February 15, 1978

RE: 76-761 - Ballew v. Georgia

Dear Harry:

Please join me in Parts I-V of your opinion. For the time being at least, I would like to withhold judgment on Part VI.

Respectfully,

[Signature]

Mr. Justice Blackmun

Copies to the Conference
February 15, 1978

Re: No. 76-761, Ballew v. Georgia

Dear Harry,

I cannot agree that the decision in this case should have prospective effect only. It seems to me that the criteria established in our previous cases, discussed in Part VI of your proposed opinion, lead almost ineluctably to the conclusion that this decision must be given fully retroactive effect.

Thus, so far as I am concerned, the only question is whether we should state explicitly that the decision is fully retroactive or remain silent on the subject. Until the advent of the vogue of "prospectivity," in the 1960's, every decision of this Court was presumptively retroactive, and I assume that that presumption exists and that our silence on the subject would be generally understood as meaning that this decision is retroactive. On the other hand, the possibility exists that lawyers and courts would not so understand our silence, and accordingly I am inclined to favor an explicit statement making this decision retroactive.

The "next inevitable case" is already here in the form of cases being held for this one, and our decision of the retroactivity question, therefore, cannot be deferred.

Sincerely yours,

Mr. Justice Blackmun
Copies to the Conference

P. S. I am unalterably opposed to any suggestion, such as that contained in the sentence at about the middle of page 22 of your opinion, that a denial of certiorari has any significance whatsoever, let alone that it might imply approval of the judgment sought to be reviewed.
FILE COPY

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell
Circulated: 16 FEB 1978
Recirculated:

76-761 BALLEW v. GEORGIA

MR. JUSTICE POWELL, concurring.

I concur in the judgment of the Court, as I agree that use of a jury as small as five members, with authority to convict for serious offenses, involves serious questions of fairness. As the Court indicates, the line between five and six member juries is difficult to justify, but a line has to be drawn somewhere if the substance of jury trial is to be preserved.

I do not agree, however, that every feature of jury trial practice must be the same in both federal and state courts. Apodaca v. Oregon, 406 U.S. 404, 414 (1972) (Powell, J., concurring). As the Court's rationale today assumes full incorporation of the Sixth Amendment by the Fourteenth Amendment contrary to my view in Apodaca, I do not join the opinion. Also, I have reservations as to the wisdom – as well as the necessity – of the Court's heavy reliance on numerology derived from statistical studies. Moreover,
neither the validity nor the methodology employed by the studies cited was addressed in briefs or argument or by the courts below. */

For these reasons I concur only in the judgment.

*/ The Court acknowledged, in disagreeing with other studies, that "methodological problems" may "mask differences in the operation of smaller and larger juries". Ante at 14 and 19.
Mr. Justice Powell, concurring in the judgment.

I concur in the judgment of the Court, as I agree that use of a jury as small as five members, with authority to convict for serious offenses, involves serious questions of fairness. As the Court indicates, the line between five- and six-member juries is difficult to justify, but a line has to be drawn somewhere if the substance of jury trial is to be preserved.

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For these reasons I concur only in the judgment.

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\(^6\)The Court acknowledged, in disagreeing with other studies, that "methodological problems" may "mask differences in the operation of smaller and larger juries." *ante*, at 14 and 19.
Mr. Justice Powell, with whom Mr. Justice Rehnquist joins, concurring in the judgment.

I concur in the judgment of the Court, as I agree that use of a jury as small as five members, with authority to convict for serious offenses, involves serious questions of fairness. As the Court indicates, the line between five- and six-member juries is difficult to justify, but a line has to be drawn somewhere if the substance of jury trial is to be preserved.

I do not agree, however, that every feature of jury trial practice must be the same in both federal and state courts. *Apodaca v. Oregon*, 406 U. S. 404, 414 (1972) (Powell, J., concurring). As the Court’s rationale today assumes full incorporation of the Sixth Amendment by the Fourteenth Amendment contrary to my view in *Apodaca*, I do not join the opinion. Also, I have reservations as to wisdom—as well as the necessity—of the Court’s heavy reliance on numerology derived from statistical studies. Moreover, neither the validity nor the methodology employed by the studies cited was addressed in briefs or argument or by the courts below.*

For these reasons I concur only in the judgment.

*The Court acknowledged, in disagreeing with other studies, that “methodological problems” may “mask differences in the operation of smaller and larger juries.” *Ante*, at 14, 19–20.
February 16, 1978

Memorandum re: No. 76-761, Ballew v. Georgia

Dear Harry,

I agree with Potter that if we consider retroactivity at all, we must hold the six-person jury requirement to be retroactive.

The basis of our holding that five is not enough is that the risk of error and inconsistent adjudication of guilt is too substantial to justify any decrease of the number of jurors from six. I see no substantial countervailing costs to applying the six-person jury rule retroactively. First, as you note at 3 n.5, the five-person jury has been abolished in Fulton County as of March 24, 1976. Thus, almost everyone who could bring the jury issue here on direct review must already have done so. In addition, since the only persons who might have been convicted by a five-person jury could at most have been sentenced to one-year in prison, see op., at 6 n. 7, there is only the most limited possibility of some kind of long-delayed collateral attack. Indeed, I am not aware of any collateral consequences flowing from a misdemeanor conviction -- which is all that is at stake in Georgia, ibid. -- that are of sufficient importance to make it likely that persons will seek collateral relief from such convictions or that the state will seek to re-try a person whose conviction is reversed solely to reimpose such consequences. The situation in Louisiana may be different, but at present any prediction of vast numbers of retrials in that state is purely speculative. Therefore, it is much less likely than in many of our early cases which refused to hold a ruling retroactive that witnesses will be unavailable for retrial or memories dim, cf. Stovall v. Denno, 388 U.S. 293, 299 (1967), or that a substantial number of retrials will result from retroactive application of the six-person rule.
Moreover, this case is unlike either Carcerano v. Gladden, 392 U.S. 631 (1968), or Gosa v. Mayden, 413 U.S. 665 (1973), since in each of those cases a tribunal that was not presumptively unfair had passed sentence on the criminal defendant. It was this sentence that we refused to upset by retroactively requiring trial by jury (in Carcerano) or trial by civilian court (in Gosa). Here, the only judgment in the field is one by a five-person jury whose ability to reach a correct result is sufficiently in doubt that we are holding such a jury constitutionally insufficient.

Finally, I cannot agree that the concern with respect to "representation of minority groups," op. at 24, is irrelevant to the truth-finding function in obscenity cases. Certainly if we are searching for community standards, a representative cross-section of the community is an essential element of a fair and accurate trial. Thus, whatever may be the retroactivity rule for cases in general, I think the six-person jury rule must apply retroactively at least in obscenity cases.

Since, as Potter points out, the "next inevitable case" is already here, I agree with him that we should decide the retroactivity issue now and hold the six-person rule to be retroactive.

W.J.B., Jr.
February 16, 1978

Re: No. 76-761 - Ballew v. Georgia

Dear Potter:

I doubt if this is anything to get so excited about.

With my pre-circulation note of February 10 I indicated, I thought, that there were three possible choices, and that I would be guided by the reaction of the majority. Despite your teaching on presumptive retroactivity, the fact is that the Court has side-stepped the presumption and did so in the 1960's when you were a member of the Court. I am aware of your posture on these retroactivity decisions. I was long enough on the Court of Appeals to be fully aware of the confusion that existed, and still exists, among lower court federal judges on retroactivity issues. My suggestion that we meet the problem in Ballew was made in order to keep the confusion at a minimum and to save ourselves some wear and tear with still an additional case. Bill Brennan and John have now indicated a preference to say nothing about retroactivity. You are inclined to feel that we should decide in Ballew that the decision is retroactive. This is enough of an indication for me to drop Part VI from the opinion, and I shall have it rerun accordingly.

I understand your "unalterable opposition" expressed in your postscript, but I do not necessarily agree with it. I am also aware of all that has been written by Felix and others about the non-significance of a denial of certiorari. I presumed to insert the reference here only because the Georgia courts in these cases have made reference to the denial in Sanders and it bears upon the good faith of the State. Thus, for me in a case like this, with Williams v. Florida on the books, I think there is some significance and I reserve the right in future similar situations independently to comment accordingly.
You say that the "next inevitable case" is already here and that the retroactivity question "cannot be deferred." I try to make it a practice, before I circulate an opinion, to review pending holds. According to my records, and I have no reason to suspect that they are incorrect, there is only one hold thus far for Ballew. It is No. 76-1738, Sewell v. Georgia, considered at our September conference. Perhaps I cannot read, but it appears to me that the 5-person jury issue is not raised in Sewell. The case does present the issues as to scienter and obscenity vel non which the Conference decided should be sidestepped in Ballew.

Friday's conference lists contain two other cases that are probable holds for Ballew. The first is No. 77-790, Teal v. Georgia, on page 14. Here again, the 5-person jury issue is not raised, but the same other issues are. It therefore seems to me that this case, like Sewell, will not present the retroactivity question.

Also on for Friday is No. 77-915, Robinson v. Georgia, on page 20. This case does reach the 5-person jury issue, and the other issues as well. Perhaps this is the one you have in mind when you say that we now are compelled to reach the question of retroactivity.

Ironically, had we chosen to decide the obscenity issues in Ballew, and decided them in favor of the defense, the 5-person Georgia jury issue would have gone away for good. Whether there would be a court for that, I doubt and, in any event, I dare not predict.

I should point out that each of the three cases is brought here by the same counsel who represent Ballew.

Sincerely,

[Signature]

Mr. Justice Stewart

cc: The Conference
SUPREME COURT OF THE UNITED STATES

No. 76-761


On Writ of Certiorari to the Court of Appeals of Georgia.

[February —, 1978]

Mr. Justice Powell, with whom The Chief Justice and Mr. Justice Rehnquist join, concurring in the judgment.

I concur in the judgment, as I agree that use of a jury as small as five members, with authority to convict for serious offenses, involves grave questions of fairness. As the opinion of Mr. Justice Blackmun indicates, the line between five- and six-member juries is difficult to justify, but a line has to be drawn somewhere if the substance of jury trial is to be preserved.

I do not agree, however, that every feature of jury trial practice must be the same in both federal and state courts. _Apodaca v. Oregon_, 406 U. S. 404, 414 (1972) (Powell, J., concurring). Because the opinion of Mr. Justice Blackmun today assumes full incorporation of the Sixth Amendment by the Fourteenth Amendment contrary to my view in _Apodaca_, I do not join it. Also, I have reservations as to the wisdom—as well as the necessity—of Mr. Justice Blackmun’s heavy reliance on numerology derived from statistical studies. Moreover, neither the validity nor the methodology employed by the studies cited was subjected to the traditional testing mechanisms of the adversary process.* The studies relied on merely represent unexamined findings of persons interested in the jury system.

For these reasons I concur only in the judgment.

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*The opinion of Mr. Justice Blackmun acknowledges, in disagreeing with other studies, that “methodological problems” may “mask differences in the operation of smaller and larger juries.” _ante_, at 14. See also _id._, at 19-20.
3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-761

Claude D. Ballew, Petitioner,  
v.  
State of Georgia.

On Writ of Certiorari to the Court of Appeals of Georgia.

[February —, 1978]

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join, concurring in the judgment.

I concur in the judgment, as I agree that use of a jury as small as five members, with authority to convict for serious offenses, involves grave questions of fairness. As the opinion of MR. JUSTICE BLACKMUN indicates, the line between five- and six-member juries is difficult to justify, but a line has to be drawn somewhere if the substance of jury trial is to be preserved.

I do not agree, however, that every feature of jury trial practice must be the same in both federal and state courts. Apodaca v. Oregon, 406 U. S. 404, 414 (1972) (POWELL, J., concurring). Because the opinion of MR. JUSTICE BLACKMUN today assumes full incorporation of the Sixth Amendment by the Fourteenth Amendment contrary to my view in Apodaca, I do not join it. Also, I have reservations as to the wisdom—as well as the necessity—of MR. JUSTICE BLACKMUN’s heavy reliance on numerology derived from statistical studies. Moreover, neither the validity nor the methodology employed by the studies cited was subjected to the traditional testing mechanisms of the adversary process.* The studies relied on merely represent unexamined findings of persons interested in the jury system.

For these reasons I concur only in the judgment.

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February 17, 1978

No. 76-761 - Ballew v. Georgia

Dear Bill,

Please add my name to your separate opinion in this case.

Sincerely yours,

[Signature]

Mr. Justice Brennan

Copies to the Conference
March 14, 1978

PERSONAL

Re: 76-761 - Ballew v. Georgia

Dear Lewis:

I can join your concurring opinion if you will

(a) Add to the third line from the end, after "was", the following:

"subjected to the traditional testing mechanisms of the adversary process."

(b) Following the asterisk of the penultimate sentence add:

"The studies relied on represent unexamined opinions of persons interested in the jury system, and nothing more."

Our holding is sheer, arbitrary ipse dixit, and I would as soon rely on palm reading as on professors' numbers. Indeed, I find no basis to support six but not five after Williams. This case will render us the "butt" of more quips than Ham Jordan has received!

There really is no rational basis for not following and applying Williams. You see, therefore, I will not mind your rejecting my suggestions so I can "explode" on my own.

Regards,

[Signature]

Mr. Justice Powell
March 16, 1978

Re: 76-761 - Ballew v. Georgia

Dear Lewis:

I join.

Regards,

[Signature]

Mr. Justice Powell

Copies to the Conference
March 20, 1978

Re: No. 76-761 - Ballew v. Georgia

Dear Lewis:

Because of the changes made in the recirculation of your opinion concurring in the judgment, I am adding the following paragraph to my opinion's footnote 10, page 9.

"We have considered them carefully because they provide the only basis, besides judicial hunch, for a decision about whether smaller and smaller juries will be able to fulfill the purpose and functions of the Sixth Amendment. Without an examination about how juries and small groups actually work, we would not understand the basis for the conclusion of Mr. Justice Powell that 'a line has to be drawn somewhere.' We also note that the Chief Justice did not shrink from the use of empirical data in Williams v. Florida, 399 U.S. 78, 100-102, 105 (1970), when the data were used to support the constitutionality of the six-person criminal jury, or in Colgrove v. Battin, 413 U.S. 149, 158-160 (1973), a decision also joined by Mr. Justice Rehnquist."

If you or either of those who have joined you wish the case to go over, please feel free to ask Mr. Putzel and Mr. Cornio to hold it up from tomorrow's calendar.

Sincerely,

[Signature]

Mr. Justice Powell

cc: The Conference

I don't think any reply is called for. Bob
March 20, 1978

Re: No. 76-761 - Ballew v. Georgia

Dear Lewis:

Because of the changes made in the recirculation of your opinion concurring in the judgment, I am adding the following paragraph to my opinion's footnote 10, page 9.

"We have considered them carefully because they provide the only basis, besides judicial hunch, for a decision about whether smaller and smaller juries will be able to fulfill the purpose and functions of the Sixth Amendment. Without an examination about how juries and small groups actually work, we would not understand the basis for the conclusion of Mr. Justice Powell that 'a line has to be drawn somewhere.' We also note that the Chief Justice did not shrink from the use of empirical data in Williams v. Florida, 399 U.S. 78, 100-102, 105 (1970), when the data were used to support the constitutionality of the six-person criminal jury, or in Colgrove v. Battin, 413 U.S. 149, 158-160 (1973), a decision also joined by Mr. Justice Rehnquist."

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Sincerely,

[Signature]

Mr. Justice Powell

cc: The Conference
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76-761 Ballew v. Georgia