10-1977

Ballew v. Georgia

Lewis F. Powell Jr.

gc/lab 1/14/77

PRELIMINARY MEMORANDUM

January 21, 1977 Conference
List 1, Sheet 3

No. 76-761 Cert to Ga Ct of App
(Webb, Deen, Quillan)

BALLEW

v.

GEORGIA State/Criminal Timely (by extension)

1. SUMMARY: The issues in this case are (1) whether a jury of five persons satisfies the Sixth/Fourteenth Amendments right of an accused in a criminal prosecution to trial by jury; (2) whether the jury instruction on scienter failed to meet the minimum constitutional standard enunciated in Hamling; and (3) whether the motion picture film "Behind the Green Door" is protected expression under the First/Fourteenth Amendments.

2. FACTS AND DECISION BELOW: Petr was convicted on two counts of distributing obscene material in violation of the Georgia obscenity statute for two exhibitions of the movie "Behind the Green Door." Prior to trial petr moved for a 12 person jury, contending that five person juries provided in the Criminal Court for Fulton County are unconstitutional. The motions were denied, and petr was found guilty by a jury on both counts. On appeal, the Georgia Ct. of App. affirmed. The Georgia Sup. Ct. denied a petn for cert.

3. CONTENTIONS: Petr first contends that the case presents for review the question expressly reserved in Williams v. Florida, 399 U.S. 78, 91 n.28: "We have no occasion in this case to determine what minimum number can still constitute a 'jury', but we do not doubt that 6 is above that minimum." Petr cites statistical studies which indicate that smaller juries are less representative of minority positions. The state argues that in light of the fact that jury verdicts in Georgia must be unanimous, a 5 person jury is constitutionally adequate.

Petr's second contention concerns the jury instruction on scienter. The jury was instructed as follows:

> "The word 'knowing' as used herein shall be deemed to be either actual or constructive knowledge of the obscene content of the subject matter. And a person has constructive knowledge of the obscene content if he has the knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.

Petr cites Hamling v. United States, 418 U.S. 87 (1974) for the proposition that the constitution requires a finding of actual rather than constructive knowledge. The state responds that

the constitution is satisfied if the defendant was aware of the character of the material, citing Mishkin v. New York, 383 U.S. 502 (1966).

Petr's third contention is that the film is not obscene. Petr asks that the Court view the film to determine the obscenity vel non of the film. After all, this is a "nationally acclaimed motion picture film" and the "conclusion is inescapable" that it constitutes protected speech. The state quotes from the opinion of the Ga. Ct. of App. describing the movie, and the state agrees with that court that this is hard core pornography.

4. DISCUSSION: As to the 5 person jury issue, petr is quite right that the question was left open in Williams. This same issue was raised in a cert petn from Georgia last Term, Sanders v. Georgia, No. 75-707, cert denied, 424 U.S. 931 (1976). It appears that the Court is not interested at this time in delineating the point at which one gets off the "slippery slope." The jury instruction issue is troublesome insofar as the jury was instructed that the scienter requirement is satisfied if one should have known the content of the movie.

I have it on fairly good authority that with respect to the obscenity of the film, it is not as pure as the driven [ivory] snow.

There is a response.

1/14/77 Comey Op in petn.

JAN 24 1977

Court CA - Ga.

Argued ....., 19...

Submitted ....., 19...

Voted on ....., 19...

Assigned ....., 19...

Announced ....., 19...

No. 76-761

CLAUDE D. BALLEW, Petitioner

vs.

GEORGIA

12/3/76 - Cert.

Stevens & Rehnquist grant cert. on 5 man jury issue. (We have approved 6 & we denied cert. last term in which 5 man jury was involved)

Grant

Unlimited

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Stevens, J.		✓											
Rehnquist, J.			✓										
Powell, J.			✓										
Blackmun, J.			✓										
Marshall, J.		✓											
White, J.		✓	✓										
Stewart, J.		✓											
Brennan, J.		✓											
Burger, Ch. J.			✓										

2

LFP/vsl
8/3/77

No. 76-761, Ballew v. Georgia

This is dictated after reviewing the briefs in the above case. It is merely an "aid to memory" rather than an analysis. Any view expressed or implied is quite tentative.

* * * * *

This is an obscenity case on certiorari to the Georgia Court of Appeals. Three issues are presented:

1. Five Person Jury. In Georgia, in misdemeanor cases where the maximum imprisonment is twelve months, defendants are tried by a five-person jury, selected from a panel of twelve prospective jurors found qualified to serve. The defendant has four preemptory challenges, the state three, with defendant having the benefit of the first and last challenges.

Although the Court left this issue open in Williams v. Florida (holding that a six-person jury was constitutional), it seems to me that the language in and rationale of Williams (see

399 U.S. 78 at 92 fn.28), and also of Johnson v. Louisiana, sustaining the validity of the five-person jury. Presumably there is a minimum number, and five appears to be marginal. Yet, for misdemeanor trials it would be difficult to hold it unconstitutional. As pointed out in Williams, it is difficult to say that a small number on the jury benefits one party more than the other.

2. The Issue of "Scienter". Section 26-2101 of the Georgia Code, setting forth the offense of exhibiting obscene materials, provides that the word "knowingly" shall be deemed to be actual or constructive knowledge of the obscene contents of the subject matter, and

> a person has constructive knowledge of the obscene content if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the materials.

Petitioner contends that an instruction based on this statute deprived him of due process of law in that actual rather than constructive knowledge of the obscene content must be proved. Petitioner quotes from Hamling, 418 U.S. 87, at 123, language which states that it is sufficient if the defendant "had knowledge of the contents of the materials he distributes, and that he knew the character and nature of the materials."

There was no evidence in this case that petitioner had ever viewed a film. But the Georgia attorney general's brief (p. 10) states that petitioner was the manager of the theatre; that he was twice arrested for the exhibition of the film (Behind The Green Door);

and that on the day before the second arrest, petitioner -- after recognizing the police officer -- reluctantly sold the officer an admission ticket. Moreover, a sign was posted on the theatre identifying the film as "X-rated and nudity, etc., if under age please do not enter."

I think it inherently incredible that the theatre manager was not familiar with the contents of this film. Possibly the evidence in this case was insufficient to get to the jury, and if the transcript of the evidence is at the Court, I might take a look at it prior to the argument. Otherwise, I am inclined to think that the Georgia statute, certainly as applied in this case, is valid. If the state had to establish that a defendant had personally viewed obscene material, defendants in these cases could simply deny that they had ever viewed or read the material.

3. The Film is Not Obscene. Petitioner argues, finally, that "'Behind the Green Door' is an artistic work of national acclaim which may not . . . be held obscene."

The Georgia court did not join in this "acclaim." Rather, the film -- after being viewed by the court -- was described as follows:

> The film, considered as a whole, and applying contemporary community standards, predominantly appeals to the prurient interest. It is without redeeming social value, and it is a shameful and morbid exhibition of nudity with particular and all-encompassing emphasis on sexual acts. It goes substantially beyond customary limits of candor in representing and portraying nudity and sex. The film presents patently offensive exhibitions and representations

> of ultimate sexual acts and manipulations, normal and perverted. It shows unabashedly offensive and lewd views of the genitals of both male and female participants, and is replete with portrayals of individual and group acts of masturbation, cunnilingus, fellatio fellatio and sexual intercourse. It is degrading to sex. Except for the opening and a few other scenes toward the conclusion, it is rank, hard core pornography, and each exhibition in the theatre was "a public portrayal of hard core sexual conduct for its own sake, and [presumably] for the ensuing commercial gain." Miller v. California, 413 U.S. 15, 35 supra. The film "Behind the Green Door" is obscene as a matter of constitutional law and fact, and is unprotected by the First and Fourteenth Amendments. Miller v. California, 413 U.S. 15, 23 supra; see also, Liles v. Oregon, 543 P.2d 698, 44 LW 3623 (cert. den. by United States Supreme Court May 3, 1976, 75-983).

* * * * *

Comment

Having read the briefs and the quite skimpy printed appendix, as well as the relatively unenlightening opinion of the Court of Appeals of Georgia, I remain of the view that we never should have taken this case. I could dismiss as improvidently granted if the film is as described by the Georgia court. My basic position on obscenity is that stated by Justice Brennan, and adhered to at all times by a majority of this Court, namely: there are no First Amendment values in obscenity. I do recognize the serious legal question -- argued primarily by Justice Stevens, that obscenity statutes are necessarily vague. In almost any other context, I

possibly could agree with the view that the degree of vagueness attains constitutional proportions. But persons engaged in the commercialization of obscene materials knowingly and cheerfully assume the risk of prosecution. The purveying of pornography is major business, totaling -- I have read -- well in excess of a billion dollars annually. The persons who are prosecuted (with rare exception) are not innocent or naive citizens. They are ultra-sophisticated, callous individuals who voluntarily assume the risk of prosecution in the pursuit of the large profits that are being made in an activity that is generally recognized to have no redeeming social value whatever.

rc/ss 10/19/77

BENCH MEMO

TO: Mr. Justice Powell DATE: Oct. 19, 1977

FROM: Bob Comfort

No. 76-761 Ballew v. Georgia

This case raises three issues: (1) the constitutionality of Fulton County's use of five-person juries in misdemeanor trials; (2) the propriety of the trial court's instruction regarding Petr's "constructive knowledge" of the film's content; and (3) the obscenity vel non of "Behind the Green Door." Unless the Court is willing to carve out a special exception for obscenity cases, it would be hard to call a five-person jury constitutionally different from the six-person jury held valid in Williams v. Florida, 399 U.S. 78 (1970). The second question seems much closer; in this case, it is beyond belief that Petr had no actual knowledge of what was in the film, but explicit approval of the trial court's instruction might have a chilling effect. On the third issue, I tend toward the view that this Court has set itself a Sisyphean task in attempting to decide where protected art shades into unprotected obscenity. Others have made that argument more articulately than I, however, so that I would not expect it to carry the day. If the Miller standards are to apply, the film probably would be held to fall under the Miller ban.

I

Five Person Jury

There is not much to go on in this area except Williams v. Florida, supra. Nothing in that case suggests that a jury of five persons generally is inadequate to perform the function that is the jury's raison d'etre: to serve as "a body of one's peers to determine guilt or innocence as a safeguard against arbitrary law enforcement." Id. at 87. Williams offers no constitutional standard for evaluating the five-person jury's ability - vis-a-vis a six-person jury - "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. Of course, it is statistically inevitable that a smaller jury will be less likely to contain members with minority characteristics or viewpoints. But Williams provides no guidance as to the constitutional significance of any particular decrease in such statistical likelihood. Although this question was not directly presented in Johnson v. Louisiana, 406 U.S. 356, 364-365 (1972), that case betrays no discomfort with the five-person jury system implicated in Johnson's equal protection attack. Also, Respondent makes the logic-chopping point that the Court in Williams declared that six was above the minimum acceptable number; therefore, five cannot be below the minimum, since there is no number in

between. Logically, this is correct, but that language was not part of the holding.

The various statistical studies are not very helpful. See Lempert, Uncovering "Nondiscernible" Differences: Empirical Research and the Jury Size Cases, 73 Mich. L. Rev. 643, 645-647 (1975). All are based ultimately on unproven assumptions, and most display design defects. Your decision on this question boils down to your instincts as to the number five. It will be difficult to write a reasoned opinion coming out either way, but explaining the constitutional difference between five and six appears more difficult than simply taking the Williams approach and saying five is marginal but acceptable.

Petitioner's only strong argument on this issue is that the general theory of Williams ought not to apply in the obscenity area. Williams rests on the assumption that, while a smaller jury is less likely to include persons with minority characteristics and beliefs, in the long run the occasions in which the small number cuts against the defendant will be balanced by the occasions in which he benefits. 399 U.S. at 101. In the obscenity area, however, we are not so much interested in the won-lost columns of the prosecution and defense; rather, we are interested in gathering juries truly representative of the communitys' standards. Otherwise, behavior that would command the approval of a majority might be chilled. It is a statistical fact that smaller juries are

less likely to display a majority of members holding a given majority view than are larger juries. Lempert, supra at 682-683. If we are particularly interested in increasing the chances of having the majority view in the majority on the jury, then each decrease in size frustrates our intent. Also, if we are interested in having some representation of the community's minority views on the jury, smaller size lessens that possibility, too. Id. at 668.

If you think that the number five is constitutionally acceptable in general, however, adherence to this view of obscenity as unique would require the creation of a special exception. Perhaps larger juries could be required in cases, like obscenity, where a public right to avoid a First Amendment chill is involved, in addition to the private rights of the criminal defendant. This exception could be phrased in terms of a peculiar blend of First and Sixth Amendment jurisprudence. If that exception held six-person juries acceptable, however, the statistical gains in community representation might not justify the adumbration of the special exception. If the exception reverted all the way to twelve (or even some intermediate number) doubt would be cast on Williams, and opportunities for challenging numbers between six and twelve in various categories of cases might arise. Moreover, creation of special rights for defendants in so-called "First Amendment" cases seems a bit unusual.

Note also that the Fulton County jury may try only misdemeanors. The six-person jury in Williams was trying a felony with the possibility of life imprisonment. If the Court's willingness to approve the five-person jury is conditioned on its limitation to misdemeanors, then again some distinction between five and six will have to be drawn. Again, Williams offers precious little help in deciding when the Court ought to get off the slippery slope. / True

II

Scienter

Section 26-2101 of the Georgia Code establishes the crime of knowing distribution of obscene materials. §2101(a) deems "knowing" "to be either actual or constructive knowledge of the obscene contents of the subject-matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material." The trial court's instructions tracked the statute. Petr contends that this standard chills free expression.

On the facts of this case, the suggestion that Petitioner did not have actual knowledge of the film's contents strains one's credulity. Thus, application of §26-2101(a) probably worked no actual harm to Petitioner. The constructive knowledge standard, however, is not clearly content-related. Instead, it seems related to the circumstances of the distribution. In that respect it may

9+ does indeed

be vague and may have an undesirable chilling effect.

The sorts of facts that give rise to "notice" under §2101(a) are not specified. Petitioner argues that the cautious bookseller or movie exhibitor will not display meritorious items with suggestive titles until he has read or viewed them himself, since a jury would find that a suggestive title - e.g., "Kinflicks," Simone de Beauvoir's "The Second Sex," Henry Miller's "Sexus", "Carnal Knowledge" - put the seller on "notice" if an item turns out to have been obscene. This is a form of the self-censorship the Court viewed as a danger in Smith v. California, 361 U.S. 147 (1959), although the dangers posed by this statute concededly are not as great as those in Smith. Petitioner looks to Hamling v. United States, 418 U.S. 87, 123 (1974), as holding that it "is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the material he distributed." Petitioner concedes that such actual knowledge would not have to derive necessarily from a viewing of the material; the state could prove actual knowledge by circumstantial evidence. Thus, a defendant could not insulate himself from prosecution by refusing to see the movie; the state could show that he must have had a "correct belief" as to the film's contents. ". . . [C]ircumstances may warrant the inference that [a bookseller] was aware of what a book contained, despite his denial." Smith, supra, at 154. Nevertheless, says Petitioner, the state must prove actual awareness.

A similar New York statute was upheld in Ginsburg v. New York, 390 U.S. 629, 643-644 (1968), along the lines suggested by Petitioner. The New York statute defined "knowingly" as having "reason to know" or "a belief or ground for belief which warrants further inspection or inquiry of . . . (i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant . . . ." The Ginsberg Court premised its validation of the statute on a prior interpretation by the New York Court of Appeals, which held that "only those who are in some manner aware of the character of the material they attempt to distribute should be punished. It is not innocent but calculated purveyance of filth which is exorcised. . . ." Actual awareness, then, was required.

Perhaps the Georgia statute is aimed at actual awareness, and the constructive knowledge portion is designed only to permit proof by circumstantial evidence. Respondent does make this argument, but immediately denies that actual knowledge or awareness is necessary, completely misreading Ginsberg. Respondent appears to confuse the requirement of awareness of contents with the non-requirement of knowledge that those contents are legally obscene. Moreover, Respondent never deals with the problem that the statute on its face appears to permit the jury to convict even if it believes that the defendant was not aware of the contents, so long as it finds that defendant had "notice" of some fact that could

have led him to inspect. That is something more than proof of actual awareness by circumstantial evidence.

Nor has the Georgia Supreme Court provided an "actual awareness" gloss similar to the one relied upon in Ginsberg. The state supreme court upheld the statute sub judice in Dyke v. State, 232 Ga. 817, 822 (1974), cert. denied, 421 U.S. 952 (1975):

> We must also reject appellant's contention that the evidence failed to prove scienter or guilty knowledge by him of the nature of the film itself. Under Code Ann. § 26-2101, the applicable test for knowingly exhibiting obscene material is whether the defendant has "knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material." The evidence need not show appellant actually knew the film was legally obscene. See, Rosen v. United States, 161 U.S. 29 (16 SC 434, 40 LE 606)(1896); United States v. Thevis, 484 F.2d 1149 (3)(5th Cir. 1973); and Hamling v. United States, 94 S.C. 2887, supra.

The court emphasizes the lack of a requirement to prove that the defendant knew that the material was legally obscene. One could infer from the structure of the quoted paragraph that the court reads §26-2101 to mean that the notice requirement relates to knowledge of facts that would lead the defendant to believe that the material might be legally obscene. That is, he would have to be aware of the contents - either directly or circumstantially - and know that they contained frontal nudity, explicit depiction of sex acts, etc. Knowledge of those facts would then put him on notice as to the "suspect nature [i.e., possible obscenity] of the material." This interpretation of the statute clearly would be acceptable

under Hamling and Ginsberg. Unfortunately, one has to read a great deal into the quoted section of Dyke to draw out that interpretation.

On its face, the Georgia statute seems to permit conviction in the absence of actual awareness of an item's content. Apparently, no express judicial gloss has narrowed it. The Court has never before upheld such a statute. A holding approving the statute on its face would appear to validate a jury's verdict of guilt in a case where the defendant was not actually aware of an item's specific sexual content, but the jury decided that a suggestive title or cover design should have put him on "notice." Permitting "notice" to relate to facts unconnected with actual content opens the door, at least a bit, to the self-censorship described in Smith v. California.

III

Obscenity vel non

Assuming that the Court reaches this question, it might not be necessary for the Court to view the film. The Georgia Appellate Court viewed it and applied the Miller standards, as elaborated in Jenkins v. Georgia, 418 U.S. 153 (1974). Thus, the court did not remit the legal conclusion of obscenity to the unbridled discretion of the jury. See Jenkins, supra, at 160. In contrast to Jenkins, this film was found to contain lewd exhibitions of the actors' genitals, explicit depicition of ultimate sexual acts, and virtuallly no plot apart from sexual gymnastics. The court concluded that

it was "hard core sexual conduct for its own sake." Jenkins, supra, at 161, quoting Miller, 413 U.S. at 35. So long as the proper standards were applied - Petitioner really does not dispute the court's factual description of the film - this Court may be able to rely on the review of the court below. This Court, of course, did view "Carnal Knowledge" in Jenkins, despite the fact that the Georgia supreme court had seen it. That case may be distinguished, however, on the ground that the state court in Jenkins was unaware of the duty to do more than review for sufficiency of the evidence. Here the state court followed the Jenkins admonition to apply the Miller standards independently.

I did not

On the other hand, if it is conceded that "patent offensiveness" and lack of "artistic value" under the Miller standards are issues of constitutional law (or at least mixed fact and law), it may be difficult for the Court to refuse to review a lower court's conclusion on that point. This has been true in the libel cases, for example. Justice Brennan's concurrence in Jenkins - joined by Justices Stewart and Marshall - puts the problem fairly succinctly:

> After the Court's decision today, there can be no doubt that Miller requires appellate courts - including this Court - to review independently the constitutional fact of obscenity. Moreover, the Court's task is not limited to reviewing a jury finding under part (c) of the Miller test at that "the work, taken as a whole lack[ed] serious literary, artistic, political, or scientific value." 413 U.S., at 24. Miller also requires independent review of a jury's determination under part (b) of the Miller test that "the work depicts or describes,

> in a patently offensive way, sexual conduct specifically defined by the applicable state law.". . .
>
> In order to make the review mandated by Miller, the Court was required to screen the film "Carnal Knowledge" and make an independent determination of obscenity vel non. Following that review the Court holds that "Carnal Knowledge" could not, as a matter of constitutional law, be found to depict sexual conduct in a patently offensive way, and that it is therefore not outside the protection of the First and Fourteenth Amendment because it is obscene." Ante, at 161.
>
> Thus, it is clear that as long as the Miller test remains in effect "one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so." Paris Adult Theatre I v. Slaton, 413 U.S., at 92 (Brennan, J., dissenting).

Although relying on the application of proper standards to a question of law by a lower court may justify a denial of cert, once a case comes here, this Court would seem obligated to review each properly presented question of law.

I have journeyed through the graphic appendix of Amicus. It does appear that the film depicts sex for its own sake. My recollection of the furor about the film is that many commentators thought that it depicted sex in an artful way, but Miller seems to dismiss sex qua sex from the protected category. Moreover, the Georgia Appellate Court found the movie degrading to sex. In any case, apart from depicting sex, little else appears to happen in the movie. Hence, it probably falls under the Miller ban: it lacks serious artistic value (in the sense that it puts over no message other than sex); it contains the elements of

"patent offensiveness"; and the jury and the court below believed it contravened "community standards."

R.C.

ss

76-761 BALLEW v. GEORGIA Argued 11/1/77

Ga. obscenity case.

1. Free person giving. No problem.

2. Obscene nature of film. Grossly obscene on basis of pictures & description of film by Ga. Ct.

3. Facial validity of Ga statute.

One may convicted on absence of "actual knowledge" if he:

> "had knowledge of facts which would put a reasonable and prudent ~~person~~ man on notice as to the suspect nature of the material".

If statute had provide that "constructive notice" ~~would~~ ~~suppose~~ of obscene nature of material could be proved by circumstantial ~~evidence~~ evidence, then would satisfy Jenkins requirements.

Bookstore example

But under Ga statute proof of constructive notice - not of obscene nature but of "suspect nature of material - is sufficient.

This is one step removed from requisite

Clutter (Petr)

Knowledge must be "actual" – not "constructive".

Relies on reasoning of Smith v Calif & on Hamlin – but concedes no case expressly supports position as to "constructive" knowledge

Rhoden (asst Sol Gen of Ga)

Under Ga law, jury verdicts must be unanimous.

Ga law now requires 6 jurors,

Reverse 8-1 (on jury issue)

76-761 BALLEW v. GEORGIA Conf. 11/4/77

The Chief Justice Affirm - or Reverse on jury issue
Conceded that film is obscene.
Statutory language that is troublesome is not in operative part of statute (but it was in instruction to jury). Hamling controls.
Nothing to 5 person jury issue.

x x x

After discussion CJ expressed willingness to join opn. on 6 man jury.

Mr. Justice Brennan Reverse

~~[redacted]~~

In an obscenity case, there must be a jury representative of community. Thus 5 member jury is invalid
Also reverse on dissent in Miller.

Mr. Justice Stewart Reverse

On all issues —
including jury issue.
Jury instruction bad

Mr. Justice White Reverse

5 man jury is not representative of community in any criminal case - But would prefer to say a 6 man jury is necessary in all criminal case.

Mr. Justice Marshall Reverse

Jury invalid.

Instructions also bad.

Mr. Justice Blackmun Affirm (But after discussion - agreed to 6 man jury)

Read Williams as controlling - but much can be said against extending its rationale.

No thing to gather since

Mr. Justice Powell Reverse

I assumed Williams was controlling - but would join four others in holding that six is a minimum number where a Δ is entitled to a jury.

I also would reverse on the instructions.

Other issues are frivolous

Mr. Justice Rehnquist Affirm

But could join an op. requiring 6 man jury.

Mr. Justice Stevens Reverse

Would hold a 6 man jury is required & not reach other issue.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 13, 1978

RE: No. 76-761 Ballew v. Georgia

Dear Harry:

I'm not persuaded that we should reach the retroactivity question but if there were a Court to do so my present view is that our decision should be held retroactive. It seems to me that the entire premise of the invalidity of the five man jury is that it does not assure appropriate fact finding.

Sincerely,

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 13, 1978

Re: 76-761 - Ballew v. Georgia

Dear Harry:

My tentative preference is for your third choice, namely, to do nothing and wait for the next case.

If only short sentences are involved in five-man jury convictions, there would seem to be a possibility that litigation delays would solve the problem without requiring us to hear another argued case.

Respectfully,

Mr. Justice Blackmun

Copies to the Conference

This opinion creates a great deal of tension with Williams v. Florida, but that is not Justice Blackmun's fault. While it might have been preferable to eschew the pseudo-scientific numerology and simply say 5 is different from 6 (which is what happens here anyway, after all is said and done), nothing in the piece is really objectionable, except for the retroactivity discussion. That could be dropped, as Justice Blackmun himself suggested in his letter to the Conference.

BRB

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: 2/14/78

Recirculated: _____

1st DRAFT

9

SUPREME COURT OF THE UNITED STATES

No. 76-761

Claude D. Ballew, Petitioner, v. State of Georgia. | On Writ of Certiorari to the Court of Appeals of Georgia.

[February —, 1978]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

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 to him by the Sixth and Fourteenth Amendments.[1] Our resolution of the issue requires an application of principles enunciated in *Williams* v. *Florida*, 399 U. S. 78 (1970), where the use of a six-person jury in a state criminal trial was upheld against similar constitutional attack.

I

In November 1973 petitioner Claude Davis Ballew was the manager of the Paris Art Adult Theatre at 293 Peachtree Street, Atlanta, Ga. On November 9 two investigators from

[1] The Sixth Amendment reads:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which districts shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Amendment's provision as to trial by jury is made applicable to the States by the Fourteenth Amendment. *Duncan* v. *Louisiana*, 391 U. S. 145 (1968).

the Fulton County Solicitor General's office viewed at the theater a motion picture film entitled "Behind the Green Door." Rec. 46–48, 90. 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. *Id.*, at 48–50, 91. 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. *Id.*, at 53–55.

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. . . ." App. 4–6.[2]

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[2] Ga. Code § 26-2101 (1972), in effect at the time of the alleged offenses, was entitled "Distributing obscene materials" and read:

"(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do: Provided, that the word 'knowing' as used herein shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject-matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.

"(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. . . ."

1975 Ga. Laws, vol. 1, No. 204, p. 408, now Ga. Code § 26-2101 (Supp. 1977), entirely superseded the earlier version.

Petitioner was brought to trial in the Criminal Court of Fulton County.[3] After a jury of five persons had been selected and sworn, petitioner moved that the court impanel a jury of 12 persons. Rec. 37–38.[4] That court, however, tried its misdemeanor cases before juries of five persons pursuant to Ga. Const., Art. 6, § 16, ¶ 1, codified as Ga. Code § 2-5101 (1973), and to 1890–1891 Ga. Laws, vol. 2, No. 278, pp. 937–938, and 1935 Ga. Laws, No. 38, p. 498.[5] Petitioner

[3] The name of the Criminal Court of Fulton County was changed, effective January 2, 1977, by the merger of that Court with the Civil Court of Fulton County into a tribunal now known as the State Court of Fulton County. 1976 Ga. Laws, vol. 2, No. 1004, p. 3023.

[4] Petitioner asked, in the alternative, that the case be transferred to the Fulton County Superior Court. That court had concurrent jurisdiction over the case. Ga. Const., Art. 6, § 4, ¶ 1, codified as Ga. Code § 2-3901 (1973); *Nobles* v. *State*, 81 Ga. App. 229, 58 S. E. 2d 486 (1950). The Superior Court could have impaneled a jury of 12. Ga. Const., Art. 6, § 16, ¶ 1, codified as Ga. Code § 2-5101 (1973). Because the State had the choice of bringing the case in either the Criminal Court or the Superior Court, petitioner argued that trial before the smaller jury violated equal protection and due process guaranteed him under the Fourteenth Amendment. Rec. 12–13. The transfer was denied. He has not pressed the contention before this Court, and we do not reach it.

[5] 1890–1891 Ga. Laws, pp. 937–938, states in part:

"The proceedings [in the Criminal Court of Atlanta] after information or accusation, shall conform to the rules governing like proceedings in the Superior Courts, except that the jury in said court, shall consist of five, to be stricken alternately by the defendant and State from a panel of twelve. The defendant shall be entitled to four (4) strikes and the State three (3) and the five remaining jurors shall compose the jury."

The cited 1935 statute changed the name of the Criminal Court of Atlanta to the Criminal Court of Fulton County. It was intimated at oral arguments that only this particular court in Georgia employed fewer than six jurors. Tr. of Oral Arg. 25.

Effective March 24, 1976, the number of jurors in the Criminal Court of Fulton County was changed from five to six. 1976 Ga. Laws, vol. 2, No. 1003, p. 3019.

Irrespective of its size, the Georgia jury in a criminal trial, in order to convict, must do so by unanimous vote. *Ball* v. *State*, 9 Ga. App. 102, 70 S. E. 888 (1911).

contended that for an obscenity trial, a jury of only five was constitutionally inadequate to assess the contemporary standards of the community. Rec. 13, 38. He also argued that the Sixth and Fourteenth Amendments required a jury of at least six members in criminal cases. *Id.*, at 38.

The motion for a 12-person jury was overruled, and the trial went on to its conclusion before the five-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. Rec. 205–208. 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. Rec. 16–17, 209. After a subsequent hearing, the court denied an amended motion for a new trial.[6]

Petitioner took an appeal to the Court of Appeals of the State of Georgia. There he argued: First, the evidence was insufficient. Second, the trial court committed several First Amendment errors, namely, that the film as a matter of law was not obscene, and that the jury instructions incorrectly explained the standard of scienter, the definition of obscenity, and the scope of community standards. Third, the seizures of the films were illegal. Fourth, the convictions on both counts had placed petitioner in double jeopardy because he had shown only one motion picture. Fifth, the use of the five-member jury deprived him of his Sixth and Fourteenth Amendment right to a trial by jury. Rec. 222–224.

[6] Petitioner, in his amended motion for a new trial, argued that the films were seized illegally under a defective warrant; that the obscenity statute, § 26-2101, violated the First, Fourth, Fifth, Sixth, and Fourteenth Amendments; that the double conviction had placed petitioner in double jeopardy, in violation of the Fifth Amendment and Ga. Code § 2-108 (1973); that the evidence was insufficient to support the verdicts; that the trial court erroneously excluded that testimony of a defense expert witness; and that the court's instruction on scienter improperly shifted the burden of proof to the defense. Rec. 19–21.

The Court of Appeals rejected petitioner's contentions. 138 Ga. App. 530, 227 S. E. 2d 65 (1976). The court independently reviewed the film in its entirety and held it to be "hard core pornography" and "obscene as a matter of constitutional law and fact." *Id.*, at 532–533, 227 S. E. 2d, at 67–68. The evidence was sufficient to support the jury's conclusion that petitioner possessed the requisite scienter. As manager of the theater, petitioner had advertised the movie, had sold tickets, was present when the films were exhibited, had pressed the button that allowed entrance to the seating area, and had locked the door after each arrest. This evidence, according to the court, met the constructive knowledge standard of § 26-2101. The court found no errors in the instructions, in the issuance of the warrants, or in the presence of the two convictions. In its consideration of the five-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*, 234 Ga. 586, 216 S. E. 2d 838 (1975), cert. denied, 424 U. S. 931 (1976), where the constitutionality of the five-person jury had been upheld. The court also cited the earlier case of *McIntyre* v. *State*, 190 Ga. 872, 11 S. E. 2d 5 (1940), a holding to the same general effect but without elaboration.

The Supreme Court of Georgia denied certiorari. App. 26.

In his petition for certiorari here, petitioner raised three issues: the unconstitutionality of five-person jury; the constitutional sufficiency of the jury instructions on scienter and constructive, rather than actual, knowledge of the contents of the film; and obscenity *vel non*. We granted certiorari. 429 U. S. 1071 (1977). Because we now 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, we do not reach the other issues.

II

The Fourteenth Amendment guarantees the right of trial by jury in all state nonpetty criminal cases. *Duncan* v. *Louisiana*, 391 U. S. 145, 159–162 (1968). The Court in *Duncan* applied this Sixth Amendment right to the States because "trial by jury in criminal cases is fundamental to the American scheme of justice." *Id.*, at 149. 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.[1] See *Baldwin* v. *New York*, 399 U. S. 66, 68-69 (1970) (opinion of WHITE, J.).

In *Williams* v. *Florida*, 399 U. S., at 100, the Court reaffirmed that the "purpose of the jury trial, as we noted in *Duncan*, is to prevent oppression by the Government. 'Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.' *Duncan* v. *Louisiana*, [391 U. S.], at 156." See *Apodaca* v. *Oregon*, 406 U. S. 404, 410 (1972) (opinion of WHITE, J.). This purpose is attained by the participation of the community in determinations of guilt and by the application of the common sense of laymen who, as jurors, consider the case. *Williams* v. *Florida*, 399 U. S., at 100.

Williams held that these functions and this purpose could be fulfilled by a jury of six members. As the Court's opinion in that case explained at some length, *id.*, at 86–99, common-law juries included 12 members by historical accident, "unrelated to the great purposes which gave rise to the jury in the

[1] The maximum penalty for a conviction of a misdemeanor in Georgia in 1973 was imprisonment for not to exceed 12 months, or a fine not to exceed $1,000, or both. Ga. Code § 27-2506 (1972). With the change in § 26-2101 effected by 1975 Ga. Laws, vol. 1, No. 204, p. 498, the offenses charged against petitioner would now be punishable "as for a misdemeanor of a high and aggravated nature," and the maximum penalty is imprisonment for not to exceed 12 months, or a fine not to exceed $5,000, or both. Ga. Code § 27-2506 (e) (Supp. 1977).

first place." *Id.*, at 89–90. The Court's earlier cases that had *assumed* the number 12 to be constitutionally compelled were set to one side because they had not considered history and the function of the jury.[5] *Id.*, at 90–92. Rather than requiring 12 members, then, the Sixth Amendment mandated a jury *only* of sufficient size to promote group deliberation, to insulate members from outside intimidation, and to provide a representative cross-section of the community. *Id.*, at 100. Although recognizing that by 1970 little empirical research had evaluated jury performance, the Court found no evidence that the reliability of jury verdicts diminished with six-member panels. Nor did the Court anticipate significant differences in result, including the frequency of "hung" juries. *Id.*, at 101–102, and nn. 47 and 48. Because the reduction in size did not threaten exclusion of any particular class from jury roles, concern that the representative or cross-section character of the jury would suffer with a decrease to six members seemed "an unrealistic one." *Id.*, at 102. As a consequence, the six-person jury was held not to violate the Sixth and Fourteenth Amendments.

III

When the Court in *Williams* 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. *Id.*, at 91 n. 28.[6] See *Johnson* v. *Louisiana*, 406

[5] The Court rejected the assumption, made in *Thompson* v. *Utah*, 170 U. S. 343, 349 (1898), and certain later cases, see *Patton* v. *United States*, 281 U. S. 276, 288 (1930); *Rassmussen* v. *United States*, 197 U. S. 516, 519, 528 (1905); and *Maxwell* v. *Dow*, 176 U. S. 581, 586 (1900), that the 12-member feature was a constitutional requirement.

[6] In the cited footnote the Court said: "We have no occasion in this case to determine what minimum number can still constitute a 'jury,' but we do not doubt that six is above that minimum."

Respondent picks up the last phrase with absolute literalness here when

U. S. 356, 365–366 (1972) (concurring opinion). 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*, 413 U. S. 149 (1973) (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.[10] These writings do not draw or identify a bright line

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it argues: "If six is above the minimum, five cannot be below the minimum. There is no number in between." Brief for Respondent 4; Tr. of Oral Arg. 24. We, however, do not accept the proposition that by stating the number six was "above" the constitutional minimum the Court, by implication, held that at least the number five was constitutional. Instead, the Court was holding that six passed constitutional muster but was reserving judgment on *any* number less than six.

[10] *E. g.*, M. Saks, Jury Verdicts (1977) (hereinafter cited as Saks); Bogue and Fritz, The Six-Man Jury, 17 S. Dak. L. Rev. 285 (1972); Davis, et al., The Decision Processes of 6- and 12-Person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules, 32 J. Pers. and Soc. Psych. 1 (1975); Diamond, A Jury Experiment Reanalyzed, 7 U. Mich. J. L. Ref. 539 (1974); Friedman, Trial by Jury: Criteria for Convictions, Jury Size and Type I and Type II Errors, 26-2 Am. Stat. 21 (April 1972) (hereinafter cited as Friedman); Institute of Judicial Administration, A Comparison of Six- and Twelve-Member Civil Juries in New Jersey Superior and County Courts (1972); Lempert, Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases, 73 Mich. L. Rev. 643 (1975) (hereinafter cited as Lempert); Nagel & Neef, Deductive Modeling to Determine an Optimum Jury Size and Fraction Required to Convict, 1975 Wash. U. L. Q. 933 (hereinafter cited as Nagel & Neef); New Jersey Criminal Law Revision Commission, Six-Member Juries (1971); Pabst, Statistical Studies of the Costs of Six-Man versus Twelve-Man Juries, 14 Wm. & Mary L. Rev. 326 (1972) (hereinafter cited as

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 both the quality of group performance and group productivity.[11] A variety of explanations has been offered for this conclusion. 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.[12] Because jurors

Palost); Saks, Ignorance of Science Is No Excuse, 10 Trial 18 (Nov.-Dec. 1974); Thompson, Six Will Do, 10 Trial 12 (Nov.-Dec. 1974); Zeisel, Twelve is Just, 10 Trial 13 (Nov.-Dec. 1974); Zeisel, . . . And Then There Were None: The Diminution of the Federal Jury, 38 U. Chi. L. Rev. 710 (1971) (hereinafter cited as Zeisel); Zeisel, The Waning of the American Jury, 58 A. B. A. J. 367 (1972); Zeisel & Diamond, "Convincing Empirical Evidence" on the Six Member Jury, 41 U. Chi. L. Rev. 281 (1974) (hereinafter cited as Zeisel & Diamond); Note, The Effect of Jury Size on the Probability of Conviction: An Evaluation of *Williams v. Florida*, 22 Case W. Res. L. Rev. 329 (1971) (hereinafter cited as Note, Case W. Res.); Note, Six-Member and Twelve-Member Juries: An Empirical Study of Trial Results, 6 U. Mich. J. L. Ref. 671 (1973); Note, An Empirical Study of Six- and Twelve-Member Jury Decision-Making Processes, 6 U. Mich. J. L. Ref. 712 (1973).

[11] Two researchers have summarized the findings of 31 studies in which the size of groups from two to 20 members was an important variable. They concluded that there were no conditions under which smaller groups were superior in the quality of group performance and group productivity. Thomas & Fink, Effects of Group Size, 60 Psych. Bull. 371, 373 (1963), cited in Lempert, at 685. See Saks, at 77 *et seq.*, 107.

[12] See Faust, Group versus Individual Problem-Solving, 59 J. Ab. & Soc. Psych. 68, 71 (1959), cited in Lempert, at 685 and 689.

take no 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.[15] Furthermore, the smaller the group, the less likely it is to overcome the biases of its members to obtain an accurate result.[16] When individual and group decisionmaking were compared, it was seen that groups performed better because prejudicies 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 with group size.[17] 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.[18] Because the risk of acquitting a guilty person (Type II error) increases with the size of the panel,[17] an optimal jury size can be selected as a function of the interaction between the two risks. Nagel & 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 weighting

[15] Saks, at 77 *et seq.*; see Kelley & Thibaut, Group Problem Solving, 4 Handbook of Soc. Psych. 68-69 (2d ed. G. Lindzey and E. Anderson 1969) (hereinafter cited as Kelley & Thibaut).

[16] Lempert, at 687–688, citing Bernlund, A Comparative Study of Individual, Majority, and Group Judgment, 58 J. Ab. & Soc. Psych. 55, 59 (1959); see Kelley & Thibaut, at 67.

[17] Lempert, at 687–688, citing Bernlund, *supra*, n. 14, at 58–59.

[18] Friedman; Nagel & Neef.

[17] Nagel & Neef, at 945.

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.[35]

Another doubt about progressively smaller juries arises from the increasing inconsistency that results from the decreases. Saks argued that the "more a jury type fosters consistency, the greater will be the proportion of juries which select the correct (*i. e.*, the same) verdict and the fewer 'errors' will be made." M. Saks, Jury Verdicts, 86–87 (1977). From his mock trials held before undergraduates and former jurors, he computed the percentage of "correct" decisions rendered by 12-person and six-person panels. In the student experiment, 12-person groups reached correct verdicts 83% of the time; six-person panels reached correct verdicts 69% of the time. The results for the former juror study were 71% for the 12-person groups and 57% for the six-person groups. *Ibid.* Working with statistics described in H. Kalven & H. Zeisel, The American Jury 460 (1966), Nagel & Neef tested the average conviction propensity of juries, that is, the likelihood that any given jury of a set would convict the defendant.[36] They found that half of all 12-person juries would have average conviction propensities that varied by no more than 20 points.

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[35] *Id.*, at 946–948, 956, 975. Friedman reached a similar conclusion. He varied the appearance of guilt in his statistical study. The more guilty the person appeared, the greater the chance that a six-member panel would convict when a 12-member panel would not. As jury size was reduced, the risk of Type I error would increase, Friedman said, without a significant corresponding advantage in reducing Type II error. Friedman, at 23.

[36] Nagel & Neef, at 952, 971, concluded that the average juror had a propensity to convict more frequently than to acquit, a tendency designated by the figure .677. In other words, if the average jury considered the average case, 67.7% of the jurors would vote to convict.

Half of all six-person juries, on the other hand, had average conviction propensities varying by 30 points, a difference they found significant in both real and percentage terms.[30] Lempert reached similar results when he considered the likelihood of juries to compromise over the various views of their members, an important phenomenon for the fulfillment of the common-sense function. In civil trials averaging occurs with respect to damage amounts. In criminal trials it relates to numbers of counts and lesser included offenses.[31] And he predicted that compromises would be more consistent when larger juries were employed. For example, 12-person juries could be expected to reach *extreme compromises* in 4% of the cases, while six-person panels would reach extreme results in 16%.[32] All three of these post-*Williams* studies, therefore, raise significant doubts about the consistency and reliability of the decisions of smaller juries.

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 six members.[33] Both studies emphasized that juries in criminal cases generally hang with only one, or more likely two, jurors remaining unconvinced of guilt.[34] 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

[30] With the average juror having a conviction propensity of .677, the average 12-member jury propensities ranged from .579 to .775. The average six-member jury propensities ranged from .530 to .830. Nagel & Neef, at 971–972.

[31] Lempert, at 680.

[32] Accord, Zeisel, at 718; Note, Case W. Res., at 347.

[33] Zeisel, at 720; accord, Lempert, at 676. But see Saks, at 89–90.

[34] Lempert, at 674–677; Zeisel, at 719.

his argument.[25] In the jury setting the significance of this tendency is demonstrated by the following figures: If a minority viewpoint is shared by 10% of the community, 28.2% of 12-member juries may be expected to have no minority representation, but 53.1% of six-member juries would have none. Thirty-four percent of 12-percent panels could be expected to have two minority members, while only 11% of six-member panels would have two.[26] As the numbers diminish below six, even fewer panels would have one member with the minority viewpoint and still fewer would have two. The chance for hung juries would decline accordingly.

I think this is the most significant feature.

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. "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Smith* v. *Texas*, 311 U. S. 128, 130 (1940). 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 Commission*, 396 U. S. 320, 330 (1970), quoting *Strauder* v. *West Virginia*, 100 U. S. 303, 308 (1870). 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

[25] Asch, Effects of Group Pressure upon the Modification and Distortion of Judgments, Group Dynamics, 189, 195-197 (2d ed., D. Cartwright and A. Zander, 1960), cited in Lempert, at 673.

[26] Lempert, at 669, 677.

10% of the community, 53.1% of randomly selected six-member juries could be expected to have no minority representative among their members, and 80% not to have two.[27] 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.[28] 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.[29] 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 common sense of the community and will also tend to insure accurate factfinding.[30]

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[27] *Ibid.*; Saks, at 90.

[28] Lempert, at 648–653; Nagel & Neef, at 934–937; Saks, Ignorance of Science is No Excuse, 10 Trial 18, 19 (Nov.–Dec. 1974); Zeisel & Diamond, at 283–291; Note, Case W. Res., at 535.

[29] *Lempert*, at 648–653.

[30] Zeisel & Diamond have criticized one of the more important studies supporting smaller juries. See text, at n. 34, *infra*. In Note, An Empirical Study of Six- and Twelve-Member Jury Decision-Making Processes, 6 U. Mich. J. L. Ref. 712 (1973), the author tested the deliberations of larger and smaller panels by showing to sets of both sizes the video tape of a single mock civil trial. The case concerned an automobile accident and turned on whether the plaintiff had been speeding. If so, Michigan law precluded recovery because of contributory negligence. Of the 16 juries tested, not one found for the plaintiff. This led Zeisel & Diamond to conclude:

"The evidence in the case overwhelmingly favored the defendant. . . .

Studies that aggregate data also risk masking case-by-case differences in jury deliberations. The authors of H. Kalven and H. Zeisel, The American Jury (1966), examined the judge-jury disagreement. They found that judges held for plaintiffs 56% of the time and that juries held for plaintiffs 59%, an insignificant difference. Yet case-by-case comparison revealed judge-jury disagreement in 22% of the cases. *Id.*, at 63, cited in Lempert, at 656. This casts doubt on the conclusion of another study that compared the aggregate results of civil cases tried before six-member juries with those of 12-member jury trials.[31] The investigator in that study had claimed support for his hypothesis that damage awards did not vary with the reduction in jury size. Although some might say that figures in the aggregate may have supported this conclusion, a closer view of the cases reveals greater variation in the results of the smaller panels, *i. e.*, a standard deviation of $58,335 for the six-member juries, and of $24,834 for the 12-member juries.[32] Again, the averages masked significant case-by-case differences that must be considered when evaluating jury function and performance.

This overpowering bias makes the experiment irrelevant. On the facts of this case, any jury under any rules would probably have arrived at the same verdict. Hence, to conclude from this experiment that jury size generally has no effect on the verdict is impermissible." Zeisel & Diamond, at 287.

See also Diamond, A Jury Experiment Reanalyzed, 7 U. Mich. L. Ref. 520 (1974). The criticized study was cited and relied upon by the Court in *Colgrove* v. *Battin*, 413 U. S. 149, 159 n. 15 (1973).

[31] See Note, Six-Member and Twelve-Member Juries: An Empirical Study of Trial Results, 6 U. Mich. J. L. Ref. 671 (1973). This also was cited and relied upon in *Colgrove* v. *Battin*, 413 U. S., at 159 n. 15.

[32] Zeisel & Diamond, at 288–290. These authors also criticized the Michigan study because it ignored two other important changes that had occurred when the size of civil juries was decreased from 12 to six members: A mediation board, which encouraged settlements, had been introduced, and rules that permitted discovery of insurance policy limits had taken effect. See Saks, at 43.

IV

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*, 406 U. S. 356 (1972), 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. *Id.*, at 363. 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 five-member panel used in a misdemeanor trial. The Court held merely that the classification was not invidious. *Id.*, at 364. Because the issue of the constitutionality

Accord, Comfort, etc.

Seems to undercut Williams, but that's inevitable.

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 *Baldwin* v. *New York*, 399 U. S. 66 (1970), the Court held that the right to a jury trial attached in both felony and misdemeanor cases. Only in cases concerning truly petty crimes, where the deprivation of liberty was minimal, did the defendant have no constitutional right to trial by jury. In the present case the possible deprivation of liberty is substantial. The State charged petitioner with misdemeanors under Georgia Code § 26–2101 (1972), and he has been given concurrent sentences of imprisonment, each for one year, and fines of $2,000 have been imposed. We cannot conclude that there is less need for the imposition and the direction of the common sense of the community in this case than when the State has chosen to label an offense a felony.[23] The need for an effective jury here must be judged by the same standards announced and applied in *Williams* v. *Florida*,

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[23] We do not rely on any First Amendment aspect of this case in holding the five-person jury unconstitutional. Nevertheless, the nature of the substance of the misdemeanor charges against petitioner supports the refusal to distinguish between felonies and misdemeanors. The application of the community's standards and common sense is important in obscenity trials where juries must define and apply local standards. See *Miller* v. *California*, 413 U. S. 15 (1973). The opportunity for harassment and overreaching by an overzealous prosecutor or a biased judge is at least as significant in an obscenity trial as in one concerning an armed robbery. This fact does not change merely because the obscenity charge may be labeled as 'misdemeanor' and the robbery a 'felony.'

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 common 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*, 406 U. S., at 411 (opinion of WHITE, J.).

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. See *Carter* v. *Jury Commission*, 396 U. S. 320 (1970); *Smith* v. *Texas*, 311 U. S. 128 (1940). But the data outlined above raise substantial doubt about the ability of juries truly to represent the community as membership decreases below six. 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. Not only is the representation of racial minorities threatened in such circumstances, but also majority attitude or various minority positions may be misconstrued or misapplied by the smaller groups. Even though the facts of this case would not establish a jury discrimination claim under the Equal Protection Clause, the question of representation does constitute one factor of several that, when combined, create a problem of constitutional significance under the Sixth and Fourteenth Amendments.

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. Tr. of Oral Arg. 27. This conclusion, however, is only one of several in the Saks study: that study eventually concludes:

> "Larger juries (size twelve) are preferable to smaller juries (six). They produce longer deliberations, more communication, far better community representation, *and*, possibly, greater verdict reliability (consistency)." Saks, at 107.

→ Williams?

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

Methodological problems prevent reliance on the three studies that do purport to bolster Georgia's position. The reliability of the two Michigan studies cited by the State has been criticized elsewhere.[24] The critical problem with the Michigan laboratory experiment, which used a mock civil trial, was the apparent clarity of the case. Not one of the juries found for the plaintiff in the tort suit; this masked any potential difference in the decisionmaking of larger and smaller panels. The results also have been doubted because in the experiment only students composed the juries, only 16 juries were tested, and only a video tape of the mock trial was presented.[25] The statistical review of the results of actual jury

[24] Note, Six-Member and Twelve-Member Juries: An Empirical Study of Trial Results, 6 U. Mich. J. L. Ref. 671 (1973) (a statistical study of actual jury results), and Note, An Empirical Study of Six- and Twelve-Member Jury Decision-Making Processes, 6 U. Mich. J. L. Ref. 712 (1973) (a laboratory experiment using a mock trial), were both criticized in Saks, at 43–46, and in Zeisel & Diamond, at 286–288. The second study was criticized in Diamond, A Jury Experiment Reanalyzed, 7 U. Mich. J. L. Ref. 520 (1974). The Michigan Studies were advanced by the State at oral argument. Tr. of Oral Arg. 27.

[25] Saks, at 45.

trials in Michigan erroneously aggregated outcomes. It is also said that it failed to take account of important changes of court procedure initiated at the time of the reduction in size from 12 to six members.[35] The Davis study, which employed a mock criminal trial for rape, also presented an extreme set of facts so that none of the panels rendered a guilty verdict.[37] None of these three reports, therefore, convinces us that a reduction in the number of jurors below six will not affect to a constitutional degree the functioning of juries in criminal trials.

The problem is that it's not clear how that "degree" is measured. Not Justice Blackmun's forte, I suppose.

V

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.

The States utilize juries of less than 12 primarily for administrative reasons. Savings in court time and in financial costs are claimed to justify the reductions.[38] The financial benefits of the reduction from 12 to six are substantial; this is mainly because fewer jurors draw daily allowances as they hear cases.[39] On the other hand, the asserted saving in judicial time is not so clear. Pabst in his study found little reduction in the time for voir dire with the six-person jury because many questions

[35] *Id.*, at 43-44; Zeisel & Diamond, at 288-290.

[37] Davis, et al., *supra*, n. 10, at 7, criticized in Saks, at 49-51.

[38] See New Jersey Criminal Law Revision Commission, Six-Member Juries (1971); Bogue & Fritz, The Six-Man Jury, 17 S. Dak. L. Rev. 285 (1972).

[39] It has been said that a reduction from 12 jurors to six throughout the federal system could save at least $4 million annually. Zeisel, Twelve Is Just, 10 Trial 33 (Nov.-Dec. 1974). Another study calculated a saving in jury man-hours of 41.9% with the reduction to six members. Pabst, Statistical Studies of the Costs of Six-Man versus Twelve-Man Juries, 14 Wm. & Mary L. Rev. 326, 328 (1972).

were directed at the veniremen as a group.[40] Total trial time did not diminish, and court delays and backlogs improved very little.[41] The point that is to be made, of course, is that a reduction in size from six to five or four or even three would save the States little. They could reduce slightly the daily allowances, but with a reduction from six to five the saving would be minimal. If little time is gained by the reduction from 12 to six, less will be gained with a reduction from six to five. Perhaps this explains why only two States, Georgia and Louisiana,[42] have reduced the size of juries in certain criminal cases to five. Other States appear content with six members or more.[43] In short, the State has offered little or no justification for its reduction to five members.

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.

VI

Although *Williams* v. *Florida* indicated that the Court even-

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[40] *Id.*, at 327; Zeisel, Twelve is Just, 10 Trial 13 (Nov.-Dec. 1974). But see Institute of Judicial Administration, A Comparison of Six- and Twelve-Member Civil Juries in New Jersey Superior and County Courts, 27–28 (1972); New Jersey Criminal Law Revision Commission, Six-Member Juries 3–4 (1971); Thompson, Six Will Do, 10 Trial 12, 14 (Nov.-Dec. 1974).

[41] Pabst, *supra*, at 327–328.

[42] La. Code Crim. Proc., Art. 782 (West) (Supp. 1977) permits juries of five members in cases in which punishment at hard labor is optional. The jury must act unanimously in order to convict.

[43] Several States have provided for six-member juries for selected criminal cases. *E. g.*, Colo. Rule Crim. Proc. 23 (1974); Fla. Stat. § 913.10 (1973); Ky. Rev. Stat. § 29.015 (1971); Mass. Gen. Laws Ann., ch. 218 § 27A (West) (1977 Supp.). Other States provide for smaller juries upon stipulation of the parties. *E. g.*, Ark. Stat. Ann. § 43–1901 (Repl. 1977); Cal. Civ. Proc. Code § 194 (1954). The Federal Indian Civil Rights Act, § 202, 88 Stat. 77, provides for a right of jury trial in certain cases before a jury of not less than six persons. 25 U. S. C. § 1302 (10).

tually would be called upon to establish a constitutional minimum on the size of criminal juries, the announcement of that minimum in this case establishes a new rule of constitutional law. It therefore prompts us to inquire whether the new rule should be applied retroactively.[*] When a decision effects "a clear break with the past," *Desist* v. *United States*, 394 U. S. 244, 248 (1969), it is possible that its holding should be limited to future cases. Today's decision may be said to effect such a break because the Court previously held, less than a decade ago, in *Williams* v. *Florida* in 1970 and in *Colgrove* v. *Battin*, 413 U. S. 149 (1973), that decreases in the size of juries infringed neither the criminal nor the civil right of trial by jury. And in 1976 we denied a petition for certiorari, 424 U. S. 931 in *Sanders* v. *State*, 234 Ga. 586, 216 S. E. 2d 838 (1975), where the five-person issue had been raised. See *Sanders* v. *Georgia*, O. T. 1975, No. 75-707, Petition for Certiorari 2.

Whether a decision effecting a new rule of constitutional law is to receive retroactive application depends on the balancing of three factors: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall* v. *Denno*, 388 U. S. 293, 297 (1967). "Foremost among these factors is the purpose to be served by the new constitutional rule." *Desist* v. *United*

[*] In order to avoid unnecessary disruption and uncertainty in States using five-person criminal juries, we consider the question of retroactivity coincidentally with the announcement of the decision on the merits. See *Witherspoon* v. *Illinois*, 391 U. S. 510, 523 n. 22 (1968) (considering retroactivity at the time of establishment of jury selection procedures in capital cases). See, generally, Beytagh, Ten Years of Non-Retroactivity: A Critique and a Proposal, 61 Va. L. Rev. 1557, 1605, and n. 261, 1619–1629 (1975). In *Morrissey* v. *Brewer*, 408 U. S. 471, 488 (1972), the Court said that the then announced basic due process requirements for parole revocation hearings were applicable only "to future revocations of parole."

I would avoid this discussion. Briefing + argument may show that, because 5-person juries are used only for misdemeanors, the problem will be mooted out within a matter of months. In that case, it would not be necessary to make retroactivity clear.

States, 394 U. S., at 249. If the purpose is to correct a substantial impairment of the truthfinding process, retroactive application may be required because of doubt about the accuracy of earlier guilty verdicts. *Williams* v. *United States*, 401 U. S. 646, 653 (1971) (plurality opinion); *Gosa* v. *Mayden*, 413 U. S. 665, 679 (1973) (plurality opinion). In such a case neither reliance by law enforcement authorities nor adverse impact on the administration of justice outweighs the purpose element. *Ibid.*

The Court's previous decisions on retroactivity of extensions of the right of trial by jury lead us to conclude that the purpose of today's decision does not preclude a careful balancing of all three factors. In *Carreraus* v. *Gladden*, 392 U. S. 631 (1968), the Court refused to apply *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), retroactively. In *Duncan*, the Court held that a State could not deny a request for a jury trial in a serious criminal case.[37] Although it recognized that a jury serves to prevent arbitrariness and repression, the Court refused to conclude that every trial before a judge was unfair. Similarly, in *Gosa* the Court recognized that the failure of military courts to provide jury trials affected incidentally the truthfinding process. 413 U. S., at 680. Nevertheless, the Court refused to apply *O'Callahan* v. *Parker*, 395 U. S. 258 (1969),[38] retroactively because the right to a jury trial had other elements, namely, avoiding excessive sentences and preventing prejudice from prosecutorial abuse. 413 U. S., at 681. The *O'Callahan* change of law did not respond exclusively to the truthfinding function. The Court, therefore, balanced

This is a different situation from trial before a jury not constitutionally structured.

[37] *Carreraus* was decided with *DeStefano* v. *Woods*, 392 U. S. 631 (1968), which refused to apply *Bloom* v. *Illinois*, 391 U. S. 194 (1968), retroactively. *Bloom* extended the right of trial by jury to persons charged with serious criminal contempt.

[38] *O'Callahan* held that civilian rather than military courts should try military personnel when the criminal activity charged was not service-connected. This rule operated to secure for such defendants the benefits of indictment by grand jury and trial by petit jury. 395 U. S., at 272–273.

the three factors in determining retroactivity and did not rely exclusively on the purpose of the new rule.

As has been said in Part IV, *supra*, we do not perceive a clear line between the reliability of six-member juries, on the one hand, and that of five-person panels, on the other. We cannot declare that the truth-finding process of cases tried previously before five-member panels was necessarily impaired. Furthermore, the constitutional minimum established today responds not only to concern about the reliability of smaller panels but also to concern about representation of minority groups, an interest that would not be significantly advanced by retroactive application. Thus, the purpose of this new constitutional rule does not mandate retroactive application so as to obviate consideration of the other *Stovall* elements of reliance and effect.

The reliance element clearly supports only prospective application of today's decision. The question is whether Georgia has adopted and maintained its system in good faith reliance on constitutional precedent. *Gosa* v. *Mayden*, 413 U. S., at 682; *DeStefano* v. *Woods*, 392 U. S., at 634. Georgia adopt its five-person jury system in 1891, see n. 5, *supra*, many years before *Duncan* applied the Sixth Amendment right to trial by jury to the States. Although *Williams* suggested that the Court eventually would be required to set a minimum number, the opinion in that case did not foretell where the cutoff would occur. Georgia, therefore, reasonably refrained from altering its longstanding statute.[47]

The effect on the administration of justice from retroactive application of today's decision would not be insubstantial. As in *DeStefano* and *Carcerano*, 392 U. S., at 634, the current system has been widespread and long in effect. Reconsideration could be requested in all misdemeanor cases that continue

[47] It should be noted that the Louisiana five-person jury provision was enacted in 1880, also long before the decisions in *Duncan* and in *Williams*. 1880 La. Acts No. 35 § 4.

If this is true, why is the difference constitutional? This section, I'm afraid will raise more problems than it solves.

This seems self-contradictory. Either 5 is reliable or it isn't.

Because it goes to fact finding.

Better to avoid all this especially if the problem would be mooted out.

to present live controversies or, perhaps, collateral consequences. And, to the extent that today's holding casts doubt on Louisiana's five-person jury system, the effect of retroactive application obviously would extend beyond the borders of the State of Georgia. This potential disruption, therefore, outweighs the uncertain force that the purpose element might provide in favor of retroactivity.[*] Today's holding will be applied only to trials in which juries are sworn after the 25th day from the date of the filing of this opinion.

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

It is so ordered.

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[*] The retroactive application, in *Berry* v. *City of Cincinnati*, 414 U. S. 29 (1973), of *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972), does not support a contrary balancing of the *Stovall* elements. *Argersinger* required the appointment of counsel for indigents in certain misdemeanor cases. In *Berry* a sensitive balancing of the three *Stovall* elements did not take place because the right to counsel was considered so important to the factfinding process. 414 U. S., at 29–30. Rather than balance the importance of counsel against the disruption from reconsideration of misdemeanor cases, the Court cited only cases turning on the retroactivity of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), which required counsel in state felony cases. E. g., *Ketchens* v. *Smith*, 401 U. S. 847 (1971); *Burgett* v. *Texas*, 389 U. S. 109 (1967). *Berry*, therefore, provides no guidance as to the balancing of interests when the purpose of the change in law responds less directly to concern about the reliability of the truthfinding process. We note in passing, however, that the disruption here far exceeds that in *Berry* because, presumably, most, if not all, misdemeanor cases in the Criminal Court of Fulton County, Georgia, have been tried before five-member panels. In *Berry*, on the other hand, reconsideration became necessary only in those misdemeanor cases where indigents had not been given appointed counsel. In addition, lack of counsel is a deprivation of far higher degree than deprivation of one additional juror about live.

What could be more relevant to truthfinding than the functioning of the jury? If 5 is constitutionally suspect then facts found by 5-person juries are suspect.

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: 2/14/78

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-761

Claude D. Ballew, Petitioner, v. State of Georgia. } On Writ of Certiorari to the Court of Appeals of Georgia.

[February —, 1978]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

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 to him by the Sixth and Fourteenth Amendments.[1] Our resolution of the issue requires an application of principles enunciated in *Williams* v. *Florida*, 399 U. S. 78 (1970), where the use of a six-person jury in a state criminal trial was upheld against similar constitutional attack.

I

In November 1973 petitioner Claude Davis Ballew was the manager of the Paris Art Adult Theatre at 293 Peachtree Street, Atlanta, Ga. On November 9 two investigators from

[1] The Sixth Amendment reads:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Amendment's provision as to trial by jury is made applicable to the States by the Fourteenth Amendment. *Duncan* v. *Louisiana*, 391 U. S. 145 (1968).

Renewed

L 7 P

2/16

9'll circulate a brief memorandum on basis of my dissenting view of adoption of 6 by the 14th.

Also, I don't like the statutory gibberish p 9 et seq

the Fulton County Solicitor General's office viewed at the theater a motion picture film entitled "Behind the Green Door." Rec. 46–48, 90. 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. *Id.*, at 48–50, 91. 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. *Id.*, at 53–55.

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. . . ." App. 4–6.[2]

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[2] Ga. Code § 26-2101 (1972), in effect at the time of the alleged offenses, was entitled "Distributing obscene materials" and read:

"(a) A person commits the offense of distributing obscene materials when he sells, leads, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do: Provided, that the word 'knowing' as used herein shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject-matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.

"(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. . . ."

1973 Ga. Laws, vol. 1, No. 294, p. 498, now Ga. Code § 26-2101 (Supp. 1977), entirely superseded the earlier version.

Petitioner was brought to trial in the Criminal Court of Fulton County.[2] After a jury of five persons had been selected and sworn, petitioner moved that the court impanel a jury of 12 persons. Rec. 37–38.[3] That court, however, tried its misdemeanor cases before juries of five persons pursuant to Ga. Const., Art. 6, § 16, ¶ 1, codified as Ga. Code § 2-5101 (1973), and to 1890–1891 Ga. Laws, vol. 2, No. 278, pp. 937–938, and 1935 Ga. Laws, No. 38, p. 498.[5] Petitioner

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[2] The name of the Criminal Court of Fulton County was changed, effective January 2, 1977, by the merger of that Court with the Civil Court of Fulton County into a tribunal now known as the State Court of Fulton County. 1976 Ga. Laws, vol. 2, No. 1084, p. 3023.

[3] Petitioner asked, in the alternative, that the case be transferred to the Fulton County Superior Court. That court had concurrent jurisdiction over the case. Ga. Const., Art. 6, § 4, ¶ 1, codified as Ga. Code § 2-3901 (1973); *Nobles* v. *State*, 81 Ga. App. 229, 58 S. E. 2d 496 (1950). The Superior Court could have impaneled a jury of 12. Ga. Const., Art. 6, § 16, ¶ 1, codified as Ga. Code § 2-5101 (1973). Because the State had the choice of bringing the case in either the Criminal Court or the Superior Court, petitioner argued that trial before the smaller jury violated equal protection and due process guaranteed him under the Fourteenth Amendment. Rec. 12–13. The transfer was denied. He has not pressed the contention before this Court, and we do not reach it.

[5] 1890–1891 Ga. Laws, pp. 937–938, states in part:

"The proceedings [in the Criminal Court of Atlanta] after information or accusation, shall conform to the rules governing like proceedings in the Superior Courts, except that the jury in said court, shall consist of five, to be stricken alternately by the defendant and State from a panel of twelve. The defendant shall be entitled to four (4) strikes and the State three (3) and the five remaining jurors shall compose the jury."

The cited 1935 statute changed the name of the Criminal Court of Atlanta to the Criminal Court of Fulton County. It was intimated at oral argument that only this particular court in Georgia employed fewer than six jurors. Tr. of Oral Arg. 25.

Effective March 24, 1976, the number of jurors in the Criminal Court of Fulton County was changed from five to six. 1976 Ga. Laws, vol. 2, No. 1083, p. 3019.

Irrespective of its size, the Georgia jury in a criminal trial, in order to convict, must do so by unanimous vote. *Hall* v. *State*, 9 Ga. App. 162, 70 S. E. 888 (1911).

contended that for an obscenity trial, a jury of only five was constitutionally inadequate to assess the contemporary standards of the community. Rec. 13, 38. He also argued that the Sixth and Fourteenth Amendments required a jury of at least six members in criminal cases. *Id.*, at 38.

The motion for a 12-person jury was overruled, and the trial went on to its conclusion before the five-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. Rec. 205–208. 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. Rec. 16–17, 209. 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: First, the evidence was insufficient. Second, the trial court committed several First Amendment errors, namely, that the film as a matter of law was not obscene, and that the jury instructions incorrectly explained the standard of scienter, the definition of obscenity, and the scope of community standards. Third, the seizures of the films were illegal. Fourth, the convictions on both counts had placed petitioner in double jeopardy because he had shown only one motion picture. Fifth, the use of the five-member jury deprived him of his Sixth and Fourteenth Amendment right to a trial by jury. Rec. 222–224.

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[*] Petitioner, in his amended motion for a new trial, argued that the films were seized illegally under a defective warrant; that the obscenity statute, § 26-2101, violated the First, Fourth, Fifth, Sixth, and Fourteenth Amendments; that the double conviction had placed petitioner in double jeopardy, in violation of the Fifth Amendment and Ga. Code § 2-108 (1973); that the evidence was insufficient to support the verdicts; that the trial court erroneously excluded the testimony of a defense expert witness; and that the court's instruction on scienter improperly shifted the burden of proof to the defense. Rec. 19–21.

The Court of Appeals rejected petitioner's contentions. 138 Ga. App. 530, 227 S. E. 2d 65 (1976). The court independently reviewed the film in its entirety and held it to be "hard core pornography" and "obscene as a matter of constitutional law and fact." *Id.*, at 532–533, 227 S. E. 2d, at 67–68. The evidence was sufficient to support the jury's conclusion that petitioner possessed the requisite scienter. As manager of the theater, petitioner had advertised the movie, had sold tickets, was present when the films were exhibited, had pressed the button that allowed entrance to the seating area, and had locked the door after each arrest. This evidence, according to the court, met the constructive knowledge standard of § 26-2101. The court found no errors in the instructions, in the issuance of the warrants, or in the presence of the two convictions. In its consideration of the five-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*, 234 Ga. 586, 216 S. E. 2d 838 (1975), cert. denied, 424 U. S. 931 (1976), where the constitutionality of the five-person jury had been upheld. The court also cited the earlier case of *McIntyre* v. *State*, 190 Ga. 872, 11 S. E. 2d 5 (1940), a holding to the same general effect but without elaboration.

The Supreme Court of Georgia denied certiorari. App. 26.

In his petition for certiorari here, petitioner raised three issues: the unconstitutionality of five-person jury; the constitutional sufficiency of the jury instructions on scienter and constructive, rather than actual, knowledge of the contents of the film; and obscenity *vel non*. We granted certiorari. 429 U. S. 1071 (1977). Because we now 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, we do not reach the other issues.

II

The Fourteenth Amendment guarantees the right of trial by jury in all state nonpetty criminal cases. *Duncan* v. *Louisiana*, 391 U. S. 145, 159–162 (1968). The Court in *Duncan* applied this Sixth Amendment right to the States because "trial by jury in criminal cases is fundamental to the American scheme of justice." *Id.*, at 149. 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.[7] See *Baldwin* v. *New York*, 399 U. S. 66, 68–69 (1970) (opinion of WHITE, J.).

In *Williams* v. *Florida*, 399 U. S., at 100, the Court reaffirmed that the "purpose of the jury trial, as we noted in *Duncan*, is to prevent oppression by the Government. 'Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.' *Duncan* v. *Louisiana*, [391 U. S.], at 156." See *Apodaca* v. *Oregon*, 406 U. S. 404, 410 (1972) (opinion of WHITE, J.). This purpose is attained by the participation of the community in determinations of guilt and by the application of the common sense of laymen who, as jurors, consider the case. *Williams* v. *Florida*, 399 U. S., at 100.

Williams held that these functions and this purpose could be fulfilled by a jury of six members. As the Court's opinion in that case explained at some length, *id.*, at 86–90, common-law juries included 12 members by historical accident, "unrelated to the great purposes which gave rise to the jury in the

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[7] The maximum penalty for a conviction of a misdemeanor in Georgia in 1973 was imprisonment for not to exceed 12 months, or a fine not to exceed $1,000, or both. Ga. Code § 27-2509 (1972). With the change in § 26-2101 effected by 1975 Ga. Laws, vol. 1, No. 204, p. 408, the offenses charged against petitioner would now be punishable "as for a misdemeanor of a high and aggravated nature," and the maximum penalty is imprisonment for not to exceed 12 months, or a fine not to exceed $5,000, or both. Ga. Code § 27-2508 (c) (Supp. 1977).

first place." *Id.*, at 89–90. The Court's earlier cases that had *assumed* the number 12 to be constitutionally compelled were set to one side because they had not considered history and the function of the jury.[7] *Id.*, at 90–92. Rather than requiring 12 members, then, the Sixth Amendment mandated a jury only of sufficient size to promote group deliberation, to insulate members from outside intimidation, and to provide a representative cross-section of the community. *Id.*, at 100. Although recognizing that by 1970 little empirical research had evaluated jury performance, the Court found no evidence that the reliability of jury verdicts diminished with six-member panels. Nor did the Court anticipate significant differences in result, including the frequency of "hung" juries. *Id.*, at 101–102, and nn. 47 and 48. Because the reduction in size did not threaten exclusion of any particular class from jury roles, concern that the representative or cross-section character of the jury would suffer with a decrease to six members seemed "an unrealistic one." *Id.*, at 102. As a consequence, the six-person jury was held not to violate the Sixth and Fourteenth Amendments.

III

When the Court in *Williams* 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. *Id.*, at 91 n. 28.[8] See *Johnson* v. *Louisiana*, 406

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[7] The Court rejected the assumption, made in *Thompson* v. *Utah*, 170 U. S. 343, 349 (1898), and certain later cases, see *Patton* v. *United States*, 281 U. S. 276, 288 (1930); *Rassmussen* v. *United States*, 197 U. S. 516, 519, 528 (1905); and *Maxwell* v. *Dow*, 176 U. S. 581, 586 (1900), that the 12-member feature was a constitutional requirement.

[8] In the cited footnote the Court said: "We have no occasion in this case to determine what minimum number can still constitute a 'jury,' but we do not doubt that six is above that minimum."

Respondent picks up the last phrase with absolute literalness here when

U. S. 356, 365–366 (1972) (concurring opinion). 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*, 413 U. S. 149 (1973) (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.[10] These writings do not draw or identify a bright line

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it argues: "If six is above the minimum, five cannot be below the minimum. There is no number in between." Brief for Respondent 4; Tr. of Oral Arg. 24. We, however, do not accept the proposition that by stating the number six was "above" the constitutional minimum the Court, by implication, held that at least the number five was constitutional. Instead, the Court was holding that six passed constitutional muster but was reserving judgment on any number less than six.

[10] *E. g.*, M. Saks, Jury Verdicts (1977) (hereinafter cited as Saks); Bogue and Fritz, The Six-Man Jury, 17 S. Dak. L. Rev. 285 (1972); Davis, et al., The Decision Processes of 6- and 12-Person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules, 32 J. Pers. and Soc. Psych. 1 (1975); Diamond, A Jury Experiment Reanalyzed, 7 U. Mich. J. L. Ref. 520 (1974); Friedman, Trial by Jury: Criteria for Convictions, Jury Size and Type I and Type II Errors, 26-2 Am. Stat. 21 (April 1972) (hereinafter cited as Friedman); Institute of Judicial Administration, A Comparison of Six- and Twelve-Member Civil Juries in New Jersey Superior and County Courts (1972); Lempert, Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases, 73 Mich. L. Rev. 643 (1975) (hereinafter cited as Lempert); Nagel & Neef, Deductive Modeling to Determine an Optimum Jury Size and Fraction Required to Convict, 1975 Wash. U. L. Q. 933 (hereinafter cited as Nagel & Neef); New Jersey Criminal Law Revision Commission, Six-Member Juries (1971); Pabst, Statistical Studies of the Costs of Six-Man versus Twelve-Man Juries, 14 Wm. & Mary L. Rev. 426 (1972) (hereinafter cited as

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 both the quality of group performance and group productivity.[11] A variety of explanations has been offered for this conclusion. 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.[12] Because jurors

Pabst); Saks, Ignorance of Science Is No Excuse, 10 Trial 18 (Nov.-Dec. 1974); Thompson, Six Will Do, 10 Trial 12 (Nov.-Dec. 1974); Zeisel, Twelve is Just, 10 Trial 13 (Nov.-Dec. 1974); Zeisel, . . . And Then There Were None: The Diminution of the Federal Jury, 38 U. Chi. L. Rev. 710 (1971) (hereinafter cited as Zeisel); Zeisel, The Waning of the American Jury, 58 A. B. A. J. 367 (1972); Zeisel & Diamond, "Convincing Empirical Evidence" on the Six Member *Jury*, 41 U. Chi. L. Rev. 281 (1974) (hereinafter cited as Zeisel & Diamond); Note, The Effect of Jury Size on the Probability of Conviction: An Evaluation of *Williams* v. *Florida*, 22 Case W. Res. L. Rev. 329 (1971) (hereinafter cited as Note, Case W. Res.); Note, Six-Member and Twelve-Member Juries: An Empirical Study of Trial Results, 6 U. Mich. J. L. Ref. 671 (1973); Note, An Empirical Study of Six- and Twelve-Member Jury Decision-Making Processes, 6 U. Mich. J. L. Ref. 712 (1973).

[11] Two researchers have summarized the findings of 31 studies in which the size of groups from two to 20 members was an important variable. They concluded that there were no conditions under which smaller groups were superior in the quality of group performance and group productivity. Thomas & Fink, Effects of Group Size, 60 Psych. Bull. 371, 373 (1963), cited in Lempert, at 685. See Saks, at 77 *et seq.*, 107.

[12] See Faust, Group versus Individual Problem-Solving, 59 J. Ab. & Soc. Psych. 68, 71 (1959), cited in Lempert, at 685 and 686.

take no 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.[13] Furthermore, the smaller the group, the less likely it is to overcome the biases of its members to obtain an accurate result.[14] When individual and group decisionmaking were compared, it was seen that groups performed better because prejudicies 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 with group size.[15] 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.[16] Because the risk of acquitting a guilty person (Type II error) increases with the size of the panel,[17] an optimal jury size can be selected as a function of the interaction between the two risks. Nagel & 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 weighting

[13] Sale, at 77 *et seq.*; see Kelley & Thibaut, Group Problem Solving, 4 Handbook of Soc. Psych. 68–69 (2d ed. G. Lindzey and E. Anderson 1969) (hereinafter cited as Kelley & Thibaut).

[14] Lempert, at 687–688, citing Barnlund, A Comparative Study of Individual, Majority, and Group Judgment, 58 J. Ab. & Soc. Psych. 55, 59 (1959); see Kelley & Thibaut, at 67.

[15] Lempert, at 687–688, citing Barnlund, *supra*, n. 14, at 58–59.

[16] Friedman; Nagel & Neef.

[17] *Nagel & Neef*, at 945.

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."

Another doubt about progressively smaller juries arises from the increasing inconsistency that results from the decreases. Saks argued that the "more a jury type fosters consistency, the greater will be the proportion of juries which select the correct (*i. e.*, the same) verdict and the fewer 'errors' will be made." M. Saks, Jury Verdicts, 86–87 (1977). From his mock trials held before undergraduates and former jurors, he computed the percentage of "correct" decisions rendered by 12-person and six-person panels. In the student experiment, 12-person groups reached correct verdicts 83% of the time; six-person panels reached correct verdicts 69% of the time. The results for the former juror study were 71% for the 12-person groups and 57% for the six-person groups. *Ibid.* Working with statistics described in H. Kalven & H. Zeisel, The American Jury 460 (1966), Nagel & Neef tested the average conviction propensity of juries, that is, the likelihood that any given jury of a set would convict the defendant.[18] They found that half of all 12-person juries would have average conviction propensities that varied by no more than 20 points.

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[17] *Id.*, at 946–948, 956, 975. Friedman reached a similar conclusion. He varied the appearance of guilt in his statistical study. The more guilty the person appeared, the greater the chance that a six-member panel would convict when a 12-member panel would not. As jury size was reduced, the risk of Type I error would increase, Friedman said, without a significant corresponding advantage in reducing Type II error. Friedman, at 23.

[18] Nagel & Neef, at 952, 971, concluded that the average juror had a propensity to convict more frequently than to acquit, a tendency designated by the figure .577. In other words, if the average jury considered the average case, 57.7% of the jurors would vote to convict.

Half of all six-person juries, on the other hand, had average conviction propensities varying by 30 points, a difference they found significant in both real and percentage terms.[20] Lempert reached similar results when he considered the likelihood of juries to compromise over the various views of their members, an important phenomenon for the fulfillment of the common-sense function. In civil trials averaging occurs with respect to damage amounts. In criminal trials it relates to numbers of counts and lesser included offenses.[21] And he predicted that compromises would be more consistent when larger juries were employed. For example, 12-person juries could be expected to reach extreme compromises in 4% of the cases, while six-person panels would reach extreme results in 16%.[22] All three of these post-*Williams* studies, therefore, raise significant doubts about the consistency and reliability of the decisions of smaller juries.

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 six members.[23] Both studies emphasized that juries in criminal cases generally hang with only one, or more likely two, jurors remaining unconvinced of guilt.[24] 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

[20] With the average juror having a conviction propensity of .677, the average 12-member jury propensities ranged from .579 to .775. The average six-member jury propensities ranged from .530 to .830. Nagel & Neef, at 971–972.

[21] Lempert, at 680.

[22] Accord, Zeisel, at 718; Note, Case W. Res., at 547.

[23] Zeisel, at 720; accord, Lempert, at 676. But see Saks, at 89–90.

[24] Lempert, at 674–677; Zeisel, at 719.

his argument.[27] In the jury setting the significance of this tendency is demonstrated by the following figures: If a minority viewpoint is shared by 10% of the community, 28.2% of 12-member juries may be expected to have no minority representation, but 53.1% of six-member juries would have none. Thirty-four percent of 12-percent panels could be expected to have two minority members, while only 11% of six-member panels would have two.[28] As the numbers diminish below six, even fewer panels would have one member with the minority viewpoint and still fewer would have two. The chance for hung juries would decline accordingly.

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. "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Smith* v. *Texas*, 311 U. S. 128, 130 (1940). 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 Commission*, 396 U. S. 320, 330 (1970), quoting *Strauder* v. *West Virginia*, 100 U. S. 303, 308 (1879). 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

[27] Asch, Effects of Group Pressure upon the Modification and Distortion of Judgments, Group Dynamics, 189, 195–197 (2d ed., D. Cartwright and A. Zander, 1960), cited in Lempert, at 673.

[28] Lempert, at 669, 677.

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.[27] 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.[28] 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.[29] 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 common sense of the community and will also tend to insure accurate factfinding.[30]

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[27] *Ibid.*; Saks, at 90.

[28] Lempert, at 648–653; Nagel & Neef, at 934–937; Saks, Ignorance of Science is No Excuse, 10 Trial 18, 19 (Nov.–Dec. 1974); Zeisel & Diamond, at 284–291; Note, Case W. Res., at 535.

[29] Lempert, at 648–653.

[30] Zeisel & Diamond have criticized one of the more important studies supporting smaller juries. See text, at n. 34, *infra*. In Note, An Empirical Study of Six- and Twelve-Member Jury Decision-Making Processes, 6 U. Mich. J. L. Ref. 712 (1973), the author tested the deliberations of larger and smaller panels by showing to sets of both sizes the video tape of a single mock civil trial. The case concerned an automobile accident and turned on whether the plaintiff had been speeding. If so, Michigan law precluded recovery because of contributory negligence. Of the 16 juries tested, not one found for the plaintiff. This led Zeisel & Diamond to conclude:

"The evidence in the case overwhelmingly favored the *defendant*. . . .

Studies that aggregate data also risk masking case-by-case differences in jury deliberations. The authors of H. Kalven and H. Zeisel, The American Jury (1966), examined the judge-jury disagreement. They found that judges held for plaintiffs 56% of the time and that juries held for plaintiffs 59%, an insignificant difference. Yet case-by-case comparison revealed judge-jury disagreement in 22% of the cases. *Id.*, at 63, cited in Lempert, at 656. This casts doubt on the conclusion of another study that compared the aggregate results of civil cases tried before six-member juries with those of 12-member jury trials.[31] The investigator in that study had claimed support for his hypothesis that damage awards did not vary with the reduction in jury size. Although some might say that figures in the aggregate may have supported this conclusion, a closer view of the cases reveals greater variation in the results of the smaller panels, *i. e.*, a standard deviation of $58,335 for the six-member juries, and of $24,834 for the 12-member juries.[32] Again, the averages masked significant case-by-case differences that must be considered when evaluating jury function and performance.

This overpowering bias makes the experiment irrelevant. On the facts of this case, any jury under any rules would probably have arrived at the same verdict. Hence, to conclude from this experiment that jury size generally has no effect on the verdict is impermissible." Zeisel & Diamond, at 287.

See also Diamond, A Jury Experiment Reanalyzed, 7 U. Mich. L. Ref. 520 (1974). The criticized study was cited and relied upon by the Court in *Colgrove* v. *Battin*, 413 U. S. 149, 159 n. 15 (1973).

[31] See Note, Six-Member and Twelve-Member Juries: An Empirical Study of Trial Results, 6 U. Mich. J. L. Ref. 671 (1973). This also was cited and relied upon in *Colgrove* v. *Battin*, 413 U. S., at 159 n. 15.

[32] Zeisel & Diamond, at 289–290. These authors also criticized the Michigan study because it ignored two other important changes that had occurred when the size of civil juries was decreased from 12 to six members: A mediation board, which encouraged settlements, had been introduced, and rules that permitted discovery of insurance policy limits had taken effect. See Saks, at 43.

IV

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*, 406 U. S. 356 (1972), 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. *Id.*, at 363. 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 five-member panel used in a misdemeanor trial. The Court held merely that the classification was not invidious. *Id.*, at 364. 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 *Baldwin* v. *New York*, 399 U. S. 66 (1970), the Court held that the right to a jury trial attached in both felony and misdemeanor cases. Only in cases concerning truly petty crimes, where the deprivation of liberty was minimal, did the defendant have no constitutional right to trial by jury. In the present case the possible deprivation of liberty is substantial. The State charged petitioner with misdemeanors under Georgia Code § 26-2101 (1972), and he has been given concurrent sentences of imprisonment, each for one year, and fines of $2,000 have been imposed. We cannot conclude that there is less need for the imposition and the direction of the common sense of the community in this case than when the State has chosen to label an offense a felony.[35] The need for an effective jury here must be judged by the same standards announced and applied in *Williams* v. *Florida*,

We have held that jury trial is not required where jury trial is available de novo review.

[35] We do not rely on any First Amendment aspect of this case in holding the five-person jury unconstitutional. Nevertheless, the nature of the substance of the misdemeanor charges against petitioner supports the refusal to distinguish between felonies and misdemeanors. The application of the community's standards and common sense is important in obscenity trials where juries must define and apply local standards. See *Miller* v. *California*, 413 U. S. 15 (1973). The opportunity for harassment and overreaching by an overzealous prosecutor or a biased judge is at least as significant in an obscenity trial as in one concerning an armed robbery. This fact does not change merely because the obscenity charge may be labeled as "misdemeanor" and the robbery a "felony."

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 common 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*, 406 U. S., at 411 (opinion of WHITE, J.).

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. See *Carter* v. *Jury Commission*, 396 U. S. 320 (1970); *Smith* v. *Texas*, 311 U. S. 128 (1940). But the data outlined above raise substantial doubt about the ability of juries truly to represent the community as membership decreases below six. 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. Not only is the representation of racial minorities threatened in such circumstances, but also majority attitude or various minority positions may be misconstrued or misapplied by the smaller groups. Even though the facts of this case would not establish a jury discrimination claim under the Equal Protection Clause, the question of representation does constitute one factor of several that, when combined, create a problem of constitutional significance under the Sixth and Fourteenth Amendments.

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. Tr. of Oral Arg. 27. This conclusion, however, is only one of several in the Saks study; that study eventually concludes:

> "Larger juries (size twelve) are preferable to smaller juries (six). They produce longer deliberations, more communication, far better community representation, and, possibly, greater verdict reliability (consistency)." Saks, at 107.

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

Methodological problems prevent reliance on the three studies that do purport to bolster Georgia's position. The reliability of the two Michigan studies cited by the State has been criticized elsewhere.[21] The critical problem with the Michigan laboratory experiment, which used a mock civil trial, was the apparent clarity of the case. Not one of the juries found for the plaintiff in the tort suit; this masked any potential difference in the decisionmaking of larger and smaller panels. The results also have been doubted because in the experiment only students composed the juries, only 16 juries were tested, and only a video tape of the mock trial was presented.[22] The statistical review of the results of actual jury

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[21] Note, Six-Member and Twelve-Member Juries: An Empirical Study of Trial Results, 6 U. Mich. J. L. Ref. 671 (1973) (a statistical study of actual jury results), and Note, An Empirical Study of Six- and Twelve-Member Jury Decision-Making Processes, 6 U. Mich. J. L. Ref. 712 (1973) (a laboratory experiment using a mock trial), were both criticized in Saks, at 45–46, and in Zeisel & Diamond, at 286–290. The second study was criticized in Diamond, A Jury Experiment Reanalyzed, 7 U. Mich. J. L. Ref. 529 (1974). The Michigan Studies were advanced by the State at oral argument. Tr. of Oral Arg. 27.

[22] Saks, at 45.

trials in Michigan erroneously aggregated outcomes. It is also said that it failed to take account of important changes of court procedure initiated at the time of the reduction in size from 12 to six members.[31] The Davis study, which employed a mock criminal trial for rape, also presented an extreme set of facts so that none of the panels rendered a guilty verdict.[32] None of these three reports, therefore, convinces us that a reduction in the number of jurors below six will not affect to a constitutional degree the functioning of juries in criminal trials.

V

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.

The States utilize juries of less than 12 primarily for administrative reasons. Savings in court time and in financial costs are claimed to justify the reductions.[33] The financial benefits of the reduction from 12 to six are substantial; this is mainly because fewer jurors draw daily allowances as they hear cases.[34] On the other hand, the asserted saving in judicial time is not so clear. Pabst in his study found little reduction in the time for voir dire with the six-person jury because many questions

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[31] *Id.*, at 43–44; Zeisel & Diamond, at 288–290.

[32] Davis, et al., *supra*, n. 10, at 7, criticized in Saks, at 49–51.

[33] See New Jersey Criminal Law Revision Commission, Six-Member Juries (1971); Bogue & Fritz, The Six-Man Jury, 17 S. Dak. L. Rev. 285 (1972).

[34] It has been said that a reduction from 12 jurors to six throughout the federal system could save at least $4 million annually. Zeisel, Twelve is Just, 10 Trial 13 (Nov.-Dec. 1974). Another study calculated a saving in jury man-hours of 41.9% with the reduction to six members. Pabst, Statistical Studies of the Costs of Six-Man versus Twelve-Man Juries, 14 Wm. & Mary L. Rev. 326, 328 (1972).

were directed at the veniremen as a group.[40] Total trial time did not diminish, and court delays and backlogs improved very little.[41] The point that is to be made, of course, is that a reduction in size from six to five or four or even three would save the States little. They could reduce slightly the daily allowances, but with a reduction from six to five the saving would be minimal. If little time is gained by the reduction from 12 to six, less will be gained with a reduction from six to five. Perhaps this explains why only two States, Georgia and Louisiana,[42] have reduced the size of juries in certain criminal cases to five. Other States appear content with six members or more.[43] In short, the State has offered little or no justification for its reduction to five members.

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.

VI

Although *Williams* v. *Florida* indicated that the Court even-

[40] *Id.*, at 327; Zeisel, Twelve is Just, 10 Trial 13 (Nov.-Dec. 1974). But see Institute of Judicial Administration, A Comparison of Six- and Twelve-Member Civil Juries in New Jersey Superior and County Courts, 27–28 (1972); New Jersey Criminal Law Revision Commission, Six-Member Juries 3–4 (1971); Thompson, Six Will Do, 10 Trial 12, 14 (Nov.-Dec. 1974).

[41] Pabst, *supra*, at 327–328.

[42] La. Code Crim. Proc., Art. 782 (West) (Supp. 1977) permits juries of five members in cases in which punishment at hard labor is optional. The jury must act unanimously in order to convict.

[43] Several States have provided for six-member juries for selected criminal cases. *E. g.*, Colo. Rule Crim. Proc. 23 (1974). Fla. Stat. § 913.10 (1973); Ky. Rev. Stat. § 29A.015 (1971); Mass. Gen. Laws Ann., ch. 218 § 27A (West) (1977 Supp.). Other States provide for smaller juries upon stipulation of the parties. *E. g.*, Ark. Stat. Ann. § 43–1901 (Repl. 1977); Cal. Civ. Proc. Code § 194 (1954). The Federal Indian Civil Rights Act, § 202, 88 Stat. 77, provides for a right of jury trial in certain cases before a jury of not less than six persons. 25 U. S. C. § 1302 (10).

tually would be called upon to establish a constitutional minimum on the size of criminal juries, the announcement of that minimum in this case establishes a new rule of constitutional law. It therefore prompts us to inquire whether the new rule should be applied retroactively.[11] When a decision effects "a clear break with the past," *Desist* v. *United States*, 394 U. S. 244, 248 (1969), it is possible that its holding should be limited to future cases. Today's decision may be said to effect such a break because the Court previously held, less than a decade ago, in *Williams* v. *Florida* in 1970 and in *Colgrove* v. *Battin*, 413 U. S. 149 (1973), that decreases in the size of juries infringed neither the criminal nor the civil right of trial by jury. And in 1976 we *denied* a petition for certiorari, 424 U. S. 931 in *Sanders* v. *State*, 234 Ga. 586, 216 S. E. 2d 838 (1975), where the five-person issue had been raised. See *Sanders* v. *Georgia*, O. T. 1975, No. 75-707, Petition for Certiorari 2.

Whether a *decision effecting* a new rule of constitutional law is to receive retroactive application depends on the balancing of three factors: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall* v. *Denno*, 388 U. S. 293, 297 (1967). "Foremost among these factors is the purpose to be served by the new constitutional rule." *Desist* v. *United*

[11] In order to avoid unnecessary disruption and uncertainty in States using five-person criminal juries, we consider the question of retroactivity coincidentally with the announcement of the decision on the merits. See *Witherspoon* v. *Illinois*, 391 U. S. 510, 523 n. 22 (1968) (considering retroactivity at the time of establishment of jury selection procedures in capital cases). See, generally, Beytagh, Ten Years of Non-Retroactivity: A Critique and a Proposal, 61 Va. L. Rev. 1557, 1605, and n. 261, 1619–1620 (1975). In *Morrissey* v. *Brewer*, 408 U. S. 471, 490 (1972), the Court said that the then announced basic due process requirements for parole revocation hearings were applicable only "to future revocations of parole."

States, 394 U. S., at 249. If the purpose is to correct a substantial impairment of the truthfinding process, retroactive application may be required because of doubt about the accuracy of earlier guilty verdicts. *Williams* v. *United States*, 401 U. S. 646, 653 (1971) (plurality opinion); *Gosa* v. *Mayden*, 413 U. S. 665, 679 (1973) (plurality opinion). In such a case neither reliance by law enforcement authorities nor adverse impact on the administration of justice outweighs the purpose element. *Ibid.*

The Court's previous decisions on retroactivity of extensions of the right of trial by jury lead us to conclude that the purpose of today's decision does not preclude a careful balancing of all three factors. In *Carcerano* v. *Gladden*, 392 U. S. 631 (1968), the Court refused to apply *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), retroactively. In *Duncan*, the Court held that a State could not deny a request for a jury trial in a serious criminal case.[15] Although it recognized that a jury serves to prevent arbitrariness and repression, the Court refused to conclude that every trial before a judge was unfair. Similarly, in *Gosa* the Court recognized that the failure of military courts to provide jury trials affected incidentally the truthfinding process. 413 U. S., at 680. Nevertheless, the Court refused to apply *O'Callahan* v. *Parker*, 395 U. S. 258 (1969),[16] retroactively because the right to a jury trial had other elements, namely, avoiding excessive sentences and preventing prejudice from prosecutorial abuse. 413 U. S., at 681. The *O'Callahan* change of law did not respond exclusively to the truthfinding function. The Court, therefore, balanced

[15] *Carcerano* was decided with *DeStefano* v. *Woods*, 392 U. S. 631 (1968), which refused to apply *Bloom* v. *Illinois*, 391 U. S. 194 (1968), retroactively. *Bloom* extended the right of trial by jury to persons charged with serious criminal contempt.

[16] *O'Callahan* held that civilian rather than military courts should try military personnel when the criminal activity charged was not service-connected. This rule operated to secure for such defendants the benefits of indictment by grand jury and trial by petit jury. 395 U. S., at 272–273.

the three factors in determining retroactivity and did not rely exclusively on the purpose of the new rule.

As has been said in Part IV, *supra*, we do not perceive a clear line between the reliability of six-member juries, on the one hand, and that of five-person panels, on the other. We cannot declare that the truth-finding process of cases tried previously before five-member panels was necessarily impaired. Furthermore, the constitutional minimum established today responds not only to concern about the reliability of *smaller* panels but also to concern about representation of minority groups, an interest that would not be significantly advanced by retroactive application. Thus, the purpose of this new constitutional rule does not mandate retroactive application so as to obviate consideration of the other *Stovall* elements of reliance and effect.

The reliance element clearly supports only prospective application of today's decision. The question is whether Georgia has adopted and maintained its system in good faith reliance on constitutional precedent. *Gosa* v. *Mayden*, 413 U. S., at 682; *DeStefano* v. *Woods*, 392 U. S., at 634. Georgia adopt its five-person jury system in 1891, see n. 5, *supra*, many years before *Duncan* applied the Sixth Amendment right to trial by jury to the States. Although *Williams* suggested that the Court eventually would be required to set a minimum number, the opinion in that case did not foretell where the cutoff would occur. Georgia, therefore, reasonably refrained from altering its longstanding statute.[47]

The effect on the administration of justice from retroactive application of today's decision would not be insubstantial. As in *DeStefano* and *Carcerano*, 392 U. S., at 634, the current system has been widespread and long in effect. Reconsideration could be requested in all misdemeanor cases that continue

[47] It should be noted that the Louisiana five-person jury provision was enacted in 1880, also long before the decisions in *Duncan* and in *Williams*. 1880 La. Acts No. 35 § 4.

to present live controversies or, perhaps, collateral consequences. And, to the extent that today's holding casts doubt on Louisiana's five-person jury system, the effect of retroactive application obviously would extend beyond the borders of the State of Georgia. This potential disruption, therefore, outweighs the uncertain force that the purpose element might provide in favor of retroactivity.** Today's holding will be applied only to trials in which juries are sworn after the 25th day from the date of the filing of this opinion.

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

It is so ordered.

**The retroactive application, in *Berry* v. *City of Cincinnati*, 414 U. S. 29 (1973), of *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972), does not support a contrary balancing of the *Stovall* elements. *Argersinger* required the appointment of counsel for indigents in certain misdemeanor cases. In *Berry* a sensitive balancing of the three *Stovall* elements did not take place because the right to counsel was considered so important to the factfinding process. 414 U. S., at 29–30. Rather than balance the importance of counsel against the disruption from reconsideration of misdemeanor cases, the Court cited only cases turning on the retroactivity of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), which required counsel in state felony cases. E. g., *Kitchens* v. *Smith*, 401 U. S. 847 (1971); *Burgett* v. *Texas*, 389 U. S. 109 (1967). *Berry*, therefore, provides no guidance as to the balancing of interests when the purpose of the change in law responds less directly to concern about the reliability of the truthfinding process. We note in passing, however, that the disruption here far exceeds that in *Berry* because, presumably, most, if not all, misdemeanor cases in the Criminal Court of Fulton County, Georgia, have been tried before five-member panels. In *Berry*, on the other hand, reconsideration became necessary only in those misdemeanor cases where indigents had not been given appointed counsel. In addition, lack of counsel is a deprivation of far higher degree than deprivation of one additional juror about five.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 15, 1978

RE: 76-761 - Ballew v. Georgia

Dear Harry:

Please join me in Parts I-V of your opinion. For the time being at least, I would like to withhold judgment on Part VI.

Respectfully,

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

February 15, 1978

Re: No. 76-761, Ballew v. Georgia

Dear Harry,

I cannot agree that the decision in this case should have prospective effect only. It seems to me that the criteria established in our previous cases, discussed in Part VI of your proposed opinion, lead almost ineluctably to the conclusion that this decision must be given fully retroactive effect.

Thus, so far as I am concerned, the only question is whether we should state explicitly that the decision is fully retroactive or remain silent on the subject. Until the advent of the vogue of "prospectivity," in the 1960's, every decision of this Court was presumptively retroactive, and I assume that that presumption exists and that our silence on the subject would be generally understood as meaning that this decision is retroactive. On the other hand, the possibility exists that lawyers and courts would not so understand our silence, and accordingly I am inclined to favor an explicit statement making this decision retroactive.

The "next inevitable case" is already here in the form of cases being held for this one, and our decision of the retroactivity question, therefore, cannot be deferred.

Sincerely yours,

P.S.
1.

Mr. Justice Blackmun
Copies to the Conference

P. S. I am unalterably opposed to any suggestion, such as that contained in the sentence at about the middle of page 22 of your opinion, that a denial of certiorari has any significance whatsoever, let alone that it might imply approval of the judgment sought to be reviewed.

FILE COPY
PLEASE RETURN
TO FILE

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: 16 FEB 1978

Recirculated: _____

76-761 BALLEW v. GEORGIA

MR. JUSTICE POWELL, concurring.

I concur in the judgment of the Court, as I agree that use of a jury as small as five members, with authority to convict for serious offenses, involves serious questions of fairness. As the Court indicates, the line between five and six member juries is difficult to justify, but a line has to be drawn somewhere if the substance of jury trial is to be preserved.

I do not agree, however, that every feature of jury trial practice must be the same in both federal and state courts. Apodaca v. Oregon, 406 U.S. 404, 414 (1972)(Powell, J., concurring). As the Court's rationale today assumes full incorporation of the Sixth Amendment by the Fourteenth Amendment contrary to my view in Apodaca, I do not join the opinion. Also, I have reservations as to the wisdom - as well as the necessity - of the Court's heavy reliance on numerology derived from statistical studies. Moreover,

neither the validity nor the methodology employed by the studies cited was addressed in briefs or argument or by the courts below. */

For these reasons I concur only in the judgment.

---

*/ The Court acknowledged, in disagreeing with other studies, that "methodological problems" may "mask differences in the operation of smaller and larger juries". Ante at 14 and 19.

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-761

Claude D. Ballew, Petitioner,
v.
State of Georgia.
} On Writ of Certiorari to the Court of Appeals of Georgia.

[February —, 1978]

MR. JUSTICE POWELL, concurring in the judgment.

I concur in the judgment of the Court, as I agree that use of a jury as small as five members, with authority to convict for serious offenses, involves serious questions of fairness. As the Court indicates, the line between five- and six-member juries is difficult to justify, but a line has to be drawn somewhere if the substance of jury trial is to be preserved.

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For these reasons I concur only in the judgment.

*The Court acknowledged, in disagreeing with other studies, that "methodological problems" may "mask differences in the operation of smaller and larger juries." *Ante*, at 14 and 19.

Mr. Justice [illegible]
Mr. Justice [illegible]
Mr. Justice [illegible]
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-761

Claude D. Ballew, Petitioner, v. State of Georgia. | On Writ of Certiorari to the Court of Appeals of Georgia.

[February —, 1978]

MR. JUSTICE POWELL, with whom MR. JUSTICE REHNQUIST joins, concurring in the judgment.

I concur in the judgment of the Court, as I agree that use of a jury as small as five members, with authority to convict for serious offenses, involves serious questions of fairness. As the Court indicates, the line between five- and six-member juries is difficult to justify, but a line has to be drawn somewhere if the substance of jury trial is to be preserved.

I do not agree, however, that every feature of jury trial practice must be the same in both federal and state courts. *Apodaca* v. *Oregon*, 406 U. S. 404, 414 (1972) (POWELL, J., concurring). As the Court's rationale today assumes full incorporation of the Sixth Amendment by the Fourteenth Amendment contrary to my view in *Apodaca*, I do not join the opinion. Also, I have reservations as to wisdom—as well as the necessity—of the Court's heavy reliance on numerology derived from statistical studies. Moreover, neither the validity nor the methodology employed by the studies cited was addressed in briefs or argument or by the courts below.*

For these reasons I concur only in the judgment.

*The Court acknowledged, in disagreeing with other studies, that "methodological problems" may "mask differences in the operation of smaller and larger juries." *Ante*, at 14, 19–20.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 16, 1978

See my
separate opn.

Memorandum re: No. 76-761, Ballew v. Georgia

Dear Harry,

I agree with Potter that if we consider retroactivity at all, we must hold the six-person jury requirement to be retroactive.

The basis of our holding that five is not enough is that the risk of error and inconsistent adjudication of guilt is too substantial to justify any decrease of the number of jurors from six. I see no substantial countervailing costs to applying the six-person jury rule retroactively. First, as you note at 3 n.5, the five-person jury has been abolished in Fulton County as of March 24, 1976. Thus, almost everyone who could bring the jury issue here on direct review must already have done so. In addition, since the only persons who might have been convicted by a five-person jury could at most have been sentenced to one-year in prison, see op., at 6 n. 7, there is only the most limited possibility of some kind of long-delayed collateral attack. Indeed, I am not aware of any collateral consequences flowing from a misdemeanor conviction -- which is all that is at stake in Georgia, ibid. -- that are of sufficient importance to make it likely that persons will seek collateral relief from such convictions or that the state will seek to re-try a person whose conviction is reversed solely to reimpose such consequences. The situation in Louisiana may be different, but at present any prediction of vast numbers of retrials in that state is purely speculative. Therefore, it is much less likely than in many of our early cases which refused to hold a ruling retroactive that witnesses will be unavailable for retrial or memories dim, cf. Stovall v. Denno, 388 U.S. 293, 299 (1967), or that a substantial number of retrials will result from retroactive application of the six-person rule.

Moreover, this case is unlike either Carcerano v. Gladden, 392 U.S. 631 (1968), or Gosa v. Mayden, 413 U.S. 665 (1973), since in each of those cases a tribunal that was not presumptively unfair had passed sentence on the criminal defendant. It was this sentence that we refused to upset by retroactively requiring trial by jury (in Carcerano) or trial by civilian court (in Gosa). Here, the only judgment in the field is one by a five-person jury whose ability to reach a correct result is sufficiently in doubt that we are holding such a jury constitutionally insufficient.

Finally, I cannot agree that the concern with respect to "representation of minority groups," op. at 24, is irrelevant to the truth-finding function in obscenity cases. Certainly if we are searching for community standards, a representative cross-section of the community is an essential element of a fair and accurate trial. Thus, whatever may be the retroactivity rule for cases in general, I think the six-person jury rule must apply retroactively at least in obscenity cases.

Since, as Potter points out, the "next inevitable case" is already here, I agree with him that we should decide the retroactivity issue now and hold the six-person rule to be retroactive.

W.J.B., Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 16, 1978

Re: No. 76-761 - Ballew v. Georgia

Dear Potter:

I doubt if this is anything to get so excited about.

With my pre-circulation note of February 10 I indicated, I thought, that there were three possible choices, and that I would be guided by the reaction of the majority. Despite your teaching on presumptive retroactivity, the fact is that the Court has sidestepped the presumption and did so in the 1960's when you were a member of the Court. I am aware of your posture on these retroactivity decisions. I was long enough on the Court of Appeals to be fully aware of the confusion that existed, and still exists, among lower court federal judges on retroactivity issues. My suggestion that we meet the problem in Ballew was made in order to keep the confusion at a minimum and to save ourselves some wear and tear with still an additional case. Bill Brennan and John have now indicated a preference to say nothing about retroactivity. You are inclined to feel that we should decide in Ballew that the decision is retroactive. This is enough of an indication for me to drop Part VI from the opinion, and I shall have it rerun accordingly.

I understand your "unalterable opposition" expressed in your postscript, but I do not necessarily agree with it. I am also aware of all that has been written by Felix and others about the non-significance of a denial of certiorari. I presumed to insert the reference here only because the Georgia courts in these cases have made reference to the denial in Sanders and it bears upon the good faith of the State. Thus, for me in a case like this, with Williams v. Florida on the books, I think there is some significance and I reserve the right in future similar situations independently to comment accordingly.

You say that the "next inevitable case" is already here and that the retroactivity question "cannot be deferred." I try to make it a practice, before I circulate an opinion, to review pending holds. According to my records, and I have no reason to suspect that they are incorrect, there is only one hold thus far for Ballew. It is No. 76-1738, Sewell v. Georgia, considered at our September conference. Perhaps I cannot read, but it appears to me that the 5-person jury issue is not raised in Sewell. The case does present the issues as to scienter and obscenity vel non which the Conference decided should be sidestepped in Ballew.

Friday's conference lists contain two other cases that are probable holds for Ballew. The first is No. 77-790, Teal v. Georgia, on page 14. Here again, the 5-person jury issue is not raised, but the same other issues are. It therefore seems to me that this case, like Sewell, will not present the retroactivity question.

Also on for Friday is No. 77-915, Robinson v. Georgia, on page 20. This case does reach the 5-person jury issue, and the other issues as well. Perhaps this is the one you have in mind when you say that we now are compelled to reach the question of retroactivity.

Ironically, had we chosen to decide the obscenity issues in Ballew, and decided them in favor of the defense, the 5-person Georgia jury issue would have gone away for good. Whether there would be a court for that, I doubt and, in any event, I dare not predict.

I should point out that each of the three cases is brought here by the same counsel who represent Ballew.

Sincerely,

HAB.

Mr. Justice Stewart

cc: The Conference

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-761

Claude D. Ballew, Petitioner,
v.
State of Georgia.

On Writ of Certiorari to the Court of Appeals of Georgia.

[February —, 1978]

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring in the judgment.

I concur in the judgment, as I agree that use of a jury as small as five members, with authority to convict for serious offenses, involves grave questions of fairness. As the opinion of MR. JUSTICE BLACKMUN indicates, the line between five- and six-member juries is difficult to justify, but a line has to be drawn somewhere if the substance of jury trial is to be preserved.

I do not agree, however, that every feature of jury trial practice must be the same in both federal and state courts. *Apodaca* v. *Oregon*, 406 U. S. 404, 414 (1972) (POWELL, J., concurring). Because the opinion of MR. JUSTICE BLACKMUN today assumes full incorporation of the Sixth Amendment by the Fourteenth Amendment contrary to my view in *Apodaca*, I do not join it. Also, I have reservations as to the wisdom—as well as the necessity—of MR. JUSTICE BLACKMUN's heavy reliance on numerology derived from statistical studies. Moreover, neither the validity nor the methodology employed by the studies cited was subjected to the traditional testing mechanisms of the adversary process.* The studies relied on merely represent unexamined findings of persons interested in the jury system.

For these reasons I concur only in the judgment.

*The opinion of MR. JUSTICE BLACKMUN acknowledges, in disagreeing with other studies, that "methodological problems" may "mask differences in the operation of smaller and larger juries." *Ante*, at 14. See also *id.*, at 19-20.

17 MAR 1978

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-761

Claude D. Ballew, Petitioner,
v.
State of Georgia.

On Writ of Certiorari to the Court of Appeals of Georgia.

[February —, 1978]

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For these reasons I concur only in the judgment.

*The opinion of MR. JUSTICE BLACKMUN acknowledges, in disagreeing with other studies, that "methodological problems" may "mask differences in the operation of smaller and larger juries." *Ante*, at 14. See also *id.*, at 19-20.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

February 17, 1978

No. 76-761 - Ballew v. Georgia

Dear Bill,

Please add my name to your separate opinion in this case.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 14, 1978

PERSONAL

Re: 76-761 - Ballew v. Georgia

Dear Lewis:

I can join your concurring opinion if you will

(a) Add to the third line from the end, after "was", the following:

"subjected to the traditional testing mechanisms of the adversary process." OK

(b) Following the asterisk of the penultimate sentence add:

"The studies relied on merely represent unexamined opinions of persons interested in the jury system, ~~and nothing more.~~"

Our holding is sheer, arbitrary ipse dixit, and I would as soon rely on palm reading as on professors' numbers. Indeed, I find no basis to support six but not five after Williams. This case will render us the "butt" of more quips than Ham Jordan has received!

There really is no rational basis for not following and applying Williams. You see, therefore, I will not mind your rejecting my suggestions so I can "explode" on my own.

Regards,

WEB

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 16, 1978

Re: 76-761 - Ballew v. Georgia

Dear Lewis:

I join.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

Would he reached me re your changes so add my name: WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 20, 1978

Re: No. 76-761 - Ballew v. Georgia

Dear Lewis:

Because of the changes made in the recirculation of your opinion concurring in the judgment, I am adding the following paragraph to my opinion's footnote 10, page 9.

> "We have considered them carefully because they provide the only basis, besides judicial hunch, for a decision about whether smaller and smaller juries will be able to fulfill the purpose and functions of the Sixth Amendment. Without an examination about how juries and small groups actually work, we would not understand the basis for the conclusion of Mr. Justice Powell that 'a line has to be drawn somewhere.' We also note that the Chief Justice did not shrink from the use of empirical data in Williams v. Florida, 399 U.S. 78, 100-102, 105 (1970), when the data were used to support the constitutionality of the six-person criminal jury, or in Colgrove v. Battin, 413 U.S. 149, 158-160 (1973), a decision also joined by Mr. Justice Rehnquist."

If you or either of those who have joined you wish the case to go over, please feel free to ask Mr. Putzel and Mr. Cornio to hold it up from tomorrow's calendar.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

I don't think any reply is called for. Bob

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 20, 1978

Re: No. 76-761 - Ballew v. Georgia

Dear Lewis:

Because of the changes made in the recirculation of your opinion concurring in the judgment, I am adding the following paragraph to my opinion's footnote 10, page 9.

> "We have considered them carefully because they provide the only basis, besides judicial hunch, for a decision about whether smaller and smaller juries will be able to fulfill the purpose and functions of the Sixth Amendment. Without an examination about how juries and small groups actually work, we would not understand the basis for the conclusion of Mr. Justice Powell that 'a line has to be drawn somewhere.' We also note that the Chief Justice did not shrink from the use of empirical data in Williams v. Florida, 399 U.S. 78, 100-102, 105 (1970), when the data were used to support the constitutionality of the six-person criminal jury, or in Colgrove v. Battin, 413 U.S. 149, 158-160 (1973), a decision also joined by Mr. Justice Rehnquist."

If you or either of those who have joined you wish the case to go over, please feel free to ask Mr. Putzel and Mr. Cornio to hold it up from tomorrow's calendar.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
					11/12/77			
Join L F P 3/16/78	Typed Draft Concurring in part & dissenting in part 2/17/78	join WJB 2/17/78	concurs in judgment 3/2/78	join WJB 2/23/78	1st draft 2/14/78 2nd Draft 2/17/78 3rd draft 2-22-78	Concurring opinion 2/16/78 typed Draft 1st Draft 2/21/78	join L F P Concurring op. 2/22/78	Join Parts I-V 2/15/78 Concurring opinion typed Draft 2/23/78 1st Draft 2/4/78 2nd Draft 3/2/78
	1st circulated draft 2/22/78 2nd Draft 2/23/78 3rd Draft 2/28/78				4th Draft 3/1/78	3rd Draft 3/16/78		
				76-761 Ballew v. Georgia				