No. 20-7822

IN THE

SUPREME COURT OF THE UNITED STATES

TREVON WILEY — PETITIONER

vs.

DARREL VANNOY, WARDEN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

TREVON WILEY
557602, CYPRESS—3
LOUISIANA STATE PENITENTIARY
ANGOLA, LA 70712

QUESTION PRESENTED

This case also involves 2 non-unanimous verdicts leading to the following question:

Does the 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)?

LIST OF PARTIES

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

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner, Trevon Wiley, respectfully petitions for a writ of certiorari to review the judgment of the Louisiana Supreme Court.

OPINIONS BELOW

The Louisiana Supreme Court's decision to deny Wiley's application for a writ of certiorari is published at 2020-01327 (La. 3/23/21); --- So.3d --- 2021 WL 1113550 and appears at Appendix A. The Fifth Circuit Court of Appeal's decision is unpublished but appears at Appendix B. The Twenty-Fourth Judicial District Court's decision is unpublished but appears at Appendix C.

JURISDICTION

The Louisiana Supreme Court denied discretionary review of Wiley's application for a writ of certiorari on March 23, 2021. The Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ... and to have the assistance of counsel for his defense.

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

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

La. C. Cr. P. art. 930.3

> 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.

STATEMENT OF THE CASE

On August 19, 2009, Wiley was convicted by a 10-to-2 verdict of second degree murder and by an 11-to-1 verdict of aggravated burglary. On August 31, 2009, the trial court imposed a life without benefits sentence and a concurrent, and maximum, thirty-year sentence. On April 26, 2011, the Fifth Circuit Court of Appeal affirmed Wiley's conviction but remanded for resentencing to remove the trial court's unlawful flat-time stipulation. *State v. Wiley*, 10-811 (La. App. 5 Cir. 4/26/11); 68 So.3d 583. On March 30, 2012, the Louisiana Supreme Court declined to invoke its supervisory jurisdiction. *State v. Wiley*, 2011-1263 (La. 3/30/12); 85 So.3d 106.

Wiley filed an application for post-conviction relief and argued that his non-unanimous jury verdicts violated his Sixth Amendment right to a jury trial as described and affirmed by the Court in *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020). On August 3, 2020, the trial court issued a one-page ruling denying Wiley's application for post-conviction relief. In fact, the trial court said the "*Ramos* decision affects [only] cases not yet final. The Supreme Court emphasized that 'the Court's decision today will invalidate some non-unanimous convictions where the issue is preserved *and the case is still on direct review.*' The petitioner is not on direct review." Appendix C, p. 5.

In upholding the trial court's ruling, the appellate court said: "*Ramos v. Louisiana* holds that the Sixth Amendment right to a jury trial—as incorporated against the states by the Fourteenth Amendment—requires a unanimous verdict to convict a defendant of a serious offense....To date, the Louisiana Supreme Court has not held that *Ramos v. Louisiana* should be given retroactive application." Appendix B, p. 3. This instant petition for a writ of certiorari timely follows.

REASONS FOR GRANTING AND STAYING THE WRIT

On May 4, 2020, the Court granted a petition for a writ of certiorari in *Edwards v. Vannoy*, ___ S.Ct. ___ (2020) (No. 19-5807) to determine if the decision in *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020) applies retroactively to petitioners whose convictions were final when *Ramos* was decided. Wiley respectfully asks the Court to stay this petition pending the resolution of *Edwards v. Vannoy* and then dispose of the petition as appropriate in light of that decision.

Wiley's matter involves his 2009 felony convictions based on 2 non-unanimous jury verdicts. Wiley's case is appropriate for review because it involves a significant unresolved issue of law on collateral cases and because the Louisiana courts have erroneously interpreted or applied the relevant law.

Wiley's non-unanimous jury verdict should be reversed as *Ramos v. Louisiana* did not announce a new rule subject to retroactivity analysis, but rather clarified and corrected the erroneous reasoning presented in *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 62 L.Ed.2d 152 (1971). Unanimous jury verdicts have been the mainstay of the American system of law since the Founding. *Apodaca* was an outlier, its peculiar plurality opinion, along with its utterly repudiated "dual tract" doctrine, did not have any binding effect on the lower courts. Alternatively, even utilizing retroactivity analysis, the *Ramos* decision clearly meets the criteria announced in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). It represents a watershed rule that implicates the fundamental fairness and accuracy of criminal prosecutions. As this honorable Court noted: "It is difficult to envision a constitutional rule that more fundamentally implicates the fairness of the trial —the very integrity of the fact-finding process....It's purpose, therefore, clearly requires retroactive application." *Brown v. Louisiana*, 447 U.S. 323, 100 S.Ct. 2214, 65 L.Ed.2d 189 (1980). Finally, the State can evince no cogent basis upon which to rely on the finality of non-unanimous verdicts, the very establishment of which has always and unabashedly been premised on racial animus. As this Court said in *Ramos*: "[I]t is something else entirely

to perpetuate something we all know to be wrong only because we fear the consequences of being right."

1. Wiley's non-unanimous convictions violates the dictates of the Sixth and Fourteenth Amendments to the United States Constitution, this Court's holding in *Ramos v. Louisiana*, and nearly every tenet of fundamental fairness, substantial justice, due process, equal protection and reasonable doubt.

Twelve men and women served on Wiley's petit jury. Twelve jurors culled from hundreds of potential jurors who answered the call for service. The jurors were selected after vigorous questioning by the trial court, the State, and the Defense. They were educated on the rudiments and fundamentals of the law during *voir dire*, the court's opening remarks and final instructions. Throughout the process, the parties and the court certified that each member of the jury was a reasonable person, qualified by their education, experience and common sense to render judgment for or against Wiley; and yet, 2 jurors found room to doubt his guilt and the State's case against him. When reasonable persons can harbor doubts, those doubts are likewise reasonable. Thus Wiley was not convicted beyond reasonable doubt. He was convicted with doubt entrenched in the mind of at least 2 members of his jury with regards to the second degree murder charge and 1 juror concerning the aggravated burglary. Wiley's non-unanimous jury

verdicts, and the rejection of his right to be convicted beyond a reasonable doubt, violated his Sixth and Fourteenth Amendment due process and equal protection rights to a jury trial.

A. The Sixth Amendment Demands Unanimity in State *and* Federal Trials.

The Sixth Amendment to the United States Constitution guarantees unanimity in federal criminal jury trials. *Andres v. United States*, 333 U.S. 740, 68 S.Ct. 880, 92 L.Ed. 1055 (1948). "[T]he wise men who framed the constitution of the United States and the people who approved it were of the opinion that life and liberty, when involved in criminal prosecutions, would not be adequately secured except through the unanimous verdict of twelve jurors." *Thompson v. Utah*, 170 U.S. 343, 18 S.Ct. 620, 42 L.Ed. 1061 (1898) ("It was not for the state, in respect of a crime committed within its limits while it was a territory, to dispense with that guaranty simply because its people had reached the conclusion that the truth could be well ascertained, and the liberty of an accused be as well guarded, by eight as by twelve jurors in a criminal case.") The unanimity requirement extends to all issues, including the character or degree of the crime, guilt and punishment, which are left to the jury. *Id.* A jury trial has historically been understood to require "the truth of every accusation, whether preferred in the shape of indictment,

information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors [sic]..." *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *citing* Blackstone.

Nevertheless, while the Fourteenth Amendment's due process clause guarantees the right to a jury trial, jury unanimity has remained an outlier. *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 144, 20 L.Ed.2d 491 (1968). This honorable Court has said that "the States are free under the Federal Constitution to try defendants with juries of less than 12 men." *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970); citing *Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1971).

The seminal case for non-unanimous jury verdicts is *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 62 L.Ed.2d 152 (1971). In *Apodaca*, a bitterly divided court eschewed the historical context and a nearly unbroken chain of cases recognizing unanimity, instead "focus[ing] upon the function served by the jury in contemporary society." *Id.*, at 410.

> '[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen...' A requirement of unanimity, however, does not materially contribute to the exercise of this commonsense judgment....In terms of this function we perceive no difference between juries required to act

> unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one. Requiring unanimity would obviously produce hung juries in some situations where nonunanimous juries will convict or acquit. But in either case, the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him is equally well served.

Apodaca v. Oregon, at 410-11.

The *Apodaca* Court's ruling is a peculiar aberration. First, 8 members of the *Apodaca* Court held that the Sixth Amendment applied equally to the states and the federal government. *Johnson v. Louisiana*, 406 U.S., at 395-96. Only Justice Powell rejected the prior precedent and cast the decisive vote to conclude that the Sixth Amendment did not apply to the states in the same way it applied to the federal government. Second, this Court's due process jurisprudence has long held that the Sixth Amendment's jury trial guarantee applies to the states and that, where a Bill of Rights protection is incorporated in the Fourteenth Amendment, "there is no daylight between the federal and state conduct it prohibits or requires." *Timbs v. Indiana*, 139 S.Ct. 682, 203 L.Ed.2d 11 (2019). This Court has also said it would be "incongruous" to apply different standards "depending on whether the claim was asserted in a state or federal court." *McDonald v. City of Chicago*, 130 S.Ct. 3020, 561

U.S. 742, 177 L.Ed.2d 894 (2010). Consequently, this Court's own authority undermined Justice Powell's deciding vote and rationale in *Apodaca*.

That the right to trial by jury is fundamental and applies to the states through the Fourteenth Amendment's due process clause is undisputed. It is also settled Supreme Court jurisprudence that rights incorporated by the Fourteenth Amendment received identical treatment by both the states and the federal government. These inviolable principles were recently reaffirmed in *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020).

In *Ramos*, this honorable Court held that there is no colorable doubt what the Framer's of the Constitution had in mind when they enshrined the right to trial by jury. "Wherever we might look to determine what the term 'trial by an impartial jury trial' meant at the time of the Sixth Amendment's adoption ... the answer is unmistakable. A jury must reach a ***unanimous verdict*** in order to convict." *Id.*, at *4. Next the Court held that longstanding jurisprudence holds that, where an amendment has been held to apply to the states through the Fourteenth Amendment, the Bill of Rights must be enforced the same for the federal government and the states, there can be no "daylight" between the protections of the one and the other:

> There can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials

> equally. This Court has long explained that 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 long explained, too, that incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government. So, if the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court.

Ramos v. Louisiana, at *7.

Having determined that the right by trial implicates a unanimous jury verdict and that the right applies with equal force to the federal government and the states, the *Ramos* Court spent the bulk of its opinion evaluating the *Apodaca* opinion. *Apodaca* was heard in tandem with *Johnson v. Louisiana*, and both cases challenged non-unanimous jury statutes. *Apodaca* was a split decision; even so, all 9 Justices found that the Sixth Amendment originally required unanimity. However, 4 of the Justices believed that "unanimity's costs outweigh[ed] its benefits in the modern era." Therefore, they were willing to uphold non-unanimous verdicts in state courts. Justice Powell cast the deciding vote. Failing to align with either side's version, he argued that the Sixth Amendment required unanimous jury verdicts **only** in federal courts. This so-called "dual track" theory holds that different standards of

constitutional protections apply to the state and federal governments and, as such, they must be evaluated differently.

However, as the Court made clear in *Ramos*, Justice Powell's dual track argument had already been rejected: "The Court had already, nearly a decade earlier, 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." *Ramos*, supra at *9 (internal quotations omitted). Consequently, the *Ramos* majority was thus faced with a dilemma. *Apodaca* should have precedential effects, but the decision was deeply flawed because: (a) all the justices agreed that the Sixth Amendment provided a right to a unanimous jury verdict; (b) no majority of the Court authored the controlling opinion; and (c) Justice Powell's opinion—which gave the majority its votes—was based upon grounds that were already invalid at the time of the opinion:

> [N]ot even Louisiana tries to suggest that *Apodoca* supplies a governing precedent. Remember, Justice Powell agreed that the Sixth Amendment requires a unanimous verdict to convict, so he would have no objection to that aspect of our holding today. Justice Powell reached a different result only by relying on a dual-track theory of incorporation ***that a majority of the Court had already rejected*** [***and continues to reject***].

Id., at p. *16 (emphasis added).

Moreover, even if the Court "accepted the premise that *Apodaca* established a precedent, no one on the Court today is prepared to say it was rightly decided, and *stare decisis* isn't supposed to be the art of methodically ignoring what everyone knows to be true." *Id.*, at p. *20.

Properly read, *Ramos* does not overrule *Apodaca*; it merely recognized that the decision never had precedential effect. It was never the law of the land and any non-unanimous conviction upheld under its premises is phantasmic. That the Sixth Amendment provides for unanimous jury verdicts is not now—and never has been—a real dispute. In *Apodaca*, all of the Justices agreed that unanimity was required at the Founding. 4 Justices, however, would do away with it as "too burdensome." A fifth, Justice Powell, would argue that the right to a unanimous jury verdict was essential to federal trials but did not apply to the states through the Fourteenth Amendment. As the *Ramos* Court noted, Justice Powell's view of "dual-track theory of incorporation was already foreclosed in 1972."

B. *Ramos* Is Not New Law as *Apodaca* had no Precedential Effect.

The *Ramos* majority is clear—the decision is not retroactive. That is, the Court only heard the limited issue of whether the Sixth Amendment's right to unanimity applies to the states: "[T]he *Teague* question [is not] even

before us. Whether the right to jury unanimity applies to cases on collateral review is a question for a future case where the parties will have a chance to brief the issue and we will benefit from their adversarial presentation." *Ramos*, supra at *12. In *Ramos*, this honorable Court pointed out that the right to unanimous jury verdicts originated in Fourteenth century England and had been practiced for four-hundred years by the time of the Founding. The right was widely practiced both before and after the Revolution and has remained a stalwart feature of constitutional jurisprudence ever since. The *Apodaca* decision, the sole support for non-unanimous verdicts, was flawed, fractured, and Justice Powell's deciding vote violated decades of Supreme Court precedent in its attempt to revive the ersatz "dual tract" doctrine. Here the Court made a strong argument that *Apodaca* was not worth the paper it was written on and that it **never** had precedential authority.

This honorable Supreme Court has issued no fewer than fourteen opinions holding that the Sixth Amendment requires unanimous verdicts to convict. In 1898, the Court held that "life and liberty, when involved in criminal prosecutions, would not be adequately secured except through the unanimous verdict of twelve jurors." *Thompson v. Utah*, 170 U.S. 343, 18 S.Ct. 620. The Court followed in short order with several similar opinions.

See generally, *Maxwell v. Dow*, 176 U.S. 581, 586 (1900); *Patton v. United States*, 281 U.S. 276, 288 (1930). In 1942, again emphasizing the Sixth Amendment's demand for "[u]nanimity in jury verdicts," the Court extended the requirement "upon both guilt and whether the punishment of death should be imposed." *Andres*, supra.

Even in *Apodaca v. Oregon* a majority of the Court agreed that the Sixth Amendment requires jury unanimity to convict. Justice Powell accepted the "unbroken line of cases reaching back into the late 1800's" holding that, under the Sixth Amendment, "unanimity is one of the indispensable features of federal jury trial[s]." *Johnson*, supra at 369. Justice Stewart, writing for 3 Justices, also concluded that "the Sixth Amendment's guarantee of trial by jury embraces a guarantee that the verdict of the jury must be unanimous." *Apodaca*, supra at 414-15. Justice Douglas similarly maintained that "the federal Constitution require[s] a unanimous jury in all criminal cases." *Johnson*, supra at 382.

Since *Apodaca*, this Court has continued to recognize that the Sixth Amendment requires that "the truth of every accusation ... be confirmed by the unanimous suffrage of twelve of [a defendant's] equals and neighbors" and "contemplates that a jury ... [will find the essential facts] unanimously

and beyond a reasonable doubt." *Apprendi*, supra at 477; *Descamps v. United States*, 570 U.S. 254, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013).

A close reading of *Ramos* suggests that in attempting to circumscribe the Court's previous authority, the *Apodaca* Court in general (and Justice Powell in particular) rendered an opinion without precedential authority. As this Court noted in *Ramos*, Justice Powell "agreed that the Sixth Amendment requires a unanimous verdict to convict." *Ramos*, supra at *16. This is uncontested. In voting with the majority, however, Justice Powell relied upon the "dual-track theory," an interpretation of law that was, and continues to be, invalid. 1 Justice cannot overrule precedent:

> It is usually a judicial decision's reasoning—its *ratio decidendi* —that allows it to have life and effect in the disposition of future cases. As this Court has repeatedly explained in the context of summary affirmances, "unexplicated" decisions may 'settl[e] the issues for parties, [but they are] not to be read as a renunciation by this Court of doctrines previously announced in our opinions." Much the same may be said here. *Apodaca's* judgment line resolved that case for the parties in that case. It is binding in that sense. But stripped from any reasoning, its judgment alone cannot be read to repudiate this Court's repeated pre-existing teachings on the Sixth and Fourteenth Amendments.

Id., at p. *24.

Put another way, since all 9 Justices recognized the requirement of unanimity at the time of the Framing and since Justice Powell's majority-

deciding vote sought to resurrect the previously-rejected theory of divergent construction of constitutional principles at the state and federal level, the *Apodaca* ruling was valid only in the case before the Court: "[S]tripped from any reasoning, its judgment alone cannot be read to repudiate this Court's repeated pre-existing teachings on the Sixth and Fourteenth Amendments." *Id.* Accordingly, the *Teague* analysis is not, strictly speaking required, as the Sixth Amendment does—and always has—barred the non-unanimous verdicts found acceptable in only 2 jurisdictions in the nation—Louisiana and Oregon. Accordingly, Wiley is entitled to the reversal of his convictions.

CONCLUSION

For the foregoing reasons Wiley's petition for a writ of certiorari should be granted and held in abeyance pending this Court's decision in *Edwards v. Vannoy*, ___ S.Ct. ___ (2020) (No. 19-5807) and then be disposed of as appropriate in light of that decision.

Respectfully submitted,

Trevon Wiley

Date: April 5, 2021