Memorandum

To: Chair and Members of the Judiciary Committee of the Vermont House of Representatives
From: Richard T. Cassidy, Rich Cassidy Law, P.C.
Date: May 7, 2021
Re: Safe, efficient and fair access to the right to a civil jury trial

Right now, and into the foreseeable future, Vermonters with civil claims are largely being denied their constitutional right to a Jury Trial.

"Article 12. [Trial by jury to be held sacred]

That when any issue in fact, proper for the cognizance of a jury is joined in a court of law, the parties have a right to trial by jury, which ought to be held sacred."

The question before lawmakers right now is how to restore the essence of this right, not whether to make permanent changes to the jury system.

Yesterday, House Judiciary learned:

- Many Courts are closed for civil trials because they are not COVID-19 safe for 12 jurors.
- Seating six jurors would be more efficient and open more Courthouses to access.
- Civil cases are second in the order of priority to criminal cases.

1) Steps Need to Be Taken Immediately to Restore Civil Jury Trials

In this COVID-19 ReStart period, juror safety is appropriately a top priority and that is not going to change anytime soon. At best, our future with respect to the COVID-19 virus is uncertain. As Professor Nicholas A. Christakis[1] testified to the Committee, it is quite likely that we will suffer setbacks with COVID-19 in the fall of 2021. Even if, as the Professor predicts, the epidemiological crisis is over by the end of the 2021, Covid-19 will still be endemic -- that is to say, widespread-- even though it should no longer be a crisis of pandemic proportion. It will be a chronic problem that will continue to frighten a significant portion of our population. As Professor Christakis noted, it may well be until 2023 before a new normal is established.

[1] Nicholas A. Christakis, M.D., Ph.D., M.P.H, is the Sterling Professor of Social and Natural Science, Internal Medicine & Biomedical Engineering at Yale University. He is a sociologist and physician who conducts research in the areas of social networks and biosocial science. He directs the Human Nature Lab. He is the author of a book about the COVID-19 pandemic, ***Apollo's Arrow: The Profound and Enduring Impact of Coronavirus on the Way We Live*** (New York: Little Brown Spark, 2020).

Juries are intended to represent a cross section of our population. No particular group -- like those who are concerned about the risk of getting Covid-- can properly be excluded from our juries.

Potential jurors and jurors need to be reassured that our judicial system is doing **everything it possibly can** to protect their health.

It is obvious that our courts have their hands full, given the fact that it has been 14 months and no state jury trial of any kind has yet occurred. It is true that the mere prospect of trials has moved the criminal docket, but that prospect can't be maintained long without actual trials occurring.

Obviously, the priority of the Judiciary has to be on getting criminal jury trials going. But resuming civil trials is very important as well. Civil jury trials have become rare, with something on the order of 20 such trials a year occurring in the years before the pandemic. But they drive the civil docket.

Without them, the powerless in our society who have been wronged by the callous nature of the insurance claims settlement process or by large corporate entities, will simply go without remedy. These people - injured in accidents or jobless due to discrimination-- are not wealthy. They cannot afford to wait for justice.

Reducing jury size to 6 jurors would be a major step towards restoring civil jury trials. By reducing the size of juries to 6, the size of the panels from which they are drawn (the venire) could correspondingly be cut in half. The current Unit Plan for Jury Trials in Chittenden County is an example of what this can mean. The plan calls for summoning 54 partially pre-qualified jurors in three panels of 18 per day of jury selection. The Court plans to allow each side 30 minutes to question each panel. That's an average of 1.6 minutes per juror. Essentially, it means one or two questions and answers per potential juror. Somewhere, the lawyers will also be given time to photograph each potential juror.

If juries were cut to 6, only panels of 27 or so should be required. Two groups, one of 13 and one of 14, could easily be questioned together, allowing 45 minutes per side. This would be a far more practical selection procedure.

And jurors, court officers, witnesses, and even lawyers and judges, would have twice as much room within which to be socially distant.

Reducing injury size to 6 offers will greatly increase the likelihood of resuming jury trials soon.

2) The Vermont Supreme Court has never decided that a jury in a civil case must consist of 12 members.

The constitutional context for this moment must be considered.

The Vermont Constitution does not specify the number of jurors required in a civil case. It says only:

> That when any issue in fact, proper for the cognizance of a jury is joined in a court of law, the parties have a right to trial by jury, which ought to be held sacred.

VT Const. CH I, Art. 12.

It is correct that on several occasions, the Vermont Supreme Court has suggested that in a jury in a criminal case must consist of 12 citizens:

> We do not mean to intimate that the Vermont Constitution permits less than twelve jurors absent the defendant's stipulation; rather, we believe that the decision to stipulate to an eleven-person jury is a "tactical" or "strategic" one that can be made by counsel with the defendant's implied consent.

State v. Machia, 155 Vt. 192, 199 (1990).

But the considerations in criminal trials are far different from those in civil cases. This is reflected by the burden of proof, beyond reasonable doubt, and stems from the underlying principle of criminal law that "it is better that ten guilty persons escape than that one innocent suffer." William Blackstone, *Commentaries on the Laws of England* at 359 *(J.B. Lippincott Co., Philadelphia, 1893).*

The same considerations do not apply in civil court, where, for example, the typical burden of proof is beyond a preponderance of the evidence, that is to say, "more likely than not."

It is true that in 1855 Vermont Supreme Court wrote that:

> We have no doubt, the 'right of trial by jury' spoken of in the constitution, and which it is said 'ought to be held sacred,' means a jury as at common law, which consists of twelve men, and that wherever a constitution guaranties 'the right of trial by jury,' it is not competent for a legislature to reduce that number to six, or any less number than twelve; for the very theory of a trial by jury requires the unanimous consent of twelve men to the verdict.

Lincoln v. Smith, 27 Vt. 328, 358-9 (1855).

It is simply not correct to understand that every word in a judicial opinion is law that lower courts are bound to follow. It is the "holding" of a court's decision that is the "law," not what it merely writes in an opinion in passing. The word "holding" is defined as "A court's determination as a matter of law **pivotal** to its decision: a principal drawn from such a decision." B. Garner, *Black's Law Dictionary 8th Edition* at 749 (emphasis added). *Dicta,* on the other hand, is not what a court decided, but is a shortening the Latin phrase *obiter dictum* meaning "A judicial comment mand while delivering a judicial

opinion, but one that is unnecessary to the decision in the case and therefore not precedential. Id. at 1102. It has also been defined as "something said by the way, that is, something said in passing." 4 *The Oxford Dictionary* 626 (2nd ed 1989).

The case of *Lincoln v. Smith* did not decide how many jurors the Vermont Constitution requires in a civil case. You do not have to take my word for it. In a case decided in 1990, the Vermont Supreme Court described its earlier opinion. It wrote:

> The most significant of our early cases is *Lincoln v. Smith, 27 Vt. 328 (1855)*, where the plaintiff challenged the lack of a twelve-person jury in a justice of the peace court. The Court held that the availability of a jury on appeal in the county court cured any deficiency.

In re Vermont Supreme Court Administrative Directive No. 17, 154 VT. 392, 400 (1990).

Plainly, *Lincoln* did not decide how many jurors were required in a civil case, since it decided instead that the availability of a jury on appeal meant no jury at all was required in a justice of the peace court.

Vermont trial courts are not bound to follow the language of *Lincoln v. Smith*. If the question of six-person juries reaches the Vermont Supreme Court, it can decide whether to follow the *Lincoln*'s twelve-person language, based on its own best judgment about what the Vermont Constitution requires.

Given the dated idea of *Lincoln* that only "men" should serve on juries, and the need of the Courts to get with reopening in a safe way, it is reasonable to expect that the Court would not follow *Lincoln.*

It is also appropriate to understand that what is said in a judicial dissent, such as Justice Dooley's dissent in *State v. Machia*, 155 Vt. at 200, is not the law. As then United States Chief Justice Charles Hughes stated in 1936, "'A dissent in a Court of last resort is an appeal...to the intelligence of a future day...' In other words, a justice might feel that the decision goes against the rule of law and hopes that similar decisions in the future will be different based on arguments listed in their dissent." M. Kelly, *The Purpose of Dissenting Opinions in the Supreme Court,* (ThoughtCo, 2019) https://www.thoughtco.com/the-purpose-of-dissenting-opinions-104784

If there is an appeal from a six-person jury verdict, it would not be reasonable to expect that, during the period of an appeal, Vermont trial courts would not follow a six-person jury statute. Until there is a ruling from the Vermont Supreme Court, each trial court judge would be free to use his or her own judgment about what the Constitution requires as noted require a 6- or 12-person jury.

3) The Social Science about whether 12 or 6 person jurors are better is ambiguous.

Studying jury decisions is notoriously difficult. There is no such thing as a controlled study. Juries operate live. They make real decisions, in almost every case, they do so inside a closed jury room inaccessible to researchers.

The study cited by opponents of H. 417, P. Higginbotham, & S. Gensler, *Opponents of the Six-person Jury Better by the Dozen: Bringing Back the Twelve-Person Civil Jury*, Judicature, (2020) (hereinafter cited as "*Better by the Dozen")* is not the report of original primary research. It is a rehash of earlier research and opinion, written by advocates of the 12-person jury rule. Certainly, the lead author, Judge Higginbotham, a retired U.S. Circuit Court of Appeals Judge. Is a respected jurist. But he is not a social scientist.

The research cited in *Better by the Dozen* is primarily articles is critical of the social science research relied upon *by* the US Supreme Court in upholding the constitutionality of six-person state court criminal juries in *Williams v. Florida.* 399 U.S. 78 (1970). The article notes that:

> In *Williams*, the Supreme Court held that the tradition of 12-person juries was a 'historical accident' unnecessary to affect the purposes of the jury system, and holy without 'significance except to mystics.' The Court held that's smaller juries were constitutional so long as they provided the same function as a traditional twelve-person jury. Based on its reading of the social-science literature of the day, the Court saw no loss of functionality, and therefore no reason to prevent states from pursuing the cost savings many claimed smaller juries would deliver.

Id. at *3.*

Better by the Dozen goes on to acknowledge that in 1973 the U.S. Supreme Court "held in *Colgrove v. Battin*, [413 U.S. 149, 157-58 (1973),] that the 7th Amendment permitted six-person juries in civil cases, embracing the same functional approach it developed in Williams*." Id.*

The article acknowledges that since *Williams and Colgrove*, juries in federal courts have been vary generally reduced in size, such that largest group of trials in its sample size (61.4 %) began with only 8 jurors.

What *Better by the Dozen* does not show is that given the smaller size of federal juries since 1973, somehow, the sky is falling. Despite the criticism the article showers on smaller juries, the federal trial system remains successful

In the end, the social science on 6-person vs. 12-person juries is simply not conclusive.

For all these reasons, I urge the Committee to advance a creative, temporary solution to get Vermont back on the path the civil trials as soon as it is practicable.

The Massachusetts Supreme Court just ordered six-member civil juries, down from 12, during their ReStart period.

It is my sense that if a defendant were to challenge a law along these lines, the Vermont Court would resolve these issues on an expedited basis and its analysis would turn on the facts of today, when we suffer the effects of a global pandemic, not those of 1855, when the practice was to seat “12 men.”