IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON Plaintiff, vs. OLAN JERMAINE WILLIAMS Defendant	Case No. 15CR58698 **MEMORANDUM OF AMICUS CURIAE THE OREGON JUSTICE RESOURCE CENTER IN SUPPORT OF DEFENDANT'S MOTION FOR NEW TRIAL**

INTEREST OF *AMICUS CURIAE* OREGON JUSTICE RESOURCE CENTER

The Oregon Justice Resource Center (OJRC) is a non-profit organization founded in 2011. OJRC works to "dismantle systemic discrimination in the administration of justice by promoting civil rights and enhancing the quality of legal representation to traditionally underserved communities." OJRC Mission Statement, available at www.ojrc.info/mission-statement. The OJRC Amicus Committee is comprised of Oregon attorneys from multiple disciplines and volunteer law students from Lewis & Clark Law School.

Amicus Curiae writes in support of Mr. Williams' request for a new trial. Mr. Williams was convicted of first-degree sodomy after ten jurors voted to convict and two voted to acquit.[1] Mr. Williams was sentenced to the mandatory minimum sentence of 100 months. Mr. Williams' *Motion for New Trial* raises an as-applied due process and equal protection challenge and a disparate impact challenge, and *amicus* agrees with those arguments. *Amicus* writes separately

[1] *Amicus* relies on the factual assertions contained in Mr. Williams' *Motion for New Trial* and *Memorandum in Support of Motion for New Trial* (hereinafter *Motion for New Trial*) filed on September 23, 2016.

TARCHIA LAW, P.C.
161 ST. HELENS STREET • SUITE 105 • ST. HELENS, OREGON 97051
TEL: (503)223-0011 • FAX (503) 223-1516 • EMILY@TARCHIALAW.COM

however, to provide additional arguments that the anachronistic non-unanimous jury rule should be swiftly abandoned.

Amicus recognizes that there is direct precedent, both federal and state, that has sanctioned non-unanimous juries in Oregon. *See e.g.*, *Apodaca v. Oregon*, 406 US 404 (1972); *State v. Bowen*, 215 Or App 199 (2007). But the legal justification for this precedent has been winnowed to nothing by recent United States Supreme Court case law. *See Apprendi* v. *New Jersey*, 530 U.S. 466 (2000); *McDonald v. City of Chicago*, 561 US 742 (2010).

Additionally, empirical evidence strongly indicates that allowing non-unanimous verdict leads to shoddier deliberations, the silencing of minorities on the jury panel and the nullification of their votes, and an increased likelihood of wrongful convictions.

Although all non-unanimous verdicts carry the risk of an unjust outcome given the features outlined above, in this case those problems are not merely theoretical. The sole African-American juror has come forward and reported that the non-unanimous jury rule led to the silencing of her voice and her vote. *Motion for New Trial* at 6–7. That juror has explained that the jury's deliberation was flawed, not evidence based, and ultimately reached a verdict because a juror switched her vote so that she would not have to return for another day of deliberations. *Motion for New Trial* at 6–7. Because the record in this case supports the conclusion that Mr. Williams' constitutional rights were violated, and because this Court and the citizens of Oregon can have no faith in the integrity of this verdict, this Court should grant Mr. Williams a new trial.

TARCHIA LAW, P.C.
161 ST. HELENS STREET • SUITE 105 • ST. HELENS, OREGON 97051
TEL: (503)223-0011 • FAX (503) 223-1516 • EMILY@TARCHIALAW.COM

DISCUSSION

I. The origins of Oregon's non-unanimous jury rule reveal that it was designed to disenfranchise minority jurors.

In 1934, Oregon voters approved via ballot measure a constitutional amendment authorizing verdicts in felony trials heard by ten or more jurors. *See* Clayton M. Tullos, *Non-Unanimous Jury Trials in Oregon*, The Oregon Defense Attorney 20 (2014) (explaining history); Or Const Art I, § 11. Oregon and Louisiana are the only United States jurisdictions that have adopted such a rule. Every other state and the federal government require unanimous jury verdicts. Tullos, at 20; Aliza Kaplan, *Reversing Apodaca v. Oregon Should Be Easy: Non-Unanimous Jury Verdicts in Criminal Cases Undermines the Credibility of the Justice System*, Or. L. Rev. (with Amy Saack) (Forthcoming 2017) *5.[2]

The ballot measure stemmed from "inflamed public reaction" to a verdict in a controversial murder case. Tullos, at 20. Jacob Silverman, a Jewish man, was tried for first-degree murder for the killing of Jimmy Walker. During deliberations, 11 of 12 jurors wanted to convict for second-degree murder. One holdout juror, who wanted to acquit, persuaded the others to convict for manslaughter. Had the jury convicted Silverman of second-degree murder, he would have received a statutory life sentence. Instead, the trial court sentenced Silverman to three years in prison. Tullos at 21–22.

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

[2] Kaplan's article, which has been accepted for publication, has been submitted by Defendant as Defense Exhibit 101.

TARCHIA LAW, P.C.
161 ST. HELENS STREET • SUITE 105 • ST. HELENS, OREGON 97051
TEL: (503)223-0011 • FAX (503) 223-1516 • EMILY@TARCHIALAW.COM

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

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

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

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

Kaplan at *2 (internal citations omitted).[3] Oregonians thus adopted the non-unanimous jury as "a reaction to the notorious trial of Jacob Silverman" in "a state simmering with anti-immigrant xenophobia (read anti-Semitism and anti-Catholicism)[.]" Kaplan at *2.

As the Oregon Supreme Court recognized, the purpose of the non-unanimous jury rule is "to make it easier to obtain convictions." *State ex rel. Smith v. Sawyer*, 263 Or 136, 138 (1972). And indeed it has. In a case review undertaken by the Oregon Office of Public Defense Services (OPDS), non-unanimous verdicts occurred in 65.5 percent of felony cases where the jury was

[3] Louisiana's non-unanimous jury rule has similarly shameful origins. Passed in 1880, three years after Reconstruction, Louisiana's rule "was designed to create more convicts, especially freed blacks, to increase the labor force." Kaplan at *1.

TARCHIA LAW, P.C.
161 ST. HELENS STREET • SUITE 105 • ST. HELENS, OREGON 97051
TEL: (503)223-0011 • FAX (503) 223-1516 • EMILY@TARCHIALAW.COM

polled.[4] Office of Public Defense Services, *On the Frequency of Non-Unanimous Felony Verdicts in Oregon: A Preliminary Report to the Oregon Public Defense Services Commission* at 4 (May 21, 2009) (available at www.oregon.gov/OPDS/docs/Reports/PDSCReportNonUnanJuries.pdf)

II. Recent United States Supreme Court case law reinforces that the Sixth and Fourteenth Amendments of the United States Constitution require unanimous juries.

More than three decades ago, a plurality of the Supreme Court upheld Oregon's use of non-unanimous verdicts. *Apodaca v. Oregon*, 406 US 404 (1972) (plurality opinion). However, *Apodaca* has virtually no *stare decisis* value, its rationale undermined by the last forty years of Supreme Court jurisprudence including *Sullivan v. Louisiana*, 508 US 275, 278 (1993); *Apprendi v. New Jersey*, 530 US 466 (2000); *Blakely v. Washington*, 542 US 296 (2004); *United States v. Booker*, 543 US 220 (2005); *Cunningham v. California*, 549 US 270 (2007); and *McDonald v. City of Chicago*, 561 US 742 (2010).

For example, in *Blakely*, Justice Scalia explained that the *Apprendi* rule "reflects two longstanding tenets of common-law criminal jurisprudence," the first of which is "that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the *unanimous suffrage* of twelve of his equals and neighbours[.]'" *Blakely*, 542 US at 301 (quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769); emphasis added); *see also Booker*, 543 US at 239 ("trial by jury has been understood to require that *the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should

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

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161 ST. HELENS STREET • SUITE 105 • ST. HELENS, OREGON 97051
TEL: (503)223-0011 • FAX (503) 223-1516 • EMILY@TARCHIALAW.COM

afterwards be confirmed by the **unanimous suffrage** of twelve of [the defendant's] equals and neighbours" (internal quotations omitted; italics in original; boldface added)).

In *Duncan v. Louisiana*, the Supreme Court held that the Sixth Amendment right to a jury trial is incorporated into the Fourteenth Amendment's Due Process Clause, explaining "that in the American states, as in the federal judicial system, a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants." 391 US 145, 157–58 (1968).

Although *Apodaca* held otherwise, the *Apprendi*-to-*McDonald* line of cases has severely diminished the force of that holding. These cases establish that the Sixth Amendment's unanimous verdict guarantee is a principle "of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 US 97, 105 (1934). It is "basic in our system of jurisprudence," *In re Oliver*, 333 US 257, 273 (1948), and "is necessary to an Anglo-American regime of ordered liberty." *Duncan*, 391 US at 149 n.14.

Apodaca's failure to fully incorporate the Sixth Amendment guarantees makes little sense today. This is especially so in light of *McDonald*. In *McDonald*, the Supreme Court "unambiguously rejected the concept of a 'watered-down, subjective version of the individual guarantees of the Bill of Rights,' that would allow different standards between the states [and] the federal government for the protection of fundamental rights." Kaplan, at *22-23 (quoting *McDonald*, 130 S Ct at 3035). *McDonald* recognized *Apodaca* as an "exception to the general rule." 561 US at 766 n.14. Kaplan explains:

> As *McDonald* expressly acknowledged, in effect, *Apodaca* is a jurisprudential orphan, stranded from the rationales employed by the Court in all other incorporation cases. The implication of *McDonald* is that overturning *Apodaca* should be easy and in fact, suggests that the Court should incorporate the few unincorporated provisions of the Bill of Rights.

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> Jury unanimity meets the *McDonald* incorporation standard as it is rooted in common law and history signifying that the founders considered jury unanimity a fundamental right. The earliest documentation of a unanimous jury verdict dates back to 1367, by the late fourteenth century, there was a widespread preference for unanimous verdicts, and it was "an accepted feature of the common-law jury by the 18th century. While its origins have never been clear, prior to the ratification of the Constitution in 1786, John Adams indicated "it is the unanimity of the jury that preserves the rights of mankind." Moreover, James Madison included it in the draft of the Sixth Amendment that he proposed, which included "the requisite of unanimity for conviction." Although the Constitution does not refer to unanimous juries, as the plurality in *Apodaca* noted, unanimity quickly obtained general acceptance "as Americans became more familiar with the details of English common law and adopted those details in their own colonial legal systems."

Kaplan, at *27–28.

Apodaca's continuing precedential value hangs by a thread. *McDonald* strongly indicates that the entirety of the Bill of Rights should be incorporated, and jury unanimity is the type of right that has been recognized as fundamental and continues to be recognized as such. Yet so long as non-unanimous jury verdicts remain the law in Oregon and Louisiana, they will continue to abridge other important constitutional guarantees, in particular the right to have every element of a crime proven beyond a reasonable doubt and the right to a jury drawn from a fair cross-section of the community.

The unanimous jury verdict has become "the manifestation of the reasonable doubt standard…. A non-unanimous verdict demonstrates the existence of reasonable doubt that could not be explained during the deliberation of twelve vetted jurors, showing that the government has failed to meet its burden of proof." *Id.* at *32. As Kaplan notes, both Oregon and Louisiana require unanimous verdicts in first-degree/capital murder cases, which suggests that both states chose "greater certainty by not weakening the reasonable doubt standard in their most serious cases." *Id*. at *34.

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161 ST. HELENS STREET • SUITE 105 • ST. HELENS, OREGON 97051
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With respect to the fair-cross section requirement, research consistently shows that jurors are biased in favor of those who are like them. *See* Kaplan at *37 (summarizing research). Accordingly, white jurors are more likely to convict minority defendants than white defendants. This bias extends to how jurors remember evidence introduced at trial. For example, white participants may have an easier time recalling "aggressive facts when the actor was African American[.]" *Id*. Considering that the purpose of a jury is to allow "twelve of the defendant's peers * * * to discuss and compare alternate views of the evidence presented at trial[,] [w]hen two of those voices may be ignored . . . there is no guarantee of a full and fair deliberation." *Id*. at *38.

III. Non-unanimous juries create unjust outcomes.

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

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161 ST. HELENS STREET • SUITE 105 • ST. HELENS, OREGON 97051
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A. Non-unanimous juries have a "verdict-driven" deliberation style that short-cuts the deliberative process.

A signature feature of non-unanimous juries is a truncated, verdict-driven deliberation. Kaplan, at *38. Unanimous juries are more likely to be evidence driven. An evidence-driven jury "will start by discussing and comparing views on the evidence." *Id*. A verdict-driven jury stops deliberating when it reaches a consensus. *Id*. Thus, unanimous juries take more time to deliberate between votes than non-unanimous juries. Brief of Amicus Curiae the Houston Institute for Race and Justice, *Barbour v. Louisiana*, No. 10-689, at 10 (Dec. 27, 2010). Unsurprisingly, evidence-driven deliberations lead to more accurate verdicts. Kaplan at *38; *see also* Brief of Amicus Curiae, *Barbour* at 8 (Jurors serving on unanimous juries report more confidence in the verdict); Brief of Amicus Curiae, *Herrera* at 10 ("The frequency of nonunanimous verdicts in Oregon and the infrequency of hung juries in other jurisdictions combine to suggest that jurors deliberate meaningfully to reach consensus when unanimity is required, but that they cease deliberations when a supermajority is reached when unanimity is not required.").

B. Non-unanimous juries nullify minority voices.

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

> [E]liminating the traditional unanimity requirement has been shown to produce a situation in which a majority of jurors can marginalize the viewpoints of other jurors by refusing to deliberate further once the majority threshold has been reached. This concern

TARCHIA LAW, P.C.
161 ST. HELENS STREET • SUITE 105 • ST. HELENS, OREGON 97051
TEL: (503)223-0011 • FAX (503) 223-1516 • EMILY@TARCHIALAW.COM

> applies to all juries and all jurors, but its effects can be particularly stark when those holding minority viewpoints are historic victims of discrimination, including women, people of color and religious minorities. In such cases, a state law provision permitting non-unanimous criminal verdicts can serve as a *de facto* means of allowing majorities of jurors to prevent minority jurors from jury participation, thereby undermining important Constitutional principles regarding equality in jury service that [the Supreme Court] has taken considerable measures to protect in recent years."

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

That point cannot be overstated. As a general matter, women and minorities are already underrepresented on juries. *Id*. That holds true in Oregon. *See* Kaplan at *48 (citing *The Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System, May 1994 Report* (1994), *available at* http://courts.oregon.gov/OJD/docs/osca/cpsd/courtimprovement/access/rac_eth_tfr.pdf [hereinafter *1994 Report*]. The *1994 Report* found that "[t]oo few minorities are called for jury duty, and even fewer minorities actually serve on Oregon juries" and that peremptory challenges frequently were used to exclude minorities from juries. *Id*.

Thus, prospective minority jurors already face barriers to jury participation. But that difficulty is compounded even if those jurors are not excluded, because "a majority of jurors can still easily dismiss the votes of minority jurors should they vote against conviction." Kaplan at *49; *see also* Brief of Amicus Curiae, *Barbour* at 11 ("[J]uror's knowledge that they do not have to reach a verdict in quorum juries often leads to 'dismissive' treatment of minority jurors whose votes are not needed to reach a verdict."). Kaplan adds, "Oregon not only has a population with few racial and ethnic minorities and a history of institutionalized racism, it also has documented structural racial disparity in its criminal justice system. Allowing non-unanimous jury verdicts not only contributes to perpetuating the structural racism in Oregon's criminal justice system but it leaves little faith in our deliberative jury process." *Id*.

TARCHIA LAW, P.C.
161 ST. HELENS STREET • SUITE 105 • ST. HELENS, OREGON 97051
TEL: (503)223-0011 • FAX (503) 223-1516 • EMILY@TARCHIALAW.COM

This is no exaggeration. Oregon's history of structural racism is well-documented. For example, Oregon was admitted into the union in 1859 with a racial exclusion law in its constitution, which prohibited black people from settling or owning property in the state. Or Const Art I, § 35 (1857). *See also* Kaplan at *49-53 (compiling numerous examples of racial discrimination). More recently, Multnomah County's Racial and Ethnic Disparities Report revealed that, compared to whites, black people are overrepresented in every phase of the county's criminal justice system. Racial and Ethnic Disparities and the Relative Rate Index (RRI), Safety and Justice Challenge, 7 (2016), *available at* www.aclu-or.org/sites/default/files/RED_Report_Mult_Co.pdf. As two examples of findings of disparity, black people are 4.2 times more likely to have their cases referred to the District Attorney and are 7 times more likely to be sentenced to prison. *Id*. In light of these disparities, minority viewpoints should have more, not less, of a role in decision making at every level, including on juries.

C. Non-unanimous juries lead to wrongful convictions.

The features of non-unanimous juries discussed above—less deliberation and the dismissal of minority viewpoints—"create an unacceptable risk of convicting the innocent." Kaplan at *41; *see also* Brief of Amici Curiae, *Barbour* at 12 ("There is evidence to suggest that when deliberations are cut off prematurely based on majority reliance on the quorum rule, the reliability of the verdict suffers. In several cases, the result favored by the minority jurors was the same as the result favored by the judges in those cases."). Indeed, in recommending unanimous juries, the American Bar Association noted that "[i]mplicit in [the historical] preference [for unanimous juries] is the assumption that unanimous verdicts are likely to be more

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161 ST. HELENS STREET • SUITE 105 • ST. HELENS, OREGON 97051
TEL: (503)223-0011 • FAX (503) 223-1516 • EMILY@TARCHIALAW.COM

accurate and reliable because they require the most wide-ranging discussions - ones that address and persuade every juror." Commentary to American Bar Association Jury Principle 4 (internal citations omitted).

Fundamentally, a non-unanimous jury "eliminates the most obvious scenario of preventing a wrongful conviction: that someone on the jury believes in the defendant's innocence or that the state has not met the burden of proving its case beyond a reasonable doubt." *Id*. at *42. Both Oregon and Louisiana have exonerees who were convicted by non-unanimous juries. *See id*. at *42, *45–46 (discussing Oregon case of Pamela Reser and Louisiana cases of Gene Bibbins and Rickie Johnson).

In the case at bar, because the verdict was not unanimous, and because a minority juror has come forward with evidence that the jury engaged in "discounting verdict-driven" deliberations and dismissed the viewpoints of minority jurors, the verdict cannot be trusted as accurate or reliable.

CONCLUSION

For the foregoing reasons, and for those presented by Mr. Williams and *amicus* ACLU Foundation of Oregon, *amicus* respectfully urge this Court to grant the motion for new trial.

Respectfully submitted this 19th day of October, 2016

Emily Elison, OSB 103800
Tarchia Law, PC
On behalf of Oregon Justice Resource Center

TARCHIA LAW, P.C.
161 ST. HELENS STREET • SUITE 105 • ST. HELENS, OREGON 97051
TEL: (503)223-0011 • FAX (503) 223-1516 • EMILY@TARCHIALAW.COM

CERTIFICATE OF SERVICE

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

Todd T. Jackson
Multnomah County DA's Office
600 Multnomah County Courthouse
1021 SW 4th Avenue
Portland, OR 97204
Email todd.jackson@mcda.us
Attorney for State of Oregon

Ryan Scott
Scott and Huggins Law Offices
1549 SE Ladd Avenue
Portland, OR 97214
Telephone: 503-546-0618
Email: ryan@ryanscottlaw.com
Attorney for Defendant

by mailing to them a true copy, correctly addressed and with sufficient postage, and with courtesy e-mail, on October 19, 2016.

Emily Elison, OSB 103800
Tarchia Law, PC
On behalf of Oregon Justice Resource Center

TARCHIA LAW, P.C.
161 ST. HELENS STREET • SUITE 105 • ST. HELENS, OREGON 97051
TEL: (503)223-0011 • FAX (503) 223-1516 • EMILY@TARCHIALAW.COM