

# The Burger Court Opinion Writing Database

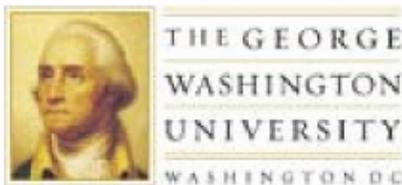
## *Apodaca v. Oregon*

406 U.S. 404 (1972)

Paul J. Wahlbeck, George Washington University

James F. Spriggs, II, Washington University

Forrest Maltzman, George Washington University



B  
M

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

April 12, 1972

CHAMBERS OF  
THE CHIEF JUSTICE

No. 69-5046 -- Apodaca v. Oregon

Dear Byron:

Please join me.

Regards,



Mr. Justice White

Copies to Conference

May 27, 1972

Dear Bill:

69-5046

I have your Memorandum about Apodaca.

I think that in view of the uncertainty of the precedent which has been established that one of the cases should be granted and put down for argument as to whether or not what the Court has decided is stare decisis. Furthermore, I think that if the Court refuses to do that, those of us who dissented in Apodaca should express our dissent. And I would hope that maybe you would write a few words expressing what that view is.

W. O. D.

Mr. Justice Brennan

69-5035  
69-5046

Off 71 Wm Douglas

(Brennan's 5/26/72 memo is attached)

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

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

May 26, 1972

Memorandum to: Mr. Justice Douglas  
Mr. Justice Stewart  
Mr. Justice Marshall

RE: Apodaca Holds

69-5046

Do you think the cases held for Apodaca v. Oregon, No. 69-5046 confront the Court with a question of the application of stare decisis? In Apodaca the four dissenters from interpreting the Sixth Amendment to require unanimity joined with the lone dissenter from applying the guarantee to the States as fully as to the Federal Government and produced a judgment of affirmance of the Oregon Supreme Court. In terms of the disposition of the cases held for Apodaca what is the stare decisis effect of Apodaca? Is it a constitutional decision that nonunanimity is constitutionally adequate in state criminal trials? Does that follow from the judgment of affirmance? Or is it that since the Sixth Amendment applies to federal and state trials alike, the applicable principle is unanimity?

The only comparable situation that occurs to me is Colegrove v. Green, 328 U.S. 549. You remember that of the seven who participated in that decision four joined a judgment of dismissal, three did so on the ground that reapportionment was a nonjusticiable question but the fourth, Justice Rutledge, joined the judgment because of his view that there was insufficient time before election to redistrict the congressional districts. Justice Rutledge, however, said he agreed with the three dissenters that reapportionment was a justiciable question. When we decided Baker v. Carr, 369 U.S. 186, we treated Colegrove, in terms of stare decisis, as a precedent that reapportionment was justiciable.

Ooo 71 Am High

69-5055

69-5046

I am of mixed views whether to write something in dissent from Byron's recommendation to deny review in all the held cases. If you think there is any substance to my notion that this may be a substantial question your views would help me make up my mind. If it does have any substance perhaps one of these cases should be granted and the parties asked to argue it. I'd appreciate any help you can give me.



W.J.B. Jr.

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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

Circulated: APR 14 1972

No. 69-5046

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

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

[April —, 1972]

MR. JUSTICE STEWART, dissenting.

In *Duncan v. Louisiana*, 391 U. S. 145, the Court squarely held that the Sixth Amendment right to trial by jury in a federal criminal case is made wholly applicable to state criminal trials by the Fourteenth Amendment. Unless *Duncan* is to be overruled, therefore, the only relevant question here is whether the Sixth Amendment's guarantee of trial by jury embraces a guarantee that the verdict of the jury must be unanimous. The answer to that question is clearly "yes," as my Brother POWELL has cogently demonstrated in that part of his concurring opinion that reviews almost a century of Sixth Amendment adjudication.\*

Until today, it has been universally understood that a unanimous verdict is an essential element of a Sixth Amendment jury trial. See *Andres v. United States*, 333 U. S. 740, 748; *Patton v. United States*, 281 U. S. 276, 288; *Hawaii v. Mankichi*, 190 U. S. 197, 211-212; *Maxwell v. Dow*, 176 U. S. 581, 586; *Thompson v. Utah*, 170 U. S. 343, 351, 353; cf. 2 J. Story, Commentaries on the Constitution of the United States § 1779 n. 2 (5th ed. 1891).

I would follow these settled Sixth Amendment precedents and reverse the judgment before us.

\*See pp. —, *ante* (concurring opinion of Mr. Justice POWELL).

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Mr. 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

No. 69-5046

Stewart, J.

Circulated: APR 1 8 1972

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

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

[April —, 1972]

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

In *Duncan v. Louisiana*, 391 U. S. 145, the Court squarely held that the Sixth Amendment right to trial by jury in a federal criminal case is made wholly applicable to state criminal trials by the Fourteenth Amendment. Unless *Duncan* is to be overruled, therefore, the only relevant question here is whether the Sixth Amendment's guarantee of trial by jury embraces a guarantee that the verdict of the jury must be unanimous. The answer to that question is clearly "yes," as my Brother POWELL has cogently demonstrated in that part of his concurring opinion that reviews almost a century of Sixth Amendment adjudication.\*

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I would follow these settled Sixth Amendment precedents and reverse the judgment before us.

\*See pp. —, ante (concurring opinion of Mr. JUSTICE POWELL).

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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

No. 69-5046

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

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

[April —, 1972]

Memorandum of MR. JUSTICE WHITE.

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

<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; . . ."

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

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

April 6, 1972

Re: No. 69-5046 - Apodaca v. Oregon

Dear Byron:

Please join me.

Sincerely,

H. A. B.

Mr. Justice White

cc: The Conference