No. 19-8149

IN THE
Supreme Court or 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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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Respondent forthrightly admits that "nearly twenty years is an extraordinary amount of time to wait for resentencing." BIO 17. Throughout the BIO, however, it casts this delay as "mere oversight" which "went unnoticed by the parties." BIO 1, 17, It tells the Court that "[o]nce the trial court's failure to resentence Lambert was brought to light, the trial court promptly resentenced him." BIO 13. That part is not forthright. The record shows that at least as early as 2006—twelve years before respondent pursued resentencing—petitioner began complaining that he had "never been re-sentenced" and that this has "precluded petitioner from seeking appellate and post-conviction review." *See infra* at 14-15. In years that followed, he filed multiple *pro se* motions and, despite more than a half-dozen scheduled and docketed resentencing hearings, it took an additional seven years before respondent meaningfully pursued a sentence. *Id.* Respondent does not dispute that for this nearly two-decade period of petitioner's life, the lack of sentence meant that he could not enroll in school or obtain a GED, could not obtain vocational training in trade programs, and could not receive "trusty" status, all of which would have also been relevant to his ability to seek clemency.

This oppressive delay had two consequences that respondent now seeks to avoid. First, because petitioner succeeded in his initial direct appeal and the error going to his motion for new trial and sentence was only recently corrected, his case is "still pending on direct appeal" and he is entitled to a GVR for Louisiana courts to determine his eligibility for relief under *Ramos v. Louisiana*, 140 S. Ct. 1390, 1406-07 (2020). Second, respondent's "concededly extraordinary" delay, BIO 4, violated

petitioner's due process rights. In reviewing petitioner's due process challenge the court below concluded that "prejudice to the defendant is the controlling factor" and that this two-decade denial of basic education and vocation "do[es] not constitute prejudice as contemplated by jurisprudence." Pet. App. 8 n. 4, 9. Respondent does not meaningfully contest that this reasoning squarely presents a lower court conflict and renders Louisiana an outlier within it.

I. The Court Should GVR For Louisiana Courts To Determine Whether Petitioner Is On Direct Review For The Purposes Of Retroactivity And Would Therefore Be Entitled To Relief Under Ramos.

After the certiorari petition in this case was filed, this Court decided *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), holding that the Sixth Amendment's unanimous jury verdict requirement applies to the states and recognizing that this rule applies to "defendants convicted of felonies by nonunanimous verdicts whose cases are still pending on direct appeal." *Id.* at 1406. Respondent does not contest that at least two of petitioner's three convictions were based on nonunanimous verdicts.[1] Respondent also does not contest that this petition arises in the context of Louisiana's direct review procedure, not its separate collateral review procedures. That is clear from the procedural history: Upon being convicted, petitioner filed his initial direct appeal and, in 2001, the appellate court reversed based on the trial court's "failure to rule on defendant's motion for new trial prior to sentencing." *State v. Lambert*, 749 So. 2d 739, 748 (La. Ct. App. Nov. 17, 1999). The trial court did not correct that error and

[1] As discussed below, the record is not clear whether petitioner's third conviction was also obtained by non-unanimous verdict. That issue of fact should also be decided by Louisiana courts in the first instance.

impose new sentences until April 3, 2018, Pet. App. 47, and this petition stems from the notice of appeal that followed, not from a petition for collateral review. Pet. App. 3, 15, 25, 47. Respondent does not contest that at least two of petitioner's convictions would be invalid under *Ramos* if his case is "still pending on direct appeal" within the meaning of *Ramos*, and that this would be true irrespective of the outcome in *Edwards v. Vannoy*, No. 19-5807 (considering whether *Ramos* applies retroactively to cases on federal collateral review).

The BIO instead tries to persuade this Court that if it GVRs, Louisiana courts will ultimately conclude he is not entitled relief to under *Ramos*. In accordance with this Court's ordinary practice, it should GVR for Louisiana courts to evaluate petitioner's entitlement to relief under *Ramos*, including respondent's objections, in the first instance. *See Griffith v. Kentucky*, 479 U.S. 314, 323 (1987) (recognizing that, to "fulfill [its] judicial responsibility" after recognizing a constitutional rule, this Court must "instruct[] the lower courts to apply the new rule retroactively to cases not yet final"). This is consistent with the Court's practice on prior occasions when respondent has attempted to litigate the application of *Ramos* at the certiorari stage. *See e.g.*, *Richards v. Louisiana*, No. 19-5301 (GVR'ing despite respondent's arguments that relief would not be granted under state law and that the issue was unpreserved); *Victor v. Louisiana*, No. 19-5989 (GVR'ing despite several arguments that petitioner would not ultimately get relief under *Ramos*); *Johnson v. Louisiana*, No. 19-6679 (same); *Nagi v. Louisiana*, No. 18-1585 (GVR'ing despite arguments that state courts would deny any relief under *Ramos* because the issue was not preserved); *Aldridge v.*

Louisiana, No. 18-8748 (same); *Dyson v. Louisiana*, No. 18-8897 (same); *Brooks v. Louisiana*, No. 18-9463 (same); *Crehan v. Louisiana*, No. 18-9787 (same); *Heard v. Louisiana*, No. 18-9821 (same).

A GVR is especially appropriate here given the novelty and infirmity of respondent's arguments. The BIO would have the Court accept several dubious propositions at the certiorari stage: First, that finality for retroactivity purposes is determined "[u]nder Louisiana law," rather than federal law, BIO 2, 9-11; second, that Louisiana law bifurcates the finality of a criminal judgment, such that "a defendant's conviction can be final for purposes of retroactivity even his sentence is not," BIO 2; third, that petitioner's conviction somehow became untethered from his sentence and final even though the initial error on direct appeal concerned petitioner's motion for a new trial *and* his sentence; and fourth, that it is "unnecessary" to GVR because the history of this case leaves "nothing" to review under *Ramos*, BIO 11-12. Each argument is unsound.

First, courts have generally concluded that "[t]he finality of a conviction is a matter of federal rather than state law," *United States v. Howard*, 115 F.3d 1151, 1158 (4th Cir. 1997), and this Court has rejected the "state-by-state definitions of the conclusion of direct review" that are essential to respondent's argument, *Gonzalez v. Thaler*, 565 U.S. 134, 152 (2012). This is why respondent cannot cite *a single authority* for the proposition that state law controls in the context of retroactivity. BIO 2, 9-11. Instead, "finality has a long-recognized, clear meaning" provided by federal law. *Clay v. United States*, 537 U.S. 522, 527 (2003). Under *Griffith*, a case is final when

"a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." 479 U.S. at 321 n.6. This all makes sense because, as the Court has held, retroactively applying newly-recognized constitutional rules to pending cases is not a choice; it is "a controlling, constitutional command." *Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016).

Respondent does not contest that, if the question of finality is decided under federal law, its theory would not hold water. Under federal law, finality has always been considered "the date on which the defendant's conviction and sentence became final." *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994); *see also id.* at 390-91; *Gilmore v. Taylor*, 508 U.S. 333, 339 (1993); *Stringer v. Black*, 503 U.S. 222, 227 (1992). After petitioner succeeded in his first direct appeal and was resentenced, he initiated this direct appeal. His criminal judgment accordingly does not become final until "the availability of appeal [has been] exhausted" and certiorari is denied. *Griffith*, 479 U.S. at 321 n.6.

In any case, Respondent's second premise—that Louisiana law bifurcates finality of a criminal judgment for the purposes of retroactivity, allowing a sentence to be on direct review and the corresponding conviction to be on collateral review—is far from clear. The novelty of that argument is evident from the weak authorities that respondent cites to support it. First, respondent offers a single-judge, single-paragraph concurrence in the denial of discretionary review, not a decision on the merits. *See* BIO 2, 10 (citing *State v. Brown*, 2020-00276, 2020 WL 3453952 (La. June 22,

2020) (Johnson, C.J., concurring in denial of writ application)). The posture of that case was also materially different. In *Brown*, it was undisputed that the defendant's conviction and sentence had both completed direct review and become final. *State v. Brown*, 289 So. 3d 1179, 1181 (La. Ct. App. Jan. 15, 2020) ("The Louisiana Supreme Court's denial of his writ [in 1997] finalized his convictions and sentences."). Indeed, the discretionary denial of the writ application that respondent relies on *followed* collateral review in which Louisiana courts granted habeas relief. *Id.* at 1183-84. Here, in contrast, everyone agrees that Louisiana courts ordered resentencing *on direct review* and that this petition followed resentencing, not a collateral review petition.

Respondent's second authority, another single-paragraph opinion, has nothing to do with the retroactivity of a rule on direct review *or* collateral review. BIO 10 (citing *State v. Lewis*, 350 So. 2d 1197, 1198 (La. 1977)). In that case, the court simply held that a defendant who had unsuccessfully advanced certain arguments related to his conviction in a prior appeal before that court could not reassert them upon returning to that court. *Lewis*, 350 So. 2d at 1198. Nothing in *Lewis* suggests that Louisiana adopts respondent's principle of bifurcating the finality of a criminal judgment between conviction and sentence for retroactivity analysis. Indeed, *Lewis* was decided over a decade before this Court's adopted its modern retroactivity framework in *Teague v. Lane*, 489 U.S. 288 (1989).

In fact, Louisiana procedural law says the opposite of what respondent argues: a defendant can only seek direct review, and cannot seek collateral review, until both

the conviction and sentence are final. *State v. Thomas*, 951 So. 2d 372, 381 (La. Ct. App. Jan. 16, 2007) (holding that it is error to advise that finality runs from finality of the conviction alone or sentence alone; rather it occurs on "the date the 'judgment of conviction and sentence has become final'"), *writ denied*, 967 So. 2d 1153 (La. Nov. 21, 2007); *State v. Clark*, 940 So. 2d 799, 801 (La. Ct. App. Sept. 27, 2006), *writ denied* 964 So. 2d 324 (La. Sept. 21, 2007).[2]

Third, even if it were true that under Louisiana law a conviction could leap ahead to collateral review while a sentence remained on direct review, that is certainly not what happened here. As set forth above, the error identified on direct appeal was the trial court's "failure to rule on defendant's motion for new trial prior to sentencing," which violated state procedural law. *Lambert*, 749 So. 2d at 748. That is, the error was not just "a technical procedural error in the original *sentencing*," BIO 12 (emphasis added), it was a procedural error in ruling on petitioner's motion for a new trial on his convictions. The Louisiana Supreme Court has accordingly been clear that when a trial court violates this rule, the case is remanded for "consideration of the new trial motion" *and* any subsequent sentence. *State v. Randolph*, 409 So. 2d 554, 555 (La. 1981); *see also El-Mumit v. Twenty-First Judicial Dist. Court*, 500 So. 2d 414, 415 (La. 1987). Moreover—directly contrary to respondent's argument—the defendant maintains "his right to appeal his conviction and sentence once more."

[2] Respondent suggests, without affirmatively arguing, that the Court might treat this direct review proceeding as if it were collateral review because petitioner filed *pro se* postconviction pleadings in state and federal court. It cites no authority for the proposition that the premature filing of a postconviction pleading controls the question of finality for the purposes of retroactivity. As noted, Louisiana law explicitly premises collateral review on the finality of both conviction and sentence.

Randolph, 409 So. 2d at 555. It makes no sense to say that respondent's conviction became final when both the remand and the right to further direct appeal included challenges to the validity of his conviction.

Respondent's final argument—that "there is nothing for this Court to GVR," BIO 11—requires the Court to accept two questionable premises and one false premise. According to respondent, even if Louisiana courts determine petitioner's case is "still pending on direct appeal," *Ramos*, 140 S. Ct. at 1406, then (i) it follows that relief would be limited to the two convictions that were also subject to 18 years of sentencing delay; (ii) of those two convictions, only one was non-unanimous; and (iii) petitioner has conceded that any challenge to that non-unanimous conviction under *Ramos* is moot. Respondent does not cite any authority for its first premise; the scope of relief under *Ramos* is an issue that should be decided in the first instance below. Respondent's second premise—that only two of petitioner's three convictions were non-unanimous—is also not clear. The present record, which was developed before *Ramos*, makes clear that *at least* two of petitioner's three convictions were non-unanimous. *See* Pet. App. 57-58 (juror verdict slips showing one not-guilty vote for each of counts two and three). However, it does not contain all of the verdict slips, and thus all three of petitioner's convictions may have been non-unanimous.[3] This factual issue should be resolved by the state courts.

Respondent's third premise—that petitioner conceded any challenge to his aggravated crime against nature conviction under *Ramos*—is not accurate. In his

[3] One of the juror slips for count 1, for instance, is blank, Pet. App. 59.

certiorari petition and prior to this Court's decision in *Ramos*, petitioner asserted a due process challenge to *his sentence* based on excessive presentencing delay and explained that *sentencing relief* for this conviction would be moot because he has already served the full sentence. Pet. 5 n.5 (explaining that "issues concerning *this sentence* are moot" (emphasis added)). The idea that this observation conceded any challenge to *the conviction itself*—which remains of great significance to petitioner, continuing to adversely affect his security classification and parole eligibility—and that petitioner made this concession prospectively, before *Ramos* was even decided, is fanciful.

In sum, petitioner's case is "still pending on direct appeal," *Ramos*, 140 S. Ct. at 1406, under applicable federal law. Consequently, at least two of his convictions are invalid under *Ramos*. Respondent's novel and dubious arguments to the contrary should not be decisively adjudicated by this Court at the certiorari stage. In accordance with ordinary practice, the Court should GVR so both parties' arguments can be considered on their merits by Louisiana courts. *See supra* at 3-4 (collecting cases). Indeed, Louisiana courts apply *Ramos* generously, including to cases where defendants failed to preserve the issue at trial. *See State v. Jenkins*, No. 2019-K-00696, 2020 WL 3423960, at *1 (La. June 3, 2020) (remanding for application of *Ramos* even "[i]f the non-unanimous jury claim was not preserved for review in the trial court or was abandoned during any stage of the proceedings" because a court should "consider the issue as part of its error patent review").[4,5]

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[4] *See also* News Release, Louisiana Supreme Court (June 3, 2020), https://www.lasc.org/Actions?p=2020-020 (mass remand of cases requiring that *Ramos* be considered as part of patent error review).

[5] Indeed, the relief respondent requests—that certiorari "be denied," BIO 18—does not make sense on its face. Respondent's argument that state law would convert this direct review proceeding into

II. The Court May Wish To Grant Certiorari Now To Resolve The Uncontested Conflict Regarding The Test That Applies To Excessive Sentencing Delay.

The Court may alternatively wish to grant plenary review now to resolve the longstanding conflict it left open in *Betterman v. Montana*, 136 S. Ct. 1609 (2016), as to the test for a due process challenge to sentencing delay, including whether one of the "relevant considerations," prejudice, is strictly required and, if so, what type of prejudice is relevant. *Id*. at 1617-18 & n.12.

As the petition explained, this issue is the subject of a conflict. The Third, Fifth and Tenth Circuits apply *Barker v. Wingo*, 407 U.S. 514 (1972), and hold that its factors "are guidelines, not rigid tests" and "no single factor is 'either a necessary or sufficient condition of the deprivation of a right to a speedy trial.'" *Burkett v. Cunningham*, 826 F.2d 1208, 1219 (3d Cir. 1987) (quoting *Perez v. Sullivan*, 793 F.2d 249, 254 (10th Cir. 1986); *Barker*, 407 U.S. at 533); *see also United States v. Campbell*, 531 F.2d 1333, 1335 (5th Cir. 1976) (holding that a defendant "need not necessarily show affirmative prejudice or any particular one of these factors to justify a finding by the court that there has been a denial of his right to a speedy trial"); *see also* Pet. 7-8**.**

The Second and Sixth Circuits apply the test articulated in *United States v. Lovasco*, 431 U.S. 783, 790 (1977), and holds that "prejudice is . . . necessary but not sufficient." *United States v. Ray*, 578 F.3d 184, 199 (2d Cir. 2009); *United States v. Cain*, 734 F. App'x 21, 25 (2d Cir. 2018) (same); *United States v. Sanders*, 452 F.3d 572, 580-82

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collateral review would, at most, support a request to hold this case pending *Edwards*. However, that makes little sense because the question in dispute—whether petitioner is "still pending on direct appeal," *Ramos*, 140 S. Ct. at 1406—is one that needs to be resolved irrespective of the outcome in *Edwards*.

(6th Cir. 2006) (adopting "[t]he *Lovasco* framework," including the "burden of showing prejudice suffered as a result of the delay"); *see also* Pet. 8-9.

The court below surveyed Louisiana Supreme Court precedent and concluded it mandates a hybrid approach, which applies the factors in *Barker*, but "dictates that prejudice to the defendant is the controlling factor." Pet. App. 8. Thus, as in the Second Circuit, "unreasonableness of a sentencing delay is irrelevant in the absence of prejudice." Pet. App. 8 n. 4; Pet. 5-6, 8 (describing the court's more demanding version of *Barker*). The court further reasoned that the particular prejudice in this case—a nearly two-decade deprivation of the ability to enroll in school and obtain a GED, to obtain vocational training in trade programs, or receive "trusty" status[6]—"do[es] not constitute prejudice as contemplated by the precedent." Pet. App. 9.

The latter reasoning renders Louisiana an outlier among *all* lower courts. Courts on both side of the conflict have concluded that "specific problems of personal prejudice" suffice. *United States v. James*, 712 F. App'x 154, 163 (3d Cir. 2017) (quoting *Heiser v. Ryan*, 15 F.3d 299, 305 (3d Cir. 1994)). For instance, the Third Circuit has recognized when applying its *Barker* standard to sentencing delay, for instance, "there may be cognizable prejudice stemming from being confined to a local jail rather than a . . . prison better equipped for long-term incarceration." *Id.* The Second Circuit has similarly recognized when applying its *Lovasco* test that "[a] defendant may

[6] In Louisiana, those with "trusty" status "are given privileges that are not available to the general prison population," including the ability to "work outside the secure perimeter of a state correctional institution without constant, direct supervision by a correctional officer." Louisiana Legislative Auditor, Oversight of Trusty Programs (2016) (Report ID 40150030), at 1. In addition to dramatically affecting Mr. Lambert's quality of life, his inability to participate in these programs made him ineligible to apply for clemency. *See* Pet. 13 n.9.

demonstrate prejudice if he or she can show that the delay in sentencing undermines successful rehabilitation." *Cain*, 734 F. App'x at 25 (quoting *Ray*, 578 F.3d at 201) (internal quotation marks and alterations omitted).[7]

Respondent does not contest that the decision below squarely presents an opportunity to clarify what test applies, whether prejudice is required and, if so, what prejudice means. The BIO's response to the conflict is to claim that the issue "has not percolated sufficiently" since 2016, when *Betterman* was decided, reasoning that "[o]nly four federal circuits have considered the application of *Betterman* to sentencing delays." BIO 13. This response makes no sense. As every member of the Court acknowledged in *Betterman*, the Court reserved the question of which test that applies to sentencing delay. *Betterman*, 136 S. Ct. at 1617-18 & n.12 (recognizing that the defendant retains a due process challenge to sentencing delay, but "express[ing] no opinion" on the proper standard because it had not been asserted); *id.* at 1618 (Thomas, J., concurring) (recognizing that the Court's opinion "leaves us free to decide the proper analytical framework to analyze such claims if and when the issue is properly before us"); *id.* at 1619 (Sotomayor, J., concurring) (writing "separately to emphasize that the question is an open one"). *Betterman* thus had no bearing on due process challenges to sentencing delay and respondent's attempt to cabin the conflict in this way is superficial at best.

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[7] One other court of appeals has adopted a similar hybrid understanding of *Barker*. In *United States v. Yupa Yupa*, 796 F. App'x 297 (7th Cir. 2019), cited by respondent, the Seventh Circuit revisited its sentencing delay caselaw and recognized that *Barker* "is the test our circuit has been using for some time"; however, it holds that in the context of due process challenges, *Barker* "require[s] that a defendant demonstrate prejudice from the delay." *Id.* at 299; BIO 13 n.18.

The courts implicated in the conflict have considered due process challenges to sentencing delay for decades and courts on both side of the split have recognized that *Betterman* has no bearing on their precedent. For instance, the Third Circuit just recently reiterated that "while *Betterman* overruled our speedy sentencing precedent under the Sixth Amendment, our precedent under the Due Process Clause survives." *United States v. Lacerda*, 958 F.3d 196, 219 (3d Cir. 2020). It has thus continued to "apply the same framework adopted by the Supreme Court in *Barker*." *Id.*; *see also James*, 712 F. App'x at 161 ("Because [in *Betterman*] the Supreme Court put forward no holding on the availability of a speedy sentencing claim under the Due Process Clause, our prior precedent under the Due Process Clause survives *Betterman*" and *Betterman* "does not disturb this precedent"). Similarly, the Second Circuit has repeatedly reaffirmed its *Lovasco* test and that "prejudice is 'necessary but not sufficient to prove a due process violation.'" *Cain*, 734 F. App'x at 25 (quoting *Ray*, 578 F.3d at 199); *see also United States v. Nieves*, 648 F. App'x 152, 154 (2d Cir. 2016) ("[W]e are bound to follow *Ray* until it is overruled by this court *en banc* or by the Supreme Court."). For similar reasons, respondent's observation that these post-*Betterman* decisions were not "selected for publication," BIO 13, is unremarkable—it only reflects that these opinions were squarely controlled by "prior precedent" and were not considered to bear on any new principle of law that would warrant publication. *James*, 712 F. App'x at 161.

Respondent's remaining arguments jump to the merits. It says that the Court "should not adopt the *Barker* factors," BIO 14-15, that the Court "*should* give the

prejudice factor and the assertion-of-the-right factor a 'talismanic quality,'" BIO 15, and echoes the court below that the two-decades of oppressive effects on petitioner's life "do[] not constitute prejudice under this Court's precedent." BIO 16-17 (citing Pet. App. 9). These arguments merely beg the conflict and the questions left open in *Betterman*: Whether the *Barker* factors "translate to the delayed sentencing context," 136 S. Ct. at 1618 (Thomas, J., concurring); whether any factor "has a 'talismanic quality,'" *id*. at 1619 (Sotomayor, J., concurring) (citation omitted); and what "prejudice" the Court had in mind as a relevant consideration, *id*. at 1618 n.12. Those questions should be resolved on plenary review.

However, one misstatement critical to respondent's merits argument warrants correction. Respondent repeats throughout its brief that its delay in pursuing sentences for petitioner's convictions were "mere oversight" that "went unnoticed by the parties." BIO 1, 6, 13, 14-15, 17-18. Respondent asserts that once the delay "was brought to light" he was "promptly resentenced." BIO 13. Courts have generally rebuffed such attempts by prosecutors to disclaim accountability for excessive sentencing delay. *See, e.g.*, *Cain*, 734 F. App'x at 25-26 ("The court must not leave a defendant in limbo [by not resentencing him] . . . And when the district court fails in this responsibility, the burden falls upon the government to remind the court of the unfinished business before it. Because the district court and the government failed in these duties, we weigh much of the delay in this case heavily against the government."). But here, respondent's claim that petitioner "slept on" his rights, BIO 3, 14-15, is belied by the record. At least as early as 2006, petitioner had filed court pleadings

urging that he had "never been re-sentenced" and that this had "precluded petitioner from seeking appellate and post-conviction review." *Lambert v. Cain*, No. 2:06-cv-00721, ECF No. 1 at 13 (E.D. La. Feb. 13, 2006).[8] In years that followed, petitioner filed multiple *pro se* motions, and the court scheduled more than a half-dozen resentencing hearings for which respondent failed to produce petitioner. Pet. App. at 45-47. Thus, to the extent that a prosecutor needs to be told to obtain a sentence to complete a criminal judgment, petitioner had complained about his lack of sentence for at least 12 years in court filings alone.

CONCLUSION

For these reasons, the Court should GVR for consideration of petitioner's entitlement to relief under *Ramos*. In the alternative, the Court should grant plenary review now to resolve the longstanding conflict left open in *Betterman*.

August 20, 2020

Respectfully submitted,

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[8] Respondent assertion that petitioner "did not complain of any delay in resentencing," BIO 6, is thus demonstrably false.