SUPREME COURT OF LOUISIANA

NUMBER _____

DONALD LOGAN,
Applicant

VS.

STATE OF LOUISIANA,
Respondent

24TH JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON
DOCKET NO. 03-4506, DIVISION "I"
HONORABLE NANCY A. MILLER, DISTRICT COURT JUDGE

COURT OF APPEAL, FIFTH CIRCUIT, NO. 19-KH-340
HONORABLE WINDHORST, LILJEBERG, JJ., AND MARCEL, J. PRO TEMP.

APPLICATION FOR WRITS OF CERTIORARI, SUPERVISORY REVIEW, AND/OR REMEDIAL WRITS ON BEHALF OF DONALD LOGAN

Respectfully Submitted By :

Donald Logan, #350072
Main Prison East, Spruce-1
Louisiana State Penitentiary
Angola, La 70712

CRIMINAL PROCEEDING
LIFE SENTENCE

SUPREME COURT OF LOUISIANA
WRIT APPLICATION FILING SHEET

NO._____

TO BE COMPLETED BY COUNSEL or PRO SE LITIGANT FILING APPLICATION

TITLE

Donald Logan

vs.

State of Louisiana

Applicant: Donald Logan
Have there been any other filings in this Court in this matter? ☒ Yes ☐ No
Are you seeking a Stay Order? ☐ Yes ☒ No
Priority Treatment? ☐ Yes ☒ No
If so you MUST complete & attach a Priority Form

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Pleading being filed: [X] In proper person, [X] In Forma Pauperis
Attach a list of additional counsel/pro se litigants, their addresses, phone numbers and the parties they represent.

TYPE OF PLEADING

[ ] Civil, [**X**] **Criminal**, [ ] R.S. 46:1844, [ ] Bar, [ ] Civil Juvenile, [ ] Criminal Juvenile, [ ]
[ ] Other, [ ] CINC, [ ] Termination, [ ] Surrender, [ ] Adoption, [ ] Child Custody

ADMINISTRATIVE OR MUNICIPAL COURT INFORMATION

Tribunal/Court: _____ Docket No. _____
Judge/Commissioner/Hearing Officer: _____ Ruling Date: _____

DISTRICT COURT INFORMATION

Parish and Judicial District Court: Jefferson, 24th JDC Docket Number: 03-4506
Judge and Section: Hon. Nancy A. Miller Date of Ruling/Judgment: June 4, 2019

APPELLATE COURT INFORMATION

Circuit: 5th Docket No.: 19-KH-340 Action: Writ Denied
Applicant in Appellate Court: Donald Logan Ruling Date: October 22, 2019
Panel of Judges: Windhorst, Liljeberg, JJ., Marcel, J. Pro Temp. En Banc: [ ]

REHEARING INFORMATION

Applicant: _____ Date Filed: _____ Action on Rehearing: _____
Ruling Date: _____ Panel of Judges: _____ En Banc: [ ]

PRESENT STATUS

[ ] Pre-Trial, Hearing/Trial Scheduled date: _____, [ ] Trial in Progress, [X] **Post Trial**
Is there a stay now in effect? No Has this pleading been filed in any other Court? No
If so, explain briefly _____

VERIFICATION

I certify that the above information and all of the information contained in this application is true and correct to the best of my knowledge and that all relevant pleadings and rulings, as required by Supreme Court Rule X, are attached to this filing. I further certify that a copy of this application has been mailed or delivered to the appropriate Court of Appeal (if required), to the respondent judge in the case of a remedial writ, and to all other counsel and unrepresented parties.

_____ _____
DATE SIGNATURE

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Pursuant to Rule X, § 1(b), of the Rules of this Court, Applicant notes the following:

Conflicting Decisions:

The Court of Appeal's decision, which refuses to permit Applicant to *pay* for a copy of a court record in *his own* case, conflicts directly with at least 60 decisions of this Court, which are listed in Appendix A. All the cases involve a prisoner Public Records Act request, and all post-date (and virtually all reference) R.S. 44:31.1, the statute the lower courts cited to deny Applicant's request. Certiorari is therefore proper under Rule X, § 1(a)(1).

Even the decision's reasoning has been roundly rejected. Its reversal of the burdens of proof and inquiry in R.S. 44:31.1, by requiring Applicant to show he is an eligible person (rather than the custodian to show he is not), conflicts directly with *Hilliard v. Litchfield*, 01-1987 (La. App. 1 Cir. 6/21/02); 822 So.2d 743, 745-46, and *Muhammad v. Office of District Attorney*, 16-9 (La. App. 5 Cir. 4/27/16); 191 So.3d 1149, 1157. Its reliance on the lapse of "the two-year delay for relator to file for post-conviction relief" to refuse Applicant's public records request conflicts directly with *State ex rel. Leonard v. State*, 96-1889 (La. 6/13/97); 695 So.2d 1325, 1325, and its progeny. Certiorari is therefore again proper under Rule X, § 1(a)(1).

Gross Departure from Proper Judicial Proceedings:

This Court has been required time and again—indeed, at least 60 times since the enactment of R.S. 44:31.1—to grant writs summarily because the court below refused to require a recalcitrant records custodian to provide a prisoner with a cost estimate for a public record *directly related to his own prosecution and conviction*. Below is a summary of those cases.[1]

		Records Custodian		
Jurisdiction	**# Writs Granted**	District Attorney	Court	Law Enforcement
First Circuit	18	13	2	4
Second Circuit	7	7	2	0
Third Circuit	10	7	2	2
Fourth Circuit	7	0	7	0
Fifth Circuit	11	7	4	1
Direct Appeal	7	4	3	0
# Custodians	**65/60**	38	20	7

1 This summarizes the cases listed in Appendix A. The numbers of writs and custodians differ because five cases involved two custodians. This list may not be complete; Applicant's research resources are limited. Further, Applicant's anecdotal experience suggests that a similar pattern of disregard by trial courts is likely to be in evidence in the unpublished writ dispositions of the Courts of Appeal, but he has no research access to unpublished matters.

By obstructing proper public records requests and thereby frustrating good-faith efforts to seek post-conviction relief—a remedy sounding in the most basic, the most fundamental laws organizing the American polity—the lower courts have "so far departed from proper judicial proceedings" and "so abused [their] powers . . . as to call for an exercise of this court's supervisory authority." La. S.Ct. R. X, § 1(a)(5). Certiorari is necessary to correct this culture of indifference, which squanders this Court's scarce resources and makes a mockery of not merely the Public Records Act but the administration of criminal justice in this state. Applicant respectfully suggests that an opinion by this Court clearly defining the categories of records presumptively outside the scope of the R.S. 44:31.1 exemption is necessary to protect both judicial economy and citizens' fundamental right to be free from wrongful conviction.

Significant Unresolved Issues and/or Erroneous Application of Constitution and Laws:

If the Court of Appeal's statutory ruling stands, then the significant constitutional issues Applicant raised below—and the Court of Appeal completely ignored—will require resolution. Only careful circumscription of R.S. 44:31.1's scope can allow courts to sidestep the thorny free speech and petition, public trial, jury trial, equal protection, due process, judicial review, suspension, court access, and constitutional public records issues that the bar as applied to Applicant presents under the Federal and Louisiana Constitutions. *E.g.*, *Revere v. Canulette*, 97-552 (La. App. 1 Cir. 5/15/98); 715 So.2d 47, 53, *rev'd on other grounds*, 98-1493 (La. 1/29/99); 730 So.2d 870, 870 (rejecting constitutional challenges because "R.S. 44:31.1 gives an inmate the right to examine any public record . . . relevant to any post-conviction relief . . . .").

If the Court of Appeal's silence on these constitutional issues was a decision on them *sub silentio*, it "has decided . . . a significant issue of law which has not been, but should be, resolved by this court." La. S.Ct. R. X, § 1(a)(2). If its silence was not a decision, the refusal to adjudicate properly presented constitutional claims in a criminal case is an "erroneous . . . appli[cation] [of] the constitution . . . of this state or the United States" that "will cause material injustice or significantly affect the public interest." La. S.Ct. R. X, § 1(a)(4). A number of prisoners in the near term will seek to obtain a copy of their jury polling information to assert various new constitutional claims connected to the state's discredited non-unanimous jury system. To allow the lower courts to stymie these prisoners at the starting gate, and in clear defiance of this Court's public records decisions at that, would not just be irregular and unjust, it would reflect a hostility to constitutional claims unworthy of any American judiciary.

STATEMENT OF JURISDICTION

The Court has jurisdiction over this matter under Article 5, § 5 of the Louisiana Constitution of 1974, as amended.

STATEMENT OF THE CASE

Applicant Donald Logan was convicted of second degree murder by a non-unanimous jury in 2006, whereupon he received the mandatory sentence of life without parole. *State v. Logan*, 07-739 (La. App. 5 Cir. 5/27/08); 986 So.2d 772. His conviction became final on March 27, 2009, or 14 days after this Court denied writs on direct review.

On May 21, 2019, Applicant submitted a public records request to the Clerk of Court for the 24th Judicial District Court on the form attached as an exemplar in Appendix E. The request asked for a copy of the jury polling information in Applicant's case and to be notified of any reasonable cost for so providing.

On June 4, 2019, the trial court—not the Clerk of Court, the statutory custodian—responded to Applicant's public records request by entering the order attached as Appendix D, which order held Applicant had no right to obtain a copy of the requested information because his "conviction is final." Applicant timely filed a notice of intention to seek writs and seasonably did so in an application to the Fifth Circuit Court of Appeal on July 15, 2019, attached as Appendix C. The Court of Appeal denied writs on October 22, 2019. Appendix B. This timely application for writs of certiorari, supervisory review, and/or remedial writs follows.

ASSIGNMENTS OF ERROR

1. The Court of Appeal erred by ignoring this Court's "constant stream of uniform and homogenous rulings" holding that a prisoner is entitled to a cost estimate for a public record, with 20 rulings specifically addressing court records, that establishes a rule entitled to deference as *jurisprudence constante*.

2. Even considering the issue anew, the Court of Appeal erred by concluding that R.S. 44:31.1 precludes Applicant from obtaining a cost estimate for a court record.

3. The Court of Appeal erred by completely ignoring the constitutional and common law arguments Applicant presented as alternative bases for relief.

ISSUES FOR REVIEW

1. Is Applicant entitled to a cost estimate for obtaining a copy of his jury polling information under the Public Records Act, R.S. 44:1 *et seq.*?

2. If not, is Applicant entitled to a cost estimate for obtaining a copy of his jury polling information under the Louisiana Constitution's guarantees of due process, equal protection/no discrimination, free speech and petition, a public trial, trial by jury, judicial review, the writ of habeas corpus, court access, or the right to review public records, as provided in Article I, Sections 2-3, 7, 9, 12, 16, 17, 19, and 21-22, and Article XII, Section 3, or a common-law right of access to the courts?

3. If not, is Applicant entitled to a cost estimate for obtaining a copy of his jury polling information under the Federal Constitution's protections of free speech and petition, a public trial, trial by jury, equal protection, or due process under the First, Sixth, and Fourteenth Amendments?

STATEMENT OF THE FACTS

Applicant Donald Logan was convicted of second degree murder and sentenced to life without parole—to die in prison—on the basis of a 10-2 jury verdict. He knows this fact because he was personally present in court when the written polling information was received and reviewed by the trial judge along with his attorney and the prosecutor. Appendix F. He heard them discuss the matter at the bench and even recalls the name of one of the dissenting jurors: Ms. Taonica Seton Ledet. Later, after the verdict was announced and before he was remanded, his attorney confirmed to him that the verdict was non-unanimous. But Applicant has never had access to documentary proof of this fact.

Applicant's inability to prove he was convicted by a non-unanimous jury was of little concern to him until other defendants succeeded in challenging the constitutionality of Louisiana's non-unanimous verdict system as racist. *E.g.*, *State v. Maxie*, No. 13-CR-72522 (11th JDC, Oct. 11, 2018). Other challenges based on the history of the Sixth Amendment have advanced far beyond points previously reached, *e.g.*, *State v. Ramos*, 16-1199 (La. App. 4 Cir. 11/2/17); 231 So.3d 44, *cert. granted*, 2019 WL 1231752 (U.S. Mar. 18, 2019), and hold great promise. And still other challenges, based on Louisiana's recent adoption of a unanimity requirement by state constitutional amendment and the irrationality of maintaining a two-tier system based simply on the date of offense, are just beginning.

Now Applicant needs proof, in the form of the written jury polling information he knows to be a part of his court record, of the non-unanimous verdict in his case to make these arguments for himself in an application for post-conviction relief. Although neither the Clerk of Court nor

the trial court provided Applicant the opportunity to explain this, he did so explain in his writ application to the Court of Appeal.

SUMMARY OF ARGUMENT

This is a case that should not be here, a writ that never need have been written. The lower courts, by refusing to provide Applicant with a cost estimate for obtaining a copy of a court record, have flouted numerous decisions by this Court on the identical issue that are entitled to deference as *jurisprudence constante*. The lower courts have also improperly construed the plain language of the governing statutes in R.S. 44:31 and R.S. 44:31.1. And by committing those errors, the lower courts have created no fewer than 17 constitutional issues under the Louisiana and United States Constitutions. Even if the Court finds ambiguity in the applicable statutes, the canon of constitutional avoidance counsels construing those statutes so as to obviate the need for this extensive constitutional review. The Court should reverse and remand with instructions to provide Applicant with a prompt cost estimate for obtaining a copy of his jury polling information and, upon payment of that estimate, to mail promptly a copy of the same to Applicant.

ASSIGNMENT OF ERROR NO. 1

> The Court of Appeal erred by ignoring this Court's "constant stream of uniform and homogenous rulings" holding that a prisoner is entitled to a cost estimate for a public record, with 20 rulings specifically addressing court records, that establishes a rule entitled to deference as *jurisprudence constante*.

There really can be no doubt about the custodian's duty in this case.[2] "The district court is ordered to provide relator with an estimate of the costs of reproducing public records relator has requested and to which relator is entitled." *State ex rel. Stelly v. State*, 17-2123 (La. 8/3/18); 249 So.3d 825, 825 (citing R.S. 44:31.1). "As the custodian of court records, the district court is ordered to provide relator with an estimate of the costs of reproducing public records relator has requested and to which he is entitled." *State ex rel. Jacobs v. State*, 17-0681 (La. 8/3/18); 249 So.3d 817, 818 (same). And so on, 58 more times, 18 more times specifically addressing court records. *See* Appendix A. This quite clearly constitutes a "constant stream of uniform and homogenous rulings having the same reasoning" and therefore the rule rises to the level of, and is entitled to the deference due, *jurisprudence constante*. *Doerr v. Mobil Oil Corp.*, 00-0947 (La. 12/19/00); 774 So.2d 119, 128-29.

Indeed, the clarity of the custodian's duty and the ease with which the custodian could have complied leave one perplexed at the lengths to which the Court of Appeal and trial court have gone to refuse Applicant. Answering his records request according to clearly established law would have taken 21 words ("The cost to obtain a copy of the document you requested is $_.__. The copy will be sent upon receipt of payment.") and $0.50 (one stamp). The courts below have instead required two writ applications, used 867 words, and spent $81.00 of public funds—a surplusage in the latter two instances of 4129% and 16,200%, respectively—to tell Applicant, in an exasperated tone and never mind the facts and law, "stop bothering us."[3]

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2 Although Applicant agrees with the Court of Appeal that "technically the request for public records should have been reviewed by the Clerk of Court," the Court of Appeal saw fit "under the facts and history of this case" to treat the trial court as the relevant custodian. As Applicant would be prejudiced by any order to restart these proceedings with the Clerk—the one-year time limits in Code Crim. P. art. 930.8(A)(2) and 28 U.S.C. § 2244(b)(2)(A) are onerous enough in an institutional environment without also having to take, and wait for, repeated writs to obtain proof of the claim—Applicant abandons his argument that it was error for the trial court to step into the Clerk's shoes. Further, because this error is not attributable to Applicant (he sent his records request to the Clerk, and he brought the irregular response to the attention of the Court of Appeal), the state should be judicially estopped now and on any remand from questioning the propriety of treating the trial court as the custodian.

3 The 24th JDC—the only court to do so—insists upon formal service by the sheriff of trial court orders sent to an incarcerated defendant, requiring the inmate be held in from all work, school, and rehabilitative programming. Appendices D, G. Even assuming no out-of-parish surcharge for service, that is $80.00. LOUISIANA LEGAL DIRECTORY 300 (2019) (Fee Schedule).

And it was "never mind the facts and law." As to the facts, the trial court, almost audibly sighing, wrote: "The defendant filed many collateral challenges." Defendant has filed precisely one application for post-conviction relief and exactly one follow-on federal petition in his 17 years of incarceration. Putting to one side that few lifers demonstrate such acceptance of the finality of their convictions, the word "many" cannot fairly be used to describe one, or at most two (depending how one classifies continuing on to federal court), collateral challenges.

As for the law, the lower courts' shared legal conclusion—that because "defendant's conviction is final," "[h]e may not now seek post-conviction relief," and so he "is not entitled to the records he seeks"—is most curious. This conclusion is the diametric opposite of the holding of the *sole* case cited by the trial court in its reasoning, which case reads in relevant part:

> Nothing in Section 31.1 prevents an inmate from seeking records related to his or her conviction simply because more than three years have passed since the conviction has become final. When and if relator files an application for post-conviction relief, and when and if the state asserts the three-year limitation[,] the court can then decide, after an evidentiary hearing if appropriate, whether any exception to the three-year limitation applies.

State ex rel. Leonard v. *State*, 96-1889 (La. 6/13/97); 695 So.2d 1325, 1325. Neither could someone easily be excused for missing that part of the opinion. *Leonard* is two paragraphs long, including the decretal language.

When the lower courts ignore *jurisprudence constante* and insist on creating more paperwork using a statute, R.S. 44:31.1, ostensibly designed to reduce it, one might be forgiven for asking plainly: What's really going on? The answer seems just as plain; only one theory fits the facts. Although the trial court never gave Applicant an opportunity to explain why his request was limited to grounds for post-conviction relief, the trial court knew, and the Court of Appeal surely would have known even if Applicant had not told it, exactly why he wanted his jury polling information. No criminal justice professional in this state right now could fail to perceive the reason: to support an argument that the non-unanimous jury verdict in Applicant's case renders his conviction unlawful and subject to be set aside.

By the extremity of their efforts to frustrate Applicant from obtaining the factual predicate for such a claim, it is evident that the trial court and Court of Appeal do not think much of it. Neither, evidently, does a state representative from within their jurisdictions, the author of Acts 2018, No. 335, which targets non-unanimous jury polling information for special secreting.[4]

4 Neither lower court mentioned Act 335 or sealing as the basis for refusing Applicant's

Perhaps a hostile attitude is an entirely understandable human reaction to a prospect no court can relish: the many *pro se* prisoners who will invariably argue for retroactive application of a new rule of constitutional law, something each is entitled once to try. But whether or not the lower courts' attitude is understandable, it provides no excuse for obdurately refusing to follow the law in some seemingly unrelated area—what amounts to judicial guerrilla warfare. As Justice Gorsuch observed in response when the Louisiana Solicitor General raised the precise worry apparently animating the decisions below:

> One might wonder whether we should worry about [the prisoners'] interests under the Sixth Amendment as well. . . . I can't help but wonder, well, should we forever ensconce an incorrect view of the United States Constitution for perpetuity, for all states and all people, denying them a right that we believe was originally give to them because of 32,000 criminal convictions in Louisiana?

Oral Argument Tr. 58:3-12, *Ramos v. Louisiana*, No. 18-5924 (O.T. 2018).

There will be time enough to decide what, if any, retroactive effect is due rulings like *Maxie* and those in related cases presently on appeal in the state and federal systems.[5] Clearly, a public records request is neither the time nor the place to decide such an important, complex, and substantive issue, a point *Leonard* makes concerning even a far easier procedural question. And even if it were the time and the place, judges should not refuse public records requests on a pretext designed to pretermit an entire class of claims without briefing, argument, or ever adverting to the true motivation behind the decision. The lower courts may not like the reason they knew Applicant wanted his jury polling information, but R.S. 44:31.1 gives them no

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request. Reliance on any such argument, therefore, should be forbidden before this Court and on any remand. Principles of waiver and estoppel aside, Act 335 also runs afoul of all the same constitutional provisions discussed in Assignment of Error 3 if it is applied to deny Applicant access to his jury polling. Further, it was enacted for the purpose of frustrating the assertion of a federal claim—non-unanimous jury verdicts having been abolished going forward, one has no need of a polling break-down anymore; the only point of the Act can be to prevent persons previously convicted non-unanimously from obtaining proof, and that is exactly how, according to Applicant's ancedotal evidence, it is being applied. Finally, Act 335 neither serves a compelling, important, or even legitimate government interest, nor is it narrowly tailored, substantially related, or even rationally connected to such an interest if one were to exist, in addition to running afoul of the categorical constitutional bars discussed in Assignment of Error 3. All that being said, Applicant is perfectly happy—though he does not concede it is an appropriate restriction—to receive the polling information in the redacted form contemplated by Act 335. He simply wants sufficient proof of non-unanimity.

5 Applicant is aware from media reports that Judge Edwards of the 15th JDC recently held that *Maxie* is binding authority throughout the state. Because of Applicant's limited research resources, he cannot give the Court a proper cite for the case but notes its existence for the reason that, by treating *Maxie* as equivalent for purposes of precedent to an appellate decision, Judge Edwards has shown that there exists a non-frivolous basis for arguing *Maxie* also should, like an appellate decision, satisfy the requirements of Code of Criminal Procedure Article 930.8(A)(2).

authority to deny the fundamental right to access a court record merely because they are skeptical of the merits of the inchoate claims they anticipate, but concerning which, of course, they cannot truly foresee either the arguments-in-support or outcomes.

Putting aside the specifics of Applicant's case, there is other evidence of lower court hostility to records requests by prisoners. It took two unanimous writ grants by this Court to convince the Third Circuit to stop obstructing *attorneys* seeking public records related to post-conviction matters. *Boren v. Taylor*, 16-2078 (La. 6/29/17); 223 So.3d 1130. This Court had to grant writs—again unanimously—after the First Circuit, in an about-face on retroactivity when constitutional rights are involved, tried to apply R.S. 44:31.1 to block all then-pending prisoner public records actions. *Revere v. Canulette*, 98-1493 (La. 1/29/99); 730 So.2d 870, 870. Not too long after, the First Circuit was back at it again with a public records request by an attorney in a death case, and this Court was required to reverse 6-1. *Landis v. Moreau*, 00-1157 (La. 2/21/01); 779 So.2d 691, 698. Dickensian delays are not unheard of. *Muhammad v. Babin*, 12-548 (La. App. 5 Cir. 3/14/18); 241 So.3d 1231, 1239 ("The fact that it took thirteen years and extensive litigation to determine that a first degree murder file is no longer in the custody of the District Attorney, and now likely no longer exists, is not only an inefficient use of judicial resources, but also does not comport with fundamental principles of fairness . . . .").

Applicant's research resources are limited, but he trusts the point is made: There is a culture in the lower courts concerning prisoner public records requests that conflicts with the governing law. Certiorari, and an opinion detailing the public records an inmate is presumptively entitled to a cost estimate for obtaining (court documents, the district attorney's file, and law enforcement agency files concerning the case), may go a ways towards correcting this unfortunate situation, one made all the more unfortunate by the importance of post-conviction relief in this state. Persistent public defender funding problems, among other causes, leave Louisiana with the shame of having more wrongful convictions than any other state. The post-conviction relief system is the primary method available for catching and correcting those wrongs. That system would become an illusory remedy—a rather macabre thought when one considers the stakes—without the adjunct of access to the records that this Court has already explained are often critical. *E.g.*, *Boren*, 223 So.3d at 1133-34 ("[I]n most cases grounds for post-conviction relief are not knowable until public records are reviewed for error by an attorney." (footnote and internal citations omitted)).

ASSIGNMENT OF ERROR NO. 2

> Even considering the issue anew, the Court of Appeal erred by concluding that R.S. 44:31.1 precludes Applicant from obtaining a cost estimate for a court record.

Even addressing the issue anew, the Court of Appeal erred. "[U]nder Louisiana's civilian tradition, every legal analysis must begin by examining the primary sources of law, consisting of the Constitution, codes, and statutes." *Fecke v. Bd. of Super. of LSU*, 15-1806 (La. 9/23/16); 217 So.3d 237, 254. "Relevant to the case before us, the primary source of law which guides our decision is statutory." *Id.* The governing statutes read:

> [A]ny person may obtain a copy . . . of any public record. . . . The burden of proving that a public record is not subject to . . . copying . . . shall rest with the custodian.

R.S. 44:31(B)(2)-(3).

> For the purposes of [the Public Records Act], person does not include any individual in custody after sentence following a felony conviction who has exhausted his appellate remedies when the request for public records is not limited to grounds upon which the individual could file for post-conviction relief. . . . *[T]he custodian may* make an inquiry of any individual who applies for a public record to determine if such individual is in custody after sentence following a felony conviction who [sic] has exhausted his appellate remedies and *the custodian may* make any inquiry necessary to determine if the request [is so limited].

R.S. 44:31.1 (emphases added).

A. Applicant is presumptively entitled to the record he seeks and the Court of Appeals erred by imposing on him a burden to prove his entitlement.

There has not been, and neither could there be, debate whether jury polling information constitutes a public record or that Applicant addressed his request to the proper custodian. R.S. 44:1(2); CODE CIV. P. art. 251; *see Pesnell v. Sessions*, 51,871 (La. App. 2 Cir. 2/28/18); 246 So.3d 686, 694. Thus, as a general rule, the custodian was required to permit Applicant to "obtain a copy" of the polling information unless it could show the record had been "specifically exempted from the Act's broad scope." R.S. 44:31.1(B)(2); *Landis v. Moreau*, 00-1157 (La. 2/21/01); 779 So.2d 691, 694.

"The burden of proving" any such exception "shall rest with the custodian." R.S. 44:31(B)(3); *see N.O. Bulldog Soc'y v. La. SPCA*, 16-1809 (La. 5/3/17); 222 So.3d 679, 683 (holding "burden" is on "custodian of records sought"); *Landis*, 779 So.2d at 696 (holding that "the burden is on [the DA] to prove that the" records sought for post-conviction "are exempt from disclosure"). "[A]ccess to public records can be denied only when a law specifically and

unequivocally provides otherwise." *Boren v. Taylor*, 16-2078 (La. 6/29/17); 223 So.3d 1130, 1132 (citing *Title Research Corp. v. Rausch*, 450 So.2d 933, 937 (La. 1984)).

The structure and language of the R.S. 44:31.1 exemption make the general rule imposing the burden on the custodian all the stronger in its case. Twice the statute uses the word "may," indicating that the custodian's inquiries are permissive and not mandatory. *See* R.S. 1:3. Twice the statute imposes the option to inquire upon "the custodian." It is therefore the custodian who must make the showing, and only after giving the prisoner notice and an opportunity to be heard ("an inquiry," then "any inquiry"), that the R.S. 44:31.1 exception applies.[6]

The jurisprudence is in agreement. The Fifth Circuit has written:

> As the custodian of records in this [prisoner public records] case, the District Attorney had the duty to respond to plaintiff's public records request. The District Attorney had the option to either respond by arranging for presentation of the requested public records to plaintiff or his counsel or to respond by making those inquiries as to plaintiff's status as a 'person' [under R.S. 44:31.1] for purposes of the Public Records Law in order to determine whether he was entitled to access the requested records.

Muhammad v. Office of Dist. Att'y, 16-9 (La. App. 5 Cir. 4/27/18); 191 So.3d 1149, 1157-58. Because "[t]he record reflect[ed] that the District Attorney failed to exercise either of these options," the prisoner was entitled to relief.[7] *Id.* at 1158.

In reaching the same result, the First Circuit noted that "there was no evidence introduced to show that the sheriff made the inquiries necessary for denying access" under R.S. 44:31.1. *Hilliard v. Litchfield*, 01-1987 (La. App. 1 Cir. 6/21/02); 822 So.2d 743, 746. "Therefore," it held, "the trial court committed legal error because it improperly assigned [the prisoner] the

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6 It is arguable whether the custodian could exercise the first option to inquire (concerning whether the person is in custody for a now-final felony conviction) by querying someone other than the person requesting the record, such as a court or the Department of Corrections. But obviously no one but the requesting party can explain why the request has been made and the basis for its linkage to a ground for post-conviction relief. A request for a copy of a deed to a house might seem, at first glance, to have nothing to do with post-conviction relief. But if the requester is in custody for simple burglary and wishes to prove counsel was ineffective for failing to show he owned the home in question, the deed would be very relevant indeed.

7 The remedy in this case was mandamus against the custodian. As explained in note 2, *supra*, the irregular actions of the Clerk, the trial court, and the Court of Appeal have left Applicant in a different posture, but one in which the Court has not before had trouble exercising its supervisory jurisdiction to order the courts below to provide a cost estimate. *E.g.*, *State ex rel. Jacobs v. State*, 17-2123 (La. 8/3/18); 249 So.3d 825, 825. Other examples are available in Appendix A. Vacatur and remand for institution of a mandamus proceeding would be a waste of judicial resources and prejudicial to Applicant because of relevant limitations periods. Further, *Muhammad*'s assumption that R.S. 44:31.1 applies to a prisoner's attorney the same as the prisoner was rejected by *Boren v. Taylor*, 16-2078 (La. 6/29/17); 223 So.3d 1130, 1134-35. Neither difference affects Applicant's point: the custodian has the burden of proving the exception in R.S. 44:31.1 applies by making an inquiry of the requester.

burden of proof and absolved the custodian of the duty to make the necessary inquiries for denying access to a public record." *Id.*

Just as in *Muhammad* and *Hilliard*, the record here is devoid of evidence that the Clerk of Court, or the trial court standing in its stead, "ma[de] any inquiry necessary to determine if [Applicant's] request . . . [was] limited to grounds upon which [he] may file for post conviction relief." R.S. 44:31.1. It was therefore reversible legal error for the lower courts to rely on this exemption as the basis for refusing to provide Applicant a cost estimate for the requested record.

B. Applicant's request was limited to grounds upon which he may file for post-conviction relief.

Even though no one inquired of Applicant the reason for his request, he supplied it in the first response allowed after the custodian cited R.S. 44:31.1 to him. Appendix C, p. 4 ("[Applicant] seeks his jury polling information in connection with asserting a claim based on Louisiana's non-unanimous jury verdict practice, a challenge to which would clearly be an assertion that his 'conviction was obtained in violation of the constitution of the United States or the state of Louisiana.'" (quoting Code Crim. P. art. 930.3(1))). Regardless which party has the burden, therefore, the exemption in R.S. 44:31.1 cannot be applied to Applicant.

Applicant notes that the lower courts' implicit suggestion that his claim lacks merit is irrelevant. No "look through" or "case-within-a-case" approach is provided for, or feasibly could be provided for, in R.S. 44:31.1, given the many unknowns and unknowables at the outset of any attempt to seek post-conviction relief. *See Boren v. Taylor*, 16-2078 (La. 6/29/17); 223 So.3d 1130, 1133-34; *Boren v. Taylor*, 15-911 (La. App. 3 Cir. 10/26/16); 206 So.3d 892, 901 (Cook, J., dissenting). The Court has already explained as much concerning potential procedural problems with the merits of a claim. *State ex rel. Leonard v. State*, 96-1889 (La. 6/13/97); 695 So.2d 1325, 1325 (holding time limitations in Code of Criminal Procedure Article 930.8 cannot be used to bar prisoner records request); *see State ex rel. Barbee v. State*, 10-275 (La. 2/4/11); 57 So.3d 318, 318 (reaffirming *Leonard*). It follows, *a fortiori*, that if even gatekeeping issues, often simpler and in any event issues necessarily considered prior to the merits, are irrelevant, so too must the merits of the substantive claim be irrelevant to the R.S. 44:31.1 inquiry.

Further, the Legislature's use of the phrase "grounds upon which the individual *could file for* post-conviction relief" evidences an intent against permitting such "mini-trial" approaches. R.S. 44:31.1 (emphasis added). The Legislature could have used "would prevail on" or "could

make a *prima facie* showing of" or "may show jurists of reason would debate the issue of," or any of the many other standards applicable in state and federal habeas cases. It did not. Neither would it be feasible or appropriate to force the many non-attorney custodians of records to perform such complex, highly technical legal assessments to answer the simple question whether to give the requester a cost estimate. Thus, if a prisoner articulates a connection or even potential for connection between the requested information and a ground for relief under Article 930.3, he is entitled to the record.[8] *Barbee*, 57 So.3d at 318 ("Because such documents *might support* [post-conviction relief] . . . relator still has the right of access . . . ." (emphasis added)).

C. Any doubt should be resolved in Applicant's favor.

"[T]he right of access to public records is a fundamental right guaranteed by" Section 3 of Article XII of the Louisiana Constitution. *Landis v. Moreau*, 00-1157 (La. 2/21/01); 779 So.2d 691, 694.[9] "This Court has consistently held that the Public Records Law should be construed liberally in favor of free and unrestricted access to public documents." *N.O. Bulldog Soc'y v. La. SPCA*, 16-1809 (La. 5/3/17); 222 So.3d 679, 684. "[W]henever there is doubt as to whether the public has the right of access to certain records, the doubt must be resolved in favor of the public's right to see; to allow otherwise would be an improper and arbitrary restriction on the public's constitutional right." *Id.* It is therefore "only a specific and unequivocal law [that] can limit the fundamental right of access to public records." *Barbee*, 57 So.3d at 318.

No "specific and unequivocal law" exempts the record Applicant has sought. If there is any doubt on that point, the above rules of liberal construction require the Court to construe the law in Applicant's favor. It would be a very perverse result indeed if millions of Louisianians were entitled to access Applicant's court records but he—the one serving the life sentence they may hold the key to setting aside—could not even pay for the privilege.

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8 Whatever the outer limits of this point, the Court does not have before it one of those *pro se* applicants on his eighth post-conviction application, asserting the same almost-indecipherable, factually baseless, and legally insufficient arguments as before. Applicant has not abused this or any other court's process, and his claim is being held open by presumptively reasonable jurists up and down state and federal courts. *E.g.*, Oral Argument Tr. 59:9-15, *Ramos v. Louisiana*, No. 18-5924 (O.T. 2018) (Ginsburg, J.) ("[T]he case of retroactivity to convictions that are already final is not before us. It would come before us in a case if you lose this one, but it—that—that is not a question that we can properly address here. It hasn't been briefed. It hasn't been decided below.").

9 The right to examine public records is so fundamental that it can even override other constitutional rights in an appropriate case. *Shane v. Parish of Jefferson*, 14-2225 (La. 12/8/15); 209 So.3d 726, 747 (Johnson, C.J., joined by Knoll, J., and Crichton, J., concurring) (explaining that "I believe the public's right" under the Public Records Act "trumps Plaintiff's individual interests in this case").

ASSIGNMENT OF ERROR NO. 3

> The Court of Appeal erred by completely ignoring the constitutional and common law arguments Applicant presented as alternative bases for relief.

If the Court interprets the Public Records Act or any other law to deny Applicant access to his jury polling information, then, on the particular facts and circumstances of this case, that would violate the Louisiana and Federal Constitutions, as well as the common law.[10]

A. Denying Applicant access to his jury polling information violates the Louisiana Constitution and a common-law right of access to the courts.

Denying Applicant a copy of his jury polling information—no matter the basis for the refusal—would violate the Louisiana Constitution's guarantees of due process, equal protection/no discrimination, free speech and petition, a public trial, trial by jury, judicial review, the writ of habeas corpus, court access, and the right to review public records, as provided in Article I, Sections 2-3, 7, 9, 12, 16, 17, 19, and 21-22, and Article XII, Section 3, as well as a common-law right of access to the courts.

1. Denying Applicant access to his jury polling information violates Article I, Section 2, of the Louisiana Constitution.

Louisiana's Due Process Clause and that of the Federal Constitution have the same wording and provide the same protections. *Progressive Sec. Ins. Co. v. Foster*, 97-2985 (La. 4/23/98); 711 So.2d 675, 688. The laws purporting to except Applicant's jury polling information from disclosure are being applied in such a manner as to deprive Applicant of his fundamental liberty interest in being able to prove that he is in custody in violation of the

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10 Applicant presented this argument to the Court of Appeal—his first opportunity to make any arguments at all, because the trial court entered its order without providing notice or an opportunity to be heard—but the decision below is silent on it. Applicant appreciates that the Court often remands for consideration of the pretermitted (or, in this case, simply omitted) issues. *E.g. La. Fed. of Teachers v. State*, 14-691 (La. 10/15/14); 171 So.3d 835, 851; *Fields v. State*, 98-0611 (La. 7/8/98); 714 So.2d 1244, 1249-50. But "[t]he failure of the [lower courts] to rule on [an] issue does not divest this court of jurisdiction . . . . [i]t simply means we could decline to rule on the constitutional issue and order a remand." *Pierre v. Admin, La. Office of Emp't*, 553 So.2d 442, 446 (La. 1989); *see State v. Sadeghi*, 16-1589 (La. 9/9/16); 201 So.3d 240, 241; *BP Oil Co. v. Plaquemines Parish Gov't*, 93-1109 (La. 9/6/94); 651 So.2d 1322, 1329. When there are no "factual issues in relation to the resolution of th[e] issue" and "a remand would serve no useful purpose and would frustrate the objectives of judicial economy," this Court will decide an issue in the first instance. *Guichard Drilling Co. v. Alpine Energy Servs., Inc.*, 94-1275 (La. 7/3/95); 657 So.2d 1307, 1319; *Pierre*, 553 So.2d at 446; *see New Orleans Firefighters Ass'n Local 632 v. City of New Orleans*, 590 So.2d 1172, 1177 (La. 1991). There are no disputed facts in this record, and Applicant would, because of the strict time limits applicable to post-conviction claims, be prejudiced by a remand that would take still more time. Applicant's constitutional claims are also of significant public importance, given the number of similarly situated individuals. His constitutional issues can, and in the interests of judicial economy, should be decided now.

Louisiana and Federal Constitutions, as well as to burden his fundamental rights under both the Louisiana and Federal Constitutions to free speech and petition, a public trial, equal protection/non-discrimination, judicial review, habeas corpus, court access, and the right to review public records. Strict scrutiny is therefore the appropriate standard of review. *Id.*; *Armstead v. Phelps*, 449 So.2d 1049, 1053 (La. App. 1 Cir. 1984).

The state's interest in "the effective and efficient upkeep of public records," its putative motive for enacting R.S. 44:31.1, *Revere v. Canulette*, 97-552 (La. App. 1 Cir. 5/15/98); 715 So.2d 47, 53, *rev'd on other grounds*, 98-1493 (La. 1/29/99); 730 So.2d 870, 870, is merely an interest in administrative convenience, which while a legitimate and perhaps even an important interest, is not a compelling governmental interest. *Stewart v. Blackwell*, 444 F.3d 843, 869 (6th Cir. 2006); *Beaumont v. Fed. Elec. Comm'n*, 278 F.3d 261, 274 (4th Cir. 2002); *see Lovelace v. Lee*, 472 F.3d 174, 212 (Wilkinson, J., concurring).

Even if such were a compelling interest, barring prisoners from paying for access to their own court records is both an over- and under-inclusive means of furthering this interest. Non-prisoners can be a burden on the public records system, *e.g.*, *Cummings v. Kempf*, 570 So.2d 133, 135-36 (La. App. 3 Cir. 1990) (title company wished to install its own copy machine to make copies of title records for commercial resale), just as prisoners can make responsible use of it, as with Applicant in this case. The state's remedy is therefore not narrowly tailored, and R.S. 44:31.1 as applied by the lower courts fails strict scrutiny.[11]

2. Denying Applicant access to his jury polling information violates Article I, Sections 3 and 12, of the Louisiana Constitution.

The Louisiana Equal Protection Clause in Article I, Section 3, provides protections more expansive than those in its federal counterpart. *Progressive Sec. Ins. Co. v. Foster*, 97-2985 (La. 4/23/98); 711 So.2d 675, 686; *Manuel v. State*, 95-2189 (La. 3/8/96); 692 So.2d 320, 339. Section 12 bans discrimination by all persons, such as court officers, providing public accommodations, a protection broader than its federal counterpart. *Albright v. So. Trace Country Club of Shreveport*, 03-3413 (La. 7/6/04); 879 So.2d 121, 127. By defining prisoners—a class overwhelmingly black and overwhelmingly poor, but in any event, indentured and incapacitated laborers at the mercy of the state—not to be "a person," R.S. 44:31.1 enacts a legislative *Dred*

11 If rational basis scrutiny applies, the lower courts' actions would still fail to pass muster for the same reasons in the rational-basis discussion under the Louisiana Equal Protection Clause, Error 3(A)(2), *infra*. Additionally, there is no rational basis for the trial court to have denied Applicant notice and an opportunity to be heard as to the reason for his request.

Scott v. *Sandford*, 60 U.S. 393, 410 (1856), that must be struck down. It is a racial classification both in intent and in effect and so, under the broader protections provided in Article I, Sections 3 and 12, it must be deemed unconstitutional regardless whether federal jurisprudence would so require. *Soloco, Inc. v. Dupree*, 97-1256 (La. 1/21/98); 707 So.2d 12, 15.

If R.S. 44:31.1 is not a racial classification, then the Court should conclude in the alternative that prisoners too poor to afford an attorney to retrieve records for them constitute a suspect class because of their discrete and insular character, a history of popular and official antipathy towards their rights, and their present vulnerability and subordination. *See generally* GEOFFREY R. STONE ET AL. CONSTITUTIONAL LAW 447-712 (5th ed. 2005) (discussing characteristics of suspect classes). Any law purporting to limit their access to court records in their own cases essential to asserting claims for post-conviction relief should be reviewed under strict scrutiny, which as detailed in the due process discussion in Error 3(A)(1), *supra*, none can survive. Affluence is not an appropriate basis for affording different criminal justice remedies, a point even the state argued in *Boren v. Taylor*, 16-2078 (La. 6/29/17); 223 So.3d 1130, 1133. *See Douglas v. California*, 372 U.S. 353, 357 (1963); *Griffin v. Illinois*, 351 U.S. 12, 16-20 (1956).

Reviewing the denial of access under equal protection's rational basis test would not produce a different result. *Foster*, 711 So.2d at 686-87. Because Applicant is willing to pay for the copy, there is no legitimate state interest in cost control. Indeed, as detailed in Assignment of Error 1, *supra*, the state has spent more money denying Applicant access to the record—and if it follows its unusual practice of entering an order on public records requests and formally serving that order on the inmate, it will *always* spend more money denying prisoner records requests—than complying could ever have cost. So too do the Kafkaesque administrative contortions detailed in Assignment of Error One reveal that the state has no legitimate efficiency rationale. The state's machinery makes it more burdensome to deny a request than to grant it.

Even if the state adopted a more streamlined procedure for denials, it has never been clear how the "effective and efficient upkeep of public records" is threatened by (1) receiving mail from an inmate requesting a record, (2) a staffer making a copy of such record, and (3) mailing that copy back, particularly when the prisoner is willing to pay the cost of such. If prisoners were asking for access to the original or to inspect the filing system personally, perhaps upkeep would be threatened. They are not. The state's asserted interests are not, on the facts here, legitimate, and even if they were, they are not being pursued rationally.

3. Denying Applicant access to his jury polling information violates Article I, Sections 7 and 9, of the Louisiana Constitution.

The Louisiana Constitution, like the Federal Constitution, provides a qualified free speech and petition right of access to court records. *Copeland v. Copeland*, 07-177 (La. 10/16/07); 966 So.2d 1040, 1042-43 & n.1. Under either the strict scrutiny or "experience and logic" tests that have variously been employed to test restrictions on this right, *see id.*, it would be unconstitutional to refuse to allow Applicant access to his jury polling information.

This Court has previously suggested that the Louisiana Constitution may provide more protection to expression-related rights than the Federal Constitution. *City of New Orleans v. Clark*, 17-1453 (La. 9/7/18); 251 So.3d 1047, 1057. Applicant submits that it does, and whatever the outcome of the tests under federal law, this Court should undertake a more searching examination of the issue under state law, in particular (but not limited to) taking account of the limitation R.S. 44:31.1 imposes on Louisiana's textually separate right of petition. Depriving a person of the evidence needed to petition his government for relief, like—at least as R.S. 44:31.1 has been applied to Applicant—the categorical barring of requests for information, are two actions federal law does not seem separately to analyze. Louisiana should, and it should conclude R.S. 44:31.1's burdening of those interests is unconstitutional as a matter of state law.

As for the experience and logic test, polling of the jury often used to occur orally, and no one has ever suggested it would be constitutional to close a court for return of a verdict. In addition to being the culmination of the trial, the one moment of greatest importance to the parties and spectators, there are no witnesses to protect, no jury pool to keep untainted, no special administrative needs. Neither experience nor logic can approve restricting the paper equivalent of this well-established practice. Further, while there are circumstances—though none have ever been alleged here—where a court might have a compelling interest in protecting jurors' identity, and even assuming such an interest is not forfeited by having an open and public voir dire process (as occurred in this case), redacting jurors' names from the polling information before release would serve the same interest in a more narrowly tailored way.

4. Denying Applicant access to his jury polling information violates Article I, Sections 16 and 17, of the Louisiana Constitution.

Judges and commentators have suggested that Louisiana's equivalent to the Federal Constitution's Sixth Amendment, found in Article I, Section 16, may provide more rights than its federal counterpart. *State v. White*, 18-0379 (La. 1/14/19); 261 So.3d 763, 764 (Weimer, J.,

dissenting) (citing BOBBY MARZINE HARGES & RUSSEL L. JONES LOUISIANA EVIDENCE 417 (2018 ed.)). Applicant agrees and asserts that Louisiana's "public trial" right should, notwithstanding *Nixon v. Warner Communications Inc.*, 435 U.S. 589, 610 (1978), be held to require access to court records.

While the public trial right may not require courts to memorialize proceedings in any particular way, there is no rational reason to deny the public access to whatever memorializations are created. For the same reasons both a court of first instance and a court of review need access to memorializations to decide cases properly, and an attorney needs access to such to brief and argue cases properly, the public requires such access to understand what goes on in open court, which often represents but a fraction of the events in any particular case. The right to a public trial under Louisiana law should be interpreted as the right of the public to observe and understand the trial on terms not substantially different from the participants.

Whether or not the Court accepts that broad rule, the right to access the documentary proof of a jury's verdict should be given heightened protection compared to other court documents because it determines the defendant's substantive legal rights. *Cf. United States v. Walker*, 2019 WL 325111, at *8 (10th Cir. Jan. 23, 2019). The right to a public trial *by jury* contained in Article I, Section 17, necessarily requires public access to some memorialization of a constitutionally adequate verdict, else that crucial, and constitutionally protected, stage of the proceeding, the one where the need for public confidence in the successful interposition of disinterested citizens between the state and the defendant is highest, could become empty ritual.

5. Denying Applicant access to his jury polling information violates Article I, Section 19, of the Louisiana Constitution.

The right to judicial review in Section 19 provides: "No person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based upon a complete record of all evidence upon which the judgment is based." Post-conviction review is a form of judicial review provided for by law and therefore within the scope of this protection. *Cf. State v. Reed*, 97-812 (La. App. 1 Cir. 4/8/98); 712 So.2d 572, 582 (seeming to assume without deciding this point); *State ex rel. Johnson v. McGougan*, 433 So.2d 827, 829 (La. App. 1 Cir. 1983) (same). Even if it were not provided by statute (though this would violate the non-suspension clause, a point further developed in Error 3(A)(6), *infra*), state and federal due process would require this form of judicial review in Louisiana because of the state's

anomalously high rate of wrongful convictions, which reveals mere direct appellate review to be woefully insufficient. By denying Applicant access to a part of his court record for purposes of pursuing this form of judicial review, the lower courts violate this right.

6. Denying Applicant access to his jury polling information violates Article I, Section 21, of the Louisiana Constitution.

This Court has previously held that the statutory right to apply for post-conviction relief is not protected by the constitutional right to non-suspension of the writ of habeas corpus in Article I, Section 21. *State ex rel. Glover v. State*, 93-2330+ (La. 9/5/95); 660 So.2d 1189, 1195. That holding is wrong and should be overruled. Construing the Federal Constitution's Suspension Clause, the Supreme Court has rejected the argument that the scope of the writ protected is limited to what was provided at common law. *See Boumediene v. Bush*, 553 U.S. 723, 774-77 (2008); *I.N.S. v. St. Cyr*, 533 U.S. 289, 300-02 (2001). So too should Louisiana conclude that its non-suspension clause protects the right against not just arbitrary executive detention without judicial process but against unlawful detention even after judicial process. While Louisiana continues to call the remedy sounding in the first such species of illegality "habeas" but the second remedy "post-conviction relief," they are two sides of the same constitutional coin. Louisiana has simply split the writ, much as federal courts distinguish between "Section 2241 writs" and "Section 2254 writs." That change in form should not be held to work divestiture of a constitutional right in substance.

Properly understood as constitutionally protected, the right to seek post-conviction relief necessarily encompasses the right to access *at least* the court records necessary to plead such a claim, which would otherwise be an empty form. Whether this right would reach to include other kinds of public records need not be decided in this case.

7. Denying Applicant access to his jury polling information violates Article I, Section 22, and Article XII, Section 3, of the Louisiana Constitution.

As detailed in Error 2(A)-(C), *supra*, by denying Applicant a cost estimate for a public record without a specific and unambiguous statutory basis, the lower courts have violated the Louisiana Constitution's guarantee of the right to examine public records in Article XII, Section 3. The right to access public records in *court* proceedings is even more fundamental, however, as the language in Article I, Section 22, contains no provision for legislatively created exceptions. This protection is greater than that provided by the Federal Constitution and, in the absence of a competing constitutional interest requiring balancing (such as a litigant's right to

privacy), is absolute. *See Copeland v. Copeland*, 07-0177 (La. 10/16/07); 966 So.2d 1040, 1047.[12] There are no competing constitutional interests in the case of a written record of an event that could, at the time, just as easily have happened in open court and been made part of the transcript. The lower courts' actions deny Applicant his fundamental right to access a court record, in his own case, without basis.

8. Denying Applicant access to his jury polling information violates the common-law right of access to court records recognized in Louisiana.

Although Louisiana is a civilian jurisdiction, this Court has cited with approval United States Supreme Court decisions recognizing a common-law right of public access to court records. *Copeland*, 966 So.2d at 1054 n.1 (citing *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589 (1978)). While the outer boundaries of this right for the public at large may be unclear, and in any event are beyond Applicant's research resources, the common law clearly protected the right to inspect public records, including court records, when, as here, one had a direct and personal interest in the document. *E.g.*, *King v. Shelley*, 100 Eng. Rep. 498, 499 (K.B. 1789); *see King v. Justices of Staffordshire*, 112 Eng. Rep. 33, 39 (K.B. 1837). Indeed, the right may be broader. *Nixon*, 435 U.S. at 597 (holding right not conditioned "on a proprietary interest in the document or upon a need for it as evidence in a lawsuit"). But what is beyond question is that when, as here, the integrity of a criminal conviction is at issue, the common law's "overriding concern with preserving the integrity of the law enforcement and judicial processes" would certainly have allowed access to a document in that very criminal case. *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985).

B. Denying Applicant access to his jury polling information violates the Federal Constitution.

Applicant is entitled to a cost estimate for obtaining a copy of his jury polling information under the Federal Constitution's protections of free speech and petition, a public trial, trial by jury, equal protection, and due process under the First, Sixth, and Fourteenth Amendments.

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12 To the extent *Copeland* suggests a mere statutory provision, unsupported by a constitutional interest, could provide a basis for restricting this right, it is wrong and should be overruled. The contrast with the text of the right to access public records under Article XII, Section 3, which is the broader right but does provide for legislative limitations, could not be clearer.

1. Denying Applicant access to his jury polling information violates the First Amendment of the U.S. Constitution.

The First Amendment provides a qualified right of public access to court documents. *Sullo & Bobbitt, PLLC v. Milner*, 765 F.3d 388, 393 (5th Cir. 2014). "Although neither the Supreme Court nor [the Fifth] [C]ircuit has explicitly held that the experience and logic tests apply to court records, other circuits have, and none has found that [they] do not apply." *Id.* Applicant is entitled to a cost estimate for obtaining a copy of his jury polling information under this test for the same reasons of "experience and logic" discussed under the analogous Louisiana right in Error 3(A)(3), *supra*. *See also Press-Enterprise Co. v. Sup. Ct. of Cal.*, 478 U.S. 1, 9-10 (1986); *Milner*, 765 F.3d at 394 n.4.

2. Denying Applicant access to his jury polling information violates the Sixth Amendment of the U.S. Constitution.

The United States Supreme Court has rejected the argument that the Sixth Amendment's right to a public trial requires access to all court documents. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 610 (1978). *Nixon* was wrong when decided and should be overruled for the same reasons given in support of Applicant's Louisiana public trial argument in Error 3(A)(4), *supra*.

Whether or not the Court accepts that argument as to all court records, access to a memorialization of a constitutionally adequate jury verdict, a point neither presented nor decided in *Nixon*, is constitutionally required by the Sixth Amendment's jury trial guarantee in conjunction with the right to a public trial. The separate, fundamental procedural protection of trial by jury must be available to be seen to have been respected not just at the trial itself, but afterward. Further, if the Supreme Court recognizes a right to a unanimous jury verdict under the Sixth Amendment's Jury Trial Clause, there must be a corresponding right to access whatever information may exist pertaining to whether that right was violated. Where there is a right, there must be a remedy. *Bivens v. Six Unknown Narcotics Agents*, 403 U.S. 388, 397 (1971).

3. Denying Applicant access to his jury polling information violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

The United States Supreme Court has repeatedly held that it is violative of the Equal Protection Clause to provide different criminal justice remedies based on a defendant's indigence. *Douglas v. California*, 372 U.S. 353, 357 (1963); *Griffin v. Illinois*, 351 U.S. 12, 16-20 (1956). The precedent of this Court allows access to court records by applicants wealthy enough to afford an attorney to represent them. *Boren v. Taylor*, 16-2078 (La. 6/29/17); 223

So.3d 1130, 1133-34. Denying that same right to prisoners without equivalent financial means impermissibly discriminates against the poor and violates equal protection.

4. Denying Applicant access to his jury polling information violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

Whether or not Louisiana is required to provide a right to post-conviction relief, it does. As such, Applicant has a federally protected liberty interest in access to that judicial process by which he may assert he is in custody in violation of the Constitution. *Bounds v. Smith*, 430 U.S. 817, 821 (1977); *Morrow v. Harwell*, 768 F.2d 619, 623 (5th Cir. 1985). He also has federally protected liberty interests in the state-created interests of due process, equal protection/no discrimination, free speech and petition, a public trial, trial by jury, judicial review, the writ of habeas corpus, court access, and the right to review public records, as provided in Article I, Sections 2-3, 7, 9, 12, 16, 17, 19, and 21-22, and Article XII, Section 3, as well as the state's common-law right of access to the courts. Finally, Applicant has a federally protected due process interest in each of the fundamental federal rights under the First, Sixth, and Fourteenth Amendments discussed in Error 3(B)(1)-(3), *supra*. Burdening these fundamental rights and interests, and purely on the basis of Applicant's limited financial means and prisoner status, is arbitrary, capricious, and irrational, and serves no compelling, important, or legitimate state interest for the same reasons given in Error 3(A)(1), *supra*. Further, the trial court's denial of notice and an opportunity to be heard on the reason for Applicant's request violates due process.

C. The canon of constitutional avoidance counsels resolving this case on statutory grounds.

"When the constitutionality of a statute is at issue, and under one construction it can be upheld, while under the other it cannot, a court must adopt the constitutional construction." *State v. Rochon*, 11-0009 (La. 10/25/11); 75 So.3d 876, 889 (citing *State v. Interiano*, 03-1760 (La. 2/13/04); 868 So.2d 9, 13); *see I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001) ("If an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems." (internal citation omitted)). Applicant argued in Error 2, *supra*, that the applicable statutes are not just susceptible to a construction obviating the need to resolve these many constitutional questions, but must be construed that way. To whatever extent the Court disagrees, this canon of constitutional avoidance suggests resolving any statutory ambiguity in Applicant's favor.

CONCLUSION

Pro se prisoners can be a burden on courts—Applicant knows this, and he would change it if he could. He cannot. So he does not fault the lower courts for occasional fits of intemperance when faced with litigants abusing their process. But not all *pro se* prisoner filings are frivolous, and, given the stakes—never to leave and only to die at Angola—he pleads with this Court to remind the lower courts of such.

The lower courts handling the bulk of prisoner public records requests have turned unduly hostile, and needlessly so.[13] Custodians, clerks of court included, are entitled to collect reasonable fees to cover the costs arising from the copy requests prisoners send. R.S. 44:32(C)(1)-(2); Op. Att'y Gen. No. 15-0056 (Oct. 8, 2015); Op. Att'y Gen. No. 93-379 (Nov. 9, 1993). Those fees not only compensate the custodians, they deter mere curiosity seekers.

Requiring twenty-five-page writs with expostulating constitutional exegesis every time a prisoner needs to pay for a copy of his own court records is not an efficient or just way to safeguard the public records system. Applicant would happily accept a simple writ grant for his own sake, but an actual opinion by the Court on these issues would well-serve the public interest by providing much needed guidance to the lower courts. There is no reason to suppose the 61st writ grant would, standing alone, better inspire fidelity to both the letter and spirit of the Public Records Act than the 60 presently being ignored by the courts below.

WHEREFORE, Applicant prays that the Court grant writs of certiorari, supervisory review, and/or remedial writs, reverse the decision below, and remand with instructions to provide Applicant with a prompt cost estimate for obtaining his jury polling information and to provide a prompt copy of such information to him by mail upon receipt of payment.

Respectfully submitted,

_____

Donald Logan, #350072
Main Prison East, Spruce-1
Louisiana State Penitentiary
Angola, LA 70712

Date: _____

13 This is particularly concerning in the Fifth Circuit, which has not always acquitted itself well in prisoner matters. *See State v. Cordero*, 08-1717 (La. 10/3/08), 993 So.2d 203, 204. Anglo-American law believes that "justice should not only be done, but should manifestly and undoubtedly be seen to be done," *Ex parte McCarthy*, [1924] 1 K.B. 256, 259 (1923), and "[s]ecrecy is not congenial to truth-seeking," *Join Anti-Fascist Refugee Cmte. v. McGrath*, 341 U.S. 123, 174 (1951) (Frankfurter, J., concurring).

APPENDIX

A. List of Prisoner Public Records Act Cases

B. Court of Appeal's Writ Disposition

C. Applicant's Brief to Court of Appeal

D. Trial Court's Ruling

E. Public Records Request

F. Trial Transcript Portion

G. Institutional Call-Out Sheet for Service of Legal Mail

APPENDIX A

Prisoner Public Records Act Writ Grants by Jurisdiction

(Reverse chronological order; Custodian(s) in parentheses)

First Circuit

State ex rel. Garrett v. State, 12-1949 (La. 1/11/13); 106 So.3d 542 (DA)
State ex rel. Walton v. State, 11-690 (La. 2/17/12); 82 So.3d 271 (DA)
State ex rel. Fortenberry v. State, 10-600 (La. 3/4/11); 56 So.3d 464 (Police)
State ex rel. Barbee v. State, 10-275 (La. 2/4/11); 57 So.3d 318 (DA)
State ex rel. Rodgers v. State, 10-213 (La. 2/4/11); 57 So.3d 319 (Police)
State ex rel. Johnson v. State, 09-2291 (La. 10/29/10); 48 So.3d 281 (Court)
State ex rel. Corbin v. State, 09-2087 (La. 9/3/10); 45 So.3d 1032 (Court & DA)
State ex rel. Payton v. State, 09-0351 (La. 11/25/09); 21 So.3d 952 (Police)
State ex rel. Phillips v. State, 08-880 (La. 3/13/09); 5 So.3d 108 (DA)
State ex rel. Adams v. State, 07-2357 (La. 1/30/09); 999 So.2d 736 (DA)
State ex rel. Owens v. State, 06-738 (La. 11/17/06); 942 So.2d 523 (DA)
State ex rel. Daley v. State, 06-779 (La. 10/6/06); 938 So.2d 62 (DA)
State ex rel. English v. State, 04-1984 (La. 5/13/05); 902 So.2d 1000 (DA)
State ex rel. Ruffin v. State, 03-3402 (La. 12/17/04); 888 So.2d 851 (DA)
State ex rel. Parker v. State, 03-0002 (La. 2/6/04); 865 So.2d 713 (DA)
Revere v. Canulette, 98-1493 (La. 1/29/99); 730 So.2d 870 (Police)
Range v. Moreau, 96-1607 (La. 9/3/96); 678 So.2d 537 (DA)
State v. Billiot, 95-489 (La. 5/31/96); 673 So.2d 1021 (DA)

Second Circuit

State ex rel. Brown v. State, 17-676 (La. 8/3/18); 249 So.3d 818 (DA)
State ex rel. Smith v. State, 15-2237 (La. 8/4/17); 222 So.3d 1247 (DA)
State ex rel. Presley v. State, 04-3094 (La. 11/28/05); 816 So.2d 123 (DA)
State ex rel. Donald v. State, 04-1775 (La. 5/6/05); 901 So.2d 1079 (DA)
State ex rel. Dumas v. State, 02-2678 (La. 10/10/03); 855 So.2d 334 (DA)
State ex rel. Overbey v. State, 01-1288 (La. 9/14/01); 796 So.2d 668 (Court & DA)
State ex rel. Overbey v. State, 00-3228 (La. 9/14/01); 796 So.2d 668 (Court & DA)

Third Circuit

State ex rel. Stelly v. State, 17-2123 (La. 8/3/18); 249 So.3d 825 (Court)
State ex rel. Jacobs v. State, 17-681 (La. 8/3/18); 249 So.3d 817 (Court)
State ex rel. Miller v. State, 13-2230 (La. 4/25/14); 138 So.3d 634 (DA)
State ex rel. Robinson v. State, 12-2562 (La. 4/19/13); 111 So.3d 1023 (Sheriff)
State ex rel. Jacobs v. State, 11-1956 (La. 4/27/12); 85 So.3d 1280 (DA)
State ex rel. Guidry v. State, 08-114 (La. 10/3/08); 992 So.2d 999 (DA & Police)
State ex rel. Anderson v. State, 06-739 (La. 9/29/06); 937 So.2d 848 (DA)
State ex rel. Adams v. State, 03-952 (La. 5/14/04); 872 So.2d 520 (DA)
State ex rel. Boudreaux v. State, 98-328 (La. 6/26/98); 719 So.2d 487 (DA)
State ex rel. Farris v. State, 97-2818 (La. 5/1/98); 805 So.2d 187 (DA)

APPENDIX A

Fourth Circuit

State ex rel. Guy v. State, 10-1331 (La. 6/24/11); 64 So.3d 207 (Court)
State ex rel. O'Banion v. State, 06-2440 (La. 6/22/07); 959 So.2d 484 (Court)
State ex rel. Stanton v. State, 06-2111 (La. 5/4/07); 956 So.2d 600 (Court)
State ex rel. Poche v. State, 05-1442 (La. 4/17/06); 926 So.2d 498 (Court)
Poche v. Jordan, 05-204 (La. 4/17/06); 926 So.2d 525 (Court)
State ex rel. Bates v. State, 04-2199 (La. 5/20/05); 902 So.2d 1035 (Court)
State ex rel. Lard v. State, 99-2260 (La. 1/7/00); 752 So.2d 173 (Court)

Fifth Circuit

State ex rel. Johnson v. State, 04-407 (La. 2/25/05); 894 So.2d 1144 (Sheriff)
State ex rel. Gentras v. State, 03-3239 (La. 11/15/04); 887 So.2d 464 (Court)
State ex rel. Luna v. State, 03-855 (La. 4/2/04); 869 So.2d 865 (Court)
State ex rel. Payne v. State, 00-3140 (La. 8/24/01); 795 So.2d 317 (Court)
State ex rel. Jackson v. State, 00-2387 (La. 5/11/01); 792 So.2d 2 (Court)
State ex rel. Denning v. State, 00-2047 (La. 3/30/01); 788 So.2d 437 (DA)
State ex rel. Boutte v. State, 99-3525 (La. 6/23/00); 765 So.2d 347 (Court)
State ex rel. Level v. State, 99-2266 (La. 12/17/99); 751 So.2d 869 (Court & DA)
State ex rel. Hebrard v. State, 97-2526 (La. 1/30/98); 709 So.2d 688 (Court)
State ex rel. Burnett v. State, 95-2033 (La. 9/20/96); 679 So.2d 410 (DA)
State ex rel. Revere v. Judges, 95-549 (La. 5/31/96); 673 So.2d 1020 (DA)

Direct Appeal Jurisdiction

State ex rel. Lemoine v. State, 15-279 (La. 11/20/15); 178 So.3d 982 (DA)
State ex rel. Williams v. State, 10-1697 (La. 8/19/11); 68 So.3d 515 (DA)
State ex rel. Walgamotte v. State, 10-947 (La. 6/3/11); 63 So.3d 1011 (DA)
State ex rel. Jones v. State, 99-3173 (La. 5/5/00); 760 So.2d 1187 (Court)
State ex rel. Gray v. State, 97-447 (La. 9/5/97); 699 So.2d 74 (Court)
State v. Code, 97-310 (La. 6/13/97); 695 So.2d 976 (Court)
State ex rel. Leonard v. State, 96-1889 (La. 6/13/97); 695 So.2d 1325 (DA)

FIFTH CIRCUIT
101 DERBIGNY STREET (70053)
POST OFFICE BOX 489
GRETNA, LOUISIANA 70054
www.fifthcircuit.org

(504) 376-1400
(504) 376-1498 FAX

NOTICE OF DISPOSITION CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE DISPOSITION IN THE FOREGOING MATTER HAS BEEN TRANSMITTED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 4-6** THIS DAY 10/22/2019 TO THE TRIAL JUDGE, THE TRIAL COURT CLERK OF COURT, AND AT LEAST ONE OF THE COUNSEL OF RECORD FOR EACH PARTY, AND TO EACH PARTY NOT REPRESENTED BY

Mary E. Legnon
MARY E. LEGNON
INTERIM CLERK OF COURT

19-KH-340

E-NOTIFIED
Thomas J. Butler (Respondent)

Terry M. Boudreaux (Respondent)

MAILED
Donald Logan #350072 (Relator)
Louisiana State Penitentiary
Angola, LA 70712

APPENDIX
B

DONALD LOGAN

VERSUS

STATE OF LOUISIANA

NO. 19-KH-340

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

October 22, 2019

Susan Buchholz
First Deputy Clerk

IN RE DONALD LOGAN

APPLYING FOR SUPERVISORY WRIT FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON, STATE OF LOUISIANA, DIRECTED TO THE HONORABLE NANCY A. MILLER, DIVISION "I", NUMBER 03-4506

Panel composed of Judges Stephen J. Windhorst, Hans J. Liljeberg, and Timothy S. Marcel, Pro Tempore

WRIT DENIED

In this *pro se* writ application, relator, Donald Logan, seeks review of the trial court's June 4, 2019 order denying his public records request. Relator contends that he filed a public records request with the Clerk of Court for the 24th Judicial District Court, seeking copies of the jury polling information from his trial, but it was improperly treated as a motion and denied by a district court judge. Relator also asserts that even if the district court properly responded to his public records request, it erred by failing to comply with the requirements of the Public Records Act, La. R.S. 44:1, *et seq*. He claims he is willing to pay for the requested documents and that the district court should have provided him with a cost estimate for reproducing them.

La. R.S. 44:31(A) states that "[p]roviding access to public records is a responsibility and duty of the appointive or elective office of a custodian and his employees." The public records law allows inmates access to public records when the request is limited to grounds upon which the inmate may seek post-conviction relief. La. R.S. 44:31.1. A "person does not include an individual in custody after sentence following a felony conviction who has exhausted his appellate remedies when the request for public records is not limited to grounds upon which the individual could file for post-conviction relief under Code of Criminal Procedure Article 930.3." Id.

While technically the request for public records should have been reviewed by the Clerk of Court, we nevertheless find that under the facts and history of this case, this request must be denied for the sound reasons stated by the trial court in its June 4, 2019 denial of relator's request. Specifically, the trial court found (1)

defendant was convicted in 2006; (2) his conviction and sentence were affirmed on appeal and the Louisiana Supreme Court denied writs; (3) he filed an application for post-conviction relief which was denied in 2011; (4) this Court and the Louisiana Supreme Court denied writs; (5) federal habeas corpus was denied in 2013; (6) defendant's conviction and sentence have been extensively reviewed and his conviction is final; and (7) under La. R.S. 44:31.1 defendant is not entitled to the records he seeks.

Specifically, we find that relator is within the exclusions set forth in R.S. 44:31.1. He has exhausted his appellate relief. Further, relator was convicted and sentenced in 2006. His conviction and sentence were affirmed by this Court in 2008, and the Louisiana Supreme Court denied writs on March 13, 2009. Thus, the two-year delay for relator to file for post-conviction has expired, and relator has failed to allege that any exception to the two-year limitation applies, and that his ground for post-conviction relief has not previously been considered by the trial court and is not repetitive. Therefore, on the showing made, the requested juror voting slips cannot be used to support a claim for post-conviction relief.

Accordingly, this writ is denied.

Gretna, Louisiana, this 22nd day of October, 2019.

SJW
HJL
TSM

IN THE
COURT OF APPEAL
FIFTH JUDICIAL CIRCUIT
STATE OF LOUISIANA

NUMBER _____

DONALD LOGAN,
Applicant

VS.

STATE OF LOUISIANA,
Respondent

24TH JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON
DOCKET NO. 03-4506 (DIVISION "I")
HONORABLE NANCY MILLER, DISTRICT COURT JUDGE

APPLICATION FOR SUPERVISORY WRITS
ON BEHALF OF DONALD LOGAN

Respectfully Submitted By :

Donald Logan 350072

Donald Logan, #350072
Main Prison East, Spruce-1
Louisiana State Penitentiary
Angola, La 70712

CRIMINAL PROCEEDING
LIFE SENTENCE

APPENDIX C

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STATEMENT OF JURISDICTION

The Court has jurisdiction over this matter under Article 5, § 10 of the Louisiana Constitution of 1974, as amended.

STATEMENT OF THE CASE

Applicant was convicted of second degree murder on June 20, 2006, whereupon he was sentenced to life imprisonment at hard labor. On May 21, 2019, he submitted a public records request to the Clerk of the 24th Judicial District Court on the form attached as an exemplar as Appendix C. He received no response until the District Court entered the order of June 4, 2019, which Applicant's institution received June 17, 2019, and Applicant received June 19, 2019, that is the subject of this writ application. The order, attached as Appendix A, denies Applicant access to the public record he requested, viz., his jury polling information. Applicant timely filed a notice of intention to seek writs on June 20, 2019, attached as Appendix B, but has received no response. This timely application for supervisory writs follows.

ASSIGNMENTS OF ERROR

1. The District Court erred by treating Applicant's public records request as a motion and denying said "motion."

ISSUES FOR REVIEW

1. Whether a custodian of public records may forward a public records request to a judge to treat as a motion?

2. Whether, assuming it was proper for the District Court to respond to Applicant's public records request via an order, the District Court complied with the requirements of the Public Records Act, R.S. 44:1 *et seq.* and the requirements of the Louisiana and Federal Constitutions?

SUMMARY OF ARGUMENT

The custodian of the public record at issue—Applicant's jury polling information—delegated its responsibility to respond to Applicant's public records request to the district court. That was improper. Even if such delegation were proper, however, the district court failed to conduct the inquiry required of it under R.S. 44:31.1 before denying Applicant's request because he is an inmate confined to an institution. And denying Applicant's request based on his prisoner status without determining whether the information he requests—and is willing to pay for—would relate to a potential ground for post-conviction relief would violate state and federal constitutional protections.

ARGUMENT

ASSIGNMENT OF ERROR NO. 1

The District Court erred by treating Applicant's public records request as a motion and denying said "motion."

The custodian of the public record Applicant sought did not respond to that request within the delay provided by law. In fact, he did not respond at all. He forwarded Applicant's request to a judge, who treated it as a motion and denied it. That is not the way the Public Records Act, R.S. 44:1 *et seq.* was designed to function. If it were, that would create problems of constitutional dimension under both the Louisiana and Federal Constitutions. But the Court need not reach those questions to conclude the district court erred and to reverse and remand with instructions to provide Applicant the jury polling information he seeks.

A. A Custodian of Public Records May Not Forward a Public Records Request to a Judge To Treat as a Motion.

The Public Records Act provides the *manner* in which a custodian, such as the Clerk of the 24th Judicial District Court to whom Applicant made request, shall respond. R.S. 44:31 *et seq.* The Clerk, as a custodian, has the "duty . . . to provide copies to persons so requesting." R.S. 44:32(C)(1)(a). While a court clerk is entitled to set a reasonable fee and to set a reasonable uniform written procedure for reproducing requested materials, R.S. 44:32(C)(1)(b), nothing within the Act or case law permits a custodian to deflect a request by referring it to a judge.

To whatever extent the Clerk in this case believed it was necessary to conduct an inquiry under R.S. 44:31.1 into the grounds for post-conviction relief concerning in connection with which Applicant was making his request, it was the *Clerk* as custodian, not a judge, who was required to conduct such an inquiry. In any event, neither the Clerk nor the district court elected to avail itself of whatever authority for such an inquiry might be conferred under R.S. 44:31.1.

The district court's order was unlawful as it was entered without any statutory basis. But to the extent the Clerk has attempted to delegate its responsibility as a custodian of public records to the district court, judicial economy and equitable considerations compel the conclusion that the best and most efficient way to resolve this controversy would be for this Court to order the district court to do that which the Clerk refused to do, then passed on to the district court. Case law clearly establishes that when, as here, a prisoner is willing to pay for copies of a court record, such copies must be provided. *State v. Byrd*, 97-KP-1924, 706 So. 2d 983, 983 (La. 1998).

B. **Even if the District Court Had Authority To Deny Applicant's Public Records Request, It Failed To Conduct the Inquiry Required by R.S. 44:31.1**

The district court's order states: "The defendant's conviction is final. He may not now seek post-conviction relief. The defendant is not entitled to the records he seeks under the authority of the public records law or any other provision." The district court seems fundamentally to misunderstand the nature of post-conviction relief. Such relief can *only* be sought after a "defendant's conviction is final." Hence its name: *post*-conviction relief. *See* Code Crim. P. art. 924.1 ("An application for post conviction relief shall not be entertained if the petitioner may appeal the conviction and sentence which he seeks to challenge, or if an appeal is pending.").

Because neither the district court nor the Clerk ever made an inquiry "to determine if [Applicant's] request . . . is limited to grounds upon which such individual may file for post-conviction relief under Code of Criminal Procedure Article 930.3," R.S. 44:31.1, Applicant never had an opportunity to explain the reason for his public records request. It *should* be obvious, however, that he seeks *his* jury polling information *in connection with asserting* a claim based on Louisiana's non-unanimous jury verdict practice, a challenge to which would clearly be an assertion that his "conviction was obtained in violation of the constitution of the United States or the state of Louisiana." Code Crim. P. art. 930.3(1). Whether or not the district court thought any such claim would have *merit* is irrelevant. The restriction imposed by R.S. 44:31.1 only prevents inmates such as Applicant from obtaining public records that may, as a categorical matter, not be related to a ground for post-conviction relief. The information Applicant requests is clearly related to such.

To the extent the district court's order meant to refer to the time limit for seeking post-conviction relief and to note that Applicant is without the time, the district court's order fails to comprehend that such time limit is subject to exception, as set forth in Code of Criminal Procedure Article 930.8. One such exception is for claims "based upon a final ruling of an appellate court establishing a theretofore unknown interpretation of constitutional law." *Id.* 930.8(a)(2). Applicant anticipates that such exception to the two-year filing period may apply to him, depending on the outcome of various cases pending in appellate courts concerning the constitutionality of Louisiana's non-unanimous jury verdict practice, under which practice Applicant was convicted. But in order to avail himself of any such claim in a timely fashion, it

may be necessary for him to establish the fact that the jury in his case was non-unanimous. Thus, the information sought is necessary to Applicant's efforts to assert an enumerated ground for post-conviction relief under Louisiana law.

Restricting Applicant's ability to access public documents in his own case file when he is willing to pay for copies of those documents, and when those documents are necessary for him to assert a claim that his conviction was obtained unconstitutionally, would violate Applicant's rights to due process and equal protection under the Louisiana and Federal Constitutions, the common-law right of public access to court documents, the Louisiana and Federal Constitutions' guarantee of a public trial, as well as the qualified right to access public documents under both the Louisiana and Federal Constitutions' protection of the freedom of speech, press, and assembly. *See generally United States v. Sealed Search Warrants*, 868 F.3d 385, 390 (5th Cir. 2017); *Times Mirror Co. v. United States*, 873 F.2d 1210 (9th Cir. 1989). Denying Applicant those documents without so much as even providing him notice or an opportunity to make the showing required by R.S. 44:31.1 also denies him due process under the Louisiana and Federal Constitutions.

The Court can sidestep all such thorny issues, however, by simply directing the district court to provide Applicant with the cost estimate he requested and, upon proper payment, to mail the requested copies to Applicant.

CONCLUSION

The district court's order denying Applicant access to documents in his own case file, documents he has offered to pay to reproduce and to which he is entitled under the Public Records Act, represents a grave abuse of discretion and departure from the proper course of judicial proceedings, in addition to violating Applicant's rights under the Louisiana and Federal Constitutions. Applicant therefore prays for an order directing the district court to provide him a cost estimate for reproducing the requested document and, upon his payment, to provide said document.

Respectfully submitted,

Donald Logan 350072

Donald Logan, #350072
Main Prison East, Spruce-1
Louisiana State Penitentiary

AFFIDAVIT/CERTIFICATE OF SERVICE

I do hereby certify that the foregoing is true and correct to the best of my knowledge and belief.

I do hereby certify that the foregoing has been served upon:

Respondent Judge

Hon. Nancy A. Miller
24th Judicial District Court
P.O. Box 10
Gretna, LA 70054-0010

Opposing Counsel

24th JDC District Attorney
200 Derbigny St., 5th Fl.
Gretna, LA 70053

by placing a copy of same in a properly addressed envelope into the hands of the Classification Officer assigned to my unit along with a Withdrawal form made out to the General Fund, LSP, Angola, LA 70712 for the cost of postage and a properly filled out Inmate's Request for Indigent/Legal Mail form, receiving receipt for same in accordance with the institution's rules and procedures for the sending of legal mail.

Done this 11th day of July 2019.

Donald Logan 350072
Donald Logan, #350072
Main Prison East, Spruce-1
Louisiana State Penitentiary
Angola, LA 70712

TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

STATE OF LOUISIANA — NUMBER 03-4506

VERSUS — DIVISION I

DONALD LOGAN

FILED: _____ CLERK: _____

UNIFORM COURT OF APPEAL RULE 4-2
NOTICE OF INTENTION TO SEEK WRITS

NOW COMES Defendant Donald Logan, who respectfully provides notice under Rule 4-2 of his intention to seek writs from the Fifth Circuit Court of Appeal concerning the Court's order on Defendant's Request for Information, entered June 4, 2019. Defendant also respectfully requests that the Court set a reasonable return date for his writ application, as provided for in Rule 4-3.

RESPECTFULLY SUBMITTED:

Donald Logan

Donald Logan, #350072
Main Prison East, Spruce 1
Louisiana State Penitentiary
Angola, LA 70712

June 20th, 2019

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on all known counsel for all parties by placing same in the U.S. Mail, postage pre-paid, and properly addressed on this the 20th day of June 2019.

Donald Logan
Donald Logan

ORDER

THE ABOVE NOTICE AND PREMISES CONSIDERED:

IT IS ORDERED that the return date for Defendant's writ application concerning the Court's Order of June 4, 2019, be the _____ day of _____, 2019.

Gretna, Louisiana this _____ day of _____, 2019

_____
HON. NANCY A. MILLER

TWENTY FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

NO. 03-4506

DIVISION "I"

STATE OF LOUISIANA

VERSUS

DONALD LOGAN

FILED: _____ DEPUTY CLERK

ORDER

This matter comes before the court on the defendant's **REQUEST FOR INFORMATION, STAMPED AS FILED MAY 28, 2019.**

On June 20, 2006, the defendant was convicted after trial by jury of second degree murder. On September 22, 2006, the court sentenced him life imprisonment at hard labor. The Fifth Circuit Court of Appeal affirmed his conviction and sentences. *State v. Logan*, 986 So.2d 772, (La. App. 5 Cir. 5/27/08), *writ denied*, 2008-KO-1525 (La. 3/13/09); 5 So.3d 117, *and certiorari denied* by *Logan v. Louisiana*, 08-10825 (10/5/09); 558 U.S. 856, 130 S.Ct. 142, 175 L.Ed.2d 293.

The defendant filed many collateral challenges. He unsuccessfully sought post-conviction relief, denied by this court on January 11, 2011. Both the Court of Appeal and Supreme Court of the State of Louisiana denied writs. Federal habeas corpus was denied on June 28, 2013. *Logan v. Cain*, 2013 WL 3293659. The defendant's convictions and sentences have been extensively review and his convictions are final.

The defendant now seeks a copy of written polling of the jury verdict. There is no basis in law to provide jury polling slips or further transcripts to the defendant. The public records law (LSA-R.S. 44:1 et seq.) allows prisoners access to public records when the request is limited to grounds upon which the inmate may seek post-conviction relief. *State ex rel. Kenneth Leonard v. State*, 695 So.2d 1325 (La. 6/13/97). The law establishes that "person does not include an individual in custody after sentence following a felony conviction who has exhausted his appellate remedies when the request for public records is not limited to grounds upon which the individual could file for post conviction relief under Code of Criminal Procedure Article 930.3." LSA-R.S. 44:31.1.

The defendant's conviction is final. He may not now seek post-conviction relief. The defendant is not entitled to the records he seeks under the authority of the public records law or any other provision.

Accordingly,

IT IS ORDERED BY THE COURT that the defendant's motion be and is hereby **DENIED.**

Gretna, Louisiana this 04 day of June, 2019

JUDGE

PLEASE SERVE:

DEFENDANT: Donald Logan, DOC # 350072, Louisiana State Penitentiary, Angola, LA 70712

APPENDIX D

REQUEST FOR INFORMATION UNDER LSA – R.S. 44:1 *et seq.*

TO: CLERK OF COURT, DIV/SEC. I
24 JUDICIAL DISTRICT COURT
PARISH OF Jefferson

RE: *State of Louisiana vs.* Donald Logan, *Case No.* 34506,
Div/Sec. I

Dear Clerk:

Pursuant to LSA-R.S. 44:1 *et seq.*, relative to *public records*, request is hereby made to obtain a copy of the records listed below maintained by, or under the custody and control of your office, in regard to the arrest, prosecution and conviction of:

Name: Donald Logan Docket Number: 34506,
Div./Sec. I

Specific Records Requested:

1) Transcript of Oral Polling of the Jury in accordance with La.C.Cr.P. art. 812 A, as amended by 2018 Act No. 335;

✓ (2) Copy of Written Polling of the Jury in accordance with La.C.Cr.P. art. 812 B(1) and (2), as amended by 2018 Act No. 335; and,

3) Copy of Court Minutes.

I, Donald Logan, am a person of majority age, and therefore entitled to inspect, copy or obtain a copy of any public record. Fees for such copies are regulated by the law under LSA-R.S. 44:32(C)(2) [Reasonable]. Further, I possess both a constitutional right, and a statutory right to inspect public records. I also maintain a right to enforcement under Article I, Section 22 Louisiana Constitution of the 1974, and LSA-R.S. 44:35 et seq.

Done and Signed this July 12th day of July, 2019.

Signature: Donald Logan
Print Name: Donald Logan
Louisiana State Penitentiary
17544 Tunica Trace
Angola, LA 70712

APPENDIX
E

(4)

TWENTY-FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

STATE OF LOUISIANA NUMBER: 03-4506

VERSUS DIVISION "I"

DONALD LOGAN

Proceedings taken in the above numbered and entitled cause heard in open court on June 26, 2006, before the Honorable JoEllen Grant, presiding judge.

* * * * *

APPEARANCES:

Assistant District Attorney

Roger Jordan
Kenneth Bordelon

Attorney for the Defendant

John Thomas

Reported by: FLORENCE BOND, CCR-OCR

APPENDIX F

paper and a pen. If you will just write your name on that, first of all. Everybody's got a pen and everybody's got paper?

The way I'm going to word the question is a little strange, so if you will listen to it. The verdict of the jury was guilty of second degree murder. Was that the way you personally voted? Yes or no. You whose name is on that piece of paper; was that your personal vote, guilty of second degree murder?

(THE JURY IS POLLED BY WRITTEN BALLOT)

THE COURT:

Okay, Maddy, if you will collect them for me please. If you collect them by rows, that helps me to keep them in rows.

(THE BALLOTS ARE COUNTED AT THE BENCH)

THE COURT:

All right, let the record reflect that I have one from all twelve members of the jury and the vote is appropriate. So at this point in time I will order the verdict of the jury recorded by the clerk. I will remand the defendant. I will set sentencing for July 14th.

MR. THOMAS:

Thank you, Your Honor.

THE COURT:

Okay, now if you will go on back I've got something for you.

(WHEREUPON THE PROCEEDINGS CONCLUDED)