

NO. 23-5023

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IN THE SUPREME COURT OF THE UNITED STATES

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KIRBY THOMAS.

Petitioner

V.

STATE OF LOUISIANA.

Respondent

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES SUPREME COURT  
FOR THE STATE OF LOUISIANA

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### QUESTION PRESENTED FOR REVIEW

Based on the procedural posture and rulings of this case in Louisiana State courts, respondent asserts that the sole issue presented herein despite petitioner's otherwise contention is whether the last State court of resort (i.e. supreme court of the State of Louisiana) violated any federal and/or state constitutional and/or jurisprudential mandates in affirming the lower State appellate court's denial of petitioner's post-conviction claim of ineffective assistance of counsel based on the evidence adduced in State court.

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## SUPREME COURT RULES

1.	Rule 10 (b).....
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### STATEMENT OF JURISDICTION

Respondent asserts that absent this Honorable Court's discretionary action to review petitioner's writ of certiorari herein, pursuant to the United States Supreme Court Rule 10 (a-c), petitioner's perceived claim does not rise to any level of constitutional and/or jurisprudential violation requiring this Honorable Court's consideration. As asserted above, the true issue herein does not merit this Honorable Court's consideration.

### CONCISE STATEMENT OF THE CASE

Petitioner was initially indicted for Attempted Second Degree murder, two (2) counts of possession with intent to distribute cocaine, and being a convicted felon in possession of a firearm, all charges arising out of a debt involving illegal drugs. Subsequently, all pre-trial motions were set and heard, trial commencing on September 26, 2018. After presentation of all witnesses and evidence, the jury unanimously found petitioner guilty of attempted manslaughter and non-unanimously guilty of being a convicted felon in possession of a firearm and possession of cocaine. Petitioner's motion for a new trial based on the jury venire's racial makeup not being representative of Assumption Parish's racial population was denied. The trial court then sentenced petitioner to a combined total of thirty (30) years. On direct appeal, the lower appellate court affirmed the convictions but remanded the matter for resentencing on the charge of a convicted felon in possession of a firearm charge. State v. Thomas, 2019-KA-0409 (La. App. 1<sup>st</sup> Cir. 10/25/19), 289 So. 3d 1030. On writ of review to the Louisiana Supreme Court, pursuant to the holding in Ramos v. Louisiana, 590 U.S. \_\_\_, 140 S.Ct. 1390, 206 L.Ed.2d 583 (2020), the matter was remanded to the trial court for reconsideration of the non-unanimous convictions. Chief Justice Johnson in her concurrence, citing the statistics set forth in petitioner's counsel's brief, noted that the issue of trial counsel's failure to file a motion to quash

the petit jury venire was troubling but more appropriately raised in a post-conviction claim of ineffective assistance of counsel. State v. Thomas, 2019-K-01819 (La. 6/22/20), 297 So. 3d 727. On remand to the trial court, petitioner again without alleging with any specificity or constitutional grounds objected to being subjected to a non-unanimous jury verdict. On remand to the lower appellate court, petitioner's non-unanimous convictions were vacated, same being found to be unconstitutional. State v. Thomas, 2019-KA-0409R (La. App. 1<sup>st</sup> Cir. 12/30/20), 317 So. 3d 688.

Petitioner then sought post-conviction relief alleging ineffective assistance of counsel based on his trial counsel's failure to file a motion to quash the petit jury venire for its alleged discriminatory racial makeup citing Louisiana supreme court Justice Johnson's dicta concurrence. After consideration, the trial court's written reasoned judgment found that petitioner had failed to meet the required Strickland standards for deficient performance or prejudice. Petitioner sought appellate review thereof which was denied without comment. State v. Thomas, 2022-KW-0909 (La. App. 1<sup>st</sup> Cir. 9/26/22), 2022WL4463842. On writ of certiorari to the Louisiana Supreme Court, petitioner contended that while only 5.4% of the petit jury venire were African Americans, they constituted "nearly 1/3" of Assumption Parish's population which allegedly amounted to a violation of the Equal Protection clause. Said writ was denied but Justice Griffin citing the requirements of Duren v. Missouri, 439 U.S. 357, 364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979) noted that without a "deeper investigation into the parish's jury selection process" the matter demanded further evidentiary development for a proper analysis. State v. Thomas, 2022-KP-01613 (La. 3/28/23), 358 So. 3d 498. Thereafter, petitioner filed the instant petition.

## ARGUMENT

Respondent asserts that petitioner's writ of certiorari must be denied based on both procedural and jurisprudential grounds. Procedurally and pertinent herein, United States Supreme Court Rule 10(b) requires that absent this Honorable Court's discretion, petitioner's writ should be granted only when:

“(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;”.

Herein, the sole issue presented to the trial court and subsequently addressed by Louisiana's appellate courts was whether petitioner's counsel was ineffective in failing to file a motion to quash the petit jury venire. That is a question of fact answered by the evidence adduced at a hearing on the matter, not a question of federal law. In this instance, petitioner has failed to substantiate that the decision of the Louisiana Supreme Court on this issue conflicts with the decision of any other state court or of a United States court of appeals. As such, respondent asserts that procedurally, petitioner's writ must be denied absent the exercise of this Honorable Court's discretion.

Jurisprudentially, it is well settled that pleadings, arguments of counsel and/or briefs and memorandum on any particular issue are not evidence upon which appellate courts can base their decisions. See Skyline Corporation v. National Labor Relations Board, 79-1594 (5<sup>th</sup> Cir. 3/19/80), 613 F.2d 1328; United States ex rel McNeil v. Jolly, (E.D. La. 4/3/20), 451 Supp. 3d 657; and Reed v. Peoples State Bank of Many, 63,531 (La. App. 2d Cir. 3/5/03), 829 So. 2d 955. Factually, the trial court herein correctly found that petitioner failed to substantiate either prong (i.e. deficiency and/or prejudice) of the Strickland standard. Specifically, petitioner failed to

adduce at trial a scintilla of fact/evidence regarding the racial makeup of Assumption Parish and/or its registered voters. Herein, the state court record accurately reflects that only petitioner's pleadings, argument, and briefs set forth the alleged statistical racial makeup of the petit jury venire and that of Assumption Parish. He failed to adduce a single record which substantiated his racial disparity contention. While he claims that the area from which a majority of petit jury venire were served to appear for trial are white, the record is devoid of a scintilla of adduced fact that of those individuals who were served and appeared for service at trial were in fact white. Petitioner's sophomoric contention is that because they were allegedly not black, there is systemic racism in the petit jury venire selection process in Assumption Parish. This contention completely negates any statistical fact of whether any individual sought to be served or was served to be on the petit jury venire was in fact of any other ethnic group (i.e. Latino, Asian and/or of mixed ethnic makeup). Justice Griffin in State v. Thomas, 2022-KP-01613, (La. 3/28/23), 358 So. 3d 498, citing Duren v. Missouri, 439 U.S. 357, 364, 99 S. Ct. 664, 668, 58 L.Ed.2d 579 (1979), stated as much, noting that he would vote to grant petitioner's writ as without a "deeper investigation into the parish's jury selection process" the matter demanded further evidentiary development to establish any basis for petitioner's claim of Assumption Parish racial disparity in the petit jury venire selection system. Based thereon, it is abundantly clear that petitioner failed to adduce a scintilla of fact at the trial court level to substantiate his claim of racial disparity in the Assumption Parish petit jury venire selection system. Further, while petitioner cites to Chief Justice Johnson's dicta concurrence outlining the "statistical disparity", he fails to note that she failed to adhere to clearly established jurisprudence (i.e. counsel's arguments/briefs/memorandums/pleadings are not adduced evidence viable to support a reasoned decision). Moreover, concurrences do not create clearly established law. Williams v.




Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); Carey v. Musladin, 549 U.S. 70, 127 S.Ct. 649, 166 L.Ed.2d 482 (2006); Honie v. Powell, (10<sup>th</sup> Cir. 1/26/23), 58 F.3th 1173; and Granier v. Hooper, (5<sup>th</sup> Cir. 7/17/23), 2023WL 4554903. Petitioner's underlying contention appears to be that a petit jury venire can only be non-discriminatory if the racial makeup of the venire matches the racial makeup of Assumption Parish. Petitioner was not entitled to a jury of any particular composition. Taylor v. Louisiana, 419 U.S. 522, 538, 95 S.Ct. 692, 702, 43 L.Ed.2d 690 (1975). A venire reflecting exactly the complete representation of every group within a community would be impossible to seat. State v. Lee, 559 So. 2d. 1310, 1314, and State v. Pooler, 96-1794 (La. App. 1<sup>st</sup> Cir. 5/9/97), 696 So. 2d 22, 39, writ denied, 97-1470 (La. 11/14/97), 703 So. 2d 1288. Petitioner's contention without any viable statistical data smacks of racial profiling in direct opposition to that "dream" imagined by Martin Luther King when he proclaimed "(I) dream of a day when my daughters will not be judged by the color of their skin but by the content of their character". Lastly, petitioner does not contend that any of the jurors selected indicated animus or bias to or against him, only that the petit jury venire was lacking in its racial makeup. This claim is without constitutional muster and must be denied.

### CONCLUSION

Based upon the above and forgoing, respondent asserts that the state court record fails to substantiate either the deficiency or prejudice prong of the Strickland standard or that Petitioner was denied any constitutional right under the Equal Protection clause based upon the alleged racial make-up of the jury venire.

RESPECTFULLY SUBMITTED.  
RICKY L. BABIN  
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By   
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Dated: 31<sup>st</sup> July, 2023

**AFFIDAVIT OF VERIFICATION AND CERTIFICATE OF SERVICE**

STATE OF LOUISIANA

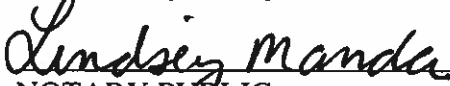
PARISH OF ASCENSION

DONALD D. CANDELL, being first duly sworn, deposed and said that he has prepared and read the foregoing Opposition to Petitioner's Writ of Certiorari to the United States Supreme Court, that the allegations of fact and arguments of law contained therein are true and correct to the best of his knowledge; and that he has the 31<sup>st</sup> day of July, 2023, delivered the foregoing Opposition to Petitioner's Writ of Certiorari to the United States Supreme Court by electronic and/or U.S. mail, to the following:

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DONALD D. CANDELL  
Assistant District Attorney, Respondent

Sworn to and subscribed before me,  
This 31 day of July, 2023.

  
NOTARY PUBLIC  
Lindsey Manda  
Print Name/Bar Roll # 30608  
My commission expires at death