Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of:

Docket No. ~~5161~~

69-5035

FRANK JOHNSON,

Appellant

vs.

THE STATE OF LOUISIANA

Appellee

Place Washington, D. C.

Date March 1, 1971

ALDERSON REPORTING COMPANY, INC.

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C O N T E N T S

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FRANK JOHNSON,

Appellant

vs

THE STATE OF LOUISIANA,

Appellee

No. 5161

The above-entitled matter came on for argument at 1:02 o'clock p.m. on Monday, March 1, 1971.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will now hear arguments in 5161: Johnson against Louisiana.

Mr. Buckley you may proceed whenever you are ready.

ORAL ARGUMENT BY RICHARD A. BUCKLEY, ESQ.

ON BEHALF OF APPELLANT

MR. BUCKLEY: Mr. Chief Justice and may it please the Court:

This is the appeal of a Louisiana Supreme Court decision which affirmed Appellant's conviction and sentence for the crime of armed robbery.

Two issues considered by the Court below and before this Court for review, involve the question of jury, the question of arrest.

Specifically, with regard to the jury question, there are two aspects to it: does the Louisiana jury system, which provides for a nonunanimous verdict, in serious felony cases, clash with the Equal Protection Clause because it denies the benefit of unanimity to Appellant by extending it to those charged and tried for greater and lesser crimes.

The second aspect of the jury question concerns whether, in light of Winship, the majority verdict is constitutionally permissible in that Appellant has not been proved guilty beyond a reasonable doubt.

Q Mr. Buckley, how old is the Louisiana system? Is it an ancient one?

A It began in 1898 when Louisiana revised its constitution and as you know, the grandfather clause and other provisions were made at that time.

The other issue that is considered relevant here before this Court, is whether Appellant's lineup identification, which Appellant contends was a direct result of an unlawful arrest, was -- should have been excluded from the trial of this case.

The Court below, in response to the two issues considered, deferred to this Court on the question concerning jury, although they did hold that system was fair and gave fairness to Appellant in this trial.

In regards to the lineup identification the Lousiana Supreme Court found a lawful arrest based upon probable cause. The relevant facts pertaining to the issues are as follows:

Appellant, a Black citizen, was seized in his home before daybreak, by six armed New Orleans detectives with shotguns, who had entered his home without a warrant. A general search was conducted of all the rooms; no evidence connecting the Appellant with any crime was found therein. Subsequent to some interrogation, Appellant was booked about four hours after the initial entry of his home.

A few days later Appellant was part of a general lineup consisting of armed robbery suspects and armed robbery victims. And he was identified by a person who was then a victim of armed robbery a couple weeks previous to Appellant's arrest. I may mention that this was not the same person for whom Appellant was booked for armed robbery initially at his arrest.

The identification was subsequently used at trial; in fact, identification formed theprimary basis of the evidence against Appellant. Pretrial motions and hearing were held on the arrest and detention of Appellant and they were denied by the trial court.

Appellant was tried on May 15, 1968 for armed robbery, a crime punishable in Louisiana for not less than five or more than 99 years, without the benefit of parole, probation or suspense of sentence. A jury of 12 returned a verdict of: nine for "guilty," and three for "not guilty,"which constitutes, in Louisiana, conviction.

Appellant was sentenced subsequently, to 35 years at hard labor and is presently serving 35 years in Angola(?) Louisiana.

Q Does the record show, or do you know how long the jury deliberated?

A I don't know whether the record shows; I believe it was less than half an hour, Your Honor.

Q How long did the trial last?

A The trial was one day. Most of the facts, of course, were taken up at thepretrial hearings, which lasted over a span of four days.

Q Let me get that last: four days altogether?

A Louisiana conducts separate pretrial in the trial itself: the pretrial hearings concerning the arrest, detention, et cetera, took place earlier and over a span of three days they were held, without a jury.

In regard to the issue of whether a nonunanimous verdict is denial of equal protection, I will briefly mention the Louisiana jury system. Lousiana provides that in capital cases there would be a jury consisting of 12, of which all must concur. In crimes that must be punishable by hard labor, the jury consists of 12, of which only nine have to concur in the verdict. In crimes which may be punishable by hard labor, the jury consists of five jurors of which all must concur in the verdict.

Louisiana asserts the reason, and this has also been explained in the decisions of Louisiana, but in their brief they indicate the reason for this difference in the classification between the different crimes and the way they are tried, is to reduce costs and expedite matters. We contend that this is not a rational basis, for Louisiana to extend unanimity to some and deny it to Appellant.

Q Well, your equal protection argument, I suppose, is based on the difference between the Louisiana requirement in capital cases and its requirement respecting noncapital cases which are subject to punishment at hard labor. Is that your equal protection -- ?

A Yes, and if I may, Your Honor, I will give you an example of that.

Q But your equal protection thing doesn't work down the line, does it; on that basis you got better protection than the people with five-man juries.

A It works down the line concerning the benefit of unanimity and the function it plays in the jury trial, Your Honor. To give an example of how it works up the line, is that, as you know, in most jurisdictions Louisiana won, in the capital case the jury can return a recommendation that punishment be without the death penalty.

In Louisiana individuals that the jury does return that recommendation to are eligible for parole and pardon within 12 years. And, as I indicated eearlier, an individual now convicted of armed robbery, as Appellant was, does not have the benefit of parole or provision or suspense of his sentence; he must serve the entire time and the verdict could be until 99 years. This, by the way, was amended in 1966.

Q Mr. Buckley, as a lawyer engaged in the defense of criminal cases, do you think it's harder to get

unanimity among the five or nine out of 12?

A I believe it's harder to get unanimity out of five, and that may be one of the reasons that the District Attorneys Association of Louisiana, has attempted twice during the 1960s to have that changed from five to four out of five, unsuccessfully.

Q Well, five out of five is obviously more difficult than four out of five, but I wondered if five out of five was harder to obtain than nine out of 12?

A I feel it is, Your Honor, because five out of five forces the jury to the deliberative process and in the exchange of the doubts that each may have, maybe then one can convince another and the two groups, the two coalitions that might have gone in there with different views, are able then to persuade one group to the other. Whereas, any nine out of 12 it's possible, as in this case it may have happened that the jurors went immediately from the jury box into the deliberation and made a vote, without any deliberating process coming into function.

Q In any event, whether it be five or 12, the fact remains that a single person can result in a hung jury, if you require unanimity.

A That's correct, Your Honor.

Q One; and that's true whether it be five or 20?

A That is where the -- of unanimity comes. that you must -- the jury in the exchange of persuasions among themselves, has to convince that person who has the most strongest doubt, whereas, now it's 12 of the nine reached that are in doubt.

Q Mr. Buckley, what are the capital crimes in Louisiana; murder?

A The usual ones: murder, aggravated rape.

Q Aggravated rape; how about burglary?

A No; aggravated burglary and burglary are tried by nine out of 12.

Q So, it's murder, aggravated rape and that's it?

A Kidnapping.

Q Kidnapping, even where the victim is returned unharmed?

A I am not sure, Your Honor.

Q Well, you want unanimity with 12 at all times?

A No; I don't think that 12 is the requirement. It's not the numbers that are important, as was so well expressed in Williams. I think it's unanimity in its function as close, direct association to the essential jury function, that is the key to the problem.

Q Well, suppose they say that nine out of

12 for murder; then you would be out of court; wouldn't you?

A No, we wouldn't, Your Honor.

Q Why not?

A Then we would still have the argument that this does not reach the constitutional requirement of guilt beyond a reasonable doubt.

Q But you're out on equal protection, of course.

Q If it were nine out of 12 for murder and four out of five for misdemeanors --

A If they extended it both ways.

Q -- you would be clearly out on your equal protection thing.

A Correct.

Q But do I understand that you would not object to a two-man jury or a one-man jury?

A I would. There is some slippery slope, as it was mentioned in Williams, that is going to be reached very soon in regard to juries and unanimities. Two would be a very difficult jury to cope with. You are going to perhaps have a split from the beginning and it may result in many hung juries there. I think you have to have a reasonable number that is going to be representative of the community.

Q Where would you draw the line?

A I believe that this Court would be able to

draw it better than I. Six seems to work, and perhaps five, as now exists in Louisiana.

Q Well, now, when you responded to Justice Blackmun, were you responding to your own choice as a matter of policy, or a constitutional requirement?

Constitutionally I will adhere to this Court's decision in Williams.

Q Of course you recognize that some defense counsel would rather have 25 with a unanimous requirement.

A There is a point that reaches absurdity, Your Honor.

Q Mr. Buckley, in any event you are not attacking the five-man in this case?

A Only in regard to the equal protection argument. We're not attacking the number of --

Q All right.

A Another aspect in regard to the equal protection argument is that Kalven stated the American jury has given some evidence that in crimes with trials where the verdict has to be unanimous, there are hung juries about five percent of the time; whereas, a nonunanimous jury verdict type case, a hung jury result about half of the time.

Taking that statistic and comparing it to what happens to the hung juries in the unanimous situation and those which in Louisiana, permits convictions, would indicate, as is

expressed in our brief that there would be a result of about 44 percent convictions in Louisiana and about 12 percent acquittals, if you used the statistics that Kalven has. This, of course, does represent that there is a greter chance of conviction than acquittal in Louisiana's scheme of providing the rule of nine out of 12.

Q Is that the standard, a constitutional standard, Mr. Buckley, which is likely or less likely to produce a verdict of guilty of not guilty?

A No; it's not a constitutional standard now, but it goes to show the value of the mistrial and the hung jury and that when the jury initially begins the deliberations if there are three or more jurors that have a doubt, this rep esents a substantial doubt and I think that the statistics in the American jury go to buttress that and for Louisiana to convict on that basis is a denial of the constitutional --

Q Would you have the same objections if the nine to three verdict was permitted in Louisiana after three hours of deliberation or two or four hours?

A Yes; I would, Your Honor, personally. I don't think that, because of some of the types of crimes that can be tried under the nine out of 12. For example: the Communist -- storage of Communist propaganda is a serious felony in Louisiana and can be tried by the rule of nine. But, I don't think any time limit should be attached to deliberations.

I think a very vital function of the jury is to be formed by the deliberative process, and should not be restricted in any way.

Q Well, the hypothetical situation I put to you, that applies in some states, doesn't restrict it. It restricts the jury merely in returning a less than unanimous verdict until they have run the course of some minimum period of deliberation.

In many states, as you know, in civil cases, particularly, after X hours of deliberation they may return a verdict of 5/6 in a civil case. Now, do you think that's as constitutionally objectionable in criminal cases as the one we're dealing with here?

A I think it's more objectionable in a criminal case to permit that activity you described, Your Honor.

Q Well, I thought you were complaining that the brevity of their deliberations and that the nine to three provision of Louisiana permitted a verdict to come back in a short time --

A Well, that is also another aspect of it, and I have indicated in regard to this particularjury verdict, isethat there might not have been any deliberation and that is permissible under the jury scheme of Louisiana.

One further aspect of the equal protection

argument I would like to make is that the divided jury verdicts result in a denial of essential jury functions, which we feel are closely associated to the unanimity rule. For example: a significant segment of the community in Louisiana, 25 percent, is not part of that conviction verdict. Thus, instead of shared responsibility in the jury's guilt determination process, we have a split or divided responsibility.

There is a possibility that a minority, not given an opportunity to express its views, thus, rather than promote group deliberation, split verdicts may prevent group deliberations. It significantly increases the chances of Government oppression. It's well known in the past Government oppression works on the basis of a majority rule.

And the minority, the three jurors in Louisiana, may be citizens who were involved in the _____ cases in 1960: Garner versus Louisiana, Keller versus Louisiana, and Lumpel(?) versus Louisiana.

And finally, after obtaining and becoming part of that fair cross-section of the community, be it Farr(?) and Louisiana and other cases that this Court has decided, and in which the Fifth Circuit has been confronted with again in the 1960s, the minority of three jurors, excluded again, may be from that section of the community which has just recently been included on the juries.

Q Do you think the Federal practice of

requiring unanimous verdicts of a jury in criminal cases is constitutionally-required?

A Yes, Your Honor.

Q In Federal trials?

A Yes, Your Honor.

Q What particular provision in the Constitution would you rest on there?

A I would rest on both the aspect of the right to a jury and the right to a fair jury, under the Due Process Clause of the Fifth Amendment.

Q History might have something to do with it, I suppose?

A Without the requirement of unanimity it is going to cut into the fairness of the trial and therefore not be the trial and its purposes and functions as expressed by this Court in Duncan.

Q Now, as expressed by this Court in re Winship, gave a reasonable doubt standard constitutional status, in essence the reasonable doubt standard or formula, is merely a guide to both prosecution and to the jury. As to the prosecution, it indicates to him the degree, proof or degree of persuasion that he must present in order to secure a conviction.

To the jury it is a guide to indicate to them degree of belief of the individual's guilt in order for them

to return and agree upon a conviction.

As to the prosecution's function, his is to the fact-finding. We contend that in this case the fact-finding body consisted of a jury of 12 individuals and to exclude any part of that fact-finding body, to be unreasonable. And in this case there were three jurors that were unpersuaded and unconvinced by the evidence presented by the prosecutor.

And furthermore, as to the jury, the reasonable doubt standard is not a mechanical process. Reasonable men differ reasonably about the proof that the prosecutor may present to them. That is the value of the jury's deliberation process. So that during deliberation views could be expressed; doubt can be examined; and the jury could finally come to unanimity on the particular question before them.

Deliberation certainly helps to clarify some of the jurors' doubts and in this case there may not have been any deliberation at all --

Q Suppose they had deliberated four days and came in 9 to 3?

A I would say, Mr. Justice Marshall, that that jury had a very substantial doubt and that is the reason why they cannot come to an agreement.

Q Suppose it would come in 11 to 1?

A To that long a period of time I would also have to say that.

Q Well, my whole point is: I just want to know how much stress you are putting on the length of time of deliberation; that's all I'm trying to clear in my mind. You seem to say that the only purpose you want a five-man jury is so that they will deliberate and obviously, from your answers that's not what you mean to say.

A No, Your Honor, it's not the only purpose. I am trying to show that it's one of the essential functions of the unanimity rule which is directly associated with the reasonable doubt standard, is so that there will be deliberation and showing that what results there are when there is no deliberation, how this can dilute and wear down the reasonable doubt standard itself. And how it almost is a mechanical process, by permitting the nine to three or the rule of nine, is for them to go in and take their initial vote.

I think if you examine most of the split decisions that have been appealed, you will see that there were of short duration, the deliberations; most of them under an hour. Obviously, if the deliberation goes further they would most likely reach --

Q You mean that mostof the 11 to 1 juries are short-term? I don't know what part of the country you are talking about.

A I am talking about Oregon and Louisiana now, and other jurisdictions that would result in a mistrial.

Q Well, that's what I mean. There are quite a few.

A Correct; about five percent.

Q After days and days and days. I'm having very much trouble with the way you are putting on these two different points. I think you realize that you just can't take 12 out of the clear blue sky and back it up. That's the feeling I get from your argument; am I right?

A I don't understand, Your Honor, about --

Q Well, why 12?

A I'm not, again, indicating it has to be 12, but all of those that are on the jury, is what I am urging --

Q And you would be satisfied with the five-man, unanimous verdict for murder, including the death penalty?

A I would be, Your Honor.

Q Is that your limit?

A That the state --

Q Is that your limit?

A I would probably prefer something further in certitude.

Q And here you would have nine men?

A It's nine of 12; three still have their doubts, Your Honor and that's the essential feature.

Q You are back where -- you are just on the unanimous point.

A Right.

Q In other words, what you are saying is: that because three have a doubt, nine must have a doubt, or should have had the doubt?

A The jury as a whole should have a doubt under the concept of the reasonable doubt standard. Actually, the reasonable doubt standard does not go to the jury as a whole; it goes to the conviction; the verdict of conviction cannot be returned were there any individual juror having a doubt.

I don't want to get mixed up in the theories that are expressed between the group entity and the individual entity, et cetera.

Q Do you see any parallel at all between a requirement of unanimity that you argue for and the jury case and the requirement that has sometimes been proposed that the unanimity of a multiple judge Appellate Court. Is there any connection between the two?

A Only if they were sitting on the same type of case, reviewing from the initial status of a criminal trial; yes.

Q Well, when annAppellate Court, this Court included, reviews a claim of sufficiency of evidence, is there

some connection between that and the jury function?

A No, Your Honor.

Q Would you care to enlarge upon that a little bit?

A Well, we have reserved the jury function to laymen and the constitution, and not the judges. They are totally two different functions and when the jury speaks and if they speak "not guilty" it concludes that matter, as with only --

Q I was addressing myself to the situation when the jury has found a guilty verdict and it is being reviewed for the sufficiency of the evidence.

A This goes strictly to the question of the law and we also -- this is getting another added protection for the accused, Your Honor.

Q You consider that purely a question of law, then when an Appellate Court reviews on that basis?

A It, in some instances, may involve facts, but it's a different function from considering the facts at trial and the witnesses, et cetera, that were there.

In regard to the second issue in this case, concerning a lineup identification. This Court has consistently indicated their preference and reason for warrants.

I feel that the facts of this case show why this preference and necessity is needed. As I indicated earlier,

it was a warrantless arrest in a home, conducted by six officers armed with shotguns. There is doubt whether the officers professed sufficient probable cause to secure an arrest warrant under Louisiana law.

Q This was a post-Wade case, I presume?

A Yes; it's post-Wade, Your Honor.

Q Did he have a lawyer at the lineup?

A He had a lawyer that was representing all the suspects that were -- did not have their own individual attorney.

Q Including him?

A Including him; yes, Your Honor.

Q Well, you are not arguing that this is invalid under Wade?

A No; only that the arrest is --

Q Only that the arrest was invalid and this was a fruit of that.

A Correct, Your Honor; yes.

Q And you don't argue that there was no probable cause?

A We argued that before the Supreme Court of Louisiana. Here we're arguing basically --

Q No warrant.

A -- no warrant, time to get a warrant; no exceptional circumstances existed here for them to proceed

without first obtaining a warrant. The review, in pointing out why such a case would cause the necessity for a warrant, has indicated that there is a chance here that the officer did not have probable cause to secure an arrest warrant, and as this Court has indicated in Wong Sun, and subsequent cases, the standard of probable cause should be at least as strong without a warrant as that required under the conditions of securing a warrant.

Q The essence of your argument is that whwnever time permits there must be a warrant to make an arrest. That's what it adds up to; isn't it?

A In a home.

Q Just in a home you would require that?

A In this particular case, Your Honor; yes, we're restricting it to a home. We're acquainted with the circumstances of street encounters and other exceptions made by this -- we're restricting it to the home.

Thank you.

Q Let me see if I get your identification problem straight. What you're saying is that if the arrest is illegal then the identification, however good it was, on its own bottom, is an unlawful proof?

A Yes, Your Honor.

Q That's what you're saying?

A Yes; that's the basis of the arrest and

the illegal detention which followed. Very similar to Davis versus Mississippi.

Q Would yourarggument be the same if he wasn't identified until the trial?

A Yes, Your Honor.

MR. CHIEF JUSTICE BURGER: Mrs. Korns.

ORAL ARGUMENT BY LOUISE KORNS, ESQ.

ON BEHALF OF APPELLEE

MRS. KORNS: Mr. Chief Justice and may it please the Court:

At the beginning of my argument I'd like to inquire whether it would be possible to have a little more time than the regular half hour, in view of the two very important questions posed by this case, without --

MR. CHIEF JUSTICE BURGER: Well, we'll see what your needs are, and since Mr. Buckley has run out of time, if we do enlarge here, we will enlarge his a little bit.

MRS. KORNS: Certainly, Your Honor.

To begin with, on the jury question, the first question in the case, just to touch briefly on the historical background of a majority jury verdict system: as this Court know, various theories have been advanced to explain why a unanimous jury verdict became required in many jurisdictions, particularly in England up until 1967, between the 13th Century and about 1967. And Lower Justice Devlin, I think

most writers concede that Lord Justice Devlin's theory that it was purely by chance is a correct theory.

As Lord Justice Devlin, and I think Professor Thayer also, in the Harvard Law Review, point out: during the middle ages in England in trial by compurgation, there was the custom of a party having to have his version of the facts supported by the oaths of 12 jurors. So they would assemble 12 compurgators, but if these 12 compurgators wouldn't support the oath of the party they would keep adding to them and adding to them until finally out of who knows how many numbers, 100 -- they had 12 men sworn to the position of one party and then he won the case.

To just skip briefly over it: as the function of the jury around in the 12th Century gradually changed to judging credibility, rather than swearing to it, the practice of adding extra jurors was eliminated, but the requirement that the Crown obtain 12 votes to convict was kept. And therefore, as Mr. Justice Devlin points out, the unanimity requirement grew out of a majority system of jury verdicts in which at least 12 votes were needed to support a verdict, out of an untold number.

Now, at the present time, as this Court knows, majority verdicts exist, not only in six states in this country, as well as Puerto Rico, but in countries which formerly formed a part of the British Commonwealth. Notably, it has

existed in Scotland, the 8 to 7 verdict from time immemorial; and works very well. And in England, as this Court knows, in 1967, in the Criminal Justice Act of that year, adopted majority votes in criminal trials, specifically the law requires that where a jury consists of not more than 11, ten can bring in a verdict; where a jury consists of not more than 10, 9 can bring in a verdict provided that a verdict of guilty cannot be brought in by a majority vote unless the jury has deliberated at least two hours.

I think this Court is familiar with the fact that in England jurors drop out in the trial -- but that's immaterial and I won't go into that point.

As this Court also knows, because it pointed out in Williams versus Florida: we had majority verdicts in Colonial times in a number of states, notably: Pennsylvania, Connecticut and the Carolinas, I think.

As this Court also pointed out in Williams versus Florida, it rejected, in fact, in Williams versus Florida, the argument that every feature of the common law jury as it existed at the time our constitution was drawn up, was incorporated in our constitution every time the word "jury" is mentioned. This Court rejected that and point out that as originally submitted by Mr. James Madison in the House, to the House, and as originally adopted by the House,the jury amendment required that, among other things, a vote must be

unanimous. That the person has this right was rejected in the Senate and, as ultimately adopted, the Sixth Amendment only says that in a criminal trial an accused is entitled to a trial by jury; what kind? An impartial jury. It doesn't mention the number or whether it has to be unanimous.

Now, to get right down to the issue in this case, as I see it, as was posed by this Court in a footnote in Williams in which it said it took no stand on whether a majority verdict violated due process. And, as Louisiana sees it, the issue is very simple: whether the use by a state of a majority vote in a criminal trial violates the due process clause of the 14th Amendment because it infringed the principle that a person accused of a crime cannot be convicted except upon proof beyond a reasonable doubt of all the facts necessary to prosecute the crime.

That is the issue for decision, as far as Louisiana sees it. As Louisiana sees it the equal protection argument is really subordinate and not important, because, if in fact, a majority verdict satisfies due process, as we think it does, the equal protection question really goes out of the picture because as soon as everyone similarly situated is treated the way the appellant here was; that is: anybody in Louisiana accused of a crime for which the punishment is necessarily hard labor, is treated the same way. As we see it, the crucial question is whether a majority verdict

satisfies or violates due process in the 14th Amendment and that, to us, is the crux.

Q That doesn't actually meet the equal protection claim; does it? You could say it satisfies due process for a state to charge $20 a year for an auto license tag, but it certainly would violate the Equal Protection Clause for a state to charge $20 to some of its motorists and $10 to others, based on some irrational classification; wouldn't it? Even though neither one would violate due process.

A Well, actually, the truth is, Mr. Justice Stewart, that -- as I studied this case and evaluated it, I arrived at that conclusion I just expressed because, as I will show later in the argument: there is no difference in the percentage of convictions between cases tried by a majority vote and cases tried by a unanimous vote. And that would be the crux of any unequal protection argument, as I see it.

And what can an accused argue on his equal protection argument, unless he can say: Look, I have a 10, or 15 or 20 percent greater chance of being convicted by a majority vote than another person in my state has who is accused of another type of crime. As I see it, that's the only type of unequal protection argument you can make.

Q Mrs. Korns, to pursue Mr. Justice Stewart's question --

A Yes, Your Honor.

Q To pursue Mr. Justice Stewart's question: if a state provided that all automobiles up to 2,000 pounds would have a license of $10 and all those over 2,000 would be $20, would there be any equal protection problem in that?

A Well, right there there would be a monetary loss to the person who had to buy the license, if nothing else, but our position in this case is that there is no loss to the accused by being tried by a majority rather than a unanimous verdict.

So, excuse me, Mr. Chief Justice, but I don't think the argument is parallel, in view of the position we take, because certainly if every person had to pay $10 for an license and another person had to pay $20; right there is a difference of $10. Somebody is being hurt $10.

Q Well, but if it's based upon the weight of the automobile or the price of the automobile, is that an invidious discrimination?

A Well, there again, in the alternative I would say it wasn't right; in the alternative I would say it was -- at the beginning we say that Louisiana -- every -- all the study I have been doing on this case since I first started working on this brief, convinces me more and more that there is absolutely no higher rate of conviction in jurisdictions -- in cases tried by a majority vote than in unanimous verdict cases, and I will explain to the Court why when I get into analyzing

the way a jury arrives at its verdict, as Messrs Kalven and Zeisel have pointed out.

Q Mrs. Korns, is it possible to be convicted of murder and get 35 years in Louisiana, as a sentence?

A If the jury in Louisiana brings in a verdict of "guilty without capital punishment" technically they can be sentenced to prison for life; but life, I think -- I'm not sure what "life" means, Mr. Justice Marshall; but it doesn't mean natural life.

Q My whole point is: as I understand Petitioner's argument, he says that if he's going to end up with punishment in prison, the same prison that somebody else goes to, for practically the same amount of time, that he has less chance of a hung jury with a majority one than he has with a unanimous one.

A We will point out, Mr. Justice Marshall, he has about one percent less chance; about one percent, and when you go into the convictions on retrial, that's our own second point in our brief. It's immaterial, on a practical basis. There is really -- the more you study it, the more --

Q Well, why is it that you have unanimous for death?

A Well, that's a good question and my position is, the more I study it: I think it's purely psychological and as a matter of fact, I wouldn't see any

difference. I don't think if you allowed a nine out of 12 verdict there would be any higher conviction rate and the only trouble with having a nine out of 12 jury involving -- when a jury has to bring in a death sentence, is that perhaps, because death and putting someone to death, fills people with guilt and awe, it may be that nine wouldn't act if 12 had a doubt, as they will just for punishment, because of the finality of it.

But, that's the only difference I see, because as I will show in my second point in this argument: there is no difference, when we study the question and you see how juries operate, there is no difference between the conviction rate when the verdict is a majority verdict or when it is a unanimous verdict.

See, in England, when they -- I studied lots of English materials in writing this brief. Mr. Roy Jenkins, who was Home Secretary, and who pushed the majority verdict through parliament because he was so convinced it would help the administration of justice in England -- he states and his arguments are summarized in these various British journals that I cite in my brief -- he states in the House of Commons, or someone stated for him -- that he was sure that the innocent would not suffer for this and he pointed to the time-honored practice in Scotland of bringing in criminal verdicts by 8 to 7; a 15-man jury, eight can convict.

And he pointed out that certainly in Scotland nobody had ever complained that the innocent suffered, or that there was any discrimination against the accused because he was convicted by eight out of 15 men.

Q Mrs. Korns, as far as you know, has the Louisiana system ever been Federally attacked before this case?

A Only in Duncan it was attacked on the basis that we allowed trials before judges when the punishment could be up to two years, and we lost that case and this Court said we had to have juries for anything -- for any serious crime, which in Baldwin this Court narrowed down to six months.

But, actually, after we lost Duncan we then amended our laws to have everybody -- either to bring down the punishment to six months, or to allow a jury trial in anything over six months.

As a matter of fact, Mr. Justice Blackmun, the first part of our constitutional provision here, which is set out on pages 3 to 4 of Louisiana's brief, is that all trials in misdemeanor cases shall be by judges, but then we had sentences up to two years; therefore, this Court's decision in Duncan cut across that first provision of our constitution which goes on and says -- you see, it's very logical the way the legislature set it up in 1898. They said all misdemeanors shall be by judge alone; all crimes which may be punished by

hard labor will be by a five-man jury, all of whom must concur. All crimes which shall be punished by hard labor, which is the instant one, shall be by a 12-man jury, nine of whom must concur.

All capital crimes shall be by a 12-man jury, all of whom shall concur. That's the way we set it up and that's the way it still is, except for the Duncan provision that cuts across the trial of misdemeanors if a sentence of more than six months can be imposed.

Q But, on the unanimity provision, or lack of it, you have had no Federal attack for 75 years?

A No, Your Honor; we have never had it. This is res novo; this is it right here, and that's why I say, this is very important for Louisiana, this case, and this point.

Q May I ask you: you have been arguing about whether more would be convicted or less would be convicted. What difference does that make to the constitutionality of --

A Well, I don't think it does, Your Honor, in the alternative as my second point. But, you see the whole picture of Appellant's case has been here, and that's why I researched this so carefully. Their whole pitch has been: Look, we have been denied due process of law because we had a much greater chance of being convicted than somebody tried by a unanimous jury or a five-man jury and so, seeing as that was

the pitch of their argument, this is what I researched and built up. I agree with you.

Even in England, for instance, they say: well, what we want to do is catch guilty people. They are very frank about it, you see, and I don't see any harm, as long as you are not unfair, in trying to convict criminals and put them where society intended them to be.

But, to get back to the due process argument, Your Honor, as this --

Q When did the British give up the non-unanimous verdict?

A I beg your pardon?

Q When --

A In 1967, 1967.

Q And before that it had been unanimous since time immemorial?

A It had been unanimous from about the 13th Century, when as I say, Mr. Justice Devlin said it developed by chance and from the 13th Century up until the 20th, of course it existed up until the time the American colonies were formed, and that's why it's clothed in this mythical status in this country.

As I say, when you tear all the fiction and fantasy aside there, there is no harm to the accused and a lot of harm to the administration of criminal justice from using a

majority verdict system.

Q Well, of course, since you have mentioned it, you recall that there were, I think, five colonies out of the 13 who had less than unanimous verdicts.

A Exactly. As a matter of fact, when you read about why Mr. James Madison's jury amendment ran into so much trouble in the Senate, that's exactly why it ran into trouble in the Senate.

Q And there was no Federal law on the subject then, at all; was there?

A No --

Q I mean the Federal Government.

A No; actually the only way we can say -- the only logical argument a person can make about needing a unanimous verdict requirement in criminal trials, is to -- only two arguments they can make, as I see it. One: is the argument which this Court rejected in Williams versus Florida. That is, but which the Court had sort of sanctioned in earlier cases, but which it repudiated in Williams versus Florida, and that is that the jury, as it existed at common law in England at the time our constitution was drafted, was the jury that the drafters of the constitution had in mind.

Now, this Court rejected that argument in Williams, when they rejected the 12-man jury, because at the time the Englishmen founded Federal American colonies they had

a 12-man unanimous jury. That was rejected in Williams.

Now, the only other argument you can make is: Look, I stand an unfair chance of being convicted under this type of jury system. Somehow or other I'm going to be convicted; I'm not going to -- see, they argument that the reasonable doubt standard is violated. And this Court held, in re Winship that the fact that an accused had to be convinced by proof beyond a reasonable doubt was because of the due process clause.

So, that's the crux of their argument. If a 9/3 verdict comes in it means three men doubted and the burden of proof hasn't been carried. Well, the flaw in that argument is this: this jury came in in 20 minutes, to answer the question of Mr. Justice Stewart, I think; and 20 minutes. They must have gone out, elected their foreman and it was the first or second ballot. They came in in 20 minutes.

Statistics show, and, as Kalven and Zeisel's Study of the American Jury, with which this Court is familiar, I know, because this Court cited it in the Williams versus Florida -- studies show that any jury and the American Jury, this book, includes majority verdicts, so it includes the Louisiana jury. When a jury deliberates long enough it will reach unanimity in 95 percent of the cases. They say that over and over again.

Therefore, in the present case there is no --

there was a 95 percent chance if this jury had not come back into the courtroom at the end of 20 minutes with a 9 to 3 verdict of guilty, there is a 95 percent chance that if it had sat there long enough it would have reached unanimity.

There is no chance in Louisiana's view, that it would have acquitted the accused, because Kalven and Zeisel show in their book that when a great majority develops, like 9 to 3 it is almost impossible for the minority to persuade the majority. They say only with extreme infrequency does a minority persuade a majority to change its mind.

Q May I ask you again: is that the way you determine constitutionality?

A See, I agree with you, Mr. Justice Black, but I'm just trying to answer their questions, the arguments they made since to say why this Court should set aside. They claim because the reasonable doubt principle is infringed that there is a higher chance of their being convicted, and so I just answered their questions.

I agree with you; I don't think it is. I don't think it is. As a matter of fact --

Q What do you think is the way to establish that 12 are required or to deny that 12 are required, according to the constitution?

A Well, this Court decided in Williams that 12 was not needed. Now, that's what this Court decided in

Williams. And this Court then went on to point out that a five-man jury it did not think -- it thought it was large enough -- well, in the first place it said: a jury which satisfied the requirements, which is the primary requirement of jury trials, that a body of laymen be interposed between the Government and the accused, as a protection against tyranny. The body, and the five men, they said, and this Honorable Court said in Williams satisfied -- and certainly a 12-man jury, nine of whom must concur to render a verdict, certainly serves the same function. It serves as a shield between the Government and the accused.

That keeps the Government from oppressing the citizen, by standing there as a body of impartial laymen. And when a member of this Court asked -- I think it was Mr. Justice Black -- does a Federal jury have to be unanimous? I say it doesn't,and the proof is that they had to enact a statute to make it that way.

In other words, if the constitution was clear, you know, or even almost clear that a jury had to be unanimous why would the Federal -- why would the U. S. Code provide that it had to be unanimous?

Q Which does it? Which does the constitution say?

A The constitution only says that in all criminal trials, the Sixth Amendment, the accused is entitled

to a trial by an impartial jury and that's all it says; an impartial jury of the neighborhood in which the crime occurred. That's all the constitution says, and the unanimity and the 12-man requirements which were originally in the Sixth Amendment, as this Court knows from Williams, was struck, was stricken out by the Senate and -- as adopted -- in other words, the drafters rejected both the 12-man and unanimity.

Q I suppose, Mrs. Korns, it could be argued, although I know that counsel doesn't make the argument, that a divided jury is not an impartial jury --

A Well, you see --

Q -- it's, if nine of them are partial to the prosecution and three of them are partial to the defense, then that's not an impartial jury; is it?

A But you see, Mr. Justice Stewart, the fallacy of that argument is that this jury would have -- there was a 95 percent chance of this jury becoming that way, and when you study the way jurisdictions are limited youunderstand more what I mean.

Kalven and Zeisel say --

Q No; I wasn't talking about that; I was simply giving the facts of the Constitution of the United States.

A Exactly -- that's his own --

Q Kalven and Zeisel were not in the

constitution.

A They are not in the constitution, but --

Q The word "impartial" is.

A Right. Their theory that they document is that the juror makes up his mind in the courtroom and actually if you adopt this, even Brazil has the right way of doing it. In Brazil the jurors listen to the case; they walk out and by written ballot they write "guilty" or "innocent." No deliberation, and the accused is -- and a majority verdict decides.

Now, Kalven and Zeisel also throw grave doubt on the whole deliberation process of the jury. They point out that the first vote of the jury out of the room determines the end verdict and they show it time and again. And they say the deliberation process is the arriving at a consensus. And actually, Louisiana says: the same sorts of pressures, only more subtle, now operate to produce unanimity in the jury, as operated, as this Court knows.

In the Middle Ages they were locked up without food, drink, dire or -- as a matter of fact, they even took them by cart to the next circuit when they went if the jurors hadn't made up their minds.

Q I suppose you would argue that that does not require that we hold a jury has to be locked up without food?

A Certainly not; certainly not, Mr. Justice Black. And to argue from that point, Kalven and Zeisel held that the same sorts of pressures exerted on juries, not only then, were subtle and psychological, naturally. He points out that the minority always -- no; 95 percent of the time the minority gives into the majority, just because they can lose ground and so forth. And the minority never turns the majority around. Never.

So, what's the reason for any deliberation, once you establish nine votes, say; reach nine votes and come out; they are never going to turn around and acquit that man when nine of them think he's guilty. The most the accused can hope for is a hung jury.

Q From that jury; from that jury, and then he gets a new trial and he gets a bigger jury.

A Right. If he gets a new trial, Mr. Justice Stewart, there are no figures to determine what the rate of convictions are under the new trial. Some people think they are higher and some people think they are lower, but there at least we can assume there will be a certain number of convictions on a new trial.

So, what does he get, but a faint hope that on a new trial he might get an acquittal?

Q Well, his point is that, right in line with what you have told us, that once nine people are against

him, he's cooked from that jury, but if you required unanimity he wouldn't be because he would get at the least, a hung jury and then he would get a new chance before a new jury.

A Exactly; and that's all he can hope for; there's no doubt about it.

Q Well, isn't there another stage in there; isn't there another stage, and that is that the nine might be able to persuade the three. So that it isn't -- there is no assurance --

A There is a 95 percent chance of their persuading the three; a 95 percent chance.

Q That's according to Kalven and Zeisel?

A That's from Kalven and Zeisel; right.

Q They didn't decide the constitution, though; they weren't part of it.

A He used Kalven and Zeisel first, Mr. Justice. They have based their whole case on Kalven and Zeisel so I've got to study Kalven and Zeisel or else the rope's around my neck, as it was, because --

Q Well, this argument is made or has been made by Mr. Buckley that a nine to three verdict means there are nine jurors partial to the constitution. I suppose your answer to that might be that if it's a unanimous verdict of 12 then there are 12 who are partial to the prosecution?

A Right; exactly.

Just briefly, I'd like to remind this Court of everything that's saved by a majority verdict. Although, the majority -- that's the second point in our brief -- that although a majority verdict only ultimately affects the verdict in a tiny minority of cases is because, as I have pointed out, they would reach unanimity and so forth. At the same time in every case, like in this case, the jury came in in 20 minutes; it reduces the dangerof mistrial by about two percent. And really, it was because of this that England, as you read these English materials you will see that the Home Secretary pressed this new law because England had been having a lot of trouble with what they call "nobbling."

Nobbling is the intimidation of bribing jurors to prevent a unanimous verdict. And, as they pointed out, it wastes time, money and judge power to have to -- especially in their own case -- like the Manson case; suppose they had had a mistrial.

Well, anyway, it just saves time, money and judge power to have a majority verdict.

MR. CHIEF JUSTICE BURGER: Mrs. Korns, you've only got about three or four minutes left to the arrest point, if you want to reach it.

MRS. KORNS: I'll do that.

MR. CHIEF JUSTICE BURGER: You make the election as to which you want to argue; I just wanted to alert you.

MRS. KORNS: So you don't want to give us any more time, Your Honor?

MR. CHIEF JUSTICE BURGER: I think you have covered this pretty well.

MRS. KORNS: All right; fine. I'll go on to the other point.

Well, my other point is just that there is any argument at all that can be made for getting a warrant to make an arrest in a home. The home has never been a sanctuary against arrest, ever.

At common law the Semayne case said: "The privilege of the house does not run against the King." Never has the home -- this is the one exception to the principle that a man's home is his castle. The one exception that cuts right across it is that a man -- the privilege of a man's house does not run against the king. In other words, translated --

Q The king has to have probable cause to get in thehouse.

A Right; no doubt about it. I agree with you, but he doesn't have to have a warrant. Right.

At common law, there is no doubt about it, Mr. Justice White, arrest could be made without a warrant in a house, based on probable cause. And, as a matter of fact, as a practical matter, I call the Court's attention to the fact that in Orleans Parish the police make about 50 or 55,000

arrests a year. I would say a hundred or a thousand a week.

Well, as this Court -- I went into this before this Court in Vale: the length of time it takes to make out an arrest warrant; which to type out probable cause --

Q How many arrest warrants do you have in New Orleans --

A Very few, Mr. Justice Marshall.

Q So, are you proud of that?

A No; that's just the only way the court can operate -- the police can operate. They only get arrest warrants the minute -- you see we have an article: 213 in the Code of Criminal Procedures -- this is an article that all jurisdictions have; it's the codification of common law.

The Federal agents, various ones, they have no Federal Law statute like our 213, because they don't have general peacekeeping power. But the FBI, the Narcotics Agents, the United States Marshals, the Selective Service, among others, have the right by statute, upon showing -- when they have reasonable cause to believe that a crime has been committed, to make an arrest without a warrant.

And, all jurisdictions have this law, like 213, and as a practical matter, the police couldn't operate. The police force, if they had to swear out 55,000 arrest warrants a year is what --

Q Do you think this was a reasonable search?

A Oh no; the search is immaterial, Mr. Justice --

Q I was just wondering if six men with shotguns --

A Well, six men always go to an armed robber's house; they do.

Q With shotguns without warrants?

A Right, because he's an armed robber.

Q And who else is in there?

A Well, see, they went to the --

Q Do they know who else is in there; how many children are in there?

A Well -- I don't --

Q How many unarmed women are in there?

A Well, they knock on the door, you know. They didn't have to force their way --

Q You are sure they knocked?

A Yeah.

Q With the gun butt?

A No; they knocked and introduced themselves and explained --

Q They said, "Excuse me, Mister whatever -- "excuse me, Mr. Johnson, we'd like for you to"--

A Mr. Johnson was under the bed; Mrs. Johnson came to the door. Mr. Johnson got under the bed.

Q Who did you say was under the bed?

A Yep; they found him under the bed.

Q The Appellant.

Q And they needed six shotguns to find a man who was hiding under the bed?

A Would the Court like to hear the facts of the case?

MR. CHIEF JUSTICE BURGER: No; I think we know the facts, Mrs. Korns.

MRS. KORNS: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Q Let me ask a question: did -- you're not old enough, and this isn't a legal question -- but wasn't there a fairly popular movie a long time ago -- I think it was Henry Fonda in the lead role, which had to do with the jury process?

A Yeah, I know --

Q -- and one man initially holding out for acquittal?

A I remember it.

Q So, it does happen in fiction; doesn't it?

A It sure does; uh huh; I've forgotten the name of that case.

MR. CHIEF JUSTICE BURGER: Thank you.

MRS. KORNS: Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: The case is submitted.

(Whereupon, at 2:07 o'clock p.m. the argument in the above-entitled matter was concluded)