No. 18-9744

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Treatises

REASONS FOR GRANTING THE PETITION

I. The State has previously conceded and the state post-conviction court found that that the verdict in Mr. Quinn's case was a non-unanimous verdict

Respondent fails to frankly inform the court that the State of Louisiana conceded that the verdict was non-unanimous on direct appeal and that the state post-conviction court expressly found that the verdict was non-unanimous.

On direct appeal, Mr. Quinn raised as a claim the unconstitutionality of the non-unanimous verdict in this case. While the State argued that the claim was defaulted by a failure to bring a pre-trial challenge, the State did not dispute that the verdict was unanimous, instead arguing "[a]ssuming, *arguendo*, that the claim had been timely raised, the appellant's conviction by a non-unanimous jury verdict did not violate the Sixth Amendment to the United States Constitution."[1]

On direct appeal, the Louisiana Fourth Circuit Court of Appeal described the non-unanimous verdict as an historical fact:

> This appeal arises from the defendant's conviction of two counts of second degree murder, by non-unanimous verdicts . . .[2]

In the post-conviction proceedings conducted below, both defense trial counsel swore affidavits attesting that the trial verdict was a 10-2, non-unanimous verdict.[3]

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[1] State's Original Brief in Opposition on direct appeal, February 20, 2013, *State v. Quinn*, 2012-689 at 26-27.

[2] *State v. Quinn*, 2012-0689 (La. App. 4 Cir. 08/21/13); 123 So. 3d 320, 322. See also *Id.* at 336 ("Additionally, the non-unanimous verdicts are not unconstitutional.")

[3] App. E, A-27.

Prosecuting counsel swore an affidavit to the effect that he could not recall whether the verdict was non-unanimous or not. *Id.*

The state district court made an affirmative finding of historical fact that the verdict was a non-unanimous verdict:

> At the second trial, a less than unanimous jury returned a verdict of guilty as charged.[4]

Mr. Quinn's conviction was returned by a non-unanimous verdict and that is the finding of the state courts both on direct appeal and in post-conviction proceedings.

II. Mr. Quinn presented the non-unanimous jury verdict as relevant to the assessment of Strickland's[5] prejudice prong in state court

Mr. Quinn raised his federal constitutional ineffective assistance claim successfully in the state district court and intermediate court of appeal, emphasizing in both courts the weakness of the State's case and the fact that his initial trial resulted in a hung jury and the second trial in a non-unanimous verdict. When the Louisiana Supreme Court reversed these decisions, holding for the first time that the showing of prejudice was insufficient and failing to consider the non-unanimous jury verdict, Mr. Quinn immediately brought the matter to the court's attention in the proper way, by application for rehearing.

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[4] App. E, A-27.

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

In his original post-conviction petition, Mr. Quinn began his introduction by pointing to the weak case, the non-unanimous verdict and the fact that counsel's deficient performance produced the conviction:

> On June 14, 2011, Landon Quinn was convicted by a 10-2, non-unanimous jury of the 2009 murders of Matthew Miller and Ryan McKinley based on the testimony of a single alleged eyewitness, Zaid Wakil. This conviction followed only after the first trial against Mr. Quinn resulted in a hung jury. Mr. Quinn's right to a fair trial, however, rested in the hands of ineffective trial counsel who were in possession of prior inconsistent statements made by Mr. Wakil in connection with the identification of Mr. Quinn, but failed to use them for impeachment.
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> * * * *
>
> The foregoing failures by trial counsel and the Court resulted in the 10-2 conviction of Mr. Quinn. There is no doubt that had the prior inconsistent statements, convictions, and alibi evidence been presented at trial, a third juror would have voted against conviction, resulting in another hung jury. Indeed, trial counsel's failures and the Court's evidentiary ruling deprived Mr. Quinn of his constitutional rights to effective assistance of counsel and confrontation of witnesses guaranteed by the Louisiana and United States Constitutions[6]

The state district court granted relief after explicitly finding that the first jury hung and the second jury returned a non-unanimous verdict.[7] In seeking review, the State did not assign as error or suggest that the district court erred in referencing the non-unanimous verdict when ruling on the *Strickland* claim.

In reviewing the district court's decision for abuse of discretion, the intermediate appellate court unanimously found that there was no abuse of discretion.[8]

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[6] Petitioner's Post-Conviction Application at p.1.

[7] App E, A-27.

[8] App. D, A-12.

In the Louisiana Supreme Court, Mr. Quinn's brief in opposition again emphasized that the verdict was non-unanimous and specifically argued that the weakness of the State's case was a factor for consideration under *Strickland's* prejudice prong.[9] The State did not argue that the court should not consider the non-unanimous verdict in its prejudice analysis.

When the Louisiana Supreme Court issued its majority opinion reversing the grant of relief, finding conceivable but not substantial prejudice, this was the first time the ineffectiveness claim had been denied and the first time Mr. Quinn had cause to complain of a court's analysis.

Mr. Quinn then properly raised the Louisiana Supreme Court's failure to have regard to the non-unanimous verdict when assessing prejudice in an application for rehearing.[10]

The Louisiana Supreme Court did not refuse to consider the motion for rehearing but instead considered it on the merits and, over the dissent of Chief Justice Johnson, denied rehearing on the ineffective assistance claim but granted rehearing on another point, remanding to allow unexhausted claims to be heard.[11]

Mr. Quinn, who twice won relief and appeared in the Louisiana Supreme Court as a Respondent can hardly be faulted for not having pled the error in the Louisiana Supreme Court analysis until after that court announced its decision.

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[9] Original Brief of Landon Quinn at pp.16; 2, 8, 27.

[10] See Original Petition for Certiorari at p.10, n.23.

[11] App. B, A-8.

Respondent relies upon an inapposite line of authority from this Court dealing with a situation in which an entirely new federal claim is made for the first time in rehearing in state court.[12] That is not this case at all and, in any event, even that line of authority permits review where the decision of the state's highest court presents a new basis for the claim of a denial of a federal right.[13]

Mr. Quinn properly presented his federal constitutional claim and the error complained of did not appear until the *per curiam* opinion of the Louisiana Supreme Court. Mr. Quinn then timely brought the error to the attention of the Louisiana Supreme Court, which denied relief over the dissent of Chief Justice Johnson.

In these circumstances, the question presented is properly before this Court.

III. The State of Louisiana affirmatively argues that a non-unanimous verdict is irrelevant to the *Strickland* prejudice inquiry, confirming a serious federal question to be answered

The State of Louisiana squarely joins issue on the application of *Strickland* to non-unanimous verdicts, arguing that a non-unanimous verdict is irrelevant to the prejudice inquiry.[14]

This Court has held that the relative strength of the State's case is relevant to the assessment of prejudice under *Strickland* but Louisiana would now like to exclude the jury's own verdict on the strength of the case from the equation.

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[12] Respondent's Brief in Opposition at 9.

[13] See, for example, *Great N. R. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 367 (1932).

[14] Respondent's Brief in Opposition at 10.

Louisiana did not have to adopt a non-unanimous jury verdict system and all evidence is that it did so in order to better allow conviction of black defendants in the face of newly enfranchised black jurors who experienced a reasonable doubt about guilt.[15]

Having introduced a system in which a less than unanimous verdict of conviction may be returned, and having done so to avoid mistrial where some jurors were not convinced of guilt, the State of Louisiana can hardly complain when a non-unanimous verdict demonstrates that the State's case failed to command a unanimous verdict of guilt beyond a reasonable doubt.[16]

In most jurisdictions, the weakness of the state's case is relevant to the prejudice analysis even though the verdict is unanimous. The fact that the conviction in Mr. Quinn's case was returned on a jury vote that would be insufficient to sustain such a conviction in any other state is relevant to determining whether confidence in the verdict is undermined as required by *Strickland*. [17]

This Court should clearly hold, consistent with its existing jurisprudence, that a non-unanimous verdict is more likely to have been affected by counsel's errors than where the verdict was unanimous.

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[15] Frampton, Thomas, *The Jim Crow Jury*, 71 Vand. L. Rev. 1594; Thomas Aiello *Jim Crow's Last Stand* (2015). *See also State v. Maxie*, No. 13-CR-72522 (La. 11th Jud. Dist. Oct. 11, 2018) (finding Louisiana's majority verdict scheme was introduced with discriminatory intent) reproduced at JA 25 in *Ramos v. Louisiana*, 18-5924.

[16] The State's attempt to import this Court's analysis of hung juries in the context of issue preclusion is not to the point at all, as the nature of the issue preclusion inquiry and its burden of persuasion are entirely different. See Brief in Opposition at 11.

[17] Oregon is the only other state permitting non-unanimous verdicts and even there would not permit such a verdict in a murder trial resulting in a mandatory sentence of life without parole.

Finally, the fact that there is not a developed jurisprudence aired across the several courts of last resort of the states is a function of Louisiana being one of only two states to permit non-unanimous verdicts and what jurisprudence there is out of Oregon is against the State of Louisiana on this point. The limited number of conflicting state court decisions is not a proper basis for denying certiorari in this case.

IV. This case should be held for this Court's pending decision in *Ramos v Louisiana*

This Court is currently considering the constitutionality of Louisiana's non-unanimous verdict scheme in *Ramos v. Louisiana*, 18-5924 argued on October 7, 2019. In his petition, Mr. Quinn requested that this case be held for the resolution of *Ramos*.[18]

At oral argument in *Ramos*, the State of Louisiana unequivocally committed itself to a position that the Sixth Amendment jury trial right does not guarantee a unanimous jury verdict at all, a position at odds with this Court's jurisprudence. The State of Louisiana also abandoned the split-plurality opinion anchored by Justice Powell in *Apodaca v. Oregon*, 406 U.S. 404 (1972).

By doing so, the State of Louisiana has only increased the likelihood that this Court in *Ramos* will address and reaffirm its own precedents, holding that "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

[18] Original Petition for Certiorari at 13-14.

not be adequately secured except through the unanimous verdict of twelve jurors." *Thompson v. Utah*, 170 U.S. 343, 353 (1898).

Furthermore, in *Ramos*, the State of Louisiana has now adopted the opposite position to that taken in Mr. Quinn's case on direct appeal, where the State of Louisiana relied upon Justice Powell's controlling vote to argue that non-unanimous verdicts were constitutional.[19]

Should relief be granted in *Ramos*, the Louisiana Supreme Court should be granted the first opportunity to reconsider its opinion in the present case in light of this Court's opinion in *Ramos*.

Further, any substantive ruling by this Court that non-unanimous verdicts are unconstitutional would require the Louisiana Supreme Court to consider, in the first instance, the effect of such a decision on a petitioner like Mr. Quinn. The Louisiana Supreme Court is the appropriate location for addressing that question and has been willing to reach the merits in cases similar to Mr. Quinn's despite procedural imperfections. See *State v. Wrestle, Inc.*, 360 So. 2d 831, 837 (La. 1978) (noting for the first time on appeal that the six person verdict was non-unanimous, and addressing the constitutionality of said verdict); *State v. Magee*, 2018-0310 (La. 12/17/18); 2018 La. LEXIS 3486 (*sua sponte* remanding for hearing on whether *McCoy v. Louisiana*, 138 S. Ct. (2018) applies retroactively on state collateral review where the post-conviction petition, filed before *McCoy*, alleged that guilt had been conceded

[19] State's Original Brief in Opposition on direct appeal, February 20, 2013, *State v. Quinn*, 2012-689 at 27.

without consent). Of course, Respondent could raise any procedural objections in state court, where they could be assessed alongside consideration of the significance of Respondent's own change of position on the constitutional basis for defending non-unanimous verdicts.

CONCLUSION

Petitioner respectfully pleads that this Court hold this petition pending the decision in *Ramos* and then either issue a GVR order 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: October 30, 2019