No. 07-1523

In the Supreme Court of the United States

DERRICK TODD LEE, ET AL.,
PETITIONERS

v.

LOUISIANA, ET AL.

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

BRIEF FOR PETITIONER

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Question Presented

Whether the Sixth Amendment right to jury trial, as applied to the states through the Fourteenth Amendment, prohibits a criminal conviction by a nonunanimous jury.

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Statement of the Case

I. Factual Background: *State v. Lee*

Petitioner Derrick Todd Lee ("Lee" or "Petitioner") was found guilty of second degree murder by a nonunanimous jury in Louisiana state court. (R. at 4-5). Petitioner appeals his conviction on the grounds that a nonunanimous jury conviction violates his Sixth Amendment right to jury trial.

The case stemmed from the death of Geralyn DeSoto, who on January 14, 2002, was found deceased at her home in a pool of blood. *Id.* In the course of investigating incidents unrelated to DeSoto's death, the Louisiana Attorney General had obtained DNA samples from Lee under the authority of a *subpoena duces tecum*. *Id.* at 7-9. State law enforcement linked these DNA samples to DNA found on DeSoto's body and promptly issued an arrest warrant for Lee. *See id.* at 9, 75.

After Lee's arrest, the media provided extensive coverage of the case, to the point where the trial judge once stated "I don't think there's a square inch of ground in this state where people have not heard of this case." *See* (R. at 36-37). At least one article dubbed Lee "the Baton Rouge Serial Killer" and published his criminal history prior to the case. *See, e.g.*, *id.* at 75. During voir dire, one of the prospective jurors for Lee's trial even admitted he had read about the case and stated that "he would not want to have himself on the jury if he were being tried," though the prospective juror promptly recanted. *Id.* at 44.

It was in this highly publicized atmosphere that Lee faced trial for second-degree murder. The State ("State" or "Respondent") initially had indicted Petitioner

for first-degree murder, but later amended its indictment to charge Petitioner with second-degree murder. (R. at 4). Under Louisiana law, the punishment for first-degree murder may involve a capital sentence, La. Rev. Stat. Ann. § 14:30(C), but the punishment for second-degree murder is life imprisonment at hard labor, La. Rev. Stat. Ann. § 14:30:1(B). Louisiana law further provides that, in criminal cases in which the punishment is necessarily confinement at hard labor, juries may render guilty verdicts with the votes of at least ten out of twelve jurors. *See* La. Const. art. I, § 17(A); La. Code Crim. Proc. art. 782(A). Lee was convicted by a jury verdict of 11-1. (R. at 5).

Lee first appealed his conviction to the Louisiana Court of Appeals claiming several assignments of error, including the contention that an 11 to 1 jury verdict is unconstitutional.[1] (R. at 4-5). Citing this Court's ruling in *Apodaca v. Oregon*, 406 U.S. 404 (1972), the Louisiana Court of Appeals held that the constitutionality of nonunanimous jury verdicts is "well-settled" law. *Id.* at 5. After reviewing Lee's other assignments of error, the appellate court concluded none had merit and affirmed the conviction. (R. at 52). The Louisiana Supreme Court denied certiorari. (R. at 2). Subsequently, this Court granted a writ of certiorari to address the sole issue of whether the Sixth Amendment, as applied to the States through the

[1] Besides the issue presented to this Court, Lee appealed various evidentiary and procedural decisions by the trial related to the DNA evidence and possible juror bias. *See, e.g.*, (R. at 7) (challenging inclusion of DNA evidence obtained by *subpoena duces tecum*); (R. at 36) (challenging denial of motion to change venue based on media coverage).

Fourteenth Amendment, prohibits nonunanimous jury convictions in criminal trials. (R. at 3).

II. Factual Background: *State v. Bertrand* and *State v. Bowen*

This Court has consolidated Lee's case with *State v. Bertrand*, 6 So. 3d 738 (La. 2009), and *State v. Bowen*, 168 P.3d 1208 (Or. Ct. App. 2007). The facts in both of these cases are substantially similar to those in *Lee*.

In *Bertrand*, Shannon McBride Bertrand and Wilford Frederick Chretien, Jr. were indicted in Louisiana with felonies punishable by confinement at hard labor. (R. at 55). As in *Lee*, the record suggests that Bertrand was initially charged with first degree murder. *See id.* at 71. After being indicted, the trial court ruled Article 782 of the Louisiana Code of Criminal Procedure (and thus nonunanimous jury convictions) unconstitutional. (R. at 55); *see also* La. Code Crim. Proc. art. 782(A). The State appealed both decisions to the Louisiana Supreme Court. (R. at 55). Similar to *Lee*, the Louisiana Supreme Court upheld the constitutionality of Article 782 on the grounds that *Apodaca*'s approval of nonunanimous jury convictions had become well-settled law. *Id.* at 61-62. Justice Weimer concurred with the decision, but on the grounds that Bertrand and Chretien lacked constitutional standing to assert the claim. *Id.* at 64 (Weimer, J., concurring).

Bowen v. Oregon addressed the nonunanimous jury conviction of Scott David Bowen under Oregon law. (R. at 67). The Oregon Constitution provides that, except for first degree murder cases, ten members of the jury may render a guilty

verdict. Or. Const., art. I, § 11. At trial, defendant Bowen requested that the trial court instruct the jury that they must reach a unanimous verdict, citing language on jury unanimity from this Court's recent decision in *Blakely v. Washington*, 542 U.S. 296 (2004). (R. at 68). The trial court rejected the proposed instructions. (R. at 68). On appeal, the Oregon Court of Appeals affirmed the trial court's decision, finding that *Apodaca* had not been effectively overruled by *Blakely*. *Id.* at 68-69.

III. Legal Background: *Apodaca* and *Apprendi*

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. amend. VI. At common law, the requirement that juries reach a unanimous verdict began in 1367. H. Frank Way, *Criminal Justice and the American Constitution* 347 (1980). By the eighteenth century, jury unanimity had become the accepted rule in America. *Id.* However, in 1972, a highly fractured Supreme Court affirmed 5-4 two nonunanimous criminal convictions in the cases of *Apodaca v. Oregon*, 406 U.S. 404 (1972), and *Johnson v. Louisiana*, 406 U.S. 356 (1972).[2] *Johnson* affirmed a 9-3 conviction, finding that at the time of the conviction, the Sixth Amendment right to jury trial did not yet apply to the states

[2] Because *Apodaca* and *Johnson* were companion cases covering substantially the same issue, several concurrences and dissents were filed to apply to both cases. *See, e.g.*, *Johnson*, 406 U.S. at 366 (Powell, J., concurring). Therefore, in referring to these opinions, this brief necessarily contains citations to *Johnson* even when discussing them in the context of *Apodaca*.

and that the Due Process and Equal Protection Clauses did not require a unanimous jury conviction. *Johnson*, 406 U.S. at 358-59 (majority opinion).

In *Apodaca*, however, the Court attempted to interpret the Sixth Amendment right to jury trial as it applied to the states through the Fourteenth Amendment, but reached no authoritative conclusion. A plurality opinion written by Justice White stated that unanimous jury convictions were not required by the Sixth Amendment. *Apodaca*, 406 U.S. at 406. Justice Powell, who cast the fifth vote to affirm the conviction, found instead that although the Sixth Amendment created a right to jury unanimity in *federal* jury trials, the Fourteenth Amendment did not incorporate this unanimity requirement for the states. *Johnson*, 406 U.S. at 369, 380 (Powell, J., concurring). Justices Douglas, Brennan, Stewart and Marshall all wrote vigorous dissents finding that the Sixth Amendment right to jury trial as applied to the states (and the federal government) necessarily included a unanimous jury requirement. *See, e.g., Johns*on, 406 U.S at 380 (Douglas, J., dissenting). In particular, Justice Douglas criticized the majority ruling for accepting a procedure that diminished the reliability of the jury, unfairly benefited the government, and made impossible the effectuation of proof beyond a reasonable doubt. *Id.* at 388-393.

After *Apodaca*, we know of only one decision in which the Court squarely addressed jury unanimity under the Sixth Amendment, holding that convictions by six-person juries must be unanimous. *See Burch v. Louisiana*, 441 U.S. 130 (1979). However, the Court recently has spoken strongly in favor of unanimous juries in a

line of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000); *see also Blakely v. Washington*, 542 U.S. 296, 301 (2004). We assert that this language in *Apprendi* has effectively overruled *Apodaca* or alternatively, that *Apodaca* should now be expressly overturned.

Summary of the Argument

The Sixth Amendment right to jury trial, as applied to the states through the Fourteenth Amendment, prohibits a criminal conviction by a nonunanimous jury. Accordingly, Petitioner's conviction for second-degree murder must be reversed.

In *Apprendi v. New Jersey*, this Court effectively overruled *Apodaca*'s holding and affirmed that all accusations against a criminal defendant must be confirmed by the unanimous vote of a jury. The plain language in *Apprendi* and subsequent cases, such as *Blakely v. Washington*, re-establishes the unanimity rule. Furthermore, *Apprendi* is not a mere "sentencing case," but rather stands for the broad propositions that all factual elements of an offense must be proven to a jury beyond a reasonable doubt and that the Sixth Amendment jury right must be protected from erosion by political forces. Moreover, subsequent decisions by this Court have broadened and reaffirmed *Apprendi*, exhibiting a well-established commitment to *Apprendi*'s unanimous jury language. Thus, *Apprendi* dictates that Petitioner's conviction must be reversed.

Alternatively, if this Court determines *Apprendi* is not controlling, it should nonetheless overrule *Apodaca* and reverse Petitioner's conviction. *Stare decisis*

respect is inappropriate for *Apodaca*. First, the *Apodaca* majority opinions contained fundamentally flawed reasoning and interpretation, and now-debunked assumptions about jury behavior. Additionally, *Apodaca*'s "substantial majority" rule has not been workable; this Court has adjusted the reach of *Apodaca* on multiple occasions. *Apodaca* also has not engendered any substantial reliance interests, nor achieved "antiquity." Furthermore, as a matter of policy, *Apodaca* should be overruled because the *Apodaca* rule hinders the ability of juries to accurately analyze complex evidence and encourages prosecutorial abuse. Finally, *Apodaca* is not substantially supported by any of the Court decisions that claim *Apodaca* is "well-settled law."

Argument

I. *Apprendi* effectively overruled *Apodaca* and established that the Sixth Amendment, as applied to the states by the Fourteenth Amendment, requires unanimous jury convictions of criminal defendants.

In *Apprendi v. New Jersey*, this Court plainly stated that "trial by jury has been understood to require that '*the truth of every accusation* . . . should afterwards be confirmed by *the unanimous suffrage of twelve of [the defendant's] equals and neighbours* . . . .'" *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)) (first emphasis in original; second emphasis added); *see also Blakely v. Washington*, 542 U.S. 296, 301 (2004) (reaffirming *Apprendi* and quoting same language). The Court could not have been less equivocal in its description. However, lest there be any remaining

confusion, Justice Scalia, in support of the majority opinion, emphasized that the *Apprendi* rule established that the defendant's guilt "will be determined *beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens.*" *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring) (emphasis in original).

Given the clear language of *Apprendi*, the Oregon and Louisiana Courts of Appeals below erroneously mischaracterized the *Apprendi* line of cases as involving only "the constitutionally prescribed role of the jury, as opposed to the court, in determining facts material to the imposition of criminal sentences." *State v. Bowen*, 168 P.3d 1208, 1209 (Or. Ct. App. 2007); *see also State v. Lee*, 964 So. 2d 967, 973 (La. Ct. App. 2007). Concededly, *Apprendi* primarily held that facts which increase criminal penalties "beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490 (majority opinion). However, the Court's detailed reasoning in *Apprendi* makes clear that its reach is not so narrowly limited.

First, the basis for the *Apprendi* "sentencing" rule was the broader well-established rule that any factual element of a criminal offense, not just those involved in sentencing, must be proven to a jury beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 476-77 (Sixth Amendment and Fourteenth Amendment "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged.'") (citing *United States v. Gaudin*, 515 U.S. 506, 510 (1995)). In short, the substantive crime of unlawful possession (or first-degree murder) must be treated exactly like a "sentence

enhancement" factor; both are elements of an offense entitled to a full jury determination. *Apprendi*, 530 U.S. at 476-77. Thus, when *Apprendi* speaks of factual determinations by the "unanimous suffrage" of a jury, it encompasses precisely the factual determination at issue, Petitioners' guilt.

Furthermore, *Apprendi* and subsequent cases expressed a particular concern about states diminishing criminal defendants' jury rights. *Id.* at 483. The Court rightly acknowledged that "'the jury right could be lost not only by gross denial, but by erosion.'" *Id.* (quoting *Jones v. United States*, 526 U.S. 227, 247-48 (1999)). In particular, political forces encourage legislatures and courts to avoid some of the less "practical" disadvantages of jury factfinding. *See Blakely v. Washington*, 542 U.S. 296, 307 n.10 (2004); *cf. Apprendi*, 530 U.S. at 498 (Scalia, J., concurring) ("[The jury-trial guarantee] has never been efficient; but it has always been free."). State laws allowing nonunanimous jury convictions are a clear-cut example of legislative action that erodes jury trial rights by emphasizing practicality over constitutionality. Precisely because of such concerns, the Sixth Amendment requires state trials to "at least adhere to the basic principles undergirding the requirements of trying to a jury all facts necessary to constitute a statutory offense. . . ." *See Apprendi*, 530 U.S. at 483. As *Apprendi* makes clear, these basic principles include confirming all accusations "by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . ." *See id.* at 477 (internal quotation marks and citation omitted).

On several occasions, this Court has broadened and reaffirmed *Apprendi* to the point where its jury unanimity requirement should be considered well-settled law. *See, e.g.*, *Blakely v. Washington*, 542 U.S. 296 (2004); *Ring v. Arizona*, 536 U.S. 584 (2002). In *Ring*, the Court overruled inconsistent prior law and explicitly expanded the *Apprendi* doctrine to require that juries, not judges, find the existence of aggravating circumstances necessary for imposing the death penalty. *Ring*, 536 U.S. at 609. Justice Scalia aptly characterized the new rule as "an evidentiary requirement . . . that a *unanimous jury* must find beyond a reasonable doubt." *Id.* at 610 (Scalia, J., concurring) (emphasis added). Similarly, *Blakely* applied *Apprendi* yet again two years later, noting that the *Apprendi* rule embodies "two longstanding tenets of common-law criminal jurisprudence," one of which is the jury unanimity requirement. *Blakely*, 542 U.S. 296, 301. These cases thus reflect the supremacy of *Apprendi*, and accordingly jury unanimity, in modern Sixth Amendment jurisprudence.

The Court's commitment to *Apprendi* "reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial." *Id.* at 305. *Apprendi* provides this intelligible content through the requirement that every factual accusation against a criminal defendant, except for prior conviction, must be proven to a unanimous jury beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 490. By attempting to truncate *Apprendi* into a mere sentencing rule, the Louisiana Court of Appeals misinterpreted established Court

doctrine in a manner that dangerously erodes the Sixth Amendment right. For these reasons, *Apprendi* requires overruling Lee's nonunanimous jury conviction.

II. To the extent that *Apprendi* does not overrule *Apodaca*, this Court's jurisprudence requires *Apodaca* now be overruled and nonunanimous convictions declared unconstitutional.

If this Court does not find that *Apprendi* implicitly overruled *Apodaca*, it should take this opportunity to explicitly overturn *Apodaca* and declare the unconstitutionality of nonunanimous jury convictions. Under the Court's *stare decisis* doctrine, all factors weigh against *Apodaca* receiving *stare decisis* respect. Moreover, the clear policy benefits of returning to a unanimity rule establish it as the constitutionally superior option. Finally, none of the jurisprudence cited by the appellate courts below supports the proposition that *Apodaca* is "well-settled law."

A. All relevant factors weigh against *Apodaca* receiving *stare decisis* respect.

The Court should overturn *Apodaca* in line with its customary *stare decisis* jurisprudence. *Stare decisis* helps ensure legitimacy and stability of the law, "but it does not compel [the Court] to follow a past decision when its rationale no longer withstands 'careful analysis.'" *Arizona v. Gant*, 129 S. Ct. 1710, 1722 (2009) (citation omitted). In other words, although the Court views decisions to overturn precedent with the "utmost caution," *stare decisis* is not an "inexorable command." *Pearson v. Callahan*, 129 S. Ct. 808, 816 (2009). To determine whether or not to overturn precedent, this Court examines the workability of a prior decision, "the

antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Montejo v. Louisiana*, 129 S. Ct. 2079, 2088-89 (2009) (citing *Pearson v. Callahan*, 129 S. Ct. 808, 816-17 (2009)). Another relevant consideration is whether "experience has pointed up the precedent's shortcomings." *Pearson v. Callahan*, 129 S. Ct. at 816 (2009). All five of these factors weigh in favor of overturning *Apodaca*.

i. The *Apodaca* majority opinions were poorly reasoned.

The Court must look to the strength or weakness of *Apodaca*'s reasoning in determining whether to give it *stare decisis* respect. *See Montejo v. Louisiana*, 129 S. Ct. 2088-89 (2009). In *Apodaca*, both the four-Justice plurality and Justice Powell's concurrence included fundamental flaws in constitutional construction that significantly undermine the reasoning of their opinions. Justice Powell took a view contrary to the entire *Apodaca* Court and to basic tenets of incorporation doctrine. At the same time, Justice White's plurality opinion violated two basic canons of constitutional interpretation by failing to take the normal meaning of language in the Sixth Amendment and by conducting a faulty analysis of the Sixth Amendment's legislative history.

In concurring with the judgment of *Apodaca*, Justice Powell disagreed with the plurality's interpretation of the Sixth Amendment as inherently allowing for nonunanimous jury convictions. *Johnson v. Louisiana*, 406 U.S. 356, 366 (1972) (Powell, J., concurring). Instead, Justice Powell found that "all of the elements of jury trial within the meaning of the Sixth Amendment are [not] necessarily

embodied in or incorporated into the Due Process Clause of the Fourteenth Amendment." *Id.* at 369. Justice Powell reasoned that although the Sixth Amendment required unanimous jury verdicts in federal criminal trials, *id.* at 371, a state's "less-than-unanimous jury requirement [was not] violative of the due process guarantee of the Fourteenth Amendment." *Id.* at 380.

Thus, Justice Powell's opinion not only envisioned an awkward framework of different basic standards for jury trials in state and federal courts, but it also violated settled incorporation doctrine. Prior to *Apodaca*, the Court had recognized that once a Bill of Rights guarantee is determined to apply against the states, "the same constitutional standards apply against both the State and Federal Governments." *Benton v. Maryland*, 395 U.S. 784, 795 (1969) (citing *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968)). In fact, in *Apodaca* itself, Justice Brennan pointed out that despite the Court's fractured approval of nonunanimous jury convictions at the state level, the majority of the Court still believed that "as in the case of every specific of the Bill of Rights that extends to the States, the Sixth Amendment's jury trial guarantee . . . has identical application against both State and Federal Governments." *Johnson*, 406 U.S. at 395-96 (Brennan, J., dissenting). Accordingly, Justice Powell's reasoning not only violated prior doctrine, but was not even approved by the Court in *Apodaca* itself.

Similarly, Justice White's plurality opinion contained fundamental flaws of reasoning that conflict with constitutional norms. First, the opinion failed to follow the principle that "'words and phrases [in the Constitution] are used in their normal

and ordinary as distinguished from technical meaning.'" *District of Columbia v. Heller*, 128 S. Ct. 2783, 2788 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). The normal meaning of the Constitution's language "excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation." *Id.* However, the plurality excluded at the onset the normal meaning of the Sixth Amendment's "trial[] by an impartial jury." *See* U.S. Const. amend. VI. Despite finding that "the requirement of unanimity arose during the Middle Ages and had become an accepted feature of the common-law jury by the 18th century,"[3] *Apodaca*, 406 U.S. 408, 407-08 (1972) (plurality opinion) (footnotes omitted), the plurality determined, after analyzing the function of a criminal jury, that unanimous conviction verdicts were not a necessary feature of juries. *Id.* at 411. Given the preference towards ordinary meaning and the Court's explicit finding that the meaning of juries had not changed for hundreds of years, the plurality's conclusion was wholly unwarranted.[4]

Furthermore, in reaching this conclusion, the plurality conducted an erroneous analysis of the Sixth Amendment's legislative history. *See id.* at 408-410. Justice White found that "one can draw conflicting inferences from th[e] legislative history." *Id.* at 409. The plurality premised this finding on the fact that language

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[3] Furthermore, even at the time of *Apodaca*, unanimity was considered a definitive feature of common law criminal juries. *See, e.g.*, O. Hood Phillips, *A First Book of English Law* 32 (1965) ("A petty jury consists of twelve persons whose verdict must be unanimous.") (emphasis removed).

[4] The plurality's functionalist analysis of juries also suffered from fatally flawed factual assumptions. *See* discussion *infra* Part II.A.ii.

specifying certain "accustomed requisites" of the jury, including unanimous verdicts, had been proposed and excluded from the Sixth Amendment. *Id.* at 409. Therefore, the plurality reasoned, it was possible the Framers found this language redundant, but also plausible that they intended the deletion to have substantive effect. *Id.* at 409-10. However, the Court has since explicitly rejected such reasoning: "It is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2796 (2008). Thus, not only did the plurality reject the normal meaning of "jury" in contravention of standard constitutional interpretation, but its justification for doing so on the basis of legislative history was similarly significantly flawed. These interpretive infirmities, along with the unfounded presumptions described below, demonstrate fatal flaws of reasoning in *Apodaca*'s majority opinions.

ii. The basic assumptions in *Apodaca* about the quality of nonunanimous juries' deliberative processes have subsequently been debunked.

The years following *Apodaca* reflect a clear instance of where the "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 855 (1992). In addition to their flawed interpretive reasoning, Justice White's and Justice Powell's *Apodaca* opinions were supported only by erroneous notions about the deliberative process and accuracy of verdicts produced by a nonunanimous jury, as well as about the systemic effects of such a

rule. Both Justice White and Justice Powell supported their opinions on assumptions that, under a nonunanimous jury verdict rule, jurors in the majority would continue to deliberate and accept input from minority viewpoints. *See Apodaca*, 406 U.S. at 413 (plurality opinion) (rejecting argument that minorities will not adequately represent their viewpoints "simply because they may be outvoted in the final result"); *Johnson*, 406 U.S. at 378-79 (Powell, J., concurring) (finding that nothing in Oregon's experience justifies fears that majorities in juries will simply limit deliberations and block out minority viewpoints); *see also Johnson*, 406 U.S. at 362 (majority opinion) ("Appellant offers no evidence that majority jurors simply ignore the reasonable doubts of their colleagues. . . ."). Similarly, the *Apodaca* majority was confident that, provided a jury was representative of the community, nonunanimous verdicts would be as accurate as unanimous ones. *See Apodaca*, 406 U.S. at 410-11 (plurality opinion) (juries will come to a commonsense judgment about a defendant's guilt as long as they represent "a cross section of the community . . . [and] have the duty and the opportunity to deliberate . . . ."); *Johnson*, 406 U.S. at 360 (majority opinion) ("[T]he 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."); *cf. Johnson*, 406 U.S. at 377 (Powell, J., concurring) (concluding that a unanimous jury requirement often causes "agreement by none and compromise by all, despite the frequent absence of a rational basis for such compromise.") (citation omitted). The majority also assumed that requiring unanimous juries resulted in additional unnecessary hung juries.

See Apodaca, 406 U.S. at 411 (plurality opinion) ("Requiring unanimity would obviously produce hung juries in some situations where nonunanimous juries will convict or acquit."); *Johnson*, 406 U.S. at 377 (majority opinion) ("Removal of the unanimity requirement could well minimize the potential for hung juries occasioned either by bribery or juror irrationality."). However, these firm convictions were little more than guesswork: "Instead of relying on empirical psychological evidence of how jurors behave, the Court 'speculated freely about social influence processes within the jury room, interactions between majority and minority factions, and the like.'" Jason D. Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror*, 40 U. Mich. J.L. Reform 569, 577 (Spring 2007) (citation omitted).

On the other side, Justice Douglas passionately opposed the majority's views on the quality of deliberations and accuracy of verdicts. *See Johnson*, 406 U.S. at 388 (Douglas, J., dissenting) (arguing that the plurality's view diminishes verdict reliability because "nonunanimous juries need not debate and deliberate as fully as must unanimous juries."). In fairness, commentators similarly criticized Justice Douglas for making "sweeping assumptions about the psychology of jury decisionmaking." *See* Reichelt, *supra*, at 576.[5] However, although Justice Douglas

[5] In fact, both sides used citations to the same study on juror behavior to support their views. *See* Valerie P. Hans et al., *The Hung Jury:* The American Jury*'s Insights and Contemporary Understanding*, 39 Crim. L. Bull. 33, 38-39 (2003); *see also* H. Kalven & H. Zeisel, *The American Jury* 461 (1966) (the study cited extensively in *Apodaca*). However, unlike the *Apodaca* majority, one of the authors of the study, Mr. Zeisel, "saw the research as pointing to the desirability of

lacked empirical support in his dissent, subsequent "psychological evidence . . . overwhelmingly lends more credence to Justice Douglas's view of juror behavior than Justice White's view." Reichelt, *supra*, at 579. Post-*Apodaca* studies indicate that jurors working towards unanimity engage in more thorough review of the evidence, allow greater expression of individual viewpoints, and feel more satisfied with the final verdict. *Id.* at 581 (citations omitted). *See also* Hans, *supra*, at 50 (concluding that empirical evidence suggests a nonunanimous verdict rule has unintended effects, "such as cutting of minority viewpoints" and "affect[ing] the robustness and overall quality of the discussion of evidence."); Shari S. Diamond et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 Nw. U. L. Rev. 201, 230 (2006) (study on actual nonunanimous civil juries demonstrated that "thoughtful minorities are sometimes marginalized when the majority has the power to ignore them in reaching a verdict."). Members of this Court have also explicitly recognized the benefits of jury unanimity. *See McKoy v. North Carolina*, 494 U.S. 433, 452 (1990) (Kennedy, J., concurring) ("Jury unanimity, it is true, is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community.").

Moreover, economists have demonstrated "that a unanimous verdict rule tends to lead to more accurate verdicts than does a nonunanimous rule." *See* William S. Neilson & Harold Winter, *The Elimination of Hung Juries: Retrials and*

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retaining the requirement that all jurors agree." Hans, *supra*, at 39 (citation omitted).

Nonunanimous Verdicts, 25 Int'l Rev. of Law and Econ. 1, 12 (2005). Studies also suggest that the costs associated with hung juries are exaggerated, especially in light of the accuracy benefits of verdicts reached by unanimity. *See* Diamond, et al., *supra*, at 230 (concluding that the cost of hung juries "seems overblown in light of the low frequency of hung juries in civil cases, even when unanimity is required."); *cf.* Hans et al., *supra*, at 50 (finding that nonunanimous juries produce "a small but significant number of divergent verdicts" in comparison with unanimous juries); Neilson & Winter, *supra*, at 12-13 (recommending that "the savings in hung jury costs . . . be weighed against the costs of generally less accurate verdicts."). Thus, abundant recent experience shows representative juries, without any unanimity requirement, engage in inferior deliberation and only reduce costs minimally. In short, modern research on jury behavior has pointed up many shortcomings of *Apodaca*'s ruling.

iii. *Apodaca* has been an unworkable rule since its inception.

Under *stare decisis* doctrine, "the fact that a decision has proved 'unworkable' is a traditional ground for overruling it." *Montejo v. Louisiana*, 129 S. Ct. 2079, 2088 (2009) (citation omitted). In determining the workability of an old rule, one relevant factor is how spirited the dissents challenging the underpinnings of the decision were, and whether the decision has later been questioned by Members of the Court or "defied consistent application by the lower courts." *See Payne v. Tennessee*, 501 U.S. 808, 828-30 (1991); *see also Arizona v. Gant*, 129 S. Ct. 1710,

1723 (2009) (examining "the checkered [case law] history of the search-incident-to-arrest exception").

Applying these considerations, *Apodaca* has proven an unworkable standard. *Apodaca* garnered no single majority opinion and was decided by a highly fractured Court with vigorous dissents. Indeed, even Justice Blackmun's concurrence hardly represented enthusiastic support for the decision: "I do not imply that I regard a State's split-verdict system as a wise one. My vote means only that I cannot conclude that the system is constitutionally offensive." *Johnson v. Louisiana*, 406 U.S. 356, 366 (1972) (Blackmun, J., concurring). Moreover, Justice Douglas' dissent challenged the underpinnings of the *Apodaca* decision with what subsequently has proven to be the more astute analysis of jury behavior. *See* discussion *supra* Part II.A.ii.

Furthermore, in decisions following *Apodaca*, the Court has made "checkered" adjustments to the doctrine based on the difficulty in determining exactly how much of a nonunanimous jury must vote for a guilty verdict. The *Apodaca* ruling involved a 9-3 system, or "a substantial majority of the jury." *See Johnson*, 406 U.S. at 362 (majority opinion). However, even upon announcement of *Apodaca*, its exact reach was not clear. *See id.* at 366 (Blackmun, J., concurring) (approving the 9-3 minimum, but noting that "a 7-5 standard . . . would afford me great difficulty.").[6]

[6] *Apodaca* also caused uncertainty about the nature of Sixth Amendment jury rights between federal and state trials. *See Johnson*, 406 U.S. at 383 (Douglas, J., dissenting) ("The result of today's decision is anomalous: though unanimous jury decisions are not required in state trials, they are constitutionally required in federal prosecutions.")

Furthermore, notwithstanding the "substantial majority" rule, the Court promptly thereafter required complete unanimity in a six-person criminal jury. *Burch v. Louisiana*, 441 U.S. 130, 134 (1979). The Court's *Apprendi* line of cases, which repeatedly emphasizes the importance of "unanimous suffrage" in criminal juries, similarly appears to be—if not outright contrary—at least significantly at odds with *Apodaca*. *See* discussion *supra* Part I; *see also Apprendi v. New Jersey*, 530 U.S. 466 (2000). Thus, *Apodaca* has proven to be a substantially unworkable rule since its inception.

iv. No substantial reliance interests require continuation of the *Apodaca* rule.

This Court is hesitant to overturn prior decisions where "the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation. . . ." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 855 (1992). However, precedents involving procedural and evidentiary rules typically do not produce such reliance interests, as opposed to those affecting property or contract rights. *Pearson v. Callahan*, 129 S. Ct. 808, 816 (2009).

Apodaca's holding affects primarily the procedure of criminal trials. Therefore, overturning *Apodaca* is inherently less likely to involve significant reliance interests. With respect to the *Apodaca* rule, criminal defendants in Oregon and Louisiana are the only ones who appear to face a significant special hardship—the increased risk of erroneously losing their liberty by a nonunanimous jury

verdict, *see* Neilson & Winter, *supra*, at 12—and they face this hardship under the current rule, not if it is overturned.

Concededly, both Oregon and Louisiana have relied on the *Apodaca* rule in the years since its announcement. *See, e.g.*, *State v. Belgard*, 410 So. 2d 720, 726-27 (1982). However, even thirty years after *Apodaca*, Oregon and Louisiana remain the only two states to date that allow for nonunanimous jury verdicts in criminal trials. *See* Reichelt, *supra*, at 575. Thus, there are no widespread expectations across the country in favor of nonunanimous jury verdicts. This Court should not hesitate to overturn *Apodaca* because of the reliance interests at stake.

v. The antiquity of the *Apodaca* rule does not justify *stare decisis*.

The final consideration in *stare decisis* doctrine is the antiquity of *Apodaca* as precedent. *See Montejo v. Louisiana*, 129 S. Ct. 2079, 2089 (2009). The Court has found the antiquity factor weighs in favor of overturning precedent that is only two decades old. *Id.* *Apodaca* is closer to four decades old, which may weigh slightly in favor of maintaining its rule. However, on the issue of criminal trial juries, and particularly the issue of unanimity, *Apodaca* represents extremely recent precedent. A criminal defendant's right to a unanimous jury verdict originated in 1367. *See* Phillips, *supra*, at 32. In the United States, relevant precedent dates back to at least the 19th century. *See, e.g.*, *Thompson v. Utah*, 170 U.S. 343, 350-51 (1898) (holding that a criminal defendant could only be convicted by a unanimous jury). Given the extensive history of jurisprudence on the right to a jury trial, as well as

the limited reliance placed on *Apodaca* to date, *see* discussion *supra* Part II.A.iv, *Apodaca* is not so antiquated in our jurisprudence as to require *stare decisis*.

In sum, *Apodaca* contained fundamentally flawed reasoning at its conception, relied on assumptions that have been proven invalid, did not create a workable rule, and in its short history did not engender any substantial reliance upon it. Thus, all the factors relevant to *stare decisis* analysis weigh in favor of overruling *Apodaca* and interpreting the Sixth Amendment to require unanimous jury verdicts for criminal convictions.

B. Broader policy considerations about the function of juries in modern society strongly favor a unanimous jury conviction rule.

In addition to the specific *stare decisis* factors listed above, the policy ramifications of continuing to allow nonunanimous jury convictions necessitate overturning *Apodaca*. Specifically, the *Apodaca* rule hinders the complex tasks faced by modern juries and creates opportunities for prosecutorial abuse.

i. The unanimity rule supports "the function served by the jury in contemporary society."

Justice White frames the *Apodaca* plurality opinion as an inquiry that "focus[es] upon the function served by the jury in contemporary society." *Apodaca*, 406 U.S. at 410. Applying this framework, it becomes apparent that the function served by the jury in today's modern society has undoubtedly become more complex than when Justice White wrote his *Apodaca* opinion. As *Lee* illustrates, today's juries must analyze complex and powerful forms of evidence, such as DNA evidence. *See* (R. at 7-9). In order to determine the probative value of such evidence, juries

are faced with difficult and possibly confusing considerations of "error rates," "likelihood ratios," and myriad other factors necessary to assess the evidence. *See generally* Jonathan J. Koehler, *On Conveying the Probative Value of DNA Evidence: Frequencies, Likelihood Ratios, and Error Rates*, 67 U. Colo. L. Rev. 859 (1996). Juries may also need to conduct such analysis in the presence of nonstop media coverage that makes unbiased determination even more difficult. *See, e.g.*, (R. at 44).

Thus, jury procedures should provide the best opportunities possible for juries to deal with such complicated analyses. Research into jury deliberations has shown that "jury-level memory and comprehension of the evidence and the judge's instructions is significantly better than that of individuals, *largely due to deliberations.*" Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 Va. L. Rev. 311, 348 (April 2003) (emphasis added). Together with the fact that unanimous juries deliberate longer and engage in a more thorough review of evidence than nonunanimous juries, *see* Reichelt, *supra* at 581, the empirical data strongly suggests a unanimity rule would help juries continue to meaningfully serve their valuable function in contemporary society. In other words, a unanimity rule is ensures that juries have "the duty and the opportunity to deliberate . . . on the question of a defendant's guilt" that is necessary to reach a commonsense judgment on the facts. *See Apodaca*, 406 U.S. at 410-11 (plurality opinion).

ii. Requiring unanimous jury convictions prevents abuses by "overzealous prosecutors."

The *Apodaca* majority properly understood that one purpose of trial by jury was to safeguard against government oppression through "overzealous prosecutors." *Apodaca*, 406 U.S. at 410 (plurality opinion). However, allowing nonunanimous jury convictions runs directly counter to this goal. As Justice Douglas warned in his *Apodaca* dissent, "the use of the nonunanimous jury stacks the truth-determining process against the accused." *Id.* at 391 (Douglas, J., dissenting). A recent study of actual juries in felony cases looked at a sample of 14 instances in which an initial minority position became the final verdict. Hans, *supra*, at 50. In 11 of these instances, juries acquitted when the first ballot favored conviction. *Id.* On the other hand, only in 3 cases did the juries convict after an initial ballot for acquittal. *Id.* Given the immense evidence that juries working towards unanimity deliberate longer and more accurately, *see* discussion *supra* Part II.A.ii, the study above further suggests that the State will erroneously benefit from shortened nonunanimous jury deliberations more than criminal defendants.

Moreover, the cases at hand highlight an additional opportunity for prosecutorial advantage under the *Apodaca* rule. In both *Lee* and *Bertrand*, the defendants were originally charged with first degree murder before ultimately being indicted for second degree murder. *See* (R. at 4, 71). The prosecutors in these cases likely simply believed that a second degree murder charge was more appropriate. However, some prosecutors may also strategically lower charges in order to benefit from only having to convince 10 jurors instead of 12 of the defendants' guilt. The opportunity for such strategic prosecution undermines the fundamental protection

embodied by juries, and should not be allowed in a society that believes "it is better that ten guilty persons escape than that one innocent suffer.' 2 W. Blackstone, Commentaries on the Laws of England 358 (1769). Accordingly, the policy considerations related to jury function and prosecutorial abuse weigh heavily in favor of overturning *Apodaca* and requiring unanimity in jury convictions.

C. The cases relied upon below by the *Bertrand* appellate court do not substantially support *Apodaca*, and in many respects oppose it.

In *Bertrand*, the appellate court attempted to rely on a litany of decisions from this Court to establish *Apodaca* as "well-settled law." *See State v. Bertrand*, 6 So. 3d 738, 742 (2009) (citing the opinions discussed below). At the onset, two of the *Bertrand* court's citations were to dissenting opinions that barely even examined *Apodaca*, using it only for indirect support. *Id.* (citing *Rita v. United States*, 551 U.S. 338, 385 (2007) (including *Apodaca* as part of a list of holdings addressing Sixth Amendment jury right "details"), and *Holland v. Illinois*, 493 U.S. 474, 511 (1990) (Stevens, J., dissenting) (citing *Apodaca* for its use of the fair-cross-section principle)). Similarly, *United States v. Gaudin*, 515 U.S. 506 (1995), contained a single footnote citation to *Apodaca*, referencing it as support for the proposition that the essential feature of a jury was the interposition of community judgment between the accused and the accuser. *Gaudin*, 515 U.S. at 510 n.2. While these three opinions possibly hint at certain limited acceptance of *Apodaca*, they do not analyze *Apodaca*'s infirmities or place significant reliance on *Apodaca*'s reasoning.

On the other hand, the Court did discuss *Apodaca* more extensively in *Burch v. Louisiana*. *See Burch v. Louisiana*, 441 U.S. 130, 136-138 (1979). However, unlike *Apodaca*, the *Burch* majority ended up holding in favor of a unanimity rule. *See id.* (recognizing *Apodaca* rule but then concluding that unanimity in six-person criminal juries is necessary for the "preservation of the substance of the jury trial guarantee."). Thus, although *Burch* recognized the nonunanimous jury rule from *Apodaca*, its main holding *narrowed* it. Furthermore, the *Burch* majority relied on the fact that Louisiana and Oregon were the only two states which allowed nonunanimous six-person verdicts, finding the "near-uniform judgment of the Nation . . . a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not." *Id.* at 138. Given that Louisiana and Oregon remain the only two states to allow nonunanimous twelve-member jury verdicts, *Burch* actually supports a finding that such jury practices are on the unconstitutional side of the line.

The *Bertrand* court also misinterpreted *McKoy v. North Carolina*, 494 U.S. 433 (1990). Again, the *Bertrand* court relied on language in a dissenting opinion that did little more than cite *Apodaca*'s holding. *See Bertrand*, 6 So. 3d at 742 (citing *McKoy*, 494 U.S. at 468 (Scalia, J., dissenting)). However, *McKoy*, albeit in an Eighth Amendment context, actually upheld the principle of requiring jury unanimity to punish an accused. *McKoy* struck down a statute prohibiting jurors in capital sentencing hearings from considering mitigating factors they did not find unanimously. *McKoy*, 494 U.S. at 444 (majority opinion). While on its face, *McKoy*

appears to promote nonunanimous juries, the basis for the ruling was to prevent "capital sentence[s] that lack[] unanimous support of the jurors. . . ." *Id.* at 452 (Kennedy, J., concurring). Thus, even though *McKoy* might also support nonunanimous jury acquittals, it directly supports the principle of jury unanimity in convicting or condemning.

Conclusion

For all the foregoing reasons, as well as those that may be advanced upon hearing of this matter, Petitioner respectfully requests that this Honorable Court REVERSE the decision of the Court of Appeals.

Respectfully submitted,

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