10-1975

Ludwig v. Massachusetts

Lewis F. Powell Jr.

JK/gg 3-11-75

MEMORANDUM

TO: Mr. Justice Powell DATE: March 11, 1975

FROM: Joel Klein

Make Copy for file on Ludwig v. Mass (75-377)

No. 73-6739, Costarelli v. Massachusetts

Appellant attacks the Massachusetts "two-tier" criminal justice system on the ground that the first tier denies him his constitutional right to a jury trial as articulated in Callan v. Wilson, 127 U.S. 540 (1888). Prior to a discussion of the merits, I will first address the serious jurisdictional issue in this case.

1. Jurisdiction -- I would suggest that this appeal be dismissed because it is not a "final judgment by the highest court of a state in which a decision could be had." Subsequent to the Court's noting of this case - at that time it postponed consideration of jurisdiction - the Massachusetts Supreme Judicial Court held that a defendant convicted in the first tier could appeal the failure to give a jury trial by way of a "motion to dismiss prior to trial in the second tier. Whitmarsh v. Commonwealth, 316 N.E. 2d 610 (1974). The Court went on to note that "if his motion were denied, and if he were thereafter tried in Superior Court (the second tier) and found guilty, the plaintiff would have available to him an opportunity for appellate review of the ruling on his motion as a matter of right." Id. at 613.

Thus, this issue would be appeablable unless the defendant were acquitted in Superior Court. That fact, it seems to me, is not sufficient to confer jurisdiction on this Court.

To be sure, such a jurisdictional dismissal is a bit hollow in this case since the Mass. J.C. went on in Whitmarsh to issue an advisory opinion stating that the two-tier system did not violate a defendant's constitutional right to trial by jury. Hence, requiring further review in state court is futile. Nevertheless, as a formal matter, I see no way to surmount the plain jurisdictional requirements of § 1257. The "futility doctrine" has never justified skipping appellate remedies in state court prior to seeking review here.

2. Merits. - If you do reach the merits I think the case is more difficult than might appear at first blush. Much is made in the briefs about whether Duncan v. Louisiana and its progeny "incorporate" Callan. In view of your position in Johnson v. Louisiana, where you expressly rejected the "incorporation" approach in this area, we need not be concerned with this debate, although it will certainly present problems for the remainder of the Court.

Turning then to the substance of the matter, the issue may be stated simply: Whether a two-tier criminal justice sytem in which a jury trial is unavailable at the first tier but available in the trial de novo violates due process? My initial instinct was to answer this question in the negative

in light of Colten v. Kentucky and my view that a two-tier system is a reasonable effort at combining efficiency with the procedural rigors traditionally required in a criminal trial. Upon reflection, however, I am not confident that such a holding will wash.

The state's interest in the two-tier system is purely one of efficiency. This much is made clear in Colten, 407 U.S. at 114, and appellee's brief herein, Br. at 36, n. 43. While this is a reasonable goal when the defendant does not seek a jury trial at the outset, the rationale disappears when, as here, he does seek such a trial. If he wants a jury trial it is hardly efficient to require him to go through an initial trial which must be redone. The "only purpose" to requiring the initial trial is to pressure him, perhaps by imposing a lenient sentence, to waive his jury trial.*

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* This pressure was made explicit in the present case when the trial court told appellant, "Take your pick, one year suspended with no appeal, or one year with appeal."

Of course, as a practical matter it is precisely these kinds of factors that influence plea bargaining. For good reason, however, the courts never explicitly articulate this consideration. It is troubling for a court to say that we are willing to give a defendant a lesser sentence if he is willing to forego his constitutional rights. I would hesitate to subscribe to such an analysis here.

Upholding appellant's claim need not significantly disrupt the procedures of those states using a two-tier system. All the state need do is allow the defendant to "waive" the first tier and seek a jury trial in the second tier. My guess is that many defendants will not waive their initial trial, precisely because they want a peek at the prosecution's case, a second chance at acquittal, and an opportunity to assess the initial sentence. But those who do not want this should get a jury trial at the outset.

I am confirmed in ~~this~~ my view by the fact that Massachusetts, unlike most two-tier states - e.g., Kentucky, Virginia and Texas - ~~do~~ does not allow a defendant to plead guilty and then seek a trial de novo. Thus, in Massachusetts, a defendant must actually go through the initial trial and may, if a witness disappears, subsequently be bound by the testimony given thereat. Moreover, since he must go through a trial the non-indigent defendant must pay lawyers fees, and frequently

in these relatively petty cases, lose a day from work. Moreover, in Massachusetts, immediately upon conviction in the first tier, a defendant such as appellant, who is tried for unauthorized use of a motor vehicle, loses his driver's license for a year or until his conviction is reversed at the de novo trial. Thus, at least in Massachusetts, requiring a defendant to go through the first tier is not imposition of a costless formality.*

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* I also note that in Colten, itself, the defendant could get a jury trial in the first tier, in that case he waived it

Note

DISCUSS

This case presents the same kind of attack on Mass. two-tier criminal trial system that we did not reach in Costarelli

PRELIMINARY MEMORANDUM

November 7, 1975, Conf.
List 1, Sheet 1

No. 75-377-ASY

LUDWIG

v.

MASSACHUSETTS

Appeal from Mass Sup Jud Ct (Kaplan, Tauro, Braucher, Hennessey, Wilkins)

State/Criminal

Timely

Discuss - possible ~~grant~~ Note. The states are not in accord on the implications ~~meaning~~ of the S. Court precedent. A sub-question is the continuing vitality of Callan.

Chris

1. Summary. Appellant challenges the constitutionality of Massachusetts' two-tier criminal trial system, under which defendants in misdemeanor and some felony cases are tried first in an inferior court without a jury, and if convicted may seek a de novo jury trial in a higher court. The constitutional violations claimed

are of the double jeopardy guarantee, and of the rights to a speedy trial, and one before a jury. Since appnt has pursued his state appellate remedies through the Supreme Judicial Court, his appeal does not suffer the jurisdictional defect which apparently prevented the Court from hearing the identical issue last term in Costarelli v. Massachusetts, 421 U.S. 193 (1975).

2. Facts. All misdemeanors, all felonies carrying a possible sentence of less than five years, and certain enumerated felonies (e.g., forgery) punishable by more than five years' imprisonment may be initially tried in Massachusetts' various district courts and in the Municipal Court of Boston. These inferior courts sit without juries.* If a defendant pleads guilty in one of them, he has an appeal of the sentence he receives, but is entitled to no other trial on the issue of guilt. If he pleads not guilty and is acquitted, that is the end of the matter. If he pleads not guilty and is convicted, he may obtain a de novo jury trial in a "higher" court. (In some cases this is actually a jury trial division of the district court.) No contention is made that the second-tier de novo trial, which is before a jury of six in some cases and twelve in others, would not fully satisfy the jury trial requirement, were it available in the first instance.

Appnt was charged in one of these district courts with reckless driving, a crime carrying a possible jail sentence of two years. He pleaded innocent, and also moved to dismiss on the ground that the procedure denied him his right to speedy jury trial. He was convicted and fined twenty dollars. He obtained a de novo jury

*/ There is apparently no express provision in the Mass General Laws stating that the inferior courts are to sit without juries. This fact caused the Court in Costarelli to register its doubt as to whether an appeal could be taken, in that it was "not clear that the denial

trial and was again convicted. He appealed to the Massachusetts Supreme Judicial Court, still claiming that he had been denied a speedy jury trial, and also that the de novo trial subjected him to double jeopardy. The SJC affirmed, relying on its opinion in Whitmarsh v. Commonwealth, 316 N.E.2d 610 (1974). In that case the SJC had dismissed an appeal taken directly from a district court conviction on the ground that it was untimely. The SJC anticipated that the defendant would properly be able to appeal from the de novo trial court's judgment, if it was a conviction. (For the same reason this Court denied cert to the district court. 421 U.S. 957 (1975).) The SJC in Whitmarsh nonetheless went on to express its adverse views of the constitutional claims. Since Whitmarsh was incorporated by reference in the SJC's brief for affirmance in this case, it is in effect the "decision below."

3. Decision below. Whitmarsh answered all three of the present contentions. (1) On the Sixth Amendment right to jury trial, it reviewed this Court's decisions in the area and concluded that the law was "in flux." Chief among those decisions are the following: Callan v. Wilson, 127 U.S. 540 (1888), holding that in federal courts the right is to a jury trial in the first instance; Duncan v. Louisiana, 391 U.S. 145 (1968), holding that due process requires a state jury trial wherever a federal jury trial would be required, but leaving open the question of whether all of the Court's previous Sixth Amendment holdings would be applied to the states, see id. at 158-59 n.30 & 213 (Fortas, J., concurring); Williams v. Florida, 399 U.S. 78 (1969), holding that the constitutional jury

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fn cont./ of a jury in the first-tier trial resulted from the operation of a statute." 421 U.S. at 195 n.3. It seems clear, however, that the statute does contemplate juryless district courts. It expressly provides for juries in the second tier courts, Mass. Gen.

is not fixed at the historically accidental number twelve; Johnson v. Louisiana, 406 U.S. 356 (1972), and Apodaca v. Oregon, 406 U.S. 404 (1972), dispensing with the unanimty requirement; and Colten v. Kentucky, 407 U.S. 104 (1972), rejecting due process and double jeopardy challenges to a two-tier system in which an enhanced sentence could be imposed in the higher court, but in which the lower court trial included a jury and could be bypassed by a plea of guilty. Reference was made in Colten to the fact that other states have no jury in the first tier, but no approval or disapproval was expressed. Id. at 113-14 & n.9. On the strength of these cases the SJC in Whitmarsh decided that

> . . . we are [not] required to conclude either (a) that the Sixth Amendment would be interpreted at the present time by the Supreme Court to require a trial by jury in the first instance for all criminal offenses, [citing Callan] or (b) that even if that Court did affirm the rule of the Callan case with respect to the Federal Courts, it would apply such a requirement in equal fashion to the States.

316 N.E.2d at 619. Not being required so to conclude, the SJC concluded otherwise.

(2) The speedy trial claim was rejected on the ground that Whitmarsh had in fact been speedily tried, and had in any case not asserted his right to a speedy trial.

(3) The double jeopardy claim was rejected on the authority of Colten, which the SJC considered indistinguishable.

4. Contentions. (1) For his right to a jury trial in the first instance appnt relies on Callan. Appee aligns with the SJC. (2) Appnt claims that the second-tier jury trial is not a speedy one

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fn. cont./ Laws ch. 278 § 2, and it repeatedly provides that one convicted in the lower tier can "appeal and claim a jury" in the higher one. Id. ch. 218 § 27A. The SJC apparently regards the lack of a first tier jury as statutory, since it simply stated that there was no such jury and cited the statute. Petn. App. 1a.

because the first trial he must undergo before obtaining it puts him under a "cloud of anxiety, suspicion, and often hostility." appee answers that the lower tier trial is speedy, and quotes Colten's statement (somewhat inaptly) that the defendant may "plead guilty without a trial and promptly secure a de novo trial." (3) Appnt claims double jeopardy on the theory that the state should vindicate its interest in a single proceeding. Appee answers that acquittal in the lower tier is conclusive, that the retrial of a convicted defendant occurs only at his request, and that Colten is dispositive.

5. Discussion. The double jeopardy claim is slightly different from that in Colten in that the Massachusetts defendant may not plead guilty and bypass the first trial, but must sit through it. Still, the claim seems weak after Colten. The speedy trial claim is difficult to assess. Presumably if it is the second trial that discharges the state's constitutional responsibility, that trial must be speedily given, but the facts are unclear as to how speedily it was given here. Since those facts will vary from case to case (and state to state), there may be no occasion for a broad ruling by the Court on this point. The important question seems to be whether the preliminary non-jury trial--allowing the prosecution something of a "dry run," and tempting the defendant to play his hand--unduly prejudices the right to the second trial before a jury. On that point, Virginia agrees with Massachusetts, Manns v. Commonwealth, 191 S.E.2d 810 (1972), but Rhode Island squarely disagrees, having held in State v. Holliday, 280 A.2d 333 (1971), that Callan gives a federal right to a jury trial in the first instance. As noted,

conflict among the state SCs

the identical issue was before the Court last term in Costarelli v. Massachusetts, No. 73-6739. The Court postponed the question of jurisdiction, 419 U.S. 893, and ultimately found it lacking in that Costarelli was attempting to appeal directly from the denial of a jury trial in the lower-tier Massachusetts court. 421 U.S. 193.

There is a motion to dismiss.

10/29/75 Patterson Mass Sup Jud Ct op in petn app

4-9-76 CRS/gg

BOBTAIL MEMORANDUM

TO: Justice Powell

FROM: Carl R. Schenker DATE: April 9, 1976

No. 75-377 LUDWIG v. MASSACHUSETTS

The two-tier trial issue was here last Term in Costarelli v. Massachusetts, 421 U.S. 193, but was not reached because of a jurisdictional problem. The Costarelli case file indicates that you and Joel were inclined to agree that the procedure violates the Sixth Amendment. The remedial measure would be to require states to allow the defendant to bypass the first-tier trial either by a guilty plea or a complete "waiver" of the first level. It is my reluctant task to recommend your upholding the system. *

Costarelli file in box

A. Waiver

The State's brief suggests that Ludwig waived his right to press this asserted constitutional error because he

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* I say "reluctant" because I don't think the brand of justice in first tier courts is very good, and the Court is slowly working its way to a complete validation of two-tier systems. See Colten v. Kentucky; North v. Russell.

waived his opportunity to have a jury at the second-tier trial. I have not given this matter a great deal of thought, but I see no waiver.

The asserted constitutional right is to have a jury for the trial of first instance. Ludwig moved that he have such a trial in the first tier. On taking his "appeal" to the second tier he further moved that he not be retried because of the deficient first trial. It seems to me that this sufficiently preserves his claim. His subsequent waiver of a jury cannot be taken as indicative of any desire not to have had a jury in the first instance. He simply may have become persuaded, for example, that the prosecution's case was so strong that there was no point in incurring the extra wait necessary for a jury trial.

B. Merits 1. Trial by Jury

As Joel's memo last year said, this case is likely to be somewhat easier for you than for the rest of the Court. Your Johnson and Apodaca approach means that you need not be concerned with whether the history of jury trial would allow this procedure in federal courts, but only with whether the procedure violates due process by depriving the defendant of the basic function of the jury - interposition of a lay judgment on guilt or innocence. My feeling is that it does not. Obviously, the defendant who wants a jury is going to have one before criminal consequences can be attached to his alleged

crime. It seems to me that the fact that there is a preliminary adjudication of guilt before he has the jury trial does not impair the fundamental function of the jury in interposing its judgment.

I begin from the premise that there is no constitutional infirmity in a state's providing for a preliminary hearing where a judge, without the assistance of a jury, makes a determination of probable guilt.* The question therefore is whether there is a constitutional difference when making a state "pretrial" procedure provides for a magistrate's determination of actual guilt that is subject to jury redetermination. Such a bar could come from either of two sources: (1) the constitutional function of the jury or (2) the burdensomeness of such a procedure.

(a) Function of the jury. I begin by noting that this is a "serious" crime, which requires a jury trial. Moreover, the crime appears to be "serious" on both indicia of "seriousness." First, it carries a potential sentence longer than six months. Second, the crime of dangerous driving is one of moral turpitude.

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* In fact, Gerstein v. Pugh sometimes requires such a hearing.

See Colts, 282 U.S. For either of these reasons independently, a final adjudication of actual guilt requires a jury (unless a jury trial is waived).

I think a historical or theoretical argument could be constructed that would bar preliminary adjudication of serious crimes without a jury. "Serious" - crime doctrine as it has evolved shows that the jury plays an important role in protecting the individual's good name. I deduce this from the facts that (1) some kinds of crime require a jury trial because of their nature, rather than just the possible seriousness of the punishment, and (2) jury trial rights derive from possible punishment, rather than the punishment actually imposed. Therefore, it could be argued that when Massachusetts adjudicates actual guilt without a jury, even though preliminarily, it is impugning the individual's good name and a jury is required.

For Sixth Amendment analysis as applied to the federal government, that argument might carry the day for me. But in Johnson and Apodaca you adopted a more functional and less historical/theoretical approach to jury trial matters. Given a functional focus, I think the jury-function argument against a two-tier system disintegrates. The "good name" function played by the jury does not seem to me to rise to constitutional dimensions when jury-trial rights are applied against the state. It is true that an actual adjudication of guilt has an impact upon one's good name. But I cannot see that it has a

constitutionally sufficient impact to require a jury trial in the first instance. First, the state promptly vacates the conviction, so that the individual is recognized not to have been convicted by a sufficient process, thereby diminishing the stigma. Second, the adjudication of actual guilt is not different in kind from typical adjudications of probable guilt that properly are made without juries. I think I can illustrate my conclusion by suggesting the following. If Massachusetts allowed a guilty plea and then a de novo trial (which it doesn't), I do not believe the Court would hold the process unconstitutional simply because it forced a defendant who wanted to be able to have a jury trial to plead guilty, thereby stigmatizing him just as much as one who is convicted preliminarily by the trial court.

All these considerations lead me to believe that there is nothing in the inherent nature of the jury function that requires a jury to make the first-instance determination of actual guilt, at least under your analysis in Johnson and Apodaca. In essence, the two-tier procedure is best viewed as simply an elongation of the pretrial process by the state. (Of course, if pretrial procedures become too elongated there will be speedy trial problems, but that point is not pressed in this case.)

(b) Burdensomeness.

The possibility remains that the two-tier procedure

so burdens the right to trial by jury that it violates the guarantee. I will give short shrift to these arguments. If you examine the arguments made in Part III, p. 27 et seq. of Ludwig's brief, it becomes apparent that the asserted burdensomeness really has little to do with the presence or absence of a jury in the first instance. Most of the arguments really are directed at the general deficiency of the first-tier trial because of its various constitutional shortcuts. I think that Colten and Russell v. North stand for the general proposition that states are entitled to have summary first tier procedures if they provide an adequate second-tier procedure. Although the deficiencies in those cases did not involve the absence of the jury, that does not seem crucial to the "burdensomeness" question.

I might add that Ludwig appears to have overstated the burdensomeness of going through the first proceeding. Apparently, one may stipulate to facts (as opposed to pleading guilty) and still get a trial de novo after a conviction. It thus appears that the defendant pretty well can bypass the first tier. (You might seek further elucidation of this matter, and in general on the operation of the system, at oral argument.)

For the foregoing reasons, I conclude that under your Johnson and Apodaca analysis, there is no right to a jury trial in the first instance. Since you have received

contrary advice from Joel, I will address myself briefly to his arguments.

(1) Joel indicated (p. 3) that the state loses its efficiency-based interest in maintaining this procedure when the defendant indicates he wants a jury trial. I cannot agree, because the defendant may be acquitted by the trial judge. Every time that the necessity of a jury trial is obviated by the acquittal of a defendant at the trial of first instance, there will be an efficiency gain.

(2) I attach no particular significance to the matters Joel mentions at pp. 4-5. It is true that there is a certain financial burden associated with the first tier procedure and that it can cause one to lose a driver's license. These consequences, however, stem from the state's elongation of the pre-trial process, rather than from the absence of a jury trial, and I see no bar to either of them as long as there is no abolute bar on preliminary adjudication of "serious" crimes by a jury.

2. Double Jeopardy

It does not appear to me that there is any double jeopardy problem in light of Colten and North v. Russell.

Summary: I recommend affirmance because your Johnson - Apodaca analysis suggests that the defendant receives the functional benefit of a jury trial in the Massachusetts two-tier system.

Carl

75-377 LUDWIG v. MASSACHUSETTS Argued 4/28/76

Appeal from S/Jud Ct of Mass, which sustained two-tier trial system.

Appellant basic complaint is that a Δ doesn't have option to waive first trial & go directly to jury trial. Relies on D/P

In Callan (1888) Court held first trial for serious offense must be by jury. Relies on Duncan as incorporating Fed rule.

Mass argues that Court requires right of jury trial but requires no particular mode. Mass. system is very little dif. from a "probable cause" procedure.

Mass has its own process for reaching the jury trial.

Colten v Ky answers D/P argument. Slate is wiped clean.

Hogopian (appellant)
Judgment is vacated when
appeal is taken

~~The~~ Driver's license is taken away
~~the~~ even if appeal is taken, thereby
vacating the judgment. Hogopian
says statute so requires & he
will give us citation to Mass.
case so holding.

(Rehnquist noted that
revocation of driver's license
does it depend upon jury
trial. State could treat
this as a civil or adm.
matter)

Even if Callahan never
existed, Hogopian says D/P
would require wording Mass system.
(Stewart thinks Callahan is
Hogopian's strongest authority. But
I don't think 14th Amend.
"incorporates" every aspect of Fed.
jury trial. See my Johnson & Apodaca op-

Irwin (Asst AG of Mass) (Made a helpful, careful argument)

Argues not a proper appeal
— as no statute in Mass ~~expts~~ prohibits jury trial at first tier.
(Stewart notes that by jud. decision, Mass is the only of Mass)

Tier tiers:

~~Jury~~ District Court

Superior Court
Main trial court. One each county.

S/Jud Ct of Mass
Intermediate appellate Court
Reviews all felony cases

S/Jud Ct of Mass

Irons (cont.)

A Δ in Dct. Ct. may "admit sufficient findings of fact" — the equivalent of probable cause. Δ may appeal forthwith thereby wiping out the conviction. *

Stewart says this is like a "binding over".

No need to allege error for an appeal.

No costs are assessed at first tier.

Good point. The Const. require a right to J/trial but requires no particular mode.

On appeal jury would not know about the conviction below. Judge would know.

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* This procedure, tho not provided for by statute, is well settled by practice.

Hagopian (Rebuttal)

No. 75-377, — Ludwig v. Massachusetts Conf. 4/30/76

Affirm 5-4

The Chief Justice Dismiss for WANT Affirm

Nothing to D/J or Speedy Trial issues. Two-tier system has been with

X X X

~~[illegible]~~

Affirm

xxxxxxxxx Stevens, J. Reverse

System is potentially unfair.

Brennan, J. Reverse

On jury trial issue.

Stewart, J. Reverse

Callan v. Wilson & Duncan v La control this case.

S/Ct of R.I. reached this result. (Holliday case)

White, J.

1st Vote - Affirm ~~and~~ over-ruling Callan

Would join 4 to reverse Callan.

Would not read Callan as invalidating a two-tier system if a D could plead guilty & go immediately to jury trial. But this is not quite the Mann system.

Marshall, J.

Reverse

Jury trial issue.

Blackmun, J. Affirm

Case is different from Colten.

Callan rested on Art III - but could join Byron in over-ruling.

Nothing fundamentally unfair in two-tier.

Powell, J. Affirm

I don't think the 14th incorporates every aspect of 6th.

Don't particularly agree with details of Mann system - but Mann has had this system ~~for~~ since Colonial days, as have other states.

Burden of basic rt. to jury trial is not of const. dimension.

Rehnquist, J. Affirm

Agree with [redacted] Harry's interpretation of Callan. Also willing to reverse Callan.

Also agree with what I wrote in Johnson & Apodaca - altho didn't join me.

C-ference 11-7-75

Court Mass. Sup. Jud. Ct. | Voted on ....., 19...
Argued ....., 19... | Assigned ....., 19... | No. 75-377
Submitted ....., 19... | Announced ....., 19...

RICHARD I. LUDWIG

vs.

MASSACHUSETTS

9/10/75 Appeal filed.

Byrnes agrees with mass ct.) but mass should be decided. Our jurisd trial, there is a dictum in an old S/Ct case to contrary — but mass doesn't worry Brennan also said mass. ct is probably right, but mass should be decided

Note

	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	
.....						✓								
Rehnquist, J.				✓										
Powell, J.				✓										
Blackmun, J.				✓										
Marshall, J.				✓										
White, J.				✓										
Stewart, J.				✓										
Brennan, J.				✓										
Douglas, J.						✓								
Burger, Ch. J.						✓								

No. 75-377 LUDWIG v. MASSACHUSETTS

MR. JUSTICE POWELL concurring.

In addition to the reasons relied upon in the opinion for the Court (which I join), I would affirm the judgment of the Supreme Judicial Court of Massachusetts for the reasons stated in my concurring opinion in Apodaca v. Oregon reported in 406 U.S., at 369-380 (1972).*

In my view it cannot fairly be said that the Fourteenth Amendment incorporates all of the elements of jury trial within the meaning of the Sixth Amendment. The due process clause of the Fourteenth Amendment, as consistently interpreted by this Court, requires that persons subjected to the criminal process in state courts must be accorded those rights that are fundamental to a fair trial. Perhaps the most fundamental of these rights is jury trial. But I would hold that the form and character of the procedure in jury trials should, within broad limits, be left for

*The Court's opinion in Apodaca v. Oregon is reported at 406 U.S. 404. My concurring opinion is appended to the Court's opinion in Johnson v. Lousiana, 403 U.S. 356, commencing at 366.

the states to decide. In this case, we are told that Massachusetts has chosen the "two-tier" system and followed it throughout the existence of this nation. The record indicates no dissatisfaction by the citizens of that Commonwealth with a procedure long approved and followed daily by its courts. The appellant has failed entirely to carry his burden of showing that the Massachusetts procedure for providing trial by jury is fundamentally unfair.

No. 75-377 LUDWIG v. MASSACHUSETTS

MR. JUSTICE POWELL, concurring.

In addition to the reasons relied upon in the Court's opinion, for the Court, (which I join), I would affirm the judgment of the Supreme Judicial Court of Massachusetts for the reasons stated in my concurring opinion in Apadoca v. Oregon reported in 406 U.S., at 369-380 (1972).*

~~In my view it cannot fairly be said~~ I cannot agree that the Fourteenth Amendment incorporates all of the elements of jury trial ~~within the meaning of~~ guaranteed by the Sixth Amendment. The due process clause of the Fourteenth Amendment, as consistently interpreted by this Court, requires that persons subjected to the criminal process in state courts must be accorded those rights that are fundamental to a fair trial. ~~Perhaps~~ Among the most fundamental of these rights is jury trial. But I would hold that the form and character of the procedure in jury trials affording should, within broad limits, be left for

*The Court's opinion in Apadoca v. Oregon is reported at 406 U.S. 404. My concurring opinion is appended to the Court's opinion in Johnson v. Lousiana, 403 U.S. 356, commencing at 366.

the states to decide. In this case, we are told that Massachusetts has chosen the "two-tier" system and followed it throughout the existence of this nation. ~~The record~~ Substantially for the reasons ~~given by the County~~ discussed in Part II of the Court's opinion, ~~indicates no dissatisfaction by the citizens of that Commonwealth with a procedure long approved and followed daily by its courts.~~ The appellant has failed ~~entirely~~ to carry his burden of showing that the Massachusetts procedure for providing trial by jury is fundamentally unfair.

Whether historical or other considerations would mandate a different result in a federal court system, I need not decide

CRS/gg 6/1-76

MEMORANDUM

To: Justice Powell

FROM: Carl Schenker

No. 75-377 LUDWIG v. MASSACHUSETTS

For the reasons sketched in my "draft", which basically incorporates yours, I do not believe that you can join Justice Blackmun consistently with Apodaca. In particular, the draft incorporates a "functional" approach to the Sixth Amendment, an approach which you rejected in Apodaca in favor of a historical approach. In this regard, you would have to at least note your disagreement with the 12 man and unanimity remarks, as you said in Apodaca that history would compel the opposite result in federal court. Here, too, history may compel the result rejected by the Court (see Callan).

On a more nitpicky level, I believe Baldwin is mischaracterized on p. 11. The case does not say that length of sentence is the only criterion - just that 6 months is always "serious". A crime with a shorter sentence can be "serious" if it is "inherently" a serious crime. See, e.g., Colts, 282 U.S. A footnote in Baldwin specifically notes as much.

CRS

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 22, 1976

Re: No. 75-377 -- Ludwig v. Massachusetts

Dear John:

Please join me in your dissent.

Sincerely,

T. M.

Mr. Justice Stevens

cc: The Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 22, 1976

Re: No. 75-377 - Ludwig v. Massachusetts

Dear Harry:

Please join me.

Sincerely,

Byron

Mr. Justice Blackmun

Copies to Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

June 22, 1976

Re: 75-377 - Ludwig v. Massachusetts

Dear Harry:

Please join me in your circulation of June 18.

Regards,

WEB

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 22, 1976

Re: No. 75-377 - Ludwig v. Massachusetts

Dear Harry:

Please join me.

Sincerely,

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 22, 1976

RE: No. 75-377 Ludwig v. Massachusetts

Dear John:

Please join me in the dissenting opinion you have prepared in the above.

Sincerely,

Bill

Mr. Justice Stevens

cc: The Conference

LFP/gg 6-22-76

At request of Harry Blackmun & to provide a 5th vote for a court, I modified this

No. 75-377 LUDWIG v. MASSACHUSETTS

6/25

MR. JUSTICE POWELL, concurring in part and concurring in the judgment.

I join Part III of the Court's opinion, but cannot join Part II thereof. Although I agree with much of what is said, I find it unnecessary to reach the question of what the Sixth Amendment requires in circumstances like these. Rather, I would reject petitioner's jury-trial contention on the grounds stated in my concurring opinion in Apodaca v. Oregon, reported in 406 U.S., at 369-380 (1972). *

I do not agree that the Fourteenth Amendment incorporates all of the elements of jury trial guaranteed

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* The Court's opinion in Apodaca v. Oregon is reported at 406 U.S. 404. My concurring opinion is appended to the Court's opinion in Johnson v. Louisiana, 403 U.S. 356, commencing at 366.

by the Sixth Amendment. The due process clause of the Fourteenth Amendment, as consistently interpreted by this Court, requires that persons subjected to the criminal process in state courts must be accorded those rights that are fundamental to a fair trial. Among the most fundamental of these rights is jury trial. But I would hold that the form and character of the procedure in affording jury trial should, within broad limits, be left for the states to decide. In this case, we are told that Massachusetts has chosen the "two-tier" system and followed it throughout the existence of this nation. Substantially for the reasons discussed in Part II of the Court's opinion, the appellant has failed to carry his burden of showing that the Massachusetts procedure for providing trial by jury is fundamentally unfair. Whether historical or other considerations would mandate a different result in a federal court system, I need not decide.

lfp/ss 6/25/76

2nd Draft

No. 75-377 LUDWIG v. MASSACHUSETTS

MR. JUSTICE POWELL, concurring.

I join the opinion of the Court, as I understand it to be consistent with my view that the right to a jury trial afforded by the Fourteenth Amendment is not identical to that guaranteed by the Sixth Amendment. See my opinion in Apodaca v. Oregon, reported at 406 U.S., at 369-380 (1972).* I add only that Callan v. Wilson, 127 U.S. 540 (1888), is distinguished most simply by the applicability to that case of the Sixth Amendment.

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*The plurality opinion in Apodaca v. Oregon is reported at 406 U.S. 404. My opinion is appended to the Court's opinion in Johnson v. Louisiana, 406 U.S. 356, commencing at 366.

SUPREME COURT OF THE UNITED STATES

No. 75–377

Richard I. Ludwig, Appellant, *v.* Commonwealth of Massachusetts. } On Appeal from the Supreme Judicial Court of Massachusetts.

[June 30, 1976]

MR. JUSTICE POWELL, concurring.

I join the opinion of the Court, as I understand it to be consistent with my view that the right to a jury trial afforded by the Fourteenth Amendment is not identical to that guaranteed by the Sixth Amendment. See my opinion in *Apodaca* v. *Oregon,* reported at 406 U. S., at 369–380 (1972).* I add only that *Callan* v. *Wilson,* 127 U. S. 540 (1888), is distinguished most simply by the applicability to that case of the Sixth Amendment.

*The plurality opinion in *Apodaca* v. *Oregon* is reported at 406 U. S. 404. My opinion is appended to the Court's opinion in *Johnson* v. *Louisiana,* 406 U. S. 356, commencing at 366.

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.
					5/5/76			dissent
join HAB 6/22/76	Join JPS 6/22/76		join HAB 6/22/76	Join JPS 6/22/76	typed draft 6/18/76 1st draft 6/28/76	Concur in part & concur in judgment 6-22-76 2nd draft 6/25/76	join HAB 6/22/76	typed draft 6/21/76
					75-377 Ludwig v. Massachusetts			