No. _____

In the

Supreme Court of the United States

CORLIOUS C. DYSON
Petitioner

vs.

THE STATE OF LOUISIANA
Respondent

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

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 non-unanimous jury verdict?

***NOTE**: This issue is currently before this Court in *Evangelisto Ramos v. Louisiana*, 2019 U.S. LEXIS 1833 (Mar. 18, 2019) (writ of certiorari granted).

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Petition for Certiorari

Corlious C. Dyson petitions for a writ of certiorari to review the judgment entered below by Louisiana Third Circuit Court of Appeal in *State v. Dyson*, 17–0021 (La. App. 3 Cir. 5/17/17), 220 So. 3d 785, *writ denied*, 17–1048 (La. 1/14/19), 261 So. 3d 784.[1]

Opinions Below

The state trial court did not issue written rulings, but the relevant trial court minutes and post-trial motions are appended at A1, A4, and A13. The published opinion of the Louisiana Third Circuit Court of Appeal is reported at 17–0021 (La. App. 3 Cir. 5/17/17), 220 So. 3d 785, and is appended to this Petition at A20. The Louisiana Supreme Court's order and judgment denying discretionary review is reported at 17–1048 (La. 1/14/19), 261 So. 3d 784, and is appended at A40.

Jurisdiction

The Louisiana Supreme Court rendered judgment on January 14, 2019. 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: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

[1] The issue raised here was not raised in the appellate courts below, *see infra*; however, the Third Circuit Court of Appeals for Louisiana is the last court to issue a ruling on the merits, and thus certiorari is directed at that court.

Section 17(A) of Article I of the Louisiana Constitution (now repealed) provided, in relevant part: "A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of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 11 to 1, a jury in a Louisiana state court found Corlious "Corey" Dyson guilty of one count of second degree murder, La. R.S. § 14:30.1, alleged to have occurred in 2012. Counsel objected to the non-unanimous jury verdict after trial and in post-trial motions.[2] The trial court rejected Mr. Dyson's arguments, but noted the objection. Thereafter, the trial court sentenced him to a mandatory sentence under Louisiana law, life in prison without parole.

Mr. Dyson appealed his conviction to the Louisiana Third Circuit Court of Appeal arguing sufficiency of evidence and trial court errors. Mr. Dyson did not raise the issue of the non-unanimous verdict in the Louisiana Third Circuit or Louisiana Supreme Court due to repeated rejection of the issue by the Louisiana Supreme Court.[3]

[2] Arguing non-unanimous verdicts, then-permitted under Louisiana law, *see* LA. CONST. art. I, § 17 (repealed); LA. CODE CRIM. PROC. ANN. art 782(A) (repealed), violated the Sixth Amendment right to a jury, which should be incorporated to the states through the Fourteenth Amendment. *See* A1, A4, & A13.

[3] *See*, *e.g.*, *State v. Bertrand*, 08-2215 (La. 3/17/09), 6 So. 2d 738 (State High Court rejecting challenge to this Court's plurality decision in *Apodaca v. Oregon*, 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. The interests of judicial administration are served by granting certiorari in this case even though this issue was not raised in the lower, state appellate courts. The issue was objected to at trial, this Court has already granted certiorari to answer this question of law in *Ramos v. Louisiana*, and the issue involves a purely legal question.

This Court should grant Corlious Dyson's certiorari petition in this case despite counsel not raising a constitutional challenge to Louisiana's non-unanimous jury verdict system in the lower appellate courts. Although the general rule requiring issues to be raised below in lower appellate courts should apply in most cases, the harm the rule seeks to protect is not present here.

First, there *was* an objection in the trial court directly after the verdict was read to the "less than unanimous verdict, which the Court so noted." *See* A1. Further, counsel again objected in post-trial motions: for a new trial and post-verdict judgment of acquittal. *See* A4 and A13.

Second, this Court has already granted a certiorari petition in *Ramos v. Louisiana*, 2019 U.S. LEXIS 1833 (Mar. 18, 2019), to address the very issue here: whether the Sixth Amendment right to a jury is incorporated through the Fourteenth Amendment to the states, requiring unanimous jury verdicts in state criminal cases. In *Carlson v. Green*, this Court held "the interests of judicial administration will be served by addressing the issue on its merits," which had not been raised in the lower district court or court of appeal. 446 U.S. 14, 17 n.2 (1980). The Court found the petition raised an "important, recurring issue and [was] properly raised in another petition for certiorari being held pending disposition of this case. *See Loe v. Armistead*, 582 F.2d 1291 (CA4 1978), cert. pending sub nom. *Moffitt v. Loe*, No. 78-1260." *Id*. Thus, although the legal issue in *Carlson*, like here, was not properly preserved, the Court nevertheless, granted the cert. petition.

Third, the question of the constitutionality of Louisiana's jury law is a purely legal question, and thus "squarely presented" to the Court for review. *Id*. This Court's resolution of *Ramos v. Louisiana* will likewise resolve whether there is a violation in this case. No further facts are needed in the record to decide this issue. Resolution will fully depend on whether the Sixth Amendment right to a unanimous jury verdict is incorporated to the states through the Fourteenth Amendment. If not, then Mr. Dyson's case is final and he will serve life in prison. If it is incorporated, then his conviction will be reversed and the case remanded for a new trial.[4]

Corlious Dyson is facing a life sentence in a Louisiana prison despite the State failing to prove its case beyond a reasonable doubt to all twelve jurors it found "reasonable" during the selection process. Failure to grant this petition while the Court considers a ruling in *Ramos* would determinately injure Mr. Dyson if the Court later rules in favor of Mr. Ramos, but does not make the decision retroactive to everyone convicted by a less than unanimous verdict. "[T]he interests of judicial administration will be served by addressing the issue on its merits." *Carlson*, 446 U.S. at 17 n.2

B. *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.

Mr. Dyson objected directly after the verdict and in post-trial motions that his non-unanimous verdicts and Louisiana's non-unanimous jury-verdict system violated the right to a jury trial guaranteed by the Sixth and Fourteenth Amendments. By denying relief, the Louisiana trial court for the Fifteenth Judicial District found this argument foreclosed by the Louisiana Supreme

[4] *See Griffith v. KY*, 479 U.S. 314 (1987) (New constitutional rules can be applied to cases not yet "final" on direct review, but not to cases that have become final before the new rule is pronounced).

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 permissible in Oregon, the *Apodaca* Court 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 rejection of a Sixth Amendment challenge to the constitutionality of Oregon's non-unanimous-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 Justice 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

[5] 08-2215 (La. 3/17/09), 6 So. 2d 738.
[6] 406 U.S. 404 (1972).
[7] 406 U.S. 356 (1972).

> 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 even acknowledged *Apodaca*'s unique exception to the now-settled rule of incorporation, but noted that 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

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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).
[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.

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 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 trial court's denial of a new trial or acquittal here, and the Louisiana Supreme Court's decision in *Bertrand*, are contrary to constitutional law and the decisions of this Court.

C. The recent passage of a ballot initiative amending Louisiana's constitution by prospectively eliminating non-unanimous 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

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

of people currently pending trial for crimes alleged to occur before January 1, 2019. The slow pace of trials and the underfunding of the Louisiana criminal defense system means trials may continue for years under the old law, with only this Court to prevent the future injustice that may occur as those cases matriculate through the system.

Undoubtedly, however, is the grave impact already being suffered by numerous incarcerated persons who have been convicted by non-unanimous 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 post-conviction relief.

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 (1880), which held that the Fourteenth Amendment prohibited states from excluding persons from jury service based upon race. Absent

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[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.

[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).

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 Louisiana because of jury verdicts that were not unanimous. A declaration by this Court that the use of non-unanimous 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.

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[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 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.").

Conclusion

The decision below of the Louisiana courts, refusing to find constitutional infirmity in Mr. Dyson's non-unanimous murder verdict, involves an important question of federal law 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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