No. 19-8062

In the Supreme Court of the United States

TROY ANTHONY LEBOUEF,
Petitioner

v.

DARREL VANNOY, WARDEN,
Respondent

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

BRIEF IN OPPOSITION BY DARREL VANNOY

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QUESTION PRESENTED

Can Troy LeBouef benefit from this Court's holding in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), even though the state court record incontrovertibly shows his jury verdict was unanimous and his conviction became final long ago?[1]

[1] LeBouef prefaces his question presented with the assertion that this case involves a non-unanimous verdict. As discussed below, his verdict was unanimous.

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INTRODUCTION

Petitioner Anthony LeBouef, acting *pro se*, presents one question to this Court: whether he was entitled to a unanimous jury verdict. But the record incontrovertibly shows that a jury unanimously convicted him. And, in any event, his conviction became final long ago. Because he presents no other question, his petition should be denied.

LeBouef argues two other issues in the body of his petition, but neither is a "subsidiary question[] fairly included within" the question of whether he was entitled to a unanimous jury verdict. Supreme Court Rule 14.1. Under the rules of this Court, those issues should not be considered.

Even if the Court entertains those issues, all the courts below found these claims to be meritless. LeBouef's petition does not warrant review from this Court.

STATEMENT OF THE CASE

The Crime:[2]

A jury unanimously convicted LeBouef for the aggravated rape of MV, who was four years old at the time of the incident. By his own admission at trial, LeBouef shared a bed with MV. His penis was in her mouth on one occasion. And, on another occasion, she was "tugging on his penis."

[2] The facts are taken from the unpublished opinion of the Louisiana Court of Appeal, First Circuit, on direct appeal and the Report and Recommendation of the magistrate judge. *State v. LeBouef,* 2011-2025 at *1–2 (La. App. 1st Cir. Jun. 14, 2012),2012 WL 2196300; Pet. App. at C, 6–10.

MV informed a forensic interviewer that LeBouef told her to go under the covers and touch his penis and that he put it in her mouth. She identified him at trial. LeBouef claimed the child acted on her own.

MV's older sister, AP, also testified that when she was about eleven years old, LeBouef put his hand in her underwear and rubbed her vagina. LeBouef's girlfriend's niece, KP, testified that when she was about twelve or thirteen, LeBouef came to her while she was asleep in another room numerous times and touched her vagina, made her touch his penis, and attempted to have sex with her.

On March 16, 2010, a Terrebonne Parish grand jury indicted LeBouef for the aggravated rape of MV.[3] He pleaded not guilty and was tried before a twelve-person jury in early December 2010. The jury unanimously found him guilty. *See* Order and Minutes, Resp. Appx. A.[4] He was sentenced to life in prison without benefit of probation, parole, or suspension of sentence on January 14, 2011. The trial court denied his motion to reconsider the sentence January 22, 2011.

LeBouef appealed to the Louisiana Court of Appeal, First Circuit, and raised two errors, neither of which he raised here. The state appellate court affirmed the conviction and observed that LeBouef had been convicted *unanimously* by the jury.

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[3] *See* LA. R.S. 14:42A(4).

[4] LeBouef requested written polling of the jury, as permitted by Louisiana Code of Criminal Procedure article 812. The trial judge reviewed the written responses of each juror, announcing each vote up to ten votes—the number then required for a legal verdict—and announced, "We have a legal verdict." The polling slips were then sealed. St. Rec. Vol. 1 of 3, Trial Minutes, 12/9/10; Jury Verdict Form, 12/9/10; St. Rec. Vol. 2 of 3, Trial Transcript, 12/910. The State requested that the trial court unseal and review the polling slips, which it did on July 27, 2020, at which time the court affirmed that the verdict was unanimous. *See* Order and Minutes, Resp. Appx. A. Article 812 expressly states that "[t]he clerk shall collect the slips of paper, make them available for inspection by the court and counsel, and record the results."

See LeBouef, 2012 WL 2196300, at *6, *8 ("We find that there was overwhelming evidence introduced at trial to support the unanimous guilty verdict."). The Louisiana Supreme Court denied supervisory review. *State v. LeBouef*, 2012-2025 (La. 2/22/13), 108 So.3d 762. LeBouef's conviction became final May 23, 2013, when he did not file for review with this Court.

LeBouef subsequently filed a *pro se* application for state post-conviction relief on May 1, 2014, where for the first time he asserted that Louisiana's non-unanimous jury verdict laws were unconstitutional. In his application he claimed, "Petitioner was found guilty of aggravated rape and sentenced to life imprisonment by a non-unanimous jury verdict." He did not provide any evidence of the verdict. He did not mention that the state appellate court on direct review of his case observed the verdict was unanimous. Nor did he ever request that the polling slips be unsealed, as the State later did. The state trial court, on post-conviction review, denied relief. The state appellate court denied LeBouef's application for supervisory review. *State v. LeBouef*, 2017-0292 (La. App. 1st Cir. 5/18/17), 2017 WL 2189964 (unpublished). And so did the Louisiana Supreme Court. *State v. LeBouef*, 2017-1026 (La. 9/28/18), 253 So. 3d 787.

LeBouef filed a petition for habeas corpus in the federal district court for the Eastern District of Louisiana. There LeBouef renewed three claims he made at various times in state courts below, including the non-unanimous jury claim. The magistrate judge found LeBouef was not entitled to federal habeas relief. Pet. App. at 6–26. The district court adopted the magistrate's findings and recommendations,

denied the claims, dismissed his petition with prejudice, and refused to issue a certificate of appealability. Pet. App. at 3–5. The Fifth Circuit denied LeBouef's motion for a certificate of appealability. Pet. App. at 1–2.

LeBouef petitions this Court for certiorari—contending he was convicted by a non-unanimous jury and is entitled to relief under *Ramos*.

REASONS FOR DENYING THE PETITION

I. LEBOUEF'S PETITION SHOULD BE DENIED BECAUSE HE WAS CONVICTED BY A UNANIMOUS JURY

LeBouef was convicted *unanimously* by the jury. *LeBouef*, 2011-2025, 2012 WL 2196300 at *8; *see* Resp. Appx. A (minute entry). Although LeBouef alleged in post-conviction proceedings that he was found guilty by a non-unanimous jury verdict, his statement is contradicted by the lower state court opinion, the minutes from the trial court, and the unsealed polling slips. This uncontroverted evidence shows that LeBouef's claim that he was convicted by a non-unanimous jury is false. He cannot benefit from this Court's holding in *Ramos*.

In any event, LeBouef's conviction became final in 2013, so he could not benefit from *Ramos* unless this Court grants relief to the petitioner in *Edwards v. Vannoy*, No. 19-5807 (U.S. May 4, 2020), 2020 WL 2105209, at *1 ("[T]he petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted limited to the following question: Whether this Court's decision in *Ramos v. Louisiana*, 590 U.S. —— (2020), applies retroactively to case on federal collateral review.").

II. THE JUROR BIAS ISSUE AND INEFFECTIVE ASSISTANCE OF COUNSEL ISSUE ARE NEITHER PROPERLY BEFORE THIS COURT NOR WORTHY OF REVIEW

A. These Issues Are Not Included in the Question Presented

LeBouef includes within his petition[5] a discussion of alleged juror bias and a discussion of what LeBouef contends was the ineffective assistance of his counsel based on a failure to object to the admission of a hearsay statement. However, the sole issue contained in the Question Presented is whether a jury verdict must be unanimous—which has nothing to do with either of these issues. Pursuant to this Court's rules, these issues should not be considered. Supreme Court Rule 14.1(a) ("The statement of any question presented is deemed to comprise every subsidiary question fairly included therein. Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *see Yee v. City of Escondido*, 503 U.S. 519, 537 (1992).

B. Neither Issue Warrants This Court's Review

Should this Court find LeBouef has sufficiently raised these two issues without stating them in his Question Presented, this Court should still deny review. LeBouef has identified no state or circuit splits with regard to either issue. And his allegations of error involve the application of well-settled principles of law.

Moreover, LeBouef is subject to the demanding requirements of AEDPA. He cannot qualify for federal habeas relief unless he can show that his state proceeding either "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable

[5] The only places where these issues are mentioned are in the "Reasons For Granting and Staying the Writ." They are not mentioned in the Question Presented, the Statement of the Case, or in the Conclusion and request for relief. In fact, LeBouef requests no relief on these claims.

determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). To the extent that his claims turn on issues of fact, "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). LeBouef cannot satisfy AEDPA's standards on any claim. Thus, the denial of relief below was correct on the merits, and no corrective action is needed from this Court.

1. There is no compelling reason to review the juror bias Issue

(a) No conflicts exist on this issue. LeBouef alleges that the trial court erred when it denied a defense challenge for cause of a prospective juror. However, LeBouef alleges no conflict among state or federal courts regarding this issue.

(b) The state court's determination that the juror was unbiased binds this Court. LeBouef claims that, during voir dire, a prospective juror was biased towards the prosecution because he had two young daughters and because he and his wife were volunteer advocates for children. The juror at issue was eliminated from the jury with a peremptory challenge—so any impartiality he might have possessed could not have infected the jury. This Court has held a claim "must focus not on [the eliminated juror], but on the jurors who ultimately sat." *Ross v. Oklahoma*, 487 U.S. 81, 86 (1988). In this case, as in *Ross*, "[n]one of those 12 jurors, however, was challenged for cause by petitioner, and he has never suggested that any of the 12 was not impartial." *Id.*

LeBouef complains that he had to use a peremptory challenge to eliminate this juror. But the right to exercise peremptory challenges in state court is determined by *state* law. This Court has "long recognized" that "peremptory challenges are not of federal constitutional dimension," and "[j]ust as state law controls the existence and exercise of peremptory challenges, so state law determines the consequence . . . ." *Rivera v. Illinois*, 556 U.S. 148, 152 (2009) (emphasis added). This Court does not review matters of state law.

In any event, the state appellate court[6] and the federal district court reviewed LeBouef's claim and found it to be meritless. *See* Pet. App. at 15–22; *LeBouef,* 2012 WL 2196300 at *2–*6. The state trial court found the juror was sufficiently rehabilitated and could have served if required. A state trial court's denial of a challenge for cause based on a finding of non-bias and impartiality of a single juror is a "factual determination [that] is binding on federal courts, including this Court, in the absence of clear and convincing evidence to the contrary." *Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018). As the magistrate judge correctly observed, the state courts determined that the juror "would have been able to serve fairly and without bias or prejudice in Mr. LeBouef's case. The record fully supports [that] factual finding." Pet. App. at 18.

[6] The state appellate court decision from LeBouef's direct appeal is the last reasoned state court judgment on this issue.

2. LeBouef's ineffective assistance of counsel claim does not warrant review

(a) No conflicts exist on this issue. LeBouef also argues his trial counsel provided ineffective assistance when he failed to lodge a hearsay objection to a statement that LeBouef had sex with an unconscious, drunken woman. However, he alleges no conflict among state or federal courts regarding this issue.

(b) LeBouef presents no substantial federal constitutional claim. LeBouef offers no constitutional argument to support his claim. He mentions no constitutional provision and cites no jurisprudence, much less federal constitutional jurisprudence. The only statutory provision he cites is Louisiana Code of Criminal Procedure article 770(2)—which allows for mistrials. Vague arguments are insufficient to preserve this claim. 28 U.S.C. §1257; *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 77 (1988) ("The vague appeal to constitutional principles does not preserve . . . claims."); *Taylor v. Illinois*, 484 U.S. 400, 406 n.9 (1988) (constitutional claim not preserved if based on an unidentified provision of the Bill of Rights).

(c) Lower courts correctly applied the law to the facts. If this Court finds LeBouef sufficiently preserved and presented a federal claim, the lower courts' decisions were correct and were based on the correct application of uncontested law to the facts of the case.

The state appellate court[7] properly applied *Strickland v. Washington*, 466 U.S. 668 (1984) to the case. *See* Pet. App. at 22–29; *LeBouef*, 2012 WL 2196300 at *6–*8.

[7] LeBouef did not raise this issue in his state post-conviction proceedings. Thus, the state appellate court decision on direct appeal is the only reasoned state court judgment on this issue.

LeBouef does not claim that an improper standard or test was used. He appears to claim only that the courts misapplied the law to the facts.

The state appellate court[8] chose not to determine whether counsel's performance was deficient and instead looked only to the question of prejudice. That was not improper. *Strickland*, 466 U.S. at 697 ("[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies."). The court concluded abundant evidence supported a finding of guilt. The court noted that the victim testified at the trial about LeBouef's actions and her testimony was consistent with her taped interview at the children's advocacy center. Two other victims testified LeBouef sexually molested them. A detective testified about his interview with LeBouef where LeBouef admitted that the four-year-old victim had his penis in her mouth and pulled on it. The videotape of the interview was played for the jury. Most importantly, LeBouef testified at trial that he committed the acts. *LeBouef,* 2012 WL 2196300 at *7. The state court held that LeBouef "failed to show that his attorney's performance prejudiced his defense such that the outcome of the trial would have been different." *Id.* at *7–8.

When "assessing prejudice under *Strickland,* the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted

[8] The state appellate court on direct appeal noted that a claim of ineffective assistance of counsel is more properly raised by an application for post-conviction relief where a full evidentiary may be conducted. *LeBouef,* 2012 WL 2196300 at *6. Although LeBouef filed a petition for post-conviction relief, his sole claim was the lack of a unanimous jury verdict.

differently." *Harrington v. Richter,* 562 U.S. 86, 111 (2011) (internal citations omitted). "Instead, *Strickland* asks whether it is reasonably likely the result would have been different." *Id.* (internal quotation marks omitted). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112. Given the substantial evidence of guilt, including LeBouef's admission at trial, there was no substantial likelihood that the result in this case would have been different had an objection been made.

The federal district court agreed with the state appellate court, noting that the "evidence of guilt [was] substantial" and "[t]he state courts' conclusions in this regard [were] fully supported by the record." Pet. App. at 28–29. It also considered, however, counsel's performance. At trial, LeBouef's counsel opened the door to a line of questioning regarding an alleged sexual encounter between LeBouef and his ex-girlfriend's roommate.[9] The federal district court found that this was part of counsel's trial strategy to bolster LeBouef's testimony that he had never raped anyone. Pet. App. at 28.

The standards created by *Strickland* and 28 U.S.C. §2254 are both highly deferential. *Harrington*, 562 U.S. at 105. On habeas review, scrutiny of counsel's performance has been termed "doubly deferential." *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 112 (2009)). Federal courts apply the "strong presumption" that counsel's strategy and defense tactics fall "within

[9] The details of the detective who investigated the incident's testimony , LeBouef's ex-girlfriend's testimony , and LeBouef 's testimony are found in *LeBouef*, 2012 WL 2196300 at *6–7 and the federal district court decision, Pet. App. at 26–28.

the wide range of reasonable professional assistance,"*Harrington*, 562 U.S. at 104 (citing *Strickland*, 466 U.S. at 689), and presume that trial strategy is objectively reasonable unless clearly proven otherwise. *Strickland*, 466 U.S. at 689. The courts "must make every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time of trial." *Id.* At 689.

As correctly determined by the federal district court, the decision by LeBouef's counsel not to object to hearsay was a reasonable strategic tactic and would have been a meritless objection anyway. Pet. App. at 28. It easily fell within the wide range of professional assistance.

"Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction." *Harrington*, 562 U.S. at 102–03 (quoting *Jackson v. Virginia,* 443 U.S. 307, 332, n.5 (1979) (Stevens, J., concurring)). This case reflects no extreme malfunction in the State's criminal justice system.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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