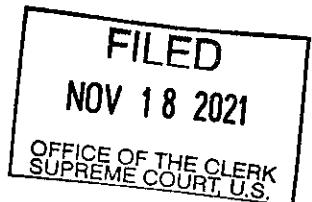


No.

21 - 6391

ORIGINAL



IN THE
SUPREME COURT OF THE UNITED STATES

HAI A. DUONG — PETITIONER

vs.

TIM HOOPER, WARDEN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

HAI A. DUONG
613130, CYPRESS—3
LOUISIANA STATE PENITENTIARY
ANGOLA, LA 70712

QUESTIONS PRESENTED

Louisiana voted to change its Constitution to require unanimous verdicts in non-capital cases where they were not required before. In 1997 and 1998, without amending the Constitution, the Legislature amended *La. R.S.* 14:42(C) and (D) to give prosecutors a unilateral power to procure aggravated (first) degree rape convictions without unanimous verdicts: This case involves non-unanimous verdicts leading to the following questions:

1. Can Louisiana's 1997 and 1998 legislative amendments to *La. R.S.* 14:42 (C) and (D) qualify, absent a constitutional amendment, as the attendant provision necessary to change the classification of a charged capital offense?
2. Was Duong's Sixth Amendment right to a unanimous verdict, protected by the Fourteenth Amendment, contravened because *La. R.S.* 14:42(D)(2)(b) unlawfully gave the State the authority to violate the constitutional and statutory mandates of *La. Const. Art. I, § 17(A)* and *La. C. Cr. P. art. 782*?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

	PAGE NO.
QUESTIONS PRESENTED.....	ii
LIST OF PARTIES.....	iii
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES CITED.....	v
INDEX TO APPENDICES.....	vi
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2
CONFIDENTIALITY OF NAMES.....	4
STATEMENT OF THE CASE.....	4
REASONS FOR GRANTING THE WRIT.....	6
1. Duong was convicted by a non-unanimous jury verdict in violation of the Sixth and Fourteenth Amendments to the United States Constitution.....	9
A. The Jury's Verdict was not Unanimous.....	9
B. Non-Unanimous Jury Verdicts Violate The Sixth And Fourteenth Amendments To The United States Constitution.....	10
2. Preservation is not required in order for Duong to raise his less-than-unanimous jury verdict issue.....	12
CONCLUSION.....	13

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Apodaca v. Oregon, 406 U.S. 404, 92 S.Ct. 1628 (1972).....	5,7
Danforth v. Minnesota, 552 U.S. 264 (2002).....	6
Duong v. Vannoy, 141 S.Ct. 933 (2020).....	5
Edwards v. Vannoy, 141 S.Ct. -- 1547 (2021).....	6,7
Kennedy v. Louisiana, 554 U.S. 407, 128 S.Ct. 2641 (2008).....	8,10
Ramos v. Louisiana, 140 S.Ct. 1390 (2020).....	5,6,7,8,10,11,12
State v. Duong, 13-763 (La. App. 5 Cir. 2014); 148 So.3d 623; Writ denied, 14-1883 (La. 4/17/15); 168 So.3d 395.....	4
State v. Gipson, 2019-1815 p. 2 (La. 6/3/20); 296 So.3d 1051.....	12
State v. Patterson, 2011-0648 (La. App. 4 Cir. 8/24/12); 98 So.3d 439.....	11
State v. Patterson, 2012-2042 (La. 3/1913); 112 So.3d 806.....	11
Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1988).....	6
Yick v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064 (1886).....	10
STATUTES AND RULES	
Fed. R. Crim. P. 49.1.....	4
La. R.S. 46:1844(W)(3).....	4
OTHER	
Rule 10 of the United States Supreme Court.....	6

INDEX TO APPENDICES

<u>APPENDIX</u>		<u>PAGE</u>
A	Louisiana Supreme Court's November 10, 2021, Judgment	1
B	State Appellate Court's June 21, 2021 Judgment	3
C	State District Court's May 5, 2021, Judgment	5
D	Application Writ Certiorari and/or Supervisory Writ of Review	7
E	Application for Supervisory Writ of Review	19
F	Application for Post-Conviction Relief with Memorandum in Support	27

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Duong respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Louisiana Supreme Court appears at Appendix A to the petition and is reported at 2021-01032 (La. 11/10/21); --So.3d --, 2021 WL 5232540. The opinion of the Louisiana Court of Appeal, Fifth Circuit appears at Appendix B to the petition and is unreported.

JURISDICTION

The Louisiana Supreme Court decided Duong's case November 11, 2021. A copy of that decision appears at Appendix A. The Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

No person shall be held to answer for a capital, or otherwise infamous crime ... nor be deprived of life, liberty, or property without due process of law[.]

The Sixth Amendment to the United States Constitution provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I § 1 of the Louisiana Constitution:

All government, of right, originates with the people, is founded on their will alone, and is instituted to protect the rights of the individual and for the good of the whole. Its only legitimate ends are to secure justice for all, preserve peace, protect the rights, and promote the happiness and general welfare of the people. The rights enumerated in this Article are inalienable by the state and shall be preserved inviolate by the state.

Article I § 2 of the Louisiana Constitution:

No person shall be deprived of life, liberty, or property, except by due process of law.

Article I § 3 of the Louisiana Constitution:

No person shall be denied the equal protection of the laws.

Article I § 17 of the Louisiana Constitution:

A criminal case in which the punishment **may** be capital shall be tried before a jury of twelve person, all of whom must concur to render a verdict. (Emphasis added).

La. C. Cr. P. art. 782

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. (Emphasis added).

La. R.S. 14:42(D)(1)(2)(a)(b)

D. (1)Whoever commits the crime of aggravated rape shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

(2) However, if the victim was under the age of thirteen years, as provided by Paragraph A(4) of this Section:

(a) And if the district attorney seeks a capital verdict, the offender shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence, in accordance with the determination of the jury. The provisions of C. Cr. P. Art. 782 relative to cases in which punishment may be capital shall apply.

(b) And if the district attorney does not seek a capital verdict, the offender shall be punished by life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The provisions of C. Cr. P. Art. 782 relative to cases in which punishment at hard labor shall apply.

CONFIDENTIALITY OF NAMES

Fictitious names have been assigned to JT and NT for easier reading. JT is called Janet and NT Nicole. *Fed. R. Crim. P.* 49.1; *La. R.S.* 46:1844(W)(3).

STATEMENT OF THE CASE

On June 21, 2012, Duong was formally charged by a 5 count indictment: counts 1 and 2 accused him of aggravated rape; counts 3 and 4 accused him of molestation of a juvenile; and count 5 accused him of aggravated oral sexual battery. On July 18, 2012, Duong pled not guilty. A jury was selected June 10, 2013, and trial began June 11, 2013. On June 12, 2013, a non-unanimous jury returned guilty as charged verdicts on counts 1,3,4 and 5. On count 2, the non-unanimous jury returned a responsive verdict of attempted aggravated rape. The court sentenced Duong to imprisonment terms of: life on count 1; fifty years on count 2; fifteen years each on counts 3 and 4; and 10 years on count 5. The court ordered the sentences to be served at hard labor, concurrently and without benefits. Duong was unsuccessful in the direct appeal of his convictions and sentences. *State v. Duong*, 13-763, (La. App. 5 Cir. 8/8/14); 148 So.3d 623, *writ denied*, 2014-1883 (La. 4/17/15); 168 So.3d 395. Duong's collateral attack of his convictions and sentences were unsuccessful at the state and federal levels.

On December 7, 2020, this Court denied Duong's application for certiorari after he was unable to obtain a federal writ of habeas corpus. *Duong v. Vannoy*, 141 S.Ct. 933 (2020).

Duong filed a successive application for post-conviction relief (SAPCR) in the state district court after this Court decided *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020). On May 5, 2021, the trial court summarily denied Duong's SAPCR and said he failed "to allege a claim which, if established, would entitle [him] to relief." Appendix C, p. 6. On June 21, 2021, the appellate court denied Duong's writ application and held that "at the time of his conviction, a non-unanimous jury verdict was not unconstitutional under *Apodaca v. Oregon*, 406 U.S. 404. 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972), and relator's conviction became final prior to the *Ramos* decision." Appendix B, p. 4. On November 11, 2021, the Louisiana Supreme Court denied Duong's timely writ application; however, Chief Justice Weimer and Justice Griffin dissented and said they "would grant to address the retroactivity of **Ramos v. Louisiana**, 140 S.Ct. 1390, 206 L.Ed.2d 583 (2020) under the laws of Louisiana." Appendix A, p. 2. This instant petition for a writ of certiorari timely follows.

REASONS FOR GRANTING THE WRIT

Under Rule 10, the Louisiana Supreme Court's decision to deny relief may be reviewed by the Court because the reasons for denial are repugnant to the United States Constitution and Duong specifically claimed his right, privilege, and immunities under the Fourteenth Amendment to the United States Constitution. See 28 U.S.C. § 1257(a).

On May 17, 2021, this Court, in a split decision, said *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020) does not apply retroactively on federal collateral review. Even so, the Court's decision did not bar Louisiana from extending Duong relief from his unconstitutional convictions because, as the Court said, Louisiana is "free ... to retroactively apply the jury unanimity rule as a matter of state law in state post-conviction proceedings." *Edwards v. Vannoy*, 141 S.Ct. 1547, 209 L.Ed.2d 651, n. 6 (2021)(citing *Danforth v. Minnesota*, 552 U.S. 264,282 (2002)).

Duong's APCR included state law claims for retroactivity under *Danforth v. Minnesota*, 552 U.S. 264 (2008). *Danforth* held that states are free to consider local interests and other tests for retroactivity. Moreover, in *Edwards*, this Court underscored that states can utilize their own test and also changed the *Teague* test to remove the watershed criminal procedure

exception. What Duong is asking the Court to decide now is whether his Sixth Amendment right to a unanimous verdict is substantive in nature and not simply a watershed rule of criminal procedure. In denying Duong's writ application, the Fifth Circuit Court of Appeal acknowledged that Duong was prosecuted for 2 offenses that may be punishable by death but sought to undermine his constitutional protections. The appellate court said:

La. C. Cr. P. art. 930.8(A)(2) permits a defendant to seek post-conviction relief outside of the applicable time limitations if "the claim ... is based upon a final ruling of an appeal court establishing a theretofore unknown interpretation of constitutional law *and petitioner establishes that this interpretation is retroactively applicable to his case[.]*" (Emphasis added). *Ramos*, which held that a defendant who is tried for a serious crime has a right to a unanimous jury verdict, applies only to cases pending on direct appeal and to future cases. 140 S.Ct. at 1407....At the time of his conviction, a non-unanimous jury verdict was not unconstitutional under *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972), and relator's conviction became final prior to the *Ramos* decision. *Edwards* holds that *Ramos* is not retroactive, and Louisiana state laws currently do not provide that jury unanimity applies to serious offenses occurring before January 1, 2019, nor that the unanimity requirement applies retroactively to cases on collateral review. Accordingly, the trial court did not err in determining that relator failed to prove that he was entitled to post-conviction relief.

Appendix A, p. 2 (internal citations omitted).

2 of Duong's convictions are classified as capital offenses under Louisiana law. The only reason the death penalty could not be sought was because this Court said it is unconstitutional to enforce the death penalty for

non-homicide offenses. *Kennedy v. Louisiana*, 554 U.S. 407, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008). Either way, Duong's death is the only way his life without benefits sentence can be satisfied.

Duong's APCR was dismissed under *La. C. Cr. P. art.* 930.8 because he, allegedly, failed to file his claim timely and because he does not fall into the category of cases where the issue was preserved and he was not still pending on direct review. However, his claims are based on more than this Court's decision in *Ramos*. Duong's claims directly confronts the so-called constitutionality of racist laws that have been recognized as such and stricken from the books—except for a class of people who, like Duong, did not reap the benefit of the prospective change in the law, or the retroactivity of the *Ramos* decision, because their convictions and sentences were final. It also confronts the unconstitutionality of a legislative amendment that was allowed to usurp Duong's constitutional and procedural protections in a “criminal case in which the punishment **may** be capital.” *La. Const. Art.* I, § 17(A); cf. *La. C. Cr. P. art.* 782(A) (emphasis added). Accordingly, the unresolved issues of law presented in this case, along with Louisiana's conflicting and erroneous decision, begs the Court to invoke its supervisory jurisdiction.

1. Duong was convicted by non-unanimous jury verdicts in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

A. THE JURY'S VERDICTS WAS NOT UNANIMOUS.

When Duong was convicted, *La. Const. Art. I, § 17* and *La. C. Cr. P. art. 782* allowed for non-unanimous verdicts. The current versions of these provisions continues to allow non-unanimous verdicts in alleged non-capital cases for offenses committed before January 1, 2019. *La. Const. Art. I, § 17(A)*; in pertinent part, provides:

Jury Trial in Criminal Cases. 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. 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.

Duong was convicted of aggravated rape of a person under thirteen by a non-unanimous (11-1) jury on June 12, 2013. On that same date, though he was charged with aggravated rape of a person under thirteen, Duong was convicted, by an eleven-to-one vote of attempted aggravated rape of a person under thirteen. Under Louisiana law, these 2 offenses were capital and thus required unanimous verdicts to convict. In connection with the 2

capital offenses, Duong was also convicted on 2 counts of molestation of a juvenile and 1 count of aggravated oral sexual battery by non-unanimous verdicts. In summarily denying Duong's SAPCR, the district court overlooked 2 important legal facts: (1) any law founded in racism is unconstitutional and cannot stand; and (2) because of an unconstitutional legislative amendment, *La. R.S. 14:42(D)(2)(b)* was altered and improperly gave district attorneys the authority to change a capital offense into a non-capital one. See *Yick v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); *Kennedy v. Louisiana*, 554 U.S. 407, 128 S.Ct. 2641.

B. NON-UNANIMOUS JURY VERDICTS VIOLATE THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Court's rhetorical questions (and answers) in *Ramos* makes this point clear:

On what ground would anyone have us leave Mr. Ramos in prison for the rest of his life? Not a single Member of this Court is prepared to say Louisiana secured his conviction constitutionally under the Sixth Amendment. No one before us suggests that the error was harmless. Louisiana does not claim precedent commands an affirmance. In the end, the best anyone can seem to muster against Mr. Ramos is that, if we dared to admit in his case what we all know to be true about the Sixth Amendment, we might have to say the same in some others. But where is the justice in that? Every judge must learn to live with the fact he or she will make some mistake; it comes with the territory. But it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequence of being right.

Ramos v. Louisiana, 140 S.Ct. 1390, 1408.

According to this Court, less-than-unanimous convictions are violative of the Sixth Amendment. The Sixth Amendment right to a jury trial is binding on the States through the Fourteenth Amendment. If the Sixth Amendment always required unanimous verdicts, the retroactivity question takes on a new meaning since the jury was not convinced, beyond a reasonable doubt, of Duong's guilt on either of the 5 counts. *Ramos v. Louisiana*, supra. Even the Louisiana Supreme Court noted that a "less than unanimous verdict suggests that the evidence, as viewed by the jury, was not overwhelming." *State v. Patterson*, 2012-2042 (La. 3/19/13); 112 So.3d 806, 809 (quoting *State v. Patterson*, 2011-0648 (La. App. 4 Cir. 8/24/12); 98 So.3d 439. Also, because of the nature of the charge, the less-than-unanimous verdict would have been invalid in every other state. Only in Louisiana does a racist Jim Crow law deprive citizens of their lives and liberty by a less-than-unanimous verdict. Said another way, Louisiana is the only state in the Union that sentences people to life imprisonment, at hard labor, without the benefits of probation, parole, or suspension of sentence on less-than-unanimous verdicts.

In *Ramos*, this Court said the Sixth Amendment always required unanimity; therefore, the *Ramos* decision was not a new constitutional rule

of criminal procedure. Secondly, if the racist Louisiana law makers had not tampered with the constitutional *and* substantive unanimity right, the question of whether less-than-unanimous verdicts violate the constitution would have never been asked. Accordingly, Duong is entitled to relief and, as the former Chief Justice of the Louisiana Supreme Court wrote, it is time to consider a retroactivity test “that takes into account the harm done by the past use of a particular law.” *State v. Gipson*, 2019-1815 p. 2 (La. 6/3/20); 296 So.3d 1051 (Johnson, C.J. dissenting).

2. Preservation is not required in order for Duong to raise his less-than-unanimous jury verdict issue.

Duong’s trial counsel objected to the non-unanimous verdicts and filed a pretrial motion opposing any non-unanimous verdict. The Court has the authority and ability to decide if, at least 2 of, Duong’s convictions should be reversed simply because they are unconstitutional; because, although the death penalty is not enforceable for aggravated rape of a person under thirteen, it is still on the books in Louisiana as a capital offense. And, in Duong’s opinion, without a constitutional amendment granting district attorney’s the power to alter the framework within which a proceeding is held, the legislative amendment allowing them to do so is inadequate. That

is to say, a charged capital offense in Louisiana cannot be altered because the district attorney is not seeking the death penalty.

CONCLUSION

For the foregoing reasons Duong's petition for a writ of certiorari should be granted.

Respectfully submitted,



Hai A. Duong

Date: November 17, 2021