No. 19-5989

In the Supreme Court of the United States

ERROL VICTOR, SR.,
***Petitioner*,**

v.

STATE OF LOUISIANA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED[1]

1. Does the Due Process Clause of the Fourteenth Amendment require *retroactive* application of a new state constitutional provision which provides for *prospective* application only?

2. Were Petitioner's Sixth Amendment rights to a speedy trial and to self-representation denied when, four years prior to trial, he was represented by a public defender for 180 days while at the same time being allowed to file and argue *pro se* motions and hire private counsel for a limited purpose?

3. Did holding one day of a nine-day trial on a Saturday, over Petitioner's unsubstantiated objection made for the first time three days into the trial and after repeated notices of the court's intent to hold court on Saturday, violate the First and Fourteenth Amendments?

4. Was it manifest error when the Louisiana Fifth Circuit Court of Appeals determined that the record did not support Petitioner's argument that proceedings were held after a Motion to Recuse was filed in this proceeding?

5. Did the random allotment of an indictment by a new grand jury, after a previous indictment was quashed due to error in the previous grand jury proceedings, violate the Due Process Clause of the Fourteenth Amendment?

6. Did the trial court judge abuse her discretion, and therefore violate Petitioner's right to present a defense under the Sixth Amendment, when she determined that Petitioner's alleged medical expert—who lied about her qualifications, whose medical license was revoked by the Louisiana Board of Medical Examiners, and who had been ordered by the Board to never serve as a medical expert in litigation in Louisiana—was not qualified to testify as an expert?

7. Did the Louisiana Fifth Circuit Court of Appeals err in finding that the issue of whether the trial court had *in personam* jurisdiction over Petitioner was not properly before the court because Petitioner did not properly raise an objection to the court's jurisdiction before or during trial?

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[1] This brief is in opposition to a *pro se* application. Petitioner's brief does not comply with this Court's rules for the format and content of petitions for certiorari. Respondent has attempted to address all arguments made in the petition. However, in doing so, counsel does not waive any objection to the form or substance of the petition and, in compliance with Supreme Court Rule 15, will attempt to point out any perceived misstatements of fact or law.

8. Is the joint charging and trial of a husband and wife for the second-degree murder of their child, when the evidence points to both of them, a violation of Petitioner's right to equal protection under the Fifth Amendment because the jury returned a verdict of a lesser included offense as to the wife?

9. Was the Fourth or Eighth Amendment violated when, nine months after Petitioner did not show up for trial, he was arrested in Georgia for bail jumping and, after an extradition hearing, returned to Louisiana where his previous bail bond was revoked?

RULE 14 LIST OF PROCEEDINGS

State Court Proceedings

State of Louisiana v. Children Victor, Williams, & Otkins, 2008-JV-15199 (R. Min. at 74-80) (custody of the children)

State v. Errol Victor, 2009-CS-51242 (child support case) (R. Min. at 72-73)

M.L. Lloyd, Jr. v. Errol Victor, Tonya Victor, and Errol Victor, Jr., 2010-CC-0871 (6/25/10), 38 So.3d 339 (writ denied)

State ex rel. Errol Victor & Tonya Victor v. Louisiana, 2013-0408 (La. 3/14/13), 109 So.3d 371.

State ex rel. Errol Victor & Tonya Victor v. Louisiana, 2013-0918 (La. 5/17/13), 117 So.3d 918

State ex rel Errol Victor & Tonya Victor v. Louisiana, 2013-0799 (La. 5/3/13), 113 So.3d 217 (writ of mandamus denied)

State ex rel Errol Victor, Sr. and Tonya O. Victor v. Louisiana, 2013-1098 (La. 6/21/13), 118 So.3d 423.

M.L. Lloyd, Jr. v. Errol Victor, et al, 2013-CC-1544 (La. 10/4/13), 122 So.3d 1024) (La. DCFS applying for writ; denied)

State v. Errol Victor, Sr., 14-KA-63 (La. App. 5 Cir. 09/24/14), 2014 WL 4724900.

State v. Errol Victor and Tonya Victor, 2014-1636 (La. 10/10/14), 151 So.3d 587.

State v. Tonya Victor, 13-888 (La. App. 5 Cir. 12/23/14), 167 So.3d 118 (bail jumping conviction; mental competency hearing; judgment affirmed)

M.L. Lloyd, Jr. v. Errol Victor, Tonya Victor, and Errol Victor, Jr., 2015-0110 (La. 4/10/15), 163 So.3d 810.

State v. Otkins-Victor, 15-340 (La. App. 5 Cir. 5/26/16), 193 So.3d 479

State v. Errol Victor, Sr., 15-339 (La. App. 5 Cir. 5/26/16), 195 So.3d 128

Errol Victor and Tonya Victor v. AAG Julie Cullen, AG Buddy Caldwell, 2016-0965 (La. App. 1 Cir. 10/18/16), 2016 WL 6092875

State v. Errol Victor, 2016-1516 (La. 10/15/18), 253 So.3d 1300 (writ denied)
Errol Victor and Tonya Victor v. AAG Julie Cullen, AG Buddy Caldwell, 2018-0948 (La. App. 1 Cir. 10/2/18), 2018 WL 4770764

State v. Errol Victor, 2016-1516 (La. 2/11/19), 263 So.3d 431 (reconsideration, not considered)

State v. Errol Victor, 2019-00711 (La. 10/15/19), 280 So.3d 612 (writ denied) (on remand from U.S. District Court, Eastern District of Louisiana, No. 18-10537)

State v. Errol Victor, Sr., 2019-KW-1123 (La. App. 1 Cir. 11/12/19), 2019 WL 5895471.

Federal Court Proceedings

Errol Victor, et al v. Community Bancorp, et al. No. 10-30024 (5th Cir. 02/02/10) (appeal of 2:09-cv-03213) (dismissed for lack of jurisdiction)

Victor v. Cmty. Bancorp of Louisiana, Inc., No. CV 09-3213, 2010 WL 11545181 (E.D. La. Mar. 15, 2010)

Errol Victor v. St. John the Baptist Parish, et al, No. 2:10-cv-01441 (07/27/10) (civil rights suit dismissed)

State v. Errol and Tonya Victor, No. 2:10-mc-01323 (E.D. La. 8/23/10), 2010 WL 3418217 (removal action)

Errol Victor, et al v. Community Bancorp, et al, No. 2:09-cv-03213 (E.D. La. 10/20/10), 2010 WL 4103063 (conspiracy and civil rights violations dismissed)

Errol Victor, et al v. St. John the Baptist Parish Correctional Center, No. 2:11-cv-00095 (E.D. La. 10/25/11)

Errol Victor, et al v. Lionel Burns and Randy Tucker, No. 2:11-cv-01924 (E.D. La. 01/19/12) (filed 8/10/11; dismissed for failure to pursue)

Hamilton v. Negi, No. 09-CV-0664, 2012 WL 1067857, at *2 (W. D. La. Mar. 15, 2012), *report and recommendation adopted*, No. CIV. A. 09-860, 2012 WL 1067897 (W. D. La. Mar. 29, 2012) (expert Dr. Velva Boles testified and her false testimony in *Victor* trial cited)

Victor v. Louisiana, No. CIV. A. 12-2745, 2012 WL 6757038 (E.D. La. Nov. 26, 2012), *report and recommendation adopted,* No. CIV. A. 12-2745, 2013 WL 28233 (E.D. La. Jan. 2, 2013)

Errol Victor, et al v. State of Louisiana, et al, No. 2:12-cv-02745 (E.D. La. 01/02/13), 2013 WL 28233 (habeas and civil rights claims)

Errol Victor, et al v. Judge Mary H. Becnel, No. 2:13-cv-05930 (E.D. La. 01/05/14) (civil rights action dismissed as frivolous)

Errol Victor, et al v. Mary Becnel, No. 14-30503 (5th Cir. 5/23/14) (appeal of No. 2:13-cv-05930) (dismissed for failure to pay fee)

Errol Victor v. Warden Joyce Jackson, et al, No. 2:13-cv-06380 (E.D. La. 09/11/14), 2014 WL 4540065 (habeas petition)

Louisiana v. Victor, No. CV 18-10537, 2019 WL 1916044 (E.D. La. Apr. 29, 2019), appeal dismissed sub nom. Victor v. Louisiana State, No. 19-30436, 2019 WL 6464009 (5th Cir. Oct. 2, 2019)

Louisiana v. Errol Victor, No. 2:18-cv-10537 (08/28/19) (civil action remanded to state court)

Errol Victor v. Louisiana State Penitentiary, et al, No. 2:19-cv-00838 (09/05/19) (voluntarily dismissed by petitioner)

Errol Victor v. Louisiana State, No. 19-30436 (5th Cir. 10/02/19), 2019 WL 6464009 (appeal of 2:18-cv-0537) (dismissed for procedural default)

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STATEMENT OF THE CASE

I. THE MURDER[2]

On April 1, 2008, the victim of this horrendous crime, eight-year-old M.L. Lloyd, III, Petitioner's stepson, died as a result of injuries consistent with an extensive and severe beating which took place over a two-day period.

M.L.'s four brothers testified at trial.[3] According to them, the afternoon before M.L.'s death, they were at Petitioner's business when Petitioner gave them some ice cream. After they arrived home, Petitioner told them he had discovered someone had stolen an extra ice cream. He whipped a few of the boys with a belt until M.L. admitted that he took the ice cream. At that point, Petitioner sent the other boys upstairs and continued to beat M.L., throwing him around, punching him in the chest, and throwing him against the stairs. M.L. was heard crying while Petitioner continued to hit him.

The next morning, Petitioner dragged M.L. out of bed and began to beat him again. He stripped M.L. down naked and ordered some of his sons to hold him down by his wrists and legs while he and his oldest son beat M.L.'s naked body with a belt and Petitioner asked him if he was sorry for what he had done. At one point Petitioner said, "I'm going to keep whopping you until I see tears come out of your eyes." This beating went on for more than an hour. During the beating, Petitioner called his wife

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[2] Because Petitioner made an insufficiency of evidence claim in the lower court, the testimony regarding the horrendous facts of this crime is set forth in detail in the decision by the Louisiana Fifth Circuit Court of Appeals, which Respondent adopts herein. *See State v. Victor*, 15-339, *8-32 (La. App. 5 Cir. 5/26/16), 195 So.3d 128, 139–53; Pet. Appx. B, 7–32.

[3] The Victors had thirteen boys between them: Mrs. Victor's five sons, including M.L., Petitioner's six sons, and two young boys of the marriage.

upstairs to witness the beating. She watched and cried but did not physically or verbally attempt to stop Petitioner. The brothers saw bruises on M.L.'s arms and scratches on his backside that were bleeding.

Once the beating stopped, M.L. could not move and it appeared he had stopped breathing. When M.L. did not improve, Petitioner, Mrs. Victor, and Petitioner's oldest son took M.L. to the hospital. Video footage from the hospital showed Petitioner's oldest son carrying M.L.'s limp body into the emergency room. Two minutes later, Mrs. Victor and Petitioner's son left.

M.L. was limp, not breathing, and unresponsive. He had no heartbeat, his pupils were fixed and dilated, and he was cold to the touch—with a body temperature of 85.2 degrees indicating that he had been dead for at least an hour. Petitioner told the hospital attendant that M.L. had an accident in the bathroom.

Deep tissue bruising on M.L.'s thighs, back, buttocks, chest, left arm, and abdomen were visible along with "impressed" abrasions on his buttocks and lower back. Those marks indicated that M.L. had not been clothed when he received his injuries. There were also distinctive "u-shaped" bruise marks displaying a pattern indicative of a doubled-over cord, such as an extension cord or a belt. There was a bruise across the neck area caused by a hard object pressed against M.L.'s windpipe at an angle. He also had a bruised lung. There were self-defense injuries to M.L.'s forearm and "grab marks" over his lower wrists and upper arms. M.L's death was caused by either blunt force trauma, which brought about cardiovascular collapse, or

by asphyxia from the object pressed against his windpipe.[4]

Shortly after dropping M.L. off at the emergency room, Petitioner had to be located and was escorted back into the hospital. When asked, again, what happened, he changed his story from "an accident in the bathroom" to "we had to discipline him because he was stealing." Although Petitioner would not respond when asked if he hit M.L., he did say, "I take full responsibility for this." He was heard telling his wife not to speak to police and asking her to tell the children the same thing.

II. PROCEDURAL HISTORY[5]

On April 15, 2008, Petitioner was charged by indictment with one count of first-degree murder,[6] to which he pleaded not guilty. Petitioner's case was randomly allotted to Division "A" of the 40th Judicial District Court. The case proceeded with further investigation, discovery, and motion practice.[7]

On September 22, 2009, both Petitioner's and his wife's charges were amended by the grand jury to second-degree murder while engaged in the perpetration of the crime of cruelty to a juvenile.[8] Petitioner filed a motion to quash the indictment on

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[4] The only evidence of asthma was Mrs. Victor's testimony. None of M.L.'s medical records substantiated that claim.

[5] The procedural history of this case is serpentine and confusing. Respondent will set forth only the procedural history relevant to the issues raised in this petition. But, for the Court's benefit, the State has attached a color-coded chart as Resp. App. B to represent all of the various twists and turns of this action, as well as the other actions filed by Petitioner—both state and federal.

[6] *See* La. R.S. 14:30. On the same day, co-Petitioner Mrs. Victor was charged by indictment with accessory after the fact to first-degree murder and cruelty to a juvenile. Petitioner's oldest son was also charged with being an accessory after the fact. His charges were later dismissed.

[7] On April 2, 2009, Petitioner also filed a federal lawsuit against twenty-three persons, including *two of the 40th Judicial District Court judges* alleging violations of their civil rights and a conspiracy to seize their personal and business assets. *See Victor v. Community Bancorp of La., Inc*., 2010 WL 11545181 (E.D. La. 3/15/2010).

[8] *See* La. R.S. 14:30.1(A)(2)(b).

the grounds that a deputy sheriff, who was randomly selected to be a grand juror, had worn a golf shirt with the name of the Sheriff's Department on it. On February 4, 2010, after a hearing, the court granted the motion and quashed the indictment. On that same day, the State filed a motion for reconsideration and/or appeal. Two months later, Petitioner asserted his right to self-representation and his tenth attorney withdrew.

On April 6, 2010, the State withdrew its motion and, in an abundance of caution, dismissed all pending charges, without prejudice. On April 12, a *newly empaneled* grand jury heard the evidence and, again, indicted Petitioner and Mrs. Victor with second-degree murder while engaged in the perpetration of the crime of cruelty to a juvenile. That same day, the case was randomly allotted to Division "B." On May 3, an arraignment on the new charges was scheduled—but Petitioner did not appear. On May 6, 2010, the new trial judge appointed two attorneys from the public defender's office to individually represent Petitioner and his wife.

Six days later, Petitioner filed a *pro se* motion to recuse all the judges in the 40th judicial district.[9] All proceedings, including Petitioner's arraignment,[10] were stayed until July 1, 2010 when the motion to recuse was heard by an appointed *ad hoc* judge, who denied the motion.[11] Petitioner was represented by retained counsel

[9] There are only three judges in this district: the judge assigned to his case (Becnel), another judge who was simultaneously hearing the matters related to custody of Petitioner's children (Snowdy), and the previous judge (Jasmine).

[10] The arraignment had been rescheduled to May 17th but Petitioner did not appear this time, either.

[11] The Louisiana Supreme Court appointed a retired former appellate court judge from another district to hear the motion for recusal.

at the hearing.

Although all proceedings had been stayed, Petitioner filed numerous *pro se* motions, which were heard once the stay was lifted. One of the motions was Petitioner's objection to the allotment which was heard on August 4 and denied on August 18. He was also allowed to argue one of his own motions during that time.

Petitioner was arraigned on August 16. On October 18, an extensive *Faretta* hearing occurred and Petitioner was granted the right to represent himself with his public defender serving as standby counsel. Nevertheless, from November 15, 2010 until his final trial date, and after two more *Faretta* hearings, Petitioner hired and fired seven more attorneys.

In April of 2011, a month before the scheduled May 16 trial date, previous private counsel, Lionel Burns, filed a motion to enroll again on behalf of Petitioner and his wife. On April 18, the court held a "counsel enrollment hearing" where she listed all of the attorneys that Petitioner had hired and fired so far in the case, evidenced her growing impatience with the practice, but allowed Mr. Burns' enrollment with a sharp warning that he must be committed to stay in the case and not withdraw. He requested a continuance—which was granted—and the trial was rescheduled for August 15, 2011.

Over the next four months, Petitioner filed numerous counseled motions with the court, including one to reduce bond—which was granted. Petitioner was released from jail and was fully able to work with counsel to prepare his case.

On August 8, 2011, a week before trial, Lionel Burns filed a Motion to

Withdraw, which was denied. Petitioner took an emergency writ to the Louisiana Fifth Circuit and requested a stay, both of which were denied.

Trial was scheduled to begin on August 15, 2011. However, Petitioner and his wife did not appear in court on that day. A bench warrant was issued. For three days, the police attempted to execute the warrant, but they could not be found. The court finally revoked their bond. It was later determined that they had absconded from Louisiana. Nearly a year later, Petitioners were located in Tifton, Georgia.[12] Although they fought extradition, Petitioner and his wife were eventually delivered into the custody of Louisiana's agents, based on a valid extradition warrant, and returned to Louisiana. They re-appeared in court on July 16, 2012.

On December 5, 2012, Petitioner's motion to terminate attorney Lionel Burns and the public defender's office was heard and granted.[13] Another *Faretta* hearing was conducted, and Petitioner was found to have waived his rights to a public defender as standby counsel and he was again found competent to represent himself.

On September 16, 2013, Stephen Yazbeck enrolled as private counsel after a stern warning from the judge that he must remain in the case despite any differences he may have with Petitioner or non-payment of his fees. Despite that, on January 21, 2014, Petitioner filed a motion to terminate Attorney Yazbeck. Once again, the court engaged in a *Faretta* colloquy with Petitioner who refused standby counsel. The judge

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[12] *See State v. Errol Victor*, 2014 WL 4724900 (La. App. 5 Cir. 9/24/14) and *State v. Tonya Victor*, 167 So.3d 118 (La. App. 5 Cir. 12/23/14) for a discussion of the facts surrounding their bail jumping and extradition. Tried separately from his wife, Petitioner was found guilty of the charge by a unanimous jury verdict. He was sentenced to serve three years and he received a $2,000 fine.

[13] Another suit had been filed against the entire public defender's office and the chief appeared to argue that he felt his office had a conflict of interest.

entered her scheduling order for the trial, which was set to begin on July 22, 2014. She admonished Petitioner that any additional private counsel must enroll timely and that she would not grant a continuance of the July trial date in order for new counsel to prepare.

Trial commenced on July 22, 2014. On that day, Tim Yazbeck, son of former counsel, Stephen Yazbeck, contacted the judge and offered to enroll in the case if the court would grant a continuance. The court denied a continuance but offered to allow him to enroll as standby counsel. He was not prepared, and so he declined the offer. Eleven days later, on Friday, August 1, 2014, the jury returned a verdict of guilty as charged as to Petitioner and a verdict of manslaughter as to Mrs. Victor.

Prior to sentencing, Petitioner filed several post-verdict motions, all of which were denied. On September 15, 2014, Petitioner was sentenced to life imprisonment at hard labor, without the benefit of parole, probation, or suspension of sentence.

On March 25, 2015, Petitioner requested to represent himself on appeal. A hearing was held and the court found he had knowingly, intelligently, and voluntarily waived his right to appointed appellate counsel. *Id.* On May 26, 2016, the Louisiana Fifth Circuit Court of Appeals denied Petitioner's appeal. He applied for rehearing, which was denied on June 24, 2016.

Petitioner filed an application for a writ of certiorari with the Louisiana Supreme Court on July 27, 2016—which was denied on October 15, 2018. He filed a disallowed Motion for Rehearing on November 6, 2018. The Louisiana Supreme Court issued an order on February 6, 2019 indicating that the application for

reconsideration was "not considered."

Petitioner filed his Petition for a Writ of Certiorari in this Court on May 6, 2019 and it was docketed on September 18, 2019.

REASONS FOR DENYING THE PETITION[14]

I. THIS PETITION WAS NOT TIMELY FILED UNDER SUPREME COURT RULE 13.1

Victor failed to file his petition within the time limits in Supreme Court Rule 13 and so this Court should deny review. This case involves "a judgment of a lower state court [the Louisiana Fifth Circuit Court of Appeal] that is subject to discretionary review by the state court of last resort [the Louisiana Supreme Court]." *See* La. C.Cr. Pro. arts. 912.1, 922. Thus, the petition is timely only if filed "within 90 days after entry of the order denying discretionary review." Supreme Court Rule 13.1. The Louisiana Supreme Court denied the writ in this case, without opinion, on October 15, 2018. Ninety days from that date was January 13, 2019. Victor filed his petition on May 9, 2019—206 days after the order denying discretionary review (116 days overdue). The petition is untimely.

Petitioner now claims, however, that he was *entitled* to an *additional* discretionary review in the Louisiana Supreme Court that tolled the running of the

[14] Petitioner gives three Rule 10 reasons for granting the writ: (1) a state court has decided an important federal question in a way that conflicts with the decision of another state; (2) an important federal question has not been, but should be, settled by this Court; and (3) the state court has decided an important federal question in a way that conflicts with relevant decisions by this Court. However, other than his procedurally barred non-unanimity claim that might qualify under reason number 2, he offers no evidence or argument on the other two.

ninety-day filing period.[15] That is incorrect as a matter of Louisiana law. The Rules of the Louisiana Supreme Court provide that "[a]n application for rehearing *will not be considered* when the court has merely . . . denied an application for a writ of certiorari." *See* Rule IX, §6 (emphasis added). And it has been the consistent practice of the Louisiana courts to recognize this bar.[16]

Nevertheless, Petitioner contends he was able to extend the time by filing a *non-admissible* application for rehearing.[17] He bases that argument, not on a Louisiana case, but on federal case—*Wilson v. Cain*, 564 F.3d 702, 707 (5th Cir. 2009). In *Wilson v. Cain*, the Fifth Circuit held that because the Louisiana Supreme Court has occasionally entertained motions for rehearing notwithstanding the language in Rule IX, §6, filing a motion for rehearing tolls the one-year AEDPA statute of limitations. 564 F.3d at 705–06.[18]

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[15] On October 30, 2019, *over five months after Victor filed his petition,* Petitioner's newly enrolled counsel, apparently in response to an *ex parte* phone call with the Clerk's office, attempted to provide "clarification and documentation establishing the timeliness of the filing of the Petition" through a letter to that office. Respondent objects to the admission of that letter, and any documents and argument made therein, as being an attempt to amend his petition with a post-deadline filing. Nothing in the Rules of this Court allow post-petition out-of-time amendment or supplementation.

[16] *See, e.g., State v. James*, 329 So.2d 713, 717 (La. 1976) (Tate, J., concurring) (Applications for rehearing as to the denial of applications for writs may not be considered (citing Rule IX, Section 6); *State v. Beamish*, 19 So.2d 258 (1944); *Blaize v. Hayes*, 15 So.2d 228 (1943); *State v. Mims*, 330 So.2d 905 (La. 1976); *State v. Sanders*, 337 So.2d 1131, 1135 (La. 1976), overruled on unrelated grounds by *State v. Baker*, 2006-2175 (La. 10/16/07); 970 So.2d 948.

[17] Although Petitioner labeled his pleading "Rehearing Application," the Louisiana Supreme Court clerk's office stamped it with the word "Reconsideration" to indicate that this was not an application for rehearing that a Petitioner had a right to file. An applicant only has a right to apply for re*hearing* if a *hearing* was held.

[18] The Fifth Circuit cited only three cases where this had happened, and Respondent has not been able to find any additional cases. All three decisions, like *Wilson*, are easily distinguishable and all possessed special circumstances.

In *Wilson*, the petition for rehearing in the state court had been "denied" with a dissenting opinion and so was, apparently, "considered." In *State v. Vale*, 664 So.3d 410 (La. 1995), there apparently was

Petitioner's argument fails for two reasons: (1) the Fifth Circuit habeas decision does not control the decision on timeliness of an application for a writ of certiorari to this Court; and (2) as both Petitioner and the Fifth Circuit concede, the application must be *timely filed* to extend the period before which a decision becomes final. Petitioner's inadmissible application to the Louisiana Supreme Court was not timely filed.

First, the ruling in *Wilson* related to a petition for habeas corpus in the federal district courts pursuant to 28 U.S.C. § 2254, not a petition for a writ of certiorari filed with this Court.[19] The language in Supreme Court Rule 13 does not allow the *untimely* filing of a petition for rehearing to toll the time *unless the court entertains the untimely petition*. Courts have the *discretion* to grant an untimely filed writ, giving litigants "hope," as the Fifth Circuit said, that their untimely writ might be granted. 564 F.3d at 706 (citation omitted). But the existence of that discretion does not vitiate the clear language disallowing untimely applications for purposes of tolling a time limitation. Rule IX, § 6 states that a petition for rehearing *will not be considered* by the Court where its prior ruling was a simple denial of an application

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a court error because decisions granting the writ and denying the writ were handed down on the same day. *Compare State v. Vale*, 661 So.2d 1366 (La. 10/27/95) (granting writ limited to one assignment) with *State v. Vale*, 661 So.2d 1358 (10/27/95). In *State ex rel. Glass v. State*, 507 So.2d 1246 (La. 1987), it appears the initial writ application was premature because the district court had not acted on an identical habeas petition and one justice suggested reapplying when the district court had acted. *See State ex rel. Glass v. State*, 507 So.2d 1245 (La. 1987). *James v. Cain*, 653 So.2d 1179 (La. 1995) was a capital case over which the Louisiana Supreme Court had direct review jurisdiction and which involved a ruling on a stay of execution. According to the dissent and concurrence in the case, the defense counsel had obtained evidence over the weekend that "presented a sufficiently plausible indication" that another person had committed the crime defendant was about to be executed for.

[19] Respondent could find no decision of this Court regarding rehearings in state court. However, *Missouri v. Jenkins*, 495 U.S. 33 (1990) provides a good analogous situation regarding rehearings in federal court.

for a writ. And, in this case, the Court *did not consider* the application. The proper treatment of an inadmissible application for rehearing would be to toll the time *only if the application was considered* (which was the situation in all cases cited by the Fifth Circuit in *Wilson*). *See* Rule 13. Because Petitioner's application was not considered, it did not toll the ninety days within which to file the writ application, and his petition to this Court was not timely filed.

Second, even if the Court determined that a *timely* filed non-admissible application for rehearing in Louisiana tolls the 90-day period of time to apply for a writ from this Court, Petitioner's application for rehearing was not timely filed. It therefore did not toll the time for petitioning. *See Butler v. Cain,* 533 F.3d 314, 316–17 (5th Cir. 2008). Petitioner's writ to the Louisiana Supreme Court was denied on October 15, 2018. It was mailed to Petitioner, through court-to-prison email, on October 22, 2018. Resp. App. A. According to the supreme court's rules on rehearing for appeals, Petitioner's application "must be filed with the Clerk . . . on or before the fourteenth calendar day after the mailing of the notice of judgment." Rule IX, § 1. Thus, the petition had to be mailed to the court on or before November 5, 2018. According to counsel's letter submitted to this Court, and the documents provided with it, Petitioner placed his Application with prison personnel on November 6, 2018, a day late.[20] According to Louisiana law, a judgment rendered by an appellate court "becomes final when the delay for applying for a rehearing has expired and no

[20] The "mailbox rule" allows the time of filing to be considered the day a prisoner deposits the document in the prison mail system, rather than the actual date it was received by the court. *Houston v. Lack*, 487 U.S. 266 (1988).

application therefor has been made." La. C. Cr. Pro. art. 922(B). Therefore, this Court's requirement that the petition for a writ of certiorari be filed within 90 days after entry of the order denying discretionary review has not been met, and Victor's petition should not be considered.

II. A *PRO SE* PETITIONER WHO REFUSES PUBLIC DEFENSE, FIRES ELEVEN PRIVATE ATTORNEYS, AND REFUSES STANDBY COUNSEL MAY NOT CLAIM HIS OWN INEPTITUDE AS GROUNDS FOR REVERSAL

Petitioner stubbornly refused or rejected the advice and assistance of over eleven public defenders and private counsel throughout the duration of these proceedings and insisted on representing himself and his wife. A number of his claims were not preserved for review at trial by contemporaneous objections or were not properly raised on appeal. He also offered an unqualified expert, did not present evidence or argument on the sincerity of his religious beliefs, lacked understanding of the law on many counts, and filed frivolous motions.

However, because he chose to represent himself, he cannot now complain about his own ineptitude. *Faretta v. California*, 422 U.S. 806, 834, n.46 (1975); *see also United States v. Flewitt*, 874 F.2d 669, 675 (9th Cir. 1989) (*pro se* petitioner who refused standby counsel and failed to utilize discovery procedures may not claim own ineptitude as grounds for reversal).

Furthermore, "the trial judge is under no duty to provide personal instruction on courtroom procedure or to perform any legal 'chores' for the Petitioner that counsel would normally carry out." *Martinez v. Court of Appeal*, 528 U.S. 152, 162 (2000) (citing *McKaskle v. Wiggins*, 465 U.S. 168, 183–84 (1984)). She is under no

obligation to intervene and assist a *pro se* Petitioner who encounters difficulty in presenting his defense, even if it becomes apparent that the defense is inadequate. "One who proceeds *pro se* with full knowledge and understanding of the risks involved acquires no greater rights than a litigant represented by a lawyer." *Birl v. Estelle*, 660 F.2d 592 (5th Cir. 1981) (citing *United States v. Pinkey*, 548 F.2d 305, 311 (10th Cir. 1977); *United States v. Fowler*, 605 F.2d 181, 183 (5th Cir. 1979)).

III. THERE IS NO STATE COURT JUDGMENT OR FEDERAL QUESTION TO REVIEW IN QUESTION 1 AND THE COURT SHOULD NOT HOLD THIS CASE FOR ITS DECISION IN *RAMOS*

In his first question presented, Petitioner asks whether his Thirteenth and Fourteenth Amendment rights were denied because the Louisiana courts did not retroactively vacate his conviction while on direct review after Louisiana revised its statutory and constitutional provisions to prospectively provide for unanimous juries. Two problems prevent the Court from answering that question: (1) there is no state appellate court judgment on this issue for the Court to review;[21] and (2) it raises a state law, not a federal law, issue.

A. The State Courts Have Not Answered Victor's First Question

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

[21] Had the issue been raised on appeal, the appellate court would not have considered it since it would not have been properly before the court. Petitioner did not raise the issue to the trial court and, thus, was procedurally barred from raising it on appeal. *See State v. Taylor*, 2015-1144 (La. App. 1 Cir. 2/10/16, *9), 2016 WL 562674 (citations omitted). Failure to comply with a state procedural rule is an independent and adequate state ground barring this Court's review of a federal question. *Hathorn v. Lovorn*, 457 U.S. 255, 262–63 (1982) (citations omitted).

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 Constitution . . . or where any title, right, privilege, or immunity is *specially set up or claimed* under the Constitution . . . ." (emphasis added). Section 1257 cannot provide a basis for jurisdiction because there is no "final judgment" by a state court where the validity of any statute was "drawn in question" or where the alleged "right" was specially set up or claimed." Petitioner argues that a newly passed state statute and constitutional provision should have been applied retroactively, despite their clear "prospective only" language. But there is no "final judgment" by a state court where the validity of the law was "drawn into question" because the issue was not raised at trial or on appeal.

This Court has "almost unfailingly refused to consider any federal-law challenge to a State-court decision unless the federal claim [raised in the challenge] was either addressed by or properly presented to the State court that rendered the decision [it was] asked to review." *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (internal quotation marks omitted) (citations omitted). 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)).

Additionally, 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 questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts." Petitioner

has failed to do so. Indeed, in his "Motion to Defer Consideration of Petitioner's Application for Writ of Certiorari Pending Determination of the Case of *Ramos v. Louisiana*, No. 18-5924,"[22] he repeatedly admits that the issue was not raised below and that "this Court's jurisdiction over this issue is questionable." Petr.'s Mot. at 4, 5.[23]

Thus, there is no final state court judgment for this Court to review and so it is without jurisdiction to rule on the issue. To be sure, since 28 U.S.C. §1257(a) was changed in 1988, this Court has "expressed inconsistent views as to whether this rule is jurisdictional or prudential in cases arising from state courts." *Robertson,* 520 U.S. at 86. Although Respondent believes this to be a jurisdictional matter, the Court should also deny the petition for prudential reasons due to lack of a meritorious basis for review. This Court "is one of final review, 'not of first view.'" *F.C.C. v. Fox Television Stations*, Inc. 556 U.S. at 529 (quoting *Cutter v. Wilkinson*, 544 U.S. 709,

[22] Respondent objects to the filing of Petitioner's Motion as there is no procedural vehicle allowing for the untimely substantive supplementation of the petition. While camouflaged as a motion, it is, in effect, a supplemental petition or brief. While facially asking for the petition to be held pending a decision in *Ramos*, it presents argument on the facts of the case, the timeliness of filing, allotment of the case, and the exclusion of an expert witness. Even as a supplemental brief, it does not conform to Supreme Court Rule 15.8 because it is not "restricted to new matter"—"new cases, new legislation, or other intervening matter not available at the time" the petition was filed. The Court should disregard the motion.

[23] Petitioner asserts that the issue is being "concurrently raised" in the 20th Judicial District Court and in the First Circuit Court of Appeals but that writ request was denied on November 19, 2019. *State v. Victor*, 2019-1123 (La. App. 11/12/19), 2019 WL 5895471. He also asserts that a related non-unanimous jury issue was raised in his Application for Rehearing. Petr.'s Mot. at 5 n.5. Without waiving any objection to the Motion, Respondent asserts that an issue raised for the first time in a motion for rehearing, but not considered, does not preserve the issue for this Court's review. *Radio WOW v. Johnson*, 326 U.S. 120, 128 (1945). Furthermore, the argument raised in the application for rehearing was that Victor was entitled to a new trial because a state district court judge, in a different jurisdiction, held that non-unanimous juries violated the equal protection clause. *This is not the claim being made in this petition*.

718 n.7 (2005)). It should reject Petitioner's invitation to address an issue raised at this late stage of the litigation.

B. Victor's First Question Does Not Present a Federal Question

Although Petitioner makes a passing reference to "Fourteenth and Thirteenth Amendment Rights"—Pet. at i—his claim is rooted in *state* law. He argues that a Louisiana case, *State v. Draughter*, 130 So.3d 855 (La. 2013), requires that the new Louisiana laws on jury verdicts—Acts 722 and 493, passed in 2018—should be applied retroactively to him.

Draughter had nothing to do with jury verdicts *or federal law*. As the Louisiana Supreme Court noted, "The defendant's motion to quash raise[d] a challenge to the constitutionality of La. R.S. 14:95.1[24] *under the state constitution only*."[25] *Draughter*, 130 So.2d at 861. The issue was whether a 2012 amendment to the Louisiana constitution, *which did not specifically provide for prospective or retroactive application*,[26] should be applied retroactively to Draughter. The Supreme Court held that the statute is presumed to have prospective effect only. *Draughter*, 139 So.2d at 864. However, given that it expressed a standard that had long been used in Louisiana, the rule should be applied retroactively. The court referenced *Griffith v.*

[24] "Possession of firearm or carrying concealed weapon by a person convicted of certain felonies."

[25] It further specifically noted that it did not raise a right under the Second Amendment of the United States Constitution. *Id.*

[26] All of the parties and the Supreme Court agreed that the constitutional amendment was silent as to its retroactive effect, unlike the provisions at issue in this case.

Kentucky, 479 U.S. 314 (1987)[27] in passing, noting that it followed *Griffith* "*as a matter of state law* for review of non-final convictions still subject to direct appellate review." But the substance of *Draughter*'s holding is irrelevant because the state court was clear that it addressed only state law and it has never since been applied to hold any legislative act retroactive.[28] A decision on the retroactivity of *a state law is not a federal issue.*

Finally, Petitioner cannot and does not explain how his *federal* constitutional rights were violated. He only generically refers to the Thirteenth and Fourteenth Amendments in his claim. A vague appeal to constitutional principles does not preserve constitutional claims. *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77 (1988) (noting, for example, that the petition in the lower court did not identify the Excessive Fines Clause of the Eighth Amendment as the source of the claim). Constitutional challenges must be "framed with the necessary specificity," *Flast v. Cohen*, 392 U.S. 83, 106 (1968). The precise provision of the Constitution, such as the Due Process Clause of the Fourteenth Amendment, must be cited. *See* S. Shapiro, K. Geller, T. Bishop, E. Hartnett, D. Himmelfarb, SUPREME COURT PRACTICE 463 (10th Ed. 2013). Additionally, Supreme Court Rule 14.4 provides that "[t]he failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready

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[27] For this conclusion it cited its decision in *State ex rel Taylor v. Whitley*, 606 So.2d 1292 (La. 1992)—in which it held that the reasonable doubt instruction required by *Cage v. Louisiana*, 498 U.S. 39 (1991) must be applied retroactively *on collateral review* pursuant to *Teague v. Lane,* 489 U.S. 288 (1988).

[28] In fact, every Louisiana court to consider its application to non-unanimous jury verdicts has distinguished it and refused to apply it. *See, e.g.*, *State v. Johnson*, 2018-00409 (La. App. 4 Cir. 3/13/19, 25) 266 So.3d 969, 984, *writ denied*, 2019-0061 (noting that it would be usurping the function of the legislature, which has clearly stated the prospective application of the Act.).

and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny the petition."

Thus, a petitioner may not baldly assert that a constitutional provision was violated without further explanation. But that is exactly what petitioner has done with regard to the federal Constitution. Thus, this petition should be construed as a request for relief under state law, as demonstrated by his arguments that the new state constitutional and statutory provisions are to be applied retroactively *under state law*. Relief on such state-law grounds must be sought elsewhere, rather than at this Court.

C. The Court Should Not Hold This Case for *Ramos*

Although Petitioner filed a motion to defer consideration of this application pending determination of the case of *Ramos v. Louisiana*, No. 18-5924, he does not claim that his rights *under the Sixth Amendment* were violated. In fact, he admits that "the issue in *Ramos* differs from the issue raised by petitioner herein . . . in that *Ramos* addresses the constitutionality of non-unanimous jury verdicts as a violation of the Sixth Amendment." Petr.'s Mot. at 6. Petitioner would like to obtain the benefit of a favorable decision in *Ramos* despite the fact that he has never raised any issue implicated by *Ramos*—in the trial court, in any state appellate court (even in a request for rehearing), or in this Court. There is no reason to hold this petition.

IV. A CORRECT VIEW OF THE FACTS RELATED TO QUESTION 2 REVEALS NO VIOLATION OF PETITIONER'S SPEEDY TRIAL RIGHT OR HIS RIGHT TO SELF-REPRESENTATION

A. There is No Constitutional Right to a Speedy *Arraignment*

Petitioner appears to claim that the delay between his indictment on April 12, 2010 and his arraignment on August 16, 2010 violated his right to a speedy trial. The Sixth Amendment right to a speedy trial attaches when a person becomes accused and ends *when the trial begins*. *Barker v. Wingo*, 407 U.S. 514 (1972); *Doggett v. United States*, 505 U.S. 647 (1992). Petitioner makes no complaint about the time between charging and the start of his trial and asserts no constitutional protection of his right to a speedy *arraignment*.

Petitioner appears to be relying on state law, rather than federal law. He cites Louisiana Code of Criminal Procedure article 701(C) & (E)—which provide that the prosecutor must set the arraignment within thirty days after charging, unless good cause is shown. "Good cause" is "any grounds beyond the control of the State or the Court." The State met its obligation by setting the arraignment on May 3, 2010. It was beyond the State's control that Petitioner did not appear on that date or on May 17. Nor did the State or the Court have any control over Petitioner filing a motion to recuse all the judges which required a stay of all proceedings. Thus, although this Court has no jurisdiction over a state law claim, there was also no violation of state law.

B. Petitioner's Right to Self-Representation Was Not Denied

Petitioner alleges that his rights were violated when a public defender was

"forced upon him" against his will and he was denied his right to access the court *pro se* for over five months. He misrepresents the record on this score.

Petitioner complains because, after dismissal of his case in February 2010 and re-indictment and assignment to a new division and new judge on April 23, 2010, the court appointed *separate* public defenders for him and his wife on May 6, 2010.[29] Prior to that point, he and his wife had been represented *jointly* by one attorney. Petitioner orally requested to proceed *pro se* at that hearing but, with other issues pending, the new judge advised him to seek legal advice on how to proceed and return in a week for his arraignment on May 17, 2010.

Prior to the arraignment date, though, Petitioner filed a *pro se* motion to recuse all of the judges in the judicial district and the court, *en banc*, entered an order staying all proceedings until the recusal motion was heard. Nevertheless, at Petitioner's request, his public defender filed an Objection to Allotment of the Case to Division "B" and Motion for Transfer. Petitioner also filed numerous pro se motions during the pendency of the stay.

On July 1, 2010, a hearing on the motion to recuse was had at which Petitioner was *represented by private counsel* for that limited purpose. The *ad hoc* judge appointed to hear the recusal motion found that the trial judge could be fair and denied the motion to recuse her. With Petitioner now present (and represented by the public defender), a *pro se* petition for habeas corpus was then heard and bail was set.

[29] Arraignment had been scheduled for May 3, 2010 but Petitioner did not appear and could not be found.

The Objection to Allotment and Motion to Transfer was heard on August 4, 2010 with Petitioner present and represented by the public defender. Twice during the hearing, he asserted that he wanted to represent himself, although that issue had been reserved for his arraignment hearing, which was held on August 16, 2010. Petitioner appeared with his public defender but refused to enter a plea. A not guilty plea was entered for him. The minutes indicate that he "made a disturbance by shouting in court and was removed from the courtroom."[30] A hearing on his *pro se* "motion to refuse indictment without dishonor" was set for August 24, 2010 and the rest of his *pro se* motions were set for October 7, 2010.

Petitioner personally argued his *pro se* "motion to refuse indictment without dishonor" on August 24, 2010. The court set September 20, 2010 for a hearing on *pro se* representation but Petitioner requested a continuance. It was reset for October 18, 2010. The court also ordered the jail to allow Petitioner and his wife to have time to meet with one another, to provide access to a legal library, and to meet with appointed or enrolled counsel as often as necessary.

On October 18, 2010, Petitioner's request to represent himself was heard. An extensive colloquy was had at that time. The Court granted his request but allowed the public defender to continue as standby counsel, in case Petitioner had questions. *See McKaskle v. Wiggins,* 465 U.S. 168 (1984) (*pro se* defendant's right to conduct own defense not violated by unsolicited participation of standby counsel).

[30] This was not the first or the last time Petitioner and his wife had to be removed from the courtroom for making a disturbance. He also had to be tazed at the jail for attacking one of his attorneys. Resp. App. B.

Thus, obviously, although he was represented by a public defender arguably against his wishes, the delay was caused by his filing a motion to recuse all of the judges. He represented himself *pro se* throughout the time filing numerous motions and representing himself at a hearing on one of them, and he was able to procure and meet with private counsel to represent him in one of the hearings. Thus, he was not denied his right to represent himself *nor* his right to private counsel.

C. Defendant Has No Right to Delay Trial

In one paragraph within his argument, Petitioner appears to smuggle in an issue regarding the denial of a continuance on the morning of the trial to allow a new private attorney to represent him. Although a person accused in a criminal trial generally has the right to counsel of his choice, a defendant must exercise that right "at a reasonable time, in a reasonable manner, and at an appropriate stage of the proceedings"—not "on the very date the trial is to begin, with the attendant necessity of a continuance and its disrupting implications to the orderly trial of cases." *Victor*, 195 So.3d at 165 (citing *State v. Bridgewater,* 00–1529 (La. 1/15/02), 823 So.2d 877); *see also Ungar v. Sarafite,* 376 U.S. 575, 589 (1964) (attorney hired five days before trial); *Morris v. Slappy,* 461 U.S. 1, 11–12 (1983) (attorney hired six days prior to date of trial); 17 Am. Jur. 2d Continuance § 65.

The record indicates that, over the course of these proceedings, Petitioner changed, or attempted to change, counsel at least eleven times. Moreover, in January of 2014, *six months before trial*, when Petitioner once again fired his private counsel, the trial court set forth very specific pretrial deadlines, including the July 22, 2014

trial date. She admonished Petitioner at that time that he could again retain new counsel in the future but that he should do so in a timely manner and that new counsel would not be cause for a continuance of the trial. Petitioner had over four years from the date of the last indictment to select representation, and over six months from the court's admonishment.

The grant or denial of a motion to continue and a motion to enroll as counsel is within the well-founded discretion of the trial court. *Ungar,* 376 U.S. at 589. The Louisiana Fifth Circuit found no abuse of the trial court's discretion in denying defendant's motion to enroll predicated on a motion to continue the trial. This court should deny review.

V. THE COURT'S DECISION TO HOLD ONE DAY OF TRIAL ON A SATURDAY DID NOT VIOLATE PETITIONER'S RIGHTS, AS ALLEGED IN QUESTION 3

A. The Louisiana Courts' Determination that Petitioner's Sabbath Claim Was Not Sincere Was Not an Abuse of Discretion

Petitioner claims that being required to appear in court on Saturday, July 26, 2014 violated his First and Fourteenth Amendment right to freedom of religion.[31] As this Court has held, "States are clearly entitled to assure themselves that there is an ample predicate for invoking the Free Exercise Clause." *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829, 833 (1989). Only "beliefs rooted in religion are protected by the Free Exercise Clause." *Id.* And, while the "'truth' of a belief is not

[31] Petitioner also appears to assert a claim under Louisiana Constitution article 1 §§ 2, 3, and 8. In addition to that being a state law claim not reviewable by this Court, Petitioner does not even set forth the content of those provisions or make any argument of their application and, thus, has waived that claim.

open to question, there remains a significant question as to whether it is 'truly held.'" *United States v. Seeger*, 380 U.S. 163, 185 (1965). Thus, "the threshold question of sincerity must be resolved in every case. It is, of course, a question of fact." *Id.* Determining whether a claimant holds a sincerely held religious belief that conflicts with a challenged law is an established part of free exercise doctrine and "one that courts are capable of making." *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 906–07 (1990) (O'Connor, J. concurring).

After observing six years of proceedings, the Louisiana Fifth Circuit found that Petitioner's First Amendment claim was an attempt to obstruct or delay the orderly progress of the trial rather than as a sincere assertion of religious belief. *Victor*, 195 So.3d at 160. As the Court noted, the record is replete with statements by the Petitioner that the matter would not go to trial. That included his statement made a month before trial that "[i]f I got to blow this courthouse up there ain't going to be no trial." On the day before trial, when asked if he could arrive in court at eight o'clock the next morning, he responded "There will be no trial." The next day, he appeared with new counsel requesting a continuance.

The Court instructed the jury *three separate times* early in the proceedings that "to get through the case we'll probably work on Saturdays." Petitioner never objected. At one point, after the judge had released the jurors, she brought them back into court for the *sole* purpose of telling them that the trial would be held on Saturday saying,

> "Well, in order to expedite things, I would like to work on Saturdays, if that's no problem with you all. So that we can finish it. Is that okay with everybody? So when you're making your arrangements, make sure when you make your arrangements for the coming days that you include

> Saturday. . . . [L]et's plan on Saturday, at least Saturday morning or part, a good part of Saturday."

Petitioner raised no objection. The following day, the first day of testimony, Petitioner's new counsel contacted the court—again requesting a continuance so that he could represent Petitioner. It was upon the denial of this request that Petitioner told the court, for the first time, that he could not do anything on Saturday because it was his "day of rest period." He acknowledged that he had heard the court's instruction to the jury the day before but had done nothing because he "had so much going on" and was "real tired."[32] The court took his claim under advisement.

Two days later, when the court instructed everyone to return Saturday morning, Petitioner responded, in front of the jury, "Your Honor, I object. Tomorrow is the Sabbath. I don't work on the Sabbath. Six days he worked, the seventh day he rest. Have to rest. We've been driving at this since Monday. Need a day of rest . . . . That's my belief. I'm not going to do nothing tomorrow." Given no other evidence or argument, the court instructed Petitioner that the trial would continue and that he would need to be present but that he could choose not to do anything if he wanted.

Saturday morning, after the judge, the prosecutors, the court personnel, the jury and Petitioner and his wife had come to court, the judge asked Petitioner if he would like to say anything about his Sabbath claim for the record. Again, he claimed that "this is the only day I can regain and recoup" and filed a handwritten motion

[32] The Fifth Circuit noted that Petitioner, "throughout the proceedings, freely objected to many things at most hearings, which render his assertion that he forgot to object on July 23, 2014 suspect." *Victor*, 195 So.3d at 160.

claiming that he could not work on the Sabbath.[33] He also claimed that his Sabbath beliefs were Biblically based although he was non-denominational. As evidence of his beliefs, he filed into the record a copy of his Certificate of Ordination by the Spiritual Sunlight Baptist Association, a church in New Orleans that holds *Sunday* services. Thus, despite the fact that his four adult sons and his brother were in the courtroom, he offered no evidence of his religious practice or belief that he could do no work on Saturdays, other than his and his wife's self-serving statements.

Given all of this evidence, the trial and appellate courts made a factual determination that Petitioner's claim was not sincere. Even if this Court was interested in determining whether a defendant has a constitutional right not to appear in court on the Sabbath, this case would be a poor vehicle to use. At best, Petitioner is objecting to no more than the misapplication of settled law to a narrow fact issue. And the courts' rulings must be sustained unless clearly erroneous. *See Snyder v. Louisiana*, 552 U.S. 472, 477 (2008). This court is a court of law rather than a court for correction of errors in fact finding. *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.,* 336 U.S. 271, 275 (1949); Rule 10 (certiorari is "rarely granted" when the petition asserts "erroneous factual findings"). As such, it should not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Id*. There was no error here.

[33] The Louisiana Fifth Circuit also noted the fact that Petitioner not only came to the trial on Saturday but also filed and argued a motion in court, belying his claim that he could perform no work on Saturday. *Victor*, 195 So.3d at 155, n.35.

B. The Court's Decision to Hold Trial on Saturday Did Not Violate Any Federal Law

Petitioner claims that his rights under the First Amendment were violated, and he appears to argue that the court needed to find that the state had a *compelling* need to hold court on Saturday. However, Petitioner misstates the law governing whether *a state* has violated his First Amendment rights. To support his contention that the state court was required to articulate a compelling interest before holding trial on a Saturday, he cites the Religious Land Use and Institutionalized Persons Act (RLUIPA); however, that law only protects "a person residing in or confined to an institution" where "the substantial burden is imposed in a program or activity that receives Federal financial assistance." 42 U.S.C. §2000cc-1. The compelling interest test required under RLUIPA does not apply.[34]

The standard of review applicable to this case was decided by this Court thirty years ago in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). In *Smith*, this Court held that the right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes [ ] conduct that his religion prescribes [ ]." *Id.* at 879 (internal citations omitted).[35]

The laws at issue in this case are "neutral laws of general applicability," and,

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[34] The Louisiana Fifth Circuit, apparently, also misunderstood the law applicable to this case, footnoting that *City of Boerne v. Flores*, 521 U.S. 507 (1997) was superseded by RLUIPA. *Victor,* 195 So. 3d at 159 n.37. Thus, it *unnecessarily* applied a more demanding standard than required.

[35] The Court left it to the individual states to provide greater protections for their citizens. Louisiana followed the Court's prompting and passed the Preservation of Religious Freedom Act in 2010. See La. R.S. 13:5231-5242. It provides for the use of the "compelling interest" test. Petitioner, however, did not argue application of the Act to the state courts below nor does he raise it here.

therefore, Petitioner's right of free exercise does not relieve him of complying with them. In Louisiana, "the judge shall hold court during ten months of the year and the session shall be continuous, Sundays and legal holidays excepted . . . ." La. R.S. 13:501(A). Legal holidays are defined in Louisiana Revised Statute 1:55 and provide that "the whole of every Saturday" is a legal holiday *only in certain parishes*, not including St. John the Baptist Parish, which is the parish at issue in this case. Furthermore, a "court possesses inherently all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders . . . ." La. C.Cr. Pro. art. 17. It has a "duty to require that criminal proceedings [are] conducted with dignity and in an orderly and *expeditious* manner." *Id.*

In this case, the Louisiana Fifth Circuit determined that "the record reflects that the trial judge carefully considered defendant's concerns." *Victor*, 195 So.3d at 158. Looking to *State v. Pride*, 1 S.W. 3d 494 (Mo. App. W. D. 1999) *cert. denied* 529 U.S. 1004 (2000)[36] for guidance, the court weighed defendant's concerns against a number of factors. *See also*, *U.S. v. Fisher*, 571 F. Supp. 1236 (S. D. N. Y. 1983); *Hoyt v. Lewin*, 444 F. Supp. 2d 258 (S. D. N. Y. 2006). The court considered his delay in raising the issue, including his failure to object when the jury was advised numerous time that they might work on Saturday. It also weighed Petitioner's request against

[36] *Pride* involved very similar circumstances: a Seventh Day Adventist who objected to a day of trial being held on a Saturday. However, Pride objected early on, testified under oath, was a member of a denomination that observed the Sabbath on Saturday, and had done nothing to delay the trial. Nevertheless, the court weighed judicial efficiency over his First Amendment rights.

the unavailability of the State's key expert witness the following week,[37] the effect of the delay on the jurors' lives, and the justice system as a whole. *Id*. at 159. The Louisiana Fifth Circuit found that all of these things "weighed in favor of a judicial interest in going forward with trial based on efficiency and fairness." *Victor*, 195 So.3d at 160. The Louisiana courts reasonably reviewed and weighed the concerns of each side in this case and determined that Louisiana law allowing for trials on Saturday, along with the court's duty to require that criminal proceedings be conducted in an orderly and *expeditious* manner, outweighed Petitioner's late asserted religious liberty claim that had questionable sincerity.

C. Petitioner Has Not Properly Raised A Sixth Amendment Confrontation Clause Claim and It Would Fail in Any Event

In his Question Presented, Petitioner does not state any claim based on the Sixth Amendment right to confront witnesses. In part of one sentence within his argument, Petitioner states, "The trial judge . . . subsequently violated substantive protections afforded the Victors pursuant to the Confrontation Clause of. . . the Sixth Amendment." He makes no further legal argument based on that assertion. The fact that a petitioner may have discussed an issue in the text of his petition does not bring it before this Court. "Rule 14.1(a) requires that a subsidiary question be fairly included in the question presented for [the Court's] review. *Izumi*, 510 U.S. at 31–32

[37] Using a quote by the prosecutor that was taken out of context, Petitioner asserts that the State did not object to the continuance. Pet. 16–17. That is simply not true. One of the State's key expert witnesses was from out-of-town and had re-arranged his schedule to be in court on Saturday, relying on the fact that the court had said all week that she was going to conduct trial on Saturday. Additionally, that expert was leaving the following day for a medical conference in San Antonio, Texas that lasted through Thursday and she "just [did not] see any way of getting him back here before the Court's anticipated conclusion of trial."

& n.5.

To the extent that Petitioner raised an issue in the text of his petition that could be "fairly included in the question presented," Respondent asserts, as the Louisiana Fifth Circuit held, Petitioner waived his Sixth Amendment right to confront witnesses. Petitioner had no right to refuse to participate in the proceedings. The court repeatedly and fully explained to Petitioner that she was going forward with the trial on Saturday. Petitioner and his wife were present in court throughout the proceedings and after the direct exam of each witness was concluded, were asked if they wished to cross-examine the witness. They did not respond.[38] The Louisiana Fifth Circuit noted that they "huddled together all day murmuring unintelligibly." *Victor*, 195 So.3d at 155, n.36. Thus, they were in court, able to confront the witnesses, and could have chosen to cross-examine them at any time. They chose not to and, thus, waived that right. *See Taylor v. United States*, 414 U.S. 17, 19 (1973) (citing *Diaz v. United States*, 223 U.S. 442 (1912); *United States v. Gagnon*, 470 U.S. 522, 528-29 (1985)).

Furthermore, pursuant to Louisiana law, Petitioner could have called any witness who appeared on Saturday as his own witness during the following week, without vouching for his credibility, and examine him on anything relevant to the case, even using leading questions if the witness is hostile or identified with an adverse party. *See* La. C. Evid. arts. 607(A), 611(B) & (C). Thus, any error committed

[38] The court had allowed Petitioner to make a statement to the jury that morning, since he had objected in front of the jury the day before, explaining to them why he and his wife were not participating in the trial.

due to their failure to cross-examine the witnesses on Saturday could have been cured later in the week and was, thus, harmless. The Louisiana Fifth Circuit decision that the trial court acted properly was correct.

VI. THE STATE COURTS DID NOT ACT WHILE PETITIONER'S MOTION TO RECUSE WAS PENDING, AS PETITIONER ALLEGES IN QUESTION 4, WHICH IS ONLY A VIOLATION OF STATE LAW IN ANY EVENT

The question presented by Petitioner is whether it is a nullity, obstruction of justice, or denial of a fair hearing when judges *en banc,* subject to an unresolved recusal motion, deliberately have proceedings prior to the recusal motion. As the Louisiana Fifth Circuit found, "Defendant's allegation that actions were taken on his case while his motion to recuse was pending is not supported by the record." *Victor*, 195 So.3d at 172. Petitioner did "not set forth the alleged 'acts' that were performed by the trial court while the motion was pending, and after a careful review of the record, no such acts can be found." *Id.* The Fifth Circuit explained that "all proceedings were explicitly stayed per the May 14, 2010 *en banc* order, contrary to defendant's allegations that the judges of the 40th Judicial District Court acted in the case while the motion to recuse was pending." *Id.*

In any event, Petitioner's fourth question raises no federal law, issue, or question. Nor does Petitioner advance any legal theory based on federal law in the body of his argument, other than a vague statement that the state court's actions violate his Fourteenth Amendment substantive right to due process and equal protection. However, he alleges *no* facts and makes *no* argument in support of a

federal due process or equal protection claim.[39] As before, a vague appeal to constitutional principles does not preserve a constitutional claim. *Bankers Life*, 486 U.S. at 77.

At best, the issue is covered under state law which Petitioner misinterprets. In support of his question, Petitioner points to three articles in the Louisiana Code of Criminal Procedure, articles 673, 671, and 538. All three articles cut against his argument. But even if they supported Petitioner, this Court does not review claims under state law.

VII. THE STATE COURTS DID NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHTS, AS ALLEGED IN QUESTION 5, BY RANDOMLY RE-ALLOTTING HIS CASE AFTER GRANTING HIS MOTION TO QUASH HIS INDICTMENT

Petitioner's fifth question vaguely references the Fourteenth Amendment while misstating the facts about the state court's re-allotment of his case after granting his motion to quash his indictment. It was not the State's action but the Petitioner's action that caused the case to be re-allotted. It was at *Petitioner's* request, made through a Motion to Quash the indictment, that the trial judge in Division A quashed both indictments. As the Louisiana Fifth Circuit noted, the grant of the motion to quash was "sufficient on its own to dismiss the case." *Victor*, 195 So.3d at 168 n.46. After quashing the first and second indictments, a new grand jury was empaneled and rendered a new indictment. As with any indictment, it was assigned a case number and randomly allotted to a judge. Since it was randomly allotted, it

[39] Petitioner cites three Supreme Court cases (and one state court case) in his petition; however, all three cases related to a finding of double jeopardy after an acquittal and have no relevance to this question presented.

could have been re-allotted to Division A, but the State had no control over that.

In his "Supplemental Brief," to which Respondent objects as an untimely supplementation of an untimely petition, Victor attempts to reframe his question to add an explicit reference to the Due Process Clause—but then reveals the weakness of his federal claim by citing to a *state* case, *State v. Reimonenq*, 2019-KK-0367 (La. 10/22/19), 286 So.3d 412. *Reimonenq*, though, is an extremely "case and fact-specific ruling"[40] in which the Louisiana Supreme Court, long weary of the "perennial practice"[41] of the prosecutors in Orleans Parish dismissing cases after non-advantageous *evidentiary* rulings in order to get a *new ruling on that same issue* by a new judge, held that taking advantage of the state laws *for that purpose*, violated due process. *Id*. at 416–17.

This Court previously improvidently granted certiorari for the alleged denial of due process under the Fourteenth Amendment because of the manner in which the trial judge was designated to sit in a case. It found that the legality of the assignment depended upon the validity of the provisions of the *state* statute as tested by the *state* Constitution and, therefore did not violate petitioner's federal rights. *Akins v. State of Tex.,* 325 U.S. 398, 400, n.1 (1945). The same is true in this case and there is no reason for this Court's review.

[40] *Reimonenq*, 286 So.3d at 418 (Weimer, J., concurring and recognizing this fact).

[41] *Reimonenq*, 286 So.3d at 421 (Crichton, J., concurring and recognizing this fact).

VIII. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION, AS ALLEGED IN QUESTION 6, BY REFUSING TO ALLOW DR. BOLES TO SERVE AS AN EXPERT WITNESS IN LIGHT OF HER EGREGIOUS "UNPROFESSIONAL CONDUCT"

In his sixth question, Petitioner claims that the denial of the qualification of Dr. Velva Boles as an expert able to testify regarding the medical causes of the death of Petitioner's step-son violated his Sixth Amendment right to present a defense, including the right to the assistance of an expert under *Ake v. Oklahoma*, 470 U.S. 68 (1985). The Louisiana Fifth Circuit went into great detail discussing the testimony of Dr. Boles—who lied about her qualifications in her testimony before the Court at previous hearings[42] and lied in her direct testimony at trial. Her medical license had been revoked by the Louisiana State Board of Medical Examiners on April 14, 2014 because she was "guilty of unprofessional conduct," with the Board noting "[her] transgressions to be 'particularly egregious.'"[43] *Victor*, 195 So.3d at 175. The Board had issued an opinion that Dr. Boles "'shall not serve as a medical expert or consultant for the purposes of litigation for the remainder of her medical career.'" *Id.* She had also been denied qualification as an expert in federal court in the case of *Hamilton v. Negi*, 2012 WL 1067857 (W. D. La. 3/15/12).[44]

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[42] Dr. Boles testified at two bail hearings in 2008 and 2009. At those hearings, she testified that she had a Ph.D. in pathology although she testified in the case of *Hamilton v. Negi*, that she did not.

[43] The Board found that she had lied in her application for medical staff privileges at a Louisiana hospital, lied in her application for licensure with the Board, lied on her application to take the "USMLE," lied on her driver's license, and lied in her medical school records. She had asserted that she had completed a residency program in Internal Medicine when she had not. She stated that she had a specialty in Internal Medicine and Pediatrics obtained at Tulane University Medical School when she had left the school prior to completion of the program.

[44] In *Hamilton*, the magistrate judge concluded, based on testimony before him, that Dr. Boles was unqualified to testify as an expert because she "repeatedly misrepresented her qualifications to employers and courts of law" by stating that she had earned degrees that she had not earned and claimed to have testified as an expert witness in trial in which she never participated.

Trial court judges serve a "gatekeeping" function which requires them to inquire into both relevance and reliability. *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 589 (1993). In light of Dr. Boles' egregious conduct, the Louisiana Fifth Circuit correctly determined that "the trial judge did not abuse her discretion in refusing to allow Dr. Boles to testify as an expert." *Victor*, 195 So.3d at 176.

IX. DESPITE PETITIONER'S ASSERTION IN QUESTION 7, LOUISIANA HAS JURISDICTION OVER PETITIONER

Petitioner appears to claim that the Louisiana courts have no *in personam* jurisdiction over him in this criminal proceeding. Apparently, he confuses jurisdiction in criminal matters with civil matters and individual status with corporate status. Both his claim and his argument are incomprehensible. Furthermore, other than generically citing the Fourteenth and Ninth Amendments in his Question Presented, he gives no explanation and makes no argument regarding how anything allegedly done violates federal law.

The Louisiana Constitution vests jurisdiction to try all crimes committed within the state in the district courts. La. Const. art. 1, §1, art. 5 §§ 14 –16. Petitioner was tried for a crime that occurred within Louisiana and within the district in which he was tried. He does not dispute that. He is being tried as an individual, not a corporation.

Furthermore, as the Louisiana Fifth Circuit held, "[t]he record contains no motion or judgment of the trial court regarding the challenged jurisdiction." In addition to there being no legal merit to his claim, Petitioner is procedurally barred from raising it. This matter is strictly one of state law and was denied by the

Louisiana court on the basis of an independent and adequate state law ground.

X. THE FACT THAT MRS. VICTOR RECEIVED A LESSER SENTENCE DOES NOT VIOLATE PETITIONER'S CONSTITUTIONAL RIGHTS, DESPITE HIS ASSERTION IN QUESTION 8

Petitioner claims that that the State "suppl[ied] two opposite theories of prosecution simultaneously driven by gender discrimination" in violation of his Fifth and Fourteenth Amendments. This generic reference to the Constitution, as argued earlier in this brief, does not preserve a federal constitutional claim. And, once again, other than citing the Fifth and Fourteenth Amendments in his question presented, he gives no explanation and makes no argument about how the State violated those constitutional provisions.

Simply stated, the Petitioner and his wife were charged with the same crime—the murder of Mrs. Victor's son. The State offered forensic evidence showing the young boy was beaten to death, offered testimonial first-hand evidence that both Victors did not appear concerned about the boy at the hospital, offered statements by the Petitioner at the hospital that the injuries happened while the child was being disciplined and that he accepted full responsibility, and offered consistent, repeated, statements and testimony by half of the children that Petitioner beat the child for two days while his wife stood by and did nothing. Statements and testimony made by some of the other children and Mrs. Victor were both internally inconsistent and inconsistent with the forensic evidence that were offered by Petitioner.

The State's theory as to the murders, presented to the jury with both Victors present, was that an 8-year-old boy was beaten to death and both of these people were

responsible. The jury was allowed to decide the level of culpability of each defendant. There is nothing unique or unusual in the presentation of the State's case. The fact that the jury found Mrs. Victor less culpable, convicting her of manslaughter and Petitioner of second-degree murder, does not constitute a violation of Petitioner's rights.

The Louisiana Fifth Circuit found that Petitioner had not cited to the record at any point, in violation of the rules of the court. And the court found that Petitioner had no standing to complain of Mrs. Victor's rights being violated. This question does not merit review by this Court.

XI. DESPITE HIS CLAIMS IN QUESTION 9, PETITIONER JUMPED BAIL AND CANNOT NOW COMPLAIN THAT HIS BONDS WERE REVOKED

In his final question, Petitioner claims that his rights under the Fourth and Eighth Amendments were violated because he was arrested three times, that his third arrest was warrantless. He also complains that his bail bonds were forfeited or revoked. Other than these bald, incomprehensible claims, he offers two sentences for argument containing no facts or argument as to how the Fourth and Eighth Amendments protect him from these alleged acts. He also fails to mention that he did not appear in court for numerous hearings and, ultimately, fled the state of Louisiana and had to be extradited from Georgia to ultimately be tried for this crime. His last arrest was made by Georgia officials based upon an extradition warrant. Understandably, his bail bond was revoked.

Furthermore, this claim was not raised before any court below and was, thus, waived. There is no judgment on this issue for the Court to review.

CONCLUSION

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

Respectfully submitted,

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