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Supreme Court Decisions

In Criminal Jury Trials: Six Jurors is the Minimum

On March 21, 1978, the Supreme Court ruled unanimously that in criminal cases a trial with less than six jurors is unconstitutional. In *Ballew v. Georgia*, 435 U.S. 223 (1978), the Court agreed that the defendant's obscenity conviction by a five person jury deprived him of his right to trial by jury guaranteed by the sixth and fourteenth amendments.

In November of 1973, Claude Ballew, manager of the Paris Art Adult Theatre, exhibited the motion picture film entitled "Behined The Green Door". Subsequently, Ballew was charged with two counts of distributing obscene materials in violation of Ga. Code §26-2101 (1972). Pursuant to the Georgia Constitution[1] which prescribed a minimum of five jurors for all courts except superior courts, Ballew was convicted on both counts by a five person jury. On appeal, the Court of Appeals of Georgia rejected Ballew's contention that a trial before a jury of less than six persons was unconstitutional (*Ballew v. State*, 138 Ga. App. 530, 227 S.E. 2d 65, 69 (1976), and added that it was bound by *Sanders v. State*, 234 Ga. 586, 216 S.E. 2d 838 (1975), *cert. denied* 424 U.S. 931 (1976), in which the Supreme Court of Georgia upheld the constitutionality of the five person jury. On certiorari, the United States Supreme Court deliberated the sole issue of "whether a state criminal trial to a jury of only five persons deprives the accused of the right to trial by jury guaranteed to him by the sixth and fourteenth amendments." *Ballew v. Georgia*, 435 U.S. 223, 224 (1978).

THE SIXTH AMENDMENT

Mr. Justice Blackmun announced the principal opinion of the court and was joined by Mr. Justice Stevens. Mr. Justice Blackmun noted that the sixth amendment was made applicable to the states through the fourteenth amendment in *Duncan v. Louisiana*, 391 U.S. 145 (1968), because a "trial by jury in criminal cases is fundamental to the American scheme of justice." *Id.* at 149. In *Duncan*, the Court emphasized that the salient purpose of the right to a jury trial is to prevent oppression by the Government (*Id.* at 155) and that this can be achieved by having the community participate in the determinations of guilt.

The issue of how many jurors are mandated by the sixth amendment was confronted by the Court in *Williams v. Florida*, 399 U.S. 78 (1970). In *Williams*, the Supreme Court ruled that while common law juries were composed of a fixed number of twelve persons, this feature "appears to have been a historical accident unrelated to the great purpose which gave rise to the jury in the first place." *Id.* at 89-90. Therefore, the court held that a twelve member jury is not an indispensable component of the sixth amendment. The sixth amendment requires that a jury be "large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community." *Id.* at 100. In sum, the Court ruled that a six person jury passed constitutional muster but refrained from expressing judgment on juries with less than six jurors.

RECENT EMPIRICAL DATA

By 1970, empirical research evaluating jury performance was exiguous. However, between 1970 and 1977 numerous scholarly studies of juries and effect of their size upon their verdicts were generated.[2] Mr. Justice Blackmun commented that the studies "[raised] significant questions about the wisdom and constitutionality of a reduction below six." 435 U.S. at 232. For example, recent empirical data indicate that as juries decrease in size, the less likely they are to foster effective group deliberation. Likewise, statistical studies reveal that "the risk of convicting an innocent person. . .rises as the size of the jury diminishes. Because the risk of not convicting a guilty person . . .increases with the size of the panel, an optimal jury can be selected as a function of the interaction between the two risks." *Id.* at 234. Also, progressively smaller juries hinder the representation of minority viewpoints of the community. Concomitantly, "if the smaller and smaller juries will lack consistency, as the cited studies suggest, then the common sense of the community will not be applied equally in like cases." *Id.* at 242.

Thus, after surveying a host of scholarly studies, Mr. Justice Blackmun concluded that "the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members." 435 U.S. at 239. The contention that the utilization of juries with less than six members saves court time and money was not of sufficient significance to offset the substantial threat to sixth and fourteenth amendment guarantees.

AVOIDING STATISTICAL STUDIES

While all nine justices agreed that a five person jury was too

[1]GA. CONST. art. 6, §16¶ 1, *codified as* GA. CODE §2.5101 (1973).

[2]E.g., Note, *Six-Member and Twelve-Member Juries: An Empirical Study of Trial Results*, 6 U. MICH. J. L. REFORM 671 (1973); Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 MICH. L. REV. 643 (1975); Zeisel and Diamond, *"Convincing Empirical Evidence" on the Six Member Jury*, 41 U. CHI. L. REV. 281 (1974); Bogue and Fritz, *The Six Man Jury*, 17 S. DAK. L. REV. 285 (1972).

small to satisfy the sixth and fourteenth amendments' guarantee of a right to trial by jury, the remaining seven justices declined to base their decisions on incipient social science data. Mr. Justice White concurred in the judgment because he agreed that a jury of less than six persons would fail to represent the sense of the community and thus fail to achieve a fair cross-section of the community. Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, concurred in the judgment but noted that Justice Blackmun's heavy reliance on numerology was unwarranted. Mr. Justice Brennan, joined by Mr. Justice Stewart and Mr. Justice Marshall, argued that while the sixth and fourteenth amendments mandate juries in criminal cases with more than five members, Ballew should not be subjected to a new trial since the Georgia law was "overbroad and therefore facially unconstitutional." *Id.*, at 246.

In conclusion, the Court felt that juries with six or more members represent a fair cross-section of the community, promote unbiased decision-making, and thus safeguard the constitutional guarantees of the sixth and fourteenth amendments.

In passing it should be mentioned that in Maryland, the Maryland Declaration of Rights[3] grants to the accused the right to juror unanimity in criminal trials. However, the defendant, with the court's consent and the prosecutor's consent, may waive unanimity.[4] Concomitantly, Maryland Rule 751 states that in criminal trials the parties may stipulate to a jury of less than twelve members. Although the Supreme Court has sanctioned less than unanimous verdicts with twelve member juries, the Court will eventually have to address the issue of unanimity for juries with less than twelve members.

—J. Michael Dougherty, Jr.

Photo by J.J.R.

[3]MD. DEC. OF RIGHTS art. 21.

[4]State v. McKay, 280 Md. 558, 375 A. 2d 228 (1977). *See*, 7 U. BALT. L. REV. 130 (1977).

The Press v. The Prosecution

Constitutional struggle between the government and the press is not a novel phenomenon. The interests of the two often conflict and as a result of a recent Supreme Court decision, the friction seems likely to continue. In *Zurcher v. Stanford Daily*, 98 S. Ct. 1970 (1978), the Justices were confronted with the question of whether the government, pursuant to a search warrant, may constitutionally seize evidence from a newspaper when the paper is not suspected of criminal activity.

The Supreme Court decided that a newspaper unsuspected of involvement in a crime cannot automatically and absolutely claim immunity from a search warrant for evidence related to that same crime. By a vote of 5-3, Justice Brennan not participating, the Court held that when a place to be searched is occupied by a person not then a suspect, a warrant to search for evidence reasonably believed to be present can be issued despite the absence of unusual circumstances. The essential element is the reasonable cause to believe that the objects to be sought are indeed present on the premises into which entry is made.

This decision affirmed *Stanford Daily v. Zurcher*, 550 F2d. 464 (9th Cir. 1977), which required the existence of probable cause to believe that the owner of the property to be searched would have disregarded the court order not to remove or destroy evidence as a basis for issuance of the search warrant. Both the Court of Appeals and the District Court, 353 F.Supp. 124 (N.D. Cal. 1972) emphasized the absence of suspected criminal involvement on the part of the newspaper reporter. In such a case, probable cause to think that evidence of a crime is located on the property is not alone sufficient to justify the issuance of a warrant; a threat concerning the removal or destruction of evidence must be clearly shown.

On Friday, April 9, 1971, a student demonstration was held at the Stanford University Hospital and culminated in the demonstrators' forcible occupation of the administrative offices. The police departments of the City of Palo Alto and Santa Clara County were called to remove the students. After several attempts were made to persuade the demonstrators to leave peacefully, the police broke through one of the barricades that had been erected by the protestors at both the east and west ends of the corridor adjacent to the administrative offices. As the police moved through the west end, the protestors emerged from the east end with sticks and attacked the police stationed there. All nine of the policemen were injured.

A photographer for the *Stanford Daily News* was also located at the east end of the corridor. On April 11, the *Stanford Daily* carried a story about the demonstration, complete with pictures and a byline of a *Daily* staff member. On April 12, the District Attorney for Santa Clara County secured a warrant for the immediate search of the *Daily* offices for negatives, film and pictures of the April 9th event. The District Attorney claimed that he had justifiable, reasonable and probable cause to believe that he could locate evidence relevant to the identity of the individuals who attacked the Hospital's administrative offices. The search included the photo lab, filing cabinets, desks and waste paper baskets but excluded locked drawers and rooms. Notes were read and photos were found but nothing was removed.

The *Stanford Daily News* argued that the actions nevertheless threatened its ability to gather, analyze, and disseminate news. Specifically, the *Daily* alleged that the search