REARGUING JURY UNANIMITY: AN ALTERNATIVE

by
Chenyu Wang[*]

Since 1972, the Supreme Court has not required states to determine the outcome of criminal trials by unanimous jury verdicts, as it has with the federal government. Even though the Court itself has criticized this rule, no challenge to the rule has been successful. With three recent rejections to challenges to the rule in an equal number of Terms, the Supreme Court has not yet shown a willingness to reconsider. This Comment analyzes the history of the rule and then considers a new approach in convincing the Court to change course: an Eighth Amendment proportionality challenge based on the procedures used. Such a new approach could arise from first considering Florida's practice of allowing just a simple majority of jurors to recommend the death penalty. In turn, Florida's practice could open the door to an Eighth Amendment proportionality challenge based on the procedure used. Because the Court consistently favors challenges based on procedure (and disfavors those based on accuracy), such an approach may be successful.

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I. INTRODUCTION

On January 10, 2011, the United States Supreme Court denied a petition for certiorari to determine whether the Constitution requires a unanimous jury verdict in a state court to convict a person of a crime in *Herrera v. Oregon*.[1] This denial was not totally unexpected; in the two years prior to *Herrera*, the Court had twice rejected similar petitions for certiorari: one from Louisiana[2] and another from Oregon.[3] The denial is a testament to the staying power of the Court's original holdings in the *Johnson v. Louisiana* and *Apodaca v. Oregon* companion cases, which collectively held that a conviction by less than a unanimous jury verdict does not violate the Sixth Amendment right to a trial by jury as incorporated by the Fourteenth Amendment.[4] The *Johnson-Apodaca* holding has weathered attacks for nearly four decades, even some from the Court itself,[5] and yet it still stands.

With three denials of certiorari on the issue in an equal number of Terms, it is time to rethink the approach to overruling *Johnson* and *Apodaca*. This Comment explores the staying power of the holding in four parts. First, it discusses the history of the jury unanimity requirement and recounts the Court's decisions in *Johnson* and *Apodaca* that allowed for nonunanimous jury verdicts. Second, it evaluates the criticisms of the non-unanimity rule. Third, it recounts the three most recent challenges to the rule. Finally, it considers Florida's nonunanimous sentencing practice, and suggests new grounds for overturning *Johnson* and *Apodaca* based on that practice.

[1] Herrera v. Oregon, 131 S. Ct. 904 (2011).

[2] Lee v. Louisiana, 129 S. Ct. 130 (2008).

[3] Bowen v. Oregon, 130 S. Ct. 52 (2009).

[4] Johnson v. Louisiana, 406 U.S. 356, 362–63 (1972); Apodaca v. Oregon, 406 U.S. 404, 406 (1972).

[5] *See, e.g.*, Blakely v. Washington, 542 U.S. 296, 301 (2004) ("[T]he 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours' . . . ." (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *343 (1769))); Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) ("[T]he historical foundation for [the Court's] recognition of [the right to a jury trial] extends down centuries into the common law." (citing United States v. Gaudin, 515 U.S. 506, 510–11 (1995))).

II. HISTORY OF THE (NON)UNANIMITY RULE

In England, common law courts started requiring jury unanimity as early as 1367.[6] By the late fourteenth century, courts preferred unanimous jury verdicts,[7] and in eighteenth-century America, unanimity was simply the rule.[8] However, despite the rule's widespread acceptance, the reason for its original adoption is unclear.[9] Even in the seventeenth century, only the Carolinas, Connecticut, and Pennsylvania required majority verdicts.[10] The reason those colonies chose to accept majority verdicts is not certain, but perhaps it was due to their ignorance of the English common law.[11] What is clear is that there was some dispute over whether to include a unanimous jury requirement in the Sixth Amendment. Some of the drafters of the Sixth Amendment—mostly Federalists—wholeheartedly accepted the unanimous jury requirement and sought its explicit inclusion.[12] Others opposed the explicit inclusion of the requirement.[13] Ultimately, it was not included in the Amendment.[14] Little was heard about the unanimity requirement until 1897, when the Court held that civil litigants in cases at common law were denied their right to a trial by jury when less-than-unanimous verdicts were accepted

[6] JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 179 (1994).

[7] *Apodaca*, 406 U.S. at 407–08 ("Like the requirement that juries consist of 12 men, the requirement of unanimity arose during the Middle Ages and had become an accepted feature of the common-law jury by the 18th century." (footnotes omitted)); *id.* at 407 n.2 ("[I]n the latter half of the 14th century . . . it became settled that a verdict had to be unanimous.").

[8] *Id.* at 408 n.3 ("[T]he unquestioning acceptance of the unanimity rule . . . indicate[s] 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.").

[9] *Id.* at 407 n.2 ("The origins of the unanimity rule are shrouded in obscurity . . . .").

[10] *Id.* at 408 n.3.

[11] *Id.* ("Although unanimity had not been the invariable practice in 17th-century America, where majority verdicts were permitted in the Carolinas, Connecticut, and Pennsylvania . . . 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.").

[12] *See id.* at 409. "[A]s it was introduced by James Madison in the House of Representatives, the proposed [Sixth] Amendment provided for trial 'by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites . . . .'" *Id.* (quoting 1 ANNALS OF CONG. 435 (1789) (Joseph Gales ed., 1834)). *See also* 1 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 376 (Philadelphia, William Cobbett 1797).

[13] *Apodaca*, 406 U.S. at 410.

[14] *Id.*

by trial courts.[15] A year later, the Court held that for felonies "the supreme law of the land require[s] that [a defendant] be tried by a jury composed of not less than twelve persons" and that the verdict be unanimous.[16] However, the issue was not considered again by the Court until 1972, the year it decided *Johnson v. Louisiana* and *Apodaca v. Oregon*.

A. Johnson v. Louisiana[17]

In *Johnson*, the defendant was initially arrested for a robbery based on witness photo identification.[18] While he was at the police station, Johnson was placed in a line-up and was picked as the suspect in a second, unrelated robbery.[19] For the second robbery, Johnson was tried before a 12-member jury and was convicted, even though three jurors voted for acquittal.[20] At the time of his conviction, the Louisiana Constitution allowed

> cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict.[21]

The *Johnson* Court addressed two closely related questions: (1) whether nine of out 12 jurors could satisfy a state's burden of proof beyond a reasonable doubt, and (2) whether the dissenting votes of the remaining three jurors would undermine the votes of the other nine sufficiently enough to force a mistrial.[22] In answering both questions, the Court held against requiring jury unanimity under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[23] First, the

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[15] Am. Publ'g Co. v. Fisher, 166 U.S. 464, 467–68 (1897) ("[U]nanimity was one of the peculiar and essential features of trial by jury at the common law. No authorities are needed to sustain this proposition. Whatever may be true as to legislation which changes any mere details of a jury trial, it is clear that a statute which destroys this substantial and essential feature thereof is one abridging the right.").

[16] Thompson v. Utah, 170 U.S. 343, 350–51 (1898) ("[I]t was [the defendant's] constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the *unanimous* verdict of a jury of twelve persons." (emphasis added)).

[17] 406 U.S. 356 (1972).

[18] *Id.* at 358.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 358 n.1 (quoting LA. CONST. art. VII, § 41) (internal quotation marks omitted).

[22] *Id.* at 362.

[23] *Id.* at 362–63 ("We conclude, therefore, that, as to the nine jurors who voted to convict, the State satisfied its burden of proving guilt beyond any reasonable doubt. . . . We conclude, therefore, that verdicts rendered by nine out of 12 jurors are not automatically invalidated by the disagreement of the dissenting three.").

Court decided that there was no indication that nine jurors would simply ignore the other three to stop debate and force a verdict.[24] The Court found no reason to believe that a less-than-unanimous jury verdict would be the product of an irresponsible jury.[25] Second, the Court decided that the dissenting jurors did not undermine the other jurors' "heavy majority" in favor of conviction.[26]

In a statement that reflected its line-drawing rationale, the Court stated that even though the "State's proof could perhaps be regarded as more certain if it had convinced all 12 jurors instead of only nine; it would have been even more compelling if it had been required to convince and had, in fact, convinced 24 or 36 jurors."[27] The Court then extended its reasoning in the companion case, *Apodaca*.

B. Apodaca v. Oregon[28]

In *Apodaca*, the Court considered three separate nonunanimous felony convictions arising out of Oregon. Then (and now), the Oregon Constitution allowed:

> In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury . . . provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict . . . .[29]

The defendants here claimed that their convictions, though allowed by the Oregon Constitution, were in violation of the Due Process Clause of the Sixth Amendment, as incorporated by the Fourteenth Amendment.[30] Here, the justices famously split 4-1-4, in favor of upholding the convictions. Four justices, led by Justice White, found that jury unanimity was not mandated by the Sixth Amendment.[31] Another

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[24] *Id.* at 361 ("We have no grounds for believing that majority jurors, aware of their responsibility and power over the liberty of the defendant, would simply refuse to listen to arguments presented to them in favor of acquittal, terminate discussion, and render a verdict.").

[25] *Id.* at 362. The Court's point here is perhaps nuanced. The Court saw no reason to find in Johnson's favor because of Johnson's failure to overcome the burden of production by not offering "evidence that majority jurors simply ignore the reasonable doubts of their colleagues or otherwise act irresponsibly in casting their votes in favor of conviction . . . [as the Court needed] some basis for [ruling in Johnson's favor] other than unsupported assumptions." *Id.*

[26] *Id.* ("In our view disagreement of three jurors does not alone establish reasonable doubt, particularly when such a heavy majority of the jury, after having considered the dissenters' views, remains convinced of guilt.").

[27] *Id.* at 362.

[28] 406 U.S. 404 (1972).

[29] OR. CONST. art. I, § 11.

[30] *Apodaca*, 406 U.S. at 406.

[31] *Id.*

four justices, in opinions led by Justice Douglas[32] and Justice Stewart,[33] found that unanimity was required by the Sixth Amendment and that the Fourteenth Amendment had incorporated the requirement against the states.[34] Justice Powell, writing alone in an opinion that defined the outcome of the case, found that while "the Sixth Amendment requires a unanimous jury verdict to convict in a federal criminal trial" for historic reasons,[35] the Due Process Clause alone does not require unanimous jury verdicts.[36] Thus, even though eight justices found that the Due Process Clause requires the same standard for unanimity in federal and state cases, Justice Powell's opinion controlled the day: Unanimous jury verdicts are required in federal criminal cases but not state cases. To this day, the result has been criticized.

III. CRITICISM OF NONUNANIMOUS JURY VERDICTS

Since *Johnson* and *Apodaca* were decided nearly four decades ago, they have been criticized both by those who favor unanimity and by those who do not. Without much mention by the majorities in either case, the Court ignored the long history and understanding that the Constitution required unanimity in jury verdicts and decided against requiring unanimity.[37] Soon after its decisions were announced, criticisms were published. The criticisms generally fit into two categories: (1) that a unanimity requirement produces more accurate results, and (2) that it produces more desirable jury deliberations.

A. Unanimity Produces More Accurate Results

The Supreme Court found in *Johnson* that the unanimity requirement excessively produces hung juries.[38] There, Justice Powell cited a study that showed that hung juries are produced 5.6% of the time in unanimous-jury states, and out of that, "56% contain either one, two, or three dissenters."[39] The study then reasoned that if nonunanimous jury verdicts of nine to three were permitted, there would be a 56% reduction in the hung jury rate, or 2.5%; in other words, only 2.5% of

[32] *Johnson*, 406 U.S. at 380 n* (Douglas, J., dissenting) (Justice Douglas's dissent in *Johnson* also applies to *Apodaca*.).

[33] *Apodaca*, 406 U.S. at 414 (Stewart, J., dissenting).

[34] *Id.*; *Johnson*, 406 U.S. at 388 (Douglas, J., dissenting).

[35] *Johnson*, 406 U.S. at 371 (Powell, J., concurring).

[36] *Id.* at 374.

[37] *See supra* notes 6–16 and accompanying text.

[38] *Johnson*, 406 U.S. at 374 n.12 (Powell, J., concurring) (citing HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 460–61 (1966)). Remember that while Justice Powell's opinion did not control *Johnson*, his opinion in *Apodaca* established the nonunanimity rule for the companion cases.

[39] *Id.*; *Johnson*, 406 U.S. at 391 (Douglas, J., dissenting).

juries would be hung.[40] If the argument were this straightforward, Justice Powell may have convinced more justices. However, the same study found that 3.1% of juries hung where nonunanimous verdicts were permitted.[41] While the discrepancy is small (2.5% versus 3.1%), it is telling that there were *more* hung juries than expected where nonunanimous verdicts were permitted. This less-than-expected reduction shows that perhaps, when juries are deadlocked, it is harder for them to overcome genuine disagreements they may have over the outcome of the case.[42] It is also important to note that hung-jury cases may not always end by jury verdicts in subsequent trials: some are retried and many resolve by guilty pleas, alternative sentencing, or dismissals. Thus, hung-jury cases may produce more accurate and desirable punishments because the prosecution, defense, and defendant have all had a chance to reevaluate the case with the benefit of hindsight.

B. Unanimity Produces More Desirable Deliberation

Independent of whether the unanimity requirement produces more accurate results, it certainly influences the tenor of jury deliberations. According to studies of juries in nonunanimous verdicts, once the requisite majority for a verdict has formed, "deliberations halt in a matter of minutes."[43] In fact, in "[o]ne of the most comprehensive empirical studies . . . conducted since" the study cited by the Supreme Court in *Apodaca*, six undesirable effects of nonunanimous juries were found:

> (1) it takes less time to reach a verdict; (2) votes are taken earlier in the process so that factions and dissenters are identified and potentially singled out for coercion before much deliberation takes place; (3) smaller factions are less likely to voice dissent; (4) jurors join larger factions more quickly; (5) holdout jurors are more likely to remain entrenched; and (6) verdict-driven [as opposed to evidence-driven] deliberation style is more frequently adopted, and less effort is made to marshal the evidence before expressing verdict preferences.[44]

Since deliberations are ended quickly after a majority has formed, the effective size of the jury is, in reality, that of the size of the majority.

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[40] *See id.* at 374 n.12 (Powell, J., concurring).

[41] KALVEN & ZEISEL, *supra* note 38, at 461.

[42] *Cf.* Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1, 41 (1997) ("Perhaps most troubling, when convicting, [nonunanimous] juries did so with less confidence that they were correct than was true of juries deciding under a unanimous rule. Apparently, at the end of the day, the existence of dissenters left even the majority with some lingering doubts that it had reached the right verdict.").

[43] Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1272 (2000).

[44] Emil J. Bove III, Note, *Preserving the Value of Unanimous Criminal Jury Verdicts in Anti-Deadlock Instructions*, 97 GEO. L.J. 251, 267 (2008) (footnote omitted) (citing REID HASTIE ET AL., INSIDE THE JURY 173–74 (1983)).

In effect, the dissenting jurors have no meaningful role in jury deliberations, and thus, allowing nonunanimous verdicts achieves a smaller effective jury size and with less meaningful deliberations. In turn, considering whose votes actually count, these smaller effective-size juries are less likely to be truly representative of their local communities,[45] since the minority votes do not matter. For example, this result would potentially allow a racially biased jury to create some *Batson*-like violations of its own by ignoring racial minorities on the jury.[46]

IV. RECENT CHALLENGES TO *APODACA* AND *JOHNSON*

With all the debate behind jury unanimity, it was inevitable that the rule would be challenged. Here are three of the most recent challenges that the Supreme Court has encountered:

A. Lee v. Louisiana

In 2002, Derek Todd Lee was charged for first-degree murder in Louisiana. Had the case proceeded as a first-degree murder case as it was originally charged, the Louisiana courts would have required a unanimous jury verdict. However, because the case against him was based almost entirely on circumstantial evidence,[47] by trial, the prosecution had amended the charges to second-degree murder, which only required 10 of 12 jurors to agree on a verdict.[48] The jury voted 11 to 1 to convict Lee, and his conviction was upheld all the way through Louisiana courts.

On petition for a writ of certiorari to the U.S. Supreme Court, Lee argued that since the time of *Apodaca*'s "deeply fractured, internally contradictory decision[,] . . . developments in t[he] Court's Sixth and Fourteenth Amendment jurisprudence"[49]—namely *Blakely v. Washington*[50] and *Apprendi v. New Jersey*[51]—signaled that it was time to reconsider requiring unanimity. In *Blakely*, decided in 2004, the Court stated that the Sixth Amendment guaranteed that "the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours.'"[52] *Apprendi*, decided in

[45] *See* Michael J. Saks, *The Smaller the Jury, the Greater the Unpredictability*, 79 JUDICATURE 263, 263 (1996).

[46] *See id.*; Batson v. Kentucky, 476 U.S. 79, 89 (1986). *Batson* stands for the rule that prosecutors may not discriminate by eliminating jurors from the jury pool based solely on the prospective juror's race.

[47] State v. Lee, 964 So. 2d 967, 989 (La. Ct. App. 2007).

[48] *Id.* at 972–73.

[49] Petition for Writ of Certiorari at 6, Lee v. Louisiana, 129 S. Ct. 130 (2008) (No. 07-1523) [hereinafter Lee Petition].

[50] 542 U.S. 296 (2004).

[51] 530 U.S. 466 (2000).

[52] *Blakely*, 542 U.S. at 301 (quoting 4 BLACKSTONE, *supra* note 5, at *343).

2000, held that a judge's decision to increase a criminal sentence upon finding an aggravating factor was impermissible because it violated the Sixth Amendment's right to a jury trial.[53] Lee argued that *Apodaca*'s "badly fractured 4-1-4 decision" had produced a holding regarding jury verdicts that eight justices did not agree with,[54] due to Justice Powell's line-drawing concurrence.

Lee then argued that the plurality's reliance in *Apodaca* on "the function served by the jury in contemporary society"[55] was simply repudiated by the Court in *Crawford v. Washington*,[56] *United States v. Gonzalez-Lopez*,[57] and *Apprendi v. New Jersey*,[58] emphasizing the role of the jury. In each, Lee argued, the "Court has eschewed a functional approach to the right to jury trial in favor of the 'practice' of trial by jury as it existed 'at common law.'"[59]

Lee's petition for certiorari was denied.[60]

B. Bowen v. Oregon

In 2003, Scott David Bowen was charged with five counts of first-degree sexual abuse, two counts of first-degree sodomy, and one count of first-degree rape of his then 15-year-old daughter in Oregon.[61] Like Lee, he requested a unanimous verdict jury instruction at trial, and the trial court denied the request.[62] The jury convicted him by a vote of 10 to 2 on each charge.[63] Interestingly, Bowen's petition for writ of certiorari to the Supreme Court was nearly a perfect copy of Lee's from Louisiana.

Bowen's petition for certiorari was similarly rejected.[64]

C. Herrera v. Oregon

In 2008, Alonzo Herrera was charged with a misdemeanor and a felony stemming from his possession of and failure to return a car he

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[53] *Apprendi*, 530 U.S. at 476.

[54] Lee Petition, *supra* note 49, at 7–11.

[55] *Id.* at 11 (quoting Apodaca v. Oregon, 406 U.S. 404, 410 (1972)) (internal quotation marks omitted).

[56] 541 U.S. 36 (2004).

[57] 548 U.S. 140 (2006).

[58] 530 U.S. 466 (2000).

[59] Lee Petition, *supra* note 49, at 12 (quoting *Apprendi*, 530 U.S. at 480).

[60] Lee v. Louisiana, 129 S. Ct. 130 (2008).

[61] Petition for Writ of Certiorari at 4, Bowen v. Oregon, 130 S. Ct. 52 (2009) (No. 08-1117).

[62] *Id.*

[63] *Id.* at 5.

[64] Bowen v. Oregon, 130 S. Ct. 52 (2009).

borrowed from a friend in Oregon.[65] Before trial, Herrera asked for a unanimous-verdict jury instruction. The trial court, however, "instructed the jury that, 10 or more jurors must agree on [the] verdict."[66] The jury voted 10 to 2 to convict on one charge and 11 to 1 to acquit on the other.[67] On appeal to the Oregon Court of Appeals, the conviction was summarily affirmed.[68] The Court of Appeals relied on its own decision in *State v. Cobb*,[69] which had held that *Blakely v. Washington*[70] had not overruled *Apodaca*. Thus, Herrera's conviction was deemed valid.

In his Petition for Certiorari to the United States Supreme Court, Herrera's argument was different from that of the prior two cases: In addition to citing *Blakely* and *Apprendi*, he cited *McDonald v. City of Chicago*, a 2010 case,[71] for the premise that the Court has "abandoned the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights."[72] The *McDonald* Court stated that "it would be 'incongruous' to apply different standards 'depending on whether the claim was asserted in a state or federal court.'"[73] Herrera then argued that previous cases established that the right to a unanimous jury verdict is "fundamental to the American scheme of justice," and that, once a right is deemed "fundamental," it must be applied the same way toward both the federal and state governments.[74] Herrera continued by arguing that jury unanimity was the original understanding of the right to a jury trial, both as to the common law and as to when the Sixth and Fourteenth Amendments were adopted.[75]

Herrera's petition for certiorari was also denied.[76]

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[65] Petition for Writ of Certiorari at 4–5, Herrera v. Oregon, 131 S. Ct. 904 (2011) (No. 10-344) [hereinafter Herrera Petition].

[66] *Id.* at 4 (internal quotation marks omitted).

[67] *Id.* at 5.

[68] *Id.* at 1.

[69] 198 P.3d 978, 979 (Or. Ct. App. 2008). *See* Herrera Petition, *supra* note 65, at 1.

[70] 542 U.S. 296, 301 (2004). "This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours . . . .'" *Id.* (quoting 4 BLACKSTONE, *supra* note 5, at *343).

[71] 130 S. Ct. 3020 (2010).

[72] Herrera Petition, *supra* note 65, at 6 (quoting *McDonald*, 130 S. Ct. at 3035 (plurality opinion)).

[73] *McDonald*, 130 S. Ct. at 3035 (quoting Malloy v. Hogan, 378 U.S. 1, 11 (1964)).

[74] Herrera Petition, *supra* note 65, at 7 (quoting Benton v. Maryland, 395 U.S. 784, 795 (1969)).

[75] *Id.* at 11–25.

[76] Herrera v. Oregon, 131 S. Ct. 904 (2011).

V. POSSIBLE REASONS WHY THE SUPREME COURT REFUSES TO GRANT CERTIORARI

The Court's refusals to grant certiorari to reconsider the Sixth Amendment's jury unanimity rule were without opinion. Since the refusals seem to fly in the face of the Court's own criticisms, an explanation is needed so that future challengers of the rule may avoid pitfalls. This Comment considers four possible reasons the Court may be refusing to reconsider the rule: stare decisis, the potential costs in retrying cases, modern international trends, and the Court's preference for procedural fairness over potential accuracy.

A. Stare Decisis

One definition of stare decisis is: "The doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation."[77] As a guiding principal, stare decisis "plays an important role in orderly adjudication; it also serves the broader societal interests in evenhanded, consistent, and predictable application of legal rules."[78] By consistently applying a legal principle, rights are defined and reliance on the principle is established.[79] Herrera had argued that *Apodaca* was not entitled to the benefit of stare decisis because it was inconsistent with the Court's past rulings, that it was the result of an unusual split among the justices, and that it was undermined by later decisions.[80]

The doctrine of stare decisis is normally applied less rigidly in constitutional matters.[81] In fact, because the Court's interpretation of any particular constitutional matter can only be changed by constitutional amendment or by overruling a decision of its own, stare decisis "is at its

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[77] BLACK'S LAW DICTIONARY 1537 (9th ed. 2009).

[78] Thomas v. Wash. Gas Light Co., 448 U.S. 261, 272 (1980). "The doctrine of *stare decisis* imposes a severe burden on the litigant who asks [the Court] to disavow one of [its] precedents." *Id.* (citing OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 290 (1920)).

[79] *See id.* "When rights have been created or modified in reliance on established rules of law, the arguments against their change have special force." *Id.* (citing Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407–08 (1932) (Brandeis, J., dissenting)). *See also* Dickie v. Farmers Union Oil Co. of LaMoure, 611 N.W.2d 168, 173 (N.D. 2000).

[80] Herrera Petition, *supra* note 65, at 28, 30 (quoting Arizona v. Gant, 129 S. Ct. 1710, 1728 (2009) (Alito, J., dissenting) (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 231 (1995); United States v. Dixon, 509 U.S. 688, 704 (1993))).

[81] Glidden Co. v. Zdanok, 370 U.S. 530, 543 (1962) (citing United States v. South Buffalo R. Co., 333 U.S. 771, 774–75; *Burnet*, 285 U.S. at 407–08 & nn.1–3 (Brandeis, J., dissenting)).

weakest when [the Court] interpret[s] the Constitution."[82] However, "even in constitutional cases, the doctrine carries such persuasive force that [the Court] ha[s] always required a departure from precedent to be supported by some special justification."[83] In *Planned Parenthood v. Casey*, the Court warned that the simple belief that a prior decision is wrong was not sufficient justification for overruling it.[84] The decision to overrule precedent must be so compelling that it does not undermine the Court's legitimacy.[85] The Court suggested that if precedents were constantly overruled, the public would simply lose respect for the rule of law.[86] In *Casey*, the Court gave two examples where the decision to ignore stare decisis was justified: in the repudiation of *Adkins v. Children's Hospital*[87] by *West Coast Hotel Co. v. Parrish*,[88] and of *Plessy v. Ferguson*[89] by *Brown v. Board of Education*.[90]

But perhaps the Court was overstating its case; numerous other criminal law precedents have been overruled.[91] However, in this case, it is likely that Herrera's petition for certiorari was denied, at least in part, due to stare decisis concerns. At the time, *Apodaca*'s holding had been left untouched for nearly four decades, and the Court may think that *Apodaca*'s level of incorrectness is not on the same level as those of *Adkins* and *Plessy*, or otherwise does not merit reconsideration. A new petition for certiorari will need to overcome this obstacle.

B. Potential Costs and Resources in Retrying Cases

Part of the problem with changing the *Apodaca* rule is that a change could be applied retroactively and thus force many retrials. However, if

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[82] Agostini v. Felton, 521 U.S. 203, 235 (1997) (emphasis added) (citing Payne v. Tennessee, 501 U.S. 808, 828 (1991)).

[83] United States v. Int'l Bus. Machs. Corp., 517 U.S. 843, 856 (1996) (quoting Payne v. Tennessee, 501 U.S. 808, 842 (1991)) (internal quotation marks omitted).

[84] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992). "[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided." *Id.* (citing Mapp v. Ohio, 367 U.S. 643, 677 (1961) (Harlan, J., dissenting)).

[85] *See generally id.* at 864–69.

[86] *Id.*

[87] 261 U.S. 525 (1923) (holding that Congress infringed the liberty of contract, as provided by the due process clause of the Fifth Amendment, by enacting a minimum-wage law protecting women and children).

[88] 300 U.S. 379 (1937).

[89] 163 U.S. 537 (1896) (upholding the "separate but equal" doctrine of racial segregation).

[90] 347 U.S. 483 (1954).

[91] *See, e.g.*, Swain v. Alabama, 380 U.S. 202 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79 (1986); Wolf v. Colorado, 338 U.S. 25 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961); Betts v. Brady, 316 U.S. 455 (1942), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963). *See* Herrera Petition, *supra* note 65, at 32 (citing each of these examples of cases overruled by the Supreme Court).

any change in *any* law were always given complete retroactive effect, and treated as if it had been always been the law, it would result in endless relitigation of cases. In other words, if any judgment could become erroneous by a future Court decision, there would be no such thing as final judgments. This cannot be the case. Therefore, as a threshold question, the Court must decide whether one of its own decisions should apply retroactively. The answer depends on whether the decision actually announces a new rule.[92] While this sounds easy, it is not often an easy inquiry to apply. Helpfully, the Court notes that "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government."[93]

Once the Court has decided whether a case actually announces a new rule of law, the rule is applied retroactively in three circumstances: (1) for all cases on point that are on or pending direct appeal,[94] (2) in cases on collateral appeal if the issue involves "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,"[95] and (3) in cases on collateral appeal "if it requires the observance of those procedures that . . . are implicit in the concept of ordered liberty."[96] Had these considerations been applied to Herrera's case, the application would have been straightforward. First, the Court would have found that requiring jury unanimity would exactly have imposed "a new obligation on the State," since Oregon did not practice it before. In theory, this could apply to any case in which a nonunanimous jury verdict instruction was given at trial, including those which produced unanimous jury verdicts. However, the Court has held that the harmless error doctrine applies in the retroactivity analysis.[97] Therefore, in any case where the jury returned a unanimous verdict, the trial court's refusal to give a unanimous verdict instruction would be harmless. This would eliminate many potential retrials. Next, the Court would require reconsideration by retrial in all cases pending direct appeal. Here, the number of cases pending appeal would be considerably

[92] *See* Teague v. Lane, 489 U.S. 288, 300–01 (1989) (plurality opinion of O'Connor, J.) ("Retroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated. Thus, before deciding whether the fair cross-section requirement should be extended to the petit jury, we should ask whether such a rule would be applied retroactively to the case at issue.").

[93] *Id.* at 301.

[94] *Id.* at 304.

[95] *Id.* at 307 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in the judgment)).

[96] *Id.* (quoting *Mackey*, 401 U.S. at 693 (Harlan, J., concurring in the judgment)) (internal quotation marks omitted).

[97] *See, e.g.*, United States v. Booker, 543 U.S. 220, 268 (2005) ("[W]hether resentencing is warranted . . . may depend upon application of the harmless-error doctrine.").

smaller than the total number of appealable cases that have been decided since *Apodaca* was announced. This would have a relatively small impact on the number of cases that must be reconsidered. Finally, because a unanimous jury verdict requirement triggers concepts "implicit in the concept of ordered liberty"[98] (as opposed to "primary, private individual conduct"), the Court would allow retrials on collateral appeals, i.e., habeas corpus cases. This could potentially open the door to retry *every* nonunanimous jury case, and given nearly four decades of reliance on *Johnson* and *Apodaca*, vast numbers of cases could be retried.

C. International Trends

Approximately 80% of jury trials in the world occur in the United States.[99] Most foreign jurisdictions simply do not conduct jury trials.[100] Even the International Criminal Court uses a panel of judges as finders of fact.[101] Simply put, trial by jury is largely an American practice. Of the foreign jurisdictions that utilize jury trials, unanimity is rarely required.[102] For example, in England and Wales, a verdict may be returned where ten of eleven or twelve jurors agree, or in the case of ten jurors, where nine of them agree.[103] In Scotland, at least eight jurors of fifteen are required to return a guilty verdict, and there is no possibility of a hung jury.[104] In Ireland, jury verdicts of ten-two and eleven-one are allowed.[105] In 2008, New Zealand repealed its jury unanimity requirement in favor of allowing eleven-one verdicts.[106] In 2010, Jamaica followed suit, repealing its unanimity requirement and allowing up to three members of a twelve member jury to disagree while still producing a verdict.[107] Today, Canada is the last remaining country that still requires jury unanimity in all criminal trials within its jurisdiction.[108] Perhaps the Supreme Court simply

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[98] *See* 4 BLACKSTONE, *supra* note 5, at *343; *supra* Part II.

[99] VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 31 (1986).

[100] *Id.*

[101] Amy Powell, Note, *Three Angry Men: Juries in International Criminal Adjudication*, 79 N.Y.U. L. REV. 2341, 2341 (2004).

[102] Ethan J. Leib, Commentary, *A Comparison of Criminal Jury Decision Rules in Democratic Countries*, 5 OHIO ST. J. CRIM. L. 629, 642 (2008).

[103] Juries Act, 1974, c. 23, § 17 (Eng. & Wales).

[104] SCOTTISH GOVERNMENT, THE MODERN SCOTTISH JURY IN CRIMINAL TRIALS 23 (2008), *available at* http://www.scotland.gov.uk/Publications/2008/09/17121921/0.

[105] Criminal Justice Act 1984, § 25 (Act No. 22/1984) (Ir.), *available at* http://www.irishstatutebook.ie/1984/en/act/pub/0022/index.html.

[106] *Unanimous Jury Verdicts Dropped*, TVNZ (June 20, 2008, 6:37 AM), http://tvnz.co.nz/content/1859717/423466.xhtml.

[107] *New Jury Act Changes Need for Unanimous Verdict*, CARIBBEAN 360 (July 14, 2010), http://www.caribbean360.com/index.php/news/31963.html.

[108] *See* Peter Sankoff, *Majority Jury Verdicts and the* Charter of Rights and Freedoms, 39 U.B.C. L. REV. 333, 333 (2006).

recognizes the modern international trend disfavoring unanimity, and is quietly acquiescing to it.

D. Accuracy Versus Fairness

An ongoing debate in the battle for unanimity is whether unanimous verdicts are more accurate than verdicts achieved by majority. This debate can even be seen in the *Johnson* and *Apodaca* companion decisions. In those decisions, both the majority and dissent based their reasoning on how they thought a unanimity requirement would affect the functioning of the jury. Little was discussed about history or precedent. In *Johnson*, the majority reasoned that nonunanimous jury verdicts would not affect jury deliberations or final verdicts, but would produce desirable reductions in the number of hung juries.[109] In his concurrence, Justice Powell acknowledged history and precedent, but suggested that juries would be less susceptible to bribery or being "held hostage" by one or more irrational jurors by eliminating the unanimity requirement.[110] In his dissent, Justice Douglas first briefly cited the history and precedent supporting the unanimity requirement,[111] but then focused on how nonunanimous verdicts would impact jury functioning, stating that the Court, by allowing nonunanimous verdicts,

> approves a procedure which diminishes the reliability of a jury. First, it eliminates the circumstances in which a minority of jurors (a) could have rationally persuaded the entire jury to acquit, or (b) while unable to persuade the majority to acquit, nonetheless could have convinced them to convict only on a lesser-included offense. Second, it permits prosecutors in Oregon and Louisiana to enjoy a conviction-acquittal ratio substantially greater than that ordinarily returned by unanimous juries.[112]

[109] Johnson v. Louisiana, 406 U.S. 356, 361 (1972) ("We have no grounds for believing that majority jurors, aware of their responsibility and power over the liberty of the defendant, would simply refuse to listen to arguments presented to them in favor of acquittal, terminate discussion, and render a verdict. On the contrary it is far more likely that a juror presenting reasoned argument in favor of acquittal would either have his arguments answered or would carry enough other jurors with him to prevent conviction.").

[110] *Id.* at 377 (Powell, J., concurring).

[111] *Id.* at 382 (Douglas, J., dissenting). "I had similarly assumed that there was no dispute that the Federal Constitution required a unanimous jury in all criminal cases. After all, it has long been explicit constitutional doctrine that the Seventh Amendment civil jury must be unanimous. . . . Like proof beyond a reasonable doubt the issue of unanimous juries in criminal cases simply never arose. Yet in cases dealing with juries it had always been assumed that a unanimous jury was required." *Id.* (citing Am. Publ'g Co. v. Fisher, 166 U.S. 464, 468 (1897)).

[112] *Id.* at 388.

Whatever the merits of the debate on accuracy may hold,[113] perhaps the Court is signaling, through denials of certiorari, that the *Johnson-Apodaca* rule has struck the appropriate balance between accuracy and fairness of trials in the interest of judicial economy, i.e., that majority verdicts are accurate enough and fair enough.

This sentiment is similar to how the Court restricted claims of actual innocence in habeas corpus proceedings in *Herrera v. Collins*.[114] In *Herrera*, the Court held that a death row inmate could not seek federal review of his state court conviction when new evidence was discovered that demonstrated his innocence; however, he could bring the habeas action if there was a constitutional (procedural) violation at the trial level.[115] In setting aside Herrera's claim of actual innocence and focusing on errors of law instead, the Court has signaled—for better or for worse—a preference for final, unappealable determinations of fact. Simply put, the Court seems to care more about correcting procedural fairness than about producing accurate results. Because the debate about which requirement—unanimity or majority—produces more accurate results still lives on, in declining to require unanimous verdicts, the Court is again showing that when the procedure is fair enough, some accuracy may be sacrificed.

VI. FUTURE PETITIONS FOR CERTIORARI

With three denials of certiorari in three years, it seems unlikely that the Supreme Court will grant certiorari on the same issue without change. This Part discusses possibilities for a future challenge to succeed.

A. Florida's Capital Sentencing Structure

Like other states that practice capital punishment, Florida bifurcates capital cases. First, the guilt of the defendant is determined.[116] At this stage, jury unanimity is required.[117] If the jury unanimously votes to convict, the same jury then recommends the punishment of the defendant. At this second stage, the jury considers all of the aggravating and mitigating circumstances surrounding the crime to decide on the

[113] *See supra* Parts III.A, B.

[114] 506 U.S. 390 (1993).

[115] *Id.* at 400, 416–19. The Court in *Herrera v. Collins* did not completely foreclose the possibility that one could obtain federal habeas relief solely on the grounds of "actual innocence" without a supplemental constitutional claim. However, the Court did not decide the issue, but merely stated, in dicta, that "the threshold showing for such an ["actual innocence" claim] would necessarily be extraordinarily high." *Id.* at 417.

[116] FLA. STAT. ANN. § 921.141(1) (West 2006).

[117] FLA. R. CRIM. P. 3.440 ("No verdict may be rendered unless all of the trial jurors concur in it.").

death penalty.[118] Here, the prosecution must prove all aggravating circumstances beyond a reasonable doubt, while the defense only needs to "reasonably convince" the jury of mitigating circumstances.[119] Lastly, and importantly, the decision need only be reached by a simple majority.[120] Thus, in Florida, only seven out of twelve jurors are needed for a death sentence recommendation.

Florida's practice is likely unconstitutional. As set forth by commentary, Florida's capital sentencing practice may violate the Sixth and Eighth Amendments as applied to the states by the Fourteenth Amendment.[121] First, Florida's practice may violate the Eighth Amendment's prohibition on cruel and unusual punishment.[122] In capital cases, the Court "has consistently recognized that the death penalty is qualitatively different from all other punishments, and therefore demands extraordinary procedural protection against error."[123] The Court has stated that capital punishment is different from all other forms of punishment in that it is irreversible and ultimately more severe than any other punishment.[124] Because no other form of punishment can be as severe or irreversible, the Court required heightened procedural protections for capital cases in *Furman v. Georgia*.[125] There, the defendant was attempting to burglarize a home when he was caught. When he tried to flee, he tripped and fell. Out of sheer coincidence, his firearm discharged and struck and killed one of the residents of the house.[126] He was convicted of murder and was sentenced to death.[127] In *Furman*, with each Justice writing a separate opinion, a majority of the Court agreed

[118] FLA. STAT. § 921.141(2).

[119] Standard Jury Instructions in Criminal Cases—No. 96–1, 690 So. 2d 1263, 1268 (Fla. 1997) (per curiam) ("Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision. . . . A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.").

[120] *Id.* at 1269 ("If a majority of the jury determine that (defendant) should be sentenced to death. . . . On the other hand, if by six or more votes the jury determines that (defendant) should not be sentenced to death . . . ."); FLA. STAT. ANN. § 921.141(2)–(3).

[121] Raoul G. Cantero & Robert M. Kline, *Death is Different: The Need for Jury Unanimity in Death Penalty Cases*, 22 ST. THOMAS L. REV. 4, 12 (2009).

[122] *Id.* at 13 n.68. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.* (quoting U.S. CONST. amend. VIII).

[123] *Id.* at 12 (internal quotation marks omitted) (citing Furman v. Georgia, 408 U.S. 238, 286–89 (1972) (Brennan, J., concurring); Wainwright v. Witt, 469 U.S. 412, 463 (1985) (Brennan, J., dissenting)).

[124] *Id.* at 13 (citing *Witt*, 469 U.S. at 463).

[125] 408 U.S. 238 (1972).

[126] *Id.* at 294–95 n.48 (Brennan, J., concurring).

[127] *Id.*

with Justice Stewart: The death penalty must not be imposed arbitrarily or inconsistently.[128] The Florida practice allows the capital punishment to be imposed by a vote of seven to five (a 58% majority). This, according to commentary, is not much better than a coin flip and can assuredly produce inconsistent outcomes.[129]

Second, the Florida practice may violate the Sixth and Fourteenth Amendments. The Sixth Amendment, as incorporated by the Fourteenth Amendment, gives defendants the right to a jury for non-petty crimes.[130] The Fourteenth Amendment also requires that no one may be deprived of life or liberty without due process of law. The Court has previously held that juries must consist of no fewer than six jurors, provided that the decision of the six jurors is unanimous.[131] In *Ballew v. Georgia*, the Court held that a state's practice of allowing a five-member jury to determine the outcome of a criminal trial deprived the defendant of the right to a jury trial.[132] There, the Court noted that "progressively smaller juries are less likely to foster effective group deliberation."[133] Thus, the Court has signaled a preference for requiring a super-majority in criminal cases, or, at the very least, it has suggested that a simple majority is inadequate. In the case of Florida's sentencing practice, allowing just seven of twelve jurors to render a verdict would deprive a criminal defendant of a meaningful jury trial on sentencing.

B. Proportionality

Because the Supreme Court has thrice denied certiorari directly on the point of reversing *Johnson* and *Apodaca*, perhaps it is time for a case to challenge Florida's sentencing practice first. If the challenge is successful on either of the two grounds mentioned above, it may signal a weakening in the Court's adherence to nonunanimous jury verdicts that is closer on point. Such a weakening may allow for a proportionality challenge against nonunanimous verdicts.

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[128] *See, e.g.*, *id.* at 247–48 (Douglas, J., concurring) ("[T]he death penalty could be unfairly or unjustly applied. The vice . . . is not in the penalty but in the process by which it is inflicted. It is unfair to inflict unequal penalties on equally guilty parties, or on any innocent parties, *regardless of what the penalty is*." (internal quotation marks omitted)).

[129] Cantero & Kline, *supra* note 121, at 17.

[130] *See* Ballew v. Georgia, 435 U.S. 223, 240 (1978).

[131] *See* Williams v. Florida, 399 U.S. 78, 100 (1970) ("But we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers 12—particularly if the requirement of unanimity is retained.").

[132] *Ballew*, 435 U.S. at 239 ("[T]he purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members.").

[133] *Id.* at 232.

The first step in the proportionality challenge is to note Oregon's practice of requiring unanimous jury verdicts in misdemeanor cases, where there are only six members in a jury.[134] Oregon also requires unanimity of verdicts in capital cases, where twelve members form a jury.[135] However, in Oregon, only ten of the twelve jurors must concur on a verdict in non-capital felonies.[136] Because this structure provides more procedural protection for misdemeanors and capital felonies than non-capital felonies and disproportionately assigns less procedural protection for those who have committed middle-of-the-road crimes, it can be argued that this likely violates due process for those who commit non-capital felonies.

The due process argument can be based off of the holding of *Burch v. Louisiana*.[137] In *Burch*, the defendant was convicted by the vote of five members of a six-member jury.[138] On appeal to the Louisiana Supreme Court, the Court held that because a "75 percent concurrence (9/12) was enough for a verdict as determined in *Johnson v. Louisiana*, . . . then requiring 83 percent concurrence (5/6) ought to be within the permissible limits of *Johnson*."[139] But ultimately, the United States Supreme Court reversed, holding that convictions must be supported by at least six members of a jury, whether or not the jury is unanimous in its verdict.[140]

This opens up the possibility for a new kind of proportionality argument. Historically, proportionality challenges are brought under the Eighth Amendment's prohibition on cruel and unusual punishments[141] and challenge the ultimate *severity* of the punishment. In Oregon, when the stakes are high (in capital cases) and low (in misdemeanors), unanimity is required. However, in the middle (in non-capital felonies), defendants are denied the benefits of a unanimous verdict. As Justice Douglas stated in *Furman*, "It is unfair to inflict unequal penalties on equally guilty parties . . . ."[142] This leaves open the possibility of a proportionality challenge based on the *procedure* of determining the punishment.

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[134] OR. REV. STAT. § 136.210(2) (2009); State *ex rel.* Smith v. Sawyer, 501 P.2d 792, 793 (Or. 1972). Per *Ballew*, a six person jury is perfectly constitutional. 435 U.S. at 230–31.

[135] OR. CONST. art. I, § 11.

[136] *Id.*

[137] 441 U.S. 130 (1979).

[138] *Id.* at 132.

[139] *Id.* at 132–33 (quoting State v. Wrestle, Inc., 360 So. 2d 831, 838 (1978)).

[140] *Id.* at 134, 137–38.

[141] *See, e.g.*, Weems v. United States, 217 U.S. 349 (1910).

[142] Furman v. Georgia, 408 U.S. 238, 248 (1972) (Douglas, J., concurring) (internal quotation marks omitted).

In Oregon, for misdemeanors, six out of six jurors (100%) must be certain as to the outcome; if not, the defendant is entitled to a new trial.[143] For capital offenses, twelve out of twelve of the jurors (100%) of the jurors must be certain, if not, the defendant is entitled to a new trial.[144] However, in Oregon, three of twelve jurors (25%) must disagree in non-capital felony cases before the defendant is entitled to a new trial.[145] It is easy to see that those charged with non-capital felonies are provided less procedural protection than those charged with misdemeanors (less serious crimes) and those charged with capital felonies (more serious crimes). This does not comport with our fundamental notions of proportionality as required by the Eighth Amendment.

VII. CONCLUSION

Since 1972, states have not been compelled to require unanimous jury verdicts in criminal trials by the Supreme Court. Even though the Court itself has criticized the rule, *Johnson* and *Apodaca* still stand. The arguments on both sides are fierce. With the exception of Canada, no foreign jurisdiction requires unanimous verdicts in all criminal cases. However, critics have suggested that anything less than unanimity in the United States is one step too far down a slippery slope. Now that Florida allows just a simple majority of jurors to recommend the death penalty, perhaps the critics are right.

Fortunately, Florida's practice of allowing a simple majority of jurors to impose such a severe punishment is exactly the type of case that would open the door to a new kind of Eighth Amendment proportionality challenge: one based on the proportionality of the *procedure* used. Because the Court consistently favors challenges based on procedure (and disfavors those based on accuracy), in a few Terms, we may see such a challenge.

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[143] *See supra* note 135 and accompanying text.

[144] OR. CONST. art. I, § 11.

[145] *Id.*; Apodaca v. Oregon, 406 U.S. 404, 406 (1972).