ORIGINAL

In the

Supreme Court of the United States

DANIEL BURCH AND WRESTLE, INC.,

PETITIONERS,

V.

STATE OF LOUISIANA,

RESPONDENT.

No. 78-90

Washington, D. C.
February 22, 1979

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v.	:	No. 78-90
STATE OF LOUISIANA, Respondent.	:	

Washington, D.C.

Thursday, February 22, 1979

The above-entitled matter came on for argument at 1:32 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JACK PEEBLES, Esq., 1006 Baronne Building, 305 Baronne Street, New Orleans, Louisiana 70112; for the Petitioners.

MRS. LOUISE KORNS, Assistant District Attorney, Parish of Orleans, 2700 Tulane Avenue, New Orleans, Louisiana 70119; for the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Daniel Burch against Louisiana.

Mr. Peebles, I think you may proceed when you are ready.

ORAL ARGUMENT OF JACK PEEBLES, ESQ.,

ON BEHALF OF THE PETITIONERS

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

This case is here by way of certiorari to the Supreme Court of the State of Louisiana. The question involved is whether the Louisiana constitutional provision for trial by jury of six persons in certain criminal cases, with five required to deliver a verdict, meets or offends the Sixth and Fourteenth Amendments to the Federal Constitution.

In the Louisiana constitution of 1974, which is now in service, we have three categories for criminal juries. In capital cases, 12 out of 12 are required for conviction. In cases requiring hard labor, 10 out of 12 are required for conviction. And in lesser felonies, such as the one in this case where the judge may impose hard labor but does not necessarily have to, you have a jury provision of six persons, five of whom must concur in any verdict.

Q Including a not-guilty verdict; is that correct?

MR. PEEBLES: Yes, that is correct.

One of the six could be for the finding of guilty; but if the other five are for a finding of not guilty, that is the verdict.

MR. PEEBLES: That is correct, Your Honor.

In this case defendants Daniel Burch and Wrestle, Incorporated, the corporation involved, were each convicted on two counts of obscenity under the state obscenity statute. Specifically they were alleged to have shown obscene movies in a coin-operated machine in downtown New Orleans. There were two charges, two convictions, and Burch was convicted and sentenced to two seven-month terms of imprisonment, which were suspended. He was fined a thousand dollars. The corporation received a $600 fine on each count.

Q Are you making any point about the corporation here?

MR. PEEBLES: Yes, Your Honor, we are submitting that their case should be considered along with Burch's.

Q All right.

MR. PEEBLES: The only rationale we can present to the Court as to why their case should be considered is that they were tried under the same statute. By way of analogy, we would submit that Duncan v. Louisiana shows an analogous situation. There, if the Court will recall, this Court determined for the first time that a defendant was entitled to a jury in a serious criminal case. In Duncan's case the maximum

sentence that could have been imposed under the statute was two years. In fact, Duncan was only sentenced to 60 days, and at argument the--

Q Here the vote was six to nothing--

MR. PEEBLES: Yes, Your Honor.

Q --on the corporation.

MR. PEEBLES: That is correct. And I am saying that by analogy, as in the case of Duncan, there the State of Louisiana argued that since Duncan in fact received a sentence which was not, in legal terminology, a serious sentence, he should not be permitted to argue his case. Nonetheless, the Court did reach the merits on that case. That is the only analogy that I can think of which would support this Court's entertaining the argument of Wrestle, Incorporated here.

Q Under your theory then, anyone who was convicted in Louisiana under this particular section of their constitution, even though by a unanimous six-man jury or six-person jury, would be entitled to be free?

MR. PEEBLES: I do not know that the decision would have to be retroactive, but I think they could have raised that point under that argument; yes, Your Honor.

However, there is no question but that Burch, who was convicted by a five-to-one vote, is properly here whether or not Wrestle should be considered by this Court. Our argument is essentially that the combination of the non-unanimity

and the reduced panel offends the Sixth and Fourteenth Amendments. This Court has said in Williams v. Florida that six out of six is constitutional; it said that in 1970. And in Ballew v. Georgia you said that five out of five offends the Sixth and Fourteenth Amendments. Here we have a case where you have five out of six, and the Court must decide whether that model offends the Sixth and Fourteenth Amendments. I think it goes without saying that many of the arguments that we might use would apply to the Ballew decision--five out of five--and many of the arguments that the state might make might apply with equal vigor to the Williams v. Florida decision regarding six out of six.

Q What about six out of twelve?

MR. PEEBLES: I do not know of any case in which the Court has decided that issue, Your Honor.

Q I am talking about this very case.

MR. PEEBLES: In this case, Your Honor, the constitution--

Q If you had gotten six out of twelve, you would get the same as if you got six out of six.

MR. PEEBLES: You still have six people voting to convict or to acquit; that is correct, sir. But that is not required by the statute in this case.

Q I do not know whether you are arguing about figures or unanimity.

MR. PEEBLES: Here you have both aspects, the non-unanimous character of the Louisiana statute and the fact that only six are required to constitute the jury, with only five required--

Q Do you think that that is still open, the six-man jury is still open?

MR. PEEBLES: No, that was foreclosed by Williams v. Florida.

Q Yes.

MR. PEEBLES: This Court has said the six-man jury with a unanimous verdict is constitutional.

Q So, you are not arguing that.

MR. PEEBLES: No, sir.

In Williams, however, the Court did indicate that it preferred the unanimity factor. In the Court's statement at that time, in the opinion, you said that you did not feel that there were any major reasons why the six-man jury would not be constitutional as contrasted with the twelve-man jury, particularly if the jury was required to come back with a unanimous vote. Of course, we do not have a unanimous vote here. So, the question arises, If you do not have a unanimous vote, does that change the character of this body, which we call a jury, so that the essential features of the jury in its classical, institutional form are inhibited? We submit that it does.

Q When you say classical form, traditional form, what do you mean by that, twelve?

MR. PEEBLES: I am sorry, Your Honor?

Q Do you mean twelve?

MR. PEEBLES: No, Your Honor. I was referring to the purposes for the jury that the Court has previously indicated, requiring adequate deliberation, a cross-section of the community, that sort of thing. I think the question that this Court must decide is whether the non-unanimous six-man jury adequately protects those features.

Q The six-man jury is all right in terms of just the cross-section. There was a six-man jury here.

MR. PEEBLES: There was, Your Honor.

Q So that there was a jury. And in terms of deliberation, would you say that if there is a split vote, it indicates more deliberation or less?

MR. PEEBLES: It indicates less deliberation, Your Honor.

Q Why, if there is a split vote?

MR. PEEBLES: I believe that some of the sociological studies indicated in the Ballew decision indicate that if there is a split vote so that only a majority is required or a percentage with not a unanimous vote, then there is less deliberation in so far as time is concerned than there ordinarily would be.

Q The five people here at least have had to face up to a dissenting vote, have they not?

MR. PEEBLES: Yes, sir, they have.

Q Let us say it was a Negro defendant and one of the six jurors was a Negro. The five others could just say, "Well, you go over and play Solitaire in the corner, and we will decide this case."

MR. PEEBLES: That is our argument, Your Honor. We submit that that is correct.

Q But you do not suggest that that is present in this case, do you?

MR. PEEBLES: We do not know what happened in the jury room in this case, Your Honor.

Q You are not suggesting any hypothesis about that?

MR. PEEBLES: We are not suggesting any hypothesis.

Q On that point that you were discussing with Mr. Justice White, when I was in law school, it was common for the lecturer to say that a divided court opinion carries more weight--carries more weight--than a unanimous opinion of a multi-judge court, whether it was three on the court of appeals or nine here, because that showed the issue was contested right to the end of the line. How do you square that with the sociological studies? I suppose each of them has about the same value perhaps. This was the wisdom of

lawyers and law teachers until at least a few years ago.

MR. PEEBLES: Of course, Your Honor, we have no way of knowing exactly what goes on in a jury room.

Q Nor what goes on in the conference room of a court of appeals or a state supreme court.

MR. PEEBLES: Yes, sir. But it would seem logical to me that a jury which requires only five out of six would not have the vigorous debate that a jury would have if all six members were required to bring back a verdict. I think some of these sociological studies have indicated that in cases where a non-unanimous jury was the one in question, the time that they stayed out was less.

Q Those are the same sociological studies that said a jury of less than twelve was bad because it reduced the chances of acquittal.

MR. PEEBLES: Yes.

Q And, by the same token, a jury of 24, 36, or 48 would cut the other way, would it not?

MR. PEEBLES: Those were the same studies, Your Honor.

Our position here is that you have said in Ballew that five men are not adequate to represent a cross-section of the community and to give adequate deliberation in a jury room.

Q That is if they are all alone.

MR. PEEBLES: Yes, all alone; that is correct.

Q If they do not have the number six there.

MR. PEEBLES: Yes, sir.

Our position is that by merely adding another individual to that jury, whose vote is not required in order to bring back a verdict, you have not essentially changed the nature of that jury. It still remains essentially a valid jury. In some respects it is even worse. One of the points made by Mr. Justice Blackmun in the Ballew decision was that the smaller jury resulted in less hung juries, which ordinarily inures to the benefit of the accused.

Of course, in our situation, where you have five out of six, as contrasted with five out of five, you are likely to have even fewer hung juries. Therefore, it is even more to the detriment of the defendant.

Q Mr. Peebles, I have a problem with this cross-section of jury. How many would you need in New York City?

MR. PEEBLES: How many would we need in order to have--

Q To have a cross-section of Manhattanites--about 8,000, would you not say?

MR. PEEBLES: That would be the perfect ideal, I suppose, sir. This Court has said that six is adequate in Williams v. Florida.

Q That is why I am not trying to reargue that one.

MR. PEEBLES: The Court has said that, and we do not

quarrel with that position. The question is, Is that the absolute minimum required so that no change can be made which would reduce the potential for deliberation and cross-section--

Q Your argument is that if you buy six, you mean six unanimously.

MR. PEEBLES: Yes, that is correct.

Q That is your point.

MR. PEEBLES: That is right.

Q All a court can do is deal with the system, with a rule. You cannot deal with individual jurors. Even with a twelve-member unanimous jury, you might have twelve peas in a pod--

MR. PEEBLES: That is correct.

Q --on any particular jury and no cross-section at all.

MR. PEEBLES: That is correct, sir.

Q But one deals with the system.

MR. PEEBLES: That is correct.

In reducing the jury to six, you have really gotten, we suggest, to the very minimum that you could have by way of cross-section. As was pointed out in the Ballew decision, if you have a segment of ten percent of the community, which represents a particular viewpoint, and you only have a six-man jury, then statistically on the average more than half the juries you select will not have any representatives of that

ten percent viewpoint. The Court has held that six out of six is constitutional; but if you add to that the factor that not all six votes are required in order to bring back a verdict, we submit that if then there is any legitimacy to the argument that five jurors may be less than fully impressed with the argument of that sixth juror, then you have gone below the line of that which is constitutional.

Q Do you relate this to the burden of proof in criminal cases as distinguished from the burden of proof in civil cases?

MR. PEEBLES: I would, Your Honor.

Q Most of the states permit a five-sixths verdict in civil case, do they not, sometimes after a certain lapse of time?

MR. PEEBLES: I am not familiar with any courts which do that. That may be the case. I do not think there are any other courts which permit it in criminal cases other than Louisiana.

We would also suggest that there is no legitimate state interest which would validate their reducing the number of jurors required to convict below six. As the Court has said in the Ballew decision, if such an interest did exist--and of course there would be maybe argument or reason for permitting the five out of six model. However, the only results here that might inure to the benefit of the state

would be the reduced time required for jury deliberations and the reduced number of hung juries.

Q Is there not some interest too on behalf of the state in not taking people away from gainful employment in order to serve as jurors if they can get by with less?

MR. PEEBLES: I think that is a legitimate reason. But we are suggesting simply that that type of reason, which I think is essentially the same as the argument I suggested--it would reduce the deliberation time, same kind of thing--is simply counterbalanced by the fact that you are reducing the very nature of the jury beyond that which people commonly conceive to be a jury. It is something less than a jury, we would suggest.

Q How is that state interest served by removing a requirement of unanimity? I do not understand.

MR. PEEBLES: Oh, it does not. I understood from Mr. Justice Rehnquist that he was speaking of a six-man jury. He would not object to this situation because we still have to have six people there no matter what, and they have to be paid. Presumably they would not hang as often, and they would be out for shorter periods of time. We suggest that these are simply not sufficient reasons for the state to--that would counterbalance what we think are the grave problems that would be presented with this type of jury. The statistics have shown that--and as is indicated in footnote ten of Ballew--that with

a twelve-man jury you have juries that hang, if the twelve men are required to come back unanimously, about five percent of the time.

If you reduce that same panel to six, with a unanimous return, you have about half that number of juries that will hang. If you then still go further and eliminate one of those jurors as a mandatory vote, I would suggest that you have practically eliminated the hung jury in our system and given our value that we would rather see ten guilty men go free than convict one innocent man--I would suggest that the hung jury has its place.

Q As a mathematical proposition, a hung jury can be of benefit to a defendant on a five-to-one basis, four-to-two basis, just as surely as it can be to the prosecution.

MR. PEEBLES: That is correct, Your Honor. In that regard, we would call the Court's attention to the fact that, as Professor Zeisel I believe has pointed out--and this was quoted in the Ballew decision--the average juror has a propensity to convict. So, although that is mathematically correct, it would not probably result in it. Most juries that are hung are hung in favor of most votes in favor of conviction but with one or two holding out for not guilty. I believe the statistics would show this. Yes, Your Honor.

Q This is an unfair question, and I hope it has not been asked when I was out of the room. Suppose the

Louisiana statute provided for a seven-man jury and the vote was six to one, do you think under the result in Ballew that that conviction would hold up constitutionally?

MR. PEEBLES: That would be a closer question, Your Honor. I would suggest that it would not. Quite frankly--you asked my impression--my impression is, if you get any further away from what has been considered the classical jury system, twelve out of twelve, you are reducing the protection below the constitutional minimum. And I would say that anything that does not require a unanimous jury below six would not be constitutional.

Q How about ten out of twelve?

MR. PEEBLES: The Court has held that that is constitutional. But you have more total members there of the jury. If I may address myself to that point, Your Honor, these studies have shown that when you have as many as twelve jurors and you have a minority of two or three, they are much more likely to maintain their minority viewpoint in the course of deliberation than they are if you have a very small jury of about six where perhaps only one has a minority view. He is much more likely, as a result of the conformity pressures on him, to give up his views. So that it is entirely likely that although nine out of twelve, as in Johnson v. Louisiana, or ten out of twelve, as Apodaca v. Oregon--

Q How about eleven out of twelve?

MR. PEEBLES: Eleven out of twelve? The Court has held that that is legitimate, that is constitutional. But you have enough jurors there so that if you do have a minority of two or three, they can still work together and hold out for this minority viewpoint. If you reduce that down to as low as six, however, and you only have one minority member, we submit that he is much more likely to give in. And thus the panel loses--

Q Of course in Ballew many members of the court were not very impressed with what they called the numerology of the studies.

MR. PEEBLES: Yes, Your Honor.

Q I suppose they are less impressed here. Ballew was not court opinion.

MR. PEEBLES: Yes, it was the court judgment. Yes, there were a number of opinions in that court, and I recognize the fact that members of the Court differ over the approach in Ballew. I thought I should address myself to it because it certainly was there. And, as Your Honor said, if you do not rely to some extent on the social studies, then you come close to just using judicial hunch. And if you are not going to rely on history--or at least you conclude that history is not going to give us the final answer as to what this jury--

Q Mr. Peebles, I am not being critical because, as you know in what was written in Ballew at least, I gave

substantial weight to the studies.

MR. PEEBLES: Yes, Your Honor.

Q But not everybody was in agreement.

MR. PEEBLES: Yes, Your Honor. We would hope that the Court would review the question of the history of the jury system, which is held not to be controlling in the Williams decision and subsequently in Apodaca.

The amicus brief in this case has presented even further evidence with regard to the intent of the framers of the Sixth Amendment, which the Court may wish to consider. I do not think that a review of that question is mandatory to a favorable decision for the petitioner Burch in this case. But we would certainly have no objection to the Court considering it. If the Court has no further questions, that will conclude my argument.

MR. CHIEF JUSTICE BURGER: Mrs. Korns.

ORAL ARGUMENT OF MRS. LOUISE KORNS

ON BEHALF OF THE RESPONDENT

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

Of course it is the State of Louisiana's position in this case that because this Court approved a six-man jury in Williams v. Florida and majority verdicts when a substantial number of the jurors agree in Apodaca v. Oregon and Johnson v. Louisiana, that a five out of six jury verdict is

constitutionally unassailable under all the reasons brought forward by this Court in Williams and Apodaca and Johnson.

Q You said that since we have approved a six-member jury, then a fortiori we would have approved a seven-member jury. If that is all it is, then just the numbers four out of seven would--as I understand your position.

MRS. KORNS: Our position, Your Honor, is anchored right on this case. We have a six-member jury, and five of them brought back a verdict. And the defense in this case made no attempt--I would like to jump to an argument that was made during my predecessor's argument where it is feared that the two horns of the dilemma were social studies on one side, judicial hunch on the other. It is the State of Louisiana's position that there is a third position, and it is the only valuable position. That is actual court studies which take place not grabbing 15 cases here or something, but with all the computers and everything available today it would be not impossible and not all that difficult to actually put into the computer every majority verdict case in Louisiana, compare it to a like number of cases in other unanimous jurisdictions. This has never been done although this Court suggested in Johnson v. Louisiana that until such evidence was presented, it was not going to set aside the will of the Louisiana legislature in its presumption that a majority verdict was perfectly constitutional.

I would like to point out to Mr. Justice Blackmun I think he will be particularly interested in this and I was particularly interested in it because of his reliance on empirical data in Ballew. And I point out in my brief that the data is sort of divided, not completely but in general, that on-the-scene, actual life studies of these majority verdicts of smaller juries, judicial proceedings--the actual in place studies generally favor these smaller juries and these majority verdicts where the mock juries and deductive modeling ones generally tend to disfavor them.

I would like to point out that coming right out right now are articles by Professor Bernard Grofman, Associate Professor of Social Sciences at the University of California at Irvine. He brought one out at the end of last year, "The Case for Majority Verdicts." He is bringing one out right now. By the way, I will just put in parentheses he is being funded in this by the National Science Foundation, its Social Sciences and Law Program. He has been funded in this. He has brought out "The Statistical Case for Majority Verdicts" and two other articles which he has sent to this Court apparently.

But, anyway, the State of Louisiana does not want the Court to rely on this but just merely points out that even these statistical data professors are sharply divided. Professor Stuart Nagle will tell you by all kinds of formulas this long in X's and parentheses that the chances of convicting

an innocent person increase as you get five out of six, whereas Bernard Grofman will tell you by other formulas, equally long and complicated, that his position that he urges in these articles--and it is surprising in a way because it is counter-intuitive--is that a six-member majority verdict jury is more likely to protect the innocent than a twelve-member unanimous verdict jury.

I am not telling this Court this because I urge them to rely on it. I am telling them this because of the disarray that exists among these theoretical thinkers on the subject. And our position is that if the National Science Foundation can fund a statistical research program like this, why can they not fund a national in place study of what actually happens in Louisiana under the majority verdict system that will go on for maybe three or four years and collect actual, hard figures so that we will no longer be speculating about what happens but we will see what happens?

Q Are you saying--I just want to be sure I understand. I have not read that particular study.

MRS. KORNS: It is just coming out.

Q It suggests that it is easier for the prosecutor to get a conviction when he has to convince twelve people to agree unanimously than it is to convince a majority of six persons? It sounds rather infallible.

MRS. KORNS: Your Honor, I am just telling you what

Professor Bernard Grofman's article--it is one of the things that he proves with these formulas. He concludes, "Thus it is shown"--first of all, I have to admit, in all honesty, that he prefers a twelve-man jury to a six-man jury. But his proposition is that if this Court finds a certain group of people constitutionally adequate, a six-man jury like in Williams v. Florida, then there is absolutely nothing wrong with a majority verdict. He even goes so far as to advocate a simple majority, simple majority--

Q Is he advocating it on the ground that it is harder to persuade a majority of six to convict than it is to persuade all twelve of the twelve-man jury to convict?

MRS. KORNS: Apparently he is, Your Honor. But I do not understand all his formulas.

Q Do you support that argument?

MRS. KORNS: Your Honor, as I say, I do not understand these mathematical formulas, to tell you the truth.

Q I would not understand that one either.

MRS. KORNS: I do not have any mathematical background. And all of these articles are Greek to me as far as their underlying reasoning goes.

Q I think maybe the term "numerology" may apply to what he wrote rather than to what Mr. Justice Blackmun wrote.

MRS. KORNS: I just cite this to this Court, as I say, because here is Professor Stuart Nagle--

Q It may be that a prosecutor in the jurisdiction that he studied does not bring a case for violation of the misdemeanors that have six-man juries unless the proof of guilt is overwhelming, whereas he does bring felony prosecutions if there is probable cause to bring the prosecution before a twelve-member jury. There are all sorts of facts that could skew those studies.

MRS. KORNS: Right. I think he is working though not on actual court studies at all. That is what I am telling you. This is one of those fanciful things. He is working on figures that he gleans--just like Professor Stuart Nagle does--from Kalven and Zeisel. That is what all these other people did, taking these figures out of that, and then getting their computers out and working out all these formulas.

But, anyway, as I say, I just mention it to this Court because I think particularly Mr. Justice Blackmun would be interested in these articles because they are coming right out of the University of California and they are right on this point. But fortunately for us, they are on our side this time.

Anyway, the state's whole position in this case--the State of Louisiana's whole position in this case, of course, is that under Williams and under Johnson and Apodaca a five out of six jury is perfectly constitutional. We feel that if any kind of data are going to be used against our position, we feel that

at least these experts ought to be put on the witness stand in the trial court, qualified as experts like a doctor or anybody who is going to testify about insanity, give testimony, the same kind as they write in these articles, and be subjected to cross-examination on conflicting articles just like a psychiatrist is when he gets up and testifies about insanity.

We feel that if Louisiana's majority verdict is going to be thrown aside, it ought to be on concrete evidence showing that unfairness results and not on speculation which is just in the realm of very interesting theories but which have never been--

Q Mrs. Korns, is it speculation--would you contend that it would be speculation that it would be harder to persuade five out of five to convict than it would be to persuade five out of six to convict? Is that just speculation, or does it not seem rather obvious?

MRS. KORNS: Our position is that in a five-out-of-six jury, Justice Stevens, which is what we have here--

Q Yes.

MRS. KORNS: --this jury would have reached unanimity 95 percent of the time. In other words--

Q But they did not this time.

MRS. KORNS: They did not this time. But if a six-man jury, five of whom--if a six-man jury had to be unanimous, they are going to become unanimous 95 percent of the time.

Q Right.

MRS. KORNS: And once the vote reaches one to five, the one is not going to turn around the five. So, all he is going to get is a five percent chance of a hung jury, and the state can try him again and have just as good--I mean, a very high chance. So, what is he losing, really?

Q That really does not respond to my question. My question is to compare the requirement of unanimity in a five-man jury, which the Court has held is not enough--

MRS. KORNS: Right.

Q --with the requirement of getting five out of six to convict.

MRS. KORNS: Oh, I understand, yes.

Q Would you not agree that it is easier to get five out of six--

MRS. KORNS: Yes, in other words, why if Ballew is no good, are we not any good?

Q --than it is--let me finish my question. Would you not agree that it is easier to get five out of six to convict than it is to get five out of five to convict?

MRS. KORNS: Your Honor, I am going to avoid that question because I do not think that is the issue. The issue is--

Q I think it is, and I would like you to answer.

MRS. KORNS: The issue we think is, Is the six-man

panel valid as a cross-section of the community as a protection against tyranny and so and so?--which this Court not only found in Williams but upheld and reaffirmed in Ballew.

Q You just do not want to answer my question then. I do not suppose the answer will help you. That is probably why.

MRS. KORNS: All right, we rely on Apodaca v. Oregon and Johnson v. Louisiana. And when the present Louisiana constitution--

Q Which cases do not answer my question.

MRS. KORNS: Whether it is--

Q I am just asking you whether you think we need statistics to demonstrate what I regard as a rather obvious proposition, that it would be harder to persuade five out of five to convict than it would be to persuade five out of six to convict.

MRS. KORNS: Yes, but this Court did not strike down five-out-of-five juries on that basis. It struck it down because it was not a fair cross-section of the community, that when you get below six--so, respectfully I do not think that is an issue here because the reasons for striking down Ballew are not here. This Court said in Ballew you have got to draw the line somewhere, and we draw it at six. And we reaffirm our holding in Williams, and a six-man jury gives a sufficient cross-section of the population, provides a bulwark against

tyranny--

Q Then your argument, Mrs. Korns, you say my question is totally irrelevant to that analysis. But under your analysis then, four out of six would also be adequate because you still have your six people. In fact, three out of six would be adequate.

MRS. KORNS: Of course, in Williams the whole argument was, How far down are we going to go?

Q IN fact, I do not know why, under your analysis, you could not have a jury that said if any one of the six believes he is guilty, that is enough.

MRS. KORNS: Scotland from time immemorial has had a bare majority verdict. And, as I say, there are people who will argue, like this Professor Grofman, that once a jury has swung to a bare majority, the chances that it is going to go back are so infinitesimal that you may as wellcome out then. I do not take any position on that because that is not my case. And in Williams I think members of this Court asked, "How far down are we going to go?" And the answer in that case was, "We will stop it some time." And in Ballew this Court stopped it. I do not think it is, frankly, a question here that if you uphold five out of six that you are going to have to--I mean, it is clear from Ballew, the way you drew the line under Williams, that if you uphold five out of six, it does not mean at all that you have to uphold anything more under that. And

having upheld ten out of twelve in Apodaca, five out of six is just half of it. And even I can understand that.

Q Two out of three would be even better.

MRS. KORNS: This Court has said you cannot go below six. So, obviously we are not going to get below six.

Q Now you are at five in your state.

MRS. KORNS: No, Your Honor, we have six, five out of six. We have to have a six-man jury.

Q That is all Ballew decided, was the total number.

MRS. KORNS: Right, the total number, and reaffirmed Williams many times. Mr. Justice Blackmun said, "We reaffirm everything we said in Williams as far as six being enough and six serving all these important constitutional functions of a jury.

Q If the vote of one of them does not count, it is not six, is it, even though that person may be sitting in the box?

MRS. KORNS: I would like to point out in this case that obviously the vote of one did count, and he was listened to because the jury deliberated for 50 minutes. It was unanimous for the corporation and five to one for Burch. Those very facts show that the juror's one vote did count. He voted one way in one and one the other. And it is obvious just from those facts that they listened to him, that he voted one way in

one and one the other, and that he never would have turned around the other five in the Burch case.

Q Mrs. Korns, you missed an opportunity to point out that this Court allows dissenting opinions and dissenting votes, but we count them anyway.

MRS. KORNS: No doubt about that, absolutely.

Q Like all the people who voted for Alf Landon in 1936, their votes were counted but Franklin D. Roosevelt was president.

MRS. KORNS: If the members of this Court do not have any further questions, I will submit the matter, Your Honor.

Q Mrs. Korns, I might say this. You mentioned a little while ago that 95 percent of your cases are unanimous.

MRS. KORNS: No, I said that both Professor Nagle and Kalven and Zeisel and everybody agree that--

Q I am talking about Louisiana's experience, that 95 percent of your six-man jury come in with a--

MRS. KORNS: No. If i said--

Q How many do? What is the percentage?

MRS. KORNS: Nobody has ever kept--that is my very point, Your Honor.

Q In any event, certainly some of them that come in with a five-to-one conviction vote, if you had a unanimity requirement, might come in with a unanimous vote--

MRS. KORNS: Oh, 95 percent of the time they would

under general rules of the way juries behave.

Q Because once you get to five and one, it is all over with.

MRS. KORNS: And the others are tired of listening to it and they either bully or persuade the other person to give in. Just like in the old days, they would not give them any light or heat or food, and they dragged them from courts from one town to the other until finally they all said--

Q They do all this in Louisiana, do they?

MRS. KORNS: We would like to, I think, Your Honor, but we cannot.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Peebles?

MR. PEEBLES: Not unless the Court has any questions, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, counsel, the case is submitted.

[The case was submitted at 2:10 o'clock p.m.]

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