In the

Supreme Court of the United States

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ROBERT APODACA, et al.,
Petitioners,
v.
STATE OF OREGON,
Respondents.

No. 69-5046

Washington, D. C.
January 10, 1972

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ROBERT APODACA, et al., Petitioners,	:	
v.	:	No. 69-5046
STATE OF OREGON, Respondent.	:	

Washington, D. C.,

Monday, January 10, 1972.

The above-entitled matter came on for argument at 10:44 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

RICHARD B. SOBOL, ESQ., 1823 Jefferson Place, N.W., Washington, D. C. 20036, for the Petitioners.

JACOB B. TANZER, ESQ., Solicitor General of Oregon, State Office Building, Salem, Oregon 97310, for the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 5046, Apodaca against Oregon.

Mr. Sobol, you may proceed whenever you're ready.

ORAL ARGUMENT OF RICHARD B. SOBOL, ESQ.,

ON BEHALF OF THE PETITIONERS

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

In 1968 this Court decided Duncan v. Louisiana, in which it held, for the first time, that the Sixth Amendment right to trial by jury is applicable to criminal trials in State courts by virtue of the due process clause of the Fourteenth Amendment.

A month later, in De Stefano v. Woods, the Court held that the holding in Duncan would only be applied to cases tried after the date of the decision in Duncan.

After Duncan, the three petitioners in these cases were tried in circuit courts of Oregon for serious crimes, and each of them was convicted by a split verdict under the procedure authorized by the Oregon Constitution, of allowing a criminal verdict with 10 out of 12 jurors concurring.

The votes in the respective cases were 11-to-1 in two of them, and 10-to-2 in the third.

The jury in each of these three cases was out of the courtroom, in the jury room, for less than an hour; in one case

for less than a half an hour. The convictions were appealed to the Oregon Court of Appeals, raising the argument that the Sixth Amendment rights enunciated by Duncan had been violated by the acceptance of a split jury verdict, and the Court of Appeals of Oregon, following a very recent decision of the Supreme Court of Oregon, affirmed the convictions and held that the Sixth Amendment does not guarantee the right to a unanimous jury verdict.

The Supreme Court of Oregon refused review of the cases, and the cases are here on certiorari to this Court.

The question, therefore, which is presented, in light of Duncan and De Stefano v. Woods, is whether the Sixth Amendment permits a conviction for a serious crime without a unanimous jury verdict.

And I would like to, in light of the arguments made by the State of Oregon, refine that question even further, and that is: Where there is no State procedure for minimum periods of deliberation, which is the case here, whether the Sixth Amendment permits a conviction of a serious crime without a unanimous jury verdict.

Q In your view, would a minimum period for deliberation make a difference, Mr. Sobol?

MR. SOBOL: I think it would be a different case. My personal view on it was that it would still not be satisfactory, but the reference in the State's brief to the English

system and the proposal of the American Bar Association are systems and proposals which, as part of them, secure a minimum period of deliberation. The draftsmen in both those cases recognize what we think is a very important value lost by the Oregon system, of requiring jury deliberation; and I think when and if that case ever gets here, the Court will have a different question if another provision is made to insure deliberation, whether or not that insurance is satisfactory.

Now, in 1970, in Williams v. Florida, the Court passed on the question of the six-man juries in Florida, and the Court held that although there had been a six-man jury historically at common law, and although the Court in the past has indicated that the Sixth Amendment does in fact require -- I'm sorry, that there had been a 12-man jury at common law; and although the Court, this Court had indicated in the past that 12 jurors are required under the Sixth Amendment, in reconsidering the question, the Court made a two-step analysis:

First, it said the history of the Constitution, the history of the Sixth Amendment left the question open, that it was impossible to tell from the historical material what the draftsmen of the Sixth Amendment meant on this point. And Mr. Justice White, for the Court, said: The way we're going to determine which feature of jury trial right at common law is incorporated in the Sixth Amendment is to determine whether the feature in question serves an important purpose in terms of

the functioning of the jury system. It's a practical test to be applied.

Applying that test, the Court held 12 men are not required, and specifically left open the question as to whether a unanimous jury verdict is required.

Now, we are arguing this case squarely within the holding and the test enunciated in Williams, and we think the application of this test resolves the case in our favor, because the requirement of a unanimous jury verdict serves four very important purposes in terms of the basic function of the jury process.

Those four purposes are: it insures that the jury enters into meaningful deliberation; we think it serves an important purpose in maintaining the reasonable-doubt standard in criminal trials; we think it maintains an important purpose in giving meaning and effect to this Court's decisions requiring that a cross-section of the community participate in jury decisions; and we think it serves an important function in terms of community respect and confidence in the process of the criminal law and in the convictions that are secured in criminal cases.

And I'd like to discuss each of these four functions, t indicate their breadth.

Q Mr. Sobol, as you do so, those are good arguments, for a policy matter will you emphasize the constitutional

aspects of them as you go along?

MR. SOBOL: Yes, sir. They're constitutional in this sense: interpreting the Sixth Amendment in Williams v. Florida, this Court said that the way to resolve the issue of constitutional interpretation in the Sixth Amendment, what does "jury" mean? It means something. And the Court said: in terms of deciding what it means, we're going to look to the functional importance of the requisite of the jury trial in issue here.

That was the Sixth Amendment test enunciated by Mr. Justice White for the Court.

We are simply taking that test and arguing in this case that unlike any fixed number of jurors, the requirement of unanimity is a concept which serves very important functions, and therefore meets the constitutional test enunciated by the Court in Williams.

Now, in 1896, in Allen v. United States, this Court said: "The very object of the jury system is to secure unanimity by a comparison of views and by arguments among jurors themselves."

The unanimity requirement is the aspect of the jury trial system which insures that the jurors will go into the jury room and exchange views. The work that has been done in the jury area by Kalven & Zeisel indicates that in States such as Oregon and Louisiana, the two States that have split verdicts, --

Q Now, was Allen a Federal case or a State case?

MR. SOBOL: Allen was a Federal case, Your Honor.

Q Well, was not the Court addressing itself to the jury system as then established by Act of Congress?

MR. SOBOL: I think in Allen the Court was talking about the jury system constitutionally. It was a case having to do with a charge to the jury, Your Honor. It did not raise this issue. I am just indicating that in Allen the Court was referring to the operation of the system in what was important functionally.

Q The Court was certainly aware then, as we all are now, that when the Sixth Amendment was proposed it was proposed to have the unanimous verdict, was it not?

MR. SOBOL: There was an amendment in the House to include unanimity as a specific requirement of the Sixth Amendment. That amendment was unsuccessful.

In analyzing that exact amendment in Williams, the Court said that it is not possible to determine whether the unanimity requirement, along with the other aspects of that amendment, was stricken because everybody knew that jury trial meant unanimity, or because the Congress did not want it in.

And in approaching this case, Your Honor, we have simply accepted the very recent interpretation of that very legislative history in Williams, and accepted that conclusion, that it's six of one, half-dozen of the other, it's impossible

to determine from that legislative history what exactly the framers had in mind.

I would point out that the major controversy concerning that amendment did not have to do, in any respect, with the requirement of unanimity. The main argument about the amendment was a proposal to put vicinage in the Sixth Amendment, to require that a specific district, as at common law, be incorporated in the Constitution. The debate was about that point, as the Journals of the Constitution reflect, and so on, in our brief. And the amendment was deleted with respect to that issue; the whole amendment was deleted. But that the controversy that the Congress was focusing on was the vicinage requirement, which was not desired to be included.

And with that, the entire subsection was deleted.

Analyzing that, as I say, in Williams, the Court said, you really can't tell what the Congress meant in its drafting; and that, again, the question has to be decided in terms of whether the issue, the requisite is functional in terms of the jury system.

Now, the unanimity requirement means that the jury can't come out of the jury room until everybody agrees, and because everybody has to agree, the process means that everyone sits down at a table and hears the views of all the jurors. And this is important, because the idea of having more than one juror is that different jurors are going to see the

questions differently, are going to have different perceptions of the evidence.

And the reason that a jury verdict is as fine a thing as it is is that everybody's view of the evidence, everybody's interpretation has been merged, has been hammered out, has been considered by everybody; so that when the jury comes out of the jury room and announces its verdict, you have a collective judgment, which is considering the views of everybody.

Now, in --

Q Well, as Justice Blackmun suggested, isn't that the policy argument that led, it was either four or six of the States of the Original Thirteen to insist upon a unanimous verdict provision written into the Constitution? Now, isn't that -- aren't you arguing the policy desirability?

MR. SOBOL: No, sir. I'm saying that when, in this country, you talk about juries, its intrinsic meaning means unanimity; that the jury system does not function, as we know it, without unanimity. And Mr. Justice White, in Williams, said that is the question the Court must ask when it is up for consideration: whether a particular feature is included in the Sixth Amendment.

I am simply taking up that test and saying that without deliberation you don't have a jury as we know it in this country. That the, as the Court said, the very object of the system is to secure unanimity by a comparison of views

and by arguments among jurors.

Now, in --

Q Mr. Sobol, --

MR. SOBOL: Yes, sir.

Q -- would your argument apply equally well to a civil jury as to a criminal jury? If not, why?

MR. SOBOL: Well, I think -- no, it wouldn't apply. I think that there are, as the courts recognized innumerably, a case like In re Winship comes to mind. There are certain interests at stake in a criminal trial, by which the society has historically wanted to be very careful about erroneous convictions. The risk of error in terms of a criminal conviction has historically been thought in this country to be a much more serious matter than the risk of error in a civil case.

That innumerable procedures have been established in criminal cases to lessen the risk of error in fact-finding, which is always present.

Now, I think the absence of unanimity certainly increases the risk of error, and the risk of an erroneous conviction. And I think that the considerations, the stakes in civil cases are very different in a very important respect.

Q Would you say that if there were a requirement in the statute of Louisiana, that they must deliberate six hours or eight hours before they can return a less-than-unanimous verdict, that that would satisfy you?

MR. SOBOL: Well, Your Honor, personally I think that there should be no time limit, there should be no procedure whereby the majority can simply sit out the minority. But I do very firmly want to indicate to the Court that I think that's a very different case, and I don't think Oregon can defend its procedure in this Court by saying, well, in England there is a minimum period of deliberation.

A minimum period of deliberation is undoubtedly a step toward retaining this feature of the jury system. In States like Oregon, when the jury goes into the jury room, it takes its first vote, if the vote is 10-to-2, there is no discussion, they return to the jury box and announce that verdict. If the vote is 8-to-4 and after an hour it turns to 10-to-2, there is no further consideration of the minority viewpoint.

Now, in these cases, the juries were all out a matter of minutes, and I think that whatever may be the ultimate decision, where a State adopts a minimum period of deliberation system, as they have in England, and as the American Bar Association has recommended, it certainly has no relevance in defending the constitutionality of this system.

Q Mr. Sobol, help me out a little bit. If Oregon provided for 24-man juries instead of 12, would you be making the same argument?

MR. SOBOL: Yes.

Q Well, then, what your argument amounts to is this: If you had a 10-to-2 vote of the jury, you would like to have it hang at that point, if there were no ultimate persuasion; then you would be content with a new trial. And then if a second trial came along, on precisely the same evidence, -- now, I realize that's a big assumption -- and the jury convicted; actually your vote would be 22-to-2. And yet you would be content with this result?

MR. SOBOL: Well, there would have been a 12-man jury which would have considered the evidence, which would have deliberated, which would have reached a verdict, then I think the first jury would not be relevant is my view. If there was a 24-man jury together, and 22 voted, yes, I guess I'd make the same argument. I think that there is an important value of the jury system in hearing what the different viewpoints are. That's why you have more than one juror, because people see things differently; that's one of the basic human lessons, that you want to hear what everybody has to say. That's what a jury system is, and I think if you were to exclude that in the process in the jury room, I would make the same argument regardless of the number.

Q Well, then, I guess what I'm suggesting, and it may be an invalid assumption, is that a lot depends on the "luck of the draw", the jury composition.

MR. SOBOL: Certainly. Certainly.

A lot depends on the "luck of the draw"; but once it's drawn, the system is to hear what everybody has to say before a vote is rendered, at the very least; and I say, more than that, to work it out so that you do have a unanimous collective judgment.

Now, my second contention with respect to what the function of unanimity is has to do with reasonable doubt. As the Court knows, in Winship, it indicated that the reasonable-doubt standard is constitutionally required.

Now, reasonable doubt was developed in the context of a unanimous jury verdict. What it means is that the prosecutor has to convince every juror to convict this man, and specifically what that means is that the juror with the highest standard, the most doubting juror, must be convinced.

I think it's beyond argument that when you say the prosecutor needs to only convince less than all the jurors, that a lesser burden of proof is being put on the State; the convictions on less evidence, conviction without convincing all the people are being allowed, more evidence would have secured all the jurors' vote, but with less evidence, ten or nine, as in Louisiana, is being allowed.

The most difficult jurors to convince need not be convinced, and therefore I think it's plain that the standard of proof in criminal trials is being lessened by a rule which allows a majority verdict.

Now, just very briefly on the figures the Kalven & Zeisel study have revealed. Across the country, 5.6 of the juries hang; 5.6 percent of the juries hang. In Oregon, 3.1 percent of the juries hang.

What that means is approximately 2.5 percent of all the criminal trials, you get a verdict in Oregon where you wouldn't get a verdict elsewhere. And we think those are the hardest cases, obviously, the cases that would have otherwise hung, the cases that have the greatest doubt associated with them; and it's those cases in which Oregon is permitting criminal convictions where other States do not.

Now, the Kalven & Zeisel --

Q Well, you must go on, to get a fair picture of it, and ask: How many of those are convicted on retrial?

MR. SOBOL: Yes. Which I don't know. But some are and some aren't.

Q But Kalven & Zeisel have those figures too, don't they?

MR. SOBOL: I don't believe that's true, Your Honor, no. If they do, I've missed them. I don't believe they're in there; convictions on retrial. Perhaps I'm mistaken.

But what Kalven & Zeisel does say and has determined from their empirical data is that when a jury is hung 10-to-2, or 11-to-1 at the end of the process of deliberation, that reflects greater dissent at the outset, that where the first

vote is 11-to-1 or 10-to-2, the jury will not hang. But it is where, that there is 8-to-4 or 9-to-3, the process of deliberation succeeds only in wheedling down that number to 2 or 1 that the jury will hang.

And their conclusion is that those are the very cases in which there is substantial doubt, where the jury cannot resolve the doubt. And those are the cases where the historical judgment is that the jury should hang.

Now, perhaps on retrial there would be different evidence, more evidence, less evidence, that might result in a judgment one way or the other. But at the trial which is being held there is doubt which cannot be resolved, and those are the cases which historically have resulted in hung juries, with the option of the State to retry.

Q Mr. Sobol, one thing that you suggest would lend itself to persuading the State and Federal Government to have 18 jurors or 24 jurors, because your incidence of the skeptical juror would increase, would it not?

MR. SOBOL: The incidence would increase, but the historic -- but the Court is interpreting the Constitution, and there's a deviation from the historic standing, which has always been recognized by this Court, which is proposed here. I am simply arguing for the maintenance of that standard, not for something new. At the last argument Your Honor asked whether we simply decide these cases on how you

make convictions most difficult.

And I am saying obviously that is not the test. But where you have a system, and the system here is unanimity, and the reasonable-doubt standard is developed within the context of that system, and then a State comes along and says, Well, we're going to have lesser proof; then I think it is the occasion for the Court to say that that deviation is not allowed, because that is a significantly lesser protection for the defendant than what the historic system has been.

In Williams, the Court said 12 or 6 is not going to make any difference, in terms of the defendant's chances of winning or losing that case.

Here we think it's plain that when 10 are voting one way and 2 the other, and the two cannot be convinced, you are making a difference, you are lessening what you need for a conviction, and that is a deviation from the reasonable-doubt standard.

Q Mr. Sobol, one detail that slipped my mind: If you have a vote of 10-to-2 for acquittal, under the Oregon system, is that an acquittal or is it a hung jury?

MR. SOBOL: It's an acquittal.

Q It's an acquittal?

MR. SOBOL: An acquittal, yes.

Q Then you wouldn't object to that?

MR. SOBOL: Would I object to the acquittal, if I

represented the defendant? No, I wouldn't object to it, but I don't think it has much to do with the issue before the Court, in which the Bill of Rights concerns protection against conviction. What you have to do before you can convict a man in a court in this country.

I don't think you can balance off lesser protections against conviction by a rule which allows a certain number of additional acquittals.

I should also say that the indications are, and they may or may not be accurate, but the study indicated, by Kalven & Zeisel, indicate that 80 percent of those extra verdicts in Oregon are convictions.

Now, my third point as to the functioning, and I must be very brief on this; the third point as to the function of the unanimity requirement has to do with the cross-section cases in this Court. The Court has held that a cross-section of viewpoints must be represented on the jury.

Now, I'm not going to argue this in terms of race or any particular minority, but it's perfectly clear from scores of cases in this Court that an important function of the jury system is to get a cross-section, to get a spectrum of views, because --

Q In any large city today, have you ever heard of a cross-sectional jury? What you mean is the panel must be a cross-section.

MR. SOBOL: The panel must be a cross-section, and --

Q Not the individual jury?

MR. SOBOL: No, but when the jury is finally chosen, we have done what we can to insure a mix of views. It's not --

Q To get a cross-section in New York, you'd have to have about 40 jurors, would you agree?

MR. SOBOL: Yes, sir; I would. But I think you'd come as close as you can within the concept of 12, or whatever the number is. But there is a --

Q Well, on your point about persuading them, it's the prosecutor's job; he wouldn't work as hard with a six-man jury as he would with a twelve; is that your argument?

MR. SOBOL: Well, the Court said, in Williams, that that is not true. The Court said that there is no significant difference. And I don't really argue that; I don't have that question before me.

Q Well, Mr. Sobol, but this same argument you're making now about the cross-section, it would have been equally available in arguing for a constitutional requirement of 12 rather than 6.

MR. SOBOL: No, I don't think thaz's true. I think what Mr. Justice White said in Williams is that -- 12 is not 40, anyway, you're not going to get a perfect cross-section either way, and 6 as to 12 is not going to make that substantial difference in the cross-section. That's different from saying

this man's on the jury, we've done our best to get a cross-section, it's not scientifically accurate but we've done our best; there he is, he hears the case, but his views are not going to be considered in the jury room because the first vote that's taken shows him to be in the minority which is acceptable, and that the jury returns without hearing his views and without incorporating his views.

Now, it's a difference in degree, but I certainly think there's a difference: where you've got the man on the jury, after being selected, and he's excluded by virtue of the process.

Q And you say that doesn't work if it's a 10-to-2 vote for acquittal, because the protection is against improper convictions? The same theory doesn't work?

MR. SOBOL: I think that in both cases you're excluding a viewpoint. But if the State wants to do something to make convictions -- acquittals easier, I'm not here to argue against it. I don't think that raises a constitutional issue. But certainly, either way you're excluding a viewpoint.

But when the viewpoint is being excluded and a conviction is resulting, I think it raises questions under the Sixth Amendment.

Now, the last point on the functions of the jury system has to do with the public respect, and confidence in criminal jury verdicts.

In Winship, the Court, referring to the reasonable-doubt standard, said, It is indispensable to command the respect and confidence of the community in the applications to the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact-finder of his guilt with utmost certainty.

Now, in Oregon, in 25 percent of the criminal trials we have a divided verdict. Now, I think that that's a serious matter in terms of public confidence in the certainty of a criminal verdict, that there is something historically about everybody going out and everybody coming back and saying "guilty", which resolves doubts at large about what's going on in court. When you've got a quarter of the cases where the jury is not in agreement, I think that's a serious matter in terms of public confidence in the --

Q Well, are you suggesting that there is a lack of public confidence in Oregon, in the --

MR. SOBOL: Well, I've never been to Oregon, Your Honor.

Q -- criminal process?

MR. SOBOL: I don't know. But I think that if you have division in the jury, which has not been resolved in a quarter of your cases, that's a serious matter in terms of the historic operation of the criminal system in this country.

Q So you think there is doubt here on the Potomac, but maybe not in Oregon?

MR. SOBOL: There's doubt in my mind about --

Q Yes.

MR. SOBOL: -- about that many split verdicts. Particularly where it's so unnecessary. Because while they're having 25 percent divided verdicts, if the jury was allowed to finish its process of deliberation, the nationwide figure indicates that the huge majority of those cases would reach a judgment. So it's not like we're saying that a verdict couldn't otherwise be reached in those cases; in 80 percent of those cases it could be reached. Only 5 percent of the total would result in a hung jury. So it's a process which serves so little purpose in terms of convenience, and has such a heavy price in terms of the appearance of what's going on in court.

Q What percentage of criminal cases -- what percentage of juries hang in Oregon now?

MR. SOBOL: 3.1, where the national average is 5.6. So you achieve a slight lessening in hung juries. And those are the very cases in which I maintain that there is --

Q So there is only a difference of, say, 2 percent; we're really talking about 2 percent of the cases.

MR. SOBOL: We're talking about judgments being reached in 2 percent additional cases, which is a lot of people, Your Honor.

Q Less those that might be convicted on retrial.

MR. SOBOL: It's 2.5 percent less those convicted on retrial, yes, sir.

Q Less those that might be convicted on retrial.

MR. SOBOL: Yes, but, of course, one thing you don't know is whether the process of deliberation might have resulted in the verdict going the other way, whether some middle ground might have been reached.

Q Right.

MR. SOBOL: We don't know how the jury operated, so --

Q You don't know which way the jury hung.

MR. SOBOL: We don't know which way it hung, and we don't know the manner in which it would have achieved unanimity, what else might have happened in the jury room in terms of lesser offenses, in terms of dividing counts, we don't know any of that.

All we know is that the process of deliberation has been short-circuited in the middle, and that a verdict is being allowed before the process is finished in those -- in most of

those 25 percent of the cases.

Q Well, of the 25 percent of the cases, how many were divided for acquittal?

MR. SOBOL: Well, from Kalven & Zeisel, which is the only information I have, Mr. Justice Blackmun, they indicate that 80 percent of those divisions are for conviction, in 20 percent the division is for acquittal.

Q So it's really you're talking about 80 percent of the 25 percent now?

MR. SOBOL: I'm talking about 80 percent of the 25 percent, yes.

But my main point is --

Q Well, this Kalven study is pretty scanty, isn't it?

MR. SOBOL: It's the best study there is, in terms of --

Q It's the only one?

MR. SOBOL: Yes, the only one there is; that's right.

Now, just lastly I'd like to talk about the significance of the holding in this case.

Forty-eight States require unanimity in cases covered by the Sixth Amendment under Baldwin; only two do not.

Now, in Duncan, the Court said: "Although virtually unanimous adherence to the reasonable doubt standard in common law jurisdictions may not conclusively establish it as a

requirement of due process, such requirement does 'reflect a profound judgment about the way in which the law should be enforced and justice administered'."

Here the Court is faced with a situation in which 48 States have resolved this question one way. The burdens of a changeover here are very slight, they don't require empaneling more juries or anything else, it's just simply a different instruction to the jury.

In closing, I'd like to make one last point which keeps occurring to me, and that is that Oregon did not mean for this -- did -- let me put it this way: Oregon did not determine to interpret the Sixth Amendment this way. When Oregon adopted this statute, the constitutional rule out of this Court was that there is no State jury trial requirement.

And I dare say that no State has affirmatively undertaken to interpret the Sixth Amendment requirement to allow a majority verdict.

Q What --

MR. SOBOL: Oregon has backed into this question by virtue of the Duncan decision.

Q What is its constitutional provision for a jury trial?

MR. SOBOL: In Oregon?

Q Yes.

MR. SOBOL: Well, it's very interesting, it has

exactly the language of the Sixth Amendment, and then it says: Provided, however, that in -- and I'm quoting off the top of my head -- in circuit courts ten out of twelve jurors may enter a judgment.

Q Well, that must have been its judgment that although we're going to provide for jury trials, the jury trial doesn't necessarily involve unanimity.

MR. SOBOL: Well, it seems to me, its judgment, that it included the Sixth Amendment language and then expressly took away from the Sixth Amendment for Oregon, and it was entitled to do that under the state of the law. The more narrow it is, is that the Sixth Amendment applies in Oregon.

Q Would you say that Oregon provides for a jury trial in its constitution?

MR. SOBOL: No, I don't. I would say it does not.

Q Even though it says so?

MR. SOBOL: It doesn't say so. It says something and it takes it away.

Q I know, but it says we want a jury trial.

MR. SOBOL: Provided, however, it won't be a jury trial, because ten out of twelve are going to be allowed to convict. And I think that's not a jury.

Q Well, I suppose you must take that position.

MR. SOBOL: Yes, I must.

Q Yes.

MR. SOBOL: Thank you very much.

Q This was an amendment, was it, of the Oregon Constitution?

MR. SOBOL: It was an amendment in 1934 to the Oregon Constitution.

Q In 1934?

MR. SOBOL: In 1934.

And my point is, for what it's worth, is that at the time that decision was made, it was not made in light of the Sixth Amendment requirements, because there were none.

Q Right.

Q It was made in light of Oregon's jury trial requirement, though?

MR. SOBOL: Yes, the Oregon judgment under it.

Q Yes.

MR. SOBOL: Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Sobol.

Mr. Tanzer.

ORAL ARGUMENT OF JACOB B. TANZER, ESQ.,

ON BEHALF OF THE RESPONDENT

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

That amendment was passed by a vote of the people of Oregon in 1934, and it was in response to a recommendation of the American Law Institute made in 1931, in its proposed

criminal code at that time. So that is its history, it was recommended by a Crime Commission, including a young law professor named Wayne Morse, who achieved some prominence, and also of one who reached the Subversive Activities Control Board. That's a matter of incidental information.

As a preliminary observation, I want to point out, with also a tip of the hat to Kalven & Zeisel, that I am not here necessarily defending some darling of the prosecutor's nursery; I am here to defend majority-verdict system as good system, rather than to argue for advantage.

Because what it does is it facilitates the end object of trials, that is a verdict one way or the other. There's no particular statistical advantage to the prosecution, and, in fact, a slight statistical advantage to the defense.

Q Is it your view that you have to sustain the burden of proving that it's a good system, or is it your burden merely to prove that the Federal Constitution doesn't put any restrictions on the States?

MR. TANZER: It is my burden, Your Honor, to show that it's not violative of the Constitution, and particularly of the Sixth Amendment. I don't think it will hurt me to demonstrate that it's also a good system.

Q I didn't mean to limit you in any way --

MR. TANZER: Yes.

Q -- I just wanted to be sure about the focus of

the case.

MR. TANZER: Yes, sir. You're quite right, Your Honor, and I intend to speak to both, because counsel does seek to broaden it, to some interpretation of the phrase "jury trial". So I do wish to get to it.

Kalven & Zeisel figures, incidently, can be interpreted -- and I'm not going to go into them in detail -- to show that the defendant would enjoy criminal cases across the board, a slightly higher acquittal rate, were 10-to-2 verdicts generally allowed in the States.

Q Is this including retrial evidence?

MR. TANZER: No, I'm not speaking of retrials. We do generally retry cases in Oregon, but I can't speak to retrials.

Furthermore, I point out, just since we're talking statistics, that we convict some 85 percent of the defendants in Multnomah County that go to trial; 94 percent altogether. So when we speak about an 80/20 break of hung juries for guilt or acquittal, even there the defendant would enjoy a slight advantage in Multnomah County, by which I mean Portland.

We feel it is a good system, 10-to-2; I am not arguing for 9-to-3 one way or the other; that the ALI, as I say, agreed with that in their recommendation of 1931. The English agreed with that proposition in 1967, when they switched to such a system; and the American Bar Association

project on minimum standards agree with that as a suitable form of procedure for the United States, in its report of 1968.

And even Kalven & Zeisel, whose commentary is not always on our side of things, begrudgingly admitted in their Law Review article, in their speech advising the English, that justice in Oregon has not broken down, to quote them; but then, also, nobody has ever claimed that Oregon justice is superior to justice elsewhere.

Kalven & Zeisel so state. The Constitution does not require that our justice be superior to elsewhere, of course.

We find that it does sort the guilty from the not guilty, and it does it in a fair manner; it does so accurately; and it does so efficiently. And I think that all three of those qualities are essential.

To invalidate the Oregon system, of course, this Court must find that it is offensive either to the very wording of the Sixth Amendment or it is offensive in the sense which counsel suggests, that the phrase "jury trial" precludes a majority-verdict system, and we argue that neither is correct.

It is not violative of the Sixth Amendment. I wish to point out that I -- and counsel pointed out an error to me in my brief; and I wish to acknowledge it, with my regrets. I started discussing Article III, section 2, and the constitutional debates thereon, quoting from Elliott, and I

transposed the word in my notes, "civil" to "criminal" in my brief at page 19, which I regret.

At the Constitutional Convention they were arguing about civil cases only.

When the Congress met to submit the Sixth Amendment, however, as counsel acknowledged, there there was specific reference to criminal cases, specific reference to unanimous jury verdicts; and James Madison's original formulation, which I will read, reads:

"The trial of all crimes . . . shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites . . ."

That was passed in that form by the House, sent to the Senate, and there in the Senate various of the clauses, including the unanimity clause, were stricken. The diarist of the Senate was ill that day and so we do not have a record of the debate. It was sent back to the House. There was a motion in the House to restore most of that wording. The motion in the House failed on an even vote.

So unanimity was stricken from the Sixth Amendment. And this Court, in order to decide with the petitioner, would essentially have to reinsert the language which the Congress struck.

As to whether or not, under Williams vs. Florida and

Duncan vs. Louisiana, the phrase "jury trial" in and of itself requires unanimity, I think not. Because it is functionally sound. The function of jury as used in that phrase, and defined in Duncan and Williams, was that -- or is that it is to serve as an interposition, an interpositional safeguard, an interposition of the common sense of the citizens as a shield against an oppressive government.

There is a safeguard inserted between citizen and Crown. It stemmed from the distrust of the courts which existed at that period. It stemmed, also, I might add, from a considerable distrust of lawyers, and also of prosecutors. But originally the Crown was the agent of the -- or the courts, as the agent of the Crown, were thought to be oppressive; and that was inserted.

Unanimity is not necessary to perform the function of safeguard.

Surely, for example, if there were a jury of 24, and we allowed a verdict of 23 out of 24, that sort of a system would safeguard the citizen from an oppressive government, it would interposition citizens' judgment at least equally effectively as the now requirement that six citizens sit in judgment of the facts.

The function, according to those cases, and I'm sure correctly so, is the substitution of citizen judgment for official judgment. And a verdict of 10-to-2 does just that.

I might point out that for other high crimes and treason, the Constitution allows the fact-finder to decide by three-quarters, and I speak specifically of the impeachment procedure, wherein, at that time, an 18-to-26 vote was sufficient to find the President or a judge guilty of, as I recall the phrase, high crimes or treason on impeachment.

Q Well, then, Mr. Tanzer, you'd make the same argument if the Oregon system were 7-to-5?

MR. TANZER: No, Your Honor, I would not. There must be a certain adequacy to the safeguard, it seems to me. And I am not called upon to defend 7-to-5. It must be more than a mere majority, it would seem; but I say that as a subjective judgment.

And 10-to-2, I would remind you, is a 5-to-1 vote; that the ratio is 5-to-1. But 7-to-5 is barely a 1-to-1 ratio, it's only slightly more than that. 9-to-3 is quite another matter.

Somewhere there is, I think, simply a judgmental determination to be made. And I think that 10-to-2, at least in my experience, has worked out satisfactorily in Oregon, without public clamor to the contrary, and it is in agreement with, as I indicated, the American Law Institute, the American Bar Association project, and the English. In 1830 there was a declaration of a Royal Commission in England that they switch to a 9-to-3 or 8-to-4 system, but it went nowhere. Jeremy

Bentham was its severest critic.

Q Mr. Tanzer, in Oregon, if the jury goes out, they always take a first vote, all juries do usually, and is this a right that if the first vote is 10-to-2, that it stands up?

MR. TANZER: That could be. That could be.

Q Well, is it?

MR. TANZER: It depends on how the jury chooses to operate, Your Honor.

There is a tendency among jurors to desire to be unanimous; but that's something I can't prove or anything of that -- I can't cite studies.

Q Well, if the jury goes out and takes the original vote, the vote is 10-to-2, what happens to that word "deliberation"?

MR. TANZER: They are empowered, Your Honor, to return their verdict at that time. Similarly, --

Q They are empowered to return a verdict without deliberation?

MR. TANZER: They are empowered equally to where they had voted 12/0, to return without deliberation.

Q Without deliberation. But 10-to-2, if two people think the State hadn't proved anything, and I assume they can't even say that.

MR. TANZER: Well, I'm saying it would be within

their power not to listen to the two, not to deliberate, not to discuss it, if that was the vote. And I must say --

Q And that's authorized?

MR. TANZER: It would be authorized, yes, indeed. Because in that case, one side or the other, the State or the defendant, has persuaded ten men beyond reasonable doubt.

Q Well, why have twelve?

Why not have a ten-man jury?

MR. TANZER: Well, of course, that would be permissible. You know, I'm not trying to debate the alternatives, Your Honor, but to discuss what we have.

Q Well, that's under Williams, isn't it?

MR. TANZER: Under Williams, of course, six would be sufficient.

I might add, incidentally, that we have used six-man juries in our lower courts, and they are required to be unanimous.

Q Well, is there any movement to make that majority, too?

MR. TANZER: No, there is not, Your Honor.

Q Why do you add it?

MR. TANZER: There is not, and I think wisely not, because unanimity is more desirable as the number is reduced. Because we are talking about a safeguard function. If the juries were composed of 40 men, then obviously unanimity would

not be as important as it is if it is composed of six men. Because we are talking about a substantial barrier between government and citizens. And six unanimous will perform it; ten agreed beyond reasonable doubt will perform that function.

I wish to say, also, that in that case unanimity is often compelled, and by that I mean 12 people are seldom unanimous in any view. We tend to be contentious. And that's particularly true as we have broadened the representation in the jury. And the law has many devices to make for unanimity, where truly there is not.

We do not any more, as they did at common law, freeze or starve the jurors or cart them from assize to assize until they decide. But we do allow our judges to comment on the evidence, and, according to Kalven & Zeisel's review of 101 cases where the judge did comment on the evidence, only one jury failed to agree with the judge. And that failed only by an 11-to-1 vote. So that's a powerful weapon to compel unanimity, or influence unanimity.

The Allen charge pushes a jury to unanimity, often not -- well, I won't say that.

In Oregon, at the time of the original argument, our Supreme Court had not ruled on the Allen charge. Since then, our Supreme Court has disallowed the Allen charge in Oregon.

We do not allow our judges to comment on the evidence. But that's what those devices are for. We don't happen to

employ those.

There are structural devices within the criminal law which are designed largely to encourage compromise, and if not designed for it -- although that is a principle of code revision -- if not designed for it, they lose their effect.

Grades of crimes, we have those in Oregon. Jury-set penalties are such devices to encourage compromise rather than really a vote of conviction. And this Court authorized that last May. Even in a single non-bifurcated proceeding, MacArthur vs. California and Crampton vs. Ohio. We do not have those devices in Oregon.

We do have a 10-to-2 verdict, which I think reflects much more accurately the feelings of those jurors. The last two would come over, or the last one to come over would come over most likely, although it's speculative, of course, because of all sorts of pressures, all sorts of things.

But I think that a 10-to-2 verdict has, certainly, the same degree of integrity behind it, and has certainly the same strength as a safeguard between citizen and government as does a verdict where there is a judge's commentary on the evidence, which means evaluation of it, and an Allen charge, and a compromise regarding penalty; none of which we allow.

And, I might add, it does it the first time around.

It has a positive value in the administration of justice, and I think that's important today. The ACLU amicus

brief referred to this, the savings in mistrials, as being a trifling economy. It is much more than a trifling economy.

Nationally, there is a picture of congestion in the courts; in Oregon we believe that justice need not be harsh but it should be swift.

Kalven & Zeisel states there are 5.6 percent mistrials in unanimous States; 3.1 percent result in mistrials in Oregon and Louisiana. I don't know what the breakdown would be. A difference of 2.5 percent. But a difference, in other words, of 81 percent, if we were to switch to the unanimous system. We would increase our mistrials by 81 percent.

We have managed in Multnomah County to get a trial down to within 60 days of arrest. We have gotten the appellate process down, in the last two and a half years, from 18 months to four and a half months. And we have done it by examining each particle of criminal procedure, to try and better the system. We do not need an 81 percent increase in mistrials.

And I think that we do more --

Q But if you'd cut it down to a fair majority, you'd save more time, wouldn't you?

MR. TANZER: But I don't think that that, Your Honor, would perform the safeguard function, which the jury is designed for; and that's why I'm not arguing for a majority.

Plaintiff argues -- pardon me. Petitioner argues -- four arguments; he has a burden of proof beyond reasonable

doubt argument; he argues for meaningful deliberation; for a cross-section of the community; and for public confidence.

And I will answer those arguments.

The burden of proof is not affected. The standard of proof beyond reasonable doubt is not affected by a non-unanimous jury system. The burden of proof stays with the government except for affirmative defenses. The burden of persuasion stays with the government, except for all affirmative defenses.

Beyond reasonable doubt remains the standard for whomever it is that the law authorizes to find the facts, and that is not a coordinate of numbers. That may be 12 jurors, 6 jurors, or one judge; or 10 out of 12 jurors.

The doubt of one juror is not reasonable doubt; elsewise a hung jury would be a finding of reasonable doubt, and there would be -- operate as an acquittal, and this Court authorized retrial in such situations back in 1902.

And to carry his argument ad absurdum to demonstrate that the beyond reasonable doubt argument is not applicable, we could say, by extending his argument, that a rule allowing a seven-man verdict for a preponderance of the evidence, a nine-man verdict for clear and convincing evidence, and a twelve-man verdict for beyond reasonable doubt, would be the logical outcome of an argument which pins the standard of proof to the number. It does not. Those are not relevant

considerations, burden of proof or burden of persuasion, in examining majority verdicts.

Regarding the requirement of a meaningful deliberation, there are cases in which deliberation will be meaningful, and I suspect that there are cases today in which deliberation is not meaningful. For example, the one where they decide 12/0 one way or another at the very beginning, on the initial vote.

There are, however, less than constitutional solutions to accomplish that particular goal, if the Court deems it desirable. And that is, I think, the minimum deliberation time as in England, which we do not have. We don't assert it.

That seems to me a rather interesting device, and probably a very good one.

I might add, incidentally, that there is a directive of court, as is the practice in England, wherein the trial courts are directed not to instruct the juries, even, regarding the possibility of a majority verdict, until they have deliberated for two hours and have reported back. Which is an interesting device.

The point I wish to make, however, is that it is not something which is of constitutional proportion which must be dealt with by carving something new into the granite of the Constitution. There is no need for it. It can be dealt with by simpler remedies if there is an indication somewhere that

there is less than meaningful deliberation.

And you never know. I tried a murder case once, which wound up with a second-degree verdict, 10-to-2, and found out afterwards that the two holdouts were for first-degree murder. One really never knows even exactly what the verdict means.

Regarding the cross-section of the community, that is a problem of the panel rather than the specific jury, as has been pointed out. Swain vs. Alabama, and the allowance of the peremptory strike system, illustrates the difficulties of translating that down to the specific jury that tries a case. But, at any rate, in Williams, it says that less than twelve men, six men are sufficient to bring such a sampling into, fair sampling into the jury room; it is sufficient to place a body of citizenry between Crown and citizen, which is the purpose of the jury.

I don't think that the demand for cross-section means that any one -- means that all should participate. It does mean that all should participate, not necessarily that each should have veto or each should be able to prohibit decision.

The goal of trial, unlike some of the assertions of defendant's brief, incidentally, seems to me always to be a verdict and not mistrial. And a demand for mistrials is really a demand for a veto, not for discussion.

If minority members are in fact excluded -- and I have a chance to answer questions which were asked me last March. It's rare that a lawyer can give the answer he thinks of after he sits down. But, at any rate, if members are arbitrarily excluded from the deliberations of a case, it seems to me that is not the likely kind of abuse that you would assume juries will commit.

In other words, we must assume a certain good faith in our juries. But if there is such an impropriety, such an abuse, that is something which we remedy after, when it comes to light. And such things do come to light.

There is a motion for new trial. There is post-conviction relief. And in Oregon we provide all the, you know, due process, counsel, transcripts, et cetera. There is federal habeas corpus as a remedy where such a matter occurs.

Parker vs. Gladden, you may recall, out of Oregon about two years ago, is such an example, where the bailiff said to the jury, "Oh, that wicked fellow; he is surely guilty" or words to that effect. Well, we didn't eliminate bailiffs as a result of such an abuse; we kept bailiffs, but we do provide the after-the-fact remedy. In that case a writ of habeas corpus issued.

So, regarding public confidence, it is significant that the requirement of unanimity is a historical accident and really nothing more. I will not repeat the history, which has

been set out in brief.

It is a historical accident. It just occurred, and we have it, and people have grown accustomed to it. And I would expect that lawyers from jurisdictions that are accustomed to unanimity have a hard time adjusting to some other system mentally. Their initial response is probably negative. Although we have grown very comfortable with it.

But non-unanimity, on the other hand, when we talk of public confidence, was specifically voted in by the people of the State of Oregon when we amended the Constitution. So when we speak of public confidence, we must remember that this came from the public. The public did decide, and it is not simply lawyers as self-appointed weather vanes of public opinion. This was a public measure.

And there is no ground, as well I can report, of opinion saying to change it. We are undergoing procedural revision at this very time. And there is no movement even within that body to change it. Because it works.

And I think that is the -- perhaps the last point that I wish to reemphasize: it does work, it works accurately, fairly, expeditiously; and it did in these cases.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Tanzer.

You have just one minute left, Mr. Sobol, --

MR. SOBOL: Thank you very much, Your Honor.

MR. CHIEF JUSTICE BURGER: -- for any comment.

REBUTTAL ARGUMENT OF RICHARD B. SOBOL, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. SOBOL: I'd like to make a few very brief points.

Firstly, I think perhaps the Court has been struck, as I was, during the argument of the inappropriateness of making innumerable constitutional decisions as to whether six out of eight or ten out of twelve or nine out of twelve or, in Montana, eight out of twelve, ad infinitum, are acceptable under the Sixth Amendment.

I think that's not a proper constitutional role for the Court. I think there must be a more objective test to be applied than just juggling all these numbers, particularly in light of Williams, where we know at least that the number can range from six to twelve, and that the combinations are very, very large. And I just wonder, I think the Court ought to take note of the fact of what it's getting into, if it starts making innumerable determinations as to which combinations are enough and which are not.

Now, secondly, the exclusion of minority is not an abuse, as Mr. Justice Marshall pointed out by his questions. If there's a 10-to-2 vote and the minority is not heard and the verdict is returned, that's not an abusive matter that can be later corrected; that is the system. And to argue, well, it can later be corrected misses the point, that that's exactly what is allowed.

Thirdly, I'd like to point out that the Kalven & Zeisel -- without going too far into that -- 80/20 rate cannot be said to be a rate in favor of acquittal. Perhaps as against those trials that result in outcome. But I think the important point is that when the jury would otherwise hang, the result is, in four out of five cases, a conviction. Now, that's not a benefit to the defendant; that is a detriment to the defendant. Whatever the consequences are of that, I think that point should be clear, that in four-fifths of those cases there's going to be a conviction.

And lastly, I would like to just note that the citation which is not in our brief, to the constitutional history, which makes very clear that the deletion of the amendment to the Sixth Amendment having to do with unanimity concerns vicinage and not unanimity. It's Volume 5 of the Documentary History of the Constitution of the United States, pages 205-06 and 210-11, in which Madison's letters make clear what the debate was about, and it was not about that.

And of course the Ninth Amendment was enacted expressly to secure that simply because a right was not expressly set forth in the Bill of Rights, it would not be read to have been intended not to be secured.

I thank the Court very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Sobol.

Thank you, Mr. Tanzer.

The case is submitted.

[Whereupon, at 11:38 a.m., the case was submitted.]

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