No. _____

In the

Supreme Court of the United States

BILLY R. LEWIS
Petitioner

vs.

THE STATE OF LOUISIANA
Respondent

_____

On Petition for a Writ of Certiorari to
The Louisiana Fourth Circuit Court of Appeal

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PETITION FOR WRIT OF CERTIORARI

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Question Presented*

Does the right to a jury trial guaranteed by the Sixth Amendment, as applied to the States through the Fourteenth Amendment, allow a criminal conviction to stand on a nonunanimous jury verdict?

*NOTE: This issue is pending before this Court in *Evangelisto Ramos v. Louisiana*, No. 18-5924, (pet. for *cert*. filed 9/7/18) (distributed for conference of 1/11/19).

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Petition for Certiorari

Billy R. Lewis petitions for a writ of certiorari to review the judgment entered below by Louisiana Fourth Circuit Court of Appeal in *State v. Lewis*, 16-0224 (La. App. 4 Cir. 12/29/16), 209 So. 3d 202, *writ denied*, 17-K-0340 (La. 9/14/18), 251 So. 3d 1087.

Opinions Below

The published opinion of the Louisiana Fourth Circuit Court of Appeal is reported at 16-0224 (La. App. 4 Cir. 12/29/16), 209 So. 3d 202, *reh'g denied*, (1/18/17), and is appended to this Petition at A1. The Louisiana Supreme Court's order and judgment denying discretionary review is reported at 17-K-0340 (La. 9/14/18), 251 So. 3d 1087 and is appended at A27.

Jurisdiction

The Louisiana Supreme Court rendered judgment on September 14, 2018. On December 6, 2018, this Court granted the Petitioner's timely filed motion for an extension of time until January 14, 2019, in which to file this Petition. Accordingly, this Court has jurisdiction to review the judgment below. Sup. Ct. R. 13(1); 28 U.S.C. § 1257.

Authority Involved

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Section 17(A) of Article I of the Louisiana Constitution (now repealed) provided, in relevant part: "A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict."

Article 782 of the Louisiana Code of Criminal Procedure (now repealed) provided, in relevant part: "Cases in which the punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict."

Statement of the Case

By a vote of 10 to 2, a jury in a Louisiana state court found Billy R. Lewis guilty of two counts of murder alleged to have occurred in 2002, and the trial court sentenced him to a mandatory term of life without parole. This was Billy Lewis's second trial. His first trial also ended in nonunanimous verdicts, but the conviction was vacated on other grounds.[1] Mr. Lewis appealed his second conviction, arguing, among other things, that the nonunanimous verdicts and the state law provisions[2] that authorize such verdicts violate his Sixth Amendment right to a jury. As the appended rulings show, the Fourth Circuit rejected this claim on the merits, holding it foreclosed by the Louisiana Supreme Court's decision in *State v. Bertrand*,[3] which, in turn, held that the claim was foreclosed by this Court's decision in *Apodaca v. Oregon*.[4] The Louisiana Supreme Court thereafter denied discretionary review.

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[1] *State v. Lewis*, 12-1021 (La. 3/19/13), 112 So. 3d 796.

[2] *See* LA. CONST. art. I, § 17 (repealed); LA. CODE CRIM. PROC. ANN. art 782(A) (repealed).

[3] 08-2215 (La. 3/17/09), 6 So. 2d 738.

[4] 406 U.S. 404 (1972).

Reason for Granting the Petition

The Sixth Amendment requires that a jury verdict be unanimous, and the Fourteenth Amendment imposes that requirement on verdicts rendered in criminal trials in state courts.

A. *Apodaca* can no longer stand in the way of the conclusion that the federal right of a criminal defendant to be found guilty only by unanimous vote of the jury applies equally to criminal defendants in state courts.

As Mr. Lewis argued below, both before and after the trial, his nonunanimous verdicts and Louisiana's nonunanimous jury-verdict system violate the right to a jury trial guaranteed by the Sixth and Fourteenth Amendments. The Louisiana Fourth Circuit found this argument foreclosed by the Louisiana Supreme Court's decision in *State v. Bertrand,*[5] which, in turn, concluded that this challenge is foreclosed by this Court's 1972 plurality decisions in *Apodaca v. Oregon*[6] and its companion case *Johnson v. Louisiana.*[7] To the extent the plurality decisions in those cases ever stood for any particular legal tenets, those tenets have been completely disavowed by this Court's decisions in the ensuing 35 years, and it is now clear that a state-court conviction premised on less than a unanimous vote of the jury is unconstitutional.

In deciding whether the unanimous juries were constitutionally mandated in Oregon, this Court, in *Apodaca*, had to answer two questions: First, does the Sixth Amendment right to a jury trial generally include the right to a unanimous verdict? Second, does the right to a jury trial guaranteed by the Sixth Amendment apply equally to the States as it does in the federal system? A majority of the justices answered both questions affirmatively, yet the Court affirmed the Oregon state court's

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[5] 08-2215 (La. 3/17/09), 6 So. 2d 738.

[6] 406 U.S. 404 (1972).

[7] 406 U.S. 356 (1972).

rejection of a Sixth Amendment challenge to the constitutionality of Oregon's nonunanimous-verdict system. The Court affirmed only because of Justice Powell's unique belief that although unanimity is constitutionally mandated in a federal court as a component of the Sixth Amendment, that aspect of the constitutional right did not apply in a state court. As a result of that position, Powell's vote to affirm added to the votes of the four justices who, unlike Powell, did not believe that unanimity was of constitutional stature.

As justice Brennan explained in dissent:

> Readers of today's opinions may be understandably puzzled why convictions by 11-1 and 10-2 jury vote are affirmed in [*Apodoca*] when a majority of the Court agrees that the Sixth Amendment requires a unanimous verdict in federal criminal jury trials and a majority also agrees that the right to jury trial guaranteed by the Sixth Amendment is to be enforced against the States according to the same standards that protect that right against federal encroachment. The reason is that, while my Brother POWELL agrees that a unanimous verdict is required in federal criminal trials, he does not agree that the Sixth Amendment right to a jury trial is to be applied in the same way to State and Federal Governments.[8]

Six years after *Apodaca*, however, a clear majority of the Court eschewed Justice Powell's theory of partial, selective incorporation in favor of full, selective incorporation,[9] and more recently, in *McDonald v. Chicago*, the Court affirmed that incorporated Bill of Rights protections have identical application against state and federal governments.[10] In a footnote in *McDonald*, this Court acknowledged *Apodaca*'s unique exception to the now-settled rule of incorporation, but noted that

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[8] *Johnson*, 406 U.S. at 395-96 (Brennan, J., dissenting opinion for both *Johnson* and *Apodoca*).

[9] *See Crist v. Bretz*, 437 U.S. 28, 37-38 (1978) (when an aspect of an incorporated guarantee of the Bill of Rights is "a settled part of constitutional law" and protects legitimate interests of the accused, it must apply with equal force to the states).

[10] 561 U.S. 742, 763-66 (2010).

the holding was "the result of an unusual division among the Justices, not an endorsement of the two-track approach to incorporation."[11]

To the extent any doubt remains on the question of incorporation, this Court appears to be ready to put those doubts to rest in *Timbs v. Indiana*, 17-1091, which was argued on November 28, 2018, and which addressed whether the Eighth Amendment's excessive-fines clause applies to the states.[12] The Justice's apparent collective view on the specific question as well as the general view of incorporation were summed up by Justice Gorsuch's statement: "[H]ere we are in 2018 still litigating incorporation of the Bill of Rights. Really?"[13]

It is likewise clear that unanimity is, in fact, a component of the Sixth Amendment right to a jury trial.[14] Indeed, this Court has already recognized that right in cases involving state court convictions.[15] Hence, there can be no question that *Apodaca*, which had never been more than a bare

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[11] *Id.* at 766 n.14.

[12] *Timbs v. Indiana*, 84 N.E.3d 11790 (Ind. 2017), *cert granted*, 138 S. Ct. 2650 (6/18/18).

[13] Amy Howe, *Argument Analysis: Court appears ready to rule that Constitution's bar on excessive fines applies to the states*, SCOTUSblog (Nov. 28, 2018, 2:44 PM), http://www.scotusblog.com/2018/11/argument-analysis-court-appears-ready-to-rule-that-constitutions-bar-on-excessive-fines-applies-to-the-states.

[14] *Andres v. United States*, 333 U.S. 740, 748 (1948) ("Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply."); *Richardson v. United States*, 526 U.S. 813, 817 (1999) ("a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element"). *See Southern Union Co. v. United States*, 567 U.S. 343, 344 (2012) (recognizing as a "longstanding tenet[s] of common-law criminal jurisprudence" that criminal accusations against a defendant should be "'confirmed by the unanimous suffrage of twelve of his equals and neighbours.'") (quoting *Blakely v. Washington*, 542 U.S. 296, 313-14 (2004) (in turn quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)); *United States v. Booker*, 543 U.S. 220, 238 (2005) (likewise quoting *Blakely*); *United States v. Gaudin*, 515 U.S. 506, 510 (1995) (likewise quoting Blackstone).

[15] *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) ("As we have, unanimously, explained, the historical foundation for our recognition of these principles extends down centuries into the common law. "To guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," … trial by jury has been understood to require that "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the

outcome with no majority opinion, can no longer stand in the way of applying settled principles of Fourteenth Amendment incorporation to the Sixth Amendment's guarantee of a unanimous jury verdict. In other words, the Fourth Circuit's decision and the Louisiana Supreme Court's decision in *Bertrand* are contrary to constitutional law and the decisions of this Court.

B. The recent passage of a ballot initiative amending Louisiana's constitution by prospectively eliminating nonunanimous jury verdicts does not render the question moot. Indeed, this Court's intervention is now even more essential.

In November 2018, the citizens of Louisiana voted to abolish the constitutional and statutory provisions that allowed for criminal verdicts to be premised on less than a unanimous vote of the jurors. The new law, however, applies only to persons whose offenses are committed after January 1, 2019. Thus, the change in the law has no effect on the very substantial numbers of incarcerated persons who have been convicted by nonunanimous verdicts, many of whom are serving life without parole. Indeed, one study indicates that approximately 40% of convictions by 12-person juries are by less-than-a-unanimous vote of the jurors.[16] But in light of the electorate's decision to repeal this law, any potential motive the Louisiana Supreme Court might have to revisit the constitutionality of those convictions is lessened, and the opportunities to do so are quickly waning by the statutory time limits imposed on a defendant's ability to seek postconviction relief.

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unanimous suffrage of twelve of [the defendant's] equals and neighbours.") (citations omitted); *accord Blakely*, 542 U.S. at 301.

[16] Jeff Adelson, Gordon Russell and John Simerman, *How An Abnormal Louisiana Law Deprives, Discriminates and Drives Incarceration: Tilting the Scales*, The Advocate, April 1, 2018, available at http://www.theadvocate.com/new_orleans/news/courts/article_16fd0ece-32b1-11e8-8770-33eca2a325de.html.

Yet those convictions are not only contrary to the constitutional requirement of unanimity, they all derived from a law that was born in the 1898 Louisiana Constitutional Convention, which was convened with the express "mission" of "establish[ing] the supremacy of the white race in this state."[17] Included in the conventioneers' efforts to remove blacks from meaningful participation in Louisiana's political and civil institutions, the decision to change the long established rule of unanimity was apparently intended, at least in part, to undermine the impact of this Court's 1880 decision in *Strauder v. West Virginia*, 100 U.S. 303, which held that the Fourteenth Amendment prohibited states from excluding persons from jury service based upon race. Absent the unanimity requirement, the vote of the one or two black jurors who might end up on a jury would be effectively nullified. As Justice Potter Stewart opined in dissent in *Apodaca's* companion case, "[Ten] jurors can simply ignore the views of their fellow panel members of a different race or class."[18]

The disproportionate impact that this law has had on Louisiana's African American jurors and prisoners, who make up a grossly disproportionate segment of Louisiana's incarcerated persons,[19] has been well-documented[20] and will live on as long as there are people imprisoned in

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[17] *Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana*, 374 (1898). *See* Petition in *Evangelisto Ramos v. Louisiana*, 18-5924 (pet. filed 9/7/18) (distributed for conference of 1/11/19).

[18] *Johnson*, 406 U.S. at 397 (Stewart, J., dissenting). *See also* Devine, Dennis J. et al., *Jury Decision making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622, 669 (2001) ("Unanimous verdicts protect jury representativeness - each point of view must be considered and all jurors persuaded."); *id.*("minority jurors participate more actively when decisions must be unanimous").

[19] Prison Policy Initiative, *Overrepresentation of Blacks in Louisiana*, https://www.prisonpolicy.org/graphs/2010percent/LA_Blacks_2010.html (as of 2010 census, black persons represent 66% of Louisiana's prison population but only 32% of its total population).

[20] *See* W. Billings & E. Haas, *In Search of Fundamental Law: Louisiana's Constitutions, 1812-1874*, The Center for Louisiana Studies (1993), pp. 93-109; Thomas Aiello, *Jim Crow's Last Stand, Nonunanimous Criminal Jury Verdicts in Louisiana*, LSU Press, 2015; Angela A. Allen-Bell, *These Jury Systems Are*

Louisiana because of jury verdicts that were not unanimous. A declaration by this Court that the use of nonunanimous jury verdicts is and has always been contrary to the U.S. Constitution will help to fade this ugly stain of racism that has besmirched the reputation of this State for too long.

Conclusion

The decision below of the Louisiana Fourth Circuit Court of Appeal, refusing to find constitutional infirmity in Mr. Lewis's nonunanimous murder verdicts, involves an important question of federal that simultaneously conflicts with relevant decisions of this Court and concerns a matter—the continued viability of *Apodaca*—that has not been but should be decided by this Court. *See* Sup. Ct. R. 10(c).

Respectfully submitted,

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Vestiges of White Supremacy, Washington Post, 9/22/2017. *See also State v. Collier*, 553 So. 2d 815, 819-20 & 823 (La. 1989) (Because only ten votes were needed to convict defendant of armed robbery, the prosecutor could have assumed, contrary to *Batson*'s admonition that it was unacceptable to do so, that all black jurors would vote on the basis of racial bias and then purposefully discriminated by limiting the number of blacks on the jury to two. . . This pattern of striking all black jurors (except two) continued in the face of mounting pressure by the trial court to select a jury more representative of the black population of the parish). *See also State v. Cheatteam*, 07-272, p. 10 (La. App. 5 Cir. 05/27/08), 986 So. 2d 738, 745 ("[Defense counsel] pointed out that it appeared the prosecutor was attempting to ensure that only two African-Americans would serve on the jury. And in order to convict, the prosecutor needed only 10 votes.").