APPENDIX "A"

ORIGINAL PCR W/
MEMORANDUM IN SUPPORT

Sadat El-Amin, #292961
MPEY/Ash-4
La. State Penitentiary
Angola, LA 70712

August 10, 2020
(Date)

Clerk of Court,
22nd Judicial District Court
P.O. Box 607
Franklinton, LA 70438

RE: *Sadat El-Amin v. Darrel Vannoy, Warden*, No. 09-CR1-101854; On Application for Post-Conviction Relief.

Dear Clerk:

Enclosed is an Original of my *pro se* pleadings, to wit:

1. Uniform Application for Post-Conviction Relief;
2. Memorandum of Law in Support;
3. Motion Requesting Evidentiary Hearing and Appointment of Counsel, w/Order;
4. Petition for Writ of Habeas Corpus Ad Testificandum, w/Order;
5. Motion to Compel Answer, w/Order.

I respectfully ask that you please file same in the docket of the above referenced criminal matter for judicial consideration and disposition.

Additionally enclosed is another copy of this cover letter that I respectfully ask that you please "file/date" stamp and return to me.

This matter is *in forma pauperis*.

Respectfully,

_____
Sadat El-Amin

AM/dec #304580

Enclosures (2)

Cc: w/encl. District Attorney, Washington Parish

IN THE
22ND JUDICIAL DISTRICT COURT
PARISH OF WASHINGTON
STATE OF LOUISIANA

DOCKET NUMBER: 09-CR1-101854

SADAT EL-AMIN
Petitioner

Versus

DARREL VANNOY, Warden
La. State Penitentiary
Respondent

APPLICATION FOR POST-CONVICTION RELIEF

BRIEF FILED ON BEHALF OF
SADAT EL-AMIN – PETITIONER

RESPECTFULLY SUBMITTED

SADAT EL-AMIN #292961
MPEY/Ash-4
LA STATE PENITENTIARY
ANGOLA, LA 70712

CRIMINAL PROCEEDING

PREPARED BY:
David Constance #304580 Offender Counsel Substitute III
Main Prison Legal Aid Office
Criminal Litigation Team
La. State Penitentiary
Angola, LA 70712

SECOND OR SUBSEQUENT UNIFORM APPLICATION FOR POSTCONVICTION RELIEF

Please review La. C. Cr. P. Arts. 924—930.9 for the correct procedure for filing an application for postconviction relief. This form does not modify the law or requirements as stated in those articles.

For the **Time Limitations** for filing this application, please see Louisiana Code of Criminal Procedure (La. C. Cr. P.) Art. 930.8(A), which states in part that "No application for post-conviction relief, including applications which seek an out-of-time appeal, shall be considered if it is filed more than two years after the judgment of conviction and sentence has become final under the provisions of Article 914 or 922 ..."

SECOND OR SUBSEQUENT UNIFORM APPLICATION INSTRUCTIONS—READ CAREFULLY

If this is **not** your **First Application** for postconviction relief, please carefully review all of the following instructions:

1. In accordance with La. C. Cr. P. Art. 930.4(D) or (E), you are entitled to file one application for postconviction relief after your conviction has become final and within the time limits provided in La. C. Cr. P. Art. 930.8.
2. If you are attempting to file a second or subsequent application, you **must use this form** and **justify your right to file a second or subsequent application** in accordance with La. C. Cr. P. Arts. 930.4 and 930.8. If you fail to use this form, your application may be automatically dismissed by the Court.

GENERAL INSTRUCTIONS—READ CAREFULLY

In addition to the above instructions, please carefully review all of the following instructions:

1. **You must use this form or the District Court will not consider your application.** This could affect your ability to seek relief in accordance with the time limits established in La. C. Cr. P. Art.930.8. Therefore, you must use this form or justify your failure to do within the postconviction time limits.
2. This application must be clearly written or typed, signed by you or your attorney, and sworn to before a notary public or institutional officer authorized to administer an oath. Any false statement of a material fact may serve as the basis for criminal prosecution. Answer questions concisely in the proper space on the form. You may attach additional pages stating the facts that support your claims for relief. No lengthy citations of authorities or legal arguments are necessary.
3. When the application is completed, **you must file the original application in the District Court for the Parish in which you were convicted and sentenced**, and you must also send a copy to the State.
4. You must raise all claims for relief arising out of a single trial or guilty plea in one application.
5. You are only entitled to file an application for postconviction relief to challenge a **habitual offender adjudication or sentence within very limited circumstances.** In most cases, you can only challenge a habitual offender adjudication or sentence in appeal.

REQUIRED ATTACHMENTS

A copy of **the Louisiana Uniform Commitment Order** of conviction and sentence **must** be attached to the application (if it is available), or the application must allege that it is unavailable.

You **must** attach a copy of **any judgment by any court** regarding prior postconviction applications, or this application may be dismissed by the district court. If you are unable to provide any judgments, please explain why.

Date of this Application:	8/10/2020	Name of Applicant:	Sadat El-Amin
DOC Number:	292961	Place of Confinement:	La. State Pen.
District Court Case Number:	09-CR1-101854	Parish of Conviction:	Washington
Name of Trial Judge:	William J. Burris		
Offense(s) for which you were convicted:	Forcible Rape (2 Counts)		
Do any of the convictions involves a sex offense or a human trafficking related offense where the victim was a minor under the age of eighteen years (see La. R. S. 46:1842(1.1) and 46:1844(W)(2))?		Yes [X] No []	

Date of Conviction:	5/14/94	Conviction by: [Check One]	Guilty Plea [] Trial by Jury [X] Trial by Judge []
Date of Sentencing:	6/4/92	Sentence	Sixty-five (65) years
Name of Counsel who represented you at the time of trial, sentence and / or conviction:		John W. Linder	
Multiple Offender Proceeding: [Check One]		Yes []	No [X]
If yes, answer both of the following questions:			
Result of Proceeding: [Check One]		Pled [] Adjudicated to be a Multiple Offender [] Adjudicated No Bill []	
Sentence on Multiple Offender Bill:			
Name of Counsel who represented you on appeal:		Prentice L. White	
Appeal of conviction and sentence: [Check One]	Yes [X] No []	Appellate Case #:	2011-0030
Appeal of Multiple Bill: [Check One]	Yes [] No []	Appellate Case #:	
Writ to Louisiana Supreme Court: [Check One]	Yes [X] No []	Supreme Court Case #:	2011-1532
Action by Supreme Court: [Check if Applicable]	Granted [] Denied [X]	Date of Action	2/17/12
Rehearing to Supreme Court: [Check if Applicable]	Granted [] Denied []	Date of Action	___ / _____ / ____

PRIOR APPLICATIONS INSTRUCTIONS—READ CAREFULLY

Please provide a list of all prior applications for postconviction relief filed by you or on your behalf in connection with the judgment of conviction and sentence challenged in this application. If you have filed more than two prior applications, provide the information for each additional application on a separate sheet of paper.

District Court Case Number	09-CR1-101854	Parish of Conviction:	Washington
Date of Filing:	6/10/2013	Is this the same case challenged in this application? [Check One]	Yes [X] No []
Claims Raised:	1. Baton violation; 2. State exceeded peremptorily challenges limit; 3. Ineffective assistance of counsel; 4. Double Jeopardy; 5. Denied the right to testify.		
Was relief granted or denied? [Check One]	Yes [] No [X]	Date of Disposition:	9/12/13
Did you receive an evidentiary hearing? [Check One]	Yes [] No [X]	Did you file a writ to the Court of Appeal? [Check One]	Yes [X] No []
Which Circuit? [Check One]	1[X] 2[] 3[] 4[] 5[]	Appellate Case #:	
Sought writ to Louisiana Supreme Court? [Check One]	Granted [] Denied [X] Not Sought []	Supreme Court Case #:	
		Date of Ruling	___ / _____ / _____

District Court Case Number	09-CR1-101854	Parish of Conviction:	Washington
Date of Filing:	1/24/18	Is this the same case challenged in this application? [Check One]	Yes [X] No []
Claims Raised:	1. Ineffective assistance of counsel (failed to argue recusal of Judge Burris.		
Was relief granted? [Check One]	Yes [] No [X]	Date of Disposition:	3/12/18

Did you receive an evidentiary hearing? [Check One]	Yes [] No [X]	Did you file a writ to the Court of Appeal? [Check One]	Yes [X]No []
Which Circuit? [Check One]	1[X] 2[] 3[] 4[] 5[]	Appellate Case #:	2018-0533

Sought writ to Louisiana Supreme Court? [Check One]	Granted [] Denied [X] Not Sought []	Supreme Court Case #:	
		Date of Ruling	___/_____/____

CLAIMS FOR RELIEF INSTRUCTIONS—READ CAREFULLY

You must include in this application **all allowable claims** relating to this conviction. If you do not, you may be **barred** from presenting additional claims at a later date. See La. C. Cr. P. Art. 930.4. You must **state facts** upon which your claims are based. Do not just set out conclusions.

Please refer to La. C. Cr. P. Art. 930.3 (Grounds), which reads:

> "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;
> (2) The court exceeded its jurisdiction;
> (3) the conviction or sentence subjected him to double jeopardy;
> (4) The limitations on the institution of prosecution had expired;
> (5) The statute creating the offense for which he was convicted and sentenced is unconstitutional; or
> (6) The conviction or sentence constitute the ex post facto application of law in violation of the constitution of the United States or the state of Louisiana.
> (7) The results of DNA testing performed pursuant to an application granted under Article 926.1 proves by clear and convincing evidence that the petitioner is factually innocent of the crime for which he was convicted."

Using a separate sheet of paper, provide the following information as it relates to claims available under La. C. Cr. P. Art. 930.3.

For each claim:

(A) You **must** state your **claim**, the **ground** on which it is based under La. C. Cr. P. Art. 930.3, and the **facts** that support your claim.
(B) If there are witnesses who could testify in support of your claim, you **must** list their names and current addresses. If you cannot do so, explain why.
(C) If you failed to raise this claim in the trial court prior to conviction or on appeal, you **must** explain why. This is your opportunity to state reasons for your failure before the court considers dismissing the application in accordance with La. C. Cr. P. Art. 930.4(F).

In the following space, provide a brief summary of the reasons why you are legally entitled to file a second or subsequent application. If you fail to justify your right to file a second or subsequent application in accordance with La. C. Cr. P. Arts. 930.4 and 930.8, your application may be automatically dismissed. **Mr. El-Amin was convicted by a non-unanimous jury verdict. The *Ramos* case must be ruled retroactive.**

Wherefore, Applicant prays that the Court grant Applicant relief to which he / she may be entitled.

8/10/2020 [Day / Month / Year]	_____ [Signature of Applicant or Applicant's Attorney]

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF WEST FELICIANA

Sadat El-Amin #292961, [Name of Applicant], being first duly sworn says that he / she has read the application for postconviction relief and swears or affirms that all of the information therein is true and correct.

_____ SWORN TO AND SUBSCRIBED before [Signature of Applicant] me this _____ day of _____, 20___.

_____
NOTARY or person authorized to administer oath

Case Name:	**JUDGMENT** [May be used by the Court in Lieu of or in addition to written reasons]	Case Number:

Considering the foregoing Application for Postconviction Relief, this Honorable Court hereby:

DENIES this application in accordance with La. C. Cr. P. Art.

926(E) [] 928 [] 929 [] 930.4 [] or 930.8 [], or

ORDERS that the Applicant show cause in writing on or before the ____ day of _____, 20 ____ why the application should not be dismissed in accordance with La. C. Cr. P. Art.

926(E) [] 928 [] 929 [] 930.4 [] or 930.8 [], or

ORDERS that the State be required to file a response to this application on or before the ____ day of _____, 20 ____.

Signed in _____, Louisiana, this ____ day of _____, 20 ____.

_____
JUDGE

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SADAT EL-AMIN

VERSUS NO: 09-CR1-101854

DARREL VANNOY, Warden
La State Penitentiary

FILED:_____

22ND JUDICIAL DISTRICT COURT

PARISH OF WASHINGTON

STATE OF LOUISIANA

_____
CLERK OF COURT

MEMORANDUM IN SUPPORT OF APPLICATION FOR POST-CONVICTION RELIEF

MAY IT PLEASE THE COURT:

NOW INTO COURT comes, Sadat El-Amin, Petitioner who respectfully moves this court pursuant to La.C.Cr.P. Arts. 924-930-8 to review his Claim(s) herein that will support that his conviction and sentence were obtained in violation of both the Louisiana and United States Constitutions. The issue presented entitles Mr. El-Amin to an evidentiary hearing with the appointment of counsel and automatic reversal.

NOTICE OF PRO-SE FILING

Mr. El-Amin requests that this Honorable Court view these Claims in accordance with the rulings of *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972); *State v. Moak*, 387 So.2d 1108 (La. 1980)(Pro-se petitioner not held to same stringent standards as a trained lawyer); *State v. Egana*, 771 So.2d 638 (La. 2000)(less stringent standards than formal pleadings filed by lawyers). Mr. El-Amin is a layman of the law and untrained in the ways of filings and proceedings of formal pleadings in this Court.

JURISDICTION

Jurisdiction is proper in this Honorable Court pursuant to Louisiana Constitution of 1974, Art. 1 § 19, 22 and Art. V § 2, 16; La.C.Cr.P. Arts. 924 and 930.8 (A)(1).

FACTS OF THE CASE

Mr. El-Amin was convicted of two Counts of Forcible Rape, a violation of LSA-R.S. 14:42.1 by a non-unanimous jury (11-1).[1] Mr. El-Amin's conviction and sentence was finalized in *State v. Sadat El-Amin*, 2011-KA-0030 (La. App. 1st Cir. 6/10/14), *writ denied*, 82 So.2d 281 (La. 2012). Mr. El-Amin has previously filed for Post-Conviction Relief; but due to "newly discovered" evidence, he is now filing this pleading.

1 See: ***State v. Sadat El-Amin***. Mr. El-Amin was found guilty of two Counts of Forcible Rape with an 11-1 verdict.

CLAIMS FOR RELIEF

Non-unanimous jury verdict convicted Mr. El-Amin in violation of his Sixth and Fourteenth Amendments.

A. Mr. El-Amin has a non-unanimous jury conviction

Article I, § of the Louisiana Constitution of 1974, and La.C.Cr.P. Art. 782 at the time of Mr. El-Amin's offense and conviction allowed for non-unanimous jury verdicts for his offense.

The current version of these provisions of the Louisiana Constitution and the Code of Criminal Procedure continues to allow for non-unanimous jury verdicts in non-capital cases for offenses that were committed prior to January 1, 2019.[2]

A non-unanimous jury convicted Mr. El-Amin of two Counts of LSA-R.S. 14:42.1, Forcible Rape on July 17, 2018. Specifically, he was convicted by a jury of 11-1. See: ***State v. Sadat El-Amin***, 2011-KA-0030 (La. App. 1st Cir. 6/10/14), *writ denied*, 82 So.2d 281 (La. 2012). See also, Exhibit 1, transcript pages w/ Court Reporter's Certification regarding results of written poll of jurors supporting Mr. El-Amin's claim that the court convicted Mr. him after a non-unanimous jury verdict. The court sentence him to sixty-five years without the benefit of Parole, Probation, or Suspension of Sentence.

The United States Supreme Court refers to life without the benefit of Probation, Parole, or Suspension of Sentence a "virtual" death penalty (or even a "virtual life sentence of sixty-five years). Simply put, Mr. El-Amin was still sentenced to a "death" penalty with a non-unanimous verdict when he was sentenced to serve sixty-five years without the benefit of Parole, Probation, or Suspension of Sentence. In ***Graham*** and ***Miller***, the United States Supreme Court addressed the issue of "likening" a life sentence to the "death" penalty for juveniles. However, it must be stated that if this sentence is a "death" penalty for a juvenile, then it must also be a "death" penalty for an adult who is sentenced to

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2 Article I, §17(A) of the Louisiana Constitution states:

> Jury trial in criminal cases. A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case for an offense committed prior to January 1, 2019, in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict. A case for an offense committed on or after January 1, 2019, in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment may be confinement without hard labor for more than six months shall be tried before a jury of six persons, all of whom must concur to render a verdict. The accused shall have a right to full voir dire examination of prospective jurors and to challenge jurors peremptorily. The number of challenges shall be fixed by law. Except in capital cases, a defendant may knowingly and intelligently waive his right to a trial by jury but no later than forty-five days prior to the trial date and the waiver shall be irrevocable.

La. Const. Art. I §17(A).

Article 782 of the Louisiana Code of Criminal Procedure provides, in pertinent part:

> A case in which punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. A case for an offense committed prior to January 1, 2019, in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. A case for an offense committed on or after January 1, 2019, in which the punishment is necessarily at hard labor shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment may be confinement at hard labor shall be tried by a jury composed of six jurors, all of whom must concur to render a verdict.

La.C.Cr.P. Art. 782(A).

life imprisonment without the benefit of Probation, Parole, or Suspension of Sentence. Mr. El-Amin sentenced to such a harsh sentence without the alleged victim losing her life.

This Court should note that a life sentence (or a "virtual life sentence") in the State of Louisiana is similar to that of a death penalty, as an offender is meticulously guaranteed that he will **NEVER** see the light of day as a free man, and is virtually sentenced to die in incarceration. Although the State may submit the fact that Mr. El-Amin may apply for a Pardon in twenty years; it should be noted that offenders sentenced to death are also able to apply for a Pardon. Hence, showing that this life sentence is really a "**Virtual Death Penalty**," or "**Death by Incarceration**." This is an unconstitutional sentence considering the fact that he was convicted with non-unanimous jury verdicts and his alleged victim did not lose her life in the process.

Only one other state allows for non-unanimous jury verdicts, Oregon. In *Apodaca v. Oregon*, 406 U.S. 404 (1972), the Supreme Court upheld Oregon's provision for non-unanimous jury verdicts in criminal cases. A plurality of the Supreme Court found that, while the Sixth Amendment of the United States Constitution requires jury unanimity for a verdict, this mandate did not apply to states because the right was not incorporated via the Fourteenth Amendment Due Process Clause.

However, one fact of Oregon's non-unanimous jury verdict which is different from that Law in Louisiana, is the fact that, in the event of a non-unanimous verdict, the defendant can not be subjected to life imprisonment without the benefit of Probation, Parole, or Suspension of Sentence.

To the extent, this Court requires additional proof of Mr. El-Amin's non-unanimous jury verdict, Mr. El-Amin seeks an evidentiary hearing with the Clerk of Court in Washington Parish, P.O. Box 607, Franklinton, LA 70438 to further support his claim. To support Mr. El-Amin's Application for Post-Conviction Relief, Mr. El-Amin also relies on the ruling in *State v. Maxie* and the *Ramos v. Louisiana* Amicus by the Innocent Project New Orleans.

B. non-unanimous jury convictions violate the Sixth and Fourteenth Amendments.

> *On what ground would anyone have us leave Mr. Ramos in prison for the rest of his life? Not a single Member of this Court is prepared to say Louisiana secured his conviction constitutionally under the Sixth Amendment. No one before us suggests that the error was harmless. Louisiana does not claim precedent commands an affirmance. In the end, the best anyone can seem to muster against Mr. Ramos is that, if we dared to admit in his case what we all know to be true about the Sixth Amendment, we might have to say the same in some others. Buy where is there justice in that? Every judge must learn to live with the fact he or she will make some mistakes; it comes with the territory. But it is something else entirely to perpetuate something we all know to be wrong because we fear the consequences of being right.*

Ramos v. Louisiana, 590 U.S. ___, ___ (2020)(plurality opinion)(slip op., at 26).

The United States Supreme Court decided *Ramos v. Louisiana*, on April 20, 2020. In that case,

Evangelisto Ramos faced a charge of Second Degree Murder, for which he maintained his innocence and invoked his right to a jury trial. ***Ramos v. Louisiana***, 590 U.S. ____, ____ (2020)(slip op., at 1). During that trial, two jurors believed that the State of Louisiana had failed to prove Mr. Ramos' guilt beyond a reasonable doubt. *Id.* The two jurors voted to acquit. *Id.*

The courts in 48 states would have acquitted Mr. Ramos in this circumstance; but in Louisiana – where the law allowed 10-2 and 11-1 non-unanimous jury convictions – Mr. Ramos received a life sentence, without the possibility of parole. *Id.*

In addition to being inconsistent with the vast majority of criminal procedure practice across the country, Louisiana's non-unanimous jury rule – the ***Ramos*** Court explained – was born from the Jim Crow era. "With a careful eye on racial demographics, the [1898 Constitutional] Convention delegates sculpted a 'facially race-neutral' rule permitting 10-to-2 verdicts in order 'to ensure that African-American jury service would be meaningless.'" *Id.*, at ___ (slip op., at 2).

Discriminatory intent:

The non-unanimous jury provision was incorporated into the Constitution of 1898 as part of an effort "to perpetuate the supremacy of the Anglo-Saxon race in Louisiana." "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." ***Arlington Heights***, 429 U.S. at 266. Evidence of any improper motive may be gleaned from the "historical background" of the law, including the "specific sequence of events leading up to" its enactment, "particularly if it reveals a series of official actions taken for invidious purposes." Id at 267 (citations omitted). One potential "highly relevant" source of such evidence includes "contemporary statements by members of the decision making body, minutes of its meeting, or reports." Id at 268.

Another indication of any improper motive may include an otherwise unexplained "substantive departure" from a law usually regarded as important. Cf. Id at 267 ("Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decision maker strongly favor a decision contrary to the one reached.")(footnote and citations omitted). Finally, an indication of improper motive may arise when the impact of the law "bears more heavily on one race than another." Id at 266, quoting ***Washington v. Davis***, 426 U.S. 229, 242, 96 S.Ct. 2040; 48 L.Ed.2d 597 (1976). Just as the ordinary "sort of difficulties" typically associated with trying to ascertain congressional intent were absent in ***Hunter*** (471 U.S. at 228), each of these factors

overwhelmingly supports the conclusion that Louisiana's non-unanimous jury provisions were the product of racially discriminatory intent as the histories of both laws are nearly identical, having arisen from the same overtly racist movement identified in *Hunter*.

Originally, the State of Louisiana had provided for the common law right to trial by jury, including unanimity of jury verdicts. By the Act of 1805, the Territory of Orleans adopted the forms and procedures of the common law of England in this criminal proceedings, including "the method of trials." Act of 1805, § 3 3; See generally Voorhies A.A. *Treatise on the Criminal Jurisprudence of Louisiana*, Bloomfield & Steel (1860), pp. 3-10. Following the Civil War and pursuant to the Military Reconstruction Act of 1867, a Constitutional Convention was convened in Louisiana with equal numbers of blacks and white delegates. Vincent, Charles M. "Black Constitutional Makers: The Constitution of 1868. "*In Search of Fundamental Law*: Louisiana's Constitutions, 1812-1974 (1993). The 1868 Constitution enshrined Louisiana's first Bill of Rights, which was modeled on the Federal Bill of Rights and included the right to trial by jury, La C Art. VI (1868).

After federal troops withdrew from New Orleans in 1877, southern Democrats immediately seized political control, electing a democratic governor and winning three quarters of the seats in the legislature by 1878. By April 1879, a Constitutional Convention had been called, and a new Constitution was ratified in December 1879. See: Abbe, Ronald M. "That the Reign of Robbery Will Never Return to Louisiana" *In Search of Fundamental Law*, (1993). To the disappointment of many Democrats, however, the Constitution of 1879 did not take significant steps to turn back the civil rights granted to black citizens during reconstruction. The limited steps taken in 1879 are explained by the circumstances at that time; one quarter of the legislature remained hostile to Democrats, the possibility of a return by federal troops lingered, and fears of a mass exodus of black citizens from the state threatened the economy. Id.

Through the early 1890's, while the white Democrats maintained power, black citizens continued to make up the majority of registered voters, and the Democrats feared their voting power and the possibility of an alliance between blacks and working class whites. Close call election victories had shaken up the Democrats and added urgency to the need to cement their power and to remove blacks and poor whites from meaningful participation in Louisiana's political and civil institutions. Furthermore, only a few years earlier, in 1880, the United States Supreme Court decided in *Strauder v. West Virginia*, 100 U.S. 303 (1880), which held that the Fourteenth Amendment prohibited states from excluding persons from jury service based upon race. It was against this backdrop and "a desire of

Louisiana's reactionary oligarchies to disfranchise blacks and poor whites (which) prompted the Constitutional Convention of 1898." (See: Lanza, Michael L. "Little More than a Family Matter: The Constitution of 1898." *In Search of Fundamental Law*. pp. 93-109.

The 1898 Constitutional Convention was designed to produce a constitution that would entrench white power once and for all, and to ensure this goal; sweeping changes to election laws were passed immediately prior to the convention. The effect was that when the people were asked by referendum to vote on whether to have a Constitutional Convention and to nominate delegates, black voter registration had dropped by ninety (90%) percent. Id at 98. As a result of this legislative disenfranchisement, the 134 delegates at the 1898 Convention were all white and the resulting constitution was ratified without being submitted to a popular vote. Id at 98-99.

The statements by members of the decision making body also support a finding of discriminatory intent. Like the delegates to the 1901 Alabama Convention discussed in ***Hunter***, Louisiana's all white delegates were "not secretive about their purpose." 471 U.S. at 229. As the President of Constitutional Convention, E.B. Kruttschnitt, stated in his opening address:

> I am called upon to preside over a little more than a family meeting of the Democratic party of the State of Louisiana ... We know that this convention has been called together by the people of the State to eliminate voters who have during the last quarter of a century degraded our politics.[3]

And in closing argument, President Kruttschnitt bemoaned that the delegates have been constrained by the Fifth Amendment from achieving "universal white manhood suffrage and the exclusion from the suffrage of every man with a trace of African blood in his veins." Id at 380.

He went on to proclaim:

> I say to you, that we can appeal to the conscience of the nation, both judicial and legislative and I don't believe that they will take the responsibility of striking down the system which we have reared in order to protect the purity of the ballot box and to perpetuate the supremacy of the Anglo-Saxon race in Louisiana. [Id at 381].

This overtly racial sentiment was echoed in the closing remarks of Honorable Thomas J. Semmes, who stated in the "mission" of the delegates had been "to establish the supremacy of the white race in this state." Id at 374. In sum, Louisiana's political climate and the dynamics of the Louisiana Convention were exactly the same as those of its neighbors in Alabama in 1901.

Further, evidence of discriminatory intent is apparent from the unexplained "substantive departure" from the universal, unquestioned, long-standing, well established rule in Louisiana that jury verdicts must be unanimous. No explanation, independent of the trumpeted mission of re-establishing white supremacy, can be found to explain this unprecedented action.

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3 See: **Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana**, 8-9 (1898).

Finally, there is little doubt that the impact of the law "bears more heavily on one race than another." As juries in 1898 were highly unlikely to contain more than three black jurors, the absolute nullification of the votes of the "peers" of black defendants was highly likely. On the other hand, the possibility that a white defendant would face a predominately black jury was quite small or nonexistent.

Considering these factors together, it is rather easy to see what the Louisiana legislators were thinking when they decided to dispense with the centuries-old mainstay of common law criminal justice: the unanimous jury verdict. Quite simply, with non-unanimous verdicts, African American citizens charged with a crime were more likely than whites to end up being convicted if the votes of the one or two potentially sympathetic black jurors who might end up on the jury can be nullified by the votes of the remaining white jurors. Given that felons cannot vote, and given the overtly racial animus of these white legislators, the intended disenfranchising effect of the new law is undeniably apparent.

Indeed, the direct racially disenfranchising effect of Louisiana's non-unanimous -verdict provision is even more obvious and more insidious than the statute struck down in *Hunter*. Unlike Alabama's certain misdemeanors can't vote provision, for which the racial motivation behind its passage is not self-evident, the discriminatory purpose of Louisiana's non-unanimous-jury provision is quite obvious.

Plainly, racial discrimination was a substantial or motivating factor behind the enactment of Louisiana's non-unanimous-jury provision that has survived several constitutional conventions and has even undergone a change from a requirement that a guilty verdict must rest on a vote of 9-3 to the current 10-2 requirement. Such a concern was addressed in *Hunter*:

> At oral argument in this Court, the appellant's counsel suggested that, regardless of the original purpose of § 182, events occurring in the succeeding 80 years had legitimated the provision. Some of the more blatantly discriminatory selections, such as assault and battery on the wife and miscegenation, have been struck down by the courts, and appellants' contend that the remaining crimes-felonies and moral turpitude misdemeanors – are acceptable bases for denying the franchise.
>
> Without deciding whether § 182 would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, it violates equal protection under *Arlington Heights*.[4]

In other words, the failure of well-intentioned lawmakers does not purge the taint of that law. The non-unanimity requirement as born of racial animus and subsequent constitutional conventions do not change that fact, irrespective of the slight ameliorative tweaking of the provision that occurred

4 471 U.S. at 232-33.

when a legal verdict was changed from nine jurors to ten jurors.

Recent developments during the 2018 Regular Session of the Louisiana Legislation, where the opponents of changing Louisiana's non-unanimous verdict Law *admitted* that the Law was premised on racial discrimination. *ANY* Law based on racial discrimination *cannot* stand, and will be declared unconstitutional by the United States Supreme Court.

This Honorable Court must consider the fact that on November 6, 2018, the voters of Louisiana voted to change the Law concerning non-unanimous verdicts. Although the new law only applies to persons whose trial commences on or after January 1, 2019, the State *admitted* that the Law was premised on racial discrimination during the arguments concerning such during the Legislative Session. A Law based on discrimination cannot stand. Although the ballot failed to include the fact that the non-unanimous jury verdict was based on racial discrimination, the Constitutional Amendment was passed by the voters of the State of Louisiana.

Most amazingly, during the course of the 2018 Legislative Session concerning the possibility of changing the Louisiana Constitution's amendment concerning non-unanimous jury verdicts, the prosecutors informed the Legislators during the Hearing that they were going to address the "White Elephant in the room." The prosecutors admitted that the non-unanimous jury verdict laws were based on racially discrimination, but, "It is what it is," ... "but it works." It would appear that any hope the State would have had to prevent the Bill's passage was "shot out of the water" with these remarks during the course of the hearing.[5]

Naturally, some of the Legislators had taken offense to to the District Attorneys' (John F. DeRosier [Calcasieu Parish], and Don M. Burkett [Sabine Parish]) statements which infuriated the Panel to the point where they unanimously agree to send the amended Bill to the House of Representatives for a full vote. Although the Bill was amended to reflect **Prospective Application** only to those arrested after January 1, 2019, the Legislators agreed that most likely the Federal Courts would most likely rule that the new law had to be applied retroactively. This Bill was passed with a *vast majority* of the Legislators.

The *Ramos* Court reversed Mr. Ramos' conviction and held that Louisiana's scheme of non-unanimous jury verdicts violated the Sixth and Fourteenth Amendments of the United States Constitution.

In doing so, Justice Gorsuch, writing for the five-Justice majority, first articulated what the

5 Mr. El-Amin is unable to obtain a copy of the CD of the Committee Hearing in order to provide a copy to the Courts due to the restrictions of this institution.

Court had "repeatedly" recognized over many years: the Sixth Amendment requires a unanimous jury verdict. *Id.*, at ___(slip op., at 6).[6] Then the Court addressed the application of this rule to the states, finding that "[t]here can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal trials equally," as it is incorporated against the states under the Fourteenth Amendment. *Id.*, at ___ (slip op., at 7).

This understanding of incorporation had also been "long explained" by the Court and was supported by jurisprudence for over a half century. *Id.*[7]

Lastly, the Court addressed *Apodaca v. Oregon*, 406 U.S. 464 (1972). In *Apodaca*, a majority of Justice recognized that the Sixth Amendment requires unanimity in jury verdicts. However, the Court nonetheless upheld Oregon's system of non-unanimous jury verdicts in "a badly fractured set of opinions." *Ramos*, (slip op., at 8).

Four Justices in the *Ramos* Court found that *Apodaca* had little-to-no precedential value to the case before them.[8] Two Justices found that *Apodaca* was simply "irreconcilable" with the Court's constitutional precedent, or "egregiously wrong," and must be overturned.[9] The Court concluded: "We have an admittedly mistaken decision, on a constitutional issue, an outlier on the day it was decided, one that's become lonelier with time." *Id.*, at ___ (plurality opinion)(slip op., at 26). The Court could not, and would not, rely on *Apodaca* to uphold Louisiana and Oregon's system of non-unanimous jury verdicts.

C. The Holding in *Ramos* applies to Mr. El-Amin.

The United States Supreme Court's Holding in *Ramos v. Louisiana*, supra., should be applied so as to vacate the conviction(s) of Mr. El-Amin.

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6 See also ***id.***, at ___ (slip op., at 4)("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 – whether it's common law, state practices in the founding era, or opinions and treatsies written soon afterward – the answer is unmistakable. A jury must reach a unanimous verdict in order to convict.").

7 See also, ***id.***, at ___ (Kavanaugh, J., concurring in part)(slip op., at 10-11)("the original meaning and this Court's precedents establish that the Fourteenth Amendment incorporates the Sixth Amendment jury trial right against the States"); ***id.***, at ___ (Thomas, J., concurring on the judgment)(slip op., at 4-5)("There is also considerable evidence that this understanding [of the Sixth Amendment's unanimity requirement] persisted up to the time of the Fourteenth Amendment's ratification.").

8 Joined by Justices Ginsberg and Breyer, Justice Gorsuch explained that "***Apodaca*** yielded no controlling opinion at all," ***Id.***, at ___ (plurality opinion)(slip op., at 18), and "not even Louisiana tries to suggest that ***Apodaca*** supplies a governing precedent." ***Id.***, at ___ (plurality opinion)(slip op., at 16). In his separate concurring opinion, Justice Thomas found ***Apodaca*** to be inapplicable in this case because it was decided on due process grounds, and in his opinion, the Sixth Amendment is incorporated against the states through the Privileges and Immunity Clause of the Fourteenth Amendment: Because "***Apodaca*** addressed the Due Process Clause, its Fourteenth Amendment ruling does not bind us because the proper question here is the scope of the Privileges or Immunities Clause." ***Id.***, at ___ (Thomas, J., concurring in the judgment)(slip op., at 8).

9 In her concurrence, Justice Sotomayor wrote: ***Apodaca*** is "irreconcilable with not just one, but two, strands of constitutional precedent well established both before and after the decision. The Court has long recognized that the Sixth Amendment requires unanimity." ***Id***, at ___ (Sotomayer, J., concurring in part)(slip op., at 2). In his concurring opinion, Justice Kavanaugh concluded that ***Apodaca*** must be reversed, as it is "***Apodaca*** is egregiously wrong. The original meaning and this Court's precedents establish that the Sixth Amendment requires a unanimous jury ... And the original meaning and this Court's precedents establish that the Fourteenth Amendment incorporates the Sixth Amendment jury trial right against the States." ***Id.***, at ___ (Kavanaugh, J., concurring in part)(slip op., at 11).

1. The Courts determined 40 years ago that rules relating to non-unanimous jury verdicts should be retroactive.

The United States Supreme Court and the U.S. Fifth Circuit Court of Appeal have already made clear that a determination that a non-unanimous jury verdict violates the Sixth and Fourteenth Amendments necessitates retroactive application.

In *Burch v. Louisiana*, 441 U.S. 130 (1979), Mr. Burch was charged with exhibiting two obscene motion pictures. *Id.*, at 132. Under Louisiana law, the court tried him before a six-person jury. *Id.* A jury poll indicated that the jury had voted five-to-one to convict him. *Id.* He appealed, arguing that the Louisiana law permitting conviction with a non-unanimous six-member jury violated his rights to a trial guaranteed by the Sixth and Fourteenth Amendments. *Id.*, at 132-33.

The United States Supreme Court agreed and found that convictions by non-unanimous six-member jury threatened the substance of the jury trial guarantee and violated the Constitution. *Id*, at 138.

In *Brown v. Louisiana*, 447 U.S. 323 (1980), the United States Supreme Court held that the constitutional principle announced in *Burch* – that conviction of a non-petty criminal offense in a state court by a non-unanimous six-person jury violates the accused's right to trial by jury guaranteed by the Sixth and Fourteenth Amendments - "requires retroactive application." *Id.*, at 334 ("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." ... Any practice that threatens the jury's ability to perform that function poses a similar threat to the truth-determining process itself. The rule in *Burch* was directed toward elimination of just such a practice. Its purpose, therefore, clearly requires retroactive application.").

In *Brown*, the Court stressed that "[w]here the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impacts its truth-finding function and so raises serious question about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances." *Id.*, at 328 (*citing Williams v. United States*, 401 U.S. 646, 653 (1971)(plurality opinion of White, J.); *Ivan v. City of New York*, 407 U.S. 203, 204 (1972)).

Stare Decisis binds this Court to follow the decision by the United States Supreme Court in *Brown*. See: e.g. *Ramos v. Louisiana*, supra at ___ (Kavanaugh, J., concurring in part)(slip op., at 10. n. 5) "vertical stare decisis is absolute, as it must be in a hierarchical system with 'one supreme court.'"

... In other words, the state courts and the other federal courts have a constitutional obligation to follow a precedent of this Court unless and until it is overruled by this Court.").

Following the United States Supreme Court's decision in *Brown*, two Fifth Circuit Court of Appeal cases found that the Supreme Court ruling on unanimous jury verdicts in cases with six-person juries required retroactive application to people seeking Post-Conviction Relief. *Atkins v. Listi*, 625 F.2d 525, 525-26 (5th Cir. 1980); *Thomas v. Blackburn*, 623 F.2d 383, 384 (5th Cir. 1980).

In the instant case, it is clear that the 11-1 non-unanimous jury verdict in Mr. El-Amin's criminal trial substantially impaired its truth-finding function and raises serious questions about the accuracy of guilty verdicts in past trials. The State failed to submit any type of physical evidence, including DNA or a rape kit in this matter. The fact that there were numerous other persons in the residence at the time of the allegation, no one could corroborate the alleged victim's story.

As the State has not met that burden, Mr. El-Amin should be released and/or granted a new trial.

Considering the rulings in *Brown*, *Atkins*, and *Thomas*, this Court should vacate the conviction of Mr. El-Amin, and remand for a new trial or set Mr. El-Amin free.

In *Teague v. Lane*, the United States Supreme Court laid out the test for determining the retroactive application of *future* newly announced rules. However, *Brown* had already laid down the rule for determining retroactivity of decisions concerning non-unanimous juries. *Teague* did not purport to overrule *Brown*, and indeed cites it as the case that determined the retroactivity of the rule in *Burch v. Louisiana*, 441 U.S. 130 (1979) prohibiting non-unanimous verdicts in six-person juries. *Teague v. Lane*, 489 U.S. 288, 299 (1989).

2. The *Ramos* decision restates the principle that governed prior Supreme Court cases, therefore it should be applied to Mr. El-Amin's case.

The Supreme Court, in *Ramos v. Louisiana*, returns to the original founding principles that were consistently applied, noting "This Court has, repeatedly and over many years, recognized that the Sixth Amendment requires unanimity. As early as 1898, the Court said that a defendant enjoys a "constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons." *Ramos*, (slip op., at 6).

In *Teague v. Lane*, the United States Supreme Court laid out the test for determining the retroactive application of future newly announced rules. However, the *Teague* doctrine applies only to future decisions that announces "new rules" of criminal procedure, not to those that are "merely an application of the principle that governed" a prior Supreme Court case. *Teague v. Lane*, 489 U.S. 288, 307 (1989)(quotation and citation omitted); *id.*, at 302 ("It is admittedly often difficult to determine

when a case announces a new rule, and we do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes."). The *Ramos* decision falls into the latter category. *Teague* does not apply.

The Supreme Court, in no fewer than 14 opinions, has explained that the Sixth Amendments; Jury Trial Clause requires a "unanimous" verdict to convict, many before Mr. El-Amin's conviction became final.

The first time the United States Supreme Court discussed the issue, it pronounced that the Framers and the ratifying public believed "life and liberty, when involved in criminal prosecutions, would not be adequately secured except through the unanimous verdict of twelve juror." *Thompson v. State of Utah*, 170 U.S. 343, 353 (1898)(emphasis added). Other contemporaneous descriptions of the right to jury trial are in accord. See: *Maxwell v. Dow*, 176 U.S. 581, 586 (1900); *Patton v. United States*, 281 U.S. 276, 288 (1930), abrogated on other grounds by *Williams v. Florida*, 399 U.S. 78 (1970).

Two generations after first addressing the unanimity issue, this Court returned to the subject in *Andres v. United States*, 333 U.S. 740 (1948). The issue there was whether a federal murder sentencing statute allowed juries to impose sentences by non-unanimous votes. See *Id.*, at 746-47. Emphasizing that the Sixth Amendment's Jury Trial Clause demands "[u]nanimity in jury verdicts," the Court construed the statute to require unanimity "upon both guilt and whether the punishment of death should be imposed." *Id.*, at 748-49.

In *Apodaca v. Oregon*, 406 U.S. 404 (1972), a majority of the Court agreed yet again that the Sixth Amendment requires jury unanimity to convict. Justice Powell accepted the "unbroken line of cases reaching back into the late 1800's" hold that, under the Sixth Amendment, "unanimity is one of the indispensable features of a federal jury trial." *Johnson v. Louisiana*, 406 U.S. 356, 369 (1972) (Powell, J., concurring in the judgment in *Apodaca*). Justice Stewart, writing for three Justices, likewise concluded that "the Sixth Amendment's guarantee of a trial by jury embraces a guarantee that the verdict of the jury must be unanimous." *Apodaca*, 406 U.S., at 414-5 (Stewart, J., joined by Brennan & Marshall, JJ., dissenting). Justice Douglas similarly maintained that "the Federal Constitution require[s] a unanimous verdict in all criminal cases." *Johnson*, 406 U.S., at 382 (Douglas, J., joined by Brennan & Marshall, JJ., dissenting in *Apodaca*).

Subsequent decisions have continued to recognize that the Jury Trial Clause requires unanimity to convict someone of a crime. In a line of cases involving the scope of the jury trial right, this Court

has repeatedly explained that the Sixth Amendment requires that "the truth of every accusation ... be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors." *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000)(quoting 4 W. Blackstone, Commentaries on the Laws of England 343; 349-50 (1769); accord *S. Union Co. v. United States*, 567 U.S. 343, 356 (2012); *United States v. Booker*, 543 U.S. 220, 239 (2005); *Blakely v. Washington*, 542 U.S. 296, 301 (2004); *United States v. Gaudin*, 515 U.S. 506, 510 (1995).

The United States Supreme Court has similarly relied on *Andres* and Justice Powell's opinion in *Apodaca* to hold that "a jury in a federal criminal case cannot convict unless it unanimously find" each element of a crime. *Richardson v. United States*, 526 U.S. 813, 817 (1999)(emphasis added); see also: *Descamps v. United States*, 570 U.S. 813, 817 (2013)("The Sixth Amendment contemplates that a jury ..." will find the essential facts "unanimously and beyond a reasonable doubt.") The Supreme Court returned to the subject in two cases involving the incorporation of other provisions of the Bill of Rights. Referencing *Apodaca*, the United States Supreme Court has noted that "the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials." *McDonald v. Chicago*, 561 U.S. 742, 777 n. 14; see also *Timbs v. Indiana*, 139 S.Ct. 682, 687 n. 1 (2019)(same); see also *Ramos*, at ___ (slip op., at 13).

The outcome in *Apodaca*, the United States Supreme Court has explained, resulted from Justice Powell's vote that the Fourteenth Amendment did not require states to fully abide by the Sixth Amendment. See: *McDonald*, 561 U.S., at 766 n. 14; see also, *Ramos*, 590 U.S. at ___, (slip op., at 14). And in *Timbs*, the United States Supreme Court explained the reasoning in *Timbs* was a sole outlier in Supreme Court jurisprudence. *Timbs*, 139 S.Ct., at 687 n. 1.

In *Timbs v. Indiana*, 139 S.Ct. 682, 203 L.Ed.2d 682 (2/20/2019), the United States Supreme Court held that: "A Bill of Rights protection is an incorporated protection, applicable to the States under the Fourteenth Amendment's Due Process Clause, if it is fundamental to the scheme of ordered liberty, or deeply rooted in the Nation's history and tradition. Fourteenth Amendment to the United States Constitution. It must be noted that *Timbs* was determined with a unanimous decision amongst the Justices of the United States Supreme Court.

Furthermore, it must be noted that, "If a Bill of Rights is incorporated by the Fourteenth Amendment's Due Process Clause, and the enforced against the States, there is no daylight between the federal and state conduct it prohibits or requires. Fourteenth Amendment to the United States Constitution.

Although the question presented to the United States Supreme Court in *Timbs* concerned the Eighth Amendment's Excessive Fines Clause, this case mirrors *Timbs* in requesting that that Honorable Court similarly determine that the Sixth Amendment right to a unanimous verdict guaranteed in the federal courts is applicable to the State through the Fourteenth Amendment's Due Process Clause.

Any correct reading of Section 1 of the Fourteenth Amendment to the United States Constitution would acknowledge that the Privileges and Immunities Clause provide an alternative basis for applying to the States, at minimum, those individual rights enumerated in the first eight Amendments (See: *Timbs v. Indiana*, 139 S.Ct. 682, 691 (2019)(Gorsuch, J., concurring). Here, there is a special reason to do so because *Apodaca* stands in the way of incorporation under the Due Process Clause. Rather than overrule *Apodaca*, the Court should hold that the Privileges and Immunities Clause requires the States to convict people of serious crimes only be unanimous verdict of an "impartial jury."[10] See: Fourteenth Amendment to the United States Constitution.

After all, the Constitution sets a floor of rights below which state authorities may not go; yet, under the two-track approach, the state and local authorities can (and do) fall beneath the federal constitutional minimum. See: **Marc L. Miller & Ronald F. Wright,** *Leaky Floors: State Law Below Federal Constitutional Limits*, 50 Ariz.L.Rev. 227 (2008).

This Court should not allow the States to construct a basement of rights somewhere beneath the federal floor. See: United States Constitution, Art. Vi, cl. 2 ("This Constitution ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding").

Overturning *Apodaca* was not hard. Justice Powell's concurrence was based on social science more than law. His opinion acknowledges that the roots of the Sixth Amendment's unanimity requirement run deep. And the import of that acknowledgment is that jury unanimity is a fundamental right. On in social-science research and legal commentary did Justice Powell find "a legitimate basis for experimentation and deviation from the federal blue-print," id., when that blueprint is the Constitution, *Johnson v. Louisiana*, 406 U.S. 366, 388 (1972)(Powell, J., concurring in the judgment of *Apodaca*).

As the *Ramos* Court acknowledged, Justice Powell's vote in *Apodaca* embraced a notion that had already been rejected by the Court: that the Fourteenth Amendment applies to the States only a

10 There is no textual basis for a two-track approach to incorporation under the Privileges and Immunities Clause because rights of national citizenship – by definition – apply everywhere in the Nation. See: United States Constitution, Amendment 14, § 1 ("***No State*** shall make or enforce any law which shall abridge the privileges or immunities of ***citizens of the United States*** ..." (***emphasis added***).

'watered-down', subjective version of the individual guarantees of the Bill of Rights.'" *Ramos*, 590 U.S., at ___ (slip op., at 15); *Timbs*, 139 S.Ct. 682, 203.

The outlier opinion in *Apodaca* is what the *Ramos* decision corrected. Therefore, for the purposes of La.C.Cr.P. Art. 930.8(2), the ruling is a "therefore unknown interpretation of constitutional law," but is not a new rule under *Teague*.

This is similar to *Stringer v. Black*, 503 U.S. 222 (1992), where the Court held that its decision in *Maynard v. Cartwright*, 486 U.S. 356 (1988), did not announce a new rule because it "applied the same analysis and reasoning" found in a prior case. *Stringer*, 503 U.S., at 228.

But, there is never a legitimate basis for "deviation from the federal blue-print," id., when the blueprint is the Constitution, cf., *McDonald v. City of Chicago*, 561 U.S. 742, 790 (2010)(plurality opinion)("Incorporation always restricts experimentation and local variations, but that has not stopped the Court from incorporating virtually every other provision of the Bill of Rights"). See also: *Burch v. Louisiana*, 441 U.S. 130, 138-9 (1979)(holding that the individual right to an "impartial jury" prevails against a state's interest in "'considerable time' savings" that might be gained from using non-unanimous, six-person juries).

The Constitution is an inexorable command, impervious to "empirical research," see *Johnson*, 406 U.S., at 374, n. 12 (Powell, J., concurring in the judgment in *Apodaca*) and unyielding to "experimentation" in the States, id, at 377, even in service of such beneficial ends as "innovations with respect to determining – fairly and more expeditiously – the guilt or innocence of the accused," id., at 376.

Because "the Sixth Amendment requires a unanimous jury verdict to convict in a *federal* criminal trial," id., at 371 (emphasis in original), the same is required to convict a person in a state criminal trial.

The Court should hold that the Sixth Amendment's guarantee of jury unanimity is a privilege or immunity of national citizenship, which Section 1 of the Fourteenth Amendment makes applicable to the States. If the Court resolves the question presented on Due Process grounds instead, it should overrule *Apodaca* and hold that the Sixth Amendment right to conviction by a unanimous jury applies to States because it is deeply rooted in our Nation's history and traditions and fundamental to our scheme of ordered liberty.

In Justice Gorsuch's concurring opinion in *Timbs*, the Honorable Justice stated:

> The majority faithfully applies our precedent and, based on a wealth of historical evidence, concludes that the Fourteenth Amendment incorporates the Eighth

> Amendment's Excessive Fines Clause against the States. I agree with that conclusion. As an original matter, I acknowledge, the appropriate vehicle for incorporation may well be the Fourteenth Amendment's Privileges or Immunities Clause, rather than, as this Court has long assumed, the Due Process Clause."

Accordingly, the district court erred in accepting the non-unanimous verdicts in this case due to the fact that Louisiana's non-unanimous jury system is unconstitutional because it violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article One, Section Three (3) of the Louisiana Constitution of 1974.

Here, in addition to the lone line of above cited cases supporting unanimous juries under the Sixth Amendment, every other provision of the Bill of Rights has been found incorporated to the states by the Fourteenth Amendment in a manner that shows "no daylight." See; *Timbs*, 139 S.Ct., at 687 n. 1, *Ramos*, 590 U.S. at ___ (slip op., at 13).

The *Ramos* decision only reiterated what the Court had long found: that the constitutional right to a unanimous jury verdict applied equally in state and federal courts"

> This Court has repeatedly and over many years, recognized that the Sixth Amendment requires unanimity ... 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. The Court has long explained, too, that incorporated provision of the Bill or 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, *Id.*, at ___ (slip op., at 6-7).

The only exception had been *Apodaca*, but it was clear to all that the exception did not comport with the analysis and reasoning used for all other incorporation cases. This was so apparent, that the State of Louisiana did not even seek to support the *Apodaca* holding in its brief in *Ramos*, or at Oral Argument. Its only defense in support of Mr. Ramos' judgment was that the Sixth Amendment does not require unanimity at all; that is, not in state courts or in federal courts – a position clearly contrary to the holding in *Apodaca*.

3. Alternatively, *Teague v. Lane* requires retroactive application of the holding in *Ramos v. Louisiana* because it is a "watershed rule."

If this Court were to undermine that the holding in *Ramos* somehow established a new rule, then *Teague* still would not bar applying to Mr. El-Amin's claim because the *Ramos* rule qualifies as a "watershed rule[] of criminal procedure."[11]

11 It may also not be barred because inherent in ***Ramos*** is a substantive categorical guarantee that no person may be convicted and sentenced to life without the benefit of Parole without the unanimous suffrage of twelve jurors. This is not a question of the process – it is a substantive holding prohibiting punishment at all without a unanimous verdict akin to ***Montgomery v. Louisiana***, 136 S.Ct. 718, 193 L.Ed.2d 599, 613 (2016). There the Court explained that the substantive rules include "rules for forbidding criminal punishment of certain primary conduct," as well as "rule prohibiting a certain category of punishment for a class of defendants because of their status or offense." Louisiana was

Ramos created a "'watershed rule of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding," like that of *Gideon v. Wainwright*, 372 U.S. 335 (1963) and should therefore have retroactive effect. *Saffle v. Parks*, 494 U.S. 484, 494-95 (1990)(citing *Teague*, 489 U.S., at 311 (plurality opinion)). To implicate "fundamental fairness and accuracy, the rule must be one "without which the likelihood of an accurate conviction is seriously diminished." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004)(internal citations omitted).

The Court has previously used *Gideon* as the lodestar for determining watershed cases. See *id.* In *Gideon*, the Court overruled *Betts v. Brady*, 316 U.S. 455 (1942), which had previously refused to incorporate the Sixth Amendment Right to Counsel under the Fourteenth Amendment. 372 U.S., at 399. Ten years prior to *Betts*, the Court found the right to counsel is fundamental and essential to a fair trial. *Powell v. Alabama*, 287 U.S. 45, 68 (1932). The Court emphasized again in 1938 that the Sixth Amendment guaranteed a right to appointed counsel in federal prosecutions where the defendant is unable to employ counsel and that, unless the right is competently and intelligently waived, the "Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty." *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938). The *Zerbst* Court went on to describe the assistance of counsel as "one of the safeguards of the Sixth Amendment Right deemed necessary to insure fundamental human rights of life and liberty." *Id.*, at 462. The *Gideon* Court, in looking at this precedent, found *Betts* to be an aberration and its decision to be a restoration of "constitutional principles established to achieve a fair system of justice." 372 U.S., at 344.

Just like in *Gideon*, *Ramos* incorporates a Sixth Amendment right into the Fourteenth Amendment, following the foundation of prior minority opinions of the United States Supreme Court as to the fundamental nature of unanimity in jury verdicts. See: *Ramos*, 590 U.S., at ___ (slip op., at 13); *Andres v. United States*, 333 U.S. 740, 748 (1948); *Johnson v. Louisiana*, 400 U.S., at 371, (Powell, J., concurring); *Id.*, at 397 (Stewart, J., dissenting).

In *Andres*, the Supreme Court unanimously held that the Bill of Rights requires a unanimous jury verdict. 333 U.S., at 748 ("Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply."). Then, in *Johnson* and *Apodaca*, five Justices agreed that the Sixth Amendment required unanimity. See: *Johnson*, 406 U.S., at 371 (Powell, J., concurring)("At the time the Bill of Rights was adopted, unanimity had long been established as one of the attributes of a jury conviction at common law. It therefore seems to me, in accord both with history and precedent, that the Sixth

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the only state in the country sentencing people to life without the possibility of Parole with non-unanimous jury verdicts.

Amendment requires a unanimous jury verdict to convict in a federal criminal trial."); *Id.*, at 381-403 (dissenting opinions). However, because Justice Powell did not believe that the right should be incorporated under the Fourteenth Amendment, state non-unanimous jury schemes were upheld as constitutional. ***Johnson***, 406 U.S., at 371 (Powell, J., concurring)(Concluding that unanimity is required by the Sixth Amendment that "it is the Fourteenth Amendment, rather than the Sixth, that imposes the States that requirement that they provide jury trials to those accused of serious crimes.").

Justice Stewart's opinion provides an argument for fundamentally that echoes the sentiments that the ***Gideon*** Court made regarding the fundamentality to the right to appointed counsel:

> The guarantee against systematic discrimination in the selection of criminal court juries is a fundamental of the Fourteenth Amendment. That has been the insistent message of this Court in a line of decisions extending over nearly a century. The clear purpose of these decisions has been to ensure universal participation of the citizenry in the administration of criminal justice. Yet today's judgment approves the elimination of the one rule that can ensure that such participation will be meaningful – the rule requiring the assent of all jurors before a verdict of conviction or acquittal can be returned. Under today's judgment, nine jurors can simply ignore the views of their fellow panel members of a different race or class.

Johnson, 406 U.S., at 397 (Stewart, J., dissenting).

Justice Brennan and Justice Marshall joined in Justice Stewart's dissent, which went on to criticize the majority for failing to recognize the reality that non-unanimous juries grossly undermines the basic assurances of a fair criminal trial and public confidence in its result. *Id.*, at 398. Justice Marshall's dissent, joined by Justice Brennan, contained even stronger words than that of Justice Stewart's:

> Today the Court cuts the heart out of two of the most important and inseparable safeguards the Bill of Rights offers a criminal defendant: the right to submit his case to a jury, and the right to proof beyond a reasonable doubt. Together, these safeguards occupy a fundamental place in our constitutional scheme, protecting the individual defendant from the awesome power of the State.

Id., at 399-400 (Marshall, J., dissenting).

What the dissenters in ***Johnson*** rightfully pointed out, and what is underlying in ***Ramos***, is that non-unanimous jury verdicts solely diminished the likelihood of accurate convictions, especially in states during periods of time of intense racial discrimination.

Furthermore, a non-unanimous verdict is a structural error as it is a "defect affecting the framework within the trial proceeds, rather than simply an error in the trial process itself." ***Arizona v. Fulminante***, 499 U.S. 279, 310 (1991). Such an error cause the criminal trial to lose reliability in its capability in serving the function of determining guilt or innocence. *Id.* Although structural error is not coextensive with ***Teague***'s watershed procedural rule exception, ***Tyler v. Cain***, 533 U.S. 656, 666 (1991), a structural error that strikes at the fundamental fairness and accuracy of the criminal

prosecution meets the standard of qualifying a new procedural rule for retroactive application.

As the Court pointed out in *Schriro* and *Teague*, "[t]hat the new procedural rule is 'fundamental' in some abstract sense is not enough; the rule must be one 'without which the likelihood of an accurate conviction is seriously diminished.'" *Schriro*, 542 U.S., at 351 (citing *Teague*, 489 U.S., at 313). Unanimous juries are not fundamental in an abstract way.

In line with *Gideon*, *Ramos*, is remarkable in its primacy and centrality of the truth finding process. The United States Supreme Court has "long explained that the Sixth Amendment right to a jury trial is 'fundamental to the American scheme of justice.'" *Ramos*, 590 U.S., at ___ (slip op., at 7). The unanimity rule of the jury verdict is "an ancient guarantee:" "the American people chose to enshrine that right in the Constitution ... They were seeking to ensure that their children's children would enjoy the same hard-won liberty they enjoyed." *Id.*, at ___ (slip op., at 15).

The unconstitutional nature of non-unanimous jury verdict fundamentally harms the accuracy and fairness of the proceedings. *Ramos* corrects the mistake of the "universe of one" that is *Apodaca* and affords Louisiana ability to bring fairness to those individuals convicted outside of constitutional precedent occurring before and after *Apodaca*. *Id.*, at ___ (Sotomayer, J., concurring in part)(slip op., at 2). *Ramos* meets the threshold set out in *Teague*. It is a watershed case that encompasses the core of a right to a trial by jury, and as such, this court should apply *Ramos* retroactively to Mr. El-Amin's case.

4. Alternatively, the State of Louisiana should depart from *Teague v. Lane*, as allowed in *Danforth v. Minnesota*.

Courts in Louisiana have their own obligation to enforce the Constitutional guarantees and can ensure constitutional protections broader than those articulated in *Teague v. Lane*. As *Danforth v. Minnesota* held that *Teague* does not constrain the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion. 522 U.S. 264, 291 (2008). It is significant to note that *Teague v. Lane* announces only a rule for prospective federal habeas review. Leaving to the states the obligations to fulfill their constitutional responsibility.

Mr. El-Amin asks this Court to fulfill its constitutional responsibility and give effect to *Ramos* and adopt one of the following rules to govern retroactivity in Louisiana.

Where the major purpose of constitutional doctrine is to overcome a practice rooted in extreme systemic racism so as to substantially impair the legitimacy of Louisiana's criminal justice system, and to impair the truth-finding function of criminal trials raising serious questions about the accuracy of guilty verdicts in past trials, the new rule will be given complete retroactive effect and neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor sever

impact on the administration of justice justify require prospective application in these circumstances.

Where the major purpose of a constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the rule will be given complete retroactive effect.

Where the major purpose of a constitutional doctrine is to restore credibility and faith in the criminal justice system, the rule should apply to all litigants.

Here, evidence of wrongful convictions relating to non-unanimous jury verdicts are significant.

Moreover, the roots of this law are deeply rooted in extreme systemic racism.[12] The practice came from Reconstruction, when whites fought to return their state to some sense of what they considered normalcy prior to the Civil War. Non-unanimous jury convictions systematically discounted the opinions of jurors of color and contributed to a significant number of wrongful convictions, some of which later led to exonerations. It corrupted the jury process by silencing skeptical viewpoints, depriving the other jurors of a full view of the evidence. This practice stripped the Louisiana criminal justice system of credibility, making all Louisianians less safe. A significant number of exonerations have been tied to non-unanimous jury verdicts.

5. The *Ramos* Court now acknowledges its mistake in *Apodaca*, and but for this mistake, Mr. El-Amin would have had a constitutional trial.

The United States Supreme Court has now explicitly found that *Apodaca* was "an admittedly mistaken decision." *Ramos* at ___ (slip op., at 26). Justice Kavanaugh, in a separate concurrence, found that *Apodaca* was "egregiously wrong" and incompatible with the original meaning of the Sixth and Fourteenth Amendments. *Id.*, at ___ (slip op., at 11)(Kavanaugh, J., concurring). Justice Sotomayer found that *Apodaca* was "irreconcilable with not just one, but two, strands of constitutional precedent well established both before and after the decision." *Id.*, at ___ (slip op., at 2)(Sotomayer, J., concurring). Not even the dissenting Justice defended the *Apodaca* opinion, finding only that "whatever one may think about the correctness of the decision, it has elicited and entirely reasonable reliance." *Id.*, at ___ (slip op., at 2)(Alito, J., dissenting).

If it were not for the error of the United States Supreme Court, Mr. El-Amin would have had the jury trial the Constitution afforded him.

The State of Louisiana did not even believe *Apodaca* was correctly decided. As previously

12 "Though it's hard to say why these laws persist, their origins are clear. Louisiana first endorsed non-unanimous verdicts for serious crimes at a Constitutional Convention in 1898. According to one committee chairman, the avowed purpose of that Convention was to "establish the supremacy white race," and the resulting document included many of the trappings of the Jim Crow era: a poll tax, a combined literacy and property ownership test, and a grandfather clause that in practice exempted white residents from the most onerous of these requirements." ***Ramos***, 590 U.S. at ___ (slip op., at 1).

discussed, the State did not argue that *Apodaca* was good law, the citizens of Louisiana have rejected non-unanimous jury verdicts, and even the dissent of *Ramos* "tacitly ... admit[s] that the Constitution forbids States from using non-unanimous juries." *Ramos* 590 U.S. at ___ (slip op., at 1). Mr. El-Amin should not be permanently deprived of his constitutional rights because of an admittedly faulty interpretation of law controlled." *Apodaca* is egregiously wrong." *Id.*, at (slip op., at 11)(Kavanaugh, J., concurring). Louisiana cannot allow Mr. El-Amin's conviction to stand merely to "perpetuate something we all know is wrong only because we fear the consequences of being right." *Id.*, at ____ (slip op., at 36).

(2) PRESERVATION IS NOT REQUIRED IN ORDER TO RAISE THE ISSUE OF NON-UNANIMOUS JURY VERDICTS.

1. Mr. El-Amin is entitled to relief regardless of preservation.

To the best of Mr. El-Amin's knowledge, Mr. El-Amin's attorney did not make an objection or motion opposing a non-unanimous jury at the trial court level or on appeal. Mr. El-Amin also did not raise this issue during Post-Conviction.

Although State law requires that the defense bring error to the attention of the trial court within a reasonable time, La.C.Cr.P. Arts. 770, 771, 841, there is a long established exception to this contemporaneous objection regime where the objection would "a vain and useless act." *State v. Ervin*, 340 So.2d 1379 (La. 1976); *State v. Lee*, 346 So.2d 682 (La. 1977).

The unanimity claim raised here was not remotely available at the time of Mr. El-Amin's trial (or appeal). Rather, it had been foreclosed by the Supreme Court's *Apodaca v. Oregon* and *Johnson v. Louisiana* rulings.

No court – state or federal – below the Supreme Court, could alter *Apodaca* or *Johnson*. See: *Agostini v. Felton*, 521 U.S. 203, 237-38 (1997)("if a precedent of this Court has direct application to a case, yet appears to rest on reasons rejected in some other line of cases, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions," quoting *Rodrigues de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). Thus, because this rule was not available until the Court's decision in *Ramos* overruling *Apodaca* and *Johnson*, it was not reasonable available and there is adequate cause to excuse it not being presented sooner. See: *Reed v. Ross*, 468 U.S. 1, 17 (1984).

Moreover, the conviction based upon a non-unanimous jury verdict is error patent, reviewable on appeal without an Assignment of Error based upon La.C.Cr.P. Art. 920 (detailing the matters that may be considered on appeal .2). An error that is discoverable by a mere inspection of the pleadings

and proceedings and without inspection of the evidence. See also: *State v. Wrestle, Inc.*, 360 So.2d 831, 837 (La. 1978)([W]e have held without discussion that under such circumstances we may, from the Minute Entry, discover by mere inspection the basis for a defendant's contention that a non-unanimous jury verdict represents constitutional error patent on the face of the proceedings"); *State v. Bradford*, 298 So.2d 781 (La. 1974); *State v. Biagas*, 255 So.2d 77 (La. 1971); *State v. Arceneaux*, 2019-60 (La. App. 3rd Cir. 10/09/19)("The defendant is correct in that if the Supreme Court finds a non-unanimous jury verdict to be unconstitutional for the types of verdicts returned in the present case and if the Supreme Court applies such a holding retroactively to include the jury verdicts returned in the present case, the verdicts returned in the present case would be improper and would be considered an error patent."); *State v. Ardison*, 277 So.3d 883, 897 (La. App. 2nd Cir. 6/26/19)("Under Louisiana law, the requirement of a unanimous jury conviction specifically applies only to crimes committed after January 1, 2019. The instance crimes were committed in 2017, and thus, the amended unanimous jury requirement is inapplicable to *Ardison*'s case. *Ardison*'s assertion of an "error patent" is without merit."); *State v. Aucoin*, 500 So.2d 921, 925 (La. Ct. App. 1987)(In our earlier opinion, *State v. Aucoin*, 488 So.2d 1336 (La. App. 3rd Cir. 1986), pursuant to court policy, the record was inspected and we found a patent error from the polling of the jury; the verdict represented a finding of guilty with only nine jurors concurring when ten is required. We reversed and remanded the case. The State filed an Application for a Rehearing alleging that the polling of the jury actually was a then to two verdict but there was an error in transcribing the polling of the jury and requested an opportunity to correct the transcript.").

If the Court follows the appropriate law above, the Court can rule solely on the issue of whether Mr. El-Amin's conviction should be reversed as unconstitutional.

However, if this Court finds that Mr. El-Amin is foreclosed from relief for failing to raise the non-unanimous jury claim at any point in the proceeding prior to the Application for Post-Conviction Relief, Mr. El-Amin asserts that his counsel was ineffective for this failure. As detailed in the section below, if the result of the failing to object were to foreclose Mr. El-Amin from raising a claim regarding the retroactivity of *Ramos*, the error must be at such a level as to meet the requirements of ineffective assistance of counsel.

Under the standard set out in *Strickland v. Washington*, 466 U.S. 668 (1984), and *State v. Washington*, 491 So.2d 1337 (La. 1986), a conviction must be reversed if the Petitioner proves (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional

norms, and (2) counsel's inadequate performance prejudiced defendant to the extent that the trial was rendered unfair and the verdict suspect. *State v. Legrand*, 864 So.2d 1462 (La. 12/03/03).

When determining the first prong of the ineffective assistance of counsel prong is met, the inquiry is whether defense counsel's conduct was deficient. *State ex rel. Craddock v. State*, 225 So.3d 452, 455 (La. 09/15/17), where the Louisiana Supreme Court stated "proper standard for attorney performance is that of reasonably effective assistance." Failing to object may be deficient conduct sufficient to reach ineffective assistance of counsel if counsel should have objected." In *State v. Truehill*, the Third Circuit Court of Appeal analyzed the accused counsel's failure to object to inadmissible evidence under the Louisiana Code of Evidence. *State v. Truehill*, 38 So.3d 1246 (La. App. 3rd Cir. 06/02/10). In that case, hearsay statements were admitted, a violation of the LSA-C.E. Article 804. The Court found that, "[b]ecause the evidence was inadmissible under the La. Code Evid. Art. 804, defense counsel's failure to object to the evidence constituted a deficient performance." *Id.*

Here, if the Court asserts that Mr. El-Amin is unable to achieve relief on Post-Conviction for his counsel's failure to object or otherwise challenge the use of non-unanimous juries, then it is clear that counsel should have raised such an objection.

Mr. El-Amin is serving a mandatory life imprisonment at hard labor for Forcible Rape. Polling following the 11-1 verdict revealed that one juror voted for not guilty. *State v. Mr. El-Amin*. Upon learning that the jury was non-unanimous, defense counsel should have lodged a contemporaneous objection. Mr. El-Amin seeks Post-Conviction Relief relief with clarity from the United States Supreme Court concerning improper incorporation of his constitutional rights. Mr. El-Amin should be able to assert his arguments for the appropriateness of a new trial or his release and not be constrained by his trial counsel's failure to object.

As to the second prong, the United States Supreme Court has held that the benchmark for judging a charge of ineffectiveness is whether the attorney's conduct was so ineffective that it undermined the proper functioning of the adversarial process that the trial cannot be considered to have produced a just result. *United States v. Cronic*, 466 U.S. 648 (1984); *Strickland v. Washington*, 466 U.S. 668 (1984). Proving prejudice requires that a Petitioner demonstrate that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," and a reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S., at 694.

For the reasons asserted above, and in *Ramos*, it is clear that non-unanimous juries undermine

the proper functioning of the court system. Non-unanimous jury convictions systematically discounted the opinions of jurors of color and contributed to a significant number of wrongful convictions, some of which later led to exonerations. It corrupted the jury process by silencing skeptical viewpoints, depriving the other jurors of a full view of the evidence. This practice stripped the Louisiana criminal justice system of credibility, making all Louisiana less safe. Louisiana courts inherited a practice that undermined the proper functioning of the adversarial process, and if the remedy of the undermining is unavailable to Mr. El-Amin, it should follow that the second prong of the ineffective assistance of counsel prong is met.

Failure to object to the constitutionality of the non-unanimous jury verdict constituted deficient performance by the defense counsel. See e.g., *Glover v. United States*, 531 U.S. 198, 203 (2001); *Scott v. Louisiana*, 934 F.2d 631, 634 (5th Cir. 1991)(finding failure to object to an instruction allowing conviction of Attempted Second Degree Murder where there was only the intent to commit serious bodily harm constitutes deficient performance.); *Gray v. Lynn*, 6 F.3d 265, 269 (5th Cir. 1993)("the failure by Gray's counsel to object to the erroneous instruction 'cannot be considered to be within the wide range of professionally competent assistance.'"); *Summit v. Blackburn*, 795 F.2d 1237 (5th Cir. 1986); *Henry v. Scully*, 78 F.3d 51, 53 (2nd Cir. 1996)(counsel ineffective for failing to object to instruction); *State v. Jackson*, 733 So.2d 736 (La. App. 4th Cir. 1989)(counsel ineffective for failing to object to instruction); *State v. Ball*, 554 So.2d 114, 115 (La. Ct. App. 1989)(counsel attempted murder case ineffective for failing to object to state argument and judge's erroneous instructions which told jury that intent to inflict bodily harm would support the conviction because an attempted murder requires a specific intent to kill). Even if the objection would have been rejected, counsel still had an obligation. *C.f.*, *Engle v. Isaac*, 456 U.S. 107, 130 (1982)("if a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid.").

To the extent the State argues that the failure to challenge the constitutionality of Louisiana's non-unanimous jury verdict, and/or the failure to raise the issue on appeal, constitutes a procedural bar preventing Mr. El-Amin from raising the claim today, Mr. El-Amin was prejudiced from counsel's failure to raise the issue.

Wherefore, Mr. El-Amin moves this Court to order a hearing on the allegations contained herein, and to grant the Application for Post-Conviction Relief.

(3)*Ramos* meets the test for retroactive application enunciated by the Supreme Court in *Teague v. Lane*.

Ramos meets the test for retroactive application enunciated by the Supreme Court in *Teague v. Lane*, 489 U.S. 288 (1989). It is time we abandoned our use of *Teague* in favor of a retroactivity test that takes into account the harm done by the past use of a particular law. By either route, Louisiana should give *Ramos* retroactive effect.

In 1992, the State of Louisiana adopted *Teague*'s test for determining whether decisions affecting rights of criminal procedure would be retroactively applied to cases in state collateral review. *State ex rel. Taylor v. Whitley*, 606 So.2d 1292, 1296 (La. 1992). In relevant part, *Teague* only requires retroactive application of a new rule if it is a "watershed rule of criminal procedure" that "implicates the fundamental fairness [and accuracy]" of the criminal proceeding. *Teague*, 489 U.S. at 311-312.

Ramos meets that definition. It plainly announced a watershed rule. "The Sixth Amendment right to a jury t rial is 'fundamental to the American scheme of justice' and incorporated against the States under the Fourteenth Amendment." *Ramos*, 140 S.Ct. at 1397 (citing *Duncan v. Louisiana*, 391 U.S. 145, 148-50 (1968). Therefore, the remaining question under *Teague* is whether the *Ramos* rule implicates fundamental fairness and accuracy. Because this Court denied the instant Writ Application, we do not have a full briefing on this issue. However, the existing *Ramos* record alone supports the conclusion that it does. The law that *Ramos* struck was designed to discriminate against African-Americans and it has been successful. For the last 120 years, it has silenced and sidelined African-Americans in criminal proceedings and cause questionable convictions throughout Louisiana.

The post-Reconstruction Louisiana Constitutional Convention of 1898 sought to "establish the supremacy of the white race." *Ramos*, 140 S.Ct. at 1394. It "approved non-unanimous juries as one pillar of comprehensive and brutal program of racist Jim Crow measures against African-Americans, especially in voting and jury service." *Id.*, at 1417 (Kavanaugh, J., concurring in part). "[A]ware that this Court would strike down any policy of overt discrimination against African-American jurors as a violation of the Fourteenth Amendment, the delegates sought to undermine African-American participation on juries in another way. With a careful eye on racial demographics, the convention delegates sculpted a 'facially race-neutral" rule ... in order "to ensure that African-American juror service would be meaningless."' *Id.*

Data showing that votes of African-American jurors have been disproportionately silenced is compelling evidence that the use of pre-*Ramos* rule affected the fundamental fairness and accuracy of criminal trials. "In light of the racist origins of the non-unanimous jury, it is no surprise that non-

unanimous juries can make a difference in practice, especially in cases involving black defendants, victims, or jurors." *Id.*, at 1417 (Kavanaugh, J., concurring in part). The whole point of the law was to make it easier to convict African-American defendants at criminal trials, even when some of the jurors themselves were African-American. By Louisiana's Constitutional Convention of 1974, which reauthorized the use of the Jim Crow law, the expected ease of convicting African-Americans in Louisiana had come to simply be described as "judicial efficiency." ***State v. Hankton***, 122 So.3d 1193 (La. App. 4th Cir. 8/2/13).

But despite "race neutral" language justifying the law in 1974, it has continued to have a detrimental effect on African-American citizens.[13] "Then and now non-unanimous juries can silence the voices and negate the votes of black jurors, especially in cases with black defendants or black victims, and only one or two black jurors. The 10 jurors "can simply ignore the views of their fellow panel members of a different race or class." ***Johnson v. Louisiana***, 406 U.S. 356, 397 (1972)(Steward, J., dissenting)." ***Ramos***, 140 S.Ct. at 1414-18)(Kavanaugh, J., concurring in part).

Approximately 32% of Louisiana's population is Black. Yet, according to the Louisiana Department of Corrections, 69.9% of prisoners incarcerated for felony convictions are Black. Again, this grossly disproportionate backdrop, it cannot be seriously contended that our 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. The original discriminatory purpose and the lasting discriminatory effect of the non-unanimous jury rule all implicate fundamental fairness.

The rights at issue here also directly implicate the accuracy of convictions. While many of those convicted by non-unanimous juries are surely guilty of the crimes of which they were convicted, we still have a subset of convictions where at least one – but often two – jurors had sufficient doubt of the accused's guilt to vote "not guilty." Experience teaches, and the ***Ramos*** decision reiterates, that those "not guilty" votes should not be cavalierly dismissed as meaningless:

> Who can say whether any particular hung jury is a waste, rather than an example of a jury doing exactly what the [*Apodaca*] plurality said it should – deliberating carefully and safeguarding against overzealous prosecutions? And what about the fact, too, that some studies ... profess to have found that requiring the unanimity may provide other possible benefits, including more open-minded and more thorough deliberations?

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13 Data on non-unanimous jury verdicts contained in the record of ***State v. Melvin Cortez Maxie***, 11th Judicial District Court, No. 13-CR-72522 and submitted to the Supreme Court in the Joint Appendix in ***Ramos v. Louisiana***, shows that African-Americans have been 30 percent more likely to be convicted by non-unanimous juries than white defendants and that African-American jurors cast "empty" votes at 64 percent above the expected rate whereas white jurors cased "empty" votes at 32 percent less that the expected rate if empty votes were evenly dispersed amongst all jurors. ***Ramos v. Louisiana***, 2018 WL 8545357, at *51 (2018).

Ramos, 140 S.Ct., at 1401.

We need not look far back in history to be reminded that sometimes the will or opinion of a majority is wrong and the dissenting minority was factually, or morally, correct. But during the 120 years of Louisiana's non-unanimous jury scheme, jurors on the majority never had reason to consider the perspective or opinion of a minority dissenting jurors, because – by design – once the jury reached a consensus of ten, dissenting voices became irrelevant. While we will likely never know how many factually inaccurate convictions have rested on non-unanimous jury verdicts, nor in how many the rule was a pivotal cause of the wrongful conviction, we know they have occurred.[14]

The non-unanimous jury rule has "allow[ed] convictions of some who would not be convicted under the proper constitutional rule, and [has] tolerate[d] and reinforce[d] a practice that is thoroughly racist in its origin and has continuing racially discriminatory effects." *Ramos*, 140 S.Ct., at 1419 (Kavanaugh, J., concurring in part). By Justice Kavanaugh's accurate summary alone, *Ramos* satisfies the relevant portion of *Teague*'s test and should be applied retroactively by Louisiana courts.

But we are not bound to continue using *Teague*'s test, and there are good reasons to abandon our decision in *Taylor* that adopted it. There was little in the *Taylor* rationale that commands our continued adherence to *Teague*. Dissenting in *Taylor*, Chief Justice Calogero explained why *Teague*'s premise did not apply to state courts: "[F]ederal courts have indicated that their reduced intrusion into state criminal process is motivated by concerns of federalism and comity. State courts should not blindly adopt these new criteria, because the concerns of federalism and comity are absent from state criminal court proceedings." *Taylor*, 606 So.2d at 1301 (Calogero, C.J., dissenting). Since this Court decided *Taylor* in 1992, Congress and the federal courts have created ever more restrictions on the availability of the federal writ of habeas corpus to prisoners convicted in state court, further undermining the premise of *Taylor* and creating additional imperative for us to revisit its holding.

The importance of the *Ramos* decision – and the historic symbolism of the law that it struck – present the opportunity to reassess *Taylor* and the wisdom of Louisiana using the *Teague* standard in retroactivity analysis. Lwe should. The original purpose of the non-unanimous jury law, its continued use, and the disproportionate and detrimental impact it has had on African-American citizens for 120 years is Louisiana's history. The recent campaign to end the use of the law is already part of the history of this state's long and ongoing struggle for racial justice and equal rights for all Louisianans. That campaign meant meant many more citizens now understand the law's origins, purpose, and

14 In 2019 alone, two Louisiana men who have been convicted by non-unanimous juries were exonerated and freed after fingerprint database searches identified the true perpetrators in both cases. Archie Williams spent 36 years wrongfully imprisoned for rape and attempted murder and Royal Clark spent 17 years wrongly imprisoned for Armed Robbery.

discriminatory impact. And that understanding contributes to a cynicism and fatal mistrust Louisiana's criminal justice system by many citizens who seek the lack of fundamental fairness and equal protection afforded to all. It is time that our state courts – not the United States Supreme Court – decided that whether we should address the damage done by our longtime use of an invidious law.

The racist history of the law was not explicitly relevant to the Supreme Court's determination that the Sixth Amendment requires jury unanimity. However, a majority of the Justices considered hat history as one of the principled justifications for abandoning *stare decisis* and departing from the "gravely mistaken" and "egregiously wrong" "outlier" precedent of *Apodaca v. Oregon*, 404 U.S. 406 (1972)(in which a plurality of the Supreme Court held that Oregon and Louisiana's non-unanimous jury schemes did not violate the Sixth Amendment) in favor of a correct interpretation of the Sixth Amendment's jury requirement. *Ramos*, 140 S.Ct., at 1405, 1418.[15] That history should be just as – if not more – persuasive to us in deciding whether to overrule the erroneously reasoned *Taylor* case. This Court should be persuaded that we should replace *Teague*'s test with one that, at least in part, weighs the discriminatory law that has disproportionately affected Black defendants and Black jurors. There is no principled or moral justification for differentiating between the remedy for a prisoner convicted by that law whose case is on direct review and one whose conviction is final. Both are equally the product of racist and unconstitutional law. If concerns of comity and federalism ultimately mean that the federal courts do not force us to remedy those convictions which are already final through a writ of habeas corpus, the moral and ethical obligation upon courts of this state to address the racial stain of our own history is even more compelling, not less.

"Any decision by [the Supreme] Court that a new ruled does not apply retroactively under *Teague* does not imply that there was no right and thus no violation of that right at the time of trial – only that no remedy will be provided in federal habeas courts." *Danforth*, 552 U.S., at 291. This Court must determine that we must formulate a new test for determining whether a decision be applied retroactively; one that includes a consideration of whether a stricken law had a racist origin, has had a disproportionate impact on cognizable groups or has otherwise contributed to our state's history of

15 The Court's majority opinion noted that "***Apodaca*** was gravely mistaken [and] no Member of the Court today defends [it] as rightly decided ... The [***Apodaca***] plurality spent almost no time grappling with the racist origins of Louisiana's and Oregon's laws." ***Ramos***, 140 S.Ct., at 1405. Justice Kavanaugh further explained the relevance of the law's history:

> "... [T]he disputed question here is whether to overrule an erroneous constitutional precedent that allowed non-unanimous juries. An on that question – the question whether to overrule – the Jim Crow origins and racially discriminatory effects (and the perception thereof) of non-unanimous juries in Louisiana and Oregon should matter and should count heavily in favor of overruling, in my respectful view. After all, the non-unanimous jury is today the last of Louisiana's Jim Crow laws.' And this Court has emphasized time and again the 'imperative to purge racial prejudice from the administration of justice' generally and from the jury system in particular."

Ramos, 140 S.Ct., at 1418 (Kavanaugh, J. additionally concurring)(citing T. Aiello, *Jim Crow's Last Stand: non-unanimous criminal jury verdicts in Louisiana*, 63 (2015).

systematic discrimination against African-Americans. And under any such test, this court must find that *Ramos* would have to be retroactively applied.

We should not reject retroactivity through a fear that we will "provoke a 'crushing tsunami' of follow-on litigation." *Ramos*, 140 S.Ct., at 1406. The Court made clear in *Ramos* that such functional assessments have no place in considering fundamental rights. "The deeper problem is that the [*Apodaca*] plurality subjected the ancient guarantee of a unanimous jury verdict to its own functionalist assessment should have no place in our decision as to whose convictions will be remedied by *Ramos*. Even if we perform such a functionalist assessment, the benefits of applying *Ramos* retroactively greatly outweigh the costs. To be sure, addressing a history of legally-sanctioned racism in our criminal system will come with a significant fiscal and administrative cost. But it is a cost we must bear if we mean to show that we guarantee all Louisianans equal justice. We must not "perpetuate something we all know to be wrong only because we fear the consequences of being right." *Id.*, at 1408. The cost of giving new trials to all defendants convicted by non-unanimous juries pales in comparison to the long-term societal cost of perpetuating – by our own inaction – a deeply-ingrained distrust of law enforcement, criminal justice, and Louisiana's government institutions.

Defendants convicted by non-unanimous jury verdicts are prisoners of a law that was designed to discriminate against them and disproportionately silence African-American jurors. Simply pledging to uphold the Constitution in future criminal trials does not heal the wounds already inflicted on Louisiana's African-American community by the use of this law for 120 years. The reality that harm "and the resulting perception of unfairness and racial bias – [has] undermine[d] confidence in and respect for the criminal justice system." *Id.*, at 1418 (Kavanaugh, J., concurring in part). At stake here is the very legitimacy of the rule of law, which depends upon ***all*** citizens having confidence in the courts to apply equal justice.

SUMMARY

Mr. El-Amin has shown this Honorable Court that he was denied his Due Process of Law as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

APPENDIX "B"

DISTRICT COURT RULING

SADAT EL-AMIN

V.

DARREL VANNOY, WARDEN

FILED: _____

DKT. NO. 09-CR1-101854 DIVISION E

22ND JUDICIAL DISTRICT COURT

PARISH OF WASHINGTON

STATE OF LOUISIANA

_____

MINUTE CLERK

ORDER WITH REASONS

Petitioner filed a Motion to Clarify District Court Ruling and a Notice of Intent to Seek Writs, seeking clarity of conflicting court orders in the above-captioned matter. Petitioner had filed an Application for Post-Conviction Relief on August 10, 2020. On August 28, 2020, a Motion for Stay of Post-Conviction Relief Proceedings was filed by the state but was inadvertently presented to and signed by the judge of another division due to a mistake in the caption. Thereafter, this Court issued reasons dismissing the application without prejudice on October 7, 2020. Following receipt of the petitioner's Motion to Clarify District Court Ruling and review of the record, the order granting the Motion for Stay of Post-Conviction Relief Proceedings was vacated on November 17, 2020. Accordingly, the Application for Post-Conviction Relief has been dismissed pursuant to the orders of this Court on October 7, 2020.

IT IS ORDERED that the Clerk of Court of the Parish of Washington give notice of this order to petitioner and to the District Attorney for the Parish of Washington.

Covington, Louisiana, this 18 day of Nov, 2020.

JUDGE WILLIAM H. BURRIS, DIV. E

10-3-2020 TSpeed

APPENDIX "D"

LOUISIANA 1ST COURT OF APPEAL: RULING

Office Of The Clerk
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Notice of Judgment and Disposition

December 30, 2020

Docket Number: 2020 - KW - 1069

State Of Louisiana
versus
Sadat El-Amin

TO: Sadat El-Amin
Spruce 3
Louisiana State Penitentiary
Angola, LA 70712

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William H. Burris
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In accordance with Local Rule 6 of the Court of Appeal, First Circuit, I hereby certify that this notice of judgment and disposition and the attached disposition were transmitted this date to the trial judge or equivalent, all counsel of record, and all parties not represented by counsel.

RODD NAQUIN
CLERK OF COURT

STATE OF LOUISIANA

COURT OF APPEAL, FIRST CIRCUIT

STATE OF LOUISIANA NO. 2020 KW 1069

VERSUS

SADAT EL-AMIN **DECEMBER 30, 2020**

In Re: On motion of Sadat El-Amin for stay of proceedings, 22nd Judicial District Court, Parish of Washington, No. 09-CR1-101854.

BEFORE: GUIDRY, McCLENDON, AND LANIER, JJ.

MOTION FOR STAY OF PROCEEDINGS DENIED.

JMG
PMc
WIL

COURT OF APPEAL, FIRST CIRCUIT

DEPUTY CLERK OF COURT
FOR THE COURT

STATE OF LOUISIANA

COURT OF APPEAL, FIRST CIRCUIT

STATE OF LOUISIANA NO. 2020 KW 1069

VERSUS

SADAT EL-AMIN **DECEMBER 30, 2020**

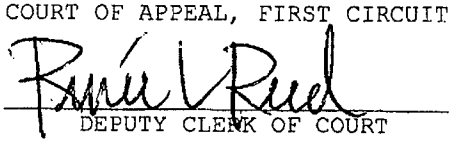
In Re: Sadat El-Amin, applying for supervisory writs, 22nd Judicial District Court, Parish of Washington, No. 09-CR1-101854.

BEFORE: GUIDRY, McCLENDON, AND LANIER, JJ.

WRIT DENIED. In **Ramos v. Louisiana**, __ U.S.__, ___, 140 S.Ct. 1390, 1397, 206 L.Ed.2d 583 (2020), the United States Supreme Court held, "the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally." However, the Court declined to address whether its holding applied retroactively to cases on collateral review. The Court specifically observed that the question of "[w]hether 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." See **Ramos**, ___ U.S. at ___, 140 S.Ct. at 1407. The question of whether **Ramos** must apply retroactively to cases on federal collateral review is currently pending before the Court. **Edwards v. Vannoy**, __ U.S. __, 140 S.Ct. 2737, 206 L.Ed.2d 917 (2020). Moreover, the Louisiana Supreme Court has declined to definitively rule on whether **Ramos** should apply on collateral review in state court proceedings pending a decision in **Edwards**. See **State v. Gipson**, 2019-01815 (La. 6/3/20), 296 So.3d 1051, 1052 (Johnson, C.J., dissenting to point out that she disagreed with the majority's decision to defer ruling until the United States Supreme Court mandates action). Therefore, we are constrained to deny relief at this time. However, our decision does not preclude relator from reurging the issue in the district court if warranted by the decision of the higher courts.

JMG
PMc
WIL

COURT OF APPEAL, FIRST CIRCUIT



DEPUTY CLERK OF COURT
FOR THE COURT

APPENDIX "F"

LOUISIANA SUPREME COURT: RULING

WESTLAW

State v. El-Amin
Supreme Court of Louisiana. April 13, 2021 --- So.3d ---- 2021 WL 1398637 (Mem) 2021-00276 (La. 4/13/21) *(Approx. 1 page)*

2021 WL 1398637
Supreme Court of Louisiana.

STATE of Louisiana
v.
Sadat EL-AMIN

No. 2021-KH-00276
04/13/2021

Applying For Supervisory Writ, Parish of Washington, 22nd Judicial District Court Number(s) 91-CR1-101854, Court of Appeal, First Circuit, Number(s) 2020 KW 1069.

Opinion

*1 Writ application denied.

Weimer, C.J., would deny on the showing made.

Griffin, J., would grant to consider the retroactivity of Ramos v. Louisiana, 140 S.Ct. 1390, 206 L.Ed.2d 583 (2020).

All Citations

--- So.3d ----, 2021 WL 1398637 (Mem), 2021-00276 (La. 4/13/21)

End of Document

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