No. 10-689

IN THE

Supreme Court of the United States

TROY BARBOUR,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition for a Writ of Certiorari to
the Louisiana Court of Appeal, Fourth Circuit

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

Jeffrey T. Green
NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE
LAWYERS
1501 K Street, NW
Washington, DC 20005-1401
(202) 736-8291

Jonathan L. Marcus
Counsel of Record
Elizabeth-Ann D. Katz
Matthew S. Krauss
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
(202) 662-6000
jmarcus@cov.com

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Interest Of *Amicus Curiae*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes or misconduct.[1] Founded in 1958, NACDL has a membership of more than 11,000 and affiliate memberships of almost 40,000. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL has participated as *amicus* in many of the Court's most significant criminal cases. The issues raised in this case are especially important, as they implicate not only the essential right to a trial by jury, but also the more general principle that a criminal defendant should receive the same constitutional protections in state court as in federal court.

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[1] Each party has consented to the filing of this brief. Pursuant to Rule 37.6, counsel for *amicus curiae* states that no party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission. Pursuant to Rule 37.2, counsel of record for all parties received timely notice of *amicus*'s intention to file this brief.

Introduction

Every year, thousands of defendants in Louisiana and Oregon face the prospect of imprisonment—including for life—as a result of a conviction by a jury whose verdict is not unanimous. In many instances, these defendants are convicted and imprisoned even though one or more jurors had a reasonable doubt about their guilt. Because this practice is common and its implications for the fair administration of justice are profound, the Court should review this case and revisit its decision in *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), in which the Court held that the Sixth Amendment does not entitle criminal defendants to a unanimous jury verdict in state court.

First, the decision in *Apodaca* continues to affect substantial numbers of cases. In Louisiana and Oregon, divided convictions occur with surprising frequency, including in many cases in which the defendant faces decades (or more) in prison as a result. The prospect of a divided verdict also affects virtually all plea negotiations in these two states, as defendants know that if they exercise their right to a trial, they could be convicted even if the state cannot convince the full jury of their guilt. Even outside Louisiana and Oregon, moreover, *Apodaca* has prevented courts from redressing faulty instructions and irregular deliberations that produced non-unanimous convictions.

Second, the lower threshold for conviction has resulted in a greater risk of error and unfairness. Divided verdicts have followed abbreviated delibera-

tions, even in the most serious cases. And they have amplified the risk of convictions based on insufficient evidence or tainted by inadmissible testimony or racially discriminatory peremptory strikes. This case highlights these concerns; because the verdict was not supported by any physical evidence, and the credibility of the alleged victim was questionable at best, this case presents an excellent vehicle for the Court to revisit *Apodaca*.

"The primary purpose of the jury in our legal system is to stand between the accused and the powers of the State." *Lewis* v. *United States*, 518 U.S. 322, 335 (1996) (Kennedy, J., concurring). Because the continued use of non-unanimous verdicts weakens this critical safeguard, the Court should grant the petition for certiorari and extend the full protections of the Sixth Amendment to defendants in all states.

Reasons for Granting the Petition

I. Non-Unanimous Verdicts Significantly Undermine The Administration Of Criminal Justice.

Although only Louisiana and Oregon currently permit non-unanimous verdicts in felony criminal cases, the practice continues to have a significant effect, both in those two states and elsewhere. Convictions by non-unanimous juries in Louisiana and Oregon are common and recurring, and defendants in other states have been denied relief from errors that have produced or may have produced non-unanimous verdicts.

First, since the Court last declined to consider whether a non-unanimous conviction violates a defendant's Sixth Amendment rights, in *Bowen* v. *Oregon*, 130 S. Ct. 52 (2009), at least two dozen defendants have been convicted by non-unanimous juries; more than eighty such convictions have occurred over the past five years.[2]

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[2] In the last two years alone, defendants were convicted by non-unanimous verdicts in *State* v. *Lawrence*, __ So. 3d __, 2010 WL 3385302, at *1 (La. Ct. App. Aug. 25, 2010); *State* v. *Garner*, __ So. 3d __, 2010 WL 3239039, at *2 (La. Ct. App. Aug. 18, 2010); *State* v. *Blow* 46 So. 3d 735, 751 (La. Ct. App. 2010); *State* v. *White*, 44 So. 3d 309, 313–14 (La. Ct. App. 2010); *State* v. *Moody*, 38 So. 3d 451, 455 (La. Ct. App. 2010); *State* v. *Every*, 35 So. 3d 410, 420 (La. Ct. App. 2010); *State* v. *Lomax*, 35 So. 3d 396, 403 (La. Ct. App. 2010); *State* v. *Sumrall*, 34 So. 3d 977, 990–91 (La. Ct. App. 2010); *State* v. *Samuels*, No. 2010 KA 0821, 2010 WL 4272863, at *6–7 (La. Ct. App. Oct. 29, 2010); *State* v. *Blanchard*, No. 2010 KA 0014, 2010 WL 2696998, at *8 (La. Ct. App. July 8, 2010); *State* v. *Jones*, No. 2009 KA 2261, 2010 WL 1838309, at *2–3 (La. Ct. App. May 7, 2010); *State* v. *Jones*, 29 So. 3d 533, 540–41 (La. Ct. App. 2009); *State* v. *Taylor*, 21 So. 3d 421, 425–26 (La. Ct. App. 2009); *State* v. *Smith*, 20 So. 3d 501, 505–08 (La. Ct. App. 2009); *State* v. *Raymond*, 13 So. 3d 577, 592–93 (La. Ct. App. 2009); *State* v. *Tillman*, 7 So. 3d 65, 77–78 (La. Ct. App. 2009); *State* v. *Martin*, No. 2009 KA 1368, 2009 WL 4981320, at *1 (La. Ct. App. Dec. 23, 2009); *State* v. *Cordova-Contreras*, 2010 WL 4867534, at *1 (Or. Ct. App. Dec. 1, 2010); *State* v. *Fish*, __ P.3d __, 2010 WL 4746157, at *1 (Or. Ct. App. Nov. 24, 2010); *State* v. *Hartman*, __ P.3d. __, 2010 WL 4629459, at *1 n.1 (Or. Ct. App. Nov. 17, 2010); *State* v. *Cole*, 242 P.3d 734, 735 (Or. Ct. App. 2010); *State* v. *Sanchez*, 242 P.3d 692, 693 (Or. Ct. App. 2010); *State* v. *Bainbridge*, 241 P.3d. 1186, 1187 (Or. Ct. App. 2010); *Oregon* v. *Claborn*, 240 P.3d 66, 66–67 (Or. Ct. App. 2010); *State* v. *Banks*, 234 P.3d 1084, 1085 (Or. Ct. App. 2010); *State* v. *Eilers*, 232 P.3d 997, 997 (Or. Ct. App. 2010); *State* v. *Ivory*, 220 P.3d 56, 56

Moreover, these figures almost certainly understate the actual number of convictions by non-unanimous juries, because they do not account for cases in which jurors were not polled or those in which verdicts were not appealed and reported in decisions by appellate courts. Oregon arrests over 150,000 individuals each year (excluding those arrested in traffic offenses), *see* Statewide Statistics Relating to Criminal Offenses and Arrests for 2007 1-4, http://www.oregon.gov/OSP/CJIS/docs/2007/SECTION_1_STATEWIDE_SUMMARY_2007.pdf, and a study performed by the Oregon Office of Public Defense Services estimated that up to two-thirds of Oregon criminal cases involve a non-unanimous verdict on at least one count, *see* Oregon Office of Public Defense Services, *On the Frequency of Non-Unanimous Felony Verdicts in Oregon: A Preliminary Report to the Oregon Public Database Services Commission* 4 (May 21, 2009), http://www.ojd.state.or.us/osca/opds/Reports/documents/PDSCReportNonUnanJuries.pdf. Even if the verdict were unanimous in every case in which the jury was not polled, "non-unanimity would still be present in over 40% of all felony jury verdicts." *Id.* at 5.

Likewise, in Louisiana, there are over 200,000 crimes per year. Louisiana Uniform Crime Reporting Program, *Crime in Louisiana 2007* 20 (May 1, 2009),

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(Or. Ct. App. 2009); *State* v. *Navarrete-Pech*, 213 P.3d 1262, 1265 (Or. Ct. App. 2009); *State* v. *Lavadores*, 214 P.3d 86, 88 n.1 (Or. Ct. App. 2009); *State* v. *Camacho-Alvarez*, 200 P.3d 613, 614 (Or. Ct. App. 2009).

http://lcle.louisiana.gov/programs/uploads/crime_in_la_2007.pdf. If even a small percentage of these crimes lead to trials that produce non-unanimous verdicts, the number of such verdicts could reach into the thousands.[3]

Second, defendants found guilty by non-unanimous juries often receive harsh sentences—including life in prison. In considering Louisiana's rules governing jury unanimity, this Court observed that the state legislature "obviously intended to vary the difficulty of proving guilt with the gravity of the offense and the severity of the punishment." *Johnson* v. *Louisiana*, 406 U.S. 356, 365 (1972). But Louisiana now permits non-unanimous juries to convict defendants of second-degree murder, which carries a mandatory sentence of life imprisonment without the possibility of parole. *See* La. Rev. Stat. § 14:30.1(B).

Indeed, at least four Louisiana defendants received mandatory life sentences in the past five years when at least one juror voted to acquit. *See State* v. *Sumrall*, 34 So. 3d 977, 978, 980–81, 987 (La. Ct. App. 2010); *State* v. *Williams*, 950 So. 2d 126, 128–29

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[3] Federal courts reviewing habeas petitions brought by defendants from Louisiana and Oregon must routinely affirm non-unanimous convictions as well. *See, e.g.*, *Wells* v. *Howton*, No. 09-35963, 2010 WL 4487128, at *1 (9th Cir. Nov. 9, 2010); *Remme* v. *Hill*, 370 Fed. App'x 855, 856 (9th Cir. 2010); *Divers* v. *Warden, La. St. Penitentiary*, No. 07-2030, 2010 WL 4291330, at *1, *13 (W.D. La. Aug. 17, 2010); *Reedy* v. *Hill*, Civ. No. 04-545, 2008 WL 441690, at *6 (D. Or. Feb. 13, 2008), *aff'd*, 383 Fed. App'x 689 (9th Cir. 2010); *Watson* v. *Cain*, No. 06-613, 2007 WL 1455978, at *8 (E.D. La. May 17, 2007).

(La. Ct. App. 2007); *State* v. *Chandler*, 939 So. 2d 574, 576 (La. Ct. App. 2006); *State* v. *Davis*, 935 So. 2d 763, 765-66 (La. Ct. App. 2006). Two others received life sentences at trial but had their convictions reversed on other grounds on appeal. *State* v. *Brown*, 943 So. 2d 614, 615 (La. Ct. App. 2006); *State* v. *Christian*, 924 So. 2d 266, 266 (La. Ct. App. 2006). Even defendants convicted of lesser crimes by non-unanimous juries have been sentenced to decades-long imprisonment. *See, e.g.*, *State* v. *Moody*, 38 So. 3d 451, 453, 455 (La. Ct. App. 2010) (60 years for aggravated burglary); *State* v. *Every*, 35 So. 3d 410, 413–14, 420 n.10 (La. Ct. App. 2010) (60 years for drug offenses).

Third, the specific regime governing non-unanimous verdicts in Louisiana encourages prosecutors to manipulate charging decisions to ease their burden of obtaining a conviction in murder cases. A conviction for first-degree murder requires a unanimous verdict. *See* La. Rev. Stat. § 14:30(C); La. C. Cr. P. Art. 782(A). A conviction for second-degree murder does not. Although a defendant convicted of second-degree murder is ineligible for the death penalty, the defendant still faces a mandatory sentence of life imprisonment without the possibility of parole. In *State* v. *Raymond*, 13 So. 3d 577 (La. Ct. App. 2009), the prosecution amended a first-degree murder charge to one for second-degree murder on the day of trial—nearly four years after the defendant pleaded not guilty to the original charge. *Id.* at 580–81. The defendant was ultimately convicted by a vote of 11–1. *Id.* at 592. Likewise, in *State* v. *Williams*, 901 So. 2d 1171 (La. Ct. App. 2005), the state amended the

charge from first-degree murder to second-degree murder the day before trial—two years after the defendant's original not-guilty plea. *Id.* at 1172. The defendant was ultimately convicted by a vote of 10–2. *See id.* at 1177.

Fourth, *Apodaca* affects even cases that do not actually result in divided verdicts. As in other contexts, a rule about jury decisions "affect[s] every case": "It would affect decisions about whether to go to trial. It would affect the content of plea negotiations." *United States* v. *Booker*, 543 U.S. 220, 248 (2005). The ability to obtain a conviction by a non-unanimous verdict gives the prosecution additional leverage that unfairly harms all defendants in Louisiana and Oregon.

Finally, *Apodaca* has compelled federal courts to reject habeas claims that challenge potentially non-unanimous verdicts from states other than Louisiana and Oregon. *See, e.g.*, *Moore* v. *Clark*, No. 2:07-cv-423, 2010 WL 3125979, at *7 (E.D. Cal. Aug. 6, 2010) (denying relief even though trial court's unanimity instruction was "limited inexplicably" to only certain counts).[4] For instance, a federal court reviewing a

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[4] *See also, e.g.*, *Barreto* v. *Martel*, No. C 08-2008, 2010 WL 546586, at *12–13 (N.D. Cal. Feb. 10, 2010) ("Since a criminal defendant in a state prosecution is not entitled to a unanimous verdict at all under the federal Constitution, the state court's determination that an instruction on jury unanimity was unnecessary under state law in the circumstances of the case cannot possibly be considered a violation of federal due process."); *Sullivan* v. *Kernan*, No. Civ. S-02-1148, 2009 WL 2985494, at *6 (E.D. Cal. Sept. 16, 2009) (relying on *Apodaca* to reject claim that jury instruction violated right to unanimous jury

criminal conviction and 35-year sentence from Texas state court was forced to deny habeas relief even though a juror averred that she had been absent during the final vote. *See Washington* v. *Quarterman*, No. 3:05-CV-1932-N ECF, 2007 WL 869015, at *1–2 (N.D. Tex. March 22, 2007). Citing *Apodaca*, the court explained that "neither the United States Constitution nor any law of the United States mandate a unanimous verdict in a State criminal action." *Id.* at *13.

In sum, the decision in *Apodaca* has permitted scores of defendants in both Louisiana and Oregon to be convicted by non-unanimous juries and imprisoned for decades or even life. It has also affected defendants in other states, who lack recourse to habeas corpus even if irregularities taint jury deliberations or otherwise produce divided verdicts. These troubling and recurring consequences warrant the Court's review.

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verdict); *Acosta* v. *N.H. State Prison*, No. 07-cv-181-PB, 2007 WL 2790734, at *4 (D.N.H. Sept. 25, 2007) (rejecting argument challenging non-unanimous verdict on one count because it "fails to identify any federal claim"); *cf. Berry* v. *Grigas*, 171 Fed. App'x 188, 189–90 (9th Cir. 2006) (*Apodaca* foreclosed claim of petitioner, convicted by a vote of 11–1 in Nevada state court, that counsel was ineffective for advising him to accept a non-unanimous verdict in exchange for the prosecutor's promise to forego the death penalty); *Lanza* v. *Sec'y, Dep't of Corr.*, No. 8:06-cv-380-T-30MSS, 2008 WL 3889628, at *7 (M.D. Fla. Aug. 20, 2008) (same).

II. Rules Permitting Non-Unanimous Verdicts Have Increased the Risk of Error and Unfairness.

Recent experience in Oregon and Louisiana also confirms that non-unanimous juries jeopardize the quality and accuracy of jury decisionmaking in criminal cases.

A. Abbreviated Deliberations, Even For Serious Charges.

As detailed in an amicus brief submitted to the Court in *Lee* v. *Louisiana*, non-unanimous verdicts produce deliberations that are shorter, less thorough, and less careful. *See* Brief for the Houston Institute of Race & Justice as Amicus Curiae Supporting Petitioner, *Lee v. Louisiana*, 129 S. Ct. 130 (2008) (No. 07-1523), 2008 WL 2682524, at *6–10. Experience in Louisiana and Oregon has highlighted this problem, which occurs even where the evidence is complex and the consequences are severe.

In *State* v. *Sumrall*, for instance, the Louisiana defendant appealed his conviction for second degree murder in a case that turned on a credibility battle between the defendant and the chief prosecution witness. *See* 34 So. 3d at 988. Although the trial featured "lengthy and detailed testimony from both of them," *id.*, the jury reported itself deadlocked after just a little over three hours, *id.* at 992. The jury then reached a 10–2 verdict after the trial judge assured the jury that it was close to "the ten you need to reach a verdict" and instructed it to continue. *Id.* *See also, e.g.*, *State* v. *Blow*, 46 So. 3d 735, 751 (La.

Ct. App. 2010) (upholding 10–2 conviction for murder solicitation resulting from less than two hours of deliberation); *State* v. *Dabney*, 908 So. 2d 60, 63–65, 68 (La. Ct. App. 2005) (reversing 10–2 armed-robbery conviction resulting from less than four hours of deliberation).

Although published decisions in Oregon rarely detail the amount of time spent reaching divided verdicts, deliberations in that state appear to be abridged as well. Members of the Oregon defense bar, in fact, have observed that if "*Twelve Angry Men* had been filmed here, it would have been a much shorter film." Brief for The Federal Public Defender for the District Court of Oregon as Amicus Curiae Supporting Petitioner, *Bowen v. Oregon*, 130 S. Ct. 52 (2009) (No. 08-1117), 2009 WL 1526929, at *17.

In some cases, the fact that unanimity is not required has led to confusion regarding whether ten jurors have even reached a verdict, further demonstrating the inadequacy of deliberations. In *State* v. *Jones*, 2009 KA 2261, 2010 WL 1838309 (La. Ct. App. May 7, 2010), for example, the trial court recorded convictions on both counts as resulting from 10–2 votes, but review of the record indicated that only nine jurors had voted to convict on one count, as one juror had "changed both of her 'guilty' votes to 'not guilty' votes" during the second poll. *Id.* at *2.

An especially bizarre example from Oregon is *Fischer* v. *Hill*, No. CV. 06-1625-MA, 2009 WL 87603 (D. Or. Jan. 12, 2009). The defendant was indicted for attempted murder and three counts of assault. Initially, the jury reported that it had found the de-

fendant not guilty on Count 1, attempted murder, and Count 2, first degree assault, and guilty on Counts 3 and 4, second-degree assault. *See id.* at *1. Yet when the jury was polled, the respective votes were 11–1 to acquit on Count 1, only 7–5 to acquit on Count 2, 11–1 to convict on Count 3, and 11–1 to convict on Count 4. *See id.* In a subsequent poll, to clarify whether the jury had enough votes to acquit on Count 2, the respective votes were 10–2 to acquit on Count 1, 6–6 on Count 2, 8–4 to convict on Count 3, and 11–1 to convict on Count 4. *See id.* at *2. The jury's position changed further after additional deliberations: it returned the next day with 11-1 guilty verdicts on both Counts 2 and 3. *See id.* at *3. Such confusion and shifting positions would be unlikely if Oregon required unanimity.

B. Magnified Risk of Prejudicial Error.

When the jury need not be unanimous, the risks and costs of error are magnified. Defendants that might have faced a hung jury notwithstanding trial errors instead face a greater risk of conviction.

Verdicts based on insufficient evidence. Non-unanimous verdicts increase the risk of convictions based on insufficient evidence. *See, e.g.*, *State* v. *Johnson*, 948 So. 2d 1229, 1238 (La. Ct. App. 2007) (non-unanimous jury "abused its vast discretion in finding that defendant committed second degree murder"); *State* v. *Houston*, 925 So. 2d 690, 698 (La. Ct. App. 2006) (non-unanimous conviction for child molestation based on insufficient evidence). Although even unanimous juries sometimes convict based on insufficient evidence, the possibility of a non-

unanimous verdict ensures that dissenting voices will receive less consideration and weaknesses in the state's proof less scrutiny.

Even where the evidence may have been sufficient as a matter of law, a non-unanimous verdict resulting from sharply conflicting evidence raises serious concerns about the strength of the state's case. In *State* v. *Brantley*, 975 So. 2d 849 (La. Ct. App. 2008), the defendant was convicted of attempted unlawful possession of a firearm, by a 10–2 vote. The appellate court acknowledged the lack of any eyewitnesses, forensic evidence, or anything beyond mere circumstance connecting the defendant with the gun, and noted several facts linking the firearm to other parties. *See id.* at 852. Yet the majority upheld the verdict, *id.*, notwithstanding the dissent's warning that the verdict should be overturned because the "state's circumstantial evidence gives rise to competing inferences" and "[t]he state presented no evidence that defendant exercised actual possession of the gun." *Id.* at 853 (Caraway, J., dissenting). Other non-unanimous convictions have been upheld even though they hung from similarly slender threads.[5]

This case too presents a vivid example of a non-unanimous verdict based on slim evidence, and thus presents an excellent vehicle for addressing the con-

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[5] *See, e.g.*, *State* v. *Mack*, 981 So. 2d 185, 186, 190 (La. Ct. App. 2008) (affirming 11–1 conviction for second degree murder and mandatory life sentence even though critical eyewitness "might have been less than forthcoming"); *State* v. *Gullette*, 975 So. 2d 753, 760 (La. Ct. App. 2008) (affirming 11–1 aggravated rape conviction in a "classic case of 'he said, she said'").

stitutional issues surrounding non-unanimous juries. Here, the alleged victim lied to police about a number of details on the evening in question and was under the influence of cocaine at the time of the events; his testimony, moreover, was not corroborated by any physical evidence. Pet. at 3. The 10–2 verdict in this case, resulting from a credibility battle and featuring an alleged victim of dubious character, highlights the concerns that make jury unanimity so important.

Introduction of inadmissible and prejudicial evidence. When the jury verdict need not be unanimous, it is also harder to undo the taint from the introduction of evidence that is inadmissible and unduly prejudicial. *See, e.g.*, *State* v. *Fish*, __ P.3d __, 2010 WL 4746157, at *6 (Or. Ct. App. Nov. 24, 2010) (reversing non-unanimous conviction for second degree murder where trial court admitted prejudicial statement with little probative value that "easily could have been misused by the jury"). Oregon courts, for instance, have reversed a series of child sex abuse convictions unsupported by physical evidence and that appeared to rest primarily upon an expert witness's impermissible vouching for the child's credibility.[6] As the appellate court recognized in *Simpson* v. *Coursey*, 197 P.3d 68 (Or. Ct. App. 2008), the non-unanimous vote made "the possibility that [im-

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[6] *See, e.g.*, *Bainbridge*, 241 P.3d 1186 (reversing 11–1 conviction where expert vouched for victim's honesty); *Cordova-Contreras*, 2010 WL 4867534 (reversing non-unanimous verdict after trial court permitted doctor to vouch for child's credibility in sexual abuse case).

proper] testimony vouching for the credibility of the victim affected the verdict . . . very real." *Id.* at 73. Although appellate review will sometimes correct these errors, there are inevitably cases in which such errors go uncorrected—making it important to adopt rules that prevent them in the first place.

Racially Motivated Peremptory Challenges. The permissibility of non-unanimous convictions also increases the risk of undetected *Batson* violations. When prosecutors need not convince the full jury, they may exercise race-based peremptory challenges more selectively, counting on the supermajority to render irrelevant the views of jurors who are racial minorities. *See, e.g.*, *State* v. *Elie*, 936 So. 2d 791, 794, 797–801 (La. 2006) (affirming an 11–1 manslaughter conviction after the state exercised peremptory challenges against eight African-American jurors, leaving a jury with only two African-Americans, one of whom was an alternate).

With shorter deliberations and less scrutiny of the state's evidence and tactics, the margin for error is slim when the state need not convince the entire jury of the defendant's guilt. Because cases presenting these concerns are numerous and recurring, the constitutionality of divided criminal verdicts and the correctness of *Apodoca* warrant the Court's reconsideration.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jeffrey T. Green
NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE
LAWYERS
1501 K Street, NW
Washington, DC 20005-1401
(202) 736-8291

Jonathan L. Marcus
Counsel of Record
Elizabeth-Ann D. Katz
Matthew S. Krauss
COVINGTON & BURLING LLP
1201 Pennsylvania Ave, NW
Washington, D.C. 20004
(202) 662-6000
jmarcus@cov.com

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