NO. 14-_____

IN THE
Supreme Court of the United States

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JOHN KEVIN O'DOWD,

PETITIONER,

v.

STATE OF LOUISIANA,

RESPONDENT.

_____

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL, FIRST CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

_____

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QUESTIONS PRESENTED

In *In re Winship*, 397 U.S. 358 (1970), this Court observed the "importan[ce] in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty in a criminal offense without convincing a proper factfinder of his guilt with utmost certainty." *Winship*, 397 U.S. at 364. This Court, in *McDonald v. City of Chicago*, 561 U.S. 742 (2010) observed that "the Court [had] abandoned 'the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights,' stating that it would be 'incongruous' to apply different standards 'depending on whether the claim was asserted in a state or federal court.'" This Court noted "[t]here is one exception to this general rule. The Court has held that although the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials, it does not require a unanimous jury verdict in state criminal trials. . . . But that ruling was the result of an unusual division among the Justices, not an endorsement of the two-track approach to incorporation." *Id.* at 766 n.14. As a result of this unusual division, Louisiana and Oregon have continued to sanction convictions in which two jurors have determined that the government has failed to carry its burden. This gives rise to the following questions:

1) *Whether the Fourteenth Amendment incorporates the Sixth Amendment guarantee that the truth of every accusation against a defendant should be confirmed by the unanimous suffrage of twelve of his equals and neighbors?*

2) *Whether the racial motivation for adopting the non-unanimous jury provision violates a citizen's right to equal protection of the laws guaranteed by the Fourteenth Amendment?*

PARTIES TO THE PROCEEDING

The petitioner is John K. O'Dowd,[1] the defendant and defendant-appellant in the courts below. The respondent is the State of Louisiana, the plaintiff and plaintiff-appellee in the courts below.

[1] Mr. O'Dowd's name is incorrectly spelled "Odowd" in the lower courts, based upon the spelling in his indictment. Pet. App. 1a.

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Petitioner John K. O'Dowd respectfully petitions for a writ of certiorari to the Louisiana First Circuit Court of Appeal in *State v. Odowd*, No. 2013-KA-1107.

OPINIONS BELOW

The judgment of the Louisiana First Circuit Court of Appeal (Pet. App. 1a) is unreported and available at *State v. Odowd*, 2014 La. App. Unpub. LEXIS 175 (La. App. 1 Cir. 2014). The Louisiana Supreme Court's order denying review of that decision (Pet. App. 1b) is available at *State v. Odowd*, 2014 La. LEXIS 2822 (La. 2014).

JURISDICTIONAL STATEMENT

The judgment and opinion of the Louisiana First Circuit Court of Appeal was entered on March 24, 2014. Pet. App. 1a. The Louisiana Supreme Court denied review of that decision on December 8, 2014. Pet. App. 1b. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

U.S. Const. Amend. VI.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.

Section 17(A) of Article I of the Louisiana Constitution provides, in relevant part:

> A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict.

La. Const. Art. I, § 17(A).

Article 782(A) of the Louisiana Code of Criminal Procedure provides, in pertinent part:

> 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.

La. C.Cr.P. art. 782(A).

STATEMENT OF THE CASE

> For notwithstanding the benefits of federalism, a constitutional requirement of jury unanimity is indispensable to reducing the rate of error in criminal cases, thereby raising confidence in the system. . . . Most jurors who hold out do so for acquittal, and the need to convince the remaining one or two doubters helps ensure that verdicts adverse to the defendant have been carefully thought through.

Hon. J. Harvie Wilkinson III, *In Defense of American Criminal Justice*, 67 VAND. L. REV. 1099, 1114 (2014).

In 1970, this Court definitively held that the Fourteenth Amendment's Due Process Clause prohibits convictions unless the prosecution has proven its case beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358 (1970). Numerous considerations undergirded that decision. For one, the reasonable-doubt standard "date[d] at least from our early years as a Nation," giving it a strong historical basis for constitutional stature. *Id.* at 361. Second, and related to the first, nearly every jurisdiction in the country had declared the reasonable-doubt standard as the appropriate one in criminal cases. Writing of the significance of this fact, this Court noted that "[a]lthough virtually unanimous adherence to the reasonable-doubt standard in common-law jurisdictions may not conclusively establish it as a requirement of due process, such adherence does 'reflect a profound judgment about the way in which law should be enforced and justice administered.'" *Id.* at 361–62 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968)).[2]

[2] The Court noted that: "There is always in litigation a margin of error, representing error in fact-finding, which both parties must take into account. . . . Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt. To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective

Yet nothing animated the Court's decision more than the fact that the reasonable-doubt standard was "a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *Winship*, 397 U.S. at 363 (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1892)). Given the stakes of conviction—both in terms of the individual's loss of liberty, and the associated stigma of conviction—this Court wrote that if we are, indeed, "a society that values the good name and freedom of every individual," then we "should not condemn a man for commission of a crime when there is reasonable doubt about his guilt." *Winship*, 397 U.S. at 363–64. In that regard, this Court concluded that "the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *Id.* at 364.

Despite these pronouncements, this Court nevertheless sanctioned non-unanimous jury verdicts just two years later. *See Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972). In the aftermath of those historically anomalous decisions, precisely zero states have opted to change their criminal codes to allow for non-unanimous jury verdicts. Instead, Louisiana has

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state of certitude of the facts in issue.'" *Winship*, 397 U.S. at 364 (citing Dorsen & Rezneck, *In Re Gault and the Future of Juvenile Law*, 1 FAMILY LAW QUARTERLY, No. 4, pp. 1, 26 (1967)).

remained one of just two jurisdictions to authorize the practice. Perhaps predictably, Louisiana has taken its place atop a number of concerning lists, leading the country in incarceration rate;[3] criminal justice error rate per capita; and, most tellingly, the rate of wrongful convictions.[4]

Simply put, the non-unanimous jury verdict undermines the reliability and fairness of Louisiana's criminal justice system just as much as a lesser standard of proof. It has no support in historical precedent, has been almost universally rejected in the States, is forbidden by the Sixth Amendment, and results in scores of wrongful convictions. When this Court constitutionalized the reasonable-doubt standard, it did so because:

> [U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

Winship, 397 U.S. at 364. Non-unanimous jury verdicts undermine that very confidence. The time to revisit *Apodaca* has come.

STATEMENT OF FACTS

John O'Dowd was given sole custody of his twin daughters after his divorce from Ms. O'Dowd in 2004. Pet. App. 3a. In 2009, after returning to Louisiana from

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[3] *See* Bureau of Justice, *Prisoners in 2013*, available at: http://www.bjs.gov/content/pub/pdf/p13.pdf (last visited Dec. 15, 2014).

[4] Innocence Project New Orleans, *Exonerees Profiles*, available at http://www.ip-no.org/exoneree-profiles (last visited Dec. 15, 2014).

her overseas job in Iraq, Ms. O'Dowd attempted to regain custody of the children and modify her court-mandated child support payments. Pet. App. 3a. Around this time, Mr. O'Dowd's daughters reported to Ms. O'Dowd that he had touched them inappropriately, but neither Ms. O'Dowd nor the children mentioned this at the custody evaluation session requested by Ms. O'Dowd. Pet. App. 3a. In 2010, Ms. O'Dowd took the children to the police department, where they filed a report alleging sexual abuse. Pet. App. 1a.

Mr. O'Dowd was indicted on two counts of aggravated incest (La. R.S. 14:78.1) in November 2011. The trial court denied Mr. O'Dowd's pre-trial motion *in limine* requesting that he be able to question his ex-wife as to the reasons for their divorce and the custody arrangement. Pet. App. 2a. The court declared a mistrial after the prosecution made several unsupported allegations of previous abuse. Pet. App. 5a. "Prior to his second trial, [Mr. O'Dowd] filed a motion to quash on the basis of double jeopardy," which was denied by the trial court. Pet. App. 5a. After his second trial in 2012, ten of twelve jurors returned a guilty verdict to both counts.

On appeal, Mr. O'Dowd raised three issues: first, Mr. O'Dowd challenged the trial court's denial of his motion *in limine*. Second, Mr. O'Dowd challenged the court's denial of his motion to quash, but the Court of Appeal found that the record did not support the "contention that he was provoked into moving for a mistrial." Pet. App. 6a. Finally, Mr. O'Dowd challenged the constitutionality of the non-unanimous jury provision:

> [T]he defendant argues that Louisiana Constitution article I, § 17(A), which allows for nonunanimous jury verdicts, violates equal protection

> under the Fourteenth Amendment of the United States Constitution and Louisiana Constitution article I, § 3. Specifically, the defendant contended that racial discrimination was a substantial and motivating factor behind the enactment of Article I, § 17(A). The defendant also complains that the nonunanimous jury verdicts violate his right to a jury trial under the Sixth and Fourteenth Amendments of the United States Constitution.

Pet. App. 3a. In rejecting Mr. O'Dowd's challenge to the non-unanimous jury verdict, the Court of Appeal held:

> This court and the Louisiana Supreme Court have previously rejected the argument that Article I, § 17(A) violates the right to equal protection. *State v. Bertrand*, 2008-2215 (La. 3/17/09), 6 So. 3d 738, 742–43; *State v. Smith*, 2006-0820 (La. App. 1st Cir. 12/28/06), 952 So. 2d 1, 16, writ denied, 2007-0211 (La. 9/28/07), 964 So. 2d 352. In *Bertrand*, the Louisiana Supreme Court specifically found that a nonunanimous twelve-person jury verdict is constitutional and that Article 782 does not violate the Fifth, Sixth, and Fourteenth Amendments. Moreover, the *Bertrand* court rejected the argument that nonunanimous jury verdicts have an insidious racial component and pointed out that a majority of the United States Supreme Court also rejected that argument in *Apodaca*. Although *Apodaca* was a plurality rather than a majority decision, the United States Supreme Court has cited or discussed the opinion various times since its issuance and, on each of these occasions, it is apparent that its holding as to nonunanimous jury verdicts represents well-settled law. *Bertrand*, 6 So. 3d at 742–43.

Pet. App. 4a.

REASONS FOR GRANTING THE WRIT

In recent years, this Court has issued repeated pronouncements that the Sixth Amendment requires that "the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the *unanimous* suffrage of twelve of his equals and neighbors.'" *Southern Union Co. v. United States*, 132 S. Ct. 2344, 2354 (2012) (quoting *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (quoting in turn 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769))) (emphasis added);

accord Apprendi v. New Jersey, 530 U.S. 466, 477 (2000). Those pronouncements have come amidst a sea-change in constitutional exegesis since the opinions of *Apodaca v. Oregon*, 406 U.S. 404 (1972), *Ohio v. Roberts*, 448 U.S. 56 (1980), and *Walton v. Arizona*, 497 U.S. 639 (1990)—a change crystallized in this Court's recent holding that "[t]he relationship between the Bill of Rights' guarantees and the States must be governed by a single, neutral principle": "incorporated Bill of Rights Protections are to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *McDonald v. City of Chicago*, 561 U.S. 742, 765, 788 (2010) (citing *inter alia*, *Mapp v. Ohio*, 367 U.S. 643, 655–56 (1961); *Ker v. California*, 374 U.S. 23, 33–34 (1963); *Aguilar v. Texas*, 378 U.S. 108, 110 (1964); *Pointer v. Texas*, 380 U.S. 400, 406 (1965); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); *Benton v. Maryland*, 395 U.S. 784, 794–95 (1969); *Wallace v. Jaffree*, 472 U.S. 38, 48–49 (1985)).

As the *McDonald* Court recognized, however, the availability of non-unanimous jury verdicts forms the "one exception to this general rule." *McDonald*, 561 U.S. at 766 n.14 (citing *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972)). But just as the Court acknowledged the existence of this exception, so, too, did it cast doubt on its legitimacy, noting "the unusual division among the Justices" in *Apodaca*, and highlighting Justice Brennan's observation that "the Sixth Amendment's jury trial guarantee, however it is to be

construed, has identical application against both State and Federal Governments." *McDonald*, 561 U.S. at 766 n.14.

Faced with this Court's recent Sixth Amendment jurisprudence, the Louisiana Supreme Court has announced that it will refuse to align its political and judicial systems with those of the other forty-nine States:

> 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, [and] 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.

State v. Bertrand, 6 So. 3d 738, 753 (La. 2009).

This Court's action is necessary to bring Louisiana's Sixth Amendment jurisprudence in line with the rest of the country's. *See Burch v. Louisiana*, 441 U.S. 130, 138 (1979) (invalidating Louisiana's non-unanimous provision for six-person juries and stating, "It appears that of those States that utilize six-member juries in trials of nonpetty offenses, only two, including Louisiana, also allow nonunanimous verdicts. We think that this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not.") (citations omitted).

I. The Non-Unanimous Jury Verdict Is an Historical Anomaly that Contradicts the Framers' Intent.

As with the reasonable-doubt standard, a jury unanimity requirement "dates at least from our early years as a Nation." *Winship*, 397 U.S. at 361, and in fact from even earlier. Influential British jurists consistently included jury unanimity as a defining characteristic of the trial by jury. For example, Sir Matthew Hale wrote that, "[t]he law of England hath afforded the best method of trial, that is possible, of this and all other matters of fact, namely, by a jury of twelve men all concurring in the same judgment . . . ." 1 Hale, *The History of the Pleas of the Crown* 33 (1736).

In his *Commentaries*, Sir William Blackstone noted the critical role a unanimity requirement can play in ensuring that the Crown wrongly seize an individual's liberty. Blackstone first observed the special risk of "violence and partiality of judges appointed by the crown" in criminal cases, and the attendant risk of overzealous prosecution if the power to prosecute were "exerted without check or control." 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769). Out of concern for those dangers, "[o]ur law has wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people, and the prerogative of the crown." *Id.* But according to Blackstone, it was not merely the existence of the jury that provided that barrier; it was the additional requirement "that the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours." *Id.* Perhaps for this reason, Blackstone argued:

> that it is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals.

3 W. Blackstone, *Commentaries on the Laws of England* 379 (1769).

The Framers carried this perspective with them in crafting the Sixth Amendment. In its original form, the proposed Amendment provided that, "The trial of all crimes . . . shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites. . . ." 1 Annals of Cong. 435 (1789). Although the House ratified that Amendment in substantially similar form, it underwent considerable transformation in the Senate, which was "inflexible in opposing a definition of the *locality* of Juries. The vicinage they contend is either too vague or too strict a term . . . ." *Williams v. Florida*, 399 U.S. 78, 95 (1970) (emphasis in original) (quoting 1 Letters and Other Writings of James Madison 492–93 (1865)). The debate over the vicinage requirement ultimately led to the more broadly-worded Sixth Amendment ratified in 1791, but the historical record contains scant evidence that there was any debate regarding the unanimity requirement. As this Court has acknowledged, however, losing the explicit unanimity requirement "is concededly open to the explanation that the 'accustomed requisites' were thought to be included in the concept of a 'jury.'" *Williams*, 399 U.S. at 97.

The subsequent historical record suggests that this explanation is correct. In his *Commentaries*, Justice Joseph Story wrote, "A trial by jury is generally understood to mean . . . a trial by jury of twelve men . . . who must unanimously

concur in the guilt of the accused . . . . Any law, therefore, dispensing with any of these requisites, may be declared unconstitutional." 2 Joseph Story, *Commentaries on the Constitution of the United States* 559 n.2 (1891). In a series of lectures on the Constitution, Justice John Marshall Harlan asked "whether a state may dispense with a petit jury or modify the trial as it was at the time of the adoption of the Constitution? I answer unhesitatingly that no court of the United States . . . can sentence any man upon the return of a verdict of jury in which all the jury have not concurred." Frye, et al., *Justice John Marshall Harlan: Lectures on Constitutional Law*, 81 Geo. Was. L. Rev. 12A, 253 (2013). Indeed, Justice Harlan went even further, in language reminiscent of Blackstone's appreciation of the importance of a unanimity requirement:

> The glory of our civilization is that we do have some regard for human life and human liberty when a man's life is at stake, or when his liberty is put at stake. I have heard that three-fourths might be sufficient to agree to a verdict. I think that a unanimous verdict is required under this Constitution in the Courts of the United States.

Id. at 252.

This Court's own precedent provides support for this conclusion, as well. After recognizing the historical roots of jury unanimity as one of the essential components of trial by jury, this Court held it "must consequently be taken that the word 'jury' and the words 'trial by jury' were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument . . . ."

Thompson v. Utah, 170 U.S. 343, 350 (1898).[5] More recently, this Court's Sixth Amendment jurisprudence has clarified that the Amendment conveys "specific" rights "that were the trial rights of Englishmen" at common law. *Giles v. California*, 554 U.S. 353, 375 (2008).

In this regard, the historical record is clear—jury unanimity was one of the essential trial rights of Englishmen, as "prime [an] instrument for reducing the risk of convictions resting on factual error" as the reasonable-doubt standard. *Winship*, 397 U.S. at 363. Indeed, as one court observed decades ago:

> The unanimity of a verdict in a criminal case is inextricably interwoven with the required measure of proof. To sustain the validity of a verdict by less than all the jurors is to destroy this test of proof for there cannot be a verdict supported by proof beyond a reasonable doubt if one or more jurors remain reasonably in doubt as to guilt. It would be a contradiction in terms. . . . [I]t is of the very essence of our traditional concept of due process in criminal cases . . . .

Hibdon v. United States, 204 F.2d 834, 838 (6th Cir. 1953).

II. This Court's Recent Jurisprudence Has Severely Undercut Its Fractured Holding in 1972 that the Constitution Permits Convictions in State Criminal Trials by Non-Unanimous Verdicts

Although Louisiana courts continue to use this Court's decision in *Apodaca* to justify non-unanimous jury verdicts, this Court's recent Sixth Amendment jurisprudence renders *Apodaca* impossible to defend. In fact, this Court's recent

[5] One year earlier, this Court also noted, in the civil context, that "unanimity was one of the peculiar and essential features of trial by jury at the common law. No authorities are needed to sustain this proposition. Whatever may be true as to legislation which changes any mere details of a jury trial, it is clear that a statute which destroys this substantial and essential feature thereof is one abridging the right." *American Pub. Co. v. Fisher*, 166 U.S. 464, 468 (1897). Surely, if unanimity was "substantial and essential" in civil cases, it was even more important in criminal cases, where individuals face deprivation of property, life, and liberty.

Sixth Amendment decisions have rejected both theoretical predicates on which the *Apodaca* plurality opinion is based.

A. This Court No Longer Measures the Value of a Constitutional Right by the Function that It Serves

While the *Apodaca* plurality focused "upon the function served by the jury in contemporary society," 406 U.S. at 410, this Court recently has made clear that the Sixth Amendment derives its meaning not from functional assessments of the Amendment's purposes but rather from the original understanding of the guarantees contained therein. In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court abandoned the functional, reliability-based conception of the Confrontation Clause conceived in *Ohio v. Roberts*, 448 U.S. 56 (1980), in favor of the common-law conception of the right known to the Framers. In *Giles v. California*, 554 U.S. 353 (2008), this Court continued that trend, explaining that "[i]t is not the role of courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the court's views) those underlying values. The Sixth Amendment seeks fairness indeed—but seeks it through very specific means . . . that were the trial rights of Englishmen." *Id.* at 375. In *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), this Court similarly rejected an approach to the right to counsel that would have "abstract[ed] from the right to its purposes" and left it to this Court whether to give effect "to the details." *Id.* at 145 (quotation omitted).

Most importantly, in a line of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court has eschewed a functional approach to the right to

jury trial in favor of the "practice" of trial by jury as it existed "at common law." *Id.* at 480. In the course of holding that all sentencing factors that increase a defendant's potential punishment must be proven to a jury beyond a reasonable doubt, this Court emphasized that "[u]ltimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice." *Blakely*, 542 U.S. at 313. Rather, the controlling value is "the Framers' paradigm for criminal justice." *Id.*

This pronounced shift in constitutional exegesis—the return to historical analysis—calls *Apodaca* into serious question. But this Court has gone further.

B. The Court's Recent Jurisprudence Has Reaffirmed that the Sixth Amendment Requires a Unanimous Verdict

In the *Apprendi* line of cases, this Court has repeatedly and explicitly reaffirmed that the "longstanding tenets of common-law criminal jurisprudence" that the Sixth Amendment embodies require that "the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the *unanimous* suffrage of twelve of his equals and neighbours.'" *Southern Union*, 132 S. Ct. at 2354 (quoting *Blakely*, 542 U.S. at 301 (quoting in turn Blackstone, *Commentaries on the Laws of England* 343)). This Court further explained in *Booker v. United States*:

> More important than the language used in our holding in *Apprendi* are the principles we sought to vindicate. . . . As we noted in *Apprendi*:
>
> > "[T]he historical foundation for our recognition of these principles extends down centuries into the common law. '[T]o guard against a spirit of oppression and tyranny on the part of rulers,' and 'as the great bulwark of [our] civil and political liberties,' trial by jury has been understood to require that '*the truth of every accusation*, whether preferred in the shape of indictment, information, or

> appeal, should afterwards be confirmed by the *unanimous* suffrage of twelve of [the defendant's] equals and neighbours . . . ."'

543 U.S. 220, 238–39 (2005) (second emphasis added) (quotation omitted); *see also Apprendi*, 530 U.S. at 498 (Scalia, J., concurring) (charges against the accused must be determined "beyond a reasonable doubt by *the unanimous vote of 12 of his fellow citizens*") (emphasis in original).

Even more recently, this Court flatly stated in *McDonald* that the only reason that "the Sixth Amendment right to trial by jury requires a unanimous jury verdict" in federal trials, but not state criminal trials, was "an unusual division among the Justices" in *Apodaca*. 561 U.S. at 766 n.14. This Court has also since stated in a double jeopardy case arising from a state prosecution that "[t]he very object of the jury system is to *secure unanimity* by a comparison of views, and by arguments among jurors themselves." *Blueford v. Arkansas*, 132 S. Ct. 2044, 2051 (2012) (emphasis added) (quoting *Allen v. United States*, 164 U.S. 492, 501 (1896)).

The *Apodaca* plurality's view of the Sixth Amendment cannot be squared with these repeated pronouncements.

III. The Racial Origins of the Non-Unanimous Jury Verdict Violate the Fourteenth Amendment

Louisiana's non-unanimity rule uniquely strikes at the heart of equality and citizenship. The State adopted its non-unanimity rule in its 1898 constitutional convention, whose "mission" was "to establish the supremacy of the white race in this state." *Official Journal of the Proceedings of the Constitutional Convention of*

the State of Louisiana, at 374 (1898) (statement of Hon. Thomas J. Semmes) (hereinafter "Official Journal").

More specifically, the convention was "called together by the people of this State to eliminate from the electorate the mass of corrupt and illegitimate voters who have during the last quarter of a century degraded our politics." *Id.* at 8–9 (opening remarks of E.B. Kruttscchnitt, President of the Convention). In his closing remarks, President Kruttschnitt bemoaned that the delegates had been constrained by the Fifteenth Amendment such that they could not provide "[u]niversal white manhood suffrage and the exclusion from the suffrage of every man with a trace of African blood in his veins." *Id.* at 380. He went on to proclaim:

> I say to you, that we can appeal to the conscience of the nation, both judicial and legislative and I don't believe that they will take the responsibility of striking down the system which we have reared in order to protect the purity of the ballot box and to perpetuate the supremacy of the Anglo-Saxon race in Louisiana.

Official Journal at 381. *See also Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (discussing the "movement that swept the post-Reconstruction South to disenfranchise blacks"); *Louisiana v. United States*, 380 U.S. 145, 147–48 (1965) (discussing steps taken at 1898 convention to "disenfranchis[e] Negroes"). To this end, Louisiana adopted not only a non-unanimity rule at its convention but also its infamous literacy test and one of the South's first Grandfather Clauses.

The Court of Appeal in *Odowd* rejected this challenge to the racial origins of the non-unanimous jury rule, stating "the *Bertrand* court rejected the argument that nonunanimous jury verdicts have an insidious racial component and pointed

out that a majority of the United States Supreme Court also rejected that argument in *Apodaca*." Pet. App. 4a.

In *State v. Hankton*, the Fourth Circuit Court of Appeal in Louisiana addressed the claim that the origins of the non-unanimous rule were founded in a Constitutional Convention convened to "minimize or cancel out the voting power of African-Americans on juries and to deny African-Americans meaningful participation in the civil institution of jury service." *State v. Hankton*, 122 So. 3d 1028, 1041 (La. App. 4 Cir. 2013). The court rejected the defendant's challenge for procedural reasons. Ultimately, the appellate court asserted that the 1973 proceeding cleansed the racial animus from the 1898 Constitutional Convention:

> Even if racial bias was the original motive behind the less-than-unanimous jury verdict's introduction in 1898, the motive in 1973 was clearly judicial efficiency. As Mr. Lanier explained, the delegates debated the final form of this provision, and the current version of the Article is the result of a synthesis of various ideas from many different delegates.
>
> We, therefore, are not dealing with an issue squarely on point with *Hunter*, where there were no intervening constitutional conventions or amendments to the challenged provision. The actual constitutional provision and statutory procedure under which Mr. Hankton's trial was conducted was not the 1898 provision and procedure. Thus, even if we accept that the concept of a less-than-unanimous verdict may have had its genesis in Louisiana in provisions adopted by a white supremacist convention, the provision under which Mr. Hankton's trial was conducted is at best an attenuated version and likely, based upon our review of the 1973 constitutional convention proceedings, unrelated to any racial supremacist designs.

Hankton, 122 So. 3d at 1040–41. The court also noted that the *Hankton* case was tried in Orleans Parish, Louisiana, where the racial make-up of the venire ensured that the non-unanimous provision would not "have a disparate impact on the

outcome of their service on petit juries." *Id.* at 1041 (noting the unlikeliness of "disparate impact existing in a parish in which 60.2% of the residents identified as African-American. See 2010 United States Census Bureau statistics.").[6] Similarly, in *State v. Webb*, the Court of Appeal recognized:

> While the defendant in this case may have established racial motivation behind the 1898 constitutional provisions on voting, he has not established that every difference between the 1898 Constitution and the 1879 Constitution is the product of racial animus.
>
> * * *
>
> In this case, given that the defendant was tried in 2012 in Orleans Parish Criminal District Court by a jury composed of qualified Orleans Parish residents, and given that it can be judicially noticed that African-Americans have composed a solid majority of the population in Orleans Parish for at least several decades, it logically would be impossible for defendant to show a present-day disparate impact due to the non-unanimous jury verdict provisions. Further, while it is not disputed that defendant was convicted by non-unanimous jury verdicts, the record does not reflect the racial makeup of the jury, much less a racial verdict.

State v. Webb, 133 So. 3d 258, 285–87 (La. App. 4 Cir. 2014).

The Louisiana Supreme Court has given no indication that it will re-visit this holding. Indeed, the Louisiana Supreme Court's last word on the subject acknowledged, and did not disagree with, the argument that "the use of nonunanimous verdicts ha[s] an insidious racial component, allow[ing] minority viewpoints to be ignored, and is likely to chill participation by the precise groups

[6] In this case and this parish, the operation of the non-unanimous rule could have the effect of disenfranchising African-American jurors. *Cf. State v. Collier*, 553 So. 2d 815, 819–20 (La. 1989) ("Because only ten votes were needed to convict defendant of armed robbery, the prosecutor could have assumed, contrary to *Batson*'s admonition that it was unacceptable to do so, that all black jurors would vote on the basis of racial bias and then purposefully discriminated by limiting the number of blacks on the jury to two.").

whose exclusion the Constitution was proscribed." *Bertrand*, 6 So. 3d at 743. But the Louisiana Supreme Court deemed itself powerless to consider that matter in light of *Apodoca*. *Id.* Given the reasoning in *McDonald*, this Court should directly consider the import of the connection between Louisiana's non-unanimous verdicts rule and race.[7]

IV. This Case Is an Appropriate Vehicle for Addressing This Issue

In the past few Terms, a wide array of groups has filed *amicus* briefs urging this Court to grant certiorari to reconsider *Apodaca*: the American Bar Association, the National Association of Criminal Defense Lawyers, the Louisiana Association of Criminal Defense Lawyers, the Charles Hamilton Institute for Race and Justice, the Constitutional Accountability Center, and various academic experts. *See, e.g.*, *Miller v. Louisiana*, 133 S. Ct. 1238 (2013) (No. 12-162); *Lee v. Louisiana*, 555 U.S. 823 (2008) (No. 07-1523). These groups have argued in various ways that condoning non-unanimous verdicts in criminal cases severely hampers the fair administration of justice and, indeed, the public perception of justice. The strength of the collective pleas in these cases suggests this is a pressing issue that is not going to go away. *Stare decisis* does not prevent the resolution of this issue. This case presents an ideal vehicle for considering whether our Constitution should continue to tolerate felony convictions by less than unanimous verdicts.

A. The Doctrine of *Stare Decisis* Does Not Prevent Resolution of This Case

The doctrine of *stare decisis* does not pose a significant impediment to reconsidering the question presented afresh. As an initial matter, the doctrine of *stare decisis* bears not at all on the first question presented to this Court, as the Court has never addressed the racial heritage of the non-unanimous rule.

Moreover, this Court explained in *McDonald* that, "if a Bill of Rights guarantee is fundamental from an American perspective, then, unless *stare decisis* counsels otherwise, that guarantee is fully binding on the States." 561 U.S. at 784–85 (footnote omitted). For two primary reasons, the doctrine of *stare decisis* should not stand in the way of this Court's reconsidering the result in *Apodaca* to bring it into line with this Court's current approach to the Sixth and Fourteenth Amendments.[8]

First, principles of *stare decisis* are at their nadir where a case results in a plurality opinion because no five Justices are able to muster a controlling view concerning the law. *Apodaca* was a deeply fractured decision. Both Justice Powell's concurrence and the four dissenters expressly disagreed with the plurality's view that the Sixth Amendment does not require unanimous verdicts to convict. *Apodaca,* therefore, is entitled only to "questionable precedential value." *Seminole Tribe v. Florida*, 517 U.S. 44, 66 (1996) (overturning prior decision in part because a

[8] In addition to those reasons, *stare decisis* considerations also wane considerably "in cases . . . involving procedural and evidentiary rules," in part because such rules generally do not induce the same kinds of individual or societal reliance as other kinds of legal doctrines. *Payne v. Tennessee*, 501 U.S. 808, 827–28 (1991). This concern is not directly relevant in Petitioner's case, however, which is before this Court on direct review and therefore does not implicate retroactivity concerns.

majority of the Court (the concurring opinion providing the fifth vote, as well as the dissent) had "expressly disagreed with the rationale of the plurality").

Second, *stare decisis* has minimal force when the decision at issue "involves collision with prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). Indeed, "[r]emaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it." *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 231 (1995). As Justice Powell and the dissenters in *Apodaca* noted without contradiction from the plurality, the plurality's view that the Sixth Amendment does not require unanimity broke sharply from "an unbroken line of cases reaching back to the late 1800's"—and, indeed, from hundreds of years of common law practice. *Johnson*, 406 U.S. at 369 (Powell, J., concurring in the judgment in *Apodaca*); *see also Apodaca*, 406 U.S. at 414–15 (Stewart J., dissenting) ("Until today, it has been universally understood that a unanimous verdict is an essential element of a Sixth Amendment jury trial. . . . I would follow these settled Sixth Amendment precedents and reverse the judgment before us.") (citations omitted). Overruling *Apodaca*, therefore, would do nothing more than reinstate the traditional meaning of the Sixth and Fourteenth Amendments—the same traditional meaning that applies in every State except

Louisiana and Oregon.[9] It also would extinguish the schism with this Court's longstanding Seventh Amendment jurisprudence requiring unanimity in civil cases.

B. This Case Is an Ideal Vehicle for Reconsidering *Apodaca*

This case is from Louisiana, which would allow this Court to consider the constitutionality of non-unanimous verdicts in a setting that highlights the reasons why the Fourteenth Amendment should prohibit this practice. Both the majority and the dissenting opinions in *McDonald* emphasized that the Fourteenth Amendment was designed to guarantee to African Americans the "full and equal benefit" of the provisions of the Bill of Rights. 561 U.S. at 774, 778–80 (majority opinion) (quotation and citation omitted); *see also id.* at 898–99, 921, 935 (Breyer, J., dissenting) (emphasizing that a right should especially apply to states when it is an "antidiscrimination" measure designed to protect "discrete and insular minorities") (quotation marks and citation omitted). Put another way, it is especially imperative to apply a guarantee of the Bill of Rights against the states when the guarantee has roots in ensuring full and equal citizenship to blacks.

[9] It bears mentioning that, when this Court considered Louisiana's non-unanimity provision for six-person juries, it determined that rule to be unconstitutional in part because "[i]t appear[ed] that of those States that utilize six-member juries in trials of nonpetty offenses, only two, including Louisiana, also allow nonunanimous verdicts. We think that this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not." *Burch*, 441 U.S. at 138. Importantly, on its way to concluding that Louisiana's non-unanimity provision was unconstitutional, this Court observed that although it "already departed from the strictly historical requirements of jury trial" in *Apodaca* and *Johnson*, "it is inevitable that lines must be drawn somewhere if the substance of the jury trial right is to be preserved." *Id.* at 137. Since those decisions, however, the Court has returned to the "strictly historical requirements of jury trial."

Those concerns are directly relevant in the context of the Sixth Amendment to a unanimous verdict. "A right to jury trial is guaranteed to criminal defendants in order to prevent oppression by the Government." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). Such oppression, of course, has all-too-often in our history taken the form of race discrimination in the criminal justice system. A requirement of jury unanimity thus serves as a vital protection against this insidious influence. Moreover, in the Framers' view, "[t]rials were not just about the rights of the defendant but also about the rights of the community. The people themselves had a right serve on the jury – to govern through the jury." Akhil Reed Amar, AMERICA'S CONSTITUTION 237 (2005). In short, serving on juries, and having one's voice heard, was—and remains—a fundamental act of citizenship and suffrage. *Cf. Blakely*, 542 U.S. at 306 ("Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their ultimate control in the judiciary.").

Yet Louisiana's non-unanimity rule provided petitioner anything but stringent protection. Jury votes that are 10–2 in favor to convict (the determinative tally in this case) result in guilty verdicts in unanimity regimes only *64.7%* of the time. Dennis J. Devine, et al., *Jury Decision Making: 45 Years of Empirical Research in Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 692 tbl.6 (2001). Even when such ballots in unanimity regimes lead to hung juries instead of outright acquittals, statistics show that prosecutors respond by dismissing the charges over 20% of the time, and when defendants are retried, they are acquitted in 45% of

bench trials and nearly 20% of jury trials. *See* National Center for State Courts, *Are Hung Juries a Problem?*, at 26–27 (2002). By virtue of the jury's non-unanimous vote, however, Louisiana's judicial system judged Petitioner guilty and sentenced him to life imprisonment without the possibility of parole.

As prior petitions for certiorari have noted, non-unanimous verdicts are an unfortunately common occurrence in Louisiana,[10] where prosecutors hold the belief that, when ten of twelve jurors find a defendant guilty of a serious crime, "that's beyond a reasonable doubt." Marcia Coyle, *Divided on Unanimity*, NAT'L L.J., Sept. 1, 2008, at 1. In the last two years alone, over forty-five appellate decisions have

[10] *See, e.g.*, *State v. Taylor*, 21 So. 3d 421 (La. App. 4 Cir. 2009); *State v. Smith*, 20 So. 3d 501 (La. App. 5 Cir. 2009); *State v. Raymond*, 13 So. 3d 577 (La. App. 5 Cir. 2009); *State v. Tillman*, 7 So. 3d 65 (La. App. 4 Cir. 2009); *State v. Bertrand*, 6 So. 3d 738 (La. 2009); *State v. Martin*, 25 So. 3d 250 (La. App. 1 Cir. 2009); *State v. Malone*, 998 So. 2d 322 (La. App. 2 Cir. 2008); *State v. Johnson*, 993 So. 2d 373 (La. App. 1 Cir. 2008); *State v. Daigle*, 994 So. 2d 153 (La. App. 1 Cir. 2008); *State v. Lloyd*, 996 So. 2d 701 (La. App. 1 Cir. 2008); *State v. Lee*, 964 So.2d 967 (La. App. 1 Cir. 2007); *State v. Ruiz*, 955 So. 2d 81 (La. 2007); *State v. Elie*, 936 So. 2d 791 (La. 2006); *State v. Mizell*, 938 So. 2d 712 (La. App. 1 Cir. 2006); *State v. Mack*, 981 So. 2d 185 (La. App. 2 Cir. 2008); *State v. Brantley*, 975 So. 2d 849 (La. App. 2 Cir. 2008); *State v. Gullette*, 975 So. 2d 753 (La. App. 2 Cir. 2008); *State v. Linn*, 975 So. 2d 771 (La. App. 2 Cir. 2008); *State v. Carter*, 974 So. 2d 181 (La. App. 2 Cir. 2008); *State v. Ross*, 973 So. 2d 168 (La. App. 2 Cir. 2007); *State v. Baker*, 962 So. 2d 1198 (La. App. 2 Cir. 2007); *State v. Allen*, 955 So. 2d 742 (La. App. 5 Cir. 2007); *State v. Tensley*, 955 So. 2d 227 (La. App. 2 Cir. 2007); *State v. Johnson*, 948 So. 2d 1229 (La. App. 3 Cir. 2007); *State v. Williams*, 950 So. 2d 126 (La. App. 2 Cir. 2007); *State v. Mayeux*, 949 So. 2d 520 (La. App. 3 Cir. 2007); *State v. Brown*, 943 So. 2d 614 (La. App. 4 Cir. 2006); *State v. Payne*, 945 So. 2d 749 (La. App. 5 Cir. 2006); *State v. Riley*, 941 So. 2d 618 (La. App. 4 Cir. 2006); *State v. Chandler*, 939 So. 2d 574 (La. App. 2 Cir. 2006); *State v. Smith*, 936 So. 2d 255 (La. App. 2 Cir. 2006); *State v. Davis*, 935 So. 2d 763 (La. App. 2 Cir. 2006); *State v. Scroggins*, 926 So. 2d 64 (La. App. 2 Cir. 2006); *State v. Houston*, 925 So. 2d 690 (La. App. 2 Cir. 2006); *State v. Christian*, 924 So. 2d 266 (La. App. 5 Cir. 2006); *State v. Smith*, 952 So. 2d 1 (La. App. 1 Cir. 2006); *State v. Caples*, 938 So. 2d 147 (La. App. 1 Cir. 2006); *State v. Pitre*, 924 So. 2d 1176 (La. App. 3 Cir. 2006); *State v. Zeigler*, 920 So. 2d 949 (La. App. 2 Cir. 2006); *State v. Wilhite*, 917 So. 2d 1252 (La. App. 2 Cir. 2005); *State v. Hurd*, 917 So. 2d 567 (La. App. 5 Cir. 2005); *State v. Wiley*, 914 So. 2d 1117 (La. App. 2 Cir. 2005); *State v. Bowers*, 909 So. 2d 1038 (La. App. 2 Cir. 2005); *State v. Dabney*, 908 So. 2d 60 (La. App. 5 Cir. 2005); *State v. Jackson*, 904 So. 2d 907 (La. App. 5 Cir. 2005); *State v. Williams*, 901 So. 2d 1171 (La. App. 4 Cir. 2005); *State v. Juniors*, 918 So. 2d 1137 (La. App. 3 Cir. 2005); *State v. Jacobs*, 904 So. 2d 82 (La. App. 5 Cir. 2005).

rejected a defendant's challenge to a non-unanimous verdict.[11] These cases note "the *Apodaca* decision was, indeed, a plurality decision rather than a majority one," but nevertheless declare that, because the Louisiana Supreme Court has addressed the issue in *State v. Bertrand*, lower appellate courts are unable to reconsider the flawed premise underlying non-unanimous jury verdicts.[12] Indeed, as one appellate court noted in rejecting a challenge to non-unanimous jury verdicts:

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[11] *See, e.g.*, *State v. Huey*, 142 So. 3d 27 (La. App. 1 Cir. 2014); *State v. Webb*, 133 So. 3d 258 (La. App. 4 Cir. 2014); *State v. Thompkins*, 2014 La. App. Unpub. LEXIS 490 (La. App. 1 Cir. 2014); *State v. Scales*, 2014 La. App. Unpub. LEXIS 497 (La. App. 1 Cir. 2014); *State v. Felton*, 2014 La. App. Unpub. LEXIS 452 (La. App. 4 Cir. 2014); *State v. Moralez*, 2014 La. App. Unpub. LEXIS 437 (La. App. 4 Cir. 2014); *State v. Denham*, 2014 La. App. Unpub. LEXIS 348 (La. App. 1 Cir. 2014); *State v. Scott*, 2014 La. App. Unpub. LEXIS 282 (La. App. 1 Cir. 2014); *State v, Mosley*, 2014 La. App. Unpub. LEXIS 292 (La. App. 1 Cir. 2014); *State v. Duplantis*, 127 So. 3d 143 (La. App. 3 Cir. 2013); *State v. Jackson*, 115 So. 3d 1155 (La. App. 4 Cir. 2013); *State v. Free*, 127 So. 3d 956 (La. App. 2 Cir. 2013); *State v. Thompson*, 111 So. 3d 580 (La. App. 3 Cir. 2013); *State v. Hammond*, 115 So.3d 513 (La. App. 1 Cir. 2013); *State v. Davis*, 2013 La. App. LEXIS 2135 (La. App. 3 Cir. 2013); *State v. Saltzman*, 2013 La. App. LEXIS 2136 (La. App. 3 Cir. 2013); *State v. Miller*, 83 So. 3d 178 (La. App. 5 Cir. 2011); *State v. Hankton*, 122 So. 3d 1028 (La. App. 4 Cir. 2013); *State v. Santos-Castro*, 120 So. 3d 933 (La. App. 4 Cir. 2013); *State v. Marshall*, 120 So. 3d 922 (La. App. 4 Cir. 2013); *State v. Mack*, 2013 La. App. LEXIS 1265 (La. App. 4 Cir. 2013); *State v. Marcelin*, 116 So. 3d 928 (La. App. 4 Cir. 2013); *State v. Napoleon*, 119 So. 3d 238 (La. App. 5 Cir. 2013); *State v. Jackson*, 115 So. 3d 1155 (La. App. 4 Cir. 2013); *State v. Ross*, 115 So. 3d 616 (La. App. 4 Cir. 2013); *State v. Curtis*, 112 So. 3d 323 (La. App. 4 Cir. 2013); *State v. Marshall*, 2013 La. App. LEXIS 355 (La. App. 4 Cir. 2013); *State v. Galle*, 107 So. 3d 916 (La. App. 4 Cir. 2013); *State v. Thomas*, 106 So. 3d 665 (La. App. 4 Cir. 2012); *State v. Sanders*, 104 So. 3d 619 (La. App. 4 Cir. 2012); *State v. Hugle*, 104 So. 3d 598 (La. App. 4 Cir. 2012); *State v. Brooks*, 103 So. 3d 608, 614 (La. App. 5 Cir. 2012); *State v. Bonds*, 101 So. 3d 531 (La. App. 4 Cir. 2012); *State v. Barnes*, 100 So. 3d 926 (La. App. 4 Cir. 2012); *State v. Williams,* 101 So. 3d 104 (La. App. 4 Cir. 2012); *State v. Henry*, 103 So. 3d 424 (La. App. 2 Cir. 2012); *State v. Smith*, 96 So. 3d 678 (La. App. 4 Cir. 2012); *State v. Mitchell*, 97 So. 3d 494 (La. App. 5 Cir. 2012); *State v. Wilkins*, 94 So. 3d 983 (La. App. 3 Cir. 2012); *State v. Everett*, 96 So. 3d 605 (La. App. 4 Cir. 2012); *State v. Crump*, 96 So. 3d 605 (La. App. 4 Cir. 2012); *State v. Clarkson*, 86 So. 3d 804 (La. App. 3 Cir. 2012); *State v. Thomas*, 90 So. 3d 9 (La. App. 2 Cir. 2012); *State v. Ott*, 80 So. 3d 1280 (La. App. 4 Cir. 2012).

[12] *See, e.g.*, *State v. Funes*, 88 So. 3d 490, 510–11 (La. App. 5 Cir. 2011) ("[A]s an intermediate appellate court, this Court is obliged to follow the precedent established by the Louisiana Supreme Court."); *State v. Williams*, 2010 La. App. Unpub. LEXIS 28, 26–30 (La. App. 4 Cir. 2010) (Belsome, J., concurring) ("Historically, a defendant could not be convicted unless the jury verdict was unanimous. The requirement of unanimous jury

> [T]his issue has been addressed by the Louisiana Supreme Court, this Court, and other appellate courts in this State, and all have held that a defendant's reliance on recent post-*Apodaca* jurisprudence used to question the viability of a less than unanimous jury verdict ignores the holdings of the courts of this State.

State v. Jones, 2013 La. App. LEXIS 2878, *7 (La. App. 5 Cir. 2013) (citations omitted).

This case also squarely presents the issue of the racial origins of the non-unanimous statute, as the Court of Appeal reached the issue directly on the merits.

This Court should promptly rebuke Louisiana's view that non-unanimous jury verdicts satisfy the beyond-a-reasonable-doubt standard, which misapprehends not only legal theory but also the "effect" of dispensing with the unanimity requirement "on the fact-finding process." *United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978). Unless and until this Court addresses the issue, this Court will continue to receive petitions on the subject and uncertainty over this Court's constitutional jurisprudence will reign. Better to grant review now and put the question to rest.

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verdicts, like the twelve-member jury, began as early as the fourteenth century, and both were well-accepted features by the eighteenth century. . . . In *Apodaca v. Oregon*, . . . a plurality of the United States Supreme Court found in 1972 that 'despite its historical importance, unanimity was not a constitutional requirement because it did not serve the purposes of the jury trial.' As the majority acknowledges, the Louisiana Supreme Court has likewise upheld decisions finding that non-unanimous jury convictions pursuant to La. C.Cr.P. art. 782(A) can withstand constitutional scrutiny. Therefore, until a further directive is given by the U.S. Supreme Court or the Louisiana Supreme Court, we are bound to follow State v. Bertrand, supra. I respectfully concur.").

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

_____

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Dated: _____

CERTIFICATE OF SERVICE

Undersigned counsel certifies that on this date, the ___ day of January, 2015, pursuant to Supreme Court Rules 29.3 and 29.4, the accompanying motion for leave to proceed *in forma pauperis* and petition for a writ of *certiorari* was served on each party to the above proceeding, or that party's counsel, and on every other person required to be served, by depositing an envelope containing these documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

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_____

G. Ben Cohen

APPENDICES

APPENDIX A: *Opinion of Louisiana First Circuit Court of Appeal*

APPENDIX B: *Decision of Louisiana Supreme Court Denying Writ of Review*