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COURT OF APPEALS OF NEW YORK

People v. Gajadhar[1]
(decided December 18, 2007)

The Appellate Division, First Department, affirmed Winston Gajadhar's conviction of second degree murder and first degree attempted robbery.[2] The New York Court of Appeals granted Gajadhar leave to appeal,[3] but later affirmed the Appellate Divisions' order, rejecting his argument that his right to a jury trial, under the state constitution, was violated.[4] That right is afforded by Article I, section 2, and Article VI section 18, which allegedly was violated when the trial court erroneously allowed a deliberating jury of eleven persons to convict the defendant, notwithstanding his consent to the jury size.[5] The issue became whether a written waiver executed in accordance with Article I, section 2 of the New York State Constitution allowed the defendant to voluntarily waive the procedural right of a twelve-

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[1] 9 N.Y.3d 438 (N.Y. 2007).

[2] People v. Gajadhar, 828 N.Y.S.2d 346, 352, 354 (App. Div. 1st Dep't. 2007) ("[E]arlier authority to the effect that a defendant cannot consent to trial before fewer than 12 jurors has been implicitly overruled. In sum, defendant is bound by his waiver of the right to be tried by a jury consisting of 12 persons.").

[3] People v. Gajadhar, 868 N.E.2d 239 (N.Y. 2007).

[4] *Gajadhar*, 9 N.Y.3d at 448.

[5] N.Y. CONST. art. I, § 2 ("A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge"); N.Y. CONST. art. VI, § 18 ("[A] jury shall be composed of six or of twelve persons . . . provided, however, that crimes prosecuted by indictment shall be tried by a jury composed of twelve persons, unless a jury trial has been waived as provided in section two of article one"); *Gajadhar*, 9 N.Y.3d at 441.

member jury and permit a deliberating jury of eleven individuals to decide the defendant's fate.[6]

Gajadhar and Tony Norg operated an automobile repair business as partners. In 1994, Sammi Fiki owed the business $1,500 for repairs made to his car.[7] Fiki stopped payment on a check he had written because allegedly the car required further repairs that would cost more than the unpaid bill, implying he wanted to pay only once. Upon the business's dissolution, Gajadhar was distributed the receivable owed by Fiki and it became his obligation to collect the debt.[8] Gajadhar went to Fiki's office to request the amount owed to him but Fiki was not familiar with the defendant and would only speak with his business partner, Norg. Gajadhar left the office, and left the returned check with Fiki.[9]

A few days later, the defendant returned to Fiki's office accompanied by an unknown person and demanded the money owed to Gajadhar. There were three individuals present when Fiki and this unknown accomplice entered the office: Fiki, his brother Mosad Elfiki and a friend, Hisham Omar. Fiki denied knowing he owed the defendant any money, and finally the unknown man asked the defendant " 'Is this the guy?' and the defendant replied, 'Yes, take care of them.' "[10] Immediately after, the unknown man locked the door, pulled out a gun, and after a resulting struggle, Fiki, his brother and his friend were all shot. During the altercation, the two accomplices

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[6] *Gajadhar*, 828 N.Y.S.2d at 440.
[7] *Id.* at 348.
[8] *Id.*
[9] *Id.*
[10] *Id.*

fled when they realized Fiki was on the phone with the police. The victims were brought to the hospital, where Fiki's brother was pronounced dead, though Fiki and Omar survived.[11]

Police suspected Gajadhar fled back to his native country, Trinidad.[12] Detectives' efforts in locating the defendant were hindered by a treaty between the United States and Trinidad and Tobago. The treaty "required a suspect to be under indictment in order to be subject to extradition."[13] It was not until February of 1994 that detectives were able to obtain an indictment in order to comply with the treaty terms. The defendant returned to the United States sometime later, and in 1999 authorities were able to locate him again, at another auto repair shop. Once again, Gajadhar fled to Trinidad, but this time he was detained by local authorities because of his altered passport. He was held until the United States extradited him from Trinidad to New York to face the charges filed against him.[14]

Three days after jury deliberation commenced, juror number nine was hospitalized. The court was notified the juror would not be able to participate further in the deliberation due to the hospitalization and the defense counsel requested that deliberation continue, notwithstanding the juror's absence. Defense counsel argued, "Given the length of the trial, the number of witnesses involved, and frankly, the availability of eleven jurors who have been working very hard now into the fourth day . . . we should forge ahead with eleven ju-

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[11] *Gajadhar*, 828 N.Y.S.2d at 348.
[12] *Id.*
[13] *Id.* at 349.
[14] *Id.*

rors."[15] The prosecution agreed with the defendant's basis for the motion to proceed but was concerned that *Cancemi v. People*[16] prohibited such a waiver, as the law was unclear.[17] Gajadhar's attorney persisted his client had the "right to have *this* jury make a decision."[18] The defendant and his counsel executed the following waiver in open court:

> The defendant herein, having been indicted for two counts of murder in the second degree, two counts of attempted murder in the second degree, two counts of assault in the first degree and one count of attempted robbery in the first degree, and having been informed of his right to be tried under said indictment by a jury of twelve persons, hereby in Open Court waives his right to trial by jury, pursuant to Article I, section 2, of the Constitution of the State of New York, and Article 270 of the Criminal Procedure Law, to the extent that, in view of the unavailability of juror number 9, he requests that he be tried by a jury consisting of the remaining eleven sworn jurors and that deliberations continue to verdict with those jurors. The defendant opposes the declaration of a mistrial. Furthermore, to the extent that such review may be waived, should there be a judgment of conviction, the defendant waives any appellate review of the lawfulness of this waiver.[19]

The court found the waiver effective and allowed the jury to

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[15] *Id.*

[16] 18 N.Y. 128 (1858) ("[A] criminal defendant [is prohibited] from consenting to a jury of less than 12.").

[17] *Gajadhar*, 9 N.Y.3d at 441.

[18] People v. Gajadhar, 753 N.Y.S.2d 309, 311 (N.Y. Sup. Ct. 2002) (internal quotations omitted). Gajadhar's counsel cited *People v. Page*, 665 N.E.2d 1041 (N.Y. 1996), and *People v. Ryan*, 224 N.E.2d 710 (N.Y. 1966) as the source of this right. *Id.*

[19] *Gajadhar*, 753 N.Y.S.2d at 311-12.

continue to deliberate with only eleven members.[20] Thereafter, that eleven-person jury convicted the defendant of felony murder for a term of twenty years to life and first degree attempted robbery for a term of five to fifteen years; the terms were to run concurrently.[21]

The United States Supreme Court has ruled on the issue of jury size—*Williams v. Florida*[22] helped guide the New York Court of Appeals in deciding the issue. In *Williams*, the Florida Court of Appeals affirmed the constitutionality of a six-person jury that ultimately convicted the defendant of robbery and sentenced him to life.[23] The defendant was granted certiorari and the United States Supreme Court was asked "whether the constitutional guarantee of a trial by 'jury' necessarily requires trial by exactly 12 persons, rather than some lesser number—in this case six."[24] The Court reasoned the "Fourteenth Amendment guarantees a right to trial by jury in all criminal cases that—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee."[25] Thus, the criminal

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[20] *Id.* at 312. The court found the waiver effective because the record and the waiver itself evinced that the defendant "fully understood his right to a jury trial, including the right to a jury of twelve persons, and that he was making a knowing, intelligent and voluntary decision to waive that right to the extent of agreeing to have the remaining eleven members of the jury deliberate to verdict." *Id.*

[21] *Gajadhar*, 828 N.Y.S.2d at 347 (acquitting the defendant of all other charges).

[22] 399 U.S. 78 (1970)

[23] *Williams*, 399 U.S. at 79-80.

[24] *Id.* at 86.

[25] U.S. CONST. amend. VI states, in pertinent part: "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 . . . ." U.S. CONST. amend. XIV states, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

defendant had the right not to have his Sixth Amendment protection violated by the state court's decree.

The Court then analyzed the historical context of the meaning of twelve and its relevance to both the composition and instrumentality of the jury, finding that the number twelve affixed to the common law jury was a historical accident,[26] rather than related to the "great purposes which gave rise to the jury in the first place."[27] Thus, the question that remained to be answered was whether the "accidental feature of the jury ha[d] been immutably codified into our Constitution."[28] In a previous decision, the United States Supreme Court had assumed the number was fixed at twelve in interpreting the Sixth Amendment.[29] In *Thompson v. Utah*,[30] the Court reversed a conviction by the state's eight-person jury, and in doing so, merely stated that the word "jury" in the text of the Sixth Amendment referred to a jury " 'constituted, as it was at common law, of twelve persons, neither more nor less.' "[31] But the Court's support for this notion was merely based on references to the Magna Carta and other treatises and lacked any evidence that "every feature of the jury as it existed at common law—whether incidental or essential to that institution—was necessarily included in the Constitution wherever that document

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Williams, 399 U.S. at 86 (relying on Duncan v. Louisiana, 391 U.S. 145 (1968)).

[26] *Williams*, 399 U.S. at 87-88 (referring to the number that comprised a presentment jury or other reasons, such as "Lord Coke's explanation that the 'number of twelve is much respected in holy writ, as 12 apostles, 12 stones, 12 tribes,' is typical").

[27] *Id.* at 89-90. The greatest purpose being "[t]hat history revealed a long tradition attaching great importance to the concept of relying on a body of one's peers to determine guilt or innocence as a *safeguard* against arbitrary law enforcement." *Id.* at 87 (emphasis added).

[28] *Id.* at 90.

[29] *Id.*

[30] 170 U.S. 343 (1898).

[31] *Williams*, 399 U.S. at 90 (quoting *Thompson*, 170 U.S. at 349).

referred to a 'jury.' "[32] The Court could not support this proposition with constitutional history and the drafter's intent of Article III's "jury" was not dispositive.[33]

Thus, the Court looked to the function of the jury and whether the twelve-person feature was essential.[34] The feature was found dispensable so long as the jury remained "large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community."[35] Although the Court did not draw a bright line rule as to minimum jury size, it held a six-person jury would meet these requirements and is above the minimum.[36] Thus, so long as the requisite number of jurors is present to constitute a "jury," the Sixth Amendment right would not be violated.[37] The Court further found that, where unanimity is still required, the size of the jury does not impede on its function as either a procedural safeguard against government oppression or its function as a fact-finder.[38] Thus, the Sixth Amendment is not violated when the criminal defendant is convicted by a six-person jury, where he would have otherwise been convicted by a twelve-person jury.[39]

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[32] *Id.* at 90-91.

[33] *Id.* at 92-93.

[34] *Id.* at 99-100.

[35] *Id.* at 100.

[36] *Williams*, 399 U.S. at 92 n.28 (stating six is above the minimum number of individuals who can constitute a jury, although not determining a minimum).

[37] *Id.* at 100 (holding a jury's function "is to prevent oppression by the Government. 'Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge' " (quoting *Duncan*, 391 U.S. at 156)).

[38] *Id.* at 100-01.

[39] *Id.* at 103.

To understand the New York Court of Appeals' rationale for deeming Gajadhar's waiver effective, it is important to analyze the progeny of cases and the constitutional amendments that led to the Court of Appeals' ultimate decision. The court first entertained its own 150-year-old decision in *Cancemi*, to determine whether Gajadhar's waiver was constitutionally permissible.[40] In *Cancemi*, the defendant was convicted of murder by an eleven-person jury when the defendant requested one juror be removed.[41] The defendant executed a waiver in open court, consenting and requesting he be tried by the eleven-person jury rather than by the twelve-person jury. The trial court granted his request, and the defendant was convicted of murder by the eleven-person jury.[42] On appeal, the *Cancemi* court reasoned the eleven-person verdict was unrecognizable at law and deemed the verdict a nullity. The court reasoned such modifications would lead down a slippery slope.[43] But the United States Supreme Court, in *Williams v. Florida*, rebutted this slippery slope notion. "[O]ne recognizes that he can get off the 'slippery slope' before he reaches the bottom."[44] In holding the waiver unconstitutional the New York Court of Appeals merely stated, "It would be a highly dangerous innovation, in reference to criminal cases . . . for the court to allow of any number short of a full panel of twelve jurors, and we think it ought not to be tolerated."[45] But as *Williams* demonstrates, there is

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[40] *Gajadhar*, 9 N.Y.3d at 443.
[41] *Cancemi*, 18 N.Y. at 129.
[42] *Id.* at 128.
[43] *Id.* at 138.
[44] *Williams*, 399 U.S. at 92 n.28.
[45] *Cancemi*, 18 N.Y. at 138.

no support for this announcement—as long as unanimity is retained, the size of the jury will have no affect on its ability to effectuate fact-finding or to prevent government oppression.[46]

The New York Court of Appeals distinguished *Gajadhar* from *Cancemi*. When *Cancemi* was decided, the constitution did not permit any type of jury waiver in any criminal proceeding.[47] It was not until the 1938 amendment to the New York State Constitution that such waiver were allowed.[48] The constitutional amendment to Article I, section 2 specified the proper procedure for procuring and executing a waiver of the type sought and granted to Gajadhar.[49] After the 1938 amendment, Article I, section 2 read, in pertinent part:

> Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. The legislature may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. *A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense.*[50]

Subsequently in 1962, the New York State Constitution was further amended to provide Article VI, section 18.

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[46] *Williams*, 399 U.S. at 100-01.
[47] *Gajadhar*, 9 N.Y.3d at 447.
[48] *Id.* at 446.
[49] *Id.* at 444.
[50] N.Y. CONST. art. I, § 2 (emphasis added).

> The legislature may provide that in any court of original jurisdiction *a jury shall be composed of six or of twelve persons* and may authorize any court which shall have jurisdiction over crimes and other violations of law, other than crimes prosecuted by indictment, to try such matters without a jury, *provided, however, that crimes prosecuted by indictment shall be tried by a jury composed of twelve persons, unless a jury trial has been waived as provided in section two of article one of this constitution.*[51]

Consequently, in deciding *Gajadhar*, the landscape changed from that of *Cancemi*, even assuming that *Cancemi* had the proper support for announcing that the Constitution's jury was identical to the common law jury of twelve. Thus, the court faced issues of interpretation of the two above mentioned provisions and their interrelation.

The first case to deal with these constitutional amendments that helped guide the New York Court of Appeals in its decision was *People v. Ryan*.[52] In *Ryan*, the defendants were convicted of first degree robbery and second degree assault and appealed based on an alleged violation of their constitutional right to a trial by jury.[53] The defendants argued their right to a jury trial was violated when an alternate juror took the place of an originally-impaneled juror who became ill, five hours into deliberation, thus making it a thirteen-member jury. Although defense *counsel* consented to the substitution of the alternate juror in open court, the defendants had not given *their*

[51] N.Y. CONST. art. VI, § 18 (emphasis added).
[52] 224 N.E.2d 710 (1966).
[53] *Ryan*, 224 N.E.2d at 711.

consent, nor were they consulted.[54] The *Ryan* court found that, although the substitution was in accordance with New York State law, the alternate juror was kept from the deliberation for five hours, and he ceased to be a juror once ousted from the initial deliberation.[55] Since the original juror was then subsequently replaced by another juror, the court deemed it to be a thirteen-person jury, and thus reversed the conviction and ordered a new trial.[56] Although the prosecution argued defense counsel had executed a valid waiver, the court found that it did not meet the constitutional requirements because only the defense counsel waived the "inclusory right" to a twelve-person jury trial, not the defendants.[57] Thus, the implication is that if the defendants had signed and executed the waiver in open court, then the waiver would have been valid, consequently making a thirteen-man jury constitutional.[58] The application of this case to *Gajadhar* is that if a valid waiver of a thirteen-person jury is constitutionally permissible, then according to that same principle, a valid waiver of an eleven-person jury should be constitutionally permissible so long as the procedural safeguards are met: a written instrument, signed in open court by both the defendant and his attorney.[59]

In the wake of *Ryan*, the New York Legislature enacted sec-

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[54] *Id.*

[55] *Id.* at 712 (" '[I]f deliberations had progressed to a stage where the original eleven were in substantial agreement, they were in a position to present a formidable obstacle to the alternate juror's attempts to persuade and convince the eleven remaining original jurors.' ").

[56] *Id.* at 713.

[57] *Id.*

[58] *Ryan*, 224 N.E.2d at 713.

[59] *Gajadhar*, 9 N.Y.3d at 447.

tion 270.35 of the Criminal Procedure Law ("CPL 270.35").[60] CPL 270.35 specifically provides for the procedural waiver requirements to be satisfied before the substitution of an originally-impaneled juror for an alternate juror.[61] The language of CPL 270.35 is identical to Article I, section 2 of the state constitution. Thus "an alternate juror can be substituted for a juror after deliberations have commenced if the defendant personally consents to the substitution in writing and in open court."[62] Consequently, when a defendant strictly complies with the statutory language in CPL 270.35, the court would deem such a waiver valid under Article I, section 2 of the New York State Constitution.[63]

The New York Court of Appeals demonstrated its adherence to this requirement of strict compliance with the CPL 270.35 when deciding *People v. Page*.[64] On November 19, 1990, the defendant obtained the victim's car keys and drove away with the co-defendant.[65] About ten minutes later, they were apprehended by the authorities in the car. The defendant was charged with grand larceny in the third degree and "unauthorized use of a motor vehicle."[66] After trial, the defense counsel requested the court not to release the alternate juror and the alternate was instructed not to discuss the case.

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[60] N.Y. CRIM. PROC. LAW § 270.35 (McKinney 2002) ("[I]f the trial jury has begun its deliberations, the defendant must consent to such replacement. Such consent must *be in writing and must be signed by the defendant in person in open court in the presence of the court.*" (emphasis added)).

[61] *Gajadhar*, 9 N.Y.3d at 445.

[62] *Id.*

[63] *Id.*

[64] 665 N.E.2d 1041 (1996).

[65] *Page*, 665 N.E.2d. at 1047 (Smith, J., dissenting).

[66] *Id.*

Four hours after deliberation had begun, a juror became ill and needed to be excused. Defense counsel, after consulting with defendant, requested the alternate juror who had not been released be used as a substitute for the ill juror.[67] The court then asked the defendant whether he consented to the substitution and whether he had consulted with his counsel in making such a strategic decision, because the implications of such consent would be a waiver of his constitutional right to a jury trial. The defendant said he had consented and had consulted with his attorney. The court proceeded to substitute the jurors without the defendant's written consent. Subsequently, the "new" jury convicted the defendant of grand larceny in the third degree and "unauthorized use of a motor vehicle."[68]

On appeal, the defendant argued that without his written consent to the waiver, the constitutional requirements were not met and his waiver was invalid.[69] Thus, the issue was whether a waiver could be created orally and be deemed valid when a defendant orally consents to a juror substitution after deliberation began.[70] The oral consent was found insufficient; strict compliance with the statute was required to ensure the state's constitutional requirements are met before a substitution of a juror is to occur after deliberation commenced. The prosecution's argument that the need for a written waiver was a mere technicality was rejected.[71] The court stated, "The history of the constitutional waiver provision thus establishes that the require-

[67] *Id.* at 1042 (majority opinion).
[68] *Id.* at 1043.
[69] *Id.* at 1042-43.
[70] *Page*, 665 N.E.2d at 1042.
[71] *Id.* at 1043.

ment that the defendant execute a signed, written waiver was considered critical to securing a knowing, intelligent and voluntary waiver of the right to trial by jury."[72] Thus, the writing requirement is a critical procedural safeguard to ensure that the defendant is making a volitional, intelligible, decision. As the court explained, " 'it is a human habit to think twice before one signs a paper.' "[73] Thus, the court held "that a waiver of the right to jury trial procured other than by a written instrument signed by the defendant in person in open court is invalid."[74]

The implication of *Page*, in regards to *Gajadhar*, is that, but for Page's oral consent, where a written consent was otherwise obtained, his waiver would have been valid and a jury comprising of a number other than twelve would be constitutional.[75] Thus according to that same principle, a jury consisting of a number other than twelve, as in *Gajadhar*, would be deemed constitutional, assuming strict compliance with the statutory waiver requirements.[76]

The court furthered its argument in *Gajadhar* with the notion that the waiver provides a defendant with more options, affording a defendant more control over the right to a jury trial, even though the constitutional amendments and the precedent cases clearly deem the defendant's waiver valid. If the circumstances are such that an "inclusory twelve person jury" is not possible for some reason, then the

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[72] *Id.* at 1044.

[73] *Id.* (quoting 2 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, APRIL 5, TO AUGUST 26, 1938 1282).

[74] *Id.* at 1046 (internal quotations omitted).

[75] *Gajadhar*, 9 N.Y.3d at 447.

[76] *Id.*

defendant now has more options in determining his or her fate.[77] For instance, if the defendant decides, after consulting with counsel, he would have a more favorable outcome retrying the case, then he need not execute the waiver and a mistrial will result.[78] But if a defendant decides, after consulting with counsel, that forging ahead with this jury would produce a more favorable outcome, then the defendant need only execute the waiver to the jury trial in strict compliance with the statutory text.[79]

Additionally, the execution of a valid waiver successfully established the right to a jury trial as a personal right to the defendant that he may waive, just as he may waive any other personal rights such as, "the right to counsel," "the right to testify," and "the right to present a defense."[80] Accordingly, where the defendant consented in a signed, written instrument, in open court, with the presiding judge's approval, such a waiver is enforceable once executed. The court has the responsibility to make sure that "express provisions of our Constitution . . . be vigilantly enforced and the rights they protect zealously guarded."[81] Where a defendant strictly complies with the statutory language to effectuate such a waiver, it is evident the defendant made the decision " 'knowingly, voluntarily and intelligently,' " and the court should thus vigilantly enforce such waivers as there is no more a court can do to safeguard such rights.[82] No matter how unwise Ga-

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[77] *Id.*
[78] *Id.* at 448.
[79] *Id.*
[80] *Gajadhar*, 9 N.Y.3d at 448.
[81] *Page*, 665 N.E.2d at 1046.
[82] *Gajadhar*, 9 N.Y.3d at 448.

jadhar's decision was to waive his right to an "inclusory twelve-man jury trial," he made that decision and it is the responsibility of the courts to enforce it.[83] Consequently, to allow a defendant to validly waive his right to an "inclusory right to a jury of twelve" and then allege that such consent was insufficient would "flout the purposes of the waiver rule."[84]

Lastly, it appears that there should be less constitutional concern in *Gajadhar* than cases like *Ryan* and *Page*. In *Ryan* and *Page*, the concern associated with the thirteenth juror, when not validly waived, seems more prevalent than the eleven-personn jury should be. The thirteenth juror may prejudice the defendant where the original members of a jury already have a basis for their decision, and the thirteenth juror has little or no ability to persuade the other jurors when deliberation has already commenced.[85] But where a jury is comprised of less than twelve and the procedure for executing the waiver was strictly complied with, the defense has little room for arguing prejudice. The only argument the defense can then muster is that the defendant was prejudiced because the excused juror, who was intelligibly waived, could have been the juror that created a hung jury, when the other eleven wanted to convict.[86] That argument is easily rebutted by the fact the excused juror could have been the reason for a hung jury when the other eleven jurors wanted to acquit.

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[83] *Id.*

[84] *Page*, 665 N.E.2d at 1043 (internal quotations omitted).

[85] *Ryan*, 224 N.E.2d at 712 ("[D]efendants argue, the alternate juror entered the jury room after the eleven original jurors had sifted the evidence and, in all probability, already formulated their preliminary positions [and] each of the eleven jurors was aware of the outlooks and positions of the others . . . ." (internal quotations omitted)).

[86] *Williams*, 399 U.S. at 101.

Thus, the prejudice of a smaller jury is negligible, especially where the procedural safeguards in waiving such a right have been satisfied, putting the constitutional concerns at rest. It would appear now that both the New York State Constitution and the United States Constitution allow for a jury of less than twelve persons, when the criminal defendants "knowingly, voluntarily and intelligently" waive their right, with a signed, written instrument, in open court, with the presiding judge's approval.[87]

Joseph Maehr

[87] *Gajadhar*, 9 N.Y.3d at 448.

CONFRONTATION CLAUSE

United States Constitution Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him . . . .

New York Constitution article I, section 6:

In any trial in any court whatever the party accused shall . . . be confronted with the witnesses against him or her.