No.

In The
Supreme Court of the United States

ORTIZ T. JACKSON,
Petitioner,

v.

LOUISIANA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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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 based on a non-unanimous jury verdict.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ortiz T. Jackson respectfully petitions for a writ of certiorari to the Louisiana Fourth Circuit Court of Appeal in *State v. Jackson*, No. 2012-KA-0090.

OPINIONS BELOW

The judgment of the Louisiana Fourth Circuit Court of Appeal is reported at 115 So.3d 1155 (La. App. 2013), and is reprinted at Pet. App. 1a. The Louisiana Supreme Court's order denying review of that decision is unpublished and is reprinted at Pet. App. 29a.

JURISDICTIONAL STATEMENT

The judgment and opinion of the Louisiana Fourth Circuit Court of Appeal was entered on April 24, 2013. The Louisiana Supreme Court denied review of this decision on December 2, 2013. Pet. App. 29a. 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 . . . ." U.S. CONST. amend. VI.

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." U.S. CONST. amend. XIV.

Section 17(A) of Article I of the Louisiana Constitution provides, in pertinent part: "A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict."

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 a question that is central to the Sixth Amendment's guarantee of the right to a jury trial: whether an individual may be convicted of a crime—and, in Petitioner Ortiz Jackson's case, sentenced to serve life in prison at hard labor without the benefit of parole, probation, or suspension of sentence—even if the jury in his case cannot reach a unanimous verdict as to his guilt. Each year, criminal defendants are convicted by non-unanimous juries in Louisiana and Oregon,

even in felony cases that carry a potential sentence of life in prison. These violations of the constitutionally protected jury right will continue unless this Court steps in, because the courts in those states have routinely found such convictions consistent with state law and permissible under the Sixth Amendment based on this Court's fractured 4-1-4 decision holding such convictions constitutional under the Sixth and Fourteenth Amendments. *Apodaca v. Oregon*, 406 U.S. 404 (1972). The *Apodaca* ruling is not only inconsistent with the history and purposes of the Sixth and Fourteenth Amendments, but also with this Court's more recent Sixth and Fourteenth Amendment case law. The Court should grant *certiorari* to restore coherence to its Sixth and Fourteenth Amendment jurisprudence and put an end to these unconstitutional convictions.

1. One evening in July 2008, Mark Westbrook and his co-worker, Roderick McKinney, got into an altercation at a bar, after McKinney cut in on Westbrook's dance partner. They took their argument outside, where they were joined by a number of friends, including Sam Mack. Westbrook and McKinney were in the process of resolving their disagreement when Mack intervened. Westbrook resented Mack's interference, and the two of them began to argue, until Mack warned Westbrook that he did not know who he was dealing with and walked away. Later that evening, as Westbrook, McKinney, and their friends were preparing to go home, McKinney went up to the window of Westbrook's car to make sure everything was fine. Westbrook got out of the car

and hugged McKinney and then hugged another friend, Terakeitha Calloway. While Westbrook and Calloway were hugging, a man approached from behind and fired two shots into Westbrook, one of which was fatal. Calloway was also injured in the shooting, but survived. No DNA or forensic evidence was found at the scene.

In November 2008, Petitioner Jackson was jointly indicted with Sam Mack for the murder of Mark Westbrook and the aggravated battery of Terakeitha Calloway. Mr. Jackson, a friend of Mack's, told the authorities that he had heard Mack had killed Westbrook; Jackson denied any personal involvement in the shooting and stated that he was not present when the murder occurred. The cases were severed prior to trial, and the State tried Mr. Jackson solely on the murder charge, producing witness testimony that Jackson fired a gun at Westbrook. Jackson filed a motion to require a unanimous verdict, which the trial court denied. The jury then found Mr. Jackson guilty of second degree murder by a 10-2 vote. Jackson renewed his objection to a non-unanimous verdict in his motion for a new trial. The court again rejected the argument, and Jackson was sentenced to serve life in prison at hard labor without the benefit of parole, probation, or suspension of sentence.

2. The Louisiana Court of Appeal affirmed Mr. Jackson's conviction. The court recognized that Jackson had made a "well-reasoned and compelling argument in support of his position that there are disparities inherent in non-unanimous juries that

should be remedied," but it considered itself "constrained by the most recent pronouncement of the Louisiana Supreme Court in *State v. Bertrand*, which upheld the constitutionality of Article 782." Pet. App. 10a (citation omitted); *see id.* at 11a (collecting cases in which the Court of Appeal "followed the Supreme Court's lead in *Bertrand*"). In *State v. Bertrand*, the Louisiana Supreme Court explained that it was constrained to uphold Louisiana's practice because of this Court's decision in *Apodaca*: "we are not presumptuous enough to suppose, upon mere speculation, that the United States Supreme Court's still valid determination that non-unanimous 12 person jury verdicts are constitutional may someday be overturned." *State v. Bertrand*, 6 So. 3d 738, 743 (La. 2009).

3. Mr. Jackson sought discretionary review in the Louisiana Supreme Court, arguing, among other things, that his conviction by a non-unanimous jury violated the Sixth and Fourteenth Amendments. The Louisiana Supreme Court denied review without comment. Pet. App. 29a.

REASONS FOR GRANTING THE WRIT

Every year defendants in Louisiana and Oregon are convicted of felonies and subjected to penalties as severe as life in prison without parole even though juries of their peers are unable to arrive at the unanimous conclusion that they are

guilty of the charged crime. *See infra* at 19-20.[1] This practice violates the Sixth Amendment's fundamental guarantee that "[i]n all prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. CONST. amend. VI. The Court has in recent years acknowledged that the "Sixth Amendment right to trial by jury requires a unanimous jury verdict," *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035 n.14 (2010); *see Blakely v. Washington*, 542 U.S. 296, 301 (2004) ("the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the *unanimous* suffrage of twelve of his equals and neighbors,'" (emphasis added) (quoting 4 William Blackstone, Commentaries on the Laws of England 343 (1769)), but has never expressly overruled *Apodaca v. Oregon*, 406 U.S. 404 (1972), a fractured and internally contradictory 40-year-old decision permitting non-unanimous jury verdicts.

Accordingly, despite this Court's recent cases making clear that the Sixth Amendment, consistent with a long common-law tradition, requires unanimous verdicts in criminal trials, the Louisiana and Oregon state courts have continued to uphold non-unanimous jury verdicts, concluding that they are powerless to prohibit the practice based on federal constitutional law because this Court blessed it in *Apodaca*. *See Bertrand*, 6 So. 3d at 743; *see also Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477,

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[1] Like Louisiana, Oregon allows a person to be convicted of a felony by a less than unanimous jury verdict. Or. Const. art. I, § 11; Or. Rev. Stat. § 136.450.

484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). Indeed, the state court reviewing Petitioner's case acknowledged his "well-reasoned and compelling argument" under the Sixth and Fourteenth Amendments, but concluded that it was "constrained" by the application of *Apodaca* to reject the constitutional claim.

This Court should step in now and grant review. *Apodaca* was deeply flawed when it was decided, and has become completely anachronistic in light of more recent decisions of this Court, which have explicitly rejected every premise on which the Court's judgment in that case rested. Most significantly, the plurality in *Apodaca* rejected the relevance of common law history to understanding the meaning of the Sixth Amendment, and the controlling fifth vote concluded that the Sixth Amendment should not apply to the States in the same way that it applies to the federal government. Both propositions are unquestionably wrong in light of this Court's more recent decisions, and this Court should grant *certiorari* to bring the law on this issue in line with the Court's more recent Sixth and Fourteenth Amendment jurisprudence and put an end to these wrongful convictions.

This issue is exceptionally important because it is a recurring one that shows no signs of

abating, and it involves a fundamental liberty interest. As noted, individuals continue to be convicted by non-unanimous juries in Oregon and Louisiana every year. All of these individuals are being denied a right that the Framers viewed as fundamental. Indeed, the centrality of the jury to the Founders cannot be overstated, and jury unanimity was essential to their conception of the jury as a bulwark of liberty. In 1786, several years before the Constitution and the Sixth Amendment were adopted, John Adams reflected that "it is the *unanimity* of the jury that preserves the rights of mankind." 1 John Adams, A Defence of the Constitutions of Government of the United States of America 376 (1787) (emphasis added). From Blackstone to James Madison, unanimity was as much a part of the jury right as the right to a jury of one's neighbors and peers. And with good reason. Modern empirical research has confirmed the important role that jury unanimity plays in producing thorough jury deliberations in which all viewpoints are considered. As then-Judge Kennedy has explained, "[a] rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury. The requirement of jury unanimity thus has a precise effect on the fact-finding process, one which gives particular significance and conclusiveness to the jury's verdict. Both the defendant and society can place special confidence in a unanimous verdict." *United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978) (Kennedy).

Despite the importance of the jury right and the obvious conflict between *Apodaca* and this Court's current Sixth and Fourteenth Amendment jurisprudence, Jackson and other individuals who are prosecuted in Louisiana and Oregon continue to have their fundamental right to a jury trial—the "sacred bulwark" of liberty—violated based on a two-track version of Sixth Amendment rights in which only "a watered-down, subjective version of the individual guarantees of the Bill of Rights" is applied to the States, *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964).

This Court should grant review in this case to right this wrong and harmonize its Sixth and Fourteenth Amendment doctrines as they relate to the right to trial by jury.

I. This Court's 1972 Holding That The Constitution Permits Non-Unanimous Verdicts In State Criminal Trials—And State Court Rulings, Including The Decision Below, That Rely On This Decision—Conflict With This Court's More Recent Cases.

In 1972, in a deeply fractured 4-1-4 opinion, this Court held that an individual may be convicted of a crime in state court even if the jury in his case cannot reach a unanimous verdict that he is guilty. *Apodaca v. Oregon*, 406 U.S. 404 (1972). That decision is in plain and irreconcilable conflict with more recent decisions of this Court making clear that "the Sixth Amendment right to trial by jury requires a unanimous jury verdict," *McDonald*, 130

S. Ct. at 3035 n.14, and that this right applies to the States in the same way it applies to the federal government, *id.* at 3035. Intervention by this Court is the only way to resolve this conflict.

1. In *Apodaca*, three defendants who had been convicted by non-unanimous juries in Oregon courts challenged their convictions on the ground that "conviction of crime by a less-than-unanimous jury violates the right to trial by jury in criminal cases specified by the Sixth Amendment and made applicable to the States by the Fourteenth." 406 U.S. at 406. Although five justices rejected the petitioners' argument, there was no single rationale for the Court's decision.

A four-justice plurality concluded that the Sixth Amendment does not require unanimity to convict. Although these justices recognized 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," they rejected what they called the "'easy assumption . . . that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution.'" *Id.* at 407, 408-09. According to the plurality, the meaning of the Sixth Amendment should turn not on practices as they existed at common law, but rather on "the function served by the jury in contemporary society." *Id.* at 410. Engaging in that functional inquiry, the plurality concluded that unanimity was not required because it "perceive[d] 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" in terms

of the jury's function of imposing the "commonsense judgment of a group of laymen." *Id.* at 410-11. The plurality also rejected the argument that jury unanimity was necessary to "give effect to the reasonable-doubt standard," concluding that "the Sixth Amendment does not require proof beyond a reasonable doubt at all." *Id.* at 412.

Justice Powell supplied the fifth vote to create a judgment of the Court, but he disagreed with the plurality's conclusion that the Sixth Amendment does not "require[] a unanimous jury verdict to convict in a federal criminal trial." *Johnson v. Louisiana*, 406 U.S. 366, 371, 369 (1972) (Powell, J., concurring). To the contrary, according to Justice Powell, the Framers "in amending the Constitution to guarantee the right to jury trial, . . . desired to preserve the jury safeguard as it was known to them at common law," and "[a]t the time the Bill of Rights was adopted, unanimity had long been established as one of the attributes of a jury conviction at common law." *Id.* at 371; *see id.* ("It therefore seems to me, in accord both with history and precedent, that the Sixth Amendment requires a unanimous jury verdict to convict in a federal criminal trial."). But the petitioners' argument nonetheless failed because, in Justice Powell's view, "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.

The dissenters agreed in part with the plurality and in part with Justice Powell. They agreed with the plurality that the Sixth

Amendment should apply in the same manner to the States as to the federal government because, as they explained, the Court "squarely held 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" in *Duncan v. Louisiana*, 391 U.S. 145 (1968). 406 U.S. at 414 (Stewart, J., dissenting). Thus, according to the dissent, "the only relevant question here is whether the Sixth Amendment's guarantee of trial by jury embraces a guarantee that the verdict of the jury must be unanimous." *Id.* Here the dissent agreed with Justice Powell, noting that "[u]ntil today, it has been universally understood that a unanimous verdict is an essential element of a Sixth Amendment jury trial." *Id.*; *see id.* (agreeing with "that part of [Justice Powell's] concurring opinion that reviews almost a century of Sixth Amendment adjudication").

Thus, even though *five* justices agreed that the Sixth Amendment requires unanimity in the context of federal convictions, and *eight* justices agreed that the Sixth Amendment should apply in state court as it does in federal court, the Court upheld the defendants' non-unanimous convictions. The Court's judgment in *Apodaca* rested on three distinct premises: (1) the proper inquiry for determining the protections of the Sixth Amendment is functional, rather than historical, (2) the Sixth Amendment does not require proof beyond a reasonable doubt, and (3) the Sixth Amendment does not apply to the States in the same way as it does at the federal level. Recent

decisions of this Court have rejected each of these premises.

2. In *Apodaca*, the plurality expressly rejected the relevance of the common law to understanding the meaning of the Sixth Amendment and instead considered the "function served by the jury in contemporary society." 406 U.S. at 410. But in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court recognized that "the historical foundation for our recognition of [the rights in the Sixth and Fourteenth Amendments] extends down centuries into the common law," *id.* at 477, and it is thus appropriate to look to the common law as it existed at the Framing to determine how the Sixth Amendment's guarantee should apply in the context of sentencing, *see id.* at 478-83.

As this Court explained in *Giles v. California*, 554 U.S. 353 (2008), "[i]t is not the role of courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the court's views) those underlying values. The Sixth Amendment seeks fairness indeed—but seeks it through very specific means . . . that were the trial rights of Englishmen." *Id.* at 375. Thus, in holding that sentencing factors that increase a defendant's sentence must be proven to a jury beyond a reasonable doubt, this Court emphasized that what matters is not "whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice," but rather "the Framers' paradigm for criminal justice." *Blakely*, 542 U.S. at 313; *see Crawford v. Washington*, 541

U.S. 36 (2004) (looking to history to determine the meaning of the Confrontation Clause).

In light of these more recent decisions, the *Apodaca* plurality's rejection of the relevant common law history was plainly wrong and cannot stand. Once the relevant history is considered, it is plain that the Sixth Amendment requires a unanimous jury verdict. Indeed, to the Framers, jury unanimity was implicit in the fundamental right to trial by jury in criminal cases, *see infra* at 21-25, and this Court has repeatedly recognized as much in recent cases.

In *Blakely*, this Court explained 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 neighbors.'" *Blakely*, 542 U.S. at 301 (emphasis added) (quoting 4 William Blackstone, Commentaries on the Laws of England 343 (1769)). This Court reaffirmed this principle in *Apprendi*, explaining that "the 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* . . . should afterwards be confirmed by the *unanimous* suffrage of twelve of [the defendant's] equals and neighbours' . . . ." *Apprendi*, 530 U.S. at 477; *see id.* at 498 (Scalia, J.,

concurring) (charges must be determined "*beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens*"); *see also United States v. Booker*, 543 U.S. 220, 238-39 (2005) (same). Most recently, in *McDonald*, this Court expressly stated that "the Sixth Amendment right to trial by jury requires a unanimous jury verdict." 130 S. Ct. at 3035 n.14. *Apodaca* is in plain and irreconcilable conflict with both the methodology and content of these recent decisions.

3. In *Apodaca*, the plurality also rejected the petitioners' argument that jury unanimity is necessary to safeguard the requirement of proof beyond a reasonable doubt, concluding that the latter is not required by the Sixth Amendment at all. 406 U.S. at 412. This Court has also rejected that conclusion. In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), this Court described it as "self-evident" that "the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated." *Id.* at 278. Thus, "[i]t 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 . . . whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." *Id.*; *see Cunningham v. California*, 549 U.S. 270, 281 (2007) ("This 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."). Again, *Apodaca* cannot be reconciled with these more recent decisions.

4. As noted earlier, Justice Powell's concurring vote supplied the critical fifth vote in *Apodaca*, and Justice Powell's rationale—that the Sixth Amendment applies differently to the States than the federal government—is also in conflict with other decisions of this Court that both preceded and followed it. Indeed, even at the time *Apodaca* was decided, Justice Powell readily acknowledged that his view on incorporation conflicted with the Court's decision in *Duncan v. Louisiana*, which had just four years earlier fully incorporated the Sixth Amendment through the Fourteenth Amendment's Due Process Clause. *Johnson*, 406 U.S. at 375 (Powell, J., concurring). The incorporation analysis of *Duncan* has stood the test of time, as this Court has repeatedly recognized that the critical rights and liberties of the Bill of Rights must be protected against state infringement just as robustly as they are protected against federal encroachment. *See, e.g.*, *Malloy*, 378 U.S. at 10 (holding that the protections of the Bill of Rights "are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment"). And the Court has abandoned Justice Powell's "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*, 378 U.S. at 10-11, explicitly rejecting such an argument in *McDonald v. City of Chicago*, 130 S. Ct. at 3035.

In *McDonald*, the Court held that "[t]he relationship between the Bill of Rights' guarantees and the States must be governed by a single, neutral principle": "incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'" *Id.* at 3035, 3048 (internal quotation and citation omitted). As the Court explained, "it would be incongruous to apply different standards depending on whether the claim was asserted in a state or federal court." *Id.* at 3035 (internal quotation marks and citation omitted); *see id.* at 3046 (explicitly rejecting the City of Chicago's suggestion that the Court utilize the abandoned "two-track approach" to incorporation). Importantly, the majority also rejected the dissenting Justices' argument that "[t]he rights protected against state infringement by the Fourteenth Amendment's Due Process Clause need not be identical in shape or scope to the rights protected against Federal Government infringement by the various provisions of the Bill of Rights." *Id.* at 3048 (quoting Stevens, J., dissenting, 130 S. Ct. at 3093); *see id.* at 3054 n.5 (Scalia, J., concurring) (explaining that "the demise of watered-down incorporation means that we no longer subdivide Bill of Rights guarantees into their theoretical components, only some of which apply to the States"). In doing so, the Court acknowledged that *Apodaca* is the "one exception to this general rule," but it made clear that *Apodaca* was "*not* an endorsement of the two-track approach to incorporation." *Id.* at 3035 n.14 (emphasis

added). Rather, it was simply "the result of an unusual division among the Justices." *Id.*

The Court's modern Sixth Amendment cases reflect this approach to incorporation, uniformly applying the same rules in federal and state courts rather than considering whether it is appropriate to do so on a rule-by-rule basis. *See, e.g.*, *Apprendi*, 530 U.S. at 466; *Blakely*, 542 U.S. at 296; *Cunningham*, 549 U.S. at 270. Justice Powell's controlling approach in *Apodaca* thus should not be allowed to stand in light of these more recent decisions.

II. The Question Presented Is Extremely Important And Has Recurred With Great Frequency In Recent Years.

Although only two states permit non-unanimous jury verdicts, the number of individuals convicted by non-unanimous jury verdicts in those states is significant and shows no signs of abating. Thus, defendants in these two states are regularly being denied a right that the Founding generation viewed as fundamental, and that more recent empirical research has confirmed is essential to ensuring a meaningful jury right. Because courts in both Louisiana and Oregon routinely rely on *Apodaca* to uphold this practice, only intervention by this Court can end it.

A. Defendants in Louisiana and Oregon Are Regularly Convicted by Non-Unanimous Juries, and Only Intervention by this Court Can End the Practice.

Whether the Sixth Amendment requires jury unanimity in state convictions is an issue of great consequence because defendants in Louisiana and Oregon are regularly convicted by non-unanimous juries. In just 2012 and 2013 alone, the Louisiana appellate courts noted over 30 cases in which defendants were convicted by non-unanimous verdicts,[2] a figure that surely understates the

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[2] *State v. Duplantis*, 127 So. 3d 143 (La. Ct. App. 2013); *State v. Jackson*, 115 So. 3d 1155 (La. Ct. App. 2013); *State v. Free*, 127 So. 3d 956 (La. Ct. App. 2013); *State v. Thompson*, 111 So. 3d 580 (La. Ct. App. 2013); *State v. Davis*, 2013 La. App. LEXIS 2135 (La. Ct. App. 2013); *State v. Saltzman*, 2013 La. App. LEXIS 2136 (La. Ct. App. 2013); *State v. Miller*, 83 So. 3d 178 (La. Ct. App. 2011); *State v. Hankton*, 122 So. 3d 1028 (La. Ct. App. 2013); *State v. Santos-Castro*, 120 So. 3d 933 (La. Ct. App. 2013); *State v. Marshall*, 120 So. 3d 922 (La. Ct. App. 2013); *State v. Mack*, 2013 La. App. LEXIS 1265 (La. Ct. App. 2013); *State v. Marcelin*, 116 So. 3d 928 (La. Ct. App. 2013); *State v. Napoleon*, 119 So. 3d 238 (La. Ct. App. 2013); *State v. Ross*, 115 So. 3d 616 (La. Ct. App. 2013); *State v. Curtis*, 112 So. 3d 323 (La. Ct. App. 2013); *State v. Marshall*, 2013 La. App. LEXIS 355 (La. Ct. App. 2013); *State v. Galle*, 107 So. 3d 916 (La. Ct. App. 2013); *State v. Thomas*, 106 So. 3d 665 (La. Ct. App. 2012); *State v. Sanders*, 104 So. 3d 619 (La. Ct. App. 2012); *State v. Hugle*, 104 So. 3d 598 (La. Ct. App. 2012); *State v. Brooks*, 103 So. 3d 608, 614 (La. Ct. App. 2012); *State v. Bonds*, 101 So. 3d 531 (La. Ct. App. 2012); *State v. Barnes*, 100 So. 3d 926 (La. Ct. App. 2012); *State v. Williams*, 101 So. 3d 104 (La. Ct. App. 2012); *State v. Henry*, 103 So. 3d 424 (La. Ct. App. 2012); *State v. Smith*, 96 So. 3d

actual frequency of such verdicts because many appellate decisions do not note non-unanimous verdicts. In Oregon, too, a relatively recent study found that almost two-thirds of felony convictions involved at least one non-unanimous count. *See* Br. *Amici Curiae* of Jeffrey Abrahamson et al., *Bowen v. Oregon*, 2009 WL 1526927, at *7 (May 28, 2009). Moreover, even if far fewer individuals were convicted each year by non-unanimous verdicts, this issue would still be a significant one because of the fundamental importance of the jury right, not only to the defendants whose freedom is at stake, but to society as a whole. *See infra* at 23 (jury right is a right of the community, not just defendants).

Defendants in these States have repeatedly challenged this Court's judgment in *Apodaca*, but the courts in both States have made clear that they are waiting for this Court to act. In this very case, the Louisiana Court of Appeal noted that Petitioner's argument was "compelling," but concluded that it could not act because the Louisiana Supreme Court has held that it remains bound by *Apodaca*, *see* Pet. App. 10a; *see also State v. Bertrand*, 6 So. 3d at 741-43. Likewise, the Oregon intermediate appellate courts have repeatedly rejected challenges to that State's non-

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678 (La. Ct. App. 2012); *State v. Mitchell*, 97 So. 3d 494 (La. Ct. App. 2012); *State v. Wilkins*, 94 So. 3d 983 (La. Ct. App. 2012); *State v. Everett*, 96 So. 3d 605 (La. Ct. App. 2012); *State v. Crump*, 96 So. 3d 605 (La. Ct. App. 2012); *State v. Clarkson*, 86 So. 3d 804 (La. Ct. App. 2012); *State v. Thomas*, 90 So. 3d 9 (La. Ct. App. 2012); *State v. Ott*, 80 So. 3d 1280 (La. Ct. App. 2012).

unanimity rule on the basis of this Court's decision in *Apodaca*, *see, e.g.*, *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), and the Oregon Supreme Court consistently denies discretionary review of this issue.[3] Thus, only intervention by this Court can ensure full enforcement of the Sixth Amendment jury right, a right that the Founding generation viewed as fundamental.

B. The History of the Sixth Amendment Demonstrates that the Founding Generation Viewed Jury Unanimity as a Fundamental Right.

The centrality of the jury to the Founders cannot be overstated. Featured expressly in three of the first ten Amendments to the Constitution, the jury is "a paradigmatic image underlying the original Bill of Rights." Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 96-97 (1998); *see, e.g.*, U.S. CONST. amends. V, VI, VII. Sacrosanct to the Founders, the "jury summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence of

[3] Further, because the Oregon and Louisiana state constitutions both allow non-unanimous verdicts, *see* Or. const. art. I, § 11; La. const. art. I, § 17(A), the only possible basis for changing this practice is enforcement of the proper meaning of the Sixth Amendment's jury right guarantee.

the original Bill of Rights." Amar, The Bill of Rights, at 97.

The Founding generation's focus on the jury as a central feature of a system of ordered liberty was strongly rooted in English common law. As Sir William Blackstone emphasized, "the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law." 3 William Blackstone, Commentaries on the Laws of England 379 (1769) ("Blackstone's Commentaries"); *see* 4 Blackstone's Commentaries 343-44 (calling the jury a "sacred bulwark" of liberty). Blackstone's understanding was that trial by jury "is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the *unanimous consent* of twelve of his neighbours and equals." 3 *id.* at 379 (emphasis added). Expanding on this, Blackstone later explained that it was important that a trial by jury include "the *unanimous suffrage* of twelve of his equals and neighbours, indifferently chosen, and superior to all suspicion." 4 *id.* at 343 (emphasis added).

The Founders shared this idea that jury unanimity was implicit in the fundamental right to trial by jury in criminal cases. In 1786, several years prior to ratification of the Constitution and the Sixth Amendment, John Adams reflected that "it is the *unanimity* of the jury that preserves the rights of mankind." 1 Adams, *supra*, at 376 (emphasis added). Later, as the Sixth Amendment was being debated and ratified by the States, Justice James Wilson expressed in his 1790-91

Lectures on Law that "[t]o the conviction of a crime, the undoubting and the *unanimous* sentiment of the twelve jurors is of indispensable necessity." 2 James Wilson, Works of the Honourable James Wilson 350 (1804) (emphasis added). In 1803, St. George Tucker, author of the 1803 edition of *Blackstone's Commentaries*, explained his view that "the trial by jury" described in Blackstone's text was adopted in the United States, and secured by the Sixth Amendment, 5 St. George Tucker, Blackstone's Commentaries 348-49 n.2 (1803), later commenting that "without [the jurors'] *unanimous verdict*, or consent, no person can be condemned of any crime," 1 *id.* at App. 34 (emphasis added).

What is more, in the Founders' view, "[t]rials were not just about the rights of the defendant but also about the rights of the community. The people themselves had a right serve on the jury—to govern through the jury." Akhil Reed Amar, America's Constitution 237 (2005). In short, serving on juries, and having one's voice heard, was—and remains—a fundamental act of citizenship and suffrage. *Cf. Blakely*, 542 U.S. at 306 ("Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their ultimate control in the judiciary."). A requirement of jury unanimity also helped effectuate this aspect of the jury right by ensuring that the voices of all jurors were heard and considered.

State practice at the time the Sixth Amendment was adopted also supports the view that unanimity had become an essential element of

trial by jury for criminal trials in the United States. Even the *Apodaca* plurality conceded that "unanimity became the accepted rule during the 18th century, as Americans became more familiar with the details of English common law and adopted those details in their own colonial legal systems." 406 U.S. at 408 n.3.

In the nineteenth century, Justice Joseph Story embraced the unanimity requirement in his 1833 *Commentaries on the Constitution*. First, he explained that America's forebearers "brought this great privilege [of trial by jury] with them, as their birthright and inheritance, as a part of that admirable common law." 2 Joseph Story, Commentaries on the Constitution of the United States § 1779, at 559 (5th ed. 1891). He then went on to explain that "[a] trial by jury is generally understood to mean . . . , a trial by a jury of *twelve* men, impartially selected, who must *unanimously* concur in the guilt of the accused before a legal conviction can be had. Any law, therefore, dispensing with any of these requisites, may be considered unconstitutional." *Id.* at n.2 (emphasis in original).

The view that jury unanimity was an essential component of the right to trial by jury did not change between the ratification of the Sixth Amendment and the ratification of the Fourteenth Amendment. In 1868, Thomas Cooley stated in an influential treatise that the "common-law incidents to a jury trial" that were "preserved by the constitution," included the requirement that "[t]he jury must unanimously concur in the verdict."

Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union 319-20 (1868). Other prominent legal commentators of the time accepted this view as well. *See* 1 Joel Prentiss Bishop, Commentaries on the Law of Criminal Procedure 532 (1866) ("[I]n a case in which the constitution guarantees a jury trial," a statute allowing "a verdict upon anything short of the unanimous consent of the twelve jurors" is "void."); John Norton Pomeroy, An Introduction to Municipal Law 78 (1864) ("[T]he jury [must] be unanimous in rendering their verdict. . . . The principle once adopted has continued as an essential part of the jury trial."); Joel Tiffany, A Treatise on Government and Constitutional Law 367 (1867) ("And a trial by jury is understood to mean—generally—a trial by a jury of twelve men, impartially selected, and who must unanimously concur in the guilt of the accused before a legal conviction can be had.").

Thus, the Framers recognized what a plurality of the justices of the *Apodaca* Court did not—that a requirement of jury unanimity is critical to ensuring the full and fair jury deliberations that the Sixth Amendment requires. As the next section demonstrates, more recent empirical research has confirmed the Framers' intuitions and makes clear why it is so important that this Sixth Amendment right be fully enforced.

C. Empirical Research Confirms Why Unanimity Is an Essential Component of the Jury Right.

The *Apodaca* plurality rejected the defendants' argument that unanimity was required based, in large part, on the assumption that a unanimity requirement "does not materially contribute to the exercise" of a jury's "commonsense judgment." 406 U.S. at 410. According to the plurality, "[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. . . . 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).

In the forty years since *Apodaca* was decided, evidence has shown that the plurality's assumptions were incorrect. Indeed, "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.americanbar.org/content/dam/aba/migrated/jury/pdf/final_commentary_july_1205.authcheckdam.pdf (last accessed March 1, 2014). Moreover, "[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." *Id.* at 24. As Professors Shari

Seidman Diamond, Mary R. Rose, and Beth Murphy explain, "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." 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); *see id.* (noting that "[t]he 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").[4] Indeed, jurors who do not agree with the majority view contribute more vigorously to jury deliberations when operating under a unanimous verdict scheme. *See* Principles for Juries and Jury Trials, *supra*, at 24; Reid Hastie et al., Inside the Jury 108-12 (1983); *see also* 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"). As a result, verdicts-by-majority-rule undermine the public credibility of our judicial system. *See id.* at 1278.

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[4] By contrast, the costs of jury unanimity are relatively minor. At worst, jury unanimity might produce a slight increase in hung juries and a slight increase in the length of deliberations, costs that are outweighed given the significant benefits of a unanimity requirement.

The significant empirical research affirming the wisdom of the unanimity requirement 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. 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 have a significant effect when the prosecution's case "is not particularly weak or strong").

In short, empirical evidence confirms the Framers' fundamental insight that "it is the *unanimity* of the jury that preserves the rights of mankind." Adams, *supra* (emphasis added). At present, defendants in Louisiana and Oregon are routinely convicted by non-unanimous juries. Only this Court can right that wrong.

III. The Doctrine Of *Stare Decisis* Is No Bar To Revisiting The Question Presented.

The Louisiana and Oregon courts may rightly be reticent to second guess this Court's decision in *Apodaca*, but there is no reason for this Court to share that reluctance. Although principles of *stare decisis* can caution against revisiting prior decisions, those principles carry little weight in this context for three distinct reasons.

1. As this Court has recognized, an opinion is of "questionable precedential value" when "a majority of the Court expressly disagreed with the rationale of the plurality" at the time it was decided. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66 (1996). That is obviously true here. Five Justices in *Apodaca* (including Justice Powell) concluded that the Sixth Amendment requires jury unanimity, and eight Justices agreed or assumed that the Amendment applies identically against the federal government and the States. Yet unanimous jury verdicts are not required in state criminal courts simply because of Justice Powell's anomalous view that the Sixth Amendment does not apply with the same force to the States and the federal government.

2. An opinion is also of questionable precedential value when it is "inconsistent with earlier Supreme Court precedent." *United States v. Dixon*, 509 U.S. 688, 704 (1993). As this Court has explained, "[r]emaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the value 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). Thus, this Court has repeatedly overruled decisions that were inconsistent with earlier precedent. *See, e.g.*, *United States v. Dixon*, 509 U.S. 688, 704 (1993); *Solorio v. United States*, 483 U.S. 435, 439-41 (1987) (overruling decision that was inconsistent with "an unbroken 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 prior case law).

Apodaca was plainly a departure from preexisting precedent. As Justice Stewart explained in his dissent, "Until today, it has been universally understood that a unanimous verdict is an essential element of a Sixth Amendment jury trial." 406 U.S. at 414-15 (Stewart, J., dissenting); *see Johnson*, 406 U.S. at 369 (Powell, J., concurring in the judgment in *Apodaca*) (noting that the plurality's conclusion that the Sixth Amendment does not require unanimity departed from "an unbroken line of cases reaching back to the late 1800s"); *see Andres v. United States*, 333 U.S. 740, 748 (1948); *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).

Similarly, Justice Powell's incorporation analysis was inconsistent with prior decisions of this Court making clear 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); *see supra* at 16-17. Indeed, this Court recently acknowledged that *Apodaca* is an outlier case that falls well beyond the Court's accepted understanding of how individual guarantees of the Bill of Rights apply to the States through the Fourteenth Amendment, explaining that it was "the result of an unusual division among the Justices." *McDonald*, 130 S. Ct. at 3035 n.14.

Overruling *Apodaca* would thus only restore the longstanding meaning of the Sixth and Fourteenth Amendments.

3. Finally, *stare decisis* principles lack force in this context because this case involved the type of "procedural . . . rule[]" that does not create individual or societal reliance. *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991). Indeed, in the more than forty years since *Apodaca* was decided, no state has abandoned its rule requiring jury unanimity. Louisiana and Oregon are today—as they were in 1972—the sole outliers on this issue. Thus, while the issue is of considerable importance because of the large number of individuals convicted by non-unanimous verdicts in those two states and the significant liberty interest involved, a decision by this Court will not disrupt the settled expectations of other States.

IV. This Case Is An Ideal Vehicle For Reconsidering *Apodaca*.

As noted earlier, the only way the Sixth Amendment's jury right will be effectively enforced in Louisiana and Oregon is if this Court grants *certiorari* to revisit *Apodaca*. This case is an ideal vehicle for doing that.

1. This case squarely presents the question presented. Petitioner raised the issue before the trial court and on appeal. Thus, there will be no procedural obstacle to this Court addressing this important issue.

2. The facts of this case illustrate why the non-unanimity rule is so troubling and why it undermines the jury right. This case involves a shooting that occurred late at night outside a bar after many of the witnesses had been drinking. The testimony against Jackson consisted largely of eyewitness testimony, which is notoriously unreliable. See, e.g., *United States v. Wade*, 388 U.S. 218, 228 (1967) ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."). There was no DNA or forensic evidence to corroborate the testimony. Because so much turned on the credibility of the witnesses, this is exactly the kind of case in which procedural protections are particularly important. Louisiana's non-unanimity rule denied Jackson one of the most important procedural protections our criminal justice system can provide—the requirement that the State convince twelve of the defendant's peers of his guilt.

Indeed, the significance of the jury unanimity requirement as a protection for criminal defendants cannot be gainsaid, as shown by the results in jurisdictions with a unanimity requirement. Tellingly, in cases where the initial ballot is 10-2 (the tally that produced a conviction in this case), the result is a guilty verdict in fewer than 70% of cases where there is a unanimity requirement. Devine et al., *supra*, at 692 tbl.6. Even when those ballots produce hung juries rather than acquittals, prosecutors respond by dismissing the charges more than 20% of the time, and when the prosecution does decide to retry the case, there are

acquittals in 45% of bench trials and nearly 20% of jury trials. Nat'l Ctr. for State Courts, *Are Hung Juries a Problem?*, at 26-27 (2002). Yet, in this case, a 10-2 verdict resulted in Mr. Jackson's being sentenced to life in prison at hard labor without the benefit of parole, probation, or suspension of sentence. Mr. Jackson should have received the protections to which he is entitled by the Sixth and Fourteenth Amendments, the same protections he would have enjoyed in all but one other State in the country.

3. Because this case arises out of Louisiana, there is an additional reason why the State's non-unanimity rule should not be allowed to stand even if the Sixth Amendment might otherwise permit it (which, again, it does not). Louisiana's current non-unanimous jury verdict provision was adopted at the State's 1898 Constitutional Convention, the avowed "mission" of which was "to establish the supremacy of the white race in [Louisiana]" by rolling back the advances made by the Civil War Amendments. *Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana* 374-75 (1898); *see id.* at 381 (Convention goal was "to perpetuate the supremacy of the Anglo-Saxon race in Louisiana"); *Louisiana v. United States*, 380 U.S. 145, 147-48 (1965) (discussing steps taken at 1898 convention to "disenfranchis[e] Negroes").[5] In light of this

[5] To this end, Louisiana adopted not only a non-unanimity rule at its convention but also its infamous literacy test and one of the South's first Grandfather Clauses, all of which sought to deprive African Americans of their fundamental

history, the Louisiana Supreme Court recently noted, and did not disagree with, the argument that "the use of nonunanimous verdicts ha[s] an insidious racial component, allow[ing] minority viewpoints to be ignored, and is likely to chill participation by the precise groups whose exclusion the Constitution has proscribed." *Bertrand*, 6 So. 3d at 743.

This racially sordid history provides an additional reason that Louisiana's law cannot stand. *Cf. Hunter v. Underwood*, 471 U.S. 222, 226-32 (1985) (holding that the Fourteenth Amendment's Equal Protection Clause prohibits a state from adopting a law for a racially discriminatory purpose, even if the law could be enacted for legitimate reasons). Thus, although this Court need not consider this history to conclude that Louisiana's non-unanimity rule is unconstitutional, granting this case (as opposed to one from Oregon) would allow the Court to consider this history.

* * *

The Framers viewed the Sixth Amendment jury right as fundamental, and they believed that a unanimity requirement was an essential

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rights and liberties. E.g., *Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana* 381 (1898) ("I don't believe that [federal courts or Congress] will take the responsibility of striking down the system which we have reared in order to . . . perpetuate the supremacy of the Anglo-Saxon race in Louisiana.").

component of that right. As this Court's recent decisions make clear, that history should determine our contemporary understanding of the Sixth Amendment's meaning, and the Sixth Amendment should be applied in the same way to both the States and the federal government. Yet each year people continue to be convicted by non-unanimous verdicts in Louisiana and Oregon because courts in those states feel constrained by this Court's fractured judgment in *Apodaca*, a decision that is in irreconcilable conflict with this Court's more recent Sixth and Fourteenth Amendment cases. The Court should grant review to protect the "sacred bulwark" of the jury and once again reject a two-track approach to incorporation of the Bill of Rights.

CONCLUSION

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

Respectfully submitted,

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March 2014

APPENDIX A

No. 2012-KA-0090
COURT OF APPEAL
Fourth Circuit, State of Louisiana

STATE OF LOUISIANA
VERSUS
ORTIZ T. JACKSON
*** * * * * * ***
APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS
PARISH
NO. 482-029, SECTION "G"
Honorable Julian A. Parker, Judge
* * * * * *
Judge Sandra Cabrina Jenkins
* * * * * *

(Court composed of Judge Paul A. Bonin, Judge
Madeleine M. Landrieu, Judge
Sandra Cabrina Jenkins)

LANDRIEU, J. CONCURS IN THE RESULT

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AFFIRMED
APRIL 24, 2013

Defendant, Ortiz Jackson was charged by grand jury indictment with the second degree murder of Mark Westbrook; he was tried by a twelve person jury and found guilty as charged.

The evidence presented at trial revealed that Westbrook was shot while hugging Terakeitha Calloway outside of Lucky's Lounge in New Orleans on July 10, 2008. Calloway was also injured in the shooting but survived her wounds. Defendant timely appeals his sentence and conviction on the grounds that (1) he was denied his constitutional right to due process of law when he was convicted on a non-unanimous verdict; (2) he was denied his constitutional right to present a defense and to confront and cross examine witnesses against him; and (3) comments made by the prosecution during closing arguments tainted jurors against the defense and constituted reversible error.

Finding no errors patent or merit to any of the defendant's assignments of error, we affirm the defendant's conviction and sentence.

STATEMENT OF THE CASE

Ortiz Jackson was jointly indicted with Samuel E. Mack in November of 2008 for the murder of Mark Westbrook and the aggravated battery of Terakeitha Calloway. The cases were severed prior to trial, and the State elected to try Jackson solely on the murder charge. The jury, in a 10-2 vote, found Jackson guilty of second degree

murder as charged. Prior to sentencing, the trial court denied defendant's motion for a new trial and his motion for post-verdict judgment of acquittal. He was sentenced to serve life in prison at hard labor without the benefit of parole, probation, or suspension of sentence. It is from this conviction and sentence that the defendant now appeals.

FACTS

Eyewitness testimony

James Bradley was one of the State's key witnesses at trial. He explained that the victim, Westbrook, was like a brother to him; the two had been close friends since childhood and were living and working together at the time of Westbrook's murder. According to Bradley, he and Westbrook were having drinks at Lucky's Lounge on July 10, 2008, when Westbrook got into a verbal argument with another friend, Roderick "Rock" McKinney, who had cut in on his dance partner. According to Bradley, that argument ended when Westbrook got into a second argument with another bar patron, Samuel Mack. Bradley also observed Mack talking on the phone around the time of their argument.

Bradley testified that he and Westbrook wer hge getting ready to leave the bar when Westbrook stepped out of the car to hug and continue making amends with McKinney. Terakeitha Calloway also walked up to hug Westbrook. Bradley was waiting for Westbrook to get back inside the car when he heard a gunshot. He then looked up and observed the defendant, Jackson, put a gun to back of

Westbrook's head and fire a second shot. Bradley estimated being approximately three to four feet away from Westbrook when the shooting occurred.

Edwin Nelson also testified as an eyewitness to the shooting at trial. He explained that he arrived at Lucky's Lounge shortly after Westbrook's argument with McKinney had ended. He followed Westbrook, McKinney, and Mack outside to find out what was going on when he observed another argument between Westbrook and Mack. Nelson also observed Mack place a call from his cell phone during this argument. Nelson never saw Samuel Mack again that night.

Later, as Nelson sat in his car, preparing to leave behind Westbrook and Bradley, Nelson observed McKinney walk up to Westbrook's window and ask if everything was okay. Westbrook then got out of his car and gave McKinney "dap" and a hug. Nelson was changing his radio when he heard the first shot; he then looked up to see Jackson standing behind Westbrook with a gun pointed at his head. He observed the defendant shoot Westbrook a second time as he was falling. Nelson estimated that the shooting occurred approximately 30-45 minutes after Mack made a call on his cell phone.

Testimony of Detective Burns

New Orleans Police Department Detective Kevin Burns, Jr., testified on behalf of the State at trial. After arriving on the scene of the crime, he interviewed Bradley, McKinney, and Ronald

Ruffin, who was also at the bar that night. Other officers interviewed Nelson and Calloway the night of the shooting; Detective Burns spoke with Calloway the following morning.
Detective Burns testified regarding photographic lineups of Jackson that were compiled and shown to Bradley, Nelson, and Calloway. Without testifying as to what any of the witnesses told him, Detective Burns explained that he obtained arrest warrants for Jackson for the first degree murder of Mark Westbrook and attempted first degree murder of Ms. Calloway after displaying the lineups to these witnesses.

Detective Burns also testified concerning statements made by Jackson after his arrest. Jackson told the detective that he heard that Samuel Mack had killed Mark Westbrook. He personally denied any role in the shooting and claimed that he was at a hotel in Slidell when the shooting occurred. Jackson was able to identify Mack in a photographic lineup and said that the two had been friends for twenty years.

During questioning Jackson also blurted out, "Terakeitha Calloway is not coming to court anyway, so I'm straight." When Detective Burns asked Jackson who Calloway was, he replied that she was the victim who had been shot at the bar. Jackson claimed he knew this because he had read it in The Times-Picayune the day after the shooting. In response, Detective Burns told Jackson that victims' names are not placed in the newspaper until family members are notified; he testified that because of this, he believed that

Jackson was lying. Jackson also told the detective that he lived across the street from Ms. Calloway. Calloway, in fact, did not testify at trial.

Other corroborating evidence

Cell phone records were introduced at trial to corroborate testimony by Nelson and Bradley, who each testified that they observed Samuel Mack on his cell phone around the time of his argument with Westbrook. These records confirmed that a total of eleven calls were placed between Jackson and Mack around the time of the shooting. In addition, five of these calls were made within thirty minutes of the shooting.

The coroner's testimony also corroborated that of Nelson and Bradley. He explained that Mark Westbrook suffered two shotgun wounds. The fatal blast entered the back of his neck at the base of the skull and came out of his right cheek. A second bullet went into Westbrook's left shoulder and came out of his chest. The coroner was of the opinion that the shots were inflicted at close range because he observed small particles of gun powder on Westbrook's skin below the hole entry point. Both Nelson and Bradley testified to looking up after hearing the first gun shot and then observing Jackson fire the second shot from behind Westbrook.

LAW AND ANALYSIS

Assignment of Error No. 1

In his first assignment of error, the defendant challenges the constitutionality of Louisiana Code of Criminal Procedure Article 782, which states 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."[6] The defendant's argument is based on the Fourteenth Amendment of the United States Constitution, which he claims guarantees defendants in Louisiana the same due process rights that defendants in other states receive. He also argues that the Sixth Amendment right to a trial by jury requires a unanimous jury verdict, citing *McDonald v. City of Chicago*, -- U.S. --, 130 S.Ct. 3020, 3035, n.14 (2010).[7]

The defendant claims that Louisiana is one of only two states that allow a person to be convicted of a felony by less than a unanimous

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[6] The defendant also cites La. Const. Art I, §17, which provides in relevant part: "A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried by a jury of twelve persons, ten of whom must concur to render a verdict."

[7] The defendant initially filed a motion to require a unanimous verdict, which was denied by the trial court. The defendant renewed his objection to a non-unanimous verdict in his motion for a new trial; the court again rejected this argument.

verdict.[8] He points out that this non-unanimity rule was adopted by the state at its 1898 constitutional convention. Of relevance, he argues, the "mission" of the convention was "to establish the supremacy of the white race."[9] The convention was also "called together by the people of this State to eliminate from the electorate the mass of corrupt and illegitimate voters who have during the last quarter of a century degraded our politics."[10]

The defendant further claims that comprehensive empirical research affirms the wisdom of requiring unanimous verdicts. For instance, he points out that the American Bar Association has recommended that unanimous verdicts be required in all criminal jury trials. Studies examined by the American Bar Association "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, p. 24.

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[8] *See* Or. Const. art. I §11; Or. Rev. Stat. §136.450.

[9] *See* Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana, at 374 (Statement of Hon. Thomas J. Semmes). It was further proclaimed that the "mission was, in the first place, to establish the supremacy of the white race in this State to the extent to which it could be legally and constitutionally done." *Id*. at 375.

[10] *Id*. at 9 (Statement of Hon. E.B. Kruttschnitt).

The ABA's American Jury Project further concluded that "[a] non-unanimous decision rule allows juries to reach a quorum without seriously considering minority votes, thereby effectively silencing those voices and negating their participation." *Id*. at 24.

In *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628 (1972), the United States Supreme Court held that juries in state courts may convict a defendant by less than a unanimous verdict even though federal law requires unanimous juries in federal criminal cases. The majority in a 4-1-4 plurality decision held that the Sixth and Fourteenth Amendments do not prohibit states from securing convictions on less than unanimous verdict in non-capital cases. Justice Powell concurred for different reasons. Four other justices disagreed with the decision, finding that the Sixth Amendment guarantee of a jury trial made applicable to the states by the 14th Amendment did mandate unanimous juries. The defendant argues that legal developments and academic studies since the *Apodaca* decision was handed down call the judgment by a five-vote majority into serious question and make it ripe for Louisiana courts to now deem Article 782 unconstitutional.

Although the defendant makes a well-reasoned and compelling argument in support of his position that there are disparities inherent in non-unanimous juries that should be remedied, this Court is constrained by the most recent pronouncement of the Louisiana Supreme Court in *State v. Bertrand,* 08–2215, p. 8 (La. 3/17/09), 6

So.3d 738, 743, which upheld the constitutionality of Article 782.[11]

In *State v. Bertrand*, *supra,* the Louisiana Supreme Court overturned two lower court judgments which had declared Article 782 unconstitutional. In doing so it stated: "Due to this Court's prior determinations that Article 782 withstands constitutional scrutiny, and because we are not presumptuous enough to suppose, upon mere speculation, that the United States Supreme Court's still valid determination that non-unanimous 12 person jury verdicts are constitutional may someday be overturned, we find that the trial court erred in ruling that Article 782 violated the Fifth, Sixth, and Fourteenth Amendments." This Court has repeatedly followed the Supreme Court's lead in *Bertrand*.[12]

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[11] The defendant cites *Bertrand, supra*, as authority claiming that the Louisiana Supreme Court took note of an insidious racial component of non-unanimous juries. To the contrary, the court took note that the defendant raised that as an issue in that case, but that it had already been considered by the court in *Apodaca*. *Bertrand*, 6 So.3d at 743. Therefore, defendant's reliance on *Bertrand* as authority for this position is misplaced.

[12] *See, e.g.*, *State v. Krodinger*, 12-0134 , p. 11 (La. App. 4 Cir. 2/27/13), -- So.3d – (unpublished); *State v. Bonds*, 11-1674, p.2 (La. App. 4 Cir. 10/3/12), 101 So.3d 531, 532; *State v. Williams*, 11-1547, p. 9-10 (La. App. 4 Cir. 9/26/12), 101 So.3d 104, 111.

Accordingly, this assignment of error is without merit.

Assignment of Error No. 2.

The issues raised by the defendant's second assignment of error are governed by the Confrontation Clause of the Sixth Amendment of the U.S. Constitution, which guarantees the right of a criminal defendant to be confronted with the witnesses against him.[13] This includes the right to confront and cross examine witnesses and the right to present a defense.[14] The defendant specifically argues that the consequences of the trial court's evidentiary rulings as to the admissibility of hearsay testimony and evidence resulted in the denial of defendant's constitutional right to: (1) present a defense; (2) produce evidence in rebuttal; (3) engage in cross examination to test the State's evidence; (4) present his version of the facts to the jury; and (5) assert that someone else committed

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[13] The Confrontation Clause of the Sixth Amendment guarantees the right of a criminal defendant "to be confronted with the witnesses against him." The United States Supreme Court has held that this guarantee, which is extended to the States by the Fourteenth Amendment, includes the right to cross-examine witnesses. *Cruz v. New York*, 481 U.S. 186, 189, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987); *State v. Collins*, 10-0757 (La. App. 4 Cir. 5/11/11), 65 So.3d 271, 286.

[14] *State v. Van Winkle*, 94-0947, p.5 (La. 6/30/95), 658 So.2d 198, 201.

the crime. The defendant cites several instances in the trial proceedings whereby he alleges the trial court's evidentiary rulings constitute reversible error.

For the reasons outlined below, we find no abuse of discretion in the trial court's evidentiary rulings under the Sixth Amendment.

Hearsay nature of cross examination testimony

One of the major arguments the defendant makes is that his constitutional rights were violated because the State failed to call witnesses for trial who gave statements that conflicted with the State's theory of the case, and the defense was not allowed to cross examine witnesses regarding these inconsistencies. He claims that this also prevented him from being able to effectively present his defense of misidentification by the State's witnesses.

In support of this position, the defendant claims that he was not allowed to cross examine Detective Burns regarding statements made by Ruffin relating to the crime scene and other evidence; evidence relating to lineups shown to Ruffin and McKinney; Ruffin's alleged misidentification of Mack; McKinney's identification of the shooter; or other information by McKinney that was inconsistent with other witnesses. He also complained that he was not allowed to cross examine Nelson regarding information he may have heard Ruffin say about

the incident. To support his position, the defendant relied on testimony elicited during the motion to suppress that defendant was not able to subsequently bring out at trial. The trial court excluded this evidence largely on the grounds that it was impermissible hearsay. A review of the record does not support the defendant's allegations that his Sixth Amendment rights were violated in this regard.

Compelling circumstances rule

This court has recognized that under "compelling circumstances," a defendant's right to present a defense may require admission of statements which do not fall under any statutorily recognized exception to the hearsay rule. *State v. Fernandez*, 09-1727 (La. App. 4 Cir. 10/6/10), 50 So.3d 219, 228-29; *State v. Van Winkle*, *supra*; *State v. Gremillion*, 542 So.2d 1074 (La. 1989). This right to present a defense, however, does not require the trial court to permit the introduction of evidence that is irrelevant or has so little probative value that it is substantially outweighed by other legitimate considerations in the administration of justice. *Fernandez*, 50 So.3d at 229; *State v. Mosby*, 595 So.2d 1135 (La. 1992); La. C. E. art. 403. Louisiana Code of Evidence Article 103(A) further provides that an error may only be predicated upon a ruling which excludes evidence if a substantial right of the party is affected. *Fernandez*, 50 So.2d at 229.

In *State v. Van Winkle*, *supra*, a leading case on this issue, the defendant was a mother accused

of murdering her 12-year old son. She alleged that the trial court erred by not allowing her to question witnesses regarding her defense theory that her boarder was a homosexual predator who killed her son with the assistance of his lover. Specifically, she complained that she was prevented from questioning the boarder regarding his sexual lifestyle; from questioning the coroner about the condition of her son's anus; from questioning the chemist regarding the absence of seminal fluid; and from questioning bartenders on whether a bar frequented by the boarder was predominately a gay bar. The Supreme Court found that these evidentiary rulings had the effect of preventing the defendant from presenting her defense. It stated, "Evidentiary rules may not supersede the fundamental right to present a defense." *Id*. at 202.

In reaching this conclusion, the Supreme Court relied on its opinion in *State v. Gremillion*, *supra*. In *Gremillion*, the defendant wanted to introduce evidence that other third parties were responsible for the victim's murder. To this end, the defendant sought to introduce evidence of a statement wherein the victim told an investigator that he had been beaten and attacked by three white males. The trial court found that the evidence was inadmissible hearsay. The Louisiana Supreme Court agreed that it was hearsay, but found that it should have been admitted under U.S. Supreme Court jurisprudence holding that normally inadmissible hearsay evidence may be admitted if it is reliable, trustworthy, and relevant, and if to exclude it would compromise the defendant's right to present a defense. *Gremillion*,

542 So.2d at 1078 (citing *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct.1038, 1079, 35 L.Ed.2d 297 (1973)).

In the present case, the evidentiary rulings complained of did not rise to the level of an impingement of the defendant's right to present a defense at trial.
Instead, they primarily related to the admissibility of out of court statements given by Ruffin and McKinney – two witnesses the defendant could have called to testify at trial and did not.

Louisiana Code of Evidence Article 801(C) defines hearsay as "a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted." *See State v. Broadway*, 96-2659 (La.10/19/99), 753 So.2d 801. Hearsay is ordinarily not admissible except as otherwise provided by the Code of Evidence or other legislation. La. C.E. art. 802. Moreover, a trial court's ruling on the admissibility of evidence will not be disturbed in the absence of a clear abuse of the trial court's discretion. *State v. Bell*, 05–0808, p. 12 (La.App. 4 Cir. 12/6/06), 947 So.2d 774,781; *State v. Lewis*, 97–2854, p. 20 (La.App. 4 Cir. 5/19/99), 736 So.2d 1004, 1017. A trial court is vested with much discretion in determining whether the probative value of relevant evidence is substantially outweighed by its prejudicial effect. *State v. Hall*, 02–1098, p. 8 (La.App. 4 Cir. 3/19/03), 843 So.2d 488, 496.

The evidence in this case reveals that the victim, Westbrook, was involved in two separate altercations: one with "Rock" McKinney and one with Samuel Mack. There is no evidence that the victim was ever involved in an altercation with the defendant, Jackson. The evidence reveals that the shooting and the prior altercations all occurred at the bar and that several bar patrons were interviewed. In light of these circumstances, it is quite conceivable that some of the bar patrons gave various descriptions of the possible suspect. The fact that the State chose to only call witnesses that the detectives concluded witnessed the shooting itself, or who supported the State's theory of the case, does not deprive the defendant of the opportunity to call others as witnesses. Instead, the defendant had the right to call as witnesses those patrons who supported his theory of the case.

In *Van Winkle*, the defendant actually called witnesses whose testimony would support her theory of the case. There, the trial court essentially impinged on her right to present a defense by not allowing her to question the defense witnesses regarding evidence that someone else may have committed the crime. In *Gremillion*, the victim was not available because he had been murdered, and none of the exceptions to the hearsay rule applied. In these cases, but for the evidentiary rulings of the trial court, the defendants had no other way to present their defenses at trial.

That is not what occurred in this case. There is no evidence that Jackson made any attempt whatsoever to call Ruffin or McKinney as witnesses

at trial; there is also no evidence that the actions of the trial court or the state prevented him from calling them as witnesses. The defendant cannot now rely on a compelling circumstances exception to salvage a defense that could have been presented at trial if the defendant had simply called as witnesses the patrons whose statements he wanted admitted in support of his defense. Under the circumstances of this case, the defendant's rights to confront and cross examine the State's witnesses and to present a defense were not violated by the evidentiary rulings of the trial court.

Non-testimonial statements

The defendant also argued that he should have been able to cross examine the State's witnesses regarding assertions made by non-testifying witnesses pursuant to *Michigan v. Bryant*, -- U.S. --, 131 S.Ct. 1143, 179 L.ED.2d 93 (2011), because the statements were made by the witnesses while detectives were still looking for the perpetrator, and the statements were therefore not hearsay. Defendant's reliance on *Bryant* is misplaced. In *Bryant*, the Supreme Court concluded that statements resulting from an interrogation were non-testimonial because the primary purpose of the interrogation was to enable police to deal with an ongoing emergency (i.e., a wounded crime victim who died before trial). It held that such non-testimonial statements do not violate the Confrontation Clause of the Sixth Amendment.

The *Bryant* Court, however, was careful to explain that a finding that a statement does not

violate the Confrontation Clause does not automatically make it admissible under state laws governing the admissibility of hearsay evidence. The Court noted, "the admissibility of a statement is a concern of state and federal rules of evidence, not the Confrontation Clause." *Id*. at 131 S.Ct. at 1155. The Court then remanded the case to the lower court for a determination of "whether the statements' admission was otherwise permitted by state hearsay rules." *Id.* at
1167.

Under the facts and circumstances of the present case, this Court finds that the trial court did not err in sustaining the State's objections to defense attempts to introduce hearsay testimony of non-testifying witnesses under the Louisiana Rules of Evidence. Furthermore, even if there was error in not allowing the defendant's line of questioning, confrontation claims are subject to a harmless error analysis. *State v. Moore*, 10–0314, p. 7 (La. App. 4 Cir. 10/13/10), 57 So.3d 1033, 1038–39.

Indirect hearsay testimony

The defendant also asserts that his constitutional rights were violated when the trial court allowed "indirect" hearsay testimony of Bradley, Nelson, and Calloway to be admitted into evidence. He claims that this evidence was introduced "indirectly" because the court allowed Detective Burns to testify regarding photographic lineups that were shown to each of these witnesses. Citing *State v. Veals*, 576 So.2d 566 (La. App 4th Cir. 1991), as authority for the exclusion of

"indirect" hearsay testimony, the defendant argues that the State improperly elicited testimony from the detective in two parts that, when considered together, would have permitted the jury to logically infer information that would have been inadmissible hearsay if testified to directly at trial.

A review of the trial transcript confirms that Detective Burns testified to compiling photographic lineups of Jackson that were shown Bradley, Nelson, and
Calloway. The lineups presented to Nelson and Bradley were admitted without objection, while the defendant successfully objected to the third lineup being introduced into evidence.[15] Detective Burns then testified that he obtained a warrant for Jackson after showing the lineups to the witnesses. Defense counsel objected, the trial court sustained the objection, and the court instructed the jury to disregard the testimony. This Court finds that the defendant's rights were not violated by virtue of this line of questioning regarding the photographic lineups.

This Court has previously explained that "[t]he fact that the jury could *infer* that someone may have made a statement implicating the appellant does not automatically make the

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[15] The defendant claims that the line-up shown to Calloway was admitted over defense's objection. Instead, it was later introduced by the State for record keeping purposes only. The jury never saw it.

statement hearsay." *State v. Bagneris*, 01-0910, p.4 (La. App. 4 Cir. 12/19/01), 804 So.2d 831, 834. In addition, "it is obvious whenever a defendant's photograph is included in a lineup that the defendant somehow came under suspicion; otherwise, his photograph would not have been included." *Id*. We explained that "[t]his permissible inference does not make the statement hearsay." *Id*. A witness' act of selecting a picture of a suspect from a photographic lineup presented by police is not hearsay because it constitutes a statement of identification as contemplated by La. C.E. art. 801(D)(1)(c), which provides:

> A statement is not hearsay if … [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is … [o]ne of identification of a person made after perceiving the person.

Because Nelson and Bradley both testified at trial and were subject to cross examination concerning any statement made by them identifying the defendant as the shooter, their identifications of the defendant were not impermissible hearsay.

This issue was recently addressed in *State v. Duncan*, 11-0563, p.19 (La. App. 4 Cir. 5/2/12), 91 So.3d 504, 516-17, wherein we explained that officers' testimony as to witnesses' identification of a defendant – "both in their respective statements as well as their assertions in selecting the defendant in…photo lineups" – is not hearsay. Instead, such statements "may be used assertively,

as substantive evidence of guilt, and may be established through the testimony of the person to whom the statement was made, even if the witness denies making an identification or fails to make an in-court identification." *Duncan*, 91 So.3d at 516.

We find that the trial court did not err in allowing Detective Burns to testify regarding the fact that he showed the lineups to the witnesses, and thereafter took action based on what they told him. Because Detective Burns' testimony did not amount to inadmissible hearsay, the defendant's Sixth Amendment right to confrontation was not violated.

Moreover, to the extent that the defendant may be complaining that Detective Burns' testimony "indirectly" placed hearsay testimony of Calloway into evidence, this allegation is not supported by the record. Defendant admits that Detective Burns did not testify regarding what Calloway said during the lineup. He also did not suggest that Calloway positively identified the defendant in the photographic lineup presented to her. Instead, after testifying that he presented photographic lineups of the defendant to each Calloway, Nelson, and Bradley, all subsequent questioning and testimony related solely to the lineups presented to Nelson and Bradley.

Newspaper evidence

Lastly, the defendant claims that the trial court impinged on his Sixth Amendment rights by preventing him from showing Detective Burns

newspaper accounts of the shooting during cross examination.

During cross-examination, defense counsel asked Detective Burns whether "it's a fact that [he] told the public information officer that Sam Mack was the shooter in this case," to which the detective responded, "No." He then asked the detective if he saw that information in the newspaper. The response was again, "No." Defense counsel then asked, "Detective, if I showed you the newspaper article, would that refresh your recollection?" At that point, the State objected and the court sustained its objection.

Defense counsel pointedly asked Detective Burns if showing him a newspaper article would refresh his memory despite the fact that the detective had already said he never saw a newspaper article which said that Sam Mack was the shooter. Now, on appeal, the defendant claims that the paper was being introduced for impeachment purposes. Newspaper articles are considered self-authenticating documents and there is ordinarily no need to show evidence of authenticity prior to admitting as evidence at trial pursuant to La. C.E. art. 902(6). *See, e.g., Spears v. Grambling State University*, 12-0398 (La. App. 1 Cir. 12/17/12), --So.3d --, 2012 WL 6560600. Generally, a trial court's ruling as to the admissibility of evidence will not be disturbed absent a clear abuse of discretion. *State v. Cyrus*, 11-1175, p. 20 (La. App. 4 Cir. 7/5/12), 97 So.3d 554, 565, citing *State v. Richardson*, 97- 1995, p. 14 (La. App. 4 Cir. 3/3/99), 729 So.2d 114, 122. In addition,

at least one case has held that evidence should not be admitted to refresh a witness' recollection where the witness has never actually expressed a desire to have their memory refreshed from the document. *State v. Collins*, 546 So. 2d 1246, 1262 (La. App. 1st Cir. 1989). Accordingly, we find that the trial court acted within its discretion by sustaining the State's objection regarding using the paper to attempt to refresh the detective's memory.

Considering all the relevant factors and evidence presented in this case, this Court finds that there is no evidence that the guilty verdict rendered was attributable in any way to any confrontation or compulsory process errors complained of by the defendant. There is no merit to this assignment of error.

Assignment of Error No. 3.

In the defendant's third assignment of error, he argues that the trial court allowed the State to make impermissible comments during closing arguments, which tainted the jury against defense counsel and created reversible error. In particular, he claims that the prosecutor made it appear that the defense was deceitful and that the defense was hiding things from the jury.

Pursuant to La. C.Cr.P. art. 774, the scope of closing argument should be confined to the evidence admitted, the lack of evidence, conclusions of fact that the State or defendant may draw therefrom, and the law applicable to the case. The

State's rebuttal shall be confined to answering the argument of the defendant. *Id.*

While prosecutors have wide latitude with regard to tactics used during closing arguments, they should not appeal to prejudice and should refrain from making personal attacks on defense strategy and counsel. *State v. Manning,* 03- 1982, p. 75 (La. 10/19/04), 885 So. 2d 1044, 1108; *State v. Brumfield*, 96-2667, p. 9 (La. 10/20/98), 737 So. 2d 660, 666. Nevertheless, even where a prosecutor exceeds that wide latitude, the reviewing court will not reverse a conviction unless thoroughly convinced that the argument influenced the jury and contributed to the guilty verdict. *State v. Taylor*, 93–2201, p. 7 (La.2/28/96), 669 So.2d 364, 369.

A trial court has broad discretion in controlling the scope of closing arguments, and Louisiana courts have consistently held that great consideration should be accorded to the good sense and fair-mindedness of jurors who have seen the evidence, heard the arguments, and repeatedly been instructed by the trial judge that arguments of counsel are not evidence. *State v. Casey*, 99-0023, p. 17 (La. 1/26/00) 775 So.2d 1022, 1036; *State v. Mitchell*, 94–2078 (La. 5/21/96), 674 So.2d 250, 258.

During rebuttal, the prosecutor compared the defense to Muhammad Ali – a "master of distraction" who would use fancy footwork and talking during fights to distract his opponents. We find that the trial court did not err in overruling the defendant's objection to the prosecution's Ali

analogy because similar arguments by prosecutors have been upheld by Louisiana courts. For instance, in *State v. Martin*, 539 So.2d 1235, 1240 (La. 1989), the Louisiana Supreme Court held that closing argument referring to "smoke screen" tactics by the defense was not improper.

The prosecutor in the present case further stated, "Remember that arrest register they showed you? Well, you know what, you all remember, you all remember this. Too late to hide it now because y'all saw it and y'all remember it." Following this comment, the trial court sustained defendant's objection and admonished the jury to disregard the remark about hiding something. We find that there was no error in this regard.

Referring to Jackson's statement to Detective Burns that Terakeitha Calloway would not come to court, the prosecutor asked, "[W]hy wouldn't I want somebody who has been shot, who's been shot, to come to court and say I didn't shoot them?" This question rhetorically commented on the facts of the case and inferences that could be drawn therefrom, and was therefore not impermissible.

Other comments cited as improper by the defendant either could not be found in the record, or are not properly before us on appeal because defense counsel did not contemporaneously object at trial. Code of Criminal Procedure Article 841 provides in pertinent part, "An irregularity or error cannot be availed of after verdict unless it was

objected to at the time of occurrence." *See also, State v. Clark*, 332 So.2d 236 (La. 1976).

Considering the record as a whole, we find that none of the prosecutor's comments contributed to the verdict or created reversible error. Therefore, this assignment of error has no merit.

DECREE

For the reasons stated above, and upon a finding of no errors patent on the face of the record on appeal, the defendant's conviction and sentence are affirmed.

AFFIRMED

STATE OF LOUISIANA	*	**NO. 2012-KA-0090**
	*	**COURT OF APPEAL**
VERSUS	*	**FOURTH CIRCUIT**
ORTIZ T. JACKSON	*	**STATE OF LOUISIANA**
	*	

* * * * * * *

LANDRIEU, J., CONCURS IN THE RESULT

APPENDIX B

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA **NO. 2013- KO-1235**

VS.

ORTIZ T. JACKSON

- - - - - - -

IN RE: Jackson, Ortiz T. ; - Defendant; Applying For Writ of Certiorari and/or Review, Parish of Orleans, Criminal District Court Div. G, No. 482-029; to the Court of Appeal, Fourth Circuit, No. 2012-KA-0090;

- - - - - - -

December 2, 2013

Denied.

JPV

BJJ

JTK

JLW

GGG

MRC

JDH

Supreme Court of Louisiana
December 2, 2013

Robin A. Burras
Deputy Clerk of Court
For the Court