No. 19-8711

In the Supreme Court of the United States

WILLIE DUNN,
Petitioner

v.

STATE OF LOUISIANA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA FIRST CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner Willie Dunn was convicted by a non-unanimous jury verdict, but his conviction and sentence became final in 2013. Years later—shortly after the Louisiana Supreme Court denied Dunn's petition for state post-conviction relief—this Court held in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), that a conviction in state or federal court is invalid unless the jury's verdict was unanimous. Dunn now petitions this Court for certiorari to review the Louisiana Supreme Court's denial of post-conviction relief. The questions presented are the following:

(1) Should the Court GVR this case merely to allow the state courts to consider whether to apply *Ramos* retroactively in state post-conviction cases, even though the Louisiana Supreme Court has repeatedly declined to consider that question?

(2) Can a petitioner in state post-conviction review retroactively benefit from *Ramos* as a matter of state law—even though the Louisiana Supreme Court has repeatedly declined every invitation to consider whether to apply *Ramos* retroactively?

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A. Factual Background

Petitioner Willie Dunn got into an argument with Petra Jones in the parking lot of a night club in Baton Rouge. *See* Pet. App. 2a–3a. Dunn's brother retrieved a gun from his truck—which Dunn grabbed and fired twice at Jones. A bullet lodged in Jones' brain, killing him. Dunn admitted to firing the shots but claimed that he acted in self-defense.

B. Procedural History

A grand jury indicted Dunn for second-degree murder[1] in early 2010, and he pleaded not guilty. He was tried by a twelve-person jury in mid-2011. Ten jury members found him guilty of the responsive verdict of manslaughter.[2] He was sentenced to twenty years' imprisonment.

On April 27, 2012, Dunn appealed his conviction to the Louisiana First Circuit Court of Appeals. That court upheld his conviction but, finding a sentencing error not relevant to this appeal, vacated the sentence and remanded for resentencing. *See* Pet. App 11a–12a. The trial court resentenced him to 20 years' imprisonment on July 8, 2013. The Louisiana Supreme Court denied review of both Dunn's conviction and sentence. Petr. App. 13a. Dunn did not seek review with this Court, so his conviction and sentence became final on November 8, 2013.

Dunn initiated state collateral review proceedings in Louisiana by filing his

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[1] *See* La. R.S. 14:30.1.

[2] *See* La. R.S. 14:31.

first application for post-conviction relief on November 9, 2015. The trial court denied the application, and it does not appear that he appealed this decision.

In January 2019, Dunn filed a second application for post-conviction relief, requesting retroactive application of Louisiana's new statutory and constitutional provisions requiring a unanimous jury verdict. The trial court denied the application without opinion on February 6, 2019, and Dunn sought discretionary review. The First Circuit denied review without opinion. Pet. App. 14a. Dunn sought review from the Louisiana Supreme Court, which denied his petition. Pet. App. 15a–16a. Chief Justice Johnson noted that she would grant the writ and remand with instructions to stay Dunn's application for post-conviction relief until this Court ruled in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020). No other justice on the lower court joined her opinion.

On April 20, 2020, this Court issued its decision in *Ramos*. Dunn filed a petition for a writ of certiorari with this Court on June 5, 2020.

SUMMARY OF ARGUMENT

In *Ramos v. Louisiana*, this Court held that a conviction—in state or federal court—based upon a non-unanimous verdict violates the Sixth and Fourteenth Amendments. But that holding cannot benefit Dunn here because his conviction and sentence became final in 2013—long before this Court issued its decision in *Ramos*. This case arises from a *state collateral* proceeding. As a general matter, under this Court's jurisprudence, new rules apply only to convictions that are not final. *See Griffith v. Kentucky*, 479 U.S. 314 (1987)

Dunn's petition asks for nothing other than a remand to allow the state courts to consider the issues of whether *Ramos* applies retroactively under state law and whether a non-unanimous jury verdict is error patent for the purposes of the Louisiana Code of Criminal Procedure. *See* Pet. at 10. But the Louisiana Supreme Court has declined to answer the question of whether *Ramos* is retroactive for the purposes of state law dozens of times. *See infra* n.4. And that court has already concluded that a non-unanimous jury verdict is error patent—but that is irrelevant because Dunn's conviction and sentence are final. *See State v. Brown*, 19-370 (La. App. 5 Cir. 1/15/20), 289 So. 3d 1179, 1188, *writ denied*, 2020-00276 (La. 6/22/20), 297 So. 3d 721. Thus, remand is futile.

Even if the Court construes Dunn's petition as a request to require Louisiana to retroactively apply *Ramos* as a matter of state law, the Court should deny certiorari. With only two narrow exceptions, new rules do not apply to cases that are final—like Dunn's—because of the retroactivity bar this Court erected in *Teague v. Lane*, 489 U.S. 288 (1989), and subsequent decisions. Because *Ramos* announced a new rule of criminal *procedure*, the *Ramos* rule would satisfy *Teague*'s second exception to the retroactivity bar only if *Ramos* announced a watershed rule of criminal procedure. Since adopting the *Teague* retroactivity framework, this Court has *never* found any new rule of criminal procedure to be watershed, despite considering the question numerous times.

To be sure, this Court has granted certiorari in *Edwards v. Louisiana* to answer

the question of "whether this Court's decision in *Ramos v. Louisiana*, 590 U. S. ___ (2020), applies retroactively to cases on federal collateral review." 140 S. Ct. 2737, 2738 (2020). But, importantly, even if this Court granted relief to the *federal* habeas petitioner in *Edwards*, and declared the *Ramos* rule retroactive, that still would not benefit Dunn. This is true because Dunn seeks *state* post-conviction relief here. Whether or not Dunn is entitled to state post-conviction relief is a question of state law.

Although this Court has held that its new *substantive* rules satisfying *Teague*'s first exception must be applied retroactively by the States, the same is not true for new, *procedural* rules satisfying *Teague*'s second exception. *Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016) ("This Court's precedents addressing the nature of substantive rules, their differences from procedural rules, and their history of retroactive application establish that the Constitution requires substantive rules to have retroactive effect regardless of when a conviction became final."). In *Montgomery v. Louisiana*, this Court expressly reserved the question of whether a new procedural rules must be applied retroactively by the States. *Id.* at 729 ("[T]he constitutional status of *Teague*'s exception for watershed rules of procedure need not be addressed here.").

The Court could not grant relief here unless it both declared the *Ramos* rule to be retroactive in *Edwards* and then took the extra step of requiring state courts to apply that rule in their post-conviction proceedings. Thus, there is no need to hold Dunn's case for this Court's decision in *Edwards*. And Dunn does not request that

relief.

For these reasons, the States respectfully requests that the Court deny certiorari.

ARGUMENT

I. DUNN ASKS THIS COURT FOR NOTHING MORE THAN A FUTILE REMAND TO THE STATE COURTS.

Dunn asks the Court to decide whether a non-unanimous jury verdict rule violates the Sixth and Fourteenth Amendments. But the Court has already decided that issue in *Ramos*. And, in any event, Dunn cannot benefit from *Ramos*' holding because his case is no longer on direct review. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). This action presents a *collateral* attack on Dunn's conviction.

Dunn never asks the Court to decide whether *Ramos* is retroactive for the purposes of state post-conviction review. On the contrary, he repeatedly and expressly makes clear that he would like this Court to remand his case to the Louisiana courts to decide the issue of retroactivity in the first instance.[3] But the Louisiana Supreme Court has had many, many opportunities to decide whether to apply *Ramos* retroactively as a matter of state law. And it has denied every request—at least forty-

[3] *See, e.g.*, Pet. at 9 ("All Petitioner asks is that the Louisiana Supreme Court first be permitted to consider the claim at issue in light of this Court's opinion in *Ramos v. Louisiana*."); *id.*. at 14 ("In this instance, before addressing the question of nonretroactivity of *Ramos v. Louisiana* in federal courts, or this Court, the State courts should be given an opportunity to adjudicate petitioners' claims in full."); *id.* at 16–17 ("[B]asic principles of federalism support the idea that the state courts should address the question of retroactivity first. And indeed, here, all that petitioner asks is that the Louisiana Courts be given an opportunity—and the responsibility—to address the validity of Mr. Dunn's post-conviction petition with the insight and elucidation provided by this Court's opinion."); *id.* at 17 ("Whether this is a claim that should be adjudicated under La. C.Cr.P. art. 930.3(1) or La. C.Cr.P. art. 930.8(A)(2) is a determination that should be made by the Louisiana courts.").

three denials.[4] Chief Justice Johnson pulled back the curtain in one of those cases and noted that "a majority of this court has voted to defer until the Supreme Court mandates that we act." *State v. Gipson*, 2019-01815, p. 1 (La. 6/3/20); 296 So.3d 1051. It would be futile for this Court to grant the writ, vacate Dunn's conviction, and remand *this* case to the state courts merely for them to deny relief again.

In the body of his petition, Dunn also asks the Court to remand to allow the state courts to determine whether a non-unanimous verdict "is error patent under Louisiana law." Pet. at 10. The Louisiana Code of Criminal Procedure allows an appellate court to correct a so-called "error patent" even if the error was not brought

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[4] *See, e.g.*, *State v. Gipson*, 2019-01815 (La. 6/3/20), 296 So.3d 1051 * (writ application currently pending in this Court, No. 20-251); *State v. Dotson*, 2019-01828 (La. 6/3/20), 296 So.3d 1059 * (writ application pending before this Court, No. 20-5728); *Silva v. Vannoy*, 2019-01861 (La. 6/3/20), 296 So.3d 1033*; *Lionel Jones v. State*, 2019-01900 (La. 6/3/20), 296 So. 3d 1060*; *State v. Rochon*, 2019-01678 (La. 6/3/20), 296 So.3d 1028*; *State v. Young*, 2019-01818 (La. 6/12/20), 2020 WL 3424876 (involved request for polling slips to file PCR); *State v. Brown*, 2020-00276 (La. 6/22/20), 297 So.3d 721*; *State v. McKnight*, 2020-00873 (La. 7/17/20), 299 So.3d 64; *Dennis v. Vannoy*, 2019-01794 (La. 7/24/20), 299 So.3d 54; *State v. Essex*, 2020-00009 (La. 8/14/20), 300 So.3d 843; *State v. Cook*, 2020-00001 (La. 8/14/20), 300 So.3d 838; *State v. Parish*, 2020-00072 (La. 8/14/20), 300 So.3d 861; *Joseph v. State*, 2019-01989 (La. 8/14/20), 300 So.3d 824; *State v. McGuire*, 2019-01632 (8/14/20), 300 So.3d 830; *State v. Johnson*, 2019-02075 (La. 8/14/20), 300 So.3d 858*; *State v. Spencer*, 2019-01318 (La. 8/14/20), 300 So.3d 855*; *Lawson v. State*, 2019-02074 (La. 8/14/20), 300 So.3d 858*; *State v. Triplett*, 2019-01718 (La. 8/14/20), 300 So.3d 827*; *Vincent Smith v. Louisiana*, 2019-02080 (La. 8/14/20), 300 So.3d 859; *State v. Rashan Williams*, 2020-00069 (La. 8/14/20), 300 So.3d 860*; *State v. Withers*, 2020-00258 (La. 8/14/20), 300 So.3d 860*; *State v. Wardlaw*, 2020-00004 (La. 8/14/20), 300 So.3d 859*; *State v. Mason*, 2019-01821 (La. 8/14/20), 2020 WL 4726952; *State v. Mims*, 2019-2088 (La. 8/14/20), 300 So.3d 867; *State v. Sonnier*, 2019-02066 (La. 8/14/20), 300 So.3d 857; *State v. Pittman*, 2019-01354 (La. 8/14/20), 300 So.3d 856; *State v. Carter*, 2019-02053 (La. 8/14/20), 300 So.3d 856*; *State v. Williams*, 2019-02010 (La. 8/14/20), 300 So.3d 856*; *Hernandez v. Vannoy*, 2019-02034 (La. 8/14/20), 300 So.3d 857*; *State v. Eaglin*, 2019-01952 (La. 8/14/20), 300 So.3d 840*; *State v. Kidd*, 2020-00055 (La. 8/14/20), 300 So.3d 828*; *State v. Joseph*, 2020-01989 (La. 8/14/20), 300 So.3d 824; *State v. Barrett*, 2019-01718 (La. 8/14/20), 300 So.3d 827*; *State v. Harris*, 2020-00291 (La. 9/8/20), 301 So.3d 13; *State v. Skipper*, 2020-00280 (La. 9/8/20), 301 So.3d 16; *State v. Sims,* 2020-00298 (La. 9/8/20), 301 So.3d 17*; *State v. Jackson*, 2020-00037 (La. 9/8/20), 301 So.3d 33*; *State v. Hawthorne*, 2020-00586 (La. 9/29/20), 2020 WL 5793105; *State v. Alcus Smith*, 2020-00621 (La. 9/29/20), 2020 WL 5793717; *State v. Johnson*, 2020-00052 (La. 9/29/20), 2020 WL 5793805*; *Givens v. State Through Attorney General's Office*, 2020-00268 (La. 10/6/20), 2020 WL 5904873*; *Cassard v. Vannoy*, 2020-00020 (La. 10/6/20), 2020 WL 5905099; *State v. Brooks*, 2020-00378 (La. 10/14/20), 2020 WL 6059695; *State v. Moran*, 2020-00623 (La. App. 10/14/20), 2020 WL 6059685.

to the attention of the district court under limited conditions: The error must be "discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence." La. C.Cr. Pro. art. 920. Error patent review under Louisiana law is similar—but not identical—to plain error review under Federal Rule of Criminal Procedure 52. *See State v. Thomas*, 427 So. 2d 428, 433 (La. 1982) (identifying differences between plain error and patent error).

Dunn's request to remand his case to the state courts for error patent review is meritless for a couple of reasons. First, the Louisiana Supreme Court has already determined that a non-unanimous jury is error patent under state law. *See State v. Boyd*, 2019-00953 (La. 6/3/20), 296 So. 3d 1024, 1025 ("If the non-unanimous jury claim was not preserved for review in the trial court or was abandoned during any stage of the proceedings, the court of appeal should nonetheless consider the issue as part of its error patent review." (citing La. C.Cr.P. art. 920(2))). And, second, the determination that a non-unanimous jury verdict is patent error is completely irrelevant to Dunn because his case is no longer on direct review. *See Brown*, 289 So. 3d at 1188. Thus, remanding for this reason would be futile.

In sum, on the face of his petition, it appears that Dunn asks for nothing more than a remand to allow the state courts to consider the issues of retroactivity and patent error. *See* Pet. at 10. The state courts have answered these questions (or at least declined to answer them). Dunn does not ask the Court to hold his case pending

a decision in *Edwards*.[5] Thus, it does not appear that Dunn asks this Court to declare *Ramos* retroactive as a matter of Louisiana law. The Court can deny the petition for these reasons alone.

II. TO THE EXTENT DUNN ASKS THIS COURT TO DECLARE *RAMOS* RETROACTIVE AS A MATTER OF STATE LAW, THIS COURT SHOULD DECLINE HIS INVITATION.

Even if the Court is inclined to construe his petition as a request for the Court to declare *Ramos* retroactive as a matter of Louisiana law, however, it should deny certiorari. That question implicates only state law. And even if the Court grants relief to the petitioner in *Edwards v. Louisiana* by declaring the *Ramos* rule to be retroactive for the purposes of *federal* habeas review, that action would not affect Dunn's case because Dunn's petition arises from *state* post-conviction review.

A. Whether *Ramos* applies retroactively on state post-conviction review is a state law issue that does not warrant review from this Court.

As a general rule, new rules of criminal procedure announced by this Court apply only to cases pending on direct review. *See Griffith*, 479 U.S. at 328. Direct review ends when a criminal defendant's conviction and sentence become final.

Here, there is no dispute that Dunn's conviction and sentence became final in 2013, many years before this Court handed down its decision in *Ramos*.

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[5] See Pet. at 9 ("This Court has granted certiorari in *Edwards v. Vannoy*, 19-5807. . . . This case presents a distinct and more narrow question, with regard to how the Louisiana courts address the validity of a non-unanimous conviction in state post-conviction and for purposes of La. C.Cr.P. art. 930.3. All Petitioner asks is that the Louisiana Supreme Court first be permitted to consider the claim at issue in light of this Court's opinion in Ramos v. Louisiana."); *id.* at 17 ("And regardless of this Court's opinion in *Edwards v. Vannoy*, the Louisiana courts should be given the opportunity to determine the scope of the application of *Ramos v. Louisiana* in post-conviction.").

If a petitioner seeks to collaterally attack his conviction on *federal* habeas review after his conviction becomes final, he generally cannot benefit from a new rule announced by this Court. In *Teague* and subsequent cases, this Court erected a retroactivity bar—which prevents new rules from applying retroactively on federal habeas review unless the new rule falls under one of two very narrow exceptions. *Teague*, 489 U.S. at 310 ("[U]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable [in federal habeas proceedings] to those cases which have become final before the new rules are announced." (O'Connor, J., plurality op.)).

Under *Teague*'s first exception, new *substantive* rules generally apply retroactively. *See Schriro v. Summerlin*, 542 U.S. at 348, 351–52 (2004). These are "rules forbidding criminal punishment of certain primary conduct" and "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Montgomery*, 136 S. Ct. at 728. They are retroactive "because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Summerlin*, 542 U.S. at 351–52.

Under *Teague*'s second exception, an "extremely narrow" class of new procedural rules may apply retroactively. *Id.* at 352. Procedural rules differ fundamentally from substantive rules because "[t]hey 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." *Id.* at 352. "Even where procedural error has infected a trial, the resulting conviction or sentence may still be accurate; and, by extension, the defendant's continued confinement may still be lawful." *Montgomery*, 136 S. Ct. at 730. Because new procedural rules have a "more speculative connection to innocence" than substantive rules, this Court has sharply curtailed *Teague*'s second exception. *Summerlin*, 542 U.S. at 352. It should "come as no surprise" that this Court has never identified a new rule satisfying *Teague*'s second exception, despite considering the question numerous times since adopting the *Teague* framework. *Beard v. Banks*, 542 U.S. 406, 417 (2004).

Importantly, *Teague*'s retroactivity bar is applicable only in *federal* habeas proceedings. *See Danforth v. Minnesota*, 552 U.S. 264, 281–82 (2008) (discussing the understanding that "the *Teague* rule [w]as binding only [on] federal habeas courts, not state courts."). Under *Danforth v. Minnesota*, state courts are free to apply a new rule retroactively even if this Court has decided against doing so for the purposes of federal habeas review. And so *Danforth* unquestionably stands for the proposition that a state court's decision about whether to retroactively apply a new rule—at least where this Court has not retroactively applied the rule—is a matter of *state* law. *Id.* at 289 ("States that give broader retroactive effect to this Court's new rules of criminal procedure do not do so by misconstruing the federal *Teague* standard. Rather, they have developed state law to govern retroactivity in state postconviction proceedings.").

In 1992, Louisiana reconsidered its retroactivity rules in light of *Teague*. *See*

State ex rel. Taylor v. Whitley, 606 So.2d 1292 (La. 1992). While observing that it was "not bound to adopt the *Teague* standards," it chose to employ the *Teague* framework "for all cases on collateral review in [its] state courts." *Id.* at 1297.

Since this Court handed down its decision in *Ramos*, as discussed above, the Louisiana Supreme Court has had numerous opportunities to decide whether to apply the *Ramos* rule retroactively for the purposes of state collateral review. It has declined every opportunity. *See supra* n.4.

Because the decision of whether to retroactively apply a new rule for the purposes of state collateral review is a question of state law—and because the Louisiana Supreme Court has declined numerous opportunities to review that question—this petition for certiorari does not warrant this Court's review. After all, this Court has explained on numerous occasions that it does not review state court decisions that rest on an adequate state law ground. *See, e.g.*, *Wilson v. Loew's Inc.*, 355 U.S. 597, 598 (1958).

B. This Court has reserved the question of whether state courts must apply new watershed procedural rules retroactively on state collateral review.

There are some limits on a State's authority to decide whether new rules should apply retroactively. Although States are free to retroactively apply new rules even where this Court has declined to make those rules retroactive, States are not always free to disregard a holding from this Court declaring that a new rule applies retroactively.

For example, in *Montgomery v. Louisiana*, this Court held that new *substantive*

rules must be applied retroactively in state collateral proceedings—regardless of when the conviction became final. 136 S. Ct. at 729. But the Court expressly limited that holding to new *substantive* rules. The Court reserved the question of whether States could decline to apply a new *procedural* rule retroactively even if this Court found it satisfied *Teague*'s second exception.

This Court has not decided whether the new *Ramos* unanimity rule should apply retroactively on federal habeas review, but it has granted certiorari to consider that question in *Edwards v. Louisiana*. *See* 140 S. Ct. at 2738. Even if the Court decides that the *Ramos* rule satisfies *Teague*'s narrow second exception for new procedural rules in *Edwards*, that decision could not benefit Dunn in this proceeding. The Court would still need to take the extra step of extending *Montgomery*'s holding to require state courts to apply new, watershed, procedural rules in post-conviction proceedings.

The Court should not take that step, even if it concludes that the *Ramos* rule is retroactive. As described above, there are important differences between new substantive and procedural rules. The most important difference, of course, is that new procedural rules have a "more speculative connection to innocence" than substantive rules. *Summerlin*, 542 U.S. at 352. As this Court has explained, substantive rules are retroactive "because they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him." *Id.* at 351–52. But new procedural rules affect "only the manner of determining the defendant's culpability."

Ramos, 140 S. Ct. at 1419 (Kavanaugh, J., concurring) (internal quotation marks omitted).

The important differences between substantive and procedural rules have led this Court to treat those rules differently for purposes of retroactivity. The logic of that distinction applies with equal force here. Although state courts are obliged to retroactively apply new substantive rules on post-conviction review, they should be free to decide whether to retroactively apply new procedural rules that this Court identifies as satisfying *Teague*'s second exception (assuming it ever identifies a new watershed procedural rule).

For these reasons, even if the Court declares the *Ramos* rule to be retroactive in *Edwards*, Dunn cannot automatically benefit from that holding because his case arises from *state* post-conviction proceedings. The Court should deny certiorari.

CONCLUSION

The Court should affirm the judgment below.

Respectfully submitted,

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