No. 18-5924

IN THE
Supreme Court of the United States

EVANGELISTO RAMOS,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Writ of Certiorari
to the Court of Appeal of Louisiana, Fourth Circuit

JOINT APPENDIX

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Petition for Writ of Certiorari Filed: September 7, 2018
Certiorari Granted: March 18, 2019

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IN THE COURT OF APPEAL FOR THE FOURTH CIRCUIT

STATE OF LOUISIANA

State of Louisiana v. Evangelisto Ramos

Case No. 2016-KA-1188

RELEVANT DOCKET ENTRIES

Date Filed	Docket Text
05/21/2015	Criminal District Court, Orleans Parish. Indictments Returned.
07/22/2015	Criminal District Court, Orleans Parish. Motion to require a unanimous verdict filed.
10/09/2015	Criminal District Court, Orleans Parish. Motion to require a unanimous verdict denied.
06/21/2016	Criminal District Court, Orleans Parish. Trial commenced.
06/22/2016	Criminal District Court, Orleans Parish. Trial concluded; jury finds defendant guilty as charged.
07/06/2016	Criminal District Court, Orleans Parish. Motion for a new trial filed.
07/12/2016	Criminal District Court, Orleans Parish. Motion for a new trial denied.
07/12/2016	Court of Appeal of Louisiana, Fourth Circuit. Notice of appeal filed.

11/16/2016	Court of Appeal of Louisiana, Fourth Circuit. Appeal submitted.
11/02/2017	Court of Appeal of Louisiana, Fourth Circuit. Decision issued.
11/27/2017	Supreme Court of Louisiana. Petition for review filed.
06/15/2018	Supreme Court of Louisiana. Petition for review denied.

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

STATE OF LOUISIANA versus EVANGELISTO RAMOS	No. 2016-KA-1199

* * * * * *

APPEAL FROM CRIMINAL DISTRICT COURT
ORLEANS PARISH
NO. 524-912, SECTION "F"
HONORABLE ROBIN D. PITTMAN, JUDGE

* * * * * *

JAMES F. MCKAY III
CHIEF JUDGE

* * * * * *

(Court composed of Chief Judge James F. McKay III, Judge Edwin A. Lombard, Judge Joy Cossich Lobrano)

LOBRANO, J., CONCURS IN THE RESULTS

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AFFIRMED

NOVEMBER 2, 2017

The defendant, Evangelisto Ramos, appeals his conviction and sentence. Finding no error, we affirm his conviction and sentence.

STATEMENT OF CASE

On May 21, 2015, the defendant was indicted on one count of second degree murder. The defendant appeared for arraignment on June 1, 2015 and entered a plea of not guilty. On July 16, 2015, the trial court denied the defendant's motion to suppress the statement.

On March 20, 2016, the trial court granted the defendant's motion for a speedy trial. A pre-trial conference was conducted by the trial court on June 10, 2016. Trial was set for June 20, 2016.

On June 20, 2016, the trial court once again denied the defense motion to exclude the statement. Trial was continued to June 21, 2016. The defendant's case proceeded to trial by jury on June 21, 2016 and concluded on June 22, 2016. The defendant was found guilty of second degree murder by a ten of twelve jury verdict.

The defendant filed a motion for new trial and a motion for post-verdict judgment of acquittal on July 6, 2016. On July 12, 2016, the defendant appeared for sentencing and his motions for new trial and for post-verdict judgment of acquittal were denied. The defendant waived sentencing delays and was sentenced to life imprisonment at the Louisiana Department of Corrections at hard labor without benefit of parole, probation or suspension of sentence. The defendant filed a motion for appeal on July 12, 2016.

STATEMENT OF FACT

On November 26, 2014, the dead body of a woman, later identified as Trinece Fedison (the "victim"), was found inside a trash can in a wooded area behind 3308 Danneel Street in New Orleans.

Robert Heim ("Mr. Heim"), a code enforcement officer for the City of New Orleans, testified that on the morning of November 26, 2014 between 9:00 and 10:00 a.m., he was inspecting blighted property in the wooded area behind the house located at 3308 Danneel Street. Mr. Heim noticed trash and various discarded items in the overgrown brush area. The woman who resided nearby called his attention to a trash can in the rear of the alley way and asked him to pull it out to the street. The woman said the trash can did not belong to her. When Mr. Heim attempted to move the trash can, he found it was very heavy. Because he was unable to move the trash can, Mr. Heim lifted the lid and discovered the dead body of a woman, later identified as the victim. He immediately called 911. Mr. Heim said it was apparent the victim was a woman and was deceased.

Jerome Fedison ("Jerome"), the victim's nephew, testified that on the afternoon before his aunt's body was discovered, he stopped at his cousin's house at about 3:30 p.m. While waiting for a friend, Jerome called his aunt (the victim) on the phone. She told him she was sick. About thirty-minutes later, he saw his aunt walking around the corner. He saw two Spanish men he had never seen before standing on the corner near his aunt. One of the men rode off on a bicycle, and the other remained on the corner. Jerome flashed his truck's lights to let his aunt know he was present and waved at her. She waved back. His aunt then went back to talk to the Spanish man and then went inside the house on the corner with the man. Jerome remained outside his cousin's house for approximately 30-40 minutes and then left. During that time, he never saw his aunt come out of the corner house.

On Thanksgiving morning, the morning his aunt's body was found, Jerome looked down the street and saw the a man exiting the Spanish man's house. Knowing that the Spanish man was the last person he saw his aunt with, Jerome approached the man in the street and confronted him. Jerome told the man, "I know what you did. You gonna [sic] feel me partner, for real." The man stood silent for ten minutes "like a damn ghost." Jerome identified the defendant at trial as the Spanish man he had last seen with his aunt.

New Orleans Police Homicide Detective Nicholas Williams ("Detective Williams") testified he assisted in the investigation of the Trinece Fedison murder. He grew up with Trinece and her family. Detective Williams learned from the victim's family that Jerome had information on a possible suspect. He subsequently took a recorded statement from Jerome,

which he turned over to Detective Bruce Brueggeman ("Detective Brueggeman"). In his statement, Jerome furnished a description and address of the suspected perpetrator.

Darryl Schuermann testified he was the operations manager for Romeo Pappa Boats, where the defendant worked as an AB seaman. Romeo Pappa Boats' office was located in Houma, and there was a mobile home located on the property. The trailer was used to lodge outgoing crewmen from out of town for the night before a crew change so that the crewmen did not have to travel in the early morning hours. A retired Coast Guard officer named Gene lived on the property and looked after the property. Gene called Mr. Scheurmann over the weekend and informed him that the defendant had been staying in the trailer for several days.

When Mr. Scheurmann arrived at work on the Monday morning following Thanksgiving, the defendant came into his office and said he needed to talk to him. The defendant told Mr. Scheurmann that he was sexually involved with a prostitute, the victim, and when she was leaving his house, he heard a commotion. The defendant told Mr. Scheurmann he saw a black SUV with two black men, who were harassing her.

The defendant stated that after the victim's body was discovered, one of her family members approached him on the street and threatened to kill him, saying; "I know you did it. I'm going to kill you." The defendant explained that he had been staying in the trailer that weekend because he feared for his life. Mr. Scheurmann advised the defendant to talk to the

police. The defendant indicated he was willing to talk to the police. Mr. Scheurmann contacted the lead detective and arranged an interview. When questioned relating to the defendant's previous employment, Mr. Scheurmann stated the defendant had been a butcher in New York.

NOPD Homicide Detective Brueggeman testified he was the lead detective assigned to investigate the the victim's murder. Upon viewing the crime scene, Detective Brueggeman suspected that a sexual assault had occurred, so he requested that a sexual assault kit be completed. He learned that the trash can in which the body was found belonged to a church located across the street from the crime scene. He surmised that the murder probably happened within the immediate area because the trash would have been too heavy to move with the body of a large woman inside. Detective Brueggeman interviewed a neighbor who lived in an apartment complex next to the wooded lot, who told him that while she was in bed in the early morning hours, she heard a garbage can being rolled across the street and over a curb.

Detective Brueggeman interviewed the victim's boyfriend, who stated that he was with several family members at the time of the murder. Because the alibi was confirmed by his family members, the victim's boyfriend was eliminated as a suspect. Detective Williams furnished Detective Brueggeman with the recorded statement he had taken from the victim's nephew, Jerome.

Detective Brueggeman received a phone call from Darryl Schuermann. The detective immediately drove to Houma to meet with Mr. Scheurmann and the

defendant. At that time, Detective Brueggeman did not consider the defendant a suspect in the victim's murder. The defendant told the detective that he had had sex with the victim just prior to her murder. Detective Brueggeman obtained a buccal swab from the defendant.

When Detective Brueggeman received the results of the DNA testing, it revealed a match between the defendant's DNA and the DNA found in the victim's vagina. The defendant's DNA was also found on the handles of the trash can in which the victim's body had been found. The DNA reports were later introduced into evidence.

After receiving the DNA results, Detective Brueggeman obtained a warrant for the defendant's arrest, and the defendant was apprehended. Detective Brueggeman, after providing the defendant with his rights in accordance with *Miranda*, obtained a second statement from the defendant. Detective Brueggeman informed the defendant there was some physical evidence. In response to learning the police had physical evidence, the defendant immediately told Detective Brueggeman about his prints being on a garbage can lid. The defendant stated that he had touched the garbage can lid when he placed a bag of garbage in the church garbage can immediately after having sex with the victim. After further questioning, the defendant said the church was located across the street from his house. The defendant told the detective that the last time he saw the victim was when she was leaving his residence. The defendant stated, as the victim was leaving, a black vehicle, possibly a Buick, pulled up, and the men inside called her name. The victim appeared to know the men, immediately got

into the vehicle, and the vehicle drove off. The detective noticed that the defendant's account of the victim's encounter with the men in the black vehicle differed from the account he had given to Darryl Schuermann in which he asserted the men were harassing the victim. The defendant was unable to describe the men in the black car.

Suggesting that the defendant had been profiled based on his ethnicity, Detective Brueggeman was asked on cross examination why someone had said, "[I]t was possibly Hispanic due to a knife being involved?" Detective Brueggeman replied: "Some of the people we spoke to like Jerome, some of the people in the black community, they feel as if somebody is a victim of [a] stab wound chances are it's probably from a Mexican. Those aren't my words but they think its Mexican or Hispanic because they like to use knives."

Detective Brueggeman stated he learned during his investigation that the victim had a drug problem; however, only the defendant stated she was a prostitute. Detective Brueggeman reviewed the victim's criminal history and found nothing to lead him to believe the victim was a prostitute. There were no arrests for prostitution and nothing to suggest the victim was a prostitute.

Dr. Erin O'Sullivan ("Dr. O'Sullivan"), a forensic pathologist for the Orleans Parish Coroner's Office, performed the autopsy on the victim's body on November 28, 2014. Dr. O'Sullivan stated the death was classified as a homicide. Dr. O'Sullivan determined that Trinece had sustained six stab wounds in the abdomen and lower right side of the back. Additionally, the victim sustained an "in size"

[sic] wound on the interior of her neck, cutting into her vertebrae. In other words, in colloquial terms, her throat was slit. The victim also had a contusion on her back and her right eye, consistent with a struggle.

Dr. O'Sullivan performed a sexual activity test on the victim at the request of the police. Dr. O'Sullivan determined that the cause of the victim's death were the stab wounds to the abdomen and neck. Based on the rigor state of the victim, Dr. O'Sullivan determined the time of death to be between the night of November 25, 2014 and the morning of November 26, 2014. Dr. O'Sullivan took fingernail clippings, which she preserved for evidence. Dr. O'Sullivan stated the victim had lost a lot of blood internally. Dr. O'Sullivan explained the abdominal wounds would not cause massive external bleeding and the wound to the neck may have had more external bleeding. Dr. O'Sullivan explained the neck wound may not have had much external bleeding if it was the last wound inflicted.

Stacey Williams ("Ms. Williams"), a forensic DNA analyst for the State Police Crime Lab, was accepted as an expert in the field of forensic DNA analysis. Ms. Williams performed the DNA analysis with respect to samples related to the victim murder investigation. The testing revealed that the defendant's DNA was found in the victim's vagina and also on the handles of the trash can in which her body was found. There were three contributors of contact (touch) DNA on the left handle of the garbage can. The defendant could not be excluded as the major contributor of the DNA, and the victim could not be excluded as the minor contributor. It was also concluded that there were two contributors to the contact DNA found on the right handle of the garbage can. The defendant could not be excluded as a

minor contributor, while the victim could not be excluded as a major contributor. Assuming one contributor, the probability of finding the same profile from an unrelated random individual other than the defendant would be one in 18.4 quadrillion, which is two to three times the earth's population. Testing of the victim's fingernail clippings revealed the DNA of the victim's own blood. Further testing revealed the DNA mixture of at least two male individuals, but no profiles could be determined due to the low-level nature of the data.

ERRORS PATENT

A review for errors patent on the face of the record reveals none.

ASSIGNMENT OF ERROR NUMBER 1

In the first assignment of error, the defendant (*pro se*) and counsel contend the evidence was insufficient to support his conviction. The defendant asserts the evidence presented at trial was circumstantial and failed to exclude every reasonable hypothesis of innocence.

The defendant was found guilty of second degree murder, a violation of La. R.S. 14:30.1, which provides in relevant part: "A. Second degree murder is the killing of a human being: (1) When the offender has a specific intent to kill or to inflict great bodily harm…."

The standard for review of a claim of insufficiency of the evidence was laid out by the Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979):

> …the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier

> of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. (Emphasis in original).

"Under the *Jackson* standard, the rational credibility determinations of the trier of fact are not to be second guessed by a reviewing court." *State v. Williams*, 2011-0414, p. 18 (La. App. 4 Cir. 2/29/12); 85 So.3d 759, 771. Further, "a factfinder's credibility determination is entitled to great weight and should not be disturbed unless it is contrary to the evidence." *Id.* But, where there is no direct evidence presented proving one or more of the elements of the offense, La. R.S. 15:438 governs circumstantial evidence and provides "assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence." "Stated differently, the reviewer as a matter of law, can affirm the conviction only if the reasonable hypothesis is the one favorable to the State and there is no extant reasonable hypothesis of innocence." *State v. Green*, 449 So.2d 141, 144 (La. App. 4 Cir. 1984) citing *State v. Shapiro*, 431 So.2d 372 (La. 1983). "This test is not separate from the *Jackson* standard; rather

it simply requires that 'all evidence, both direct and circumstantial, must be sufficient to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt.'" *State v. Hoang*, 2016-0479, p. 3 (La. App. 4 Cir. 12/21/16), 207 So.3d 473, 475, quoting *State v. Ortiz*, 96–1609, p. 12 (La. 10/21/97), 701 So.2d 922, 930.

In the case *sub judice*, some of the evidence may be susceptible of innocent explanation. However, "under the *Jackson* standard, if rational triers of fact could disagree as to the interpretation of evidence, the rational fact finder's view of all of the evidence most favorable to the prosecution must be adopted." *State v. Ellis*, 2014-1511, p. 4 (La. 10/14/15), 179 So.3d 586, 589. Therefore, viewing the evidence in the light most favorable to the State, a rational juror could have found that the State proved its case beyond a reasonable doubt.

The defendant asserts that the evidence presented at trial was insufficient to prove his identity as the murderer of the victim. A review of the evidence and testimony presented at trial reflects Jerome saw the victim at approximately 4 p.m. the day before her body was discovered. Jerome had noticed two men on the corner he had never seen before. Jerome thought the two men were Hispanic. Jerome opined the two men were behaving suspiciously and were selling drugs in front of the church. As Jerome saw the victim coming around the corner, he flashed his headlights and waved to her. One of the men left on a bicycle. The victim waved to Jerome but turned around and went back to the man on to the corner. The victim and the man spoke briefly and then went into the corner house. Jerome waited outside the house for thirty-five to forty minutes but never saw the victim exit the house.

Jerome identified the defendant as the last person with whom the victim was seen.

DNA testing revealed a match between the defendant's DNA and the DNA found in the victim's vagina. The defendant's DNA was also found on the handles of the trash can in which the victim's body had been found. Ms. Williams believed the high volume of the defendant's DNA found on the handle of the trash can was due to some form of the defendant's sweat or other substance on the handle.

Testimony was also given at trial that the defendant left the area following the murder. In addition, the defendant gave conflicting stories regarding what transpired when the victim left his residence. The defendant could not identify the type of vehicle or give a description of the men in the vehicle. An unopened condom was found with the victim and the defendant's seminal fluid was found in her vagina. Detective Brueggeman testified the condition of the victim when she was found led him to believe a sexual assault had occurred. Pictures of the crime scene, including the body of the victim in the condition in which she was found, were introduced into evidence. The defendant told Detective Brueggeman that he lifted the lid of the trash can to deposit trash, however, the defendant was the major contributor to the DNA found on the handle of the trash can suggesting he moved the trash can rather than simply lift the lid to deposit garbage into it.

The evidence presented by the State including the testimony of the witnesses provided sufficient evidence, when viewed in the light most favorable to

the prosecution, to support the jury's verdict of guilty. This claim is without merit.

ASSIGNMENT OF ERROR NUMBER 2

The defendant and counsel contend the State made improper comments during its opening statement and closing arguments asserting that he raped and/or sexually assaulted the victim. The defendant asserts the comments influenced the jury and contributed to the verdict because it undermined his defense that his sexual contact with the victim was consensual.

La. C.Cr.P. art. 774 relates to the scope of argument and provides as follows:

> The argument shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case. The argument shall not appeal to prejudice.
>
> The State's rebuttal shall be confined to answering the argument of the defendant.

The Louisiana Supreme Court in *State v. Reed*, 2014-1980 (La. 9/7/16), 200 So.3d 291 summarized the law relevant to alleged improper remarks during argument as follows:

> . . . Louisiana jurisprudence on prosecutorial misconduct allows prosecutors considerable latitude in choosing closing argument tactics. The trial judge has wide discretion in controlling the scope of closing argument. *State v. Prestridge*, 399 So.2d 564, 580 (La. 1981). Even if the prosecutor exceeds these bounds, a reviewing court will not reverse a

> conviction due to an improper remark during closing argument unless the court is thoroughly convinced the argument influenced the jury and contributed to the verdict, "as much credit should be accorded the good sense and fair mindedness of jurors who have seen the evidence and heard the arguments, and have been instructed repeatedly by the trial judge that arguments of counsel are not evidence." *State v. Martin*, 93- 0285, p. 18 (La. 10/17/94), 645 So.2d 190, 200; see *State v. Jarman*, 445 So.2d 1184, 1188 (La. 1984); *State v. Dupre*, 408 So.2d 1229, 1234 (La. 1982).

Id., at 32, 200 So.3d, p. 315 (emphasis in original).

The defendant asserts he was prejudiced by the following statement made by the prosecutor during opening statements:

> When they take her out of the trash can you are going to learn that immediately the initial officers say she was raped. She was half naked. Her underwear shoved down to her knees. Her pants shoved down beside her ankles, a bra shoved up over her breasts, she had two socks on, no shoes and no shirt. And the initial detectives know right away that this woman had been raped and murdered.

The defendant contends he was prejudiced by the State's reference to sexual assault or rape during opening, closing, and rebuttal arguments. However, the defendant admitted sexual contact with the victim during his initial conversation with Detective Brueggeman but asserted it was consensual.

The trial court informed the jury, prior to opening statements, that opening statements were not evidence. Following the defendant's objection to the State's assertion that the victim was raped prior to her murder, the trial court, outside the presence of the jury, heard argument from the State as well as the defense. The State contended that the sexual assault of the victim was part of a continuing act which resulted in her murder. The trial court ruled that while the defense was entitled to assert the sexual contact was consensual, the State was entitled to argue that the sexual contact was not consensual and was a sexual assault. The trial court cautioned the State to avoid the use of the word "rape" when referring to the sexual assault.

This Court will not reverse a conviction for alleged improper opening, closing, or rebuttal arguments unless it is "thoroughly convinced" that the argument influenced the jury and contributed to the verdict. *State v. Casey* 99-0023, p.17 (La. 1/26/00), 775 So.2d 1022, 1036 (citing *State v. Martin*, 93–0285, p.17 (La.10/17/94), 645 So.2d 190, 200). The jury in the case *sub judice* was presented with evidence consisting of photographs of the victim as she was found in the trash can. The victim's clothing was partially removed, the defendant's seminal fluid was found in her vagina, and she had been stabbed multiple times. From this evidence, the jury reasonably could have found the victim had been sexually assaulted prior to her murder. The trial court did not abuse its discretion in determining that the use of the term "rape" or "sexual assault" by the State in its opening, closing, or rebuttal arguments did not influence the jury or contribute to the verdict. This claim is without merit.

PRO SE ASSIGNMENT OF ERROR NUMBER 3

The defendant asserts his conviction was based solely on racial profiling. The defendant asserts that because the victim's nephew, Jerome, stated during testimony that when he found out his aunt was stabbed he thought the crime had been committed by a "Spanish guy." However, Jerome stated: "A Spanish guy had to do it. If [sic] not really that, I really went straight to the last person I saw her with . . . ."

Detective Brueggeman, the lead detective investigating the murder, testified that the defendant was not considered a suspect in the murder at their first meeting. Detective Brueggeman stated the fact that the defendant's DNA was found on the trash can handles in which the victim was found lead him to suspect the defendant. Detective Brueggeman confirmed that some of the people he spoke to during the investigation of the murder suspected it was committed by a Spanish individual because they believed when someone was stabbed it was probably by a Mexican. Detective Brueggeman stated those were not his words but were the suspicions of some members of the black community. Detective Brueggeman detailed the evidence which lead him to suspect the defendant had committed the murder. Detective Brueggeman concluded the murder was committed by someone who lived nearby because of where the trash can was hidden. It was also determined that the trash can would have been difficult to move due to the weight of the victim's body inside it. In addition, it was determined that the trash can was originally stored next to a church which was across the street from the defendant's residence.

A review of the record demonstrates that there was substantial evidence linking the defendant to the murder. The defendant has not established that he was investigated based on racial profiling as he asserts. This claim is without merit.

PRO SE ASSIGNMENT OF ERROR NUMBER 4

In his final assignment of error, the defendant contends the trial court erred in denying his motion to require a unanimous jury verdict. The defendant contends that Louisiana's statutory scheme which permits non-unanimous jury verdicts in non-capital felony cases should be declared unconstitutional. In particular, he claims that La. Const. Art. I, Sec. 17 and La. C.Cr.P. art. 782 violate the equal protection Clause.

La. Const. Art. I, Section 17(A) provides that 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." Additionally, La. C.Cr.P. art. 782(A) provides in part that "[c]ases in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict."

In *Apodaca v. Oregon*, 406 U.S. 404, 410-11 (1972), the United States Supreme Court stated:

> [T]he purpose of trial by jury is to prevent oppression by the Government by providing a 'safeguard against the corrupt or overzealous prosecutor and against the complaint, biased, or eccentric judge.' *Duncan v. Louisiana*, 391 U.S. 145 at 156 (1968) ... 'Given this purpose,

> the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen ...' *Williams v. Florida*, supra, 399 U.S. 78 at 100 (1970). A requirement of unanimity, however, does not materially contribute to the exercise of this commonsense judgment. As we said in *Williams*, a jury will come to such a judgment as long as it consists of a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate, free from outside attempts at intimidation, on the question of a defendant's guilt. In terms of this function we perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one. Requiring unanimity would obviously produce hung juries in some situations where non-unanimous juries will convict or acquit. 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.

In *State v. Bertrand*, 2008-2215 (La. 3/17/09), 6 So.3d 738, the trial court found that La. C.Cr.P. art. 782(A) violated the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, relative to the number of jurors needed to concur to render a verdict in cases in which punishment is necessarily confinement at hard labor, the same issue raised by the defendant in the instant case. On direct

appeal by the State, the Louisiana Supreme Court reversed, stating in its conclusion:

> Due to this Court's prior determinations that Article 782 withstands constitutional scrutiny, and because we are not presumptuous enough to suppose, upon mere speculation, that the United States Supreme Court's still valid determination that non-unanimous 12 person jury verdicts are constitutional may someday be overturned, we find that the trial court erred in ruling that Article 782 violated the Fifth, Sixth, and Fourteenth Amendments. With respect to that ruling, it should go without saying that a trial judge is not at liberty to ignore the controlling jurisprudence of superior courts.

Bertrand, 2008-2215, p. 8, 6 So.3d at 743.

This Court cited and relied on *Bertrand* in *State v. Hickman*, 2015-0807, pp. 13-14 (La. App. 4 Cir. 5/16/16), 194 So.3d 1160, 1168-69, to reject the argument that the trial court had erred in denying the defendant's motion to declare La. C.Cr.P. art. 782(A) unconstitutional as violative of the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution.

As stated by the Louisiana Supreme Court in *Bertrand*, under current jurisprudence from the U.S. Supreme Court, non-unanimous twelve-person jury verdicts are constitutional, and La. C.Cr.P. art. 782(A) is constitutional. Accordingly, there is no merit in this assignment of error.

CONCLUSION

For the above stated reasons, we affirm defendant's conviction and sentence.

AFFIRMED

LOBRANO, J., CONCURS IN THE RESULTS

I respectfully concur in the results of the majority opinion.

SUPREME COURT OF LOUISIANA

NO. 2017-KO-2133

State of Louisiana

vs.

Evangelisto Ramos

June 15, 2018, Decided

Notice: THIS DECISION IS NOT FINAL UNTIL EXPIRATION OF THE FOURTEEN DAY REHEARING PERIOD.

DECISION WITHOUT PUBLISHED OPINION

Judges: Bernette J. Johnson, John L. Weimer, Greg G. Guidry, Marcus R. Clark, Jefferson D. Hughes, III, Scott J. Crichton, James T. Genovese.

Denied.

DOCKET NO.: 13-CR-72522

STATE OF LOUISIANA

VERSUS

MELVIN CARTEZ MAXIE

11th JUDICIAL DISTRICT
SABINE PARISH, LOUISIANA

JUDGMENT

THIS CAUSE HATH COME BEFORE THIS HONORABLE COURT on an Omnibus Motion for New Trial, In Arrest of Judgment, and for Post-Verdict Judgment of Acquittal filed by the Defendant, Melvin Maxie, on January 3, 2018. A hearing was held on February 7, 2018. Present were Defendant with his attorneys, Richard Bourke, Esq., and Casey Secor, Esq.; also present were the Hon. Don Burkett, Esq., District Attorney in and for the 11th Judicial District, and Suzanne Williams, Esq., Assistant District Attorney. The record was left open for the introduction of new expert evidence on the issue of non-unanimous jury verdicts and to ensure that the Attorney General could be notified of the matter. An evidentiary hearing was then held on July 9, 2018 and present were Defendant with his attorneys, Richard Bourke, Esq., and Casey Secor, Esq.; also present were the Hon. Don Burkett, Esq., District Attorney in and for the 11th Judicial District, and Suzanne Williams, Esq., Assistant District Attorney. The State requested leave to file a post-hearing memorandum and the Court ordered that the memorandum be filed by September 17, 2018. The Court then granted the Defendant leave

to file a response by September 26, 2018. The matter was submitted to the court for discernment and judgment in the afternoon of September 26, 2018.

AFTER DUE AND REVERENT CONSIDERATION OF THE FOREGOING MOTIONS, ARGUMENTS OF COUNSEL, EVIDENCE, AND RECORD, IT IS ORDERED, ADJUDGED, AND DECREED that

1. Article 1, §17 of the Louisiana Constitution of 1974 and Article 782 of the Louisiana Code of Criminal Procedure be and are hereby declared UNCONSTITUTIONAL pursuant to the Equal Protection Clause of the 14th Amendment to the Constitution of the United States;

2. The Motion for New Trial be and is hereby GRANTED IN PART, finding that a unanimous jury verdict is constitutionally required for conviction;

3. The District Attorney's peremptory challenges against Deacon Donald Sweet, Mercedes Hale, and Victoria Reed violated the standard set forth in *Batson v. Kentucky* and warrant a new trial;

4. The Motion for New Trial be and is hereby DENIED IN PART on all other grounds alleged;

IT IS FURTHER ORDERED that the Clerk of Court notify the Parties of the signing of this Order.

THUS DONE AND SIGNED in Chambers in the Town of Many, Parish of Sabine, and State of Louisiana, on this, the 11th day of October, 2018.

/s/ Stephen B. Beasley
HON. STEPHEN B. BEASLEY
DISTRICT COURT JUDGE

STATE OF LOUISIANA

VERSUS

MELVIN CARTEZ MAXIE

11TH JUDICIAL DISTRICT
SABINE PARISH, LOUISIANA

WRITTEN REASONS FOR JUDGMENT

This matter came before the Court on Defendant, Melvin Cartez Maxie's, Omnibus Motion for New Trial, In Arrest of Judgment, and for Post-Verdict Judgment of Acquittal filed on January 3, 2018. The Defendant alleges several grounds for relief, but the Court chooses to truncate discussion of all issues alleged and instead focuses on the allegations that the majority verdict scheme of Louisiana, codified at Louisiana Constitution Article I, Section 17 and Code of Criminal Procedure Article 782, is unconstitutional, that there were three unique violations of the standard enshrined in *Batson v. Kentucky*, and that a non-resident juror served on Defendant's jury. For the reasons assigned below, Defendant, Melvin Cartez Maxie, is granted a new trial requiring a unanimous jury verdict for conviction.

STATEMENT OF FACTS

On the night of May 11, 2013, Defendant, Melvin Cartez Maxie, was at a party at Gasaway's (a local watering hole in Many, LA) along with Marcello Hicks and Philip Jones. The victim, Tyrus Thomas, was also present at this party. At some point during the evening, the Defendant and the victim had a heated

exchange. There are allegations that both men may have been involved in the drug trade in Sabine Parish, but this was not directly at issue in the trial of the matter. The victim, Mr. Thomas, left the party by himself and drove east toward the Town of Many proper. Shortly after the victim left, Hicks, Jones, and Maxie entered their vehicle and also headed east toward Many proper. Shortly after leaving Gasaway's, the three gentlemen found themselves behind Mr. Thomas and allegedly began following him on Highland Avenue in East Many. While the three gentlemen were allegedly following Thomas, Thomas was talking to his brother on his cell phone and informing him that he was being followed and that he was fearful of what these three men might do.

While driving on Highland Avenue, with the three gentlemen behind him, Thomas "slammed" on his brakes, requiring Jones, the driver, to pull up next to Thomas in the opposite lane of travel to avoid a collision. While Jones was stopped next to Thomas, Thomas fired a shot out of his driver-side window at Jones's car. The Defendant was sitting in the front-passenger seat at the time of the shot. The bullet from Thomas's gun went through the front-passenger door and lodged itself in the front-passenger seat, missing Mr. Maxie by less than a few inches. Thomas proceeded to accelerate at a high rate on La. Hwy. 6 eastbound. Jones, Hicks, and Maxie proceeded to follow Thomas. At times, the two vehicles were traveling at speeds over 100 miles per hour. During the ensuing chase, Mr. Maxie fired eight shots out of the front passenger-window of Jones's car. Mr. Maxie used Jones's gun during this exchange, having not been armed himself. One of the several shots fired by Mr. Maxie passed through the rear of Thomas's vehicle and the driver's seat, penetrating Thomas and causing

him to run off the road and crash into a ditch just before reaching Many High School. Thomas died as a result of the gunshot wound.

The three gentlemen fled the scene and hid in the woods near the accident while local law enforcement commenced their investigation of the incident. Eventually, all three individuals were arrested. Defendant, Melvin Cartez Maxie was charged with First Degree Murder by Assault by Drive By Shooting.

PROCEDURAL HISTORY

On May 11, 2013, Defendant was arrested on the charge of First Degree Murder by Drive By Shooting in violation of La. R.S. 14:30. On August 22, 2013, the grand jury duly empaneled for the 11th Judicial District returned a True Bill of Information charging Mr. Maxie with First Degree Murder by Assault by Drive By Shooting. Mr. Maxie pled not guilty on August 22, 2013, after formal arraignment. Don Burkett, District Attorney in and for the 11th Judicial District, filed notice that he would seek the death penalty in relation to the First Degree murder charge.

During the ensuing months and years, the Defense filed several pre-trial motions. While these motions were important and dealt directly with the due process rights of the Defendant, most of these motions are not germane to the current proceeding and therefore the Court pretermits discussion of their nature and outcome as unnecessarily confusing and irrelevant to the disposition of the Omnibus Motion before the Court.

On August 8, 2016, the grand jury for the 11th Judicial District returned an amended true bill of information charging Maxie with First Degree Murder by Assault by Drive By Shooting and in the alternative

that Mr. Maxie killed Thomas because he was a State witness in another adjudicative proceeding and Mr. Maxie acted to prevent or influence the witness's testimony. On August 9, 2016, the State filed a notice that it would no longer be pursuing the death penalty. While this filing would normally have the Capital Assistance Project (hereinafter referred to as "CAP") removed from the case as counsel of record for Mr. Maxie, the organization decided to allow less experienced attorneys to continue to represent Mr. Maxie as a means of gaining experience.

On September 13, 2016, CAP filed a motion and memorandum to declare Article I, Section 17 of the Louisiana Constitution of 1974 and Article 782 of the Code of Criminal Procedure unconstitutional. On September 19, 2016, CAP filed a *Prieur* writ application that was later denied by the Louisiana Court of Appeal, Third Circuit. On September 19, 2016, a hearing was had on the merits of the requirement that Mr. Maxie be convicted by a unanimous jury verdict. This Court denied that motion and declared that Maxie could be convicted by a non-unanimous jury on October 6, 2016.

On March 20, 2017, jury selection began for a trial on the charge of First Degree Murder in violation of La. R.S. 14:30 under the alternative theories of assault by drive by shooting or preventing or influencing a State's witness's testimony: After a trial, the jury returned a verdict of Second Degree Murder in violation of La. R.S. 14:30.1 on March 25, 2017.

Defendant filed his Omnibus Motion on January 3, 2018 and a hearing was set for February 7, 2018. The State filed an opposition to the Omnibus Motion on February 6, 2018. At the hearing on February 7, 2018, Defendant put on testimony regarding the *Batson*

violations as well as the non-resident juror. Other testimony was also proffered. The hearing was held open for further evidentiary testimony regarding Article I, Section 17 and Code of Criminal Procedure Article 782. The Court took judicial notice that the Attorney General had not been notified of the proceeding, although the Attorney General was notified regarding the previous pre-trial motion to rule these provisions unconstitutional and chose not to oppose Mr. Maxie's motion.

The final evidentiary hearing was scheduled for July 9, 2018. Mr. Maxie filed a supplemental brief on the issue of the constitutionality of Article I, Section 17 of the Louisiana Constitution of 1974 and Article 782 of the Code of Criminal Procedure on June 18, 2018. The State filed its opposition to the supplemental brief on July 3, 2018. The evidentiary hearing was had on July 9, 2018, wherein two experts testified as to the discriminatory purpose and impact of the challenged provisions and a reporter from *The Advocate* newspaper in Baton Rouge testified as to the veracity of its study regarding the racial impact of the non-unanimous jury verdict scheme in Louisiana. The matter was submitted to the Court in the afternoon of September 26, 2018, upon the filing of Mr. Maxie's final brief in support of his position on the constitutionality of the challenged provisions.

LAW AND ANALYSIS

Non-unanimous jury verdicts

Defendant has challenged the non-unanimous jury scheme in Louisiana, codified at Article I, Section 17 of the Louisiana Constitution of 1974 and Article 782 of the Louisiana Code of Criminal Procedure on three unique constitutional grounds. First, that the non-

unanimous verdict rule violates the Sixth Amendment's guarantee to a fair trial. Second, that non-unanimous verdicts violate the Fourteenth Amendment's Equal Protection Clause. Third, that non-unanimous jury verdicts violate the Sixth Amendment's impartial jury requirement. While Defendant disagrees with the following holdings, Defendant has conceded that the first claim is foreclosed by *Apodaca v. Oregon*, 406 U.S. 404 (1972), and *State v. Bertrand*, 2008-22115 (La. 3/18/09), 6 So. 3d 738. The issue before the Court is whether the non-unanimous jury verdict scheme in Louisiana is unconstitutional under the Fourteenth Amendment, the Sixth Amendment, or both. For the reasons set forth below, the provisions of Louisiana law permitting non-unanimous jury verdicts are ruled unconstitutional in violation of the Fourteenth Amendment.

Testimony and Evidence Adduced at the Evidentiary Hearing

At the commencement of the evidentiary hearing on July 9, 2018, the State and Defense made several stipulations regarding documentary evidence to be submitted into evidence and the record. Of particular importance for this issue is Defense Exhibit 7. Exhibit 7 *is* a certified transcript of a Motions Hearing in the matter of *State v. Lee*, No. 500-034 & 498-666, Criminal District Court, Parish of Orleans, 2/3/17. The State did not stipulate to the weight or the relevance of the testimony of the expert witnesses called in that matter, namely Professor Emeritus of History Lawrence Powell of Tulane University and Professor Kim Taylor-Thompson of New York University. However, the State did stipulate that the transcript

reflects what the experts would have said had they been called to testify personally.

The Defense called John Simerman of the Advocate to testify as to his data collection and conclusions. Next, Professor Thomas Aiello was called to provide historical context on the adoption of the non-unanimous jury verdict scheme for both the 1898 and 1973 conventions. Finally, Professor Thomas Frampton was called to discuss the data collected by *The Advocate* and his independent statistical analysis of the data. The State did not call any witnesses during the evidentiary hearing. The testimony of each witness is outlined below.

John Simerman

John Simerman is an investigative journalist working for *The Advocate* newspaper covering criminal matters in Orleans Parish and the surrounding areas. Mr. Simerman worked with two other individuals to develop the investigative series, "Tilting the Scales," regarding Louisiana's non-unanimous jury verdict system. Mr. Simerman was called to testify as to the methodology of the study and to verify and authenticate the data and conclusions as detailed in the published series.

Mr. Simerman provided a detailed analysis as to the collection methods for the dataset used to calculate the impact of a non-unanimous jury verdict scheme on the Louisiana criminal justice system. Generally, Mr. Simerman and his two colleagues contacted the clerks of court and the district attorneys in Louisiana's 64 parishes and requested lists of all jury trials between 2011 and 2016. Not all of these officials responded to the requests, and as a result, the data collected covered nine out of the ten busiest jurisdictions in the

state, and a total of 35 jurisdictions were represented in some manner in the dataset. Unfortunately, despite requests from *The Advocate*, Sabine Parish did not provide any data to Mr. Simerman regarding felony jury trials. Mr. Simerman also conceded that there were some cases that fell outside of the date range indicated above, but that this did not alter the outcome of the study.

The Advocate also collected data regarding the composition of juries and the outcomes of jury trials where available. Specifically, the data included jury polling statistics, jury composition by demographic category, including gender and race, and overall jury outcome regardless of polling. Furthermore, when demographic information was not available, *The Advocate* staff cross-referenced juror information with the Secretary of State's voter registration database and the Nexis public records database. When the authors were able to determine accurately the demographics of a particular juror, that information was included in the dataset. When the information could not be accurately cross-referenced, those fields were omitted from the dataset with respect to that juror.

The data were further broken down by individual charges and outcomes and then another database of jury venires. The jury venire database attempted to track strikes and other reasons why a potential juror may have been excluded from the final jury pool from which felony criminal juries were selected. After the datasets were constructed, the numbers were run against the Louisiana Supreme Court database of reported jury trials throughout the time period. The study was able to collect information of some kind in 2,931 cases of the 3,906 cases reported to the

Louisiana Supreme Court between 2011 and 2016. Mr. Simerman conceded that the dataset did contain a large number of cases from a relatively small number of parishes, but explained that of the ten busiest parishes by case-load, nine gave their requested information. Mr. Simerman testified that this did not skew the data, as the busiest parishes would of course have the most datapoints in the system, even if all parishes had reported. In fact, the nine of the ten busiest parishes represent approximately 68% of cases in Louisiana, and in the jury verdict dataset, these parishes represented approximately 69% of the total data.

Mr. Simerman also conceded that he could not recall whether the team attempted to match the number of cases they collected from each jurisdiction to the number reported by that jurisdiction to the Supreme Court. Rather, the team focused on total numbers for each year as the measure by which they determined thoroughness.

Mr. Simerman also testified with respect to the jury venire dataset. He stated that the dataset was built using clerk of court provided venire lists and court minutes. The team was generally able to identify jurors who were excused for cause, which side brought the challenge, if there were joint challenges for cause, or if there was a peremptory challenge. However, there were some instances where it was unclear from the court-provided documents what formed the basis of the juror being excluded from the final jury pool or from jury service.

The race and gender identification of potential jurors in the venire was determined through examination of and cross-reference to a Secretary of State voter registration database purchased by *The*

Advocate. If it was not possible to determine these characteristics from the Secretary of State's database, the team utilized a private, third-party public records database known as Nexis. Approximately 10-20% of the race and gender information obtained for the jury venire dataset was obtained using the Nexis database.

The main focus of the research was the conviction patterns of felony, twelve-person juries. However, the research also included a comparison of conviction rates between twelve-person and six-person juries. This comparison did not, however, look at racial composition disparities, merely conviction disparities between juries that require a unanimous verdict and those that don't, albeit with different numbers of jurors on each panel.

Of all of the cases that *The Advocate* compiled, there were only 109 cases where there was complete information as to the race and gender of each individual juror, the verdict as to each count, and the votes of each juror. Of these 109 cases, the majority of them came from East Baton Rouge Parish because their court records were the most detailed and complete. Other parishes were represented in this data analysis; however, they represented a much smaller percentage of the available data.

After statistical analysis was completed, it became clear that the racial composition of juries, especially in East Baton Rouge Parish, were not representative of the general population. In fact, on average, there were two fewer African-American individuals on juries than should be expected compared to the racial demographics of the parish. The statistical analysis *The Advocate* performed also included results comparing jury racial composition with the overall African-American population and the population of

African-American voters. Statistics were provided showing the percentage of African-Americans in the jury pool compared to these numbers and then the percentage of African-Americans actually serving on juries.

The statistical analysis of peremptory strikes was not further corroborated by reading transcripts or interviewing attorneys. The data reflect, however, that minority jurors were peremptorily struck at statistically significant rates while non-minority jurors were not. The analysis showed that prosecutors peremptorily struck minority potential jurors at a statistically significant rate and defense attorneys did not.

Professor Thomas Aiello

Professor Thomas Aiello is an associate professor of history and African-American studies at Voldasta State University in Georgia. He is the author of *Jim Crow's Last Stand*, a comprehensive book on the history and context of Louisiana's majority verdict system. After the State traversed, Professor Aiello was offered as an expert historian and the Court recognized him as such.

Professor Aiello testified as to the historical context surrounding the constitutional conventions of both 1898 and 1973. He provided a detailed analysis of the prevailing sentiments and feelings of the delegates at the conventions and the general societal beliefs during these periods of time. His testimony persuasively demonstrated that race was a motivating factor behind the adoption of the 1898 constitution, especially with respect to disenfranchisement of minority voters and stripping the ability of minorities to influence the judicial system. His testimony also

persuasively showed that the 1973 convention was not free from racial consideration and that the delegates at the convention were keenly aware of the racial tensions when drafting the new constitution. His testimony provides the historical basis for this Court's determination that the non-unanimous jury verdict scheme in Louisiana was motivated by invidious racial discrimination.

Professor Aiello testified as to the general sentiment during the post-Civil War era known as Reconstruction. He spoke to the fact that the white South saw Reconstruction as a destruction of an idealized past. Once Reconstruction was ended in the compromise to elect President Hayes, federal troops were withdrawn from the South and the white South saw this as the opportunity to regain what had been lost during Reconstruction. These white supremacists were known as the Redeemers and they embarked on a long journey of suppressing and oppressing minorities in every aspect of society, especially by excluding them from the legal and civic rights enjoyed by the white supremacists. Professor Aiello describes the situation in the following manner:

> [the] white politicians seek to reclaim what had existed before. And what had existed before is a virtual apartheid state where black labor was free and there was no threat from black political power and white people were able to carry on considering the black population to be mostly things; and so, they did that. So that was the goal. That was the goal, to get that back, and that was the goal everywhere in the South. And so, what we start to see throughout the South is a variety of different efforts to try to make that happens.

> . . . This is the period that we know as 'The Lost Cause,' wherein the White South valorized the Antebellum South as being, 'A great place. Everything was going well until the Yankees come down — came down and ruined it.'"

Hearing Transcript, p. 72.

Professor Aiello testified that the 1898 convention was motivated by white supremacist fears enflamed by the 1896 election. Poor white farmers and African-Americans created a populist coalition that nominated and almost elected an African-American governor in Louisiana. White supremacists were terrified that this populist coalition could actually gain future political power and therefore the convention was called to "fix" the problem.

During this same time period after Reconstruction, African-Americans were exercising limited political and legal power, especially in Louisiana because of a politically powerful African-American middle-class in New Orleans. One of the key areas where African-Americans were participating, outside of voting, was in jury service. *Strauder v. West Virginia* held that the states could not categorically exclude minorities from jury service on the basis of race. And the African-Americans of Louisiana took the opportunity to exercise their jury duty rights. However, the white South pushed back against this and attempted to exclude minority members in every conceivable manner.

Professor Aiello also testified to the general concerns that the white supremacist South had with the concept of African-American jury service. It is his opinion that white Louisiana continued to view

African-Americans as chattel and less than people. Because the South as an entity categorically denied African-Americans access to any kind of education, the Redeemers continued to think of African-Americans as ignorant and incapable of sophisticated thought. Due to the pervasive denial of African-American opportunity, it was a logical step to believe that the entire group of people would lack the appropriate qualifications for jury service, including voting only as a block because they didn't have as much stake in the game. It became the general consensus that African-Americans did not deserve to serve on juries in Louisiana. Professor Aiello testified that,

> [w]hile the end of the Civil War did make the slaves free, it did not make them the peers of white people in Southern white minds. And if you were supposed to get a fair trial by a jury of your peers, there are a very scant few white Southerners in the Gilded Age who saw black jurors as their peers; and it was an affront to justice for white people to put black jurors in front of them to decide their fate.

Hearing transcript, p. 75.

In the run-up to the 1898 convention, the white population of Louisiana took great issue with African-American jury service. Several of the largest and most prominent newspapers, more or less the only form of media available in this time, began running editorials, "news" articles, and opinion pieces on the topic of minority jury service. These reproduced articles were offered and entered into evidence as Defense Exhibits 11-21. The articles reflect the collective societal understanding of the era and are representative of commonly held beliefs in Louisiana, especially among those who would go on to be delegates at the

constitutional convention. Professor Aiello testified consistently and persuasively that while there is no direct evidence available as to intent of any given delegate, this indirect evidence would have been reflective of the delegates in 1898. The decisions they made would have been done with such thoughts and concerns in the forefront of their minds.

Professor Aiello also testified that the language used in the excerpts is very revealing. He testified that white supremacists used coded language to discuss African-Americans and white people, especially white women. For example, "protecting female virtue" refers to preventing African-American men from raping white women. It also refers to the use of lynching as a means of rape prevention and justice. Based on Professor Aiello's research, approximately "85 percent of all the [lynchings] is to protect white womanhood. They claim black men raping white women or threatening to rape white women. That was always the threat, this myth of black animal sexuality." Hearing Transcript, p. 80.

Professor Aiello also testified that non-unanimous jury verdicts would prevent white supremacists from being able to defend lynching as necessary to protect white womanhood. Because Northern states did not have these same lynching and rape problems as the Southern states, it was necessary to find an alternative theory, and protecting virtue became that theory. However, it became harder to defend extra-judicial violence as this was only a Southern phenomenon. The solution was non-unanimous verdicts. Professor Aiello testified that the argument for non-unanimous juries is that it would be easier to convict African-American men, even if the jury were not all white, by allowing three dissenting votes. It

was argued that by making convictions easier, the total number of lynchings would go down, and that was seen as a positive good because Louisiana had one of the highest, if not the highest, number of lynchings in the South during Redemption. Professor Aiello also testified that the creation of the 9-to-3 system would accomplish the same as removing African-Americans from the jury pool completely because of the relative population of whites to African-Americans in Louisiana.

The coded language of the time was a means to avoid explicit racial terms. Professor Aiello testified that the Southern states would learn from each other when enacting racially discriminatory policies. Because the Constitution prohibited such explicit discrimination, the latter-adopting states, such as Louisiana, had to find means of discriminating using facially-neutral language, both in the policy enactments and in describing their intent for passage. This is why there is little direct evidence of racially discriminatory intent and this is why courts have consistently relied on circumstantial and indirect evidence when evaluating the racial motivations for policy enactments.

Professor Aiello opined that the lack of explicit racial language in the Exhibits 11-21 should not be indicative of a lack of racial motivation. This, he argues, continues with the coded language of the era. The articles avoid specific use of race but use a common language created by white supremacists to communicate in a manner that would not raise red flags with the federal government that still kept a quasi-watchful eye on the South, especially legislation with specific racial terms.

Professor Aiello went on to describe the case of *Murray v. Louisiana*, where an African-American man was indicted by an all-white grand jury and then convicted by an all-white petit jury. The case went to the Supreme Court of Louisiana at the same time as *Plessy v. Ferguson*, but has not achieved the same notoriety. However, both the district court and the Supreme Court found no constitutional violation as there were African-Americans in the respective jury pools. And the state district court judge said,

> The discrimination was not of the nature alleged by counsel for the applicant. Colored men are not discriminated against as a race or a class but because of their lack of intelligence and of moral standing. The jury commissioners are authorized by law to so discriminate, for the purpose of the law is to secure competent jurors, and, therefore, white men are preferred to colored men. The past history of this state shows that when no such discrimination was made, there was no possibility of just verdicts. There is no disguising that fact, which is known to every man born in Louisiana.

Hearing Transcript, p. 89. The district court judge here made these comments in 1895, just three years before the convention in 1898. This sentiment is demonstrative of the white majority in Louisiana. And the reference to the "past history of this state," means the period during Reconstruction when African-Americans had a great deal of political power and regular jury service. It is clear that the general view during Redemption was to remove African-Americans from political and legal power. And these feelings

motivated the Constitutional Convention of 1898 and the enactments stemming therefrom.

Professor Aiello then discussed the *Thezan* case in federal court. A light-skinned African-American man was allowed to participate on a jury because everyone thought he was a light-skinned Cuban. When it was discovered that he was African-American, the judge, prosecution, and defense all agreed to have him removed from the jury. The *Comité de Citoyens*, an influential African-American activist organization, challenged this exclusion and contacted the federal government, specifically the Department of Justice. As a result of this letter, Senator Chandler of New Hampshire demanded a full investigation into jury service in Louisiana. Because of his efforts, the Senate of the United States passed a resolution ordering the Department of Justice to do a full investigation and report back to the Senate. While this investigation never really occurred, the threat of federal intervention in jury service loomed heavily over the Constitutional Convention of 1898. Professor Aiello testified that it was this threat of federal intervention that changed the conversation at the convention. The members of the convention had no problem being overtly racist with respect to voting rights because there was no federal investigation, but had to couch the non-unanimous jury verdict scheme in facially race-neutral terms because Louisiana was being watched specifically in relation to its jury service system.

After discussing societal notions of African-American jury service, Professor Aiello testified about the Constitutional Convention of 1898. He testified that the purpose of the Convention of 1898 was clear and unequivocal, "to eliminate black political power,"

Hearing Transcript, p. 103. While it was impossible to eliminate African-American political power through explicit racial terms, the delegates to the convention used cribs to cover their tracks. The conventioneers relied heavily on the experience of other Southern states to craft the Constitution. Because Louisiana was one of the last Southern states to adopt a new constitution, they could avoid the pitfalls of other states. Some of the facially race-neutral provisions adopted by the Convention include a poll-tax and a combination literacy test and property qualification. These measures, Professor Aiello testified, would deny access to African-Americans because they had been kept artificially poor and uneducated and therefore could not pass any test or pay any tax. While these were facially race-neutral, they were created specifically to exclude African-Americans. However, he further testified that these requirements would also exclude many poor white people, and therefore the Grandfather Clause was adopted whereby if someone's father or grandfather had voted in the election of 1867, none of the new restrictions applied. While this was justified as continuing voting rights for people who had been in the state for a long time, it was actually enacted because no African-American could have voted in 1867 because the right to vote was extended to African-Americans in 1868.

It was the Professor's testimony that the same racial motivations animated the debate around and the adoption of the 9-to-3 majority verdict scheme. The chair of the judiciary committee, Thomas Semmes, argued that the 9-to-3 system would prevent the pervasiveness of lynchings. He uses the same language as the newspaper articles in describing the virtues of the non-unanimous verdict scheme. The conventioneers were far more covert in their language

and description of jury service than voting, not because they were less interested in the matter, but because the federal government was watching this particular issue closely and the conventioneers knew they had to be careful if they wanted the Constitution to survive federal scrutiny.

Professor Aiello finally argued that the non-unanimous jury scheme was racially motivated in part by the convict-lease program. The convict-lease program was instituted in Louisiana to recreate free black labor, more or less. Convicts were leased out to white companies and landowners for a nominal fee and had no protections against abuse. In order to Redeem the South, free African-American labor was absolutely necessary. By creating a system where white supremacists could convict African-Americans with 25 percent of the jury dissenting, Louisiana could achieve its desired free labor pool. Professor Aiello stated forcefully that there was no possibility that the non-unanimous verdict scheme was race-neutral good governance and that it was absolutely motivated by invidious racial discrimination.

Professor Aiello next discussed the societal context for the 1973 convention and adoption of the Constitution of 1974. Leading up to the Convention of 1973, racial tensions in Louisiana were high. Edwin Edwards was elected in 1971 thanks in large part to the black vote, one of its biggest wins since the Convention of 1898. In 1972, a 30-person Nation of Islam protest in Baton Rouge descended into violence when the police opened fire on the demonstrators. The city shut down for several days in the summer of 1972. And after the Convention of 1973, but before the adoption of the Constitution in 1974 the Destrehan High School desegregation crisis occurred. There are

also several desegregation lawsuits and crises throughout the South and Louisiana, exacerbating race relations during this time period.

The Professor testified that the reason the 1973 convention was called was because the Constitution of 1921 had become too unwieldly; there were hundreds of provisions in the Constitution that were better situated in the Revised Statutes and therefore a Convention was called to restructure the Constitution of 1921 and make it an actual constitution.

At the 1973 Convention, delegate Woody Jenkins proposed keeping the 9-to-3 standard without any changes and continuing the system as adopted in 1898. Delegate Chris Roy proposed expanding the requirement of unanimity to all cases where there is a possibility of life without parole. Delegate Roy also wanted to increase the standard to 10-to-2 because of *Apodaca.* The committee debated this in light of *Apodaca* and eventually settled on a compromise where unanimity was expanded to life without parole cases but maintained the 9-to-3 standard. On the convention floor, Delegate Lanier proposed a further compromise, wherein unanimity is only required in capital cases, but the standard for conviction is 10-to-2. Professor Aiello testified the original intent of the conventioneers was to reenact without change the provision adopted in 1898. He further testified that all of the debates in the Convention of 1973 are heavily contested and that district attorneys around the state opposed the shift to expand the class of cases requiring unanimity and the increase to a 10-to-2 standard. Delegate Roy on the convention floor argued that the non-unanimous system is discriminatory, especially against minority defendants, and that increasing the standard to 10-to-2 would make the discrimination

less significant. However, Professor Aiello pointed out that these admissions and arguments logically require the conclusion that anything less than unanimity for conviction will have discriminatory impacts, especially on minority defendants.

Professor Aiello further testified that the stated goal of the conventioneers was to make as little change to the substance of the Constitution of 1921 as possible. The purpose of the convention was to reduce the size of the document, to remove measures from the constitution and place them in the Revised Statutes where they belonged. Because of this stated objective of continuity, Professor Aiello said that it was his expert opinion that the 1974 constitution's non-unanimous jury verdict scheme was rooted in and fairly traceable to the 1898 enactment. If not directly to 1898, then to the constitutions of 1921 and 1913, and these were clearly traceable to 1898 because they adopted wholesale and without debate the non-unanimous jury verdict scheme of 1898.

In terms of the effects of the non-unanimous jury verdict scheme, Professor Aiello directed the Court's attention to two cases from 1979 where prosecutors peremptorily struck African-American jurors on the basis of race and openly stated that these strikes were based on the non-unanimous system. It "demonstrate[s] . . . that there are instances where non-unanimous juries are used specifically to cover racial intent by including black jurors that you know won't have the ability to sway a jury," Hearing Transcript, p. 127.

<u>Professor Thomas Frampton</u>

Professor Frampton is a lecturer at Harvard University on staff as a Climenko Fellow. He has a

B.A. and M.A. from Yale University, *summa cum laude*, and a J.D., with highest honors, from Berkeley School of Law. Professor Frampton was proffered as an expert lawyer, with a specialty in legal history, race, and the law. The State chose not to traverse Professor Frampton's qualifications and he was accepted as an expert lawyer, with a specialty in legal history, race, and the law. Professor Frampton was present in court during Professor Aiello's testimony and endorsed it "wholeheartedly" and would concur with his conclusions and analysis. Hearing Transcript, p. 143.

Professor Frampton was retained as an expert to perform an independent empirical analysis of the data collected by Mr. Simerman for *The Advocate* series. He performed his own data analysis to verify the results as presented were accurate. He also performed empirical analysis of the data according to Supreme Court precedent with respect to disparate impact and proving unconstitutional racial discrimination.

Professor Frampton performed the following statistical analyses:

> I also looked at jury selection practices, but I think for present purposes, the most relevant areas that I examined more closely were the affects *[sic]* of a non-unanimous decision rule in criminal verdicts. And I looked at it from several different ways, including from the perspective of the individual juror who is hearing cases as a member of a non-unanimous jury and also from the perspective of defendants. . . . I chose as my basic unit of measure the number of non-unanimous verdicts, which is slightly different [than *The Advocate*], because in certain cases, there

> might be a mix of unanimous and non-unanimous verdicts. I chose to do that because I was particularly interested in assessing for any given verdict what we can say about the likelihood of race mattering.

Hearing Transcript, p. 145. Based on this measure, Professor Frampton was able to isolate 190 cases where there were racially-mixed, non-unanimous jury verdicts. This implies that there were 2,280 individuals votes cast (190 times 12).

Professor Frampton testified that the analysis he performed on these 2,280 votes is in the context of the literature pioneered by Dr. Kim Taylor-Thompson on "empty votes."[1] Professor Taylor-Thompson's social-science work in controlled experiments shows that majority-voting schemes in jury convictions tend to have discriminatory impacts on non-white jurors. The research indicates that non-white jurors will more frequently cast empty votes than white jurors. Professor Frampton's analysis of *The Advocate* dataset provided "startling confirmation" of Professor Taylor-Thompson's thesis in that the overwhelming number of empty votes cast in Louisiana are those by non-white jurors.

Of the votes cast in the dataset, 64 percent were by white jurors. According to Professor Frampton, if there

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[1] Professor Taylor-Thompson is a New York University researcher. A transcript of her testimony was filed into the record as Defense Exhibit 7. In this exhibit, she provides a comprehensive discussion of the social science literature on empty votes. Simply, empty votes are those cast by the minority in a super-majority regime. These votes are essentially meaningless because a majority can come to the conclusion without discussion or inclusion of the minority point of view.

is no correlation with race, then white jurors should cast 64 percent of empty votes and 64 percent of meaningful votes. However, the data reveal that only 43 percent of empty votes are cast by white jurors. This represents a 21 percent absolute disparity, or 21 percent less than what would be expected if there were nothing else operating on the outcome. African-American votes represented 31.3 percent of overall votes cast, but represented 51.2 percent of the empty votes cast. This is an absolute disparity of 20 percent.

Courts have also used a comparative disparity standard when evaluating discrimination under the Fourteenth Amendment. Comparative disparity is a measure where the absolute disparity is divided by the proportion in the initial pool.

> If, for example, black residents were 10 percent of a given jurisdiction but only 7 percent of the members of a given country club, in absolute terms, that's relatively small. That's a 3 percent absolute disparity. The measure that is more often used when we're talking about those kinds of measures, though, would be a comparative disparity. The comparative disparity is measuring the absolute disparity against the proportion in the overall group. So that's actually a 30 percent drop from what we would expect from 10 percent down to 7 percent, given the relatively small overall group in the overall population.

Hearing Transcript, p. 150. Given the data provided by *The Advocate*, African-American jurors are casting empty votes at 64 percent above the expected value and white jurors are casting empty votes 32 percent less than the expected value when looking at these two measures from a comparative disparity point of view.

Professor Frampton further testified that these disparities cannot be explained from random variation in the data and that these findings are statistically significant under Supreme Court precedence in the race-discrimination context.

Professor Frampton also ran empirical analyses of the data where urban parishes were excluded, or busy parishes were excluded, or parishes with similar demographics as Sabine Parish were only included. In all of these different situations, the results were substantially similar, with statistically significant percentages of African-American jurors casting empty votes. It was Professor Frampton's expert opinion that the non-unanimous jury verdict system operated today just as it was intended in 1898: to silence African-Americans on juries and to render their jury service meaningless.

The data were also examined with respect to the impact on defendants as opposed to juror representation. For this analysis, there was a much larger dataset because *The Advocate* was able to identify a much larger number of cases where the decision was non-unanimous, but where the authors may not have been able to obtain complete jury polling information. These data revealed that African-American defendants are convicted by non-unanimous juries 43 percent of the time and that white defendants are convicted by non-unanimous juries 33 percent of the time. Comparing these rates of conviction by non-unanimous verdicts, Professor Frampton found a disparity of approximately 30 percent. That is, African-Americans are 30 percent more likely to be convicted by non-unanimous juries than white defendants. These results were statistically significant and indi-

cated racial discrimination against African-American defendants.

Professor Frampton testified as to the quality of the data complied [sic] by *The Advocate.* It is his expert opinion that this is the largest dataset ever compiled, even when compared with peremptory strike studies, of which there are eight or nine in the legal scholarship. Professor Frampton also stated that the disparate impact discovered by *The Advocate* is correct and that while he used different metrics, the results of both analyses demonstrates disparate racial impacts for African-Americans stemming from the use of non-unanimous jury verdicts.

Finally, Professor Frampton testified that jury deliberations tend to be less robust and shorter when non-unanimous verdict rules are in place. That is, once the minimum number of votes are achieved, deliberations end, regardless of the desire of the minority to continue deliberating. Furthermore, Professor Frampton was unpersuaded by the proposition that the 1898 enactment was about judicial efficiency or economy. Rather, it was about efficiently silencing African-American jurors and that this impact is being perpetuated today through the continued use of non-unanimous jury verdicts.

Law and Analysis

Sixth Amendment Jury Trial Guarantee

The Defense has urged that non-unanimous jury verdicts violate the Sixth Amendment's Guarantee to a jury trial, alleging that *Apodaca v. Oregon*, 406 U.S. 404 (1972), and *State v. Bertrand*, 2008-22115 (La. 3/18/09), 6 So. 3d 738, were wrongly decided and continue to be wrong today. However, the Defense has conceded that these cases and their progeny are

controlling. This Court agrees with the State and Defense in this matter and therefore holds that there is no Sixth Amendment jury trial violation in the instant matter.

Fourteenth Amendment Equal Protection Clause

Racially motivated laws are presumptively unconstitutional. Facially race-neutral laws will be deemed unconstitutional when one of the motivating factors in its adoption is racial discrimination. *Arlington Heights v. Metro. Housing Corp.*, 429 U.S. 252 (1977). The Court held that five factors would be used to determine if a facially race-neutral law was motivated by invidious racial discriminatory intent, in violation of the Fourteenth Amendment's Equal Protection Clause: 1) the historical background of the enactment; 2) the sequence of events leading to the enactment; 3) the legislative history of the enactment; 4) Statements by decision makers; 5) the discriminatory impact. 492 U.S. at 267-68. "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 564. If a showing can be made that the law was passed with racial motivation and has a disparate impact, the burden shifts to the defender of the law to show that the law would have passed despite the racial impact. 429 U.S. at 270, n.21; *Hunter v. Underwood*, 471 U.S. 222, 228.

However, the Court in *Hunter* held that a facially race-neutral law was motivated by invidious racial discrimination and was unconstitutional under the Fourteenth Amendment where that law continued to have a racially disparate impact despite technical amendments since adoption. 471 U.S. at 233. The Supreme Court found the following evidence sufficient

to hold that the original enactment at issue in *Hunter* was adopted with invidious racial discrimination and therefore invalidated the "new" law:

> Although understandably no "eyewitnesses" to the 1901 proceedings testified, testimony and opinions of historians were offered and received without objection. These showed that the Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks. . . . The delegates to the all-white convention were not secretive about their purpose. John B. Knox, president of the convention, stated in his opening address:
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> "And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State." 1 Official Proceedings of the Constitutional Convention of the State of Alabama, May 21st, 1901 to September 3rd, 1901, p. 8 (1940).
>
> Indeed, neither the District Court nor appellants seriously dispute the claim that this zeal for white supremacy ran rampant at the convention.

471 U.S. at 228-229. The Court also adopted the analysis of the Court of Appeal that minority voters were 1.7 times more likely to be removed from the voter rolls than white voters, and that this disparate impact was sufficient to prove an Equal Protection Clause violation. 47 U.S. at 227. The Court in *Hunter* finally held that it was immaterial to the analysis if the law at issue would have been passed "today" without the racial discrimination because the law as

adopted was motivated by racial animus and therefore violated the standard in *Arlington Heights.* 471 U.S. at 233.

The Court in *Arlington Heights* decided the case simply on the grounds that the challengers of the law had failed to prove racially motivated intent. 429 U.S. at 270-71. The current matter is distinguishable on its facts from *Arlington Heights.* The five factors outlined in *Arlington Heights* point to invidious racial discrimination in the adoption of the non-unanimous jury verdict rule. The racial motivations of the conventioneers in 1898 has been persuasively demonstrated by the uncontroverted testimony of both Professor Aiello and Professor Frampton. This testimony clearly establishes that the delegates convened to strip political and legal rights from the African-American population of Louisiana.

Applying the factors in *Arlington Heights*, it is clear that non-unanimous jury verdicts were motivated by racial animus. The historical context in which the rule was adopted was clearly hostile to African-Americans. The uncontroverted expert testimony of Professor Aiello shows that the post-Reconstruction South intended to remove African-Americans from the political and legal process. There is ample evidence in the form of news articles, the main source of societal beliefs in this era, that white supremacists saw African-American jury service as counter-productive to the cause of the Redeemers. The evidence also indicates that white supremacists in post-Reconstruction Louisiana viewed African-Americans as a homogeneous group, whose beliefs were antithetical to those of the whites and that African-Americans would “thwart” “justice” at every opportunity.

Shortly before the opening of the Convention of 1898, the federal government had initiated, or at least threatened to initiate, an investigation into the jury practices throughout Louisiana in response to the *Thezan* case. While the Department of Justice never really undertook the endeavor, the conventioneers were keenly aware that any enactments regarding the jury process would be watched carefully. As a result, the delegates nonetheless adopted a facially race-neutral law that was designed to ensure that African-American jury service would be meaningless by constructing a non-unanimous jury verdict system based on relative demographics of the population. That is, it would be highly unlikely that any jury would ever have more than three African-Americans, and therefore their service would be silenced. This was all predicated on the belief that the races voted as groups and African-Americans as a group could not be trusted with the administration of justice.

At the outset of the 1898 Convention, the President of the Convention, E.B. Kruttschnitt made the following remarks:

> We know that this convention has been called together by the people of the State to eliminate from the electorate the mass of corrupt and illiterate voters who have during the last quarter of a century degraded our politics. . . . With a unanimity unparalled *[sic]* in the history of American politics, they have intrusted *[sic]* to the Democratic Party of this State the solution of the question of the purification of the electorate. They expect that question to be solved, and to be solved quickly."

Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana, Held in New Orleans 1898, p. 3. At the closing of the Convention, Thomas Semmes, the chair of the Judiciary Committee, offered the following statement:

> [W]hen you eliminate the Democratic Party or the Democracy of the State, what is there left but that which we came here to suppress? I don't allude to the fragments of what is called the Republican Party. We met here too establish the supremacy of the white race and the white race constitutes the Democratic party of this State.

Official Proceedings, p. 374. It is abundantly clear from the documentary evidence and the uncontroverted expert testimony that the motivating factor behind the Constitutional Convention of 1898 was to establish white supremacy throughout the State of Louisiana. Regardless of what society might have felt at the time, the leaders of the Convention openly and on the record endorsed racial discrimination and white supremacy as the goal and the outcome of the Convention.

While the record of discriminatory disparate impact coming from the original 1898 enactment requiring a majority of 9-to-3 to convict has not been empirically established. This Court takes judicial notice that if a 10-to-2 majority verdict rule can create comparative racial disparities that are statistically significant, the old rule of 9-to-3 must by logic and definition create at a minimum an equally disparate racial impact.

Under the analysis of *Arlington Heights*, the initial enactment of 1898 is unconstitutional under the Fourteenth Amendment's Equal Protection Clause.

However, the analysis does not end there. The question is whether the current policy is also unconstitutional as applied. The current case is substantially similar to *Hunter*, cited above. In *Hunter*, the Supreme Court was asked to evaluate a section of the Alabama Constitution of 1901 that disenfranchised voters for misdemeanor crimes of "moral turpitude." 471 U.S. at 223. The provision of the 1901 constitution was substantially similar to that adopted in 1875, but the 1901 enactment expanded the number of crimes included. 471 U.S. at 227. The evidence was clear that the legislature enacted the 1901 provision because the new crimes were believed to be committed by African-Americans more than whites. 471 U.S. at 227. This evidence, indirect that it was, was sufficient to establish a breach of the Equal Protection Clause as being motivated by racial animus.

In the instant matter, we have a policy that is substantially similar to the original enactment of 1898. It continues to this day to have a severe disparate impact. As the uncontroverted evidence offered by Professor Frampton and Mr. Simerman, the comparative disparities are statistically significant and startling. African-American jurors are casting empty votes 64 percent above the expected outcome and African-American defendants are being convicted by non-unanimous juries 30 percent more frequently than white defendants. The original enactment from 1898 was unconstitutionally motivated by race and the current enactment continues to have a discriminatory impact. Under the *Hunter* analysis, the original unanimous jury verdict scheme is unconstitutional.

While it is clear that the 1898 non-unanimous jury verdict scheme is unconstitutional, it does not answer the question with respect to the current enactment.

This is a different issue to analyze. The Supreme Court has a line of jurisprudence dealing with the *perpetuation* of racially discriminatory policies that have been reenacted by new legislatures where the new legislature claims to have cleansed the past discrimination. *U.S. v. Fordice*, 505 U.S. 717 (1992). *Fordice* stands for the proposition that if a new policy is enacted that is rooted in or fairly traceable to a policy motivated by invidious racial discrimination, and the new enactment continues to have discriminatory effects, the new policy violates the Fourteenth Amendment. 505 U.S. at 737. If a new policy is not rooted in or fairly traceable to the prior enactment, then it must be shown that the new enactment is itself violative of the Fourteenth Amendment under the *Arlington Heights* standard. 505 U.S. at 737, n. 6.

In *Fordice*, the University of Mississippi had a *de jure* higher education system. During the desegregation era, the system adopted a new ACT admission requirement policy for the universities. However, the admissions requirements were not uniform across the system, and there continued to be a segregative effect from the policy. 505 U.S. at 734. The Court determined that this "new" policy was clearly traceable and rooted in the prior discriminatory policy of maintaining a dual university system and that race-neutral explanations failed to cleanse the enactment of its prior discriminatory intent. 505 U.S. at 734.

Following from *Fordice* was the recent case in June, 2018, of *Abbott v. Perez*, __ U.S. __, 138 S.Ct. 2305 (2018). *Abbott* is a voting rights case dealing with Texas redistricting plans. A 2011 plan adopted by the legislature was never allowed to go into effect by a three judge panel of a federal district court. 138 S. Ct. at 2313. The district court created and adopted a plan

for use in 2012. *Id.* The Texas legislature later adopted the plan developed by the district court with minor changes in 2013. *Id.* The three-judge panel of the district court in 2017 invalidated the plans adopted by the State in 2013 and held that the plans were based on the unenacted 2011 plan and the 2013 adoption had not cleansed the enactment of its racial motivation. *Id.*

The *Abbott* Court held, in pertinent part, that the burden of proof to challenge a new policy never before enacted lies with the challengers of the law. 138 S. Ct. at 2325. The case before the Court in *Abbott* was about a new policy, drafted by the legislature based on district court maps. The reason the State was not required to show that the "taint" of racial discrimination had been cleansed was because there was no indication that the district court plans adopted, albeit with small changes, by the legislature had been motivated by discriminatory intent or by the 2011 legislative plan. *Id.* The Supreme Court took great pains to distinguish *Abbott* from the perpetuation cases stemming from *Fordice* because the enactment in *Abbott* was not fairly traceable to any previous discrimination because the state legislature operated off the maps given to it by the district court. If a policy can be traced to a previously discriminatory enactment, the correct standard of review is that announced in *Fordice.*

In the instant matter, it is clear that this Court is faced with a situation similar to *Fordice* and distinct from *Abbott.* In Mr. Maxie's case, the 1974 provision is rooted in and fairly traceable to the provisions of the 1898, 1913, and 1921 constitutions allowing for non-unanimous verdicts. It has already been conclusively established that the 1898 provision is unconstitutional under the *Arlington Heights* and *Hunter*

jurisprudence. It is also the undisputed expert testimony of Professor Aiello that the provisions in 1913 and 1921 were reenacted without debate or comment.

The issue for this Court is to determine if the Convention of 1973 sufficiently cleansed the provision of its discriminatory past and intent to pass constitutional muster under *Fordice.* This Court agrees with the Defense that the 1973 convention did not cleanse the taint of invidious racial discrimination. It is the unopposed expert testimony of Professor Aiello that the 1973 convention originally wanted to continue the majority verdict scheme as enacted in 1898 because the Supreme Court had affirmed that policy in *Johnson v. Louisiana*, 406 U.S. 365 (1972). However, some of the delegates wished to decrease, *but not eliminate*, the harmful and discriminatory effects of the non-unanimous jury scheme. Some of these proposals involved expanding the unanimity requirement to all cases involving cases where the sentence could be life without the possibility of parole, and increasing the non-unanimous rule to 10-to-2 in order to convict. As the evidence already outlined above shows, the final outcome was to compromise and keep the unanimity requirement only with capital cases and to increase the rule to 10-to-2. As Professor Aiello correctly points out, the admission that raising the standard to 10-to-2 must logically require the conclusion that anything but unanimity is discriminatory.

This Court takes notice of the fact that certain members of the convention wanted to *decrease but not eliminate* the discriminatory impact of non-unanimous jury verdicts. However, decreasing the discriminatory impact and removing it are not equivalent. Taking cognizance of discrimination and

not curing it cannot, as the State argues, cure the policy of its discrimination, either in intent or in impact. Just as in *Fordice* neither an *ad hoc* nor mid-stream race-neutral explanation can cure a policy that is rooted in and fairly traceable to the past system of discrimination. The current scheme continues to perpetuate the discrimination intended and adopted in 1898.

This case is also clearly distinguishable from *Abbott* in that the original proposal of the Bill of Rights Committee in 1973 was to reenact the prior law without any changes and only through a concerted minority effort that recognized the discriminatory impact of the law was any change made. The Defense need not demonstrate that the 1973 convention acted with invidious racial motivation. The new enactment and the convention took cognizance of its discriminatory impact and chose instead to continue the policy, albeit with less drastic outcomes. However, the current scheme was not something that had never before been enacted in the State of Louisiana, as were the maps at issue in *Abbott. Abbott* is entirely factually distinguishable but its legal reasoning applies here just as much as that in *Fordice.*

The final issue before this Court under the *Arlington Heights* and *Fordice* analysis is whether the current non-unanimous jury verdict rules have a disparate impact on minorities. The Court heard the testimony from two witnesses as to the disparate impact on African-Americans that stem from the current non-unanimous verdict rule: Mr. John Simerman and Professor Thomas Frampton. Both indicated that the empirical analyses they conducted showed statistically significant results that demonstrate disparate impacts.

The detailed analysis and evidence have been summarized above. It has been conclusively demonstrated by the largest study of jury outcomes and voting patterns ever conducted that the non-unanimous system in Louisiana discriminates against African-American jurors and defendants. African-American jurors are 250 percent more likely to cast an empty vote, that is, a vote that has no impact on the outcome of a jury trial than is a white juror. This disparity is statistically significant and meets Supreme Court requirements of disparate impact based on the uncontroverted expert testimony of Professor Thomas Frampton. The disparate impact of this law was found in both urban and rural parishes.

Professor Frampton's analysis also showed that African-American defendants were convicted by non-unanimous juries in 43 percent of all trials where data was available. The comparative disparity was 30 percent. The analysis also showed that this outcome was statistically significant.

The analysis of the data shows that the rate at which African-Americans cast empty votes, thereby being deprived of meaningful jury service, and the rate at which African-Americans are convicted by non-unanimous juries could not be explained by random variation in the data. These outcomes could only be explained by some outside force operating on the jury process. The only common denominator in these matters was the use of a non-unanimous jury verdict system. The current scheme in Louisiana has a disparate impact on minority jurors and defendants and therefore violates the Equal Protection Clause of the Fourteenth Amendment and is therefore unconstitutional.

The State attempts to defend the non-unanimous jury scheme. The State relies on state court holdings in *State v. Webb*, 2013-0146 (La. App. 4th Cir. 1/30/14), 133 So. 3d 258, and *State v. Hankton*, 2012-375 (La. App. 4th Cir. 8/2/13), 122 So. 3d 1028. The State's reliance on these cases is misplaced as both dealt with evidentiary and procedural problems that prevented the Court of Appeal from ruling in the challengers' favor.

In *State v. Hankton*, the Louisiana Court of Appeal, Fourth Circuit, held that, 1) the challenge to non-unanimous jury verdicts was not properly reserved for appeal, 133 So. 3d at 1036; and 2) Hankton did not prove a *prima facie* case that non-unanimous jury verdicts violate the Equal Protection Clause, 133 So. 3d at 1035.

The Fourth Circuit in *Hankton* denied relief first and foremost on the ground that the defendant had not properly preserved his claim on appeal. The failure of the defense to request an evidentiary hearing in the trial court was not error patent, thereby depriving the Fourth Circuit from appellate jurisdiction. 122 So. 3d at 1029. Of great import to the Fourth Circuit was that Hankton had requested a unanimous jury verdict in his first trial, which was granted by the trial court. 122 So. 3d at 1030. Upon that trial resulting in a mistrial, a new trial was granted and the jury was instructed that only a majority verdict was required. 122 So. 3d 1030- 31. Hankton's counsel did not object to this until after a non-unanimous verdict was returned. 122 So. 3d at 1031. A motion for new trial was filed and the motion came before the court for a hearing, but was denied, and the defense counsel did not request the opportunity for an evidentiary hearing on the issue of

the constitutionality of non-unanimous jury verdicts. 122 So. 3d at 1031.

Despite these procedural issues, the Fourth Circuit still engaged in an analysis of the history of Louisiana's non-unanimous jury verdict scheme. The Fourth Circuit was willing to find that the 1898 convention was imbued with racial animus and discriminatory intent, including the knowledge of the relative demographic population in Louisiana such that the non-unanimous verdict scheme would deprive African-Americans of any meaningful service. 122 So. 3d at 1033-35. The Fourth Circuit then again brought up the failure to request an evidentiary hearing and that the defendant had failed to prove *a prima facie* case demonstrating racial animus because of this lack of a hearing. 122 So. 3d at 1036. It was the opinion of the Fourth Circuit that the Convention of 1973 had sufficiently cleansed itself of the prior racially discriminatory intent because race was never specifically mentioned in the debate around the current 10-to-2 majority scheme. 122 So. 3d at 1038-41. However, the *Hankton* court did not have available to it any of the evidence offered in the instant matter and clearly bases its main reasoning on procedural, not substantive, grounds. The fact that a factually insufficient record did not convince the Fourth Circuit that the current non-unanimous verdict scheme is not unconstitutional does not bind this Court from determining, based on a full and *uncontroverted* evidentiary record, that Article I, Section 17 and Code of Criminal Procedure Article 782 are unconstitutional.

In *State v. Webb*, the Louisiana Court of Appeal, Fourth Circuit, held, *inter alia*, that Article I, Section 17 of the Louisiana Constitution of 1974 and

Louisiana Code of Criminal Procedure 782 were not unconstitutional under the Sixth Amendment and the Fourteenth Amendment. The court in *Webb* determined that the defendant had failed to uphold his evidentiary burden under *Arlington Heights* and *Hunter.* 133 So. 3d at 283. The reason for this finding was that the defendant had simply filed into evidence an excerpt of the Official Proceedings of the Constitutional Convention of 1898, similar to the evidence in this case, but had not provided any other evidence, such as an expert witness. *Id.* The Court of Appeal accepted the arguments of the delegates at the 1898 Constitutional Convention that judicial economy and efficiency were the only motivating factors behind the adoption of the 9-to-3 rule for jury verdicts. *Id.* at 285. However, the Fourth Circuit did not have before it the same context as that which has been provided to this Court and was therefore unable to discern the surrounding circumstances of the Convention of 1898. Furthermore, the defendant in *Webb* failed to provide any evidence that there was a disparate racial impact from the non-unanimous jury verdict scheme.

Webb is entirely distinguishable on its facts from the present case. Here, this Court has the historical context surrounding the calling of the convention. This Court has heard multiple experts testify as to the purpose and motivation of the non-unanimous jury verdict scheme in 1898. This Court has uncontroverted empirical proof of the disparate impact of the *current* non-unanimous jury verdict scheme. Finally, this Court has taken evidence and testimony that the Convention of 1973 did not cleanse itself of the racial taint of the 1898 enactment because the 1973 delegates tacitly, if not overtly, recognized that the regime was discriminatory and did not take steps to

cure but merely attempted to *ameliorate* the discrimination of non-unanimous jury verdicts.

Finally, the Fourth Circuit based much of its analysis in *Webb* on that contained in *Hankton*, that case having already been discussed above. Nothing in *Webb* should be controlling on this Court and this Court chooses not to follow the analysis of either *Webb* or *Hankton* as both are based on procedural errors and lack of an evidentiary record, unlike the instant matter, to require or substantiate these defendants' claims regarding the constitutionality of the non-unanimous verdict scheme. Also of import is that the *Webb* and *Hankton* courts took notice of *Apodaca v. Oregon* and *State v. Bertrand.* These cases dealt specifically with the Sixth Amendment argument that Defendant Maxie has already conceded forecloses recovery under that Amendment. The reliance of *Webb* and *Hankton* on these cases to determine a Fourteenth Amendment challenge is misplaced as neither of these cases dealt with an Equal Protection Clause violation.

Based on the uncontroverted evidentiary record before this Court, it is clear that the non-unanimous jury verdict scheme originally adopted in 1898 and perpetuated in 1913 and 1921 and reenacted as modified in 1973 is unconstitutional. The original scheme was motivated by invidious racial animosity. It was continued without hesitation or debate until 1973. In 1973, it was explicitly recognized that non-unanimous juries inflicted disparate impacts on minority defendants. It has been clearly and "startlingly" established that those disparate impacts continue to affect African-American jury service and the non-unanimous convictions of African-American defendants. The State's arguments to the contrary,

Article I, Section 17 of the Louisiana Constitution of 1974 and Code of Criminal Procedure Article 782 are unconstitutional as written and as applied.

The State also attempts to argue that the dataset used by Defendant Maxie is unreliable. The State argues that data collection methods may not be consistent across parishes, that there may be outlier cases included in the data, and that urban or "busy" parishes are over-included in the dataset compiled by *The Advocate.* However, all of these arguments are without merit. At no point during these proceedings has the State attempted to provide any evidence that the data collected by *The Advocate* were collected in violation of standard methodological practices. Furthermore, it is the uncontested expert testimony of Professor Thomas Frampton that this dataset is the most comprehensive and extensive study of jury outcomes and juror voting he has ever seen. Also contained in Professor Frampton's expert testimony that the inclusion of these "outlier" cases actually makes the disparate racial impact of non-unanimous juries *less* severe, not more. Finally, the empirical analysis contained in the record demonstrates that the stated results of absolute and comparative disparate impact hold regardless of how one analyzes the data by urban or rural parish. The State has offered no evidence to substantiate its claims that data offered in this matter has in any way been subject to error or bias.

Retroactivity

The final issue with respect to the constitutionality of non-unanimous jury verdicts is the extent of the retroactivity of the ruling of this Court. The Supreme Court of the United States has had a long history developing its jurisprudence on the issue of retro-

activity, but this Court need not examine it in its entirety. Rather, the decision announced today is limited by the holding in *Griffith v. Kentucky* where the Supreme Court stated, "that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987); *Cf. Quantum Res. Mgmt., L.L.C. v. Pirate Lake Oil Corp.*, 2012-1472 (La. 3/19/13), 112 So.3d 209.

For purposes of the non-unanimous jury verdict scheme in Louisiana, all cases that are currently pending trial and all cases on direct review must now be adjudicated subject to a unanimous jury requirement. All cases and convictions that are final are settled as a matter of law and cannot now be collaterally challenged because of the decision issued today.

<u>Sixth Amendment Impartial Jury Claim</u>

The Defense alleges that the exclusion through empty votes of African-American jurors as a result of non-unanimous verdicts violates the Sixth Amendment guarantee to an impartial jury. The crux of the Defense's argument is that African-American jurors' votes are systematically diluted by the non-unanimous jury scheme in Louisiana. The Defense relies on the statistics provided by *The Advocate* study and the independent analysis of Professor Thomas Frampton. However, the Defense has only argued this violation of the Constitution in briefing. At no point has the Defense actually raised this claim in a motion or other pleading that would put it properly before this Court. This procedural defect requires that this Court deny the relief requested. Furthermore, as this Court has already decided that the non-unanimous jury scheme violates the Fourteenth Amendment Equal Protection

Clause, the Court need not determine if there is a separate constitutional ground upon which relief can be granted.

Conclusion

The Defense has presented this Court with a complete evidentiary record challenging the constitutionality of Louisiana's non-unanimous jury verdict scheme. The evidence, unopposed and unchallenged by the State establishes the following: 1) The original 1898 enactment was motivated by invidious racial discrimination; 2) The enactment of 1973 perpetuates the disparate impact of the 1898 provision; 3) The delegates at the Convention of 1973 did not cleanse the racial motivation from 1898; 4) The delegates at the Convention of 1973 at the very least tacitly acknowledged the discriminatory impact of the 1898 provision and merely attempted to ameliorate, but not cure, this disparate impact; 5) The current provision perpetuates invidious racial discrimination; and 6) The current non-unanimous jury verdict scheme disparately affects African-American jurors by negating their jury service and disparately affecting African-American defendants by overwhelmingly convicting them by non-unanimous juries. Given the uncontested evidence adduced by the Defense and in light of the law, Article I, Section 17 of the Louisiana Constitution of 1974 and Code of Criminal Procedure Article 782 are unconstitutional as written and applied.

***Batson* Challenges**

The State used three peremptory challenges during voir dire to exclude African-American potential jurors from service on Maxie's jury. The defense challenged these peremptory challenges as a violation of *Batson*

v. Kentucky, 476 U.S. 79 (1986). The State and Defense had both already excluded African-American potential jurors for cause. However, the State's peremptory challenges were accused of being motivated by race. The three potential jurors were Deacon Donald Sweet, Victoria Reed, and Mercedes Hale. The State proffered "race-neutral" explanations for the exclusion of these potential jurors. During voir dire, this Court accepted these justifications and allowed the peremptory challenges. However, upon review, the analysis provided by the Defense in its post-trial memoranda, and the evidence submitted, this Court has determined that the State was motivated by invidious racial discrimination in its use of these three peremptory challenges. Therefore, a new trial must be ordered in favor of Defendant, Melvin Cartez Maxie, to ensure the fair and just adjudication of the State's allegations that Maxie violated La. R.S. 14:30, First Degree Murder.

> [T]he State's privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause. Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges "for any reason at all, as long as that reason is related to his view concerning the outcome" of the case to be tried, . . . the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.

Batson v. Kentucky, 476 U.S. 79, 89 (1986) (internal citations omitted). To show a violation of *Batson*, the

Defense must prove a *prima facie* case that the State is excluding potential jurors on the basis of race, at which time the burden shifts to the State to demonstrate a race-neutral reason for having challenged the potential jurors. The clearest statement of the *Batson* challenge standard was in *Snyder v. Louisiana*, where the Supreme Court of the United States held that:

> First, a defendant must make a prima facie *[sic]* showing that a peremptory challenge has been exercised on the basis of race[; s]econd, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question[; and t]hird, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Snyder v. Louisiana, 552 U.S. 472, 476-77 (2008) (internal citations omitted) (alterations in original). Once the Defendant has demonstrated a case of racial discrimination, the analysis proceeds as follows:

> Once defendants establish a prima facie case, the burden then shifts to the state to come forward with a race-neutral explanation. This second step of the process does not demand an explanation from the state that is persuasive, or even plausible. The reason offered by the state will be deemed race-neutral unless a discriminatory intent is inherent within that explanation. The persuasiveness of the state's explanation only becomes relevant at the third and final step which is when the trial court must decide whether defendants have proven purposeful discrimination. Thus, the ultimate burden of persuasion as to racial motivation

> rests with, and never shifts from, the opponent of the peremptory challenge.

State v. Baker, 34973, p. 9-10 (La. App. 2d Cir. 9/26/01); 796 So. 2d 146, 152-53.

While this Court during voir dire determined that the State had not acted with invidious racial discrimination in its exclusion of three African-American potential jurors via peremptory challenges, that determination was incorrect. Upon review of the record and evidence submitted, a new trial must be ordered. Each of the *Batson* Challenges will be handled separately.

Deacon Sweet

The State peremptorily challenged Deacon Donald Sweet. When this was challenged by the Defense, the State proffered a race-neutral explanation that Deacon Sweet's demeanor indicated to the State that he was unfit to serve on the jury. (Transcript of Juror Challenges, p. 35-36).[2] Specifically, Deacon Sweet appeared to be answering questions slowly or taking a long time to think about the answers. *Id.* The Defense challenged these propositions pointing out that Deacon Sweet was on the last jury panel of the day, that it was late in the afternoon, and that the courtroom was warm. Tr. J.C., p. 36. Furthermore, the Defense overheard, without intent to overhear, ADA Anna Garcie say to the District Attorney, Don Burkett, that the State had no good reason to exclude Deacon Sweet to which Don Burkett replied something to the effect that Deacon Sweet was "stupid." Tr. J.C., p. 37. Don Burkett attempted to pivot away from this

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[2] Tr. J.C. will be used as the short form citation for the Juror Challenges Transcript.

position and said that he was attempting to be nice to Deacon Sweet and that he used the demeanor language as an euphemism so as not to place into the record that Deacon Sweet was unintelligent. *Id.* However, the record is clear that neither the State nor the Defense inquired of Deacon Sweet's intelligence or mental capabilities until the first day of the Defense's Omnibus Motion.

> [A]lthough there is no requirement that a litigant question a prospective juror during voir dire, the jurisprudence holds that the lack of questioning or mere cursory questioning before excluding a juror peremptorily is evidence that the explanation is a sham and a pretext for discrimination. *Miller—El*, 545 U.S. at 246, 125 S. Ct. at 2328, quoting *Ex parte Travis*, 776 So.2d 874, 881 (Ala. 2000); *State v. Collier*, 553 So.2d at 823, n. 11, citing *In re Branch*, 526 So.2d 609 (Ala. 1987). The purpose of voir dire examination is to develop the prospective juror's state of mind not only to enable the trial judge to determine actual bias, but to enable counsel to exercise his intuitive judgment concerning the prospective jurors' possible bias or prejudice. *Trahan v. Odell Vinson Oil Field Contractors, Inc.*, 295 So.2d 224, 227 (La. App. 3 Cir. 1974). It is evident in the context of *Batson/Edmonson* that trial and appellate courts should consider the quantity and quality of either party's examination of the challenged venire member and to view the use of this tool as a means for the judiciary to ferret out sham justifications for peremptory strikes.

Alex v. Rayne Concrete Serv., 2005-1457, p. 21 (La. 1/26/07), 951 So. 2d 138, 154.

In this matter, the record is devoid of either the State or the Defense questioning Deacon Sweet about his intelligence or his mental capabilities. The only time this occurred was during the post-trial hearing of February 7, 2018. The State used Deacon Sweet's demeanor as a smoke-screen or euphemism to hide its true motive for excluding him, that is, his intelligence. However, because there was no questioning of Deacon Sweet regarding his intelligence, this is clear evidence of a pre-textual facially race-neutral explanation. Without having first questioned Deacon Sweet regarding his intelligence, there would be no reasonable basis for the State to challenge Deacon Sweet with respect to his intelligence. Maxie is entitled to a new trial because the State violated *Batson* by pre-textually and improperly excluding Deacon Sweet on the basis of his race.

Mercedes Hale and Victoria Reed

The State challenged both Hale and Reed peremptorily. The Defense challenged both of these. When the Court inquired of the State as to its race-neutral explanations for the peremptory challenges, the State responded with respect to Hale and Reed that, "There's a very small, as the Court's aware, African-American community here in Many, in the Zwolle area that people are closely connected." Tr. J.C., at p. 29. The State also attempts to argue that there is an attenuated acquaintance between these two potential jurors and parties in the case, but the State's clearest articulation of the "race-neutral" explanation is that the potential jurors are African-American. Much more telling, however, is that the State attempts to justify its challenge on "race-neutral" grounds and then

immediately proceeds, much more strongly, with the race-specific explanation.

A divided panel of the Louisiana Supreme Court has held that the specific interjection of race into the *race-neutral* explanation for a peremptory challenge under *Batson* fails constitutional muster. *State v. Coleman*, 2006-0518 (La. 11/2/07), 970 So. 2d 511. In *Coleman*, the prosecutor challenged a juror who seemed preoccupied with outside civil litigation involving institutional racism. *Id.* at 5. When the court inquired for a race-neutral explanation, the prosecutor specifically interjected race into the matter. *Id.* The Louisiana Supreme Court described the situation as:

> However, in this case, there was no attempt by the State to explain how bias might operate from the mere existence of this lawsuit. Miller was never questioned about the impact the lawsuit would have on his ability to serve as a juror. Moreover, the prosecutor's very next statement following the mention of the "institutional discrimination" lawsuit interjected the issue of race, undercutting the acceptable "ongoing litigation" explanation and suggesting that the reasons for striking Miller were in fact race-related. The prosecutor stated: "Defense counsel voir dired on the race issue. There is a black defendant in this case. There are white victims." The prosecutor's statement explicitly places race at issue, without any attempt to explain or justify why race might be a relevant consideration in this instance.

Id. at 6. The Supreme Court refused to accept a plausible race-neutral explanation once the taint of racial bias or discrimination entered the proceedings.

Just as in *Coleman*, the District Attorney here attempted a plausible, race-neutral explanation that both potential jurors knew witnesses or parties, but then immediately interjected race into the calculus. Tr. J.C., at 29-30. This explicit reliance on race in its *race-neutral* explanation cannot survive the *Batson* challenges as presented. A new trial must be ordered to preserve fairness and justice.

Conclusion

The peremptory challenges to Deacon Sweet, Mercedes Hale, and Victoria Reed violated the standard set forth in *Batson v. Kentucky.* These challenges were motivated by race and worked to exclude African-American jurors from Maxie's jury in violation of the Fourteenth Amendment's Equal Protection Clause. Therefore, a new trial must be granted and Maxie given the opportunity to have a trial free from racial bias and discrimination.

Non-Resident Juror

The Defense also alleges that Juror Bruce Beasley was a non-resident of Sabine Parish at the time that he served on the jury and was instead a resident of the State of Texas. Testimony was taken on February 7, 2018, and evidence introduced at both the hearings on February 7, 2018, and July 9, 2018. Given that this Court has determined that Mr. Maxie's rights have been violated under the Fourteenth Amendment, both with respect to non-unanimous juries and *Batson v. Kentucky*, the matter is deemed moot and this Court wishes to pretermit any further discussion of the issue as not necessary to the disposition of this matter.

However, even if the issue were not moot, the Defense is not entitled to the relief requested under the statutory framework for jury service. Louisiana

Code of Criminal Procedure Article 401 requires a potential juror to have resided in the parish of service for at least one year prior to serving on a jury. While a new trial would normally be the appropriate remedy for service by a non-resident juror, the Defense has an affirmative obligation to question the juror about his qualifications if that is going to form the basis of a post-trial motion. *State v. Lewis*, 109 So. 391, 392 (La. 1926); *See also*, *State v. Baxter*, 357 So. 2d 271 (La. 1978) ("in order for a defendant to avail himself of the lack of qualification of a juror, it must be made to appear that the disqualification of the juror was not known to defendant, or his counsel, when the juror was accepted by him and could not then have been ascertained by due diligence; and it must be made to appear that such diligence was exercised by an examination of the juror, on his voir dire, touching his qualifications, and that he answered falsely.").

The evidence adduced at the hearings on the matter, and the transcripts filed in this matter, show that the Defense failed to examine Juror Beasley adequately regarding his residence and qualifications. The juror questionnaire filed into the record as State Exhibit 1 shows that Juror Beasley lived a transient lifestyle and that he might possibly reside outside of Sabine Parish. The Defense had the affirmative obligation to investigate this possibility if it wished to urge juror disqualification based on evidence adduced at a later date.

Finally, the Defense urges a unique Sixth Amendment vicinage requirement violation with Juror Beasley's service in this matter. However, no evidence was placed into the record regarding the vicinage requirement and why satisfaction of the statutory requirements is violative of this requirement.

Therefore, this Court respectfully denies the vicinage argument for failure of the Defense to meet its evidentiary burden.

Felony Murder, Manslaughter, and Justifiable Homicide

The Defense argues several theories of mitigation or reduction of the conviction of Second Degree Murder in violation of La. R.S. 14:30.1. First is a theory of collateral estoppel based on the fact that the jury returned a verdict of guilty for second degree murder, a responsive verdict to the charge of first degree murder. Second is a theory of justifiable homicide in the name of self-defense. Third is a theory that the evidence establishes manslaughter by a preponderance of the evidence and the State failed to overcome this preponderance by proof beyond a reasonable doubt. These theories of recovery were argued as an alternative to the motion for new trial and arrest of judgment.

As the above analysis reflects, Maxie is entitled to a new trial on the independent grounds that the majority verdict system in Louisiana is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment and that three of the peremptory strikes that the State exercised violated the standard announced in *Batson v. Kentucky.* Because the Defendant is entitled to a new trial, this Court need not determine whether a reduction in sentence is appropriate. This Court further need not determine if the evidence established justifiable homicide. These are questions of fact best left to a unanimous jury in Defendant's new trial.

Juror Sequestration Violation

The Defense argues that Juror Hosea Parrie violated the rule of sequestration alleging that he spoke to his wife regarding the trial before the jury had returned its verdict. The Defense called Juror Parrie during the hearing of February 7, 2018. However, Juror Parrie testified that any and all conversations he may have had with his wife occurred *after* the conclusion of the trial. This Court respectfully denies the motion for new trial on the grounds that the Defense has failed to meet its evidentiary burden to show that Juror Hosea Parrie actually violated the rule of sequestration.

Juror Castie

The Defense argues that Juror Castie deliberately deceived this Court when he failed to state that he had a brother killed in a drive-by shooting in Shreveport, LA. After being examined by the State and Defense, Juror Castie was accepted and sworn as a member of the jury. However, *before* deliberations began, Juror Castie was removed from the jury and an alternate seated. He was removed because it came to light that Juror Castie had a personal connection to a death by drive-by shooting. The Defense attempts to argue that this was prejudicial error. However, the entire body of law cited by the Defense deals with post-deliberation discovery of the deception. None of the cases cited deal with the pre-deliberation removal of a juror and the seating of an alternate. Therefore, since there does not appear to be a legal basis upon which to grant the relief requested, the motion for new trial is respectfully denied on this basis.

The Victim's Mother's Fainting

The Defense argues that the victim's mother, Ms. Thomas, prejudiced the jury and the outcome of the jury process because of her crying and fainting episode. The Defense cites to a body of case law that deals with cases wherein the courtroom descends into madness or into a farce of justice. *See, e.g.*, *Sheppard v. Maxwwell*, 384 U.S. 333 (1966) (holding that fair trial rights were violated because of "carnival atmosphere."). All of the cases cited by the Defense deal with extreme examples of the courtroom no longer being a place of solemn deference but instead become the scenes of television dramas. Beyond the fact that the law cited by the Defense is inapplicable to the facts of this case, the Defense failed to introduce any documentary or testimonial evidence that any of the reactions of Ms. Thomas caused the jury to vote in a prejudicial manner against the Defendant. The Defense has failed to carry its evidentiary burden that the physical reactions of Ms. Thomas prejudiced the jury and the outcome of the trial. The motion is respectfully denied on these grounds.

CONCLUSION

Defendant, Melvin Cartez Maxie, is entitled to a new trial for the charge of First Degree Murder in violation of La. R.S. 14:30. The non-unanimous jury verdict scheme of Louisiana, as adopted in 1898 and modified in 1974, violates the Equal Protection Clause of the Fourteenth Amendment. The original enactment was motivated by invidious racial discrimination and the re-enactment of 1974 perpetuates the discriminatory effect of the law. The re-enactment is fairly traceable and is rooted in the 1898 provision and therefore violates the standard set forth in *Fordice.* Therefore, Article I, Section 17 of the Louisiana

Constitution of 1974 and Article 782 of the Louisiana Code of Criminal Procedure are hereby ruled unconstitutional. A new trial must be ordered and the verdict must be unanimous to convict or acquit Defendant.

Furthermore, the exclusion of three African-American potential jurors by the State's use of peremptory challenges violates the Equal Protection Clause of the Fourteenth Amendment as stated in *Batson v. Kentucky.* Race was a motivating factor in the exclusion of these African-American jurors and their exclusion worked an unconstitutional disservice to Defendant. Therefore, a new trial must be ordered.

THUS DONE AND SIGNED in Chambers, in the Town of Many, Parish of Sabine, and State of Louisiana, on this, the 11th day of October, 2018.

/s/ Stephen B. Beasley
HON. STEPHEN B. BEASLEY
DISTRICT COURT JUDGE

[CLERK'S SEAL]

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

Case No.: 15CR58698

STATE OF OREGON

Plaintiff,

v.

OLAN JERMAINE WILLIAMS,

Defendant,

OPINION AND ORDER

This case comes before this Court on Defendant's motion for new trial. Having reviewed the record, the arguments, and materials submitted by all parties, this Court finds as follows:

BACKGROUND

Defendant in this matter, Olan Jermaine Williams, is an African-American man. Prior to the incident forming the basis of this case, he was a college graduate and working professional with no prior criminal record, who had recently married his long-term partner. The State charged Defendant with two counts of Sodomy in the First Degree, alleging that Mr. Williams anally and orally sodomized a heavily intoxicated Caucasian man following a party.

Following a two-and-a-half day trial, a jury of twelve began deliberations on the matter on the afternoon of the third day. Around 4:35 p.m. the clerk of the court entered the jury room and asked the jury when they

would like to return the following day to continue deliberations. Moments later, the jury informed this Court it had reached a decision. At 4:48 p.m. court reconvened and the jury returned a verdict unanimously acquitting Defendant of the anal sodomy charge, but returning a non-unanimous 10-2 verdict for guilt on the oral sodomy charge. Defense counsel did not request a unanimous jury instruction, nor did counsel object to the receipt of the non-unanimous verdict.

At Defendant's sentencing the courtroom was filled with members of Portland's African American community who spoke at length in support of Mr. Williams. They also voiced frustration with the treatment of African Americans in Multnomah County's criminal justice system. Towards the end of the sentencing a woman raised her hand and asked to speak. She indicated that she did not know the people present, but identified herself as a juror in the case. She was the sole African American on the jury, and was one of the two jurors who voted to acquit. She voiced her opinion that Defendant's conviction was unfair. This Court ultimately imposed the statutorily mandated minimum sentence of 100 months. Defendant, now represented by new counsel, filed a motion for new trial.

MOTION FOR NEW TRIAL

ORS 136.535 applies sections A, B, D and G of Oregon Rule of Civil Procedure (ORCP) 64 to criminal trials. Defendant moved for a new trial asserting an as-applied equal protection challenge to the entry of a non-unanimous jury verdict in this case. Defendant readily acknowledged that his challenge did not squarely fit within the legislatively specified bases for a new trial under ORCP 64(B).

Prior to 1933, Oregon courts' authority to order a new trial was a function of common law. That changed in 1933 with the enactment of ORS 17.630. Subsequent to that enactment, Oregon case law became disjointed, uncertain how to reconcile statutory and common law authority for new trials. Ultimately this resulted in three categories:

> "(1) Cases in which such orders have allowed motions for new trials based upon grounds specified in ORS 17.610, including 'error in law occurring at the trial, and excepted to by the party making the application'; (2) Cases in which trial courts have granted new trials upon *** their 'own motion'; and (3) Cases in which new trials were granted because of substantial and prejudicial error to which no proper exception or objection was taken, but which was raised by motion for new trial * * * ."

Beglau v. Albertus, 272 Or 170, 181-82, 536 P.2d 1251 (1975).

That third category would appear to envision a residual common law authority to grant a motion for new trial upon grounds not contained within ORCP 64(B). However, that third category was subsequently disavowed by the Oregon Supreme Court:

> "Correia and its progeny must be overruled, for these cases appear to establish a basis for new trial orders which is so broad that it would swallow up the existing statutory categories for such orders and thereby effectively abolish all restrictions which those statutes impose. Any other result would amount to a deliberate disregard of the clear mandate of the

> legislature. Therefore, to the extent that Young v. Crown Zellerbach, supra; Lundquist v. Irvine, supra; Lee v. Caldwell, supra; Hillman v. North. Wasco Co. P.U.D., supra; and Hays v. Herman, supra, are inconsistent with the statutory restrictions imposed by ORS 17.610 and 17.630, they, as well as Correia, are hereby overruled."

Maulding v. Clackamas Cty., 278 Or 359, 365, 563 P2d 731 (1977).

This Court concluded that ORCP 64(B) could not support Defendant's request for a new trial. However, in light of the materials presented for that hearing, coupled with the unusual circumstances surrounding the case, this Court invoked its *sua sponte* power under ORCP 64(G), which provides:

> "If a new trial is granted by the court on its own initiative, the order shall so state and shall be made within 30 days after the entry of the judgment. Such order shall contain a statement setting forth fully the grounds upon which the order was made, which statement shall be a part of the record in the case."

A court's authority for *sua sponte* allowance of a new trial is not limited to errors properly excepted to. *Dutra v. Tree Line Transp., Inc.*, 112 Or App 330, 333, 831 P2d 691 (1992). However, a court's power under ORCP 64(G) is not unlimited. Under this provision a court may order a new trial only if it has committed an error that "was so prejudicial as to prevent a party from having a fair trial" and "where there is a basis for a finding of substantial prejudice." *Quick Collect, Inc. v. Gode*, 142 Or App 570, 572, 922 P2d 694 (1996).

This Court ordered an evidentiary hearing to determine whether a grant of a new trial under ORCP 64(G) was appropriate in this case. This Court also allowed the appearance as *amici* of the Oregon ACLU and the Oregon Justice Resource Center. The parties presented substantial briefing, and introduced numerous exhibits, without objection, which are part of this record.

APODACA AND DEFENDANT'S ARGUMENT FOR NEW TRIAL

In 1972 the United States Supreme Court took up Oregon's non-unanimous jury system in *Apodaca v. Oregon*, 406 US 404 (1972). *Apodaca* involved a coordinated challenge by three Oregon defendants who argued that jury unanimity was required under the Sixth Amendment. The Court split 4-1-4, upholding the convictions. Four justices, led by Justice White, found that the Sixth Amendment did not require unanimity. Four justices, led by Justice Douglas, found that the Sixth Amendment did require unanimity. Justice Powell wrote the concurrence that held the opinion together, concluding that while "the Sixth Amendment requires a unanimous jury verdict to convict in a federal criminal trial," that aspect of the jury trial was not incorporated against the states.

Apodaca's companion case, *Johnson v. Louisiana*, 406 US 356 (1972) addressed two additional challenges to Louisiana's non-unanimous jury system. First, the defendant argued that only unanimity could ensure compliance with the "beyond a reasonable doubt" standard. The Court rejected that argument. Second, the defendant argued that requiring unanimity in misdemeanor and capital murder, but non-unanimity in general felony cases, violated equal

protection. The Court, applying a rational basis standard, found that challenge unavailing.

The criticism of *Apodaca* is voluminous. Legal scholars point out that the opinion itself has questionable precedential value as the holding is the work of but one lone justice. More pointedly, critics note that *Apodaca* is difficult to reconcile with the current Court's jurisprudence on the Sixth Amendment and the importance of the jury as reflected in cases such as *Apprendi v. New Jersey*, 530 US 466 (2000) and *Blakely v. Washington*, 542 US 296 (2004).

Even more questionable, however, is *Apodaca's* endorsement of the selective incorporation doctrine. Justice Powell's concurrence, holding that jury unanimity is fundamental to the Sixth Amendment, but is somehow not fundamental enough to be incorporated against the states, is difficult to reconcile with the current Court's incorporation doctrine as expressed in more recent cases such as *McDonald v. City of Chicago*, 561 US 742 (2010). For these reasons, it is the opinion of many legal scholars that were the Court to take up jury unanimity again, it would likely disavow *Apodaca.* Despite this, *Apodaca* remains binding precedent today, and forecloses arguments in lower courts that the Sixth Amendment requires jury unanimity.

In light of the above, Defendant does not raise a facial challenge to Oregon's non-unanimous jury system. Rather, in asserting why the receipt of a non-unanimous verdict would be error in this case while otherwise permitted by the Oregon Constitution, Defendant advances an as-applied race-based equal protection challenge – an argument not raised in *Apodaca* or *Johnson.*

Constitutional challenges are commonly divided into two categories: facial and "as-applied." A facial attack is as one where "no application of the statute would be constitutional." *Sabri v. United States*, 541 US 600, 609 (2004). In contrast, a party's burden in an as-applied challenge is different from that in a facial challenge. In an as-applied challenge, "the plaintiff contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional." *Women's Med. Prof'l Corp. v. Voinovich*, 130 F 3d 187, 193 (6th Cir 1997). Stated another way, an as-applied challenge asserts that "a statute, even though generally constitutional, operates unconstitutionally as to him or her because of the plaintiff's particular circumstances." Richard H. Fallon, Jr., *As Applied and Facial Challenges and Third-Party Standing*, 113 Harv L Rev 1321, 1321-22 (2000) (summarizing the conventional account of facial and as-applied challenges). If a law is unconstitutional as applied, the State may continue to enforce it in different circumstances where it is not unconstitutional, but if a law is unconstitutional on its face, the State may not enforce the statute under any circumstances. *Women's Med Prof'l Corp* at 193.

In raising an as-applied challenge, Defendant is not asking this Court to find Oregon's non-unanimous jury system unconstitutional on its face, only in its unique application to him, in the context of this case. With that framework in mind, this Court will first address the general equal protection argument, and then will discuss the particular circumstances of this Defendant and this case.

EQUAL PROTECTION

The Fourteenth Amendment to the United States Constitution reads in part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In general, equal protection claims arise in one of three categories. The first is a claim "that a statute discriminates on its face." *E & T Realty v. Strickland*, 830 F.2d 1107 (11th Cir 1987). The second is where the neutral application of a facially neutral statute has a disparate impact. *Id.* The third category "is that defendants are unequally administering a facially neutral statute." *Id.; see also* 3 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law, Substance & Procedure*, § 18.4 (4th ed. 2008) (Under equal protection review, a law may establish a classification either "on its face," in its purpose or effect, or in its application.).

In this case, Defendant's equal protection claim, by his own admission, could only fit within the second category: a disparate impact upon a racial group of a facially neutral law. However, not every disparate impact is unlawful. "[A] law, neutral on its face and serving ends otherwise within the power of government to pursue, is not invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another." *Washington v. Davis*, 426 US 229, 242 (1976). A classification having a differential impact, absent a

showing of discriminatory motive, is subject to review under the lenient rationality standard. *Id.* at 247-48.

To subject a law to the more rigorous heightened scrutiny standard requires more than mere disparate impact. Heightened scrutiny requires Defendant show a disparate impact, coupled with a discriminatory motive in the law. In establishing a discriminatory motive, the parties agree that this Court need not find that the law was motivated *solely* by a discriminatory motive. "Discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences... It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Massachusetts Personnel Adm'r v. Feeney*, 442 US 256, 279 (1979); see also *Hunter v. Underwood*, 471 US 222, 228 (2985) (stating standard as a motivating factor); *Columbus Bd of Educ v. Penick*, 443 US 449, 509 (1979) (a motivating factor).

In evaluating Defendant's equal protection claim, this Court must therefore look to history to determine if there was a discriminatory motive in the enactment of Oregon's non-unanimous jury system. Then, even if Defendant can establish a historical discriminatory motive, he must further show that the application of the law is, in fact, having a disparate impact today. The question so framed, this Court turns first to history.

HISTORY OF OREGON'S NON-UNANIMOUS JURY SYSTEM

Before discussing Oregon's non-unanimous jury system, it is helpful to discuss the history of the jury itself.

It is uncertain whether the jury system existed in England prior to 1066. We do know, however, that William the Conqueror brought a system of having witnesses swear under oath and give testimony before a court of law. The English word juror comes from the Old French jurer which means to swear.

By the reign of Henry II (1154-1189) it is clear that juries existed, at least in an advisory capacity to the king. Henry II instituted the system of assizes. The *assize utrum* ordered the sheriff to summon "twelve free and lawful men of the vil." "They were to come from the local community, and would be expected to know something about the dispute. * * * The twelve men all had to be free * * * [and] 'lawful' * * * [meaning] "worthy of making an oath". * * * These twelve men were known in documents of the time by several different names: the inquest, the recognition * * * the assize, and, less often in the twelfth century than the thirteenth, the jury." McSweeney, Thomas J., *Magna Carta and the Right to Trial by Jury* in Magna Carta: Muse and Mentor, 139-57 (Randy J. Holland, ed., Thomson Rueters, 2014).

The abolition of trial by ordeal by Pope Innocent II, as well as the signing of Magna Carta and its provision conditioning one's loss of liberty to the "the lawful judgment of his peers," further laid the groundwork for the development of the jury as we would recognize it today. The earliest recorded unanimous jury verdict dates to 1367. Jeffrey Abramson, *"We*, *The Jury: The Jury System and the Ideal of Democracy"* 179 (1994). By the late fourteenth century there was widespread preference for unanimity among twelve jurors. James B. Thayer, *The Jury and Its Development*, 5 Harv L Rev 295, 296 (1892). In fact, English courts went to incredible lengths to force jurors to deliberate to

unanimity. Blackstone describes how jurors were "to be kept without meat, drink, fire, or candle, till they were all unanimously agreed." William Blackstone, *Commentaries on the Laws of England* 375 (Oxford, Clarendon 1768).

By the time of this country's founding, jury unanimity was the norm, although not universal. The Framers considered putting the requirement into the Constitution. James Madison included it in the draft of the Sixth Amendment that he proposed to the House of Representatives, which would have "the requisite of unanimity for conviction." 1 Annals Of Cong 435 (1789). That wording was ultimately removed, but nevertheless unanimity quickly acquired general acceptance "as Americans became more familiar with the details of English common law and adopted those details in their own colonial legal systems." *Apodaca*, at 408 n3.

So it was that Oregon's original constitution contained no provision for non-unanimous juries. At its admission into the United States, and for nearly eighty years thereafter, Oregon followed the custom in federal court and other states requiring that juries deliberate to unanimity. That changed with the passage of Ballot Measure 302-33, passed by popular vote on May 18, 1934. That legislative referendum made Oregon only the second state in the union to allow a felony conviction on less than a unanimous verdict. That remains true today. In the courts of 48 states, as well as federal court, a felony conviction requires the unanimous verdict of a jury of twelve. Oregon and Louisiana continue to be the only outliers. How and why Oregon voters chose to abandon that historical practice cannot be understood without an examination of the state's past.

From the time of the founding of the Oregon territory, Oregon was not open to black residents. In 1844 the Provisional Government of Oregon banned slavery and freed existing slaves, yet simultaneously forbade that African Americans reside within the territory. African Americans who remained in Oregon after being freed were to be whipped and forcibly removed. Historians have opined that Oregon's ban derived in significant part from a fear of minority collusion against whites:

> "A major factor in the passage of the 1844 exclusion act was the Cockstock incident,
> a dispute between James Saules, a black settler, and Cockstock, a Wasco Indian, over ownership of a horse. * * * Saules, who had married an Indian woman three years earlier * * * [claimed the] ability to bring the wrath of the Indians on the settlers.
>
> The Cockstock affair had a number of implications for future black-white relations. White settlers were * * * apprehensive about a potential black-incited Indian uprising against them led by Saules or some other Afro-American."

Quintard Taylor, *Slaves and Free Men: Blacks in the Oregon Country, 1840-1860*, Oregon Historical Quarterly, pg 154, Vol 83 No 2 (Summer, 1982).

In 1849 Oregon granted a form of amnesty for African Americans currently in the territory, but prohibited further immigration. The preamble to that bill reinforced that the principle motivation of lawmakers was a concern that minorities would collude to challenge the white hold on power:

> "* * * [I]t would be highly dangerous to allow free Negroes and mulattoes to reside in the Territory, or to intermix with Indians, instilling into their mind feelings of hostility towards the white race."

"A Bill to Prevent Negroes or Mulattoes from Coming to, Or Residing in Oregon" Oregon Territorial Government Records #6075, Oregon State Archives, Salem.

In 1857 the Oregon Constitution enshrined this discrimination in, of all places, the state's "Bill of Rights." Article I, section 35 read:

> "No free negro or mulatto not residing in this state at the time of the adoption of this Constitution shall come, reside, or be within this State, or hold any real estate, or make any contracts, or maintain any suit therein * * *."

Article I, section 35 was put to a vote of the people at the same time as Article I, section 34, which banned slavery. The exclusion of African Americans from the state received more votes than the ban on slavery. A repeal effort was submitted to Oregon voters in 1900, where it was defeated. Further repeal resolutions in 1901, 1903, 1915 and 1916 were also defeated. It was not until 1927 that Article I, section 35 was finally removed from Oregon's Constitution.[3]

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[3] Juror service required residency, and until its repeal in 1927 African-Americans could not technically lawfully reside in the state, setting up the possibility of their exclusion as jurors. Whether that was actually enforced by country clerks in constructing the juror rolls is unknown. This Court did not have the resources to review the historical records in this area.

Although certainly not the only reason, Article I, section 35 contributed to the paucity of racial and ethnic migration to the state. Oregon became, as it remains today, predominantly white. Historians have noted the odd dynamic in Oregon immigrants, being possessed of both "a hatred of slavery," yet also a hatred "of blacks." Taylor, *Slaves and Free Men* at 154. "Whites of the Old Northwest, whether of Southern origin or not, shared the idea that blacks were not only inferior but were a definite threat to a free white society." *Id.*

In the early 1860's, the Oregon Legislature engaged in a heated debate concerning the role minorities could play in Oregon's courts. Between 1862 and 1864 the Code of Civil Procedure was revised. When the revision was presented to the Oregon House in 1864, certain representatives realized that the prior version, which contained a prohibition on minorities offering testimony in court, had been removed. House Bill 23 revealed significant racial hostility among some in the Legislature. K. Keith Richard, *Unwelcome Settlers: Black and Mulatto Oregon Pioneers*, Oregon Historical Quarterly, pg 49, Vol 84, No 1 (Spring 1983).

Representative Lawson introduced the following amendment:

> "It being the opinion of this legislature that a negro, Chinaman or Indian has no right that a white man is bound to respect, and that a white man may murder, rob, rape, shoot, stab and cut any of those worthless and vagabond races, without being called to account therefore * * *."

Id.

No vote was taken on that inflammatory amendment. Next, Representative Fay moved to amend the bill to exclude as witnesses "persons of African, Chinese, Indian, or Kanaka blood, or having one half, or more, African, Chinese, Indian, or Kanaka blood." That too was ultimately defeated over dissenting votes in the House. *Id.*

By the 1920s, Oregon began to feel the social changes taking hold in other parts of the country, resulting ultimately in the appearance of the Klu Klux Klan in the state. The Klan in Oregon, which at one point numbered in excess of 200,000, was responsible for a number of lynchings, or threats of lynchings, including that of George Arthur Burr in Medford, Charles Maxwell in Salem, and Perry Ellis in Oregon City. McLagan, Elizabeth, *A Peculiar Paradise: A History of Blacks in Oregon, 1788-1940,* 138-39. (1980).

These attacks occurred while some Oregon schools were segregated, and organized opposition to black-owned housing was on the rise. In 1919 the Portland Realty Board added to its code of ethics a provision prohibiting its members from selling property in white neighborhoods to blacks or "Orientals." *Id.* at 140-43. In 1923 the Oregon Legislature passed the Alien Land Law preventing Japanese Americans from owning or leasing land. That same year the Legislature passed The Oregon Business Restriction Law which permitted localities to refuse business licenses to Japanese Americans.

In short, by the dawn of the 1930s in Oregon, the state was in the grip of a deep sense of racial paranoia. As one historian noted:

> "The phenomenon of the Klan's rapid growth in Oregon in the early 1920's had little to with local minorities: Catholics, Jews, Chinese and blacks were few in number and there was little radicalism or labor unrest in the state. The nation as a whole had reverted to a new conservatism: the war had failed to eradicate communism, there were race and labor riots elsewhere in the nation, and a post war recession, increased immigration, and prohibition. It was an age of national paranoia, ripe for a movement that promised to restore law, order, and 100% Americanism to the nation."

Id. at 138.

In the case of statutes enacted by initiative, the legislative history of the law includes statements contained in the voters' pamphlet. *Ecumenical Ministries of Oregon v. Oregon State Lottery Comm'n*, 318 Or 551, 559-60, 871 P 2d 106 (1994). It also includes other "contemporaneous sources" such as newspaper stories, magazine articles and other reports from which it is likely that the voters would have derived information about the initiative. *Lipscomb v. State Bd. of Higher Ed.*, 305 Or 472, 480-83, 753 P 2d 939 (1988). The referendum to Oregon voters to implement a non-unanimous jury system is closely connected to three court-related prominent news stories of the time.

The first, a case from Honolulu, was known as the Massie Affair. Thalia Fortescue Massie, a white woman, brought accusations of rape against five non-white young men: Horace Ida, Joe Kahahawai, Benny Ahakuelo, David Takai and Henry Chang. After a three week trial, the jury deadlocked.

Enraged at the verdict, Ms. Massie's mother, Grace Fortescue, arranged for the kidnapping and assault of Horace Ida. After that, she arranged for the kidnapping of Joseph Kahahawai. During the kidnapping Kahahawai was shot and killed. David Stannard, *"The Massie Case: Injustice and Courage"* The Honolulu Advertiser October 14, 2011.

Ultimately, the jury returned a verdict of manslaughter rather than murder. The case was extremely well covered in national press at the time, and the two jury results contrasted against each other. In particular the racial composition of the jury was an issue. One headline of the Morning Oregonian noted: "Testimony Closes in Massie Trial Mixed-Blood Jury to Hear Arguments Today." The Morning Oregonian April 26, 1932.

The Oregonian continued with this race-focused coverage of the jury, contrasting the "mixed-blood" jurors from "white" jurors:

> "The Oregonian by no means condemned the jury in the Massie-Fortescue case. It called attention to the sense of duty shown by the white persons on the jury in bringing a verdict of guilty against their fellow white men, as contrasted with the lack of responsibility shown by native and mixed-blooded people in freeing the assaulters of Mrs. Massie. We certainly do not wish the white people to sink to the native views on crime and punishment, but the natives must be aroused by some means to a realization of what jury duty means."

The Morning Oregonian, May 7, 1932.

A year later, revelations came to light of a widespread system of jury fixing in Boston. There, Oregon papers lamented the role immigrants were playing on juries:

> "It is particularly shocking that this widespread corruption should have developed in Boston, in the shadow of Bunker Hill monument – in the birthplace of the American system of government. True, Boston is now crowded with immigrants and the children of immigrants, people who are new to our traditions. Nevertheless, that Boston should be the seat of such bribery is psychologically bad.
>
> "Americans have learned, with some pain, that many people in the world are unfit for democratic institutions, lacking the traditions of the English-speaking peoples. Note, for instance, the complete lack of a sense of responsibility on the part of the recent mixed murder jury in Honolulu. Or note the troubles in Cuba and the Philippines. But if Americans are to become corruptible in their own courts, they also will be unfitted for the responsibilities which their forefathers won for them."

The Morning Oregonian, November 3, 1933.

As fate would have it, the very morning the Oregonian ran that article, a jury was being selected in Columbia County in what would become the state's most sensational trial of the day: the Silverman trial. Jake Silverman was charged with the murder of Jimmy Walker. The case received an extraordinary amount of press coverage. Eleven of the jurors wanted

to convict on second-degree murder. One juror wanted to acquit. The jury compromised on a verdict of manslaughter, and Silverman ultimately received three years in prison.

The Morning Oregonian was outraged at the compromise verdict, and six days afterwards ran an editorial echoing its previous coverage from earlier in the month:

> "This newspaper's opinion is that the increased urbanization of American life, the natural boredom of human beings with rights once won at great cost, and the vast immigration into America from southern and eastern Europe, or people untrained in the jury system, have combined to make the jury of twelve increasingly unwieldy and unsatisfactory."

The Morning Oregonian, November 25, 1933.[4]

Within weeks the Oregon Legislature had passed a referendum to the people to amend the Oregon Constitution to allow for felony verdicts by 10-2. Many of the arguments in support touted the increased cost savings to the state in avoiding retrials. The voter's pamphlet statement in support noted:

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[4] Defendant and *amid* assert that the Silverman trial was an example of anti-Semitism. In reviewing the original documents and newspaper articles concerning the Silverman trial, this Court could find no explicit reference to either Silverman or the holdout juror being Jewish. As such, at least on this record, claims of anti-Semitism appear speculative. However, whether the Silverman was, or was not, Jewish misses the point. The realities of the trial are not the focus of inquiry. Rather, it is the media coverage of the trial, and the themes that coverage brought forth that bear on the analysis.

> "Disagreements not only place the taxpayers to the expense of retrial which may again result in another disagreement, but congest the trial docket of the courts."

Oregon Voter's Pamphlet, Special Election May 18, 1934.

However, that same voter's statement also directly referenced the Silverman trial:

> "A notable incident of one juror controlling the verdict is found in the case of State v. Silverman recently tried in Columbia County. In this case 11 jurors were for a verdict of murder in the second degree. One juror was for acquittal. To prevent disagreement 11 jurors compromised * * *."

The argument presented to the voters of Oregon relied, in part, on the "notable" Silverman trial – a trial that was notable because of the overwhelming coverage provided by the dominant media outlet at the time, the Morning Oregonian. That coverage was, in part, self-referential to its previous articles, drawing direct lines from the Massie trial, to the Boston incidents, ultimately to Silverman. And by drawing those lines, the media coverage intertwined Silverman with issues of race and jury composition.

From the foregoing, it is clear that a multitude of factors spurred the passage of 302-33. Certainly concerns of cost and efficiency were a significant, if not dominant, motivation behind the referral. But this Court cannot cherry pick history. Neither the parties, nor the public, are served by attempts to marginalize the realities of a past that today we find uncomfortable or unpleasant. We do not live, as some might claim, in a "post-fact" era. Facts exist, and history is as it was,

not as we wish it to be. And the inescapable conclusion is that the historical evidence supports a racial undercurrent to 302-33.

302-33 was passed in a state with a long history of racial discrimination. It was passed in a state where minority participation in the legal system, even as witnesses let alone as decision makers on a jury, was subject to heated debate. It was passed during a period of racial tension when the state had seen an explosion of organized racial hatred and the rise of the KKK. In light of that history, when the dominant media of the period ran multiple stories, over the span of years, contrasting "white" jurors from those of "mixed blood," warning against immigrant participation on jury service, and claiming that certain "people in the world are unfit for democratic institutions," no reasonable fact-finder could conclude that race wasn't a motivating factor in the passage of 302-33.

Based on the historical evidence, this Court therefore finds as fact that race and ethnicity was a motivating factor in the passage of 302-33, and that the measure was intended, at least in part, to dampen the influence of racial, ethnic, and religious minorities on Oregon juries.

DISPARATE IMPACT

In light of the historical factual finding above, it becomes necessary to determine if non-unanimous juries in Oregon are having a disparate impact on minorities today. Defendant offers no direct evidence that racial minorities are more affected by non-unanimous juries than whites. And while this Court finds that lack of direct evidence difficult, it is also to be expected.

First, Oregon does not keep records on the racial composition of jurors, so Defendant cannot avail himself of state-created data. Second, Oregon Rules of Professional Conduct 3.5(c) and (e) prohibit attorneys from initiating contact with jurors after a trial – making Defendant's collection of his own data difficult if not impossible. Finally, in the extraordinary circumstance of a juror contacting an attorney on his or her own initiative, Oregon law prohibits a court from receiving testimony from a juror impeaching a jury verdict except in the very narrow circumstances of criminal juror misconduct:

> "The kind of misconduct of a juror that will be considered in an attack upon a verdict by a juror's affidavit within the rule set forth in the Gardner and Imlah cases is misconduct that amounts to fraud, bribery, forcible coercion or any other obstruction of justice that would subject the offender to a criminal prosecution therefor."

Carson v. Brauer, 234 Or 333, 345, 382 P2d 79 (1963).

In this case, two jurors provided statements to the defense after the verdict about their experience in the minority. Defendant has requested this Court consider those statements, asserting he has a right to rely on that evidence under the Due Process clause. This Court has expressly not considered any of those statements, concluding it is bound by *Carson.*[5]

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[5] A denial of a motion for new trial under ORCP 64(G) is not normally appealable. But whether this Court properly excluded the juror statements from its consideration in determining whether to exercise discretion is a question of law, reviewable for errors of law. Should an appellate court determine that this Court erred in excluding those documents, this Court respectfully

This Court cannot fault Defendant's lack of direct evidence when that absence is due to systemic barriers to its acquisition and presentation. And ultimately, there is nothing in this Court's review of federal or state law indicating that only direct evidence is reliable to establish disparate impact. As Oregon juries are routinely instructed, direct and circumstantial evidence are equally reliable under the law. This Court sees no reason why that standard would not apply here. Therefore, if there is evidence of disparate impact it can be shown by circumstantial evidence and inferences that surround Oregon's juries, including the average racial makeup of juries, the psychological and sociological dynamics of group decision-making, and the participation of minorities in the criminal justice system.

A. Data Bearing on Jury Composition, the Frequency of Non-Unanimous Verdicts, and Defendants

According to the July 1, 2015 census, Oregon is 87.6% white, and approximately 12.4% non-white. See http://www.census.gov/quickfacts/table/PST0452 5/41. An exclusion of two of twelve jurors represents an exclusion of 16.6% of the jury. The comparison of those numbers is sobering. A jury drawn from the average cross section of Oregon would have ten white jurors and two minorities. If one wanted to craft a system to silence the average number of non-white jurors on an Oregon jury, one could not create a more efficient system than 10-2. But, even that assumes that minorities are represented on Oregon juries in accord

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suggests that this matter be remanded to the Circuit Court to determine whether those materials would have altered its exercise of discretion.

with their census numbers, and that is factually incorrect. In truth, minorities are represented at numbers even lower than the census would suggest.

Oregon's own studies have concluded that racial minorities are underrepresented on juries. "The extent to which minorities have been underrepresented in juries has been the subject of considerable research. A consensus exists that 'American jury systems tend to over represent white, middle-aged, suburban, middle-class people and under represent other groups.'" Edwin Peterson, Chair, Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System, pg 74, May 1994 at http://courts.oregon.gov/OJD/docs/osca/cpsd/courtimprovement/access/rac_eth_tfr.pdf

> Chief Justice Peterson's report noted one potential cause of this underrepresentation:
>
> "The failure of juries fairly to represent their communities is largely a function of the selection process. Drawing jury pools from voter registration lists tends systematically to underrepresent a number of different groups of people. National census data, for example, reveals that 73 percent of whites are registered to vote, but only 65 percent of African Americans and 44 percent of Hispanics are registered. Jury pools drawn from such lists necessarily exclude minorities even before subpoenas go out."

Id. at 73.

The report cites an August 1993 study conducted by the Multnomah Bar Association, finding that minorities were underrepresented in Multnomah County jury pools:

> "Comparison of characteristics of those who served jury duty with census data for Multnomah County for 1990 shows overrepresentation in the jury pool for those with some college or college degrees, married people, home owners, those aged 35-74, and whites. It thus appears that the master list from which those to be subpoenaed are selected (created from voter registration and DMV records) is not including certain groups in proportion to their representation in the County: those under 35 and over 75, never married people, renters, and Black and Asian citizens."

Id.

We also know that non-unanimous verdicts are not unusual in Oregon. Rather, the majority of verdicts rendered by juries on felony cases are non-unanimous. All criminal convictions have an appeal as a matter of right in Oregon. For indigent defendants, which encompass the majority of criminal defendants, all those appellate requests funnel through a single state office: The Office of Public Defense Services (OPDS) Appellate Division. As the single point of contact for indigent criminal appeals, that office is well situated to objectively determine how many cases contained non-unanimous verdicts on at least one count. And, in fact, that office conducted precisely that study in 2009.[6]

According to the official data of the Oregon Judicial Information Network (WIN), in 2007, 833 felony jury trials reached the verdict stage. In 2008, 588 felony

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[6] In the interest of disclosure, this judicial officer was employed in a managerial position at OPDS at that time of this study.

jury trials reached the verdict stage, for a total of 1421 trials over the 2007-2008 period. Those 1421 trials generated 662 indigent appeal requests handled by OPDS Appellate Division, or 46.5% of all felony trials in Oregon. Of that number, only 63% were polled and thus could provide data. That yields a sample size of nearly 30% of all felony jury convictions throughout Oregon over the course of two years – a statistically significant number. From that sample size 65.5% of felony jury verdicts were non-unanimous on at least one count. Oregon Office of Public Defense Services Appellate Division, *On the Frequency of Non-Unanimous Felony Verdicts in Oregon: A Preliminary Report to the Oregon Public Defense Services Commission* (May 21, 2009) at https://www.oregon.gov/OPDS/docs/Reports/PDSCReportNonUnanJuries.pdf.

The data above addressed matters primarily from the point of view of the juror. But this is, of course, a challenge raised by Defendant. Therefore, the final data point worth considering is the representation of minority defendants in the criminal justice system. Given that Defendant is raising an as-applied challenge, the representation of minority defendants in the Multnomah County criminal justice system is especially applicable.

A review of the data show that racial disproportionality dramatically pervades Multnomah County's criminal justice system at all levels, and has for years. Data on racial disparity filled the Peterson report twenty years ago. That report began by noting the racial disparity of arrests:

> "Arrest data compiled by the State of Oregon Law Enforcement Data System reveals a disproportionately large number of minority

> arrests. In 1992, for example, 9,739 African Americans were arrested, representing 6.4 percent of all arrests. Yet African Americans account for only 1.6 percent of the state's 1990 population. Similarly, in 1992, 12,599 Hispanics were arrested, representing 8.3 percent of all arrests. Hispanics represented only 4 percent of the state's 1990 population. This disproportionality in arrests is especially evident in particular counties. In Multnomah County, 1992 arrests of African Americans accounted for nearly 23 percent of the total, while African Americans constitute only 5.9 percent of the county's total population."

Peterson, Chair, *Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System*, pg 31, May 1994.

That report continued, noting that the racial disparity did not end with arrest, but carried through to the end of the criminal process at sentencing:

> "In Multnomah County, where 58 percent of the state's minority felons are sentenced, racial disparity in downward dispositional departure rates was deemed statistically significant. The rate for white offenders totaled 22 percent, while the rates for Hispanic and African-American offenders were only 10.3 percent and 15.8 percent respectively.

Id. at 40.

Unfortunately, Chief Justice Peterson's Report did little to engender change in racial disproportionality. Twenty years later, the MacArthur Foundation partnered with participating locales to evaluate race in the criminal justice system. Multnomah County

was one such partner, and the results were even more alarming than the Peterson Report.

That report calculated the Relative Rate Index (RRI) for minorities at various stages of the criminal justice system in Multnomah County "As Whites are the reference group, if an RRI was presented for Whites, it would be 1. An RRI value of 1 indicates that a racial/ethnic group is represented at the same rate as Whites. Values greater than 1 indicate greater representation than Whites." Safety and Justice Challenge, *Racial and Ethnic Disparities and the Relative Rate Index (RRI)*, pg 3 2016.

Based on that report's findings, African-Americans are 6.0 times more likely than Caucasians to be in jail. They are 4.2 times more likely to be referred to the DA and they are less likely to receive a cite in lieu of arrest. Once their case is issued, African-Americans are less likely to have the case diverted than Caucasians, are more likely to be convicted, and are 7 times more likely to be sentenced to prison. *Id.* at 7,19 and 26.

To all of this data, the State has provided no response. Having offered no countervailing statistics, the State does not appear to contest or dispute that minorities are underrepresented on juries, over-represented as defendants, and that the majority of Oregon felony jury verdicts are non-unanimous on at least one count. But statistics, of course, are not dispositive. Merely because the system could be efficient in silencing minorities, does not mean that it in fact does so. For evidence of that, we must turn to science.

B. Implicit Bias

The concept of implicit bias emerged in the 1990s from earlier research on stereotyping and automatic psychological processes. Rather than conscious endorsement of beliefs or feelings, implicit bias has its roots in generalized associations formed from systematically repetitious or unique and limited experience or exposure. Susan Fiske & Shelley Taylor, *Social Cognition: From Brains to Culture* 328 (2007). For example, regularly seeing images of Black but not White criminals in the media may lead even people with egalitarian values to treat an individual Black as if he has a criminal background or assume that a racially unidentified gang member is Black. Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 Psychol Rev 4 (1995).

Implicit biases are "the plethora of fears, feelings, perceptions, and stereotypes that lie deep within our subconscious, without our conscious permission or acknowledgement. Indeed, social scientists are convinced that we are, for the most part, unaware of them. As a result, we unconsciously act on such biases even though we may consciously abhor them." Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv L & Poly Rev 149 (2010).

The existence of implicit bias in cognitive processing is a scientific fact, arrived at through valid testing and subject to peer review, and appears uncontested by the State in this case. Its existence is not in reasonable dispute within the scientific community. *See e.g.*, *See* Patricia G. Devine, *Stereotypes and Prejudice: Their*

Automatic and Controlled Components, 56 J Personality & Soc Psychol 5, 5 (1989); Anthony G. Greenwald, *Sensory Feedback Mechanisms in Performance Control: With Special Reference to the Idea-Motor Mechanism*, 77 Psychol Rev 73, 73 (1970); David L. Hamilton & Robert K. Gifford, *Illusory Correlation in Interpersonal Perception: A Cognitive Basis of Stereotypic Judgments*, 12 J Experimental Soc Psycho! 392, 392 (1976); Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 Psychol Rev 231 (1977); Henri Tajfel, *Cognitive Aspects of Prejudice*, 25 J. Soc Issues 79, 83-86 (1969).

Due to implicit bias, multiple studies have shown that jurors are more likely to convict a defendant of another race:

> "Jurors in White-majority juries were more likely to vote to convict a Black defendant and were more severe in their preferred verdict than jurors in Black-majority juries when the prosecution's evidence was weak. In contrast, jurors in Black-majority juries tended to be harsher on a Black defendant when the evidence strongly pointed to the defendant's guilt, consistent with the "black sheep" effect observed in several studies with mock jurors (Bonazzoli, 1998; King, 1993). * * * Perez, Hosch, Ponder, and Trejo (1993) observed that White-majority juries were much more likely to convict Hispanic defendants than White defendants, * * * K. S. Klein and Klastorin (1999) noted a relationship between racial diversity and the likelihood of a jury hanging in that the number of White jurors was positively correlated with the odds of reaching

> a verdict when at least one defendant was African American.

Jury Decision Making, 7 Psychol Pub Poly & L 622 (2001).

The legal profession, like many others, is awash in trainings to recognize and minimize implicit bias in decision-making. Ameliorating implicit bias is seen as essential to achieving justice. *See e.g. Grutter v. Bollinger*, 539 US 306, 345 (2003) (Ginsburg, J., concurring) ("It is well documented that conscious and unconscious race bias . . . remain alive in our land, impeding realization of our highest values and ideals."); *Georgia v. McCollum*, 505 US 42, 68 (1991) (O'Connor, J., dissenting) ("It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence.").

Where much of the law's focus over the last fifty years has been addressing explicit biases, the future will see implicit bias taking center stage. "The very existence of implicit bias poses a challenge to legal theory and practice, because discrimination doctrine is premised on the assumption that, barring insanity or mental incompetence, human actors are guided by their avowed (explicit) beliefs, attitudes, and intentions." Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 Cal L Rev 945 (2006).

Studies show, however, that the way to counter implicit bias in jury decision-making is to ensure juries are diverse. One key study in this area studied controlled environment jury deliberations. Some juries included only Caucasians while others included both

Caucasians and African Americans. The study found that racially heterogeneous mock juries cited more facts from the case, made fewer errors when discussing facts, and when they did make errors, were more likely to correct them Samuel R. Sommers, *On Racial Diversity and Group Decision-Making: Informational and Motivational Effects of Racial Composition on Jury Deliberations*, 90 J Personality & Soc Psychol 597 (2006).

Scholars have noted that juror diversity "might better overcome implicit memory biases than homogeneous juries. * * * If other measures are less effective in overcoming implicit memory bias, however, then striving for (or even requiring through legislation) heterogeneous juries might be warranted, particularly when from the case facts involve members of stereotyped groups." Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 Duke L J 345 (2007).

We ask the jury to do a lot. On the most basic level, we ask it to evaluate physical evidence. We also ask it to pass on determinations of credibility. Even more difficult, we ask it to bring its collective experience and wisdom to determine such things as "reasonableness," when a risk is "justified," when someone "should have known" something, and whether someone acted "with intent." The law provides no ready answers on the most difficult questions. Jurors evaluate them in the context of their own experiences and understanding.

> "So open discussion is critical. An individual juror's experience can affect her perception of and reaction to the evidence. As knowledge and expertise may be distributed unequally within any given jury, interaction among jurors will expand the range of issues to be

> discussed and broaden the scope of information shared by the group. Of course, this information will not necessarily be purely factual. Rather, open communication may introduce strongly held beliefs and prejudices into the discussion. But the existence of competing beliefs and prejudices in jury deliberations may help to reduce their significance. In the end, a deliberative process that emphasizes and maximizes consultation among individual jurors with diverse backgrounds broadens the overall perspective of the jury."

Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv L Rev 1261 (2000).

Now, does the specter of implicit bias imply that a defendant has a right to control the racial composition of a jury? No, certainly not. A defendant has no right to a *particular* jury. But *Batson v. Kentucky*, 476 US 79 (1986) made it clear that the Equal Protection Clause guarantees that a state will not exclude even one member of the defendant's race from the jury on the basis of race. *Batson* is not just merely about prosecutorial discrimination. It stands for the principle that a defendant has a right to be tried in a system that does not systematically exclude the participation of jurors who share a similarity with the defendant – and thereby potentially suffer less from implicit bias against him. That is the real promise of *Batson.* And whether that exclusion of voices happens before the trial starts, or after it has concluded, makes no difference.

But there remains one essential piece of evidence necessary to connect the data and implicit bias to non-unanimous verdicts: the social science of group

decision making. It is not enough to show statistics and data, or to show implicit bias. There must be a connecting of the dots showing that non-unanimous juries operate to silence minority *viewpoint* jurors, and those minority viewpoint jurors correlate to *racial* minority jurors.

C. Social Science in Group Decision Dynamics

Justice Stewart in *Johnson* expressed concerns that non-unanimity would affect the quality of deliberations:

> "For only a unanimous jury so selected can serve to minimize the potential bigotry of those who might convict on inadequate evidence, or acquit when evidence of guilt was clear. * * * And community confidence in the administration of criminal justice cannot but be corroded under a system in which a defendant who is conspicuously identified with a particular group can be acquitted or convicted by a jury split along group lines."

Johnson, 406 US at 398 (internal citations omitted).

Since *Apodaca* and *Johnson* were decided, the dynamics of group decision making in juries has become a robust area of academic study. The empirical research conducted over the forty-five years since *Johnson* and *Apodaca* seems to indicate that Justice Stewart's theoretical concerns might manifest in reality. But while this Court is aware of the research in this area, little was offered by Defendant into the evidentiary record in this case.

For example, the 2006 Diamond et al. study, not referenced by Defendant, examined the actual deliberations of civil juries in Arizona. Under that system,

only six of eight jurors need agree to reach a civil verdict. That study found that jurors were highly cognizant of their need only to deliberate to non-unanimity. Certainly in some juries the majority attempted to persuade the minority. But in a significant number no attempt at persuasion occurred and the jury terminated deliberations and ended debate when the minimum vote was achieved:

> "The majority of the juries, however, revealed the salience of the quorum required to reach a verdict by pointing it out early in the deliberations. In some instances, this early recognition explicitly discouraged a concerted effort to resolve differences. In three-quarters (37) of the cases, at some point before the jurors arrived at a verdict, at least one of the jurors alluded to the size of the quorum required. In 12 of those cases, the first mention of the quorum occurred within the first ten minutes of deliberations. Juries with eventual holdouts were twice as likely to have early mentions of the quorum rule (6 of 16) than juries that reached unanimous verdicts (6 of 33), raising the possibility that early attention to the non-unanimous decision rule undercut efforts in deliberations to resolve disagreement."

Shari Seidman Diamond, Mary R. Rose and Beth Murphy, *Revising the Unanimity Requirement: The Behavior of the Non-unanimous Jury*, 100 NW U L Rev 201 (2006).

Additional studies, also not introduced by Defendant, have claimed that non-unanimity results in hastier deliberations; deliberations that concluded as soon as the majority number was reached, rather than

engaging and persuading minority viewpoint jurors. *See e.g.* James H. Davis, Norbert L. Kerr, Robert S. Atkin, Robert Holt and David Meek, *The Decision Process of 6 and 12 Person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules*, 32 J Personality and Soc Psychology 1 (1975); Robert D. Foss, *Group Decision Processes in the Simulated Trial Jury*, 39 Sociometry 305 (1976), Charlan Nemeth, *Interactions Between Jurors as a Function of Majority vs. Unanimity Decision Rules*, *7* J Applied Soc Psych 38 (1977).

Even when juries wanted to continue debate on some points beyond the required quorum, studies have shown that does not mean that minority viewpoints will be allowed to participate. The Diamond study, which benefited from video and audio of 50 actual jury deliberations, related one such encounter:

> "[Juror #6] (foreperson to the bailiff): I have a question, a procedural question. If one juror disagrees with the others, does that person have to stay? We have enough of a consensus for a verdict, but we're arguing on some points, but there's one person who didn't agree with the verdict that we came to a consensus with. Does that person have to stay or can he be excused or do we all have to be here?
>
> [The bailiff confirms that the juror will stay and then leaves the jury room]:
>
> "[Juror #6] (to Juror #4): All right, no offense, but we are going to ignore you."

Shari Seidman Diamond et. al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 Nw U L Rev 201 (2006).

Other sociological studies have concluded that non-unanimity results in jurors with minority views participating less in deliberations, and being seen by fellow jurors as less influential. Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 Del L Rev 1 (2001). Further studies have concluded that minority jurors report being less likely to have made the arguments they wanted to make than jurors under a unanimous system. Norbert L. Kerr, Robert S. Atkin, Garold Stasser, David Meek, Robert W. Holt, and James H. Davis, *Guilt Beyond a Reasonable Doubt: Effects of Conceptual Definition and Assigned Rule on the Judgment of Mock Juries*, 34 J Personality & Soc Psychology, 282 (1976).

The social science in this area is a necessary connective element for Defendant's claim to succeed, and it must be based on evidence in the record. While this Court is aware of the studies cited above, they were not introduced into evidence in this case, and they are not a proper subject for judicial notice. More importantly, the Court is also aware of alternate academic viewpoints. The academic conclusions in this area are not self-evident. This is precisely the area where testimony is necessary, subject to the crucible of cross-examination, where a court can hear from the experts in the field and properly assess credibility and the quality of the social science research.

DISPARATE IMPACT FINDINGS

From all of the above, while there is no direct evidence of a disparate impact on minorities of non-unanimous juries – there is significant circumstantial evidence which gives this Court serious concern. Oregon's non-unanimous jury law, enacted in part with racial motives, functions in a criminal justice

system where one's race impacts one's experience. Minorities, those least likely to be influenced by implicit bias against a minority defendant are under-represented as jurors. Data further shows that non-unanimous verdicts are not rare, but common. And the defendants subjected to those non-unanimous verdicts are the same defendants involved in a criminal justice system that arrests, charges, tries, and sentences minorities disproportionally to whites.

But two missing components prevent this Court from finding in Defendant's favor at this time. The first is evidentiary. There must be evidence in the record, preferably in the form of expert testimony, on the sociological and psychological aspects of group decision making and how minority viewpoint jurors under a 10-2 system equate to racial minority jurors , i.e. the jurors with the least implicit bias. It is not surprising this evidence is missing in this case, given the procedural posture. A motion for a new trial in a criminal case is a poor vehicle to litigate complex issues that might more properly belong in a civil rights lawsuit.

The second missing component in this litigation is a proposed remedy. If this court were to order a new trial, what rule of law would govern that new proceeding? Would the jury in the new trial be ordered to deliberate to unanimity? A blanket unanimity instruction presents problems, because Defendant has a right under the Oregon Constitution to *acquittal* by 10-2.[7] Is Defendant proposing that this Court deprive him of that right?

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[7] To be clear, this Court is not saying that non-unanimous acquittals happen as frequently as non-unanimous guilty verdicts. In fact, the State has presented no evidence, and this

Alternatively, if the proposed rule would be to require unanimity for a conviction, but 10-2 for an acquittal, the remedy would become disconnected from its rationale. The central argument to Defendant's challenge is the need to respect and hear all juror voices. It cannot be reconciled that those voices are worth hearing only when they coalesce around one particular result.

Or perhaps the proposed rule is a new trial under the existing system, but with more robust cautionary jury instructions against disregarding the opinions of minority viewpoint jurors, or requesting that they continue to engage minority viewpoints prior to calling a vote. Ironically, Oregon does have language in one uniform jury instruction that advises a jury to deliberate and hear all jurors before taking a vote, but that uniform instruction is for civil, not criminal, cases:

> "You may conduct your deliberations any way you wish, but most juries find it helpful to discuss the evidence before taking any votes."

Oregon Uniform Civil Jury Instruction 90.01.

Parties come before a court seeking a remedy. And Defendant in this case has offered this Court no briefing, argument, or authority for what lawful remedy he is asking this Court to impose that would

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Court is aware of no evidence, suggesting that non-unanimous acquittals are common, or occur with anything like the frequency of guilty verdicts. And in fact the Oregon Supreme Court has expressly held that non-unanimity is designed to increase "convictions," not acquittals. *State ex rel Smith v. Sawyer,* 263 Or 136, 139, 501 P 2d 792 (1972). But nevertheless, a non-unanimous acquittal is a right Defendant possesses under the Oregon Constitution.

not simply recreate the situation existing today. Without some articulation of that remedy, it is difficult for this Court to say that Defendant met his burden in this case.

It is possible that the entity best suited to crafting a viable remedy in this area is the Oregon Legislature. It is clearly an issue of great importance that is potentially disadvantaging thousands of Oregonians. It is worthy of that body's time.

The other entity that might be well-suited to crafting a remedy is the Multnomah County District Attorney's Office. Oregon's non-unanimous jury provision says that "ten members of the jury *may* render a verdict of guilty or not guilty." It is permissive, not mandatory. Parties can mutually consent to try a criminal case to unanimity.

But one thing must be made clear. Merely because crafting a judicial remedy is difficult, does not imply this Court would refuse to do so. The State in this case has argued that the consequences of finding Oregon's non-unanimous jury system unconstitutional are, themselves, a reason this Court should avoid such a finding. That argument is unavailing. Constitutional infirmity cannot be overlooked because recognizing it as such stresses the system. What is easy is not always right, and what is efficient is not always what the law demands.

But for this Court to act – to take the extraordinary step of declaring a provision of the Oregon Constitution in violation of the United States Constitution - it must be on a full and robust evidentiary record, with a clearly articulated remedy proposed. With those pieces missing from this case, invocation of this

Court's power under ORCP 64(G) to order a new trial would be an abuse of discretion.

For the reasons stated, Defendant's motion for new trial is DENIED.

IT IS SO ORDERED.

Dated the 15th day of December, 2016

Signed: /s/ Bronson D. James
Circuit Court Judge Bronson D. James