BALLEW v. GEORGIA
SUPREME COURT OF THE UNITED STATES
435 U.S. 223
March 21, 1978
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OPINION: Mr. Justice BLACKMUN/STEVENS…This case presents the issue whether a **state** criminal trial to a jury of only **five persons** deprives the accused of the right to trial by jury guaranteed by him by the Sixth and Fourteenth Amendments. Our resolution of the issue requires an application of principles enunciated in *Williams v. Florida*[1], where the use of a six-person jury in a state criminal trial was upheld against similar constitu-tional attack.

In November 1973 petitioner Claude Davis Ballew was the manager of the Paris Adult Theatre at 320 Peachtree Street, Atlanta, Ga. On November 9 two investigators from the Fulton County Solicitor General's office viewed at the theater a motion picture film entitled "Behind the Green Door." After they had seen the film, they obtained a warrant for its seizure, returned to the theater, viewed the film once again, and seized it. Petitioner and a cashier were arrested. Investigators returned to the theater on November 26, viewed the film in its entirety, secured still another warrant, and on November 27 once again viewed the motion picture and seized a second copy of the film.

[1] Csse 6A-J-4 on this website.

On September 14, 1974, petitioner was charged in a two-count misdemeanor accusation with "distributing obscene materials in violation of Georgia Code Section 26-2101 in that the said accused did, knowing the obscene nature thereof, exhibit a motion picture film entitled 'Behind the Green Door' that contained obscene and indecent scenes…"

Petitioner was brought to trial in the Criminal Court of Fulton County. **After a jury of 5 persons had been selected and sworn, petitioner moved that the court impanel a jury of 12 persons.** That court, however, tried its misdemeanor cases before juries of five persons pursuant to [a Georgia statute.] Petitioner contended that for an obscenity trial, a jury of only five was constitutionally inadequate to assess the contemporary standards of the community. He also argued that the Sixth and Fourteenth Amendments required a jury of at least six members in criminal cases.

The motion for a 12-person jury was overruled, and the trial went on to its conclusion before the 5-person jury that had been impaneled. At the conclusion of the trial, the jury deliberated for 38 minutes and returned a verdict of guilty on both counts of the accusation. The court imposed a sentence of one year and a $1,000 fine on each count, the periods of incarceration to run concurrently and to be suspended upon payment of the fines. After a subsequent hearing, the court denied an amended motion for a new trial.

Petitioner took an appeal to the Court of Appeals of the State of Georgia. There he argued…[amongst other matters that] the use of the five-member jury deprived him of his Sixth and Fourteenth Amendment right to a trial by jury…In its consideration of the 5-person-jury issue, the Court noted that *Williams v. Florida* had not established a constitutional minimum number of jurors. Absent a holding by this Court that a five-person jury was constitutionally inadequate, the Court of Appeals considered itself bound by *Sanders v. State* (a state case where the U.S. Supreme Court denied certiorari), where the constitutionality of the five-person jury had been upheld…

> This is a good time to point out that a denial of certiorari by the United States Supreme Court does not necessarily mean that a majority of the Justices agree with the outcome of a case. Perhaps they want to see a better set of facts in another case before accepting the issue. Or, perhaps they are simply overwhelmed with requests for certiorari at that time, etc., etc.

The Supreme Court of Georgia denied certiorari…We granted certiorari…[and] hold that the five-member jury does not satisfy the jury trial guarantee of the Sixth Amendment, as applied to the States through the Fourteenth…

The Fourteenth Amendment guarantees the right of trial by jury in all state nonpetty criminal cases. *Duncan v. Louisiana*[2]…The right attaches in the present case because the maximum penalty for violating §26-2101, as it existed at the time of the alleged offenses, exceeded six months' imprisonment…

[2] Case 6A-J-3 on this website.

When the Court in *Williams v. Florida* permitted the reduction in jury size—or, to put it another way, when it held that a jury of six was not unconstitutional—it expressly reserved ruling on the issue whether a number smaller than six passed constitutional scrutiny. The Court refused to speculate when this so-called "slippery slope" would become too steep. We face now, however, the two-fold question whether a further reduction in the size of the state criminal trial jury does make the grade too dangerous, that is, whether it inhibits the functioning of the jury as an institution to a significant degree, and, if so, whether any state interest counterbalances and justifies the disruption so as to preserve its constitutionality.

Williams v. Florida and *Colgrove v. Battin* (where the Court held that a jury of six members did not violate the Seventh Amendment right to a jury trial in a **civil case**), generated a quantity of scholarly work on jury size. These writings do not draw or identify a bright line below which the number of jurors would not be able to function as required by the standards enunciated in *Williams*. On the other hand, they raise significant questions about the wisdom and constitutionality of a reduction below six. We examine these concerns:

First, recent empirical data suggest that progressively smaller juries are less likely to foster effective group deliberation. At some point, this decline leads to inaccurate fact-finding and incorrect application of the common sense of the community to the facts. Generally, a positive correlation exists between group size and the quality of both group performance and group productivity…Several are particularly applicable in the jury setting. The smaller the group, the less likely are members to make critical contributions necessary for the solution of a given problem. Because most juries are not permitted to take notes, memory is important for accurate jury deliberations. As juries decrease in size, then, they are less likely to have members who remember each of the important pieces of evidence or argument. Furthermore, the smaller the group, the less likely it is to overcome the biases of its members to obtain an accurate result. When individual and group decisionmaking were compared, it was seen that groups performed better because prejudices of individuals were frequently counterbalanced, and objectivity resulted. Groups also exhibited increased motivation and self-criticism. All these advantages, except, perhaps, self-motivation, tend to diminish as the size of the group diminishes. Because juries frequently face complex problems laden with value choices, the benefits are important and should be retained. In particular, the counterbalancing of various biases is critical to the accurate application of the common sense of the community to the facts of any given case.

Second, the data now raise doubts about the accuracy of the results achieved by smaller and smaller panels. Statistical studies suggest that the risk of convicting an innocent person (Type I error) rises as the size of the jury diminishes. Because the risk of not convicting a guilty person (Type II error) increases with the size of the panel, an optimal jury size can be selected as a function of the interaction between the two risks. Nagel and Neef concluded that the optimal size, for the purpose of minimizing errors, should vary with the importance attached to the two types of mistakes. After weighing Type I error as 10 times more significant than Type II, perhaps not an unreasonable assumption, they

concluded that the optimal jury size was between six and eight. As the size diminished to five and below, the weighted sum of errors increased because of the enlarging risk of the conviction of innocent defendants…

Third, the data suggest that the verdicts of jury deliberation in criminal cases will vary as juries become smaller, and that the variance amounts to an imbalance to the detriment of one side, the defense. Both Lempert and Zeisel found that the number of hung juries would diminish as the panels decreased in size. Zeisel said that the number would be cut in half—from 5% to 2.4% with a decrease from 12 to 6 members. Both studies emphasized that juries in criminal cases generally hang with only one, or more likely two jurors remaining unconvinced of guilt. Also, group theory suggests that a person in the minority will adhere to his position more frequently when he has at least one other person supporting his argument…

Fourth, what has just been said about the presence of minority viewpoint as juries decrease in size foretells problems not only for jury decisionmaking, but also for the representation of minority groups in the community. The Court repeatedly has held that meaningful community participation cannot be attained with the exclusion of minorities or other identifiable groups from jury service…The exclusion of elements of the community from participation "contravenes the very idea of a jury…composed of 'the peers or equals of the person whose rights it is selected or summoned to determine.'" *Carter v. Jury Comm'n*. Although the Court in *Williams* concluded that the six-person jury did not fail to represent adequately a cross-section of the community, the opportunity for meaningful and appropriate representation does decrease with the size of the panels. Thus, if a minority group constitutes 10% of the community, 53.1% of randomly selected six-member juries could be expected to have no minority representative among their members, and 89% not to have two. Further reduction in size will erect additional barriers to representation.

Fifth, several authors have identified in jury research methodological problems tending to mask differences in the operation of smaller and larger juries. For example, because the judicial system handles so many clear cases, decisionmakers will reach similar results through similar analyses most of the time. One study concluded that smaller and larger juries could disagree in their verdicts in no more than 14% of the cases. Disparities, therefore, appear in only small percentages. Nationwide, however, these small percentages will represent a large number of cases. And it is with respect to those cases that the jury trial right has its greatest value. When the case is close, and the guilt or innocence of the defendant is not readily apparent, a properly functioning jury system will insure evaluation by the sense of the community and will also tend to insure accurate factfinding…

While we adhere to, and reaffirm our holding in *Williams v. Florida*, these studies, most of which have been made since *Williams* was decided in 1970, lead us to conclude 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. **We readily admit that we do not pretend to discern a clear line between six members and five.** But the

assembled data raise substantial doubt about the reliability and appropriate representation of panels smaller than six. Because of the fundamental importance of the jury trial to the American system of criminal justice, any further reduction that promotes inaccurate and possibly biased decisionmaking, that causes untoward differences in verdicts, and that prevents juries from truly representing their communities, attains constitutional significance.

Georgia here presents no persuasive argument that a reduction to five does not offend important Sixth Amendment interests. First, its reliance on *Johnson v. Louisiana* for the proposition that the Court previously has approved the five-person jury is misplaced. In *Johnson* the petitioner challenged the Louisiana statute that permitted felony convictions on less-than-unanimous verdicts. The prosecution had to garner only nine votes of the 12-member jury to convict in a felony trial. The Court held that the statute did not violate the due process guarantee by diluting the reasonable-doubt standard. The only discussion of the five-person panels, which heard less serious offenses, was with respect to the petitioner's equal protection challenge. He contended that requiring only nine members of a 12-person panel to convict in a felony case was a deprival of equal protection when a unanimous verdict was required from the 5-member panel used in a misdemeanor trial. The Court held merely that the classification was not invidious. Because the issue of the constitutionality of the five-member jury was not then before the Court, it did not rule upon it.

Second, Georgia argues that its use of five-member juries does not violate the Sixth and Fourteenth Amendments because they are used only in misdemeanor cases. If six persons may constitutionally assess the felony charge in *Williams*, the State reasons, five persons should be a constitutionally adequate number for a misdemeanor trial. The problem with this argument is that the purpose and functions of the jury do not vary significantly with the importance of the crime…In the present case the possible deprivation of liberty is substantial. The State charged petitioner with misdemeanors under Ga.Code Ann. §26-2101, and he has been given concurrent sentences of imprisonment, each for one year, and fines totaling $2,000 have been imposed. We cannot conclude that there is less need for the imposition and the direction of the sense of the community in this case than when the State has chosen to label an offense a felony. The need for an effective jury here must be judged by the same standards announced and applied in *Williams v. Florida*.

Third, the retention by Georgia of the unanimity requirement does not solve the Sixth and Fourteenth Amendment problem. Our concern has to do with the ability of the smaller group to perform the functions mandated by the Amendments. That a five-person jury may return a unanimous decision does not speak to the questions whether the group engaged in meaningful deliberation, could remember all the important facts and arguments, and truly represented the sense of the entire community. Despite the presence of the unanimity requirement, then, we cannot conclude that "the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him is equally well served" by the five-person panel. *Apodaca v. Oregon*.

Fourth, Georgia submits that the five-person jury adequately represents the community because there is no arbitrary exclusion of any particular class. We agree that it has not been demonstrated that the Georgia system violates the Equal Protection Clause by discriminating on the basis of race or some other improper classification. But the data outlined above raise substantial doubt about the ability of juries truly to represent the community as membership decreases below six…

Fifth, the empirical data cited by Georgia do not relieve our doubts. The State relies on the Saks study for the proposition that a decline in the number of jurors will not affect the aggregate number of convictions or hung juries. This conclusion, however, is only one of several in the Saks study; that study eventually concludes:

> "Larger juries (twelve) are preferable to smaller juries (six). They produce longer deliberations, more communication, far better community representation, and, possibly, greater verdict reliability (consistency)."

Far from relieving our concerns, then, the Saks study supports the conclusion that further reduction in jury size threatens Sixth and Fourteenth Amendment interests…

With the reduction in the number of jurors below six creating a substantial threat to Sixth and Fourteenth Amendment guarantees, we must consider whether any interest of the State justifies the reduction. We find no significant state advantage in reducing the number of jurors from six to five…

Petitioner, therefore, has established that his trial on criminal charges before a five-member jury deprived him of the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion…

CONCURRENCE: Mr. Justice STEVENS…[Not Provided.]

CONCURRENCE: Mr. Justice WHITE…[Not Provided.]

CONCURRENCE: Mr. Justice POWELL/CHIEF JUSTICE BURGER/REHNQUIST …[Not Provided.]

ADDITIONAL OPINION: Mr. Justice BRENNAN/STEWART/MARSHALL…[Not provided as not relevant to this issue.]