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

APPLICATION FOR REHEARING

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Pursuant to Rule 44, Petitioner Harlow Hutchinson files this *Petition for Rehearing* and attached certificate of counsel that it is presented in good faith and not for delay.

This case should be governed by this Court's decision in *Evangelisto Ramos v. Louisiana*, 139 S. Ct. 1318 (2019). Counsel believes that this Court has held seven other cases pending a decision in *Ramos v. Louisiana*.[1] (The number appears decidedly less than the "flood of these cases" that the Louisiana Attorney General asserts that they "are already receiving… as is this Court." *Ramos v. Louisiana*, Oral Argument 7/7/2019, at pg 56).

This Court denied certiorari based upon the State's assertion that: "There is no evidence that Petitioner was convicted by a nonunanimous jury verdict and, thus, he has no standing to complain about the law;" *Id.* see also BIO at 7 ("As the Louisiana Third Circuit Court of Appeals observed, '[a]lthough defense counsel requested polling of the jury, neither the transcript nor the minutes reflect the results of said polling. Accordingly, Defendant cannot prove that he was convicted by a less than unanimous jury verdict.' Thus, Petitioner has no standing to bring his complaint to this Court.").

[1] *Crehan v. Louisiana*, 18-9787; *Sheppard v. Louisiana*, 18-9693; *Brooks v. Louisiana*, 18-9463; *Alridge v. Louisiana*, 18-8748, *Heard v. Louisana*, 18-9821; *Lewis v. Louisiana*, 18-7488; *Dick v. Oregon*, 18-9130.

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. The BIO purported to quote petitioner's "Entire argument". See BIO at 3. However, the BIO literally omitted 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."

Record page 262, cited by the defendant in his *pro se*, to the Court of Appeal provides:

> correct way. So the bailiff is going to hand you each a sheet. I need you to fill it out, check off what your verdict was, or what your decision was rather, and then sign it and date it, each of you. And then I'm going to call the lawyers up here and myself and the lawyers will go over it to make sure at least 10 of you concurred.
>
> (PAUSE)
>
> THE COURT: All right. Ladies and gentlemen, I want to thank you and everybody wants to thank you, the lawyers, we all appreciate your service. I know it's a very

R. 262. Significantly, when the jury initially returned the verdict, the verdict was not in proper form and the Court had to ask the jury to "write what the number is":

> (THE COURT REVIEWS THE VERDICT AS TO FORM.)
>
> THE COURT: All right. It's close to proper form, but I'd rather you write out what the number is.
>
> (PAUSE)
>
> THE COURT: All right. Thank you, ma'am. All right. The jury verdict is in proper form and it is signed by Nicole Stansbury, Foreperson. I'll ask the clerk to read it aloud, please.

R. 261. While defense counsel specifically asked the jury be polled, neither the minutes nor the transcript reveals the actual verdict count – but what is clear is that the trial court only made sure that 10 jurors concurred. *Id.* ("And then I'm going to call the lawyers up here and myself and the lawyers will go over it to make sure at least 10 of you concurred").

The record includes a denotation that the verdict poll was ordered sealed by the judge but that it was available upon request.

> **VERDICT POLL ORDERED SEALED BY JUDGE 1/24/2018
> (AVAILABLE UPON REQUEST)

See Exhibit A, attached. Counsel moved to unseal and review the polling slips. The district court judge has denied counsel's effort to inspect or review the polling slips. See Exhibit B, attached.

The fact that petitioner was *pro se* in the Court of Appeal means the Court should relieve him of such harsher pleading requirements proposed by the State. *Haines v. Kerner*, 404 U.S. 519, 520 (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.

To the extent the record was incomplete, on direct appeal it is the responsibility of the state to secure a complete record. *State v. Landry*, 97-0499 (La.6/29/99), 751 So.2d 214 (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).

Indeed, by statute, the Clerk of Court is required to record the verdict after polling. *See* 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).

It is likely that the Louisiana Court of Appeal for the Third Circuit did not address the completeness of the record because, at the time, it did not matter under state law whether the verdict was unanimous or not:

> [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 (3rd Cir. App. 2018), pet. app. at 18a.

Questions concerning the validity of the verdict, and the burden of procedural bars 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.").

It makes little sense to distinguish this case from others involving claims of non-unanimous jury verdicts and it should be held for *Ramos v. Louisiana.* If *Ramos* is decided favorably for the state, the rehearing can be denied without any harm to respondent. If Ramos is decided favorably for the Petitioner, the case should be remanded to the state courts, where the district court will be obligated to provide counsel access to the polling slips. If, as the State maintains, the verdict was unanimous – then there will be no harm to the state. If, as the defendant maintained in his *pro se* brief, the verdict was non-unanimous, the state courts can review the issue afresh.

CONCLUSION

The Application for Rehearing should be granted and 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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