No. 22-81

In the Supreme Court of the United States

NATHANIEL LAMBERT

Petitioner,

v.

LOUISIANA,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) How should courts evaluate excessive sentencing delay claims under the Due Process Clause?

(2) When does a state criminal conviction become final for the purposes of *Griffith v. Kentucky*, 479 U.S. 314 (1987)?

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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 in 1997. The aggravated rape conviction carried a mandatory life sentence, and Lambert received an additional life sentence on the aggravated burglary conviction and a 15-year sentence for the aggravated crime against nature charge. Lambert appealed. The state intermediate appellate court affirmed all of the convictions as well as the life sentence for aggravated burglary, but *sua sponte* vacated the other two sentences after realizing that the trial court had committed a purely technical error: Rather than pronouncing these two sentences after denying Lambert's motion for a new trial, the trial court had pronounced them moments *before* denying the motion. Perhaps because he was already serving a valid life sentence for aggravated burglary, the vacatur apparently went unnoticed by courts—both state and federal—for many years. For his part, and despite his protestations to the contrary, Lambert failed to take any meaningful action to pursue his resentencing for decades.

Lambert's petition to this Court raises two questions. Neither merits review. This case is a poor vehicle to consider his first question—whether the test of *Barker v. Wingo*, 407 U.S. 514 (1972), governs delayed-sentencing claims under the due process

clause—because this is an atypical delayed-sentencing case as the delay here occurred between vacatur and resentencing, not conviction and resentencing, and while Lambert was already serving a valid life sentence. Moreover, the facts of this case are highly unusual, 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). This Court should also deny the petition to allow the issue to further percolate in the courts below. Just six years ago, in *Betterman v. Montana*, 578 U.S. 437 (2016), this Court held that the Speedy Trial Clause does not apply to delayed sentences, correcting the framework with which eleven federal courts of appeal and most state courts had considered such cases. In the few years since *Betterman*, distinct due process delayed-sentencing frameworks—and meaningful conflicts between them—are yet to emerge in lower courts. The Court should allow more courts to articulate their delayed-sentencing jurisprudence post-*Betterman* before addressing this issue.

The Court should also deny the petition as to the second question—whether state court convictions become final for purposes of *Griffith v. Kentucky*, 479 U.S. 314 (1987) when they are affirmed, and all that remains is a perfunctory resentencing. The Louisiana Supreme Court heard oral argument this week in a case in which it will resolve a conflict in Louisiana's lower courts on this very issue. The Louisiana Supreme Court's decision "to review the question . . .

provides a prudential ground for declining to review" the issue at this time. *Carpenter v. Gomez*, 516 U.S. 981 (1995) (Stevens, J., respecting the denial of the petition for a writ of certiorari). In any event, Lambert has failed to identify a single case that is actually in conflict with the Louisiana court's approach and the Seventh Circuit case law that he identifies. So, this is not an issue requiring this Court's attention. For these reasons, this Court should deny Lambert's petition.

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.[1] A grand jury indicted him on three counts: (1) aggravated rape;[2] (2) aggravated burglary;[3] and (3) aggravated crime against nature.[4] 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.[5] Pet. App. at 86a.

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[1] 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.

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

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

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

[5] Based on his review of a photo copy of polling slips, Lambert argues before this Court that all of his convictions were in fact non-unanimous. But this is contrary to the minutes of the trial court and the opinions of the courts below, *see, e.g.* Pet. App. at

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. *State v. Lambert*, 98-0730 (La. App. 4 Cir. 11/17/99), 749 So. 2d 739, 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 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.*

4a, and Lambert does not claim to have raised this point before them. This Court is "a court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718, n.7 (2005), and this factual issue is not properly before it.

[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 states: "Except as otherwise provided by this Article, a motion for a new trial must be filed *and disposed of* before sentence." (emphasis added).

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 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 State and by the courts—perhaps because Lambert was already serving one valid life sentence—and so 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 asked for any relief on this issue. The trial court denied post-conviction relief. The state intermediate appellate court and the Louisiana Supreme Court denied review.[11]

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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.

Lambert was already serving one valid life sentence, and his resentencing on the aggravated rape conviction could only result in the imposition of another life sentence. So, the non-occurrence of this perfunctory resentencing apparently went undetected. Despite numerous rounds of post-conviction and federal habeas review, apparently no court—state or federal—noticed this procedural oddity for years.

For his part, Lambert did not take any meaningful action to rectify this error for decades. In his original petition for a writ of certiorari to this Court, Lambert admitted as much, but claimed to have decided never to act only after a bizarre, off the record conversation with the original trial judge in which the judge told him that he simply refused to resentence Lambert for fear of bad publicity. Pet. at 3, *Lambert v. Louisiana*, 141 S. Ct. 225 (No. 19-8149) (2020).[12] But even if this strange event occurred, as Lambert himself noted, "[i]t does not explain the failure of counsel representing [Lambert] during this time to note the inadvisability of dropping the [resentencing] issue." *Id.* at 3, n.2. Whatever the reason, Lambert simply did not pursue his resentencing.

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[12] According to Lambert, the judge told him that "the last time I gave a man two life sentences I ended up as a cartoon in Time magazine." *Id.* But this was the same judge who had sentenced Lambert to his original twin life sentences that were then vacated.

Despite his admission of inaction on the resentencing front in his earlier petition—indeed, in his initial petition he stated that after this interaction with the judge "[a]ll went their separate ways until September 2017"[13]—Lambert now claims that he filed "multiple pro se motions raising his lack of sentences" in the intervening years.[14] But the only petition Lambert can actually point to in this respect is his 2006 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. In the petition, he sought relief on various inadequate assistance of counsel grounds, as well as on the grounds that his confession was involuntary and had been improperly admitted.[15] While Lambert did mention in passing that he had not yet been resentenced, earlier in the same petition he indicated that all three original sentences were in effect.[16] In any event, he did not request any relief on these grounds. Nor did he—contrary to Lambert's contention in his new petition[17]—describe any efforts

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[13] *Id.* at 3.

[14] Pet. at 6.

[15] Pet. for Writ of Habeas Corpus, *Lambert v. Cain*, No. 2:06-cv-00721, (E.D. La. Feb. 13, 2006), ECF No. 1.

[16] *Id.* at 1, 6 (indicating that he was serving two life sentences and an additional fifteen year sentence; and again that he was serving multiple sentences).

[17] Pet. at 6, n.5 (claiming that in this habeas petition Lambert "describ[ed] efforts to obtain resentencing"). Lambert also claims that he wrote that this lack of resentencing "precluded [him] from

he had made to obtain resentencing.[18] He simply mentioned his resentencing in passing and moved on to his ineffective assistance of counsel and Fifth Amendment involuntary confession arguments which were the subject of his habeas petition and the only grounds upon which he requested relief.

After determining that Lambert's petition was timely filed because his convictions became final on April 26, 2001,[19] the court denied the petition with

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seeking appellate and post-conviction review" full-stop, *id.* at 6, when in reality he wrote that it "precluded [him] from seeking appellate and post-conviction review *of his sentence*." Pet. for Writ of Habeas Corpus at 13, *Lambert*, No. 2:06-cv-00721 (emphasis added).

Lambert also claims that he attached as appendixes to this habeas petition twelve letters that he supposedly had written to courts about his resentencing. Pet. at 6, n.5. But he did not include these letters as part of his habeas petition, nor did he file them separately. And, based on his description of them in the habeas petition's table of contents simply as "Nine Letters To District Court Asking For Ruling on [Post-Conviction Relief]" and "Three Letters-One to 4th Circuit, Two to Louisiana Supreme Court"), there is nothing to indicate that these had anything to do with his resentencing. Tellingly, Lambert does not discuss the actual substance of any of these letters in his petition before this Court, nor does he include them as part of his appendix.

[18] *See* Pet. for Writ of Habeas Corpus at 13, *Lambert* No. 2:06-cv-00721.

[19] 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

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. 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.

As Lambert points out, apparently having noticed the resentencing issue, the trial court continually attempted to resentence Lambert in 2014. But the resentencing was rescheduled numerous times after Lambert and his counsel repeatedly failed to appear for resentencing hearings.[20]

Finally, in 2017, Lambert filed a motion for clarification of his sentence in which he sought the removal of the two vacated sentences from his RAP sheet.[21] After this—Lambert's first meaningful attempt to address the issue—the court scheduled a hearing to address the issue. But Lambert or his counsel again failed to appear at numerous scheduled hearings, and so resentencing did not occur until April 3, 2018.

Court, following the Louisiana Supreme Court's denial of his application for writs." The court accordingly determined that Lambert's petition was timely filed.

[20] Pet. App. at 46, *Lambert*, 141 S. Ct. 225 (No. 19-8149).

[21] *Id.* at 46.

Before the resentencing, Lambert filed pro se motions to quash and requested discharge from custody based on the delay. *See* Pet. App. at 14a. 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.

The Fourth Circuit considered Lambert's claim that he suffered an inordinate sentencing delay. Relying on this Court's opinion in *Betterman v. Montana*, 578 U.S. 437 (2016), the Fourth Circuit observed that the principles of due process applied to Lambert's claim. Pet. App. at 16a. Noting that this Court has cited Louisiana Code of Criminal Procedure article 874 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." *Id.* at

18a n.4 (citing *Betterman*, 578 U.S. at 444). The court observed that such a rule would amount to "an unjustified windfall" for a defendant. *Id.* (quoting *Betterman*, 578 U.S. at 444). The court reasoned that "[t]he unreasonableness of a sentencing delay is irrelevant in the absence of prejudice to the defendant." *Id.* at 17a. 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 count, the Fourth Circuit found that Lambert suffered no prejudice from the delay. *Id.* at 18a–19a. The Louisiana Supreme Court denied Lambert's petition without opinion. Pet. App. at 10a.

Lambert petitioned 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*. While his petition was pending, Lambert filed a supplemental brief requesting that this Court grant, vacate, and remand his case so that the state court could consider whether he was entitled to retroactive relief under this Court's recently announced decision in *Ramos v. Louisiana*. This Court did so. On remand, the state court determined that Lambert was not entitled to retroactive relief under *Ramos* because his *convictions* had become final long ago, so his case was no longer on direct review. The Louisiana Supreme Court denied review. Lambert then filed the present petition for a writ of certiorari from this Court.

REASONS FOR DENYING THE PETITION

I. THIS CASE IS A POOR VEHICLE TO CONSIDER HOW TO ADDRESS EXCESSIVE SENTENCING DELAYS.

A. This Isn't Like Most Sentencing Delay Cases.

Lambert's is not a customary sentencing delay case. In a typical case, the delay occurs between the conviction and the sentencing. But here, Lambert's initial sentencing was not inappropriately delayed. He received three sentences for three convictions all on the same day. Rather, the delay occurred between those initial sentencings and a perfunctory resentencing on two of those three convictions. The vacatur and remand that necessitated the resentencing were based on a purely technical procedural error in the original sentencing: The trial court pronounced the sentences moments *before* ruling on a motion for a new trial, instead of *after* that ruling, as required by state law. But Lambert's initial life sentence for aggravated burglary was never vacated. And of the two convictions whose sentences were vacated, one of them—aggravated rape—carried a mandatory life sentence. La. R.S. 14:42. So, the resentencing could not change the length or conditions of the aggravated rape sentence in any way.

Likely because Lambert was already serving one valid life sentence, and his resentencing on the aggravated rape conviction could only result in the

imposition of another life sentence, the non-occurrence of this perfunctory resentencing apparently went undetected for years. Despite numerous rounds of post-conviction and federal habeas review, apparently no court—state or federal—noticed this procedural oddity for years.

For his part, Lambert did not take any meaningful action to rectify this error until 2017. Then, Lambert finally raised the issue when he filed a *pro se* motion to clarify his sentences in state court, arguing that his RAP sheet incorrectly stated that he had two life sentences instead of just one. At that point, the trial court denied the motion as premature and promptly scheduled a resentencing hearing. It then resentenced him to the exact sentences he had originally received, bringing the strange saga of Lambert's sentencing to a close.

Suffice it to say, these facts are highly unusual. Simply put, Lambert's case is dramatically different than a typical delayed sentencing case. "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.

Just six years ago, in *Betterman v. Montana*, 578 U.S. 437 (2016), this Court resolved a split among

the courts below over whether the Speedy Trial Clause applies to delays in sentencing. This Court held that it does not, rejecting the approach that had been taken by all but one of the federal courts of appeal. Indeed, prior to *Betterman*, the federal courts of appeal for the Third, Fifth, Sixth, Tenth, and Eleventh Circuits had all explicitly held that the Speedy Trial Clause applied to sentencing delays, while the courts of appeal for the D.C., First, Fourth, Seventh, Eighth, and Ninth Circuits had all assumed that it did without specifically so deciding.[22] Most state high courts had adopted the same approach.[23] Only the Second Circuit, joined by a handful of state courts, had determined that the Speedy Trial Clause did not apply to sentencing delays, instead applying only the Due Process Clause to such claims.[24] In *Betterman*, this Court rejected the Speedy Trial Clause approach to sentencing delays, but "reserve[d] judgment on whether sentencing delays might violate the Due Process Clause." *Betterman*, 578 U.S. at 449 (Thomas, J., concurring).

In the few years since this Court rejected the Speedy Trial Clause approach in *Betterman*, only a handful of federal courts of appeal and state courts have considered the application of *Betterman* to

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[22] *See* Pet. at 9–12, *Betterman v. Montana*, 578 U.S. 437, (No. 14-1457).

[23] *See id.*

[24] *See id.*

sentencing delays.[25] As Louisiana argued in its brief in opposition to Lambert's earlier petition, the substance of those rulings involves traditional due process analysis—and they do not appear to contradict each other.[26] Simply put, lower courts have not had enough to 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. In his latest petition, Lambert argues that no percolation on the due process issue is necessary post-*Betterman* because *Betterman* refrained from establishing a due process test for sentencing delays. Pet. at 13, n.11. Essentially, according to Lambert, because *Betterman* articulated no due process test, it worked no meaningful change on sentencing delay jurisprudence. That is of course false. *Betterman*'s impact on sentencing delay

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[25] *See, e.g.*, *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); *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).

[26] Lambert points to only one case that was decided after his earlier petition*, Lacerda*, 958 F.3d.

jurisprudence was massive in that it rejected the Speedy Trial Clause approach that the vast majority of courts had adopted. Because before *Betterman* the Speedy Trial Clause dominated most every courts' sentencing delay analysis, distinct due process sentencing delay approaches—and, conflicts among them, if any—are largely yet to emerge.

Meanwhile, to the degree that some courts had previously conducted due process analyses alongside Speedy Trial Clause analyses pre-*Betterman*, they were necessarily informed and animated by the Speedy Trial Clause concerns they believed ran concurrently with the due process issues. Whether their approaches remain completely unchanged after *Betterman* is a question those courts must answer. This is particularly true given the thoughtful concurrences Justice Thomas and Justice Sotomayor penned in *Betterman*, both of which discuss possible approaches to these due process issues. While, as Lambert points out, the Third Circuit recently explained that its approach would not change after *Betterman*, *Lacerda*, 958 F.3d at 219, other courts should be given the opportunity to consider the issue. *Betterman* worked a sea-change in sentencing delay law, and it is still only six years old. Further percolation is needed on this issue.

II. LAMBERT'S QUESTION ABOUT FINALITY AMOUNTS TO A REQUEST FOR ERROR CORRECTION, AND THE LOUISIANA SUPREME COURT HAS ALREADY AGREED TO ADDRESS THE ISSUE.

A. The Louisiana Supreme Court Has Granted Certiorari and Heard Oral Argument On this Exact Issue.

The Court should not review Lambert's second question because this exact issue is currently pending before the Louisiana Supreme Court. This summer, the court granted the writ application in *Louisiana v. Vaughn*,[27] which raises the question of whether *Ramos* applies retroactively to defendants whose convictions, but not sentences, were final at the time *Ramos* was decided. The court granted the writ to resolve a split among the Louisiana courts of appeal over whether defendants in Lambert's position are

[27] 338 So. 3d 479 (La. 2022).

entitled to retroactive relief under *Ramos*.[28] It heard oral argument in *Vaughn* on October 18, 2022.[29]

This Court should not use its precious resources to resolve an issue that the Louisiana Supreme Court has already decided to address. The Louisiana Supreme Court's decision "to review the question . . . provides a prudential ground for declining to review" the issue at this time. *Carpenter*, 516 U.S. at 981 (Stevens, J., respecting the denial of the petition for a writ of certiorari). Doing so now would be premature considering that this is an unsettled issue in the Louisiana courts awaiting resolution by the Louisiana Supreme Court this term. If, as Lambert claims, the Louisiana court's finality analysis here is so deeply and obviously flawed and is an extreme outlier, this Court should not waste its precious resources on a problem that the Louisiana Supreme Court is poised to fix. And if the Louisiana Supreme Court adopts the approach, granting the petition before it does so would needlessly deprive this Court of guaranteed further

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[28] *Compare State v. Sylvester*, 21-0441 (La. App. 3 Cir. 12/15/2021), 330 So.3d 1139, writ denied, 22-0104 (La. 4/26/22), 336 So.3d 893 (La. 2022) (holding *Ramos does not* retroactively apply under these circumstances), *with State v. Bryant*, 53,321 (La. App. 2 Cir. 9/01/21), 326 So.3d 967, *writ not taken*, *State v. Harrison*, 21-0063 (La. App. 4 Cir. 1/12/22), 334 So.3d 831, *writ not taken*, and *State v. Vaughn*, 21-0521 (La. App. 1 Cir. 12/30/21), 2021 WL 6316618 (holding *Ramos does* apply under these circumstances).

[29] October 17 and 18 Official Docket, LOUISIANA SUPREME COURT (Sept. 13, 2022), https://www.lasc.org/dockets/Oct2022.pdf.

percolation and clarification on the issue.[30] Moreover, deciding to review a purported error of a Louisiana court while that very issue awaits resolution by the Louisiana Supreme Court would undermine state and federal comity. Doing so would effectively abrogate the Louisiana Supreme Court's authority over the Louisiana courts by depriving it of the opportunity to resolve a conflict among them—potentially by rejecting the approach taken by the lower court in Lambert's case—before this Court decides to do so. For these reasons, the Court should deny the petition.

B. In Any Event, There Is No Split of Authorities.

i. Lambert has pointed to no federal cases that conflict with the Seventh Circuit's and the Louisiana court's finality analysis.

Lambert claims that the Louisiana court and the Seventh Circuit are in conflict with the First, Second, and Ninth Circuits in holding that a conviction may be final under *Griffith* before resentencing on the same or other counts has occurred. But the Seventh Circuit case law that he points to expressly differentiates between finality for

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[30] Percolation in the courts below provides this Court "with a means of identifying significant rulings as well as an experimental base and a set of doctrinal materials with which to fashion sound binding law." *California v. Carney*, 471 U.S. 386, 401 (1985) (Stevens, J., dissenting).

cases subject to appellate review under 28 U.S.C. Section 1291, the statute implicated in the First, Second, and Ninth Circuit cases cited to by petitioner, and finality for cases subject to appellate review under 28 U.S.C. Section 1257, the statute before the Seventh Circuit. Section 1291 confers appellate jurisdiction on the federal courts of appeals over "all final decisions of the [federal] district courts . . . except where a direct review may be had in the Supreme Court." Section 1257, meanwhile, grants this Court the power to review final decisions of state high courts only on issues of federal law.

In *Holman v. Gilmore*, 126 F.3d 876, 881 (7th Cir. 1997), *cert. denied*, 497 U.S. 1032 (1990), the Seventh Circuit case Lambert points to—a case this Court declined to review—a habeas petitioner convicted of murder in Illinois state court sought relief from his conviction through retroactive application of the rule from *Batson v. Kentucky*, 476 U.S. 79 (1986). *Batson* was decided after the Illinois Supreme Court had affirmed the *Holman* conviction itself, remanded for resentencing, and a second jury had sentenced the inmate to death, but before direct state court review of that second sentence was complete. The petitioner argued in the Seventh Circuit that he could receive retroactive relief from *Batson* for his underlying conviction because his sentence was not final at the time *Batson* was decided.

Rejecting this argument, Judge Easterbrook explained that "the definition of 'finality' for purposes

of [Section] 1257 differs from the definition that word has under [Section 1291]." *Holman*, 126 F.3d at 881 (7th Cir. 1997). Under Section 1291, "[a] criminal defendant may not take an appeal until the sentence has been fixed." *Id.* That interpretation is of course consistent with Lambert's First, Second, and Ninth Circuit cases, all of which dealt with Section 1291, not Section 1257. This distinction is crucial, for "[u]nder Section 1257, by contrast, an issue of federal law may be reviewed as 'final' even though the decision or judgment is not 'final'" either "as the state system understands the term" or "as [Section 1291] uses it for review by the intermediate federal courts." *Id.* And, in cases like *Holman* and Lambert's, that includes instances where state court review of an actual conviction's validity is final and sentencing is all that remains.

This difference in finality for cases that originate in federal court versus cases that originate in state court flows from the significant difference in the scope of review federal courts exercise over them. As Judge Posner explained in an earlier Seventh Circuit case—another case this Court declined to review:

> The only rulings by a state court that the Supreme Court can review are rulings on issues of federal law . . . whereas a federal court of appeals' appellate jurisdiction over rulings by district courts, the courts of the same sovereign,

> is plenary . . . . This distinction has led the Court to deem a state-court judgment final if 'the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings.'

Richardson v. Gramley, 998 F.2d 463, 466 (7th Cir. 1993), *cert. denied*, 510 U.S. 1119 (1994) (quoting *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480 (1975)). And in *Holman* itself, Judge Easterbrook looked to this Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963), where the Maryland high court had denied Brady's petition for collateral relief from the conviction itself, but remanded the case for resentencing. This Court explained that the state court decision was final with respect to the validity of the conviction because it was "independent of" and would be "unaffected by" any subsequent sentencing, so it could not "be mooted by such a proceeding." *Id.* at 85, n.1. In other words, "the decision was final with respect to this issue, because the federal question would survive the proceedings to set the sentence." *Holman* 126 F.3d at 880. So, the state court decision regarding the conviction was final and this Court reviewed it despite the lack of a sentence. And, as Judge Easterbrook noted, in *Cox Broadcasting Corp. v. Cohen*, this Court "generaliz[ed] this approach so that it logically includes decisions on direct appeal in addition to collateral attacks." *Holman*, 126 F.3d at 880.

That is exactly Lambert's situation. But he wholly fails to address this Court's finality analysis in *Brady*, *Cox*, and their progeny, and points to no decision of any federal court that conflicts with Judge Posner's and Judge Easterbrook's application of it for the Seventh Circuit to a case that, like his own, originated in state court. Lambert's cases involving the finality of federal court convictions subject to review under Section 1291 are irrelevant, as the "definition of 'finality' for purposes of [Section] 1257 differs from the definition that word has under [Section 1291]." *Holman*, 126 F.3d at 881.

ii. Lambert's state cases do not conflict with the Seventh Circuit's and the Louisiana court's finality analysis.

Next, Lambert claims that decisions by the Kansas and Colorado high courts conflict with those of the Seventh Circuit and the Louisiana court on this finality issue. Lambert points to *State v. Kleypas,* 305 Kan. 224 (2016). There, the Kansas Supreme Court determined that a defendant on direct appeal of his resentencing after his conviction had been affirmed was entitled to retroactive application of a new rule of criminal procedure that it had announced in *State v. Appleby*, 289 Kan. 1017 (2009). *Appleby*'s new rule was based in the double jeopardy clauses of the federal and—on seemingly independent and adequate grounds—Kansas constitutions. And *Kleypas*'s finality analysis was expressly based in state law. *Kleypas*,

382 P.3d at 394–96; 405–06. After reviewing relevant Kansas statutes and cases, the Kansas Supreme Court concluded that "*Kansas* law defines a criminal judgment as consisting of a conviction and a sentence." *Id.* at 394 (emphasis added). So, the defendant was entitled to retroactive application of the new rule it had announced in *Appleby*.

The situation here is entirely different. Lambert seeks retroactive application of a new rule of federal law announced by this Court, not of new rules under the federal *and* state constitutions announced by a state high court. While Kansas must follow *Griffith*'s retroactivity requirements when its high court announces new rules under the federal constitution, *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535 (1991), it is free to decide who is entitled to retroactive application of new rules of state law announced by its high court, and how to determine finality under Kansas law for that purpose. *See, e.g. Taylor v. State*, 10 S.W.3d 673, 680–81 (Tex. Crim. App. 2000) (explaining that this Court has never held that the federal constitution imposes a retroactivity requirement on new rules of state law).[31] But, when retroactive application of a new rule of federal constitutional law is sought, "[f]ederal law defines

[31] Moreover, it is free to give new rules of federal constitutional law broader retroactive effect than this Court would. *Danforth v. Minnesota*, 552 U.S. 264 (2008).

what makes a decision final for purposes of retroactivity analysis." *Holman*, 126 F.3d at 880.[32]

In *Kleypas*, the Kansas Supreme Court expressly stated that its finality analysis was based in Kansas law, not federal law. Because the new rule announced in *Appleby* was independently and adequately based in the Kansas constitution, *Kleypas* is perhaps best understood as retroactively applying the new state law rule announced in *Appleby*, rather than the federal constitutional one. And even if the Kansas Supreme Court errantly applied its state law finality to a question of federal constitutional retroactivity, its finality analysis is still of no moment here. Because "[f]ederal law defines what makes a decision final for purposes of retroactivity analysis[]" involving new rules of federal constitutional law, *Holman*, 126 F.3d at 880, *Kleypas*'s discussion of finality under Kansas law is irrelevant here either way. And if it is in fact state law that defines what makes a decision final for purposes of federal constitutional retroactivity analysis, then the finality issue here is of course not subject to this Court's review at all. *See, e.g., DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 54 (2015) ("State courts are the ultimate authority on that state's law." (cleaned up)).

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[32] *See also, e.g., United States v. Howard*, 115 F.3d 1151, 1158 (4th Cir. 1997) ("The finality of a conviction is a matter of federal rather than state law.").

The only other case that Lambert points to is *Sharp v. People*, No. 06SC18, 2006 WL 2864916 (Colo. Oct. 10, 2006). There, the Colorado Supreme Court, over a dissent by Chief Justice Mullarkey, actually denied a petition for certiorari on the question of whether "[w]hen a judgment of conviction is affirmed on direct appeal but the case is remanded for resentencing, should the conviction be considered final for retroactivity purposes, thus limiting a second direct appeal to claims arising from the resentencing." *Sharp*, 2006 WL 2864916, at *1. In the opinion below, the Colorado Court of Appeals had concluded that, for purposes of retroactive application of a new rule, "in Colorado a judgment of conviction cannot be considered final so long as a defendant may directly appeal the conviction or sentence." *People v. Sharp*, 143 P.3d 1047 (Colo. App. 2005). This was because, according to the court, that approach "accords with the law of [Colorado] regarding when a conviction becomes final," including the definition of "judgment of conviction" under Colorado Rule of Criminal Procedure 32 and the Colorado case law it examined. *Id.* at 1050. In other words, the court's holding concerned finality under Colorado law, not federal law.[33]

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[33] While the Colorado Court of Appeals briefly noted that it also perceived the approach to finality it adopted to be consistent with federal law, it expressly stated that it was deciding the question of finality as a matter of Colorado law, and its conclusion on the issue was based in its interpretation of Colorado statutes and cases. *Id.*

While denying the cross-petition as to this question of finality, the Colorado Supreme Court granted the petition as to whether the defendant's Sixth Amendment rights had been violated, and summarily vacated the Colorado Court of Appeals' decision and remanded the case for reconsideration in light of *Davis v. Washington*, 547 U.S. 813 (2006) and *People v. Vigil*, 127 P.3d 916 (Colo. 2006). Even if the Colorado Supreme Court's action is viewed as an endorsement of the Colorado Court of Appeals' finality analysis—and Lambert completely fails to explain why it should be so viewed—its endorsement was of the lower court's determination of finality under state law. But "[f]ederal law defines what makes a decision final for purposes of retroactivity analysis[]" involving new rules of federal constitutional law. *Holman*, 126 F.3d at 880. How states define finality under their own law is irrelevant. And again, if for purposes of federal constitutional retroactivity analysis the finality of a state court decision is actually a question of state law, then it is not subject to this Court's review.

iii. In the absence of any square split, Lambert's second question amounts to error correction.

In the absence of any split of authorities, and especially considering that the Louisiana Supreme Court has already granted certiorari to consider this question, Lambert's petition amounts to a request for error correction. But this Court is "not a court of error correction." *Martin v. Blessing*, 134 S. Ct. 402, 405

(2013) (Statement of Alito, J., respecting the denial of certiorari); *see Cavazos v. Smith*, 565 U.S. 1, 11 (2011) (Ginsburg, J., dissenting) (quoting E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, Supreme Court Practice § 5.12(c)(3), p. 351 (9th ed. 2007)); Supreme Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

Even if the Court believes the lower court erred, the Court should allow the Louisiana Supreme Court to address the issue and resolve the split in state law on the question. *Carpenter*, U.S. at 981 (Stevens, J., respecting the denial of certiorari) (observing that a state high court's expressed intention to review a question provides a "prudential ground" for declining to grant certiorari).

CONCLUSION

Louisiana respectfully asks the Court to deny the petition for a writ of certiorari.

Respectfully Submitted,

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