Lawyers argue Louisiana's nonunanimous verdict rule

BY JOE GYAN JR.
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LSU law professor Cheney Joseph sheepishly recalls presiding over his final trial in the 16th Judicial District Court in 1992 and forgetting to tell the 12-member jury that its verdict did not have to be unanimous. Joseph learned of his omission when the jury - after deliberating for quite some time - asked if its verdict had to be 12-0.

When Joseph told the panel only 10 members had to agree on a verdict, the jury went back to the deliberation room and immediately returned with a guilty verdict in the drug case.

"I made a really silly mistake on my part," Joseph, vice chancellor for academic affairs at LSU's Paul M. Hebert Law Center, said recently.

Louisiana's so-called "10-of-12" rule from the 1974 Louisiana Constitution is no laughing matter to criminal defense lawyers.

Louisiana and Oregon are the only states that allow nonunanimous verdicts of 10-2 in felony trials with punishment of imprisonment at hard labor.

In Louisiana, that includes second-degree murder and aggravated rape, both of which Professor Michelle Ghetti of the Southern University Law Center suggests it would take a constitutional amendment to change the 10-of-12 rule in Louisiana state courts.

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Carry automatic sentences of life in prison.
Prosecutors, including East Baton Rouge Parish District Attorney Hilliar Moore III, a former defense lawyer, obviously love the 10-of-12 rule.

"From a jury standpoint, it's easier to convict someone when it's 10 out of 12 instead of 12 out of 12," he acknowledged.

Defense lawyers would love to see Louisiana join the other 48 states and require unanimity in all felony jury trials.

In Louisiana, unanimous verdicts are required in first-degree murder trials, felony trials with six-member juries, and in criminal trials in federal courts.

"The federal government has it right. If you want to be judged by your peers, make it unanimous by your peers," Baton Rouge lawyer Rodney Messina said. He said defense lawyers are "handcuffed" by the 10-of-12 rule because it limits their ability to plea-bargain.

"I'm a big believer in 12-zip," adding local lawyer John McLin don, an attorney for a Donaldsonville man convicted in May by a 10-2 vote of second-degree murder in the 2006 slaying of his girlfriend in a Baton Rouge casino parking lot.

Unfortunately for the criminal defense bar, the U.S. Supreme Court and the Louisiana Supreme Court have upheld the constitutionality of such verdicts in state courts.

Michelle Ghatti, endowed Louisiana health and ethics professor at the Southern University Law Center, said it would take a state constitutional amendment to change the 10-of-12 rule in Louisiana state courts.

"I don't see the United States Supreme Court overturning its prior decisions," Joseph added.

A landmark day
In 1972, the unanimity rule's applicability to the states became the subject of two landmark cases decided by the U.S. Supreme Court on the same day, May 22, 1972.

In Apodaca v. Oregon and Johnson v. Louisiana, the Supreme Court found that unanimity is not constitutionally required.

In the Louisiana case, Frank Johnson was convicted of armed robbery by a 9-3 jury vote.

Joseph said 9-3 votes were allowed in state criminal trials in Louisiana from 1921 to 1974.

"That rational men disagree is not in itself equivalent to a failure of proof by the State, nor does it indicate infidelity to the reasonable-doubt standard," the high court stated in affirming Johnson's conviction.

The court noted that when jurors in federal court cannot agree on a verdict, the defendant is not acquitted, but is given a new trial.

In the Oregon case, three defendants convicted of separate felonies by less than unanimous verdicts challenged that state's 10-of-12 rule.

In upholding their convictions, the Supreme Court said it perceived "no difference" between juries required to act unanimously and those permitted to convict or acquit by votes of 10-2 or 11-1.

"Requiring unanimity would obviously produce hung juries in some situations where non-unanimous juries will convict or acquit," the court said. "But 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."

The prosecution
Former U.S. Attorney David Dugas agrees and believes juries in federal and state systems strive to reach a unanimous "community consensus."

"The jury system seems to work very well in achieving that," Dugas said. "I have a lot of faith in the jury system. Juries want to do the right thing. I don't think 10-2 as opposed to 12-0 makes a big difference."

Moore said most 12-member jury verdicts in criminal trials in the 19th Judicial District Court are unanimous, but he's glad his prosecutors aren't held to the unanimity standard under which federal prosecutors operate.

"We deal with a different kind of crime here" in state court, Moore said, noting that federal prosecutors deal with much more white collar crime as opposed to the large volume of violent crime his prosecutors handle on a daily basis.

"I don't think you'll see the Louisiana law change," he said.

The non-unanimity requirement protects against a rogue juror or two holding the process hostage, Moore said.

"You give the minority the upper hand in a unanimous system," he argued.

The defense
Defense lawyers in Baton Rouge counter that requiring unanimous jury verdicts would reduce the likelihood of convicting the innocent and put the full force of the law behind the "proof beyond a reasonable doubt" standard.

"Even if one juror votes not guilty, then to me there's reasonable doubt there," McLin don said.

"That would be more in tune with what the criminal justice system is designed to do -- proof beyond a reasonable doubt," he said.

Lawyer Bo Rougeau is even more direct.
"If they have a case that warrants prosecution," he said, "they should have a 12-0 verdict.

"I don't think it's (the 10-of-12 rule) right. If I were king, I'd change it."

Mike Mitchell, director of the East Baton Rouge Parish Public Defender's Office, called the 10-of-12 rule "a terrible system."

"It opens the door for erroneous verdicts," he said.

Local defense lawyers said they agree with the plaintiffs in Apodaca that less than unanimous jury verdict provisions undercut the right to a jury drawn from a cross-section of the community by implicitly permitting the exclusion of minority group viewpoints.

"I've had that happen on juries before. They (the majority in a 10-2 vote) may have just sat on those two people. Those two jurors' votes don't count," said Margaret Lagattuta, a local public defender and former prosecutor in the Orleans Parish District Attorney's Office.

But in Apodaca, the Supreme Court wrote, "We cannot assume that the majority of the

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In October 2008, the nation's top court rejected South Louisiana serial killer Derrick Todd Lee's attempt to require that jury verdicts be unanimous in all criminal trials.

Lee was convicted by an 11-1 vote in 2004 in West Baton Rouge Parish of second-degree murder in the 2002 slaying of Geralyn Barr DeSoto, of Addis.

In a subsequent trial in Baton Rouge, Lee was convicted of first-degree murder and sentenced to die by lethal injection in the 2002 killing of Charlotte Murray Pace.

In March 2009, the Louisiana Supreme Court again upheld the state non-unanimous verdict law. That ruling overturned a 2008 decision by state District Judge Wilford Carter of Calcasieu Parish, who ruled that suspects in two murder trials were entitled to unanimous verdicts.

The Louisiana high court took Carter to task for what it called a "rather insubstantial" ruling that relied on "no discernible legal analysis."