IN THE SUPREME COURT
STATE OF LOUISIANA

Docket number 2021–KP–01893

STATE OF LOUISIANA,
Applicant

V.

REGINALD REDDICK,
Respondent

Writ of Certiorari and/or Review from
Fourth Circuit Court of Appeal, No. 2021–K–0589

On writ to review the final order from the
25th Judicial District Court,
Parish of Plaquemines No. 93–3922
Hon. Michael D. Clement, Div. B

RESPONDENT'S BRIEF

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INTRODUCTION

This Court has a historic opportunity to provide a remedy for a constitutional violation of a magnitude of importance rarely before any court. For Louisiana, the significance of this case rivals a case like the storied *Brown v. Board of Education*, 347 U.S. 483 (1954)—or, if handled differently, the shameful *Plessy v. Ferguson*, 163 U.S. 537 (1896). Respondent Reginald Reddick respectfully requests a new trial, and that Louisiana courts administer justice in a manner that ensures equal justice for all.

We now know that in 1898, our Jim Crow era government intentionally enshrined into the Louisiana Constitution a practice intended to silence the voices of Black jurors and convict more Black people. It allowed our courts to convict defendants of serious crimes without the protection of a unanimous jury verdict. Almost 100 years later, Reginald Reddick—a Black man—went to trial, and the State convicted him through that very practice.

In *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), the U.S. Supreme Court held that this Jim Crow law—allowing non-unanimous jury verdicts—deprived Louisiana residents of their federal constitutional rights. Today, Mr. Reddick, and the hundreds of people similarly situated, ask this Court to right that wrong and give them fair and constitutional trials. The reasons for doing so are critical, and the path to doing so is clear.

This Court should find the *Ramos* decision retroactively applicable to Mr. Reddick under *State ex rel. Taylor v. Whitley*, 606 So. 2d 1292 (La. 1992), as the trial court did. If this Court does not find *Ramos* retroactive under *Taylor*, Mr. Reddick asks this Court do what it is empowered to do: supplement Louisiana's retroactivity test. Mr. Reddick does not suggest this lightly. But if the test Louisiana currently uses can be interpreted to leave hundreds of predominantly Black men in prison on the basis of a Jim Crow law without an opportunity for a constitutional trial, then the test is morally indefensible and Article I, Section 3 of Louisiana's Constitution demands an alteration to the test.

STATEMENT OF CASE

Two jurors voted to acquit Reginald Reddick of second degree murder. Despite significant evidence of his innocence—and the non-unanimous jury verdict—the unconstitutional system in place allowed for his conviction. This case, however, is about the wrongs that influenced his trial beginning long before his conviction in January 1997, and even long before Mr. Albert Moliere's death in 1993.

A. The history of Jim Crow jury verdicts

As one historian noted, it is said that the Confederacy lost the war but won the peace.[1] The Civil War ended April 9, 1865, but the Confederacy's supporters quickly recaptured power.[2] By the end of that year, while the states ratified the Thirteenth Amendment to the U.S. Constitution, Louisiana joined many other southern states in enacting "Black Codes."[3] Needing Black Louisianans to continue to work in farm labor in the places of their enslavement, these Black Codes criminalized Black people leaving the location of their enslavement by arresting them if they lacked stable employment or housing.[4] Additionally, Louisiana criminalized feeding or harboring a "contracted" person leaving his or her employer.[5] The need for Black suffrage in the face of the mounting legal system became paramount for many in these years of transition.

The following year, in 1866, events in New Orleans disturbed the nation when White militia killed 48 people and wounded hundreds gathered to guarantee Black men the vote.[6] The New Orleans Massacre, along with the other riots and terror throughout the United States, forced the nation to pass the Reconstruction Acts in March of 1867, which, among other changes, officially enfranchised Black men.[7] By late 1867, Louisiana reported that 84,527 Black men had registered to vote, compared to 45,189 White men in the state.[8]

Louisiana did not receive the Reconstruction Acts gracefully.[9] Rather than treating the Black population as equal, some White Louisianans turned violent.[10] Thousands of Louisianans, many former

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[1] R. 519 (*citing* Bill Quigley, *The Continuing Significance of Race: Official Legislative Racial Discrimination in Louisiana 1861 to 1974*, 47 S.U.L. REV. 1, 17 (2019)).
[2] *Id.* at 1–2.
[3] *Id.* at 12; Angela A. Allen-Bell, *How the Narrative About Louisiana's Non-Unanimous Criminal Jury System Became a Person of Interest in the Case Against Justice in the Deep South*, 67 MERCER L. REV 585, 593–94 (2016).
[4] Quigley, *supra* note 1, at 12. Additionally, Louisiana passed laws in 1865 centralizing its prison population and creating the Board of Control of the Louisiana penitentiary system. Allen-Bell, *supra* note 3, at 594.
[5] Allen-Bell, *supra* note 3, at 594.
[6] Quigley, *supra* note 1, at 14–15.
[7] *Id.* at 17.
[8] *Id.* at 18 (citing *United States v. Louisiana*, 225 F. Supp. 353, 364 (E.D. La. 1963), *aff'd sub nom. Louisiana v. United States*, 380 U.S. 145 (1965)).
[9] Reddick App. at 1, p. 52. (*State v. Maxie,* No. 13-CR-72522 (La. 11th Jud. Dist., Oct. 11, 2018)). Mr. Reddick submitted with his PCR Application the opinion from *Maxie* and the transcript from a hearing where the Court in that case considered testimony on the history and present day impact of non-unanimous jury verdicts. *See* R. 469 at fn. 11. The *Maxie* court heard testimony from Professor Thomas Aiello, Pulitzer Prize winning reporter John Simerman, and Professor Thomas Frampton. The link provided to the court for these materials is below. The documents were absent from the clerk-provided record, but Mr. Reddick submits them for court ease at Appendix 1 https://drive.google.com/file/d/1_Wzi6fuDopqcHwmhLlNRejJ96stBLfAN/view?usp=sharing.
[10] Quigley, *supra* note 1, at 14–15.

Confederate troops, joined terrorists groups and conducted a "reign of terror among the State's Black population."[11]

> In 1868, as many as 250 people, mostly African American, were massacred by white mobs in Opelousas, Louisiana to suppress black voter turnout. . . . [I]n 1868, at least thirty-five, possibly more than one hundred, African Americans were murdered by marauding whites in St. Bernard Parish, Louisiana.
>
> On April 13, 1873, a white mob in Colfax, Louisiana, attacked a courthouse full of people defending the right to vote, set fire to the building, shot down people trying to flee, and, ultimately, murdered over one hundred black men.[12]

Reconstruction lasted until 1877, but the federal government's removal of its oversight was insufficient for those who saw Black Louisianans as less than equal.[13] Lawmakers passed many laws to segregate and dehumanize the Black population, perhaps most notably the Louisiana Separate Car Act of 1890 that led to the *Plessy v. Ferguson* decision in 1896. 163 U.S. at 540. That decision infamously lent federal approval to the segregation and subjugation of Black citizens.[14]

Emboldened by the *Plessy* decision,[15] Louisiana convened a constitutional convention—with 134 all-White male delegates—to re-write the Louisiana Constitution. Convention President Ernest Benjamin Kruttschnitt made it clear from the outset that the Convention's purpose was to minimize or eliminate the political power of Black Louisianans.[16] The official journals of the proceeding of the Convention stated: "Our mission was, in the first place, to establish the supremacy of the white race in this State to the extent to which it could be legally and constitutionally done."[17] Judge Thomas Semmes, Chair of the Convention's Judiciary Committee, stated its purpose clearly: "We [are] here to establish the supremacy of the white race . . . ."[18]

Article 116 of the 1898 Louisiana Constitution, which later became Article I, § 17, was part of a much larger package of measures adopted in the Convention, all of which were enacted in furtherance of the white supremacist intent and agenda of the delegates.[19] The proponents of the non-unanimous jury

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[11] *Id.*
[12] *Id.* at 14.
[13] *Id.* at 24–25. Reddick App. 1 at p. 166:25–167:21.
[14] Quigley, *supra* note 1, at 27–28.
[15] *Id.* at 28.
[16] Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1615 (2018) (citing Official Journal of the Proceedings of the Constitutional of the State of Louisiana: Held in New Orleans, Tuesday, February 8, 1898, at 380).
[17] *Id.* (citing Official Journal, *supra* note 16, at 375).
[18] *Ramos*, 140 S. Ct. at 1417; *see also* Frampton, *supra* note 16, at 1615 n.130 ("Semmes was a leading legal figure in Louisiana and the President of the American Bar Association in 1886. During the Civil War, he helped draft Louisiana's articles of secession and served as a Louisiana senator in the Senate of the Confederate States of America.")
[19] R. 467; *see also United States v. Louisiana*, 225 F. Supp. 353 (E.D. La. 1963).

system justified its creation on the belief that Black jurors would become the champions of a Black defendant solely because of race: "He [the freed slave] does not appear to much advantage in any capacity in the courts of law . . . . As a juror, he will follow the lead of his white fellows in causes involving distinctive white interests; but if a negro be on trial for any crime, he becomes at once his earnest champion, and a hung jury is the usual result."[20]

Public sentiment suggested, even if disingenuously, that denying Black juror participation would actually be beneficial to Black Louisianans as a measure to stop lynching. Statements like "it is not to be wondered at that when such a jury sets free criminals whose guilt is established, peace-loving and law-abiding citizens rise up,"[21] and "[I]f the jury system be so reformed that a majority may bring in a verdict, that lynching will be absolutely prevented,"[22] appeared in Louisiana publications.[23]

At the time of the Convention, federal authorities were investigating the exclusion of Black jurors from Louisiana juries.[24] Federal scrutiny made an outright ban on Black jury service impracticable, but adoption of non-unanimity accomplished the same thing: it "ensure[d] that African-American juror service would be meaningless."[25] The resulting constitution was a "document includ[ing] many of the trappings of the Jim Crow era: a poll tax, a combined literacy and property ownership test, and a grandfather clause that in practice exempted white residents from the most onerous of these requirements."[26] The non-unanimous jury rule allowed Louisiana to do indirectly what it was prohibited from doing directly.[27] Numerous commentators, including U.S. Supreme Court justices, have noted that the non-unanimous jury verdict rule functioned just as its white supremacist framers intended.[28] Louisiana continued to nullify Black juror participation and convict a disproportionate number of Black defendants with non-unanimous juries.[29]

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[20] R. 467. 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, 375–76 (2012) (quoting *Future of the Freedman*, DAILY PICAYUNE, Aug. 31, 1873, at 5). *See also* Reddick App. 1 at p. 171:15–172:7.
[21] R. 525. *Put a Stop to Bulldozing*, DAILY PICAYUNE, Feb. 1, 1893, at 4.
[22] R. 468. *Remedy for Lynching*, DAILY COM. HERALD, Sept. 11, 1894, at 2.
[23] *See also* Reddick App. 1 at 175:1–193:18. Louisiana had well over 20 incidents of lynching per year through the 1890s. *See* Reddick App. at 1, p. 165:4–6.
[24] *Ramos,* 140 S. Ct. at 1394; *see also* Reddick App. at 1, p. 189:14–192:29 (describing the Congressional Record regarding "Service on Juries in Louisiana").
[25] *Ramos,* 140 S. Ct. at 1394 (quoting *State v. Maxie*, No. 13–CR–72522); *see also* Brief of Amicus Curiae JonRe Taylor in Support of Petitioner at 7–13, *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021) (describing Ms. Taylor's experience as a dissenting vote on the Edwards jury).
[26] *Ramos*, 140 S. Ct. at 1394.
[27] *See* Reddick App. 1 at 200:31–204:30.
[28] *See, e.g.*, Smith and Sarma, *supra* note 20, at 376–77; *see also* Frampton, *supra* note 16, at 1599; Allen-Bell, *supra* note 3, at 606–07.
[29] *Maxie*, No. 13–CR–72522, at Reddick App. at 1, p. 63–64 ("[T]he comparative disparities are statistically significant and startling [;] African-American jurors are casting empty votes 64 percent above the expected

Delegates at the 1973 Constitutional Convention debated a fix for the non-unanimous jury provision in Louisiana's constitution. The South found itself at a racial crossroads in the early 1970s.[30] The Convention sought in large part to roll back some of the unwieldiness of the Louisiana Constitution, and not necessarily to enact sweeping change.[31] In the debates about the non-unanimous jury verdict provision, delegates explicitly recognized that non-unanimous juries inflicted disparate impacts on minority defendants.[32] Cognizant of the discriminatory impact, the delegates chose to continue that impact, albeit with one change: they increased from nine to ten the number of jurors who would need to find guilt in order to convict.[33] In the years that followed, Louisiana would continue convicting primarily Black defendants and silencing the voices of primarily Black jurors.[34]

B. Reginald Reddick's Jim Crow jury conviction.

In January of 1997, Reginald Reddick went to trial for the second degree murder of Albert Moliere.[35] Mr. Moliere died from a gunshot wound to his left eye in the early morning hours of August 16, 1993.[36] Medical examiners determined the killer fired the gun from within two feet of Mr. Moliere's head.[37] The police recovered 13 latent fingerprints from outside the car and several prints from inside the car on a cup and beer can.[38] These prints were tested against Mr. Reddick, and Mr. Reddick only.[39] None of these prints matched Mr. Reddick and there was no DNA evidence.[40]

In fact, officers linked no physical evidence collected at the scene of Mr. Moliere's death to Mr. Reddick.[41] The scene of Mr. Moliere's death contained a lot of blood; enough blood was present that the

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outcome[.]"); *see* also *Ramos*, 140 U.S. at 1417–18.
[30] Reddick App. at 1, p. 206:17–209:11.
[31] *Id*., p. 218:22–219:12.
[32] *Id.*, p. 80; 217:1– 218.
[33] *Id.*, p. 73–75.
[34] Dan Swenson, *Understanding Louisiana's nonunanimous jury law findings*, THE ADVOCATE (Apr. 1, 2018), https://www.nola.com/news/courts/article_96d53268-9b2b-5343-b08d-1b7bdbcd557f.html (summarizing *The Advocate's* five-part investigative series on the practice, reporting that won the staff of *The Advocate*—including John Simerman, Jim Mustian, Jeff Adelson, and Gordon Russell—the 2019 Pulitzer Prize).
[35] R. 1600.
[36] R. 1624–25.
[37] R. 1704.
[38] R. 1672; R. 1716; R: 1723; R. 1726.
[39] The State's only alleged witness to the death of Mr. Moliere, Mr. Darryl Williams, stated that he was in the car at the time of the shooting with Mr. Reddick and a fourth individual. R. 1816–1820. Although the car was only a two-door car, and four people were alleged to be in the car, no prints were found in the back seat. R. 1630. The police did not check the prints found against Mr. Williams or Mr. Denair Riley, the alleged fourth passenger in the car at the time of Mr. Moliere's death. R. 1673–74.
[40] *Id.*
[41] R. 1674–75. ("Q: None of the physical evidence which you personally collected implicates Reginald Reddick to this crime, is that correct? A: I got a statement that says that he committed this murder. Q: The physical evidence. You collected no physical evidence - - A: That is correct. Q: To your knowledge, Wayne Seiffert collected no physical evidence linking Mr. Reddick to this crime. A: No, sir.")

police assumed whoever committed the murder would have blood on their person.[42] Indeed, the shooter tracked blood out into the parking lot.[43] Officers did not find or connect any blood to Mr. Reddick.[44] A witness who saw Mr. Reddick immediately after the alleged crime testified there was no blood on him.[45] Police never sought a search warrant to look for evidence of the crime or a weapon in the home where Mr. Reddick was staying, despite executing an arrest warrant there the day after the crime.[46]

The State wrongly suggests that police discovered some of Mr. Moliere's personal effects in front of where Mr. Reddick was staying.[47] In fact, officers retrieved those items only 350 yards from the crime scene, and not in front of the home—along a road that half the residents of Davant could have taken to flee the scene.[48] The discovery of evidence led police to rent a boat and a metal detector to search for a gun along the levee.[49] Officers found no gun during their thorough multi-day search.[50]

Four months after Mr. Moliere's death, a child found a handgun lying openly on the pavement 263 yards from the crime scene.[51] The crime lab could not connect the weapon to Mr. Reddick[52] or to the death of Mr. Moliere.[53] It was seriously damaged, and the damage was not the kind that would be caused by being in the water for four months.[54]

At trial, seven individuals gave testimony of what they witnessed the night of Mr. Moliere's death.[55] On August 15, 1993, Mr. Moliere had been buying drinks using a wad of cash in his shirt pocket for many hours at Alice's Sweet Shop.[56] By the end of the night, he was sleeping on the bar.[57] None of

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[42] R. 1677–78; R. 1704. ("Q: So, whoever committed this murder had blood on them when they left that car, correct? A: I would assume that they would have, sir.")
[43] R. 1722.
[44] R. 1678; R. 1724.
[45] R. 1801. Mr. Reddick had been spending the weekend with his aunt. His cousin, who had been a disc jockey at the bar that night, saw him come home around 12:30 a.m. R. 1801. He was making himself a hamburger. He did not observe any blood on Mr. Reddick, but Mr. Reddick was sweaty that August night. *Id*. He recalls Mr. Reddick saying he had run some of the way home. R. 1802.
[46] R. 1674.
[47] State Br. at 1. Mr. Reddick lived with his aunt since the time he was five years old. R. 1805. He had been living with his sister in New Orleans, and arrived at his aunt's house to visit on August 15, 1993. *Id.* at R. 1805–06.
[48] R. 1647–48.
[49] R. 1717.
[50] R. 1730; R. 1736.
[51] R. 1707–10; R. 1725. Note, this was only 290 feet from where the personal effects had been found four months earlier. R. 1725.
[52] R. 1730. The best police could do was describe the inscription of what "appeared to be" the letter "R" on each side of the gun. R. 1122. It is not certain whether this was aftermarket.
[53] R. 1763.
[54] R. 1768–73.
[55] Only six of the seven witnesses' testimony starts at Alice's Sweet Shop: Deborah Isidore (starting at R. 1739); Edwin Bolton (starting at R. 1774); Deona Sims (starting at R. 1781); Kevin Encalade (starting at R. 1793); Denair Riley (starting at R. 1837); Darren Narcise (starting at R. 1843).
[56] R. 1780.
[57] R. 1795–96.

the testifying witnesses saw any interaction between Mr. Reddick and Mr. Moliere in the bar.[58] Near closing time, employees at the bar tried to find Mr. Moliere a ride, but he insisted on driving.[59] At some time between 11:45 p.m. and midnight, the employees stood at the bar door after closing and watched him to make sure he made it to his car.[60] They saw him drive out of the empty parking lot alone.[61]

Mr. Moliere's niece, Ms. Deborah Isidore, saw her uncle's car driving erratically on the stretch of road leading away from Alice's Sweet Shop.[62] Her passenger reported Mr. Moliere drove extremely slowly that night.[63] Believing Mr. Moliere to be intoxicated, Ms. Isidore began to follow Mr. Moliere's car.[64] She observed her uncle driving with a single passenger.[65] The car pulled into the parking lot where officers would find Mr. Moliere's dead body several hours later.[66] While she could not identify who the passenger was, she could tell that the passenger appeared tall; Ms. Isidore does not consider Mr. Reddick to be tall.[67]

Ms. Isidore testified that Mr. Darryl Williams, the State's only alleged eyewitness to Mr. Moliere's death, is tall.[68] Mr. Williams—a 6'3" "slow" and highly suggestable 19-year-old—told four different accounts of what happened that night.[69] None of his accounts matched any of the other accounts from the witnesses.[70] The jury had serious reasons to distrust Mr. Williams' account. He testified that Mr. Reddick, Mr. Denair Riley, and he were in the car at the time of the murder.[71] Evidence at trial strongly demonstrated that Mr. Riley left the bar with others and was not in the vicinity at the time of Mr. Moliere's murder.[72] In fact, the jury learned that Mr. Riley successfully sued the sheriff's office for false arrest when they arrested him as an accessory based on the flawed account of Mr. Williams.[73]

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[58] R. 1799. *See also* testimony at *supra* note 55.
[59] R. 1777; 1797.
[60] R. 1797.
[61] *Id.*
[62] R. 1745–46.
[63] R. 1786.
[64] R. 1745–46.
[65] R. 1746.
[66] R. 1748.
[67] R. 1746; R. 1751. Mr. Reddick is 5'4". *See* R. 175.
[68] R. 1751.
[69] R. 1663–64; R. 1804. R. 1829; R. 1832. *See* also R. 1679–78 (detailing the transcripts of the police interviews with Darryl Williams, as almost exclusively leading and heavily influenced by officers.)
[70] R. 1826–30. Mr. Williams' statements concerning the night of Mr. Moliere's death changed repeatedly. R. 1826–30. Mr. Williams' story grew from initially saying he knew nothing of the event, to saying he saw Mr. Reddick needing a ride. R. 1826–27. Then Mr. Williams' story changed to place Mr. Reddick in the car with Mr. Moliere. R. 1827. Mr. Williams' story again changed, now placing himself in the car with Mr. Reddick and Mr. Moliere and being present for the murder. R. 1828. Lastly, the story changed again to placing Mr. Denair Riley in the backseat with Mr. Williams at the time of Mr. Moliere's death. R. 1828.
[71] R. 1816–17.
[72] R. 1838–39.
[73] R. 1842–43.

Two jurors did not believe the State met its burden of proof to convict Mr. Reddick.[74] Due to Louisiana's Jim Crow jury law, Mr. Reddick was nonetheless found guilty and sentenced to life in prison.

SUMMARY OF ARGUMENT

The *Ramos* decision has a significant impact on Louisiana and nationwide. The new rule it espoused is not merely about requiring unanimity in juries; it ended what some have called the last Jim Crow law in Louisiana. The new rule requires that juries reach constitutional verdicts, an essential part of a fair and accurate trial that had been missing from Louisiana for more than 120 years. It further required deliberation considering the viewpoint of all jurors. It ended a practice that has been a factor in numerous confirmed wrongful convictions. It further exposed a glaring weak spot in the credibility of the courts. In many ways, *Ramos* parallels *Gideon v. Wainwright,* 372 U.S. 335 (1963), in that it helps to ensure that a fair and accurate verdict can be reached in criminal trials.

The trial court properly used the *Teague v. Lane*, 489 U.S. 288 (1989), standard adopted by this Court in *Taylor*, 606 So.2d at 1296. Under that standard, "a new rule should be applied retroactively if it requires the observance of those procedures that are implicit in the concept of ordered liberty." *Id.* at 1299. "This exception is reserved for watershed rules of criminal procedure and rules which will alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction." *Id.* (internal quotation marks omitted). In other words, a rule is watershed if it calls into question the fundamental fairness and accuracy of convictions. ***Ramos* is watershed.** Because *Ramos* is watershed, this Court should not consider the burden on the State or interests of finality. It must vacate the conviction and allow those with final convictions a new trial.

In rejecting *Ramos'* retroactivity for *federal collateral review*, the U.S. Supreme Court crucially left the door open to this Court finding *Ramos* retroactive. *Edwards v. Vannoy*, 141 S. Ct. 1547, 1559, 1559 n.6 (2021) ("States remain free, if they choose, to retroactively apply the jury-unanimity rule as a matter of state law in state post-conviction proceedings.") (citing *Danforth v. Minnesota*, 552 U.S. 264, 282 (2008)). The State would have this Court forego the inquiry encouraged by the U.S. Supreme Court and instead simply mimic *Edwards*, which speaks only to federal collateral review. In doing so, the State asks this Court to end the watershed test for state collateral review. Such an approach would leave hundreds of individuals convicted by Jim Crow juries without any remedy.

[74] R. 339.

If the State is going to change the retroactivity test, it should do so in a way that affords a remedy to Mr. Reddick—an innocent man who remains imprisoned because of Louisiana's Jim Crow jury law. A retroactivity standard that cannot account for the healing necessary in Louisiana to address the injustices inflicted by Jim Crow violates the very principles behind Louisiana's Individual Dignity Clause. Mr. Reddick asks this Court to consider adding to *Taylor*, if the Court deems it necessary to afford relief, so that Jim Crow laws are not allowed to continue to inflict harm in the 21st century.

ARGUMENT

A. *Ramos* is different from *all* of the cases that came before it.

In *Ramos*, the U.S. Supreme Court confirmed that the Sixth Amendment right to a jury trial requires a unanimous jury verdict to convict a defendant of a serious offense in state trials. 140 S. Ct. 1390. The *Ramos* decision's effect is momentous and sweeping for the fairness and accuracy of trials in Louisiana. No longer will Louisiana convict individuals when some jurors find that the State failed to meet its burden of proof.

1. *Ramos* ended "an engine of discrimination."

Louisiana and Oregon were the only states to convict people for serious offenses without a unanimous jury verdict. *Ramos*, 140 S. Ct. at 1394.[75] In addition to being inconsistent with the vast majority of criminal procedure practices across the country, Louisiana's non-unanimous jury rule was born from the Jim Crow era. *Id.* The *Ramos* court explained that "[w]ith 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.* (internal quotation marks omitted). Louisiana enacted the law to silence the voices of jurors and convict more Black people. *Id.* at 1417–18 (Kavanaugh, J., concurring). Not surprisingly, the practice operated as designed. *Id.*[76] This case is about whether the historic decision announced in *Ramos* will apply retroactively to the people who continue to sit in prison without a constitutional conviction, based on a Jim Crow law.

[75] Only Louisiana sentenced people to life without the possibility of parole with non-unanimous jury verdicts, as Oregon prohibited non-unanimous jury verdicts for aggravated murder and murder 1. *See* OR. CONST. art. I, § 11; OR. REV. STAT. §§ 136.450(1), 163.105, 163.07.

[76] Despite the State's contention that there is no evidence in the record of the disparate racial impact, there are hundreds of pages that were provided to the court and the district attorney of the *Maxie* transcript. Additionally, the *Ramos* court had access to the same materials, which supported its assertion that the law operated as intended.

a. It is indisputable Louisiana's non-unanimity law emerged from delegates' racist intent.

There can be no doubt that the constitutional and statutory provisions allowing for non-unanimous jury verdicts were expressly designed to discriminate against Black residents on the basis of race. Every Louisiana constitution prior to 1898 included a right to a unanimous jury trial in step with the right guaranteed in the Sixth Amendment.[77] While the U.S. Supreme Court decided *Ramos* under the Sixth Amendment, as incorporated to the states in the Fourteenth Amendment, there is also no denying that at its core, the decision is a strong statement on racial injustice.

The Court described the origin of the Louisiana non-unanimity laws at a constitutional convention intended to "establish the supremacy of the white race." *Ramos*, 140 S. Ct. at 1394 (internal quotation marks omitted). The justices were not subtle about the role race played in Louisiana's non-unanimity practice. How could they be? The evidence overwhelmingly supported the Court's conclusion that the delegates intended to dilute the influence on jurors "of racial, ethnic and religious minorities" and "to ensure that African-American juror service would be meaningless" *Id*. In short, the *Ramos* decision ended "an engine of discrimination against Black defendants." *Id.* at 1418 (Kavanaugh, J., concurring). In light of the racist origins, "it is no surprise that non-unanimous juries can make a difference" and that "then and now" they can "negate the votes of black jurors, especially in cases with black defendants or black victims." *Id.* at 1417–18. Simply put, the unanimity rule announced in *Ramos* helps prevent "racial prejudice" from resulting in wrongful convictions. *Id.* at 1418–19.

The new rule announced in *Ramos* is in direct response to explicit racism, where many other decisions announcing new rules resulted from cases that only had atmospheric racism. For instance, *Duncan v. Louisiana*, 391 U.S. 145 (1968), involved a 19-year-old Black teenager who became involved in an argument with a group of White teenagers in the early days of integration at a Plaquemines Parish high school. *Id.* at 147. Mr. Duncan returned to his car and was trying to leave when he made physical contact with the elbow of one of the White teens. *Id.* Police arrested him and charged him with simple assault—a misdemeanor in Louisiana that carries up to two years. *Id.* at 146. Louisiana law denied him a jury, and after a bench trial, the judge sentenced him to 60 days. *Id.* The U.S. Supreme Court held that the Sixth Amendment entitled Mr. Duncan to the option of a jury trial, but despite the clear racial overtones

[77] *See* LA. CONST. OF 1812, art. 6, § 18; LA. CONST. OF 1845, Title VI, art. 107; LA. CONST. OF 1852 Title VI, art. 103; LA. CONST. OF 1864 Title VI, art. 105; LA. CONST. OF 1868 Title I, art. 6; LA. CONST. OF 1879 art. 7.

of the case, the Court did not state or suggest that Louisiana had deprived him of that jury trial based on lawmakers' racist intent; the racial history is atmospheric in the *Duncan* decision. In *Ramos*, it is central.

b. Jim Crow jury verdicts are racially discriminatory.

Non-unanimous jury verdicts have operated as designed. As provided to the trial court, researchers have studied the racial disparity associated with non-unanimous Jim Crow juries. In *State v. Maxie*, 13-CR-72522 (La. 11th Jud. Dist. Oct. 11, 2018), the court accepted evidence presented by Professor Thomas Frampton. Reddick App. at 1, p. 63–64. Professor Frampton analyzed a dataset of 2,280 Louisianan juror votes, and from that dataset he found that Black jurors cast 31.3% of the overall votes but represented 51.2% of the silenced, or "empty," jury votes. Reddick App. at 1, p. 64. Based on the number of White juror votes, which made up 64% of the votes cast, White jurors made up only 43% of the silenced or "empty" jury votes. *Id.* This means that at an absolute level, Black jurors were more likely to have their votes disregarded to a statistically significant degree.

The *Maxie* court's analysis on the racial disparity in defendants convicted by non-unanimous verdicts—an analysis the trial court had before it in this case—showed that Louisiana convicted Black defendants by non-unanimous juries 43% of the time, and White defendants 33% of the time. *Id.* at p. 24. Comparing the rates of conviction by non-unanimous verdicts, the *Maxie* court found that Black defendants are 30% more likely to be convicted by non-unanimous juries than White defendants are. *Id.*

c. The State seeks to uphold the Jim Crow impacts *Ramos* criticized.

The State takes one line from Mr. Reddick's post-conviction relief application out of context to suggest that there was no racial taint in the 1973 Louisiana Constitutional Convention, and unconvincingly asserts that this convention cleansed the Jim Crow jury verdict system. State Br. at 23–27. This argument might have succeeded pre-*Ramos*, but, as Justice Alito made clear, a re-adoption of a law cannot cleanse the original racist intent of non-unanimous juries:

> Nevertheless, the provision's origin is relevant under the decision we issued earlier this Term in *Ramos* v. *Louisiana*. The question in *Ramos* was whether Louisiana and Oregon laws allowing non-unanimous jury verdicts in criminal trials violated the Sixth Amendment. The Court held that they did, emphasizing that the States originally adopted those laws for racially discriminatory reasons. The role of the Ku Klux Klan was highlighted.
>
> I argued in dissent that this original motivation, though deplorable, had no bearing on the laws' constitutionality because such laws can be adopted for non-discriminatory reasons, and "both States readopted their rules under different circumstances in later years." But I lost, and *Ramos* is now precedent. If the original motivation for the laws mattered there, it certainly matters here.

Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2267–68 (2020) (Alito, J., concurring) (internal citations omitted) (detailing the origin of the provision at issue as one spawned by virulent prejudice against immigrants, particularly Catholic immigrants). The list of cases that the State provides from other federal circuit courts are now irrelevant.[78]

Regardless, the debate at the 1973 Louisiana Constitutional Convention about readopting the non-unanimous jury provision was not race-neutral. In *Maxie*, historian Thomas Aeillo testified about the Convention. The *Maxie* court held "[h]is testimony also persuasively showed that the 1973 convention was not free from racial consideration and that the delegates at the convention were keenly aware of racial tensions when drafting the new constitution. His testimony provides the historical basis for the Court's determination that the non-unanimous jury verdict scheme in Louisiana was motivated by invidious racial discrimination." Reddick App. at 45. Here, the trial court also had access to the testimony and the court's conclusion. *Id.* On the convention floor, Delegate Roy argued that the non-unanimous system was discriminatory, especially against minority defendants, but that increasing the majority required from 9-3 to 10-to-2 could lessen the discrimination. Reddick App. at 1, p. 21.

"[T]he non-unanimous jury is today the last of Louisiana's Jim Crow laws." *Ramos*, 140 S. Ct. at 1418 (J. Kavanaugh concurring) (quoting T. Aiello, *Jim Crow's Last Stand: Nonunanimous Criminal Jury Verdicts in Louisiana* 63 (2015) (written by the historian from *Maxie*)). That the State still seeks to defend the last of Louisiana's Jim Crow laws and the pernicious effects the non-unanimity rule had on Louisianans is shocking to the concept of ordered liberty and fundamental fairness.

2. *Ramos* ensured that convictions have lawful verdicts.

The *Ramos* Court proclaimed that a "verdict, taken from eleven, [i]s no verdict at all." 140 S. Ct. at 1395. From 1898 until the U.S. Supreme Court intervened, Louisiana had been giving the appearance of a jury system. There would be jury selection. That jury would hear the evidence. A judge would instruct that jury. They would deliberate. At that point, Louisiana departed from 48 other states. Louisiana allowed a conviction even when the jury did not return a verdict suitable for a constitutional conviction. Nothing could be more central to the accuracy and fairness of a jury trial than having a lawful jury verdict prior to a conviction.

[78] These cases are voting rights cases, and most relate to felon disenfranchisement, a practice that exists in most states across the country.

Ramos is not, as the State suggests, merely about *having* a jury. State Br. at 8–9. In *Duncan*, the issue was the right to choose a jury trial over a judge trial: a choice between two qualified factfinders. 391 U.S. 145. No one doubts that judges can also serve in the role of factfinder, and that is why our system upholds a defendant's right to choose. But in *Ramos*, there was no lawful verdict from any factfinder, because a non-unanimous verdict is "no verdict at all." Instead, the factfinder came back *without a verdict* and the court considered it a *guilty* verdict.

Further, *Ramos* focuses on the critical moment of deciding guilt or innocence. For that reason, *Ramos* is unlike *Mills v. Maryland*, 486 U.S. 367 (1988), *Ring v. Arizona*, 536 U.S. 584 (2002), and *Caldwell v. Mississippi*, 472 U.S. 320 (1985), because those cases addressed the fairness of sentencing after a jury had unanimously found guilt. As the U.S. Supreme Court explained in *Teague*, watershed rules must be about a jury's determination about guilt or innocence, not the sentencing phase of trial. 489 U.S. at 313; *see also Edwards*, 141 S. Ct. at 1547 (Kagan, J., dissenting) ("*Teague* itself explains why sentencing procedures are not watershed: A watershed rule, the Court said there, must go to the jury's 'determination of innocence or guilt.'"). Therefore, the cases considering retroactivity of *Mills*, *Ring*, and *Caldwell* have little applicability for this Court.[79]

Ramos' rule that no one may be convicted of a serious offense in the absence of a lawful verdict is also unlike the rule announced in *Batson v. Kentucky*, 476 U.S. 79 (1986)—that attorneys may not exercise racially discriminatory preemptory challenges to jurors. While *Batson* certainly changed how jury selection occurs, its relationship to guilt and innocence is speculative and limited. *See Allen v. Hardy*, 478 U.S. 255, 259 (1986) ("By serving a criminal defendant's interest in neutral jury selection procedures, the rule in *Batson may* have some bearing on the truthfinding function of a criminal trial.") (emphasis added). Moreover, while race is central in *Batson*, unlike in *Duncan*, *Batson* speaks to the federal equal protection right of the *juror* to serve on a jury, and it is on the juror's behalf that parties raise *Batson* challenges. *Batson*, 476 U.S. at 87. Compare *Ramos*, where the jury has heard all the evidence, been instructed on the law, weighed the evidence, and then returned to the courtroom unable to agree on an appropriate determination of guilt or innocence. The defendant's rights are the rights that the State violates with non-unanimity. *Batson's* front-end rule is far-removed from the verdict; it happens before the State presents any evidence. *Ramos'* rule is inseparable from the most critical moment in a trial—the verdict.

[79] *See also Schriro v. Summerlin,* 542 U.S. 348 (2004) (finding *Ring* not retroactive); *Sawyer v. Smith*, 497 U.S. 227 (1990) (finding *Caldwell* not retroactive); *Beard v. Banks*, 542 U.S. 406, 417 (2004) (rejecting retroactivity of *Mills v. Maryland*, 486 U.S. 367 (1988)).

Ramos is rooted in the verdict phase. By contrast, cases like *Crawford v. Washington,* 541 U.S. 36 (2004), do not meet the standards for retroactivity because they are not rooted in the verdict phase. Mr. Crawford went to trial for a homicide, and the trial court allowed prosecutors to offer Mr. Crawford's wife's out-of-court statement as evidence, despite the fact that Washington, like many states, prohibits spouses from testifying against one another. *Id.* at 38–40. The Washington Supreme Court determined that the function of evidentiary rules was to exclude evidence with insufficient indices of trustworthiness. *Id.* at 68. After using a nine-part test to examine the trustworthiness of Mrs. Crawford's statement to police, the court found sufficient indices to admit the evidence. *Id.* The U.S. Supreme Court reversed on Confrontation Clause grounds, finding that the right to confront a witness is a matter of fairness, but has no fundamental role in the resulting verdict. [80] *Id.* The Confrontation Clause just does not reach the point of an impermissibly large risk of an inaccurate conviction. *Whorton v. Bockting*, 549 U.S. 406, 420–21 (2007). Any comparison to *Ramos* therefore fails.

Further, consider cases involving the establishment of the burden of proof, which are inextricably entwined with the verdict. *In re Winship*, 397 U.S. 358 (1970), is an example of a case that announced a new rule on what the burden of proof in criminal cases must be, and the U.S. Supreme Court gave it complete retroactive effect. *See Ivan V. v. City of New York*, 407 U.S. 203, 204 (1972) (per curiam).

When a new rule merely seeks to resolve confusion surrounding the primary rule, the courts see these new rules as less fundamental. *See, e.g.*, *Falconer v. Lane*, 905 F.2d 1129, 1136 (7th Cir. 1990) (finding procedural due process issues where the jury may have been left with the false impression that it could convict Ms. Falconer of murder even if she possessed one of the mitigating states of mind described in the voluntary manslaughter instruction);[81] *see also Cage v. Louisiana*, 498 U.S. 39, 40 (1990) (finding a jury instruction about "grave uncertainty" and "moral certainty" "taken out of context, might overstate the requisite standard and confuse the jury");[82] *Taylor*, 606 So. 2d at 1299 ("[*Cage*] set forth a new rule designed to give guidance to these courts in the future and eliminate the possibility of juror confusion. It did not attempt to create a new procedure 'without which the likelihood of an accurate conviction is

[80] The State also references *O'Dell v. Netherland*, 521 U.S. 151 (1997), which rejects retroactivity of *Simmons v. South Carolina*, 512 U.S. 154 (1994), another penalty phase case about knowing whether someone would be subject to life or life without the possibility of parole when deciding a sentence.
[81] *Gilmore v. Taylor*, 508 U.S. 333 (1993) (rejecting that a rule about clarity of jury instructions met the watershed test).
[82] While the U.S. Supreme Court rejected retroactivity of *Cage* in *Tyler v. Cain*, 533 U.S. 656 (2001), it did so under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and declined to review retroactivity.

seriously diminished.'"). *Ramos* does not seek to avoid confusion in the instruction stage, but seeks to stop convictions in the absence of lawful verdicts.

In summary, two parts of a criminal case are sacrosanct: (1) the opportunity for a meaningful trial before a conviction, and (2) the factfinder's determination of guilt or innocence. Without *Gideon's* guarantee to a right to counsel, we can have no confidence that the State proffers evidence fairly or that a defendant is familiar enough with the law to know what evidence to present; there is no meaningful proceeding before a conviction. Without *Winship*, the factfinder cannot come to a final determination of guilt or innocence. Both the *Gideon* and *Winship* guarantees are fundamental to fairness and accuracy such that the accused needed an opportunity to raise those new rules past the date of finality. The guarantee of *Ramos* is equally fundamental. Without *Ramos*, there is an impermissible risk of conviction where the jury *did not come to a verdict at all*.

3. *Ramos* operates to prevent inaccurate convictions.

Non-unanimous jury convictions systemically discounted the opinions of jurors of color, convicted many Black defendants, and also contributed to a significant number of wrongful convictions, some of which later led to exonerations.[83] An Orleans Parish judge recently exonerated Jermaine Hudson after he spent more than 20 years in prison for a crime that never occurred.[84] The State convicted Mr. Hudson of armed robbery and sentenced him to 99 years.[85] In early 2021, his alleged victim came forward and submitted an affidavit that he had fabricated the entire story because he did not want to admit to his father that he had spent his paycheck on drugs.[86] Two jurors had held serious reservations about the account provided by the alleged victim, but the non-unanimity provision silenced their voices.[87] The result was Mr. Hudson's wrongful conviction—and a 22-year incarceration.[88] Mr. Hudson's case is not unique: the Innocence Project New Orleans submitted briefing to this Court on February 22, 2022 about the inaccuracy of non-unanimous jury convictions leading to exonerations.

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[83] The trial court had before it the amicus brief from the Innocence Project New Orleans from *Ramos v. Louisiana.* R. 473, fn. 14.
[84] Matt Sledge, *New Orleans man freed after accuser says he fabricated robbery: 'I have been tortured by the lie I told*', THE ADVOCATE (Mar. 30, 2021), https://www.nola.com/news/courts/article_29f8c3e8-90e5-11eb-98a0-dff328f992d5.html**.**
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] Mr. Hudson also was awarded $330,000 from the State for his wrongful conviction. Undoubtedly, due to the inaccuracies of non-unanimous convictions, there are more wrongfully convicted individuals still incarcerated today who might someday be entitled to comparable compensation. Failing to provide a path toward fair trials for these individuals only serves to increase those potential costs.

More than half of Louisiana's exonerations from the relevant pool of cases involved wrongful convictions decided by non-unanimous juries. Of Louisiana's 70 total confirmed wrongful convictions, 39 resulted from a jury trial where a non-unanimous jury verdict could issue.[89] *See* Amicus Curiae Innocence Project New Orleans In Support of Reginald Reddick, p. 1, 3. And of those 39 cases, 20 were non-unanimous. *Id.* Since it is estimated that 40% of jury trials in Louisiana result in non-unanimous jury verdicts, the exoneration statistics are significant. *See* Swenson, *supra* note 34 ("[during the six-year research window], roughly 40 percent of the people who are convicted after jury trials in Louisiana are convicted by nonunanimous juries"). This means a person is more likely to be wrongfully convicted by a non-unanimous jury verdict than by a unanimous jury. Despite this evidence, the State continues to misunderstand the role that the non-unanimous jury verdict has in wrongful convictions.

Concerns of accuracy also led to the retroactive application of a 1980s' decision finding six-person non-unanimous jury verdicts unconstitutional. 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, and a jury poll showed that the jury voted five-to-one to convict. *Id.* Mr. Burch 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. 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. 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" to those on direct appeal. *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.").[90]

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[89] Of the remaining 31, some were pleas, and others were first-degree murder convictions—neither of which can result from a non-unanimous jury verdict.

[90] The U.S. Court of Appeals for the Fifth Circuit, relying on *Brown*, applied *Burch* retroactively to a final conviction on federal collateral review. *Atkins v. Listi*, 625 F.2d 525, 525–26 (5th Cir. 1980) (conviction became final in 1979 before 1980 *Burch* decision).

B. The trial court correctly found *Ramos* retroactive under *Taylor*.

The trial court and the Fourth Circuit Court of Appeal disagree with the State's argument that there are no watershed rules of criminal procedure. *See* State Writ App. Ex. 5 p. 117–18 (trial court per curiam) ("The right to a jury trial, which includes the requirement of unanimity, is as fundamental as the right to counsel recognized in *Gideon* which *Teague* found was a watershed rule of criminal procedure."); *see also Reddick v. State,* 2021-0589 (La. App. 4 Cir. 11/18/21) (denying the State's writ); *State v. Waldron*, 2021-0512 (La. App. 4 Cir. 01/24/22) ("non-unanimous jury verdicts created an unacceptable risk and consequence of inaccurate, wrongful convictions."); *State v. Melendez*, 2021-0597 (La. App. 4 Cir. 12/09/21). This Court need not follow *Edwards* and need not keep *Taylor*, but in the face of all the ways that *Ramos* is different, and considering what it means for restoring justice, this Court should find *Ramos* a watershed decision *for Louisiana*.

1. Louisiana presently uses *Taylor* to decide retroactivity.

For more than 165 years, the courts recognized a general rule of retroactive application for the constitutional decisions of the U.S. Supreme Court in civil and criminal cases. *See, e.g.*, *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) ("if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied."); *see also Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543 (1941); *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting) ("Judicial decisions have had retrospective operation for near a thousand years."); *Robinson v. Neil*, 409 U.S. 505, 507 (1973).[91] "Beginning in the 1960s, however, the [U.S.] Supreme Court began to limit certain decisions to prospective application, in part, due to its reluctance to apply the Warren Court's criminal procedure decisions retroactively, potentially freeing countless defendants." *Quantum Res. Mgmt., L.L.C v. Pirate Lake Oil Corp.*, 2012–1472 (La. 03/19/13); 112 So. 3d 209, 215.[92] In 1965, for the first time, the U.S. Supreme Court held that courts *could* deny retroactive effect to a newly announced rule of criminal law if it was in the interest of justice. *Linkletter v. Walker*, 381 U.S. 618, 636 (1965). In 1987, the U.S. Supreme Court determined that courts could *never* deny retroactivity to cases on direct review. *Griffith v. Kentucky*,

[91] The courts drew no distinction between civil and criminal litigation. *Linkletter v. Walker*, 381 U.S. 618, 627 (1965).
[92] Citing Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach,* 110 HARV. L. REV. 1055, 1059 (1997).

479 U.S. 314, 328 (1987) ("[A] new rule . . . applie[s] retroactively to all cases, state or federal, pending on direct review or not yet final.").

The U.S. Supreme Court then decided *Teague v. Lane* in 1989, which limited the criminal procedure decisions that would be retroactive. At the time, prior to the stringent procedural and substantive restrictions on federal habeas review imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the Court was concerned with the hefty costs of frequent federal collateral attack on final judgments. *See Teague*, 489 U.S. at 309–10; *see also McCleskey v. Zant*, 499 U.S. 467, 491 (1991) ("Federal collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes."). In 1992, Louisiana adopted *Teague's* test for determining whether decisions affecting new constitutional rules on criminal procedure would be retroactively applied to cases on state collateral review. *See Taylor*, 606 So. 2d at 1296; *see also State v. Waldron*, No. 2021-0512 (La. App. 4 Cir. 01/24/22) ("Louisiana has not abandoned the *Teague* rule and watershed exception for retroactivity.").

Teague requires retroactive application of a new rule if it is a "watershed rule[] of criminal procedure" that "implicate[s] the fundamental fairness [and accuracy]" of the criminal proceeding. 489 U.S. at 311–12. Under *Teague*, the courts do not balance finality concerns or burdens on the State like courts had done under the *Linkletter* retroactivity standards. *Id.* at 309.[93]

2. *Ramos* meets the *Taylor* standard.

For the reasons detailed in Section A above, the *Ramos* non–unanimity rule is watershed. It is the only case since *Gideon* to fundamentally change what it means to have a trial in Louisiana. For 120 years, Louisiana deprived its residents of the benefits conferred to nearly every other U.S. resident. Never before has a case involved such a long-standing and intentional deprivation of a constitutional right in the face of such clear evidence of that deprivation.

Nearly every opinion concerning retroactivity, including *Edwards*, recognizes that the new rule announced by *Gideon*—guaranteeing the right to counsel—would be watershed and would need to be retroactive if it were a new rule today.[94] In *Gideo*n, the Court ruled that the Sixth Amendment right to

[93] The *Teague* rule reflects the limited "purpose of federal habeas corpus [] to ensure that state convictions comply with the federal law in existence at the time the conviction became final, and not to provide a mechanism for the continuing reexamination of final judgments based upon later emerging legal doctrine." *Sawyer v. Smith,* 497 U.S. 227, 234 (1990).

[94] *See Gilmore v. Taylor*, 508 U.S. 333, 364 (1993) ("Although the precise contours of [the second *Teague*] exception may be difficult to discern, we have usually cited *Gideon*"); *see also O'Dell v. Netherland*, 521 U.S. 151, 167 (1997) ("Unlike the sweeping rule of *Gideon*, which established an affirmative right to counsel in all

counsel applies to the states through the Fourteenth Amendment. 372 U.S. at 342. It is a hallmark of what makes a watershed rule, a bedrock principle of our criminal justice system: the accused shall have counsel. In so holding, the Court overruled *Betts v. Brady*, 316 U.S. 455 (1942), which failed to recognize that the right to counsel is fundamental and essential to a fair trial, and noted that the "Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'" *Gideon*, 372 U.S. at 343. Indeed, the Court in *Johnson v. Zerbst* had held that the assistance of counsel is "one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." 304 U.S. 458, 462 (1938). Based in part upon these decisions, the *Gideon* Court found *Betts* to be an aberration, and its decision applying the right to counsel to the states to be a restoration of constitutional principles necessary "to achieve a fair system of justice." 372 U.S. at 344.

This is also what occurred in *Ramos*; the Court repudiated its 1972 *Apodaca* decision:

> Toppling of precedent needs a special justification—more than a run-of-the-mill claim of error. To meet that demand, the *Ramos* majority described *Apodaca* as flouting the essential "meaning of the Sixth Amendment's jury trial right," as revealed in both historical practice and judicial decisions." . . . [T]he Court took the unusual step of overruling precedent for the most fundamental of reasons: **the need to ensure, in keeping with the Nation's oldest traditions, fair and dependable adjudications of a defendant's guilt**.

Edwards, 141 S. Ct. at 1575 (Kagan, J., dissenting) (emphasis added).

a. *Gideon* rejected the relevance of international legal practices.

The State's argument that *Ramos* is different from *Gideon* because other countries have non-unanimous jury systems echoes an argument that the Court rejected in *Gideon*, saying simply that "[t]he right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, *but it is in ours*." *Gideon*, 372 U.S. at 344 (emphasis added). The Court then emphasized that the right to counsel has long been embedded in U.S. tradition. *Id.*

b. The unanimity tradition in the U.S. is so deep that depriving Louisianans of this right is abhorrent.

The tradition of unanimity is just as deep as the right to counsel, if not deeper. When James Madison picked up his quill and began drafting the Sixth Amendment, and when the states ratified the same, the idea of jurors dissenting and a conviction still occurring was unthinkable.[95] The State accepted

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felony cases . . . ."); *Beard v. Banks*, 542 U.S. 406, 417 (2004) ("In providing guidance as to what might fall within this exception, [the Court has] repeatedly referred to the [right-to-counsel] rule of *Gideon*"); *Whorton v. Bockting*, 549 U.S. 406, 409 (2007) (finding the *Crawford* rule is not comparable to the *Gideon* rule).

[95] From the start of this nation, all U.S. courts appeared to regard unanimity as an essential feature of the jury trial. *See, e.g.*, *Commonwealth v. Bowden*, 9 Mass. 494, 495 (1813); *see also People v. Denton*, 2 Johns. Cas. 275, 277 (N. Y. 1801); *Commonwealth v. Fells*, 36 Va. 613, 615 (1838); *State v. Doon & Dimond*, 1 R. Charlton 1, 2 (Ga. Super. Ct. 1811); *Respublica v. Oswald*, 1 U.S. 319, 324, 329 (Pa. 1788) (reporting Chief Justice McKean's

this was the common law practice in its *Ramos* briefing. *See Ramos*, 140 S. Ct. at 1400 ("Sensibly, Louisiana doesn't dispute that the common law required unanimity."). Louisiana was no different: its practice was rooted in juror unanimity. *State v. Ardoin*, 51 La. Ann. 169, 24 So. 802 (Sup. 1899).

The year that Louisiana's 1898 Constitution took effect, the U.S. Supreme Court said that a person at trial 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." *Thompson v. Utah*, 170 U.S. 343, 351 (1898). In all, the U.S. Supreme Court commented 13 times over 120 years that under the Sixth Amendment, juries in the United States require unanimity.[96]

There was no serious debate that the Sixth Amendment applied to state and federal trials, equally.[97] In *Duncan*, the U.S. Supreme Court said as much when it 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. 391 U.S. at 148–50. Incorporated provisions of the Bill of Rights bear the same content regardless of whether they are asserted against a state or the federal government. *Malloy v. Hogan*, 378 U.S. 1, 10–11 (1964).

As precedent, *Apodaca v. Oregon*, 406 U.S. 404 (1972) (plurality opinion), is unworkable—the U.S. Supreme Court itself has acknowledged this. *See Ramos*, 140 S. Ct. 1398–99 (describing the tortured efforts to make sense of *Apodaca* and noting "[r]eally, no one has found a way to make sense of it."). Moreover, in *Apodaca*, a majority of the justices agreed that non-unanimous jury verdicts violated the Sixth Amendment.[98] Thus, there has never been a case up for retroactive consideration that has so blatantly allowed a group of residents to languish in a space created by a clearly incorrect case.

The strange turn of jurisprudence in the *Apodaca* case shows how a plurality opinion can impact the freedom and rights of hundreds of people. This caused the *Ramos* Court to ponder, "[h]ow, despite these seemingly straightforward principles, have Louisiana's and Oregon's laws managed to hang on for

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observations that unanimity would have been required even if the Pennsylvania Constitution had not said so explicitly).

[96] *See also Maxwell v. Dow*, 176 U.S. 581, 586 (1900) ("[T]he right of trial by jury . . . implies that there shall be an unanimous verdict of twelve jurors."); *Patton v. United States*, 281 U.S. 276, 288 (1930) ("[T]he verdict should be unanimous."); *Andres v. United States*, 333 U.S. 740, 748 (1948) ("Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply."); *Johnson v. Louisiana*, 406 U.S. 356, 369 (1972) (Powell, J., concurring); *United States v. Gaudin*, 515 U.S. 506, 510 (1995); *Richardson v. United States*, 526 U.S. 813, 817 (1999); *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000); *S. Union Co. v. United States*, 567 U.S. 343, 356 (2012); *Blakely v. Washington*, 542 U.S. 296, 301 (2004); *United States v. Booker*, 543 U.S. 220, 238 (2005); *Descamps v. United States*, 570 U.S. 254, 269 (2013); *United States v. Haymond*, 139 S. Ct. 2369, 2376 (2019) (plurality opinion).

[97] The *Apodaca v. Oregon*, 406 U.S. 404 (1972), plurality decision is often misunderstood. Justice Powell stood alone as the only justice suggesting the Bill of Rights did not become fully incorporated by the Sixth Amendment.

[98] But only four joined the opinion to vacate the conviction.

so long?" 140 S. Ct. 1397. The Court further remarked that Louisiana's justification for having non-unanimous convictions "always stood on shaky ground." *Id.* at 1398.

As the dissent in *Edwards* explained:

> The unanimity rule, as *Ramos* described it, is as "bedrock" as bedrock comes. It is as grounded in the Nation's constitutional traditions—with centuries-old practice becoming part of the Sixth Amendment's original meaning. And it is as central to the Nation's idea of a fair and reliable guilty verdict. When can the State punish a defendant for committing a crime? Return again to *Ramos*, this time going back to Blackstone: Only when "the truth of [an] accusation" is "confirmed by the unanimous suffrage" of a jury "of his equals and neighbours." For only then is the jury's finding of guilt certain enough—secure enough, mistake-proof enough—to take away the person's freedom.

141 S. Ct. at 1576 (Kagan, J., dissenting) (internal citations omitted).

c. Courts have found new rules retroactive, including this Court.

Contrary to the State's assertion, both the U.S. Supreme Court and this Court has found new rules retroactive under the U.S. Supreme Court's past standard—a standard still used in many states.[99] In *Ivan V.*, the U.S. Supreme Court gave "complete retroactive effect" to the rule of *In re Winship*, that a jury must find guilt "beyond a reasonable doubt." 407 U.S. at 204. The *Ivan V.* court needed only two pages to find *In re Winship* retroactive, because, like *Ramos*, the *In re Winship* case involved an "ancient" legal tradition, in place to "safeguard" from "unjust convictions, with resulting forfeitures" of freedom. *See In re Winship*, 397 U.S. at 361–62. When a jury has divided, as when it has failed to apply the reasonable-doubt standard, "there has been no jury verdict within the meaning of the Sixth Amendment." *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993).

Under that previous standard, the U.S. Supreme Court also found *Burch* retroactive in *Brown*—the case described *supra* regarding non-unanimous six-person jury verdicts in Louisiana. 447 U.S. at 331 (plurality opinion). *Brown* found conviction by a non-unanimous jury "impair[s]" the "purpose and functioning of the jury," undermines the Sixth Amendment's very "essence," "raises serious doubts about the fairness of [a] trial," and fails to "assure the reliability of [a guilty] verdict." *Id.* at 331, 334, 334 n.13.

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[99] *See, e.g.*, *State v. Whitfield*, 107 S.W.3d 253, 267 (Mo. 2003) ("While Missouri shares many of the policy concerns *Teague* discusses concerning the finality of convictions, these concerns are well protected by the three-factor test set out in *Linkletter–Stovall* and traditionally applied by this Court.") . Some courts have adopted *Teague* but kept the ability to find retroactivity even if it may be barred by *Teague*. *See, e.g.*, *Colwell v. State*, 59 P.3d 463, 471 (Nev. 2002) ("We adopt the general framework of *Teague*, but reserve our prerogative to define and determine within this framework."). Others have been explicit that their state courts, and not the U.S. Supreme Court, will decide whether a rule is watershed. *Rhoades v. State*, 233 P.3d 61, 70 (Idaho 2010) ("[W]hen deciding whether to give retroactive effect to a decision of the U.S. Supreme Court [for purposes of conducting the *Teague* analysis], this Court is not required to blindly follow that court's view of what constitutes a new rule or whether a new rule is a watershed rule."). Additionally, as described in *Powell v. State*, Delaware "declined to adopt a formal static test for determining the meaning of a 'new rule' for the purposes of deciding a Delaware postconviction proceeding."). 153 A.3d 69, 77 (Del. 2016).

This Court gave retroactive effect to new rules before *Taylor* adopted *Teague.* It did so, for instance, for the new rule announced in *State v. Broussard*, 490 So.2d 273 (La. 1986) (reversing a contempt conviction on the ground that the defendant was not advised of his *Boykin* rights and not afforded counsel). This Court found *Broussard* retroactive in *State v. St. Pierre*, 515 So.2d 769, 775 (La. 1987) (finding the right to counsel retroactively applicable in contempt proceedings, but the *Boykin* right prospective only). It did so because the new rule affected "the fairness of the trial—the very integrity of the fact finding process." *Id.*

As noted in the State's Brief, the Louisiana Supreme Court has rarely had occasion to use the *Teague* "watershed rule" test for new procedural rules. *Stewart v. State*, 95-2385 (La. 07/02/96); 676 So.2d 87; *State v. Tate*, 12-2763 (La. 11/5/13); 130 So.3d 829.[100] This scarcity of cases should not lead this Court to think its analysis here unimportant, because the very concept behind *Taylor* is that an applicable watershed rule will rarely come to the courts. This is that rare case.

The State would have this Court not even conduct its own inquiry into the nature of *Ramos* under Louisiana law, instead requesting that this Court subrogate its duty and merely adopt the *Edwards* reasoning unthinkingly.[101] Doing so would abdicate an important state right to the federal government.

3. The *Edwards* Court specifically invited this Court to make an independent determination of retroactivity.

In *Edwards*, the U.S. Supreme Court declared that *Ramos* was a "momentous decision" and a new rule of criminal procedure. 141 S. Ct. at 1561. And although *Edwards* found that no retroactive relief can be granted on *federal collateral review*, the U.S. Supreme Court explicitly noted that *Edwards* should not be interpreted as foreclosing relief for defendants in *state* post-conviction proceedings: "The *Ramos* rule does not apply retroactively on *federal* collateral review. States remain free, if they choose, to retroactively apply the jury-unanimity rule as a matter of state law in state post-conviction proceedings." *Edwards,* 141 S. Ct. at 1559 n.6 (emphasis in original) (citing *Danforth v. Minnesota*, 552 U.S. 264, 282 (2008)). Never

[100] The State also cites the per curiam in *State v. Ferreira*, 19-1929 (La. 10/14/20); 302 So.3d 1096. But *Ferreira* was a case where the rule was not considered new, and the application was not timely filed. The State also improperly lists *Chaidez v. US,* 568 U.S. 342 (2013) (rejecting retroactivity of *Padilla v. Kentucky*, 559 U.S. 356 (2010)), in its federal retroactivity case list. The argument there was whether *Padilla* was a new or old rule; counsel did not argue the watershed test before the Court. Following its most recent usage of the *Teague* framework, the U.S. Supreme Court reversed the interpretation of the Louisiana Supreme Court just three years later with *Montgomery v. Louisiana*, 577 U.S. 190 (2016).

[101] Such an action would further rob Mr. Reddick, and the hundreds similarly situated, of their rights afforded to them under Louisiana law. It would allow the State, as it has for over 120 years, to intentionally strip constitutional guarantees and meaningful participation from its Black citizenry. At stake is the chance to obtain a constitutional trial for the approximately 1,500 identified, mostly Black, still incarcerated individuals. At stake is the individual dignity of the 1.5 million Black citizens of Louisiana who will know once this matter is resolved whether Louisiana law serves us all, or whether it serves the furtherance of white supremacy.

before had the U.S. Supreme Court offered such an explicit invitation to the states when deciding an issue of retroactivity where the question of what states must do was not squarely presented.

In *Danforth v. Minnesota*, 552 U.S. 264 (2008), the U.S. Supreme Court made clear the states are free to provide their own standards for retroactivity or decide cases differently from the federal courts: "States that give broader retroactive effect to this Court's new rules of criminal procedure do not do so by misconstruing the federal *Teague* standard. Rather, they have developed *state* law to govern retroactivity in state postconviction proceedings." *Id.* at 289 (emphasis in original).

Courts in Louisiana have their own obligation to enforce constitutional guarantees. States are free to see *Teague* differently from the U.S. Supreme Court, as was shown in *Powell v. State*, 153 A.3d 69, 70 (Del. 2016) (finding retroactivity of *Hurst v. Florida* under *Teague*, despite the U.S. Supreme Court not finding *Teague* retroactivity). *Danforth* held that *Teague* does not constrain the authority of state courts to give broader effect to new rules of criminal procedure. 552 U.S. at 291. Nothing in *Edwards* prevents or is contrary to this Court finding retroactivity. Indeed, *Edwards* itself endorses an independent inquiry from this Court. 141 S. Ct. at 1559 n.6.

C. Alternatively, this Court should add an exception to its retroactivity standard.

As stated above, this case has the potential to be comparable to *Brown v. Board*—or to *Plessy v. Ferguson*. If Louisiana's retroactivity standard—which is wholly judge-made—deprives hundreds of individuals of a constitutional trial based on a Jim Crow law, then this Court will be directly responsible for continuing the impacts of Jim Crow through, and even beyond, the natural lives of those who remain in prison based on unconstitutional convictions. Notably, while 33% of Louisiana is Black, and 67% of the prison population is Black, 80% of those with non-unanimous juries still in prison are Black.[102] Given the historic context of these convictions, and the seriousness of the stakes, even if this Court does not find *Ramos* watershed, it can and should modify its retroactivity standard to provide retroactivity in this instance.

1. Louisiana's Constitution should influence the retroactivity standard.

This Court is empowered to create the retroactivity standard that best affords justice. The Louisiana Constitution neither prohibits nor requires retroactive application of criminal laws. *Taylor*, 606 So.2d at 1296 (citing *State v. St. Pierre*, 515 So.2d 769, 774 (La. 1987)). That does not mean that the Louisiana

[102] Amici Curiae The Promise of Justice Initiative et al, *Edwards v. Vannoy*, No. 19–5807 (U.S. Sup. Ct., July 21, 2020), *available at* https://www.supremecourt.gov/DocketPDF/19/19-5807/148311/20200721163238941_19-5807.Edwards.Vannoy.Amicus.Promise%20of%20Justice%20Initiative.pdf.

Constitution is absent when a standard is put in place that does not allow the State to fix a grave and discriminatory injustice.

When considering the Declaration of Rights in the 1973 Constitution, Louisiana's delegates rejected a generic guarantee of "equal protection of laws" and instead adopted a more expansive provision.[103] Article I, Section 3 of the Louisiana Constitution provides:

> Right to Individual Dignity
>
> No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.

The Declaration of the Right to Individual Dignity was written to go "beyond the decisional law construing the Fourteenth Amendment." *Sibley v. Bd. of Supervisors of La. State Univ.*, 477 So.2d 1094, 1108 (La. 1985); *accord State v. Granger*, 2007-2285 (La. 05/21/08); 982 So.2d 779, 787–88. In *Granger*, the Court emphasized that:

> Article I, Section 3 commands the courts to decline enforcement of a legislative classification of individuals in three different situations: (1) When the law classifies individuals by race or religious beliefs, *it shall be repudiated completely;* (2) When the statute classifies persons on the basis of birth, age, sex, culture, physical condition, or political ideas or affiliations, its enforcement shall be refused unless the state or other advocate of the classification shows that the classification has a reasonable basis; (3) When the law classifies individuals on any other basis, it shall be rejected whenever a member of a disadvantaged class shows that it does not suitably further any appropriate state interest.

Id. at 788–89 (quoting *Sibley*, 477 So.2d at 1107–08) (emphasis added); *see also Moore v. RLCC Techs.*, 95-2621 (La. 02/28/96); 668 So.2d 1135, 1140 ("The second sentence [of Article I, § 3] uses absolute language, permitting no discrimination with respect to race or religion.") (citing Lee Hargrave, *The Louisiana Constitution, A Reference Guide* 24 (1991)). "[E]ven a facially neutral statute can be deemed unconstitutional if . . . [it] was enacted because of a discriminatory purpose." *Granger*, 982 So.2d at 789 n.10. *See also State v. Baxley*, 94-2982 (La. 05/22/95); 656 So.2d 973, 978.

Louisiana's retroactivity test is completely judge-made law. "[T]he courts of this state . . . are not at liberty to borrow and apply judge made rules in disregard of our fundamental law or to reweigh balances of interests and policy considerations already struck by the framers of the constitution and the people who ratified it." *New Orleans v. Bd. of Comm'rs*, 93-C-0690 (La. 07/05/94); 640 So.2d 237, 256.

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[103] Louis "Woody" Jenkins, *The Declaration of Rights*, 21 LOY. L. REV. 9, 11 (1975).

Mr. Reddick does not ask this Court to find non-unanimous jury verdicts unconstitutional under Louisiana's Article I, Section 3. It need not do so, because the law has already been deemed unconstitutional under the Sixth Amendment. The Equal Protection cases cited by the State are irrelevant here because Mr. Reddick is not bringing a claim that Article I, § 17 violated Article I, § 3.[104] What Mr. Reddick instead suggests is that Louisiana's retroactivity standard should be altered, as necessary, in the spirit of repudiating completely the harm that a Jim Crow law has visited upon a segment of Louisiana's population. This harm has deprived hundreds of Louisianans of any confidence in the fairness of the judicial process by denying them constitutional verdicts.

Failing to apply *Ramos* retroactively to Mr. Reddick and others like him would violate the letter and spirit of Louisiana's Declaration of the Right to Individual Dignity and the jurisprudence implementing it. Such a failure would disregard the principle that when a law classifies individuals by race or religious beliefs, the law shall be repudiated *completely.* There can be no doubt that non-unanimous jury verdicts operated to create two invidious racial classifications: the first to convict Black and minority defendants efficiently, and the second to nullify the voices of Black and minority jurors. Moreover, given that the U.S. Supreme Court has found this provision to be unconstitutional under the Sixth Amendment, failing to apply *Ramos* to cases on collateral review does not "repudiate completely" the legislative classifications based on race.

This Court can and should craft a retroactivity rule that adheres to the intent that this state protect its residents from racial discrimination more zealously than the federal government.[105]

2. Any finality considerations should favor Mr. Reddick.

There is no place in *Teague* or *Taylor* for considerations of finality, but even if finality comes under consideration in this Court's construction of a new retroactivity standard, it is clear that the retroactive application of *Ramos* will not overly burden Louisiana's justice system. This Court's ruling in favor of Petitioner would likely require reversal of approximately 1,500 convictions—increasing the number of criminal cases in Louisiana by less than 2%.[106] The majority of these cases will either be

[104] Further, Louisiana has rejected the tests of the federal Equal Protection Clause when discussing the Individual Dignity clause of Louisiana's Constitution. *Sibley*, 477 So.2d at 1107.

[105] This is similar to how Delaware has proceeded, using its own laws and constitution to guide its retroactivity decisions.

[106] *See* Amici Curiae The Promise of Justice Initiative, *supra* note 102, at 9. The State accepted the accuracy of these numbers at oral argument. *Edwards v. Vannoy* No. 19–5807 Oral Argument Transcript at 42, Dec. 2, 2020, *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-5807_i4dj.pdf. In July of 2020, the number of people incarcerated based on non-unanimous jury convictions was just over 1,600. Today that number is closer to 1,500. A number of people with non-unanimous jury verdicts who filed *Ramos*-based post-

resolved with plea agreements or dismissed. Even assuming a rate of re-trials ten times the current trial rate, the net effect of retroactive application will be *one* additional jury trial per year per assistant district attorney, spread over two years. It is also worth noting that one-third of Louisiana's judicial districts have fewer than five cases with non-unanimous jury verdicts.[107]

In *Allen v. Hardy*, 478 U.S. 255 (1986)—a case the State relies upon in its discussion of the difficulty of retrials—the retrials were not the main problem; rather, the problem was how the court would determine whether there were pre-textual reasons provided for excluding jurors. *Id.* at 260. The language about memories fading and evidence lost was about the burden on prosecutors to recreate the reason for striking a juror. No such issue is present here, because full trials occurred. If witnesses are unavailable, Louisiana's rules provide that the courts can order the transcripts to be read into the record. La. Code Evid. Ann. § art. 804(1). If memories have faded, witnesses can have their recollections refreshed on the stand. La. Code Evid. Ann. § art. 612(B). After *Gideon*, there were also concerns about re-trying cases.[108] The only states without a right to counsel were Florida, Alabama, Mississippi, North Carolina and South Carolina.[109] Courts overturned more than 3,000 convictions in Florida, alone.[110]

Moreover, Mr. Reddick's conviction does not meet the precondition for recognizing a state's interest in finality because his original trial and conviction by a non-unanimous jury was neither "fundamentally fair" nor "conducted under those procedures essential to the substance of a full hearing." *Mackey v. United States*, 401 U.S. 667, 693 (1971); *see also Teague*, 489 U.S. at 312 (adopting this language from *Mackey*). Under this *Mackey* standard, if the party seeking retroactive application of current constitutional standards had a trial that was fair enough when measured by constitutional standards in effect at the time, he or she is not entitled to *fairer* trial now. But Mr. Reddick's original trial and conviction were not fair enough even by the constitutional standards in effect at the time. Louisiana has no legitimate interest in the finality of a criminal conviction obtained through a system consciously

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conviction relief applications did not survive the pandemic and died since filing applications, including Barry Baker (Case No. 37,464 2nd JDC); Corinthians Milton (Case No. 194394 1st JDC); Joe Stephens (Case No. 126696 1st JDC); William Curtis (Case No. 94–610 29th JDC); Theiring Jerome Charles (Case No. 97–145–0900 16th JDC); Arthur Thomas (Case No. 07–4055 24th JDC); Raymond Shaw (Case No. 98–5802 24th JDC); Henry McMillan (Case No. 15–CR7–129462 22nd JDC); Thomas Daniel (Case No 149075 22nd JDC); and Lee Pipkins (Case No 11082–91 14th JDC). Others have completed their sentences, obtained relief through post-conviction plea agreements, or had their sentences vacated on other grounds.

[107] Amici Curiae The Promise of Justice Initiative, *supra* note 102, at Appendix A.

[108] *Trials: And the Court Said unto Gideon*, TIME MAGAZINE, Oct. 18, 1963, https://content.time.com/time/subscriber/article/0,33009,873770-1,00.html. Notably, more than half of Florida's prison population had to have new trials. Here, only about 5% of Louisiana's prison population is impacted, and fewer filed timely post-conviction applications.

[109] *Id.*

[110] *Id.*

designed to create structural discrimination and enable convictions by less than proof beyond a reasonable doubt. Therefore, any finality balancing should favor Mr. Reddick and others like him, many of whom are set to spend life at hard labor in Louisiana's prisons.

The State cites 39 decisions from this Court to make the claim that Louisiana has already foreclosed the issue of retroactivity—this claim is mistaken at best, disingenuous at worst. None of the cases that the State cites were timely filed post-conviction applications raising *Ramos* retroactivity. In at least 32 of the 39 cases, the respondents filed the post-conviction relief application well before the *Ramos* decision issued on April 20, 2020.[111] In at least two of the cases, there is no post-conviction relief in question.[112] And in one case, this Court granted relief due to the matter being on direct review.[113] Moreover, in *State* v. *Dotson*, an Orleans Parish court vacated Dotson's conviction and agreed to a new trial that has since resolved in his release.[114]

In the few writ denials directly attacking the non-unanimous jury verdicts, the post-conviction claims were brought under a theory of law positing that Louisiana's non-unanimous jury laws violated the U.S. Constitution's Equal Protection Clause, based on *The Advocate's* comprehensive study on the practice as new evidence, the *Maxie* case's testimony and ruling, or both.[115] In the cases the State cites,

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[111] *State v. Dotson*, 2019-01828 (La. 06/03/20); 296 So.3d 1059; *State v. Cook*, 2020-00001 (La. 08/14/20); 300 So.3d 838; *State v. Parish*, 2020-00072 (La. 08/14/20); 300 So.3d 861; *State v. McGuire*, 2019-01632 (La. 08/14/20); 300 So.3d 830; *State v. Johnson*, 2019-02075 (La. 08/14/20); 300 So.3d 858; *State v. Spencer*, 2019-01318 (La. 08/14/20); 300 So.3d 855; *State v. Williams*, 2020-00069 (La. 08/14/20); 300 So.3d 860; *State v. Withers*, 2020-00258 (La. 08/14/20); 300 So.3d 860; *State v. Wardlaw*, 2020-00004 (La. 08/14/20); 300 So.3d 859; *State v. Sonnier*, 2019-02066 (La. 08/14/20); 300 So.3d 857; *State v. Pittman*, 2019-01354 (La. 08/14/20); 300 So.3d 856; *State v. Carter*, 2019-02053 (La. 08/14/20); 300 So.3d 856; *State v. Eaglin*, 2019-01952 (La. 08/14/20); 300 So.3d 840; *State v. Kidd*, 2020-00055 (La. 08/14/20); 300 So.3d 828; *State v. Skipper*, 2020-00280 (La. 09/08/20); 301 So.3d 16; *State v. Jackson*, 202000037 (La. 09/08/20); 301 So.3d 33; *State v. Hawthorne*, 2020-00586 (La. 09/29/20), 2020 WL 5793105; *State v. Johnson*, 2020-00052 (La. 09/29/20), 2020 WL 5793805; *Silva v. Vannoy*, 2019-01861 (La. 06/03/20); 296 So.3d 1033; *Jones v. State*, 2019-01900 (La. 06/03/20); 296 So. 3d 1060; *State v. Brown*, 2020-00276 (La. 06/22/20); 297 So.3d 721; *Dennis v. Vannoy*, 2019-01794 (La. 07/24/20); 299 So.3d 54; *Joseph v. State*, 2020-01989 (La. 08/14/20); 300 So.3d 824; *Lawson v. State*, 2019-02074 (La. 08/14/20); 300 So.3d 858; *Hernandez v. Vannoy*, 2019-02034 (La. 08/14/20); 300 So.3d 857; *State v. Harris*, 2020-00291 (La. 09/08/20); 301 So.3d 13; *State v. Smith*, 2020-00621 (La. 09/29/20), 2020 WL 5793717; *Givens v. State*, 2020-00268 (La. 10/06/20), 2020 WL 5904873; *Cassard v. Vannoy*, 2020-00020 (La. 10/06/20), 2020 WL 5905099; *State v. Barrett*, 2019-01718 (La. 08/14/20); 300 So.3d 827; *State v. Mason*, 2019-01821 (La. 08/14/20), 2020 WL 4726952; *State v. Mims*, 2019-2088 (La. 08/14/20); 300 So.3d 867; *State v. Williams*, 2019-02010 (La. 08/14/20); 300 So.3d 856.

[112] *State v. Young*, 2019-01818 (La. 06/12/20), 2020 WL 3424876; *State v. Brooks*, 2020-00378 (La. 10/14/20), 2020 WL 6059695.

[113] *State v. McKnight*, 2020-00873 (La. 07/17/20); 299 So.3d 64.

[114] *State v. Dotson*, No. 514,318 (Orleans Parish Criminal District Court 03/31/21).

[115] *State v. Dotson*, 2019-01828 (La. 06/03/20); 296 So.3d 1059; *State v. Cook*, 2020-00001 (La. 08/14/20); 300 So.3d 838; *State v. Parish*, 2020-00072 (La. 08/14/20); 300 So.3d 861; *State v. McGuire*, 2019-01632 (La. 08/14/20); 300 So.3d 830; *State v. Withers*, 2020-00258 (La. 08/14/20); 300 So.3d 860; *State v. Sonnier*, 2019-02066 (La. 08/14/20); 300 So.3d 857; *State v. Carter*, 2019-02053 (La. 08/14/20); 300 So.3d 856; *State v. Eaglin*, 2019-01952 (La. 08/14/20); 300 So.3d 840; *State v. Kidd*, 2020-00055 (La. 08/14/20); 300 So.3d 828; *State v. Sims*, 2020-00298 (La. 09/08/20); 301 So.3d 17; *State v. Johnson*, 2020-00052 (La. 09/29/20), 2020 WL 5793805; *State v. Mason*, 2019-01821 (La. 08/14/20), 2020 WL 4726952; *State v. Williams*, 2019-02010 (La. 08/14/20); 300 So.3d 856; *Jones v. State*, 2019-01900 (La. 06/03/20); 296 So. 3d 1060; *Silva v. Vannoy*, 2019-01861 (La. 06/03/20); 296

the prospect of addressing the retroactivity of *Ramos* was raised *sua sponte* by justices in dissenting opinions of this Court. In fact, in at least 24 of the cases that the State cites, the petitioners currently have a post-conviction relief application concerning *Ramos* retroactivity pending before a court in Louisiana, stayed while awaiting guidance on the matter from this Court.[116]

Even if the State had cited cases in which this Court had denied writ on a claim seeking the retroactivity of *Ramos*, this Court has made clear that a denial of writ has no precedential value on this or any other court. *State v. David Brown*, 16-0998 at 129 (La. 01/28/22).[117]

The goal of our criminal justice system is not finality for finality's sake; we do not speed toward a resolution merely to preserve judicial momentum. Finality is of importance because once fair evidence has been produced, a fair verdict reached and a fair sentence proscribed, we can have trust that our imperfect system has at least been adjudicated fairly. But when one of those phases is not only imperfect but grossly repugnant, designed to maintain unfairness of the most insidious kind, finality becomes a frivolous concern that only seeks to pervert our notions of law and order.

3. Louisiana has state-specific interests in the retroactivity of *Ramos*.

Today, Louisiana has the highest incarceration rate in the United States. It leads the nation in life without the possibility of parole sentences.[118] As of June 30, 2020, 4,596 people in Louisiana were serving

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So.3d 1033; *State v. Brown*, 2020-00276 (La. 06/22/20); 297 So.3d 721; *Dennis v. Vannoy*, 2019-01794 (La. 07/24/20); 299 So.3d 54; *Lawson v. State*, 2019-02074 (La. 08/14/20); 300 So.3d 858; *Hernandez v. Vannoy*, 2019-02034 (La. 08/14/20); 300 So.3d 857; *State v. Harris*, 2020-00291 (La. 09/08/20); 301 So.3d 13; *State v. Smith*, 2020-00621 (La. 09/29/20), 2020 WL 5793717; *Givens v. State*, 2020-00268 (La. 10/06/20), 2020 WL 5904873; *Cassard v. Vannoy*, 2020-00020 (La. 10/06/20), 2020 WL 5905099.

[116] *Lionel Jones v. State*, 2019-01900 (La. 06/03/20); 296 So. 3d 1060; *State v. Young*, 2019-01818 (La. 06/12/20), 2020 WL 3424876; *State v. Brown*, 2020-00276 (La. 06/22/20); 297 So.3d 721; *Dennis v. Vannoy*, 2019-01794 (La. 07/24/20); 299 So.3d 54; *Lawson v. State*, 2019-02074 (La. 08/14/20); 300 So.3d 858; *Hernandez v. Vannoy*, 2019-02034 (La. 08/14/20); 300 So.3d 857; *Cassard v. Vannoy*, 2020-00020 (La. 10/06/20), 2020 WL 5905099; *State v. Barrett*, 2019-01718 (La. 08/14/20); 300 So.3d 827; *State v. Mason*, 2019-01821 (La. 08/14/20), 2020 WL 4726952; *State v. Mims*, 2019-2088 (La. 08/14/20); 300 So.3d 867; *State v. Williams*, 2019-02010 (La. 08/14/20); 300 So.3d 856; *State v. Brooks*, 2020-00378 (La. 10/14/20), 2020 WL 6059695; *State v. Cook*, 2020-00001 (La. 08/14/20); 300 So.3d 838; *State v. Parish*, 2020-00072 (La. 08/14/20); 300 So.3d 861; *State v. McGuire*, 2019-01632 (La. 08/14/20); 300 So.3d 830; *State v. Williams*, 2020-00069 (La. 08/14/20); 300 So.3d 860; *State v. Withers*, 2020-00258 (La. 08/14/20); 300 So.3d 860; *State v. Wardlaw*, 2020-00004 (La. 08/14/20); 300 So.3d 859; *State v. Sonnier*, 2019-02066 (La. 08/14/20); 300 So.3d 857; *State v. Pittman*, 2019-01354 (La. 08/14/20); 300 So.3d 856; *State v. Carter*, 2019-02053 (La. 08/14/20); 300 So.3d 856; *State v. Eaglin*, 2019-01952 (La. 08/14/20); 300 So.3d 840; *State v. Sims*, 2020-00298 (La. 09/08/20); 301 So.3d 17; *State v. Johnson*, 2020-00052 (La. 09/29/20), 2020 WL 5793805. This may be true for the others as well. Counsel on this case represents most of these 24 individuals.

[117] *See also id.* at 129 n.69. This court has repeatedly held that a writ denial by the court has no precedential value. *St. Tammany Manor v. Spartan Bldg. Corp.*, 509 So.2d 424, 428 (La. 1987) ("A writ denial by this Court has no precedential value."). Additionally, "once [a] court of appeal denie[s] a writ, any additional remarks of findings are not binding." *Maloney Cinque, L.L.C. v. Pacific Ins. Co. Ltd.*, 10-1164 (La. 05/21/10); 36 So.3d 236; *see also, Davis v. Jazz Casino Co., L.L.C.*, 03-0276, p.1 (La. 06/06/03); 849 So.2d 497, 498 (when a court of appeal "declines to exercise its supervisory jurisdiction by denying the writ, the court was without jurisdiction to affirm, reverse or modify the judgment of the trial court. Thus, any language in the court of appeal's earlier writ denial purporting to find no error in the trial court's certification ruling is without effect.").

[118] Lea Skene, *Louisiana's Life Without Parole sentencing the Nation's Highest—and Some Say That Should Change*, THE ADVOCATE (Dec. 7, 2019), https://www.theadvoca te.com/baton_rouge/news/article_f6309822-17ac-

these life sentences.[119] Louisiana has more incarcerated people serving life without parole than Texas, Arkansas, Mississippi, Alabama, and Tennessee combined.[120] "In Louisiana, almost one in five of the people serving these life without the possibility of parole sentences, received such a sentence because of a non-unanimous jury verdict, ratified by that 1898 Constitutional Convention."[121] In 48 other states, when the jury failed to reach unanimity, the states retried the cases. Perhaps doing so here will put Louisiana in line with other states across the country.

This Court must also be mindful of the impact of continued legal enforcement of a Jim Crow law in our state on the confidence of its citizenry, specifically Black Louisianans. Courts are already facing a lack of public confidence from communities of color. In 2015, the National Center for State Courts reported that only 32% of Black Americans believe state courts provide equal justice to all.[122] Trust in our judicial system is paramount—without trust, people lose interest in participating and lose respect for our democracy. Louisiana residents know that a Jim Crow law persisted and systematically denied the rights of countless Black and other minority residents for over one hundred years, and they know that this law was able to do so in secret and under the guise of "efficient" law and order. Black Louisianans may accept that our criminal system was unaware that Jim Crow endured, but if the justice system refuses to repudiate it when given the opportunity, the impact will be profound.[123] The failure to find *Ramos* retroactive not only dooms hundreds to forfeit the remainder of their lives to imprisonment—it also serves as a permeant reminder that the rights of Black Louisianans are not inalienable and are not guaranteed.

11ea-8750-f7d212aa28f8.html [https://perma.cc/HYR8-PHNR].

[119] JOHN BEL EDWARDS & JAMES M. LEBLANC, LOUISIANA CORRECTIONS: BRIEFING BOOK 28 (July 2020), *available at* https://s32082.pcdn.co/wp-content/uploads/2020/08/Full-BB-Jul-20.pdf [https://perma.cc/QTR2-TRUB]; TCR Staff, *Louisiana Leads Nation in Life Without Parole Terms*, THE CRIME REPORT (Dec. 12, 2019), https://thecrimereport.org/2019/12/12/louisiana-leads-nation-in-lifewithout-parole-terms [https://perma.cc/G3PL-8SDK].

[120] TCR Staff, *supra* note 119.

[121] Jamila Johnson & Talia MacMath, *State Courts Must Combat Mass Incarceration by Granting Broader Retroactivity to New Rules Than is Provided Under the Federal Teague v. Lane Test*, 111 J. CRIM. L. & CRIMINOLOGY ONLINE 33, 48 (2021).

[122] *See* NAT'L CENTER FOR STATE COURTS, STATE OF THE STATE COURTS IN A (POST) PANDEMIC WORLD 4 (2020), *available at* https://www.ncsc.org/__data/assets/pdf_file/0005/41000/COVID19-Poll-Presentation.pdf. In 2021, national survey results across races showed that Americans' trust in courts' ability to provide equal justice to all reached a 10-year low, with only 46% of Americans trusting state court systems' ability to provide equal justice to all. NAT'L CENTER FOR STATE COURTS, STATE OF THE STATE COURTS 2021 POLL 6 (2021), *available at* https://www.ncsc.org/__data/assets/pdf_file/0020/70580/SSC_2021_Presentation.pdf.

[123] This is especially true for Black jurists who serve this state's bar and have to reconcile their oath to support our state's constitution with the knowledge that, for generations, that very constitution was specifically designed to subjugate its Black populace.

4. Mr. Reddick Proposes the "Jim Crow" retroactivity test.

One test the Louisiana Supreme Court could adopt is a simple variation of what was requested in Mr. Reddick's post-conviction relief application: This test would provide for retroactivity of a new constitutional rule under *Taylor/Teague*, ***or*** where the new rule impacts the guilt or innocence phase of a proceeding and has emerged from a Jim Crow law.

As Justice Kavanaugh stated in his concurrence—"the non-unanimous jury is today the last of Louisiana's Jim Crow laws." *Ramos*, 140 S. Ct. at 1418 (Kavanaugh, J., concurring). Thus, this Court would not need to worry about the future application of a test that provides for retroactivity (independent of *Taylor/Teague*) only when a Jim Crow law is implicated.

CONCLUSION

> *Simply pledging to uphold the Constitution in future criminal trials does not heal the wounds already inflicted on Louisiana's African American community by the use of this law for 120 years. The reality of that harm "and the resulting perception of unfairness and racial bias—[has] undermine[d] confidence in and respect for the criminal justice system." At stake here is the very legitimacy of the rule of law, which depends upon all citizens having confidence in the courts to apply equal justice.*

State v. Gipson, 2019-01815 (La. 06/03/20); 296 So. 3d 1051, 1057 (Johnson, J., dissenting) (internal citation omitted).

The United States has put in significant effort to remove Jim Crow laws from its books. The nation has also started more candidly acknowledging their existence. Changing a Jim Crow law takes work, and that is work that the courts, voters, and legislators have been willing to do. Where we struggle is in finishing the job we start. We frequently fail to identify who is carrying the weight of the remains of our Jim Crow laws across the country, and as a result, we leave that weight on their shoulders. This Court must remove that weight to prevent the harms of Jim Crow from hindering another generation—the children and families of those incarcerated with these convictions. Mr. Reddick and his family are carrying a weight from 1898, and the only way to lift that weight is to finally give Mr. Reddick an opportunity for a constitutional trial.

Respectfully submitted,

/s/ Jamila Asha Johnson

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Date: May 2, 2022

CERTIFICATE OF SERVICE

I certify that all of the information contained in the above brief is true and correct to the best of my knowledge. I further certify that a copy of this brief has been transmitted by electronic means to counsel of record at the email addresses provided on pleadings to this court. Petitioner also provided this pleading by first class mail to the Plaquemines Parish District Court clerk of court at P.O. Box 40, Belle Chasse, Louisiana 70037 on this the 2nd day of May, 2022:

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CERTIFICATION OF ATTACHMENTS

I hereby verify that all attachments to this brief have previously been entered into evidence, or proffered as evidence in the lower court, to the best of my knowledge, information and belief. I understand that failure to comply with this local rule may result in the refusal to consider said attachments, on this the 2nd day of May, 2022.

/s/ Jamila Asha Johnson

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