

No. 19-5989

IN THE  
**Supreme Court of the United States**

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ERROL VICTOR, SR.,

PETITIONER,

V.

STATE OF LOUISIANA,

RESPONDENT.

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

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**SUPPLEMENTAL BRIEF IN SUPPORT OF  
PETITION FOR WRIT OF CERTIORARI**

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## **SUPPLEMENTAL QUESTION PRESENTED**

Whether Petitioner's Right to Due Process, Guaranteed under the Fourteenth Amendment to the United States Constitution, Was Violated by the State's *Nolle Prosequi* Dismissal and Reinstitution of Petitioner's Case, where the Original Indictment against Petitioner Was Quashed and the State Avoided Appellate Review of Same, as per the recent Louisiana Supreme Court Case of *Louisiana v. Reimoneng*, 2019-KK-0367, p.1 (La. 10/22/19).

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## SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

In his Original Petition to this Honorable Court for Writ of Certiorari to the decision of the Louisiana Fifth Circuit Court of Appeal in *Louisiana v. Victor*, 15-KA-339 (La. App. 5 Cir. 5/26/16), 195 So. 2d 128; petitioner, Errol Victor, Sr., provided the following prescient analysis in support of Question No. 5, Issue No. 5:

The instant case provides a step-by-step guide of how to judge-shop a case and potentially get away with it. It further provides great insight as to the correct method and arguments to use to allow a clearly judge-shopped case, to be upheld on appeal. As the record reflects that on February 4, 2010, Judge Madeline Jasmine granted appellant/appellants Motion to Quash the amended indictment. [The prosecutor] gave notice of their intent to seek an appeal of the judge's ruling quashing the indictment, however, said ADA failed to timely do so, thereby rendering the judgment of the trial court undisturbed.

Frustrated at the loss, [the prosecutor], sought to subvert the now controlling February 4, 2010, quashed judgment by filing a non-dejure de facto nolle prosequi by the A.A.G., ignoring Judge Jasmine (African American female Judge), power, position, Quash and the correct operation of law. This case was moved/reallotted from Section "A" . . . of the 40<sup>th</sup> JDC to Section "B" . . . a different judge of the prosecutor's choice to preside over the same case. This re-allotment was illegal and Rev. and Mrs. Victor both objected and on May 17, 2010, filed a Motion challenging the unconstitutionality of the process.

Orig. Pet. at pp. 26-27.

On October 22, 2019, in the case of *Louisiana v. Reimonenq*, 2019-KK-0367 (La. 10/22/19), the Louisiana Supreme Court agreed, in principle, with petitioner's analysis:

This case involves the authority of the district attorney to dismiss and reinstitute criminal prosecutions. We granted writs to determine whether fundamental fairness and due process prohibit the state from dismissing and reinstituting criminal charges in order to circumvent the normal order of criminal proceedings. Specifically, the district attorney in this case dismissed and reinstituted charges against defendant in response to two adverse rulings in the trial court. The state refiled charges without ever challenging the rulings in the appellate court, and defendant subsequently filed various motions in limine and a motion to quash, which the trial court denied. Because the actions of the state in this matter so undermined the authority of the trial court that it offends bedrock principles of fundamental fairness and due process, we reverse.

*Louisiana v. Reimonenq*, 2019-KK-0367, p.1 (La. 10/22/19).

Petitioner hereby submits this Supplemental Brief in Support of his Petition for Writ of Certiorari and herein prays: 1) that this Court grant his Petition for Certiorari; 2) that this Court adopt the reasoning of the Louisiana Supreme Court in the case of *Louisiana v. Reimonenq*, 2019-KK-0367 (La. 10/22/19); 3) that this Court reverse the decision of the Louisiana Fifth Circuit Court of Appeal in *Louisiana v. Victor*, 15-KA-339 (La. App. 5 Cir. 5/26/16), 195 So. 2d 128, vacating his conviction of August 1, 2014 and quashing the indictment of April 6, 2010; and 4) in accord with the decision of *Reimonenq*, that this Court further issue an order: a) re-alloting the case to the originally allotted trial court division, Division “A” of the Louisiana 40<sup>th</sup> Judicial District Court (“J.D.C.”), and b) prohibiting the State of Louisiana, in support of any potential reinstitution of criminal charges in this matter, from calling any witnesses previously called in support of the previous

indictment (found tainted in the unchallenged ruling of the trial court on February 4, 2010).

### **OPINIONS BELOW**

The judgment of the Louisiana Fifth Circuit Court of Appeal is reported at *Louisiana v. Victor*, 15-KA-339 (La. App. 5 Cir. 5/26/16), 195 So. 2d 128. The Louisiana Supreme Court's decision denying review of that decision is reported at *Louisiana v. Victor*, 2016-KO-1516 (La. 10/15/18). The Louisiana Supreme Court's decision to refusing to consider petitioner's application for rehearing is reported at *Louisiana v. Victor*, 2016-KO-1516 (La. 2/11/19). Finally, the judgment of Division "A" of the 40<sup>th</sup> Judicial District Court granting petitioner's motion to quash is reported at *Louisiana v. Victor*, 2008 CR 165 (La. 40<sup>th</sup> J.D.C. 2/4/10), and attached as "Appendix A".

### **SUPPLEMENTAL JURISDICTIONAL STATEMENT**

The judgment and opinion of the Louisiana Fifth Circuit Court of Appeal were entered on May 26, 2016. The Louisiana Supreme Court denied review of that decision on October 15, 2018, which decision was received by petitioner on October 24, 2018. On November 6, 2019, petitioner timely submitted an application for reconsideration with the Louisiana Supreme Court. On February 11, 2019, the Louisiana Supreme Court refused to reconsider its previous denial of review, extending the commencement date for filing of this Application with this Court. *See Wilson v. Cain*, 564 F.3d 702, 707 (5<sup>th</sup> Cir. 2009). Petitioner's initial writ application was filed with submitted on May 9, 2019, and, as such, was timely filed

per United States Supreme Court Rule 13(1). Therefore, this Court maintains jurisdiction over this petition pursuant to 28 U.S.C. § 1257(a).

### **SUPPLEMENTAL CONSTITUTIONAL AND STATUTORY PROVISION**

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

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and 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.

U.S. Const. Amend. XIV.

### **SUPPLEMENTAL STATEMENT OF THE CASE**

On August 1, 2014, petitioner, Errol Victor, Sr., without the assistance of counsel, was convicted by non-unanimous 10-2 verdict of second degree murder. 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. Throughout a trial that was significantly marred with substantial violations of the United States Constitution and Constitution of the State of Louisiana; petitioner, without the assistance of counsel, was convicted as charged, on August 1, 2014, by non-unanimous 10-2 verdict.

Of the myriad of constitutional infirmities plaguing this case, some of the most prominent center around the re-allotment of petitioner's case within the Louisiana 40<sup>th</sup> J.D.C. Petitioner's case was initially allotted to Division "A" of the Louisiana 40<sup>th</sup> J.D.C. The judge in that division granted, on February 4, 2010, a defense motion to quash the initial indictment due to the potential improper conduct of the St. John the Baptist Sheriff's Office ("SJBSO") with respect to both the grand jurors and grand jury witnesses. *Victor*, 2008 CR 165, Appx. "A" at p.3. Specifically, the basis of the motion to quash was that a deputy of the SJBSO, though a properly impaneled grand juror, wore his deputy shirt while participating in the grand jury process, clearly displaying his affiliation with the SJBSO. *Id.* In granting the motion to quash, the Division "A" trial judge noted not only the potential impact on fellow grand jurors, but focused specifically, and materially, upon the potential effect on witnesses testifying before the grand jury to "influence, suppress or alter testimony to the prejudice of the defendant":

. . . [T]he Court finds that this case, which involves a sheriff's deputy who wore his deputy shirt while participating in the grand jury indictment process; presents an even greater need for the Court to exercise an 'abundance of caution' to protect not only the sacredness of the grand jury process but also the freedom of

witnesses to testify openly and the rights of the accused that did the *Revere* case. This is a highly publicized case. Understandably anyone appearing before the grand jury might be anxious and nervous. However, the normal anxiety that a grand jury witness might experience could unnecessarily be heightened if a law enforcement officer were among the grand jury panelist.

\* \* \*

The *Revere* Court noted that the “attendance of a police officer would afford opportunity for subjecting witnesses to fear or intimidation, for preventing freedom of full disclosure by testimony, and for infringing the secrecy of the proceeding.” Moreover, because of the secrecy of the grand jury process, only in the “clearest situations would it be possible to show that any influence or prejudice had occurred. A change in expression, a pressure on the hand, or a warning glance would not be shown by the minutes but might well influence, suppress, or alter testimony to the prejudice of the defendant. These were all of the concerns addressed by the *Revere* Court at the mere presence of the investigator in the grand jury room.

\* \* \*

For these reasons, this Court is of the opinion that the manner in which the deputy participated as a grand juror in this case “offers too great a possibility for the exercise of undue influence to be condoned.”

*Id.* at pp. 3-4.

“After initially filing for reconsideration and/or appeal of the judgment, on April 6, 2010, the State filed a notice of dismissal without prejudice of all pending charges” in petitioner’s case. “Six days later, on April 12, 2010, a newly empaneled grand jury re-indicted [petitioner] with second degree murder”. “The case was randomly allotted to Division ‘B’” despite the existence of Louisiana Uniform District Court Rule 14.1, which provides:

- (a) Unless a different method is set forth in Appendix 14.1, if a defendant has a felony case pending and previously allotted, any new felony arrest for that defendant shall be allotted to the divisions to which the pending felony was allotted. This “felonies-following-felonies” rule also applies to the pending felony arrests for a co-defendant with a new arrest and billed as a co-defendant.
- (b) For purposes of this Rule, a felony case remains pending until any of the following events has occurred:
  - (1) a bill of information or indictment is filed or amended, reducing the case to a misdemeanor;
  - (2) the District Attorney’s Office enters a *nolle prosequi* in a case; or
  - (3) there is an adjudication of guilty by plea or trial.

*Id.*

Petitioner, understandably nonplussed at what can only be described as a blatant abuse of the *nolle prosequi* exception to the “felonies-following-felonies” rule of District Court Rule 14.1, refused to enter a plea at arraignment in the re-allotted case and filed “multiple pre trial motions” attacking the new indictment, all of which were denied. *Victor*, 15-339 (La. App. 5 Cir. 5/26/16), pp. 5-6, 195 So. 2d at 138. Trial then proceeded in the new division through petitioner’s conviction on August 1, 2014. *Id.*

As such, the significant concerns regarding the potentially tainted grand jury testimony were not addressed through the appeals process, nor were they in any way “remediated”; but were conspicuously avoided by the State of Louisiana in its actions of dismissing and reinstituting charges against the petitioner herein (and obtaining a new trial judge). Additionally, of considerable significance, as noted in

the opinion of the Fifth Circuit Court of Appeal currently under review, the potentially tainted grand jury testimony was used by the State in at least one instance to impeach the trial testimony of a defense witness. *Id.* at p.20 & n.22, 195 So. 2d at 146-47 & n.22.

Petitioner appealed the August 1, 2014 conviction to the Louisiana Fifth Circuit Court of Appeal, which affirmed petitioner's conviction on May 26, 2016. Petitioner applied for writ's with the Louisiana Supreme Court, which considered and denied his application for writ on October 15, 2018. On November 6, 2019, petitioner filed for reconsideration of the denial of writs by the Louisiana Supreme Court, which refused reconsideration on February 11, 2019.

On May 9, 2019, petitioner, proceeding *pro se*, submitted a Petition for Writ of Certiorari with this Court. On October 22, 2019, the Louisiana Supreme Court issued its opinion in the case of *Louisiana v. Reimonenq*, 2019-KK-0367 (La. 10/22/19). Undersigned counsel hereby submits this Supplemental Brief in Support of Petition for Writ of Certiorari pursuant to United States Supreme Court Rule 15.8.<sup>1</sup>

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<sup>1</sup> On October 25, 2019, petitioner, through undersigned counsel, filed his Motion to Defer Consideration Petitioner's Application for Writ of Certiorari Pending Determination of the Case of *Ramos v. Louisiana*, No. 18-5924. Said motion was, admittedly, filed after the issuance of *Louisiana v. Reimonenq*, but before undersigned counsel's discovery of same. Given the serious implications of petitioner's non-unanimous jury verdict, the status of his conviction as non-final at this point, the imminent decision in the *Ramos* case and the application of said decision as per the holding of the case of *Griffith v. Kentucky*, 479 U.S. 314 (1987); petitioner is hesitant to simply withdraw his Motion to Defer Consideration in light of this current filing. Having said that, petitioner does respectfully beseech this Court's indulgence to, at a minimum, require the State of Louisiana to respond to

## SUPPLEMENTAL ARGUMENT

**Petitioner's Right to Due Process, Guaranteed under the Fourteenth Amendment to the United States Constitution, Was Violated by the State's *Nolle Prosequi* Dismissal and Reinstitution of Petitioner's Case, where the Original Indictment against Petitioner Was Quashed and the State Avoided Appellate Review of Same, as per the recent Louisiana Supreme Court Case of *Louisiana v. Reimonenq*, 2019-KK-0367, (La. 10/22/19).**

In “Question No. 5, Issue No. 5” of his Original Petition, petitioner notes that the State effectively engaged in “judge-shopp[ing]” in violation of the Fourteenth Amendment of the United States Constitution. Orig. Pet. at pp. 26-27. Particularly, the petitioner specifically argued that the originally allotted judge granted a motion to quash. The prosecutor, after initially signaling an intent to appeal, instead dismissed, then reinstituted charges against the petitioner; thereby not avoiding the consequences of the ruling of the originally allotted judge in the motion to quash, but also any consequences of that judge's considerable concerns underlying said ruling by taking undue advantage of the *nolle prosequi* exception to District Court Rule 14.1. *Id.*

As mentioned above, the Louisiana Supreme Court has recently addressed the power of the district attorney to dismiss and reinstitute criminal charges within the context of the Due Process Clause of the United States Constitution. In *Louisiana v. Reimonenq*, 2019-KK-0367 (La. 10/22/19), the prosecution in a juvenile rape case attempted to introduce the testimony of an expert witness for which it provided the defense formal notice on the morning of trial. *Id.* at pp. 1-2. The

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this Supplemental Brief (and permit petitioner an opportunity to reply) prior to acting on the pending Motion to Defer Consideration.

defense filed a motion *in limine* to exclude the expert witness testimony on the basis that said testimony had not been properly noticed under La. C. Cr. P. article 719; and the trial court granted, citing prejudice to the defense in its ability to properly prepare for the expert's testimony. *Id.* at p.2. The prosecution initially "noted its intent to apply for supervisory writs, but did not do so, and, instead, opted to enter a *nolle prosequi*." *Id.* Two days later, the prosecution filed a new indictment on the same charges. *Id.* Six days prior to the scheduled trial on the reinstituted charges, the prosecution filed a supplemental notice with respect to the expert's testimony. *Id.* at pp. 2-3. On the morning of trial on the newly instituted charges, defense filed a supplemental motion *in limine* to exclude the expert's testimony as well as a related motion to quash, arguing that six days notice was still insufficient, and that defendant was prejudiced because the defendant was ready to proceed without the state having an expert (which impacted the defense's need and ability to procure an expert). *Id.* at p.3. The defense also specifically argued that "the prejudice was in the denial of the defendant's right to a jury trial on the original trial date, which occurred when the state abused the process by entering a *nolle prosequi* in the face of an unfavorable evidentiary ruling." *Id.* The trial court denied the defense motion to quash, but ordered the prosecution to supplement its expert notice. *Id.*

The Louisiana Supreme Court reversed the ruling of the trial court and granting the defense motion to quash. First of all, citing as authority the U.S. Supreme Court cases of *Duncan v. Henry*, 513 U.S. 364 (1995) and *Lisbena v. California*, 314 U.S. 219 (1941), the Louisiana Supreme Court noted that the

discretion of the prosecution to dismiss and reinstitute charges, while vast, did not permit the prosecution “to undermine trial court proceedings and evade appellate review.” *Reimonenq*, 2019-KK-0367, pp. 6-7. Additionally, the Louisiana Supreme Court noted the “co-exist[ence]” of the broad powers of the prosecution to dismiss and reintroduce criminal charges with the equally broad powers of the court to control criminal proceedings, and that “natural tension” between them required the court “to balance and harmonize these sometimes conflicting and broad grants of authority in a manner that accords with our state and federal due process guarantees.” *Id.* at p.7.

Next, in applying the aforementioned precepts, the Louisiana Supreme Court found that the exercise of the prosecutions otherwise broad powers to dismiss and reinstitute criminal charges nevertheless violated “defendant’s right to due process and fundamental fairness”:

In its brief, the state openly acknowledges it could have sought writs from the appellate court and simply declined to do so. The state also suggests that dismissing and reinstituting these charges was simply “to put its case together.” We find that in this case, the state’s exercise of its statutory right under La. C. Cr. P. arts. 691 and 61 to dismiss and reinstitute charges against defendant upset this “balance of forces” to such a degree that it violates defendant’s right to due process and fundamental fairness.

*Id.* at pp. 7-8.

Finally, and most significantly, in addition to reversing the ruling of the trial court and granting the motion to quash, the Louisiana Supreme Court imposed an additional remedy preventing the prosecution from using the expert witness or any

other similarly employed expert witness in any reinstituted prosecution of the charges. In analyzing this remedy, the Louisiana Supreme Court provided, as follows:

The question now turns to the remedies available when, as here, the state wields its power to dismiss and reinstitute charges in a way that violates a defendant's right to due process and fundamental fairness in the proceedings against him. Necessarily, such remedies will be specific and fact intensive. However, in this case, the appropriate remedy presents itself in defendant's pleadings. The state abused its authority to dismiss and reinstitute charges against the defendant in order to give itself a continuance and reverse the trial court's ruling excluding its expert witness. Thus, we grant defendant's motion to quash. Nothing, however, would appear to preclude the state from reinstituting the charges in accordance with governing laws. However, we also find it necessary and requisite to reinstate the status quo before the state misused its authority. Thus, we further prohibit the state from utilizing this expert witness or any other expert witness meant to bolster the credibility of the testifying child victim should it choose to reinstitute the prosecution.

*Id.* at p.8.

As in the *Reimonenq* case, the prosecution in the extant case also specifically dismissed and reinstituted charges against the petitioner to evade the original trial court's ruling on defendant's motion to quash and avoid appellate review of same. However, the actions of the state in dismissing and reinstituting charges in this case carry far more profound implications with respect to the denial of due process and fundamental fairness than were present in the *Reimonenq* case. In petitioner's case, the evaded ruling on the motion to quash, predicated on the actions of the SJBSO deputy's wearing of his deputy shirt at the proceedings, was further



predicated upon the impact on testifying witnesses. *Victor*, 2008 CR 165, Appx. “A” at pp. 3-4. Specifically, the originally allotted trial judge explicitly noted the potential “for subjecting witnesses to fear and intimidation” as well as the potential to “influence, suppress, or alter testimony to the prejudice of defendant.” *Id.* Arguably, the impact of such a ruling, as written, was potentially fatal to any attempt to reinstitute the criminal prosecution, absent the limitation of same by a reviewing court on appeal. More significantly, not only did the prosecution avoid the ruling, but it also avoided the substantial concerns behind the ruling, evading the trial judge altogether by taking improper advantage of the *nolle prosequi* exception to the “felonies-following-felonies” rule of District Court Rule 14.1 (in essence, blatant “judge shopping”).

In any event, to the extent that the potential “taint” upon the testimony of the witnesses could have been remediated (presumably through “normal order of criminal proceedings” improperly evaded by the prosecution herein); the testimonies of those witnesses were nevertheless presented, uncured (and completely unaddressed), to the jury that ultimately convicted petitioner (by non-unanimous verdict).

As such, the complete evasion of the originally allotted judge’s ruling on petitioner’s motion to quash, being specifically grounded on the potential to “influence, suppress, or alter [grand jury witness testimony] to the prejudice of the [petitioner]”, clearly constitutes a violation of petitioner’s “right to due process and fundamental fairness”, under the analysis of *Reimonenq*. Being a much more

compelling and blatant violation of due process and fundamental fairness than even existed in *Reimonenq*, petitioner's conviction should be reversed and the indictment upon which the conviction was predicted should be quashed.

Furthermore, as the Court in *Reimonenq* imposed additional sanctions upon the prosecution in prohibiting the prosecution from presenting the both the excluded expert witness testimony as well as the testimony of another in kind expert witness; so should this Court, in adopting the *Reimonenq* analysis, impose analogous sanctions. Since the "status quo" at the time of the originally allotted judge's ruling was that 1) the case was allotted to Division "A" of the 40<sup>th</sup> J.D.C., and 2) any and all grand jury witnesses had potentially been subjected to "fear or intimidation" and their corresponding testimony was potentially "influence[d], suppress[ed], or alter[ed] to the prejudice of defendant"; this Court should order that any case potentially reinstituted by the State of Louisiana be allotted to Division "A" of the 40<sup>th</sup> J.D.C. and that State of Louisiana be precluded from calling, at the trial on the merits, any witness that testified in the grand jury proceeding that returned the originally quashed indictment.

### **CONCLUSION**

Based on the arguments above, this Court should grant this Petition for Writ of Certiorari, should reverse the Opinion of the Louisiana Fifth Circuit Court of Appeal and subsequently reverse petitioner's August 1, 2014 conviction as a violation his Due Process rights under the Fourteenth Amendments of the United States Constitution. Furthermore, this Court should further quash the indictment

upon which that conviction was predicted. Finally, as a means of properly remedying the substantial violations of due process and fundamental fairness suffered to this point by petitioner, this Court should further order that any reinstitution of charges by the state be allotted to Division "A" of the 40<sup>th</sup> J.D.C, and should order that the State of Louisiana be prohibited from calling, at the trial on the merits in any subsequently reinstituted charges, any witnesses that testified before the grand jury upon which the indictment quashed by the February 4, 2010 ruling was based.

Respectfully submitted,

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

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## CERTIFICATE OF SERVICE

Undersigned counsel certifies that on this date, the 8<sup>th</sup> day of November, 2019, pursuant to Supreme Court Rules 29.3, the accompanying Supplemental Brief in Support of Petition for a Writ of *Certiorari* was served on each party to the above proceeding, or that party's counsel, and on every other person required to be served, by depositing an envelope containing these documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

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