

Opinion No. 72-31

July 3, 1972

BY: OPINION OF DAVID L. NORVELL, Attorney General Oliver E. Payne, Deputy Attorney General

TO: Alexander F. Sceresse, District Attorney, Second Judicial District, Bernalillo County Courthouse, Albuquerque, New Mexico

QUESTIONS

QUESTIONS

1. Does Article II, Section 12 of the New Mexico Constitution require a unanimous verdict in a criminal case?
2. May the legislature change this requirement?

CONCLUSIONS

1. Yes.
2. No; it may be changed only by constitutional amendment.

OPINION

{*53} ANALYSIS

Your questions are no doubt prompted by the May 22, 1972 Supreme Court decisions in **Johnson v. Louisiana**, U.S. , 92 S. Ct. 1620 (1972) and **Apodaca v. Oregon**, U.S. , 925 S. Ct. 1628 (1972). The major question in each of these cases was whether the state's constitutional provision allowing less than unanimous jury verdicts in criminal proceedings violated the United States Constitution. Each case was decided by a five to four decision and in each the court held that such state constitutional provisions did not violate the United States Constitution. **Apodaca v. Oregon, supra**, is the more relevant for our purposes.

The reasoning of the majority is based upon the legislative history of the Sixth Amendment. The majority points out that when the Sixth Amendment was first introduced by James Madison it provided for trial "by an {*54} impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction . . ." 1 Annuals of Congress 435 (1789). Although this form of the Sixth Amendment passed the House, it failed in the Senate and was sent to a Conference Committee. The House Conferees suggested that juries be defined as possessing "the accustomed requisites." 1 Letters and Other Writings of James Madison 492 (1865). However, the final draft which was

passed by both Congress and the states only provided: "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 . . ."

The majority in **Apodaca** concluded that there is nothing in the Sixth Amendment of the Federal Constitution as applied to the states through the Fourteenth Amendment which requires the states to provide for unanimous jury verdicts. This decision did not **require** the states to have less than unanimous verdicts. In the final analysis, whether unanimous jury verdicts are required in criminal cases, is determined by the constitution and laws of each state.

Article II, Section 12, New Mexico Constitution provides:

"The right of trial by jury **as it has heretofore existed** shall be secured to all and remain inviolate. In all cases triable in courts inferior to the district court the jury may consist of six. **The legislature may provide that verdicts in civil case may be rendered by less than a unanimous vote of the jury.**" (Emphasis added)

There is much precedent in New Mexico which holds that the proper interpretation of Article II, Section 12 is that the right to trial by jury is included in those rights which were in existence **prior** to the adoption of the New Mexico Constitution, i.e., common law rights. See **E. G. Seward v. Denver & R.G.R.R. Co.**, '17 N.M. 557, 131 P. 980 (1913); **State v. Holloway**, 19 N.M. 324, 146 P. 1066 (1914); **Young v. Vail**, 28 N.M. 324, 222 P. 912 (1924); **Gutierrez v. Gober**, 43 N.M. 146, 87 P.2d 437 (1939); **State ex rel Bliss v. Greenwood**, 65 N.M. 470, 315 P.2d 223 (1957); **Hamilton v. Walter**, 65 N.M. 470, 340 P.2d 407 (1959); **State v. McFall**, 67 N.M. 260, 354 P.2d 547 (1960); **Territory v. Ortiz**, 8 N.M. 154 (1895); **State v. Hernandez**, 46 N.M. 134, 123 P.2d 387 (1942).

Courts in other states which do not have specific constitutional provisions to the contrary have also stated that the right to trial by jury is included in those rights which existed at common law. **State v. Jutila**, 34 Idaho 595, 202 P. 566 (1921); **Austin v. City and County of Denver, Colo.**, 462 P.2d 600 (1970); **White v. White**, 108 Tex. 70, 196 S.W. 508 (1917); **Ex parte Bracklis**, 52 C.A. 274, 198 P. 659 (1921); **People v. Powell**, 87 Cal. 348, 25 P. 481 (1891); **Commonwealth v. Martin**, 379 Pa. 587, 109 A.2d 325 (1954);

And the common law requires unanimous jury verdicts in criminal cases. 3 W. Blackstone, **Commentaries on the Laws of England** 375 (1775); **Holdsworth, History of English Law** 318 (1927). The majority in **Apodaca v. Ortega, supra**, recognized this: ". . . the requirement of unanimity arose during the Middle Ages and had become an accepted feature of the common law jury by the 18th century." Other cases in state courts have held or inferred that jury verdicts must be unanimous unless specifically denied in their constitution. **Commonwealth v. McNeil**, 328 Mass. 436, 104 N.E.2d 153 (1952); **State v. Jutila, supra**; **Darven v. Hyatt**, 28 Colo. 129, 63 P.403

(1900); **Commonwealth v. Martin**, 379 Pa. 587, 109 A.2d 325 (1954); **Petitti v. State**, 2 Okla. Cr. 131, 100 P. 112 (1909); **Markum v. State**, 209 Miss. 135, 46 S.2d 88 (1950); **State v. Oswald**, 306 S.W.2d 559 (1957); **People v. Light**, 285 App. Div. 138 N.W. S.2d 262 (1955); **State v. Ring**, 52 Wash.2d 423, 325 P.2d 730 (1958); **Gidley v. State**, 19 Ala. App. 113, 95 So. 330 (1923); **People v. Bradshaw**, 5 C.A.2d 528, 43 P.2d 317 (1935); **State v. Bryan**, 120 Kan. 763, 245 P. 102 (1926); **Tacket v. Commonwealth**, Ky., 320 S.W.2d 299 (1959); **State v. Gardner**, 231 S.W. 1057 (No App. 1921); **State v. Keeble**, 49 S.D. 456, 207 N.W. 456 (1926); **Counts v. Commonwealth**, 137 Va. 744, 119 S.E. 79 (1923); **People v. Sanabria**, 42 Misc. {*55} 2d 464, 249 N.Y. S.2d 66 (1964); **People v. Kulep**, 29 Ill.2d 116, 193 N.E.2d 753 (1963). All these cases were decided under constitutional provisions similar to New Mexico's.

Far from authorizing less than unanimous verdicts in criminal cases, our constitution provides that "The legislature may provide that verdicts in **civil cases** may be rendered by less than a unanimous vote of the jury." By implication, this seems to preclude any legislative action to permit less than unanimous verdicts in **criminal** cases.

A recent New York case has held that a constitutional amendment to its state constitution would be necessary to change the requirement of unanimous verdicts. The court said, "It could not be denied that a constitutional amendment would be necessary to abolish less than unanimous jury verdicts in criminal cases tried before a jury. This is so . . . because Article I, Section 2 of the New York Constitution provides: 'Trial by jury, in all cases which it has heretofore been guaranteed shall be constitutional provision remain inviolate . . .'" **People v. Sanabria**, 42 Misc.2d 464, 249 N.Y. S.2d 66 (1964).

Our constitution contains almost identical language and our conclusion is the same. A unanimous jury verdict in criminal trials is a **constitutional** guarantee which may be changed only by amendment to the state constitution.