No. 19-5301

In the Supreme Court of the United States

AARON ORLANDO RICHARDS,
Petitioner

vs.

STATE OF LOUISIANA,
Respondent

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Did petitioner's conviction by a non-unanimous jury violate the Louisiana State Constitution, or reveal any internal conflicts in Louisiana state law?[1]

[1] Petitioner also lists a question concerning the lower courts' applications of *State v. Bertrand*, 2008-2215 (La. 3/17/09), 6 So.3d 738, 741, and *Apodaca v. Oregon*, 406 U.S. 404 (1972), but then fails to develop any argument related to these cases in the argument section of his petition. Alleged errors not discussed in a petitioner's argument should be considered waived. *See, e.g.*, *Eastman Kodak Co. of New York v. S. Photo Materials Co.*, 273 U.S. 359, 369 (1927).

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INTRODUCTION

The petitioner here challenges his murder conviction, but raises exactly the sort of challenge that this Court should not consider, for three reasons. Petitioner alleges that his conviction by a non-unanimous jury violated various provisions in Louisiana's Constitution. This is sharply different from the arguments raised by the petitioner in *Ramos v. Louisiana*, no. 18-5924, who argued that the federal Constitution prohibits conviction by non-unanimous juries. Petitioner's claims in this case are rooted in state law, and should be left to state courts to decide. Although he references the federal Constitution, he advances no argument based on that document, unlike Ramos. Petitioner here focuses on interrelated provisions of Louisiana law and on Article 1, § 17 of the Louisiana Constitution. This Court should not wade into an issue of State law where Louisiana courts have previously upheld the use of non-unanimous juries, *see State v. Bertrand*, 2008-2215 (La. 3/17/09), 6 So.3d 738, 741 (citing *Apodaca v. Oregon*, 406 U.S. 404 (1972)), and where petitioner could have presented these arguments to a State court and failed to do so. *See West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940) ("the highest court of the state is the final arbiter of what is state law"); *see also Danforth v. Minnesota*, 552 U.S. 264, 291–92 (2008) ("State courts are the final arbiters of their own state law; this Court is the final arbiter of federal law").

In addition, petitioner's arguments were not raised below, and were not addressed by the Louisiana Court of Appeal for the Third Circuit, which was the last court to write a reasoned opinion on petitioner's case. The legal issues presented by

petitioner are therefore not properly set up for review by this Court, and should be considered forfeited even if the Court agreed to hear the case. Petitioner should not be allowed to raise new arguments for the first time in a petition for certiorari. *See Leonard v. Texas*, 137 S. Ct. 847, 850 (2017) (Statement of Thomas, J., respecting the denial of certiorari); *Monks v. New Jersey*, 398 U.S. 71 (1970) (dismissing a writ as improvidently granted where constitutional challenge was "raised for the first time" on certiorari "and the state courts have had no opportunity to pass on it.").

Beyond this, petitioner's arguments fail on the merits. There is no conflict between the statute under which petitioner was convicted and any other provision of Louisiana law. Therefore, there is no reason to grant certiorari in this case.

STATEMENT OF THE CASE

I. THE MURDER

Timothy Falgout was delivering a pizza on the evening of March 29, 2010 when he was murdered by petitioner. *State v. Richards*, 2017-1135 (La. App. 3 Cir. 6/6/18), 247 So.3d 878, 882 (Petr.'s Appx. 4, at 2), *writ denied*, 2018-1036 (La. 4/22/19), 268 So.3d 294. Falgout was stabbed five times. Petr.'s Appx. 4, at 2. The woman who had ordered the pizza found Falgout expiring from loss of blood on her lawn. *Id.* at 6–7. Falgout was dead before any medics or police could reach him. Examining the body, police found that he had been robbed of his wallet, and they also discovered a bloody knife near the body. *Id* at 7. The knife was sent for DNA testing, which established that DNA found on the knife matched petitioner's DNA. *Id.* Marcus Feast, petitioner's co-defendant who had been driving petitioner around on that night, testified that

shortly before the time of the killing, he had dropped petitioner off briefly in the neighborhood where the killing took place. According to Feast, when petitioner got back into the car, he said "Hurry up, get out of here. I think I just killed somebody." *Id.* at 9.

II. THE TRIAL AND APPEAL

Petitioner was indicted for first-degree murder. *Id.* at 2. Extensive pre-trial litigation took place over whether the State could introduce evidence relating to prior bad acts committed by the defendant; this evidence was ultimately allowed at trial. *Id.* Several months before trial, the State filed a "Notice of Intent Not to Seek the Death Penalty." *Id.* This meant that the requirement of jury unanimity applicable to capital cases did not apply. At trial, a police officer testified to video evidence confirming that petitioner had mugged and robbed a woman in 2009. *Id.* at 5. Concerning the present crime, police testified that DNA from the fatal knife matched petitioner's DNA. *Id.* at 8. A surveillance camera also recorded Feast's car, a gold Mercedes Benz, following Falgout's car as Falgout was driving to deliver the pizza, shortly before the killing. *Id.* The same surveillance camera captured the same car minutes later, travelling back the other direction "at a high rate of speed on the wrong side of the street." *Id.* Feast also testified, and repeated petitioner's damning words to the jury: "I think I just killed somebody." *Id.* at 9. The jury was correctly told that, under Louisiana law, specific intent to kill (an element of first-degree murder) could be inferred from repeatedly stabbing a victim in the chest. *See State v. Dooley*, 38,763,

38,764 (La.App. 2 Cir. 9/22/04), 882 So.2d 731, *writ denied*, 04-2645 (La. 2/18/05), 896 So.2d 30. The jury convicted Petitioner by a vote of eleven to one.

Petitioner then appealed to the Louisiana Third Circuit Court of Appeal, bringing four assignments of error. He argued that (1) insufficient evidence supported his conviction, (2) testimony from witnesses relating to defendant's prior bad acts should not have been admitted, (3) the trial court erred by granting the State's challenge of a potential juror for cause, while denying five such challenges from petitioner, and (4) the trial court erred by excusing one juror without allowing defense counsel to question that juror. His attack on the sufficiency of the evidence largely amounted to an attack on Feast's credibility, but the Third Circuit rightfully recognized that appellate courts do not sit to second-guess credibility determinations by juries. *Id.* at 886. The Third Circuit denied relief on all grounds. *Id.* at 882. Importantly, petitioner did not raise any argument at the Third Circuit that his conviction was invalid because the jury had not been unanimous.

Petitioner then sought review in the Supreme Court of Louisiana, raising the same issues he had raised below. Again, there was no argument that his conviction by a non-unanimous jury was unconstitutional. The state high court denied relief without opinion. *State v. Richards*, 2018-1036 (La. 4/22/19), 268 So.3d 294. Petitioner then filed for a writ of certiorari from this Court.

REASONS FOR DENYING THE PETITION

I. PETITIONER'S ARGUMENTS CONCERN STATE LAW, NOT FEDERAL LAW

Although Petitioner makes a passing reference to the "Fifth, Sixth, and Fourteenth Amendments to the United States Constitution," {Pet. at 5} his claims are actually rooted in State law. Petitioner argues that the statute under which he was convicted, La. Rev. Stat. § 14:30(C)(2), runs afoul of sections 2, 3, and 17 of Article I of the Louisiana Constitution. Whether or not this argument is correct, it is not an appropriate question for this Court to answer. It is well-settled that state high courts are the final authority on questions of state law. *See Danforth*, 552 U.S. at 291–92; *see also Fid. Union Tr. Co. v. Field*, 311 U.S. 169, 177 (1940) (citing *Beals v. Hale*, 4 How. 37, 54 (1846)). Even an "intermediate state court," "in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question." *Fid. Union Tr. Co.*, 311 U.S. at 178. To the extent that any conflict exists between La. Rev. Stat. § 14:30(C)(2) and other provisions of state law or the state constitution—which Respondent does not concede—resolution must come from the Louisiana court system.

Petitioner does not explain, at any time, how his federal constitutional rights were violated. Constitutional challenges must be "framed with the necessary specificity," *Flast v. Cohen*, 392 U.S. 83, 106 (1968). A petitioner may not baldly assert that a constitutional provision was violated without further explanation. But that is exactly what petitioner has done here with regard to the federal Constitution. Thus, this petition should be construed as a request for relief under *State* law, as

demonstrated by his arguments that La. Rev. Stat. § 14:30(C)(2) runs afoul of the Louisiana Constitution and the Louisiana Code of Criminal Procedure. Relief on such state-law grounds must be sought elsewhere, rather than at this Court.

This Court granted certiorari in *Ramos v. Louisiana*, no. 18-5924, on March 18 of this year. The petition in this case was filed July 10 of this year, and therefore petitioner had opportunity to view the federal law arguments raised in that case, but still focused his arguments on State law. Petitioner cannot credibly claim that he had no opportunity to raise federal claims in his petition; he simply chose not to do so. Nor is there cause to stay this case pending a decision in *Ramos*; because the two petitioners raise distinct arguments, the outcome of *Ramos* will not control in this case.

II. PETITIONER'S ARGUMENTS WERE NOT PRESERVED BELOW; THEY SHOULD NOT BE CONSIDERED FOR THE FIRST TIME HERE

Petitioner raised several arguments on direct appeal of his conviction in State court: (1) evidence of petitioner's other crimes was wrongfully introduced, (2) the trial court erred in multiple rulings on whether jurors should be dismissed for cause, (3) insufficient evidence supported petitioner's conviction. Petitioner was represented by counsel. Petr.'s Appx. 4, at 1. He did not raise any argument concerning the non-unanimity of his trial jury, either at trial or on direct appeal. In his petition for a writ from the Louisiana Supreme Court, he raised the same points, and again raised no arguments on the issue he sets forth here. Arguments not raised below are waived (with few exceptions), and petitioner should not be permitted to attack his conviction

by a non-unanimous jury for the first time at this late stage of his case. *See, e.g.*, *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 56 n.4 (2002) (petitioner argued on appeal that a different body of law, not applied below, governed in the case; argument was held waived); *United States v. Gagnon*, 470 U.S. 522, 529 (1985) (argument relating to defendant's right to be present at various stages of trial could not be raised for the first time on appeal); *Monks*, 398 U.S. 71 (state courts should have an opportunity to pass on constitutional challenges prior to review by this Court; failure to present constitutional challenge below merited a dismissal of the case as improvidently granted).

III. PETITIONER'S ARGUMENTS FAIL ON THE MERITS

Petitioner first claims that La. Rev. Stat. § 14:30(C)(2) violates the Louisiana Code of Criminal Procedure. In addition to clearly being a question of State law, Petition is simply wrong. The statute provides that "If the district attorney does not seek a capital verdict [in a first degree murder case], the offender shall be punished by life imprisonment at hard labor without benefit of parole, probation or suspension of sentence. The provisions of Code of Criminal Procedure Article 782 relative to cases in which punishment is necessarily confinement at hard labor shall apply." Code of Criminal Procedure Article 782 states: "A case in which punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. 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."

Petitioner appears to argue that, because first-degree murder can be a capital offense, it is constitutional error *ever* to try the offense in a non-capital manner, as happened here. Whatever the potential merits may be to such a claim, this was *not* a case in which punishment "may [have been] capital." Well before trial, the State affirmed that it would not seek the death penalty. Article 782 does not begin "An *offense* for which the punishment may be capital . . .". It begins with "a case," and in this case there was no possibility of capital punishment, as was established before the trial started. La. Rev. Stat. § 14:30(C) clearly establishes two tracks for the prosecution of first-degree murder: one in which the death penalty is sought, and another in which only life imprisonment is sought. This case falls squarely under latter category, and therefore should have been tried by a jury of twelve, with ten concurring to render a verdict, just as happened. There is no conflict between the Code and La. Rev. Stat. § 14:30(C)(2), and it was not error for the trial court to conduct a non-capital trial in petitioner's case.

Next, petitioner argues that he has been given a *functional* death sentence, as life imprisonment is equivalent to "death by incarceration." {Pet. at 7} The logical implication of this argument is that any defendant facing a potential sentence of life imprisonment should receive all the procedural safeguards due a defendant facing the death penalty. This argument finds no support in either the Louisiana or the Federal Constitution, nor in any relevant caselaw. *Graham v. Florida*, cited by petitioner, does not help him. That case established a "categorical rule against life without parole for juvenile nonhomicide offenders." *Graham v. Fla.*, 560 U.S. 48, 79

(2010), as modified (July 6, 2010). Defendant here is a homicide offender and is not a juvenile. Moreover, *Graham* provides no support for the proposition that life imprisonment is equal to the death penalty in severity. *State ex rel. Morgan v. State*, 2015-0100 (La. 10/19/16), 217 So. 3d 266, 271, applied *Graham* to another juvenile nonhomicide offender, and thus is distinguishable for the same reasons. There is simply no authority justifying petitioner's claim that life imprisonment is equivalent to the death penalty. Several Justices of this Court have, in fact, stated the opposite. *See, e.g.*, *Gardner v. Fla.*, 430 U.S. 349, 357 (1977) (Stevens, J., plurality op.) ("[D]eath is a different kind of punishment from any other which may be imposed in this country.").

Petitioner finally alleges that his conviction violated sections 2, 3, and 17 of Article I of the Louisiana Constitution. Section 2 guarantees that "No person shall be deprived of life, liberty, or property, except by due process of law." Petitioner does not explain why his conviction by a non-unanimous jury amounts to a denial of due process, perhaps because controlling Louisiana Supreme Court precedent upheld the use of non-unanimous juries against a due process challenge. *See Bertrand*, 6 So.3d at 741 (citing *Apodaca*, 406 U.S. 404). Nor can petitioner explain why his conviction violated art. I, § 3 of the State Constitution, as there is no evidence he was denied "equal protection of the laws" — aside from his claim that he should have received equal procedural safeguards to a defendant facing the death penalty, which is erroneous as laid out in the preceding paragraph.

Note that in his statement of the Questions Presented, petitioner asks "did the appellate court err in its interpretation of *Apodaca* and *Bertrand*?" but then never mentions those cases again, and raises no argument that they might have been wrongly decided. This underscores that the present case is highly different from *Ramos*, and is really a State-law challenge to the use of non-unanimous juries, not a federal-law one.

Petitioner's remaining constitutional argument, and the only one he makes in detail, is that La. Rev. Stat. § 14:30(C)(2) violates Louisiana Constitution Article I, § 7. Though, again, this is purely a question of Louisiana law, this argument also fails on its merits. Section 17 states: "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 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." This language *duplicates* that of Section 782 of the Code of Criminal Procedure. So, La. Rev. Stat. § 14:30(C)(2) does not run afoul of the state Constitution, just as it did not run afoul of the Code.

Petitioner's argument based on *State v. Goodley*, 398 So. 2d 1068, 1069 (La. 1981), fails for the reasons laid out in *State v. Bishop*, 2010-1840 (La. App. 1 Cir. 6/10/11), 68 So. 3d 1197, 1201–02, *writ denied*, 2011-1530 (La. 12/16/11), 76 So. 3d 1203. In *Goodley*, the Louisiana Supreme Court held that "in charged capital offenses a unanimous verdict for conviction, not just sentencing, is necessary *and there is no*

attendant provision giving the state the authority to alter that scheme on its own motion by simply stipulating that the death penalty will not be sought in a certain case." 398 So.2d at 1071 (emphasis added). But here, just such a provision exists. La. Rev. Stat. § 14:30(C) gives prosecutors discretion in first-degree murder cases to seek a capital verdict or not. If they choose not to, the 10-2 jury provisions apply. *Goodley*'s own words suggest that a non-unanimous jury conviction was permissible in this case, as the statute, § 14:30(C)(2), expressly contemplates two separate trial processes: one for prosecutions where the death penalty is sought, and another where only life imprisonment is sought. The once-absent "attendant provision" is present here.

Finally, as noted *supra* and confirmed by this discussion of the merits of petitioner's claims, all of these claims are based on *State law*. This makes review by this Court inappropriate regardless of the merits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

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