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 *Prieur* writ application that was later denied by the Louisiana Court of Appeal, Third Circuit. On September 19, 2016, a hearing was had on the merits of the requirement that Mr. Maxie be convicted by a unanimous jury verdict. This Court denied that motion and declared that Maxie could be convicted by a non-unanimous jury on October 6, 2016.

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

Defendant filed his Omnibus Motion on January 3, 2018 and a hearing was set for February 7, 2018. The State filed an opposition to the Omnibus Motion on February 6, 2018. At the hearing on February 7, 2018, Defendant put on testimony regarding the *Batson* violations as well as the non-resident juror. Other testimony was also proffered. The hearing was held open for further evidentiary testimony regarding Article I, Section 17 and Code of Criminal Procedure Article 782. The Court took judicial notice that the Attorney General had not been notified of the proceeding, although the Attorney General was notified regarding the previous pre-

trial motion to rule these provisions unconstitutional and chose not to oppose Mr. Maxie's motion.

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

LAW AND ANALYSIS

Non-unanimous jury verdicts

Defendant has challenged the non-unanimous jury scheme in Louisiana, codified at Article I, Section 17 of the Louisiana Constitution of 1974 and Article 782 of the Louisiana Code of Criminal Procedure on three unique constitutional grounds. First, that the non-unanimous verdict rule violates the Sixth Amendment's guarantee to a fair trial. Second, that non-unanimous verdicts violate the Fourteenth Amendment's Equal Protection Clause. Third, that non-unanimous jury verdicts violate the Sixth Amendment's impartial jury requirement. While Defendant disagrees with the following holdings, Defendant has conceded that the first claim is foreclosed by *Apodaca v. Oregon*, 406 U.S. 404 (1972), and *State v.*

Bertrand, 2008-22115 (La. 3/18/09), 6 So. 3d 738. The issue before the Court is whether the non-unanimous jury verdict scheme in Louisiana is unconstitutional under the Fourteenth Amendment, the Sixth Amendment, or both. For the reasons set forth below, the provisions of Louisiana law permitting non-unanimous jury verdicts are ruled unconstitutional in violation of the Fourteenth Amendment.

Testimony and Evidence Adduced at the Evidentiary Hearing

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

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

John Simerman

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

Mr. Simerman provided a detailed analysis as to the collection methods for the dataset used to calculate the impact of a non-unanimous jury verdict scheme on the Louisiana criminal justice system. Generally, Mr. Simerman and his two colleagues contacted the clerks of court and the district attorneys in Louisiana's 64 parishes and requested lists of all jury trials between 2011 and 2016. Not all of these officials responded to the requests, and as a result, the data collected covered nine out of the ten busiest jurisdictions in the state, and a total of 35 jurisdictions were represented in some manner in the dataset. Unfortunately, despite requests from *The Advocate*, Sabine Parish did not provide any data to Mr. Simerman regarding felony jury trials. Mr. Simerman also conceded that there were some cases that fell outside of the date range indicated above, but that this did not alter the outcome of the study.

The Advocate also collected data regarding the composition of juries and the outcomes of jury trials where available. Specifically, the data included jury polling statistics, jury composition by demographic category, including gender and race, and overall jury outcome regardless of polling. Furthermore, when demographic

information was not available, *The Advocate* staff cross-referenced juror information with the Secretary of State's voter registration database and the Nexis public records database. When the authors were able to determine accurately the demographics of a particular juror, that information was included in the dataset. When the information could not be accurately cross-referenced, those fields were omitted from the dataset with respect to that juror.

The data were further broken down by individual charges and outcomes and then another database of jury venires. The jury venire database attempted to track strikes and other reasons why a potential juror may have been excluded from the final jury pool from which felony criminal juries were selected. After the datasets were constructed, the numbers were run against the Louisiana Supreme Court database of reported jury trials throughout the time period. The study was able to collect information of some kind in 2,931 cases of the 3,906 cases reported to the Louisiana Supreme Court between 2011 and 2016. Mr. Simerman conceded that the dataset did contain a large number of cases from a relatively small number of parishes, but explained that of the ten busiest parishes by case-load, nine gave 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. Approximately 10-20% of the race and gender information obtained for the jury venire dataset was obtained using the Nexis database.

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

Of all of the cases that *The Advocate* compiled, there were only 109 cases where there was complete information as to the race and gender of each individual

juror, the verdict as to each count, and the votes of each juror. Of these 109 cases, the majority of them came from East Baton Rouge Parish because their court records were the most detailed and complete. Other parishes were represented in this data analysis; however, they represented a much smaller percentage of the available data.

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

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

Professor Thomas Aiello

Professor Thomas Aiello is an associate professor of history and African-American studies at Voldasta State University in Georgia. He is the author of *Jim*

Crow's Last Stand, a comprehensive book on the history and context of Louisiana's majority verdict system. After the State traversed, Professor Aiello was offered as an expert historian and the Court recognized him as such.

Professor Aiello testified as to the historical context surrounding the constitutional conventions of both 1898 and 1973. He provided a detailed analysis of the prevailing sentiments and feelings of the delegates at the conventions and the general societal beliefs during these periods of time. His testimony persuasively demonstrated that race was a motivating factor behind the adoption of the 1898 constitution, especially with respect to disenfranchisement of minority voters and stripping the ability of minorities to influence the judicial system. His testimony also persuasively showed that the 1973 convention was not free from racial consideration and that the delegates at the convention were keenly aware of the racial tensions when drafting the new constitution. His testimony provides the historical basis for this Court's determination that the non-unanimous jury verdict scheme in Louisiana was motivated by invidious racial discrimination.

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

and civic rights enjoyed by the white supremacists. Professor Aiello describes the situation in the following manner:

> [the] white politicians seek to reclaim what had existed before. And what had existed before is a virtual apartheid state where black labor was free and there was no threat from black political power and white people were able to carry on considering the black population to be mostly things; and so, they did that. So that was the goal. That was the goal, to get that back, and that was the goal everywhere in the South. And so, what we start to see throughout the South is a variety of different efforts to try to make that happens. . . . This is the period that we know as 'The Lost Cause,' wherein the White South valorized the Antebellum South as being, 'A great place. Everything was going well until the Yankees come down – came down and ruined it.'"

Hearing Transcript, p. 72.

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

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

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

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

Hearing transcript, p. 75.

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

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

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

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

had one of the highest, if not the highest, number of lynchings in the South during Redemption. Professor Aiello also testified that the creation of the 9-to-3 system would accomplish the same as removing African-Americans from the jury pool completely because of the relative population of whites to African-Americans in Louisiana.

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

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

Professor Aiello went on to describe the case of *Murray v. Louisiana*, where an African-American man was indicted by an all-white grand jury and then convicted by an all-white petit jury. The case went to the Supreme Court of

Louisiana at the same time as *Plessy v. Ferguson*, but has not achieved the same notoriety. However, both the district court and the Supreme Court found no constitutional violation as there were African-Americans in the respective jury pools. And the state district court judge said,

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

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

Professor Aiello then discussed the *Thezan* case in federal court. A light-skinned African-American man was allowed to participate on a jury because everyone thought he was a light-skinned Cuban. When it was discovered that he was African-American, the judge, prosecution, and defense all agreed to have him removed from the jury. The *Comité de Citoyens*, an influential African-American activist organization, challenged this exclusion and contacted the federal government, specifically the Department of Justice. As a result of this letter,

Senator Chandler of New Hampshire demanded a full investigation into jury service in Louisiana. Because of his efforts, the Senate of the United States passed a resolution ordering the Department of Justice to do a full investigation and report back to the Senate. While this investigation never really 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 evidennce and the State failed to overcome this preponderance by proof beyond a reasonable doubt. These theories of recovery were argued as an alternative to the motion for new trial and arrest of judgment.

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

Juror Sequestration Violation

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

Juror Castie

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

The Victim's Mother's Fainting

The Defense argues that the victim's mother, Ms. Thomas, prejudiced the jury and the outcome of the jury process because of her crying and fainting

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

CONCLUSION

Defendant, Melvin Cartez Maxie, is entitled to a new trial for the charge of First Degree Murder in violation of La. R.S. 14:30. The non-unanimous jury verdict scheme of Louisiana, as adopted in 1898 and modified in 1974, violates the Equal Protection Clause of the Fourteenth Amendment. The original enactment was motivated by invidious racial discrimination and the re-enactment of 1974 perpetuates the discriminatory effect of the law. The re-enactment is fairly traceable and is rooted in the 1898 provision and therefore violates the standard set forth in *Fordice*. Therefore, Article I, Section 17 of the Louisiana Constitution of 1974 and Article 782 of the Louisiana Code of Criminal Procedure are hereby ruled unconstitutional. A new trial must be ordered and the verdict must be unanimous to convict or acquit Defendant.

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

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

HON. STEPHEN B. BEASLEY
DISTRICT COURT JUDGE

RECEIVED AND FILED
2018 OCT 11 P 2:43
TAMMY FOSTER
CLERK OF COURT
SABINE PARISH

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

IN THE ELEVENTH JUDICIAL DISTRICT COURT

STATE OF LOUISIANA

PARISH OF SABINE

STATE OF LOUISIANA	**X**	**NUMBER: 13-CR-072522**
VERSUS	**X**	**11TH JUDICIAL DISTRICT COURT**
MELVIN CARTEZ MAXIE	**X**	**SABINE PARISH, LOUISIANA**

* * * * * * * * * * * * * * * * * * * *

Transcript of the **CONTINUATION OF THE EVIDENTIARY HEARING PREVIOUSLY HELD ON FEBRUARY 7, 2018:**

- **Motion for a New Trial;**
- **Motion to Arrest Judgment;**
- **Motion for Post-Verdict Judgment of Acquittal or Modification;**
- **Three *Batson* challenges;**
- **Motion to Rule Unconstitutional Art. 1 Section 17 of the Louisiana Constitution and Art. 782, the *Code of Criminal Procedure*,**

heard on **JULY 9, 2018**, in the above numbered and entitled cause, at Many, Sabine Parish, Louisiana, before the Honorable Stephen B. Beasley, presiding Judge of the Eleventh Judicial District Court.

Reported by and transcribed by Martha Walters Hagelin, Official Certified Court Reporter in and for the Parish of Sabine, Louisiana.

* * * * * * * * * * * * * * * * * * * *

APPEARANCES:

FOR THE STATE:

MR. DON M. BURKETT, District Attorney, P.O. Box 1557, Many, Sabine Parish, Louisiana

71449, representing the State of Louisiana.

MS. SUZANNE WILLIAMS, Assistant District Attorney, P.O. Box 1557, Many, Sabine Parish, Louisiana 71449, representing the State of Louisiana.

FOR THE DEFENSE:

MR. RICHARD BOURKE, Attorney at Law, 636 Baronne Street, Metairie, Orleans Parish, Louisiana 70113, representing the defendant, Melvin Cartez Maxie; assisted by

MR. CASEY M. SECOR, Attorney at Law, 400 Travis Street, Ste. 1500, Shreveport, Caddo Parish, Louisiana 71101, representing the defendant, Melvin Cartez Maxie.

INDEX OF WITNESSES

RB = MR. BOURKE / DEFENSE

SW = MS. WILLIAMS / STATE

WITNESSES CALLED ON BEHALF OF THE STATE:

NAME	DR.	CR.	RE-DR.	RE-CR.	RE-DR.	RE-CR.
None						

WITNESSES CALLED ON BEHALF OF THE DEFENDANT:

NAME	DR.	CR.	RE-DR.	RE-CR.	RE-DR.	RE-CR.
SIMERMAN, John	18	23	57			
AIELLO, Dr. Thomas	62	65	69	129	137	
FRAMPTON, Thomas	139	156	160			

EXHIBIT INDEX

STATE:

NUMBER	EXHIBIT	OFR'D	REC'D
S-1	Jury questionnaire of Juror Jeffrey Beasley	10	10

DEFENSE:

NUMBER	EXHIBIT	OFR'D	REC'D
Exhibit 5	Shreveport Police Department records regarding the death of Thomas Castie	9	9
Exhibit 6	Caddo Parish District Attorney's Office records regarding the death of Thomas Castie	9	9
Exhibit 7	Transcript of the motions hearing heard on February 3, 2017 in State vs. Lee (testimonies of Professor Powell and Professor Thompson)	10	10
Exhibit 8	"Downloading the Data Used in *The Advocate's* Exhaustive Research In 'Tilting the Scales" series dated April 1, 2018	144	144
Exhibit 9	"Tilting the Scales," printed copy of slideshow	144	144
Exhibit 10	Curriculum vitae of Dr. Thomas Aiello	63	63
Exhibit 11	Article from *The Times*, "Negro Jurors in Texas," dated February 19, 1885	102	102
Exhibit 12	Article from *The Weekly Town Talk*, "The Best One Yet," dated July 20, 1889	102	102
Exhibit 13	Article from *The Saint Landry Democrat*, "On the Jury," dated January 25, 1890	102	102
Exhibit 14	Article from *The Daily Picayune*, "Put a Top to Bulldozing," dated February 1, 1893	102	102
Exhibit 15	Article from *The Weekly Message*, "Lynch Law," dated	102	102

	October 7, 1893		
Exhibit 16	Article from *The Crusader*, "Citizen's Committee," dated February 14, 1895	102	102
Exhibit 17	Article from *The Daily Picayune*, "The Question of Colored Jurors," dated March 2, 1895	102	102
Exhibit 18	Article from *The Times Democrat*, "Negros After Gurley," dated July 9, 1897	102	102
Exhibit 19	Article from *The Times Picayune*, "The Old Story of Negroes on the Jury," dated July 9, 1897	102	102
Exhibit 20	Article from *The Congressional Record*, "Service on Juries in Louisiana," dated January 26, 1898	102	102
Exhibit 21	Editorial from *The Daily Advocate*, dated January 28, 1898	102	102
Exhibit 22	Letter to Attorney General, dated February 8, 1898	102	102
Exhibit 23	Exert from the Official Journal of the Proceedings of the Constitutional Convention, dated February 8, 1898	112	112
Exhibit 24	Committee working document of the first proposed Bill of Rights	128	128
Exhibit 25	Records of Committee containing tentative proposals for jury provisions, dated May 5, 1973	128	128
Exhibit 26	Minute entry of Bill of Rights Committee, dated May 9, 1973	128	128
Exhibit 27	Records of Committee on Bill of Rights, dated June 14, 1973	128	128
Exhibit 28	Page from the record of proceedings of Convention, dated September 8, 1973	128	128
Exhibit 29	Page 4 from the record of the proceedings of the Convention, dated September 8, 1973	128	128

NUMBER	EXHIBIT	OFR'D	REC'D
Exhibit 30	Curriculum Vitae of Thomas Frampton	144	144

(**COURT REPORTER'S NOTE**: The Court addressed two other cases on the docket before addressing the case of State vs. Melvin Maxie)

THE COURT: Are we ready to proceed? We need Mr. Maxie.

(Defendant Maxie being escorted into courtroom)

THE COURT: Sir, would you please come forward and have a seat.

(Defendant Maxie coming forward and being seated at counsel table)

THE COURT: Yes, ma'am.

MS. WILLIAMS: Good morning, Your Honor. This is State of Louisiana versus Melvin Carter [*sic*] Maxie, and Docket No. 13-CR-072522, for a continuation of Evidentiary Hearing and arguments on his Motion for New Trial. And I believe Mr. Maxie is present with his counsel, Mr. Richard Bourke, and I'm not sure who else.

MR. BOURKE: Yes, Your Honor, Richard Bourke and Casey Secor on behalf of Melvin Maxie, who is present in court.

THE COURT: Would you like to take up these motions? I have them: the Motion for a New Trial; the Motion to Arrest Judgment; the Motion for Post-Verdict Judgment of Acquittal or Modification; and there's the *Batson* - motion regarding the *Batson* challenges, three *Batson* challenges; and then there's a Motion to Rule Unconstitutional Art. 1 Section 17 of the Louisiana Constitution and Art. 782, the *Code of Criminal Procedure*. How would you like to proceed, sir?

MR. BOURKE: Yes, Your Honor. We have - principally, what we need to take up in this

continuation of the hearing are the matters related to the majority verdict, which are raised by the Motion to Declare the Provisions Unconstitutional, the Arrested Judgment, of course, and also the Motion for a New Trial because relief could be granted under that standard, also.

We have some minor housekeeping, in relation to one of the other claims - or two of the other claims where both the State and I will just, by agreement, tender some documents. So we can do that at the start or the end, as to those, and then we are ready to procced with the majority verdict issue.

We have had discussions and we've agreed to provide to the Court the transcript of two witnesses who've previously testified in a similar, but far less complete hearing. In lieu of their testimony, the State does not stipulate for (Incomprehensible word) reliability or what have you, but agrees that if called they would testify accordingly and that the Court can receive that testimony. We will also anticipate three live witnesses, one of whom we have had made previous arrangements to take their testimony telephonically, and then two live witnesses to testify in the courtroom.

THE COURT: Could we address the stipulations first, please, regarding any documents or any -

MR. BOURKE: Yes, Your Honor.

THE COURT: - testimony.

MR. BOURKE: If I can lead off then, Your Honor, in relation to Claim 5 in the Motion for New Trial, which - those claims around Juror Castie and the death of his brother, the failure to disclose the

circumstances of the death of his brother. On the last occasion I was here, I had Ms. Purvis, on the witness stand, testify to various documents received in the investigation, but I overlooked putting into the record the records of the Shreveport Police Department in relation to that offense and the record of the Caddo District Attorney's Office, in relation to that offense. And so, I would like to mark and offer as what I believe will be Exhibit 5 and 6 in this hearing.

THE COURT: Do you agree with that, madam clerk?

DEPUTY CLERK MILLER: Yes, sir.

THE COURT: Thank you.

MR. BOURKE: So if I can mark as Exhibit 5, the records of the Caddo Police - the Shreveport Police Department as to the death of Thomas Castie, and Exhibit 6, the records of the Caddo District Attorney's Office in respect to the death of Thomas Castie.

THE COURT: There's no objection?

MS. WILLIAMS: That's correct, Your Honor. The State is not stipulating to the weight or the relevance of the records, but we do agree that they are what they appear to be.

THE COURT: Let them be entered.

(The exhibits, as identified, were received by Deputy Clerk Miller and filed into evidence / **D-5, the records from the Shreveport Police Department, and D-6, the records from the Caddo District Attorney's Office**)

MR. BOURKE: Thank you, Your Honor. And then, while I'm putting matters in, as to Claim No. 7, the nonunanimous jury verdict claim, I'd like to offer and

introduce as Exhibit 7, the transcript of the motions hearing held on February 3, 2017, in State vs. Lee, in particular, the testimony of Professor Lawrence Powell, Professor Emeritus of History at Tulane University, and also of Professor Kim Taylor-Thompson of New York University. And by agreement with the State, in lieu of the appearance of these witnesses, that transcript is offered, again, without any statement by the State as to the weight or relevance of the evidence.

THE COURT: Is that correct, ma'am?

MS. WILLIAMS: That is, Your Honor.

THE COURT: Ma'am, I'm sorry. Would you tell me your name again.

MS. WILLIAMS: Suzanne Williams, Your Honor.

THE COURT: Ms. Williams.

MR. BOURKE: Those are the documents. There will be other exhibits once we get to the witnesses, but those are the documents we are seeking to admit, sir.

THE COURT: Anything else, Ms. Williams?

MS. WILLIAMS: Yes, Your Honor, and I was discussing this with Mr. Bourke before the hearing, and this may already be in the record, but just in an abundance of caution, I would like to submit what I've marked as State's Motion for New Trial, Exhibit 1, a copy of Mr. Jeffery Beasley's juror questionnaire.

MR. BOURKE: No objection, Your Honor.

THE COURT: Let it be entered.

(The exhibit, as identified, was received by Deputy Clerk Miller and filed into evidence / **S-1, copy of juror questionnaire of Jeffrey Beasley**)

MR. BOURKE: How will that be marked?

THE COURT: She marked it State Exhibit 1.

MR. BOURKE: I'm sorry. Thank you, Your Honor. That just went in one ear and out the other. I apologize.

THE COURT: Would you like to just - we addressed - I'll call the motion, we address it that way, or you want to lead off with a particular motion? I know you have some witness testimony, that's why I'm asking, sir.

MR. BOURKE: Well, Your Honor, I think it would be useful to just briefly open on the cluster of motions and set the table for what the proofs are going to be aimed at, because I think that will narrow the dispute between the parties. Because of the US Supreme Court's recent decision, I do have to trim one of our claims, so if I can do that.

We have in our pleadings ways - the challenge to Louisiana's majority verdict system in three distinct constitutional challenges:

One is the challenge that it violates the Sixth Amendment Jury Trial Guarantee, and that is the claim that is foreclosed by *Apodaca vs. Oregon* and the *Betrand* decision under the Louisiana Supreme Court.

The second is the Fourteenth Amendment Equal Protection claim that the majority verdict system was introduced with invidious discriminatory intent and that our current scheme is traceable and rooted to that - in that original enactment and continues to have a discriminatory effect. So that's the Fourteenth Amendment Equal Protection claim.

And we added a separate, slightly different claim, which is a Sixth Amendment Impartial Jury

Claim, similar to a fair cross-section claim arguing that because of the proof of discriminatory effect and without the need of a showing of discriminatory intent, the majority verdict scheme is shown to violate the impartial jury clause of the Sixth Amendment. And that's distinct from the jury trial provision dealt with in *Apodaca*.

So those three claims are before the Court, and they're pled independently as constitutional challenges, asking this Court to strike down Louisiana's constitutional provision and statutory provision under the federal constitution in the Motion In Arrest of Judgment because the verdict is - does not comport with federal constitutional law because of the majority verdict system and in the Motion for New Trial, in particular - or of particular relevance, Article 851(5) where this Court, even if not satisfied that there's a legal entitlement to relief, may take those matters into account in determining that a new trial would serve the interest of justice.

And I intend to present the evidence that is relevant to all three of those pleadings together. They're simply different lenses through which to look at the same claims.

The - importantly, in June of this year, the United States Supreme Court announced that *Abbott vs. Perez*, which is - was June 25th, 2018, and (Looking through papers) I have a copy here for Your Honor.

THE COURT: Would you hand it to the clerk, thank you.

(Mr. Bourke handing documents to Deputy Clerk Miller, who is forwarding said documents to the Court)

(Mr. Bourke handing documents to Ms. Williams and Mr. Burkett)

THE COURT: Thank you.

MR. BOURKE: And, Your Honor, in respect of that - that was the Texas redistricting case where the issue was, "What is the equal protection standard to be applied when there has been a complete reenactment of the redistricting plan?" And the United States Supreme Court faulted the district court and said because this was a whole new reenactment, you had to show discriminatory intent with the new 2013 legislative act. You couldn't rely on the prior discriminatory intent.

But they also made clear that they were not reversing or addressing any of the perpetuation of discrimination cases that we rely on, that is, cases where there was an original enactment with discriminatory intent and that that enactment is either itself reenacted or the policy in that enactment is continued forward with its ongoing discriminatory effect, and that is the - the test in *Fordice*, which is the case we relied upon in our - in our briefing. And so, in fact, *Abbott vs. Perez* echoes our briefing. I said in that brief, "If this was a whole new, fresh look, a whole new enactment, not rooted and untraceable until 1898, then it will be the standard. *Washington v. Davis* would have to prove 1974 was intentionally discriminatory."

But our argument, and we will offer proof, is that that - that this was a reenactment of the original provision, with a small change that was traceable to and rooted in 1898, continued that majority verdict

policy. Even if it did so with a race-neutral intent in 1974, it continued the discriminatory effect, and that under *Fordice* is enough. And why I am so confident that that is not affected by *Abbott vs. Perez* is in the two paragraphs that appear at Pages 22 through 23 of the slip opinion that I've provided Your Honor where the majority was at pains to distinguish what it was saying in *Abbott* about the need to prove discriminatory intent in 2013 from the other situations I'm describing. And they said at the very bottom of Page 22, "In these cases, we do not confront a situation like the one in *Hunter*," referring to *Hunter vs. Underwood*, "Nor is this a case in which a law originally enacted with discriminatory intent is later reenacted by a different legislature." The 2013 Texas legislature did not reenact the plan previously passed by its 2011 predecessor, nor does it use criteria that arguably carried forward the affects of any discriminatory intent on the part of the 2011 legislature. Instead, it enacted, with only very small changes, plans that had been developed by the Texas court, pursuant from - to instructions from this court, not to incorporate any legal defects." And the court, in the next paragraph, went on to say, "Under theses circumstances, there can be no doubt about what matters. It is the intent of the 2013 legislature."

And so, the court in *Abbott* was dealing with a case where the legislature in 2013 had to reenact the redistricting and they took a plan that the court had - the Texas court had imposed as an interim plan and used that as their base. And so, the 2013 plan wasn't traceable to the earlier discriminatory plan. It was

directly traceable and rooted in the court plan, and clearly broke and severed any links to the earlier plan. But the court here is unmistakable leaving open those cases where there is prior discriminatory intent and its either a pro forma reenactment or whether the discriminatory effect is continued on by the legislature, which is what we argue here. So we will continue to advance that claim.

As I've advised Ms. Williams, we will not be trying to prove today that there was invidious, discriminatory intent in 1973 and 1974. We're not going to try to prove that high a bar. We're going to try to meet the legal bar under *Fordice* to show that the 1974 language is traceable to and rooted in the original 1898 language and demonstrate discriminatory intent, at which point we make out our claim.

I did, however, in that reply and supplement have an alternative argument, which is now foreclosed by *Abbott*. So at Pages 22 to 23 of my supplemented reply, I argued that in the alternative, the '74 constitution should be struck down on a "but for 1989" it wouldn't have been enacted. I have to admit, that's gone now. I - *Abbott vs. Perez* ends that argument and I concede that. So the argument appearing at IV, B IV, at Pages 22-3, I concede is no longer available under *Abbott vs. Perez*, but our principle argument, it certainly is. And so I hope that was helpful in framing the argument.

As to how we proceed, I'm in the hands of the Court, but my preference will be to dispose of the witness we will take telephonically first, so we can put him and his lawyer out of his misery.

THE COURT: Let's do that. Is there anything that you care to add, ma'am?

MS. WILLIAMS: Just briefly, Your Honor. I would - I appreciate Mr. Bourke's concessions on certain points, but I would like to say that I do disagree with his argument about the application of *Abbott* to this case. I do think that *Abbott* speaks to this type of issue, in this of situation that is before the Court today; and I think to find otherwise would result in, really, a ludicrous result. If every statute, every constitutional provision in the State of Louisiana that was enacted or reenacted or amended in 1974 that had some sort of - that echoed in some way the 1898 provisions was to be found unconstitutional because the 1898 convention or delegates were racists, the result would be insane. We would throw out everything.

And I think if you look at *Abbott*, when it talks about *Underwood*, *Underwood* had a very different situation. In *Underwood*, it's - the statute they were talking about, basically, in some ways mirrors, like, our 14:213. It gave a list of offenses, and if you were convicted of something, those offenses had other consequences.

And over the years, in response to the argument that the original enactment was racist, they've pruned that down. That would be similar to us taking 14:213 and over the years taking out certain offenses and saying, "Well, we can't call that a crime of violence any longer because it has affects that lead to racially discriminatory results." That's not what happened with this majority verdict scheme.

The majority verdict scheme was up for sincere and honest debate in the 1974 Constitutional Convention. There were arguments either way as to what would happen with it. It wasn't a pro forma matter. Certainly, the delegates had the *Apodaca* decision and all those issues in mind. And if you look at the reasoning behind the adoption of the 10-2 standard, as opposed to the earlier 9-3 standard, it's clear that one, it was judicial efficiency. That was an overriding concern, but there was also mention that this would abrogate or lessen any possible racially discriminatory effect of the previous system.

So, in fact, there was a conscious design to break with that previous system and avoid any possible taint. And I think that *Abbott* really does speak to that in this case and I do realize that *Abbott* is a very new case. It just came out, I think, about two weeks ago. And it's - I don't know if Your Honor would prefer us to do some more briefing on that point, but I do think that *Abbott* does apply here.

THE COURT: Why don't we - let's go in the library and do this telephone call.

MR. BOURKE: So we'll - I'll - will we take the testimony in the library -

THE COURT: Yes.

MR. BOURKE: - on the telephone system?

THE COURT: Yes.

MR. BOURKE: I will contact them and make sure they're waiting by the phone.

THE COURT: Okay.

MR. BOURKE: So I'll just be one extra minute getting there.

THE COURT: Yes. Yes. That's fine. Let's do that.

(Proceedings in the courtroom temporarily recessed as court resumed in the library with all court personnel, counsel, and Defendant Maxie being present)

THE COURT: Sir, would you raise your right hand and take your oath.

(Deputy Clerk Miller administering the oath to Witness, who is appearing telephonically)

THE COURT: Mr. Bourke.

JOHN SIMERMAN,

having been called as a witness by counsel for the Defense, having been duly and properly sworn, was examined and testified as follows:

DIRECT-EXAMINATION OF JOHN SIMERMAN

BY MR. BOURKE:

Q Mr. Simerman, could you identify yourself for the record with your full name and your current employment.

A My name is John Simerman. I'm a reporter with *The Advocate*.

Q And, Mr. Simerman, how long have you been working as a journalist?

A I've been working as a newspaper reporter for 23 years.

Q And as part of that, have you been involved in reporting on legal affairs, court matters, that sort of thing?

A Yes, I've covered the courts in Orleans Parish for the last seven years, and prior to that, I was a reporter in California, in the Bay area of California, covering a variety of topics, but mostly focused on criminal justice.

Q Thank you. And have you, with others, conducted a body of research into the operation of Louisiana's majority-verdict system?

A Yes. We did a very lengthy review, investigation of jury

trials in Louisiana that wrapped up in April.

Q And when you say "we," who else was involved, the primary team members involved with you on that?

A There was myself. There was our investigation's editor, Gordon Russell, and reporter, Jeff Adelson, who did much of the data analysis.

Q And is it fair to say that you all worked as a team and you were involved in supervising and observing the stages of that study?

A Yes. We worked as a team. Gordon Russell and myself gathered all of the data over the course of a year or more. And so, we were involved and privy to each of us - what each of us was doing with regard to gathering the data and - and creation of databases.

Q And when you refer to "databases," you are particularly referring to two Excel spreadsheets, is that correct?

A Correct.

Q And the - *The Advocate* has conducted a lot of reporting on this issue and the study. I want to draw your attention to an article on Jeff Adelson's byline dated April 1, 2018, -

A Okay.

Q - titled, "Download Data Used in *The Advocate's* Exhaustive Research in 'Tilting the Scales' Series." Are you familiar with that article?

A I am.

Q And that article weighs out the methodology used in the study -

A Yes.

Q - to gather the information.

A Correct.

Q Is it your testimony that that article, the description in that article of the methodology used by your team is an accurate

description of how the data was gathered?

A Yes.

MR. BOURKE: Your Honor, I'd like to mark for identification only at this stage a copy of the April 1, 2018, article by Jeff Adelson.

THE COURT: You're marking that as Exhibit 8?

MR. BOURKE: Thank you, sir.

MR. BOURKE-CONTINUING:

Q And just in terms of the - briefly, I know it's in the methodology, what sort of data were you gathering and what were your sources on information? Where did you get that data from?

A We first went to the district attorneys and gathered lists of trials, lists of felony trials, from as many district attorneys as we could get (Incomprehensible words). In some cases, we - we got lists from the court clerks. And then we reviewed the records for each of those trials for various information.

Q And so, the data that you ultimately produced in the Excel spreadsheets is drawn from those public records and those public sources, is that correct?

A That's correct.

Q And in terms of the data, where it was available, did you collect data on the outcomes of jury trials?

A Yes, we did.

Q Whether the jury trials were unanimous verdicts, majority verdicts, or hung juries, obviously?

A Correct. Or "picking pleas" or cases where the defendant pled guilty in the middle of a trial or just after jury selection.

Q And you said "picking pleas," that's a New Orleans practice of empaneling a jury and entering a plea in the process or right at the end of picking the jury, is that correct?

A Correct. I know it from Orleans Parish, but it may take please elsewhere.

Q And you also gathered information on the race of jurors?

A Correct.

Q And the racial makeup of the jury venires?

A That's correct.

Q And where possible, the - the voting patterns of the individual jurors matched up with their race?

A When we were able to determine that, yes.

Q And also the - the composition, the racial composition of the juries and the exercise of peremptory challenges.

A That's correct.

Q And that - that dataset covered the time-period margin from 2011 to 2016?

A Yes. There were small and large cases on either end of those dates, but the vast majority of our cases were from 2011 to 2016.

Q And as I read that methodology, the data was gathered from - was concentrated out of nine of the ten busiest court systems in the state.

A Yes, that is correct.

Q But you also indicate in that methodology that there was data gathered from another 35 parishes.

A Yes. We gathered data from as many parishes as was practical and as we were able to get trial lists from the district attorneys or the court clerks.

Q And then - and so, just to be clear, in terms of the data collection, were you cherry-picking particular trials to get the data or were you just trying to get as many cases as data was available for?

A We simply got lists from where we could, from the district attorneys or the clerks, and tried to get data on as many of

those trials as - as was publicly available.
Q And then those demographics and data points were talked about were entered into Excel spreadsheets, is that correct?
A Correct. We had two spreadsheets, one that listed the cases and the charges, the individual charges, and various information from there and then the other database were all of the jury venires, all of the names and what happened to those jurors in terms of strikes and whether they were seated on the juries.
Q And those - those Excel spreadsheets and the - the data definitions describing what they had in them were posted online, on your website, available to the public, correct?
A Correct, and they remain so.
Q You were also - at your end, I think you said through Mr. Adelson - conducted some mathematical or empirical analysis of those numbers to produce a study of what your teams says the - the effects of the majority-verdict system.
A That's correct.
Q And that study, or those results, were also published on your website in the form of a slideshow titled, "Titling the Scales."
A That's correct, and that slideshow was produced by Dan Swenson, who is our graphics editor.
Q But using the data that you have described.
A Correct, and with our collaborations of the reporters who gathered the data and analyzed it.
Q And is it your testimony that the - the numbers described in that study, produced in that slideshow form, are accurate?
A Yes.

MR. BOURKE: Your Honor, I would like to mark for identification purposes only at this stage as Defense Exhibit 9, a copy of the "Titling the Scales" slideshow.

THE COURT: Yes, sir.

MR. BOURKE: I have no further questions for Mr. Simerman.

THE COURT: Ms. Williams.

MS. WILLIAMS: Thank you, Your Honor.

CROSS-EXAMINATION OF JOHN SIMERMAN,

BY MS. WILLIAMS:

Q Mr. Simerman, my name is Suzanne Williams and I represent the State of Louisiana in this matter. Do you mind if I ask you a few questions?

A Please do.

Q Okay. You said that the data covers - largely covers 2011 through 2016, but it also includes some records outside that range. So your data does not cover, like, a sharply-defined time period? Is that fair to say?

A Well, there were a few - we got a list of a few parishes that were - that provided us - the DAs provided us, like I say, a very small minority of trials outside of that range that we included.

Q So you chose to include that information, even though information for that time period was not available for other jurisdictions?

A I'm sorry? Say that again?

Q So you chose to include that information in your study, even though that same information was not available for other jurisdictions in that time frame?

A No. We - we went with the data that was provided to us.

Q Regardless of whether it fell within 2011 through 2016 or not.

A Well, there was a handful of cases outside of that range. I don't know the exact number of them, but we chose to include a handful of cases outside of that range.

Q Okay. Well, Mr. Simerman, can you tell me a little bit about your educational background, because I don't think Mr. Bourke got into that.

A Sure. I graduated from Pomona College with a B.A. in 1990. I went to - I received a master's in journalism from New York University in 1993.

Q Okay. What was your B.A. in?

A That was a long time ago, but I believe it was - I majored - I believe I was a philosophy major is what it ended up as.

Q You believe you were a philosophy major?

A Yeah. That was 25 years ago. Yes.

Q Okay. As a philosophy major, how many classes did you take on statistics?

A I believe none.

Q Did you take any courses on data collection?

A No.

Q Did you take any courses on the court system?

A No.

Q Did you take any courses on constitutional law?

A Yes.

Q Okay. How many?

A One.

Q One? Okay. What about in your master's program. Did you take any courses on statistics in that?

A No.

Q Since you got your master's, have you done any, you know, I don't know what the word is, continuing education, I guess -

A Yes.

Q - in the area of statistics?

A (No response)

Q I'm sorry?

A Yes. I have attended conferences of the investigative

reporters and editors. I have attended various, I guess, in-house seminars put on by data-journalism experts.

Q Okay. Who are these experts?

A I can't recall. I can't recall.

Q Were they employees of media organizations?

A Say it again?

Q Were they -

A One was NICAR and - and it's - and I don't know the exact, sort of, what that acronym stands for precisely.

Q Okay. What about Mr. Adelson? Do you know anything about his background, educationally speaking?

A I don't. He has far more extensive data-analysis training than I do.

Q But you don't know what his degrees are in?

A I do not.

Q And what about Mr. - is it Russell?

A Yes, Mr. Russell.

Q Gordon Russell? What about him? Can you tell us about his educational background?

A I don't know where he went to undergraduate school. I know he also attended New York University for graduate school.

Q Okay. Do you know what his degrees are in?

A I do not.

Q Do you know if he's had any training in statistics?

A I do not know.

Q All right, thank you. And you said that you've covered the Orleans courts for seven years, is that correct?

A That's correct.

Q How many years did you spend covering the courts, say, in Calcasieu Parish?

A None.

Q Sabine Parish?

A None.
Q Caddo Parish?
A I've covered stories out of Caddo Parish, but I'd never - I haven't covered the court system.
Q Okay. So Orleans would be the only court system within the state of Louisiana with which you're intimately familiar?
A Correct. I am familiar with Jefferson Parish court system, somewhat familiar with St. Tammany Parish court system, and the St. Bernard Parish court system.
Q And was the focus of your reporting or your work in those court systems the facts and outcomes of particular criminal trials?
A Certainly.
Q Did it also focus on civil trials?
A To an extent, I have covered civil matters in Orleans Parish, as well as federal court.
Q So your focus wasn't exclusively on state criminal trials.
A It was not.
Q Okay. During this entire seven years, were you focused on the issue that is before the Court today or were you more focused about, I guess, more of the human-interest angle of the story?
A I'm sorry?
Q Were you focused more on the human-interest angle of the story, in other words, the nature of the offense, the victim, the defendant, and the outcome?
A No. I'd covered a variety of issues regarding the court system in Orleans Parish and other parishes. I have not simply just covered hearings and trials, if that's what you're asking.
Q But, again, your focus on this was as a journalist, correct, not as a statistician?
A Correct.
Q Now, when you started collecting this data, can you tell

us again or elaborate a little bit about your sources for your data.

A Our sources for the list of trials, for the trials was district attorneys for the most part, and to a lesser extent, the court clerks.

Q But I believe it was stated in one of your articles that you only inquired into cases that went to the Louisiana State Supreme Court, is that correct?

A No.

Q Okay. I believe -

A That is not correct.

Q Let me see if I can find that article (Looking through papers in hand). I'll tell you what, I'll come back to that. Well, I'll take - let's see. If you look at Exhibit - well, we have it marked as Exhibit A, "Download Data Used in the Advocate's Exhaustive Research in 'Tilting the Scales' Series." Do you have that article with you?

A I do. Would you like for me to review it?

Q Well, if you'll just look at - I guess on my printout, it's the second page, under the heading, "The Data and Collection Methodology."

A Okay.

Q And maybe you can explain this to me, because I'm not a specialist in statistics, either, but it says - there's a sentence that says: "Of those -" and it's talking about your dataset of cases that went to trial, how many cases there were and defendants and charges. And it says, "Of those, 2,931 cases occurred during 2011 through 2016, out of a total of 3,906 cases in those years reported to the Louisiana Supreme Court." Well, that sort of leads to the inference that you looked at Louisiana Supreme Court cases only.

A I'm sorry. I'm looking for where you're referring to. I -

can you read that one more time?

Q Okay. If you look at the printout, you'll see a graphic that shows an empty jury box -

A Yes.

Q - with the heading, "Tilting the Scales."

A Yes.

Q Look in the paragraph immediately proceeding that.

A Okay.

Q And if you could read that.

A Well, I see what you're asking. No, the Louisiana Supreme Court puts out an annual report where they list parish by parish the number of trials that take place in those parishes, and that is what that refers to, that number, 3-9-0-6.

Q Okay. And did you take that number or that list and cross-reference every case on it to the data you were able to collect from the various parishes?

A They don't provide the - courts do not provide a list of cases to the Louisiana Supreme Court. They only provide a number.

Q Well, did you confirm that number to show that the cases that - the number of cases you were finding correlated to the number the Louisiana Supreme Court had?

A We did not -

Q Okay.

A - we did not receive lists of trials for all of those 3,906 cases for various reasons.

Q Well, in situations where you were not able to obtain a list, what steps were made to obtain the data independently?

A Independently? We did not attempt to secure lists of trials from anyone other than the district attorneys or the court clerks.

Q Now, are you familiar with the data collection policies,

practices, and accuracy rates of those district attorneys and clerks of courts offices?

A Are we familiar with how accurate they are in keeping their own lists of trials?

Q Yes.

A No.

Q Okay. Did you take - did you investigate that issue at all?

A About whether they were accurate in their own data-collection methods? No.

Q Okay. Are you aware that clerk of court records and district attorney records of this type are occasionally inaccurate or incomplete?

A I am not aware of the data-collection methods or the trial, score keeping, I suppose, accuracy of the district attorneys, no.

Q Now, it said that in some cases data was collected from media reports; is that correct?

A Not on the trials themselves. Occasionally, media reports would indicate whether the verdict was unanimous or otherwise, and in some cases that is the best way of knowing that, because in many cases the court records do not show because there may be an oral polling of the jury and the verdict, whether unanimous or not, is not recorded in the minutes or in the court record.

Q Okay. What type of media reports were you looking at? Was this print media? Television media?

A In most cases, it was my own.

Q Your own what?

A My own reports of trials.

Q Okay. So you didn't reply - rely on media reports from other jurisdictions?

A In - outside of Orleans, I don't believe we did.

Q So your data collection methods did differ from parish to

parish, is that correct?

A Well, Orleans is its own kind of animal and I'm familiar with it, and - but in - in most parishes, if not all others, we relied on the records or the clerk's office to provide us with the poll count. They're in the court records.

Q And how did you verify the information that was contained in the court minutes?

A The court minutes are the official records of the trial, and so, we relied on the court minutes because that's the official record.

Q Well, yes, as I'm sure you're aware from your time spent in court, sometimes they are incorrect, and in that case transcripts take precedence over the minutes. Did you order transcripts of any of these cases to verify that the minutes were accurate?

A Yes.

Q How many?

A I don't know the exact number, but we ordered transcripts for several cases and many of them for the trials that we wrote about in more detail in the newspaper stories.

Q Okay. Well, how many cases total was it that you included in your data set?

A How many cases? Do you mean trials or charges?

Q Trials.

A (Very long pause) (No response)

Q Mr. Simerman?

A Yes?

Q Okay. I just wanted to make sure we hadn't lost you. Are you looking for that number?

A No. I'm sorry, I'm asking - we included the trial - I believe we had 3,000 trials, a little bit more than that. And when you're talking about individual charges, it was more than

5,000 individual charges.

Q Well, let's say of those 3,000-something trials, how many cases did you order transcripts in and review those?

A I don't know the answer.

Q Would it be under a hundred?

A Probably.

Q Would it be under 50?

A I'm not sure.

Q So, statistically speaking, a very small percentage.

A Correct.

Q Now, how many trials did you include where the media reports were the only or main source of information?

A Of information on the -

Q From your data.

A - on the verdict counts?

Q Yes.

A A few dozen.

Q A few dozen out of the 3,000-something?

A Correct.

Q Now, did you use media report as your main source of information for any other type of data collection, such as the racial composition of the jury or the break down of the jury vote?

A No.

Q Now, you said - I believe in your articles you said that you - data was collected in large part from the busiest court districts in the state; is that correct?

A Correct.

Q Nine of the top 10 parishes by case load?

A By the number of trials that were listed in the Supreme Court's Annual Reports.

Q Now, what are those top 10 parishes?

A Orleans, Jefferson, St. Tammany, Baton Rouge, Caddo, Ascension, I can't list - you're asking me what the 9 of 10 - Calcasieu, the rest escape me.

Q So, -

A Caddo.

Q - so these parishes altogether compose less than one-sixth of the total number of parishes in the state, is that correct?

A Well, we also got trial information from dozens of other parishes; but those parishes have by far the most trials, in terms of, you know, of the percentage of the total number of trials that the Supreme Court reported.

Q Yes. I want to get to the other parishes in just a minute, but these nine parishes you looked at, they're all either urban or urban and suburban parishes, is that correct?

A Our data includes trials from many other parishes, as well; but they - well, I don't know if suburban, urban, some are mixed; but those are the parishes that have by far the most trials.

Q But those urban or urban-suburban areas are disproportionally represented in your data set, are they not?

A They're disproportionally represented in terms of the number of trials that they hold; and, therefore, they're represented as a, you know, as a - a large percentage of the - of our dataset.

Q But in terms of the geographic distribution of the state, your study is heavily-weighted towards these urban or urban-suburban areas, isn't it?

A Well, you know, we - we got every trial that we could get and a lot of these smaller parishes there are two or three trials a year and in some cases, the district attorneys were unwilling or unable to provide us a list of trials. So we relied on what we - on the data that we could manage to get.

Q Do you think it would be fair to say that the conditions prevailing in these nine parishes differ from those prevailing in some of the smaller, more rural parishes?

A I don't know the answer to that.

Q Would you say there is a difference between the court system in Sabine Parish, as opposed to the court system in Orleans Parish?

A I don't know the court system in Sabine Parish.

Q What about the number of trials, would you say there's a difference?

A There's a vast difference, yes.

Q Have you studied the jury composition rates between Sabine Parish and, say, Orleans Parish?

A By "jury composition rates," what do you mean?

Q Well, say the racial make up of the jury.

A We didn't look at Sabine Parish jury composition because we didn't get a list of trials from Sabine Parish.

Q And who did you inquire with in Sabine Parish?

A My colleague, Gordon Russell, inquired of the district attorney and others. I think there were repeated calls and efforts to attain trial lists from Sabine Parish.

Q Did anyone attempt to obtain that information from the clerk of court?

A Yes. I believe Mr. Russell did.

Q Okay. What about from media accounts?

A I am uncertain about whether any attempt was made to - to look at media accounts of those trials.

Q What about appellate case reports from the Courts of Appeal and the Louisiana Supreme Court?

A Well, we didn't rely on appellate case results because we thought that that would skew the results.

Q Now tell me about these other 35 parishes. How were those

parishes chosen?
A By whatever trial data that we could obtain from them.
Q Okay. Did you use the same methods?
A Yes.
Q And you said some of these parishes only had two to three trials a year?
A Some had zero.
Q Okay. Well, in parishes where you were unable to obtain a list, did you make efforts to ask persons in those communities about the number of trials or the names of those trials?
A Persons in those communities, as opposed to the district attorneys or the court clerks?
Q Yes.
A No, because we felt that not having the official list of trials might skew the data.
Q Even in parishes where there may only be one or two trials a year?
A Correct.
Q Okay. Let's see. And I want to go back to the fact that you did go outside the 2011 through 2016 time period for some of these trials. For the sake of uniformity, would not it have been better to include data strictly from 2011 through 2016?
A Perhaps.
Q And why was that decision made to not be uniform?
A Like I said, I don't know how many trials there are. What we received from parishes is because we wanted as big a dataset as possible. We asked for all trials between 2011 and 2016. I can't recall which parish, it may have been Jefferson, gave us a few trials outside of that range that we included.
Q Other than Jefferson, is there any other parish in which you obtained data outside the 2011 through 2016 time period?
A I'm not sure.

Q Would your colleagues have that information?
A I'm not sure. Russell might, I think he would. I don't - I don't recall. We split up the parishes. We split up the districts and I don't recall any of the districts that I obtained the trial information from falling outside of that range.
Q Oh, so you and your colleagues each had a set number of parishes or jurisdictions that you were to have obtained data from?
A Yes. We - once we obtained a list of trials, we both corroborated and worked together on - on finding in the court records the relevant information that we were looking for for our spread sheets.
Q So, none of you has independent knowledge of the accuracy of the data from all the parishes included in your data set.
A Our methodology was the same. We discussed that at length and - and continually through the process; so we are familiar with the methodology and at some point you have to divide the work.
Q Okay. Well, again, you're individually familiar on a first-hand basis with the dataset - data from each individual parish included.
A I would say that's accurate.
Q Do you know the percentage of trials outside the 2011 to 2016-time period, as opposed to the total number of trials that are included in the dataset?
A I'd say it's at most one percent, if you're looking at 3,000 trials, but I can't put a firm number on that.
Q I want to talk a little bit about the list you got from the Louisiana Supreme Court, and I believe you said it was 3,906 trials that were reported on the list from 2011 through 2016; is that correct?
A Three thousand and twenty - 3,906 is - is what this report

says and that's just adding up the numbers from the Supreme Court's annual report.

Q Now, were those all jury trials, which would include six-pack juries as well as capital cases, or were those only cases where a majority jury verdict was a possibility?

A They were all felony criminal trials.

Q And then you gathered data on 2,931, is that right?

A One moment. Well, like I said, we didn't go off of the Supreme Court's list to gather the data. So they don't have a list of trials. They only have a number.

Q Well, yes, again, so did you - but did you - you didn't corollate those numbers. You didn't verify them.

A Verify what?

Q Well, you didn't take, say, the number of cases or trials reported by the Louisiana Supreme Court for a particular jurisdiction and compare that to your data, did you?

A Yes. Well, the numbers are, you know, hm [*sic*], that's a good question. I don't recall that we did. We received a list of trials from each parish and, you know, whether their numbers were accurate per - I believe that the trial list are mostly, like I said, from the district attorneys. What gets reported to the Supreme Court is a list of trials from the court clerk or the judicial administrator. So they're a little bit - you know, it depends on how they're - how they're counting trials. There, like I say, in Orleans, several "pick and pleas" that may not accurately be described as trials.

Q So of this - of your dataset, you found this is - let's make sure I have this right - 2,207 (two thousand two hundred and seven) cases that had at least one guilty verdict?

A All I'm doing is going off of - of the story that you said there are 2,027 (two thousand and twenty-seven) cases that ended in at least one guilty verdict from a jury. Yes.

Q Okay. And you determined that the verdicts were unanimous in 993 of those cases?

A No.

Q Or - excuse me - you were only able to determine if the guilty verdict was unanimous in 993 of those cases.

A Right, but those 2,027 cases also include six-pack and "pick and pleas." So, the - the actual number of twelve-number jury trials is less than that.

Q Do you know that number?

A I do not off-hand, no.

Q Going on the subject of your juror dataset, does your dataset include jurors who were summonsed to appear but were excused prior to the date of trial?

A No. They include the venire list.

Q Okay. Well, when you say the "venire list," that would include those jurors who were summonsed but excused, wouldn't it, or do you know that?

A They were excused prior to arriving in court? Prior to coming to court?

Q Yes.

A Well, the - we - we found the venire list in two different manners. One was through the court minutes and that's where they list, you know, everybody who shows up to court. And we also determined them in some cases, Orleans in particular, through the spread sheets that the judges or the minute clerks used to - to keep track and - of - of jury selection.

Q Are you aware that in some jurisdictions the venire list includes jurors who were summonsed but were excused by the judge prior to the day of trial?

MR. BOURKE: Your Honor, I'd object to that question. That assumes facts not in evidence. Ms. Williams [*sic*] can't testify to that.

THE COURT: Do you have a response to the gentleman's objection?

MS. WILLIAMS: Your Honor, I'm just asking him if he's aware of that. He either is or he isn't.

MR. BOURKE: My objection was the question was framed as if it's a fact. There's no such evidence.

MS. WILLIAMS: I can rephrase, Your Honor.

THE COURT: Thank you, ma'am.

MR. BOURKE: Thank you.

MS. WILLIAMS-CONTINUING:

Q Mr. Simerman, do you know if the venire list in some jurisdictions contains juror's names who were excused by the judge prior to the day of trial?

A I can't say that one way or the other. I can't recall.

Q Did you make that inquiry of the clerk of court or jury coordinator or anyone else in any jurisdiction?

A Like I said, we used the venire lists that were provided to us from the courts, as well as court minutes that included, you know, only those people who showed up to court.

Q Do you know if your juror dataset includes jurors who were summonsed and on a list but then failed to show up for jury duty?

A I do not.

Q Did your dataset include jurors who showed up but were then found unqualified to be jurors and released -

A Yes.

Q - before voir dire started?

A Yes.

Q Do you know - what percentage of cases were you unable to determine what side struck a juror or if the juror was subject to a joint challenge?

A I don't know the percentage.

Q Were you always able to determine if a juror was subject to a joint challenge?

A No.

Q So that factor is unaddressed in your analysis of the data?

A No, it is. I mean, where we were able to determine - I mean, in the large majority of cases, we were able to determine whether the juror was struck for cause, where it was joint cause, whether it was a judge's excusal for cause, and in some cases the documents were not clear about - about that.

Q So your data on that particular point is not 100 percent accurate.

A I wouldn't say that.

Q Well, you just said that in some cases it was unclear. So in that case, you don't know.

A In some cases, we're not able to determine who struck for cause, as opposed to peremptory challenges (Clearing throat) - excuse me - where we were able to determine which side struck.

Q So on the subject of causes challenges, you are not 100 percent certain what percentage of jurors were struck by the state or the defense or both.

A Well, we didn't include that in our analysis. We didn't - you know, we were focused on peremptory challenges and where we could, you know, who struck for cause. But it's very clear in our data where we knew and where we didn't.

Q Well, in cases where a subject of - of contention or dispute or a point is raised by the defense about challenges for cause by the state to jurors of color, don't you think that information might be helpful?

A Can you repeat the question?

Q In some cases - let's just assume that in some cases challenges for cause by the state to jurors of color is a factor, cited or relied upon by the defense in making some arguments.

So in those cases, don't you think that data would be helpful?
A Yes.
Q But y'all didn't collect that or include it.
A I'm not sure what data you're referring to that we didn't collect or include.
Q Well, it's not 100 percent clear or accurate in your dataset as to what percentage of jurors may have been subject to a joint challenge for cause.
A I think in most cases it is.
Q What type of court records do you utilize to determine the juror's race and sex?
A We ran voter registration data. We ran all of the names through voter registration data to determine the gender and race of a large percentage of the prospective jurors. When we - for those that the voter registration did not come up with a, you know, a clear indication, we researched through the Nexis database that information.
Q Okay. Well, let's talk about the registrar of voters first. Do you know what percentage of those voter registration records you were unable to determine the race and sex?
A It was somewhere between 10 and 20 percent.
Q Did you inquire of each registrar of voters how that information was obtained and recorded?
A No. We have a database, a voter registration database.
Q So you don't know if, say, the race of a particular registered voter was determined by the employee at the registrar of voter's office or whether it was self-reported by the voter.
A I don't.
Q And in the cases where you could not obtain those records, such as they are, you went to Nexis?
A Yes. We researched individual voter names through the Nexis database.

Q Can you explain for the Court what the Nexis database is.
A It's a - you know, I'm not an authority on what the Nexis database is, but it gathers data from a variety of sources, including voter registration and - and other data sources and compiles various information on individual's past addresses, past, you know - in some cases, professions and relatives and - and things of that nature.
Q So in part, to the best of your knowledge, this Nexis database relies upon the same records that were unsatisfactory for your purposes?
A And many other records.
Q Okay. I guess I'm a little puzzled. Can you explain to me how, say, an address is going to tell you what race someone is?
A It's not.
Q What records does Nexis have in its database that were relied upon in your searches that would disclose a person's race with any degree of accuracy?
A Well, they - they have a - (Incomprehensible word), you know, voter registration information than, you know, perhaps, our database, and they have more history.
Q I guess I'm a little confused. My understanding is that you went directly to the registrar of voters.
A I'm sorry? We have a database from the registrar of voters that we used to find the race and gender of, like I said, the majority of the names in the venire list.
Q Okay. But, again, you were not able to obtain that information in, you estimate, 10 to 20 percent of cases from the voter registration information?
A That's correct.
Q But then you went to the Nexis database which relies upon those same sources of information from the registrar of voters.
A Well, they may rely - they rely on a lot more information

and - and past voter registration databases and I'm not an expert on every data point that Nexis gathers.

Q So, in at least 10 to 20 percent of these cases, you relied upon an unknown or unsubstantiated source of information to determine a juror's gender and race.

A No. The Nexis database gathers official information on people.

Q I thought you said you were unaware of how Nexis got its information.

MR. BOURKE: Objection, that's -

WITNESS-CONTINUING:

A I - I

MR. BOURKE: - that's not what the witness said.

THE COURT: Just a moment, sir. What's your objection, sir?

MR. BOURKE: The objection is that Ms. Williams misquoted the witness when the - the question was framed as, "I thought you said you didn't know where Nexis got its information from?" Mr. Simerman testified that he did not know all of the sources it got its information from. And so, it was a - a question predicated on a fact not in evidence and - and misstated the witness's prior answer.

THE COURT: Do you have a response to the gentleman's objection, ma'am?

MS. WILLIAMS: I'll rephrase, Your Honor.

THE COURT: Thank you.

MS. WILLIAMS-CONTINUING:

Q So, Mr. Simerman, in at least 10 to 20 percent of the cases where you were unable to obtain gender and race information from the registrar of voters, you relied upon a source of information where you - that you were not, yourself, entirely familiar with;

is this correct?

A Well, there are public records that Nexis gathers.

Q But you don't know the accuracy of those records, do you?

A No more than I know the accuracy of voter registration records.

Q Exactly. You're not familiar with Nexis's, whatever algorithm or search methods they use, are you?

A Not intimately.

Q Other than registrar of voters' records and this Nexis database, did you use any other methods to determine the race and gender of jurors?

A No.

Q No attempts were made to locate some of these jurors by name and observe them or ask them?

A Ask them what their race is?

Q Yes.

A No. I've only - in the few trials that I, myself, covered, one of the trials that we wrote about was the Cardell Hayes murder trials in Orleans Parish where I spoke with jurors directly for a story that was a part of this series.

Q Okay. So your data collection methods did vary between, say, some trials in Orleans Parish and trials in other parishes.

A No, I'm talking about one specific trial.

Q Oh, so in one specific case you utilized a data collection method that you did not utilize in any other case.

A No. I just was at the trial and recorded the race of jurors.

Q But that is a data collection method that you did not utilize in any other case included in your dataset, is it not?

A Well, no. We did the same thing with that trial, as well. But I believe you were asking me whether there was any other way that I determined the race of jurors. We used the exact same methods for that trial, as well.

Q Did you review transcripts of any cases to see if the judges had asked jurors to self-identify their gender and race on the record?

A No.

Q Are you aware that that process is done is some jurisdictions?

A To ask jurors to identify their race -

Q Yes.

A - on the record? I'm not familiar with that.

Q Now, Mr. Simerman, after you and your colleagues collected this data, who went behind you to double-check it for accuracy?

A We double-checked ourselves repeatedly for accuracy.

Q You didn't utilize another source or another person to do that?

A No.

Q In one of the articles, it says, "The data cover parishes that represent all geographic regions, demographic mixes, and urbanization patters found in the state." Was the data weighted in any way by geographic region, for example?

A No.

Q Who determined what the demographic mixes are?

A Who determined - I don't understand the question.

Q Well, your article or one of your colleague's articles states that the data covers all demographic mixes. Who set the parameters for that?

A I think because we got information from thirty-some-odd parishes that - and, you know, I don't know that we did a scientific analysis of urban versus rural versus demographic mixes.

Q What different ethnicities or races were included in your data?

A On the juror data?

Q Yes.
A Black, white, Asian-American, or Asian-specific islander, Hispanic, and "other" I believe are the designations that we used.
Q Did you have a designation for Native American?
A I believe that we categorized that as "other" in - in our, you know, analysis.
Q You said that the data covers parishes also that represent all urbanization patterns. Can you tell us what an urbanization pattern is?
A I'm not sure I can answer that question. I'm not sure I can answer that question.
Q Okay. Let's see. In your data collection, did y'all look at any - at the verdicts in six-member juries where unanimous verdicts were required and the racial composition of those juries?
A We did not focus on the racial composition of six-member juries.
Q So there was no examination or collection of data to show - to compare conviction rates where unanimous verdicts were required?
A Yes. We did - we had - we did determine conviction rates for six-member juries versus twelve-member juries.
Q Oh, I thought you said you didn't look at six-member juries.
A We did look at six-member juries. You'd asked me about racial composition.
Q Well, yes, did you look at the racial composition and whether there was any effect on that as to the rate of conviction?
A No, we did not. We focused for the most part on twelve-member juries, although we did do an analysis of conviction rates for those six-member juries.

Q And I believe it said in one of these articles that the data for nonunanimous verdicts and the racial breakdown of juror votes came from only 109 cases, is that correct?

A The 109 cases are where we could determine the individual votes of jurors in the verdicts.

Q And almost half of those cases came from East Baton Rouge Parish?

A That's correct.

Q So the results from East Baton Rouge Parish are disproportionally represented in your dataset - or in your analysis.

A That is because - yes, and that's - well, we focused on East Baton Rouge Parish in our analysis of jury votes because we had the most complete dataset from East Baton Rouge Parish and for statistical significance purposes, that's - that's why we used East Baton Rouge.

Q Do you know the total number of parishes that you were able to obtain that sort of data from?

A I don't. I think it was a handful.

Q A hand-

A I know we - we got some from Caddo. I know we got some from Orleans and I'm trying to remember some of the other parishes we got it from.

Q So only a handful out of 64 parishes.

A That's correct.

Q In your dataset, you include the total number of jurors who voted against a guilty verdict where that's known. Do you know if that was "not guilty as charged," or not - or whether they were guilty of a responsive? Did y'all differentiate?

A Yeah, I believe we did. I believe that was only for when it was guilty as charged. I believe that we - I can't - I'm trying to recall. I believe we didn't want to have - have, um,

how can I phrase this? When it was "guilty as charged" verdicts that we left at - where the dissenting votes were cast.

Q Now, Mr. Simerman, when you and Mr. Adelson and Mr. Russell engaged in this data-collection analysis and prepared your story, you did so with a particular view point in mind, didn't you?

A No.

Q Have you ever written an article in favor of the majority verdict system?

A I don't write articles in favor or against. We relied on our data.

Q So it's your position that you are completely neutral on the subject - in terms of your personal predilections, you're neutral in the subject of unanimous versus nonunanimous jury verdicts?

A We relied on our data.

Q Well, in the article, I believe it was written by Mr. Adelson, were two men who were interviewed who were minority votes on a jury in the Matthew Allen case. Are you familiar with that portion of the article?

A Matthew Allen was a first story, he - yeah, of the two black jurors who voted for acquittal.

Q Well, they voted for manslaughter, I believe, as opposed to second degree murder.

A Okay. That's correct. They voted for manslaughter, yes.

Q Yes. And in that case, Mr. Allen had confessed to shooting the victim, hadn't he?

A I believe so.

Q And the reasons that Mr. Newton and Mr. Howard, who were the jurors at issue, gave in the article for voting for manslaughter were based on their valuation of what was a fair penalty, not what the facts proved at trial; is that correct?

A I believe that was their viewpoint.

Q And in your completely neutral article, based solely on data, he chose to include that, is that correct, or Mr. Adelson did?

A We did, yes.

Q But their reasons for voting, when they're based on penalty, really don't affect - don't have any bearing on the accuracy of the jury process, do they?

MR. BOURKE: Objection. That's an inaccurate statement of law in Louisiana, given out responsible verdict system. It's an option as a matter of law open to every jury to return a lesser verdict, notwithstanding a finding of guilt on the higher charge, specifically to ameliorate penalties. So that question, which ignores Louisiana's legal structure, assumes something that is contrary to our law.

THE COURT: Do you have a response, ma'am?

MS. WILLIAMS: Your Honor, I'm just - I'm not trying to get into the legalities of it. I'm trying to explore the bias that I think Mr. Simerman, Mr. Adelson, and Mr. Russell displayed in these articles.

THE COURT: I'm going to let her ask the question. You can certainly redirect, sir. Your objection is noted as to my ruling.

MS. WILLIAMS-CONTINUING:

Q Mr. Simerman, can you please answer the question?

A What is the question?

Q Let me gather my thoughts again. It's been a minute. It's been a long morning. If you were writing an extensively neutral article on the subject of the fairness of majority verdicts in Louisiana, and you're including a lot of information about racial overtones and racial discrimination, and you're trying

to base this article on data, what do their opinions about the appropriate sentence have to do with the accuracy of a verdict?

A I think that that trial - we, you know, we analyzed our data and - and determined that there was a disparate racial impact on black defendants in - from this law; and their viewpoint or their - on this particular trial was reflective of what our data found.

Q Their - these two gentlemen's viewpoints reflective of all - all jurors in the state who don't agree with the majority on the verdict?

A No. I think the outcome of this trial was reflective of what our data show and whether they - whatever those two dissenting jurors said is reflective of - of, you know, what our data show is that the nonunanimous jury verdict law has a disparate impact on black defendants and that in those - in that subset of cases where we were able to determine the votes of individual jurors, that black jurors were more prone to dissent from the majority in those trials; and this case was reflective of, to some extent, anyway, of our findings.

Q But these interviews do make a point that sometimes jurors vote for reasons other than the evidence and the law.

A Yeah.

Q Okay, thank you. Somewhere in one of these articles, and I apologize, I can't remember which one at the moment, it was stated that in East Baton Rouge Parish the average jury has nearly two fewer black people than it would if the panel reflected the population. Now, when you say "the population," are you referring to the general population of East Baton Rouge Parish or a subset of that population?

A I believe we were referring to the general population of East Baton Rouge Parish.

Q But the general population of East Baton Rouge is not

necessarily reflective of the population of persons qualified to be jurors, is it?

A Not necessarily.

Q And so, that statistic, really, is meaningless.

A No. I think it has meaning.

Q Okay. Well, can you explain to us what meaning that has?

A Well, our analysis, I believe - well, I'm not sure sitting here that - that we - I believe we also did an analysis of voter - of voter demographics and I'm not sure how different voter demographics are in East Baton Rouge Parish to the general population. So I - I don't think that I can, sort of, squarely answer that question.

Q But in the article or the slideshow that you disseminated on your website, you - this statistic is prominently displayed that the average jury in East Baton Rouge Parish has nearly two fewer black people than it would if the panel reflected the population. And there's no qualification or explanation that that's not the statistic that's particularly meaningful since it's not drawn on the number of persons who are qualified to be jurors.

MR. BOURKE: Objection, Your Honor. That's Ms. Williams' testimony about whether it's meaningful or meaningless. Mr. Simerman already testified that he believes it's meaningful to look at the comparison with the total population of the parish. Ms. Williams can disagree, but she can't include it in the question as a fact.

THE COURT: Do you have a response, ma'am?

MS. WILLIAMS: Again, Your Honor, I'm just exploring his possible bias. I'm sure if he has an explanation for that, he can give it.

THE COURT: What's your objection, sir?

MR. BOURKE: The objection is that the question contained a statement of fact and Ms. Williams opinion that's not in evidence and as a predicate clause to the question -

THE COURT: Ask the question - I'm sorry. Ask the question again, ma'am.

MS. WILLIAMS: Okay.

MS. WILLIAMS-CONTINUING:

Q Mr. Simerman, in one of the articles or in the slideshow published by you and your colleagues on this subject, it's promptly displayed that the average jury has nearly two fewer black people than it would if the panel reflected the population. But you did - you or your colleagues did not explain that that fact has no bearing on the - or has no relevance to the number of persons who are actually qualified to serve as jurors; is that correct?

MR. BOURKE: Objection. The question contains - was, "But that explanation did - that you did not explain that that information has no relevance?" That's Ms. Williams' conclusion and that's the part of the question that's objectionable.

THE COURT: Sustained as to argumentative. Your objection's noted, ma'am.

MS. WILLIAMS-CONTINUING:

Q Mr. Simerman, in the articles the same comparison was made, or the same type of comparison was made, when discussing St. Tammany Parish where it said that jurors there only about half - half as many black members as you would expect based on the parish's population. Again, were those numbers based upon the parish's population in total?

A Yes, I believe so. I also believe we did an analysis, and I don't have it in front of me, on voter make-up, demographic

make-up, because we showed the, sort of, littering of black participation in the jury process throughout.

Q But that's not the information that you put forth in that article.

A In the slideshow?

Q Yes.

A I don't believe so. I believe that was relying on - on population as a whole, but I am not 100 percent certain of that.

Q And just as a point of clarification, I believe it may - and I hope you're familiar with this, in Mr. Adelson's article, he said, "In East Baton Rouge the difference between the proportion of voting-eligible black people and their percentage in the venires of prospective jurors called to the court exceeded 10 percentage points." Does that definition of voting eligible mean that they have actually registered to vote or merely that they are old enough to do so?

A I don't know the answer to that.

Q There was a portion in another - in another - or another portion in an article by Mr. Adelson, where, basically, prosecutors in Terrebone Parish were described as utilizing racially-motivated peremptory strikes. In that case, did either you, Mr. Adelson, or Mr. Russell read transcripts of the voir dire to learn why those peremptory challenges may have happened?

A No. This was a statistical analysis of strikes.

Q So no effort was made to learn what the reason was behind the strikes.

A Not on a - not in a comprehensive or - or systematic fashion, no.

Q So did you make any efforts to take into account when analyzing this data on peremptory strikes, that say, perhaps, due to the higher rate of incarceration for African Americans in Louisiana, black venire members may be more likely to have

family members or close friends that have been arrested or incarcerated?

A No. This was statistical in nature. It relied on who struck whom and - and analyzing the, you know, the frequency of - of strikes of various races of white, black, and other and Asian American.

Q So did you make any efforts to determine if those African American jurors who were subject to peremptory strikes, perhaps, stated during voir dire that they had difficulties in the past with law enforcement?

A No.

Q Did you attempt to find out if they said that they were willing to follow the law, but according to the observations of the court, were reluctant to do so?

A No.

Q Did you attempt to find out if they said that they did not want to serve?

A No.

Q Did you attempt to find out if serving would cause a financial hardship to them and their families?

A No.

Q Did you attempt to find out if they said they could be impartial but also hinted that they were worried about returning to their communities after serving on the jury?

MR. BOURKE: Judge -

THE COURT: Yes, sir.

MR. BOURKE: - I'm going to object at this stage as asked and answered. At the outset of this series of questions, Mr. Simerman indicated that they did not research the specific reasons or transcripts offered. When it was one or two questions for Ms. Williams to make her point, that's fine, but we've not got six or

eight questions. The question was asked and answered. They didn't look at the specific transcripts, the testimony of the jurors, or the reasons proffered by the prosecutor.

THE COURT: Do you have a response, ma'am?

MS. WILLIAMS: Your Honor, that was actually my last question along that line.

THE COURT: All right. Thank you.

MS. WILLIAMS: I'll withdraw it then. Your Honor, If I could have just moment?

THE COURT: Yes, ma'am.

(Ms. Williams is conversing privately with Mr. Burkett)

MS. WILLIAMS-CONTINUING:

Q Mr. Simerman, just a few more questions. How much time was spent on this data collection and analysis?

A About 14 months.

Q And it was you and Mr. Adelson and Mr. Russell?

A Yes. Well, the data collection was me and Mr. Russell.

Q And was this your only duty during this time period?

A Over the, probably, the final nine months of the project, it was by and large my only duty.

Q What about Mr. Adelson?

A Mr. Adelson did the data analysis. He helped design the databases and he has many other duties. He covers city hall for *The Advocate* in New Orleans.

Q Bear with me just a moment, Mr. Simerman.

(Ms. Williams is speaking privately with Mr. Burkett)

MS. WILLIAMS-CONTINUING:

Q Mr. Simerman, were there expenses associated with the collection and analysis of this data?

A Yeah. We paid court clerks in some cases for records. That would be the dominant expense.

Q Did you also pay district attorneys offices for costs of records?

A I don't believe so.

Q You didn't pay the Caddo Parish District Attorney's Office for some records?

A I'm not certain. I'm not sure. We may have.

Q And who provided the funding for these costs and expenses?

A *The Advocate*.

Q Solely and entirely, or do you know?

A Yes.

Q Was any assistance provided by any outside sources, financial or otherwise?

A No.

Q Okay. And when - you said data was attempted to be collected from Sabine?

A Yes.

Q Can you describe who made that effort?

A Mr. Russell.

Q Mr. Russell. And do you know how he made that effort?

A I believe he had spoke with the district attorney on a few occasions and I believe with the court clerk, as well, and was never able to get a list of trials out of either.

Q He spoke with Mr. Burkett, directly?

A Yes.

Q By phone or in person?

A By phone.

Q And then he spoke directly with the clerk of court?

A I'm not sure who within the clerk of court he spoke with. But, yes, he did speak with somebody in the clerk of court's office.

Q Did he request a list of dockets for jury trials for those years from the clerk of court?

A Yes, I believe so.

Q Was he able to obtain those dockets?

A He was not.

Q And did he search any of the online legal reporters for a list of cases - jury trials reported from Sabine Parish for that time period?

MR. BOURKE: Objection, Your Honor, asked and answered. We already asked about searching appellate decisions for - the legal reports for cases and Mr. Simerman said they did not do that.

THE COURT: Do you have a response, ma'am?

MS. WILLIAMS: Well, Your Honor, there could be reports of other issues, such as writs taken pretrial or during trial. So it may not necessarily have been reported as a finalized conviction.

THE COURT: I'm going to let the gentleman answer the question, if he knows. Your objection is noted, sir.

MS. WILLIAMS-CONTINUING:

Q Mr. Simerman, do you know?

A We - we relied on the district attorneys and the court clerks to provide us with a list of trials and we received a list from Sabine Parish from neither.

Q Did you or Mr. Adelson review any Sabine Parish media reports to obtain names of trials?

A No.

MS. WILLIAMS: Your Honor, that's all I have for Mr. Simerman at this time.

THE COURT: Mr. Bourke.

REDIRECT-EXAMINATION OF JOHN SIMERMAN

BY MR. BOURKE:

Q Mr. Simerman, I just have a few questions, if you can bear with me. In your 23 years of journalism and many of reporting on the courts, have you had cause to look at court files for information for your reporting over the years?

A Yes.

Q Are you familiar with court files and the documents you find in court files?

A Yes, very.

Q In looking at the documents in the court files to obtain this limited information you described, the jury verdict, peremptory challenges recorded in the minutes, etc., did you encounter any situation in which you would've needed any additional or special training to be able to read those documents?

A No, none other than what I have gained over the years.

Q And so, in looking at these files and translating the results of those records, was that something that was within your experience and capacity?

A Yes.

Q I think you described that the - you gathered records on 2,931 out of 3,906 trials reported statistically to the Louisiana Supreme Court in the 2011 to 2016 period, correct?

A Correct.

Q So that's about 75 percent, give or take, of all of the trials during that period statewide, as that number is maintained by the Louisiana Supreme Court.

A Correct, and that number is maintained by the Louisiana Supreme Court.

Q You talked about needing to rely on some of your own reporting in Orleans for recording whether verdicts were unanimous or majority verdicts and described Orleans as its own

animal. Were you referring to the poor quality of recording keeping or the - the lesser-quality of record keeping, the less-detailed recording keeping in Orleans?

A That's correct. Many judges do not record the verdict counts into the records.

Q You described being able to identify unanimous verdicts and majority verdicts in under a few dozen, but a few dozen cases from media reports. In those cases, did you also obtain all of the court records and not rely simply on a media article?

A That's correct. Yes.

Q In terms of obtaining trial data in the top nine most prolific parishes, am I right in understanding from the methodology that those accounted for - those top nine parishes account for 68 percent or more than two-thirds of all the convictions in the state?

A Two-thirds of the trials in the state, I believe.

Q And I- I think you looked at whether that figure, that 68 percent figure, - well, if they matched up to the percentage of cases in the jury unanimity dataset to a similar proportion.

A That's correct.

Q And just going from the methodology, the parishes that compromise 68 percent of the - the trials also compromised 69 percent of the data in the jury unanimity dataset.

A That is correct.

Q Is it your opinion then that that's fairly representative of the proportion in the statewide trials?

A It is if you trust the Louisiana Supreme Court's annual report, yes.

Q You were asked questions about peremptory challenge data and cause data, where it could sometimes be unclear. Did you use data where it was unclear?

A No.

Q You were asked questions about whether the voter registration for the State of Louisiana is accurate and can be relied upon. Is this the voter registration that one obtains from the Secretary of State? Is that the document you're referring to?

A Correct.

Q And so, you're relying on the voter registration roll maintained by the Louisiana Secretary of State.

A That is correct.

Q Then you talked about some cases where the voter registration roll couldn't confirm, you couldn't - you couldn't be sufficiently sure of the - the race of a juror. Were some of those cases where there was more than one person on the registration roll with the name of the juror?

A Correct.

Q So you couldn't tell which John Smith in the parish it was.

A That's right, or it's also possible in some parishes that - that go beyond voter registration rolls to - to pull juror names or perspective juror names. But, you know, that - we would - we had to review or - or look for the race and gender of jurors for those people.

Q And in those cases where there was more than one possible hit in the voter registration roll, did the address information help you identify which particular person in the parish it was?

A No. We didn't rely on addresses for that.

Q Addresses to match up which John Smith on the voter registration roll was the John Smith who served on the jury trial?

A Well, in some cases, in Orleans, for example, I also got from the judicial administrator's office the jury pool information and in some cases - in some cases, they tracked the address and the age of - the age of the perspective juror, the

person on the venire list. So in some cases, they did have addresses in Orleans for those people and then you could rely on the address in Nexis for that.

Q And when you're talking about Nexis, am I right in thinking that you're talking about the subscription database of public information about people that is maintained by - is it Lexi Nexis as a propriety database?

A Correct.

Q And that's something that's used throughout the legal industry to assist people in conducting the investigation and research of people.

A That's correct.

Q You were asked about a number of hypotheticals about things that may be errors in one data point or another, in one case or another. Are you aware of any reason why any of those errors would skew one way or the other in the majority-verdict analysis?

A No.

Q You talked about the - the race designations. Are those the race designations that are used by the Secretary of State?

A Yes, in some cases for very small, you know, we use "other" for race designations that were in the very small minority.

Q You've grouped together the "others." Is that what you mean?

A That's correct.

Q Gotcha [*sic*]. In terms of Baton Rouge providing a larger number of cases with data on the racial makeup of the votes in majority-verdict cases, are you aware of any reason why that data would be skewed one way or another in the particular analysis?

A No reason to indicate that.

Q You were asked about - statistics about the total

population of Baton Rouge compared to black jurors and in terms of the report and the slideshow, is it right that you reported in a stepladder-like graphic the percentage black population, the percentage black registered voters, then the percentage of blacks in the jury pool, and then the percentage of blacks actually serving on juries?

A Yes. Correct.

Q So you did actually break out the different levels from population to registered voters to being in the jury pool to being on juries.

A Yes. I just don't recall what was used in the interactive graphic.

Q Gotcha. And, in fact, the - on the graphic it indicates that the black population in East Baton Rouge was 44 percent and the black registered voters is 43.6 percent. So would you agree there's no significant difference between the population and the registered voters?

A I would agree with that.

Q As a journalist, do you think it's a matter of public interest that there's a drop from 44 percent in the black population to 29.6 percent in representation on the juries?

A That seems like a significant drop, yes.

Q And so did you report on that with a particular ax to grind, with a bias, as Ms. Williams was suggesting?

A No. We did it for every parish, regardless of the outcome, every - all of the parishes for which we got the majority or we set the larger parishes where - that have the most trials.

Q And there was even one parish where black-jury participation matched up to the percentage in the black population.

A Yes. I believe that's Calcasieu.

Q And you even reported on that.

A Correct.

MR. BOURKE: I have no further questions, Your Honor. I'd ask that Mr. Simerman be excused.

THE COURT: Thank you, Mr. Simerman.

WITNESS SIMERMAN: Thank you.

THE COURT: Okay. Unless there's something else we need to put on the record right now, we'll stop for 15 minutes and move back into the courtroom.

(Court in recess)

(Court resuming in courtroom)

THE COURT: Court will come to order. Mr. Bourke, on the issue of non-unanimous jury verdicts, anything else, sir?

MR. BOURKE: Yes, Your Honor, the Defense would call Professor Thomas Aiello.

THE COURT: Would the gentleman come forward.

(Dr. Thomas Aiello coming forward)

THE COURT: Sir, would you come and stand over here (Indicating), please, and take your oath.

(Deputy Clerk Miller administering the oath to Dr. Thomas Aiello)

THE COURT: Please have a seat, sir.

WITNESS AIELLO: Thank you.

(Dr. Thomas Aiello, taking the stand)

DR. THOMAS AIELLO,

having been called as a witness by counsel for the Defense, having been duly and properly sworn, was examined and testified as follows:

DIRECT-EXAMINATION OF DR. THOMAS AIELLO

BY MR. BOURKE:

Q Professor, could you please introduce yourself with your full name and your current occupation and position.

A Absolutely. I'm Dr. Tom Aiello. I am an Associate Professor of History and African American Studies at Valdosta State University in Valdosta, Georgia.

MR. BOURKE: If I could approach, Your Honor?

THE COURT: Yes, sir. Would you show it to opposing counsel, what you're approaching with, if you haven't already, sir.

(Mr. Bourke showing document to Ms. Williams and Mr. Burkett, before handing Witness a document)

MR. BOURKE-CONTINUING:

Q Professor, if you could look at the document that I've marked as Defense Exhibit 9 and have previously provided a copy to prosecuting counsel. Can you confirm that that is a copy of your curriculum vitae?

A It is.

MR. BOURKE: I would like to mark, offer, and introduce offer Professor Aiello's curriculum vitae, Your Honor.

THE COURT: Are you asking to introduce it, sir?

MR. BOURKE: Yes, sir.

THE COURT: Any objection, ma'am, -

MS. WILLIAMS: No objection, Your Honor.

THE COURT: - subject to cross? Let it be entered.

(The exhibit, as identified, was received by Deputy Clerk Miller and filed into evidence **/ D-10, curriculum vitae of Dr. Thomas Aiello**)

MR. BOURKE: Your Honor, if you'd bear with me, I just knocked over a large pile of documents, but I have a copy of that for Your Honor, as well.

THE COURT: That's fine, sir.

(Mr. Bourke forwarding a copy of Dr. Aiello's curriculum vitae to the Court)

THE COURT: Thank you, sir.

MR. BOURKE-CONTINUING:

Q Professor Aiello, you've indicated you're an associate professor of history and African American studies. How long have you been at Valdosta?

A Eight years, since 2010.

Q And can you briefly describe your academic background?

A Absolutely. I am - I'm from Monroe. I went to high school there, but I went to college at Arkansas, at Henderson University. I came back. I came back to the University of Louisiana at Lafayette for my masters. I went back up to Arkansas for my PhD and then returned to Lafayette for three years before moving to Valdosta.

Q And your undergraduate degree, your masters, and your PhD, those are all in history.

A They're all in American history, yes, sir.

Q And in your studies of history, have you had a particular concentration?

A Yes, sir. My concentrations have been in African American cultural and intellectual history and southern history.

Q Have you also taught in that area?

A Yes, sir.

Q Is that, in fact, your primary area of teaching?

A That's almost all of it.

Q Have you conducted as a historian research and writing and published in that area?

A Yes, sir.

Q And I noticed a very lengthy publication list of articles and books. I don't propose to go through them all, but a great many of those articles and books [*sic*] in your area of specialty and history.

A Most of - not all of them, but most of those dovetail

towards those - those subjects.

Q And you have specifically researched the historical context and the development of Louisiana's majority verdict system.

A Yes, sir.

Q And, in fact, compiled your research and wrote and published a whole book about it.

A Yes, sir.

Q And what was that book called?

A *Jim Crow's Last Stand.*

Q And as a part of the development of that, did you conduct extensive research into the historical development of the majority verdict system and the context in which it occurred?

A Yes, sir.

Q Reviewing original documents or copies of original documents from the period, those sorts of things?

A Yes, sir.

Q And did that fit into your own concentration and expertise in Southern history in the 1880s and beyond and that sort of thing?

A It did.

MR. BOURKE: Your Honor, I'd offer Professor Aiello as an expert historian.

THE COURT: Do you care to traverse, ma'am?

MS. WILLIAMS: Yes, Your Honor, if I could ask a few questions?

THE COURT: Yes.

CROSS-EXAMINATION OF DR. THOMAS AIELLO,

BY MS. WILLIAMS:

Q Is it Aiello?

A It's Aiello. It's a weird one.

Q Bear with me on that one.

A Oh, sure.

Q I'll do my best. Mr. Aiello, looking at your CV - and I apologize, I just received this about 10 minutes ago. Let's see. It looks like when you were at ULL back in, I guess this is 2003 and 2004, you were just teaching, generally, just US history and History of World Civilizations?

A No. No. No. In 2003 and 2004, I was actually just a teaching assistant at that point. I wasn't teaching my own classes. I was still a graduate student at that point.

Q Oh, okay. Okay.

A My teaching at UL is from 27 [*sic*] to 2010. It's a little bit up on that list, the classes that I actually created myself and taught.

Q Okay. As I said, please bear with me because I just -

A Oh, sure. No problem.

Q - got this very recently. So one of your focuses has been American sport?

A It has.

Q Okay.

A Still is.

Q And History of American Letters?

A Um-hm (Responding audibly and affirmatively), yes, ma'am.

Q And the Harlem Renaissance -

A Yes, ma'am.

Q - I see that as well from 2007 to 2010. But none of those really have any bearing on the subject that's before this Court today, do they?

A Right. The Harlem Renaissance might in the black context from the 1880s to the 1940s. It kind of spans that, but, no, right. I mean, certainly, the vast majority of that, while participated in by Black Louisiana, took place well outside of it.

Q And then your position as an assistant professor of

history, is it Valdosta State University from -

A Valdosta.

Q - 2010 to 2015? I see US History from 1865. African American history to 1865, and from 1865 again, -

A Um-hm (Responding audibly and affirmatively).

Q - the Harlem Renaissance; Black Power; History of Black Political Murder; -

A Um-hm (Responding audibly and affirmatively).

Q - The Black Press; History of American Sport; Black Intellectual History.

A Um-hm (Responding audibly and affirmatively).

Q I don't see anything in there on criminal law or the criminal justice system or jury systems.

A No. I have never taught a law course, and we don't have a law school at our university.

Q Well, I - but even in terms of an undergraduate or a historian's sense, you don't - you haven't focused or taught on that subject.

A Well, I have. Black Political Murder is about lynchings and the trials that are related to those kinds of things and you can't teach a two-semester African American history course without spending a lot of time on the racial cases in the country that have, kind of, developed from slavery and then later from civil rights. But as far as a general course on legal decisions that have anything specifically to do with the black experience, I've never done a whole course on that. No, ma'am.

Q In looking at some of your books, let's see, what is - you wrote *Bayou Classic: The Grambling-Southern Football Rivalry*?

A I did.

Q Which sound interesting, but again, it doesn't have any bearing on the subject before the Court today?

A No.

Q Or *Paul Morphy: The Pride and Sorrow of Chess*?

A No. Those - I mean, you know, those and the one right above it, I mean, they have - they have, I guess, maybe tangential bearing in that those three are about Black Louisiana and the Louisiana experience, in particular, but - but, no, certainly nothing to do with any kind of thing criminal. Those didn't.

Q Okay. I guess the same could be said for *It Matters Not What Comes To Pass, A History of New Orleans Sports*?

A Right. The sports stuff is - is really unrelated.

Q Okay. Under "Works in Progress," -

A Yeah?

Q - *The Trouble in Room 519, the Life and Times of Gordon Malherb Pillman, Author and Murderer;*

A Uh-huh (Answering audibly and affirmatively).

Q - *Money, Matricide, and Marginal Fiction in the Early Twentieth Century*, -

A Um-hm (Responding audibly and affirmatively).

Q - does that have any bearing on jury verdicts -

A No.

Q - or the jury system?

A That's not - that has nothing to do with even Louisiana.

Q Okay.

A That's New England.

MS. WILLIAMS: Your Honor, it's my understanding that Mr. Bourke was tendering Mr. Aiello as an expert in just general US history?

THE COURT: He said expert historian.

MS. WILLIAMS: Expert historian. I'll accept or agree to that.

THE COURT: Recognized as such.

MR. BOURKE: Thank you. And I believe, Your Honor, I may have made a mistake in marking Mr. - Professor

Aiello's CV as 9. It should be 10. I've confirmed that with your clerk.

THE COURT: Yes, sir.

MR. BOURKE: Thank you.

THE COURT: Thank you, sir.

REDIRECT-EXAMINATION OF DR. THOMAS AIELLO

BY MR. BOURKE:

Q So, Professor, I'm going to start with the period leading up to the introduction of the majority verdict system in Louisiana. So I'm going to take you back into the nineteenth century and can you, without delivering a whole course on it, can you just set the framework of the racial and political environment in the, sort of, Reconstruction and Post-Reconstruction period there in Louisiana.

A Yes, absolutely. Not only in Louisiana, but throughout the South -

Q Professor, just so that it's easier for his Honor to hear, perhaps direct your answers to him.

A Sure, absolutely.

THE COURT: And you don't have to look at me if you don't want to.

(Laughter throughout the courtroom)

THE COURT: I can hear him just fine.

WITNESS-CONTINUING:

A Okay. Well, I - you know, in - in the - in the period following Reconstruction, Reconstruction was seen largely by the white population of all the southern states, but also Louisiana, as part of that as - as an imposition of federal authority where it did not belong; and the vast majority of the white population, either through media or through political speeches, decried the fact that there was so much black representation in government and that it was degrading what the

South had built. And so, as soon as Reconstruction ends, and they take active steps to end it, whether it be through extra-legal violence and the creation of the Klan and things like that, or through the actual compromise of 1877, which does end Reconstruction where Southerners negotiate an unelected president so that they can get all of the federal troops out of the South, when that happens, the immediate project of the White South becomes to regain what they felt they had lost, to regain a new version of a better time prior to 1860, the election of Abraham Lincoln. We refer to these - this effort as "redemption." Often in Louisiana, we often refer to "Bourbon Louisiana" as the version of redemption that happens here, wherein 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 happen. We see our first segregation laws in the late 1870s, not in Louisiana, but in other parts of the South and each southern state would essentially, kind of, "cut and paste" from what other states were doing and apply it their own state and start creating varities of laws and policies that would ensure that they could regain the white political control that they felt they had lost during Reconstruction because of federal intervention. 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." That turns out not to be true. The economy

of the South was actually just as broke or more broke before the Civil War, but they certainly valorized that anyway and kind of put this emphasis, I suppose, on reclaiming white hegemony.

Q And you've talked about that as a phenomenon across the South -

A It was.

Q - and - but were there particular things that we should pay attention to, particular features for Louisiana that were important in this political movement?

A Absolutely. Louisiana political leaders felt it particularly vulnerable in a way that others didn't. Louisiana was the only southern state that actually had a black man rise to the level of governor, even though it was largely by accident; and still to this day the only black governor who has ever served in the South. There was - and the reason that happened is because New Orleans, because of its location in the Gulf, because it had a direct relation to the Caribbean Islands, because there was a Haitian population that had come after the Toussaint L'Ouverture Revolution in Haiti, it had a long history of a free, black population that existed well before the end of slavery that had been able to amass a modicum of what we call the politics of respectability and generic wealth which made them a political influence that really didn't exist in a place like, for example, Mississippi, which had an incredibly large black population, but didn't have an incredibly large middle-class black population. And so, White Louisiana obsessed with the same kinds of retrenchments that the rest of the White South was obsessed with, had this extra hurdle to overcome because there was an influential black - urban black population that simply didn't exist in the rest of the South.

Q And in terms of those pressures, is that - can you reflect on, as an example, the election of 1896 and explain how that

fits?

A Absolutely. In the 1890s - the 1890s are when we see the bulk of this retrenchment, whether through law or through violence. In violence, I mean, we averaged 181 lynchings per year in the 1890s in the South, and Louisiana had well over 20 per year. It was also the age when poor farmers really, kind of, struck back against what they thought of as, what they called "the money power." It was the area of capital "P", populism. And because of that populism, in Louisiana, which had a lot of poor farmers, black and white, the election of 1896 saw what we call in Louisiana history a "fusion ticket," wherein the white cotton farmers in the North combined with a segment of the sugar farmers in the Southwestern parishes and actually voted with a black-rural voting block to try to elect a populace candidate. It was the first real time in 1896 that - that the Democratic party felt a real challenge since the end of Reconstruction, you know - I mean, at this time, throughout what we know as the Gilded Age and the second half of the 19th century white-southern Democrat was always going to win an election. It was a one-party state in the South and Louisiana was no exception; 1896 proved that to be vulnerable. And so, the white-southern Democrats, the politicians who led the state, felt as though their power was in jeopardy for the first time since the election of 1876, 20 years prior.

Q And I want to bring you to - you talked about political power, I want to bring you to the issue in the 1880s and 1890s of black jury service. Was that a political issue? Was that an important issue at the time?

A It absolutely was. In 1880, as Louisiana first makes nonunanimous civil juries a thing, *Strauder v. West Virginia*, kind of, made the case that you can't strike - you can't just completely discriminate against black jurors, but it did kind

of let you do that if you just didn't talk about blackness. And so, in a lot of the South, they start to actively go after black jury service. It's relatively easy in most places, because the black population has lost all of its political power after 1877. In Louisiana, that is the case, in the Northeast and the Northwest, and to some extent, it is the case in the Southwest. In the New Orleans area though, it really isn't. I mean, New Orleans actually has an influential black population that has been influential for several decades. And so, black jury service is going to continue. With that being the case, if you are part of that white population that is seeking to retrench and your goal is to get rid of black political influence in whatever way possible and even to regain free labor from the black population to get as close as you could to how it was before slavery, then one of the ways you have to do that is to ensure that black jurors don't ruin the trials of white people, especially in a time when there is this, kind of, extra legal violence that is dominating the South. Black jury service becomes one of the hot button issues for White Louisiana to have to deal with.

Q And when you say "ruin the trials," what are some of the ways in which black jurors were understood back then to ruin the trials?

A Right. The assumption was - so in 10 of the 11 Confederate states, the black population was considered to be chattel. It was considered to be an animal property. In Louisiana, slaves were considered to be a land property, but they're always considered to be something else; and they were always grouped together as one. And in the same way that they grouped these people together and considered them in a herd mentality, they made the same kind of cases about juries, wherein they argued that the black population will always vote together. They always have their own best interests. The Civil War demonstrated to us

that they don't have our best interest in mind and they will openly subvert justice to prop up the - the black terror of attempting to get its political power back. At the same time, the black population, because it had been kept artificially poor and artificially ignorant for the past 300 years, it was reasoned that they didn't have the necessary qualifications to be on juries because in a state that had made it illegal to teach slaves how to read, the notion that in the 20 years since the end of Reconstruction that we would have had overt literacy in the black population was relatively optimistic, to be sure. And so, the arguments were that they all voted as a block; that they weren't worthy of jury service; that they didn't have as much stake in the game that was Louisiana justice; and so, therefore, they didn't deserve to be on juries.

Q And so in some trials, some criminal trials, the defendant may be a black man. Was there a concern about voting patterns of black jurors if they - if some, one or more, black jurors got on a case with a black defendant?

A Absolutely. Absolutely. And the notion was, I mean, that they are going to be of the same mind, that - that black jurors will intentionally subvert justice to gain acquittal for black defendants because they stick together, in the same way that they might want to go after, let's say, someone on trial who might have been a previous slave owner and they want some kind of revenge. At the same time, they would try - not "they would," but the assumption is they would try to let criminals off, black criminals off, because - because they want to see white justice thwarted.

Q And I think you've eluded to it there a little bit, a concern about when one or two or more black jurors get on the trial where it's a white defendant charged with a crime again a black person.

A Absolutely. While 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.

Q And, Professor, have you - are you able to take us through a few examples of public commentary on this in the newspapers at the time?

A Absolutely.

Q And just to set the stage, we've got some copies of those original newspaper articles from back in the day, from back in the 1880s, -

A Sure.

Q - which are hard to read from the -

A That's all right. I can -

Q - and so we got them transcribed on the front cover so that they're easy to read.

A All right.

MS. WILLIAMS: Your Honor, at this time could I make a request of the Court, before we proceed with this line of questioning, Mr. Burkett and I just received this. As a matter of fact, we've just learned that Mr. Aiello was going to testify today. Could we have five minutes to review these documents quickly?

THE COURT: Yes.

MS. WILLIAMS: Thank you, Your Honor.

MR. BOURKE: Your Honor, if we want to do that, I don't want to have to stop for every document and be - I'm not trying to be unfair to Ms. - to the contrary - I have a series of documents that I propose

and I'm happy to provide a bundle of them to -

THE COURT: All right.

MR. BOURKE: - Ms. Williams and Mr. Burkett, - and get it done and looked at.

THE COURT: We'll stop for 15 minutes then.

MR. BOURKE: Very good, sir.

THE COURT: If you need more time, just send someone back and tell me. You can step down for now, sir. Thank you.

WITNESS AIELLO: Thank you.

MS. WILLIAMS: Thank you, Your Honor.

THE COURT: Fifteen minutes.

(Court in recess)

(Court resuming)

THE COURT: Would you retake the stand, please.

(Witness Aiello retaking the stand)

THE COURT: Do we need to wait for Mr. Burkett?

MS. WILLIAMS: Your Honor, I think we can go ahead and proceed.

THE COURT: All right. Mr. Bourke.

(Mr. Burkett entering courtroom)

MR. BOURKE-CONTINUING (Questioning of Dr. Aiello):

Q Yes. Now, Professor, before we took the break, I was asking you whether or not you're able to show us a few examples of the sorts of things that were being said in the public straight and political straight. And before we do that, just to be clear, are these the entire body of evidence you rely on for your opinion about the political thought at the time in race and jurors?

A No. No. But the newspapers do provide good representation of what a lot of people are thinking. It was the dominant media of the day.

MR. BOURKE: Your Honor, if I may approach?

THE COURT: Yes, sir.

(Mr. Bourke approaching Witness)

MR. BOURKE-CONTINUING:

Q (Handing documents to Witness) Professor, I've provided you with a bundle of documents that are marked 11-21. Are you familiar with those documents?

A Yes, sir.

MR. BOURKE: Your Honor, I have a courtesy copy for you, Your Honor. (Forwarding documents to the Court)

THE COURT: Thank you, sir.

MR. BOURKE-CONTINUING:

Q And those are copies of primary sources from back in the 1880s and '90s that you're going to take us through; is that correct?

A Yes, sir.

Q And just to be clear, you and I have met and discussed those documents and what you draw from them?

A Right.

Q And you've - you've got a copy - a copy that you've made some of your own - or we've got - worked together and got some - highlighted on it the things you're going to bring out from those exerts.

A Yes, sir.

Q So my intention is to go through them one-by-one, not read them all out, but ask you to - to take us to the things that are particularly, sort of, relevant or pertinent, and if I could start with the first one that I've marked as Exhibit 11, the article from *The Times-Shreveport* of February 19, 1885, titled, "Negro Jurors in Texas." Do you have that one?

A I do.

Q Why are you showing us that as an example?
A Well, this is from 1885. It demonstrates that black jury service in Louisiana began at the very beginning of Reconstruction. Of course, New Orleans was conquered before the rest of the state. And so, in this - in this article, it is explaining that Texas is beginning to have - White Texas is beginning to have a problem with black jury service. And by "problem," they just mean that black jurors are starting to serve in Texas. It explains that Louisiana has been having to deal with this problem since 1866. It says we were "Broke into it immediately after the war. That custom has in many instances turned the jury system into a roaring farce."
Q And that's the custom of having blacks being allowed to serve on juries.
A The custom of having - being forced to introduce black jurors into the legal system. And as a matter of fact, the article closes by saying, "That since the introduction of the colored juror into this court, the same has been besieged by numbers of colored men anxiously awaiting to be summoned." And the idea is that if you start to allow black jury service, black jurors are just going to be coming down to the courthouse to try to make sure that they can get on and affect the political process. And so, it is - it is - black jurors, in particular, are seen as completely willing to subvert their duties to - to get on the court and do things they're not supposed to do.
Q And so, turning then to what I've marked as Exhibit 12, article of the weekly *Town Talk* from Alexandria, 20th of July, 1889, titled "The Best One Yet." Tell us about this as an example of what we're looking at.
A Right. So the second paragraph of this article says, "The man who kills the protector of female virtue cannot be hung in any community in which the interocean and its like have been

able to force the Negro into the jury box." The argument is that the only reason for the acquittal in this particular case was because there were black jurors and this notion about the protector of female virtue and the man who kills the protector of female virtue is referring to black men who need to be lynched and it is a - a coded reference to the validity of lynching because black jurors remove any kind of formal justice from the legal system -

Q And -

A - justification for lynching.

Q - what I've marked as Exhibit 13, an article in the *St. Landry Democrat* out of Opelousas, 25th of January 1890, I should say more like a letter to the editor, titled, "On the Jury." What can you tell us about that as helpful in understanding the feeling of the times?

A This - this is a case from - this is essentially a letter to the editor written by a Baton Rouge man who had spent time serving on the jury and, kind of, was reporting what he had seen and experienced to the newspaper, kind of, writing this, kind of, expose of what it's like in there now that they're allowing black jurors to be in there. And his stories were particularly problematic. He talks about one obstreperous, colored juror who claimed that the accused had a right to whip his wife and his grandmother-in-law, other cases where black jurors held out for acquittal and what was the phrase, "Not caring to convict anybody." And so, he essentially, kind of, tells this tale that says, "Well, black jurors are doing things that are antithetical to the whole idea of the jury process. They shouldn't be there." His - he creates this very caricatured portrait of black-jury performance that is designed specifically to - to denigrate all black-jury service as being particularly problematic, not only to the justice for the people, but also for his fellow white

jurors who have to be there with them.

Q And so, thank you, Professor. You'd mentioned before this idea of lynching and the role that lynching played in the debate about majority verdicts and the need for majority verdicts. Can you expand a little on that?

A I can. So this is a period of lynch law. Lynching as a - kind of a national phenomena began during Reconstruction, but really takes off in the 1880s and the 1890s as a way to extra judiciously enforce white supremacy now that Reconstruction is over and slavery can't be used. In the 1880s, the South was averaging about 125 lynchings per year. By the 1890s, that goes up to 181 lynchings per year, on average. Louisiana is in - at the top of that category a couple of years. For the most part, they tend to hover around 3 or 4 on the lists. But I will say the most - the most - the parish with the most lynchings in the entire South, the county with the most lynching in the entire South is Ouachita Parish in Northeast Louisiana, where I'm from. Yea. So lynching was a very big problem, and unlike a lot of these kinds of worries about juries, there's no real way to finesse lynching. It is someone dying. And even though our lynching studies have demonstrated that the vast majority of lynchings happened because of fear of black money or political power, the common denominator used to justify lynchings in more than 85 percent of all the cases is to protect the virtue of 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. And so, they're, kind of, using this claim to justify lynching. Now, to Northerners, who also exist in a multi-racial society but do not have all these lynchings and curiously don't have any of these rapes either, that is getting harder and harder to defend. And so, if you are looking to defend your state and the way it conducts extra-legal

violence, in the face of challenges, the first challenge that tries to get a federal anti-lynch law happens in the 1890s and it's unsuccessful. We never get that. It was an early Gilded Age version of what today we think of a "hate crimes" law where they want federal intervention to make lynching a federal crime if the - if the murder is racially motivated. Louisiana wants to make sure that doesn't happen, as do the rest of the former Confederate states. And so one of the ways you do that is to, kind of, make this claims that says, "Well, lynchers are actually virtuous, because they're protecting white womanhood. They are doing something - they are creating speedy trials because they are meting out justice incredibly quickly. We're not having to spend money on all of this stuff. We're not having to wait it out. We're not having to rely on these people," and most importantly, "We're not at the mercy of potential black jurors. How can you say we cannot lynch if you also say that we have to put unqualified black people on the jury?" And so, the notion of lynching and the defense of lynching has a defense of Southern honor. It's part and parcel to the way white Southerners talk, and white Louisianans, in particular, talk about black jury service. Black jury service was one of the reasons they gave why it was okay to lynch, and they argued that if you want to get rid of lynching, get rid of black jury service, that way we can have - white people can have courts that they feel will uphold their best interests and actually do justice. And if you can start getting white males to think that the courts are going to give us proper justice, they won't need to feel as though they need to form lynch mobs.

Q And is that - do you have some examples of that sort of idea in the next few articles?

A Absolutely.

Q Hold - let me - let me - for the record identify these. So

the first is marked as Exhibit 14, an article in the *Daily Picayune* from New Orleans, 1st of February 1893, titled, "Put a Stop to Bulldozing." Why don't you tell us about that one first.

A So, right. "Bulldozing" was a code word used for lynching in a couple of the Gulf South states. It's not used everywhere in the South. This article, in particular, is, kind of, making the case that lynching is an embarrassment to the state and if we want to get rid of it, the best way to do that is to get - get clear of things like mistrials and hung juries and create a system that is far more judiciously efficient, which is to say to get black people off juries. In one section of this article, it says, "If judges of the criminal court had more power to dictate to juries, as is the rule in some of the foreign courts, the shameful violations of justice, which are sometimes perpetrated by juries, would be impossible; and manifestly guilty men would not be turned loose simply because men composing trial juries were opposed to the execution of laws which did not find favor with them. It is not to be wondered that that when such a jury sets free criminals whose guilt is established, peace-loving and law-abiding citizens rise up to rebuke the outrage." Which is to say those peace-loving citizens lynch the people who should have been declared guilty because they had black jurors.

Q And when you - they don't say the word, "black jurors," in this article.

A They do not.

Q Should we be fooled by that?

A We should not. The notion of - as you can see - in the same paragraph, above it, it uses language, like, "juries not wishing to punish criminals," as being "too lenient," as "sticking together." It is the - it is the same language that was used in our first three articles about why black jurors shouldn't be on

the jury. So it's clearly using the same coded language that is being used overtly in the articles that proceed it.

Q And as a - as an expert historian familiar with the usages and phrases and the code of language of the time, is there any doubt in your mind that this is talking about black jurors voting to acquit black men, causing the need for lynching?

A No, absolutely not. I mean that's exactly what it is. I mean, they also don't say "black victim" when they talk about lynching, but they're talking about black victims. I mean - I mean, there is a racial code to the way Southerners speak, especially in editorial pages.

Q And now I want to draw your particular attention to one passage in the third paragraph, "If a criminal can get one partisan on that jury that tries him, he can always accomplish a hanging of that body, and so escape punishment until all the witnesses can be got out of the way or public interest in the case is lost. It has been repeatedly urged that nine jurors should be competent to bring in a verdict and so overthrow the power of a single person to disappoint or obstruct justice."

A Absolutely.

Q And so what are we talking about there?

A Well, they're arguing - they're arguing for - they're arguing that if you get one of these jurors that looks favorably on black criminality, which is to say a black juror, if we had a 9 to 3 system, we could subvert black jurors and we wouldn't have to worry about them as much. And so, a 9 to 3 system could do what getting rid of black jurors could do. It could be a possible remedy to lynching. If we can't eliminate black jurors entirely and we don't want to keep justifying lynching, then a 9 to 3 system might keep us from having to kill black defendants.

Q And the - the language (Incomprehensible word), "So overthrow the power of a single person," and you've said by that

they mean "black person," so, "Overthrow the power of a single person to disappoint or obstruct justice." Is that idea of overthrowing the power of that political minority something that was echoed in the rest of the political discourse?

A Absolutely. I mean, that was the whole point. I mean, that was the notion of - the whole notion of calling themselves "redeemers" was the idea that they wanted to "redeem" the state from - and "redeem" the law from these people who were subverting to overthrow everything they had ever known. And even more than that, I mean, you can see in that language that says, "disappoint or obstruct justice." I mean, that's the same language that they're using in the far more overt cases to talk about black-jury service. That's the exact same language that they're using.

Q And when you're talking about it in terms of "this will help stop lynchings," are we to look upon this as an altruistic pursuit to stop lynchings?

A No, because certainly lynchings don't stop and - and these same newspapers are going to continue to defendant them. No, lynching is the cudgel by which you, kind of, make the case against black-political power. And if - if the vast majority of lynchings are excused as protections of white womanhood but really almost all of them are specifically designed as retribution for black-political power, then what you really want to do is end black political, not end lynchings. And the way you do that is by getting them off juries.

Q Turning to what I've marked as Exhibit 15, in the *Weekly Messengre*, spelled M-E-S-S-E-N-G-R-E, out of St. Martinville, October 7th, 1893, titled, "Lynch Law." And we spent a bit of time on that last article, but can you just let us know the - why we're looking at this one, why this is a good example.

A Well, in this one, this one is a far more overt version of what we just looked at. The black population is called "alien."

They're called "savages." "They are no better than cannibals." And also, it overtly states that, "A long trial of one of them with Negro witnesses and Negro jurors would be a farce, must we permit our women, and even female children, to live in constant peril of outrage." And, of course, "outrage" is the 19th century word for rape.

Q But, Professor, maybe, can I get you to stop further up? Perhaps, read that whole paragraph there.

A Absolutely. "'But what shall we do then?' The people asked. We live in the midst of an alien race who by far outnumbers us. A certain portion of them are savages. They have a gloss of civilization, but in all the relations of religion, morality, and respect for law, they are no better than cannibals. These, it is true, are very - are few, very few. But the decent members of their race shield them and protect them. A long trial of one of them with Negro witnesses and Negro jurors would be a farce. Must we permit our women, and even female children, to live in constant peril of outrage?"

Q Thank you. And so, when we're talking - when it's talking there in the St. Martinville newspaper about "Living in the midst of an alien race, some of whom are no better than cannibals and the decent members shield those folks," that's white people talking about living with black people.

A That absolutely is. They're talking about two different classes of the black population, the lower-class black population and the pseudo-respectable middle-class black population that serves to protect them by wielding political power.

Q So I want to take you - thank you for those examples, Professor - I want to take you to some of the more overt political discussion of black jury service.

A Okay.

Q And you're familiar with some of the events surrounding what - familiar, as we know as *Murray versus Louisiana* or the trial of "Greasy Jim" Murray.

A Right.

Q So I'm going to bring you to that. Can you, perhaps, just introduce us to the argue of what was going on at the outset of that case, not the Supreme Court -

A No, right. James Murray was on trial for murdering a night watchman, a white man, and he was convicted by an all-white jury in New Orleans. And he - he challenged that conviction based on the fact that it wasn't a jury of his peers, that black jurors weren't included. His case was ultimately lost because the argument was that there were a few black jurors in the jury pool originally, and so, that was good enough.

Q And just to be clear, the actual challenge was to the all-white grand jury, correct?

A Absolutely. I should have said that. Right. Absolutely. The grand jury.

Q I mean, I think you're right, but the petit jury was all-white, as well.

A Yeah.

Q And so, take us then to what I've marked as Exhibit 16, published in *The Crusader* in Baton Rouge, 14th of February 1895, under the title, "Citizens Committee." Could you first tell us what was the crusader, the newspaper *The Crusader*?

A *The Crusader* was the newspaper of an influential group of black New Orleanians who were devoted to, kind of, using the respectability that they had, and the political clout, what little of it there was, that they had to force the issue on race and to defend black political gains from Reconstruction, at least, in the city of New Orleans, and in some cases, outside of it, a group called the Comité des Citoyens.

Q And just because the lawyers in the room will probably be familiar with it, this is the organization behind *Plessy versus Ferguson* and the challenge to the Separate Powers Act.

A It is.

Q So looking at what I've marked as Exhibit 16, what can you tell us about this?

A All right. So this - this is - *The Crusader* is the newspaper of this organization and is essentially reporting on itself and it's kind of making this claim that segregation as of 1895 is causing all of these problems. This is - this is coming the year before the *Plessy* Supreme Court case, but *Plessy,* of course, had been in the court for years at that point. If you will - and it's kind of initiating this protest that it doesn't like - the two places that you're supposed to find relief the most, the judicial system and church, are the two places that are the most difficult for the black community to find an integrated equal opportunity. You're supposed to find some kind of equality in front of the law and in front of God, and those are the two places they can't find it in Louisiana. And so, they're kind of issuing this protest. And I'll just read one - one sentence from this down this protest. It says that the committee decided, "That the Jim Crow jury should be fought to the death, and to that end will circulate lists for subscriptions to assist Lawyer Maher in his legal battle against the present jury law. Their statement and appeal to the public will be published at the proper time." The idea is that if you are worried about Jim Crow in the courts, the first thing you have to tackle is to make sure that you are not limiting jury service because that is the bedrock of how people get justice when they go to court, and if they can take away that from you, then you have absolutely no recourse to the law.

Q And I see here that they're referring to the *Plessy* case

as the "Jim Crow car case."

A Right.

Q And this - this is a reference to the *Murray versus Louisiana* case, the Jim Crow jury case.

A Absolutely. *Murray v. Louisiana* was taken up, essentially, side-by-side with the case that becomes known as *Plessy*; and it makes sense. I mean, if you're thinking about social segregation and legal segregation, these are the two things that they're going to be worried about most, moving around in society and being able to maneuver through the court system. And so, even though *Murray* doesn't become as notorious as *Plessy* -

(Loud audio noise over sound system)

THE COURT: Sorry.

WITNESS-CONTINUING:

A Is that you or me?

Q I don't know.

A I don't know. I -

THE COURT: It's fine, sir.

WITNESS-CONTINUING:

A - *Murray* doesn't become as notorious as *Plessy*. That is - that is simply because it is less on the nose. I mean, *Plessy* is far more overt and obvious and the way the Supreme Court rules makes it far more famous, but at the time, they see both of these cases as equal, and as equally important to, kind of, creating a space for the black population in Louisiana to be safe, comfortable, and at least moderately -

Q I'm looking at what I've marked as Exhibit 17, an article in *The Daily Picayune*, March 2, 1895, titled, "The Question of Colored Jurors." That's an article talking about the challenge in the trial court; is that correct?

A Right. Yes. Absolutely.

Q And what should we take, in particular, from the - from

that article and the judge's remarks there?

A Well, I think we should take from it that this is not something that - this was - this was kind of an "after the fact" thing. I mean, they were very much concerned at the time that they aren't getting - that if you have a grand jury that is all white and that really isn't composed of any black grand jurors, that even the charges themselves are going to be less than fair, and if you can't start at an equal ground at the beginning, there's no way to end up at somewhere equal at the end.

Q And if I can take you to that last paragraph, I think it reflects Judge Molse's, M-O-L-S-E, Judge Molse's remarks. Perhaps, you could read that out for us.

A Great. Absolutely. Judge Molse remarked that, "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," which, of course, means every white man in Louisiana. And they are, kind of, making the case here that back when we had black jury service, which meant back during Reconstruction, when everything was horrible, and we had black representatives and black voting, this is what we're trying to deny.

Q And so, this is 1895 -

A Yes.

Q - only three years before the Constitutional Convention.

A Yes.

Q And then I think you'd already said *Murray versus Louisiana* comes down in 1896, -

A Right.

Q - giving Louisiana essentially a pass on excluding black people from grand juries.

A Right.

Q And then even closer to the Convention, there is a great deal of controversy about the removal of a juror by the name of Thezan, T-H-E-Z-A-N, from a federal jury in New Orleans.

Q Right. This was - this was a federal case. So it was a New Orleans bank that had collapsed under mysterious circumstances and there was a jury trial for that and Thezan was - admitted to the jury. It was assumed that he was a light-skinned Cuban man. And when the jurors began talking to one another, one of the white jurors realized that he was not a Cuban, that - and the jurors got together and complained to the judge and said that there was actually a black juror on this - on this jury. And the judge, the prosecution, and, actually, everybody got together and agreed that he needed to be kicked off. And he was actually kicked off the jury simply because they discovered that even though he was white skinned, he was black.

Q And were there other black perspective jurors who were also excluded from that jury before they -

A Yes, but that was before - yes. They had ex- they had intended to exclude all black jurors. The only reason he made it on was because he was in the province an octoroon, and because he was assumed to have been Cuban.

Q And so, looking at what I've marked as Exhibit 18, article of *The Times Democrat*, 9th of July 1897 titled, "Negros After Gurley." Just to -

A Right.

Q - am I right in saying that Gurley is the federal

prosecutor?

A Right. This is - this article is about that *Thezan* case and about how - how the - this man, who had been sworn in on the jury, was kicked off simply because the other jurors believed him to be black and decided they didn't want him there.

Q And it describes meeting and discussions about raising this issue, complaining about what had happened. Can you tell us about that?

A Absolutely. The same committee that had been responsible for the onset of *Plessy* and the onset of *Murray*, that influential group of black New Orleanians, was outraged by this, as well, because this was - this was a federal court and this was supposed to be where you got recompense from a lot of those - the racisms that existed in - in - in Louisiana courts, more generally. And this was different, this was different than just having all the black jurors excluded, which might could have - which might have been reason to weigh in one's shape or form, and which had always been before, this was somebody actually being pointed out as black and then removed from a jury. And so, this is one of the cases that they really decided that they could push, because this was a great example. There was no, kind of, finessing the racism here. I mean, it was just obvious, "We're taking you off because you're black."

Q Because he'd already been qualified and accepted to serve.

A He'd already been accepted. I mean, he'd already been sworn in as a juror. So, absolutely. And so, the head of this committee, Louis Martinet, decides to - to fight. He said he wants friction on this case. He's willing to, kind of, push this issue and, kind of, get into heated arguments about it. And - and because it is a federal case, he decides to take that protest to Washington. And so, he writes a letter to the Justice Department, kind of explaining the racism that exists in a court

situation in the South, where it is a federal court but it is all Southerners, White Southerners, kind of, participating in it and they're going to act the same way White Southerners do; and then he goes to Washington and actually meets with several legislators and the Justice Department.

Q And just coming back to this article, before I step off it, it - it describes - it's a lengthy article -

A Yes.

Q - but it describes the proceedings at this meeting of the committee who were going to protest.

A It does and it was - it was not a unanimous idea and, you know, of course, the black population, especially in New Orleans, is not monolith. There are arguments back and forth about what exactly constitutes legitimate blackness, about the class concerns of certain upper and middle class black residents of New Orleans and their relationship to poorer black New Orleans. But eventually, they kind of - they kind of make the case and Martinet, himself, kind of, I think, makes this case very well. He says - in trying to convince the meeting that this is a risky fight but one that is worth the risk, he says, "I don't care how much friction this will bring about. We have our rights under the Constitution. Senator Romain has said that the Constitution is color blind and recognized no color. We have a right under its provisions to equal liberties, and we must raise our voice to get them. I don't care for sugar or cotton or rice, nor for protection or finance, but I want my rights, friction or no friction. We are killed and lynched and we don't say a word. Let us have a little friction. It may be better for us if it comes along."

Q And you'd referred to Senator Romain as reporting - of Senator Romain's remarks warning about being on the eve of this 1898 Constitutional Convention and that the result of stirring

up this matter may make it worse.
A Right. That's a good point. One of the other reasons why members of the - of the committee were, kind of, worried about this is because this is happening in 1897. And they know that there is going to be a new convention in 1898, and the last thing that they want to do is to force the issue to a point that it will create retributive acts of the constitutional committee. And so, there is some worry that this might create blowback, and it's a different kind of blowback than it would be in the early 1890s because now there's an actual constitutional convention. This can affect you for a lot longer.
Q And was it clear by 1897 that the 1898 Convention was going to pass all those odious laws depriving African Americans of suffrage?
A Yes.
Q And so, but that - that voice of concern and moderation don't raise this because "We'll get retribution at the convention," was that the voice that won out or was it the voice saying -
A No. No. It was Martinet's voice that won out. I mean, and his argument basically was that, yes, this is a harrowing time, but if you're black in Louisiana, they are all harrowing times. And, you know, if you keep making that excuse, you'll never - you'll never get that fight going and what better time to try to create some kind of federal push-back except when there might be a chance to influence a Constitutional convention?
Q Notwithstanding the risk of retribution at the convention?
A Right.
Q And there was another prominent voice, that of Mr. Tharpe, who is identified, I think, as a labor leader, a black labor leader.
A Right.

Q And he -

A I've lost it. (Looking at papers in hand) Oh, right. Tharpe, who was a labor leader, which meant that he was essentially the representative of the working poor in that meeting, he - he is convinced by Martinet's argument. And it is largely because the representative of the black lower class, kind of, gets on board with this that they decide to go ahead and do this. He says, "I am not as educated a man as you are, but I am mouthy as a worm." And he - he says that he is going - I'm not going to read all the things he says because he says words that are not appropriate for court - but he talks about the fact that he is tired of being othered by his race and that he is willing to go to Washington to tell McKinley, himself, if he has to that this needs to change. If you can't get any recompense from the state, then you go to the federal government.

Q And he's specifically talking - I know it's hard because you're weeding out all of the use of the N word -

A Right. I didn't want to read that part in court.

Q - it's in the exhibit, but he's talking about specifically about, "I'll never get on that jury list," right?

A Right.

Q He's not talking about everything else. He's talking about jury service.

A Right. I mean, his whole point was, "I'm not going to get on the jury because I am black and as a representative of labor, I can tell you that none of my people are going to do that either and they are the most likely to be in front of a courtroom needing a representative jury."

Q And who's McKinley in this? He says he's going to tell McKinley.

A That is the President of the United States, William McKinley.

Q And this is July 1897, right before the convention.
A This is right before the - yeah, this is - this is - the *Thezan* case and its aftermath comes right before the conventioneers go to write the new constitution in 1898.
Q And you tell me, can we derive some significance of the importance from all of this - in this meeting from how much space *The Times Democrat* dedicated to this incredibly long article?
A Absolutely. It was a big deal and it - what it shows is that *The Times Democrat*, one of the two largest English language newspapers in New Orleans, is giving all this space to this because this has been a conversation for years, I mean, as our 1895 article lamenting what's going on in Texas tells us. This has been an issue for White Louisiana for well over a decade at this point and something that was readily discussed. And so, the fact that there might be something coming to a head in the federal government is obviously going to be a big deal. The one thing that that White South was more afraid of than anything else was federal intervention into white politics.
Q And is that the tone of the article?
A Yes.
Q And just to be clear, *The Times Democrat* was an organ of the white southern political -
A Oh, right. Absolutely. This was - this was a white, daily newspaper. Yes. Absolutely. One hundred percent.
Q And then on a similar theme and just to complete this, what I've marked as Exhibit 19, *Times Picayune of New Orleans*, July 9th, 1897, "The Old Story of Negroes on the Jury."
A Right. This is a - this is the other major English language newspaper in New Orleans reporting essentially on the same - the same - the same meeting.
Q And I think there's references in here to the fact that

representatives of that committee of protest were taking steps, going and seeing the judge, going and seeing the prosecutor, -

A Absolutely.

Q - actively agitating.

A Absolutely. There were - there were black lawyers in - in New Orleans in the 1890s. They did go and get those kind of audiences. Really, I mean, it is - it is something that is unique to Louisiana that other southern states don't have this kind of relatively influential black minority in New Orleans that does have access to things like that and that can actually lobby people of influence. It obviously doesn't work, but the fact that they can get those audiences is fundamentally different than most other southern states.

Q Turning to Exhibit 20 then, this is a Congressional record of the United States Senate, January 26th, 1898, Page 1019 of the Congressional record, "Service on Juries in Louisiana." What are we looking at here?

A So, what the Senate is worried about here is that the federal government has noticed - is starting to notice that - that Black Louisianans are being denied jury service. It is essentially a warning that says in the middle of this convention, to be careful, "Let's make sure that we can figure out a way to finesse black jury service without getting the federal government -

Q Let me - I'm sorry, just - I think you may have a different document in front of you. I'm referring to the resolution of Senator Chandler, not the - the later discussion. I think we might have gone -

A Oh. Oh, right. Right.

Q - (Incomprehensible words).

A Right. Okay. I'm sorry. Right. So - all right. So Senator Chandler was a New Hampshire senator - I'm sorry, I was just on

the wrong page - was a New Hampshire senator that was incensed by what was going on in Louisiana. He had spoken personally to Martinet and he had decided that this was an issue that he felt like he could take up. And so, he was looking for an investigation into Louisiana's jury system to see whether or not - to find proof that black jurors were being excluded.

Q And so, this is the text of the resolution introduced into the United States Senate.

A Absolutely. This was part of the formal record that he is directing the attorney general to, kind of, make an inquiry on behalf to get Louisiana -

Q And I'll just ask you, can you read out this -

A Absolutely.

Q - resolution -

A Absolutely.

Q - was the resolution passed by the - the Senate, -

A Yes.

Q - was it adopted?

A Absolutely.

Q So the federal - the Senate of the United States, January 26th, 1898, passes this resolution. Can you read the resolution, please.

A It absolutely does. "It is resolved that the Attorney General be directed to inform the Senate whether or not the records of the Department of Justice show that in the State of Louisiana there have been recent violations of the Constitution of the United States by the exclusion from service on juries in the United States courts of duly qualified citizens on account of color, and, if so, what action has been taken or is in contemplation by the Department."

Q That's the unanimous resolution of the United States Senate. Is that a big deal at the time for Louisiana and the

ruling class in Louisiana?

A Absolutely. I mean, everybody who is at the convention of 1898 is in, you know, kind of living memory of Reconstruction. They think about Reconstruction the way we think about the late '90s and it's fresh on their mind. And they are incredibly paranoid about federal intervention because that is the one good representation of they have of federal intervention and if the government is going to be watching you on black jury service, then you have to be careful to talk about black jury service in a way that is not going to draw the attention of the Attorney General.

Q And so, turning to what I've marked as Exhibit 21, an editorial in *The Daily Advocate* in Baton Rouge, January 28th, 1898, I understand this to be a response to Senator Chandler's resolution published two days after the resolution.

A Oh, right. This is - this is a great one from *The Daily Advocate*. In part, it says, "If Mr. Chandler is really anxious to have Negroes serve on juries, he ought to encourage the importation of Negroes to New Hampshire and then nobody here would object if he composed his juries entirely of Negroes all the time." And the argument was that northern senators don't have to expose themselves to the perils that were black jury service because we had just begun the very early birth pains of what we know as The Great Migration, the Black Migration out of the South, which really starts in the 1890s in a very small number. The vast majority of the black population, over 70 percent, still lived in the South in the 1890s. And because of that, they're arguing that it's easy for somebody who has no stake in the game to, kind of, make the claim that it's not okay to be racist on these juries. We have to be racist or otherwise we're not going to get good justice.

Q And perhaps you could pick up where you left off there, the

next sentence that starts, "It is unfortunately…"

A Absolutely. "It is unfortunately too true that too many Negroes serve on juries in this state and the interests of justice are not subserved thereby. Even intelligent Negroes in this state prefer to be tried by white juries, as they feel that in such cases the evidence will be properly weighed and the verdict reached will be in accordance with - with the testimony. While in the majority of instances, the Negro juryman is governed by his feelings, rather than by the law and the evidence." I should - I'll keep going. "Negroes do serve as juror in this state, Mr. Chandler, all too often for the good of the state, but we hope eventually to do better and to leave Negro juries as an institution to be fostered in New Hampshire, where a man has to do [*sic*] when he wants to go to the United States Senate is to open up his barrel and buy up white legislators."

Q So this is - and I think we're less than two weeks from the opening of the 1898 Convention.

A That's right. This is late January. The convention starts in early February. And I should also - I should also add that this notion of black men, in particular, black people, in general, kind of, relying on their feelings rather than their intellect, is a common thread. It's one of the same threads that gives the white population the excuse to lynch them. It is one of the core grounding myths of black animal sexuality; that they're a threat to white womanhood; that they can't think for themselves; they only go off their feelings. This is another one of those common racial tropes that has - has kind of come from -

Q They're not fit to serve. They're too unintelligent to sere. They go by their feelings. They will never vote -

A They go by their feelings. That was -

Q - they would never vote to convict -

A - also lynching code. Right. Absolutely. That was jury code and lynching code.

Q And then finally in this bundle we have what I've marked as Exhibit 22, a letter from Louis Martinet dated February 8, 1898, to the attorney general of the United States.

Q Right. This - this is - this is, kind of, the - the written summation of what he was trying to do with his lobbying in Washington. And, kind of, while we're reading some of this, I just want to read a little bit of it because this letter, I think, encapsulates a lot of what he was trying to say in his - his lobbying efforts in Washington. He says, "Our committee beg leave to request that you allow us to traverse the answer of Judge Parlonge and District Attorney Gurley, should they attempt to deny our allegations." Of course, he is referring to his allegations of the denial of black jury service.

Q And this is - this is the judge and the prosecutor -

A In the Thezan case.

Q - in the case where Thezan was -

A Right. This is the - this is the - the federal bank case in - in New Orleans. "We stand ready to furnish any further proof in support of our statement that the Department of Justice may require or desire. Our charge is true and specific. All that we allege is founded on truth. The case isn't an isolated one." It - and I'm skipping around here. "It also shows conclusively that the exclusion of colored men from the jury was intentional and deliberate. And if it happened in these present cases in how many others has it not happened?" I think I should say before I go on that is an important point, because there are always ways that you can, kind of, finesse racial thinking by eliminating a black juror from service by saying "feelings" or by saying something like that, using the code of the time. It's

harder in this case because the juror was seated and then removed specifically for a race issue. And so, they're saying, "If this is happening here, just imagine how many times that it's happening in all those other cases when we don't have the luck of having this - this - the formula work out this way." He says, "Mr. Attorney General, all the rights and privileges that make American citizenship desirable or worth anything are being taken one by one from the colored American in the South. He no longer sits on juries. He no longer sits on juries… Under the numerous convict laws and other abominable statutes, he can be auctioned off or hired out to parties for any offense, from the slightest misdemeanor to the greatest crime. Today, the Constitutional Convention meets in this city for the avowed purpose, not of qualifying the suffrage in this State, but of disenfranchising the colored citizen… The problem uppermost in the minds of the members of this convention is how to disfranchise as many colored men and disqualify as few white men without too apparent a violation of the Constitution…".

Q Thank you, Professor. And you were jumping or skipping a few lines -

A I was, I'm sorry. I was just kind of reading -

Q That's okay. I just want it to be clear. It's clear to us, who've got it in front of us, but just to be clear for the transcript. And this is literally on the eve of the convention. This is as the convention is starting.

A This is - this is right as the convention is getting underway in early February.

Q So in your opinion, at the time of the start of the convention, what was the political and social environment around the issue of black jurors and the task before the convention?

A Ah, Louisiana was attempting to re-control the black population. They were aiming - aiming to re-get their white

supremacy back that they felt that they had lost. The specific political climate was, A, that all of the surrounding states around Louisiana, all of its peer states, had already taken steps to disfranchise the black population and to get black jury service ended. Louisiana was, kind of, the last to go in 1898. On top of that, they had federal watchdogs looking to make sure that whatever they did with jury service, that they weren't talking about race overtly because Chandler had been worried about it. And you have this really influential black lobby group that is trying to exert some control and trying to make noise about what's really going on her. And it was into that climate, with those - those three, kind of, strands working their way around the conventioneers that these guys, all white, meet to create a new constitution in Louisiana.

Q Let's turn then to that 1898 convention and the creation of the 1898 Constitution.

A Right.

MR. BOURKE: Before we do that or I'll lose track, Your Honor, I've marked Exhibits 11 through 22, which have been testified about by Professor Aiello. I'd like to offer and introduce Exhibits 11 through 22 as identified in the course of that testimony.

THE COURT: Any objection, ma'am?

MS. WILLIAMS: No objection, Your Honor.

THE COURT: Let it be entered, 11 through 22.

(The exhibits, as previously identified, were received by Deputy Clerk Miller and filed into the records **/ Defense Exhibits 11 - 22, please see Exhibit Index for detailed description of the exhibits**.)

MR. BOURKE: And I'd like to mark as Exhibit 23 an exert from the proceedings of the 1898 Constitutional Convention. This was the exhibit

attached to the Omnibus Motion, Your Honor. It's the same document. And if I could approach the professor.

THE COURT: Yes, sir.

MR. BOURKE-CONTINUING:

Q (Handing copy of document to Witness)

A (Looking at document)

Q Professor Aiello, are you familiar with the - the document that I've handed to you and marked as Exhibit 23?

A I am.

Q And am I correct that that's an exert of some of the pages from the beginning and the end of the proceedings -

A The beginning and the end of the proceedings of the Convention, yes.

Q And I'm going to ask you specifically about it in a moment. But can you - and I think the Court's - from - other place [*sic*] so I think we're all pretty familiar with 1898's Convention now. It's become notorious, but perhaps you could just summarize and point to such examples as you wish in that text to summarize what the evidence of racially discriminatory intent and the purpose of that convention was.

A Right. This one - this one is relatively easy. They are very open about the fact that they are at a convention to - to promote white supremacy. E. B. Kruttschnitt, in his opening statement, talks - argues that the reason they are here is to eliminate black political power, that black political power has been the demise of the state, again, calling back on this "lost cause" language that says, "We were so great before the Civil War," a very familiar line to any white Louisianan at the time. And he makes the case that what we need to do is to eliminate black political power, particularly through voting rights.

Q And in terms of the language of the laws produced by the 1898 Constitution, did they specifically refer to black people

in the text of the laws they generated?

A No, absolutely not. They couldn't do that. The Reconstruction amendments disallowed that from being able to happen. And so, they knew that they weren't allowed to - to, kind of, craft these laws with race, color, or previous condition of servitude in the language. And so, they came up with cribs. They came up with ways around that. In doing so, they largely built off of what other southern states had done prior to them. They came up with, for example, a poll tax, which was common in all 11 of the former Confederate states, in which they argued that by forcing voters to, kind of, put their money where their vote was they were creating an electorate with a far greater stake in the outcome, knowing, of course, that for those - for that black population that had been kept artificially poor for the last 300 years, the likelihood that they were going to have enough money to be able to pay to vote or that they would choose to pay to vote in an election they knew they would lose when they could use it to buy something else that they really needed was unlikely. You don't have to say "race," but if you create a poll tax, you know exactly who was going to be affected by that. They - they created - at the same time, they created a combination law for illiteracy test and/or a property qualification. A property qualification being the same kind of idea as the poll tax. If you've been kept artificially poor for so long, the notion that you're going to have enough property to qualify to vote was suspect, at best, especially considering when the vast majority of the relatively wealthy black population in Louisiana was urban and was not land owning. And illiteracy test, and again, if there has been a law on the books for so long that it was illegal to teach slaves how to read and you have been keeping the black population artificially ignorant for the past 300 years, the likelihood

that that population would somehow become relatively literate in a place that did not provide them very much or any schooling at all was unlikely. And so, at the same time, though, all of these things give you an out. So, while all - all three of those efforts were racially motivated, trying to play off of the disparities that were generated by slavery and in the decades after to create disfranchisement, they all had an excuse. The poll tax was, "We want people invested in the process. We want them to vote." Literacy test was, "We - we don't stupid people voting. We want our best and our brightest choosing our best and our brightest." What other way to have a great state than to make sure that there is an educational bar for voting, to make sure that everybody has to go over that bar. It's only going to make us better in the long run. The same thing for property qualifications. The people who have the most stake in the outcome of what the government does are the people who own the most land. And so, therefore, if they have the biggest stake in the game, then we want to make sure they are given pride of place whenever we vote. And so, their justifications for the laws themselves don't include race, color, or previous condition of servitude, because they know they need them to pass muster and because Alabama and Georgia had taught them how to do this already in their own efforts. And so, they had these arguments worked up, but it was clearly racial in intent.

Q And just to - to round out, I suspect everyone's familiar with it, but if they'd just introduced a literacy test, that would have wiped out a lot of illiterate white voters, as well, right?

A Absolutely. Southern states did this in two different ways. In some southern states, they just said, "Well, let's just eliminate the white - poor white people, too!, because we can't trust poor white people either." In other states, they had to

come up with a crib to make sure that all the massive, illiterate white people could vote, as well. There were far more illiterate white people in Louisiana than there were illiterate black people. And so, in Louisiana, they came up with the Grandfather Clause, again, cribbed from other states. There were four different Grandfather Clauses. Eventually, there became six or seven, I think, in which they said, "If you - if your grandfather or father had voted in the election of 1867, then - then none of this stuff applied to you." And the argument there was - again, it was a stake in the game argument that meant that your family had been here, that they had been around for at least 30 years. That meant that - that if - maybe you didn't have the education or you didn't have the money to vote, "But we know that you've been here and you've been voting for a long time. And so, we know you have a vested interest. And so, we're going to let you do it." What that really meant, of course, is that you were white, because before the 1868 document, nobody but white people were allowed to vote. And so, it was a way to ensure that all of the poor white people who did not meet those qualifications could slide under and still participate.

Q And so, was this - did this pattern play out in the majority verdict provision of the 1898 Constitution?

A Absolutely. The same thing happens here. They decide on the same 9 to 3 standard that was mentioned, that had been lobbied for in the pages of the Baton Rouge newspaper and these other, kind of, press incidences who had, kind of, made the claim that a 9 to 3 verdict would suffice. They actually say, Thomas Simms, the - the head of the judiciary committee which was responsible for putting together the entirety of all of the judicial processes of - of the convention, actually says - I don't know exactly where it is. But what he says is that what we have done by creating a streamlined jury process is to eliminate the

possibilities of more lynchings. He actually uses the same language that is in those newspaper articles, kind of, saying that we are giving ourselves an excuse not to have to lynch so many people, because we have gotten rid of black jury service. In the law itself, however, they never say anything about race, color, or previous condition of servitude when they talk about jury service, because A, they know, in the same way that the - the - the - the disfranchisement laws were structured that they have to, to pass constitutional muster, but even more so for juries, because under the jury thing, they have federal eyes on them for that, as was demonstrated the year before. And so, though the Convention very clearly says, "We're here for white supremacy. We're here to take the votes away from black people," they openly say that, even though they structured their laws very differently, they're far more quiet about the jury-service law, not because they're less passionate about it. I mean, it is obviously one of the - kind of the core elements about of the way their racial thinking had developed in the 1880s and the 1890s, but instead, because that was the issue that was being discussed at the federal level and by the influential black citizens of New Orleans. And so, by, kind of, making this case, what they assured themselves of being able to do was to still be able to allow themselves black jurors, keep the federal government off their back and still make sure that no black juror could ever really have a say when it mattered.

Q And, Professor Aiello, in your opinion, was it the intention of the 1898 Constitution to introduce the majority verdicts for the purpose of racially discriminating against black persons in Louisiana?

A Absolutely.

MR. BOURKE: And, Your Honor, I'm about four minutes away from what might be a convenient breaking

point, but I'll just finish up the late 19th century.

MR. BOURKE-CONTINUING:

Q What other matters have you identified in your research, and we can address it quite briefly given what you said is, the - the other pressure in the criminal justice system created by the convict lease system. Explain to His Honor how that may have played in here, as well.

A Right. Convict lease played a large role in the other element of redemption. If you want to recreate what - what life was like for white people before the Civil War, it's great to get - black voting ended. It's - it's great to segregate stuff. But what you really need to do is get free black labor. I mean, that is the whole point of the slave system. And so, White Louisiana, along with every other southern state, every other deep south state, I should say, created a system known as "convict lease," wherein they used the - the loophole in the 13th Amendment to put people in bondage. The South - the White South and Louisiana, in particular, had always made a state's rights, kind of, case that they argued for small government and the fewer institutions the better. And so, they, kind of, held that provision and they decided that if we need free labor what we really need to start doing is arresting more people and convicting them of crimes. And they do that, and as they start arresting all of these people, they passed new laws against vagrancy and - and there was a law against improper conduct, whatever that could possibly mean. And it was designed to be vague, intentionally, so they could arrest as many people as possible, run them through the court system and then say, "Well, since we don't really believe in institutions, we don't have a lot of prisons. We don't have a lot of things like that. We're just going to take all of these prisoners and lease them out to industries that might need labor," to the railroads who were

trying to reinvigorate the railroad system west of the Mississippi River after the Civil War or, more often than not, to planters to develop their farms. And so, what we see is a large black population moving back on to plantation agriculture. And the convict lease system is - it is in some ways even more insidious than the slavery because for all the horrors that were slavery, there was a vested financial interest for a slave owner to keep slaves alive. The vast majority of slaves, though they were often mistreated and sometimes killed for punishment and things like that, the vast majority of slaves were given three meals a day. The vast majority of slaves did have a roof over their head. And it wasn't because slave owners were nice, it was because if you have made this investment, you want that investment to last as long as possible. You want that investment to have kids, because those kids become free slaves. You want - you want longevity to happen. Under convict lease, that isn't the case. Convict lease creates a system whereby if you have a prisoner for six months, then you're going to get the most work out of that prisoner you possibly can in six months. And if that prisoner drops dead, then, eeh (Spelled phonetically), you can always rent another one for $5.

Q So what - what - of these prisoners involved in this convict lease system at that time, what percentage of them were black?

A In the years that we have in Louisiana, the percentage was between 80 and 85 percent black. Throughout the South, in general, the average is 90 percent black.

Q What's the mortality rate?

A The mortality rate, depending on the year, hovers between 19 percent and 35 percent.

Q So in Louisiana - convicted 85 percent black people put into servitude under convict lease for the -

A For the crimes that were basically just standing in the

wrong place at the wrong time. They had a one-in-four chance of having that be a death sentence.

Q And so how does that relate to the 1898 amendment that lowered the bar for conviction?

A Louisiana's convict lease system was run very differently than the convict lease systems in all the other southern states. It was a monopoly. It was given out to one person, a man named S. L. James, who contracted with the state and paid them thousands of dollars a year to have the total, private control of all convicts in the state. So it was a sweetheart system that he paid his influential friends to get. He bought an old plantation to be able to run the convict lease system. It was called Angola, and he would take all the prisoners in the state out to Angola. He would work his own farm there and then he would lease all those convicts out and make money over and against what he was paying to the state. The state gets paid. He gets paid. And by - he first signed a 21-year lease, then he reupped after the 21st year in 1891 and created a new system where he was paying about $35,000 a year to the state for the right to take all the convicts and lease them out under his watch. Just on the records that they kept, we have under his watch a death rate of about 25 percent, on average, once you, kind of, go through all the numbers.

Q And so he was using that free labor or cheap labor. Were any of the conventioneers of 1898 implicated economically in that system, as well?

A Absolutely. I mean, the only reason he was able to get that deal is because he was very close allies with democratic politicians in New Orleans and in the surrounding parishes, and they certainly benefited from that. There were several - they weren't technically calling them plantations at that point. There were several large farm owners who were using convict

labor who were at the convention. Absolutely, there was a vested stake for everybody in the state and it really looks different. I mean, all the different states had convict lease, but none of them - but none of them else [*sic*] got nonunanimous juries. The reason why Louisiana does is because they have that monopoly, because there was a certain person that they had dealt with that is paying them money, that's a special interest. That special interest doesn't exist in the other states. It has happened - kind of, at least happens at a local level everywhere else.

Q And so, there was a political and economic pressure to keep the conviction rate of black citizens high.

A Absolutely.

Q And it has been suggested elsewhere, Professor, that maybe the 1898 convention was flagrantly racist white supremacists, in relation to suffrage that, maybe, the majority verdict cause was just an example of white supremacists engaging in race-neutral good government. In your professional opinion, is there any possibility that is true?

A There is absolutely no possibility that is true. I mean, I'm sure that plenty of the things that they did were just engage in race-neutral good government. I mean, there were lots of things about government that you just have to do that don't have anything to do with race. But when something that is this overt, that has been talked about this much for 20 years, and that is being investigated at the moment, and that is in your face constantly and you have dedicated yourself to white supremacy and eliminating black power - remember, black political power is more than just voting. Disenfranchisement is taking away black political power, and part of your political power is being able to serve on juries.

Q Thank you.

MR. BOURKE: Your Honor, I'm going to have the

Professor provide some testimony about the 1973, 1974 period next. And so this represents a convenient breaking appoint, if Your Honor wished to take it, or I can keep going. It's up to the Court.

THE COURT: I normally don't stop for lunch, but we're going to stop for 15 minutes and then we'll resume. You can step down, sir.

MR. BOURKE: Thanks. Just before we do, if I could -

THE COURT: Yes, sir.

MR. BOURKE: - offer Exhibit 23, exerts from the 1898 Constitutional Convention.

THE COURT: Any objection, ma'am?

MS. WILLIAMS: No objection, Your Honor.

THE COURT: Let Exhibit 23 be entered. Thank you, sir. You can step down now.

(The exhibit, as identified, was received by Deputy Clerk Miller and filed into evidence **/ Exhibit 23, Exert from the official journal of the proceedings of the Constitutional Convention, dated February 8, 1898)**

WITNES AIELLO: Thank you. (Exiting the stand)

THE COURT: Fifteen minutes.

(Court in recess)

(Court resuming)

THE COURT: Sir, would you come and retake the stand, please.

(Dr. Aiello retaking the stand)

THE COURT: Let's wait for Mr. Maxie.

(Defendant Maxie being escorted into the courtroom and taking a seat next to his counsel)

MR. BOURKE: Shall I proceed, Judge?

THE COURT: Yes, sir, please.

MR. BOURKE-CONTINUING:

Q Professor Aiello, we got to the 1898 Convention and the 1898 Constitution before the break. I know that you have studied the development of that law as it continued into the 20th century in writing your book on this very subject, correct?

A Yes.

Q And I don't think it's in dispute, but just to round out the progression, did that majority-verdict provision roll through into the 1913 and 1921 constitutions?

A It did, 1913 and 1921, they kept the same standard.

Q And was there debate in 1913 and 1921 about it or was it just a reenactment?

A Just a reenactment, no debate.

Q So let's move then to the meat of things, which is getting to the early '70s. I wonder - just before we talk about the 1973 Constitutional Convention, I wonder if you could just briefly set the stage for the political environment and the environment in relation to politics and race and the criminal justice system that operated in the early '70s in the South and Louisiana, in particular.

A Sure, absolutely. The South was really at a racial crossroads in the early 1970s. The success of the Civil Rights Act of 1964 and the Voting Rights Act of 1965 had given way in the Civil Rights movement to a far more militant version of civil rights. The Black Power movement had come around, and while it was making, kind of, theoretically sound arguments, it was alienating a vast number of people. And so, you have a lot of Civil Rights allies who are still, kind of, turning off from the Civil Rights movement and you have the Civil Rights activists that were still prodding through far more militant than they had been and far more scary to, kind of, the - just

the average white Southerner at the time. And so, we have this situation where we've had some serious legal victories, both in the courts and in the legislature, but society was certainly not equal by any means and those still pushing for it were met with many of the same arguments that the people of the 1890s were being met with, who were met with arguments, like, "Well, you got - you got rid of - you got rid of slavery. You've had enough." You know, they had that same kind of argument in the early 1970s, when the Civil Rights activists were kind of pushing for a fuller version of equality and it seemed to them like the system was pushing back, saying, "We've given you enough already." That is epitomized in several different things. I think more broadly speaking, around the South, this was the beginning, in the late 1960s and the early 1970s, of the white Southern transition from the Democratic to the Republican party, wherein a white Southern Democrat, that same code that had always existed for white Southerners who were racist was the guy who gave us the Civil Rights Act of '64 and the Voting Rights Act of '65. It was a white Southern Democrat who was portrayed in the South as a race trader, Lyndon Johnson, who said, "We shall overcome," on the floor of the house of representatives and shocked a lot of his voting constituency in the South. It is because of that - it's no coincidence the very next presidential election in 1968, Richard Nixon runs on the Republican ticket and storms the South on a campaign of law and order, one of the - one of the original, kind of, dog whistle campaigns where he, kind of, asserts to white Southerners that, "I will be a champion of what Lyndon Johnson was not. I will stand in for that kind of thing." And we see the first transition of the White South to the Republican party. That won't be fully completed for a couple of decades. But it starts in '68, and in 1972, we're still dealing with that. At the same time, however,

1971 is the first election of Edwin Edwards in Louisiana. And Edwin Edwards was elected, I think by any reasonable historical standard, because of the black vote. This was the first election where the black electorate really swings that election in '71. And so, while there was still a - a climate of racial tension, the black population of Louisiana had made some legitimate gains that said the tension is always going to - to, you know, everybody's worst problem is always their worst problem. And so, even with gains, things are going to be bad. The badness was probably represented most in 1972 by an incident in Baton Rouge where a group of 30 members of the Nation of Islam are protesting segregation in Baton Rouge and the police come out and shoot several of them and - and kill some of them, and there is a big ordeal about that. The city shuts down for several days in the summer of 1972, after this - this - this, kind of, racial shooting incident, of the police shooting Nation of Islam protestors. Just to kind of - kind of finish out that climate, the year after the Convention, when the Constitution actually takes effect in '74, we get the Destrehan High School desegregation crisis. And, of course, throughout this whole time, there are segregation lawsuits in a vari- every region of the state still has at least one desegregation lawsuit going on and in Destrehan, they try a version of bussing, which is going on in - in Boston at the very same time, '71 and '72 is when all that's going on in Boston. They try that. It doesn't work and the white people get so angry that they are, kind of, accosting the - the school bus with all the black students on it and they're pushing and they're trying to knock it over and somebody fires a gun and it creates this - this murder trial that goes along with it. But it - it demonstrates that while there had clearly been progress and there is no doubting that the Civil Rights Act of '64 and the Voting Rights Act of '65

were good for the people of Louisiana, especially the black population of Louisiana, and there had been this progress and that we do see that play out in the election of 1971, that there is still this racial tension and this conflict because of the new militancy of Civil Rights, which is far more militant than it was before, and this - this response by the white population that is questioning more what they saw as "gifts" to the black community because they had already provided these various laws and they were very afraid of this new militant attitude that did not look like the kind of Martin Luther King activists, you know. They looked far more aggressive and angry.

Q And did I - did I understand you correctly, just to finish this out, that Nixon's "law and order" of politics are born out a campaign of the late '60s, early '70s, in your opinion, was a dog-whistling campaign around when "law and order" was set up as the opposition to Civil Rights?

A Oh, absolutely, and that's not - that's not my opinion. I mean, Nixon admits that later on. I mean, absolutely. I mean, they - they openly admit that, absolutely. That was the whole idea. We finally have - I mean, the South had been solid for the Democrats since Thomas Jefferson. I mean, there had never been an opportunity that Republicans were going to win the South. I mean, Abraham Lincoln didn't even make it on the ballot in the South. So, I mean, this was the first real opportunity. Now we can say, "There's a Democrat in office. He's a race trader." And we can say it in various ways and, kind of, retake the White South for a different political party.

Q And so, coming back more specifically - and thank you for that context - to the majority verdict law. There'd been a challenge that became *Johnson versus Louisiana* in the United States Supreme Court.

A Yes.

Q And I think that came out the year before the convention, is that right?

A It did.

Q And just form, for a second, what we saw in the *Johnson* decision in terms of the contemporary understanding of majority verdicts and their effect.

A Right. So - so *Johnson* was actually argued before the Supreme Court twice, the first time with a different set of justices and under the - the first time it was argued, as they were, kind of, going over their debate, the justices had a tentative five to four to strike down nonunanimous verdicts as unconstitutional. But in between that argument and the second argument, one justice died and another retired, giving Nixon, based on that election from 1968, the opportunity to appoint Lewis Powell and William Rehnquist, both of whom had very different attitudes than the two who had died and retired. And that switched the 5 to 4 against unanimous verdicts - nonunanimous verdicts to a 5 to 4 in favor of them. The - the pro-unanimous verdicts ruling argued that if - that it is consistency that provides the fairness under the law; it is not unanimity. And so, as long as these verdicts are consistent, and as long as everybody knows going in that this is going to be the way it is, then that's fair enough. The dissents, kind of, really took them to task. They were incredibly vigorous. All four - there were three different dissents. All four justices, kind of, making their - their opinions know. First, that in practice, this does have - it had discriminatory intent originally and that it is discriminatory. It argued that it was discriminatory for jurors, themselves, because jurors - it allowed jurors who were not in line with the rest of their - their - their compatriots on the jury to get shouted down and to have their opinion not matter. And if that happens, they

argued, then you've eliminated reasonable doubt, because the whole idea of having somebody disagree and then shouting them down is essentially a demonstration of reasonable doubt. The other argument that they used was that three of the Supreme Court justices, including Rehnquist and Powell, two of the new ones who voted for upholding nonunanimous jury verdicts, had also voted that federal trials had to be unanimous. And they argued that it makes no sense to, kind of, make a 14th Amendment claim that federal trials have to be unanimous and not fold them into the 6th Amendment for the States. The notion that - the notion that you can say, "Well, you have to have a unanimous jury in a federal trial. It's the only way to make it fair." And then say, "But in Louisiana, you don't have to," made very little sense to them.

Q And - and one of the things just to highlight then is that the year before the 1973 Constitutional Convention, some of the dissenting justices in *Johnson* pointed to the discriminatory effect of majority verdicts.

A Absolutely.

Q All right. And -

A Overtly.

Q - and so, then coming to the 1973 Constitutional Convention, can you describe from a historical or chronological perspective, and focusing on the majority verdict provision -

A Right.

Q - how did the convention come to deal with the 1921 Constitution, the Majority Verdict Provision, and how did that make its way through the convention to the final vote?

A Sure. The reason we get a Constitutional Convention in 1973 is because the 1921 Constitution had become unwieldly, I mean, just hundreds of amendments added to it. It wasn't a document. I mean, they were - they were starting to just, kind of, amend

regular laws. It was - it was becoming less of a constitution and more of just, kind of, a - a code. And they wanted to, kind of, create an actual constitution that would be far more succinct and deal with issues on a - on a more-broad basis. And so, they met to do that. One of the committees was designed specifically to deal with the Bill of Rights that had been part of the other constitution, specifically the '21 Constitution, which is where the jury mandate exists. On that committee, a man named Woody Jenkins proposes that just like we have in all the other constitutions, we just, kind of, keep that the same. He proposes a regular nine-to-three jury standard. He is responded to by a delegate named Chris Roy, who at first says - kind of, lets that part go - and says, "Well, what we want to do, though, is try to expand the notion of what counts as unanimity." So to move it from just capital trials to - to life without parole trials, to expand what counts as - as requiring unanimity. And there is debate about that in - in the Bill of Rights committee itself. Eventually, Roy is going to, kind of, add an additional amendment that says, "Let's also move our jury standard to 10 to 2," to move it from 9 to 3. Of course, the other case - the other state that does this, Oregon, was the - the focus of *Apodaca* and Louisiana and it was attended to, and he, kind of, makes this case - wanted you to - "Let's - let's - let's - let's try to just push it up one." Jenkins does like that and they have some substantive debate on this and he makes the case that, "Yes, but they also ruled in *Johnson* that - that our 9 to 3 is fine. There's no reason to change this. We - this has been the way we've always done it." Eventually, that version with the expanded unanimity, but with 9 to 3, ends up coming out of the committee and there is another fight about that. Roy is very much pushing to get ten - is to get - get more expansion. Ultimately, there is a compromise when a delegate named Lanier,

whose first name I don't remember, creates this - this 10 to 2 proposition as a compromise, "We will give something for everyone. We'll reduce the - the unanimity expansion, but we will give 10 to 2, and in that way, everybody is happy. We will successfully build off the 1921 Bill of Rights, and we'll change it a little bit to make everybody else happy. And we'll still be in line with what the Supreme Court said, and we'll just do that."

Q Thank you, Professor, and I want take you to a few of the original documents. Have you, in your research, looked at the records of the convention and some of those original records?

A The records of the '73 convention? Yes.

Q Yes. And so, -

MR. BOURKE: If I may approach, Your Honor.

THE COURT: Yes.

MR. BOURKE-CONTINUING:

Q - and show you what I've marked as Exhibit 24.

(Mr. Bourke showing document to Ms. Williams)

MS. WILLIAMS: Okay.

MR. BOURKE-CONTINUING:

Q (Showing document to Witness)

A (Looking at document)

Q And can you just confirm for us, Professor, that this is the first working document of the committee on -

A Yeah. This is the -

Q - the Bill of Rights?

A - this is the committee's working document where Jenkins first broaches the idea of just maintaining the standard that had always been.

Q And this is - this working document is a first full draft of a proposed Bill of Rights.

A Of a full Bill of Rights, yes.

Q And the provision dealing with jury verdicts is the one proposed by Jenkins, which is to keep it the same as 1921.

A Absolutely.

Q Which is the same as 18 - 19 - 1889, correct?

A 1913 and 1898.

Q 1898, I've become dyslexic somehow.

A (Laughing)

Q So and that's the first document in the Convention that produces a draft of what the jury provision might look like; is that correct?

A Absolutely. Their original - their original intent was just to, kind of, keep going with what they had been doing.

Q And then you referred to what I've marked as Exhibit 25. Professor, can you confirm that what you're looking at is the records of the committee and the Bill of Rights from May 5, 1973, containing the tentative proposals for the jury provisions?

A Yes, it is.

Q And that - that contains, starting in the right-hand column, "Tentative Proposal 85, 86, and 87"?

A Yes.

Q And so, who is that first tentative proposal by? Tentative Proposal 85?

A Eighty-five is from Jenkins. It is essentially, kind of, describing the - the 9 to 3 standard as being the original idea.

Q And so, the working document was the 1921 standard, Tentative Proposal 85, the first proposal on trial by jury is the 9 to 3, 1921 standard.

A Absolutely.

Q And then you described what on this document is Tentative Proposal 86.

A Right, just below that Roy - Chris Roy attempts to expand

the requirements for unanimity.

Q So he offers up Tentative Proposal 86, which would expand unanimity to capital cases or cases in which parole or probation - in which no parole or probation is permitted.

A Right.

Q And you indicated there was a dispute in the committee, it indicates adopted four-three and there be a minority report; is that what you're referring to?

A Absolutely. Yes, sir.

Q And then just to round it out, Tentative Proposal 87 is that same Chris Roy language, but then added the last sentence to the right to voir dire.

A Right. This was just a - the basic addition of - of - of a voir dire sentence just to make sure it was there.

Q And then you didn't - you didn't mention in your discussion, but I'll take you to it now, is it the situation that witnesses came and testified in committee, in the Bill of Rights committee, about their objections to tentative proposals and that sort of thing

A Yes.

Q And I'm sorry, I've marked - I believe I've marked those - the - the tentative proposals from May 5th, 1973, as Exhibit 25. I just want to make sure that I did that. And so, turning to Exhibit 26, can you identify that as the minutes of the Bill of Rights committee from May 9th, 1973?

A May the 9th, that's right.

Q And it's recording the district attorney from Caddo, Mr. Richardson, making his remarks about the tentative proposals.

A Yes. It certainly does.

Q And if I can draw your attention to the bottom right-hand corner, is that on that - on that first page there, is that where Mr. Richardson, the district attorney, addresses Chris

Roy's expanded requirement of unanimity?

A Right, he does, and he is not a fan. He asks that some of those phrases be stricken, such as, "For cases in which no parole or probation is permitted."

Q And that's the expansion from just capital cases.

A Right.

Q He wants to get rid of the expansion.

A To keep unanimity at what it always was.

Q I'm showing you what I've marked as Exhibit 27. Can you confirm that this is, again, records of the committee on Bill of Rights from June 14th, 1973, and including on the bottom right-hand corner there Tentative Proposal 155?

A That is correct.

Q And I think we can all see that in that tentative proposal from - it's from Mr. Roy again, correct?

A It is.

Q And that contains the expanded unanimity requirement in non-parolable cases, but also introduces the 10-2 rather than 9-3; is that correct?

A That's correct.

Q And that's the first formal proposal that actually introduces 10-2.

A That is the first time that we get that.

Q And that's June 14th, 1974.

A Right.

Q And, again, was there an objection to that? Is that noted?

A Oh, absolutely. I mean, all of these debates were - were contested. I mean, people were contesting them. So, yes, absolutely, this was adopted, but adopted with objection.

Q And there was, in fact, a minority report submitted; is that correct?

A There was.

Q If I could ask you to look at what I've marked as Exhibit 28, can you confirm that this is a page of the record of proceedings of the convention, so not the committee, but the actual convention from September 8th, 1973?

A That's correct.

Q And this is where Mr. Roy introduced the proposal with expanded unanimity and 10-2 on to the convention floor.

A That's correct.

Q And there was a reference earlier, an argument by Ms. Williams, to the fact that there was an observation during the convention of attempting to reduce the discriminatory effect of the majority verdicts. Is that in - do we see that in this passage?

A That is true. That is in this passage.

Q Whereabouts - can you take us to where that is?

A Absolutely, it's down in the bottom right, about 20 lines up you see a reference to Robert Kennedy.

Q Perhaps, maybe you could just read the relevant part.

A I'll just - I'll just read this out to you. "Now ladies and gentlemen, Robert Kennedy once said that 'The poor -," excuse me, "- that the only people to whom justice is administered are poor.' For the poor are the ones that only get justice. He had a good point. Because if you check with any of the staff, you will find the statistics show that generally ugly, poor, illiterate, and mostly minority groups are those people who are convicted by juries. Juries don't generally - and that's particularly in murder cases - juries just generally don't convict nice-looking, intelligent, well-meaning, decent people like all of you folks here in this convention. But remember that you represent maybe only .0003 of one percent of the people of this state. I urge you to accept the section. Let's not get off on any harum-scarum tactics. I've had enough of it." But his

argument there is that by going to 10 to 2, you reduce discrimination, which itself is an acknowledgment that anything less than unanimity is discrimination, because you can't reduce something that doesn't exist. He's admitting the discriminatory nature of both of them.

Q I think in particular its - its impact on "ugly, poor, illiterate, and mostly minority groups."

A Indeed.

Q And the last one. And, Professor, can you just confirm that what I've handed you marked as Exhibit 29 is a further page from the record of the convention proceedings dated September 8, 1973, and that this is where Mr. Lanier introduces the compromise provision?

A That is correct.

Q And that's the provision that eliminates the expansion of unanimity, limits unanimity to capital cases, but moves us from 9-3 to 10-2.

A But gives us 10 to 2, right. One side gets one thing, one gets the other. It's a compromise bill.

Q And that - that provision is the one that found itself into the proposed constitution and voted into the 1974 Constitution.

A Right.

Q And just to understand the approach then of the convention and the constitution, were they trying to advertise to the public that they were making radical changes in the law, or were they trying to - to suggest continuity in the law (Incomprehensible words)?

A Quite the opposite, actually. The goal, the stated goal of the conventioneers was to make as little change as possible because - with the exception of shrinking the document, of course, from all of the amendments. But they wanted to assure the population that they weren't making any dramatic changes

because this constitution had to be voted on by the public and if you need to get the public on your side, you need to convince them that everything is basically status quo.

Q And so, then in relation to the - the language that came into the '73 convention and then there was some amendments that came out, as a historian, do you have an opinion as to whether or not that language and that majority-verdict provision is traceable to or rooted in the 1898 Constitution?

A Absolutely. I mean, I think they openly admitted it. I think it's very undeniably traceable to the 1898 Constitution - or at least to 1921, which is traceable to the '13, which is traceable to the '98.

Q Thank you. And just to round out the understanding at the time of the discriminatory effect of majority verdicts, were there some cases in 1979 that we should pay attention to?

A There were. There were two cases in particular that dealt with challenges to black jurors. In both of these cases in 1979, the argument was that lawyers were intentionally striking black jurors from the jury box specifically because of their race.

Q And you are talking about peremptory challenges there.

A Yes. Yes.

Q Go on.

A So the idea was that - the court required that the defendant prove that the jurors were being struck specifically because of their race and they are able to do that; and the prosecutors had admitted to such. And it demonstrated in both of those cases that it was clear that this was a practice that was being undertaken at the time. And they were interpreted in the media as representative of a possible pattern of impropriety.

Q And was there a link between - or was there a discussion, as well, of the role of majority verdicts in this practice of peremptorily striking all of the African Americans who were

presented?

A Absolutely. One of the - one of the lawyers, themselves, actually said that, "You got to strike - you have to strike most of your black jurors. But if you can let one or two on, it'll be okay because we have majority verdicts."

Q And these are - just to -

MR. BOURKE: I won't burden your clerk with the exhibits, Your Honor. I'll read the citations into the record.

MR. BOURKE-CONTINUING:

Q - you're talking about *State vs. Brown*, 371 So.2d 751 from May 21st, 1979; and *State vs. Washington*, 375 So.2d 1162 from June 25th, 1979.

A Also from '79, that's right.

Q And the prosecutor in those cases and the other lawyers who testified, testified specifically to the deliberate exclusion of all African Americans except in a case where the majority verdict you might let one or two on.

A Right. Right. Absolutely.

Q And as a historian, what - His Honor is a lawyer and can work out what the legal context of those cases is, but what does that mean for you in terms of the understanding of the discriminatory effect of the majority verdict at that time?

A Right. That - the - the discussion around it, kind of, argued that this might be a pattern. I think this isn't necessarily born out by, you know, one or two lawyers who are doing this. But what it does demonstrate is that there are instances where nonunanimous juries are used specifically to cover racial intent by including black jurors that you know won't have the ability to sway a jury.

Q Thank you, Professor. I'll lend the State the opportunity to ask you some questions.

THE COURT: Ms. Williams.

MS. WILLIAMS: Thank you, Your Honor. Your Honor, before I start, could I ask the Court's indulgence. I have not been feeling particularly well. Would it be okay if I questioned Professor Aiello while seated?

THE COURT: Yes.

MS. WILLIAMS: Okay. Thank you.

THE COURT: Do you need a break?

MS. WILLIAMS: No, sir.

THE COURT: We could take a break, if you like.

MS. WILLIAMS: I'll be okay. Thank you.

THE COURT: Okay.

MR. BOURKE: I'm sorry, sir. I did it again. I wonder if I could move into evidence Exhibits 24 through 29.

THE COURT: Do you have an objection, ma'am?

MS. WILLIAMS: No objection, Your Honor.

THE COURT: Let 24 through 29 be entered.

MR. BOURKE: And maybe you could provide those copies to the clerk.

WITNESS AIELLO: Absolutely.

THE COURT: Are those what you've been looking at, sir?

WITNESS AIELLO: Oh, just all of it. Okay, absolutely. Here you go. (Handing exhibits to Bailiff Gentry, who, in turn, handed exhibits to Deputy Clerk Miller)

(The exhibits, as identified, were received by Deputy Clerk Miller and filed into evidence **/ D-24 through 29. Please see Exhibit Index for detailed description of the exhibits.**)

MR. BOURKE: Thank you.

CROSS-EXAMINATION OF DR. THOMAS AIELLO

BY MS. WILLIAMS:

Q All right, Professor, bear with me. We've covered a lot of ground.

A Oh, yeah, that's all right. Sure.

Q You have admirable fluency when talking about this.

A Yeah.

Q As you said, you're a historian; is that correct?

A Yes, ma'am.

Q That's your field. Now, when discussing this convention or the actions in 1898 - now, obviously, you're not a contemporary of any of those persons who were involved in those proceedings, is that correct?

A Right.

Q So - so the sources of your information are what, media reports?

A Well, there are media reports that didn't do that. And even though the convention records aren't as massive as the ones in '73, there are plenty of convention records themselves. They were keeping records of the convention itself.

Q Okay. Now, are you familiar with the possibility that, perhaps, politicians do not always give all of their reasons when they're speaking publicly?

A It turns out that way.

Q Yes. And when you say - because you've used this phrase a lot, "they thought" or they used "code words," -

A Yes.

Q - you're, in fact, expressing your opinion; is that correct?

A Well, no. I mean, we - and I realize the standards of evidence for historians are different than the standards for lawyers, but, I mean, I think any historian who studies the

South will tell you that that is a generic truism; and we have enough examples of it across the South to be able to demonstrate that racial code of language was incredibly common and it was used all the time, and that it was part of the lexicon of almost every single white Southern speaker that made its way into the public record.

Q But, again, generic truisms aren't necessarily evidence, it's not a witness standing here, testifying saying, "Yes, this is my opinion. This is my thought process. This is why I did what I did." Would you agree?

A Right. No, right. Absolutely.

Q Okay. And even back in 1898, there isn't evidence that public opinion, or, at least, white-public opinion was completely homogenous on this point, is there?

A Well, it depends. If we use just, kind of, election results of the Democratic party, which wasn't about white-supremacist organization, we can say that it's over 90 percent. So, yes. I mean, there is not complete homogeneity. There was no way to talk about the White South as one thing. You're absolutely right. There were also class differences in between the various white groups, who do not like each other necessarily. But I do think it's - it means something that Louisiana chose to get a grandfather clause and many other Southern states did not. I mean, their white population was far more homogeneous than many of their neighbors. And so while nobody is going to have complete uniform opinion, it was an overwhelming majority, into the 90th percentile.

Q But you did speak about a coalition of poor white farmers and -

A Yes.

Q - African Americans who did elect an African American governor, is that correct?

A No. No. They didn't elect an African American governor.
Q Oh, I'm sorry. I misheard you.
A But they did - they lost that election, but they did put the fear of God into the leaders of the white Democratic party. That was only for one election. The Populist party grew up in 1892. It - after it lost in 1896, it fizzles out. And so, it's only a one-election cycle. It just happens to be that election cycle, the same election cycle where we're getting *Plessy* and where we're right before that constitutional convention. But, yes, there was this one radical movement in the South and in the West where agrarians got together against rich people. But, unfortunately, it had - or fortunately, depending on who you are - it only had about a five-year life span.
Q But it take place?
A Absolutely.
Q And it did show that not all white persons at that time had the same opinion on the subject of race - intersection of race and politics, perhaps.
A I think that's fair to say, although, almost every single leader of Louisiana's white populist were avowedly white supremacists. So they all still - everybody who still - was part of that coalition, and it was on the record, was decidedly racist. But, I mean, in among all politics? Maybe. Sure.
Q Now, we - you saw - let me find my stack here - numerous exhibits that were introduced by Mr. Bourke, these articles from the late nineteenth century.
A From the newspapers. Right.
Q Yes.
A Yes, ma'am.
Q Yes. How many of those - I guess some of them appear to be letters to the editor or for the Op-Ed type piece, how many of those were written by persons who were delegates to the 1898

Convention?

A None.

Q None? So these represent the opinions of either members of the media or just members of the public who wrote in?

A They do, but news was read differently in the 1890s. I mean, they're not on an opinion page. I mean, uh, -

Q Well, I understand there may have been different journalistic standards at that time.

A The journalistic standard was - I mean, those were considered to be news articles, with the exception of the one that was overtly a letter to the editor. Those were considered regular news. All of that news was just filtered editorial opinion in the 1890s, generally, but it would have been accepted as news by any reader.

Q But those views don't reflect, necessarily - we don't have evidence that those views are - were written by persons who were delegates to that convention?

A Like, direct one-on-one correlation?

Q Yes.

A No.

Q And going back to, again, the 1898 Convention, when he was making some remarks about the - switch the majority verdict scheme, the 9-3, didn't President - I can't pronounce this name - Kruttschnitt -

A Kruttschnitt. Yeah, it's a weird one.

Q - didn't he make some comments focusing on the efficiency and the economy of the majority verdicts in lessening the burdens on the parishes?

A He did. Simms used the same language. It was the exact same language. It was in that newspaper article about stopping lynching.

Q But I'm talking about President Kruttschnitt.

A Yes.

Q Okay. Now, and I believe you admitted earlier that you can't really ascribe a racist purpose to every action of that 1898 Convention, is that correct?

A Absolutely. Absolutely.

Q And you made some remarks earlier about the delegates to that convention having - I guess you said "the fear of God or the federal government overseeing their actions" and they were being very careful to use code words and hide their intentions. But wouldn't you say that the openly racist speeches that opened up the convention, sort of, bely that fear?

A Right. No. I see what you're saying. The only time they really had to couch their language, it was around the jury system, because the jury system was the only thing that was under the purview of a possible investigation. And so as long as all of the language comes out race neutral in the actual constitution itself, and as long as they're not overtly talking about black jury service in the constitutional convention, they should be okay. I mean, they're model was the Mississippi Convention, which openly stated white supremacy and that kind of stuff, too, and then used the race-neutral language. So they would have modeled their same thing after everybody else in the South.

Q But, again, that is your opinion. It may be a learned opinion, but it is an opinion. That's - we don't know -

A Of which part?

Q That that was their thought process.

A Well, I mean, we have plenty of them, kind of, acknowledging the - the other Southern constitution writers as their background. I mean, I think we can state that as - as fact. But again, you know, evidence of history and the evidence of law, I mean, there's no one-to-one correlation there.

Q What was the result of Senator Chandler's resolution?
A Um, not much. The reality is that what Chandler wanted to investigate or claim to want to investigate in Louisiana was actually being done all across the South. The only reason he singles out Louisiana is because Louisiana has that one influential black population who can actually get a voice to him. There is no intense federal investigation. And the reason there is no intense federal investigation is because Louisiana keeps black jury service. I mean, once you create the 9 to 3 standard - I mean, we get black jurors all the way until 1909, because they don't need to start erasing black jury service and to get themselves noticed by Chandler, because once you create the 9 to 3 standard, you can let on at least three black jurors and be okay. So they were able to evade any kind of federal investigation simply by making it 9 to 3 by allowing black jurors to serve.
Q Now, when you look at records from trials at that time -
A Um-hm (Responding audibly and affirmatively).
Q - I mean, undoubtedly there are examples of jury trials where the verdict did not break down on a 9-3 - on 9-3 racial lines. Were there, perhaps, black jurors who did vote for guilt? Is that correct?
A Absolutely.
Q So the prosecutors at that time could not assume that black jurors would vote to acquit.
A No.
Q And coming forward to - I have just a few more questions - the 1973 Convention, let me find my page. If you could look at Page 53 of Exhibit 29.
A I gave all my papers away.
Q Oh, I'm sorry (Laughing softly).
MR. BOURKE: So, Exhibit 29?

MS. WILLIAMS: Yes, it's Page 53.

(Pages being given to Witness Aiello)

WITNESS AIELLO: Thank you.

WITNESS-CONTINUING:

A Yes, ma'am.

Q On this page, if you look on the left column -

A Okay.

Q - about half-way down, didn't Mr. Lanier say that the switch to the 10-2 verdict was about judicial efficiency?

A Let's see (Reading paper).

Q Here it says, "It leads to a situation where you'll get a definitive action in more cases rather than have a hung jury. Because if it required twelve out of twelve to render a verdict, that means that if you had anything less than twelve out of twelve, either for innocence or for guilt, you would have what's called a hung jury, and that means you would have to go back and do it all over again. And this is one of the modernizations of our criminal procedure."

A Right.

Q So he's speaking not to racially discriminatory reasons or anything else, he's speaking to judicial efficiency at that point.

A No. I'm not accusing Mr. Lanier of being a racist. I'm just saying that it's continuing a standard. He's building off a standard that was before. And remember, judicial efficiency was also the language in the 1890s. So, I mean, you know, they're using the same language either way. But, I mean, he's still building off of the original constitution, off of a - a racist law.

Q Did anyone in the 1973 Convention come out and say that they were doing this for racist reasons?

A No. No. And I don't think they were. I think they had known

this their entire life.

Q I'm sorry. You said "think" what?

A I think they had known this standard their entire life. I mean, I - I don't, I mean, that is the nature of the problem with racist laws like this. I mean, they become part of the way we thing because we've never known anything else. I think that's - I think that's what they were doing there. I don't think they were racist. I mean, they might have been racist, I don't know them, but I don't think they were doing anything racist here, no.

Q Okay. So in your opinion at the 1973 Convention, when they made that change to 10-2, it was not for racist reasons.

A For racist reasons?

Q Yeah.

A No. I mean, they acknowledge that it had - that it's for discriminatory reasons, but to try to fix discrimination some -

Q Yes.

A - but in - in - in fixing it, they're admitting that it's discriminatory. So, they accidentally admit it, even though they're not doing it for specifically racist reasons.

Q And when we went through earlier the history of the 1973 Convention -

A Yes, ma'am.

Q - you - you talked about how there were several different proposals on the majority verdict scheme, where it was back and forth, back and forth. Was it going to be retained the way it was? Was it going to move unanimous, on life without parole, but -

Right.

Q - but keep 9-3, back and forth. So this didn't come in as a foregone conclusion as to what the outcome was going to be, did it?

A No.

Q There was some vigorous debate on it, wasn't there?

A There was.

Q I think That's all the questions I have, thank you.

THE COURT: Mr. Bourke.

REDIRECT-EXAMINATION OF PROFESSOR THOMAS AIELLO

BY MR. BOURKE:

Q Professor, just so that no one misunderstands the record, at the very outset of the cross-examination, you were asked about sources of information about 1898 and there was reference to media reports and the convention records. As a historian who studied that period, do you rely on other sources of information in learning about that period and the people involved than just the media reports and convention records?

A No. Not all of them, some of the - some of the conventioneers have - their papers have survived. These people are very influential and so, they are the kinds of people who normally have their collections saved. So we can actually see what they are writing and what they are thinking. We have many of their letters to and from other places. No, those aren't the only forms of evidence.

Q And Ms. Williams was asking you about the language in the 1898 Convention about economy and efficiency and that that didn't talk about race, that that was facially race neutral.

A This is in 18-

Q 1898, Kruttschnitt -

A Right.

Q - and Simms talking about economy and efficiency -

A Right.

Q - for the juries.

A The efficiency that they were arguing about, of course, was to make sure we didn't have to lynch people.

Q And there were hung juries with black voters who - black jurors who wouldn't go along.

A Right.

Q So given the times and given what we know about the people speaking those words and the way that they spoke at that time, should we accept those as genuine expressions of genuinely race neutral expressions?

A No. Not at all, in 1898.

Q And just to be clear, you were asked questions about the back and forth of the proposals. It's been suggested elsewhere that the first proposal in 1973, in relation to jury service, was a proposal for 10-2; is that correct?

A That is not correct.

Q And so, when we talk about a "back and forth," they started with the 9-3 system from the 1921 Constitution.

A Yes, they did.

Q And then there was an effort to amend that.

A And - right. And then the debate was over how to tweak the one that had always been there.

MR. BOURKE: I have no further questions for Professor Aiello.

THE COURT: Thank you, sir.

WITNESS AIELLO: Thank you. (Exiting the stand)

MR. BOURKE: Your Honor, I would like to - I have one more witness.

THE COURT: Yes, sir.

MR. BOURKE: I'd like to call Thomas Frampton.

THE COURT: Sir, would you come forward and take your oath, please.

(Thomas Frampton coming forward and being administer the oath by Deputy Clerk Miller)

THE COURT: Please have a seat.

(Thomas Frampton taking the stand)

MR. THOMAS FRAMPTON,

having been called as a witness by counsel for the Defense, having been duly and properly sworn, was examined and testified as follows:

DIRECT-EXAMINATION OF MR. THOMAS FRAMPTON

BY MR. BOURKE:

Q Mr. Frampton, could you please identify yourself by your full name and your current place of employment.

A Good afternoon, my name is Thomas Frampton. I am a Lecturer on Law and Climenko Fellow at Harvard Law School.

Q And, Mr. Frampton, if I can show you what I've marked as Exhibit 30 and have you confirm that that is your curriculum vitae.

A (Looking at document) It is.

Q And I think you'd indicated you're currently lecturing at Harvard University. Could you also explain your status as a - a Climenko Fellow. What's the focus of that work?

A Yes. My primary position on the Harvard Law's faculty is a research fellowship. It is a two-to-three-year fellowship to support a generation of legal scholarship.

Q And just to take us through your academic qualifications, you've indicated here you've got a graduate degree in American Studies from Yale.

A That's right. I received an MA from Yale University in 2006 in American Studies. I graduated there, summa cum laude with distinction.

Q And just so that we're clear, what does that study in American Studies involve?

A So as a requirement for the master's degree, I produced a master's level thesis and two years of graduate course work, including the graduate historiography, American historiography,

and a methodology class.

Q And you also then have a law degree from Berkley?

A That's correct.

Q And I'm not going to embarrass you, but you appeared to have graduated from there with the highest possible graduate honors, when you were going to Berkley.

A I did and received graduation prizes for legal scholarship and for GPA and writing.

Q In your profession and in your current practice of your profession, do you have a speciality or focus in your legal research and writing?

A I do. I primarily do legal history and the study of race and the law, with a background in criminal law.

Q And is this something that you have researched, written, and been published in this area?

A It is. My more-legal-history focused work includes a history of the development of - concept of criminal predisposition in the American legal imagination in the early twentieth century and the late nineteenth century. That was an article published in *The Journal of Criminal Law and Criminology*. My work, coming out of the master's thesis, was a peer-reviewed historical article on race and legal violence in the mid-nineteenth century; and I've also done work on the development of variations in state-court jury practices that was published in the *California Law Review*.

Q And you also, we know, related work with the principle author on an amicus brief in the United States Supreme Court.

A That's right. I was hired by the Japanese American Citizen's League to author an amicus brief urging *Korematsu* to be struck down, discussing and focusing on the history of anti-Japanese American animus in twentieth century America. That was this Spring.

Q And to give credit where it's due, they did strike down *Korematsu*.

A That's correct. The brief was cited and the dissented opinion responded to by the majority opinion in striking down *Korematsu*.

Q The dissent of the ones who cited, too, but the majority struck down *Korematsu*.

A Correct.

Q And in addition to that, have you conducted specific research into Louisiana's majority verdict system?

A Yes, I have. That research is primarily contained in a forthcoming article in *The Vanderbilt Law Review* entitled, "The Jim Crow Jury."

Q And how long have you been researching the background of the majority verdict system and its discriminatory effect?

A Approximately a year and a half of work or research went into that article.

Q And what - what has your work then, in preparing and developing information about that, - to be able to publish that article involve?

A So it involved a range of research activity, including archival research in Louisiana, the National Archive, the Library of Congress. It involved an empirical component, as well, which focused on examining the legacies of past discrimination and the ongoing impact of, among other things, the nonunanimous decision rule that Louisiana still retains.

Q And in turn, you'd indicated you had a focus on race and the law. Is that - in your research and your writing, is that somewhere where you've done work over the years on empirical proofs of discriminatory effect, that sort of thing?

A It is. It's part of the work in this research, but in previous research, as well. I've studied and focused on

different ways that federal courts and the US Supreme Court have articulated standards and tests by which racial discrimination can be measured and established.

Q These are - you're talking about mathematical empirical tests -

A Correct.

Q - endorsed by the US Supreme Court.

A Yes.

Q And you've researched and written about and are familiar with those.

A I have.

Q And just to be clear, in your work in developing your - your research on the majority verdict, is that something you've worked on alone, or have you worked as part of a team with other people?

A I - I'm the author of the forthcoming article, but my research - I led a team of folks at Harvard Law School, including research assistants. I also enlisted other members of the Harvard Law School faculty who essentially checked and corroborated the empirical components.

Q These are people with expertise in empirical work of the law?

A Law and econ, folks on the faculty.

MR. BOURKE: Your Honor, I'd like to offer Mr. Frampton as an expert lawyer, with a specialty in legal history, race, and the law.

THE COURT: It's a specialty in what, sir?

MR. BOURKE: Legal history, race, and the law is what he indicated his - his special focus was.

THE COURT: Do you care to traverse, ma'am?

MS. WILLIAMS: No, Your Honor.

THE COURT: Do you accept him as an expert in

that field?

MS. WILLIAMS: Yes, sir.

THE COURT: Recognized as such.

MR. BOURKE-CONTINUING:

Q Now, you were - been present in court while Professor Aiello's provided that historical recounting of 1898 and then 1973 and 1974. Is that something you've also researched?

A It is.

Q And would you endorse his testimony, in your opinion, as accurate?

A His scholarship and over-arching opinions as to the discriminatory intent behind the 1898 enactment is something that I would wholeheartedly endorse and - and concur with.

Q Now in terms of - so I'm going to leave that. We've heard a lot about that. I'm going to talk about the empirical piece of the puzzle here. What was the dataset that you analyzed when you talk about analyzing the discriminatory affect of the majority verdict (Incomprehensible word)?

A Part of my scholarship was to independently look at the raw data that was collected as part of the Simerman-Russell dataset, and to look at that data to - to assess whether or not there was ongoing disparate impact when you approach the problem from different ways in the contemporary practice of criminal law in Louisiana.

Q And that was comparing it with the standard set out by the United States Supreme Court.

A That's right.

Q You were present in court when Mr. Simerman provided his testimony by telephone earlier?

A I was.

(Mr. Bourke showing document to Ms. Williams, and then handing same to Witness)

MR. BOURKE-CONTINUING:

Q Mr. Frampton, I've handed you what I've previously marked for identification as Exhibits 8 and 9. I've actually - can you take a look at the exhibit marked 8 and see if you can identify that for us.

A I can. It's the printout of the website and hyperlink posting the methodology and the actual raw data that was collected as part of *The Advocate's* work.

Q And you heard Mr. Simerman describe that that had been posted on *The Advocate's* website? Can you confirm that Exhibit 8 is a printout of what Mr. Simerman was describing in his testimony?

A Yes.

Q And, Exhibit 9, can you identify what that is a printout of.

A Exhibit 9 is the slideshow interactive presentation that was published as part of *The Advocate* study.

Q And you can confirm that that is the slideshow that Mr. Simerman was referring to that was posted online and that is Exhibit 9?

A Yes.

MR. BOURKE: Your Honor, I would like to now move Exhibits 8 and 9 - I'd previously only marked them for identification - move those into evidence.

MS. WILLIAMS: No objection, Your Honor.

THE COURT: Let 8 and 9 be entered.

MR. BOURKE: Your Honor, while I'm at it, if I could move Exhibit 30, Thomas Frampton's curriculum vitae into evidence.

MS. WILLIAMS: No objection.

THE COURT: Let it be entered.

(The exhibits, as identified, were received by

Deputy Clerk Miller and filed into evidence / **[Defense] Exhibit 8, article entitled "Download Data Used in *The Advocate's* Exhaustive Research in 'Tilting the Scales' Series dated April 1, 2018"; Exhibit 9 printed copy of "Titling the Scales" slideshow; Exhibit 30, curriculum vitae of Thomas Ward Frampton)**

MR. BOURKE-CONTINUING:

Q So bringing you to the - your analysis of what you call the "Russell-Simerman" data, that's - when you say that, you're talking about the data that John Simerman testified about.

A That's right.

Q What - what were the areas of possible discriminatory effect you, in particular, were analyzing?

A So, I - 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 of a nonunanimous 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 nonunanimous jury and also from the perspective of defendants.

Q And just so that there's no confusion for anyone, did you count the data slightly differently than the way it's reported in the - *The Advocate's* study?

A In certain regards I did. So for example, in *The Advocate* study, their basic unit of measure is the number of cases involving nonunanimous verdicts. I chose as my basic unit of measure the number of nonunanimous verdicts, which is slightly different, because in certain cases, there might be a mix of unanimous verdicts and nonunanimous 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. And so for - for my purposes of what I was looking at, that

seemed like a more precise unit of measure.

Q And so, how many - I want to talk first about the possible discriminatory effect on jurors. How many verdicts, if that's the unit you were using, how many verdicts were you able to identify where you could - where the dataset provided the - the race and voting breakdown of the jurors?

A There were 199 individual verdicts in the dataset where we knew the votes cast by every juror and the race of each of the votes, 199 nonunanimous convictions - excuse me, cases with racially-mixed juries and 190 of those being convictions, convictions by nonunanimous juries.

Q Okay. So - so that's 490 nonunanimous convictions. That's not unanimous and nonunanimous. I might have misunderstood.

A I apologize. So I - my - I was looking at 190 nonunanimous racially-mixed convictions. And so, in those 190 cases, we actually had our "N" equals 2,280. That's 190 times 12. There's 2,280 individual votes cast in those cases. So I was examining -

Q Which is each juror for each verdict.

A Precisely.

Q So 2,280 examples of voting behavior. And these are just the majority verdicts. There was other data on the unanimous verdicts, but we're just talking about the majority verdicts at the moment.

A Correct. Right now, I'm looking only at nonunanimous majority verdicts.

Q Now, just to - to frame that in the material already before the Court, the Court has received the testimony of Dr. Kim Taylor-Thompson in this area. Are you familiar with that testimony from the *Lee* case?

A I am. Then with her previous scholarship, she's the author of - of an important *Harvard Law Review* article on the concept

of empty votes.

Q And what is that concept?

A So, empty votes is the - the term that legal scholars use to refer to dissenting votes in a super-majority regime. That is to say votes that are cast but are essentially - have no affect on the outcome because of a nonunanimous decision rule.

Q And in Dr. Kim Taylor-Thompson's testimony, she describes the social science literature on discriminatory effect and the clinical trials and studies with mock juries and those sorts of things; and what was her conclusion?

A So, Professor Taylor-Thompson's article and scholarship, which at the time was based primarily on social-science research and other, kind of, controlled studies was that nonunanimous decision rules tend to have a disparate impact on minority jurors, that when we have a regime such as this, that the likelihood that black jurors and white jurors will be casting these empty votes will have their voices effectively silenced is not the same. And so, based on what was known about mock juror studies and other social-science literature and about what we know about how juries deliberating - deliberate, her research predicted that when we have a situation like this, in fact, it would be black jurors who most frequently cast these votes that are essentially overridden, just as the idea was set up back in 1898 when it shifted from a unanimous regime to a majority-verdict regime.

Q And when you studied this Simerman-Russell dataset, did that confirm the hypothesis that - that the - that there will be a disparate impact on black jurors who would - whose votes were more often be left as empty votes?

A It provided startling confirmation of that thesis. What we saw when we looked at the actual numbers was a significant disparity between white jurors and black jurors, as to who was

actually casting the empty votes, in 10 to 2 and 11 to 1 cases. Overwhelmingly, it is black jurors who are over-represented in that regard.

Q So why don't you take those - take us through those numbers. What do the numbers show for white jurors and casting empty votes, how many - their vote - their voting power overall in that group and the empty votes for white jurors?

A I have my raw numbers, and I want to get it exactly right, if I could refer to that?

Q Yes.

MR. BOURKE: (Speaking to Ms. Williams) Do you have any objection?

MS. WILLIAMS: (Shaking head negatively)

WITNESS-CONTINUING:

A So, the starting point is to look at all of the total votes, the 2,280. And of those 2,280 votes, we saw that white jurors were casting most of them. There's - there's 1,461 votes that are being cast by white jurors, 714 cast by black jurors. If, in fact, the proportions were what we would expect - so, I'm sorry - white jurors are casting 64 percent of all of the votes here.

Q All right. So -

A So you -

Q - so of all the votes, empty or meaningful, 64 percent of the votes are white jurors. They make up -

A Right. So if this were not correlated with race, if this didn't have a disparate impact, we would expect to see white jurors casting about 64 percent of the votes that are with the majority, and 64 percent would be empty votes. But, in fact, they are not. In fact, of the empty votes that were cast, only 43 percent of them were being cast by white jurors. So in absolute terms, that's about 21 percent less than the expected

value that we would get there.
Q And when you use that phrase, "absolute terms," are you referring to the concept of absolute disparity, as defined by the United States Supreme Court in its jurisprudence?
A Yes. So one way the - in the race discrimination jurisprudence that disparities can be measured is in an absolute disparity. An absolute disparity is essentially the difference between the expected value, measured as a percentage, and the observed value as a percentage. So here, if we expected to see 64 percent of these empty votes being cast by white jurors, but we saw only 43, then the absolute disparity is 21 percent.
Q Well, let me ask you then about what the observations were of the black jurors.
A So, black jurors, of this 2,280 votes, cast overall 31.3 percent of these votes. So, again, if this were not having a disparate impact, we should see about 31.3 percent of the empty votes being cast by black jurors. Instead, 51.2 percent of the black - of the empty ballots of the ones that are essentially being overridden and having no impact are cast by black jurors.
Q And so, were you able to determine the absolute disparity in black jurors' empty votes?
A Yes. So that's a - that's measured, again, in absolute terms, which I don't think is necessarily the right way to look at this. It's a 20 percent absolute disparity, from 31 percent representation or expected value to 51 percent observed.
Q All right. And the Supreme Court has given us an alternative to absolute disparity. Perhaps, you could explain that.
A Sure. So often times in the race-discrimination context, comparative disparity is the measure that is used, and that's particularly useful measure and - and precise way of talking about racial discrimination when we're dealing with minorities that are, relatively speaking, a smaller sample. So I could give

a basic explanation or example to illustrate concept. 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 kind 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.

Q And so you get the 30 percent because you say if it's dropped 3 percent out of 10 percent -

A Right.

Q - 3 out of 10 is your 30 percent.

A And the Supreme Court discussed this methodology in *Berghuis v. Smith*, but we'd arrived at the comparative disparity simply by dividing the absolute disparity by the proportion in the initial pool.

Q And were you able to determine the comparative disparity for black jurors in having a disparately large number of empty votes?

A Yes. So based on what we would expect the number of empty votes to be cast, black jurors are casting empty votes at 64 percent above the expected value, when measured from a comparative disparity ration. And for white jurors, they're casting those empty votes 32 percent less than the expected value, when we're looking at comparative disparities.

Q Another way that this information is sometimes expressed or is - how many times more likely a black juror is to end up casting an empty vote.

A Right.

Q Are we able to tell what that - what that number is?
A Yes. We calculate that just by looking at the comparative disparity for white jurors who are less likely, and the comparative disparity for black jurors who are more likely. And black jurors are two-and-a-half times as likely to be casting empty votes than we would expect, based on their observed proportion in the overall initial sample size.
Q Now, is it true that the United State Supreme Court has also looked at the concept of statistical significance?
A Yes.
Q And they've told us when things will be accepted as statistically significant as proof of disparate impact.
A Yes. The Supreme Court has done that and, specifically, in the equal protection, race discrimination context and has explained that deviations - observed values that are outside two or three standard deviations are deemed to be statistically significant when looking at racially disparate impact.
Q And is that proof of the 64 percent over-representation of black jurors in empty votes?
A Yes. These are disparities that cannot be attributable to random variations or noise. These are statistically significant disparities.
Q Now, just in terms of the - the dataset, a couple of questions that came out with Mr. Simerman that you may be able to help us with: Of those 190 nonunanimous guilty verdicts, where we have all of the race and voting information, how many of those cases came outside the 2011 to 2016 period?
A Less than 6 percent of them. I also reran the numbers without those cases and, actually, the disparities came out larger.
Q So if including the numbers outside 2011 to 2016 really has any affect, it's only to - it's only that the 2011 to 2016 is

worse.
A Correct. There are some cases from late 2010, I believe only from East Baton Rouge Parish, but they did not in any way reflect a dramatically different pattern. And to the extent that they did, it was only slightly less.
Q And given how few cases, are you trying to draw any big distinction between the 2011 to '16 period and the other cases?
A I can't think of any reason why that would make - no. I am not and I don't think that it compromises the - the observed phenomenon.
Q And amongst those 190 cases with a nonunanimous guilty verdict, where we have the - all of the race information for the jurors and their votes, were you able to look at whether or not there was a distinction between the cases occurring in the bigger urban parishes or the smaller, rural parishes?
A I did. So in the 2,280 votes that we have, they - where we have the most-detailed breakdown, they're from actually ten different parish. And so, some of the parishes have higher African American populations in the general population. The ones with the highest are Orleans, Caddo, East Baton Rouge. So I also reran the numbers, taking out just Orleans Parish, taking out just Orleans, Caddo, and East Baton Rouge and looking at other parishes that had similar African American populations to Sabine Parish, specifically to test this issue about whether the pattern exists when we have a critical mass of African American jurors in the - in the general population or on specific jury panels or whether we saw the exact same patterns occur across the board.
Q And what did you see?
A The patterns were the exact same across the board, even when we took out the - the parishes - the urban parishes, the parishes with larger African American populations. We similarly

saw large over-representations of African Americans casting these empty votes, being the hold-out jurors, whose votes ultimately do not impact the verdict and the under-representation of white jurors in that same group.

Q And you were present in court when Professor Aiello testified that discriminatory - the discriminatory purpose of the majority verdict system in the first place was to limit the effective vote of black people in the jury box, correct?

A I - yes.

Q So based on this analysis of this data, does Louisiana's majority verdict system render black juror's votes empty votes much more often than white juror votes?

A It does. It is continuing to function today precisely as it was designed to function in 1898.

Q And comparing that with the United States Supreme Court's jurisprudence around levels of disparate impact, is that much higher rate of empty votes at a level that matches up with the United States Supreme Court's jurisprudence on proof of disparate impact?

A Certainly, when compared to other sorts of jury discrimination, whether it's fair cross-section guarantee of the Sixth Amendment or other cases involving prima facia case of - of racial discrimination in jury selection or peremptory strikes. The observed disparities here are large, great, and in my opinion, demonstrate an Equal Protection violation.

Q Now, obviously, that's a - I'm going to come to the second part now, which is the disparate impact on black defendants. You'd said that that was the other thing that you studied. What can you tell us about what the data shows about a disparate impact on black defendants?

A Sure. So thus far, we've only been talking about the issue of nonunanimous decision rules from the prospective of the

jurors and whether or not they have disparate impact on white jurors versus black jurors. I was also interested in studying and examining whether or not white defendants and black defendants were equally likely to be convicted by nonunanimous juries or whether that also broke differently along racial lines.

Q And what did you find?

A Sure. So for this issue, we actually have an even greater sample, because although there's 190 convictions in the dataset where we know the votes of every jurist, there's actually a much greater number of total cases where we know if it was a unanimous or nonunanimous conviction, even if we don't know the votes of every jurist. So looking at that much-greater number, what I was able to determine was that when black defendants are convicted, they're convicted by nonunanimous juries 43 percent of the time. When white defendants are convicted, they're convicted by nonunanimous juries only 33 percent of the time. So to the extent that these are convictions that in another jurisdiction would not be a conviction, or would not be a conviction as quickly, the impact of this decision rule is adversely impacting black defendants more than it is white defendants.

Q And that's the - the 43 percent, compared to the 33 percent.

A Right. So the - the 43 percent in, sort of, relative terms, comparing those two is close to 30 percent higher for when we're looking at black defendants than the absolute measure for - for white defendants.

Q And were you and your team able to determine whether that is a statistically significant difference?

A Yes. And, again, it is significant. This is not a product of - of noise or random variations.

Q Now, what can you tell us about the size of this dataset?

Have we, in Louisiana, conducted a large enough study to draw those conclusions?

A The dataset at issue here is larger than any dataset or study that has ever been conducted on the use of peremptory strikes, of which the legal scholarship has eight or nine that have been done, but none have been as broad or as wide ranging as this one. And with respect to the collection of trial results, this is also larger than any other study or dataset that I am familiar with that's ever been done of - of - in US courts.

Q And just to be clear, because you used a slightly-different metric than *The Advocate* study, you've looked at the - the results in their study in that slideshow and using their different metric of cases, rather than verdicts, do you agree with their - their numbers and conclusions?

A The numbers line up almost exactly. It turns out that it doesn't matter all that much, when you're measuring empty votes or effects on defendants, whether you refer to cases being your basic metric or number of verdicts being your basic metric.

Q Thank you, Mr. Frampton.

THE COURT: Ms. Williams.

MS. WILLIAMS: Your Honor, in light of the fact that I was unaware until this morning that Mr. Frampton would be appearing today, could we have 15 minutes to prepare for cross-examination?

THE COURT: Yes, ma'am. You can step down, if you like, sir. Fifteen minutes.

MS. WILLIAMS: Thank you, Your Honor.

(Court in recess)

(Court resuming)

THE COURT: Please have a seat. Court will come to order. Sir, would you retake the stand? Where is the gentleman? Would you retake the stand, please.

(Thomas Frampton, retaking the stand)

THE COURT: Yes, Ms. Williams.

MS. WILLIAMS: Thank you, Your Honor.

CROSS-EXAMINATION OF MR. THOMAS FRAMPTON

BY MS. WILLIAMS:

Q Mr. Frampton, I just have a very few questions for you. You've referred repeatedly to the effect of an empty vote, talking about these jurors who are in the minority on say, an 11-1 or 10-2 verdict, is that correct? Did I understand you correctly on that?

A That's right. An "empty vote" is the term that's used in the legal scholarship to describe that phenomenon.

Q Okay. And you say that they don't have any effect on the other jurors' votes or on the verdict, but isn't it true that even a juror who ultimately is outvoted by other jurors could have effected those juror's verdicts? In other words, like in this case where the man was charged with first degree murder, he was ultimately convicted of second degree, and you had a juror who voted for manslaughter and a juror who voted for first degree. Well, isn't it possible that, perhaps, the juror who voted for manslaughter convinced some of the other jurors in the majority to come down from first to second?

A So I don't know anything about the specifics of the particular case, but, certainly, anyone casting what is called an "empty vote" is part of deliberations, and, presumably, does deliberate with other jurors. There is some social science evidence that in a nonunanimous regime, the opinions and voices of dissenting jurors are listened to less, that less-robust deliberations occur. But I can't speak to the specifics about what does or doesn't happen inside of that jury box.

Q Okay, exactly. You don't know exactly what happens in the deliberation room, do you, or what role these minority jurors

play?
A In any particular case? Certainly not.
Q Okay. And this study that you just referred to, you said that's a social science study? Is that distinguishable from, say, a hard-science study or a more empirical study?
A No. I mean, it's empirical and it is based on scientific methods, but there are different ways in which we try to answer these types of questions. So you could do polling of jurors after the fact. You can get - talk - talk to jurors in that way. You could do mock juror studies. There are different approaches that have been employed by scholars to try to answer the question, "How does race impact outcomes in jury deliberations?" Up until now, however, there has never been statistical evidence as robust as what's been produced that puts numbers on the racially disparate impact in terms of how jurors of different races look at the exact same evidence in real-world settings.
Q But in these social science studies you were referring to, even then, aren't you relying upon the individual juror's opinions or perceptions or recollections of how the jury deliberations went down and which may not necessarily be reflective of the truth?
A I don't fully understand the question.
Q Well, when you say that you - in those social science studies, one of the ways you look at those is, perhaps, by talking to jurors after the verdict and getting their impressions of how things happened, whether they had a say or a voice or were listed to. Well, isn't that dependent upon their individual recollections and perceptions and their own biases?
A I - right, which is a drawback of self-reporting interviews. The mock-juror studies are typically observed by scholars. So they're observed in real-time. That's an advantage of doing it that way.

Q Are the jurors in those mock-juror studies aware that it's not a real case?

A Typically, yes, which is another methodological drawback of doing it that way, as opposed to another one.

Q Yes. That was my next question. Thank you. Now, when you evaluated this data, you have no way of knowing what these juries would have done if they had been forced to go to unanimous verdict; is that correct?

A Certainly, some of the cases that resulted in 10 to 2 or 11 to 1 verdicts, had we been in a hypothetical different jurisdiction that required unanimity, I suspect some of them would have resulted, ultimately, in unanimous verdicts. Some of them probably would have resulted in compromised verdicts. Some of them may have led in mistrials and some of them may have flipped all together in the, you know, *Twelve Angry Men* sort of way.

Q And so that's -

A We can't say with confidence in any given case what would have happened in an alternative hypothetical.

Q Okay. So that's the question you can't answer then, nor can you say what would have happened if the case had hung up in a - under a unanimous verdict scheme and then been later retried. There's no way of knowing that, is there?

A No.

Q Okay. You talked about how this was the largest dataset to be looked at on peremptory challenges and - I forgot the other - jury outcomes, but larger dataset does not necessarily mean better or more accurate, does it?

A Correct.

Q Wouldn't that depend upon the collection methods and the accuracy and thoroughness of the way the data was collected?

A Sure. There have been better design studies and worst

designed studies, in my opinion, in the scholarship.

Q Did you, yourself, do anything to independently verify the data in *The Advocate* study?

A No.

Q And when you looked at these nonunanimous jury convictions, did you do any type of breakdown by the type of charge that the jury was considering to see if that had an effect on the results?

A I did not. No. I was looking only - obviously, because they're twelve packs - twelve-person juries. They are charges that are all punishable at hard labor. But other than that, I did not disaggregate by murder versus rape versus other types of charges.

Q Just one second, Mr. Frampton.

(Ms. Williams is speaking privately with Mr. Burkett)

MS. WILLIAMS-CONTINUING:

Q Mr. Frampton, you're employed by Harvard right now?

A Correct.

Q And you said this upcoming study and paper has been prepared for the *Vanderbilt Law Journal*?

A *Vanderbilt Law Review*.

Q *Law Review*? I'm sorry. Who is the source of funding for your work on this project?

A Harvard Law School.

Q Entirely?

A They pay my salary.

Q Okay. Do you know if there's any grants involved in their funding?

A No. I'm paid out of the Harvard Law School General Fund, like any other member of the faculty.

Q Okay. I think that's it, Mr. Frampton. Thank you.

THE COURT: Mr. Bourke, any other questions, sir?

REDIRECT-EXAMINATION OF MR. THOMAS FRAMPTON

BY MR. BOURKE:

Q Mr. Frampton, you were asked about whether, even though a juror's vote wasn't reflected in the verdict, a juror's presence in the jury room may have influenced the votes of other jurors and you were given a hypothetical. Well, what about the hypothetical, which I believe was the evidence in this case, that after a vote was taken and ten votes were achieved, no further discussion was entered into. Would that empty vote be also empty persuasion in the jury room?

A The one thing that we know for sure is that in a 10 to 2 regime, once 10 votes have been reached, then there's no further deliberations.

Q And I believe some of the social science referred to by Professor Thompson talked about length of deliberation, that deliberations are shorter in majority-verdict cases.

A That's correct and that's born out also by numerous studies that she relies on, that when there is not a requirement for the jurors to reach unanimity, deliberations tend to be truncated.

Q We've been presented with the possibility that back in 1898 Mr. Simms was telling the truth when he said it was just for efficiency and that in the juror studies, the jurors might have been lying about what they were really doing, so we can't rely on them. Do any of those possibilities attract you as a reason to change your opinion?

A No. From my own research into the historical aspect, I think that there is every reason to believe that references to efficiency are essentially code words for being able to more efficiently mute the impact of - of black jurors and that the hypothesis that we shouldn't trust social science research that's based on interviews or other forms of self-reporting

because of systematic deception and how people self-report who are members of studies, seems fairly implausible.

Q An extremely polite answer, Mr. Frampton. And so, just to sum up them what you had said and answered to Ms. Williams, so that I'm sure I understand it, notwithstanding the questions she's asked you, is it your testimony that Louisiana's majority verdict scheme, introduced in 1898 to discriminate against black people, as we stand here today in the twenty-first century, continues to have a discriminatory effect against black people?

A Yes. That is exactly my testimony.

Q And you have described the evidence of disparate impact. Is there any evidence that it doesn't have a disparate impact?

A Overwhelmingly, when you look at it from the prospective of defendants, from the prospective of jurors, when you cut up the numbers and look at them from every different angle that I did, we continue to see a disparate impact of - to the detriment of African Americans.

MR. BOURKE: I have no further questions, Your Honor. I would ask that Mr. Frampton be excused.

THE COURT: Thank you, sir.

(Thomas Frampton exiting the stand)

MR. BOURKE: Your Honor, that's the final witness and the last of the evidentiary proofs I was going to offer. One technical matter I omitted, earlier I indicated in my Certificate of Service, in relation to our reply and supplement that we had served the Attorney General. I just wanted to put on the record that the Attorney General accepted service, and by email to myself and to prosecution counsel, indicated that the attorney general was not seeking to become involved, despite the constitutional challenge. Just so that that was clear, that they had the option and

they've exercised that option.

THE COURT: Do you agree, Ms. Williams?

MS. WILLIAMS: Yes, sir, I do.

MR. BOURKE: And, Your Honor, I have - there was one matter than I can do in 45 seconds, one legal matter that arose out of Ms. Williams' reply brief, that would then complete my need for any briefing on this. We've put the law before you. Now we put the facts before you. So - but in the Court's hands and in Ms. Williams's hands, if I could do 45 seconds, I don't have to put pen to paper, and I mean 45 seconds.

THE COURT: All right.

MR. BOURKE: All right, 60 (Laughing).

THE COURT: Yes, sir, 60 seconds.

MR. BOURKE: So I'll go ahead. It's as to Claim 3, Mr. Beasley, the unqualified juror. Ms. Williams cited a case, I think it's *Zeno*, in which the First Circuit had said an unqualified juror doesn't result in reversal because we've got a majority verdict system. So you only needed ten votes anyway. And there is Second Circuit law to that effect. The Third Circuit has not addressed it. The Louisiana Supreme Court has not addressed it. And none of the cases that I found in the First or Second Circuit were vicinage cases, that is where the juror was unqualified because he wasn't from the vicinage, he wasn't from the parish. And that's a distinct constitutional guarantee, compared to a felon on a jury or someone who's hard of hearing or that sort of thing, which is a statute prequalification.

And so, we would say that there is no harmless error analysis within the majority verdict scheme for

vicinage disqualification because the Constitution says they have to be from here. They have to reside in this parish, and the fact that you've got 11 people who do is not a substitute for what the Constitution guarantees, which is 12 jurors who do. And so, we don't accept that that impacts Claim 3. And in any event, this Court would have the option of granting a new trial in the interest of justice, even if the law did not require it. Such a ruling, and it is applicable to any of these claims, is unreviewable as an exercise of this Court's discretion that the interest of favor a new trial in the circumstances, as long as the Court is basing its consideration in the record, even though it's not finding legal error, rather than something completely extraneous.

THE COURT: I've read your memos. Is there anything else regarding any of the other motions that you filed, sir?

MR. BOURKE: No, sir. We'd submit on what we've presented.

THE COURT: Ms. Williams.

MS. WILLIAMS: Your Honor, just again on the issue of Claim 3, as we stated this morning, we wanted to make sure the Court had in the record the Jury Questionnaire for Mr. Jeffrey Beasley, the juror at issue on that claim. And the reason for that is in their memorandum, the Defense stated that there was nothing in Mr. Beasley's questionnaire or his voir dire that indicated that they should pursue this issue of where he lives. But if, in fact, if you look at this jury questionnaire -

THE COURT: Has it been introduced? Is it in the

record?

MS. WILLIAMS: Yes, sir.

THE COURT: All right, thank you.

MS. WILLIAMS: Madam clerk, could I look at that just briefly, so I can quote it exactly.

(Deputy Clerk Miller handing document to Ms. Williams)

MS. WILLIAMS: He describes himself as - it says, "Have you ever lived outside of Sabine Parish, and if so, where?" And he says, "College, rotational occupation." And then Number 3, it says, "What is your present occupation and place of employment?" He says, "Engineer," this says "and," I think he meant "At Chevron." And then in parenthesis, it says, "Currently rotation in Houston, Texas." So I think - I'm arguing to the Court that it's sufficient to put the Defense on notice that they needed to make further inquiries of Mr. Beasley.

Your Honor, I would ask at this time - because the State did not have any notice of Mr. Frampton or Mr. Aiello's testimony, that we have the opportunity - instead of making final arguments today, to obtain a transcript and either address it in either further oral argument or in a written memorandum.

THE COURT: What is the last thing that you said, ma'am? What do you wish?

MS. WILLIAMS: I'm sorry, I'm losing my voice.

THE COURT: Have a seat. Why don't you sit down.

MS. WILLIAMS: In light of the na- in light of the fact that the State was not informed that Mr. Aiello and Mr. Frampton were going to be testifying today, and that we received those materials at the

last minute, especially Mr. Frampton, instead of making oral arguments on these issues today, I'm asking permission that we be allowed to order the transcript and either come back another day for oral argument or submit a written memorandum on those issues.

THE COURT: How long - do you want the entire transcript of what we've done today?

MS. WILLIAMS: If I could, Your Honor.

THE COURT: (Speaking to Court Reporter) What kind of time are we looking at?

COURT REPORTER: Thirty days.

THE COURT: Thirty days from now? Do you think you'll have it done?

COURT REPORTER: Yes, sir.

THE COURT: So you think you would have it done by the - what is today, the 9th? Do you think you would have it done by the 10th of August?

COURT REPORTER: May I have until the 17th?

THE COURT: By the 17th?

COURT REPORTER: Yes, sir.

THE COURT: And then how much time do you need after that, ma'am? Two weeks?

MS. WILLIAMS: Your Honor, I would - I would request at least a month, just because statistics are not my thing. So I'm going to have to struggle with that a little bit.

THE COURT: Any objection?

MR. BOURKE: None, Judge.

THE COURT: Then can it be simultaneous? Is there - do you have a problem with that? If you do, we'll adjust.

MR. BOURKE: If I could just have a week after I get Ms. Williams.

THE COURT: Okay.

MR. BOURKE: Just to keep it rolling along.

THE COURT: Is that enough time?

MR. BOURKE: Yes, I can - I can.

THE COURT: All right. So, it would be - you would have this by the 17th of August. And so, by the 17th of September, you could have whatever it is you wish to submitted by that date. And then a week from that date, so I'll say the 26th of September, sir, if you could have yours in by that date, please.

MR. BOURKE: Yes.

THE COURT: Is there anything else in this case, today?

MS. WILLIAMS: No, Your Honor. Thank you, Your Honor.

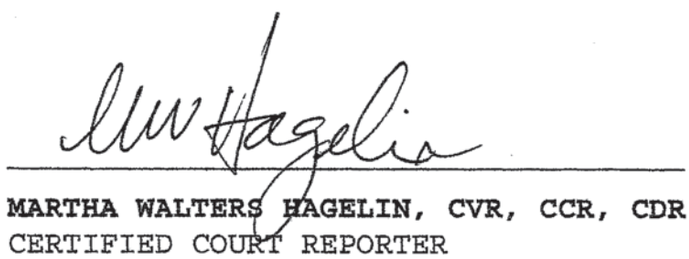
THE COURT: It's a pleasure. Thank you.

MR. BOURKE: Thank you.

(Hearing adjourned)

REPORTER'S PAGE

I, Martha Walters Hagelin, Certified Court Reporter in and for the State of Louisiana, the officer, as defined in Rule 28 of the Federal Rules of Civil Procedure and/or Article 1434(B) of the Louisiana Code of Civil Procedure, before whom this proceeding was taken, do hereby state on the record: That due to the interaction in the spontaneous discourse of this proceeding, dash(es) (-) have been used to indicate pauses, changes in thought, and/or "talk-overs"; that same is the proper method for a Court Reporter's transcription of proceeding, and that the dash(es) (-) do not indicate that words or phrases have been left out of this transcript; that any words and/or names which could not be verified through reference material have been denoted with the phrase "(spelled phonetically)."



MARTHA WALTERS HAGELIN, CVR, CCR, CDR
CERTIFIED COURT REPORTER
Stenomask Certificate #2010015
Certified Digital Certificate #4342010

C E R T I F I C A T E

This certificate is valid only for a transcript accompanied by my original signature and original required seal on this page.

I, Martha Walters Hagelin, Official Court Reporter in and for the State of Louisiana, employed as the Official Court Reporter by the Eleventh Judicial District Court for the State of Louisiana, as the officer before whom this testimony was taken, do hereby certify that this testimony was reported by me, in the digital reporting method, was prepared and transcribed by me to the best of my ability, and is a true and correct transcript of the:

CONTINUATION OF THE EVIDENTIARY HEARING PREVIOUSLY HELD ON FEBRUARY 7, 2018:

- Motion for a New Trial;
- Motion to Arrest Judgment;
- Motion for Post-Verdict Judgment of Acquittal or Modification;
- Three *Batson* challenges;
- Motion to Rule Unconstitutional Art. 1 Section 17 of the Louisiana Constitution and Art. 782, the *Code of Criminal Procedure*,

heard in the above numbered and entitled cause, as set forth on page one thereof; that the transcript has been prepared in compliance with transcript format guidelines required by statute or by rules of the board or by the Supreme Court of Louisiana, and that I am not related to counsel or to the parties herein nor am I otherwise interested in the outcome of this matter.

I certify that I have delivered a transcript of the above

and foregoing to the Clerk of Court for the Parish of Sabine, Louisiana for filing on this the 17th day of August 2018.

MARTHA WALTERS HAGELIN, CCR, CVR, CDR
11th JDC Official Reporter, Sabine Parish
Certified Court Reporter
Stenomask Certificate #2010015
Certified Digital Certificate #4342010

STATE OF LOUISIANA

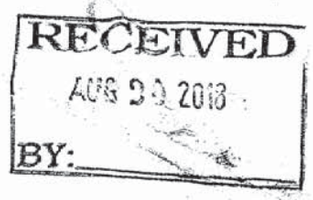
vs.

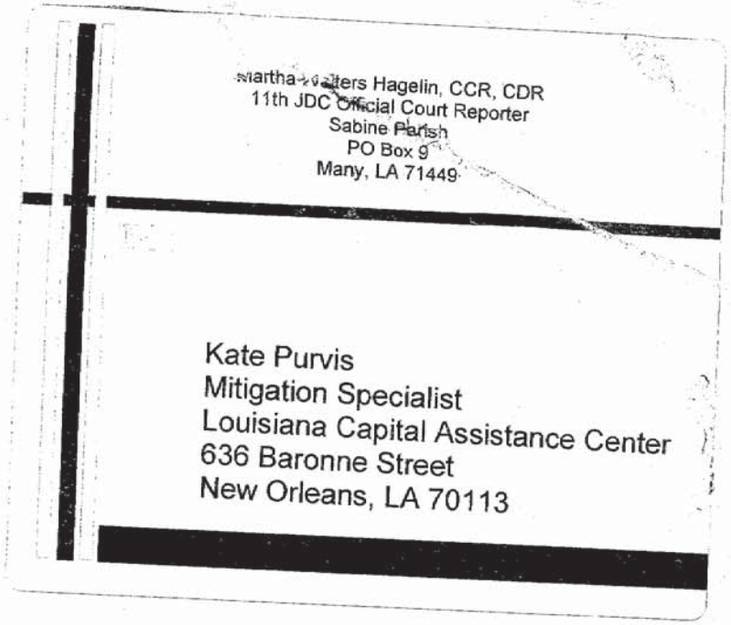
MELVIN CARTEZ MAXIE

DOCKET #72522

TRANSCRIPT OF THE
MOTIONS HEARD ON
JULY 9, 2018


UNITED STATES POSTAL SERVICE.
Retail
P
US POSTAGE PAID
$8.80
Origin: 71449
Destination: 70113
2 Lb 8.60 Oz
Aug 17, 16
2158110705-06
1020
PRIORITY MAIL 2-Day ®
EXPECTED DELIVERY DAY: 08/20/2018
C010
USPS TRACKING NUMBER
9505 5158 1086 8229 1182 79


RECEIVED
AUG 3 0 2018
BY:


Martha Walters Hagelin, CCR, CDR
11th JDC Official Court Reporter
Sabine Parish
PO Box 9
Many, LA 71449
Kate Purvis
Mitigation Specialist
Louisiana Capital Assistance Center
636 Baronne Street
New Orleans, LA 70113