdict. This proposal was rejected, due to strong opposition from judges and lawyers. The court finally observed:

> But even if . . . this right [was waivable], we think that the consent of the appellant . . . was not the free and unfettered judgment of the accused. The suggestion for waiver . . . was initiated by the judge after twenty-seven minutes of jury deliberation. The accused was in prison serving another sentence, his record was bad, the evidence of guilt, we must assume, was substantial.[54]

In *Ashton v. Commonwealth,*[55] the defendant was convicted of criminal libel, a misdemeanor. He consented to a majority verdict,[56] which was returned ten-to-two for conviction. The relevant section of the Kentucky Constitution read: "The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution."[57] A state criminal rule provided: "The verdict shall be unanimous."[58] Another rule provided that, if upon the jury's poll, "there is not unanimous concurrence, the verdict cannot be received."[59]

The Kentucky Court of Appeals declined to follow the *Hibdon* precedent and affirmed the defendant's conviction. At the outset, the court disagreed with *Hibdon's* interpretation of Rule 31(a), which was similar to Kentucky R. Cr. 9.82. The court said:

> A vast number of both civil and criminal procedural rules are mandatory in form, but unless they are jurisdictional in nature, or noncompliance will adversely affect the administration of justice, no reason is apparent why a party cannot understandingly and voluntarily waive their requirements.[60]

The court pointed out that, formerly, the defendant in a criminal case was not permitted to waive rights intended for his protection only because, at common law, an accused was not allowed to testify on his own behalf, had no right to counsel, and usually faced a severe penalty upon conviction. But since these harsh prohibitions of the common law have been abolished,[61] the court could find no reason to deny waiver.

54. 204 F.2d at 839.
55. 405 S.W.2d 562 (Ky. 1965).
56. It is not clear from the opinion when the majority verdict election was made or what the circumstances were that convinced the defendant to elect it.
57. KY. CONST. § 7.
58. KY. R. CR. 9.82.
59. *Id.* 9.88.
60. 405 S.W.2d at 570.
61. *See* Hack v. State, 141 Wis. 346, 351-52, 124 N.W. 492, 494-95 (1910).

III. DISCUSSION

The court of appeals' interpretation of the Declaration of Rights provisions regarding jury trial was perceptive. Article 21 was conceived as a codification of Maryland trial practices as they existed in 1776. That trial by jury could be waived under the early Maryland practice is indicative of a traditionally less rigid adherence in the state to the English common law jury concept.[62] As a former judge of the court of appeals, Carroll T. Bond, wrote: "[There is a] need of an investigation of facts before any statement is made that trial by jury in criminal cases was the only form known to the early American law. It is possible to assume too close an adherence to English practice in the colonies."[63]

The court of appeals omitted from its opinion some further evidence of Maryland's infidelity to the common law notion of the jury: the state constitutional enactment of 1851[64] authorizing juries to be the judges of law, as well as fact, in the trial of criminal cases. This provision has withstood constitutional scrutiny[65] and remains in force today.[66] It reinforces the court of appeals' decision in *McKay* and affirms the fact that a Maryland criminal jury possesses traits uniquely its own.

As far as practical implications of *McKay* are concerned, it is difficult to conceive of a situation in which waiver of juror unanimity could redound to the benefit of an accused.[67] The hung jury would always seem to be more advantageous to the criminal defendant. The prosecution might drop the charges; key witnesses often die or develop faulty memories. A hung jury is also a bargaining chip in the hands of an accused. For example, where the prosecution has refused to plea bargain at the outset of a case, it may be forced to revise its position when the jury is unable to reach accord.

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62. Originally, waiver of jury trial in Maryland was employed only in misdemeanor cases, and was in the nature of a "submission" to the court — a species of *nolo contendere*. As the system developed, however, there were acquittals under this submission practice. Not until 1809 was waiver actually encouraged by statute Act of 1809, ch. 144. In 1821, the rule was extended to a felony case in State v. Buchanan, 5 H. & J. 317. By a legislative act of 1852, any criminal case could be tried by the court alone if the defendant so desired Ch. 344, Md. Laws (1852). *See* note 63, *infra*.
63. Bond, *The Maryland Practice of Trying Criminal Cases by Judges Alone, Without Juries*, 11 A.B.A.J. 699, 699 (1925). This article contains an extended discussion of the development of the non-jury trial in Maryland. *See also* Williams v. Florida, 399 U.S. 78, 98 n.45 (1970).
64. MD. CONST. art. 10, § 5 (1851).
65. *See, e.g.*, Bremer v. State, 18 Md. App. 291, 357 A.2d 503 (1973).
66. MD. CONST. art. XV, § 5.
67. Waiver is, of course, a two-edged sword. Just as the defendant waives his right to a unanimous verdict for conviction, so also does he eliminate the requirement of a unanimous verdict for acquittal. A jury of twelve, where unanimity has been waived, will hang only if the verdict is deadlocked at six-to-six.

It has been suggested that disagreement among jurors usually exists only when the majority favors conviction,[68] and so no defendant, when apprised of the fact that the jury is in disagreement, should opt for waiver of the unanimity guarantee. A recent study is not entirely supportive of this view, however.[69] Instead it is suggested that the probability a jury will hang because a minority favors acquittal is roughly equal to the probability that it will hang because a minority favors conviction.[70]

An accused may feel he has convinced the majority of a hung jury and decide to gamble on a non-unanimous verdict.[71] The defendant in a factual context similar to the one in which *McKay* arose might find waiver tempting; where there are verdicts of acquittal on every other count, one might well believe that the majority on the hung count is likewise in favor of acquittal.[72]

Nonetheless, the prosecutor's consent is necessary in order for unanimity to be waived. If the prosecution thinks the majority of a hung jury is in favor of acquittal, obviously no consent to the waiver will be forthcoming.[73] Thus, McKay's brief in the court of appeals reasoned that:

> Since unanimity is required for an acquittal as well as a guilty verdict, the state would have an interest in objecting to any waiver of unanimity which might jeopardize its chances of retrial. It is difficult to see how unanimity can be designated a "right" when in all fairness the prosecutor [has] this power to object.[74]

The consent of neither the prosecutor nor the court is necessary for an accused to waive trial by jury in a Maryland criminal case. If the defendant elects trial by the court for tactical reasons[75] and neither prosecution nor court consent is required, there is no apparent reason why such consent should be required if, as a matter of trial strategy, the defendant wishes to dispense with the

68. *See,* Note, *Waiver of Jury Unanimity — Some Doubts About Reasonable Doubt,* 21 U. CHI. L. REV. 438, 446 n.60 (1954).
69. H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1971).
70. *Id.* at 460.
71. One commentator has written that criminal jury trials are quite predictable, and that the jury's decision can be foretold with about 90% accuracy. L. MOORE, THE JURY 173 (1973).
72. If this was McKay's belief, he was, of course, mistaken.
73. *See,* Note, *Waiver of Jury Unanimity - Some Doubts About Reasonable Doubt,* 21 U. CHI. L. REV. 438, 446 (1954).
74. Brief for Appellee at 4 n.4, State v. McKay, 280 Md. 558, 375 A.2d 228 (1977).
75. There are numerous reasons why an accused might prefer trial by the court over a jury trial. A few considerations are: fear of juror prejudice; favorable personality traits of a particular judge; or the fact that an accused has a known criminal record or reputation which would likely cause hostility in a jury. *See* Bond, *The Maryland Practice of Trying Criminal Cases by Judges Alone, Without Juries,* 11 A.B.A.J. 699, 702 (1925).

unanimity guarantee. The court of appeals recognized this issue, but addressed it unconvincingly: "We find no constitutional impediment to conditioning a waiver of unanimity on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the jury must return a unanimous verdict — the very right the Maryland Constitution guarantees the accused."[76]

Under the modern view, a criminal defendant may waive nearly all privileges which have been constitutionally established for his benefit.[77] In determining what is and what is not waivable, the crucial question would appear to be: Is the particular incident sought to be waived a right personal to the defendant, or a limitation upon the court's power to act?[78] If it is a mere personal right — as is the right to a unanimous jury verdict — waiver should be allowed.

Waiver of jury unanimity is admittedly a risky option and, most likely, few defendants will ever exercise the right. Even where, in a particular situation, waiver might seem to be a viable alternative to the defendant, its tactical effectiveness is vitiated by the holding in *McKay*. The requirement of prosecutorial and court consent renders waiver of unanimity an illusory "right" in Maryland, and a tool of limited practical utility to the criminal defense practitioner.

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76. 280 Md. at 572, 375 A.2d at 235. *Accord,* Singer v. United States, 380 U.S. 24, 36 (1965) (applying the identical rationale to waiver of jury trial in federal cases).
77. *See* notes 28-34, *supra.*
78. The dictates of due process necessitate the preservation of certain rights which a criminal defendant can never waive. For example, one cannot be punished for a crime by voluntarily submitting to the court's jurisdiction; there must be a formal accusation. Albrecht v. United States, 273 U.S. 1 (1926). Similarly, a defendant cannot consent to trial by a court lacking subject matter jurisdiction. United States v. Anderson, 60 F. Supp. 649 (W.D. Wash. 1945).