No. 12-162

IN THE
Supreme Court of the United States

COREY MILLER,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

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

REPLY BRIEF FOR PETITIONER

Robert Smith
Van Hecke-Wettach Hall
160 Ridge Road
Chapel Hill, NC 27514

Kevin K. Russell
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Ave., NW
Suite 404
Washington, DC 20015

Jeffrey L. Fisher
Counsel of Record
Pamela S. Karlan
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305-8610
(650) 724-7081
jlfisher@law.stanford.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONER

Jefferson Parish, Louisiana (where this case arises), has the fourth highest rate of wrongful convictions per capita in the country. Samuel L. Gross & Michael Shaffer, *Exonerations in the United States, 1989-2012*, at 36 tbl.11 (2012), *available at* http://tiny.cc/Miller-1. Neighboring Orleans Parish has the highest rate. *Id.* These realities are due in part to the frequency of *Brady* violations in these jurisdictions, which, as this Court has recently observed, undermine the proper operation of the adversarial process. *See Smith v. Cain*, 132 S. Ct. 627 (2012); *Connick v. Thompson*, 131 S. Ct. 1350 (2011). But there is another root cause of the problem: Louisiana's sanctioning of nonunanimous verdicts – a practice that stultifies the time-honored method of ensuring careful review of the prosecution's case in the jury room.

Each of these contributors to wrongful convictions marred petitioner's prosecution. Saddled with an improbable theory of the case and lead witnesses with serious credibility problems, the State in the initial trial committed *four* distinct *Brady* violations. *See* Pet. 3-5. On retrial, the State secured a conviction despite two jurors voting not guilty (and the decisive juror voting guilty only after she informed the court that her initial vote to convict was cast "under duress"). *Id.* 5. Petitioner is now serving a sentence of life in prison without the possibility of parole.

In light of the overwhelming historical and modern evidence condemning its practice of nonunanimous verdicts, the State opposes certiorari on two grounds. First, the State argues that

petitioner's challenge to that practice is not properly before this Court because he failed to raise his objection below in accordance with local procedural rules. BIO 3-5. Second, the State contends that *stare decisis* precludes revisiting this Court's fractured decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972). BIO 8. But the State's procedural objection is meritless. Furthermore, the principles underlying *stare decisis* – consistency, tradition, and the actual and perceived integrity of the judicial process – dictate that this Court should reconsider, not perpetuate, *Apodaca*.

1. Petitioner's federal constitutional challenge to the nonunanimous verdict in his case is properly before this Court. It suffices to note that it is "irrelevant" whether a party complied with state procedural requirements when the state court below "actually considered and decided" the federal question at issue. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991); *see also Orr v. Orr*, 440 U.S. 268, 274-75 (1979). And here, when petitioner moved for a new trial on grounds that the jury's nonunanimous verdict violated his Sixth and Fourteenth Amendment rights, the trial court "recognized and denied" his motion. BIO 2-3. The Louisiana Court of Appeal also implicitly accepted the procedural legitimacy of this objection and ruled on the merits of petitioner's federal constitutional claim. *See* Pet. App. 47a-49a. That ruling places petitioner's claim squarely before this Court.

2. Principles of *stare decisis* provide no basis for denying review. The doctrine of *stare decisis* is designed to promote "'the evenhanded, predictable, and consistent development of legal principles,

foster[] reliance on judicial decisions, and contribute[] to the actual and perceived integrity of the judicial process.'" *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). Each of those values counsels revisiting, not preserving, *Apodaca*. That fractured, internally inconsistent decision (a) is directly at odds with this Court's subsequent jurisprudence; (b) has not generated any legitimate reliance interest; and (c) condones a practice that seriously undermines the integrity and accuracy of criminal trials.

a. Consistency with this Court's Sixth and Fourteenth Amendment jurisprudence – including two new cases decided just last Term – requires eliminating *Apodaca* as the "one exception" to this Court's longstanding approach to incorporation. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035 n.14 (2010); *see also* Pet. 14-15 (discussing *S. Union Co. v. United States*, 132 S. Ct. 2344, 2354 (2012), and *Blueford v. Arkansas*, 132 S. Ct. 2044, 2051 (2012)). A simple three-step syllogism illustrates that *Apodaca*'s holding is untenable:

- *First*, "[this] Court has held that . . . the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials." *McDonald*, 130 S. Ct. at 3035 n.14. This was the Court's view "[i]n an unbroken line of cases" before *Apodaca*. *Johnson v. Louisiana*, 406 U.S. 356, 369 (1972) (Powell, J., concurring in the judgment). It was the view of a majority of the Justices in *Apodaca* itself. *See id.* at 371 (Powell, J., concurring in the judgment); *id.* at 383 (Douglas, J., dissenting); *Apodaca*, 406 U.S. at 414

(Stewart, J., dissenting) (joined by Brennan & Marshall, JJ.). And this Court's pronouncements in subsequent Sixth Amendment cases make clear that it *still* holds this view. *See* Pet. 14-15.

- *Second*, "In *Duncan v. Louisiana*, the Court held that the [Sixth Amendment] right of trial by jury was a fundamental right applicable to the States by virtue of the Fourteenth Amendment." *Burch v. Louisiana*, 441 U.S. 130, 132 n.2 (1979) (citation omitted).
- *Third*, "the Court [has] decisively held that incorporated Bill of Rights protections are all to be enforced against the States under the Fourteenth Amendment according to the *same standards* that protect those personal rights against federal encroachment." *McDonald*, 130 S. Ct. at 3035 (emphasis added) (internal quotation marks and citation omitted).

The logical conclusion is inescapable: this Court has already made clear that the Sixth Amendment, fully applied to the states through the Fourteenth Amendment, requires a unanimous jury verdict.

Stare decisis provides no reason for this Court to remain chained to a result it has logically repudiated. To the contrary, this Court has recognized its responsibility to "overrule[] [its] precedents when subsequent cases have undermined their doctrinal underpinnings." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 900 (2007) (internal quotation marks and citation omitted). This is particularly true in incorporation cases, where this Court repeatedly has "overruled

earlier decisions in which it had held that particular Bill of Rights guarantees or remedies did not apply to the States." *McDonald*, 130 S. Ct. at 3036 (listing cases). In fact, the sole right that remains partially, but not fully, incorporated against the states is the right to "a unanimous jury verdict in state criminal trials." *Id.* at 3035 n.14. Continuing to adhere to *Apodaca*'s result on *stare decisis* grounds would leave it as the only departure from this Court's otherwise uninterrupted and consistent practice in incorporation cases. A fractured opinion that rests on a single Justice's legal theory – one which eight others rejected even at that time – does not merit that distinction.

b. Contrary to the State's suggestion (BIO 9), the states lack any legitimate "reliance interest[]" in the continued vitality of *Apodaca*. Since *Apodaca*, not a single one of the forty-eight states to require unanimity in felony prosecutions has relaxed that standard. Pet. 23. Just as when *Apodaca* was decided, Louisiana and Oregon are the only states that allow nonunanimous verdicts in such cases. And those states' interest in enforcing their laws is no different today than it was then.

Nor can either of those states claim a vested interest in the "functional" approach to the right to a jury trial that the plurality espoused in *Apodaca*. *See* BIO 9-10. In *Apodaca* itself, a majority of the Justices rejected that approach in favor of one grounded in the history and tradition of requiring unanimous verdicts. *See Johnson*, 406 U.S. at 370 & n.6 (Powell, J., concurring in the judgment); *id.* at 382 & n.1 (Douglas, J., dissenting); *Apodaca*, 406 U.S. at 414-15 (Stewart, J., dissenting) (joined by

Brennan & Marshall, JJ.). And in case after case since, this Court has made absolutely clear that regardless of any supposed functional justification for a given practice, states lack any "sovereign prerogative[]" (BIO 10) to abandon "the Framers' paradigm for criminal justice" embodied in the Sixth Amendment. *Blakely v. Washington*, 542 U.S. 296, 313 (2004); *see also* Pet. 13-14 (quoting and citing other cases to this effect).[1]

c. For two reasons, this Court's duty to safeguard "the actual and perceived integrity of the judicial process," *Payne*, 501 U.S. at 827, further warrants revisiting *Apodaca*. First, nonunanimous jury verdicts undermine the accuracy of criminal trials. Second, Louisiana's law allowing nonunanimous verdicts is a vestige of Jim Crow politics, the remnants of which this Court has otherwise taken pains to eradicate from American law.

i. Louisiana's nonunanimous jury system facilitates wrongful convictions. In the forty years since *Apodaca*, studies have shown that nonunanimous juries convict innocent defendants more often than their unanimous counterparts. *See* NACDL Amicus Br. 12-17, 21-22 (discussing studies

---

[1] To the extent the State argues that applying the Sixth Amendment's requirement of jury unanimity to the states would require this Court to revisit its prior decisions concerning the number of people that a jury must contain, the State is incorrect. *See* BIO 13 (citing *Williams v. Florida*, 399 U.S. 78, 92 (1970)). In contrast to jury unanimity, *see McDonald*, 130 S. Ct. at 3035 n.14, this Court has never determined that the Sixth Amendment requires a jury comprised of exactly twelve persons. That distinction is dispositive here. Accordingly, this Court need not concern itself here with disturbing *Williams* or any additional precedent.

and actual cases); William S. Neilson & Harold Winter, *The Elimination of Hung Juries: Retrials and Nonunanimous Verdicts*, 25 Int'l Rev. L. & Econ. 1, 17 (2005) (study showing that nonunanimous juries generally produce "less accurate verdicts"); James Kachmar, *Silencing the Minority: Permitting Nonunanimous Jury Verdicts in Criminal Trials*, 28 Pac. L.J. 273, 301-02 (1996). Indeed, by requiring jury unanimity for capital cases, Louisiana itself appears to agree that unanimous jury verdicts are more accurate. La. Const. art. I, § 17(A) ("A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict."). Given Louisiana's well-documented problem of wrongful convictions, *see supra* at 1, it should require this same degree of certainty when, as here, a sentence of life without parole is at stake.

ii. In *McDonald*, this Court noted that it is especially important to incorporate elements of the Bill of Rights when necessary "to provide full protection for the rights of blacks." *McDonald*, 130 S. Ct. at 3041. Holding that states must abide by the Sixth Amendment's unanimity requirement would further this purpose.

Louisiana's nonunamimity rule was adopted during a constitutional convention designed to "establish the supremacy of the white race." *Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana* 374 (1898) (statement of Hon. Thomas J. Semmes, Chairman, Comm. on the Judiciary). The State contends that this abhorrent purpose animated only the grandfather clause and literacy test that came out of

the convention. BIO 11. But the State offers no reason why the nonunanimity rule does not share the same taint. In fact, public discourse of the era viewed black votes in jury rooms with the same kind of derision as black votes at the ballot box. For instance, a letter published in the *Daily Picayune* complained that black jurors "d[id] not appear to much advantage in any capacity in the courts of law. . . . [I]f a negro be on trial for any crime, [a black juror] becomes at once his earnest champion, and a hung jury is the usual result." P. Mevin, Letter to the Editor, *Future of the Freedman*, Daily Picayune (New Orleans), Aug. 31, 1873, at 5. Discriminatory measures reflecting such sentiments are exactly what the Reconstruction Amendments were designed to combat.

The racial effects of Louisiana's nonunanimous verdict rule continue to be felt today. In Jefferson Parish, where petitioner was convicted, the State strikes African-American jurors at more than three times the rate of white jurors. LACDL Amicus Br. 15-16, *Snyder v. Louisiana*, 552 U.S. 472 (2008) (No. 06-10119), 2007 WL 1495832. The result of this reality, when combined with the allowance of nonunanimous verdicts, is that 80% of juries in this Parish can return guilty verdicts with no African-American votes in favor of conviction. Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* 14 (2010), *available at* http://tiny.cc/Miller-2. Accordingly, contrary to the State's suggestion, this Court's duty to safeguard the actual and perceived integrity of the criminal justice system demands that this Court promptly

forbid Louisiana's nonunanimous verdict rule, not that it allow this anomalous practice to persist.

Stamping out this practice now would be especially appropriate in light of the work this Court already has decided to undertake this Term. This Court recently granted certiorari to consider whether its current Sixth Amendment jurisprudence requires it to overrule prior precedent that was insufficiently attentive to the history and practical importance of the right to jury trial. *See Alleyne v. United States*, No. 11-9335. Reconsidering *Apodaca* now would serve the vital function of ensuring that this Court's jury-trial jurisprudence emerges from this Term as a coherent and evenhanded whole.

CONCLUSION

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

Respectfully submitted,

Robert Smith
Van Hecke-Wettach Hall
160 Ridge Road
Chapel Hill, NC 27514

Kevin K. Russell
GOLDSTEIN &
RUSSELL, P.C.
5225 Wisconsin Ave., NW
Suite 404
Washington, DC 20015

Jeffrey L. Fisher
Counsel of Record
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305-8610
(650) 724-7081
jlfisher@law.stanford.edu

October 31, 2012