No. 18-A1229

In The Supreme Court of the United States

SAM NEWMAN

Petitioner,

v.

STATE OF LOUISIANA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO

THE LOUISIANA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Louisiana Revised Statute Annotated § 14:94(A) (1995), barring the "illegal use of a weapon," is unconstitutionally vague under *Johnson v. United States*, 135 S. Ct. 2551 (2015), *Sessions v. Dimaya*, 138 S. Ct. 1202 (2018), and *United States v. Davis*, 139 S. Ct. 2319 (2019), where it criminalizes the intentional or negligent discharge of a firearm, when it is "foreseeable" to a reasonable adult, that said discharge "may cause death or serious bodily harm."
2. Whether the Court of Appeal misapplied the harmless error portion of this Court's holding in *Cruz v. New York*, 481 U.S. 186 (1987), with respect to hearsay statements of co-defendants that directly incriminated Mr. Newman, when the trial court never issued the standard limiting instruction as to those statements?
    a. In the alternative, whether *Bruton v. United States*, 391 U.S. 123 (1968) applies to non-testimonial statements in light of *Crawford v. Washington*, 541 U.S. 36 (2004).

LIST OF PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Sam Newman is the Petitioner in this case, and he was represented in the court below by Katherine M. Franks of the Louisiana Appellate Project. The State of Louisiana is the Respondent in this case and was represented in the court below by the Orleans Parish District Attorney's Office and Assistant District Attorney Kyle Daly. Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Federal Cases

Statutes

State Cases

Constitutional Provisions

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Sam Newman respectfully requests that the Court grant a writ of certiorari to review the decision of the Louisiana Supreme Court affirming his conviction.

OPINIONS BELOW

The Louisiana Court of Appeal, Fourth Circuit, opinion reversing Mr. Newman's sentence but affirming his conviction under Louisiana Revised Statute § 14:94(A) is at *State v. Sandifer*, 2016-0842 (La. App. 4 Cir 06/27/18), 249 So. 3d 142. Appendix A, Pet. App. 1-27a. The order from the Louisiana Supreme Court denying review of the Court of Appeal decision can be found at *State v. Sandifer*, 2018-1310 (La. 3/25/19), ___ So. 3d ___, 2019 Westlaw 1467892. Appendix B, at Pet. App. at 28a.

JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Louisiana Supreme Court under 28 U.S.C. § 1257. The Louisiana Supreme Court denied review of Petitioner's appeal on March 25, 2019. Pet. App. at 28a. On May 29, 2019, the application for an extension of time to file a Petition for a Writ of Certiorari was granted to and including August 22, 2019. Appendix C, Pet. App. at 29-30a.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides in relevant part:

> No person shall . . . . be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . . to be confronted with the witnesses against him

The Fourteenth Amendment provides in relevant part:

> No State shall . . . . deprive any person of live, liberty, or property, without due process of law.

STATUTORY PROVISIONS INVOLVED

> Illegal use of weapons or dangerous instrumentalities is the intentional or criminally negligent discharging of any firearm, or the throwing, placing, or other use of any article, liquid, or substance, where it is foreseeable that it may result in death or great bodily harm to a human being.

La. Rev. Stat. Ann. § 14:94(A).

> Criminal negligence exists when, although neither specific nor general criminal intent is present, there is such disregard of the interest of others that the offender's conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances.

La. Rev. Stat. Ann. § 14:12.

> All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission or directly or indirectly counsel or procure another to commit the crime, are principles.

La. Rev. Stat. Ann. § 14:24.

STATEMENT OF THE CASE

A. Background

Sixteen-year-old Sam Newman was arrested at his home in New Orleans. Almost a year later, he was charged along with 14 others in Orleans Parish Criminal District Court in a wide-ranging indictment alleging participation in the "110'ers" gang. Pet. App. at 7a. The charges included violations of the Louisiana racketeering statute, conspiracy, and multiple shootings which resulted in the deaths of four people, including a five-year-old child. Pet. App. at 7a, 19a. Mr. Newman was the youngest defendant on the indictment, which included his step-brother and step-father.

The indictment alleged several murders and attempted murders, drug dealing, obstruction of justice, perjury, related charges, and a conspiracy that spanned several years of violence. The 110'ers gang was an amalgamation of the "10th Ward" and "11th Ward" in New Orleans.

Mr. Newman was jointly tried with two other co-defendants, Demond Sandifer and Tyrone Harden. Many of the other, older co-defendants testified as prosecution witnesses at the trial. The opinion on appeal describes the results as:

> • Count 1 (conspiracy to commit racketeering): as to Sandifer and Newman, guilty as charged; as to Harden, not guilty;
> • Count 2 (conspiracy to commit illegal use of weapons): as to each of the Defendants, guilty as charged;
> • Counts 27 and 28 (second degree murder): as to each of the Defendants, guilty as charged; as to Sandifer and Newman only the jury further found that these murders were committed "in furtherance of criminal gang activities.

Pet. App. at 7a; *State v. Sandifer*, 2016-0842, p.2 (La. App. 4 Cir 06/27/18), 249 So. 3d 142, 147-48. The Court of Appeal also upheld Mr. Newman's conviction for the second degree murder of Marlon Smith and the attempted second degree murder of Kevon Robinson in a footnote. Pet. App. at 19a.

B. La. Rev. Stat. Ann. § 14:94

Mr. Newman was convicted of conspiracy to violate subsection (A) of La. Rev. Stat. Ann. § 14:94, which prohibits "the intentional or criminally negligent discharge of any firearm . . . . where it is foreseeable that it may result in death or great bodily injury." That statute has two other subsections, neither of which involve a negligence standard. Subsection (E) of the statute bars "discharging a firearm from a motor vehicle…where the intent is to injure, harm, or frighten," and subsection (F) criminalizes the discharge of a weapon during an enumerated violent crime or drug offense. *Id.*

La. Rev. Stat. Ann. § 14:12 defines criminal negligence as occurring when "there is such disregard of the interest of others that the offender's conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances."

La. Rev. Stat. Ann. § 14:94 commonly functions as a *de facto* sentencing enhancement, as it is frequently charged when other criminal acts are also alleged. *See e.g.*, *Foucha v. Louisiana*, 504 U.S. 71, 91 (1992) ("Petitioner was apprehended and charged with aggravated burglary and the illegal use of a weapon"); *State v.*

Jones, 601 So. 2d 339, 343 (La. App. 2 Cir. 1992) (the defendant was charged with manslaughter, aggravated assault, and illegal use of a weapon).

C. The Jury Instruction

The trial court's jury instruction for La. Rev. Stat. Ann. § 14:94(A) defined foreseeability as "that which ordinarily would be anticipated by a human being of average, reasonable intelligence and perception." Pet. App. at 38a. The conspiracy to commit illegal use of a weapon ranged from November of 2008, when Mr. Newman was 13 years old, through May of 2013, when he was 17.[1]

The trial court's jury instructions misstated an element of subsection (A), instructing that illegal use of a firearm is a discharge where it is foreseeable that it "might," rather than "may," result in death or great bodily injury. Pet. App. at 47a. The instruction also incorrectly included elements from the two uncharged subsections of the statute. Pet. App. at 47-48a. The trial court also instructed the jury as to a lesser included offense of attempted conspiracy to commit illegal use of a weapon, which is not a crime. Pet. App. at 48a. Finally, the trial court never instructed the jury on the meaning of criminal negligence within the context of § 14:94(A),[2] which is clearly defined under Louisiana law. *See* La. Rev. Stat. Ann. § 14:12.

D. *Bruton* / Severance

[1] Mr. Newman was incarcerated at age 16. The indictment, which alleged a conspiracy through the date it was issued, subsumed his existing charges, and was handed down when he was 17 years old.
[2] The trial court did define criminal negligence in another portion of the instructions on negligent homicide. Pet. App. at 40-41a.

The trial court declined to sever the defendants, permitting the state to introduce multiple out-of-court statements made by Sam Newman's co-defendants against him. Pet. App. at 15a. Throughout the trial, witnesses testified to statements by Mr. Harden and Mr. Sandifer where they admitted to participation in two of the murders,[3] and directly inculpated Mr. Newman. One of those witnesses, Mr. Newman's step-father, Antonio Johnson, testified about his son, co-defendant Demon Sandifer, emotionally confessing his involvement, as well as Mr. Newman's, in the shooting. Because of Louisiana's broad application of the law of principals, the sixteen year old Newman was then held responsible for the actions and admissions of his older co-defendants but was unable to cross-examine them on his own involvement.

The trial court denied each of the defendant's applications for a limiting instruction. Instead, the court instructed the jury that:

> Each witness may testify regarding alleged statements made by one co-defendant to that witness. Those alleged statements may implicate one and/or both of the other co-defendants. Although those out-of-court statements—out-of-court alleged statements—are being admitted, note that the alleged statements are made by one co-defendant. At the end of this trial, you will be instructed that you are the sole judges of the weight and credibility of each witness' testimony.

Pet. App. at 72a.

E. Post-trial Proceedings

[3] That testimony concerned the murders of Briana Allen and Shawana Pierce on May 29, 2012. The bulk of the trial testimony related to the events surrounding that shooting.

At sentencing, the trial court refused to hold a hearing pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012), despite defense requests to be permitted to call an expert witness who was hospitalized at the time. Pet. App. at 18a, 25-27a. Instead, the trial court sentenced Mr. Newman to life without parole for each count of second degree murder, after hearing a brief argument from defense counsel. *Id.* In addition to the life without parole sentences, Mr. Newman was sentenced to fifty years for attempted murder, fifty years for racketeering, twenty five years for two "gang enhancements" under La. Rev. Stat. Ann. § 15:1403(B), ten years for illegal carrying of a firearm during a crime of violence, and ten years for conspiracy to commit illegal use of a weapon—all to run concurrent with each other.[4] Pet. App. at 16-18a.

Mr. Newman appealed to the Louisiana Fourth Circuit Court of Appeal asserting a variety of errors by the trial court, including a challenge to his conviction under La. Rev. Stat. Ann. § 14:94(A). Pet. App. 7a; *Sandifer*, 2016-0842 at p.1. The case was remanded by motion of his appellate counsel to reconsider his sentence on September 20, 2016, and the trial court again declined to conduct a *Miller* hearing. Pet. App. at 19a. The Court of Appeal issued a decision on June 27, 2018, which remanded the case for a *Miller* hearing and corrected several additional errors by the trial court, but affirmed all but one of his convictions. Pet. App. at 18a.

First, Mr. Newman was not charged with or convicted of illegal carrying of a firearm during a crime of violence. Pet. App. at 17a. That conviction was vacated, as

[4] Prior to this trial, Mr. Newman was also tried a convicted on severed counts included in the same indictment of second degree murder and a gang enhancement. He has not received a legal sentence for those convictions, which are not a part of this appeal.

was his ten-year prison sentence. Pet. App. at 17a. Second, the sentences on the gang enhancements and conspiracy to commit illegal use were erroneously ordered to be without the benefit of parole. Pet. App. at 17-18a. The Court of Appeal corrected those sentences. *Id.* Pet. App. at 17-18a. Third, the sentence as to conspiracy to commit illegal use of a firearm carried a maximum of one year in prison. Pet. App. at 17a. The trial court sentenced Mr. Newman to ten years in prison.[5] Pet. App. at 17a. The Court of Appeal affirmed the conviction under § 14:94(A), but modified the ten-year sentence imposed by the trial court to the one year maximum.[6] Pet. App. at 17a; *Sandifer*, 2016-0842 at p. 12.

F. Legal Background

Five months after Sam Newman was convicted, this Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015), invalidating the residual clause of the Armed Career Criminal Act, an enhanced sentencing statute, as unconstitutionally vague. This Court went on to strike down similar residual clauses of 18 U.S.C. §16(b), a provision of the Immigration and Nationality Act, and 18 U.S.C. § 924(c), which criminalized certain firearm offenses committed during "a crime of violence or drug trafficking crime." *Sessions v. Dimaya*, 138 S. Ct. 1202 (2018); *United States v. Davis*,

[5] The trial court may not have known which subsection of the statute Mr. Newman was charged with violating. The instructions included elements from La. Rev. Stat. Ann. § 14:94(A), (E), and (F), and the ten-year sentence would have been permissible had he been convicted under subsections (E) or (F). On appeal, Louisiana even argued that he had been convicted under subsection (F). He was not.

[6] La. Rev. Stat. Ann. § 14:94(A) carries a penalty of zero to two years, but a conspiracy to violate the statute halves the maximum sentence to one year.[6] La. Rev. Stat. Ann. § 14:26(C) (governing the sentencing for criminal conspiracies).

139 S. Ct. 2319 (2019). In all three decisions, this Court affirmed the long-held principle that "a vague law is no law at all." *Davis*, 139 S. Ct. at 2319.

On June 27, 2018, the Louisiana Court of Appeal rejected Mr. Newman's claims regarding § 14:94(A) and affirmed his conviction. Pet. App. at 17-18a

Regarding the severance, "the State argue[d] that, even if joinder was improper, the Defendants were not prejudiced." Pet. App. 14a. Ultimately, the Court of Appeal recognized the possibility that the joint trials resulted in the introduction of un-cross-examined statements by Newman's co-defendants but asserted that the "erroneous admission of hearsay is a confrontation error subject to harmless error analysis." Pet. App. at 16a. In finding the testimony harmless the Court of Appeals relied on *Cruz v. New York*, 481 U.S. 186 (1987) and asserted:

> when, as here, the complained-of hearsay is the mutually inculpatory confession of a non-testifying co-defendant, the Supreme Court of the United States has observed that a reviewing court may consider the extent to which the confession "interlocks" with a confession by the defendant . . . . Each of the Defendants made interlocking confessions that were introduced at trial.

Pet. App. at 16a.

REASONS FOR GRANTING THE PETITION

La. Rev. Stat. Ann. § 14:94(A), illegal use of a firearm, is an unconstitutionally vague criminal statute. It goes far beyond the typical qualitative risk statute and criminalizes speculative harm by a hypothetical defendant, in violation of the Due Process Clause. No federal court has ruled on the constitutionality of La. Rev. Stat. Ann. § 14:94(A). While the statute has survived a few state court challenges for

vagueness, those pre-date this Court's rulings in *Johnson*, *Dimaya*, and *Davis*. *E.g.*, *State v. Dumaine*, 534 So. 2d 32, 34 (La. App. 4 Cir. 1988). Moreover, the law only further deprives children, like a then 16-year-old Sam Newman, of fair notice, by applying the same "reasonably careful man" standard of criminal negligence to all defendants, no matter the age. La. Rev. Stat. Ann. § 14:12. Lastly, the jury instructions in this case were riddled with errors and allowed the prosecution to abdicate its burden of proof as to each element of the charge. Pet. App. at 38a, 47-48a. Petitioner respectfully requests that this Court grant the Writ to resolve the questions presented by an impossibly vague criminal statute.

Additionally, the wholescale abdication of the premise of *Bruton v. United States* along with the backward application of *Cruz v. New York* warrants summary reversal of this case. In the alternative this Court should grant the Writ of Certiorari to provide needed guidance to the lower courts on whether *Bruton* applies to non-testimonial statements in light of *Crawford v. Washington*.

ARGUMENT

I. This Court Should Grant Certiorari to Decide Whether La. Rev. Stat. Ann. § 14:94(A) is Unconstitutionally Vague

A. La. Rev. Stat. § 14:94(A) Violates Due Process under *Johnson* and its Progeny

Vague criminal statutes are unconstitutional. *E.g.*, *Johnson v. United* States, 135 S. Ct. 2551, 2554 (2015). They violate due process by failing to provide "fair notice" to individuals of prohibited conduct. *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019). They violate the separation of powers by handing "responsibility for

defining crimes to relatively unaccountable police, prosecutors, and judges." *Id.* States violate due process when they revoke someone's liberty "under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson*, 135 S. Ct. at 2554 (citing *Kolender* v. *Lawson*, 461 U.S. 352, 357-358 (1983)).

Subsection (A) of La. Rev. Stat. Ann. § 14:94 is unworkably vague. It criminalizes the "intentional or criminally negligent discharge of any firearm . . . . where it is foreseeable" to "a reasonably careful man under like circumstances" that such conduct "may cause death or serious bodily harm." *Id.*; La. Rev. Stat. Ann. § 14:12. Rather than criminalize conduct that creates an unreasonable risk of harm, the law requires a fact-finder to parse whether an intentional or criminally negligent act "may" cause a hypothetical harm. It also does not separate the intentional or criminally negligent *mens rea* requirements into different subsections.

The statute provides even less notice to ordinary individuals of what conduct is prohibited than 18 U.S.C. § 924(c)(3)(B) did in *Davis*. 139 S. Ct. at 2324. That statute, which criminalized the "carrying" or "possessing" a firearm in a manner that "involves a substantial risk" that "physical force . . . . *may be used*," was similarly problematic. *Id.* (emphasis added). In both cases, the focus is not on the harm actually created in a specific case, but what could be conceivable given an individual's actions. What makes the Louisiana statute even more problematic than 18 U.S.C. § 924(c)(3)(B) is that the risk does not even have to be "substantial." *Id.* It merely "may" be present. La. Rev. Stat. Ann. § 14:94(A). The word "may" in 18 U.S.C. § 924(c)(3)(B)

was at least tethered closer to reality by the phrase "involves a substantial risk." In La. Rev. Stat. Ann. § 14:94(A), "may" is in the statutory driver's seat. There is no requirement that the conduct, "by its nature" or otherwise, actually carries or involves a risk of harm, just that is minimally possible. *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 767 (11th ed. 2003) (defining "may" as "have the ability to," or, in the context of probability, "used interchangeably with *can*") (emphasis in original).

Generally, criminal statutes governed by a "qualitative standard," that prohibit creating a substantial, grave, or unreasonable risk of harm, are not unconstitutional when they fairly criminalize actions "*on a particular occasion*." *Johnson*, 135 S. Ct. at 2561 (emphasis in original); *Welch v. United States*, 136 S. Ct. 1257, 1262 (2016) ("The Court's analysis in *Johnson* thus cast no doubt on the many laws that require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*.") (emphasis in original). In *Davis*, the Court posited that "legislatures know how to write risk-based statutes that require a case-specific analysis." 139 S. Ct. at 2334. § 14:94(A) is not one of those statutes.

Unlike the statutes highlighted in Justice Kavanaugh's dissenting opinion in *Davis*, or Justice Scalia's majority opinion in *Johnson*, § 14:94(A) does not criminalize *particular acts* that in this *particular instance* created a substantial, grave, or unreasonable risk. Rather, Louisiana criminalizes intentional *or* negligent acts "where it is foreseeable that [they] *may*" create a risk of harm. La. Rev. Stat. Ann. § 14:94(A) (emphasis added). Asking the fact-finder to look to what risk is foreseeable,

rather than what risk was actually present *on that occasion* creates a level of abstraction not present in the qualitative risk statutes. Those statutes, while not the subject of the Court's decisions, were discussed at length in *Johnson* and *Davis*. 135 S. Ct. at 2561; 139 S. Ct. at 2340 (Kavanaugh, J., dissenting).

Were subsection (A) to bar intentional or even criminally negligent conduct that *created* a risk of death or serious bodily injury, the law would not be vague under *Johnson* and *Davis*. In his dissent in *Davis*, Justice Kavanaugh highlighted "a few examples from federal law: It is a federal crime to create 'a *substantial risk* of harm to human life' while illegally 'manufacturing a controlled substance.' 21 U. S. C. § 858. Under certain circumstances, it is a federal crime to create 'a *substantial risk* of serious bodily injury to any other person by destroying or damaging any structure, conveyance, or other real or personal property within the United States or by attempting or conspiring to' do so. 18 U. S. C. § 2332b(a)(1)(B)." 139 S. Ct. at 2440. (emphasis and quotations in original). Those examples are telling. They illustrate why the Louisiana law differs from the typical substantial (or reasonable, or grave) risk statute. Those laws, like 21 U. S. C. § 858 and 18 U. S. C. § 2332b(a)(1)(B), criminalize conduct that actually "creates" a risk of harm. *Id.* Louisiana attempts to bar conduct where a reasonable person would find it foreseeable that such conduct "may" create a risk of harm. La. Rev. Stat. Ann. § 14:94(A). The risk of harm may very well never have materialized under the Louisiana law.

Louisiana compounds the problem by providing a far lower threshold for the foreseeable risk—that it "may" be present. The use of such a low standard of "may,"

instead of a substantial, grave, or unreasonable risk, further invites a fact-finder to speculate about far-flung possibilities, rather than focus on the individual conduct in a particular case or "*on a particular occasion*." *Johnson*, 135 S. Ct. at 2561 (emphasis in original). As a whole, the statute requires a search for what a "hypothetical defendant" may find foreseeable, rather than deciding whether the conduct actually created a risk of harm. *See* 139 S. Ct. at 2344 (Kavanaugh, J., dissenting).

While Mr. Newman's conviction under § 14:94(A) resulted in a one-year prison sentence, concurrent with his far greater sentences, as Justice Gorsuch explained in his concurrence in *Dimaya*, this nation's courts have a long history of striking down vague statutes even when penalties are comparatively minor. 138 S. Ct. 1204 at 1226; *McJunkins v. State*, 10 Ind. 105, 108-09 (1858) (striking down a public indecency law on vagueness grounds); *McConvill v. Jersey City*, 39 N.J.L. 38, 42 (1876) ("The older English authorities, so far as they hold such a by-law void for uncertainty, are regarded as not sound in principle, and ought not to be followed.") (internal quotations omitted); *see also Rutledge v. United States*, 517 U.S. 292, 302 (1996) (an unlawful conviction must be reversed despite a lesser concurrent sentence); *Ball v. United States*, 470 U.S. 856, 865 (1985) (same). A law "ought to be expressed in such a manner as that its meaning may be unambiguous, and in such language as may be readily understood by those upon whom it is to operate." *McConvill*, 39 N.J.L. at 42.

Section 14:94(A) is untenably vague. It invites arbitrary and discriminatory enforcement. It does not provide fair notice to ordinary individuals as to what conduct

it prohibits. This Court should grant review and determine whether it passes muster under the *Johnson* jurisprudence.

B. The "Reasonable Man" Standard Violates Due Process as Applied to a Child Defendant

This case is a strong vehicle to establish how the vague nature of the statute undermines constitutional guarantees. Sam Newman's conviction under § 14:94(A) stemmed from events that occurred when he was 15 and 16 years old.[7] Vague states are unconstitutional because they fail to provide "fair notice" to individuals of what conduct is prohibited. *Johnson*, 135 S. Ct. at 2554. Criminal laws "must be sufficiently explicit to inform those *who are subject to it* what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (emphasis added). Sam Newman, a child "subject to" § 14:94(A), could not have had fair notice of the standard of care exercised by a "reasonably careful man."

While the trial court did not instruct the jury on the meaning of criminal negligence in the context of § 14:94(A), Louisiana does provide a definition. Criminal negligence is demonstrated when "there is such disregard of the interest of others

[7] As this Court has pointed out, a child's immaturity can "lead to recklessness, impulsivity, and heedless risk-taking." *Miller v. Alabama*, 567 U.S. 460, 461 (2012). "Even the normal 16-year-old customarily lacks the maturity of an adult." *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982). The "transient rashness, proclivity for risk, and inability to assess consequences," mean that a child would not have fair notice of the standard of care to be employed by a "reasonably careful" adult, especially in light of the other vague language of the statute. *See Miller* 567 U.S. at 472; *Montgomery v. Louisiana*, 136 S. Ct. 718, 733 (2016) (children are highly susceptible to peer pressure, rash decision-making, and impulsive behavior); *see also Graham v. Florida*, 560 U.S. 48, 68 (2010) (adolescent brains are not yet fully developed and physiologically have "fundamental differences" from adult brains).

that the offender's conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances." La. Rev. Stat. Ann. § 14:12. The conspiracy to commit illegal use of a firearm for which Mr. Newman was convicted ranged from November 2008, when Mr. Newman was 13 years old, through May of 2013, when he was 17. The overt acts in conspiracy related to firearms that Mr. Newman was alleged to have participated in occurred when he was between the ages of 15 and 16 years old. That he could be convicted under a statute for failing to exercise the standard of care maintained by a "reasonably careful man under like circumstances" only exacerbates the lack of fair notice that La. Rev. Stat. Ann. § 14:94(A) provides.

Moreover, the phrase "under like *circumstances*" in La. Rev. Stat. Ann. § 14:12 refers to external factors surrounding an incident. It does not modify the "reasonably careful man" standard by allowing a trier of fact to consider youth.[8] By way of contrast, Louisiana does provide for a different standard of care for youth when defining *civil* negligence. *See Johnson v. Fleet Mortg. Corp.*, 2001-0715, p. 5 (La. App. 4 Cir 01/23/02), 807 So. 2d 1077, 1079; *In re Malter*, 508 So. 2d 143, 144 (La. App. 4 Cir. 1987); *see also Gremillion v. State Farm Mutual Insurance Co.*, 331 So. 2d 130 (La. App 3 Cir. 1976). No case has interpreted § 14:94(A)'s criminal negligence prong to require a different standard of care when a defendant is a child.

C. Instructional Error Exacerbated the Due Process Violations

[8] Even if a court were to read into the phrase "under like circumstances" some consideration of one's age, the jury was not instructed to consider Mr. Newman's age. Pet. App. at 31a.

Finally, the trial court's hopelessly insufficient jury instruction tainted Mr. Newman's conviction under § 14:94(A). *See Middleton v. McNeil*, 541 U.S. 433, 437 (2004) (A jury instruction violates due process when it fails to hold the prosecution to its burden to prove "every element of the offense" beyond a reasonable doubt). *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (quoting *Boyde v. California*, 494 U.S. 370, 380 (1990)) (If the flawed instructions created a "reasonable likelihood" that the jury, in following those instructions, violated an accused's due process rights, the conviction must be reversed).

The trial court failed to offer an instruction on the element of criminal negligence in the context of § 14:94(A). In another portion of the forty transcript pages of instructions, the court instructed the jurors on criminal negligence when explaining negligent homicide. Pet. App. at 40-41a. The court never told the jurors what criminal negligence meant in the context of § 14:94(A) or whether to apply the same standard. It failed to instruct the jury as to the difference between an "intentional" discharge and a "criminally negligent" one, both of which are illegal under the statute. Pet. App. at 38-39a, 47-48a. As a result, the trial court relieved the prosecution of its burden to prove the necessary *mens rea* beyond a reasonable doubt. The jury had no idea that criminal negligence requires a "gross deviation from the standard of care." La. Rev. Stat. Ann. § 14:12.

The trial court made matters worse by including elements from other subsections of the statute. Nine transcript pages after initially defining § 14:94(A), the trial court returned to the statute and instructed the jury that they must find

that "the parties to [the conspiracy] committed, solicited, coerced or intimated [sic] another to commit a crime of violence" and that "the intent was to injure, harm, or frighten another human being." Pet. App. at 47-48a. That language comes from subsections (F) and (E), respectively. It is not present in the charged subsection (A).

The trial court then incorrectly stated that the required risk of harm created by the conduct "might" (rather than "may") exist. Pet. App. at 47a. The trial court then instructed the jury on a lesser offense of attempted conspiracy to commit illegal use of weapons. Pet. App. at 48a. The court did not specify whether the lesser of attempted conspiracy to commit illegal use of a weapon referred to the criminally negligent or intentional portion of subsection (A). Attempted negligence is not a crime in Louisiana. *See State v. Martin*, 539 So. 2d 1235, 1237 (La. 1989).

The result of the totality of these mistakes was an error-riddled, disjointed instruction that created a "reasonable likelihood" that the jury did not understand, at a minimum, the intent element of the statute. This Court should grant certiorari in this case.

II. Louisiana's Backward Application of *Cruz v. New York* Warrants Reversal and Remand

A. The Louisiana Court of Appeal Plainly Violated this Court's Decision in *Cruz v. New York*

In *Bruton*, this Court held that the prejudice from a mutually inculpatory statement by a co-defendant, admitted at a joint trial, could not be cured by a jury instruction. 391 U.S. at 137. The Court explained, "[d]espite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence

inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all." *Id.*

This Court's decision in *Cruz* held that *Bruton* applies (1) even if the defendant herself gave an incriminating statement that substantively matched—or "interlocked" with—the mutually inculpatory statement of a co-defendant and (2) even if the trial court gave a limiting instruction that the co-defendant's statement was not to be considered against the defendant. 481 U.S. at 192-94, 189. This Court then explained that the defendant's interlocking confession can be considered as part of a harmless error analysis. *Id.* at 194.

The Louisiana Court of Appeal effectively turned *Cruz* on its head and started with the harmless error portion of the analysis. Pet. App. at 15-16a. The Court failed to consider the lack of a limiting instruction, which was present in the statement at issue in *Cruz*.

Louisiana's invocation of *Cruz* to use an interlocking confession as justification to ignore a *Bruton* issue defies the very logic underpinning *Cruz*. The Court in *Cruz* rejected outright the logic behind not applying *Bruton* when there was an interlocking confession. As explained by Justice Scalia, writing for the Court:

> A codefendant's confession will be relatively harmless if the incriminating story it tells is different from that which the defendant himself is alleged to have told, but enormously damaging if it confirms, in all essential respects, the defendant's alleged confession . . . . ***It seems to us illogical, and therefore contrary to common sense and good judgment, to believe that codefendant confessions are less likely to be taken into account by the jury the more they are corroborated by the defendant's own admissions***; or that they are less likely to be

> harmful when they confirm the validity of the defendant's alleged confession.

Id. at 192-93 (emphasis added).

Perversely, even if the Court in *Cruz* had come to the *opposite* conclusion, the Louisiana Court of Appeal would still have erred. Prior to *Cruz*, several Circuits had allowed statements that would otherwise by the subject of a *Bruton* challenge because they interlocked with a defendant's own confession. *Id.* at 192. But even where the courts admitted the co-defendant statements because of an interlocking confession, they still required a limiting instruction similar to the one given prior to *Bruton*. *See e.g.*, *United States ex rel. Stanbridge v. Zelker*, 514 F.2d 45 (2d Cir. 1975); *see generally Delli Paoli v. United States*, 352 U.S. 232 (1957). In *Cruz*, the trial court had given a limiting instruction that the mutually inculpatory statement not be considered against the defendant who was not the hearsay declarant. *Cruz*, 481 U.S. at 189. Interlocking confessions did not suddenly render those statements admissible *against* a defendant, but they could be introduced, under the logic of the pre-*Cruz* cases, so long as they were limited to the case against the jointly tried declarant.

Because the appellate court skipped straight to the harmless error analysis under *Cruz*, and counted the "interlocking nature of the confession" as a reason to find its admission harmless rather than evidence of the harm, it did not consider lack

of any curative instruction by the trial court.[9] Pet. App. at 15-16a. This Court should grant the Petition, vacate the judgment, and remand for a proper application of *Cruz*.

B. This Court Should Grant Certiorari to Decide Whether *Bruton* Applies to Nontestimonial Statements

In the alternative, this Court should grant the Petition and consider for the first time whether *Bruton* applies to nontestimonial statements.

Bruton protects defendants when prejudice from inculpatory hearsay not subject to cross-examination cannot be cured by a jury instruction. It exists as an exception to the general rule that jurors are presumed to follow their instructions. *Richardson v.* Marsh, 481 U.S. 200, 210 (1987) ("the precise facts" of *Bruton* required a limited departure from the general rule). Their inability to follow instructions in these narrow circumstances, when hearing a mutually inculpatory statement of a non-testifying co-defendant, does not change merely because the Court's Confrontation Clause jurisprudence has.

Moreover, *Bruton* did not hinge on a new interpretation of the Confrontation Clause. Rather, the Court reversed its prior holding that a limiting instruction to the jury is sufficient to cure the prejudice of a non-testifying co-defendant's confession that also inculpates the defendant. *Compare* 391 U.S. at 132-37 *with Delli Paoli*, 352 U.S. at 232. Whether or not a statement is testimonial, the prejudice at a joint trial

[9] The trial court declined, over defense objection, to give a curative instruction for the statements. After the first statement, the court only advised the jurors that, "Each witness may testify regarding alleged statements made by one co-defendant to that witness. Those alleged statements may implicate one and/or both of the other co-defendants. Although those out-of-court statements—out-of-court alleged statements -- are being admitted, note that the alleged statements are made by one co-defendant. At the end of this trial, you will be instructed that you are the sole judges of the weight and credibility of each witness' testimony." Pet. App. at 72a

of introducing the statement of a co-defendant, who cannot be cross-examined, through a third party, that inculpates the defendant as well, still requires some judicial remedy.

Most Circuits have assumed post-*Crawford* that *Bruton* only applies to testimonial statements.[10] However, that belief is not universal. *United States v. DeLeon*, 287 F. Supp. 3d 1187, 1258-62 (D.N.M. 2018); *United States v. Williams*, No. CR 09-0414, 2010 WL 3909480, at *5 (E.D. Va. 2010); *see also* Colin Miller, *Avoiding a Confrontation—How Courts Have Erred in Finding That Non-Testimonial Hearsay is Beyond the Scope of the Bruton Doctrine*, 77 BROOK. L. REV. 625 (2012); Jason Portwood Hipp, *Redacting the Constitution: Securing Bruton's Confrontation Protections for a Codefendant During Non-Evidentiary Counsel Commentary*, 44 COLUM. HUM. RTS. L. REV. 259 (2012). The Court of Appeals for the District of Columbia noted that, regardless of whether statements are testimonial, the *prejudice* by admitting those statements not subject to cross-examination may nonetheless warrant a curative instruction. *Thomas v. United States*, 978 A.2d 1211, 1225 (D.C. 2009).

This Court has not ruled on the issue since *Crawford* was decided more than fifteen years ago. Petitioner respectfully requests that the Court grant the Writ of Certiorari to remand for a proper application of *Cruz* or to consider the scope of

[10] *United States v. Figueroa-Cartagena*, 612 F.3d 69, 85 (1st Cir. 2010); *United States v. Pike*, 292 F. App'x 108, 112 (2d Cir. 2008); *United States v. Berrios*, 676 F.3d 118, 128 (3d Cir. 2012); *United States v. Dargan*, 738 F.3d 643, 651 (4th Cir. 2013); *United States v. Vasquez*, 766 F.3d 373, 379 (5th Cir. 2014); *United States v. Pugh*, 273 F. App'x 449, 455 (6th Cir. 2008); *United States v. Dale*, 614 F.3d 942, 958 (8th Cir. 2010); *Smith v. Chavez*, 565 F. App'x 653, 653-54 (9th Cir. 2014); *United States v. Clark*, 717 F.3d 790, 816 (10th Cir. 2013); *United States v. Hano*, 922 F.3d 1272, 1286 (11th Cir. 2019).

Bruton and whether the repeated use of mutually inculpatory hearsay in Mr. Newman's trial constituted "[a] machine-gun repetition of a denial of constitutional rights" *Chapman v. California*, 386 U.S. 18, 26 (1967).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the Writ of Certiorari to review the Louisiana Supreme Court's affirmance of his conviction under the unconstitutionally vague § 14:94(A) and to vacate and remand for Louisiana to properly apply *Cruz*, or, in the alternative, consider the *Bruton* question on the merits. The convictions should be reversed.

Respectfully submitted,

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