No. 20-____

In The

Supreme Court of the United States

WILLIE GIPSON,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Louisiana

PETITION FOR A WRIT OF CERTIORARI

Jeffrey L. Fisher
O'MELVENY & MYERS LLP
2765 Sand Hill Road
Menlo Park, CA 94025

Jamila Johnson
G. Ben Cohen
THE PROMISE OF JUSTICE INITIATIVE
1024 Elysian Fields Ave.
New Orleans, LA 70116

Yaira Dubin
Counsel of Record
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036
(212) 728-5946
ydubin@omm.com

Meaghan VerGow
Kendall Turner
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington DC 20006

QUESTION PRESENTED

Whether this Court's decision in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), applies to cases on state collateral review, where the State follows the retroactivity framework established in *Teague v. Lane*, 489 U.S. 288 (1989).

RELATED PROCEEDINGS

State v. Gipson, 747 So. 2d 187 (La. Ct. App., 4th Cir. 1999);

State v. Gipson, 775 So. 2d 1076 (La. 2000);

State ex rel. Gipson v. State, 857 So. 2d 509 (La. 2003);

State ex rel. Gipson v. State, 56 So. 3d 989 (La. 2011);

State ex rel. Gipson v. State, 178 So. 3d 140 (La. 2015); and

State v. Gipson, 296 So. 3d 1051 (La. 2020).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Willie Gipson respectfully petitions for a writ of certiorari to review the judgment of the Louisiana Supreme Court.

OPINIONS BELOW

The Louisiana Supreme Court's decision denying petitioner's application for a writ of certiorari is published at 296 So. 3d 1051 (La. 2020), and reprinted in the Appendix to the Petition ("Pet. App.") at 1a. The decision of the court of appeals is unpublished but reprinted at Pet. App. 14a. The decision of the trial court is unpublished but reprinted at Pet. App. 16a.

JURISDICTIONAL STATEMENT

The Louisiana Supreme Court denied discretionary review of petitioner's appeal on June 3, 2020. Pet. App. 1a. On March 19, 2020, this Court issued an order automatically extending the time to file any petition for a writ of certiorari to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. This petition is accordingly due on November 2, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

The Fourteenth Amendment to the United States Constitution provides, in relevant 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." U.S. Const. amend. XIV, § 1.

Louisiana Code of Criminal Procedure article 930.3 provides in pertinent part: "If the petitioner is in custody after sentence for conviction for an offense, relief shall be granted only on the following grounds: (1) The conviction was obtained in violation of the constitution of the United States or the state of Louisiana."

INTRODUCTION

When petitioner was tried for a murder that occurred when he was 17 years old, two jurors voted to acquit. Had petitioner been tried in federal court or any of 48 States, that 10-2 verdict would not have sufficed to convict him. But Louisiana allowed non-unanimous jury verdicts at the time, making the dissenting jurors' votes meaningless. Petitioner was convicted and sentenced to life in prison.

This Court recently held in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), that the Sixth and Fourteenth Amendments prohibit criminal convictions by non-unanimous jury verdicts. But the Court left open the question whether *Ramos* applies retroactively to cases on collateral review. Shortly thereafter, the Court granted certiorari in *Edwards v. Vannoy*, No. 19-5807, to decide whether *Ramos* applies to cases on *federal* collateral review.

This case presents the question whether *Ramos* applies to cases on *state* collateral review, where the State follows the retroactivity framework established in *Teague v. Lane*, 489 U.S. 288 (1989).[1] Insofar as the Court decides *Edwards* on the basis of whether *Ramos* is retroactive under the *Teague* framework, this case should be held for that one and disposed of accordingly. But if, for whatever reason, the Court does not reach that question in *Edwards*, the Court should grant plenary review in this case and hold that *Ramos* is retroactive under the *Teague* framework.

Under *Teague*, constitutional rules of criminal procedure that are not "new" apply retroactively. *See, e.g.*, *Saffle v. Parks*, 494 U.S. 484, 487–88 (1990). When a constitutional decision is "grounded upon fundamental principles" that have been consistent "year to year," *Desist v. United States*, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting), the state interests protected by the general prohibition against retroactivity must yield, *Teague*, 489 U.S. at 309. *Ramos*'s holding that the Sixth Amendment does not permit non-unanimous state jury verdicts is such a rule. It did not "break[] new ground," *Chaidez v. United States*, 568 U.S. 342, 347 (2013) (internal quotation marks omitted), but rather applied the original understanding of the Sixth Amendment to the States based on longstanding incorporation doctrine, *see Ramos*, 140 S. Ct. at 1395–97.

Even if *Ramos*'s rule were deemed "new," it would apply retroactively because it is a watershed rule—

[1] Unless otherwise noted, citations to *Teague* in this petition are citations to *Teague*'s plurality opinion.

i.e., a rule that is "central to an accurate determination of innocence or guilt" and an "absolute prerequisite to fundamental fairness." *Teague*, 489 U.S. at 313–14. Because jury unanimity implicates the fundamental fairness and accuracy of criminal proceedings, a conviction secured with a fractured jury is defective even if the case is on collateral review.

STATEMENT OF THE CASE

A. Initial Proceedings

1. In July 1996, the State of Louisiana charged petitioner Willie Gipson, then 17 years old, with the second-degree murder of Roy Simon. Pet. App. 11a. The victim had sustained three gunshot wounds, including a fatal wound to his abdomen. *Id.* at 19a.

On the evening of the shooting, Marion Mosley, a next-door neighbor, came down the steps of the apartment complex at the same time as the victim. Pet. App. 19a. The victim then walked toward his car and Ms. Mosley headed to her sister-in-law's apartment down the block. *Id.*

As Ms. Mosley was talking to neighbors outside of her sister-in-law's apartment, she heard shooting and dove into the hallway. Pet. App. 19a. Although not certain, Ms. Mosley believed she saw "a bike" outside. *Id.* "It was too dark to determine if a man or a woman was on the bicycle." *Id.* Ms. Mosley heard the victim calling for his wife, and she ran over to him. *Id.* at 19a–20a. Ms. Mosley stayed with the victim and continued to call for his wife. *Id.* at 20a. Ms. Mosley testified at trial that she did not see petitioner that night. *Id.*

The victim's wife, Sabrina Simon, testified that she witnessed the shooting from her second-floor kitchen window. From there, she said "she could see her husband working on the car." Pet. App. 21a. As she watched, she said she saw someone "whom she had never seen before 'roll up' on a bicycle and shoot her husband." *Id.* According to Mrs. Simon, the shooter "did not stop," but she "could see a gun in" his hand. *Id.* She called 911 from the phone in the kitchen, then gathered her children and took them to the apartment balcony so they would not see their father. *Id.* After several neighbors pounded on her door, however, she gave her children to them and then "went downstairs and stayed with her husband until the ambulance" arrived. *Id.*

The police subsequently received a phone call telling them to go to 2538 Mazant Street to look for a bicycle and a subject armed with a handgun. Pet. App. 18a. The apartment resident gave her consent to search. *Id.* Inside, the police observed a bicycle, which they seized as evidence and introduced at trial—though the apartment resident stated she knew nothing about the bike or to whom it belonged. *Id.* at 18a–19a. Petitioner did not live at the Mazant Street apartment, and an examination of the bicycle did not reveal any identifiable fingerprints. *Id.* at 19a–20a.

A week after the murder, Mrs. Simon told the police "[i]t would be kind of like hard" to identify the shooter and "I really didn't look, you know, really see him that well." Pet. App. 22a. Yet despite the distance and the darkness, Mrs. Simon identified petitioner as the perpetrator from a photographic line-up six weeks after the offense. *Id.* at 20a. The prosecution's case at

trial hinged on this single eyewitness's identification from a photographic lineup.

Petitioner was convicted by a non-unanimous verdict. Two jurors harbored enough doubt about petitioner's guilt to enter a vote of "not guilty." Pet. App. 6a, 11a. On the basis of that 10-2 verdict, petitioner was sentenced to life without the possibility of probation, parole, or suspension of his sentence. Pet. App. 18a.[2]

2. The Louisiana Court of Appeal relied on both witnesses' testimony that the perpetrator was on a bicycle, albeit a bicycle with no connection to petitioner, in affirming the verdict: "[A]lthough there was no evidence to link the defendant to the crime except for Mrs. Simon's identification, Ms. Mosley was able to corroborate Mrs. Simon's testimony that the perpetrator was riding a bicycle." Pet. App. 25a.

3. Petitioner's conviction became final on December 8, 2000. Pet. App. 11a–12a.

B. This Court Holds That Non-Unanimous Jury Verdicts Are Unconstitutional.

On March 18, 2019, this Court granted certiorari to address whether the Sixth and Fourteenth Amendments require a unanimous jury verdict to

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[2] Petitioner was later resentenced to life with the possibility of parole after this Court held that mandatory sentences of life without the possibility of parole are unconstitutional for juvenile offenders, *Miller v. Alabama*, 567 U.S. 460 (2012), and deemed that decision retroactively applicable, *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). *See Gipson v. State*, 178 So. 3d 140, 141 (La. 2015).

convict a defendant of a serious offense. *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).

Ramos asked this Court to reconsider *Apodaca v. Oregon*, 406 U.S. 404 (1972), and its companion case, *Johnson v. Louisiana*, 406 U.S. 356 (1972). In those deeply divided opinions, five Justices held that the Sixth Amendment requires unanimous jury verdicts. *See Johnson*, 406 U.S. at 371 (Powell, J., concurring in the judgment in *Apodaca*); *Apodaca*, 406 U.S. at 414 (Stewart, J., joined by Brennan & Marshall, JJ., dissenting); *Johnson*, 406 U.S. at 381–83 (Douglas, J., dissenting in *Apodaca*). Four of those five Justices also concluded that the incorporation doctrine requires States to abide by the Sixth Amendment's unanimity requirement. *Apodaca*, 406 U.S. at 414–15 (Stewart, J., dissenting); *Johnson*, 406 U.S. at 380 (Douglas, J., dissenting in *Apodaca*). But the fifth, Justice Powell, rejected the notion that the incorporation doctrine required unanimous state jury verdicts. *Johnson*, 406 U.S. at 369–71 (Powell, J., concurring in the judgment in *Apodaca*). Justice Powell endorsed "'dual-track' incorporation—the idea that a single right can mean two different things depending on whether it is being invoked against the federal or a state government." *Ramos*, 140 S. Ct. at 1398. Although this Court had repeatedly rejected, that proposition, and rejects it today, *id.* at 1398–99, Justice Powell's solo position in *Apodaca* and *Johnson* carried the day, allowing the practice of non-unanimous state jury verdicts to continue.

On April 20, 2020, this Court held in *Ramos* that the Sixth and Fourteenth Amendments prohibit state criminal convictions by non-unanimous jury verdicts.

Ramos, 140 S. Ct. at 1408. Writing for the majority, Justice Gorsuch acknowledged that "*Apodaca* was gravely mistaken." *Ramos*, 140 S. Ct. at 1405. As the Court explained, "the common law, state practices in the founding era, [and] opinions and treatises written soon afterward" all show that the Sixth Amendment requires that "[a] jury must reach a unanimous verdict in order to convict." *Id.* at 1395. The Court also confirmed that the Sixth Amendment guarantee applies equally "against the States" as "against the federal government." *Id.* at 1397. The Court accordingly reversed Mr. Ramos's conviction, explaining that "[n]ot a single Member of this Court [wa]s prepared to say Louisiana secured his conviction constitutionally under the Sixth Amendment." *Id.* at 1408.

C. Louisiana Continues To Deny Petitioner Relief.

In 2019, petitioner sought state post-conviction relief, arguing that his conviction is invalid because it rests on a non-unanimous jury verdict. Before *Ramos* was decided, the trial court denied the petition, Pet. App. 16a, and the Louisiana Court of Appeal denied review, *id.* at 14a–15a. Judge Bartholomew-Woods concurred, noting this Court's grant of certiorari in *Ramos*. Pet. App. 15a. Until that decision is issued, she explained, the Louisiana Court of Appeal "is without the legal authority to revisit the [unanimity] issue as it relates to the retroactive application of the law to defendants" like petitioner. *Id.*

After *Ramos* was decided, the Louisiana Supreme Court remanded nearly forty non-final cases to the courts of appeal for further proceedings. But that

court, which has adopted *Teague*'s retroactivity test for cases on state collateral review, *State ex rel. Taylor v. Whitley*, 606 So. 2d 1292, 1296 (La. 1992), denied at least six applications for collateral relief, including Mr. Gipson's.

Three Justices dissented from the denial of review in petitioner's case. In her dissent, Chief Justice Johnson urged Louisiana courts to apply *Ramos* retroactively, rather than "defer[ring] until the Supreme Court mandates that we act." Pet. App. 2a. She urged the court to correct the "historic injustices done to Louisiana's African American citizens by the use of the non-unanimous jury rule." *Id.* The Chief Justice further argued that Louisiana should abandon *Teague*'s retroactivity test and provide citizens with "more than the minimum mandated by the Supreme Court," as allowed by *Danforth v. Minnesota*, 552 U.S. 264 (2008). Pet. App. 2a. The Chief Justice also explained that, regardless, *Ramos* is retroactive under *Teague* because it "plainly announced a watershed rule"; "the Sixth Amendment right to a jury trial is 'fundamental to the American scheme of justice.'" *Id.* at 3a.

REASONS FOR GRANTING THE WRIT

I. This Court Should Resolve Whether *Ramos* Applies On State Collateral Review.

Petitioner, like others in Louisiana and Oregon, seeks state collateral relief based on this Court's holding in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), that the Constitution prohibits States from procuring criminal convictions by non-unanimous jury verdicts. Under Louisiana law, petitioner is entitled to such

relief if he can satisfy the federal retroactivity framework established in *Teague v. Lane*, 489 U.S. 288 (1989). *See State ex rel. Taylor v. Whitley*, 606 So. 2d 1292, 1296 (La. 1992); *cf. Danforth v. Minnesota*, 552 U.S. 264, 282 (2008) (States may elect to follow *Teague*).

This Court, meanwhile, has granted certiorari to determine whether *Ramos* "applies retroactively to cases on *federal* collateral review." *Edwards v. Vannoy*, No. 19-5807, Order (May 4, 2020) (emphasis added). The petitioner in *Edwards* argues that the retroactivity framework adopted in *Teague* governs his case and that he satisfies that framework. Insofar as the Court decides *Edwards* on the basis of whether *Ramos* is retroactive under the *Teague* framework, this case should be held for that one and resolved accordingly.

But if, for whatever reason, the Court's ultimate disposition of *Edwards* does not resolve whether *Ramos* is retroactive under the *Teague* framework, the Court should grant certiorari here to do so. Approximately 1,601 individuals remain in prison in Louisiana alone because of convictions based on non-unanimous state jury verdicts. *See* Amicus Br. of the Promise of Justice Initiative et al. at 11, *Edwards v. Vannoy*, No. 19-5807. In Oregon, the Federal Public Defender's office has filed new successive state post-conviction petitions in 52 cases implicating *Ramos*. *See* Amicus Br. of Fed. Public Defender for the District of Oregon et al. at 6, *Edwards v. Vannoy*, No. 19-5807.

Ramos itself confirms that these convictions are untrustworthy because of the method by which they

were obtained. And as the Court has already recognized in granting certiorari in *Edwards*, this issue is unquestionably important—for the affected individuals but also for a society that champions the integrity of its criminal process.[3]

II. The Decision Below Is Incorrect.

In *Ramos*, this Court confirmed the original understanding of the Sixth Amendment and settled principles of incorporation: State convictions based on non-unanimous jury verdicts are invalid. 140 S. Ct. at 1395–97. Because *Ramos* reaffirmed "fundamental principles" that have held true from "year to year." *Desist v. United States*, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting), it did not establish a new rule. And because *Ramos*'s rule is not new, but rather is "merely an application of the principle[s] that governed" prior decisions of this Court, it applies to cases on collateral review under the retroactivity framework that this Court established in *Teague*, 489 U.S. at 307 (internal quotation marks omitted). Alternatively, even if *Ramos*'s unanimity requirement is new, it applies retroactively to cases on collateral review because it is a "watershed" rule that is "central to an accurate determination of innocence and guilt" and an "absolute prerequisite to

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[3] This Court has requested responses to several petitions that, like petitioner's here, arise from state collateral review proceedings and challenge the validity of their convictions by non-unanimous juries. *See, e.g.*, *Jones v. Louisiana*, No. 19-8875; *Woods v. Louisiana*, No. 20-5003; *Williams v. Louisiana*, No. 19-8740; *Dunn v. Louisiana*, No. 19-8711. The Louisiana Supreme Court decided all of these cases before this Court issued its opinion in *Ramos*.

fundamental fairness." *Teague*, 489 U.S. at 311, 313–14.

A. *Ramos* Did Not Announce A New Rule.

"[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301. *Ramos* did not announce a new rule because it simply applied two longstanding principles: the Sixth Amendment guarantees the right to a unanimous jury verdict and that right applies fully against the States through the Fourteenth Amendment. Both principles were established long before petitioner's conviction became final in 2000, as this Court recognized in *Ramos*.

1. "The requirement of juror unanimity emerged in 14th century England and was soon accepted as a vital right protected by the common law." *Ramos*, 140 S. Ct. at 1395. The "young American States" also embraced the view that the jury trial right entails a guarantee of unanimity. *Id.* at 1396. At the time of ratification, "[i]f the term 'trial by an impartial jury' carried any meaning at all, it surely included a requirement as long and widely accepted as unanimity." *Id.* Even "*Apodaca* itself [saw] a majority of Justices . . . recognize[] that the Sixth Amendment demands unanimity." *Id.* at 1398–99. In short, the principle that "[a] jury must reach a unanimous verdict in order to convict" is "unmistakabl[y]" a long-standing rule of criminal law. *Id.* at 1395.

2. This Court has similarly "long explained" that the Sixth Amendment jury trial right applies in full to the States. *Ramos*, 140 S. Ct. at 1397. Well before

Apodaca, this Court "rejected the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights." *Malloy v. Hogan*, 378 U.S. 1, 10–11 (1964) (internal quotation marks omitted). The Court reiterated that stance "many times . . . , including as recently as last year." *Ramos*, 140 S. Ct. at 1398 (citing *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019)).

3. The idiosyncratic result in *Apodaca* does not render *Ramos* new. "[T]he mere existence of conflicting authority does not necessarily mean a rule is new." *Williams v. Taylor*, 529 U.S. 362, 410 (2000) (internal quotation marks omitted).

Apodaca "always stood on shaky ground" because a majority of Justices has consistently rejected its rationale—before, after, and even in *Apodaca* itself. *Ramos*, 140 S. Ct. at 1389–99; *see id.* at 1409 (Sotomayor, J., concurring) (*Apodaca* was a "universe of one"). Although Justice Powell "offered up the essential fifth vote" in *Apodaca*, his personal view that the Sixth Amendment was not fully incorporated against the States "was (and remains) foreclosed by precedent," as he "frankly" acknowledged. *Ramos*, 140 S. Ct. at 1398; *see also McDonald v. City of Chicago*, 561 U.S. 742, 766 n.14 (2010) ("In *Apodaca*, eight Justices agreed that the Sixth Amendment applies identically to both the Federal Government and the States.").

Because *Ramos* simply coupled two longstanding rules of constitutional law—that the Sixth Amendment requires unanimous jury verdicts and that the Sixth Amendment is fully incorporated

against the States—it did not establish a "new" rule of criminal procedure within the meaning of *Teague*. *See Ramos*, 140 S. Ct. at 1409 (Sotomayor, J., concurring) (noting that *Apodaca* was "uniquely irreconcilable with not just one, but two, strands of constitutional precedent well established both before and after the decision"); *Tyler v. Cain*, 533 U.S. 656, 666 (2001) (recognizing that "the right combination of holdings" can render a rule retroactive). *Ramos* accordingly applies retroactively to cases on collateral review.

B. If New, *Ramos*'s Unanimity Requirement Constitutes A Watershed Rule Of Criminal Procedure.

To qualify as a watershed rule, a rule's "[i]nfringement . . . must seriously diminish the likelihood of obtaining an accurate conviction, and the rule must alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." *Tyler*, 533 U.S. at 665 (internal quotation marks and citation omitted). *Ramos*'s rule meets both components of this test. It is like the rule announced in *Gideon v. Wainwright*, 372 U.S. 335 (1963), which held that the Sixth Amendment requires States to provide an attorney to criminal defendants who are unable to afford their own attorneys. This Court has "repeatedly referenced [*Gideon*] in discussing the meaning of the *Teague* exception" for watershed rules. *Whorton v. Bockting*, 549 U.S. 406, 419 (2007). *Gideon* was a watershed rule because it reduced the "intolerably high" "risk of an unreliable verdict" that inevitably follows "[w]hen a defendant who wishes to be represented by counsel is denied representation,"

id., and "restore[d]" a "constitutional principle[] established to achieve a fair system of justice." 372 U.S. at 344. The rule recognized in *Ramos* is the same. It is among the "small core of rules" "implicit in the concept of ordered liberty," that apply retroactively to cases on collateral review. *O'Dell v. Netherland*, 521 U.S. 151, 157 (1997) (internal quotation marks omitted).

1. The unanimity requirement is "central to an accurate determination of innocence or guilt." *Teague*, 489 U.S. at 313. "The basic purpose of a trial is the determination of truth, and it is the jury to whom we have entrusted the responsibility for making this determination in serious criminal cases." *Brown v. Louisiana*, 447 U.S. 323, 334 (1980) (plurality op.) (internal quotation marks and citations omitted). Accordingly, "[a]ny practice that threatens the jury's ability to properly perform that function poses a similar threat to the truth-determining process itself." *Id.*

a. The unanimity requirement is vital to ensuring that jurors engage in "real and full deliberation," *McKoy v. North Carolina*, 494 U.S. 433, 452 (1990) (Kennedy, J., concurring in the judgment), through "a comparison of views" and "arguments among the jurors themselves," *Allen v. United States*, 164 U.S. 492, 501 (1896). When "[a] single juror's change of mind is all it takes" to provoke discussion and debate, verdicts are substantially more accurate. *Blueford v. Arkansas*, 566 U.S. 599, 608 (2012).

b. The unanimity rule ensures that a verdict represents the views of the entire jury, which guards against biased or inaccurate verdicts. As *Ramos*

noted, Louisiana and Oregon adopted their non-unanimity rules for "racially discriminatory reasons." 140 S. Ct. at 1401. Louisiana adopted its rule to "establish the supremacy of the white race" and "to ensure that African-American juror service would be meaningless." *Id.* at 1394 (internal quotation marks omitted). Oregon likewise wanted "to dilute the influence of racial, ethic, and religious minorities on Oregon juries." *Id.* (internal quotation marks omitted).

The racially discriminatory intent of these States' rules bore fruit: Black defendants have been 30 percent more likely to be convicted by non-unanimous juries than white defendants. Pet. App. 5a n.1. And the jurors voting to convict are more likely to be white: White jurors have cast "empty" votes 32 percent less than the expected rate if empty votes were evenly distributed among all jurors. *Id.*

c. Unanimity protects the accuracy of trial outcomes by reinforcing the defendant's "right to put the State to its burden" of proof, making the government convince each juror of the defendant's guilt beyond a reasonable doubt. *Ramos*, 140 S. Ct. at 1409 (Sotomayor, J., concurring). The absence of unanimity creates "an impermissibly large risk" of an inaccurate conviction, *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004) (internal quotation marks omitted), because it allows the State to brand the defendant "guilty" even though at least one juror has concluded that the prosecution did *not* meet its burden.

Allowing the jury to ignore the concerns of up to two jurors undercuts the accuracy of the trial. Louisiana has the second highest per capita rate of

proven wrongful convictions in the country. Amicus Br. of Innocence Project New Orleans et al. at 30, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020). Since 1990, at least 13 men have been proven innocent and exonerated after being convicted by non-unanimous juries. *Id.* at 9. The practice of non-unanimous juries bred convictions based on "insubstantial and inferior evidence." *Id.* at 27.

2. The unanimity requirement also promotes the fundamental fairness of criminal proceedings.

Non-unanimous jury verdicts disproportionately convicted Black defendants and silenced Black jurors. *See supra* at 16. "Against this grossly disproportionate backdrop, it cannot be seriously contended that" Louisiana's "longtime use of a law deliberately designed to enable majority-White juries to ignore the opinions and votes of Black jurors at trials of Black defendants has not affected the fundamental fairness of Louisiana's criminal legal system." Pet. App. 5a–6a.

Indeed, this Court concluded that the jury-trial right applies in state courts precisely *because* that right "is among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'" *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968) (quoting *Powell v. Alabama*, 287 U.S. 45, 67 (1932)). The jury is the factfinder in criminal proceedings because it allows the defendant's peers to "guard against a spirit of oppression and tyranny on the part of rulers." *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (quoting 2 J. Story, Commentaries on the Constitution of the United States 540–41 (4th ed.

1873)). That function of the jury is frustrated when "the unanimous suffrage of twelve of [the defendant's] equals and neighbours" is not required to confirm "the truth of every accusation." *Id.* (internal quotation marks and citation omitted).

Unanimity not only increases accuracy, *see supra* at 15–17, but also gives legitimacy to the criminal justice system as a whole. That legitimacy is critical to this Court's ongoing efforts "to eradicate racial prejudice from our criminal justice system." *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987). The jury is "a criminal defendant's fundamental protection . . . against race or color prejudice," *id.* at 310 (internal quotation marks omitted), and the requirement of unanimity is essential to that purpose. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991) ("Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there," "mars the integrity of the judicial system[,] and prevents the idea of democratic government from becoming a reality.").

III. This Case Is An Ideal Vehicle To Resolve Whether *Ramos* Is Retroactive Under *Teague*.

1. This case presents an excellent vehicle to address *Ramos*'s retroactivity under the *Teague* framework because it arises from a state habeas proceeding that adjudicated petitioner's Sixth Amendment claim on the merits while purporting to apply *Teague*. If *Ramos* is retroactive under the *Teague* framework, then petitioner is entitled to relief.

This Court has granted review of a retroactivity question in this posture before. In *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the Court granted certiorari to decide whether its decision in *Miller v. Alabama*, 567 U.S. 460 (2012)—holding that mandatory sentences of life without the possibility of parole are unconstitutional for juvenile offenders—applied to cases on state collateral review. In *Montgomery*, as here, the petitioner sought review from denial of relief in collateral proceedings in the Louisiana state courts. 136 S. Ct. at 727. This Court specifically confirmed that cases in this posture provide an opportunity to determine whether rules of criminal procedure apply retroactively under *Teague*. *Id.* at 727–32.

2. Petitioner's case exemplifies the grave doubts that pervade convictions obtained by non-unanimous verdicts. His conviction hinges on the testimony of a single witness who expressed uncertainty about her identification of the shooter. Before she identified petitioner from a photo array six weeks after the shooting, she told police: "It would be kind of like hard" to identify the perpetrator, but "maybe if I see photos I probably could [identify him] because I really didn't look, you know, really see him that well." Pet. App. 11a. Experience and scientific research have shown that such uncertain, uncorroborated, and delayed identification evidence is notoriously unreliable. *See, e.g.*, Nat'l Academy of Sciences, *Identifying the Culprit: Assessing Eyewitness Identification*, The National Academies Press (2014).

Two jurors had serious enough doubts about the sufficiency of the evidence to vote to acquit petitioner.

The unanimity requirement protects against convictions based on shaky evidence; its absence here occasioned a conviction that cannot be trusted.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Jeffrey L. Fisher
O'MELVENY & MYERS LLP
2765 Sand Hill Road
Menlo Park, CA 94025

G. Ben Cohen
THE PROMISE OF JUSTICE INITIATIVE
1024 Elysian Fields Ave.
New Orleans, LA 70116

Yaira Dubin
Counsel of Record
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036
(212) 728-5946
ydubin@omm.com

Meaghan VerGow
Kendall Turner
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington DC 20006

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