No. 19-6679

In the Supreme Court of the United States

HORATIO JOHNSON,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA FOURTH CIRCUIT COURT OF APPEAL

RESPONDENT'S APPENDICES

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IN THE

COURT OF APPEAL, FOURTH CIRCUIT

STATE OF LOUISIANA

No. 2018-KA-0409

STATE OF LOUISIANA,

Appellee

versus

HORATIO JOHNSON,

Appellant

ON APPEAL FROM THE CRIMINAL DISTRICT COURT IN AND FOR ORLEANS PARISH, STATE OF LOUISIANA, THE HONORABLE BENEDICT J. WILLARD, JUDGE PRESIDING, NO. 521-673, DIV. "C"

ORIGINAL BRIEF OF APPELLANT

RESPECTFULLY SUBMITTED,

LOUISIANA APPELLATE PROJECT

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(Criminal Appeal)

Resp. Appx. A

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MAY IT PLEASE THE COURT:

STATEMENT OF JURISDICTION

This Court has jurisdiction over this direct appeal pursuant to Article V, Section 10(A), of the Louisiana Constitution of 1974.

STATEMENT OF THE CASE

This is a criminal case resulting in a conviction.

Horatio Johnson was charged by indictment with two counts of second degree murder, violations of La. R.S. 14:30.1, one count of conspiracy to commit obstruction of justice by tampering with evidence, in violation of La. R.S. 14:(26)130.1, and one count of obstruction of justice, in violation of La. R.S. 14:130.1.[1] On September 4, 2014, Mr. Johnson entered a plea of not guilty and a motion to determine counsel was set. On January 21, 2017, motions to suppress evidence, identification, and statements were denied.

Trial by jury commenced August 21, 2017. On August 31, 2017, after delays caused by recesses for writs and a tropical storm, the jury returned guilty verdicts as to all four counts. On September 5, 2017, the defense filed a motion for post verdict judgment of acquittal and a motion for a new trial, both of which were denied, and a motion for appeal. On September 6, 2017, Mr. Johnson was sentenced on counts one and two to life imprisonment without all benefits, to run concurrently with all other sentences; on count three to twenty years at hard labor, to run consecutively to count four; and on count four, forty years at hard labor, to run consecutively to count three. The defense filed a motion for appeal, which was granted. This direct appeal follows.

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[1]Also charged in all counts were co-defendants Brittany Martin and Steven Bradley; Frank Mike was charged in counts three and four and an additional count five for accessory after the fact (amended to obstruction of justice). Counts one through three were nolle prossed as to Martin and she pled to count four. The co-defendants are not a part of the current appeal.

ASSIGNMENTS OF ERROR

1. The trial court erred in denying the motion for post verdict judgment of acquittal based upon sufficiency.

2. This Court erred in reversing the trial court's mistrial.

ISSUES PRESENTED

1. Did the State fail to present sufficient evidence to uphold the conviction?

2. Did this Court err in reversing the trial court's mistrial?

STATEMENT OF THE FACTS

Kenneth Joseph and his wife LaKeitha were reported missing from their home at 530 Homewood in Reserve on February 19, 2014. Kenneth's sister, Alosia Hayward, had loaned him her Dodge Caravan on the night of February 18, 2014. Kenneth frequently borrowed the van, always picking it up at night and returning it the next morning because he knew Alosia needed it to drive to work. Kenneth, however, failed to return the van on February 19, 2014. After attempting to call him and LaKeitha several times, Alosia and her mother went to the Joseph's home. Concerned because the van was not there, they eventually made entry and found the Joseph's house ransacked and their dogs locked up in a bedroom. Vol. 8, Tr. T. 8/22/17, P. 18, 20, 21, 23, 24, 32.

Kirsten McBee[2] from the St. John the Baptist Parish Sheriff's Office was assigned to the case. She obtained phone records for three phone numbers associated with the couple, requesting a list of all income and outgoing calls and texts, as well as cell site locations. Mrs. Joseph's phone records indicated on the night of February 18, 2014, calls registered placing the phone in Kenner, but twelve minutes later registered a call placing the phone in Lutcher. Id. at 90, 91, 92, 93. McBee was unable to explain this incongruity. Id. at 93.

[2]McBee's first and last names are spelled a variety of ways in the various transcripts.

On February 27, 2014, McBee was notified by the Fulton County Police Department that the van had been found at the Pleasant Hill apartments in College Park, Georgia, an area of Atlanta. Id. at 72. She sought and obtained the assistance of the Fulton County Police Department to have the van secured, searched, and processed. Id. at 73.

On March 1, 2014, Helen Weathers, the forensic supervisor for Fulton County P.D., obtained a search warrant for the van. Id. at 116, 119, 120. She noted that the key was in the ignition, the van had recently been washed as evidenced by the car wash tape on the back windshield wipers, but the tires of the van were dirty. Id. at 125, 126. She observed stains that appeared to be blood in various locations inside the van, and a presumptive test for blood was performed with positive results. Id. at 130-142. She recovered several items from the van, took swabs for DNA comparison as well as swabs of suspected blood, and recovered two latent prints that were of too poor a quality to use for identification. Id. at 151-163, 150, 168, 169, 178. She turned the evidence over to the NOPD. Id. at 168.

On March 10, 2014, LaKeitha's body surfaced in the Intracoastal Waterway in New Orleans. Vol. 9, Tr. T. 8-23-17, p. 13. Her ankles were tied together and she was disfigured from marine life. Id. at 22.

The case, now a homicide, was assigned to NOPD Detective Ryan Vaught. Upon learning that the van's license plate had been captured at a Travelodge motel on February 20, 2014, Vaught traveled to Atlanta on March 19, 2014. Working with the Fulton County P.D. and the St. John the Baptist Sheriff's Office, he obtained hours of surveillance footage to search to see if he could find the person who arrived with the van. Vol. 11, Tr. T. 8-28-17, p. 199, 202, 204, 205. He brought the surveillance video back with him to New Orleans on March

22, 2014. Id. at 204, 205.

Kenneth Joseph's body surfaced nearby in the same waterway as his wife's on March 24, 2014, in nearly the same condition except the nylon rope around the bottom of his legs had a 30-pound kettle bell attached to it. Vol. 9, Tr. T. 8-23-17, P. 23, 27, 33.

Both deaths were ruled homicides, with the cause of death listed as drowning or asphyxia caused by drowning Id. at 133, 141. Additionally, both pathologists involved in the autopsies testified that drowning is determined by excluding other causes, that the injuries noted on the victims were primarily post mortem caused by marine life, and that there were no life threatening injuries on either body. Id. at 132, 133, 134, 139, 140, 131, 143. Mrs. Joseph had a collection of blood under her scalp, without bruises or abrasions, which could have been caused by hitting her head or being struck in the head, and the wound would not have caused death because there was no fracture to the skull or hemorrhage inside the brain. Id. at 132, 134.

Detective Ryan Vaught approached the case from two directions– he began watching the video surveillance from the Atlanta Travelodge to see if he could determine who was in possession of the van, and he began searching stores and researching online for the kettle bells and rope. Vol. 11, Tr. T. 8-28-17, P. 207, 209.

He was able to develop Frank Mike as the person in possession of the van from DNA swabs and the video from the motel. Id. at 207.

He noticed the kettle bells were unique and subsequently discovered that Walmart had the only contract to sell them. He and other detectives began looking for the kettle bells, starting with the Walmart in Laplace, until he found a match at the Walmart in Kenner. Id. at 209, 201. He learned that on February 19,

2014, kettle bells, blue rope, gloves, black hoodies, and cleaning fluid were purchased by Brittany Martin. Id. at 211. The asset protection manager was able to provide video from the self checkout lane of the individuals who purchased the items, as well as video of them walking into the store. The individuals were Brittany Martin and the appellant. Id. at 215. According to a store receipt, Martin paid for the items with her American Express card. Id. at 211.

Meanwhile, a search warrant was obtained for Frank Mike's house, a residence with a gutted first floor and an almost-unfurnished second floor. Id. at 9, 10.

Frank Mike turned himself in, annoyed with the police for the destruction they wreaked at his gutted home. Vol. 9, Tr. T. 8-23-17, P. 102. Mike had a history of drug convictions and was being investigated by the DEA during this case for dealing heroin, which he freely admitted he did to the agents. Id. at 77, 78, 110, 111, 118. Mike gave various statements to the police, another statement to his friend Jeff Stokes, and another version at trial after entering into a memorandum of understanding and having his charges modified so he would serve a total of nine years on the state charges. He also pled in federal court to transporting a stolen vehicle across state lines. Id. at p. 42, 43, 44, 70.

At trial, Mike testified when he went home to cut his grass on February 19, 2014, he saw a van in his driveway he did not recognize. He called individuals who sometimes stayed at his house–his home was a safe haven for murderers and other criminals looking to hide from the police–to see who the van belonged to. Steven Bradley, a man Mike referred to as nephew who is a drug dealer and a pimp, arrived alone and moved the van to the back of the house. Bradley said he would return for the van Friday. When Bradley returned on February 21, 2014, Mike asked if he could borrow the van. He testified Bradley this time was with

the appellant, whom he had never met before, a man Mike knew from Dixon Correctional Institute called Blue, and an unknown female who remained in the car. Id. at 46, 47, 48, 74, 76, 77. Mike indicated he needed the van to go to Atlanta to buy things he sold at a flea market. Id. at 49.

Mike also testified at trial that the van had blood it in and Bradley said "we" were fighting a girl and a guy and the girl fought too hard so they hit her in the head with a weight, hence the blood. He did not explain who comprised the "we" Bradley mentioned and did not implicate the appellant in the crime at that time. Id. at 51. In his first statement, Mike had not mentioned blood, stating he saw the blood after he got to Atlanta. Vol. 12, Tr. T. 8-30-18, P. Id. at 123.

When Mike got to Atlanta, he checked into the Travelodge and claimed a story was on the news about a van that was reported missing in connection with a missing New Orleans couple and the van looked like the one he had borrowed from Bradley. Id. at 90, 92. Mike tried calling Bradley to see if it was the same van, but Bradley failed to answer. Vol. 9, Tr. T. 8-23-17, P. 55. When he saw the news story again the following day, upon advice from his friend who lived in Atlanta, Mike abandoned the van at an apartment complex a mile away from the motel. Id. He wiped down everything he thought he touched, vacuumed the van, and washed it at a carwash. Id. at 57, 58.

Bradley eventually called him back on a phone that was traced to the appellant. Id. at 56. Mike indicated that Bradley sometimes used phones that belonged to other people and that he did not speak to Horatio Johnson on the phone. They argued for a while because Mike was upset about how long it took Bradley to call him back and because Bradley had not disclosed the entire story to him. Id. at 60. Mike testified Bradley had initially told him they had robbed someone of two hundred thousand dollars and "some" bricks of cocaine, but

apparently had not mentioned the missing couple. Id. at 61.

When Mike told Bradley where he left the van, Bradley told him to set it on fire. Mike said he would, but claimed he was being sarcastic and left it abandoned at the apartment complex. Id. at 61. Mike then got a ride back to New Orleans with another friend and found his gutted house had been searched by the police while he was gone. Id. at 59, 65.

Mike went to talk to the State Police on April 3, 2014, and demanded they leave his house alone. Id. at 102, 114. He admitted he drove the van out of the state and that Bradley have given him the van. He was allowed to leave after this first visit. Id. at 104.

The police later contacted him and said they needed to talk to him again, and when he went back on April 21, 2014, they arrested him for transporting the stolen van across state lines. The agents also told they were not just looking at him for the stolen van, but also for dealing heroin and that with his criminal history, he could be sentenced to life in prison. Id. at 105, 111. He then agreed to testify in exchange for being given a no-bill, substantially reducing the sentence he would have received. Id. at 117.

Based on the information provided by Frank Mike, Detective Ryan Vaught met with Steven Bradley three times. Based on those interviews, arrest warrants were issued for the appellant, Brittany Martin, and Amir Ybarra, aka "Blue." Vol. 12, Tr. T. 8-30-17, P. 14.

Steven Bradley refused to testify at trial. He had been indicted for the same charges as the appellant and Martin, and his trial had been severed. The State obtained immunity for Bradley's testimony, but he invoked his Fifth Amendment privilege because his trial was still pending. A hearing was held where Bradley's attorney indicated Bradley would not testify, despite the threat

of a contempt charge each time he failed to answer a question. When he was

called to the stand, after invoking his Fifth Amendment right, Bradley was held in contempt by the trial court and he and the jury were removed from the courtroom. The State sought writs with this Court, the trial was stayed, and the writ subsequently denied in a 2-1 decision. The Louisiana Supreme Court granted the State's writ based upon this Court's dissenting opinion. Vol. 9, Tr. T. 8-23-17, P. 212-214, 216.

On August 25, 2017, Steven Bradley was re-called to the stand and failed to respond to any of the State's questions. Vol. 10, Tr. T. 8-25-17, P. 6-18. The defense objected to the entire line of questioning, the entire lack of testimony, and requested a limiting instruction that none of the questions by the prosecutor constituted evidence, which was given. Id. at 18, 19.

Donald Silva was then called by the State. Silva was a bail bondsman at the time of the murders and a mentor, for lack of a better word, to Bradley. Vol. 10, Tr. T. 8-25-17, P. 28. Bradley's statement was presented to the jury through Silva without objection by the defense. Silva testified that Bradley stated the victims were taken to a studio in the 2400 block of David Drive, that Bradley, the appellant, and Ybarra were present at the studio and that when the victims arrived, the appellant beat them with a barstool or a chair and jumped on top of the chair while it was on the female victim's head. Additionally, Bradley admitted he took part in the beating. According to Bradley's statement, Brittany Martin came into the studio while the beatings were going on and became frightened and distraught. According to Silva, Bradley asserted that they used the van to bring the bodies out to where they dumped them and the appellant told him and Ybarra to get rid of the van. Bradley also indicated there was a lot of cash involved. Id. at 29-31.

Silva acknowledged he did not observe any of the events and that the police spoke to Bradley in mid-May, after the appellant and Martin had been arrested. Id. at 32.

Silva had brought Bradley, whom he had bonded out of jail in Kenner, to court to get a new court date on an unrelated matter. Bradley was arrested in court and questioned about the murder. Silva told the detectives that he felt Bradley knew more than the was stating and thought Bradley was trying to protect himself, possibly minimizing his involvement so he wouldn't go to jail for murder. Id. at 33.

Silva testified that he and Bradley were also friends and Bradley used to call him from jail to chat. Silva also testified he knew Brittany Martin and that he had observed an altercation between the appellant and Martin at an event downtown called All-Star Weekend. The appellant was out with a woman named Shay Johnson and Bradley when the argument occurred. Id. at 36, 38.

Silva further testified he had never seen the appellant become violent with Martin, never saw him around drugs, knew that he had a t-shirt company, and thought he was a business man. Id. at 38, 39.

Brittany Martin testified for the State pursuant to a plea deal where the second degree murder charges were dropped and she pled guilty to obstruction of justice, with the sentencing left up to the judge. Id. at 45, 47. By the time of trial, Martin had already given a completely different statement in Magistrate court, which she now claimed was a lie. Id. at 51.

Martin and the appellant had been involved in a relationship for two years. She had plans to marry him and wanted a "normal perfect life," but he had a girlfriend who was also his business partner Id. at 51, 143. Martin went from working as a corrections officer at the Elayn Hunt Correctional Center, where

she resigned after being accused of having an inappropriate relationship with Mr. Johnson, who was an inmate there, and sending him inappropriate photos of herself, to working various temporary jobs at chemical plants, which were stressful and potentially dangerous, as well as required long hours away from her child. Id. At 129, 130. Martin decided to start modeling and open her own online clothing business with the help of Mr. Johnson. As a result, Martin's social media presence began to grow–but not as much as that of Shay Johnson. Id. at 125.

The girlfriend, Shay Johnson, was a reality TV star, a cast member of the reality show Flavor of Love and had a significant social media following. In court, Brittany Martin identified a screen-shot she had taken on her cell phone of one of Shay Johnson's social media accounts. Vol. 11, Tr. T. 8-28-17, P. 7, 8.

The week of the murders Horatio Johnson went downtown for the NBA Allstar weekend. Brittany Martin tracked him down and discovered him in a car with Shay, resulting in a blowup between Martin and the appellant. Vol. 10, Tr. T. 10-25-17, P. 144, 145. Additionally, Martin had shown up without invitation at the studio on David Drive a few days before the murders because, she claimed, she was in the area. Again, Mr. Johnson was with Shay. Only this time, Martin threatened to shoot the other woman when the woman threatened to hit her with a shoe. Id. at 163, 166.

Martin testified that a few days later, while she was on her way into Metairie to buy shoes for a wedding, Mr. Johnson called her and asked her to stop by the studio. When she arrived, Bradley was present. The appellant asked her to follow him and give him a ride back to the studio but did not say why. Martin claimed he drove a motorcycle and she followed in her car to a warehouse. While she was there, Kenneth and LaKeitha Joseph stopped by in a

van. The men stood outside and spoke. When they were finished, the appellant got in Martin's car and the other couple followed them back to the studio in the van. Id. at 54, 55, 56, 57, 58.

According to Martin's testimony, Mr. Johnson and Kenneth went inside the building while the women waited in their respective vehicles for twenty minutes. Id. at 59. The appellant came outside a few times and eventually told LaKeitha that Kenneth wanted her to hear him rapping on something. Id. at 59, 60, 61. LaKeitha agreed and the three went into the studio with LaKeitha in the lead, Mr. Johnson behind her, and Martin last. Id. at 62.

Martin testified the studio was quiet and dark and that once they got into the recording area, Mr. Johnson put his hand around LaKeitha's neck and choked her. Id. at 63. Martin said no one else was in the room. Id. Martin screamed and asked why was he doing that and he told her to be quiet. Id. Martin then ran from the building but for some reason could not locate the single car key she kept in her own back pocket, so she opened the studio door and called out, asking if she left her keys inside. Id. at 64. Ybarra walked out of one of the other rooms and yelled at her to close the fucking door. Id. Mr. Johnson yelled back at Ybarra not to scream at Martin because she was just looking for her keys. Id. Martin then found her key in her pocket, got in her car, and drove to the Discount Zone on Veterans where she purchased a beverage. Id. at 65.

Martin stated that Mr. Johnson then began calling her, telling her to come back so they could talk. Martin made the decision to go back. Id. at 66. When she got back to the studio, Mr. Johnson allegedly walked up to the car and she told him she had to go finish her shopping, but in reality she was afraid and wanted to buy something to use to protect herself. Id. at 67, 68. He then got in the car and announced he was going with her. Id. at 68. She drove to T.J. Maxx

on Veterans. Id. Martin claimed she purchased a small kitchen knife and put it in her bra on the way out of the store for protection. Id. She indicated she had to buy the knife because Mr. Johnson knew she had a gun in the car and she wanted a weapon he did not know about for protection. Id. The knife was not produced for trial, and although Martin paid with a credit card and said she gave the receipt to the prosecutor, no receipt was admitted at trial to prove what was actually purchased. Id. at 70.

She then allegedly drove him back to the studio and waited in the car while he went inside for twenty minutes. When he came out, he told her to bring him home. Id. at 71. Martin maintained that although she was terrified, she did not call the police, drive away, or otherwise attempt to do anything useful to save the victims, because she was trying to handle it on her own. Id. at 72.

According to her testimony, she drove the appellant home to Laplace, where he changed everything from his shirt to his shoes, and put his other clothes inside a plastic bag and put it in her trunk. Id. at 72, 73. He then directed her where to drive, eventually exiting the I-10 at Highway 51. She drove until he stopped her, got out of the car, went to the side of the road, and set the bag on fire. Id. at 74.

He then directed her to drive back to Kenner, to the Walmart. Id. At 77. Martin identified video of the two of them at Walmart. At the entrance, she was immortalized in a still shot laughing freely as she crossed the threshold. Id. at 78. Video captured the two at the self checkout purchasing two kettle bells, rope, gloves, hoodies, shoes, and degreaser. While Martin testified only Mr. Johnson scanned the items, the camera catches them both scanning the items and then Brittany Martin's attempts to pay for the items with a credit card that refuses to scan. Id. at 80, 84. According to Martin, Mr. Johnson picked all of the items out

and then asked her to pay because he did not have enough cash on him. Id. at 79, 82. None of the other video from the store, such as video where they actually could have been seen picking out the merchandise, was provided by Walmart or requested by the detectives to corroborate her statement.

They then allegedly went back to David Drive where she remained in the car again and Mr. Johnson went inside, taking the purchases with him. Twenty minutes later she observed Bradley, the appellant, and Ybarra moving two large objects out of the studio and into the van, objects she believed were the two bodies. Id. at 85, 86, 87, 88.

Ybarra and Bradley entered the van and Mr. Johnson got back in the car with Martin. He told her to drive to New Orleans East. Id. at 89. He directed her to drive down the I-10 until he pointed out an exit with a bridge. The van was just ahead of them. Id. When they got to the bridge, he told her to stop. At the top, they could not see the van. The appellant exited the car, walked to the edge of the side of the bridge and looked over. Id. at 89, 90.

He then instructed her to go over the bridge and when she did, the van was on the other side. He told her to flash her lights and the van then pulled away. As it did, he told her to follow it. Id. at 90. They drove to Laplace and then to Baton Rouge. Id.

The appellant told her to keep driving around and later they met the van back on Airline. Id. They then went to Bradley's mother's house, where the men got out and spoke and she remained it the car, and then she followed the van again while they looked for another house. Id. at 91, 92. They finally found it and a man called Box told them to back the van in. Id. at 93. Martin waited across the street in her car the entire time and indicated she couldn't hear what they were talking about. Id. The men then began wiping the van down and

emptied everything from inside. Id. They then set the items on fire. Id at 94. She

could not see how they did it but did see a lot of smoke. Id.

She then followed the van again to New Orleans East where the van was brought to Frank Mike's house and parked around the back of the house. Frank Mike was outside and the men, including Mr. Johnson, got out to speak to him. She then drove Bradley, Ybarra, and the appellant back to the studio in her car. Id. at 95, 96.

The sun was up when they arrived back at the studio, and Ybarra and the appellant decided to get manicures because Ybarra said he had blood under his nails. Id. Despite this being her perfect opportunity to escape if she had so desired, Martin instead went to Wendy's and purchased burgers for herself and Mr. Johnson. Id. at 97. She then dropped Mr. Johnson off at his house. Id. at 98.

She claimed she asked him why he did what he did and he called her a loose end. Id. at 98. Martin insisted she was terrified of being killed by Mr. Johnson, yet two days after she allegedly observed an attack that resulted in a death, she purchased condoms at the Walmart in Laplace to use with him. Id. at 99.

The entire night that the Josephs were allegedly being murdered by the appellant, Martin was texting her friends about the wedding and posting or taking screen shots on Instagram. Between the day the victims were killed and the day of the wedding, Martin bought the shoes she needed from a shop in Metairie and then stood in the her friend's wedding. At the wedding, she took numerous smiling selfies and sent them to Mr. Johnson. Id. at 100, 102, 103; Vol. 11, Tr. T. 8-28-17, P. 19, 23, 26.

She continued to stay in a romantic relationship with Mr. Johnson, having frequent sex, sending him explicit text messages including nudes, constantly

sexting, claiming in court she was only doing so to make him think things were

normal. Vol. 10, Tr. T. 8-25-17, P. 100, 101. Between February 18, 2014, and April 9, 2018, she also took frequent screen shots on her phone of expensive wedding rings, honeymoon destinations, homes for sale, and money. Vol. 11, Tr. T. 8-28-17, 32-44.

On February 25, 2014, she celebrated her birthday with Horatio Johnson and his family at his mother's house, receiving a large cake with the design of her newly formed company, Chic Infusion. Id. at 27, 28.

Brittany Martin claimed she was just playing a part until she could get away from the appellant, even after acknowledging he sent her a text on March 13, 2014, indicating his desire to break up with her, saying they needed time apart. Id. at 57. She sent him four responses that same day, both chastising him for not being the man he pretended to be and for not recognizing what he was losing by throwing her away. Id. at 58, 60.

On April 7, 2014, apparently back together, she texted Mr. Johnson about getting his opinion on a car she wanted to purchase, calling him "BAE" and stating she needed her "baby's support and opinion right quick." Id. at 53.

According to Martin, after the bodies surfaced, she and Mr. Johnson went to the house of a friend and business associate, Marvin Buendia. Id. at 105. The appellant and Marvin left and came back with a car. Id. at 106. Mr. Johnson allegedly told the two to get in the car but would not answer where they were going when they asked. Id. According to Martin, Marvin was upset because he was missing a business meeting. Id. at 107. Mr. Johnson then drove them to a Texas Walmart. Id. Martin claimed Mr. Johnson went into Walmart and then came back to the car. Id. He left and drove them to a second Walmart, where he did the same thing. Id. He did the same at a third, except at the third he told

Marvin to go into the store and explained where he had hidden some items to

purchase. Id. Marvin went in and came out with kettle bells. Id. Mr. Johnson explained he needed Marvin to make the purchase because it was a Hispanic store and Mr. Johnson would have stood out too much. Id. at 108. They then made the drive back to Marvin's home.

At Marvin's, Mr. Johnson allegedly banged the kettle bells on the driveway. Id. He then gave them to Brittany Martin and brought them back to Laplace. Id. at 109. He told her that if anyone asked, to say she used the kettle bells for exercising. Id.

Marvin Buendia testified that he was a graphic designer and friends and associates with Horatio Johnson, and knew both Brittany Martin and Shay Johnson. Vol. 11, Tr. T. 8-28-17, P. 129, 130, 131. He spoke to Mr. Johnson nearly every day and did graphic design work for him, Brittany, and Shay. Id. at 130, 131. Marvin testified that it was around April 25, 2014, when the appellant and Martin showed up at his house. Mr. Johnson would frequently stop by and often spent the night. Id. at 131. Marvin recalled the date because it was both his brother and brother in laws birthdays. Id. at 132. Marvin also recalled that on the day in question, he dropped Mr. Johnson off at a house on Houma to pick up a car. Id. at 133. When Mr. Johnson came back, he had Brittany Martin with him. Id. at 134. The two spent the night at his house and the next morning Mr. Johnson asked Marvin to go for a ride. Id. At 134. Marvin said he had a full day of work ahead of him and Mr. Johnson offered to pay him for a regular work day. Id. Marvin then agreed. Id.

Marvin indicated he saw Brittany's Scion outside his house, which was impossible because she had already traded it in for an Infinity. Id. On the trip out, he asked Mr Johnson where they were going but received no response.

According to Marvin, Brittany Martin was giving Mr. Johnson directions from the back seat and Mr. Johnson took his phone from him and turned his data off and gave him the phone back. Id. At 136. Marvin turned his data back on and fell asleep and woke up as they were pulling into a Walmart. The appellant allegedly went into the Walmart and five minutes later came out and told Marvin to go inside and buy a thirty pound kettle bell. He gave Marvin cash and Marvin complied. Id. He then drove to another Walmart and repeated the scenario. Marvin went inside and bought another kettle bell. Id. at 139. On the drive back, Marvin realized they were in Texas. Id. at 140.

Back at Marvin's, the appellant banged the kettle bells on the ground and put them back inside the car. Mr. Johnson and Martin then spent the night at Marvin's and were gone when he woke up. Id. At 141, 142, 143. Marvin testified that prior to his arrest, Mr. Johnson told him to remember February 18th and if anyone asked if Mr. Johnson slept at his house that night, tell them he did. Id. at 143.

Marvin further tesitfied Brittany Martin did not seem afraid of the appellant. Id. at 151. Marvin told Detective Vaught about the Texas road trip and acknowledged he had also seen the First 48 episode about the case so he already knew about the kettle bells. Id. at 155, 156.

The police executed a warrant at Brittany Martin's house and retrieved the rope and the kettle bells and determined the rope, at least, was different than the one used in the murder. Id. at 163, 169.

Martin was arrested in May. Vol. 10, Tr. T. 8/25/2017, P. 118. She refused to cooperate and the entirety of her time in jail wrote love letters to Mr. Johnson, the two corresponding frequently, making plans to marry, designing the furniture that would be in the house they were going to get when they got out of

jail, and talking about all the sex they were going to have and the different rooms

they were going to have it in. Vol. 11, Tr. T. 8-28-27, P. 62-97. The defense presented a total of ten such letters.

Brittany Martin began talking to the prosecution when she learned from her own attorney that Mr. Johnson told his cousin he had no intention of marrying her and was just using her. Vol. 10, Tr. T. 8-25-17, P. 119, 120. Her attorney obtained the statement from the prosecution. Her attorney also claimed a letter existed in which Mr. Johnson threatened Martin, but it was never provided, so while it was mentioned at trial, there was no proof it existed. Vol. 12, Tr. T. 8-30-17, P. 86.

Martin gave several recorded statements to Detective Vaught and the prosecutor, statements even they did not quite believe. Id. at 97, 98, 100. In one of the statements the prosecutor discussed how the jury would not believe her and instructed her what she needed to say to change this. Specifically, the prosecutor said they had to fill the gaps in her story and the detective told her when the time came to say her story was that she loved him. Id. at 102; Vol. 11, Tr. T. 8-28-17, P. 15, 16, 17.

Detective Vaught checked Martin out of jail so she could show him all of the places she went the night of the murders. Id. at 36, 37, 38. He testified that he found the house where "Box" let Ybarra and Bradley burn the items from the van, the road where Mr. Johnson directed Martin to where he burned his own clothes, and the bridge where the bodies were thrown into the water. Id.

The detective referred the house where the van items were burned to the State Police to follow up with a warrant because he saw a washing machine that was used to burn the clothes, but was then assigned to the French Quarter for a special function and did not follow up on it so the warrant was never obtained or

executed. Id. at 38, 39. He also could not find the exact spot or any evidence of

Mr. Johnson burning his own clothes. Id. at 36. He did not document this adventure in his police report and indicated that he did not always have time to do everything that needed to be done on his cases and things often slipped through the cracks, although he did manage to find the time to do re-shoots for the 48 Hour TV show. Id. at 91, 92, 93, 94.

SUMMARY OF THE ARGUMENTS

1. The trial court erred in denying the motion for post verdict judgment of acquittal based upon insufficient evidence. The only evidence linking the appellant to any of the crimes was the testimony of State witnesses which both conflicted with other witnesses and conflicted with the physical evidence, none of which linked Horatio Johnson to the crimes.

2. This Court erred in reversing the mistrial granted by the trial court. The trial court was in a better position to know how much harm was caused by the inadmissible reference to the appellant's prior manslaughter conviction, and the State capitalized impermissibly upon this ruling by arguing in closing that the appellant is guilty of the current crimes because he is an experienced killer.

ARGUMENT ISSUE ONE: Denial of Post Verdict Judgment of Aquittal

Horatio Johnson was convicted of four felonies and sentenced to life in prison based solely upon the word of criminals, drug dealers, and the woman he had scorned. Because no rational juror could have found the State's evidence was sufficient to prove the appellant was guilty of the offenses charged, the post verdict judgment of acquittal should have been granted.

A defendant challenging the sufficiency of the evidence to support his conviction may do so through either a motion for post verdict judgment of acquittal, under La. C.Cr.P. art. 821, or a motion for new trial, under La. C.Cr.P.

art. 851. Both were filed and denied in the present case.

La. C.Cr.P. art. 821, paragraph B, presents a codification of the *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct 2781, 61 L.Ed. 2d 560 (1979) standard. In *Jackson v. Virginia*, the United State's Supreme Court set the standard for determining sufficiency of the evidence–viewing the evidence in the light most favorable to the prosecution, this Court must determine whether any rational trier of fact could have found that the State proved the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

The reviewing court must consider the record as a whole, and if a rational trier of fact could disagree as to the interpretation of the evidence, the rational trier's view of all the evidence most favorable to the prosecution must be adopted. The fact finder's discretion will be impinged upon only to the extent necessary to guarantee the fundamental protection of due process of law. *State v. Mussall*, 523 So.2d 1305 (La. 1988). A trier of fact has great discretion in determining the credibility of the witnesses, and such determination will not be disturbed unless it is clearly contrary to the evidence. *State v. Varnado,* 97-2825 (La. App. 4 Cir. 9/22/99), 753 So.2d 850, *writ denied*, 1999-3186 (La. 4/20/00), 760 So.2d 341.

When circumstantial evidence forms the basis of the conviction, the evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. *State v. Shapiro*, 431 So.2d 372 (La. 1982). The elements must be proven such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. This is not a separate methodology, but rather an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a

defendant guilty beyond a reasonable doubt. *State v. Wright*, 445 So.2d 1198 (La.1984). All evidence, direct and circumstantial, must meet the Jackson reasonable doubt standard. *State v. Jacobs*, 504 So.2d 817 (La.1987).

Additionally, when the key issue is whether a defendant was the perpetrator, rather than whether a crime was committed, the State must negate any reasonable probability of misidentification. *State v. Neal*, 2000-0674, p. 11 (La. 9/21/01), 796 So. 2d 649, 658. In the absence of internal contradiction or irreconcilable conflict with physical evidence, positive identification by only one witness is sufficient to uphold a conviction. *Id*; *State v. Barthelemy*, 2009-0399, p. 25 (La. App. 4 Cir. 2/24/10), 32 So. 3d 999, 1015, *writ denied*, 2010-0706 (La. 10/29/10), 48 So. 3d 1097; See *also State v. Robinson*, 2002-1869, p. 16 (La. 4/14/04), 874 So. 2d 66, 79.

To uphold a conviction for second degree murder, pursuant to La. R.S. 14:30.1, the State was required to present proof beyond a reasonable doubt that there was the killing of the human being and the offender had the specific intent to kill or inflict great bodily harm. Additionally, the State was required to prove the appellant's identity as the perpetrator.

To uphold a conviction for conspiracy to commit obstruction of justice by tampering with evidence, pursuant to La. R.S. 14:(26)130.1, the State was required to prove that there was an agreement between Mr. Johnson and another person to tamper with evidence with the specific intent of distorting the results of a criminal investigation, and that Mr. Johnson had the knowledge that the act would affect a criminal investigation,

To uphold a conviction for obstruction of justice, pursuant to La. R.S. 14:130.1, the State was required to prove that Mr. Johnson tampered with evidence with the specific intent of distorting the results of a criminal

investigation, and that he had the knowledge that the act would affect a criminal investigation.

The defense does not dispute that Kenneth and LaKeitha Joseph were murdered, but does dispute that the appellant had any involvement in it.

First, there is no physical evidence linking the crimes to the appellant. None of the DNA or prints or blood matches Horatio Johnson. In fact, the State stipulated that the DNA from the van matched LaKeitha Joseph, Kenneth Joseph, and Frank Mike. Vol. 11, Tr. T. 8-28-17, P. 180. Additionally, no DNA or prints were recovered from the victims' house that matched the appellant, and no evidence was retrieved from the kettle bell or the rope. Id. at 182, 183.

The entirety of the State's case is based upon the contradictory statements of drug dealers, criminals, and liars, and a video showing Brittany Martin and the appellant entering the Walmart and paying for two kettle bells, nylon rope, hoodies, shoes, and gloves.

The two most relevant statements are also the two most contradictory. Brittany Martin testified that she followed Mr. Johnson and LaKeitha Joseph into the studio and Mr. Johnson choked her. Vol. 10, Tr. T. 8-25-17, P. 63. Brittany Martin testified no one was around except for the three of them. Id.

The only other statement as to what occurred inside the building came from double hearsay, the testimony of bail bondsman Donald Silva, who was not present at the incident and heard the tale second hand from Steven Bradley, who refused to testify at trial. According to Silva, Mr. Johnson began beating the victims with a chair or bar stool when they arrived in the studio and jumped on top of the chair while it was on the female victim's head. Id. at 29. He stated that Brittany Martin came into the studio while the beatings were going on and that she was frightened and distraught. Id. at 30.

Clearly, Brittany Martin and Donald Silva's version of Steven Bradley's statement cannot both be true. Either Martin lied at trial, or Bradley lied to the police, or perhaps both of them lied to implicate Mr. Johnson and extricate themselves. Unfortunately, Bradley's statement was not subject to cross-examination because it was admitted through the hearsay testimony of Donald Silva. Also unfortunately, the record does not reveal that the defense lodged a hearsay objection in order to preserve the admission of the statement as an assignment of error on direct appeal. Vol. 10, Tr. T. 8-25-17, P. 32-42.

Second, the coroner records do not show that LaKeitha Joseph was choked. She had a slight injury to her head, a non life-threatening injury, that would not have been consistent with a full grown man smashing her in the head with a chair and then standing on it. Vol. 9, Tr. T. 8-23-17, P. 132, 134. Further, Frank Mike claimed that Bradley told him that the female victim had been subdued by being hit in the head with a weight, also inconsistent with a minor head injury. Id. at 51. So now there was a third version of events presented by yet another unreliable source. Thus, the most important testimony, i.e. how the murder actually occurred, is in conflict with the physical findings.

Third, the State said perhaps the truest thing in this case in rebuttal close–hell hath no fury like a woman scorned. Brittany Martin did not come forth with a statement implicating the appellant because her conscience was troubled– she only came forward when she heard from her own attorney, courtesy of the prosecution, that Mr. Johnson had told his cousin he was not really planning on marrying her. Vol. 10, Tr. T. 8-25-17, P. 119, 120. The State asserts that this is proof that she was covering for him before to protect him; the defense would suggest this is proof that she is lying about him now to implicate him.

The State presented cell phone records to prove Brittany Martin was where she said she was, and license plate reader photos and data to show she basically traveled where she said she traveled. Vol. 11, Tr. T. 8-28-17, 63-65, 76, 78. Detective Vaught could not account for results from the license plate reader that presented a physical impossibility regarding the locations of Martin's car, suggesting only that sometimes the reader gets "misreads" that include the wrong plate or a bad read. Id. at 79. Thus, the license plate reader results cannot fully be trusted. Additionally, verifying the location of Brittany Martin's car does not prove that Mr. Johnson was with her. This all only proves Brittany Martin was in the area and could have participated in, or even orchestrated, the murders herself.

Brittany Martin, Frank Mike, and Steven Bradley were all motivated by their desire to make themselves the least culpable as possible. That is why their statements do not match and why their statements should not be believed. Each of them took the information they had received from either the A&E show, the news, their attorneys, the State, Detective Vaught, or some other source, and created a story that fit as much as possible with that information to exculpate and distance themselves as much as possible from the murder they participated in.

None of the statements in this case are consistent, from when and where and how the car was left with Frank Mike to how the victims were actually killed.

Additionally, no one has ever reconciled the fact that the Joseph's home was ransacked and they were presumed kidnaped with Brittany Martin's statement that they willingly met Mr. Johnson at the warehouse. In fact, there are at least two theories presented that make more sense as to how the Joseph's were kidnaped and murdered– testimony was presented through Detective Vaught that

he received information that Frank Mike and Steven Bradley had gone to do a drug deal with Kenneth Joseph's brother and things went south, and another witness, Rodney Singleton, advised police that he observed what he thought was an abduction of the Joseph couple. Vol. 8, Tr. T. 8-21-17, P. 95, Vol. 12, Tr. T. 8-30-17, P. 114-115.

Singleton lived directly across the street from the victims and told Officer McBee that he saw two unknown men outside with the couple and saw them drive away in the van on February 18, 2014, between 7:00 and 8:00 p.m. Vol. 8, Tr. T. 8-21-17, P. 97. Vaught, however, dismissed this theory because Singleton had difficulty communicating because he was deaf and mute and used an untraditional slang or street sign language that the interpreter had difficulty understanding. Id. at 107; Vol. 12, Tr. T. 8-21-17, P. 111. Vaught also projected Singleton's family's version of events, i.e. relaying what they said Singleton had told them, which lacked credibility, onto Singleton, thus finding Singleton to lack credibility. Vol. 12, Tr. T. 8-21-17, P. 107, 108. Vaught also stated that whatever Singleton saw was alleged to have occurred on February 9, at 6 a.m., completely ignoring McBee's statement that Singleton told her it occurred on February 19. Id. at 111. Thus, Vaught did not attempt to have Singleton make any identifications because Vaught said he did not believe that what Singleton saw had anything to do with the current case. Id.112, 113.

While not following up on witnesses and evidence, Vaught considered the Walmart video the big break. However, the video is circumstantial and does not prove that Mr. Johnson was involved in the murder or knew what Martin planned to do with the items purchased. There is no footage showing Mr. Johnson picking out any of those items, although the Walmart asset protection manager, Warren Chablis, testified that such video evidence would have been available but was

not requested. Vol. 9, Tr. T. 8-23-17, P. 193.

Brittany Martin walked into the Walmart with a giant smile on her face as if she did not have a care in the world and paid for the items herself. State Exhibit 52. Without sufficient proof that Mr. Johnson was actually involved in the murders, his presence alone with Martin when she purchased the items subsequently used to conceal the murders is not sufficient to prove he was guilty of obstruction of justice. Additionally, without credible evidence that Mr. Johnson had an agreement with at least one other person to tamper with evidence, the evidence is insufficient to prove he was guilty of conspiracy to obstruct justice.

Finally, while the tale of Mr. Johnson's wild trip to Texas to purchase identical weights and ropes may seem inculpatory, the tales woven by Brittany Martin and Marvin Buendia are completely inconsistent and there is absolutely no corroborating evidence to prove this even happened. The detectives were not able to trace the weights, which were found in Brittany Martin's possession, to a Walmart in Texas, nor were there any cell phone records, license plate photos, etc., to prove that this even happened. Whatever game Brittany Martin was playing, she may have managed to lure Marvin Buendia in as well.

The State failed to prove that Mr. Johnson committed the crimes he was charged with. Consequently, the jury should have returned not guilty verdicts. Because they did not, the post verdict judgment of acquittal should have been granted.

ARGUMENT ISSUE TWO: Error in reversing mistrial

During Brittany Martin's testimony, she blurted out that Mr. Johnson had been convicted of manslaughter in the past. Vol. 10, 8-25-17, P. 189. The trial court had already ruled this was inadmissible and the State had indicated they

had spoken to all of their witnesses and warned them not to mention the prior conviction. Id. at 190. 191, 192. The State then, after Martin blurted this out, retracted its own statement, and said they warned their witnesses only about not mentioning the prior conviction when the State was questioning them, which is disingenuous at best. Id. at 199; 200.

The trial court granted a mistrial upon the defendant's request. This Court reversed, finding that an admonition would be sufficient. Id. at 194.

The law of the case doctrine prohibits a higher court from reversing its prior rulings unless the appellant produces new evidences showing that a prior ruling was patently erroneous or produced an unjust result. *State v. Garrison*, 2016-0257, p. 6 (La. App. 4 Cir. 3/29/17), 215 So.3d 333, 337; *State v. Golden*, 2011-0735, p. 13 (La. App. 4 Cir. 5/23/12), 95 So.3d 522, 531. The doctrine is not only applicable to full appeals, but also applies to rulings on pre-trial writs. *Garrison*, 2016-0257 at p.6, 215 So.3d at 337Â (quoting *State v. McElveen*, 2010-0172, p. 13, (La. App. 4 Cir. 9/28/11), 73 So.3d 1033, 1054 (citations omitted)); *State v. Zeitoun*, 2017-0366 (La. App. 4 Cir. 11/08/17); 231 So. 3d 934, 944.

This issue is properly before this court because additional testimony was presented that showed the ruling produced an unjust result. Thus, this Court's ruling on the pretrial writ reversing the trial court's granting of the defense's mistrial request should now be reversed.

Pursuant to La. C.Cr.P. art. 771, when a witness makes a remark or comment that is irrelevant or immaterial and of such a nature that it might create prejudice against the defendant in the mind of the jury, the court shall promptly admonish the jury to disregard the remark. However, on motion of the defendant, the court may grant a mistrial if it is satisfied that an admonition is not

sufficient to assure the defendant a fair trial. La. C.Cr.P. art. 775 provides that

upon motion of the defendant, a mistrial must be ordered when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial, or when authorized by Article 770 or 771.

The trial court clearly felt an admonition was not sufficient to avoid the prejudice in this case.

As noted by the dissent, the trial court had already granted the motion in limine and the State had agreed to instruct their witnesses not to mention the manslaughter conviction. The State did not take this obligation seriously. Id. at 199, 200.

This is supported by the fact that in its closing argument, the State referred to Mr. Johnson not only as a killer, but stated he, "...is experienced when it comes to taking lives." Closing Arguments, Supp. Tr. P. 111. This is a direct reference to Brittany Martin's statement that Mr. Johnson had a prior manslaughter conviction.

Additionally, also as noted by the dissent, this Court was not present to see the jury and gauge their reaction when this statement was made. The trial court was. It was not a clear abuse of discretion for the trial court to grant the mistrial. *State v. Griffin*, 15-0125, p. 31 (La. App. 4 Cir. 9/16/15), 176 So.3d 561, 579.

Finally, as noted by the dissent, the trial court felt this was a bell that could not be unrung. The trial judge had spent days handling this trial– if he felt it was necessary to start all over again to ensure a fair trial for the appellant, and avoid an unjust result, this Court should not have found that he abused his discretion. Additionally, the State is not prejudiced because they can try the case again. La. C.Cr.P. art. 591.

Consequently, this court's reversal of the trial court's ruling on the motion

for mistrial should be reversed.

CONCLUSION

Accordingly, the convictions and sentences must be set aside.

RESPECTFULLY SUBMITTED:

LOUISIANA APPELLATE PROJECT

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing brief upon the Honorable Benedict Willard and the Orleans Parish District Attorney's Office, by first class mail this 25th day of October, 2018.

Holli Herrle-Castillo

HOLLI HERRLE-CASTILLO

IN THE

COURT OF APPEAL, FOURTH CIRCUIT

STATE OF LOUISIANA

No. 2018-KA-0409

STATE OF LOUISIANA,

Appellee

versus

HORATIO JOHNSON,

Appellant

ON APPEAL FROM THE CRIMINAL DISTRICT COURT IN AND FOR ORLEANS PARISH, STATE OF LOUISIANA, THE HONORABLE BENEDICT J. WILLARD, JUDGE PRESIDING, NO. 521-673, DIV. "C"

SUPPLEMENTAL BRIEF OF APPELLANT

RESPECTFULLY SUBMITTED,

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(Criminal Appeal)

Resp. Appx. B

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MAY IT PLEASE THE COURT:

STATEMENT OF JURISDICTION

This Court has jurisdiction over this direct appeal pursuant to Article V, Section 10(A), of the Louisiana Constitution of 1974.

STATEMENT OF THE CASE

Counsel would adopt the Statement of the Case from her original brief with a few additions. Trial counsel filed a pre-trial motion for a unanimous jury verdict, which was denied by the trial court on August 21, 2017. On August 31, 2017, the jury returned a unanimous verdict as to one count of obstruction of justice, and non-unanimous verdicts for two counts of second degree murder and one count of conspiracy to obstruct justice. On November 6, 2018, after the original brief had been filed, Louisiana voters amended Article I, Section 17 of the Louisiana Constitution to require unanimous jury verdicts in all criminal cases. The Louisiana legislature amended La. C.Cr.P. art. 782 prior to the vote, making it effective contingent upon the passing of the amendment.

ASSIGNMENT OF ERROR

Because the appellant was convicted by a non-unanimous jury on three counts and his convictions are not yet final, he is entitled to a new trial on the three non-unanimous counts pursuant to the Louisiana Supreme Court's decision in *State v. Draughter*.

ISSUE PRESENTED

Are Article I, Section 17 of the Louisiana Constitution and La. C.Cr.P. art. 782 retroactive pursuant to *State v. Draughter*?

STATEMENT OF THE FACTS

The defense would adopt the Statement of the Facts as set out in the original brief.

SUMMARY OF THE ARGUMENT

The appellant is entitled to a new trial because the provisions of Article I, Section 17 of the Louisiana Constitution and La. C.Cr.P. art. 782, although prospective in most cases, were made retroactive for those defendants whose convictions are not yet final, pursuant to the Louisiana Supreme Court's decision in *State v. Draughter*, 2013-0914 (La. 12/10/13); 130 So. 3d 855.

ARGUMENT: The amended unanimous jury verdict law is retroactive for those defendants whose convictions are not yet final

Horatio Johnson was convicted by an 11-to-1 non-unanimous jury on two counts of second degree murder and one count of conspiracy to obstruct justice. Tr. T. 8-31-17, P. 4. Although the trial court refused to do a written polling, the court did conduct an oral polling, wherein a lone juror indicated the majority verdict was not hers for those three counts. Id.

On the day of Mr. Johnson's conviction, August 31, 2017, the Louisiana Constitution allowed for a felony conviction on a non-capital case if 10 out of the 12 jurors voted guilty. However, on November 6, 2018, Louisiana voters overwhelmingly passed a constitutional amendment, amending Art. 1, Sec. 17 of the Louisiana Constitution, mandating unanimous jury verdicts for all criminal convictions.

La. C.Cr.P. art. 782(A) was amended by the legislature contingent upon the voters passing the amendment. The amendments to La. Const. Art. 1, Sec. 17 and La. C.Cr.P. art. 782(A) are essentially identical and read, in pertinent part, "A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case for an offense committed prior to January 1, 2019, in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve

persons, ten of whom must concur to render a verdict. A case for an offense committed on or after January 1, 2019, in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, all of whom must concur to render a verdict." La. Const. Art. I, Sec. 17; La. C.Cr.P. art. 782(A).

Louisiana follows the general rule that a constitutional provision or amendment has prospective effect only, unless a contrary intention is clearly expressed therein. *State v. Cousan*, 1994-2503, p. 17 (La. 11/25/96), 684 So.2d 382, 392-393. Both Article I, Section 17 and La. C.Cr.P. art. 782 provide that the amended law requiring unanimous jury verdicts is applicable to offenses that occur on or after January 1, 2019. While this would seem to require the change in the law to be construed as prospective only, the Louisiana Supreme Court noted in *State v. Draughter* that the retroactivity analysis does not end with that determination. *State v. Draughter*, 2013-0914 (La. 12/10/13); 130 So. 3d 855.

In *Draughter*, the Court held that because Draughter's conviction was not final when an amendment to Article I, Section 11 became effective, the amendment had prospective effect from its effective date, but had retroactive effect to the appellant's case and all other cases pending on direct review or not yet final. Id. at 864.

The *Draughter* Court opined, "In *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987), the Supreme Court held 'that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past.' This court has endorsed *Griffith* as a matter of state law for review of non-final convictions still subject to direct appellate review. See *State ex rel Taylor v.*

Whitley, 606 So.2d 1292, 1296 (La. 1992)." Id.

While *Griffith* involved a judicial determination of the unconstitutionality of a law as opposed to the amendment of a law by vote or legislation, the Louisiana Supreme Court made no such distinction in *Draughter* and did not limit its ruling. Thus, despite the prospective language and stated effective date of La. C.Cr.P. art. 782 and Article I, Section 17 of the Louisiana Constitution, the requirement that a conviction must be based on a unanimous jury verdict is retroactive for those defendants whose convictions were not yet final as of November 6, 2018, the date Louisiana voters amended the constitution.

Consequently, because Mr. Johnson's convictions are not yet final, his convictions are subject to the retroactive application of the amendment. Because his convictions for two counts of second degree murder and one count of conspiracy to obstruct justice were obtained by less than the legally required unanimous guilty vote, this retroactive application requires reversal of these three convictions.[1]

CONCLUSION

Accordingly, the convictions for second degree murder and conspiracy to obstruct justice, and the correlative sentences, must be set aside.

RESPECTFULLY SUBMITTED:

LOUISIANA APPELLATE PROJECT

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[1]As noted above, trial counsel filed a pre-trial "Motion for Unanimous Jury Verdict," which was denied by the trial court. Tr. T. 8-21-17, P. 6-7. Thus, while counsel does not suggest that raising the issue pretrial was necessary to assert it now on appeal, trial counsel did so in the present case, so the assignment is preserved for appeal regardless, making the issue moot.

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing supplemental brief upon the Honorable Benedict Willard and the Orleans Parish District Attorney's Office, by first class mail this 19th day of December, 2018.

HOLLI HERRLE-CASTILLO

RESPONDENT'S APPENDIX C

SIXTH AMENDMENT NON-UNANIMOUS JURY VERDICT CASES CURRENTLY BEING HELD BY THE LOUISIANA SUPREME COURT PENDING A DECISION IN *RAMOS V. LOUISIANA*[1]

State v. Jonathan Corn, No. 2019-K-824
State v. Matthew Cole, No. 2019-K-1733
State v. Ahman Rainey, No. 2019-K-1795
State v. Marvin Acevedo, No. 2019-K-824
State v. Roosevelt Ardison, No. 2019-K-1210
State v. Jonterry Bernard, 2019-K-1668
State v. Will Antonio Celestine, 2019-K-1688
State v. Joshua David Evans, 2019-K-1013
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State v. Ronald Gasser, 2019-K-1220
State v. Elvin Bryant Jinks, 2019-K-818
State v. David Billy Parker, 2019-K-825
State v. Jonathan David Talley, 2019-KA-1300
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State v. Nathan Curry, 2019-K-1723
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State v. Randy Keith Baldridge, 2019-K-1013, 1804
State v. Argentina Mesa, 2019-K-1908
State v. John Spears, 2020-K-0023
State v. Kirby Thomas, 2019-KA-0409
State v. James Ray Evans, 2019-KP-1457
State v. Lutgardo Silva, 2019-KP-1861
State v. Ted Dwayne Stevens, 2019-KP-1906
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State v. Travis Dennis, 2019-KH-1794
State v. Willie Dunn, 2019-KH-868
State v. Timothy Calhoun, 2019-KH-1822
State v. Harold Campbell, 2019-KH-1516
State v. Derrick Dotson, 2019-KH-1828

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[1] These cases include cases on both direct and collateral review and include both counseled and pro se petitions. These are cases for which the Louisiana Attorney General's office has received notice and may not be all the cases currently pending before the Louisiana Supreme Court on this issue.

Resp. Appx. C

State v. Brandon Laurant, 2019-KO-1611
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