IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON,

Plaintiff,

v.

OLAN JERMAINE WILLIAMS,

Defendant.

Case No. 15CR58698

BRIEF *AMICUS CURIAE* OF AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF OREGON

GARVEY SCHUBERT BARER
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INTRODUCTION

Defendant must have his day in court to challenge the provision of the Oregon State Constitution, Article I, § 11 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 "Provision"). Whether the hearing is denominated a hearing on a motion for new trial or not, this Court is required to provide an opportunity to challenge the Provision's constitutionality.

ARGUMENT

I. This Court Must Allow a Challenge to the Constitutionality of the Provision.

No principle of law is as firmly established in this country as that every right must have a remedy. *Marbury v. Madison*, 5 U.S. 137, 163 (1803). The State's theory would preclude any challenge to the Provision for its unconstitutionality under Federal law.

As early as 1886, the Supreme Court of Oregon held that "it was the indisputable and clear function of the court to pass upon the constitutionality of legislative acts." *State v. Ware*, 13 Or. 380, 384 (1886), *citing Marbury v. Madison*. The Oregon Constitution is even more clear: "every man shall have remedy by due course of law for injury done him in his person, property, or reputation." Or. Const. Art. I, § 10 (the "Remedy Guarantee").

David Schuman, in his excellent article regarding the remedy guarantee, explains the courts must devise a form of relief for all infringements of rights. David Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 Or. L. Rev. 35 (1986) "In *Rodda v. Rodda*, the court interpreted article I, section 10 as giving courts a power in equity to fashion remedies to match injuries. . . . And in *State v. Burrow*, Justice Peterson wrote that article

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I, section 10 'provides an affirmative claim upon the state to provide a legal "remedy" for an "injury done"'" *Id*. at 69-70, *citing Rodda v. Rodda*, 185 Or. 140 (1949); *State v. Burrow*, 293 Or. 691, 695 n.5 (1982).

The right of access to the courts is also well-established. The First Amendment requires that a defendant have the ability challenge the constitutionality of a state's actions as part of the right to petition the government. *See Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 387 (2011) ("[T]he right to access to courts for redress of wrongs is an aspect of the First Amendment right to petition the government"); *McGee v. Baldwin*, 183 Or. App. 1, 5 (2002); *Bounds v. Smith*, 430 U.S. 817, 821 (1977). This Court is therefore doubly required to hold a hearing on the motion for new trial.

Defendant and the amici have already demonstrated the unconstitutionality of the Provision. Defendant has the right, at the very least, to a hearing on his challenge and the entry of an order with regard to the same.

II. This Court Has Authority to Hold a Hearing on a Motion for New Trial and to Enter an Order Thereto.

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Based upon the above, Defendant has an absolute right to a hearing. Procedurally, Defendant has outlined the basis for that hearing in his own briefing. But even if the Court finds there is no explicit authority under statute or case law to hold a hearing on Defendant's motion, the Court may hold the hearing and enter an order on its own initiative.[1] ORCP 64 G. A new trial may be ordered in any of these three cases:

> (1) Cases in which such orders have allowed motions for new trials based upon grounds specified in ORS 17.610, including 'error in law occurring at the trial, and

[1] In *State ex rel Schrunk v. Johnson*, the Court ordered a new trial on its motion even though defendant had moved for a new trial and an evidentiary hearing had been held on that motion. 97 Or. App. 420, 422-23 (1989).

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> excepted to by the party making the application'; (2) Cases in which trial courts have granted new trials upon their 'own motion'; and (3) Cases in which new trials were granted because of substantial and prejudicial error to which no proper exception or objection was taken, but which were raised by motion for new trial, rather than by a trial court on its own motion, as next discussed.

Beglau v. Albertus, 272 Or. 170, 181-82 (1975) (footnotes excluded).

If, as the State contends, Defendant failed to make an objection, the Court may still grant a new trial for "substantial and prejudicial error to which no proper exception or objection was taken, but which were raised by motion for new trial, rather than by a trial court on its own motion[.]" *Id*. That procedure is particularly appropriate here, where there is uncertainty regarding the time at which an exception would have been proper.

CONCLUSION

Based upon the foregoing, amicus respectfully requests the Court find it has the authority to hold a hearing on the motion for new trial and hold such a hearing, and subsequently order a new trial.

DATED this 4th day of November, 2016.

GARVEY SCHUBERT BARER

By */s/ Jennifer Fransen Gould*

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **BRIEF AMICUS CURIAE OF AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF OREGON** was served on:

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by mailing to them a copy of the original thereof, contained in a sealed envelope, addressed as above set forth, with postage prepaid, and deposited in the mail in Portland, Oregon, on this 4th day of November, 2016.

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