

**NO. 12-162**  
**IN THE**  
**UNITED STATES SUPREME COURT**

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**COREY MILLER**

Petitioner

versus

**STATE OF LOUISIANA**

Respondent

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

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**BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI**

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## **QUESTIONS PRESENTED FOR REVIEW**

### **I.**

Whether petitioner properly objected in the state proceedings to reserve the claim he seeks to raise herein.

### **II.**

Whether Louisiana's procedure authorizing criminal convictions to be based on non-unanimous verdicts violates the Sixth Amendment right to a jury trial.

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Respondent, the State of Louisiana, respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of the State of Louisiana be denied.

**CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Sixth Amendment of the United States Constitution provides, in pertinent part, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”

The Fourteenth Amendment of the United States Constitution provides, in pertinent part, “Nor shall any State deprive any person of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws.”

The Tenth Amendment of the United States Constitution provides, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

Article I § 17 (A) of the Louisiana Constitution provides, in pertinent part, “ A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict.”

Article 782 (A) of the Louisiana Code of Criminal Procedure provides, in pertinent part, “Cases in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict.”

## **STATEMENT OF THE CASE**

### **PROCEDURAL HISTORY**

Petitioner was twice convicted by jury in Louisiana of second degree murder. After the first trial, the trial court granted his motion for a new trial and this ruling, after being challenged by the state, was upheld by the Louisiana Supreme Court. State v. Miller, 05-1111 (La. 3-10-06), 923 So.2d 625. He was tried again by jury and again found guilty. He was sentenced to life in prison without the benefit of parole, probation or suspension of sentence. The state appellate court affirmed. State v. Miller, 10-718 (La. App. 5<sup>th</sup> Cir. 12-28-11), 83 So.3d 178. The Louisiana Supreme Court denied supervisory review. State v. Miller, 12-0282 (La. 5-18-12), 89 So.3d 1191.

As permitted by Louisiana law, the jury’s guilty verdict was returned with 10 jurors

voting for guilty while 2 jurors voted not guilty. This non-unanimous verdict provides the basis for petitioner's claim herein.

### **PROCEDURAL OBJECTION**

The state submits that petitioner's application should be denied because the issue was not properly preserved for review in the courts below. The defendant was indicted on February 28, 2002. His first trial was held in September of 2003. His second trial was held in August 2009. Defendant did not, prior to, during or before the case was submitted to the jury in either trial, file any challenge or otherwise object to Louisiana's non-unanimous jury law. This issue was first raised by petitioner several days after the jury returned its guilty verdict. The verdict was returned on August 11, 2009. It was accepted and the jury discharged. It was not until August 14, 2009, when counsel, for the first time, voiced an objection to a non-unanimous verdict. This was on the date set for sentencing. Counsel acknowledged not filing a formal motion for a new trial on this issue (in contravention of the requirement in article 852 of the Louisiana Code of Criminal Procedure that "a motion for a new trial shall be in writing"). Counsel stated to the court, "... it was your duty, you had no discretion but to instruct the jury that they had the option of returning a non-unanimous verdict that it would take at least ten out of twelve to return a verdict. That having been said, nevertheless, I want the record to clearly reflect that Corey Miller does not waive or give up any objections he would have to a non-unanimous jury system as a matter of federal law, and would argue and ask for a mistrial on the grounds that a non-unanimous jury is a violation of his Sixth and Fourteenth Amendment rights to the United States Constitution." (App. 2).



But of course he did waive it by not timely objecting. This untimely challenge was not permitted by state law. As the trial court ruled, “Alright. I think, just so we’re clear, the record – we supplemented the record. I can’t really rule on the motion for mistrial at this point because as far as I’m concerned, the trial’s over.” (App. 3). Counsel did file a Motion For Mistrial, but the non-unanimous jury issue was not raised. (App. 10).

To the extent that counsel belatedly argued that the trial court had no discretion in its jury instructions on this issue, but that he was not waiving this claim, the state points out that counsel did timely file a written Motion For Special Written charges. (App. 5). However, this Motion did not address the issue sought to be raised herein.

The state further points out that in Petitioner’s Application herein his Statement Of The Case accurately relates the chronology of this claim being raised. On page 5 of his Application he states, “This time the trial court accepted the verdict.” His next paragraph advises that he then moved for a new trial. As shown herein, this was several days later. This was too late as found by the trial judge which ruling was in accord with the contemporaneous objection rule.

Rule 1-3 of the Louisiana Uniform Rules – Courts of Appeal, states that “The Courts of Appeal will review only issues which were submitted to the trial court and which are contained in specifications or assignments of error, unless the interest of justice clearly requires otherwise.” Similarly, La. C.Cr.P. art. 841 (A), Louisiana’s contemporaneous objection rule, provides that “An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence.”

This Court’s Rules are in accord. Rule 14 (g) (i) provides that a petitioner must specify “. . . the stage in the proceedings, both in the court of first instance and in the appellate courts,

when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts.” Petitioner does not comply with this Rule because he does not provide such a specification for this Court.

Despite the lack of a contemporaneous objection, appellate counsel argued this claim on appeal. The state responded that it was procedurally barred and should not be considered. The state’s brief argued

## VI. NON-UNANIMOUS VERDICT

Defendant contends that the Sixth Amendment to the United States Constitution requires unanimous verdicts and that therefore the non-unanimity provision is unconstitutional. Defendant, however, makes no showing that his contention was raised in the court below to preserve it for review as required by the contemporaneous objection rule. La.C.Cr.P. art. 841. Similarly, defendant makes no reference to the record to show any objection in the trial court. Thus, this contention should not be considered as it does not comply with Rule 2-12.4 of the Uniform Rules – Courts of Appeal.

Rule 2-12.4 provides that the appellant’s brief shall set forth the ruling or action of the trial court thereon. Petitioner’s brief could not comply because the claim was not timely raised in the trial court.

In affirming petitioner’s conviction the state appellate court chose not to address the lack of a contemporaneous objection and proceeded to deny relief on the merits as required by this Court’s precedents. See petitioner’s Appendix. A, p. 47a.

Applying this Court’s Rules, respondent submits that this petition for certiorari should be denied because petitioner did not timely raise the question sought to be presented herein in the court of first instance and because the state did timely and properly object when petitioner did first attempt to raise it. Thus, Orr v. Orr, 440 U.S. 275 (1979) cannot authorize the petition to be

granted because in Orr, the party adverse to the constitutional challenge did not object that it was untimely raised. Here, respondent did object that the claim was untimely.

“No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.” United States v. Olano, 507 U.S. 725 (1993). This petition should be denied because the issue was not properly preserved for review in the courts below.

### **REASONS FOR DENYING THE PETITION**

Petitioner asks this Court to reverse a ruling made by this Court 40 years ago. When presented with this request between then and now this Court has declined. It should do so again as it has consistently done since the Court’s ruling in Apodaca v. Oregon, 406 U.S. 404 (1972). The plurality in Apodaca concluded that the law in Oregon which allowed non-unanimous verdicts in criminal cases did not violate the Constitution. This has been the settled law of the land since. It implicitly approved the practice in Louisiana which is challenged herein. The practice and law allowing non-unanimous verdicts in Louisiana was adopted in the state Constitution of 1898. At that time, Article 116 provided that juries consisting of twelve jurors required nine of the twelve to render a verdict. This Court explicitly approved this practice in a companion case to Apodaca. In Johnson, v. Louisiana, 406 U.S. 356 (1972), this Court considered whether this practice violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Id.*, at 357, 358. The Court noted at the outset that it has never held that jury unanimity is a requisite of due process. *Id.*, at 359. It noted that more than once it had stated

that due process of law is not denied by a state law which dispenses with the necessity of unanimity in the verdict. *Id.* (Citations and quotation marks omitted). The Court concluded that due process was not violated by a verdict returned by 9 of 12 jurors. *Id.*, at 363. This Court similarly rejected an Equal Protection Clause challenge finding that the law served a rational purpose, was not an invidious classification and that the state legislative judgment was not defective in any constitutional sense. *Id.*, at 363-365. This conclusion was and is consistent with the powers reserved by the Tenth Amendment to the states.

Petitioner asks this court to reverse a matter settled by this Court forty years ago and a settled matter of state law for over 100 years. *Stare decisis* and the state's interest in its administration of criminal justice compel the conclusion that this court should deny petitioner's petition.

This Court has repeatedly recognized the fundamental importance of the doctrine of *stare decisis* to the rule of law. Hilton v. South Carolina Railways Comm., 502 U.S. 197 (1991). It promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. United States v. International Business Machines, Corp., 517 U.S. 843 (1996). Its significant role in maintaining consistency is illustrated in Dickerson v. United States, 530 U.S. 428, 443 (2000), when the Court stated, "While *stare decisis* is not an inexorable command, particularly when we are interpreting the Constitution, even in constitutional cases, the doctrine carries such a persuasive force that we have always required a departure from precedent to be supported by some special justification." (Citations and quotation marks omitted). Further, as this Court noted in Montejo v. Louisiana, 129 S.Ct. 2079, 2088-89 (2009), relevant factors in

deciding whether to adhere to the principle of stare decisis include the antiquity of the precedent, the reliance interests at stake and whether the decision was well reasoned. Each of these factors favors the continuing application of Apodaca and Johnson to the jury trials of second class felonies throughout the 64 parishes of Louisiana as well as in Oregon.

The focus of the Court's inquiry must be on the function served by the jury in contemporary society. Apodaca, supra, at 410. The purpose of trial by jury is to prevent oppression by the government by providing a safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge. The essential feature of a jury is the interposition of the commonsense judgment of the jurors between the accused and his accuser. Id., citing Duncan v. Louisiana, 391 U.S. 145, 156. In Oregon v. Ice, 555 U.S. 160 (2009), the Court noted the jury's historic role as a bulwark between the state and the accused at trial for an alleged offense. Ice concerned the question of whether the Sixth Amendment as construed in Apprendi v. New Jersey, 530 U.S. 466 (2000) and Blakely v. Washington, 542 U.S. 296 (2004) requires a jury determination of any fact concerning whether sentences may be consecutive in lieu of concurrent. In concluding that it did not, this Court was cognizant of the fact that the "... administration of a discrete criminal justice system is among the basic sovereign prerogatives States retain." Ice, supra, at 168. Two considerations noted by this Court in Ice counsel against Petitioner's assertions herein: historical practice and respect for state sovereignty. Id. In upholding Oregon's law, this Court noted that the respect due a sovereign state's choices in administering its criminal justice system, the "States' interest in the development of their penal systems, and their historic dominion in this area . . ." counseled in favor of Oregon's procedure. "Beyond question, the authority of States over the administration

of their criminal justice systems lies at the core of their sovereign status.” *Id.*, at 170. Similarly, these considerations counsel against granting petitioner’s request.

The state submits that petitioner’s assertion that in Apprendi this Court “. . . eschewed a functional approach to the right to jury trial . . .” (Petition, p. 14) is refuted by Apprendi itself. The Court noted it has unanimously explained the centuries-old historical foundation of the function of a trial by jury: to guard against a spirit of oppression and tyranny on the part of rulers and as the great bulwark of our civil and political liberties. (*Id.*, at 477). (Citations and quotation marks omitted). Apprendi did not address the issue of unanimous verdicts.

Similarly, petitioner’s assertion that the non-unanimity rule was adopted as part of a “. . . mission [was] to establish the supremacy of the white race . . .” (Petition, p. 33; Amici Constitutional Accountability Center, p. 12) improperly conflates the speaker’s sentiment on one topic onto another.

The quotes come from the opening session of the 1898 Constitutional Convention. (Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana, 1898). The speakers quoted are addressing voting rights, not whether juries in criminal cases should be unanimous in order to return a verdict.

Ernest Kruttschnitt, president of the convention, noted the “suffrage question” was a paramount issue to be addressed (*Id.*, p.9). At the end of the of the convention he observed the difficulties faced by the most heterogenous population of any state: Anglo-Saxon English speaking northerners, Latin races in the southern part of the state; “In the South you have the descendants of the old Acadians, many of whom would be unable to meet the requirements of a constitutional suffrage provision which should demand an educational qualification as a

prerequisite to the right of voting.” (Id., p. 381). The comments of delegates to the convention were addressing voting rights. A matter not at issue herein. The comments should not be taken out of context and forcibly grafted onto the issue herein. To do so would be an improper attempt to rewrite history to force a revisionist interpretation at odds with the historical record.

Respondent also submits that petitioner has no Sixth Amendment right to a unanimous jury verdict in light of Justice O’Conner’s statement in Teague v. Lane, 489 U.S. 288 (1989), which considered the retroactive application of new rules to cases on collateral review. One of the exceptions to not applying new rules retroactively is when the rule requires the observance of procedures that are implicit in the concept of ordered liberty, i.e., those bedrock procedural elements without which the likelihood of an accurate conviction is seriously diminished. Id., at 311. Thus, Justice O’Connor’s statement that “. . . we believe it unlikely that many such components of basic due process have yet to emerge.” Id., at 313. Teague considered such procedures to fit within this exception as proceedings dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted by brutal methods. These illustrations of improper procedures are not comparable to a non-unanimous verdict rendered after a fair trial. Indeed, in contrast to petitioner’s contention that ten or eleven votes for a verdict is constitutionally impermissible, this Court has approved verdicts rendered by six jurors when the jury consists of six members. Louisiana law provides for six person juries in third class felonies (punishment not necessarily at hard labor) where verdicts are required to be unanimous. La. Const. Art. 1 § 17; La. C.Cr.P. art. 782.

In Williams v. Florida, 399 U.S. 78 (1970), this Court considered whether the

constitutional guarantee of a trial by jury necessarily requires a jury of 12. This Court held that a 12 person panel is not required by the Sixth Amendment's right to a "trial by jury". *Id.*, at 86. In reaching this conclusion the Court observed "the relevant constitutional history casts considerable doubt on the easy assumption in our past decisions that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution." *Id.*, at 92. The Court noted that a proposal by James Madison to include a unanimity requirement in the Sixth Amendment was rejected. *Id.*, at 94. In reaching this conclusion, the Court considered the "oppression by the government" purpose of the jury and found that the function is preserved by the community participation and shared responsibility that results from the group's determination of guilt or innocence. Further, the Court added that the performance of this role is not a function of the particular number of the body that makes up the jury. The Court further noted that the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community. *Id.*, at 100. The Court added in a footnote that "We intimate no view whether or not the requirement of unanimity is an indispensable element of the Sixth Amendment jury trial." *Id.*, n. 46 at 101.

Two years later, the Court did more than intimate a view on whether a requirement of unanimity is an indispensable element of the Sixth Amendment jury trial. It rendered its ruling in Apodaca v. Oregon, *supra*. Its plurality opinion correctly found that the Sixth Amendment does not require a unanimous verdict in state proceedings. This ruling should not be reconsidered. Indeed, this Court has chosen not to re-examine it when presented with the opportunity to do so. This includes the following cases seeking review of this issue in which this



Court has denied certiorari:

1. Lee v. Louisiana, 555 U.S. 823 (2008);
2. Howard v. Oregon, 555 U.S. 1052 (2008);
3. Bowen v. Oregon, 130 S.Ct. 52 (2009);
4. Herrera v. Oregon, 131 S.Ct. 904 (2011);
5. Barbour v. Louisiana, 131 S.Ct. 1477 (2011).

Despite petitioner's contentions that a unanimous verdict is required and can be found in this Court's rulings in Apprendi, supra, Jones and Ring,<sup>1</sup> this Court has found to the contrary. In Schad v. Arizona, 501 U.S. 624 (1991), the Court considered whether a jury's decision to convict for first degree murder had to be unanimous on which of two aggravating factors it found to support its verdict. The Court found the Constitution does not have such a requirement. *Id.*, at 645. In so holding, the Court observed, “. . . a state criminal defendant, at least in noncapital cases, has no federal right to a unanimous jury verdict, see Johnson . . .” and Apodaca. *Id.*, n. 5 at 634. Even more recently, this Court has observed, in noting that it has incorporated almost all of the provisions of the Bill of Rights, a handfull remains unincorporated. McDonald v. City of Chicago, 130 S.Ct. 3020, 2034-35 (2010). One exception was noted in a footnote:

There is one exception to this general rule. The Court has held 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. See Apodaca v. Oregon, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972); see also Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972) (holding that the Due Process Clause does not require unanimous jury verdicts in state criminal trials). But that ruling was the result of an unusual division among the Justices, not an endorsement of the two-track approach to incorporation. In Apodaca,

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<sup>1</sup> Jones v. United States, 526 U.S. 227 (1999);  
Ring, v. Arizona, 536 U.S. 584 (2002).

eight Justices agreed that the Sixth Amendment applies identically to both the Federal Government and the States. See Johnson, supra, at 395, 92 S.Ct. 1620 (Brennan, J., dissenting). Nonetheless, among those eight, four Justices took the view that the Sixth Amendment does not require unanimous jury verdicts in either federal or state criminal trials, Apodaca, 406 U.S., at 406, 92 S.Ct. 1628 (plurality opinion), and four other Justices took the view that the Sixth Amendment requires unanimous jury verdicts in federal and state criminal trials, *id.*, at 414–415, 92 S.Ct. 1628 (Stewart, J., dissenting); Johnson, supra, at 381–382, 92 S.Ct. 1620 (Douglas, J., dissenting). Justice Powell's concurrence in the judgment broke the tie, and he concluded that the Sixth Amendment requires juror unanimity in federal, but not state cases.

The Sixth Amendment provides for a right to a trial by jury. The Tenth Amendment reserved to the States the authority to define that right. Louisiana has done so in a way which has been recognized by this Court as respecting due process and equal protection. This Court's precedents refute petitioner's claim. It should be denied.

## CONCLUSION

Based on the foregoing the State of Louisiana respectfully submits that petitioner's application should be denied.

Respectfully Submitted,

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