IN THE STATE OF LOUISIANA
TWENTY SEVENTH JUDICIAL DISTRICT
ST. LANDRY PARISH

RUFUS HENRY,	)	Twenty Seventh Judicial District Court
Petitioner,	)	
DOC # 074334	)	Parish of St. Landry
	)	
-vs-	)	Section D
	)	
DARREL VANNOY, Warden,	)	Case No. 91-K-0046-D
LOUISIANA STATE PENITENTIARY,	)	
Respondent.	)	
	)	

Please serve CUSTODIAN and District Attorney of the Twenty-Seventh Judicial District, St. Landry Parish, State of Louisiana.

PETITION FOR POST CONVICTION RELIEF

INTRODUCTION

1. On January 4, 1991, during a bar room dispute, Rufus Henry, a Black man, fired one shot and killed the other man, who was also Black. Mr. Henry then placed the gun on the bar counter and waited for law enforcement to arrive. Mr. Henry, who never denied that he shot the decedent, stayed and waited because he had acted in self-defense. In fact, he testified that the decedent had threatened him—telling him, "you [are] not leaving here tonight"—and that the decedent had a knife and he feared he was going to use it. Indeed, the police recovered a knife from the decedent at the scene. Several of the State's witnesses were patrons at the bar that night, who, like Mr. Henry and the decedent, had been drinking alcohol at the time of the incident. Their testimony that Mr. Henry was some distance away from the decedent when he fired the shot conflicted with police forensic evidence that showed the gun was fired at close range.

2. At trial, the State was unable to obtain a unanimous verdict convicting Mr. Henry of second-degree murder. Rather, 10 jurors voted to convict him, while 2 voted to acquit. Indeed, while there is no dispute that Mr. Henry shot and killed the decedent, the outcome of this case turned entirely on whether or to what extent the jurors credited the testimony of the various witnesses that Mr. Henry did not act in self-defense. Two jurors believed Mr. Henry did; 10 did not. But what is clear from the record of trial is that absent the State's ability to obtain a conviction based on a non-unanimous verdict, a rule recently declared unconstitutional by the United States Supreme Court, the State would not have been able to convict Mr. Henry of murder in 1991 because at least two of the jurors concluded there was reasonable doubt.

3. Under Louisiana law and federal law at the time of Mr. Henry's conviction, non-unanimous jury verdicts were permissible. In Louisiana, in particular, non-unanimous verdicts were permissible specifically because they afforded the State greater opportunity to convict Black men such as Mr. Henry on little or no evidence and "establish the supremacy of the white race." *Ramos v. Louisiana*, 590 U.S. ___, 140 S. Ct. 1390, 1417 (2020) (Kavanaugh, J. concurring); Louisiana Constitutional Convention, Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana: Held in New Orleans, Tuesday, February 8, 1898, at 375 (H. J. Hearsey, Convention Printer 1898) (cleaned up). As Justice Kavanaugh explained in his

concurrence in *Ramos*, the aim of non-unanimity was "to diminish the influence of Black jurors." 140 S. Ct. at 1417 (Kavanaugh, J. concurring). Non-unanimous juries "silence the voices and negate the votes of black jurors, especially in cases with black defendants or black victims, and only one or two black jurors. The 10 jurors can simply ignore the views of their fellow panel members of a different race or class." *Id.* at 1418 (quotation omitted). That is precisely what happened here. All of the jurors who voted to convict Mr. Henry were white, and the two who voted to acquit him were Black.

4. In the intervening years, Louisiana has outlawed non-unanimous jury verdicts. In *Ramos*, the Supreme Court also recently held that non-unanimous jury verdicts violate the U.S. Constitution. Yet, Mr. Henry, who is now 68 years old, was sentenced to life imprisonment without the possibility of parole. He has been imprisoned for *more than 30 years*—during which time his prison record has been devoid of any serious offenses—on the basis of a conviction that is unconstitutional under state and federal law. Mr. Henry therefore petitions for post-conviction relief under Louisiana law and federal law, and asks this Court for three types of relief: First, the Court should vacate his conviction on the grounds that conviction by non-unanimous jury is unconstitutional. Second, it should order a new trial in this matter. Third, the Court should grant him release on bail pending retrial. Lastly, the Court should order whatever additional relief it deems necessary and appropriate.

BACKGROUND AND PROCEDURAL HISTORY

5. Mr. Henry is the Petitioner in this case. He pled not guilty to charges of second-degree murder, for which he was convicted on July 24, 1991 by a jury vote of 10 to 2. Mr. Henry is Black, as were both jurors who voted to acquit him. All ten jurors who voted to convict were white.

6. He has been incarcerated for upwards of thirty years.

7. Mr. Henry is currently confined at the Louisiana State Penitentiary.

8. Warden Darrel Vannoy is custodian of Petitioner.

9. Mr. Henry was represented at trial and on appeal by Ed Lopez, 125 West Landry Street, Opelousas, Louisiana 70570.

10. The Third Circuit Court of Appeals affirmed Mr. Henry's conviction on appeal on December 9, 1992. *State v. Henry*, 610 So.2d 285 (Table) (La. App. 3 Cir. 1992).

11. This is Mr. Henry's second formal application for post-conviction relief and Mr. Henry has filed timely. He filed six other motions after his trial and appeal which were treated as applications for post-conviction relief by the Louisiana Supreme Court and which were denied. *See* Exhibits C-I annexed to Uniform Application.

12. In 2018, Louisiana voters overwhelmingly approved a state constitutional amendment requiring unanimous jury convictions. However, the amendment does not apply retroactively, instead taking effect only for cases decided after January 1, 2019.

13. Last year, the U.S. Supreme Court also invalidated non-unanimous jury verdicts under federal law. The Court held in *Ramos v. Louisiana* that the Sixth Amendment requires felony convictions to be obtained by unanimous jury vote and that unanimity applies to the States. 140 S. Ct. 1390. Currently pending at the United States Supreme Court is *Edwards v. Vannoy*, which would decide the retroactive application of *Ramos* to cases such as Petitioner's. No. 18-31095, 2019 WL 8643258 (5th Cir. May 20, 2019), *cert. granted*, 140 S. Ct. 2737 (Mem) (May 4, 2020) (No. 19-5807).

14. This application for post-conviction relief is timely in accordance with La. Code Crim. Proc. art. 930.8(2) because it is based upon a final ruling handed down by the United States Supreme Court on April 20, 2020, establishing a theretofore unknown interpretation of constitutional law, and Mr. Henry establishes that this interpretation is retroactively applicable to his case.

15. Mr. Henry is entitled to post-conviction relief under La. Code Crim. Proc. art. 930.3(1) as the conviction was obtained in violation of the Constitution of the United States or the State of Louisiana.

CLAIM FOR RELIEF:

A NON-UNANIMOUS JURY CONVICTED MR. HENRY IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS.

16. Upon information and belief, Mr. Henry asserts that he has a meritorious constitutional claim for relief from his conviction of second-degree murder and his subsequent sentence of life imprisonment without parole:

A. MR. HENRY HAS A NON-UNANIMOUS JURY CONVICTION.

17. Article I, § 17 of the Louisiana Constitution and Article 782 of the Louisiana Code of Criminal Procedure at the time of Mr. Henry's offense and conviction allowed for non-unanimous verdicts for his offense.

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

19. A non-unanimous jury convicted Mr. Henry of second-degree murder on July 24, 1991.

20. Specifically, he was convicted by a jury vote of 10-2. Exhibit A to the Uniform Application is a true and accurate copy of the minutes of Mr. Henry's Trial, reflecting his conviction and non-unanimous jury verdict.[1]

21. The court sentenced him to life in prison without the possibility of parole on November 25, 1991. Exhibit B to the Uniform Application is a true and accurate copy of the minutes of Mr. Henry's sentencing hearing.

22. To the extent this Court requires additional support, the Petitioner would request an evidentiary hearing with the clerk of court in St. Landry Parish to further support this claim.

23. Mr. Henry did not make an objection or motion opposing a non-unanimous jury at the trial court level, on appeal, or post-conviction.[2]

[1] Petitioner endeavored to obtain a copy of the Uniform Commitment Order but no copy could be found in the record.

[2] Although State law requires that the defense bring error to the attention of the trial court within a reasonable time, La. Code Crim. Proc. arts. 770, 771, 841, there is a long established exception to this contemporary objection regime where the objection would be "a vain and useless act." *State v. Ervin*, 340 So. 2d 1379, 1380 (La. 1976); *State v. Lee*, 346 So. 2d

24. The unanimity claim raised here was not remotely available at the time of Mr. Henry's trial (or appeal). Rather, it had been foreclosed by the Supreme Court's *Apodaca v. Oregon*, 406 U.S. 404 (1972), and *Johnson v. Louisiana*, 406 U.S. 356 (1972), rulings. No court—state or federal—below the Supreme Court could alter *Apodaca* or *Johnson*. *See Agostini v. Felton*, 521 U.S. 203, 237-38 (1997) ("'[i]f a precedent of this Court has direct application to a case, yet appears to rest on reasons rejected in some other line of cases, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions,'" quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)). Thus, because this rule was not available until the Court's decision in *Ramos* overruling *Apodaca* and *Johnson*, it was not reasonably available and there is adequate cause to excuse it not being presented sooner. *See Reed v. Ross*, 468 U.S. 1, 17 (1984).

25. Article I, § 17 of the Louisiana Constitution and Article 782 of the Louisiana Code of Criminal Procedure at the time of Mr. Henry's offense and conviction allowed for non-unanimous verdicts for his offense. The current version of these provisions of the Louisiana Constitution and the Code of Criminal Procedure continues to allow for non-unanimous verdicts in non-capital cases for offenses that were committed prior to January 1, 2019.[3]

682, 685 (La. 1977).

[3] Article I, § 17(A) of the Louisiana Constitution states:

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

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

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

B. NON-UNANIMOUS JURY CONVICTIONS VIOLATE THE SIXTH AND FOURTEENTH AMENDMENTS.

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

Ramos v. Louisiana, 140 S. Ct. 1390 (2020) (plurality opinion).

26. The U.S. Supreme Court decided *Ramos v. Louisiana* on April 20, 2020. In that case, Evangelisto Ramos faced a charge of second-degree murder, for which he maintained his innocence and invoked his right to a jury trial. *Ramos v. Louisiana*, 140 S. Ct. at 1393-94. During that trial, two jurors believed that the State of Louisiana had failed to prove Mr. Ramos's guilt beyond reasonable doubt. *Id.* at 1394. The two jurors voted to acquit. *Id.*

27. In 48 states and federal court, a single juror's vote to acquit would have been enough to prevent Mr. Ramos' conviction; but in Louisiana—where the law allowed 10-2 and 11-1 non-unanimous jury convictions—Mr. Ramos received a life sentence, without the possibility of parole. *Id.*

28. In addition to being inconsistent with the vast majority of criminal procedure practice across the country, Louisiana's non-unanimous jury rule—the *Ramos* Court explained—was born from the Jim Crow era. "With a careful eye on racial demographics, the [1898 Constitutional] convention delegates sculpted a 'facially race-neutral' rule permitting 10-to-2 verdicts in order 'to ensure that African-American juror service would be meaningless.'" *Id.* at 1394.

29. The *Ramos* Court reversed Mr. Ramos' conviction and held that Louisiana's scheme of non-unanimous jury verdicts violated the Sixth and Fourteenth Amendments of the United States Constitution. *Id.* at 1397.

30. In doing so, Justice Gorsuch, writing for the five-justice majority, first articulated what the Court had "repeatedly" recognized over many years: the Sixth Amendment requires a unanimous jury verdict. *Id*. at 1396.[4] Then the Court addressed the application of this rule to the states, finding that "[t]here can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally," as it is incorporated against the states under the Fourteenth Amendment. *Id*.

31. This understanding of incorporation had also been "long explained" by the Court and was supported by jurisprudence for over a half century. *Id.*[5]

32. Lastly, the Court addressed *Apodaca v. Oregon*, 406 U.S. 464 (1972). In *Apodaca*, a majority of Justices recognized that the Sixth Amendment requires unanimity in jury verdicts. However, the Court nonetheless upheld Oregon's system of non-unanimous jury verdicts in "a badly fractured set of opinions." *Ramos*, 140 S. Ct. at 1392.

33. Four Justices in the *Ramos* Court found that *Apodaca* had little-to-no precedential value to the case before them.[6] *Id*. at 1404. Two Justices found that *Apodaca* was simply "irreconcilable" with the Court's constitutional precedent, or "egregiously wrong" and must be overturned.[7] *Id*. at 1409 (Sotomayor, J. concurring in part). The Court concluded: "We have an

---

[4] *See also id.* at 1395 ("Wherever we might look to determine what the term 'trial by an impartial jury trial' meant at the time of the Sixth Amendment's adoption—whether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward—the answer is unmistakable. A jury must reach a unanimous verdict in order to convict.")

[5] *See also id.* at 1416 (Kavanaugh, J., concurring in part) ("the original meaning and this Court's precedents establish that the Fourteenth Amendment incorporates the Sixth Amendment jury trial right against the States"); *id*. at 1423 (Thomas, J., concurring in the judgment) ("There is also considerable evidence that this understanding [of the Sixth Amendment's unanimity requirement] persisted up to the time of the Fourteenth Amendment's ratification.").

[6] Joined by Justices Ginsberg and Breyer, Justice Gorsuch explained that "*Apodaca* yielded no controlling opinion at all," 140 S. Ct. at 1404, and "not even Louisiana tries to suggest that Apodaca supplies a governing precedent." *Id*. at 1402. In his separate concurring opinion, Justice Thomas found *Apodaca* to be inapplicable in this case because it was decided on due process grounds, and, in his opinion, the Sixth Amendment is incorporated against the states through the Privileges and Immunity Clause of the Fourteenth Amendment: Because "*Apodaca* addressed the Due Process Clause, its Fourteenth Amendment ruling does not bind us because the proper question here is the scope of the Privileges or Immunities Clause." *Id*. at 1424-25 (Thomas, J., concurring in the judgment).

[7] In her concurrence, Justice Sotomayor wrote: *Apodaca* is "irreconcilable with not just one, but two, strands of

admittedly mistaken decision, on a constitutional issue, an outlier on the day it was decided, one that's become lonelier with time." *Id*. at 1408.

34. The Court could not, and would not, rely on *Apodaca* to uphold Louisiana and Oregon's systems of non-unanimous verdicts.

C. THE HOLDING IN *RAMOS* APPLIES TO MR. HENRY

35. The U.S. Supreme Court's holding in *Ramos v. Louisiana* should be applied to vacate Mr. Henry's conviction.

1. The State has no legitimate authority to maintain Mr. Henry's incarceration based upon an unconstitutional verdict.

36. *Ramos v. Louisiana* laid out a substantive rule making clear that the State of Louisiana has no moral and legal authority to continue detention based on an unconstitutional statute. The punishment of a petitioner "pursuant to an unconstitutional law is no less void because the prisoner's sentence became final before the law was held unconstitutional." *Montgomery v. Louisiana*, 136 S. Ct. 718, 731 (2016). As the Supreme Court has explained: "There is no grandfather clause that permits States to enforce punishments the Constitution forbids. To conclude otherwise would undercut the Constitution's substantive guarantees." *Id.*

2. The Courts Determined 40 Years Ago That Rules Relating to Non-Unanimous Jury Verdicts Should Be Retroactive.

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

38. In *Burch v. Louisiana*, 441 U.S. 130 (1979), Mr. Burch was charged with exhibiting two obscene motion pictures. *Id.* at 132. Under Louisiana law, the court tried him before a six-person jury. *Id.* A jury poll indicated that the jury had voted five-to-one to convict him. *Id.* He

---

constitutional precedent well established both before and after the decision. The Court has long recognized that the Sixth Amendment requires unanimity." *Id*. at 1409 (Sotomayor, J., concurring in part). In his concurring opinion, Justice Kavanaugh concluded that Apodaca must be reversed, as it is "Apodaca is egregiously wrong. The original meaning and this Court's precedents establish that the Sixth Amendment requires a unanimous jury. … And the original meaning and this Court's precedents establish that the Fourteenth Amendment incorporates the Sixth Amendment jury trial right against the States." *Id*. at 1416 (Kavanaugh, J., concurring in part).

appealed, arguing that the Louisiana law permitting conviction by a non-unanimous six-member jury violated his rights to a trial by jury guaranteed by the Sixth and Fourteenth Amendments. *Id.* at 132-33.

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

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

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

42. *Stare decisis* binds this Court to follow the decision by the United States Supreme Court in *Brown*. *See Ramos*, 140 S. Ct. at 1416 n.5 (Kavanaugh, J., concurring in part) ("vertical stare decisis is absolute, as it must be in a hierarchical system with 'one supreme court' …. In other words, the state courts and the other federal courts have a constitutional obligation to follow a precedent of this Court unless and until it is overruled by this Court.").

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

44. It is clear that the non-unanimous jury verdict in Mr. Henry's criminal trial substantially impaired its truth-finding function and raises serious questions about the accuracy of guilty verdicts in past trials. As described in section 4.C., *infra*, Mr. Henry's case illustrates precisely the dangers such a system has wrought. For a whole host of reasons, the two dissenting jurors harbored reasonable doubts about Mr. Henry's guilt. Their reasonable doubts and their votes were effectively nullified by La. Code Crim. Proc. art. 782.

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

46. In *Teague v. Lane*, the U.S. Supreme Court laid out the test for determining the retroactive application of *"new* constitutional rules of criminal procedure." 489 U.S. 288, 311 (1989) (emphasis added). However, *Brown* had already laid down the rule for determining retroactivity of decisions concerning non-unanimous juries almost a decade earlier. *Brown*, 447 U.S. at 334. *Teague* did not purport to overrule *Brown*, and indeed cites it as the case that determined the retroactivity of the rule in *Burch v. Louisiana*, 441 U.S. 130 (1979), prohibiting non-unanimous verdicts in six person juries. *Teague*, 489 U.S. at 299.

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

47. The Supreme Court, in *Ramos v. Louisiana*, returns to the original founding principles that were consistently applied, noting "[t]his Court has, repeatedly and over many years, recognized that the Sixth Amendment requires unanimity. As early as 1898, the Court said that a defendant enjoys a 'constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons.'" *Ramos*, 140 S. Ct. at 1396-97. In *Teague v. Lane*, the U.S. Supreme Court laid out the test for

determining the retroactive application of *future* newly announced rules. 489 U.S. 288 (1989). However, the *Teague* doctrine applies only to future decisions that announce "new rules" of criminal procedure, not to those that are "merely an application of the principle that governed" a prior Supreme Court case. 489 U.S. at 307, 311 (quotation and citation omitted); *id.* at 301 ("It is admittedly often difficult to determine when a case announces a new rule, and we do not attempt to define the spectrum of what may or may not constitute a new rule for retroactivity purposes.").

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

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

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

51. In *Apodaca v. Oregon*, 406 U.S. 404 (1972), a majority of the Court agreed yet again that the Sixth Amendment requires jury unanimity to convict. Justice Powell accepted the "unbroken line of cases reaching back into the late 1800's" holding that, under the Sixth Amendment, "unanimity is one of the indispensable features of federal jury trial." *Johnson*, 406 U.S. at 369 (Powell, J., concurring in the judgment). Justice Stewart, writing for three Justices, likewise concluded that "the Sixth Amendment's guarantee of trial by jury embraces a guarantee that the verdict of the jury must be unanimous." *Apodaca*, 406 U.S. at 414-15 (Stewart, J., joined

by Brennan & Marshall, J., dissenting). Justice Douglas similarly maintained that "the Federal Constitution require[s] a unanimous jury in all criminal cases." *Johnson*, 406 U.S. at 382 (Douglas, J., joined by Brennan & Marshall, J., dissenting in *Apodaca*).[8]

52. Subsequent decisions have continued to recognize that the Jury Trial Clause requires unanimity to convict someone of a crime. In a line of cases involving the scope of the jury trial right, this Court has repeatedly explained that the Sixth Amendment requires that "the truth of every accusation . . . be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours." *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 343, 349-50 (1769)); *see also S. Union Co. v. United States*, 567 U.S. 343, 356 (2012); *United States v. Booker*, 543 U.S. 220, 239 (2005); *Blakely v. Washington*, 542 U.S. 296, 301 (2004); *United States v. Gaudin*, 515 U.S. 506, 510 (1995).

53. The U.S. Supreme Court has similarly relied on *Andres* and Justice Powell's opinion in *Apodaca* to hold that "a jury in a federal criminal case cannot convict unless it *unanimously* finds" each element of a crime. *Richardson v. United States*, 526 U.S. 813, 817 (1999) (emphasis added); *see also Descamps v. United States*, 570 U.S. 254, 269 (2013) ("The Sixth Amendment contemplates that a jury … will find essential facts 'unanimously and beyond a reasonable doubt.'"). The Supreme Court returned to the subject in two cases involving the incorporation of other provisions of the Bill of Rights. Referencing *Apodaca*, the U.S. Supreme Court has noted that "the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials." *McDonald v. Chicago*, 561 U.S. 742, 766 n.14; *see also Timbs v. Indiana*, 139 S. Ct. 682, 687 n.1 (2019) (same).

54. The outcome in *Apodaca*, the U.S. Supreme Court has explained, resulted from Justice Powell's vote that the Fourteenth Amendment did not require states to fully abide by the Sixth Amendment. *See McDonald*, 561 U.S. at 766 n.14; *see also Ramos*, 140 S. Ct. at 1397. And

[8] To be sure, four of these five Justices dissented on other grounds. But where five Justices expressly embrace a legal proposition, the consensus of the five Justices prevails over any separate opinions on that issue. *See, e.g., Alexander v. Choate*, 469 U.S. 287, 292-93, 293 n.9 (1985) (proposition adopted by one Justice in the majority and four in dissent in *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983), constituted a "holding").

in *Timbs,* the U.S. Supreme Court explained the reasoning in *Apodaca* was a sole outlier in Supreme Court jurisprudence. *Timbs*, 139 S. Ct. at 687, n.1.

55. As the *Ramos* Court acknowledged, Justice Powell's vote in *Apodaca* embraced a notion that had already been rejected by the Court: that "the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'" *Ramos*, 140 S. Ct. at 1398; *Timbs,*139 S. Ct. at 682, 689.

56. The outlier opinion in *Apodaca* is what the *Ramos* decision corrected. Therefore, for purposes of La. Code Crim. Proc. art. 930.8(2) the ruling is a "theretofore unknown interpretation of constitutional law" but is not a new rule under *Teague*.

57. This is similar to *Stringer v. Black*, 503 U.S. 222 (1992), where the Court held that its decision in *Maynard v. Cartright*, 486 U.S. 356 (1988), did not announce a new rule because it "applied the same analysis and reasoning" found in a prior case. *Stringer*, 503 U.S. at 228.[9]

58. Here, in addition to the long line of above cited cases supporting unanimous juries under the Sixth Amendment, every other provision of the Bill of Rights has been found incorporated to the states by the Fourteenth Amendment in a manner that shows "no daylight." *See Timbs*, 139 S. Ct. at 687 n.1.; *Ramos*, 140 S. Ct. at 1405 n.63.

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

> This Court has repeatedly and over many years, recognized that the Sixth Amendment requires unanimity…. There can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally. This Court has long explained that the Sixth Amendment right to a jury trial is "fundamental to the American scheme of justice" and incorporated against the States under the Fourteenth Amendment. This Court has long explained, too, that incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government. So if the Sixth

[9] *See* also *Penry v. Lynaugh*, 492 U.S. 302 (1989) (finding that the relief a state prisoner sought would not create a new rule because it was dictated by *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Eddings v. Oklahoma*, 455 U.S. 104 (1982), both of which were decided before the prisoner's conviction became final). In that case, Penry sought relief based on the proposition that when a capital defendant presents mitigating evidence of mental retardation and an abused background, courts must "give[] jury instructions that make it possible for them to give effect to that mitigating evidence in determining whether a defendant should be sentenced to death." *Penry*, 491 U.S. at 315. Both *Lockett* and *Eddings* had held that sentencers in capital cases could not be precluded from considering certain potentially mitigating evidence. Even though those cases dealt with different kinds of mitigating evidence, this Court concluded that the rule Penry sought was "dictated by *Eddings* and *Lockett*." *Penry*, 492 U.S. at 319.

> Amendment's right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court.

Id. at 1397.

60. The only exception had been *Apodaca*, but it was clear to all that the exception did not comport with the analysis and reasoning used for all other incorporation cases.[10] This was so apparent, that the State of Louisiana did not even seek to support the *Apodaca* holding in its briefing in *Ramos* or at oral argument. Its only defense in support of Mr. Ramos' judgment was that the Sixth Amendment does not require unanimity at all; that is, not in state courts or in federal courts—a position clearly contrary to the holding in *Apodaca.*[11]

61. If this Court were to determine that the holding in *Ramos* somehow established a new rule, then *Teague* still would not bar applying it to Mr. Henry's claim because the *Ramos* rule qualifies as a "watershed rule[] of criminal procedure."[12]

62. *Ramos* creates "'watershed rule[s] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding," like that of *Gideon v. Wainwright*, 372 U.S. 335 (1963), and should therefore have retroactive effect. *Saffle v. Parks*, 494 U.S. 484, 495 (1990) (citing *Teague*, 489 U.S. at 311 (plurality opinion)). To implicate "fundamental fairness and accuracy," the rule must be one "without which the likelihood of an accurate conviction is seriously diminished." *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (internal citations omitted).

---

[10] "*Apodaca* . . . was on shaky ground from the start." *Ramos,* 140 S. Ct. at 1409 (Sotomayor, J. concurring).

[11] At oral argument Justice Kavanaugh asked the State of Louisiana what its best argument would be if it were not to overrule the 14 cases in which it has said the Sixth Amendment requires a unanimous jury trial. "What are your best arguments, then, for why the right is not incorporated and relatedly your best arguments for not overruling Apodaca?" he asked. The State responded: "Justice Kavanaugh, they are concededly not very good. . . this Court at least at this point in time has taken a view of incorporation that says that there's no daylight. So if you find that unanimity is required, I find myself in a far more difficult position." *See* U.S. Supreme Court No. 18-5924, Oral Argument Transcript, p. 47-48; *see also Ramos*, 140 S. Ct. at 1399 ("Louisiana acknowledges the problem. The State expressly tells us it is not 'asking the Court to accord Justice Powell's solo opinion in *Apodaca* precedential force.'").

[12] Inherent in *Ramos* is also a substantive categorical guarantee that no person may be convicted and sentenced to life without the possibility of parole without the unanimous suffrage of 12 jurors. This is not a question of the process – it is a substantive holding prohibiting punishment at all without a unanimous verdict akin to *Montgomery v. Louisiana*, 136 S. Ct. at 728. There the Court explained that substantive rules include "rules forbidding criminal punishment of certain primary conduct," as well as "rules prohibiting a certain category of punishment for a *class of defendants because of their status or offense*." *Id*. (emphasis added). Louisiana was the only state in the country sentencing people to life without the possibility of parole with non-unanimous jury verdicts.

63. The Court has previously used *Gideon* as the lodestar for determining watershed cases. *See id*. In *Gideon*, the Court overruled *Betts v. Brady*, 316 U.S. 455 (1942), which had previously refused to incorporate the Sixth Amendment Right to Counsel under the Fourteenth Amendment. 372 U.S. at 339. Ten years prior to *Betts*, the Court found that the right to counsel is fundamental and essential to a fair trial. *Powell v. Alabama*, 287 U.S. 45, 71 (1932). The Court emphasized again in 1938 that the Sixth Amendment guaranteed a right to appointed counsel in federal prosecutions where the defendant is unable to employ counsel and that, unless the right is competently and intelligently waived, the "Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty." *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938). The *Zerbst* Court went on to describe the assistance of counsel as "one of the safeguards of the Sixth Amendment Right deemed necessary to insure fundamental human rights of life and liberty." *Id*. at 462. The *Gideon* Court, in looking at this precedent, found *Betts* to be an aberration and its decision to be a restoration of "constitutional principles established to achieve a fair system of justice." 372 U.S. at 344.

64. Just like in *Gideon*, *Ramos* incorporates a Sixth Amendment right into the Fourteenth Amendment, following the foundation of prior minority opinions of the U.S. Supreme Court as to the fundamental nature of unanimity in jury verdicts. *See Ramos*, 140 S. Ct. at 1397; *Andres*, 333 U.S. at 748; *Johnson*, 406 U.S. at 371 (Powell, J., concurring); *id*. at 397 (Stewart, J., dissenting).

65. In *Andres*, the Supreme Court unanimously held that the Bill of Rights required a unanimous jury verdict. 333 U.S. at 748 ("Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply."). Then in *Johnson* and *Apodaca*, five justices agreed that the Sixth Amendment required unanimity. *See Johnson*, 406 U.S. at 371 (Powell, J., concurring) ("At the time the Bill of Rights was adopted, unanimity had long been established as one of the attributes of a jury conviction at common law. It therefore seems to me, in accord both with history and precedent, that the Sixth Amendment requires a unanimous jury verdict to convict in a federal criminal trial."); *id.* at 381-403 (dissenting opinions); *Apodaca*, 406 U.S. at 414-15 (concurring and dissenting opinions). However, because Justice Powell did not believe that the right should be

incorporated under the Fourteenth Amendment, state non-unanimous jury schemes were upheld as constitutional. *Johnson*, 406 U.S. at 371 (Powell, J., concurring) (Concluding that unanimity is required by the Sixth Amendment but that "it is the Fourteenth Amendment, rather than the Sixth, that imposes upon the States the requirement that they provide jury trials to those accused of serious crimes.").

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

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

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

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

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

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

What the dissenters in *Johnson* rightfully point out, and what is underlying in *Ramos*, is that non-unanimous jury verdicts seriously diminished the likelihood of accurate convictions, especially

in states during periods of intense racial discrimination. *Johnson*, 406 U.S. at 398 (Stewart, J., dissenting).

68. Furthermore, a non-unanimous verdict is a structural error as it is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). Such an error causes the criminal trial to lose reliability in its capability in serving the function of determining guilt or innocence. *Id*. Although structural error is not coextensive with *Teague's* watershed procedural rule exception, *Tyler v. Cain*, 533 U.S. 656, 666 (2001), a structural error that strikes at the fundamental fairness and accuracy of the criminal prosecution meets the standard of qualifying a new procedural rule for retroactive application.

69. As the Court pointed out in *Schriro* and *Teague*, "[t]hat a new procedural rule is 'fundamental' in some abstract sense is not enough; the rule must be one 'without which the likelihood of an accurate conviction is *seriously* diminished." *Schriro*, 542 U.S. at 352 (citing *Teague*, 489 U.S. at 313). Unanimous juries are not fundamental in an abstract way.

70. In line with *Gideon*, *Ramos* is remarkable in its primacy and centrality of the truth finding process. The U.S. Supreme Court has "long explained that the Sixth Amendment right to a jury trial is 'fundamental to the American scheme of justice.'" *Ramos*, 140 S. Ct. at 1397. The unanimity of the jury verdict is "an ancient guarantee": "the American people chose to enshrine that right in the Constitution. . . . They were seeking to ensure that their children's children would enjoy the same hard-won liberty they enjoyed." *Id.* at 1402.

71. The unconstitutional nature of a non-unanimous jury verdict fundamentally harms the accuracy and fairness of the proceedings. *Ramos* corrects the mistake of the "universe of one" that is *Apodaca* and affords Louisiana ability to bring fairness to those individuals convicted outside of constitutional precedent occurring before and after *Apodaca. Id*. at 1409 (Sotomayor, J., concurring in part). *Ramos* meets the threshold set out in *Teague*. It is a watershed case that encompasses the core of a right to a trial by jury, and as such, this court should apply *Ramos* retroactively to Mr. Henry's case.

4. The State of Louisiana can adopt a broader retroactive effect to *Ramos* per *Danforth v. Minnesota*.

72. Courts in Louisiana have their own obligation to enforce the Constitutional guarantees and can ensure constitutional protections broader than those articulated in *Teague. Danforth v. Minnesota* held that *Teague* does not constrain the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion. 552 U.S. 264, 291 (2008). It is significant to note that *Teague* announces only a rule for prospective federal habeas review – leaving to the states the obligations to fulfill their constitutional responsibility.

73. While the Louisiana Supreme Court applied the *Teague* retroactivity standard in *State ex. rel. Taylor v. Whitley*, the high court also recognized that it was not bound to accept the *Teague* rule. 606 So. 2d 1292, 1296 (La. 1992). As least one member of the Louisiana Supreme Court indicated their support for abandoning *Teague* altogether. *See State v. Gipson*, 2019-01815 (La. 6/3/20), 296 So. 3d 1051, 1052 (Johnson, C.J.) As Justice Johnson observed, Louisiana courts are free to abandon "*Teague* in favor of a retroactivity test that takes into account the harm done by the past use of a particular law." *Id.*

74. Mr. Henry asks this Court, if it does not find grounds above to provide retroactive effect to *Ramos*, to give broader effect to *Ramos* and adopt one of the following rules to govern retroactivity in Louisiana.

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

b. Where the major purpose of new constitutional doctrine is to overcome a practice rooted in extreme systemic racism so as to so substantially impair the legitimacy of Louisiana's criminal justice system, and impair the truth-finding function of criminal trials so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule will be given complete retroactive effect and neither good-faith reliance by state or federal authorities on prior constitutional law or accepted

practice, nor severe impact on the administration of justice justify require prospective application in these circumstances.

75. Both proposed rules are supported by historical evidence, would rectify current structural deficiencies within the criminal justice system, and apply to Mr. Henry in this case.

a. Non-Unanimous Jury Verdicts Substantially Impair Courts' Truth-Finding Function.

76. The non-unanimity rule seriously diminishes the accuracy of the criminal adjudicatory process, undermining the efficacy of—and confidence in—the entire Louisiana judicial system. Unanimity is essential to maintaining public faith in how the system works—and that it works. *See* Brief for American Bar Association as Amicus Curiae, *Ramos*, 140 S. Ct. 1390, 2019 WL 2549746, at *21 (June 18, 2019) ("Citizens consider unanimous juries to be more accurate, more thorough, more likely to account for the views of jurors holding contrary views, more likely to minimize bias, better able to represent minorities, and fairer.").

77. Recent social science research has demonstrated that non-unanimous verdicts significantly constrict the flow of information within jury deliberations and shorten deliberations overall, reducing the likelihood that jurors will hear, request, or vigorously challenge others' views, leading to less accurate judgments overall. *State v. Hankton*, 2012-0375 (La. App. 4 Cir. 8/2/13), 122 So. 3d 1028, 1032, n.5, *writ denied*, 2013-2109 (La. 3/14/14), 134 So. 3d 1193 (citing Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1276–77 (2000)). An older study examining the issue found that whereas each unanimous jury examined returned a legally correct verdict, at least 13% of non-unanimous juries returned a legally incorrect verdict. *See* Reid Hastie, et al., *Inside the Jury* (1983).

78. Research on non-unanimous jury verdicts indicates that there are at least 100 innocent people currently in prison based on non-unanimous verdicts. *See* Brief of Amicus Curiae Innocence Project New Orleans, *Edwards v. Vannoy*, No. 19-5807, 2020 WL 4450443, at *14 (U.S. July 22, 2020). A "significant number of the people currently imprisoned because of these verdicts are innocent." *Id.* at *15.

79. The National Registry of Exonerations, which tracks exonerations since 1989, has identified sixty-two exonerations in Louisiana.[13] Of the sixty-two individuals exonerated in Louisiana, at least fifteen were convicted by a non-unanimous verdict. *See* Br. Innocence Project at *11.

80. These fifteen individuals spent a combined 257 years in prison. Of the fifteen, twelve are Black. Further, of these same fifteen, twelve individuals were sentenced to life in prison without the possibility of parole. Ten of the fifteen cases involved incorrect eyewitness identification. Nine of the people were tried at proceedings that lasted less than a day. *See id*.

81. Non-unanimous verdicts impair the judicial system's essential, indispensable factfinding ability. Where "a single juror's vote to acquit is enough to prevent a conviction," *Ramos*, 140 S. Ct. at 1393, a non-unanimous verdict can have disastrous consequences. *See State ex rel. Smith v. Sawyer*, 501 P.2d 792, 793 (Ore. 1972) (trading in accuracy in order to "make it easier to obtain convictions."). This was as intended by the 1898 Louisiana Constitutional Convention.

b. Non-Unanimous Jury Verdicts Were Borne of Extreme Systemic Racism

82. Louisiana implemented its non-unanimous jury system with the explicit intent to diminish the rights of Black citizens. It wrought disastrous consequences and has substantially impaired the legitimacy of Louisiana's criminal justice system. As the Louisiana Supreme Court observed last year, "our longtime use of a law deliberately designed to enable majority-White juries to ignore the opinions and votes of Black jurors at trials of Black defendants has . . . affected the fundamental fairness of Louisiana's criminal legal system."). *Gipson*, 296 So. 3d at 1053.

83. Reporting from post-Reconstruction Louisiana reflected a ubiquitous white fear that Black jurors would not vote to convict Black defendants.[14] Thomas Ward Frampton, *The Jim*

[13] Louisiana is second only to Illinois in its per capita rate of individuals exonerated. (*See The First 1600 Exonerations*, Nat'l Registry of Exonerations 14 (2015), http://www.law.umich.edu/special/exoneration/Documents/1600_Exonerations.pdf).

[14] The prospect of a racially non-discriminatory jury system also threatened the state's robust convict leasing system. *See* Brief of Amicus Curiae of Lawyers Committee for Civil Rights, *Edwards v. Vannoy*, No. 19-5807, 2020 WL 4450446, at *6 (U.S. July 22, 2020). With the prospect of fewer wrongfully convicted Black Louisianans, the state had fewer individuals to lease out to plantations, threatening the economic status quo statewide. This prospect was untenable to the white majority. *See Acts Passed by the General Assembly of the State of Louisiana at the Regular Session* 141–142 (New Orleans, E.A. Brandao 1880); Thomas Aiello, *Jim Crow's Last Stand: Non-unanimous Criminal Jury Verdicts in Louisiana*, 267-28 (2015) ("The Louisiana legislature created a new law in 1880 that removed the unanimity requirement. . . . The law created a larger criminal population . . . and reenslaved more and

Crow Jury, 71 Vand. L. Rev. 1593, 1603 (2018). Black jurors were castigated "as ignorant, incapable of determining credibility, and susceptible to bribery." Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 La. L. Rev. 361, 376 (2012). Politicians of the era hoped to eliminate "the vast mass of ignorant, illiterate and venal negroes from the privileges of the elective franchise." Henry Weinstein, *Real justice requires unanimous juries for criminal convictions*, L.A. Times (Oct. 7, 2019) (citing *The Following Resolutions*, Daily Picayune (New Orleans, La.), Jan. 4, 1898, at 9).

84. Many states simply refused to allow Black people to serve on juries altogether. On the heels of *Strauder v. West Virginia*, 100 U.S. 303 (1880), however, in which the Supreme Court held that states could not bar Black jurors, Louisiana began to apply increasingly more clandestine means to subvert Black participation in the criminal justice system. In 1898, Louisiana implemented the non-unanimity requirement outright.

85. Louisiana did not always adhere to a system of non-unanimity: since at least 1804, Louisiana criminal courts required a unanimous jury for a felony conviction. As *Ramos* notes, non-unanimity was established at the Louisiana Constitutional Convention of 1898, which convened with "the avowed purpose . . . to 'establish the supremacy of the white race.'" *Ramos*, 140 S. Ct. at 1394. "[T]he sinister purpose of the Convention was to create a racial architecture in Louisiana that would circumvent the Reconstruction Amendments and marginalize the political power of black citizens." *See* Smith & Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 La. L. Rev. at 374–75. Though legislators adopted the race-neutral language of "judicial efficiency" to justify permitting non-unanimous juries during Louisiana's constitutional convention in 1974, non-unanimous juries continued to invalidate the perspectives of Black jurors for decades to come.

86. The non-unanimity rule was thus concretized as a judicial means to effect a racially subjugatory end. Louisiana Constitutional Convention, Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana: Held in New Orleans, Tuesday, February 8, 1898, at 375 (H. J. Hearsey, Convention Printer 1898) [hereinafter "Louisiana Constitutional

---

more of the state's black population.").

Convention"]. The Louisiana Judiciary Committee Chairman Thomas Semmes, formerly a Confederate Senator, emphatically ended the Convention by claiming that it "establish[ed] the supremacy of the white race in this State to the extent to which could be legally and constitutionally done." *Id.*

87. *Ramos* observed that non-unanimity aimed to weaken the influence of Black jurors and other jurors of marginalized backgrounds. 140 S. Ct.. at 1394; *see also* Frampton, *The Jim Crow Jury*, 71 Van. L. Rev. at 1636 ("the non-unanimous-decision rule operate[d] . . . just as it was intended to 120 years ago—to dilute the influence of black jurors."). It was crafted "[w]ith a careful eye on racial demographics . . . in order to ensure that African-American juror service would be meaningless." Louisiana Constitutional Convention (internal quotation marks omitted). As the convention's delegates recognized, "silenc[ing] the voices and negat[ing] the votes of black jurors" would be particularly impactful "in cases with black defendants." *Ramos*, 140 S. Ct at 1418 (Kavanaugh, J., concurring). The same was true in Oregon. *Ramos*, 140 S. Ct at 1394 ("Adopted in the 1930s, Oregon's rule permitting non-unanimous verdicts can be similarly traced to the rise of the Ku Klux Klan and efforts to dilute 'the influence of racial, ethnic, and religious minorities on Oregon juries.'").

88. Weakening the influence of Black jurors has had irreparable consequences. Some parishes could effectively nullify proportionate representation. For example, in Louisiana's Jefferson Parish, in 80% of criminal trials, there is no effective Black representation on the jury because only the votes of white jurors are necessary to convict, even though Jefferson Parish is 23% Black. *Id. See* Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* 14 (2010). White jurors can "simply ignore the views of their fellow panel members of a different race." *See Johnson*, 406 U.S. at 397 (Stewart, J., dissenting).

89. The problems run deeper. Black jurors disproportionately cast "not guilty" votes that are overridden by the guilty votes of the other jurors. In other words, "black jurors [find] themselves casting 'empty votes'—that is, 'not guilty' votes overridden by the supermajority vote of the other jurors . . . ." Frampton, *The Jim Crow Jury*, 71 Vand. L. Rev. at 1637. Black jurors are about two-and-a-half times as likely to cast "empty votes" to acquit than their white peers. *Id.*

Indeed, the Louisiana Supreme Court has itself recognized the deleterious effect of non-unanimity on the "fundamental fairness and accuracy of criminal trials." *See Gipson*, 296 So. 3d at 1053.

90. In its amicus brief to *Edwards v. Vannoy*, the Innocence Project of New Orleans analyzed fifteen exonerated non-unanimous convictions, as mentioned in paragraphs 79-81, *supra*. The fifteen convictions led to a total of 94 votes by white jurors and 45 votes by Black jurors. Of the white jurors' votes, 7 were discounted; of the Black jurors' votes, 11 were discounted. "This means that a white juror has a 7% [chance] of having his or her vote discounted and an innocent person convicted over his or her objection, but a Black juror has a 25% [chance] of this happening to them[,] [a] greater than three-fold discrepancy." Br. Innocence Project at 14.

91. Louisiana's non-unanimous jury rule continues to "inhibit inclusion" of minority jurors in the deliberative process. Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. at 1263. It also delivers more Black defendants to the state's prison system, disproportionately so. In one dataset of Louisiana trials between 2011 and 2017, while white defendants had a 33 percent chance of being convicted by a non-unanimous jury, Black defendants had a 43 percent chance of being convicted non-unanimously. Jeff Adelson, et al., *How an Abnormal Louisiana Law Deprives, Discriminates and Drives Incarceration: Tilting the Scales*, The Advocate (Apr. 1, 2018), https://www.theadvocate.com/baton_rouge/news/courts/article_16fd0ece-32b1-11e8-8770-33eca2a325de.html. Historic trends continue.

92. There are situations in which "time and growth in social capacity, as well as judicial perceptions of what we can rightly demand of the adjudicatory process, will properly alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction." *Teague*, 489 U.S. at 311 (quoting *Mackey v. United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring)). Should the Supreme Court reject retroactive application of *Ramos*, this Court is empowered to recognize a new rule of criminal procedure under *Danforth v. Minnesota*, 552 U.S. at 291. *See* paragraph 73, *supra*.

5. Mr. Henry's case illustrates how the non-unanimity rule functions, with its intended racialized impacts, and how it substantially impairs courts' truth-finding function.

93. As the preceding paragraphs detail, even modest estimates indicate a widespread problem with the accuracy of non-unanimous guilty verdicts. The twin perils of extreme systemic racism and impairment of the judicial fact-finding function are obvious. Perhaps no one case illustrates this more than Mr. Henry's.

94. About 15 percent of Louisiana's prison population consists of people serving life without parole, which is the highest percentage among all states. Those convicted of second-degree murder make up the largest subset, over half of all incarcerated. Half of those individuals were under 25 when convicted and around three-quarters are Black. When factoring in other long sentences too, almost one in three incarcerated individuals in Louisiana will die behind bars.[15]

95. Mr. Henry was convicted of second-degree murder by a jury vote of 10 to 2. Mr. Henry is Black, as were both dissenting jurors. All ten jurors who voted to convict were white. As identified in paragraph 89 *supra*, non-unanimity allows Black jurors to disproportionately cast "not guilty" votes that are overridden by the guilty votes of the other jurors. As in paragraph 88 *supra*, non-unanimity has nullified Black representation on juries because only the votes of white jurors are necessary to convict.

96. Among the ten white jurors was the foreperson. The position of the foreperson in jury deliberations is foremost in influencing the outcome of jury-room deliberations, dominating the jury. Studies indicate that the jury foreperson absorbs "approximately one-quarter of the total jury discussion time." Hiroshi Furkurai & Edgar W. Butler, *Sources of Racial Disenfranchisement in the Jury and Jury Selection System*, 13 Nat'l Black L.J. 270 (1994). As detailed in paragraph 87 *supra*, non-unanimity aimed to weaken the influence of Black jurors.

97. The facts particular to Mr. Henry's case at trial demonstrate (a) why two jurors would find reason to dissent; (b) why non-unanimity weakens the judicial factfinding function;

[15] Ashley Nellis, *Still Life: America's Increasing Use of Life and Long-Term Sentences*, The Sentencing Project (2017), https://www.sentencingproject.org/publications/still-life-americas-increasing-use-life-long-term-sentences/.

and (c) how non-unanimity has brought into question the fundamental fairness of Louisiana's criminal legal system.

98. The State's case-in-chief presented Mr. Henry's guilt as an open-and-shut, cold-blooded barroom murder at Mel's Beer Garden on January 4, 1991. Mr. Henry claimed self-defense.

99. According to the State, Mr. Henry and the decedent were engaged in a game of billiards when, after a discussion, Mr. Henry fired a single shot, hitting the decedent in the chest, after which Mr. Henry placed the gun on the bar counter and waited for the police to arrive. This theory garnered ten out of twelve jury votes to convict Mr. Henry of second-degree murder.

100. Mr. Henry testified that the decedent threatened him with his life when he walked into the bar, stating: "you're not going to leave this place tonight." Exhibit J, Trial Transcript Excerpts, p.355. There was additional evidence to support this threat. Although the appellate court found that, as a matter of law, Mr. Henry and decedent had not engaged in a "hostile demonstration" as required to introduce evidence regarding the decedent's character, the State's own witness, Charles Carrier, testified that the two were "in each other's face[s]," *id.* at p. 218, "faced off having an argument," p. 223 and that the witness was trying to "push[] them apart," p. 218, and "squash," p. 206, the ongoing conflict between the two.

101. The State called eleven witnesses, including three police officers, one forensic pathologist, and several eye-witnesses. A full review of the trial court testimony reveals a number of inconsistencies and explains why two reasonable jurors would have voted to acquit Mr. Henry. Mr. Henry's defense at trial urged that he had a good-faith belief that the decedent was armed and intended to cause him lethal bodily harm. The evidence supports this defense.

102. Second, as Mr. Henry testified, the decedent was indeed armed. Officers at the scene recovered from the decedent's body a knife, *id.* at p. 264, which Mr. Henry alleged the decedent brandished to support his earlier threat. Further, toxicology reports established that, at the time of the shooting, the decedent was intoxicated with alcohol above the legal limit and that he was on cocaine and had evidence of other drug use in his system.

103. Third, there was a glaring inconsistency between eyewitnesses who claimed to have witnessed the shooting and powerful forensic evidence that contradicted their testimony. Although witnesses—some of whom were admittedly intoxicated at the time of the incident—claimed that Mr. Henry shot the decedent from over twelve feet away, *id.* at p. 220, the ballistics expert testified that the distance was scientifically certain to be between "near contact and [one-and-a-half] feet." *Id.* at p. 285-86. Such evidence would establish that Mr. Henry did not shoot the decedent from the other side of the bar, but would instead support a theory, as propounded by Charles Carrier, that the two were in each others' faces.

104. These facts about the trial are not offered here to relitigate Mr. Henry's trial; to order relief, this Court needn't be convinced of Mr. Henry's innocence of the crime charged. Rather, Mr. Henry raises these inconsistencies to demonstrate why two jurors would conclude that there was reasonable doubt in the first place.

105. The paragraphs above demonstrate precisely why the Supreme Court—and other courts—have ruled that the Constitution requires full unanimity to justify a criminal conviction, especially one that has already cost Mr. Henry over thirty years of his freedom, and could cost him his entire life.

6. The *Ramos* Court now acknowledges its mistake in *Apodaca;* but for this mistake, Mr. Henry would have had a constitutional trial.

106. The U.S. Supreme Court has now explicitly found that *Apodaca* was an "an admittedly mistaken decision." *Ramos*, 140 S. Ct. at 1408. Justice Kavanaugh, in a separate concurrence, found that *Apodaca* was "egregiously wrong" and incompatible with the original meaning of the Sixth and Fourteenth Amendments. *Id*. at 1416 (Kavanaugh, J., concurring). Justice Sotomayor found that *Apodaca* was "irreconcilable with not just one, but two, strands of constitutional precedent well established both before and after the decision." *Id*. at 1409 (Sotomayor, J., concurring).

107. Even the State of Louisiana did not believe *Apodaca* was correctly decided. As previously discussed, the State did not argue that *Apodaca* was good law, the citizens of Louisiana have rejected non-unanimous jury verdicts, and even the dissent of *Ramos* "tacitly … admit[s] that the Constitution forbids States from using non-unanimous juries." *Ramos*, 140 S. Ct. at 1395. Mr.

Henry should not be permanently deprived of his constitutional rights because an admittedly wrong interpretation of law controlled. "*Apodaca* is egregiously wrong." *Id.* at 1420 (Kavanaugh, J. concurring). Mr. Henry's conviction should not be allowed to stand and "perpetuate something we all know is wrong only because we fear the consequences of being right." *Id.* at 1408.

7. Preservation Is Not Required in Order to Raise the Issue of Non-Unanimous Jury Verdicts.

108. To the best of Mr. Henry's knowledge, Mr. Henry's attorney did not make an objection or motion opposing a non-unanimous jury at the trial court level or on appeal. Mr. Henry also did not raise the issue during post-conviction.

a. **Mr. Henry is entitled to relief regardless of preservation**

109. Although State law requires that the defense bring error to the attention of the trial court within a reasonable time, La. Code Crim. Proc. arts. 770, 771, 841, there is a long-established exception to this contemporary objection regime where the objection would be "a vain and useless act." *State v. Ervin*, 340 So. 2d at 1381; *State v. Lee*, 346 So. 2d at 685.

110. The unanimity claim raised here was not remotely available at the time of Mr. Henry's trial or appeal. Rather, it had been foreclosed by the Supreme Court's *Apodaca* and *Johnson* rulings.

111. No court—state or federal—below the Supreme Court could alter *Apodaca* or *Johnson*. *See Agostini v. Felton*, 521 U.S. at 237-38 ("if a precedent of this Court has direct application to a case, yet appears to rest on reasons rejected in some other line of cases, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions") (internal quotation omitted). Thus, because this rule was not available until the Court's decision in *Ramos* overruling *Apodaca*, it was not reasonably available and there is adequate cause to excuse it not being presented sooner. *See Reed v. Ross*, 468 U.S. at 17.

112. Moreover, the conviction based upon a non-unanimous verdict is error patent, reviewable on appeal without an assignment of error based upon La. Code Crim. Proc. art. 920 (detailing the matters that may be considered on appeal "2) An error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence."). *See also*

State v. Wrestle Inc., 360 So. 2d 831, 837 (La. 1978) ("[W]e have held without discussion that under such circumstances we may, from the minute entry, discover by mere inspection the basis for a defendant's contention that a non-unanimous jury verdict represents constitutional error patent on the face of the proceedings.")

113. The Louisiana Supreme Court has made clear that a non-unanimous verdict is subject to review as error patent. The matter is remanded to the court of appeal for further proceedings and to conduct a new error patent review in light of *Ramos*. *State v. Williams*, 2019-01690, 2020 WL 3424599, at *1 (La. 6/12/20)("If the non-unanimous jury claim was not preserved for review in the trial court or was abandoned during any stage of the proceedings, the court of appeal should nonetheless consider the issue as part of its error patent review. *See* La.C.Cr.P. art. 920(2)."); *State v. Jackson*, 2019-02023, 2020 WL 3424906, at *1 (La. 6/12/20) ("Application for reconsideration granted. The matter is remanded to the court of appeal for further proceedings in light of *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020). If the non-unanimous jury claim was not preserved for review in the trial court, the court of appeal should consider the issue as part of an error patent review. *See* La.C.Cr.P. art. 920(2)"); *State v. Richardson*, 2020-00175 (La. 6/03/20) 296 So. 3d 1050 (Mem) ("The matter is remanded to the court of appeal for further proceedings and to conduct a new error patent review in light of *Ramos v. Louisiana*, 590 U.S. ___, 140 S. Ct. 1390, 206 L.Ed.2d 583 (2020). If the non-unanimous jury claim was not preserved for review in the trial court or was abandoned during any stage of the proceedings, the court of appeal should nonetheless consider the issue as part of its error patent review. See La.C.Cr.P. art. 920(2).").

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

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

b. If preservation were required, then Mr. Henry's counsel was ineffective for failing to object to the non-unanimous jury verdict.

116. Under the standard set out in *Strickland v. Washington*, 466 U.S. 668 (1984), and *State v. Washington*, 491 So. 2d 1337 (La. 1986), a conviction must be reversed if Mr. Henry proves (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's inadequate performance prejudiced defendant to the extent that the trial was rendered unfair and the verdict suspect. *State v. Legrand*, 2002-1462 (La. 12/3/03), 864 So. 2d 89.

117. When determining whether the first prong of the ineffective assistance of counsel prong is met, the inquiry is whether defense counsel's conduct was deficient. In *State ex rel. Craddock v. State*, 2016-0912 (La. 9/15/17), 225 So. 3d 452, 455, the Louisiana Supreme Court stated that the "proper standard for attorney performance is that of reasonably effective assistance." Failing to object may be deficient conduct sufficient to reach ineffective assistance of counsel if counsel should have objected. In *State v. Truehill*, the Third Circuit Court of Appeals analyzed the accused counsel's failure to object to inadmissible evidence under the Louisiana Code of Evidence. *State v. Truehill*, 2009-1546 (La. App. 3 Cir. 6/2/10), 38 So. 3d 1246, 1253. In that case, hearsay statements were admitted, a violation of Louisiana Code of Evidence article 804. The court found that, "[b]ecause the evidence was inadmissible under La. Code Evid. art. 804, defense counsel's failure to object to the evidence constituted a deficient performance." *Id.*

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

119. Mr. Henry is serving a life without the possibility of parole sentence, and but-for this failure of counsel, he would be able to assert his arguments for the appropriateness of a new trial.

120. As to the second prong, the U.S. Supreme Court has held that the benchmark for judging a charge of ineffectiveness is whether the attorney's conduct was so ineffective that it undermined the proper functioning of the adversarial process that the trial cannot be considered to have produced a just result. *United States v. Cronic*, 466 U.S. 648 (1984); *Strickland v.*

Washington, 466 U.S. 668 (1984). Proving prejudice requires that a petitioner demonstrate that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," and a reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

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

122. Failure to object to the constitutionality of the non-unanimous verdict constituted deficient performance by defense counsel. *See e.g. Glover v. United States*, 531 U.S. 198, 203 (2001); *Gray v. Lynn*, 6 F.3d 265, 269 (5th Cir. 1993) ("the failure by Gray's counsel to object to the erroneous instruction "cannot be considered to be within the 'wide range of professionally competent assistance'"); *Summit v. Blackburn*, 795 F.2d 1237, 1244-45 (5th Cir. 1986) (counsel ineffective for failing to raise corpus delicti issue); *Henry v. Scully*, 78 F.3d 51, 53 (2d Cir. 1996) (counsel ineffective for failing to object to instruction); *State v. Jackson*, 97-2220 (La. App. 4 Cir. 5/12/99), 733 So. 2d 736, 741 (counsel ineffective for failing to request a specific instruction); *State v. Cole*, 97-348 (La. App. 3 Cir. 10/8/97), 702 So. 2d 832, 839 (counsel ineffective for failing to object to instructions); *State v. Ball*, 554 So. 2d 114, 115 (La. App. 2 Cir. 1989) (counsel in attempted murder case ineffective for failing to object to state argument and judge's erroneous instructions which told jury that intent to inflict bodily harm would support the conviction because an attempted murder requires a specific intent to kill). Even if the objection would have been rejected, counsel still had an obligation. *C.f. Engle v. Isaac*, 456 U.S. 107, 130 (1982) ("If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he

may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid.").

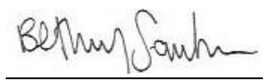
123. To the extent the State argues that the failure to challenge the constitutionality of Louisiana's non-unanimous verdict, and/or the failure to raise the issue on appeal, constitutes a procedural bar preventing Mr. Henry from raising the claim today, Mr. Henry was prejudiced from counsel's failure to raise the issue.[16]

[16] At the very least, both defense counsel and the State of Louisiana have been on notice since the United States Supreme Court opinion in *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000), that Justice Powell's view of partial incorporation had been flatly rejected and that the interpretation of the five justices who agreed that the Sixth Amendment's guarantee of the trial by jury "embrace[d] a guarantee that the verdict of the jury must be unanimous" was the applicable rule. *See Ramos*, 140 S. Ct. at 1421 (Thomas, J. concurring) ("Five justices agreed that the Sixth Amendment's guarantee of trial by jury embraces a guarantee that the verdict must be unanimous… We have accepted this interpretation of the Sixth Amendment in recent cases.") (*citing inter alia*, *Apprendi*, 530 U.S. at 477). *Apprendi* made clear that the Fourteenth Amendment due process clause applied fully to the state court, and noted that "the historical foundation for our recognition of these principles extends down centuries into the common law. … [A]s the great bulwark of our civil and political liberties,' trial by jury has been understood to require that "the truth of every accusation… should afterwards be confirmed by the unanimous suffrage of twelve of the defendant's equals and neighbours." *Id.* at 477. Justice Scalia concurred in full, but wrote additionally to emphasize "[t]he founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free." *Id.* at 498 (Scalia, J., concurring). Nor could defense lawyers, or judges in Louisiana miss Justice Scalia's observation of the core principal of our constitution, that an accused's "guilt of the crime (and hence the length of sentence to which he is exposed) will be determined beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens." *Id.* From the moment that decision was published, it was ineffective assistance of counsel, and ineffective assistance of appellate counsel, not to raise the unconstitutionality of Louisiana's provisions allowing for non-unanimous convictions.

Relief Requested

Wherefore, Mr. Henry moves this Court to (1) overturn his conviction on the grounds that conviction by non-unanimous jury is unconstitutional; (2) order a new trial in this matter; (3) grant him release on bail pending retrial; and (4) if necessary, grant any other relief this Court deems proper and necessary in the interests of justice.

Respectfully Submitted,



Jamila Johnson, LA 37953
Hardell Ward, LA 32266
Bethany Samhan, LA 39323
Promise of Justice Initiative
1024 Elysian Fields Ave
New Orleans, LA 70117
Telephone: 504-529-5955

CENTER FOR CONSTITUTIONAL RIGHTS
Angelo Guisado (N.Y. Bar No. 5182688) *
aguisado@ccrjustice.org
Pamela Spees, La. Bar Roll No. 29679
pspees@ccrjustice.org
666 Broadway, 7th Floor
New York, NY 10012
Telephone: +1.212.614.6464
Facsimile: +1.212.614.6431

William P. Quigley, La. Bar #07769
Loyola University New Orleans College of Law
7214 St. Charles Avenue
New Orleans, LA 70118
504.710.3074
quigley@loyno.edu

* *pro hac vice* motion pending

Counsel for the Petitioner

DATE: April 12, 2021