IN THE CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

FILED
TIME
SEP 14 2015
SIG:
DEPUTY CLERK
CRIMINAL DISTRICT COURT

STATE OF LOUISIANA

v.

BILLY LEWIS,

Defendant

No. 433-888
Section F
Judge Robin Pittman

FILED: _____ DEPUTY CLERK: _____

MOTION IN LIMINE FOR A UNANIMOUS JURY VERDICT

THE ACCUSED, by counsel, moves this Court, pursuant to the Sixth and Fourteenth Amendments[1] to the United States Constitution and in light of the United States Supreme Court's recent Sixth Amendment jurisprudence in McDonald v. City of Chicago, Illinois, et al. 561 U.S. ___ (2010), Apprendi v. New Jersey 530 U.S. 466 (2000), Blakely v. Washington, 542 U.S. 296 (2004), and Booker v. United States, 543 U.S. 220 (2005), for a jury instruction requiring an unanimous verdict of all twelve of the jurors in this case for all pending charges. In support of this motion, counsel states:

1. In Apodaca v. Oregon, 406 U.S. 404 (1972), the Supreme Court was presented with the question of whether the Sixth Amendment of the federal constitution permits a state to convict an individual of a crime based on a non-unanimous jury verdict. In answering this question, the Court issued a deeply fractured 4-1-4 decision where it ultimately held that the Sixth Amendment's jury trial clause requires unanimity for criminal conviction, however that constitutional rule does not apply to the states by means of the Fourteenth Amendment.

2. The constitutional methodologies and the theoretical predicates on which Apodaca was based have been substantially undercut, if not outright abandoned, by the Supreme Court's recent Sixth Amendment decisions. The most significant of these is McDonald v. City of Chicago, Illinois, et. al., 561 U.S. ___ (2010). In McDonald, the Court revisited its doctrine of incorporation of the Bill of Rights through the Fourteenth Amendment's due process clause, and held that the due process clause of the Fourteenth Amendment incorporates the Second Amendment's right to possess a handgun in the home for the purpose of self-defense. In other

[1] The Accused moves for unanimous jury instruction under the Sixth Amendment as incorporated through the Fourteenth Amendment's due process clause, as well as under the Fourteenth Amendment's privileges and immunities clause.

words, the right protected by the Second Amendment is protected against state infringement by the due process clause of the Fourteenth Amendment for "the right to bear arms is fundamental to our scheme of ordered liberty," McDonald, 561 U.S. at 19, and is a right "deeply rooted in this nation's history and tradition." Id.

3. In reaching this decision, Justice Alito, writing for the plurality, clearly notes that the holding of Apodaca "was the result of an unusual division among the Justices, not an endorsement of the two-track approach to incorporation," 561 U.S. at 18, and that Apodaca "does not undermine the well established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government." Id. By its McDonald decision, the Court has now recognized that the superannuated Apodaca ruling does not stand in the way of considering the argument that the unanimous jury requirement of the Sixth Amendment should apply equally to Louisiana.

4. Since Apodaca, the Court's Sixth Amendment jurisprudence has defined the historical Sixth Amendment right as encompassing unanimity. In a line of cases beginning with Apprendi v. New Jersey, 530 U.S. 466 (2000), the Court has described the requirement that charges must be proved "beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens," 530 U.S. at 498, and that "the truth of every accusation against a defendant should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors." Blakely v. Washington, 542 U.S. 296, 301 (2004). Again in Booker v. United States, 543 U.S. 220, 238-39 (2005), the Court stated that "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors."

5. In short, because subsequent developments in the Supreme Court's Sixth Amendment jurisprudence call into question and reject the result in Apodaca, this court should grant the Accused's motion for a jury instruction requiring an unanimous verdict and give the following instruction:

> The verdict must represent the considered judgment of each juror. In order to return a verdict, each juror must agree to the verdict. Your verdict must be unanimous.

WHEREFORE, for the foregoing reasons and any others that may appear to this Honorable Court, the Accused requests that this Court instruct the jury at the close of the evidence in this case that the jury's verdict must be unanimous.

Respectfully submitted

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Certificate of Service

I hereby certify that I have caused to be served by mail or hand delivery in open court a copy of the foregoing document upon the prosecution on the day of the filing of the motion.

Daniel Engelberg

Motion denied.
9/15/15 Judge Robin S. Pittman

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LA. C. CR. P. ART. 782(A) AND LA. CONST. ART. I, § 17 VIOLATES THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION CLAUSE

THE ACCUSED, by counsel, moves this Court pursuant to the Fourteenth Amendments to the United States Constitution to declare Louisiana Code of Criminal Procedure article 782(A) and La. Const. Art. I § 17 unconstitutional to the extent that they allow for a non-unanimous verdict in this non-capital felony case.

In support of his motion, counsel states:

1. The Louisiana provisions authorizing non-unanimous jury verdicts were introduced into our law by the explicitly racist Constitutional Convention of 1898 for the substantial purpose of discriminating against African-Americans; the provision had, and continue to have, the desired discriminatory effect. Nothing since enactment has purged the taint of racist intent behind the non-unanimous jury provisions. Louisiana's majority verdict scheme thus violates the Fourteenth Amendment's Equal Protection Clause.

2. A state statute violates the 14th Amendment where racial discrimination is shown to be a substantial or motivating factor behind its introduction, unless the state can show that the law would have been enacted without the discriminatory motive. Arlington Heights v. Metropolitan Housing Corp, 429 U.S. 252 (1977). Arlington Heights set out five factors that a court should consider in determining whether an enactment was motivated by the substantial purpose of racial discrimination: Historical background of the enactment; sequence of events leading to the enactment; legislative history of the enactment; statements by decision makers; and the discriminatory effect of the enactment.[1]

3. Majority verdicts were first introduced in Louisiana as Article 116 of the Constitution of 1898, by explicitly and proudly racist legislators, as part of a raft of deliberately discriminatory measures.[2] Put simply, "[t]he

[1] The United States Supreme Court has not hesitated to strike down post-reconstruction era statutes that were initially passed with a discriminatory purpose. In Hunter v. Underwood, 471 U.S. 222 (1985), the Court held that Art. VIII, § 182 of the Alabama Constitution of 1901, a provision disenfranchising misdemeanants, violated the Equal Protection Clause of the Fourteenth Amendment under Arlington Heights, despite the provision's facial neutrality. John B. Knox, the president of the Alabama Constitutional Convention, had revealed the discriminatory purpose of the 1901 Constitution in his opening address: "And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State." Id. at 228-29. And Alabama in 1901 was no different than Louisiana during the same time period. As the Court in Hunter noted, "the Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks." Id.

[2] Article 116 read as follows:

> The General Assembly shall provide for the selection of competent and intelligent jurors. All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, which shall not be prior to 1904, be tried by the judge without a jury. Cases in which the punishment may be at hard labor shall be tried by a jury of five, all of whom must concur to render a verdict; cases in which the punishment is necessarily at hard labor, by a jury of twelve, nine of

desire of Louisiana's reactionary [redacted]archies to disfranchise blacks and po[redacted]hites prompted the Constitutional Convention of 1898." Michael L. Lanza, Little More than a Family Matter: The Constitution of 1898 in In Search of Fundamental Law: Louisiana's Constitutions, 1812-1974, 93–109, 93 (Warren M. Billings & Edward F. Haas, eds. 1993). The majority verdict system was intended invidiously to minimize or cancel out the voting power of African-Americans on juries and to deny African-Americans meaningful participation in the civil institution of jury service.[3] That provision has then been rolled over to each succeeding Constitution with only one meaningful amendment in the last 110 years.[4]

4. The 134 delegates at the 1898 Convention were all white and, with the exception of one Republican and one Populist, were all Democrats. Id. at 98-99. The delegates were not at all secretive about their purpose. The President of Louisiana's 1898 Convention, E.B. Kruttschnitt, stated in his opening address:

> I am called upon to preside over what is little more than a family meeting of the Democratic party of the State of Louisiana.... We know that this convention has been called together by the people of the State to eliminate from the electorate the mass of corrupt and illiterate voters who have during the last quarter of a century degraded our politics.

Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana, 8-9 (1898). In closing the Convention, Hon Thomas J. Semmes stated that the "mission" of the delegates had been "to establish the supremacy of the white race in this state." Id. at 374. In his closing remarks, President Kruttschnitt bemoaned that the delegates had been constrained by the Fifteenth Amendment such that they could not provide "[u]niversal white manhood suffrage and the exclusion from the suffrage of every man with a trace of African blood in his veins." Id. at 380. He went on to proclaim:

> I say to you, that we can appeal to the conscience of the nation, both judicial and legislative and I don't believe that they will take the responsibility of striking down the system which we have reared in order to protect the purity of the ballot box and to perpetuate the supremacy of the Anglo-Saxon race in Louisiana.

Id. at 381.

5. It was in this atmosphere of hate that Article 116 was drafted and ratified. Jury trial was abolished for misdemeanors, reduced to trial by a jury of five for lesser felonies, and the requirement of unanimity was removed for all save capital offenses. In cases where hard labor was a necessary punishment, defendants were to

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> whom concurring may render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict.

La. Const. of 1898, art. 116.

[3] From its creation until the end of reconstruction and the withdrawal of federal troops, the state of Louisiana provided for the common law right to trial by jury, including unanimity in jury verdicts. By the Act of 1805, the Territory of Orleans adopted the forms and procedures of the common law of England in its criminal proceedings, including "the method of trials." Act of 1805, § 33; See generally A. Voorhies, A Treatise on the Criminal Jurisprudence of Louisiana, Bloomfield & Steel (1860), pp.3-10.

[4] Non-unanimity came to be considered by the United States Supreme Court in two cases with significantly different procedural histories. Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972). The Sixth Amendment claim was not reached in Johnson, which dealt with verdicts by 9 of 12 jurors, but the Supreme Court in Apodaca ruled that verdicts by 10 of 12 jurors were constitutional. In the wake of Apodaca and Johnson, Louisiana majority-verdict provision was amended in 1974 to provide for a majority vote of ten, rather than nine. This sort of minor amendment in no way changes the analysis of the legislative intent of the provision when introduced in 1898. In Hunter, the scope of the disqualifications created by the § 182 had been substantially reduced but this subsequent

be tried before a jury of twelve requiring only nine to concur to render a verdict.

6. When it passed the majority-verdict scheme, the Convention had before it the "Statement of Registered Voters 1897 and 1898" which is contained in the Official Journal itself. See Journal supra at inserted chart. Blacks represented 14.7% of all citizens registered to vote in Louisiana as of January 1, 1898 (12,902 of 87,240). Id. Proportionate representation on juries would have seen an average of two black jurors per trial. The selection of nine votes for a verdict served to guarantee white majority control over jury verdicts: black votes could be ignored.

7. In the face of this clear evidence that a substantial motivation for the introduction of majority verdicts was racial discrimination, the burden falls to the state to establish that the law would have passed – deviating from Louisiana's long tradition of unanimous juries – even without the racial motivation. This, the state cannot do.[5] The majority-verdict jury trial scheme must therefore be struck down under the Equal Protection Clause of the Fourteenth Amendment.

8. WHEREFORE, for the foregoing reasons and any others that may appear to this Honorable Court, the Accused requests that this Court declare Louisiana Code of Criminal Procedure article 782(A) and Article I, § 17 of the Louisiana Constitution unconstitutional.

Respectfully Submitted,

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Certificate of Service

I hereby certify that I have caused to be served by mail or hand delivery in open court a copy of the foregoing document upon the prosecution on the day of filing.

Motion DENIED.
Judge Robin Pittman
9-15-15

tweaking was not understood to alter the original intent of the provision.

[5] Commentators have also noted that the "majority-rule" authorized by non-unanimous verdicts has an insidious discriminatory impact. Recent social science research has demonstrated that non-unanimous verdicts significantly constrict the flow of information within jury deliberations and shorten deliberations overall, leading to less accurate judgments, and reducing the likelihood that jurors will hear, respect, or vigorously challenge each other's views. Crucially, a minority viewpoint can simply be ignored in a non-unanimous setting, and generally is. It has been averred that nonunanimous voting schemes are likely to chill participation by the precise groups whose exclusion the Court has proscribed in other contexts. See Kim Taylor-Thompson, Empty Votes in Jury Deliberations, 113 Harv. L. Rev. 1261, 1276-1277 (2000) (citing and describing relevant social science studies); Valerie P. Hans, The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making, 4 Del. L. Rev. 1 (2001).