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## Right to Trial by Jury, Court of Appeals People v. Page

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of the Sixth Amendment of both the Federal and New York Constitutions is to insure that there is a fair trial.

People v. Page<sup>115</sup>  
(decided April 2, 1996)

Defendant Kenneth Page moved to set aside his convictions for grand larceny and unauthorized use of a motor vehicle.<sup>116</sup> He based his motion on the fact that an alternate juror had, without his written consent, been substituted for a regular juror subsequent to the beginning of deliberations.<sup>117</sup> Page argued that, unlike the Sixth Amendment of the Federal Constitution,<sup>118</sup> the New York State Constitution<sup>119</sup> guarantees criminal defendants the right to a jury of twelve persons.<sup>120</sup> Thus, when the alternate juror was

115. 88 N.Y.2d 1, 665 N.E.2d 1041, 643 N.Y.S.2d 1 (1996).

116. *Id.* at 4, 665 N.E.2d at 1042, 643 N.Y.S.2d at 2.

117. *Id.* at 4, 665 N.E.2d at 1042-43, 643 N.Y.S. 2d at 2-3.

118. U.S. CONST. amend. VI. The Sixth Amendment provides 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 . . . ." *Id.*

119. N.Y. CONST. art. 1, § 2. This section provides:

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 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. The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver.

*Id.*

120. *Page*, 88 N.Y.2d at 3, 665 N.E.2d at 1042, 643 N.Y.S.2d at 2. Though Article I, § 2 of the New York State Constitution does not specifically grant a constitutional right to twelve jurors in a criminal trial, New York courts take the view that a right to twelve jurors is a fundamental right based

“added” during the deliberations phase, this right was allegedly violated.<sup>121</sup> The New York State Court of Appeals credited Page’s argument and reversed the convictions accordingly.<sup>122</sup> The court held that the only way in which a defendant may validly consent to juror substitution during deliberations is by a written waiver of his right to a trial by jury in accordance with the procedures expressly delineated in the state constitution and the applicable statutory provision.<sup>123</sup> The majority was unmoved by the fact that Page appeared to give his oral consent to the substitution knowingly and voluntarily.<sup>124</sup> Rather, it emphasized that an explicit directive of the New York State Constitution can never be disregarded as a mere technicality.<sup>125</sup>

Twelve regular jurors and two alternates were chosen for the defendant’s criminal trial, one of whom was excused prior to deliberations.<sup>126</sup> Upon submission of the case to the jury, the court granted defense counsel’s request that the remaining alternate not be released and admonished this juror not to discuss the case.<sup>127</sup> After four hours of deliberation, the jury foreperson was excused permanently for illness.<sup>128</sup> Defense counsel requested that the remaining alternate be substituted for the foreperson in order to prevent a mistrial.<sup>129</sup> The judge spoke directly to the defendant and asked whether the defendant consented to the

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on the common law. *Id.* The fundamental right to a criminal jury of twelve “has been properly interpreted as guaranteeing the right to a trial by jury as it had existed at common law.” *Id.* (quoting *People v. Ahmed*, 66 N.Y.2d 307, 311, 487 N.E.2d 894, 896, 496 N.Y.S.2d 984, 986 (1985)).

121. *Id.* at 8, 665 N.E.2d at 1045, 643 N.Y.S.2d at 5.

122. *Id.* at 3, 665 N.E.2d at 1042, 643 N.Y.S.2d at 2.

123. *Id.* See N.Y. CRIM. PROC. LAW § 270.35 (McKinney 1993). This section provides in pertinent part: “[I]f the trial jury has begun its deliberations, the defendant must consent to such replacement [by the alternate]. Such consent must be in writing and must be signed by the defendant in person in open court in the presence of the court.” *Id.*

124. *Id.* at 3-4, 665 N.E.2d at 1042, 643 N.Y.S.2d at 2.

125. *Id.* at 3, 665 N.E.2d at 1043, 643 N.Y.S.2d at 3.

126. *Id.* at 4, 665 N.E.2d at 1042, 643 N.Y.S.2d at 2.

127. *Id.*

128. *Id.*

129. *Id.*

substitution of the alternate juror and whether the defendant had an adequate opportunity to discuss the matter with his attorney.<sup>130</sup> After the defendant answered both questions in the affirmative, the judge granted the substitution request.<sup>131</sup> No written waiver was ever issued.<sup>132</sup> The court instructed the jury to begin deliberations anew, and the defendant was ultimately convicted on all charges.<sup>133</sup> The defendant moved to set aside the verdicts on the ground that his oral consent was void because the state constitution and applicable statute expressly require a signed written instrument under these circumstances.<sup>134</sup> The New York State Supreme Court for New York County denied the defendant's motion, and the Appellate Division affirmed, stating that "[t]o do otherwise would exalt form over substance."<sup>135</sup>

The New York State Constitution guarantees all criminal defendants the right to a trial by jury.<sup>136</sup> This right, as interpreted by the court, is one of a right to a trial by jury as it existed at common law.<sup>137</sup> Because a jury comprised of twelve persons at common law, the court noted that the right to a jury of twelve is accordingly compelled.<sup>138</sup> If Page's conviction was rendered by a jury of more or less than twelve persons owing to the substitution

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130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 4, 665 N.E.2d at 1042-43, 643 N.Y.S.2d at 2-3.

135. *People v. Page*, 210 A.D.2d 41, 619 N.Y.S.2d 567 (1st Dep't 1994).

136. N.Y. CONST. art. 1, § 2.

137. *Page*, 88 N.Y.2d at 5, 665 N.E.2d at 104, 643 N.Y.S.2d at 3. *See People v. Ahmed*, 66 N.Y.2d 307, 310, 487 N.E.2d 894, 895, 496 N.Y.S.2d 984, 985 (1985) (holding that a judge who was absent for a portion of a criminal trial owing to illness, and who permitted his law secretary to discharge certain of his responsibilities accordingly, violated the defendant's right to a trial by jury because the judge's presence was an integral part of that right as it existed at common law).

138. *Id.* (citing *People v. Cosmos*, 205 N.Y. 91, 96, 98 N.E. 408, 409 (1912) holding that the undisputed common law right to a jury of twelve was not violated during the defendant's trial, after which it was discovered that one of the jurors had previously lost the property rights that qualified him to serve, because twelve competent and impartial persons had convicted the defendant of murder)).

of the alternate, then, absent a valid waiver, his constitutional rights were violated.<sup>139</sup>

The court observed that a defendant's right *per se* to a jury necessarily includes the right to a jury of twelve, and if the former is validly waived so is the latter.<sup>140</sup> The New York State Constitution was amended in 1938 to allow for waiver of a jury trial by a criminal defendant "in the manner to be prescribed by law."<sup>141</sup> The method to be employed in executing such a waiver was "to be determined by the Legislature and fixed by statute."<sup>142</sup> This silence as to the necessary procedure was, for the dissenting judge in *Page*, a clear indication that written consent was not meant to be an indispensable element of a valid waiver.<sup>143</sup> Rather, what is essential is that the defendant understand the significance of his actions and that the court play an active role in making a determination in this regard.<sup>144</sup>

However, the majority rightly notes that within a year of the first Constitutional Amendment, a second amendment was adopted, which was designed to remedy this lack of specificity of method.<sup>145</sup> The provision mandated that, in order to effect a valid waiver of the right to a jury trial, the defendant must sign a written instrument signifying this intent in open court and with the approval of the judge.<sup>146</sup> Observing that "it is a human habit to think twice before one signs a paper," members of the 1938 Convention enacted the Amendment in order to ensure a knowledgeable waiver on the part of a defendant.<sup>147</sup> Contrary to

139. *Id.* at 9, 665 N.E.2d 1045, 643 N.Y.S.2d at 5.

140. *Id.* at 8, 665 N.E.2d at 1045, 643 N.Y.S.2d at 5 (citing *People v. Ryan*, 19 N.Y.2d 100, 224 N.E.2d 710, 278 N.Y.S.2d 199).

141. *Id.* at 6, 665 N.E.2d at 1043, 643 N.Y.S.2d at 3.

142. *Id.* (quoting 2d Ann. Rep. of N.Y. Jud. Council, 1936 N.Y. Legis. Doc. No. 48, at 97).

143. *Id.* at 14-15, 665 N.E.2d at 1048, 643 N.Y.S.2d at 8 (Smith J., dissenting).

144. *Id.* (Smith J., dissenting).

145. *Id.* (citing 2 Revised Record of 1938 NY State Constitutional Convention, at 1281).

146. *Page*, 88 N.Y.2d at 6, 665 N.E.2d at 1043-44, 643 N.Y.S.2d at 3-4.

147. *Id.* (quoting 2 Revised Record of 1938 NY State Constitutional Convention, at 1282).

the conclusions of the dissenting judge, it appears that the history of the New York State Constitution suggests a fundamental belief that the requirement of a signed instrument is critical to the enactment of a valid waiver.<sup>148</sup>

The court also recounted the history of the applicable statutory requirements. Section 358-a of the code of Criminal Procedure,<sup>149</sup> which predates the current provision, only allowed for the substitution of an alternate for a regular juror prior to the deliberations phase. The New York State Court of Appeals deemed the statute constitutional in the 1934 case of *People v. Mitchell*.<sup>150</sup> In *Mitchell*, two alternate jurors sat through a murder trial, as did the regular jurors, and were dismissed upon submission of the case for a verdict, in strict compliance with the statute.<sup>151</sup> There was no suggestion that either of these alternate jurors tried to influence the other twelve in any way.<sup>152</sup> Thus, the court concluded, the defendant was afforded his constitutional right to a jury of twelve.<sup>153</sup> However, some years later in 1952, the Legislature amended section 358-a to allow for retention of alternate jurors subsequent to the submission of the case for deliberation and substitution of these alternates as necessary.<sup>154</sup> No consent, written or otherwise, was required.<sup>155</sup>

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148. *Id.*

149. N.Y. CODE CRIM. PROC. § 358(a) (repealed by L. 1952, ch. 670) provided in pertinent part: "The court may direct the calling of one or two additional jurors, in its discretion, to be known as 'alternate jurors.' [S]uch alternate jurors . . . shall be discharged upon the final submission of the case to the jury." *Id.*

150. 266 N.Y. 15, 193 N.E. 445 (1934).

151. *Id.* at 18, 193 N.E. 445 at 445-46.

152. *Id.* at 18, 193 N.E. at 445.

153. *Id.* at 19, 193 N.E. 445 at 446.

154. *Page*, 88 N.Y.2d at 7 n.2, 665 N.E.2d at 1044 n.2, 643 N.Y.S.2d at 4 n.2. Section 358(a) now provides in pertinent part:

After final submission of a case . . . if the court deem it advisable he may direct that one or more of the alternate jurors be kept in custody of the sheriff . . . separate and apart from the regular jurors until the jury have agreed upon a verdict. If after the final submission of the case and before the jury have agreed upon a verdict, a juror dies or becomes ill, or for any other reason he be unable to perform his duty, the court may order him to be discharged and draw the name of an alternate, who shall

In the 1966 case of *People v. Ryan*,<sup>156</sup> upon which the court relied heavily, the New York Court of Appeals held that substitution of an alternate juror after the case had been submitted to the jury violated the criminal defendant's constitutional guarantee to a jury of twelve persons.<sup>157</sup> In *Ryan*, the defendants were convicted of first degree robbery and assault.<sup>158</sup> Five hours into deliberations a juror took ill and was accordingly replaced by an alternate, with the consent of defense counsel, although the defendants themselves were neither consulted nor present in the courtroom at the time.<sup>159</sup> The court concluded that, in effect, thirteen jurors had deliberated, yet only twelve had voted.<sup>160</sup> The court was particularly troubled by the fact that the eleven original jurors had most likely arrived at their preliminary determinations of guilt or non-guilt by the time the alternate joined them, leaving the latter at a distinct disadvantage with regard to persuading the others.<sup>161</sup> The court in *Page* noted that the *Ryan* holding, which required that the defendant waive his right to a jury trial in writing and in open court under such circumstances, was incorporated into section 270.35 of New York State's current Criminal Procedure Law.<sup>162</sup>

The circumstances in *Ryan* were, however, unlike those of the instant case, as emphasized by the dissenting judge.<sup>163</sup> Unlike the *Ryan* defendants, the record clearly reflects that *Page* knew precisely what he was doing when he personally, voluntarily, and avowedly waived his right to a jury trial.<sup>164</sup> The purpose of the

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then take the place of the discharged juror in the jury room and the jury shall then renew its deliberations with the alternate juror.

*Id.*

155. *Id.*

156. 19 N.Y.2d 100, 224 N.E.2d 710, 278 N.Y.S.2d 199 (1966).

157. *Id.* at 103-04, 224 N.E.2d at 712, 278 N.Y.S.2d at 202.

158. *Id.* at 101, 224 N.E.2d at 711, 278 N.Y.S.2d at 200.

159. *Id.*

160. *Id.* at 103, 224 N.E.2d at 712, 278 N.Y.S.2d at 202.

161. *Id.*

162. *Page*, 88 N.Y.2d at 8, 665 N.E.2d at 1045, 643 N.Y.S.2d at 5. See N.Y. CRIM. PROC. LAW § 270.35.

163. *Page*, 8 N.Y.2d at 15, 665 N.E.2d at 1049, 643 N.Y.S.2d at 9.

164. *Id.*

Constitutional Amendment, which was to protect vulnerable defendants from being unfairly stripped of their rights, was arguably not defeated in this case.<sup>165</sup> The court's instruction to deliberate anew with the alternate juror, so as to ensure that only twelve persons contributed to the verdict, further serves to distinguish this case from what occurred in *Ryan*.<sup>166</sup> While conceding that the *Ryan* holding might compel reversal of these convictions if applied literally, the dissent argued for a less rigid adherence to formal procedural requirements.<sup>167</sup> In accordance with fundamental notions of fairness, the dissenting judge deemed Page's actions a valid implicit waiver of his constitutional right to a jury trial in light of the compelling circumstances of this case.<sup>168</sup>

New York State has chosen to afford its citizens greater protection with respect to their right to a trial by jury than is mandated by the Federal Constitution. The Sixth Amendment states simply that the defendant "shall enjoy" the right to a jury trial. However, the New York State Constitution affirms, in strikingly potent language, that the comparable state right "shall remain inviolate forever." Accordingly, New York has chosen to interpret this right more broadly than do the federal courts. A plain reading of the Sixth Amendment mandates only that the jury be "impartial," and no right to the common law jury of twelve persons has been implied.<sup>169</sup> It is debatable whether the reversal of convictions in cases such as *Page*, wherein the defendant who

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165. *Id.* at 14, 665 N.E.2d at 1048, 643 N.Y.S.2d at 8 (citing 2 Revised Record of 1938 N.Y. State Constitutional Convention, at 1274). "The proposal is a very simple one. It is intended to protect the rights of the defendant, to assure him by the necessity for an approval by the judge a full opportunity to understand what he is doing. That is all that there is in this proposal, and we ask that that be advanced." *Id.*

166. *Id.* at 11, 665 N.E.2d at 1047, 643 N.Y.S.2d at 7.

167. *Id.* at 15, 665 N.E.2d at 1049, 643 N.Y.S.2d at 9 (Smith J., dissenting).

168. *Id.* at 17, 665 N.E.2d at 1050, 643 N.Y.S.2d at 10.

169. *See Williams v. Florida*, 399 U.S. 78 (1970) (holding that Florida law, pursuant to which criminal defendants are tried by a six-person jury in all but capital cases, did not violate the defendant's Sixth Amendment rights because the twelve-person jury came about as a historical accident and has not evolved into an integral element of the right to a trial by jury).



voluntarily waived his rights was clearly treated fairly, serves to advance New York's ideals regarding constitutional protections. Nonetheless, this decision of the New York State Court of Appeals exemplifies its inclination to safeguard the rights of its citizens above and beyond the federal minimum standard.

## SUPREME COURT, APPELLATE DIVISION

### FOURTH DEPARTMENT

People v. Perkins<sup>170</sup>  
(decided July 12, 1996)

The defendant, Sean Perkins, after a jury trial, was convicted of manslaughter in the first degree and criminal possession of a weapon in the second degree.<sup>171</sup> The defendant appealed and claimed, *inter alia*, that the trial judge's brief absence from the courtroom during juror *voir dire* warranted a reversal of the conviction.<sup>172</sup> Both the United States<sup>173</sup> and New York State<sup>174</sup> Constitutions grant a defendant the right to a trial by jury.<sup>175</sup> This constitutional right to a trial by jury has been interpreted to mean that a judge must be in control of a jury trial.<sup>176</sup> The Appellate Division, Fourth Department, unanimously affirmed the trial court's conviction of the defendant, holding that the trial judge's brief absence from the courtroom during *voir dire* was

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170. 645 N.Y.S.2d 693 (4th Dep't 1996).

171. *Id.* at 694.

172. *Id.*

173. U.S. CONST. art. III, § 2, cl. 3. Article III, section 2, clause 3, states in pertinent part: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed . . . ." *Id.*

174. N.Y. CONST. art. I, § 2. Article I, section 2 states in pertinent part: "Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever . . . ." *Id.*

175. *Perkins*, 645 N.Y.S.2d at 695.

176. *Perkins*, 645 N.Y.S.2d at 695 (citing *People v. Ahmed*, 66 N.Y.2d 307, 311-12, 487 N.E.2d 894, 896, 496 N.Y.S.2d 984, 986 (1985)).