Docket No. 24-5155

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

(Term: October 2023-2024)

Bradley Wayne Berry-Petitioner
(Petitioner)

vs.

State of Louisiana, et al.;
c/o Elizabeth Murrill, Attorney General
(Respondents)

On Petition for Writ of Certiorari to the United States Court of Appeals- Fifth Circuit, Case No. 23-30221, from the United States District Court, Western District of Louisiana, Case No. 22-cv-00397.

PETITION FOR WRIT OF CERTIORARI

Filed by:

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QUESTION(S) PRESENTED FOR REVIEW

1. Whether the decision by the federal court of appeals is correct as applied to the Petitioner regarding a certificate of appealability.

2. Does the ruling in *Griffith v. Kentucky*, 107 S. Ct. 708 concerning new constitutional rules applying retroactively to all cases, state or federal, pending on direct review or not yet final apply to a state constitution when it is amended to proclaim a "new rule."

3. Should a state be allowed to word their constitutional amendment(s) in such a way as to by-pass/annul previously established federal case law rulings such as *Griffith v. Kentucky*, 107 S. Ct. 708?

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CORPORATE DISCLOSURE STATEMENT

I, Bradley Wayne Berry, declare that I do not possess or own any parent corporations or any publicly held company owning 10% or more of any corporation's stock in these United States of America or abroad.

_____

BRADLEY WAYNE BERRY
D.O.C. #430191
SSN: 433-51-7093

Notice of Pro-Se Filing

Petitioner 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 Appellant 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). Petitioner is a layman of the law and untrained in the ways of filings and proceedings of formal pleadings in this Court.

PROCEEDINGS IN STATE AND FEDERAL COURTS

U.S. District Court
Western District of Louisiana
Docket No.: 22-cv-397
Case Caption: Berry v. Guerin
Date of Judgment: 03/21/2023

U.S. Court of Appeals, Fifth Circuit
Docket No.: 23-30221
Case Caption: Berry v. Guerin
Date of Judgment: 07/27/2023

La. Supreme Court (State Collateral Review, Supervisory Writ App.)
Docket No.: 2021-KH-01248
Caption: State v. Berry, 328 So. 3d 81(Mem)
Date of Judgment: 11/23/2021

Second Circuit Court of Appeals (State Collateral Review Appeal)
Docket No.: 54,141-KH
Caption: Berry v. Hooper, (Unpublished)
Date of Judgment: 07/15/2021

La. Supreme Court (State Direct Appeal)
State v Berry, No.: 2017-KO 1146; 257 So.3d 1260 (Mem)

Court of Appeals, Second Circuit (State Direct Appeal)
State v. Berry, No.: 51,213-KA

Fifth Judicial District Court, Parish of Richland, Louisiana
Docket No.: F-2014-255
Caption: State v. Berry
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U.S. Court of Appeals-Fifth Circuit
Berry v. Guerin, 2023 WL 6890737

U.S. District Court- Western District of La.
Berry v. Guerin, 2023 WL 2592284

La. Supreme Court (State Collateral Review)
State v. Berry, 21-1248(La. 11/23/21); 328 So.3d 81

Court of Appeals, Second Circuit (State Collateral Review)
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La. Supreme Court (State Direct Appeal)
State v Berry, No.: 2017-KO 1146; 257 So.3d 1260(Mem)-Cert denied 12/27/2018

Court of Appeals, Second Circuit (State Direct Appeal)
State v. Berry, No.: 51,213-KA

Fifth Judicial District Court
State v. Berry, No.: F-2014-255

BASIS FOR JURISDICTION

For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was July 27, 2023. A copy of that decision appears at Appendix C.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: August 2023, and a copy of the order denying rehearing appears at Appendix C. An extension of time to file the petition for a writ of certiorari was granted to and including December 26, 2023 on August 25, 2023 in application No. 23A172.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and the First Amendment to the Constitution of the United States of America.

For cases from **state courts:**

The dates on which the highest state court (Direct Review and PCR) decided my case was December 17, 2018. A copy of that decision appears at Appendix A and B.

An extension of time to file the petition for a writ of certiorari was granted to and including December 26, 2023 in Application No.23A172.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) and the First Amendment to the Constitution of the United States of America.

The notification requirements of Supreme Court Rule 29.4(c) have been made on the Attorney General of Louisiana.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the U.S. Constitution

Sixth Amendment to the U.S. Constitution

Fourteenth Amendment to the U.S. Constitutional

Fifth Amendment, U.S. Constitution

Privileges or Immunities Clause

U.S. Const. amend X

6th Amendment

Due Process Clause

CONSISE STATEMENT OF CASE

This case involves two individuals falsely accusing Petitioner of sexual misconduct. Petitioner was found guilty in Richland Parish on count one (1) Aggravated Rape by an 11-1 jury verdict and count two (2) Indecent Behavior with a juvenile by a 12-0 jury verdict on December 15, 2015. Petitioner filed Motion to appeal. Motion was granted.

On December 12, 2016, Petitioner filed pro se brief for state direct appeal to Second Circuit Court of Appeals in which he claimed a nonunanimous jury was unconstitutional and requested relief in the form of a new trial.

On 05-17-2017, Petitioner's state direct appellate review was denied by the Second Circuit Court of Appeals.

On June 2, 2017, Petitioner timely filed writ of certiorari to La.Sup.Ct. for state direct appeal.

On December 12, 2018, while Petitioner was pending certiorari, Louisiana **effectively** amended their constitution to a unanimous jury verdict requirement via La Acts 2018 No. 722 being amended to La. Const. Art. 1 § 17 in which unanimous jury verdicts were to begin for persons arrested on or after January 1, 2019.

On December 17, 2018 Petitioner's certiorari to the La. Supreme Court was denied in error by not applying *Griffith v. Kentucky, 107 S.Ct. 708* to his case.

On February 14, 2020, Petitioner then filed a timely State Post-Conviction Relief application in the trial court in which he claimed the court erred in that he was not yet

final when the unanimous jury verdict requirement was effectively enacted.

On July 13, 2020 Petitioner filed for extension of time to respond to State's answer to his PCR application due to Covid restrictions at his facility preventing him adequate access to the law library.

On January 27, 2021, Petitioner was denied Post-Conviction Relief in the trial court.

On April 8, 2021, Petitioner appealed the trial court's denial of PCR to the Second Circuit Court of Appeals.

On July 15, 2021, Petitioner was denied relief of PCR in Second Circuit Court of Appeals.

On August 9, 2021 Petitioner filed appeal letter to La. Supreme Court requesting review of Circuit Court's ruling on his PCR.

On November 23, 2021, Petitioner was denied State PCR by the La. Supreme Court with two Justices agreeing to GRANT -(Justice Griffin and Chief Justice Weimer).

On March 25, 2022, Petitioner filed Federal Habeas Corpus application in the U.S. Western District Court of Appeals.

On March 21, 2023, the Western District Court of Appeals denied Petitoner Habeas relief and dismissed Petitioner's claims with prejudice.

On May 25, 2023, Petitioner filed appeal to U.S. Fifth Circuit Court of Appeals requesting Certificate of Appealability.

On July 27, 2023, the Fifth Circuit Court of Appeals denied Petitioner's request for

Certificate of Appealability contrary to federal law.

In August 2023, Petitioner was denied en banc rehearing in Fifth Circuit Court of Appeals.

Mr. Berry had requested review of his conviction of a state court post-conviction proceeding arising in the Fifth Judicial District Court, Richland Parish, Louisiana; wherein Mr. Berry raised two identical issues in the Court of Appeals, Second Circuit, Louisiana, and the Louisiana Supreme Court. Mr. Berry, after receiving the highest state court denial of these federal questions petitioned for writ of habeas corpus in the U.S. District Court, Western District of Louisiana, Monroe Division. This Federal District Court denied habeas corpus writs and Mr. Berry sought a COA in it's stead. The District Court denied COA and Mr. Berry then sought a COA in the U.S. Court of Appeals for the Fifth Circuit which was denied as stated above.

With "excusable neglect", Mr. Berry raised these federal questions in a timely manner and he thus believes that this Court has jurisdiction to hear this matter.

The basis for federal jurisdiction in the court of first instance is *28 U.S.C. § 2254*, for Appellate jurisdiction *28 U.S.C. § 2253(c)(2)*, and for writ of certiorari in this Court, *28 U.S.C. § 1254(1)*.

Petitioner now brings certiorari to this Honorable Court.

CONSISE DIRECT ARGUMENTS

I.

On March 21, 2023, U.S. District Court Judge David Joseph ordered that Bradley Wayne Berry's (herein after referred to as Mr. Berry) petition for Writ of Habeas Corpus be denied with prejudice- adopting U.S. Magistrate Judge Kayla McClusky's Report and Recommendation. (See Appendix D.)

On June 27, 2023, U.S. Circuit Judge Carl Stewart ordered that Mr. Berry's motion for a certificate of appealability be denied. (See Appendix C.)

After such denial, a panel of the U.S. Court of Appeals, Fifth Circuit, denied Mr. Berry's motion for reconsideration of the June 27, 2023 ruling in an unpublished order.

It is from these rulings that Mr. Berry's petition for writ of certiorari is before this Honorable Supreme Court.

II.

Mr. Berry challenges the decision by His Honor Carl Stewart today for the decision and ruling seems premature to a granting of Mr. Berry's motion to amend his certificate of appealability brief. (See Appendix C.)

If this Supreme Court will see the Order appended it is clear and convincing that Justice Stewart granted Mr. Berry's motion to amend his certificate of appealability brief. Although this Order grants an amendment and denies to issue the certificate is of a legal concern.

As a pro se litigant, Mr. Berry was not skilled or had an advance knowledge of the procedures to request a COA. Seeing that, before Mr. Berry's COA request was denied he filed motions to amend his COA brief which was factually granted. Mr. Berry realized he had failed to argue his claim of "Improper Indictment" and made his motions to the Circuit Court. Upon receipt of these motions Mr. Berry still had not raised his "Indictment" claim.

For this reason, Mr. Berry believes the Order of June 27, 2023 is premature. Mr. Berry will now give this Supreme Court an overview of his claims and a general assessment of their merits.

PRAYER FOR RELIEF

A. OVERVIEW OF HABEAS CLAIMS

In Mr. Berry's original habeas petition he raised two (2) claims which he exhausted on state collateral review.

Mr. Berry's first claim involved Louisiana's enactment of *La. Act 2018 No. 722* which required all serious offenses to be governed by a unanimous jury verdict. Petitioner feels as though this claim was valid in that *Griffith v. Kentucky, 479 U.S. 314, 328 (1978)* is a "clearly established federal law" that was substantially violated by Louisiana not granting retroactivity to Mr. Berry while he was still pending State Direct Review Certiorari in the La. Supreme Court while this Act became effective[1]. Petitioner argues that even though the new Act by La. legislatures indicated that it was for arrests made on or after Jan. 01, 2019 the new act still made a "clear break"[2] with the past and was effective on Dec. 12, 2018[3]-five days before Mr. Berry was denied certiorari in La. Supreme Court on Direct Review. Mr. Berry claimed that since other cases were afforded retroactive application of *Ramos* while they were on state direct review, as per *Griffith*, then he should have had Louisiana's new "constitutional rule" applied retroactive to his case as he was still pending certiorari in the La. Supreme Court for state direct review in 2018 when *La. Act 2018 No. 722* became effective thus amending Louisiana's Constitution. Petitioner is of the firm belief that *Griffith* speaks of new state

1 See *State v. Berry*, 257 So. 3d 1260 (Mem)
2 *Griffith v. Kentucky* clearly speaks of "clear breaks" with the past concerning new procedural rules.
3 See *La. Const. Art 1 § 17* in which *La. Acts. 2018 No. 722* became effective on Dec. 12, 2018.

constitution rules as well as new federal constitution rules and believes that this failure to apply the federal ruling of *Griffith* thus showed State Court error and violated his federal Constitution rights protected in *Griffith's* ruling. Petitioner points to *Montgomery v. Louisiana, 577 U.S. 190, 136 S.Ct 718* in which Justice Scalia, with whom Justice Thomas and Justice Alito joined, dissenting an opinion which stated under 1. Jurisdiction B, (second paragraph):

"...Because of the supremacy clause, says the majority. Ante, at 731. But the supremacy clause cannot possibly answer the question before us here. It only elicits another question: What federal law is supreme? old or new? **The majority's champion, Justice Harlan,** said the old rules apply for federal habeas review of a state court conviction: [T]he ***218** habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place[4]..."

In *Maxwell v. Dow, 20 S.Ct.494* (02-26-1900) Mr. Justice Harlan dissents saying:
"...And we have held that the jury here referred to was a common-law jury consisting of neither more nor less than twelve persons, **whose unanimous verdict was necessary** to acquit or convict the accused; that a jury of less number was not admissable in any criminal trial in the District of Columbia or in a territory of the United States, or in any prosecution of a criminal character in a court of the United States, or in any court organized under the authority of the United States...
"...Mr. Hallam in his Constitutional History of England, after observing that liberty had been the slow fruit of ages, said that as early as the reign of Henry VII. on of the essential checks upon royal power was that 'the fact of guilt or innocence on a criminal charge was determined in a public court, and in the country where the offense was alleged to have occurred, by a jury of twelve men, **from whose unanimous verdict** no appeal could be made.'"

Therefore, Petitioner argues that Justice Harlan's opinions throughout history have proven to hold weight in this Court and as such have led to landmark cases such as *Griffith v. Kentucky* and Petitioner relies on this ruling for relief and requests such that

4 According to dissenting judges in Apodaca v. Oregon unanimous verdicts has always been required. (See "Conclusion" of writ pg. 39 for cases listed)

was denied to him due to La. State Supreme Court error in 2018 in not applying the *Griffith* standard to his case. Furthermore, Petitioner argues that Louisiana legislature worded their proposal in violation of U.S. Const. in *La. Acts 2018 No. 722* to the public to vote on as for arrest on or after January 01, 2019 and further, the La. Supreme Court Justices should not have said that Louisianians "chose" to make the amendment prospective[5] as such makes *Griffith* annul and void for those seeking relief from nonunanimous jury verdicts whom are still on State Direct Review.

Petitioner claims that since the La. Supreme Court had already adopted *Griffith* as a matter of state law in *Draughter* then why the sudden change and departure from previously announced Federal law? New rules should apply to all cases, federal or state, on direct appeal regardless of certain dates announced as beginning dates. Thus, by the La. Supreme Court not applying the *Griffith* standard they, in effect, rendered Petitioner's conviction unconstitutional by not applying the new rule to him. Petitioner's conviction at this time (December 17, 2018) became unconstitutional upon denial of State Direct Review certiorari in the La. Supreme Court. Violation of the U.S. Constitution's 14th Amendment, Privileges or Immunities Clause, 6th Amendment, 4th Amendment, & Due Process Clause.

Petitioner sought certiorari in the La. Supreme Court. While pending review, *La. Const. Art 1 § 17* was **effectively** amended on December 12, 2018 via *La. Acts 2018 No.*

5 The public was only given one (1) option to vote on at that particular time which was worded in such a way to hide barring retroactivity by putting a date of "when" the new rule was to take effect which in fact Judges used skillfully and manipulatively to determined "whom" the new rule was to apply to as well.

722 which changed Louisiana's jury verdict requirement to unanimous in order to convict. Petitioner was denied in **court error** on December 17, 2018 as according to *La. Code of Criminal Procedure Art. 922 (D)*[6] he was not yet final in the La. Sup. Ct. as he was pending certiorari review. This error is what made Petitioner's conviction unconstitutional as *Griffith v. Kentucky, 107 S. Ct. 708* directly controlled Petitioner's case, per Justice Harlan's view,[7] and should have made the new rule apply to him as he was still under state direct review at the time of the effective date of the new rule of unanimous jury verdict requirement.

Petitioner points to *State v. Draughter,130 So. 3d 855* in which case Louisiana shows that *Griffith* had already been adopted as a matter of state law and as such was argued in *State v. Johnson, 266 So. 3d 969* in the same manner that Petitioner is arguing it now. However, the state denied relief and such was never addressed in this Honorable Court as *Ramos v. Louisiana, 140 S.Ct. 1390* had just came out and *Johnson* was remanded in *Johnson v. Louisiana, 140 S. Ct. 2715* on *Ramos v. Louisiana, 140 S.Ct. 1390* grounds and the issue was never addressed by this Court. Neither was the issue addressed by the Louisiana Appellate Court in which the case was remanded back to in *State v. Johnson, 302 So.3d 142.*

Petitioner claims that Louisiana's amended constitution[8] is unconstitutional as applied

6 *La. Code of Crim. Proc. Art. 922 (D)* states: "If an application for a writ of review is timely filed with the supreme court, the judgment of the appellate court from which the writ of review is sought becomes final when the supreme court denies the writ."

7 Justice Harlan..."the majority's champion" [*Montgomery v. Louisiana, 577 U.S. 190, 136 S.Ct. 718].*

8 *La. Const. Art. 1 § 17*

in *State v. J.E., 310 So. 3d 1262* as it puts a beginning date of January 01, 2019 in the amended constitution[9] which the State uses to deny retroactive relief to persons still on state direct review at the time of the beginning date. By the State using this to annul *Griffith*, they are thus making void previously established federal law. However, this claim failed in the District Court based on U.S. Magistrate Judge Kayla McClusky's Report that Louisiana law did not require a unanimous jury verdict in 2014, the year of Mr. Berry's conviction of the alleged offense.

Although Louisiana did not require this verdict, Mr. Berry claimed that his Sixth Amendment and Fourteenth Amendment rights to the U.S. Constitution were violated. This Supreme Court in the case of *Ramos v. Louisiana, 590 U.S. ___, 140 S.Ct. 1390, 206 LED 2d 583 (2020)*, held that the Sixth Amendment to the U.S. Constitution requires that a jury reach a unanimous guilty verdict to convict a defendant of a crime. This Supreme Court also held be the majority that *Apodaca v. Oregon, 406 U.S. 404, 92 S.Ct. 1028, 32 LED 2d 184 (1972)*, was egregiously wrong for state reliance interests.

In *Ramos*, the Supreme Court did not give precedent value to Louisiana's newly enacted law of *LSA-Const. Art. 1 § 17(a)*, where *Ramos'* commission of his offense occurred before January 01, 2019. *Ramos'* decision affected Evangalisto Ramos and the few cases that were not final in Louisiana.

Since this decision, the Supreme Court of Oregon published an opinion on *Ramos* in *Watkins v. Ackley, 2002 WL 18002935*, where it's ultimate decision was that 'a

9 *La. Acts 2018 No. 722*

nonunanimous jury verdict amounts to a substantial denial in the proceedings resulting in Petitioner's conviction of Petitioner's rights under the Constitution of the United States which denial rendered the conviction void, for which post-conviction relief shall be granted.'

Now, the State of Louisiana is the only registered State that refuses to apply the retroactivity of *Ramos* on State Collateral Review. This measure then is still quite unsettled where the U.S. Magistrate Judge in this case gives an erroneous application of federal constitutional law when it stated:

"Therefore, Petitioner's conviction by an 11-1 vote of the jury did not violate the sixth amendment." (See Appendix ___.)

This decision by the federal district court (adopted) in itself gives a certain merit to Mr. Berry's writ of Habeas Corpus. If *Ramos* allegedly committed his offense before January 01, 2019, and facts say that he did, and this Supreme Court gave a detailed opinion concerning the meaning of the Sixth Amendment and unanimous jury verdicts, how is it that this claim does not deserve a certificate of appealability?

Petitioner also argues that *Ramos v. Louisiana, 140 S.Ct. 1390* should be applied retroactively in Louisiana to persons on State Collateral Review for the following reasons set forth in Justice Griffin's dissent in *Louisiana v. Reddick, 2022 WL 12338521 No. 2021-KP-01893UI* which reads:

"Injustices from Louisiana's past call for a remedy from this Court. I must therefore dissent from the majority's adoption of a *Teague/Linkletter*[10] hybrid test and it's denial of retroactive relief to those convicted by non-unanimous jury verdicts. I would instead use a holistic approach to the *Teague* watershed test and find *Ramos* applies retroactively. In *Edwards v. Vannoy*, the Supreme Court held that its decision in *Ramos* did not rise to the level of a watershed rule under *Teague v. Lane*. The Supreme Court examined individual aspects of *Ramos* to determine if those aspects-considered separate and apart from each other-made the decision watershed.

"The Supreme Court also determined that even though *Ramos* restored the original intent of the Sixth Amendment, it was not watershed because it had previously held reviving the original intent of the Framers did not make such a rule watershed. The Supreme Court finally determined that the racially discriminatory history of non-unanimous verdicts did not make *Ramos* watershed because it had previously held that a similar rule against using race in jury selection was not retroactive. Justice Kagan critiqued this "conquer by dividing" analysis because it failed to recognize the unique nature of *Ramos* in touching on all of those aspects.

"Prior to *Edwards*, the issue of whether a new constitutional criminal procedural rule was watershed was determined holistically. *See Whorton*, 549 U.S. at 421 ("a new rule must *itself* constitute a previously unrecognized bedrock procedural element")(emphasis added). Not once has this Court required that some or every aspect of a new rule be watershed- it has examined the new rule as a whole with all of its aspects considered together. *See State ex rel. Taylor v. Whitley, 606 So.2d 1292, 1299 (1992); Stewart v. State, 95-2385 (**Lal** 7/2/96), 676 So. 2d 87, 89; State v. Tate, 122763 (**La.** 11/5/13), 130 So. 3d 829, 840, abrogated on other grounds by Montgomery v. Louisiana, 577 U.S. at 212* (finding retroactivity applies because the rule at issue was substantive thus not overruling this Court's watershed analysis); see also *State v. Gipson*, 19-1815 **La.** 6/3/20), 296 So. 3d 1051 (Johnson, C.J., would grant and docket). A holistic approach is consistent with this Court's treatment of *Gideon v. Wainwright, 372 U.S. 335 (1963)*, as being the type of case that presents a watershed rule. *See Taylor*, 606 So. 2d at 1299; see also *Whorton*, 549 U.S. at 42. If watershed status is determined by examining whether individual aspects of a case are watershed, then even *Gideon* would fail such a test.

"A case being judged holistically in relation to jurisprudence and society generally, will come within the watershed exception and be applied retroactively if these for interrelated elements are met: (1) it prevents an actual or generally understood impermissibly large risk of erroneous convictions, (2) it can be said to be in the same category as *Gideon* in having effected a profound and sweeping change in the law; (3) it

10 Petitioner argues that Justice O'Connor overruled *Linkletter* by *Teague* therefore making Louisiana's "hybrid" test unconstitutional as is *Apodaca v. Oregon*, 406 U.S. 464 (1972). In the same way that we don't use *Apodoca* anymore, we do not use *Linkletter* anymore. Louisiana, therefore, should not, in any way, be allowed to use it in their state while determining retroactivity.

is not narrowly applicable to only a small subset of defendants; and (4) it can be said to touch on fundamental aspects of our understanding of the basic procedural elements of essential fundamental fairness. *See* Tate, 12-2763, pp. 15-16, 130 So. 3d at 840-41. Ramos meets these requisite elements for a number of interdependent reasons.

"Unanimous juries prevent erroneous convictions. They are more thorough in their consideration of evidence. *See* Kim Taylor-Thompson, *Empty Votes in Jury Deliberations,* 113 HARV. L. REV. 1261, 1272 (2000). They are more respectful to dissenting views. *Id.* at 1273-73. Further, unanimous juries are seen as more legitimate or to "get it right" more often than non-unanimous juries. *Id* at 1273. There is also a strong public perception that a unanimous jury is more correct in it's results than a non-unanimous jury. *See* United States v. Lopez, 581 F.2d 1338, 1341 (9th Cir. 1978)("A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury."), Ramos, 140 S.Ct. at 1401; *see also* Robert MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency.* 12 LAW & HUM. BEHAV, 333, 337 (1988).

"Ramos is sufficiently broad in it's application because it applied the jury unanimity right in all felony cases to the states. It therefore covers the same universe of defendants as Gideon and is unlike Miller where the new constitutional criminal procedural rule applied only to a small subset of cases.

"Ramos is a profound sweeping change in the law which touches on basic fundamental fairness. Not only did it restore the original intent of the Framers in regard to the Sixth Amendment, it also cured a rule that was indisputably adopted for the racially discriminatory purpose of diluting the power of black jurors. *See* Ramos, 140 S.Ct. at 1394; Thomas Aiello, *Jim Crows Last Stand: Nonunanimous Criminal Jury Verdicts in* ***Louisiana*** *(2015).* That the **Louisiana** Constitution of 1974 somehow cleansed the non-unanimous jury system of it's racial animus and impact is an untenable position. *See* Espinoza v. Montana Dep't of Revenue, *---U.S. ---,* 140 S.Ct. 2246, 2268 (2020)(Alito, J., concurring)(conceding that [i]f the original motivation for the laws mattered [in *Ramos]*, it certainly matters here") In 1898, the delegates averred their primary motivation was judicial efficiency, with their secondary motivation being their disparate impact the law would have on African Americans. In 1973, judicial efficiency was again advanced as a primary motivation despite the continued disparate impact on African Americans being a byproduct of the law. *See* Angela Allen-Bell, *How the Narrative About* ***Louisiana's*** *Non-unanimous Criminal Jury System Became a Person of Interest In The Case Against Justice in the Deep South,* 67 MERCER L. REV, 585, 605 (2016). Further, in defending non-unanimous juries on judicial efficiency grounds, one delegate at the 1973 Convention recognized that the system discriminated against minority groups he referenced as being "ugly, poor, [and] illiterate," but that juries "don't convict

nice-looking, intelligent, well-meaning, decent people." Transcript of the **Louisiana** Constitutional Convention of 1973 v. VII at 1184. Not only is this language reminiscent of the 1898 Convention, it also shows that the delegates at the 1973 Convention knew of the racially discriminatory purpose behind the non-unanimous jury verdict system, knew that it would continue to have a disparate impact, and yet continued the system despite such knowledge.

"*Ramos* as *Gideon*, set aside a system that disproportionately discriminated against poor individuals and racial minorities. *Ramos* is even greater than *Gideon* on this point because *Ramos* addressed a system that was explicitly racist in origin. Further, the right to a unanimous jury verdict enhances the protections under *Batson* which prohibits racially motivated juror strikes. *See* Allen-Bell, 67 MERCER L. REV. 585, 609 (a "nonunanimous-jury system readily facilitates effective *Batson* violation" as a prosecutor "need only strike enough black jurors to make sure that ten black jurors remain"). The jury returns an erroneous verdict due to racial prejudice or because it failed to listen to the reasonable doubt within a dissenting jurror, then the *Gideon* right is virtually worthless. *Ramos* therefore assists and protects *Gideon* in preserving fundamental fairness and the legitimacy of a trial and the criminal justice system as a whole.

"The requirement for unanimous verdicts was adopted into the **Louisiana** Constitution prospectively for all cases relating to crimes committed on or after January 1, 2019. **La.** Const. art. I § 17 (A). The majority argues that because the people adopted a constitutional provision that only applies *Ramos* prospectively[11], we should not apply it retroactively. I disagree. When it comes to the power of a state, what is not prohibited is allowed. *See* U.S. Const. amend X. The people of **Louisiana** knew full well of this Court's power to make rules such as *Ramos* retroactive but did not remove that power in our Constitution. Unanimous jury verdicts are so fundamental to due process and fairness that the people of **Louisiana** amended their Declaration of Rights. If the right is necessary for procedural fairness for future cases, it is also necessary for past cases.

"*Duncan* did not overturn a system that was specifically designed for racially discriminatory purposes. *Batson* did not restore the original meaning of a fundamental precept of our Constitution; and did not undo a century's long intentionally racist system. *Crawford* only restored the original meaning of the Constitution relevant to minor hearsay evidence, it did not bear on the public legitimacy of juror trials and did not undo an intentionally racist system. None of these cases was the subject of sweeping constitutional change in this state. *Ramos* possesses all of these qualities and is

11 Petitioner points out that the people did not "choose" to adopt this constitutional provision against one that includes retroactive application. The ballot question was silent as to a retroactive application choice. They were only given one option to vote on of which included the amendment to be applied to arrests on or after January 1, 2019 only. In effect, they were unaware and/or were not given the option of this new rule not being applied to other's that weren't given the benifit of the new rule by voting on "retroactivity".

therefore, under the foregoing analysis, a watershed rule.

"Intentional racism has no place in our criminal justice system. The **Supreme 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., concurring in part) (citing *Pena-Rodriguez v. Colorado,* 580 U.S. 206, 137 S.Ct. 855, 867-68 (collecting cases)). The racially discriminatory nature of convictions secured by non-unanimous verdicts does not change over time. Such convictions were racially discriminatory in 1898. They were racially discriminatory in 1975. They remain racially discriminatory today.

"The imperative to correct past injustices manifest in the deprivation of a constitutionally guaranteed right should not cede to reliance interests and administrative concerns. Rather, "it is a cost we must bear if we mean to show that we guarantee all Louisianans equal justice." *Gipson,* 19-1815, p. 9, 296 So. 3d at 1056 (Johnson, C.J., would grant and docket). We must not perpetuate something we all know to be wrong only because we fear the consequences- and costs- of being right. *See Ramos*, 140 S.Ct. at 1408. Accordingly, I would apply *Ramos* retroactively to all defendants convicted by non-unanimous jury verdicts. The integrity of our criminal justice system and legitimacy of the rule of law demands no less."

Furthermore, in Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060 the Court stated:

"...This retroactivity determination would normally entail application of the *Linkletter* standard, but we believe that our approach to retroactivity for cases on collateral review requires modification."

"...Because we adopt Justice Harlan's approach to retroactivity for cases on collateral review, we leave the resolution of that question for another day."

"...We agreed with Justice Harlan that, 'failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *479 U.S., at 322, 107 S.Ct., at 713.*

"...We agree with Justice Harlan's description of the function of habeas corpus."

Furthermore, Petitioner claims that since he had a non-unanimous jury verdict in his case he should have been given the benefit of retroactivity to *Ramos* while he was on State Collateral Review and asks this Court to allow him to appeal his case.

Mr. Berry's claim also involves a constitutional law that cites *Griffith v. Kentucky, 479 U.S. 314 (1987)*, where *La. Acts 2018 No. 722* was effectively enacted into La. Const.

Art 1 § 17 while Mr. Berry pending certiorari in La. Sup. Ct. on state direct review. Although Mr. Berry actually attempts to apply *Griffith* to his direct appeal decision he falls short of the *Ramos* decision and his conviction and sentence becomes final.

This claim deserves a review in this Supreme Court where this Supreme Court has requested new applications of writ of certiorari based on this constitutional issue. Because *Edwards v. Vannoy, 593 U.S.___ (2021)* declined to apply the new rule announced in *Ramos* for cases seeking habeas review, Mr. Berry requests that the certificate of appealability be reviewed whereas *28 U.S.C. §2244* could employ an avenue for Mr. Berry to receive Federal Review of "substantial denial of a federal right". Without this review, the Acts of Congress in *28 U.S.C. § 2244*, would seem only to benefit this government but not the rights of the people it has sworn to serve and protect. Such people include Petitioner, Mr. Berry.

B.

Mr. Berry's second claim stemmed from the state prosecutor changing the "time frame" in which Mr. Berry was accused of committing an offense to meet the new legislation that repealed *LSA-R.S. 14:43.4*, and added that language to *LSA 14:41* and *14:42*, making it an aggravated rape to commit an "oral" sexual act.

The State of Louisiana Grand Jury in this case returned an "indictment" for Aggravated Rape upon the dates entered in the original bill to them. With this original time frame (Jan. 01, 2000-Dec. 31, 2003) the Grand Jury returned an improper

indictment and left the offense without jurisdiction of the state court. Mr. Berry argues this on an objection and instead of quashing the indictment due to prosecutorial failures the state trial court allows the prosecutor to amend the indictment to fit the new law of *LSA-R.S.14:41*, violating Mr. Berry's federal right to the due process of law found in our 5th and 14th Amendments.

Mr. Berry does not believe that this claim should have failed in the district court because the process of the indictment is so defective that it deprives the state trial court of jurisdiction to "indict" and impose a sentence of life where the document received be the Grand Jurors held a different offense date.

Mr. Berry requests to amend his request for COA as granted and include this claim. Mr. Berry was on quarantine at the time of his habeas review and did not have any law library access due to his facility's "Unit Integrity" which denied Mr. Berry complete access to the law library and help from inmate counsel substitute. May this Court review the COA order for this cause.

B. OVERVIEW OF MAGISTRATE'S REPORT

The U.S. Magistrate Judge Kayla McClusky submitted a Report and Recommendation that was adopted to dismiss both of Mr. Berry's claims. Following is an overview of how incorrect this report is to federal constitutional law:

A.

If this Supreme Court will see the Appendix ___, which includes a copy of the Report and Recommendation by the U.S. District Court; Mr. Berry now submits an overview of how erroneous this report is.

At the beginning of the report the Magistrate refers to the decision published by the state's Second Circuit Court of Appeals of which in view of the entire report is a rendering of a state court decision without jurisdiction of the current federal questions.

This report acknowledges that Mr. Berry's innocence was inferred by the state jurors. Mr. Berry believes that commenting on this direct appeal is a direct violation of The Magistrates Act and is something a federal judge should not do because the claims are not based on what the Second Circuit authored.

On Page 9, the U.S. Magistrate states that the respondent state argues that all of petitioner's (Mr. Berry's) claims are untimely. Mr. Berry offered an "equitable tolling" argument that included his reasons for "excusable neglect" which included his attemts to secure counsel were unsuccessful even after securing verbal commitment from Attorney

Mary Winchell after having paid her[12] $5,000.00 and hardships imposed upon him from the government and state due to the covid pandemic causing restrictions at his institution of confinement.

The U.S. Magistrate used the dicta of *Davis v. Johnson, 158 F. 3d 806 (5ht Cir, 1998)*, to report that the limitations issue is not jurisdictional and that federal courts may bypass them and proceed to the merits of a § 2254 request for federal relief. The Magistrate then bypassed the respondents contentions and chose to rule on the merits of Mr. Berry's claims as follows:

1. Unanimous Jury Claim

The Magistrate Begins her report on this claim with a state law that became effective on December 12, 2018 requiring that offenses committed before January 01, 2019 shall permit nonunanimous jury verdicts to convict a person charged with a crime. This law is unconstitutionalto the sixth amendment and to the decision held in *Ramos v. Louisiana, id.*

This report on this claim is clearly unreasonable to federal law. The Sixth Amendment originally required that all crimes in this nation be proved by unanimous vote of jurors. This is merely a prospective application of the Sixth Amendment from 1779-2024. The Magistrate authors that the State of Louisiana did not require that *Ramos* conviction be

12 Attorney Mary E. Winchell was hired by Mr. Berry's uncle to handle his State Collateral Review but did not file anything on his behalf. Receipts are being held by Mr. Berry's family whom tried mailing them to him to show this Honorable Court but Mr. Berry believes that his facility has been withholding those receipts as his family has said that they have repeatedly mailed them to him. (See Appendix "E" for e-mails to Mr. Berry from Attn. Winchell)

unanimous but it was still found that Louisiana violated the 6th and the 14th Amendments to the Constitution by convicting *Ramos* by an 11-1 vote, the identical verdict to Mr. Berry's.

This issue deserves/requires a certificate of appealability and Mr. Berry requests review of his federal rights to receive an opportunity to request a revisit of the decision in *Edwards v. Vannoy, 142 S.Ct. 288(Mem), 211 L.Ed 2d 134*, id, as *Burch v. Louisiana*, 441 U.S. 130, 99 S.Ct. 1623 was granted unanimous jury verdict retroactivity by this court.

2. Invalid/Improper Indictment

The Magistrate completes her report of Mr. Berry's claims by adopting the State Appellate Court's determination. This is another violation of the Magistrate's Act.

On the footnote of Page 12 of the report, it is clear the original indictment states the alleged offense occurred between January 01, 2000 and December 31, 2003. The beginning of this time frame shows a lesser charge than aggravated rape. The act alleged in Mr. Berry's Bill of Particulars shows an act of "oral" sex. Which evidently appeared in the Grand Jury Indictment proceedings. Such act, from January 01, 2000 through December 31, 2003, according to La. R.S. 14:43.4[13], was considered Aggravated Oral Sexual Battery and was not considered Aggravated Rape until August 15, 2001. Therefore, the trial court grand jury should not have returned an indictment of

13 This statue of an "oral" sexual act was repealed and reenacted as an act of Aggravated Rape effective August 15, 2001.

Aggravated Rape for this time frame. This indictment for Aggravated Rape is clearly defective and according to federal law it should not have been amended by the state prosecutor. Quoting the headnote of *Stirone v. U.S., 361 U.S. 212:*

> "After an indictment has been returned, it's charge may not be broadened through amendment except by grand jury itself. *U.S.C.A. Const. Amendment 5.*"

The Ex Post Facto Clause of the U.S. Constitution requires that this conviction be reversed according to this falsely accused act not being properly indicted and as the time limits for instituting prosecution for this allegation had expired according to Louisiana law in January of 2000.

May this Court review the COA request to amend Mr. Berry's COA brief in light of this report and ruling.

ASSESSMENT OF QUESTION PRESENTED

Mr. Berry is before this U.S. Supreme Court under the precedent of Miller El. Crockrell, 537 U.S. 322, 123 S.Ct. 1029, 154 LED 2d 931(2003), where this Supreme Court held that Petitioner Thomas Joe Miller-El was entitled to certificate of appealability.

Briefly, Miller-El's Habeas petition involved totally different claims of federal protections than Mr. Berry's. Nonetheless, this Supreme Court gave an available remedy to denial of certificate's of appealability.

Mr. Berry's understanding now of 28 USC § 2253(c)(2), Congress has set the tone for the issuance of certificate of appealability by this Court's decision in *Slack v. McDaniel, 529 U.S.473, 120 S.Ct. 1595, 146 LED 2d 542(2000)*, where this Supreme Court held that a Court of Appeals should limit it's examination to a threshold inquiry into the underlying merit of the claims.

Accordingly, a COA request does not require a "showing"that the appeal will succeed. Also, a court of appeals should not decline the issuance of a COA merely because the applicant did not demonstrate an entitlement to relief. The Supreme Court has stated that it does not require Mr. Berry (or a Petitioner) to prove that some Jurists would grant the Petition for Habeas Corpus. However, the belief of Mr. Berry is that the Circuit did not take into consideration the severity of the sentence when deciding to deny to issue a COA in his case, or the fact that he was a pro se petitioner. The question is whether Mr.

Berry stated a valid claim of a constitutional right in his request for permission to proceed to an appeal.

In *Ramos*, Chief Justice Roberts authored the opinion that included a request to convicted litigants on the same legal issue to present their petitions to the Supreme Court of the United States and those petitions will weigh greatly with the Court. In this decision, if a habeas petitioner is trying to establish a constitutional right and the Circuit denies to issue a COA, how is it that Mr. Berry will ever meet the Chief Justice's request and recommendation to file?

In *Hohn v. United States*, 524 U.S. 236, 118 S.Ct. 1969, 141 LED 2d 242(1998), this Supreme Court held that its Court has jurisdiction under *28 USC § 1254(1)* to review denials of applications for certificate of appealability by a Circuit Judge of a Court of Appeals panel.

Today, Mr. Berry believes he is in custody in violation of the Sixth Amendment Right to a jury trial which consists of a unanimous verdict.

Mr. Berry, at the time of his direct appeal, could not use the Supreme Court's "new rule" set out in *Ramos v. Louisiana, id.* Upon filing his APCR in State Collateral proceedings that led to his habeas petition, the *Ramos* decision brought a "new rule" to state courts. That "new rule" announced in *Edwards v. Vannoy, 142 S.Ct. 288(Mem), 211 L.Ed 2d 134,* was declined to have application to final convictions on federal habeas review. Although habeas review is not the vehicle to challenge a nonunaniomous jury

verdict, Mr. Berry's case is "exceptional" because he does not rely on the *Ramos* decision to achieve a retroactive application of it's "new rule". Mr. Berry relies on *Griffith v. Kentucky*, 479 U.S. 314 (1987), adopted as precedent-prospective in that the State of Louisiana, when reviewing his Direct Appeal, failed to adhere to *Griffith's* mandate which held that "a new constitutional procedural rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constituted a 'clear break' with the past". It is a substantial showing in a constitutional violation of the La. Sup. Ct. not applying *Griffith* to Mr. Berry's case in 2018 but yet the U.S. District Court did consider Mr. Berry's brief and habeas application to show such.

It is exceptional that *Ramos* was decided for the State criminal justice systems. It is a benefit that *Ramos* is a decision of the Supreme Court which resulted in a "new rule". However, Mr. Berry does not seek a retroactive application of *Ramos*, He seeks a retroactive application of *La. Acts 2018 No. 722*, which clearly constitutes a "break" with the past.

This petition for writ of certiorari on regards to whether the District Court was correct to imply that Mr. Berry's conviction did not violate the Sixth Amendment, abrogates the case of *Ramos*, *Griffith*, and *Schiro v. Summerlin*, *542 U.S. 348 (2004).*

Although the State of Louisiana refuses to apply *Ramos* retroactively on State Collateral reviews pursuant to its opinion in *State v. Reddick*, *21-1893 (La. 10/21/22);*

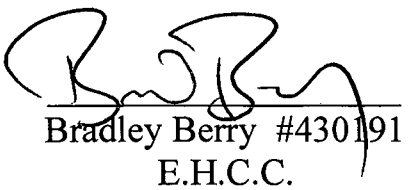
2022 WL 12338521, the matter is still subject to review by this Supreme Court. In the case of *Watkins v. Ackley*, *2022 Wl 18002935*, the Supreme Court of Oregon gave a detailed legal reasoning on why *Ramos* should be retroactive in it's State. Basically, it should be because it involved a Constitutional error substantial to a petitioner's federal constitutional rights. Oregon, through *Danforth v. Minnesota*,*552 U.S. 264 (2008)*, made *Ramos* retroactive on State Collateral Reviews and has left Louisiana the sole State in the Union whom refuses to acknowledge the federalism of the Courts of this nation.

CONCLUSION

Petitioner asserts that a unanimous verdict is an essential element of a Sixth Amendment jury trial. *See Andres v. United States,* 333 *U.S.* 740, 748, 68 *S.Ct.* 880, 884, 92 *L.Ed.* 1055; *Patton v. United States,* 281 *U.S.* 276, 288, 50 *S.Ct.* 253, 254, 74 *L.Ed.* 854; *Hawaii v. Mankichi,* 190 *U.S.* 197, 211-212, 23 *S.Ct.* 787, 788, 47 *L.Ed.* 1016; *Maxwell v. Dow,* 176 *U.S.* 581, 586, 20 *S.Ct.* 448, 450 44 *L.Ed.* 597; *Thompson v. Utah,* 170 *U.S.* 343, 351, 353, 18 *S.Ct.* 620, 623, 42 *L.Ed.* 1061; *cf.* 2 *J. Story, Commentaries on the constitution s* 1779 n.*2* (*5th ed.* 1891).

Seeing this, Mr. Berry prays that this Supreme Court find that a prospective application of *Griffith* apply to him and/or that *Edwards v. Vannoy* be revisited for reconsideration of retroactivity being made applicable to all persons through State/Federal Collateral Review and/or that he has shown this Supreme Court reason to grant a COA in this case. May it be so.

Signed this 16th day of July 2024.



Bradley Berry #430191
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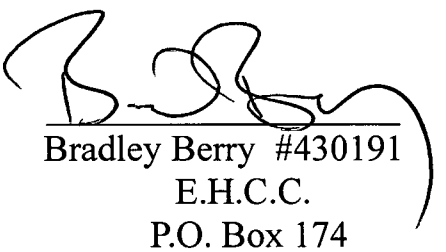
Proof of Service

I, Bradley Berry, do hereby swear that a copy of service was mailed to all Parties involved in this matter such include: Attorney General, Livingston Bldg, 1885 N. 3rd St., P.O. Box 94005, Baton Rouge, La. 70804-9005 by placing such in the prison postal mail on the 6th day of May 2024.



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