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CRIMINAL PROCEDURE-WAIVER OF UNANIMOUS JURY VERDICT IN FEDERAL COURTS

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CRIMINAL PROCEDURE—WAIVER OF UNANIMOUS JURY VERDICT IN FEDERAL COURTS—Defendant was tried for two counts of felony. After twenty-seven minutes of deliberation the jury was unable to agree on either count, and the court asked the parties whether they would accept a majority verdict. Counsel for the defendant, after consulting with his client, consented, as did the United States Attorney. The jury found defendant guilty on both counts by a majority of nine to three and ten to two respectively. The court ordered a verdict to be filed and imposed a sentence. On appeal, *held,* reversed. A unanimous verdict is "the inescapable element of due process" and cannot be waived under any circumstances. Aside from the disability springing from the "due process" concept, the mandatory wording of rule 31(a) of the Federal Rules of Criminal Procedure[1] might also prevent waiver. *Hibdon v. United States,* (6th Cir. 1953) 204 F. (2d) 834.

The leading case of *Patton v. United States*[2] held that the constitutional guaranty of jury trial did not define a jurisdictional element of tribunals, but only a privilege for the protection of the accused. The Supreme Court ruled that a constitutional jury was composed of three essential elements: (1) a twelve-man panel, (2) the presence of a judge having power to instruct jurors as to the law and advise as to the facts, and (3) unanimity of the verdict. The absence of one element was held tantamount to the complete absence of a constitutional jury,[3] and since one can waive the whole by a plea of guilty, the Court allowed waiver of a part (twelve-man panel) when made in a manner consistent with the requirement of a fair trial. This decision has been said to have opened the door to waiver of at least unanimity of the verdict.[4] Indeed, even superintend-

[1] "The verdict shall be unanimous. It shall be returned to the judge in open court." 18 U.S.C. (1946).

[2] 281 U.S. 276, 50 S.Ct. 253 (1930).

[3] For an article criticizing this reasoning and predicting a strict limitation of the Patton case to its facts, see Grant, "Waiver of Jury Trial in Felony Cases," 20 CALIF. L. REV. 132 at 152 (1931).

[4] Robinson, "The Proposed Federal Rules of Criminal Procedure," 27 J. AM. JUD. SOC. 38 at 47 (1943); Moscowitz, "Some Aspects of the Trial of a Criminal Case in the Federal Court," 3 F.R.D. 380 at 392 (1944); HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 70 (1951); ROTTSCHAEFER, CONSTITUTIONAL LAW 789 (1939).

ence of the judge with power to instruct has been held waivable.[5] The rationale of the *Patton* decision rests on a significant factor: today's penalties are not as brutal and excessive as at common law and the need for over-technical rules to prevent convictions resulting in grievous punishment for trivial crimes is no longer felt. To escape the compelling logic of the *Patton* decision, the court of appeals in the principal case sets up the unanimity rule as being indispensable to the moral certainty of guilt before conviction and therefore impossible to surrender, regardless of the historical setting. In attempting to reconcile its decision with the *Patton* case, the court misconstrues the value and functions placed by the *Patton* opinion on the elements of jury trials. The *Patton* decision shows that rigid common law procedural practices were not so much designed to ensure moral certainty of guilt and fairness which could not be attained by any other rule, as to erect a "barrier" against despotic acts of the state and to prevent, when possible, disproportionate retribution. The change of conditions has made the barrier obsolete, since adequate procedural safeguards protect one from dangers faced at common law and punishment is humanely graduated to the gravity of the offense. This is the essence of the *Patton* case. A reasonable doubt could be eliminated without the concurrence of all the jurors in the verdict, and this was felt to be the case at common law as well. The reports of coercive practices to induce unanimity can thus be explained.[6] The "barrier" was an obnoxious obstacle to justice in some cases and was forcibly torn down. A majority of states provide, either in their constitutions or in statutes, for majority verdicts in criminal cases.[7] It is significant that the question was never presented to the Supreme Court whether majority verdicts in felony cases violated the due process clause of the Fourteenth Amendment. On the other hand, the Supreme Court has stated by way of dictum that majority verdicts in state courts do not violate due process.[8] It is to be noted that in these cases statutes are being upheld which do not even give a defendant a choice. The question of a voluntary waiver would seem to be of less moment from the due process standpoint than an outright denial of choice. On principle and authority it would seem to follow that the notion that a unanimous verdict is "the inescapable element of due process" is a fallacy. Commentators have exposed the harm flowing from the unanimity rule in modern times, especially in view of a radi-

[5] Iowa v. Sereg, (Iowa 1941) 296 N.W. 231 (trial judge left after jury retired, without objection of defendant; jury later asked for more instructions from substitute judge, defendant objected, and instructions were withheld), noted 40 MICH. L. REV. 113 (1941); Simons v. United States, (9th Cir. 1941) 119 F. (2d) 539 (substitution of judge sanctioned after arguments to the jury but before verdict), noted 21 NEB. L. REV. 171 (1942). Rule 25, Federal Rules of Criminal Procedure, 18 U.S.C. (1946), does not seem to forbid a waiver.

[6] 1 HOLDSWORTH, HISTORY OF ENGLISH LAW, 3d ed., 318 (1922). In early English courts, when a majority of the jury concurred, failure of others to bow was considered malicious and punishable. See also Lindsey, "The Unanimity of Jury Verdicts," 5 VA. L. REG. 133 (1899); Eastman, "The History of Trial by Jury," 3 NAT. B.J. 87 at 98 (1945).

[7] A list of state constitutional or statutory provisions can be found in commentary to §355 in A.L.I. CODE OF CRIMINAL PROCEDURE (1930).

[8] Jordan v. Massachusetts, 225 U.S. 167 at 176, 32 S.Ct. 651 (1912).

cally new conception of criminal law as seeking the prevention of serious crimes through the punishment of activities conducive to them.[9] The unanimity rule is not followed in Europe.[10] The American Law Institute has disowned the rule.[11] The circuit court contention that rule 31(a) of the Federal Rules of Criminal Procedure forbids a majority verdict under any circumstances applies too narrow an interpretation to a set of rules expressly designed to streamline the conduct of criminal trials.[12] Such mandatory language should be read in the light of rule 2,[13] construed by the courts as inviting a liberal construction of the rules to effectuate their purpose. The rules can be said simply to provide for cases where the question of waiver does not arise without changing existing law.[14] The inclusion of a waiver of unanimity provision in the rules was sponsored by many of the bench and bar.[15] It must be conceded, however, that the abandonment of the unanimity rule entails technical problems for which new standards must be provided. The change to majority verdicts has not come about in the states through judicial decisions. Questions of degree arise as to the kind of majority needed, the offenses covered, and the possible exclusion of capital crimes, which can best be coped with by the legislature. In this light the hesitation of federal courts to follow the path opened by the *Patton* decision can perhaps be understood and appreciated.

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[9] Haralson, "Unanimous Jury Verdicts in Criminal Cases," 21 MISS. L.J. 185 (1950). The author ably shows the effects of the "veto power" granted one juror. The legislative intent is often thwarted by compromises entered into by the state because of the prohibitive burden of proof placed on the prosecutor, and the difficulty of obtaining unanimous verdicts in cases not involving crimes directly against personality or property.

[10] Mannheim, "Trial by Jury in Modern Continental Criminal Law," 53 L.Q. REV. 99 (1937).

[11] A.L.I. CODE OF CRIMINAL PROCEDURE (1930). Sec. 355 proposes verdicts concurred in by five-sixths for non-capital felonies, and by two-thirds for misdemeanors.

[12] The note to rule 31(a) in 18 U.S.C. (1946) says: "This rule is a restatement of existing law and practice." This is indicative of a lack of intent to exclude possible waivers under the Patton rule. However, the court of appeals in the present case noted that the adoption of the rule many years after the Patton case and the non-inclusion of a proposed rule allowing a waiver of unanimity prove an intent not to depart from the unanimity rule.

[13] ". . . They shall be construed to secure simplicity in procedure, fairness in administration and elimination of unjustifiable expense and delay."

[14] Rule 29(a) of the First Preliminary Draft of the Federal Rules of Criminal Procedure had provided that by written stipulation of the parties, approved by the court, a verdict might be by a stated majority of the jurors. This rule was not included in the final draft, but none of the criticisms found are based on constitutional grounds. On the contrary, many commentators on the first draft of the rules expressed the opinion that rule 29(a) embodied only existing law. See, e.g., Berge, "The Proposed Federal Rules of Criminal Procedure," 42 MICH. L. REV. 353 at 371-372 (1943); Moscowitz, "Some Aspects of the Trial of a Criminal Case in the Federal Court," 3 F.R.D. 380 at 392 (1944); Robinson, "The Proposed Federal Rules of Criminal Procedure," 27 J. AM. JUD. SOC. 38 at 47 (1943). This may suggest that reasons other than validity or desirability of the rule caused its rejection from the final draft.

[15] For recommendations by federal judges for "utilization . . . of the provisions of existing law which permit . . . the parties to stipulate . . . to accept verdicts of a majority of the jurors" see REPORT OF THE JUDICIAL CONFERENCE OF THE COMMITTEE ON SELECTION OF JURORS 11, appx. II, 2-3 (Sept. 1942). The provision is recommended also in PROCEEDINGS OF THE ATTORNEY GENERAL'S CONFERENCE ON CRIME 172-173, 317, 360, 453 (1934).