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In The XXX District Court

Parish Of XXX, State Of Louisiana

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| STATE OF LOUISIANA,  *Plaintiff*,  v.  XXX XXXX  *Defendant*. |  | No. XXXXX  Section XX  Hon. XXX |

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| FILED |  | DEPUTY CLERK OF COURT |

MOTION TO REQUIRE A UNANIMOUS JURY VERDICT, OR, IN THE ALTERNATIVE, STAY ALL PROCEEDINGS UNTIL THE UNITED STATES SUPREME COURT RULES IN *RAMOS VS. LOUISIANA, \_\_\_* U.S \_\_\_ (20\_\_)

COMES NOW [NAME OF CLIENT], through undersigned counsel, and respectfully moves this Court to find that, pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, [NAME OF CLIENT] is entitled to a unanimous jury verdict in the trial of his criminal case and therefore, La. Const. art. I, § 17 and La. C.Cr.P. art. 782 violate the U.S. Constitution. [NAME OF CLIENT] moves this Court to order that a jury shall return a unanimous verdict at his trial, or, in the alternative, to stay all proceedings in this case while the United States Supreme Court considers this precise question in *Ramos v. Louisiana, \_\_\_* U.S \_\_\_ (20\_\_).[[1]](#footnote-2)

La. Const. art. I, § 17 and La. C.Cr.P. art. 782 violate [NAME OF CLIENT]’s rights by subjecting him to the possibility of a non-unanimous jury verdict, in violation of his Sixth and Fourteenth Amendment rights. The United States Supreme Court case upholding the constitutionality of non-unanimous juries, *Apodaca v. Oregon*, 406 U.S. 404, 406, 92 S. Ct. 1628, 1630, 32 L. Ed. 2d 184 (1972), resulted in a fractured decision, where the technical holding, that the Sixth Amendment requires unanimous jury verdicts but is not fully incorporated against the states under the Fourteenth Amendment, received one lone vote from Justice Powell. It guaranteed to both the accused in the federal system and those accused in state systems the right to a jury verdict, but extended the right to a unanimous jury verdict only to those within the federal system. His single vote, unusually, had the effect of holding that the Fourteenth Amendment only partially incorporated the Sixth Amendment right to a jury against the states. A holding by a single justice carries little precendential weight, and more recent case law suggests that the current U.S. Supreme Court is unlikely to give it much.

As detailed below, recent Supreme Court jurisprudence supports full incorporation of the Bill of Rights against the states, and indicates that the United States Supreme Court is likely to find the right to a unanimous jury to be fully incorporated in *Ramos v. Louisiana, \_\_\_* U.S \_\_\_ (20\_\_). Additionally, La. Const. art. I § 17 and La. C.Cr.P. art. 782 have already been held unconstitutional under the Equal Protection Clause of the Fourteenth Amendment by a Louisiana court because of their racially discriminatory origins and the continued racially disparate impact that the practice incurs. *See State v. Maxie*, 72,522 (La. 11th JDC 10/11/18). Not only would proceeding without a finding that La. Const. art. I § 17 and La. C.Cr.P. art. 782 violate [NAME OF CLIENT]’s right to a jury, but also his right to equal protection of law. Therefore, [NAME OF CLIENT] moves this court to require a unanimous jury verdict at trial, or, in the alternative, stay all proceedings in his case while the Supreme Court decides *Ramos v. Louisiana. Id.*

**LAW AND ARGUMENT**

1. **The U.S. Supreme Court Has Granted Certiorari To Determine Whether The Sixth Amendment Is Fully Incorporated Against The States, Indicating They Are Likely To Reverse The Current Precedent Of *Apodaca*.**

The U.S. Supreme Court has upheld the constitutionality of non-unanimous jury verdicts under the authority of *Apodaca v. Oregon*, a decision in which a fractured court established the rule that the Sixth Amendment requires unanimity, but is only partially incorporated against the states and therefore allows non-unanimous state criminal convictions.406 U.S. 404. If the U.S. Supreme Court had no intention of revisiting this theory of partial incorporation, they would not have granted a petition for certiorari to consider the question. Instead, this Supreme Court has clearly indicated their desire and intention to hold that the Bill of Rights is fully incorporated and effective against the states through other recent cases.

Only last term, in the oral argument of *Timbs v. Indiana*, a case in which the Indiana Attorney General argued against the full incorporation of the Eighth Amendment’s Excessive Fines Clause against the states, several justices, in particular Justices Gorsuch and Kavanaugh, expressed extreme skepticism for the proposition that some Amendments may only be partially incorporated.[[2]](#footnote-3) Furthermore, in the Court’s ruling on that case, Justice Ginsburg writing for the Court specifically drew attention to the “sole” outlier status of the non-unanimous state felony jury verdict within the jurisprudence of incorporation which otherwise permits “no daylight between the federal and state conduct it prohibits or requires.” *Timbs v. Indiana*, 139 S. Ct. 682, 687, 203 L. Ed. 2d 11 (2019). *Apodaca*’s holding that the Fourteenth Amendment “does not require that the States apply the federal jury-trial right with all its gloss” is squarely in the sights of this pro-incorporation Court. 406 U.S. at 369-71 (Powell, J., concurring).

Even without these strong indications that it is about to be abandoned, *Apodaca* has always supplied weak authority, because its holding was only supported by a single Justice’s opinion at the time of writing. Justice Powell alone held in a concurrence that the Sixth Amendment requires unanimous juries, but is not fully incorporated against the states. *Id*. In *Apodaca*, five Justices held that the Sixth Amendment requires unanimity. *Id*.; *Id*. at 414 (Stewart, J., joined by Brennan & Marshall, JJ., dissenting); *Id.* at 381-83 (Douglas, J., dissenting). Thus, a majority of the Court in *Apodaca* found that the right the a jury under the Sixth Amendment included the right to a unanimous jury, and only one justice found that the right was only partially incorporated by the Fourteenth Amendment.

Four Justices concluded that the Sixth Amendment unanimity requirement is fully incorporated against the states. *Id.* at 414-15; *Id*. at 380.[[3]](#footnote-4) Eight Justices agreed that the Sixth Amendment applies identically to both the federal and state governments, and against Justice Powell’s theory of partial incorporation. *Johnson*, 406 at 395 (Brennan, J., dissenting); *see also* *McDonald v. City of Chicago, Ill*., 561 U.S. 742, 766, 130 S. Ct. 3020, 3035, 177 L. Ed. 2d 894 (2010) n.14. Thus, *Apodaca*’s holding cannot be expected to carry significant precedential weight.Even the State of Louisiana while arguing the case in front of the Supreme Court on October 7, 2019, conceded that “[Powell’s] plurality opinion plus four dissenters does not – is not equal to a holding.”[[4]](#footnote-5)

The Supreme Court has previously disregarded similarly split opinions when considering whether a previous ruling is entitled to the deference of stare decisis. For example, in one case where, exactly like *Apodaca*, a fifth justice had had “provided the fifth vote for the result” but had written “separately in order to indicate his disagreement with the plurality's rationale,” the Court later rejected the earlier case’s holding. *Seminole Tribe of Fla. v. Fla*, 517 U.S. 44, 64, 116 S. Ct. 1114, 1127, 134 L. Ed. 2d 252 (1996). The Court’s opinion in that case notes that the previous split decision was “of questionable precedential value, largely because a majority of the Court expressly disagreed with the rationale of the plurality.” *Id.* at 66. Even the dissent agreed with the majority's “decision to reexamine [the previous case] for the Court in that case produced no majority for a single rationale.” *Id*. at 100 (Souter, J., dissenting).

The only leg on which *Apodaca* stands is Justice Powell’s theory that the Sixth Amendment is only partially incorporated against the states. This position had no other support at the time of the decision, and the Court has since repeatedly indicated its disagreement with Powell’s partial incorporation theory. *Brief for American Bar Association as Amicus Curiae Supporting Petitioner,* *Ramos v. Louisiana*, 2019 WL 2549746 (U.S. 2019) at 14-15.[[5]](#footnote-6) Only two states, Louisiana and Oregon, have continued to allow criminal convictions for felonies based on non-unanimous jury verdicts. La. Const. art. I, § 17; Or. Const. art. I, § 11. All forty-eight other states, and federal criminal courts, require a unanimous jury verdict to convict a defendant of a felony. Fed. R. Crim. P. 31 (a); *e.g.* MS R RCRP Rule 18.1(a)(2). Louisiana’ non-unanimous jury scheme, as required by La. Const. art. I § 17 and La. C.Cr.P. art. 782, violates the Sixth and Fourteenth Amendments, and the U.S. Supreme Court has indicated its imminent intention to so hold.

1. **The Sixth Amendment Requires A Unanimous Jury Verdict And This Requirement Is Fully Incorporated Under The Due Process Clause Of The Fourteenth Amendment And Is Applicable Against The States.**

The Sixth Amendment of the United States Constitution requires that federal juries reach a unanimous jury verdict. *Andres v. United States*, 333 U.S. 740, 748, 68 S. Ct. 880, 884, 92 L. Ed. 1055 (1948) (“Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply.In criminal cases this requirement of unanimity extends to all issues—character or degree of the crime, guilt and punishment—which are left to the jury.”); *see also Richardson v. United States*, 526 U.S. 813, 817, 119 S. Ct. 1707, 1710, 143 L. Ed. 2d 985 (1999). In one of the earliest cases deciding the issue, the Court held that “life and liberty, when involved in criminal prosecutions, would not be adequately secured except through the *unanimous* verdict” of the jury. *Thompson v. Utah*, 170 U.S. 343, 353, 18 S. Ct. 620, 624, 42 L. Ed. 1061 (1898) (emphasis added). Even Justice Powell in *Apodaca* asserted that “unanimity is one of the indispensable features of *federal* jury trial.” 406 U.S. at 369 (1972) (Powell, concurring). This rule has been repeatedly reaffirmed. In a line of cases involving the scope of the jury trial right, this Court has reiterated that the Sixth Amendment requires that “the truth of every accusation … be confirmed by the unanimous suffrage of [the defendant's] equals and neighbors.” *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348, 2356, 147 L. Ed. 2d 435 (2000) (quoting 4 William Blackstone, *Commentaries on the Laws of England* 349-50 (1769)*; accord S. Union Co. v. United States*, 567 U.S. 343, 356, 132 S. Ct. 2344, 2354, 183 L. Ed. 2d 318 (2012); *United States v. Booker*, 543 U.S. 220, 239, 125 S. Ct. 738, 753, 160 L. Ed. 2d 621 (2005); *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536, 159 L. Ed. 2d 403 (2004); *United States v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310, 2313, 132 L. Ed. 2d 444 (1995).

From the earliest days of the common law through the colonial period, the right to a jury trial was inextricable from the right to a unanimous jury trial. 3 William Blackstone, Commentaries on the Laws of England 379 (1769) (conviction requires the “unanimous consent” of the jury). In *Ramos v. Louisiana*, the State of Louisiana attempts to argue that jury unanimity is not required at all by the Sixth Amendment. *Brief of Respondent*, 2019 WL 3942901 at 4 (U.S. 2019). Such an argument is foreclosed by a century of precedent; the indispensability of unanimity in a jury trial has been consistently reaffirmed in Court opinions, including one just last term. *United States v. Haymond*, 139 S. Ct. 2369, 2376, 204 L. Ed. 2d 897 (2019). Moreover, that rule is not even supported by *Apodaca*: its holding was, as previously discussed, that the Sixth Amendment required unanimity, but the states were not bound by that requirement. 406 U.S. at 369-71 (Powell, J., concurring). In oral arguments, the Court made it clear that they were skeptical of the State of Louisiana’s position that stare decisis applies to *Apodaca’s* partial incorporation of the Sixth Amendment, but not to its majority holding that the Sixth Amendment requires unanimity.[[6]](#footnote-7)

To proceed with a felony trial without requiring jury unanimity for a conviction would violate [NAME OF CLIENT]’s Sixth and Fourteenth Amendment rights to a unanimous jury verdict. The U.S. Supreme Court will shortly rule on this very issue and require such a jury verdict. Therefore, this court should order any trial in [NAME OF CLIENT]’s case to be determined by a unanimous jury verdict, or at least, stay the trial until the ruling on this very issue is handed down by the U.S. Supreme Court.

1. **Non-Unanimous Jury Verdicts Were Introduced In Louisiana For The Purpose Of Discriminating Against African-Americans And Cause A Disparate Racial Impact in Violation of The Equal Protection Clause of the Fourteenth Amendment.**

The Louisiana law allowing convictions based on a non-unanimous jury vote was originally passed as a part of the 1898 Constitutional Convention’s attempts to wrest all political and judicial power away from African-American Louisianans and to enshrine the political supremacy of the white race. The practice violates the Equal Protection Clause of the Fourteenth Amendment because racial discrimination was a substantial or motivating factor behind its introduction. *Arlington Heights v. Metropolitan Housing Corp*, 429 U.S. 252, 266-68, 97 S. Ct. 555, 565-66, 50 L. Ed. 2d 450 (1977). In deciding whether a statute violates the Fourteenth Amendment based on its racially discriminatory origins, a court must consider five factors to determine whether the enactment was motivated by the substantial purpose of racial discrimination: (1) historical background of the enactment; (2) sequence of events leading to the enactment; (3) legislative history of the enactment; (4) statements by decision makers; and (5) the discriminatory effect of the enactment. *Id*. The Supreme Court has repeatedly struck down statutes that were passed during the post-Reconstruction era when Southern states acting to restore white supremacy.[[7]](#footnote-8) The non-unanimous jury verdict law was passed in this way and for this racially discriminatory purpose during the post-Reconstruction 1898 Constitutional Convention. Thomas Ward Frampton, *The Jim Crow Jury*, 71 Vand. L. Rev. 1593, 1609 (2018) (“We are here upon the eve of a constitutional convention [in Louisiana], the avowed purpose of which is to disfranchise the colored citizens.”). Louisiana courts have held that the statute violates the constitution based on an evidentiary hearing that established its racially discriminatory history and its racially disparate impact. *State v. Maxie,* 13-CR-72522 (La. 11th JDC 10/11/18).[[8]](#footnote-9) Similarly, the Supreme Court in oral arguments in *Ramos* suggested that the statute is unconstitutional because of its racist history. Transcript at 60 (“JUSTICE KAVANAUGH: [T]he rule in question here is rooted in a --in racism, you know, rooted in a desire, apparently, to diminish the voices of black jurors in the late 1890s.”). Therefore, the statute is unconstitutional and violates [NAME OF CLIENT]’s right to equal protection of the law.

* 1. **La. Const. art. I, § 17 and La. C.Cr.P. Art. 782 Violate The Fourteenth Amendment Because Of The Discriminatory Intent Evident in the Historical Background, Sequence Of Events, Legislative History, And Statements By Decision Makers Surrounding the 1898 Enactment.**

Each of the first four factors to be considered in this analysis under the *Arlington Heights* test support a finding in this case that La. Const. art. I § 17 and La. C.Cr.P. art. 782 violate the Equal Protection Clause of the 14th amendment. Non-unanimous verdicts were first introduced in Louisiana as Article 116 of the Constitution of 1898, by legislators as part of a raft of deliberately discriminatory measures.[[9]](#footnote-10) Put simply, “[t]he desire of Louisiana’s reactionary oligarchies to disfranchise blacks and poor whites prompted the Constitutional Convention of 1898.”[[10]](#footnote-11) The delegates were not at all secretive about their purpose. The President of Louisiana’s 1898 Convention, E.B. Kruttschnitt, stated in his opening address: “I am called upon to preside over … this convention [which] has been called together by the people of the State to eliminate from the electorate the mass of corrupt and illiterate voters who have during the last quarter of a century degraded our politics.”[[11]](#footnote-12) In closing the Convention, Hon Thomas J. Semmes stated that the “mission” of the delegates had been “to establish the supremacy of the white race in this state.”[[12]](#footnote-13) The delegates established majority voting for felony juries: of twelve jurors, nine votes were needed to convict in all cases except capital offenses. In his closing remarks, President Kruttschnitt lamented that the delegates had been constrained by the Fifteenth Amendment from enacting “[u]niversal white manhood suffrage and the exclusion from the suffrage of every man with a trace of African blood in his veins.”[[13]](#footnote-14)

When it passed the majority-verdict scheme, the Convention had before it the “Statement of Registered Voters 1897 and 1898” which is contained in the Official Journal itself.[[14]](#footnote-15) Blacks represented 14.7% of all citizens registered to vote in Louisiana as of January 1, 1898 (12,902 of 87,240).[[15]](#footnote-16) Proportionate representation on juries would have seen an average of two black jurors per trial. The selection of nine votes for a verdict served to guarantee white majority control over jury verdicts: black votes could be ignored.

The provision allowing for a 10-2 conviction in Louisiana felony cases was adopted in the Constitutional Convention of 1974. At this date, when “racial tensions in Louisiana were high,” Louisiana attempted to “make as little change to the substance of the Constitution of 1921 as possible,” and simply “reduce the size of the document.” *State v. Maxie.* In the *Maxie* hearing, Professor Aiello testified to his “his expert opinion that the 1974 constitution’s nonunanimous jury verdict scheme was rooted in and fairly traceable to the 1898 enactment.” *Id*. Therefore, Louisiana persisted in acting on and reinforcing a racially motivated practice of requiring only some jurors to deprive a defendant of his liberty.

In reaction to the continued racial taint of the practice, in 2018, a broad coalition encompassing actors from the Louisiana Conference of Catholic Bishops, to the Southern Poverty Law Center, to the Louisiana Republican Party expressed opposition and supported the elimination non-unanimous jury verdicts for felony convictions.[[16]](#footnote-17) The broad base of support formed to eliminate the practice was solidified and bolstered by widespread acknowledgement of the racist origins of non-unanimous jury verdicts. The legislative history supports a finding of substantial discriminatory intent under the first four factors as required by the *Arlington Heights* test.

* 1. **La. Const. art. I, § 17 and La. C.Cr.P. 782 Violate The Fourteenth Amendment Based On Their Disparate Racial Impact on Both African-American Defendants and African-American Jurors.**

The final factor in the *Arlington Heights* test, the discriminatory effect of a law, also weighs in support of a finding that La. Const. art. I, § 17 and La. C.Cr.P. 782 are unconstitutional because in addition to their racist origins, they create a racially disparate impact in current outcomes and sentencing of African-American defendants. The data demonstrating that effect was collected and published by *The New Orleans* *Advocate* in 2018; that reporting was awarded the Pulitzer Prize.[[17]](#footnote-18) A statewide analysis of jury selection patterns throughout Louisiana between 2011 and 2016 revealed that the continued use of non-unanimous juries perpetuates racially disparate outcomes.[[18]](#footnote-19) Specifically, *The Advocate* found that 43% of black defendants were convicted non-unanimously, as opposed to 33% for white defendants.[[19]](#footnote-20) Additionally, black jurors were 2.7 times as likely to cast a “useless” vote against a majority conviction vote.[[20]](#footnote-21) Research from social scientists shows that the robustness of factual and legal debate in a jury deliberation are significantly constrained when minority perspectives can be overruled by a majority. [[21]](#footnote-22) Additionally, non-unanimous jury verdicts have paved the way for many wrongful convictions in Louisiana.[[22]](#footnote-23) All these data were presented in the courtroom in the *State v. Maxie* hearing, after which the judge ruled that,

“The analysis of the data shows that the rate at which African-Americans cast empty votes, thereby being deprived of meaningful jury service, and the rate at which African-Americans are convicted by nonunanimous juries could not be explained by random variation in the data. These outcomes could only be explained by some outside force operating on the jury process. The only common denominator in these matters was the use of a non-unanimous jury verdict system. The current scheme in Louisiana has a disparate impact on minority jurors and defendants and therefore violates the Equal Protection Clause of the Fourteenth Amendment and is therefore unconstitutional.”

*Maxie*. The data makes clear that the fifth factor of the *Arlington Heights* test also supports a finding that non-unanimous juries in Louisiana violate the Equal Protection Clause of the Fourteenth Amendment.

As the Court in *State v. Maxie* found, the practice of allowing a non-unanimous verdict under La. Const. 1§ 17 and La. C.Cr.P. 782 violates the Equal Protection Clause of the Fourteenth Amendment.[[23]](#footnote-24) Allowing this case to proceed to trial without requiring a unanimous jury verdict would allow laws passed with discriminatory intent to have a discriminatory impact, not just on [NAME OF CLIENT], but on also all black jurors called to serve on his jury.

1. **The United States Supreme Court Has Repeatedly Held That Life Without Parole is the Ultimate Penalty for Children and to Proceed in Such a Case Pursuant to a Statute that has been Found Unconstitutional And Likely Will Soon Be Held Unconstitutional by the United States Supreme Court Is Especially Problematic and Judicially Inefficient.**

In their jurisprudence about criminal sentencing of children, the Court has discussed extensively how extreme and severe a sentence of life without parole is for a child. The Court held that for a child to be so sentenced, he must be the “rare juvenile offender whose crime reflects irreparable corruption.” *Miller v. Alabama*, 567 U.S. 460, 479–80, 132 S. Ct. 2455, 2469, 183 L. Ed. 2d 407 (2012). The Court has held that “this ultimate penalty for juveniles [is] akin to the death penalty, [and therefore has] treated it similarly to that most severe punishment.” *Id*. at 474, *citing* *Graham v. Florida*, 560 U.S. 48, 69-70, 130 S. Ct. 2011, 2027, 176 L. Ed. 2d 825 (2010). Given the severity of such a punishment, any child facing such a sentence should not be denied his Constitutional rights to equal protection of law and to a unanimous jury verdict. A possible constitutional violation in this context should be weighed heavily by this Court. There is no reason to take such a risk when the consequences faced by [NAME OF CLIENT] are so severe and permanent.

Given those severe potential consequences, a trial in this case requires more resources from the prosecution, the defense and this Court. Proceeding in circumstances where a verdict may well be soon overturned is simply more costly in this case, and the interests of judicial economy should be weighed when deciding whether or not to proceed. [[24]](#footnote-25) The risk of allowing trial to proceed under an unconstitutional statute is not just to [NAME OF CLIENT], but also to the judicial system. The expenditure of judicial and attorney resources is heightened in the prosecution of children eligible for life-without-parole sentences.

The new and significant obligations on attorneys defending children facing life without parole, as well as the courts adjudicating those children’s cases, mean that going to trial under a statute likely to soon be found unconstitutional is a substantial risk. Significant judicial, prosecutorial, and state defender resources would be spent for nothing and then have to be spent again if this case were to proceed to trial without a unanimity requirement. The duties and obligations of defense counsel in representing a child such as [NAME OF CLIENT] are codified in the Performance Standards for Attorneys Representing Juveniles in Life Without Parole Cases that have been promulgated by the Louisiana Public Defender Board and codified into the Louisiana Administrative Code. See generally, LAC 22:XV.Ch 21.

Because of the rigorous demands of litigating *Miller* cases, “[a] minimum of two counsel shall be assigned to each case.” *Id*. at § 2115(A). Among counsel on the case, “[a]t least one attorney must have specialized training and relevant substantive expertise representing child clients[.] . . . In particular, at least one attorney must have experience interviewing and communicating with child clients in a trauma-informed and developmentally appropriate manner.” *Id*. at § 2105(C)(1). This already imposes a burden on defender resources, and necessarily increases the expense associated with going to trial.

Additionally, the Standards require an extensive investigation of both the guilt and sentencing aspects of the defense prior to the adoption of strategic decisions and trial preparation. A child facing life without parole is entitled to a mitigation specialist, with specialized training and expertise, in addition to the usual investigatory resources, including expert witnesses, necessary to an adequate defense of an adult. Specifically, “[c]ounsel has an ongoing duty to conduct a high quality, independent, exhaustive investigation of all matters relevant to the guilt phase, sentencing phase, [and] possible agreed upon disposition.” *Id*. at § 2125(A)(1). Counsel’s investigation must be “thorough, and independent,” *Id*., and “[n]o area of inquiry or possible evidence in the guilt or sentencing phase investigations should be ruled out until a thorough investigation has been conducted.” The Standards articulate extensive requirements for the pre-trial investigation of all *Miller* cases that focus equally on the guilt and sentencing phases of trial. See generally, *Id*. at §2127(A)-(E). Given the constitutional question that is currently before the Supreme Court for disposition, and the consequent possibility of reversal, it would be unnecessarily wasteful to proceed to trial without requiring a unanimous jury verdict at the guilt phase of trial, or at least stay the case pending the ruling of the Court.

**CONCLUSION**

WHEREFORE, because La. Const. 1§ 17 and La. C.Cr.P. art. 782 violate [NAME OF CLIENT]’s right to a unanimous jury verdict under the Sixth and Fourteenth Amendments and violate his Equal Protection rights under the Fourteenth Amendment, [NAME OF CLIENT] moves that this Court set an evidentiary hearing on this motion, or, in the alternative, stay all proceedings until the U.S. Supreme Court issues a ruling on *Ramos v. Louisiana*.

Respectfully Submitted,

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ {Attorney Full Name}

[ATTORNEY NAME]

La. Bar # [ATTORNEY BAR#]

[ADDRESS]

[PHONE#]

Certificate of Service

I hereby certify that I have caused to be served by mail or hand delivery in open court a copy of the foregoing document upon the Office of the District Attorney, as well as on the Office of the Attorney General, on the day of filing.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

[ATTORNEY NAME]

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In The XXX District Court

Parish Of XXX, State Of Louisiana

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| STATE OF LOUISIANA,  *Plaintiff*,  v.  XXX XXXX  *Defendant*. |  | No. XXXXX  Section XX  Hon. XXX |

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| FILED |  | DEPUTY CLERK OF COURT |

**ORDER**

IT IS HEREBY ORDERED that [NAME OF CLIENT]’s Motion is GRANTED and an evidentiary hearing is to be held on \_\_\_\_\_\_\_.

Signed this \_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_, 2019.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Judge

1. Supreme Court of the United States Docket No. 18-5924, Transcript of Proceedings, available at https://www.supremecourt.gov/oral\_arguments/argument\_transcripts/2019/18-5924\_4g25.pdf. [↑](#footnote-ref-2)
2. “JUSTICE GORSUCH: I mean, most -- most of the incorporation cases took place in like the 1940s. . . . And here we are in 2018 . . . still litigating incorporation of the Bill of Rights. Really? Come on, General.

   . . .

   JUSTICE KAVANAUGH: Well, for the clause, why do you have to take into account all of the history, to pick up on Justice Gorsuch's question? Isn't it just too late in the day to argue that any of the Bill of Rights is not incorporated?”

   Transcript of Oral Argument at 32-33, *Timbs v. Indiana*, (No. 17-1091) U.S. Supreme Court (available at <https://www.supremecourt.gov/oral_arguments/argument_transcripts/2018/17-1091_1bn2.pdf>). [↑](#footnote-ref-3)
3. According to Justice Douglas, “once it is decided that a particular Bill of Rights guarantee [applies to the states], the same constitutional standards apply against both the State and Federal Governments.” *Johnson*, 406 U.S. at 385 (Douglas, J., dissenting in *Apodaca*). [↑](#footnote-ref-4)
4. Transcript of Proceedings at 35, available at <https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-5924_4g25.pdf>. [↑](#footnote-ref-5)
5. “[D]evelopments in the Court's case law and empirical research have eroded support for the two (competing) rationales for *Apodaca.* As explained above, the *Apodaca* plurality's rationale - that the Sixth Amendment does not require jury unanimity, period - has been repudiated by this Court, as has the concurrence's rationale - that the Sixth Amendment need not be incorporated *in toto.*”; *see also* *Brief of Amicus Curiae The Rutherford Institute in Support of the Petitioner*, *Ramos v. Louisiana*, 2019 WL 2522629 (U.S. 2019) at 11-12 (“[The *McDonald* and *Timbs*] approach is supported by the Court's precedent, *see Benton,* 395 U.S. at 795, and yet stands in stark contrast to the *Apodaca* plurality's functional analysis of the right to a unanimous verdict.”). [↑](#footnote-ref-6)
6. “JUSTICE GINSBERG: Are you asking the Court to take up a question that five justices answered in *Apodaca*? That is . . . there were five votes to say that the Sixth Amendment requires jury unanimity in federal trials. You are asking to --us to reject a rule that five justices adhered to . . . there were four justices who said unanimity was required. And then there was Justice Powell, who said unanimity is required in federal trials. You are asking us to overturn that position, that unanimity is required in federal trials? . . .

   JUSTICE GORSUCH: Then aren't we -aren't we in --having to address this fresh, just as you really seem to want us to do? . . . If precedent weighs for anything, what do we do with *Andres*? What do we do with those 14 cases throughout Supreme Court history that seem to treat unanimity as part of the Sixth Amendment?”

   *Ramos v. Louisiana*, Supreme Court of the United States Docket No. 18-5924, Transcript of Proceedings at 34-35, available at <https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-5924_4g25.pdf>. [↑](#footnote-ref-7)
7. For example, in *Hunter v. Underwood*, 471 U.S. 222 (1985), the Court held that Art. VIII, § 182 of the Alabama Constitution of 1901, a provision disenfranchising misdemeanants, violated the Equal Protection Clause of the Fourteenth Amendment under *Arlington Heights*, despite the provision’s facial neutrality. John B. Knox, the president of the Alabama Constitutional Convention, had revealed the discriminatory purpose of the 1901 Constitution in his opening address: “And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State.” *Id.* at 228-29. Alabama in 1901 was no different than Louisiana during the same time period. As the Court in *Hunter* noted, “the Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks.” *Id.* [↑](#footnote-ref-8)
8. “Under the analysis of *Arlington Heights*, the initial enactment of 1898 is unconstitutional under the Fourteenth Amendment’s Equal Protection Clause.…The current scheme in Louisiana has a disparate impact on minority jurors and defendants and therefore violates the Equal Protection Clause of the Fourteenth Amendment and is therefore unconstitutional.” *See also* *State v. Jinks*, 18-733, 2019 WL 1929961, 706 (La. Ct. App. May 1, 2019) (Cooks, dissenting) (“Louisiana's historic racial basis for its non-unanimous verdict law provides no support for upholding its constitutionality and, in fact, provides persuasive evidence of its unconstitutionality.”) [↑](#footnote-ref-9)
9. Article 116 read as follows:

   “The General Assembly shall provide for the selection of competent and intelligent jurors. All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, which shall not be prior to 1904, be tried by the judge without a jury. Cases in which the punishment may be at hard labor shall be tried by a jury of five, all of whom must concur to render a verdict; cases in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom concurring may render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict.”

   La. Const. of 1898, art. 116. [↑](#footnote-ref-10)
10. Michael L. Lanza, *Little More than a Family Matter: The Constitution of 1898* in *In Search of Fundamental Law: Louisiana’s Constitutions, 1812-1974*, 93–109, 93 (Warren M. Billings & Edward F. Haas, eds. 1993). [↑](#footnote-ref-11)
11. *Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana*, 8-9 (1898). [↑](#footnote-ref-12)
12. Lanza at 374. [↑](#footnote-ref-13)
13. *Id.* at 380. [↑](#footnote-ref-14)
14. *See* chart in *Journal, supra*. [↑](#footnote-ref-15)
15. *Id.* [↑](#footnote-ref-16)
16. John Simerman, *Louisiana's Catholic bishops throw support behind unanimous jury amendment on Nov. 6 ballot* (10/4/18) <https://www.nola.com/news/article_88668c20-b851-5eaa-b345-14adeba06af6.html>; Julia O'Donoghue, *Louisiana approves unanimous jury requirement, scrapping Jim Crow-era law* (11/7/18) <https://www.nola.com/news/crime_police/article_cae52b78-3812-57ae-8676-ea4dc3a5d3d0.html>. [↑](#footnote-ref-17)
17. Advocate Staff Report, *The Advocate wins first Pulitzer Prize for series that helped change Louisiana's split-jury law*, The Advocate (New Orleans, La.) (April 15, 2019). <https://www.theadvocate.com/baton_rouge/news/article_dba87282-5f28-11e9-92b3-bfba0cf08ab2.html> [↑](#footnote-ref-18)
18. Jeff Adelson, *Download Data Used in The Advocate’s Exhaustive Research in ‘Tilting the Scales’ Series*, The Advocate (New Orleans, La.) (Apr. 1, 2018), https://www.theadvocate.com/new\_orleans/news/ courts/article\_6f31d456-351a-11e8-9829-130ab26e88e9.html. [↑](#footnote-ref-19)
19. Jeff Adelson, How an abnormal Louisiana law deprives, discriminates and drives incarceration: Tilting the scales, The Advocate (New Orleans, La.) (Apr. 1, 2018), <https://www.nola.com/news/courts/article_8e284de1-9c5c-5d77-bcc5-6e22a3053aa0.html>. [↑](#footnote-ref-20)
20. *Id*. [↑](#footnote-ref-21)
21. Non-unanimous verdicts significantly constrict the flow of information within jury deliberations and shorten deliberations overall, leading to less accurate judgments, and reducing the likelihood that jurors will hear, respect, or vigorously challenge each other’s views. Crucially, a minority viewpoint can simply be ignored in a non-unanimous setting, and generally is. It has been averred that non-unanimous voting schemes are likely to chill participation by the precise groups whose exclusion the Court has proscribed in other contexts. *See* Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1276-1277 (2000) (citing and describing relevant social science studies); Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 Del. L. Rev. 1 (2001). [↑](#footnote-ref-22)
22. *See Brief of Innocence Project New Orleans and The Innocence Project, Amici Curiae in Support of Petitioner, Ramos v. Louisiana,* 2019 WL 2576550 (U.S. 2019) at 6-27 (discussing the ease through which wrongful convictions were obtained in Louisiana with non-unanimous jury verdicts). [↑](#footnote-ref-23)
23. Note that the question of whether Louisiana’s non-unanimous jury verdict provision violates the Equal Protection Clause of the Fourteenth Amendment has not been addressed by the Louisiana Supreme Court. *See State v. Hankton*, 2012-0375 (La. App. 4 Cir. 8/2/13), 122 So. 3d 1028, 1032, writ denied, 2013-2109 (La. 3/14/14), 134 So. 3d 1193, citing *State v. Lewis*, 2010-1775 (La. App. 4 Cir. 4/4/12), 96 So. 3d 1165, 1171, *writ granted*, 2012-1021 (La. 12/14/12), 104 So. 3d 425, and *rev'd*, 2012-1021 (La. 3/19/13), 112 So. 3d 796. In *Hankton*, the Louisiana Fourth Circuit Court of Appeals addressed this question for the first time; however, because the Court ruled that Mr. Hankton had failed to preserve the issue for appeal, the Court did not address the substance of Mr. Hankton’s Equal Protection claim in its holding, limiting its substantive analysis of this issue to dicta portions of the opinion. 122 So. 3d at 1029 (“we conclude that Mr. Hankton has failed to preserve the issue for appellate review by failing to request an evidentiary hearing on his allegations and therefore do not directly consider the merits of his argument.”). [↑](#footnote-ref-24)
24. Even in a non-juvenile life-without-parole case, these considerations should be weighed. Judge Conery of the Third Circuit Court of Appeal recently stated that he would suggest “an evidentiary hearing to include victim impact evidence and evidence of the costs and expenses of a murder trial which may be reversed if the Supreme Court overturns the Louisiana law allowing non-unanimous jury verdicts in *Ramos*. Unless there is a pressing need or reason to move forward, such as the health or availability in the future of a witness, a stay should be seriously considered. I would at this point leave that decision to the sound discretion of the trial judge.” *State v. Kennedy*, KW 19-00496 (08/30/19) (Conery, J., concurring). [↑](#footnote-ref-25)