STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2003 KA 1345

STATE OF LOUISIANA

VERSUS

DANIEL J. JONES

DATE OF JUDGMENT: SEP 2 4 2004

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
(NUMBER 350825 "F"), PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE MARTIN E. COADY, JUDGE

* * * * * *

Hon. Walter P. Reed, District Attorney
Parish of St. Tammany
Covington, Louisiana

Counsel for Plaintiff/Appellee
State of Louisiana

Dorothy Pendergast
Metairie, Louisiana

John W. Lindner, II
Appellate Attorney
Covington, Louisiana

Counsel for Defendant/Appellant
Daniel J. Jones

* * * * * *

McClendon, J. concurs and assigns reasons

Whipple, J. dissents and assigns reasons.

BEFORE: CARTER, C.J., FOIL, WHIPPLE, PARRO, FITZSIMMONS, KUHN, GUIDRY, PETTIGREW, DOWNING, GAIDRY, McDONALD, AND McCLENDON, JJ.

Downing, J. dissents for the reasons assigned by Whipple, J.

Disposition: TRIAL COURT'S JUDGMENT, FINDING OF GUILT, AND SENTENCE STAND.

McDonald, J. concurs and assigns reasons.

Pettigrew, J. DISSENTS and assigns Reasons

Gaidry, J. - CONCURS AND ASSIGNS REASONS

Parro, J., concurs and assigns reasons.

KUHN, J. CONCURS & ASSIGNS REASONS

PER CURIAM.

This court has considered the appeal of defendant-appellant, Daniel Jones, en banc, and all twelve of the judges of this court have participated. Louisiana Constitution Art. V, § 8B requires that "[a] majority of the judges sitting in a case must concur to render judgment." Since six of the twelve judges agree to the affirmance of the conviction while six would reverse, there is no majority concurring to render judgment in this case. Accordingly, the judgment of conviction and the sentence stand.

CONVICTION AND SENTENCE STAND.

STATE OF LOUISIANA

VERSUS

DANIEL J. JONES

NO. 2003 KA 1345

COURT OF APPEAL

FIRST CIRCUIT

STATE OF LOUISIANA

KUHN, J., concurring in part.

Defendant, Daniel J. Jones, was charged by bill of information with one count of fourth offense driving while intoxicated (hereinafter "DWI-fourth offense"), in violation of La. R.S. 14:98.[1] The offense was alleged to have occurred on June 29, 2002. Defendant entered a plea of not guilty. After a trial by a jury, defendant was found guilty as charged and was sentenced to twenty years imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence. In addition the trial court imposed a fine of $5,000.00 and ordered defendant's vehicle forfeited. The trial court denied defendant's motion to reconsider sentence.

Defendant appeals, urging the following assignments of error warrant reversal of his conviction and sentence:

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[1] Defendant was originally charged with DWI-third offense. The bill was first amended to charge defendant with DWI-fifth offense and amended again to charge DWI-fourth offense. The fourth offense charged in this case occurred on June 29, 2002. The predicate offenses alleged in the information, as amended from time to time, were a February 18, 1997 22nd Judicial District Court guilty plea to the offense of operating a motor vehicle while under the influence of alcoholic beverages (# 251957-predicate number one), a May 31, 1994 22nd Judicial District Court guilty plea to the offense of operating a motor vehicle while under the influence of alcoholic beverages (# 224540-predicate number two), a November 8, 1990 22nd Judicial District Court guilty plea to the offense of operating a motor vehicle while under the influence of alcoholic beverages (# 189990-predicate number three), and a February 11, 1992 22nd Judicial District Court guilty plea to the offense of operating a motor vehicle while under the influence of alcoholic beverages (# 202761-predicate number four). Defendant raises no objection on appeal to the amendments to the bill of information.

1. There was insufficient evidence presented at trial from which a jury could have found defendant guilty as charged.

2. The trial court erred in refusing to sentence defendant under the 2001 Acts, No. 1163 amendments to La. R.S. 14:98.

Finding no merit in these assignments of error, I would affirm defendant's conviction and sentence.

FACTS

At about 11:15 P.M. on June 29, 2002, Pearl River Police Department Deputy Corey Crow was dispatched to assist a motorist on State Highway 41. On her way to work, police dispatcher Barbara Crawford had observed a white male slumped over the steering wheel of a silver Kia that was pulled off on the shoulder of the highway, just barely off the road. No one else was in or around the car and there were no other vehicles in the vicinity. She thought the driver might be having a medical emergency. When she arrived at the station, only about one and one half miles away, she asked Deputy Crow and reserve Officer Edgar Legman to investigate. Officer Legman left immediately to investigate.

When Officer Legman arrived on the scene, just moments later, defendant Daniel J. Jones was getting out of the driver's side of the Kia and staggering toward a sports utility vehicle (SUV) parked nearby. At this point, the Kia was in a different location, about twenty-five feet off the roadway, stuck in mud. Defendant tried to get into the passenger side of the SUV, but Officer Legman advised him that he could not leave. The driver of the SUV then drove off, leaving defendant on the shoulder of the road. Defendant told Officer Legman that he was trying to get his vehicle out of a ditch and that his girlfriend had been driving.

When Deputy Crow arrived to take over the investigation shortly thereafter, defendant was sitting in the driver's seat of the Kia, with the driver's side door open. Defendant appeared intoxicated and Deputy Crow read him his ***Miranda*** rights. When asked if he had been drinking, defendant admitted that he had a couple of beers earlier, had been at a friend's house swimming, and was headed home. Defendant had a Kia uniform shirt on and indicated that he was purchasing the Kia. At no time did he suggest to Deputy Crow that anyone else had been driving the vehicle. Officer Crow understood from his exchange with defendant that defendant had driven the car into the ditch on the side of the road.

Officer Crow called for assistance from the State police DWI patrol. State Trooper Greg Vogt was dispatched to assist. Trooper Vogt observed defendant staggering, with watery bloodshot eyes, slurred speech, and a strong odor of alcohol coming from his breath. After defendant failed a field sobriety test, he was placed under arrest and advised of his ***Miranda*** rights. Trooper Vogt asked defendant how his vehicle ended up off the roadway. Defendant answered that he was driving from a friend's house and just "ran off the road." He also stated: "I know I drank too much. I guess I'm going to jail for thirty years now." He made no mention of anyone else operating the Kia.

After defendant was transported to the Pearl River Police Station, Trooper Vogt administered a chemical test for intoxication. Defendant admitted that he had been drinking and had consumed about five beers at home. He also indicated that he had taken a muscle relaxant. At this point, defendant changed his story and told Trooper Vogt that he had not been driving the Kia. He stated that a girl named Cindy had been driving, but he denied knowing where Cindy had gone. He

did not describe "Cindy" as his girlfriend. When asked why he changed his story, defendant replied: "Well, I don't like lying, but I will say anything to keep me in the clear." The results of defendant's Breath Intoxilyzer Test showed a blood alcohol level of .216, more than twice the legal limit. Afterward, on the way to jail, he apologized to Trooper Vogt for lying and saying that someone named "Cindy" had been operating the vehicle.

Shonni Oswald, a probation officer for the Twenty-Second Judicial District Court for the Parish of St. Tammany, testified that she personally supervised defendant in connection with two separate misdemeanor DWI offenses in cases Nos. 189990 and 202761. Adam Stocks, another probation officer, identified documents showing defendant's release from incarceration on three previous DWI charges. The dates on the documents showed that not more than ten years elapsed between defendant's first conviction and this charge, excluding periods of incarceration. Stocks also testified that defendant was released on supervised probation on the most recent offense, No. 224540, with parole supervision scheduled to extend until December 2006. Finally, James Folks of the St. Tammany Parish Crime Laboratory testified that defendant's prints matched those of the defendant convicted in cases Nos. 224540 and 251957.[2]

ASSIGNMENT OF ERROR NUMBER 1

In his first assignment of error, defendant claims that the evidence adduced by the State was insufficient to support his conviction of driving while intoxicated,

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[2] 1993 La. Acts, No. 669, § 1 increased the cleansing period of La. R.S. 14:98F(2) from five to ten years. Application of Act 669 to an offender who committed his last DWI after the amendment and more than five years after the commission of his previous DWI offense does not violate the Ex Post Facto Clauses of either the federal or state constitutions. ***State v. Rolen***, 95-0347, pp. 1-2 (La. 9/15/95), 662 So.2d 446, 447 (per curiam).

fourth offense. Specifically, he argues that there was no evidence that he was operating a motor vehicle on the evening in question.

The standard of review for sufficiency of the evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude that the State proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. See La. C.Cr.P. art. 821; ***State v. Johnson***, 461 So.2d 673, 674 (La. App. 1st Cir. 1984). The ***Jackson v. Virginia***, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), standard of review incorporated in Article 821 is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the fact finder must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. ***State v. McLean***, 525 So.2d 1251, 1255 (La. App. 1st Cir.), ***writ denied***, 532 So.2d 130 (La. 1988). However, when a case involves circumstantial evidence, and the trier of fact reasonably rejects the hypothesis presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. ***State v. Moten***, 510 So.2d 55, 61 (La. App. 1st Cir.), ***writ denied***, 514 So.2d 126 (La. 1987).

At all relevant times, Louisiana Revised Statute 14:98A provided, in pertinent part:

> (1) The crime of operating a vehicle while intoxicated is the operating of any motor vehicle, aircraft, watercraft, vessel, or other means of conveyance when:
>
> (a) The operator is under the influence of alcoholic beverages; or

> (b) The operator's blood alcohol concentration is 0.10 percent or more by weight based on grams of alcohol per one hundred cubic centimeters of blood . . . .

In order to convict an accused of driving while intoxicated, the State need only prove that the defendant was operating a vehicle and that he was under the influence of alcohol. ***State v. Pitre***, 532 So.2d 424, 428 (La. App. 1st Cir. 1988), ***writ denied***, 538 So.2d 590 (La. 1989).

In his brief to this court, defendant does not contest the fact that he was intoxicated. Instead, he argues that the State failed to prove that he was *operating* a vehicle while under the influence of alcohol. Defendant insists that there was a reasonable hypothesis that someone other than defendant was driving the Kia and left in the SUV, so that there was insufficient evidence to prove beyond a reasonable doubt that he ever operated the vehicle.

The evidence adduced at trial shows that defendant was initially observed alone in the Kia, slumped over the wheel when no other vehicles were around. At that point the Kia was just slightly off the road. The SUV was not at the scene at that time. When Officer Legman arrived, shortly thereafter, the Kia had been moved and defendant was getting out of the driver's side of the vehicle and staggering toward the SUV. Although he told Officer Legman that his girlfriend had been driving, he also advised that he was trying to get his vehicle out of the ditch. He later admitted to Trooper Vogt that he had been drinking and driving and apologized for lying about it. In my view, the evidence was more than sufficient to exclude, beyond a reasonable doubt, any reasonable hypothesis of defendant's innocence. Defendant did not testify at trial. His hypothesis that

someone else had been operating the vehicle and departed in the SUV was refuted at trial by the location of the Kia when Officer Legman arrived, defendant's position exiting from the driver's side of the vehicle, and defendant's own admissions to officers that he had been driving and trying to get the Kia out of the ditch. The evidence presented at trial, viewed in the light most favorable to the State, supports defendant's conviction for driving while intoxicated, fourth offense. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER 2

Defendant claims the trial court erred and imposed an excessive sentence by refusing to sentence defendant under the new sentencing provisions contained in 2001 La. Acts, No. 1163, amending the provisions of La. R.S. 14:98, which amendments went into effect August 15, 2001.[3]

Defendant was convicted on January 28, 2003. In ***State v. Mayeux***, 2001-3195 (La. 6/21/02), 820 So.2d 526, the Louisiana Supreme Court held that the specific language of the recent amendments to La. R.S. 14:98, the intent of the legislature, and the social and public policy goals sought to be served, mandate that the sentencing provisions of the amendments to La. R.S. 14:98 dictate the penalties for DWI offenses where convictions are obtained *after* the effective date of the amendments. Thus, the date of conviction, rather than the date of the offense, now governs the applicable penalties for DWI offenses. Since defendant in this case was convicted in January 2003, he was entitled to be sentenced in accordance with the amendments to La. R.S. 14:98 in effect at the time of his

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[3] Defendant makes no argument that his sentence is unconstitutionally excessive for any other reason.

conviction. And because the date of his conviction was January 28, 2003, the trial judge did correctly sentence him in accordance with the law in effect.

Louisiana Revised Statute 14:98E(4)(b) provided at all pertinent times:

> If the offender has previously received the benefit of suspension of sentence, probation, or parole as a fourth offender, no part of the sentence may be imposed with benefit of suspension of sentence, probation, or parole, and no portion of the sentence shall be imposed concurrently with the remaining balance or any sentence to be served for a prior conviction for any offense.

In this case, the trial judge reviewed a presentence investigation report, which he relied upon in deciding an appropriate sentence. That report, made part of the record in this case, shows that defendant did receive the benefit of parole in connection with a previous conviction as a fourth DWI offender.[4] In addition, at the trial on the merits the State presented the testimony of Adam Stocks, a supervisor with the Louisiana Department of Public Safety and Corrections, Division of Probation and Parole, Covington District, who authenticated State records documenting defendant's previous convictions and parole releases. Moreover, James Folks, a fingerprint expert, identified defendant as the same convicted person referred to in the records produced by Adam Stocks. The trial judge made a specific finding that the defendant had received the benefit of probation, parole, or suspension of sentence in the past at the sentencing hearing for this offense. The trial judge did not abuse his discretion in making such a finding. The sentence imposed on defendant in this case was not excessive and is in compliance with applicable law. This assignment of error is without merit.

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[4] See La. C.Cr.P. art. 877. Defendant did not contemporaneously contest the accuracy of the information in the presentence investigation report.

THE PROPRIETY OF THE TWELVE-PERSON JURY'S VERDICT

I expressly address the posture of the dissenting opinion, which maintains that the holding in ***State v. Smith***, 367 So.2d 857 (La. 1979) requires this court, on our own motion, find that the verdict rendered by a twelve-person jury constituted patent error.

Article I, § 17 of the Louisiana Constitution states in 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. A case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons, all of whom must concur to render a verdict. ... Except in capital cases, a defendant may knowingly and intelligently waive his right to a trial by jury.

And La. C.Cr.P. art. 782A states in relevant part:

> Cases in which the punishment may be confinement at hard labor shall be tried by a jury composed of six jurors, all of whom must concur to render a verdict.

Review of the jurisprudence, including ***State v. Smith***, 367 So.2d 857, shows the supreme court has never expressly held that a defendant convicted of an offense triable by a six-person jury is entitled to a reversal of his conviction when a twelve-person jury has rendered a *unanimous* verdict. The ***Smith*** court relies on the majority's holding in ***State v. Nedds***, 364 So.2d 588 (La. 1978), which cites numerous cases, including ***State v. Bailey***, 154 La. 536, 97 So. 851 (1923), wherein the case of ***State v. Beebe***, 127 La. 493, 496, 53 So. 730, 731 (1910) is cited as authority for the annulment of the jury's verdict and the sentence imposed. And it is the ***Beebe*** court that supplied an articulated rationale for the conclusion

that the conviction of a defendant by a larger-size jury was required to be set aside. In ***Beebe***, the defendant was tried before a twelve-person jury although Article 116 of the Louisiana Constitution of 1898 provided that the case "shall be tried by a jury of five, all of whom must concur to render a verdict." In reversing the conviction, the stated rationale given by the court was that "[t]he tribunal before which the accused was tried was ... without jurisdiction in the premises, and, as to him and his case, [it] was as though it did not exist." ***State v. Beebe***, 127 La. at 496, 53 So. at 731. An underpinning warranting the reversal was "'that the [S]tate has an interest in the preservation of the lives and liberties of its citizens, and will not allow them to be taken away without due process of law.'" ***Beebe***, 127 La. at 497, 53 So. at 731 (citing ***State v. Thompson***, 104 La. 167, 28 So. 882 (1900)). The court articulated:

> for the [S]tate is as much interested that a person who may be subjected to punishment at hard labor shall not be deprived of his liberty without due process of law as that one who must be subjected to such punishment shall not be so dealt with, and certainly one cannot be said to have had the benefit of due process of law if tried before a tribunal upon which the law has conferred no jurisdiction to try him, but has, discriminatingly, conferred such jurisdiction elsewhere.

Beebe, 127 La. at 497, 53 So. at 731.

Subsequent to ***Beebe***, the supreme court has held the verdict of a twelve-person jury that convicted a defendant of an offense triable by six-persons was defective, see e.g., ***State v. Rabbas***, 278 So.2d 45 (La. 1974), or that the court lacked jurisdiction, see e.g., ***State v. Reeves***, 128 La. 37, 54 So. 415 (1911), or both, see e.g., ***State v. Bailey***, 154 La. 536, 97 So. 851 (1923).

Without analyzing the breakdown of the respective verdicts of individual jurors, citing the language of earlier constitutions, the conclusion that jury size is a "jurisdictional requirement" was made. But none of these cases actually holds that when a defendant has been convicted of an offense triable by a six-person jury by the *unanimous* verdict of a twelve-person jury, the conviction must be declared null and set aside.

Likewise, I do not find that this court's holdings in ***State v. King***, 524 So.2d 1376 (La. App. 1st Cir. 1988), and ***State v. Clark***, 589 So.2d 549 (La. App. 1st Cir. 1991), ***writ denied***, 592 So.2d 1333 (La. 1992), require this court to raise as patent error the unanimous verdict, declare it null, and remand for a new trial. The convictions under scrutiny in ***King*** and ***Clark*** pre-dated La. Acts 1997, No. 1502, § 1, approved October 3, 1998, effective November 5, 1998, and involved offenses triable before a six-person jury that had been joined with offenses triable before a twelve-person jury. ***King***, 524 So.2d at 1382; ***Clark***, 589 So.2d at 553. Thus, the total number of peremptory challenges available to each defendant was implicated by the improper joinder. See La. C.Cr.P. art. 799. Prejudice certainly existed, and defendants' due process rights had clearly been infringed. This case in which defendant was charged with but one offense for which the punishment was imprisonment with or without hard labor for more than six months is distinguishable because the total peremptory challenges were not implicated as in ***King*** and ***Clark***. And this defendant has not been prejudiced.

I also find this court's holding in ***State v. Adams***, 525 So.2d 1256 (La. App. 1st Cir.), ***writ denied***, 532 So.2d 130 (La. 1988) distinguishable. The issue under scrutiny in ***Adams*** was the propriety of convictions stemming from the misjoinder

of offenses. Thus, unlike the defendant in this case who was tried for but a single offense, in ***Adams***, the defendant had been tried before a jury on two charges: one which entitled him to a jury and the other which was required to be heard by a judge. Clearly, that defendant suffered prejudice and an infringement of his due process rights.[5] Therefore, ***Adams*** is distinguishable from the facts of this case and I do not believe this court is compelled to declare on our own motion the conviction a nullity which must be set aside.

Defendant's DWI-fourth offense conviction mandates, among other things, imprisonment with or without hard labor for not less than ten nor more than thirty years. See La. R.S. 14:98E(1)(a). Thus, under La. Const. Art. I, § 17, this is a "case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months" and one that "shall be tried before a

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[5] Louisiana Code of Criminal Procedure article 493, providing for joinder of offenses, was under scrutiny in ***Adams***. According to Article 493, two or more offenses may be charged in the same indictment or information as separate counts, whether felonies or misdemeanors, if the offenses are based on the same act or transaction or if part of a common scheme or plan "provided that the offense joined must be triable by the same mode of trial." The words "same mode of trial" could refer to more than one logical method of classifying criminal cases. Four classifications of trial are suggested by La. Const. Art. I, § 17: judge, six-person jury, twelve-person jury for which ten must concur, and unanimous twelve-person jury). See ***State v. Strickland,*** 94-0025, p. 10 (La. 11/1//96), 683 So.2d 218, 225. These classifications are based upon both the character of the trier of fact and the requirement for reaching the verdict. ***State v. McZeal***, 352 So.2d 592, 601 (La. 1977). By selecting different criteria, other classes of trials could be devised: if one focused on the presence or absence of a jury, there would be two modes of trial: non-jury and jury; if one focused on the number of triers of fact, there would be three modes of trial: judge, six-person jury, and twelve-person jury. ***Id.*** The ***Adams*** court analogized the case of a defendant who had been convicted by a jury when he was charged with an offense triable before a judge with the case of a defendant convicted by a twelve-person jury when the offense of which he was charged was one triable by a six-person jury and concluded, under the ***Nedds*** rationale, that the verdict was "constitutionally defective." The analogy is not pure; the facts of ***Nedds*** merely exemplify one possible logical mode of trial. A trial before a jury (of any number) is clearly a different "mode of trial" than one before a judge, regardless of the criteria focused on in classifying the trials provided for by La. Const. Art. I, § 17. Thus, reliance on ***Nedds*** was not pivotal to the disposition in ***Adams***. Undeniably, the mode of trial was different for the felony conviction (mandated to be tried by a jury) from the misdemeanor offense (requiring a trial before a judge) and, therefore, the misjoinder resulted in a constitutionally-defective trial warranting reversal of the misdemeanor conviction which had been improperly submitted to the jury.

jury of six persons, all of whom must concur to render a verdict." Because *all* members of the twelve-person jury concurred, under the Louisiana Constitution, defendant was technically tried "before a jury of six persons, all of whom ... concur[ed] to render a verdict."[6]

As pointed out by Justice Dennis in ***State v. Nedds***, 364 So.2d 588 (La. 1978), and expressly subscribed to by Justice Lemmon, see ***State v. Mosley***, 425 So.2d 764, 766 n.4 (La. 1983), where a defendant has been tried by a twelve-person jury in a case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months, there simply is no prejudice. This lack of prejudice is especially true in a case, like this one, where the verdict was unanimous. Mathematically, the lesser number is included within the greater. Thus, where unanimity is required and had, that twelve-persons rendered a guilty verdict in no way defeats the mathematical principle that six-persons, as a subset of the larger quantity, have rendered a guilty verdict. This obviously is not the case when the twelve-person verdict is not unanimous since, sitting alone, one or more of the six jurors comprising the six-person jury may have precluded a unanimous verdict. And clearly, as a matter of mathematics, logic, and legal principle, a person entitled to a twelve-person jury is not afforded his full panoply of rights when tried by a jury of a smaller size.

Located in that section of Title XXVI of the Code of Criminal Procedure setting forth the general provisions of Chapter 3, "Trial by Jury," nothing in La.

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[6] Indeed, this defendant has been unanimously found guilty by two six-person juries. If his case were to be remanded for a new trial and he were once again found guilty by another six-person jury, he will have received more due process than a person charged with a capital offense.

C.Cr.P. art. 782A specifies particular consequences when an accused is tried before a jury composed of a number which is not in conformity with the requirements stated in the procedural statute. It is incumbent on the accused to object to any non-conformity to the procedure employed at the trial against him. Where, as here, the defendant did not object to the larger jury composition and because the twelve-juror verdict was unanimous thereby obviating any prejudice, any "error, defect, irregularity, or variance" simply did not affect any substantial rights of the accused so as to warrant a reversal. See La. C.Cr.P. art. 921.

That rendition of a verdict by a twelve-person jury in a case calling for empanelment of a five-person jury is a violation of the accused's due process rights in 1910, which the ***Beebe*** court stated as the basis to nullify a conviction, simply has no present day application given the jurisprudential development of sophisticated procedures that ensure an accused considerable protections. While due process affords a criminal defendant the right to a fair trial before an impartial jury, see ***Duncan v. State of Louisiana***, 391 U.S. 145, 150, 88 S.Ct. 1444, 1448, 20 L.Ed.2d 491 (1968), where the accused has been afforded more protection than he is constitutionally mandated to receive, there is no deprivation of his right to an impartial jury and, hence, no due process violation. An error is harmless if the verdict rendered was surely unattributable to the error. See La. C.Cr.P. art. 921; ***State v. Taylor***, 93-2201, p. 11 (La. 2/28/96), 669 So.2d 364, 371, cert. denied, 519 U.S. 860, 117 S.Ct. 162, 136 L.Ed.2d 106 (1996). Any error created by defendant having been convicted by a twelve-person jury although the crime he was charged with having committed was an offense that was triable "before a jury of six persons, all of whom must concur to render a verdict" under La. Const. Art.

I, § 17 was harmless. The verdict rendered -- being unanimous -- was surely unattributable to the fact that 12 persons agreed that defendant was guilty since any and all subsets comprised of any 6 jurors did, in fact, concur in that verdict.

I do not believe that the citizens of Louisiana in ratifying the 1974 Constitution intended this result, which -- without infringement of a defendant's due process safeguards -- defies consistent application of mathematical principles and logic. Where defendant has not complained or objected to the size of the jury and there has been no due process infringement, concluding on our own motion, that the verdict is absolutely null and reversing the conviction of a unanimous twelve-person jury simply because the offense is triable by a six-person jury is not justified and inconsistent with the purpose of the criminal justice system.

Accordingly, I would affirm the conviction and sentence.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

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VERSUS

DANIEL J. JONES

PARRO, J., concurring with reasons.

I agree that because there was not a concurring majority by this court, we are unable to render judgment. However, I also note that this matter comes down to the simple and clear wording of Article I, section 17 of the Louisiana Constitution, which mandates a trial by a six-person jury for this offense, rather than a twelve-person jury. This mandate should have been followed by the trial court. Accordingly, the sentence should be vacated, the conviction set aside, and a new trial held with a six-person jury.

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VERSUS

DANIEL J. JONES

GAIDRY, J., concurs.

Although I commend the detailed analysis and concise reasoning expressed in the concurring opinion of my learned colleague, Judge Kuhn, I must take issue with the ultimate rationale expressed: that a defendant required to be tried before a six-person jury but convicted by unanimous verdict of a twelve-person jury may not seek reversal of that conviction based upon La. Const. Art. I, § 17(A), as he has in effect been tried before a six-person jury. The result achieved, in which I concur, is better grounded on the defendant's failure to raise the numerical composition as error on appeal, rather than a strained interpretation of a twelve-person jury as a six-person jury, or as "two six-person juries."[1] The language of La. Const. Art. I, § 17(A) and La. C. Cr. P. art. 782(A) is mandatory and unambiguous, and if error in the number of jurors required for trial had been properly raised by

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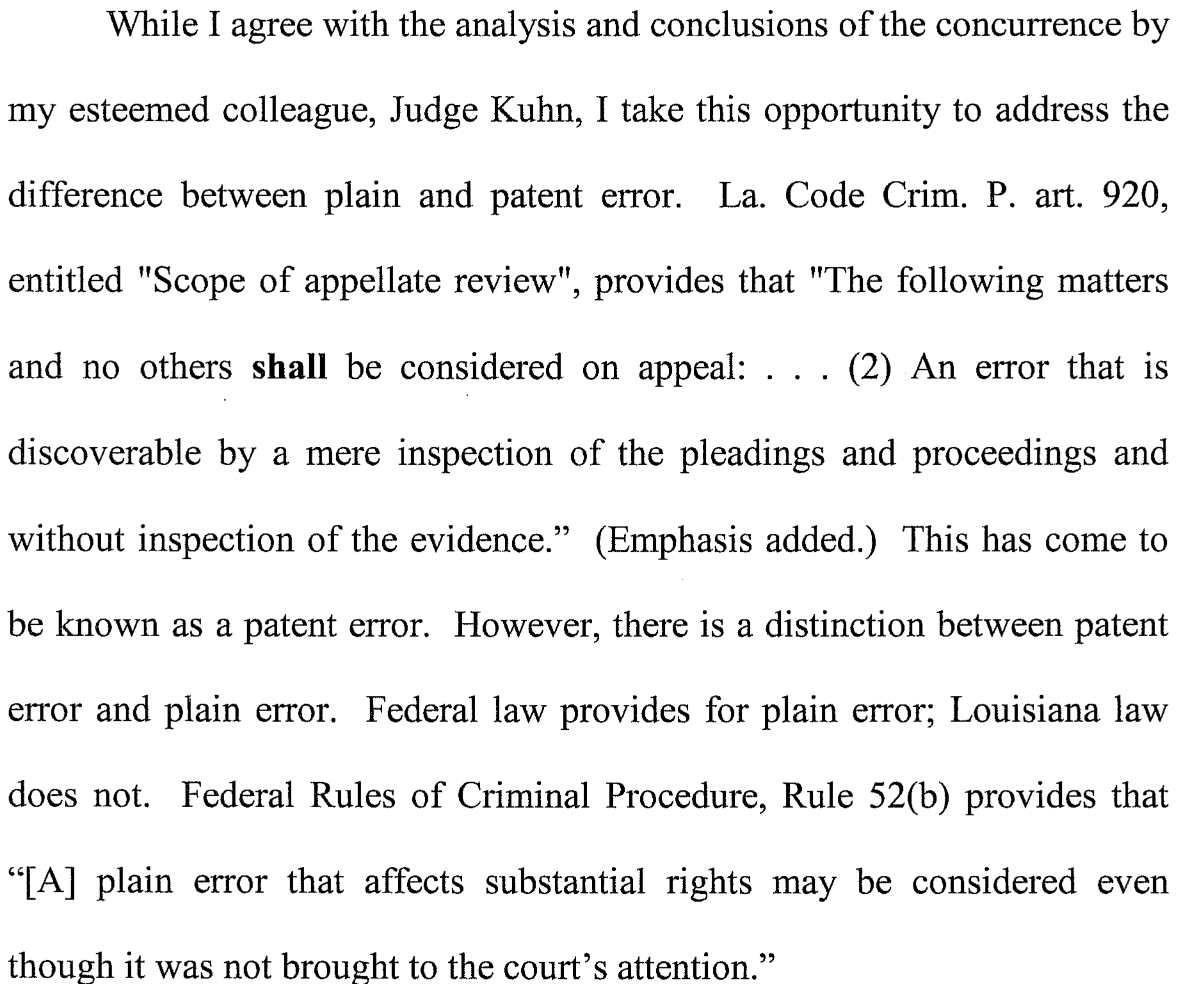
[1] Without indulging in a full theoretical exposition, I would simply emphasize that a jury should appropriately be considered a social unit, rather than simply a mathematical construct. More jurors do not necessarily equate to more due process; due process must be considered in light of more complex and subtle factors than counting noses. For example, the defendant herein could perhaps have argued that a larger jury would tend to inhibit freer expression of each individual juror's convictions, since many individuals are less vocal in larger groups than in smaller, more intimate ones, and that he was entitled to the benefit of the social dynamics of a six-member jury under the particular facts of this case and the language of La. Const. Art. I, § 17(A).

the defendant in this appeal, the verdict must be considered null, and I would reverse the conviction and remand for a new trial.

Here, however, the defendant has not invoked the benefit of La. Const. Art. I, § 17(A), and the verdict should therefore be considered a relative nullity, since it is not the type of patent error which affects substantial rights and fundamental due process, requiring reversal. In this respect, I join in the lucid reasoning employed by Judge McDonald in his separate concurrence. While the right to trial by a jury of your peers is a fundamental due process right, the right of a defendant charged with a relative felony to a trial before six jurors, rather than twelve, is not. Under the particular circumstances present here, where the defendant has not raised the numerical composition of the jury as error nor claimed prejudice by reason of it, reversal is not warranted. I respectfully concur.

STATE OF LOUISIANA	STATE OF LOUISIANA
VERSUS	FIRST CIRCUIT COURT OF APPEAL
DANIEL J. JONES	NUMBER 2003 KA 1345

McDONALD, J. CONCURRING



While I agree with the analysis and conclusions of the concurrence by my esteemed colleague, Judge Kuhn, I take this opportunity to address the difference between plain and patent error. La. Code Crim. P. art. 920, entitled "Scope of appellate review", provides that "The following matters and no others **shall** be considered on appeal: . . . (2) An error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence." (Emphasis added.) This has come to be known as a patent error. However, there is a distinction between patent error and plain error. Federal law provides for plain error; Louisiana law does not. Federal Rules of Criminal Procedure, Rule 52(b) provides that "[A] plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

Thus, a plain error is such that requires reversal because it is so fundamentally prejudicial to the due process rights of the defendant. In *State v. Williamson,* 389 So.2d 1328 (La.1980), the supreme court reviewed an erroneous jury instruction even though the defendant failed to object at trial. In reversing the conviction the court stated:

> [T]he asserted error involves the very definition of the crime of which the defendant was in fact convicted. Such an error is of such importance and significance as to violate fundamental requirements of due process. 389 So.2d at 1331.

However, in *State v. Thomas,* 427 So.2d 428 (La.1982), on rehearing, the court warned against equating a patent error review with plain error. The court cautioned:

> *Williamson* should not be construed as authorizing appellate review of every alleged constitutional violation and erroneous jury instruction urged first on appeal without timely objection at occurrence. 427 So.2d at 435; see also *State v. Belgard*, 410 So.2d 720, 727 (La. 1982).

Thus, the error must be of such magnitude when found on a patent error search as to prejudice the defendant and the burden is on the defendant to prove that he was prejudiced. *State v. Brown*, 2003 WL 23095559, (La.App. 1 Cir. 2003) citing *See State v. Augustine,* 555 So.2d 1331, 1333-1334 (La.1990) and *State v. Claxton,* 603 So.2d 247, 250 (La.App. 1 Cir.1992). Unless the defendant can show he was prejudiced by the error, the conviction is not reversible. The defendant in this case did not raise the error either at trial or on appeal and there is no prejudice. For all these reasons, including those stated in Judge Kuhn's concurring opinion, I agree the conviction should be affirmed.

STATE OF LOUISIANA	NUMBER: 2003 KA 1345
VERSUS	COURT OF APPEAL
	FIRST CIRCUIT
DANIEL J. JONES	STATE OF LOUISIANA

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McClendon, J., concurs and assigns reasons.

I believe the conviction of the defendant should be affirmed and adopt in part the reasoning set forth by Justice Dennis in **State v. Nedds**, 364 So.2d 588 (La. 1978), and subscribed to by Justice Lemmon in **State v. Mosely**, 425 So.2d 764, 766 n.4 (La. 1983). Clearly, the defendant could have waived the jury entirely. Therefore, his trial before a twelve person jury constitutes a waiver of his right to trial by a fewer number of jurors.[1] Furthermore, the defendant has neither alleged nor shown that he suffered any prejudice as a result of being convicted by a unanimous twelve person jury. Although it is difficult to imagine that the defendant could show any prejudice under this factual scenario, I do not rule out that possibility. Accordingly, as defendant did not raise as error the numerical makeup of the jury and did not allege or show prejudice resulting from said jury composition, I would affirm the conviction.

[1] The issue of fundamental due process where a defendant is tried by a jury composed of fewer persons than mandated by the Constitution of the State of Louisiana is not present here.

STATE OF LOUISIANA

VERSUS

DANIEL J. JONES

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2003 KA 1345

WHIPPLE, J., dissenting.

At the outset, I find no legal basis for the re-designation of this docketed and assigned case as a "per curiam" by unilateral action of one judge, in contravention of the rules of this court, absent a conference vote to allow such a deviation from our internal rules. Specifically, Rule 2.3d(1)(a) of the Internal Rules of Court, First Circuit Court of Appeal provides for cases to be **randomly allotted** to a panel with one judge on the panel designated as **primary (or writing) judge**. Additionally, under the policies of this court, if the opinion of the primary judge does not garner the necessary votes, the back-up judge then becomes the author.

By practice, panels (or even the conference) can agree to issue an opinion as a per curiam. Additionally, Rule 4.1 of this court's internal rules further provides that in instances where the court's rules do not expressly provide for a particular situation, the chief judge is the judge charged with the authority to act and "shall act in the best interest of the court, subject to review by the conference." However, the minutes of the conference do not reflect any approval, by either the en banc conference or the chief judge of this court, allowing the judge who became the authoring judge herein to hand down this matter as a "per curiam opinion with a concurrence" (and to thereby accomplish affirming the defendant's conviction and sentence). There are important and valid policy reasons why en banc courts adopt, and should then follow, procedural rules to govern the conduct of the business of the court.

Additionally, I note that the procedure being employed by Judge Kuhn herein, that is, the issuance of a purported "per curiam" with no majority opinion[1] being issued, is the same flawed procedure that was attempted by the Second Circuit Court of Appeal, a procedure which the Supreme Court rightfully and properly termed a "procedural mishap." See Maranto v. Goodyear Tire & Rubber Company, 25114 (La. App. 2nd Cir. 10/5/94), 643 So. 2d 173, reversed, 94-2603, 94-2615 (La. 2/20/95), 650 So. 2d 757.

In particular, I question whether the "ruling" of the purported "per curiam" herein (and accompanying concurrence) allowing the conviction and sentence to "stand" (as if this is somehow distinguishable from an affirmance of same) can have any legal or constitutional effect. Pursuant to LSA-Const. art. V, § 8(A), each court of appeal shall sit in panels of at least three judges. The Uniform Rules—Courts of Appeal further provide that "[w]hen authorized by law, or when the court deems it necessary to promote justice or expedite the business of court, the court may sit in panels of more than 3 judges or en banc." Uniform Rules—Courts of Appeal, Rule 1-5. Additionally, this court's internal rules require that the court sit en banc to overrule existing published and unpublished First Circuit jurisprudence or to resolve a conflict between decisions of this court. Internal Rules of Court, First Circuit Court of Appeal Rule 2.1d(1) and (4).

Most importantly, with regard to rendition of an opinion, the Louisiana Constitution dictates clearly that "[a] majority of the judges sitting in a case **must** concur to render judgment." LSA-Const. art. V, § 8 (emphasis added); Pattan v. Fields, 95-2342 (La. 9/25/95), 661 So. 2d 142.

Notably, in State v. Mathews, 2002 KA 2267 (La. App. 1st Cir. 5/9/03) (unpublished), a previous case likewise involving a unanimous jury verdict (12-0)

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[1] As reflected herein, Judges Kuhn, Foil, Fitzsimmons, Gaidry, McDonald and McClendon would affirm the conviction or "allow the judgment of conviction . . . [to] stand."

finding defendant guilty of fourth offense DWI, a three-judge panel of this court found reversible patent error due to the incorrect number of jurors. In the instant case, the court chose to consider the appeal en banc, and all twelve judges have participated herein. Thus, the majority of this twelve-judge court necessary to render judgment (and to overrule existing First Circuit jurisprudence) is **seven** judges. See Pattan, 95-2342, 661 So. 2d at 142 (A majority of a thirteen-judge court is seven); Dauzat v. Allstate Insurance Company, 242 So. 2d 539, 546 (La. 1971) (A majority of a six-judge court is four); and McLaughlin v. Fireman's Fund Insurance Company, 582 So. 2d 203, 234 (La. App. 1st Cir.), writ denied, 586 So. 2d 536 (La. 1991) (on rehearing) (A majority of a ten-judge court is six). In this case, only six judges of the twelve judges sitting en banc have agreed to allow the conviction and sentence of the trial court to "stand." Thus, there are not seven votes to render a judgment either affirming or reversing the conviction.[2] Therefore, any purported judgment of less than a majority of this court allowing the conviction and sentence to "stand," which obviously has the effect of affirming the conviction and sentence, is invalid. Pattan, 95-2342, 661 So. 2d at 142. Additionally, I note that in the absence of a majority vote by the en banc court to reverse this court's prior opinion of State v. Mathews, which opinion was directly on point herein, by our own internal rules, this court remains bound by State v. Mathews, and the conviction must be reversed in keeping with the decision on this issue of law previously and directly addressed by members of this court.

Setting aside my objections to the procedures employed herein, the paramount issue, in my view, is that the defendant has a constitutional right to

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[2]It is quite interesting to note that the lead concurring authoring judge resorts to mathematical principles in attempting to justify allowing the conviction herein to stand (i.e., where 12 persons have rendered a verdict, 6 persons, as a subset of the larger group of 12 persons, have necessarily rendered a verdict), yet completely ignores the basic mathematical principle that 6 is not a majority of 12 in agreeing with the result of allowing the conviction and sentence to "stand," which, as noted above, effectively affirms the conviction and overrules existing First Circuit caselaw without a majority vote.

appellate review of his criminal conviction to this court. See LSA-Const. art. 5, sec. 10. In the instant case, the issuance of a "per curiam" decreeing that the conviction and sentence "stand" because this court of twelve is unable to reach a majority has effectively deprived the defendant of any constitutional review of the case by this court.

Given the 6/6 split of the votes in this case, the Louisiana Supreme Court could easily appoint a judge ad hoc to participate in this matter as a thirteenth judge of the court See Dauzat, 245 So. 2d at 452 (wherein the Supreme Court noted that it took four of the court's six judges to decide an en banc case and, thus, on remand the case was heard with another judge added to break a possible tie). Alternatively, this court could employ the provisions of LSA-Const. art. V, sec. 11, which sets forth that a court of appeal can certify any question of law to the Louisiana Supreme Court, with the Supreme Court then either issuing a binding instruction or deciding the case upon the whole record. This approach certainly seems appropriate in the present situation.

Nevertheless, should a superior court find a valid "per curiam" opinion has been rendered herein, I respectfully dissent from the six-vote "per curiam" decision to allow the conviction to stand, as being directly contrary to the constitution and jurisprudence of this court and the Supreme Court of this state. Louisiana Code of Criminal Procedure article 920, entitled "Scope of appellate review", provides that "The following matters and no others **shall** be considered on appeal: . . . (2) An error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence." (Emphasis added.) Louisiana Code of Criminal Procedure article 5, entitled "Mandatory and permissive language," provides, in pertinent part, that "The word 'shall' is **mandatory**." (Emphasis added.) This language is clear and unambiguous. Its application is not limited to errors favorable or unfavorable to either the state or a criminal defendant.

Louisiana Civil Code article 9 states the basic rule for the interpretation of laws and provides, in pertinent part, that "[w]hen a law is clear and unambiguous . . . the law shall be applied as written." State v. Paoli, 2001-1733, p. 6 (La. App. 1st Cir. 4/11/02), 818 So. 2d 795, 799 (en banc), writ denied, 2002-2137 (La. 2/21/03), 837 So. 2d 628. In my view, as mandated by Article 920, a patent error review of the record on appeal discloses patent error herein, and those concurring in this purported "per curiam" err in failing to so find.

The minutes and transcript reflect that defendant in this case was tried by a twelve-member jury on the charge of DWI-fourth offense. At all relevant times, LSA-R.S. 14:98E(1)(a) provided in pertinent part that upon conviction, a defendant **shall** be imprisoned **with or without hard labor** for a period of not less than ten nor more than thirty years and shall be fined five thousand dollars. The statute further provided that sixty days of any sentence imposed shall be served without benefit of probation, parole, or suspension of sentence, that the remainder of the sentence shall be suspended, and that the offender shall be required to undergo evaluation and treatment for his substance abuse disorder. Louisiana Constitution Article I, § 17A and LSA-C.Cr.P. art. 782A provide that cases in which punishment **may** be confinement at hard labor shall be tried by a jury composed of **six jurors**, all of whom must concur to render a verdict. Accordingly, a six-person jury clearly was required for defendant's trial in this case.[3]

Despite the ambitious effort of my learned colleague, in his authorship of the "per curiam," accompanied by his lead concurring opinion, and the valiant attempts

[3]Under La. R.S. 14:98E(4)(a), imprisonment at hard labor shall be imposed if the offender has previously been required to participate in substance abuse treatment **and** home incarceration under Subsection D of La. R.S. 14:98. The predicate offenses cited in the bill of information involved convictions in 1997, 1994, 1992, and 1990. At all times relevant to those convictions, there was no provision for home incarceration in Subsection D of La. R.S. 14:98. State Exhibit 8, transcript page 37 shows that defendant's sentence on the 1990 conviction did not include home incarceration. State Exhibit 9, transcript page 36 shows that defendant's sentence on the 1992 conviction did not include home incarceration. State Exhibit 14, shows that defendant's sentence for his 1994 conviction did not include home incarceration. State Exhibit 13, transcript page 3 shows that defendant's sentence for his 1997 conviction did not include home incarceration. Thus, La. R.S. 14:98E(4)(a) is inapplicable in this case.

to find a way around the Louisiana Constitution and the prior pronouncements of both this court and the Louisiana Supreme Court, an error in the number of jurors trying a defendant constitutes patent error. See State v. Smith, 367 So. 2d 857, 858 (La. 1979) (per curiam). As clearly set forth therein, a verdict returned by a jury composed of either more or less than the correct number of jurors is null. Smith, 367 So. 2d at 858. Until the Louisiana Supreme Court or the Constitution provides otherwise, the requirement of a properly constituted jury stands. Since defendant was tried by a jury of twelve for this offense, the Louisiana Supreme Court (or a true majority of this court en banc) should reverse the conviction, vacate the sentence, and remand the case to the district court for a new trial. See State v. Brown, 2002-2231, pp. 5-6, 11 (La. App. 1st Cir. 5/9/03), 849 So. 2d 566, 569-570, 573.

In a constitutional system, there is no support for a "technical" trial as alluded to in my learned colleague's concurrence. The Louisiana Constitution is clear in its directive: the state was required to try this matter before a jury of six persons, all of whom must concur to render a verdict. Judicial activism to reach a desired result can not supercede principles of constitutional due process. In the leading concurring opinion, the author would affirm the conviction on the basis that this defendant "has been unanimously found guilty by two 6-person juries," that a verdict of guilty in a new trial before a properly constituted six-person jury would grant him "more due process than a person charged with a capital offense," and that "sophisticated procedures . . . ensure an accused considerable protection." I disagree. Our system of justice calls for constitutional trials, not "technical trials," absent amendment of the constitution to provide otherwise.[4]

For these reasons, I respectfully dissent.

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[4]Indeed, juror No. 7 could have been the juror to sway the entire improperly constituted panel of twelve.

STATE OF LOUISIANA

VERSUS

DANIEL J. JONES

NUMBER 2003 KA1345

COURT OF APPEAL

FIRST CIRCUIT

STATE OF LOUISIANA

BEFORE: CARTER, C.J., WHIPPLE, FOIL, PARRO, FITZSIMMONS, KUHN, GUIDRY, PETTIGREW, DOWNING, GAIDRY, McDONALD, AND McCLENDON, JJ.

PETTIGREW, J., DISSENTS, AND ASSIGNS REASONS.

PETTIGREW, J., dissenting.

The defendant in this case was tried by a twelve-person jury on the charge of DWI-fourth offense. Pursuant to La. R.S. 14:98E(1)(a), on conviction of a fourth or subsequent DWI offense, a defendant shall be imprisoned with or without hard labor for a period of not less than ten nor more than thirty years and shall be fined five thousand dollars. As set forth in La. Const. Art. I, § 17A and La. Code Crim. P. art. 782A, cases in which punishment may be confinement at hard labor shall be tried by a jury composed of six jurors, all of whom must concur to render a verdict. Thus, a six-person jury was clearly required for the defendant's trial in this case.

It is impossible for us to know what discussions the jurors had during their deliberations. The original six jurors may have found the defendant not guilty, but for the argument of the additional six jurors. In my humble opinion, the conviction must be reversed and the matter remanded for a new trial before a jury containing the proper number of jurors. See **State v. Smith**, 367 So.2d 857 (La. 1979) (per curium).