

No. 19-6679

In the
Supreme Court of the United States

HORATIO JOHNSON
Petitioner

vs.

THE STATE OF LOUISIANA
Respondent

On Petition for a Writ of Certiorari to
The Louisiana Fourth Circuit Court of Appeal

REPLY BRIEF OF PETITIONER

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Argument in Reply

As the Sixth Amendment claim raised here was squarely presented to the Louisiana Supreme Court and has never been rejected on independent state law grounds, this Court should continue to hold this case pending its decision in *Ramos*.

In an effort to show that Petitioner's constitutional claim is not properly before this Court, the State argues that the "Fourth Circuit made no mention of the United States Constitution, much less the Sixth Amendment right to a jury trial, anywhere in its decision."¹ But in rejecting Mr. Johnson's original statutory-based argument, which admittedly, did not depend on the Sixth Amendment, the Fourth Circuit Court of Appeal rejected his argument, in part, on the following ground:

In addition, both the Louisiana Supreme Court and the United States Supreme Court have held that a statute permitting non-unanimous jury verdicts in non-capital cases is constitutional. *State v. Bertrand*, 08-2215, 08-2311, pp. 6-8 (La. 3/17/09), 6 So. 3d 738, 742-43; *Apodaca v. Oregon*, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972). ***The 2018 statutory amendments at issue here do not undermine those holdings.***²

As the holdings in *Apodaca* and *Bertrand* are both unequivocally premised on the right to a jury trial under the Sixth Amendment to the U.S. Constitution, the emphasized text plainly constitutes a holding premised on the U.S. Constitution.

Regardless, it is sufficient for purposes of review by this Court, that the Petitioner had squarely presented his Sixth Amendment challenge to the Louisiana Supreme Court (with no opposition from the State). The Petitioner noted to that court that although the claim was foreclosed under current jurisprudence, he was raising the issue to preserve it for further review by this Court,

¹ State's Brief in Opposition at 4.

² Appendix to Petition at A26 (emphasis added).

which granted certiorari in *Ramos* five days after the Fourth Circuit issued its decision in this case. That the claim may have not been squarely raised to the Fourth Circuit is not fatal because Louisiana law does not foreclose review of the claim on the merits in the first instance at any subsequent point in the direct appeal process.

The Louisiana Supreme Court long ago held that errors related to the jury vote count may be reviewed under the state's error-patent doctrine, which *requires* a court to correct an error *at any time*, even if not raised by the defendant, if the error "is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence."³ Likewise, that court has long held that strict procedural requirements for claim preservation may be dispensed with for review of structural errors that both affect a defendant's substantial rights and implicate the reliability of the fact-finding process.⁴ If *Ramos* holds that a guilty verdict must, as a matter of constitutional law, be premised on a unanimous vote of the jury, then a conviction premised on an insufficient number of jurors' votes should readily constitute both a structural error and an error patent. In other words, even if the state courts, on remand from this Court, conclude that the petitioner's Sixth Amendment challenge was not adequately raised or addressed by the intermediate appellate court, the issue may nonetheless be addressed on the merits.

³ See *State v. Bradford*, 298 So. 2d 781, 785 (La. 1974) (quoting L.A. C. Cr. P. art. 920(2)).

⁴ See *State v. Williamson*, 389 So. 2d 1328, 1331 (La. 1980) (review of error warranted despite lack of objection where error is "of such importance and significance as to violate fundamental requirements of due process"); *State v. Arvie*, 505 So. 2d 44, (La. 1987) (review despite lack of objection would be warranted where "error is so fundamental that it strikes at the very essence of the reliability of the fact-finding process"); *State v. Hongo*, 96-2060 (La. 12/02/97), 706 So. 2d 419, 420-21(indicating that structural errors are reversible notwithstanding absence of objection).

In this regard, the Respondent is simply wrong to infer that the Louisiana's Supreme Court's unreasoned writ denial in this case suggests that that Court has already concluded that the issue was not properly before it. In support of that inference, the State presents a list of undecided writ applications, in which the Sixth Amendment issue was raised both on direct appeal and on collateral review.⁵ The State claims that the Louisiana Supreme Court is holding these cases pending *Ramos*. The State thus surmises that because the Petitioner's writ was denied and is therefore not on the list, the Supreme Court must have rejected it on an independent state law ground.⁶

This argument is specious. First, the State merely assumes that the Louisiana Supreme Court is "holding" these cases, an assumption apparently premised only on the fact that those cases have not yet been decided. But the oldest case on the list (Jinks) was filed less than ten months ago, well within the expected time frame for the pendency of a writ application in the Louisiana Supreme Court. Second, the Petitioner's writ application was filed 11 months ago, making it older than any case on the State's list, a fact readily evinced by the lower (earlier) case number assigned to Petitioner's writ (19-K-601). Thus, even if the Louisiana Supreme Court is holding cases pending *Ramos*, it made the decision to do so after it decided the Petitioner's writ application.

Conclusion

As the foregoing discussion makes clear, this Court cannot conclusively determine that Louisiana law will prevent the Petitioner from benefitting from a favorable decision in *Ramos*. Accordingly, this Court should hold this case pending its decision in *Ramos*. Thereafter, the

⁵ Respondent's Appendix C.

⁶ Brief in Opposition at 4 n.10, 5 n.11.

Respondent, on remand, may present its state law defenses in the state court, where they may appropriately be considered in the first instance.

Respectfully submitted,

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