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).

[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).

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 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?

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

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

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 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

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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.

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 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 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.

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[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 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 of 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 Stand: Nonunanimous Criminal Jury Verdicts in Louisiana*, 63 (2015)).

"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 photo-array, 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.