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**Constitutional Law—Twelve Angry People. Arkansas Constitution Guarantees Right to Trial by Jury of Twelve Persons in Criminal Cases. *Byrd v. State*, 317 Ark. 609, 879 S.W.2d 435 (1994).**

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CONSTITUTIONAL LAW—TWELVE ANGRY PEOPLE. ARKANSAS CONSTITUTION GUARANTEES RIGHT TO TRIAL BY JURY OF TWELVE PERSONS IN CRIMINAL CASES. *BYRD V. STATE*, 317 Ark. 609, 879 S.W.2d 435 (1994).

I. INTRODUCTION

The right to a trial by jury for criminal defendants is guaranteed under both the Arkansas Constitution and the Constitution of the United States. This right is generally understood to provide for a common-law jury. Although the origin of the common-law jury is subject to debate, it is beyond question that it consisted of a panel of twelve people.<sup>1</sup>

In *Byrd v. State*,<sup>2</sup> the Arkansas Supreme Court agreed with the noted constitutional commentator, Justice Joseph Story, that a jury should be composed of twelve people.<sup>3</sup> The court held that Act 592 of 1993,<sup>4</sup> which allowed six jurors in misdemeanor cases, violated the Arkansas Constitution. Unless the constitution is amended, all criminal defendants in Arkansas may rest assured they will be guaranteed a common-law jury of twelve persons who must reach a unanimous verdict in order to convict.<sup>5</sup>

This casenote considers the facts, background, and relevance of *Byrd v. State*. Part II is a brief consideration of the facts underlying the opinion. Part III is a discussion of the background of the law relating to the number of jurors in criminal cases. This note considers the number of jurors required by the United States Constitution, the holdings of sister-state courts interpreting similar state constitutional provisions, and the earlier holdings of the Arkansas Supreme Court considering the number of jurors required by the Arkansas Constitution. Part IV presents an analysis of the court's

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1. Many early authorities seemingly accept this number without question. See, e.g., 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*352, where the author wrote: "When the trial is called on, the jurors are to be sworn, as they appear, to the number of twelve, unless they are challenged by the party." For a thorough discussion of the history of the common-law jury, see generally WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY (1852).

2. 317 Ark. 609, 879 S.W.2d 435 (1994).

3. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1779 (3d ed. 1858). Justice Story wrote:

[A] trial by jury is generally understood to mean, *ex vi termini*, a trial by a jury of twelve men, impartially selected, who must *unanimously* concur in the guilt of the accused before a legal conviction can be had. Any law therefore, dispensing with any of these requisites, may be considered unconstitutional.

*Id.*

4. Act of Mar. 19, 1993, No. 592, 2 Ark. Acts 1748 (codified as amended at ARK. CODE ANN. §§ 16-32-202, -203 (Michie 1994)).

5. Both unanimity and the requirement of twelve jurors seem to be intertwined inextricably as essential elements of the common law jury. See STORY, *supra* note 3, at § 1779.

reasoning in *Byrd*. Finally, Part V concludes the note with a discussion of the significance of the court's opinion.

## II. FACTS

Michael Wayne Byrd was arrested on December 10, 1992, for first offense driving while intoxicated (DWI), after the arresting officer saw him swerving back and forth and driving across the center line.<sup>6</sup> Byrd was tried and found guilty in a bench trial in the Prairie Grove Municipal Court.<sup>7</sup> He appealed to the Washington County Circuit Court, where he received a new trial before a jury.<sup>8</sup> The court informed Byrd that it would impanel a six-person jury.<sup>9</sup> Byrd objected to the six-person jury and requested a jury panel of twelve persons.<sup>10</sup> The trial court overruled Byrd's objection and impaneled only six jurors.<sup>11</sup> The six jurors convicted Byrd on September 16, 1993.<sup>12</sup> Following the recommendation of the jury,<sup>13</sup> the court sentenced Byrd to ten days in jail, fined him \$150, with court costs of \$392.75, and suspended his driver's license for ninety days.<sup>14</sup>

Byrd made five arguments on appeal to the Arkansas Supreme Court: (1) a jury consisting of only six people does not fairly represent the community; (2) article 2, section 7, of the Arkansas Constitution requires twelve people on a jury; (3) Act 592 of 1993 violates the Equal Protection Clause of the Arkansas Constitution<sup>15</sup> because the Act allows a six-person jury in misdemeanor cases, but requires a twelve-person jury in felony cases; (4) because the determination of the number of jurors is a power vested in

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6. *Byrd*, 317 Ark. at 610, 879 S.W.2d at 436.

7. *Id.*

8. *Id.*

9. *Id.* Before 1993, parties in misdemeanor cases could agree to try their case to a jury of less than twelve jurors. ARK. CODE ANN. § 16-32-202(b) (Michie 1987). However, in 1993 the Arkansas General Assembly passed Act 592 giving judges discretion to impanel six jurors in misdemeanor cases regardless of the wishes of the parties.*Id.* § 16-32-202(b) (Michie 1994). Act 592 was approved on March 19, 1993. Act of Mar. 19, 1993, No. 592, 1993 Ark. Acts 1748 (codified as amended at ARK. CODE ANN. §§ 16-32-202, -203 (Michie 1994)). Because the Act had no emergency clause or effective date, it became effective on August 13, 1993, only one month before Byrd was convicted. Ark. Op. Att'y Gen. No. 93-149A (June 2, 1993).

10. Appellant's Brief at 8, *Byrd v. State*, 317 Ark. 609, 879 S.W.2d 435 (1994) (No. CR 94-167).

11. *Byrd*, 317 Ark. at 610, 879 S.W.2d at 436.

12. *Id.*

13. Appellant's Brief at 6, *Byrd* (No. CR 94-167).

14. *Byrd*, 317 Ark. at 610, 879 S.W.2d at 436. Byrd could have been imprisoned for up to one year. ARK. CODE ANN. § 5-65-111 (Michie 1993).

15. ARK. CONST. art. 2, § 18.

the Arkansas Supreme Court,<sup>16</sup> the separation-of-powers doctrine<sup>17</sup> prohibits the legislature from setting the number; and (5) even if the court found Act 592 valid, the trial court judge did not use the discretion required by the Act.<sup>18</sup> Although Byrd presented five arguments for reversal, the court discussed only the second argument in its opinion.

The court found Byrd's second argument persuasive and reversed and remanded the case.<sup>19</sup> The court held that Act 592 of 1993 violated article 2, section 7 of the Arkansas Constitution and that the two code sections as amended by Act 592 of 1993 were void.<sup>20</sup> As a result of declaring them

16. ARK. CONST. art. 7, § 1 provides that the judicial power of the State of Arkansas is vested in the Arkansas Supreme Court.

17. ARK. CONST. art. 4, § 2.

18. Appellant's Brief at 13-14, *Byrd* (No. CR94-167). The code section amended by Act 592 provides that "cases other than felonies may be tried, *in the discretion of the trial court judge*, by a jury of six (6) jurors." ARK. CODE ANN. § 16-32-202(b) (Michie 1994) (emphasis added).

19. *Byrd v. State*, 317 Ark. 609, 614, 879 S.W. 2d 435, 438 (1994).

20. *Id.* The void sections of the code read as follows:

16-32-202. Selection, summons, and composition of trial generally.

(a)(1) The jurors for the trial of criminal prosecutions shall be selected and summoned as provided by law.

(2) Juries shall be composed of twelve (12) jurors.

(b) However, cases other than felonies may be tried, in the discretion of the trial court judge, by a jury of six (6) jurors.

16-32-203. Selection for misdemeanor trial.

The jury, for the trial of all prosecutions for misdemeanors, shall be selected in the following manner:

(1) Each party shall have three (3) peremptory challenges, which may be made orally;

(2) For a twelve (12) person jury, if either party desires a panel for a twelve-person jury:

(A) The court shall cause the names of twenty-four (24) competent jurors, written upon separate slips of paper, to be placed in a box to be kept for that purpose, from which the names of eighteen (18) shall be drawn and entered on a list in the order in which they were drawn, and numbered.

(B) Each party shall be furnished with a copy of the list, from which each may strike the names of three (3) jurors and return the list so stricken to the judge, who shall strike from the original list the names struck from the copies.

(C) The first twelve (12) names remaining on the original list shall constitute the jury;

(3) If the trial court decides on a six-person jury:

(A) The names of only twelve (12) persons shall be drawn and entered on a list in the order in which they were drawn, and numbered.

(B) Each party shall be furnished with a copy of the list, from which each may strike the names of three (3) jurors and return the list so stricken to the judge, who shall strike from the

void, the court announced that the two sections, "as they existed prior to the enactment of Act 592, remain viable and extant."<sup>21</sup> In summary, the court

original list the names struck from the copies.

(C) The first six (6) names remaining on the original list shall constitute the jury.

ARK. CODE ANN. §§ 16-32-202, -203 (Michie 1994).

21. *Byrd*, 317 Ark. at 614, 879 S.W.2d at 438. Although section 4 of the Act was a severability clause, and section 5 repealed the prior law, the court, to have reinstated the prior provisions, must have found the Act inseverable. Even though this was not discussed in the opinion, the court did not give effect to either the severability clause or the repealer. To determine whether an Act is severable, the court looks at the entire act to determine whether one part would have been enacted without the other. *Borchert v. Scott*, 248 Ark. 1041, 1049-50, 460 S.W.2d 28, 33 (1970). The court has "generally held that when a statute is declared unconstitutional it must be treated as if it had never been passed." *Huffman v. Dawkins*, 273 Ark. 520, 527, 622 S.W.2d 159, 162 (1981) (citing *Morgan v. Cook*, 211 Ark. 755, 202 S.W.2d 355 (1947); *State v. Williams-Echols Dry Goods Co.*, 176 Ark. 324, 3 S.W.2d 340 (1928); *Cochran v. Cobb*, 43 Ark. 180 (1884)). Because the Act was inseverable, section 5, which repealed the prior law, could not take effect. Therefore, the code was reinstated as it was before the Act was passed. The code sections reinstated read as follows:

16-32-202. Selection, summons, and composition of trial generally.

(a) The jurors for the trial of criminal prosecutions shall be selected and summoned as provided by law. Juries shall be composed of twelve (12) jurors.

(b) However, cases other than felonies may be tried by a jury of less than twelve (12) jurors by agreement of the parties.

16-32-203. Selection for misdemeanor trial.

The jury, for the trial of all prosecution for misdemeanors, shall be selected in the manner provided in the Civil Code for the formation of a jury in a civil action.

ARK. CODE ANN. §§ 16-32-202, -203 (Michie 1987).

In 1995, the General Assembly again amended the above code sections to reinstate the parts of the 1993 Act not involving the number of jurors. The new language of the code sections reads as follows:

16-32-202. Selection, summons, and composition of trial generally.

(a) The jurors for the trial of criminal prosecutions shall be selected and summoned as provided by law.

(b)(1) Juries shall be composed of twelve (12) jurors.

(2) However, cases other than felonies may be tried by a jury of less than twelve (12) jurors by agreement of the parties.

16-32-203. Selection for misdemeanor trial.

The jury, for the trial of all prosecutions for misdemeanors, shall be selected in the following manner:

(1) Each party shall have three (3) peremptory challenges, which may be made orally; and

(2) (A) The court shall cause the names of twenty-four (24) competent jurors, written upon separate slips of paper, to be placed in a box to be kept for that purpose, from which the names of eighteen (18) jurors shall be drawn and entered on a list in the order in which they were drawn, and numbered.

(B) Each party shall be furnished with a copy of the list, from which each may strike the names of three (3) jurors and

held that the right to a jury trial guaranteed by the Arkansas Constitution means that a person charged with any offense has a right to a twelve-person jury.<sup>22</sup>

### III. BACKGROUND

#### A. Right to Twelve Jurors Under the United States Constitution

The right to a jury trial in criminal cases is guaranteed by Article 3, Section 2, Clause 3 of the United States Constitution.<sup>23</sup> The right is also guaranteed by the Sixth Amendment to the Constitution.<sup>24</sup> Although *Byrd* made no argument based on the federal constitutional right to a jury trial, a discussion of this right is helpful for understanding the Arkansas Supreme Court's holding. Because the Sixth Amendment protects criminal defendants in state courts, the court might have interpreted the Arkansas Constitution such that the right to a jury trial protected by the state constitution is the same as that protected by the United States Constitution. Although the state high court could not find the state right less protective than the federal right, it was free to interpret the state right as more protective than the federal right.<sup>25</sup>

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return the list so stricken to the judge, who shall strike from the original list the names struck from the copies.

(C) The first twelve (12) names remaining on the original list shall constitute the jury.

Act of April 14, 1995, No. 1296, § 61, 1995 Ark. Acts 6303, 6331-32 (codified as amended at ARK. CODE ANN. §§ 16-32-202, -203 (Michie Supp. 1995)).

22. *Byrd*, 317 Ark. at 610, 879 S.W.2d at 436.

23. This clause reads as follows:

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; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. CONST. art. III, § 2, cl. 3.

24. The Sixth Amendment states:

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

U.S. CONST. amend. VI.

25. For a thorough discussion of this issue, see 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 1.6(c) (2d ed. 1992).

### 1. *Early United States Supreme Court Decisions on the Jury*

Before 1970, the United States Supreme Court had several opportunities to examine the meaning of the right to a jury trial guaranteed in the Constitution. The Court consistently held that the meaning of the word "jury" was the common-law jury with twelve jurors and a unanimous verdict.<sup>26</sup>

In *Thompson v. Utah*,<sup>27</sup> an 1898 case, the Court established that the term "jury" in the Sixth Amendment and Article 3 of the Constitution had the same meaning as at common law.<sup>28</sup> The Court did not consider how the number of jurors came to be twelve. However, Justice Harlan reasoned that, because the right to a jury trial granted by the *Magna Carta* consisted of a twelve-person jury, those who came from England recognized that guilt must be determined by twelve jurors.<sup>29</sup> If the framers understood that a jury verdict required the unanimous consent of twelve people, then this must have been the intended meaning of the right protected in the Constitution.<sup>30</sup>

In another case involving a territory, *Rasmussen v. United States*,<sup>31</sup> the Court reaffirmed the meaning of the word "jury" in the Constitution. The primary issue before the Court was whether the Sixth Amendment applied to Alaskan territorial laws passed by Congress.<sup>32</sup> After deciding the Constitution did apply, the Court held that a statute permitting six-person juries in misdemeanor cases violated the right to be tried by a common-law jury, and "was repugnant to the Constitution and void."<sup>33</sup> In this case, there

26. Larry T. Bates, *Trial by Jury After Williams v. Florida*, 10 HAMLINE L. REV. 53, 56-58 (1987).

27. 170 U.S. 343 (1898). Thompson was first convicted by a twelve-person jury when Utah was a territory under the protection of the Federal Constitution. He was granted a new trial; however, the second trial was after Utah became a state. He was then tried by only eight jurors as provided in the Utah Constitution. *Id.* at 344. The Court held the state constitutional provision allowing eight jurors to try cases was an *ex post facto* law as applied to crimes committed when Utah was a territory. *Id.* at 355.

28. *Id.* at 348-49.

29. *Id.* at 349-50.

30. *Id.* Justice Harlan wrote:

It must consequently be taken that the word "jury" and the words "trial by jury" were placed in the Constitution of the United States 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; and that . . . the supreme law of the land required that he should be tried by a jury composed of not less than twelve persons.

*Id.* at 350. The Court did not consider whether the State of Utah could reduce the number of jurors in state courts from twelve to six consistent with the Sixth and Fourteenth Amendments.

31. 197 U.S. 516 (1905).

32. *Id.* at 519.

33. *Id.* at 528.

was no dispute regarding the number of jurors once the Court decided that the Constitution controlled.<sup>34</sup>

Later, in *Patton v. United States*,<sup>35</sup> the United States Supreme Court concluded it was "not open to question" whether the constitutional guaranty of trial by jury had the common-law meaning that included a twelve-member panel and a unanimous verdict.<sup>36</sup> The Court considered whether a defendant could waive the right to a common-law jury in a case in which one of the jurors had been dismissed because of illness.<sup>37</sup> Although the Court suggested that any number less than twelve could not constitute a jury,<sup>38</sup> it held that because one could waive the right to a jury altogether, a defendant could waive the right to a twelve-person jury by consenting to less than twelve jurors.<sup>39</sup>

Not until 1968, in *Duncan v. Louisiana*,<sup>40</sup> did the Court apply the Sixth Amendment to the states. The Louisiana Constitution provided for jury trials only in cases where the punishment could be "at hard labor."<sup>41</sup> Because the defendant was charged with a misdemeanor, he was denied a jury trial.<sup>42</sup> The Court held that the Fourteenth Amendment incorporates the right to a jury trial guaranteed by the Sixth Amendment and extends this right to trials in state courts.<sup>43</sup> Although the State argued, and the Court agreed, that this right does not attach to "petty" offenses,<sup>44</sup> the Court held that Duncan's potential for receiving a sentence of two years in prison was

34. *Id.* at 519.

35. 281 U.S. 276 (1930).

36. *Id.* at 288.

37. *Id.* at 287. After briefly considering prior cases that established the importance of the elements of the common-law jury, the Court concluded that the "common law elements are embedded" in the Constitution and "beyond the authority of the legislative department to destroy or abridge." *Id.* at 290.

38. *Id.* at 292. The Court remarked that "[a] constitutional jury means twelve men as though that number had been specifically named; and it follows that, when reduced to eleven, it ceases to be such a jury quite as effectively as though the number had been reduced to a single person." *Id.*

39. *Id.* at 312. The Court disagreed with the preeminent constitutional scholar of the period who noted that, even if a less number were consented to, the "tribunal would be one unknown to the law." THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 458-59 (7th ed. 1903).

40. 391 U.S. 145 (1968).

41. *Id.* at 146.

42. *Id.*

43. *Id.* at 149. The Court held "that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee." *Id.*

44. *Id.* at 159.



not petty.<sup>45</sup> Read together, these cases establish that the United States Constitution guaranteed a twelve-person jury trial in state courts to defendants accused of non-petty crimes.

## 2. *Williams v. Florida and its Aftermath*

Only two years after *Duncan*, in *Williams v. Florida*,<sup>46</sup> the United States Supreme Court reconsidered the number of jurors required by the Constitution. Johnny Williams contested the constitutionality of a Florida statute that provided for six-person juries in all but capital cases.<sup>47</sup> In considering Williams's claim, the Court criticized the lack of analysis in its earlier decisions requiring twelve jurors.<sup>48</sup> It reexamined the history of the jury trial and concluded that the Sixth Amendment did not require twelve jurors.<sup>49</sup> While acknowledging that the common-law jury size was generally twelve, the Court stated that the number was merely "a historical accident, unnecessary to effect the purposes of the jury system and wholly without significance 'except to mystics.'"<sup>50</sup> The Court also considered the few jury studies available and concluded there was virtually no difference in the determination of guilt between six- and twelve-person juries.<sup>51</sup> These studies supported the Court's decision that, because the purpose of the jury was not necessarily a function of its size, twelve jurors were not constitutionally

45. *Id.* at 161-62. The Court was unwilling to establish a maximum sentence for non-petty offenses in *Duncan*; however, in *Baldwin v. New York*, the Court held that the Sixth Amendment right controls when a defendant might be imprisoned for more than six months. 399 U.S. 66, 69 (1970). *Baldwin* was handed down the same day as *Williams v. Florida*.

46. 399 U.S. 78 (1970).

47. *Id.* at 79-80.

48. *Id.* at 90-92.

49. *Id.* at 86.

50. *Id.* at 102. The Court noted these "mystical" explanations for the requirement of twelve jurors:

John Proffatt in his treatise on jury trials notes that the reasons why the number of the petit jury is 12, are "quaintly given" in Duncombe's *Trials per Pais*, as follows:

"[T]his number is no less esteemed by our own law than by holy writ. If the twelve apostles on their twelve thrones must try us in our eternal state, good reason hath the law to appoint the number twelve to try us in our temporal. The tribes of Israel were twelve, the patriarchs were twelve, and Solomon's officers were twelve."

Trial by Jury 112 n.4 (1877), quoting G. Duncombe, 1 *Trials per Pais* 92-93 (8th ed. 1766).

*Id.* at 88-89 n.23.

51. *Id.* at 101-02. The Court stated that "neither currently available evidence nor theory suggests that the 12-man jury is necessarily more advantageous to the defendant than a jury composed of fewer members." *Id.*

required.<sup>52</sup> The Court emphasized, however, that its holding did not affect the states' right to continue to require twelve-person juries.<sup>53</sup>

Because the bright line requiring twelve jurors was removed, it was inevitable one would ask how few jurors one could have. If the common-law jury of twelve jurors was not required by the Constitution, what about the unanimity requirement for twelve or fewer jurors? Later cases gave the Court the opportunity to address these issues.

The State of Georgia permitted juries of five persons to try misdemeanor cases.<sup>54</sup> Claude Ballew was convicted of a misdemeanor before a five-person jury in Georgia and challenged the constitutionality of the size of the jury.<sup>55</sup> The Court lamented the little evidence on the effectiveness of juries when it decided *Williams* eight years earlier.<sup>56</sup> However, from the results of studies generated by *Williams*, the Court conceded that smaller juries deliberate less effectively,<sup>57</sup> smaller juries are more likely to convict

52. *Id.* at 101. The number of jurors should be "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." *Id.* at 100. At least one commentator was concerned by the method the Court used to reach its conclusion: "The majority did not even suggest a reason for lowering the requirement from twelve down at least as far as six, but rested instead on a questionable critique of the reasons for holding the line at twelve." *The Supreme Court, 1969 Term—Right to Twelve-Man Jury: Constitutionality of Pretrial Prosecutorial Discovery*, 84 HARV. L. REV. 165, 167 (1970).

53. *Williams*, 399 U.S. at 103. "Our holding does no more than leave these considerations to Congress and the States, unrestrained by an interpretation of the Sixth Amendment that would forever dictate the precise number that can constitute a jury." *Id.* In a separate opinion, Justice Harlan dissented in *Baldwin*, and concurred in the result in *Williams*. *Id.* at 117. He was concerned that twelve jurors would not be required on federal juries. Justice Harlan indicated the Court "dilut[ed] constitutional protections" with an argument that was "much too thin to mask the true thrust" of the decision in *Williams*; namely, that the "'incorporationist' view of the Due Process Clause . . . must be tempered to allow the States more elbow room in ordering their own criminal systems." *Id.* at 118 (Harlan, J., dissenting).

54. *Ballew v. Georgia*, 435 U.S. 223, 226 (1978).

55. *Id.* at 226-27.

56. *Id.* at 230-31. The Court recognized that because "little empirical research had evaluated jury performance" when *Williams* was decided, "the [*Williams*] Court found no evidence that the reliability of jury verdicts diminished with six-member panels." *Id.* at 230. However, the Court noted of the *Williams* decision:

[It] generated a quantity of scholarly work on jury size. These writings do not draw or identify a bright line below which the number of jurors would not be able to function as required by the standards enunciated in *Williams*. On the other hand, they raise significant questions about the wisdom and constitutionality of a reduction below six.

*Id.* at 231-32 (footnote omitted).

57. *Id.* at 232-34. Less effective deliberation results in "inaccurate fact-finding and incorrect application of the common sense of the community to the facts." *Id.* at 232.

innocent persons,<sup>58</sup> and a cross-section of the community may not be represented by smaller juries.<sup>59</sup> After comparing the cost to defendants with the slight benefits to the State in allowing less than six jurors,<sup>60</sup> the Court decided that a five-person jury did not satisfy the Sixth Amendment requirements for a jury trial.<sup>61</sup>

The unanimity requirement of the common-law jury was questioned in *Johnson v. Louisiana*<sup>62</sup> and *Apodaca v. Oregon*,<sup>63</sup> a pair of opinions handed down the same day. The petitioners in *Apodaca* were convicted by non-unanimous twelve-person juries in Oregon.<sup>64</sup> The Court likened the unanimity requirement to the twelve-person requirement of the common-law jury in that unanimity does not "materially contribute" to the function of the jury.<sup>65</sup> Petitioners argued non-unanimous verdicts weakened the reasonable doubt standard, but the Court noted the standard did not arise from the Sixth Amendment.<sup>66</sup> The Court decided *Johnson* on the basis of the Fourteenth Amendment because the defendant was convicted before the Court's holding in *Duncan*.<sup>67</sup> Because the Sixth Amendment did not apply to his case, the Court considered whether Johnson's conviction by a non-unanimous jury violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Court explained the Due Process Clause never required unanimous jury verdicts,<sup>68</sup> and the Louisiana statute allowing non-unanimous verdicts by twelve jurors satisfied the Equal Protection Clause because it had a rational relationship to state objectives.<sup>69</sup> In these two cases, the Court

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58. *Id.* at 234-35. The possibility of acquitting a guilty person is greater with a larger jury, therefore "an optimal jury size can be selected as a function of the interaction between the two risks." *Id.* at 234. One study concluded "the optimal jury size was between six and eight." *Id.*

59. *Id.* at 236-37.

60. *Id.* at 243. There are substantial savings in utilizing six rather than twelve jurors, but there is little effect on backlogs and trial time. *Id.* at 244.

61. *Id.* at 245. Although most of the jury studies compared six- and twelve-member juries, the Court admitted it "[did] not pretend to discern a clear line between six members and five." *Id.* at 239.

62. 406 U.S. 356 (1972).

63. 406 U.S. 404 (1972) (plurality opinion).

64. *Id.* at 405-06. The Oregon defendants were convicted by votes of ten-to-two and eleven-to-one, representing 83% and 92% of the juries respectively. *Id.* at 406.

65. *Id.* at 410.

66. *Id.* at 411. The Court noted that "the rule requiring proof of crime beyond a reasonable doubt did not crystallize in this country until after the Constitution was adopted." *Id.*

67. *Johnson v. Louisiana*, 406 U.S. 356, 358-59 (1970). *Johnson* was convicted by a nine-to-three vote of the jury, or 75%, prior to the holding in *Duncan*; thus, the Sixth Amendment did not apply to his case. *Id.* at 358.

68. *Id.* at 359.

69. *Id.* at 363. Charles Torcia summarized the Court's holding: "[A] classification

upheld non-unanimous verdicts and allowed as little as seventy-five percent and eighty-three percent agreement on twelve-person juries.

The next logical question was whether unanimity was required in juries with less than twelve members. In another Louisiana case, *Burch v. Louisiana*,<sup>70</sup> the Court concluded that a non-unanimous verdict by a six-person jury violated the right to a jury trial protected by the Sixth Amendment.<sup>71</sup> Although seventy-five percent of a twelve-member jury proved sufficient,<sup>72</sup> eighty-three percent of a six-member jury did not. The Court admitted difficulty in justifying the decision,<sup>73</sup> but indicated a need to draw the line somewhere.<sup>74</sup> Because only two states allowed non-unanimous verdicts with six jurors, the Court concluded this would be a good place to draw the line.<sup>75</sup>

Michael Wayne Byrd, the defendant in *Byrd v. State*,<sup>76</sup> had a federal constitutional right to a trial by jury in an Arkansas court.<sup>77</sup> However, because Byrd was convicted by a unanimous six-person jury, his federal rights were not violated. The United States Supreme Court's interpretation of constitutional rights establishes a minimum level of protection that the states must afford. Therefore, the states are free to provide their citizens with equal or greater protection under their state constitutions.

## B. Right to Twelve Jurors Under the Constitutions of the Sister States

When presented with the task of interpreting Arkansas law, the Arkansas Supreme Court frequently considers the interpretation and

scheme which allows guilt to be predicated on a less-than-unanimous verdict in the case of some offenses, but requires unanimity in the case of more serious offenses, is not violative of the Equal Protection Clause." 3 CHARLES E. TORCIA, *WHARTON'S CRIMINAL PROCEDURE* § 387 (13th ed. 1991).

70. 441 U.S. 130 (1979). Petitioner was convicted by a jury vote of five-to-one, or 83%. *Id.* at 132.

71. *Id.* at 134.

72. *See supra* note 67.

73. *Burch*, 441 U.S. at 137. The Court noted it did not "pretend the ability to discern *a priori* a bright line below which the number of jurors participating in the trial or in the verdict would not permit the jury to function in the manner required." *Id.*

74. *Id.* at 137.

75. *Id.* at 138. Justice Rehnquist noted that "this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not." *Id.*

76. 317 Ark. 609, 879 S.W.2d 435 (1994).

77. The maximum prison sentence for the first DWI offense is one year. ARK. CODE ANN. § 5-65-111 (Michie 1993). Therefore, under *Baldwin v. New York*, the offense is non-petty and Byrd had a Sixth Amendment right to a jury trial. 399 U.S. 66, 69 (1970); *see supra* note 45.

application of similar provisions in sister states. Although the court is by no means bound by these interpretations, it has found persuasive the reasoning and results reached by other courts of last resort.<sup>78</sup> Indeed, in *Byrd v. State*, the Arkansas Supreme Court was persuaded by the Minnesota Supreme Court's interpretation of a state constitutional provision similar to article 2, section 7 of the Arkansas Constitution.<sup>79</sup> Therefore, this note considers the decisions of several state courts of last resort interpreting the right to a jury trial under their state constitutions.

The state constitutional treatment of the composition of juries varies greatly. Under the current interpretation of the federal right to a jury trial, the United States Constitution extends to defendants neither the right to a twelve-member jury nor a unanimous verdict, unless there are only six jurors. However, some state constitutions specifically provide for a unanimous verdict by twelve jurors in courts of record.<sup>80</sup> Other states give power to the legislature to regulate the jury.<sup>81</sup> Almost every state constitution has broad language guaranteeing the inviolate right to a trial by jury.<sup>82</sup> However, the language concerning juries in a few state constitutions, including the Constitution of Arkansas, has only broad language, which neither specifies the number of jurors nor specifically allows for legislation regarding this right.<sup>83</sup>

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78. See, e.g., *Jones v. Brinkman*, 200 Ark. 583, 587, 139 S.W.2d 686, 687 (1940); *Springfield v. Fulk*, 96 Ark. 316, 319, 131 S.W. 694, 695 (1910) (finding interpretation of similar statutes from other states persuasive but not binding).

79. See *infra* part IV.A.

80. See, e.g., GA. CONST. art. 1, § 1, ¶ xi(b) (providing for twelve jurors, yet allowing the legislature to determine the number in inferior courts); MO. CONST. art. 1, § 22 (allowing the legislature to provide for less than twelve jurors in courts not of record and non-unanimous verdicts in civil cases); S.C. CONST. art. V, § 18 (requiring twelve unanimous jurors in circuit courts); W. VA. CONST. art. 3, § 14 (providing for twelve jurors in criminal cases).

81. See, e.g., MINN. CONST. art. 1, § 6 (requiring twelve jurors in felony prosecutions, allowing legislature to determine the number of jurors greater than or equal to six in all other cases); N.Y. CONST. art. 6, § 18 (allowing legislature to determine composition of juries in non-indictable offenses).

82. See, e.g., ARIZ. CONST. art. 2, § 23; CAL. CONST. art. 1, § 16; CONN. CONST. art. 1, § 19; FLA. CONST. art. 1, § 22; IDAHO CONST. art. 1, § 7; IOWA CONST. art. 1, § 9; NEB. CONST. art. 1, § 6; NEV. CONST. art. 1, § 3; OHIO CONST. art. 1, § 5; OKLA. CONST. art. 2, § 19; PA. CONST. art. 1, § 6; S.C. CONST. art. 1, § 14; S.D. CONST. art. 6, § 6; TEX. CONST. art. 1, § 15; WASH. CONST. art. 1, § 21; WYO. CONST. art. 1, § 9.

83. See, e.g., ALA. CONST. art. 1, § 11; DEL. CONST. art. 1, § 4; ILL. CONST. art. 1, § 13; IND. CONST. art. 1, § 20; KAN. CONST. Bill of Rights § 5; KY. CONST. Bill of Rights § 7; VT. CONST. ch. I, art. 12.

Before the Supreme Court's decisions in *Williams*,<sup>84</sup> most of the state high courts considering the number of jurors required by their state constitutions held that twelve unanimous jurors were required for a verdict in criminal cases.<sup>85</sup> The opinions, though, are subject to the same criticism that the United States Supreme Court leveled at its earlier decisions. Just as in the early United States Supreme Court cases, the state courts accepted without question that, by definition, a jury was composed of twelve persons who must render a unanimous verdict.<sup>86</sup> After the United States Supreme Court decided *Williams v. Florida* and the cases following, a number of states reconsidered the interpretation of their own constitutions in light of the new understanding of the Sixth Amendment. The results are mixed.

Ohio's constitution, for example, does not specify the number of jurors, but the Supreme Court of Ohio previously held that its constitution required twelve jurors.<sup>87</sup> In *Work v. State*,<sup>88</sup> the Ohio Supreme Court held that a statute authorizing conviction by a jury of six violated the state's constitution. One hundred twenty-six years later, the court implicitly overruled its holding in *Work*. In *State ex rel. City of Columbus v. Boyland*,<sup>89</sup> the court held that a rule of criminal procedure providing for eight-person juries in misdemeanor cases<sup>90</sup> did not violate the constitution. The court reasoned that it could regulate the number of jurors because it is a procedural rather than a substantive issue.<sup>91</sup> Furthermore, the substantive federal right discussed in *Williams* and *Ballew* was not altered by the court's rule.<sup>92</sup> The *Boyland* decision may be distinguished from the *Work* decision. In *Boyland* the court was exercising its constitutional power, whereas in *Work* the legislature exceeded its power under the state constitution.

84. 399 U.S. 78 (1970). See *supra* notes 46-75 and accompanying text, for a discussion of the *Williams* decision and subsequent cases interpreting *Williams*.

85. See, e.g., *Jackson v. State*, 6 Blackf. 461 (Ind. 1843); *State v. Everett*, 14 Minn. 439 (1869); *Byrd v. State*, 2 Miss. (1 Howard) 163 (1835); *Doebler v. Commonwealth*, 3 Serg. & Rawle 237 (Penn. 1817). But see *State v. Bates*, 47 P. 78 (Utah 1896) (holding that the Constitution of Utah providing for trial by eight jurors, except in capital cases, did not violate the United States Constitution).

86. See, e.g., *Territory of N.M. v. Ortiz*, 42 P. 87 (1895).

87. OHIO CONST. art. 1, § 5 states: "The right of trial by jury shall be inviolate . . ."

88. 2 Ohio St. 296 (1853). The court held that "[t]he number must be twelve, they must be impartially selected, and must unanimously concur in the guilt of the accused before a conviction can be had." *Id.* at 304.

89. 391 N.E.2d 324 (Ohio 1979).

90. OHIO R. CRIM. P. 23(B).

91. *Boyland*, 391 N.E.2d at 326.

92. *Id.* The court reasoned that the rule allowing only eight jurors "merely prescribes the method by which the substantive right is to be exercised." *Id.*

Massachusetts also has a constitutional provision protecting the right to a jury trial.<sup>93</sup> In 1971, the Supreme Judicial Court of Massachusetts issued an advisory opinion to the governor holding that a statute allowing six-person juries in misdemeanor criminal cases would not violate that state's constitution.<sup>94</sup> Interpreting the state constitution, the court agreed with the reasoning of the United States Supreme Court in *Williams v. Florida*. Although the term "jury" was understood at the time of the framers to mean twelve people, the court suggested that the framers did not intend for the meaning of constitutional terms to be immutable.<sup>95</sup> The majority was convinced the number of jurors was not an essential attribute of the trial by jury.<sup>96</sup> However, one of the justices dissented because the ancient history of twelve jurors indicated the legislature could not reduce the number.<sup>97</sup>

Not all states have followed the *Williams* holding. The Rhode Island Supreme Court, interpreting the state constitution<sup>98</sup> in *Advisory Opinion to the Senate*,<sup>99</sup> rejected the United States Supreme Court's reasoning in *Williams*. The Rhode Island legislature proposed to reduce the number of petit jurors to six, but the Supreme Court of Rhode Island held to do so would violate the state constitution.<sup>100</sup> First, the court considered the history of the jury trial in Rhode Island from the first settlers of the New World.<sup>101</sup> Then, the court noted the considerable body of case law around the nation requiring twelve impartial, unanimous jurors for a valid verdict.<sup>102</sup> In contrast to the United States Supreme Court in *Williams*, this court refused to accept that the requirement of twelve jurors under that state's constitution

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93. MASS. CONST. pt. 1, art. 12 provides in part: "[T]he legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury."

94. Opinion of the Justices, 271 N.E.2d 335 (Mass. 1971).

95. *Id.* at 339. The court suggested that the framers did not intend to "freeze for all time by constitutional mandate the details of all then existing practice, or that they gave any significant attention to the particular number of jurors." *Id.*

96. *Id.* at 340.

97. *Id.* at 341 (Quirico, J., dissenting). The justice found persuasive a history "of almost six centuries when trial by jury has meant trial by a jury of twelve unless the persons entitled to such a trial agreed otherwise." *Id.* (Quirico, J., dissenting).

98. R.I. CONST. art. 1, § 15 provides: "The right of trial by jury shall remain inviolate. In civil cases the general assembly may fix the size of the petit jury at less than twelve but not less than six."

99. 278 A.2d 852 (R.I. 1971).

100. *Id.* at 853.

101. *Id.* at 855-57. In 1639 a "Portsmouth ordinance provided for trials by a jury of twelve." *Id.* at 855. Although some municipalities during the colonial period used six-person juries, "juries of twelve were required at all trials conducted in the General Court." *Id.* at 856.

102. *Id.* at 857.

was a "historical accident."<sup>103</sup> The opinion, however, was not unanimous. Justice Roberts, in dissent, expressed the opinion that the question was not whether the framers understood that a common-law jury was composed of twelve people. Instead, the question was whether the constitution prohibited the legislature from determining the number of jurors.<sup>104</sup> Considering the history of legislation regarding the number of jurors, Justice Roberts concluded it was wholly within the power of the legislature to determine this number.<sup>105</sup>

In *State v. Hamm*,<sup>106</sup> a case on which the Arkansas Supreme Court relied for its holding in *Byrd*, the Minnesota Supreme Court followed its pre-*Williams* case law in striking down a statute allowing six-person juries in misdemeanor cases.<sup>107</sup> The court reasoned it was not for the courts or the legislature to change the meaning of the constitution.<sup>108</sup> If the people wished to change the requirement of twelve jurors, they could do this only by amending the constitution.<sup>109</sup>

103. *Id.* at 858.

104. *Id.* at 860 (Roberts, J., dissenting).

105. *Id.* at 861 (Roberts, J., dissenting). Justice Roberts concluded his lengthy dissent:

I am of the opinion, then, that the Carolinian Charter of 1663 vested the Legislature of the colony with the power to prescribe the numerical constitution of a petit jury; that this power passed to the Legislature of this state at the time of our Declaration of Independence on May 4, 1776, and was exercised by the Legislature of this state until the adoption of our constitution in 1842; that the provisions of the inviolate clause, section 15 of article I, of our constitution neither expressly nor by necessary implication prohibit the exercise of that power by the Legislature pursuant to the provisions of article IV, section 10, of our constitution; and that, therefore, the question propounded to us should be answered in the negative as to both the Federal Constitution and the constitution of this state.

*Id.* at 866 (Roberts, J., dissenting).

106. 423 N.W.2d 379 (Minn. 1988) (plurality opinion).

107. *Id.* at 386. The court reasoned:

[A]lthough our constitution does not specifically spell out the number required to constitute a jury, this court has done so in its decision in *Everett*. Therefore, a 12-person jury is written into the constitution by decision of this court as if it were expressly stated in the original constitution itself.

*Id.* at 382 (citing *State v. Everett*, 14 Minn. 439 (1869)).

108. *Id.* at 383.

109. In 1988 the people of Minnesota followed the recommendation of their high court and amended the state's constitution. As amended, the constitution provides for twelve jurors in felony cases, but in all others the legislature may "provide for the number of jurors, provided that a jury have at least six members." MINN. CONST. art. 1, § 6 (amended 1988).



### C. The Right to Twelve Jurors under the Arkansas Constitution

The issue was first addressed in Arkansas in the 1848 case of *Larillian v. Lane & Co.*<sup>110</sup> In that case, the record showed that twelve jurors tried the case, but only eleven names were recorded on the verdict.<sup>111</sup> The court affirmed the judgment of the lower court because the issue of the number of jurors was not preserved properly for appeal.<sup>112</sup> However, in dictum, the court explained that the constitutional jury is the common-law jury consisting of twelve persons.<sup>113</sup>

The same year, in *State v. Cox*,<sup>114</sup> the court considered the constitutionality of an Act that created jurisdiction for justices of the peace.<sup>115</sup> Section 11 of the Act provided for six-person juries in the courts of justices of the peace. Once again, the issue of jury size was not properly before the court.<sup>116</sup> Nevertheless, the court indicated that the right to a trial by jury meant a right to be tried by twelve jurors.<sup>117</sup> In 1851, the court overruled *State v. Cox* and invalidated the entire Act on the grounds that it conflicted with the requirement for presentment and indictment in section 14 of the Arkansas Constitution's Bill of Rights.<sup>118</sup>

In a railroad case in 1877, the supreme court again commented on the meaning of the word "jury."<sup>119</sup> Although this too was dictum, the court

110. 8 Ark. 372 (1848).

111. *Id.* at 373.

112. *Id.* at 374.

113. *Id.* at 374-75. The court stated:

The trial by jury is a great constitutional right, and when the convention incorporated the provision into the constitution of the country, they most unquestionably had reference to the jury trial as known and recognized by the common law. It is a well ascertained fact, that the common law jury consisted of twelve men, and as a necessary consequence, since the constitution is silent upon the subject, the conclusion is irresistible that the framers of that instrument intended to require the same number.

*Id.*

114. 8 Ark. 436 (1848), *overruled in part on other grounds by* Eason v. State, 11 Ark. 481 (1851).

115. Act of Dec. 16th, 1846, 1846 Ark. Acts 58 (defining jurisdiction of justices of the peace).

116. *Cox*, 8 Ark. at 446-47. The court conceded "[t]his question does not properly present itself in the present case, but we have deemed it proper to say thus much upon it, for the guidance of justices of the peace in the exercise of the new jurisdiction with which they have been invested." *Id.* at 447.

117. *Id.* In dictum, the court wrote: "The constitutional provision securing the right of trial by a jury means a jury of twelve men, according to the known technical meaning of the term." *Id.*

118. Eason v. State, 11 Ark. 481, 486 (1851).

119. Cairo & Fulton R.R. v. Trout, 32 Ark. 17, 24-25 (1877).

continued to define the constitutional jury as a body of twelve persons.<sup>120</sup> The court reviewed an Act requiring a five-member commission to assess damage to property caused by railroads.<sup>121</sup> It upheld the Act against a challenge that it violated the 1836 Constitution because the right to a trial by jury was not an issue in the case.<sup>122</sup>

In 1886, in *Warwick v. State*,<sup>123</sup> the court considered the number of jurors required by the current constitution. In the trial court, the defendant was charged with selling alcohol to a minor.<sup>124</sup> After the evidence was presented and the jury instructions were read, the judge realized that only eleven jurors had been impaneled, so he ordered an additional juror to be added.<sup>125</sup> After Warwick objected to the addition of a juror, the court permitted the eleven jurors to retire and consider their verdict.<sup>126</sup> The jury found Warwick guilty.<sup>127</sup> On appeal, the State argued the defendant waived his right to twelve jurors when he objected to the addition of a juror.<sup>128</sup> The defendant argued he could not, and did not, constitutionally waive the right to twelve jurors.<sup>129</sup> Although the court cited previous cases interpreting the word "jury" as meaning twelve men, it held that, because a jury could be waived altogether, one could consent to be tried by less than twelve jurors.<sup>130</sup> Here, however, the defendant did not consent to fewer jurors by objecting to the addition of a juror.<sup>131</sup> Instead, the court held that the trial judge should have impaneled a new twelve-person jury.<sup>132</sup>

In 1917 the Arkansas General Assembly enacted a law providing for a non-unanimous jury verdict in civil cases.<sup>133</sup> The Act was held unconstitu-

120. *Id.* at 25. "The word 'jury' is here used in its common law sense, and means twelve men, and the Legislature cannot abridge the number." *Id.* (citing *State v. Cox*, 8 Ark. 446 (1848)). The court noted the right to a jury trial was not related to "cases of the kind now under consideration." *Id.*

121. *Id.*

122. *Id.*

123. 47 Ark. 568, 2 S.W. 335 (1886).

124. *Id.* at 569, 2 S.W. at 336.

125. *Id.* at 569-70, 2 S.W. at 336.

126. *Id.* at 570, 2 S.W. at 336.

127. *Id.*

128. *Id.* at 571, 2 S.W. at 336.

129. *Id.* at 570, 2 S.W. at 336.

130. *Id.* at 570-71, 2 S.W. at 336. "The trial jury still consists of twelve, unless the prisoner consents to be tried by a less number." *Id.* at 570, 2 S.W. at 336. It is interesting that this court reached the same conclusion as the United States Supreme Court would 44 years later in *Patton v. United States*. See *supra* part III.A.1.

131. *Warwick*, 47 Ark. at 572, 2 S.W. at 337.

132. *Id.*

133. Act of Feb. 8, 1917, 1917 Ark. Acts 229. Section 1 of the Act provided that "in civil cases the verdict of any nine of the jurymen trying the cause shall be accepted as the verdict of the jury." *Id.* at 230.

tional in *Minnequa Cooperage Co. v. Hendricks*<sup>134</sup> the same year it was enacted. The court found its previous decisions on the meaning of jury had "settle[d] beyond controversy" that a constitutional jury must consist of twelve impartial, unanimous jurors.<sup>135</sup> In dissent, Chief Justice McCulloch argued that the silence of the constitution on the number of jurors and the unanimity for a verdict suggested the legislature could regulate such matters.<sup>136</sup> Chief Justice McCulloch viewed constitutions as "declarations of principles and not specifications of details."<sup>137</sup> While acknowledging that virtually every case discussing the point accepted the requirement of twelve unanimous jurors, the Chief Justice disagreed with their holdings and would not have followed them.<sup>138</sup> Instead, he understood that the framers intended to allow the law to grow and develop rather than to fix the meaning of the constitutional jury as it was when the Arkansas Constitution was adopted.<sup>139</sup>

On November 6, 1928, the people of Arkansas amended article 2, section 7 of the Arkansas Constitution to allow non-unanimous verdicts in civil cases.<sup>140</sup> The amended section was first interpreted by the Arkansas

134. 130 Ark. 264, 197 S.W. 280 (1917).

135. *Id.* at 266-67, 197 S.W. at 281.

136. *Id.* at 270, 197 S.W. at 282 (McCulloch, C.J., dissenting).

137. *Id.* at 271, 197 S.W. at 283 (McCulloch, C.J., dissenting). Chief Justice McCulloch wrote:

The Declaration of Rights embodied in the Constitution merely provides that "the right of trial by jury shall remain inviolate." It does not specify what number of men shall constitute a jury, nor how the verdict shall be rendered. That is left, by the silence of the Constitution on the subject, to legislative regulations. The purpose of the framers of the Constitution was to preserve, in this State, the principle of trial by jury, and not to prescribe any particular form by which the remedy shall be applied. There is no magic in particular numbers, and it is difficult for me to believe that those who inserted the declaration of principles into our organic law intended to hamper the Legislature in reforming legal procedure from time to time so as to keep pace with advanced thought. Any other view constitutes the worship of mere form instead of preserving a principle.

*Id.* at 270, 197 S.W. at 282 (McCulloch, C.J., dissenting).

138. *Id.* (McCulloch, C.J., dissenting). The Chief Justice commented:

I am of course, aware of the fact that nearly all of the courts which have passed on the question, held that a constitutional guaranty of the right of trial by jury means a trial by a jury of twelve, and a unanimous verdict, according to the practice at common law. But I think the decisions are wrong. They follow each other blindly, and it seems to me to be the time to stop. Decisions on that subject do not become rules of property, and there is no obligation to follow them when found to be wrong.

*Id.* at 271, 197 S.W. at 283 (McCulloch, C.J., dissenting).

139. *Id.* at 270-71, 197 S.W. at 282 (McCulloch, C.J., dissenting).

140. ARK. CONST. art. 2, § 7 stated: "The right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law." However, the text was changed in 1928 by Amendment 16 to read as follows:

Supreme Court in a civil case, *Western Union Telegraph Co. v. Philbrick*.<sup>141</sup> In this case the trial judge, over the defendant's objection, decided to allow a trial before eleven jurors after one of the twelve jurors was excused.<sup>142</sup> The supreme court reversed because, although the court recognized that only nine jurors had to agree on a civil verdict, twelve jurors were required by the language of the constitution.<sup>143</sup>

Although the state constitutional requirement of twelve jurors seemed settled, the 1993 the General Assembly sought to relax the requirement by allowing six jurors in misdemeanor cases.<sup>144</sup> The law was challenged in 1994 when the Arkansas Supreme Court was asked once again to interpret the Arkansas constitutional provision guaranteeing the right to a trial by jury in a criminal case. The court had several cases on which to rely. These cases included the court's own decisions and the decisions of other states that were handed down both before and after the United States Supreme Court decision of *Williams v. Florida*.

#### IV. ANALYSIS OF THE COURT'S DECISION IN *BYRD V. STATE*

In *Byrd v. State*,<sup>145</sup> the Arkansas Supreme Court considered the constitutionality of Act 592 of 1993, which gave discretionary authority to trial judges to impanel juries of six people to decide misdemeanor cases.<sup>146</sup> Byrd was tried and convicted by a six-person jury.<sup>147</sup> He argued his conviction was invalid because the Act violated article 2, section 7 of the Arkansas Constitution.<sup>148</sup> Six justices agreed with Byrd and reversed his conviction.<sup>149</sup>

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The right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law; and in all jury trials in civil cases, where as many as *nine* of the jurors agree upon a verdict, the verdict so agreed upon shall be returned as the verdict of such jury, provided, however, that where a verdict is returned by less than *twelve* jurors all the jurors consenting to such verdict shall sign the same.

ARK. CONST. art. 2, § 7, *amended by* ARK. CONST. amend. XVI (emphasis added).

141. 189 Ark. 1082, 76 S.W.2d 97 (1934).

142. *Id.* at 1083, 76 S.W.2d at 97.

143. *Id.* at 1084-85, 76 S.W.2d at 97-98. Without discussing how it reached this conclusion, the court announced that "[t]his amendment to the Constitution clearly recognizes that a jury must consist of twelve jurors." *Id.* at 1084, 76 S.W.2d at 97.

144. ARK. CODE ANN. § 16-32-202(b) (Michie 1994).

145. 317 Ark. 609, 879 S.W.2d 435 (1994).

146. *Id.* at 610, 879 S.W.2d at 436.

147. *Id.*

148. Appellant's Abstract and Opening Brief at 13-14, *Byrd* (No. CR 94-167).

149. *Byrd*, 317 Ark. at 614, 879 S.W.2d at 438.

### A. Majority Opinion

The court first focused on the meaning of the word "jury" in article 2, section 7 of the Arkansas Constitution.<sup>150</sup> The term "jury" had been defined previously by the court as a fact-finding body of twelve people.<sup>151</sup> Two cases so holding, *Larillian v. Lane & Co.*<sup>152</sup> and *State v. Cox*,<sup>153</sup> were decided before the adoption of the 1874 Constitution. From these cases, the court reasoned that both the framers and voters adopting the new Arkansas Constitution in 1874 must have understood that a jury was composed of twelve people.<sup>154</sup> The court then considered a case decided after the adoption of the current constitution. In *Warwick v. State*,<sup>155</sup> a misdemeanor conviction was overturned because the jury consisted of only eleven persons.<sup>156</sup> Finally, in 1928 when the people of Arkansas amended article 2, section 7 of the Arkansas Constitution to allow for jury verdicts in civil cases where nine jurors agree, the court reasoned the people must have understood a jury was composed of twelve people.<sup>157</sup>

Next, the court considered the United States Supreme Court decision in *Williams v. Florida*.<sup>158</sup> The Arkansas court was not persuaded by the Court's reasoning and decided instead to follow the Minnesota Supreme Court decision in *State v. Hamm*.<sup>159</sup> Agreeing with the reasoning in *Hamm*, the court explained that to allow the legislature to decrease the size of the jury would be "to erode the fundamental right of trial by jury under our system of state government without a vote of the people."<sup>160</sup>

### B. Dissenting Opinion

Justice Hays would have held Act 592 constitutional because there is a strong presumption of constitutionality for legislative acts<sup>161</sup> and because

150. See *supra* note 140.

151. *Byrd*, 317 Ark. at 611-12, 879 S.W.2d at 436-37.

152. 8 Ark. 372 (1848).

153. 8 Ark. 436 (1848), *overruled on other grounds by* *Eason v. State*, 11 Ark. 481 (1851).

154. *Byrd*, 317 Ark. at 612, 879 S.W.2d at 437.

155. 47 Ark. 568, 2 S.W. 335 (1886).

156. *Byrd*, 317 Ark. at 612, 879 S.W.2d at 437.

157. *Id.* at 613, 879 S.W.2d at 437.

158. *Id.* (citing *Williams v. Florida*, 399 U.S. 78 (1970)). For a discussion of the *Williams* line of cases, see *supra* part III.A.2.

159. *Byrd*, 317 Ark. at 613, 879 S.W.2d at 437-38 (citing and discussing *State v. Hamm*, 423 N.W.2d 379 (Minn. 1988)).

160. *Id.* at 614, 879 S.W.2d at 438.

161. *Id.* at 614-15, 879 S.W.2d at 438 (Hays, J., dissenting) (citing *Arnold v. Kemp*, 306

the constitutional provision in question did not specify the number of jurors.<sup>162</sup> Even though the framers may have understood that a common-law jury was composed of twelve jurors, Justice Hays noted the common law is susceptible to change.<sup>163</sup> He agreed with Chief Justice McCulloch's dissenting opinion in *Minnequa Cooperage Co. v. Hendricks*<sup>164</sup> that the determination of the number of jurors should be left to the legislature.<sup>165</sup>

## V. SIGNIFICANCE

The Arkansas Supreme Court has established beyond question that a defendant in a criminal case has a right to be tried by twelve jurors. Although in civil trials the Arkansas Constitution provides for non-unanimous verdicts, dicta in the case law strongly suggests that a unanimous verdict is required in criminal cases. This issue was not properly before the court in *Byrd*, but the court's reliance on a long history of interpreting the term "jury" to mean twelve unanimous jurors indicates it would not permit the legislature to eliminate the requirement of unanimous verdicts. Although statutes are presumed constitutional, the court will not be reluctant to strike down a legislative act that restricts a right as old and fundamental as the right to a trial by jury.

The court adopted an interpretation that will prove costly to the State of Arkansas. The cost of impaneling twelve jurors is greater than the cost for six jurors. In *Ballew v. Georgia*, the United States Supreme Court accepted that there are substantial savings in using six jurors instead of twelve.<sup>166</sup> In addition to the direct cost, there may be indirect costs associated with larger juries. With more jurors, there is a greater likelihood for hung juries.<sup>167</sup> This, in turn, increases the cost to the state for retrying cases. Because of the higher cost, a prosecutor may decide not to retry the less serious cases. Furthermore, as jury size increases, the chance of acquitting a guilty defendant increases.<sup>168</sup> This implies another cost: the cost to society of releasing possibly guilty defendants.

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Ark. 294, 813 S.W.2d 770 (1991)).

162. *Id.* at 615, 879 S.W.2d at 438 (Hays, J., dissenting).

163. *Id.* (Hays, J., dissenting) (citing *Funk v. United States*, 290 U.S. 371 (1933); *Dimick v. Schiedt*, 293 U.S. 474 (1935)).

164. 130 Ark. 264, 270, 197 S.W. 280, 282 (1917) (McCulloch, C.J., dissenting).

165. *Byrd*, 317 Ark. at 616, 879 S.W.2d at 439 (Hays, J., dissenting).

166. 435 U.S. 223, 244 (1978).

167. *Id.* at 236.

168. *Id.* at 234.

On the other hand, as the size of the jury decreases, it is more likely that an innocent defendant will be convicted.<sup>169</sup> In *Byrd*, the court recognized that the cost to innocent defendants of the increased risk of conviction of a serious crime is greater than the benefit to the state in savings associated with fewer jurors.<sup>170</sup> However, as the seriousness of the offense decreases, this cost may be outweighed by the benefit to the state.

These conflicting interests could have been balanced properly by permitting the General Assembly to provide for six person juries in petty offenses—crimes in which the potential for imprisonment is less than six months.<sup>171</sup> This scheme would protect the rights of those accused of even minor offenses by affording them both a bench trial in municipal court and a jury trial *de novo* before a six-person jury in circuit court.<sup>172</sup> Although the savings to the state would not be as great as they would have been under Act 592 of 1993, there would be some savings to the state. An act allowing six-person juries in petty cases might have been constitutional because the

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169. *Id.* at 235. For a discussion of the increased probability of conviction in smaller juries, see David F. Walbert, Note, *The Effect of Jury Size on the Probability of Conviction: An Evaluation of Williams v. Florida*, 22 CASE W. RES. L. REV. 529, 545-47 (1971).

170. The majority noted that “[a] panel of six jurors for misdemeanor trials may seem economical and, therefore, desirable at first blush because less serious offenses are involved. However, many misdemeanors including the DWI offense at hand are serious and carry with them maximum jail terms of one year and substantial fines.” *Byrd*, 317 Ark. at 614, 879 S.W.2d at 438.

171. This would be in accordance with the recommendations of the American Bar Association. The Association recommends twelve unanimous jurors in all non-petty prosecutions. See STANDARDS FOR CRIMINAL JUSTICE, Standard 15-1.1 (2d ed. 1980). This standard provides:

Jury trial should be available to a party, including the state, in criminal prosecutions in which confinement in jail or prison may be imposed. The jury should consist of twelve persons, except that a jury of less than twelve (but not less than six) may be provided when the penalty that may be imposed is confinement for six months or less. The verdict of the jury should be unanimous. The comments to the standard note that “[t]he size of a jury — so long as there are at least six members — is generally a matter for each state to decide, although ‘a jury of twelve’ is recommended in *all* cases in which the sixth amendment right to jury trial attaches.” Regarding the unanimity of the verdict, the comment points to studies from which “it would appear that defendants fare less well under a less than unanimous verdict system, although the statistics are not conclusive on this point because it is not known how defendants whose trials end in a hung jury fare, as a group, on retrial.”

*Id.* at 15.15 (citations omitted).

172. The Arkansas Constitution protects the right to jury trial in all criminal cases. ARK. CONST. art. 2, §§ 7, 10. Although no jury trial is provided for in municipal courts, defendants have an almost absolute right to a trial *de novo* in circuit court. See ARK. CODE ANN. § 16-17-703 (Michie 1994). This right is limited to defendants who perfect their appeal under Arkansas Inferior Court Rule 9. *Edwards v. City of Conway*, 300 Ark. 135, 138, 777 S.W.2d 583, 584 (1989).

court in *Byrd* was not presented with the question whether a twelve-person jury is required in such cases. The court could have limited to non-petty cases their holding that the Arkansas Constitution requires twelve jurors.

The court was unlikely to choose this course because it suggested in *Byrd* that the Arkansas Constitution would have to be changed to allow for fewer jurors.<sup>173</sup> In a recent case the court foreclosed the possibility of six-person juries when it decided *Grinning v. City of Pine Bluff*.<sup>174</sup> In *Grinning*, the defendant was convicted of disorderly conduct and refusal to submit to arrest.<sup>175</sup> Although both of the crimes are truly petty offenses,<sup>176</sup> the court reversed and remanded because of the holding in *Byrd v. State*.<sup>177</sup>

Fortunately, the possibility of changing the Arkansas Constitution is not too remote for serious consideration. There is a movement to modernize the state's aging constitution through a constitutional convention.<sup>178</sup> This would give the people of the state the opportunity to say what they mean by "trial by jury." Either a constitutional amendment or a convention<sup>179</sup> should consider specifying the requirements for unanimity of verdict and number of jurors or setting minimum requirements and giving the General Assembly or the Arkansas Supreme Court the power to regulate these details.<sup>180</sup>

173. *Byrd*, 317 Ark. at 614, 879 S.W.2d at 438.

174. 322 Ark. 45, 907 S.W.2d 690 (1995) (4-3 decision).

175. *Id.* at 47, 907 S.W.2d at 690. Disorderly conduct is only a class C misdemeanor. ARK. CODE ANN. § 5-71-207(b) (Michie 1993). Resisting arrest is a class B misdemeanor. *Id.* § 5-54-103(b)(4) (Michie 1993).

176. A petty offense is one where the maximum penalty is confinement for six months or less. See *supra* note 171 and accompanying text. Betty Lou Grinning faced only a maximum of 120 days confinement for the class B and C misdemeanors. ARK. CODE ANN. § 5-4-401(b)(2)-(3) (Michie 1993). Justices Glaze and Brown and Chief Justice Jesson dissented because there was no objection to the six person jury at the time of trial. *Grinning*, 322 Ark. at 51, 907 S.W.2d at 693 (Glaze, J., dissenting).

177. *Grinning*, 322 Ark. at 49-50, 907 S.W.2d at 692.

178. Both the Senate and the House of Representatives of the 80th General Assembly proposed a convention because "many of the provisions of the Arkansas Constitution of 1874, as amended, are not reasonable or appropriate at the present time and do not reflect the needs of a modern and vital state government and should be revised." H.R. 1302, 80th Ark. Gen. Assembly, Reg. Sess. § 1 (1995); S. 247, 80th Ark. Gen. Assembly, Reg. Sess. § 1 (1995).

179. On December 12, 1995, Arkansas voters rejected a proposed constitutional convention. Rachel O'Neal, *Voters Say No to Convention*, ARK. DEMOCRAT-GAZETTE, Dec. 13, 1995, at 1A.

180. Governor Tucker's proposed Arkansas Constitution provided for unanimous verdicts in criminal trials, and would allow the legislature to provide for six-person juries in misdemeanor cases. JIM GUY TUCKER, THE ARKANSAS CONSTITUTION OF 1996: A CONSTITUTION FOR THE 21ST CENTURY art. 2 § 5 (1995), also available on the Internet from the Arkansas World Wide Web Homepage at [http://www.state.ar.us/proposed\\_constitution/constit.html](http://www.state.ar.us/proposed_constitution/constit.html). Although purporting to be "substantially similar to Article 2, Section 7, and Amendment 16 of the 1874 Constitution,"



The Arkansas Supreme Court's decision in *Byrd v. State* is firmly rooted in reason and precedent. The court refused to allow the legislature to infringe Byrd's right to have a twelve-person jury decide his guilt. However, truly petty offenses should be tried by only six jurors. After the decision in *Grinning v. City of Pine Bluff*, the only way to allow six-person juries in any criminal cases is for the people to change the constitution through convention or amendment.

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the proposed article is significantly less restrictive than the Arkansas Supreme Court's interpretation of Article 2, Section 7, and even less restrictive than the guidelines suggested by the American Bar Association. *Id.* cmt. to art. 2, § 5. *See also supra* note 171 and accompanying text.