No. 07- 07-1523 JUN 4 - 2008

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

PETITION FOR WRIT OF CERTIORARI

G. Ben Cohen
THE CAPITAL APPEALS PROJECT
636 Baronne Street
New Orleans, LA 70113

Gwendolyn K. Brown
LOUISIANA APPELLATE PROJECT
P.O. Box 64962
Baton Rouge, LA 70896

Jeffrey L. Fisher
Counsel of Record
Pamela S. Karlan
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305-8610
(650) 724-7081

Kevin K. Russell
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

1. 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.

2. Whether DNA evidence introduced at Petitioner's trial should have been suppressed as the product of an unconstitutional search and seizure.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Constitutional and Statutory Provisions

Other Authority

PETITION FOR A WRIT OF CERTIORARI

Petitioner Derrick Todd Lee respectfully petitions for a writ of certiorari to the Louisiana First Circuit Court of Appeal in *State v. Lee*, No. 2005 KA 0456.

OPINIONS BELOW

The judgment of the Louisiana First Circuit Court of Appeal is reported at 964 So. 2d 967 (La. App. 2007), and is reprinted at App. 1a. The Louisiana Supreme Court's order denying review of that decision is unpublished and is reprinted at App. 66a.

JURISDICTIONAL STATEMENT

The judgment and opinion of the Louisiana First Circuit Court of Appeal was entered on May 16, 2007. The Louisiana Supreme Court denied review of this decision on March 7, 2008. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Article 782 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."

STATEMENT OF THE CASE

This case raises an issue that goes to the heart of our Constitution's guarantee that individuals accused of a crime receive certain fundamental procedural protections: whether a jury may convict a defendant of a crime based on a less than unanimous jury verdict. Thirty-six years ago, in *Apodaca v. Oregon*, 406 U.S. 404 (1972), this Court held in a 4-1-4 decision that the Sixth and Fourteenth Amendments do not prohibit States from securing criminal convictions in this manner. Subsequent legal developments and academic studies call this result into serious question.

1. In the evening of January 14, 2002, Darren DeSoto reported that he had found his wife, Geralyn Barr Desoto, dead on the floor of her trailer home. She had been stabbed to death and was lying in a pool of blood. There were no eyewitnesses to the crime.

A West Baton Rouge grand jury charged Petitioner Derrick Todd Lee with the first degree murder of Ms. DeSoto. The State simultaneously suspected that Petitioner had committed two other violent crimes in 2002 – a rape and murder in one case, and an attempted rape and attempted murder in another. The evidence linking Petitioner to *this* murder, however, was limited and "circumstantial." App. 41a. In its totality, the State evidence showed that: DNA analysis secured from scrapings of Ms. DeSoto's fingernails "indicat[ed that] a male member of [Petitioner's] family was the perpetrator[;] a boot print at the scene of the murder possibly [was] made by defendant's boot[; Petitioner] traveled a route on the day of the murder that brought him within 200 yards of the victim's home[;] and [Petitioner] carried a knife consistent with the type of knife used to kill the victim." App. 40a.

In pre-trial proceedings, the trial court denied Petitioner's motion to suppress the State's DNA evidence on the ground that that the State obtained Petitioner's DNA in violation of the Fourth Amendment because the police had not obtained a search warrant for its collection. The State also secured the trial court's permission to introduce the evidence it had linking Petitioner to the other violent crimes.

On the eve of trial, the State amended the charge against Petitioner to second-degree murder. While first-degree murder in Louisiana is a capital crime and requires a unanimous verdict to convict, second-degree murder is punishable only by life in prison and does not require unanimity to convict. The State

in such a prosecution need only persuade ten of twelve jurors to vote guilty in order to secure a conviction. La. C. Cr. P. Art. 782.

Some of the evidence at trial undercut the State's already-thin case. Forensic testimony demonstrated that the DNA under Ms. DeSoto's fingernails came from more than one source. The forensic examiner also testified that the DNA could have come from Mr. DeSoto rather than Petitioner.

The jury nonetheless found Petitioner guilty of second degree murder. Polling of the jury revealed that one juror, Amanda Landry, had voted "not guilty" and did not concur in the verdict. Petitioner moved for a mistrial based upon the non-unanimous jury verdict, but the trial court denied his motion. The trial court sentenced Petitioner to life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence.

2. The Louisiana Court of Appeal affirmed Petitioner's conviction. The appellate court rejected Petitioner's Fourth Amendment argument, holding that even though the Fourth Amendment generally requires investigators to obtain search warrants from neutral and detached magistrates, it was permissible for the Louisiana Attorney General's Office to issue a subpoena duces tecum for Petitioner's biological material. App. 21a-22a. The appellate court also found that the trial court had erred in allowing the State to introduce evidence linking Petitioner to the rape and murder in 2002. But the appellate court found that error harmless, and it

further held that there was sufficient remaining evidence to support the verdict.

Finally, the Louisiana Court of Appeal rejected Petitioner's argument that it was unconstitutional to convict him of a crime by a non-unanimous jury verdict. Relying on this Court's 4-1-4 decision in *Apodaca v. Oregon,* 406 U.S. 404 (1972), the appellate court held that "under both state and federal jurisprudence, a criminal conviction by a less than a unanimous jury does not violate a defendant's right to trial by jury specified by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment." App. 3a-4a.

3. Petitioner sought discretionary review in the Louisiana Supreme Court, arguing among other things that his DNA evidence should have been suppressed and that convicting him by a non-unanimous jury verdict violated the Sixth and Fourteenth Amendments. *See* Deft's Orig. App. for Writ of Certiorari or Review, at 23-24. The Louisiana Supreme Court denied discretionary review without comment. App. 66a

REASONS FOR GRANTING THE WRIT

Louisiana is one of two states in this country that allow a person to be convicted of a felony by a less than unanimous jury verdict. (Oregon is the other. *See* Or. Const. art. I § 11.) This practice contravenes literally centuries of common law, as well as longstanding American precedent, requiring unanimity to convict in criminal cases.

Nevertheless, in *Apodaca v. Oregon*, 406 U.S. 404 (1972), a bare majority of this Court – in a deeply fractured, internally contradictory decision – held that the Constitution does not forbid Louisiana and Oregon from securing convictions by non-unanimous verdicts.

Subsequent developments in this Court's Sixth and Fourteenth Amendment jurisprudence dictate that this Court should reconsider the result in *Apodaca*. The two opinions that comprise the five-vote judgment in *Apodaca* use constitutional methodologies that this Court has long since abandoned. Worse yet, the result in *Apodaca* is squarely inconsistent with this Court's recent, repeated pronouncements in cases reviewing criminal convictions from state courts 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 neighbours.'" *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (emphasis added) (quoting William Blackstone, Commentaries on the Laws of England *343 (1769)); *accord Apprendi v. New Jersey,* 530 U.S. 466, 477 (2000). In light of the minimal force of *stare decisis* in this context and great importance of the constitutional right at stake, this Court should grant certiorari to make clear that states in our Union must conduct criminal trials according to the time-honored method of requiring unanimous verdicts to convict.

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE WHETHER THE CONSTITUTION ALLOWS STATES TO SECURE CRIMINAL CONVICTIONS BY NON-UNANIMOUS JURY VERDICTS.

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

A comparison between *Apodaca v. Oregon*, 406 U.S. 404 (1972), and this Court's modern Sixth and Fourteenth Amendment jurisprudence demonstrates that the two have become irreconcilable.

1. *Apodaca v. Oregon*

The question whether the Constitution permits a State to convict an individual of a crime based on a non-unanimous jury verdict turns on two sub-issues: (1) whether the Sixth Amendment's jury trial clause requires unanimity for criminal convictions; and (2) if so, whether that constitutional rule applies to the States by means of the Fourteenth Amendment. In *Apodaca*, five Justices answered the first sub-issue affirmatively, and eight answered the second affirmatively (or at least assumed the answer was yes). Yet because of the odd voting patterns in the Court's badly fractured 4-1-4 decision, the Court nevertheless ruled by a bare majority that States may convict individuals of crimes notwithstanding one or two jurors voting "not guilty."

a. The four-Justice plurality in *Apodaca* acknowledged that it had been "settled" since "the latter half of the 14th century . . . that a verdict had to be unanimous" to convict someone of a crime and that this requirement "had become an accepted feature of the common-law jury by the 18th century." *Id.* at 407-08 & n.2. Indeed, this Court had held or assumed in numerous previous cases that the Sixth Amendment required unanimity for a criminal conviction. *See Andres v. United States,* 333 U.S. 740, 748 (1948) ("Unanimity in jury verdicts is required" where the Sixth Amendment applies); *accord Patton v. United States,* 281 U.S. 276, 288 (1930); *Maxwell v. Dow*, 176 U.S. 581, 586 (1900); *Thompson v. Utah*, 170 U.S. 343, 351 (1898). Justice Story likewise explained in his noted Commentaries that any law dispensing with the requirement that jurors "must *unanimously* concur in the guilt of the accused before a legal conviction can be had . . . may be considered unconstitutional." 2 Joseph Story, Commentaries on the Constitution § 1779 n.2 (1891) (emphasis in original). And this Court had long since resolved that the Seventh Amendment's jury trial guarantee for civil trials required unanimity. *See American Pub. Co. v. Fisher,* 166 U.S. 464, 467-68 (1897).

The *Apodaca* plurality nonetheless concluded that the unanimity requirement "was not of constitutional stature" in criminal cases. 406 U.S. at 406. It did so for two primary reasons. First, the plurality asserted that instead of following history, "[o]ur inquiry must focus upon the *function* served by the

jury in contemporary society." *Id.* at 410 (emphasis added). After identifying the jury's function as interposing "the commonsense judgment of a group of laymen" between the accused and his accuser, the plurality found that "[i]n terms of this function we perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one." *Id.* at 410-11 (quotation omitted).

Second, in response to Petitioners' argument that the Sixth Amendment requires jury unanimity in part "to give effect of the reasonable-doubt standard," the plurality asserted that "the Sixth Amendment does not require proof beyond a reasonable doubt at all." *Id.* at 412. "We are quite sure," the plurality emphasized, "that the Sixth Amendment itself has never been held to require proof beyond a reasonable doubt in criminal cases." *Id.* at 411.

b. Justice Powell provided a fifth vote by concurring in the plurality judgment. He did so, however, by disagreeing with the plurality on both sub-issues presented in the case. In his joint opinion respecting *Apodaca* and a companion case, Justice Powell stated that he believed, "in accord with both history and precedent, that the Sixth Amendment requires a unanimous jury verdict to convict in a federal criminal trial." *Johnson v. Louisiana,* 406 U.S. 366, 371 (1972) (Powell, J., concurring in the judgment). But he also expressly rejected the plurality's "major premise" that "the concept of jury trial, as applicable to the States under the Fourteenth Amendment, must be identical in every

detail to the concept required by the Sixth Amendment." *Id.* at 369. "Viewing the unanimity controversy as one requiring a fresh look at the question of what is fundamental in jury trial," Justice Powell found "no reason to believe . . . that a unanimous decision of 12 jurors is more likely to serve the high purpose of jury trial, or is entitled to greater respect in the community, than the same decision joined by 10 members of a jury of 12." *Id.* at 374, 376.

c. The four dissenters objected to the Court's judgment as a "radical departure from American traditions." *Johnson,* 406 U.S. at 381 (Douglas, J., dissenting). The dissenters bemoaned the plurality's decision to abandon the previously "universal[] understanding that a unanimous verdict is an essential element of a Sixth Amendment jury trial." *Apodaca,* 406 U.S. at 414 (Stewart, J., dissenting); *see also Johnson,* 406 U.S. at 395 (Brennan, J., dissenting); *id.* at 399 (Marshall, J., dissenting). The dissenters also disagreed with Justice Powell's rejection of the settled rule that the Sixth Amendment's jury trial guarantee "is made *wholly* applicable to state criminal trials by the Fourteenth Amendment." *Apodaca,* 406 U.S. at 414 (Stewart, J., dissenting) (emphasis added).

As Justice Brennan summed up the situation:

> Readers of today's opinions may be understandably puzzled why convictions by 11-1 and 10-2 jury votes are affirmed in [*Apodaca*], when a majority of the Court agrees that the

> Sixth Amendment requires a unanimous verdict in federal criminal jury trials, and a majority also agrees that the right to jury trial guaranteed by the Sixth Amendment is to be enforced against the States according to the same standards that protect that right against federal encroachment. The reason is that while my Brother Powell agrees that a unanimous verdict is required in federal criminal trials, he does not agree that the Sixth Amendment right to a jury trial is to be applied in the same way to State and Federal Governments.

Johnson v. Louisiana, 406 U.S. at 395 (Brennan, J. *dissenting*).

2. This Court's Current Sixth Amendment Jurisprudence

This Court's modern approach to Sixth Amendment jurisprudence renders *Apodaca* anachronistic. In fact, all three theoretical predicates on which the plurality and Justice Powell's opinions are based have been substantially undercut – if not brought directly into disrepute – by this Court's recent Sixth Amendment decisions.

a. 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 some abstract functional analysis 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 embodied in *Ohio v. Roberts,* 448 U.S. 56 (1980), in favor of the common-law conception of the right known to the Framers. In *United States v. Gonzalez-Lopez,* 548 U.S. 140 (2006), this Court 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). And, 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 v. Washington*, 542 U.S. 296, 313 (2004). Rather, the controlling datum is "the Framers' paradigm for criminal justice." *Id.*

This pronounced shift in constitutional methodology itself calls *Apodaca* into serious question. But this Court has gone further. In the *Apprendi* line of cases, this Court explicitly has reaffirmed that the "longstanding tenets of common-law criminal jurisprudence" that the Sixth Amendment embodies include the rule "that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the *unanimous* suffrage of twelve of his equals

and neighbours.'" *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (emphasis added) (quoting William Blackstone, Commentaries on the Laws of England 343 (1769). 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, 238-239 (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).

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

b. This Court has disregarded the *Apodaca* plurality's assertion that "the Sixth Amendment does not require proof beyond a reasonable doubt at all." 406 U.S. at 412. In *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993), this Court unanimously held:

> It 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 [*In re Winship*, 397 U.S. 358 (1970)] 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.*

Sullivan, 508 U.S. at 278 (second emphasis added). The *Sullivan* Court concluded that a defendant's "Sixth Amendment right to jury trial" is "denied" when a jury instruction improperly defines the concept of reasonable doubt. *Id.*

This Court likewise explained in *Cunningham v. California*, 127 S. Ct. 856 (2007) – the latest case applying the *Apprendi* rule to a state sentencing system – that "[t]his Court has repeatedly held 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." *Id.* at 863-64 (emphasis added).

It takes little reflection to perceive that the holdings and reasoning in *Sullivan* and *Cunningham* are in serious tension with the plurality's reasoning in *Apodaca*. The pronouncements respecting the Sixth Amendment in all three cases cannot all be right.

c. Even when *Apodaca* was decided, Justice Powell's notion of applying a clause in the Bill of Rights in a piecemeal manner to state proceedings was difficult to square with this Court's previous "reject[ion of] the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'" *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964) (quoting *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 275 (1960)). But whatever its viability in 1972, this Court's modern Sixth Amendment jurisprudence has long since rendered Justice Powell's "partial incorporation" methodology untenable. In *Crist v. Bretz,* 437 U.S. 28 (1978), the state argued that a particular aspect of the Fifth Amendment's double jeopardy guarantee should not be incorporated against the States. Although Justice Powell agreed with this argument, this Court rejected it, holding that when a component of the Bill of Rights that applies against the States is "a settled part of constitutional law" and protects legitimate interests of the accused, it must apply with equal force to the States. *Id.* at 37-38.

The *Crist* case, decided thirty years ago, dispensed with any possibility of Justice Powell's views ever gaining sway on this Court. "In the years since *Crist*, . . . [n]o member of the Court has suggested . . . that [a] particular requirement might not be constitutionally demanded for state proceedings while constitutionally mandated in federal proceedings. . . . Thus, absolute parallelism seems to be a settled principle." Wayne R. LaFave et. al, Criminal Procedure § 2.6(c), at 67-68 (4th ed. 2004).

This Court's modern Sixth Amendment decisions are fully consistent with this observation. In *Apprendi*, *Ring*, *Blakely*, and *Cunningham*, this Court applied the *Apprendi* rule to state proceedings without even pausing to consider whether that aspect of the right to trial by jury applied to the States. This Court, in recent years, has proceeded in the same holistic manner with respect to the Sixth Amendment's Confrontation Clause, *see Crawford,* 541 U.S. 36; *Davis v. Washington,* 547 U.S. 813 (2006); the right to counsel, *Alabama v. Shelton,* 535 U.S. 654 (2002); *Strickland v. Washington,* 466 U.S. 669 (1984); and the right to compulsory process, *Pennsylvania v. Ritchie,* 480 U.S. 39 (1987). Justice Powell's controlling methodology in *Apodaca* stands as the sole exception to decades of otherwise unbroken precedent.[1]

---

[1] To be sure, this Court has held that some guarantees in the Bill of Rights, such as the Fifth Amendment's Grand Jury Clause, do not apply to the States at all. *See Beck v. Washington,* 369 U.S. 541, 545 (1962); *Hurtado v. California,* 110 U.S. 516 (1884). But Justice Powell's opinion in *Apodaca*

Even if the question here were still fundamentally considered one of due process, Justice Powell's analysis would still contradict this Court's modern case law. Justice Powell approached the incorporation in *Apodaca* as depending on a "fresh look" at what elements of the right to jury trial are essential. 406 U.S. at 376. This Court, however, has made clear in recent decisions that due process does not depend upon the subjective views of individual Justices regarding the importance or desirability of given practices. Rather, the "crucial guideposts" in due process cases are now "[o]ur Nation's history, legal traditions, and practices." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quotation omitted); *see also Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion) (due process requires adherence to rights that are "deeply rooted in this Nation's history and tradition"). As even Justice Powell recognized, those historical guideposts demonstrate that at the time of the Founding, "unanimity had long been established as one of the attributes of a jury conviction." *Johnson,* 406 U.S. at 371 (Powell, J., concurring in the judgment in *Apodaca*); *see also supra* at 8 (collecting other historical citations). That reality should settle the question.

---

stands alone as holding that a component of the Bill of Rights that *does* apply to state proceedings does not apply in the same manner as in federal trials.

B. The Doctrine of *Stare Decisis* Does Not Pose a Significant Impediment to Reconsidering the Question Presented Afresh.

For three reasons, the doctrine of *stare decisis* should not stand in the way of this Court's reconsidering the result in *Apodaca* in light of this Court's recent approach to the Sixth Amendment.

1. Principles of *stare decisis* are at their nadir where a plurality opinion renders a judgment but is unable to muster a controlling view concerning the law. In *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), for example, this Court reconsidered and overturned a prior decision – *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) – 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." *Id.* at 66.

The same is true here. *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. Furthermore, the eight other Justices on the Court disagreed with Justice Powell's "partial incorporation" rationale. *Apodaca,* therefore, is entitled only to "questionable precedential value." *Seminole Tribe,* 517 U.S. at 66.

2. *Stare decisis* has minimal force when the decision at issue "involves collision with prior doc-

trine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock,* 309 U.S. 106, 119 (1940). Indeed, "[r]emaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it." *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 231 (1995). When faced with such situations, therefore, this Court repeatedly has determined that the better course is to reinstate the prior, traditional doctrine. *See id.* at 231-32; *United States v. Dixon,* 509 U.S. 688, 704 (1993) (overruling recent decision that "lack[ed] constitutional roots" and was "wholly inconsistent with earlier Supreme Court precedent"); *Solorio v. United States*, 483 U.S. 435, 439-41 (1987) (overruling decision that had broken from an earlier line of decisions "from 1866 to 1960"); *Continental T.V., Inc., v. GTE Sylvania, Inc.*, 433 U.S. 36, 47-48 (1977) (overruling case that was "an abrupt and largely unexplained departure" from precedent); *Swift & Co. v. Wickham*, 382 U.S. 111, 128-29 (1965) (overruling recent decision to reinstate the "view . . . which this Court ha[d] traditionally taken" in earlier cases).

As Justice Powell and the dissenters in *Apodaca* noted without contradiction from the plurality, the plurality's view that the Sixth Amendment does not require unanimity broke sharply from "an unbroken line of cases reaching back to the late 1800's" – and, indeed, from hundreds of years of common law practice. *Johnson*, 406 U.S. at 369 (Powell, J., concurring in the judgment in *Apodaca*); *see also*

Apodaca, 406 U.S. at 414-15 (Stewart J., dissenting) ("Until today, it has been universally understood that a unanimous verdict is an essential element of a Sixth Amendment jury trial. . . . I would follow these settled Sixth Amendment precedents and reverse the judgment before us.") (citations omitted). Justice Powell's "partial incorporation" rationale likewise ignored this Court's prior precedent that "the Sixth Amendment right to trial by jury in a federal criminal case is made *wholly* applicable to state criminal trials by the Fourteenth Amendment." *Apodaca*, 406 U.S. at 414 (Stewart J., dissenting) (emphasis added); *see also supra,* at 10. Overruling *Apodaca*, therefore, would do nothing more than reinstate the traditional meaning of the Sixth and Fourteenth Amendments. It also would extinguish the schism with this Court's longstanding Seventh Amendment jurisprudence requiring unanimity in civil cases.

3. *Stare decisis* considerations 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). Such is the case here. The rules governing juror voting are quintessentially procedural rules. What is more, in the thirty-six years since *Apodaca* was decided, not a single state has retreated from its requirement that jury verdicts be unanimous to convict in criminal cases. Louisiana and Oregon remain the sole outliers and are in exactly the same position as they were in 1972. And no other constitutional doctrine

or legislation depends on the continued validity of *Apodaca*. To the contrary, *Apodaca* is an increasingly unexplainable anomaly in this Court's constitutional criminal procedure jurisprudence.

C. The Question Whether States May Continue to Convict Individuals of Serious Crimes Based on Non-Unanimous Verdicts is Extremely Important and Ripe for Consideration.

1. Empirical research conducted since *Apodaca* was decided confirms the wisdom of the historical unanimity requirement and highlights the importance of enforcing that constitutional mandate. The *Apodaca* plurality defended its decision in part based on its assumption that a unanimity requirement "does not materially contribute to the exercise" of a jury's "commonsense judgment." 406 U.S. at 410. The plurality prophesized:

> [W]e perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one. Requiring unanimity would obviously produce hung juries in some situations where nonunanimous juries will convict or acquit. But in either case, the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him is equally well served.

Id. at 411 (footnote omitted).

Evidence amassed from both mock juries and actual Arizona jury deliberations occurring over the last half-century has revealed that the plurality's assumptions were incorrect. Specifically, "[s]tudies suggest that where unanimity is required, jurors evaluate evidence more thoroughly, spend more time deliberating and take more ballots." American Bar Association, American Jury Project, *Principles for Juries and Jury Trials* 24, available at http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf (last accessed June 3, 2008). As Professors Shari Seidman Diamond, Mary R. Rose, and Beth Murphy explain:

> The Arizona jury deliberations reveal that some of the claims made in favor of dispensing with unanimity are unfounded. The image of eccentric holdout jurors outvoted by sensible majorities receives no support. Indeed, the judge agreed with the verdict favored by the holdouts in a number of these cases. Instead, the deliberations demonstrate that thoughtful minorities are sometimes marginalized when the majority has the power to ignore them in reaching a verdict. Although juries generally engage in serious and intense deliberations, jurors themselves report more thorough and open-minded debate when they reach unanimity.

> The primary cost frequently attributed to the unanimity requirement is that it increases the rate of hung juries, a cost that seems overblown in light of the low frequency of hung juries in civil cases, even when unanimity is required. More importantly, a slight increase in hung juries and the potential for a longer deliberation may be costs outweighed by the benefits of a tool that can stimulate robust debate and potentially decrease the likelihood of an anomalous verdict.

Shari Seidman Diamond, et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 Nw. U. L. Rev. 201, 230 (2006). Other scholars have reached similar conclusions. *See* Kim Taylor Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1272 (2000) (noting "[a] shift to majority rule appears to alter both the quality of the deliberative process and the accuracy of the jury's judgment"); John Guinther, The Jury in America 81 (1988) (finding that non-unanimous juries correct each other's errors of fact less frequently than do jurors required to reach unanimity).

The *Apodaca* plurality further assumed that allowing non-unanimous verdicts would not marginalize jurors who are members of minority groups. 406 U.S. at 413. This assumption also appears misguided. After considering the effect of non-unanimity rules on dissenting voices, the American Bar Association's American Jury Project concluded

that "[a] non-unanimous decision rule allows juries to reach a quorum without seriously considering minority voices, thereby effectively silencing those voices and negating their participation." *See* Principles for Juries and Jury Trials, *supra*, at 24. Empirical studies corroborate the fact that jurors in the minority contribute more vigorously to jury deliberations when operating under a unanimous verdict scheme. *See id.*; Reid Hastie et al., Inside the Jury 108-12 (1983). It thus comes as no surprise that members of racial and ethnic minorities are often the ones who are outvoted in non-unanimous verdicts. *See, e.g., State v. Potter*, 591 So. 2d 1166, 1167 (La. 1991) ("The vote was eleven to one with the sole 'not guilty' vote cast by one of the black members of the jury. Eleven blacks were peremptorily challenged by the state during voir dire . . . ."). Such verdicts-by-majority-rule undermine the public credibility of our judicial system. *See* Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1278 (2000).

The comprehensive empirical research affirming the wisdom of the unanimity requirement, as well as the disproportionately negative impact of non-unanimity rules on jurors of color, led the American Bar Association to conclude that "[a] unanimous decision should be required in all criminal cases heard by a jury." *Principles for Juries and Jury Trials*, *supra*, at 23. Numerous other organizations and commentators have concluded the same. *See, e.g.*, Dennis J. Divine, et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622, 669 (2001) (reviewing

all available social science and concluding that laws allowing non-unanimous verdicts matter when prosecution's case "is not particularly weak or strong").

2. The consequences of Louisiana and Oregon continuing to allow criminal convictions based on non-unanimous jury verdicts are serious and will continue until this Court steps in. It is not at all uncommon for defendants in these populous states to be convicted by non-unanimous verdicts.[2] Such

---

[2] This statement is based on discussions with public defender offices and other criminal defense attorneys in Louisiana and Oregon. Neither State keeps any statistics of which we are aware concerning the frequency of convictions by non-unanimous verdicts. But it seems that non-unanimous verdicts occur with some regularity in single-charge cases and perhaps even more often than not in complicated, multi-count cases.

Over the past five years, the Louisiana appellate courts have noted over forty cases in which defendants were convicted of crimes by non-unanimous verdicts. *See State v. Ruiz*, 955 So. 2d 81, 83 (La. 2007); *State v. Elie*, 936 So. 2d 791, 794 (La. 2006); *State v. Mizell*, 938 So. 2d 712, 713 (La. App. 2006); *State v. Mack*, No. 43-KA-206, 2008 La. App. LEXIS 585 (La. App. Apr. 23, 2008); *State v. Brantley*, 975 So. 2d 849, 851 (La. App. 2008); *State v. Gullette*, 975 So. 2d 753, 758 (La. App. 2008); *State v. Linn*, 975 So. 2d 771, 772 (La. App. 2008); *State v. Carter*, 974 So. 2d 181, 184 (La. App. 2008); *State v. Ross*, 973 So. 2d 168, 171 (La. App. 2007); *State v. Baker*, 962 So. 2d 1198, 1201 (La. App. 2007); *State v. Allen*, 955 So. 2d 742, 746 (La. App. 2007); *State v. Tensley*, 955 So. 2d 227, 231 (La. App. 2007); *State v. Johnson*, 948 So. 2d 1229, 1239 (La. App. 2007); *State v. Williams*, 950 So. 2d 126, 129 (La. App. 2007); *State v. Mayeux*, 949 So. 2d 520, 535 (La. App. 2007); *State v. Brown*, 943 So. 2d 614, 620 (La. App. 2006); *State v. Payne*, 945 So. 2d 749, 750 (La. App. 2006); *State v. Riley*, 941 So. 2d 618, 622 (La. App. 2006); *State v. Chandler*, 939 So. 2d 574, 576 (La. App. 2006); *State v. Smith*, 936 So. 2d 255, 259 (La. App. 2006);

defendants have pressed the constitutional argument made herein in recent years, but have continually been told that only this Court can declare that *Apodaca* is no longer good law. *See* App. 3a-4a; *State v. Smith*, 952 So. 2d 1, 16 (La. App. 2006), *writ denied*, 964 So. 2d 352 (La. 2007); *State v. Newman*, 2006 WL 3813692, at *5 (La. App. 2006) (unpublished opinion); *State v. Caples*, 938 So. 2d 147, 157 (La. App. 2006), *writ denied*, 955 So. 2d 684 (La. 2007); *State v. Juniors*, 918 So. 2d 1137, 1147-48 (La. App. 2005), *writ denied*, 936 So. 2d 1257 (La. 2006), *cert. denied*, 127 S. Ct. 1293 (2007); *State v. Divers*, 889 So. 2d 335, 353 (La. App. 2004), *writ.*

State v. Davis, 935 So. 2d 763, 766 (La. App. 2006); *State v. Scroggins*, 926 So. 2d 64, 65 (La. App. 2006); *State v. Houston*, 925 So. 2d 690, 706 (La. App. 2006); *State v. Christian*, 924 So. 2d 266 (La. App. 2006); *State v. Zeigler*, 920 So. 2d 949, 952 (La. App. 2006); *State v. Wilhite*, 917 So. 2d 1252, 1258 (La. App. 2005); *State v. Hurd*, 917 So. 2d 567, 568 (La. App. 2005); *State v. Wiley*, 914 So. 2d 1117, 1121 (La. App. 2005); *State v. Bowers*, 909 So. 2d 1038, 1043 (La. App. 2005); *State v. Dabney*, 908 So. 2d 60, 65 (La. App. 2005); *State v. Jackson*, 904 So. 2d 907, 909 (La. App. 2005); *State v. Williams*, 901 So. 2d 1171, 1177 (La. App. 2005); *State v. Jackson*, 892 So. 2d 71, 73 (La. App. 2004); *State v. King*, 886 So. 2d 598 (La. App. 2004); *State v. Nguyen*, 888 So. 2d 900, 904 (La. App. 2004); *State v. Tauzin*, 880 So. 2d 157, 158 (La. App. 2004); *State v. Shrader*, 881 So. 2d 147, 150 (La. App. 2004); *State v. Williams*, 878 So. 2d 765, 778 (La. App. 2004) (Thibodeaux, J. dissenting); *State v. Guiden*, 873 So. 2d 835, 837 (La. App. 2004); *State v. Brown*, 874 So. 2d 318, 328 (La. App. 2004); *State v. Harris*, 868 So. 2d 886, 890 (La. App. 2004); *State v. Moore*, 865 So. 2d 227, 232 (La. App. 2004); *State v. McKinnie*, 850 So. 2d 959, 960 (La. App. 2003).

We understand that an amicus brief filed in support of this petition will provide additional information regarding the Oregon experience with non-unanimous verdicts.

denied, 899 So. 2d 2 (La. 2005), *cert. denied*, 546 U.S. 939 (2005); *State v. Sharp*, 810 So. 2d 1179, 1193-94 (La. App. 2002), *writ denied*, 845 So. 2d 1081 (La. 2003); *State v. Bowen*, 168 P.3d 1208, 1209 (Or. App. 2007) (same); *State v. Miller*, 166 P.3d 591, 599 (Or. App. 2007), *opinion modified on reh'g*, 176 P.3d 425 (Or. App. 2008); *State v. Phillips*, 174 P.3d 1032, 1037 (Or. App. 2007); *State v. Norman*, 174 P.3d 598, 604 (Or. App. 2007); *State v. Rennels*, 162 P.3d 1006, 1008 n.2 (Or. App. 2007). Petitioner respectfully requests that this Court do so now.

II. DNA EVIDENCE INTRODUCED AT PETITIONER'S TRIAL SHOULD HAVE BEEN SUPPRESSED AS THE PRODUCT OF AN UNCONSTITUTIONAL SEARCH AND SEIZURE.

The State obtained the key evidence leading to Petitioner's arrest and conviction – a biological sample containing his DNA – by means of a subpoena duces tecum issued by the Louisiana Attorney General's Office. The Louisiana Court of Appeal held that this procedure comported with the Fourth Amendment because the subpoena was sufficiently similar to an ordinary search warrant. App. 10a-23a. On appeal from Petitioner's separate conviction for capital murder, the Louisiana Supreme Court rejected this analysis, holding that the search and seizure of Petitioner's DNA violated the Fourth Amendment. *State v. Lee,* 976 So. 2d 109, 126-27 (La. 2008). The Louisiana Supreme Court, however, held that the DNA evidence did not need to be

suppressed because the inevitable discovery doctrine applied. *Id.* at 131.

Petitioner is challenging the Louisiana Supreme Court's inevitable-discovery ruling in a separate petition for certiorari, filed contemporaneously with this one. *See Lee v. Louisiana,* No. 07-____. In the event that this Court grants certiorari in that case, this Court should hold this case. And if this Court reverses the judgment in that case, it should grant, vacate, and remand, the Court of Appeal's opinion here for further proceedings. The Louisiana Supreme Court has repudiated the Court of Appeal's Fourth Amendment analysis, and a remand would allow Petitioner to litigate in light of this Court's opinion whether the inevitable discovery doctrine applies in this case.

* * * * * *

CONCLUSION

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

Respectfully submitted,

G. Ben Cohen
THE CAPITAL APPEALS PROJECT
636 Baronne Street
New Orleans, LA 70113

Gwendolyn K. Brown
LOUISIANA APPELLATE PROJECT
P.O. Box 64962
Baton Rouge, LA 70896

Jeffrey L. Fisher
Counsel of Record
Pamela S. Karlan
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305-8610
(650) 724-7081

Kevin K. Russell
HOWE & RUSSELL PC
7272 Wisconsin Ave.
Bethesda, MD 20814

June 4, 2008