

No. 19-5989

IN THE
Supreme Court of the United States

REV. ERROL VICTOR, SR.,
V.
STATE OF LOUISIANA,
PETITIONER,
RESPONDENT.

**MOTION TO DEFER CONSIDERATION OF PETITIONER'S
APPLICATION FOR WRIT OF CERTIORARI PENDING DETERMINATION
OF THE CASE OF *RAMOS V. LOUISIANA*, No. 18-5924**

Petitioner, through undersigned counsel, moves that this Court's consideration of his Petition for Writ of Certiorari be deferred pending the decision of this Court in the case of *Ramos v. Louisiana*, No. 18-5924, as a favorable determination in that case would render moot nearly all of the issues that petitioner has raised before this Court, as well as render moot issues yet to be litigated in Louisiana courts and which would potentially be before this Court at a later time. As such, the granting of said requested relief would potentially result in fairness to petitioner and considerable judicial economy.

Pursuant to 28 U.S.C. §1257, petitioner herein seeks review of the judgment of the Louisiana Fifth Circuit Court of Appeal in *State v. Victor*, 15-KA-339 (La. App. 5 Cir. 5/26/16), 195 So. 2d 128. On August 1, 2014, petitioner, Rev. Errol Victor, Sr., without the assistance of counsel and in a trial that was significantly marred with substantial violations of the United States Constitution, was

wrongfully convicted by non-unanimous 10-2 verdict of second degree murder.¹ *See* Ex. A. Petitioner was subsequently sentenced to life imprisonment at hard labor without the benefit of parole, probation or suspension of sentence. The Louisiana Fifth Circuit Court of Appeal affirmed petitioner's conviction on May 26, 2016. The Louisiana Supreme Court denied review of that decision on October 15, 2018. Petitioner timely submitted an application for reconsideration with the Louisiana Supreme Court, which refused consideration on February 11, 2019.² Petitioner's initial application for writ of certiorari was submitted in proper person on May 9, 2019, and, as such, was timely filed per United States Supreme Court Rule 13.

¹ The initial charges stemmed from the death of petitioner's eight year old stepson on April 1, 2008, when he suffered from an asthma attack after being disciplined (spanked) by his mother while at home. Petitioner was not present at home at the time. Petitioner did return home after his wife reported that his stepson was having breathing problems. Petitioner also brought his stepson to the hospital, where he tragically passed away later that day. As a result of the death of petitioner's stepson, and in part from the purported medical findings (the validity and veracity of which are specifically contested by petitioner herein), petitioner was ultimately charged with second degree murder.

² Petitioner, who was incarcerated and unrepresented at all relevant times, received, on October 24, 2018, a copy of the Louisiana Supreme Court's October 15, 2018 disposition, per prison logs. On November 6, 2018, petitioner filed his Rehearing Application with the Louisiana Supreme Court, thirteen days after receipt of the copy of the October 15, 2018 disposition of the Louisiana Supreme Court. Louisiana Supreme Court Rule IX, §1 provides that an application for rehearing is to be filed within fourteen days of mailing of the disposition, thus otherwise rendering the filing of the Rehearing Application timely under the "mailbox rule", *See Houston v. Lack*, 487 U.S. 266 (1988), *State of Louisiana ex rel. Egana*, 2000-2351 (La. 9/22/00), 771 So. 2d 668. Despite the general unavailability of petitions for reconsideration under Louisiana Supreme Court Rule IX, §6, the Louisiana Supreme Court's February 11, 2019 refusal to consider said petition nevertheless constituted "discretionary review", to which the Louisiana Fifth Circuit opinion is subject, for purposes of the application of United States Supreme Court Rule 13(1). *See Wilson v. Cain*, 564 F.3d 702, 707 (5th Cir. 2009).

Within that *pro se* application submitted to this Court, petitioner raised several violations of the United States Constitution. For instance, in “Question No. 5, Issue No. 5” of the Original Petition; petitioner raised the issue that his right to Due Process under the Fourteenth Amendment of the United States Constitution was clearly violated by the trial court’s effective refusal to apply as written Louisiana uniform procedural criminal rules resulting in the improper re-allotment of his case (and appears to constitute a rather blatant example of “judge shopping”) in violation of those rules.³

Additionally, in “Question No. 6, Issue No. 6” of the Original Petition; petitioner raised the issue pertaining to the trial court’s exclusion of petitioner’s expert witness, which was predicated upon objections by the State made only after *voir dire* of the expert witness at trial, resulting in petitioner being functionally

³ Said procedural rule, Louisiana Uniform District Court Rule 14.1, prohibits re-allotment of cases arising out of the same facts except under certain circumstances (which includes entry of a *nolle prosequi* by the district attorney). *Victor*, 15-339, 195 So. 3d at 168. By allowing the district attorney to dismiss and re-indict the petitioner for the same offense (six days after dismissal, which followed a dispositive ruling by the properly allotted judge that was unfavorable to the State), and by classifying such as a “*nolle prosequi*”, the trial court blatantly ignored (or, more accurately, re-wrote out of existence) an otherwise clear rule of criminal procedure, which violation rose to the level of a violation of a fundamental right of petitioner to due process under the United States Constitution. *Compare, id* at 168-69 (“Here, the State filed a *nolle prosequi* on April 6, 2010, six days before defendant was re-indicted by a newly empaneled grand jury. Thus, Rule 14.1(a) does not apply.”), *with, id* at 171 (“However, it must be remembered that Judge Jasmine had granted the motion to quash on February 4, 2010. Though the State did not file its motion to dismiss [*nolle prosequi*] until April 6, 2010, the trial court noted in its ruling denying the objection to allotment that grant of the State’s motion to dismiss [*nolle prosequi*] was ‘superfluous’ once the motion to quash had been granted ending the prosecution [*no, these are not misprints*].”). Petitioner raised this constitutional issue in the proceedings in which petitioner herein seeks review. *Id.* at 166.

precluded from obtaining a replacement expert, in violation petitioner's right to Due Process under the Fourteenth Amendment of the United States Constitution.⁴

Finally, and most significantly, in "Question No. 1, Issue No. 1" of the Original Petition; petitioner raised the issue of the constitutionality of the non-unanimous jury verdict in his case. Specifically, petitioner argued that the prospective application of the recent amendment to Article I, Section 17(a) of the Louisiana Constitution violates this Court's pronouncement of retroactive application of such changes in criminal procedure to cases that are pending direct review at the time of the change. *See Griffith v. Kentucky*, 479 U.S. 314 (1987); *State v. Draughter*, 2013-0914 (La. 12/10/13), 130 So. 3d 855 (adopting *Griffith v. Kentucky* to Louisiana law). While this Court's jurisdiction over this issue is questionable under 28 U.S.C. §1257 (as it was not available for direct review in the

⁴ Specifically, petitioner's expert was qualified as such earlier in the case (before the trial court's improper re-allotment of his case). *Victor*, 15-339, 195 So. 3d at 175-76. The issues pertaining to the expert's qualifications (or petitioner's ability to discover same under the circumstances) did not arise until well after the case had been dismissed and petitioner re-indicted, and during the time in which petitioner was unrepresented by counsel. *Id.* at 174-75 (noting that a complaint against petitioner's expert "was investigated" by the Louisiana Board of Medical Examiners on April 20, 2009, but a "formal administrative complaint", which was based, in part, on the findings in the case of *Hamilton v. Negi*, 2012 WL 1067897, 09-860 (W.D. La. 3/29/2012), could not logically have been initiated until after the date of that decision). As the decision presented for review indicates that the State did not challenge the expert's qualifications until after the commencement of trial, despite clearly having the ability to ascertain said issues and to file a motion well prior thereto; petitioner's Due Process rights were clearly violated by excluding petitioner's expert at that time and not affording petitioner an opportunity, by means of a continuance, to obtain a replacement expert. *See id.* at 174-76. Petitioner raised this constitutional issue in the proceedings in which petitioner herein seeks review. *Id.* at 172.

Louisiana Fifth Circuit decision of May 26, 2016),⁵ the issue has also been concurrently raised by undersigned counsel in the Louisiana courts on collateral review in the case of *Victor v. Vannoy*, La. 20th J.D.C. No. 19-WCR-501, and is currently pending supervisory review with the Louisiana First Circuit Court of Appeal on a procedural/jurisdictional issue.⁶ *See Victor v. Vannoy*, La. App. 1st Cir., No. 2019-KW-1123. In any event, given the complicated procedural issues involved, undersigned counsel anticipates that, if not properly before the Court in the pending application, this issue will potentially be before this Court in the future, but not before approximately two to three years of substantial litigation in the Louisiana courts.

The propriety of this Court's jurisdiction of this particular issue notwithstanding; the issue of the constitutionality of non-unanimous jury verdicts is currently pending before this Court in the matter of *Ramos v. Louisiana*, No. 18-

⁵ Petitioner raised this issue in his Application for Rehearing to the Louisiana Supreme Court, filed on November 6, 2018, although the underlying rule change predicate was initially a Louisiana district court decision on the issue.

⁶ The procedural vehicle used to raise the issue collaterally in state court is Louisiana Code of Criminal Procedure Article 360, *et seq.*, which is distinct from the "traditional" post conviction relief procedures of Louisiana Code of Criminal Procedure Article 926, *et seq.* The district court dismissed the petition for lack of jurisdiction, characterizing the relief sought as a petition for post conviction relief under the latter provisions of La. C. Cr. P. Articles 926, *et seq.* At this point, petitioner is in the preliminary stages of resolving the jurisdictional issue of whether the constitutionality of prospective application of the amendment to Article I, Section 17(a) of the Louisiana Constitution pertaining to unanimous jury verdicts is a proper issue to be raised on post conviction procedures under La. C. Cr. P. Article 926, *et seq.*, or whether it must be raised in a separate state habeas corpus proceeding under La. C. Cr. P. Article 360, *et seq.* This is before any consideration of the merits of petitioner's claim takes place, which speaks to the lengthy anticipated timeline for ultimately resolving this issue.

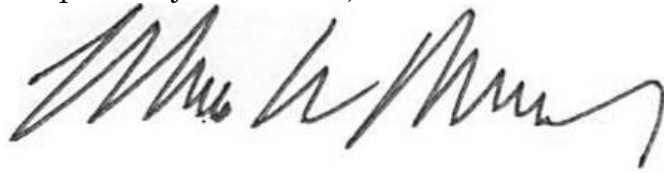
5924. As this Court is most certainly aware, the issue of *Ramos* differs from the issue raised by petitioner herein (and the issue that is currently working its way through the Louisiana courts), in that *Ramos* addresses the constitutionality of non-unanimous jury verdicts as a violation of the Sixth Amendment of the United States Constitution (without reference to the recent amendment to Article I, Section 17(a) of the Louisiana Constitution). As this Court is also aware, oral arguments have already been conducted in *Ramos*, with a decision in that case being imminent. While the particular issues are distinct, the effect of a decision in *Ramos* invalidating non-unanimous jury verdicts under the Sixth Amendment would obviate petitioner's assignment of error as to the constitutionality of the non-unanimous jury verdict in his particular case, as well as the prosecution of said issue in the Louisiana state courts; provided that his application for writ of certiorari is still pending in this Court at the time of the *Ramos* decision, per *Griffith v. Kentucky*, 479 U.S. 314 (1987). Such a favorable decision would also obviate almost all of the assignments of error contained in petitioner's pending application for writ of certiorari; again, provided that his application is pending herein at the time the decision is rendered.⁷

As such, in the interest of fairness to the petitioner, who has been wrongfully convicted and incarcerated under a life sentence for over five years, as well as considerable judicial economy, petitioner herein prays that this Honorable Court

⁷ The issue of improper re-allotment of petitioner's case would not be affected by a favorable decision in *Ramos* and would potentially still require a decision as to certiorari and potential review by this Court.

defer consideration of his pending Petition for Writ of Certiorari until after this Court has issued its decision on *Ramos v. Louisiana*, No. 18-5924.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'C. W. Brown', written in a cursive style.

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STATE OF LOUISIANA

VERSUS

ERROL VICTOR, SR.

40TH JUDICIAL DISTRICT COURT

PARISH OF ST. JOHN THE BAPTIST

STATE OF LOUISIANA

No. 2010-CR-172(1), DIVISION "B"

FILED: 8/1/2014

DEPUTY CLERK: C. M. [Signature]

VERDICT OF THE JURY

WE, THE JURY, FIND THE DEFENDANT, ERROL VICTOR, SR.:

(YOUR VERDICT)

10 Guilty(a)

Adrian Lathers
FOREPERSON

8/1/14
DATE

NOTE TO FOREPERSON: Hand-write your verdict in the designated area above, sign and date with today's date.

Ex. "A"

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