No. 19-8337

In the Supreme Court of the United States

JERMAINE RUFFIN,

Petitioner

vs.

STATE OF LOUISIANA,

Respondent

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

BRIEF IN RESPONSE BY THE STATE OF LOUISIANA

JEFF LANDRY
Attorney General
ELIZABETH BAKER MURRILL*
Solicitor General,
*Counsel of Record
Louisiana Department of Justice
Post Office Box 94005
Baton Rouge, LA 70804
(225)456-7544

HILLAR MOORE
District Attorney
CHRISTOPHER J.M. CASLER
Assistant District Attorney
19th Judicial District Attorney's Office
222 St. Louis Street, Suite 550
Baton Rouge, LA 70802
(225)389-3400

QUESTION PRESENTED

Does this Court's decision in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), require reversal of a non-unanimous jury conviction, even though the petition for certiorari was not timely filed?

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INTRODUCTION

A twelve-person jury convicted Petitioner of second-degree murder and attempted second-degree murder by a 10-2 vote on both counts. After Petitioner's trial and his appeal, this Court held that the Sixth Amendment requires a unanimous jury verdict. *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020). Ruffin now seeks to benefit from that decision; however, he did not timely filed his petition.[1]

STATEMENT OF THE CASE[2]

Jermaine Ruffin, for no apparent reason, walked up to an occupied vehicle parked in a neighborhood driveway and fired sixteen live rounds into the driver's side window. He killed the driver, Anthony Jones, and gravely injured Jones's wife, Sheirica Ellis, who were at the house visiting family.

A grand jury indicted Ruffin for second-degree murder[3] and attempted second-degree murder.[4] He pled not guilty but a jury convicted him by a 10-2 vote for both crimes. Ruffin did not object to the non-unanimous jury instruction or the verdict.

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[1] Petitioner also did not object to the non-unanimous jury verdict instruction or the non-unanimous verdict at trial nor did he timely or properly raise the issue on appeal to the Court of Appeals, First Circuit. Thus, as noted by Chief Justice Johnson, Petitioner was procedurally barred from raising the issue and,the Court denied certiorari. Pet. App'x. C, p. 15a. ("This Court cannot consider issues raised on appeal for the first time that were not raised in the district court"). The Court has since determined that the lack of objection at trial no longer serves as a procedural bar.

[2] The facts regarding the crime, the trial, and the appeal were taken from *State v. Ruffen*, 2018-1230 (La. App. 1 Cir. 2/28/19) (unpublished opinion); Pet. App'x. A, 1a – 13a. Petitioner's name is spelled "Ruffen" in the indictment and, for that reason, it was the spelling used by the appellate court. As "Ruffin" is the manner in which he spells his name in the Petition before this Court, that spelling is used here.

[3] Louisiana Revised Statute 14:30.1.

[4] Louisiana Revised Statute 14:30.1 and 14:27.

The court sentenced him to life in prison, without benefit of parole, probation or suspension of sentence, for the murder and to fifty years in prison, without benefit of parole, probation, or suspension of sentence, for the attempted murder—both sentences to run concurrently.

Ruffin appealed raising one counseled assignment of error (insufficiency of evidence) and three *pro se* assignments of error (insufficiency of evidence, defective indictment, and ineffective assistance of appellate counsel). He did not complain of the non-unanimous jury verdict. On January 25, 2019, however, after the deadline for his appellate briefing had passed, Ruffin filed a *pro se* "motion to remand for a new trial" arguing that Louisiana's new law requiring unanimity should be retroactively applied to him. Pet. App'x. at 12a. The First Circuit dismissed the motion as untimely and found all other alleged errors to be without merit. Pet. App'x. 1a-13a.

Ruffin then filed a petition for certiorari with the Louisiana Supreme Court, which the court summarily denied on September 6, 2019. Pet. App'x. 14a. Petitioner filed a motion for reconsideration, something not allowed by the state supreme court's rules, which the court denied on January 22, 2020. Pet. App'x. 15a.

Ruffin filed this petition for certiorari on April 16, 2020.

ARGUMENT

In *Ramos v. Louisiana*, this Court held that the Sixth Amendment requires jury verdicts in state felony cases to be unanimous. 140 S. Ct. at 1397. In *Griffith v. Kentucky*, 479 U.S. 314 (1987), this Court held that "failure to apply a newly declared

constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Griffith v. Kentucky,* 479 U.S. 314, 322 (1987). Petitioner was convicted by a non-unanimous 10-2 jury verdict; however, his conviction is no longer pending on direct review having become final on December 5, 2019, ninety days after the Louisiana Supreme Court denied his petition for a writ of certiorari.

Regarding the finality of criminal convictions, both Louisiana statutory law and the state supreme court rules distinguish between judgments of right and discretionary review. Louisiana Code of Criminal Procedure article 922 (Finality of judgment on appeal) provides:

> (A) Within fourteen days of rendition of the judgment of the supreme court or any appellate court, in term time or out, a party may apply to the court for rehearing. The court may act upon the application at any time.
> (B) A judgment rendered by the supreme court or other appellate court becomes final when the delay for applying for rehearing has expired and no application therefor has been made.
> (C) If an application for a rehearing has been made timely, a judgment of the appellate court becomes final when the application is denied.
> *(D) If an application for a writ of review is timely filed with the supreme court, the judgment of the appellate court from which the writ of review is sought becomes final when the supreme court denies the writ.*

Thus, although the rule provides for the tolling of the time upon an application for rehearing when the supreme court issues a *judgment*, it does not allow for tolling when the court simply denies the application for review – which is what happened in this case.[5]

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[5] The Louisiana Supreme Court in *State v. Bennett*, 610 So.2d 120 (1992) discusses article 922 prior to the addition of subsection (D). The issue in that case was what date triggered the one year limit to retry the defendant after he had been granted a new trial. Lacking the current language at that time, the supreme court found the omission inadvertent and held the court of appeal judgment was final when the supreme court denies a writ application. The Legislature amended article 922, to clarify when the judgment is final in 1993. *See* La. Code Cr. Proc. art. 922, comment—1993 ("This amendment

The state supreme court's rules reflect this same result. Rule IX provides the rule for rehearings; Section 6 pertains to an application for rehearing after a denial of an application for a writ, as in this case. It provides, "An application for rehearing *will not be considered* when the court has merely granted or denied an application for a writ of certiorari or a remedial or other supervisory writ …." Rules of Supreme Court of Louisiana, Rule IX, §6. Thus, since the Louisiana Supreme Court merely denied Ruffin's application for a writ, he had no right to have that decision reconsidered.[6] Therefore, pursuant to La. Code of Criminal Procedure art. 922D, the judgment of the First Circuit Court of Appeal became final on September 6, 2019 when the writ was denied – subject to the timely filing of a petition with this Court.

But Ruffin did not timely file a petition with this Court. This Court's rules govern the timeliness of a petition for certiorari.[7] Similar to the Louisiana rule, SUPREME COURT RULE 13.1 provides that "[a] petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk *within 90 days after entry of the order denying discretionary review*." (Emphasis added.) The

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incorporates the holding of *State v. Bennett*, 610 So.2d 120 (1992)…. This revision is intended t codify the result in *Bennett*."). Finality of the judgment is also important because the two year time limit for applying for state post-conviction relief runs from finality under the provisions of statutes on time of appeal and finality of judgment on appeal. See, e.g., *State v. Henry*, 2017-1141 (La. App. 3 Cir. 10/3/18), 256 So.3d 1080, *writ denied*, 2018-01795 (La. 9/6/19), 278 So.3d 373; *State v. Tyler*, 2017-410 (La. App. 3 Cir. 11/15/17), 233 So.3d 126,

[6] Reflecting the non-existence of a motion for rehearing, the court stamps any such motion with the word "reconsideration" upon its receipt.

[7] This Court promulgated this rule under the authority granted by Congress to prescribe rules concerning the time limitations for applying for certiorari in criminal cases. *Schacht v. United States*, 398 U.S. 58, 64 (1970).

Louisiana Supreme Court denied discretionary review on September 6, 2019; thus, Petitioner should have filed his petition by December 5, 2019. But he instead filed it on April 16, 2020, apparently assuming his 90-day time period would not begin to run until after the Louisiana Supreme Court disposed of his motion.

SUPREME COURT RULE 13.3 provides that "if a petition for re-hearing is timely filed in the lower court by any party, or if the lower court appropriately entertains an untimely petition for rehearing or *sua sponte* considers rehearing, the time to file the petition for a writ of certiorari … runs from the date of the denial of rehearing." However, there being no provision in State law for a rehearing, much less a time parameter for one, Ruffin could not have "timely filed" such a petition. Nor could the Louisiana Supreme Court "appropriately entertain" a petition for rehearing without there being a right to one. Finally, the Court did not consider rehearing *sua sponte* because Ruffin's unauthorized motion was denied.

Nevertheless, Petitioner contends he was able to extend the time by filing an unauthorized application for rehearing. He bases that argument on a list of state supreme court cases[8] in which, he argues, the Court distinguishes between applications that are considered and applications that are not considered. What Petitioner fails to point out, though, is that in each case where the Court considered the application for rehearing, it *specifically* noted that the "application for

[8] Pet. at p. 9, n. 1.

reconsideration was granted" and *then* denied the writ. In this case, the Court simply denied the application thus indicating, by omission, that it was *not* considered.[9]

He further supports his argument with a federal habeas 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. Petitioner's reliance on *Wilson* fails for two reasons: (1) the Fifth Circuit habeas decision, based on a Congressionally mandated statute, does not control the decision on timeliness of an application for a writ of certiorari to this Court; and (2) as Petitioner notes, the unwritten exceptions to the black letter rule disallowing applications for rehearing have only been granted in extreme, unorthodox circumstances – which hardly applies to Petitioner's conviction.[10]

Consequently, this Petition should be denied as untimely. Petitioner would still be able to raise any claims he deems appropriate in state post-conviction review

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[9] The lack of any reasoned decision by a lower court on the non-unanimous jury issue would also hinder any attempt by this Court to address the merits. The First Circuit refused to consider the issue – which was presented as a state law argument on the retroactivity of new law – because it was not timely or properly filed with the court. Pet. App'x. A, 12a, n. 4. .

[10] In *State v. Vale*, there apparently was 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. 1995) (granting writ limited to one assignment) with *State v. Vale*, 661 So.2d 1358 (1995). 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.

(including retroactively applying *Ramos* or the Louisiana Supreme Court decisions relative to patent error) and/or federal habeas review.

CONCLUSION

The Court should deny this Petition for Certiorari.

Respectfully submitted,

/s/ *Elizabeth Baker Murrill*
JEFF LANDRY
Attorney General
ELIZABETH BAKER MURRILL*
Solicitor General,
Counsel of Record
Louisiana Department of Justice
1885 N. 3rd St.
Baton Rouge, LA 70804
(225) 326-6028
MurrillE@ag.louisiana.gov

HILLAR MOORE
District Attorney
CHRISTOPHER J.M. CASLER
Assistant District Attorney
19th Judicial District Attorney's Office
222 St. Louis Street, Suite 550
Baton Rouge, LA 70802
(225)389-8840
Cris.casler@ebrda.org