ORIGINAL

In the

Supreme Court of the United States

DARNELL BROWN,

PETITIONER,

V.

LOUISIANA,

RESPONDENT.

No. 79-5364

Washington, D.C.
March 25, 1980

Pages 1 thru 46

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IN THE SUPREME COURT OF THE UNITED STATES

DARNELL BROWN, Petitioner,	:	
v.	:	No. 79-5364
LOUISIANA, Respondent.	:	

Washington, D. C.,

Tuesday, March 25, 1980.

The above-entitled matter came on for oral argument at 1:38 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JOHN M. LAWRENCE, ESQ., 2700 Tulane Avenue, New Orleans, Louisiana 70119; on behalf of the Petitioner

THOMAS CHESTER, ESQ., Assistant District Attorney, Parish of New Orleans, 2700 Tulane Avenue, New Orleans, Louisiana 70019; pro hac vice

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in 79-5364, Brown v. Louisiana.

Mr. Lawrence, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF JOHN M. LAWRENCE, ESQ.,

ON BEHALF OF PETITIONER

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

The issue in this case is whether to apply the Court's ruling in Burch v. Louisiana that a verdict of five out of six on a bobtail jury should be applied retroactively to this case, and if so if any other cases are involved, whether there should be full retroactivity or limited retroactivity to cases pending but not yet filed at the time that Burch was decided.

Darnell Brown was convicted in Orleans Parish of simple burglary by five-to-one vote. He was then multiple-billed and sentenced to serve 22 years.

We are relying on the rule in Hankerson v. North Carolina as the rule to apply in this case. Similarly, we are relying on the rule in Witherspoon and Ballew v. Georgia, as well as Burch v. Louisiana.

QUESTION: In which case did we define or at least tried to give some guidance on retroactivity?

MR. LAWRENCE: In Stovall v. Denno the guidelines came out, the criterion to apply. In Ballew v. Georgia, the statistics came out, and in Burch the five-out-of-six decision was made. But in Stovall and later with Linkletter, the Court drew on three factors: the purpose to be served by the new rule, the reliance on good faith by the state authorities on the old rule, and the effect on the administration of criminal justice by implementing the new rule.

In Hankerson, the Court looked to the purpose of the new rule and that if that purpose was to enhance the truth of the fact-finding matter, then you need not look to reliance and effect, and that if the purpose was only to incidentally enhance the truth finding function or if it was small, then you would consider the other factors.

We submit here that we are in a better position than the litigant in Hankerson because we are not concerned with just an incidental enhancement of the truth finding function. If you will recall in Ballew when the statistics were mentioned, they talk about prevention of type one error which is that an innocent man should not be wrongfully convicted being weighed ten times more heavily than the prevention of the type two error that a guilty person should go free.

QUESTION: Was that this Court's --

MR. LAWRENCE: That was in Ballew. That came out of Ballew from the statistics that the Court considered in making its decision.

QUESTION: But was it this Court's statement that it should be a ten-to-one ratio?

MR. LAWRENCE: No, it is not this Court's statement. That is the statistics.

The fact remains that the enhancement here is not incidental or small, that the unanimity requirement, where do you draw the line, the unanimity requirement in a bobtail jury is where you draw the line, whether it is six of six or five out of six, as in the case of Brown.

Now, when you look at the reliance by state authorities, after Ballew and Williams v. Florida, they were put on notice that unanimity was being favored and not five out of six any more. That is the reason that the motion to quash the five-out-of-six panel requirement was filed.

The purpose also in Burch was to assure accuracy in jury verdicts, to overcome an aspect of the criminal trial that substantially impaired the truth finding function, and raised serious doubts about prior trials, where five out of six would convict someone. That is the reason for Ballew and Burch.

So here we are on similar ground with Hankerson, that the purpose of Burch is to enhance the fact-finding process, but if the Court would look at the other factors, such as the reliance and the effect on the administration of justice, you should consider this, that we are talking about really two states here, Louisiana and Oklahoma, who have the five out of six requirements.

Most of the people who were convicted five of six have already served their sentences and are out of prison. Some people who have been multiple-billed are not, but most of the people who were convicted are already out. We are talking about a period of time between 1974 and 1978 and we are not talking about people charged with relative felonies who pled guilty or who were convicted six to nothing. We are talking only about five-one, so there is a relatively small number of people that we are talking about here.

QUESTION: Do you think that -- Ballew was the five-man, wasn't it?

MR. LAWRENCE. Yes. Ballew said that a verdict by five was illegal.

QUESTION: Wouldn't you have argued that was retroactive?

MR. LAWRENCE: That Ballew was retroactive? I'm afraid I don't understand your question.

QUESTION: What about people who before Ballew had been convicted by five, would they be out under Ballew?

MR. LAWRENCE: That was a unanimous group. The inner working of the jury was a unanimous group then.

QUESTION: I understand.

MR. LAWRENCE: And prior to 1974, when we tried these cases, where we have the five-man jury, it was a unanimous requirement.

QUESTION: Well, are you arguing for retroactivity back behind Ballew?

MR. LAWRENCE: No.

QUESTION: Just back to Ballew?

MR. LAWRENCE: That's right.

QUESTION: And you think that that would not -- Ballew was '70?

MR. LAWRENCE: Ballew was in '78. Burch was in '78.

QUESTION: So you must be arguing for retroactivity of Ballew then.

MR. LAWRENCE: Well, Ballew only had five people on the jury.

QUESTION: I understand.

MR. LAWRENCE: And in this decision we are talking about five people convicting out of six. And Burch came after Ballew.

QUESTION: Yes.

MR. LAWRENCE: So I would argue that any retroactivity -- yes, I'm sorry, also includes cases in Ballew, yes, back to 1974.

QUESTION: Are there any statistics as to numbers that would be affected?

MR. LAWRENCE: There are not. There is no Louisiana agency that has these figures, and what I am trying to show the Court here is that we are talking about a small number of people. These are relative felonies, small crimes, where the legislative has not seen fit to give more significance to the number of people needed to convict.

QUESTION: Of course, there are two elements really in the jury composition. You say it is the truthfulness of the fact-finding process, but many of our recent decisions going down in numbers of jurors have emphasized the necessity of the cross-section and that you have to draw an arbitrary line to preserve a right to jury trial, without ever suggesting that a bench trial by a single judge is not an accurate truth-finding process.

MR. LAWRENCE: We are not talking here about the right to a jury trial or a judge trial. We are talking here about the inner workings of a jury. After you have made that decision to go before a group of people

between the defendant and the prosecutor. We are talking about that and not the right to a jury or a judge.

Once we get into the inner working of the jury, the five of six or the six of six, the unanimity requirement, it is a different matter.

QUESTION: Which do you say is the better truth-finding process, a jury of five, which must be unanimous, or a jury of six in which the conviction may be had by five out of six?

MR. LAWRENCE: I would have to draw on my own prior experience before 1974 and I will be very candid with the Court in telling the Court that at that time I favored five out of five, unanimity, but I am not going to argue with the requirement now of the six, but I never favored the five out of six.

QUESTION: My question is which do you think is likely to be the more accurate truth-finding process?

MR. LAWRENCE: Unanimity, six out of six.

QUESTION: That isn't my question. My question is unanimity with five or non-unanimity with six.

MR. LAWRENCE: I see no difference.

QUESTION: You see no difference?

MR. LAWRENCE: I see no difference in the -- except that you may be dealing with one person if you have a five-out-of-six situation that you would not be

dealing with if you had a five-out-of-five. But I certainly don't want to argue with the requirement now of six-out-of-six, unanimity.

QUESTION: With the six and non-unanimity you have at least a challenger in the jury room.

MR. LAWRENCE: If you --

QUESTION: Do you see some advantage to that in the truth-finding process?

MR. LAWRENCE: If there is an advantage to it, then I would recall that in Ballew they talk about the five factors when you are dealing with a small jury, the lack of discussion that goes on, that the minority viewpoint may not be adhered to, and that the position of the defense is of some detriment when you have a small jury.

QUESTION: Ballew was simply a line-drawing process, wasn't it?

MR. LAWRENCE: One line, yes, sir.

QUESTION: There is nothing magic about five or six or seven except that the court concluded that the line had to be drawn somewhere.

QUESTION: And it had already upheld the six line.

MR. LAWRENCE: Unanimity.

QUESTION: That is the only reason there was a line drawn, is because the six-person jury had been

upheld.

MR. LAWRENCE: Correct. Now, in our situation, our case was pending on review in the Louisiana Supreme Court at the time Burch was decided and we raised the issue by motion to quash after Ballew came out.

QUESTION: Why do you say we are only talking about going back to '74?

MR. LAWRENCE: Prior to 1974, in our state, the statute provided for a five-man jury.

QUESTION: So the five-out-of-six thing could only have been happening since then?

MR. LAWRENCE: Since 1974 through 1978.

QUESTION: Has the retroactivity of Ballew been decided?

MR. LAWRENCE: No.

QUESTION: Well, this one would certainly decide it, wouldn't it?

MR. LAWRENCE: Yes, sir, it should.

QUESTION: So you are really not talking about just back to '74.

MR. LAWRENCE: As I understand it, if there are other states who have --

QUESTION: Well, you are at least talking about it in Louisiana and Oklahoma. You are talking about anybody who is still in jail who has been convicted by

either a five-man jury or by a five-out-of-six jury.

MR. LAWRENCE: If they are still in jail.

QUESTION: Mr. Lawrence, do you know what the maximum sentence that could have been imposed for conviction by a five-man jury? Wasn't it generally for rather minor offenses?

MR. LAWRENCE: Yes, it was for minor offenses, what they call relative felonies where you could get not necessarily hard labor but --

QUESTION: Would any of them provide for a sentence of in excess of six years?

MR. LAWRENCE: At that time it provided for a nine-year sentence.

QUESTION: A nine-year maximum.

MR. LAWRENCE: Nine years maximum.

QUESTION: And what was the sentence in this case?

MR. LAWRENCE: In this case there was a multiple bill filed and he got 22 years.

QUESTION: And that is not unusual?

MR. LAWRENCE: Not with people convicted in Orleans Parish with a prior criminal record, it is not.

QUESTION: Well, what is the maximum you could be sentenced to by a five-man jury prior to '74 in case of a repeater?

MR. LAWRENCE: 18 years on a double bill and 18 years on a --

QUESTION: So there may be quite a few people in jail still who were convicted prior to '74 by a five-man jury?

MR. LAWRENCE: If they were multiple bill.

QUESTION: Yes.

MR. LAWRENCE: And if they were in Orleans Parish. But if they were outside of Orleans Parish, in the other parishes, probably not.

QUESTION: Well, what is your answer to Justice White's question, is it likely that there are quite a few people in jail? Your answer was if they were subject to a multiple bill. I think what he is asking is were there very many subjected to multiple bills, as you call them.

MR. LAWRENCE: Let me explain it this way. In 1974, there was a new policy for multiple billing that came into effect and after that there was a denial of good time that came into effect, and I believe in 1977 -- now, the people sentenced before that got the benefit of good time and probably are not in jail, people from, say, '77 on are likely to be in jail under multiple bill.

QUESTION: Even someone who was sentenced to 22 years in 1976 might be out now?

MR. LAWRENCE: If they were multiple billed in

1976 --

QUESTION: 1976.

MR. LAWRENCE: -- say '76 or back to 1974, during that period of time, their good time would not be affected by the multiple billing and whatever their sentence would be from zero -- from a third of the maximum, which would be three years, which most of them received, three to the maximum of 18 on a multiple bill at that time, they would be out of jail. If they received the heavy end of the sentence on a multiple bill, they may still be there, but again this applies to Orleans Parish and not to most of the other parishes in the state.

QUESTION: What is the population of Orleans Parish?

MR. LAWRENCE: Over a million.

QUESTION: Over a million?

MR. LAWRENCE: Over a million.

QUESTION: Just by practice, not by law.

MR. LAWRENCE: That is by practice.

QUESTION: Can I go back to the question asked by the Chief Justice. I think the question was which do you regard as possessing the greater integrity, a jury verdict unanimous with five or divided with six, and you said you couldn't detect any difference. Do you still feel that way, even though there is, as the Chief

suggested --

MR. LAWRENCE: You have the wild card but I would like to just draw my own experience when I tried cases at that time. I feel that a unanimous verdict is always preferable but if you limit me to five of five or five out of six -- and I would for the sake of this argument say I would prefer to have five out of six, but since we are dealing here with the new rule in Burch that has thrown this out and require six of six, then I would of course feel that six of six is much better because it is unanimous and does not have a wild card.

QUESTION: Do you respond that way because you see some advantage in having a challenger in the jury room who is in effect going to make the other five jurors think a little longer?

MR. LAWRENCE: It depends. It is a two-edge sword, Chief Justice Burger. It could also affect a not guilty verdict. But as far as the guilty verdicts, sometimes -- and I really have to draw on my own experience again -- sometimes it did work to our advantage.

QUESTION: You are dealing with a lot of imponderables. For example, you would rather have one strong-willed juror on your side than eight weak-minded ones on the other side, wouldn't you?

MR. LAWRENCE: Yes.

QUESTION: There is no trouble with the figures.

MR. LAWRENCE: There is no --

QUESTION: I think I understand your problem, but isn't that what your problem is?

MR. LAWRENCE: There is no doubt about that. I would like to see all of these cases tried by twelve-member juries, but since we are talking about the small juries then we are limited to that factor.

QUESTION: Well, wouldn't 24 be even better from your point of view?

MR. LAWRENCE: From my viewpoint, yes, it would.

QUESTION: Thirty-six?

MR. LAWRENCE: Yes.

QUESTION: Unanimous --

MR. LAWRENCE: If I had enough guts to try it that way, I would do it.

QUESTION: You are pretty close in the Fifth Circuit these days to that.

MR. LAWRENCE: I'm sorry, I didn't understand.

QUESTION: I say you have it close to that in the Fifth Circuit these days when you sit en banc, don't you?

QUESTION: The Fifth Circuit can decide a case 13-to-12.

QUESTION: There are questions of law, too.

MR. LAWRENCE: That's true.

I have only to say that I would ask the Court, if there are no more questions, to reverse the holding of the state supreme court and to apply retroactively --

QUESTION: Let me ask one other question. This case as I understand it involves a conviction which had not yet become final --

MR. LAWRENCE: That's correct.

QUESTION: -- by the time Burch was decided. Do you happen to know if there are proceedings attacking collaterally final convictions on the basis of Burch in the Firth Circuit?

MR. LAWRENCE: I'm aware that they are doing that, yes.

QUESTION: You say you are aware that is going on?

MR. LAWRENCE: Well, I have --

QUESTION: I just didn't understand your answer.

MR. LAWRENCE: Again, I am drawing on my experience with correspondence with people who have been convicted and are in the parish prison at this time, yes.

QUESTION: I didn't really need an embellishment to your answer. I didn't hear your answer.

MR. LAWRENCE: I'm sorry. I would say that those are under way, yes.

QUESTION: You are aware that that is going on.

MR. LAWRENCE: Yes.

QUESTION: Thank you.

QUESTION: Could I ask you, in the state's brief, on page 27, it says in the case of an habitural felon, a conviction by a six-man jury can ultimately result in the sentence of life imprisonment.

MR. LAWRENCE: That is if he has four felony convictions.

QUESTION: Anyway, it can happen?

MR. LAWRENCE: From 20 to life.

QUESTION: Well, it can happen then that he could have a sentence for life and be convicted by five out of six?

MR. LAWRENCE: Yes, that's correct. That to my knowledge has not happened.

QUESTION: How do you tell when a verdict has been unanimous on the six-man jury?

MR. LAWRENCE: At the end of the trial you ask for a poll of the verdict.

QUESTION: What if the poll wasn't taken?

MR. LAWRENCE: They take it in open court right at the end of the trial.

QUESTION: It isn't required, is it?

MR. LAWRENCE: It is not required. It sometimes

does not go into the court records.

QUESTION: So how do you ever know?

MR. LAWRENCE: We don't. We ask the jury.

QUESTION: I know, but once the trial is over how would you ever know?

MR. LAWRENCE: If there is no poll taken, you would not know.

QUESTION: In some instances, if there is a poll taken, I take it it doesn't necessarily show up on the court minutes.

MR. LAWRENCE: It may be recorded by the stenographer but it is not usually made part of the record. It can be, but usually the poll is taken, the number is given and that is it, there is no further action on it.

QUESTION: Do you in your defender practice routinely ask for a poll?

MR. LAWRENCE: Yes, unless I have the advantage and then I don't.

QUESTION: Do most defense lawyers do that?

MR. LAWRENCE: Yes, as a matter of practice they do, in any of the verdicts they do, whether it is five out of six or twelve out of twelve.

QUESTION: When there is an acquittal, is there a poll?

MR. LAWRENCE: I would never ask for one.

QUESTION: I know you wouldn't, but is there one?

MR. LAWRENCE: Sometimes the state does, yes. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Chester.

ORAL ARGUMENT OF THOMAS CHESTER, ESQ.,

PRO HAC VICE

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

The respondent state of Louisiana would suggest to the Court that Burch v. Louisiana should be applied prospectively only, for three reasons:

First is that petitioner Darnell Brown has failed to establish that serious and substantial doubts exist as to the accuracy of non-unanimous verdicts before the time of Burch.

Second, the state of Louisiana conducted numerous jury trials before this Court ruled in Burch in good-faith reliance on what the law was earlier.

And third, the contrary ruling would have a seriously disruptive impact on the administration of justice in Louisiana.

QUESTION: Well, don't you at least think that Ballew heralded Burch?

MR. CHESTER: No, I don't, Your Honor. The state's position is this: First of all, in Burch there

was --

QUESTION: There wouldn't make much difference, would it?

MR. CHESTER: No, sir. I believe that the relevant test could be applied to these two cases and differing results could --

QUESTION: But they weren't far apart.

MR. CHESTER: I believe there are differences.

QUESTION: But how far apart were they in time?

MR. CHESTER: About a year. I believe Ballew was decided in '78 and Burch was decided in '79.

QUESTION: So in terms of impact on justice, even if Burch were retroactive back to Ballew, it wouldn't make that much difference.

MR. CHESTER: If Burch were retroactive back to Ballew?

QUESTION: Yes.

MR. CHESTER: I believe there would be a substantial number of jury trials having been tried in the interim period, approximately one year.

The Court asked Mr. Lawrence how many persons would be affected. The Orleans Parish District Attorney's office in the four years that non-unanimous jury verdicts were law, we tried approximately 300 cases. This is just for the City of New Orleans, not counting the other

parishes.

QUESTION: Would you be able to estimate how many of those were non-unanimous?

MR. CHESTER: In no way, Your Honor. I imagine you could go back to each particular record and look and see if a poll had been requested. If a poll had been requested, whether the verdict or the count had been recorded.

As the state pointed out in its brief, it has been the practice of some judges to merely examine the ballots that the individual jurors fill out and then announce for the record whether or not the verdict is lawful.

QUESTION: And no numbers at all?

MR. CHESTER: Not necessarily, Your Honor, not necessarily.

QUESTION: What we are talking about then is 300 cases minus an unknown number of unanimous cases and again minus an unknown number of cases which the record is unclear.

MR. CHESTER: Yes, sir, for Orleans Parish alone, not for the entire state of Louisiana.

QUESTION: I gather from your point -- maybe I didn't get it right -- that that is probably where the problem is most likely to occur, is that right? There

are more trials using this particular procedure, or is that wrong?

MR. CHESTER: I believe the procedure would have been the same all through the state.

QUESTION: I see.

MR. CHESTER: The Parish of Orleans does have a disproportionate amount of jury trials because it has much more serious crime problems than some of the other parishes do.

QUESTION: What is the population of the state of Louisiana?

MR. CHESTER: Your Honor, I am not sure but I know that the population of the city of New Orleans is about one-half million.

QUESTION: Do you have any idea of the population of the state as a whole? Three, four million?

MR. CHESTER: I think what Your Honor is getting at is about what proportion of jury trials in the state were held in New Orleans. I would say that it would be roughly a third to a quarter.

QUESTION: What I was getting at was what the population of the state of Louisiana is.

MR. CHESTER: Yes, sir. From talking with people in the Department of Corrections, I understand that about a third to a quarter of their inmates come

from New Orleans.

QUESTION: If you would back up for just a minute, about the other people now in jail who might be affected.

MR. CHESTER: Yes, sir.

QUESTION: Do I understand you to say that practically none of them can show that there was a --

MR. CHESTER: I don't know if that that would be a correct statement of the situation, Your Honor. However, I believe there would be a substantial number who could not show.

QUESTION: So there wouldn't be many who could show.

MR. CHESTER: There would be some but not all.

QUESTION: That is what I thought.

MR. CHESTER: Now --

QUESTION: All of your friend's clients would be in the other category because he polls the jury on every guilty verdict.

MR. CHESTER: Yes, sir, some defense attorneys always poll the jury, others do not. It is not required by law.

QUESTION: Just to clear up any possible misunderstanding, I notice one of the briefs recites the Ballew case as 1975 which struck some of us as being

incorrect.

MR. CHESTER: No, that is incorrect.

QUESTION: It was '78.

MR. CHESTER: Yes, sir.

As I was saying, petitioner Brown was convicted by one of these non-unanimous juries in 1978, August, about nine months before this Court decided Burch. As a habitual felon, he received a sentence of 22 years which I submit to the Court is not a minor sentence. Mr. Brown had been convicted about six or seven times previously.

After he was convicted he appealed the sentence and his conviction. This was affirmed by the Louisiana Supreme Court in May of 1979.

The particular record in this case certainly fails to reflect any miscarriage of justice as to petitioner, Darnell Brown. The record reflects that Brown was arrested inside of a ransacked residence, that he tried to flee --

QUESTION: Is that the issue here, whether there was any miscarriage of justice?

MR. CHESTER: Your Honor, I believe that the ultimate issue in this case is whether nine unanimous jury verdicts are inaccurate, are unjust, if there is a good chance that they are erroneous. In this case there is not.

The gist of what petitioner argues therefore is that in a substantial number of cases there must be error to justify wholesale and a windfall reversal of prior convictions, a substantial number of prior convictions.

The state concedes that there is no question that the Sixth Amendment that was the subject of Burch v. Louisiana pertains to what has been called the fact-finding process by this Court, but we submit also that it is well settled that the mere fact that the Sixth Amendment or the fact-finding process is involved in a particular ruling does not mandate automatic retroactivity.

Since it would be improper and impossible to review all of the convictions and the records of all the convictions, we have to look at this issue in general terms from what the jurisprudence has taught us about the jury trial and its functions.

The purpose of the jury trial is to prevent government oppression. The main feature of the jury trial is an interposition between the accused and the accuser, of what this Court has called the common sense deliberations of a group of laymen. The Court has further ruled that this interpoaition can operate if the jury can deliberate effectively and if it fairly represents a cross-section of the community from which it has been taken.

Many of these features are functions of the absolute size of the jury rather than the composition of the final ballot. For example, it has been established that by empaneling six jurors, the cross-section requirement is satisfied. And I believe the Court has rejected the argument that the fact that a member of the minority group is ultimately out-voted does not indicate that his position was not or the position of the minority was not adequately represented during the jury deliberations.

The Court in Ballew expressed some concern about the collect ve memory of the jury, and I think it has been further established that when six persons are empaneled they are able when they go back to that deliberation room to remember all the facts and arguments that were important in the trial of the case.

Also the state would suggest that it can't be said that a lay body has failed to interpose itself between accused and accuser, whether the final verdict is unanimous or non-unanimous.

Reading Burch together with this Court's prior decisions suggests that, while unanimous jury verdicts may indicate that more perfect deliberation processes occur, that the extent to which non-unanimous jury verdicts infect the integrity of the fact-finding process ranks low on the scale of probabilities.

The language of the Burch decision supports this. The majority opinion of Mr. Justice Rehnquist at several points noted that the case was a close one, but went on to state that it was necessary to draw lines, that demarcation lines had to be drawn at some point if the substance of the trial was to be preserved.

The State of Louisiana owuld liken the rule of Burch to the rule of Callahan v. Parker as interpreted in Gosa v. Mayden, and that is that it is a prophylactic rule that only incidentally enhances the reliability of the fact-finding process.

QUESTION: You would argue that even if Ballew were retroactive, Burch is not?

MR. CHESTER: Yes, sir, I believe that there are several --

QUESTION: That Ballew did say that there is a real danger of reliability?

MR. CHESTER: Yes, sir.

QUESTION: But you think that is not the basis for --

MR. CHESTER: As I stated, I think --

QUESTION: You think that is not the basis for Burch?

MR. CHESTER: I think that the major difference between the two cases is that the prior

jurisprudence, up until the time of Burch, talks more in terms of the absolute size of the jury, representation of the community.

QUESTION: Ballew said that only five persons really raised a substantial doubt about not only the composition and representational nature of the jury but about the reliability of its verdict.

MR. CHESTER: Yes, Your Honor, and I believe that some of the --

QUESTION: And do you think Burch said the same thing?

MR. CHESTER: No, sir, I don't. I believe Burch was more of a line-drawing decision. I think that some of the features of the jury trial are more perfectly represented in a non-unanimous six-member jury than there are in a five-member jury. Those are particularly cross-section of the community, the jury's ability to remember, and certain other facts.

QUESTION: But you don't feel that the illegality in Burch of a five-out-of-six verdict rested on the danger of unreliability?

MR. CHESTER: I believe that that was a factor in the case, but I believe --

QUESTION: You think it was?

MR. CHESTER: I believe it was a factor in the

case, but I don't believe that was the reason for the whole decision. I believe there was a line-drawing decision and I think that that was noted in the opinion several times.

The state would further submit that the Court's ruling in DeStefano v. Woods and Gosa v. Mayden are dispositive of the issue before the Court. In both of these cases, the Court denied retroactive application to cases where jury trials had been denied outright, where the purpose of the Sixth Amendment as it relates to trial had been frustrated entirely.

QUESTION: DeStefano v. Woods and Duncan v. Louisiana are not retroactive?

MR. CHESTER: Not retroactive, no.

QUESTION: How about Gosa v. Mayden, what did that hold?

MR. CHESTER: That was a case which interpreted O'Callahan as not being retroactive, O'Callahan being the decision as to the military civil trial.

QUESTION: Right.

MR. CHESTER: The state's position is that if these cases are not retroactive, then Burch v. Louisiana should not be retroactive because --

QUESTION: How about Ballew?

MR. CHESTER: Although I have prepared an argument as to Ballew, Your Honor, I think that if you applied

the same test, the Stovall three-pronged balancing test, I think you would find also that Ballew should not be retroactive. If you are talking in terms of reliance on prior jurisprudence, prior law, if you are talking about impact on the administration of justice -- I think when these factors are balanced against the purpose of both of the decisions, the ultimate ruling should be that they are prospective only.

However, I think that the case is stronger in Burch for prospective application than it is in Ballew. I believe that Burch was not as grounded in fairness as Ballew was. I believe Burch had other justifications and other reasons for the Burch decision.

QUESTION: On the other hand, Mr. Chester, in the Ballew-type case the proof would be very simple, we would know -- I guess everybody who was convicted there has a claim, whereas in the Burch-type case a large percentage may not have a claim.

MR. CHESTER: Exactly, Your Honor.

QUESTION: So that may argue for making it the other way.

MR. CHESTER: It could be both ways.

QUESTION: Yes.

MR. CHESTER: Now, as I spoke earlier, once we have established that the rule with which we are dealing

is not so grounded in fundamental fairness as is, say, the right to counsel or reasonable doubt, like in Hankerson v. North Carolina, then it becomes appropriate to apply countervailing factors to the analysis, factors that were first set out in Linkletter, later in Stovall and those cases proginy.

As to the reliance of the state of Louisiana, the role of an inquiry before the court is should the state be charged with having anticipated the Court's ruling in Burch, and the state would submit that it should not.

First, we are dealing with an institution which was provided for by the Louisiana Constitution. This is not a juris prudential rule. It is not merely a statutory rule. Normally, the constitutions of the states are presumed to have some validity.

The jurisprudence of this Court, as I said earlier, has seemed to examine the composition of the jury question in terms of absolute number rather than in terms of the final vote.

The issue involved in Burch had not raised long and widespread attacks in the lower courts as did the Court's Firth Amendment decision in Bruton which was made retroactive by Roberts v. Russell.

Further, I don't believe that any of the Court's

decision in Burch can be said to have been foreshadowed or preordained as had been the confrontation clause rule of Barber v. Page by this Court's previous decision in Pointer v. Texas.

Finally, again Burch by its own terms at several points noted that the issue was a close one. As to the impact on the administration of justice, the third factor which was identified in Stovall, is noted in the state's brief that a number of serious felonies have been traditionally tried by juries, tried by non-unanimity six-man juries.

This institution, incidentally, was in effect for a little over four years, from January 1, 1974 until the date of Burch. Crime such as aggravated battery, possession of narcotics, burglary, forgery, theft, possession of stolen property are among the most common prosecutions that are held in criminal courts in the state of Louisiana or probably anywhere.

QUESTION: Before this system you had, what, six-member juries unanimous or five-member juries?

MR. CHESTER: Before 1975, it was five out of five to convict for felonies which were not necessarily punishable by hard labor.

QUESTION: And that is precisely what was held invalid in Ballew?

MR. CHESTER: Exactly, Your Honor.

QUESTION: Ballew v. Georgia.

MR. CHESTER: The difference being that in Georgia I believe that the maximum sentence for a five out of five conviction in Georgia was one year whereas in Louisiana it would have been nine, possibly being enhanced by the multiple offender statute. Prior to 1975 and after 1975, potentially a man that had prior felony convictions, as had petitioner Darnell Brown, could possibly be sentenced up to life imprisonment.

QUESTION: Well, wouldn't you think that if Burch would have to be retroactive a fortiori, that Ballew would be?

MR. CHESTER: Yes, sir. I believe that Burch is a stronger case for prospective application than Ballew is.

QUESTION: And Louisiana had the unanimous five-member jury for a long time, did it?

MR. CHESTER: Yes, sir, the 1921 Constitution.

QUESTION: It was in the 1921 Constitution.

MR. CHESTER: Yes, sir. I'm not sure what type of jury was before that.

QUESTION: You have no figures nor any idea how many people might still be in jail who were convicted by five-member juries prior to 1975?

MR. CHESTER: I don't know how many of those

people would still be in jail, Your Honor. I know between '74 and '75 the Department of Corrections estimates that there are about 2,000 people currently in jail who were either convicted, pled guilty or convicted by a judge or a jury or who pled guilty. So you are talking about 2,000 people who were convicted --

QUESTION: If you just took 80 percent -- you really get the guilty pleas in 80 to 85 percent of the cases, don't you?

MR. CHESTER: I would say we have guilty pleas in more than half of the cases. But what is important to note is that the people who would be most affected would be people with the longest and most serious criminal records. Those are the men who usually do go to trial because they are facing too much time to plead guilty.

QUESTION: What is the Louisiana system for multiple billing, as your opponent has been referring to it. Is it something that has to be alleged in the -- is it an indictment that you proceed by or --

MR. CHESTER: We proceed with a bill of information after a man has been convicted or pled guilty to a felony, we proceed by filing a bill of information alleging that he has been previously convicted of one or more felonies within a statutory time period. Generally speaking, it is five years from the time of his last

conviction.

QUESTION: Then that is an allegation in the bill that can be put in issue by a not guilty plea, I take it?

MR. CHESTER: It is put in issue -- what happens is it is --

QUESTION: It is after conviction?

MR. CHESTER: It is after conviction. The jury doesn't know about the man's prior record.

QUESTION: This is only for sentencing then?

MR. CHESTER: Yes, and it is tried before a judge.

QUESTION: Now, would retroactivity here subject a person who was convicted by a unanimous six-man jury, would it give him the right to attack a prior conviction, say, back to 1921?

MR. CHESTER: It would depend on the scope of the retroactive ruling. I believe it would. That would be a matter I guess for the Louisiana Supreme Court and my opinion would be yes, it would.

QUESTION: Conceivably this Court, too.

MR. CHESTER: Yes, sir.

QUESTION: Whether or not there is to be multiple billing is in the discretion of the prosecutor?

MR. CHESTER: Discretion of the district attorney.

I believe Mr. Lawrence spoke about since 1974 there have been more multiple bills filed, that is because a new district attorney came into office in '74. So Louisiana has had the multiple sentence statute since the early 1900's.

QUESTION: It is a matter of prosecutorial policy?

MR. CHESTER: Yes, sir.

QUESTION: Then that can be denied and that is tried before the sentencing judge?

MR. CHESTER: Yes, sir. There are certain technical requisites of proof that require the state to prove up the prior convictions.

Now, as the Court has recognized, a retroactive application of this case could have -- could yield windfall benefits to a certain number of people who are in jail. Ironically, the retrial of a case now may well result in a verdict which is less reliable than was the original trial held before the Court's decision in Burch. That is when a case can be brought back to trial.

Inevitably, the passage of time will destroy the state's chances for bringing a lot of these cases back to trial. How many, you can't tell, but again what is important is that those persons who would be most likely to be unretriable would be those persons whose

cases were the stalest, that is, people with the most serious criminal records who were sentenced to the longest terms a good number of years back.

Mr. Lawrence initially also brought up in his argument a distinction between retroactivity on direct review and on collateral review, and I would like to answer that briefly. I think that first that the jurisprudence of the court has established that that distinction is without merit back to Tehan and ex rel. Shott soon after the first non-retroactivity decision in Linkletter. That distinction was rejected then.

I believe that the countervailing factors which spoke about earlier in connection with the Stovall decision don't admit any distinction between cases on direct review and cases on collateral review.

QUESTION: What was the chronology here, Mr. Chester? At the time he was tried, Burch had not been decided.

MR. CHESTER: Had not come out, Your Honor. What happened ---

QUESTION: And of course it hadn't been decided at the time he committed the offense.

MR. CHESTER: Yes, sir. There was a trial; nine months later Burch was decided. He appealed and a month after the Burch decision the Louisiana Supreme

Court affirmed Darnell Brown's case, holding that Burch v. Louisiana was not retroactive.

QUESTION: Which had not been decided in the meantime.

MR. CHESTER: Petitioner Brown would be on direct review.

QUESTION: Right.

MR. CHESTER: Additionally, I would submit that I think that the impetus behind the argument for this distinction is basically one of inequity. It is dissatisfaction with what the Court has previously termed chance beneficiary. In other words, why should one man benefit from the Court's decision when another man similarly situated does not.

I would suggest that drawing a distinction between cases on collateral review and cases on direct review merely exchanges one inequity for the other, with the side effect of having just that many more convictions reversed for reasons other than unfairness in the original trial.

QUESTION: Was your earlier reference to the inherent inequity related to the inability to show that a polling took place of the jury?

MR. CHESTER: No, sir, this would be in more general terms --

QUESTION: Wouldn't that be another basis for chance --

MR. CHESTER: It certainly would. Some persons who in fact may have been convicted by non-unanimous juries may not be able to prove that.

QUESTION: And maybe they never knew it.

MR. CHESTER: Exactly, maybe --

QUESTION: Counsel didn't take the precautions that your friend did.

MR. CHESTER: That is perfectly correct, Your Honor.

QUESTION: In Louisiana, can you establish such a factor by some collateral process?

MR. CHESTER: Well, there is a rule in the Code of Criminal Procedure which says that jurors are incompetent to impeach their own verdicts. Now, whether that would prevent a situation where a defendant could recall members of the jury to testify as to what their particular ballot was in a case, I am not sure.

QUESTION: Well, that would be impeaching it.

MR. CHESTER: The practical problems inherent in that are widespread. First of all --

QUESTION: To call back jurors of five or six years ago and ask them whether or not a particular verdict was, in the words of the usual polling language,

was this your verdict --

MR. CHESTER: Exactly, Your Honor. It would be analogous to the situation of trying to rediscover state witnesses in a case that was five or six or seven years old. Some of the witnesses or jurors may be dead or may have moved. They may have forgotten what their vote was. The practical problems, sir, are overwhelming in that type of situation.

In summary, I point out to the Court that there has been no showing that a substantial number of these verdicts were wrongly decided or were unfair. The state of Louisiana relied on the law as it stood before the Court's decision in Burch, as it was set out in the '74 Constitution, and finally if retroactivity were found in the case before the bar it would have a seriously disruptive impact on Louisiana's criminal laws. It would be time-consuming, it would be expensive, and it would yield unfair results.

QUESTION: Mr. Chester, I notice at the time that you wrote your brief you didn't have the citation to the U.S. reports in Burch v. Louisiana.

MR. CHESTER: No, sir, I did not.

QUESTION: Do you have it now?

MR. CHESTER: Not with me, Your Honor.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Lawrence, do you have anything further?

ORAL ARGUMENT OF JOHN M. LAWRENCE, ESQ.,

ON BEHALF OF PETITIONER--REBUTTAL

MR. LAWRENCE: Mr. Chief Justice, I would like to make one point to the Court, and it is not really in the nature of rebuttal but it is just something I feel the Court should know.

In 1974, for cases that were tried after 1974 or in the year 1974 which were committed in '73, the defendant had his choice to be tried with five of five or five of six. There was a period of time when a defendant did have a choice.

QUESTION: Were you defending then?

MR. LAWRENCE: Yes.

QUESTION: What was your advice? Or was it always --

MR. LAWRENCE: It would depend on the type of case I had. If I had a good case I might go with five-man jury. If I had a --

QUESTION: And if you weren't so strong you would go for that wild card?

MR. LAWRENCE: Right.

QUESTION: And maybe make a pass at a twelve-member jury?

MR. LAWRENCE: If we had that it would be even better for us.

QUESTION: I must say, that is very revealing.

QUESTION: Well, we thank you for your candor on that. Let me ask you one more question, counsel. What about the point we were just discussing with your friend, that a good many lawyers apparently did not take the precautions you did and poll every jury on a guilty verdict. Isn't it just a matter of lottery and chance as to which ones would get the benefit of a retroactive holding should that be the Court's decision? That is a pretty chancy business, isn't it?

MR. LAWRENCE: There are some attorneys who did poll and in some cases there are records to show the number, but not all.

QUESTION: It would be a matter of chance, wouldn't it?

MR. LAWRENCE: It would be a matter of chance, that's correct.

QUESTION: To the contrary, wouldn't it be a burden on the person alleging to show it?

MR. LAWRENCE: That's correct, too.

QUESTION: And if they couldn't show it, they wouldn't get a hearing, would they?

MR. LAWRENCE: That's right.

QUESTION: Then on what standards in Louisiana, if there are any on this point, would a defense counsel be open to a charge of ineffective assistance of counsel if the record did not show that he polled the jury?

MR. LAWRENCE: In that case --

QUESTION: That is not a fanciful possible claim, is it, on the part of the defendant who is in prison now?

MR. LAWRENCE: It could be a claim of ineffective assistance of counsel without polling the jury if this --

QUESTION: There is nothing on federal habeas, do you suppose you could poll the jury if they were still alive?

MR. LAWRENCE: I don't know how to answer that.

QUESTION: Well, do you know of any Louisiana law that would prevent you?

MR. LAWRENCE: From polling the jury if they were able to be found?

QUESTION: Yes.

MR. LAWRENCE: They would --

QUESTION: If you could find them.

MR. LAWRENCE: If you could find them --

QUESTION: And you might have to dig some of them up.

QUESTION: You've got the summary records, haven't you?

MR. LAWRENCE: Yes, if they are still there.

QUESTION: Of course, a lot of them may be dead by now or moved away or something, I agree with you. But if they were around, if you even found one of them you could probably find out if it was unanimous.

MR. LAWRENCE: I'm sure they would remember the count.

QUESTION: Your friend suggested that there is a statute prohibiting collateral attack on the jury verdict by such an inquiry. Wouldn't that preclude any inquiry of any juror? Because certainly the result would be to impeach the verdict. That would be the purpose of the inquiry, wouldn't it?

MR. LAWRENCE: There is a statute that says that the jury is not competent to impeach its own verdict and I have only seen --

QUESTION: Well, it is not impeaching it, it is just a question of fact.

MR. LAWRENCE: That's correct, too. I have had two of those cases though in the last ten years.

QUESTION: The fact is that it was not unanimous then the verdict has been impeached.

MR. LAWRENCE: That's correct.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:32 o'clock p.m., the case in the above-entitled matter was submitted.)

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