Reply

No.: 18-8776

In The
Supreme Court of the United States

TAM Q. LE
Petitioner

v.

STATE OF LOUISIANA
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL, FIRST CIRCUIT

PRO-SE SUPPLEMENTAL BRIEF IN SUPPORT OF ORIGINAL PETITION FOR A WRIT OF CERTIORARI

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September 23, 2019

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In The
Supreme Court of the United States
October Term, 2019

No.: 18-8776

TAM Q. Le v. DARREL VANNOY, Warden

Pro-Se Supplemental Brief in Support of Original Petition for Writ of Certiorari

Pro Se Petitioner, Tam Q. Le respectfully prays that this Honorable Court allow him to Supplement his Original Petition for Writ of Certiorari which is currently pending pursuant to Sec. 142, and Supplemental Brief or Memorandum – New Developments pursuant to Sec. 143; Supreme Court Rule 15.8.

It appears as though Louisiana had filed a Response to Mr. Le's Original Petition on June 27, 2010 according to the updated docket Mr. Le recently received from this Court. However, it must be noted that Mr. Le has ***never been served*** with a copy of Louisiana's Response, nor has he been able to obtain such by any other means, denying him the right to file a proper Traverse. Mr. Le received the updated docket on September 16, 2019.

Furthermore, according to the updated docket in this case, Mr. Le's case has been set for a Conference on October 1, 2019. Mr. Le apologizes for any inconvenience this pleading may cause this Court, but Mr. Le is filing this with very limited notification that Louisiana had filed a Response in this matter, and that this matter had been set for Conference.

As Mr. Le has been unable to obtain a copy of the Response which was filed by Louisiana, he can only speculate as to the argument contained within such. Without the Response Mr. Le is unable to properly argue against Louisiana's contentions. Therefore, in lieu of a Traverse to the Response, Mr. Le is now filing a Supplement to his Original Petition pursuant to the provisions listed above.

NOTICE OF PRO-SE FILING

Mr. Le requests that this Honorable Court view these Claims in accordance with the ruling of *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972). Mr. Le is a layman of the law and untrained in the ways of filings and proceedings of formal pleadings in this Court. Therefore, he should not be held to the same stringent standards as those of a trained attorney.

STATEMENT OF THE CASE

Mr. Le relies upon his Statement of the Case as stated in his Original Petition for Writs of Certiorari to this Honorable Court. However, Mr. Le would also note that on April 8, 2019, Mr. Le filed his Original Petition. On April 10, 2019, Mr. Le's case was docketed with this Court as designated as Docket Number 18-8776.

On April 16, 2019, the Waiver of right of Respondent Louisiana to respond was filed. On April 18, 2019, this case was distributed for conference of 5/9/19. On April 25, 2019, this Court requested a Response from Louisiana (Due May 28, 2019). On May 10, 2019, Louisiana filed a motion to extend to file a Response from May 28, 2019 to June 27, 2019, which was granted.

On July 22, 2019, Mr. Le informed this Court that it appears as though Louisiana had failed to forward him a copy of the Response, and requested that if the State had filed a Response to this Petition, to please forward a copy of the Response to him. This correspondence was stamped July 30, 2019 by the Clerk of Court's Office for this Honorable Court.

On September 17, 2019, Mr. Le received a correspondence from the Clerk of Court's Office, along with the updated docket concerning his case. According to the updated docket, it appears as though Louisiana had filed a Response to Mr. Le's Petition on June 27, 2019.

Mr. Le filed his Original Petition for Writs of Certiorari to this Honorable Court on April 8, 2019, and has recently been informed of recent events in Louisiana and rulings made by this Honorable Court which would greatly affect the outcome of these pleadings. Therefore, Mr. Le is requesting that this

Court accept, and make a part of the record, this Supplement in accordance to Supreme Court Rule 15.8. Mr. Le humbly requests that this Honorable Court find his pleadings good and proper, and that this Court grant him relief in this matter.

ISSUE NO. 1
ADDENDUM/SUPPLEMENT TO ISSUE NO. 1

Mr. Le was convicted by a non-unanimous jury in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments.

The trial of Tam Q. Le ended with the jury finding him guilty as charged on two Counts of Aggravated Rape by the margin of 10-2.

The following argument is based upon a recent ruling by this Honorable Court, and only recently made available to Mr. Le. Although the Law Library at the Louisiana State Penitentiary, Angola, Louisiana, has access to Westlaw©, the system utilized by this institution relies upon updates (discs), which are infrequently updated (approximately 3 times a year) from Information Services, and are normally several months (7-9 months) behind.

Therefore, Mr. Le humbly requests that this Honorable Court allow him to Supplement his Original pleadings with the following, to wit:

In ***Timbs v. Indiana***, 139 S.Ct. 682, 203 L.Ed.2d 682 (2/20/2019), the United States Supreme Court held that: "A Bill of Rights protection is an incorporated protection, applicable to the States under the Fourteenth Amendment's Due Process Clause, if it is fundamental to the scheme of ordered liberty, or deeply rooted in the Nation's history and tradition." Fourteenth Amendment to the United States Constitution. It must be noted that ***Timbs*** was determined with a unanimous decision amongst the Justices of the United States Supreme Court.

Furthermore, it must be noted that, "If a Bill of Rights is incorporated by the Fourteenth Amendment's Due Process Clause, and then enforced against the States, there is no daylight between

the federal and state conduct it prohibits or requires." Fourteenth Amendment to the United States Constitution.

Although the question presented to the United States Supreme Court in ***Timbs*** concerned the Eighth Amendment's Excessive Fines Clause, this case mirrors ***Timbs*** in requesting that the Honorable Court similarly determine that the Sixth Amendment right to a unanimous verdict guaranteed in the federal courts is applicable to the State through the Fourteenth Amendment's Due Process Clause.

"Any correct reading of Section 1 of the Fourteenth Amendment to the United States Constitution would acknowledge that the Privileges and Immunities Clause provide an alternative basis for applying to the States, at minimum, those individual rights enumerated in the first eight Amendments." See: ***Timbs v. Oregon***, 139 S.Ct. 682, 691 (2019)(Gorsuch, J., concurring). Here, there is a special reason to do so because ***Apodaca*** stands in the way of incorporation under the Due Process Clause. Rather than overrule ***Apodaco***, the Court could hold that the Privileges and Immunities Clause requires the States to convict people of serious crimes only by unanimous verdict of an "impartial jury."[1] See: Fourteenth Amendment to the United States Constitution.

This case offers the perfect opportunity to review ***Apodaca***, the controlling opinion of which is premised on the two-track approach. Whenever the Court concludes with respect to the meaning of the Sixth Amendment (and it should conclude that the Sixth Amendment requires unanimous jury verdicts), it should emphasize that when a right is incorporated under the Due Process Clause of the Fourteenth Amendment, that right applies identically in state and federal forums.

After all, the Constitution sets a floor of rights below which state authorities may not go; yet, under the two-track approach, the state and local authorities can (and do) fall beneath the federal

1 There is no textual basis for a two-track approach to incorporation under the Privileges and Immunities Clause because rights of national citizenship – by definition – apply everywhere in the Nation. See: United States Constitution, Amendment 14, § 1 ("***No State*** shall make or enforce any law which shall abridge the privileges or immunities of ***citizens of the United States*** ..." (***emphasis added***).

constitutional minimum. See: **Marc L. Miller & Ronald F. Wright,** ***Leaky Floors: State Law Below Federal Constitutional Limits,*** 50 Ariz.L.Rev. 227 (2008).

This Court should not allow the States to construct a basement of rights somewhere beneath the federal floor. See: United States Constitution, Art. Vi, cl. 2 ("This Constitution ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding").

Overturning *Apodaca* should not be hard. Justice Powell's concurrence is based on social science more than law. His opinion acknowledges that the roots of the Sixth Amendment's unanimity requirement run deep. And the import of that acknowledgment is that jury unanimity is a fundamental right. Only in social-science research and legal commentary did Justice Powell find "a legitimate basis for experimentation and deviation from the federal blue-print," id., when that blueprint is the Constitution, *Johnson v. Louisiana*, 406 U.S. 366, 388 (1972)(Powell, J., concurring in the judgment of *Apodaca*).

But, there is never a legitimate basis for "deviation from the federal blue-print," id., when the blueprint is the Constitution, cf., *McDonald v. City of Chicago*, 561 U.S. 742, 790 (2010)(plurality opinion)("Incorporation always restricts experimentation and local variations, but that has not stopped the Court from incorporating virtually every other provision of the Bill of Rights"). See also: *Burch v. Louisiana*, 441 U.S. 130, 138-9 (1979)(holding that the individual right to an "impartial jury" prevails against a state's interest in "'considerable time' savings" that might be gained from using non-unanimous, six-person juries).

The Constitution is an inexorable command, impervious to "empirical research," see *Johnson*, 406 U.S., at 374, n. 12 (Powell, J., concurring in the judgment in *Apodaca*) and unyielding to "experimentation" in the States, id, at 377, even in service of such beneficial ends as "innovations with

respect to determining – fairly and more expeditiously – the guilt or innocence of the accused," id., at 376.

Because "the Sixth Amendment requires a unanimous jury verdict to convict in a ***federal*** criminal trial," id., at 371 (emphasis in original), the same is required to convict a person in a state criminal trial via the Fourteenth Amendment to the United States Constitution.

The Court should hold that the Sixth Amendment's guarantee of jury unanimity is a privilege or immunity of national citizenship, which Section 1 of the Fourteenth Amendment makes applicable to the States. If the Court resolves the question presented on Due Process grounds instead, it should overrule ***Apodaca*** and hold that the Sixth Amendment right to conviction by a unanimous jury applies to States because it is deeply rooted in our Nation's history and traditions and fundamental to our scheme of ordered liberty.

In Justice Gorsuch's concurring opinion in ***Timbs***, the Honorable Justice stated:

> The majority faithfully applies our precedent and, based on a wealth of historical evidence, concludes that the Fourteenth Amendment incorporates the Eighth Amendment's Excessive Fines Clause against the States. I agree with that conclusion. As an original matter, I acknowledge, the appropriate vehicle for incorporation may well be the Fourteenth Amendment's Privileges or Immunities Clause, rather than, as this Court has long assumed, the Due Process Clause."

Mr. Le would like this Honorable Court to note that the State of Louisiana does not meaningfully challenge the case for incorporating the requirement of unanimous jury verdicts through the use of the Fourteenth Amendment's Due Process Clause as a general matter. Instead the State of Louisiana argues "Judicial Economy" as its reason for this Court to deny him relief in this matter.

In short, the historical and logical case for concluding that the Fourteenth Amendment incorporates the right to a unanimous jury verdict is overwhelming. The right to a unanimous jury verdict secured by the Fourteenth Amendment Due Process Clause is both "fundamental to our scheme or ordered liberty," and "deeply rooted in this Nation's history and tradition." ***McDonald v. City of Chicago***, 561 U.S. 742,

767, 130 S.Ct. 3020 (2010).

Most amazingly, during the course of the 2018 Legislative Session concerning the possibility of changing the Louisiana Constitution's amendment concerning non-unanimous jury verdicts, the prosecutors informed the Legislators during the Hearing that they were going to address the "White Elephant in the room." The prosecutors admitted that the non-unanimous jury verdict laws were based on racial discrimination, but stated, "It is what it is," ... "but it works." It would appear that any hope the State would have had to prevent the Bill's passage was "shot out of the water" with these remarks during the course of the hearing.[2]This Honorable Court must consider the fact that on November 6, 2018, the voters of Louisiana voted to change the Law concerning non-unanimous verdicts. Although the new law only applies to persons whose offenses were committed on or after January 1, 2019, the State ***admitted*** that the Law was premised on racial discrimination during the arguments concerning such during the Legislative Session. A Law based on any discrimination cannot stand.

Naturally, some of the Legislators had taken offense to to the District Attorneys' (John F. DeRosier [Calcasieu Parish], and Don M. Burkett [Sabine Parish]) statements which infuriated the Panel to the point where they agree to send the amended Bill to the House of Representatives by a vast majority for a full vote. Although the Bill was amended to reflect **Prospective Application**, Mr. DeRosier agreed that most likely the Federal Courts would rule that the new law had to be applied retroactively. This Bill was passed with a ***vast majority*** of the Legislators.

This Honorable Court must consider the fact that on November 6, 2018, the voters of Louisiana voted to change the Law concerning non-unanimous verdicts. Although the new law only applies to persons whose offenses were committed on or after January 1, 2019, the State had ***admitted*** that the Law was premised on racial discrimination during the arguments concerning such during the

2 Mr. Le is unable to obtain a copy of the CD of the Committee Hearing in order to provide a copy to the Courts due to the restrictions of this institution.

Legislative Session. A Law based on discrimination cannot stand. Although the ballot failed to include the fact that the non-unanimous jury verdict was based on racial discrimination, the Constitutional Amendment was passed by the voters of the State of Louisiana.

SUMMARY OF ARGUMENT

This Court must note that although it appears (from the updated docket in this case) that filed its Response on June 27, 2019, Mr. Le has never been served with a copy of such by the State. This, in effect, has denied Mr. Le the right to file a Traverse to the State's Brief of Opposition in this matter.

If Louisiana followed its normal routine (in its Response) of arguing that the non-unanimous jury verdict should not be granted due to the ruling in ***Apodaca v. Oregon***, 406 U.S. 404 (1972), Mr. Le has shown this Court that the ruling by this Court was based on Social Science theology, and not the United States Constitution. Accordingly, although Louisiana desires to argue that the Sixth Amendment to the United States Constitution is not applicable to defendants in State proceedings, this Court must note that Section 1 of the Fourteenth Amendment to the United States Constitution would acknowledge that the Privileges and Immunities Clause provides an alternative basis for applying to the States, at minimum, those individual rights enumerated in the first eight Amendments (See: ***Timbs v. Oregon***, 139 S.Ct. 682, 691 (2019)(Gorsuch, J., concurring).

Here, there is a special reason to do so because ***Apodaca*** stands in the way of incorporation under the Due Process Clause. Rather than overrule ***Apodaco***, the Court could hold that the Privileges and Immunities Clause requires the States to convict people of serious crimes only by unanimous verdict of an "impartial jury."[3] See: Fourteenth Amendment to the United States Constitution.

Furthermore, Louisiana would normally argue that "In the interest of judicial economy," this Issue

3 There is no textual basis for a two-track approach to incorporation under the Privileges and Immunities Clause because rights of national citizenship – by definition – apply everywhere in the Nation. See: United States Constitution, Amendment 14, § 1 ("***No State*** shall make or enforce any law which shall abridge the privileges or immunities of ***citizens of the United States*** ..." (***emphasis added***).

should be denied. However, as Mr. Le has properly argued this Issue throughout these proceedings, the Sixth Amendment to the United States Constitution is applicable to the state via the Fourteenth Amendment to the United States Constitution.

As Louisiana has admitted that this Law was predicated upon racial discrimination during its inception, this Court has firmly held that any Law based on any discrimination is ***void***, and must be declared unconstitutional. Although Louisiana admits that the Law was predicated upon racial discrimination, Louisiana now argues that the Law has remained in effect since 1974 due to "convenience." Again, Mr. Le argues that once Louisiana admitted that the Law was based on racial discrimination, there can be no doubt that this Law's sole purpose was to discriminate against African Americans and other minorities.

CONCLUSION

After a review of the Record in this case, Mr. Le this Honorable Court must determine that Mr. Le was denied his constitutional rights to a fair and impartial trial in this matter. Mr. Le now introduces additional facts and cases which were unknown to him at the time of the filing of the Original Petition, which fully support Mr. Le's argument.

WHEREFORE, after a careful review of the merits of these Claims, Mr. Le contends that this Honorable Court will find that reasonable jurists would not allow these convictions to stand.

Respectfully submitted this 23rd day of September, 2019.

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