

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

April 12, 1972

No. 69-5035 -- Frank Johnson v. Louisiana

Dear Byron:

Please join me.

See small comments in longhand on your 3/30/72
circulation which you are at liberty to "take or leave."
The addition of these few words made the reading
easier for me and perhaps would do so for others.

Regards,

WEB

Mr. Justice White

Copies to Conference

file
Cir
3/31

4th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 69-5035 & 69-5046

Frank Johnson, Appellant,
69-5035 v. Louisiana. } On Appeal From the Supreme Court of Louisiana.

Robert Apodaca, Harry
Morgan Cooper, Jr., and
James Arnold Madden,
Petitioners,
69-5046 *v.*
Oregon. } On Writ of Certiorari to
the Court of Appeals of
Oregon.

[April —, 1972]

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.

Oct 71
Ann Dayton

File

5th DRAFT

Rec'd
4/3/72

SUPREME COURT OF THE UNITED STATES

Nos. 69-5035 & 69-5046

Frank Johnson, Appellant,
69-5035 v. Louisiana. } On Appeal From the Supreme Court of Louisiana.

Robert Apodaca, Harry Morgan Cooper, Jr., and James Arnold Madden, Petitioners, 69-5046 v. Oregon. } On Writ of Certiorari to the Court of Appeals of Oregon.

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Oct 17/71
Wm. Douglas

3/56
1

To : The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist

6th DRAFT

SUPREME COURT OF THE UNITED STATES

Mr. Justice Douglas, J.

Nos. 69-5035 & 69-5046 Circulate: _____

Recirculated: 4/11/72

Frank Johnson, Appellant,
 69-5035 *v.* On Appeal From the Su-
 preme Court of Louisiana.
 Louisiana.

Robert Apodaca, Harry
 Morgan Cooper, Jr., and
 James Arnold Madden,
 Petitioners,
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 the Court of Appeals of
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 Oregon.

[April —, 1972]

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To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

5, 6, 8

Same

WJD

WJS

TM

BH

PS

7th DRAFT

SUPREME COURT OF THE UNITED STATES Douglas, J.

Circulated:

Nos. 69-5035 & 69-5046

Recirculated: 4-17

Frank Johnson, Appellant,
69-5035 v. Louisiana. } On Appeal From the Supreme Court of Louisiana.

Robert Apodaca, Harry Morgan Cooper, Jr., and James Arnold Madden, Petitioners, 69-5046 v. Oregon. } On Writ of Certiorari to the Court of Appeals of Oregon.

[April —, 1972]

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

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Brennan Oct 71

Chas T. Thayer
MS. B. 1. 1. v. 1. p. 1

To: The Chief Justice
Mr. Justice Black
Mr. Justice Black

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

Nos. 69-5035 & 69-5046

Circulated:

Recd. [unclear] 5/19/72

Frank Johnson, Appellant,
69-5035 v. Louisiana. } On Appeal From the Su-
preme Court of Louisiana.

Robert Apodaca, Harry
Morgan Cooper, Jr., and
James Arnold Madden,
Petitioners,
69-5046 v. Oregon. } On Writ of Certiorari to
the Court of Appeals of
Oregon.

[May 22, 1972]

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR. April 14, 1972

RE: No. 69-5035 - Johnson v. Apodaca
No. 69-5046 - Apodaca v. Oregon

Dear Bill:

Please join me in your dissent in the
above.

Sincerely,

WJD

Mr. Justice Douglas

cc: The Conference

Print shop notified
4-4-72

Oct 71
Mr. Douglas

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR. April 14, 1972

RE: No. 69-5035 - Johnson v. Louisiana
No. 69-5046 - Apodaca v. Oregon

Dear Potter:

Please join me in your dissents in
the above.

Sincerely,

WJ

Mr. Justice Stewart

cc: The Conference

Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

From: Brennan, J.

Nos. 69-5035 AND 69-5046

Circulated: 4/17/72

Recirculated:

Frank Johnson, Appellant,
69-5035 *v.* On Appeal From the Su-
Louisiana. preme Court of Louisiana.

Robert Apodaca, Harry
Morgan Cooper, Jr., and
James Arnold Madden,
Petitioners, On Writ of Certiorari to
69-5046 *v.* the Court of Appeals of
Oregon.

[April —, 1972]

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.

OC '72
Wm. Douglas

SD 12
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR. May 11, 1972

RE: Nos. 69-5035 & 69-5046 Johnson v. Louisiana
and Apodaca v. Oregon

Dear Thurgood:

Please join me in your dissent in the above.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

B
Page 1 of 2

✓ Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

4th DRAFT

From: _____ J.

SUPREME COURT OF THE UNITED STATES

Circul. _____

Nos. 69-5035 AND 69-5046

Recirculated: 5-17-72

Frank Johnson, Appellant,
69-5035 v. Louisiana. } On Appeal From the Supreme Court of Louisiana.

Robert Apodaca, Harry Morgan Cooper, Jr., and James Arnold Madden, Petitioners, 69-5046 v. Oregon. } On Writ of Certiorari to the Court of Appeals of Oregon.

[April —, 1972]

MR. JUSTICE BRENNAN, dissenting.

Readers of today's opinions may be understandably puzzled why convictions by 11-1 and 10-2 jury votes are affirmed in No. 69-5046, when a majority of the Court agrees that the Sixth Amendment requires a unanimous verdict in federal criminal jury trials, and a majority also agrees that the right to jury trial guaranteed by the Sixth Amendment is to be enforced against the States according to the same standards that protect that right against federal encroachment. The reason is that our Brother POWELL agrees only with the holding that a unanimous verdict is required in federal criminal trials, and dissents from the holding that the Sixth Amendment right to a jury trial is to be applied in the same way to State and Federal Governments. In that circumstance, it is arguable that the affirmance of the convictions of Apodaca, Madden, and Cooper is not inconsistent with a view of today's decision in No. 69-5046 as a holding that only a unanimous verdict will afford the accused in a state

On 2/1
Mr. Douglin

To: The Chief Justice
 Mr. Justice Douglas
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist

6th DRAFT

From: Brennan, J.

Circulated:

Recirculated: 5/19/72

SUPREME COURT OF THE UNITED STATES

Nos. 69-5035 AND 69-5046

Frank Johnson, Appellant,
 69-5035 v. On Appeal From the Su-
 preme Court of Louisiana.
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Robert Apodaca, Harry
 Morgan Cooper, Jr., and
 James Arnold Madden,
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 69-5046 v. On Writ of Certiorari to
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 Oregon.
 Oregon.

[April —, 1972]

MR. JUSTICE BRENNAN, dissenting.

Readers of today's opinions may be understandably puzzled why convictions by 11-1 and 10-2 jury votes are affirmed in No. 69-5046, when a majority of the Court agrees that the Sixth Amendment requires a unanimous verdict in federal criminal jury trials, and a majority also agrees that the right to jury trial guaranteed by the Sixth Amendment is to be enforced against the States according to the same standards that protect that right against federal encroachment. The reason is that while our Brother POWELL agrees that a unanimous verdict is required on federal criminal trials, he does not agree that the Sixth Amendment right to a jury trial is to be applied in the same way to State and Federal Governments. In that circumstance, it is arguable that the affirmance of the convictions of Apodaca, Madden, and Cooper is not inconsistent with a view that today's decision in No. 69-5046 is a holding that only a unanimous verdict will afford the accused in a state criminal prose-

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 1, 1972

RE: Cases held for Johnson v. Louisiana
and Apodaca v. Oregon

Dear Byron:

After due consideration I have decided
that I shall not write in the above cases but
join in your recommendation of May 25 for
their disposition.

Sincerely,



Mr. Justice White

cc; The Conference

67-5035

Wm. Doyle
Oct 71

69-5046

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
 Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: Stewart, J.

SUPREME COURT OF THE UNITED STATES: APR 14 1972

Recirculated: _____

No. 69-5035

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

[April —, 1972]

MR. JUSTICE STEWART, dissenting.

This case was tried before the announcement of our decision in *Duncan v. Louisiana*, 391 U. S. 145. Therefore, unlike *Apodaca v. Oregon*, decided today, — U. S. —, the Sixth Amendment's guarantee of trial by jury is not applicable here. *DeStefano v. Woods*, 392 U. S. 631. But I think the Fourteenth Amendment alone clearly requires that if a State purports to accord the right of trial by jury in a criminal case, then only a unanimous jury can return a constitutionally valid verdict.

The guarantee against systematic discrimination in the selection of criminal court juries is a fundamental of the **Fourteenth Amendment**. 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); *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 that 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

the Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

rt, J APR 18 1972

Circulated:

No. 69-5035

Recirculated

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

[April —, 1972]

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

This case was tried before the announcement of our decision in *Duncan v. Louisiana*, 391 U. S. 145. Therefore, unlike *Apodaca v. Oregon*, decided today. — U. S. —, the Sixth Amendment's guarantee of trial by jury is not applicable here. *DeStefano v. Woods*, 392 U. S. 631. But I think the Fourteenth Amendment alone clearly requires that if a State purports to accord the right of trial by jury in a criminal case, then only a unanimous jury can return a constitutionally valid verdict.

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Brewer Oct 11

To: The Chief Justice
 Mr. Justice Douglas
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist

1st DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

circulated: 3-30-72

Recirculated: _____

No. 69-5035

Frank Johnson, Appellant,
 v.
 Louisiana. } On Appeal From the Su-
 preme Court of Louisiana.

[April —, 1972]

Memorandum of MR. JUSTICE WHITE.

Under both the Louisiana Constitution and Code of Criminal Procedure, criminal cases in which the punishment is necessarily at hard labor are tried to a jury of 12, and the vote of nine jurors is sufficient to return either a guilty or not guilty verdict.¹ The principal question

¹ Criminal cases where the punishment may be at hard labor are cases are tried to a 12-man jury with an unanimous verdict required.

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

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 25, 1972

MEMORANDUM TO THE CONFERENCE

I would deny each of the twelve cases held for
Johnson v. Louisiana and Apodaca v. Oregon except
69-5046
69-5035 No. 69-5041, Boutte v. Louisiana, which I recommend
be dismissed and denied. Jury unanimity appears to be
the only issue in each case except Boutte and
No. 70-5010, Miller v. Oregon. But the additional
claims in these cases are insubstantial it seems to
me.


B.R.W.

To: The Chief Justice
Mr. Justice ~~Rehnquist~~
Mr. Justice ~~White~~
Mr. Justice ~~Black~~
Mr. Justice ~~Clark~~
Mr. Justice ~~Marshall~~
Mr. Justice ~~Powell~~
Mr. Justice ~~Stewart~~
Mr. Justice ~~Brennan~~
Mr. Justice ~~Douglas~~

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Marshall, .
Circulated: APR 21 1972

Nos. 69-5035 & 69-5046

Recirculated: _____

Frank Johnson, Appellant,
69-5035 v. On Appeal From the Su-
Louisiana. preme Court of Louisiana.

Robert Apodaca, Harry
Morgan Cooper, Jr., and
James Arnold Madden.
Petitioners,
69-5046 v. On Writ of Certiorari to
Oregon. the Court of Appeals of
Oregon.

[April —, 1972]

MR. JUSTICE MARSHALL, dissenting.

Today the Court cuts the heart out of two of the most important and inseparable safeguards the Bill of Rights offers a criminal defendant: the right to submit his case to a jury, and the right to proof beyond a reasonable doubt. Together, these safeguards occupy a fundamental place in our constitutional scheme, protecting the individual defendant from the awesome power of the State. After today, the skeleton of these safeguards remains, but the Court strips them of life and of meaning. I cannot refrain from adding my protest to that of my Brothers DOUGLAS, BRENNAN, and STEWART, whom I join.

In *Apodaca v. Oregon*, the question is too frighteningly simple to bear much discussion. We are asked to decide what is the nature of the "jury" that is guaranteed by the Sixth Amendment. I would have thought that history would provide the appropriate guide, and as MR. JUSTICE POWELL has demonstrated so convincingly, history compels the decision that unanimity is an essential feature of that jury. But the majority has embarked

To: The Chief Justice
 Mr. Justice Douglas
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist

AM
 2nd DRAFT

From: Marshall, J.

SUPREME COURT OF THE UNITED STATES

Circulated.

Nos. 69-5035 & 69-5046

Recirculated:

APR 28 1972

Frank Johnson, Appellant,
 69-5035 *v.* Louisiana. } On Appeal From the Su-
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Robert Apodaca, Harry
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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 69-5035 & 69-5046

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Oregon.

[April —, 1972]

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

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 6, 1972

Re: No. 69-5035 - Johnson v. Louisiana

Dear Byron:

Please join me.

Sincerely,

H. A. B.

Mr. Justice White

cc: The Conference

B
AM

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall ✓
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Mr. Blackmun, J.

Nos. 69-5035 & 69-5046

Circulated: 4/6/72

Recirculated: _____

Frank Johnson, Appellant,
69-5035 *v.* On Appeal From the Su-
Louisiana. preme Court of Louisiana.

Robert Apodaca, Harry
Morgan Cooper, Jr., and
James Arnold Madden,
Petitioners, On Writ of Certiorari to
69-5046 *v.* the Court of Appeals of
Oregon.

[April —, 1972]

MR. JUSTICE BLACKMUN, concurring.

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. Our task here, however, is not to pursue and strike down what happens to impress us 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 in *Johnson, ante*, p. 6, "a substantial majority of the jury are to be convinced. That is all that is before us in each of these cases.

3
To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Powell, J.

APR 7 1972

Nos. 69-5035 & 69-5046

Circulated

Recirculated

Frank Johnson, Appellant,
69-5035 v. On Appeal From the Su-
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Robert Apodaca, Harry
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James Arnold Madden,
Petitioners,
69-5046 v. On Writ of Certiorari to
Oregon. the Court of Appeals of
Oregon.

[April —, 1972]

MR. JUSTICE POWELL, concurring.

I concur in the judgment of the Court that convictions based on less than unanimous jury verdicts in these cases did not deprive criminal defendants of due process of law under the Fourteenth Amendment. As my reasons for reaching this conclusion differ from those expressed in the plurality opinion by MR. JUSTICE WHITE, I will state my views separately.

I

Duncan v. Louisiana, 391 U. S. 145 (1968), stands for the proposition that criminal defendants in state courts are entitled to trial by jury.¹ The source of that right is the Due Process Clause of the Fourteenth Amendment. Due process, as consistently interpreted by this Court, commands that citizens subjected to criminal process in state courts be accorded those rights which are

¹ That right, of course, is reserved for those crimes which may be deemed "serious." See *id.*, at 159-162; *Bloom v. Illinois*, 391 U. S. 194 (1968); *Baldwin v. New York*, 399 U. S. 66 (1970).

26
1, 3, 4, 8, 9, 14

and minor citation corrections

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

SUPREME COURT OF THE UNITED STATES

From: Powell, J.

Nos. 69-5035 & 69-5046

Circulated: _____

Frank Johnson, Appellant,
69-5035 v. Louisiana. } On Appeal From the Supreme Court of Louisiana. Regirculated MAY 19 1972

Robert Apodaca, Harry Morgan Cooper, Jr., and James Arnold Madden, Petitioners, 69-5046 v. Oregon. } On Writ of Certiorari to the Court of Appeals of Oregon.

[May 22, 1972]

MR. JUSTICE POWELL, concurring in No. 69-5035 and concurring in the judgment in No. 69-5046.

I concur in the judgment of the Court that convictions based on less than unanimous jury verdicts in these cases did not deprive criminal defendants of due process of law under the Fourteenth Amendment. As my reasons for reaching this conclusion in the Oregon case differ from those expressed in the plurality opinion by MR. JUSTICE WHITE, I will state my views separately.

I

69-5035

Duncan v. Louisiana, 391 U. S. 145 (1968), stands for the proposition that criminal defendants in state courts are entitled to trial by jury.¹ The source of that right is the Due Process Clause of the Fourteenth Amendment. Due process, as consistently interpreted by this Court, commands that citizens subjected to criminal process in state courts be accorded those rights which are

¹ That right, of course, is reserved for those crimes which may be deemed "serious." See *id.*, at 159-162; *Bloom v. Illinois*, 391 U. S. 194 (1968); *Baldwin v. New York*, 399 U. S. 66 (1970).

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

Re. *Johnson v. La* 69-5035
Apodaca v. Doe 69-5046
January 17, 1972

Dear Lewis:

The cases which I referred to in my comments at the Conference when we were discussing the non-unanimous jury decisions were Maxwell v. Dow, 176 U.S. 581 (1900), and Jordan v. Massachusetts, 225 U.S. 167. In Maxwell, Justice Peckham, speaking for eight of the nine members of the Court, said at 605:

". . . when providing in their constitution and legislation for the manner in which civil or criminal actions shall be tried, it is in entire conformity with the character of the Federal Government that they should have the right to decide for themselves what shall be the form and character of the procedure in such trials, whether there shall be a jury of twelve or a lesser number, and whether the verdict must be unanimous or not. These are matters which have no relation to the character of the Federal Government. As was stated by Mr. Justice Brewer, in delivering the opinion of the court in Brown v. New Jersey, 175 U.S. 172, the State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with the specific and applicable provisions of the Federal Constitution."

225 U.S. 167, 176

In Jordan v. Massachusetts, Mr. Justice Lurton, speaking for a unanimous Court, said at 225 U.S. 276:

"In criminal cases due process of law is not denied by a state law which dispenses with a grand jury indictment and permits prosecution upon information, nor by a law which dispenses with the necessity of twelve, or unanimity in the verdict. Indeed the requirement of due process does not deprive a state of the power to dispense with a jury trial altogether."

Both of these statements are dicta, but they impressed me because they were rendered by unanimous or virtually unanimous Courts sitting much closer to the time of the adoption of the Fourteenth Amendment than we are. I think the other two cases I referred to for general support of my position were Twining v. New Jersey, 211 U.S. 78, which is a long and able discussion by Justice Moody rejecting the notion of "incorporation", and Hurtado v. California, 110 U.S. 516, which is an able discussion by Justice Matthews in a case decided in 1884 -- only fifteen years after the adoption of the Fourteenth Amendment -- which categorically rejects the notion of "incorporation".

Sincerely,

Bill

Mr. Justice Powell



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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 3, 1972

Re: 69-5035 - Johnson v. Louisiana
69-5046 - Apodaca v. Oregon

Dear Byron:

Please join me in these two cases.

Sincerely,



Mr. Justice White

Copies to the Conference