ORIGINAL

No. 19-8062

IN THE

SUPREME COURT OF THE UNITED STATES

TROY ANTHONY LEBOUEF — PETITIONER

vs.

DARREL VANNOY, WARDEN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

TROY ANTHONY LEBOUEF
578743, OAK—1
LOUISIANA STATE PENITENTIARY
ANGOLA, LA 70712

QUESTION(S) PRESENTED

This Court has granted certiorari in *Ramos v. Louisiana*, 139 S.Ct. 1318 (2019) (No. 18-5924). This case also involves a non-unanimous verdict leading to the following question:

Was LeBouef entitled to a unanimous jury verdict under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution?

LIST OF PARTIES

[] All parties appear in the caption of the case on the cover page.

[X] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Troy Anthony LeBouef
Louisiana State Penitentiary
Angola, LA 70712

Joseph L. Waitz, Jr., District Attorney
Attention: ADA Ellen Daigle Doskey
P. O. Box 3600
Houma, LA 70361-3600

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is
[] reported at _____;
or,
[] has been designated for publication but is not yet reported;
or,
[x] unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is
[] reported at _____;
or,
[] has been designated for publication but is not yet reported;
or,
[x] unpublished.

[x] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix C to the petition and is
[] reported at 12-1667 (La. 2/22/13); 108 So.3d 762; or,
[] has been designated for publication but is not yet reported;
or,
[] unpublished.

The opinion of the Louisiana First Circuit Court of Appeal appears at Appendix C to the petition and is

[] reported at _____;

or,

[] has been designated for publication but is not yet reported;

or,

[x] is unpublished.

JURISDICTION

[x] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was February 10, 2020.

[x] No petition for rehearing was timely filed in my case.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[x] For cases from **state courts:**

The date on which the highest state court decided my case was September 28, 2018.

A copy of that decision appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United Sates 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 ... and to have the assistance of counsel for his defence.

The Fourteenth Amendment to the United Sates Constitution provides in pertinent part:

> 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.

Louisiana Constitution Article 1, § 17

> 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 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.

La. C. Cr. P. art. 782

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STATEMENT OF THE CASE

LeBouef was found guilty of aggravated rape of a child under thirteen and sentenced to life imprisonment by a non-unanimous jury verdict. He unsuccessfully appealed his conviction and sentence to Louisiana's First Circuit Court Appeal and the state supreme court.

LeBouef launched an unsuccessful collateral attack against his conviction and sentence in the state courts. Thereafter, he filed a timely petition for a writ of habeas corpus in the Eastern District Court of Louisiana. On May 30, 2019, the district court adopted the Magistrate's recommendation and denied LeBouef's petition for a writ of habeas corpus with prejudice. On February 10, 2020, the Fifth Circuit Court of Appeals denied LeBouef's request for a Certificate of Appealability. This instant petition for writ of certiorari timely follows.

REASONS FOR GRANTING AND STAYING THE WRIT

On March 18, 2019, the Court granted a petition for a writ of certiorari in *Evangelisto v. Louisiana*, 139 S.Ct. 1318 (2019) (No. 18-5924). For the reasons stated in that petition, as well as reasons stated in similar petitions filed over the last 45 years, the plurality opinion in *Apodaca v. Oregon*, 406 U.S. 404 (1972) deserves a re-examination and disavowal. Given the racial

origins of the non-unanimous jury provisions, full incorporation by the Fourteenth Amendment of the Sixth Amendment's guarantee of a unanimous jury is required. This Court should stay this petition pending it's decision in *Ramos* and then dispose of the petition as appropriate in light of that decision.

Under Rule 10, the Louisiana's courts and the United States Fifth Circuit Court of Appeals has denied relief in contrarily decided an important question of federal law that has been settled by this Court and has decided an important federal question in a way that conflicts with relevant decisions of this Court as set forth below:

1. **The trial court erred when it denied a defense challenge for cause after the prospective juror expressed a strong bias in favor of the prosecution.**

LeBouef has explained to the lower courts that his attorney used a peremptory challenge to exclude a biased juror after the trial court denied his challenge for cause. He also explained, because he had used all of his peremptory challenges, he could not peremptorily remove any other biased jurors from the panel.

Even the Fifth Circuit Court of Appeals had said the "criminal justice system rests firmly on the proposition that before a person's liberty can be

deprived, guilt must be found, beyond a reasonable doubt, by an impartial decision[]maker." *Virgil v. Dretke*, 446 F.3d 598, 605 (C.A.5) (Tex.) 2006). Accordingly, the Sixth Amendment guaranteed LeBouef the right to be tried by an impartial jury made up of "indifferent jurors." *Id.*, (internal citations omitted). The Fifth Circuit further observed that this "Supreme Court has unfailingly protected the jury room from juror bias in a variety of context ... [and] relevant here are the Supreme Court decisions concerning biased decision[]makers." *Id.*

As LeBouef apprised the lower courts, "The Sixth Amendment guarantees criminal defendants a verdict by an impartial jury, and the bias or prejudice of even a single juror is enough to violate that guarantee. Accordingly, the presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice." *U.S. v. Kechedzian*, 902 F.3d 1023, 1027 (C.A. 9 (Cal.) 2018) (internal citations and quotations omitted.

Prospective juror Tarr volunteered to the prosecutor that he would be biased against LeBouef for a number of significant reasons. Despite the best efforts of the prosecutor, Mr. Tarr remained unequivocally certain he would

not be unable to put aside his feelings and biases and rule only on the evidence:

MR. TARR: I'm sorry I don't—

MR. DAGATE: Yes sir.

MR. TARR: I don't think I qualify.

MR. DAGATE: And Mr. Rhodes? I'm sorry, Mr. Tarr.

MR. TARR: I think I would be biased towards the State's case. I have two daughters, one is six, and for his benefit I don't think I could—

MR. DAGATE: So you—

MR. TARR: necessarily be fair because obviously for you guys to bring it this far you believe that he is guilty. And I'm an advocate for children. You know, my wife works with youths in Thibodeaux. And honestly, I don't know if I can separate this on this particular instance.

MR. DAGATE: And I appreciate your candor and your honesty, but just so everyone else knows I appreciate you bringing that up and if I could just converse with you a little bit on this one. As a jury you do need—we all have different experiences we all have different opinions and beliefs, okay, maybe even biases outside of this courtroom, okay, but as a juror we have to set those issues, beliefs, biases aside, okay. And I know with human tendency its tough to do that sometimes and that's why I am getting into this part of the questioning about whether [not] you feel comfortable finding someone guilty if I prove them guilty knowing that your verdict will send them to jail for the rest of their life. So what you are telling me Mr.—

MR. TARR: Tarr.

MR. DAGATE: —Mr. Tarr is that because you have younger children and because your wife's involvement with children you will not be able to set that aside and listen only to the facts that is presented in this case?

MR. TARR: That is absolutely correct.

MR. DAGATE: Okay. You would not be able to set those things aside?

MR. TARR: No sir.

R. pp. 241-243.

The trial court tried to persuade Mr. Tarr that he, with two years of college, should be able to put his feelings aside:

THE COURT: All right. You indicated that you—you might have some difficulty setting aside the sympathy that you have for children in making a decision in this case. If you were selected as a juror in this case and after you heard all of the evidence you were not convinced beyond a reasonable doubt that the defendant was guilty, would you vote to find him guilty because of the sympathy you have for children?

MR. TARR: No.

THE COURT: Don't you think you are capable of separating the sympathy you have for children from your obligation to follow the law as I give it to you weigh the evidence and render a decision based on the evidence in his case. Don't you think you could do that?

MR. TARR: Well, that was something I was thinking about with respect to the law, you know, and the fairness to the system, you know, you almost to—but when it comes to children where they can't, you know,

protect themselves or do something like that, it just makes it really hard for me.

THE COURT: Well, you haven't heard any of the evidence in this case. You haven't seen any of the witnesses. You haven't heard anything that they have had to say. I am just concerned that frankly a man with two years of college would have some difficulty—and a man with children of his own would have some difficulty putting aside his personal feelings of sympathy for children when he has to carefully consider the testimony that those children might give in making a decision that could have such serious consequences in a case like this one. You don't think you could do that? And quite frankly, you impress me as one who could do it easily, but you seem to think you can't, and that's why I am questioning you.

MR. TARR: Well, you know, the way you are talking to me and the way you put it, yes, I could I guess.

THE COURT: Well, that is why I ask you instead of letting the attorneys ask you these questions sometimes.

R. pp. 259-260.

Not long thereafter, the court questioned another prospective juror and then turned to Mr. Tarr and asked him if he could fairly render a verdict based on the evidence. Mr. Tarr said he thought he could:

THE COURT: Do you think that you could weigh the evidence and render a decision based on that evidence without letting sympathy for either side or passion for either side or prejudice for either side if any of it exists from entering into that decision? Do you think you could do that?

MS. SEVIN: I don't know until I get to that point.

THE COURT: All right. How about you, Mr. Tarr, do you think you could do that?

MR. TARR: Yes, sir.

R. p. 262.

Defense counsel challenged Mr. Tarr for cause, arguing that Mr. Tarr and his wife were advocates for children and that Mr. Tarr has already said he could not be fair. The trial judge overruled the challenge:

> All right. Well, Mr. Tarr's final word on the subject was that he could make a decision weighing the evidence and he could put aside any personal feelings he might have insofar as sympathy for children to whatever extent that might play out in this case. I don't know, but I am satisfied he is an educated man with children of his own and he confirmed to me in the end that yes, he could follow the instructions so I am going to—I am going to deny that challenge for cause.

R. p. 264.

LeBouef's trial counsel immediately objected. To prove there has been error warranting a reversal of the conviction and sentence, the defendant need only show (1) the erroneous denial of a challenge for cause; and (2) the use of all his peremptory challenges. *State v. Taylor*, 1999-1311 (La. 1/17/14), 781 So.2d 1205, 1213; *State v. Cross*, 93-1189 (La. 6/30/95), 658 So.2d 683, 686; *State v. Maxie*, 93-2158, (La. 4/10/95), 653 So.2d 526, 534; *State v. Robertson* 630 So.2d 1278, 1280; *State v. Carmouche*, La. 2001-0405, (La. 5/14/02), 872 So.2d 1020, 1028; *Patton v Yount*, 467 U.S. 1025,

1036, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984); *Wainwright v. Witt*, 469 U.S. 412, 425, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). By the end of jury selection, counsel had used all of his peremptory challenges, including one for Mr. Tarr. R. pp. 266, 395.

Although a trial judge is vested with broad discretion in ruling on challenges for cause, a challenge for cause should be granted, even when a prospective juror declares his ability to remain impartial, if the prospective juror's response as a whole reveals facts from which bias, prejudice, or an inability to render judgment according to the law may be reasonably inferred. *State v. Thompson*, 489 So.2d 1364, 1370 (La. App. 1st Cir. 1986); *writ denied*, 494 So.2d 324 (La. 1986); *State v. Parfait*, 96-1814 (La. App. 1 Cir. 5/9/97); 693 So.2d 1232; *State v. Carmouche*, 872 at 1029; *Nerthery v. Collins*, 993 F.2d 1154, 1160 (5th Cir. 1993); *United States v. Dozier*, 672 F.2d 551, 547 (5th Cir. 1982); *U.S. v. Scott*, 159 F.3d 916, 925 (CA. 5 (Tex.) 1998). Plainly, a trial judge is required to consider more than a final yes answer to a final leading question by the trial judge on whether he thought he could do that. However, that is exactly what the trial judge did in this case. The court ignored everything Mr. Tarr had to say except for the final

yes and denied the challenge for cause based upon that final single yes answer to an equivocal question.

The practice of rehabilitating a prospective juror is supposed to be a process of explanation and enlightenment and not a form of verbal musical chairs where the questions stop when the prospective juror acquiesces or capitulates and responds to a question in the affirmative. The trial judge erred and abused his discretion by failing to consider Mr. Tarr's responses as a whole and for denying the challenge based entirely on a final one word answer to an equivocal question. Indeed, Mr. Tarr never said he was certain he could put his biases aside and rule only on the evidence. He simply said he thought he could.

2. LeBouef's trial counsel rendered ineffective assistance when he failed to object to hearsay testimony elicited by the prosecution that LeBouef allegedly had sex with a drunken woman while she was passed out.

The lower courts completely misconstrued LeBouef's claim about his trial counsel's deficient and prejudicial performance. The federal district court claimed that:

> LeBouef's counsel did not object to that line of questioning which tended to confirm LeBouef's defense that he did not rape M.V. or anyone else. The record reflects that the defense strategy incorporated Cheri's statement to bolster LeBouef's denial that anything happened with the children or the roommate. In addition, because the contents of Cheri's statement to Detective

> Breaux was brought into evidence by the defense, his counsel would have had no basis to object to the prosecutor's cross-examination based on the statement.

Appendix B, p. 28.

Contrary to the federal district court's contention, the prosecution's examination of Cheri LeBouef went far beyond LeBouef's "defense that he did not rape M.V. or anyone." See Appendix B, p. 28. The prosecutor elicited hearsay testimony to make the jury believe LeBouef had sex with an adult female while she was drunk and passed out. Again, LeBouef's trial counsel did not object to the inadmissible and damaging hearsay:

QUESTION:	Do you see here in that statement where Cheri says "and Troy split up about one month ago due to me catching him coming out of my roommate's bedroom when she was passed out drunk."
ANSWER:	Yes, sir.
QUESTION:	Did y'all discuss that incident further?
ANSWER:	As far as me and Cheri?
QUESTION:	Yeah. Did she indicate if she thought [LeBouef] was having sex with a passed out woman who was drunk?
ANSWER:	Yes, sir.

R. p. 470.

Moreover, as previously argued, LeBouef's trial counsel did not timely object to the prosecutor soliciting even more damaging hearsay:

QUESTION: Okay. Are you still dating this man today?

ANSWER: No.

QUESTION: When did y'all split up?

ANSWER: The beginning of this year, January—

QUESTION: Why did you split?

ANSWER: Well, we had went out for a night of partying. We came home with my roommate, which is a female. She was sick throwing up from being drunk. I put her to bed. We went to bed. About fifteen minutes later Troy gets out of the bed. So about forty-five minutes passed, he wasn't there, he didn't come back. So I got out of the bed went down stairs looking for him. I didn't see him downstairs. And as I am coming back up the stairs, which our stairs make like a u-turn—so as I'm coming up the first part I hear Stacy's door open and close and when I get to the second part I see Troy going around the corner. He'd just come out of her bedroom. I didn't tell him anything that night. The next morning I went and woke up Stacy and asked her if she remembered anything because I saw him coming out of her room and that's when she said yes, she remembers pushing him off of her, that he was trying to seduce her while she was asleep—well, passed out drunk.

QUESTION: All right. That's what told—

ANSWER: And that's when I asked him to leave the house.

QUESTION: That is what you told Detective Breaux in your report, in your statement?

ANSWER: Yes.

QUESTION: So this—this occurred with this other woman while you were asleep?

ANSWER: Well, he thought I was asleep.

QUESTION: He thought you were asleep?

ANSWER: Right.

QUESTION: So he thought you were sleeping and he went and prey on someone who—

DEFENSE: Objection, Your Honor. She doesn't know that—

THE COURT: Sustained.

R. pp. 597-598.

Again, the testimony elicited by the prosecution had already happened. It was after the prosecutor had asserted inadmissible hearsay testimony suggesting LeBouef had, at the very least, attempted to rape someone that trial counsel decided to lodge an objection with the court. This was too-little-too-late because the jury had already heard inaccurate and prejudicial hearsay testimony. LeBouef's trial counsel failed to even ask the court to instruct the jury to disregard any impermissible hearsay.

The lower courts believes counsel's *failure* was trial strategy and not deficient performance. Appendix B, p. 28. However, counsel's deficient performance cannot be masked as trial strategy. In fact, counsel's failure here should be construed as a concession of guilt if, indeed, he broached the subject of an uncharged allegation of rape. There is no legitimate defense strategy in permitting the prosecutor to infect the jury with references to another crime committed or alleged to have been committed by LeBouef as

to which evidence is not admissible, particularly where the crime is simple rape or attempted simple rape and LeBouef is on trial for aggravated rape of a minor female. Defense counsel was either asleep at the wheel or did not know references by the prosecutor to another crime committed, or alleged to have been committed, by LeBouef as to which evidence is not admissible entitled his client to a mistrial under *La. C. Cr. P. art.* 770(2); and, that such testimony by a witness entitled his client to an admonition to the jury or a mistrial.

As further argued by LeBouef in his original habeas petition, because his case was based solely on testimonial evidence, the jury was tasked with deciding which side was the most credible. For more than one reason, LeBouef did not receive a fair trial. No one wants to believe someone manipulated a child, or children, to lie on a grown man—like Mr. Tarr, for instance. The natural human tendency is to protect the youth and there exist a natural bias against a person defending against allegations of improper relations with a child—whether true or false. Even more so when there is no physical or scientific evidence to substantiate the allegations.

3. Article 1, § 17 of the Louisiana Constitution of 1974 and La. C. Cr. P. Art. 782(A); as applied to this case, violates LeBouef's equal protection and due process rights under the Sixth and Fourteenth Amendment to the United States Constitution.

The federal district court again misconstrued LeBouef's claim. In arguing his conviction and resultant life-sentence is unconstitutional because it violates due process and equal protection, LeBouef is arguing that a change in law is needed. Since the initial filing of this claim, as pointed out by the federal district court, that change has come; however, Louisiana does not allow the law to apply to any cases before January 1, 2019.

Louisiana is the only state in the Union that allows a person to be convicted and sentenced to life imprisonment without the possibility of parole on a less-than-unanimous verdict. Even worse, Legislators, in approving the change and allowing it to go to the voters, acknowledged the racial origin of the less-than-unanimous verdict system in Louisiana. LeBouef presented an equal protection claim that has found success in one Louisiana court because the State failed to refute the evidence presented in an evidentiary hearing. See *State v. Melvin Maxie*, No. 13-Cr-07255, Sabine Parish on July 9, 2018.

Additionally, under existing Louisiana law, the offense of aggravated or first degree rape is punishable by death. Although this Court declared *La. R.S.* 14:42(D)(2) unconstitutional in *Kennedy v. Louisiana*, the law is still on the books and LeBouef's constitutional protections cannot be overlooked. *See La. R.S.* 14:42(A)(4); cf. *La. R.S. Ann.* 14:42 (2015, No. 184,§ 1), the

word "aggravated" was substituted for the word "first degree"; *Kennedy v. Louisiana*, 554 U.S. 407, 421, 128 S.Ct. 2641, 2650-51, 171 L.Ed.2d 525 (2008); *La. R.S. Ann.* 14:42 (TEXT: VALIDITY).

Through many revisions of the statute, *La. R.S.* 14:42 began to allow the death penalty for the first degree rape of children under a certain age. See *La. R.S. Ann.* 14:42 (1995 Amendment; Acts 1997, No. 757; Acts 1997, No. 898; Acts 2003, No. 795, § 1). Although the 1995 Amendment properly gave juries authority to determine if a person convicted of first degree rape of a child should die if convicted of his or her crime; it also impermissibly gave district attorneys power to control the constitutional scheme if the State chose not to seek the death penalty. It may be considered mercy for a district attorney, or his representative, to not seek the death penalty; however, it may also be construed as a lessening of the State's burden in procuring a less-than-unanimous verdict where one is required by the constitution in charged capital offenses. In other words, neither the state or federal constitutions grant district attorneys the power to determine whether a charged offense is capital or not based on his or her decision to seek the death penalty. Whether an offense is a capital one is determined by the offense charged. The Louisiana Constitution does not make a distinction between charged capital offenses or cases that may

be capital. More importantly, neither the state or federal constitution empowers a prosecutor to render a capital case non-capital simply by saying the death penalty will not be sought.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Evangelisto Ramos v. Louisiana*, 139 S.Ct. 1318 (2019) and then be disposed of as appropriate in light of that decision.

Respectfully submitted,

TROY ANTHONY LEBOUEF

Date: March 13, 2020