NO. _____

IN THE
Supreme Court of the United States

DAJUAN ALRIDGE,

PETITIONER,

V.

STATE OF LOUISIANA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL, FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether statistics alone are sufficient to demonstrate a prima facie case of discrimination in the first step of a *Batson* analysis?

2. Whether life without the possibility of parole is an excessive sentence for a juvenile who was convicted by a non-unanimous jury in a circumstantial evidence case?

3. Whether the Fourteenth Amendment fully incorporates the Sixth Amendment guarantee of a unanimous verdict?

PARTIES TO THE PROCEEDING

The petitioner is Dajuan Alridge, the defendant and defendant-appellant in the courts below. The respondent is the State of Louisiana, the plaintiff and plaintiff-appellee in the courts below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Dajuan Alridge, respectfully petitions for a writ of certiorari to the Louisiana Fourth Circuit Court of Appeal.

OPINIONS BELOW

The judgment of the Louisiana Fourth Circuit Court of Appeal is reported at *State v. Alridge*, 2017-0231 (La.App. 4 Cir. 05/23/18), 249 So. 3d 260 (La. 2018), 2018 WL 2328457, and attached as Appendix A. The Louisiana Supreme Court's order denying review of that decision is reported at *State v. Alridge*, 2018-K-1046 (La. 1/8/19), 259 So. 3d 1021, 2019 La. LEXIS 52, and attached as Appendix B.

JURISDICTIONAL STATEMENT

The judgment and opinion of the Louisiana Fourth Circuit Court of Appeal were entered on May 23, 2018. The Louisiana Supreme Court denied review of that decision on January 8, 2019. *See* Appendix A and B. This Court's jurisdiction is pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. Amend. VI.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII.

The Fourteenth Amendment to the United States Constitution provides, in pertinent parts:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV.

Article 782(A) of the Louisiana Code of Criminal Procedure provides, in pertinent part: "Cases in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict." La. C.Cr.P. art. 782(A).

STATEMENT OF THE CASE

Dajuan Alridge ("Petitioner") was convicted by a non-unanimous jury of the second degree murder of James McKenzie in New Orleans, Louisiana. Pet. App. A at 1; 16. He was charged along with co-defendant Dennis Lewis, who pled to manslaughter in exchange for testifying against Petitioner at trial, receiving a sentence of forty years. Pet. App. A at 1, fn 2. Petitioner and his co-defendant were both seventeen years old at the time of the offense. Pet. App. A at 1.

During the first panel of voir dire, the State used five out of six peremptory challenges to remove 100% of the African-American prospective jurors on the panel. Pet. App. A at 13. The trial court found, however, no prima facie case of discrimination under *Batson*. *Id.* The court of appeal upheld this ruling, holding that "numeric evidence" was insufficient to establish a prima facie case of discrimination, and that the burden was on the defendant to come forward with "non-numeric evidence." Pet. App. A at 14-15.

While the court of appeal determined that the state presented sufficient evidence to sustain a conviction, *see* Pet. App. A, at 4-6, no physical evidence connected petitioner to the offense, and his conviction rested in large part on the prior custodial statement of co-defendant Dennis Lewis. See Pet. App. A, at 23 (Love, J., concurring). When called as a witness by the State, Lewis admitted that his prior statement was self-serving and untruthful. *Compare* Pet. App. A at 2-3 (detailing multiple statements to police, including statements that inculpated and exculpated petitioner) *with* Pet. App. A at 3 (noting Lewis' trial testimony denying petitioner's

involvement, admitting stabbing victim himself and acknowledging that he lied to his mother and the police officers during the interrogation to conceal his own culpability); Pet. App. A at 2 (witness told police that he saw Lewis alone, burning clothes in the backyard, on the day the victim went missing).

At the conclusion of trial, a jury of twelve deliberated. Only eleven of those twelve found Petitioner guilty. Pet. App. A at 1; 16. An affidavit from the juror who voted "not guilty," attached to a subsequent Motion for New Trial, states that "one of the main reasons the jury decided to convict [Petitioner] was due to his failure to testify on his own behalf." Pet. App. A at 11. Nonetheless, this non-unanimous verdict was enough to convict Petitioner of second-degree murder; a verdict that the appellate court found constitutional under *Apodaca v. Oregon*, 406 U.S. 404 (1972). Pet. App. A at 16.

At the sentencing hearing, the defense presented evidence that Petitioner had been diagnosed with schizophrenia and bipolar disorder since the age of five, that this was his first offense, and that Hurricane Katrina had devastated and traumatized him and his family. Pet. App. A at 19. The trial court discounted evidence of Petitioner's serious mental illnesses because it "was of the opinion 'this does not represent the conduct of anyone with an impulsive behavior.'" *Id.* The trial court found that the defense "unfortunately failed to provide this Court any circumstances that would mitigate as it relates to the sentencing [sic] which the Court is compelled to impose." *Id.* Petitioner was sentenced to life without possibility of parole. *Id.*

The Louisiana Fourth Circuit Court of Appeal affirmed Petitioner's conviction and sentence on March 23, 2018. In upholding Petitioner's sentence, the court found that the sentence was "commensurate to sentences imposed in similar cases with similar-aged defendants" and cited to pre-*Miller* cases involving mandatory life-without-parole sentences. Pet. App. A at 20.

The court of appeal also upheld the trial court's refusal to find a *prima facie* case of discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986). Pet. App. A at 13-16. Although the *Batson* challenge had been made after the first panel of voir dire, the court viewed the *Batson* challenge from the standpoint of the conclusion of voir dire, including the second panel for which race data was not available on the record. Pet. App. A at 15 (evaluating Batson claim in terms of the State using "five of ten peremptory challenges" on African-American jurors).[1] In fact, at the time of the challenge, the State had only used *six* peremptory challenges, with five removing every African American on the panel. Pet. App. A at 13. Ultimately, the court found that no prima facie case of discrimination, as the defense presented only "numeric evidence" and not further "non-numeric evidence" or comparative juror analysis at this first *Batson* step. Pet. App. A at 14.

[1] While Petitioner had repeatedly objected to the incomplete appellate record, the court based its decision to uphold the trial court's denial of a *prima facie* case of discrimination on the lack of a complete record after the initial panel: "the record evidence does not reflect the representation of African-Americans in the venire (panels one and two) as to those on the empaneled jury. Thus, it is impossible to make a valid statistical analysis of the stricken jurors." Pet. App. A at 15.

The court of appeal also noted that Petitioner had been convicted by a non-unanimous jury but held "Presently in Louisiana, the *Apodaca* decision is still good law." Pet. App. At 16.

Petitioner timely applied for review of this decision in the Louisiana Supreme Court, which was denied on January 8, 2019. This Petition ensues.

REASONS FOR GRANTING THE WRIT

I. The Lower Courts Are Split Concerning Whether "Numeric Evidence" is Sufficient to Make Out a Prima Facie Case under *Batson v. Kentucky*

In *Johnson v. California*, this Court defined the low showing a defendant must make to support a *prima facie* case of discrimination under *Batson*:

> We did not intend the first step to be so onerous that a defendant would have to persuade the judge--on the basis of all the facts, some of which are impossible for the defendant to know with certainty--that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of Batson's first step by producing evidence sufficient to permit the trial judge to draw **an inference** that discrimination has occurred.

Johnson v. California, 545 U.S. 162, 170 (2005) (emphasis added). However, the circuit courts are split about what type, and how much, evidence a defendant must present at this first step in a *Batson* challenge. Louisiana has adopted the position that a pattern of peremptory challenges against African Americans is not enough to make out a prima facie case of discrimination. *See, e.g., State v. Dorsey,* 2010-0216 (La. 09/07/11), 74 So. 3d 603; *State v. Duncan,* 992615 (La. 10/16/01); 802 So. 2d 533, 550; *State v. Holand,* 2011-0974 (La. 11/18/11); 125 So. 3d 416 (finding the Court of

Appeals erred when it found a *prima facie* case of discrimination based upon the state's use of "11 peremptory challenges to exclude 10 African-Americans of which 9 were women"); *cf State v. Williams*, 2013-0283 (La. App. 4 Cir. 04/23/14); 137 So. 3d 832 (denying Batson claim where ten of prosecutor's strikes were against African-Americans).

A. There is a Split among the Circuits Regarding Whether Statistics Are Enough to Prove a Prima Facie Case

At least four circuits have definitively found or affirmed *prima facie* cases of discrimination by only considering the numbers presented, and at least one other has laid out jurisprudence leading to the same.

The Second Circuit is unequivocal "that statistics, alone and without more, can, in appropriate circumstances, be sufficient to establish the requisite prima facie showing under *Batson*." *Overton v. Newton*, 295 F.3d 270, 278 (2d Cir. 2002). Likewise, the Third Circuit has been explicit that statistics may be sufficient to support a step-one showing. *See Williams v. Beard*, 637 F.3d 195, 214 (3d Cir. 2011); *Jones v. Ryan*, 987 F.2d 960, 971 (3d Cir. 1993). The Seventh Circuit has also found that statistical analysis alone may prove a *prima facie* case. *United States v. Stephens*, 421 F.3d 503 (7th Cir. 2005).[2]

In the Ninth Circuit, the court of appeal has stated: "[w]e have held that a defendant can make a prima facie showing based on a statistical disparity alone."

[2] *Stephens* remanded the case to the district court for consideration of the step two and three analysis, where the court find a *Batson* violation; the Seventh Circuit later reversed on these grounds, after the entire analysis was complete. *See United States v. Stephens*, 514 F.3d 703 (7th Cir. 2008)

Williams v. Runnels, 432 F.3d 1102, 1107 (9th Cir. 2006). In *Paulino*, the appellate court considered a case where the trial court refused to permit defense counsel to explain his objection.[3] *Paulino v. Castro*, 371 F.3d 1083 (9th Cir. 2004). Thus, all the appellate court *could* consider were the numbers. The court found that because five of the prosecutor's six total strikes at the time of objection were against minorities, the defense's objection proved a pattern of strikes sufficient to support a prima facie case of discrimination. *Id* at 1091. The court also noted that it "sometimes" considers the context in which the objection is made to see if it alters the statistical evidence, but this language makes clear further analysis is not required. *Id.*

The First Circuit has not been so unambiguous about whether the *exclusive* use of statistics make out a *prima facie* case, but their limited jurisprudence on the matter implies that statistics are enough at the first step of *Batson*. The court has explained that numerical information may be used at step one, while relegating comparative juror analysis to step three:

> Statistical evidence is frequently used to show impermissible discrimination. Courts look to the percentage of a particular racial group removed from the venire by the strikes at issue, and the percentage of strikes directed against members of that group. A prosecutor's intent may also be discerned by comparing the treatment of white and non-white panelists. An instance where a prosecutor's stated reason for striking a non-white potential juror would apply to a white panelist who was permitted onto the jury could serve as evidence of purposeful discrimination at the final step of a Batson challenge analysis.

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[3] This case is partially analogous to Petitioner's case, as defense counsel's objection was cut off by the trial court before it could be completed, and five of the six peremptory strikes at the time of objection were against African-Americans. *See also Flowers v. State.* 158 So.3d 1009 (Miss. 2014) (finding a prima facie case where the State accepted a single African-American juror, but then struck the next five potential African-American jurors).

United States v. Casey, 825 F.3d 1, 10 (1st Cir. 2016) (internal citations omitted). This distinction between presenting statistical evidence at the first step, and suggesting other, contextual evidence is more appropriate at step three, suggests the First Circuit likewise considers bare statistics enough.

However, like Louisiana, at least the Eighth and the Tenth Circuits have found that statistics, without more, cannot support a *prima facie* case under *Batson*. The Eighth Circuit has found that because this first step is "necessarily fact-intensive," a defendant must "come forward with *facts*, not just numbers alone." *United States v. Moore*, 895 F.2d 484, 485 (8th Cir. 1990) (emphasis in original); *see also United States v. Dawn*, 897 F.2d 1444, 1448 (8th Cir. 1990) ("numbers alone are not sufficient to establish or negate a prima facie case"). The Eleventh Circuit has quoted Eighth Circuit cases to find that "[i]n making out a prima facie case, 'the defendant must point to more than the bare fact of the removal of certain venirepersons and the absence of an obvious valid reason for the removal.'" *United States v. Allison*, 908 F.2d 1531, 1538 (11th Cir. 1990) (*quoting United States v. Young-Bey*, 893 F.2d 178, 179 (8th Cir. 1990)). The Tenth Circuit has found the same. *See United States v. Willie*, 941 F.2d 1384, 1399 (10th Cir. 1991).

The split in the circuit courts of appeal on whether bare statistics are enough to overcome *Batson*'s first step presents opportunity for a much-needed resolution in this Court. Not only does a defendant have a Sixth Amendment right to an impartial jury, but prospective jurors have an Equal Protection right to serve on juries in their

communities. As the *Batson* process continues to be applied inconsistently across the circuits, guidance from this Court is appropriate.

B. *Louisiana's Adoption of the Minority Rule Impermissibly Handicaps Defendants in Conducting* Batson *Challenges*

Louisiana's rule, requiring more than bare statistics on the first *Batson* step, renders many defendants unable to make a challenge at all, and runs afoul of this Court's rulings. Not only did the Court in *Johnson* explain that the defendant only need to prove an "inference" of discrimination, the Court has further stated that "statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors." *Miller-el v. Cockrell (Miller-El I)*, 537 U.S. 322, 342 (2003). Additionally, "a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination." *Batson*, 476 U.S. at 96-97.

Louisiana's position belies the command of *Johnson v. California* that a prima facie case is established by an inference sufficient for the trial court to decide that further inquiry is necessary. The defendant need not prove discrimination at this point; "[i]t is not until the *third* step that the persuasiveness of the justification becomes relevant--the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." *Johnson*, 545 U.S. at 171 (citing *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (emphasis in original). *See Chamberlin v. Fisher*, 885 F.3d 832, 838 (5th Cir. 2018) (en banc) (discussing whether there is a requirement to conduct comparative juror analysis at *Batson*'s *third* step).

It is of greatest benefit to the trial court to conduct the comparative juror analysis at the third step of the *Batson* analysis, at which time all relevant circumstances may be considered. *See Miller–El II*, 545 U.S. at 240. Until the prosecutor proffers a race-neutral reason for striking an African-American juror, the defense is unable to evaluate that reason in context with the other jurors. To require a comparative juror analysis before the State has explained why they are striking a juror would be to require a defendant to compare *all* potential reasons with *all* jurors who gave similar or dissimilar answers.

Thus, at the first step of *Batson*, all the relevant information a defendant *has* are the statistical disparities. In the majority of jurisdictions, this is sufficient to meet the low bar this Court intended to set in proving a *prima facie* case of discrimination in *Batson*. The rule in Louisiana and the other minority jurisdictions unconstitutionally handicaps defendants from making adequate *Batson* challenges.

C. *Misapplication of the* Batson *Framework Continues to Percolate In the Louisiana Courts Without Any Signs of Resolution*

Louisiana's misapplication of this Court's *Batson* jurisprudence continues to produce disproportionate results and unclear standards. In some Louisiana courts, more than statistics are absolutely required to make out a *prima facie* case. *See State v. Dorsey*, 2010-0216 (La. 09/07/11); 74 So. 3d 603, 617; *State v. Duncan*, 992615 (La. 10/16/01); 802 So. 2d 533, 550; *State v. Holand*, 2011-0974 (La. 11/18/11); 125 So. 3d 416. In others, numbers alone suffice. *See State v. Bess*, 45-358 (La. App. 2 Cir. 08/11/10); 47 So. 3d 524, 531 finding a *Batson prima facie* case based only on presentation that State used five of six peremptory challenges on African-Americans);

see also State v. Nelson, 2010-1724 (La. 03/13/12); 85 So. 3d 21, 26 (the "sheer numerical analysis" convinced the court that a *prima facie* case had been made).

Courts are unable to correctly implement the three-step process, unclear about what evidence needs to be presented and when in the process to evaluate it. In 2000, where a defendant made two *Batson* objections and the court continued with voir dire without explicitly denying either objection or asking the State for race-neutral reasons, the defendant's conviction was reversed. *State v. Myers,* 99-1801 (La. 04/11/00); 761 So. 2d 498. *See also State v. Givens,* 99-3518 (La. 01/17/01); 776 So. 2d 443, 450 (the trial court muddled its denial of discriminatory strikes based on gender,[4] rendering it unclear whether the ruling was on step one or step three and unable to be reviewed by the appellate courts).

Yet as late as 2018, Louisiana courts still had issues with *Batson*'s application. In *Crawford,* the trial court explicitly found a *prima facie* case based *only* on numbers, but then gave its *own* reasons the prosecutor must have struck the jurors, and then inexplicably ruled there was *no* prima facie case. *State v. Crawford,* 2014-2153 (La. 11/16/16); 218 So. 3d 13, 32. In 2018, a court of appeals found that due to "*Batson*-related legal errors that permeated the entire voir dire proceedings," even an evidentiary hearing would be impossible on a remand, and the defendant's conviction was reversed. *State v. Hampton,* 52403 (La. App. 2 Cir. 11/14/18), 261 So. 3d 993.

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[4] *Batson* protection from discrimination was extended to gender discrimination in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

The Louisiana courts likewise improperly analyzed "reverse-*Batson*" challenges.[5] In *State v. Harris*, the prosecutor made "reverse-*Batson*" challenges when the defense struck three white females. *State v. Harris*, 2015-0995 (La. 10/19/16); 217 So. 3d 255, 256. Finding a prima facie case, the trial court required the defense to give race-neutral reasons for the strikes; however, the court simply denied the defense the use of its peremptory challenge and never proceeded to step three and rule on the ultimate question of discrimination. *Id.* at 260. The Louisiana Supreme Court reversed the conviction based on the denial of defense peremptory challenges. *Id.*

Similarly, in *State v. Nelson*, the Louisiana Supreme Court found that, in ruling on a "reverse-*Batson*" claim:

> In a procedure that confounded steps two and three of Batson, we find the trial court erred in two respects. First, the trial court refused to accept the race-neutral reasons offered by defendants, and instead placed the burden on the defendants to rebut the State's prima facie showing of discrimination. Second, and most significantly, the trial court declined to find that defense counsel engaged in purposeful discrimination but instead found that discriminatory effect alone constituted Batson error.

Nelson, 85 So. 3d at 29 (also finding the court erred in fashioning its' remedy to its ruling); *see also State v. Bourque*, 12-1358 (La.App. 3 Cir. 06/05/13); 114 So. 3d 642

[5] In *Georgia v. McCollum*, a case in which a white defendant was systematically striking African-Americans based on race, this Court held that a defendant may not engage in purposeful discrimination based on race in the use of peremptory challenges. *Georgia v. McCollum*, 505 U.S. 42, 59 (1992). The Louisiana Supreme Court has expanded that ruling to explicitly allow the State to object when an African-American defendant peremptorily strikes white prospective jurors. *State v. Knox*, 609 So.2d 803 (La. 1992)

(where the court does not require the State to prove "purposeful discrimination" at step three of a "reverse-*Batson*" challenge, structural error requires reversal).

As there are significant issues with the trial court's ability to implement the process, and given the prosecutor's exceptionally low burden in providing facially neutral reasons at step two,[6] it makes it difficult for any defendant to have a *Batson* objection granted. Clear guidance on the process from this Court is much needed, as even with the odds stacked in their favor, Louisiana consistently reveals the true discrimination that underlies the jury selection process across the state. *See Snyder v. Louisiana,* 552 U.S. 472 (2008) (upon comparative juror analysis, this Court found that prosecutor's acted with discriminatory intent); *State v. Coleman*, 2006-0518 (La. 11/02/07); 970 So. 2d 511, 515 (the State explicitly stated that its strike of an African-American juror was because "[d]efense counsel voir dired on the race issue. There is a black defendant in this case. There are white victims"); *State v. Harris*, 2001-0408

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[6] *See* Erin T. Campbell, *Challenges Under Batson; If We Can't Get it Right, Perhaps We Shouldn't Get it At All,* 40 S.U .L. REV. 551, 566 (2013) ("Any decently-equipped and half-competent attorney can come up with a race-neutral justification for using a peremptory challenge"); Jonathan Abel, *Batson's Appellate Appeal and Trial Tribulations*, 118 COLUM. L. REV. 713, 719-720 (2018) ("there is no requirement that the prosecutor's explanation be logical or plausible, so long as the prosecutor can convince the judge that it is sincerely held...[t]he prosecutor has so much freedom that she practically cannot get caught unless she picks a demonstrably false or explicitly race-based justification. The ease of inventing pretexts to satisfy step two can make the entire *Batson* framework feel like a farce"); Wade Henderson, *Justice On Trial: Racial Disparities in the American Criminal Justice System, available at* http://www.protectcivilrights.org/pdf/reports/justice.pdf (2000), at 33 ("'[I]f prosecutors exist who . . . cannot create a 'racially neutral' reason for discriminating on the basis of race, bar exams are too easy.'") (quoting Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Strikes*, 35 WM. & MARY L. REV. 21, 59 (1993)); Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net To Ensnare More Than The Unapologetically Bigoted Or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1077 (2011) ("The current framework makes it exceedingly difficult for judges to reject even the most spurious of peremptory strikes – a reality that is not lost on trial attorneys").

(La. 06/21/02); 820 So. 2d 471 (conviction and death sentence reversed where prosecutor struck a prospective juror because he was the "only single black male on the panel with no children"); *State v. Wilkins*, 11-1395 (La. App. 3 Cir. 06/20/12); 94 So. 3d 983 (prosecutor repeatedly stated that he would not accept African-Americans on the jury because the victim was in the KKK, but asked no white prospective jurors their feelings on that issue).

II. This Court Should Grant Certiorari to Decide Whether a Sentence of Life Without Possibility of Parole Violates the Eighth Amendment for a Seventeen-Year-Old Convicted by a Non-Unanimous Jury on Circumstantial Evidence

This Court has consistently acknowledged that children are developmentally different from adults, and thus must be treated differently in the criminal justice context. *See Roper v. Simmons*, 543 U.S. 551, 569 (2005) (holding the Constitution bars the death penalty for juveniles because the developmental differences between juveniles and adults means "juvenile offenders cannot with reliability be classified among the worst offenders"); *Graham v. Florida*, 560 U.S. 48, 68 (2010) (barring the imposition of life without parole to any juvenile offender in a non-homicide offense because "juveniles have lessened culpability they are less deserving of the most severe punishments").

In 2012, this Court held that that the Eighth Amendment prohibits the mandatory imposition of life without parole for juvenile offenders convicted of murder. *Miller v. Alabama*, 567 U.S. 460 (2012). In so finding, the Court stated that a life without parole sentence "reflects an 'irrevocable judgment about an offender's value and place in society' at odds with a child's capacity for change." *Id* at 473.

In 2016, in further clarification of the breadth of the *Miller* decision, the Court further found that life without parole for juveniles convicted of murder is *constitutionally barred* "for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility," because *Miller* "established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'" *Montgomery v. Louisiana*, 136 S. Ct. 718, 734 (2016). This Court prophesied "[a]fter *Miller*, it will be the rare juvenile offender who can receive [life without parole]"). As the Court reiterated in *Montgomery*, the Eighth Amendment establishes that "the sentence of life without parole is disproportionate for the vast majority of juvenile [murder] offenders." *Montgomery*, 136 S.Ct. at 736.

The mandates of *Miller* and *Montgomery* are abused where the states are not reserving the most extreme punishment available for a juvenile for only the most extreme cases. A review of the second-degree juvenile convictions in Louisiana from 2013 through 2016 indicate that nearly four out of every five juveniles receive a sentence of life without the possibility of parole that is affirmed on appeal.[7] Thus, it

[7] *See State v. Jones*, 15-157 (La. App. 5 Cir. 09/23/15), 176 So. 3d 713 (sentenced to life without the possibility of parole); *State v. Graham*, 2014-1769 (La. App. 1 Cir. 04/24/15), 171 So. 3d 272 (sentenced to life without the possibility of parole); *State v. Williams*, 2015-0866 (La. App. 4 Cir. 01/20/16), 186 So. 3d 242 (sentenced to life without the possibility of parole); *State v. Hudson*, 2015-0158 (La. App. 1 Cir. 09/18/15) (sentenced to life without the possibility of parole); *State v. Davis*, 15-118 (La. App. 5 Cir. 06/30/15), 171 So. 3d 1223 (sentenced to life without the possibility of parole); *State v. Wilson*, 2014-1267 (La. App. 4 Cir. 04/29/15), 165 So. 3d 1150 (sentenced to life without the possibility of parole); *State v. Ross*, 14-84 (La. App. 5 Cir. 10/15/14), 182 So. 3d 983 (sentenced to life without the possibility of parole); *State v. Fletcher*, 49303 (La. App. 2 Cir. 10/01/14), 149 So. 3d 934 (sentenced to life without the possibility of parole); *State v. Brooks*, 49033 (La. App. 2 Cir. 05/07/14), 139 So. 3d 571 (sentenced to life without the possibility of parole); *State v. Smoot*, 13-453 (La. App. 5 Cir. 01/15/14), 134 So. 3d 1 (sentenced to life without the possibility of parole); *State v. Smith*, 47983 (La. App. 2 Cir. 05/15/13), 116 So. 3d 884 (sentenced to life without the possibility of

is not the exceptionable "incorrigible" youth that is sentenced to spend the remainder of his life imprisoned, but the vast majority of cases that are processed through Louisiana's criminal system.

This injustice becomes starker where, as in Petitioner's case, the jury was not unanimous in their conviction. In Louisiana, in order to be capitally sentenced, a defendant must both be found guilty by twelve, and sentenced to death by twelve. La. R.S. 14:30. Though this Court has noted that a life sentence for juveniles is akin to a death sentence for adults,[8] Petitioner was found guilty by only eleven, and sentenced to life without the possibility of parole by a single judge.[9] The protection of unanimity provided to adults facing the ultimate punishment is stripped when a juvenile is facing the same.

Finally, there is a burgeoning and consistent movement across the States to disallow even discretionary life without parole sentences for juveniles. At least twenty-one jurisdictions have categorically prohibited this most severe punishment

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parole); *State v. Williams*, 50060 (La. App. 2 Cir. 09/30/15), 178 So. 3d 1069 (sentenced to life with the possibility of parole); *State v. Baker*, 2014-0222 (La. App. 1 Cir. 09/19/14); 154 So. 3d 561 (sentenced to life with the possibility of parole after 35 years); *State v. Jones*, 49,830 (La. App. 2 Cir. 05/20/15); 166 So. 3d 406 (sentenced to sixty years with the possibility of parole).

[8] *Graham*, 560 U.S. at 68-69.

[9] The judge who sentenced Petitioner has since been suspended from the bench. *See* John Simerman, *New Orleans Judge Byron C. Williams, Accused of Inappropriate Behavior, Suspended from Bench*, THE ADVOCATE (July 2, 2018), *available at* https://www.theadvocate.com/new_orleans/news/courts/article_67282ff4-7bb9-11e8-a712-0b2fb7cd9687.html.

for those under eighteen.[10] Eight further states have limited the availability of this punishment for juveniles to capital or first degree murder.[11] Ten other jurisdictions have either no juveniles serving a life without parole sentence,[12] or less than five across the state.[13] Thus, there are only a handful of states – 12 – that are extensively using their power to sentence juveniles to life without the possibility of parole.

Both this Court's developing jurisprudence on the distinctions between adults and juveniles, as well as the non-unanimous verdict here, make plain that life without the possibility of parole is not appropriate in this case.

III. This Court Should Hold Petitioner's Case for This Court's Decision in *Ramos v. Louisiana*, as This Case Presents the Same Constitutional Question: Whether The Sixth Amendment Right to a Unanimous Jury is Incorporated to the States.

This Court granted certiorari in *Ramos v. Louisiana*, No. 18-5924 on March 18, 2019. The sole question presented in *Ramos* is "whether the Fourteenth Amendment fully incorporates the Sixth Amendment guarantee of a unanimous verdict?" The constitutional question in Petitioner's case is identical. As his case is pending on direct appeal at this time, a favorable decision would apply to him. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).

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[10] Alaska, Colorado, Kansas, Kentucky, Arkansas, California, Connecticut, Delaware, District of Columbia, Hawaii, Iowa, Massachusetts, Nevada, New Jersey, North Dakota, South Dakota, Texas, Utah, Vermont, West Virginia, Wyoming.

[11] Arizona, Florida, Minnesota, Missouri, New York, North Carolina, Pennsylvania, Washington

[12] Maine, New Mexico and Rhode Island

[13] Idaho, Indiana, Montana, Nebraska, New Hampshire, Ohio and Oregon

Louisiana and Oregon are now the only states that allow for non-unanimous jury verdicts. Louisiana stands alone in sentencing juveniles to life without the possibility of parole without a unanimous conviction. In *Apodaca v. Oregon,* a fractured plurality found that though the Sixth Amendment required unanimity, this right was not incorporated to the states through the Fourteenth Amendment. 406 U.S. 404 (1972). However, the opinion itself, as well as this Court's subsequent jurisprudence, make clear the doctrine of partial incorporation cannot stand.

First, though the plurality recognized that the common law long-required juries to return unanimous verdicts, *Apodaca*, at 407-08 & n.2, it relied "upon the function served by the jury in contemporary society," 406 U.S. at 410, to conclude that unanimity "was not of constitutional stature" in criminal cases. 406 U.S. at 406. However, this Court has subsequently emphasized the idea that the Sixth Amendment derives its meaning not from functional assessments, but from the Framers' original intention and the practice at common law. *See, e.g., Crawford v. Washington,* 541 U.S. 36 (2004) (abandoning the functional conception of the Confrontation Clause in *Ohio v. Roberts*, 448 U.S. 56 (1980), in favor of the common-law conception of the right known to the Framers); *Giles v. California*, 554 U.S. 353, 375 (2008) ("[i]t is not the role of courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the court's views) those underlying values," instead finding the Sixth Amendment guarantees "the trial rights of Englishmen"); *Apprendi v. New*

Jersey, 530 U.S. 466 (2000) (finding that the right to a jury is considered as it existed at common law).

Second, Justice Powell's theory of partial incorporation—where the Sixth Amendment required unanimity, but the protections guaranteed by the Fourteenth Amendment were less than those offered by the Sixth Amendment—has been applied in no other case than *Apodaca*. The constitutionality of this two-track view on incorporation has been disavowed by this court's holding in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), where this Court expressly rejected the idea that only a "watered-down" version of the Bill of Rights is applied to the states. Instead, the "single, neutral principle" of incorporation requires that the Constitution protects citizens from both state and federal encroachment under the same standards. *Id.* at 765.

As this Court has now determined that this question is of constitutional concern, Petitioner respectfully requests this Court hold Petitioner's case until the constitutional question is resolved.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel certifies that on this date, the 5th day of April, 2019, pursuant to Supreme Court Rules 29.3 and 29.4, the accompanying motion for leave to proceed *in forma pauperis* and petition for a writ of *certiorari* was served on each party to the above proceeding, or that party's counsel, and on every other person required to be served, by depositing an envelope containing these documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

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