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An End to the Twelve-Man Jury

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CASES NOTED

AN END TO THE TWELVE-MAN JURY

Prior to his trial for robbery in the State of Florida, the defendant filed a pretrial motion to impanel a twelve-man jury instead of the six-man jury provided for by Florida law in all but capital cases.[1] Florida's Third District Court of Appeal affirmed the trial court's ruling that the defendant was entitled to a jury consisting of only six persons.[2] On certiorari to the Supreme Court of the United States, *held*, affirmed: The defendant's sixth amendment rights, as applied to the states through the fourteenth amendment, were not violated by Florida's decision to provide a six-man rather than a twelve-man jury. *Williams v. Florida*, 90 S. Ct. 1893 (1970).[3]

There has long been uncertainty as to what the framers of the Constitution actually meant by "trial by jury." However, in the past it has been generally accepted that this concept was based on the essential elements of a common law jury which are as follows: (1) twelve impartial and qualified jurors; (2) who shall unanimously decide the facts in controversy; (3) under the direction and supervision of the judge.[4]

Nowhere in the Federal Constitution itself does the number appear as descriptive of the size of a jury. As a consequence, it has been left to our highest court, in the leading case of *Thompson v. Utah*,[5] to interpret that "the jury referred to in the original Constitution and in the Sixth Amendment is a jury constituted, as it was at common law, of twelve persons, neither more or less."[6] Acceptance of the common law number of twelve can be found in a wealth of subsequent decisions.[7] The Supreme Court has gone so far as to say:

> [A] constitutional jury means twelve men as though that number had been specifically named; and it follows that when reduced

1. FLA. STAT. § 913.10(1) (1967): "Twelve men shall constitute a jury to try all capital cases, and six men shall constitute a jury to try other criminal cases."

2. Williams v. State, 224 So.2d 406 (Fla. 3d Dist. 1969). The defendant was convicted as charged and was sentenced to life imprisonment.

3. The Supreme Court also held in this case that Florida's notice-of-alibi rule, FLA. R. CRIM. P. 1.200, which requires the defendant to give notice of an alibi defense and disclose his alibi witnesses, does not violate the privilege against self-incrimination guaranteed by the fifth and fourteenth amendments.

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

5. 170 U.S. 343 (1898).

6. Thompson v. Utah, 170 U.S. 343, 349 (1898).

7. *E.g.*, Maxwell v. Dow, 176 U.S. 581 (1900); Beatty v. United States, 377 F.2d 181 (5th Cir. 1967); Markham v. State, 209 Miss. 135, 46 So.2d 88 (1950); State v. Rogers, 162 N.C. 656, 78 S.E. 293 (1913); Bettge v. Territory, 17 Okla. 85, 87 P. 897 (1906). Similarly, the jury trial provisions of the seventh amendment (dealing with civil actions) have often been interpreted to mean the common-law twelve. *E.g.*, Capital Traction Co. v. Hof, 174 U.S. 1 (1899).

> to eleven it ceases to be such a jury quite as effectively as though the number had been reduced to a single person.[8]

Although it is widely accepted that at the inception of the United States Constitution the common law jury consisted of twelve persons, there is no agreement on how this particular number evolved. The explanations are numerous and span a wide range of subject areas. "[T]he twelve tribes of Israel, the twelve patriarchs, and the twelve officers of Solomon recorded in the Book of Kings, and the twelve Apostles,"[9] are samples of the romantic explanations that have been offered.

Another belief is that in ancient times the court astrologers, who had the duty of choosing juries, would select one name for each of the signs of the Zodiac thus assuring a fair verdict, since every type of mind and temperament would be represented.[10] No matter what explanations are advanced, the true origin of the number twelve remains shrouded in doubt and one can only surmise why twelve became the sacred number.[11]

Realistically, however, the number twelve is not sacred at all, for throughout history there have been jury-like institutions consisting of 500, 100, 66, 41, 20, 17, 11, 8, 7 and a great variety of other numbers.[12] One noted authority reaches the following conclusion regarding the origin of the number twelve.

> Reason would seem to indicate that there is no special merit, no magic formula, no Divine origin, no Holy Order in the number twelve. On the contrary, if the common law jury had consisted of 20, 14 or 4 jurors at the time of the adoption of the Constitution, we would have adopted a jury of 20, 14 or 4 men and would loyally defend, as is our custom, that which exists only because of its origin in antiquity.[13]

In spite of this seeming lack of reason, the federal court system has continually adhered to the twelve-man jury, guided in the past by the interpretation of "trial by jury" in the *Thompson* case[14] and presently by the Federal Rules of Criminal Procedure.[15] However, uniformity on this subject in the state courts has been lacking and a number of the

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8. Patton v. United States, 281 U.S. 276, 292 (1930).

9. P. DEVLIN, TRIAL BY JURY 8 (1956).

10. Mathews, *The Jury—Old Wine in New Bottles*, 39 FLA. B. J. 94 (1965).

11. Tamm, *The Five-Man Civil Jury*, 51 GEO. L.J. 120 (1962).

12. Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 249 (1892).

13. Tamm, *The Five-Man Civil Jury*, 51 GEO. L.J. 120, 129 (1962). *See also* Hibdon v. United States, 204 F.2d 834 (6th Cir. 1953), where the court said at 838:

> The origins of the twelve-man jury may be shrouded, in the mists of antiquity. The number is arbitrary and it may now well be recognized, . . . that the interests of the public and of the accused may, in the light of changing concepts of punishment, as adequately be served by a jury somewhat less in number than twelve. . . .

14. Thompson v. Utah, 170 U.S. 343 (1898).

15. FED. R. CRIM. P. 23(b): "[J]uries shall be of 12. . . ."

states provide for less than twelve-man juries in certain criminal actions.[16] If civil actions are included, at least thirty-six states have constitutional and statutory provisions for juries of less than twelve in one or another of their courts.[17]

There have been various decisions which have advanced the proposition that the individual states may determine their own jury numbers without coming in conflict with the Federal Constitution.[18] For instance, in upholding its state constitutional provision, the Supreme Court of Utah, in *State v. Bates*,[19] held that the requirement of eight jurors in courts of general jurisdiction, except in capital cases, was not in conflict with the sixth amendment. The court reasoned that "if a jury of 8 men is as likely to ascertain the truth as 12, that number secures the end. There can be no magic in the number 12, though hallowed by time."[20]

In the instant case, the Court referred to its recent decision in *Duncan v. Louisiana*,[21] which laid the foundation for the present case. In *Duncan*, the Court held that the right to trial by jury is a right fundamental to the America scheme of justice and is guaranteed by the fourteenth amendment in all state criminal prosecutions which would come within the sixth amendment's guarantee of a jury trial were they tried in a federal court.[22] Thus, the question which faced the court in the present case was whether the *constitutional guarantee* of a "trial by jury" necessarily required trial by exactly twelve persons, rather than some lesser number.[23]

In answering in the negative, the Court, speaking through Justice White, recognized that the common law jury came to be fixed generally at twelve, but declared this to be an historical accident "unrelated to the great purposes which gave rise to the jury in the first place."[24] Accordingly, the Court concluded there is no indication that "the intent of the Framers" of the Constitution was to rigidly incorporate all the common law characteristics of the jury into the Constitution.[25]

Hence, the underlying and fundamental purpose of the jury, which is to prevent oppression by the government,[26] must prevail; however,

16. For states, other than Florida, which provide for juries of less than twelve in felony cases, *see* Williams v. Florida, 90 S. Ct. 1893, 1904 n.45 (1970).

17. *See* Herndon, *The Jury Trial in the Twentieth Century*, 32 L.A.B. BULL. 35 (1956).

18. *E.g.*, Coates v. Lawrence, 46 F. Supp. 414 (S.D. Ga. 1942), *aff'd*, 131 F.2d 110 (5th Cir. 1942), *cert. denied*, 318 U.S. 759 (1942). "There is nothing in the Constitution of the United States requiring the states to provide a jury of twelve in the trial of criminal cases, though the Constitution does require the federal courts to have that number." *Coates v. Lawrence*, 46 F. Supp. 414, 423 (S.D. Ga. 1942).

19. 14 Utah 293 (1896).

20. *Id.* at 301.

21. 391 U.S. 145 (1968).

22. *Id.* at 149. In addition, the Court held that there need not be a jury for trials of petty offenses, however, they did not define a petty offense.

23. Williams v. Florida, 90 S. Ct. 1893 (1970).

24. *Id.* at 1900.

25. *Id.* at 1905.

26. This purpose was expressed by the Court in Duncan v. Louisiana, 391 U.S. 145

this purpose need not be choked by inflexible restrictions implied by the sixth amendment. As long as the jury is large enough to promote group deliberation and to provide a fair possibility for obtaining a representative cross section of the community, it will be able to perform its role; *i.e.*, to interpose between the accused and his accuser. This decision leaves Congress and the states free to objectively evaluate and implement the most advantageous and practical number of jurors necessary to adequately perform the functions of a jury within our present judicial environment.

It is evident to this writer that there are very good arguments in favor of a smaller jury.[27] The advantages are numerous and include the possibilities of reducing delays and the steadily increasing costs of litigation. As long as due consideration is given to preserve the effectiveness of the jury, it is time that all lawmaking bodies untie themselves from the archaic past. Now that the number twelve is no longer sacred, it may be advisable for the various states to examine the structure of their jury systems and adapt the size of the jury to the requirements of each particular type of litigation.[28]

LAWRENCE H. GOLDBERG

FEDERAL JURISDICTION AND RES JUDICATA: LITIGATION IN STATE COURTS OF FEDERAL CONSTITUTIONAL QUESTIONS CLOSING THE DOOR TO THE FEDERAL COURTS

The plaintiff, Paul, initially litigated and lost in the Florida state courts an action for a declaratory decree that the erection of a Latin Cross each December on the defendant's courthouse, with the sanction of the defendant's county government, was a violation of the establishment and freedom of religion clauses of the first amendment as applied to the states through the due process clause of the fourteenth amendment and was also a violation of the equal protection clause of the fourteenth amendment to the United States Constitution.[1] Subsequently, Feder

(1968). "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." *Id.* at 156.

27. Wiehl, *Six Man Jury*, 4 GONZAGA L. REV. 35 (1968); Tamm, *The Five-Man Civil Jury*, 51 GEO. L.J. 120 (1962). For evaluations of experiments with smaller juries which resulted in prompt trials, lower costs, and verdicts no different than those returned by 12-man juries, the reader should consult the following sources: Cronin, *Six-Member Juries in District Courts*, 2 BOSTON B.J. 27 (1958); *Six-Member Juries Tried in Massachusetts District Court*, 42 J. AM. JUD. SOC'Y 136 (1958).

28. Another area of jury reform under current consideration, although outside the scope of this note, is the controversy regarding the merits of majority versus unanimous verdicts.

1. Paul v. Dade County, 202 So.2d 833 (Fla. 3d Dist. 1967), *cert. denied*, 207 So.2d 690 (Fla. 1967), *cert. denied*, 390 U.S. 1041 (1968).