

No. 18-9787

IN THE
Supreme Court of the United States

JACE CREHAN

PETITIONER,

V.

STATE OF LOUISIANA,

RESPONDENT.

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

REPLY TO THE STATE'S BRIEF IN OPPOSITION

G. Ben Cohen*
Shanita Farris
Erica Navalance
The Promise of Justice Initiative
1024 Elysian Fields Avenue
New Orleans, LA 70117
(504) 529-5955
bcohen@defendla.org

* Counsel of Record

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	ii
REPLY BRIEF	1
I. The Brief in Opposition’s Claim that the Issue is Procedurally Barred Is Wrong As a Matter of Fact and Law.	1
A. <i>The Issue was Properly Raised and Addressed on the Merits in the Lower Courts.....</i>	<i>1</i>
B. <i>Procedural Bars Are Best Addressed In the First Instance In the State Courts.....</i>	<i>4</i>
II. The BIO is Incorrect in its Claim that the Question Presented is Too Vague	5
III. The Case Should be Held for <i>Ramos v. Louisiana</i>	6
CONCLUSION	7
CERTIFICATE OF SERVICE	Error! Bookmark not defined.

TABLE OF AUTHORITIES

Federal Cases

<i>Apodaca v. Oregon</i> , 406 U.S. 404 (1972)	5
<i>Ramos v. Louisiana</i> , 139 S. Ct. 1318 (2019)	3, 4, 7

State Cases

<i>State v. Arceneaux</i> , 19-60 (La. App. 3 Cir 10/09/19)	4
<i>State v. Ardison</i> , 52739 (La. App. 2 Cir 06/26/19), 277 So. 3d 883	4
<i>State v. Aucoin</i> , 488 So.2d 1336 (La. App. 3rd Cir. 1986)	4
<i>State v. Aucoin</i> , 500 So. 2d 921 (La. Ct. App. 1987)	4
<i>State v. Bertrand</i> , 2008-2215 (La. 03/17/09); 6 So. 3d 738	2
<i>State v. Crehan</i> , 2018-0746 (La. App. 1 Cir. 11/5/2018)	3

REPLY BRIEF

Pursuant to Rule 15.6, Petitioner Jace Crehan files this *Reply Brief* to the State's *Brief in Opposition* ("BIO").

The BIO spends pages arguing that Petitioner is procedurally barred from raising his claim that the Fifth, Sixth and Fourteenth Amendments require unanimity to convict in a criminal jury trial. BIO at 9-11.

The BIO strains credulity when Respondent argues that the Petitioner failed to present an actual question or legal arguments, requiring heroic "guesswork for the State and this Court." BIO at 5. It then argues that the Louisiana appellate courts were correct in relying on *Apodaca* to uphold Petitioner's verdict since "A Unanimous Jury Verdict is Not Fundamental to Ordered Liberty" and that "the Sixth Amendment Does Not Require Unanimity." BIO at 14-17.

It also argues that there is no need for this court to constitutionalize the issue of non-unanimous juries when Louisiana law now require unanimity in criminal jury trials. BIO at 17-18.

In each of these arguments, the BIO is wrong.

I. The Brief in Opposition's Claim that the Issue is Procedurally Barred Is Wrong As a Matter of Fact and Law.

Both as a matter of fact and law, petitioner's claim is not procedurally foreclosed.

A. The Issue was Properly Raised and Addressed on the Merits in the Lower Courts

Petitioner properly raised his challenge to the non-unanimous verdict, and objected to the jury's non-unanimous verdict in the trial court. Therefore, this Court

should hold this case pending the decision in *Ramos*. Without any citation to the record below, BIO alleges Petitioner did not raise his constitutional claim until post-verdict. BIO at 9-10. The BIO argues that the alleged lack of contemporaneous objection deprived the trial court of the “ability to correct the error until after the jury was dismissed, when it was too late” and prevented the State “during trial to present evidence, brief, or make argument on the constitutionality of its jury verdict laws – until it was too late.” BIO at 11. This argument borders on perversity; had Mr. Crehan objected prior to the jury’s verdict the State would have unquestionably argued that his objection was pre-mature.¹

Regardless, the Louisiana Supreme Court has signaled that the appropriate time and place to raise an objection was after a non-unanimous conviction. *See State v. Bertrand*, 2008-2215 (La. 03/17/09); 6 So. 3d 738, 743 (Weimer, J., concurring “in the majority’s decision to reverse the district court's ruling finding LSA-C.Cr.P. art. 782(A) unconstitutional,” but because the defendant did not have standing to raise the constitutionality of a non-unanimous jury verdict prior to being convicted with a non-unanimous verdict).

Moreover, and dispositively, the Court of Appeal reached the issue on the merits. Indeed, the Louisiana Court of Appeal, First Circuit noted that the state’s brief addressed the issue on the merits by “urg[ing] that defendant makes no claim warranting reexamination of Louisiana’s jurisprudence upholding the validity of non-

¹ Counsel need not speculate concerning what Respondent would have argued had counsel raised the issue prior to trial. Where defendants have raised the issue prior to trial, the State has argued that the issue is premature prior to a non-unanimous jury vote.

unanimous jury verdicts.” Pet. App. at 9a. The state appellate court proceeded to address the merits of the issue. *Id.*

Respondent’s BIO ignores all of this, and as well foregoes discussion of Judge Guidry’s concurrence in the court of appeal, which specifically alerted the State to the ongoing problem (had Respondent been unaware):

Regarding the constitutionality of the non-unanimous jury verdict in Louisiana, I concur in the result of this case, because for now the law on the issue is well-settled. However, though *State v. Bertrand*, 08-2215 (La. 3/17/09), 6 So.3d 738, continues to be the law in Louisiana, its validity has recently been put into question. As an initial matter, the Louisiana Legislature has placed before the voters of Louisiana an opportunity to amend the State constitution to require unanimous jury verdicts in all felony cases, indicating their discomfort with the *status quo*. See 2018 La. Acts 722. Moreover, in *State v. Maxie*, 72,522 (La. 11th JDC 10/11/18), the Sabine Parish district court granted a motion for new trial on the basis that the defendant's right to equal protection under the United States Constitution had been infringed. U.S. Const. Amend. 14. Evidence demonstrating the discriminatory intent of La. Const. art. I § 17(a) and La. C.Cr.P. art. 782, first promulgated in Reconstruction Louisiana in 1898, was submitted to that court. Finding that split-verdict results disproportionately affected African-American defendants, the court ordered that defendant would receive a new trial, and generally that all non-unanimous verdicts are per-se unconstitutional.

Pet. App. at 10a-11a; *State v. Crehan*, 2018-0746 (La. App. 1 Cir. 11/5/2018) (Guidry J., concurring). The issue was directly raised in the appropriate venue, and decided on the merits. Respondent’s claim to the contrary, though lengthy, are at best inaccurate and at worst disingenuous.

Moreover, as Respondent did not argue to the lower State courts that Petitioner’s objection was too late, or that he was procedurally barred from raising the constitutionality of a non-unanimous verdict, Respondent has no standing to do so

now. Had the State had a valid procedural bar to raise—which it did not—the State waived that bar when it did not raise it in the court of appeal below. The State appellate court denied the claim on the merits clearly recognizing that the claim was properly raised. The issue is properly before this Court after having been reviewed by the state court.

B. Procedural Bars Are Best Addressed In the First Instance In the State Courts.

Regardless, procedural bar questions are best, in the first instance, addressed in the state courts. Whether the obligation is imposed upon the State to establish the unanimity of the verdict, or the defendant to establish the lack of unanimity, or whether the non-unanimous verdict is error patent, are—for instance—questions initially of state law. *State v. Arceneaux*, 19-60 (La. App. 3 Cir 10/09/19) (“The defendant is correct in that if the Supreme Court finds a non-unanimous jury verdict to be unconstitutional for the types of verdicts returned in the present case and if the Supreme Court applies such a holding retroactively to include the jury verdicts returned in the present case, the verdicts returned in the present case would be improper and would be considered an error patent.”); *State v. Ardison*, 52739 (La. App. 2 Cir 06/26/19), 277 So. 3d 883, 897 (“Under Louisiana law, the requirement of a unanimous jury conviction specifically applies only to crimes committed after January 1, 2019. The instant crimes were committed in 2017, and thus, the amended unanimous jury requirement is inapplicable to Ardison's case. Ardison's assertion of an "error patent" is without merit.”); *State v. Aucoin*, 500 So. 2d 921, 925 (La. Ct. App. 1987) (“In our earlier opinion, *State v. Aucoin*, 488 So.2d 1336 (La. App. 3rd Cir.

1986), pursuant to court policy, the record was inspected and we found a patent error from the polling of the jury; the verdict represented a finding of guilty with only nine jurors concurring when ten is required. We reversed and remanded the case. The State filed an application for a rehearing alleging that the polling of the jury actually was a ten to two verdict but there was an error in transcribing the polling of the jury verdict and requested an opportunity to correct the transcript.”).

II. The BIO is Incorrect in its Claim that the Question Presented is Too Vague

The BIO argues that the Petitioner’s Question Presented was too vague and does not specifically identify which constitutional rights under the Fifth, Sixth and Fourteenth Amendments he is entitled relief under. BIO at 6. However, the question presented clearly raises the question regarding whether Petitioner is entitled to trial by a unanimous jury. The question is similar to the question presented in *Ramos v. Louisiana*—where the Court did not have a problem discerning what was at issue. The question presented accurately, concisely and clearly identified the constitutional claim.

Additionally, the Respondent further argues that the Petitioner did not present any legal arguments to support the question presented. However, Respondent then immediately acknowledges that the Petitioner adopted the reasons stated in *Ramos v. Louisiana* and similar petitions filed over the last 45 years. BIO at 6-7. Through adopting the reasons presented in *Ramos* and other petitions filed to this Court on the unanimity issue, Petitioner adequately incorporated those arguments as his own on the same issue. The BIO does not challenge Petitioner’s ability to do this.

But unrelenting, Respondent argues that Petitioner is barred by this Court's rule against "smuggling" in claims through vague questions presented. BIO at 8. That is not the case here. Petitioner argued as a reason for granting writ that:

The Sixth Amendment requires a unanimous verdict to convict a defendant of a nonpetty offense, and the Fourteenth Amendment applies that requirement to the states. Full incorporation is an established principle on which the Court itself has relied for several decades. This Court should overrule *Apodaca*'s idiosyncratic and incorrect holding and apply the Sixth Amendment's unanimity guarantee to the states.

Crehan v. Louisiana, Petition for Certiorari at 8. Again, Petitioner's reasons were concise, explicit and direct. Respondent, who is the same as the Respondent in *Ramos* and other similar petitioner filed out of the State of Louisiana on the same issue, made clear in the BIO that it understands that Petitioner's question is, "Whether this Court should overrule *Apodaca v. Oregon*, 406 U.S. 404 (1972), and hold that the Sixth Amendment right to an impartial jury, as incorporated through the Fourteenth Amendment, guarantees State criminal defendants the right to a unanimous jury verdict." BIO at ii. Because the question before this Court is clearly expressed in the Petitioner's brief and fully understood by the Respondent, Respondent's arguments—though lengthy—are not compelling.

III. The Case Should be Held for *Ramos v. Louisiana*

The BIO takes the position in this case that "*Apodaca* was decided correctly" and that "*stare decisis*" requires upholding the decision. BIO at 13. Of course, as this Court is aware, in *Ramos v. Louisiana*, the State's Brief concedes that it is "not defending State law on the ground that the Sixth Amendment should not apply to it." *Ramos v. Louisiana*, 18-5924 (Brief of Respondent) Filed 8/16/2019, at 49. *See also*

Ramos, Oral Argument 10/7/19 at 37-40. As such, the State’s argument—“Here, the ‘settled law;’ is the prevailing rule that States may allow criminal convictions based on jury verdicts that are no unanimous”, BIO at 13,—has already been disavowed by Respondent.

The jury trial right is an essential bulwark of liberty, a check against over-zealous prosecutors and on the tyranny of government. Respondent provides no countervailing assurances against such zeal by their argument in this case.

CONCLUSION

The Petitioner has properly raised the same claim raised in *Ramos* and this Court should therefore hold Petitioner’s petition pending this Court’s decision in *Evangelisto Ramos v. Louisiana*, 139 S. Ct. 1318 (2019), and then be disposed of as appropriate in light of that decision.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "G. Ben Cohen", with a stylized flourish at the end.

G. Ben Cohen*
Shanita Farris
Erica Navalance
The Promise of Justice Initiative
1024 Elysian Fields Avenue
New Orleans, LA 70117
(504) 529-5955
bcohen@defendla.org

*Counsel of Record