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No. 07-1523

IN THE

Supreme Court of the United States

DERRICK TODD LEE,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

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

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Sixth Amendment right to jury trial, as applied to the States through the Fourteenth Amendment, allows a criminal conviction based on a non-unanimous jury verdict.

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with more than 12,800 direct members worldwide and 94 state, local, and international affiliate organizations with another 35,000 members – including private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the fair and proper administration of criminal justice.[1]

Few protections are of more "surpassing importance" than the proscription against any deprivation of liberty without due process of law and the guarantee that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. *Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000); U.S. Const. amends. XIV, VI. This Court has recently reaffirmed not only that "the historical foundation for our recognition of these principles

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[1] Pursuant to this Court's Rule 37, amicus states that no counsel for any party authored this brief in whole or in part, and no person or entity other than amicus made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties were timely notified at least ten days prior to filing and have consented to the filing of this brief. A letter of consent executed by Respondent has been filed with the Clerk of the Court and counsel for Petitioner has filed a global consent.

extends down centuries into the common law," but also that these protections were instituted principally "to guard against a spirit of oppression and tyranny on the part of rulers" and stands "as the great bulwark of [our] civil liberties and political liberties." *Apprendi*, 530 U.S. at 477 (citations omitted). Thus, "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 . . . .'" *Id.* (citing 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)) (second emphasis added). "Equally well founded is the companion right to have the jury verdict based on proof *beyond a reasonable doubt.*" *Id.* (emphasis added).

The Louisiana statute at issue here provides that in cases where a defendant is charged with a non-capital offense for which the punishment may be "confinement at hard labor," the State need only persuade ten of twelve jurors to vote guilty in order to secure a conviction. La. C. Cr. P. art. 782 (2008). This statute, which purports to find constitutional refuge in the Court's deeply fractured 4-1-4 opinion in *Apodaca v. Oregon*, 406 U.S. 404 (1972) (upholding the constitutionality of a state statute providing for criminal convictions on the basis of 9-3 jury verdicts), severely diminishes the protections afforded the criminally accused by the right to jury trial and the reasonable doubt standard.

NACDL is in agreement with Petitioner that the Sixth and Fourteenth Amendments prohibit the States from securing criminal convictions on the basis of anything less than a unanimous jury verdict. NACDL submits that the fractured opinion in *Apodaca* is neither

sufficiently clear nor sufficiently consonant with intervening opinions of the Court to stand any longer as this Court's ruling on the issue. NACDL respectfully submits that the Court should reaffirm the traditional meaning of the Sixth and Fourteenth Amendments in declaring that Louisiana's non-unanimity rule is unconstitutional.

SUMMARY OF ARGUMENT

Developments in the Court's Sixth and Fourteenth Amendment jurisprudence in the wake of *Apodaca*, the weight of the empirical research conducted in response to *Apodaca*, and the experiences of various trial courts all present compelling grounds for a critical re-examination and abandonment of *Apodaca* as endorsing an unconstitutional abrogation of the rights to due process and a fair trial by jury. Accordingly, the NACDL respectfully submits that the Court should grant the petition and reject *Apodaca*.

REASONS FOR GRANTING THE PETITION

This Court has recognized that "[its] decisions interpreting the Sixth Amendment are always subject to reconsideration." *Duncan v. Louisiana*, 391 U.S. 145, 158 n.30 (1968); *see also Williams v. Florida*, 399 U.S. 78, 107 (1970) (Black, J., concurring in part and dissenting in part) (recognizing the Court's "duty to re-examine prior decisions to reach the correct constitutional meaning in each case"); Petition For Writ of Certiorari at 18-21. Here, where a prior decision of the Court is so misaligned with the historical underpinnings and constitutional stature of the right at issue – specifically, the right of a defendant to be free from conviction except by proof sufficient to convince a jury of defendant's guilt "beyond a reasonable doubt" –

the necessary pre-conditions for such a critical re-examination plainly exist.

Petitioner's brief in support of granting certiorari thoroughly canvases the fractured nature of the Court's decision in *Apodaca*. Amicus NACDL will not retread the same ground here. Instead, NACDL seeks to demonstrate the lack of any sound basis for the Court's decision in *Apodaca* – in what was an apparent detour from settled principles and established practice – and the practical consequences for the criminally accused of the continued vitality of *Apodaca*.

I. The Louisiana Statute, As Endorsed By *Apodaca* and *Johnson*, Runs Counter To The Historically Recognized Constitutional Protections Of Trial By Jury And The Reasonable Doubt Standard.

This Court has expressly held that "[b]ecause . . . trial by jury in criminal cases is fundamental to the American scheme of justice, . . . the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which – were they to be tried in a federal court – would come within the Sixth Amendment's guarantee." *Duncan*, 391 U.S. at 149. The right to trial by jury is historically entrenched, pre-dating the writing of the United States Constitution, having been brought to this country by those who emigrated from England "'as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.'" *Id.* at 154 (citations omitted). Fearing unchecked power, the framers of the Constitution insisted upon community participation in the determination of guilt or innocence of the accused, and by guaranteeing the accused a right to trial by jury,

provided him with "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Id.* at 156.

Just two years after deciding *Duncan*, the Court explicitly held that the Due Process Clause of the Fourteenth Amendment protects the criminally accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364 (1970). The *Winship* Court reasoned that the historic pedigree of the heightened standard of proof in criminal cases and the virtually unanimous adherence to the reasonable doubt standard in common law jurisdictions "'reflect[ed] a profound judgment about the way in which the law should be enforced and justice administered.'" *Id.* at 361-62 (quoting *Duncan*, 391 U.S. at 155). Because the criminally accused has an interest of "immense importance" and "transcending value" in his liberty and reputation at stake, the margin of error that exists in all litigation must be reduced as to the defendant by placing on the prosecution the burden of persuading the factfinder of his guilt beyond a reasonable doubt. *Id.* at 363-64. As the Court explained:

> use 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.

Id. at 364.

In both *Apodaca* and its companion case, *Johnson v. Louisiana*, 406 U.S. 356, 359 (1972), Petitioners argued that the failure to require unanimous verdicts in state criminal cases undermined the reasonable doubt standard. In *Apodaca*, Petitioners argued that the right to a jury trial provided by the Sixth Amendment and made mandatory on the states by virtue of the Fourteenth Amendment, *see Duncan v. Louisiana*, 391 U.S. at 145, carries with it a requirement that the prosecution must prove the accused guilty beyond a reasonable doubt, and, according to the Petitioners, a unanimous verdict is required to give substance to that standard. 406 U.S. at 406. Despite the obvious interrelationship between the right to a trial by jury and the right to be free from conviction except by proof of guilt beyond a reasonable doubt, Justice White and three other justices in *Apodaca* posited that "the Sixth Amendment does not require proof beyond a reasonable doubt at all." *Id.* at 412 (White, J.).

In *Johnson*, Petitioner was foreclosed from raising a Sixth Amendment argument, but instead argued that the Due Process Clause of the Fourteenth Amendment mandated a reasonable doubt standard, *see Winship*, 397 U.S. at 363-64, and that, under the Due Process and Equal Protection clauses, such a standard must be construed to require a unanimous jury verdict. 406 U.S.

at 358-59.[2] The Court rejected the argument that a unanimous jury verdict was required in all criminal cases. *Id.* at 359. More specifically, the *Johnson* majority held that "the fact of three dissenting votes to acquit raises no question of constitutional substance about either the integrity or the accuracy of the majority verdict of guilt." *Id.* at 360.

With admittedly little empirical or evidentiary support other than its own hunches and assumptions, the majority in *Johnson* rejected any notion that upon reaching the quorum necessary to convict, the majority jurors might simply cut short deliberations and ignore the reasonable doubts of their colleagues. *Id.* at 360-61. The Court concluded that before it would alter its own perceptions about jury behavior and overturn a legislative judgment that unanimity is not essential to reasoned jury verdicts, "we must have some basis for doing so other than unsupported assumptions." *Id.* at 361-62; *compare with id.* at 389-90 (Douglas, J., dissenting) ("I fail to understand why the Court should lift from the States the burden of justifying so radical a departure from an accepted and applauded tradition and instead demand that these defendants document with empirical evidence what has always been thought to be too obvious for further study.").

Recent developments in the Court's Sixth and Fourteenth Amendment jurisprudence, as well as the now substantial body of empirical evidence regarding

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[2] Petitioner in *Johnson* conceded that *Duncan*, which held that the Sixth Amendment guaranty of jury trial was applicable to the States, did not apply to his case because his trial occurred before *Duncan* was decided. *Johnson*, 406 U.S. at 358-59.

juror perceptions and behavior, demonstrate that both the common-law originalist conception of the rights at issue *and* the functional, reliability-based conception of those rights confirm the need to revisit the Court's rulings in *Apodaca* and *Johnson*.

Within a very few years after *Apodaca* and *Johnson* were decided, the Court began to re-examine the foundation of those decisions. In *Burch v. Louisiana*, 441 U.S. 130, 138 (1979), for example, the Court held that conviction by a non-unanimous six-person jury in a Louisiana criminal trial for a non-petty offense violated the Sixth Amendment right of the defendant to a trial by jury. The *Burch* Court buttressed its determination by looking to the current jury practices of the several States:

> [i]t 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.

Id. (citations omitted). *Burch* effectively rejected the subjective analysis embraced by *Apodaca* and *Johnson* and employed the "useful guide" that its predecessors eschewed.

More recently, the Court rejected the *Apodaca* plurality's premise that the reasonable doubt standard was untethered to the Sixth Amendment right to trial by jury. In *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993), this Court unanimously held:

> [i]t is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as *Winship* requires) whether he is guilty beyond a reasonable doubt. *In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.*

Id. at 278 (second emphasis added). The Court concluded that by providing the jury with a faulty "reasonable doubt" definition during the instruction stage, the trial court denied defendant the right to a jury verdict of guilt beyond a reasonable doubt. *Id.* at 281. That deprivation amounted to "structural error," the Court concluded, "the jury guarantee being a 'basic protectio[n]' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function." *Id.* at 281-82; *see also Cunningham v. California*, 549 U.S. 270, ___; 127 S. Ct. 856, 863-64 (2007) (applying the *Apprendi* rule to a state sentencing system and explaining that "*under the Sixth Amendment*, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established *beyond a reasonable doubt*, not merely by a preponderance of the evidence" (emphasis added)). Under the original common law conception, the right to trial by jury includes the right to be convicted only upon proof beyond a reasonable doubt.

II. A Substantial Body Of Post-*Apodaca* Case Law Demonstrates That The Court's Assumptions And Hunches Regarding Jury Behavior Were Flawed.

A growing body of case law demonstrates that the unanimity requirement provides the greatest assurance that the jury will fulfill its indispensible role in the criminal justice system and undercuts the hunches and assumptions relied upon by the plurality in *Apodaca* and the majority in *Johnson*, who determined that unanimity is not essential to the reasonable doubt standard.[3] For example, the more recent experiences of several courts from jurisdictions where the unanimity requirement is in force refute the *Johnson* Court's presumption that robust jury discussion and a thorough debate of the facts would not suffer as a result of a majority decision rule. *See Johnson*, 406 U.S. at 361 (concluding that the Court had "no grounds for believing that majority jurors, aware of their responsibility and power over the liberty

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[3] Notably, Justice Powell's concurrence respecting *Apodaca* relied, at least in part, on his observation that "[l]ess-than-unanimous verdict provisions . . . have been viewed with approval by the American Bar Association's Criminal Justice Project." 406 U.S. at 377. In connection with the more recently conducted American Jury Project, the American Bar Association (ABA), which NACDL understands will file a brief *amicus curiae* in support of Petitioner in this case, recently published and released its Principles for Juries and Jury Trials, available at http://www.abanet.org/jury/pdf/final%20 commentary_july_1205.pdf (last accessed July 3, 2008). Based upon a comprehensive review of the empirical research conducted over the past half-century, the ABA now recommends that, in accord with the established practice in federal criminal trials, "a unanimous verdict should be required in all criminal cases heard by a jury." *Id.* at 23-26 (Principle 4.B).

of the defendant, would simply refuse to listen to arguments presented to them in favor of acquittal, terminate discussion, and render a verdict," but instead posited that a "juror presenting reasoned argument in favor of acquittal would either have his arguments answered or would carry enough other jurors with him to prevent conviction").

These recent cases reveal that dissenting jurors frequently seek escape from deliberations rather than confront their peers or cast a vote against their consciences. *See, e.g.*, *Early v. Packer*, 537 U.S. 3, 4-6 (2002) (dissenting juror twice asked to be dismissed from jury rather than continue deliberations); *United States v. Dorsey*, 865 F.2d 1275, 1277 (D.C. Cir. 1989) (dissenting juror asked to be exchanged with alternate because she felt she would be "lying to myself to change my verdict just to have a unanimous decision"); *United States v. Norton*, 867 F.2d 1354, 1364 (11th Cir. 1989) (juror asked to be replaced because he entertained doubt as to defendant's guilt while majority did not); *United States v. O'Brien*, 609 F.2d 895, 896 (8th Cir. 1979) (juror asked to be removed from jury, explaining "my decision would not be fair to the U.S. people or to the defendant"); *Blackwood v. State*, 627 S.E.2d 907, 911-12 (Ga. Ct. App. 2006) (juror asked to be excused because she was the "only one with a different decision" and "wouldn't feel good tonight if I said he was guilty"); *Fairley v. State*, 467 So. 2d 894, 900 (Miss. 1985) (juror sought to be excused because he reached a decision that he felt would not be reached by the rest of the jury); *Wilson v. United States*, 419 A.2d 353, 355 (D.C. 1980) (juror left deliberations, and after being directed to

return, asked to be excused because she was the "only hold up").[4] If dissenting jurors are willing to seek escape in unanimity jurisdictions, it only stands to reason that these same jurors, when sitting on juries in non-unanimity jurisdictions, would silently accept the decision of the majority rather than force a discussion of the charges.[5]

It is difficult for the average layperson – frequently not skilled in the arts of rhetoric or advocacy – to marshal his argumentative skills to defend his dissenting view or sway others to his side. Juries are rarely composed of Ciceros, Websters and Douglasses. A dissenting juror who knows the decision is foretold once a ten-juror quorum is achieved has little motivation to challenge the judgment of his peers; as a result, he commands less attention from the majority. When unanimity is required, however, the full benefits of the jury system reveal themselves. Not only must the dissenter attempt to persuade his peers, but the majority must also persuade the dissenter. Such a system necessarily requires a robust and probing discussion of the case.

When a juror has a deciding vote, it is then that percolations of doubt are given voice. *See, e.g.*, *Early*, 537 U.S. at 4-5 (upon polling of the jury, juror revealed

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[4] In each of these cases, the jury eventually convicted the defendant. However, it is impossible to know how many similar situations resulted in a hung jury, as these are unlikely to appear in published decisions.

[5] In the unanimity cases, jurors who have reservations about forcing a debate are more readily identified and instructed by the Court on their civic duty – an opportunity that may be lost in non-unanimity jurisdictions.

dissent with verdict); *In re Hoare*, 155 F.3d 937, 939 (8th Cir. 1998) (juror refused to affirm guilty verdict when polled). In non-unanimity jurisdictions, a juror with doubts may remain silent, morally secure that it is not his vote that is convicting the accused; no such luxury is available where unanimity is required. "[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the *community participation and shared responsibility* that results from that group's determination of guilt or innocence." *Williams v. Florida*, 399 U.S. 78, 100 (1970) (emphasis added). The best guarantee of *true* community participation is the unanimity requirement.

III. Empirical Research On The Behavior Of Juries Confirms The Wisdom Of The Historical Unanimity Requirement.

The value of the unanimity requirement demonstrated by the events documented in the post-*Apodaca* jurisprudence is validated by a now substantial body of empirical research. For example, research on jury decision-making published between 1955 and 1999, much of which was inspired by the Court's decisions in *Apodaca* and *Johnson*, concludes that juries not required to reach a unanimous decision tend to take less time to arrive at a verdict, take fewer polls, cease deliberating when a quorum is reached, and report being less satisfied and confident that the jury reached the correct verdict. Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622, 669 (2001); *see also* Reid Hastie et al., INSIDE THE JURY 29-32, 238 (Harv. Univ. Press 1983).

Recent studies have also found that, contrary to the theories of non-unanimous jury system advocates, there is no evidence that outvoted holdouts are irrational or eccentric in ways that justify isolating them or failing to seriously consider their views. Shari Seidman Diamond et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 Nw. U.L. Rev. 201, 205-06 (2006) (also noting the scant empirical evidence available to the *Apodaca* and *Johnson* Courts and concluding that "the benefits of unanimity outweigh its costs"). Further, the existing research indicates that non-unanimous voting schemes "are likely to chill participation by the precise groups whose exclusion the Court has proscribed in other contexts." Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1310-12 (2000) (also noting the limited empirical data available to the *Apodaca* and *Johnson* Courts and concluding that in light of the substantial evidence contradicting the assumptions made by the *Johnson* majority and *Apodaca* plurality, "a stubborn adherence to precedent would be a perverse dynamic"); *see also* Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 Del. L. Rev. 1 (2001) ("effects of eliminating unanimity tend to mirror the effects of reduction in jury size by lessening the strength of those arguing a minority position and by undermining the quality and accuracy of jury decision making").

NACDL submits that this compelling body of empirical research confirms the wisdom of the unanimity requirement established by our forefathers and reveals the arbitrary nature of the Court's departure, in *Apodaca* and *Johnson*, from the Founders' original intent.

IV. The Louisiana Statute Dilutes The Reasonable Doubt Standard For Defendants Accused Of Non-Capital Crimes.

The distinction established by the Louisiana Legislature – requiring unanimity in capital cases but dispensing with the requirement in all *other* felony cases, some of which may be punishable by life in prison without parole, cannot be justified. In addressing the Equal Protection arguments raised by the Petitioner in *Johnson*, which involved a predecessor to the statute at issue here, the Court acknowledged that the distinction between the unanimity requirement for capital offenses and the non-unanimity rule for crimes punishable by hard labor or life in prison "obviously" reflected the Louisiana Legislature's "inten[tion] to vary the difficulty of proving guilt with the gravity of the offense and the severity of the punishment." *Johnson*, 406 U.S. at 364-65. But Louisiana has not made proving guilt in capital cases *more* difficult. Rather, the Louisiana statute merely diminishes the constitutional protections for defendants charged with all other felony offenses by diluting the reasonable doubt standard that must be met in non-capital cases.[6] This reservation of full

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[6] *See, e.g., United States v. Correa-Ventura*, 6 F.3d 1070, 1076-77 (5th Cir. 1993) ("The unanimity rule is a corollary to the reasonable-doubt standard, both conceived as a means of guaranteeing that each of the jurors 'reach[] a subjective state of certitude' with respect to a criminal defendant's culpability before rendering a conviction. . . . The requirement that all twelve jurors be in agreement as to a defendant's guilt is employed to give substance to the reasonable-doubt standard; *if a verdict is less than unanimous, the dissension tends to show that a reasonable doubt*

constitutional protection in Louisiana only for those cases in which the most severe punishment is a possibility may be efficient for Louisiana law enforcement authorities and prosecutors, but it fails to offer defendants faced with life imprisonment the full panoply of constitutional protections secured by the Sixth and Fourteenth Amendments.

Louisiana's statute also fails to offer those who participate on Louisiana juries full confidence that their views – as well as their votes – will count equally with those of their peers. A unanimity requirement allows each juror to have equal power – in essence a veto – as to the question at hand. A majority requirement quickly determines whose views must be subordinate and may be discounted entirely, or worse, affirmatively silenced on the ground that such an airing is a waste of the majority's time. While Louisiana may perceive substantial efficiencies that might be achieved through the use of non-unanimous juries – *e.g.*, reduction in the time and expense associated with the administration of its system of criminal justice – those interests, which are speculative at best, must give way to the constitutional guarantee that no person shall be convicted of a crime on the basis of anything less than proof of guilt beyond a reasonable doubt. *See Burch v. Louisiana*, 441 U.S. 130,

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exists as to the criminal activity charged.") (citations omitted) (emphasis added); *United States v. Lee*, 317 F.3d 26, 36 (1st Cir. 2003) ("[T]he unanimity requirement . . . helps to ensure that no defendant will be convicted unless the government has carried its burden of proving guilt beyond a reasonable doubt. . . . *[L]eaving jurors free to convict despite disagreements about critical facts will imperil the integrity of the reasonable doubt standard.*") (emphasis added).

138-39 (1979). The Louisiana majority-vote conviction scheme falls short of maintaining the confidence of every individual in our free society 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. The continued allowance for such schemes and the concomitant erosion of the reasonable doubt standard dilute the moral force of the criminal law such that people may well be left in doubt "whether innocent men are being condemned." *Id.*

V. The Majority-Verdict Scheme Severely Disadvantages Defendants During Jury Selection.

In the most practical sense, the Louisiana statute requires the defense to create a doubt in the minds of three jurors, not in order to prevail, but merely to hang the jury. One point in the criminal trial process where allowance for non-unanimous convictions undermines defense strategy is in the exercise of peremptory challenges. A defendant in a non-capital case in Louisiana is afforded only twelve peremptory challenges. La. C. Cr. P. art. 799 (2008). This is woefully inadequate where defense counsel must create doubt in the minds of 25% of the jury merely to avoid conviction and obtain a re-trial.

The peremptory challenge is one of the oldest established rights of the criminal defendant. *See, e.g., Lewis v. United States*, 146 U.S. 370, 376 (1892). The importance of this right is evidenced by the remedy courts have afforded defendants deprived of the right – reversal of conviction even without proof of prejudice. *Id.* at 376. The principal purpose of the peremptory challenge is to enable a litigant to remove a potential

juror in whom the litigant perceives bias or hostility. *Swain v. Alabama*, 380 U.S. 202, 212 (1965), *overruled on other grounds by Batson v. Kentucky*, 476 U.S. 79 (1986). The effective exercise of this right is especially important in circumstances where counsel finds it necessary to conduct vigorous questioning of prospective jurors to expose possible causes for challenge.

In cases where conviction may result upon a non-unanimous verdict, defense counsel has a duty to be especially vigorous in her efforts to expose bias, hostility and indifference in prospective jurors. Under federal law, in non-capital felony cases, it is recognized that a defendant should be allotted ten peremptory challenges to accomplish this objective, in circumstances where a single dissenting vote will permit the defendant to avoid conviction. Fed. R. Crim. P. 24 (b)(2) (2008). Where, however, a defendant must persuade three jurors in order to avoid conviction, and defense counsel must ferret out not only those prospective jurors who may be biased or hostile, but also those of weak will who cannot take or vocalize an unpopular stance, the importance of having an adequate number of peremptory challenges is much more pronounced. The allotment to defendants in Louisiana of a mere twelve peremptory challenges, while permitting conviction upon a vote of only ten jurors, tilts the field dramatically in favor of the government.

VI. Allowing Conviction On The Basis Of Non-Unanimous Juries Is Inherently Coercive And Discourages Juror Dissent.

A jury instruction approving a 10-2 or 11-1 verdict essentially admonishes a dissenting juror that his view of the evidence is likely inaccurate, and that his theory of the case is entitled to no deference. Indeed, such an instruction is the equivalent of admonishing the jury

that "a 'dissenting juror should consider whether his doubt was a reasonable one . . . [when it made] no impression upon the minds of so many men, equally honest, equally intelligent with himself.'" *Johnson*, 406 U.S. at 361-62 (*quoting Allen v. United States*, 164 U.S. 492, 501 (1896)) (alteration in the original). Notably, the dangers of such an explicit suggestion have been recognized by the many courts of appeal that have employed their supervisory powers to rewrite the *Allen* instruction to remove the coercive sting that it inflicts on dissenting voices. *See, e.g.*, *United States v. Paniagua-Ramos*, 135 F.3d 193, 197 (1st Cir. 1998) (stating that *Allen* instruction must tell members of both the majority and the minority to reexamine their positions); *United States v. Burgos*, 55 F.3d 933, 936 (4th Cir. 1995) (recognizing that "[i]n the traditional *Allen* charge, one of the most likely sources of coercion is rooted in the court's admonition to the jury that members of the minority reconsider the position taken by those in the majority"); *United States v. Thomas*, 449 F.2d 1177, 1187 (D.C. Cir. 1971) (en banc) (rejecting the *Allen* charge and adopting the ABA instruction); *United States v. Fioravanti*, 412 F.2d 407, 417 (3d Cir. 1969) (holding instruction that a juror should "distrust his own judgment if he finds a large majority of the jurors taking a view different from his" is reversible error); *United States v. Brown*, 411 F.2d 930, 933-34 (7th Cir. 1961) (rejecting *Allen* charge in future cases and adopting the

ABA instruction).[7]

Not surprisingly, empirical research has revealed that this tilting of the field on which jury trials are conducted in favor of the government has a measurable impact on the number of hung juries. Juries not required to be unanimous tend to hang less often. *See* Devine, *supra* 13, at 669; ABA Principles, *supra* note 3, at 25 (survey of trial judges found that, where

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[7] The majority of states have also either completely rejected the traditional, one-sided *Allen* charge, *State v. Thomas*, 342 P.2d 197, 200 (Ariz. 1959); *Taylor v. People*, 490 P.2d 292, 295 (Colo. 1971); *State v. Fajardo*, 699 P.2d 20, 25 (Haw. 1985); *State v. Flint*, 761 P.2d 1158, 1164 (Idaho 1988); *State v. Randall*, 353 P.2d 1054, 1058 (Mont. 1960); *State v. Howard*, 537 N.E.2d 188, 192 (Ohio 1989); *State v. Ferguson*, 175 N.W.2d 57, 61 (S.D. 1970); or have replaced the traditional charge with language more balanced and salutary to the minority. *Fields v. State*, 487 P.2d 831, 842 (Alaska 1971) (Alaska 1987) (rejecting *Allen* charge in favor of ABA Standards Relating to Trial by Jury (1968) § 5.4, pp. 145-46 (approved draft) (predecessor to 3 ABA, Standards for Criminal Justice, Standard 15-4.4 (2d Ed. 1980)); *People v. Gainer*, 566 P.2d 997, 1005-09 (Cal. 1977); *Winters v. United States*, 317 A.2d 530, 533 (D.C. 1974); *People v. Prim*, 289 N.E.2d 601, 609-10 (Ill. 1972); *Lewis v. State*, 424 N.E.2d 107, 110-11 (Ind. 1981); *State v. Nicholson*, 315 So. 2d 639, 641, 643 (La. 1975); *State v. White*, 285 A.2d 832, 838 (Me. 1972); *Goodmuth v. State*, 490 A.2d 682, 687 (Md. 1985); *Commonwealth v. Rodriquez*, 300 N.E.2d 192, 200-02 (Mass. 1973); *People v. Sullivan*, 220 N.W.2d 441, 450 (Mich. 1974); *State v. Martin*, 211 N.W.2d 765, 771 (Minn. 1973); *Gearlson v. State*, 482 So.2d 1141, 1143 (Miss.1986); *State v. Garza*, 176 N.W.2d 664, 666 (Neb. 1970); *State v. Czachor*, 413 A.2d 593, 597-98 (N.J. 1980); *Commonwealth v. Spencer*, 275 A.2d 299, 303-04 (Pa. 1971); *State v. Patriarca*, 308 A.2d 300, 322-23 (R.I. 1973); *Kersey v. State*, 525 S.W.2d 139, 144 (Tenn. 1975); *State v. Perry*, 306 A.2d 110, 112 (Vt. 1973); *Quarles v. State*, 233 N.W.2d 401, 402 (Wis. 1975); *Hoskins v. State*, 552 P.2d 342, 347 n.8 (Wyo. 1976).

unanimous verdicts were required, 5.6% of juries ended in deadlock, compared with 3.1% where majority verdicts were permitted) (citing Harry Kalven & Hans Zeisel, THE AMERICAN JURY 463 (1966)). Although the differentials are obviously not pronounced, they do suggest that in a small number of cases, the accused would have fared better under a system requiring unanimity, as opposed to one employing a majority decision rule. *See Johnson*, 406 U.S. at 390 (Douglas, J., dissenting). This is especially true given that only one-third of the cases resulting in hung juries are re-tried; half are disposed of by plea agreements or dismissals. ABA Principles, *supra* note 3, at 25 (citing Paula L. Hannaford-Agor et al., ARE HUNG JURIES A PROBLEM? 67 (2002)). In all events, however small the differentials may be, to tilt the scale to any degree in favor of the government undermines the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *Winship*, 397 U.S. at 1077 (Harlan, J., concurring). Where that sacrifice must be borne by the criminally accused so that the State may pursue interests that are "speculative, at best," these governmental interests must give way to the public's interest in the reliability and accuracy of the jury system. *Burch*, 441 U.S. at 139.

Finally, the abandonment of unanimity almost certainly adversely impacts the defense of the criminally accused in ways that have not yet been studied or analyzed. For example, it seems almost a truism that in states that allow for conviction by non-unanimous juries, the percentage of criminal defendants who enter into plea bargains, rather than go to trial against a prosecutor unencumbered by the constitutionally heightened burden of proof, will be markedly higher

than in those states where the unanimity requirement is employed to give substance to the reasonable doubt standard. In sum, statutes permitting non-unanimous guilty verdicts create both practical and legal impediments that unfairly increase the likelihood of conviction.

CONCLUSION

For all the reasons state above, the Court should grant the petition.

Respectfully submitted,

s/ Charles S. Leeper

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