No. 20-5728

In the Supreme Court of the United States

DERRICK DOTSON,
Petitioner

v.

STATE OF LOUISIANA,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Does this Court's decision in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), which announced a new procedural rule, apply retroactively to cases on state collateral review?

(2) Does the prosecution's exercise of a high percentage of its strikes against African American jurors constitute a *prima facie* case of discrimination even though there is no evidence of the race of the jurors selected to serve on the jury or the race of the jury venire?

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INTRODUCTION

In *Ramos v. Louisiana*, this Court held that a conviction based upon a non-unanimous verdict—in state or federal court—violates the Sixth Amendment's jury trial guarantee. Petitioner Derrick Dotson's conviction and sentence became final before this Court issued *Ramos*, and so his petition arises from state collateral review. Dotson's first question asks "whether *Ramos* applies on state collateral review." Pet. 7.

With only two narrow exceptions, new rules do not apply to cases that are final 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.

Moreover, this case arises from a *state* collateral proceeding. If Dotson is asking the Court to require Louisiana to retroactively apply *Ramos* as a matter of state law, the Court should deny certiorari because this Court does not resolve questions of state law. The Louisiana Supreme Court has declined to directly answer the question of whether the *Ramos* rule is retroactive in state collateral proceedings. It has denied writs in all post-conviction cases raising the issue.

If Dotson is asking this Court to require state courts to apply *Ramos* retroactively as a matter of federal constitutional law, the Court should deny certiorari anyway because the Court could not grant relief to Dotson unless it (1) declares the *Ramos* rule retroactive and (2) constitutionalizes *Teague*'s second

exception. The Court should not take these steps.

First, there is no need to grant certiorari in this case to decide whether *Ramos* is retroactive because this Court has already 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). It bears emphasis that, 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.

Second, even if this Court granted relief to the *federal* habeas petitioner in *Edwards*, and declared the *Ramos* rule retroactive, Dotson could not directly benefit from that holding. Dotson seeks *state* post-conviction relief. Although this Court has held that new *substantive* rules satisfying *Teague*'s first exception must be applied retroactively by the States in post-conviction proceedings, the same is not true for new *procedural* rules satisfying *Teague*'s second exception. *Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016). In *Montgomery*, this Court expressly reserved the question of whether a new procedural rules must be applied retroactively by the States. *Id.* at 729.

The Court should not extend *Montgomery*'s holding and constitutionalize *Teague*'s second exception. There are important differences between procedural and substantive rules, and the Court has long treated these rules differently for the purposes of *Teague*'s retroactivity analysis. The logic of that distinction applies with equal force to the question of whether the Constitution requires retroactive

application of procedural rules.

Because it is unlikely that the Court will identify any watershed rules of criminal procedure, and because there is no basis to constitutionalize the second exception to *Teague*'s retroactivity bar, the Court should deny certiorari.

Dotson's second question relates to the application of the first step of *Batson v. Kentucky*, 476 U.S. 79 (1986). To raise a claim that a prosecutor's peremptory challenge of a juror is motivated by racial discrimination, a defendant must first make out a *prima facie* case of discrimination. Dotson appears to suggest that the barest of statistics should always be sufficient to prove a *prima facie* case and asks the Court to intervene to correct Louisiana's law.

But a number of problems plague Dotson's *Batson* argument, making this petition a poor vehicle to consider his second question. First, Dotson did not raise his *Batson* claim on direct review, and so he is procedurally barred from raising it in State post-conviction proceedings. Second, Dotson presents no record evidence to support his claim other than his bald statement that there had been "nine peremptory strikes and two back strikes to remove Black jurors." Pet. 9. He presents no context for the strikes because there is no evidence in the record of the race of the jurors in the overall jury pool, the race of the jurors selected to serve on the petit jury, or the race of the jurors challenged. In essence, his second claim here asks this Court to make a factual determination on a bare record.

Dotson's petition should be denied.

STATEMENT OF THE CASE

Factual Background

Over twenty-seven years ago, a young woman, K.T., informed the New Orleans Police Department (NOPD) that a young man, who had at one time worked with her mother,[1] called her over to his vehicle one night while she was crossing the street in East New Orleans. Holding a gun in his lap, he told her to get in his car. He then drove to a wooded area, forced her to have sexual intercourse with him, and returned her to the place where he picked her up. She immediately contacted the police, gave an interview, underwent a sexual assault exam, and provided a DNA sample. The perpetrator could not be found.

Two years later, another young woman, H.B., also reported to police that she had been sexually assaulted. Again, the man was one whom she was familiar with but did not know. He had come to her home begging for money before, which her brother had given him ($5). He had returned earlier that evening to thank her brother for the money. After her brother left, he returned again claiming to be locked out of his house and asked H.B. to make a call for him. The number he gave her, however, did not work. When she returned to the door to tell him, he forced his way inside and, with gun in hand, sexually assaulted her. She, too, contacted the police, gave an interview, and underwent a sexual assault exam in which a DNA sample was taken. Again, the perpetrator could not be found.

[1] K.T. thought he looked familiar but did not know his name.

Fourteen years later, authorities investigating unsolved rape cases tested the DNA samples provided by the two victims. Both tests matched to Dotson, and he was arrested.

Procedural History

Dotson was charged by a grand jury with the aggravated rape[2] and aggravated kidnapping[3] of K.T. and the aggravated rape and aggravated kidnapping of H.B. After dropping the aggravated kidnapping charges, Dotson's cases were joined, and he was tried in 2014. Dotson raised a *Batson*[4] objection, which the court denied. After a three-day trial, the jury returned a 10-2 verdict convicting Dotson of the responsive verdict[5] of forcible rape[6] of H.B. But because the jury was unable to reach a verdict regarding the rape of K.T., the court declared a mistrial on that charge. The court sentenced Dotson to life in prison without benefit of parole, probation, or suspension of sentence.

Dotson appealed to the Fourth Circuit, raising two assignments of error: the trial court erred by denying (1) his challenge for cause of a prospective juror and (2) his motion for mistrial regarding the testimony of the State's DNA expert. He did not complain about the denial of his *Batson* challenge. In a split decision, the Fourth Circuit found merit in Dotson's challenge for cause claim and reversed the conviction. Pet. App. 1a.

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[2] La. R.S. 14:42 (the name of this crime was changed in 2015 from "aggravated rape" to "first degree rape." *See* 2015 La. Acts 301, § 1).

[3] La. R.S. 14:44.

[4] *Batson v. Kentucky*, 476 U.S. 79 (1986).

[5] *See* La. Code Crim. Proc. art. 814(A)(11).

[6] La. R.S. 14:42.1 The name of this crime was changed in 2015 from "forcible rape" to "second degree rape." *See* 2015 La. Acts 301, 184, 256.

The State requested supervisory writs of the Louisiana Supreme Court, which reversed the Fourth Circuit and remanded the case to the lower court for review of the second assignment of error. Pet. App. 7a, 16a.

Dotson did not request review by this Court at that time, nor is he complaining of that ruling in this petition. Upon remand, the Fourth Circuit considered his claim regarding the DNA expert's testimony, found no error, and affirmed the conviction. Pet. App. 17a. The Louisiana Supreme Court denied a supervisory writ. Pet. App. 22a. Dotson did not ask for review by this Court, and so his conviction and sentence became final in March 2019.

On May 1, 2019, Dotson filed a *pro se* application for post-conviction relief with the state trial court—raising the claims he brings before the Court in this petition. Pursuant to Louisiana Code of Criminal Procedure articles 927, 928, and 929, the trial court did not request a response from the State and denied the application outright "for lack of merit." Pet. App. 23a.

Dotson requested supervisory review from the Fourth Circuit Court of Appeals and then from the Louisiana Supreme Court. Both courts denied review without opinion. Pet. App. 24a, 25a. Chief Justice Johnson[7] would have granted the application but only to "clarify that the Supreme Court's recent decision in *Ramos* should be applied retroactively to cases on state collateral review." Pet. App. 25a (cleaned up).

Dotson now seeks a writ of certiorari from this Court, and he poses two

[7] Chief Justice Johnson retired on January 1, 2021.

questions. He asks this Court to consider whether *Ramos* should apply retroactively on state collateral review and whether his conviction should be vacated because of the alleged *Batson* violation.

REASONS FOR DENYING THE PETITION

I. BECAUSE DOTSON'S *RAMOS* CLAIM REACHES THE COURT ON *STATE* COLLATERAL REVIEW, GRANTING CERTIORARI IS UNWARRANTED.

Dotson's first question is ambiguous about how he expects the Court to grant relief in this procedural posture. He asks the Court to "resolve whether *Ramos* applies on state collateral review." Pet. 9. But whether to grant collateral relief under Louisiana law is, of course, a question of state law. And this Court does not decide issues of state law.

This Court explained in *Montgomery* that the question of whether the federal Constitution requires retroactive application of a new rule handed down by this Court is a question of federal law. But even under *Montgomery*, Dotson can receive no relief unless this Court both declares the *Ramos* rule to be retroactive and constitutionalizes *Teague*'s second exception. The Court should not grant certiorari to resolve these issues here for the following reasons.

A. To the Extent Dotson Asks This Court to Decide A Question of State Law, Certiorari Is Unwarranted.

This Court has said many times that States alone have the power to determine the content, meaning, and application of state law. *See, e.g.*, *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 47 (2015) ("State courts are the ultimate authority on that state's law."); *Dickerson v. United States*, 530 U.S. 428, 431 (2000) ("Federal courts hold no supervisory authority over state judicial proceedings and may intervene only

to correct wrongs of constitutional dimension."); *Huddleston v. Dwyer*, 322 U.S. 232, 233 (1944) ("The decisions of the highest court of a state on matters of state law are in general conclusive upon the Supreme Court of the United States.").

And this Court has further explained that whether to provide retroactive relief in a state collateral proceeding—at least where this Court has not declared a new rule retroactive—is a question of state law. In *Danforth v. Minnesota*, the Court observed that its cases about "civil retroactivity" demonstrate that the "remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law." 552 U.S. 264, 288 (2008). "Federal law simply 'sets certain minimum requirements that States must meet but may exceed in providing appropriate relief.'" *Id.* (quoting *Am. Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 178–79 (1990) (plurality opinion)). Although this Court has "ample authority to control the administration of justice in the federal court—particularly in their enforcement of federal legislation—[the Court has] no comparable supervisory authority over the work of state judges." *Id.* at 289–90 (citing *Johnson v. Fankell*, 520 U.S. 911 (1997)).

The fact that a State has purported to adopt the retroactivity standard this Court articulated in *Teague v. Lane*—as the Louisiana Supreme Court has done—does not transform the issue into a federal question. *See State ex rel. Taylor v. Whitley*, 606 So. 2d 1292, 1297 (La. 1992) (adopting *Teague* for state collateral review). On the contrary, this Court has held that, "[i]f a state court chooses merely to *rely* on federal precedents as it would on the precedents of all other jurisdictions, then it need only

make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (emphasis added). And, when adopting *Teague*'s standard to guide state courts in collateral proceedings, the Louisiana Supreme Court went out of its way to say that it was "not bound to adopt the *Teague* standards." *See Whitley*, 606 So. 2d at 1297. Thus, Louisiana courts merely use *Teague* as guidance.

Moreover, in *Danforth*, the Court explained that "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." 552 U.S. at 288–89 (citing *State v. Whitfield*, 107 S.W.3d 253, 268 (Mo. 2003)). It is entirely plausible—and allowable under *Danforth*—that this Court could deny relief under *Teague* while a state court could grant relief under *Teague*. A corollary of this rule is that a state court, for the purposes of state law, could deny relief under *Teague*'s second exception,[8] even if this Court granted relief under *Teague*'s second exception.

To the extent Dotson raises a state-law issue, this Court is without jurisdiction to decide the matter. "If a state-law basis for the judgment is adequate and independent, then this Court lacks jurisdiction because its review of the federal question would be purely advisory." *Coleman v. Thompson*, 501 U.S. 722 (1991).

The Louisiana Supreme Court has had many opportunities to decide whether

[8] This Court held in *Montgomery* that a state court could not fail to grant relief under *Teague*'s first exception where this Court had granted relief under that exception. 136 S. Ct. at 729.

to apply *Ramos* retroactively as a matter of state law. And it has denied every request.[9]

B. The Court Could Not Grant Dotson Relief Without Declaring the *Ramos* Rule To Be a Watershed Rule Of Criminal Procedure and Constitutionalizing *Teague*'s Second Exception.

If Dotson is asking this Court instead to require state courts to apply *Ramos* retroactively under the federal Constitution, the Court still should deny certiorari. This Court explained in *Montgomery* "that when a new *substantive* rule of constitutional law controls the outcome of a case, the *Constitution* requires state collateral review courts to give retroactive effect to that rule." 136 S. Ct. 718, 729 (2016) (emphasis added). But the Court limited its holding only to new substantive

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[9] *See, e.g.*, *State v. Dotson*, 2019-01828 (La. 6/3/20), 296 So.3d 1059; *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.

rules and left open the question of whether the Constitution requires state courts to apply new procedural rules retroactively on collateral review. It follows that the Court could not grant Dotson relief unless it (1) declared the *Ramos* rule retroactive and (2) extended *Montgomery* and constitutionalized *Teague*'s second exception.

The Court should not grant certiorari or take these steps.

1. *There is no need to resolve whether Ramos is retroactive under* Teague *here because this Court has granted certiorari to decide that issue in* Edwards v. Louisiana.

Dotson contends that "this case presents an appropriate vehicle to address *Ramos*'s retroactivity under the *Teague* framework." Pet. 18. And he further contends that *Ramos* did not announce a *new* rule for the purposes of *Teague* Pet. 11–13. But this Court will almost certainly decide these issues in *Edwards*. Indeed, with one exception, the arguments Dotson advances are identical to the arguments the petitioner made in *Edwards*. And so, there is no need to grant certiorari to decide those issues here.

Unlike the petitioner in *Edwards*, Dotson contends that *Ramos* announced a new *substantive rule*. This argument is meritless. Dotson contends that because his "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." Pet. 13. But this begs the question and does not explain why the *Ramos* rule is substantive and not procedural. As Justice Kavanaugh observed in his concurring opinion in *Ramos*, "[t]he first *Teague* exception does not apply because today's new rule is procedural, not substantive: It affects 'only the manner of determining the defendant's culpability.'" 140 S. Ct. at 1419 (Kavanaugh,

J., concurring) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)); s*ee also Welch v. United States,* 136 S.Ct. 1257, 1275 (2016), (Thomas, J., dissenting, referencing the non-unanimity rule as "undoubtedly procedural."*)*; *Teague,* 489 U.S. at 314 (plurality op) (Sixth Amendment's fair cross section requirement considered a new procedural rule). The petitioner in *Edwards* conceded the rule announced in *Ramos* was procedural because this Court's precedent rendered that argument meritless.

Dotson's other arguments supporting the position that *Ramos* should apply retroactively should fail for the reasons the State briefed in *Edwards*. First, *Ramos* did not announce an "old rule." Under this Court's jurisprudence, a so-called "old rule" applies retroactively. *See Teague*, 489 U.S. at 301; *see also Whorton v. Bockting*, 549 U.S. 406, 416 (2007) ("[A]n old rule applies both on direct and collateral review."). But, as this Court has explained, "there can be no dispute that a decision announces a new rule if it expressly overrules a prior decision." *Graham v. Collins*, 506 U.S. 461, 467 (1993). And a majority of the Court in *Ramos* agreed that this Court's decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972), was a binding precedent. A different majority of this Court in *Ramos* overruled *Apodaca*. Thus, for the purposes of *Teague*, Dotson's "old rule" argument is a nonstarter because *Ramos* overturned binding precedent.

Second, the *Ramos* rule cannot be applied retroactively because it does not satisfy either of *Teague*'s exceptions to the retroactivity bar. *Teague*, 489 U.S. at 310 (O'Connor, J., plurality opinion) ("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."). Because the *Ramos* rule is new and procedural, it will survive *Teague*'s retroactivity bar only if it satisfies *Teague*'s second exception. *See Ramos*, 140 S. Ct. at 1419 (Kavanaugh, J., concurring) ("The second *Teague* exception does not apply because today's new rule, while undoubtedly important, is not a 'watershed' procedural rule."). It cannot satisfy *Teague*'s second exception because—like *every* procedural rule this Court has considered since adopting the *Teague* framework—it does not implicate "the fundamental fairness and accuracy of the criminal proceeding.'" *Summerlin*, 542 U.S. at 348, 352 (quoting *Saffle v. Parks*, 494 U.S. 484, 495 (1990)); *accord Teague*, 489 U.S. at 311.

The State discussed these points at length in its briefing in *Edwards*. Thus, there is no need to grant certiorari to consider Dotson's arguments here because the Court will almost certainly address them in *Edwards*.

2. Even assuming the Court declares the Ramos *rule to be retroactive in* Edwards*, the Court could not grant relief to Dotson without constitutionalizing* Teague*'s second exception.*

There are some limits on a state court's ability to deny collateral relief. In *Montgomery v. Louisiana*, this Court held that—under the federal Constitution—new *substantive* rules that this Court has held satisfy *Teague*'s first exception must be applied retroactively in state collateral proceedings, regardless of when a prisoner's conviction became final. 136 S. Ct. at 729.

Under *Teague*'s first exception to the retroactivity bar, new *substantive* rules announced by this Court apply retroactively on federal collateral review. *See Summerlin*, 542 U.S. at 351–52. 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. Indeed, "this Court has recognized that substantive rules 'are more accurately characterized as . . . not subject to the [retroactivity] bar." *Montgomery*, 136 S. Ct. at 728.

Under *Teague*'s second exception, only an "extremely narrow" class of new procedural rules may apply retroactively on federal collateral review. *Summerlin*, 542 U.S. 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.* "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).

This Court had never required state courts to apply *Teague*'s exceptions in *state* collateral proceedings until its recent decision in *Montgomery*. But the Court expressly limited its holding by requiring state courts to retroactively apply only new *substantive* rules satisfying *Teague*'s first exception. 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. 136 S. Ct. at 729 ("This holding is limited to *Teague*'s first exception for substantive rules; the constitutional status of *Teague*'s exception for watershed rules of procedure need not be addressed here.").

Thus, 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 automatically benefit Dotson in this proceeding. Before the Court could grant relief to Dotson, the Court would 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. There are important differences between substantive and procedural rules. The most important difference is that procedural rules have a "more speculative connection to innocence" than substantive rules. *Summerlin*, 542 U.S. at 352. Unlike substantive rules, 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 the purposes of retroactivity. New substantive rules are almost always retroactive; new procedural rules are almost never retroactive.

The logic of that distinction applies with equal force to the question of whether to extend *Montgomery*'s holding to procedural rules. When concluding that the Constitution requires state courts to apply new substantive rules retroactively, this Court expressly noted the difference between substantive and procedural rules: "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." *Montgomery*, 136 S. Ct. at 729 (emphasis added). "By holding that new substantive rules are, indeed, retroactive, *Teague* continued a long tradition of giving retroactive effect to constitutional rights *that go beyond procedural guarantees*." *Id.* at 730 (emphasis added). Administration of criminal procedure implicates States' sovereign power in a way that substantive constitutional laws do not. For this reason, "[w]hen a new substantive rule of constitutional law is established, this Court is careful to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems." *Id.* at 735.

At bottom, 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*, Dotson should not benefit from that holding because his case arises from *state* post-conviction proceedings. The Court should deny certiorari.

II. DOTSON'S *BATSON* CLAIM IS PROCEDURALLY BARRED AND INSUFFICIENTLY SUPPORTED WITH RECORD EVIDENCE.

A. Dotson's *Batson* Claim Was Not Raised on Appeal and Is Procedurally Barred.

Although Dotson's counsel raised a *Batson* challenge at trial, on direct review, he complained only of the denial of his challenge of a juror for cause and the admission of certain testimony by the State's DNA expert. He did not complain about the denial of his *Batson* challenge.[10] *See* Pet. 3 ("The denial of the *Batson* claim was not raised on direct review."); Pet. App. at 3a–3b.

In Louisiana, if a post-conviction application "alleges a claim which the petitioner raised in the trial court and inexcusably failed to pursue on appeal," the post-conviction court must deny relief. *See State ex rel. Holden v. State*, 215 So. 3d 673, 674 (La. 2017); *see* La. Code Crim. Proc. arts. 930.4(A), (B), (C) ("If the application alleges a claim which the petitioner raised in the trial court and inexcusably failed to pursue on appeal, the court shall deny relief.").

This procedural bar is an independent and adequate state law ground for denying review of a federal claim. This Court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground

[10] Had the issue been raised on appeal, the appellate courts could have remanded the case for an evidentiary hearing. *See State v. Potter*, 612 So. 2d 953 (La. App. 4th Cir. 1993) *cert. den.* 619 So. 2d 574 (1993).

that is independent of the federal question and adequate to support the judgment." *Lambrix v. Singletary,* 520 U.S. 518, 522–23 (1997) (quoting *Coleman v. Thompson,* 501 U.S. 722, 729 (1991)). Because the state-law determination is sufficient here, any opinion of this Court on the federal question would be purely advisory. *Id*. at 523 (citing *Herb v. Pitcairn,* 324 U.S. 117, 125–26 (1945)).

B. The Undeveloped Record Prevents the Court from Answering Dotson's Second Question.

In any event, Dotson's claims are unsupported by the record. Statistics are relevant to *Batson*'s first step; however, they are also inherently reductive and thus "manipulable and untrustworthy absent a holistic view of the circumstances to which they apply." *Allen v. Lee*, 366 F.3d 319, 330 (4th Cir. 2004). "For example, a strike rate of 90% looks less stark when the venire is 90% African American." *Williams v. Beard*, 637 F.3d 195, 214 (3d Cir. 2011); *see also Paulino v. Harrison*, 371 F.3d 1083, 1091 (9th Cir. 2004) (noting that, "[i]f a black juror 'is the first person called, and . . . [is] struck, all (or 100%) of the prosecutor's peremptory challenges will have been exercised against African-Americans'" (citation omitted)).

Dotson's petition includes only a *single* piece of statistical evidence: the number of strikes against Black people in the jury pool. Dotson provides no context. There is no indication of the race of other individual jurors, the racial composition of the overall venire, the racial composition of the individual panels, the racial composition of the final jury, the race of the jurors challenged for cause, or the pattern in which the strikes were made. Dotson failed to carry his burden of proof at trial, and he failed to raise his claim on direct review. He cannot resurrect his claim here.

The Louisiana Supreme Court recognizes the value of and acts upon statistical evidence that is comprehensive and compelling. *See, e.g.*, *State v. Drake*, 2 So.3d 416, 417 (La. 2009) (per curiam) (reversing lower courts to find a *prima facie* case of discrimination because "Caucasian jurors were significantly overrepresented on the panel in comparison to their number in the overall tally of jurors called for examination, and African-American jurors were grossly underrepresented."). But no such evidence was presented here. Dotson's bare numerical argument is incomplete. Dotson's failure to develop a record that would allow for any meaningful statistical analysis is reason to deny review.

CONCLUSION

The Court should deny Dotson's petition for certiorari.

Respectfully submitted,

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