No. 18-7488

In the Supreme Court of the United States

BILLY R. LEWIS,
Petitioner,
v.
LOUISIANA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA FOURTH CIRCUIT COURT OF APPEAL

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the right to a jury trial guaranteed by the Sixth Amendment, as applied to the States through the Fourteenth Amendment, allow a criminal conviction to stand on a non-unanimous jury verdict?

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CONSTITUTIONAL AND STATUTORY AUTHORITY

Petitioner misstates the Louisiana statutory law on jury verdicts. Article 782 of the Louisiana Code of Criminal Procedure was not repealed in 2018, it was amended. The text of the statute that existed at the time of trial is correctly stated in the petition. Louisiana Code of Criminal Procedure article 782 now provides, in pertinent part:

> A case for an offense committed prior to January 1, 2019, in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. A case for an offense committed on or after January 1, 2019, in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, all of whom must concur to render a verdict.

Similarly, the text of La. Const. art. I, § 17(A) that existed at the time of the trial is correctly stated in the petition. However, that constitutional article was not repealed either and currently reads in pertinent part:

> A case for an offense committed prior to January 1, 2019, in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict. A case for an offense committed on or after January 1, 2019, in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, all of whom must concur to render a verdict.

La. Const. art. I, § 17(A).

STATEMENT OF THE CASE

Three juveniles were shot inside a home in New Orleans on July 24, 2002, causing the deaths of eleven-year-old D.J. and sixteen-year-old T.W. Pet. App.

A2.[1] Petitioner was indicted on October 10, 2002 with two counts of first degree murder. These charges were subsequently amended to two counts of second degree murder. Petitioner pled not guilty to these charges. Petitioner was tried twice for these crimes. In his first trial, he was found guilty on March 11, 2010.[2] *See State v. Lewis*, 96 So. 3d 1165, 1167 (La. Ct. App. 2012). Petitioner was sentenced to life without parole on both counts. *Id.*

The intermediate court of appeal affirmed the convictions and sentences. *Id.* at 1175. Defendant argued before the intermediate appellate court that non-unanimous jury verdicts violated his rights under the Sixth and Fourteenth Amendments. The Court denied Petitioner's claim on the basis that it was foreclosed by the Louisiana Supreme Court in *State v. Bertrand*, 2008–2215 (La. 3/17/09), 6 So.3d 738. *Lewis*, 96 So. 3d at 1172. The Court also found that his related claim, that Louisiana's non-unanimous verdict system is allegedly unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, to be improperly raised because he had not made this objection prior to the verdict. *Id.* at 1171-1172.

The Louisiana Supreme Court reversed and remanded this first conviction for failure of the trial court to allow the Defendant to make one peremptory back strike, which the court held violated the Louisiana Constitution and was not harmless error. *State v. Lewis*, 112 So. 3d 796 (La. 2013). Although Petitioner raised his constitutional arguments before the Louisiana Supreme Court, the Court

[1] The State is using the initials of the minor victim associated with this case. Fed. R. Crim. Proc. 49.1(a)(3); *see also* La. Rev. Stat. 46:1844(W)(3).
[2] The verdict for one count was 10-2 and the verdict on the second count was 11-1. *Lewis*, 96 So. 3d at 1171.

"pretermit[ted] consideration of these constitutional challenges because we find the case can be resolved on non-constitutional grounds." *Id*. at 800, n. 4 (citation omitted).

On the first day of Petitioner's second trial, September 14, 2015, he filed a two motions. First, he requested a unanimous jury verdict on the basis of the Sixth and Fourteenth Amendments. Resp. App. A1—A3. He argued that *Apodaca v. Oregon*, 406 U.S. 404 (1972) was no longer controlling in light of more recent cases decided by this Court. Second, he argued that La. Code Crim. Proc. 782(A) and La. Const. art. I, § 17 violated the Fourteenth Amendment's Equal Protection Clause. *Id*. at A4—A6. Both motions were denied the next day without a written ruling. *Id*. at A3, A6. Petitioner was convicted again on September 17, 2015 on both counts and later sentenced to life without parole. Pet. App. A-3.

On December 29, 2016, the convictions and sentences were upheld on appeal by the intermediate court of appeal. Pet. App. A22. The court of appeal denied the Petitioner's argument that Louisiana's non-unanimous jury verdict system violated his Sixth and Fourteenth Amendment rights because of prior precedent from both the Louisiana Supreme Court and the court of appeal. *Id*. at A21—A22. Again relying on *Bertrand*, the court of appeal wrote that the Louisiana Supreme Court "noted that La. C.Cr.P. art. 782 'withstands constitutional scrutiny,' and the Court refused to assume that the United States Supreme Court's 'still valid determination that non-unanimous twelve-person jury verdicts are still constitutional may someday be overturned.'" *Id*. at A22 (citing *Bertrand*, 6 So. 3d at 743). Petitioner did

not assign as error his earlier argument regarding the Equal Protection Clause. *See id*. at A1—A22. The Petitioner sought rehearing, which was denied on January 18, 2017. *Id*. at A26.

Petitioner sought discretionary review on the basis that *Apodaca* was no longer good law by virtue of the Sixth and Fourteenth Amendments, but he did not seek review on the Equal Protection Clause issue. *See* Resp. App. B. The Louisiana Supreme Court denied review, without opinion, on September 14, 2018. *Id*. at A27.

DISCUSSION

1. The Petitioner contends that the Sixth Amendment requires that a jury verdict be unanimous and that the Fourteenth Amendment imposes that requirement on verdicts rendered in criminal trials in state courts. Pet. App. 3. He argues that *Apodaca* and *Johnson v. Louisiana*, 406 U.S. 356 (1972), have been "completely disavowed by this Court's decisions" and, therefore, the alleged federal right of a criminal defendant to be found guilty only by unanimous vote of the jury applies equally to criminal defendants in state courts. *Id*.

For nearly fifty years, Louisiana Courts have faithfully relied upon *Apodaca* and *Johnson*. Ten years ago, the Louisiana Supreme Court wrote: "Although the *Apodaca* decision was, indeed, a plurality decision rather than a majority one, the Court has cited or discussed the opinion not less than sixteen times since its issuance. On each of these occasions, it is apparent that the Court considered that *Apodaca's* holding as to non-unanimous jury verdicts represents well-settled law." *Bertrand*, 6 So. 3d at 742.

That reliance has real life consequences that are highlighted in this case. The murders at issue occurred seventeen years ago and this case, along with hundreds of others, is still on direct review. The courts below relied upon this Court's decision in *Apodaca* during both of Petitioner's trials and were entitled to rely on it as a matter of *stare decisis*.

Petitioner acknowledges that the same "issue is pending before this Court in *Evangelisto Ramos v. Louisiana*, No. 18-5924." *Id.* at i. This Court granted the petitioner's petition for a writ of certiorari in *Ramos* on March 18, 2019. Accordingly, the petition in this case should be held pending the Court's decision in *Ramos* and then disposed of as appropriate in light of that decision.

2. To the extent that Petitioner has attempted to make an equal protection argument in Section B of his petition, whether facial or as-applied, that argument was not raised before the Louisiana Supreme Court in 2017 and, thus, cannot be reviewed here. Moreover, none of the "evidence" the Petitioner now attempts to offer in support of that argument was admitted in the trial court nor has a factual record been made that would substantiate an as-applied challenge; therefore, the State has had no opportunity to respond to such evidence or present its own. Furthermore, any such equal protection argument was not part of the question presented and has certainly not been presented with accuracy and clarity. "The statement of any question presented is deemed to comprise every subsidiary question fairly included therein. Only the questions set out in the petition, or fairly included therein, will be considered by the Court." Sup. Ct. R. 14.1(a). "The failure

of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition." Sup. Ct. R. 14.4. Thus, such an issue does not merit review by the Court.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Evangelisto Ramos v. Louisiana*, No. 18-5924 (April 3, 2019), and then disposed of accordingly.

Respectfully submitted.

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APRIL 2019