

No.

22-6253

Supreme Court, U.S.
FILED

DEC 12 2022

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

FURLONZO R MORAN — PETITIONER

VS.

STATE OF LOUISIANA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
THE LOUISIANA SECOND CIRCUIT COURT OF APPEAL
PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Is it unconstitutional to disqualify a juror from service without just cause?
2. Was Moran deprived of his right to be tried by the jurors selected to try him and decide his fate?
3. Did the trial court abuse its discretion when it allowed the jury to review forbidden written evidence over trial counsel's objection?
4. Did the trial court commit reversible error when it admitted unauthenticated social media posts into evidence as proof of other crimes?

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner, Furlonzo R Moran ("Moran") respectfully requests that the Court grant a writ of certiorari to review the decision of the Louisiana Supreme Court Affirming his second degree murder conviction and the resultant life sentence.

Moran is the defendant and defendant-appellant in the courts below. The respondent is the State of Louisiana, the plaintiff and plaintiff-appellee in the courts below.

OPINIONS BELOW

The Louisiana Supreme Court's decision to deny Moran's writ application appears at Appendix C to the petition and is reported at *State v. Moran*, 2022-00395 (La. 10/12/22); --- So.3d ---, 2022 WL 6944306.

The Louisiana Second Circuit Court of Appeal's opinion and decision denying rehearing appears at Appendices A and B to the petition and is reported at *State v. Moran*, 54,281 (La. 2 Cir. 5/25/22); 338 So.3d 1229.

JURISDICTION

Moran invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Louisiana Supreme Court on the basis of 28 U.S.C. § 1257(a). The Louisiana Supreme Court denied Moran's writ application seeking review of the affirmance of his conviction and sentence on direct appeal on October 12, 2022. See Rules of the Supreme Court of the United States, Rule 10(b).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The questions presented implicate the following provisions of the United States Constitution, the Louisiana Constitution, the Louisiana Code of Criminal Procedure, and the Louisiana Code of Evidence:

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people to peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

The Fourteenth Amendment, § 1, to the United States Constitution provides:

All person born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

Article 1, § 2 of the Louisiana Constitution provides:

Due Process of Law. No person shall be deprived of life, liberty, or property, except by due process of law.

Article 1, § 3 Louisiana Constitution provides:

Right to individual Dignity. No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.

Article 1, § 5 Louisiana Constitution provides:

Right to Privacy. Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.

Article 1, § 7 of the Louisiana Constitution Provides:

No law shall curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish his sentiments on any subject, but is responsible for abuse of that freedom.

Article 789 of the Louisiana Code of Criminal Procedure, in pertinent part, provides:

A. The court may direct that not more than six jurors in addition to the regular panel be called and impaneled to sit as alternate jurors. Alternate jurors, in the order in which they are called, shall replace jurors who become unable to perform or disqualified from performing their duties.

Article 793 of the Louisiana Code of Criminal Procedure, in pertinent part, provides:

A. Except as otherwise provided in paragraph B of this Article, a juror must rely upon his memory in reaching a verdict. He shall not be permitted to refer to notes or to have access to any written evidence. Testimony shall not be repeated to the jury. Upon the request of a juror and in the discretion of the court, the jury may take with it or have sent to it any object or document received in evidence when a physical examination thereof is required to enable the jury to arrive at a verdict.

Article 404 of the Louisiana Code of Evidence, in pertinent part, provides:

B. Other crimes, wrongs, or acts. (1) Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes, or

when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

Article 901 of the Louisiana Code of Evidence, in pertinent part, provides:

A. General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

STATEMENT OF THE CASE

A. *Introduction.*

Moran was convicted of one count of second degree murder on October 1, 2020. On December 9, 2020, the trial court sentenced him to life imprisonment without the benefits of probation, parole, or suspension of sentence. The Louisiana Second Circuit Court of Appeal affirmed his conviction and sentence on direct appeal. *State v. Moran*, 54,281 (La. App. 2 Cir. 5/25/22); 338 So.3d 1229 *reh'ng denied* (La. App. 2 Cir. 6/23/22. On October 12, 2022, the Louisiana Supreme Court declined to exercise its supervisory jurisdiction. *State v. Moran*, 2022-00395 (La. 10/12/22); --- So.3d ---, 2022 WL 6944306.

Moran now petitions this Court for a writ of certiorari to the Louisiana Supreme Court to reverse his conviction and sentence as they were obtained in violation of his First, Fifth, Sixth, and Fourteenth Amendment rights.

B. *Facts of the Incident.*

On December 4, 2017, police officers were dispatched to 2008 Talbot Street in response to a shots fired call. Ultimately, the officers went. R. pp. 83,902. When Corporal Oneal, of the Shreveport Police Department arrived on scene, Moran flagged him down. R. pp. 901-02,919. Moran's weapon was

lying on the ground near him with the magazine ejected. The items were seized as evidence. R. pp. 840-41,902,919.

Samuel Johns was located at the 2008 Talbot address and had been pronounced dead by the Shreveport Fire Department. R. p. 862. The pathologist testified that Johns died from multiple gunshot wounds. R. p. 983. Moran admitted to the police that he shot Johns, but explained it was only after Johns brandished a weapon. R. pp. 920,927.

The facts behind the shooting indicates it was not cold-blooded or unjustifiable. Johns was armed when he approached Moran at his residence. Johns had removed his weapon from his waistband and placed it under his arm when he heard an approaching vehicle.

C. Factual Background Relevant to Questions One and Two.

During the testimony of the prosecution's sixth witness, the court recessed for lunch. Horace Gibbs was a sworn and seated member of the jury. As Ms. Gibbs was leaving with the other jury members, a lady in the audience pulled her mask down and looked at her. The lady did not say anything to Ms. Gibbs. When the jury returned from lunch, Ms. Gibbs told the bailiff she believed she knew someone in Moran's family. R. p. 950. Ms. Gibbs did not discuss this matter with, or in the presence of, the other jury

members. Ms. Gibbs explained to the court that the woman was a third or fourth cousin of her deceased husband. R. p. 951. She did not mention the lady's name and said the last time she saw her was when her husband passed away in 2013. R. p. 952. In fact, Ms. Gibbs said she never knew the lady's last name. R. p. 954. When asked if the lady was related to Moran, Ms. Gibbs said she did not know. She knew the lady had a son who was a "little bitty guy" when Ms. Gibbs's son was young. Ms. Gibbs also said she did not know if Moran was the lady's son and, if he was, she could not say he was the son she had met when he was a small child. R. p. 952.

Ms. Gibbs's resolve to be fair to both sides never wavered. She was not uncomfortable or uneasy with performing her duty as a fair and impartial juror. R. p. 954. She specifically said she was not going to show any favoritism. R. p. 955. Moran's counsel said he would agree to keep the lady (believed to be Moran's mother) out of the courtroom and, if necessary, the courthouse. R. p. 956. The lady did not make any statements in court and neither did she say anything to Ms. Gibbs. Even so, the court said if the State had known this information during voir dire, a peremptory challenge would have been made. R. pp. 956,957. The court then disqualified Ms. Gibbs from service and seated an alternate juror. R. p. 960.

D. Factual Background Relevant to Question Three.

After the jury retired to deliberate, they asked to review four items of evidence: (1) Moran's Miranda Rights Form—which contained statements Moran had written; (2) the autopsy report; (3) the victim's firearm; and (4) pictures of the scene. The trial judge asked the lawyers how they felt about the jury receiving the requested evidence. R. p. 1076. The prosecutor said the jury is allowed to see what they asked for with the exception of the Miranda Rights Form and the autopsy report. R. p. 1076. The trial judge believed the jury could see the forbidden items of evidence if the defense and the prosecution agreed. R. p. 1077. There was no agreement between the defense and the prosecution to allow the jury to review the Miranda Rights Form or the autopsy report.

The trial judge's understanding of the law concerning this issue was misplaced. First, the trial judge said he "thought that the law was that they couldn't see anything unless you all agreed." R. p. 1077. The judge then said he was going to send in everything the jury requested, including the forbidden written evidence, because *La. C. Cr. P. art. 793* gave him discretion. Moran's trial counsel objected to the Miranda Rights Form and the autopsy report being sent to the jury room. R. p. 1079.

E. Factual Background Relevant to Question Four.

The State filed a 404(B) Notice concerning unauthenticated Facebook posts Moran allegedly made. R. p. 247. The trial court said the State could introduce the unauthenticated posts at trial because they contained threats. R. p. 598. Detective Taywania Jackson was allowed to read the posts to the jury. R. pp. 1021-25. The Second Circuit Court of Appeal denied Moran's pre-trial writ application about this issue on the showing made. *State v. Moran*, 53,548-K W (La. App. 2 Cir. 3/11/20). R. p. 485.

Detective Jackson testified that she found the posts on Moran's Facebook account from the week preceding December 4, 2017. Some of those posts contained statements about killing the police and others. R. p. 581. Detective Jackson would not say, at the hearing or trial, whether Johns's name was included in any of the alleged threats. R. pp. 582,900. During the hearing on this issue, Detective Jackson said because one of Johns's relatives was mentioned by name, she did not feel comfortable saying Johns was not listed in the posts. R. p. 584. The person mentioned was nicknamed "Thirteen" and he was alleged to be Johns's brother-in-law. It is alleged that Johns shot and killed Thirteen. R. p. 584. Johns's nickname was "S. I." R. p. 1031. At trial, Detective Jackson said she did not recall if

either Johns's name or nickname was included in any of the Facebook posts she reviewed. R. p. 1032. The prosecution did not produce any evidence of a direct or indirect threat aimed at Johns in the Facebook posts. The unauthenticated posts were allowed into evidence to convince the jury that Moran was a bad man. During rebuttal, Detective Jackson said Moran was homicidal, had the desire to kill someone, and he was an angry and mean person. R. p. 1033.

In ruling the unauthenticated posts admissible, the trial court said the "clincher" was a statement where Moran supposedly said he would kill anyone who disrespected him or thinks they are going to harm him. The trial court also said it did not matter who the threats, contained in the unauthenticated posts, were made against. R. p. 598.

REASONS FOR GRANTING THE PETITION

I. [Questions 1 and 2] This Court should decide whether it is unconstitutional to disqualify a juror from service without just cause; and if Moran was deprived of his right to be tried by the jurors selected to try him and decide his fate.

A. *The Louisiana Second Circuit Court of Appeal held that although the juror's conduct was proper in all regards and the trial court employed an incorrect standard of review, the juror had to be disqualified because her presence on the jury would create a potential for bias and lack of impartiality.*

The Louisiana Second Circuit Court of Appeal erred when it substituted its belief that "the potential for bias and lack of impartiality was clearly present if Gibbs remained on the jury." Appendix A, p. 20. The appellate court came to this conclusion after acknowledging the trial court's ruling was erroneous. Not only did the trial court apply an incorrect standard of review, the court also failed to explain how Ms. Gibbs became "unable to perform" or how she "disqualified" herself "from performing" her duty as an impartial and fair-minded juror. See *La. C. Cr. P. art. 789*. To simply declare a juror incompetent to serve is not sufficient. There must be a demonstration of how a sworn and seated juror has become unable or disqualified from performing his or her duties.

In *State v. Clay*, 446 So.2d 1213 (1984) Justice Lemmon, in concurring with the decision to deny the defendants writ application, said:

The trial judge, upon replacing the juror, should have stated for the record the precise reasons that the juror was unable to continue serving, as well as any alternative to replacement that the judge had considered. Otherwise, our appellate court cannot review for abuse of discretion. However, since defendant failed to apply for a new trial to make a record in support of his objection or otherwise to establish prejudice. I concur in the denying the application.

State v. Clay, supra.

Moran's counsel objected and preserved the issue for appellate review.

The appellate court agreed the trial court abused its discretion when it removed Ms. Gibbs from service because the State could have used a peremptory challenge during voir dire. The appellate court also praised Ms. Gibbs's honesty in reporting what was believed to be "an attempt to influence her." Appendix A, p. 20. The appellate court then erred when it substituted its belief that "the potential for bias and lack of impartiality was clearly present if Gibbs remained on the jury." Appendix A, p. 20. To justify this erroneous opinion, the appellate court said the trial court did not abuse its discretion when it removed Ms. Gibbs from the jury.

In *State v. Orphey*, 2020-167 (La. App. 3 Cir. 10/28/20); 306 So.3d 550, the Third Circuit Court of Appeal observed:

After a jury has been selected and trial has commenced, double jeopardy attaches. It is at that point that "the accused has a right to have the particular jurors selected to try him and decide his fate, save in cases of death, illness or any other cause which renders a juror unfit

or disqualified to perform this duty[.]” *State v. White*, 244 La. 585, 620, 153 So.2d 401, 413 (1963). The defendant’s right to have the original twelve jurors selected decide his fate ... [is] not absolute.” *State v. Clay*, 441 So.2d 1227, 1231 (La. App. 1 Cir. 1983), *writ denied*, **8 446 So.2d 1213 (La. 1984). “Alternate jurors, in the order in which they are called, shall replace jurors who become unable to perform or disqualified from performing their duties.” La. Code Crim. P. art. 789(A). “La. Code Crim. P. art. 789 permits replacement of a juror with an alternate juror when the juror is physically unable to serve, or when the juror is found to have become disqualified, or to have either the real or potential for bias in the deliberations.” *State v. Tennors*, 05-538, p. 15 (La. App. 3 Cir. 2/15/06), 923 So.2d 823, 833. “We regard this right of the accused to be a substantial one, the improper deprivation of which is prejudicial. Hence, ... harmless error, is inapplicable.” *White*, 153 So.2d at 413. See also *Tennors*, 923 So.2d at 838.

State v. Orphey, 306 So.3d at 554.

A juror becomes incompetent to serve when he or she becomes unable to perform or is disqualified from performing a juror’s duties. Moran’s appellate counsel identified the correct issue but argued the wrong law. For instance, counsel argued *La. C. Cr. P. art. 796*, and *State v. Parker*, 18-271 (La. App. 3 Cir. 11/8/18); 258 So.3d 883; *writ denied*, 237 So.3d 1112. The issue in the Article and the case concerns a trial that has started but an issue arises with a juror before the State’s first witness is called. Again, in this case, the trial was about halfway over and the jury had heard at least six prosecution witnesses testify. Therefore, Moran had a right to have his fate decided by those jurors. *State v. Cass*, 356 So.2d 396 (La. 1977). When the

prosecution called its first witness, jeopardy attached and, at that point, Moran had the "right to have the particular jurors selected to try him decide his fate, save in cases of death, illness or any other cause which renders a juror unfit or disqualified to perform his duty." *State v. White*, 244 La. at 620, 153 So.2d at 413. The Court in *White* said this is a substantial right. In other words, the improper deprivation of this right is not amenable to harmless error analysis.

According to the United States Fifth Circuit Court of Appeals, a juror may be dismissed for good cause after trial has begun only if the trial court has become convinced that a juror's ability to perform his or her duty has become impaired. The court also said a juror's "inability to follow instructions or a lack of candor may be a valid basis for dismissing a juror." *United States v. Veasey*, 843 Fed. Appx. 555,559-60 (5th Cir. 2021) (internal citations omitted).

Ms. Gibbs's ability to be a fair and impartial juror is apparent from her decision to notify the trial court of the incident that led to her removal. Had she remained silent, she would not have been removed from the jury. According to the trial court, Ms. Gibbs had to be removed because Moran's family "tried to communicate with her." R. p. 951. The operative word is

“tried.” After Ms. Gibbs was questioned, she said she would “be impartial” and not “show any favoritism.” R. p. 955. There was no reason for the court to doubt Ms. Gibbs’s integrity. The court abused its discretion when it based its decision to remove Ms. Gibbs from the jury on its belief that “if the State had known this information, a peremptory challenge would have been made by the State.” R. pp. 956,957.

The Fifth Circuit Court of Appeals also said a district court abuses its discretion “when its ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence.” *United States v. Veasey*, 843 Fed. Appx. at 559 (quoting *United States v. Ebron*, 683 F.3d 105,126 (5th Cir. 2012)). Ms. Gibbs said she would be fair and impartial to both sides and affirmed that she would follow the court’s instruction. The trial court abused its discretion because there “was nothing to indicate good cause for [Ms. Gibbs’s] removal” from the jury. *United States v. Veasey*, 843 Fed. Appx. at 561.

II. [Question 3] This Court decide if the trial court abused its discretion when it allowed the jury to use written evidence during deliberation over trial counsel's express objection.

A. *The Louisiana Second Circuit Court of Appeal held that the trial court did not err when it allowed the jury to view statutorily forbidden written evidence during deliberation. The appellate court further held that even if there was an error, it was harmless.*

After the jury retired to deliberate, they asked to review four items of evidence: (1) Moran's Miranda Rights Form—containing statements written by Moran; (2) the autopsy report; (3) the firearm belonging to the victim; and (4) pictures of the scene. The trial judge asked the lawyers how they felt about the jury receiving the requested evidence. R. p. 1076. The prosecutor said the jury is allowed to see what they asked for with the exception of the Miranda Rights Form and the autopsy report. R. p. 1076. The trial judge responded the jury could see the forbidden items of evidence if the defense and the prosecution agreed. R. p. 1077. There was no agreement between the defense and the prosecution to allow the jury to review the Miranda Rights Form or the autopsy report.

The trial judge's understanding of the law concerning this issue was misplaced. First, the trial judge said he "thought that the law was that they couldn't see anything unless you all agreed." R. p. 1077. The judge then said he was going to send in everything the jury requested, including the forbidden

written evidence, because *La. C. Cr. P. art. 793* gave him discretion. The judge's ruling was clearly wrong and a clear abuse of the court's discretion. See R. p. 1078. Moran's trial counsel objected to the Miranda Rights Form and the autopsy report being sent to the jury room. R. p. 1079.

Article 793 of the Code of Criminal Procedure provides that:

A. Except as otherwise provided in paragraph B of this Article, a juror must rely upon his memory in reaching a verdict. He shall not be permitted to refer to notes or to have access to any written evidence. Testimony shall not be repeated to the jury. Upon the request of a juror and in the discretion of the court, the jury may take with it or have sent to it any object or document received in evidence when a physical examination thereof is required to enable the jury to arrive at a verdict.

The Louisiana Supreme Court has said a jury cannot examine written statements for the purpose of examining its verbal contents. *State v. Johnson*, 541 So.2d 818,824 (La. 1989) (internal citation omitted). The state supreme court further explained that the rationale behind Article 793 was to address the "concern that if jurors are allowed to review the contents of written exhibits during their deliberations, they will place undue weight on such exhibits and not decide the case with an even balance concerning all of the evidence, and their own recall thereof." *State v. Johnson*, 541 So.2d at 824. Like in Johnson's case, "there was no need for the jurors to make a physical examination of the exhibits in question to arrive at a verdict." *Id.*

(internal quotation marks omitted). Also, this error adversely affected Moran's Sixth Amendment right to a fair and impartial jury verdict made applicable through the Fourteenth Amendment to the United States Constitution. This Court has said that state created rights are also protected by the Due Process Clause of the Fourteenth Amendment. See *Goss v. Lopez*, 419 U.S. 565, 572-73, 95 S.Ct. 729, 735, 42 L.Ed.2d 725 (1975). In fact, it has been said that a "state or governmental body violates due process of law when it fails to follow the procedural steps it has adopted for proceedings held before it." See *Whiteside v. Kay*, 446 F.Supp. 716, 719 (W. D. La. 1978) (internal citations omitted). Moran's right to a fair and impartial trial was adversely affected by the trial judge's decision to allow the jury to review the Miranda Rights Form (that contained statements written by Moran) and the autopsy report during deliberation.

III. [Question 4] This Court should decide if the trial court abused its discretion when it allowed unauthenticated Facebook posts into evidence as so-called other crimes evidence under La. C.E. art. 404(B) because they contained threats Moran allegedly made.

A. *The Louisiana Second Circuit Court of Appeal held that the unauthenticated posts shows Moran had a mindset to kill and to incite others to kill for him. The appellate court also said the Facebook post are admissible because they prove Moran had a specific intent to kill and that he was not acting in self-defense. The appellate court did not comment on what crime was committed even if the prosecution proved Moran authored the posts.*

Prior to trial, the State filed a 404B Notice to introduce other crimes evidence in the form of Facebook posts Moran allegedly made. R. p. 247.

The trial court allowed the Facebook posts into evidence because “they contain[ed] threats.” R. p. 598. The state appellate court denied Moran’s pre-trial writ application about this issue on the showing made. *State v. Moran*, 53,548-KW (La. App. 2 Cir. 3/11/20). R. p. 485.

Detective Jackson, of the Shreveport Police Department, testified that she found the posts on Moran’s Facebook account from the week preceding December 4, 2017. Some of those posts contained statements about killing the police and others. R. p. 581. Detective Jackson would not say, at the hearing or trial, whether Johns’s name was included in any of the threats. R. pp. 582,900. During the hearing on this issue, Detective Jackson said because one of Johns’s relatives was mentioned by name, she did not feel

comfortable saying Johns was not listed in the posts. R. p. 584. The person mentioned was nicknamed "Thirteen" and he was, allegedly, Johns's brother-in-law. Thirteen was also murdered, allegedly by Johns. R. p. 584. Johns's nickname was "S. I." R. p. 1031. At trial, Detective Jackson said she did not recall if either Johns's name or nickname was included in any of the Facebook posts she reviewed. R. p. 1032. The prosecution did not produce any evidence of a direct or indirect threat aimed at Johns in the Facebook posts. The unauthenticated posts were allowed into evidence to convince the jury that Moran was a bad man. During rebuttal, Detective Jackson said Moran was homicidal, had the desire to kill someone, and he was an angry and mean person. R. p. 1033.

In ruling the unauthenticated posts admissible, the trial court said the "clincher" was the statement he made that if someone disrespected him or thinks they are going to harm him, Moran would kill them. The trial court also said it did not matter who the threats, contained in the unauthenticated posts, were made against. R. p. 598. Even if the prosecution could prove Moran authored the posts, they were not criminal and are protected by *La. Const. Art. I, §§ 5 and 7*; and the First Amendment to the United States

Constitution. Also, if someone were seeking to harm Moran, he does have the right to defend himself just as others do.

The substance of the unauthenticated posts can be found in Detective Jackson's trial testimony. In one post it goes from "I'm glad I learned how to get away with murder" to "I ain't never killed nobody and I'm happy." The post goes on to state "I don't want nobody life." R. p. 1021. Some posts are vague threats about killing for fun or killing everybody. R. pp. 1021-22. However, none of the posts contained threats against Johns. The State claimed the purpose of using the unauthenticated posts was to prove motive, intent, knowledge, and absence of mistake or accident. R. p. 247. Again, there are problems with the State's claim: (1) the Facebook posts were not authenticated; (2) if Moran was the author, the posts are not evidence of past crimes; (3) the posts were not deemed serious by Facebook because the administrators would have frozen or deactivated the account; and (4) not one of the unauthenticated posts were relevant to Johns and the justifiable shooting that resulted in his death.

The unauthenticated Facebook posts should not have been admitted into evidence. They were not relevant at trial and any possible probative value was outweighed by their prejudicial effect. In *State v. Burge*, 515

So.2d 494 (La. App. 1 Cir. 10/14/87); the court allowed the introduction of threats to establish motive or intent. However, in that case, threats were specifically made against the victim and were targeted at anyone who testified against Mr. Burge. That is not the case here.

Even if the unauthenticated posts were relevant and admissible, the inquiry does not end there because the probative value of the so-called evidence must be weighed against their prejudicial effects. It was inappropriate for the trial court to allow the State to use evidence, which was not criminal, to show Moran was a man of bad character and was acting in conformity to that character. See *State v. Howard*, 47,495 (La. App. 2 Cir. 11/13/12); 106 So.3d 1038. The unauthenticated posts should not have been admitted even if Moran was the person who authored them. Moran, like any other person, has the right to defend himself against a person threatening him with a weapon. Again, the so-called threats found in the posts were not made against Johns. If the "threats" are to be taken serious or literal, then the threats made against the police must also be considered in a different light. Moran called 9-1-1 after the shooting. He took the magazine out of his weapon and told the operator he was not going anywhere and that he would be on the scene when the police arrived. When the police did arrive, Moran

was seen with his hands up, and he alerted the police to the presence of his weapon. R. pp. 836-37, 1022. These are not the actions of the “bad man” the prosecution painted Moran to be.

In *State v. Henderson*, 2022-01113 (La. 11/8/22); --- So.3d ---; 2022 WL 16757423, Justice McCallum wrote separately to discuss the steady encroachment of technology in daily social interactions. Justice McCallum wrote:

The laying of a foundation for the admissibility of evidence before a trial court is of primal importance, yet it has become routine that such elementary applications of procedural law are often disregarded in the introduction of social media evidence. Therefore I offer, as a reminder that “[s]tated perspicuously, the Internet is not self-proving.” *Wood v. Hackler*, 52,791, p. 8 (La. App. 2 Cir. 8/14/19); 276 So.3d 1136, 1141, writ denied, 2019-01469 (La. 12/10/19); 285 So.3d 490.

There is a lack of in-depth legislative and jurisprudential analysis of this issue. As observed by the Fourth Circuit, “[a]uthentication of electronic messaging ... is an issue [with] which Louisiana courts have dispensed limited guidance, particularly as it relates to social media.” *State v. Smith*, 2015-1359, p. 7 (La. App. 4 Cir. 4/20/16); 192 So.3d 836, 840. Furthermore, the lack of judicial guidance on this issue has created seemingly inconsistent applications of the requirements to authenticate social media evidence.

In *State v. Smith*, for example, the Fourth Circuit considered whether “social media posts,” including an image purporting to show the defendant holding a gun and making comments, and screenshots of text messages he allegedly sent to the victim, were properly authenticated. The state sought to introduce that evidence solely through a police officer who testified that the victim had shown her the text messages and image on his cell phone. Finding that the defendant “would be able to adequately deal with [the authenticity of

the digital evidence] on cross-examination,” the trial court denied his motion to exclude. *Smith*, 2015-1359, p. 5, 192 So.3d at 840.

On appeal, the Fourth Circuit vacated the trial court’s ruling and remanded for the state to properly authenticate the evidence. The court noted that “[s]ufficient proof will vary from case to case” and “[c]onsistently, the type and quantum of evidence will depend on the context and the purpose of its introduction. Evidence which is deemed sufficient is to support a reasonable juror’s finding that the proposed evidence is what it is purport[ed] to be in one case, may be insufficient in another.” *Id.*, 2015-1359, p. 10, 192 So.3d 842.

A year later, the same appellate court reached a different conclusion, declining to follow *State v. Smith*. In *State v. Gray*, the court of appeal found YouTube videos depicting the defendant and his gang affiliation to be admissible. It rejected the defendant’s argument “that there was no authentication evidence as to when the three YouTube videos were recorded and posted or who posted the videos.” *State v. Gray*, 2016-1195, p. 30 (La. App. 4 Cir. 6/28/17), - - -So.3d - - -, 2017 WL 3426021 at *16, *writ denied*, 2017-1306 (La. 6/15/18), 257 So.3d 688. These issues, the court found, address “the reliability and the weight of the video evidence, not the authenticity.” *Id.* The Court further observed that “the testimony of a witness with personal knowledge may provide the authentication of evidence necessary for its admission.” *Id.* In its evaluation of the issue, the *Gray* Court resorted to reviewing decisions of other jurisdictions, including California and Mississippi.

It may very well be that simply looking to Louisiana Code of Evidence Article 901 A, which provides that “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims” may not be enough to resolve this issue. Today’s technology has changed the very fabric of human interaction, and it may be doing the same for evidentiary issues in current court cases. The confusion and lack of authority as to the authentication and the admissibility of social media in court cases likely needs the legislature’s attention sooner rather than later.

The trial court abused its gate-keeping function when it based the decision to admit the Facebook posts into evidence because the posts contained threats. It is the trial court's duty to perform its gate-keeping function when deciding the authenticity of social media posts. Louisiana's Fourth Circuit said a trial court's determination about "relevancy and admissibility should not be overturned absent a clear abuse of discretion." *State v. Smith*, 192 So.3d at 840. The trial court abused its discretion when it failed to perform its gate-keeping duty to require the State to offer "sufficient evidence to support a finding that the proffered evidence is what it is claimed to be." *State v. Smith*, 192 So.3d at 842.

Under *La. C.E. art. 901*, "authentication" is a "condition precedent to admissibility" that is "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Louisiana's Fourth Circuit also observed that:

It is a fundamental law of evidence that an article or substance which is introduced as demonstrative evidence, or to which a witness is asked to testify, must be sufficiently identified as the one involved in the occurrence in question.

State v. Smith, 192 So.2d at 840. (Citing *State v. Lee*, 01-2082, p. 9 (La. App. 4 Cir. (8/21/02)); 826 So.2d 616,624 (quoting *State v. Hotoph*, 99-243 (La. App. 5 Cir. 11/10/99)); 750 So.2d 1036,1045; *U.S. v. Gagliardi*, 506 F.3d 140,151 (2d Cir. 2007); *Sublet v. State*, 442 Md. 632, 113 A.3d 695 (2015)).

Moran respectfully asks the Court to consider if the Facebook posts were authenticated before they were admitted into evidence and if the trial court abused its discretion when it allowed the unauthenticated social media posts to be admitted into evidence.

CONCLUSION

Moran respectfully ask the Court to grant his writ of certiorari and permit briefing and argument on the issues.

Respectfully submitted,

A handwritten signature in cursive script that reads "Furlonzo R. Moran". The signature is written in dark ink and is positioned above the printed name and address.

Furlonzo R. Moran
757083, Spruce—2
Louisiana State Penitentiary
Angola Louisiana 70712

Date: December 8, 2022

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

FURLONZO R. MORAN — PETITIONER

vs.

STATE OF LOUISIANA — RESPONDENT(S)

PROOF OF SERVICE

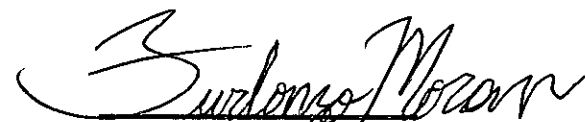
I, Furlonzo R. Moran, do swear or declare that on this date, December ____, 2022, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

James E. Stewart, Sr., District Attorney
Caddo Parish District Attorney's Office
501 Texas Street Fifth Floor
Shreveport Louisiana 71101

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 8, 2022


(Signature)