No. 19-6679

In the Supreme Court of the United States

HORATIO JOHNSON,
***Petitioner*,**

v.

STATE OF LOUISIANA,
Respondent

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the right to a jury trial guaranteed by the Sixth Amendment, as applied to the States through the Fourteenth Amendment, allow a state-court criminal conviction to stand on a nonunanimous jury verdict?

RULE 14 LIST OF PROCEEDINGS[1]

State v. Johnson, 95-210 (La. App. 5 Cir. 7/25/95), 659 So.2d 846 (manslaughter conviction; no excessive sentence).

State v. Johnson, 98-650 (La. App. 5 Cir. 2/10/99), 729 So.2d 55 (manslaughter conviction; post-conviction proceeding).

State v. Johnson, 2017-0717 (La. App. 4 Cir. 8/27/17), 226 So.3d 1178 (interlocutory writ regarding mistrial; grant of mistrial set aside).

State v. Johnson, 2017-1462 (La. 8/25/17), 224 So.3d 978 (interlocutory writ regarding termination of questioning of witness by state; trial court order set aside).

State v. Bradley, 2018-0734 (La. App. 4 Cir. 5/15/19), 272 So.3d 94 (co-defendant).

[1] Petitioner did not include this section in his petition, so this list is not supplemental but lists all cases related to the instant case.

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STATEMENT OF THE CASE

I. The "Kettlebell Killings"[2]

On February 18, 2014, Petitioner, along with his girlfriend[3] and two other men,[4] savagely beat his cousin, Kenneth Joseph, and his cousin's wife, Lakeitha Joseph, to the point of unconsciousness. After obtaining blue nylon rope and two thirty-pound kettlebells from WalMart,[5] Petitioner tied the victims' hands behind their backs, tied their feet together, and attached a kettlebell to each of them. While the Josephs were still alive, trussed up, and weighed down, Petitioner and the others transported them to the Gulf Intracoastal Waterway in New Orleans East and "tossed" them one hundred feet down into the water. Pet. Appx. A10. According to forensic evidence, the Josephs died of asphyxia by drowning.

A few weeks later, a fisherman discovered Mrs. Joseph's bound body floating in the water. Two weeks after that, Mr. Joseph's body was found near the shoreline

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[2] Because Petitioner made an insufficiency of evidence claim in the lower court, the Louisiana Fourth Circuit Court of Appeals sets forth the details of this horrendous crime in its decision. *See State v. Johnson*, 2018-0409, *2-14, 17-20 (La. App. 4 Cir. 3/13/19), 266 So.3d 969, 973-979, 980-982; Pet. Appx. A3–15, 16–20.

[3] Petitioner met his girlfriend, Brittany Martin, when he was serving time in prison for another murder. She was a guard who lost her job due to the relationship. After his parole, they began a two-year relationship. She was one of the key witnesses at the trial. Although also charged with second-degree murder, she pled guilty to obstruction of justice and, after testifying at trial, was sentenced to ten years in prison, with five years suspended. *See Woman sentenced for role in 2014 drowning of Reserve couple*, WWLTV.com (2/28/18) available at https://tinyurl.com/r2x8waf.

[4] The two other men were Steven "Future" Bradley, a rapper Petitioner was allegedly managing, and Amir "Blue" Ybarra, the owner of the recording studio in which the Josephs were beaten. Bradley was acquitted of the murders but convicted of conspiracy to commit obstruction of justice and obstruction of justice, and sentenced to 35 years for the obstruction charge and 15 years for the conspiracy charge. *See State v. Bradley*, 2018-0734 (La. App. 4 Cir. 5/15/19), 272 So.3d 94. Mr. Ybarra was charged with obstruction of justice but has never been located and is believed to have left the country.

[5] A video of Petitioner and his girlfriend purchasing the blue rope and the kettlebells from WalMart the night of the murders was a key piece of evidence tying Petitioner to the murders.

with the kettlebell still attached. At about that same time, law enforcement located the van used to transport the victims in Georgia,[6] which, ultimately, led to the arrest of Petitioner.

II. Procedural Posture

On August 28, 2014, the State charged Petitioner with two counts of second-degree murder,[7] one count of conspiracy to commit obstruction of justice by tampering with evidence,[8] and one count of obstruction of justice.[9] Defendant pled not guilty to all charges on September 4, 2014.

A jury trial was held August 21-31, 2017. At trial, the State presented testimony from twenty witnesses and introduced numerous exhibits and other tangible evidence. After the State rested, the defense notified the court that it did not intend to call any witnesses. After only two hours of deliberation, the jury returned a verdict of guilty on all counts, with eleven-to-one verdicts for both counts of second-degree murder and the conspiracy charge and a unanimous verdict on the obstruction of justice charge. Defendant was sentenced to two life sentences for the murders,

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[6] On February 20th, Bradley loaned the van to his "street uncle," Frank Mike, Jr., who drove it to Georgia and abandoned it there after discovering blood in the back. He was indicted for interstate transportation of a stolen vehicle by a federal grand jury, pled guilty, and was sentenced to 20 months of time served. *See* Ken Daley, "*Second guilty plea in Reserve couple's drowning case*," NOLA.com (12/17/15) accessible at https://tinyurl.com/telbu8d. He was also charged in state court as an accessory to the murders, obstruction of justice, and conspiracy to obstruct justice. He testified against Petitioner and, after pleading guilty to obstruction and cooperating with prosecutors, was ultimately sentenced to nine years. *See* "*Woman sentenced for role in 2014 drowning of Reserve couple*," WWLTV.com (2/28/18) available at https://tinyurl.com/r2x8waf.

[7] La. R.S. 14:30.1.

[8] La. R.S. 14:26, 14:130.1.

[9] La. R.S. 14:130.1.

twenty years for the conspiracy charge, and forty years for obstruction of justice—each sentence to be served consecutively.

The Louisiana Appellate Project was appointed to represent Petitioner on appeal, and the trial court terminated his trial counsel's representation. In his original brief before the Louisiana Fourth Circuit Court of Appeals, filed October 26, 2018, Petitioner did not even *reference* his non-unanimous verdicts or the Sixth Amendment to the United States Constitution. Nor did he contend that the verdicts violated his federal constitutional rights in any way. *See* Resp. Appx. A.

On November 6, 2018, the voters in Louisiana approved a constitutional amendment that provided for unanimous jury verdicts for all persons committing crimes after January 1, 2019. Based on this change, Petitioner filed a Supplemental Brief in the Fourth Circuit arguing, as the sole issue and error, that his non-unanimous jury verdicts should be set aside under Article I, Section 17, of the Louisiana Constitution and Louisiana Code of Criminal Procedure article 782 because those laws should be applied to him *retroactively* under the Louisiana Supreme Court's decision in *State v. Draughter*, 2013-0914 (La. 12/10/13), 130 So.3d 855. *See* Resp. Appx. B.

On March 13, 2019, after a three page discussion of *Draughter*, the Fourth Circuit held that, because "[t]here can be no retroactive application of these amendments, and defendant's convictions by non-unanimous jury verdict are not unconstitutional, Defendant's third assignment of error has no merit." *State v. Johnson*, 266 So.3d at 985; Pet. Appx. A26. The court held that the Louisiana

legislature had clearly provided that the new *state* constitutional and statutory provisions were to be applied prospectively only to offenses that occur on or after January 1, 2019. Any other decision would be "usurping the function of the Legislature." *Johnson*, 266 So.3d at 985; Pet. Appx. A26. Thus, because "there can be no retroactive application of these amendments," Petitioner's "convictions by non-unanimous jury verdicts are not unconstitutional." *Id.* 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.[10]

Petitioner applied to the Louisiana Supreme Court for a supervisory writ. On October 1, 2019, the Louisiana Supreme Court denied Petitioner's writ application. *State v. Johnson*, 2019-00601 (La. 10/1/19), 280 So.3d 166; Pet. Appx. A28.

Petitioner timely filed a petition for writ of certiorari with this Court.

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[10] The court did cite *Apodaca v. Oregon*, 406 U.S. 404 (1972). However, as in *Osborne v. Clark*, the citation of *Apodaca* was superfluous and unnecessary to its holding that the new Louisiana laws were explicitly prospective in application. *See Osborne v. Clark,* 204 U.S. 565 (1907). As in *Osborne*, the Louisiana Fourth Circuit simply reiterated the "violations of the state Constitution set up in the [appeal], summarize[d] the questions presented by the [appeal], and then addresse[d] itself to answering those questions, suggesting no others, and saying nothing about the Constitution of the United States." *Id.* at 567–68.

As further evidence that this state law issue, and not the federal constitutional question raised herein, was the basis of the Fourth Circuit's decision, the Louisiana Supreme Court unanimously denied Petitioner's application for supervisory writs without reasoned opinion, despite the fact that Petition mentioned the Sixth Amendment in its application. *Johnson,* 280 So.3d 166; Pet. Appx. A28. Given that it has held 63+ applications that raise the Sixth Amendment question, the denial would suggest that the issue was waived in the Fourth Circuit and not properly before the Louisiana Supreme Court. *See* Resp. Appx. C.

REASONS FOR DENYING THE PETITION

I. NO STATE COURT OPINION ADDRESSES THE SIXTH AMENDMENT ISSUE

Petitioner asserts that he appealed his non-unanimous jury verdicts arguing that they violated the Sixth Amendment right to jury trial and that the Louisiana Fourth Circuit Court of Appeals rejected his claim on the merits. This is not true. Petitioner never made a Sixth Amendment claim before the Fourth Circuit and, thus, it did not render a judgment on such a claim.[11]

Based on this erroneous assertion, Petitioner contends this Court has jurisdiction pursuant to 28 U.S.C. §1257(a), which 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 [United States] Constitution* . . . or where any title, right, privilege, or immunity is specially set up or claimed *under the [United States] Constitution* . . . ." (Emphasis added).

Section 1257 cannot provide a basis for jurisdiction, however, because there is no "final judgment" by a state court where the validity of any statute was drawn in question as *repugnant to the United States Constitution* or where the alleged right *under the United States Constitution* was specially set up or claimed. Petitioner's only jury verdict argument to the appellate courts below was that a newly passed *state*

[11] Although Petitioner included the statement "Non-unanimous jury verdicts are unconstitutional in that they violate the defendant's Sixth Amendment guarantee to a jury trial" in his application to the Louisiana Supreme Court, he presented no argument on that point and simply stated "the issue is raised here to preserve it for possible further review by the United States Supreme Court." The Louisiana Supreme Court apparently rejected that statement as unsatisfactory to preserve such a claim since it unanimously denied the writ application without a reasoned opinion. *See* further discussion in n. 10, *supra*.

statute and *state* constitutional provision should have been applied retroactively, pursuant to an earlier *state* court decision.

With "very rare exceptions," *Yee v. Escondido,* 503 U.S. 519, 533 (1992), this Court has "adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 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, 86–87 (1997) (citing *Heath v. Alabama,* 474 U.S. 82, 87 (1985); *Illinois v. Gates,* 462 U.S. 213, 217–219 (1983)). The principle of comity stands behind this "properly-raised-federal-question" doctrine. *See Webb v. Webb*, 451 U.S. 493, 496–500 (1981) (citing *Picard v. Connor*, 404 U.S. 270 (1971)). This comity rule affords state courts "an opportunity to consider the constitutionality of the actions of state officials and, equally important, propose changes that could obviate any challenges to state action in federal court." *Adams*, 520 U.S. at 90 (citations and internal quotation marks omitted). As this Court further explained, "it would be unseemly in our dual system of government to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Id.*

Petitioner bears the burden of showing that the issue was properly presented to the state court. *Webb,* 451 U.S. at 501. Petitioner must either "establish that the claim was raised at the time and in the manner required by the state law," persuade the Court "that the state procedural requirements could not serve as an independent and adequate state-law ground for the state court's judgment," or demonstrate that

he "presented the particular claim at issue here with 'fair precision and in due time.'" *Adams,* 520 U.S. at 86–87. *See also* 16 B. C. Wright, A. Miller, & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 4022, pp. 322–39 (1996). Petitioner cannot meet his burden.

Furthermore, Supreme Court Rule 14.1(g) requires that Petitioner specify "the stage of the proceedings, both in the court of first instance and in the appellate courts, when the federal question sought to be reviewed [was] raised; the method or manner of raising [it] and the way in which [it was] passed on by those courts." Petitioner has failed to meet this requirement, as well.

Although this Court considers the question of whether failure to present a federal claim in state court is jurisdictional or prudential to be "unsettled," *Howell v. Mississippi,* 543 U.S. 440, 445 (2005) (citations omitted), Respondent maintains that this is a jurisdictional matter. Thus, since there is no final state court judgment addressing a properly raised Sixth Amendment claim for this Court to review, this Court is without jurisdiction to rule on the issue.

That said, the Court should also deny the petition for prudential reasons. As this Court has held, "[i]f a case is carried through the state courts upon arguments drawn from the state Constitution alone, the defeated party cannot try his chances in this Court merely by suggesting for the first time when he takes his writ of error that the decision is wrong under the Constitution of the United States." *Osborne*, 204 U.S. at 569 (citing *Crowell v. Randell*, 9 L. Ed. 458, 470 (1836)). After all, this Court is "a court of review, not of first view . . . ." *Timbs v. Indiana*, 139 S. Ct. 682, 690

(2019) (citing *Cutter* v. *Wilkinson*, 544 U.S. 709, 718, n.7 (2005)). The Court should reject Petitioner's invitation to address an issue raised for the first time at this late stage of the litigation.

II. PETITIONER WAIVED ANY FEDERAL CONSTITUTIONAL CLAIM

An argument based on federal law is waived if it was not properly raised in the state courts. *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp*., 537 U.S. 51, 56, n.4 (2002). Where a petitioner fails to list the federal issue as an assignment of error or to argue the point in his state brief, the matter is considered to be waived. *See, e.g. Howell*, 543 U.S.at 443-44; *Beck v. Washington*, 369 U.S. 541 (1962).[12] Because Petitioner did not raise or argue the Sixth Amendment claim in his appeal to the Fourth Circuit, he has waived that claim. In *Howell v. Mississippi,* the petitioner argued that he had presented his federal claim to the state court because he had cited a state case that cited a state case that cited a relevant decision from this Court. 543 U.S. at 443–44. This Court held that was not enough. *Id.*

In the case at bar, Petitioner's argument is weaker than the defendant's argument in *Howell*. As this Court has explained, "[a] litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief . . . by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply

[12] *See* La. C. Cr. P. arts. 930.4(B) ("If the application [for post-conviction relief] 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."), 930.4(C) ("If the application [for post-conviction relief] alleges a claim which the petitioner raised in the trial court and inexcusably failed to pursue on appeal, the court shall deny relief.").

labeling the claim 'federal.'" *Baldwin v. Reese,* 541 U.S. 27, 32 (2004). Petitioner could have easily done any of these things, but he did not.[13] Instead, he specifically characterized his claim as an issue of state law. Thus, he waived his federal Sixth Amendment claim.

III. THE JUDGMENT BELOW RESTED ON A STATE LAW GROUND INDEPENDENT OF THE FEDERAL QUESTION AND ADEQUATE TO SUPPORT THE JUDGMENT

The decision by the Fourth Circuit rested on the court's interpretation of a newly enacted state constitutional amendment and revision to a state statute. The decision was wholly independent of the federal question now being raised and was adequate, in and of itself, to answer the question raised in the appeal and to support the judgment. Thus, this Court should not consider the federal question now being raised. *See Coleman v. Thompson*, 501 U.S. 722 (1991) (citing *Herndon v. Georgia*, 295 U.S. 441 (1935)).

IV. THE COURT SHOULD NOT HOLD THIS CASE FOR *RAMOS*

Although Petitioner requests that this Court hold his application pending determination of the case of *Ramos v. Louisiana*, No. 18-5924, his request is based on a faulty premise. He alleges that he "argued in the courts below [that] his nonunanimous verdicts and Louisiana's nonunanimous jury-verdict system violate the right to a jury trial guaranteed by the Sixth and Fourteenth Amendments . . . which is precisely the issue currently pending before this Court in" *Ramos*. Pet. at 3. Of course, this was not the argument made by Petitioner in the

[13] The non-unanimous jury issue was not novel during the period covering Petitioner's appeal. Over 63 applications for review were filed with the Louisiana Supreme Court raising a non-unanimous verdict as error. *See* Resp. Appx. C.

state intermediate appellate court. Any decision from this Court in *Ramos*—which implicates an issue *different from* that raised below—should have no effect on this case. There is no reason to hold this petition.

CONCLUSION

Louisiana submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

/s/ *Michelle Ward Ghetti*

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