

# The Burger Court Opinion Writing Database

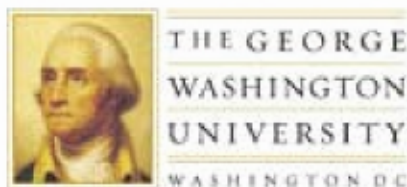
## *Apodaca v. Oregon*

406 U.S. 404 (1972)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



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

CHAMBERS OF  
THE CHIEF JUSTICE

June 3, 1971

Re: No. 5338 - Apodaca v. Oregon

Dear Byron:

Please include me.

Regards,

WRB

Mr. Justice White

cc: The Conference

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. 5338. — OCTOBER TERM, 1970

From: Stewart, JUN 10 1971

Circulated: \_\_\_\_\_

Robert Apodaca et al.,  
 Petitioners,  
 v.  
 State of Oregon.

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

Recirculated: \_\_\_\_\_

[June —, 1971]

MR. JUSTICE STEWART, dissenting.

## I

The guarantee against systematic discrimination in the selection of criminal court juries is a fundamental of our Constitution. That has been the insistent message of this Court in a line of decisions extending over nearly a century. *E. g.*, *Carter v. Jury Comm'n*, 396 U. S. 320 (1970); *Whitus v. Georgia*, 385 U. S. 545 (1967); *Hernandez v. Texas*, 347 U. S. 475 (1954); *Patton v. Mississippi*, 332 U. S. 463 (1947); *Glasser v. United States*, 315 U. S. 60 (1942); *Norris v. Alabama*, 294 U. S. 587 (1935); *Carter v. Texas*, 177 U. S. 442 (1900); *Strauder v. West Virginia*, 100 U. S. 303 (1880). The clear purpose of these decisions has been to ensure universal participation of the citizenry in the administration of criminal justice. Yet today's judgment approves the elimination of the one rule that can ensure such participation will be meaningful—the rule requiring the assent of all jurors before a verdict of conviction or acquittal can be returned. Under today's judgment, 10 jurors can simply ignore the views of their fellow panel members of a different race or class.<sup>1</sup>

<sup>1</sup> Under a companion judgment today, *Johnson v. Louisiana*, ante, nine jurors can do the same. And, notwithstanding MR. JUSTICE

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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

3rd DRAFT

# SUPREME COURT OF THE UNITED STATES

From: Stewart, J.

No. 5338.—OCTOBER TERM, 1970

Circulated: \_\_\_\_\_

Robert Apodaca et al.,  
 Petitioners,  
 v.  
 State of Oregon.

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

Recirculated: JUN 11 1971

[June —, 1971]

MR. JUSTICE STEWART, dissenting.

## I

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Please join me in  
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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

# SUPREME COURT OF THE UNITED STATES

No. 5338.—OCTOBER TERM, 1970 From: Stewart, J.

Robert Apodaca et al.,  
Petitioners,  
v.  
State of Oregon.

Circulated: \_\_\_\_\_  
On Writ of Certiorari to the  
Court of Appeals of Oregon. **JUN 11 1971**

[June —, 1971]

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN joins, dissenting.

## I

The guarantee against systematic discrimination in the selection of criminal court juries is a fundamental of our Constitution. That has been the insistent message of this Court in a line of decisions extending over nearly a century. *E. g.*, *Carter v. Jury Comm'n*, 396 U. S. 320 (1970); *Whitus v. Georgia*, 385 U. S. 545 (1967); *Hernandez v. Texas*, 347 U. S. 475 (1954); *Patton v. Mississippi*, 332 U. S. 463 (1947); *Glasser v. United States*, 315 U. S. 60 (1942); *Norris v. Alabama*, 294 U. S. 587 (1935); *Carter v. Texas*, 177 U. S. 442 (1900); *Strauder v. West Virginia*, 100 U. S. 303 (1880). The clear purpose of these decisions has been to ensure universal participation of the citizenry in the administration of criminal justice. Yet today's judgment approves the elimination of the one rule that can ensure such participation will be meaningful—the rule requiring the assent of all jurors before a verdict of conviction or acquittal can be returned. Under today's judgment, 10 jurors can simply ignore the views of their fellow panel members of a different race or class.<sup>1</sup>

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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

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 5338.—OCTOBER TERM, 1970 From: Stewart, J.

Robert Apodaca et al.,  
Petitioners,  
v.  
State of Oregon.

Circulated: \_\_\_\_\_  
On Writ of Certiorari  
Court of Appeals of Oregon.  
Re-circulated: JUN 17 1971

[June —, 1971]

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join, dissenting.

I

The guarantee against systematic discrimination in the selection of criminal court juries is a fundamental of our Constitution. That has been the insistent message of this Court in a line of decisions extending over nearly a century. *E. g.*, *Carter v. Jury Comm'n*, 396 U. S. 320 (1970); *Whitus v. Georgia*, 385 U. S. 545 (1967); *Hernandez v. Texas*, 347 U. S. 475 (1954); *Patton v. Mississippi*, 332 U. S. 463 (1947); *Glasser v. United States*, 315 U. S. 60 (1942); *Norris v. Alabama*, 294 U. S. 587 (1935); *Carter v. Texas*, 177 U. S. 442 (1900); *Strauder v. West Virginia*, 100 U. S. 303 (1880). The clear purpose of these decisions has been to ensure universal participation of the citizenry in the administration of criminal justice. Yet today's judgment approves the elimination of the one rule that can ensure such participation will be meaningful—the rule requiring the assent of all jurors before a verdict of conviction or acquittal can be returned. Under today's judgment, 10 state court jurors can simply ignore the views of their fellow panel members of a different race or class.<sup>1</sup>

<sup>1</sup> Under a companion judgment today, *Johnson v. Louisiana*, ante, nine jurors can do the same. And, notwithstanding Mr. Justice

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.

SUPREME COURT OF THE UNITED STATES

Recirculated: 5-21-71

No. 5338.—OCTOBER TERM, 1970

Recirculated: \_\_\_\_\_

Robert Apodaca et al.,  
 Petitioners,  
 v.  
 State of Oregon. } On Writ of Certiorari to the  
 Court of Appeals of Oregon.

[May —, 1971]

MR. JUSTICE WHITE delivered the opinion of the Court.

Robert Apodaca, Henry Morgan Cooper, Jr., and James Arnold Madden were convicted respectively of assault with a deadly weapon, burglary in a dwelling, and grand larceny before separate Oregon juries, all of which returned less than unanimous verdicts. The vote in the cases of Apodaca and Madden was 11–1, while the vote in the case of Cooper was 10–2, the minimum requisite vote under Oregon law for sustaining a conviction.<sup>1</sup> After their convictions had been affirmed by the Oregon Court of Appeals, 89 Ore. 939, 462 P. 2d 691 (1969), and review had been denied by the Supreme Court of Oregon, all three sought review in this Court upon a claim that conviction of crime by a less than unanimous

<sup>1</sup> Ore. Const. Art. I, § 11, reads in relevant part:

"In all criminal prosecutions, the accused shall have the right to public trial by an imparital jury in the county in which the offense shall have been committed; . . . provided, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise; . . ."

WM

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/   
pp 4, 8

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

3rd DRAFT

From: White, J.

**SUPREME COURT OF THE UNITED STATES**

Revised: \_\_\_\_\_

No. 5338.—OCTOBER TERM, 1970

Recirculated: 6-16-71

Robert Apodaca et al.,  
Petitioners,  
v.  
State of Oregon. } On Writ of Certiorari to the  
Court of Appeals of Oregon.

[June —, 1971]

MR. JUSTICE WHITE delivered the opinion of the Court.

Robert Apodaca, Henry Morgan Cooper, Jr., and James Arnold Madden were convicted respectively of assault with a deadly weapon, burglary in a dwelling, and grand larceny before separate Oregon juries, all of which returned less than unanimous verdicts. The vote in the cases of Apodaca and Madden was 11-1, while the vote in the case of Cooper was 10-2, the minimum requisite vote under Oregon law for sustaining a conviction.<sup>1</sup> After their convictions had been affirmed by the Oregon Court of Appeals, 89 Ore. 939, 462 P. 2d 691 (1969), and review had been denied by the Supreme Court of Oregon, all three sought review in this Court upon a claim that conviction of crime by a less than unanimous

<sup>1</sup> Ore. Const. Art. I, § 11, reads in relevant part:

"In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; . . . provided, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise; . . ."

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U.S. SUPREME COURT



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

4th DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

No. 5338.—OCTOBER TERM, 1970

Recirculated: 6-17-71

Robert Apodaca et al.,  
Petitioners,  
v.  
State of Oregon.

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

[June —, 1971]

MR. JUSTICE WHITE announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE BLACKMUN join.

Robert Apodaca, Henry Morgan Cooper, Jr., and James Arnold Madden were convicted respectively of assault with a deadly weapon, burglary in a dwelling, and grand larceny before separate Oregon juries, all of which returned less than unanimous verdicts. The vote in the cases of Apodaca and Madden was 11-1, while the vote in the case of Cooper was 10-2, the minimum requisite vote under Oregon law for sustaining a conviction.<sup>1</sup> After their convictions had been affirmed by the Oregon Court of Appeals, 89 Ore. 939, 462 P. 2d 691 (1969), and review had been denied by the Supreme Court of

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*held for 1971*  
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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 16, 1971

Re: No. 5338 - Apodaca v. Oregon

Dear Potter:

Please join me in your dissent.

Sincerely,

  
T.M.

Mr. Justice Stewart

cc: The Conference

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U.S. DEPARTMENT OF JUSTICE