

SUPREME COURT OF LOUISIANA

No. 2020-KH-0055

STATE OF LOUISIANA

VS.

FRED D. KIDD, SR.

On Supervisory Writ to the Fourth Judicial District Court, Parish of Ouachita

Johnson, C.J., would grant and assigns reasons:

Mr. Kidd, a Black man, was convicted of attempted second degree murder by a non-unanimous jury verdict of 10-2. He challenges the constitutionality of his conviction by non-unanimous jury. 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. I have previously expressed that it is time we abandoned our use of *Teague v. Lane*, 489 U.S. 288 (1989) in favor of a retroactivity test that takes into account the harm done by the past use of non-unanimous jury verdicts in Louisiana courts. This case provides one illustration of the specific ways in which the racist law has had a detrimental impact on Black defendants like Mr. Kidd.

Mr. Kidd was 54-years-old with no criminal history when he was charged, in 2006, with attempted second degree murder for an incident in which he shot his girlfriend, Ms. Robinson, in the abdomen. The two had a tumultuous and mutually violent relationship, including an incident in the month before the shooting at issue in which the victim had gone to a bar where Mr. Kidd was drinking and pointed a handgun in his face. *State v. Kidd*, 45-638 (La. App. 2 Cir. 11/3/10), 55 So.3d 90, 93.

Mr. Kidd was tried first in July 2008. The jury, after deliberating for seven hours, could not reach a verdict and deadlocked at 9-3. The court declared a mistrial.

Mr. Kidd was tried again a year later. The entire venire of three panels of prospective jurors (42 people) contained only eight Black people (19% of the venire), yet according to U.S. Census data, Ouachita Parish is almost 38% Black. Then, the jury selected contained only two Black jurors. That jury found him guilty as charged by a vote of 10-2.¹

In 1992, we adopted *Teague*'s test for determining whether decisions affecting rights of criminal procedure would be retroactively applied in cases on state collateral review. *State ex rel. Taylor v. Whitley*, 606 So. 2d 1292, 1296 (La. 1992). *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.

In my view, *Ramos* announces a watershed rule implicating fundamental fairness and accuracy. "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)). The law that *Ramos* struck came from the post-Reconstruction Louisiana Constitutional Convention of 1898, which sought to "establish the supremacy of the white race." *Id.* 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). The point was to make it easier to

¹ The non-unanimous jury verdict also gives reason to question the prior denial of Mr. Kidd's direct appeal based on harmless error. On direct review, Mr. Kidd claimed the trial court erroneously excluded evidence about the victim's prior propensities that could have impeached her testimony regarding prior acts of violence by the defendant, and which could have undermined her general credibility. Because the victim and defendant were the only witnesses to the exact events that led to the defendant shooting her, the jury had to decide to credit her testimony or the defendant's. The court of appeal on direct review held that, "[t]he trial court should have allowed limited questioning of the victim regarding any previous report she may have made about domestic violence suffered at the hands of her ex-husband. . . . Defendant was trying to diminish the proof that he had, prior to the shooting, committed violence against the victim, and, perhaps more importantly, he was trying to prove that the victim was not a credible witness." *Kidd*, 55 So.3d at 98. Nevertheless, the court of appeal found that "any error in this regard was surely harmless beyond a reasonable doubt" because "the verdict in this case was surely unattributable to any error by the trial court on this issue." *Id.*

convict African American defendants at criminal trials, even when some of the jurors themselves were African American. As shown here, it worked. Data contained in the *Ramos* record shows that votes of Black jurors have been disproportionately silenced and that Black defendants have been disproportionately affected by non-unanimous verdicts. This case contains presumptive proof that two Black jurors were silenced and Mr. Kidd was directly affected by the non-unanimous jury law. Approximately 32% of Louisiana's population is Black, yet 69.9% of prisoners incarcerated for felony convictions are Black. Clearly our longtime use of a law deliberately designed to enable majority-White juries to ignore the opinions and votes of Black jurors at trials of Black defendants has affected the fundamental fairness and accuracy of proceedings.

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 then non-unanimous jury rule was intentionally racist and has disproportionately affected Black Louisiana citizens like Mr. Kidd for 120 years. 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. We should abandon our use of the *Teague* test, which—informed by federalism concerns—has never had any logical application in state court anyway, and formulate a new retroactivity test for Louisiana that takes into account the racist origins or disproportionate impact of a stricken law. We should not fear a “crushing” “tsunami” of follow-on litigation.” *Ramos*, 140 S. Ct. at 1406. The cost of giving new trials to defendants convicted by non-unanimous juries is much less than the social cost of perpetuating—by our own inaction—a deeply-ingrained distrust of law enforcement, criminal justice, and Louisiana's government institutions.

For these reasons, which I explain further in *State v. Gipson*, 2019-01815 (La. 6/3/20), 2020 WL 3427193 regardless of the words or legal grounds a defendant uses to challenge his conviction, I believe *Ramos* should apply to anyone convicted by a non-unanimous jury.