FOR IMMEDIATE NEWS RELEASE

NEWS RELEASE #015

FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **17th day of March, 2009**, are as follows:

BY TRAYLOR, J.:

2008-KA-2215 C/W 2008-KA-2311

STATE OF LOUISIANA v. SHANNON MCBRIDE BERTRAND C/W STATE OF LOUISIANA v. WILFORD FREDERICK CHRETIEN, JR. (Parish of Calcasieu)

For the foregoing reasons, we reverse the district court's ruling on the constitutionality of Article 782 and remand these consolidated cases to the district court for further proceedings consistent with the views expressed in this opinion.
REVERSED AND REMANDED

WEIMER, J., concurs with reasons.

03/17/09

SUPREME COURT OF LOUISIANA

No. 08-KA-2215

STATE OF LOUISIANA
VERSUS
SHANNON MCBRIDE BERTRAND

c/w

No. 2008-KA-2311

STATE OF LOUISIANA
VERSUS
WILFORD FREDERICK CHRETIEN, JR.

On Appeal from the Fourteenth Judicial District Court,
For the Parish of Calcasieu, Honorable Wilford D. Carter, Judge

Traylor, Justice

These consolidated matters arise from the defendants' separate constitutional challenges to Article 782 of the Louisiana Code of Criminal Procedure, a legislative enactment which enumerates the number of jurors who must concur to reach a verdict in a felony case in which the punishment is necessarily confinement at hard labor. The cases are before us on direct appeal pursuant to Article V, Section 5(D)(1)[1], of

---

[1] Louisiana Constitution, Article V, Section 5(D) provides: In addition to other appeals provided by this constitution, a case shall be appealable to the supreme court if (1) a law or ordinance has been declared unconstitutional or (2) the defendant has been convicted of a capital offense and a penalty of death actually has been imposed.

the Louisiana Constitution, as the district court judge declared in both cases that Article 782 violated the United States Constitution. After reviewing the constitutional provisions and case law of this State and of the United States, we find that the district court erred in finding Article 782 unconstitutional. Accordingly, we reverse the judgments of the district court, and remand these matters to the district court for further proceedings consistent with the views expressed herein.

FACTS and PROCEDURAL HISTORY

Defendants Shannon McBride Bertrand and Wilford Frederick Chretien, Jr., were each indicted, at separate times and for separate offenses, with felonies punishable by confinement at hard labor.[2] On the same day, May 19, 2008, the defendants' attorneys filed motions in district court to declare Article 782 unconstitutional. The trial judge granted both motions that same day, stating that the statute violated the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. The State appealed both decisions directly to this Court, and asked that the cases be consolidated. This Court consolidated the two cases for oral argument and opinion on November 12, 2008.

DISCUSSION

This Court recently discussed the procedure by which a party may challenge

---

[2] Bertrand is charged with one count of second degree murder, a violation of R.S. 30.1. Chretien is charged with one count of second degree murder, one count of armed robbery, and one count of attempted second degree murder, violations of R.S. 14:30.1, 14:64.3 and 14.27/14:30.1. The punishment for each of these crimes is necessarily confinement at hard labor.

a statute's constitutionality:

> It is well-settled that a constitutional challenge may not be considered by an appellate court unless it was properly pleaded and raised in the trial court below. Although this court generally possesses the power and authority to decide the constitutionality of the provisions challenged in a defendant's motion to quash, it is not required to decide a constitutional issue unless the procedural posture demands that it do so.
>
> * * *
>
> Moreover, this Court has consistently held that legislative enactments are presumed valid and their constitutionality should be upheld when possible. Accordingly, as a result of this presumption, if a party wishes to challenge the constitutionality of a statute, the party must do so properly.
>
> While there is no single procedure for attacking the constitutionality of a statute, it has long been held that the unconstitutionality of a statute must be specially pleaded and the grounds for the claim particularized. This Court has expressed the challenger's burden as a three step analysis. First, a party must raise the unconstitutionality in the trial court; second, the unconstitutionality of a statute must be specially pleaded; and third, the grounds outlining the basis of unconstitutionality must be particularized. The purpose of these procedural rules is to afford interested parties sufficient time to brief and prepare arguments defending the constitutionality of the challenged statute. The opportunity to fully brief and argue the constitutional issues provides the trial court with thoughtful and complete arguments relating to the issue of constitutionality and furnishes reviewing courts with an adequate record upon which to consider the constitutionality of the statute.
>
> The final step of the analysis articulated above requires that the grounds outlining the basis of the unconstitutionality be particularized. This Court has thoroughly considered the standard for particularizing the constitutional grounds. The purpose of particularizing the constitutional grounds is so that the adjudicating court can analyze and interpret the language of the constitutional provision specified by the challenger. This basic principle dictates that the party challenging the constitutionality of a statute must cite to the specific provisions of the constitution which prohibits the action.

> In addition to the three step analysis for challenging the constitutionality of a statute, the specific plea of unconstitutionality and the grounds therefor must be raised in a pleading.
>
> Thus, in light of the foregoing jurisprudential rules, in order to properly confect a constitutional challenge, a party must raise the constitutional issue in the trial court by raising the unconstitutionality and the grounds outlining the basis of the alleged unconstitutionality in a pleading
>
> * * *
>
> Raising the constitutional issue in a motion has been deemed sufficient to satisfy the purpose of the three step analysis required to properly assert a constitutional challenge. Moreover, we recently recognized that a motion raising the constitutionality and the grounds therefor are sufficient to satisfy the three step analysis for raising a constitutional challenge.
>
> * * *
>
> The final step of the analysis is that the party challenging the constitutionality of a statute particularize the grounds outlining the basis of the unconstitutionality.
>
> * * *
>
> Although the issue of raising constitutional grounds not particularized in the trial court generally arises under circumstances in which a party raises a new or additional constitutional ground before an appellate court, this Court has consistently found that the purpose of the three step analysis for challenging the constitutionality of a statute is to give the parties an opportunity to brief and argue the constitutional grounds and to prepare an adequate record for review. Clearly, these purposes are not satisfied if the trial court is permitted to rule on grounds not properly raised by the party challenging the constitutionality of a statute. Further, we note that this situation is similar to those instances in which a trial court sua sponte declares a statute unconstitutional when its unconstitutionality has not been placed at issue by one of the parties in a pleading. A judge's sua sponte declaration of unconstitutionality is a derogation of the strong presumption of constitutionality accorded legislative enactments.

State v. Hatton, 07-2377 (La. 7/1/08), 985 So.2d 709, 718-20 (citations omitted).

Here, each defendant raised the issue of the unconstitutionality of Article 782

in the trial court by means of motions to declare the statute unconstitutional. Further, in the motions, each defendant specified that the statute violated the Fifth, Sixth, and Fourteenth Amendments. The defendants, while arguing a Sixth and Fourteenth Amendment violation, neither argued a Fifth Amendment violation in the trial court, nor briefed a Fifth Amendment violation here. As such, defendants have waived any discussion as to whether Article 782 violates the Fifth Amendment.

The trial court's reasoning for declaring the statute unconstitutional is rather insubstantial. In fact, other than to state that Article 782 violated the Fifth, Sixth, and Fourteenth Amendments, the court's reasoning is nonexistent in the record of these two cases. The court did state, however, that the basis for its ruling was the same as for its ruling in the case of *State v. Robert Wilkins*,[3] filed in this Court as docket number 2008-KA-0887. This Court was able to review those reasons, which were filed here with the *Wilkins* record. Those reasons consisted of a rambling diatribe with no discernable legal analysis, and were only slightly more expansive than those contained in the record in these consolidated cases.

In its ruling in *Wilkins*, the trial court first attacked the United States Supreme Court's decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972), then discussed equal protection, and finished by declaring that Article 782 violated the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. The court notably failed

[3] That case, likewise a second degree murder matter, was dismissed on July 10, 2008 as moot when the defendant opted for a bench trial.

to discuss this Court's prior and controlling jurisprudence which has consistently upheld the constitutionality of Article 782 against precisely the same constitutional challenges raised here.

As neither defendant specified, briefed, or argued that the statute violated the Constitution's guarantee of equal protection under the law, any reliance by the trial court in its ruling on such grounds was based on constitutional grounds not properly raised, and was, therefore, improper.

The statute in question, Article 782 of the Louisiana Code of Criminal Procedure, provides as follows:

> Art. 782. Number of jurors composing jury; number which must concur; waiver
>
> A. Cases in which 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 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. Cases in which the punishment may be confinement at hard labor shall be tried by a jury composed of six jurors, all of whom must concur to render a verdict.
>
> B. Trial by jury may be knowingly and intelligently waived by the defendant except in capital cases.

In *Apodaca*, the United States Supreme Court examined an Oregon statute similar to Article 782, in that the Oregon statute did not require unanimous jury verdicts in noncapital cases. In a plurality decision, the Court determined that the United States Constitution did not mandate unanimous jury verdicts in state court felony criminal trials, with four Justices holding that the Sixth Amendment guarantee

of a jury trial, made applicable to the States by the Fourteenth Amendment, does not require that a jury's vote be unanimous. Justice Powell concurred in the judgment of the Court for reasons different than those expressed by the author of the opinion. Four Justices, disagreed, finding that the Sixth Amendment guarantee of a jury trial was made applicable to the States by the Fourteenth Amendment, and does require a unanimous jury.

The defendants argue here that, because no single rationale for the non-unanimity position prevailed in *Apodaca* and in light of more recent Supreme Court Sixth Amendment jurisprudence, the validity of the *Apodaca* decision is questionable. Defendants further argue that the *Apodaca* decision is diametrically opposed to the approach taken by the U.S. Supreme Court in recent Sixth Amendment cases involving Federal criminal jury trials, in that, rather than looking at the text of the Amendment and the Framers' understanding of the right at the time of adoption, the decision relied on the function served by the jury in contemporary society. Finally, defendants argue that the use of non-unanimous verdicts have an insidious racial component, allow minority viewpoints to be ignored, and is likely to chill participation by the precise groups whose exclusion the Constitution has proscribed.

This Court has previously discussed and affirmed the constitutionality of Article 782 on at least three occasions. In *State v. Jones*, 381 So.2d 416 (La. 1980), we ruled that Article 782 did not violate the Sixth and Fourteenth Amendments. Later, in *State v. Simmons*, 414 So.2d 705 (La. 1982), we found that Article 782 did

not violate either the Fifth or Fourteenth Amendments. Finally, in *State v. Edwards*, 420 So.2d 663 (La. 1982), we again affirmed the statute's constitutionality.

Despite defendants' arguments to the contrary, the case law of the United States Supreme Court also supports the validity of these decisions. Although the *Apodaca* decision was, indeed, a plurality decision rather than a majority one, the Court has cited or discussed the opinion not less than sixteen times since its issuance. On each of these occasions, it is apparent that the Court considered that *Apodaca's* holding as to non-unanimous jury verdicts represents well-settled law. For instance, in *Burch v. Louisiana*, 99 S.Ct. 1623, 1626-27 (1979), the Court matter-of-factly recognized the reasoning behind the *Apodaca* holding as support for its overturning of a jury conviction by a 5-1 margin. Further, in *Holland v. Illinois*, 110 S.Ct. 803, 823 (1990) (Stevens, J., dissenting), Justice Stevens stated that it was the fair cross section principle underlying the Sixth Amendment's right to a jury trial that permitted non-unanimous juries. Justice Scalia, a noted originalist on the Court, explicitly rejected a unanimity requirement in his dissent in *McKoy v. North Carolina*, 110 S.Ct. 1227 (1990), saying:

> Of course the Court's holding today–and its underlying thesis that each individual juror must be empowered to "give effect" to his own view–invalidates not just a requirement of *unanimity* for the defendant to benefit from a mitigating factor, but a requirement for *any* number of jurors more than one. This it is also in tension with *Leland v. Oregon* (citation omitted), which upheld, in a capital case, a requirement that the defense of insanity be proved (beyond a reasonable doubt) to the satisfaction of at least 10 of the 12-member jury. Even with respect to proof of the substantive offense, as opposed to an affirmative defense,

> we have approved verdicts by less than a unanimous jury. *See Apodaca v. Oregon* (citation omitted) (upholding state statute providing for conviction by a 10-to-2 vote).

McKoy, 110 S.Ct. at 1246-47 (Scalia, J., dissenting) (emphasis in original). Likewise, in *United States v. Gaudin*, 115 S.Ct. 2310, 2314 (1995), the Court, in a unanimous opinion, recognized the reasoning behind the *Apodaca* decision. Finally, Justice Souter, dissenting in *Rita v. United States*, 127 S.Ct. 2456, 2484, (2007) (Souter, J., dissenting), again recognized the *Apodaca* holding as well-settled law.

We note that defendants last argument - that the use of non-unanimous verdicts have an insidious racial component, allow minority viewpoints to be ignored, and is likely to chill participation by the precise groups whose exclusion the Constitution has proscribed - was also argued in *Apodaca*. With regard to this assignment of error, a majority, rather than a plurality, of the Court determined that the argument was without merit.

CONCLUSION

Due to this Court's prior determinations that Article 782 withstands constitutional scrutiny, and because we are not presumptuous enough to suppose, upon mere speculation, that the United States Supreme Court's still valid determination that non-unanimous 12 person jury verdicts are constitutional may someday be overturned, we find that the trial court erred in ruling that Article 782 violated the Fifth, Sixth, and Fourteenth Amendments. With respect to that ruling,

it should go without saying that a trial judge is not at liberty to ignore the controlling jurisprudence of superior courts.

DECREE

For the foregoing reasons, we reverse the district court's ruling on the constitutionality of Article 782 and remand these consolidated cases to the district court for further proceedings consistent with the views expressed in this opinion.

REVERSED AND REMANDED

03/17/09

SUPREME COURT OF LOUISIANA

No. 08-KA-2215

STATE OF LOUISIANA

VERSUS

SHANNON MCBRIDE BERTRAND

c/w

No. 08-KA-2311

STATE OF LOUISIANA

VERSUS

WILFORD FREDERICK CHRETIEN, JR.

On Appeal from the Fourteenth Judicial District Court, Parish of Calcasieu,
Honorable Wilford C. Carter, Judge

WEIMER, J. concurring.

I concur in the majority's decision to reverse the district court's ruling finding LSA-C.Cr.P. art. 782(A) unconstitutional, but write separately to suggest it is unnecessary to reach the merits of the constitutional issue. Given the procedural posture of these cases, I believe that the question of the constitutionality of Article 782 is not ripe for adjudication because defendants have failed to demonstrate that they have standing to assert the constitutional claim.

As we have repeatedly and consistently recognized, while this court has the power and authority to address the constitutionality of state laws, we are not required

to do so unless the procedural posture of the case and the relief sought by the appellant demand that we do so. **State v. Hatton**, 07-2377, p. 13 (La. 7/1/08), 985 So.2d 709, 718; **State v. Mercandel**, 03-3015, p. 7 (La. 5/25/04), 874 So.2d 829, 834; **Ring v. State, Department of Transportation and Development**, 02-1367, pp. 6-7 (La. 1/14/03), 835 So.2d 423, 428. One of the threshold issues that must be decided by a court before it may consider a constitutional challenge is whether the person challenging the provision has standing to assert the challenge. **Mercandel**, 03-3015 at pp. 7-8, 874 So.2d at 834. A person has standing to challenge the constitutionality of a legal provision only if he or she has rights in controversy, or more specifically, only if the provision seriously affects his or her rights. **State v. Turner**, 05-2425, p. 17 (La. 7/10/06), 936 So.2d 89, 101; **Mercandel**, 03-3015 at p. 8, 874 So.2d at 834.

In this case, the defendants challenging the constitutionality of LSA-C.Cr.P. art. 782(A) on grounds that conviction by a non-unanimous jury violates the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution have not been convicted by a jury, either unanimously or non-unanimously. Therefore, they have not suffered any real harm, or been seriously adversely affected by the criminal code article challenged. Indeed, these defendants may be acquitted of the charges against them or unanimously convicted, in either of which events, the defendants will not benefit from a judgment declaring LSA-C.Cr.P. art. 782(A) unconstitutional, and thus will have no rights in controversy sufficient to give them standing to bring this

challenge. If these defendants have no ultimate interest in, and will not benefit by, a decision declaring LSA-C.Cr.P. art. 782(A) unconstitutional, then any declaration of constitutionality at this juncture amounts to an impermissible advisory opinion. **Ring**, 02-1367 at pp.8-9, 835 So.2d at 429.

Because I believe that the district court acted precipitously in ruling on the constitutionality of LSA-C.Cr.P. art. 782(A), I concur in the majority decision to the extent it reverses the district court's ruling on the constitutionality of LSA.C.Cr.P. art. 782(A). I would not reach the merits of the constitutional question.