NO. 19-5693

IN THE
Supreme Court of the United States

HARLOW HUTCHINSON

PETITIONER,

V.

STATE OF LOUISIANA,

RESPONDENT.

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

REPLY TO THE STATE'S BRIEF IN OPPOSITION

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REPLY BRIEF

Pursuant to Rule 15.6, Petitioner Harlow Hutchinson files this *Reply Brief* to the *State's Brief in Opposition*. This case will be governed by this Court's decision in *Evangelisto Ramos v. Louisiana*, 139 S. Ct. 1318 (2019).

Despite this clear reality, the *Brief in Opposition* argues that neither the State nor this Court can ascertain from the Question Presented, what issue is at stake in this case, or what constitutional issues are presented. It complains that Petitioner has cited too many constitutional provisions in his pleadings to this Court, and too few provisions in the courts below. It also promises that the problem has already been fixed prospectively, so that there is no purpose in holding Petitioner's case for a decision in *Ramos v. Louisiana*.

But at its core, the BIO clarifies what is at stake: Respondent believes that "A unanimous jury verdict is not fundamental to ordered liberty" and that "the Sixth Amendment Does not Require Unanimity." BIO at 18-20; *id.* ("unanimity is not essential to those core purposes."). Petitioner believes that unanimity is an essential component of the Sixth Amendment's guarantee to trial by jury.

I. The BIO's Procedural Objections Are Misplaced.

The BIO cites footnote 7 of *Michigan v. Tyler*, 436 U.S. 499, 512 (1978) to claim that Petitioner has no standing to raise this claim. See BIO at 14 ("Failure to comply with a state procedural rule may constitute an independent and adequate state ground barring its review of a federal question. *Hathorn v. Lovorn*, 457 U.S. 255, 262–

63 (1982) (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)).").

Our understanding of footnote 7 of *Michigan v. Tyler*, is that the Court declined to permit the Petitioner in that case (the State of Michigan), from raising a procedural bar because Michigan had failed to follow the procedural rules itself:

> The petitioner [Michigan] alleges that respondent Tompkins lacks standing to object to the unconstitutional searches and seizures. The Michigan Supreme Court refused to consider the State's argument, however, because the prosecutor failed to raise the issue in the trial court or in the Michigan Court of Appeals. … We read the state court's opinion to mean that in the absence of a timely objection by the State, a defendant will be presumed to have standing. Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, ***so long as the State has a legitimate interest in enforcing its procedural rule***. *Henry v. Mississippi*, 379 U.S. 443, 447. See *Safeway Stores v. Oklahoma Grocers*, 360 U.S. 334, 342 n. 7; *Cardinale v. Louisiana*, 394 U.S. 437, 438. The petitioner does not claim that Michigan's procedural rule serves no legitimate purpose. Accordingly, we do not entertain the petitioner's standing claim which the state court refused to consider because of procedural default.

Michigan v. Tyler, 436 U.S. 499, at n. 7 (1978). Similarly in this case, Louisiana did not argue in the Court of Appeal that the verdict was unanimous or that Petitioner lacked standing to raise the issue. *Michigan v. Tyler* stands for the exact opposite proposition that Respondent urges here: because Louisiana did not raise the standing question in the court below, it cannot be heard to argue it here.

It is true that Petitioner raised the argument *pro se* that "The Sixth Amendment guarantees the defendant the right to a unanimous verdict." Petitioner's

Pro Se Brief to Third Circuit Court of Appeal, at pg 9.[1] The fact that petitioner was *pro se* in the Court of Appeal and the Louisiana Supreme Court should relieve him of such harsher pleading requirements proposed by the State. *Haines v. Kerner*, 404 U.S. 519 (1972) ("we hold ['*pro se* complaint'] to less stringent standards than formal pleadings drafted by lawyers. . . ."). It is clear from petitioner's pleadings that the State was put on notice that petitioner was complaining that his conviction by a non-unanimous jury verdict violated his federal constitutional rights.

While the BIO characterizes it as *dicta*, the actual holding of the Court of Appeals was "although defense counsel requested polling" it did not matter what the transcript or the minutes reflected the result because:

> [U]nder La.Code Crim.P. art. 782 "[c]ases 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." The Supreme Court's ruling in *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L. Ed. 2d 184 (1972), held that a state court conviction obtained by a less than unanimous jury was constitutional, and the Louisiana State Supreme Court recently upheld the constitutionality of La. Code Crim. P. art. 782 in *State v. Bertrand*, 08-2215, 08-2311 (La. 3/17/09); 6 So.3d 738. Therefore, even if Defendant could prove his conviction was by a less than unanimous jury the verdict is valid.

State v. Hutchinson, 261 So. 3d 927, at 947 (3 Cir. App. 2018), pet. app. at 18a. Had the holding been that the transcript and minutes were incomplete, the proper ruling would have been for a remand to complete the record or reverse the conviction based upon the incomplete record. *State v. Landry*, 97-0499 (La.6/29/99); 751 So.2d 214

[1] The BIO purports to quote petitioner's "Entire argument". See BIO at 3. However, the BIO literally omits the portion of the pro se brief that specifically cites to pages in the record as part of the Assignment of the Record, where the district court confines the polling of the jury to determining whether ten jurors agree. *State v. Hutchinson*, 18-KA-448, *Pro Se Brief* at 9 citing "R.p. 262, 368."

(reversing conviction and death sentence because deficiencies deprived the defendant of his constitutional right of appeal and judicial review); *State v. Pinion*, 06-2346 (La. 10/26/07), 968 So. 2d 131 (rejecting contention made by BIO in this case that it is the defendant's responsibility to insure an adequate recording of the proceedings). See also La. C. Cr. P. art. 811 (requiring judge to order the clerk to record the verdict after polling); La. C. Cr. P. art. 812 (setting forth procedures for written polling).

II. The Issue Is Plainly Apparent and Ripe for Review.

While the BIO complains that counsel is smuggling claims into the Court, relying on "vague citations to certain constitutional amendments" "leaving the specifics as guesswork for the state and this Court" and that coffers of "books line the shelves of law school libraries one each one of the amendments he has listed," there is, in fact, no confusion.

The Petition argued:

> 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.

Hutchinson v. Louisiana, Petition for Certiorari at 8. No matter how many times respondent accuses counsel of smuggling claims into this Court, or forcing this Court to engage in guesswork, counsel's brevity should not be depicted as vagueness.

Indeed, the Brief in Opposition makes clear that respondent understood the issue in this case was plainly apparent: whether "*Apodaca v. Oregon* was decided correctly." BIO at 6. The BIO then argues that "*Apodaca* was decided correctly and

should not be overruled." BIO at 15-16. Indeed, the BIO asserts that "the 'settled law' is the prevailing rule that States may allow criminal convictions based on jury verdicts that are not unanimous." BIO at 17.

Significantly, however the State of Louisiana has since disavowed the rationale for Justice Powell's opinion in *Apodaca's*. In *Ramos v. Louisiana*, the State's Brief to this Court 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 ability to rely upon *Apodaca* for the claim that "states may allow criminal convictions based on jury verdicts that are not unanimous" has been affirmatively disavowed by Respondent.

Indeed, had Respondent acknowledged the indefensibility of Justice Powell's opinion in *Apodaca* in the Court below, it is unlikely that the Louisiana courts would have deferred to the decision.

III. Questions of Procedural Bar Are Best Addressed Initially By the State Courts.

The state raises various procedural questions, based upon an assortment of procedural bar-hopping. These 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.").

CONCLUSION

The petition for writ of certiorari should be held 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,

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