

**SUPREME COURT OF LOUISIANA**

**No. 23-KH-0678**

**NOEL AUSTIN**

**v.**

**TIM HOOPER, WARDEN**

**ON SUPERVISORY WRITS TO THE TWENTY-FOURTH  
JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON**

**PER CURIAM:**

Denied. The application was not timely filed in the district court, and applicant fails to carry his burden to show that an exception applies. La.C.Cr.P. art. 930.8; *State ex rel. Glover v. State*, 93-2330 (La. 9/5/95), 660 So.2d 1189.

Applicant has now fully litigated several applications for post-conviction relief in state court. Similar to federal habeas relief, see 28 U.S.C. § 2244, Louisiana post-conviction procedure envisions the filing of a second or successive application only under the narrow circumstances provided in La.C.Cr.P. art. 930.4 and within the limitations period as set out in La.C.Cr.P. art. 930.8. Notably, the legislature in 2013 La. Acts 251 amended that article to make the procedural bars against successive filings mandatory. Applicant's claims have now been fully litigated in accord with La.C.Cr.P. art. 930.6, and this denial is final. Hereafter, unless he can show that one of the narrow exceptions authorizing the filing of a successive application applies, applicant has exhausted his right to state collateral review. The district court is ordered to record a minute entry consistent with this per curiam.

**The Supreme Court of the State of Louisiana**

**NOEL AUSTIN**

No. 2023-KH-00678

**VS.**

**TIM HOOPER, WARDEN**

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IN RE: Noel Austin - Applicant Plaintiff; Applying For Supervisory Writ, Parish of Jefferson, 24th Judicial District Court Number(s) 03-6329, Court of Appeal, Fifth Circuit, Number(s) 23-KH-125;

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**October 10, 2023**

Writ application denied. See per curiam.

JDH

JLW

SJC

JTG

WJC

JBM

Griffin, J., would grant.

Supreme Court of Louisiana  
October 10, 2023

Kathy Marjanovic  
Chief Deputy Clerk of Court  
For the Court

SUSAN M. CHEHARDY  
CHIEF JUDGE  
  
FREDERIC-  
JUDGE G. GRAVOIS  
MARC E. JOHNSON  
ROBERT A. CHAISSON  
STEPHEN J. WINDHORST  
JOHN J. MOLASION, JR.  
CORNELIUS E. REGAN, PRO TEM

JUDGES



CURTIS B. PURSELL  
CLERK OF COURT  
  
SUSAN S. BUCHHOLZ  
CHIEF DEPUTY CLERK

LINDA M. WISEMAN  
FIRST DEPUTY CLERK

MELISSA C. LEDET  
DIRECTOR OF CENTRAL STAFF  
  
(504) 376-1400  
(504) 376-1498 FAX

FIFTH CIRCUIT

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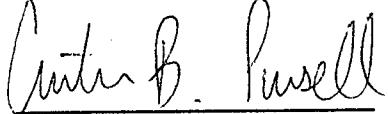
GRETNA, LOUISIANA 70054

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**NOTICE OF DISPOSITION CERTIFICATE OF DELIVERY**

I CERTIFY THAT A COPY OF THE DISPOSITION IN THE FOREGOING MATTER HAS BEEN  
TRANSMITTED IN ACCORDANCE WITH UNIFORM RULES - COURT OF APPEAL, RULE 4-6 THIS  
DAY 04/13/2023 TO THE TRIAL JUDGE, THE TRIAL COURT CLERK OF COURT, AND AT LEAST ONE OF  
THE COUNSEL OF RECORD FOR EACH PARTY, AND TO EACH PARTY NOT REPRESENTED BY  
COUNSEL, AS LISTED BELOW:

**23-KH-125**

  
CURTIS B. PURSELL  
CLERK OF COURT

**E-NOTIFIED**

24th Judicial District Court (Clerk)  
Honorable Frank A. Brindisi (DISTRICT JUDGE)  
Thomas J. Butler (Respondent)

**MAILED**

Noel Austin #305854 (Relator)  
Louisiana State Penitentiary  
Angola, LA 70712

NOEL AUSTIN

NO. 23-KH-125

VERSUS

FIFTH CIRCUIT

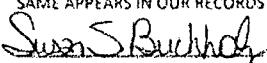
TIM HOOPER, WARDEN

COURT OF APPEAL

STATE OF LOUISIANA

April 13, 2023

Susan Buchholz  
Chief Deputy Clerk

FIFTH CIRCUIT COURT OF APPEAL  
A TRUE COPY OF DOCUMENTS AS  
SAME APPEARS IN OUR RECORDS  
  
Susan S. Buchholz  
Chief Deputy, Clerk of Court

IN RE NOEL AUSTIN

APPLYING FOR SUPERVISORY WRIT FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT,  
PARISH OF JEFFERSON, STATE OF LOUISIANA, DIRECTED TO THE HONORABLE  
FRANK A. BRINDISI, DIVISION "E", NUMBER 03-6329

Panel composed of Judges Fredericka Homberg Wicker,  
Stephen J. Windhorst, and Cornelius E. Regan, Pro Tempore

#### WRIT DENIED

Relator, Noel Austin, seeks review of the trial court's February 2, 2023 denial of his "Petition to Adjudicate and Resolve the Federal Question of: Whether La. Const. Art. 1, §17 And La. C.Cr.P. Art. 782 Suffered Federal Preemption From Their Inception?[,]” challenging the constitutionality of his 2004 convictions. For the following reasons, we find that the trial court was correct in denying relator's pleading seeking post-conviction relief, and we deny the writ.

On February 18, 2004, relator was convicted of two counts of attempted first degree murder, aggravated battery, and possession with intent to distribute cocaine.  
The verdict was non-unanimous. On March 4, 2004, the trial court sentenced relator to concurrent terms of fifty years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence for his attempted first degree murder convictions, ten years imprisonment at hard labor for the aggravated battery conviction, and thirty years imprisonment at hard labor with the first two years to be served without benefit of parole, probation, or suspension of sentence for the possession with intent to distribute cocaine conviction.

On May 18, 2004, after the filing of a multiple offender bill, the trial court adjudicated relator a third felony offender, vacated relator's original sentence on his first degree murder conviction (count one), and imposed a sentence of life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. On March 1, 2005, this Court affirmed relator's convictions and sentences on appeal. *State v. Austin*, 04-993 (La. App. 5 Cir. 3/1/05), 900 So.2d 867, 872. On November 28, 2005, the Louisiana Supreme Court denied relator's writ application. *State v. Austin*, 05-830 (La. 11/28/05), 916 So.2d 143.

On April 14, 2021, relator filed an application for post-conviction relief challenging the constitutionality of his conviction, contending that his non-unanimous jury verdict was unconstitutional and insufficient to sustain his convictions and sentences in light of the United States Supreme Court's *Ramos*<sup>1</sup> decision. On April 27, 2021, the trial court declined to consider relator's motion to correct an illegal sentence, reasoning that relator's motion failed to point to an illegal term in relator's sentence but rather sought post-conviction relief. The trial court denied relator's APCR, finding it procedurally time-barred under La. C.Cr.P. art. 930.8. On June 25, 2021, this Court denied relator's writ application seeking review of the trial court's denial of his application for post-conviction relief, declining to apply the *Ramos* holding retroactively. See *Austin v. Vannoy*, 21-KH-327 (La. App. 5 Cir. 6/25/21) (unpublished writ disposition), *writ denied*, 21-1880 (La. 4/26/22), 336 So.3d 896. Moreover, subsequently, in *State v. Reddick*, 21-1893 (La. 10/21/22), 351 So.3d 273, 283, the Louisiana Supreme Court held that "the new rule of criminal procedure announced in *Ramos* that requires unanimity in jury verdicts is not retroactive on state collateral review in Louisiana."

On January 10, 2023, relator filed in the district court a "Petition to Adjudicate and Resolve the Federal Question of: Whether La. Const. Art. 1, §17 And La. C.Cr.P. Art. 782 Suffered Federal Preemption From Their Inception?" again challenging the constitutionality of his convictions. On February 2, 2023, the trial judge issued an Order finding first that, regardless of the caption of relator's pleading, relator's pleading challenging the constitutionality of his convictions is an application seeking post-conviction relief. The trial judge further found that relator's application for post-conviction relief was untimely under La. C.Cr.P. art. 930.8 and denied it.

Upon review of relator's writ application and attachments thereto, we agree with the trial court that, despite the caption of relator's pleading, his petition is appropriately considered as an application for post-conviction relief. La. C.Cr.P. art. 930.8 provides that no application for post-conviction relief shall be considered if it is filed more than two years after defendant's conviction and sentence become final under the provisions of La. C.Cr.P. arts. 914<sup>2</sup> and 922,<sup>3</sup> unless certain

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<sup>1</sup>*Ramos v. Louisiana*, 590 U.S. --, 140 S.Ct. 1390, 206 L.Ed.2d 583 (2020).

<sup>2</sup> La. C.Cr.P. art. 914 provides:

A. A motion for an appeal may be made orally in open court or by filing a written motion with the clerk. The motion shall be entered in the minutes of the court.

B. The motion for an appeal must be made no later than:

(1) Thirty days after the rendition of the judgment or ruling from which the appeal is taken.

(2) Thirty days from the ruling on a motion to reconsider sentence filed pursuant to Article 881.1, should such a motion be filed.

<sup>3</sup> La. C.Cr.P. art. 922, titled "Finality of Judgment on Appeal," provides:

A. Within fourteen days of rendition of the judgment of the supreme court or any appellate court, in term time or out, a party may apply to the appropriate court for a rehearing. The court may act upon the application at any time.

B. A judgment rendered by the supreme court or other appellate court becomes final when the delay for applying for a rehearing has expired and no application therefor has been made.

C. If an application for a rehearing has been made timely, a judgment of the appellate court becomes final when the application is denied.

D. If an application for a writ of review is timely filed with the supreme court, the judgment of the appellate court from which the writ of review is sought becomes final when the supreme court denies the writ.

[REDACTED] enumerated exceptions apply. Thus, [REDACTED]'s application for post-conviction relief, filed more than seventeen years after his conviction became final, is procedurally time-barred pursuant to La. C.Cr.P. art. 930.8. Accordingly, this writ is denied.

Gretna, Louisiana, this 13th day of April, 2023.

**FHW**  
**SJW**  
**CER**

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NO. 03-6329

TWENTY-FOURTH JUDICIAL DISTRICT COURT  
PARISH OF JEFFERSON  
STATE OF LOUISIANA  
STATE OF LOUISIANA

DIVISION "E"

FILED: 02/01/2023

VERSUS

NOEL AUSTIN

*Sharon Butler*  
DEPUTY CLERK

ORDER

This matter comes before the court on Petitioner's PETITION TO ADJUDICATE AND RESOLVE THE FEDERAL QUESTION OF: WHETHER L.A. CONST. ART. 1, § 17 AND L.A.C.C.R.P. ART. 782 SUFFERED FEDERAL PREEMPTION FROM THEIR INCEPTION? STAMPED AS FILED JANUARY 10, 2023.

On February 19, 2004, Petitioner was found guilty of count #1 and #2, LSA-R.S. 14:17(30), relative to attempted first degree murder, count #5, LSA-R.S. 14:34, relative to aggravated battery, and count #8, LSA-R.S. 40:967A, relative to PWITD cocaine. On March 4, 2004, the court sentenced him on counts #1 and #2 to 50 years, count #5 to 10 years, and count #8 to 30 years imprisonment at hard labor, concurrently. On May 18, 2004, the court adjudicated him on count #1 of the multiple bill, found him to a third felony offender, and sentenced him on that count to life imprisonment at hard labor, to run concurrently with the other sentences. His convictions were affirmed on appeal. *State v. Austin, 04-993 (La. App. 5 Cir. 3/01/05), 900 So.2d 867, writ denied, 2005-830 (La. 11/28/05) 916 So.2d 143.*

Petitioner now files this petition challenging the constitutionality surrounding his conviction. Regardless of the caption of his pleading, however, Petitioner seeks post-conviction relief. An application for post-conviction relief is defined as "a petition filed by a person in custody after sentence following conviction for the commission of an offense seeking to have the conviction and sentence set aside." LSA-C.Cr.P. art. 924.

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.

This APCR is untimely, and thus, is procedurally barred from review. 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, 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 be and is hereby DENIED.

Gretna, Louisiana, this 02 day of February 10 2023

*Frank A. Brindisi*  
JUDGE

PLEASE SERVE:

PRISONER: Noel Austin, DOC # 305854, Louisiana State Penitentiary, Angola, LA 70712

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



02/02/2023 13:38:56 CERTIFIED TRUE COPY - Pg:1 of 1 - Jefferson Parish Clerk of Court - ID:2313216

SIGNED: HON. FRANK A. BRINDISI - DIVISION: E - 02/02/2023 10:30:27 - CASE:03-06329 - ID:42906/222488

ISSUED: 02/02/2023 13:38:55