No. 18-8776

# In the Supreme Court of the United States

**TAM Q. LE,**
***Petitioner***

**vs.**

**DARREL VANNOY, Warden**
***Respondent***

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

## BRIEF IN OPPOSITION


JEFF LANDRY
*Attorney General*
ELIZABETH BAKER MURRILL
*Solicitor General*
MICHELLE WARD GHETTI*
*Deputy Solicitor General,*
**Counsel of Record*
Louisiana Department of Justice
1885 N. Third St.
Baton Rouge, LA 70804
(225) 326-6028

WARREN MONTGOMERY
*District Attorney*
MATTHEW CAPLAN
*Assistant District Attorney*
St. Tammany Parish
701 North Columbia Street
Covington, LA
(985) 809-8398

## QUESTIONS PRESENTED[1]

1. Reasonable jurists would determine that Mr. Le was convicted by a non-unanimous jury in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments and equivalent provisions of the Louisiana Constitution.

2. Reasonable jurists would debate that Mr. Le was denied a fair and impartial trial with the submission of testimony from "Expert" witnesses which failed to meet the *Daubert* standard, in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

[1] This brief is in opposition to a *pro se* application. Petitioner's brief does not comply with this Court's rules for the format and content of petitions for certiorari. Respondent has attempted to address all arguments made in the petition. However, in doing so, counsel does not waive any objection to the form or substance of the petition and, in compliance with Supreme Court Rule 15, will attempt to point out any perceived misstatements of fact or law.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Statutes**

## ADDITIONAL STATUTORY AUTHORITY

### Louisiana Code of Criminal Procedure, art. 782: Number of jurors composing jury; number which must concur; waiver

A. A case in which punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. A case for an offense committed prior to January 1, 2019, 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. A case for an offense committed on or after January 1, 2019, in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment may be confinement at hard labor shall be tried by a jury composed of six jurors, all of whom must concur to render a verdict.

B. Trial by jury may be knowingly and intelligently waived by the defendant except in capital cases.

### Louisiana Constitution of 1974, Art. 1 Sec. 17(A): Jury Trial in Criminal Cases; Joinder of Felonies; Mode of Trial

**Section 17. (A) Jury Trial in Criminal Cases.** A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case for an offense committed prior to January 1, 2019, in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict. A case for an offense committed on or after January 1, 2019, in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons, all of whom must concur to render a verdict. The accused shall have a right to full voir dire examination of prospective jurors and to challenge jurors peremptorily. The number of challenges shall be fixed by law. Except in capital cases, a defendant may knowingly and intelligently waive his right to a trial by jury but no later than forty-five days prior to the trial date and the waiver shall be irrevocable.

### Louisiana Code of Evidence Art. 701: Opinion testimony by lay witnesses

If the witness is not testifying as an expert, his testimony in the form of

opinions or inferences is limited to those opinions or inferences which are:

(1) Rationally based on the perception of the witness; and
(2) Helpful to a clear understanding of his testimony or the determination of a fact in issue.

**Louisiana Code of Evidence Art. 702: Testimony by Experts**

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(1) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
(2) The testimony is based on sufficient facts or data;
(3) The testimony is the product of reliable principles and methods; and
(4) The expert has reliably applied the principles and methods to the facts of the case.

**Louisiana Code of Criminal Procedure Art. 930.4: Repetitive Applications**

A. Unless required in the interest of justice, any claim for relief which was fully litigated in an appeal from the proceedings leading to the judgment of conviction and sentence shall not be considered.
B. If the application alleges a claim of which the petitioner had knowledge and inexcusably failed to raise in the proceedings leading to conviction, the court shall deny relief.
C. If the application alleges a claim which the petitioner raised in the trial court and inexcusably failed to pursue on appeal, the court shall deny relief.
D. A successive application shall be dismissed if it fails to raise a new or different claim.
E. A successive application shall be dismissed if it raises a new or different claim that was inexcusably omitted from a prior application.
F. If the court considers dismissing an application for failure of the petitioner to raise the claim in the proceedings leading to conviction, failure to urge the claim on appeal, or failure to include the claim in a prior application, the court shall order the petitioner to state reasons for his failure. If the court finds that the failure was excusable, it shall consider the merits of the claim.

**28 U.S.C. § 1254. Courts of appeals; certiorari; certified questions**

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

**(1)** By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

**(2)** By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

## OPINIONS BELOW[2]

*State of Louisiana v. Tam Q. Le*, Number 506845 (22nd Judicial District Court 5/4/2017) (unpublished) attached as Appendix _____.

*State of Louisiana v. Le*, 2017 WL 6055438, 2017-1354 (La.App. 1 Cir. 12/7/17) attached as Appendix ____.

*State of Louisiana v. Tam Le*, 2018-0085 (La. 2/18/19), 263 So.3d 422 (Mem) attached as Appendix ____.

[2] The only judgments at issue in this petition for certiorari are the trial court post-conviction relief judgment, and the denial of writs by the circuit court and the state supreme court. They are listed here and attached as appendices. Petitioner has listed all appellate cases involved in the challenge to his conviction. However, his conviction was appealed to the circuit court and state supreme court in 2013 and has been final for six years.

## JURISDICTION

Petitioner has not set out a proper basis for jurisdiction in his Petition. His only claim of jurisdiction in this Court is under 28 U.S.C. Sec. 1254(1). That provision, however, applies to petitions for writs of certiorari from the federal appellate courts not from the state courts. Thus, his brief does not comply with Supreme Court Rule 14.1(e)(iv).

Furthermore, the petitioner does not state the date that the judgment sought to be reviewed was entered pursuant to Supreme Court Rule 14.1(e)(i). In the Opinions Below section, Petitioner lists two decisions from his direct appeal which were final over *six years ago* and over which this Court no jurisdiction due to untimeliness. 28 U.S.C. Sec. 2101(c); Supreme Court Rule 13.1.

## INTRODUCTION

Not only is the Petition in this matter a poor vehicle for review of any of the issues presented, but it presents claims that are not properly before this Court. This Court has "almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim [raised in the challenge] 'was either addressed by or properly presented to the state court that rendered the decision [it was] asked to review.'" *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (citing *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (*per curiam*); *Illinois v. Gates*, 462 U.S. 213, 218 (1983) (tracing this principle back to *Crowell v. Randell*, 35 U.S. 368 (1836), and *Owings v. Norwood's Lessee*, 9 U.S. 344 (1809). That has not happened here on multiple claims.

None of Petitioner's claims are in the proper procedural posture for a writ grant.

1) There is NO ruling by a Louisiana state court regarding Petitioner's Fifth and Fourteenth Amendment Equal Protection non-unanimous jury claim. It is being raised for the first time in this Court.

2) Petitioner's Sixth and Fourteenth Amendment non-unanimous jury claims were decided six years ago on direct appeal. These claims were subsequently denied on post-conviction review on procedural grounds as a successive claim, pursuant to Louisiana Code of Criminal Procedure art. 930.4, and appear to have been waived on review of the post-conviction court's ruling. Furthermore, since Petitioner is in collateral post-conviction proceedings, he would not benefit from a favorable decision

in *Ramos v. Louisiana* overruling *Apodaca* and *Johnson,* should that occur, because he is no longer on direct review. *See Griffith v. Kentucky*, 479 U.S. 314 (1987), *Teague v. Lane*, 489 U.S. 288 (1989), *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016).

3) Petitioner claims that the opinion testimony of Det. Nicaud and Ms. Mathern violates his right to a fair and impartial trial. This, too, is a new claim not made in any court below. Although Petitioner complained of their testimony in the courts below, it was based on violation of evidentiary rules, not constitutional requirements. No court has heard argument on how this testimony denies him a "fair and impartial trial" nor has the State had any opportunity to brief and argue that issue before the state courts.

The complaint about Detective Nicaud's testimony was fully litigated on appeal and is barred from collateral review. The complaint about Ms. Mathern's testimony was not raised at trial or on appeal, although it could easily have been, and was raised through *pro se* supplemental briefing in post-conviction and denied because not raised below, as well as on its merits.

The only issue apparently argued to the appellate courts after post-conviction was ineffective assistance of counsel. It is questionable that that issue is even being raised before this Court. It is not expressed in the Question Presented and, other than for a paragraph setting forth the rule of *Strickland*, is not argued in the petition.

## STATEMENT OF THE CASE

On February 8, 2011, a ten-year-old girl walked up to her Fifth-grade teacher and handed her a note that said, among other things, that her stepfather had raped her. R. 409[3]. Thus began an investigation that ultimately led to the conviction of Tam Q. Le on two counts of aggravated rape, one for each of his stepdaughters.

Two years earlier, while the mother of the two little girls was out of town, Tam Le tried "to put his private part into" NNV's private part after she fell asleep watching a movie in her mother's bedroom.[4] When she woke up during the night, she found her shorts missing and the defendant on top of her. Her sister, NDV, told a forensic interviewer that Tam Le called her into her mother's bedroom, made her lay down on the bed, took her pants off and licked her vagina. There were also other times when he would put his hand down her pants and rubbed her vagina.

After NNV reported the conduct to her teacher, the teacher brought the note to the school counselor, Ms. Mathern, who was a licensed professional counselor and state certified school counselor with a Master's Degree in guidance and counseling and many years of experience working with children who had experienced traumatic experiences including at least ten to fifteen initial complaints of sexual abuse. R. 408-412. Ms. Mathern was tendered as an expert licensed professional counselor and, after traversal, she was accepted without objection. R. 412-413.

The school counselor called NNV into her office to verify the facts and then

[3] The pages from the Trial Transcript Record are found at Appendix E.
[4] The facts are primarily drawn from the opinion of the First Circuit Court of Appeals. *State v. Tam Q. Le,* 2013-0611 (La. App. 1 Cir. 11/4/13), 2013 WL 5935677 attached as Appendix ____.

contacted NNV's mother, Tuyet Le Lam, who came to school to talk to the counselor. The counselor testified at trial that regarding the mother's demeanor upon learning the news: "The main thing I remember is that her eyes began to well up with tears and also her voice was very shaky. … her facial, the color in her face had become more pale. It was more of a shock and a fear and very, very high concern." R. 416. Ms. Mathern told Ms. Lam that she was required by law to report the incident to the police and so she did, going to the police in St. Tammany Parish the next morning. There she met up with Detective Brian Nicaud who interviewed her and asked her to bring the girls to the Hope House Children's Advocacy Center (CAC) where they could be interviewed by a forensic child examiner and to the Children's Hospital for an examination. R. 393. She complied.

At trial, the DVDs of the forensic exam of each of the girls[5] were entered through the testimony of Det. Nicaud, who had stayed at the CAC while the girls were interviewed and watched through a video transmission from a separate room, and broadcast for the jury to watch. R. 331-333. The anatomic diagrams filled out by both girls describing what had happened were also entered into evidence and circulated to the jury as was the girls' medical record and transcript of the interview at Children's Hospital. R. 335. Both girls also testified at trial. R. 367 – 377 (NDV) and R. 378 -388 (NNV).

[5] Petitioner only states in his Petition that the girls testified and mischaracterized their testimony by saying the combined number of pages of their direct exam was six pages (it was over ten) but not mentioning that the total pages covering direct and cross examination were over twenty pages. More importantly, he completely ignores that the forensic exam DVDs were played for the jury – the main role of the girls on direct exam was, thus, corroborating and authenticating their forensic exam testimony.

After the interview of the girls' mother and the girls' forensic interview, and after reviewing the records from the Children's Hospital, Det. Nicaud obtained an arrest warrant for Mr. Le's arrest. R. 339. Mr. Le knew about the warrant for a few weeks but did not turn himself in. R. 340, 455. Once arrested, Det. Nicaud interviewed Mr. Le, who testified at trial. R. 339-340, 446-448, 433-459.

Det. Nicaud had been with the Slidell Police Department for twenty-two years and investigated many crimes in his career, including rape. Det. Nicaud testified at trial regarding the demeanor and reactions of the girls, their mother, and Petitioner based on his observations. He was never qualified or proffered as an expert. He gave an opinion about whether they were believable to him during the investigation and justifying his pursuit of an arrest warrant.

In addition to Det. Nicaud, the two girls, their mother, and the school counselor, the state also called the girls' grandmother to testify. R. 429-433. In addition to his own testimony, Petitioner called his former girlfriend (and mother of three other children), his sister, and his niece as character witnesses.

Defense counsel's opening statement focused the attention of the jury on credibility (primarily inconsistencies in the two girls' statements) and lack of investigation. He told the jury "…because it is a child no one wants to treat this investigation as a normal investigation. They don't want to judge the facts critically. They don't want to look at the facts critically …." R. 327. The defense tried to suggest that the girls' mother, out of spite because of a bad marriage and contentious divorce,

convinced the girls to lie about this.[6] R. 328. (Note, however, that the divorce had been two years earlier and the girls' mother had remarried and had another child at the time of the report of the incident. R. 393.)

Cross examinations and closing argument were more of the same. Defense counsel continuously suggested that the police did not pursue the truth in the case: "There was a bias against Tam from the very beginning … That's where it begins when a child makes an allegation because the police automatically assume that because allegations are made that they must be true. They don't look critically at the facts of the case ... Detective Nicaud … looked at this case and was nothing more than a paper pusher. He was a bureaucrat behind a desk ... He doesn't follow up on anything … he doesn't look critically at the DVD's or the interviews." R. 485-486. "They didn't videotape or introduce the tape of Tam Le's interview." R. 490. "They didn't seize his computer and look for pornography." R. 493. "And what I would tell you is that it could happen to anyone where a false allegation is made. The police don't do their jobs and follow the evidence and you can be sitting in the same spot where Tam is." R. 497.

After closing argument, the jury received instructions including,

> It is the duty of the jurors to consider the opinions of the experts together with all the other testimony and to give them such weight as they deem proper. However, experts are not called into the court for the purpose of deciding the case. You as jurors are the ones in law who must bear the responsibility of deciding the case. The experts are merely witnesses and you have the right to either accept or reject their testimony and opinions

[6] Petitioner attempts to argue in his Petition that there was another party who was culpable of raping his step-daughter: her step-grandfather. However, he presented no evidence to support this claim at trial other than his own self-serving testimony and the girls and their grandmother denied that the step-grandfather was at the house or ever spent the night.

> in the same manner and for the same reasons for which you may accept or reject the testimony of other witnesses in the case." R. 515.

They were also given the following instruction:

> When you enter the jury room you should consult with one another, consider each other's views and discuss the evidence with the objective of reaching a just verdict. Each of you must decide the case for yourself but only after an impartial consideration of the case with your fellow jurors.
>
> You are not advocates for one side of the other. Do not hesitate to re-examine your own views and change your opinion if you are convinced you are wrong, but do not surrender your honest belief as to the weight and effect of the evidence solely because of the opinion of a fellow juror or for the mere purpose of reaching a verdict.

R. 529. They were then instructed that "[t]en members of the jury must concur to reach a verdict in this case." R. 529. There is nothing in the record to indicate Petitioner objected in any way to this instruction.

At about 1:00 pm, the jury was released for deliberations. R. 32. At 2:25 p.m., they sent a note out requesting to see a copy of the note to the teacher and a transcript of the forensic interviews, neither of which could be provided under Louisiana procedural rules. They also wanted to be re-instructed on the lesser included offenses, which the court did. *Id.,* R. 531-537. They returned to deliberate at 3:25 p.m. and at 4:00 p.m. they sent a note out saying they were "currently hung." R. 32. The Court brought them into the courtroom and told them

> "All I can ask you is it has been a few day trial. It is a serious matter. You went in around 1:00, you have had lunch, you have been at it a few hours. I would ask you to please go back and consult with one another again, consider each other's views, discuss the evidence with the objective of reaching a just verdict. Again, of course, you have to decide the case for yourself, but you have to be open to a discussion with your fellow jurors with the objective of reaching a just verdict. So, I ask you

to please go back and give it another try. Thank you."

R. 538. At 7:00 p.m., on October 31, 2012, the jury returned with a guilty verdict for two counts of aggravated rape, which was, *according to Petitioner*, a 10-2 verdict (the polling slips were sealed and Petitioner has never requested that they be unsealed). R. 32, 539-540. Petitioner never objected to the non-unanimous verdict and the jury was dismissed.

Nearly one month later, on November 28, Petitioner filed a Motion for New Trial complaining for the first time of the non-unanimous verdict. R. 106. The Motion was denied that same day after a hearing. R. 544.

Petitioner, with newly hired private counsel, appealed his conviction to the First Circuit Court of Appeals raising the following errors: 1) the trial court erred in allowing Det. Nicaud to "more or less" provide an expert opinion concerning the veracity of the victims, based on his years of experience (Petitioner did not complain about the school counselor, Ms. Mathern, on appeal); 2) the trial court erred in allowing the prosecution's presentation of "other crimes evidence" not previously ruled admissible and failed to provide a limiting instruction to the jury; 3) the trial court erred in providing an *Allen* charge to the jury when they advised they were deadlocked; 4) the proceedings were defective because the jury returned less than unanimous verdicts; 5) the sentences against him were unconstitutionally excessive. All assignments of error were denied. *State v. Tam Q. Le*, 2013-0611, p. 2 (La. App. 1 Cir. 11/4/13), 2013 WL 5935677 (not reported). Resp. App. D.

The only errors relevant to this petition were the improper testimony and non-

unanimous jury claims. As to the improper testimony, Petitioner argued that Detective Nicaud improperly gave opinion testimony concerning: the mother's demeanor being consistent with a person receiving "devastating news"; Vietnamese culture frowning on reporting these kinds of cases; believing the victims had provided consistent testimony and had given "100% truth"; and, although the defendant denied culpability, the defendant's statement confirming Detective Nicaud's belief that an arrest was justified. *State v. Le,* 2013-0611, p. 2, Resp. App. D. After discussing Louisiana Code of Evidence article 701 (lay testimony) and Louisiana Code of Evidence article 103 and Code of Criminal Procedure article 841 (contemporaneous objections), without ruling on whether or not the testimony was admissible, the First Circuit held Petitioner failed to object and therefore failed to timely preserve the issue. *State v. Le*, 2013-0611, p. 3, Resp. App. D.

Regarding the non-unanimous jury verdict claim, the Defendant had argued that "his convictions by '10-2 verdict[s]' were inconsistent with our legal history and violated his Sixth Amendment and procedural due process rights." The First Circuit held that "[t]he provisions of La. Const. art. I, § 17(A) and La. C. Cr. P. art. 782(A) are constitutional and do not violate the Fifth, Sixth, and Fourteenth Amendments, *State v. Bertrand,* 08–2215 and 08–2311, p. 8 (La 3/17/09), 6 So.3d 738, 743 …. There is no authority to the contrary. Accordingly, the trial court was not, and we are not, at liberty to ignore the controlling jurisprudence of superior courts on this issue." *State v. Le*, 2013-0611, p. 6, Resp. App. D.

Petitioner applied for a writ of certiorari with the Louisiana Supreme Court

which was denied. *State v. Tam Q. Le*, 2013-2828 (La. 5/23/14), 140 So.3d 724. *Petitioner did not seek a writ of certiorari in this Court*. At that point, Petitioner's conviction was final. *See Griffith v. Kentucky*, 479 U.S. 314, 321; (1987) ("final" means a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.).

On May 22, 2015, Petitioner, represented by the same counsel, filed an application for post-conviction relief in the trial court. Petitioner raised two claims for ineffective assistance of counsel and one claim challenging Louisiana's non-unanimous jury rule on post-conviction. He alleged that trial counsel was ineffective for failing to object to opinion evidence concerning the credibility of Le and his accusers by the lead detective. He also alleged that trial counsel was ineffective for failing to request a limiting instruction concerning other bad acts evidence challenging Le's credibility. Petitioner filed a *pro se* supplemental application for relief alleging that the trial court erred in allowing Ms. Mathern, the school counselor, to testify as an expert witness for the State because her testimony was not reliable under *Daubert v. Merrill Dow Pharmaceuticals, Inc*. 509 U.S. 579 (1993). He also alleged that his trial counsel was ineffective because he failed to object to Ms. Mathern's testimony.

Applying *Strickland v. Washington*, 466 U.S. 668 (1984), the post-conviction trial court noted that defense counsel, during opening and closing statements, attacked the credibility of Detective Nicaud by painting a picture that he, after

hearing the allegations against defendant, made a determination in the beginning of the investigation that Petitioner had committed the crime and failed to follow up on anything the defendant told him. Thus, the court held, defense counsel's decision not to object to the testimony may be considered a reasonable trial strategy because it supported Petitioner's theory of the case and, therefore, did not constitute deficient performance under the first prong of *Strickland*. The post-conviction court further pointed out that had Petitioner's counsel made these objections, he had not shown they would have been meritorious. Jurisprudence has allowed lay witnesses to opine as to whether they believe an individual is credible, as long as those opinions are rationally based upon first-hand perceptions. *See State v. Carter*, 10-0614, p. 12-13 (La. 1/24/12), 84 So.3d 499, 512-513; *State v. Hubbard*, 97-0916 (La. App. 5 Cir. 1/27/98), 708 So.2d 1099, 1106. Thus, the court held, Petitioner failed to prove any prejudice. The court also noted that the jury was fully instructed on the weight to give, or not give, witness testimony and that Det. Nicaud was not held out to be an expert but was simply providing testimony based on personal observations.

As to the claim that Ms. Mathern should not have been allowed to testify, the court found that the "many medical articles relating to psychology, child sexual abuse, sexual behavior in children and forensic examinations, as well as case law from other jurisdictions" was not "discovery of new facts or a new interpretation of constitutional law that would warrant the granting of a new trial." The court also pointed out that Petitioner had the ability to conduct a pretrial *Daubert* hearing but did not do so and that this claim was not raised on appeal. Furthermore, the claim

that his trial counsel were ineffective for failing to object to Ms. Mathern's testimony was conclusory, speculative, and insufficient to show that such objection would have been meritorious or changed the outcome of the trial. This claim was also denied.

As to the non-unanimous jury verdict issue, as mentioned above, the court held that the claim had been raised on appeal and the Court of Appeal had found no merit, so the claim was denied.

Petitioner applied to the First Circuit Court of Appeal for a supervisory writ but was denied without an opinion. *State v. Tam Le*, 2017-1354 (La. App. 1 Cir. 12/7/17), 2017 WL 6055438 (unpublished opinion). Resp. App. B. Petitioner applied to the Louisiana Supreme Court for a supervisory writ and was denied for a simple stated reason: "Relator fails to show he received ineffective assistance of counsel under the standard of *Strickland v. Washington*, 466 U.S. 668 (1984)." Resp. App. C.

## REASONS FOR DENYING THE WRIT[7]

### I. PETITIONER'S NON-UNANIMOUS JURY CLAIM WAS WAIVED AND IS TIME-BARRED.

This Court has "almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim [raised in the challenge] 'was either addressed by or properly presented to the state court that rendered the decision [it was] asked to review.'" *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (citing *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam); *Illinois v. Gates*, 462 U.S. 213, 218 (1983) (tracing this principle back to *Crowell v. Randell*, 35 U.S. 368 (1836)). The principle of comity stands behind this "properly-raised-federal-question" doctrine. *See Webb v. Webb*, 451 U.S. 493, 496-97 (1981) citing *Picard v. Connor*, 404 U.S. 270 (1971). The doctrine's function reflects

> an accommodation of our federal system designed to give the State the initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights. We have consistently adhered to this federal policy, for 'it would be unseemly in our dual system of government for a federal [] court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation.'

*Ibid.* (citations omitted).

Despite the changes to 28 U.S.C.A. § 1257 in 1970 and 1988, this Court has continued to recognize the importance of comity and the "properly-raised-federal-question" doctrine and, with "very rare exceptions" has "adhered to the rule in

[7] Petitioner gives two Rule 10 reasons for granting the writ: a state court has decided an important federal question in a way that conflicts with the decision of another state, an important federal question that has not been, but should be, settled by this Court, and has decided an important federal question in a way that conflicts with relevant decisions by this Court. However, other than his procedurally barred non-unanimity claim, he offers no evidence or argument on the other two.

reviewing state court judgments" that it "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision [it] has been asked to review." *Adams v. Robertson*, 520 U.S. at 86 (citations omitted).

While this Court has, admittedly, since the wording of the rule was changed in 1988, "expressed inconsistent views as to whether this rule is jurisdictional or prudential in cases arising from state courts," it has noted that, *in federal cases* the rule is prudential only. *Id.*

Furthermore, those exceptional cases where the Court has granted review involved situations where the issue could not have been raised below, *e.g. Wood v. Georgia*, 450 U.S. 261, 265 n. 5 (1981) (conflicted counsel would not have raised conflict), and where both parties consented to the waiver of the procedural default, as in Carlson.

The issue before this Court in *Ramos v. Louisiana* is not new - in fact, he challenges long-standing, settled precedent of this Court. Defendant did not raise a claim that non-unanimous juries violate the Fifth Amendment right to equal protection in any state court. He should not be able to do so now.

His Motion for New Trial also fails to sufficiently state an objection to the non-unanimous jury verdict based on equal protection. *See State v. Fasola*, 2004-902 (La. App. 5 Cir. 3/29/05), 901 So.2d 533 *writ denied* 2005-1069 (La. 12/9/05), 916 So.2d 1055

The party challenging the validity of a statute bears the burden of proving

it is unconstitutional. *State v. Fleury*, 2001–0871 (La. 10/16/01), 799 So.2d 468, 472. The unconstitutionality of a statute must be specially pleaded and the grounds for the claim particularized. *State v. Schoening*, 2000–0903, p. 3 (La. 10/17/00), 770 So.2d 762, 764. The Louisiana Supreme Court "has expressed the challenger's burden as a three-step analysis. First, a party must raise the unconstitutionality in the trial court; second, the unconstitutionality of a statute must be specially pleaded; and third, the grounds outlining the basis of unconstitutionality must be particularized." *State v. Hatton*, 2007-2377 (La. 7/1/08); 985 So.2d 709, 719. The purpose of this rule is "to afford interested parties sufficient time to brief and prepare arguments defending the constitutionality of the challenged statute." *Id.* citing *Schoening*, 770 So.2d at 764. Knowing with specificity what constitutional provisions are allegedly being violated allows the opposing parties the opportunity to fully brief and argue the facts and law surrounding the issue and "provides the trial court with thoughtful and complete arguments relating to the issue of constitutionality and furnishes reviewing courts with an adequate record upon which to consider the constitutionality of the statute." *Id.* This basic principle dictates that the party challenging the constitutionality of a statute must cite to the specific provisions of the constitution which prohibits the action. *Id.* at 720, citing *Fleury*, 799 So.2d at 472 ("It is elementary that he who urges the unconstitutionality of a law must especially plead its unconstitutionality and show specifically wherein it is unconstitutional....").

To the extent that Petitioner has attempted to make an equal protection

argument under Issue no.1, pp.7-10 of his petition, that argument was also not raised before any Louisiana court below and, thus, cannot be reviewed here. Moreover, none of the "evidence" Petitioner now attempts to offer in support of that argument was admitted in the trial court nor has a factual record been made that would substantiate an as-applied challenge. The State has had no opportunity to respond to such evidence or present its own.[8]

Finally, Petitioner failed to even preserve his non-unanimity claims by the lack of contemporaneous objection. Louisiana law requires that "[a]n irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence." La. Code Crim. Proc. art. 841. "It is sufficient that a party, *at the time the ruling or order of the court is made* or sought, makes known to the court the action which he desires the court to take, or of his objections to the action of the court, *and the grounds therefor*." *Id* (emphasis added).

Petitioner did not object to the jury instructions, which is procedurally required in order to raise an objection to the non-unanimous verdict on appeal. *See State v. Rubens*, 2010-1114 (La. App. 4 Cir. 11/30/11), 83 So.3d 30, *writ denied* 2012-0399 (La. 10/12/12), 99 So.3d 37, *cert. denied Rubens v. Louisiana*, 568 U.S. 1236 (2013). In *State v. King*, exactly the same thing happened regarding a different statute. As the court in *King* determined, "The defendant did not object to the jury instructions either prior to or during the jury deliberations." *State v. King,* 47,207

[8]This Court has "consistently condemned" a party's attempts to influence decisions by submitting "additional or different evidence that is not part of the certified record." *Ross v. Blake*, 136 S.Ct. 1850, 1862 (2016) (Thomas, J., concurring in part, dissenting in part), citing S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, SUPREME COURT PRACTICE §13.11(k), p. 743 (10th ed. 2013).

(La. App. 2 Cir. 6/27/12, 13), 94 So.3d 203, 212. *See also State v. Tillery,* 2014-429 (La. App. 5 Cir. 2014), 167 So.3d 15, *writ denied* 2015-0106 (La. 11/6/15), 180 So.3d 306; *State v. Bravo*, 2016-562 (La. App. 5 Cir. 4/12/17), 219 So.3d 1213. The purpose of this rule is to allow a trial court to consider the argument and make a correction at the time of the error. It also serves to create a full record on the issue raised for subsequent reviewing courts. Petitioner did not complain of the 10-2 verdict instruction prior to or at any time during deliberations nor before the jury was dismissed. He cannot resurrect it now.

## II. IF THIS COURT DOES NOT DENY REVIEW BASED ON THE PREVIOUSLY STATED DEFECTS IN THE PETITION, THEN THE COURT SHOULD HOLD DEFENDANT'S PETITION PENDING THIS COURT'S DECISION IN *RAMOS V. LOUISIANA*, NO. 18-5924.

Petitioner's conviction is a final judgment; all direct appeals were finished six years ago and he is now in collateral post-conviction proceedings. He should not be eligible for relief even if this Court concludes in *Ramos* that the unanimity rule applies to the states through the Fourteenth Amendment. Such a rule would not be a substantive rule of constitutional law that would require that it be applied in collateral proceedings. *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). Such a rule is a procedural rule because it "regulate[s] only the *manner of determining* the defendant's culpability." New rules of procedure generally do not apply retroactively. They do not produce a "class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004). Thus, Tam Le cannot benefit from a hold and this Court

should deny this petition.

For nearly fifty years, Louisiana Courts have faithfully relied upon *Apodaca* and *Johnson*. Ten years ago, the Louisiana Supreme Court wrote: "Although the *Apodaca* decision was, indeed, a plurality decision rather than a majority one, the Court has cited or discussed the opinion not less than sixteen times since its issuance. On each of these occasions, it is apparent that the Court considered that *Apodaca's* holding as to non-unanimous jury verdicts represents well-settled law." *State v. Bertrand*, 2008-2215 (La. 3/17/09), 6 So. 3d 738, 742. There have also been dozens of cases, some as recently as last year, where this Court has denied certiorari review on this issue further evidencing that non-unanimous jury verdicts do not violate the United State Constitution.

This Court granted the Defendant's petition for a writ of certiorari in *Ramos* March 18, 2019. If this Court declines to dismiss the petition, then it should be held pending the Court's decision in *Ramos* and then disposed of as appropriate in light of that decision.

## III. PETITIONER'S "EXPERT TESTIMONY" CLAIMS ARE NOT TIMELY.

The claim regarding Det. Nicaud was raised on appeal, fully considered, and denied by the First Circuit Court of Appeal in 2013. Resp. App. D. The Louisiana Supreme Court denied writs. The petitioner seek review of this decision from this Court. His claim is no longer timely for purposes of review by this Court and should be denied.

Although Petitioner may have obliquely complained about the admission of

expert testimony couched as an ineffective assistance of counsel claim, the post-conviction court did not consider nor rule on the merits of any claim directly attacking the court's discretionary admission of the testimony, finding it had already been decided on appeal. See Resp. App. D.

The claim that Ms. Mathern's testimony should be excluded because it was not reliable under the *Daubert* standard was found to be procedurally barred by the post-conviction court. As the post-conviction court noted, Petitioner has no excuse for not raising this claim at trial, on appeal to the First Circuit Court of Appeals, or to the Louisiana Supreme Court. "If the application alleges a claim of which the petitioner had knowledge and inexcusably failed to raise in the proceedings leading to conviction, the court *shall* deny relief." La. Code Crim. Proc. art. 930.4(B). Petitioner waived this claim in the Louisiana courts and should be denied relief in this Court as well.

Petitioner's second Question Presented, as stated, *only* asks this Court to determine if the admission of lay testimony regarding credibility issues violates his right to a fair and impartial trial. It says nothing about ineffective assistance of counsel, which was the issue raised before the post-conviction court. Although later in the petition, Defendant tacks on the phrase "Mr. Le was denied effective assistance of counsel for failure to object" at the end of "Issue No. 2," it's not stated in his Question Presented and he only sets out the jurisprudential rule *without discussing its application to his case*. He then spends the remaining thirteen pages of his petition arguing the merits of admission of the evidence, an issue decided

against him on appeal, not presented below, and not properly or timely presented to this Court. Although he claims he was injured, he has not set forth any argument as to how counsel's performance was deficient or how it could not have been a strategy decision, which is what the State argued at the post-conviction hearing, what the trial court determined, and what the Louisiana Supreme Court solely and explicitly referred to in its denial of certiorari.

## IV. THE LOUISIANA COURTS WERE CORRECT.

At best, Petitioner appears to be objecting to no more than misapplication of settled law to a narrow issue regarding which a trial court's ruling must be sustained unless clearly erroneous. *See Snyder v. Louisiana*, 552 U.S. 472, 477 (2008). As this Court has stated, these factual determinations lie peculiarly within a trial judge's province. *Id.* Petitioner does not suggest that a circuit split exists and does not give examples of factually similar cases decided differently than this one. That could be because there does not appear to be a single case – federal or state – where a court has held that the failure to object to lay opinion testimony deficient performance qualifying as ineffective assistance of counsel. This case invites this Court to engage in little more than error correction, which is not a compelling reason to exercise its power of discretionary review.

Louisiana Code of Evidence article 701 provides that if a witness is not testifying as an expert, his testimony in the form of inferences or opinions is limited to those opinions or inferences rationally based upon the perception of the witness and are helpful to a clear understanding of his testimony or the determination of a

fact in issue. *State v. Davis*, 2000-0275 (La.App. 4 Cir. 2/14/01, 8); 781 So.2d 633, 638–39, writ denied, 2001-1004 (La. 10/4/02); 826 So.2d 1113. Petitioner has not demonstrated any basis for this Court to conclude the trial court incorrectly applied this rule, much less that his counsel performed deficiently. And even if he could have shown deficiency, he has not demonstrated the conduct was prejudicial. So at every turn, his petition on this issue is deficient and should be denied.

Under *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant must show that his counsel's performance was deficient and that the deficient performance prejudiced him. Regarding counsel's performance, the defendant must show that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed by the Sixth Amendment. As to prejudice, the defendant must show that counsel's errors were so serious as to deprive the defendant of a fair trial, *i.e.,* a trial whose result is reliable. *Id*. 466 U.S. at 687. Both showings must be made before it can be found that the defendant's conviction resulted from a breakdown in the adversarial process that rendered the trial result unreliable. *Id*. A claim of ineffective assistance may be disposed of on the finding that either of the *Strickland* criterion has not been met. *State v. James*, 555 So.2d 519 (La.App. 4 Cir. 1989), *writ denied,* 559 So.2d 1374 (La. 1990). If the claim fails to establish either prong, the reviewing court need not address the other. *Murray v. Maggio*, 736 F.2d 279 (5 Cir. 1984).

If an error falls within the ambit of trial strategy, it does not establish ineffective assistance of counsel. *State v. Bienemy*, 483 So.2d 1105 (La.App. 4 Cir. 1986). Moreover, hindsight is not the proper perspective for judging the competence

of counsel's decisions because opinions may differ as to the advisability of a tactic; and, an attorney's level of representation may not be determined by whether a particular strategy is successful. *State v. Brooks*, 505 So.2d 714 (La. 1987), *cert. denied, Brooks v. Louisiana*, 484 U.S. 947 (1987); *State v. Davis*, 2000-0275 (La.App. 4 Cir. 2/14/01, 7); 781 So.2d 633, 638, *writ denied*, 2001-1004 (La. 10/4/02); 826 So.2d 1113.

Generally, a lay witness can only testify to the facts within his knowledge and not to impressions or opinions; however, a witness is permitted to draw reasonable inferences from his personal observations. *State v. Williams*, 353 So.2d 1299 (La. 1977), *cert. denied*, 437 U.S. 907 (1978); *State v. Davalie,* 313 So.2d 587 (La. 1975); *State v. Alexander*, 430 So.2d 621 (La. 1983).

Detective Nicaud testified as a lay witness about a matter within the proper scope of his personal knowledge related to the investigation; he was not qualified nor proffered as an expert. As such, he is allowed to testify regarding his assessment of the victim's identification of the Defendant as he perceived it from his own observations of the victim at the time of his investigation. Accordingly, this argument is without merit. *State v. Francis*, 99-208 (La. App. 3 Cir. 10/6/99); 748 So.2d 484, 490, *writ denied sub nom. State ex rel. Francis v. State*, 2000-0544 (La. 11/13/00); 773 So.2d 156; *State v. Harmon*, 2008-454 (La.App. 3 Cir. 11/5/00), 2008 WL 4801743 (not reported)(law enforcement opinion regarding resemblance of defendant and his cousin); *State v. Jefferson,* 04-1960 (La.App. 4 Cir. 12/21/05), 922 So.2d 577, *writ denied,* 06-940 (La. 10/27/06), 939 So.2d 1276 (law enforcement opinion that voice

sounded like defendant). In *State v. Davis*, 781 So.2d at 638–39, the court found that a lay person's identification of handwriting was proper and, therefore, counsel was not ineffective. Similar to the court in *Davis*, the post-conviction court also found that Detective Nicaud's testimony was admissible and, accordingly, defense counsel was not ineffective for failing to object to that testimony.

## CONCLUSION

The petition for a writ of certiorari should be denied because this Court lacks jurisdiction to consider it, it is in a poor procedural posture to be reviewed, it raises no conflict in any court, the Louisiana courts have not decided an important issue in a way that conflicts with relevant decisions of this Court, Petitioner is complaining of no more than misapplication of settled law to a narrow issue regarding which a trial court's ruling must be sustained unless clearly erroneous. and it is requesting no more than error correction.

Should this Court decline to dismiss it, the petition should be held pending this Court's decision in *Evangelisto Ramos v. Louisiana*, No. 18-5924 (April 3, 2019), and disposed of accordingly.

Respectfully submitted.

/s/ *Michelle W. Ghetti*

JEFF LANDRY
Attorney General
ELIZABETH BAKER MURRILL
Solicitor General
MICHELLE WARD GHETTI*
Deputy Solicitor General,
**Counsel of Record*

Louisiana Department of Justice
1885 N. 3rd St.
Baton Rouge, LA 70804
(225) 326-6028
ghettim@ag.louisiana.gov

WARREN MONTGOMERY
District Attorney
MATTHEW CAPLAN
Assistant District Attorney
St. Tammany Parish
701 North Columbia Street
Covington, LA
(985) 809-8398