No. 19-_____

IN THE
Supreme Court of the United States

PHILLIP NEWTON,
PETITIONER,
v.
STATE OF LOUISIANA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Manasseh, Gill, Knipe & Bélanger, P.L.C.
André R. Bélanger
8075 Jefferson Hwy.
Baton Rouge, LA 70809
Telephone: 225-383-9703
Facsimile: 225-383-9704
Email: Andre@manassehandgill.com

QUESTION PRESENTED

The issue presented is whether the Sixth Amendment right to a jury trial requires an unanimous jury verdict and, if so, would that unanimity requirement be required in state criminal jury trials via the Fourteenth Amendment. In deciding this question, the Court will be asked to revisit the plurality opinions of *Johnson v. Louisiana* and *Apodaca v. Oregon*.

PARTIES TO THE PROCEEDING

Phillip Newton is the Defendant and Defendant-Appellant in this case and the respondent, the State of Louisiana, is the Plaintiff and Plaintiff-Appellee in the Courts below. To date, the State of Louisiana has been represented by the 20th Judicial District Attorney's Office. However, since the question raised concerns the constitutionality regarding the manner on how criminal jury trials are conducted within the State of Louisiana, it is anticipated that The Louisiana Attorney General's Office may elect to represent the State in this matter.

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OPINIONS BELOW

The judgment of the Louisiana First Circuit Court of Appeal is an unpublished opinion reported as *State v. Newton* , No. 2017-kw-1146, 2017 WL 483212 (La. App. 1 Cir.10/30/17). After receiving an adverse ruling, this petitioner sought a writ of certiorari from the Louisiana Supreme Court which was denied in an opinion published as *State v. Newton*, 262 So.3d 274, 2017-kp-1997, (La. 1/28/19).

JURISDICTIONAL STATEMENT

The trial court denied Mr. Newton's post-conviction application on July 19, 2017. The judgment and opinion of the Louisiana First Circuit Court of Appeal was entered on October 30, 2017. The Louisiana Supreme Court denied review of that decision on January 28, 2019. This Court's jurisdiction is pursuant to 28 U.S.C. 1257(a).

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Phillip Newton, respectfully requests a writ of certiorari to the Louisiana Supreme Court in *State v. Newton*, 262 So.3d 274, 2017-kp-1997, (La. 1/28/19). This petition raises the issue whether the United States Constitution requires an unanimous jury in criminal cases and, if so, whether this provision is incorporated into the due process clause of the Fourteenth Amendment and made applicable to the states. It raises a similar issue found in *Ramos v. Louisiana* in which this Court granted cert. on March 18, 2019.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Six Amendment to the United States Constitution provides a defendant with the right to a jury trial in criminal cases. Both history and tradition have interpreted this to mean an unanimous jury. So, it is now settled that an accused has a fundamental right to an unanimous jury in federal prosecutions. 48 states have adopted this approach with Louisiana and Oregon being the "hold outs." Recently, Louisiana amended its constitution to fall in line with this tradition. However, Mr. Newton was convicted before this new provision was enacted in a 10-2 decision.

The Due Process clause of the Fourteenth Amendment requires the state's adopt those Bill of Rights that are either fundamental to our scheme of liberty or deeply rooted in our nation's history and tradition. We submit the right to an unanimous jury in a criminal proceeding is one of those rights. The scope of this issue will also be addressed by the Court in *Ramos v. Louisiana* (cert granted March 18, 2019).

STATEMENT OF CASE

Mr. Newton was charged with the attempted murder of his wife and convicted responsively of attempted manslaughter and sentenced to 30 years in jail as a second felony offender. By virtue of Louisiana's habitual offender law, Mr. Newton will serve that sentence "day for day" and not have his sentence lessened for "good behavior." The jury that convicted Mr. Newton was not unanimous. It was a 10-2 decision which is the least amount of jurors necessary to sustain a conviction in Louisiana for crimes whose punishment mandates a sentence to hard labor. La. C.Cr.P. Art782(A).

Mr. Newton appealed the merits of his case and lost. Afterwards, as noted above, he sought post-conviction relief. The issues raised were the ineffective assistance of counsel and the denial of his right to an impartial jury. Both claims were denied by the trial court and that decision was not disturbed by either the Louisiana First Circuit Court of Appeal or the Louisiana Supreme Court as cited above.

STATEMENT OF THE FACTS

The defendant was convicted responsively of attempted manslaughter for shooting his wife in the abdomen. At trial, the defense contended that the defendant did not intend to kill his wife and argued that the facts suggested an accidental discharge of the gun. The state asserted that the defendant did intend to kill her and intentionally shot her. They would note culpability by his flight and allege a lack of aid and provide evidence of prior altercations between the two to establish his intent. Mr. Newton was convicted in a 10-2 decision. Were Louisiana required to provide an unanimous jury, as is the federal custom, before depriving a citizen of his liberty, Mr. Newton would not be convicted.

REASONS FOR GRANTING A WRIT OF CERTIORARI

Louisiana law requires the concurrence of 10 of 12 jurors to render a verdict for crimes necessarily punishable by hard labor. La. C.Cr.P. Art. 782. This petitioner believes that this procedural scheme is unconstitutional and runs afoul of a long-standing legal tradition requiring unanimous juries in criminal cases. It is urged

below that this view is now universally recognized as a requirement for federal prosecutions. This petition now seeks to apply a person's federal Sixth Amendment right to an unanimous jury with equal measure to the state of Louisiana.

Admittedly, this position is at odds with two plurality decisions that gave Louisiana and Oregon permission for devising a non-unanimous jury scheme. See *Johnson v. Louisiana,*406 U.S. 356 (1972) and *Apodaca v. Oregon*, 406 U.S. 404 (1972). The rationale of these two decisions is succinctly described in *McDonald v. City of Chicago*. In *McDonald*, it was noted that 8 justices believed the rights afforded by the Sixth Amendment applied equally to the states and federal governments with 4 of them deciding an unanimous jury was required and 4 suggesting it did not. Justice Powell was the tie breaker who "split the baby" if you will and held that unanimity was required by the federal government but not the states. *McDonald v. City of Chicago*, 561 U.S. 742 (2010). In essence, he gave a "two track" approach to the Fourteenth Amendment's incorporating the provisions of the Bill of Rights through its due process clause. This position no longer holds sway.

In *McDonald*, it was suggested neither the *Johnson* or *Apodaca* decisions stood as an endorsement of a 2 track approach to incorporating provisions of the Bill of Rights. More recently in *Timbs v. Indiana*, this Court held whenever a Bill of Rights protection is incorporated, there is "no daylight" between the conduct required or prohibited to the two governments. *Timbs v. Indiana*, _____ U.S. _____ (2019). In other words, the states cannot afford less protections than required of the federal

government for an identical right made applicable to the states through the Fourteenth Amendment.

The United States Fifth Circuit Court of Appeals considers it a well settled legal principle that a criminal defendant has a constitutionally based right to an unanimous verdict. *United States v. Gipson*, 553 F.2d 453 (5th Cir. 1977). The Third Circuit held similarly in *United States v. Edmonds*, 80 F.3d 810 (3rd Cir. 1996). Though *Edmonds* concerned the unanimity jury instruction within the context of a Continuing Criminal Enterprise (CCE) prosecution, the holding was recognized and supported by this Court in *Richardson v. United States*, 526 U.S.813 (1999).

Notwithstanding the *Johnson* decision, this Court has, since *Johnson*, intervened into Louisiana's procedural scheme in favor of unanimous juries. In *Burch v. Louisiana*, this Court reversed the non-unanimous conviction for a non-petty criminal offense when 5 of 6 jurors voted to convict. *Burch v. Louisiana*, 441 U.S. 130 (1979). *Burch* was followed by *Brown v. Louisiana*, which simply made the holding in *Burch* retroactive. *Brown v. Louisiana*, 447 U.S. 323 (1980). These two decisions indicate that an unanimous jury has historical roots and can be required before the state can deprive a person of their liberty. But, these cases dealt with less serious crimes. Why would the standards be lessened when the consequences for an erroneous conviction are increased for those crimes requiring a 12 person jury?

This logical fallacy of making it easier to jail someone for life than it is to convict someone for shoplifting is precisely why a two track approach to the trial rights afforded by the Sixth Amendment makes no sense. Again, returning to

McDonald and *Timbs*, this approach is rejected and uniformity is required whenever a Bill of Rights protection is incorporated into the Fourteenth Amendment's due process clause and made applicable to the states. Since an unanimous jury is required for federal prosecutions so too must it now be for state prosecutions. Any procedural rule to the contrary are unconstitutional.

CONCLUSION

As recently as a few months ago, this Court's *Timbs* decision recognized the principle that those Bill of Rights applicable to the states through the due process clause of the Fourteenth Amendment are given the full measure of what is required or prohibited to the federal government. At issue here is whether Louisiana's non-unanimous jury rule runs afoul of the Sixth Amendment's jury trial rights. Appellate Courts, in analyzing this Court's precedents, have reasoned that the right to a unanimous jury is required for federal prosecutions as a matter of constitutional law. Notwithstanding this jurisprudential recognition, this Court's rulings in the *Johnson* and *Apodaca* cases have been viewed as supporting less than an unanimous jury for state proceedings. These decisions are implicitly rejected by the *Timbs* decision as well as Footnote 14 in *McDonald* since they reject a two tiered approach to the Bill of Rights. Interestingly, 8 Justices in *Johnson* recognized the principle that the Sixth Amendment's panoply of rights applied identically to the states and federal government with 4 saying unanimity was required and 4 saying otherwise. Justice Powell was the swing vote saying the right exists in federal cases but was not required for the states. Now that Justice Powell's two track approach is rejected by current

precedent, shouldn't we reconsider the underpinnings of the *Johnson* and *Apodaca* decisions? That is what this writ of certiorari seeks to accomplish.

Respectfully Submitted,

MANASSEH, GILL, KNIPE & BÉLANGER, P.L.C.

ANDRÉ R. BÉLANGER
Louisiana State Bar No. 26797
8075 Jefferson Hwy.
Baton Rouge, LA 70809
Telephone: 225-383-9703
Facsimile: 225-383-9704
Email: Andre@manassehandgill.com

Dated:
April 24, 2019

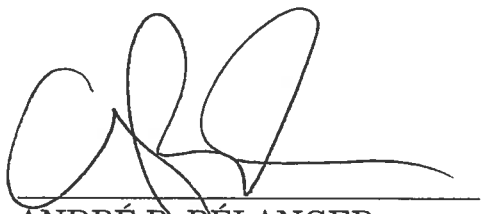
CERTIFICATE OF SERVICE

Undersigned counsel certifies that on this date, the 24th day of April 2019, pursuant to Supreme Court Rules 29.3 and 29.4, the accompanying motion for leave to proceed *in forma pauperis* and petition for a writ of *certiorari* was served on each party to the above proceeding, or that party's counsel, and on every other person required to be served, by depositing an envelope containing these documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Samuel C. D'Aquilla
Attorney for Plaintiff-Appellee
Office of the District Attorney
20TH Judicial District
East Feliciana Parish
P.O. Box 8428
Clinton, La 70722
Fax: (225)-683-3117

Jeff Landry
Louisiana Attorney General
Louisiana Department of Justice
P.O. Box 94005
Baton Rouge, La 70804
Fax: (225)-326-6297



ANDRÉ R. BÉLANGER