NO. _____

IN THE
Supreme Court of the United States

_____

DERRICK DOTSON, PETITIONER,

V.

STATE OF LOUISIANA, RESPONDENT.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE LOUISIANA SUPREME COURT

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PETITION FOR WRIT OF CERTIORARI

_____

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QUESTIONS 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, 313–14 (1989)?

Whether the prosecution's exercise of eleven of twelve strikes against African-American jurors constitutes a prima facie case of discrimination?

PARTIES TO THE PROCEEDING

Petitioner in this case is Derrick Dotson. The State of Louisiana is the Respondent.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

PRIOR RELATED PROCEEDINGS

State v. Dotson, 2015-0191 (La. App. 4 Cir. 02/17/16); 187 So. 3d 79.

State v. Dotson, 16-0473 (La. 10/18/17); 234 So. 3d 34.

State v. Dotson, 2015-0191 (La. App. 4 Cir. 12/18/17); 2017 La. App. LEXIS 2526.

State v. Dotson, 2018-0177 (La. 12/17/18); 259 So. 3d 340.

State v. Dotson, 2019-01828 (La. 06/03/20); 2020 La. LEXIS 1046.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Derrick Dotson respectfully petitions for writs 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 2020 La. LEXIS 1046 and reprinted in the Appendix to the Petition ("Pet. App.") at 25–26a. The decision of the court of appeals is unpublished but reprinted at Pet. App. 24a. The decision of the trial court is unpublished but the minute entry is reprinted at Pet. App. 23a.

JURISDICTIONAL STATEMENT

The Louisiana Supreme Court denied discretionary review of petitioner's appeal on June 3, 2020. Pet. App. 25a–26a. 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. That order has the effect of making this petition 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 United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI.

The Fourteenth Amendment to the United States 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.

U.S. Const. amend. XIV.

Article 930.4 of the Louisiana Code of Criminal Procedure 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."

STATEMENTS OF FACTS

In 2014, petitioner was convicted of rape by a non-unanimous jury and (thereafter ultimately) sentenced to life imprisonment at hard labor without the benefit of parole, probation or suspension of sentence. *State v. Dotson*, 2015-0191 (La. App. 4 Cir. 02/17/16); 187 So. 3d 79, Appendix A, Pet. App. 1a–6a. Detectives claimed the rape occurred twenty years earlier in 1994; petitioner maintained the encounter was consensual. *Id.* During the trial, the State's DNA expert testified that petitioner's

DNA profile had previously been put into a state database, implying he had been convicted of a prior crime, and compelling him to testify. *State v. Dotson*, 2015-0191 (La. App. 4 Cir. 12/18/17); 2017 La. App. LEXIS 2526, Appendix C, 17a–21a.

During voir dire, the state used peremptory strikes to remove eleven African-American jurors. The defense raised a *Batson* challenge, asserting a prima facie case of discrimination. The trial court ruled there was insufficient evidence to support a prima facie case of discrimination. The denial of the *Batson* claim was not raised on direct review.

The trial court also denied petitioner's challenge to a prospective juror whose mother had been raped and murdered. *State v. Dotson*, 2015-0191 (La. App. 4 Cir. 02/17/16); 187 So. 3d 79, Appendix A, Pet. App. 1a–6a. The Fourth Circuit Court of Appeal reversed his conviction, finding the "trial court abused its discretion in denying the challenge for cause" for that juror. *Id.* at 84. However, the Louisiana Supreme Court reversed the appellate court's decision. *State v. Dotson*, 16-0473 (La. 10/18/17); 234 So. 3d 34, Appendix B, Pet. App. 7a–16a. The case was remanded to the Court of Appeals for further consideration of remaining assignments. The Court of Appeal rejected Petitioner's remaining claim, *State v. Dotson*, 2015-0191 (La. App. 4 Cir 12/18/17), and petitioner's conviction became final when the Louisiana Supreme Court denied writs. *State v. Dotson*, 259 So. 3d 340, 2018 La. LEXIS 3450 (La., Dec. 17, 2018), Appendix D, pet. app. 22a.

Petitioner's original post-conviction application raised six claims for relief including the *Batson* issue where the trial court had erred in failing to find a prima

facie case of discrimination based upon the prosecution's use of eleven peremptory strikes against African-Americans. Petitioner also alleged that defense counsel had been ineffective at trial and on appeal in pursuing his *Batson* claim as counsel had not known the three step requirement for establishing a *Batson* violation or raised the issue on direct appeal – and that conviction based upon a non-unanimous verdict was unconstitutional. The state filed no procedural objections.

The petition was denied on May 14, 2019. Appendix E, pet. app. 23a. Petitioner's timely writ to the Court of Appeals was denied on September 10, 2019. Appendix F, pet. app. 24a. The Louisiana Supreme Court denied writs on June 3, 2020, with Chief Justice Johnson voting to grant, docket and assign reasons, and Justice Weimer voting to grant writs and docket. Appendix G, pet. app. 25a-26a.

STATEMENT OF THE CASE

Petitioner was convicted by a non-unanimous verdict. His conviction became final on December 17, 2018. On March 18, 2019, this Court granted certiorari in *Ramos v. Louisiana*, No. 18-5924, to evaluate the constitutionality of non-unanimous jury convictions and reconsider the decisions that upheld the practice: *Apodaca v. Oregon*, 406 U.S. 404 (1972), and its companion case, *Johnson v. Louisiana*, 406 U.S. 356 (1972). Shortly thereafter, on or about May 1, 2019, petitioner filed for post-conviction relief challenging his non-unanimous jury conviction. The district court denied the petition; the Fourth Circuit Court of Appeal denied review. Pet. App. 23a–24a. Petitioner sought writs from the Louisiana Supreme Court.

Simultaneously, while *Ramos v. Louisiana* was pending in this Court, the State of Louisiana disavowed Justice Powell's theory of partial incorporation which had formed the basis for the opinion in *Apodaca*. *See* Br. of Resp't, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (No. 18-5924) ("neither party is asking the Court to accord Justice Powell's solo opinion in Apodaca precedential force."); Transcript of Oral Argument at 34, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (No. 18-5924) (Ms. Murrill: Justice Ginsburg, we don't think that Justice Powell's decision was entirely clear with regard to the rule as it would apply historically); *see also id.* at 39, lines 6-18. Nevertheless, the state courts continued to treat the conviction as valid.

On April 20, 2020, this Court held that the Sixth and Fourteenth Amendments prohibit criminal convictions by non-unanimous jury verdicts and reversed the conviction of Evangelisto Ramos. *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020). Writing

for the majority, Justice Gorsuch observed that "[n]ot a single member of this court is prepared to say Louisiana secured his conviction constitutionally under the Sixth Amendment." *Id.* at 1408.

After *Ramos* was decided, the Louisiana Supreme Court remanded nearly forty non-final cases to the courts of appeal to conduct new error patent reviews in light of the decision. Still, the court, which adopted the *Teague*[1] retroactivity test for cases on 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. Dotson's. *State v. Dotson*, 2019-01828 (La. 06/03/20); 2020 La. LEXIS 1046.

Chief Justice Johnson dissented, noting that she would grant writs and docket and assigned reasons. *Id.* at *1 (Johnson, C.J., dissenting) ("I would grant the writ to clarify that the Supreme Court's recent decision in *Ramos v. Louisiana*, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020) should be applied retroactively to cases on state collateral review. It is time we abandoned our use of *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) in favor of a retroactivity test that takes into account the harm done by the past use of non-unanimous jury verdicts in Louisiana courts."). Justice Weimer also would have granted and docketed. In one of those six writ denials, Chief Justice Johnson noted that a "majority of this court has voted to defer until the Supreme Court mandates that we act," but she urged Louisiana courts to apply *Ramos* retroactively. *State v. Gipson*, 2019-01815 (La. 06/03/20); 2020 La. LEXIS 1039 at *1 (Johnson, C.J., dissenting). Chief Justice

[1] *Teague v. Lane*, 489 U.S. 288 (1989).

Johnson noted that *Danforth v. Minnesota*, 552 U.S. 264 (2008), enables the state to provide citizens with "more than the minimum mandated by the Supreme Court" in *Teague*. *Gipson*, 2020 La. LEXIS 1039 at *2. Still, she addressed the merits question regarding whether retroactive application of *Ramos* was warranted under *Teague*. *Gipson*, 2020 La. LEXIS 1039 at *2 (Johnson, C.J., dissenting). ("[*Ramos*] plainly announced a watershed rule. 'The Sixth Amendment right to a jury trial is "fundamental to the American scheme of justice"' and incorporated against the States under the Fourteenth Amendment.'").

This Court has granted certiorari in *Edwards v. Vannoy*, 19-5807, limited "to the following question: Whether this Court's decision in *Ramos v. Louisiana*, 590 U.S. ___ (2020), applies retroactively 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*. 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 answer 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). That is because the general prohibition against retroactivity is designed to protect States' interests in comity and the finality of criminal convictions, *Teague*, 489 U.S. at 309

(plurality op.), and those interests are irrelevant where the decision at issue 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). *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), but rather confirmed the original understanding of the Sixth Amendment and longstanding doctrine about the Sixth Amendment's incorporation against the States, *see Ramos*, 140 S. Ct. at 1395–97.

Even if *Ramos*'s rule were deemed "new," it would apply retroactively because it is either a substantive rule or a watershed rule— 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 (plurality op.). Because jury unanimity implicates the fundamental fairness and accuracy of criminal proceedings, a conviction secured without unanimity should not be allowed to stand even if the case is on collateral review.

SUMMARY OF THE ARGUMENT

Petitioner was convicted by a non-unanimous verdict. The law is clear: under the Sixth Amendment, the government can only sustain a conviction for a serious offense based upon a unanimous verdict.

In at least six cases where convictions were deemed final, including Mr. Dotson's, the Louisiana Supreme Court denied writs as the majority "voted to defer until the Supreme Court mandates that we act." *State v. Gipson*, 2019-01815 (La.

06/03/20); *State v. Dotson*, 2019-01828 (La. 06/03/20); 2020 La. LEXIS 1046. Petitioner asks this Court to grant certiorari to consider whether the holding of *Ramos v. Louisiana* applies to cases on state collateral review, where the State follows the retroactivity framework established in *Teague v. Lane*.

This case also presents an additional issue involving whether bare statistics can constitute a prima facie case of discrimination in the *Batson* context, in the circumstance where it appears the state used nine peremptory strikes and two back strikes to remove Black jurors.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH AMENDMENT RIGHT TO A TRIAL BY JURY REQUIRES A UNANIMOUS VERDICT.

In *Ramos v. Louisiana*, this Court recognized that the fundamental Sixth Amendment right to a trial by jury, as incorporated against the States by the Fourteenth Amendment, requires a unanimous verdict to convict a defendant of a serious crime. 140 S. Ct. at 1397. Louisiana's use of non-unanimous jury verdicts originated at the 1898 Constitutional Convention "to ensure that African-American juror service would be meaningless." *Id.* at 1394. That intention became a reality; over the following 120 years, non-unanimous jury verdicts disproportionately convicted Black defendants and silenced Black jurors. *State v. Gipson*, 2019-01815 (La. 06/03/20); 2020 La. LEXIS 1039 at *4, n.1 (Johnson, C.J., dissenting) (citing *Ramos v. Louisiana*, 2018 WL 8545357, at *51 (2018)).

In 1972, the practice survived challenges in the only two states that allowed convictions by non-unanimous juries. *Apodaca v. Oregon*, 406 U.S. 404 (1972);

Johnson v. Louisiana, 406 U.S. 356 (1972). "[I]n a badly fractured set of opinions," the four-Justice *Apodaca* plurality conducted a functionalist analysis and found that "unanimity's costs outweigh its benefits." *Ramos*, 140 S. Ct. at 1397–98. Justice Powell, concurring, espoused "his belief in '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." *Id.* at 1398. The Court has repeatedly rejected, and continues to reject, that proposition. *Id.* at 1398–99.

In *Ramos*, the Court acknowledged that "[w]hether we look to the plurality opinion or Justice Powell's separate concurrence, *Apodaca* was gravely mistaken." *Id.* at 1405. Writing for the majority, Justice Gorsuch said the problem with *Apodaca* was not the quality of the cost-benefit analysis employed by the Court, but "that the plurality subjected the ancient guarantee of a unanimous jury verdict to its own functionalist assessment in the first place." *Id.* at 1401–02. The decision granted relief to Mr. Ramos. *Id.* at 1408. ("Not a single Member of this Court is prepared to say Louisiana secured his conviction constitutionally under the Sixth Amendment.") Still, others affected by non-unanimous juries—including Mr. Dotson—remain imprisoned, victims of a Jim Crow era practice this Court has deemed unconstitutional.

II. RAMOS APPLIES TO CASES ON COLLATERAL REVIEW.

Ramos should apply retroactively to Mr. Dotson's case. This Court, in *Teague v. Lane*, 489 U.S. 288 (1989), outlined the limitations for a rule's retroactive

application for cases on collateral review. However, *Teague*'s limitations only apply for new rules of criminal law.

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 v. Lane*, 489 U.S. 288, 301 (1989) (citations omitted). *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 2018, as this Court recognized in *Ramos*.

"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." *Ramos*, 140 S. Ct. at 1398. 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.

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 guaranties of the Bill of Rights." *Malloy v. Hogan*, 378 U.S. 1, 10–11 (1964). This 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)). That *Apodaca* reached the opposite result does not render *Ramos* a new rule. "[T]he mere existence of conflicting authority does not necessarily mean a rule is new." *Williams v. Taylor*, 529 U.S. 362, 410 (2000).

Apodaca "always stood on shaky ground" because its rationale had been rejected 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 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) (plurality op.) ("In *Apodaca*, eight Justices agreed that the Sixth Amendment applies identically to both the Federal Government and the States.").

Because *Ramos* simply affirmed 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 this Court finds Ramos established a new rule, the rule is substantive.

Teague's limitation on retroactive application of procedural rules does not apply to new substantive rules. *Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016). Substantive rules "set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose." *Id.* at 729. When a State "enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful." *Id.* at 729–30. In *Montgomery*, the Court held that *Miller v. Alabama*, 567 U.S. 460 (2012), announced a new substantive rule. *Id.* at 732–33 ("Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment…"). Similarly, the right to a trial by jury is the central substantial guarantee of the Sixth Amendment, a guarantee that this Court has long understood to require jury unanimity.

Because Mr. Dotson's detention relies upon his conviction, and his conviction violated the central substantial guarantee of the Sixth Amendment, *Ramos*' holding constitutes a substantive rule of criminal law. As such, the holding is not subject to *Teague*'s limitations on retroactivity for cases on collateral review. *See id.* at 729. The continued punishment of individuals "pursuant to an unconstitutional law is no less

void because the prisoner's sentence became final before the law was held unconstitutional." *Id.* at 731. As the Court explained: "There is no grandfather clause that permits States to enforce punishments the Constitution forbids. To conclude otherwise would undercut the Constitution's substantive guarantees." *Id.*

C. *Alternatively, 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 v. Cain*, 533 U.S. 656, 665 (2001) (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" and "restore[d]" a "constitutional principle[] established to achieve a fair system of justice." *Id.* The rule recognized in *Ramos* is the same. It is thus 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).

The unanimity requirement is "central to an accurate determination of innocence or guilt." *Teague*, 489 U.S. at 313 (plurality op.). "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.*

The unanimity requirement is also 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).

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 allowing non-unanimous verdicts bore fruit: Black defendants have been 30 percent more likely to be convicted by non-unanimous juries than white defendants. *State v. Gipson*, 2019-01815 (La. 06/03/20); 2020 La. LEXIS 1039 at *4, n.1 (Johnson, C.J., dissenting) (citing *Ramos v. Louisiana*, 2018 WL 8545357, at *51 (2018)). Black jurors have cast "empty" votes at 64 percent above the expected rate, while white jurors casted "empty" votes 32 percent less than the expected rate if empty votes were evenly distributed among all jurors. *Id.*

Stifling debate by allowing the jury to ignore the concerns of up to two jurors affects the accuracy of the trial. Louisiana has the second highest per capita rate of proven wrongful convictions in the country. *Br. for Innocence Project New Orleans et al.* at 30, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (No. 18-5924) . Since 1990, at least 13 men have been proven innocent and exonerated after being convicted by non-unanimous juries. *Id.* at 3. The practice of non-unanimous juries bred convictions based on "insubstantial and inferior evidence." *Id.*

Unanimity also reinforces "the right to put the State to its burden" of proof by 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), 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.

Furthermore, the unanimity requirement promotes the fundamental fairness of criminal proceedings. Non-unanimous jury verdicts disproportionately convicted Black defendants and silenced Black jurors. *See State v. Gipson*, 2019-01815 (La. 06/03/20); 2020 La. LEXIS 1039 at *4, n.1 (Johnson, C.J., dissenting) (citing *Ramos v. Louisiana*, 2018 WL 8545357, at *51 (2018)). "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." *Id.* at *5.

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.* at 476–77 (internal quotation marks and citation omitted).

Unanimity not only increases accuracy, but also gives legitimacy to the criminal justice system as a whole. That legitimacy is critical in the context of 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, 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 PRESENTS AN APPROPRIATE VEHICLE TO RESOLVE WHETHER *RAMOS* IS RETROACTIVE UNDER *TEAGUE*.

This case presents an appropriate[1] vehicle to address whether *Ramos* is retroactive 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.

Additionally, this Court possesses jurisdiction and 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.*

[1] Counsel is aware that the petition in *Gipson v. Louisiana*, filed on August 27, 2020 presents the same or similar issues, and suggests that if certiorari is not granted in this case, that it be held for *Gipson* and or *Edwards v. Vannoy*.

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.

IV. THE COURT SHOULD GRANT THE WRIT TO CORRECT LOUISIANA'S ANACHRONISTIC RULE THAT STATISTICS ARE INSUFFICIENT TO PROVE A PRIMA FACIE CASE OF DISCRIMINATION FOR A BATSON CHALLENGE

The defense raised a *Batson* objection initially when the state had used nine of eleven peremptory strikes against Black jurors, and then again as the state used backstrikes to remove two additional Black jurors and replace them with white jurors. The trial court ruled "You can't just come back here and say they used nine peremptory challenges to strike black jurors. You have to—and look, I'm not in a position to teach either one of y'all to sit here and say, well, they struck nine African-American jurors, that statement doesn't show a pattern. And I'm so confident in that ruling you can take me all the way to the U.S. Supreme Court." (Writ Application at Exhibit C, pg 18).

The trial court continued to tell defense counsel "Y'all not even in the same zip code with *Batson* and I'm not going to sit here and tell y'all how to do it. ..."). Defense counsel said that to do more, he would "have to go get my notes, and they are out

there, and I'm not going to do that so we can proceed." *Id.* at 19. The Court repeatedly criticized the defense handling of it "You're confused. You're confused as the day is long." *Id.*[2]

In his post-conviction application, petitioner raised this as a stand-alone *Batson* claim, as ineffective assistance of trial counsel and as an ineffective assistance of appellate counsel claim for failing to raise the issue on appeal. The state filed no procedural objections to the petition, and the petition was dismissed without ever securing a response. Had the issue been adequately briefed, it would have traveled in the exact same circumstance as *Jabari Williams v. Louisiana*, 136 S. Ct. 2156 (2016) – where the Court remanded the case to the Louisiana courts.

The confusion below demonstrates that Louisiana continues to avoid following the three-step inquiry established by *Batson* designed to "enforce[] the mandate of equal protection" during jury selection. *Batson,* 476 U.S. at 99. Recognizing that the Constitution prohibits the exclusion of just one juror based upon race, the Court obviated the need for defendants to prove a prosecutor's history of discrimination in multiple cases, holding that evidence of discrimination in the record of the pending case could suffice. *Id.* (reversing *Swain v. Alabama*, 380 U.S. 202 (1965)). In *Johnson v. California*, the Court emphasized the minimal showing needed at step one to trigger a trial court's further inquiry under this framework. *Johnson*, 545 U.S. at 172. As the Court explained, "[t]he *Batson* framework is designed to produce actual

[2] Both trial counsel and the court referred to the parties as *Batson* and *North Carolina*, though they disagreed on who was the petitioner and who was respondent.

answers to suspicions and inferences that discrimination may have infected the jury selection process." *Id.* "The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question." *Id.* This Court made clear:

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

Id. at 170 (emphasis added).

Striking nine Black jurors is just such a pattern. This Court explicitly found as much in *Batson* itself: "a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination." *Batson*, 476 U.S. at 97. *See Miller-El v. Cockrell (Miller-El I)*, 537 U.S. 322, 342 (2003) ("statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors").

However, the law in Louisiana is that "bare statistics" cannot make out a prima facie case of discrimination. *See*, *e.g.*, *State v. Dorsey*, 2010-0216 (La. 09/07/11), 74 So. 3d 603; *Duncan*, 802 So. 2d at 550; *State v. Holand*, 2011-0974 (La. 11/18/11), 125 So. 3d 416 (court of appeals erred when it found a prima facie case of discrimination based upon the state's use of "11 peremptory challenges to exclude 10 African-Americans"). *Cf State v. Simon*, 51-778 (La. App. 2 Cir 01/10/18), 245 So. 3d 1149, 1164 (no prima facie case where state used 4 of 5 strikes to remove black jurors); *State*

v. Henderson, 2013-0074 (La. App. 1 Cir 09/13/13), 135 So. 3d 36, 46 ("bare statistics" insufficient); *State v. McElveen*, 2010-0172 (La. App. 4 Cir 09/28/11), 73 So. 3d 1033, 1059 (no prima facie case where prosecutor struck 12 black jurors).

The question of whether "bare statistics" is sufficient to meet a prima facie case is a significant issue, as often a defendant (or proponent of a *Batson* challenge) will have nothing but unexplained statistics as a basis for a prima facie case.

Louisiana joins a minority of one Circuit Court of Appeal in answering that question in the negative. While the Eighth Circuit has yet to consider the issue in light of *Johnson*, Louisiana clings to its old precedent despite recognizing its inconsistency with *Johnson*. In many cases, this leaves defendants no better off than they would have been under *Swain*.[3] The Court's intervention is required to correct this anachronistic rule and ensure the effective application of *Batson*.

The issue of whether bare statistics can make out a prima facie case of discrimination is a critical threshold inquiry that determines the reach of *Batson*. In the majority of trial cases, all a proponent of a *Batson* objection will have is "bare statistics" to provide indicia of discrimination. Unless a prosecutor voluntarily provides reasons or the trial court orders reasons be given notwithstanding the legal insufficiency of the prima facie case showing under Louisiana law, defendants in such cases will have no means to ferret out the discriminatory intent and safeguard their

[3] *Cf State v. McClinton*, 492 So. 2d 162, 164 (La. Ct. App. 1986) (prosecutor's strikes of 12 black jurors insufficient to show prima facie case under *Swain*); *State v. Wagster*, 489 So. 2d 1299, 1305 (La. Ct. App. 1986) (same); *State v. Hayes*, 414 So. 2d 717, 720 (La. 1982) (prosecutor's use of 14 of 18 challenges to remove black jurors where only one black person served on the jury insufficient to prove prima facie case under *Swain*).

Constitutional rights. To the extent that more than bare statistics is necessary, counsel was patently ineffective for failing to walk outside chambers to collect his notes on the various jurors.

Petitioner asks this Court to grant certiorari on the question of whether bare statistics can constitute a prima facie case of discrimination – or in the alternative grant, vacate and remand the case for further consideration consistent with *Williams v. Louisiana*, 136 S. Ct. 2156 (2016) and the decisions in *Flowers v. Mississippi*, 139 S. Ct. 2228 (2019), *Foster v. Chatman*, 136 S. Ct. 1737 (2016), *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Johnson v. California*, 545 U.S. 162 (2005), and *Batson v. Kentucky*, 476 U.S. 79 (1986).

At the very least, the Court should direct the Louisiana courts in the first instance to consider in the first instance the interaction between *Ramos v. Louisiana* and a challenge under *Batson v. Kentucky*.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted, or granted, vacated and remanded for further consideration of the issues identified herein.

Respectfully Submitted,

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