No. 18-9025

In the Supreme Court of the United States

PHILLIP NEWTON,
Petitioner

vs.

THE STATE OF LOUISIANA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The issue presented by the Petitioner is whether the Sixth Amendment right to a jury trial requires a unanimous jury verdict and, if so, would that unanimity requirement be required in state criminal jury trials via the Fourteenth Amendment.

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REASONS FOR DENYING THE WRIT

This petition for review of a post-conviction ruling should be denied because, although not disclosed by Petitioner, the sole issue raised in the petition was not raised at *any* time in *any* court below but, instead, is being raised *for the first time* before this Court. There is *no judgment* by a Louisiana court regarding the non-unanimous jury verdict to be reviewed by this Court. Thus, if this Court has jurisdiction of this claim at all, it should "adhere 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. 83, 86 (1997) (per curiam) (citations omitted).

Additionally, Petitioner's case is no longer on direct review and, as the Louisiana Supreme Court has recognized, he has "exhausted his right to state collateral review." Pet'r Appx. C. Thus, he would not be able to benefit from any ruling in *Evangelisto Ramos v. Louisiana*, No. 18-5924 (April 3, 2019) currently pending before this Court. In six years and with five separate opportunities, Petitioner has never complained about the non-unanimous jury system in Louisiana; he should not now be allowed to hitch his empty wagon to the *Ramos* star.

LACK OF JURISDICTION

The authority for this Court to review the decision of a state court is found in 28 U.S.C. §1257(a) which provides in material part: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where … the validity of a

statute of any State *is drawn in question* on the ground of its being repugnant to the Constitution…." (emphasis added). There has been no final judgment in this case by any court in Louisiana, much less the highest court, where the validity of the Louisiana statute on non-unanimous juries has been "drawn in question on the ground of its being repugnant to the Constitution." Thus, this Court has no jurisdiction to consider Petitioner's claim.

Furthermore, Petitioner has failed to set out a proper basis for jurisdiction in his Petition. Although he states that the jurisdiction is pursuant to 28 U.S.C. §1257(a) and gives the dates the three opinions in post-conviction were entered, he does not "specify the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised, the method or manner of raising them and the way in which they were passed on by those courts" so as to "show that the federal question *was timely and properly raised* and that this Court has jurisdiction to review the judgment on a writ of certiorari." Supreme Court Rule 14.1(g). He does not do this because he cannot do this. The federal question sought to be reviewed - the constitutionality of Louisiana's non-unanimous jury verdict laws - *was not raised in any court below* and, thus, again, this Court does not have jurisdiction pursuant to 28 U.S.C. §1257(a).

The State recognizes that, since the wording of 28 U.S.C. §1257(a) was changed in 1988, this Court has "expressed inconsistent views as to whether this rule is jurisdictional or prudential in cases arising from state courts." *Robertson,* 520 U.S. at 86. Although the State believes this to be a jurisdictional matter, the Court should also deny the petition for prudential reasons due to lack of a

meritorious basis for review. The only basis arguably presented (although not stated) by Petitioner is that "a state court … has decided an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(c). That basis does not exist, though, because *no state court has decided* the federal question Petitioner presents.

CONSTITUTIONAL AND STATUTORY AUTHORITY

Louisiana Jury Verdict Law:

Petitioner misstates the Louisiana statutory law on jury verdicts later in his brief. Article 782 of the Louisiana Code of Criminal Procedure was *amended* in 2018. 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.

Louisiana Constitution article I, § 17(A) is also at issue in this case but was not cited by the Petitioner. It was amended in 2018, effective January 1, 2019, 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.

Additional relevant Louisiana law:

Louisiana Code of Criminal Procedure art. 841 (Objections Required):

A. An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence. A bill of exceptions to rulings or orders is unnecessary. 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.

B. The requirement of an objection shall not apply to the court's ruling on any written motion.

C. The necessity for and specificity of evidentiary objections are governed by the Louisiana Code of Evidence.

Louisiana Code of Criminal Procedure art. 930.4 (Post-Conviction Review):

B. If the application alleges a claim of which the petitioner had knowledge and inexcusably failed to raise in the proceedings leading to conviction, the court shall deny relief.

C. If the application alleges a claim which the petitioner raised in the trial court and inexcusably failed to pursue on appeal, the court shall deny relief.

STATEMENT OF THE CASE

On May 12, 2013, Petitioner and his wife got into an argument, he followed her out to her car, and he shot her just below the breast area. State's Appx. 1.[1] She suffered severe injuries to her liver, stomach, colon, small bowel, and back of her abdomen. *Id*. at 3. Petitioner was charged by bill of information with attempted second degree murder and entered a plea of not guilty. *Id*. at 1. His defense was that

[1] The State has attached the unpublished opinion of the First Circuit Court of Appeals on appeal from the trial court verdict as its Appendix, to supplement the post-conviction decisions Petitioner attached to his Petition, primarily to show that the non-unanimous jury verdict was not raised in any court, including on appeal.

he had not realized the gun had discharged, he had called for assistance, and that the gun discharged while he was trying to evade an attack by the victim. *Id*. at 2.

After a trial by jury, the defendant was found guilty of the responsive offense of attempted manslaughter on June 10, 2014. Pet'r Appx. A1. Although Petitioner claims he was convicted in a 10-2 decision, there is nothing in any of the reported cases that indicates the vote of the jury nor does Petitioner offer anything, other than his bald statement, to substantiate this claim.[2] There is nothing in the reported cases to indicate that Petitioner objected to the 10-2 jury verdict instruction nor to the alleged return of a 10-2 verdict. It does not appear that any post-trial motions were filed. He was adjudicated a second-felony habitual offender and sentenced to thirty years of imprisonment at hard labor. Pet'r Appx. A1.

Petitioner appealed his conviction to the First Circuit Court of Appeals raising four assignments of error: failure to prove specific intent (State's Appx. 2), improper admission of other crimes evidence (*id*. 6), an improper reference to his post-arrest silence (*id*. 9), and improper adjudication of him as a second-felony offender (*id*. 11). He did not complain about a non-unanimous jury verdict. On March 6, 2015, the First Circuit affirmed his conviction and amended his sentence. *Id*. 12. He did not file a petition for certiorari with the Louisiana Supreme Court or this Court.

Two years later, on March 2, 2017, Petitioner filed an Application for Post-Conviction Relief. Pet'r Appx. A1. He alleged two errors in the petition: ineffective

[2] This Court has "consistently condemned" a party's attempts to influence decisions by submitting "additional or different evidence that is not part of the certified record." *Ross v. Blake*, 136 S.Ct. 1850, 1862 (2016) (Thomas, J., concurring in part, dissenting in part), citing S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, SUPREME COURT PRACTICE §13.11(k), p. 743 (10th ed. 2013).

assistance of counsel based on trial counsel not having Petitioner testify on his own behalf and right to a trial by an impartial jury based on one of the juror's knowing Petitioner and his father. Pet'r Appx. A1 and A2. Again, he did not raise any objection to his alleged non-unanimous jury verdict. Finding no merit to his two arguments, the application for post-conviction relief was dismissed on July 19, 2017 (Pet'r Appx. A4) and writs were denied by the First Circuit Court of Appeal on October 30, 2017 (Pet'r Appx. B) and by the Louisiana Supreme Court on January 28, 2019 (Pet'r Appx. C).

ARGUMENT

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 *Robertson*, 520 U.S. at 86; *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." *Robertson*, 520 U.S. at 86 (citations omitted).

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 v. Green*, 446 U.S. 14, 16 n. 2 (1980). The issue of whether non-unanimous jury verdicts are constitutional is not a new issue. It has been raised in hundreds of cases in Louisiana, even since the Louisiana Supreme Court definitively upheld the laws in 2009. *See State v. Bertrand*, 2008-2215 (La. 3/17/09), 6 So. 3d 738, 742 and cases citing it. It could have easily been raised below. And, obviously, the State is not willing to waive Petitioner's procedural default in this matter.

A. There Is No Ruling by a Louisiana Court Regarding Non-Unanimous Jury Verdicts.

The sole federal question raised by Petitioner herein was not raised, preserved, or ruled upon at any time in the state courts – not at trial, not on appeal, not to the post-conviction trial court or in any petition for review before the state circuit or

supreme court. 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 Robertson*, 520 U.S. at 90, citing *Yee v. Escondido*, 503 U.S. 519, 533 (1992).

B. Petitioner's Non-Unanimous Jury Claim Was Waived and is Time-barred.

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). As the court in *King* determined, "The defendant did not object to the jury instructions either prior to or during the jury deliberations. … 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.

Furthermore, if an application for post-conviction relief "alleges a claim of which the petitioner had knowledge and inexcusably failed to raise in the proceedings leading to conviction," the court must deny relief. La. Code of Criminal Procedure art. 930.4. Thus, even if Petitioner had attempted to make the argument that his alleged non-unanimous jury verdict violated the United States Constitution in his application for post-conviction relief (he did not), the court would have been required to reject it.

Petitioner did not complain about the 10-2 verdict instruction prior to or at any time during deliberations nor before the jury was dismissed. Furthermore, Defendant did not object in any way to the alleged non-unanimous verdict in his case in any post-trial proceeding and, thus, he could not (and did not) raise it in post-conviction review. This claim was waived long ago and cannot be resurrected now.

II. PETITIONER, IN POST-CONVICTION PROCEEDINGS, CANNOT BENEFIT FROM THIS COURT'S DECISION IN *RAMOS V. LOUISIANA*, NO. 18-5924 SO HIS PETITION SHOULD BE DENIED OUTRIGHT

As noted by Petitioner, this Court granted the petition for a writ of certiorari in *Ramos v. Louisiana* on March 18, 2019, a case in which the same question presented by Petitioner is raised. However, because Petitioner has now exhausted his right to state collateral review, he would not benefit from a favorable decision in *Ramos v. Louisiana,* should that occur, because he is no longer on direct review. *See Griffith v. Kentucky*, 479 U.S. 314 (1987), *Teague v. Lane*, 489 U.S. 288 (1989),

Montgomery v. Louisiana, 136 S.Ct. 718 (2016). Accordingly, the petition in this case should be denied outright.

III. ALTERNATIVELY, THE PETITION SHOULD BE DENIED ON ITS MERITS OR HELD PENDING THE DECISION IN *RAMOS*.

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. 2. He argues that "a two track approach to the trial rights afforded by the Sixth Amendment makes no sense" and was rejected in *McDonald v. City of Chicago*, 561 U.S. 742 (2010) and *Timbs v. Indiana*, 139 S.Ct. 682 (2019). Pet'r App. 5-6. He further claims that "uniformity is required whenever a Bill of Rights protection is incorporated into the Fourteenth Amendment's due process clause and made applicable to the states" and that because a "unanimous jury is required for federal prosecutions so too must it now be for state prosecutions." Pet'r App. 6. Louisiana disputes this claim, as will be more fully set forth in its brief in opposition to the petition of Evangelisto Ramos.

As argued more fully in *Ramos*, for nearly fifty years, Louisiana Courts have faithfully relied upon *Apodaca v. Johnson,* 406 U.S. 404 (1972) and *Johnson v. Louisiana*, 406 U.S. 356 (1972). Ten years ago, the Louisiana Supreme Court wrote: "Although the *Apodaca* decision was, indeed, a plurality decision rather than a majority one, the [Supreme] 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. Historically, the requirement of jury unanimity was rejected as a constitutional requirement by the Founding Fathers. Furthermore, since that time, nearly every nation using a jury, including Great Britain, has recognized the problems involved in requiring unanimous verdicts and has moved to allowing non-unanimous jury verdicts. It's simply not a right with concrete historical roots that is fundamental to our scheme of ordered liberty.

As it should do in *Ramos v. Louisiana*, this Court should reject Petitioner's arguments that Louisiana's 10-2 jury verdict violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Alternatively, it should hold that Petitioner cannot benefit from any decision in *Ramos* because his case is no longer on direct review. However, should the Court not deny Newton's petition outright, it should hold Newton's petition pending the Court's decision in *Ramos* and then disposed of it 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 presented to a state court for consideration. Additionally, Petitioner's case is no longer on direct review so he should not benefit from any favorable decision in *Ramos v. Louisiana*.

Alternatively, the petition should be denied on its merits or 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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