

No. _____

In The
Supreme Court of the United States

WILLIAM SHUPP,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

**On Petition For Writ Of Certiorari
To The State Of Louisiana Court Of Appeal,
Third Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Louisiana grants the right to appellate review of criminal convictions in its courts of appeal and by application for writ of certiorari to the Louisiana Supreme Court. When a defendant loses his right to appeal to the court of appeal for no fault of his own, Louisiana allows for an out-of-time appeal. Here, after Shupp's convictions by jury were affirmed by the Louisiana Third Circuit Court of Appeal, his lawyer told him that he would file an application for writ of certiorari to the Louisiana Supreme Court but then, after the deadline had passed, told him that he would *not* file the application. Then the trial court granted Shupp permission to file an out-of-time application for writ of certiorari because he had lost the right to file the application—without fault on his part—because of his lawyer. The court of appeal reversed, reasoning that Shupp “has already received his constitutional right to a direct appeal” in the court of appeal when the conviction was affirmed, and therefore, “he is not entitled to a writ of review to the Louisiana Supreme Court” even though he lost his right to seek review by application for writ of certiorari in the Louisiana Supreme Court because of his lawyer’s ineffective assistance of counsel. The Louisiana Supreme Court denied Shupp’s application for supervisory writ of review seeking to reverse the court of appeal and reinstate the trial court’s grant of the out-of-time application for writ of certiorari. The question presented by these circumstances is:

Whether Louisiana’s denial of Shupp’s request to file an out-of-time application for writ of certiorari to

QUESTION PRESENTED—Continued

the Louisiana Supreme Court, despite the ineffective assistance of his lawyer, violates the Due Process Clause of the Fourteenth Amendment, contrary to the holding of *Evitts v. Lucey*, 469 U.S. 387, 400 (1985).

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

1. William Shupp
2. State of Louisiana

RELATED CASES

State of Louisiana v. William Shupp, Louisiana Supreme Court, No. 2022-KP-00797, not reported. Order denying review entered Sept. 19, 2023.

State of Louisiana v. William Shupp, Louisiana Third Circuit Court of Appeal, No. KW 21-00759, not reported. Opinion reversing the trial court's order granting Shupp an out-of-time to file an application for writ of certiorari in the Louisiana Supreme Court filed Sept. 19, 2023.

State of Louisiana v. William Shupp, Parish of Calcasieu Fourteenth Judicial District Court, No. 19130-13, not reported. Order on Shupp's application for post-conviction relief granting out-of-time appeal to file application for writ of certiorari to the Louisiana Supreme Court entered Sept. 24, 2021.

State of Louisiana v. William Shupp, Louisiana Third Circuit Court of Appeal, No. 15-695, reported at 185 So.3d 900 (La App. 3 Cir. 2016). Opinion affirming in part and reversing in part filed Feb. 3, 2016.

RELATED CASES—Continued

State of Louisiana v. William Shupp, Parish of Calcasieu Fourteenth Judicial District Court, No. 19130-13, not reported. Judgment of conviction entered on Aug. 6, 2014.

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PETITION FOR WRIT OF CERTIORARI

Petitioner William Shupp petitions for writ of certiorari to review the judgment of the Louisiana Court of Appeal for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Louisiana Third Circuit Court of Appeal affirming Shupp's armed-robery and false-imprisonment-with-a-dangerous-weapon convictions and reversing Shupp's unauthorized-use-of-a-motor-vehicle conviction is reported at *State v. Shupp*, 185 So.3d 900, 924 (La. App. 3rd Cir. 2016).

The opinion of the trial court granting Shupp an out-of-time appeal to file his application for writ of certiorari to the Louisiana Supreme Court is located at Appendix 4 thru 9.

The opinion of the Louisiana Third Circuit Court of Appeal reversing the trial court's grant of an out-of-time appeal to file an application for writ of certiorari to the Louisiana Supreme Court is located at Appendix 1 thru 3.

The order of the Louisiana Supreme Court denying Shupp's application for writ of review seeking to overturn the Third Circuit Court of Appeal's reversal to the trial court's grant of an out-of-time appeal to file

an application for writ of certiorari to the Louisiana Supreme Court is located at Appendix 10.

JURISDICTION

The Louisiana Court of Appeal for the Third Circuit entered its judgment on April 26, 2022. The Supreme Court of Louisiana denied review on September 19, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment provides, in relevant part, that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1.

28 U.S. Code § 1257(a) provides:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the

United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

INTRODUCTION

Louisiana has created an appellate court system whereby criminal defendants have a right to direct appeal of their convictions to the intermediate courts of appeal and a right to seek discretionary review in the Louisiana Supreme Court by application for writ of certiorari. Louisiana has also given defendants the right to seek post-conviction relief in some situations. When a defendant loses his right to appeal to the courts of appeal because his lawyer is ineffective for no fault of the defendant, Louisiana allows for an out-of-time appeal. *State v. Clark*, 295 So.3d 935, 936 (La. 2020). And when a defendant loses his right to pursue post-conviction relief because his lawyer is ineffective for no fault of the defendant, Louisiana allows for an out-of-time application for post-conviction relief. *State v. Davis*, 295 So.3d 396, 397-398 (La. 2020). However, when a defendant loses his right to file an application for writ of certiorari to the Louisiana Supreme Court after a criminal conviction is affirmed by the court of appeal because his lawyer is ineffective for no fault of the defendant, Louisiana does not allow for an out-of-time application for writ of certiorari to the Louisiana

Supreme Court. *Talley v. Maggio*, 451 So.2d 1358, 1360-1361 (La. App. 4th Cir. 1984).

This Court held in *Evitts v. Lucey* that for a state to grant a right of review but to then disallow a defendant from pursuing the right because his lawyer was ineffective violates the defendant's right to due process of law. 469 U.S. 387, 400 (1985). In *Evitts*, the defendant's lawyer failed to file the statement of appeal required by a Kentucky Rule of Appellate Procedure when he filed his brief and record on appeal resulting in dismissal of the appeal, denial of his motion for reconsideration, the Kentucky Supreme Court affirming the conviction, and the trial court denying a motion to vacate or grant a belated appeal. *Id.* at 389-390. Thus, the issue in *Evitts* was "whether the state court's dismissal of the appeal, despite the ineffective assistance of respondent's counsel on appeal, violates the Due Process Clause of the Fourteenth Amendment." *Id.* at 391-392. In this case, a similar issue is whether Louisiana's denial of Shupp's request to file an out-of-time application for writ of certiorari to the Louisiana Supreme Court, despite the ineffective assistance of his counsel, violates the Due Process Clause to the Fourteenth Amendment. In other words, the dispositive question is whether the principle in *Evitts* that applies to the loss of an appeal to an intermediate state court of appeal also applies to the loss of a request for review to a state supreme court.

STATEMENT OF THE CASE

- 1. Shupp was convicted by a jury, the court of appeal affirmed, and he lost his right to seek review in the Louisiana Supreme Court because his lawyer was ineffective in missing the deadline to file the application for writ of certiorari in the Louisiana Supreme Court.**

After Shupp was convicted by a nonunanimous jury of armed-robery, false-imprisonment-with-a-dangerous-weapon, and unauthorized-use-of-a-motor-vehicle, the Louisiana Third Circuit Court of Appeal affirmed the armed-robery and false-imprisonment-with-a-dangerous-weapon convictions and reversed the unauthorized-use-of-a-motor-vehicle conviction. *State v. Shupp*, 185 So.3d 900, 924 (La. App. 3rd Cir. 2016). Shupp's lawyer said that he would seek review of the Third Circuit Court of Appeal's decision to the Louisiana Supreme Court by filing an application for writ of certiorari, but the lawyer later informed him after the 30-day filing deadline had passed that he would not file the application.

- 2. The trial court granted Shupp post-conviction relief to file an out-of-time application for writ of certiorari to the Louisiana Supreme Court.**

Shupp filed an application for post-conviction relief in the trial court requesting permission to file an out-of-time application for writ of certiorari to the Louisiana Supreme Court under the theory that such a

proceeding is a continuation of the appeal from the trial court's judgment of conviction, and therefore, an out-of-time application for writ of certiorari—like an out-of-time appeal or an out-of-time application for post-conviction relief—is within the trial court's inherent authority to grant under the proper circumstances because of the *Evitts* principle. He also requested the trial court to grant a new trial because the jury verdict was nonunanimous, contrary to *Ramos v. Louisiana*, 590 U.S. ___, 140 S. Ct. 1390 (2020).

The trial court agreed with Shupp's argument and reasoning and granted his request to file an out-of-time application for writ of certiorari citing as authority *State v. Clark*, 295 So.3d 935, 936 (La. 2020) ("When the defendant loses his constitutional right to appeal without fault on his part, a district court has the inherent authority to grant the limited relief of an out-of-time appeal.").¹ See App. 4-9. As for Shupp's request for a new trial based on *Ramos*, the trial court concluded it could not reach the issue, noting "that while [Shupp] may be entitled to a new trial under *Ramos*, given the reinstatement of his right to appeal his conviction, this Court questions whether the Application for Post-Conviction Relief is the proper procedural vehicle to request relief under *Ramos*, where the present law does not clearly establish that *Ramos* is applicable on

¹ In *Clark*, the Court allowed an out-of-time appeal where "trial counsel for defendant failed to file a motion for appeal following defendant's conviction" thus causing defendant to have "lost his constitutional right to an appeal through no fault of his own." 295 So.3d at 936.

collateral review at the state level[, and t]he Court is additionally bound by La. C.Cr.P. Art. 916, which provides that the trial court is divested of jurisdiction over a matter upon the entering of an appeal order.”² See App. 4-9.

3. The Louisiana Third Circuit Court of Appeal reversed the trial court’s grant of post-conviction relief for Shupp to file an out-of-time application for writ of certiorari.

Upon the State of Louisiana’s application for a supervisory writ of review, the Third Circuit Court of Appeal vacated the trial court’s order granting Shupp permission to file an out-of-time writ of certiorari stating:

This court has found no authority which allows a trial court to grant a petitioner’s request to file a writ of certiorari in the Louisiana Supreme Court. Since Relator has already received his constitutional right to a direct appeal in this court, he is not entitled to a writ of review to the Louisiana Supreme Court. Furthermore, the time for filing an application for review of

² The trial court cites *State ex rel. Johnson v. Kent*, 316 So.3d 824 (La. 2021) and *State v. Henry*, 316 So.3d 831 (La. 2021) in support of this portion of its ruling. In both of those cases, the Louisiana Supreme Court summarily denied applications for supervisory writs, whereas Justice Griffin would have granted to consider the retroactivity of *Ramos* under Louisiana law. See *Edwards v. Vannoy*, 593 U.S. ___, 141 S. Ct. 1547 (2021) (rights granted in *Ramos* do not apply retroactively to final convictions of state prisoners on federal collateral review).

a judgment in the supreme court is within thirty days of the mailing of the notice of the original judgment, and no extensions of time therefor will be granted. LA. S. CT. R. X, § 5(a). *See State v. Chester*, 15-2304 (La. 12/16/16), 208 So.3d 338. This rule is considered jurisdictional in nature and is strictly enforced. *Id.*

See App. 1-3.

4. The Louisiana Supreme Court denied Shupp's application for supervisory writ of review without opinion.

Shupp filed an application for supervisory writ of review requesting the Louisiana Supreme Court to overturn the Third Circuit Court of Appeal's reversal of the trial court's grant of Shupp's out-of-time application for writ of certiorari. The Louisiana Supreme Court denied the application for supervisory writ of review without opinion. *See App. 10.*

REASONS FOR GRANTING THE PETITION

Shupp was convicted by a nonunanimous jury of three offenses. *Shupp*, 185 So.3d at 924. The Louisiana Third Circuit Court of Appeal affirmed as to two of those convictions and reversed as to one. *Id.* Shupp's lawyer told him he would file an application for writ of certiorari to the Louisiana Supreme Court regarding the two convictions, but after the 30-day deadline passed, the lawyer then told Shupp that he was *not* filing the

application. *See* App. 4-9. On Shupp's application for post-conviction relief, the trial court granted him permission to file an out-of-time application for writ of certiorari because the filing deadline had been missed for no fault of Shupp. *See* App. 4-9. The Third Circuit Court of Appeal reversed, concluding that a trial court *never* has authority to grant permission to file an out-of-time application for writ of certiorari to the Louisiana Supreme Court in a criminal case. *See* App. 1-3. This conclusion of law is contrary to the principle in *Evitts v. Lucey* that a violation of federal due process occurs when a state grants a right of review but then disallows a defendant from pursuing the right when a Sixth Amendment effective assistance of counsel violation has occurred by the defendant's lawyer missing the filing deadline. 469 U.S. 387, 400 (1985). In this regard, *Evitts* states that when a state establishes a system of review it "may not extinguish the right because another right of the appellant—the right to effective assistance of counsel—has been violated." 469 U.S. at 400; *see also id.* at 393 ("[I]f a State has created appellate courts as an integral part of the system for finally adjudicating the guilt or innocence of a defendant, the procedures used in deciding appeals must comport with demands of the Due Process and Equal Protection Clauses of the Constitution." (quotation marks, ellipsis and citation omitted)). This argument was raised by Shupp in the trial court, in the Third Circuit Court of Appeal and in the Louisiana Supreme Court. *See* App. 1-10.

In this case, the trial court was confronted with a factual scenario where, after Shupp's conviction was affirmed by the Third Circuit Court of Appeal, his lawyer told him he would file an application for writ of certiorari to the Louisiana Supreme Court, and then, after the 30-day deadline had passed, told him he would not file the application. The trial court was also confronted with the Louisiana Supreme Court opinion in *State v. Clark* which holds that “[w]hen the defendant loses his constitutional right to appeal without fault on his part, a trial court has the inherent authority to grant the limited relief of an out-of-time appeal.” 295 So.3d 935, 936 (La. 2020); *see also State v. Davis*, 295 So.3d 396, 397-398 (La. 2020) (holding that a trial court may grant an out-of-time application for post-conviction relief when the right to file the application is lost for no fault of the defendant). Relying on the logic of *Evitts*, and *Clark*, and *Davis*, the trial court concluded that it had the authority to grant Shupp the limited relief of an out-of-time application for writ of certiorari because he had lost the right to file an application for writ of certiorari—without fault on his part—because of his lawyer. *See* App. 4-9.

The Third Circuit Court of Appeal's conclusion that a trial court *never* has the authority to grant a defendant in a criminal case the relief of an out-of-time application for writ of certiorari is contrary to the logic of *Evitts*, which holds that when a state establishes a system of review it “may not extinguish the right because another right of the appellant—the right to effective assistance of counsel—has been violated.” 469

U.S. at 400; *see also id.* at 393 (“[I]f a State has created appellate courts as an integral part of the system for finally adjudicating the guilt or innocence of a defendant, the procedures used in deciding appeals must comport with demands of the Due Process and Equal Protection Clauses of the Constitution.” (quotation marks, ellipsis and citation omitted).

The Third Circuit Court of Appeal’s conclusion that a trial court *never* has authority to grant permission to file an out-of-time application for writ of certiorari puts at risk the Sixth Amendment rights of all defendants whose convictions are affirmed by an intermediate appellate court in Louisiana. This is because, under the rule applied by Louisiana appellate courts, the right to seek review by writ of certiorari will be taken away whenever counsel fails to timely file an application for writ of certiorari. *See Talley*, 451 So.2d 1358, 1360-1361. In those cases, the defendants’ deprivations of their constitutional right to effective assistance of counsel will be without recourse. The unsatisfying result is that defendants will have theoretical Sixth Amendment constitutional rights to have their lawyers timely file paperwork requesting that affirmed convictions to be reviewed by the Louisiana Supreme Court by certiorari, but no procedural vehicle to enforce those constitutional rights when their lawyers fail to timely file the paperwork. This is squarely contrary to the principle stated in *Evitts* that a violation of federal due process occurs when a state grants a right of review but then disallows a defendant from pursuing the right when a Sixth Amendment effective

assistance of counsel violation has occurred by the defendant's lawyer missing the filing deadline.

The Third Circuit Court of Appeal's core reason for vacating the trial court order, which granted Shupp permission to file an out-of-time application for writ of certiorari, is that he "has already received his constitutional right to a direct appeal" in the Third Circuit when the conviction was affirmed, and therefore, "he is not entitled to a writ of review to the Louisiana Supreme Court." See App. 1-3. However, this line of reasoning completely overlooks the fact that Shupp's Sixth Amendment right to have effective assistance of counsel to timely file his application for writ of certiorari in the Louisiana Supreme Court was violated and the violation cannot be rectified under the rule applied by the Louisiana appellate courts. This is itself a violation of due process under *Evitts*, 469 U.S. at 400. The Third Circuit Court of Appeal's reasoning is bound up in the fact that there is no federal constitutional right to appellate review by intermediate or supreme courts³

³ *McKane v. Durston*, 153 U.S. 684, 687 (1894) ("An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case, however grave the offence of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review. A citation of authorities upon the point is unnecessary."); *Evitts*, 469 U.S. at 393 ("the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors"); *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) ("It is true that

even though there is a state constitutional right to judicial review in Louisiana. *See* LA. CONST. art. 1, § 19; *State v. Counterman*, 475 So.2d 336, 339 (La. 1985). The Third Circuit Court of Appeal's emphasis that Shupp had his state constitutional right to an appeal to the intermediate court of appeal satisfied completely overlooks the due process violation in taking away his right to request review in the Louisiana Supreme Court by not being provided a means of rectifying the Sixth Amendment violation that was the cause of his losing the right to request review in the Louisiana Supreme Court.

CONCLUSION

For the reasons stated herein, Petitioner requests this Court to grant this petition.

Respectfully submitted,

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a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all.”).