The Burger Court Opinion Writing Database

Ballew v. Georgia

435 U.S. 223 (1978)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 14, 1978

PERSONAL

Re: 76-761 - Ballew v. Georgia

Dear Lewis:

I can join your concurring opinion if you will

(a) Add to the third line from the end, after "was", the following:

"subjected to the traditional testing mechanisms of the adversary process." OK

(b) Following the asterisk of the penultimate sentence add:

"The studies relied on merely represent unexamined opinions of persons interested in the jury system. ~~— and nothing more.~~"

Our holding is sheer, arbitrary ipse dixit, and I would as soon rely on palm reading as on professors' numbers. Indeed, I find no basis to support six but not five after Williams. This case will render us the "butt" of more quips than Ham Jordan has received!

There really is no rational basis for not following and applying Williams. You see, therefore, I will not mind your rejecting my suggestions so I can "explode" on my own.

Regards,

WEB

Mr. Justice Powell

j

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 16, 1978

Re: 76-761 - Ballew v. Georgia

Dear Lewis:

I join.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 28, 1978

MEMORANDUM TO THE CONFERENCE:

I will defer assignments in the outstanding argued cases until all votes are in as to the following cases:

76-811 - Bakke

76-6573 - Bell

76-6997 - Lockett

77-747 - Fleck

I am not in a position to make these final assignments until all votes are firmly in hand. Even one change has a "domino" impact on all other assignments -- especially at this time of the Term!

Regards,

WEB

P.S. I will send a memo on "snails" shortly.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

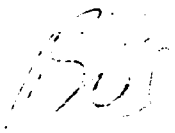
February 13, 1978

RE: No. 76-761 Ballew v. Georgia

Dear Harry:

I'm not persuaded that we should reach the retroactivity question but if there were a Court to do so my present view is that our decision should be held retroactive. It seems to me that the entire premise of the invalidity of the five man jury is that it does not assure appropriate fact finding.

Sincerely,



Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 16, 1978

Memorandum re: No. 76-761, Ballew v. Georgia

Dear Harry,

I agree with Potter that if we consider retroactivity at all, we must hold the six-person jury requirement to be retroactive.

The basis of our holding that five is not enough is that the risk of error and inconsistent adjudication of guilt is too substantial to justify any decrease of the number of jurors from six. I see no substantial countervailing costs to applying the six-person jury rule retroactively. First, as you note at 3 n.5, the five-person jury has been abolished in Fulton County as of March 24, 1976. Thus, almost everyone who could bring the jury issue here on direct review must already have done so. In addition, since the only persons who might have been convicted by a five-person jury could at most have been sentenced to one-year in prison, see op., at 6 n. 7, there is only the most limited possibility of some kind of long-delayed collateral attack. Indeed, I am not aware of any collateral consequences flowing from a misdemeanor conviction -- which is all that is at stake in Georgia, ibid. -- that are of sufficient importance to make it likely that persons will seek collateral relief from such convictions or that the state will seek to re-try a person whose conviction is reversed solely to reimpose such consequences. The situation in Louisiana may be different, but at present any prediction of vast numbers of retrials in that state is purely speculative. Therefore, it is much less likely than in many of our early cases which refused to hold a ruling retroactive that witnesses will be unavailable for retrial or memories dim, cf. Stovall v. Denno, 388 U.S. 293, 299 (1967), or that a substantial number of retrials will result from retroactive application of the six-person rule.

Moreover, this case is unlike either Carcerano v. Gladden, 392 U.S. 631 (1968), or Gosa v. Mayden, 413 U.S. 665 (1973), since in each of those cases a tribunal that was not presumptively unfair had passed sentence on the criminal defendant. It was this sentence that we refused to upset by retroactively requiring trial by jury (in Carcerano) or trial by civilian court (in Gosa). Here, the only judgment in the field is one by a five-person jury whose ability to reach a correct result is sufficiently in doubt that we are holding such a jury constitutionally insufficient.

Finally, I cannot agree that the concern with respect to "representation of minority groups," op. at 24, is irrelevant to the truth-finding function in obscenity cases. Certainly if we are searching for community standards, a representative cross-section of the community is an essential element of a fair and accurate trial. Thus, whatever may be the retroactivity rule for cases in general, I think the six-person jury rule must apply retroactively at least in obscenity cases.

Since, as Potter points out, the "next inevitable case" is already here, I agree with him that we should decide the retroactivity issue now and hold the six-person rule to be retroactive.

W.J.B., Jr.

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

1st WANG DRAFT

Circulated: 2/17/78

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

CLAUDE D. BALLEW, Petitioner v. STATE OF GEORGIA

On Writ of Certiorari to the Court of Appeals of Georgia

No. 76-761. Decided February --, 1978.

MR. JUSTICE BRENNAN, concurring in part and dissenting.

I join the Court's opinion insofar as it holds that the Sixth and Fourteenth Amendments require juries in criminal trials to contain no less than six persons. However, I cannot agree that petitioner can be subjected to a new trial, since I continue to adhere to my belief that Ga. Code Ann. § 26-2101 (1972) is overbroad and therefore facially unconstitutional. See Sanders v. Georgia, 424 U.S. 931 (1976) (dissent from denial of certiorari). See also Paris Adult Theatre I v. Slaton, 413 U.S. 49, 73 (1973) (Brennan, J., dissenting).

To: The Chief Justice
Mr. Justice Stewart
Mr Justice White
Mr Justice Marshall
Mr Justice Blackmun
Mr Justice Powell
Mr Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated:

Recirculated: 2/22/78

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–761

Claude D. Ballew, Petitioner,
v.
State of Georgia.

On Writ of Certiorari to the Court of Appeals of Georgia.

[February —, 1978]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART joins, concurring in part and dissenting.

I join the Court's opinion insofar as it holds that the Sixth and Fourteenth Amendments require juries in criminal trials to contain no less than six persons. However, I cannot agree that petitioner can be subjected to a new trial, since I continue to adhere to my belief that Ga. Code Ann. § 26–2101 (1972) is overbroad and therefore facially unconstitutional. See *Sanders* v. *Georgia*, 424 U. S. 931 (1976) (dissent from denial of certiorari). See also *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 73 (1973) (BRENNAN, J., dissenting).

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

Mr. Justice Brennan

2nd DRAFT

Circulated: 2/23/78

SUPREME COURT OF THE UNITED STATES

No. 76-761

Claude D. Ballew, Petitioner,
v.
State of Georgia.

On Writ of Certiorari to the Court of Appeals of Georgia.

[February —, 1978]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join.

I join the Court's opinion insofar as it holds that the Sixth and Fourteenth Amendments require juries in criminal trials to contain more than five persons. However, I cannot agree that petitioner can be subjected to a new trial, since I continue to adhere to my belief that Ga. Code Ann. § 26-2101 (1972) is overbroad and therefore facially unconstitutional. See *Sanders* v. *Georgia*, 424 U. S. 931 (1976) (dissent from denial of certiorari). See also *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 73 (1973) (BRENNAN, J., dissenting).

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 3/20/78

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-761

Claude D. Ballew, Petitioner,
v.
State of Georgia.

On Writ of Certiorari to the Court of Appeals of Georgia.

[February —, 1978]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join.

I join MR. JUSTICE BLACKMUN's opinion insofar as it holds that the Sixth and Fourteenth Amendments require juries in criminal trials to contain more than five persons. However, I cannot agree that petitioner can be subjected to a new trial, since I continue to adhere to my belief that Ga. Code § 26-2101 (1972) is overbroad and therefore facially unconstitutional. See *Sanders* v. *Georgia,* 424 U. S. 931 (1976) (dissent from denial of certiorari). See also *Paris Adult Theatre I* v. *Slaton,* 413 U. S. 49, 73 (1973) (BRENNAN, J., dissenting).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

February 15, 1978

Re: No. 76-761, Ballew v. Georgia

Dear Harry,

I cannot agree that the decision in this case should have prospective effect only. It seems to me that the criteria established in our previous cases, discussed in Part VI of your proposed opinion, lead almost ineluctably to the conclusion that this decision must be given fully retroactive effect.

Thus, so far as I am concerned, the only question is whether we should state explicitly that the decision is fully retroactive or remain silent on the subject. Until the advent of the vogue of "prospectivity," in the 1960's, every decision of this Court was presumptively retroactive, and I assume that that presumption exists and that our silence on the subject would be generally understood as meaning that this decision is retroactive. On the other hand, the possibility exists that lawyers and courts would not so understand our silence, and accordingly I am inclined to favor an explicit statement making this decision retroactive.

The "next inevitable case" is already here in the form of cases being held for this one, and our decision of the retroactivity question, therefore, cannot be deferred.

Sincerely yours,

P.S.
1.

Mr. Justice Blackmun
Copies to the Conference

P. S. I am unalterably opposed to any suggestion, such as that contained in the sentence at about the middle of page 22 of your opinion, that a denial of certiorari has any significance whatsoever, let alone that it might imply approval of the judgment sought to be reviewed.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

February 17, 1978

No. 76-761 - Ballew v. Georgia

Dear Bill,

Please add my name to your separate opinion in this case.

Sincerely yours,

P.S.

Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 17, 1978

Re: Ballew v. Georgia
#76-761

Dear Harry,

As you requested, I have been considering your circulating opinion, and with the returns flowing as they are, it is hard to get a word in edgewise.

You have obviously put a great deal of effort into this case, and I do respect that. But I have also been interested in the issue and have given some attention to the developments as they have come along. I regret to say that you credit the various studies and their conclusions substantially more than I do or would. Specifically, I am unconvinced by any of the studies that decisions by smaller juries are less accurate. Smaller juries may not reach the same results as larger ones, and they may convict more. But I am unconvinced that they are less accurate when guilt is found.

Although, as I said in conference, I am solidly against our approving juries smaller than six in criminal cases, it would be enough for me to conclude that there must be at least six on a jury to comport with the community cross-section requirement.

As for retroactivity, the question is not altogether clear but in the end I would agree with you that the decision is not retroactive. I would not in any event agree to impose retroactivity for the reason of the presumed inaccuracy of past verdicts.

I shall circulate a note to the conference indicating that I am concurring in the result.

Sincerely,

Mr. Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 2, 1978

Re: 76-761 - Ballew v. State of Georgia

Dear Harry,

I shall not write at length in this case, but file only the following concurrence:

> Mr. Justice White, concurring in the judgment.
>
> Agreeing that a jury of fewer than six persons would fail to represent the sense of the community and hence not satisfy the fair cross-section requirement of the Sixth and Fourteenth Amendments, I concur in the judgment of reversal.

Sincerely,

Mr. Justice Blackmun

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 3/2

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-761

Claude D. Ballew, Petitioner,
v.
State of Georgia.

On Writ of Certiorari to the Court of Appeals of Georgia.

[March —, 1978]

MR. JUSTICE WHITE, concurring in the judgment.

Agreeing that a jury of fewer than six persons would fail to represent the sense of the community and hence not satisfy the fair cross-section requirement of the Sixth and Fourteenth Amendments, I concur in the judgment of reversal.

✓

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 23, 1978

Re: No. 76-761, Ballew v. Georgia

Dear Bill:

Please join me.

Sincerely,

TM.

T. M.

Mr. Justice Brennan

cc: The Conference

February 10, 1978

Personal

Re: No. 76-761 - Ballew v. Georgia

Dear Byron:

My attempt at an opinion in this case has gone to the printer. Because the subject matter ties in with your many writings in the area, namely, Duncan v. Louisiana, Baldwin v. New York, Williams v. Florida, Johnson v. Louisiana, and Apodaca v. Oregon, I would appreciate it if you would give particular attention to what I have tried to do. We are stepping off the slippery slope, provided, of course, that a Court agrees.

Sincerely,

HAB

Mr. Justice White

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 10, 1978

MEMORANDUM TO THE CONFERENCE

Re: No. 76-761 - Ballew v. Georgia

A draft of an opinion in this case has gone to the printer and will be on your desks shortly. You will recall that we were scattered in our conclusions at conference. My notes indicate, however, that a majority eventually came to an agreement of sorts on the five-man jury issue. My notes also indicate that the case was to be decided on this issue and that we would not now reach the questions of scienter and obscenity vel non. I have tried to prepare the opinion accordingly.

This at once raises the question of retroactivity. One or two commented on this at conference, but I have no recollection that any decision was made. We have three choices: (1) to make the ruling prospective only; (2) to make it fully retroactive; (3) to do nothing and await the inevitable next case. My tentative inclination is to meet the issue now and to hold our present ruling to be prospective only. There is some precedent for this. The opinion could easily be written either way and I shall be guided by the reaction of the majority. As presently written, I have arbitrarily fixed the prospectivity date as 25 days after the filing of the opinion. This ties into the time for filing a petition for rehearing under our Rule 58. Some of you may have a better date to suggest. I have always been bothered by using the filing date as the cutoff time because it takes a while for any decision here to trickle down, particularly on the state side.

HAB.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: 2/14/78

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-761

Claude D. Ballew, Petitioner,
v.
State of Georgia.

On Writ of Certiorari to the Court of Appeals of Georgia.

[February —, 1978]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue whether a state criminal trial to a jury of only five persons deprives the accused of the right to trial by jury guaranteed to him by the Sixth and Fourteenth Amendments.[1] Our resolution of the issue requires an application of principles enunciated in *Williams* v. *Florida*, 399 U. S. 78 (1970), where the use of a six-person jury in a state criminal trial was upheld against similar constitutional attack.

I

In November 1973 petitioner Claude Davis Ballew was the manager of the Paris Art Adult Theatre at 293 Peachtree Street, Atlanta, Ga. On November 9 two investigators from

[1] The Sixth Amendment reads:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Amendment's provision as to trial by jury is made applicable to the States by the Fourteenth Amendment. *Duncan* v. *Louisiana*, 391 U. S. 145 (1968).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 16, 1978

Re: No. 76-761 - Ballew v. Georgia

Dear Potter:

I doubt if this is anything to get so excited about.

With my pre-circulation note of February 10 I indicated, I thought, that there were three possible choices, and that I would be guided by the reaction of the majority. Despite your teaching on presumptive retroactivity, the fact is that the Court has sidestepped the presumption and did so in the 1960's when you were a member of the Court. I am aware of your posture on these retroactivity decisions. I was long enough on the Court of Appeals to be fully aware of the confusion that existed, and still exists, among lower court federal judges on retroactivity issues. My suggestion that we meet the problem in Ballew was made in order to keep the confusion at a minimum and to save ourselves some wear and tear with still an additional case. Bill Brennan and John have now indicated a preference to say nothing about retroactivity. You are inclined to feel that we should decide in Ballew that the decision is retroactive. This is enough of an indication for me to drop Part VI from the opinion, and I shall have it rerun accordingly.

I understand your "unalterable opposition" expressed in your postscript, but I do not necessarily agree with it. I am also aware of all that has been written by Felix and others about the non-significance of a denial of certiorari. I presumed to insert the reference here only because the Georgia courts in these cases have made reference to the denial in Sanders and it bears upon the good faith of the State. Thus, for me in a case like this, with Williams v. Florida on the books, I think there is some significance and I reserve the right in future similar situations independently to comment accordingly.

You say that the "next inevitable case" is already here and that the retroactivity question "cannot be deferred." I try to make it a practice, before I circulate an opinion, to review pending holds. According to my records, and I have no reason to suspect that they are incorrect, there is only one hold thus far for Ballew. It is No. 76-1738, Sewell v. Georgia, considered at our September conference. Perhaps I cannot read, but it appears to me that the 5-person jury issue is not raised in Sewell. The case does present the issues as to scienter and obscenity vel non which the Conference decided should be sidestepped in Ballew.

Friday's conference lists contain two other cases that are probable holds for Ballew. The first is No. 77-790, Teal v. Georgia, on page 14. Here again, the 5-person jury issue is not raised, but the same other issues are. It therefore seems to me that this case, like Sewell, will not present the retroactivity question.

Also on for Friday is No. 77-915, Robinson v. Georgia, on page 20. This case does reach the 5-person jury issue, and the other issues as well. Perhaps this is the one you have in mind when you say that we now are compelled to reach the question of retroactivity.

Ironically, had we chosen to decide the obscenity issues in Ballew, and decided them in favor of the defense, the 5-person Georgia jury issue would have gone away for good. Whether there would be a court for that, I doubt and, in any event, I dare not predict.

I should point out that each of the three cases is brought here by the same counsel who represent Ballew.

Sincerely,

HAB.

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 17, 1978

MEMORANDUM TO THE CONFERENCE

Re: No. 76-761 - Ballew v. Georgia

I shall add the following at the end of footnote 10 on page 9 of the proposed opinion:

"Some of these studies have been pressed upon us by the parties. Brief for Petitioner 7-9; Tr. of Oral Arg. 26-27."

H.A.B.

pp. 10, 21

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: 2/17/78

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-761

Claude D. Ballew, Petitioner, *v.* State of Georgia. } On Writ of Certiorari to the Court of Appeals of Georgia.

[February —, 1978]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue whether a state criminal trial to a jury of only five persons deprives the accused of the right to trial by jury guaranteed to him by the Sixth and Fourteenth Amendments.[1] Our resolution of the issue requires an application of principles enunciated in *Williams* v. *Florida*, 399 U. S. 78 (1970), where the use of a six-person jury in a state criminal trial was upheld against similar constitutional attack.

I

In November 1973 petitioner Claude Davis Ballew was the manager of the Paris Art Adult Theatre at 293 Peachtree Street, Atlanta, Ga. On November 9 two investigators from

[1] The Sixth Amendment reads:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Amendment's provision as to trial by jury is made applicable to the States by the Fourteenth Amendment. *Duncan* v. *Louisiana*, 391 U. S. 145 (1968).

pp, 9, 10, 22

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated:

Recirculated: FEB 22 1978

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-761

Claude D. Ballew, Petitioner,
v.
State of Georgia.

On Writ of Certiorari to the Court of Appeals of Georgia.

[February —, 1978]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the issue whether a state criminal trial to a jury of only five persons deprives the accused of the right to trial by jury guaranteed to him by the Sixth and Fourteenth Amendments.[1] Our resolution of the issue requires an application of principles enunciated in *Williams* v. *Florida*, 399 U. S. 78 (1970), where the use of a six-person jury in a state criminal trial was upheld against similar constitutional attack.

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The Amendment's provision as to trial by jury is made applicable to the States by the Fourteenth Amendment. *Duncan* v. *Louisiana*, 391 U. S. 145 (1968).

J

pp. 1, 21, 22

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

4th DRAFT

Recirculated: 3/1/78

SUPREME COURT OF THE UNITED STATES

No. 76-761

Claude D. Ballew, Petitioner,
v.
State of Georgia.

On Writ of Certiorari to the Court of Appeals of Georgia.

[February —, 1978]

MR. JUSTICE BLACKMUN.

This case presents the issue whether a state criminal trial to a jury of only five persons deprives the accused of the right to trial by jury guaranteed to him by the Sixth and Fourteenth Amendments.[1] Our resolution of the issue requires an application of principles enunciated in *Williams* v. *Florida*, 399 U. S. 78 (1970), where the use of a six-person jury in a state criminal trial was upheld against similar constitutional attack.

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The Amendment's provision as to trial by jury is made applicable to the States by the Fourteenth Amendment. *Duncan* v. *Louisiana*, 391 U. S. 145 (1968).

J

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 20, 1978

Re: No. 76-761 - Ballew v. Georgia

Dear Lewis:

Because of the changes made in the recirculation of your opinion concurring in the judgment, I am adding the following paragraph to my opinion's footnote 10, page 9.

> "We have considered them carefully because they provide the only basis, besides judicial hunch, for a decision about whether smaller and smaller juries will be able to fulfill the purpose and functions of the Sixth Amendment. Without an examination about how juries and small groups actually work, we would not understand the basis for the conclusion of Mr. Justice Powell that 'a line has to be drawn somewhere.' We also note that the Chief Justice did not shrink from the use of empirical data in Williams v. Florida, 399 U.S. 78, 100-102, 105 (1970), when the data were used to support the constitutionality of the six-person criminal jury, or in Colgrove v. Battin, 413 U.S. 149, 158-160 (1973), a decision also joined by Mr. Justice Rehnquist."

If you or either of those who have joined you wish the case to go over, please feel free to ask Mr. Putzel and Mr. Cornio to hold it up from tomorrow's calendar.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

H.A.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 21, 1978

MEMORANDUM TO THE CONFERENCE

Re: Holds for No. 76-761 - Ballew v. Georgia

There are three holds for Ballew. Each is brought to us by the same counsel who represented Ballew.

Before I comment specifically on the three holds, I remind the Conference that, in addition to the 5-person criminal jury issue, Ballew itself raised issues as to scienter and as to obscenity vel non of a film. My conference notes indicate that our votes were scattered on the scienter and obscenity issues, but that we -- or at least a majority -- agreed to have the case go off on the 5-person jury issue. Accordingly, I attempted to follow the instructions of the Conference and, in the Ballew opinion, specifically did not reach the other issues.

This perhaps was a way to dispose of Ballew and to get on the books a definitive disposition of the 5-person jury question. The cases that are holds for Ballew, however, force us to decide, at least in a sense, what we finessed in Ballew. In my letter of February 16 to Potter, I pointed out that had we chosen to face the other issues in Ballew and had they been decided in favor of the defense, the jury issue would have gone away.

1. No. 76-1738, Sewell v. Georgia. This appellant was convicted in Fulton County under a single count accusation for distributing obscene material in violation of § 26-2101 of the Georgia Code. This is the same statute under which Ballew was convicted. The material consisted of a magazine and an artificial vagina and other sexual devices. The magazine was alleged to be obscene under § 26-2101(b), a portion of the statute the appellant does not challenge. He does challenge subsection (c) relating to devices "for the stimulation of human genital organs" and defining

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: 16 FEB 1978

Recirculated: _____

76-761 BALLEW v. GEORGIA

MR. JUSTICE POWELL, concurring.

I concur in the judgment of the Court, as I agree that use of a jury as small as five members, with authority to convict for serious offenses, involves serious questions of fairness. As the Court indicates, the line between five and six member juries is difficult to justify, but a line has to be drawn somewhere if the substance of jury trial is to be preserved.

I do not agree, however, that every feature of jury trial practice must be the same in both federal and state courts. Apodaca v. Oregon, 406 U.S. 404, 414 (1972)(Powell, J., concurring). As the Court's rationale today assumes full incorporation of the Sixth Amendment by the Fourteenth Amendment contrary to my view in Apodaca, I do not join the opinion. Also, I have reservations as to the wisdom - as well as the necessity - of the Court's heavy reliance on numerology derived from statistical studies. Moreover,

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

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1st DRAFT

Recirculated: 21 FEB 1978

SUPREME COURT OF THE UNITED STATES

No. 76-761

Claude D. Ballew, Petitioner, v. State of Georgia. } On Writ of Certiorari to the Court of Appeals of Georgia.

[February —, 1978]

MR. JUSTICE POWELL, concurring in the judgment.

I concur in the judgment of the Court, as I agree that use of a jury as small as five members, with authority to convict for serious offenses, involves serious questions of fairness. As the Court indicates, the line between five- and six-member juries is difficult to justify, but a line has to be drawn somewhere if the substance of jury trial is to be preserved.

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For these reasons I concur only in the judgment.

*The Court acknowledged, in disagreeing with other studies, that "methodological problems" may "mask differences in the operation of smaller and larger juries." *Ante*, at 14 and 19.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

2nd DRAFT

From: Mr. Justice Powell

SUPREME COURT OF THE UNITED STATES

No. 76-761

Circulated: _____

Recirculated: 27 FEB 1978

Claude D. Ballew, Petitioner, v. State of Georgia. } On Writ of Certiorari to the Court of Appeals of Georgia.

[February —, 1978]

MR. JUSTICE POWELL, with whom MR. JUSTICE REHNQUIST joins, concurring in the judgment.

I concur in the judgment of the Court, as I agree that use of a jury as small as five members, with authority to convict for serious offenses, involves serious questions of fairness. As the Court indicates, the line between five- and six-member juries is difficult to justify, but a line has to be drawn somewhere if the substance of jury trial is to be preserved.

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For these reasons I concur only in the judgment.

*The Court acknowledged, in disagreeing with other studies, that "methodological problems" may "mask differences in the operation of smaller and larger juries." *Ante*, at 14, 19–20.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: 16 MAR 1978

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-761

Claude D. Ballew, Petitioner, v. State of Georgia. | On Writ of Certiorari to the Court of Appeals of Georgia.

[February —, 1978]

MR. JUSTICE POWELL, with whom MR. JUSTICE REHNQUIST joins, concurring in the judgment.

I concur in the judgment of the Court, as I agree that use of a jury as small as five members, with authority to convict for serious offenses, involves grave questions of fairness. As the Court indicates, the line between five- and six-member juries is difficult to justify, but a line has to be drawn somewhere if the substance of jury trial is to be preserved.

I do not agree, however, that every feature of jury trial practice must be the same in both federal and state courts. *Apodaca* v. *Oregon*, 406 U. S. 404, 414 (1972) (POWELL, J., concurring). As the Court's rationale today assumes full incorporation of the Sixth Amendment by the Fourteenth Amendment contrary to my view in *Apodaca*, I do not join the opinion. Also, I have reservations as to wisdom—as well as the necessity—of the Court's heavy reliance on numerology derived from statistical studies. Moreover, neither the validity nor the methodology employed by the studies cited was subjected to the traditional testing mechanisms of the adversary process.* The studies relied on merely represent unexamined findings of persons interested in the jury system.

For these reasons I concur only in the judgment.

*The Court acknowledged, in disagreeing with other studies, that "methodological problems" may "mask differences in the operation of smaller and larger juries." *Ante*, at 14, 19-20.

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-761

Claude D. Ballew, Petitioner, *v.* State of Georgia. | On Writ of Certiorari to the Court of Appeals of Georgia.

[February —, 1978]

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring in the judgment.

I concur in the judgment, as I agree that use of a jury as small as five members, with authority to convict for serious offenses, involves grave questions of fairness. As the opinion of MR. JUSTICE BLACKMUN indicates, the line between five- and six-member juries is difficult to justify, but a line has to be drawn somewhere if the substance of jury trial is to be preserved.

I do not agree, however, that every feature of jury trial practice must be the same in both federal and state courts. *Apodaca* v. *Oregon*, 406 U. S. 404, 414 (1972) (POWELL, J., concurring). Because the opinion of MR. JUSTICE BLACKMUN today assumes full incorporation of the Sixth Amendment by the Fourteenth Amendment contrary to my view in *Apodaca*, I do not join it. Also, I have reservations as to the wisdom—as well as the necessity—of MR. JUSTICE BLACKMUN's heavy reliance on numerology derived from statistical studies. Moreover, neither the validity nor the methodology employed by the studies cited was subjected to the traditional testing mechanisms of the adversary process.* The studies relied on merely represent unexamined findings of persons interested in the jury system.

For these reasons I concur only in the judgment.

*The opinion of MR. JUSTICE BLACKMUN acknowledges, in disagreeing with other studies, that "methodological problems" may "mask differences in the operation of smaller and larger juries." *Ante*, at 14. See also *id.*, at 19–20.

76-761

Supreme Court of the United States

Memorandum

2-22-78

Harry ----------, 19----

Not wanting to hold things up in Ballew, but mindful of your suggestion that I might want to wait for BPW's writing, I talked to BPW. He said he might write a paragraph or two about your reliance on statistics & studies, he did not agree with LFP's "most all bag + baggage" rule when incorporating jury trial ~~as~~

Supreme Court of the United States
Memorandum

----------, 19----

gov rules as against states.
I do agree w/ LFP's position
re this (the one he borrowed
from the Fortas in Ap Lis
separate Aprodaca opinion.
I think LFP's concurrence
will better express my view
than will BRW's when
written — I have therefore
joined LFP's concurrence

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 22, 1978

Re: No. 76-761 - Ballew v. Georgia

Dear Lewis:

Please join me in your separate opinion concurring in the judgment in this case.

Sincerely,

WHR

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 13, 1978

Re: 76-761 - Ballew v. Georgia

Dear Harry:

My tentative preference is for your third choice, namely, to do nothing and wait for the next case.

If only short sentences are involved in five-man jury convictions, there would seem to be a possibility that litigation delays would solve the problem without requiring us to hear another argued case.

Respectfully,

JPS

Mr. Justice Blackmun

Copies to the Conference

✓

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 15, 1978

RE: 76-761 - Ballew v. Georgia

Dear Harry:

Please join me in Parts I-V of your opinion. For the time being at least, I would like to withhold judgment on Part VI.

Respectfully,

John

Mr. Justice Blackmun

Copies to the Conference

✓

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

76-761 - Ballew v. Georgia

From: Mr. Justice Stevens

Circulated: 2/23/78

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MR. JUSTICE STEVENS, concurring.

While I join the Court's opinion, I have not altered the views I expressed in Marks v. United States, 430 U.S. 188.

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

FEB 24 1978

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-761

Claude D. Ballew, Petitioner,
v.
State of Georgia.

On Writ of Certiorari to the Court of Appeals of Georgia.

[February —, 1978]

MR. JUSTICE STEVENS, concurring.

While I join the Court's opinion, I have not altered the views I expressed in *Marks* v. *United States*, 430 U. S. 188.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 2, 1978

Re: 76-761 - Ballew v. State of Georgia

Dear Harry:

By adding my little concurrence, I did not intend to withdraw my "join" in your opinion. If it is all right with you, I will modify mine to read:

"While I join MR. JUSTICE BLACKMUN's opinion, I have not altered the views I expressed in Marks v. United States, 430 U.S. 188."

Respectfully,

John

Mr. Justice Blackmun

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: MAR 3 '78

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–761

Claude D. Ballew, Petitioner,
v.
State of Georgia.

On Writ of Certiorari to the Court of Appeals of Georgia.

[February —, 1978]

MR. JUSTICE STEVENS, concurring.

While I join MR. JUSTICE BLACKMUN's opinion, I have not altered the views I expressed in *Marks* v. *United States*, 430 U. S. 188.