No. 24-7252

In the Supreme Court of the United States

ISSA L. LAMIZANA, JR.,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Louisiana courts correctly held that Petitioner failed to carry his burden under Louisiana law to show that he is entitled to relief under *Ramos v. Louisiana*, 590 U.S. 83 (2020).

2. Whether the Louisiana courts correctly held that Petitioner failed to establish any violations of his "right to a defense."

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INTRODUCTION

Petitioner anally raped his two stepchildren—one boy and one girl, each younger than thirteen years old. For those heinous crimes, a jury found Petitioner guilty, and the state trial court sentenced Petitioner to life in prison without the possibility of parole. In his petition for writ of certiorari, Petitioner raises two general issues, neither of which merits this Court's review.

First, Petitioner challenges the Louisiana courts' determination that Petitioner failed to carry his burden under Louisiana law to show that he is entitled to relief under *Ramos v. Louisiana*, 590 U.S. 83 (2020)—*i.e.*, that the jury verdict was not unanimous—because there is no sufficient evidence showing unanimity (or lack thereof). This issue is not cert-worthy. For one thing, this issue rests on the Louisiana courts' application of pure Louisiana law, which forecloses this Court's review. For another thing, Petitioner does not (and could not) claim a split of authority over this issue arising under Louisiana law. Moreover, resolving this issue would likely affect only Petitioner himself: Because *Ramos* challenges in Louisiana are nearly extinct—and because the facts of Petitioner's case (*e.g.*, the absence of sufficient evidence answering the unanimity question) are highly unlikely to arise again—this issue bears no exceptional or nationwide importance. And finally, there is no question that the Louisiana courts properly applied Louisiana law in the underlying litigation. Thus, there is no need for this Court's intervention.

Second, Petitioner complains that he has suffered a violation of his "right to a defense" because he was unable to rely on a State investigator's testimony and reports. As an initial matter, this is a fact-bound regurgitation of all the reasons why

Petitioner believes he should have prevailed below. There is no split of authority on this question, and it is important to nobody other than Petitioner himself—thus, the issue is not cert-worthy. The issue also is not properly before the Court insofar as Petitioner claims that the State unlawfully failed to disclose material evidence; the Louisiana court below expressly declined to reach that issue because Petitioner failed to properly preserve it. Finally, the Louisiana courts indisputably were correct in rejecting Petitioner's claim that the State investigator's testimony would have altered the outcome of this case. Petitioner's stepchildren unequivocally testified that he anally raped them and that, throughout the abuse he inflicted on them over time, he threatened to kill them and their mother if they told anyone. Such damning evidence rendered this case open-and-shut.

The Court should deny the petition.

STATEMENT OF THE CASE

A. Legal Background

Prior to this Court's decision in *Ramos*, Louisiana and Oregon permitted non-unanimous jury verdicts for "serious crimes." *Ramos*, 590 U.S. at 87. *Ramos* prohibited the continuation of that practice pursuant to "the Sixth Amendment right to a jury trial—as incorporated against the States by way of the Fourteenth Amendment." *Id.* at 88. In particular, the Court held that the Sixth Amendment "requires a unanimous verdict to convict a defendant of a serious offense." *Id.*

In advance of *Ramos*, Louisiana amended its constitution in 2018, effective January 1, 2019, to require a trial "before a jury of twelve persons, all of whom must concur to render a verdict" for serious crimes (*i.e.*, those "in which the punishment is

necessarily confinement at hard labor"). La. Const. art. I, § 17. Thus, for any "offense committed on or after January 1, 2019," a defendant can be constitutionally convicted for a serious crime only by a unanimous jury of his peers. *Id.*

That 2019 back-stop—combined with *Ramos* itself—severely limits the number of criminal defendants in Louisiana who may actually benefit from *Ramos*. Specifically, only those defendants (1) who committed their crime prior to January 1, 2019, (2) with "criminal cases still pending on direct review," *Schriro v. Summerlin*, 542 U.S. 348, 351 (2004), potentially could raise a *Ramos* challenge. *See Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("a new 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"); *accord Edwards v. Vannoy*, 593 U.S. 255, 258 (2021) (*Ramos* does not "appl[y] retroactively to overturn final convictions on federal collateral review"); *State v. Reddick*, 2021-01893 (La. 10/21/22), 351 So. 3d 273, 274 ("the *Ramos* jury unanimity rule does not apply retroactively in Louisiana" to "cases on state collateral review").

As the Court may suspect, the universe of *Ramos*-eligible defendants in Louisiana is extraordinarily small now that we are a half decade removed from *Ramos*. And indeed, that Petitioner himself can technically invoke *Ramos* is simply a product of a combination of unusual circumstances (a protracted appellate timeline and the absence of sufficient evidence to answer the *Ramos* question) that are unlikely to recur.

B. Factual Background

1. In 2012, Petitioner Issa Lamizana was charged with two counts of aggravated rape of his two stepchildren, in violation of La. R.S. 14:42(A)(4). Resp.App.039.[1] On January 20, 2016, a jury found Petitioner guilty as to both counts. *Id.* In February 2016, the state trial court sentenced Petitioner to life imprisonment without possibility of parole on both counts. Resp.App.039–040.

Both of Petitioner's victims testified at trial. E.T.1,[2] who was sixteen years old at the time of her testimony, testified that one day in September 2011 when she was eleven years old, Petitioner came into her bedroom. Pet. 23. Petitioner pushed the covers off her, took off her shorts, and put his "private area" into her "butt." *Id.*[3] E.T.1 also testified Petitioner inappropriately touched her on two prior occasions, the first time when she was only eight years old.[4] Throughout this abuse, Petitioner used his guns as a "way [to] scare" her.[5] When he was touching her, she "would cry out or scream" but he "covered [her] mouth and told [her] to hush."[6] And she never told anyone about the abuse "because [Petitioner] threatened to kill [her] and [her] mom."[7]

E.T.2, who was seventeen years old at the time of his testimony, likewise "testified unequivocally that [Petitioner] penetrated his anus with his 'private area.'"

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[1] Because Petitioner's appendix is difficult to navigate, the State has reordered and repaginated the appendix materials, which are cited as Resp.App.#.

[2] There is a lack of consistency in the record regarding pseudonyms for the two minor victims. For purposes of this brief, and consistent with the Louisiana Fourth Circuit's usage, E.T.1 refers to the female minor victim and E.T.2 refers to the male minor victim.

[3] 2021-KA-0409 R. Vol. 5 (Tr. Trans. 1/14/2016 pp.5–7).

[4] *Id.* p.10.

[5] *Id.* p.11.

[6] *Id.* p.15.

[7] *Id.* p.16.

Resp.App.32a. E.T.2 testified that, when he was twelve years old, Petitioner hit him, chipping his tooth and causing his nose to bleed, and then threw him in a room where E.T.2 passed out.[8] When E.T.2 awoke, Petitioner was on top of him, anally raping him.[9] E.T.2 stated that he went in and out of consciousness, and he thought he was screaming but no noise was coming out his mouth.[10] E.T.2 further testified that, after he learned Petitioner raped his sister, E.T.1, he felt guilty for not protecting her and so decided to tell his mother what happened to him.[11]

2. Two facets of Petitioner's jury trial are particularly relevant here. *First*, Petitioner's counsel "filed a [pre-trial] motion to declare former La. C.Cr.P. art. 782(A) and La. Const. Art. 1, § 17 unconstitutional to the extent those provisions allowed for non-unanimous jury verdicts in this non-capital felony case." Resp.App.008. The trial court denied that motion, and, because Petitioner's trial occurred prior to Louisiana's 2019 constitutional amendment, the trial court instructed the jury pursuant to state law "that only ten votes were required to convict." *Id.* After the jury returned two guilty verdicts, "the trial transcript reflects that" Petitioner's "trial attorneys failed to request the jury be polled." *Id.*

Second, the court quashed "the subpoena of a Department of Children and Family Services investigator, [Monique Hayes,] who was the first person to interview the victims and their mother [Ms. Thomas]," and did not "allow the defense to call this investigator to testify at trial." Resp.App.036. Neither the motion to quash nor

[8] 2021-KA-0409 R. Vol. 6 (Tr. Trans. 1/19/2016, pp.196–98).
[9] *Id.*
[10] *Id.*
[11] *Id.* p.204, 206.

the trial court's ruling originally appeared in the appellate record. Resp.App.042. The record did show, however, that Petitioner's counsel "moved for a mistrial ... based on the exclusion of the testimony of Ms. Hayes and the DCFS report prepared by Ms. Hayes," and that the trial court denied that motion. *Id.* Petitioner's counsel again raised the issue in a motion for new trial, which the court likewise denied. Resp.App.042–043.

C. Procedural Background

1. Petitioner appealed his convictions and sentences several times over, leading to a litany of opinions from the Louisiana Fourth Circuit Court of Appeals and the Louisiana Supreme Court, as well as multiple remands and evidentiary hearings.

In the first appeal, Petitioner raised five assignments of error, but the Fourth Circuit only reached Assignment of Error Two—"that the exclusion of testimony by Ms. Hayes ... constituted a denial of [Petitioner's] fundamental right to present a defense and confront witnesses." Resp.App.043. Because the trial court "granted the DCFS motion to quash without waiting for DCFS to submit the correct records and, thus, without making a determination as to whether Ms. Hayes's testimony was material to the defense," *id.*, the Fourth Circuit found error "implicat[ing Petitioner's] right to procedural due process," Resp.App.044. As indicated above, the appellate record was deficient as to the proposed testimony, and so the Fourth Circuit vacated the convictions and sentences and "remanded to the trial court for further proceedings." Resp.App.046.

On certiorari review, the Louisiana Supreme Court declined to vacate the convictions, but otherwise agreed with the Fourth Circuit, finding "that the record [was] inadequate to make" the required determination as to the materiality of the proposed testimony to the defense. Resp.App.36a. Considering the State's "agree[ment] that the record was inadequate," the Court "remand[ed] to the district court to conduct an evidentiary hearing" regarding the absent testimony. Resp.App.037.

The trial court held the required evidentiary hearing on February 20, 2020. Resp.App.029. In November 2021, the court "issued its ruling regarding the outcome of the evidentiary hearing at which Ms. Hayes testified and the DCFS reports were introduced." Resp.App.004. The trial court's ruling "accept[ed] the testimony … as well as the reports … into evidence." Resp.App.004–005.

The second appeal followed, in which Petitioner raised the same five assignments of error, but, "for the first time," he also "assign[ed] error to the absence of unanimous jury verdicts in the record." Resp.App.029. On review, the Fourth Circuit first assessed the newly proffered testimony of Ms. Hayes on the question of the sufficiency of the evidence. Resp.App.030–032. The court determined that, "at the February 20, 2020 evidentiary hearing, Ms. Hayes offered no testimony undermining the victims' testimony." Resp.App.032. Because the State presented legally adequate evidence via "the victims' testimony and prior statements," and the proffered testimony "could not have undermined [the witnesses'] credibility," "the evidence presented at trial was sufficient" to support the convictions. *Id.*

The Fourth Circuit then turned to the unanimity issue, new to Petitioner's case because of this Court's intervening 2020 opinion in *Ramos*. *Supra* p.2. The court found that, "[b]ecause [Petitioner's] case [was] pending on direct review, the Supreme Court's decision in *Ramos* applie[d]." Resp.App.033 (citing *Schriro*, 542 U.S. at 351). However, as with the Hayes testimony issue on the first appeal, "no evidence exist[ed] in the record as to the unanimity of the jury's verdicts." *Id.* "Specifically," the court held, "the record does not reflect that the jurors were polled as to their verdicts." *Id.* "Further, in response to an order from [the Fourth Circuit], the district court stated that it had searched its record of this case and was unable to locate any juror polling slips or discover any additional information indicating the number of jurors voting to convict" Petitioner. *Id.* Relying on "[r]ecent decisions" from other Louisiana courts, the Fourth Circuit found "that a remand [was] necessary to clarify the record on the crucial issue of whether the jury's verdicts were unanimous." Resp.App.033–034. The court "further instructed the district court to provide a *per curiam* stating the outcome of its review and proceedings." Resp.App.005.

Back down Petitioner's case went—this time for the district court to hold "several evidentiary hearings" on the *Ramos* issue. Resp.App.006. On December 14, 2023, the district court issued its *per curiam*, holding that, "[g]iven the lack of direct evidence regarding jury unanimity," it was "unwilling to reopen [Petitioner's] case under the current circumstances." Resp.App.025. The court first determined that "this [was] a post-conviction matter," and therefore "the burden of producing [] evidence lies with the defendant." *Id.* The court then summarized the newly produced

evidence, noting that "[o]ver the course of the evidentiary hearings ..., the court heard testimony from the second chair defense attorney, Ms. Mariah Holder, which revealed that she had second hand knowledge that the jury returned a non-unanimous verdict[.]" *Id.* "[H]owever," the court emphasized, it had "not heard from any of the jurors themselves, nor ha[d] it seen any of the jury polling slips upon which Ms. Holder's recollection is based." *Id.* And so, the court denied Petitioner's motion for new trial. *Id.*

2. On the subsequent and final appeal, Petitioner again raised five assignments of error. The Fourth Circuit addressed and rejected each on its merits. Resp.App.007.

The Fourth Circuit turned to the *Ramos* issue first, finding that "[t]he criteria for *Ramos* to apply [were] present"—namely, that Petitioner's "case was pending on direct review when *Ramos* was decided; and he was convicted of two serious, felony offenses." *Id.* As a preliminary matter, the Fourth Circuit noted that, under Louisiana jurisprudence, Petitioner "did not waive the *Ramos* issue" by failing to request a jury poll. Resp.App.008. Rather, a "challenge to the unanimity of the verdict is an error patent under Louisiana law," so "an objection to the jury's verdict, in the form of polling the jury, is not required" to preserve the issue for appeal. *Id.*

The Fourth Circuit then analyzed the district court's *per curiam* in two steps. Resp.App.009. *First*, the burden of proof. While the district court incorrectly labeled the proceeding a post-conviction matter (because the "case remain[ed] on direct review"), the Fourth Circuit agreed that Louisiana law "place[s] the burden on

defendant" to "establish if the jury was unanimous." Resp.App.010 (citing *State v. Robinson*, 2021-0254 (La. App. 4 Cir. 2/18/22), 336 So. 3d 567, *writ denied*, 2022-00437 (La. 5/24/22), 338 So. 3d 1185). The court found that conclusion "buttressed by both a statutory presumption and general rule" under state law. Resp.App.011. "The presumption is that judicial proceedings are regular." *Id.* (citing La. R.S. 15:432). "The general rule is that the party seeking relief bears the burden of proof." *Id.* (citing La. R.S. 15:439). With these two Louisiana principles at the forefront, the court held that "[t]here is no authority, in the absence of polling, to assume that a jury's verdict was not unanimous." *Id.* "Given that [Petitioner] is the party seeking *Ramos* relief, he bears the burden of proving the fact that the jury verdict on both counts was *not* unanimous." *Id.* (emphasis added).

Second, with the burden under Louisiana law properly placed on Petitioner, the Fourth Circuit turned to the lack of "direct evidence of a non-unanimous jury verdict," as required by the "jurisprudence" to "establish a *Ramos* violation." Resp.App.012. While "[o]ther forms of evidence have been found to suffice," "[j]ury polling slips 'are the best evidence of the jury votes.'" *Id.* (quoting *State v. Jones*, 2018-0973 (La. App. 4 Cir. 2/3/21), 314 So. 3d 20, 22). No matter the preferred form of evidence, though, "[h]ere, [Petitioner] failed to present *any* direct evidence that the jury verdict on either count was not unanimous." *Id.* (emphasis added). The court analyzed Ms. Holder's testimony at length, finding that "she lacked any first-hand knowledge of the jury's vote." *Id.* Namely, "Ms. Holder never saw any jury polling form or jury slips," and "[h]er affidavit and testimony both were based solely on a

statement by the first-chair trial attorney—Leon Roche—who was not presented as a witness." Resp.App.013. The Fourth Circuit therefore affirmed that, "based on the lack of direct evidence that the jury was not unanimous," Petitioner "was not entitled to a new trial" under *Ramos*. *Id.*

The Fourth Circuit then turned to Petitioner's argument on the "right to present a defense" as it relates to Ms. Hayes's testimony. Resp.App.013, 014. The court found that "[a] review of Ms. Hayes' February 2020 testimony and the DCFS reports reflects that Ms. Hayes, had she offered said testimony at trial, would not have undermined the credibility of the victims' testimony." Resp.App.015. Following a detailed comparison of the proffered testimony and the questions actually asked by defense counsel at trial, the court rejected Petitioner's arguments that both E.T.1 and E.T.2's testimony could be undermined by the "coercive" effect of Ms. Thomas (their mother) on their statements. Resp.App.017. Because "Ms. Hayes' testimony would not have aided his defense," "the district court's alleged error in precluding Ms. Hayes from testifying at trial was harmless." Resp.App.018–019.

The Fourth Circuit made short work of Petitioner's remaining arguments—improper witnesses as to credibility, improper closing argument, and excessive sentences—as, respectively, "not [] preserved for appellate review," Resp.App.020, "ha[ving] little, if any, persuasive impact" on the jury and its verdicts, Resp.App.022, and not sufficiently "exceptional" so as to rebut the presumption of constitutionality, Resp.App.023–024.

The Louisiana Supreme Court denied certiorari review without written opinion, over three justices' votes to grant (without reasons). Resp.App.001.

REASONS FOR DENYING THE PETITION

I. THE *RAMOS* ISSUE DOES NOT WARRANT THIS COURT'S REVIEW.

The principal issue raised in the petition is whether the Louisiana courts correctly determined that Petitioner failed to carry his burden to show that he was entitled to relief under *Ramos*. The Louisiana courts' resolution of that issue rests on adequate and independent state grounds, which forecloses this Court's review. In all events, the issue is not cert-worthy, not least because resolution of the issue will affect no one other than Petitioner. And the Louisiana courts properly applied Louisiana law. There is no reason for this Court to intervene.

A. The Lower Courts' Resolution of This Issue Rests on Adequate and Independent State Grounds.

Petitioner's principal complaint is that the State, rather than Petitioner, should bear "the burden of proving the verdicts were unanimous." Pet. i. That is a question of Louisiana law. So, too, is Petitioner's complaint that he "met" that burden in any event. Pet. 18. These are just arguments that the Louisiana courts misinterpreted and misapplied Louisiana law.

The Louisiana Fourth Circuit's[12] placement of the evidentiary burden on Petitioner flowed from four separate sources of Louisiana law. *First*, in its prior *Robinson* litigation, the court had "concluded—albeit implicitly—that the burden of

[12] Because the Louisiana Supreme Court's summary order denying review is unreasoned, the State here focuses on the underlying, reasoned Fourth Circuit decision. *See Foster v. Chatman*, 578 U.S. 488, 498 n.3 (2016).

proof was on the defendant to establish the jury verdict was not unanimous." Resp.App.010. So the same framework applied here. *Second*, the Fourth Circuit grounded its ruling in Louisiana's "presumption [] that judicial proceedings are regular." Resp.App.011 (citing La. R.S. 15:432). *Third*, the Fourth Circuit grounded its ruling in Louisiana's "general rule [] that the party seeking relief bears the burden of proof." Resp.App.011 (citing La. R.S. 15:439). And *fourth*, the Fourth Circuit grounded its ruling in Louisiana Supreme Court Justice Piper Griffin's (D-7th Dist.) opinions, which recognize that in Louisiana "[d]efendants still generally bear the burden to show they have been convicted by a non-unanimous jury." Resp.App.011–12 (quoting *Cade v. State*, 21-00660, p. 1 (La. 10/19/21), 326 So. 3d 229 (Griffin, J., concurring)).[13]

Petitioner's complaint to this Court that he should not bear this burden is thus a question of Louisiana law through and through—both what actual Louisiana statutes and Louisiana decisional law require and how Louisiana courts and judges have interpreted Louisiana law. In fact, it does not appear that the Louisiana Fourth Circuit, in particular, addressed *any* federal question related to this issue. *Cf. Michigan v. Long*, 463 U.S. 1032, 1041 (1983) ("If the state court decision indicates

[13] The application of Louisiana's procedural rules alongside the assertion of federal constitutional rights is in line with longstanding practice. *See, e.g.*, *Edwards*, 593 U.S. at 271 n.6 (recognizing that "States remain free, if they choose, to retroactively apply the jury-unanimity rule as a matter of state law in state post-conviction proceedings); *Delaware v. Van Arsdall*, 475 U.S. 673, 678–69 (1986) (States may "impose reasonable limits" on cross-examination by defense counsel to avoid "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant," without violating a defendant's right to confrontation under the Sixth Amendment); *Taylor v. Illinois*, 484 U.S. 400, 402 (1988) (States may exclude a defense witness as a sanction for violating discovery rules, without violating the Compulsory Process Clause of the Sixth Amendment).

clearly and expressly that it is alternatively based on bona fide, separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.").

Petitioner effectively admits to raising pure state-law issues. At one point, for example, he accuses the Fourth Circuit of "mistakenly" interpreting La. R.S. 15:439. Pet. 17 n.29. At another point, he complains that the trial court "did not fulfill any of the requirements of the Louisiana Criminal Code that prevents ambiguous verdicts from occurring." Pet. 10 & n.12; *accord* Pet. 8. And at yet another point, he complains that the Fourth Circuit "impermissibly expanded the statutory presumption of regularity to normalize what occurred here"—an attack on the Fourth Circuit's interpretation and application of La. R.S. 15:432. Pet. 9. Unsurprisingly, then, the petition itself is overrun with citations of Louisiana cases and statutes.

Petitioner's petition is difficult to follow in many respects, but one thing that is clear is that the Fourth Circuit's resolution of the *Ramos* issue rests on adequate and independent state grounds, which Petitioner wants this Court to review. That this Court cannot do. *See Michigan*, 463 U.S. at 1038.

B. This Issue Does Not Meet the Court's Certiorari Criteria.

Even if Petitioner's demand for review were not procedurally barred, this issue (1) implicates no split of authority and (2) is not important to anyone other than Petitioner.

1. Petitioner identifies no split of authority.

Perhaps because the Fourth Circuit's resolution of the *Ramos* issue is so bound up in Louisiana law, Petitioner does not even try to suggest that the Louisiana courts have "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." Sup. Ct. R. 10. Rightly so. As discussed above, it does not appear that the Fourth Circuit rendered *any* decision on a federal question in holding that Petitioner failed to carry his evidentiary burden. Because that holding rests on Louisiana law, Petitioner, of course, cannot identify some split of authority outside Louisiana on that issue. Nor can he show any split of authority within Louisiana because the only two Louisiana cases (this case and *Robinson*) to resolve this issue were resolved in precisely the same way. There is thus no split of authority that requires this Court's review.

2. **This issue bears no exceptional and nationwide importance.**

This case also is not important to anyone other than Petitioner. *Cf.* Sup. Ct. R. 10. That is because the finite universe of *Ramos* challenges in Louisiana is vanishingly small, it grows smaller every day, and the unique circumstances presented by Petitioner's case appear to have arisen only twice since *Ramos*. There is thus no reason for the Court to take a case that is important only to Petitioner.

Consider the four distinct conditions that must be satisfied to replicate a unique case like Petitioner's. *First*, a defendant must have committed his crime before 2019. That is because, beginning on January 1, 2019, the Louisiana Constitution has required jury unanimity for serious crimes. La. Const. art. I, § 17. If the defendant committed his crime after 2018, therefore, he has no *Ramos* challenge.

Second, the defendant's appeal regarding that pre-2019 crime must be on direct review, not collateral review. *See Reddick*, 351 So. 3d at 274 ("the *Ramos* jury unanimity rule does not apply retroactively in Louisiana" to "cases on state collateral

review"). If the defendant's conviction is "still pending on direct review," *Schriro*, 542 U.S. at 351, then *Ramos* applies. *E.g.*, *State v. Mart*, 2023-0872 (La. App. 1 Cir. 9/26/24), 405 So. 3d 719, 722 (defendant's "*pro se* motion seeking appointment of" appellate counsel constituted "request for an out-of-time appeal that was never adjudicated" and thus "case was still pending on direct review when *Ramos* was decided"). If not, then not. *E.g.*, *State v. Bias*, 2022-822 (La. App. 3 Cir. 3/29/23), 364 So. 3d 456, 459, *writ denied*, 2023-00608 (La. 9/19/23), 370 So. 3d 464 ("attempt to raise a *Ramos* argument approximately three years after [] conviction became final" was meritless, despite pending resentencing). As logic suggests, this finite universe of potential *Ramos* challenges is shrinking rapidly as time passes and the number of direct-review appeals regarding pre-2019 crimes dwindles.

Third, within this shrinking universe, the record on appeal must be unclear regarding whether the jury verdict was unanimous. In Louisiana's experience, many (if not most) *Ramos* cases end at this step because the record on appeal is ordinarily clear one way or the other.[14] If the record shows the jury was in fact unanimous in reaching its verdict, then the defendant is not entitled to relief under *Ramos*. *E.g.*, *State v. Rickmon*, 2023-0048 (La. App. 4 Cir. 8/30/23), 372 So. 3d 60, 72, *writ denied*, 2023-01311 (La. 5/21/24), 385 So. 3d 241 ("Here, the jury was polled, and the record reflects the unanimity of the jury's verdicts."). Conversely, if the record clearly shows

[14] In fact, because the record is often clear, in certain cases the State has preemptively "agree[d] that the conviction and sentence should be set aside" because of a *Ramos* issue. *State v. Marquez*, 2020-0987 (La. App. 1 Cir. 6/4/21), 327 So. 3d 1030, 1031; *e.g.*, *State v. Harvey*, 2021-0730 (La. App. 4 Cir. 5/25/22), 345 So. 3d 1043, 1054 n.10, *writ denied*, 2022-00953 (La. 9/20/22), 346 So. 3d 803 ("the State concedes that the verdict of guilty on the charge of aggravated battery was not unanimous").

the opposite—that the jury was not unanimous in reaching its verdict—then vacatur and remand for new trial is appropriate. *E.g.*, *State v. Bradley*, 53,550 (La. App. 2 Cir. 11/18/20), 307 So. 3d 369, 373; *State v. Corn*, 52,867 (La. App. 2 Cir. 7/8/20), 299 So. 3d 749, 750, *writ denied*, 2020-00928 (La. 11/10/20), 303 So. 3d 1040 ("the jury was not unanimous" where "jury was polled revealing a vote of 10-2"); *State v. Stringfellow*, 53,966 (La. App. 2 Cir. 6/30/21), 324 So. 3d 739, 741–42, *writ denied*, 2021-01290 (La. 12/21/21), 329 So. 3d 827 (conviction overturned where recorded vote was "11 to 1"). Either way, because the record on appeal ordinarily will resolve the *Ramos* issue, few cases proceed past this point.

Fourth, if the case is one of the few in which "the record is insufficient" for the reviewing court to make the unanimity determination, the trial court *also* must be unable to make that determination after further review. *Jones*, 314 So. 3d at 22; *see, e.g.*, *State v. Norman*, 2020-00109 (La. 7/2/20), 297 So. 3d 738, 738–39 ("[T]he court of appeal found with the benefit of the record that the district court ceased polling the jury after the first ten jurors. Thus, it is not known whether the verdict was unanimous."); *Robinson*, 336 So. 3d at 580 ("a review of the record does not demonstrate whether the jury verdicts convicting Defendant…were unanimous or non-unanimous"); *Bradley*, 307 So. 3d at 374 (unanimity unclear as to count two because defense "did not request that the jury be polled with respect to those convictions"). In such cases, where "it is not known" from the record "whether the verdict was unanimous," the reviewing court "remand[s] to the trial court ... to conduct further proceedings to ascertain whether the verdict was unanimous."

Norman, 297 So. 3d at 739. "The trial court" thereafter "provide[s] a *per curiam*" to the reviewing court that "rul[es] on the *Ramos* issue and stat[es] the outcome." *Id.*

Additional hearings and investigations at the trial court level typically reveal the desired evidence of unanimity, or the lack thereof. *E.g.*, *State v. Fortune*, 2019-0868 (La. App. 4 Cir. 11/18/20), 310 So. 3d 604, 604–05 (trial court on remand "confirm[ed] the representations of both counsel for the defense and the prosecution as found in the sentencing transcript … that the jury returned a non-unanimous verdict of 10-2"); *State v. Smith*, 20-177 (La. App. 5 Cir. 6/2/21), 325 So. 3d 509, 510, *writ denied*, 2021-00975 (La. 11/17/21), 327 So. 3d 992 ("the district court issued a *per curiam* which concluded that the jury verdict was, in fact, unanimous"). If a *Ramos* challenge actually reaches this point, therefore, it almost always ends because the trial court is able to determine the outcome.

This is a unicorn case where all of these conditions are met: (1) a serious offense committed pre-January 1, 2019, (2) that was still on direct review in the state court, (3) where the record on appeal was unclear as to the unanimity of the verdict, and (4) the trial court was unable to uncover sufficient evidence of the unanimity (or lack thereof) on remand following additional investigation and hearings. It is difficult to overstate how unlikely this is, but the low probability is perhaps best demonstrated by the fact that it appears only one other case in Louisiana reflected similar facts—and this Court denied certiorari in that case. *State v. Robinson*, 2021-0254 (La. App. 4 Cir. 4/13/23), 382 So. 3d 198, 202, *writ denied*, 2023-00661 (La. 12/19/23), 374 So. 3d 982, *reconsideration not considered*, 2023-00661 (La. 3/12/24), 381 So. 3d 47, *and*

cert. denied, 144 S. Ct. 2614 (2024). Moreover, because *Ramos* challenges are quickly dying off in Louisiana, it seems extraordinarily unlikely that any case bearing facts like these will arise again.

The *Ramos* issue in this case is thus a quintessential example of a rare, rapidly fleeting issue (regarding Louisiana law, no less) that has no nationwide importance. This Court's review is unwarranted.

C. The Louisiana Courts Correctly Applied Louisiana Law.

That the Louisiana courts correctly applied Louisiana law underscores that this Court's review is unwarranted. The Fourth Circuit determined that (1) the burden falls on the defendant to provide evidence of non-unanimity upon remand to the district court, and (2) Petitioner here did not produce the requisite direct evidence of non-unanimity to warrant relief. Resp.App.009–013. Both conclusions are correct under Louisiana law.

First, as to the burden of proof, since Louisiana courts first began resolving post-*Ramos* procedural issues, the question of proof has been fairly clear. As just one example, Justice Griffin of the Louisiana Supreme Court stated in no uncertain terms that "[d]efendants [] generally bear the burden to show they have been convicted by a non-unanimous jury." *Cade*, 326 So. 3d at 229 (Griffin, J., concurring). Whether done by "jury polling forms" or "other means of proof," by nature of these cases, "practical realities dictate that not every defendant purportedly convicted by a non-unanimous jury" will be able to meet the burden of proof required to justify a new trial. *Id.* Thus, where "the defendant did not poll the jury … and the defendant has

produced no other evidence to support his claim for *Ramos* relief[,] ... further assistance from ... the courts [] would be futile." *Id.*; *see also Reddick*, 351 So.3d at 293 n.1 (Griffin, J., dissenting) ("mere allegations by a defendant that they were convicted by a non-unanimous verdict are insufficient to warrant relief"). Louisiana law is clear: The burden belongs with defendants.

That the burden remains on the defendant is, as the Fourth Circuit put it, "buttressed by both a statutory presumption and general rule" under state law. Resp.App.011. The relevant statutory presumption is that all aspects of judicial proceedings in Louisiana are regular—"a presumption 'deeply rooted' in the jurisprudence, even when the question is waiver of constitutional rights." *State v. Jefferson*, 2008-2204 (La. 12/1/09), 26 So. 3d 112, 120 (citation omitted); *see* La. R.S. 15:432. While Petitioner argues at length that the proceedings below were not "regular" and places blame on the trial court for the lack of polling evidence in the record, Pet. 8–13, the Fourth Circuit determined that there is no good reason to suspend the statutory presumption of regularity here—and Petitioner identifies no basis for revisiting that fact-bound determination of Louisiana law.

Petitioner simply misunderstands state law and how Louisiana courts apply it. Louisiana law "does not require jury polling in criminal cases, although it allows both the defense and the State to request that the jury be polled." *State v. Alexander*, 2021-1346 (La. App. 1 Cir. 7/13/22), 344 So. 3d 705, 724, *writ denied*, 2022-01262 (La. 11/8/23), 373 So. 3d 62. Where a defendant does not object to the verdict via a jury poll, the burden does not fall on the State—and certainly not on the court—to step in

and make the objection for him. And, where a jury was polled (as Petitioner seems to allege happened here), the burden is once again on the defendant, if he so desires, "to make a contemporaneous objection to the polling procedure" to record that alleged error for posterity. *Id.* Under Louisiana law, any argument as to the procedure of polling itself does not fall into the same error patent bucket as a plain *Ramos* issue, so Petitioner must have objected at the time the error occurred. *Id.* (defendant "cannot raise this issue for the first time on appeal"). It was therefore Petitioner's obligation to both (1) request a jury poll and (2) if unsatisfied with that poll, object to its procedure. Petitioner here did neither, and now suffers the consequences.

Petitioner's refrain (*e.g.*, at 17) that "the district court could not identify or locate" the evidence needed to establish a non-unanimity problem misunderstands the role of the court in the post-*Ramos* process. When an appellate court finds that the record lacks any evidence demonstrating unanimity one way or the other, the trial court is ordered to, on remand, "review the record and to conduct further proceedings to ascertain whether the jury's verdicts were unanimous." Resp.App.034. The court's duty to review its records does not, and certainly cannot, extend to producing witnesses itself to satisfy defendant's burden of proof.

Second, the Fourth Circuit's determination that Petitioner did not carry his burden is also correct on the merits. Under Louisiana law, "[d]irect evidence provides proof of the existence of a fact, for example, a witness's testimony that he saw or heard something." *State v. Howard*, 49,965 (La. App. 2 Cir. 6/24/15), 169 So. 3d 777, 784, *writ granted*, 2015-1404 (La. 12/16/16), 212 So. 3d 1168, *and aff'd*, 2015-1404 (La.

5/3/17), 226 So. 3d 419. "Circumstantial evidence," on the other hand, "provides proof of collateral facts and circumstances, from which the existence of the main fact may be inferred according to reason and common experience." *Id.* at 784–85.

Both the trial court and the Fourth Circuit analyzed at length the only evidence Petitioner could come up with on the unanimity issue: the second-hand recollection of a second-chair defense attorney, Ms. Holder. Resp.App.012–013. Rather than persuasively answering the unanimity question, "Ms. Holder's testimony reflected that she lacked any first-hand knowledge of the jury's vote." Resp.App.012. In other words, Ms. Holder did not see any jury polling slips herself nor obtain any other knowledge of the unanimity of the verdicts through her own observation. Rather, her testimony was pure hearsay, and any implication of non-unanimity was based solely on the *first-chair defense attorney's* separate recollection. *Id.* Because Petitioner declined to bring forward the first-chair defense attorney for questioning, and because the State's review of its own prosecutorial file did not reveal any evidence of non-unanimity, there simply was no sufficient evidence to prove that the jury here was not unanimous. Resp.App.013.

Petitioner's quibble here does not seem to be with the validity of the state law itself; rather, his argument boils down to a contention that the Fourth Circuit simply misapplied that law to his particular case. For all the reasons described above, that contention is incorrect—and there is no reason for this Court to reconsider these fact-bound, split-less questions of Louisiana law.

II. THE "DENIAL OF RIGHT TO DEFENSE" ISSUE DOES NOT WARRANT THIS COURT'S REVIEW.

The Court also should summarily reject Petitioner's puzzling attempt to relitigate his "denial of right to defense" (Pet. 18 (capitalization altered)) issue. There are many reasons to do so.

First, this issue (or confused combination of issues) is not cert-worthy. As reflected in the petition (Pet. 18–38), it is a fact-bound regurgitation of all the reasons why Petitioner believes he should have prevailed in the Louisiana courts. He also rightly does not suggest that there is any serious and relevant split of authority. The Court thus need do no more than deny review on the basis of Petitioner's failure to satisfy Rule 10.

Second, at least some subset of Petitioner's arguments is procedurally barred from this Court's review because the Louisiana Fourth Circuit disposed of them on state-law grounds. Specifically, Petitioner extensively complains that certain DCFS records and reports "had never been disclosed by the State to the defense in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and their progeny." Pet. 29 & n.51, 30, 31. Petitioner does not disclose that he belatedly tried to inject this issue into the litigation below—and the Fourth Circuit rejected that gambit. *See* Resp.App.006 n.6 ("On appeal, we decline to address the *Brady* issue because it was beyond the scope of this Court's limited remand order."); *see also id.* (alternatively holding on the merits that this issue did not warrant a new trial). Because the Fourth Circuit's resolution of this issue rests on the independent

ground that Petitioner failed to properly raise the issue (which Petitioner does not now address or refute), this Court cannot review the *Brady* issue.

Third, and finally, the Louisiana Fourth Circuit correctly held that the excluded testimony of Ms. Hayes, the DCFS investigator, was immaterial to the defense and thus such exclusion was harmless. Resp.App.019. At least two points confirm as much.

One, the Fourth Circuit was correct that Petitioner's right to defense argument is subject to harmless error analysis on appeal. Resp.App.014. Petitioner's rights under the Sixth Amendment's Confrontation Clause and general right to "evidence and cross examination that tests the State's evidence, impeaches State witnesses, and challenges the State's theory of the case" (Pet. 18–19) is limited by baseline rules of evidence and the trial court's ability to exercise control over proceedings. *See Van Arsdall*, 475 U.S. at 678–69. Louisiana jurisprudence thus makes clear that a trial court's "refus[al] to admit … evidence" is subject to "harmless error" review "insofar as defendant being deprived of his right to present a defense." *State v. Allen*, 2012-1118 (La. App. 4 Cir. 11/20/13), 129 So. 3d 724, 740, *writ denied*, 2013-2994 (La. 5/30/14), 140 So. 3d 1174.

Two, the Fourth Circuit correctly determined that Ms. Hayes's testimony would not have undermined the witnesses' credibility at trial and was therefore immaterial to the defense and constituted harmless error, if any. Resp.App.015.

Under Louisiana law, the testimony of the victims alone is sufficient to sustain Petitioner's convictions. *State v. Douglas*, 23-331 (La. App. 5 Cir. 2/28/24), 383 So. 3d

266, 276, *writ denied*, 2024-00434 (La. 10/23/24), 394 So. 3d 1282 ("The testimony of the victim alone can be sufficient to establish the elements of a sexual offense, even when the State does not introduce medical, scientific, or physical evidence to prove the commission of the offense."). And here, E.T.1's testimony was damning:

Q. And you said he touched you. How did he touch you?

A. Like my butt.

Q. And what part of his body did he use to touch you?

A. His private area.

Q. And was that his front privates or back private?

A. Front.

Q. And did his front privates go into your butt?

A. Yes.

Resp.App.031–032. "Likewise, E.T.2 testified unequivocally that Mr. Lamizana penetrated his anus with his 'private area.'" Resp.App.032. On direct review, the Fourth Circuit found this testimony, along with the many prior identical statements, sufficient to sustain Petitioner's convictions. *Id.* (citing *State v. Wallace*, 2013-0149 (La. App. 4 Cir. 6/25/14), 143 So. 3d 1275, 1279). Petitioner does not challenge that sufficiency here, nor could he. Instead, Petitioner asserts that Ms. Hayes's testimony, if permitted at trial, would have undermined his victims' testimony. But the Fourth Circuit correctly dismissed any error on this front as harmless.

For one, Ms. Hayes's testimony only pertained to E.T.1—she did not interview E.T.2 at all, and therefore any testimony she gave would not have been relevant to

E.T.2's testimony. Resp.App.015. So "Ms. Hayes' testimony could not have been used to attack E.T.2's credibility given that Ms. Hayes never interviewed E.T.2." Resp.App.017. Petitioner has no response to this conclusion. Any argument as to the validity of E.T.2's testimony is thus dead in the water.

For another, as for victim E.T.1, "the vast majority of defense counsel's questioning related to Ms. Hayes' interview with [the victims' mother] Ms. Thomas, not E.T.1," and thus the ways "defense counsel would have used Hayes' testimony concerned attacking the credibility of Ms. Thomas, not the victims." Resp.App.015, 017. More, to the extent Petitioner argues that the testimony was imperative to establishing Ms. Thomas's coercive effect on her children's testimony, "Ms. Hayes confirmed that Ms. Thomas was not present when she interviewed E.T.1 and, as such, could not have coerced E.T.1 regarding what to tell Ms. Hayes." Resp.App.015. "Ms. Hayes concluded by stating that her report reflected that E.T.1 'provided a clear and detailed history of penile anal penetration by her stepfather, [Mr.] Lamizana.'" *Id.* Any argument as to the validity of victim E.T.1's testimony is likewise meritless.

The Fourth Circuit went on to refute Petitioner's argument that he was deprived of his ability to present the "acrimonious relationship" between Ms. Thomas and Petitioner, which he believes would have further undermined witness credibility. Resp.App.018. At trial, "the jury was made aware" of the nature of the adults' relationship, which Ms. Thomas herself called "horrible," and which was bolstered by both Petitioner and Ms. Thomas testifying to the physical violence—"slapping" and "spray[ing] with mace"—that the adults inflicted upon each other. *Id.*

The bottom-line is that the excluded testimony and reports from Ms. Hayes—as made clear by the evidentiary hearings conducted on remand—would not have undermined the key testimony at trial that led to Petitioner's convictions. "Thus, contrary to [Petitioner's] contentions, Ms. Hayes' testimony would not have aided his defense," and any error in its exclusion was therefore harmless. Resp.App.018–019. Petitioner fails to demonstrate any real error in the Fourth Circuit's analysis, and so cannot establish a violation of his Sixth Amendment rights. Again, this is a fact-bound, split-less issue on which the Louisiana Fourth Circuit was correct.

CONCLUSION

The Court should deny the Petition.

Respectfully submitted,

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