No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

LANDON QUINN, *Petitioner,*
v.
DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY, *Respondent.*

ON WRIT OF CERTIORARI TO THE
LOUISIANA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the fact that a criminal conviction was returned by a non-unanimous verdict is relevant to a court's consideration of the prejudice prong of *Strickland v Washington*, 466 U.S. 668 (1984)?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Landon Quinn respectfully requests that the Court grant a writ of certiorari to review the decision of the Louisiana Supreme Court denying his post-conviction claim of ineffective assistance of counsel.

The petitioner is the petitioner and petitioner-respondent in the Louisiana Supreme Court. The respondent is Darrel Vannoy, the respondent and respondent-appellant in the Louisiana Supreme Court.

OPINIONS BELOW

The opinion of the Louisiana Supreme Court denying Mr. Quinn's ineffective assistance of counsel claim is at *State v. Quinn*, 2016-1285 (La. 3/13/18); 248 So.3d 1276 and is reprinted in the Appendix at App. A.

The opinion of the Louisiana Supreme Court partially granting rehearing from this decision and remanding for consideration of pretermitted claims is at *State v. Quinn*, 2016-1285 (La. 5/11/18); 2018 La. LEXIS 1264 and is reprinted in the Appendix at App. B. The final decision of the Louisiana Supreme Court denying post-conviction relief is at *State v. Quinn*, 2018-1103 (La. 3/18/19); 265 So.3d 760 *reconsideration denied* (La. 6/3/19) and is reprinted in the Appendix at App. C.

Relief had originally been granted in the state district court, which issued a *per curiam* at *State v. Quinn*, 489-027 (La. 41st JDC, 5/13/16), which is reprinted at App. E. This grant of relief was affirmed by the Fourth Circuit Court of Appeal in a reasoned opinion at *State v. Quinn*, 2016-150 (La. 4 Cir., 6/10/16), reprinted at App. D.

JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Louisiana Supreme Court on the basis of 28 U.S.C. § 1257. The Louisiana Supreme Court finally denied Petitioner's application for post-conviction relief on March 18, 2019 and denied reconsideration on June 6, 2019. This petition follows timely pursuant to Supreme Court Rule 13.1.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The question presented implicates the following provision of the United States Constitution:

Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV: . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

A. Introduction

This Court has held that when considering the prejudice prong of *Strickland's*[1] test of ineffective assistance of counsel, a reviewing court must look at "the totality of the evidence" and apply the rule that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696. Further, that when a defendant challenges a conviction, "the question to be asked in assessing the prejudice from counsel's errors . . . is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695.

In the present case, Mr. Quinn's first trial ended in a hung jury and he was convicted at his second trial by a non-unanimous (ten-to-two) jury verdict. Thus, two of the twelve jurors experienced at least a reasonable doubt in what was a single eyewitness case with a problematic identification.

In post-conviction proceedings, Mr. Quinn brought a meritorious ineffective assistance of counsel claim, obtaining relief in the state district court and the intermediate court of appeal.[2]

In reversing the grant of relief, the Louisiana Supreme Court found deficient performance established but while finding that prejudice was conceivable, held that

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[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

[2] *See* Appendices E (A-27) and D (A-12) respectively.

the showing of prejudice was not sufficiently substantial to meet the second prong of *Strickland*.[3]

In denying relief under the prejudice prong, the Louisiana Supreme Court gave no consideration to the fact that the State could obtain only a non-unanimous conviction and that even without counsel's unprofessional errors, two jurors experienced at least a reasonable doubt based upon the evidence of a clearly "problematic" identification.[4] The Louisiana Supreme Court refused to grant rehearing even when this deficiency in its analysis was pointed out.[5] By way of contrast, both the state district court and intermediate court of appeal had expressly noted that the conviction was supported only by a nonunanimous verdict.

The Louisiana Supreme Court's application of *Strickland's* second prong without regard to the fact that the underlying conviction was returned by a non-unanimous jury is contrary to this Court's precedents and the practice in Oregon[6] and should be reversed.

B. Procedural history at trial and on direct appeal

Mr. Quinn's first trial ended in a hung jury and his second in a conviction by a non-unanimous jury verdict with a vote of ten-to-2.[7]

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[3] See Appendix A, A-5.

[4] The court of appeal and Chief Justice Johnson (dissenting) both use the word problematic to describe the identification. See Appendices D (A-13) and A (A-6) respectively.

[5] See Appendix B, A-8.

[6] The only other state allowing nonunanimous jury verdicts.

[7] See A-3, A-27 n.2; *State v. Quinn*, 2012-0689 (La. App. 4 Cir. 08/21/13); 123 So. 3d 320, 322 (review "arises from the defendant's conviction of two counts of second degree murder, by non-unanimous verdicts).

Originally charged with a capital offense, Mr. Quinn, an indigent, was appointed capitally certified counsel. Upon indictment on non-capital charges, Mr. Quinn's case was transferred to the local public defender's office where new counsel were assigned who then handled both trials.[8]

The sole issue at trial was mistaken identity and the State was able to present only one identifying eye witness, Mr. Wakil, with no physical or forensic evidence linking Mr. Quinn to the commission of the offense.[9] As Louisiana's Fourth Circuit Court of Appeal observed on direct appeal, "the crucial testimony as to the convictions of Mr. Quinn was Mr. Wakil's identification of Mr. Quinn."[10]

Mr. Wakil testified that while waiting in his car he witnessed an armed robbery that resulted in two fatalities. Essentially, the offender ran up behind the two victims with a white t-shirt pulled over his head, exposing only what could be seen through the neckhole. Mr. Wakil testified that the hole in the t-shirt exposed the offender's eyes, cheek and nose, agreeing on cross-examination that he could essentially see above the upper lip to the forehead.[11]

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[8] See Appendix D, A-12.

[9] Surveillance video from a shop near the crime scene did not capture the offense but did show the victims apparently making a purchase as well as a number of other young men, almost all men of color. In the second trial, the state offered a portion of this video that showed a man the state argued was Mr. Quinn, though no evidence was admitted identifying this person as Mr. Quinn. The post-conviction trial court described the video as "fuzzy black and white and about three seconds in length." See Appendix E, A-27. In any event, even if the video depicted Mr. Quinn, it would merely establish that he was in the neighborhood, not something that was disputed at trial.

[10] *Quinn*, 123 So. 3d at 330.

[11] See Appendix A, A-4.

Mr. Wakil identified Mr. Quinn from a photo lineup, though another eyewitness was unable to make an identification given the way in which the offender's face was obscured. Mr. Wakil repeated an in-court identification at the time of trial.

Based upon the photo identification, Mr. Quinn was arrested within 24-48 hours of the offense and his booking photograph showed him to have medium length hair styled in twists.

Mr. Quinn was convicted and sentenced to two mandatory terms of life imprisonment without the possibility of parole. While some error was identified on direct appeal, it was found to be harmless.[12]

C. State post-conviction proceedings

In state post-conviction proceedings, Mr. Quinn presented a claim of ineffective assistance of trial counsel arising, in particular, from the failure of trial counsel to review or utilize a prior inconsistent statement obtained by previously appointed counsel's investigator. Prior counsel's investigator had interviewed Mr. Wakil days after the offense, including showing Mr. Wakil a booking photo of Mr. Quinn, which had been taken within 24-48 hours of the offense. In an uncontested affidavit tendered in the post-conviction proceedings, the investigator attested:

> [Wakil] stated that he could tell the person had short hair, tight to their head. He stated that the person did not have twists in their hair or anything like that. He said, he could tell this because he could see some of the hair and also because he has a wife and daughters who wear head coverings and that due to this he can tell what type or style a person's hair would be, even when covered in part. . . . He further stated that the hair of the person he saw that night was shorter and not like that of the man he saw in the [booking] photograph [shown by the defense

[12] *State v. Quinn*, 2012-0689 (La. App. 4 Cir. 08/21/13); 123 So. 3d 320.

investigator].[13]

Mr. Wakil also told the investigator that the skin color of the people in the photo lineup was too light but the detective told him to ignore that and so he excluded skin color from his identification. After identifying Mr. Quinn from the photo lineup, the detective told Mr. Wakil he had identified the right person.[14]

The defense investigator also testified in an evidentiary hearing conducted as a part of the post-conviction hearing, stating that:

> [Wakil] told me that the person had like tight hair, you know, tight to the head. He could see the----to me, it was like he could see the front, like portion of the hair, and he said it was tight to the head. And, also he could tell that it was tight to the head because his wife and daughters wear the hijab, the Muslim hair cover----head covering, and he could tell when someone's hair would be, you know, tight to the head, I guess.
>
> And, he said that, you know, basically said that the hair wasn't long or twisty, I believe.[15]

Thus, Mr. Wakil had previously stated that he saw the offender's hair at the time of the shooting and that it was *shorter* than and not like Mr. Quinn's hair.

Trial counsel were provided the defense investigator's affidavit both in prior counsel's file and by a separate email highlighting its importance. However, trial counsel inadvertently failed to consider or use the information in the affidavit, blaming crushing caseloads within the public defender system at the time.[16]

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[13] *See* Affidavit of Cormac Boyle (9/15/09) at 2, 3 (emphasis added); *See also* Appendix E, A-28.

[14] See Appendix E, A-28.

[15] *See Transcript 10/19/15* at 19 (emphasis added); *See also* Appendix E, A-28.

[16] See Appendix D, A-12 ("two Orleans Parish public defenders (whose felony caseloads far exceeded the ABA recommended maximum) were appointed to represent him.")

The post-conviction court found that trial counsel "were in possession of the affidavit and that the defense investigator would have made a compelling witness who could have challenged the strength of the eyewitness identification."[17]

In the post-conviction proceedings the trial court granted relief stating, "[w]hen you look closely at this case you are struck with a level of ineptness that leaves you breathless."[18] The state sought review in the intermediate court of appeal which affirmed the grant of post-conviction relief stating:

> As observed by the district court judge in his written reasons for granting post-conviction relief, this information - in light of the defendant's arrest photo taken within 24 hours of the crime and showing the defendant's hair in dreadlocks or twists - strongly suggests that the defendant was mistakenly identified as the perpetrator.[19]

The state sought review in the Louisiana Supreme Court, which reversed the grant of relief in a *per curiam* opinion, over the dissent of Johnson, CJ.[20]

The Louisiana Supreme Court readily found deficient performance but held that "the likelihood of a different result if that information had been used at trial appears conceivable but not substantial, and is insufficient to undermine confidence in the outcome of the second trial."[21]

The trial court noted in its reasons that Mr. Quinn's conviction was by a nonunanimous (ten-to-two) jury[22] but the Louisiana Supreme Court omitted this

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[17] Appendix A, A-4.

[18] See Appendix E, A-30.

[19] See Appendix D, A-13.

[20] See Appendix A, A-1.

[21] See Appendix A, A-5; *Quinn*, 248 So.3d at 1279.

[22] See Appendix E, A-27.

information from its opinion and gave no consideration to the relevance of a nonunanimous verdict when applying *Strickland's* prejudice prong.

Mr. Quinn submitted a motion for rehearing alerting the Louisiana Supreme Court to its failure to consider the significance of the nonunanimous jury and urging it to do so, but in this respect the motion for rehearing was denied.[23]

REASONS FOR GRANTING THE PETITION

I. Whether, the fact that a criminal conviction was returned by a non-unanimous verdict is relevant to a court's consideration of the prejudice prong of *Strickland v Washington*, 466 U.S. 668 (1984)?

A. The Louisiana Supreme Court has decided an important federal question in a way that conflicts with relevant decisions of this court and with the limited jurisprudence from Oregon

This Court has held that when considering the prejudice prong of *Strickland's* test of ineffective assistance of counsel, a reviewing court must look at "the totality of the evidence" and apply the rule that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696.

It seems clear that a conviction based upon a nonunanimous verdict, a verdict that could not have supported a conviction in any other jurisdiction in the country,[24]

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[23] Appendix B, A-8 (denying rehearing save to remand for pretermitted claims). The *Application for Rehearing* (at 5-6) quoted the passage from *Strickland* directing a reviewing court to the strength of the prosecution case and argued "This Court should have placed the assessment of prejudice in the context of: . . . the bare majority (10:2) verdict at the second trial — a verdict that would be unable to sustain such a conviction in any other jurisdiction in the country." Petitioner's opposition to the grant of the supervisory writ had cited the nonunanimous verdict nine times.

[24] Oregon, the only other state permitting nonunanimous jury verdicts does not allow them in cases carrying terms of life imprisonment.

is a verdict only weakly supported by the record. Indeed, the ten-to-two conviction obtained in this case is the most weakly supported murder conviction then possible in the country and is now no longer lawful even in Louisiana.

Such a conclusion is consistent with our Founding Father's understanding of the Sixth Amendment's guarantee of jury unanimity as a necessary prerequisite to adequate protection of the liberty of the subject.

Whatever may be said about the incorporation of the jury trial right into the Fourteenth Amendment, this Court could not have spoken more clearly about the significant difference between a unanimous and non-unanimous jury for Sixth Amendment purposes when it stated:

> But the wise men who framed the Constitution of the United States and the people who approved it were of opinion that life and liberty, when involved in criminal prosecutions, would not be adequately secured except through the unanimous verdict of twelve jurors.

Thompson v. Utah, 170 U.S. 343, 353 (1898).

Even if the Sixth Amendment's guaranteed right to trial by a unanimous jury of twelve is not incorporated in the Fourteenth Amendment's Due Process Clause, when applying the Sixth Amendment's guarantee of effective assistance of counsel an assessment of prejudice must be undertaken through the lens of the Sixth Amendment's premise that only a unanimous jury can produce a verdict of sufficient weight to imperil life and liberty.

A contrary conclusion would require the Court to hold that a non-unanimous verdict is to be regarded as showing equal support for the prosecution's case as a unanimous verdict, a conclusion at odds with common sense, the Sixth Amendment's

insistence that unanimity is essential to safeguard the life and liberty of the subject and this Court's own acknowledgment that a non-unanimous verdict likely denotes that the State's proof was less certain. *Johnson v. Louisiana*, 406 U.S. 356, 362 (1972) ("Of course, the State's proof could perhaps be regarded as more certain if it had convinced all 12 jurors instead of only nine . . .").

As Oregon is the only other jurisdiction permitting nonunanimous verdicts and even Oregon does not allow such verdicts in life cases, there is limited opportunity for conflicting jurisprudence to emerge on this point. However, even in this narrow field it appears that Oregon jurisprudence or, at least, practice does have regard to a lack of jury unanimity when considering *Strickland's* prejudice prong. *Holbrook v. Amsberry*, 289 Ore. App. 226, 234, 410 P.3d 289, 295 (2017)(describing with apparent approval the trial court's acknowledgment that the fact of a nonunanimous jury "supported a determination that counsel's inadequate performance prejudiced petitioner.")

As in the present case, the fact that the jury were able to see and hear the testimony of the sole eyewitness and could not reach a unanimous verdict counsels in favor of considering the nonunanimous verdict when assessing prejudice. A reviewing court, working from a bare transcript, may attach greater weight to the testimony of a single witness than the jury who saw the witness were willing to do.

The Louisiana Supreme Court's approach in the present case is in conflict with the decisions of this Court and the approach in Oregon. This Court's jurisprudence requires a consideration of the strength of the state's case, aside from counsel's

unprofessional errors, and recognizes that a non-unanimous verdict denotes a showing of less strong proof by the state.

This Court should make clear that where prejudice under Strickland is to be assessed in a case with a nonunanimous conviction, the fact of the nonunanimous conviction is relevant and such a verdict "is more likely to have been affected by errors"[25] than a conviction supported by a unanimous verdict.

II. This Court should hold this petition pending its decision in *Ramos*, and then dispose of the petition as appropriate in light of that decision

On March 18, 2019, this Court granted a petition for a writ of certiorari in *Evangelisto Ramos v. Louisiana*, 139 S.Ct. 1318 (2019) (No. 18-5924). For the reason stated in that petition, as well as reasons stated in similar petitions filed over the last 45 years, the plurality opinion in *Apodaca v. Oregon,* 406 U.S. 404 (1972) deserves reexamination and disavowal.

In Mr. Quinn's case, trial counsel failed to preserve an objection to Louisiana's nonunanimous jury scheme prior to trial. As a result, when counsel on direct appeal raised a claim essentially identical to Ramos', Louisiana's Fourth Circuit Court of Appeal held the claim to be procedurally defaulted. *State v. Quinn*, 2012-0689 (La. App. 4 Cir. 08/21/13); 123 So. 3d 320, 334.

Since Mr. Quinn's conviction, Louisiana's nonunanimous verdict scheme has been held by one district court judge to violate the Equal Protection Clause on the basis that it was introduced deliberately to dilute black jury votes and maintain white

[25] *Strickland*, 466 U.S. at 696.

hegemony.[26] Further, the people of Louisiana have overwhelmingly passed a constitutional amendment eliminating majority verdicts on a prospective basis.[27] However, this is all too little, too late for Mr. Quinn.

Nevertheless, this Court's examination of Louisiana's non-unanimous jury scheme in *Ramos* may be expected to produce a discussion of considerations relevant to whether nonunanimity should be relevant to *Strickland's* prejudice prong.

Speaking plainly, were *Ramos* to secure relief and this Court to dispense with *Apodaca's* plurality opinion, it is likely that the Court's opinion would contain a discussion that would justify a GVR to the Louisiana Supreme Court to reconsider its opinion in the present case in light of *Ramos*.

For this reason, Mr. Quinn asks that this Court hold this petition pending its decision in *Ramos*, and then dispose of the petition as appropriate.

CONCLUSION

Petitioner respectfully pleads that this Court hold this petition pending the decision in *Ramos* and then either GVR in light of *Ramos* or grant Mr. Quinn's writ of certiorari and permit briefing and argument on the issues.

Respectfully submitted,

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Counsel of Record
Attorney for Petitioner

Dated: June 17, 2019

[26] *State v. Melvin Cartez Maxie*, 13-CR-72522 (La. 11th JDC., 10/11/18).

[27] See La. Const. Art I, § 17.