In the

Supreme Court of the United States

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ROLAND V. COLGROVE,

Petitioner,

vs.

JAMES F. BATTIN, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF MONTANA.

No. 71-1442

Washington, D. C.
January 17, 1973

Pages 1 thru 22

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v.	:	No. 71-1442
JAMES F. BATTIN, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF MONTANA	:	

Washington, D. C.

Wednesday, January 17, 1973

The above-entitled matter came on for argument at 10:07 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:

LLOYD J. SKEDD, ESQ., 1225 - 11th Avenue, Helena, Montana 59601 for the Petitioner

CALE CROWLEY, Esq., P. O. Box 2529, Billings, Montana 59103 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 first this morning in No. 71-1442, Colgrove against Battin.

Mr. Skedd, you may proceed whenever you are ready.

ORAL ARGUMENT OF LLOYD J. SKEDD, ESQ.,

ON BEHALF OF THE PETITIONER

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

The Montana District Court adopted a rule in September, at least it was filed in September of 1971 requiring all civil cases to be tried before a six-man jury. This case was a libel.

Q Six-man jury?

MR. SKEDD: Six man or woman, six persons.

Q Six persons?

MR. SKEDD: Yes, your Honor. The plaintiff that I was representing objected to the six-man jury. We went to the circuit court and the circuit court refused to mandate the judge and we are here now on certiorari.

The questions that we have are simply that one, the six-man jury -- six-person jury -- adopted by the local district court for local rule offends the Constitution, the Seventh Amendment and the second argument being that the six-man -- or six-person -- jury offends the rules of civil procedure.

Now, in regard to the first argument then, the constitutional argument, the Seventh Amendment, of course, provides that in civil cases over the sum of $20, title to a jury has that common law.

Now, the word "common law" is used twice in that particular section and, as was pointed out in note 30 in the Williams versus Florida. We believe that that reference to the common law at that time when it was adopted means that there is a constitutional right to twelve persons on the jury unless there is a stipulation as provided by the rules that were adopted which were forwarded by this Court to Congress.

Now, Capitol Traction versus Hof decided in 1899 that a twelve-person jury was a common law jury. It is well-documented in that case and as far as I know that is still the law, the law as pronounced by this Court and for a district court to adopt a local rule overruling a decision of this Court seems to me to offend and be irregular.

The second portion, then, of the argument relating to the rules, rule one under the provisions -- under the act of Congress, that is 28 U.S. Code section 2072, and adopted by this Court provides that these rules shall govern the district courts. The rules of civil procedure recall when they were adopted in '63 and at that time there was some question by members of this court as to whether or not

they should be adopted because of the question of juries but at any rate, they were adopted and rule 48 of those rules provides very clearly -- and I don't see how it could be read otherwise -- that the parties may stipulate to a jury of less than twelve persons.

Now, in this case, the parties did not stipulate. Both parties wanted a twelve-man jury. In rule 48 it does not say nor imply that the court -- the local court -- may say, you take less than twelve jurors. For example, you could not stipulate to eleven, ten, eight. You are bound by our rules at our court thirteen-D, the six-man rule, to six jurors. You couldn't stipulate to three.

We believe that that was not the intent of the rule and we believe that Congress in passing on those rules had definitely in mind a twelve-man jury.

Q Well, why is it they weren't stipulating three or four, even under your local rule?

MR. SKEDD: The rule thirteen-one says "A civil jury shall consist of six."

Q What if you had offered to stipulate to four before Judge Battin? Do you think he would have turned you down on the basis of that rule?

MR. SKEDD: Well, I am confident that Judge Battin would agree, gentlemen, but the rule itself is what I am speaking of, your Honor. It states that "It shall consist of

six persons." It think it does away effectively at least with a stipulation above the number six -- seven, eight, nine, ten, eleven or twleve.

Q You and your opponent were both willing to stipulate to twelve, I take it?

MR. SKEDD: Yes, your Honor, we made the motion for a twelve-man jury and the court, of course, said, no, we are going to trial with a six-man jury, as provided by the new rules. In the circuit court, the Ninth Circuit court, the opponents, the defendants, joined with us and said that they wanted a twelve-man jury at that time. But there have been many briefs filed in this that are much deeper and better than I can write them by the Civil Liberties unions and others. They have them with regard to whether or not a six-man jury is a fair cross-section of the people. I mean whether or not you are not losing some rights by taking a six-man jury. They say there is evidence now written by Professor Ziegler -- or whatever his name is -- that conclusively shows that with twelve men you get a more diverse representation than you would with six.

Q You'd get a still larger one if you had fifty.

MR. SKEDD: That is right, your Honor and whether or not in these times they state in their brief and I believe, the amount of jurors should be increased rather than decreased to get a fair representation is a good question

but that, as the Court said in Williams -- in Williams they said they leave it to the legislature. They leave it to the legislature and to the Congress to determine the policy of the number of jurors and I think that is a proper allocation with after many people testifying after much evidence taken rather than adopting a local rule and saying you have a six-man jury, by doing that.

Q Mr. Skedd, was any point made in the Ninth Circuit as to whether this kind of issue was properly raisable by mandamus?

MR. SKEDD: No, there was not, your Honor.

As a matter of fact, the court stayed -- the district court -- stayed the trial of this case until the mandamus one way or the other would come down. That was filed in October of 1971 and the circuit court handed its dedision down in March and because of this petition and because of the proceedings had here with regard to six-man juries in the federal courts in the State of Montana, without stipulation they haven't tried any six-man juries as far as I know but our position then is that Congress authorized and allowed this court to adopt rules for the district court if this court proposed the rules of Congress, assuming the constitutional problem is all right, then it would be properly presented and become a part of the force of law.

This Court dould do it and Congress reviews it

within the ninety days but certainly a local court by local rule cannot overturn a federal rule properly presented by the Court.

We say that this case should be returned such that the petitioner is allowed to have twelve men hear him and try his case.

Thank you.

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

Mr. Crowley.

ORAL ARGUMENT OF CALE CROWLEY, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. CROWLEY: Mr. Chief Justice and gentlemen of the Court:

It is obvious from reading the majority and the concurring and the dissenting opinions in all of the cases which have considered both the Sixth and Seventh Amendments that you gentlemen have a far deeper and broader appreciation of the constitutional history than we do and there will be no rehash.

There are a few very brief highlights that I think are essential to shed light on a point which is not covered in my brief and which I think you gentlemen should consider in deliberating in this case when we come to it.

Now, I like very, very much the description of an impartial jury under the American tradition that you find

in the Ballard case and I think we can start out with these two basic assumptions that the selective consistency as well as the qualification competency of a jury is vital and essential as ingredients of a fair and impartial jury and having those two points in mind, let's go back for a few minutes to the period of time between the miracle at Philadelphia and the date of September 24 of 1789 when the Federal Judiciary Act was first enacted and the date of September 25 of 1789 when the Bill of Rights was adopted.

Now, we all know that at the original convention because, apparently, of two things, the great fear of our people of concentrating an overall federal control that might result in new tyranny against them and probably more importantly because of the great differences in jury practice that existed between the states, they could not agree on any single federal standard of jury consistency so nothing was done.

And then came the great hue and cry throughout the land. Our people wnated the protection of the Bill of Rights in writing. They didn't want to rely on promises of legislation and the like and that was accomplished at the First Congress.

Again we find that at that time, because of the fear of centralized federal control, all efforts in the promulgation of the Seventh Amendment to provide that the

jury shall be as it was heretofore or it shall have the requisites as they were before, were defeated and that first Congress, bared down to its barest fundamental essential in simple and unambiguous language, the preservation of the right in these words, "In actions at common law, the right of trial by jury shall be preserved," and we have to then construe that what they did and what they rejected, with the language that we find in that First Federal Judiciary Act.

Now, there were three places in that act where they specified clearly three sections that issues of fact shall be tried by a jury and then we come to the all-important section 29 of the Federal Judiciary Act which I think has to be construed along with the Seventh Amendment and keeping in mind these two elements, these two vital ingredients of selective consistency and qualification competency that we are all agreed upon.

Now, subsection A of the Federal Judiciary Act, of section 29, provided that in cases punishable by death the trial shall be in the county where the offense was committed and if for any reason it is too inconvenient to hold the trial in that county, the trial shall be held at some place in the district and twelve petit jurors shall be summoned from thence. The only place in the Constitution and the only place in the Federal Judiciary Act that you find the number of twelve and it was confined to actions of

crimes punishable by death and then we go to subsection B, which I think is of great importance to you in your deliberations here.

Now, keeping in mind that the traditional American jury up until that time consisted solely of twelve white male citizens and keeping in mind the fear that our people had of the -- of devising a centralized federal consistency that would be controlling overall and the differences in practices, they provided in the Federal Judiciary Act and jurors in all cases in the courts of the United States shall be designated by lot according to the mode of forming juries therein now practiced so far as the laws of the same shall render such designation practicable and the jurors shall have the same qualifications as are requisite for jurors by the laws of the state of which they are citizens and shall be returned from time to time so as to have an impartial trial.

There are our two ingredients of selective consistency and qualification competency in there, no set federal standard because they couldn't agree on it in the Seventh Amendment. All they could agree on in the Seventh Amendment were the preservation of the basic right to a trial by jury and nothing more.

Now, speculate with me for one moment. Let's go back to the time this provision was enacted in the Federal

Judiciary Act. Supposing one or more of our states at that time had had the enlightened foresight to provide in their state law all persons born or naturalized within the boundaries of this state shall be citizens and entitled to the same privileges of amenities and to the same due process of law and to the equal protection under the law of life, liberty and property and qualified to serve on juries. Can there be any doubt that in any one of those states the jury would have consisted as described in the Ballard case of both men and women regardless of race or color or sex?

Can there be any doubt in view of construing the reason for paring the Seventh Amendment down to its barest fundamental essentials and the language of this Federal Judiciary Act, that the people in that Congress contemplated that there were differences in selective consistency and there were differences in qualification competency and at the same time provided for potential changes and for the life of me, if you can change the quality competency of a civil jury, I can't see where the number twelve is a sacred cow that should be preserved for posterity.

Q Do you know of any examples where, in the states or otherwise, where there were juries of less than twelve citizens at the time the Constitution was enacted?

MR. CROWLEY: Sir, I don't know. Our -- the material available to us --

Q What do you do about the statute which says that -- which seems to indicate that juries shall -- in the federal courts -- shall be as they were at common law and under the amendment?

MR. CROWLEY: I don't think the Seventh Amendment says that.

Q Well, the Seventh Amendment doesn't, but a statute does.

MR. CROWLEY: Oh, you mean this 28 --

Q Yes, 2072. I suppose that is a controlling limitation on the power of the courts to make their own rules.

MR. CROWLEY: Well, all I can say is --

Q Isn't it?

MR. CROWLEY: I agree with that.

Q And so we must deal with the limitation that the juries shall be left as they were at common law, even if the Seventh Amendment doesn't require it.

MR. CROWLEY: That is a possibility.

Q Well, is it or not? What do you do with that statute?

MR. CROWLEY: Well, we get back to this. I don't know that there was any consistency in the essentials of the common law jury. I know that you have twelve. But I can't find any place, I mean in my reading, which says, which

is proof that there was any intention at any time to continue twelve as the number.

Q Well, let's assume that you are right under the amendment, assume you are quite right as far as the requirements of the Seventh Amendment are concerned, but let's assume Congress came along and said juries in the federal courts shall be twelve. There would be twelve, we'd say.

MR. CROWLEY: We would be --

Q They haven't said that. The Congress has said juries shall, in civil cases, shall be as they were at common law.

MR. CROWLEY: If that is the interpretation of that congressional statute, I --

Q Well, what is your interpretation of it?

MR. CROWLEY: I just don't import that therewas at that time any consistency, any detailed consistency and I am not sure, your Honor, that such a law by Congress, if the Seventh Amendment was not intended to impose those conditions, I am not sure that that would be a binding restriction.

Q Well, certainly, Congress under Article three has power to create lower federal courts and I suppose that it would follow from that Article three power that it would --

MR. CROWLEY: Plus the necessary appropriate clause. I'll have to go over this, your Honor.

Q -- have power plus the necessary and

appropriate clause would have power to say how trials in those courts would be conducted.

MR. CROWLEY: I'll have to go along with that.

Q That is implicit in the rulemaking structure under which the federal rules of civil and criminal procedure were enacted, is it not?

MR. CROWLEY: I'll have to concede that.

Q Those are enactments, ultimately, of Congress, were they not?

MR. CROWLEY: Yes, even though they are promulgated by this Court, they are in effect -G

Q They have no effect --

MR. CROWLEY: -- in behalf of Congress.

Q -- without the acquiescence of Congress.

MR. CROWLEY: That is right.

I would like to make one comment, if I may in connection with the discussion about cross-section of the community. The billings division of our court consists of some twenty counties and there is a total of 186,000 people there of which 93,000 come from one county and I neglected to find out how many qualified jurors there are from that whole group but I don't think it would be unfair to suggest maybe a figure of 50,000.

Now, we will call a trial calendar of from one to five cases and out of that 50,000 people they will select a

trial panel of from 30 to 65 total panel jurors and then from that 30 to 65 people, we will select either the twelve or the six-man jury as the case may be and there isn't any doubt, of course, that if you were simply comparing the twelve and six to a selection out of thirty-five that you would have more of a cross-section out of the twelve and six and again, I am no mathematical Einstein but I would be very much surprised if it were computed mathematically by percentages, that the difference between the six-man and the twelve-man insofar as a cross-section of that 50,000 is concerned would be anything but miniscule.

I think this bugaboo of cross-section is more fiction than fact.

Q You are now addressing yourself to the wisdom rather than to the statutory or --

MR. CROWLEY: Well, these are commented on in the Amicus briefs, your Honor, and I just wanted to make that point.

The same thing with respect to statistics. I had the opportunity last summer at the circuit conference of the Ninth Circuit Court, to asked Professor Zeisel point blank whether or not his statistics would have any valid application to jury practice in a place such as Montana and I posed to him these basic facts.

Montana, areawise, is the fourth largest in the

Union. You can put most of the New England states and part of New York in our boundaries. We have got a total of 675,000 people in all that area. Five or six of our communities are big cities, most of which is 70,000, will have more than half of that total amount and I will go into a county to try a case which is as large in area as Connecticut or Delaware and maybe even approaching Maryland and I'll have a total population of from 1,600 to 2,500 people who are rural, farming, agricultural estate and I posed those facts to the Professor and asked him if there had ever been any study made that would correlate or validly apply as statistics to a state such as ours and he said no.

He said "Our statistics are drawn from the large metropolitan areas"and so on, so that I don't think that is a good reason here.

Q Mr. Crowley?

MR. CROWLEY: Yes, sir.

Q Montana is one judicial district.

MR. CROWLEY: Yes, the whole district.

Q And where does the district court sit?

MR. CROWLEY: Well, we have it then divided into six divisions, your Honor.

Q Six.

MR. CROWLEY: And in the Missoula division, Judge Russel Smith was the senior acting judge. In the

Butte division, retired Judge Murray, who still handles all matters in retirement when that court sits, and then in Billings there are Judge Jamison and Judge Battin and Judge Battin is the junior acting judge.

By the way, in that connection, the connection of talking about statistics, another --

Q Yes, but now, you said there were six divisions.

MR. CROWLEY: Yes.

Q And you have so far identified --

MR. CROWLEY: Yes, then we travel. Judge Battin --

Q Then the others move.

MR. CROWLEY: Judge Battin will take care of the Great Falls division and the Billings division. Judge Smith will take care of the Missoula division and the Northern Havern division. Judge Murray takes care of the Helena division. Well, and then Battin takes care of the Helena division. So they do move from division to division.

Q And the jurors are drawn in any division just from the division?

MR. CROWLEY: That is right, sir.

Well, I wanted to make this point, too. This rule for Montana is not the product of pique or frustration of any federal judge who is way behind on his calendar. Quite the contrary. This rule was devised by those four men with

great legal and judicial talent who were born and raised in Montana. Three of them went through our Montana law school and they know Montana like the back of their hands. I would accept their judgment over any jury statistics from any law school in the country.

Q Mr. Crowley?

MR. CROWLEY: Yes, sir.

Q The petitioner relies on Capital Traction Company and says in effect in his brief that the court there held that the Constitution guarantees, in the federal civil cases, a jury of twelve people. What is your view on that?

MR. CROWLEY: I don't agree with that statement.

Q Well, will you -- would you analyze that?

MR. CROWLEY: I know that in the Capital Traction case the court said that by way of dicta that we infer or we accept or we assume that a jury shall be twelve. But I don't think that that was the gist of the holding in that case at all. As I recall it, Congress had enacted a statute applicable to the District of Columbia which provided that they could have a trial by jury in a justice case and the petitioner there objected and the statute also provided that in the even that they lost in the justice courts, then they would have their right of appeal to the court of record, providing they posted a bond and that that was the decision of that case that there was no justice court of

common law and the rules really had no application. They did say in that case, by way of inference or acceptance or assumption or whatever it may be, that a civil jury should be twelve. There is no doubt about that.

Q And they said it several times.

MR. CROWLEY: Yes, sir. But that issue was never the issue that was to be decided in the case. It was never studied and never reviewed from the standpoint of whether that was or was not the fact and I find no evidence that I can find in any of the material that I have read that the first Congress or the Constitutional Convention ever has said in so many words that our juries shall be twelve. I think that is something that you have to decide all anew, regardless of the dicta that there was in any of those cases.

There were two or three cases as I remember it, your Honors, where they made that same assumption, the American Fisher and Capital Traction and Springfield cases I remember in particular. But those were all dicta and they were simply assuming that that was what was intended.

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

Do you have anything further, Mr. Skedd?

REBUTTAL ARGUMENT OF LLOYD SKEDD, ESQ.,

ON BEHALF OF THE PETITIONER

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

I just have two remarks:

One, I agree with my friend and colleague, Mr. Colgrove, that we have fine judges. I don't want anyone to get the idea I don't. They are my friends and we think they are competent and good.

However, our friends the judge -- judges of this district do not see fit to publish the fact that this rule was going to be set out. As a matter of fact, Mr. Crowley is on the rules commission that we had for the district court and in August or whenever it was adopted -- we don't know -- it was effective September the 1st, 1971 -- we found out about it or I found out about it on September the 27th at the final pretrial conference when we were going to trial that it had been adopted.

It was not announced such as they did apparently in Minnesota to see how the bar accepts it.

Whether or not I find that the greater majority, in fact, nearly all of the lawyers in Montana at this reading are opposed to the six-man jury but Capital Traction -- my second remark -- Capital Traction said that -- as I read it -- that what that case does is determine what is a common law jury under the Seventh Amendment.

Q My borther Powell is certainly correct in pointing out in his questions that that was not the issue in that case, was it?

MR. SKEDD: Well, that was a -- the court --

Q Nobody in that case had tried to have a jury of less than twelve.

MR. SKEDD: No, I think that was the District of Columbia, but --

Q It was, indeed, from the District of Columbia and the issue was not whether or not there could be a jury of less than twelve, was it?

MR. SKEDD: No. They just added that in.

Q So anything that the court said was technically dicta.

MR. SKEDD: Yes, in Roman numeral III of the court's decision.

Q Right.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 10:38 o'clock a.m., the case was submitted.)