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James M. O'Brien
West Virginia University College of Law

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INQUIRIES INTO THE NUMERICAL DIVISION
OF JURIES: ELLIS V. REED

The defendant Ellis was convicted for embezzlement in a North Carolina court. After presentation of the evidence, the jury retired for deliberations. Unable to arrive at a verdict after one hour, the jury requested additional instructions from the court. Upon consideration of the court's instructions, the jury then retired for another hour only to return, once again unable to agree on a verdict. At this point the court inquired into the numerical division of the jury. Informed that the jury stood eleven to one, the court instructed the jury members they had a duty to reconcile their differences and reach a verdict if such could be done without the surrender of their respective conscientious convictions. Retiring once again, the jury returned eight minutes later with a verdict of guilty. On appeal, the United States Court of Appeals for the Fourth Circuit held that an inquiry by a state trial court into the numerical division of the jury is not violative of the accused's right to trial by an impartial jury.¹

The court reached this anamolous result by reasoning that the rule of Brasfield v. United States,² which prohibits inquiry by a trial court into the numerical division of the jury, is not a constitutional interpretation of the Sixth Amendment right to trial by an impartial jury³ applicable to the states by reason of the Fourteenth Amendment.⁴ Instead the court designated the Brasfield rule as one of judicial administration binding only upon the federal court system, determining that the property of such inquiry by state trial courts is best left to the state appellate courts.⁵

¹ Ellis v. Reed, 596 F.2d 1195 (4th Cir. 1979). The North Carolina Court of Appeals found no error. 33 N.C. App. 667, 236 S.E.2d 299 (1977). The Supreme Court of North Carolina denied discretionary review. This appeal to the Fourth Circuit followed denial of habeas corpus relief by the United States District Court for the Eastern District of North Carolina.
² 272 U.S. 448 (1926).
³ "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ." U.S. Const. amend. VI.
⁴ "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. Const. amend. XIV, § 1.
⁵ 596 F.2d 1195, 1200 (4th Cir. 1979).
This conclusion, however, is inconsistent with the clear statement of the Supreme Court in Brasfield that:

We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal. Such procedure serves no useful purpose that cannot be attained by questions not requiring the jury to reveal the nature or extent of its division. Its effect upon a divided jury will often depend upon circumstances which cannot properly be known to the trial judge or appellate courts and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear in some degree, serious although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded. Such a practice, which is never useful and is generally harmful, is not to be sanctioned.\(^6\)

In addressing the above holding, however, the Ellis court asserted that Brasfield must be read in light of the prior Supreme Court decision of Burton v. United States.\(^7\) Regarding inquiries into numerical jury divisions, the Burton court stated: "[W]e do not think that the proper administration of the law requires such knowledge or permits such a question on the part of the presiding judge."\(^8\) It was this dicta\(^9\) which first caused a split among federal

\(^6\) 272 U.S. at 450.
\(^7\) 196 U.S. 283 (1905).
\(^8\) Id. at 308 (emphasis added).
\(^9\) In Burton, the defense requested that the court give certain instructions to the jury. The court gave the requested instructions but commented to the jury that the defendant's requested instructions were abstract propositions of law which were given in connection with the charge to perhaps amplify it. The jury then retired and deliberated for thirty-six hours before returning for additional instructions. At this point the court inquired into the numerical division of the jury and then gave an Allen instruction on the jury's duty to agree. Thereafter the court ordered the jury to retire and to deliberate again. The defense sought to have the court further instruct the jurors that the defense's prior requested instructions were not abstract or general propositions of law, but rather requests which affected the case then on trial with reference to the facts proved in the case. The Supreme Court determined that the trial court's refusal to so instruct the jury before they again retired constituted reversible error. Having made this determination, the Court had already ruled on the issue essential to the pertinent assignment of error. The Court's subsequent comments on the impropriety of the trial court's inquiry into jury numbers relied upon by the court in Ellis, was not essential to resolving the point in controversy, and as such was only dicta.
circuits as to the constitutional/administrative dichotomy of jury inquiries and ultimately led to the Brasfield decision. Noting that the Brasfield opinion cited no provision of the Constitution, the Fourth Circuit relied upon the above Burton language to support the contention that Brasfield was not a constitutional interpretation but rather an administrative procedural rule applicable only to the federal courts.

While the majority's argument against the constitutional stature of Brasfield has some merit, this position is considerably weakened in view of the Supreme Court's decision in Duncan v. Louisiana. In Duncan the Court held that trial by jury in criminal cases is fundamental to the American judicial system, and that the Fourteenth Amendment guarantees a right to jury trial in all state criminal cases which would come within the Sixth Amendment's guarantee were they to be tried in federal courts. In the

10 After Burton a split developed among the federal circuits as to whether the inquiry into jury division constituted grounds for reversal. For the view that inquiry into numerical division required reversal after Burton, see Weideman v. United States, 10 F.2d 745, 746 (8th Cir. 1926) (decided nine months before Brasfield, the court found the inquiry to be reversible error citing Burton); Nigro v. United States, 4 F.2d 781 (8th Cir. 1925) (trial court's inquiry as to whether a predominance of individual jurors felt one way or the other, and the elicited answer that there was a predominance, was found to be error); Stewart v. United States, 300 F. 769 (8th Cir. 1924) (inquiry as to whether the jury was evenly divided or whether there was a larger preponderance one way or another, and the elicited response that there was a larger preponderance one way, was found to be error with the court citing Burton for the proposition that inquiry into jury division was prohibited); St. Louis & S.F.R. Co. v. Bishard, 147 F. 496 (8th Cir. 1906) (inquiry and the elicited response that there has been no change since the first ballot held to be error). In support of the position that inquiry, while improper, is not prejudicial error see Quong Duck v. United States, 293 F. 563 (9th Cir. 1923) (no error where the inquiry is limited to the proportion of division and expressly excludes any inquiry into the jury's leaning towards guilt or innocence) (reversed on other grounds); Bernal v. United States, 241 F. 339 (5th Cir. 1917) (inquiry and the elicited response of eight to four with no indication as to which verdict the majority favored was found not to constitute error).

11 596 F.2d at 1197.
13 Id. at 159-62.

[T]here is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision and should not be subject to the Fourteenth Amendment jury trial requirement . . . But the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment.
context of Duncan the constitutional stature of the Brasfield decision becomes apparent. In Brasfield the inquiry into jury numbers was determined to be a threat to the fair and impartial conduct of the trial because it brings to bear an improper influence upon the jury. In holding that such an inquiry itself constitutes grounds for reversal, the Court sought to preserve the purity of the jury’s deliberations. As a criminal defendant’s right to a jury trial is a fundamental one guaranteed under the Constitution, it follows that: “Preservation of the purity of the jury’s deliberations is furtherance of a constitutional objective, not merely the exercise of supervisory power for a desirable but nonconstitutional purpose.”

Although the Ellis majority acknowledged Duncan, it relied instead upon Cupp v. Naughten to support the contention that...

We need not, however, settle in this case the exact location of the line between petty offenses and serious crimes. It is sufficient for our purposes to hold that a crime punishable by two years in prison is, based on past and contemporary standards in this country, a serious crime and not a petty offense. Consequently, appellant was entitled to a jury trial.

In North Carolina, embezzlement of property received by virtue of employment is punishable as in cases of larceny. Larceny by servants and other employees is punishable by fine or imprisonment for not less than four months nor more than ten years. N.C. Gen. Stat. §§ 14-90, 14-74 (1969 Replacement Vol.). The trial court sentenced Ellis to a term of imprisonment of three to five years. 33 N.C. App. 667, 236 S.E.2d 299 (1977). Clearly the crime with which Ellis was charged falls within the Duncan serious crime category, thereby entitling Ellis to trial by an impartial jury.

596 F.2d at 1201-02 (dissenting opinion). In dissent, Judge Winter argues that while the Brasfield Court did not identify the basis of its decision (constitutional or supervisory) a close review of the language employed by the Court makes it clear that Brasfield is a constitutional interpretation.

272 U.S. at 450.

596 F.2d at 1202 (dissenting opinion).

The majority notes the fundamental nature to which the right to trial by an impartial jury has been raised by Duncan, but it contends that inquiry into numerical division is essentially procedural in nature and as such allows for reasonable deviation by state courts from the federal standard. Here the court is attempting to bring its decision within the parameters of the implications of the Supreme Court’s decisions in Johnson v. Louisiana, 406 U.S. 356 (1972) (holding that a jury verdict may be less than unanimous), and Williams v. Florida, 399 U.S. 78 (1970) (holding that states may provide for juries of less that twelve).

414 U.S. 141 (1973). The Ellis majority relied on Cupp in support of the proposition that state courts may make their own determinations as to whether a particular procedural practice, such as inquiry into jury division, comports with sound judicial procedure. A state may follow a procedure that is universally con-
states may deviate from federal procedural standards. However, it is difficult to accept the proposition that a practice which the Supreme Court has condemned as coercive and as bringing an improper influence upon the jury is not violative of the fundamental right to trial by an impartial jury. Therefore even in the context of a Cupp analysis, it is evident that an inquiry by a state trial court into the numerical division of the jury is impermissible.

A few of those states\(^9\) which have held that Brasfield is applicable only to federal courts have reasoned that an inquiry into the jury's numerical division is proper and valuable because it enables the trial judge to ascertain the likelihood of eventual agreement among the jurors. However, it is absurd to justify the inquiry on a basis which serves as the foundation for the presiding judge's determination of whether to give the jury an Allen charge\(^9\) in the

derminated by the federal courts, yet the federal courts still may not overturn a resulting conviction unless the state's procedure is violative of some right guaranteed the defendant by the Fourteenth Amendment.


\(^9\) In Allen v. United States the Supreme Court approved a supplemental charge given to the jury when it returned to the courtroom for additional instructions, 164 U.S. 492 (1896). The substance of the additional charge was:

[In] a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.

Id. at 501.

The propriety of an Allen charge itself poses an issue beyond the scope of this comment. For cases criticizing Allen type charges see: Burroughs v. United States, 365 F.2d 431 (10th Cir. 1966); Thaggard v. United States, 354 F.2d 735 (5th Cir. 1965); Walker v. United States, 342 F.2d 22, 28 (5th Cir. 1965) (dissenting opinion); Jenkins v. United States, 330 F.2d 220, 221 (D.C. Cir. 1964) (Wright, J. dissenting opinion); Andrews v. United States, 309 F.2d 127, 129 (5th Cir. 1962) (dissenting opinion); Green v. United States, 309 F.2d 852, 854 (5th Cir. 1962); Huffman v. United States, 297 F.2d 754 (5th Cir. 1962); State v. Randall, 137 Mont. 534, 353
hopes of coercing them into a decision. A proper balancing of any advantage against the danger of coercion illustrates that the inquiry is not to be allowed.

Contrary to the Fourth Circuit’s holding in Ellis v. Reed, the better rule is that an inquiry by a state trial court into the numerical division of the jury in a criminal trial is a violation of the defendant’s right to trial by an impartial jury as guaranteed by the Sixth and Fourteenth Amendments. When Brasfield is read in light of the fundamental position to which jury deliberations were raised in Duncan, it becomes evident that the Supreme Court’s prohibition against such inquiries is a constitutional ruling intended to apply to the states through the Fourteenth Amendment.

The Fourth Circuit, furthermore, could easily have overturned Ellis and still have avoided the determination that Brasfield applies a constitutional standard to the states. The circumstances of the inquiry itself were sufficient reason to reverse the conviction. After the trial court had inquired into the numerical division of the jury it proceeded to give the jury the following Allen charge:

Well, I presume, ladies and gentlemen, that you realize what a disagreement means; that the time of the Court will again have to be consumed in the trial of this action. I don’t want to force you or coerce you or attempt to do so in any way to reach a verdict but it is your duty to try to reconcile your differences and to reach a verdict if it can be done without the surrender of anyone’s conscientious convictions; and you heard the evidence in this case, and a mistrial will mean that another jury will have to be selected to hear this case and evidence again; and it’s long and complicated. The Court recognizes sometimes that there are reasons why jurors cannot agree, but I want to emphasize the fact that it is your duty to do whatever you can to reason this matter over as reasonable men and women and attempt to reconcile your differences if it is possible without the surrender of any conscientious convictions on the part of any member of the jury. I will let you resume your deliberations and see if you can reach a verdict.\(^{21}\)

The jury then retired and returned a verdict of guilty eight minutes later.


\(^{21}\) 596 P.2d at 1196.
Clearly eight minutes does not provide a jury with the requisite amount of time to reconcile differences as to the merits of the case without the surrender of conscientious convictions. The hasty return of a verdict can only indicate that the one juror constituting the minority succumbed to the pressure placed upon him to conform by the court's inquiry and its subsequent Allen charge. Though the Ellis court declined to hold that the Brasfield rule applies to the states, it did acknowledge the Jenkins \(^{22}\) “totality of the circumstances” test. The court more appropriately could have held that the totality of the circumstances indicated that the trial court’s inquiry had a coercive effect upon the jury, where the jury returned a conviction only eight minutes after the trial court's inquiry into numerical division and its giving of the subsequent Allen charge.

The Fourth Circuit, in discussing the Jenkins test and the coercive effect of jury inquiries stated: “Courts have most frequently found such coercive effect when the inquiry is accompanied by an Allen instruction.”\(^{23}\) The West Virginia Supreme Court of Appeals adopted this approach in Lennox v. White.\(^{24}\) In Lennox the trial court inquired into the numerical division of the jury and having been informed that they were divided eleven to one proceeded to give an Allen charge. On appeal the court held that the trial court's inquiry followed by the giving of an Allen instruction constituted error.\(^{25}\) Here the court reasoned that the trial court's inquiry into the jury's division supplied the context for the Allen charge which immediately followed, and made the court's “admonition much more emphatic concerning the one than it was

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\(^{22}\) In Jenkins v. United States the federal trial judge did not inquire into the numerical division but did comment to jury members deadlocked after two hours of deliberation that they had to reach a decision when they resumed deliberations the following day. 380 U.S. 445 (1965). On appeal, the Supreme Court stated: “we conclude that in its context and under all the circumstances the judge's statement had the coercive effect attributed to it.” Id. at 446. (emphasis added)

The Ellis court noted the Jenkins totality of the circumstances test but did not apply it to the facts of the case. Rather, the court determined that the inquiry was essentially procedural in nature and that state courts can properly deviate from federal procedural standards. The Ellis court thus relied upon the principles of federalism. 596 F.2d at 1199-1200.

\(^{23}\) 596 F.2d at 1199.

\(^{24}\) 133 W. Va. 1, 54 S.E.2d 8 (1949).

\(^{25}\) Id. at 7, 54 S.E.2d at 11.
concerning the eleven." When such an inquiry immediately precedes an *Allen* charge, the inquiry acts to direct the weight of the subsequent instruction to the minority rather than to the entire jury. Therefore inquiry into a jury's numerical division when immediately followed by an *Allen* type charge is an invasion by the court into the province of the jury. Short of a complete prohibition against inquiry into numerical division, the *Lennox* rule is the best alternative.

Under either of the above approaches, Ellis should have been granted habeas corpus relief. An assertion that the Constitution does not bar a state trial court's inquiry into the numerical division of the jury cannot be reconciled with the fundamental right of a criminal defendant to trial by an impartial jury. By condoning the trial court's intrusion into the province of the jury, the *Ellis* court has jeopardized a fundamental right of criminal defendants.

*James M. O'Brien*

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23 Id. at 6, 54 S.E.2d at 11.