IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON Plaintiff, V. OLAN JERMAINE WILLIAMS, Defendant,	)	Case No.: 15CR58698 OPINION AND ORDER

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

BACKGROUND

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

Following a two-and-a-half day trial, a jury of twelve began deliberations on the matter on the afternoon of the third day. Around 4:35 p.m. the clerk of the court entered the jury room and asked the jury when they would like to return the following day to continue deliberations. Moments later, the jury informed this Court it had reached a decision. At 4:48 p.m. court reconvened and the jury returned a verdict unanimously acquitting Defendant of the anal sodomy charge, but returning a non-unanimous 10-2 verdict for guilt on the oral sodomy charge.

Defense counsel did not request a unanimous jury instruction, nor did counsel object to the receipt of the non-unanimous verdict.

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

MOTION FOR NEW TRIAL

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

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

> "(1) Cases in which such orders have allowed motions for new trials based upon grounds specified in ORS 17.610, including 'error in law occurring at the trial, and excepted to by the party making the application'; (2) Cases in which trial courts have granted new trials upon *** their 'own motion'; and (3) Cases in which new trials were granted because of

> substantial and prejudicial error to which no proper exception or objection was taken, but which was raised by motion for new trial * * *."

Beglau v. Albertus, 272 Or 170, 181-82, 536 P2d 1251 (1975).

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

> "Correia and its progeny must be overruled, for these cases appear to establish a basis for new trial orders which is so broad that it would swallow up the existing statutory categories for such orders and thereby effectively abolish all restrictions which those statutes impose. Any other result would amount to a deliberate disregard of the clear mandate of the legislature. Therefore, to the extent that Young v. Crown Zellerbach, supra; Lundquist v. Irvine, supra; Lee v. Caldwell, supra; Hillman v. North. Wasco Co. P.U.D., supra; and Hays v. Herman, supra, are inconsistent with the statutory restrictions imposed by ORS 17.610 and 17.630, they, as well as Correia, are hereby overruled."

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

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

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

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

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

APODACA AND DEFENDANT'S ARGUMENT FOR NEW TRIAL

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

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

The criticism of *Apodaca* is voluminous. Legal scholars point out that the opinion itself has questionable precedential value as the holding is the work of but one lone justice. More

pointedly, critics note that *Apodaca* is difficult to reconcile with the current Court's jurisprudence on the Sixth Amendment and the importance of the jury as reflected in cases such as *Apprendi v. New Jersey*, 530 US 466 (2000) and *Blakely v. Washington*, 542 US 296 (2004).

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

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

Constitutional challenges are commonly divided into two categories: facial and "as-applied." A facial attack is as one where "no application of the statute would be constitutional." *Sabri v. United States*, 541 US 600, 609 (2004). In contrast, a party's burden in an as-applied challenge is different from that in a facial challenge. In an as-applied challenge, "the plaintiff contends that application of the statute in the particular context in which he has acted, or in which he proposes to act, would be unconstitutional." *Women's Med. Prof'l Corp. v. Voinovich*, 130 F 3d 187, 193 (6th Cir 1997). Stated another way, an as-applied challenge asserts that "a

statute, even though generally constitutional, operates unconstitutionally as to him or her because of the plaintiff's particular circumstances." Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV L REV 1321, 1321–22 (2000) (summarizing the conventional account of facial and as-applied challenges). If a law is unconstitutional as applied, the State may continue to enforce it in different circumstances where it is not unconstitutional, but if a law is unconstitutional on its face, the State may not enforce the statute under any circumstances. *Women's Med Prof'l Corp* at 193.

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

EQUAL PROTECTION

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

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

In general, equal protection claims arise in one of three categories. The first is a claim "that a statute discriminates on its face." *E & T Realty v. Strickland,* 830 F2d 1107 (11th Cir 1987). The second is where the neutral application of a facially neutral statute has a disparate impact. *Id.* The third category "is that defendants are unequally administering a facially neutral statute." *Id.*; *see also* 3 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law, Substance & Procedure,* § 18.4 (4th ed. 2008) (Under equal protection review, a law may establish a classification either "on its face," in its purpose or effect, or in its application.).

In this case, Defendant's equal protection claim, by his own admission, could only fit within the second category: a disparate impact upon a racial group of a facially neutral law. However, not every disparate impact is unlawful. "[A] law, neutral on its face and serving ends otherwise within the power of government to pursue, is not invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another." *Washington v. Davis*, 426 US 229, 242 (1976). A classification having a differential impact, absent a showing of discriminatory motive, is subject to review under the lenient rationality standard. *Id.* at 247-48.

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

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

HISTORY OF OREGON'S NON-UNANIMOUS JURY SYSTEM

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

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

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

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

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

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

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

From the time of the founding of the Oregon territory, Oregon was not open to black residents. In 1844 the Provisional Government of Oregon banned slavery and freed existing slaves, yet simultaneously forbade that African Americans reside within the territory. African

Americans who remained in Oregon after being freed were to be whipped and forcibly removed. Historians have opined that Oregon's ban derived in significant part from a fear of minority collusion against whites:

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

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

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

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

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

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

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

Article I, section 35 was put to a vote of the people at the same time as Article I, section 34, which banned slavery. The exclusion of African Americans from the state received more

votes than the ban on slavery. A repeal effort was submitted to Oregon voters in 1900, where it was defeated. Further repeal resolutions in 1901, 1903, 1915 and 1916 were also defeated. It was not until 1927 that Article I, section 35 was finally removed from Oregon's Constitution.[1]

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

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

Representative Lawson introduced the following amendment:

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

Id.

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

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

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

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

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

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

Id. at 138.

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

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

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

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

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

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

The Morning Oregonian, May 7, 1932.

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

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

The Morning Oregonian, November 3, 1933.

As fate would have it, the very morning the Oregonian ran that article, a jury was being selected in Columbia County in what would become the state's most sensational trial of the day: the Silverman trial. Jake Silverman was charged with the murder of Jimmy Walker. The case received an extraordinary amount of press coverage. Eleven of the jurors wanted to convict on second-degree murder. One juror wanted to acquit. The jury compromised on a verdict of manslaughter, and Silverman ultimately received three years in prison.

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

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

The Morning Oregonian, November 25, 1933.[2]

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

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

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

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

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

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

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

incidents, ultimately to Silverman. And by drawing those lines, the media coverage intertwined Silverman with issues of race and jury composition.

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

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

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

DISPARATE IMPACT

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

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

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

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

In this case, two jurors provided statements to the defense after the verdict about their experience in the minority. Defendant has requested this Court consider those statements, asserting he has a right to rely on that evidence under the Due Process clause. This Court has expressly not considered any of those statements, concluding it is bound by *Carson*.[3]

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

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

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

According to the July 1, 2015 census, Oregon is 87.6% white, and approximately 12.4% non-white. See http://www.census.gov/quickfacts/table/PST045215/41. An exclusion of two of twelve jurors represents an exclusion of 16.6% of the jury. The comparison of those numbers is sobering. A jury drawn from the average cross section of Oregon would have ten white jurors and two minorities. If one wanted to craft a system to silence the average number of non-white jurors on an Oregon jury, one could not create a more efficient system than 10-2. But, even that assumes that minorities are represented on Oregon juries in accord with their census numbers, and that is factually incorrect. In truth, minorities are represented at numbers even lower than the census would suggest.

Oregon's own studies have concluded that racial minorities are underrepresented on juries. "The extent to which minorities have been underrepresented in juries has been the subject of considerable research. A consensus exists that 'American jury systems tend to over represent white, middle-aged, suburban, middle-class people and under represent other groups.'" Edwin

Peterson, Chair, Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System, pg 74, May 1994 at http://courts.oregon.gov/OJD/docs/osca/cpsd/courtimprovement/access/rac_eth_tfr.pdf

Chief Justice Peterson's report noted one potential cause of this underrepresentation:

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

Id. at 73.

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

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

Id.

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

determine how many cases contained non-unanimous verdicts on at least one count. And, in fact, that office conducted precisely that study in 2009. [4]

According to the official data of the Oregon Judicial Information Network (OJIN), in 2007, 833 felony jury trials reached the verdict stage. In 2008, 588 felony jury trials reached the verdict stage, for a total of 1421 trials over the 2007-2008 period. Those 1421 trials generated 662 indigent appeal requests handled by OPDS Appellate Division, or 46.5% of all felony trials in Oregon. Of that number, only 63% were polled and thus could provide data. That yields a sample size of nearly 30% of all felony jury convictions throughout Oregon over the course of two years – a statistically significant number. From that sample size 65.5% of felony jury verdicts were non-unanimous on at least one count. Oregon Office of Public Defense Services Appellate Division, *On the Frequency of Non-Unanimous Felony Verdicts in Oregon: A Preliminary Report to the Oregon Public Defense Services Commission* (May 21, 2009) at https://www.oregon.gov/OPDS/docs/Reports/PDSCReportNonUnanJuries.pdf.

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

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

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

> "Arrest data compiled by the State of Oregon Law Enforcement Data System reveals a disproportionately large number of minority arrests. In 1992, for example, 9,739 African Americans were arrested, representing 6.4 percent of all arrests. Yet African Americans account for only 1.6 percent of the state's 1990 population. Similarly, in 1992, 12,599 Hispanics were arrested, representing 8.3 percent of all arrests. Hispanics represented only 4 percent of the state's 1990 population. This disproportionality in arrests is especially evident in particular counties. In Multnomah County, 1992 arrests of African Americans accounted for nearly 23 percent of the total, while African Americans constitute only 5.9 percent of the county's total population."

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

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

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

Id. at 40.

Unfortunately, Chief Justice Peterson's Report did little to engender change in racial disproportionality. Twenty years later, the MacArthur Foundation partnered with participating locales to evaluate race in the criminal justice system. Multnomah County was one such partner, and the results were even more alarming than the Peterson Report.

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

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

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

B. Implicit Bias

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

Implicit biases are "the plethora of fears, feelings, perceptions, and stereotypes that lie deep within our subconscious, without our conscious permission or acknowledgement. Indeed,

social scientists are convinced that we are, for the most part, unaware of them. As a result, we unconsciously act on such biases even though we may consciously abhor them." Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv L & Pol'y Rev 149 (2010).

The existence of implicit bias in cognitive processing is a scientific fact, arrived at through valid testing and subject to peer review, and appears uncontested by the State in this case. Its existence is not in reasonable dispute within the scientific community. *See e.g., See* Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J Personality & Soc Psychol 5, 5 (1989); Anthony G. Greenwald, *Sensory Feedback Mechanisms in Performance Control: With Special Reference to the Ideo-Motor Mechanism*, 77 Psychol Rev 73, 73 (1970); David L. Hamilton & Robert K. Gifford, *Illusory Correlation in Interpersonal Perception: A Cognitive Basis of Stereotypic Judgments*, 12 J Experimental Soc Psychol 392, 392 (1976); Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 Psychol Rev 231 (1977); Henri Tajfel, *Cognitive Aspects of Prejudice*, 25 J. Soc Issues 79, 83-86 (1969).

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

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

> number of White jurors was positively correlated with the odds of reaching a verdict when at least one defendant was African American.

Jury Decision Making, 7 Psychol Pub Pol'y & L 622 (2001).

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

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

Studies show, however, that the way to counter implicit bias in jury decision-making is to ensure juries are diverse. One key study in this area studied controlled environment jury deliberations. Some juries included only Caucasians while others included both Caucasians and African Americans. The study found that racially heterogeneous mock juries cited more facts from the case, made fewer errors when discussing facts, and when they did make errors, were more likely to correct them. Samuel R. Sommers, *On Racial Diversity and Group Decision-*

Making: Informational and Motivational Effects of Racial Composition on Jury Deliberations, 90 J Personality & Soc Psychol 597 (2006).

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

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

> "So open discussion is critical. An individual juror's experience can affect her perception of and reaction to the evidence. As knowledge and expertise may be distributed unequally within any given jury, interaction among jurors will expand the range of issues to be discussed and broaden the scope of information shared by the group. Of course, this information will not necessarily be purely factual. Rather, open communication may introduce strongly held beliefs and prejudices into the discussion. But the existence of competing beliefs and prejudices in jury deliberations may help to reduce their significance. In the end, a deliberative process that emphasizes and maximizes consultation among individual jurors with diverse backgrounds broadens the overall perspective of the jury."

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

Now, does the specter of implicit bias imply that a defendant has a right to control the racial composition of a jury? No, certainly not. A defendant has no right to a *particular* jury. But *Batson v. Kentucky*, 476 US 79 (1986) made it clear that the Equal Protection Clause

guarantees that a state will not exclude even one member of the defendant's race from the jury on the basis of race. *Batson* is not just merely about prosecutorial discrimination. It stands for the principle that a defendant has a right to be tried in a system that does not systematically exclude the participation of jurors who share a similarity with the defendant – and thereby potentially suffer less from implicit bias against him. That is the real promise of *Batson*. And whether that exclusion of voices happens before the trial starts, or after it has concluded, makes no difference.

But there remains one essential piece of evidence necessary to connect the data and implicit bias to non-unanimous verdicts: the social science of group decision making. It is not enough to show statistics and data, or to show implicit bias. There must be a connecting of the dots showing that non-unanimous juries operate to silence minority *viewpoint* jurors, and those minority viewpoint jurors correlate to *racial* minority jurors.

C. Social Science in Group Decision Dynamics

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

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

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

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

For example, the 2006 Diamond et al. study, not referenced by Defendant, examined the actual deliberations of civil juries in Arizona. Under that system, only six of eight jurors need agree to reach a civil verdict. That study found that jurors were highly cognizant of their need only to deliberate to non-unanimity. Certainly in some juries the majority attempted to persuade the minority. But in a significant number no attempt at persuasion occurred and the jury terminated deliberations and ended debate when the minimum vote was achieved:

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

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

Additional studies, also not introduced by Defendant, have claimed that non-unanimity results in hastier deliberations; deliberations that concluded as soon as the majority number was reached, rather than engaging and persuading minority viewpoint jurors. *See e.g.* James H. Davis, Norbert L. Kerr, Robert S. Atkin, Robert Holt and David Meek, *The Decision Process of 6 and 12 Person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules*, 32 J PERSONALITY AND SOC PSYCHOLOGY 1 (1975); Robert D. Foss, *Group Decision Processes in the Simulated Trial Jury*, 39 SOCIOMETRY 305 (1976), Charlan Nemeth, *Interactions Between Jurors as a Function of Majority vs. Unanimity Decision Rules*, 7 J APPLIED SOC PSYCH 38 (1977).

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

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

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

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

The social science in this area is a necessary connective element for Defendant's claim to succeed, and it must be based on evidence in the record. While this Court is aware of the studies cited above, they were not introduced into evidence in this case, and they are not a proper subject

for judicial notice. More importantly, the Court is also aware of alternate academic viewpoints. The academic conclusions in this area are not self-evident. This is precisely the area where testimony is necessary, subject to the crucible of cross-examination, where a court can hear from the experts in the field and properly assess credibility and the quality of the social science research.

DISPARATE IMPACT FINDINGS

From all of the above, while there is no direct evidence of a disparate impact on minorities of non-unanimous juries – there is significant circumstantial evidence which gives this Court serious concern. Oregon's non-unanimous jury law, enacted in part with racial motives, functions in a criminal justice system where one's race impacts one's experience. Minorities, those least likely to be influenced by implicit bias against a minority defendant are underrepresented as jurors. Data further shows that non-unanimous verdicts are not rare, but common. And the defendants subjected to those non-unanimous verdicts are the same defendants involved in a criminal justice system that arrests, charges, tries, and sentences minorities disproportionally to whites.

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

The second missing component in this litigation is a proposed remedy. If this court were to order a new trial, what rule of law would govern that new proceeding? Would the jury in the new trial be ordered to deliberate to unanimity? A blanket unanimity instruction presents problems, because Defendant has a right under the Oregon Constitution to *acquittal* by 10-2.[5] Is Defendant proposing that this Court deprive him of that right?

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

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

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

Oregon Uniform Civil Jury Instruction 90.01.

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

Parties come before a court seeking a remedy. And Defendant in this case has offered this Court no briefing, argument, or authority for what lawful remedy he is asking this Court to impose that would not simply recreate the situation existing today. Without some articulation of that remedy, it is difficult for this Court to say that Defendant met his burden in this case.

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

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

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

But for this Court to act – to take the extraordinary step of declaring a provision of the Oregon Constitution in violation of the United States Constitution - it must be on a full and robust evidentiary record, with a clearly articulated remedy proposed. With those pieces missing from this case, invocation of this Court's power under ORCP 64(G) to order a new trial would be an abuse of discretion.

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

IT IS SO ORDERED.

Dated the 15th day of December, 2016

Signed: _____

Circuit Court Judge Bronson D. James