

40TH JUDICIAL DISTRICT COURT FOR THE PARISH OF ST. JOHN THE BAPTIST

STATE OF LOUISIANA

NO. 2010-CR-172

DIVISION: "B"

STATE OF LOUISIANA

versus

ERROL VICTOR, SR.

FILED: _____ **DEPUTY CLERK**

**MOTION TO TRANSFER TO DIVISION "A"
MOTION TO VACATE SENTENCE
MOTION FOR ARREST OF JUDGMENT
MOTION TO QUASH INDICTMENT**

NOW INTO COURT, through undersigned counsel, comes defendant, Errol Victor, Sr.
who moves this Honorable Court, as follows:

- 1) to transfer this matter to Division "A" in compliance with Louisiana Uniform District Court Rule 14.1;
- 2) pursuant to La. C. Cr. P. Article 882, to vacate his September 15, 2014 sentence in the above captioned matter as being based upon: a) an invalid verdict under La. C. Cr. P. Article 872; b) the recent decision of the United States Supreme Court in the matter of *Ramos v. Louisiana*, 18-5924 (4/20/2020), 590 U.S. ____ ; c) the ruling of the United States Supreme Court decision in this matter, *Victor v. Louisiana*, 19-5989 (4/27/2020), 590 U.S. ____, vacating the decision of the Louisiana Fifth Circuit Court of Appeal in this matter; and d) the United States Supreme Court decision in *Griffith v. Kentucky*, 479 U.S. 314 (1987);
- 3) pursuant to La. C. Cr. P. Article 859, upon vacating the sentence, to arrest the August 1, 2014 judgment of conviction as being based on a fatally defective verdict, as provided in the case of *Ramos*;
- 4) upon arresting judgment, pursuant to La. C. Cr. P. Article 531, to quash the indictment for failure of the State of Louisiana to properly appeal the trial court's granting of defendant's motion to quash in this matter originally pending in

Division “A” under 2008-CR-165, as prohibited by the recent Louisiana Supreme Court case of *State v. Reimoneng*, 2019-0367 (La. 10/22/19), 286 So. 3d 412.

Background

1.

On April 15, 2008, the State of Louisiana initially charged defendant, by grand jury indictment, with first degree murder, in violation of La. R.S. 14:30. Defendant’s case was randomly allotted to Division “A” under case number 2008-CR-165 of this Court, Judge Madeline Jasmine presiding. Defendant pled not guilty at arraignment.

2.

The initial charges stemmed from the death of defendant’s eight year old stepson on April 1, 2008, when he suffered from an asthma attack after being disciplined (spanked) by his mother while at home. Defendant was not present at home at the time. Defendant did return home after his wife reported that his stepson was having breathing problems. Defendant also brought his stepson to the hospital, where he tragically passed away later that day. As a result of the death of defendant’s stepson, and in part from the purported medical findings (the validity and veracity of which are specifically contested by defendant herein), the State brought this prosecution against the defendant herein.

3.

On September 22, 2009, the charges were amended by indictment to second degree murder, while engaged in the perpetration of the crime of cruelty to a juvenile, in violation of La. R.S. 14:30.1(A)(2)(b).

4.

On February 4, 2010, the Division “A” trial judge granted a defense motion to quash the initial indictment due to the potential improper conduct of the St. John the Baptist Sheriff’s Office (“SJBSO”) with respect to both the grand jurors and grand jury witnesses. *Victor*, 2008 CR 165, Ex. “A” at p.3. Specifically, the basis of the motion to quash was that a deputy of the SJBSO, though a properly impaneled grand juror, wore his deputy shirt while participating in the grand jury process, clearly displaying his affiliation with the SJBSO. *Id.* In granting the motion to quash, the Division “A” trial judge noted not only the potential impact on fellow grand jurors,

but focused specifically, and materially, upon the potential effect on witnesses testifying before the grand jury to “influence, suppress or alter testimony to the prejudice of the defendant.” Ex. “A” at p.4.

5.

After initially filing for reconsideration and/or appeal of the judgment, on April 6, 2010, the State filed a notice of dismissal without prejudice of all pending charges in defendant’s case. Six days later, on April 12, 2010, a newly empanelled grand jury re-indicted defendant with second degree murder. Notwithstanding the clear requirements of Louisiana Uniform District Court Rule 14.1, the case was randomly allotted to Division “B” under the above case number 2010-CR-172. The defendant explicitly objected to the re-allotment of the case to Division “B”.

6.

On August 1, 2014, defendant was convicted as charged by non-unanimous 10-2 verdict. *See* Ex. “B”. On September 15, 2014, defendant was sentenced to life imprisonment at hard labor, without the benefit of parole, probation, or suspension of sentence.

7.

Petitioner appealed the August 1, 2014 conviction to the Louisiana Fifth Circuit Court of Appeal, which affirmed petitioner’s conviction on May 26, 2016. Petitioner applied for writ’s with the Louisiana Supreme Court, which considered and denied his application for writ on October 15, 2018. On November 6, 2019, petitioner filed for reconsideration of the denial of writs by the Louisiana Supreme Court, which refused reconsideration on February 11, 2019.

8.

On May 9, 2019, defendant filed a Petition for Writ of Certiorari with the United States Supreme Court challenging the decision of the Louisiana Fifth Circuit Court of Appeal under 18 U.S.C. § 1257.

9.

On November 12, 2019, the U.S. Supreme Court requested a response to the defendant’s petition from the State. In its February 24, 2020 response, the State expressly admitted that the character of the dismissal of the original matter, 2008-CR-165, was not a “*nolle prosequi*”, but was a granting of a motion to quash indictment:

3

It was not the State's action but the Petitioner's action that caused the case to be re-allotted. It was at *Petitioner's* request, made through a Motion to Quash the Indictment, that the trial judge in Division A quashed both indictments. As the Louisiana Fifth Circuit noted, the grant of the motion to quash was "sufficient on its own to dismiss the case." *Victor*, 195 So. 3d at 168 n.46.

Br. in Opp. to Pet. Cert. SCOTUS at p.32, Ex. "C".

10.

On April 20, 2020 the United States Supreme Court rendered its decision in the case of *Ramos v. Louisiana*, 18-5924 (4/20/2020), 590 U.S. ____ (2020). In that case, the U.S. Supreme Court held that "the Sixth Amendment right to a jury trial – as incorporated against the States by way of the Fourteenth Amendment – requires a unanimous verdict to convict a defendant of a serious offense." *Id.* at pp. 1, 7.

11.

On April 27, 2020, the United States Supreme Court granted certiorari on defendant's petition, vacated the May 26, 2016 judgment of the Louisiana Fifth Circuit Court of Appeal, and remanded the case "for further consideration in light of *Ramos v. Louisiana*, 590 U.S. ____." *See Ex. "D"*.

Motion to Transfer to Division "A"

12.

Louisiana Uniform District Court Rule 14.1(a) explicitly provides that "[u]nless a different method is set forth in Appendix 14.1, if a defendant has a felony case pending and previously allotted, any new felony arrest for that defendant shall be allotted to the divisions to which the pending felony was allotted. This "felonies-following-felonies" rule also applies to the pending felony arrests for a co-defendant with a new arrest and billed as a co-defendant." *Id.*

13.

Louisiana Uniform District Court Rule 14.1(b) explicitly provides that "(b) For purposes of this Rule, a felony case remains pending until any of the following events has occurred: (1) a bill of information or indictment is filed or amended, reducing the case to a misdemeanor; (2) the District Attorney's Office enters a *nolle prosequi* in a case; or (3) there is an adjudication of

guilty by plea or trial.” A dismissal due to the granting of a defense motion to quash indictment is not included in the list of exceptions to Rule 14.1(a). *See id.*

14.

The rationale behind Louisiana Uniform District Court Rule 14.1(b) is that Louisiana jurisprudence recognizes that the allotment of criminal cases among judges implicates due process concerns and that “capital or other felony cases must be allotted for trial . . . on a random or rotating basis or under some other procedure adopted by the court which does not vest the district attorney with power to choose the judge to whom a particular case is assigned.” *See State v. Nunez*, 187 So. 3d 964, 970 (citing *State v. Simpson*, 551 So. 2d 1303 (La. 1989)).

15.

As expressly admitted by the State on February 24, 2020, the character of the dismissal of the original matter pending in Division “A” under 2008-CR-165 was an involuntary dismissal effected by a defense motion to quash.

16.

The quash of the indictment, admitted by the State as the independent basis for termination of the matter of 2008-CR-165 before Division “A”, was explicitly based upon the potential that the grand jury witness testimony was “influence[d], alter[ed], or suppress[ed] . . . to the prejudiced of defendant.” This basis, arguably, was incurable and potentially fatal to the State’s ability to even prosecute this case further. To allow the State under these circumstances to avoid the consequences of the judgment of Division “A” by filing what the State has clearly and recently conceded was an effectively meaningless “*nolle prosequi*”, would completely gut Louisiana Uniform District Court Rule 14.1 and would sanction the overt appearance of allotment manipulation by the State. As such, this matter should have been, and should now therefore be, transferred back to Division “A” under Louisiana Uniform District Court Rule 14.1.

Motion to Vacate Sentence

17.

Under La. C. Cr. P. Article 882(A), “an illegal sentence may be corrected at any time by the court that imposed the sentence.” *Id.* Notwithstanding the procedural posture of this case as

pending on direct review in the Louisiana Fifth Circuit Court of Appeal, the district court retains jurisdiction to correct an illegal sentence under La. C. Cr. P. Article 916(3).

18.

La. C. Cr. P. Article 872 explicitly and unequivocally provides that “[a] valid sentence must rest upon a valid and sufficient: (1) Statute; (2) Indictment; and (3) Verdict, judgment or plea of guilty.” *Id.*

19.

The United States Supreme Court case of *Griffith v. Kentucky*, 479 U.S. 314 (1987), provides that “[a] new rule for the conduct of criminal prosecutions applies retroactively to all cases, state or federal, pending on direct review or not yet final, with no exceptions for cases in which the new rule constitutes a “clear break” with the past.” *Id.* at pp. 314, 328 (emphasis added).

20.

Notwithstanding the procedural posture of this case as pending on direct review in the Louisiana Fifth Circuit Court of Appeal, and notwithstanding the concurring recommendation of a single Justice that said review include whether the question had previously been raised below; the unquestionable status of defendant’s criminal prosecution as being on direct review at the time of the rendering of the decision in *Ramos v. Louisiana*, 590 U.S. ____ (2020) on April 20, 2020 effectively renders his non-unanimous jury verdict invalid by operation of law.

21.

As such, defendant’s September 15, 2014 sentence is therefore invalid and otherwise illegal under La. C. Cr. P. Article 872, and defendant is therefore entitled to have that sentence vacated by this Court under La. C. Cr. P. Article 882.

Motion for Arrest of Judgment

22.

Upon the vacating of defendant’s September 15, 2014 sentence in this matter under La. C. Cr. P. Article 881, a motion for arrest of judgment will be timely under La. C. Cr. P. Article 861. While a formal arrest of judgment under La. C. Cr. P. Article 859 is arguably unnecessary

for reasons set forth above, defendant nevertheless brings this motion out of an abundance of caution.

23.

Under La. C. Cr. P. Article 859, “the court shall arrest the judgment” where “the verdict is not responsive to the indictment, or is otherwise so defective that it will not form the basis of a valid judgment.” La. C. Cr. P. art. 859(5).

24.

By virtue of the decision of the United States Supreme Court in *Ramos v. Louisiana*, 18-5924 (4/20/2020), 590 U.S. ____ (2020), and the retroactive application of that decision to defendant’s case, as per *Griffith v. Kentucky*, 479 U.S. 314 (1987), defendant’s non-unanimous jury verdict of August 1, 2014 is “so defective that it will not form the basis of a valid judgment” and must, therefore be arrested by this Court under La. C. Cr. P. Article 859.

Motion to Quash Indictment

25.

Upon the arrest of the August 1, 2014 conviction of defendant, and based upon the timing of the decision of the Louisiana Supreme Court in the case of *State v. Reimonenq*, 2019-0367 (La. 10/22/19), 286 So. 3d 412 (and presuming the State’s intent to continue the prosecution of this matter); this motion to quash will be timely under La. C. Cr. P. Articles 521 and 535.

26.

Under La. C. Cr. P. Article 531, “all . . . defenses raised before trial, shall be urged by a motion to quash.” *Id.*

27.

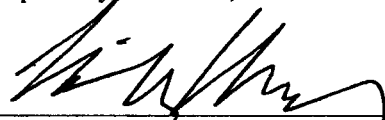
In the case of *State v. Reimonenq*, 2019-0367 (La. 10/22/19), 286 So. 3d 412, the Louisiana Supreme Court ruled that the use of the State’s power to dismiss and re-institute criminal charges, when used to avoid an adverse ruling of the trial court without seeking appellate review, constituted a violation of “due process and fundamental fairness.” 2019-0367, 286 So. 3d at 416-17. *Reimonenq* also required, as a remedy for such violation, that the State be bound, without further appellate recourse, by the adverse ruling which it sought to avoid by using its power to dismiss and re-institute prosecution. *Id.* at 417.

28.

In this case, the State did not challenge, via the normal appellate process, the finding of the Division “A” trial court in 2008-CR-165 that the grand jury witness testimony was potentially “influence[d], alter[ed], or suppress[ed] . . . to the prejudiced of defendant.” Neither did the State, in any way, attempt to cure said defect in the subsequent grand jury proceedings after it filed its otherwise superfluous (by its own admission) dismissal *nolle prosequi*. As such, the same defects that existed in the indictment in the matter of 2008-CR-165, exist in the current matter of 2010-CR-172, requiring that this current indictment be quashed under La. C. Cr. P. Article 531.

WHEREFORE, defendant herein prays that this Honorable Court 1) transfer this matter to Division “A” pursuant to Louisiana Uniform District Court Rule 14.1; 2) pursuant to La. C. Cr. P. Article 882, vacate defendant’s September 15, 2014 sentence in the above captioned matter as being based upon an invalid verdict under La. C. Cr. P. Article 872; 3) arrest defendant’s August 1, 2014 conviction pursuant to La. C. Cr. P. Article 859; and 4) pursuant to La. C. Cr. P. Article 531, quash the April 12, 2010 indictment in this matter.

Respectfully Submitted;



CLAIBORNE W. BROWN (25594)
1070-B West Causeway Approach
Mandeville, LA 70471
Telephone: (985) 845-2824
Facsimile: (985) 246-3199
cwbrown@cwbrownlaw.com

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ORDER

Considering the foregoing Motion to Transfer to Division "A"; Motion to Vacate Sentence;
Motion for Arrest of Judgment; Motion to Quash Indictment;

IT IS HEREBY ORDERED, that State of Louisiana show cause on the ____ day of _____, 2020 at _____ a.m. why the relief in the foregoing Motion to Transfer to Division "A" should not be granted.

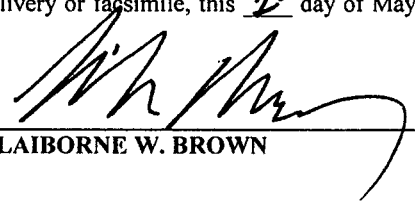
IT IS FURTHER ORDERED, that State of Louisiana show cause on the ____ day of _____, 2020 at _____ a.m. why the relief in the foregoing Motions to Vacate Sentence, Motion for Arrest of Judgment, and Motion to Quash should not be granted.

EDGARD, LOUISIANA, this ____ day of May, 2020.

JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing motion has been forwarded to the office of the Louisiana Attorney General by placing a copy of same in the U.S. Mail, postage prepaid, by electronic mail, by hand delivery or facsimile, this 1st day of May, 2020.



CLAIBORNE W. BROWN