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RIGHT TO A JURY TRIAL

United States Constitution Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury

New York Constitution Article I Section 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

New York Constitution Article VI Section 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

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

People v. Gajadahar¹
(decided November 13, 2002)

Winston Gajadahar was indicted for murder in the second degree, attempted murder in the second degree, assault in the first degree, and attempted robbery in the first degree.² The Supreme Court of New York, New York County approved Gajadahar's waiver of a twelve person jury.³ In doing so, the court considered

¹ 194 Misc. 2d 142, 753 N.Y.S.2d 309 (N.Y. Sup. Ct. 2002).

² *Id.* at 143, 753 N.Y.S.2d at 310.

³ *Id.* at 145, 753 N.Y.S.2d at 312.

the constitutional implications of such a waiver under the Sixth⁴ and Fourteenth Amendments⁵ of the Federal Constitution and Article I, Section 2⁶ and Article VI, Section 18⁷ of the New York State Constitution.⁸ Gajadahar was ultimately convicted of murder in the second degree and attempted robbery.⁹

The charges against Gajadahar stem from a shooting where one person was killed and two others were seriously wounded.¹⁰ The defendant was not apprehended until five years after the shooting, at which time he was caught trying to enter his native Trinidad and Tobago and then extradited to the United States.¹¹ The start of the trial was substantially delayed because one of the victims and another witness had to travel great distances to attend.¹² The case was submitted to the jury more than three years after his capture.¹³

On the third day of jury deliberations, one of the jurors became ill and had to be hospitalized.¹⁴ Because the sick juror's

⁴ U.S. CONST. amend. VI provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury"

⁵ U.S. CONST. amend. XIV § 1 provides in pertinent part: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

⁶ N.Y. CONST. art. I § 2 provides in pertinent part:

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

⁷ N.Y. CONST. art. VI § 18 provides:

Trial by jury is guaranteed as provided in article one of this constitution. The legislature may provide that in any court of original jurisdiction 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 of this constitution.

⁸ *Gajadahar*, 194 Misc. 2d at 147, 753 N.Y.S.2d at 309.

⁹ *Id.* at 145, 753 N.Y.S.2d at 312.

¹⁰ *Id.* at 143, 753 N.Y.S.2d at 310.

¹¹ *Id.*

¹² *Id.*

¹³ *Gajadahar*, 194 Misc. 2d at 143, 753 N.Y.S.2d at 310.

¹⁴ *Id.* at 143, 753 N.Y.S.2d at 310-11.

prognosis was unclear, Gajadhar insisted the deliberations continue with the eleven remaining jurors.¹⁵ The court decided to permit Gajadhar to proceed as he requested.¹⁶ The court reviewed the constitutional right to a jury of twelve with Gajadhar on the record and reviewed the language of the written waiver which he and his attorney signed in open court.¹⁷ Gajadhar also waived appellate review of his waiver of a jury of twelve.¹⁸

In ruling on Gajadhar's motion, the court considered the 1858 New York Court of Appeals decision in *People v. Cancemi*.¹⁹ Cancemi was convicted of murder and sentenced to death by an eleven member jury.²⁰ The jury was reduced to eleven following the trial court's grant of Cancemi's request to remove one of the jurors.²¹ The Court of Appeals rejected the notion that a criminal defendant could waive his or her right to a trial by twelve jurors, reversed, and ordered a new trial.²² The court noted that:

[i]t would be a highly dangerous innovation . . . upon the ancient and invaluable institution of trial by jury, and the constitution and laws establishing and securing that mode of trial, for the court to allow any number short of a full panel of twelve jurors, and we think it ought not to be tolerated.²³

The *Gajadhar* court then considered the impact of the 1938 amendment of the pertinent section of the New York State Constitution, Article I, Section 2, which permits the waiver sought by Gajadhar.²⁴ The section was further amended in 1962 to provide for juries of six or twelve members.²⁵ This issue was addressed in *People v. Ryan*,²⁶ where the Court of Appeals

¹⁵ *Id.* at 143, 753 N.Y.S.2d at 311.

¹⁶ *Id.* at 144, 753 N.Y.S.2d at 311.

¹⁷ *Id.*

¹⁸ *Gajadhar*, 194 Misc. 2d at 143, 753 N.Y.S.2d at 312.

¹⁹ 18 N.Y. 128 (1858).

²⁰ *Id.* at 130.

²¹ *Id.* at 130-31.

²² *Id.* at 138-39.

²³ *Id.*

²⁴ *Gajadhar*, 194 Misc. 2d at 147, 753 N.Y.S.2d at 313.

²⁵ *Id.*

²⁶ 19 N.Y.2d 100, 224 N.E.2d 710, 278 N.Y.S.2d 199 (1966).

expressly stated that as a result of the 1962 amendment, a criminal defendant has the right to waive a jury trial.²⁷ More recently, the Court of Appeals addressed this issue in *People v. Page*, and the majority opinion, written by Chief Judge Kaye, detailed the impact of the New York State constitutional amendments.²⁸ The court concluded “[t]he history of the constitutional waiver provision thus establishes that the requirement 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”²⁹

Several departments of the appellate division have also had an opportunity to consider this issue. Those courts, applying *Cancemi* or a similar standard, held that a criminal defendant cannot consent to such a waiver. In *People v. Lester*,³⁰ the Fourth Department reversed the defendant’s conviction on the grounds that even though the defendant consented to a trial by a ten person jury, the court erred in permitting the trial to proceed.³¹ The court concluded that a criminal defendant cannot consent to a trial by a jury consisting of fewer than twelve persons.³² Similarly, the Second Department has reached the same conclusion on multiple occasions.³³

²⁷ *Id.* at 105, 224 N.E.2d at 713, 278 N.Y.S.2d at 203.

²⁸ 88 N.Y.2d 1, 5-6, 665 N.E.2d 1041, 1043, 643 N.Y.S.2d 1, 3 (1996).

²⁹ *Id.* at 6, 665 N.E.2d at 1044, 643 N.Y.S.2d at 4 (citations omitted). The requirements for the format of that waiver are enumerated in N.Y. CRIM. PROC. LAW § 320.20 (2) (McKinney 2002), which provides in pertinent part:

Such waiver must be in writing and must be signed by the defendant in person in open court in the presence of the court, and with the approval of the court. The court must approve the execution and submission of such waiver unless it determines that it is tendered as a stratagem to procure an otherwise impermissible procedural advantage or that the defendant is not fully aware of the consequences of the choice he is making.

³⁰ 149 A.D.2d 975, 540 N.Y.S.2d 110 (4th Dep’t 1989).

³¹ *Id.*

³² *Id.*

³³ See *Stressler v. Hynes*, 169 A.D.2d 750, 750, 565 N.Y.S.2d 116, 117 (2d Dep’t 1991); *Bell v. Sherman*, 174 A.D.2d 738, 738, 571 N.Y.S.2d 572, 573 (2d Dep’t 1991).

In ruling on Gajadahar's motion, the court cited *People v. Hurst*, an unpublished opinion of the Supreme Court, Bronx County.³⁴ The facts in *Hurst* are very similar to those in *Gajadahar*. The start of Hurst's trial was delayed by more than a year, the jury deliberated for three days at which point one of the jurors was discharged for misconduct, and the defendant moved to continue with the remaining eleven jurors.³⁵ *Hurst* differed from *Gajadahar* in that the prosecutor objected to continuing with the remaining jurors, arguing a mistrial was required, and the court reluctantly denied the defendant's motion.³⁶ The court explained that such a decision was mandated by the prior binding precedent from *Bell*, *Stressler*, and *Lester*.³⁷ However, the court expressed its disagreement with those cases, stating "it wishe[d] to express the view that the logic, if not the letter, of the Court of Appeals' decisions in [*Ryan* and *Page*] permits a trial court to accept defendant's waiver and allow jury deliberations to proceed with less than eleven jurors."³⁸

The *Gajadahar* court distinguished this case from *Lester*, *Stressler*, and *Bell* by noting that all of those cases were decided prior to *Page* and none of them involved written waivers as did the instant case.³⁹ Instead, it held that:

in light of subsequent constitutional amendments and the interpretation of those provisions by the Court of Appeals in cases such as *Ryan*, *Ahmed*, and *Page*, *Cancemi* can no longer stand for the proposition that a defendant may not waive his 'inclusory right' to a jury of twelve persons, an option specifically acknowledged in *Page*.⁴⁰

The seminal federal case on the issue of jury size is *Williams v. Florida*.⁴¹ *Williams* advanced several arguments challenging his robbery conviction, including his claim that the court violated his Sixth Amendment right by denying his motion

³⁴ 2001 N.Y. Misc. LEXIS 511 (Sup. Ct. Bronx County 2001).

³⁵ *Id.* at **1-2.

³⁶ *Id.* at *2, *7.

³⁷ *Id.* at *2.

³⁸ *Hurst*, 2001 N.Y. Misc. LEXIS 511, at *3.

³⁹ *Gajadahar*, 194 Misc. 2d at 149, 753 N.Y.S.2d at 314-15.

⁴⁰ *Id.* at 148, 753 N.Y.S.2d at 314.

⁴¹ 399 U.S. 78 (1970).

for a twelve person jury, rather than the six person jury provided by state law.⁴² The United States Supreme Court undertook a historical analysis to determine whether the constitutional mandate of a jury trial required the jury to consist of twelve members, ultimately answering in the negative.⁴³

The Court commenced its analysis with discussion of *Duncan v. Louisiana*,⁴⁴ which held that a defendant's right to be tried by a jury in "serious criminal cases" is fundamental and, therefore, must be recognized by states in accordance with due process requirements.⁴⁵ The Court noted that such a right gives the accused "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."⁴⁶

The Court indicated that although it was clear that Williams was entitled to a jury, the issue of the constitutional requirement regarding the size of the jury was less certain.⁴⁷ The history of the use of juries in criminal cases provided no indication of how the common law jury came to be composed of twelve members.⁴⁸ The Court's earlier decisions assumed there was a constitutional requirement that the jury number twelve.⁴⁹ That view was espoused in *Thompson v. Utah*, where, the Court held "that the word 'jury' and the words 'trial by jury' were placed in the Constitution . . . with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument . . ."⁵⁰ The Court noted that the Magna Carta of 1215⁵¹ provided the right to trial by a twelve member jury, a right that was the birthright of the English immigrants, which they brought with them to America.⁵²

⁴² *Id.* at 79.

⁴³ *Id.* at 86.

⁴⁴ 391 U.S. 145 (1968).

⁴⁵ *Id.* at 154.

⁴⁶ *Id.* at 156.

⁴⁷ *Williams*, 399 U.S. at 86.

⁴⁸ *Id.* at 87.

⁴⁹ *Id.* at 90.

⁵⁰ *Thompson v. Utah*, 170 U.S. 343, 350 (1898).

⁵¹ See 10 *Halsbury's Statutes of England and Wales* 14-17 (2001).

⁵² *Thompson*, 179 U.S. at 349-50.

In deciding *Williams*, the Court noted that the historical argument was flawed by its failure to provide the missing link indicating 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 whenever that document referred to a ‘jury.’”⁵³ Further, the Court indicated that the constitutional history did not support such a conclusion.⁵⁴ The small amount of history regarding Article III did not provide support for either position.⁵⁵ The Court concluded that although it is impossible to determine what ‘jury’ meant to the framers, there was nothing evincing an explicit determination that the term should include the common law characteristics.⁵⁶

As historical considerations did not provide the answer, the Court turned to a consideration of the purpose of the right to a trial by jury and the manner in which the size of the jury might impact that purpose.⁵⁷ The Court concluded that the size of the jury would have no appreciable impact on the jury’s purpose.⁵⁸ Therefore, the Court held that a twelve member jury was a historical accident rather than a constitutional requirement.⁵⁹ Thus, under both the New York and Federal Constitutions, the right to a trial by jury does not impose a requirement that the jury consist of twelve persons. Consequently, criminal defendants in both New York and federal courts are able to waive their right to a twelve person jury and consent to a jury of a smaller size.

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⁵³ *Williams*, 399 U.S. at 91.

⁵⁴ *Id.* at 92.

⁵⁵ *Id.* at 93.

⁵⁶ *Id.* at 98-99.

⁵⁷ *Id.* at 100.

⁵⁸ *Williams*, 399 U.S. at 100.

⁵⁹ *Id.* at 102.

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