The Burger Court Opinion Writing Database

Johnson v. Louisiana

406 U.S. 356 (1972)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 3, 1971

Re: No. 5161 - Johnson v. Louisiana

Dear Byron:

Please include me.

Regards,

WEB

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HUGO L. BLACK

May 26, 1971

MEMORANDUM FOR THE CONFERENCE

In Re: No. ~~5175~~ 5161 - Johnson v. Louisiana,
I am concurring in the judgment. (White, J.)

In No. 5338 - Apodaca v. Oregon, I am agreeing to Justice White's opinion for the Court.

Sincerely,

H. L. B.

H. L. B.

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

4th DRAFT

SUPREME COURT OF THE UNITED STATES

...las, J.
5/25/71

Nos. 5161 AND 5338.—OCTOBER TERM, 1970

Frank Johnson, Appellant, 5161 *v.* Louisiana.	On Appeal From the Supreme Court of Louisiana.
Robert Apodaca, Harry Morgan Cooper, Jr., and James Arnold Madden, Petitioners, 5338 *v.* Oregon.	On Writ of Certiorari to the Court of Appeals of Oregon.

[June —, 1971]

MR. JUSTICE DOUGLAS, dissenting.

Appellant in the Louisiana case and petitioners in the Oregon case were convicted by juries that were less than unanimous. This procedure is authorized by both the Louisiana and Oregon Constitutions. Their claim, rejected by the majority, is that this procedure is a violation of their federal constitutional rights. With due respect to the majority, I dissent from this radical departure from American traditions.

The Constitution does not mention unanimous juries. Neither does it mention the presumption of innocence nor that guilt must be proven beyond a reasonable doubt in all criminal cases. Yet it is almost inconceivable that anyone would have questioned whether proof beyond a reasonable doubt was in fact the constitutional standard. And, indeed, when such a case finally arose we had little difficulty disposing of the issue. *In re Winship,* 397 U. S. 358, 364.

WB

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1, 4, 5

5th DRAFT

From: Douglas, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 5/27/71

Nos. 5161 AND 5338.- OCTOBER TERM, 1970

Recirculated:

Frank Johnson, Appellant,
5161 *v.*
Louisiana.

On Appeal From the Supreme Court of Louisiana.

Robert Apodaca, Harry Morgan Cooper, Jr., and James Arnold Madden, Petitioners,
5338 *v.*
Oregon.

On Writ of Certiorari to the Court of Appeals of Oregon.

[June —, 1971]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN concurs, dissenting.

Appellant in the Louisiana case and petitioners in the Oregon case were convicted by juries that were less than unanimous. This procedure is authorized by both the Louisiana and Oregon Constitutions. Their claim, rejected by the majority, is that this procedure is a violation of their federal constitutional rights. With due respect to the majority, I dissent from this radical departure from American traditions.

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WB

To: The Chief Justice
Mr. Justice Black
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

6th DRAFT

SUPREME COURT OF THE UNITED STATES

J.

Nos. 5161 AND 5338.—OCTOBER TERM, 1970

6/16/71

Frank Johnson, Appellant, 5161 *v.* Louisiana.	On Appeal From the Supreme Court of Louisiana.
Robert Apodaca, Harry Morgan Cooper, Jr., and James Arnold Madden, Petitioners, 5338 *v.* Oregon.	On Writ of Certiorari to the Court of Appeals of Oregon.

[June —, 1971]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

Appellant in the Louisiana case and petitioners in the Oregon case were convicted by juries that were less than unanimous. This procedure is authorized by both the Louisiana and Oregon Constitutions. Their claim, rejected by the majority, is that this procedure is a violation of their federal constitutional rights. With due respect to the majority, I dissent from this radical departure from American traditions.

The Constitution does not mention unanimous juries. Neither does it mention the presumption of innocence nor that guilt must be proven beyond a reasonable doubt in all criminal cases. Yet it is almost inconceivable that anyone would have questioned whether proof beyond a reasonable doubt was in fact the constitutional standard. And, indeed, when such a case finally arose we had little difficulty disposing of the issue. *In re Winship,* 397 U. S. 358, 364.

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

From: Harlan, J.

SUPREME COURT OF THE UNITED STATES

Circulated: JUN 8 1971

Recirculated: _____

No. 5161 AND 5338.—OCTOBER TERM, 1970

Frank Johnson, Appellant, 5161 *v.* Louisiana.	On Appeal From the Supreme Court of Louisiana.
Robert Apodaca, Harry Morgan Cooper, Jr., and James Arnold Madden, Petitioners, 5338 *v.* Oregon.	On Writ of Certiorari to the Court of Appeals of Oregon.

[June —, 1971]

Memorandum of MR. JUSTICE HARLAN.

In *Johnson* v. *Louisiana, ante,* the Court holds, *inter alia,* that jury unanimity is not a requisite of due process of law under the Fourteenth Amendment. With that holding I surely agree.[1] While in a jury case the unanimity requirement undoubtedly reinforces the "reasonable doubt" standard held an essential prerequisite of due process in *In re Winship,* 397 U. S. 358, 364 (1970), a State can well conclude as a matter of procedural due process that judicial instructions, juror oaths, and procedural mechanisms other than unanimity serve adequately to assure good faith and conscientious applica-

[1] I also agree with the Court's conclusion in Part III of its opinion that the classifications with respect to size of jury and requisite votes to convict made in the Louisiana constitutional and statutory provisions before us have a rational basis and therefore do not deprive appellant Johnson of equal protection of the laws. I cannot, however, join either Parts II or III of the Court's opinion, resting as they do on the nonretroactivity of *Duncan* v. *Louisiana,* 391 U. S. 145 (1968). See my dissents in *Williams* and *DeStefano* v. *Woods,* 392 U. S. 631 (1968).

Substantially revised

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

From: Harlan, J.

Circulated:

Recirculated: JUN 17 1971

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 5161 AND 5338.—OCTOBER TERM, 1970

Frank Johnson, Appellant, 5161 *v.* Louisiana.	On Appeal From the Supreme Court of Louisiana.
Robert Apodaca, Harry Morgan Cooper, Jr., and James Arnold Madden, Petitioners, 5338 *v.* Oregon.	On Writ of Certiorari to the Court of Appeals of Oregon.

[June —, 1971]

MR. JUSTICE HARLAN concurring in Part IV of the opinion and the judgment of the Court in No. 5161, and the judgment of the Court in No. 5338.

In these cases, we are called upon to determine whether the decisions of Oregon and Louisiana to dispense with unanimous jury verdicts in the trial of felonies violates federal constitutional rights secured by either the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. In *Duncan* v. *Louisiana,* 391 U. S. 145 (1968), the Court held, over my dissent, that the Sixth Amendment right to trial by jury was fundamental to the Anglo-American scheme of ordered liberty and hence an appropriate candidate for "selective incorporation" into the Due Process Clause of the Fourteenth Amendment. In *Duncan, supra,* at 158 n. 30, and later in *Baldwin* v. *New York,* 399 U. S. 66 (1970), the Court made it clear that its "incorporation" holding required uniformity in state and federal criminal jury practice. Then in *Williams* v. *Florida,* 399 U. S. 78 (1970), the Court held that the Sixth Amendment does not require

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 27, 1971

RE: Nos. 5161 & 5338 - Johnson v. Louisiana
and Apodaca, et al. v. Oregon

Dear Bill:

Please join me in your dissent in the above. I'm adding a few words of my own.

Sincerely,

W.J.B. Jr.

Mr. Justice Douglas

cc: The Conference

B

Mr. Justice Black
✓ Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Brennan, J.

Circulated: 5-27-71

Nos. 5161 AND 5338.—OCTOBER TERM, 1970

Recirculated: _____

Frank Johnson, Appellant,
5161 *v.*
Louisiana.
} On Appeal From the Supreme Court of Louisiana.

Robert Apodaca, Harry Morgan Cooper, Jr., and James Arnold Madden, Petitioners,
5338 *v.*
Oregon.
} On Writ of Certiorari to the Court of Appeals of Oregon.

[June —, 1971]

MR. JUSTICE BRENNAN, dissenting.

I can add only a few words to the opinion of my Brother DOUGLAS, which I have joined. Emotions may run high at criminal trials. Although we can fairly demand that jurors be neutral until they have begun to hear evidence, it would surpass our power to command that they remain unmoved by the evidence that unfolds before them. What this means is that jurors will often enter the jury deliberations with strong opinions on the merits of the case. If at that time a sufficient majority is available to reach a verdict, those jurors in the majority will have nothing but their own common sense to restrain them from returning a verdict before they have fairly considered the positions of jurors who would reach a different conclusion. Even giving all reasonable leeway to legislative judgment in such matters, I think it simply ignores reality to imagine that most jurors in these circumstances would or even could fairly weigh the arguments opposing their position.

WM

B

Page 1.

Mr. Justice Black
✓Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

2nd DRAFT

From: Brennan, J.

Circulated:

Recirculated: 6-11-71

SUPREME COURT OF THE UNITED STATES

Nos. 5161 AND 5338.—OCTOBER TERM, 1970

Frank Johnson, Appellant, 5161 *v.* Louisiana.	On Appeal From the Supreme Court of Louisiana.
Robert Apodaca, Harry Morgan Cooper, Jr., and James Arnold Madden, Petitioners, 5338 *v.* Oregon.	On Writ of Certiorari to the Court of Appeals of Oregon.

[June —, 1971]

MR. JUSTICE BRENNAN, dissenting.

I can add only a few words to the opinions of my Brothers DOUGLAS and STEWART, which I have joined. Emotions may run high at criminal trials. Although we can fairly demand that jurors be neutral until they have begun to hear evidence, it would surpass our power to command that they remain unmoved by the evidence that unfolds before them. What this means is that jurors will often enter the jury deliberations with strong opinions on the merits of the case. If at that time a sufficient majority is available to reach a verdict, those jurors in the majority will have nothing but their own common sense to restrain them from returning a verdict before they have fairly considered the positions of jurors who would reach a different conclusion. Even giving all reasonable leeway to legislative judgment in such matters, I think it simply ignores reality to imagine that most jurors in these circumstances would or even could fairly weigh the arguments opposing their position.

Apodaca dissent to follow.

P.S.

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Stewart, J.

No. 5161.—October Term, 1970

Circulated: JUN 9 1971

Recirculated: _____

Frank Johnson, Appellant,
v.
Louisiana.
} On Appeal From the Supreme Court of Louisiana.

[June —, 1971]

Mr. Justice Stewart, dissenting.

I would reverse the judgment of the Supreme Court of Louisiana for the reasons stated in my dissenting opinion in *Apodaca* v. *Oregon, post,* p. —. But there is another issue in this case, and I cannot let the Court's disposition of it go unchallenged.

Before dawn on the morning of January 20, 1968, six police officers armed with shotguns appeared at the appellant's home for the purpose of arresting him. They entered the house, searched it, found the appellant in his bedroom, and there arrested him. They allowed him to get dressed, and then handcuffed him and took him to police headquarters. The police possessed neither an arrest nor a search warrant. The officer in charge of the raid later testified that there was "no reason" why the police had failed to obtain a warrant, and the record shows that they had possessed the information on which the arrest was based for two days before the arrest was made.

One of the first principles of Fourth Amendment law is that a warrantless entry by government officers into a person's home is unconstitutional unless the entry falls within one of the specifically defined and limited exceptional situations where judicial decisions have recognized that exigent circumstances make it unnecessary to obtain a warrant. See *Camara* v. *Municipal Court,* 387 U. S. 523, 528–529, and cases there cited. No such exceptional

p. 1

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 5161.—October Term, 1970

From: Stewart, J.

Circulated: _____

Recirculated: JUN 10 1971

Frank Johnson, Appellant, v. Louisiana. } On Appeal From the Supreme Court of Louisiana.

[June —, 1971]

Mr. Justice Stewart, dissenting.

I

Louisiana was not constitutionally required to provide a jury trial in this case. *DeStefano* v. *Woods*, 392 U. S. 631. But the State having accorded such a trial, I think, for the reasons stated in Part I of my dissenting opinion in *Apodaca* v. *Oregon, ante*, the Constitution required the jury's verdict to be unanimous. I would, therefore, reverse the judgment of conviction.

II

But there is another issue in this case, and I cannot let the Court's disposition of it go unchallenged.

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To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun

4th DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES

No. 5161.—October Term, 1970 Circulated: _____

Recirculated: JUN 14 1971

Frank Johnson, Appellant, *v.* Louisiana. } On Appeal From the Supreme Court of Louisiana.

[June —, 1971]

Mr. Justice Stewart, with whom Mr. Justice Douglas and Mr. Justice Brennan join, dissenting.

Louisiana was not constitutionally required to provide a jury trial in this case under *DeStefano* v. *Woods*, 392 U. S. 631. But the State having accorded such a trial, I believe, for the reasons stated in Part I of my dissenting opinion in *Apodaca* v. *Oregon*, *post*, that the Constitution required the jury's verdict to be unanimous. I would, therefore, reverse the judgment of conviction.

Part II omitted

Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun

1st DRAFT

From: White, J.

Circulated: 5-21-71

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 5161.—October Term, 1970

Frank Johnson, Appellant, v. Louisiana. } On Appeal From the Supreme Court of Louisiana.

[May —, 1971]

Mr. Justice White delivered the opinion of the Court.

Under both the Louisiana Constitution and Code of Criminal Procedure, criminal cases in which the punishment may be at hard labor are tried by a jury of five, with a unanimous verdict required; where punishment is necessarily at hard labor, a jury of 12 is provided but a verdict may be rendered by nine out of the 12 jurors; in capital cases, there are 12 jurors, all of whom must concur in the verdict.[1] The principal question in this case is

[1] La. Const. Art. VII, § 41, provides:

"Section 41. The Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall be drawn for jury service unless she shall have previously filed with the clerk of the District Court a written declaration of her desire to be subject to such service. All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury. Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict."

La. Code Crim. Proc. Art. 782 provides:

"Cases in which the punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. Cases in which the punishment is necessarily at hard labor shall be tried by a jury composed of twelve jurors, nine of whom must con-

pp 8-9

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas ✓
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun

2nd DRAFT

From: White, J.

Circulated: _____

Recirculated: 6-11-71

SUPREME COURT OF THE UNITED STATES

No. 5161.—October Term, 1970

Frank Johnson, Appellant, v. Louisiana. } On Appeal From the Supreme Court of Louisiana.

[May —, 1971]

Mr. Justice White delivered the opinion of the Court.

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J5

pp 6, 7

Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun

3rd DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 5161.—October Term, 1970

Recirculated: 6-16-71

Frank Johnson, Appellant, v. Louisiana. } On Appeal From the Supreme Court of Louisiana.

[June —, 1971]

Mr. Justice White delivered the opinion of the Court.

Under both the Louisiana Constitution and Code of Criminal Procedure, criminal cases in which the punishment may be at hard labor are tried by a jury of five, with a unanimous verdict required; where punishment is necessarily at hard labor, a jury of 12 is provided but a verdict may be rendered by nine out of the 12 jurors; in capital cases, there are 12 jurors, all of whom must concur in the verdict.[1] The principal question in this case is

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 16, 1971

Re: Nos. 5161 and 5338 - Johnson v. Louisiana;
Apodaca v. Oregon

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.

Mr. Justice Douglas

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 18, 1971

Re: No. 5161 - Johnson v. Louisiana

Dear Potter:

Please join me in your dissent.

Sincerely,

T.M.

Mr. Justice Stewart

cc: The Conference

To: The Chief Justice
Mr. Justice Black
Mr. Justice Douglas
Mr. Justice Harlan
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall ✓

1st DRAFT

From: Blackmun, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 6/2/71

Nos. 5161 AND 5338.—OCTOBER TERM, 1970

Recirculated: _____

Frank Johnson, Appellant, 5161 *v.* Louisiana.	On Appeal From the Supreme Court of Louisiana.
Robert Apodaca, Harry Morgan Cooper, Jr., and James Arnold Madden, Petitioners, 5338 *v.* Oregon.	On Writ of Certiorari to the Court of Appeals of Oregon.

[June —, 1971]

MR. JUSTICE BLACKMUN.

I join the Court's opinion and judgment in each of these cases. I add only the comment, which should be obvious and should not need saying, that in so doing I do not imply that I regard a State's split verdict system as a wise one. My vote means only that I cannot conclude that the system is constitutionally offensive. Were I a legislator, I would disfavor it as a matter of policy; my task here, however, is not to pursue and strike down what happens to impress me as undesirable legislative policy.

I do not hesitate to say, either, that a system employing a 7–5 standard, rather than a 9–3 or 75% minimum, would afford me great difficulty. As MR. JUSTICE WHITE points out, *ante*, p. 6, "a substantial majority of the jury" were convinced. That is all that is before us here.