IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF BENTON

STATE OF OREGON, Plaintiff, vs. MARCO ISAIAH BREWER, Defendant.	Case No. 17CR49844 **MEMORANDUM OF AMICUS CURIAE THE OREGON JUSTICE RESOURCE CENTER IN SUPPORT OF DEFENDANT'S MOTION TO REQUIRE A UNANIMOUS JURY VERDICT**

INTEREST OF *AMICUS CURIAE* OREGON JUSTICE RESOURCE CENTER

The Oregon Justice Resource Center (OJRC) is a non-profit organization founded in 2011. OJRC works to "promote civil rights and improve legal representation for communities that have often been underserved in the past: people living in poverty and people of color among them." OJRC Mission Statement, available at https://ojrc.info/about-us/. The OJRC Amicus Committee is comprised of Oregon attorneys from multiple disciplines.

Amicus Curiae writes in support of Mr. Brewer's motion to require that a jury return and this court enter a guilty verdict only upon a unanimous vote. Mr. Brewer's motion to require a unanimous jury verdict raises Due Process and Equal Protection challenges under the Sixth and Fourteenth Amendments to the United States Constitution and under Article I, section 20, of the Oregon Constitution. *Amicus* agrees with those arguments. *Amicus* writes separately to provide additional arguments that this court should abandon the nonunanimous jury rule because it violates the United States Constitution as written and as applied in this case, which involves a black defendant.

DISCUSSION

The nonunanimous jury rule uniquely positions criminal defendants, especially minority defendants, to be convicted of alleged crimes with reasonable doubt in violation of the Sixth and Fourteenth Amendments to the United States Constitution. Although courts have past upheld the nonunanimous jury rule, the national trend is against it and the United States Supreme Court has since suggested that it would not uphold the rule. The historically discriminatory rule silences minority jurors, and it makes it more likely for minority criminal defendants to be convicted than white criminal defendants.

I. The national trend opposes nonunanimous jury schemes as unconstitutional.

Past federal and state precedent has sanctioned nonunanimous juries in Oregon. *See e.g.*, *Apodaca v. Oregon*, 406 US 404 (1972); *State v. Bowen*, 215 Or App 199 (2007). But the United States Supreme Court has since winnowed the legal justification for that precedent to nothing, suggesting the Court would no longer uphold Oregon's nonunanimous jury scheme. *See Apprendi* v. *New Jersey*, 530 US 466 (2000); *McDonald v. City of Chicago*, 561 US 742 (2010). Additionally, only one other state in the nation—Louisiana—employs a similar rule, and that state is moving away from the rule with a trial court recently holding the rule unconstitutional and the voters considering a ballot measure to overturn it. *Louisiana v. Melvin Cartez Maxie*, 11th District Court of Louisiana No. 13-CR-72522 (Oct 11, 2018).[1] Every other state and the federal government require unanimous jury verdicts. Clayton M. Tullos, *Nonunanimous Jury Trials in Oregon*, The Oregon Defense Attorney 20 (2014); Aliza Kaplan & Amy Saack, *Overturning Apodaca v. Oregon Should Be Easy: Nonunanimous Jury Verdicts In Criminal Cases Undermine The Credibility Of Our Justice System*, 95 Or L Rev 1 (2016).

[1] The complete Louisiana trial court order is attached.

Oregon's nonunanimous jury rule has specifically received recent criticism because there has been renewed focus on the racially discriminatory impetus for the rule. *See generally*, Kaplan, 95 Or L Rev 1 (2016); Shane Dixon Kavanaugh, *"Dirty Secret" of Oregon Jury System Could Go Before U.S. Supreme Court*, Oregonian, September 21, 2017, *available at* http://www.oregonlive.com/pacific-northwest-news/index.ssf/2017/09/dirty_secret_of_oregon_jury_sy.html (last accessed Feb 15, 2018). Oregonians have expressed their belief that nonunanimous verdicts are inconsistent with justice. Many of Oregon's newspapers have come out against the practice. *E.g.*, *Editorial: Jury rule still stains state constitution*, Corvallis Gazette-Times (Feb 7, 2018), https://www.gazettetimes.com/opinion/columnists/editorial-jury-rule-still-stains-state-constitution/article_1d6cdf56-ff42-5ad9-919b-958cb618e791.html (accessed Oct 19, 2018); *Legislators should seek repeal of Oregon's outlier jury law: Editorial*, The Oregonian (Feb 3, 2018), https://www.oregonlive.com/opinion/index.ssf/2018/02/legislators_should_seek_repeal.html (accessed Oct 19, 2018); Re-examine split juries, Eugene Register-Guard (Oct 7, 2017), https://www.registerguard.com/rg/opinion/36023143-78/re-examine-split-juries.html.csp (accessed Sept 6, 2018); *Addressing Oregon's legacy of injustice*, Medford Mail Tribune (Sept 10, 2017), http://mailtribune.com/news/top-stories/addressing-oregon-s-legacy-of-injustice (accessed Oct 19, 2018). Even Oregon prosecutors have expressed concern or outright opposition to nonunanimous verdicts. Multnomah County District Attorney Rod Underhill recently led an effort to put Oregon's nonunanimous verdict system to a statewide vote, and he said that "most" of Oregon's district attorneys agreed that unanimous verdicts are necessary to ensure "the perception of fairness and balance." Conrad Wilson, *Oregon DAs To Back*

Campaign Against Nonunanimous Juries, Oregon Public Broadcasting (Jan 10, 2018), https://www.opb.org/news/article/oregon-district-attorneys-nonunanimous-juries/ (accessed Sept 6, 2018). Benton County District Attorney John Haroldson supported the effort, saying, "The unanimous jury system allows for all voices in the jury to be heard, and that's critical to a just and transparent criminal justice system." Lillian Schrock, *Benton County DA, defense attorneys agree nonunanimous juries should be abolished*, Corvallis Gazette-Times (Jan 12, 2018), https://www.gazettetimes.com/news/local/benton-county-da-defense-attorneys-agree-nonunanimous-juries-should-be/article_f4739ef8-a94f-5fb3-a1ab-9badb41dbb07.html (accessed Sept 6, 2018). And Deschutes County District Attorney John Hummel has said that allowing nonunanimous verdicts "compromises the integrity of the result." Aubrey Wieber, *U.S. Supreme Court may review nonunanimous jury verdicts*, Bend Bulletin (Sept 19, 2017), https://www.bendbulletin.com/localstate/5593614-151/us-supreme-court-may-review-nonunanimous-jury-verdicts (accessed Sept 6, 2018).

In a detailed opinion and order issued this year, a Multnomah trial court concluded that there was significant circumstantial evidence of a disparate impact on minorities from the nonunanimous jury scheme. *State v. Olan Jermaine Williams*, Multnomah Circuit Court Case No. 15CR58698, *available at* http://www.aclu-or.org/sites/default/files/williams_opinion_12152016.pdf (last accessed Feb 15, 2018). After reviewing the history of the nonunanimous provision, the trial court concluded that "[b]ased on the historical evidence, this Court therefore finds as fact that race and ethnicity was a motivating factor in the passage of [ballot measure 302-33, permitting nonunanimous juries], and that the measure was intended, at least in part, to dampen the influence of racial, ethnic, and religious minorities on Oregon juries." *Id*. at 16. The trial court also reviewed Oregon census data related

to the racial composition of the population of Oregon and a 1994 Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System, and an OPDS report of a 2009 study on nonunanimous jury verdicts in Oregon. *Id*. at 18-22. Based on that data, the trial court concluded that "minorities are underrepresented on juries, over-represented as defendants, and that the majority of Oregon felony jury verdicts are nonunanimous on at least one count." *Id*. at 22. Finally, the trial court turned to science, specifically the science behind the concept of implicit bias and group decision dynamics. *Id*. at 22-29. Ultimately, however, the trial court concluded that the record was insufficient for it to take the "extraordinary step of declaring a provision of the Oregon Constitution in violation of the United States Constitution[.]" *Id*. at 31.

Since then, a Louisiana trial court took up the issue and held that verdicts from nonunanimous juries are unconstitutional. *Maxie*, No. 13-CR-72522. Additionally, a ballot initiative abolishing the nonunanimous jury provision of the Louisiana Constitution is on the November 2018 ballot. John Simerman, *"It's time": Louisiana House backs letting voters decide on controversial jury verdict law*, The Advocate (May 14, 2018), https://www.theadvocate.com/baton_rouge/news/politics/legislature/article_3b633f84-5798-11e8-a5d1-f361ba45aedc.html (accessed Oct 19, 2018); Kevin Gosztola and Brian Sonenstein, *Lousiana Court Declares State's Nonunanimous Jury Verdict Scheme Unconstitutional, Motivated by Racial Discrimination*, Shadow Proof, (Oct 18, 2018) *available at* https://shadowproof.com/2018/10/18/louisiana-court-nonunanimous-jury-verdicts-racism/ (accessed Oct 19, 2018).

In its order finding the Louisiana's nonunanimous jury scheme unconstitutional, the Louisiana court relied on the same issues presented in Mr. Brewer's motion and in this memorandum: (1) the history of the nonunanimous jury scheme is based on racial

discrimination; and (2) the system creates a disparate impact on minority jurors and defendants. It ultimately held that the scheme violates the Equal Protection Clause of the Fourteenth Amendment. And it noted that reliance on past precedent was misplaced because those cases relied on evidentiary and procedural obstacles and did not assess the facts substantiating the disparate impact claims.

The history on which the Louisiana trial court relied is remarkably similar to the history of Oregon's nonunanimous jury scheme. Both were rooted in racially biased intentions.[2] And the Louisiana court found that the scheme created racial disparity in the justice system, citing empirical data similar to that presented here.

II. Oregon's nonunanimous jury rule was designed to disenfranchise minority jurors.

In 1934, Oregon voters approved via ballot measure a constitutional amendment authorizing verdicts in felony trials heard by 10 or more jurors. *See* Tullos at 20 (explaining history); Or Const Art I, § 11. The ballot measure stemmed from "inflamed public reaction" to a verdict in a controversial murder case. Tullos at 20. Jacob Silverman, a Jewish man, was tried for first-degree murder for the killing of Jimmy Walker. During deliberations, 11 of 12 jurors wanted to convict for second-degree murder. One holdout juror, who wanted to acquit, persuaded the others to convict for manslaughter. Had the jury convicted Silverman of second-degree murder, he would have received a statutory life sentence. Instead, the trial court sentenced Silverman to three years in prison. Tullos at 21–22.

[2] Louisiana's nonunanimous jury rule has similar discriminatory origins. Passed in 1880, three years after Reconstruction, Louisiana's rule was designed to create more convicts, especially freed blacks, to increase the labor force. Kaplan at 3.

Following the Silverman verdict, public outrage centered on the "unreasonable juror." Tullos at 22. The *Morning Oregonian*, six days after the sentencing, called for a revision to the law authorizing nonunanimous juries. In so doing, the *Morning Oregonian* argued:

> "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*, of people untrained in the jury system, have combined to make the jury of twelve increasingly unwieldy and unsatisfactory * * *."

Tullos at 22 (quoting The Morning Oregonian (Nov 25, 1933)) (emphasis added); *see also Brief of Amicus Curiae ACLU Foundation of Oregon* (discussing response to the Silverman trial). The subsequent ballot measure expressly referenced the outcome of the Silverman trial. Tullos at 20 (quoting Ashby C. Dickson, Frank H. Hilton, & F. H. Dammash, *Republican Voters' Pamphlet*, P.J. Stadelman, Secretary of State, 1934, at 7).

The historical context of the Silverman verdict is important. As Kaplan notes:

> "The late 1920s and early 1930s found Oregon deep in recession and caught up in 'the growing menace of organized crime and the bigotry and fear of minority groups.' This followed more than a decade of a powerful Ku Klux Klan that was welcomed by an overwhelmingly white, native-born, and Protestant society. A society where '[r]acism, religious bigotry, and anti-immigrant sentiments were deeply entrenched in the laws, culture, and social life.'"

Kaplan at 4 (internal citations omitted). Oregonians thus adopted the nonunanimous jury as "a reaction to the notorious trial of Jacob Silverman" in "a state simmering with anti-immigrant xenophobia (predominantly anti-Semitism and anti-Catholicism)[.]" Kaplan at 3.

As the Oregon Supreme Court recognized, the purpose of the nonunanimous jury rule is "to make it easier to obtain convictions." *State ex rel. Smith v. Sawyer*, 263 Or 136, 138 (1972). And indeed it has. *See* Office of Public Defense Services, *On the Frequency of Nonunanimous Felony Verdicts in Oregon: A Preliminary Report to the Oregon Public Defense Services Commission* at 4 (May 21, 2009) (available at

http://library.state.or.us/repository/2014/201403101430171/index.pdf) (nonunanimous verdicts occurred in 65.5 percent of felony cases where the jury was polled[3]). And as empirical evidence indicates, the "easier convictions" occur at a disparate rate for minority criminal defendants.

III. Nonunanimous juries create unjust outcomes.

Empirical evidence strongly indicates that allowing nonunanimous verdicts leads to shoddier deliberations, the silencing of minorities on the jury panel and the nullification of their votes, and an increased likelihood of wrongful convictions especially for minority defendants. Although all nonunanimous verdicts carry the risk of an unjust outcome given the features outlined above, in this case, the disparate impact is particularly salient because Mr. Brewer is an African-American.

There is far more evidence now than was available in 1972, when the United States Supreme Court decided *Apodaca,* that nonunanimous jury verdicts lead to procedural and substantive unfairness. In his concurrences in *Apodaca* and *Johnson v. Louisiana*, Justice Powell, the architect of the Sixth Amendment's piecemeal incorporation, explained that "[t]here is no reason to believe, on the basis of experience in Oregon or elsewhere, that a unanimous decision of 12 jurors is more likely to serve the high purpose of jury trial, or is entitled to greater respect in the community, than the same decision joined in by 10 members of a jury of 12." *Johnson v. Louisiana*, 406 US 366, 374 (1972) (Powell, J., concurring). However, this no longer holds true: "A plethora of empirical evidence is now available suggesting that permitting nonunanimous verdicts of guilt negatively affects the jury's deliberation process and the accuracy of its findings." Brief of Oregon Criminal Law and Criminal Procedure Professors as *Amici Curiae* in Support of Petitioner, *Herrera v. Oregon*, No. 10-344 at 6 (Oct 12, 2010).

[3] In the sample considered—all felony jury verdicts referred to OPDS for 2007 and 2008—jury polling occurred in 63 percent of the cases.

A. Nonunanimous juries have a "verdict-driven" deliberation style that short-cuts the deliberative process.

A signature feature of nonunanimous juries is a truncated, verdict-driven deliberation. Kaplan at 34. Unanimous juries are more likely to be evidence driven. An evidence-driven jury "will start by discussing and comparing views on the evidence." *Id*. A verdict-driven jury stops deliberating when it reaches a consensus. *Id*. Thus, unanimous juries take more time to deliberate between votes than nonunanimous juries. Brief of *Amicus Curiae* the Houston Institute for Race and Justice, *Barbour v. Louisiana*, No. 10-689, at 10 (Dec 27, 2010), available at http://sblog.s3.amazonaws.com/wp-content/uploads/2011/02/02-18-Barbour-Amicus-of-the-Houston-Institution-for-Race-and-Justice.pdf. Unsurprisingly, evidence-driven deliberations lead to more accurate verdicts. Kaplan at 34; *see also* Brief of *Amicus Curiae*, *Barbour* at 8 (Jurors serving on unanimous juries report more confidence in the verdict); Brief of *Amicus Curiae*, *Herrera* at 10 ("The frequency of nonunanimous verdicts in Oregon and the infrequency of hung juries in other jurisdictions combine to suggest that jurors deliberate meaningfully to reach consensus when unanimity is required, but that they cease deliberations when a supermajority is reached when unanimity is not required.").

Beyond an unfair deliberation process, the unanimous jury verdict has become "the manifestation of the reasonable doubt standard. * * * A nonunanimous verdict demonstrates the existence of reasonable doubt that could not be explained during the deliberation of twelve vetted jurors and shows that the government has failed to meet its burden of proof." Kaplan at 29. Oregon requires unanimous verdicts in first-degree/capital murder cases, which suggests that the state chose "greater certainty by not weakening the reasonable doubt standard in their most serious cases." *Id*. at 31. However, the reasonable doubt standard is constitutionally required in all criminal cases.

B. Nonunanimous juries nullify minority voices.

The nonunanimous jury scheme has a disparate effect on minority jurors , acting to silence their voice and vote.

Although exclusion of women and people of color from a jury is prohibited, research indicates that a nonunanimous jury "contribute[s] to a *de facto* exclusion" of the viewpoints of people of color and women. Brief of *Amicus Curiae*, *Barbour* at 13 (citing Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv L Rev 1261, 1264 (Apr 2000)). As the *amicus curiae* in *Barbour v. Louisiana* succinctly explains:

> "[E]liminating the traditional unanimity requirement has been shown to produce a situation in which a majority of jurors can marginalize the viewpoints of other jurors by refusing to deliberate further once the majority threshold has been reached. This concern applies to all juries and all jurors, but its effects can be particularly stark when those holding minority viewpoints are historic victims of discrimination, including women, people of color and religious minorities. In such cases, a state law provision permitting nonunanimous criminal verdicts can serve as a *de facto* means of allowing majorities of jurors to prevent minority jurors from jury participation, thereby undermining important Constitutional principles regarding equality in jury service that [the Supreme Court] has taken considerable measures to protect in recent years."

Brief of *Amicus Curiae*, *Barbour* at 4–5.

That point cannot be overstated. As a general matter, women and minorities are already underrepresented on juries. *Id*. That holds true in Oregon. *See* Kaplan at 43 (citing *The Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System, May 1994 Report* (1994), *available at* https://www.courts.oregon.gov/programs/inclusion/resources/Documents/RacialEthnicTaskForceReport_1994.pdf [hereinafter *1994 Report*]). The *1994 Report* found that "[t]oo few minorities are called for jury duty, and even fewer minorities actually serve on Oregon juries" and that peremptory challenges frequently were used to exclude minorities from juries. *Id*.

Thus, prospective minority jurors already face barriers to jury participation. But that difficulty is compounded even if those jurors are not excluded, because "a majority of jurors can still easily dismiss the votes of minority jurors should they vote against conviction." Kaplan at 44; *see also* Brief of Amicus Curiae, *Barbour* at 11 ("[J]uror's knowledge that they do not have to reach a verdict in quorum juries often leads to 'dismissive' treatment of minority jurors whose votes are not needed to reach a verdict."). Kaplan adds, "Oregon not only has a population with few racial and ethnic minorities and a history of institutionalized racism, it also has documented structural racial disparity in its criminal justice system. Allowing nonunanimous jury verdicts not only contributes to perpetuating the structural racism in Oregon's criminal justice system, but it leaves little faith in our deliberative jury process." Kaplan at 44.

This is no exaggeration. Oregon's history of structural racism is well-documented. For example, Oregon was admitted into the union in 1859 with a racial exclusion law in its constitution, which prohibited black people from settling or owning property in the state. Or Const Art I, § 35 (1857). *See also* Kaplan at 45-46 (compiling numerous examples of racial discrimination). More recently, Multnomah County's Racial and Ethnic Disparities Report revealed that, compared to whites, black people are overrepresented in every phase of the county's criminal justice system. Racial and Ethnic Disparities and the Relative Rate Index (RRI), Safety and Justice Challenge, 7 (2016), *available at* www.aclu-or.org/sites/default/files/RED_Report_Mult_Co.pdf. As two examples of findings of disparity, black people are 4.2 times more likely to have their cases referred to the District Attorney and are 7 times more likely to be sentenced to prison. *Id*. In light of these disparities, minority viewpoints should have more, not less, of a role in decision making at every level, including on juries.

C. Nonunanimous juries lead to wrongful convictions.

The features of nonunanimous juries discussed above—less deliberation, reduction of the reasonable doubt standard, and the silencing of minority viewpoints—"create an unacceptable risk of convicting the innocent." Kaplan at 36; *see also* Brief of Amici Curiae, *Barbour* at 12 ("There is evidence to suggest that when deliberations are cut off prematurely based on majority reliance on the quorum rule, the reliability of the verdict suffers. In several cases, the result favored by the minority jurors was the same as the result favored by the judges in those cases."). Indeed, in recommending unanimous juries, the American Bar Association noted that "[i]mplicit in [the historical] preference [for unanimous juries] is the assumption that unanimous verdicts are likely to be more accurate and reliable because they require the most wide-ranging discussions - ones that address and persuade every juror." Commentary to American Bar Association Jury Principle 4 (internal citations omitted).

Fundamentally, a nonunanimous jury "eliminates the most obvious scenario of preventing a wrongful conviction: that someone on the jury believes in the defendant's innocence or that the State has not met its burden of proving its case beyond a reasonable doubt." Kaplan at 37. Both Oregon and Louisiana have exonerees who were convicted by nonunanimous juries. *See id*. at 37-38 (discussing Oregon case of Pamela Reser and Louisiana cases of Gene Bibbins and Rickie Johnson). And a nonunanimous jury most unfairly affects minority criminal defendants.

The disparate impact on minority defendants is evident in the fact that "all-white jury pools convict black defendants * * * 16 percentage points[] more often than white defendants." Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Quarterly J. of Econ. 1017, 1046-47 (2012). A jury comprised of only one or two minority jury members becomes an

all-white jury under a nonunanimous jury rule. Research consistently shows that jurors are biased in favor of those who are like them. *See* Kaplan at 33 (summarizing research). This bias extends to how jurors remember evidence introduced at trial. For example, white participants may have an easier time recalling "aggressive facts when the actor was African American[.]" *Id*. Considering that the purpose of a jury is to allow "twelve of the defendant's peers * * * to discuss and compare alternate views of the evidence presented at trial[,] [w]hen two of those voices may be ignored * * * there is no guarantee of a full and fair deliberation." *Id*. at 33.

CONCLUSION

In all cases, but especially the case at bar (because defendant is a member of a minority group), a unanimous jury verdict is the only way to protect against unjust outcomes and comply with the Sixth and Fourteenth Amendments to the United States Constitution and under Article I, section 20, of the Oregon Constitution. Thus, for the foregoing reasons and for those presented by Mr. Brewer, *amicus* respectfully urges this Court to grant the motion to require a unanimous jury verdict.

Respectfully submitted this 31st day of October, 2018

/s/ *Crystal Maloney*
Crystal Maloney, OSB #164327
On behalf of Oregon Justice Resource Center

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum of Amicus Curiae OJRC was served on:

Ryan Joslin Chief Deputy District Attorney Benton County District Attorney Office 120 NW 4th Street Corvallis, OR Email: Ryan.Joslin@Co.Benton.OR.US Attorney for State of Oregon	Terri Wood Law Office of Terri Wood, P.C. 730 Van Buren Street Eugene, OR 97402 Telephone: 541-484-4171 Email: contact@terriwoodlawoffice.com Attorney for Defendant

by mailing to them a true copy, correctly addressed and with sufficient postage, and with courtesy e-mail, on October 31, 2018.

/s/ *Crystal Maloney*
Crystal Maloney, OSB #164327
On behalf of Oregon Justice Resource Center

STATE OF LOUISIANA	**DOCKET NO.: 13-CR-72522**
VERSUS	**11TH JUDICIAL DISTRICT**
MELVIN CARTEZ MAXIE	**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.

HON. STEPHEN B. BEASLEY
DISTRICT COURT JUDGE

A TRUE COPY-ATTEST
Terri Hunt
DEPUTY CLERK 11TH JUDICIAL
DISTRICT COURT, SABINE PARISH, LA

STATE OF LOUISIANA **DOCKET NO.: 13-CR-72522**

VERSUS **11TH JUDICIAL DISTRICT COURT**

MELVIN CARTEZ MAXIE **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 *Pricur* 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 the 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. Approxmately 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 occured, 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.

Professor Thomas Frampton

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-unimous 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.

[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.

Of the votes cast in the dataset, 64 percent were by white jurors. According to Professor Frampton, if there 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 indicated racial discrimination against African-American defendants.

Professor Frampton testified as to the quality of the data complied 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:

> "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 intened 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 reace and the white race constitutes the Democractic 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* jurispridence. 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 adoptedin 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 retroactivity, 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.

Sixth Amendment Impartial Jury Claim

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 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

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

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. Maxwell*, 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.

HON. STEPHEN B. BEASLEY
DISTRICT COURT JUDGE

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No. 10-344

In The
Supreme Court of the United States

ALONSO ALVINO HERRERA,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Petition For A Writ Of *Certiorari*
To The Court Of Appeals
Of The State Of Oregon

BRIEF OF OREGON CRIMINAL-LAW AND CRIMINAL-PROCEDURE PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF CRIMINAL LAW AND CRIMINAL PROCEDURE PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

Pursuant to Supreme Court Rule 37.2, the undersigned seek leave to file as *amici curiae* on the Petition for Writ of *Certiorari* on whether the provision of Oregon law that permits a felony conviction based upon a nonunanimous verdict violates the Sixth Amendment right to trial by jury as applied to the states through the Due-Process Clause of the Fourteenth Amendment. Each of these *amici curiae* is a full-time law professor at an accredited law school in the State of Oregon who teaches courses and/or regularly publishes academic writings in the fields of criminal law and/or criminal procedure:

Dean Margie Paris
University of Oregon School of Law

Professor Barbara Aldave
University of Oregon School of Law

---

[1] Counsel for all parties received timely notice, pursuant to Supreme Court Rule 37.2 (a), at least ten days prior to the filing of this brief, and all parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, counsel undersigned states that no counsel for any party authored this brief in whole or in part and no counsel or party made any monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

Professor Laura Appelman
Willamette University College of Law

Professor Caroline L. Davidson
Willamette University College of Law

Professor Leslie Harris
University of Oregon School of Law

Professor Carrie Leonetti
University of Oregon School of Law

Professor Susan Mandiberg
Lewis and Clark School of Law

Professor Ofer Raban
University of Oregon School of Law

Amici submit this brief to bring to the foreground of this case the scholarly consensus within the legal academic community in Oregon (1) that *Apodaca v. Oregon,* 406 U.S. 404 (1972), was wrongly decided and (2) that the empirical evidence gathered in Oregon to date strongly suggests that permitting nonunanimous verdicts of guilt violates the Sixth-Amendment right to trial by jury.

SUMMARY OF ARGUMENT

Empirical evidence, not available at the time that *Apodaca* was decided, now overwhelmingly suggests that the requirement of jury unanimity for a guilty verdict plays a similar role as the requirement of proof beyond a reasonable doubt in protecting against wrongful convictions. *See* Richard A. Primus,

When Democracy Is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries, 18 CARDOZO L. REV. 1417 (1997).

Apodaca is an anachronism. In the past decade, this Court has seen significant changes in three doctrinal areas of its jurisprudence, all of which suggest that the time has come to overrule *Apodaca*. In *Apprendi v. New Jersey,* 530 U.S. 466, 498 (2000), and its progeny, this Court has recently suggested that the right to trial by jury includes a long-standing right to a conviction solely by a unanimous jury. Last term, in *Graham v. Florida,* 130 S. Ct. 2011 (2010), this Court reiterated that the determination of what process was due to a criminal defendant necessitates a consideration of society's standards, as expressed in legislative enactments and state practice to determine the national consensus regarding the practice at issue, undercutting this Court's decision in *Apodaca* to uphold a practice of questionable constitutionality that was then, and continues to be, the anomalous practice in only two of the fifty-two American jurisdictions. Also last term, in *McDonald v. City of Chicago,* 130 S. Ct. 3020 (2010), this Court held that "incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment'" (internal citation omitted), undercutting the central holding of the plurality opinion in *Apodaca* that a

defendant's right to a unanimous verdict applied in federal court only.[2] Any one of this Court's recent decisions, let alone the three of them standing in conjunction, dictate that this Court grant *certiorari,* overturn *Apodaca,* and hold that the Sixth-Amendment right to trial by jury, as applicable to the states via the Fourteenth Amendment, prohibits a verdict of guilt found by a less-than-unanimous jury.

ARGUMENT

Almost forty years ago, a fractured plurality of this Court, focusing upon "the function served by the jury in contemporary society," held that the Fourteenth Amendment did not prohibit the states from securing felony convictions with less-than-unanimous verdicts. *Apodaca,* 406 U.S. at 410. Subsequent legal developments, empirical data, and the ongoing national consensus in favor of unanimity call into question the validity of this decision. Today, almost forty years later, Oregon remains one of only two states that permit felony conviction by less than a unanimous vote of the trial jury.

[2] This argument is briefed fully in Mr. Herrera's Petition. *See* Petition for Writ of *Certiorari, Herrera v. Oregon,* No. 10-344, at 5-11.

I. Post-*Apodaca* Empirical Evidence Calls Into Question the Court's Reasoning Behind Its Holding That the Right to a Unanimous Verdict Is Not So Fundamental That It Must Apply to the States via the Fourteenth Amendment.

This Court, in *Apodaca* and its companion case, *Johnson v. Louisiana,* 406 U.S. 356 (1972), addressed two interrelated issues: (1) whether the Sixth-Amendment right to trial by jury included a right to unanimity and (2) if so, whether that constitutional requirement applied to the States via the Due-Process Clause of the Fourteenth Amendment. In *Apodaca,* five justices answered the first issue affirmatively, and only four answered the second negatively (four of the remaining five justices assumed that the answer to the second inquiry was yes, but did not decide the issue because they answered the first in the negative; only one justice decided the issue in the negative). Nonetheless, because there was not a majority of the Court in agreement on both questions, the resulting holding permitted the State of Oregon to continue to accept nonunanimous verdicts of guilt in felony cases. This holding was dictated by Justice Powell's fifth vote, in which he concurred in the judgment of the plurality. Justice Powell agreed that the Sixth Amendment required a unanimous jury verdict to convict in a federal criminal trial, *see Johnson,* 406 U.S. at 371 (Powell, J., concurring in judgment), but rejected the plurality's finding that this right to a unanimous verdict was

applicable to the states via the Fourteenth Amendment. *See id.* at 369.

In reaching this conclusion, Justice Powell explicitly based his finding on the lack of empirical evidence ("no reason to believe") to demonstrate "that a unanimous decision of 12 jurors [was] more likely to serve the high purpose of a jury trial, or [was] entitled to greater respect in the community, than the same decision joined by 10 members of a jury of 12." *Id.* at 375. The majority in *Johnson* concluded that, to overturn a legislative judgment that unanimity was not essential to a reasoned jury verdict, it would need "some basis for doing so other than unsupported assumptions." *Id.* at 361-62.

The Court's concern in 1972 with the lack of empirical basis for the unanimity challenges in *Apodaca* and *Johnson* is no longer valid. A plethora of empirical evidence is now available suggesting that permitting nonunanimous verdicts of guilt negatively affects the jury's deliberation process and the accuracy of its findings. Nearly forty years of empirical research on jury decisionmaking since *Apodaca* was decided demonstrates conclusively that unanimous juries are more careful, thorough, and accurate. *See* JOHN GUINTHER, THE JURY IN AMERICA 81 (1988); REID HASTIE, *ET AL.*, INSIDE THE JURY 108 (1983) (finding that mock juries that were required to reach a unanimous verdict deliberated more thoroughly and spent more time discussing the evidence); James H. Davis, *et al., The Decision Processes of 6- and 12-Person Mock Juries Assigned Unanimous and Two-Thirds*

Majority Rules, 32 J. PERSONALITY & SOC. PSYCHOL. 1 (1975) (finding that simulated juries deliberated longer when they were required to be unanimous than when they were permitted to reach a verdict with a two-thirds vote); Dennis J. Devine, *et al., Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups,* 7 PSYCHOL. & PUB. POL'Y & L. 622, 629 (2001) (providing a comprehensive review of the empirical research on jury decisionmaking published between 1955 and 1999 and concluding that permitting nonunanimous verdicts of guilt have a significant effect when the prosecution's case is "not particularly weak or strong"); Shari Diamond, *et al., Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury,* 100 NW. U. L. REV. 201 (2006) (documenting that real juries that were told that they did not have to reach unanimity were less concerned about deliberation, refused to consider the merits of the minority view, were more likely to hold a formal vote count within ten minutes of the beginning of "deliberations," and continued to vote often until they reached the required majority vote for a verdict); Valerie P. Hans, *The Power of Twelve: the Impact of Jury Size and Unanimity on Civil Jury Decision Making,* 4 DEL. L. REV. 2, 23 (2001) (finding that dissenting jurors on mock juries participated less and were viewed by majority jurors as less persuasive when unanimity was not required); Norbert Kerr, *et al., Guilt Beyond a Reasonable Doubt, Effects of Conceptual Definition and Assigned Rule on the Judgment of Mock Juries,* 34 J. PERSONALITY & SOC. PSYCH. 282 (1976) (finding that dissenting jurors

operating under a majority decision rule were less likely than dissenting jurors operating under a unanimity rule to argue with majority jurors during deliberations); Charles Nemeth, *Interactions Between Jurors as a Function of Majority v. Unanimity Decision Rules,* 7 J. APPLIED SOC. PSYCH. 38 (1977) (finding that simulated juries deliberated longer when they were required to be unanimous than when they were permitted to reach a verdict with a majority vote); Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?,* 6 S. CAL. INTERDISC. L. J. 1, 40-41 (1997); Kim Taylor Thompson, *Empty Votes in Jury Deliberations,* 113 HARV. L. REV. 1261 (2000) (documenting that, when unanimity is not required, dissenting jurors tend to be disenfranchised, verdicts tend to be less accurate, and public confidence in the fairness of resulting verdicts tends to be undermined). Most pertinently for the present challenge, these studies have documented that unanimity rules, standing alone, can shape the jury's verdict. *See, e.g.,* HASTIE, ET AL., *supra,* at 96-98 (documenting that, in almost one-third of the unanimous juries that they monitored, the verdict initially supported by a supermajority of the jurors was different than the verdict ultimately delivered after deliberations).

Since *Apodaca,* nonunanimous verdicts of guilt have been common in Oregon. A recent analysis of two years of felony jury-trial records by the Appellate Division of the Oregon Office of Public Defense Services indicated that nearly two thirds of the juries

who were polled reached a nonunanimous verdict on at least one count. *See* Appellate Division, Office of Public Defense Services, *On the Frequency of Non-Unanimous Felony Verdicts in Oregon* (May 21, 2009), available at http://courts.oregon.gov/OPDS/docs/Reports/PDSCReportNonUnanJuries.pdf; *see, e.g., State v. Cobb,* 198 P.3d 978, 979 (Or. App. 2008); *State v. Jones,* 196 P.3d 97, 104 (Or. App. 2008); *State v. Smith,* 195 P.3d 435, 436 (Or. App. 2008); *State v. Perkins,* 188 P.3d 482, 484 (Or. App. 2008); *Simpson v. Coursey,* 197 P.3d 68, 71 (Or. App. 2008); *Wyatt v. Czerniak,* 195 P.3d 912, 916 (Or. App. 2008); *State v. Cave,* 195 P.3d 446, 448 (Or. App. 2008); *State v. Miller,* 176 P.3d 425 (Or. App. 2008); *State v. Moller,* 174 P.3d 1063, 1064 (Or. App. 2007); *State v. Phillips,* 174 P.3d 1032, 1037 (Or. App. 2007); *State v. Norman,* 174 P.3d 598, 601 (Or. App. 2007); *State v. Rennels,* 162 P.3d 1006, 1008 n.2 (Or. App. 2007); *State v. O'Donnell,* 85 P.3d 323, 326 (Or. App. 2004).

Hung juries are rare in the overwhelming majority of jurisdictions that require unanimity. *See* Jason D. Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror,* 40 MICH. J. L. REFORM 569, 582-83 (2007) (documenting that approximately two percent of federal trials and four-to-six percent of state trials nationwide end in hung juries); *see also* Thompson, *supra,* at 1287 n.50.

This Court, in assessing the contours of the right to trial by jury as it regards jury size, has indicated the importance of empirical evidence. *See Ballew v. Georgia,* 435 U.S. 223, 231 n.10 (1978) (noting that

social-science data on jury size "provide the only basis, besides judicial hunch, for a decision about whether smaller and smaller juries will be able to fulfill the purpose and functions of the Sixth Amendment"). The frequency of nonunanimous verdicts in Oregon and the infrequency of hung juries in other jurisdictions combine to suggest that jurors deliberate meaningfully to reach consensus when unanimity is required, but that they cease deliberations when a supermajority is reached when unanimity is not required. An abundance of scholarly literature documents the same. In light of the empirical data amassed since *Apodaca* was decided, this Court should reconsider its holding that the right to a unanimous jury verdict is not so fundamental that it applies to the states.

II. This Court's Post-*Apodaca* Sixth-Amendment Jurisprudence Calls Into Question the Doctrinal Holding That the Right to a Unanimous Verdict Is Not So Fundamental That It Must Apply to the States via the Fourteenth Amendment.

Since *Apodaca,* this Court has rejected the premise of the plurality opinion that the reasonable-doubt standard was not tied to the Sixth-Amendment right to trial by jury, clarifying that "the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." *Sullivan v. Louisiana,* 508 U.S. 275, 278 (1993) (holding that Sullivan's right to trial by jury was denied because his jury was

improperly instructed about the meaning of a reasonable doubt).

More importantly, in a recent line of cases, this Court has made clear that "the longstanding tenets of common-law criminal jurisprudence" that the Sixth Amendment codifies include the guarantee that "the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the *unanimous* suffrage of twelve of his equals and neighbors.'" *Blakely v. Washington,* 542 U.S. 296, 301 (2004) (emphasis added) (internal citation omitted). *See Apprendi,* 530 U.S. at 498 (Scalia, J., concurring) (explaining that the accusations against the accused must be determined "beyond a reasonable doubt by *the unanimous vote of 12 of his fellow citizens*"); *see also Cunningham v. California,* 127 S. Ct. 856, 863-64 (2007) (incorporating the Sixth-Amendment requirement of proof of any fact that exposes a defendant to a greater potential sentence be found by a jury beyond a reasonable doubt, established in *Apprendi,* to the states); *cf. Ring v. Arizona,* 536 U.S. 584 (2002). In *Ring,* this Court explained that the holding in *Apprendi* was irreconcilable with its earlier decision in *Walton v. Arizona,* 497 U.S. 639 (1990). *See Ring,* 536 U.S. at 609-10 (concluding that this Court's "Sixth Amendment jurisprudence [could] not be home to both" *Apprendi* and *Walton*).[3]

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[3] For a thorough discussion of why *stare decisis* concerns do not justify preserving *Apodaca,* see Petitioner's Brief, No. 10-344, at 27-33.

Apodaca is, quite simply, an anachronism. The holding in *Apodaca,* permitting the State of Oregon to continue to accept nonunanimous verdicts of guilt in felony cases, is irreconcilable with the recent pronouncements of *Apprendi* and its progeny. Like this Court did to *Walton* in *Ring,* this Court should revisit and overturn *Apodaca* in the case *sub judice.*

III. Since *Apodaca,* the National Consensus in Favor of Unanimous Verdicts Has Continued.

This Court has explained, in other contexts, that the "crucial guideposts" of what process is due to criminal defendants are the "history, legal traditions, and practices" of our Nation. *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997) (finding that the asserted right to assisted suicide was not a fundamental liberty interest protected by the Due-Process Clause of the Fourteenth Amendment in part because there was no national consensus in protecting it). "The clearest and most reliable objective of contemporary values is the legislation enacted by the country's legislatures." *Penry v. Lynaugh,* 492 U.S. 302, 331 (1989). *See Graham,* 130 S. Ct. at 2022; *Kennedy v. Louisiana,* 128 S. Ct. 2641, 2650 (2009); *Roper v. Simmons,* 543 U.S. 551, 563 (2005); *Atkins v. Virginia,* 536 U.S. 304, 312 (2002); *Coker v. Georgia,* 433 U.S. 584, 593 (1977).

This Court's most recent case defining Eighth-Amendment standards (as applied to the States via

the Due-Process Clause of the Fourteenth Amendment) was *Graham,* in which the Court applied its categorical approach to the Cruel-and-Unusual-Punishment Clause for the first time in a context outside of imposition of the death penalty. *See id.* at 2022. The Court should use the present case to accord significant respect to national consensus and interpret the jury trial guarantee, "like other expansive language in the Constitution, . . . according to its text, by considering history, tradition, and precedent, and with due regard for its purpose in the constitutional design." *Roper,* 543 U.S. at 560.

This Court has previously looked to the practices of the states in determining the minimum number of jurors required by the Sixth-Amendment right trial by jury:

> It appears that of those States that utilize six-member juries in trials of non-petty offenses, only two, including Louisiana, also allow non-unanimous verdicts. We think that this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not.

Burch v. Louisiana, 441 U.S. 130, 138 (1979) (internal citations omitted).

In the almost forty years since this Court decided *Apodaca,* no States have heeded its siren call to permit nonunanimous verdicts in felony cases. On the contrary, a consensus against their use remains, and

Oregon remains one of only two states that permit a defendant to be convicted of a felony by a less-than-unanimous verdict. *See* Diamond, *et al., supra,* at 203.

This Court has also recently noted, in the context of the right to effective assistance of counsel, that it has long referred to the American Bar Association ("ABA") Standards "as guides to determining what is reasonable." *Rompilla v. Beard,* 545 U.S. 374, 387 (2005) (internal quotations omitted). The ABA Standards, on which Justice Powell relied in his concurring opinion in *Apodaca,* have been amended since *Apodaca* was decided to require unanimity in all criminal jury trials. *See* ABA Standard Relating to Trial Courts 2.10 (1976) ("The verdict of the jury [in criminal cases] should be unanimous.") (abrogating ABA Standard for Criminal Justice, Trial by Jury 1.1 (d) (1968) (approving of "less-than-unanimous verdicts, without regard to the consent of the parties")); ABA Principles for Juries & Jury Trials 4 (B) (August 2005) ("A unanimous decision should be required in all criminal cases heard by a jury."). The Commentary to Trial-Court Standard 2.10 concludes: "If the question of jury trial in criminal cases is considered from a long range viewpoint, placing the present exigencies of the trial courts in proper perspective, the[ ] qualifications [in Criminal Justice Standard 1.1 (d) for less-than-unanimous verdicts] appear to be both unnecessary and unwarranted by our legal traditions." The Comment to Jury Principle 4 states:

> At least as early as the fourteenth century it was agreed that jury verdicts should be unanimous. . . . The historical preference for unanimous juries reflects society's strong desire for accurate verdicts based on thoughtful and thorough deliberations by a panel representative of the community. Implicit in this preference is the assumption that unanimous verdicts are likely to be more accurate and reliable because they require the most wide-ranging discussions – ones that address and persuade every juror.

Commentary to ABA Jury Principle 4 (internal citations omitted).

CONCLUSION

This case requires this Court to answer a fundamental question of criminal procedure: what is a hung jury? Is it an anomaly, a breakdown in the system, a failure of *voir dire* and jury selection to eliminate one or two individual jurors whose personal biases preclude their ability to reach a reasonable conclusion based on the evidence, the result of instructional error or confusion? *See, e.g., Johnson,* 406 U.S. at 377 (Powell, J., concurring in judgment) (positing that permitting nonunanimous verdicts could minimize the potential for "hung juries occasioned either by bribery or juror irrationality"); Jere W. Morehead, *A "Modest" Proposal for Jury Reform: The Elimination of Required Unanimous*

Jury Verdicts, 46 KAN. L. REV. 933, 935 (1998) (contending that those who vote "not guilty" are unreasonable, hold-out jurors, simply seeking to hang the jury). Or is it a referendum on the weight of the evidence presented by the prosecution, an indication that, in the particular case *sub judice,* reasonable minds could disagree on the existence of a reasonable doubt, a tool to stimulate meaningful deliberation, a bulwark against wrongful conviction? *See Apodaca,* 406 U.S. at 403 (Brennan, J., dissenting) ("The doubts of a single juror are . . . evidence that the government has failed to carry its burden of proving guilt beyond a reasonable doubt."); Thompson, *supra,* at 1317 (documenting that juries rarely hang because of one or two obstinate jurors). *Apodaca* only makes sense if a hung jury is the former. Because, if a hung jury is a natural, necessary, and desired byproduct of a system of lay participation in fact finding, then this Court should not permit a serious criminal conviction that is not based upon the unanimous finding of guilt by all twelve jurors. Nonetheless, the empirical evidence suggests that a hung jury is the latter. *See* Devine, *et al., supra,* at 690-707 (documenting that, when a jury is unable to reach a unanimous verdict, it is usually because the jurors began deliberations significantly divided in their views of the case and not because of a lone, irrational dissenter); Diamond, *supra,* at 205, 220, 229-30 (documenting that "hold-out" jurors in nonunanimous civil juries and mock criminal juries were not irrational or eccentric but rather viewed the judge's instructions and recalled the testimony in much the same way as the majority

jurors and frequently shared the same assessment of the case as the trial judge); Thompson, *supra,* at 1317 (finding that juries rarely hang because of one or two obstinate, "holdout" jurors).

As then-Judge Kennedy so eloquently expounded: "A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury. The requirement of jury unanimity thus has a precise effect on the fact-finding process, one which gives particular significance and conclusiveness to the jury's verdict." *United States v. Lopez,* 581 F.2d 1338, 1341 (9th Cir. 1978) (Kennedy, J.).

For the reasons presented herein, *amici curiae* join Mr. Herrera in asking this Court to grant *certiorari,* overrule *Apodaca,* and hold that the practice of depriving an individual of his or her liberty on the basis of a nonunanimous verdict of guilt violates the rights to trial by jury and due process protected by the Sixth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

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