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LAW REVIEW

"RECYCLING "JUSTICE": FROM LRW TO CLE"

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This article describes a Legal Research & Writing exercise the author created for a law school class, but that he repurposed as a 2-act drama used to educate lawyers in a CLE program. The piece challenges other law faculty to repurpose their many law school assignments for the benefit of members of the legal profession outside of law schools. The author hopes that the article inspires faculty members to collaborate with CLE providers around the country to teach judges and lawyers in fun and entertaining ways.

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I. INTRODUCTION

In the fall of 2017, the William H. Bowen School of Law at the University of Arkansas-Little Rock offered me a last-minute opportunity to visit and teach a first-year legal research and writing ("LRW") course to approximately forty first-year students.[2] I had taught portions of the course during two summer CLEO[3] programs, but I did not consider myself a true LRW professor. I nonetheless accepted the offer and enjoyed the experience immensely. During the fall semester, the law school asked if I would teach the second half of the course in the spring term. The opportunity to spend more time with my first-year students was unquestionably the best reason to say "yes," but I also decided that I would use the continuing appointment as an opportunity to give my students a writing assignment in the fall that could carry over into the spring semester. I wanted to create a fact pattern that would allow them to see and learn how a case progresses and give them the experience of researching and writing on multiple topics within one case.

For reasons I did not expect, the LRW fact pattern that bridged the two semesters took on a life of its own. Students wanted to know more about the back story of the characters involved in the exercise and, based on their inquiries and my responses, I converted the fact pattern into a two-act drama entitled "Justice." The play has the potential to become an important continuing legal education ("CLE") vehicle for seasoned attorneys. This article describes the wonderfully unpredictable journey from a first-year law class to an equally unpredictable CLE opportunity.

II. THE LRW ASSIGNMENTS

In my fall class, the students wrote a case brief and three legal memos, in addition to a few other, smaller assignments.[4] The first memo was a "closed" exercise, for which I provided all of the research material to the students. The second memo consisted of two issues; I supplied the research material for the first issue, but the students had to conduct their own research for the second, narrower issue. The third paper was an "open memo," again with two issues, but the students had to research both issues before they could begin to write.

The fact pattern for the third memo revealed that law enforcement officers arrested a young man for attempting to assassinate a fictional First Lady of the

[2] At the Bowen School of Law, the first-year LRW course is called "Research, Writing & Analysis."
[3] CLEO is "The Council on Legal Education Opportunity," a national organization that was founded in 1968 to expand opportunities for minority and low-income students to attend law school. CLEO INC., https://cleoinc.org/about (last visited Nov. 1, 2020). CLEO's flagship program is the Prelaw Summer Institute, a rigorous, residential program designed to familiarize and better prepare students to succeed in law school. The Institute has been held on various law school campuses every summer since 1968. *Id.*
[4] A memo is typically an in-house "prognostic [document] based on a set of research materials that are provided to [the student]." *Write a Successful Memo*, LEXISNEXIS, http://www.lexisnexis.com/supp/lawschool/resources/write-successful-memo.pdf (last visited Nov. 1, 2020).

United States in a fictional national park. The assignment asked the students to determine if there were enough facts to charge the man with Attempted Murder[5] pursuant to federal law and whether he could successfully raise the defense of Abandonment.[6] "Abandonment" to the federal crime of Attempted Murder is somewhat controversial. Technically, federal law does not recognize Abandonment as a "defense."[7] The federal courts have held that Attempted Murder requires a defendant to have taken a substantial step toward the completion of a crime and a defendant could not have taken a substantial step if s/he abandoned his or her efforts.[8] Consequently, in federal court, a defendant who ceased all effort to continue toward the murder of another does not raise an affirmative defense as he might pursuant to state law. Rather, he is asserting that the government cannot prove the elements of Attempted Murder because the defendant did not take a substantial step toward the murder. To keep the exercise simple for my first-year students (who had not yet had Criminal Law), I described their second issue as whether or not the defendant could successfully raise the "defense" of Abandonment to refute the government's charge that he completed an attempt to assassinate the fictional First Lady.

The students self-selected into two groups: law clerks in the United States Attorney's Office and law clerks in the Office of the Federal Public Defender. I gave each group its own set of facts, which revealed slightly different details, but nothing significant enough to disadvantage either group.[9]

The students immediately had questions about the underlying story, as they always do. Why did the arrestee go to a national park? Why was the First Lady the target? Did he have a weapon with him when the police arrested him? As was and is my custom, I tried to answer their questions when the answers would not affect their writing assignment; if I thought that my answer would tip the scale in favor of one side, I would tell the student(s) that I simply could not answer the question and that they had to work around the issue.

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[5] 18 U.S.C. § 1113 (2017).
[6] Charles Doyle, Cong. Rsch. Serv., R42001, Attempt: An Overview of Federal Criminal Law 1, 7 (Apr. 6, 2015), https://fas.org/sgp/crs/misc/R42001.pdf ("Defendants charged with attempt have often offered one of three defenses—impossibility, abandonment, and entrapment.").
[7] Doyle, *supra* note 4, at 9; *See also* United States v. Young, 613 F.3d 735, 745 (8th Cir. 2010) ("We hold today that a defendant cannot abandon an attempt once it has been completed. We emphasize that all of our sister circuits that have faced this issue have either held that a defendant cannot abandon a completed attempt or have alluded to such a determination.") (citing cases in accord from the Second, Sixth and Ninth Circuits); United States v. Mehanna, 735 F.3d 32, 57 (1st Cir. 2013).
[8] Doyle, *supra* note 6, at 9; *See also* United States v. Young, 613 F.3d 735, 745 (8th Cir. 2010) ("We hold today that a defendant cannot abandon an attempt once it has been completed. We emphasize that all of our sister circuits that have faced this issue have either held that a defendant cannot abandon a completed attempt or have alluded to such a determination") (citing cases in accord from the Second, Sixth and Ninth Circuits); United States v. Mehanna, 735 F.3d 32, 57 (1st Cir. 2013).
[9] Interestingly, the opportunity to self-select which side of the case a student would be on resulted in an even split between government attorney and defense counsel. Copies of the two fact patterns are attached as Appendix A (government version) and Appendix B (defense version).

The students did a great job with the fall assignment. Their memos showcased their research skills by the breadth and depth of their legal arguments, syntheses, and analyses. Collectively, their citations also improved over earlier papers. Their knowledge of a wide variety of "life facts" arising from the facts of the problem was equally impressive.[10]

As the assignment due date approached, some students asked me if I thought that the protagonist in the fact pattern was "guilty." My general response to these types of questions is "I have no idea," but that response was not sufficient for many of the students. They pressed me on why I was neutral and about the information that they thought was crucial to writing a thorough memo based on their research. It was a very rewarding semester.

Fast forward to the spring semester, and I had the same group of students in the second semester of the LRW class. They knew that they would be interacting with the same fact pattern in some way upon their return, but they also knew the spring semester would focus on persuasive writing. In their case, the students learned that the young man from their fall memo assignment had been indicted and his case had gone to trial over their winter break. His trial ended with a guilty verdict; however, the jury took only two minutes to reach its verdict. Moreover, it arguably did not follow any of the judge's admonitions to select a presiding juror, meditate on the law, deliberate, reach a unanimous verdict, and sign the verdict form.[11] Because of the abrupt ending to the trial, defense counsel filed a motion to set aside the verdict and for a new trial. As a result, the first assignment in the spring semester was to determine whether the law permitted the defendant to receive a new trial based on the shortcomings in the deliberation process.

III. PROCEDURAL REQUIREMENTS FOR A NEW TRIAL

Rule 33(a) of the Federal Rules of Criminal Procedure provides: "Upon the defendant's motion, the court may vacate any judgment and grant a new trial *if the interest of justice so requires*."[12] One alternative that judges have when a jury's verdict seems hasty, or when the jurors have not followed court instructions, is to send the jury back to the jury room for additional deliberation or for an opportunity to correct the administrative or ministerial errors that occurred.[13] However, in the students' fact pattern, the trial judge dismissed the jury immediately after

[10] In the fact pattern, the defendant used "a Barret .50-caliber sniper rifle." Several students researched that type of weapon and incorporated into their memos that it could shoot accurately from great distances, and several included other similar, helpful facts.
[11] A copy of the second semester fact pattern trial transcript is attached as Appendix C.
[12] Fed. R. Crim. P. 33(a) (emphasis added). *But see* United States v. Feng Ling Liu, 69 F.Supp.3d 374, 381 (S.D.N.Y. 2014) ("It is well-settled," however, "that motions for new trials are not favored and should be granted only with great caution.") (quoting United States v. Costello, 255 F.2d 876, 879 (2d Cir. 1958)).
[13] *See* Allen v. United States, 164 U.S. 492, 501 (1896) (recognizing the federal judge's inherent power to send a jury back to the jury room to deliberate further).

announcing the verdict. Because the judge dismissed the jurors, their service had ended, and the judge was unable to take any further action concerning the jury.[14]

There is no bright-line test to determine when justice requires a new trial and, interestingly, "until 1984 grants of new trial motions were not appealable."[15] At best, there are illustrations from state and federal courts of the types of infractions that would warrant conducting a new trial again. In *United States v. Kellington*, the Ninth Circuit United States Court of Appeals cited to a decision from outside its circuit to explain the extraordinary nature of new-trial orders:

> If the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.[16]

Several factors could lead a judge to conclude that a "serious miscarriage of justice" may have occurred, thereby warranting a new trial in a particular case where a party: presented evidence obtained in violation of the Fourth Amendment; introduced other constitutionally-prohibited evidence; and permitted the erroneous admission of a co-defendant's confession that might have contributed to the jury's guilty verdict.[17] Similarly, the repeated reference to a defendant's failure to testify in a criminal case has warranted a new trial[18] and jury misconduct has also been deemed to be a sufficient basis for a new trial.[19]

To be fair, there are also non-legal factors one must consider when determining if a new trial is necessary. A trial is more than just the time questioning witnesses in court; there is significant preparation that takes place to know the current state of the applicable law and to prepare witnesses to give testimony and for cross-examination. There are pre-trial motions to be researched, filed, and argued, as well as post-trial motions that require the same attention. To go through

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[14] The United States Supreme Court has held that a federal district judge, in a civil case, "has the inherent power to rescind a jury discharge order and recall a jury for further deliberations after identifying an error in the jury's verdict." Dietz v. Bouldin, 136 S. Ct. 1885, 1890 (2016). However, the Court has not held that a district judge can rescind a discharge order and recall a jury for further deliberations in a criminal case.

[15] United States v. Kellington, 217 F.3d 1084, 1097 (9th Cir. 2000).

[16] *Id.* (citing United States v. Lincoln*,* 630 F.2d 1313, 1319 (8th Cir. 1980)).

[17] *See, e.g.*, United States v. Hoffa, 307 F.Supp. 1129 (E.D.Tenn. 1970), *aff'd* 437 F.2d 11 (6th Cir. 1971); United States ex rel. Orsini v. Reincke, 286 F.Supp. 974 (D. Conn.), *aff'd* 397 F.2d 977 (2d Cir. 1968); Greenwell v. United States, 336 F.2d 962 (D.C. Cir. 1964).

[18] *See, e.g.*, Calloway v. Wainwright*,* 409 F.2d 59 (5th Cir. 1968), *cert. denied,* 395 U.S. 909 (1969); Schultz v. Yeager*,* 403 F.2d 639 (3d Cir. 1968), *cert. denied,* 394 U.S. 961 (1969); Hearn v. Mintzes, 708 F.2d 1072 (6th Cir. 1983); United States ex rel. Burke v. Greer, 756 F.2d 1295 (7th Cir. 1985).

[19] *See* Yarbrough v. Sturm, Ruger & Co., 964 F.2d 376, 378–80 (5th Cir. 1992); Box v. Ferrellgas, Inc., 942 F.2d 942, 944–45 (5th Cir. 1991).

that process once and then to have to re-invest one's time and energy in a repeat performance can be soul-crushing, as well as time-consuming. There is also the matter of cost. Trials are not cheap, and one must factor in attorney time, expert witness time, and time away from other cases when deciding whether to ask that a case be re-tried. Additionally, the court and the attorneys in the matter *sub judice* all have other matters on their calendars, and a retrial of one case will disrupt those calendars and potentially impact other matters.

IV. STUDENT ARGUMENTS FOR AND AGAINST A NEW TRIAL

I presented the initial second-semester assignment in the form of a trial transcript in which the students could read how the trial came to an end and could note that the "judge" requested simultaneous briefing of the "new trial" issue. They learned that the judge suggested two caselaw sources to counsel to help them begin their research. One case reference was a correct name; however, the second reference was the judge's best recollection of the case name, and it was incorrect. Most lawyers can relate to a judge who believed that she remembered a case name, but not as well as she thought. The students had to rely on their researching skills to find the two suggested cases and any other support for their respective arguments. The two cases the judge provided were *United States v. Cunningham*[20] and *State v. Lumbra*.[21] When read together, the cases should lead one to conclude that the law does not prescribe the length of time a jury should take to arrive at a verdict. However, a short jury deliberation period could be one factor, along with others, a judge should consider when deciding a motion for a new trial.[22] In order to have any success in arguing for a new trial, a defendant must show something in addition to the brief jury deliberation that was serious enough for the interests of justice to mandate a new trial.

A. Jury Deliberation Time

The caselaw is surprisingly consistent regarding the length of time that a jury must deliberate. No particular amount of time is needed to render a sustainable verdict; indeed, an appellate court in Ohio held that a jury may render a verdict without even retiring to the jury room![23] In *Lumbra,* the party seeking a new trial alleged that the jury took only eight minutes to reach its verdict and "did not make

[20] 108 F.3d 120 (7th Cir. 1997).
[21] 177 A.2d 1235 (Vt. 1962).
[22] *See Cunningham*, 108 F.3d at 123–24; *Lumbra*, 177 A.2d at 358.
[23] *See, e.g.,* Val Decker Packing Co. v. Treon, 97 N.E.2d 696 (Ohio Ct. App. 1950). *See also* Patillo v. Thompson, 128 S.E.2d 656 (Ga. Ct. App. 1962) (the fact that a jury might agree on a verdict, even without ever leaving the jury box, raises no presumption that there is something wrong with the verdict). *See also* Lappe v. Blocker, 220 N.W.2d 570, 574 (Iowa 1974) ("Indeed, our statute in criminal cases provides, '[a]fter hearing the charge, the jury may either decide in court or retire for deliberation.'") (citation omitted); Gulf. B. & K.C. Ry. Co. v. Harrison, 104 S.W. 399, 401 (Tex. Civ. App. 1907) ("The law does not prescribe the length of time that a jury shall remain out in consideration of their verdict, and, if they returned the verdict without retirement from the box, that alone would not impeach or weaken it.").

a fair review of the evidence, and its [v]erdict was arrived at and based upon prejudice, passion and capriciousness."[24] The court did note, however, that "the trial court may—and doubtless should—cause the jury to reconsider its verdict if it considers that their decision is so hasty as to indicate, in the circumstances, either a flippant disregard or a perfunctory performance of their duties."[25] Likewise, in *Cunningham*, the jury found the defendant guilty of possessing stolen U.S. mail following a one-and-a-half-day trial and a ten minute jury deliberation.[26] The defendant moved for judgment of acquittal notwithstanding the jury verdict pursuant to Federal Rules of Criminal Procedure 29(a).[27] The trial judge granted the motion, citing, *inter alia*, that the jury's ten-minute deliberation was troubling to the court, but the government appealed the district judge's ruling.[28] The appellate court reversed the lower court and explained, "[b]efore attaching great significance to the short time the jury took for deliberations, we must have reason to suspect that the jury in some way disregarded its instructions or otherwise failed in its duty. A brief deliberation cannot, alone, be a basis for an acquittal."[29]

A short deliberation period might suggest that the jurors thought the evidence was so clear that there was no need to deliberate. On the other hand, a short period might also mean the jurors discussed the case as the trial progressed, which runs afoul of the classic courtroom instruction to juries that they are not to discuss the case until the end of the trial. There have even been challenges to a short deliberation time on the ground that haste in reaching a verdict indicates that passion and prejudice against the defeated party influenced the jury.[30] However, caselaw suggests that courts do not punish improper jury conversations unless they were informed by "some process outside the scope of the trial."[31] Caselaw is replete with examples of short jury deliberation periods that did not give rise to a new trial. In *Urquhart v. Durham & S.C.R. Co*., the jurors deliberated for just twenty

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[24] 177 A.2d at 358.
[25] *Id.* (citing Urquhart v. Durham & S. C. R. Co., 72 S.E. 630 (N.C. 1911)).
[26] 108 F.3d at 122.
[27] *Id.*
[28] *Id.* at 123.
[29] *Id.* at 124. *See also* Kearns v. Keystone Shipping Co., 863 F.2d 177, 182 (1st Cir. 1988); Guar. Serv. Corp. v. Am. Emps.' Ins. Co., 893 F.2d 725, 729 (5th Cir.1990); United States v. Smith, 26 F.3d 739, 760 (7th Cir. 1994).
[30] *See, e.g.,* Broxson v. Robinson, 254 P. 252, 253 (Wash. 1927) (jury took only twenty minutes to rule in favor of the defendant and plaintiff charged that the jury was prejudiced against her; the court upheld the verdict, saying "that the character of the case was such that if any prejudice existed it would more likely have been in favor of the plaintiff, a comely young lady whose facial beauty had been severely marred"); O'Connell v. Ford, 191 A. 501 (R.I. 1937) (court could not conclude that a speedy verdict indicated that the jury was motivated by prejudice); Mahoney v. Smith, 78 A.2d 798, 800 (R.I. 1951) (quick jury verdict was understandable in a case that was not complicated and the trial judge "told the jury in [his] charge that the case was 'very, very simple and elementary"); Alabama Farm Bureau Mut. Cas. Ins. Co. v Dalrymple, 116 So. 2d 924, 927 (Ala. 1959) (court was unwilling to reach the conclusion that a verdict after short deliberation evidenced the jury's "passion, partiality, or corruption").
[31] Robert P. MacKenzie III and C. Clayton Bromberg Jr., *Jury Misconduct: What Happens Behind Closed Doors*, 62 ALA. L. REV. 623, 636 (2011) (citing Jimmy Day Plumbing & Heating, Inc. v. Smith, 964 So. 2d 1, 9 (Ala. 2007)).

minutes.[32] In *Beach v. Commonwealth*, the jury deliberated for eight minutes and found the defendant guilty of murder.[33] In *Kitts v. Kitts*, the jury was out for only four minutes.[34] In fact, in *Sepulvado v. Daniels Lincoln-Mercury, Inc.*, the jury announced that it reached a decision before the bailiff could deliver the trial exhibits to the jury room for examination.[35]

B. "Other Factors"

If jury deliberation time alone is insufficient to allow a criminal case to be tried again, "something else" must persuade the court, in addition to the short deliberation period, requiring a new trial in the interest of justice.[36] In *Park v. Belford Trucking Co.*, a Florida appeals court explained that a new trial is appropriate:

> [W]here it is evident that the jury has not followed the law as instructed or has generally abrogated or failed to fulfill their functions according to law, but a jury verdict arrived at in a short period of time is not *sufficient* evidence to establish the fact that the jury failed to fulfill its function. The short period of time would be *some* evidence, but without more it would be error for the trial judge to grant a new trial.[37]

In the students' LRW problem, the facts suggested one could argue that the jury's failure to follow the court's final instructions was so egregious that it amounted to juror misconduct. In the fact pattern, the court specifically directed the jurors to select a Presiding Juror,[38] review the facts, meditate on the law, reach a unanimous verdict, and sign the jury verdict form.[39] The jurors, as far as the facts revealed, did not follow the judge's admonitions, save for reaching a unanimous verdict.[40] After the jury announced its verdict and the judge pointed out that most of the procedural requirements were likely ignored, the jurors hastily selected one juror to serve as the "Presiding Juror," and that person signed the verdict form—all in open court.[41] Additionally, the defense counsel asked the judge to poll the jurors.[42] While all jurors agreed that the jury verdict reflected their individual vote,

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[32] 72 S.E. 630, 632 (N.C. Ct. App. 1911).
[33] 246 S.W.2d 587, 588 (Ky. 1952).
[34] 315 S.W.2d 617, 618 (Ky. 1958).
[35] 316 S.E.2d 554 (Ga. Ct. App. 1984).
[36] *See, e.g.*, United States v. Peskin, 527 F.2d 71, 85 (7th Cir. 1975) (suggesting that a judge coercing a jury to reach a verdict would be problematic).
[37] 165 So. 2d 819, 823 (Fla. Dist. Ct. App. 1964).
[38] To avoid the sexist "Foreman," the patronizing "Forewoman," or the awkward "Foreperson," many law professors have adopted "Presiding Juror" as the preferred title for the juror who will guide the jury to its final verdict. We can only hope that the courts will one day follow suit.
[39] *See* Appendix C.
[40] *See id.*
[41] *See id.*
[42] *See id.*

two jurors reacted in ways to give the courtroom audience pause.[43] One juror began to sob and responded, "Yes, Your Honor, it it it is, I guess"; when pressed by the judge, she subsequently gave an unequivocal "yes" response.[44] The last juror concluded the polling by stating, "It is, Your Honor. It is time to go home."[45]

Juror misconduct is a sufficient basis to require a new trial, but the typical types of misconduct fall into two broad categories: (1) introduction of extraneous information and (2) *ex parte* communications.[46] A jury failing to follow the judge's end-of-trial instructions is not an issue with which aggrieved parties have had much success.[47] Moreover, there is a universal presumption in American jurisprudence that jurors have followed a court's instructions not to discuss the case prior to deliberation.[48] There are cases where an individual juror is removed from a jury for failing to deliberate and/or failing to follow the trial court's orders,[49] but it is unlikely that a court will dismiss an entire jury for failing to follow a court's instructions.[50]

V. CLE PEDAGOGY

Most judges and lawyers are familiar with the CLE program that involves an individual or a panel in front of a room, presenting information, and then taking

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[43] *See id.*
[44] *See id.*
[45] *See id.*
[46] United States v. Rosenthal, 454 F.3d 943, 949 (9th Cir. 2006). *See also* United States v. Gaggi, 811 F.2d 47, 51 (2d Cir. 1987) (establishing guidelines for a district court to follow when the problem of widely disseminated publicity may prejudicially impact an ongoing criminal trial); Harper v. People, 817 P.2d 77, 86-87 (Colo. 1991) (failing to poll jury to determine if mid-trial publicity affected its decision); United States v. Boone, 458 F.3d 321 (3rd Cir. 2006) (asserting that attempts at jury nullification by a juror may be grounds for disciplining a juror).
[47] *See, e.g.*, Harmston v. Agro-West, Inc., 727 P.2d 1242, 1249 (Idaho Ct. App. 1986) (finding that jury's relatively quick decision did not indicate that jury hadn't given careful and thoughtful consideration or that verdict was result of passion and prejudice); State v. Jernigan, 455 S.E.2d 163, 167 (N.C. Ct. App. 1995) (holding that the process of selecting a foreman is not part of deliberations). *But see* Kenan v. Moore, 195 So. 167, 169 (Fla. 1940) (holding that a sixteen-minute deliberation was not enough time to consider all of the issues in a complex personal injury case); Turner v. Cotham,105 N.W.2d 237, 242–43 (Mich. 1960) (agreeing with the trial court's observation that "This action by the jury shows conclusively that the jury either did not understand or did not give any attention to the charge of the court regarding the damages to be awarded. The defendant was entitled to have the jury give deliberate consideration to the amount of the damage that the plaintiff sustained. This certainly was not done.").
[48] *See, e.g.*, Richardson v. Marsh, 481 U.S. 200, 206 (1987) (referring to the "almost invariable assumption of the law that jurors follow their instructions"); *Jernigan* at 169; State v. Shrader, 290 N.C. 253, 225 S.E.2d 522 (1976).
[49] *See, e.g.*, United States v. Luisi, 568 F. Supp. 2d 106, 123 (D. Mass. 2008); United States v. Kemp, 500 F.3d 257, 301 (3d Cir. 2007); United States v. Lawson, 677 F.3d 629, 656 (4th Cir. 2012); United States v. Fattah, 224 F. Supp. 3d 403, 406 (E.D. Pa. 2016).
[50] *See* Lappe, 220 N.W.2d at 574 ("Moreover, nothing in our law requires the jury to read the instructions after the judge has performed his duty to read them aloud. In some jurisdictions the jury is not even allowed to have the written instructions, and in some (including Iowa in civil cases under $1,000) the instructions are oral.") (Citation omitted).

questions. While it is an effective way to impart information to an audience, it is not the only way. By most accounts, this traditional presentation style is often boring.

> We take material that once stirred us so much we built a career on it, and we reduce it to dry, uninspired text, effectively sucking the soul right out of it. And when we present, we compound the problem: Instead of talking directly to our audience like human beings, we read straight from those soul-sucking slides.[51]

Today, even within the legal profession, there is a recognition that people learn in various ways, and the most effective speakers incorporate various presentation components into a program to reach the widest audience possible.[52] Consequently, in order to impart information to a CLE audience, it is imperative that educational programs recognize and take into consideration the various learning styles for the potential audience. These learning styles include visual, aural, verbal, kinesthetic, logical, social, and solitary.[53]

It is virtually impossible for a traditional CLE presentation to effectively share information to an audience that each audience member receives equally; however, theatrical presentations come the closest. From elementary school through adulthood, educators stress the benefits of participating in theater arts because it provides an opportunity to learn through the sensory modes (visual, aural, and kinesthetic), and it contributes to the development of interpersonal and intra-personal intelligences.[54] Additionally, for audience members, watching a play or a musical can tap into multiple learning styles as the theatrical event unfolds. One expert explained:

> The audience absorbs the developing action immediately and directly, taking in the relationships among the characters, the dialog, rhythms, movements, and spectacle just as they would events in real life. However, they must watch and listen carefully to have the fullest possible experience and to understand the implications formed by the production as a whole.[55]

Even though an audience member is a third-party observer of a stage performance, that person is expected to do more than sit passively while the actors are on stage. Plays and musicals invoke emotion, and that emotion provokes

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[51] Jennifer Gonzalez, *A Review of Presentation Zen*, CULT OF PEDAGOGY (Oct. 9, 2017, 1:03 PM), https://www.cultofpedagogy.com/presentation-zen.
[52] *See generally* HOWARD GARDNER, FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES (1983).
[53] *See Overview of Learning Styles*, LEARNING-STYLES-ONLINE.COM (Oct. 9, 2017, 1:25 PM), https://www.learning-styles-online.com/overview.
[54] Carolyn Elder, Carol Hovey & Gai Jones, *CETA Position Paper*, CALIFORNIA EDUCATIONAL THEATER ASSOCIATION (Sept. 9, 2007), http://www.cetoweb.org/pdf/CETA_Position_Paper.pdf.
[55] OSCAR G. BROCKETT ET AL., THE ESSENTIAL THEATER 25 (11th ed. 2011).

thought and reaction.[56] Award-winning director and author Anne Bogart posits that the audience role is an integral part of a theater performance, thereby necessitating that audience members draw on all of their learning and listening skills. She explains:

> As I sit in an audience during a play, I am always acutely, sometimes painfully, aware of the creative tension or the lack of tension between actors and audience. The theater is what happens between spectator and actor. The dynamics between an actor and the audience constitutes a creative relationship that is at once intimate and distanced and which is very different from daily life. The relationship is circular. The actor is completely dependent upon the creative potential of each audience member and must be able to adjust and respond to whatever ensues. The actor initiates and the audience completes the circle with their imagination, memory and creative sensibilities. Without a receiver, there is no experience.[57]

In the play "Justice," the audience watches scenes from a trial in order to understand that the main character has been accused of a terrible crime but that he is nonetheless entitled to justice.[58] The members of the audience receive "insider information" in that they witness how the jurors perceive the presentation of the evidence (via scenes in the jury room), and they overhear a significant conversation between the main character and his attorney.[59] At the end of the first act, the trial reaches an abrupt conclusion when the jury returns with a guilty verdict after just two minutes of deliberation.[60] In addition, it is clear that the jurors did not follow all of the judge's instructions, which included admonitions to select a Presiding Juror, meditate on the law, review the evidence, reach a unanimous verdict, and sign the Jury Verdict Form.[61] As a result of the trial's unexpected conclusion, the defendant's attorney moves for a new trial, arguing that the proceedings did not afford his client justice.[62]

What the audience does not know is that it will decide whether the defendant should receive a new trial. Just before intermission, the three legal players—defense counsel, prosecutor, and judge—each take a turn in front of the curtain and ask the

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[56] THE PRAEGER HANDBOOK OF LEARNING AND THE BRAIN, VOLUME 1,182-83 (Sheryl Feinstein, ed., 2006) ("For the audience member watching Shakespeare, Lady MacBeth's guilt and madness may raise emotions . . . that not only make the experience memorable, involving long-term memory…but also promote thoughtful consideration of her plight . . . Cognitive research of drama performances has shown that the emotional content of the work can affect not only audiences' later recall of the performance but also facilitate the higher order processing of the performance to appreciate the aesthetics and themes of the work.").
[57] ANNE BOGART, A DIRECTOR PREPARES: SEVEN ESSAYS ON ART AND THEATER 4 (2001).
[58] *See* JOHN GALSWORTHY, JUSTICE, (Galsworthy Plays Second Series—No. 3. 1910).
[59] *Id.* at act I.
[60] *Id.*
[61] *Id.*
[62] *Id.*

audience for guidance.[63] The play contains canned statements from actors who portray audience members.[64] In an actual CLE, the presenter invites the judges and lawyers in the audience (and perhaps laypersons) to give their opinions as to whether the defendant should receive a new trial. In the play, the judge asks the audience to vote whether to grant a new trial and promises that her decision in the second act will reflect their collective vote.[65]

Using the play as a vehicle to impart important legal information serves several purposes. It provides the lawyers and judges in the audience with context that supports their appreciation of the legal issues raised in the CLE program. They observe portions of a trial and of an attorney-client conference to better understand the facts of the case. They also learn the factual nuances that are important to an attorney before he or she tries a case before a jury. The play therefore becomes a case-study for the audience. It is an entertaining vehicle to ask what justice means and how much justice a criminal defendant is entitled to receive. Moreover, if the play is staged well, the audience is drawn into the actors' world, and the entire experience becomes an engaging way to examine legal issues that are important to a broad swath of the legal community.

On August 24, 2019, members of the University of North Texas at Dallas College of Law (UNTDCOL) community mounted a play production for lawyers, judges, and law students. The State Bar of Texas offered CLE credit for those who sought credit.[66] The theatrical performance was well-received, and several people commented that watching the material presented helped crystallize the issues surrounding requests for new trials in federal criminal cases.

Subsequent to the performance, a focus group convened to react and comment on the CLE experiment. The focus group consisted of UNTDCOL faculty members who were actors in the play and members of the audience. They shared their observations about the merit (or lack thereof) in presenting a CLE program as a work of theater. A law professor from another law school, who was also in the audience, provided helpful written feedback about her experience as well.

One of the themes that all of the focus group members raised was that the theatrical nature of the CLE program made it "participatory." Another law professor from another law school provided additional feedback about her experience, explaining:

> It was participatory—not just the vote-for-the-answer end, but in the engagement, the way in which we the audience bought into the story and cared about its outcome. So often in CLEs, I'm bored deeply. I

[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] The State Bar of Texas approved 2.0 hours of CLE credit, including 0.5 hours of Ethics, for the program.

> find myself counting ceiling tiles and struggling to stay awake. Here, I was on the edge of my seat![67]

Focus-group members added that the play format works, in part, because it displays emotions similar to a panel presentation that becomes more engaging as the panelists begin to argue with each other.[68] Another member coined a new word, referring to a CLE presentation in the form of a theatrical work as "edumatainment" to support her belief that learning does not have to be boring.[69]

Using the play as the vehicle to refine law student's and lawyer's understandings of a complex issue also serves several indefinable purposes. Law students can visualize themselves in the courtroom as they watch the play unfold before them. Students, lawyers, and judges watch all of the activity taking place on the stage and are drawn into the world of the lawyers who represent criminal clients. In this regard, using the play becomes an excellent example of pedagogical scaffolding.[70]

Scaffolding is considered an important aspect of effective teaching. It bridges learning gaps by reducing "the negative emotions and self-perceptions that students may experience when they get frustrated, intimidated, or discouraged when attempting a difficult task without the assistance, direction, or understanding they need to complete it."[71] In the play, the audience is exposed to a trial, something that everyone has some familiarity with prior to watching the performance.[72] Then, as the main characters develop through Act I of the play, the audience increases its appreciation of the defendant's situation. Hopefully, as the actor portraying the defendant reveals more of the defendant's story and personality, the audience becomes more invested in what happens to the defendant, and everyone is brought along as the issues become more complex and consequential. The goal of the performance is for the audience lean into the defendant's plight and learn the

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[67] E-mail from Kit F. Johnson, Professor of Law, Univ. of Okla. Coll. of Law, to author (Oct. 3, 2019, 8:58PM) (on file with author).

[68] Focus Group Interview by Loren Jacobson, Assistant Professor of Law, UNT Dall. Coll. of Law, with Matthew Crockett, Brian Owsley, and Melissa Shultz, Assistant Professors of Law, UNT Dall. Coll. of Law, Dallas, Tx. (Dec. 18, 2019).

[69] *Id.*

[70] Scaffolding "refers to a variety of instructional techniques used to move students progressively toward stronger understanding and, ultimately, greater independence in the learning process." *Scaffolding*, THE GLOSSARY OF EDUCATION REFORM (March 29, 2019, 1:35 PM), https://www.edglossary.org/scaffolding/.

[71] *Id.*

[72] In fact, during the focus group discussion with colleagues from UNT Dallas College of Law, colleagues shared thoughts about why the play was so accessible. One commented that we learn in our K-12 civics classes what juries are and how they are supposed to function, so a play about jurors is not foreign to most members of the audience, and another suggested that, because of television courtroom dramas, most people know what happens at trial. *See* Focus Group, *supra* note 68. Professor Johnson added that the cast was partly responsible for helping the audience follow the story so easily; she offered that "The cast performed their parts excellently and really drew the audience into the drama." E-mail from Kit F. Johnson, *supra* note 67.

applicable legal concepts that affect him because the audience members have internalized what is happening to the defendant. They want to do the right thing because the outcome affects someone whom they believe they have come to know. These outcomes mirror common scaffolding strategies.[73]

VI. CONCLUSION

"Justice" should not be the only time a student problem from an LRW class becomes a CLE experience for judges and lawyers. This article should inspire the hundreds of LRW faculty members who create similar exercises each year to repurpose their exercises and to collaborate with CLE providers around the country. There is much knowledge to be discovered in this world and, if information can be imparted during a fun evening of theater, more legal professionals might enjoy fulfilling their CLE obligations.

[73] Scaffolding strategies include giving students a simplified version of a lesson, assignment, or reading, and then gradually increases the complexity, difficulty, or sophistication over time; describing or illustrating a concept, problem, or process in multiple ways to ensure understanding; and giving the students a vocabulary lesson that builds on the knowledge and skills that the audience was taught in a previous lesson or setting. *Id. See also* KATHLEEN HOGAN & MICHAEL PRESSLEY, SCAFFOLDING STUDENT LEARNING: INSTRUCTIONAL APPROACHES & ISSUES (1999).

VII. APPENDIX A: GOVERNMENT VERSION

RWA I - Alexander

Memo Problem #3 - Government

On Saturday, October, 8, 2016, the First Lady of the United States, Margaret Chase, was scheduled to provide the keynote address at the dedication of the United States' newest national park, Ozark National Park. The park is located within the territorial boundaries of the State of Bowen, which is in the newly-created Twelfth Circuit of the U.S. Court of Appeals. (The federal district Court is called the "District of Bowen.") Mrs. Chase was to begin her remarks at 11:30am and they were expected to last thirty minutes.

The Secret Service, working with the United States Park Police (the police force for the national parks), had blocked off a five-acre area of the park surrounding the location of Mrs. Chase's speech two days prior to the event. The two agencies then walked the entire five-acre area to make sure there were no campers, hikers, or wrongdoers within the protected area. Police were stationed approximately every half-mile around the perimeter of the protected area to guard it until the First Lady's speech had been delivered.

On October 7, one of the Park Police officers (Paul Belton) saw a white, late-model, Chevrolet van pull into a parking area near his perimeter station around 3:00PM. The van had a Bowen license plate on the rear that read "123-ABC" and it was parked outside of the "safe zone" that had been established for the First Lady's event. The officer walked over to the van, but did not see anyone or anything in it or near it. He had his office run the plates and learned that the vehicle was registered to Carl Maxxon, a 28-year-old U.S. citizen whose driving record indicated that he had a driver's license issued by the State of Missouri and that listed his permanent address as being in Joplin, Missouri. Maxxon had recently been arrested (but not charged) by authorities in Jasper County, Missouri for participating in a protest at The Wildcat Glades Conservation & Audubon Center, a conservation area south of Joplin with extensive walking trails, museum, and wildlife programs & activities. The protestors were part of an unorganized group of activists who believe that the government is setting aside too much land for conservation and animal preservation to the detriment of hunters and sportsmen and women. Officer Belton used his cell phone to take a photograph of the van and returned to his post.

Belton's shift ended at 9:00PM on October 7 and he shared information about the van with his replacement officer. Before going to his car, Belton noticed that there was a change of clothing flung over the back of the driver's seat; the clothing was not there earlier in the day. He returned and reported this information to his replacement and then Belton went home. He returned the next morning at 6:00AM and relieved his replacement. The replacement officer reported that there had been no activity in or around the van all night. Belton radioed his supervisor and shared the information that he had obtained from the night before as well as the fact that he was concerned about the presence of an unoccupied vehicle so close to the protected area on the morning of the First Lady's speech.

By 9:25AM, the Secret Service and U.S. Park Police had assembled a team of men and women who were going to comb the protected area, once again, to make sure someone wasn't lurking in the woods or underbrush who might try and harm the First Lady. At 10:15AM, Special Agent Stacy Ogden radioed that she reached an outcropping of rock, approximately one-half mile from the stage where the First Lady would be speaking, that had a suspicious pile of brush and cut branches on one side of it. As she approached the pile of natural material, she saw a small, dark green tent inside. She examined the tent and saw it was unoccupied, but also saw a backpack that was open with clothing in it inside. She then noticed a single bullet and a tripod next to the tent that was oriented in such a way that something could be mounted to it that would be pointing in the direction of the stage where the First Lady would be speaking. Ogden couldn't tell if the tripod was designed to hold a camera, a rifle, or something else. There were leaves, branches and other debris piled up around the tripod, but there were no obstructions between the tripod and the stage. Ogden also noticed a newspaper clipping on the ground by the entrance to the tent. Without touching it, she moved it with a stick so she could read it. It was an article about the First Lady's speech, giving the location and time of the event.

At 10:18AM, the engine in white van suddenly started up and the vehicle left the parking area and headed off in a direction toward the main entrance to Ozark National Park. Park police immediately stopped the driver and asked him to step out of the van. One police officer looked inside the van and saw a Barret .50 caliber sniper rifle (high-powered rifle), with a scope attached to it, and two boxes of bullets. He opened the boxes of bullets and immediately saw that one bullet was missing from one of the two boxes. (Ballistics tests conclusively matched the bullet found in the Park and near the tent as the same ammunition that was in the box that was missing one bullet.) The officer also noticed a backpack and a newspaper with an article torn from it. (The Secret Service lab conclusively matched the newspaper article found near the tent in the Park as having been torn from the newspaper that was in the van.)

Maxxon was arrested and charged with Attempted Murder of the First Lady of the United States in violation of 18 U.S.C. §1113. (The federal Murder statute is found at 18 U.S.C. §1111.) Special Agent Ogden believes that the scene she stumbled upon indicated that the suspect might have left something in his car and just went back to retrieve whatever it was because clothing, the tripod, and the tent were all together in the brush. Moreover, his sudden exit from the parking area suggests that he might have seen the government agents and officers and he panicked. Maxxon initially told the interrogating officers that he hadn't done anything wrong and that he was camping but forgot something in his van so he went to retrieve it. After some intense questioning, he said that he thought about killing the First Lady but that he had "utterly and completely given up on the idea of trying to kill Mrs. Chase" so he went back to the van to head home.

Please research whether the government has enough evidence to charge Maxxon with Attempted Murder and whether his claimed defense of abandonment would be successful.

VIII. APPENDIX B: DEFENSE VERSION

RWA I - Alexander

Memo Problem #3 - Defendant

On Saturday, October, 8, 2016, the First Lady of the United States, Margaret Chase, was scheduled to provide the keynote address at the dedication of the United States' newest national park, Ozark National Park. The park is located within the territorial boundaries of the State of Bowen, which is in the newly-created Twelfth Circuit of the U.S. Court of Appeals. (The federal district Court is called the "District of Bowen.") Mrs. Chase was to begin her remarks at 11:30am and they were expected to last thirty minutes.

The Secret Service, working with the United States Park Police (the police force for the national parks), had blocked off a five-acre area of the park surrounding the location of Mrs. Chase's speech two days prior to the event. According to the local news, the two agencies walked the entire five-acre area to make sure there were no campers, hikers, or wrongdoers within the protected area. Police were stationed approximately every half-mile around the perimeter of the protected area to guard it until the First Lady's speech had been delivered.

Again, according to the local news, on October 7, one of the Park Police officers (Paul Belton) saw a white, late-model, Chevrolet van pull into a parking area near his perimeter station around 3:00PM. The van had a Bowen license plate on the rear that read "123-ABC" and it was parked just outside of the "safe zone" that had been established for the First Lady's event. The officer walked over to the van, but did not see anyone or anything in it or near it. He had his office run the plates and learned that the vehicle was registered to Carl Maxxon, a 28-year-old U.S. citizen whose driving record indicated that he had a driver's license issued by the State of Missouri and that listed his permanent address as being in Joplin, Missouri.
Maxxon shared with your office that he had recently been arrested (but not charged) by authorities in Jasper County, Missouri for participating in a protest at The Wildcat Glades Conservation & Audubon Center, a conservation area south of Joplin with extensive walking trails, museum, and wildlife programs & activities. The protestors were part of an unorganized group of activists who believe that the government is setting aside too much land for conservation and animal preservation to the detriment of hunters and sportsmen and women.

At some point, according to the notes you were able to obtain from the U.S. Attorney's Office, Belton noticed that there was a change of clothing flung over the back of the driver's seat of the van; he didn't see any clothing earlier in the day. Belton went home at the end of his shift and returned the next morning at 6:00AM. The replacement officer reported that there had been no activity in or around the van all night. Belton radioed his supervisor and shared the information that he had obtained from the night before as well as the fact that he was concerned about the presence of an unoccupied vehicle so close to the protected area on the morning of the First Lady's speech.

According to the news, a full-scale search began early in the morning of October 8, to make sure someone wasn't lurking in the woods or underbrush who might try and harm the First Lady.

The U.S. Attorney's Office's notes indicate that, at 10:15AM, Special Agent Stacy Ogden radioed that she reached an outcropping of rock, approximately one-half mile from the stage where the First Lady would be speaking, that had a suspicious pile of brush and cut branches on one side of it. As she approached the pile of natural material, she saw a small, dark green tent inside. She examined the tent and saw it was unoccupied, but also saw a backpack that was open with clothing in it inside. She then noticed a single bullet and a tripod next to the tent that was oriented in such a way that something could be mounted to it that would be pointing in the direction of the stage where the First Lady would be speaking. There were leaves, branches and other debris piled up around the tripod, but there were no obstructions between the tripod and the stage.

Your client has shared with you that he has been growing increasingly more annoyed at the federal government because of its disregard of hunters and their rights and, "for a split second," he had the idea of shooting the First Lady in protest. He admits that he went to the park for that purpose and that he did camp out in the park overnight; however, as the night progressed, he grew less enamored of the idea. So, when he awoke on the 8th, he decided to go home. He thought he heard rustling and feared that someone might spot him so he left without collecting all of his things. He also admits that he had a high-powered rifle with him and some bullets.

The news reported that Special Agent Ogden retrieved (from Maxxon's campsite) a newspaper clipping that was on the ground by the entrance to Maxxon's tent. It was a newspaper article about the First Lady's speech, giving the location and time of the event.

Maxxon says that, around 10:15AM on October 8, he reached his van and saw what looked to be federal police all over so he quickly started the van and drove away as fast as he could in a direction toward the main entrance to Ozark National Park. Park police immediately stopped him and asked him to step out of the van. One police officer looked inside the van and saw a Barret .50 caliber sniper rifle (high-powered rifle), with a scope attached to it, and two boxes of bullets. The officer opened the boxes of bullets and immediately saw that one bullet was missing from one of the two boxes. (Government ballistics tests conclusively matched the bullet found in the Park and near the tent as the same ammunition that was in the box that was missing one bullet.) The officer also noticed a backpack and a newspaper with an article torn from it. (The Secret Service lab conclusively matched the newspaper article found near the tent in the Park as having been torn from the newspaper that was in the van.)

Maxxon was arrested and charged with Attempted Murder of the First Lady of the United States in violation of 18 U.S.C. §1113. (The federal Murder statute is found at 18 U.S.C. §1111.) He initially told the interrogating officers that he hadn't done anything wrong and that he was camping but forgot something in his van so he went to retrieve it. After some intense questioning, he said that he thought about killing the First Lady but that he had "utterly and completely given up on the idea of trying to kill Mrs. Chase" so he went back to the van to head home.

Please research whether the government has enough evidence to charge Maxxon with Attempted Murder and whether his claimed defense of Abandonment would be successful.

IX. APPENDIX C: TRIAL TRANSCRIPT

Excerpt from the Trial Transcript of United States v. Carl Maxxon (Case No. 16CR-2822)
December 19, 2016
Judge Alice Noble, United States District Judge for the District of Bowen

Judge: Ladies and gentlemen of the jury, we have now completed the trial. You have listened, patiently, to six days of testimony, several hours of jury instructions read to you by me, and one-half day of arguments from counsel. I have repeatedly asked you not to talk about the case or to form any opinions about the outcome of the case. However, we are now at the point where the rules will change.

You are about to begin your deliberations. This is a serious case and I urge you to take your time, review the testimony and other evidence that was presented, consider the arguments of counsel, and meditate on the law as I read it to you.

The Defendant in this case, Carl Maxxon, is charged with the crime of Attempt Murder. You have heard the law regarding Murder read to you and you have heard the law regarding Attempt read to you. When you retire to the jury room, you must decide if Mr. Maxxon took a substantial step toward the completion of a Murder. That requires you to consider both statutes, even though he is only charged with one crime. In addition, you must decide whether Mr. Maxxon abandoned his efforts therefore ending any criminal activity that may have begun. Only when you have considered all of these things should you reach a decision about whether Mr. Maxxon is guilty of the crime for which he is charged. When you reach your decision, you are to complete the Verdict Form that the bailiff will hand to you and one of you will read your decision in open court.

Now, prior to you beginning your deliberations, please elect one person to serve as the Presiding Juror. That person will guide you through your deliberations and will be the person who signs the Verdict Form and who will read your decision in open court. Remember that your verdict must be unanimous.

As I have said many times in this trial, this is a very serious case. It is a high-profile case because of the nature of the facts, the identity of the Complaining Witness, news cameras in the courtroom, and the unprecedented allegations against the Defendant. You should approach your verdict thoughtfully and carefully. Take your time. Select a presiding juror, review the law, consider the facts, and reach your decision. It is now 3:30 in the afternoon. There should be enough time for you to organize yourselves and get started. If you feel that you

have concluded your discussions for today, notify the bailiff and the court will allow you to adjourn for the day and you will resume deliberations tomorrow. Thank you for your service. You may now proceed to the jury room.

Clerk: All rise.

Judge: This is out of the presence and hearing of the jury. The Court Clerk will take the cell phone numbers of the lead counsel for each side so that we might remain in contact with you while the jury deliberates. I don't anticipate that the jury will be able to get started and get very far into its deliberations today, but you never know. Feel free to pack up your things and leave. Once the jury decides to call it quits for the day, the Court will contact you and notify you of the time that the deliberations stopped.

U.S. Atty: Thank you, Your Honor.

Mr. Cardi: Thanks judge.

KNOCK AT THE DOOR LEADING TO THE JURY ROOM.

Judge: Standby, counsel. Bailiff is there a problem?

Bailiff: Judge, the jurors say they are finished and they are ready to render a verdict.

Judge: Already?

Bailiff: Yes, ma'am. That's what they've told me. We got down the hall to the jury room and, as I shut the door, they opened it and said that they were done.

Judge: Okay, bring them back in.

Ladies and gentlemen, the Bailiff informs me that you have reached a verdict. Is that true?

Judge: Let the record reflect that several jurors are nodding their heads. Alright, will the Presiding Juror please stand and read your verdict?

Mr. Cardi: Your Honor, may the record reflect that there is obvious confusion in the jury box. There is whispering and motioning, but no one is standing up.

Juror #11: Mark, you do it. You are as good as anyone to read it. Go ahead and sign it.

Juror #2: Judge, I guess I am the Foreman.

Judge: The record will reflect Mr. Cardi's observation. Juror #2, you will note that we call the person the Presiding Juror in this court and we ask that person to sign the Verdict Form. Have you signed it?

Juror #2: I am signing it now, Judge.

Mr. Cardi: Let the record reflect that Juror #2 does not have a writing instrument and is borrowing a pen from Juror #3.

U.S. Atty: Objection.

Judge: Overruled. Mr. Cardi's observation is noted as correct. Juror #2 is borrowing a pen from Juror #3. What is your verdict?

Juror #2: We the Jury find the Defendant guilty of Attempted Murder of the First Lady of the United States.

Mr. Cardi: Your Honor, we request that you poll the jury.

Judge: Okay, ladies and gentlemen, we have heard the Presiding Juror read the verdict. I will now ask each of you if the verdict reflects your individual decision. The purpose of a jury poll is "to give each juror an opportunity, before the verdict is recorded, to declare in open court his or her assent to the verdict which the [presiding juror] has returned and thus to enable the court and the parties to ascertain with certainty that a unanimous verdict has in fact been recorded and that no juror has been coerced or induced to agree to a verdict to which he has not fully assented."

I will ask each of you the same question and you are to stand up and give me your individual response, please. Juror #1, is this verdict reflective of your individual vote?

Juror #1 Yes it is.

Judge: Juror #2, is this verdict reflective of your individual vote?

Juror #2: Yes, ma'am.

Judge: Juror #3, is this verdict reflective of your individual vote?
Juror #3: Yes it is.

Judge: Juror #4, is this verdict reflective of your individual vote?

Juror #4? Do you have a response?

Mr. Cardi: May the record reflect that Juror #4 is looking down at the floor and is clearly crying?

U.S. Atty: Objection.

Judge: Juror #4? The record will reflect Mr. Cardi's observation on behalf of the Defendant is a correct statement of what the Court observes.

Juror #4?

Juror #4: Yes, Your Honor, it it it is, I guess.

Judge: Juror #4, "I guess" is not an acceptable answer. The verdict is either reflective of your individual vote or it is not.

Juror #4: It is.

Judge: Very well. Juror #5?

Juror #5: Yes, judge.

Judge: Juror #6, is this verdict reflective of your individual vote?

Juror #6 It is reflective of my individual vote.

Judge: Juror #7, is

Juror #7: It is how I voted, Judge.

Judge: Juror #8, is this verdict reflective of your individual vote?

Juror #8: Yes.

Judge: Juror #9?

Juror #9: Yes it is, Your Honor.

Judge: Juror #10, is this verdict reflective of your individual vote?

Juror #10?

Mr. Cardi: Your Honor, may the record reflect that Juror #10 is seated in the row behind Juror #4 and Juror #10 has been consoling Juror #4, who is still wiping tears from her eyes. Juror #10 has been patting the shoulder of Juror #4 since Juror #4 gave her response to the Court.

U.S. Atty: Objection, Your Honor. Recording this observation as a part of the record serves absolutely no purpose.

Judge: Overruled. The record will note that Juror #10 has been patting the shoulder of Juror #4 since Juror #4 gave her response to the Court.

Juror #11, is this verdict reflective of your individual vote?

U.S. Atty: Judge, you did not receive a response from Juror #10.

Juror #10: It is my vote to convict, Judge.

Judge: Thank you. Juror #11?

Juror #11: The verdict reflects my vote, yes, Your Honor.

Judge: And Juror #12, is this verdict reflective of your individual vote?

Juror #12: It is, Your Honor. It is time to go home.

Judge: Ladies and gentlemen, thank you for your time and hard work. The Court accepts your verdict and shall record it. Mr. Maxxon will be remanded to the custody of the U.S. Marshal at the completion of today's proceedings.

The members of the jury are excused.

Clerk: All rise.

Judge: We are now out of the presence and hearing of the jury. Counsel, are there any post-trial motions to consider?

Mr. Cardi: Judge, the defense moves to renew its motion for judgment of acquittal under Federal Rules of Criminal Procedure, Rule 29, and further moves to set aside the verdict and for a new trial because the jurors obviously failed to follow your instructions and delivered a verdict against my client hastily. I did not have a stopwatch on it, but they could not have been out of the courtroom for more than three minutes before they asked to return to deliver their verdict. They did not select a Presiding Juror as you asked them to do; they did it in open court and upon the suggestion of Juror #11. The Verdict Form wasn't signed and two jurors had difficulty answering the very simple polling question that you asked. I think that a miscarriage of justice has occurred here today, Your Honor. Justice demands that my client's guilt be determined by a jury that is following the law and your directions and not by a rogue panel which seems to have either obviously made up its mind prior to deliberating or who wanted to get home without taking the time to read the law, review the evidence, and consider your instructions.

U.S. Atty: Your Honor, this is an unusual ending to a trial, but the evidence was strong and fairly straightforward. The jurors listened carefully to the testimony and they did do what you asked them to do: they selected someone to preside, to sign the Verdict Form, and to render a verdict. It may have been a little fast, but they did their job. We have spent considerable time, money and effort to secure this conviction. I would hate to think about the cost if we had to do it all over again.

Mr. Cardi: Judge, this is a federal felony trial. This is insane. Forgive me, but my client is facing a very long prison sentence and he deserves more than three minutes' worth of deliberation and a less-than-unanimous verdict.

Judge: I am intrigued by the new-trial issue. I deny the renewed motion for judgment of acquittal. Under Federal Rules of Criminal Procedure, Rule 29(a), the Court orders entry of judgment of acquittal if the evidence is insufficient to sustain a conviction. I believe there is plenty of evidence in this case to support a conviction. Mr. Maxxon was arrested after leaving a parking area in a national park in a hurry, so fast in fact, that it caused the police to stop him. The evidence presented at trial was that the subsequent investigation revealed that he had

planned to shoot the First Lady of the United States and that his planning went so far as to include obtaining a newspaper with the details of her visit, which he cut out and carried on his person, carrying a gun with a scope and bullets into the national park where she was to speak, setting up camp with a line-of-sight that would give him a direct shot at the First Lady, and a mount for the gun that was lined up consistent with a shot that could be fired in the direction of the First Lady's location when she gave her address. His abandonment defense is, quite frankly, too little too late. The jury didn't believe that he gave up on his plan to kill the First Lady and I didn't believe it either. That motion won't fly.

I am, however, uncomfortable with the jury disregarding my step-by-step instructions to select a Presiding Juror, review the facts, meditate on the law, and deliberate. I am also bothered by two jurors's apparent lack of certainty about whether the jury verdict is reflective of their individual decision, and I do question the amount of time the jury deliberated, and I will put that word in quotes because it appears that they did not even sit down in the jury room. Clerk, might you have written down the times for when the jurors left the courtroom and when they returned?

Clerk: Yes, Judge. They were dismissed at 3:31pm and the knock on the door occurred at 3:33pm. They were out for two minutes.

Judge: Thank you. Gentlemen, I think that I will set this matter for hearing on the oral motion to set aside the verdict and for a new trial and ask each side to file simultaneous briefs on the issue. The due-date for your memoranda of law will be Monday, January January 30, 2017, and the Clerk will advise you of the court hearing date. I was just at a continuing education class on the issue of jury deliberations and I recall one of the presenters talking about a couple of cases with short deliberation times. I think one was called United States v. Rufus Cunningham and the other was from Vermont and I think it was called Umbra, Penumbra, or maybe it was Lumbra. Something like that. Anyway, that should be enough to get both sides started. I thought I would share those case names because of the simultaneous briefing schedule that I'm imposing.

Thank you all for your work on this case. We stand in recess until the Defendant's motion to set aside the verdict or for a new trial is scheduled for hearing.

Clerk: All rise.