No. _____

In the

Supreme Court of the United States

ERIC J. BROWN
Petitioner

vs.

THE STATE OF LOUISIANA
Respondent

On Petition for a Writ of Certiorari to
The Louisiana Fifth Circuit Court of Appeal

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Under *Griffith v. Kentucky,* new rules apply to all defendants whose cases are "pending on direct review *or not yet final*." Petitioner was convicted in 1996 by a nonunanimous jury—contrary to this Court's recent decision in *Ramos v. Louisiana*—for a crime he committed when he was 16 years old, but in 2018, his life sentence was vacated. As Petitioner is still on direct appeal from resentencing, is he entitled to the benefit of the holding in *Ramos*?

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The published opinion of the Louisiana Fifth Circuit Court of Appeal is reported at 19-370, 374 (La. App. 5 Cir. 1/15/20), 289 So. 3d 1179, and is appended to this Petition at A1. The Louisiana Supreme Court's order and judgment denying discretionary review is reported at 20-K-276 (La. 6/22/20), ___ So. 3d ___, and is appended at A22.

Jurisdiction

The Louisiana Supreme Court denied review on June 22, 2020. This Petition is filed with 150 days of that ruling. SUP. CT. R. 13(1); Supreme Court Order of March 19, 2020, extending deadlines. Section 1257, 28 U.S.C., confers jurisdiction on this Court to review the judgment through certiorari.

Authorities Involved

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[Nor shall any State deprive any person of life, liberty, or property, without due process of law."

Statement of the Case

In 1994, the State charged Eric Brown, who was then sixteen years old, with second-degree murder and with armed robbery, and on May 3, 1996, a jury found Mr. Brown guilty by a nonunanimous vote of 10 to 2 on each count. The court originally sentenced Mr. Brown to life without parole, but following several hearings, the court, on October 11, 2018, resentenced Mr. Brown in accordance with *Miller v. Alabama*,[1] and *Montgomery v. Louisiana*,[2] to life *with* parole eligibility. Recently, Mr. Brown was released on parole.

On direct appeal from the 2018 resentencing, Mr. Brown argued that the nonunanimous jury verdicts that support Mr. Brown's convictions violated his Sixth Amendment right to a jury trial and that, in light of the then pending decision in *Ramos v. Louisiana*,[3] he was raising the issue pursuant to *Griffith v. Kentucky*[4] in anticipation that this Court would conclude that nonunanimous verdicts like his are unconstitutional. The Louisiana Fifth Circuit Court of Appeal, however, held that *Ramos* would not apply to Mr. Brown because his convictions were long ago affirmed and are therefore final, notwithstanding his resentencing under *Miller*.

Mr. Brown thereafter raised his *Ramos* claim in a timely filed writ application in the Louisiana Supreme Court. While the matter was pending in that court, this Court decided *Ramos,* which held that nonunanimous jury verdicts violate a defendant's constitutional rights to a jury trial. On June 22, 2020, the Louisiana Supreme Court denied discretionary review.

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[1] 567 U.S. 460 (2012).

[2] 136 S. Ct. 718 (2016).

[3] 590 U.S. ___, 140 S. Ct. 1390 (2020).

[4] 479 U.S. 314 (1987).

Reason for Granting the Petition

This Court should grant certiorari to instruct Louisiana and other state and federal courts that a criminal conviction is "not yet final" within the meaning of *Griffith v. Kentucky* if the sentence imposed on that conviction was vacated and resentencing is not yet final.

Mr. Brown argued in the state courts that in light of his resentencing of October 11, 2018, his convictions are not *final* within the meaning of *Griffith v. Kentucky,* in which this Court held that a decision announcing a new rule of constitutional criminal procedure applies to all cases "pending on direct review *or not yet final*" when the new rule is announced.[5] Mr. Brown thus asserted that he is entitled to the benefit of the favorable holding in *Ramos*, in which this Court held that a guilty verdict premised on a nonunanimous vote of the jury violates a defendant's Sixth Amendment right to a jury trial. The court of appeal, however, disagreed, holding: "Though his sentences are pending, his convictions on both counts have already been affirmed and are final."[6] The chief justice of the Louisiana Supreme Court, concurring in the denial of discretionary review, agreed with this assessment,[7] and at least one other appellate court has denied relief to a similarly situated defendant.[8]

The state courts below are confusing its own state rules of justiciability with finality, which, for purposes of the application of the rule in *Griffith,* is defined by this Court. In *Griffith*, this Court held: "By 'final,' we mean a case in which 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

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[5] 479 U.S. at 328 (emphasis added).

[6] Appendix at A10.

[7] Appendix at A23.

[8] *State v. Johnson*, 19-0969 (La. App. 1 Cir. 8/6/20), ___ So. 3d ___, 2020 WL 4524745.

certiorari finally denied."[9] And as this Court noted many decades ago in *Berman v. United States*: "Final judgment in a criminal case means sentence. The sentence is the judgment."[10]

More recently, this Court has made clear that finality of judgment is determined by the most recently imposed sentence, notwithstanding any previously imposed sentences. Thus in addressing when a petitioner's state court conviction was final for purposes of the running of the one-year statute of limitations for filing his federal habeas corpus challenge to his conviction, this Court, in *Burton v. Stewart*, held that finality occurred at the conclusion of the direct review of the petitioner's resentencing, notwithstanding that his original sentence stood for one year and notwithstanding that his sentence was vacated for reasons unrelated to the petitioner's federal challenge to his conviction.[11]

Citing *Berman*, the First Circuit Court of Appeals in *United States v. Pizarro* has recently held that a defendant's federal conviction was not final for purposes of *Griffith* while his third appeal, following two remands for resentencing, was still pending.[12] The court of appeals held that Pizarro could therefore challenge his conviction based on *Alleyne*,[13] which this Court decided during

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[9] 479 U.S. at 321 n.6 (emphasis added).

[10] 302 U.S. 211, 212 (1937). *Accord Flynt v. Ohio*, 451 U.S. 619, 620 (1980) ("Applied in the context of a criminal prosecution, finality is normally defined by the imposition of sentence.").

[11] *Burton v. Stewart*, 549 U.S. 147, 156 (2007) (citing *Berman*, 302 U.S. at 212). *Accord United States v. Dodson*, 291 F.3d 268, 275-76 (4th Cir. 2002) (holding that for purposes of the AEDPA statute of limitations, a "judgment of conviction" is not final if the court of appeals affirms convictions on several counts but vacates sentence and remands for resentencing on any single count).

[12] *United States v. Pizarro*, 772 F.3d 284, 290-91 (1st Cir. 2014).

[13] *Alleyne v. United States*, 570 U.S. 99 (2013).

the pendency of Pizarro's third appeal, and in so holding, the court of appeals held that it did not matter that this Court had denied certiorari in a prior appeal.[14]

Federal district courts in Tennessee and Mississippi considering 2254 petitions have applied this reasoning to state court convictions in situations akin to that presented in the instant case. Thus, the petitioner in *Miller v. Bell* was convicted of murder in a Tennessee state court and sentenced to death in 1982. In 1984, the Tennessee Supreme Court affirmed the conviction but vacated the sentence and remanded for a new sentencing hearing.[15] In 1987, a jury again imposed the death sentence, and Miller again appealed, challenging his conviction based on this Court's decision in *Ake v. Oklahoma*,[16] which was decided in 1985, after his first appeal became final. The Tennessee Supreme Court refused to consider the *Ake* claim on the ground that "[a]ll of the guilt-innocence issues were foreclosed when the 1984 opinion sustaining defendant's conviction of first degree murder became final."[17]

Miller filed a 2254 petition in the Eastern District of Tennessee raising, among others, a claim premised on *Ake*. The district court initially concluded that the claim was barred by the retroactivity principles of *Teague v. Lane*,[18] but on motion to amend the judgment, the district court,

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[14] *Id. Accord Ramirez-Burgos v. United States*, 313 F.3d 23 (1st Cir. 2002). *But see Gretzler v. Stewart*, 112 F.3d 992, 1004 (9th Cir. 1997) (holding pre-*Burton* that finality of conviction is not affected by "vacation of a sentence on grounds wholly unrelated to the conduct of the trial"); *United States v. Judge*, 944 F.2d 523, 526 (9th Cir. 1991) (same with respect to federal conviction); *Richardson v. Gramley*, 998 F.2d 463, 466 (7th Cir. 1993) (holding in dicta that finality occurs when the state's highest court decides the federal claim)).

[15] *State v. Miller*, 674 S.W.2d 279 (Tenn. 1984).

[16] 470 U.S. 68 (1985).

[17] *State v. Miller*, 771 S.W.2d 401, 403 (Tenn. 1989).

[18] 489 U.S. 288 (1989).

citing *Burton* and *Flynt*, agreed with Miller that for purposes of *Griffith*, Miller's conviction was not final when *Ake* was decided in light of the pendency of Miller's direct appeal from his resentencing.[19]

Similarly, the petitioner in *Jordan v. Epps*, after having been sentenced four times in a Mississippi state court, sought to challenge his 1977 conviction on the ground that an incriminating statement he gave to law enforcement should have been suppressed in accordance with *Jackson v. Michigan*,[20] which this Court decided in 1986 long after Jordan's conviction and initial death sentence had been affirmed in 1979.[21] After his second sentencing, Jordan raised his *Jackson* claim in a state post-conviction proceeding, but the Mississippi Supreme Court rejected the argument, holding that the conviction had already been affirmed on appeal and upheld in federal habeas proceedings and was therefore "final" and "barred from relitigation."[22]

The federal district court disagreed, holding that the conviction was not final until the conclusion in 2002 of the direct review of the petitioner's fourth sentencing proceedings, notwithstanding numerous prior direct appeals and state postconviction and federal habeas proceedings associated with the imposition and reversal of the three prior sentences. "For that reason," the court held, "*Jackson*, which was decided in 1986, was the law at the time that Jordan's conviction and sentence became final and should be applied to Jordan's case."[23]

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[19] *Miller v. Bell*, 655 F. Supp. 2d 838, 845 (E.D. Tenn. 2009), *aff'd*, 694 F.3d 691 (6th Cir. 2012).

[20] 475 U.S. 625 (1986).

[21] 740 F. Supp. 2d 802, 810-12 (S.D. Miss. 2010), *COA denied*, 756 F.3d 395 (5th Cir. 2014).

[22] *Id*. at 835 (quoting *Jordan v. State*, 518 So. 2d 1186, 1189 (Miss. 1987)).

[23] *Id*. at 841.

Like the Tennessee and Mississippi state courts in *Jordan* and *Miller*, the Louisiana court in this case has concluded that a defendant is not entitled to the benefit of a new constitutional rule handed down by this Court if the conviction has been affirmed in a prior appeal, irrespective of whether the sentence has been vacated and whether any direct appeals of subsequently imposed sentences are not yet final. And like the petitioners in *Jordan* and *Miller*, Mr. Brown would likely succeed in showing a federal district court in a 2254 proceeding that the State court has erred in failing to understand that finality under *Griffith* occurs when the last imposed sentence is final, and that, consequently, Mr. Brown's convictions were not final when *Ramos* was decided. That conclusion would, in turn, compel the district court to grant habeas relief, as the *Ramos* violation is clear and because no state-law procedural obstacles stand in the way of relief on this claim, which the Louisiana Supreme Court regards as an "error patent"—one "that is discoverable by a mere inspection of the proceedings" and which must be corrected on appellate review, irrespective of whether it was raised or preserved by the defendant.[24]

But if these state courts had properly applied the holding in *Griffith*, the petitioners in those cases, including Mr. Brown in this case, would not have needed to present their claims to the federal courts. Hence, a definitive ruling from this Court is needed, as such potentially unnecessary federal challenges are likely to arise whenever this Court issues a new rule of constitutional criminal procedure. Indeed, in Louisiana there are currently several defendants, like Mr. Brown, who were

[24] *See, e.g., State v. Taylor*, 19-946 (La. 6/3/20), 296 So. 3d 1020 ("If the non-unanimous jury claim was not preserved for review in the trial court or was abandoned during any stage of the proceedings, the court of appeal should nonetheless consider the issue as part of its error patent review.") (citing LA. CODE CRIM. PROC. ANN. art. 920, which provides: "The following matters and no others shall be considered on appeal: (1) An error designated in the assignment of errors; and (2) An error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence.").

found guilty by nonunanimous jury verdicts for crimes alleged to have been committed while they were children and who were sentenced to life without parole, but whose original sentences have recently been or will soon be vacated under *Miller*. It is anticipated that many of these defendants will eventually be presenting their *Ramos* claims while on direct appeal from their *Miller* resentencing.[25]

Accordingly, in the interest of justice and in judicial economy, this Court—which has jurisdiction over not only the procedural *Griffith* issue but of the substantive *Ramos* issue as well[26]—should grant certiorari, vacate the decision of the Louisiana Fifth Circuit Court of Appeal, and issue a per curiam decision making it clear to all state courts that a criminal judgment is not final within the meaning of *Griffith v. Kentucky* if the sentence imposed or reimposed on the conviction is not final. Such a decision is also needed in light of the above referenced decisions of the Seventh and Ninth Circuits that conflict with those of the First Circuit and of district courts sitting in the Fifth and Sixth Circuits.[27]

Alternatively, this Court should grant certiorari and set this matter for full briefing and argument.

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[25] Representation to the undersigned by the Louisiana Center for Children's Rights.

[26] *See Dodson*, 291 F.3d at 276 n.3 (holding that in a second direct appeal brought after a resentencing hearing, the defendant can petition the Supreme Court for certiorari as to every issue, including those the court of appeals denied in his first appeal and citing *Mercer v. Theriot*, 377 U.S. 152, 153 (1964), in which this Court held that it may review issues settled in prior decisions of the court of appeals after granting certiorari as to a subsequent decision).

[27] *See* fn. 14 *supra.*

Conclusion

Although the jury in this case returned nonunanimous verdicts against Mr. Brown more than a quarter century ago, Mr. Brown's case is not final. He is therefore entitled to the benefit of *Ramos*.[28] The state courts must be instructed to follow the law.

Respectfully submitted,

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[28] *Danforth v. Minnesota*, 552 U.S. 264, 291 (2008) ("It is fully consistent with a government of laws to recognize that the finality of a judgment may bar relief. It would be quite wrong to assume, however, that the question whether constitutional violations occurred in trials conducted before a certain date depends on how much time was required to complete the appellate process.").