No. 20-____

In The

Supreme Court of the United States

WILLIE GIPSON,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Louisiana

PETITION FOR A WRIT OF CERTIORARI

Jeffrey L. Fisher
O'MELVENY & MYERS LLP
2765 Sand Hill Road
Menlo Park, CA 94025

Jamila Johnson
G. Ben Cohen
THE PROMISE OF JUSTICE INITIATIVE
1024 Elysian Fields Ave.
New Orleans, LA 70116

Yaira Dubin
Counsel of Record
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036
(212) 728-5946
ydubin@omm.com

Meaghan VerGow
Kendall Turner
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington DC 20006

QUESTION PRESENTED

Whether this Court's decision in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), applies to cases on state collateral review, where the State follows the retroactivity framework established in *Teague v. Lane*, 489 U.S. 288 (1989).

RELATED PROCEEDINGS

State v. Gipson, 747 So. 2d 187 (La. Ct. App., 4th Cir. 1999);

State v. Gipson, 775 So. 2d 1076 (La. 2000);

State ex rel. Gipson v. State, 857 So. 2d 509 (La. 2003);

State ex rel. Gipson v. State, 56 So. 3d 989 (La. 2011);

State ex rel. Gipson v. State, 178 So. 3d 140 (La. 2015); and

State v. Gipson, 296 So. 3d 1051 (La. 2020).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Willie Gipson respectfully petitions for a writ of certiorari to review the judgment of the Louisiana Supreme Court.

OPINIONS BELOW

The Louisiana Supreme Court's decision denying petitioner's application for a writ of certiorari is published at 296 So. 3d 1051 (La. 2020), and reprinted in the Appendix to the Petition ("Pet. App.") at 1a. The decision of the court of appeals is unpublished but reprinted at Pet. App. 14a. The decision of the trial court is unpublished but reprinted at Pet. App. 16a.

JURISDICTIONAL STATEMENT

The Louisiana Supreme Court denied discretionary review of petitioner's appeal on June 3, 2020. Pet. App. 1a. On March 19, 2020, this Court issued an order automatically extending the time to file any petition for a writ of certiorari to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. This petition is accordingly due on November 2, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI.

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

Louisiana Code of Criminal Procedure article 930.3 provides in pertinent part: "If the petitioner is in custody after sentence for conviction for an offense, relief shall be granted only on the following grounds: (1) The conviction was obtained in violation of the constitution of the United States or the state of Louisiana."

INTRODUCTION

When petitioner was tried for a murder that occurred when he was 17 years old, two jurors voted to acquit. Had petitioner been tried in federal court or any of 48 States, that 10-2 verdict would not have sufficed to convict him. But Louisiana allowed non-unanimous jury verdicts at the time, making the dissenting jurors' votes meaningless. Petitioner was convicted and sentenced to life in prison.

This Court recently held in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), that the Sixth and Fourteenth Amendments prohibit criminal convictions by non-unanimous jury verdicts. But the Court left open the question whether *Ramos* applies retroactively to cases on collateral review. Shortly thereafter, the Court granted certiorari in *Edwards v. Vannoy*, No. 19-5807, to decide whether *Ramos* applies to cases on *federal* collateral review.

This case presents the question whether *Ramos* applies to cases on *state* collateral review, where the State follows the retroactivity framework established in *Teague v. Lane*, 489 U.S. 288 (1989).[1] Insofar as the Court decides *Edwards* on the basis of whether *Ramos* is retroactive under the *Teague* framework, this case should be held for that one and disposed of accordingly. But if, for whatever reason, the Court does not reach that question in *Edwards*, the Court should grant plenary review in this case and hold that *Ramos* is retroactive under the *Teague* framework.

Under *Teague*, constitutional rules of criminal procedure that are not "new" apply retroactively. *See, e.g.*, *Saffle v. Parks*, 494 U.S. 484, 487–88 (1990). When a constitutional decision is "grounded upon fundamental principles" that have been consistent "year to year," *Desist v. United States*, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting), the state interests protected by the general prohibition against retroactivity must yield, *Teague*, 489 U.S. at 309. *Ramos*'s holding that the Sixth Amendment does not permit non-unanimous state jury verdicts is such a rule. It did not "break[] new ground," *Chaidez v. United States*, 568 U.S. 342, 347 (2013) (internal quotation marks omitted), but rather applied the original understanding of the Sixth Amendment to the States based on longstanding incorporation doctrine, *see Ramos*, 140 S. Ct. at 1395–97.

Even if *Ramos*'s rule were deemed "new," it would apply retroactively because it is a watershed rule—

[1] Unless otherwise noted, citations to *Teague* in this petition are citations to *Teague*'s plurality opinion.

i.e., a rule that is "central to an accurate determination of innocence or guilt" and an "absolute prerequisite to fundamental fairness." *Teague*, 489 U.S. at 313–14. Because jury unanimity implicates the fundamental fairness and accuracy of criminal proceedings, a conviction secured with a fractured jury is defective even if the case is on collateral review.

STATEMENT OF THE CASE

A. Initial Proceedings

1. In July 1996, the State of Louisiana charged petitioner Willie Gipson, then 17 years old, with the second-degree murder of Roy Simon. Pet. App. 11a. The victim had sustained three gunshot wounds, including a fatal wound to his abdomen. *Id.* at 19a.

On the evening of the shooting, Marion Mosley, a next-door neighbor, came down the steps of the apartment complex at the same time as the victim. Pet. App. 19a. The victim then walked toward his car and Ms. Mosley headed to her sister-in-law's apartment down the block. *Id.*

As Ms. Mosley was talking to neighbors outside of her sister-in-law's apartment, she heard shooting and dove into the hallway. Pet. App. 19a. Although not certain, Ms. Mosley believed she saw "a bike" outside. *Id.* "It was too dark to determine if a man or a woman was on the bicycle." *Id.* Ms. Mosley heard the victim calling for his wife, and she ran over to him. *Id.* at 19a–20a. Ms. Mosley stayed with the victim and continued to call for his wife. *Id.* at 20a. Ms. Mosley testified at trial that she did not see petitioner that night. *Id.*

The victim's wife, Sabrina Simon, testified that she witnessed the shooting from her second-floor kitchen window. From there, she said "she could see her husband working on the car." Pet. App. 21a. As she watched, she said she saw someone "whom she had never seen before 'roll up' on a bicycle and shoot her husband." *Id.* According to Mrs. Simon, the shooter "did not stop," but she "could see a gun in" his hand. *Id.* She called 911 from the phone in the kitchen, then gathered her children and took them to the apartment balcony so they would not see their father. *Id.* After several neighbors pounded on her door, however, she gave her children to them and then "went downstairs and stayed with her husband until the ambulance" arrived. *Id.*

The police subsequently received a phone call telling them to go to 2538 Mazant Street to look for a bicycle and a subject armed with a handgun. Pet. App. 18a. The apartment resident gave her consent to search. *Id.* Inside, the police observed a bicycle, which they seized as evidence and introduced at trial—though the apartment resident stated she knew nothing about the bike or to whom it belonged. *Id.* at 18a–19a. Petitioner did not live at the Mazant Street apartment, and an examination of the bicycle did not reveal any identifiable fingerprints. *Id.* at 19a–20a.

A week after the murder, Mrs. Simon told the police "[i]t would be kind of like hard" to identify the shooter and "I really didn't look, you know, really see him that well." Pet. App. 22a. Yet despite the distance and the darkness, Mrs. Simon identified petitioner as the perpetrator from a photographic line-up six weeks after the offense. *Id.* at 20a. The prosecution's case at

trial hinged on this single eyewitness's identification from a photographic lineup.

Petitioner was convicted by a non-unanimous verdict. Two jurors harbored enough doubt about petitioner's guilt to enter a vote of "not guilty." Pet. App. 6a, 11a. On the basis of that 10-2 verdict, petitioner was sentenced to life without the possibility of probation, parole, or suspension of his sentence. Pet. App. 18a.[2]

2. The Louisiana Court of Appeal relied on both witnesses' testimony that the perpetrator was on a bicycle, albeit a bicycle with no connection to petitioner, in affirming the verdict: "[A]lthough there was no evidence to link the defendant to the crime except for Mrs. Simon's identification, Ms. Mosley was able to corroborate Mrs. Simon's testimony that the perpetrator was riding a bicycle." Pet. App. 25a.

3. Petitioner's conviction became final on December 8, 2000. Pet. App. 11a–12a.

B. This Court Holds That Non-Unanimous Jury Verdicts Are Unconstitutional.

On March 18, 2019, this Court granted certiorari to address whether the Sixth and Fourteenth Amendments require a unanimous jury verdict to

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[2] Petitioner was later resentenced to life with the possibility of parole after this Court held that mandatory sentences of life without the possibility of parole are unconstitutional for juvenile offenders, *Miller v. Alabama*, 567 U.S. 460 (2012), and deemed that decision retroactively applicable, *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). *See Gipson v. State*, 178 So. 3d 140, 141 (La. 2015).

convict a defendant of a serious offense. *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).

Ramos asked this Court to reconsider *Apodaca v. Oregon*, 406 U.S. 404 (1972), and its companion case, *Johnson v. Louisiana*, 406 U.S. 356 (1972). In those deeply divided opinions, five Justices held that the Sixth Amendment requires unanimous jury verdicts. *See Johnson*, 406 U.S. at 371 (Powell, J., concurring in the judgment in *Apodaca*); *Apodaca*, 406 U.S. at 414 (Stewart, J., joined by Brennan & Marshall, JJ., dissenting); *Johnson*, 406 U.S. at 381–83 (Douglas, J., dissenting in *Apodaca*). Four of those five Justices also concluded that the incorporation doctrine requires States to abide by the Sixth Amendment's unanimity requirement. *Apodaca*, 406 U.S. at 414–15 (Stewart, J., dissenting); *Johnson*, 406 U.S. at 380 (Douglas, J., dissenting in *Apodaca*). But the fifth, Justice Powell, rejected the notion that the incorporation doctrine required unanimous state jury verdicts. *Johnson*, 406 U.S. at 369–71 (Powell, J., concurring in the judgment in *Apodaca*). Justice Powell endorsed "'dual-track' incorporation—the idea that a single right can mean two different things depending on whether it is being invoked against the federal or a state government." *Ramos*, 140 S. Ct. at 1398. Although this Court had repeatedly rejected, that proposition, and rejects it today, *id.* at 1398–99, Justice Powell's solo position in *Apodaca* and *Johnson* carried the day, allowing the practice of non-unanimous state jury verdicts to continue.

On April 20, 2020, this Court held in *Ramos* that the Sixth and Fourteenth Amendments prohibit state criminal convictions by non-unanimous jury verdicts.

Ramos, 140 S. Ct. at 1408. Writing for the majority, Justice Gorsuch acknowledged that "*Apodaca* was gravely mistaken." *Ramos*, 140 S. Ct. at 1405. As the Court explained, "the common law, state practices in the founding era, [and] opinions and treatises written soon afterward" all show that the Sixth Amendment requires that "[a] jury must reach a unanimous verdict in order to convict." *Id.* at 1395. The Court also confirmed that the Sixth Amendment guarantee applies equally "against the States" as "against the federal government." *Id.* at 1397. The Court accordingly reversed Mr. Ramos's conviction, explaining that "[n]ot a single Member of this Court [wa]s prepared to say Louisiana secured his conviction constitutionally under the Sixth Amendment." *Id.* at 1408.

C. Louisiana Continues To Deny Petitioner Relief.

In 2019, petitioner sought state post-conviction relief, arguing that his conviction is invalid because it rests on a non-unanimous jury verdict. Before *Ramos* was decided, the trial court denied the petition, Pet. App. 16a, and the Louisiana Court of Appeal denied review, *id.* at 14a–15a. Judge Bartholomew-Woods concurred, noting this Court's grant of certiorari in *Ramos*. Pet. App. 15a. Until that decision is issued, she explained, the Louisiana Court of Appeal "is without the legal authority to revisit the [unanimity] issue as it relates to the retroactive application of the law to defendants" like petitioner. *Id.*

After *Ramos* was decided, the Louisiana Supreme Court remanded nearly forty non-final cases to the courts of appeal for further proceedings. But that

court, which has adopted *Teague*'s retroactivity test for cases on state collateral review, *State ex rel. Taylor v. Whitley*, 606 So. 2d 1292, 1296 (La. 1992), denied at least six applications for collateral relief, including Mr. Gipson's.

Three Justices dissented from the denial of review in petitioner's case. In her dissent, Chief Justice Johnson urged Louisiana courts to apply *Ramos* retroactively, rather than "defer[ring] until the Supreme Court mandates that we act." Pet. App. 2a. She urged the court to correct the "historic injustices done to Louisiana's African American citizens by the use of the non-unanimous jury rule." *Id.* The Chief Justice further argued that Louisiana should abandon *Teague*'s retroactivity test and provide citizens with "more than the minimum mandated by the Supreme Court," as allowed by *Danforth v. Minnesota*, 552 U.S. 264 (2008). Pet. App. 2a. The Chief Justice also explained that, regardless, *Ramos* is retroactive under *Teague* because it "plainly announced a watershed rule"; "the Sixth Amendment right to a jury trial is 'fundamental to the American scheme of justice.'" *Id.* at 3a.

REASONS FOR GRANTING THE WRIT

I. This Court Should Resolve Whether *Ramos* Applies On State Collateral Review.

Petitioner, like others in Louisiana and Oregon, seeks state collateral relief based on this Court's holding in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), that the Constitution prohibits States from procuring criminal convictions by non-unanimous jury verdicts. Under Louisiana law, petitioner is entitled to such

relief if he can satisfy the federal retroactivity framework established in *Teague v. Lane*, 489 U.S. 288 (1989). *See State ex rel. Taylor v. Whitley*, 606 So. 2d 1292, 1296 (La. 1992); *cf. Danforth v. Minnesota*, 552 U.S. 264, 282 (2008) (States may elect to follow *Teague*).

This Court, meanwhile, has granted certiorari to determine whether *Ramos* "applies retroactively to cases on *federal* collateral review." *Edwards v. Vannoy*, No. 19-5807, Order (May 4, 2020) (emphasis added). The petitioner in *Edwards* argues that the retroactivity framework adopted in *Teague* governs his case and that he satisfies that framework. Insofar as the Court decides *Edwards* on the basis of whether *Ramos* is retroactive under the *Teague* framework, this case should be held for that one and resolved accordingly.

But if, for whatever reason, the Court's ultimate disposition of *Edwards* does not resolve whether *Ramos* is retroactive under the *Teague* framework, the Court should grant certiorari here to do so. Approximately 1,601 individuals remain in prison in Louisiana alone because of convictions based on non-unanimous state jury verdicts. *See* Amicus Br. of the Promise of Justice Initiative et al. at 11, *Edwards v. Vannoy*, No. 19-5807. In Oregon, the Federal Public Defender's office has filed new successive state post-conviction petitions in 52 cases implicating *Ramos*. *See* Amicus Br. of Fed. Public Defender for the District of Oregon et al. at 6, *Edwards v. Vannoy*, No. 19-5807.

Ramos itself confirms that these convictions are untrustworthy because of the method by which they

were obtained. And as the Court has already recognized in granting certiorari in *Edwards*, this issue is unquestionably important—for the affected individuals but also for a society that champions the integrity of its criminal process.[3]

II. The Decision Below Is Incorrect.

In *Ramos*, this Court confirmed the original understanding of the Sixth Amendment and settled principles of incorporation: State convictions based on non-unanimous jury verdicts are invalid. 140 S. Ct. at 1395–97. Because *Ramos* reaffirmed "fundamental principles" that have held true from "year to year." *Desist v. United States*, 394 U.S. 244, 263 (1969) (Harlan, J., dissenting), it did not establish a new rule. And because *Ramos*'s rule is not new, but rather is "merely an application of the principle[s] that governed" prior decisions of this Court, it applies to cases on collateral review under the retroactivity framework that this Court established in *Teague*, 489 U.S. at 307 (internal quotation marks omitted). Alternatively, even if *Ramos*'s unanimity requirement is new, it applies retroactively to cases on collateral review because it is a "watershed" rule that is "central to an accurate determination of innocence and guilt" and an "absolute prerequisite to

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[3] This Court has requested responses to several petitions that, like petitioner's here, arise from state collateral review proceedings and challenge the validity of their convictions by non-unanimous juries. *See, e.g.*, *Jones v. Louisiana*, No. 19-8875; *Woods v. Louisiana*, No. 20-5003; *Williams v. Louisiana*, No. 19-8740; *Dunn v. Louisiana*, No. 19-8711. The Louisiana Supreme Court decided all of these cases before this Court issued its opinion in *Ramos*.

fundamental fairness." *Teague*, 489 U.S. at 311, 313–14.

A. *Ramos* Did Not Announce A New Rule.

"[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301. *Ramos* did not announce a new rule because it simply applied two longstanding principles: the Sixth Amendment guarantees the right to a unanimous jury verdict and that right applies fully against the States through the Fourteenth Amendment. Both principles were established long before petitioner's conviction became final in 2000, as this Court recognized in *Ramos*.

1. "The requirement of juror unanimity emerged in 14th century England and was soon accepted as a vital right protected by the common law." *Ramos*, 140 S. Ct. at 1395. The "young American States" also embraced the view that the jury trial right entails a guarantee of unanimity. *Id.* at 1396. At the time of ratification, "[i]f the term 'trial by an impartial jury' carried any meaning at all, it surely included a requirement as long and widely accepted as unanimity." *Id.* Even "*Apodaca* itself [saw] a majority of Justices . . . recognize[] that the Sixth Amendment demands unanimity." *Id.* at 1398–99. In short, the principle that "[a] jury must reach a unanimous verdict in order to convict" is "unmistakabl[y]" a long-standing rule of criminal law. *Id.* at 1395.

2. This Court has similarly "long explained" that the Sixth Amendment jury trial right applies in full to the States. *Ramos*, 140 S. Ct. at 1397. Well before

Apodaca, this Court "rejected the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights." *Malloy v. Hogan*, 378 U.S. 1, 10–11 (1964) (internal quotation marks omitted). The Court reiterated that stance "many times . . . , including as recently as last year." *Ramos*, 140 S. Ct. at 1398 (citing *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019)).

3. The idiosyncratic result in *Apodaca* does not render *Ramos* new. "[T]he mere existence of conflicting authority does not necessarily mean a rule is new." *Williams v. Taylor*, 529 U.S. 362, 410 (2000) (internal quotation marks omitted).

Apodaca "always stood on shaky ground" because a majority of Justices has consistently rejected its rationale—before, after, and even in *Apodaca* itself. *Ramos*, 140 S. Ct. at 1389–99; *see id.* at 1409 (Sotomayor, J., concurring) (*Apodaca* was a "universe of one"). Although Justice Powell "offered up the essential fifth vote" in *Apodaca*, his personal view that the Sixth Amendment was not fully incorporated against the States "was (and remains) foreclosed by precedent," as he "frankly" acknowledged. *Ramos*, 140 S. Ct. at 1398; *see also McDonald v. City of Chicago*, 561 U.S. 742, 766 n.14 (2010) ("In *Apodaca*, eight Justices agreed that the Sixth Amendment applies identically to both the Federal Government and the States.").

Because *Ramos* simply coupled two longstanding rules of constitutional law—that the Sixth Amendment requires unanimous jury verdicts and that the Sixth Amendment is fully incorporated

against the States—it did not establish a "new" rule of criminal procedure within the meaning of *Teague*. *See Ramos*, 140 S. Ct. at 1409 (Sotomayor, J., concurring) (noting that *Apodaca* was "uniquely irreconcilable with not just one, but two, strands of constitutional precedent well established both before and after the decision"); *Tyler v. Cain*, 533 U.S. 656, 666 (2001) (recognizing that "the right combination of holdings" can render a rule retroactive). *Ramos* accordingly applies retroactively to cases on collateral review.

B. If New, *Ramos*'s Unanimity Requirement Constitutes A Watershed Rule Of Criminal Procedure.

To qualify as a watershed rule, a rule's "[i]nfringement . . . must seriously diminish the likelihood of obtaining an accurate conviction, and the rule must alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." *Tyler*, 533 U.S. at 665 (internal quotation marks and citation omitted). *Ramos*'s rule meets both components of this test. It is like the rule announced in *Gideon v. Wainwright*, 372 U.S. 335 (1963), which held that the Sixth Amendment requires States to provide an attorney to criminal defendants who are unable to afford their own attorneys. This Court has "repeatedly referenced [*Gideon*] in discussing the meaning of the *Teague* exception" for watershed rules. *Whorton v. Bockting*, 549 U.S. 406, 419 (2007). *Gideon* was a watershed rule because it reduced the "intolerably high" "risk of an unreliable verdict" that inevitably follows "[w]hen a defendant who wishes to be represented by counsel is denied representation,"

id., and "restore[d]" a "constitutional principle[] established to achieve a fair system of justice." 372 U.S. at 344. The rule recognized in *Ramos* is the same. It is among the "small core of rules" "implicit in the concept of ordered liberty," that apply retroactively to cases on collateral review. *O'Dell v. Netherland*, 521 U.S. 151, 157 (1997) (internal quotation marks omitted).

1. The unanimity requirement is "central to an accurate determination of innocence or guilt." *Teague*, 489 U.S. at 313. "The basic purpose of a trial is the determination of truth, and it is the jury to whom we have entrusted the responsibility for making this determination in serious criminal cases." *Brown v. Louisiana*, 447 U.S. 323, 334 (1980) (plurality op.) (internal quotation marks and citations omitted). Accordingly, "[a]ny practice that threatens the jury's ability to properly perform that function poses a similar threat to the truth-determining process itself." *Id.*

a. The unanimity requirement is vital to ensuring that jurors engage in "real and full deliberation," *McKoy v. North Carolina*, 494 U.S. 433, 452 (1990) (Kennedy, J., concurring in the judgment), through "a comparison of views" and "arguments among the jurors themselves," *Allen v. United States*, 164 U.S. 492, 501 (1896). When "[a] single juror's change of mind is all it takes" to provoke discussion and debate, verdicts are substantially more accurate. *Blueford v. Arkansas*, 566 U.S. 599, 608 (2012).

b. The unanimity rule ensures that a verdict represents the views of the entire jury, which guards against biased or inaccurate verdicts. As *Ramos*

noted, Louisiana and Oregon adopted their non-unanimity rules for "racially discriminatory reasons." 140 S. Ct. at 1401. Louisiana adopted its rule to "establish the supremacy of the white race" and "to ensure that African-American juror service would be meaningless." *Id.* at 1394 (internal quotation marks omitted). Oregon likewise wanted "to dilute the influence of racial, ethic, and religious minorities on Oregon juries." *Id.* (internal quotation marks omitted).

The racially discriminatory intent of these States' rules bore fruit: Black defendants have been 30 percent more likely to be convicted by non-unanimous juries than white defendants. Pet. App. 5a n.1. And the jurors voting to convict are more likely to be white: White jurors have cast "empty" votes 32 percent less than the expected rate if empty votes were evenly distributed among all jurors. *Id.*

c. Unanimity protects the accuracy of trial outcomes by reinforcing the defendant's "right to put the State to its burden" of proof, making the government convince each juror of the defendant's guilt beyond a reasonable doubt. *Ramos*, 140 S. Ct. at 1409 (Sotomayor, J., concurring). The absence of unanimity creates "an impermissibly large risk" of an inaccurate conviction, *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004) (internal quotation marks omitted), because it allows the State to brand the defendant "guilty" even though at least one juror has concluded that the prosecution did *not* meet its burden.

Allowing the jury to ignore the concerns of up to two jurors undercuts the accuracy of the trial. Louisiana has the second highest per capita rate of

proven wrongful convictions in the country. Amicus Br. of Innocence Project New Orleans et al. at 30, *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020). Since 1990, at least 13 men have been proven innocent and exonerated after being convicted by non-unanimous juries. *Id.* at 9. The practice of non-unanimous juries bred convictions based on "insubstantial and inferior evidence." *Id.* at 27.

2. The unanimity requirement also promotes the fundamental fairness of criminal proceedings.

Non-unanimous jury verdicts disproportionately convicted Black defendants and silenced Black jurors. *See supra* at 16. "Against this grossly disproportionate backdrop, it cannot be seriously contended that" Louisiana's "longtime use of a law deliberately designed to enable majority-White juries to ignore the opinions and votes of Black jurors at trials of Black defendants has not affected the fundamental fairness of Louisiana's criminal legal system." Pet. App. 5a–6a.

Indeed, this Court concluded that the jury-trial right applies in state courts precisely *because* that right "is among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'" *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968) (quoting *Powell v. Alabama*, 287 U.S. 45, 67 (1932)). The jury is the factfinder in criminal proceedings because it allows the defendant's peers to "guard against a spirit of oppression and tyranny on the part of rulers." *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (quoting 2 J. Story, Commentaries on the Constitution of the United States 540–41 (4th ed.

1873)). That function of the jury is frustrated when "the unanimous suffrage of twelve of [the defendant's] equals and neighbours" is not required to confirm "the truth of every accusation." *Id.* (internal quotation marks and citation omitted).

Unanimity not only increases accuracy, *see supra* at 15–17, but also gives legitimacy to the criminal justice system as a whole. That legitimacy is critical to this Court's ongoing efforts "to eradicate racial prejudice from our criminal justice system." *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987). The jury is "a criminal defendant's fundamental protection . . . against race or color prejudice," *id.* at 310 (internal quotation marks omitted), and the requirement of unanimity is essential to that purpose. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991) ("Race discrimination within the courtroom raises serious questions as to the fairness of the proceedings conducted there," "mars the integrity of the judicial system[,] and prevents the idea of democratic government from becoming a reality.").

III. This Case Is An Ideal Vehicle To Resolve Whether *Ramos* Is Retroactive Under *Teague*.

1. This case presents an excellent vehicle to address *Ramos*'s retroactivity under the *Teague* framework because it arises from a state habeas proceeding that adjudicated petitioner's Sixth Amendment claim on the merits while purporting to apply *Teague*. If *Ramos* is retroactive under the *Teague* framework, then petitioner is entitled to relief.

This Court has granted review of a retroactivity question in this posture before. In *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the Court granted certiorari to decide whether its decision in *Miller v. Alabama*, 567 U.S. 460 (2012)—holding that mandatory sentences of life without the possibility of parole are unconstitutional for juvenile offenders—applied to cases on state collateral review. In *Montgomery*, as here, the petitioner sought review from denial of relief in collateral proceedings in the Louisiana state courts. 136 S. Ct. at 727. This Court specifically confirmed that cases in this posture provide an opportunity to determine whether rules of criminal procedure apply retroactively under *Teague*. *Id.* at 727–32.

2. Petitioner's case exemplifies the grave doubts that pervade convictions obtained by non-unanimous verdicts. His conviction hinges on the testimony of a single witness who expressed uncertainty about her identification of the shooter. Before she identified petitioner from a photo array six weeks after the shooting, she told police: "It would be kind of like hard" to identify the perpetrator, but "maybe if I see photos I probably could [identify him] because I really didn't look, you know, really see him that well." Pet. App. 11a. Experience and scientific research have shown that such uncertain, uncorroborated, and delayed identification evidence is notoriously unreliable. *See, e.g.*, Nat'l Academy of Sciences, *Identifying the Culprit: Assessing Eyewitness Identification*, The National Academies Press (2014).

Two jurors had serious enough doubts about the sufficiency of the evidence to vote to acquit petitioner.

The unanimity requirement protects against convictions based on shaky evidence; its absence here occasioned a conviction that cannot be trusted.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Jeffrey L. Fisher
O'MELVENY & MYERS LLP
2765 Sand Hill Road
Menlo Park, CA 94025

G. Ben Cohen
THE PROMISE OF JUSTICE INITIATIVE
1024 Elysian Fields Ave.
New Orleans, LA 70116

Yaira Dubin
Counsel of Record
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036
(212) 728-5946
ydubin@omm.com

Meaghan VerGow
Kendall Turner
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington DC 20006

August 27, 2020

APPENDIX A

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA
vs. No. 2019-KH-01815

WILLIE GIPSON,

IN RE: Willie Gipson - Applicant Defendant; Applying for Supervisory Writ, Parish of Orleans Criminal, Criminal District Court Number(s) 384-121, Court of Appeal, Fourth Circuit, Number(s) 2019-K-0857;

June 03, 2020

Writ application denied.

JTG
JDH
WJC
JHB

Johnson, C.J., would grant and docket and assigns reasons.
Weimer, J., would grant and docket.
Chrichton, J., would grant and docket.

Supreme Court of Louisiana
June 03, 2020

/s/
Clerk of Court
For the Court

SUPREME COURT OF LOUISIANA

No. 2019-KH-01815

STATE OF LOUISIANA

VS.

WILLIE GIPSON

On Supervisory Writ to the Criminal District Court, Parish of Orleans **Johnson, C.J., would grant and docket and assigns reasons.**

I would grant the writ to clarify that the Supreme Court's recent decision in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) should be applied retroactively to cases on state collateral review.

The Supreme Court has granted certiorari to decide whether *Ramos* must apply retroactively to cases on federal collateral review. *Edwards v. Vannoy*, *Warden*, --- S. Ct. ---, 2020 WL 2105209 (Mem). But regardless of the outcome of that case, we are free to provide our citizens with more than the minimum mandated by the Supreme Court. *Danforth v. Minnesota*, 552 U.S. 264, 277-78 (2008). While the majority of this court has voted to defer until the Supreme Court mandates that we act, I am persuaded that we should take this opportunity to squarely address the historic injustices done to Louisiana's African American citizens by the use of the non-unanimous jury rule.

In my opinion, *Ramos* meets the test for retroactive application enunciated by the Supreme Court in *Teague v. Lane*, 489 U.S. 288 (1989). But I also believe it is time we abandoned our use of *Teague* in

favor of a retroactivity test that takes into account the harm done by the past use of a particular law. By either route, Louisiana should give *Ramos* retroactive effect.

In 1992, we adopted *Teague*'s test for determining whether decisions affecting rights of criminal procedure would be retroactively applied to cases in state collateral review. *State ex rel. Taylor v. Whitley*, 606 So. 2d 1292, 1296 (La. 1992). In relevant part, *Teague* only requires retroactive application of a new rule if it is a "watershed rul[e] of criminal procedure" that "implicates the fundamental fairness [and accuracy]" of the criminal proceeding. *Teague*, 489 U.S. at 311-312.

Ramos meets that definition. It plainly announced a watershed rule. "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." *Ramos*, 140 S. Ct. at 1397 (citing *Duncan v. Louisiana*, 391 U.S. 145, 148-50 (1968)). Therefore the remaining question under *Teague* is whether the *Ramos* rule implicates fundamental fairness and accuracy. Because this court denied the instant writ application, we do not have full briefing on this issue. However, the existing *Ramos* record alone supports the conclusion that it does. The law that *Ramos* struck was designed to discriminate against African Americans and it has been successful. For the last 120 years, it has silenced and sidelined African Americans in criminal proceedings and caused questionable convictions throughout Louisiana.

The post-Reconstruction Louisiana Constitutional Convention of 1898 sought to "establish the supremacy of the white race." *Ramos*, 140 S. Ct. at 1394. It "approved non-unanimous juries as one pillar of a comprehensive and brutal program of racist Jim Crow measures against African-Americans, especially in voting and jury service." *Id.* at 1417 (Kavanaugh, J., concurring in part). "[A]ware that this Court would strike down any policy of overt discrimination against African-American jurors as a violation of the Fourteenth Amendment, the delegates sought to undermine African-American participation on juries in another way. With a careful eye on racial demographics, the convention delegates sculpted a "facially race-neutral" rule . . . in order "to ensure that African-American juror service would be meaningless." *Id.*

Data showing that votes of African American jurors have been disproportionately silenced is compelling evidence that the use of the pre-*Ramos* rule affected the fundamental fairness and accuracy of criminal trials. "In light of the racist origins of the non-unanimous jury, it is no surprise that non-unanimous juries can make a difference in practice, especially in cases involving black defendants, victims, or jurors." *Id.* at 1417 (Kavanaugh, J., concurring in part). The whole point of the law was to make it easier to convict African American defendants at criminal trials, even when some of the jurors themselves were African American. By Louisiana's constitutional convention of 1974, which reauthorized the use of the Jim Crow law, the expected ease of convicting African Americans in Louisiana had

come to simply be described as "judicial efficiency." *State v. Hankton*, 2012-0375, 19 (La. App. 4 Cir. 8/2/13) 122 So. 3d 1028, 1038, *writ denied*, 2013-2109 (La. 3/14/14); 134 So. 3d 1193. But despite "race neutral" language justifying the law in 1974, it has continued to have a detrimental effect on African American citizens.[1] "Then and now, non-unanimous juries can silence the voices and negate the votes of black jurors, especially in cases with black defendants or black victims, and only one or two black jurors. The 10 jurors "can simply ignore the views of their fellow panel members of a different race or class." *Johnson v. Louisiana*, 406 U.S. 356, 397 (1972) (Stewart, J., dissenting)." *Ramos*, 140 S. Ct. at 1414-18 (Kavanaugh, J., concurring in part).

Approximately 32% of Louisiana's population is Black.[2] Yet according to the Louisiana Department of Corrections, 69.9% of prisoners incarcerated for felony convictions are Black.[3] Against this grossly

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[1] Data on non-unanimous jury verdicts contained in the record of *State v. Melvin Cartez Maxie*, 11th Judicial District Court, No. 13-CR-72522 and submitted to the Supreme Court in the Joint Appendix in *Ramos v. Louisiana*, shows that African Americans have been 30 percent more likely to be convicted by non-unanimous juries than white defendants and that African American jurors casted "empty" votes at 64 percent above the expected rate whereas white jurors casted "empty" votes at 32 percent less than the expected rate if empty votes were evenly dispersed amongst all jurors. *Ramos v. State of Louisiana*, 2018 WL 8545357, at *51 (2018).

[2] Census statistics available at https://www.census.gov/quickfacts/LA (last accessed May 25, 2020).

[3] Statistics from the Louisiana Department of Public Safety and Corrections January 2020 Briefing Book available at

disproportionate backdrop, it cannot be seriously contended that our longtime use of a law deliberately designed to enable majority-White juries to ignore the opinions and votes of Black jurors at trials of Black defendants has not affected the fundamental fairness of Louisiana's criminal legal system. The original discriminatory purpose and the lasting discriminatory effect of the non-unanimous jury rule all implicate fundamental fairness.

The rights at issue here also directly implicate the accuracy of convictions. While many of those convicted by non-unanimous juries are surely guilty of the crimes of which they were convicted, we still have a subset of convictions where at least one—but often two—jurors had sufficient doubt of the accused's guilt to vote "not guilty." Experience teaches, and the *Ramos* decision reiterates, that those "not guilty" votes should not be cavalierly dismissed as meaningless:

> Who can say whether any particular hung jury is a waste, rather than an example of a jury doing exactly what the [Apodaca] plurality said it should—deliberating carefully and safeguarding against overzealous prosecutions? And what about the fact, too, that some studies . . . . profess to have found that requiring unanimity may provide other possible benefits, including more open-minded and more thorough deliberations?

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https://s32082.pcdn.co/wp-content/uploads/2020/03/0Z-Full-Jan-2020-BB-3.13.2020.pdf (last access May 25, 2020).

Ramos, 140 S. Ct. at 1401. We need not look far back in history to be reminded that sometimes the will or opinion of a majority is wrong and the dissenting minority was factually, or morally, correct. But during the 120 years of Louisiana's non-unanimous jury scheme, jurors in the majority never had reason to consider the perspective or opinion of a minority of dissenting jurors, because—by design—once the jury reached a consensus of ten, dissenting voices became irrelevant.[4] While we will likely never know how many factually inaccurate convictions have rested on non-unanimous verdicts, nor in how many the rule was a pivotal cause of the wrongful conviction, we know they have occurred.[5]

The non-unanimous jury rule has "allow[ed] convictions of some who would not be convicted under the proper constitutional rule, and [has] tolerate[d] and reinforce[d] a practice that is thoroughly racist

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[4] *See, e.g.*, Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1274-75 (2000) (a non-unanimous jury system "eliminates the imperative to engage in substantive discussions with the minority and . . . instead invites them to elect the easier course: they need only deliberate long enough to produce the necessary majority . . . [s]o jurors can acquit or convict without once considering conflicting perspectives on the meaning or strength of the evidence.")

[5] In 2019 alone, two Louisiana men who had been convicted by non-unanimous juries were exonerated and freed after fingerprint database searches identified the true perpetrators in both cases. Archie Williams had spent 36 years wrongly imprisoned for rape and attempted murder and Royal Clark had spent 17 years wrongly imprisoned for armed robbery.

in its origins and has continuing racially discriminatory effects." *Ramos*, 140 S. Ct. at 1419 (Kavanaugh, J., concurring in part). By Justice Kavanaugh's accurate summary alone, *Ramos* satisfies the relevant portion of *Teague*'s test and should be applied retroactively by Louisiana courts.

But we are not bound to continue using *Teague*'s test, and there are good reasons to abandon our decision in *Taylor* that adopted it. There was little in the *Taylor* rationale that commands our continued adherence to Teague. Dissenting in *Taylor*, Chief Justice Calogero explained why *Teague*'s premise did not apply to state courts: "[F]ederal courts have indicated that their reduced intrusion into state criminal process is motivated by concerns of federalism and comity. State courts should not blindly adopt these new criteria, because the concerns of federalism and comity are absent from state criminal court proceedings." *Taylor*, 606 So. 2d at 1301 (Calogero, C.J., dissenting). Since this court decided *Taylor* in 1992, Congress and the federal courts have created ever more restrictions on the availability of the federal writ of habeas corpus to prisoners convicted in state court, further undermining the premise of *Taylor* and creating additional imperative for us to revisit its holding.

The importance of the *Ramos* decision—and the historic symbolism of the law that it struck—present the opportunity to reassess *Taylor* and the wisdom of Louisiana using the *Teague* standard in retroactivity analysis. We should. The original purpose of the non-unanimous jury law, its continued use, and the disproportionate and detrimental impact it

has had on African American citizens for 120 years is Louisiana's history. The recent campaign to end the use of the law is already part of the history of this state's long and ongoing struggle for racial justice and equal rights for all Louisianans. That campaign meant many more citizens now understand the law's origins, purpose, and discriminatory impact. And that understanding contributes to a cynicism and fatal mistrust of Louisiana's criminal justice system by many citizens who see the lack of fundamental fairness and equal protection afforded to all. It is time that our state courts—not the United States Supreme Court—decided whether we should address the damage done by our longtime use of an invidious law.

The racist history of the law was not explicitly relevant to the Supreme Court's determination that the Sixth Amendment requires jury unanimity. However, a majority of the justices considered that history as one of the principled justifications for abandoning stare decisis and departing from the "gravely mistaken" and "egregiously wrong" "outlier" precedent of *Apodaca v. Oregon*, 404 U.S. 406 (1972) (in which a plurality of the Supreme Court held that Oregon and Louisiana's non-unanimous jury schemes did not violate the Sixth Amendment) in favor of a correct interpretation of the Sixth Amendment's jury requirement. *Ramos*, 140 S. Ct. at 1405, 1418.[6] That history should be just as—if not

[6] The Court's majority opinion noted that "*Apodaca* was gravely mistaken [and] no Member of the Court today defends [it] as rightly decided . . . . The [*Apodaca*] plurality spent almost no

more—persuasive to us in deciding whether to overrule the erroneously reasoned *Taylor* case. I am persuaded that we should, and that we should replace *Teague*'s test with one that, at least in part, weighs the discriminatory effects of a stricken law when determining retroactive applicability in Louisiana.

There are some rules of procedure untethered to our history of discrimination against African Americans where the question of retroactive application may carry less weight. But this was an intentionally racially discriminatory law that has disproportionately affected Black defendants and Black jurors. There is no principled or moral justification for differentiating between the remedy for a prisoner convicted by that law whose case is on direct review and one whose conviction is final. Both are equally the

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time grappling with the racist origins of Louisiana's and Oregon's laws." *Ramos*, 140 S. Ct. at 1405. Justice Kavanaugh further explained the relevance of the law's history:

> "…[T]he disputed question here is whether to overrule an erroneous constitutional precedent that allowed non-unanimous juries. And on that question—the question whether to overrule—the Jim Crow origins and racially discriminatory effects (and the perception thereof) of non-unanimous juries in Louisiana and Oregon should matter and should count heavily in favor or overruling, in my respectful view. After all, the non-unanimous jury 'is today the last of Louisiana's Jim Crow laws.' And this Court has emphasized time and again the 'imperative to purge racial prejudice from the administration of justice' generally and from the jury system in particular."

Ramos, 140 S. Ct. at 1418 (Kavanaugh, J., additionally concurring) (citing T. Aiello, *Jim Crow's Last Standin: Nonunanimous Criminal Jury Verdicts in Louisiana*, 63 (2015)).

product of a racist and unconstitutional law. If concerns of comity and federalism ultimately mean that the federal courts do not force us to remedy those convictions which are already final through a writ of habeas corpus, the moral and ethical obligation upon courts of this state to address the racial stain of our own history is even more compelling, not less.

"Any decision by [the Supreme] Court that a new rule does not apply retroactively under *Teague* does not imply that there was no right and thus no violation of that right at the time of trial—only that no remedy will be provided in federal habeas courts." *Danforth*, 552 U.S. at 291. I believe we must formulate a new test for determining whether a decision be applied retroactively; one that includes a consideration of whether a stricken law had a racist origin, has had a disproportionate impact on cognizable groups or has otherwise contributed to our state's history of systemic discrimination against African Americans. And under any such test, I believe *Ramos* would have to be retroactively applied.

Mr. Gipson is Black. He was 17-years-old when he was arrested in 1996. He was convicted of second degree murder by a jury vote of 10-2 based on the trial testimony of a single eyewitness who, before identifying Mr. Gipson from a photoarray, had told police that, "[i]t would be kind of like hard [to identify the perpetrator]" and "maybe if I see the photos I probably could [identify the perpetrator] because I really didn't look, you know, really see him that well." *State v. Gipson*, 98-0177 (La. App. 4 Cir. 11/17/99); 747 So.2d 187, 190, *writ denied*, 2000-

0241 (La. 12/8/00); 775 So.2d 1076. He has challenged his conviction by non-unanimous jury verdict on collateral review under the Fourteenth Amendment's Equal Protection clause rather than the Sixth Amendment. However, *Ramos* should apply to anyone convicted by a non-unanimous jury, regardless of the words they have used or the constitutional provisions they have cited to challenge their conviction.

We should not reject retroactivity through a fear that we will "provoke a 'crushing' 'tsunami' of follow-on litigation." *Ramos*, 140 S. Ct. at 1406. The Court made clear in *Ramos* that such functionalist assessments have no place in considering fundamental rights. "The deeper problem is that the [*Apodaca*] plurality subjected the ancient guarantee of a unanimous jury verdict to its own functionalist assessment in the first place." *Id.* at 1401–02. Likewise, such a functionalist assessment should have no place in our decision as to whose convictions will be remedied by *Ramos*. Even if we performed such a functionalist assessment, the benefits of applying *Ramos* retroactively greatly outweigh the costs. To be sure, addressing a history of legally-sanctioned racism in our criminal justice system will come with a significant fiscal and administrative cost. But it is a cost we must bear if we mean to show that we guarantee all Louisianans equal justice. We must not "perpetuate something we all know to be wrong only because we fear the consequences of being right." *Id.* at 1408. The cost of giving new trials to all defendants convicted by non-unanimous juries pales in comparison to the long-term societal cost of

perpetuating—by our own inaction—a deeply-ingrained distrust of law enforcement, criminal justice, and Louisiana's government institutions.

Defendants convicted by non-unanimous jury verdicts are prisoners of a law that was designed to discriminate against them and disproportionately silence African American jurors. 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." *Id.* at 1418 (Kavanaugh, J., concurring in part). 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.

APPENDIX B

NO. 2019-K-0857

COURT OF APPEAL, FOURTH CIRCUIT

STATE OF LOUISIANA

STATE OF LOUISIANA

VERSUS

WILLIE GIPSON

IN RE:	WILLIE GIPSON
APPLYING FOR:	SUPERVISORY WRIT
DIRECTED TO:	HONORABLE DENNIS J. WALDRON CRIMINAL DISTRICT COURT ORLEANS PARISH SECTION "G", 384-121

WRIT DENIED

Relator seeks review of the trial court's judgment which denied his application for post-conviction relief. The writ is denied.

New Orleans, Louisiana this ___ day of ___, ___.

_____

Judge Roland L. Belsome

_____

Judge Daniel L. Dysart

_____

Judge Regina Bartholomew-Woods

STATE OF LOUISIANA	*	**NO. 2019-K-0857**
	*	**COURT OF APPEAL**
VERSUS	*	
WILLIE GIPSON	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	

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BARTHOLOMEW-WOODS, J., CONCURS

I concur with the denial of the writ. Until the United States Supreme Court opines whether all defendants, even those defendants who have been convicted prior to the amendment to Louisiana's constitution, are entitled to a unanimous jury verdict, this Court is without the legal authority to revisit the issue as it relates to the retroactive application of the law to defendants similar to Relator.[1]

[1] *State v. Ramos*, 2016-1199 (La. App. 4 Cir. 11/2/17); 231 So.3d 44, *writ denied*, 2017-2133 (La. 6/15/18); 257 So.3d 679, and *writ denied sub nom. State ex rel. Evangelisto Ramos v. State*, 2017-1177 (La. 10/15/18); 253 So.3d 1300, and *cert. granted*, 139 S.Ct. 1318; 203 L.Ed.2d 563 (2019).

APPENDIX C

CRIMINAL DISTRICT COURT OF ORLEANS PARISH, LOUISIANA

SECTION "G" Judge:	THE HONORABLE DENNIS WALDRON
Minute Clerk:	MARCELLE BUTSCHER
Court Reporter:	NANCY FREMEN
Assist. D.A.:	SARAH DAWKINS, ERIC CUSIMANO, GEMINESSE DORSEY

Date: TUESDAY, September 10, 2019
Case Number: 384-121
State of Louisiana
versus
WILLIE J GIPSON Violation: RS.14 30.1

AS TO DEF, WILLIE J GIPSON,
IN CONNECTION WITH THE DEFENDANTS APPLICATION FOR POST CONVICTION

RELIEF FILED ON 8/23/2019 AND THE SUPPLEMENTAL APPLICATION FILED

ON 9/9/2019. THE COURT AFTER REVIEW OF THE DEFENDANTS APPLICATION AND THE LAW, THE COURT DENIES THE APPLICATION FOR LACK OF MERIT.

A COPY OF THIS MINUTE ENTRY WAS SENT TO THE DEFENDANT AT THE ADDRESS PROVIDED.

_____
MARCELLE BUTSCHER, Minute Clerk

APPENDIX D

747 So.2d 187
Court of Appeal of Louisiana,
Fourth Circuit.

STATE of Louisiana

v.

Willie J. GIPSON.

No. 98-KA-0177.

Nov. 17, 1999.

Attorneys and Law Firms

Harry F. Connick, District Attorney, Nicole Barron, Assistant District Attorney, New Orleans, Counsel for Plaintiff.

Donald O. Pinkston, New Orleans, and Laura Pavy, Louisiana Appellate Project, New Orleans, Counsel for Defendant.

(Court composed of Chief Judge ROBERT J. KLEES, Judge MIRIAM G. WALTZER and Judge ROBERT A. KATZ).

Opinion

KLEES, Chief Judge.

On July 18, 1996, the State filed a bill of information charging the defendant-appellant Willie Gipson with one count of second degree murder, a violation of La. R.S. 14:30.1. The defendant was arraigned and entered a not guilty plea on July 22, 1996. A motion hearing was held on November 8,

1996, at which time the trial court denied the motions to suppress the identification and evidence. Following a trial on May 1, 1997, a twelve-person jury returned a verdict of guilty as charged. The defendant's post-verdict motions were denied on September 4, 1997. On October 31, 1997, the trial court sentenced the defendant to life imprisonment without the benefit of probation, parole, or suspension of sentence. Defendant appeals this sentence.

FACTS

On March 28, 1996, Officer Wellington Beaulieu was assigned to community policing and was working on foot patrol in the Florida housing project. While in the 2600 block of Alvar, he and his partner heard several shots of gunfire in the area of the 2600 block of Bartholomew. After calling dispatch, the officer proceeded the one-half block to Bartholomew, where he observed a black male lying face down in the driveway. The victim, Roy Simon, had sustained several gunshot wounds. After calling for an emergency unit, the officer interviewed Sabrina Simon, the victim's wife. The officer obtained information that a black male, wearing a green shirt, fled on a bicycle. Later, while filling out the pertinent reports, Officer Beaulieu received information by phone as a result of which he went to 2538 Mazant Street to look for a bike and a subject armed with a handgun. When no one responded at 2538 Mazant, Officer Beaulieu's partner left to secure a search warrant. At that point, the resident of the apartment returned home and gave the police consent to search. Inside the kitchen, Officer Beaulieu observed a bicycle; the apartment resident stated she

knew nothing about the bike or to whom it belonged. The bicycle was seized as evidence. At trial, the bicycle was identified by Officer Beaulieu by the tag and because of its muddy condition. The officer testified that the courtyard was wet and muddy on the night of the incident. However, on cross-examination, he admitted that he observed no bike tracks in the area where the victim was shot. He also testified that the defendant did not live at the Mazant Street apartment.

According to the trial testimony of Dr. Paul McGary, an expert in forensic pathology, the victim Roy Simon had sustained three gunshot wounds. Three bullets, nine millimeters in diameter, were recovered from the victim's body during the autopsy. The fatal wound had entered the victim's abdomen and collapsed his right lung. Tests on the victim's bodily fluids were negative for alcohol and drugs.

Marion Mosley lived next door to the victim and his wife. On the evening of the murder, Ms. Mosley was coming down the steps with the victim. The victim walked toward his car while Ms. Mosley proceeded down the driveway to her sister-in-law's apartment down the block. As Ms. Mosley was talking to neighbors outside of her sister-in-law's apartment, she heard shooting and dived into the hallway. Although she was not sure at trial, Ms. Mosley believed she saw "a bike going through the gap." It was too dark to determine if a man or a woman was on the bicycle. She heard the victim calling, "Brenda, Brenda, Brenda, I'm shot" and ran over to him; Ms. Mosley stayed with the victim and called

out for his wife, but the victim's wife never came. Ms. Mosley testified at trial that she did not see the defendant that night.

Detective Fred Austin was the lead homicide investigator assigned to the murder of Roy Simon. After some investigation, the defendant's name was developed as a subject. Detective Austin compiled a photographic line-up which he showed to Sabrina Simon. Mrs. Simon selected the defendant's photograph as that of the person who shot her husband Roy. The photo line-up was conducted on May 9, 1996.

Detective Austin testified at trial that, on the night of the murder, Sabrina Simon provided a description of the shooter as approximately five feet eight inches to six feet tall. Ms. Mosley could not provide any physical description except that of a black male wearing a green shirt and riding a bike. Detective Austin further testified that the bicycle seized from the Mazant Street apartment was examined for fingerprints; the examination was negative for latent fingerprints. The defendant did not live at the apartment.

Sabrina Simon testified that she had been married to the victim Roy Simon for six and a half years. They resided on Bartholomew Street in a second-floor apartment. On the day of the murder, her husband had worked then gone to Mobile One with his brother-in-law to get an amplifier. After his brother-in-law left, the victim went downstairs to install the amplifier in his car. Mrs. Simon was in the kitchen cooking. Their children were in the living room

watching television. As Mrs. Simon looked out the kitchen window, she could see her husband working on the car. As she watched, she observed the defendant, whom she had never seen before, "roll up" on a bicycle and shoot her husband. The defendant did not stop. Mrs. Simon could see a gun in the defendant's hand. Mrs. Simon called 911 from the phone in the kitchen, then gathered her children. Mrs. Simon and the children went onto the apartment balcony because she wanted to give the children to her neighbor so that they would not see their father downstairs. However, the neighbor, Ms. Mosley, was downstairs. After Mrs. Simon and her children went back inside, other neighbors pounded on her door and took her children. Mrs. Simon went downstairs and stayed with her husband until the ambulance came.

Mrs. Simon testified that she had an opportunity to see the defendant as he was riding up to her husband's car. The only clothing she could remember was a green shirt. Later, Mrs. Simon picked the defendant's photograph out of the line-up because she remembered his face.

During cross-examination, Mrs. Simon was questioned on whether she had made a statement to police officers on the night of the murder. She recalled making a statement, but could not recall if she told them she could identify anyone; she was hysterical. She did recall telling them that she could identify the person who shot her husband if she saw him again. Mrs. Simon was also asked if she recalled making a statement on April 6th, one week

after the murder. She testified that she told the police that her husband was shot twice by a thirty-eight or nine millimeter gun and that the perpetrator had medium brown skin.

Defense counsel presented Mrs. Simon with a written copy of the statement she made to the police one week after the murder. According to the statement, when asked if she could identify the person who shot her husband, Mrs. Simon replied, "It would be kind of like hard cause because when it happened after I was trying to bring-I ran to the phone and to bring my children to the neighbor. That's how I saw him going through the front court because I went to the balcony to bring my children to my neighbor and I saw him coming - through the front court and rode back toward Mazant where the other incident happened." Mrs. Simon's statement also reflected that she told the police, when asked if she got a good look at the perpetrator's face, "Maybe if I see the photos I probably could because I really didn't look, you know, really see him that well." (*Id.*). Her written statement also reflected that she told the police that she "was right downstairs in front [of](sic) the door" when the incident occurred.

On redirect examination, Mrs. Simon testified that she could remember the face, from the forehead to the eyes, of the person who shot her husband. She could particularly remember his face because of the subject's thick eyebrows and eyes that "sit back".

The defendant did not testify at trial.

DISCUSSION

In the briefs filed by the appellant's retained and appointed counsel, the sole issue raised is the sufficiency of the evidence, which, they argue, consisted solely of the identification of the defendant by Sabrina Simon. The appellant pro se alleges that the evidence was insufficient because of the inconsistencies in Mrs. Simon's statements and the great likelihood of misidentification. Because all of the arguments focus on the issue of whether the State proved the defendant's identity as the perpetrator, they will be discussed together.

This court set out the standard for reviewing convictions for sufficiency of the evidence in *State v. Egana,* 97-0318, pp. 5-6 (La. App. 4 Cir. 12/3/97), 703 So.2d 223, 227-28, as follows:

> In evaluating whether evidence is constitutionally sufficient to support a conviction, an appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of act could have found the defendant guilty beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green,* 588 So.2d 757 (La. App. 4 Cir.1991). However, the reviewing court may not disregard this duty simply because the record contains evidence that tends to support each fact necessary to constitute the crime. *State v. Mussall,* 523 So.2d 1305 (La. 1988). The reviewing court must consider the record as a whole since that is what a rational

> trier of fact would do. If rational triers of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted. The fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. *Mussall*; *Green*; *supra*. "[A] reviewing court is not called upon to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence." *State v. Smith,* 600 So.2d 1319 (La. 1992) at 1324.
>
> In addition, when circumstantial evidence forms the basis of the conviction, such evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. *State v. Shapiro,* 431 So.2d 372 (La. 1982). The elements must be proven such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. This is not a separate test from *Jackson v. Virginia, supra,* but rather an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. *State v. Wright,* 445 So.2d 1198 (La. 1984). All evidence, direct and circumstantial, must meet the *Jackson* reasonable doubt standard. *State v. Jacobs,* 504 So.2d 817 (La. 1987).

97-0318 at pp. 5-6, 703 So.2d at 227-28.

Credibility determinations, as well as the weight to be attributed to the evidence, are soundly within the province of the jury's trial function. *State v. Brumfield,* 93-2404, pp. 5-6 (La. App. 4 Cir. 6/15/94), 639 So.2d 312, 316. The determination of the weight of the evidence is a question of fact which rests solely with the trier of fact, who may accept or reject, in whole or in part, the testimony of any witness. *State v. Silman,* 95-0154, p. 12 (La. 11/27/95), 663 So.2d 27, 35.

As noted above, Mrs. Simon was extensively cross-examined about her statement to the police, made one week after the murder, that she really did not get a good look at the perpetrator's face. The jury was able to consider that statement in its totality, including the portion where Mrs. Simon told the police that she probably could identify the perpetrator if she saw a photograph. The State was also able to present to the jury that portion of Mrs. Simon's statement wherein she told the police that there was a light right by her husband's car and that the area was well lit. Mrs. Simon identified photographs of the scene which depicted the light pole, the black top of her husband's car, and the location of the kitchen window from which she saw the murder. Furthermore, although there was no evidence to link the defendant to the crime except for Mrs. Simon's identification, Ms. Mosley was able to corroborate Mrs. Simon's testimony that the perpetrator was riding a bicycle.

The appellant pro se argues that "numerous eccentricities, unusual coincidences, and lack of corroboration" as in the case of *State v. Perron,* 94-

0761, p. 6 (La. App. 4 Cir. 12/27/96), 686 So.2d 994, 997, *writ denied,* 97-0090 (La. 1/24/97), 686 So.2d 869, establish that the evidence is insufficient to establish his identity beyond a reasonable doubt. In *Perron* the State's evidence as to identity rested upon the testimony of a police officer, Len Davis, who was later convicted of murder. Officer Davis testified that the defendant, while illuminated by streetlights, discharged a rifle into a crowd of thirty to forty people only fifteen to twenty feet away. However, no one was injured, and the State presented no witnesses to corroborate Officer Davis's testimony. Furthermore, Officer Davis testified that he and other persons fired back at the defendant as he ran behind a vehicle; however, the vehicle was never hit by any gunfire, despite the fact that police gathered over forty spent casings from the scene and the casings came from at least six weapons. This Court found that, given Officer Davis's incredible testimony, which was contradicted by the physical evidence and uncorroborated by any other witness, no rational jury could find the defendant guilty beyond a reasonable doubt.

This case does not rise to the level of *Perron*. The only arguable inconsistency in Mrs. Simon's testimony is her statement that she did not get a real good look at the perpetrator and would need a photo to identify him. The physical evidence did not contradict her testimony. A rational juror could find beyond a reasonable doubt that the defendant was the subject who shot the victim and fled on a bicycle.

The appellant pro se further argues that Mrs. Simon's identification of his photograph is suspect because she had only a glimpse of the perpetrator, that her identification rested upon particular facial characteristics, and that none of the faces of the persons included in the photographic lineup, except his, contained these characteristics which were described by Mrs. Simon as thick eyebrows and eyes that "sit back".

To suppress an identification, a defendant must prove that the identification itself was suggestive and that there was a substantial likelihood of misidentification as a result of the identification procedure. *State v. Nogess,* 98-0670, pp. 3-4 (La. App. 4 Cir. 3/3/99), 729 So.2d 132; *State v. Hankton,* 96-1538, p. 8 (La. App. 4 Cir. 9/16/98), 719 So.2d 546, 550, *writ denied,* 98-2624 (La. 1/29/99), 736 So.2d 828. If the identification procedure is found to have been suggestive, the court must then determine whether there was a substantial likelihood of misidentification by looking to the five factors enunciated in *Manson v. Brathwaite,* 432 U.S. 98, 97 S. Ct. 2243, 53 L.Ed.2d 140 (1977), as adopted by the Louisiana Supreme Court in *State v. Prudholm,* 446 So.2d 729, 738 (La. 1984): (1) the witness's opportunity to view the defendant at the time the crime was committed; (2) the degree of attention paid by the witness during the commission of the crime; (3) the accuracy of any prior description; (4) the level of the witness's certainty displayed at the time of identification; and (5) the length of time elapsed between the crime and the identification. *Hankton, supra,* 96-1538 at pp. 8-9, 719 So.2d at 550. The trial

court's determination on the admissibility of identification evidence is entitled to great weight and will not be disturbed on appeal in the absence of an abuse of discretion. *Nogess, supra,* at p.4, 729 So.2d at 135.

The photographs used in the line-up presented to Mrs. Simons have been made an exhibit to the appeal record in this matter. A review of those photographs fails to support the defendant's claim that his photograph is different and distinctive so as to render the identification suggestive. One of the photographs is relatively dissimilar to the rest because of the lighter skin of the person depicted; however, that is not the defendant's photograph. The balance of the six photographs depicts persons with similar facial structures and skin color. Notably, the defendant's eyebrows appear to be thinner than the eyebrows shown in two other photographs. The appellant's pro se claim that the photographic identification procedure was suggestive is without merit.

Accordingly, the conviction and sentence of appellant Willie J. Gipson is hereby affirmed.

AFFIRMED.