No. 19-8149

In the Supreme Court of the United States

NATHANIEL LAMBERT,
***Petitioner*,**

v.

LOUISIANA,
***Respondent*.**

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Does the new rule from *Ramos v. Louisiana* retroactively apply under *Griffith v. Kentucky* even though a defendant's conviction—but not sentence—became final under state law nearly twenty years ago?[1]

(2) Does an inadvertent delay in resentencing violate a defendant's due process rights if he suffered no prejudice and he failed to raise the issue to the court?

[1] This Court has granted certiorari to decide the question of "[w]hether this Court's decision in *Ramos v. Louisiana*, 590 U. S. (2020), applies retroactively to cases on federal collateral review." *Edwards v. Vannoy*, No. 19-5807, 2020 WL 2105209, at *1 (U.S. May 4, 2020).

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INTRODUCTION

After breaking into a young woman's home and brutally raping her, Nathaniel Lambert was convicted of (1) aggravated rape, (2) aggravated burglary, and (3) aggravated crime against nature. The aggravated rape conviction—which carries a mandatory life sentence—was unanimous, but the jury divided 11-1 on the other two charges. Lambert received a life sentence on each of the aggravated rape and aggravated burglary convictions, and he received a 15-year sentence for the aggravated crime against nature charge.

Lambert appealed to the state intermediate appellate court, which observed that two of Lambert's sentences—for the aggravated rape and aggravated crime against nature convictions—had been improperly rendered. The intermediate appellate court *sua sponte* vacated those sentences and ordered resentencing. For reasons that are not clear, the vacatur went unnoticed by the parties and the courts for nearly twenty years—even though Lambert collaterally attacked his convictions in both state and federal courts.

When Lambert finally brought the resentencing delay to the attention of the state court, it handed down the exact same sentences he had initially received. Lambert challenged the resentencing delay on appeal as a violation of his due process rights. The state intermediate appellate court affirmed the sentences, and Lambert now seeks a writ of certiorari from this Court.

While his petition was pending here, Lambert filed a supplemental brief contending that this Court's recent decision in *Ramos v. Louisiana*, 140 S. Ct. 1390

(2020), retroactively applies to him under *Griffith v. Kentucky*, 479 U.S. 314 (1987), because not all of his convictions *and* sentences are final.

The Court should deny Lambert's petition. As an initial matter, *Ramos* does not retroactively apply to this case because none of Lambert's convictions is pending on direct review. Under Louisiana law, a defendant's *conviction* can be final for purposes of retroactivity even his *sentence* is not. Indeed, the Louisiana Supreme Court recently declined to review a similar case in *Louisiana v. Brown*, ---So. 3d---, 2020 WL 3446058, 2020-00276 (La. 6/22/20). Chief Justice Johnson concurred in the denial of the writ, explaining that the defendant—who was recently resentenced in accordance with this Court's decisions in *Miller v. Alabama*, 567 U.S. 460 (2012) and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016)—"was entitled to an appeal of his new *sentence*, not the underlying *conviction*." *Id.* (emphases added) (citing LA. C.CR. P. art. 912(C)(1)). And so the defendant's "1996 conviction was final long before the United States Supreme Court's decision in *Ramos v. Louisiana*." *Id.*

Even if this Court determines, as a matter of federal law, that *Ramos* applies retroactively unless a defendant's conviction *and* sentence are final, a GVR is unnecessary in light of the procedural posture here. Of the three convictions, only Lambert's conviction for aggravated crime against nature was both nonunanimous and tied to a long resentencing delay. The sentence on that count was fifteen years, which Lambert has served. Lambert expressly concedes in footnote 5 of his petition before this Court that "issues concerning this sentence are moot." Pet. at 5 n.5. Thus, there is nothing left for this Court to GVR under *Ramos* and *Griffith*.

Nor should this Court grant certiorari to consider Lambert's first question—whether the test of *Barker v. Wingo*, 407 U.S. 514 (1972), governs delayed-sentencing claims. This is not your run-of-the-mill delayed-sentencing case because the delay here occurred between vacatur and *resentencing*, not conviction and sentencing. Moreover, the facts of this case are unusual—to put it mildly—and unlikely ever to reoccur. "If bad facts make bad law, then 'unusual facts' inspire unusual decisions." *Tharpe v. Sellers*, 138 S. Ct. 545, 547 (2018) (Thomas, J., dissenting).

If the Court is determined to address the issue, it should not adopt the *Barker* factors—which are used to consider speedy trial violations—to address delayed sentencing violations. As Justice Thomas noted in a concurring opinion in *Betterman v. Montana*, the *Barker* factors "may not necessarily translate to the delayed sentencing context." 136 S. Ct. 1609, 1618 (2016) (Thomas, J., concurring). This is true because "[t]he Due Process Clause can be satisfied where a State has adequate procedures to redress an improper deprivation of liberty or property." *Id.* Louisiana has made such remedies available to defendants—*see, e.g.*, LA. C.Cr. P. art. 874. Thus, defendants in Louisiana have their due process rights guaranteed by other means. Lambert simply slept on those remedies.

If the Court does import the *Barker* factors, it should require defendants to prove both that the delay caused them prejudice and that they had brought the matter to the court's attention. The stark differences between speedy trial violations and delayed sentencing violations make it unnecessary to balance the remaining

Barker factors—the length of the delay and the reason for the delay—when a defendant sleeps on his remedies or cannot show prejudice.

Even if the Court adopts the *Barker* balancing test wholesale in the sentencing context, Lambert's claim is without merit because he failed to raise the issue and cannot demonstrate prejudice because he is serving a life sentence already. The nearly 20-year resentencing delay was concededly extraordinary. But vacating the convictions would amount to "an unjustified windfall" for Lambert—as the lower court correctly observed. Pet. at 8 n.4 (quoting *Betterman*, 136 S. Ct. at 1615).

The petition for certiorari should be denied.

STATEMENT OF THE CASE

In 1997, Nathaniel Lambert, wielding a hammer, broke down a young woman's door, threatened to kill her, and raped her multiple times over the course of two hours.[2] A grand jury indicted him on three counts: (1) aggravated rape;[3] (2) aggravated burglary;[4] and (3) aggravated crime against nature.[5] On August 11, 1997, a unanimous jury convicted Lambert on count one and a divided jury (11-1) convicted him on counts two and three. Pet. App. at 42, 57–60 (polling slips).

On August 15, 1997, the state trial court held a hearing and handed down Lambert's sentences on all three counts: (1) a mandatory life sentence without

[2] The facts of this case are set forth in more detail in *State v. Lambert*, 98-0730 (La. App. 4 Cir. 11/17/99), 749 So. 2d 739, 745–48.

[3] *See* LA. R.S. 14:42.

[4] *See* LA. R.S. 14:60.

[5] *See* LA. R.S. 14:89.1.

probation or parole for the aggravated rape count; (2) a fifteen-year sentence for the aggravated crime against nature count; and (3) a thirty-year sentence for the aggravated burglary count. The court denied Lambert's motions for new trial.

After a motion from the State, the trial court declared Lambert a fourth-felony habitual offender,[6] vacated the earlier sentence on the aggravated burglary charge, and re-sentenced him to life imprisonment without probation or parole on that count. *Lambert*, 749 So. 2d at 745.

Lambert appealed his convictions to the Louisiana Fourth Circuit Court of Appeal claiming twelve errors, none of which related to his sentences or the non-unanimous verdicts. *Id.* at 748–67. When conducting patent error review,[7] the state appellate court noticed that on the day of the sentencing hearing the trial court had sentenced Lambert on counts 1 (aggravated rape) and 3 (aggravated crime against nature) prior to ruling on his motion for new trial—a technical violation of Louisiana Code of Criminal Procedure article 853.[8] *Id.* at 748. The appellate court affirmed all three convictions but vacated the sentences for aggravated rape and aggravated crime against nature. *Id.* at 767.

Lambert petitioned the Louisiana Supreme Court for review after the Fourth

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[6] *See* LA. R.S. 15:529.1. In his testimony at trial, Lambert admitted to a 1979 armed robbery conviction, a 1983 aggravated battery conviction, a 1990 conviction for theft, and 1993 convictions for possession of cocaine and carrying a concealed weapon as a convicted felon. *Lambert I*, 749 So.2d at 747–48.

[7] Under the Louisiana rules of procedure, patent error review is similar (though not identical) to federal plain error review. *Compare* FED. R. CRIM. P. 52 *with* LA. C.CR. P. art. 920.

[8] Louisiana Code of Criminal Procedure article 853 provides: "Except as otherwise provided by this Article, a motion for a new trial must be filed *and disposed of* before sentence." (emphasis added).

Circuit handed down its decision.[9] The Louisiana Supreme Court summarily denied his petition.[10]

It appears that the appellate court's vacatur of two of Lambert's sentences went unnoticed by the parties and the courts, because he was not resentenced until the issue came to light many years later.

In the meantime, Lambert filed numerous applications for state post-conviction relief, but he never complained of the delay in resentencing. Pet. App. at 45. The trial court denied post-conviction relief. The state intermediate appellate court and the Louisiana Supreme Court denied review.[11]

On February 13, 2006, Lambert filed a petition for a writ of habeas corpus challenging all three of his convictions in the United States District Court for the Eastern District of Louisiana. He did not complain of any delay in resentencing.

On April 29, 2007, after determining that Lambert's petition was timely filed because his convictions became final on April 26, 2001,[12] the court denied the petition with prejudice. *Lambert v. Cain*, No. 2:06-cv-00721, Doc. 15 (E.D. La. 4/30/08) (unreported). Lambert filed a motion for a COA but was denied. On

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[9] The Fourth Circuit handed down its decision on November 17, 1999 and the Louisiana Supreme Court denied discretionary review on January 26, 2001.

[10] *State ex rel. Nathaniel Lambert v. State*, 2000-1346 (La. 1/26/01), 781 So. 2d 1258.

[11] *See State ex rel. Lambert v. State*, 2002-2119 (La. 8/29/03), 852 So. 2d 1014; *State ex rel. Lambert v. State*, 2004-2987 (La. 8/19/05), 908 So. 2d 650; *State ex rel. Lambert v. State*, 2006-1038 (La. 11/3/06), 940 So. 2d 659; *State ex rel. Lambert v. State*, 2010-0205 (La. 1/28/11), 56 So. 3d 972, 973; *State ex rel. Lambert v. State*, 2012-1219 (La. 9/28/12), 98 So. 3d 836.

[12] In response to Lambert's petition, the State filed a procedural objection arguing his claims were time barred under 28 U.S.C. § 2244(d). The court observed that "Petitioner's convictions became final April 26, 2001, the last day on which he could have applied for a writ of certiorari to the United States Supreme Court, following the Louisiana Supreme Court's denial of his application for writs." The court accordingly determined that Lambert's petition was timely filed.

February 27, 2009, the United States Court of Appeals for the Fifth Circuit also denied his request for a COA. Lambert has not sought review by this Court in any of his previous state or federal proceedings.

Although it is unclear from the Orleans Parish Docket Master when Lambert first requested resentencing on the aggravated rape and aggravated crime against nature counts, he claims in his petition to this Court that it was September 2017—when he filed a Motion for Clarification of Sentence. Once the error was brought to the attention of the court, it scheduled a hearing for November to address the issue. But Lambert or his counsel failed to appear at numerous scheduled hearings, and so resentencing did not occur until April 3, 2018.

Before the hearing, Lambert filed *pro se* motions to quash and requested discharge from custody based on the delay in resentencing.[13] *See* Pet. App. at 6. The state court denied those motions and resentenced Lambert to the same sentences he originally received: a life sentence for the aggravated rape charge (as required by law) and fifteen years for the aggravated crime against nature charge. The sentences were to run concurrently with the life sentence Lambert was already serving, and Lambert was given credit for all time served. Apparently anticipating the two sentences, Lambert also filed a *pro se* motion to reconsider sentence prior to the hearing. The court denied the motion and Lambert appealed to the Fourth Circuit.

[13] Lambert never asked a Louisiana court for the remedy he requests of this Court—parole eligibility. Lambert asked the Louisiana courts to release him from custody—despite three convictions for aggravated rape, aggravated crime against nature, and aggravated burglary—one of which he was serving a valid life sentence.

The Fourth Circuit considered Lambert's claim that he suffered an inordinate sentencing delay.[14] Relying on this Court's opinion in *Betterman v. Montana*, 136 S. Ct. 1609, 1617 (2016), the Fourth Circuit observed that the principles of due process applied to Lambert's claim. Pet. App. at 7. Noting that this Court has cited Louisiana Code of Criminal Procedure article 874[15] as an example of a state statutory provision safeguarding due process principles, it found that when determining whether the delay was unreasonable, it had to "adopt a flexible approach evaluating the circumstances of [Lambert's] case." *Id.*

Looking to this Court's precedent, the Fourth Circuit "expressed doubt as to whether the remedy for speedy trial violations—dismissal of the charges—would be appropriate in the delayed sentencing context." Pet. at 8 n.4 (citing *Betterman*, 136 S. Ct. at 1618). The court observed that such a rule would amount to "an unjustified windfall" for a defendant. *Id.* (quoting *Betterman*, 136 S. Ct. at 1615). The court reasoned that "[t]he unreasonableness of a sentencing delay is irrelevant in the absence of prejudice to the defendant." *Id.* at 8.

Because a conviction for aggravated rape *mandated* a sentence of life imprisonment upon resentencing under Louisiana law, and because he was already serving a concurrent life sentence as a habitual offender on the aggravated burglary

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[14] The Fourth Circuit also considered two issues that Lambert has not raised before this Court: whether Lambert's sentences were excessive and whether his enhanced aggravated burglary conviction was an illegal sentence under state law. The court ruled against Lambert on both issues. *See* Pet. App. at 10–13.

[15] Louisiana Code of Criminal Procedure article 874 provides: "Sentence shall be imposed without unreasonable delay. If a defendant claims that the sentence has been unreasonably delayed, he may invoke the supervisory jurisdiction of the appellate court."

count, the Fourth Circuit found that Lambert suffered no prejudice from the delay. Pet. App. at 8–10. The Louisiana Supreme Court denied Lambert's petition without opinion. Pet. App. at 15.

Lambert petitions this Court for certiorari, contending that the delay in his resentencing violated his due process rights, as explained under this Court's opinions in *Betterman* and *Barker v. Wingo*. Lambert also filed a supplemental brief after this Court held in *Ramos v. Louisiana* that, under the Sixth Amendment, States can no longer accept non-unanimous jury verdicts. 140 S. Ct. 1390, 1397 (2020). Lambert contends that, although his convictions resting upon non-unanimous verdicts—aggravated burglary and aggravated crime against nature—have been final since 2001, *Ramos* applies retroactively to his case under *Griffith v. Kentucky* because his convictions *and* sentences are not final. He now seeks a GVR in light of *Ramos*.

REASONS WRIT SHOULD BE DENIED

I. THIS COURT'S HOLDING IN *RAMOS* IS INAPPLICABLE TO LAMBERT, WHOSE CONVICTIONS ARE NO LONGER ON DIRECT REVIEW

A. Lambert's Convictions Are No Longer on Direct Review

Lambert claims that the holding of *Ramos* applies to him because his "convictions and sentences have never become final" and his case is "still pending on direct appeal." Supp. Br. at 1, 3. As detailed above, Lambert's convictions for all three crimes (along with his sentence for aggravated burglary) became final when the Louisiana Supreme Court denied discretionary review on January 26, 2001. *See Lambert*, 781 So. 2d at 1258; LA. C.CR. P. arts. 912(C)(1), 922(D).

It has long been the law in Louisiana that once a conviction has been affirmed on appeal, "[a]ny additional issues defendant wishes to raise in connection with his conviction . . . must be brought to the attention of the courts by application for writs of habeas corpus." *State v. Lewis*, 350 So.2d 1197, 1198 (La. 1977) (citing LA. C.CR. P. art. 922). The fact that an appellate court partially remands the matter for *resentencing* does not affect the finality of the appeal of the underlying *conviction*. *Id.*

The Louisiana Supreme Court expressly made this clear in a recent non-unanimous jury case. On June 22, 2020, in *Louisiana v. Brown*, the Louisiana Supreme Court denied the writ application of Eric Brown. ---So. 3d---, 2020 WL 3446058, 2020-00276 (La. 6/22/20). In a concurring opinion, Chief Justice Johnson explained that she agreed with the court's denial "despite his conviction by a non-unanimous jury verdict." *Id.* Brown had been convicted in 1996, but he was re-sentenced under *Miller v. Alabama*, 567 U.S. 460 (2012) and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016). *Id.* Chief Justice Johnson explained that it was the court's view[16] that Brown "was entitled to an appeal of his new *sentence*, not the underlying *conviction*." *Id.* (emphases added) (citing LA. C.CR. P. arts. 912(C)(1)). And so Brown's "1996 conviction was final long before the United States Supreme Court's decision in *Ramos v. Louisiana*." *Id.*

Thus, under Louisiana law, a remand for resentencing, as in this case, does

[16] Chief Justice Johnson wrote separately to emphasize that Brown could mount a "collateral challenge to his conviction" under Louisiana Code of Criminal Procedure articles 930.3(1) and 930.8(A)(2). *Id.*

not disturb the finality of an underlying conviction. Lambert long ago appealed his convictions, requested post-conviction relief, and when that failed, requested habeas relief in the federal court. Lambert's convictions are not "still pending on direct appeal.'" *Ramos*, 140 S. Ct. at 1406. And so he does not qualify for retroactive application of *Ramos* under *Griffith v. Kentucky*, 479 U.S. 314 (1987).

B. Even Assuming *Ramos* Applies Retroactively as a Matter of Federal Law Unless a Defendant's Conviction *and* Sentence Are Final, the Procedural Posture of this Case Makes a GVR Unnecessary

Even if the Court concludes that *Ramos* retroactively applies under *Griffith* unless both Lambert's convictions *and* their respective sentences are final, in light of the procedural posture of this case, there is nothing for this Court to GVR. Lambert's conviction on count 1—for aggravated rape—was rendered by a *unanimous* verdict and so *Ramos* is inapplicable. Lambert's conviction on count 2—for aggravated burglary—was rendered by an eleven-to-one verdict, but both the conviction *and* the sentence were affirmed on appeal. Thus, that conviction and its sentence became final long ago.

Lambert's conviction on count 3—for aggravated crime against nature—is the only conviction that was both nonunanimous *and* tied to a long resentencing delay. But the sentence on that count was fifteen years' imprisonment, which Lambert has served completely. Lambert expressly concedes in footnote 5 of his petition to this Court that "issues concerning this sentence are moot."[17] Pet. at 5 n.5.

[17] The State takes no position on whether Lambert is correct that by serving the sentence he has mooted any claim under *Ramos*, *Griffith*, or *Betterman*. The point is that Lambert does not appear to challenge this conviction before this Court.

In sum, in light of the procedural posture of this case, there is nothing left for this Court to review under *Ramos* and *Griffith*, even assuming those cases apply when a conviction *and* sentence are not final as a matter of federal law.

II. THIS CASE PROVIDES A POOR VEHICLE TO DECIDE WHETHER THE *BARKER* FACTORS APPLY TO DELAYED SENTENCING CLAIMS

A. The Facts of This Case Are Highly Unusual

This is not a customary sentencing delay case. The delay occurred not between conviction and sentencing but, rather, between the initial sentencing and a perfunctory resentencing. The vacatur and remand was based on a technical procedural error in the original sentencing: The sentences were pronounced moments *before* ruling on a motion for new trial rather than *after* the ruling on the motion, as required by a state statute. *See Lambert*, 749 So. 2d at 767.

Lambert's initial sentencing was not inappropriately delayed. He received three sentences all on the same day. For his conviction on the aggravated burglary charge, he received a life sentence that was not subsequently vacated on appeal. Although the other two sentences were vacated on appeal and remanded for resentencing, one of the underlying convictions—aggravated rape—carried a *mandatory* life sentence. LA. R.S. 14:42. Thus, the resentencing could not change the length or conditions of that sentence in any way. Lambert's other vacated sentence—aggravated crime against nature—was fifteen years and has been completely served. As discussed above, Lambert concedes in footnote 5 of his petition before this Court that "issues concerning this sentence are moot." Pet. at 5 n.5.

Not even Lambert noticed the trial court's failure to resentence him for many years—despite rounds of post-conviction and federal habeas review. Once the trial court's failure to resentence Lambert was brought to light, the trial court promptly resentenced him to the exact sentences he originally received.

These facts are unusual, to put it mildly. This situation is unlikely ever to reoccur. "If bad facts make bad law, then 'unusual facts' inspire unusual decisions." *Tharpe*, 138 S. Ct. at 547 (Thomas, J., dissenting). This case presents a poor vehicle to address future delayed-sentencing claims.

B. The Issue Has Not Percolated Sufficiently in the Lower Courts

Only four federal circuits[18] have considered the application of *Betterman* to sentencing delays,[19] and only one of those decisions was selected for publication. Other than Louisiana, the courts of only three states[20] have considered application of *Betterman* to sentencing delays.[21] The substance of those rulings involves traditional due process analysis—and they do not appear to contradict each other.

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[18] *United States v. Cain*, 734 F. App'x. 21 (2d Cir. 2018); *United States v. Brown*, 709 F. App'x. 103 (2d Cir. 2018); *United States v. Lacerda*, 958 F.3d 196 (3d Cir. 2020); *Martinez v. Fudeman*, 763 F. App'x. 298 (3d Cir. 2019); *United States v. James*, 712 F. App'x. 154 (3d Cir. 2017); *United States v. Yupa Yupa*, 796 F. App'x. 297 (7th Cir. 2019); *Lee v. Warden, FCC Coleman-USP II*, 714 F. App'x. 984 (11th Cir. 2018).

[19] *Betterman* has been quoted by the circuit courts on other related issues not relevant to a sentencing delay. It has also been cited by the district courts regarding sentencing delays and other issues, which have not yet percolated up to the circuit courts.

[20] *People v. Johnson*, 2019 IL App (5th) 160241-U (App. Ct. Ill. 5th Dist. 2019) (unpublished); *State v. Juan*, 2019-Ohio-281, ¶ 8, *appeal not allowed,* 2019-Ohio-1759, ¶ 8, 155 Ohio St. 3d 1457, 122 N.E.3d 217, and *appeal not allowed,* 2019-Ohio-5193, ¶ 8, 157 Ohio St. 3d 1514, 136 N.E.3d 513; *Maier v. Holton*, 2018 WL 1310067 (Montana 2018) (not reported) (habeas case based on delay in execution of sentence).

[21] As in the federal courts, *Betterman* has been cited for other issues, predominantly that the right to the Sixth Amendment speedy trial protections start upon arrest and end upon conviction and that there is a due process right at a sentencing hearing.

Lower courts have not had enough time to adequately consider how to apply due process principles to a sentencing delay. This Court should wait until confusion or contradiction exists in the lower courts before developing this area of the law further.

III. THE DELAYED RESENTENCING DID NOT VIOLATE LAMBERT'S DUE PROCESS RIGHTS

A. The Court Should Not Adopt the *Barker* Factors in the Delayed Sentencing Context

In *Barker v. Wingo*, this Court articulated the criteria to determine whether a defendant's Sixth Amendment speedy trial right has been violated. 407 U.S. at 516. "Under the *Barker* test, courts consider four factors—the length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Betterman*, 136 S. Ct. at 1619 (Sotomayor, J., concurring). Justice Sotomayor opined in a concurring opinion in *Betterman v. Montana* that "the *Barker* factors capture many of the concerns posed in the sentencing delay context and that because the *Barker* test is flexible, it will allow courts to take account of any differences between trial and sentencing delays." *Id.*

But, as Justice Thomas observed in his concurrence in *Betterman*, the *Barker* factors "may not necessarily translate to the delayed sentencing context." 136 S. Ct. at 1618 (Thomas, J., concurring). This is true because "[t]he Due Process Clause can be satisfied where a State has adequate procedures to redress an improper deprivation of liberty or property." *Id.*

Louisiana has made such remedies available to defendants—*see* La. C.Cr. P. art. 874—but Lambert "slept on th[ese] remed[ies]" for nearly twenty years. 136 S.

Ct. at 1618 (Thomas, J., concurring). He did not complain of the lack of sentencing during state or federal post-conviction proceedings. Once the matter was brought to the attention of the court, Lambert was promptly resentenced.

Thus, in light of the facts of this case, the *Barker* factors do not present the best framework for considering delayed sentencing cases.

B. If the Court Imports the *Barker* Factors into the Delayed Sentencing Context, a Defendant's Failure to Demonstrate Prejudice or Assert His Right Should Be Dispositive

Justice Sotomayor observed in her concurrence in *Betterman* that "none of the four [*Barker*] factors is 'either necessary or sufficient,' and no one factor has a 'talismanic quality.'" 136 S. Ct. at 1619 (Sotomayor, J., concurring) (quoting *Barker*, 407 U.S. at 533 (alterations removed)). Assuming that the Court is inclined to import the *Barker* factors into the context of delayed sentencing claims, the Court *should* give the prejudice factor and the assertion-of-the-right factor a "talismanic quality." *Id.*

As this Court explained in *Betterman*, there are significant differences between delayed sentencing claims and speedy trial claims. For example, although dismissal of charges is generally the appropriate remedy for a speedy trial claim, "[i]t would be an unjustified windfall, in most cases, to remedy sentencing delay by vacating validly obtained convictions." 136 S. Ct. at 1615. Moreover, although "time spent in jail awaiting *trial* has a detrimental impact on the individual"—*Barker*, 407 U.S. at 532 (emphasis added)—there is no similar detrimental impact for an individual in jail awaiting *sentencing*. In light of these differences, if a defendant has failed to assert his right or if the delay in the sentencing does not prejudice the

defendant, that should end the matter. There is no need to balance *Barker*'s remaining factors if the defendant fails to show prejudice or assert his right.

Lambert waited almost two decades before alerting the court to the delay. And he cannot show prejudice for three reasons: (1) he was already serving a valid life sentence; (2) the conviction for aggravated rape carried a mandatory life sentence; and (3) he has already served the aggravated crime against nature sentence and conceded here that issues concerning that sentence are "moot." Pet. at 5 n.5.

Despite these facts, Lambert claims he suffered two forms of prejudice from the delay. First, he claims that he lost the ability to prove a state constitutional excessiveness claim. But Lambert did not argue that his sentence was excessive when it was initially rendered—nor did he appeal his sentence on any grounds. The court below noted that courts have "consistently rejected the assertion that the mandatory life sentence for aggravated rape [one of the most violent felonies a person can commit] is excessive punishment under the Louisiana Constitution." Pet. App. at 11.

Second, Lambert claims that he was prevented from "enrolling into school to obtain a GED, working at the Angola Rodeo, receiving trustee [sic] status and enrolling in educational/trade programs." *See* Pet. at 3. He further claims that the delayed resentencing prevented him from seeking clemency. *See id.* Lambert has offered no evidence that he ever applied to enroll in school to obtain a GED or take an educational/trade course, to work at the Angola Rodeo, or to be a trusty. Lambert

has been serving a life sentence for the aggravated burglary conviction for many years—but he has never applied for clemency. The court below concluded that the deprivation of such privileges does not constitute prejudice under this Court's precedent in any event. Pet. App. at 9. Thus, these issues are simply irrelevant.

Because Lambert cannot show prejudice or that he asserted his right, there is no need to balance these considerations against the length or reason for the delay in resentencing.

C. Even Applying a Pure *Barker* Balancing Test, Lambert's Claim Should Fail

Even if this Court adopts wholesale the four-part balancing test from *Barker* to consider inordinate sentencing delays, Lambert's claim should fail. In *Barker*, this Court observed that the defendant was required to wait an "extraordinary" time between arrest and trial—more than five years. 407 U.S. at 533. Despite that delay, this Court found that "[t]wo counterbalancing factors . . . outweigh these deficiencies." *Id.* at 534. Specifically, the Court found first that the prejudice to the defendant "was minimal." *Id.* Second, the defendant in *Barker* did not object to the long delay because, for reasons not relevant here, he "did not want to be tried." *Id.* at 535.

The State does not dispute that nearly twenty years is an extraordinary amount of time to wait for resentencing. But the reason for the delay appears to be mere oversight, despite multiple rounds of post-conviction review. As explained above, Lambert suffered no prejudice because he is already serving a valid life sentence—among other reasons. Lambert did not raise any claims about his

sentence until recently. Once the issue was raised, the state trial court resentenced Lambert as soon as practicable. Like the extraordinary delay in *Barker*, the extraordinary delay Lambert experienced is outweighed by the lack of prejudice and his failure to bring the deficiency to the attention of the court. Thus, even adopting the *Barker* factors would not change the result.

CONCLUSION

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

Respectfully submitted,

/s/ *Elizabeth Baker Murrill*

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