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Unanimity in Criminal Jury Verdicts: Antiquity or Necessity?

Raymond M. Seidler

abuses. By holding that a city may close its recreational facilities rather than integrate them, the Court has given local governments a new "legal" method of avoiding desegregation. Unfortunately, the majority of the Court chose not to consider the ultimate effect of Jackson's actions to the black community. Because of lower economic standing, it is unlikely that Blacks would be able to afford membership fees at privately-owned pools (assuming they are even admitted). Particularly disturbing is the fact that this decision was rendered in favor of a city which has been known for its resistance to the integration of any public facility.[33] Under the rationale of *Palmer*, members of minority groups may think twice before attempting to force a local government to desegregate recreational facilities or programs since the response of the city fathers could be to simply close the facilities and lay the blame on excessive operational costs and danger.[34] In such a situation, there are certainly no winners—only losers.

MICHAEL A. ROSEN

UNANIMITY IN CRIMINAL JURY VERDICTS: ANTIQUITY OR NECESSITY?

Defendant, on trial for commission of a felony, was convicted in an Oregon trial court by a jury verdict with only ten of the twelve jurors concurring. On appeal to the Court of Appeals of Oregon,[1] *held*, affirmed: Defendant's constitutional rights as applied to the states through the fourteenth amendment were not violated by a conviction based on a less than unanimous jury verdict. *State v. Apodaca*, 1 Or. App. 483, 462 P.2d 691 (1969). The United States Supreme Court granted certiorari in October, 1970,[2] and *Apodaca*, along with the companion case of *Johnson v. Louisiana*,[3] was reargued on January 10, 1972.[4]

33. *See, e.g.*, United States v. City of Jackson, 318 F.2d 1, 5-6 (5th Cir. 1963), where the court took "judicial notice that the State of Mississippi has a steel-hard, inflexible, undeviating official policy of segregation. The policy is stated in its laws. It is rooted in custom." (citations omitted).

34. It is important to note that the only recreational facilities closed were the pools, and these were closed only after extended litigation. *See* note 1 *supra*. City parks, golf courses and the zoo remained open. Evidently, only at the swimming pools would disorder and economic loss occur.

1. The Court of Appeals of Oregon *en banc* decided *State v. Apodaca* along with three companion cases: *State v. Plumes*; *State v. Madden*; and *State v. Cooper*; all reported at 1 Or. App. 483, 462 P.2d 691 (1969). The unanimous jury verdict was the sole question on appeal in all four cases.

2. Apodaca v. Oregon, *cert. granted*, 400 U.S. 901 (1970) [hereinafter cited in text as *Apodaca*].

3. Johnson v. Louisiana, *prob. juris. noted*, 400 U.S. 900 (1970). This case deals with a nine-three criminal conviction for armed robbery. For the lower court opinion, see State v. Johnson, 255 La. 314, 230 So.2d 825 (1970).

4. *See* 40 U.S.L.W. 3331 (January 10, 1972). [At the time of publication, the Court affirmed the holding in *Apodaca*. *See* 40 U.S.L.W. — (U.S. filed May 22, 1972).]

The sixth amendment guarantees criminal defendants the right to a trial by jury. The phrase, "trial by jury," has been interpreted by the Supreme Court of the United States to mean, "a trial by jury as understood and applied at common law. . . ."[5] Three essential elements comprised a jury trial at common law: (1) a twelve man jury; (2) under the supervision and guidance of a judge; and (3) a unanimous verdict of the jurors.[6]

The first element, a twelve man jury, was held inapplicable to the states under the fourteenth amendment in the case of *Williams v. Florida*.[7] In deciding *Williams*, the Supreme Court looked not only to the historical basis,[8] but also to the necessity for a twelve man jury in a criminal trial. In rendering its decision, the Court did not equate the requirements for a jury under the fourteenth amendment with its common law characteristics.[9] Rather, the Court formulated its own test to determine the necessary elements of a constitutionally valid jury trial. The Court stated that the relevant inquiry must center on the function and purpose that the particular element performs in a jury trial.[10]

In applying this test, the Supreme Court stated in *Williams* that the number of men required to compose a jury should not be based on historical accident.[11] The rationale for fixing a specific number of jurors must be based on the *necessity* for that specific number. With regard to the issue of necessity, the Court ruled that six men could decide issues of fact with the same fairness and justice as twelve men.[12] However, in *Williams*, the Court did not deal with the other common law characteristics of a jury trial. One of them, the necessity for unanimity in jury trials, is now being reviewed by the Supreme Court in *Apodaca*.

The requirement of unanimity in criminal jury trials, though rarely questioned in the courts,[13] is a right basic to the concept of trial by

5. Patton v. United States, 281 U.S. 276, 288 (1930).

6. *Id.*

7. 399 U.S. 78 (1970) [hereinafter cited as *Williams*], *noted in* 24 U. MIAMI L. REV. 832 (1970).

8. Williams v. Florida, 399 U.S. 78, 88-89 (1970).

9. *Id.* at 99.

10. *Id.*

11. *Id.* at 89.

12. *Id.* at 100.

13. The Supreme Court has never ruled on the necessity for unanimity in criminal cases under the fourteenth amendment, although the Court has held that unanimity is a requirement in federal criminal cases. *See* Andres v. United States, 333 U.S. 740, 748-49 (1948); Patton v. United States, 281 U.S. 276, 288-90 (1930). Perhaps the most striking federal case on unanimity is Hibdon v. United States, 204 F.2d 834 (6th Cir. 1953) [hereinafter cited in text as *Hibdon*]. Although that case principally concerned waiver of a unanimous verdict rather than the requirement for unanimity, it was nevertheless one of the few cases directly dealing with unanimity. *See also* Billeci v. United States, 184 F.2d 394, 403 (D.C. Cir. 1950). There has been, however, strong dicta indicating that unanimity is not required in state criminal cases. *See* Duncan v. Louisiana, 391 U.S. 145 (1968); Maxwell v. Dow, 176 U.S. 581 (1900); Thompson v. Utah, 170 U.S. 343 (1898). *But see* Springville v. Thomas, 166 U.S. 707 (1897); American Publishing Co. v. Fisher, 166 U.S. 464 (1897).

jury.[14] The right to a trial by jury at common law was held to be "the most transcendent privilege" any person could enjoy.[15] A British subject could not be deprived of his property, liberty, or life, "but by the unanimous consent of twelve of his neighbours and equals."[16] The historical foundation for this concept may provide a key in determining the necessity for the unanimity rule. Unanimity was first required in England during the early development of the present day jury system. Originally, the jury consisted of twelve witnesses who would testify for the winning party. Naturally, such testimony had to be unanimous.[17] "[W]hen the twelve witnesses were translated into judges [jurors], the unanimity rule, notwithstanding that its original significance had then departed, remained with them."[18]

As early as 1367, unanimity was required under English case law.[19] This standard has remained a part of the common law, even though the particular reasons for its initial development have abated. Although the historical basis for the rule is antiquated, the contemporary necessity for the rule may serve as a justification for its continued application. In examining the necessity of the unanimity rule from a historical viewpoint, Joseph Story has stated that "[t]he great object of a trial by jury in criminal cases is, to guard against . . . a spirit of violence and vindictiveness on the part of the people."[20] For this reason, to convict one of a criminal charge, the defendant's guilt must be proved beyond a reasonable doubt. The presumption of innocence demands proof to that extent. As this presumption applies to the unanimity rule, *all* of the jurors must be convinced beyond a reasonable doubt. Therefore,

> if only one of them [the jurors] fixedly has a reasonable doubt, the verdict cannot be returned. . . . [This means] that the prosecutor in a criminal case must actually overcome the presumption of innocence, all reasonable doubt as to guilt, and the unanimous verdict requirement.[21]

It has been suggested that a criminal conviction based on a jury verdict which is less than unanimous would destroy the burden of proof placed upon the prosecution.[22] Under this theory, the failure of a juror

14. Hibdon v. United States, 204 F.2d 834, 838 (6th Cir. 1953).

15. 3 W. BLACKSTONE, COMMENTARIES *379.

16. *Id.*

17. P. DEVLIN, TRIAL BY JURY 48 (1956).

18. *Id.*

19. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 88-89 (1896). Thayer discussed an early unnamed English case dealing with a criminal conviction based on a jury verdict of eleven concurring jurors. The twelfth juror who persistently dissented from the guilty verdict was imprisoned by the judge for failure to concur with the verdict of the other eleven. The defendant was convicted, and he appealed. On appeal, the conviction was reversed, and the case retried for lack of unanimity.

20. J. STORY, COMMENTARIES *§ 1780. *See also* 4 J. KENT, COMMENTARIES *1-9; Maxwell v. Dow, 176 U.S. 581 (1900) (Harlan, J. dissenting).

21. Billeci v. United States, 184 F.2d 394, 403 (D.C. Cir. 1950).

22. Hibdon v. United States, 204 F.2d 834, 838 (6th Cir. 1953).

to concur means that he has retained a reasonable doubt as to the guilt of the accused.

Oregon, as evidenced by its decision in *State v. Apodaca*, does not follow this line of reasoning. In *Apodaca*, the court of appeals, in a per curiam decision, dismissed the defendant's constitutional arguments on the authority of *State v. Gann*,[23] a case where the same defense arguments used by *Apodaca* were raised.

In deciding *Gann*, the Supreme Court of Oregon had based its decision on a provision of the Oregon constitution[24] which permits a ten-two jury verdict for non-capital crimes. The supreme court upheld the constitutional provision for three reasons:

> Because of the absence of any decision of the United States Supreme Court directly to the contrary, because the people of Oregon were acting within their power to regulate the incidents of criminal procedure . . . and because a unanimous verdict is not a "fundamental right, essential to a fair trial," we hold that the Oregon Constitution is not a violation of the Fourteenth Amendment.[25]

The court then concluded that unanimity is not an essential element of a fair trial, citing many authorities which dispel the historical basis for the unanimity rule.[26] In addition, the court summarily dismissed the "reasonable doubt" argument raised by the defense in *Gann*.

> [A] failure of one or two jurors to agree with the verdict of their fellow jurors is more likely to be caused by a failure of the dissenters to correctly understand the evidence or the court's instructions or by some extraneous cause having no relation to the quantum of proof.[27]

The *Gann* court favorably cited statements by Sir Patrick Devlin to support its decision on the antiquity of the unanimity rule.[28] However, the court failed to consider what Devlin had stated relative to the extraneous influences of a dissenting juror. Devlin believed that a dissenting juror was not a "crank," and that the rare appearance of an eccentric juror did not occur often enough to demand reform of accepted methods requiring unanimity among the jurors.[29] Although a juror's

23. 254 Or. 549, 463 P.2d 570 (1969) [hereinafter cited in text as *Gann*]. *Johnson v. Louisiana* (*See* note 3 *supra*) was decided in the same manner, and the Louisiana Supreme Court cited State v. Schoonover, 252 La. 311, 211 So.2d 273 (1968).

24. OR. CONST. art. I, § 11, which states:

> [I]n 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 the first degree murder, which shall be found only by a unanimous verdict, and not otherwise . . . .

25. State v. Gann, 254 Or. 549, 565, 463 P.2d 570, 577 (1969). *See also* State v. Schoonover, 252 La. 311, 323-24, 211 So.2d 273, 278 (1968).

26. State v. Gann, 254 Or. 549, 562, 463 P.2d 570, 576 (1969).

27. *Id.* at 561, 463 P.2d at 575.

28. *Id.* at 556, 463 P.2d at 573.

29. P. DEVLIN, TRIAL BY JURY 57 (1956).

dissent may result from a misunderstanding or from outside influences, Devlin believed that as a general rule dissent arises from a juror's belief that there is "[a] real possibility of the defence being right."[30]

If the nonconcurrence of a juror arises from misunderstanding the evidence or jury instructions, then the solution is not to disregard that dissent, but rather to properly instruct the jury on the applicable law. The onus is upon the judge to make his instructions to the jury completely free from question or doubt. If a judge's failure to properly instruct results in a dissent, that dissent should not then be disregarded on the theory that the dissent does not go to the question of guilt or innocence.

The issue before the Supreme Court in *Apodaca* is whether the reasonable doubt which must be overcome by the prosecution is that of all the jurors collectively or that of each individual juror. *Hibdon v. United States*,[31] one of the rare cases dealing with unanimous jury verdicts, examined this question and considered the jury as one unit. Judge Simons, writing for the court, dealt with the jury as a "group mind" and contended that less than unanimous verdicts by the jury's "group mind" would offend the constitution. He reasoned that since proof beyond a reasonable doubt is required by law, there is an implied demand that the jury must decide guilt or innocence by objective standards. However, while he recognized that the nature of man presupposes that each individual will make this decision according to his own subjective standards, Judge Simons reasoned that each juror's subjective verdict would react upon the subjective verdicts of his brother jurors, each cancelling out the emotional and subjective reasoning of the other, resulting in a verdict void of subjective reasoning. Thus, the court in *Hibdon*, equated the individual subjective verdicts of the jurors with an objective verdict coming from the "group mind" of the jury.

Judge Simons' view would ensure a verdict based on proof beyond a reasonable doubt, a single dissenting juror indicating reasonable doubt in the mind of the entire jury. However, our criminal jury system does not operate in accord with this view. The dissent of one juror results in a hung jury requiring a retrial, rather than a verdict of not guilty. Thus, it has been said of *Hibdon* that "[p]roof beyond a reasonable doubt should be confined to the subjective standard applied by the individual juror, and unanimity—a group concept—must be justified in some other terms."[32]

If unanimity is to be the accepted rule for jury verdicts, the prosecutor must make a showing of guilt beyond a reasonable doubt to each individual juror. If the jury as a whole must be convinced beyond a

30. *Id.*

31. 204 F.2d 834, 838 (6th Cir. 1953). *See also* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, TRIAL BY JURY, § 1.3(b) (approved draft 1968); P. DEVLIN, TRIAL BY JURY 48-49 (1956).

32. Comment, *Waiver of Jury Unanimity—Some Doubts About Reasonable Doubt*, 21 U. CHI. L. REV. 438, 442 (1954).

reasonable doubt, and if Judge Simons' view of the jury's "group mind" is disregarded, less than unanimous verdicts may not offend the sixth and fourteenth amendments of the constitution, and the abolition of the unanimity rule may not destroy the concept of reasonable doubt, since the prosecutor can be said to have a burden of proof and a burden of persuasion. Like the burden of proof, the burden of persuasion can be divided into two elements:

> the necessity for convincing the individual juror beyond a reasonable doubt and the need for convincing all twelve of them. If the second element is removed . . . it can be said, in a very real sense, that the prosecutor's burden of persuasion is lessened. But is does not destroy the requirement of proof beyond a reasonable doubt if that concept is limited to the necessity for convincing an individual juror by a certain degree.[33]

This proposition is true, however, only if Judge Simons' concept of the "group mind" of the jury is disregarded.

In looking to the future decision of the Supreme Court in *Apodaca*, there may be doubt as to whether the Court is ready to rule on the necessity of unanimity. In *Williams v. Florida*,[34] the necessity of the unanimity rule was discussed, but the Court expressly stated that it would not "intimate . . . whether or not the requirement of unanimity is an indispensible element of the Sixth Amendment jury trial."[35] But, in its last term, without explanation, the Court requested the parties to reargue the case in the upcoming term, and that the Department of Justice enter the arguments.[36] Consequently, it appears likely that the Supreme Court will soon decide the issue of unanimous verdicts in criminal jury trials.

In the opinion of this writer, the Supreme Court's decision in *Williams v. Florida* has weakened the jury system. Whether this indicates a trend paralleling the philosophy of the Nixon Administration, which favors states' rights, remains to be seen.[37] A decision by the newly con-

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33. *Id.* at 443. *But see* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, TRIAL BY JURY, § 1.3(b) (approved draft 1968).

34. 399 U.S. 78 (1970).

35. *Id.* at 100 n.46.

36. Interview with Mrs. Louise S. Korns, Attorney for Respondent, in Johnson v. Louisiana, 255 La. 314, 230 So.2d 825 (1970); *prob. juris. noted*, 400 U.S. 900 (1970) at New Orleans, August 21, 1971. *See also* Apodaca v. Oregon, 91 S. Ct. 2289 (1971) (set for reargument).

37. These views were expressed by then Assistant Attorney General William H. Rehnquist, speaking for the Justice Department, before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on S.895, 92d Cong., 1st Sess. (1971) (a proposed speedy trial bill). Mr. Rehnquist indicated that the Justice Department, in order to lend its support to the proposed bill, should include (as further measures to insure speedy trials) the modification of the exclusionary rule, limitations on the use of Habeas Corpus, severe sanctions on attorneys that delay trials, and the elimination of unanimous jury verdicts. 117 Cong. Rec. 12,393 (daily ed. Nov. 18, 1971) (public remarks of William H. Rehnquist).

stituted Court[38] approving the positions of Oregon and Louisiana would not be totally unexpected. The essence of our criminal justice system hinges on a verdict of guilty by the entire jury based on proof beyond any reasonable doubt. Therefore, regardless of the outcome of *Apodaca*, this writer maintains that in criminal trials, the prosecution must not only prove guilt beyond a reasonable doubt to the jury as a whole, but must make that showing to each individual juror. If *any* juror does not believe that the defendant is guilty, a verdict of guilty cannot be rendered, and rather than convict a defendant when such doubt exists, a retrial should be ordered. Any other standard would lessen the responsibility placed on the prosecution for a conviction by the burden of proof required, and the presumption of innocence would be fatally weakened. It is therefore submitted that the unanimity rule for criminal jury verdicts is not merely an historical antique, but is a necessity for a fair trial.

RAYMOND M. SEIDLER

WILL CONTESTS: THE SHIFTING BURDENS OF PROOF

Petitioners were lineal descendants, who had not been included in their mother's will. They contested probate of the will on the grounds that the testamentary instrument had been obtained as a result of the exercise of undue influence by their sister, the sole beneficiary. The county judge found that a "confidential relationship" existed between mother and daughter and that the daughter actively procured the will. Consequently, the judge ruled that a presumption of undue influence arose and that the burden of proof shifted to the daughter, requiring her to prove that there was no undue influence. The court then found that the daughter's evidentiary showing was insufficient to carry the burden of proof necessary to rebut the presumption and refused to admit the will to probate. The District Court of Appeal, Fourth District, reversed the county judge and held that the raising of a presumption of undue influence did not shift the burden of proof to the proponent of the will. According to the Fourth District, the daughter was only required to introduce "credible evidence" to rebut the presumption; once such evidence was introduced, the presumption and the persuasiveness of its supporting evidence disappeared. Having determined that the presumption failed and after reviewing the other remaining evidence in the record, the court ruled that there was insufficient evidence to support a finding of undue influence as a matter of law.[1] On certiorari, the Supreme Court of Florida

38. At the time of the writing of this Note, Mr. Justice Harlan and the late Mr. Justice Black announced their resignations to the Supreme Court, and since that time President Nixon has appointed two new Justices to the Court including William Rehnquist.

1. *In re* Carpenter, 239 So.2d 506 (Fla. 4th Dist. 1970).