No. 18-9821

In the Supreme Court of the United States

ROBERT LEE HEARD,
Petitioner

vs.

THE STATE OF LOUISIANA,
Respondent

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the right to a jury trial guaranteed by the Sixth Amendment, as applied to the States through the Fourteenth Amendment, allow a state-court criminal conviction to stand on a nonunanimous jury verdict?

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The text of Louisiana Code of Criminal Procedure article 782 that existed at the time of Mr. Heard's trial provided, in pertinent part:

> Cases in which punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. Cases 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. Cases in which punishment may be confinement at hard labor shall be tried to a jury composed of six jurors, all of whom must concur to render a verdict.

It was amended in 2018 and 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) that existed at the time of the trial provides, in pertinent part:

> A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case 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 in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons, all of whom must concur to render a verdict.

That article was also amended 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.

U. S. Const. amend. 6 provides in pertinent part: "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…."

U.S. Const. amend. 14 provides in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law…."

STATEMENT OF THE CASE[1]

Facts of the Crime. Petitioner stabbed his wife, Demetra (Mimi) Doyle, to death on September 14, 2012 – a fact he does not dispute. Her best friend found her face down in her own home with a knife sticking into her back. She died from *forty* sharp force injuries, including one through her jugular, larynx, and thyroid, and others to her lungs, heart, liver, stomach, and small intestines. She had defensive wounds on her arms. After killing his wife, Petitioner called his wife's best friend, spoke to her ex-husband, and told him that he had killed his wife. He then requested that the ex-husband tell his wife's best friend he was sorry and asked them to go to the couple's home. Petitioner then fled to another part of the State, where he was apprehended a day and a half later and found to have scratches on his left arm and a cut on his right hand. Petitioner now claims that the evidence was only sufficient

[1] Taken from Pet'r. Appx. A1-4, A5-10.

enough to prove manslaughter – a lesser included offense where a crime is committed in the "heat of passion."

Procedural background. Petitioner was charged with second degree murder[2] in violation of La. R.S. 14:30.1, punishable at hard labor, and pled not guilty. He was tried by a jury of twelve in 2017. He filed no pretrial motions questioning the constitutionality of Louisiana's jury verdict laws. He did not request a jury instruction requiring a unanimous verdict. He was found guilty by a vote of eleven to one. Rec. 30, 108, 350. He did not object to the jury verdict. Although he filed post-trial motions, he did not raise the issue of the non-unanimous jury verdict. He was sentenced to life in prison without probation or parole.

He appealed his conviction to the Louisiana Third Circuit Court of Appeals. He raised the non-unanimous verdict as part of an assignment of error on the *insufficiency of evidence*: "The Conviction Of Second Degree Murder Should Not Stand As It Results From A Non-Unanimous Jury Verdict, Which Supports The Sufficiency Argument Herein That The State Failed To Prove Its Case Beyond A Reasonable Doubt." *See* Petitioner's Original Brief filed with the Third Circuit in *State v. Heard*, 2018-236 (La. App. 3 Cir. 4/17/18), 2018 WL 2432481. He never argued that the verdict violated his Sixth Amendment rights, as he now claims in his Petition to this Court. In fact, neither the Sixth Amendment nor the Fourteenth Amendment were even *mentioned* in his brief. That explains why in an unpublished decision, the Third

[2] Petitioner was initially charged by a grand jury with first degree murder. Petitioner filed a motion to quash challenging the constitutionality of the first degree murder statute. The trial court grant the motion, but the Third Circuit Court of Appeals reversed and remanded to the trial court. Nevertheless, the State amended the charge to second degree murder and proceeded to trial.

Circuit held only that "Defendant's argument fails in light of La. Code Crim. P. art. 782(A) … [which] was ruled constitutional in both *State v. Bertrand*, 08-2215, 08-2311 (La. 3/17/09), 6 So.3d 738, and *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628 (1972)." Pet'r. Appx. A13. The Louisiana Supreme Court denied an application for discretionary review without opinion. Pet'r. Appx. A14.

REASONS FOR DENYING THE WRIT

Even if this Court determines that the Sixth and Fourteenth Amendments require unanimity to convict in criminal jury trials in the States, *this* petition should be denied because the sole issue raised in the petition was never raised at trial or on appeal and is procedurally barred. Petitioner should not be allowed to resurrect a waived claim at this late juncture. Because an adequate and independent state-law basis exists 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).

Additionally, Petitioner presents *no* legal argument to support this newly-found Question Presented or to justify the Court granting the writ. In his reasons for granting the writ, he states, *in two sentences*, nothing more than the fact that this Court granted a petition for a writ of certiorari in *Evangelisto Ramos v. Louisiana*, 139 S. Ct. 1318 (2019), and, that he is "entitled to the benefit of that ruling."

That said, to the extent that the Louisiana appellate courts ruled that non-unanimous jury verdicts did not violate the United States Constitution simply by citing *Apodaca v. Oregon*, they were correct. They relied upon this Court's precedent, as did the people of Louisiana in enacting the jury verdict law in place at the time of

Petitioner's conviction. That precedent, including *Apodaca*, was decided correctly. Nowhere in the Constitution, including Article III and the Sixth Amendment, is a unanimous jury verdict required. In fact, the Framers of the Constitution considered such a provision and purposefully left it out. Thus, nothing in the text, history, or structure of the Constitution, including the Sixth Amendment, provide for a right to a unanimous jury verdict.

Furthermore, such a right is not fundamental to ordered liberty – as a requirement of stand-alone due process or in incorporation analysis. It has never been found to be essential to due process. Additionally, the vast majority of other countries who use juries—including England, from whom we inherited the concept of a jury trial—do not provide for unanimous jury verdicts.

Finally, current law requires unanimity for conviction of crimes committed after January 1, 2019. Thus, any change the Court may wish to actuate has already been realized and without any negative collateral consequences.

Alternatively, if the Court finds the Petitioner has adequately preserved or presented any claim, Louisiana requests that the petition be held pending this Court's decision in *Evangelisto Ramos v. Louisiana*, No. 18-5924 (April 3, 2019).

ARGUMENT

I. THE LONGSTANDING RULE THAT THIS COURT WILL NOT CONSIDER CLAIMS NOT PRESSED IN THE STATE COURTS BELOW CREATES A WEIGHTY PRESUMPTION AGAINST REVIEW

A. Petitioner Did Not Claim That His Non-Unanimous Jury Verdict Violated the Sixth Amendment's Right To Impartial Jury In the Appellate Courts Below

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 *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam); *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." *Adams v. 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, 17, n.2 (1980).

The claim that Louisiana's non-unanimous jury verdict laws violate the Sixth Amendment is not new. Defendant did not raise a claim that non-unanimous juries violate the Sixth Amendment right to jury trial in state appellate court, instead he claimed that the non-unanimous jury verdict allowed him to be convicted of a crime based on insufficient evidence thereby violating his Fourteenth Amendment right to due process. He should not be able to raise a Sixth Amendment claim now.

B. Petitioner's Failure to Object Was A Procedural Default Constituting An Independent and Adequate State Law Basis to Uphold His Conviction

Louisiana law generally 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). But Petitioner did not do so.

More specifically, an objection to a claimed improper jury instruction is procedurally required in order to raise the issue 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). 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. Federal law also provides that a party may not assign

error to a jury instruction if he fails to object before the jury retires or to "state distinctly the matter to which that party objects and the grounds of that objection." *Jones v. United States*, 527 U.S. 373, 387-88 (1999) (citing Fed. Rule Crim. Proc. Art. 30).

More importantly, the party challenging the constitutionality of any provision of Louisiana law bears the burden of proving it is unconstitutional. *State v. Fleury,* 2001–0871 (La. 10/16/01), 799 So.2d 468, 472. It has long been held that the unconstitutionality of a statute must be specially pleaded and the grounds for the claim particularized. *State v. Schoening,* 2000–0903, p. 3 (La. 10/17/00), 770 So.2d 762, 764. The Louisiana Supreme Court "has expressed the challenger's burden as a three step analysis. First, a party must raise the unconstitutionality in the trial court; second, the unconstitutionality of a statute must be specially pleaded; and third, the grounds outlining the basis of unconstitutionality must be particularized." *State v. Hatton*, 2007-2377 (La. 7/1/08); 985 So.2d 709, 719. The purpose of this rule is "to afford interested parties sufficient time to brief and prepare arguments defending the constitutionality of the challenged statute." *Id.* (citing *Schoening,* 770 So.2d at 764). Knowing with specificity what constitutional provisions are allegedly being violated gives the opposing parties the opportunity to fully brief and argue the facts and law surrounding the issue and "provides the trial court with thoughtful and complete arguments relating to the issue of constitutionality and furnishes reviewing courts with an adequate record upon which to consider the constitutionality of the statute." *Id.* This basic principle dictates that the party challenging the

constitutionality of a statute must cite to the *specific* provisions of the constitution that prohibits the action. *Id.* at 720 (citing *Fleury,* 799 So.2d at 472) ("It is elementary that he who urges the unconstitutionality of a law must especially plead its unconstitutionality and show specifically wherein it is unconstitutional. . . .")).

This was simply not done in this case. No objection was made to the jury instruction or to the verdict.

Failure to comply with a state procedural rule is an independent and adequate state ground barring this Court's 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)). "[F]ederal law takes the state courts as it finds them." *Id.* (quotation omitted). This rule is "bottomed deeply in belief in the importance of state control of State 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).

Petitioner did not complain of the 11-1 verdict instruction prior to trial, when it was given, during deliberations, at any time before the jury was dismissed, or in any post-verdict motion and, thus, he waived that claim. 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*. It should deny the writ.

II. THE JUDGMENT OF THE LOUISIANA CIRCUIT COURT WAS CORRECT

The Louisiana First Circuit Court of Appeals spoke of nearly fifty years of this Court's jurisprudence upon which Louisiana Courts have faithfully relied.[3] As the Louisiana Supreme Court has recognized, as of today, the Court has cited or discussed the opinion *not less than nineteen times* since its issuance.[4] 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.

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[3] Indeed, Louisiana *expressly* relied on *Apodaca* in 1974 when it readopted its rule and revised the minimum vote to 10-2. *See* Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts, Vol. 7, pp. 1184-1189 (La. Constitutional Convention Records Commission 1977).

[4] *Bertrand*, 6 So. 3d at 742. *See Colgrove v. Battin,* 413 U.S. 149, 169 (1973) (Marshall, dissenting)(neither *Apodaca, Johnson* nor *Williams* squarely presented the Court with the problem of defining the meaning of jury trial in a federal context.); *Michigan v. Payne*, 412 U.S. 47, 49 (1973); *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975) (Defendants are not entitled to a jury of any particular composition; 'a jury will come to such a (commonsense) judgment as long as it consists of a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate . . . on the question of a defendant's guilt.'); *Ludwig v. Massachusetts,* 427 U.S. 618, 625 (1976) (the jury's verdict need not be unanimous; what is important is that the verdict reflect the commonsense judgment of a group of laymen); *Ballew v. Georgia,* 435 U.S. 223, 229 (1978); *Crist v. Bretz*, 437 U.S. 28, 37 (1978) (when jeopardy attaches); *Burch v. Louisiana,* 441 U.S. 130, 136 (1979) (noting that in *Apodaca*, it had upheld a state statute providing for 10 out of 12 verdicts and that there was no difference between those juries required to act unanimously and those permitted to act by votes of 10 to 2 and that unanimity did not materially contribute to the exercise of the jury's judgment or as a necessary condition to a jury representing a fair cross section of the community); *Brown v. Louisiana*, 447 U.S. 323, 331 (1980) (10-to-2 vote in state trial does not violate the Constitution); *Blackburn v. Thomas*, 450 U.S. 953, 955 (1981); *Spaziano v. Florida*, 468 U.S. 447, 482, fn 26 (1984) (Stevens, concurring); *Holland v. Illinois,* 493 U.S. 474, 511 (1990) (Stevens, dissenting) (we have permitted nonunanimous verdicts); *McKoy v. North Carolina*, 494 U.S. 433, 468 (1990) (Scalia, dissenting) (we have approved verdicts by less than a unanimous jury.); *Schad v. Arizona,* 501 U.S. 624, 630 (1991) (the Sixth, Eighth, and Fourteenth Amendments do not require a unanimous jury in state cases); *Victor v. Nebraska*, 511 U.S. 1, 8 (1994); *United States v. Gaudin*, 515 U.S. 506, 511, n. 2 (1995) (jury unanimity is not constitutionally required); *Rita v. United States*, 551 U.S. 338, 384–85 (2007) (Souter, dissenting) (the Sixth Amendment right to trial by jury otherwise relies on history for details, and the practical instincts of judges and legislators for implementation in the courts.); *McDonald v. City of Chicago, Ill.,* 561 U.S. 742, n. 14 (2010) (noting the Court had held that the Sixth Amendment does not require a unanimous jury verdict in state criminal trials); *see also*, 561 U.S. at 867–68 (Stevens, dissenting) (noting the Court had resisted a uniform approach to the Sixth Amendment's criminal jury guarantee, demanding 12–member panels and unanimous verdicts in federal trials, yet not in state trials.); *Welch v. United States*, 136 S.Ct. 1257, 1275 (2016) (Thomas, dissenting) (the Court's jury unanimity rule is, undoubtedly, "procedural"); *Timbs v. Indiana,* 139 S.Ct. 682, 687 (2019).

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 States Constitution.[5] For the same reasons the State presents in its brief on the merits in *Ramos*, the State appellate court was not wrong and, therefore, Heard's petition should be denied.

A. Apodaca Was Decided Correctly and Should Not Be Overruled

There is no reason to overrule *Apodaca*. As the Court recently explained, "even in constitutional cases, a departure from precedent demands special justification." *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (cleaned up). *Apodaca* was not a summary affirmance that was decided without briefing and argument. Whether or not it has "questionable precedential value," *Seminole Tribe of Fla. v. Fla.,* 517 U.S. 44, 66 (1996), it warrants respect.

The doctrine of *stare decisis* is about "maintaining settled law" or abandoning it for a different legal rule. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007). Here, the "settled law" is the prevailing rule that States may allow criminal convictions based on jury verdicts that are not unanimous. *Accord Alleyne*, 570 U.S. at 134 n* (Alito, J., dissenting). Unlike the excessive fines clause of the Eighth Amendment held to apply to the States in *Timbs v. Indiana,* 139 S. Ct. 682, 687 (2019), that has been the rule since the Founding and has been explicit in

[5] *See, e.g., Sims v. Louisiana*, 138 S.Ct. 1592 (2018); *Dove v. Louisiana*, 138 S.Ct. 1279 (2018); *Baumberger v. Louisiana*, 138 S.Ct. 392 (2017); *Mincey v. Vannoy*, 138 S.Ct. 394 (2017); *Barbour v. Louisiana*, 562 U.S. 1217 (2011); *Louisiana v. Webb*, 135 S.Ct. 1719 (2015); *Louisiana v. Hankton*, 135 S.Ct. 195 (2014); *Louisiana v. Miller*, 568 U.S. 1157 (2013); *McElveen v. Louisiana*, 568 U.S. 1163 (2013); *Herrera v. Oregon*, 562 U.S. 1135 (2011); *Bowen v. Oregon*, 558 U.S. 815 (2009).

this Court's precedent for nearly 50 years. It has been relied on by Louisiana, in enacting its constitution and its statutes, as well as in interpretations of that constitution and those statutes, for fifty years. It *should* take a special justification, such as a showing of demonstrable error, to reverse course at this point.

Overturning *Apodaca*, moreover, would lead to significant practical problems and would unsettle related areas of the law. The lower courts are already receiving a crush of petitions for relief seeking to apply a mandatory unanimity rule retroactively to long-final convictions in Louisiana and Oregon. And, given that unanimity and a 12-person jury share similar historical and common-law roots, this Court should be prepared to reconsider the constitutionality of less-than-12-person juries if it endorses a revisionist approach to the Sixth Amendment. Although just two States and the Territory of Puerto Rico have permitted felony convictions by a non-unanimous vote, at least 40 States allow juries smaller than 12 in some types of criminal cases. In short, overturning *Apodaca* has little to recommend it but could have serious negative consequences for both the criminal justice system and this Court's jurisprudence.

B. The Sixth Amendment Does Not Require Unanimity.

In his Reasons for Granting the Petition, Petitioner states that the Sixth Amendment requires a unanimous verdict to convict a defendant of a non-petty offense. Although several of this Court's opinions reference a federal requirement of unanimity, all do so in dicta and none critically considered the history of jury unanimity in this country.

When it did examine history, it found not "every feature of the jury as it existed at common law—whether incidental or essential to that institution—was necessarily included in the Constitution wherever that document referred to a 'jury.'" *Williams v. Florida*, 399 U.S. 78, 91 (1970). In holding that the Sixth Amendment did not implicitly adopt the common-law rule mandating twelve jurors, this Court rejected "the easy assumption . . . that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution." *Id.* at 92. Thus, the proper starting point to determine whether the Sixth Amendment requires unanimous jury verdicts is not the English common law, but the U.S. Constitution's text. But neither Article III nor the Sixth Amendment—the two provisions of the Constitution that address juries in criminal cases—mentions a unanimity requirement. That omission is telling because those provisions *do* expressly mention other attributes of the jury system. For example, Article III requires that a jury trial take place in the "state where the said crimes shall have been committed," and the Sixth Amendment further restricts the location of the trial to the "State and district" where the crime occurred.

Furthermore, the legislative history of the Sixth Amendment eliminates any doubt that the *omission* of a unanimity requirement was intentional. Madison's original draft of the Sixth Amendment expressly guaranteed a jury trial that included "the requisite of unanimity" and the "other accustomed requisites" of the jury. *Id.* at 94. But the Senate *rejected* that proposal and the Conference Committee adopted a modified proposal—minus any mention of unanimity or "other accustomed

requisites"—that ultimately became the Sixth Amendment. *Id.* at 95-96. Those omissions are especially notable given that State constitutions at the time—drafted by the Framers of the U.S. Constitution—took a variety of approaches to the jury right. Some expressly required unanimity; some expressly incorporated the English common law; and others merely preserved an unadorned right to a "jury trial." *Id.* at 98 n. 45 (quoting Reinsch, *The English Common Law in the Early American Colonies*, in 1 Select Essays in Anglo-American Legal History 367, 412 (1907)). In short, the *Apodaca* plurality, and, therefore, the Louisiana First Circuit, correctly applied settled law in concluding that the Sixth Amendment does not mandate unanimity in a state court proceeding.

C. A Unanimous Jury Verdict is Not Fundamental to Ordered Liberty

Unanimity is also not fundamental to our scheme of ordered liberty. The core purpose of a jury trial "obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." *Williams*, 399 U.S. at 100; *see also Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) ("Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.").

But unanimity is not essential to those core purposes. Regardless of whether the jury's final vote is 12-0, 11-1, or 10-2, no defendant can be convicted and deprived of his liberty until a body of his peers has independently reviewed the evidence

against him and found him guilty.

Indeed, recognizing that unanimity is not essential to the purposes underlying the jury right, a large majority of countries that provide for jury trials do not require unanimity, including several (such as England and Ireland) that share common-law roots. In fact, "among the class of countries that embraces the jury, the unanimous decision rule for guilt and acquittal generally enforced by the American system is very much an anomaly." Ethan J. Lieb, *A Comparison of Criminal Jury Decision Rules in Democratic Countries*, 5 Ohio St. J. Crim. L. 629, 642 (2008). Instead, "more relaxed majoritarian and super-majoritarian rules clearly dominate the global jury system landscape." *Id.* at 642. Notably, English law no longer requires juries to render verdicts unanimously. It adopted non-unanimity over fifty years ago—at about the same time that this Court upheld Oregon and Louisiana's decision to do so. "In England . . . the requirement of a unanimous verdict was dropped in 1967 by the Criminal Justice Act, which permitted verdicts of ten to two." Sally Lloyd-Bostock & Cheryl Thomas, *Decline of the "Little Parliament": Juries and Jury Reform in England and Wales*, 62-SPG Law & Contemp. Probs. 7, 36 (1999).

The decision below was correct and should be affirmed.

III. LOUISIANA HAS ALREADY CHANGED ITS JURY VERDICT LAWS TO PROVIDE FOR UNANIMOUS VERDICTS IN ALL CASES

Petitioner ignores the important fact that in 2018 Louisiana changed its laws on jury verdicts requiring a unanimous jury verdict in all felony trials for crimes committed after January 1, 2019. This Court has been hesitant to "suddenly constitutionalize" an issue via the Due Process Clause when "[t]he elected

governments of the States are actively confronting" it, as in Louisiana and Oregon. *District Attorney's Office for Third Judicial Dist. v. Osborne,* 557 U.S. 52, 72-73 (2009). Petitioner offers no compelling reason to short-circuit this robust democratic process. The legislative resolution of this long-debated policy issue provides a clear date for implementation of a new system that avoids negative collateral consequences.

There is no need for, nor is there any benefit in, this Court now "suddenly constitutionalizing" this issue when Louisiana's elected government has already actively confronted it.

IV. ALTERNATIVELY, THIS COURT SHOULD HOLD DEFENDANT'S PETITION PENDING THIS COURT'S DECISION IN *RAMOS V. LOUISIANA*, NO. 18-5924.

Petitioner asks this Court to hold his petition pending its decision in *Ramos v. Louisiana* which was argued October 7, 2019. Louisiana submits that even if this Court determines that non-unanimous juries violate the Constitution, Petitioner cannot benefit because he did not properly raise the issue in the courts below. Thus, his petition should be denied outright and should not be held pending a decision in *Ramos*. Only if this Court determines that Petitioner is not procedurally barred from raising a Sixth Amendment claim should this petition be held and disposed of in light of the *Ramos* decision.

Additionally, should this Court decide in *Ramos* that either the Sixth Amendment does not require unanimous juries or that any such requirement is not applicable to the States, Heard's petition should be denied because he has not properly raised any other claim.

CONCLUSION

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

Respectfully submitted.

/s/ *Michelle W. Ghetti*

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