11-7-2016

Brief of the National Association for Public Defense as Amici Curiae Supporting Petitioner, Christensen v. United States of America (U.S. November 7, 2016) (No. 16-461).

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No. 16-461

IN THE
Supreme Court of the United States

TERRY CHRISTENSEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF NATIONAL ASSOCIATION FOR PUBLIC DEFENSE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Association for Public Defense ("NAPD") is an association of more than 14,000 attorneys, investigators, social workers, administrators, and other professionals who fulfill constitutional mandates to deliver public defense representation throughout all U.S. states and territories. NAPD members advocate for clients in jails, courtrooms, and communities, and are experts in the theory and practice of effective defense to people who are charged with crimes but who cannot afford to hire counsel. They work in federal, state, county, and municipal jurisdictions as full-time, contract, and assigned counsel, litigating juvenile, capital, and appellate cases through a diversity of traditional and holistic practice models.

NAPD plays an important role in advocating for defense counsel and the clients they serve, and is uniquely situated to speak to issues of fairness and justice in criminal legal systems. The critical importance of the jury's role in checking government power has only increased in the context of contemporary mass incarceration—a phenomenon widely criticized by sentencing experts. *See, e.g.*, Vivien Stern, *The International Impact of U.S.*

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[1] No counsel for a party authored this *amicus curiae* brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. By letters dated October 27, 2016, *amicus* notified counsel of record for both parties in this case of the intent to file this *amicus* brief, and both parties have consented to the filing of this brief.

Policies, *in* INVISIBLE PUNISHMENTS 279–80 (Marc Mauer & Meda Chesney-Lind, eds. 2002). Members of the federal judiciary—including a Member of this Court—have acknowledged resulting harms. Associated Press, *Justice Criticizes Lengthy Sentences*, N.Y. TIMES, Aug. 10, 2003, www.nytimes.com/2003/08/10/us/justice-criticizes-lengthy-sentences.html ("Our resources are misspent, our punishments too severe, our sentences too long … .") (quoting Justice Kennedy's address to the 2003 annual meeting of the American Bar Association).

The effects of mass incarceration fall disproportionately on low-income communities and communities of color, and those effects include the deepening of a democracy deficit in which these communities exercise relatively little voice in generating and administering the governing law. J. TRAVIS, *ET AL.*, NATIONAL RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 303 (2014). In light of these factors, a robust right to jury trial has heightened importance as a critical bulwark against the exercise of concentrated government power and its disproportionate effects in already disadvantaged communities. *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 141–42 (2011). As this case presents important and unresolved questions about the jury's role and the protections the jury offers to the rights of individual criminal defendants as well as to society at large, NAPD respectfully offers its perspective to the Court.

SUMMARY OF ARGUMENT

The jury is essential to our structure of government, available to criminal defendants as the final arbiter of guilt. As this Court has recognized time and again, the jury serves an important role both structurally within the balance of powers and as a check on governmental power, adding a layer of protection for individual defendants.

The rule applied by the Ninth Circuit and some other courts, allowing dismissal of a holdout juror if a judge sees no reasonable possibility that his view is connected to the merits of the case, threatens the fundamental role of the jury. In contrast to the rule endorsed by federal courts of appeals that prohibit dismissal if there is any possibility a juror's view is connected to the merits, the Ninth Circuit's rule makes dismissal of jurors easier, resulting in more frequent removal of dissenting viewpoints. Equally threatening to the jury is the practical reality of the Ninth Circuit's approach, which forces judges to invade jury deliberations in order to assess the reasonableness of a juror's views.

The rule applied below risks minimizing the role of the jury in the criminal system and forces judges to undertake intrusive assessments of the reasonableness of individual juror's views. This Court should grant certiorari and clarify the standard under which a dissenting juror can be investigated and ultimately dismissed.

ARGUMENT

A. The Role of the Jury Is Fundamental in Our National Justice System.

The jury performs a role essential to the balance of powers and protection of individual rights in our system of government. The jury right has long been recognized as a key guarantor of protection against government overreach, a systematic and structural defense for the individual. "This right was designed to guard against a spirit of oppression and tyranny on the part of rulers, and was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties." *United States v. Gaudin*, 515 U.S. 506, 510–11 (1995) (internal quotations omitted).

This Court has recognized the essential role the jury plays in the functioning of the federal constitutional system: The jury trial right "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely v. Washington*, 542 U.S. 296, 305–06 (2004) (citation omitted).

As this Court has observed, the history of the right shows the Founders' concern about protecting a criminal defendant against potentially arbitrary judicial action:

> A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and

> experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Duncan v. Louisiana, 391 U.S. 145, 155–56 (1968).

The importance of the jury right, coupled with the unanimity requirement in the federal system and the vast majority of states, makes each jury member's perspective relevant and each and every juror of equal importance in the outcome. "The dynamics of the jury process are such that often only one or two

members express doubt as to view held by a majority at the outset of deliberations. 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." *United States v. Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978) (Kennedy, J.).

B. The Decision Below Undermines the Functioning of the Essential Institution of the Jury.

Any rule of law that threatens the jury's role by minimizing or demanding justification from dissenting viewpoints demands scrutiny and should require strong justification. The rule applied by courts that allow dismissal of a dissenting juror absent a "reasonable possibility" that his view is connected to the merits of the case encourages interference with the jury's role and weakens the jury's status as a safeguard for criminal defendants, with no corresponding benefit.

1. The Holdout Juror Serves an Important Role for the Legitimacy and Reliability of the Jury System.

The dissenting juror serves as an important check preserving the rights of a criminal defendant, especially in the federal system and the many state systems where a jury must be unanimous. The juror who dissents even in the face of the social pressure of a jury panel that is otherwise in agreement offers a different viewpoint that adds to both the quality of the deliberation that culminates in the ultimate verdict and, studies suggest, the accuracy of the

verdict itself. This important role thus safeguards not only the individual criminal defendant's rights, but the jury system and its place in society as well.

In the unanimous jury system, the vote of each juror is determinative, and thus even one juror can exercise the role envisioned by the Framers, serving as a check on overzealous prosecution or insufficient evidence. Nor is there any reason to think that the holdout juror must necessarily be eccentric, incorrect, or unthinking. A holdout juror must maintain his view in the face of unanimous disagreement from the rest of the panel, often over a significant length of time. Indeed, one study concluded that the views of holdouts are far from eccentric; the trial judge often sided with dissenting jurors in non-unanimous verdicts. Shari Seidman Diamond, Mary R. Rose, & Beth Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201, 221–22 (2006).

A juror who takes a different view from the majority of the panel strengthens the deliberative process that results in the jury's ultimate verdict. As one study found, jurors "report[ed] more thorough and open-minded debate" when forced to reach unanimity and thus interact with any dissenting jurors. Diamond, Rose & Murphy, *supra*, at 230. As this Court long ago observed, "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." *Allen v. United States*, 164 U.S. 492, 501 (1896). Where a holdout juror remains in deliberations, the jury is forced to confront the opposing viewpoint, resulting in a jury verdict that is reached after taking account of diverse views. A rule

like the one below, which permits a jury to more easily conscript a judge into removing a juror who sees the case differently, allows juries to avoid this thorough deliberation. *See* Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1263–64 (2000) ("Jury research conducted in the past two decades reveals that eliminating the obligation to secure each person's agreement on the verdict can result in truncating or even eliminating jury deliberations."). This, in turn, risks removing the holdout juror's ability to contribute to the function the jury performs in the governmental system. In Oregon, for instance, where non-unanimous verdicts are allowed, 65.5% of verdicts on at least one count in felony jury trials were non-unanimous, demonstrating that juries who can ignore an opposing viewpoint will regularly do so. *See* OREGON OFFICE OF PUBLIC DEFENSE SERVICE APPELLATE DIVISION, ON THE FREQUENCY OF NON-UNANIMOUS FELONY VERDICTS IN OREGON 4 (2009). By allowing minority viewpoints to be silenced, a rule making dismissal of a dissenting juror easier allows juries to target those whose backgrounds or experiences may be different from their own, and to attempt to remove those voices from the deliberative process. Conversely, where a jury is forced to reach a unanimous verdict, it "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 … ." *Lopez*, 581 F.2d at 1341.

Jurors express greater confidence in the accuracy of their verdicts where all members agree. *See* Diamond, Rose & Murphy, *supra*, at 208. A survey of wrongful convictions in Louisiana, where some non-

unanimous criminal verdicts are permitted, found that out of 20 wrongful convictions where the verdict could be non-unanimous, 9 were the result of verdicts reached over dissenting votes. *See* Br. of Innocence Project New Orleans as *Amicus Curiae* Supporting Petitioner at 11, *Jackson v. Louisiana*, No. 13-1105 (U.S. 2014).

2. Unlike the Rule in Some Courts, the "Reasonableness" Standard Applied by the Ninth Circuit and Others Forces Judges To Intrude into the Province of the Jury.

The rule allowing dismissal of a juror where there is "no reasonable possibility" that his view relates to the merits of the case requires greater intrusion into the jury's role by the district judge, who must examine the reasons for the complaints about the holdout and inquire into the holdout's reasoning. Because of the jury's important role as a check within the criminal justice system, any rule encouraging this increased intrusion on the jury role should be met with skepticism.

Holdout jurors already face significant pressure to conform to the views of the majority. *See* Dan Simon, *More Problems with Criminal Trials: The Limited Effectiveness of Legal Mechanisms*, 75 L. & CONTEMP. PROBS. 167, 198–99 (2012) (surveying empirical data demonstrating that "a distinctive feature of jury deliberation is that unanimity is often achieved through social pressure," and that the "strength of the social pressure tends to increase as the deliberation progresses"). Such pressure can only be magnified when it is a judge who inquires into the rationale of the views of the holdout juror, and the

"no reasonable possibility" rule increases both the frequency and intensity of this inquiry. The difference between the standard allowing dismissal of a juror where there is "no reasonable possibility" that the view is connected to the merits, as compared to the bar on dismissal where there is "any possibility" that the view is connected to the merits, has a practical effect on the judge/jury relationship.

First, the "no reasonable possibility" rule increases the likelihood of an inquiry into a dissenting juror's views. Jurors in the majority can, as they did in this case, more easily appeal to the district judge about their disagreement. The "no reasonable possibility" rule, designed as it is to make juror dismissal more attainable, will lead to more frequent inquiries by the judge, since a wider variety of opinions and behavior by holdout jurors will demand an inquiry into the reasonableness of a holdout's views and their connection to the merits. Regardless of how the judge constructs the inquiry or whether he dismisses the juror, the "no reasonable possibility" rule will result in judges more often needing to make an inquiry in the first place. Thus, whether the holdout is dismissed or not, the very fact of the questioning by the district judge, which will be more frequent under the reasonableness rule, intrudes into substantive jury deliberations by sending (even if inadvertently) a powerful signal to both the holdout and the other jurors about what the result ought to be. Indeed, here, the jury decided to convict shortly after the alternate juror was seated. *See* Pet. 16.

Second, the reasonableness inquiry requires a more substantive, and thus more intrusive,

exploration of the holdout's reasoning by the district judge. The judge must gather enough information to assess whether the juror's expressed opinions have no reasonable possibility of relation to the merits. Here, for instance, the standard required inquiry into the juror's views even after the district court acknowledged that the juror's reported statements could be construed as comments on the strength of the government's case. As the dissenting judge below (himself a federal district court judge) noted, "the record makes clear that the questioned jurors' answers to the court's inquiries were rooted, at least potentially, in their disagreement with Juror 7 about his assessment of the merits of the government's case." Pet. App. 133a (Christensen, C.J., concurring in part and dissenting in part). Juror 7 had commented, for instance, on the fact that a key witness was missing from the government's case, Pet. App. 91a, and that it was a "joke case," and later confirmed that he thought the evidence insufficient because it was circumstantial, Pet. App. 93a n.24. In circuits that apply the "any possibility" rule, no inquiry would have been needed: As even the district judge here concluded, there was some possibility that the holdout juror's views of the case were connected to the merits. Under the approach adopted by other courts of appeals, that fact would have prohibited the inquiry. Instead, as this case demonstrates, under the "no reasonable possibility" standard, the judge is forced into complicated interactions with jurors that would not take place under the rule from other courts. And that inquiry will continually risk intrusion into substantive deliberations. The record from the district court shows that the judge "repeatedly had to cut [jurors] off mid-sentence"

because the inquiry inevitably led jurors to discuss the merits of jury deliberations. *See* Pet. App. 96a.

Thus, the "no reasonable possibility" rule has systemic consequences, forcing judges into intrusive questioning that interferes in the jury's functioning, no matter how careful the judge is. Indeed, several members of this Court have expressed deep unease about a trial judge intruding into the jury's sphere to dismiss a holdout juror. "[T]he possibility of getting rid of … the hold-out juror," rather than encouraging further deliberation, "is really troublesome." Tr. at 18, *Johnson v. Williams*, No. 11-465, 133 S. Ct. 1088 (2013) (statement of Ginsburg, J.); *see also id.* at 21 (statement of Sotomayor, J.) ("I'm deeply troubled when trial judges intrude in the deliberative processes of juries."); *id.* at 19 (statement of Kennedy, J.) ("agree[ing]" that such intrusion is "very troublesome").

Holdout jurors play an essential role in promoting careful deliberation and ensuring that the jury performs its protective function of bringing the voices of individuals into the criminal justice system. And they provide this safeguard at little risk to the efficiency of the system: the rate of hung juries in federal criminal trials is quite low. *See* PAULA L. HANNAFORD-AGOR, VALERIE P. HANS, NICOLE L. MOTT & G. THOMAS MUNSTERMAN, NATIONAL CENTER FOR STATE COURTS, ARE HUNG JURIES A PROBLEM 22 (2002). Thus, there is no danger of rampant hung juries if holdouts are not more easily removable. The rule applied below, making removal of holdout jurors easier, is a solution in search of a problem. Instead, holdout jurors should be permitted to offer their unique perspective in the jury system where there is

any possibility that their dissenting view relates to the merits of the case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 2016