

## JURY PRACTICE IN POST-TRUTH AMERICA: A CAUTIONARY NOTE

*Richard A. Harpootlian*  
*Christopher P. Kenney\**

Trial lawyers and judges like to regale jurors with the fact that the word “verdict” comes from the Latin *veredicto*, meaning “to speak the truth.”<sup>1</sup> When a jury reaches a verdict, it speaks truth by resolving factual disputes between the parties. Did the defendant shoot the victim? Was the plaintiff injured when the contract was breached? Disputed facts are proven or disproven through the presentation of evidence, testimony and tangible objects that make the existence of a fact more or less probable.<sup>2</sup> This basic formula—evidence proving facts, facts informing truth—is fundamental to our notion of ordered liberty and the constitutional guarantee of a jury trial.

Truth-seekers are a beleaguered lot in the aftermath of the 2016 presidential election, a campaign whose winner was propelled to victory by demagoguery, racism, sexism, and a willful resistance to any fact that challenged these grotesque views. While ambitious public office-seekers have long stretched the truth, Donald Trump’s indifference to it altogether confounded political opponents and challenged the fourth estate to reconcile its commitment to objectivity with a documentarian’s moral obligation to call a lie a lie.<sup>3</sup> There is

---

\* Richard “Dick” A. Harpootlian and Christopher “Chris” P. Kenney are trial lawyers in Columbia, South Carolina at Richard A. Harpootlian, P.A. where their practice includes whistleblower, class action, personal injury, wrongful death, complex business litigation, and criminal defense work.

Dick Harpootlian is a former chair of the South Carolina Democratic Party and early supporter of Barack Obama. In 1990, Harpootlian was elected district attorney for the judicial circuit that includes Columbia, South Carolina. In 1983, while serving as the district’s deputy prosecutor, he obtained a conviction and death sentence for Donald “Pee Wee” Gaskins, the state’s most notorious serial killer. During his more than 30 years as a prosecutor, defense attorney, and civil litigator, Harpootlian has tried hundreds of cases to a jury verdict.

The authors would like to thank Yani Mouratev for his research assistance and the editors and staff of the Emory Corporate Governance and Accountability Review for their editorial work. The views expressed here, or any errors made in so doing, belong to the authors and the authors alone.

<sup>1</sup> See, e.g., Ralph King Anderson, Jr., South Carolina Requests to Charge—Civil, 2009, § 1-1 (preliminary charge on general matters).

<sup>2</sup> See Fed. R. Evid. 401 (defining relevant evidence as evidence that “has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action.”)

<sup>3</sup> Liz Spayd, *When to Call a Lie a Lie*, N.Y. TIMES, (Sept. 20, 2016), <http://www.nytimes.com/2016/09/20/public-editor/trump-birther-lie-liz-spayd-public-editor.html>.

something pernicious about disputing facts by rejecting evidence outright. It threatens clear thinking and poses the ultimate distraction by attacking the predicate to any informed policy debate.<sup>4</sup> While Hillary Clinton was a predictably flawed candidate,<sup>5</sup> she marshaled the facts against her general election opponent with lawyerly competence. An alarmingly large electoral plurality did not care. Lawyers and litigants alike should find this result troubling because, far more than the nation's political institutions, the jury system's reliance on evidence-based reasoning is fundamental to its operation and the predictable, orderly administration of justice.

The assault on evidence-based reasoning was forefront in our minds the week after Donald Trump's surprise election victory as we sat in a Richland County, South Carolina courtroom next to Jermaine Davis—a 16-year-old, African-American male charged with murder—and prepared to strike 12 jurors and two alternates to hear evidence the State claimed would prove beyond a reasonable doubt that Jermaine shot and killed a man walking home from a neighborhood convenience store. Since our investigation revealed facts that cast serious doubt on the State's allegations, we believed Jermaine would be exonerated if jurors followed the evidence. As our recent trial work alerted us to the threat posed by evidence-adverse jurors, we endeavored to do what trial counsel must in the current litigation environment: identify and exclude them.

\* \* \*

Jermaine's representation was an unusual one for our office. Jermaine is a ward of the State of South Carolina who had spent the last nine years in the "care" of the State Department of Social Services. Jermaine's childhood was not a happy one as he spent almost a decade being bounced between 15 different foster placements and two group homes. During the summer of 2016, he ran away from the last group home placement in Columbia, South Carolina and had been living on the streets when he was arrested by the Richland County Sheriff's Department and charged in the shooting. When our practice takes a criminal representation, it routinely quotes a six-figure fee. Jermaine fired his public defender and hired our office for five (\$5) dollars.

---

<sup>4</sup> See Masha Gessen, *Arguing the Truth with Trump and Putin*, N.Y. TIMES (Dec. 17, 2016) <http://www.nytimes.com/2016/12/17/opinion/sunday/arguing-the-truth-with-trump-and-putin.html?ref=opinion>.

<sup>5</sup> Jim Morrill, *S.C. Democrat tries to jumpstart Biden bandwagon*, CHARLOTTE OBSERVER, (Aug. 18, 2015), <http://www.charlotteobserver.com/news/politics-government/article31440230.html> ("I don't believe [Clinton] can beat the Republican in 2016," Harpootlian says.").

Jermaine gave the police a written statement denying he shot the victim. They charged him anyway. The State had no DNA, no fingerprints, and no eyewitnesses linking Jermaine to the killing. The only witness was a woman who did not see anything, but heard shots outside her apartment window followed by the revving of a car engine and the squealing of tires. A ballistics report on the bullet retrieved from the victim's chest and another found nearby indicated the murder weapon was likely a semi-automatic pistol, but police found no shell casings at the scene. Nor was the victim robbed of the cash, wallet, or cell phone found in his pockets. This, and other circumstantial evidence, strongly suggested a possible drive-by shooting—a theory inapposite to the State's theory that Jermaine followed the victim from the convenience store and shot him over a brief verbal altercation some three days earlier.

The testimony of star prosecution witnesses cast further doubt on the State's theory and the soundness of the police's investigation. When the State called Jermaine's 16-year old girlfriend to the stand to testify she saw him with a gun the day of the shooting, she testified she did *not* see him with a gun that day, but that the story she told police actually occurred earlier that week. She explained the police pressured her to change her story, threatened to charge her as an accessory to murder, and showed her a holding cell. The girl's mother corroborated this account, explaining her teenage daughter was so visibly distraught during the interrogation that she could see the girl's heart beating in her chest. In fact, the last time Jermaine's girlfriend saw the gun, it was in the home of the State's other key witness: Terrance.

Terrance, another black, 16-year-old youth, was living in the apartment of a woman who took him in after his mother kicked him out for bad behavior. Over the summer, he befriended Jermaine and the two boys were frequently seen at the convenience store together including on the night of the murder and three days earlier when both boys had words with the victim. The only testable DNA recovered by police showed that Terrance, or "T", had worn Jermaine's hoodie—the same hoodie police claimed was used to conceal the gun the night of the shooting. The alleged murder weapon was never recovered, but was last seen in a purse behind the sofa in the apartment where T was living. Police recovered the empty purse, not behind the sofa, but in T's room. After police arrested him, T claimed Jermaine told him that he (Jermaine) shot the victim. Unlike Jermaine's girlfriend, whose mother was present during coercive police questioning, T was interrogated twice without a parent, guardian, or lawyer present. None of the interrogations were recorded or videotaped. After T rolled on Jermaine, T was charged with misprision of a felony. With Jermaine facing

a possible life sentence for a crime he did not commit, our primary concern was seating a jury that would be guided by the evidence or, rather, an extraordinary lack of evidence, implicating Jermaine.

\* \* \*

The modern American jury's role as fact finder traces its roots to an early nineteenth century shift that divested the jury of its authority to decide questions of law.<sup>6</sup> During the colonial and post-Revolutionary period, American juries routinely exercised the power to decide the law, often with little direction from the court and sometimes in contravention to the law as explained by the court.<sup>7</sup> This near absolute power over legal and plenary matters accorded with the trial court's modest role of maintaining order, jurists with little or no legal training, and an overarching belief that the entirety of a dispute was put before the jury for decision.<sup>8</sup> Accordingly, when the Supreme Court empaneled a jury in 1794, Chief Justice John Jay charged:

It may not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this, and on every other occasion, however, we have no doubt, you will pay that respect, which is due to the opinion of the court: For, as on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of law. But still *both objects* are lawfully, within your power of decision.<sup>9</sup>

However, by the 1830s, the legal landscape of jury power had taken its present shape whereby courts, guided by precedent or legislative enactment, instructed juries on the law and set aside verdicts that departed from that instruction.<sup>10</sup> In 1835, Justice Joseph Story, while sitting as a circuit court judge, articulated the modern view that “[i]t is the duty of the court to instruct the jury as to the law;

---

<sup>6</sup> See, e.g., Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 902–21 (1994); Martin A. Kotler, *Reappraising the Jury's Role as Finder of Fact*, 20 Ga. L. Rev. 123, 128–34 (1985).

<sup>7</sup> Alschuler, *supra* note 6 at 903–04.

<sup>8</sup> *Id.* at 903–06.

<sup>9</sup> *Georgia v. Brailsford*, 3 U.S. 1, 4 (1794). (emphasis added).

<sup>10</sup> See W. Nelson, *The Americanization of the Common Law: The Impact of Legal Changes on Massachusetts Society, 1760–1830*, p. 8 (1975).

and it is the duty of the jury to follow the law, as it is laid down by the court.”<sup>11</sup> One leading commentator attributes this shift to an effort to meet the needs of a burgeoning business community by promoting more certain or predictable litigation outcomes in a rapidly changing public sphere.<sup>12</sup>

This change was practical and normative “as American[s] perception of the jury changed from seeing it as a protective barrier between the citizen and a potentially tyrannous, corrupt state to seeing it as an instrument for the fair and efficient administration of justice.”<sup>13</sup> The eighteenth century jury system tasked citizens with picking winners and losers based not just on facts in that case, but on what a cross-section of the community believed concerning whether punishment or reward was owed. While this open-ended inquiry comports with the framer’s skepticism toward the exercise of government power, it could not be justified following the rise of a professional legal class, maturation of a robust jurisprudence, adoption of extensive legislative codifications, and the inclusion of ethnically, religiously, and ideologically heterogeneous jurors in the venire. Contemporary reappraisals of the jury’s role raise more arguments urging caution than supporting reforms that would allow juries to again decide questions of law.<sup>14</sup> Thus, to the extent modern jury procedure is designed to resolve factual disputes, decision-making that occurs in spite of trial evidence is a real threat to that system.

\* \* \*

Our concerns in Jermaine’s case arose one year earlier during a civil suit tried to a \$1.6 million verdict in Richland County. In that dispute, captioned *Stevens & Wilkinson v. City of Columbia*, our client, and one of South Carolina’s most reputable architectural firms, sued the city for breach of contract over unpaid fees. In preparing our trial strategy, we focused grouped the case with two groups of 10 citizens. Our findings were critical.

The sole question at trial was whether the city contracted with the architectural firm to continue work on construction drawings for a publically financed hotel while the city waited for bond financing to close so construction could begin. Believing they had a contract and would be paid for the work, the architectural firm finished the hotel drawings. Meanwhile, the bonds never

---

<sup>11</sup> *United States v. Battiste*, 24 F. Cas. 1042 (C.C.D. Mass. 1835).

<sup>12</sup> Nelson, *supra* note.10.

<sup>13</sup> Kotler, *supra* note.6 at 127–28.

<sup>14</sup> *See id.* at 135–72.

closed, city politics changed, and support for a publically financed hotel evaporated. When Stevens & Wilkinson sought payment for their work, the city disclaimed the contract. Evidence the jury would hear at trial supported only one of two possible conclusions. If the jury believed the city, there was no contract and nothing was owed. However, if the jury believed our client, the architectural firm was entitled to a weekly rate multiplied by the number of weeks it worked—an amount that equaled \$1.6 million.

Our pretrial focus groups revealed a serious possible pitfall in an otherwise strong case. When the focus group moderator presented the facts, both groups were unanimous: there was a contract; the city breached the contract. But when our moderator began polling the first group on the question of damages, troubling outliers emerged. Without much thought, the first four individuals favored an award of \$1.6 million—the only conclusion possible based on the facts they were given. The fifth group member: \$600,000. Our curious moderator paused, “tell me why you say \$600,000.” A slightly overweight white man in his early 60s with a snowy, unkempt beard and overalls rocked back slightly in his chair. “Well,” he began, “\$1.6 million is an awful lot of money and \$600,000 just seems fair,” he concluded without further explanation. Our moderator paused, waiting for explication. When it did not follow, he gently pressed, “well, does it matter to you that the evidence will show that what they agreed to adds up to \$1.6 million?” Without hesitation, “nope. \$600,000. That’s what’s fair.”

Two more panelists were polled: \$1.6 million for each and, on the other side of the wall, we began to breathe easier. Then another man, also white, mid-40s with creased, leathery skin and a goatee uncrossed his arms, peaked out from under the bill of his camouflage ball cap and said, “I’d do 400.” While looking at the bearded man, he continued, “but 600 is ok with me too.” Again, the moderator probed: “What about this document that says they agreed to pay a certain amount each week? Doesn’t that add up to \$1.6 million?” “Yep, but that don’t mean I agree with that.” “What if the architect ends up losing money at \$400,000 because they had to pay people to draw hundreds of pages of detailed blueprints?” “That don’t matter because that’s not what I would give’em,” he said, pushing back from the table and re-crossing his arms to signal that was the end of the matter. The second panel of 10 yielded a similar result with the overwhelming majority following the facts while two panelists—this time a middle-aged accountant and a stay-at-home mom—took a facts-be-damned approach.

After our moderator thanked the second group he joined us in the room next door where we had watched the discussion from a big screen TV. “Well,” he rubbed his forehead while we waited for his pronouncement. “I think what you have to take from this is there are some people who do not care about the facts. They have a gut feeling about their view and you’re not going to dislodge it by emphasizing the evidence.” Once he said it aloud, it was obvious which potential jurors might harbor an aversion to evidence-based reasoning. They were white. They lived in rural or suburban Richland County. They likely had little or no college education. Their wages were stagnant. They were angry and motivated by resentment. They could not identify with a deal to pay professional architects \$1.6 million for drawings. At the time we did not know it, but these panelists would vote for Donald Trump.

\* \* \*

Perhaps we should have seen this coming. Some did. In his October 17, 2005 pilot episode of *The Colbert Report*, Stephen Colbert coined the term “truthiness,” which he described as belief guided by what *felt* true while he derided reliance on “elitist” institutions like the *Encyclopedia Britannica* by explaining it was his right to claim that the Panama Canal was completed in 1941 (. . . it was completed in 1914).<sup>15</sup> While Colbert’s left-leaning audience chuckled along, he aptly drew the battle lines for the nation’s contemporary kulturkampf between “those who think with their head and those who know with their heart.” The following year, Merriam Webster recognized Colbert’s contribution, choosing “truthiness” as its word of the year ahead of contenders like “google,” “decider,” and “quagmire.”<sup>16</sup> A decade after Colbert’s satiric bit defined the encroaching zeitgeist, the *Oxford Dictionary* recognized “post-truth” as its 2016 word of the year<sup>17</sup> while the assault on evidence-based reasoning marched on.

---

<sup>15</sup> *The Colbert Report* (Comedy Central television broadcast Oct. 17, 2005), available at <http://www.cc.com/video-clips/63ite2/the-colbert-report-the-word—truthiness>; cf. *Face the Nation* (CBS television broadcast Dec. 25, 2016) (discussing post-truth, truthiness, and Trump with Colbert), available at <http://www.cbs.com/shows/the-late-show-with-stephen-colbert/news/1006371/stephen-colbert-talks-trump-the-holidays-and-the-perfect-joke-on-face-the-nation/>.

<sup>16</sup> Merriam-Webster website, *Merriam-Webster Announces Truthiness’ as 2006 Word of the Year*, <https://www.merriam-webster.com/press-release/2006-word-of-the-year>.

<sup>17</sup> Post-truth is an adjective defined as “relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief.” *Oxford Dictionaries* website, “Word of the Year 2016 is . . .”, available at <https://en.oxforddictionaries.com/word-of-the-year/word-of-the-year-2016>.

These observations are supported by evidence. Consider a recent Public Policy Polling (PPP) survey<sup>18</sup> that tested voters' knowledge of objective, measurable facts during the Obama years. Survey question 14 asked respondents whether "you think the unemployment rate has increased or decreased since Barack Obama became President?" Forty-one (41%) percent incorrectly believed unemployment is up over the last eight years, while the survey's crosstabs explain an astonishing 67% of Trump voters held this erroneous belief.<sup>19</sup> This is demonstrably false as, regardless of your view of Barack Obama, unemployment is down since he took office on January 20, 2009.<sup>20</sup> Likewise, 23% of respondents and 39% of Trump voters believe "the stock market has gone down since Barack Obama became President."<sup>21</sup> On December 7 and 8, when PPP conducted its survey, the Dow Jones Industrial Average hit record highs, 13,000 points higher than when Obama took office and inherited a great recession. For these respondents, their belief concerning these objective facts is not motivated by investigation, but by a feeling that Barack Obama performed poorly as president. Even Trump expressed astonishment at this phenomenon, aptly explaining, "I could stand in the middle of Fifth Avenue and shoot somebody, okay, and I wouldn't lose any voters, okay?"<sup>22</sup>

Experienced trial practitioners have long been cognizant of how to neutralize or exploit jury bias. For instance, belief bias recognizes that jurors are more likely to embrace a bad argument if it leads to a conclusion they already hold true or reject a good argument that leads to a conclusion believed false.<sup>23</sup> Similarly, confirmation bias causes some jurors to overemphasize certain evidence or ignore other evidence when it supports a preferred conclusion.<sup>24</sup> While biases have long been matters of concern, there is something qualitatively different about a bias affecting the *manner* in which information is processed versus rejection outright of the evidence's ability to persuade. Thus, while it may be error to give greater weight to evidence that supports a personal preference, it is folly to simply throw the scale out the window.

---

<sup>18</sup> Public Policy Polling, National Survey Results (1,224 registered voters, conducted Dec. 6–7, 2016), [http://www.publicpolicypolling.com/pdf/2015/PPP\\_Release\\_National\\_120916.pdf](http://www.publicpolicypolling.com/pdf/2015/PPP_Release_National_120916.pdf) (hereinafter, "PPP NSR").

<sup>19</sup> By way of comparison, 32% of Gary Johnson and Jill Stein's voters held this view, while just 18% of Clinton's voters did.

<sup>20</sup> U.S. Dept. Labor website, <http://data.bls.gov/timeseries/LNS14000000>.

<sup>21</sup> PPP NSR, question 15, *supra*.

<sup>22</sup> Ali Vitali, *Trump Says He Could 'Shoot Somebody' and Still Maintain Support*, NBC NEWS, (Jan. 23, 2016), <http://www.nbcnews.com/politics/2016-election/trump-says-he-could-shoot-somebody-still-maintain-support-n502911>.

<sup>23</sup> Roger G. Oatley, *An Overview of the Jury Bias Model*, Ann. 2005 ATLA-CLE 1613.

<sup>24</sup> *Id.*

\* \* \*

The adversarial jury trial remains one of the most potent civil institutions for dispensing justice and vindicating rights *provided* trial counsel is prepared to avoid seating jurors impervious to evidence-based reasoning. This requires preparation in advance of jury selection to compile all available information about potential jurors that can ethically be collected and a strategy that employs strikes within constitutional bounds.

Juror research begins by collecting information made available by the clerk of court. This information varies from court to court. South Carolina clerks of court merely disseminate a list with names, addresses, gender, and race. The United States District Court for the District of South Carolina, on the other hand, disseminates a detailed 47-question juror questionnaire that seeks disclosure concerning a wide range of topics. District court questions expressly asks jurors whether they can be fair in cases involving corporations, law enforcement, foreign nationals, and other categories of individuals routinely subject to bias.<sup>25</sup> Far more helpful in detecting evidence-averse jurors are open-ended questions soliciting disclosure concerning juror participation in social, political, civic, religious, or other organizations; which bumper stickers were displayed on their vehicle during the last year; the juror's primary source(s) of news; and which magazine and newspapers the juror regularly reads. Indeed, there is likely no better indicator of whether an individual values objective fact-finding than an examination of sources they rely on to gather information for them. Subscribers to a national newspaper no doubt value objective fact-finding far more than those reliant on a Facebook newsfeed to aggregate “newsworthy” content.<sup>26</sup>

Beyond voir dire, trial counsel should conduct individual juror research to gather juror voting history and information posted to social media. While

---

<sup>25</sup> While striking a federal jury in November 2015, potential jurors who indicated they could not be fair in a case involving a foreign national were so numerous that the judge expressed his own surprise from the bench.

<sup>26</sup> Potential jurors who report relying on Facebook to aggregate news content should receive even greater scrutiny given the proliferation of fake news on the platform and the success of fake content over mainstream news. See Craig Silverman, “This Analysis Shows How Fake Election News Stories Outperformed Real News On Facebook”, BuzzFeed, Nov. 16, 2016, available at [https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook?utm\\_term=.ygQwp9Wg8#.tvdnrq9Ya](https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook?utm_term=.ygQwp9Wg8#.tvdnrq9Ya) (finding top fake news stories generated more engagement on Facebook than top mainstream news from August to November 2016); see also Jeremy W. Peters, *Wielding Claims of ‘Fake News,’ Conservatives Take Aim at Mainstream Media*, N.Y. TIMES (Dec. 25, 2016) (discussing right wing media campaign to undermine objective reporting and quoting one conservative radio host lamenting, “we’ve effectively brainwashed the core of our audience to distrust anything that they disagree with.”), [http://www.nytimes.com/2016/12/25/us/politics/fake-news-claims-conservatives-mainstream-media-.html?\\_r=0](http://www.nytimes.com/2016/12/25/us/politics/fake-news-claims-conservatives-mainstream-media-.html?_r=0).

lawyers should refrain from contacting prospective jurors through social media platforms, many users' social media settings publically share profile information, posts, photos, and friend lists without requiring a friend request.<sup>27</sup> Likewise, blogs posts, tweets, Instagrams, and other posting services publically broadcast private views that may offer an insight or inference into the juror's disposition and thought process. Partisan primary voting histories, available from a state election commissions or private data vendors, can also be a telling source of information, particularly when coupled with other indicators. A reliable Republican primary voting record might, but need not necessarily, be indicative of an aversion to evidence-based reasoning. However, when this voting record presents alongside to a steady diet of Facebook and Fox News, trial counsel should proceed with extreme caution.

Once you have this information, be prepared to use it within the confines of the law. The constitution forbids the exercise of preemptory challenges based on race.<sup>28</sup> When a litigant mounts a "Batson challenge" to a preemptory strike by making a prima facie showing it was motivated by race, the challenged party must offer a race-neutral reason for the strike from which the trial court can decide its propriety based on the totality of the circumstances.<sup>29</sup> When the characteristic warranting exclusion is typically identifiable within a single racial group (e.g., white people), trial counsel must consistently apply the rationale for striking jurors both within that group and across racial lines.<sup>30</sup> Counsel must also be prepared to justify the strike, which might require divulging juror research to substantiate a claim that counsel's strategy is based in fact.

\* \* \*

---

<sup>27</sup> Unless limited by law or court order, lawyers may review juror Internet presence before or during trial without such passive activity constituting communication prohibited by Model Rule 3.5(b). ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 466 (2014), available at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/formal\\_opinion\\_466\\_final\\_04\\_23\\_14.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_466_final_04_23_14.authcheckdam.pdf). A lawyer may not, directly or indirectly, send an access request to a juror's social media account. *Id.*

<sup>28</sup> In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Court held equal protection forbade the use of preemptory challenges to exclude jurors based on race and established a burden-shifting procedure for proving a violation. In *Powers v. Ohio*, 499 U.S. 400 (1991), the Court expanded *Batson's* holding beyond the exclusion of jurors sharing the defendant's race.

<sup>29</sup> See *Foster v. Chatman*, 136 S. Ct. 1737, 1747 (2016) (summarizing *Batson's* procedure); see also *Batson*, supra n.28.

<sup>30</sup> See, e.g., *Foster*, 136 S. Ct. at 1750–52 (noting explanations given by prosecutors were "difficult to credit because the State willingly accepted white jurors with the same traits that supposedly rendered [a black juror] unattractive juror[.]" and that if the age of a [black] juror's son "was the issue, why did the State accept [a] (white) juror [. . .] who had a 17-year-old son?").

On the seventh day of trial, Jermaine's case went to the jury. After approximately three and one-half hours, the court received a note indicating the jury was deadlocked. The judge charged the jury on Allen<sup>31</sup> and they continued deliberations. One hour later, another jury note reported a deadlock and a vote: 11 not guilty, one guilty. After the foreman reported that further deliberation would not be productive, the judge declared a mistrial.<sup>32</sup>

The next day, we contacted one of the jurors seeking insight into the deliberations. The conversation soon turned to the lone holdout for guilty. Much to our chagrin, our holdout was a black man in his late 30s who worked for a local government and appeared attentive, contemplative, even friendly each day of trial as he sat neatly dressed on the front row. He fit the profile of an individual who might be troubled by sloppy police work and sympathetic to a young black child ensnared by a rush to clear the case. Unbeknownst to us, our holdout was moonlighting as a preacher, a fact he shared with his fellow jurors when explaining he was certain of Jermaine's guilt because God had spoken to him and told him so.

---

<sup>31</sup> An Allen charge is "[a] supplemental jury instruction given by the court to encourage a deadlocked jury, after prolonged deliberations, to reach a verdict[.]" which takes its name from the decision in *Allen v. United States*, 164 U.S. 492 (1896). ALLEN CHARGE, *Black's Law Dictionary* (10th ed. 2014). Typically, the charge informs the jury that (1) a new trial would be expensive for both sides, (2) there is no reason to believe another jury would be better suited to reaching a decision, (3) it is important a unanimous verdict be reached, and (4) the majority and the minority must give equal consideration to each other's views in attempting to reach a verdict. *See, e.g., United States v. Burgos*, 55 F.3d 933, 935–41 (4th Cir. 1995) (explaining the charge and holding a trial court must give even-handed admonitions on the fourth prong).

<sup>32</sup> Under South Carolina law, when a jury returns deadlocked a second time, "it shall not be sent out again without its own consent unless it shall ask from the court some further explanation of the law." S.C. Code Ann. § 14-7-1330 (1976); *but cf. United States v. Cornell*, 780 F.3d 616, 626 (4th Cir.), cert. denied, 136 S. Ct. 127 (2015) ("To the extent Defendants suggest that a trial court should at no time give a second Allen charge, we disagree.").