No. 10-689

IN THE
Supreme Court of the United States

TROY BARBOUR,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, Fourth Circuit

REPLY BRIEF FOR PETITIONER

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Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Authorities

Other Authorities

Blank Page

REPLY BRIEF FOR PETITIONER

The State does not dispute that the question whether it may secure felony convictions through nonunanimous jury verdicts is an exceptionally important constitutional issue that arises frequently in its courts, as well as in Oregon's. Nor does the State contest that this case, unlike *Herrera v. Oregon*, No. 10-344 (cert. denied Jan. 10, 2011), presents an ideal vehicle to resolve the issue. In particular, the jury's 10-2 vote in this "he said, he said" attempted-murder case in which petitioner received a 48-year prison sentence perfectly showcases the uncertainties of non-unanimous verdicts. *See* Pet. 34-35. And the racially discriminatory history of Louisiana's law highlights why incorporating the Sixth Amendment's unanimity principle against the states is vital to fulfilling the objective of the Fourteenth Amendment. Pet. 31-33.

The only argument the State offers for denying certiorari is that this Court should give *stare decisis* effect to its deeply fractured decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972), which allowed convictions through non-unanimous verdicts. But this argument cannot withstand scrutiny on either legal or practical grounds.

In the 40 years since *Apodaca* was decided, this Court has abandoned not only the constitutional methodology that the plurality employed in that case, but also its specific conclusion that the Sixth Amendment does not require unanimous verdicts. *See McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035 n.14 (2010); Pet. 12-16. This Court also has

repudiated Justice Powell's conclusion in his decisive concurrence that incorporated provisions of the Bill of Rights – one of which is the right to jury trial, *see Duncan v. Louisiana*, 391 U.S. 145 (1965) – need not apply the same in federal and state courts. *See McDonald*, 130 S. Ct. at 3048; Pet. 16-19. This case thus provides a textbook example of the principle that this Court should at the very least reexamine – and likely overrule – a decision when "related principles of law have so far developed as to have left the old rule no more than a remnant of an abandoned doctrine." *Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992) (plurality opinion); *see also Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989) (overruling is proper when doctrinal changes "have removed or weakened the conceptual underpinnings of the prior decision").

Furthermore, considerations in favor of *stare decisis* are at their nadir "in cases . . . involving procedural and evidentiary rules" because such rules do not produce "reliance" as substantive rules do. *Pearson v. Callahan*, 129 S. Ct. 808, 816 (2009) (quotation marks and citation omitted). It thus comes as no surprise that the State cannot point to a single state practice (other than the non-unanimity policy at issue here) or legal doctrine that depends upon *Apodaca.* Nor has the federal government or any other state acted in reliance on *Apodaca.* Louisiana and Oregon remain the sole national outliers, engaging in a practice that flouts centuries of Anglo-American legal heritage and the continuing public perception of the fair administration of justice.

It is, in short, hard to imagine a more compelling case for re-examination of one of this Court's prior decisions or a less compelling case for *stare decisis*. This Court should grant certiorari.

ARGUMENT

The State's attempt to defend the constitutionality of securing criminal convictions by non-unanimous verdicts demonstrates just how incompatible *Apodaca* has become with this Court's Sixth and Fourteenth Amendment jurisprudence. It is imperative that this Court address that schism, not just to bring clarity to its own law but also to provide guidance to Louisiana and Oregon state courts and federal courts across the country.

A. Sixth Amendment

The State argues that "the Sixth Amendment does not require unanimous verdicts in criminal cases." BIO 3. In *McDonald*, however, this Court expressly disavowed any such general rule. There, this Court described *Apodaca* as holding that "although the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials, it does not require a unanimous jury verdict in state criminal trials." 130 S. Ct. at 3035 n.14. Surely this Court did not mean in this passage to suggest, for the first time in the history of constitutional law, that the same constitutional provision can mean two different things, depending on whether it is invoked in a federal or a state court. Instead, this Court can only have meant to describe *Apodaca* as holding (consistent with the votes of five

Justices in the case, as well as pre-*Apodaca* precedent, *see* Pet. 9) that the Sixth Amendment requires unanimous verdicts, but that the Fourteenth Amendment does not apply that rule to the states. The State's view of the Sixth Amendment cannot be squared with that characterization of this Court's precedent.

Even if the State's reading of *Apodaca* remained plausible, however, it would only heighten the need for certiorari. Every federal court of appeals to have considered the issue since *Apodaca* has concluded that the Sixth Amendment requires unanimous verdicts.[1] Indeed, the federal circuits have held the Sixth Amendment's unanimity requirement is so constitutionally indispensable that a defendant cannot even waive it. *United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978) (Kennedy, J.); *see also United States v. Pachay*, 711 F.2d 488, 491 (2d Cir. 1983) (agreeing with several other circuits to this effect). If the State's view of the Sixth Amendment were somehow correct, then it would be necessary for this Court to grant certiorari to correct the error in all of this federal precedent. The Sixth Amendment can mean only one thing, and its

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[1] *See, e.g.*, *United States v. Russell*, 134 F.3d 171, 177 (3d Cir. 1998); *United States v. Sarihifard*, 155 F.3d 301, 310 (4th Cir. 1998); *Sincox v. United States*, 571 F.2d 876, 878-79 (5th Cir. 1978); *United States v. Smedes*, 760 F.2d 109, 111-12 (6th Cir. 1985); *United States v. Eagle Elk*, 820 F.2d 959, 961 (8th Cir. 1987); *United States v. Savage*, 7 F.3d 1435, 1439 (9th Cir. 1995); *United States v. Hernandez-Garcia*, 901 F.2d 875, 877 (10th Cir. 1990); *United States v. Ginyard*, 444 F.3d 648, 652 (D.C. Cir. 2006).

protections and effects should not depend on the forum in which a defendant is prosecuted.

B. Fourteenth Amendment

The State also contends that even if the Sixth Amendment requires unanimous verdicts, the Fourteenth Amendment need not incorporate that rule against the states because this Court takes an "individualistic" approach to whether protections in the Bill of Rights apply to the states. BIO 17. This argument likewise flies in the face of *McDonald.* There, this Court held in no uncertain terms that "[t]he relationship between the Bill of Rights' guarantees and the States must be governed by a single, neutral principle": "incorporated Bill of Rights protections are to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Id.* at 3035, 3048 (internal quotation and citation omitted). Indeed, this Court thus made clear that it had long since "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." *Id.* at 3035 (internal quotation marks and citation omitted). "[I]t would be incongruous to apply different standards depending on whether the claim was asserted in a federal or state court." *Id.* (internal quotation marks and citation omitted).

Nothing in the cases the State cites for its preferred "individualistic" approach (BIO 17-19) suggests the contrary. Those cases, such as

Washington v. Glucksberg, 521 U.S. 702 (1997), are all substantive due process cases in which this Court considered whether a constitutional right existed at all. By contrast, when, as here, the question is merely whether to apply a rule concerning an already-existing constitutional right that applies to the federal government against the states, this Court's equivalence mandate controls. This Court confirmed as much in *McDonald*, asserting that it was a "well-established rule," notwithstanding *Apodaca*'s outcome, that "incorporated Bill of Rights protections apply identically to the States and the Federal Government." *McDonald*, 130 S. Ct. at 3035 n.35. Having thus disavowed the decisive reasoning of *Apodaca*, it is practically incumbent on this Court to overrule the case.

Lest there be any remaining hesitancy regarding the need to re-examine *Apodaca*, both the majority and the dissenting opinions in *McDonald* emphasized that it is especially imperative to apply a guarantee of the Bill of Rights against the states when the guarantee has roots in guaranteeing full citizenship to blacks. *See* 130 S. Ct. at 3040, 3043 (majority opinion); *id.* at 3112, 3125, 3133 (Breyer, J., dissenting). It is therefore striking that while the State expends considerable energy making various arguments on the merits, it never disputes that Louisiana's goal in adopting its non-unanimity rule in 1898 was to disenfranchise blacks and to ensure whites' control over this species, as others, of political decision making. *See* Pet. 33; Amicus Br. of LACDL at 20-31, *Herrera v. Oregon*, No. 10-344 (cert. denied Jan. 10, 2011). This Court was apparently unaware of this history when it decided

Apodaca and *Johnson v. Louisiana*, 406 U.S. 366 (1972). But there is now no justification for allowing the State to continue to enforce this enormously consequential remnant of the Jim Crow era.[2]

CONCLUSION

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

Respectfully submitted,

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[2] The State's suggestion there is no evidence of "any correlation between nonunanimous verdicts and wrongful convictions" (BIO 16) is wrong. Louisiana has the highest rate of recorded wrongful convictions in the country. *See* Samuel R. Gross, et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 541 (2006). In any event, "[t]o look upon the jury as a mere judicial institution, is to confine our attention to a very narrow view of it; for, however great its influence may be on the decisions of the law-courts, that influence is very subordinate to the powerful effects which it produces on the communities at large. The jury is above all a political institution," intended to "introduce an eminently republican element into the government." Alexis de Tocqueville, Democracy in America 308-09 (8th ed. 1848).

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