No. 19-8149 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

NATHANIEL LAMBERT,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO

THE COURT OF APPEAL OF LOUISIANA, FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

NATHANIEL LAMBERT, #90883
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QUESTION PRESENTED

Whether, as reserved for decision in *Betterman* v. *Montana*, 136 S. Ct. 1609, 1617-18 (2016), the test of *Barker* v. *Wingo*, 407 U.S. 514, 530-33 (1972), governs Petitioner's claim that an eighteen-year sentencing delay violated due process?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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Petitioner respectfully prays that a writ of certiorari issue to review the decision of the Court of Appeal of Louisiana, Fourth Circuit, denying his delayed sentencing claim under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

OPINIONS BELOW

The Court of Appeal's opinion appears at Appendix A and is reported at *State* v. *Lambert*, 18-KA-0777 (La. App. 4 Cir. 3/27/19), 267 So. 3d 648. The order of the Supreme Court of Louisiana summarily denying discretionary review appears at Appendix B and will be reported at *State* v. *Lambert*, 19-KH-00736 (La. 01/22/20), __ So. 3d __.

JURISDICTION

The Supreme Court of Louisiana denied discretionary review on January 22, 2020. Pet. 14a. As such, this Court has jurisdiction under 28 U.S.C. § 1257(a) and Rule 13.1 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

Petitioner was convicted (nonunanimously) of aggravated rape, aggravated crime against nature, and aggravated burglary for an incident involving an acquaintance. *State* v. *Lambert*, 98-0730 (La. App. 4 Cir. 11/17/99), 749 So. 2d 739, 745-48; Pet. 57a-60a (R. 366-69). Evidence obtained subsequent to trial shows grossly ineffective assistance of counsel resulted in the conviction of one more innocent Louisianian. Pet. 55a-56a (R. 351, 433). That sad tale can no longer be told in any legally relevant way. But there is another story.

The trial court sentenced Petitioner to: (1) life without parole for the aggravated rape; (2) life without parole as a habitual offender for the aggravated burglary; and (3) fifteen years for the aggravated crime against nature. *Lambert*, 749 So. 2d at 745. On November 17, 1999, the state court of appeal vacated the sentences for aggravated rape and aggravated crime against nature because the trial court failed to consider a motion for new trial, one raising substantial issues, before imposing those sentences. *Id.* at 739, 748, 767. Yet not until April 3, 2018, or nearly eighteen-and-a-half years later, did the trial court re-sentence Petitioner for those convictions, despite literally dozens of status conferences and hearings over the intervening years. Pet. 5a, 41a-47a.[1]

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1 The opinion below incorrectly refers to a "seventeen-year delay in resentencing." Pet. 7a. From November 17, 1999, until April 3, 2018, is eighteen years, four months, and two weeks.

After some number of those hearings, Petitioner asked when he would be re-sentenced because a liminal sentencing state "prevented [him] enrolling into school to obtain a GED, working at the Angola Rodeo, receiving trustee [sic] status and enrolling in educational/trade programs." Pet. 9a. Several such activities are legal prerequisites, and all are useful, to seeking clemency. The trial judge responded that he did not intend to re-impose the vacated sentences because "the last time I gave a man two life sentences I ended up as a cartoon in *Time* magazine."[2]

All went their separate ways until September 2017, when Petitioner sought to resolve the muddled state of his master prison record by "fil[ing] a *pro se* motion to clarify sentences averring that his 'RAP sheet' incorrectly reflected two life sentences and should be amended to only reflect the life sentence resulting from the enhanced sentence on aggravated burglary." Pet. 5a. The trial court denied the motion for clarification but, realizing Petitioner was correct that he had at least one conviction without a sentence, appointed Petitioner counsel for a sentencing hearing. *Id.*

2 Petitioner recalls this statement but has no transcript to support it. The trial judge, a character colorful enough to stand out in a legal scene suffuse with color, was never particularly punctilious in his observance of the legal niceties and was eventually removed from the bench. *In re Marullo*, 15-246 (La. 2/20/15), 162 So. 3d 370. The statement is at least plausible coming from him and would explain why Petitioner, a rather unsophisticated person, did not persist in his requests for re-sentencing despite the harsh institutional consequences. It does not explain the failure of counsel representing Petitioner during this time to note the inadvisibility of dropping the issue. That seems, however, a subject best addressed on remand if the Court decides diligence must weigh heavily in any analysis, no matter the extremity of the delay.

At this point the proceedings were more or less a metaphysical matter—something to satisfy the correctional bureaucrats who, on account of mysteries known only to them, perceive an offender serving two life-without-parole sentences as a lesser security risk than an offender serving one life-without-parole sentence and facing another.[3] Pet. 9a. Then the legal landscape changed.

On January 30, 2018—which is to say between the time Petitioner commenced clarification proceedings in September 2017 and the time he finally received a sentence in April 2018—the Supreme Court of Louisiana handed down *State ex rel. Esteen* v. *State*, 16-0949 (La. 1/30/18), 239 So. 3d 233. Under *Esteen*, Petitioner became eligible for amelioration of his life-without-parole habitual offender sentence on aggravated burglary, either by re-sentencing to a determinate term of thirty to sixty years or by electing parole eligibility.[4] Pet. 6a, 12a.

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3 Denying lower custody status to offenders serving a known sentence but facing another, as-yet-unknown sentence obviously makes sense when the known sentence is for less than life. (Otherwise an offender serving five years but realistically facing fifty could obtain an unwarranted trusty status and attempt to escape.) It is when the known sentence is to life that this otherwise sensible policy becomes absurd.

4 The trial court, after acknowledging Petitioner was "superficially correct" on this point, gestured at an alternative holding—that, according to the state, Petitioner had other priors which would allow it to "reconstruct[]" a habitual offender bill placing Petitioner outside *Esteen*'s scope. Pet. 12a n.8, 26a. Although it is debatable whether the trial court in fact offered this as an alternative holding, it is clear the court of appeal did not rely upon it. Pet. 12a ("Nonetheless, [the trial court] concluded that, in light of the resentencing to life imprisonment on the charge of aggravated rape, [Petitioner's] circumstances would not be ameliorated by retroactive application of the habitual offender statute. We agree. As we have affirmed [Petitioner's] resentencing, the ameliorative requirements of La. R.S. 308(B) are not met."). Neither would it have been proper for the court of appeal to rely it; the issue turns on complex, and hotly contested, issues of fact and law on which there has never been a hearing.

The prospect of Petitioner becoming eligible for mere parole *consideration* evidently set the state's hair afire, and the sentencing ignored for more than eighteen years happened in just two months, on April 3, 2018, over Petitioner's due process objections. Pet. 6a-9a. At the conclusion of that hearing the trial court sentenced Petitioner to life without parole, the sole statutory penalty provided for aggravated rape.[5] Pet. 6a, 12a.

Petitioner filed motions to reconsider sentence under Louisiana law allowing a defendant to show that, even when a statute provides for a putatively mandatory sentence, he deserves a lesser sentence because "the legislature failed to assign a sentence meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case." Pet. 11a. The motions, which could no longer be supported by evidence from employers or family members or other mitigation witnesses and documents long since lost in hurricanes and scattered with the sands of time, were denied. *Id.*

On appeal, Petitioner re-urged his due-process-based delayed sentencing claim and state-law excessive sentence argument. Pet. 7a-8a & n.4, 10a. The court of appeal rejected both claims on the merits. In rejecting the due process challenge, the court of appeal used a demanding test, one which considers all four

5 The trial court also sentenced Petitioner to fifteen years for the aggravated crime against nature, but as all sentences were ordered to run concurrently and Petitioner has served more than fifteen years, issues concerning this sentence are moot. Pet. 10a n.6.

of the *Barker* v. *Wingo*, 407 U.S. 514 (1972), factors—length of the sentencing delay, reasons for the delay, diligence, and prejudice to the defendant—but only after a threshold showing of prejudice. Pet. 8a n.4 ("[*State* v.] *Johnson*[, 363 So. 2d 458 (La. 1978),] and its progeny dictate that prejudice to the defendant is the controlling factor [from *Barker*]."). Concluding that Petitioner had suffered no prejudice, the court of appeal found no due process violation. Pet. 9a-10a.

In a timely, *pro se* application for a writ of certiorari to the Supreme Court of Louisiana, Petitioner framed the issue with a clarity unusual in a *pro se* petition:

> Defendant submits the 1[8] year delay in sentencing in his case denied him Fifth and Fourteenth Amendment Due process and the courts should consider the appropriate test for such a due process challenge and the appropriate remedy at law.
>
> For instance, as noted by Justice Sotomayor in *Betterman*, in evaluating whether a delay in instituting judicial proceedings . . . violated the Due Process Clause, the Court applied the test from *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). In the instant case, Petitioner submits the court erred dispensing with all but the fourth factor (prejudice) set forth in *Barker v. Wingo*, *supra*.
>
> Further, the court erred in finding the defendant failed to prove prejudice. . . .
>
> Further, [Petitioner] was denied an evidentiary hearing to allow evidence to be placed in to the record in support of his claims on the issue of prejudice. . . .

Pet. 18a-19a. The state supreme court denied the application summarily and without dissent on January 22, 2020. Pet. 15a. This timely petition follows.

REASONS FOR GRANTING THE PETITION

The age of mass incarceration has brought with it an age of mass administrative indifference, as evidenced by the hundreds of extreme sentencing delay cases in Louisiana alone.[6] It is a principle as old as Magna Carta and as enduring as the Ankerwyke Yew that this violates due process. 4 WILLIAM BLACKSTONE, COMMENTARIES *422 ("To none will we . . . delay right or justice.").

The absence of guidance from this Court on the only doctrine available to constrain such abuses leaves lower courts without a governing standard in this especially murky area of law. That encourages courts to ignore what is, after *Betterman* v. *Montana*, 136 S. Ct. 1609 (2016), the only reliable protection against oppressive government overreach in criminal sentencing, something which the data suggest is a real and worsening problem. The question reserved in *Betterman* is in need of answer, and this is the ideal case in which to provide it.

I. The split on the standard governing due-process-based delayed sentencing claims that preceded *Betterman* persists and is worsening.

Three federal courts of appeals analyze due-process-based delayed sentencing claims under the full four-factor balancing test of *Barker* v. *Wingo*, 407

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6 Administrative chaos is not limited to the front-end in Louisiana. Recently, inmates have been overdetained for a total of more than 3000 years. Lea Skene, *Lawyer: La. aware of inmates being held past release dates since 2012*, THE ADVOCATE (Baton Rouge), Feb. 7, 2020, at A1. Petitioner's locality is especially notorious for outrageous behavior. Matt Sledge, *New Orleans clerk of court announces near-total shutdown, furloughing employees and stranding inmates*, THE ADVOCATE (New Orleans), Jan. 3, 2020, at A1.

U.S. 514 (1972), which considers the length of the delay, reasons for the delay, diligence, and prejudice to the defendant. *See* Note, *Beyond* Pollard: *Applying the Sixth Amendment's Speedy Trial Right to Sentencing*, 68 STAN. L. REV. 481, 494-95 & nn.99-101 (2016);[7] *see Burkett* v. *Cunningham*, 826 F.2d 1208, 1222 (3d Cir. 1981) (counting itself as joining Fifth and Tenth Circuits) Although prejudice is "generally" necessary to prove such claims, "the prevailing caselaw [is] that none of the *Barker* factors is either necessary or sufficient." *Burkett*, 826 F.2d at 1220-21.

The Second Circuit and state courts such as Maryland and Louisiana look to the *Barker* factors but consider evidence of "actual" prejudice to be necessary as a threshold matter. Pet. 8a n.4; *United States* v. *Ray*, 578 F.3d 184, 199-200 (2d Cir. 2001); *Erbe* v. *State*, 336 A.2d 129, 136 (Md. Ct. Spec. App. 1975), *aff'd*, 350 A.2d 640 (Md. 1976). The Eleventh Circuit requires evidence of "presumptive prejudice" before it will conduct full *Barker* balancing, with "delays exceeding one year . . . found to be 'presumptively prejudicial.'" *United States* v. *Danner*, 429 F. App'x 915, 917 (11th Cir. 2011) (quoting *United States* v. *Ingram*, 446 F.3d 1332, 1336 (11th Cir. 2006)).

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7 This note argued for a result ultimately rejected in *Betterman*, but its survey of the state of delayed sentencing jurisprudence, including due-process-based approaches, as of 2016 remains accurate and useful.

The Sixth Circuit and states such as Montana and New Mexico "have rejected the *Barker* factors and instead have looked to the due process analysis set out in *United States* v. *Lovasco*, 431 U.S. 783 (1977)," which considers only two factors: the reasons for the delay and prejudice. *State* v. *Lopez*, 410 P.3d 226, 232-33 (N.M. Ct. App. 2017) (citing *United States* v. *Sanders*, 452 F.3d 572 (6th Cir. 2006); *State* v. *Betterman*, 342 P.3d 971 (Mont. 2016)). At least one state, Colorado, asks the nebulous, effectively standard-less, question whether the delay "was so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *People* v. *Wiseman*, 413 P.3d 233, 241-42 (Col. Ct. App. 2017) (internal quotation marks omitted).

Thus, at least two jurisdictions (New Mexico and Colorado) have departed from a *Barker*-based approached since *Betterman,* and the court below applied a modified, more demanding version, of the *Barker* test. Particularly as many jurisdictions were accustomed to addressing delayed sentencing claims under a now-rejected Sixth Amendment analysis, there is every reason to expect further discord and confusion as courts fill the gap created by *Betterman* by choosing among the alternatives in the pre-existing, and mature, split on the correct due process standard.

II. Petitioner's case is an ideal vehicle for resolving this issue.

Petitioner has preserved and presented the claim this Court invited in *Betterman* with perfect clarity. Pet. 18a-33a. Beyond satisfaction of that necessary condition, which structural reasons to do with the nature of the claim will make rare, several discretionary factors favor granting certiorari in this case.

Petitioner has, contrary to the conclusion of the court below, been prejudiced by the delay in his sentencing. But even if the Court disagrees, the extremity and purposelessness of the delay in Petitioner's case nicely presents the necessity *vel non* of prejudice, a central point of dispute in the split of authorities. If an almost eighteen-and-a-half-year delay for no reason is insufficient to make out a due process violation in the absence of prejudice, then it seems fair to say prejudice is categorically required. It is, however, Petitioner's position that, contrary to the conclusion of the court below, prejudice should not be required when the extremity and purposelessness of the delay, as here, is so offensive that it merits sanctioning the state to deter similar misconduct in the future.

The facts of this case also allow the Court to demonstrate the remedial flexibility of due process. The prejudice suffered by Petitioner amounts to the deprivation in two different ways of the opportunity to seek discretionary release, based on an appropriate showing, from service of a life sentence. Although

Petitioner does not abandon his position that discharge should be an available remedy for a delayed sentencing claim, re-sentencing Petitioner to life *with* parole would remedy the prejudice he has suffered on the facts of this case without providing a potentially unjust windfall.

Finally, Louisiana's especially egregious track record when it comes to timely sentencing means that, whatever jurisdiction eventually supplies the case for determining the appropriate standard, this Court will almost certainly be invited—and repeatedly—to address Louisiana's practices. Establishing the standard in a case from a state likely otherwise to require a personal invitation to observe the standard may, or at least should, reduce this Court's workload while bringing the specter of routine multi-year sentencing delays in Louisiana to a speedier end.

A. Petitioner has been prejudiced.

Petitioner has suffered two forms of prejudice. First, the eighteen-and-a-half-year delay fatally prejudiced him in making the showing required under state law to demonstrate he merited a lesser sentence. *State* v. *Sepulvado*, 367 So. 2d 762, 766-69 (La. 1979) (providing authority for state excessiveness review more protective than Eighth Amendment); *see State* v. *Dorthey*, 92-3120 (La. 9/10/93), 623 So. 2d 1276 (reaffirming *Sepulvado*). Such determinations are factually intensive, involving dozens of factors both codified and jurisprudential.

Sepulvado, 367 So. 2d at 768-69 (incorporating LA. CODE CRIM. P. art. 894.1 factors into excessiveness review); *e.g.*, *State* v. *Rice*, No. 01-0215 (La. App. 4 Cir. 1/16/02), 807 So. 2d 250, 355 (same, into *Dorthey* review). *See generally* GAIL DALTON SCHLOSSER, LOUISIANA CRIMINAL TRIAL PRACTICE § 26:3 (West 2020) (listing factors developed in case law). An example of the prejudice Petitioner suffered is the death over the past eighteen years of family members he would have called to show his peaceable nature and the extent of his family obligations and support.[8]

Second, Petitioner's delayed sentencing "prevented [him] from enrolling into school to obtain a GED, working at the Angola Rodeo, receiving trustee [sic] status and enrolling in educational/trade programs." Pet. 9a. The lower court held: "While we do not dispute the value of such privileges, we find they do not constitute prejudice as contemplated by the jurisprudence." *Id.* This was error.

As Petitioner explained, his inability to participate in these activities "caused his LARNA [Louisiana Risk-Needs Assessment] score to remain high and [a]ffected his ability to apply for the pardon board." Pet. 27a. Petitioner's delayed sentencing thus did not simply, as the state court seemed to think, prevent him enjoying certain prison privileges. It impaired his ability to seek (and in fact

8 Because the trial court erroneously denied Petitioner's request for an evidentiary hearing on the issue of prejudice, Pet. 19a, he did not have an opportunity to supplement the record with death certificates or requests for admissions and the like.

categorically prohibited him as a matter of statute and formal policy from seeking[9]) the only relief available to one serving a life-without-parole sentence in Louisiana, the opportunity for clemency created and protected by state law. LA. CONST. art. IV, § 5(E); LA. REV. STAT. § 15:572 *et seq.*

The deprivation of Petitioner's opportunity to seek trusty status, with its corresponding effect on his custody level and LARNA score for pardon and parole purposes, is also irremediable. Although persons convicted of a sex offense were eligible for Class A and Class B trusty status when Petitioner began serving his sentence, they are now eligible for only Class C status, though sex offenders who obtained Class A or B status prior to the change may retain it. PENITENTIARY DIRECTIVE No. 19.005(B)(1) (Aug. 11, 2008).

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9 Petitioner's inability to enroll in, and therefore demonstrate "successful completion of[,] vocational training while incarcerated" rendered him ineligible as a matter of formal policy to so much as request a commutation. LA. BD. PARDONS No. 02.203-POL(C)(2)(d) (Dec. 19, 2012). Had that barrier not existed, the delayed sentencing also rendered Petitioner statutorily ineligible to seek a pardon or commutation until 2017 (meaning he missed at least one and as many as five such possibilities entirely) because, until the Louisiana Legislature fixed this peculiarty in 2017 Acts No. 267, time served prior to the imposition of the sentence sought to be commuted was not credited against the fifteen years persons serving a life sentence were required to wait before applying for clemency. *Compare* LA. REV. STAT. § 15:572.4(D) (2018) *with id.* (2016); LA. BD. PARDONS 02.203-POL(D).

B. Petitioner is in a position to benefit from a narrowly tailored remedy.

In *Betterman* the Court observed that "[i]t would be an unjustified windfall, in most cases, to remedy sentencing delay by vacating validly obtained convictions." 136 S. Ct. 1609, 1615 (2016). While Petitioner does not abandon his argument that the extremity of the delay in his case merits dismissal of the underlying charge as a sanction against the state, he notes that he is in a position to benefit from a less drastic remedy, such as simply removing the delayed sentence's restriction on parole eligibility.

Allowing Petitioner to seek parole would have been a possible, and perhaps the most likely, remedy afforded had he been allowed a fair opportunity to make an excessiveness showing under state law. Further, provision of parole eligibility is a frequent form of commutation in Louisiana. Thus the two forms of prejudice Petitioner has suffered could be remedied without providing him a windfall or detracting from public safety, as Petitioner's release would still depend on due demonstration and consideration of his readiness to re-enter society by a body specializing in such.

C. Louisiana's sentencing delays are especially egregious.

Multi-year sentencing delays in Louisiana occur with regularity,[10] particularly in the multi-bill context where Louisiana even allows persons who have already completed their sentences to be brought back into custody and re-sentenced to a longer term as a habitual offender. *State* v. *Muhammad*, 03-2991 (La. 5/25/04), 875 So. 2d 45, 55-56. At some point, the Court will almost certainly provide guidance on the standard governing due-process-based delayed sentencing claims. At some point the Court will also almost certainly be asked, and repeatedly, to deliver a message to Louisiana on this kind of abuse. With the conflict of authorities mature and the legal issue ripe for decision, sooner would seem better than later on both counts.

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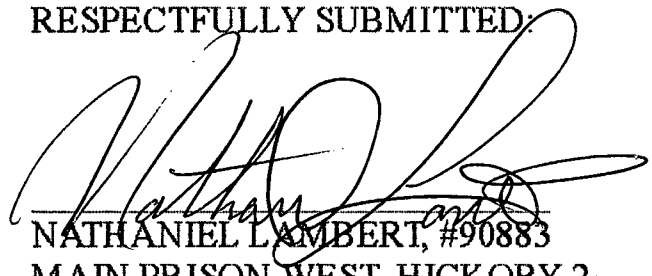
10 The lead case on delayed sentencing claims in Louisiana, *State* v. *Johnson*, 363 So. 2d 458, 461 (La. 1978), involved a seven-year sentencing delay. There are many, many more such examples. *E.g.*, *State* v. *Davis*, 11-137 (La. App. 5 Cir. 5/31/12), 94 So. 3d 902 (13-year delay); *State* v. *Zachary*, 08-634 (La. 11/21/08), 995 So. 2d 631 (7 years); *State* v. *Sims*, 09-504 (La. App. 5 Cir. 2/12/10), 33 So.3d 340, 342-44 (6 years); *State* v. *Dorsey*, 95-1084 (La. App. 3 Cir. 3/20/96), 672 So.2d 188 (4 years); *State* v. *Ellis*, 14-1170 (La. App. 4 Cir. 3/2/16), 190 So. 3d 354 (3.5 years); *State* v. *Ellison*, 14-790 (La. App. 5 Cir. 2/25/15), 168 So. 3d 862 (3.5 years); *State* v. *Buckley*, 11-369 (La. App. 4 Cir. 12/27/11), 88 So. 3d 482 (3 years); *State* v. *Dauzart*, 07-15 (La. App. 5 Cir. 5/15/07), 960 So. 2d 1079 (3 years); *State* v. *Dukes*, 48,101 (La. App. 2 Cir. 8/14/13), 121 So. 3d 1256 (32 months).

Examples involving a more-than-one-year but less than three-year delay are the most common, with 159 entries under one West Key Number (1366 - "Time for filing or instituting habitual offender proceedings") in Louisiana appellate cases and KeyCite of *Barker* generating 275 citations in the same. It is not possible to determine the full extent of the delay in many habitual offender cases because often the only dates considered are those after filing of the multi-bill, which happens after conviction and is itself often much-delayed.

CONCLUSION

WHEREFORE Petitioner respectfully requests that the Court grant the petition and reverse the judgment below.

RESPECTFULLY SUBMITTED:



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Date: March 16, 2020