

No. \_\_\_\_\_

IN THE  
*Supreme Court of the United States*

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DAVID WAYNE SIMS,

PETITIONER,

V.

STATE OF LOUISIANA,

RESPONDENT.

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

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PETITION FOR WRIT OF CERTIORARI

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G. Ben Cohen\*  
Shanita Farris  
Erica Navalance  
*The Promise of Justice Initiative*  
636 Baronne Street  
New Orleans, LA 70113  
(504) 529-5955  
[bcohen@thejusticecenter.org](mailto:bcohen@thejusticecenter.org)

\* Counsel of Record

## QUESTION PRESENTED

In *Apodaca v. Oregon* and *Johnson v. Louisiana*, this Court upheld state rules borne out of ill-will to minority defendants. Consequently, these rules allowed the conviction of defendants based upon non-unanimous juries. The Court held that although the Sixth Amendment requires unanimity in federal trials, the Fourteenth Amendment did not require unanimous verdicts in state trials. That ruling, as this Court noted in *McDonald v. City of Chicago*, 561 U.S. 742 (2010) was “the sole remaining exception to the notion that the ‘Fourteenth Amendment applies to the States only a watered down, subjective version of the individual rights,” and was the “result of an unusual division among the justices not an endorsement of the two track approach to incorporation.” While recognizing the value of stare decisis, this case presents a clear opportunity to redress a question of critical constitutional significance in order to prevent further deviation from constitutional principles:

The Question Presented is:

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

## **PARTIES TO THE PROCEEDING**

The petitioner is David Wayne Sims, 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.

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner, David Wayne Sims, respectfully petitions for a writ of certiorari to the Louisiana Third Circuit Court of Appeal in *State v. Sims*, No. 2016-20, 2016 WL 5477520 (La. App. 3 Cir. 9/28/16). (Pet. App. 1a-7a).

## **OPINIONS BELOW**

The judgment of the Louisiana Third Circuit Court of Appeal (Pet. App. 1a – 6a) is an unpublished opinion reported at *State v. Sims*, 2016 La. App. Unpub. LEXIS 353 (La.App. 3 Cir., Sept. 28, 2016). The Louisiana Supreme Court’s order denying review of that decision is reported at *State v. Sims*, 2016-KO-2076 (La. 09/06/17), 224 So.3d 984, (Pet. App. 7a).

## **JURISDICTIONAL STATEMENT**

The judgment and opinion of the Louisiana Third Circuit Court of Appeal were entered on September 28, 2016. Pet. App. 1a-6a. The Louisiana Supreme Court denied review of that decision on September 7, 2017. Pet. App. 7a. This Court’s jurisdiction is 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.

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

Petitioner, David Wayne Sims, was indicted on December 12, 2013, for aggravated rape and sexual battery, based upon the allegation that he had sexual intercourse with his stepdaughter, "D.C.", during a three year period beginning in 2009, and that he had fondled his daughter, "A.C", between January 2011 and September 2012. Petitioner denied the allegations, noting that they arose after he was "serving a jail sentence for unpaid traffic tickets" and "had refused to allow their mother to sell their food stamps to various relatives so she could play bingo." The prosecution argued that the allegations of sexual contact were truthful because both the defendant and D.C. were infected with herpes simplex virus 2 (HSV2).<sup>1</sup> A.C. was not.

Prior to trial, the defense moved for a special jury instruction seeking a unanimous verdict. As the Court of Appeals acknowledged:

In his motion for the special jury instruction regarding unanimous verdicts, Defendant questioned the survivability of *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L. Ed. 2d 184 (1972) for noncompliance with the federal rule regarding unanimous jury verdicts "once the United States Supreme Court again grants certiorari on this issue." He argued that for this reason he was preserving the issue. He further argued there was a racial bias behind the State's insistence that La.Code Crim.P. art. 782 was constitutional and, whereas he was black, his Fourth[sic] Amendment right against discrimination was being violated. Pet. App. at 4a. The trial court denied the request for special instructions and rejected the challenge to the non-unanimous verdict. Petitioner was convicted by a jury on May 1, 2015, of aggravated rape and sexual battery. Two of the jurors

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<sup>1</sup> The Center for Disease Control indicates relatively high prevalence rates for HSV2.

concluded that the State failed to prove beyond a reasonable doubt that Mr. Sims was guilty. Based on the jury's verdict, the trial judge sentenced Mr. Sims to life imprisonment without the benefit of parole, probation or suspension of sentence. Mr. Sims filed a notice of appeal.

On direct appeal, Mr. Sims argued that (1) the evidence adduced at trial is insufficient to support the jury's verdicts; and (2) his conviction and life sentence for aggravated rape by a non-unanimous jury verdict violated his Sixth and Fourteenth Amendment Rights under the United States Constitution. He argued that *Apprendi v. New Jersey*, 530 U.S. 466 (2000) called into question the validity of *Apodaca v. Oregon*, 406 U.S. 404 (1972), which held that non-unanimous jury verdicts do not violate the defendant's constitutional rights. Pet. App. 4a. The Louisiana Third Circuit Court of Appeal rejected the argument on the basis that the argument has been found to be without merits in previous cases. Pet. App. 5a. The Court of Appeals noted the Louisiana Supreme Court's decision:

In *State v. Bertrand*, 08-2215, 08-2311 (La.3/17/09), 6 So.3d 738, 743, the Louisiana Supreme Court specifically reversed a district court ruling which found LSA-C.Cr.P. art. 782 unconstitutional. In reaffirming well-established jurisprudence that a non-unanimous jury verdict is constitutional and does not violate the Fifth, Sixth, or Fourteenth Amendments, the Bertrand court stated as follows:

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.

In accordance with *State v. Bertrand*, supra, this Court has consistently upheld the constitutionality of Louisiana law which allows for non-unanimous jury verdicts in non-capital cases.

*State v. Sims*, 16-20 ( La. App. 3 Cir 09/28/16), \_\_ So. 3d \_\_, quoting *State v. Wilmot*, 13-994, pp. 6-9 (La.App. 5 Cir. 5/14/14), 142 So.3d 141, 146-48.

Mr. Sims filed an application for writ of review with the Louisiana Supreme Court, which denied review without reasons. See, *State v. Sims*, 2016-KO-2076 (La. 09/06/17), 224 So.3d 984. Pet. App. 8a.

### SUMMARY OF THE ARGUMENT

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*, 2344567 U.S. 343, 356 (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. at 477. 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, (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-eight 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).

The issue has further percolated in the state courts in the context of capital sentencing, where Florida and Delaware have determined that non-unanimous verdicts violate the Sixth and Fourteenth Amendment.

This case presents a clean opportunity to address the question of whether Justice Powell's view of partial incorporation remains good law, or if this Court now agrees that the whole of the Sixth Amendment is incorporated to the states either through the due process prong of the Fourteenth Amendment or as one of the privileges and immunities guaranteed each citizen of the United States.

### **REASON FOR GRANTING REVIEW**

"It is the unanimity of the jury that preserves the rights of mankind." 1 John Adams, *A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES* 376 (1797).

In *Jones v. United States*, this Court warned of the:



relative diminution of the jury's significance" and emphasized William Blackstone's warning that "other liberties would remain secure only 'so long as this palladium remains sacred and inviolate, not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it.'

526 U.S. 227, 244-246 (1999) (quoting 4 W. Blackstone, Commentaries on the Laws of England 342-44 (1769))

When the Fourteenth Amendment required universal suffrage, permitting African Americans to serve on juries throughout the states of the Confederacy, Louisiana responded. Louisiana's majority verdict system was first introduced in the State's 1898 Constitution, as part of a series of measures specifically designed to "establish the supremacy of the white race." Louisiana's 1898 Constitution, like the Alabama Constitution of 1901 examined by this Court in *Hunter v. Underwood*, 471 U.S. 222 (1985), "was part of a movement that swept the post-Reconstruction South to disenfranchise blacks." *Id.* at 229.

The opening address at the 1898 Louisiana Constitutional Convention made clear that the point was to limit African-American participation in the democratic process and to "perpetuate the supremacy of the Anglo-Saxon race in Louisiana." Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana, 8-9 (1898) [hereinafter "Journal"]. Closing the Convention, Hon. Thomas J. Semmes celebrated the putatively successful "mission" of the delegates "to establish the supremacy of the white race in this state." *Id.* at 374.

The 1898 Convention encoded a rule allowing verdicts by a 9-3 majority, eliminated misdemeanor juries and reduced jury sizes for lesser felonies. The

proponents of those rules sometimes tried to pass them off as cost-saving devices, but commentators have directly linked the diminution of the jury trial right to the Convention's larger effort "to consolidate Democratic power in the hands of the 'right people,' thereby bypassing the poorer sorts, just as the suffrage provision did." W. Billings & E. Haas, *In Search of Fundamental Law: Louisiana's Constitutions, 1812-1874*, The Center for Louisiana Studies (1993), pp. 93-109; see also Thomas Aiello, *Jim Crow's Last Stand: Nonunanimous Jury Verdicts In Louisiana*, Louisiana State University Press.

As Aiello writes:

It was a law designed to increase convictions to feed the state's burgeoning convict lease system and remained in the first half of the segregationist twentieth century even after convict lease had run its course. ... It is the last active law of racist Redeemer politics in Louisiana.

Aiello, *supra* at \_\_. See also Angela A. Allen-Bell. *These Jury Systems are Vestiges of White Supremacy*, Washington Post, 9/22/2017.

Oregon's law, as well was, borne out of prejudice:

Oregon's law was a reaction to the notorious trial of Jacob Silverman, which took place after a state simmering with anti-immigrant xenophobia (predominantly anti-Semitism and anti-Catholicism) became outraged when a twelve-person jury unanimously convicted Silverman of manslaughter rather than first-degree murder in a case involving the death of Jimmy Walker. Oregonians became angry that a Jewish man accused of killing a Protestant was spared a murder conviction and death sentence because a single juror held out for manslaughter.

Aliza B. Kaplan, Amy Saack, *Overtuning Apodaca v. Oregon Should Be Easy: Non-Unanimous Verdicts In Criminal Cases Undermine The Credibility Of Our Justice System*, Vol. 95 Oregon Law Review No. 1, 3 (February 2017).

Louisiana has also long rejected the view that the federal Constitution requires a unanimous jury:

Defendant argues that Louisiana's jury practice is not in conformity with the provisions of the constitution of the United States as Louisiana does not require a unanimous jury verdict to convict in such a case as this. ... We disagree. We find that the Act of Congress February 20, 1811, 2 U.S. Stat. 641, an act for the admission of the State of Louisiana into the Union, does not require that the provisions of our state constitution and statutes be identical with the federal unanimous jury requirements. We conclude that by the terms of the act of admission, our state constitution and statutes need only conform to the requirements of the United States Constitution. There is no constitutional requirement that one be convicted by a unanimous jury.

*State v. Hodges*, 349 So. 2d 250, 260 (La. 1977)

This Court need not reach the question whether it should invalidate Louisiana's non-unanimous jury provision under the privileges and immunities clause identified by Justice Thomas in his concurrence in *McDonald v. City of Chicago*, 561 U.S. 742 (2010)<sup>2</sup> or the equal protection analysis identified in *Hunter v. Underwood*. Whatever the validity of Justice Powell's concept of partial incorporation and whether the Fourteenth Amendment fully incorporates the Bill of Rights in every instance, it should be beyond peradventure that the Fourteenth Amendment protections are at their zenith where states water down the protections as part of an effort to establish racial hegemony; that one of the essential, fundamental rights guaranteed all citizens of the United States was the right to trial by a unanimous jury.

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<sup>2</sup> The Court in *McDonald* noted that "unanimity" was "one exception" to the general full incorporation rule. See *id.* at n. 14. In his concurrence, Justice Thomas concurred in judgment suggesting that there was a "more straightforward path to this conclusion, one that is more faithful to the Fourteenth Amendment's text and history." *McDonald*, at 805-806 (Thomas, J., concurring).

While this Court has denied certiorari on this question in a number of instances, to the extent the Court does not address the issue now, the prospect of secret machinations sapping the jury trial right extend elsewhere. Moreover, it cannot be gainsaid that Louisiana leads the country per capita in incarceration rates, the incarceration of African-Americans, and in wrongful convictions. While Petitioner acknowledges that the non-unanimity rule may not be solely responsible for these statistics, the lack of unanimity undoubtedly contributes, and undermines confidence in the administration of justice.

**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 cannot 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).<sup>3</sup> 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 fundamental 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 . . . .

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<sup>3</sup> 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.

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

Nor did the *Apodaca* or *Johnson* majorities actually reject the proposition that the Sixth Amendment historically required unanimous verdicts:

In *Apodaca*, eight Justices agreed that the Sixth Amendment applies identically to both the Federal Government and the States. *See Johnson*, supra, at 395, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (Brennan, J., dissenting). Nonetheless, among those eight, four Justices took the view that the Sixth Amendment does not require unanimous jury verdicts in either federal or state criminal trials, *Apodaca*, 406 U.S., at 406, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (plurality opinion), and four other Justices took the view that the Sixth Amendment requires unanimous jury verdicts in federal and state criminal trials, *id.*, at 414-415, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (Stewart, J., dissenting); *Johnson*, supra, at 381-382, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (Douglas, J., dissenting).

Justice Powell's concurrence in the judgment broke the tie, and he concluded that the Sixth Amendment requires juror unanimity in federal, but not state, cases. *Apodaca*, therefore, does not undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government. *See Johnson*, supra, at 395-396, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (Brennan, J., dissenting) (“In any event, the affirmance must not obscure that the majority of the Court remains of the view that, as in the case of every specific of the Bill of Rights that extends to the States, the Sixth Amendment's jury trial guarantee, however it is to be construed, has identical application against both State and Federal Governments”..

*McDonald v. City of Chicago*, 561 U.S. 742, 766 (2010). It is significant to note that the four plurality justices who held that the Sixth Amendment did not require unanimity did not do so because of a different view of the original history (compare for instance Justice Stevens’ and Justice Scalia’s differing historical understandings of the Second Amendment in *Heller*) but rather observed “Our inquiry must focus upon the function served by the jury in contemporary society.” *Apodaca*, 406 U.S.at 410 (plurality of White, J. Blackmun, J., Rehnquist, J., and Burger, CJ).



## **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* – both Justice Powell’s partial incorporation theory, and the plurality’s focus on the function of the jury in contemporary society -- impossible to defend. In fact, this Court’s recent Sixth Amendment decisions have rejected both of the theoretical predicates upon 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 Provide Strong Justification for Ensuring that the Fourteenth Amendment Fully Incorporates the Sixth Amendment**

Whatever the views on partial incorporation of the Fourteenth Amendment in other contexts, the Sixth Amendment's guarantee of a unanimous jury verdict is not the location to provide a watered down version of the Bill of Rights because Louisiana's nonunanimity rule uniquely strikes at the heart of equality and citizenship. The State adopted its nonunanimity 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. Kruttschnitt, 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 “disenfranchise[e] Negroes”). To this end, Louisiana adopted not only a nonunanimity rule at its convention, but also its infamous literacy test, and one of the South’s first Grandfather Clauses.

Like Alabama’s Constitutional Convention of 1901, the Louisiana constitutional convention of 1898 “was part of a movement that swept the post-Reconstruction South to disenfranchise blacks.” See *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) citing S. Hackney, *Populism to Progressivism in Alabama* 147 (1969); C. Vann Woodward, *Origins of the New South, 1877-1913*, pp. 321-322 (1971). In Alabama, like Louisiana:

[t]he delegates to the all-white convention were not secretive about their purpose. John B. Knox, president of the convention, stated in his opening address: "And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State." 1 *Official Proceedings of the Constitutional Convention of the State of Alabama, May 21st, 1901 to September 3rd, 1901*, p. 8 (1940).

*Hunter v. Underwood*, 471 U.S. at 229. These conventions understood that denial of suffrage, both from the jury box and the voting poll, through misdemeanor disenfranchisement, dilution, and other apparatus in a manner that would ensure the “supremacy” of the Anglo-Saxon race that would avoid the scrutiny of “Massachusetts” judges.” See *Official Journal* At 381; see also Robert J. Smith, Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of*

*Criminal Justice*, Vol. 72 No. 2 LA. LAW REV. 361, 375 (2012) (“The Delegates achieved these anti-participation goals not only by restricting access to the ballot box but also by diluting the voice of members of racial minority groups by allowing non-unanimous jury verdicts in criminal cases”); *id* at 376 (noting commentators at the time of Constitutional Convention’s concern that African-American presence on juries would prevent convictions, and result in hijacking sentencing outcomes); Thomas Aiello, *Jim Crow’s Last Stand: Non-Unanimous Criminal Jury Verdicts in Louisiana*, Louisiana State University Press, Baton Rouge, Louisiana, 2015; Aliza Kaplan, Amy Saack, *Overtuning Apodaca v. Oregon Should Be Easy: NonUnanimous Verdicts In Criminal Cases Undermine The Credibility Of Our Justice System*, Vol. 95 OREGON LAW REVIEW No. 1, 3 (February 2017); Angela A. Allen-Bell, *These Jury Systems are Vestiges of White Supremacy*, Washington Post, Sept. 22, 2017.

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 unlikelihood 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.").<sup>4</sup> 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.

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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

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<sup>4</sup> 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.").

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). Regardless of whether Petitioner can establish an unbroken line of racial animus arising from the 1898 Constitutional Convention, the history of that animus makes clear that the full protections that the Fourteenth Amendment promised should apply. And this case, unlike *Hankton* or *Webb* was tried in Calcasieu Parish, a jurisdiction where African-Americans make up 25% of the population, and the non-unanimous rule can effectively eliminate the voice of minority citizens from a jury.

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 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 nonunanimous verdicts rule and race.



#### **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. First, *Apodaca* – as discussed above – was a fractured opinion predicated upon disavowed methods of constitutional exegesis.

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.<sup>5</sup>

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 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. Peña*, 515 U.S. 200, 231 (1995). As Justice Powell and the dissenters in *Apodaca*

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<sup>5</sup> 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.

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.<sup>6</sup> 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 nonunanimous verdicts in a setting that highlights the reasons why the Fourteenth Amendment should prohibit this practice. This case is from

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<sup>6</sup> 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.”

Calcasieu Parish, with its own rich and sordid history of racism. 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 African-Americans.

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.”).

The facts of this particular prosecution also place the problems associated with allowing less than unanimous verdicts in unusually stark relief. The State's case depended on a single witness. Because no physical evidence corroborated this account, the prosecution boiled down to a credibility dispute—exactly the kind of case in which the need for stringent procedural safeguards is at its zenith.

Yet Louisiana's nonunanimity 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 (2001) (Table 6). 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,<sup>7</sup> 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. 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.<sup>8</sup> Indeed, as one appellate court noted in rejecting a challenge to non-unanimous jury verdicts:

[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).

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<sup>7</sup> A non-exhaustive list of non-unanimous verdicts, over the last twelve years, detailing more than one hundred cases is attached as Appendix C.

<sup>8</sup> 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*, 26 So. 3d 321 (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 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.”).

This Court should reject 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.

### CONCLUSION

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

Respectfully Submitted,



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G. Ben Cohen\*  
Shanita Farris  
Erica Navalance  
*The Promise of Justice Initiative*  
636 Baronne Street  
New Orleans, LA 70113  
(504) 529-5955  
[bcohen@thejusticecenter.org](mailto:bcohen@thejusticecenter.org)  
\*Counsel of Record

