

IN THE
SUPREME COURT OF THE UNITED STATES

HAI A. DUONG — PETITIONER

vs.

TIM HOOPER, WARDEN — RESPONDENT(S)

APPENDICES

The Supreme Court of the State of Louisiana

HAI A. DUONG

No. 2021-KH-01032

VS.

DARRYL VANNOY, WARDEN LOUISIANA
STATE PENITENTIARY

IN RE: Hai A. Duong - Applicant Plaintiff; Applying For Supervisory Writ, Parish
of Jefferson, 24th Judicial District Court Number(s) 12-1285, Court of Appeal, Fifth
Circuit, Number(s) 21-KH-288;

November 10, 2021

Writ application denied.

JDH

SJC

JTG

WJC

JBM

Weimer, C.J., would grant and assigns reasons.

Griffin, J., would grant for reasons assigned by Chief Justice Weimer.

Supreme Court of Louisiana

November 10, 2021

Katie Marianowicz

Chief Deputy Clerk of Court
For the Court



November 10, 2021

SUPREME COURT OF LOUISIANA

No. 2021-KH-01032

HAI A. DUONG

VS.

DARRYL VANNOY, WARDEN LOUISIANA STATE PENITENTIARY

On Supervisory Writ to the 24th Judicial District Court, Parish of Jefferson

JW WEIMER, C.J., would grant and assigns reasons.

I would grant to address the retroactivity of **Ramos v. Louisiana**, 140 S.Ct. 1390, 206 L.Ed. 2d 583 (2020) under the laws of Louisiana.

HAI A. DUONG

NO. 21-KH-288

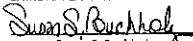
VERSUS

FIFTH CIRCUIT

DARRYL VANNOY, WARDEN LOUISIANA
STATE PENITENTIARY

COURT OF APPEAL
STATE OF LOUISIANA

FIFTH CIRCUIT COURT OF APPEAL
A TRUE COPY OF DOCUMENTS AS
SAME APPEARS IN OUR RECORDS


Susan S. Buchholz
First Deputy, Clerk of Court

June 21, 2021

Susan Buchholz
First Deputy Clerk

IN RE HAI A. DUONG

APPLYING FOR SUPERVISORY WRIT FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT,
PARISH OF JEFFERSON, STATE OF LOUISIANA, DIRECTED TO THE HONORABLE ELLEN SHIRER
KOVACH, DIVISION "K", NUMBER 12-1285

Panel composed of Judges Fredericka Homberg Wicker,
Jude G. Gravois, and Robert A. Chaisson

WRIT DENIED

Relator, Hai Duong, seeks review of the trial court's May 5, 2021 denial of his application for post-conviction relief, contending that the trial court erred in failing to grant him a new trial in light of the United States Supreme Court's recent decision in *Ramos v. Louisiana*, 590 U.S. ___, 140 S.Ct. 1390, 206 L.Ed.2d 583 (2020). For the following reasons, we deny the writ.

On June 12, 2013, relator was found guilty by a jury of aggravated rape (count one); attempted aggravated rape (count two); molestation of a juvenile (counts three and four); and aggravated oral sexual battery (count five). The verdict was non-unanimous. On June 24, 2013, the trial court sentenced relator to life imprisonment at hard labor on count one; fifty years imprisonment at hard labor on count two; fifteen years imprisonment each on counts three and four; and ten years imprisonment at hard labor on count five. The trial court ordered the sentences to run concurrently with each other and without the benefit of parole, probation, or suspension of sentence. Relator's convictions and sentences were affirmed by this Court on August 8, 2014. *See State v. Duong*, 13-763 (La. App. 5 Cir. 8/8/14), 148 So.3d 623. On April 17, 2015, the Louisiana Supreme Court denied writs. *See State v. Duong*, 14-1883 (La. 4/17/15), 168 So.3d 395.

On April 21, 2021, relator filed an application for post-conviction relief, contending that his non-unanimous jury verdict as to his convictions was unconstitutional and insufficient to sustain his convictions and sentences in light of the United States Supreme Court's *Ramos* decision.

La. C.Cr.P. art. 930.8 (A)(2) permits a defendant to seek post-conviction relief outside of the applicable time limitations if "the claim ... is based upon a final ruling of an appeal court establishing a theretofore unknown interpretation of constitutional law and petitioner establishes that this interpretation is retroactively applicable to his case[.]" (Emphasis added). *Ramos*, which held that a defendant who is tried for a serious crime has a right to a unanimous jury verdict, applies only to cases pending on direct appeal and to future cases. 140 S.Ct. at 1407.

Moreover, the United States Supreme Court has determined that the jury-unanimity rule in *Ramos* does not apply retroactively on federal collateral review. *Edwards v. Vannoy*, 593 U.S. ___, 141 S.Ct. 1547, 1554 (2021). The *Edwards* Court determined, however, that states remain free to retroactively apply the jury-unanimity rule as a matter of state law in state post-conviction proceedings if they choose to do so. 141 S.Ct. at 1559, n.6 (citing *Danforth v. Minnesota*, 552 U.S. 264, 282, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008)).

Relator was convicted in 2013. At the time of his conviction, a non-unanimous jury verdict was not unconstitutional under *Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972), and relator's conviction became final prior to the *Ramos* decision. *Edwards* holds that *Ramos* is not retroactive, and Louisiana state laws currently do not provide that jury unanimity applies to serious offenses occurring before January 1, 2019, nor that the unanimity requirement applies retroactively to cases on collateral review.¹ Accordingly, the trial court did not err in determining that relator failed to prove that he was entitled to post-conviction relief. Relator's writ application is denied.

Gretna, Louisiana, this 21st day of June, 2021.

FHW
JGG
RAC

¹ At this time, Louisiana law provides: "A case for an offense committed prior to January 1, 2019, in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. A case for an offense committed on or after January 1, 2019, in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, all of whom must concur to render a verdict." La. Const. Art. 1, § 17; La. C.Cr.P. art. 782 (A). *Edwards* does not repudiate these provisions. See *Edwards*, 141 S.Ct. at 1559-60 (2021).

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MAY 17 2021

SERVICE

W. Feliciano

LEGAL PROGRAMS DEPARTMENT TWENTY FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

NO. 12-1285

STATE OF LOUISIANA

DIVISION "K" RECEIVED

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Katie L. Newby DY CLERK
JEFFERSON PARISH LA

VERSUS

MAY 10 2021

HAI DUONG

WFFPCO

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DEPUTY CLERK

ORDER

This matter comes before the court on the petitioner's APPLICATION FOR POST-CONVICTION RELIEF, MEMORANDUM, MOTION FOR STAY. ALL STAMPED AS FILED APRIL 21, 2021.

On June 12, 2013, petitioner was convicted by a non-unanimous jury (11-1) of count #1, LSA-R.S. 14:42, aggravated rape, count #2, LSA-R.S. 14:(27)30.1, attempted aggravated rape, count #3 & #4, LSA-R.S. 14:81.2, molestation of a juvenile, count #5, LSA-R.S. 14:43.4, aggravated oral sexual battery. The court sentenced him on count #1 to life imprisonment at hard labor, on count #2 to 50 years, count #3 to 15 years, count #4 to 15 years, and count #5 to 10 years, all concurrently.

Petitioner now files an Application for Post-Conviction Relief (APCR) claiming that his jury verdict is unconstitutional in light of the most recent decision by the United States Supreme Court, *Ramos v. Louisiana*, ___ U.S. ___, 140 S.Ct. 1390 (2020).

Under the clear language of LSA-C.Cr.P. art. 930.8, Petitioner had two years from the date that the conviction and sentence became final to file an application for post-conviction relief, unless he proves an exception to the time limitations of LSA-C.Cr.P. art. 930.8 (A). Petitioner's case has long been final.

Petitioner does not provide an exception to timeliness. The *Ramos* decision only affects cases not yet final, and thus is not retroactive. The United States Supreme Court specifically noted, "the Court's decision today will invalidate some non-unanimous convictions where the issue is preserved *and the case is still on direct review.*" *Id.* At 1419, emphasis added. Petitioner clearly does not fall within this category.

The Fifth Circuit Court of Appeal recently granted writ on a Post-Conviction Relief judgment wherein the district court granted a new trial based on defendant's non-unanimous jury verdict judgment. The appellate court specifically addressed the retroactivity of *Ramos*:

La. C.Cr.P. art. 930.8 (A)(2) permits a defendant to seek post-conviction relief outside of the applicable time limitations if "the claim ... is based upon a final ruling of an appeal court establishing a theretofore unknown interpretation of constitutional law *and petitioner establishes that this interpretation is retroactively applicable to his case[.]*" (Emphasis added). *Ramos*, which held that a defendant who is tried for a serious crime has a right to a unanimous jury verdict, applies only to cases pending on direct appeal and to future cases. 140 S.Ct. at 1407. The majority in *Ramos* specifically declined to decide whether the right to jury unanimity applies to now-final convictions and sentences, believing that issue is best left for another day. *Id.*

Additionally, the Louisiana Supreme Court has given no indication that it intends to apply *Ramos* retroactively. Should the United States Supreme Court or the Louisiana Supreme Court determine in the future that the right to a unanimous jury verdict applies to now-final judgments, defendant may be able to satisfy the requirements of La. C.Cr.P. art. 930.8 (A)(2) necessary for filing an application for out-of-time relief. However, at this time, defendant is not entitled to a new trial. Accordingly, the state's writ is granted and the November 5, 2020 trial court judgment is vacated.

State v. Robertson, 20-KH-440 (La. App. 5 Cir. 3/15/2021), 2021 WL 966135.



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Appendix

C

Parish Clerk of Court - ID:2163361

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Additionally, this court will deny petitioner's motion to stay post-conviction proceedings. Petitioner bases his request for stay upon the possible outcome of a case pending in the United States Supreme Court, *Edwards v. Vannoy*. If any future Supreme Court decisions affect the current state of the law, the law allows petitioner to re-file his APCR.

Under LSA-C.Cr.P. art. 928, an application may be dismissed without an answer if the application fails to allege a claim which, if established, would entitle petitioner to relief. In this case, the petitioner has not alleged a valid claim reviewable in accordance with LSA-C.Cr.P. art. 930.3 or 930.4.

Accordingly,

IT IS ORDERED BY THE COURT that this application for post-conviction relief and accompanying pleadings are hereby **DENIED**.

Gretna, Louisiana, this

5th day of May, 2021.

EAT Trace

JUDGE

PLEASE SERVE:

PRISONER: Hai Duong, DOC # 613130, Louisiana State Penitentiary, Angola, LA 70712

Thomas Butler, Appeals Division, District Attorney's Office, 200 Derbigny Street, Gretna, LA 70053

Issued 5/5/21



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**Additional material
from this filing is
available in the
Clerk's Office.**