No. 07-1523

IN THE
SUPREME COURT OF THE UNITED STATES

DERRICK TODD LEE,
Petitioner,

versus

LOUISIANA
Respondent.

On Petition for Writ of Certiorari

To the Louisiana Supreme Court

BRIEF OF *AMICUS CURIAE* THE LOUISIANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

TIMOTHY ALLISON MECHE
Counsel of Record
STEPHEN SINGER
JULIE HAYES KILBORN
700 Camp Street
New Orleans, LA 70113
(504) 528-9500

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INTEREST OF AMICUS CURIAE

The Louisiana Association of Criminal Defense Lawyers (LACDL) is a voluntary professional organization of private and public defense attorneys practicing in the state of Louisiana.[1] LACDL counts among its members the vast majority of the criminal defense bar in Louisiana. LACDL's mission includes the protection of individual rights guaranteed by the Louisiana and United States Constitutions and, occasionally, acting as *amicus curiae* in cases where the rights of all are implicated. The LACDL is, from time to time, invited by the Louisiana Supreme Court to submit briefs as *amici* in appropriate cases.

The Petition before the Court raises critically important issues that implicate basic trial rights. Members of *amicus curiae* represent clients whose interests are gravely affected by these issues.

SUMMARY OF ARGUMENT

Louisiana's majority verdict system was first introduced in the state's 1898 Constitution, which contained a raft of measures specifically designed to "establish the supremacy of the white race."

Most of those measures have since been abandoned or struck down. However, the majority

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae certify that no counsel for a party authored this brief in whole or in part, and that no person or party, other than the amicus curiae, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief. The parties have consented to the filing of this amicus brief.

verdict system continues to undermine the participation of African Americans in the administration of criminal justice in this state and to tarnish the legitimacy of jury verdicts.

The pernicious effect of non-unanimous jury verdicts amplifies and is itself exacerbated by the racially discriminatory use of peremptory challenges. Discriminatory intent can be masked by accepting one or two African-American jurors in the knowledge that their vote will not be fully effective in a system of majority verdicts. Equally, discriminatory use of peremptory challenges can more easily ensure that African-American jurors are denied effective voting power when prosecutors need only ten votes to convict.

The pernicious effect of majority verdicts is particularly troubling given the impact of jury verdicts on the African-American population in this state. Louisiana has the highest incarceration rate in the country. The burden of this imprisonment policy is borne disproportionately by African Americans who make up 70% of sentenced prisoners but less than one-third of the overall population.

In sum, the system of majority verdicts in Louisiana operates to undermine the twin goals of community participation and legitimacy that form a critical part of our jury system.

Furthermore, as the drafters of the 1898 Constitution were no doubt aware, where a group forming a majority in the community can elect both the District Attorney and the judge in a parish and then form an effective quorum on the jury, the jury no longer operates effectively as a check on oppression by the government.

ARGUMENT

I. Louisiana's majority verdict system was introduced in 1898 by a Constitution explicitly designed to disenfranchise the African-American population and enshrine white power.

By the Act of 1805, the Territory of Orleans adopted the forms and procedures of the common law of England in its criminal proceedings, including "the method of trials." Act of 1805, § 33; *See generally* A. Voorhies, *A Treatise on the Criminal Jurisprudence of Louisiana*, Bloomfield & Steel (1860), pp.3-10.

When the Territory became the State of Louisiana in 1812 a savings clause was inserted in the Constitution of 1812 to ensure that the existing laws of the Territory would continue in effect until altered or abolished by the legislature. La. Const. of 1812, art. 14, § 11.

At the same time, perhaps as a result of French distrust of a system of laws not specifically articulated by the legislature,[2] the Constitution of 1812 and successive constitutions[3] provided that the legislature could not adopt any system or code of laws by general reference but must specify the several provisions of the law it enacted. La. Const. of 1812, art. 14, § 11

While these Louisiana Constitutions barred the legislature thenceforward from simply adopting the remainder of the common law of England, this

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[2] *See* Judith Schafer, *The Long Arm of the Law: Slave Criminals and the Supreme Court in Antebellum Louisiana*, 60 Tul. L. Rev. 1247, 1248-49 (1986).

[3] La. Const. of 1945 and 1852.

proscription was not retroactive. The adoption of criminal definitions and procedures under the common law of England by the Act of 1805 was held to continue in force by operation of the savings clause. *State v. Lacombe*, 12 La. Ann. 195 (La. 1857). As a result, the common law requirement of unanimity in jury determinations in criminal cases applied in full in the State of Louisiana from its inception.

Following the Civil War and pursuant to the Military Reconstruction Act of 1867, a Constitutional Convention was convened in Louisiana.[4] The 1868 Constitution enshrined Louisiana's first Bill of Rights, which was modeled on the Federal Constitution and included the right to trial by jury. La. Const. of 1868, art. 6.

Following the reconstruction Constitutions and upon the withdrawal of federal troops, new Constitutions were promulgated in 1879 and 1898.

In the Constitution of 1898, jury trial was abolished for misdemeanors, reduced to trial by a jury of five for lesser felonies, and the requirement of unanimity was removed for all save capital offenses. In cases where hard labor was a necessary punishment, defendants were to be tried before a jury of twelve, requiring only nine to concur to render a verdict:

> The General Assembly shall provide for the selection of competent and intelligent jurors. All cases in which the punishment

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[4] Delegates were elected, with forty-nine white and forty-nine black delegates participating and producing a Constitution that was ratified by popular vote in 1868. W. Billings & E. Haas, *In Search of Fundamental Law: Louisiana's Constitutions*, 1812-1874, The Center for Louisiana Studies (1993).

> may not be at hard labor shall, until otherwise provided by law, which shall not be prior to 1904, be tried by the judge without a jury. Cases in which the punishment may be at hard labor shall be tried by a jury of five, all of whom must concur to render a verdict; cases in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom concurring may render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict.

La. Const. of 1898, art. 116.

The move to non-unanimous verdicts applied only to offenses committed after the adoption of the 1898 Constitution. *State v. Ardoin*, 51 La. Ann. 169 (La. 1899).

Louisiana's 1898 Constitution, like the Alabama Constitution of 1901 previously examined by this Court, "was part of a movement that swept the post-Reconstruction South to disenfranchise blacks." *Hunter v. Underwood*, 471 U.S. 222, 229 (1985). *See also* W. Billings & E. Haas, *In Search of Fundamental Law: Louisiana's Constitutions*, 1812-1874, The Center for Louisiana Studies (1993), pp. 93-109.

In his opening address, the President of Louisiana's 1989 Convention,[5] E.B. Kruttscchnitt, captured the tone, stating:

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[5] The 134 Convention delegates were all white and, with the exception of one Republican and one Populist, were all Democrats. Billings & Haas, *supra*, at 98-99. A referendum had been employed to call the Convention and elect delegates but with a newly introduced literacy test, black voter

> I am called upon to preside over what is little more than a family meeting of the Democractic party of the State of Louisiana.
>
> * * * *
>
> We know that this convention has been called together by the people of the State to eliminate from the electorate the mass of corrupt and illiterate voters who have during the last quarter of a century degraded our politics.

Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana, 8-9 (1898) [hereinafter "*Journal*"].

In closing the Convention, Hon Thomas J. Semmes stated that the "mission" of the delegates had been "to establish the supremacy of the white race in this state." *Id.* at 374. In his closing remarks President Kruttscchnitt bemoaned that the delegates had been constrained by the Fifteenth Amendment such that they could not provide what they would have wished: "universal 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.

Id. at 381.

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registration dropped by 90% to approximately 13,000 statewide. Billings & Haas, supra, at 98.

By the end of its work, the Convention had produced a Constitution built around article 197, the infamous suffrage provision that enshrined literacy testing and property ownership requirements while exempting most whites from these requirements through its Grandfather Clause.

The Convention substantially diminished the right to jury trial, most importantly for present purposes, by introducing majority verdicts. While the elimination of misdemeanor juries and the reduction of jury size for lesser felonies were said by their proponents to be driven by a desire to reduce costs, commentators have directly linked the diminution of the jury trial right to the general effort "to consolidate Democratic power in the hands of the 'right people,' thereby bypassing the poorer sorts, just as the suffrage provision did." Billings & Haas, *supra*, at 106, fn. 46.

The 1898 Constitution was not submitted to popular vote but simply ratified by the delegates.

The non-unanimity provision introduced in 1898 was rolled over into subsequent Louisiana Constitutions without apparent debate or particular consideration.

In 1972, in a deeply divided opinion, this Court upheld the Constitutionality of non-unanimous jury verdicts with the deciding vote of Justice Powell cast in favor of state's rights, rather than the model of incorporation settled upon by the remainder of the Court. *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972).

In 1973, Louisiana held its most recent Convention, producing our current Constitution, including art. 1, § 16, the provision at issue in the present proceeding. At this Convention majority verdicts were discussed but the debate centered

almost exclusively on the move from a verdict based upon nine out of twelve to a requirement of ten out of twelve votes. This change was presented on the express basis that notwithstanding this Court's ruling in *Johnson*, a vote of nine out of twelve did not comport with the need to establish guilt beyond a reasonable doubt. *Record of the Louisiana Constitutional Convention of 1973: Convention Transcripts, Louisiana Constitutional Convention Records Commission*, vol. 7, 1184.

The transcripts do not disclose any consideration of abolishing majority verdicts nor any weighing of their advantages and disadvantages. It was simply observed that "[I]t leads to a situation where you'll get a definitive action in more cases rather than a hung jury," *id.* at 1188. Louisiana's use of majority verdicts was described as:

> one of the modernizations of our criminal procedure, quite frankly of which Louisiana is one of the leaders in the field.

Id.

Thirty-five years since the Convention, thirty-six years since majority verdicts were ratified by this Court and 110 years since they were introduced in Louisiana in a deliberately racist Constitution, it can be fairly put that Louisiana is a maverick, rather than a leader in this field.

Whatever the intent of the Convention delegates in 1973, Louisiana's provision for majority verdicts appears to have originally been motivated by a desire to disempower African Americans on account of race and, as discussed below, it continues to this day to have that effect.[6]

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[6] Cf. *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) ("Without deciding whether § 182 would be valid if enacted today without

II. The combination of majority verdicts and the discriminatory use of peremptory challenges exponentially increases the negative effect of each on meaningful African-American participation in jury decision making.

The system of majority verdicts in Louisiana creates the inherent risk that the voices of African Americans on the jury will not be respected, will not form a meaningful part of the deliberations and may even be completely ignored. Majority verdicts create an opportunity for other jurors to return the verdict of their choosing while ignoring or discounting the views of minority jurors.

This dilution of meaningful African-American participation in jury service and jury decision making is exponentially worsened when combined with the discriminatory use of peremptory challenges by prosecutors.

The LACDL has previously filed an *amicus* brief in this Court detailing the extensive problems with the enforcement of *Batson* in Louisiana and describing evidence of the systemic use of peremptory challenges to exclude African Americans from jury service in this state. *Snyder v. Louisiana*, No. 06-10119 (U.S. filed May 18, 2007).

Within a system of majority verdicts it becomes easier to conceal discriminatory intent in the use of peremptory challenges and the impact on jury

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any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, it violates equal protection under Arlington Heights.")

participation by African Americans becomes even more dramatic.

Where a prosecutor minded to discriminate knows that he or she need only secure ten out of twelve votes to obtain a conviction there is an opportunity to include one or two token African-American jurors.[7] This strategy was observed by the Louisiana Supreme Court in the case of a particularly obvious *Batson* violation:

> Moreover, the presence of two black persons on defendant's jury did not necessarily defeat an inference of discrimination. 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.
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> * * * *
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> The record in this case strongly suggests that the prosecutor, already frustrated in defendant's first trial by a hung jury which included three blacks, pursued a strategy in the second trial of limiting the number of blacks on the jury to two, thus making a conviction possible even if all of the blacks on the jury voted according to racial bias.

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[7] The plurality in *Apodaca* was unwilling to accept that members of a minority group may not be adequately heard or represented in deliberations directed to achieving a majority verdict, rather than unanimity. *Id.* at 413-4. As illustrated in *Collier* (*infra*), at least some of those experienced in trying cases under a majority verdict system take the opposite view.

> This pattern of striking all black jurors (except two) continued in the face of mounting pressure by the trial court to select a jury more representative of the black population of the parish.

State v. Collier, 553 So. 2d 815, 819-20 & 823 (La. 1989) (footnotes omitted). *See also State v. Cheatteam*, 07-272, 2008 La. App. LEXIS 816 (La. App. 5 Cir. May 27, 2008)("[Defense counsel] pointed out that it appeared the prosecutor was attempting to ensure that only two African-Americans would serve on the jury. And in order to convict, the prosecutor needed only 10 votes."); *State v. Davis*, 626 So. 2d 800 (La. App. 2 Cir. 1993) (State struck four of six African-American jurors, 10:2 guilty verdict returned, *Batson* challenge denied).

Where the discriminatory use of peremptory challenges winnows down the number of African Americans to serve on a particular jury to one or two, the inherent potential of the majority verdict system to diminish the meaningful participation of African Americans on criminal juries is amplified by increasing the number of cases in which there are two or fewer African-American votes.

In a large scale study of the pattern of prosecution peremptory challenges in Jefferson Parish, Louisiana, it was reported that prosecutors peremptorily challenged African Americans at more than three times the rate at which they challenged non-African Americans.[8]

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[8] *Blackstrikes, A Study of the Racially Disparate Use of Peremptory Challenges By the Jefferson Parish District Attorney's Office*, A Report of the Louisiana Crisis Assistance Center, (Sept. 2003), available at www.blackstrikes.com.

In the course of the same research the authors analyzed the number of juries that ended up with zero, one, two, three, etc., African-American members serving. These figures were compared with the number of juries with zero, one, two, three, etc., African-American members that one would expect if jury selection were not racially skewed.[9] The results were reported in the following table:

Blacks on Jury	What it should be	What it is
0	6%	22%
1	17%	35%
2	24%	23%
3	22%	12%
4	15%	6%
5	8%	1%
6	4%	1%

These results suggest that as a result of the extensive use of prosecution peremptory challenges against African Americans, the number of all white juries was triple that which would be expected in Jefferson Parish, where 23% of the population is African-American.[10]

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[9] The results of this further analysis are reported at www.blackstrikes.com (last visited 7/3/08). Using a statistical tool known as a Poisson Distribution, the authors estimated the distribution of African-American participation on juries expected in a race neutral jury selection process where the Parish was 22.9% African-American. This was compared to the percentage of juries with zero, one, two, etc., black jurors observed in 390 jury trials.

[10] The 2000 U.S. Census recorded the African-American population at 22.9% of the Parish. Profile of General

The percentage of juries with two or fewer African Americans went from an expected 47% to an overwhelming 80%.

The combined effect of racially disparate use of prosecution peremptory strikes and majority verdicts is dramatic. In a system of unanimous verdicts and even handed use of peremptories, there should be only 6% of juries in Jefferson Parish in which there is no guaranteed African-American voice; that is, those cases where an all white jury is empanelled.

However, given the reality of jury selection methods and the use of majority verdicts, it is 80% of juries in Jefferson Parish that have no guaranteed African-American voice; being those juries where two or fewer African Americans are empanelled.

Amicus is not suggesting that all juries split on racial lines or all jurors refuse to listen to or share the views of those of other races. However, these figures dramatically illustrate the inherent potential of a system of majority verdicts to undermine the benefits of full participation and legitimacy offered by unanimous verdicts, particularly when combined with the abuse of peremptory challenges.

III. Majority verdicts undermine full community participation in criminal justice decisions and the legitimacy of verdicts in the state with the highest rate of incarceration in the country and massive over representation of African Americans in the state's prison population.

Demographic Characteristics 2000, U. S. Census Bureau, available at

http://factfinder.census.gov/servlet/QTTable?_bm=n&_lang=en&qr_name=DEC_2000_SF1_U_DP1&ds_name=DEC_2000_SF1_U&geo_id=05000US22051 (last visited 7/3/08).

Louisiana has the nation's highest rate of incarceration. In 2007 the Department of Justice reported that 857 out of every 100,000 residents in Louisiana were held in custody serving a sentence of imprisonment of one year or more (1,649 per 100,000 males).[11] The national average was only 509 per 100,000 (957 per 100,000 males).

African Americans are massively over-represented amongst those persons incarcerated in Louisiana. Statewide, African Americans make up just under one-third of the total population.[12] However, they make up over two-thirds of Louisiana's prison population, including over two thirds of those sentenced to life imprisonment.[13]

One of the singular benefits that unanimity offers our criminal justice system is a guarantee of participation by minority groups in jury decision making.[14] Another is the perceived legitimacy of

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[11] Appendix 5. *Prison Inmates at Midyear 2007*, Department of Justice (June 2008), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/pim07.pdf (last visited 7/3/08).

[12] African Americans represent 31.7% of the population according to the Census Bureau 2006 estimate. *Louisiana QuickFacts*, U.S. Census Bureau, available at http://quickfacts.census.gov/qfd/states/22000.html (last checked 7/3/08).

[13] *Demographic Profiles of the Adult Correctional Population* and *Demographic Profiles of LIFERS Adult Correctional Population*, Louisiana Department of Public Safety and Corrections (March 31, 2008), available at http://www.corrections.state.la.us/view.php?cat=1&id=185#ms (last visited 7/3/08).

[14] The problem of under-representation of African Americans perpetuates itself in Louisiana, as individuals convicted of felony offenses are themselves unable to serve on juries. *State*

decisions that have been reached unanimously, with the concurrence of all sworn to decide, regardless of race.

Operating in a system where a jury verdict can expose a prisoner to perhaps the harshest sentencing regime in the country and where those sentences are borne disproportionately by members of the African-American community, the need for full participation in jury decisions and legitimacy of jury determinations is at its peak.

CONCLUSION

Louisiana's system of majority verdicts was produced in a Constitution designed to disenfranchise African Americans and to enshrine white majority power.

Majority verdicts in Louisiana directly diminish the twin goals of community participation and legitimacy of verdicts, particularly as a result of their effect on meaningful African-American participation in the administration of criminal justice.

The jury trial right found in the Sixth Amendment is designed to protect the individual from the oppression by the government. *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968).

Where a group forming a majority in the community can elect the District Attorney and the judge in a parish and then form an effective quorum on the jury, the jury no longer operates effectively as a check on oppression by the government. This is so

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v. Jacobs, 904 So. 2d 82, 91 (La.App. 5 Cir. 2005), *writ denied*, 927 So. 2d 282, 2006 La. LEXIS 1451 (La., Apr. 28, 2006).

whether the majority group is defined by race, class, religion or politics.

The drafters of the 1898 Constitution understood how to draft a constitution in order to secure majority power and it was they who enshrined majority verdicts in this state's criminal justice system.[15]

Majority verdicts in Louisiana are inconsistent with the Sixth Amendment jury trial guarantee and directly diminish that guarantee, particularly in their impact upon the African American community.

Respectfully submitted,

TIMOTHY ALLISON MECHE
Counsel of Record
700 Camp Street
New Orleans, LA 70113
(225) 578-8326

STEPHEN SINGER
LOYOLA LAW CLINIC
LOYOLA UNIVERSITY
SCHOOL OF LAW
7214 St. Charles Ave.
New Orleans, LA 70118
(504) 821-8101

[15] "The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives." P. Devlin, *Trial by Jury* 164 (1956), cited in *Duncan* at 156, n. 23.

JULIE HAYES KILBORN
Co–Chair, Amicus Committee
LOUISIANA ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
636 Baronne Street
New Orleans, LA 70113
(504) 558-9867