

**PACIFIC NORTHWEST NEWS**

# 'Dirty secret' of Oregon jury system could go before U.S. Supreme Court

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The U.S. Supreme Court(Associated Press)

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**By Shane Dixon Kavanaugh**

The Oregonian/OregonLive

The U.S. Supreme Court next week will decide whether to accept a case that could test Oregon's unusual jury system, targeted by criminal justice reform advocates as deeply flawed and racist.

For decades, Oregon juries — and those in only one other state, Louisiana — have been permitted to convict most felony defendants with a 10-2 vote. The federal government and all other states require a unanimous verdict.

Lawyers for defendant Dale Lambert want the nation's high court on Monday to hear his challenge to Louisiana's jury law. His petition claims that such statutes deprive some defendants of equal protection under the law and should be ruled as unconstitutional.

Lambert, 30, was convicted in 2015 of second-degree murder by a 10-2 jury vote in Louisiana's Orleans Parish.

The debate on non-unanimous juries has resurfaced at a time when states and communities across the country grapple with issues of race and institutional discrimination.

Critics in Oregon claim that the state's jury system remains a relic of an intolerant past.

"It's one of our dirty little secrets hiding in plain view," said Aliza Kaplan, a professor at Lewis and Clark Law School in Portland, where she directs the Criminal Justice Reform Clinic.

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Some of the state's most seasoned prosecutors reject the characterization and believe Oregon's jury system provides more benefit than harm.

"I think it serves justice," said Clatsop County District Attorney Josh Marquis. "It empowers jurors. It protects the rights of defendants."

The Supreme Court upheld Oregon and Louisiana's jury laws in 1972 and has declined to hear cases challenging Oregon's 10-2 jury verdicts since as recently as 2009. But Kaplan and other critics believe that the court's recent interest in cases involving race and juries could compel a new hearing.

"It's especially timely right now," said Kaplan, whose Lewis and Clark law clinic filed a brief in support of Lambert's petition.

### **'AN INFLAMED PUBLIC'**

Critics in both states claim these systems, which no other state has ever used, are remnants from an era when suspicion of nonwhites swirled in the open and discrimination toward racial and religious minorities was endemic to public life.

Louisiana's majority verdict system was adopted during the state's 1898 constitutional convention to diminish the influence of black jurors upon verdicts, scholars claim. Thomas Aiello, a history professor at Valdosta State University in Georgia, has argued that the system helped feed emancipated black people into Louisiana's privatized convict-leasing system.

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In Oregon nearly four decades later it was a sensational murder trial involving a Jewish suspect that prompted voters to adopt the non-unanimous jury system, advocates and legal scholars said.

Jake Silverman, a onetime merchant turned criminal, was accused of executing a couple in a remote part of Columbia County in April 1933. Silverman believed the man, Jimmy Walker, had shot one of Silverman's friends, a former safecracker who ran a speakeasy and halfway house for ex-convicts in Portland.

Prosecutors charged Silverman, who was Jewish, with first-degree murder in the death of Walker, a Protestant, and sought the death penalty.

The trial, with its cast of seedy characters, received extensive coverage in The Morning Oregonian, then the state's largest newspaper, and other publications. It also drew public outrage when one of the jurors refused to convict Silverman of second-degree murder, forcing instead a manslaughter conviction that resulted in a three-year sentence for the accused killer.

Silverman's light sentence elicited scorn from The Morning Oregonian, which railed against the juror in an editorial tinged with racist undertones and nativist fervor.

"This newspaper's opinion is that the increased urbanization of American life ... 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," it wrote on Nov. 25, 1933.

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The remarks weren't the first time The Morning Oregonian took aim at ethnic jurors. In previous editorials around that time, the paper bemoaned "mixed-blood" jurors and lamented the role that some immigrants played on juries, questioning their "sense of responsibility" and "views on crime and punishment."

Less than a month after the Silverman trial ended, the Oregon Legislature recommended a public vote to amend the state's constitution to allow 10-2 jury verdicts in most felony cases, said Clayton Tullos, a Eugene attorney and expert on the origins of Oregon's non-unanimous jury system.

Proponents of the amendment, known as Measure 302-03, cited the Silverman trial in the May 1934 Special Election voter pamphlet and newspapers in Eugene and Portland urged readers to support it. The amendment, which received no organized opposition, passed with 58 percent of the vote.

"It was a definite rush to judgment by an inflamed public" said Tullos, who published an article in 2014 on non-unanimous jury trials in The Oregon Defense Attorney journal. "There wasn't much debate."

## 'IS THIS REALLY A JURY OF YOUR PEERS?'

The decision, however, has had a lasting impact on Oregon's criminal justice system, critics contend.

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Kaplan, the Lewis and Clark professor, said the rule is likely to limit evidence-based jury deliberations and increase wrongful convictions. It may also marginalize minority jurors whose votes aren't needed, she said.

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Mat dos Santos, legal director for the ACLU of Oregon, said that non-unanimous juries also undercut one of the fundamental aspects of a jury trial in the U.S.

"If we truly believe in a fair criminal justice system that includes conviction beyond a reasonable doubt, there is no way that such a system squares with a jury vote of 10-to-2," dos Santos said.

While no agency or body in the state tracks non-unanimous convictions, a study by the Oregon's Office of Public Defender's Services in 2009 offered some insight. It found that more than 40 percent of the 662 convictions it surveyed from 2007 and 2008 were non-unanimous.

Critics say non-unanimous juries can be especially harsh on blacks and other minorities in Oregon. The state jails African Americans at a rate five times higher than the rate it jails white people, according to data compiled by The Sentencing Project, a national advocacy group.

Because Oregon is 76 percent white and 2 percent black, according to U.S. Census figures, critics say it's rare to see more than one or two black jurors assigned to any one jury. And if those black jurors dissent from the majority, their votes effectively don't count, critics say.

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"If you have a rule in place that allows you to nullify the votes of two jurors, the question then becomes, 'Is this really a jury of your peers?'" dos Santos said.

That's the argument one African American man in Portland made last year when he asked a Multnomah Circuit Court judge for a retrial following his non-unanimous jury conviction.

In a 10-2 vote last July, Olan Jermaine Williams was found guilty of sodomizing an unconscious man that he met at a summer barbecue and was sentenced to 8 1/3 years in prison. Afterward, the lone black juror assigned to Williams' trial spoke out publicly, claiming she had voted not guilty and felt that the majority of the jury disregarded her view.

Ryan Scott, an attorney for Williams, filed a motion for a new trial based on the argument that all people have implicit biases, especially against people of a different race.

Judge Bronson James didn't grant Williams a new trial, writing that his defense hadn't presented any evidence that implicit racial bias motivated this particular jury.

But James in his ruling all but said that an effort to squelch nonwhite voices was part of the motivation for creating Oregon's non-unanimous jury system.

"Based on the historical evidence, this court therefore finds as fact that race and ethnicity was a motivating factor in the passage of 302-03 [the 1934 ballot measure], and that the measure was intended, at least in part, to dampen the influence of racial, ethnic and religious minorities on Oregon juries," James wrote.

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## COOKED UP BY THE KKK?

Not everyone in Oregon's criminal justice system agrees.

"These laws were not cooked up in the back room of the Ku Klux Klan or their friends," said Marquis, the district attorney in Clatsop County, which includes Astoria.

Marquis, a Democrat who has served as the coastal county's top prosecutor since 1994, defended Oregon's jury system, arguing that it helped reduce the number of hung juries, which benefits crime victims.

He also emphasized that the non-unanimous rule in Oregon doesn't apply to murder trials like it does in Louisiana.

Patty Perlow, Lane County's district attorney, said more data is needed on the effects on non-unanimous juries before deciding whether to upend the 83-year-old system.

"Before changing the way we're doing business, let's find out the best way to do business," she said in an email.

Those hoping to see non-unanimous juries eliminated in Oregon said they're cautiously optimistic that the Supreme Court will accept the Lambert case, though they concede it's possible it won't. The court is expected to publish a list of petitions it plans to review by Monday.

Should the high court decline the case, Oregon legislators still have the ability to refer a proposal to voters to change the system back to a 12-0 vote, which would likely spark a multimillion-dollar ballot fight. State lawmakers have not tackled the issue of non-unanimous juries since it first recommended a public vote in 1934, Kaplan said.

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Multnomah County District Attorney Rod Underhill said that criminal justice system should be a reflection of the public's shared values.

"It is time for a thoughtful review of this law," Underhill told The Oregonian/OregonLive in a statement. "My hope is that such a discussion will bring attention to this important topic and serve to increase public confidence in our criminal justice system."

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