

In the Supreme Court of the United States

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KENDRICK TAYLOR,
Petitioner

vs.

THE STATE OF LOUISIANA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The issue presented by the Petitioner is whether the Sixth Amendment right to a jury trial requires a unanimous jury verdict and, if so, would that unanimity requirement be required in state criminal jury trials via the Fourteenth Amendment.

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REASONS FOR DENYING THE WRIT

This petition for review of a post-conviction judgment should be denied because, although not disclosed by Petitioner, the sole issue raised in the petition was not raised or decided in any of the post-conviction proceedings below. There is no final judgment in which the validity of a state statute was drawn in question as required to give this Court jurisdiction under 28 U.S.C. §1257(a). Alternatively, if this Court has jurisdiction of this claim at all, it should “adhere 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. 83, 86 (1997) (per curiam) (citations omitted). Petitioner did not complain about the non-unanimous jury system in the Louisiana post-conviction proceedings; he should not now be allowed to hitch his empty wagon to the *Ramos* star. This Court should deny his writ application.

Additionally, Petitioner’s case is no longer on direct review and, as the Louisiana Supreme Court has recognized, he has “exhausted his right to state collateral review.” Pet’r Appx. C. Thus, he would not be able to benefit from any ruling in *Evangelisto Ramos v. Louisiana*, No. 18-5924 (April 3, 2019) currently pending before this Court.

OBJECTION TO JURISDICTION

28 U.S.C. §1257(a) provides in material part: “Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where ... the validity of a

statute of any State *is drawn in question* on the ground of its being repugnant to the Constitution...." (emphasis added). The final judgment in this case by the post-conviction trial court, upheld by the circuit and Supreme Court of Louisiana, is not one where the validity of the Louisiana statute on non-unanimous juries has been "drawn in question on the ground of its being repugnant to the Constitution." Thus, this Court has no jurisdiction to consider Petitioner's claim.

Furthermore, Petitioner has failed to set out a proper basis for jurisdiction in his Petition. Although he states that the jurisdiction is pursuant to 28 U.S.C. §1257(a) and gives the dates the three opinions in post-conviction were entered, he does not "specify the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised, the method or manner of raising them and the way in which they were passed on by those courts" so as to "show that the federal question *was timely and properly raised* and that this Court has jurisdiction to review the judgment on a writ of certiorari." Supreme Court Rule 14.1(g). He does not do this because he cannot do this. The federal question sought to be reviewed - the constitutionality of Louisiana's non-unanimous jury verdict laws - was not raised in the post-conviction courts below and, thus this Court does not have jurisdiction pursuant to 28 U.S.C. §1257(a).

Since 28 U.S.C. §1257(a) was changed in 1988, this Court has "expressed inconsistent views as to whether this rule is jurisdictional or prudential in cases arising from state courts." *Robertson*, 520 U.S. at 86. Although the State believes this to be a jurisdictional matter, the Court should also deny the petition for

prudential reasons due to lack of a meritorious basis for review.

CONSTITUTIONAL AND STATUTORY AUTHORITY

Petitioner does not state the Louisiana law on jury verdicts in his brief. At the time of his trial, Article 782 of the Louisiana Code of Criminal Procedure provided in pertinent part: “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.” It was amended in 2018, effective January 1, 2019, to provide, 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.

At the time of Petitioner’s trial, Louisiana Constitution article I, § 17(A) provided in pertinent part: “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.” It was amended in 2018, effective January 1, 2019, 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.

Additional relevant Louisiana laws:

**Louisiana Code of Criminal Procedure art. 841
(Objections Required)**

- A. An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence. A bill of exceptions to rulings or orders is unnecessary. 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.
- B. The requirement of an objection shall not apply to the court's ruling on any written motion.
- C. The necessity for and specificity of evidentiary objections are governed by the Louisiana Code of Evidence.

**Louisiana Code of Criminal Procedure art. 930.4
(Post-Conviction Review)**

- A. Unless required in the interest of justice, any claim for relief which was fully litigated in an appeal from the proceedings leading to the judgment of conviction and sentence shall not be considered.
- B. If the application alleges a claim of which the petitioner had knowledge and inexcusably failed to raise in the proceedings leading to conviction, the court shall deny relief.

STATEMENT OF THE CASE

In 2013, after a chase through the woods from his motel room, Petitioner gave himself up and was arrested for possessing 196.57 grams of cocaine, along with additional narcotics and paraphernalia used to make powdered cocaine into crack cocaine. This was a violation of Louisiana Revised Statute 40:967(F)(1)(a), necessarily punishable at hard labor and, therefore, subject to a twelve-person jury trial with at least a 10-2 verdict required for conviction.

Petitioner pled not guilty and, after a jury trial in February 2014, was found

guilty of the responsive offense of attempted possession of cocaine between 28 and 200 grams, a violation of La. Rev. Stat. 14:27, 40:967(F)(1)(a), and 40:979(A), by a vote of 10-2.¹ The trial court sentenced defendant to fifteen years at hard labor. After sentencing, Petitioner filed motions for new trial and post-verdict judgment of acquittal, neither of which complained about the 10-2 verdict and both of which were denied as being moot and untimely. The State filed a habitual offender bill of information alleging defendant to be a second-felony habitual offender based on his prior 2000 conviction for armed robbery. Petitioner stipulated to the contents of the habitual offender bill and the trial court adjudicated him a second-felony habitual offender resentencing him to twenty-two years at hard labor.²

Petitioner appealed his conviction to the state First Circuit Court of Appeal and, among other issues, raised the issue of the non-unanimous jury verdict. The First Circuit denied his appeal, finding that the constitutionality of Louisiana's jury verdict law had not been properly pleaded and raised in the trial court and was, therefore, not properly before the court. *State v. Taylor*, 2015-1144 (La. App. 1 Cir. 2/10/16, *9), 2016 WL 562674. On March 13, 2017, the Louisiana Supreme Court denied Petitioner's application for a writ of certiorari. *State v. Taylor*, 2016-0457 (La. 3/13/17), 216 So.3d 799. Petitioner did not seek review of that judgment by this Court.

¹ Petitioner alleges that had unanimous jury verdicts been required, he would not have been convicted. That, however, is pure speculation. This is particularly true where ten jurors vote for a responsive verdict since it is entirely possible that the two dissenting jurors were holding out for the more serious conviction.

² The original sentence was for 22 years without probation or parole. The Fourth Circuit Court of appeal vacated that sentence because the law provides that it must be with the opportunity for probation and parole. The trial court resentenced Petitioner to 22 years *with* benefit of probation and parole.

Two years later, Petitioner filed a counseled Application for Post-Conviction Relief with the state trial court. Pet'r. Appx. A. His sole claim for relief was “ineffective assistance of counsel for not fully litigating a motion to suppress statement which linked the defendant to a cell phone found within close proximity to the weight of narcotics for which he was convicted.” *Id.* *He did not claim that he was convicted by a non-unanimous jury in violation of federal constitutional law.*

The trial court, applying *Strickland v. Washington*, 466 U.S. 668 (1984), determined Petitioner failed to meet either prong of the *Strickland* test and, therefore, his claim of ineffective assistance of counsel was without merit. Pet'r. Appx. A. Since the issue of non-unanimous jury verdicts was not presented to the court, it was not addressed in any way nor did it form any part of the court's final judgment.

Petitioner applied for a writ to the state Court of Appeal, where the writ was “denied on the showing made.” Pet'r. Appx. B. Petitioner applied for a writ to the Louisiana Supreme Court, where the writ was denied by per curium opinion stating that he had failed “to show that he received ineffective assistance of counsel.” Pet'r. Appx. C. Since the issue of non-unanimous jury verdicts was not presented to the state supreme court, it was not addressed in any way nor did it form any part of the court's final judgment. The court further ruled that Petitioner's claims had now been fully litigated and that he had exhausted his right to state collateral review. *Id.*

ARGUMENT

I. THE LONGSTANDING RULE THAT THIS COURT WILL NOT CONSIDER CLAIMS THAT WERE NOT PRESSED OR PASSED UPON IN THE STATE COURT WHOSE JUDGMENT IS AT ISSUE CREATES A WEIGHTY PRESUMPTION AGAINST REVIEW.

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 *Robertson*, 520 U.S. at 86; *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.” *Robertson*, 520 U.S. at 86

(citations omitted). *See generally* S. Shapiro, K. Geller, T. Bishop, E. Hartnett, D. Himmelfarb, SUPREME COURT PRACTICE 181-197 (10th Ed. 2013)

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, 16 n. 2 (1980). The State has not consented to waive Petitioner’s procedural default in this matter. As to the first exception, the issue of whether non-unanimous jury verdicts are constitutional is not a new issue. It has been raised in hundreds of cases in Louisiana, even since the Louisiana Supreme Court definitively upheld the laws in 2009. *See State v. Bertrand*, 2008-2215 (La. 3/17/09), 6 So. 3d 738, 742 and cases citing it. It could have easily been raised below.

A. The Judgment Which the Petitioner Asks this Court to Review Does Not Rule on the Sole Issue Raised in this Petition

The sole federal question Petitioner raised here – whether non-unanimous jury verdicts are constitutional – was not “drawn in question” or “specially set up or claimed” by Petitioner during post-conviction proceedings nor was it addressed or decided by any post-conviction court. *See Pet’r. Appx. D* (Application for Post-Conviction Relief) and *Pet’r. Appx. A* (Reasons for Denying Application for Post-Conviction Relief). *See also Pet’r. Appx. B* (First Circuit denial of writ) and *Pet’r. Appx. C* (Louisiana Supreme Court Per Curium on post-conviction review). Thus, there is no federal question for this Court to review. Whether the requirement that a

federal claim be addressed or properly presented in state court is jurisdictional or prudential, the principle of comity should require that this petition be denied. *See Robertson*, 520 U.S. at 90, citing *Yee v. Escondido*, 503 U.S. 519, 533 (1992).

B. Petitioner’s Non-Unanimous Jury Claim Was Waived and is Time-barred.

1. No certiorari review was sought on direct review so the claim is time-barred.

Petitioner is not seeking review of the judgment of the Louisiana First Circuit Court of Appeal *on direct review*, presumably because he realizes it is time-barred.³ Although Petitioner raised his non-unanimous jury claim three and one-half years ago, the First Circuit rejected it because it was not “properly pleaded and raised in the trial court below,” an adequate and independent state procedural ground for denial. The Louisiana Supreme Court denied his request for a writ of certiorari March 13, 2017 – two and one-half years before his petition for review was filed with this Court and long outside of the ninety-day time limitation to file for direct review of that issue in this Court. *See* 28 U.S.C. § 2101(c) and Supreme Court Rule 13(1) & (2). He thus forfeited any claim for relief from a non-unanimous jury verdict by not requesting review of the only state court decision on the federal question raised herein.

2. No objection was made at trial so defendant waived the claim.

As noted above, the Louisiana courts on direct review rejected Petitioner’s non-

³ Counsel for Petitioner on appeal was the same as counsel representing Petitioner in this writ application.

unanimous jury verdict claim because it was not raised at trial. 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. Furthermore, “[i]t is well-settled that a constitutional challenge may not be considered by an appellate court unless it was properly pleaded and raised in the trial court below. In order to do so, a party must raise the issue of unconstitutionality in the trial court, the alleged unconstitutionality must be specially pleaded, and the grounds outlining the basis of unconstitutionality must be particularized.” *State v. Taylor*, 2015-1144 (La. App. 1 Cir. 2/10/16, *9), 2016 WL 562674, citing *State v. Hatton*, 07-2377 (La. 7/1/08); 985 So.2d 709, 719–20. See also *State v. Schoening*, 00-0903 (La. 10/17/00); 770 So.2d 762, 764 (citing *Vallo v. Gayle Oil Co.*, 94-1238 (La. 11/30/94); 646 So.2d 859, 864–65).

Furthermore, Louisiana law 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.* In particular, Louisiana law requires that a defendant object to jury instructions either prior to or during jury deliberations. *State v. King*, 47,207 (La. App. 2 Cir. 6/27/12, 13), 94 So.3d 203, 212. Federal law similarly 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). 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. Such an objection is procedurally required in order to raise an objection to the non-unanimous verdict 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).

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 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)). “[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 about the 10-2 verdict instruction prior to or at any time during deliberations or before the jury was dismissed. This claim was waived long ago and cannot be resurrected now.

II. PETITIONER CANNOT BENEFIT FROM THIS COURT'S DECISION IN *RAMOS v. LOUISIANA*, NO. 18-5924, IN POST-CONVICTION PROCEEDINGS SO HIS PETITION SHOULD BE DENIED OUTRIGHT

This Court granted the petition for a writ of certiorari in *Ramos v. Louisiana* March 18, 2019. However, because Petitioner has exhausted his right to state direct and collateral review, he would not benefit from a favorable decision in *Ramos v. Louisiana*, should that occur. *See Griffith v. Kentucky*, 479 U.S. 314 (1987), *Teague v. Lane*, 489 U.S. 288 (1989), *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016). Accordingly, the petition in this case should be denied.

III. ALTERNATIVELY, THE PETITION SHOULD BE DENIED ON ITS MERITS OR HELD PENDING THE DECISION IN *RAMOS*.

The Petitioner contends that the Sixth Amendment requires that a jury verdict be unanimous and that the Fourteenth Amendment imposes that requirement on verdicts rendered in criminal trials in state courts. Pet'r App. 5. He argues that “a two track approach to the trial rights afforded by the Sixth Amendment makes no sense” and was rejected in *McDonald v. City of Chicago*, 561 U.S. 742 (2010) and *Timbs v. Indiana*, 139 S.Ct. 682 (2019). Pet'r App. 4-5. He further claims that “uniformity is required whenever a Bill of Rights protection is incorporated into the Fourteenth Amendment’s due process clause and made applicable to the states” and that because a “unanimous jury is required for federal prosecutions so too must it now be for state prosecutions.” Pet'r App. 5-6. Louisiana disputes this claim, as more fully set forth in its brief in opposition to the petition of Evangelisto Ramos.

As argued more fully in *Ramos*, for nearly fifty years, Louisiana Courts have faithfully relied upon *Apodaca v. Johnson*, 406 U.S. 404 (1972) and *Johnson v.*

Louisiana, 406 U.S. 356 (1972). Ten years ago, the Louisiana Supreme Court wrote: “Although the *Apodaca* decision was, indeed, a plurality decision rather than a majority one, the [Supreme] Court has cited or discussed the opinion *no less than sixteen times* since its issuance. 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.” *State v. Bertrand*, 2008-2215 (La. 3/17/09), 6 So. 3d 738, 742. 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 State Constitution. Historically, the requirement of jury unanimity was rejected as a constitutional requirement by the Founding Fathers. Furthermore, since that time, nearly every nation using a jury, including Great Britain, has recognized the problems involved in requiring unanimous verdicts and has moved to allowing non-unanimous jury verdicts. It is simply not a right with concrete historical roots that is fundamental to our scheme of ordered liberty.

This Court should reject Petitioner’s arguments that Louisiana’s 10-2 jury verdict violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

The petition for a writ of certiorari should be denied because the sole issue raised in the petition was not presented to the state courts for consideration in post-conviction and, consequently, there is no state court judgment deciding the issue of the constitutionality of non-unanimous jury verdicts to be reviewed.

Additionally, Petitioner's case is no longer on direct review so he should not benefit from any favorable decision in *Ramos v. Louisiana*.

Alternatively, the petition should be denied on its merits or held pending this Court's decision in *Evangelisto Ramos v. Louisiana*, No. 18-5924 (April 3, 2019), and then disposed of accordingly.

Respectfully submitted.

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