

## I. Introduction

Court Watch NOLA (CWN) is a non-profit organization whose mission is to promote reform in the Orleans Parish criminal court system through civic engagement and courtroom observation. As legal scholar Jocelyn Simonson wrote in her Harvard Law Review article,

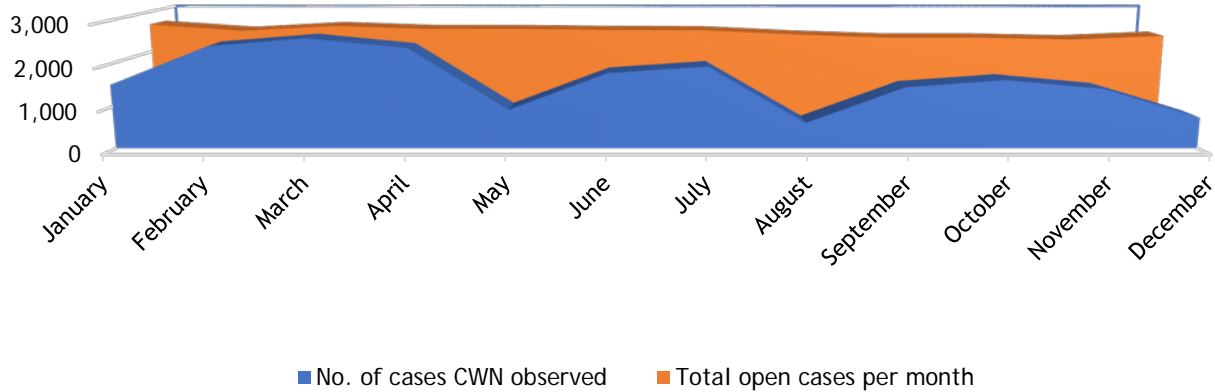
“The audience’s power, born from its physical presence in the courtroom, is bolstered by its ability to act based on what it hears: not only through voting for district attorneys, sheriffs, and sometimes judges, but also by contributing to public discourse at local gatherings, protests, or even in casual conversations with neighbors...These informal methods of political participation are crucial if “affected locals” are to have input into more formal political decision making.”<sup>i</sup>

CWN is objective in its approach, neither siding with the prosecution nor the defense. Rather, CWN tries to increase public confidence in the Orleans Parish Criminal Courts by examining aggregate trends in the Orleans Parish criminal justice system. CWN empowers individuals through legal education to demand transparency and accountability of public officials and educate others to do the same.

## II. Data Collection

In 2016, CWN trained and engaged with 130 court watchers who made over 1,110 visits to Orleans Parish Criminal District Court, gathering crucial data on transparency, professionalism, performance, delays, and fairness on over 7,000 cases.<sup>ii</sup> On average, in 2016 court watchers observed 17 cases per session, generating over 90 observations per month. There were marked decreases in observations in August and December, due to holidays and vacations; however mean coverage was 65% cases observed. Each observation lasted an average 3 hours and 10 minutes, with a range of 0 hours for days when court was cancelled and above 9 hours when trials were observed.

*Chart 1: Number of Court Watcher Observations in 2016*





*Table 1: Number of Court Watcher Observations in 2016*

	Number of observations	Number of cases observed	Average number of cases per observation	Total open cases	Coverage of cases court watched
January	78	1,514	19.41	2,680	56%
February	135	2,426	17.97	2,524	96%
March	177	2,612	14.76	2,647	99%
April	156	2,384	15.28	2,570	93%
May	66	926	14.03	2,570	36%
June	86	1,795	20.87	2,544	71%
July	88	1,950	22.16	2,537	77%
August	30	610	20.33	2,430	25%
September	81	1,462	18.05	2,349	62%
October	98	1,629	16.62	2,349	69%
November	72	1,417	19.68	2,303	62%
December	43	732	17.02	2,395	31%

*Source:* Monthly open case report data provided by the Judicial Administrator of Orleans Parish Criminal District Court; compared to volunteer court watcher data gathered in 2016. Court watchers were asked the date of their observation and the total number of cases heard by the judge during their observation period.

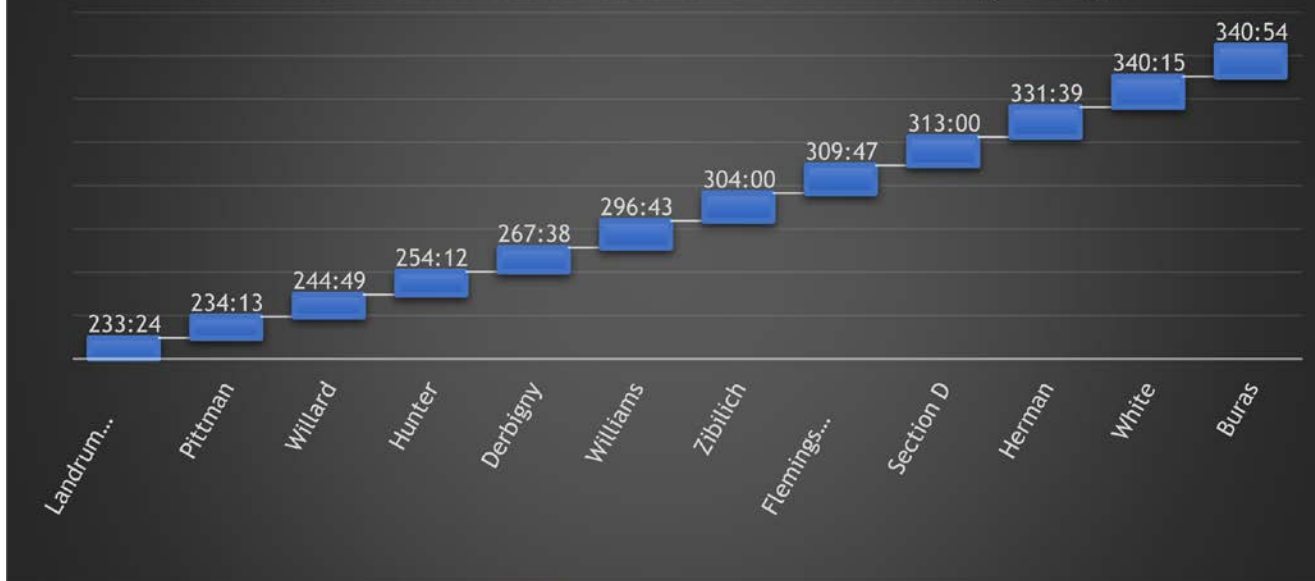
The data collected from court watchers represent over 3,456 hours of court observed across 12 sections of Criminal District Court, for an average of 300 hours of observation per section. Observation times per courtroom varied, with less observation time due to seasonality (summer vacation, Christmas, etc.) and less observation time due to an expressed dissatisfaction for certain judges' courtrooms. Judges Buras and White had the most observation hours at approximately 340 hours, and Judges Landrum-Johnson and Pittman had the least observations at approximately 233 hours. Regardless, this range represents substantial coverage for all sections of the Orleans Parish Criminal District Court.

With the courtrooms most visited, satisfaction was made apparent where the majority of comments were positive such as:

- “Judge White had one of the best courtrooms that I have sat in on. She was extremely easy to hear and ensured that everyone in the courtroom that was speaking was speaking into the microphones.... She was extremely diligent and made it extremely easy to understand what was going on. She honestly ran her court room better than any other court that I have been in.”- Court watcher comment 4/3/2016
- “If we had to rate the Judges, Judge Buras would be near the top of my list. She seems steady, intelligent, confidant and compassionate.” – Court watcher comment 3/16/2016



Chart 2: Court Time Observed in Hours by Judge



Source: Volunteer court watcher data gathered in 2016 (n=1,110). Court watchers were asked their observation start and end times, measured from the time they arrived at and departed from the courthouse.

### III. Victims

The term “community justice” has been defined by prosecutors and national prosecutorial associations as the increased collaboration between criminal justice agencies and communities in the joint pursuit of public safety, as well as a “pursuit of justice for victims, offenders and all community members affected by crime.”<sup>iii</sup> National prosecutorial associations have increasingly stated that increased public safety occurs when prosecutors serve specific stakeholders that play important roles in conjunction with public safety, such as victims and witnesses. While it is ideal for prosecutors to keep data regarding how well they are meeting the needs of victims and witnesses, there is often very little data collected and even less publicly shared on how prosecutors’ agencies serve these traditional stakeholders.<sup>iv</sup>

CWN had contact with over thirty victims in 2016. Thirty victims reached out to CWN to complain about their treatment in Criminal Court, inquire about their rights, or request that CWN monitor their case. These victims believe, as does CWN, that the activities and attitudes of all courtroom actors transform when CWN monitors a criminal case; prosecutors, judges, defense attorneys, and police all act differently when they know they are being watched. CWN has reviewed several factors relating to victims and their treatment in the Orleans Parish Criminal Courts.

#### A. Victims Served with Material Witness Warrants

A victim may call the police after she or he has been victimized. Alternatively, the police or the prosecutor may learn of the victimization through other sources, for example a call from a neighbor, a police confidential informant, or hospital staff. If the victim later determines they do not want to cooperate with law enforcement, the



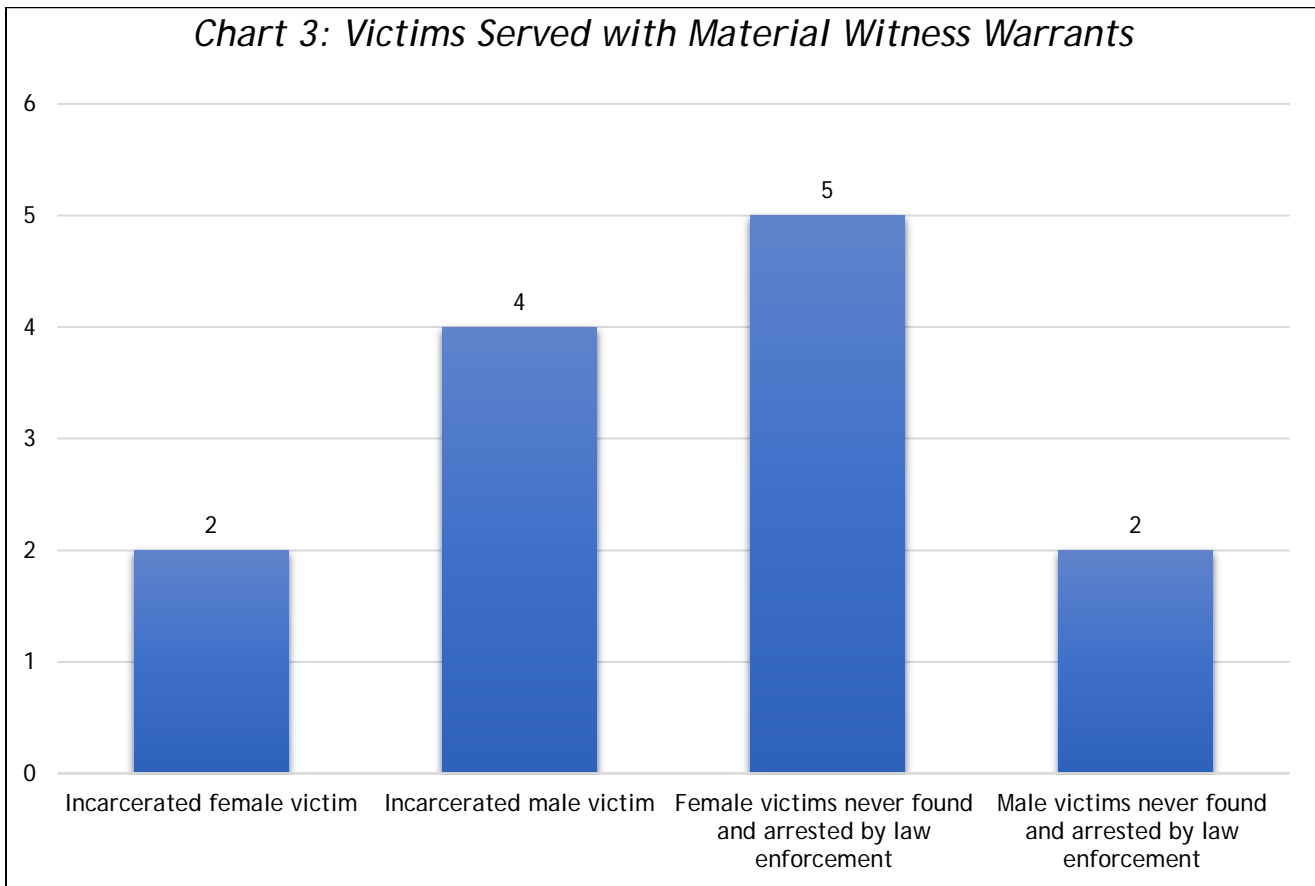
victim may refuse to contact the police department or the district attorney's office or refuse to share information with either office. The victim may do this for a variety of reasons. The victim may fear retribution from either the perpetrator of the crime or from others in the community. Alternatively, the victim may not want to continue with the prosecution of the case because she or he is concerned with the consequences of continuing with the prosecution. For example, a domestic violence victim may fear loss of income if the father of her child is incarcerated, although she herself may have initiated the call to police in a desperate attempt to make the abuse stop. A victim may also fail to cooperate where she or he does not trust law enforcement to improve the situation. In some cases, a prosecutor may be able to continue without the victim coming to court to testify. The prosecutor may do this through other evidence, such as previously recorded statements from the victim or the testimony of other witnesses.

A prosecutor is also permitted to request a material witness warrant whereby a victim can be arrested for failing to come to court to testify when subpoenaed. When the victim is arrested on a material witness warrant, the witness is incarcerated- often in the same correctional facility as her or his aggressor, the Orleans Justice Center. To obtain a material witness warrant, an assistant district attorney must apply to a criminal district court judge for the warrant. The criminal court judge can grant or deny the material witness warrant based on whether the prosecution has established that the victim's testimony is essential and there are good grounds to believe the witness may depart the jurisdiction.<sup>v</sup> Material witness warrants can also be issued on behalf of victims or witnesses who fail to cooperate with the prosecution.

Out of the material witness warrants issued in 2016, CWN reviewed 13 material witness warrants issued to arrest victims, and 15 material witness warrants issued to arrest (non-victim) witnesses. Out of the 13 material witness warrants issued to arrest victims, 7 victims were female, and 6 victims were male. Chart 3 presents the number of victims arrested for failing to cooperate with the prosecution and the number of victims sought after on material witness warrants but never found nor arrested. The number of material witness warrants listed in Chart 3, Table 2 and Table 3 represent the minimum number of material witness warrants issued in 2016. Since material witness warrants are sometimes not explicitly referred to in the Orleans Parish Sheriff's Office public information system, it is difficult to determine if there were more victims arrested or sought after to be arrested, for failing to cooperate with law enforcement.



*Chart 3: Victims Served with Material Witness Warrants*



*Source:* CWN applied a mixed method using qualitative and quantitative data. These methods included: receiving data provided by the Vera Institute of Justice, the Orleans Public Defenders (OPD), former assistant district attorneys, former OPD attorneys, private defense attorneys, and the Office of the Clerk of Court.

Table 2 below shows the number of days victims served in jail on material witness warrants and the types of cases on which victims failed to cooperate with the prosecution. Furthermore, although in Louisiana judges are not required to appoint counsel to victims arrested under material witness warrants, it is a terrifying process for victims to undergo incarceration for days without an attorney to represent them or at least to explain to them the reasons for their arrest and incarceration.<sup>vi</sup> Only two out of the six victims incarcerated on a material witness warrant in 2016 were represented by counsel.



<i>Table 2: Victims Arrested in 2016, Number of Days Incarcerated and Type of Case on which the Victim Did Not Cooperate with Law Enforcement</i>		
<b>Victim Identifier</b>	<b>Number of Days the Victim was Incarcerated</b>	<b>Type of Case on which the Victim was Arrested for Failing to Testify for the Prosecution</b>
Female Victim #1	8	Second Degree Rape, Second Degree Battery
Female Victim #2	6	Aggravated Assault with a Firearm
Male Victim #1	18	Attempted Second Degree Murder, Possession of a Firearm by a Felon
Male Victim #2	179 <sup>vii</sup>	Attempted Second Degree Murder, Armed Robbery with a Firearm
Male Victim #3	1	Aggravated Burglary, Attempted Second Degree Murder, Second Degree Murder, Aggravated Battery
Male Victim #4	1+ <sup>viii</sup>	Attempted Second Degree Murder, Manslaughter, 2nd Degree Murder

*Source:* CWN applied a mixed method using qualitative and quantitative data. These methods included: receiving data provided by the Vera Institute of Justice; the Orleans Public Defenders (OPD); former assistant district attorneys, former OPD attorneys, private defense attorneys, and the Office of the Clerk of Court.

Table 3 shows the type of cases in which victims refused to cooperate with the prosecution, where the victim was subject to a material witness warrant in 2016 and the victim was never found or arrested by law enforcement.



**Table 3: Victims Not Found, Type of Case on which Victim Did Not Cooperate with Law Enforcement**

Victim Identifier	Type of Case on which the Victim Failed to Testify for the Prosecution
Never Found or Arrested Female Victim #1	Sexual Battery, Second Degree Kidnapping, Attempted Possession of a Firearm by a Felon, Possession of Firearm by a Felon, Misdemeanor Sexual battery
Never Found or Arrested Female Victim #2	Aggravated Assault, Domestic Abuse Battery, Domestic Abuse Aggravated Assault
Never Found or Arrested Female Victim #3	Aggravated Battery, Simple Battery
Never Found or Arrested Female Victim #4	Simple Burglary, Theft under \$750
Never Found or Arrested Female Victim #5	Simple Battery, Simple Robbery
Never Found or Arrested Male Victim #1	Armed Robbery with a Firearm, Unauthorized Use of a Motor Vehicle, Criminal Possession of Marijuana
Never Found or Arrested Male Victim #2	Armed Robbery with a Firearm, Attempted Armed Robbery with a Firearm, Possession of a Weapon by a Felon

*Source:* CWN applied a mixed method using qualitative and quantitative data. These methods included: receiving data provided by the Vera Institute of Justice; the Orleans Public Defenders (OPD); former assistant district attorneys, former OPD attorneys, private defense attorneys, and the Office of the Clerk of Court.

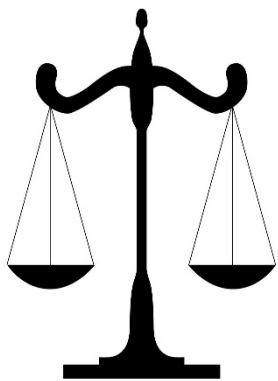
A prosecutor must determine if they can proceed to trial without a victim who has stopped cooperating. While every prosecutor would prefer the victim testify, sometimes an assistant district attorney has sufficient evidence to establish their case beyond a reasonable doubt even when the victim fails to cooperate. This evidence may include but is not limited to: a recording of a 911 call made by the victim, a recording of a call made by the aggressor to the victim from jail (for example, threatening the victim if the victim testifies), or a police body-worn camera recording a statement made by the victim. For example, nationally, some district attorneys have greatly increased the number of domestic violence convictions by prosecuting with other available evidence when victims fail to cooperate.<sup>ix x</sup>

The decision to apply for a warrant to arrest a non-cooperative victim should not be made lightly. When making such a decision, an assistant district attorney should consider factors including: the seriousness of the offense, the strength of the case, and the public interest in punishing the defendant and deterring others from committing similar crimes. A prosecutor should also consider the trauma and fear that is often associated with being a victim of a crime, the victim’s fear of retribution from the aggressor or the community, and the great harm it causes the victim to be arrested and jailed in a corrections facility.<sup>xi</sup> As one expert has stated:

The tensions for an ethical prosecutor between convicting and punishing a dangerous offender while at the same time recognizing that his victim refuses to be the means to that end, and deferring to his victim's wishes, ultimately will leave one goal unattainable.<sup>xii</sup>



In fact, some prosecutors have taken a public stance against incarcerating victims for failure to cooperate with the prosecution or law enforcement. Houston District Attorney Kimberly Ogg promised to never incarcerate a victim for failing to cooperate with the prosecution. This promise came after her predecessor incarcerated a rape victim and the victim had a mental breakdown while testifying against her aggressor in court.<sup>xiii</sup>

<p>Some victim rights groups argue that arresting and incarcerating victims will deeply traumatize an already shattered individual, and there are alternative approaches to ensuring public safety. Additionally, victim advocates point out that if victims believe they could face incarceration, they will be disinclined from reporting crime in the first place.</p>		<p>Some prosecutors argue that arresting and incarcerating victims who fail to cooperate with law enforcement will allow them to remove dangerous criminals from the streets. This is true, they argue, in some cases such as gang cases where the larger community is at clear risk.</p>
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Additionally, in the area of domestic violence, think tanks such as Praxis International have developed an internationally-used blueprint for the prosecution and prevention of domestic violence, the Blueprint for Safety. This blueprint includes a prohibition against, “threaten[ing] to or place[ing] a victim in custody to ensure witness availability.” In some crimes, such as sexual assault cases that are already serially underreported, the arrest of non-cooperative victims may have a chilling effect on survivors already reluctant to report the crime to law enforcement.<sup>xiv</sup> The Blueprint Safety has been adopted in New Orleans. However, the specific prohibition against arresting domestic violence victims on material witness warrants has been omitted in the New Orleans version.

At the start of a case, a prosecutor’s office should always attempt to connect the victim to local and state victim services. In Orleans Parish, where public victim services are often inadequate, the prosecution can (and often does) refer victims to non-profit victim support organizations including but not limited to the New Orleans Family Justice Center, Silence is Violence, Family Services of New Orleans, and the Eden House. The prosecutor should make it a priority to educate state and local representatives on the importance of public resources for victims. When a victim is connected to supportive services and badly needed resources at the start of a case, the victim is much more likely to cooperate and testify.<sup>xv</sup>

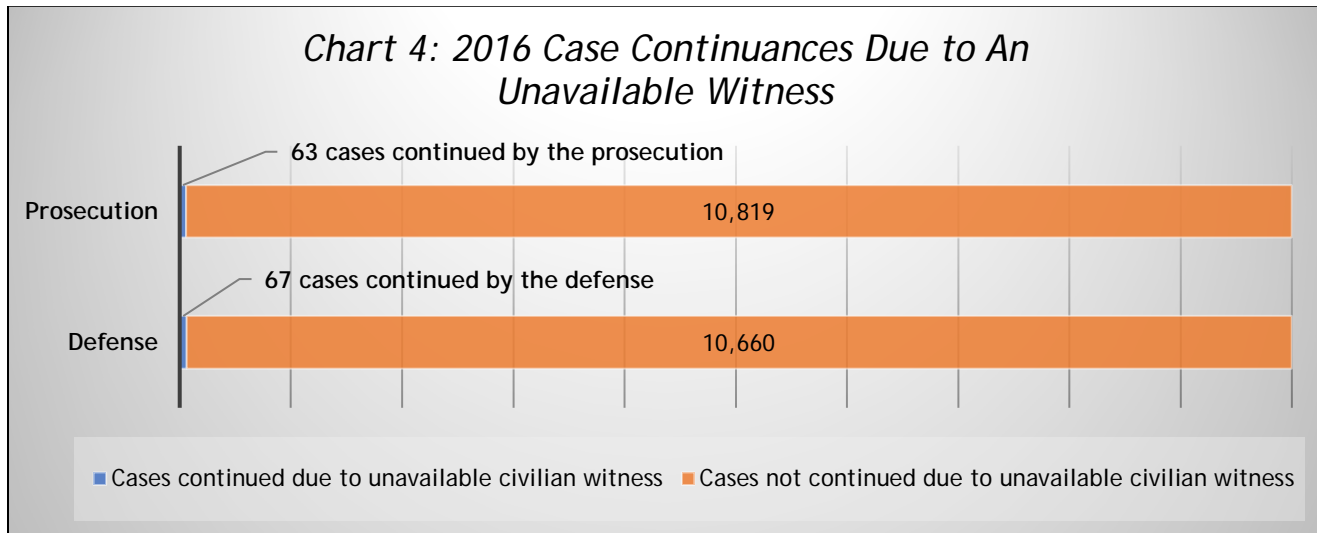
The category of civilian witnesses includes victims but also may include (non-victim) eyewitnesses, character witnesses, and others. Civilian witnesses are often subpoenaed or voluntarily testify in criminal cases. Just like victims, other civilian witnesses who testify on behalf of the prosecution often fear and are reluctant to cooperate. Civilian witnesses may be reluctant due to fear of retribution from the defendant or the community at large, as well as generally distrusting that the police or prosecution will improve the situation.<sup>xvi</sup> Where a civilian witness fails to appear in court to testify on behalf of the prosecution, the court will often “continue” or delay the case for another court adjournment, hoping the civilian witness will be able to appear for this next adjournment. Chart 4 shows that less than 1% of the cases observed by court watchers were continued due to civilian witnesses failing to appear to testify on behalf of the Prosecution. This was comparable to the percentage of cases continued due to





a witness being unavailable to testify on behalf of the defense. It should be stated that the Prosecution and the Defense may continue a case for another stated reason (such as attorney absence or general unpreparedness) when their witness is unavailable. However, it does not appear that civilian witnesses' failure to appear on behalf of the prosecution is a common or regular problem. This is true, despite the fear a civilian witness may face in testifying on behalf of the Prosecution.

Chart 4 depicts the number of case continuances caused by civilian witnesses failing to appear on behalf of the prosecution compared to the number of case continuances caused by a defense witness failing to appear.



Source: Volunteer court watcher data gathered in 2015 and 2016 ( $n = 1,019$ ). Court watchers were asked: “How many cases were continued to another day due to the State’s civilian witness and the defense’s witness being unavailable?” These data were compared to the total number of cases observed during court watchers’ observation periods.

## **B. The Frequency Victims are Considered by the Judge or the Prosecutor**

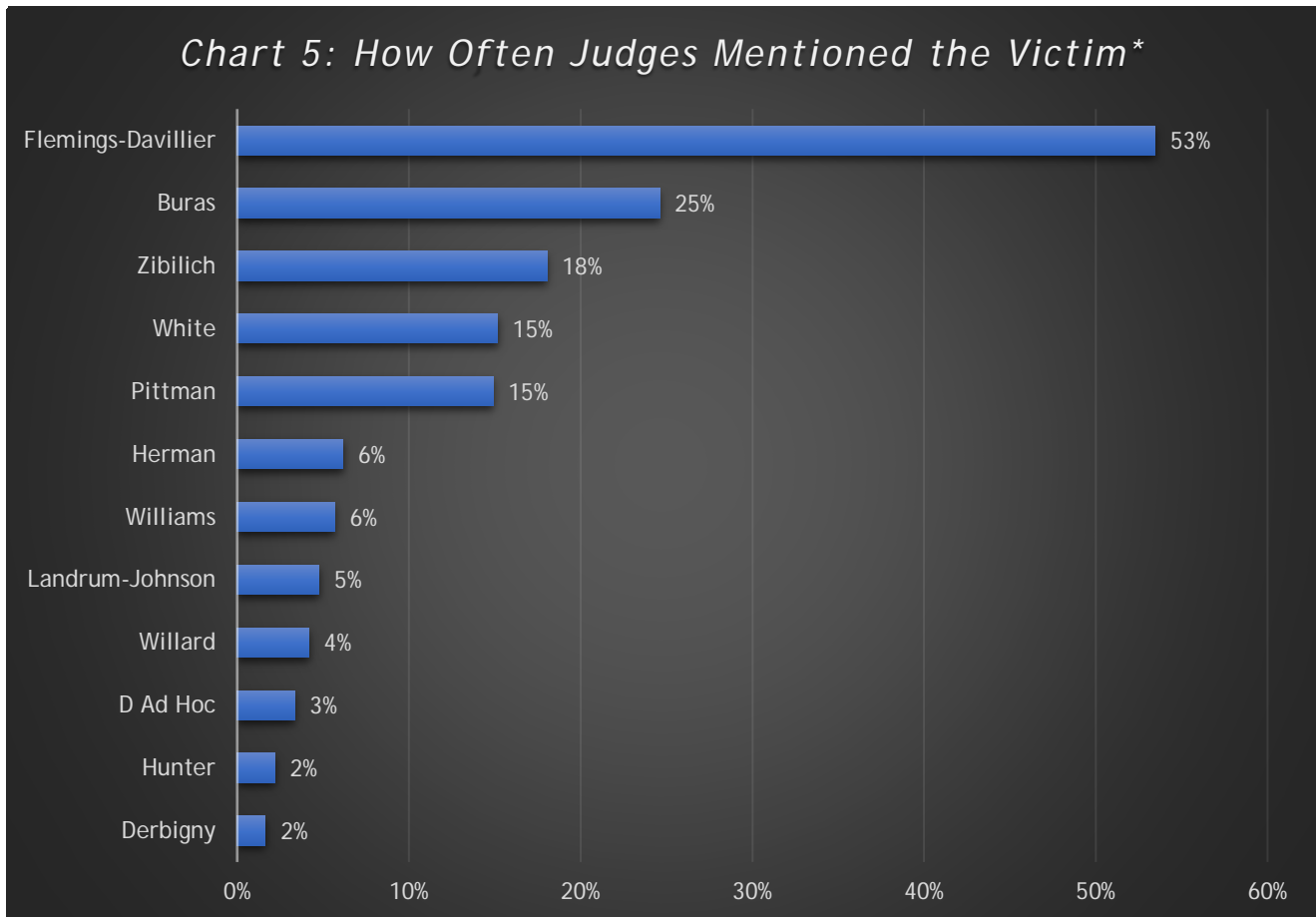
Some crimes, such as possession of narcotics or possession of a firearm by a felon, are considered victimless crimes. These crimes do not have one specific victim other than perhaps the defendant himself or herself or society at large. In 2016, 71% of NOPD arrests were for victim crimes.<sup>xvii</sup> Crime victims have certain rights under Louisiana Law. For example, the victim has the right to:

- reasonable notice to be present and heard during all critical stages of pre-conviction and post-conviction proceedings;
- review and comment upon the pre-sentence report prior to imposition of sentence;
- be considered when a judge rules on a defense motion for continuance;
- notification concerning an accused's arrest, release, escape, or re-apprehension;
- a secure waiting area during court proceedings where the victim is not in close proximity to the defendant, their family or friends; and
- present an impact statement.



Participation in the criminal case can offer victims an incredible amount of empowerment. Where a victim is offered information about her or his case, a participatory role in the development of her or his case, fair and respectful treatment, emotional healing, apologies, and restitution, a victim can begin the process of healing.<sup>xviii</sup> Victims see the law as more fair and legitimate when they have some control over the process and feel that they have been heard.<sup>xix</sup>

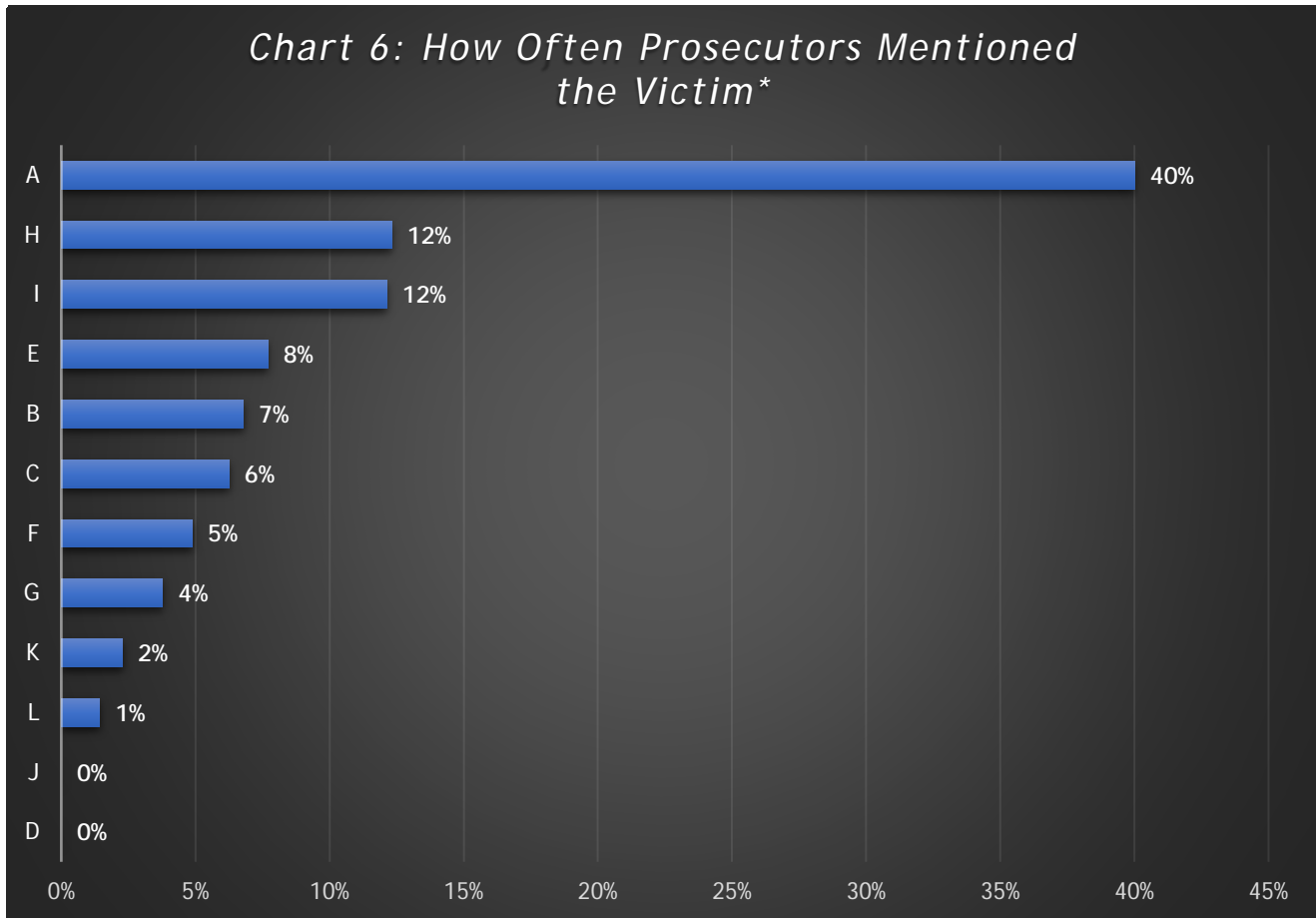
Court watchers counted the number of times both prosecutors and judges explicitly and publicly mentioned the victim in court. Charts 5 and 6 detail the number of times, by court section, judges and prosecutors mentioned victims in conjunction with critical stages such as sentencing, restitution or stay-away orders.



\*In conjunction with a sentencing, restitution or stay-away order. *Source:* volunteer court watcher data gathered observations in 2016 ( $n = 1,110$ ).<sup>xx</sup> Court watchers were asked, “How many times a victim was mentioned by the judge? What was said?” The percentages presented above are calculated from all observations.



In 2016, Judge Flemings-Davillier mentioned victims of crime in the context of sentencing, restitution, or stay-away orders most frequently, 31 times (53%) out of a total 58 observations. Judge Derbigny mentioned victims least frequently, only once (2%) out of 61 total observations in the context of sentencing, restitution, or stay-away orders.



\*In conjunction with a sentencing, restitution or stay-away order. *Source:* Volunteer court watcher data gathered observations in 2016 ( $n = 1,110$ ).<sup>xxi</sup> Court watchers were asked, “How many times was a victim mentioned by the Prosecution? What was said?” The percentages presented above are calculated from all observations.

In 2016, prosecutors in Section A mentioned victims of crime in the context of sentencing, restitution, or stay-away orders most frequently, 26 times (40%) out of a total 65 observations. Prosecutors in Sections D and J did not mention victims at all (0%) out of 32 and 48 total observations, respectively, in the context of sentencing, restitution, or stay-away orders.

### C. Types of Cases on Which Victims Appeared in Court

CWN tracked the types of cases on which victims or victims’ family members voluntarily appeared in court. Court watchers collected data on the victim’s court presence when victims were publicly identified by the court, the prosecutor, or the defense as well as when victims made themselves known publicly. There can be several factors

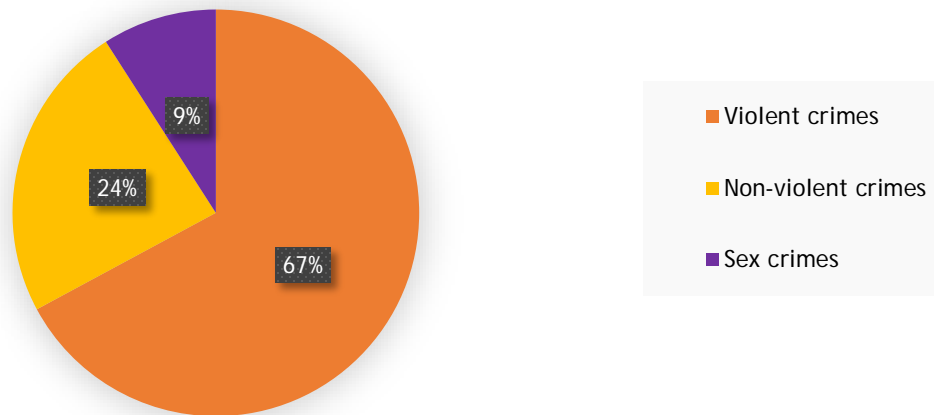


that could impede victims from appearing on a case, including but not limited to whether the prosecutor or clerk of court gave sufficient notice for a victim to appear on the case or the level of fear or discomfort the victim has with appearing in court. Additionally, in many cases the District Attorney’s office will discourage victims from attending court for pre-trial hearings out of fear that a defense attorney will seek to put the victim on the stand,<sup>xxii</sup> a practice not prohibited by either Louisiana Law or Victim Rights Legislation. However, it can be said that a victim who does appear in court shows a high level of interest in or concern with his or her case. It is important to note for which crimes the victim has made the decision to come to court. There is no more important function of our safety and justice systems than protecting crime victims and those who are at-risk of becoming a victim of crime.<sup>xxiii</sup> Policyholders should acknowledge the types of crimes victims have prioritized by their presence in court, and provide suitable resources toward prosecuting these crimes. As one academic wrote in his Pennsylvania Law Review,

Giving victims a greater role as stakeholders would also shift prosecutors’ priorities away from so-called victimless crimes towards classic violent and property crimes. . . . As a matter of distributive justice, it is more important to focus on palpably wronged victims of violent and property crime. Having suffered most acutely, they need healing most.<sup>xxiv</sup>

The chart below shows what type of cases in which victims or their family members were present in court. Out of 143 victims, 67% were present in court as the victim of a violent crime, 9% were present in court as the victim of a sex crime, and 24% appeared in court as a victim of a non-violent crime. However, it should also be noted that out of the total number of NOPD arrests for state offenses in 2016, only 1.4% were sex offense arrests.<sup>xxv</sup> Thus, the fact that sex offense victims were 9% of those who appeared in court and made their presence known is a rather large showing and should be noted as such by policyholders.

*Chart 7: Types of Cases on which Victims or Victims' Families Appeared in Court*



*Source:* Volunteer court watcher data gathered in 2016 ( $n = 143$ ). “**Violent crimes**” in the above chart include murder, robbery, charges with a weapon or firearm, battery, domestic abuse, violation of a protective order, and kidnapping charges.

“**Non-violent crimes**” in the above chart include theft, drug charges, obstruction of justice, assault, driving under the influence or vehicular homicide, burglary, unauthorized use of a vehicle, criminal damage to property, filing false public records, hit and run, malfeasance in office or public bribery, and witness intimidation. “**Sex crimes**” in the above chart include rape or sexual battery, child molestation or indecent/lewd behavior with a juvenile, and human trafficking. Court

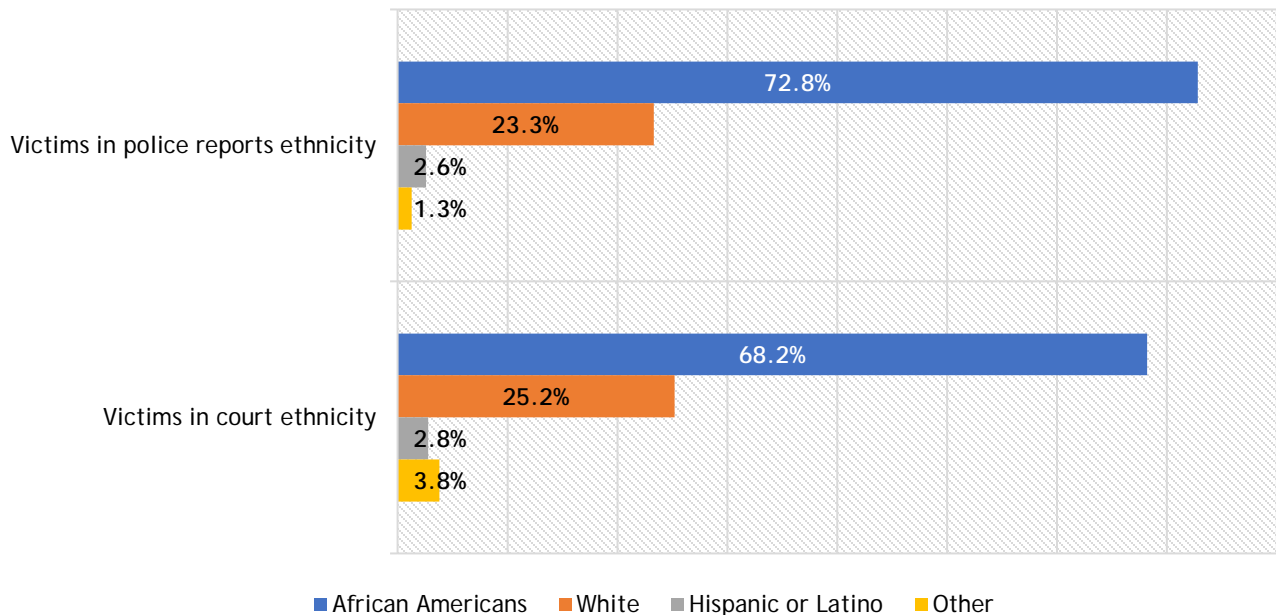


watchers were asked, “What criminal charges did the defendant face?” This question was only posed when the respondent answered affirmatively that they were aware that a victim or victim’s family was in court during their observation period.

#### D. Demographics of Victims

CWN examines the demographics of victims and victim family members that are publicly disclosed to the court. Victims and their family are stakeholders who hold the prosecution, the judge, the defense, the police and the sheriff’s office accountable. Those victims and family members who attend court have an opportunity to hold decision-makers directly responsible for their actions. For this reason, it is important to recognize which victims attend court. Chart 9 and 10 portray the race and the gender of victims observed in court by court watchers are compared to the race and gender of victims as reported by NOPD in 2016. The number of victims and thus the demographic breakdown of victims will likely be slightly different once the Orleans Parish District Attorney determines what felony cases the office will accept or not accept for prosecution. CWN does not have any evidence nor does it intend to suggest, that any of this data evidences selective prosecution; this would be impossible to establish without the demographic breakdown on the prosecution's accepted cases. Instead, the difference in the types of victims in police reports versus the type of victims seen in court, likely evidences the victims' lack of desire or inability to come to court while their case proceeds. These numbers are telling however, in that they show who in the victim community are coming to court to hold stakeholders (judges, prosecutors, defense attorneys, police) accountable or believe they can hold such stakeholders accountable. All numbers in Chart 8 and 9 are percentages of either the total number of victims reported by NOPD in 2016 or the percentage of the total number of victims publicly disclosed in court during 2016. Thus, while African Americans represent 72.8% of crime victims reported in 2016 by NOPD, they only represented 68.2% of crime victims publicly disclosed in court. White crime victims only represented 23.3% of crime victims reported in 2016 by the NOPD but represent 25.2% of crime victims publicly disclosed in court.

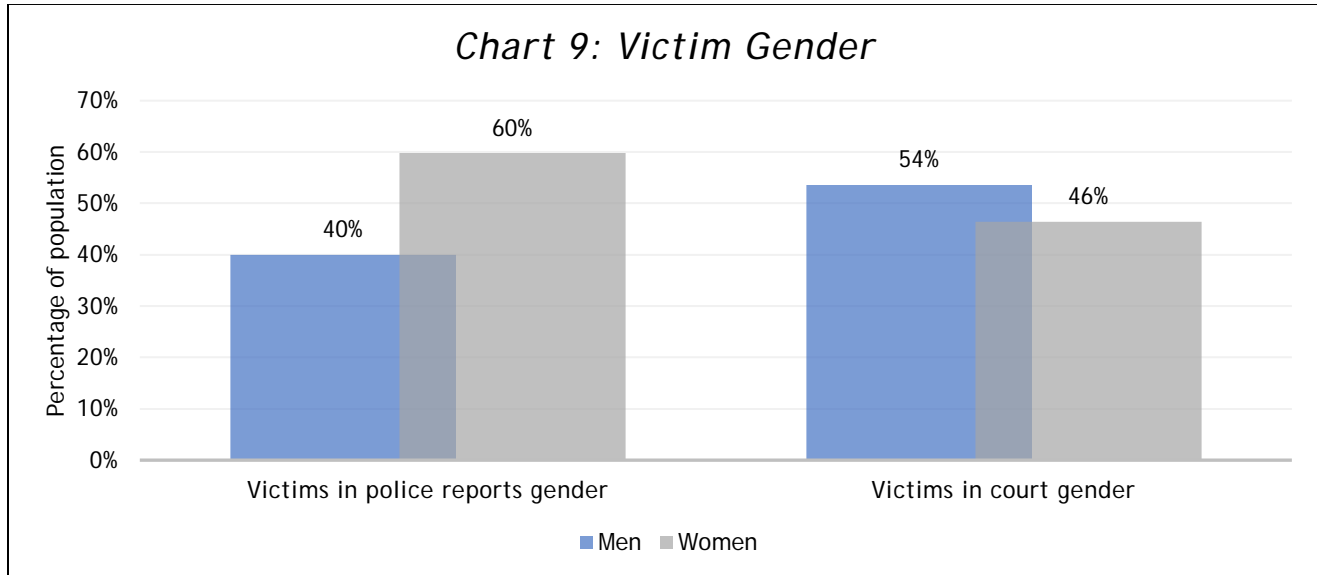
Chart 8: Victim Ethnicity





## Court Watch NOLA 2016 Criminal District Court Annual Report

Source: 2016 Orleans Parish data from police reports provided by the New Orleans Police Department ( $n = 4,973$ ); volunteer court watcher data gathered in 2016 ( $n = 107$ ). “Other” includes Asian, American Indian, Middle Eastern, and persons of unknown ethnicities. Court watchers were asked about victim ethnicity only when the respondent answered affirmatively that they were aware that a victim or victim’s family was in court during their observation period.



Source: 2016 Orleans Parish data from police reports provided by the New Orleans Police Department ( $n = 4,973$ ); volunteer court watcher data gathered in 2016 ( $n = 105$ ). Court watchers were asked about victim gender only when the respondent answered affirmatively that they were aware that a victim or victim’s family was in court during their observation period.<sup>xxvi</sup>

African American female victims made up the largest demographic population identified in NOPD police reports in 2016, adding up to 2,310 African-American female victims out of all 4,973 crime victims identified in police reports, or 46.5%. In contrast, African American females made up only 34 (31.8%) of all 107 crime victims observed in court.





*Source:* 2016 Orleans Parish data from police reports provided by the New Orleans Police Department ( $n = 4,973$ ); volunteer court watcher data gathered in 2016 ( $n = 107$ ). Court watchers were asked about victim demographics only when the respondent answered affirmatively that they were aware that a victim or victim's family was in court.

### IV. Building a Case

The strength of the evidence used to prosecute a case is integral to the proper functioning of our criminal courts. National standards do not dictate the exact combination of evidence needed for a strong or reliable prosecution and it is understood that each criminal case is distinct. However, on a national level, those working in the criminal justice system are learning from examples of wrongful conviction and, the specific types of evidence that can be most helpful in ensuring the right person is being prosecuted for the offense at hand. Additionally, most citizens obey the law not only because they fear punishment, but because the law seems fair to them and thus legitimate. When citizens see that the law reaches substantively just outcomes, the law earns moral credibility that persuades people to obey the law. Conversely, when the law reaches outcomes that are substantively unjust, or at least not visibly just, citizens view the legal judgments as less credible and less worthy of respect.<sup>xxvii</sup> Forensic evidence is increasingly referenced in print and television and civil society. As the familiarity with forensic or scientific evidence grows, there is a greater expectation that scientific evidence will be available in criminal cases. Thus, where citizens and citizen jurors expect to see DNA, fingerprint, blood spatter, audio recordings or video evidence and no such evidence exists, whether that citizen is a victim, a defendant or a juror, the citizen's confidence in the system is often shaken.

#### A. Evidence

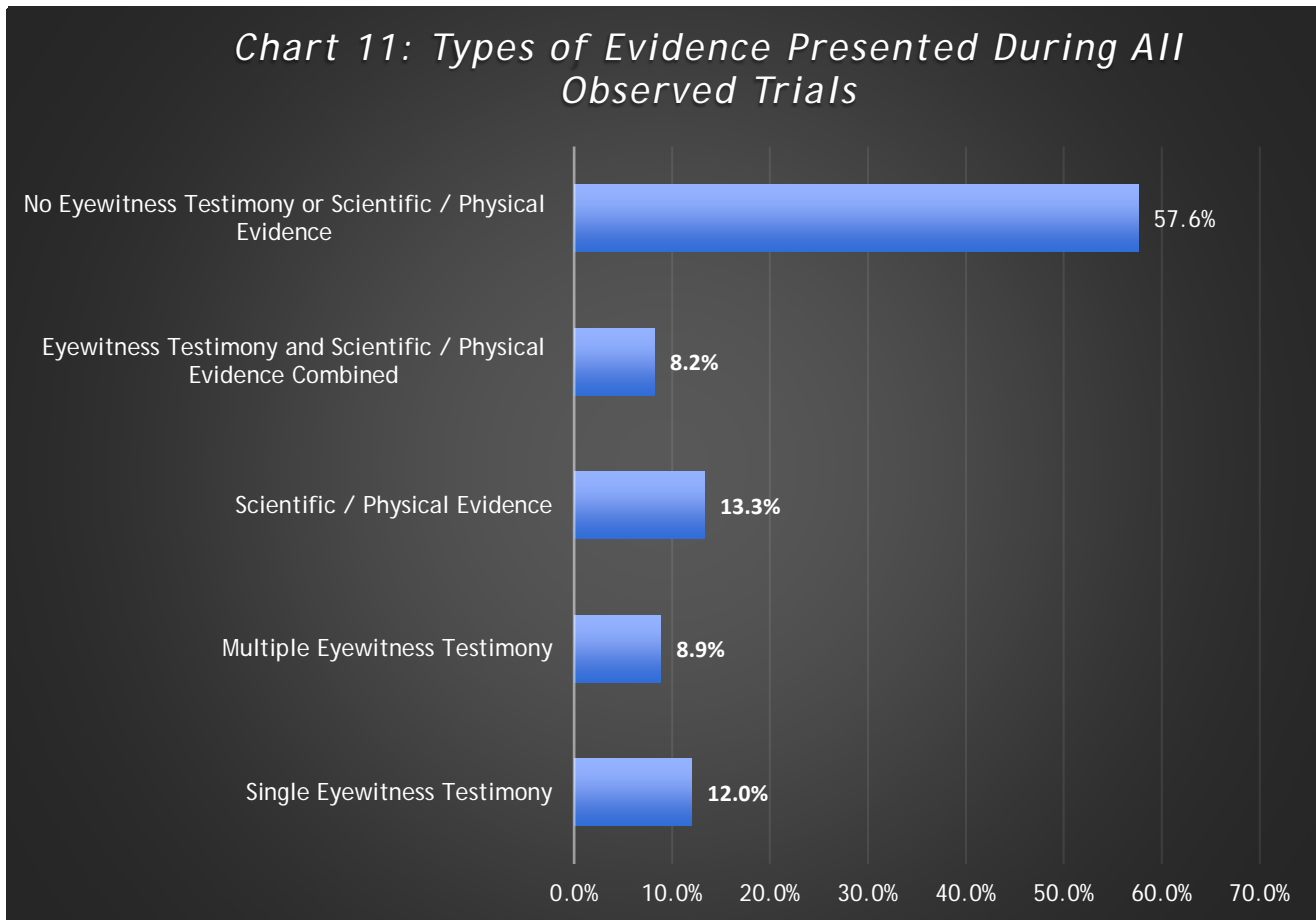
In 2016, there was a lot of news on wrongful convictions in Orleans Parish Criminal District Court. In 2016, Innocence Project of New Orleans worked on a total of six major cases, on behalf of five defendants, securing the release of one defendant and the exoneration of another. According to the National Registry of Exonerations, examining cases between January 1989 and May 2015, Louisiana has the second highest per capita rate of wrongful conviction in the country. Orleans Parish is the biggest exonerator of wrongful conviction cases per capita of all the counties/parishes with a population over 300,000 in the country.<sup>xxviii</sup> The National Registry of Exonerations considers an exoneration to have occurred when a person who has been convicted of a crime is officially cleared based on new evidence of innocence, a definition that is met by the 2016 exoneration, the Innocence Project of New Orleans secured.<sup>xxix</sup> While the Orleans Parish District Attorney has disagreed on whether the individuals Innocence Project of New Orleans represented in 2016 were in fact wrongfully convicted,<sup>xxx</sup> what both sides can agree on is the premise that the strongest and most reliable evidence available should be used to prosecute criminal defendants in Orleans Parish.

CWN is not present at crime scenes, and is thus unaware whether scientific evidence such as fingerprints, ballistics, or DNA evidence is available to the NOPD when they gather evidence at a crime scene. However, NOPD officers and to a lesser extent Louisiana State Police (LSP), will usually always be the first law enforcement on a crime scene with prosecutors only learning about the crime later, sometimes days after the incident occurs. Therefore, the initial gathering of physical or scientific evidence tends to be the responsibility of the police department. While prosecutors can exercise supervision over law enforcement personnel involved in prosecutions,<sup>xxxi</sup> prosecutors face legal prohibitions from becoming directly involved in evidence gathering at the crime scene. What is clear is there should be an effort to obtain as much evidence from the crime scene as possible and ensure such evidence is timely analyzed so that criminal prosecutions are not based solely on a single eyewitness identification. The strength of a case relies on the quality and not necessarily the quantity of evidence, and a case is not necessarily



weak simply because it is based on eyewitness testimony. Yet a case built with different types of evidence, and beyond just eyewitness testimony, can clearly increase conviction rates, reduce reversals of convictions on appeal, reduce the need to plead down or dismiss a case, and reduce the extent to which the wrong person is prosecuted for the crime. On a national level, eyewitness misidentification is the greatest contributing factor to wrongful convictions proven by DNA testing, playing a role in more than 70% of convictions overturned through DNA testing.<sup>xxxiii</sup> This is even more problematic in Louisiana where eyewitness identification experts are per se prohibited from testifying.

Charts 11 and 12 explore evidence used at trial in 2016. The evidence mentioned in Chart 11 incorporates scientific/physical evidence (including but not limited to gunshot residue, gunshot casings, blood spatter, DNA, fingerprint analysis, video tape footage, 911 audio footage, NOPD body worn camera footage, ballistics, etc.) and eyewitness testimony. An eyewitness in a criminal case is an individual who is present during an event (usually the crime or some part of the crime) and is called by either the prosecution or the defense to testify as to what the eyewitness observed.<sup>xxxv</sup>



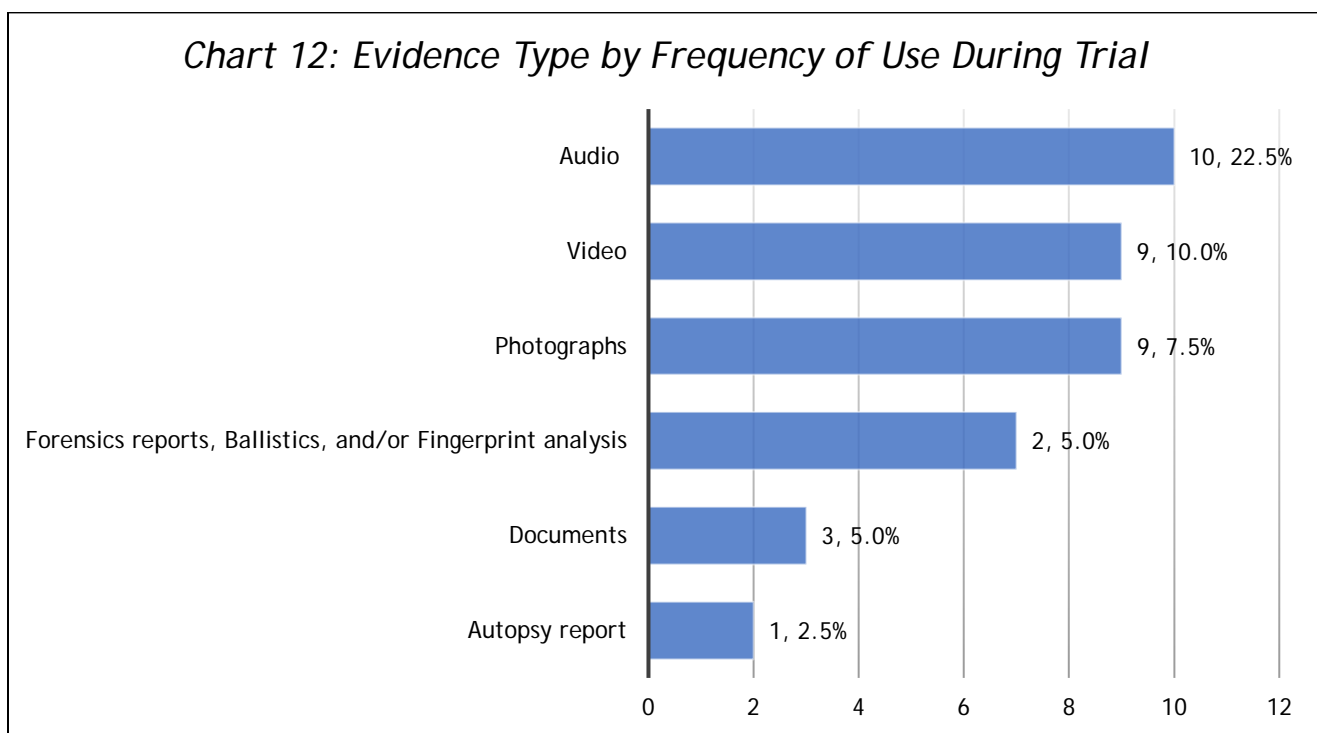
Source: Volunteer court watcher data gathered in 2016 ( $n=155$  times court watchers observed trials). Court watchers were asked, “Was scientific or hard evidence proposed for introduction (*gunshot residue, gunshot casings, blood spatter, DNA, fingerprint analysis, video/audio recordings, photos, etc.*)?” This question was only posed when the respondent answered affirmatively that they had observed a trial during their observation period. Multi-day trials may be counted as multiple observations in this data point.





Out of 155 observations of trials made by court watchers, an average of 57.6% of trial observations did not include eyewitness testimony, scientific evidence or physical evidence. Twelve percent of trial observations relied solely on the testimony of a single eyewitness. While a domestic violence felony may use different evidence (e.g. eyewitness testimony) than a homicide, it is important to note that where evidence exists, all attempts should be made to include it at trial. The fact that over 57% of all trial observations made by court watchers involved no physical evidence, no scientific evidence, nor any eyewitness testimony is problematic and should be a good starting point for future improvement.

Chart 12 below lists the frequency in which different types of evidence (and the combinations of each type of evidence) are proposed for introduction at trial.



*Source:* volunteer court watcher data gathered in 2016 ( $n=155$  times court watchers observed trials). Multi-day trials may be counted as multiple observations in this data point.

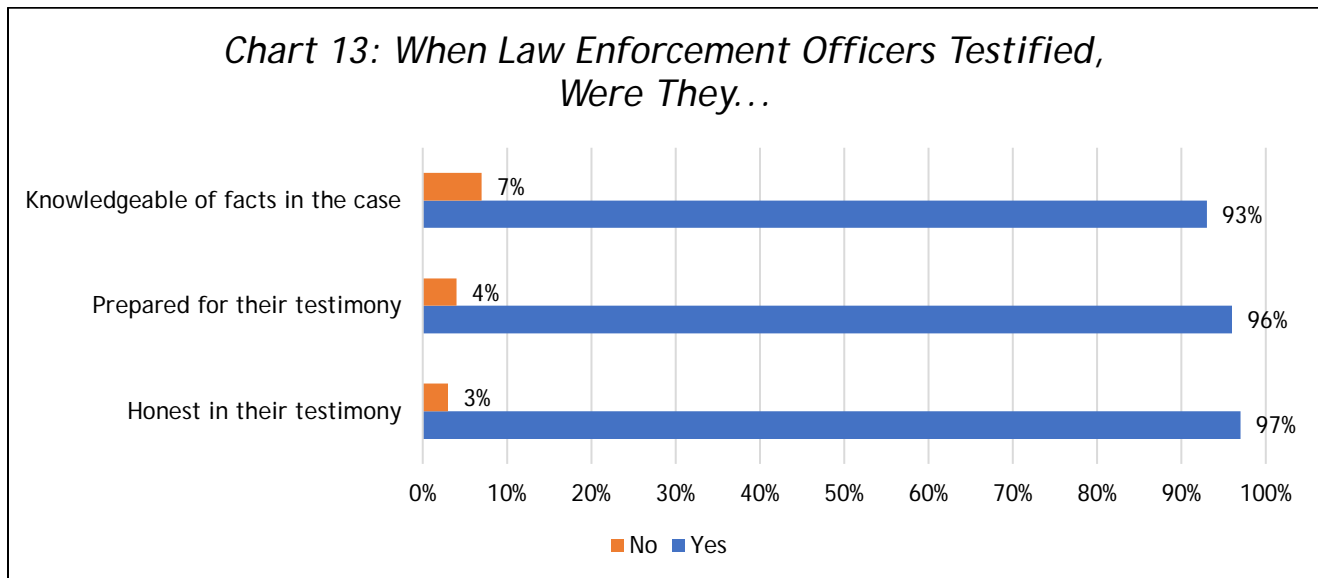
Chart 12 explores the frequency of certain types of evidence used at trial including forensics reports; fingerprint analysis; autopsy reports; documents (including but not limited to medical reports or records, cellphone and social media printouts, and witness statements to police, but excluding police reports, search/arrest warrants); ballistics (including but not limited to gunshot residue, bullet shell casings); video (including but not limited to police body worn camera); photographs; and audio. Audio evidence (including but not limited to 911 calls, jail calls, call transcripts) was the most frequently used type of evidence, introduced in a quarter of the times that trials were observed by CWN in 2016. It should be noted that autopsy reports would not be present in cases where there was not a death involved.



## B. Police Testimony

In 2013, the City of New Orleans and the United States Department of Justice put in place an agreement to ensure the NOPD complies with constitutional policing, improves public safety, and increases public confidence. This agreement is known as the NOPD consent decree.<sup>xxxvi</sup> Jim Letten, the US Attorney of the Eastern District of Louisiana at the time the consent decree was announced said, “the consent decree will serve as a blueprint for the New Orleans Police Department, so that it may become a world class police department- one which will be more effective in protecting its citizens against all threats and all dangers.”<sup>xxxvii</sup> Integral to the NOPD transformation process is that the public gains greater confidence in its department’s performance.

For this reason, CWN collects qualitative assessments of police testimony. Specifically, court watchers made qualitative assessments on the honesty of police testimony; whether police were prepared for their testimony; and whether police were knowledgeable of the facts in the case. Although court watchers are given eight hours of education on criminal court procedure and policy as compared to jurors who are given none, a citizen court watcher’s qualitative assessment as citizens of Orleans Parish is comparable to that of a juror’s assessment. The main difference is when a juror is not satisfied with the quality of police testimony, such dissatisfaction can affect the jury trial verdict. However, both the jurors’ and the court watchers’ perceptions of police testimony reflect the confidence that our citizen court watchers’ have in that testimony and thus the NOPD and the Louisiana State Police (LSP) in general. To his credit, NOPD Superintendent Michael Harrison when asked by CWN, requested the below metrics on police testimony be collected by CWN.



*Source:* Volunteer court watcher data gathered in 2016 ( $n = 981$ ).<sup>xxxviii</sup> Court watchers were asked whether New Orleans Police Department and Louisiana State Police officers were “honest in their testimony (*e.g., any contradictory or potentially untruthful testimony noted*),” “prepared for their testimony,” and “knowledgeable of the facts in the case.” These questions were only posed when respondents answered affirmatively that they had observed NOPD or LSP officers testify during their observation period.

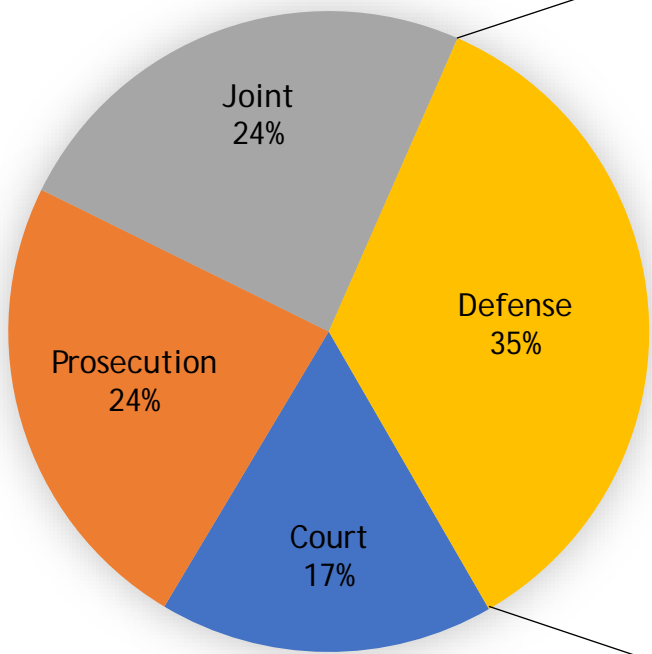
In 2016, court watchers watched NOPD officers (and to a smaller extent, LSP officers) testify in court 981 times out of a total 1,110 observations, or 88% of all observations. Court watchers found law enforcement testimony to be honest 97% of the time, and they found officers prepared for their testimony and knowledgeable of the facts in the case 96% and 93% of the time, respectively.



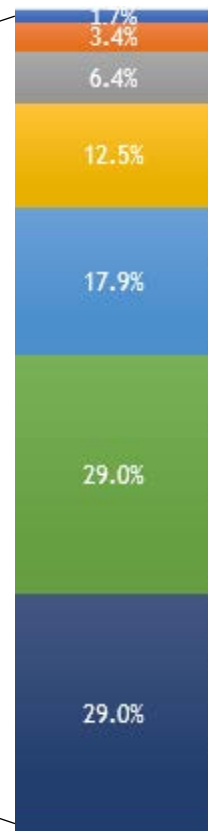
### C. Continuances and the Harm It Can Cause to Both the Defendant and the Victim

Substantive justice and quality of a case should never take a back seat to efficiency issues in criminal court. Certainly, a criminal case should never be rushed for the sake of efficiency; life and liberty is at stake as is public safety of the victim and the larger community. Neither should the court, a defense attorney or a prosecutor use efficiency as justification for a defendant to admit guilt early. However, there must be a healthy medium between sufficient time for the defense to investigate a case and cases that continue for years on end. Excessive numbers of continuances can weaken the administration of justice and the strength of a case. The longer a case takes, the more likely that key evidence and witnesses are lost or stop coming to court. In addition to weakening a case, continuances cause trauma to victims who wait years to gain closure at the end of a case. Defendants are often incarcerated as a case drags on breaking up families and reducing income coming into the home. If out of jail, defendants find it problematic to remain gainfully employed with the excessive number of court adjournments. CWN urges all parties to focus on reducing unnecessary delays. It should also be mentioned that with joint continuances, judges do not have the legal discretion to forbid the continuance. Although the judge may want the case to move more efficiently, the judge is barred from doing so if a joint continuance is requested. Chart 14 shows the breakdown of continuances in which the Court, the Defense or the Prosecution was responsible for in 2016. Out of all the parties responsible for continuances in 2016, the defense is by far the largest contributor to continuances.

*Chart 14: Continuance Requests by Party in 2016*



*Chart 14.1: Breakdown of Reasons for Defense Continuance*



- Unexplained defense continuance (1.7%)
- Defense witness unavailable (3.4%)
- Defense owes discovery to the State (6.4%)
- New/change in defense counsel (12.5%)
- Defense attorney did not show (17.9%)
- Defense attorney unprepared (29%)
- Defendant was released and did not appear (29%)



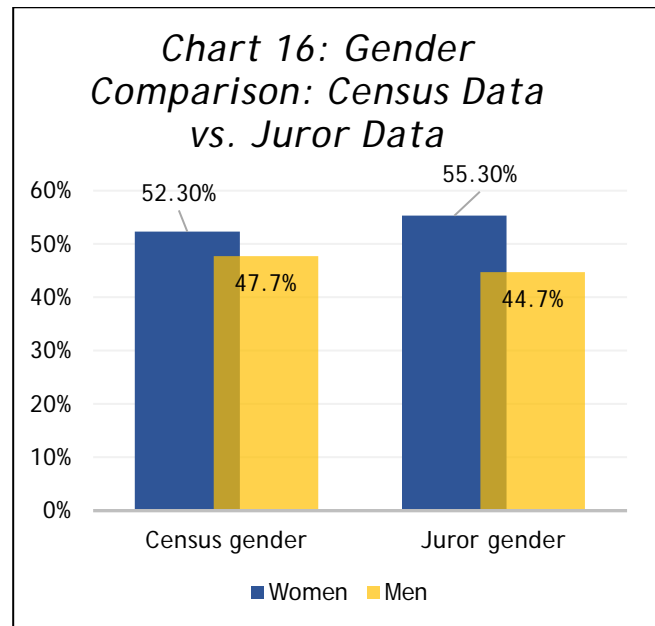
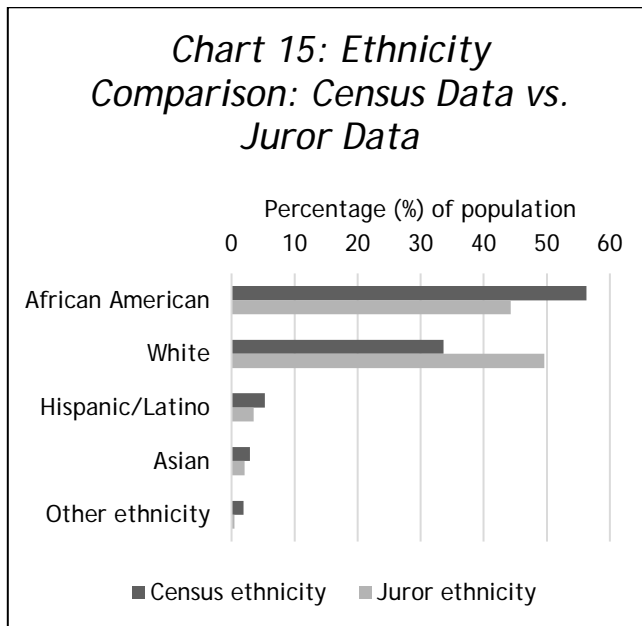
## Court Watch NOLA 2016 Criminal District Court Annual Report

Source: Volunteer court watcher data gathered in 2016 ( $n = 1,108$ ). Court watchers were asked nineteen questions about the number of cases continued to another day, who requested the continuances, and for what reason.

In 2016, the Defense requested continuances in 2,029 cases (15.3%) out of a total 13,240 cases. Chart 14.1 shows that the two most frequent reasons for Defense case continuances indicated in court were that the defense attorney was unprepared and that the defendant was out on bond and failed to appear for a scheduled court appearance.<sup>xxxix</sup>

### D. Jurors

The Sixth Amendment right to a trial by a fair and impartial jury of peers is a bedrock of the criminal justice system. Specifically, the jury should be drawn from a group “composed of the peers or equals [of the defendant]; that is, of his neighbors, fellows, associates, persons having the same legal status in society as he holds.”<sup>xi</sup> In a recent study, Tufts University researcher, Samuel Sommers, has found that multiracial juries appraise evidence more accurately than juries that are made up of all-white jurors; the study found that multiracial jury is simply more careful in considering evidence.<sup>xli</sup> While Orleans Parish draws its jury pool exclusively from Department of Motor Vehicles (DMV) and voter registration records,<sup>xlii</sup> Louisiana Law allows the Parish to choose the citizens who will serve jury duty from other sources and lists outside of DMV and voter registration lists. Other jurisdictions for example, choose which citizens will serve jury duty from lists of: utility subscribers, local taxpayers, persons applying for or receiving family assistance, medical assistance or safety net assistance, and persons receiving state unemployment benefits.<sup>xliii</sup> Chart 15 and 16 depict the demographic breakdown of 2016 jurors as observed by court watchers. It is important to note that observations are based on perception of court watchers as to what they observed. Court watchers did not speak to jurors about the juror’s race or gender.



Source: Orleans Parish census data (2015 most recent available); volunteer court watcher data gathered in 2016 ( $n = 251$  for ethnicity;  $n = 114$  for gender).<sup>xliv</sup> Court watchers were asked about juror demographics only when the respondent answered affirmatively that they observed a jury trial during their observation period.



Census data for 2015 reflects a larger population of African Americans (56.3%) residing in Orleans Parish, than court watchers observed (44.3%) serving on juries. In contrast, census data reflects a smaller population of Caucasians (33.6%) than court watchers observed (49.6%) serving on juries. Census data also reflects a smaller population of women (52.3%) than court watchers observed (55.3%) serving on juries.

## V. Court Professionalism

As a general observation, Court Watch NOLA found criminal court judges incredibly hard-working. Each criminal Court judge had over a thousand court case appearances in 2016. Additionally, it was noted that several judges including Judges Laurie White, Landrum Johnson, and Judge Byron Williams were observed to have worked late into the evening, presiding over trials. Often however, the public is unaware of the effort judges sink into hearing the case adjournments, hearings and trials on their docket.

There is a division between the “insiders” and “outsiders” in the criminal justice system. The “Insiders” such as judges, the prosecutor, defense attorneys (both private and public defenders), police, and clerks- all have power and self-interest that can greatly influence the criminal justice system's process and outcomes. “Outsiders” such as crime victims, indigent defendants, bystanders, and most of the general public-often find the system frustrating, insular, and unconcerned with proper justice. This lack of transparency impairs trust in and the legitimacy of the law and it provokes increasingly draconian reactions by outsiders. For example, while a judge may be ethical, competent and hardworking, if that judge intentionally hears most cases outside of the earshot of the public, the public often assumes that same judge is discussing subjects such as campaign contributions or fundraisers with a private defense attorney or other party to the criminal case up at the bench. It also impairs outsiders' faith in the law's legitimacy and trustworthiness, which undercuts outsider's willingness to comply with it. If opacity frustrates and misleads outsiders, transparency and fuller disclosure can alleviate these problems.<sup>xlv</sup>

Sidebars are discussions between the judge and attorneys, off the record and outside the earshot of the community audience members and almost always outside the earshot of the defendant and the victim.<sup>xlvi</sup> Judges often insist that these sidebars are necessary to run their courtrooms. Judges forget that even the appearance of back-room justice causes the public to assume the worst.<sup>xlvii</sup> Sidebars have become so prevalent in Orleans Parish District Court that in some court rooms there is more time spent off the record in private sidebar conversations than there is time spent making the record of a case. In one courtroom, a judge jovially refers to the continual off the record conversations held in the judge's back chambers as the “Coffee House.”

**“I knew my daughter’s abuser was well connected but I thought if I went to the authorities that justice was blind and he would receive justice for the terrible abuse he caused my daughter. But every time we come to court all I see are these secret meetings at the bench where his private defense attorney and the judge just keep laughing and the case is continued once again. My daughter and I cannot take much more of this. What’s so funny about a child sex abuse case?”**

**-Victim statement made to CWN in November 2016**



Additionally, there is no requirement that sidebars be recorded by a court stenographer, and most sidebars go unrecorded and are not made part of the court record. Considering the real concerns of wrongful conviction and the right to appeal, it is essential that the written record of a criminal case is complete and includes the exchanges that occurred in the criminal proceeding. Given the high frequency of sidebars in many Orleans Parish Criminal District courtrooms and the absence of court stenographers at such sidebars, an inadequate trial record has already proven to be problematic for higher courts expected to hear an appeal.<sup>xlvi</sup> In evaluating judicial transparency, CWN examines the incidence of (1) one-party sidebars and (2) two-party sidebars without explanation.

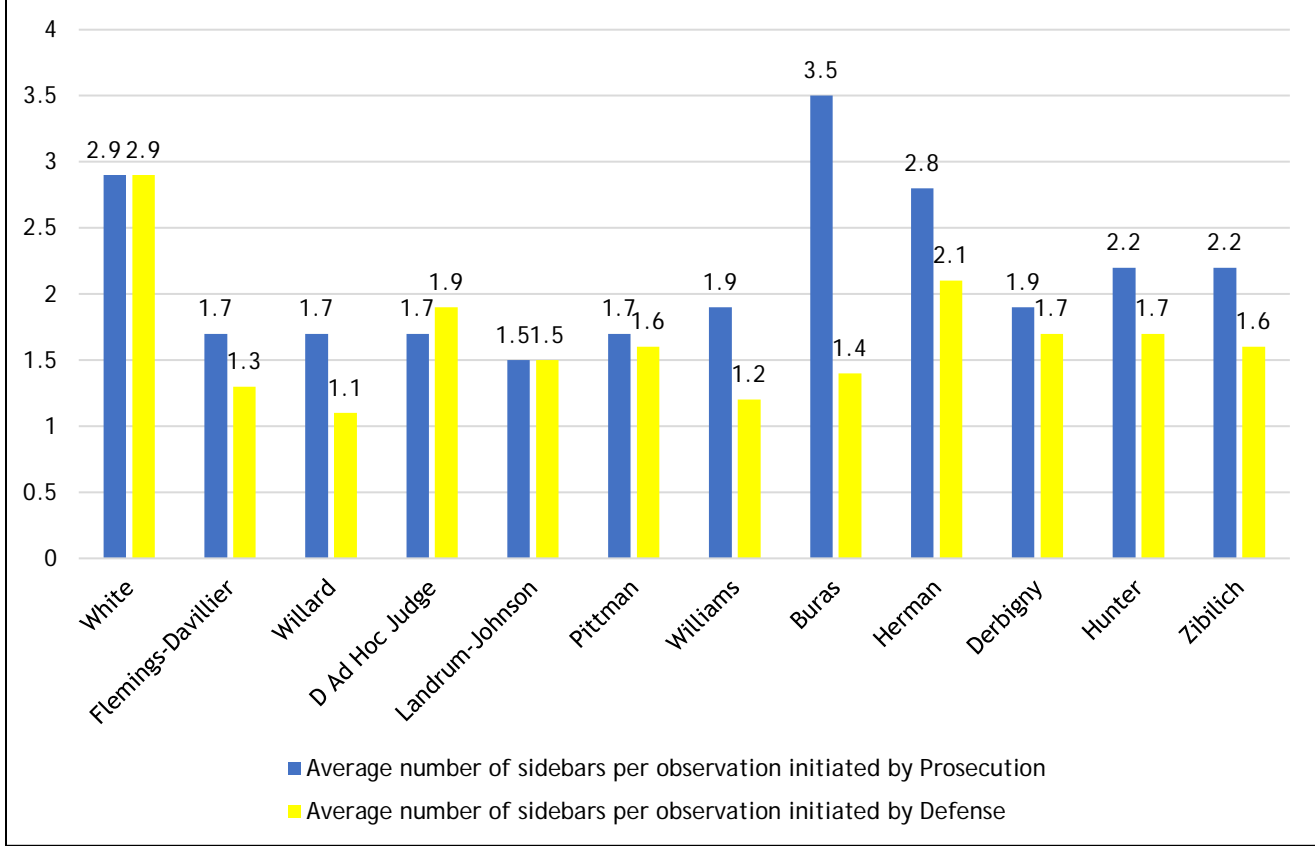
### **A. One-Party Sidebars**

There are relatively few explicit and narrow rules judges are required to abide by in Louisiana. Instead, judicial rules are often painted with a broad brush. For example, judges are required to “act at all times in a manner that promotes public confidence in the integrity and the impartiality of the judiciary”<sup>xlix</sup> and “diligently discharge the judge’s administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration.”<sup>li</sup> By contrast, one specific prohibition listed in the Code of Judicial Conduct should be noted: the prohibition against ex-parte contact.<sup>li</sup> Ex parte contact in the criminal court context includes any communication relative to the merits of a case made between the judge and one of the parties to the criminal case without the opposing party present.<sup>lii</sup> Amongst the many dangers of ex parte contact is the danger that the opposing but absent party cannot refute an untrue claim made by the one party speaking to the judge since the opposing party has been excluded from the sidebar.

In 2016, CWN tracked one-party sidebars, the discussion between the judge and either the defense or the prosecution, without the other party present, conducted at the bench or in chambers and always outside the hearing of the public. Since both ex-parte contact and one-party sidebars are not conducted publicly, CWN could not determine what was ex-parte contact (a discussion about the merits of the case) compared to a one-party sidebar (where judge and defense attorney could be talking about their next golf game but are not referring to the criminal case). The former is unethical and the latter while not unethical under the Judicial Code of Conduct, cause outsiders: the crime victims, defendants, bystanders, and most of the general public-to find the system frustrating, insular, and unconcerned with proper justice. Judges often justify one-party sidebars by claiming an attorney wishes to inquire about personal matters with the judge- a sick spouse or inquire about the judge’s health. CWN would recommend that a judge publicly appear as transparent and as ethical as possible by reserving personal well wishing to a time when the judge is not on the bench.



*Chart 17: Average Number of 1-Party Sidebars Initiated by the Prosecution or the Defense Per Day of Court Observed*



Source: Volunteer court watcher data gathered in 2016 ( $n=1,110$ ).<sup>liii</sup> Court watchers were asked how many sidebars occurred with the judge speaking with only one party, and which party initiated the 1-party sidebars. The total number of 1-party sidebars observed were averaged over the total number of times the judge was observed.

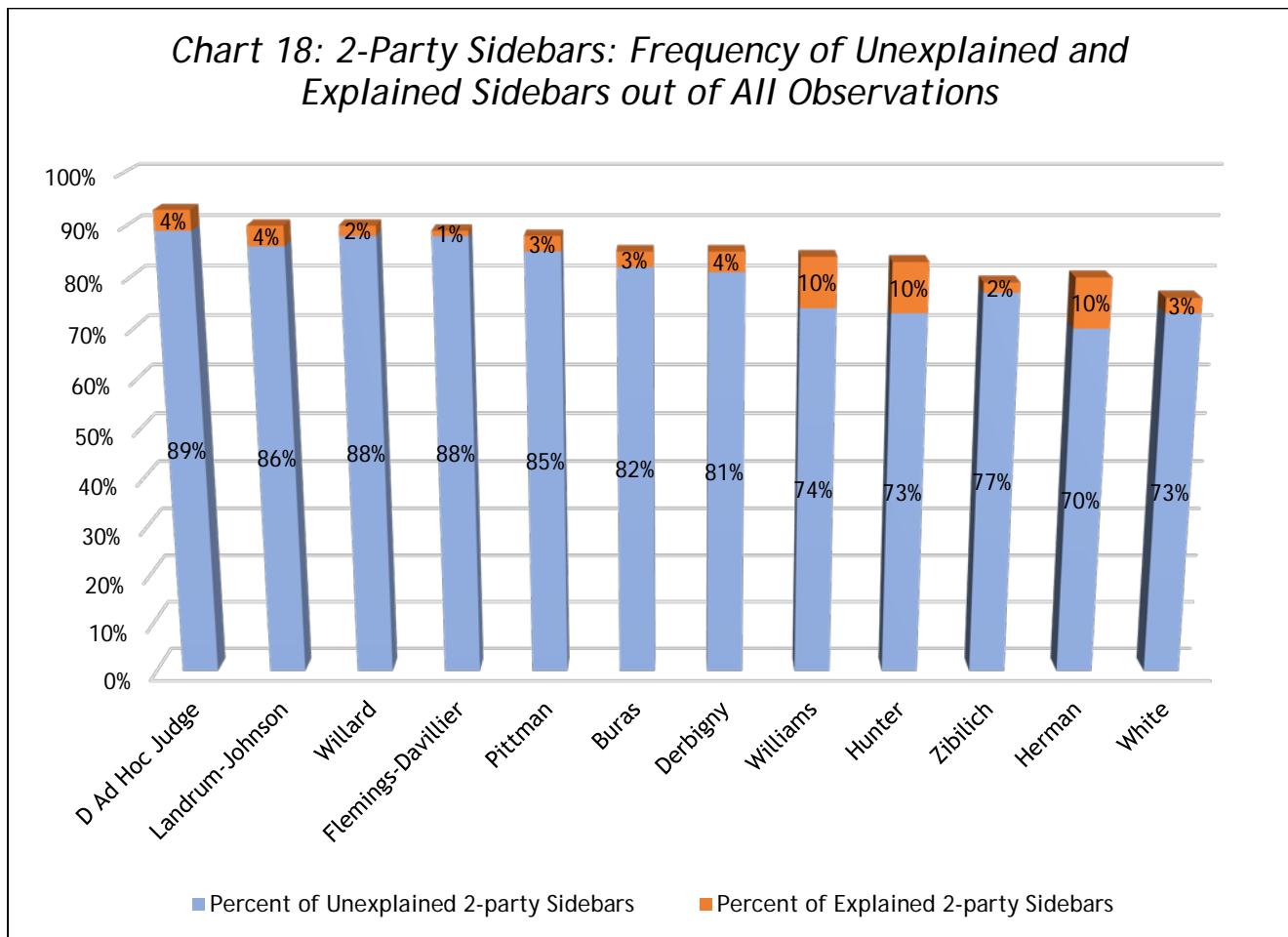
Chart 17 shows that prosecutors in Section E (Judge Landrum-Johnson’s courtroom) initiated the fewest one-party sidebars, averaging 1.5 one party sidebars per day of court observed. Defense attorneys in Section E initiated a similarly low number of one-party sidebars. Prosecutors in Section H (Judge’s Buras’s courtroom) initiated the most one-party sidebars, averaging 3.5 ex parte sidebars per observation. In contrast, defense attorneys in Section H initiated only an average 1.4 one-party sidebars per observation.

Defense attorneys in Section C (Judge Willard’s courtroom) initiated the fewest 1-party sidebars, averaging 1.1 one-party sidebars per observation. Prosecutors in Section C initiated an average 1.7 one-party sidebars per observation. Defense attorneys in Section A (Judge White’s courtroom) initiated the most one-party sidebars, averaging 2.9 one-party sidebars per observation. Prosecutors in Section A initiated a similar average number of one-party sidebars per observation.



## B. Two-party Sidebars without Explanation

Some judges have informed CWN that two-party sidebars are necessary because courtroom acoustics are bad. Judges have also informed CWN that sidebars are necessary where an attorney must inform the Judge of confidential information relating to the criminal case, the defendant or public safety. CWN agrees that the acoustics of some courtrooms are poor and urges that all parties use the microphones installed in every courtroom. CWN understands that a minority of the information in the criminal case is confidential. In those few instances, CWN advises judges to include an explanation to the public, defendant, victims, etc. that a sidebar was called to discuss confidential information that is not a matter of public record. Chart 18 shows the number of two-party sidebars without any explanation in 2016. While no courtroom experienced sidebars in 100% of all observations, the frequency of total 2-party sidebars was very high in every courtroom. For instance, Section D experienced 2-party sidebars in 93% of all observations in that courtroom. Of those 2-party sidebars, only 4% of all observations in Section D included explanations for the sidebars on the record. Of all 1,110 observations made by court watchers across all 12 sections of court, only 4.5% of the total 4,679 two-party sidebars were explained on the record as to what was discussed off record.



Source: Volunteer court watcher data gathered in 2016 ( $n = 1,110$ ).<sup>liv</sup> Court watchers were asked how many sidebars occurred with the judge speaking with both parties, and of the total 2-party sidebars, how many times the reasons for such sidebars were not explained on the record.





In 2016, reasons for 2-party sidebars were most frequently put on record in the courtrooms of Judges Williams, Hunter, and Herman, a frequency of 10% of all sidebars occurring in those courtrooms. Reasons for 2-party sidebars were discussed on record only 1% of all sidebars occurring in Judge Flemings-Davillier's courtroom.

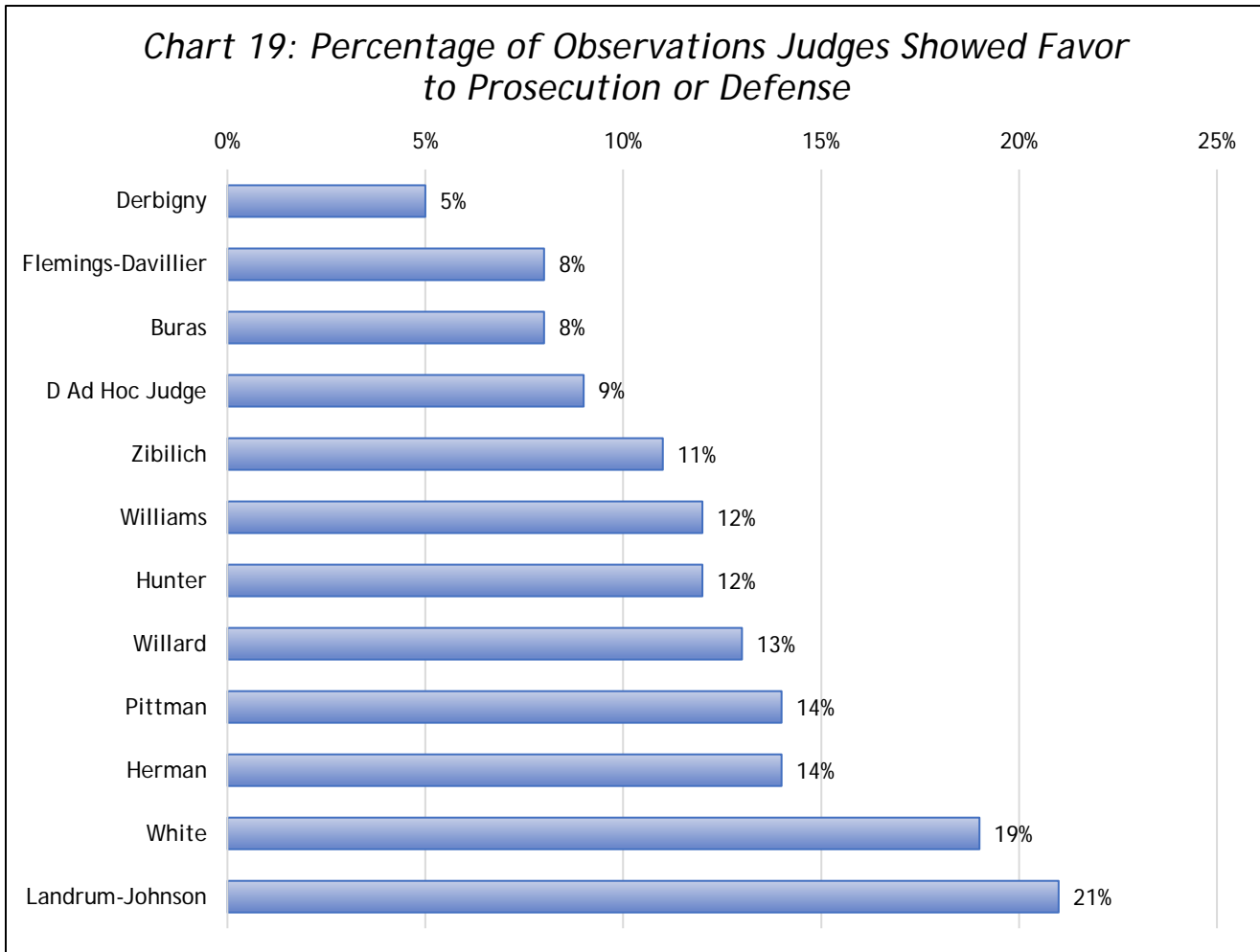
### C. Judicial Treatment toward Attorneys and Defendants

Procedural fairness, also known as procedural justice, is an evidence-based practice endorsed by the American Judges Association, National Center for State Courts, Conference of Chief Justices, and Conference of State Court Administrators.<sup>lv</sup> As the latter two groups recently stated, “extensive research demonstrates that in addition to providing legal due process, it is important [for courts] to meet the public’s expectations regarding the process in order to increase positive public perceptions of the court system, reduce recidivism, and increase compliance with court orders.”<sup>lvi</sup> Procedural fairness is about the serious, real-world implications of whether the public perceives courtroom procedure to be fair, neutral, and respectful. Thus, substantive law and objective case processing data mean little in this critical area. Instead, it is the lay public’s (admittedly subjective) *perception* that matters. And while the police, lawyers, and court staff influence the public’s perception of procedural fairness, the Judge is the primary contributor to whether people feel they are being treated fairly.<sup>lvii</sup> Judges, like other public servants, are not entitled to the public’s trust but must instead earn it. As representatives of the public at large,<sup>lviii</sup> CWN volunteers rate the Judges of Orleans Parish Criminal District Court on a variety of metrics culled from national procedural fairness evidence-based practices. Chart 20 sets out the frequency of times Judges showed favor to either the prosecution or the defense. CWN volunteers did not make a distinction between whether judges favored the prosecution over the defense, or the defense over the prosecution. Since procedural fairness relates to whether a judge was unbiased in favoring either the prosecution or the defense, favor toward either party was what was observed and collected by CWN volunteers. Since court watchers did not make a distinction whether a judge favored the defense over the prosecution in each individual interaction, there is a possibility that individual court watchers found a judge to favor the defense attorney one day and the assistant district attorney another. Some of the ways in which court watchers found a judge to show favoritism toward the prosecution or the defense is best exemplified by individual court watcher observation:

- “Prosecutor made a comment about the defense attorney ‘being a better criminal than her client’ when she objected the judge sided with the prosecution, despite multiple objections being made against the prosecution for inappropriate conduct” -- Court watcher comment 3/31/16
- “Her rude outbursts appeared to be directed at defense attorneys the majority of the time. She called one defense attorney on the phone and left it on speakerphone as she redressed him.” - Court watcher comment 4/13/16
- “His meeting with the ADA (Assistant District Attorney) in chambers and with the ADA alone in one sidebar could have given the impression of showing favor.” - Court watcher comment 7/21/16



*Chart 19: Percentage of Observations Judges Showed Favor to Prosecution or Defense*

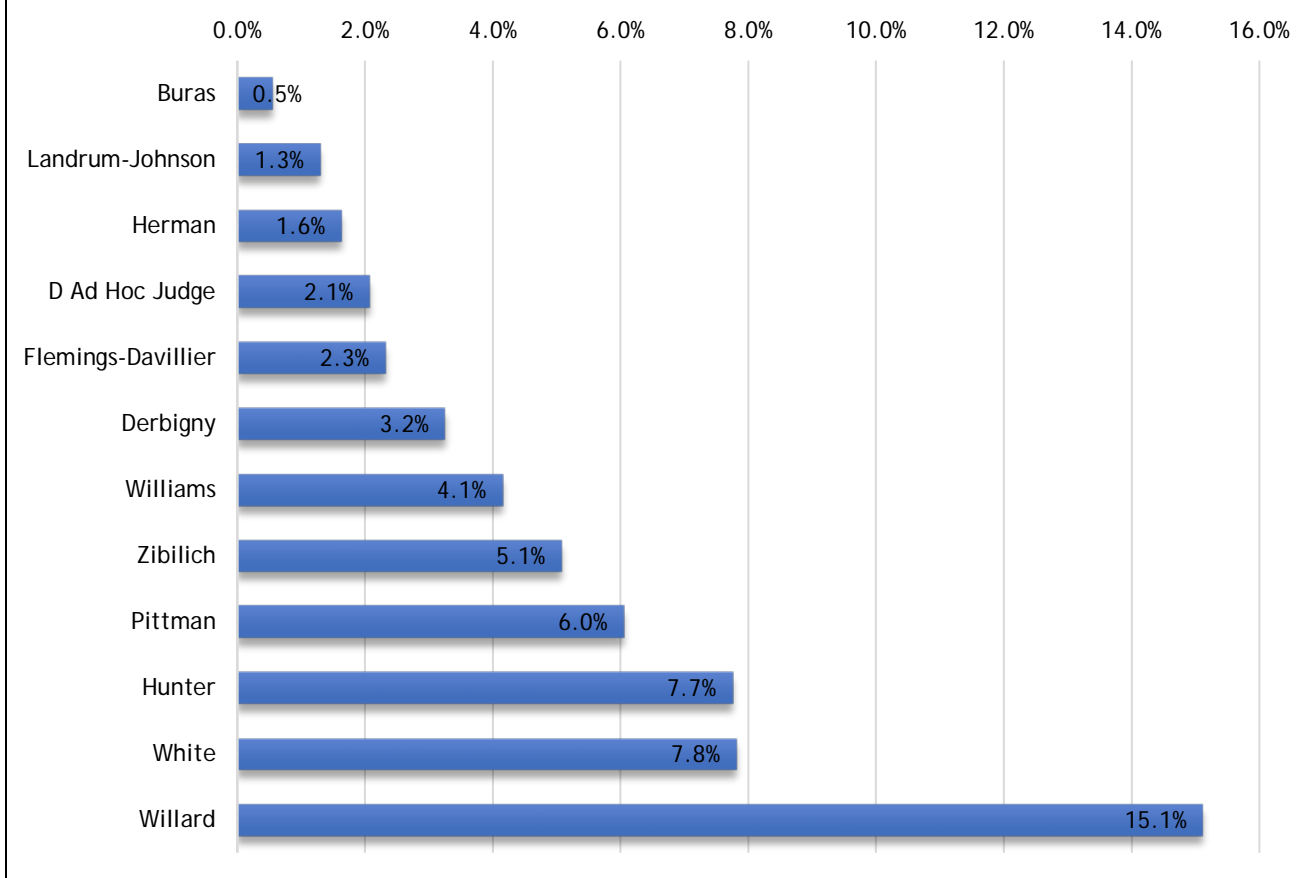


Source: Volunteer court watcher data gathered in 2016 ( $n = 1,039$ ).<sup>lix</sup> Court watchers were asked the following yes/no question to form the above metric: “Did the judge avoid showing favor towards prosecutors or defense attorneys.” This chart is composed of the frequency of observations in which court watchers answered “no” to the question.

Judge Derbigny showed favor towards either the prosecution or the defense least frequently, in 5% of all observations in his courtroom. Judge Landrum-Johnson showed favor towards either the prosecution or the defense most frequently, during 21% of all observations of her courtroom. Similarly related to the public perception of fairness is the amount of respect that judges afforded both attorneys (including prosecutors, public defenders, and private defense attorneys) and all defendants in their courtroom. Chart 20 on the following page examines observable moments of disrespect toward attorneys or defendants.



*Chart 20: Percentage of Observations Judges Showed Disrespect toward Attorneys or Defendants*



*Source:* Volunteer court watcher data gathered in 2016 ( $n = 1,039$ ).<sup>1x</sup> Court watchers were asked the following yes/no questions to form the above metric: 1) “Was the judge respectful to all defendants (*e.g. make eye contact, greet by name, use respectful tone*)?” and 2) “Was the judge respectful to all attorneys?” This chart is composed of the frequency of observations in which court watchers answered “no” to either of the two questions.

In 2016, Judge Willard showed disrespect to either attorneys or defendants in his courtroom most frequently 11 times (15.1%) out of 139 observations. Judge Buras showed disrespect to attorneys or defendants least frequently, 1 time (0.5%) out of 182 observations. Some of the ways in which court watchers found a judge to show disrespect to attorneys or the defendant is best exemplified by individual court watcher observation:

- “Rude all around- harsh tone- condescending.” - Court watcher comment 4/18/16
- “Generally snappy, pretentious, not being very nice with the defendants (I have observed very different behavior from other judges).” – Court watcher comment 4/10/16
- “The defense attorney was trying to get a hearing for his client he said had been jailed for over 3 months with 6 continuances. Judge refused without letting the attorney be heard, even though the attorney was very polite.” - Court watcher comment 3/29/16



## VI. Sixth Amendment

In January 2017, a civil rights class action litigation was filed against the State of Louisiana arguing that “the poor in Louisiana are denied access to effective and meaningful attorney representation when facing criminal charges and therefore do not stand equal before the law.”<sup>lxi</sup> According to the lawsuit, the denial of the right to counsel under the Sixth Amendment has come to mean denial of counsel at critical stages of the case,<sup>lxii</sup> denial of the right to effective cross examination, and the failure of counsel to subject the prosecution’s case to meaningful adversarial testing.<sup>lxiii</sup> Procedural justice and the safeguard of a criminal defendant’s constitutional rights, including the right to have an adequate defense attorney for all criminal defendants, whether rich or poor, is key to the public’s confidence in the criminal justice system. As Amy Bach has said in her commentary on state local criminal courts *Ordinary Injustice*, “It takes a whole entire legal community to allow a defense attorney to sleep through a trial.”<sup>lxiv</sup> The public’s perception of procedural justice- whether the criminal courts treat defendants fairly and respectfully- determines the public’s willingness to engage in and comply with the system.<sup>lxv</sup> Stories of inadequate assistance of counsel cause the public to become much less willing to cooperate with a system that fails to afford adequate safeguards to maintain the integrity of that system.<sup>lxvi</sup>

In 2016, CWN was unable to distinguish between the activity of Orleans Public Defenders (OPD) and private defense attorneys in Orleans Parish Criminal District Court since often OPD attorneys do not identify themselves in court as public defenders. However, OPD estimates they represented over 80% of criminal defendants in 2016.<sup>lxvii</sup> While OPD received some additional funding in 2016 from City Council<sup>lxviii</sup> and state funding was not reduced despite threats to the contrary,<sup>lxix</sup> OPD lawyers typically still have over double the number of felony cases they are supposed to have under national standards.<sup>lxx</sup> In January 2016, OPD announced they would refuse certain felony cases and by late March 2016, 110 indigent people accused of crimes in New Orleans had their cases wait-listed or refused.<sup>lxxi</sup> The Chief OPD Defender stated that the refusal to take on additional cases was prompted by an inability to provide constitutionally adequate legal defense to indigent clients. Thus, many of CWN’s observations are reflective of how our public defense system is enduring in the face of its many reported financial and workload challenges.

### A. Defense Attorney Absence and Level of Preparedness

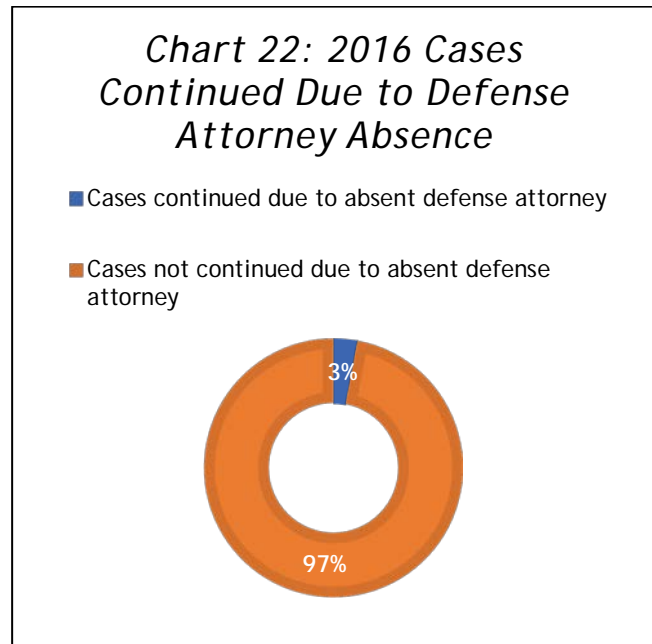
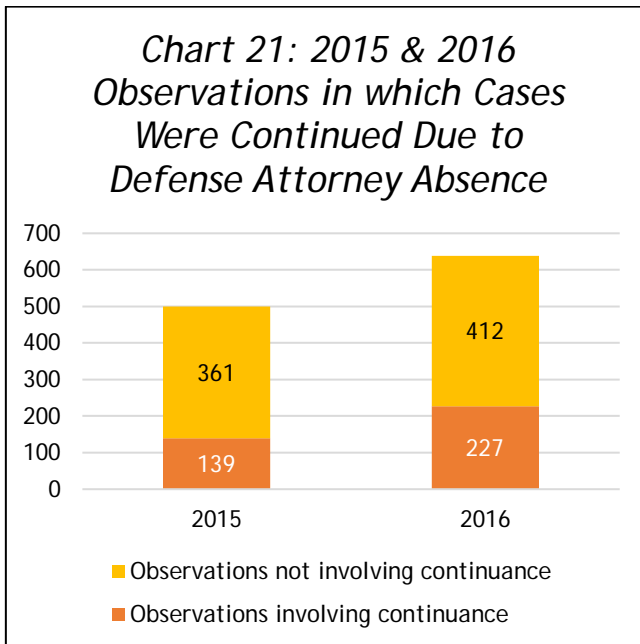
The right of counsel under the Sixth Amendment includes the right to counsel during critical stages of the criminal case.<sup>lxxiii</sup> These critical stages include but are not limited to the setting of bail,<sup>lxxiv</sup> custodial interrogations,<sup>lxxv</sup> arraignments,<sup>lxxvi</sup> plea negotiations,<sup>lxxvii</sup> guilty pleas,<sup>lxxviii</sup> trial,<sup>lxxix</sup> and sentencing.<sup>lxxx</sup> In fact, the right to counsel exists “from the time of a defendant’s arraignment until the beginning of his or her trial.” Additionally, the right to counsel exists in probation or parole revocation hearings where the probationer or parolee claims (i) that he has not committed the alleged parole/probation violation or (ii) that, even if the violation is uncontested, there are substantial reasons which justify or mitigate the violation and make parole/probation revocation inappropriate, and that the reasons are complex.<sup>lxxxii</sup> Judges should not conduct a critical stage of a criminal proceeding without defense counsel present.<sup>lxxxiii</sup> Therefore, where the defense attorney does not appear on behalf of a case, a judge may have no choice but to adjourn a case to a different date due to the defense attorney’s failure to appear in court on the case. OPD attorneys usually have multiple cases pending in separate court sections but also often have



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section attorneys who can represent an indigent defendant when the specific appointed OPD lawyer is unable to appear in a court section.<sup>lxxxiv</sup> Often OPD appeared on behalf of the defendant, even if it was not his or her specific OPD lawyer that made a representation. Defendants were often not represented at their arraignment, the first appearance in Criminal District Court, where the defendant's formal rights are read and the defendant is first expected to plead guilty or not guilty. However, defense counsel is rarely informed of the arraignment court date, the clerk's office sets the arraignment date after indictment but does not inform defense counsel of the date set.<sup>lxxxv</sup>

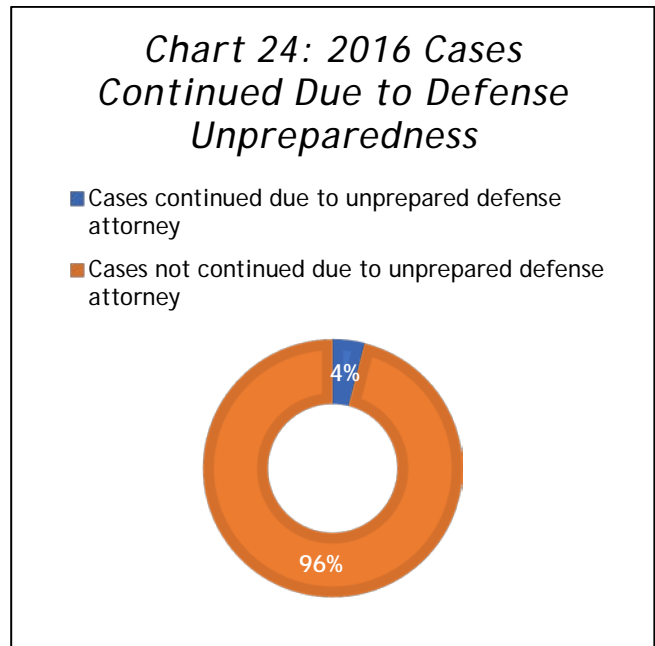
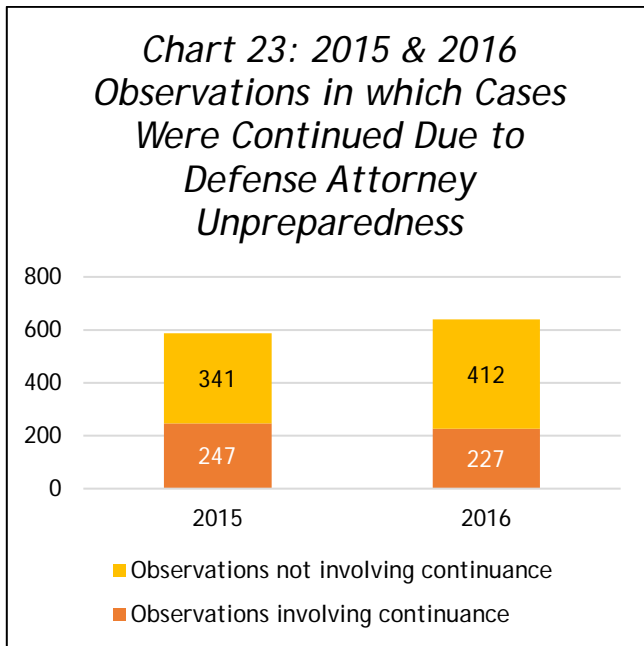
Court watchers collected data on the number of times judges were forced to adjourn a case for defense counsel's failure to appear. Chart 21 shows that there was a 27.7% increase from 2015 to 2016 of court watcher observations in which cases were continued due to defense attorney absence. In 2016, 361 cases (3%) of 11,918 cases observed were continued because of absent defense counsel. This represents a negative trend, with more cases in 2016 where judges were forced to adjourn the case because defense counsel was absent.



Source: Volunteer court watcher data gathered in 2015 ( $n = 500$ ) and 2016 ( $n = 639$ ).<sup>lxxxvi</sup> Court watchers were asked the following questions to form the metric in **Chart 21**: "How many cases were continued to another day because the defense attorney did not show?" **Chart 22** calculates the preceding 2016 data as a ratio of the total number of cases court watchers observed during their observation periods.



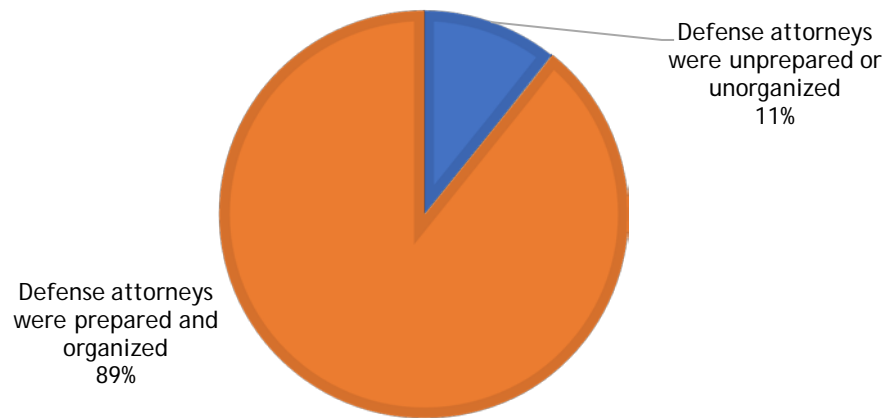
Court watchers collected data on whether defense attorneys were prepared. As with court watcher observations of police testimony, judicial bias, and judicial respect for attorneys, court watcher’s assessments are subjective in character. Court watchers are trained to examine the following factors in examining defense preparation: acting as a zealous advocate for the defendant,<sup>lxxxvii</sup> familiarity with the defendant’s case,<sup>lxxxviii</sup> overall alertness in court<sup>lxxxix</sup> and prompt arrival to represent a defendant or having adequate justification for tardiness.<sup>xc</sup> Chart 23 below shows that the rate of continuances due to defense attorney unpreparedness decreased from 2015 to 2016 by 15.5%. This represents a positive trend. The possible reasons for this trend may be many including the fact that OPD was able to hire additional attorneys in 2016 or that OPD began to refuse certain capital cases in January 2016, and thus has a lower caseload and more time to prepare.<sup>xc</sup> Chart 24 shows that in 2016, 548 cases (4%) of 13,291 cases observed were continued because of unprepared defense counsel.



Source: Volunteer court watcher data gathered in 2015 ( $n = 588$ ) and 2016 ( $n = 639$ ). Court watchers were asked the following questions to form the metric in **Chart 23**: in 2015, court watchers were asked, “How many cases were continued to another day because the defense attorney was unavailable/unprepared?” and in 2016, court watchers were asked how many cases were continued to another day because the defense attorney was unprepared?” **Chart 24** calculates the preceding 2016 data as a ratio of the total number of cases court watchers observed during their observation periods.



*Chart 25: Defense Attorney Preparation & Organization in 2016*



*Source:* volunteer court watcher data gathered in 2016 ( $n = 1,037$ ). Court watchers were asked the yes/no question, “in general during your observation period, were defense attorneys prepared and organized?”

At the end of each observation report, court watchers are asked about their general impressions of how each stakeholder (judges, prosecutors, defense attorneys, police) performed during their observation period. In 2016, court watchers found defense attorneys to be unprepared or unorganized in 111 observations (11%) out of 1,037 observations.

## **B. Private Defense vs. Public Defender and the Constitutional Right to Counsel**

The Sixth Amendment of the U.S. Constitution requires that a criminal defendant be appointed an attorney if he or she cannot afford to hire one. In Louisiana, the procedure by which it is determined whether a defendant must hire a private attorney or will be appointed a public defender is an intricate process established in Revised Statute §175 which states, in part:

“A(1)(b) A person will be deemed "indigent" who is unable, without substantial financial hardship to himself or to his dependents, to obtain competent, qualified legal representation on his own. "Substantial financial hardship" is presumptively determined to include all defendants who receive public assistance, such as Food Stamps, Temporary Assistance for Needy Families, Medicaid, Disability Insurance, resides in public housing, or earns less than two hundred percent of the Federal Poverty Guideline. A defendant is presumed to have a substantial financial hardship if he or she is currently serving a sentence in a correctional institution or is housed in a mental health facility.

(c) Defendants not falling below the presumptive threshold will be subjected to a more rigorous screening process to determine if their particular circumstances, including seriousness of the charges being faced, monthly expenses, local private counsel rates, would result in a "substantial hardship" were they to seek to retain private counsel.”

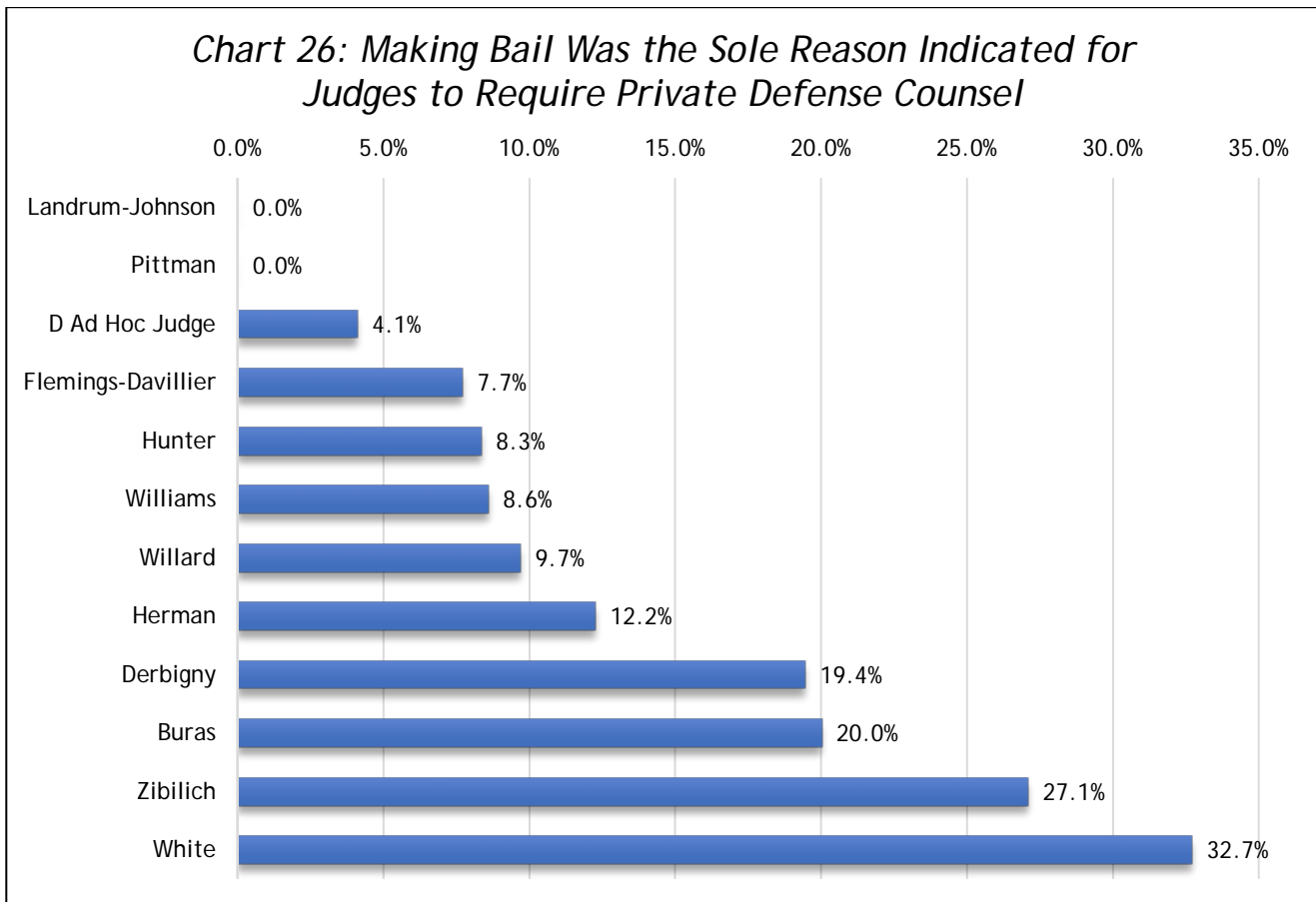
B.(1) In determining whether or not a person is indigent and entitled to the appointment of counsel, the court shall consider whether the person is a needy person and the extent of his ability to pay. The court may consider such factors as income or funds from employment or any other source, including public assistance, to which the accused is entitled, property owned by the accused or in which he has an economic



interest, outstanding obligations, the number and ages of dependents, employment and job training history, and level of education.

(2) ***Release on bail alone shall not disqualify a person for appointment of counsel.*** In each case, the person subject to the penalty of perjury shall certify in writing such material factors relating to his ability to pay as the court prescribes. [emphasis added]<sup>xcii</sup>

There is no doubt that judges are in a difficult situation in determining what approach to take when an OPD attorney refuses to represent a defendant accused of a capital offense. Tensions have run high at times between judges and OPD lawyers since OPD began to refuse cases with some judges threatening to hold OPD lawyers in contempt. Some judges have also assigned private lawyers to take cases pro bono.<sup>xciii</sup> However, an acceptable approach to the OPD representation problem is not to disregard provisions of the Louisiana Revised Statutes and deny an adequate indigency determination based solely on the fact alone that the defendant paid his or her bail. This of course is problematic because often it may be a relative or boss that has collected resources to ensure the defendant is out of jail awaiting trial, resources that may be unavailable to the defendant for hiring an attorney. Chart 26, shows the number of times Judges required defendants to hire a private attorney based solely on the fact that the defendant had paid his or her bail, without any other indigency factors publicly taken into consideration on the record.



Source: Volunteer court watcher gathered in 2016 ( $n = 479$ ). Court watchers were asked, “Did the judge require a defendant to hire a private attorney, for the sole reason that the defendant had successfully paid bail or bond?” This question was only posed when court watchers indicated that the District Court judge had either appointed a public defender or required the defendant to hire private counsel during their observation period.<sup>xciv</sup>



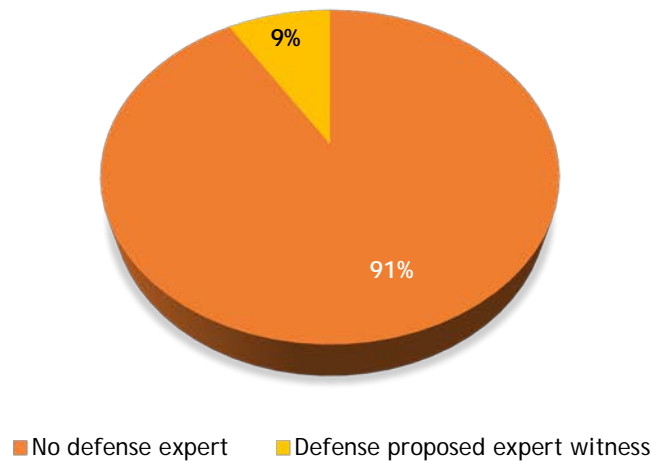


Judge White most frequently required defendants to hire a private attorney based solely on the fact that the defendant had paid his or her bail, without any other indigency factors publicly taken into consideration on the record, in 17 observations (32.7%) out of 52 observations. Judges Landrum-Johnson and Pittman were not observed requiring defendants to hire private counsel for the sole reason that defendants had made bail, 0% out of 35 and 38 observations, respectively.

### C. Defense Expert Witnesses

Expert testimony can be introduced where the jury needs an expert to explain evidence unlikely to be understood by the jury without the expert's testimony.<sup>xv</sup> While the defense does not bear the burden of putting on a case or presenting witnesses, defense expert witnesses are useful when the defense plans on introducing forensic evidence or contradicting the prosecution's forensic evidence. Additionally, expert witnesses may not be necessary in most defense cases. Experts can often be expensive for either party to hire and can be a good indicator of the resources a defense attorney has been able to or decides to devote to a case. In Chart 27 below, court watchers examined the number of times defense attorneys requested expert testimony be used at trial in 2016.

*Chart 27: Defense Use of Expert Witnesses*



*Source:* Volunteer court watcher data gathered in 2016 ( $n = 137$ ). Court watchers were asked, "Did the defense propose using an expert witness?" This question was only posed when the respondent answered affirmatively that they had observed a trial during their observation period.

Out of 137 trials observed in 2016, CWN only 12 trial observations (9%) involved expert witnesses used by the defense.

## VII. Recommendations

Based on the data accumulated, CWN proposes the following recommendations:



1. The District Attorney should discontinue the incarceration of domestic violence victims and sex crime victims on material witness warrants. Other district attorneys have discontinued issuing material witness warrants for all victims; this practice of refusing to jail victims is not unprecedented. In non-domestic violence and non-sex offense cases, the District Attorney should, at a minimum, publicly release a protocol that includes the different risk factors considered in cases before a material witness warrant is requested to arrest a victim. For example, this protocol may include, weighing the competing goals of victim safety and emotional trauma to the victim, as well as offender accountability and public safety.
2. More resources should be specifically earmarked for the employment and training of NOPD crime lab employees to ensure the greater collection of forensic and scientific evidence at the crime scene. Such training will ensure the utilization of all available evidence to strengthen ongoing prosecutions in Criminal District Court.
3. More resources should be specifically allocated for the payment of forensic expert witnesses for the Prosecution and OPD. This will properly allow for the use of forensic and scientific evidence in criminal cases.
4. Judges should discontinue the use of one-party sidebars. While not all one-party sidebars may involve discussion of the merits of a case, the incidence of one-party sidebars is disturbingly high. Thus, it is difficult to believe criminal cases are not being discussed in one-party sidebars without opposing counsel present.
5. Judges should minimize the number of two-party sidebars used on a regular basis in their courtroom, confining sidebar use to true occasions where confidential information must be shared and cannot be done so publicly. Where a sidebar is utilized, judges and attorneys should explain the reason for or the resulting decision from the sidebar.

## VIII. Commendations

1. CWN commends NOPD Superintendent Michael Harrison who requested CWN track specific data on the quality of police testimony. We appreciate the fact that Chief Harrison understands that CWN can act as a tool for stakeholders to improve their performance measures in the eye of public.

CWN thanks its 2016 volunteers and donors,<sup>xvii</sup> who were generous with their time and resources, and without whom this report would not have been possible. CWN offers appreciation to the New Orleans Police Department, Vera Institute of Justice, the Orleans Public Defenders, and the Innocence Project for providing hard data for this report. CWN offers appreciation to the Orleans Parish District Attorney's Office, the Juror Project and the Fund for Modern Courts for providing legal research for this report.

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<sup>i</sup>Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 Harv.L.Rev., n.8,34-35 (2014), [http://cdn.harvardlawreview.org/wp-content/uploads/2014/06/vol127\\_-simonson.pdf](http://cdn.harvardlawreview.org/wp-content/uploads/2014/06/vol127_-simonson.pdf) 2182-2183.

<sup>ii</sup> This figure was provided by Vera Institute of Justice, calculated as a count of every case with an initial Orleans Criminal District Court date earlier than 1/1/2017 and a disposition date after 12/31/2015 or no disposition date because the case is still open.

<sup>iii</sup> Irons-Guynn, Cheryl. Keynote Address at ABA Conference: The Role of the American Prosecutor and the Advent of Community Prosecution.

<sup>iv</sup> Nugent, M. Elaine et al., *Exploring the Feasibility and Efficacy of Performance Measures in Prosecution and Their Application to Community Prosecution*, National District Attorney Association and American Prosecutors Research Institute 11.

<sup>v</sup> La.Rev.Stat. Ann. §15:257



- <sup>vi</sup> *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)
- <sup>vii</sup> This defendant was also held in jail on a probation violation caused by his arrest for failing to testify for the Prosecution
- <sup>viii</sup> This victim is a juvenile and thus was not identified by name and could not be identified in the Orleans Parish Sheriff's Office system. CWN spoke to the attorney of record for the defendant who allegedly victimized the juvenile to confirm the juvenile victim's incarceration and learned he was arrested in another state and transported to Orleans Parish while in custody.
- <sup>ix</sup> William Glaberson, *Abuse Suspects your calls are taped, speak up*, New York Times (Feb. 25 2011), <http://www.nytimes.com/2011/02/26/nyregion/26tapes.html>.
- <sup>x</sup> Rules of evidence would apply in introducing all of the above evidence. However, often such evidence can be admitted as an exception to hearsay rules or non-hearsay evidence. This is especially the case where the aggressor has intimidated the victim or threatened the victim if she or he does cooperate with law enforcement. Some of these exceptions include: La Code Evid Ann. Art 804 (B)(7) Forfeiture by Wrongdoing.
- <sup>xi</sup> *Threats and Bullying By Prosecutors*, 46 Loy.U.Chi.L.J 327 (2014).
- <sup>xii</sup> *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 Lewis & Clark L. Rev. 559 (2005).
- <sup>xiii</sup> This was true in Harris county (Houston), Texas where the incumbent district attorney had jailed a rape victim for failing to cooperate with the prosecution. The incumbent was voted out of office and replaced by current Harris County District Attorney, Kim Ogg who promised, "I will never put a crime victim in jail to secure a conviction... There are so many other things we can do." Samantha Ketterer, *Ogg says DA's office needs reform to protect rape victims*, Chron, July 26, 2016, <http://www.chron.com/news/houston-texas/article/Ogg-says-reform-needed-to-protect-rape-victims-8423671.php>.
- <sup>xiv</sup> Daniel Victor, *Texas rape victim was jailed for fear she would not testify lawsuit says*, N.Y. Times, (July 22, 2016), <https://www.nytimes.com/2016/07/23/us/texas-rape-victim-was-jailed-for-fear-she-would-not-testify-lawsuit-says.html>
- <sup>xv</sup> *Prosecuting Attorney-Charging Decisions*, Charging Decisions in Domestic Violence-Related Crimes, 78 (2016), <http://praxisinternational.org/wp-content/uploads/2016/02/BlueprintChapter5.pdf>.
- <sup>xvi</sup> See Generally: Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6:231 Ohio St.L.J.(2008), [http://moritzlaw.osu.edu/osjcl/Articles/Volume6\\_1/Tyler-Fagan-PDF.pdf](http://moritzlaw.osu.edu/osjcl/Articles/Volume6_1/Tyler-Fagan-PDF.pdf).
- <sup>xvii</sup> Email from Christopher Lea, NOPD Lieutenant (March 22, 2017)
- <sup>xviii</sup> 130 "Prosecutorial Regulation Versus Prosecutorial Accountability", 157 U. PA. L. Rev. 959 (2009).
- <sup>xix</sup> Stephanos Bibas, "Transparency and Participation in Criminal Procedure", 81 N.Y.U. L. Rev. 911 (June 2006).
- <sup>xx</sup> Out of 665 responses, volunteer court watchers said that the judge mentioned a victim in court for a total of 479 mentions. In regard to this data point, Judge White was observed 68 times; Judge Flemings-Davillier was observed 58 times; Judge Willard was observed 48 times; Judge Landrum-Johnson was observed 42 times; Judge Pittman was observed 48 times; Judge Williams was observed 53 times; Judge Buras was observed 63 times; Judge Herman was observed 67 times; Judge Derbigny was observed 47 times; Judge Hunter was observed 45 times; and Judge Zibilich was observed 62 times. In Section D, Judge Jerome Winsberg mentioned a victim 18 times, Judge Graham Bosworth mentioned a victim 7 times, and Judge Walter Rothschild mentioned a victim one time.
- <sup>xxi</sup> Out of 722 responses, volunteer court watchers said that prosecutors mentioned a victim in court for a total of 949 mentions. In regard to this data point, Section A was observed 68 times; Section B was observed 58 times; Section C was observed 48 times; Section D was observed 67 times; Section E was observed 42 times; Section F was observed 48 times; Section G was observed 53 times; Section H was observed 63 times; Section I was observed 67 times; Section J was observed 47 times; Section K was observed 45 times; and Section L was observed 62 times.
- <sup>xxii</sup> Interview with David Pipes (April 10, 2017).
- <sup>xxiii</sup> Crime Survivors Speak, at 4, <https://www.allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf> (last visited March 28, 2017).
- <sup>xxiv</sup> 135-6. *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009).
- <sup>xxv</sup> Email from Christopher Lea, NOPD Lieutenant (March 29, 2017)
- <sup>xxvi</sup> Percentages are rounded up. NOPD data for 2016 revealed the following: 5191 black male victims; 1345 black female victims; 860 white male victims; 224 White female victims; 129 Hispanic male victims; 20 Hispanic female victims; 31 Asian female victims; 8 Asian male victims; 14 unknown male victims; 3 unknown female victims. CWN data found the following data on victims who appeared in court: 73 African Americans, 26 whites, 3 Hispanics, 2 Asians, and 1 of other ethnicity. CWN volunteers observed 59 male victims and 51 female victims in court.
- <sup>xxvii</sup> Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. Rev. 911, 175-178 (June 2006).
- <sup>xxviii</sup> *The First 1,600 Exonerations*, National Registry of Exonerations, at 13-14, [http://www.law.umich.edu/special/exoneration/Documents/1600\\_Exonerations.pdf](http://www.law.umich.edu/special/exoneration/Documents/1600_Exonerations.pdf) pg 13 and 14 first accessed 2.12.16 These rankings are based on 1,600 individual exonerations from January 1989 through May 18, 2015. Additionally, the National Registry of Exonerations reported, "A few large and medium sized counties have exoneration rates per capita 5 to 10 times the national average: Orleans Parish, Louisiana; Suffolk County, Massachusetts; Kern County, California; and Jefferson Parish, Louisiana."
- <sup>xxix</sup> National Registry of Exonerations, <http://www.law.umich.edu/special/exoneration/Pages/glossary.aspx> first accessed 4.8.16. Specifically, the National Registry of Exoneration defines exoneration where a "person has been exonerated if he or she was convicted of a crime and later was either: (1) declared to be factually innocent by a government official or agency with the authority to make that declaration: or (2) relieved of all the consequences of the criminal conviction by a government official or body with the authority to take that action. The official action may be: (i) a complete pardon by a governor or other competent authority, whether or not the pardon is designated as based on innocence; (ii) an acquittal of all charges factually related to the crime for which the person was originally convicted; or (iii) a dismissal of all charges related to the crime for which the person was originally convicted, by a court or by a prosecutor with the authority to enter that dismissal. The pardon, acquittal, or dismissal must have been the result, at least in part, of evidence of innocence that either (i) was not presented at trial at which the person was convicted; or (ii) if the person pled guilty, was not known to the defendant and the defense attorney, and to the court, at the time the plea was entered. The evidence of innocence need not be an explicit basis for the official action that exonerated the person. A person who otherwise qualifies has not been exonerated if there is unexplained physical evidence of that person's guilt.
- <sup>xxx</sup> *Violent Crimes aren't going to get DA's sympathy*, The Times-Picayune (Feb. 10, 2017), [http://www.nola.com/opinions/index.ssf/2017/02/cannizzaro\\_prosecutions.html](http://www.nola.com/opinions/index.ssf/2017/02/cannizzaro_prosecutions.html); see also Ken Daley, *DA Cannizzaro's office using 'desperate' tactics, Innocence Project attorneys say*, The Times-Picayune (Feb. 29, 2016), [http://www.nola.com/crime/index.ssf/2016/02/jerome\\_morgans\\_attorneys\\_attac.html](http://www.nola.com/crime/index.ssf/2016/02/jerome_morgans_attorneys_attac.html) and Ken Daley, *DA Cannizzaro's office halts prosecution of Jerome Morgan, ending decades-long case*, The Times-Picayune (May 27, 2016), [http://www.nola.com/crime/index.ssf/2016/05/da\\_cannizzaros\\_office\\_halts\\_pr.html](http://www.nola.com/crime/index.ssf/2016/05/da_cannizzaros_office_halts_pr.html) accessed 3.19.17



- <sup>xxxj</sup> American Bar Association, Criminal Justice Standards for the Prosecution Function, Standard 3-3.2(c) (4d), available at [http://www.americanbar.org/groups/criminal\\_justice/standards/ProsecutionFunctionFourthEdition.html](http://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.html)
- <sup>xxxii</sup> Prosecutors may lose their absolute immunity from litigation if they become too involved in investigative activities at the crime scene. See *Imbler v. Pachtman*, 424 U.S. 409 (1976).
- <sup>xxxiii</sup> *Eye Witness Misidentification*, Innocence Project, <https://www.innocenceproject.org/causes/eyewitness-misidentification> (last visited March 28, 2017).
- <sup>xxxiv</sup> *State v. Henry*, 147 So. 3d 1143 (La. Ct. App. 2014) writ denied, 164 So. 3d 831 cert. denied, No. 15-50, 2015 WL 4243359 (U.S. Nov. 2, 2015).
- <sup>xxxv</sup> West's Encyclopedia, *Eyewitness* (The Gale Group 2d 2008) available at <http://legal-dictionary.thefreedictionary.com/eyewitness>.
- <sup>xxxvi</sup> <http://consentdecreemonitor.com/>.
- <sup>xxxvii</sup> <https://www.justice.gov/opa/pr/justice-department-announces-consent-decree-city-new-orleans-resolve-allegations-unlawful>.
- <sup>xxxviii</sup> Out of 332 observations of both New Orleans Police Department and Louisiana State Police officers, 299 respondents said that law enforcement officers ("LEO") were honest in their testimony, and 10 said that LEO were not honest in their testimony. 317 respondents said that LEO were prepared for their testimony, and 14 said that LEO were unprepared for their testimony. 306 respondents said that LEO were knowledgeable of the facts in the case, and 22 said that LEO were not knowledgeable of the facts in the case.
- <sup>xxxix</sup> If a defense attorney was on trial in another court or another courtroom and the defense attorney did not have substitute counsel to come to court and appear on behalf of the defendant, the continuance was marked "Defense attorney did not show"
- <sup>xl</sup> *Strauder v. West Virginia*, 100 U.S. 303 (1880).
- <sup>xli</sup> Velasquez-Manoff, Moises, *What Racial people know*, New York Times. Additionally, in a recent study out of Duke University it was found that the presence of even one or two African-Americans in the jury pool (that is in the group that may initially become jurors but also may be excluded by either the defense or the prosecution) results in significantly higher conviction rates for white defendants and lower conviction rates for black defendants. Among the key findings: In cases with no blacks in the jury pool, blacks were convicted 81 percent of the time, and whites were convicted 66 percent of the time. was a victim in the case When the jury pool included at least one black person, the conviction rates were nearly identical: 71 percent for black defendants, 73 percent for whites. Shamera Anwar, Patrick Bayer, Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials*, <https://academic.oup.com/qje/article-lookup/doi/10.1093/qje/qjs014> (last visted March 28, 2017).
- <sup>xlii</sup> Telephone Interview with William Collins (March 28, 2017).
- <sup>xliii</sup> E-mail from Dennis Hawkins, Executive Director for the Fund for Modern Courts. (March 29, 2016) (on file with author). See also New York Judiciary \$506 Source of Names
- <sup>xliv</sup> US Census Bureau Quick Facts New Orleans, LA, <https://www.census.gov/quickfacts/table/PST045215/22071> (last visited March 28, 2017); The categories included under "Other are: "American Indian and Alaska Native alone" and "Native Hawaiian and other Pacific Islander alone." Additionally, in the US Census, those surveyed may choose to report more than one race to indicate their racial mixture, such as "American Indian" and "White." People who identify their origin as Hispanic, Latino, or Spanish may be of any race. For this reason the combination of each category's proportion may add up to over 100%. Out of 53 jury trials and 607 possible jury seats, CWN volunteers observed 301 white jurors (49.6%), 269 African American jurors (44.3%), 21 Hispanic or Latino jurors (3.5%), 13 Asian jurors (2.1%), and 3 jurors or other ethnicities (0.5%). Out of 53 jury trials and 618 possible jury seats, CWN volunteers observed 342 female jurors (55.3%) and 276 male jurors (44.7%).
- <sup>xlv</sup> Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. Rev. 911 (June 2006).
- <sup>xlvi</sup> Collins Dictionary of Law, *Sidebar* (2006), available at <http://legal-dictionary.thefreedictionary.com/sidebar>.
- <sup>xlvii</sup> Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U.L. Rev. 947-8 (June 2006).
- <sup>xlviii</sup> Interview with Paul Bonin (August 31, 2016).
- <sup>xlix</sup> Code of Judicial Conduct, *Cannon 2*, available at <https://www.lasc.org/rules/supreme/cjc.asp> (last visited March 28, 2017).
- <sup>l</sup> Code of Judicial Conduct, *Cannon 3*, available at <https://www.lasc.org/rules/supreme/cjc.asp> (last visited March 28, 2017).
- <sup>li</sup> Code of Judicial Conduct, *Cannon 3 (a) (6)*, available at <https://www.lasc.org/rules/supreme/cjc.asp> (last visited March 28, 2017).
- <sup>lii</sup> 12 CFR §263.9 (1994).
- <sup>liii</sup> In regard to this data point, Judge White was observed 78 times; Judge Flemings-Davillier was observed 66 times; Judge Willard was observed 55 times; Section D was observed 75 times; Judge Landrum-Johnson was observed 54 times; Judge Pittman was observed 54 times; Judge Williams was observed 67 times; Judge Buras was observed 61 times; Judge Herman was observed 71 times; Judge Derbigny was observed 58 times; Judge Hunter was observed 54 times; and Judge Zibilich was observed 76 times.
- <sup>liiv</sup> In regard to this data point, Judge White was observed 102 times; Judge Flemings-Davillier was observed 87 times; Judge Willard was observed 65 times; Judge Landrum-Johnson was observed 77 times; Judge Pittman was observed 69 times; Judge Williams was observed 86 times; Judge Buras was observed 88 times; Judge Herman was observed 94 times; Judge Derbigny was observed 76 times; Judge Hunter was observed 77 times; and Judge Zibilich was observed 104 times. In Section D, Judge Jerome Winsberg was observed 57 times; Judge Graham Bosworth was observed 35 times; Judge Walter Rothschild was observed 3 times; Judge Calvin Johnson was observed two times; and Judge Donald Fendlason was observed one time.
- <sup>lv</sup> See *Burke and Leben*, Ex. 1, at 8; Resolution 12 In Support of State Supreme Court Leadership to Promote Procedural Fairness, Conference of Chief Justices and Conference of State Court Administrators (July 31, 2013), available at [www.proceduralfairness.org](http://www.proceduralfairness.org) (NCSC is a "founding participant").
- <sup>lvi</sup> Resolution 12 In Support of State Supreme Court Leadership to Promote Procedural Fairness, Conference of Chief Justices & Conference of State Court Administrators (2013). Resolution 12, in support of state supreme court administrators, adopted at 2013 annual meeting on July 31, 2013, available at <http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/07312013-Support-State-Supreme-Court-Leadership-Promote-Procedural-Fairness-CCJ-COSCA.ashx>
- <sup>lvii</sup> See *Burke and Leben*, Ex. 1, at 8; Resolution 12 In Support of State Supreme Court Leadership to Promote Procedural Fairness, Conference of Chief Justices and Conference of State Court Administrators (July 31, 2013), available at [www.proceduralfairness.org](http://www.proceduralfairness.org) (NCSC is a "founding participant").
- <sup>lviii</sup> See S. Beier, C. Eib, V. Oehmann, P. Fiedler, & K. Fiedler, *Influence of Judges' Behavior on Perceived Procedural Justice* Journal of Applied Social Psychology, vol. 44 at 57 (2014). (neutral observers may be better suited to making procedural fairness judgments than defendants themselves because they may have "a more objective perception of the [defendant's] actual treatment.") Utah and Alaska, two leaders in the procedural fairness movement, also use citizen observers to rate Judges as part of the two states' official judicial performance evaluations. Hon. S. Leben, *The Procedural-Fairness Movement Comes of Age*, Trends in State Courts 2014, the National Center for State Courts at 60-61.
- <sup>lix</sup> Out of 1,040 observations, 914 respondents said the judge avoided showing favor towards either the prosecution or defense, and 126 respondents said that the judge showed favor. In regard to this data point, Judge White was observed 106 times; Judge Flemings-Davillier was observed 87 times; Judge Willard was observed 69 times; Judge Landrum-Johnson was observed 76 times; Judge Pittman was observed 74 times; Judge Williams was observed 85 times; Judge Buras was observed 92 times; Judge Herman was observed 92 times; Judge Derbigny was observed 76 times; Judge Hunter was observed 77 times; and Judge



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Zibilich was observed 108 times. Of 14 respondents who provided comment, 2 said the judge (sections A and L) favored the defense, and 12 said the judge (sections A, C, E, F, G, H, I, J, K, and L) favored the prosecution. In Section D, respondents said that Judge Jerome Winsberg showed favor 5 times (8.8%) out of 57 observations, Judge Graham Bosworth showed favor 2 times (5.9%) out of 34 observations, Judge Dennis Waldrige showed favor 1 time (100%) out of 1 observation, and Judge Donald Fendlason showed favor 1 time (100%) out of 1 observation.

<sup>lx</sup> In regard to this data point, Judge White was observed 103 times; Judge Flemings-Davillier was observed 87 times; Judge Willard was observed 70 times; Judge Landrum-Johnson was observed 78 times; Judge Pittman was observed 75 times; Judge Williams was observed 85 times; Judge Buras was observed 91 times; Judge Herman was observed 93 times; Judge Derbigny was observed 77 times; Judge Hunter was observed 78 times; and Judge Zibilich was observed 109 times. No ad hoc judges presiding in Section D were observed to be disrespectful to attorneys. Judge Jerome Winsberg was observed to be disrespectful to defendants four times (7%) out of a total 57 observations.

<sup>lxi</sup> *Allen et al. v. Edwards et al.*, petition filed 19<sup>th</sup> Judicial District Court East Baton Rouge (2017)

<sup>lxii</sup> *Strickland v. Washington*, 466 US 668 (1984).

<sup>lxiii</sup> *United States v. Cronin*, 466 U.S. 648, 658 (1984).

<sup>lxiv</sup> Amy Bach, *Ordinary Injustice: How America Holds Court*, 3 (Henry Holt and Company, LLC 2009)

<sup>lxv</sup> Erin Conway, *Ineffective Assistance of Counsel: How Illinois has used the “Prejudice” Prong of Strickland to Lower the Floor on Performance when Defendants Plead Guilty*, 105 Nw.U.L.Rev. (2011).

<sup>lxvi</sup> Jocelyn M. Pollock, *Ethical Dilemmas and Decisions in Criminal Justice*, 70 (Cengage Learning 4<sup>th</sup> ed. 2017).

<sup>lxvii</sup> E-mail from Lindsey Hortenstine (March 15, 2016) (on file with author)

<sup>lxviii</sup> Greg Larose, *New Orleans city council approves 2017 budget, with more and less for criminal justice*, The Times-Picayune, Nov. 17, 2016, available at [http://www.nola.com/politics/index.ssf/2016/11/new\\_orleans\\_city\\_council\\_appro\\_18.html](http://www.nola.com/politics/index.ssf/2016/11/new_orleans_city_council_appro_18.html).

<sup>lxix</sup> Casey Tolan, *Inside the New Orleans public defenders office, where attorneys are so overworked they’re turning down new clients*, Fusion, April 6, 2016, available at <http://fusion.net/story/287941/new-orleans-public-defenders/>.

<sup>lxx</sup> Casey Tolan, *Inside the New Orleans public defenders office, where attorneys are so overworked they’re turning down new clients*, Fusion, April 6, 2016, available at <http://fusion.net/story/287941/new-orleans-public-defenders/>.

<sup>lxxi</sup> Jed Lipinski, *The trials and travails of a New Orleans public defender*, The Times-Picayune, March 30, 2016, available at [http://www.nola.com/crime/index.ssf/2016/03/new\\_orleans\\_public\\_defender\\_trials\\_and\\_travails.html](http://www.nola.com/crime/index.ssf/2016/03/new_orleans_public_defender_trials_and_travails.html).

<sup>lxxii</sup> Casey Tolan, *Inside the New Orleans public defenders office, where attorneys are so overworked they’re turning down new clients*, Fusion, April 6, 2016, available at <http://fusion.net/story/287941/new-orleans-public-defenders/>.

<sup>lxxiii</sup> *Brewer v. Williams*, 430 U.S. 387, 399 (1977).

<sup>lxxiv</sup> *Brewer v. Williams*, 430 U.S. 387, 399 (1977).

<sup>lxxv</sup> see *Brewer v. Williams*, 430 U.S. 387 (1977), *Miranda v. Arizona*, 384 U.S. 436 (1966), *Massiah v. United States*, 377 U.S. 201.

<sup>lxxvi</sup> see *Hamilton v. Alabama*, 368 U.S. 52 (1961).

<sup>lxxvii</sup> see *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

<sup>lxxviii</sup> see *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), *Padilla v. Kentucky*, 599 U.S. 356 (2010), *McMann v. Richardson*, 397 U.S. 759 (1970)

<sup>lxxix</sup> *Alabama v. Shelton*, 535 U.S. 654 (2002), *Argersinger v. Hamlin*, 407 U.S. 25 (1972), *In re Gault*, 387 U.S. 1 (1967), *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>lxxx</sup> *Padilla v. Kentucky*, 599 U.S. 356 (2010), *McMann v. Richardson*, 397 U.S. 759 (1970).

<sup>lxxxi</sup> As originally stated in *Powell v. Alabama*, 287 U. S. 45, 287 U. S. 57; and reiterated in *Brewer*

<sup>lxxxii</sup> *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

<sup>lxxxiii</sup> *Rothgery v. Gillespie County*, 554 U.S. 191 (2008).

<sup>lxxxiv</sup> Ken Daley, *Orleans public defenders’ bombshell: No new cases for us, please*, The Times-Picayune, Nov. 20, 2015, available at [http://www.nola.com/crime/index.ssf/2015/11/orleans\\_public\\_defenders\\_bombs.html](http://www.nola.com/crime/index.ssf/2015/11/orleans_public_defenders_bombs.html).

<sup>lxxxv</sup> Interview with Collin Reingold (April 10, 2017).

<sup>lxxxvi</sup> Out of 500 observations, volunteer court watchers in 2015 reported in 139 observations (28%) that cases were continued because a defense attorney did not show when his or her case was called. In 2016, volunteer court watchers in reported in 227 observations out of 639 (36%) that cases were continued because a defense attorney did not show when his or her case was called.

<sup>lxxxvii</sup> American Bar Association, *Criminal Justice Standards for the Defense Function*, Standard 4-1.2 (4d), available at [http://www.americanbar.org/groups/criminal\\_justice/standards/DefenseFunctionFourthEdition.html](http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html).

<sup>lxxxviii</sup> American Bar Association, *Criminal Justice Standards for the Defense Function*, Standard 4-8.3 (4d), available at [http://www.americanbar.org/groups/criminal\\_justice/standards/DefenseFunctionFourthEdition.html](http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html).

<sup>lxxxix</sup> See Generally: American Bar Association, *Criminal Justice Standards for Defense Function*, (4d), available at [http://www.americanbar.org/groups/criminal\\_justice/standards/DefenseFunctionFourthEdition.html](http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html).

<sup>xc</sup> American Bar Association, *Criminal Justice Standards for Defense Function*, Standard 4-1.9 (4d), available at

[http://www.americanbar.org/groups/criminal\\_justice/standards/DefenseFunctionFourthEdition.html](http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html).

<sup>lxi</sup> Casey Tolan, *Inside the New Orleans public defenders office, where attorneys are so overworked they’re turning down new clients*, Fusion, April 6, 2016, available at <http://fusion.net/story/287941/new-orleans-public-defenders/>.

<sup>lxii</sup> Louisiana Revised Statute §175

<sup>lxiii</sup> Casey Tolan, *Inside the New Orleans public defenders office, where attorneys are so overworked they’re turning down new clients*, Fusion, April 6, 2016, available at <http://fusion.net/story/287941/new-orleans-public-defenders/>.

<sup>lxiv</sup> In regard to this data point, Judge White was observed 52 times; Judge Flemings-Davillier was observed 52 times; Judge Willard was observed 31 times; Judge Landrum-Johnson was observed 35 times; Judge Pittman was observed 38 times; Judge Williams was observed 35 times; Judge Buras was observed 30 times; Judge Herman was observed 49 times; Judge Derbigny was observed 36 times; Judge Hunter was observed 24 times; and Judge Zibilich was observed 48 times. Judge Jerome Winsberg, presiding in Section D, was observed to have required defendants to hire private counsel for the sole reason that the defendants had successfully posted bond in two observations (6.7%) out of a total of 30 observations.

<sup>lxv</sup> LA.Code Evid. Ann. Art.CE 702 (1) (2009).

<sup>lxvi</sup> CWN would like to thank all of its 2016 donors for their support, including the following donors: Sustaining Sponsor (\$10,000 and above) Baptist Community Ministries; Eugene Jones Family Foundation; The Helis Foundation; Namlog Foundation; Mary Freeman Wisdom Foundation; Corporate Donor (\$5,000 to \$9,999): Louisiana Bar Foundation; National Council of Jewish Women; RosaMary Foundation; George H. Wilson Fund; Senior Partner



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