

No. 17-7002

IN THE
Supreme Court of the United States

DAVID WAYNE SIMS,

PETITIONER,

v.

STATE OF LOUISIANA,

RESPONDENT.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The State's Brief in Opposition (BIO) makes clear that the issue presented in the Petition is ripe for this review.¹ Moreover, the BIO concedes that this Court *might* address the matter differently as a 'matter of first impression.' BIO at 5. The broadest feature of the BIO is a merits response. This Court should grant review.

I. THIS COURT'S PLURALITY DECISION IN *APODACA* DOES NOT SUSTAIN THE NON-UNANIMITY RULE

The decisions in *Apodaca v. Oregon*² and *Johnson v. Louisiana*³ do not form the bedrock jurisprudence that deserves the full weight of stare decisis.

A. The BIO Incorrectly Asserts that *Apodaca* has Not Been Called into Question

The BIO claims that "no recent developments in this Court's Sixth Amendment jurisprudence justify upsetting longstanding precedent," and this Court has "not questioned *Apodaca*" and cited it "without reservation." *Id.* at 3-4, citing *McDonald v. City of Chicago*, 561 U.S. 742, 766, n.14 (2010). However, a plain reading of *McDonald v. City of Chicago* reveals that *Apodaca* is far less structurally sound than the BIO would suggest. *McDonald* made clear that this Court has "abandoned 'the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights,' stating that it

¹ Compare *State v. Sims*, Brief in Opposition with *State v. Dove*, Brief in Opposition (asserting Petitioner failed to establish that underlying conviction was non-unanimous). While this case was pending, respondent moved in the trial court to unseal the jury polling slips; had the slips indicated that the verdict was unanimous, respondent would likely have informed this Court.

² *Apodaca v. Oregon*, 406 U.S. 404 (1972).

³ *Johnson v. Louisiana*, 406 U.S. 356 (1972).

would be ‘incongruous’ to apply different standards ‘depending on whether the claim was asserted in a state or federal court.’” *McDonald*, 561 U.S. at 765. Moreover, the *McDonald* footnote that the BIO relies on, actually identifies *Apodaca* as an anomaly, due to “an unusual division among justices not an endorsement of the two-track approach to incorporation.” See *McDonald*, 561 U.S. at 766 n.14 (noting “eight Justices agreed that the Sixth Amendment applies identically to both the Federal Government and the States.”). As *McDonald* makes clear, the unusual division of justices produced an anomalous result but did “not undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government.” *Id.*

B. The Doctrine of *Stare Decisis* Is Not An Impediment to Granting Certiorari in This Case

The doctrine of *stare decisis* does not pose a significant impediment to reconsidering this question presented afresh. Principles of *stare decisis* are at their nadir where a case depends upon a plurality opinion because no five Justices are able to muster a controlling view concerning the law. As noted above, *Apodaca* was a deeply fractured decision that occurred as a result of an “unusual division among the justices – not an endorsement of the two track approach to incorporation.” *Id.*

As noted above, *Apodaca*’s plurality was made up of two distinct and inconsistent, perspectives, both of which have since been disavowed. First, the four-person plurality recognized that the common law long-required juries to return unanimous verdicts, *Apodaca v. Oregon*, 406 U.S. 404, 407-08, 407 n.2 (1972), but relied on “upon the function served by the jury in contemporary society,” *id.* at 410,

to conclude that unanimity “was not of constitutional stature” in criminal cases. *id.* at 406. This Court has subsequently strictly adhered to historical origins of the amendment. See *Crawford v. Washington*, 541 U.S. 36 (2004); *Giles v. California*, 554 U.S. 353 (2008). Second, Justice Powell offered a never-used-before, never-used-since theory of partial incorporation of the Sixth Amendment. Justice Powell believed that the Sixth Amendment required unanimity at the Founding and in federal cases, but that the protections guaranteed by the Fourteenth Amendment were less than those offered by the Sixth Amendment. Justice Powell’s curious view on incorporation has also been exploded by this Court’s recent holding in *McDonald*. This Court left no doubt that it “abandoned the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights.” *McDonald*, 561 U.S. at 765.

Nine justices have agreed that unanimity was required at the Founding. Eight justices agreed that the Fourteenth Amendment incorporated the full force of the Sixth Amendment. Five justices agreed that the Sixth Amendment required adherence to its historical origins. And yet the odd configuration of opinions resulted in a rule permitting non-unanimous verdicts. *Apodaca*, therefore, is entitled only to “questionable precedential value.” *Seminole Tribe v. Florida*, 517 U.S. 44, 66 (1996) (overturning prior decision in part because a majority of the Court (the concurring opinion providing the fifth vote, as well as the dissent) had “expressly disagreed with the rationale of the plurality”). But regardless, the question of whether *stare decisis* warrants upholding *Apodaca*, is a merits question – not a reason to deny certiorari.

II. UNANIMITY WAS AN ESSENTIAL COMPONENT OF THE JURY TRIAL RIGHT AT THE FOUNDING.

The BIO claims that *Apodaca* held that unanimity was not an essential component of the jury trial right at the Founding. See BIO at 8 (“it definitively found that the historical record suggests the founders did not intend the requirement to be contained within the Sixth Amendment.”). The BIO is wrong with respect to the decision of *Apodaca* and wrong with respect to the history of the Sixth Amendment.

A. The BIO Erroneously Suggests that the *Apodaca* Plurality Decision was Based Upon the Historical Record.

The *Apodaca* plurality’s basis for rejecting unanimity was not based upon history. The plurality plainly recognized “[l]ike the requirement that juries consist of 12 men, the requirement of unanimity arose during the Middle Ages and had become an accepted feature of the common-law jury by the 18th century.” *Apodaca*, 406 U.S. at 407. At most, the plurality acknowledged “conflicting inferences”, but then held: “[I]n determining what is meant by a jury we must turn to other than purely historical considerations. Our inquiry must focus upon the function served by the jury in contemporary society.” *Id.* at 410. But at least five justices recognized that unanimity was an indispensable feature of the federal jury trial right, “mandated by history.” See *Johnson v. Louisiana*, 406 U.S. at 370 (Powell, J., *concurring*) (“In an unbroken line of cases reaching back into the late 1800’s, the Justices of this Court have recognized, virtually without dissent, that unanimity is one of the indispensable features of federal jury trial.”); *Johnson* at 383 (Brennan J., *dissenting*) (“[I]n cases dealing with juries, it had always been assumed that a

unanimous jury was required. . . . Today the bases of these cases are discarded and two centuries of American history are shunted aside.”).

B. The Historical Record is Clear that Unanimity Was an Essential Component of the Jury Trial Right.

The historical record is clear: unanimity was an essential component of what was conceived of when the Constitution referred to juries. Justice Powell and the dissenters in *Apodaca* noted without contradiction that the Sixth Amendment unanimity requirement drew from “an unbroken line of cases reaching back to the late 1800’s,” – as well as hundreds of years of common law practice. *Johnson*, 406 U.S. at 369 (Powell, J., concurring in the judgment in *Apodaca*); *see also Apodaca*, 406 U.S. at 414-15 (Stewart J., dissenting) (“Until today, it has been universally understood that a unanimous verdict is an essential element of a Sixth Amendment jury trial... I would follow these settled Sixth Amendment precedents and reverse the judgment before us.”) (citations omitted). The BIO’s textual concern regarding the omission of the word “unanimity” from the Sixth Amendment is undermined by the fact that the Constitution does not mention – as Justice Douglas, with Justices Brennan and Marshall pointed out – “the presumption of innocence, nor does it say that guilt must be proved beyond a reasonable doubt.” *Johnson*, 406 U.S. at 381.

As with the reasonable-doubt standard, a jury unanimity requirement “dates at least from our early years as a Nation,” *In re Winship*, 397 U.S. 358, 361 (1970), and in fact from even earlier. Influential British jurists consistently included unanimity as a defining characteristic of the trial by jury. For example, Sir Matthew Hale wrote that, “[t]he law of England hath afforded the best method of trial, that is

possible, of this and all other matters of fact, namely, by a jury of twelve men all concurring in the same judgment...” 1 Hale, *The History of the Pleas of the Crown* 33 (1736). In his *Commentaries*, Sir William Blackstone noted the critical role a unanimity requirement can play in ensuring that the Crown wrongly seize an individual’s liberty. Blackstone first observed the special risk of “violence and partiality of judges appointed by the crown” in criminal cases, and the attendant risk of overzealous prosecution if the power to prosecute were “exerted without check or control.” 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769). Out of concern for those dangers, “[o]ur law has wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people, and the prerogative of the crown.” *Id.* But according to Blackstone, it was not merely the existence of the jury that provided that barrier; it was the additional requirement “that the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours.” *Id.* For this reason, Blackstone explained: “that it is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals.” 3 W. Blackstone, *Commentaries on the Laws of England* 379 (1769).

The Framers carried this perspective with them in crafting the Sixth Amendment. In its original form, the proposed Amendment provided that, “The trial of all crimes . . . shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed

requisites...” 1 Annals of Cong. 435 (1789). Although the House ratified that Amendment in substantially similar form, it underwent considerable transformation in the Senate, which was “inflexible in opposing a definition of the *locality* of Juries. The vicinage they contend is either too vague or too strict a term...” *Williams v. Florida*, 399 U.S. 78, 95 (1970) (emphasis in original) (quoting 1 Letters and Other Writings of James Madison 492-93 (1865)). The debate over the vicinage requirement ultimately led to the more broadly-worded Sixth Amendment ratified in 1791, but the historical record suggests that the elimination of the term “accustomed requisites” from an earlier draft of the amendment was based upon the understanding that unanimity was included in very definition of a jury.⁴

This Court’s recent Sixth Amendment jurisprudence has clarified that the Amendment conveys “specific” rights “that were the trial rights of Englishmen” at common law. *Giles v. California*, 554 U.S. at 375. See also *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (noting “the ‘truth of every accusation’ against a defendant ‘should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours.’”); *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (same). In this

⁴ In his *Commentaries*, Justice Joseph Story wrote, “A trial by jury is generally understood to mean . . . a trial by jury of twelve men . . . who must unanimously concur in the guilt of the accused. . . . Any law, therefore, dispensing with any of these requisites, may be declared unconstitutional.” 2 Joseph Story, *Commentaries on the Constitution of the United States* 559 n.2 (1891). In a series of lectures on the Constitution, Justice John Marshall Harlan asked “whether a state may dispense with a petit jury or modify the trial as it was at the time of the adoption of the Constitution? I answer unhesitatingly that no court of the United States . . . can sentence any man upon the return of a verdict of jury in which all the jury have not concurred.” Frye, et al., *Justice John Marshall Harlan: Lectures on Constitutional Law*, 81 Geo. Was. L. Rev. 12A, 253 (2013); *Id.* at 252 (noting Justice Harlan’s appreciation of the importance of a unanimity requirement: “The glory of our civilization is that we do have some regard for human life and human liberty when a man’s life is at stake, or when his liberty is put at stake. ...I think that a unanimous verdict is required under this Constitution in the Courts of the United States.”).

regard, the historical record is clear—jury unanimity was one of the essential trial rights of Englishmen, as “prime [an] instrument for reducing the risk of convictions resting on factual error” as the reasonable-doubt standard. *Winship*, 397 U.S. at 363. But regardless, the question of whether unanimity was required at the founding, is a merits question not a reason to deny certiorari at this stage.

III. THE SORDID RACIST ORIGINS OF LOUISIANA’S NON-UNANIMOUS JURY RULES SHOULD INFORM THIS COURT’S ASSESSMENT REGARDING WHETHER THE FOURTEENTH AMENDMENT INCORPORATES THE SIXTH AMENDMENT.

The BIO suggests that race may not have been the motivating factor for the avowedly racist 1898 Constitutional Convention’s decision to authorize non-unanimous juries, as “for example, a mundane matter like an ordinance affecting public roads was unlikely to be motivated by racial animus” (BIO at 17 n.19) and that even if it was racist, that “history did not end in’ 1898.” (BIO at 17).

A. The Origins of the Non-Unanimous Jury Rule Was Racist

The opening address at the 1898 Louisiana Constitutional Convention made clear that the point of the entire Convention was to limit African Americans’ participation in the democratic process and to “perpetuate the supremacy of the Anglo-Saxon race in Louisiana.” Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana, 8-9 (1898) [hereinafter “Journal”]. Closing the Convention, Hon. Thomas J. Semmes celebrated the putatively successful “mission” of the delegates “to establish the supremacy of the white race in this state.” *Id.* at 374. When discussing the provisions adopted to prevent African-American suffrage, a like-minded delegate explained:

[T]he Supreme Court of the United States in the Wilson case, referring to that, said that they had swept the field of expedients, but they were permissible expedients, and that is what we have done in order to keep the negro from exercising the suffrage. What care I whether the test we have put be a new one or an old one? What care I whether it be more or less ridiculous or not? Doesn't it meet the case? Doesn't it let the white man vote, and doesn't it stop the negro from voting, and isn't that what we came here for? (Applause)

Constitutional Convention of the State of Louisiana, *supra*, at 380.

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 what they would have wished: "universal 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 assert his belief that neither the judiciary nor the congress would "take the responsibility of striking down the system that 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.

The proponents of those rules sometimes tried to pass them off as cost-saving devices, but commentators have directly linked the diminution of the jury trial right to the Convention's larger effort "to consolidate Democratic power in the hands of the 'right people,' thereby bypassing the poorer sorts, just as the suffrage provision did." W. Billings & E. Haas, *In Search of Fundamental Law: Louisiana's Constitutions, 1812-1874*, The Center for Louisiana Studies (1993), pp. 93-109. *See also* 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; Angela A. Allen-Bell, *Why Stop at Confederate Monuments? Remove the Codification of Supremacy and Oppression by Abandoning the Use of Non-Unanimous Juries in Criminal Cases*, American Bar Association, Nov. 14, 2017; Angela Allen-Bell, *How the Narrative about Louisiana's Non-Unanimous Criminal Jury System Became A Person of Interest in the Case Against Justice in the Deep South*, 67 Mercer L. Rev. 585 (2015-2016). Whatever the historical accuracy⁵ behind the BIO's claim that "mundane matter like an ordinance affecting public roads" were "unlikely to be motivated by racial animus," the non-unanimous jury provision was not disconnected from race.

B. The Non-Unanimous Rule Continues to Operate in a Manner to Reduce African-American Voices on Juries

While the BIO suggests that "cleansing" of the race-based non-unanimity rule may have occurred in the 1970's, the rule continues to operate in a way that undermines African Americans' participation in jury service. An exhaustive non-partisan analysis of approximately 3,000 felony trials over the last six years by *The Advocate* identified 993 jury verdicts by 12 member jury verdicts. Forty percent of these trials were non-unanimous. The review revealed that the combination of prosecutorial strikes and the non-unanimous jury rule effectively silenced

⁵ It is ultimately ahistorical to suggest that the "mundane" questions of taxation for public roads and public transportation, were unrelated to race. These issues were hotly debated. Cf *Plessy v. Ferguson*, 163 U.S. 537 (1896). See also Gilbert Thomas Stephenson, *The Separation of Races in Public Conveyances*, Vol. 3, The American Political Science Review No. 2 (May 1909), at 199 ("So far, eight of the Southern States have passed general statutes to separate the races on street cars, in the following order: ...Louisiana, 1902...").

participation by African-American jurors. See 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. The recent *Advocate* article merely confirms what researchers have previously suggested: that non-unanimity serves to silence minority jurors. Kim Taylor-Thompson, *Empty Votes In Jury Deliberations*, 113 Harv. L. Rev. 1261, 1264 (Apr. 2000). Ultimately, petitioner does not take on the responsibility to prove that the non-unanimous jury verdict proceeds on an unbroken line of racism from 1898 to 2018, but simply that the Fourteenth Amendment incorporation doctrine should be at its most robust where the history and the impact of the rule has such a sordid racial component.

IV. CONSIDERATIONS REGARDING RELIANCE AND FINALITY WARRANT GRANTING CERTIORARI NOW RATHER THAN WAITING UNTIL LATER

The BIO's most vehement argument for denying certiorari involves an issue not presently before the Court: that "Thousands of final convictions in these two states could be upset if such a new rule were later declared retroactive." BIO at 5. "Although the State would contend that a new rule requiring unanimous verdicts in state criminal cases should not be applied retroactively during collateral review, the outcome of such a hypothetical case is not certain and a flood of defendants undoubtedly would immediately file motions claiming otherwise." *Id.* at 5-6. The question of retroactivity is not presently before this Court. The longer the Court

delays resolving the issue that is before the Court, the greater the problem for the State after it is resolved.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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Undersigned counsel certifies that on this date, the 4th day of April, 2018, pursuant to Supreme Court Rules 29.5(b), the accompanying Reply Brief for Petitioner 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.

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