

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

**APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE
A PETITION FOR A WRIT OF CERTIORARI**

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**Application for Extension of Time in Which to File
a Petition for a Writ of Certiorari**

To: Justice Samuel A. Alito, Jr., Circuit Justice for the Fifth Circuit, which includes the State of Louisiana.

Applicant Billy R. Lewis respectfully requests an extension of 30 days in which to file his petition for a writ of certiorari, challenging the decision of the 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. In support of this application, Mr. Lewis avers:

1. The Louisiana Supreme Court rendered judgment denying review of the Fourth Circuit's opinion on September 14, 2018, thereby making a petition for certiorari currently due on December 13, 2018. If this motion is granted, the petition would be due instead on Monday, January 14, 2018.

2. This case is a serious candidate for review by certiorari. Mr. Lewis has twice been found guilty of two counts of murder by nonunanimous jury verdicts. Mr. Lewis challenged the constitutionality of the his nonunanimous verdicts following the first trial, but those verdicts were overturned on other grounds. Mr. Lewis subsequently challenged the nonunanimous verdicts that followed his second trial, and the court below rejected that challenge, finding it foreclosed by this Court's 1972 decision in *Apodaca v. Oregon*.¹

But while the 46-year-old ruling in *Apodaca* did leave intact Louisiana's nonunanimous jury system, that is true only because of a quirk in the lineup the justices in that case regarding two legal questions: first, whether unanimity is required by the Sixth Amendment in a federal court, and second, whether such right, if it exists, is applicable to state-court proceedings under the Fourteenth

¹ 406 U.S. 404 (1972) (plurality opinion).

Amendment. Five justices agreed that unanimity was required in federal courts, and five justices agreed that the jury-trial rights bestowed by the Sixth Amendment applied equally to defendants in state court proceedings.

But because these two subsets of five justices were not identical, the challenge to Louisiana's (and Oregon's) nonunanimous jury system failed. As Justice Brennan explained:

Readers of today's opinions may be understandably puzzled why convictions by 11-1 and 10-2 jury vote are affirmed in [*Apodaca*] 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.²

Long after *Apodaca* was decided, little doubt remains that the right to a unanimous verdict is required by the Sixth Amendment³ and that the right is fully incorporated by the Fourteenth Amendment,⁴ such that *Apodaca* should no longer stand in the way of declaring Louisiana's nonunanimous jury provisions unconstitutional.⁵

² *Johnson v. Louisiana*, 406 U.S. 366, 395-96 (Brennan, J., dissenting in both *Johnson* and *Apodaca*).

³ See *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").

⁴ 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); accord *McDonald v. Chicago*, 561 U.S. 742, 763-66 & n.14 (2010) (noting that *Apodaca*'s contrary holding was "the result of an unusual division among the Justices, not an endorsement of the two-track approach to incorporation").

⁵ See, e.g., *Blakely v. Washington*, 542 U.S. 296, 313-14 (2004) ("The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and

3. This application is not filed for the purposes of delay. Rather, three recent developments support the requested extension. First, this Court is scheduled to hear oral argument in *Timbs v. Indiana*, 17-1091, on November 28, 2018. The issue in that case is: “Whether the Eighth Amendment’s Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment.” As the issue to be presented in Mr. Lewis’s petition concerns the incorporation of the Sixth Amendment’s unanimity requirement against the states, *Timbs* will surely be relevant to the resolution of Mr. Lewis’s petition. The presentation of Mr. Lewis argument in his petition is likely to be better informed through a study of the course of the upcoming argument in *Timbs*.

Second, the issue to be presented in Mr. Lewis’s petition is identical to the issue currently under consideration by this Court in *Evangelisto-Ramos v. Louisiana*, 18-5924. The petition in that case was docketed on September 11, 2018, and, pursuant to this Court’s request, the State filed its response on November 8, 2018. The course of the proceeding in *Evangelisto-Ramos* over next 48 days leading up to the requested extended due date may determine both the course and the fate of Mr. Lewis’s petition.

Finally, the extra time would be helpful in allowing Mr. Lewis to assess the impact of the very recent repeal of Louisiana’s nonunanimous jury provisions on the appropriateness of this case as a candidate for review by certiorari. That repeal, voted by the people of Louisiana earlier this month, applies prospectively only to persons whose offenses are committed after January 1, 2019. Hence, the repeal does not apply to Mr. Lewis or the hundreds of persons currently incarcerated, often for life without parole, following nonunanimous jury verdicts; nor will it apply to the unknown numbers of defendants who have yet to be convicted but whose offenses were alleged to have been

neighbours,’”) (quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)).

committed before the start of next year. Nevertheless, it is the Applicant's thesis that the repeal will reduce what little chance there ever was that the Louisiana Supreme Court would ever again consider the constitutionality of these many convictions, thus making the granting of a petition in this case all the more appropriate.

4. For theses reasons, the Applicant respectfully requests the entry of an order extending his time to file for a writ of certiorari until January 14, 2019.

Respectfully submitted this 27th Day of November,



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