No. 18-8897

# In the Supreme Court of the United States

**CORLIOUS C. DYSON,**
***Petitioner***

**vs.**

**THE STATE OF LOUISIANA,**
***Respondent***

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

## BRIEF IN OPPOSITION


JEFF LANDRY
*Attorney General*
ELIZABETH BAKER MURRILL
*Solicitor General*
MICHELLE WARD GHETTI
*Deputy Solicitor General, Counsel of Record*
Louisiana Department of Justice
1885 N. Third St.
Baton Rouge, LA 70804
(225) 326-6028

KEITH A. STUTES
*District Attorney*
CYNTHIA SIMON
*Assistant District Attorney*
Lafayette Parish District Attorney P O Box 3306
Lafayette, LA 70502 (337) 232-5170

## 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 Article 782 of the Louisiana Code of Criminal Procedure was not *repealed* in 2018, it was *amended*.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 Louisiana Constitution article I, § 17(A) that existed at the time of the trial is correctly stated in the petition. However, that constitutional article was also not *repealed* and currently reads in pertinent part: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.

## STATEMENT OF THE CASE

In the early morning hours of August 26, 2012, the victim, Clement Amos, received a request from his female neighbor to investigate why Petitioner, a stranger, was standing outside of her apartment for the second morning in a row. After approaching and verbally confronting the Petitioner, he shot Mr. Amos five times. Mr. Amos died on the steps of his apartment complex. *See State v. Dyson*, 2017-0021

(La. App. 3 Cir. 05/17/17), 220 So.3d 785. *See* Pet'r App. 20.[1]

Petitioner was charged with one count of second degree murder and plead not guilty. At the end of closing arguments, the court instructed the jury, in part:

> … The verdict which you return in this case must represent the considered judgment of each individual juror. In order to render any of the responsive verdicts permissible under this charge, it is necessary that at least ten of you must agree to the verdict. It is your duty as jurors to consult with one another and deliberate with the view of reaching a just verdict, that is if you can do so without violating your own individual judgment. Each of you must decide the question of guilty (sic) or innocence for yourself, but you are to do so only after impartial consideration of the evidence with your fellow jurors. You are not advocates for one side or the other. In the course of your deliberation, do not hesitate to re-examine your views or change your opinion. That is, if you are convinced they are wrong, but you are not considering your honest belief as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or merely for the purpose of returning a verdict. …

ROA 610-611, Resp. App. 2-3. *See also* written instructions, ROA 60-61, Resp. App. 13-14. Defense counsel was asked if he objected to the instructions and he replied, "No, your Honor." ROA 611, Resp. App. 3.

The jury returned a guilty verdict on a vote of 11-1. *See* Pet'r App. 2. After the jury was dismissed, defense counsel made an objection to the verdict simply stating, for the first time: "We would like to state our objection to the less than unanimous jury." ROA 619, Resp. App. 4. Despite what Petitioner claims in his petition,[2] no reason was given for the objection, much less any argument that it was a violation of the Constitution. The objection was noted. *Id*. Four months later, the trial court sentenced Petitioner to life imprisonment without the benefit of parole, probation, or

[1] Petitioner did not number the pages or designate subparts of his Appendix. Respondent has internally designated consecutive page number for the Appendix found on the website and refers to those pages for the Court's convenience.
[2] Pet'r App. 2, n 2.

suspension of sentence. Pet'r App. 3.

Petitioner filed a "Motion for a New Trial" and a "Post-Verdict Motion of Acquittal." Pet'r App. 4, 13. In the Motion for New Trial, *in support of his argument related to the insufficiency of evidence*, the Defendant says only:

> To the extent that the Defendant's challenge of the constitutionality of the non-unanimous verdict in this case should legally be argued on weight of the evidence grounds and not sufficiency of evidence grounds, the Defendant wishes to incorporate here all arguments made on the subject in the post-verdict motion of acquittal that was filed by counsel on the same day as this motion for new trial.

Pet'r App. 10. In the Post-Verdict Motion for Acquittal, Defendant argued only that the verdict was:

> "*de facto* evidence that the State failed to provide sufficient proof to meet the beyond a reasonable doubt standard. … Defendant alleges here that Louisiana's non-unanimity rule is unconstitutional because it allows the State to meet a 'beyond a reasonable doubt' standard without having to convince all jurors of their case."

Pet'r App. 17. He cited no law in support of that argument. He later makes a bare assertion that Louisiana's legal provisions on non-unanimous juries "violate the Due Process Clause, Equal Protection Clause, and Fair Trial Rights of the United States Constitution, specifically found in the fifth, Sixth, and Fourteenth amendments" and that "the reasoning of the plurality opinion in *Apadaco (sic) v. Oregon* … has been called into serious question by the subsequent Sixth Amendment jurisprudence…." *Id*. at 17, 18.

Despite what he alleges in his petition, Defendant did not argue that non-unanimous verdicts "violated the Sixth Amendment right to a jury, which should be incorporated to the states through the Fourteenth Amendment." Pet'r App. 2, n. 2.

Furthermore, Petitioner *wholly* abandoned any argument that non-unanimous

juries might be unconstitutional at the hearing on the motions; he never mentioned this claim. ROA 623-630, Resp. App. 5-12. The trial court orally denied both motions although no written judgment is in the record. ROA 625, 629, Resp. App. 7, 11.

Petitioner appealed to the Louisiana Third Circuit Court of Appeals but, as he admits in his petition, *did not raise any claim regarding the non-unanimous verdict*. Pet'r App. 1, n. 1. The appellate court found no merit to the Petitioner's allegations of error and affirmed his conviction and sentence. *State v. Dyson*, 2017-21 (La. App. 3 Cir. 5/17/17); 220 So.3d 785, Pet'r App. 20. He applied for a writ to the Louisiana Supreme Court, again not raising the issue of non-unanimous juries, which was denied. *State v. Dyson*, 2017-1048 (La. 1/14/19); 261 So.3d 784; Pet'r App. 40.

## REASONS FOR DENYING THE WRIT

This petition should be denied because the sole issue raised in the petition was inadequately raised at trial, if raised at all, and then abandoned at oral argument. Furthermore, as admitted by Petitioner, it was not raised in any way in the two Louisiana courts to which he appealed. Thus, *there is no ruling* by a Louisiana court regarding the non-unanimous jury verdict that is available for review by this Court. Petitioner should not be allowed to resurrect this wholly abandoned claim at this late juncture.

Should this Court not deny the petition on that basis, Louisiana requests that it hold the petition for further action pending this Court's decision in *Evangelisto Ramos v. Louisiana*, No. 18-5924 (April 3, 2019).

### I. THE LONGSTANDING RULE THAT THIS COURT WILL NOT CONSIDER CLAIMS THAT WERE NOT PRESSED OR PASSED UPON IN THE STATE COURT WHOSE JUDGMENT IS AT ISSUE CREATES A WEIGHTY PRESUMPTION AGAINST REVIEW.

This Court has "almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim [raised in the challenge] 'was either addressed by or properly presented to the state court that rendered the decision [it was] asked to review.'" *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (citing *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (*per curiam*); *Illinois v. Gates*, 462 U.S. 213, 218 (1983) (tracing this principle back to *Crowell v. Randell*, 35 U.S. 368 (1836)). The principle of comity stands behind this "properly-raised-federal-question" doctrine. *See Webb v. Webb*, 451 U.S. 493, 496-97 (1981) *citing Picard v. Connor*, 404 U.S. 270 (1971). The doctrine's function reflects

> 'an accommodation of our federal system designed to give the State the initial "opportunity to pass upon and correct" alleged violations of its prisoners' federal rights.' We have consistently adhered to this federal policy, for 'it would be unseemly in our dual system of government for a federal [] court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation.'

*Ibid.* (citations omitted).

Despite the changes to 28 U.S.C.A. § 1257 in 1970 and 1988, this Court has continued to recognize the importance of comity and the "properly-raised-federal-question" doctrine and, with "very rare exceptions" has "adhered to the rule in reviewing state court judgments" that it "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision [it] has been asked to review." *Adams v. Robertson*, 520 U.S. at 86 (citations omitted).

### A. As Petitioner Admits, There Is No Ruling by A Louisiana Appellate Court Regarding Non-Unanimous Jury Verdicts.

As Petitioner admits in his petition, the sole federal question raised by

Petitioner herein was not raised, preserved, or ruled upon in the state appellate courts. Thus, as described above, no Louisiana court has ruled on his claim regarding non-unanimous jury verdicts and therefore there is nothing for this Court to review. Whether the requirement that a federal claim be addressed or properly presented in state court is jurisdictional or prudential, it should be denied. *See Adams*, 520 U.S. at 90, citing *Yee v. Escondido*, 503 U.S. 519, 533 (1992).

### B. Despite His Assertions, Petitioner Did Not Properly Raise His Claim at Trial

1. *Lack of Contemporaneous Objection.* Louisiana law requires that "[a]n irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence." La. Code Crim. Proc. art. 841. "It is sufficient that a party, *at the time the ruling or order of the court is made* or sought, makes known to the court the action which he desires the court to take, or of his objections to the action of the court, *and the grounds therefor*." *Id* (emphasis added).

Petitioner did not object to the jury instructions, which is procedurally required in order to raise an objection to the non-unanimous verdict on appeal. *See State v. Rubens*, 2010-1114 (La. App. 4 Cir. 11/30/11), 83 So.3d 30, *writ denied* 2012-0399 (La. 10/12/12), 99 So.3d 37, *cert. denied Rubens v. Louisiana*, 568 U.S. 1236 (2013). In fact, when asked, he specifically said that he had no objection. In *State v. King*, exactly the same thing happened regarding a different statute. As the court in *King* determined, "The defendant did not object to the jury instructions either prior to or during the jury deliberations. In fact, defense counsel specifically stated that the defense had no objection to the jury instructions. … Therefore, the defendant cannot raise the issue now on appeal." *State v. King,* 47,207 (La. App. 2

Cir. 6/27/12, 13), 94 So.3d 203, 212. *See also State v. Tillery,* 2014-429 (La. App. 5 Cir. 2014), 167 So.3d 15, *writ denied* 2015-0106 (La. 11/6/15), 180 So.3d 306; *State v. Bravo*, 2016-562 (La. App. 5 Cir. 4/12/17), 219 So.3d 1213. The purpose of this rule is to allow a trial court to consider the argument and make a correction at the time of the error. It also serves to create a full record on the issue raised for subsequent reviewing courts. Petitioner did not complain of the 10-2 verdict instruction prior to or at any time during deliberations nor before the jury was dismissed. He cannot resurrect it now.

2. *Insufficient objection after the verdict.* Defendant argues that he raised his objection at trial by simply stating, after the jury returned the verdict *and was dismissed*, "We would like to state our objection to the less than unanimous jury." He gave no reason for this objection; he certainly did not point out that he felt it was unconstitutional in any way. Furthermore, his two post-verdict motions also do not sufficiently state an objection to the non-unanimous jury verdict. *See State v. Fasola*, 2004-902 (La. App. 5 Cir. 3/29/05), 901 So.2d 533 *writ denied* 2005-1069 (La. 12/9/05), 916 So.2d 1055 (Defendant's constitutional claim was clearly not the focus of any hearing and the record contained no argument on the topic.)

The party challenging the validity of a statute bears the burden of proving it is unconstitutional. *State v. Fleury,* 2001–0871 (La. 10/16/01), 799 So.2d 468, 472. It has long been held that the unconstitutionality of a statute must be specially pleaded and the grounds for the claim particularized. *State v. Schoening,* 2000–0903, p. 3 (La. 10/17/00), 770 So.2d 762, 764. The Louisiana Supreme Court "has expressed the challenger's burden as a three step analysis. First, a party must raise the

unconstitutionality in the trial court; second, the unconstitutionality of a statute must be specially pleaded; and third, the grounds outlining the basis of unconstitutionality must be particularized." *State v. Hatton*, 2007-2377 (La. 7/1/08); 985 So.2d 709, 719. The purpose of this rule is "to afford interested parties sufficient time to brief and prepare arguments defending the constitutionality of the challenged statute." *Id.* citing *Schoening,* 770 So.2d at 764. Knowing with specificity what constitutional provisions are allegedly being violated allows the opposing parties the opportunity to fully brief and argue the facts and law surrounding the issue and "provides the trial court with thoughtful and complete arguments relating to the issue of constitutionality and furnishes reviewing courts with an adequate record upon which to consider the constitutionality of the statute." *Id.* This basic principle dictates that the party challenging the constitutionality of a statute must cite to the *specific* provisions of the constitution which prohibits the action. *Id*. at 720, citing *Fleury,* 799 So.2d at 472 ("It is elementary that he who urges the unconstitutionality of a law must especially plead its unconstitutionality and show specifically wherein it is unconstitutional....").

This was simply not done in this case. Petitioner's post-trial arguments for unconstitutionality were repeatedly based upon a claim that the evidence was insufficient and allowed the State to meet a beyond a reasonable doubt standard without having to convince all jurors of their case, not that the non-unanimous verdict violated the Sixth Amendment requirement of unanimity which is the claim he is making before this Court. To the degree that he once said the words "Due Process Clause, Equal Protection Clause … found in the Fifth, Sixth, and

Fourteenth amendments (sic)," given the variety of claims set forth in each of those provisions, it does not constitute a "specific provision of the constitution which prohibits the action." Nor does referring generally to decisions of the Louisiana Supreme Court or this Court, without further argument meet his burden. In fact, his prayer in the Post-Verdict Motion of Acquittal is for the court to "reverse the guilty verdict of the jury because the State failed to offer sufficient prove (sic) of his guilty beyond a reasonable doubt" - no mention of non-unanimous verdicts.

3. *Any argument was abandoned at the hearing on the two motions.* At the hearing on the two motions, Petitioner said absolutely nothing about non-unanimous jury verdicts on either motion. It is a common axiom that a court may consider as abandoned any alleged error which has not been briefed or argued. *See, e.g.* La. U.R.C.A. R. 2-12.4; La. Sup. Ct. R. 7; *State v. King*, 94 So. 3d at 214. Petitioner neither briefed nor argued that the 11-1 verdict in his case was an unconstitutional infringement of the Sixth Amendment. To the extent that he even raised it in motions, he abandoned the claim at argument. *See State v. Fasola*, 2004-902 (La. App. 5 Cir. 3/29/05), 901 So.2d 533, *writ denied* 05-1069 (La. 12/9/05), 916 So. 2d 1055 (Defendant's constitutional claim was clearly not focus of any hearing and record contained no argument on the topic).

### C. The Interests of Judicial Administration Are Not Served by Granting This Petition

Defendant believes this Court should grant a *writ of certiorari* in his case, even though he admittedly did not raise the issue in any court below, because it would

serve the interests of judicial administration.[3] His argument is based upon a footnote in *Carlson v. Green*, 446 U.S. 14, 16 n. 2 (1980). However, the "usual formulation" of the rule is: "It is only in exceptional cases coming here *from the federal courts* that questions not pressed or passed upon below are reviewed." *Youakim v. Miller*, 425 U.S. 231, 234 (1976), citing *Duignan v. United States*, 274 U.S. 195, 200 (1927) (emphasis added). *Carlson* was a case which reached this Court from the federal courts below where the Court's jurisdiction is governed by 28 U.S.C. 1253 or 1254. This, however, is a case reaching this Court strictly from the Louisiana state courts. As stated above, "[i]n reviewing the judgments of state courts under the jurisdictional grant of 28 U.S.C. § 1257, the Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below." *Yee v. Escondido*, 503 U.S. at 533. While this Court has, admittedly, since the wording of the rule was changed in 1988, "expressed inconsistent views as to whether this rule is jurisdictional or prudential in cases arising from state courts," it has noted that, in federal cases, the rule is prudential only. *Id.* citing *Carlson.*

Furthermore, those exceptional cases where the Court has granted review involved situations where the issue could not have been raised below, e.g. *Wood v. Georgia*, 450 U.S. 261, 265 n. 5 (1981) (conflicted counsel would not have raised conflict), and where both parties consented to the waiver of the procedural default, as in *Carlson.*

The issue before this Court in *Ramos v. Louisiana* is not new - in fact, he challenges long-standing, settled precedent of this Court. Defendant did not raise a

[3] Pet. p. 3.

claim that non-unanimous juries violate the Sixth Amendment right to jury trial in any state court. He should not be able to do so now.

### D. Petitioner is Foreclosed from Raising an Equal Protection Claim.

To the extent that Petitioner has attempted to make an equal protection argument in Section C of his petition, whether facial or as-applied, that argument was also not raised before any Louisiana court below 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. 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.

## II. ALTERNATIVELY, THIS COURT SHOULD HOLD DEFENDANT'S PETITION PENDING THIS COURT'S DECISION IN *RAMOS V. LOUISIANA*, NO. 18-5924, .

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'r App. 6-7. He argues that *Apodaca v. Oregon*, 406 U.S. 404 (1972) 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. Pet'r App. 5. Louisiana disputes this claim, as will be more fully set forth in its brief in opposition to the petition of Evangelisto Ramos.

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." *State v. Bertrand*, 2008-2215 (La. 3/17/09), 6 So. 3d 738, 742. There have also been dozens of cases, some as recently as last year, where this Court has denied *certiorari* review on this issue further evidencing that non-unanimous jury verdicts did not violate the United State Constitution.

This Court granted the petitioner's petition for a writ of certiorari in *Ramos* 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.

## CONCLUSION

The petition for a writ of certiorari should be denied because the sole issue raised in the petition has never been properly presented to a state court for consideration.

Alternatively, the petition 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.

*s/ Michelle W. Ghetti*

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JEFF LANDRY
Attorney General
ELIZABETH BAKER MURRILL
Solicitor General
MICHELLE WARD GHETTI*
Deputy Solicitor General,
**Counsel of Record*

Louisiana Department of Justice

KEITH A. STUTES
District Attorney
CYNTHIA SIMON
Assistant District Attorney

Office of the District Attorney
Parish of Lafayette