No. 18-9744

In the Supreme Court of the United States

LANDON M. QUINN,

Petitioner,

v.

DARREL VANNOY, WARDEN, LOUISIANA STATE PENITENTIARY,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a non-unanimous jury verdict is relevant to a court's consideration of the prejudice prong of *Strickland v. Washington*, 4466 U.S. 668 (1984)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

INTRODUCTION

After finding that Petitioner Landon Quinn robbed and killed Matthew Miller and Ryan McKinley, a jury convicted him of two counts of second-degree murder. Although Quinn contends that the jury verdict was 10–2, the record does not clearly reflect whether the jury's verdict was non-unanimous. And, on direct review, the Louisiana intermediate appellate court found that Quinn failed to preserve the unanimity issue because he failed to raise it at trial. Quinn's convictions were affirmed on direct review.

Seeking post-conviction relief in state court, Quinn argued that he received ineffective assistance of counsel. Quinn found success at both the state district court and the state appellate court, but the Louisiana Supreme Court reversed. That court held that, although Quinn's attorneys rendered ineffective assistance, their unprofessional conduct did not prejudice Quinn.

In his original brief to the Louisiana Supreme Court, Quinn did not contend that the court should consider non-unanimity when determining whether his attorney's conduct prejudiced him under *Strickland v. Washington*, 4466 U.S. 668 (1984). *See Quinn's Original Br. to La. Supreme Ct. [Quinn's Br.]*, 2018 WL 1240414 at *3 (Jan. 3, 2018). And the Louisiana Supreme Court did not decide that issue. *See* Pet. App. A, A1–A6. But now, Quinn contends that the Louisiana Supreme Court erred by failing to consider the allegedly non-unanimous jury verdict when deciding whether his attorneys' deficient performance prejudiced him.

Even if the Court wanted to address that issue, this case presents a poor vehicle. It is unclear that the jury's verdict was non-unanimous. And Quinn failed to point to even one other court in the country that has addressed the question of whether non-unanimity is relevant to *Strickland*'s prejudice inquiry, including the court below. This Court will not consider any federal-law challenge to a state-court decision unless that challenge was raised to the court below. *Howell v. Mississippi*, 543 U.S. 440, 443 (2005). And, as a Court of final review, this Court should not be the first to address the issue. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009).

In any event, a non-unanimous jury verdict is irrelevant to whether a defense attorney's unprofessional conduct prejudiced the defendant. Even if a non-unanimous verdict is less reliable than a unanimous verdict, the mere fact of non-unanimity says nothing about the quality of defense counsel's assistance. Nor does it demonstrate that, had defense counsel done something differently, the jury "would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. Quinn's argument misunderstands the *Strickland* test.

Finally, at this late state of the litigation, Quinn cannot transform his ineffective assistance of counsel claim into a claim that his allegedly non-unanimous verdict violated his Sixth and Fourteenth Amendment rights. The state appellate court expressly found that he waived that claim, and so he was procedurally barred from raising it on appeal. Because there is an adequate and independent state-law basis for upholding his conviction, the Court should not hold his petition for this

Court's decision in *Ramos v. Louisiana*, 139 S. Ct. 1318 (2019) (No. 18-5924). *See Hathorn v. Lovorn*, 457 U.S. 255, 262–63 (1982).

STATEMENT OF THE CASE

I. The Murders

On the evening of April 14, 2009, Matthew Miller and Ryan McKinley purchased a roast beef po-boy and a soda from a convenience store about a mile outside of the French Quarter in New Orleans. *See* Pet. App. E, A-27; *State v. Quinn*, 2012-0689 (La. App. 4 Cir. 8/21/13), 123 So. 3d 320, 323, writ denied, 2013-2193 (La. 3/14/14), 134 So. 3d 1195. They left the store and walked past a mosque on Barracks Street. *Quinn*, 123 So. 3d at 324–25. Two Muslim men—Qaid Ali and Zaid Wakil—were sitting in their vehicles waiting for the nine o'clock prayer session to begin. *Id.* Both Ali and Wakil saw a black man with a white t-shirt over his head run up to Matthew and Ryan as they walked past the mosque. *Id.*

Wakil saw the man run up behind Matthew and Ryan and point a gun at them. Pet. App. D, A-17. Matthew and Ryan turned around, nervous. *Id.* Wakil described the gun as a "black revolver." *Id.* The gunman commanded Matthew and Ryan to "[g]ive it here" before he took something from them. *Id.* Wakil heard one of them tell the gunman to "calm down" or "be cool." *Id.* Wakil heard the gunman fire three shots before turning and running. *Id.* As the gunman fled, Wakil observed that the t-shirt covered the lower part of the shooter's face and his hair. But Wakil could see the man's eyes, cheeks, and nose. Pet. App. A, A-4. Because Matthew and Ryan got up

after the gunman fled, Wakil assumed that he had fired the shots only to scare them. Pet. App. D, A-17.

Ali did not see the gunman's face, but his recounting of the events matched Wakil's. Matthew and Ryan were standing in front of his vehicle when the gunman ran up to them and stopped them. *Quinn*,123 So. 3d at 324–25. Ali saw the gunman grab one of the victims and pull him to the ground before Ali heard "two faint shots." *Id.* Ali thought that perhaps it was a cap gun. *Id.* The gunman turned and fled, and Ali noticed that gunman had a small build. *Id.*

Matthew and Ryan got up after the incident, and neither Wakil or Ali initially understood that they had been shot. *See id.*; *Quinn*,123 So. 3d at 324–25. Bleeding and disoriented, Matthew and Ryan made it about a block before they collapsed. *See* Pet. App. D, A-17.

Responding to calls reporting a shooting, Officers Enjoli Harris, Armond Clavo, and Rodney Vicknair arrived at the scene. *See Quinn*, 123 So. 3d at 322–23. They observed Matthew and Ryan lying in the street suffering from gunshot wounds. *Id.* Officer Vicknair attempted to speak with Ryan while Officer Clavo spoke to Matthew. *Id.* Officer Vicknair later described Ryan as "pale in color, scared, having a little trouble breathing and concerned about his friend." *Id.* at 322. Ryan was unable to answer the officers' questions. *Id.* Matthew was able to explain that he was robbed and shot by a black male. *Id.* at 323. Officer Clavo later said that at some point Matthew "shut down" and was no longer able to speak. *Id.*

EMS arrived and transported Matthew and Ryan to the hospital. *Id.* at 322. Both of them died from their injuries. Autopsies later revealed that Matthew and Ryan each suffered two gunshot wounds. *Id.* at 324. Ryan was shot twice in the back. And Matthew was shot in the arm and in his chest. *Id.*

As officials were tending to Ryan and Matthew and searching the area for clues about the gunman's identity, Wakil and Ali exited the mosque. *Id.* at 325. Wakil told an officer who was searching the ground that he would not find any bullet shell casings because the gunman used a revolver. *Id.* The officer asked for his phone number so that he could take Wakil's statement. *Id.* The next day, Wakil met with a detective, who showed him a photo lineup. *See id.* Wakil identified Quinn as the gunman. *Id.* Videos put Quinn in the area at the same time that Matthew and Ryan were there. *Id.* at 322. Officials arrested Quinn soon after the shootings. Pet. App. E, A-27.

II. Procedural History

The State initially charged Quinn with capital murder, but it eventually lowered the charges to two counts of second-degree murder. Pet. App. D, A-12. The jury hung in Quinn's first trial. Pet. App. D, A-16. After the second trial, the jury debated for less than 15 minutes before returning a guilty verdict. *See* Pet. App. E, A-27; *State's Original Br. to La. Supreme Ct.*, 2017 WL 8217162 at *6 (Dec. 11, 2017). Quinn claims that the jury returned a 10–2 verdict. But, as the state district court—and even Quinn himself—acknowledged, the record does not reflect that the jury was

polled.[1] Pet. App. E, A-27; *Quinn's Br.*, 2018 WL 1240414 at *27 n.11 ("[T]he polling of the jury may not be in the record . . . .").

Quinn's conviction was affirmed on direct appeal. *Quinn*, 123 So. 3d at 322. Although Quinn raised the non-unanimous jury issue on appeal, the state appellate court ruled that "[t]here is no record of Mr. Quinn having filed a pre-trial constitutional challenge to [the non-unanimous jury rule]." *Id.* at 333–34. Because he failed to preserve the issue, the court held that he was "prohibited from raising the issue on appeal." *Id.* at 334. The Louisiana Supreme Court denied Quinn's application for a writ on direct review.

Quinn sought post-conviction relief in a state criminal district court. *See* Pet. App. E, A-27. The district court concluded that Quinn's counsel's performance was deficient for several reasons not relevant to the question presented in this petition.[2] And so the district court ordered a new trial.[3] A three judge panel of the state intermediary appellate court affirmed, but one of the judges concurred and noted "that the issue [was] exceedingly close." Pet. App. D, A-16.

The Louisiana Supreme Court granted the State's petition for review. That court agreed with the lower courts that Quinn's counsel had rendered deficient

[1] Quinn's attorneys filed affidavits claiming that the jury verdict was non-unanimous. *See Quinn's Br.*, 2018 WL 1240414 at *27 n.11. The State's attorney also filed an affidavit explaining that he did not remember whether the verdict was unanimous. *Id.* The state court's record does not reflect that the jury was polled. *Id.*

[2] As Quinn's petition explains, he disputes the credibility of Wakil's testimony, the accuracy of the photo lineup, and even whether the video surveillance depicts him at all. Quinn blames his attorneys for failing to raise these issues in his second trial. These disputes are not at issue here because the only question presented is whether a non-unanimous verdict is relevant to the prejudice prong of the *Strickland* test.

[3] The district court's opinion noted that "[t]here is some debate as to whether the verdict was non-unanimous." Pet. App. A–27 n.2.

performance under *Strickland*. Pet. App. A, A-5. But the Louisiana Supreme Court concluded that Quinn had failed to show that counsel's deficient performance prejudiced Quinn. *See id.*

Importantly, when defending the lower courts' conclusion that his counsel's deficient performance violated *Strickland*, Quinn did not argue before the Louisiana Supreme Court in his original brief that the allegedly non-unanimous verdict was relevant to *Strickland*'s prejudice prong. *See generally Quinn's Br.*, 2018 WL 1240414. Instead, he argued that his attorneys' performance was deficient because they failed to properly preserve the non-unanimous jury verdict issue for appeal. *Id.* at *27.

Quinn sought rehearing before the Louisiana Supreme Court. The court granted limited rehearing to clarify that it was remanding the case to the State appellate court for consideration of some of Quinn's claims that were rendered moot when the intermediate court of appeals granted his petition for post-conviction relief. Pet. App. B, A-8. Eventually, the case made its way back up to the Louisiana Supreme Court, which again denied relief. Pet. App. C, A-10. Quinn now appeals to this Court, raising only the issue of whether a non-unanimous jury verdict is relevant to the prejudice prong of the *Strickland* analysis.

REASONS FOR DENYING THE PETITION

I. This case is a poor vehicle to decide the question presented because the issue was not raised below and the record is unclear about whether the verdict was unanimous.

A. It is not clear that the jury rendered a non-unanimous verdict.

Whether the jury returned a non-unanimous verdict in the second trial has been the subject of dispute throughout these proceedings. As Quinn noted in his briefing before the Louisiana Supreme Court, the record does not reflect whether the jury was polled. *Quinn's Br.*, 2018 WL 1240414 at *27 n.11. Even the State district court that granted Quinn's petition for post-conviction relief acknowledged that there was "some debate" on this point. Pet. App. A–27 n.2. To fill the record's silence, Quinn offered his attorneys' affidavits stating that the verdict was non-unanimous. *Quinn's Br.*, 2018 WL 1240414 at *27 n.11. But the attorney who tried the case for the State—David Pipes—filed an affidavit stating that he could not remember whether the verdict was unanimous. *See id.* This Court should not decide whether a non-unanimous verdict is relevant to *Strickland* prejudice when it is not even clear that the jury returned a non-unanimous verdict.

B. Quinn did not argue below that a non-unanimous jury verdict is relevant to the prejudice prong of the Strickland inquiry.

Quinn did not raise his argument—that a non-unanimous verdict is relevant to the *Strickland* prejudice inquiry—in his original brief to the Louisiana Supreme

Court.[4] *See generally Quinn's Br.*, 2018 WL 1240414. And, when denying his claim for post-conviction relief, the Louisiana Supreme Court did not address or make any ruling about whether a non-unanimous verdict is relevant to the *Strickland* prejudice inquiry. *See* Pet. App. A, A-5.

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*, 543 U.S. at 443 (internal quotation marks omitted) (citing *Adams v. Robertson*, 520 U.S. 83, 86 (1997); *Illinois v. Gates*, 462 U.S. 213, 218 (1983); *Crowell v. Randell*, 35 U.S. 368 (1836); *Owings v. Norwood's Lessee*, 9 U.S. 344 (1809)). That has not happened here.

Indeed, it appears that no court has ever addressed the issue on the merits. Quinn cites no authority adopting his position that a non-unanimous verdict is relevant to the *Strickland* prejudice inquiry. *See* Pet. at 10–13. Instead, he appeals to "common sense." Pet. at 11. But this Court "is one of final review, 'not of first view.'" *F.C.C. v. Fox Television Stations*, Inc. 556 U.S. at 529 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). And so this Court should reject Quinn's invitation to address a novel issue raised at this late stage of the litigation.

[4] Quinn may have raised the issue to the Louisiana Supreme Court when he sought rehearing. But if so, at that point the argument was waived. *Consol. Tpk. Co. v. Norfolk & O.V.R. Co.*, 228 U.S. 326, 334 (1913). In any event, the Louisiana Supreme Court never addressed the issue, and neither should this Court. *See id.*

II. A non-unanimous jury verdict is irrelevant to the *Strickland* prejudice inquiry.

As noted above, no court has ever held that a non-unanimous jury verdict is relevant to the prejudice prong of the *Strickland* test. Quinn supports his position with "common sense" and stray comments from this Court and an Oregon appellate court suggesting that a non-unanimous verdict may mean that the State's proof was less than certain. *See* Pet. 11–12 (citing *Johnson v. Louisiana*, 406 U.S. 356, 362 (1972); *Holbrook v. Amsberry*, 289 Ore. App. 226, 234 (2017)).

Quinn's position misunderstands the nature of the prejudice inquiry. In *Strickland*, this Court "identified the two components to any ineffective-assistance claim: (1) deficient performance and (2) prejudice." *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993). "[A] criminal defendant alleging prejudice must show 'that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Id.* (quoting *Strickland*, 466 U.S. at 687). And the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (quoting *Strickland*, 466 U.S. at 694).

Non-unanimity does not show that, but for counsel's errors, the jurors "would have had a reasonable doubt respecting guilt." *See Strickland*, 466 U.S. at 695. A non-unanimous jury verdict is irrelevant to the prejudice inquiry because the jury count is outside of the control of the defendant's attorney. As this Court has explained, "[t]hat rational men disagree is not in itself equivalent to a failure of proof by the State." *Johnson*, 406 U.S. at 362. The world's greatest attorney could provide effective

assistance and lose 10–2. Or, in the exact same case, an advocate could offer no support whatsoever and lose 10–2.

Reading anything into a jury vote is a speculative enterprise. In a similar context, this court has refused "[t]o ascribe meaning to a hung count [because that] would presume an ability to identify which factor was at play in the jury room. But that is not reasoned analysis; it is guesswork." *Yeager v. United States*, 557 U.S. 110, 121–22 (2009). "A contrary conclusion would require speculation into what transpired in the jury room. Courts properly avoid such explorations into the jury's sovereign space." *Id.* at 122. This is "for good reason. The jury's deliberations are secret and not subject to outside examination." *Id.* The Court has reasoned that "[a] host of reasons" could account for a jury's failure to decide—"sharp disagreement, confusion about the issues, exhaustion after a long trial, to name but a few." *Bravo-Fernandez v. United States,* 137 S. Ct. 352, 357 (2016) (quoting *Yeager*, 557 U.S. at 121, 129).

Attempting to divine why a jury count may be less than unanimous would similarly require "guesswork." There are all sorts of irrelevant reasons that could explain why a verdict is not unanimous: confusion about the issues, exhaustion after a long trial, fear of retaliation, desire to convict of a more serious offense, etc. This Court should not invade the "jury's sovereign space" and speculate about why a jury verdict may be non-unanimous.

The facts of the present case offer an example of why the verdict vote count is irrelevant to the prejudice inquiry. The jury returned a verdict within fifteen minutes. Even assuming that the jury verdict was not unanimous, the alleged 10–2 verdict

suggests nothing more than that two members of the jury wanted to deliberate longer before returning a verdict.

Before this Court could conclude that the verdict count was relevant to the *Strickland* prejudice inquiry, it would need to assume that the jurors had a reasonable doubt about the evidence (as opposed to a misunderstanding about the issues or a simple desire to continue deliberating). And then the Court would need to further assume that those doubts stemmed from the unprofessional aspects of defense counsel's performance—as opposed to innocuous, garden variety reasons that a juror might want to acquit (*e.g.*, a juror might not believe a government's key witness). No Court has ever engaged in such a speculative enterprise. There is simply no way to know what is going on in jurors' minds. Nothing in the record here even unambiguously establishes the verdict count, let alone the reasons why the jurors chose to convict.

In sum, even if this court believes that a non-unanimous verdict is, by its nature, less reliable than a unanimous verdict, that says nothing about the quality of defense counsel's assistance. Nor does a non-unanimous verdict show that, had defense counsel done something differently, the jury "would have had a reasonable doubt respecting guilt." *See Strickland*, 466 U.S. at 695. Non-unanimity is simply irrelevant to the question of *Strickland* prejudice.

III. The Court should not hold this case for its decision in *Ramos* because Quinn failed to preserve the issue of whether a non-unanimous verdict violates the Constitution.

As explained above, it is not clear that the jury in Quinn's second trial rendered a non-unanimous verdict. But even assuming the verdict was not unanimous, on direct appeal the state appellate court found that Quinn had not preserved the issue for appeal because he failed to raise it in the district court.[5] *Quinn*, 123 So. 3d at 333–34. Quinn expressly conceded that he failed to preserve the issue: That was one of his reasons supporting his view that he received ineffective assistance of counsel. *Quinn's Br.*, 2018 WL 1240414 at *27; *see* Pet. at 13 ("In Mr. Quinn's case, trial counsel failed to preserve an objection to Louisiana's nonunanimous jury scheme prior to trial.").

This Court has held that failure to comply with a state procedural rule may constitute an independent and adequate state ground barring its review of a federal question. *Hathorn*, 457 U.S. at 262–63 (citing *Michigan v. Tyler*, 436 U.S. 499, 512, n.7 (1978); *New York Times Co. v. Sullivan*, 376 U.S. 254, 264 n.4 (1964)). When a state court refuses to rule on the merits of a claim in light of a neutral state rule, the Court acts with "utmost caution" before deciding that the state court is obligated to entertain the claim. *Howlett By & Through Howlett v. Rose*, 496 U.S. 356, 372 (1990). "[F]ederal law takes the state courts as it finds them." *Id.* (quotation omitted). This

[5] Properly preserving his constitutional challenge to the non-unanimous jury rule in the district court was essential because, among other reasons, when the constitutionality of a Louisiana law is challenged in state court, the state Attorney General has a statutorily prescribed interest in defending the state statute. *See* LA. REV. STAT. § 49:257(C) (providing that "[n]otwithstanding any other law to the contrary, the attorney general, at his discretion, shall represent or supervise the representation of the interests of the state in any action or proceeding in which the constitutionality of a state statute or of a resolution of the legislature is challenged or assailed.").

rule is "bottomed deeply in belief in the importance of state control ofsState judicial procedure." *Id.* This Court has acknowledged that states have great latitude to establish the structure and jurisdiction of their own courts. *Id.*; *see also Walker v. Martin*, 562 U.S. 307, 316 (2011); *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 398 (1990).

Quinn cannot now transform his ineffective assistance of counsel claim into a claim that his alleged non-unanimous verdict violated the constitution. *Adams*, 520 U.S. at 86. And, as the state appellate court found on direct review, he waived that claim by failing to raise it in the district court. For these reasons, the Court's decision in *Ramos* cannot aid Quinn—whatever the result. Thus, the Court should not hold this case for its decision in *Ramos*.

CONCLUSION

The State of Louisiana respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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