No. _____

In The

Supreme Court of the United States

KIRK POWELL
Petitioner

vs.

THE STATE OF LOUISIANA
Respondent

On Petition for Writ of Certiorari to
The Louisiana Supreme Court and Louisiana Court of Appeal, Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where the trial of eleven counts of a fourteen count indictment against five defendants was based on circumstantial evidence, requiring over twenty witnesses, and was so confusing that even the Court of Appeal could not distinguish what evidence applied to each defendant, was it error to deny the motion to quash for misjoinder? Where Petitioner's antagonistic defense was that co-defendant Robinson threatened him, his girlfriend, and their child at gunpoint, and held them hostage after Robinson had invaded the residence to commit the murders, should Petitioner have been forced to trial with Robinson? When the State intended to use Robinson's statements at trial, was it error to deny the motion for severance? Did the State use the misjoinder of the defendants to trample on Petitioner's Fifth Amendment right to a fair trial and Sixth Amendment right to confrontation of Robinson, resulting in Powell's conviction for conspiracy and obstruction of justice because of his alleged association with Robinson?

2. Could Robinson's out of court statements be used by the State in a joint trial as the essential evidence against Petitioner Kirk Powell where the State had not established the existence of a conspiracy or the criteria for the co-conspirator exception to apply? Did the admission of co-defendant's statements in a joint trial violate the Sixth Amendment where Powell was prevented from cross examining Robinson about his statements in two police videos and his statements to State witnesses? Under the Fourteenth Amendment, did Robinson's highly prejudicial hearsay statements in the State's otherwise circumstantial case encourage jury speculation and contribute to the verdicts, denying Petitioner Kirk Powell his Sixth Amendment right to confrontation and his Fifth Amendment right to due process?

LIST OF PARTIES

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

State of Louisiana, through the District Attorney for the Parish of Orleans

Kirk Powell, an individual incarcerated in the State of Louisiana

No other cases are directly related.

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The opinion of the State of Louisiana Court of Appeal, Fourth Circuit in this matter is attached as **Pet. App. A,** *State v. Powell, et al.,* 401 So. 3d 809; 2023-0058 (La.4 Cir. 09/04/24).

The recent 4 to 3 decision of the Supreme Court of Louisiana denying the defendant's application for a Writ of Certiorari for discretionary review, *State v. Powell, et al.,* – So.3d–, 2025 La. LEXIS 252 (La., Feb. 25, 2025), sub nom *State v. Robinson*, is attached as **Pet. App. B.**

JURISDICTION

The four of the seven members of the Louisiana Supreme Court entered judgment against the Petitioner, denying discretionary review, on February 25, 2025. **Pet. App. B.** This petition is filed within 90 days of that date. Accordingly, this Court has jurisdiction to review the judgment of the Louisiana Supreme Court, declining to review the decision of the Louisiana Court of Appeal, Fourth Circuit. SUP. CT. R. 13(1); 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND AUTHORITIES INVOLVED

1. *The Fifth Amendment to the United States Constitution* provides in relevant part: "No person shall . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

2. *The Sixth Amendment to the United States Constitution* provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to a speedy and public trial;. . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

3. *The Fourteenth Amendment to the United States Constitution* provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Shantrell (Shantrell) Parker[1] and Gavonte (Gavonte) Lumpkin were witnesses to Denzel (West) West and Michael (Robinson) Robinson's murder of Leroy Benn Jr. on July 18, 2018. Gavonte was already the complainant is two pending criminal cases involving Elijah (Elijah) Favorite.[2] Approximately five hours after Benn Jr. was murdered, police received reports indicating that Kirk (Kirk) Favorite, the father of Petitioner Kirk (Powell) Powell, allegedly shot his nephew, Terence (Terence) Favorite, in a separate incident. It was the State's theory that Robinson needed Kirk, the family protector out of his way, so that he could silence Shantrell and Gavonte.

In the early hours of July 29, 2018, Robinson and Terence, invaded the place where Powell and Leante (Leante) Wilson were staying to demand the gun that Kirk had used to shoot Terence. Robinson and Terence took the gun to police and had Kirk arrested that afternoon. That evening, Robinson, who was always armed, silently entered the place where Powell and Leante were staying again around 6:00 p.m., allegedly with Shantrell and Gavonte in tow. While Powell and Leante were outside discussing what to do, they heard gunshots inside.[3]

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[1]The case involves four intertwined families. Powell's parents are Kirk (Kirk) Favorite and Rachell (Rachell) Powell. Shantrell (Shantrell) Parker's parents are Shantrice Parker and Elijah (Elijah) Favorite. Robinson is Petitioner Powell's great uncle. Co-defendant Terence (Terence) Favorite is Elijah's brother. Co-defendant Ronald (Ronald) Robinson is Robinson's brother. As many of the people in this case share surnames, their names, as designated in parenthesis and assigned by the La. Court of Appeal, will be used herein. None of them are juveniles.

[2]Gavonte had survived two prior attacks. Elijah was charged with shooting Gavonte for impregnating Shantrell. In a second incident, Gavonte was shot to prevent his testimony against Elijah. Elijah's friends were charged and set for trial on August 8, 2018.

[3]There was no evidence that Powell or Leante knew Shantrell or Gavonte were there. Powell was acquitted of their murders that the State alleged Robinson committed in the house.

Robinson appeared in the doorway with a rifle, threatened Leante, and took Powell, Leante, their child and Shantrell's child to Robinson's house, threatening their lives on the way. After bragging about what he had done to Terence, West, Ronald, and his other people, Robinson announced it was time to "clean up," and made Powell leave with them. Near midnight, the bodies of Shantrell and Gavonte were found burning in a wooded area. Powell and Leante were terrified into staying at Robinson's home under his control until Kirk was released from jail.

Kirk Powell found himself charged, along with the men who had terrorized his family, in seven counts of a fourteen count indictment as one of Robinson's four co-defendants,[4] relative to murder, obstruction of justice and conspiracy to do both. (R.7-11) Powell's Motion to Sever the defendants was denied. (R.637,988). The Motion to Quash the indictment for misjoinder (R.78-85,130-133) was denied multiple times. (R.682-684,985-986; Suppl.R.14) The defense motion in limine to prevent the use of Robinson's out of court statements was denied, without requiring the State to establish there was an exception. (V10,p.8-13,342-344) The State proceeded to joint trial against Powell, Robinson and West on eleven counts. During trial, Powell's repeated objections to the use of Robinson's out of court statements were denied and a continuing objection to the misjoinder was made. (V.10, p.36) A second motion to quash was denied. (V10, p.302-303) At the conclusion of the State's case, Powell renewed his motion to quash based on misjoinder and was denied. (R.302-303; Suppl.R.14)

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[4]Robinson was named in all counts. Counts One to Four and Twelve to Fourteen did not involve Kirk Powell. Robinson and Powell were the only defendants in Counts Five to Seven; Powell was acquitted of Five and Six. Counts Eight and Nine named Robinson, Powell and West. All five co-defendants were charged in Counts Ten and Eleven.

Kirk Powell was acquitted of the murder charges, but was convicted of one count of conspiracy to commit second degree murder of Shantrell Parker and/or Gavonte Lampkin, in violation of La. R.S. 14:26(30.1), two counts of obstruction of justice, in violation of La.R.S. 14:130.1; and two counts of conspiracy to obstruct justice, in violation of La.R.S. 14:26(130.1). Powell's motion for new trial based on the misuse of Robinson's statements and the misjoinder was denied. (V1,43,V12,5) Twenty three year old Kirk Powell was sentenced to concurrent, aggregate sentences of forty years at hard labor. (V12,61). The Louisiana Court of Appeal affirmed the convictions. **Pet.App.A.** In a split 4-3 decision, the Louisiana Supreme Court denied discretionary review as to the admission of Robinson's statements and the misjoinder. **Pet.App.B**

REASONS FOR GRANTING THE WRIT

Despite the complexity of the case due to the number of defendants, their varying degrees of involvement, and the Constitutional and evidentiary issues involved with using Robinson's statements as evidence, the State elected a joint trial of Powell, Robinson and West. Powell was denied due process when severance was wrongly denied. The State used Robinson's out of court statements as evidence: a) the video recordings of Robinson's statements during the police's search of his house and car; b) Robinson's custodial statements to police after arrest; and c) Leante and Rachell's testimony about statements Robinson made to them. The State used Robinson's statements to convict Powell without establishing the co-conspirator hearsay exception of La. C.E. Art. 801(D)(3), or any other hearsay exception, contrary to precedents of the U.S. Supreme Court.

The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against" him, which includes the right to cross-examine those

witnesses.[5] Robinson's statements were the State's essential evidence of Powell's conspiracy and obstruction charges as the State's other evidence was only circumstantial. Robinson was Powell's co-defendant, who could not be made to testify. Powell was deprived of his right to confront and cross examine Robinson. The district court impermissibly allowed Robinson's unchallenged statements to go to the jury for determining Powell's guilt[6] and a majority of the Louisiana Supreme Court denied review.

The district court allowed the prejudicial joinder because the defendants were charged with conspiracy, and allowed Robinson's hearsay statements into evidence because of the conspiracy charges, without requiring even prima facie proof of a conspiracy. A majority of the Louisiana Supreme Court denied review. The State's misjoinder cannot be used to trample the Fifth, Sixth, and Fourteenth Amendment rights of Kirk Powell. The improper joinder of defendants denied Powell due process and his right to confrontation and a defense.

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[5]*Pointer* v. *Texas*, 380 U. S. 400, 404, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

[6]*Bruton v. United States*, 391 U. S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) held that the government cannot introduce a confession by a non-testifying defendant that names a co-defendant as an accomplice as it would violate his Sixth Amendment right to cross-examine witnesses. An instruction to the jury to disregard the confession when assessing the co-defendant's guilt cannot remove the constitutional problem. In this situation, a co-defendant's statements are inadmissible because of the effect that such a "powerfully incriminating extrajudicial statement[ ]" is likely to have on a jury. *Id.*, at 126, 135-136, 88 S. Ct. 1620, 20 L. Ed. 2d 476. The *Bruton* rule applies even when an accusatory statement does not expressly name the co-defendant, *Gray v. Maryland,* 523 U.S. 185, 189;118 S. Ct. 1151; 140 L. Ed. 2d 294 (1998); *Harrington* v. *California*, 395 U. S. 250, 252-253, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969), but it may not apply where the co-defendant's statements are "redacted to eliminate not only [a co-defendant's] name, but any reference to his or her existence." *Richardson* v. *Marsh*, 481 U. S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987); *Samia v. U.S.* 599 U.S. 635; 143 S. Ct. 2004; 216 L. Ed. 2d 597 (2023)

Prejudice by Joint Trial of Defendants

Where the evidence against Petitioner Powell was minimal on its own, the State gained a huge benefit by trying him jointly with Robinson and West. Powell's Motions to Quash for Misjoinder and the Motion to Sever, concerning the misjoinder of defendants,[7] were denied. When ruling on a motion to sever, a trial court must weigh the possibility of prejudice to the accused against the important considerations of economical and expedient use of judicial resources.[8] If it appears that a defendant will be prejudiced by the joinder, a district court may order a severance or provide whatever other relief justice requires. The district court's ruling on a motion to sever should not be disturbed on appeal absent a showing of an abuse of discretion.[9] The standard of review is *de novo*.[10]

In *Zafiro v. U.S.,* 506 U.S. 534; 113 S. Ct. 933; 122 L. Ed. 2d 317 (1993), the defendants were indicted on federal drug charges and brought to trial together under F.R.Cr.P. 8(b) on which

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[7]Under La. C.Cr.P. Art. 494, "Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."La. C.Cr.P. Art. 495: "The objections of misjoinder of defendants or misjoinder of offenses may be urged only by a motion to quash the indictment."

[8]*State v. Grimes*, 11-0984, p. 50 (La. App. 4 Cir. 2/20/13), 109 So.3d 1007, 1035, writ denied, 13-0625 (La. 10/11/13), 123 So.3d 1216.

[9] *State v. Davis*, 92-1623 (La. 5/23/94), 637 So.2d 1012, 1019; *State v. Deruise,* 98-0541, p. 7 (La. 4/3/01), 802 So.2d 1224, 1232.

[10]The Court said that "A claim of misjoinder is a matter of law that we review *de novo*, but we may affirm if we find that misjoinder occurred but that the error was harmless." *United States v. Whitfield,* 590 F.3d 325, 355 (5th Cir. 2009); see also *United States v. Maggitt,* 784 F.2d 590, 595 (5th Cir. 1986); *United States v. Manzella,* 782 F.2d 533, 540 (5th Cir. 1986); *State v. Prudholm*, 446, So. 2d 729 (La. 1984).

La. C.Cr.P. Art. 494 was patterned. The Court held that severance is not *required* as a matter of law when co-defendants present "mutually exclusive defenses." Rather, severance should be granted if there is a serious risk that a joint trial would compromise a specific trial right or prevent the jury from making a reliable judgment about guilt or innocence.[11] The risk of prejudice will vary with the facts in each case. Although separate trials will more likely be necessary when the risk is high, less drastic measures, such as limiting instructions, often will suffice.[12]

Powell was entitled to severance where he had no part of the Benn murder that was the basis of the State's theory that they "participated in the same act or transaction or in the same series of acts or transactions" that led to the other alleged crimes. The joinder demolished Powell's trial right to confrontation of Robinson and hampered presentation of his defense of duress. Most significantly, the joinder with the four other defendants created confusion and promoted guilt by association.

In a *per curiam* on a co-defendant Ronald's pre-trial writ **about this case** ,[13] the Louisiana Supreme Court said: "***here, the case is complex, and defendant is accused of a broad conspiracy***

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[11]Under F.R.Cr.P. 14, identical to La. C.Cr.P. Art. 495.1: "If it appears that a defendant or the state is prejudiced by a joinder ...., the court may order separate trials, grant a severance of offenses, or provide whatever other relief justice requires."

[12]Louisiana law is consistent with the federal rules and precedents. The Louisiana Supreme Court in *State v. Craddock*, 2023-01147, pp. 1-2 (La. 11/15/23), 373 So. 3d 47, 47-48, said that as a general matter, jointly charged defendants shall be tried jointly unless.....justice requires severance. La. C.Cr.P. Article 704 does not provide precise standards for ruling on a motion for severance. The "antagonistic defense" standard was judicially developed. *State v. Lavigne*, 412 So.2d 993, 996-97 (La. 1982). It is an abuse of discretion to deny a motion for severance when the trial judge has been made aware that a defendant intends to lay blame for the offense at the feet of a co-defendant. *State v. Webb*, 424 So.2d 233, 236 (La. 1982); *Bruton v. United State*s, supra.

[13]*State v. Ronald Robinson* 312 So. 3d 253; 2020-01389 (La. 03/09/21)

to obstruct justice in two separate murder investigations." The four conspiracy charges with seven different underlying offenses and five named defendants, were complicated and overwhelming for the unskilled jury, making it impossible for the jurors to give fair consideration to the elements of each count and whether they were proven individually as to Powell. The misjoinder prevented the jury from making a reliable judgment about Powell's guilt or innocence.

The first evidence the jury heard was about the four counts concerning the Benn murder and the dysfunction of the extended Powell family, even though Kirk Powell was not charged in those counts. That testimony about the Benn murder and the family dynamics poisoned the jurors against Powell. If tried separately, none of the evidence about the Benn incident would have been relevant or admissible. This evidence of West and Robinson's wrongdoing set the stage for the State's baseless depiction of Powell's involvement in Robinson's criminal undertakings.

In *U.S. v. Warren et al.* 702 F.3d 806 (U.S. 5th Ct. of App. 12/17/12), the Court reversed the conviction and ordered a new trial for former police officer Warren whose case was only tangentially relevant and marginally related to the other officers charged in the alleged cover-up. The Court found severance of the defendants was required where the joinder allowed the government to subtly link Warren with the egregious acts of his co-defendants. Powell's situation in this case was identical to Warren's. Powell's case had only a tangential relationship with the others and should have been tried separately.

In *U.S. v. Erwin et al.* 793 F.2d 656 (US 5th Cir. Ct. App. 1986), very little of the "mountainous evidence," pertained to Erwin and almost none of it applied directly, resulting in the reversal of Erwin's conviction that was only peripherally related to the co-defendants. The imbalance

became noticeable as the trial progressed. The prejudice from the joint trial "far outweighed" any benefit of judicial economy. Similarly in this case, while the State presented mountainous circumstantial evidence, none of it related to Kirk Powell. He was an afterthought in the State's case. He was even an afterthought in the Court of Appeal's review of the case. It was easy to get lost in the eleven counts and five named defendants. This record is voluminous, but testimony or reference to criminal activity by Kirk Powell is non-existent, unless one conflates Powell with the other defendants, as the Court of Appeal did, as discussed in detail on Page 11, infra. It was impossible for the jury to untangle the evidence and apply it against only the appropriate defendant and the appropriate charge.

The Louisiana Court of Appeal's conclusion that "neither Powell nor West allege that a co-defendant was antagonistic towards another" is absolutely wrong. Kirk Powell's defense, to the extent he was allowed to pursue it in the joined trial, was that any participation was the result of compulsion and duress occasioned by Robinson's threats, extortion, and intimidation of him and his girlfriend. His defense was antagonistic towards and blamed Robinson. Robinson's statements were used against Powell, making Powell's defense appear retaliatory.

In *United States v. Kelly*, 349 F.2d 720, 759 (1965), cert. denied, 384 U.S. 947, 86 S. Ct. 1467, 16 L. Ed. 2d 544 (1966), the Court recognized the danger that guilt of one of the defendants might "rub off" on the other. Even the possibility of this "guilt by association" has led courts to sever defendants. "The dangers of transference of guilt are such that a court should use every

safeguard to individualize each defendant in his relation to the mass."[14] The admissibility of unrelated misconduct "involves substantial risk of grave prejudice to a defendant."[15]

Powell was unduly prejudiced by harmful "spill-over" of the evidence against Robinson.[16] The burden of proof of the enumerated elements for each of the crimes was eased or lost due to the misjoinder. There was no evidence that even mentioned Powell other than his being in proximity to and related to Robinson, who was charged in all counts with four murders and an attempted murder. Robinson's violence "spilled over" on to Powell.

When there is no "series of acts unified by some substantial identity of facts or participants," joinder is not appropriate.[17] The Benn shootings occurred ten days before any crime alleged against Powell. Powell was not a participant and had no reason to participate in more crimes to cover the first. Powell was alleged to be far less culpable than Robinson. Powell's defense was that he was also a victim of Robinson, which also made them antagonistic. When many defendants are tried together in a complex case and they have markedly different degrees of culpability, the risk of prejudice is heightened,[18] requiring severance. The district court's denial of Powell's attempts to sever the defendants was clearly arbitrary in light of the other rulings of the court and actions of the State.

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[14]*Kotteakos v. U. S.*, 328 U.S. 750, 773, 774, 66 S. Ct. 1239, 1252, 90 L. Ed. 1557 (1946).

[15]*State v. Goza* 408 So.2d 1349 (La. 1982); See *State v. Moore,* 278 So. 2d 781, 787 (La. 1973) (on rehrg). *State v. Prieur,* 277 So. 2d 126, 128 (La. 1973) , citing 1 Wigmore, Evid. § 194 (3rd ed.).

[16]*United States v. Johnson,*713 F.2d 633, 639 (11th Cir. 1983), cert. denied, 465 U.S. 1081, 79 L. Ed. 2d 766, 104 S. Ct. 1447 (1984).

[17]*U.S. v. Warren et al., supra*; *United States v. Lane,* 474 U.S. 438, 106 S. Ct. 725, 88 L. Ed. 2d 814 (1986).

[18]See *Kotteakos* v. *United States*, supra.

Like Powell, co-defendants Terence and Ronald (Ronald) Robinson, Michael Robinson's brother, had lesser alleged roles. They were nonetheless charged with conspiracy to obstruct justice in Counts 10 and 11 with Robinson, Powell and West. There was more evidence introduced against Terence, who was with Robinson at every aspect of the day, than there was against Powell, yet Terence's case was severed.[19] The State's case against Powell was similar to their case against Ronald, yet his charges were reduced and severed.[20]

Kirk Powell was nothing more than a bystander. With no evidence specific as to Kirk Powell, the State was allowed to use the joint trial and Powell's blood relationship and proximity to Robinson to imply guilt. By trying Powell, West and Robinson together, the State got the benefit of each of them implicating the other, if nothing more than by association, and the admission of Robinson's statements incriminating the others without the test of cross examination.

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[19] A week before trial, Terence filed a motion to sever, which was granted *without opposition* on May 12, 2022. After the three defendant trial, Terence entered guilty pleas to Counts 10 and 11 and was sentenced to thirty *months*, whereas Powell was sentenced to twenty *years* for the same offenses. **Pet.App.1, fn.2-3**

[20]Ronald aggressively challenged the misjoinder and vagueness of the indictment. The Court of Appeal ordered the State to file another bill of particulars to inform Ronald of the nature of the alleged conspiracy to obstruct *State v. Robinson*, 2020-0040, p. 3 (La. App. 4 Cir. 3/05/20) (unpub'd), but the State responded "only that defendant was part of a conspiracy to remove and destroy the victims' bodies and ballistic and other evidence with the intent to distort the results of criminal proceedings." Ronald's second motion to quash the indictment was denied and the Court of Appeal denied writs. *State v. Robinson*, 2020-0427 (La. App. 4 Cir. 11/2/20) (unpub'd).

In a *per curiam*, the Louisiana Supreme Court in *State v. Ronald Robinson* 312 So. 3d 253; 2020-01389 (La. 03/09/21) reversed and remanded to the district court again to give the State a final opportunity to expeditiously provide sufficient particulars. Instead, the State reduced the charges in a plea deal with Ronald. On August 17, 2021, Ronald entered a no contest plea to two counts of failure to report the commission of a felony, violations of La. R.S. 14:131.1, with stipulations that he would not testify in the pending case and the State would not enhance the sentence with his prior felonies. Ronald was sentenced to serve two concurrent terms of one year, to be served in Parish Prison, with credit for time served and was discharged that day. (R.15)

The jury in Powell's case was lost in the swarm of charges, defendants, and witnesses. Powell's father, mother, sister and girlfriend were State witnesses as to *Robinson,* but their appearance *for the State* when Powell was also on trial made it seem like Powell's family was testifying against him and tainted the jury. This piling on of defendants and charges had only one purpose: to prove guilt by association and so overwhelm the jury that evidence got muddled - even the Court of Appeal could not keep the facts and people in the case straight.

Due to the complexity of the charges, the number of defendants and characters, and the State's injection of tangential theories and allegations, the misjoinder so complicated this case that, even the Court of Appeal with a written record and plenty of time,[21] could not keep the facts and defendants straight. The prejudice of the misjoinder continued into the appeal, where the Louisiana Court of Appeal mixed up the defendants and conflated the evidence, reaching conclusions not based on fact, as set forth below:

The Court of Appeal wrongly attributed Michael Robinson's statements to Powell[22] causing the Court to erroneously conclude that Powell conspired to obstruct justice. In fact, Leante testified the pertinent statements were made by *Robinson*, called "Mike"by the prosecutor below:

Q, Eventually, though, does *Mike* start talking about it?
A. Yep.
Q. Who is he talking to?
A. He talking to Terence now; Terence and Nut and all them: Terence, Nut, Rayquan, Denzel.

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[21]Jurors were not allowed to take notes at trial while hearing 21 witnesses in 4 days on 5 sets of charges.

[22]The Court mistakenly said "Leante's testimony about ***Powell*** discussing a plan to dispose of Gavonte and Shantrell's bodies, the cleaning supplies needed to clean the crime scene, and then departing Robinson's apartment to accomplish the plan" Pet.App.A, p. 36.

Q. What is *Mike* saying at this point?
A. I got them bitches. Now it's time for me to go clean it up. I got to go get some bleach and all this and that: bleach and, you know, Fabuloso, to go clean it up." (R.611-612)

Additionally, the Court of Appeal mistakenly said that "Robinson and *Powell* planned to have Kirk arrested, and lured both Gavonte and Shantrell to the Powell residence so that they could kill them without interference." **Pet. App. A, p.28-29.**[23] This conclusion is wrong on many levels:

a) The Louisiana Court of Appeal confused Powell with *Terence* and used evidence about Terence to mistakenly find that Powell was part of the conspiracy. The testimony of Leante and Rachell was that Robinson and *Terence,* not Powell, planned and achieved the arrest of Kirk. Rachell testified that *Robinson and Terence* came "to brag" about having Kirk arrested. Kirk testified that Robinson and *Terence* committed the murders and planned his arrest. (V10,262-263). Kirk testified *Terence*[24] and Robinson had a motive and intent to kill Gavonte that Powell did not share. Moreover, the police also testified that Robinson and *Terence* met them at Kirk's house, gave them the gun, and stayed to revel in Kirk's arrest. There was no testimony that Powell had any role in the arrest of his father. An accurate review of the evidence, without incorrectly intermingling the defendants, shows that Powell did *not* conspire to have Kirk arrested.

b) There was no evidence to support the Court of Appeal's conclusion that "Powell had *taken* (the firearm) from Kirk" to give to Robinson. Rather, Leante testified that Kirk had entrusted the

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[23]In all of the circumstances cited by the Court of Appeal in the paragraph leading up to this mistaken conclusion, the Court correctly stated that Robinson and Terence got Kirk arrested. **Pet. App. A, p.28.** But in its conclusion, the Court wrongly inserted "Powell" for Terence. Later, the Court of Appeal wrongly lumps all "defendants" together without differentiating their roles or interests. **Pet. App. A, Footnote 9, Page 29.** The Court assumes a connection that was never proven.

[24]Gavonte was about to testify against Terence's brother, Elijah, in an August 18, 2018 trrial.

firearm to Powell, his son, for safekeeping. Robinson and Terence burst in and unexpectedly woke them on July 29 to get the gun. (V11,598,601) Powell only gave the gun to Robinson so that he would leave. (V11,602) Powell should not have been tried jointly with Robinson.

c) The Court's inaccurate conclusion that the use of "Powell's residence" was evidence he was part of the conspiracy overlooks the detective's testimony that the quadraplex on Tullis Drive had no locks. There was no key. Entry was made through a window. (V11,599) There was nothing to prevent Robinson from entering and there was no evidence he was invited there. Many family members lived there from time to time (V11,594) , including Shantrell and her mother. One of the two prior shootings of Gavonte occurred in that block. (V11,360, 594) Powell and Leante did not use the Tullis Drive place as their stable address. (V11,485-486) Leante testified that Robinson came to the quadraplex that day without the permission or agreement of Powell or herself. While they sometimes stayed at the quadraplex, it was not Powell's residence.

d) There was no evidence that Powell *lured* anyone to the quadraplex. To the contrary, Leante testified that she and Powell stayed home all day. Around 6:00 p.m., Robinson just showed up. A scared and nervous Powell took her outside to talk about what to do. With the children inside, clearly neither of them expected there to be a murder. It is an unreasonable inference that Powell participated in, or consented to, Robinson bringing Shantrell and Gavonte to be murdered where Powell was staying with his girlfriend and child. Keyon (Keyon) Powell testified that right after

Kirk's arrest, Shantrell called and said *Robinson* picked them up to take them to get drugs.[25] There was no evidence that Robinson had communicated his ruse to Powell or that Powell agreed to it.

The Court of Appeal's factual errors are evidence of the complexity of the case that the jury had to consider without notes or a written transcript. Based on these examples of the Court of Appeal confusing the defendants and the facts, it was clearly too much to ask of the jury. The denial of the motion to quash based on misjoinder violated Kirk Powell's due process rights to a fair trial. The defendants should have been severed.

That the jury acquitted Petitioner Powell on the murder charges, but convicted him on the conspiracy charges, under the convoluted circumstances of this trial, was the unsurprising and virtually inevitable result of the misjoinder of defendants on conspiracy charges. The Krulewitch warning[26] noted that the risk to a codefendant of guilt by association was abnormally high in a joint conspiracy trial where the jury is asked to digest voluminous testimony,[27] and accurately predicted what happened in Powell's case.

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[25]The Court of Appeal also cited Rachell's double hearsay statement *that was not admitted into evidence*: "Rachell also testified that she heard Shantrell say on the phone that she was heading to Powell's residence with Robinson to purchase Tramadol shortly before she was killed."

[26]"As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed." 336 U.S. 440, 453, 69 S. Ct. 716, 93 L. Ed. 790. See A. Goldstein, The Krulewitch Warning: Guilt by Association, 54 Geo. L.J. 133 (1965); Derby & Orfield, Cases on Criminal Law and Procedure, 64 (1950).

[27]"There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other." *Krulewitch v. United States*, 336 U.S. 440, 454, 69 S. Ct. 716, 93 L. Ed. 790.

The misjoinder of Kirk Powell's case with the older, violent Robinson, seen in video as boastful, arrogant, and unrepentant when making his statements, asserted an inference of a criminal disposition to Kirk Powell and instilled jury hostility. It appeared that Powell was part of a crime family, when he in fact had no part of Robinson's side of the family. The jury could not fairly consider all of the elements of every charge and was more likely to find Powell guilty based on his mere association with Robinson. Further, the misjoinder forced Powell to trial with Robinson, a man who controlled him and of whom he was afraid.

Lastly, the joint trial was prejudicial to Powell where Robinson's statements were used against him. Cases with *Bruton* issues are exceptions to the general rule that jointly indicted defendants shall be tried jointly because of the inability to cross-examine Robinson as to his statements, especially where, as here, Robinson's statements were purposely misleading or self-serving.[28] The district court should have either required separate trials for the co-defendants or excluded Robinson's statements. In light of the prejudice committed in this multi-defendant conspiracy trial, certiorari should be granted to consider whether the misjoinder of the defendants denied Powell a fair trial as guaranteed by the Fifth and Fourteenth Amendments and/or whether the State's extensive reliance on the coconspirator exception to the hearsay rule in the joint trial deprived Powell of his Sixth Amendment constitutional rights of confrontation and cross-examination.

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[28]*Pointer v. Texas*, 380 U.S. 400, 407 (1965); *Douglas v. Alabama*, 380 U.S. 415 (1965); *Brookhart v. Janis*, 384 U.S. 1 (1966); *Bruton*, supra; *Barber v. Page*, 390 U.S. 719 (1968); *Roberts v. Russell*, 392 U.S. 293 (1968); *Dutton v. Evans*, 400 U.S. 74 (1970)

B. Denial of Confrontation: Improper Admission of Co-Defendant's Statements

The main and essential purpose of the Sixth Amendment[29] is to secure the opportunity of cross-examination to test the believability and truthfulness of the testimony by impeaching or discrediting the witness.[30] A co-conspirator's out of court statement is not hearsay under La. C.E. Art. 801(D)(3)(b) if the statement is made by a declarant while participating in a conspiracy to commit a crime and in furtherance of the object of the conspiracy, provided that a prima facie case of conspiracy has been established.[31] Where the requirements of Art. 801(D)(3)(b) are not established, Robinson's statements are clear hearsay, which could not be admitted. It was reversible error to allow Robinson's statements to be presented to the jury in violation of Powell's Sixth Amendment constitutional right to confront and cross-examine Robinson.

Powell's pre-trial motion to exclude Robinson's statements was denied without a hearing. During trial when Robinson's statements were put on display, Powell's renewed his objection and his motion to quash for misjoinder. (V4,682-684). He entered a continuing objection. (V10,36) Without fulfilling the co-conspirator requirements, the district court improperly admitted statements

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[29]The right to cross-examine witnesses is extended to the States by the *Fourteenth Amendment*. *Cruz v. New York,* 481 U.S. 186, 189, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987)*;* La. Const. art. I, § 16; *State v. Robinson*, 01-0273 (La. 5/17/02), 817 So. 2d 1131, 1135.

[30] *Maryland v. Craig*, 497 U.S. 836, 845, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). In *Mattox v. U. S.*, 156 U.S. 237, 242, 15 S. Ct. 337, 39 L. Ed. 409 (1895). *Dowdell v. United States*, 221 U.S. 325, 31 S. Ct. 590, 55 L. Ed. 753 (1911); 5 Wigmore on Evidence, §§ 1364, 1397 (3d Ed. 1940).

[31]See also Federal Rule of Evidence 804(b)(3); Before these statements could be admitted into evidence, the State had to establish by competent evidence (1) a prima facie case of conspiracy, (2) that the statement sought to be introduced was made while the conspiracy was ongoing, and (3) that the statement itself was made in furtherance of the conspiracy.

of Robinson at joint trial including Leante's testimony about Robinson's admission to the killing and the need to clean up; Rachell's repetition of Robinson's admissions, bragging and plans; and the video and audio recordings made by police of Robinson's statements at his house during the search and his later custodial statement.

Before reaching the issue of the existence of a conspiracy, the determination of whether the co-conspirator exception is established looks at the substance and timing of the statements and the context in which they were made.[32] The State's failed to show that Robinson's statements were made while the conspiracy was ongoing and that the Robinson's statements were made in furtherance of the conspiracy. On those factors alone, the exception did not apply and the statements should have been excluded.

The alleged conspiracy to murder had ended when, according to Leante, Robinson said "I got them bitches," while at his house after leaving the quadraplex. (V12,612). Likewise, Robinson's statements in the police search video, his custodial statement to police and his boasting to Rachel were all made by Robinson days after any purported conspiracy had ended. In *Krulewitch v. United States*, 336 U.S. 440, 93 L. Ed. 790, 69 S. Ct. 716 (1949), the Court reversed defendant's Mann Act conviction, finding that statements made *after* the completion of the conspiracy did not come within the co-conspirator exception. The "confession or statement made by a confederate after the termination of the conspiracy may not be introduced or used at the separate trial of another to prove his guilt."[33] Moreover, Robinson's bragging, his attempts to lay blame on others, and his denials

[32]*State v. Myers,* 545 So. 2d 981 (La. 1989); *State v. Michelli*, 301 So. 2d 577 (La.1974).

[33]*Michelli*, supra, citing 100 years of state law and *Mosley v. U.S.*, 285 F.2d 226 (5th Cir. 1960).

of personal responsibility were not in furtherance of the alleged conspiracy. Robinson had already moved on to other things when he made these statements. Yet the trial court mistakenly admitted them into evidence. The La. C.E. Art. 803(D) co-conspirators exception did not apply to them[34] as the prejudicial statements were not made "in furtherance of the objective" of the conspiracy.[35]

B.1. No Prima Facie Case of Conspiracy

In *Glasser v. United States*, 315 U.S. 60, 74-75, 86 L. Ed. 680, 62 S. Ct. 457 (1941), the Supreme Court stated, "such declarations are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof *aliunde* that he is connected with the conspiracy. Otherwise hearsay would lift itself by its own boot straps to the level of competent evidence." In *United States v. Nixon*, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974), the Court confirmed that the prerequisite has constitutional implications. There must be

> "a sufficient showing, *by independent evidence*, of a conspiracy among one or more other defendants and the declarant and if the declarations at issue were in furtherance of that conspiracy. . . .These formulations, though written in terms of evidentiary rules, acquire basic constitutional overtones when the effect is considered of a rule which would make acts or declarations admissible against a defendant who had neither committed nor authorized them."[36]

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[34]In *State v. Boudreaux* 396 So. 2d 1303 (La. 1981), the theft conviction was reversed where the alleged coconspirator's statement was made *after* the supposed conspiracy was at an end. The other evidence was not sufficient to convict without the statement.

[35]Art. 801, comment (g) states that the "in furtherance" requirement is meant to guard against abuse of this controversial hearsay exclusion. It is intended to be applied strictly, and independently of and in addition to the durational requirement. (Citations omitted.)

[36]See also La.R.S. 15:455 allows acts of co-conspirators to be imputed to each other only where "*a prima facie case of conspiracy must have been established"* and applies the Code of Evidence to the determination. La. C.E. Art. 801, Comment (f) adds that the highly prejudicial effect of co-conspirators' statements warrants this increase in the rigor of the test for admissibility. See

Powell's pre-trial motion to exclude Robinson's statements was denied without a hearing and without a determination that there was a conspiracy. In pre-trial discovery hearings, not specific to the motion to quash and/or motion in limine, the State only showed that two people,[37] Robinson and Terence, committed the acts of July 29, 2018, and there was no showing that Powell either committed or conspired to commit the criminal act. The trial court must *itself determine whether there was in fact a conspiracy* based on substantial, independent evidence, that may be direct or circumstantial.[38] Without the an initial finding the conspiracy existed, the admission of Robinson's statements violated Powell's Sixth Amendment rights.

Instead of assessing the evidence, the district court jumped right to a presumption that a conspiracy existed based solely on the State's representations and that there were five named

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generally Kessler, "The Treatment of Preliminary Issues of Fact in Conspiracy Litigations: Putting the Conspiracy Back Into the Co-conspirator Rule," 5 Hofstra L. Rev. 77 (1976). See also 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 104[05], at 104-44 (1981).

[37]"The fact, alone, that two or more have committed the crime charged is not sufficient to establish a prima facie case of conspiracy." *State v. Carter*, 326 So.2d 848 (La.1975); *State v. Clark*, 387 So. 2d 1124, 1129-1130 (La. 1980) In *Carter*, the Court said, "the existence of a conspiracy...is a mixed question of law and fact," and emphasized the two part process should not be confused. Until the initial determination is made by the court, the existence of the conspiracy should not be a question of fact for the jury.

[38]*State v. Dupree*, 377 So. 2d 328 (La. 1979). Similarly in the federal system, see 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 104[05], at 104-48 (1981); *United States v. James*, 590 F. 2d 575 (5th Cir. 1979: A pretrial hearing on admissibility of the declaration is practical and preferable; *Nixon*, 418 U.S. 683, 94 S. Ct. 3090, 3104, 41 L. Ed. 2d 1039, citing *United States v. Vaught*, 485 F.2d 320, 323 (CA 4 1973); *United States v. Hoffa*, 349 F.2d 20, 41-42 (CA 6 1965), aff'd on other grounds, 385 U.S. 293, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966); *United States v. Santos*, 385 F.2d 43, 45 (CA 7 1967), cert. denied, 390 U.S. 954, 88 S. Ct. 1048, 19 L. Ed. 2d 1148 (1968); *United States v. Morton*, 483 F.2d 573, 576 (CA 8 1973); *United States v. Spanos*, 462 F.2d 1012, 1014 (CA 9 1972); *Carbo v. United States*, 314 F.2d 718, 737 (CA 9 1963), cert. denied, 377 U.S. 953, 84 S. Ct. 1625, 12 L. Ed. 2d 498 (1964); *State v. Sheppard*, 350 So.2d 615 (La.1977); *State v. Kaufman*, 331 So.2d 16 (La. 1976), cert. denied, 429 U.S. 981, 97 S. Ct. 495, 50 L. Ed. 2d 591 (1976)

defendants. The district court made the existence of a conspiracy an issue for the jury and allowed the jurors to use Robinson's inadmissible statements to make the determination. This procedure was found lacking in *Myers*, supra. The concurrence in *Krulewitch* criticized the practice of allowing the State to admit the hearsay statements of an alleged co-conspirator into evidence at trial while provisionally claiming that evidence of the conspiracy will be provided. Under such a procedure, the jury is allowed to assume that a conspiracy exists. It poisons the well. If the conspiracy is not ultimately established, jurors cannot legitimately disregard the provisionally admitted hearsay, especially in a complex and lengthy trial like this one.

Not only did the district court fail to find that Powell was in a conspiracy with Robinson before admitting Robinson's statements, the evidence was insufficient to make such a finding. In *State v. Lobato*, 603 So.2d 739, 746 (La. 1992), the Louisiana Supreme Court explained that a prima facie case of conspiracy is presented when the State introduces evidence which, if unrebutted, would be sufficient to establish the facts of the conspiracy.[39] Robinson's statements may be considered in making the preliminary determination of whether there was prima facie evidence of a conspiracy, but his statements *by themselves* will not establish a prima facie case of conspiracy. The Court in *Myers* found that the Louisiana legislature apparently adopted the view expressed in *Bourjaily.*[40]

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[39]*State v. Nall*, 439 So. 2d 420 (La. 1983).

[40]*State v. Myers,* 545 So. 2d 981 (La. 1989); *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987).In response to *Bourjaily*, Congress amended Fed. Rule 801(d)(2) to specifically note, "the contents of the statement shall be considered *but are not alone sufficient to establish the existence of the conspiracy* and the participation therein of the declarant, and the party against whom the statement is offered. . . ." Other federal courts have held that the existence of the conspiracy must be established by admissible evidence apart from the questioned statement itself. *Glasser v. United States*, 315 U.S. 60 (1942); *United States v. James*, 590 F. 2d 575 (5th Cir. 1979);

In *Myers*, the Court found no prima facie case of conspiracy were the statements of the defendants"were practically the only evidence presented at the hearing."[41] The *Myers* circumstances also occurred here. There was no evidence of a conspiracy independent of Robinson's hearsay statements. There was no physical evidence implicating Powell. Only Robinson's statements were offered to prove the conspiracy. The circumstantial facts in this case were largely supplied by Powell's girlfriend and family members and are not in dispute. The speculative inferences made by the State from their testimony do not substitute for proof. While Powell's family testified against Robinson, they said nothing against Powell to infer a conspiracy. As the State failed to present a prima facie case of conspiracy, Robinson's statements were inadmissible in Powell's trial for conspiracy and obstruction.

The jury's conviction of Powell on the conspiracy counts is not determinative of the issue as to whether sufficient evidence of a conspiracy was presented *before* Robinson's statements were admitted under the co-conspirator exception. Put another way, here, the jury was allowed to presume there was a conspiracy which allowed them to hear Robinson's statements before they considered whether the evidence of conspiracy was proven beyond a reasonable doubt. It begged the question.

Kirk Powell is entitled to judicial review of what he *individually* did on July 29, 2018, to determine if there was evidence of *his* participation in a conspiracy. He did not get that from the trial

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Accord *State v. Johnson*, 438 So. 2d 1091 (La. 1983).

[41]The *Meyers* Court said that that, "The element missing from all of the State's evidence and inferences therefrom is any evidence of a conspiracy. The State presented *no* evidence at the hearing to corroborate a finding of conspiracy. There is no physical evidence retrieved from the crime scene in the record...."

court, the jury, or the Louisiana Court of Appeal. The elements of conspiracy are: (1) an agreement or combination of two or more persons for (2) the specific purpose of committing a crime, ***plus*** (3) an act done in furtherance of the object of the agreement or combination.[42]

First, there was no direct evidence[43] of an agreement to murder or obstruct justice.[44] Despite law enforcement investigation (V1,252-259) of the alleged co-conspirators phones, there was no evidence of any communication, planning or agreement among the alleged conspirators. (V11,467) Powell made no statements to police. There was no evidence that Powell agreed to Robinson's motive to "get" Gavonte.[45] Moreover, Powell was close to Shantrell and Gavonte. He did not agree with Robinson's purpose.

There was evidence that the five named co-defendants were together only one time, at Robinson's house on July 29, but Powell was not there voluntarily. Leante testified that they had

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[42]*State v. Toby,* 395 So. 3d 831; 2023-00722 (La. 10/25/24)

[43]The Court in *State v. Bradley* 272 So. 3d 94; 2018-0734 (La.App. 4 Cir. 05/15/19) upheld the conviction for conspiracy to obstruct justice where a co-conspirator testified as to Bradley's willing participation in hiding, removing, and destroying evidence to disrupt the murder investigation Unlike *Bradley*, in the case at bar, none of the alleged co-conspirators testified.

[44]In *Krulewitch*, the concurrence noted that a definite agreement "is the gist of the offense" and criticized the tendency of courts to dispense with its proof. "The focus in a conspiracy charge is on the dimensions of the alleged illegal agreement to pursue a common purpose or goal or to achieve various objectives. *U.S. v. Erwin et al.* 793 F.2d 656 (US 5th Cir. Ct. App. 1986)*; United States v. Marable,* 578 F.2d 151, 153 (5th Cir. 1978); *United States v. Perez,* 489 F.2d 51, 62 (5th Cir. 1973), *cert. denied*, 417 U.S. 945, 94 S. Ct. 3067, 41 L. Ed. 2d 664 (1974); *United States v. Morado,* 454 F.2d 167, 171 (5th Cir.), *cert. denied*, 406 U.S. 917, 32 L. Ed. 2d 116, 92 S. Ct. 1767 (1972).

[45]Rachell, as noted by the Court, testified that *Robinson* stated that Gavonte was "trying to set [him] up with [Kirk]." Robinson needed to get Kirk, Shantrell's protector, so that Robinson could get to Gavonte. *Only* Robinson was saying, "I gotta get that nigga 'cause I'm hearing they saying he trying to take my freedom." (V11,570-571,630) Robinson's statement about Gavonte was personal.

been taken there under threat and at gunpoint. Powell had not agreed to be there and he was not part of the plan. It would not have been necessary to threaten Powell or hold them hostage if Powell had been a co-conspirator or had agreed to let Robinson use the house.

In Leante's testimony about *Robinson's* statements regarding the cleaning supplies and needing to clean up,[46] she said Robinson made the statements to "his people" and listed them. The list did not include Powell. Leante testified that Robinson was telling his plan to "all of them" and again gave a list that did not include Powell.[47] Powell made no agreements with them.[48] No one testified that Powell uttered a word or gave any type of consent to Robinson's actions or statements.[49]

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[46]The Court of Appeal got confused and mistakenly attributed this statement to Powell, see Page 13-14, supra, for transcript excerpt.

[47]Q. When you say "his people," who are you referring to?
A. Um, Nut, Rayquan, (spelled phonetically) Ezell, (spelled phonetically) Terence. Everybody was over there.---
Q. Who is he talking to?
A. He talking to Terence now; Terence and Nut and all them: Terence, Nut, Rayquan, Denzel.(R.611-612)

[48]In *State v. Njoku*, 20-13 (La. App. 3 Cir 03/10/21), 312 So. 3d 693, the Court found the evidence was insufficient to convict Njoku of conspiracy to commit aggravated battery where not a single witness testified that Njoku planned or conspired in advance, making the evidence "woefully insufficient."

[49]*Cf.* In *State v. Speaks* 204 So. 3d 1167; 16-163 (La.App. 5 Cir. 12/07/16), writ denied 2017 La. LEXIS 2382 (La., Oct. 16, 2017), there was evidence that the two co-defendants attempted to cover-up their crimes and then agreed, in their e-mails and phone calls, to not say anything to the police. In *State v. Griffin,* 169 So. 3d 473; 14-251 (La.App. 5 Cir. 03/11/15), there were recordings of jailhouse calls of discussions between conspirators about how to handle the State's only witness. In *State v. Tatum,* 09-1004, p. 11 (La. App. 5 Cir. 5/25/10), 40 So.3d 1082, Tatum removed a gun from his premises and asked the co-conspirator over the phone to hold it at a time that *both* parties believed the gun had been used in a shooting. In these three cases, the Courts found sufficient evidence of an agreement for conspiracy to obstruct justice.

After Robinson's bragged that ***he*** "killed them bitches," Robinson announced to his people that "Now it's time **for me** to go clean it up." It was not a call to arms. Leante Wilson testified that, without discussion or agreement, the men left Robinson's house. There was no evidence that Powell agreed or joined Robinson's unstated purpose. Obedience gained by threats is not a voluntary agreement.[50] Robinson's "people" were there to keep Leante and Powell from leaving and going to police. That Powell followed the men while his girlfriend and child continued to be held hostage is not evidence that Powell agreed or intended to obstruct justice. Based on Robinson's earlier threats, if either Powell or Leante had tried to leave, it would have jeopardized the other. The State failed to prove Powell willingly, knowingly, and voluntarily agreed to a conspiracy to obstruct justice, murder, or destroy evidence of the murders.

Similarly to the lack of evidence of an agreement, the State also failed to prove that Powell had specific intent to murder Shantrell and Gavonte or to tamper with evidence of crimes he wanted no part of and had nothing to do with. According to all of the State witnesses, Powell loved Shantrell like a sister and had no conflict with Gavonte. (V10,161;V11,551,625, 630) From the testimony, Robinson had free reign on July 29, 2018, using Tullis Drive, manipulating the arrest of Kirk, and doing whatever he wanted. Powell was powerless to stop him. Robinson had Powell's father incarcerated. Powell's only intent that day was to get himself, Leante, and his child away from Robinson safely. When Powell and Leante were finally able to leave, there was no evidence that

[50]Where Powell was acting under duress, as described by State witness, Leante, the lack of evidence that Powell refused Robinson's demands or that Powell failed to called police are not circumstances that can be used to infer a conspiracy, as the Louisiana Court of Appeal mistakenly found.

Powell fled from New Orleans to avoid police. He did nothing that inferred guilty knowledge. He did nothing to facilitate the murders.[51]

While the State showed circumstantially that Gavonte and Shantrell were killed by Robinson and that someone burned and destroyed evidence of the killing,[52] the State did not prove that *Powell* committed an overt act to facilitate the murders and did not prove that Powell was a principal or a co-conspirator to any overt act necessary to the murder or the obstruction. The evidence does not support the Court of Appeal's mistaken conclusion that Powell's presence at the quadraplex made him complicit. The jury heard evidence of Powell's presence at Tullis Drive and acquitted him of the murders. Powell's presence outside the apartment is not an overt act that proved a conspiracy.

Moreover, the Court of Appeal's mistaken reliance on "surveillance footage" is not applicable to *Powell*. The only surveillance footage in evidence was from a neighborhood camera

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[51]*Cf. State v. Lang* 128 So. 3d 330, 13-21 (La.App. 5 Cir. 10/09/13) and *State v. Henry*, 12-545, (La. App. 5 Cir. 5/30/13) 119 So.3d 713, where shortly after the murder, Lang left town, altered her appearance, and lied to the police. The Court said, "Evidence of flight, concealment, and attempt to avoid apprehension is relevant and admissible to prove consciousness of guilt from which the trier-of-fact may infer guilt." In *Toby*, supra, the Court relied on evidence that the co-defendant brothers engaged in multiple phone calls and texts to each other before the murder and "[Toby] obtained a new phone the day after the murder. The Court held that the jury could reasonably infer guilty knowledge from the attempt to conceal electronic communications with [his brother]." Neither brother made statements that were used at trial.

[52]The New Orleans Fire Department found two bodies on a fire in a vacant lot near a wooded area around midnight on July 29, later identified as Shantrell Parker and Gavonte Lumpkin. There was no evidence regarding where they were killed or how they came to be in the woods. The cause of death for Shantrell and Gavonte was homicide from multiple gunshot wounds before their bodies were burned. (V9,84-85) The quadraplex was set on fire on August 13, 2018. Police officers video taped the execution of a search warrant on Robinson's house and car on August 15, 2018. Robinson talked incessantly during the search. The video was played for the jury. Several guns were seized, but none were linked to the bullets recovered in the autopsy. (V10,274-291, 310-318) After his arrest the same day, Robinson gave a taped custodial statement (V10,453-456) in which he blamed Kirk, Powell's father.(V10,477-481) The arsonist for either fire was never identified. (V10,320-341)

that filmed a white vehicle of unknown make or model. No witness identified it as Robinson's vehicle. Circumstantially, Robinson and *Terence* were together in Robinson's white car that afternoon, getting Kirk arrested and picking up Shantrell and Gavonte. (V11,437-443,540,562) The surveillance video did not depict how many people were in the vehicle and no one in the vehicle was identified. Not a single witness conclusively identified Robinson or his car as being depicted in the surveillance video. The surveillance video does nothing to establish that *Powell* was in the car or involved in a conspiracy to murder or obstruct justice.[53]

The Court of Appeal erroneously relied on assumptions about Robinson's lack of physical size, as allegedly seen in the surveillance video,[54] to conclude that " a rational fact finder could find that he would have required assistance from Powell and West to move the victims' bodies from Powell's residence to the woods." This erroneous inference by the Court of Appeal makes many inappropriate leaps without any evidence in support. Without evidence that *Powell individually* was involved, the law does not allow the Court of Appeal to make such speculative leaps.

The presumption that Shantrell and Gavonte were killed at the apartment and that there was evidence there was based on *Robinson's hearsay statements.* Leante did not testify that she saw

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[53]Further, there was no evidence as to how the bodies got to the burn site. There was no evidence any of the four co-defendants had a vehicle. The five men would have taken all of the space in the car. Earlier that day, police saw guns in Robinson's car but no gas cans or cleaning supplies and there was no evidence that they bought them. Despite a ten hour, meticulous search of Robinson's white car, there was no evidence that any bodies were ever in the car. The car had not been cleaned as there was evidence found relative to the earlier Benn murder, including the DNA of Denzel West. An officer testified that Robinson had red cans for gasoline in his car during the search two weeks later on August 15 (V10,405), but he did not say whether they were full or empty.

[54]The identity, size and weight of the shadowy figure in the surveillance video was not determined at trial.

Shantrell and Gavonte at Tullis Drive. She heard gunshots but never went back inside. There was no forensic evidence that they had been there. There was no testimony or evidence that anything had been left at Tullis Drive that had to be destroyed, removed, or damaged. Despite the apartment being one unit of a quadraplex, none of the neighbors reported the five men being there late on July 29, cleaning the site or moving anything from the site.

There is no evidence as to whether Shantrell and Gavonte were dead or alive when Robinson made everyone leave. If they were dead, it is not unreasonable to presume that one person might need assistance to move two bodies, but there was no direct or circumstantial evidence that Powell assisted. The State presented no evidence that any the men were seen going between Tullis Drive and the wooded area. There was no testimony, physical evidence, or forensic evidence of Powell or anyone being at or near the burn site in the wooded area where the bodies were found. There were no witnesses to the fire. No one was identified as setting it. (V11,487)

Leante did not know what the men did or where they went when they left Robinson's house. Leante did not testify than any of them smelled of bleach or fire or that they had changed clothes.[55] When the men returned, no one said where they had been. There is not even any temporal evidence that shows their return to Robinson's house coincided with the time the fire in the woods was reported. Even if the circumstances were broadly indicative of wrongdoing and gave rise to suspicion, they did not prove Powell's voluntary participation in a conspiracy.

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[55]Leante testified that when she went to the address to retrieve some belongings with her father more than ten days later, the place smelled of bleach, but the smell is unlikely to linger for that long.

Considering the entire record as it pertains to *Powell*, the State failed to prove a prima facie case that Powell was part of any conspiracy with Robinson. The State offered only speculation[56] based on Powell's familial relationship with Powell and Powell's geographical proximity to Robinson at the time that Robinson likely committed the murders. Mere association or proximity is not proof of agreement, specific intent to obstruct justice, or an overt act. As there was no conspiracy, there was no basis for allowing Robinson's statements to be used against Powell in a joint trial. There was no evidence that Robinson's statements were made during an on-going conspiracy or in furtherance of a conspiracy as needed for the co-conspirator exception to the hearsay rule. Robinson's statements were allowed in error, without cross examination, and in violation of the Sixth and Fourteenth Amendments. Kirk Powell was denied a fair trial when he was joined with Robinson for trial. The convictions must be vacated and new trial granted.

B.2. No Exception to Hearsay Rule Applies

Hearsay is a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted. The State was using Robinson's statements such as the ones about "getting them bitches" and "cleaning up" to prove their truth, that Robinson killed Shantrell and Gavonte at the Tullis address and there was evidence there or somewhere that needed to be destroyed. In *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), the Court said that the Confrontation Clause was not violated if the evidence at

[56]A conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm. Where a rational trier of fact could not reasonably conclude, without speculating, that the elements of the crime were proven, the defendant is entitled to an acquittal under *Hudson v. Louisiana*, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981); *State v. Trahan*, 20-1233, p.7 (La. 12/10/21), 332 So.3d 602, 606

issue fell within a firmly rooted exception to the hearsay rule or if there were particular indicia of reliability. Introduction of Robinson's hearsay declarations without proving an exception to the hearsay rule, especially at the joint trial of Powell, violated both the evidence laws[57] and Powell's Constitutional guarantee of the right to confront and cross-examine the witnesses against him.[58]

In *Crawford v. Washington*, 158 L. Ed. 2d 177, 541 U.S. 36, 124 S. Ct. 1354 (2004), the Court held, "Where testimonial evidence[59] is at issue . . . the Sixth Amendment demands what common law required: unavailability and a prior opportunity for cross-examination." In this case, without establishing a basis for their admission, the State was allowed to introduce into evidence: 1)Robinson's statements in the official police video of the search of his house and car; 2) Robinson's custodial statement to police; and 3) Robinson's inculpatory statements to Rachell and Leante. The official police videos of Robinson's statements during the search and after his arrest were clearly testimonial hearsay.[60] Robinson's statements to Leante and Rachell were also testimonial as they

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[57] La.R.S. 15:434 and La.C.E. Art. 801C.

[58]Sixth Amendment, U.S. Constitution; La.Const. Art. 1, s 16; *State v. Michelli*, 301 So. 2d 577 (La.1974); *Dupree*, 377 So. 2d at 330.

[59]"Testimonial" was not defined, but the Court included police interrogations, noting these are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed. *Crawford*, *supra* at 1374.

[60]In *Samia*, supra, the Court said that the co-defendant's formal, Mirandized confession to authorities is testimonial and thus falls within the ambit of the Sixth Amendment's Confrontation Clause, citing *Crawford* v. *Washington*, 541 U. S. at 52-54; "Statements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard" *Melendez-Diaz* v. *Massachusetts*, 557 U. S. 305, 329, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) (Thomas, J., concurring) (explaining that "the Confrontation Clause is implicated by extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"

went directly to the charged offenses. All of the statements were hearsay, testimonial evidence that was introduced without restriction, any limiting instruction, or any redaction,[61] *against* Kirk Powell to attempt to prove conspiracy and obstruction.

Robinson's hearsay statements used in the instant case were introduced for the purpose of asserting the truth of an out-of-court utterance (that he killed the victims at Tullis Drive and they had to clean up) in order to prove the conspiracy and obstruction charges against Kirk Powell. There was no basis for their admission in Powell's trial if he had been tried separately. In the joint trial, admission of Robinson's statements was contrary to *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), where the Court held that a defendant is deprived of his rights under the Confrontation Clause when his co-defendant's incriminating confession is introduced at their joint trial, even if the jury is instructed to consider that confession only against the co-defendant. Just like Powell's case here, the co-defendant in *Bruton* did not testify at the joint trial nor had he confessed. The trial court's denial of severance, denial of the motion to quash for misjoinder, and the denial of the motion in limine to prevent Robinson's statements authorized the State's prejudicial use of hearsay evidence in the case against Powell.

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[61] *Id*., at 50, 124 S. Ct. 1354, 158 L. Ed. 2d 177; *Richardson* v. *Marsh*, 481 U. S. 200, 206, 107 S. Ct. 1702, 95 L. Ed. 2d 176. In *Richardson* v.*Marsh*, the Court "decline[d] to extend [*Bruton*] to a redacted "confession that was not incriminating on its face, and became so only when linked with evidence introduced later at trial." 481 U. S., at 208,211, 107 S. Ct. 1702, 95 L. Ed. 2d 176. In such cases of inferential incrimination, the Court posited that "the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference." *Ibid.*

Robinson's statements were not "res gestae" as they occurred far after the crimes were committed.[62] Nor did they meet any other hearsay exception, including statements against penal interest. In *Williamson v. U.S.,* 512 U.S. 594; 114 S. Ct. 2431; 129 L. Ed. 2d 476 (1994), co-defendant Harris refused to testify against Williamson in a drug trial. The DEA agent testified about Harris' two pre-trial custodial statements[63] in which Harris confessed and implicated Williamson as the owner of the drugs, under the F. R. E. 804(b)(3)'s hearsay exception for statements against penal interest. The Court reversed, holding that the statements were against Harris' penal interest but they were not against Williamson's penal interest. The "against penal interest" hearsay exception did not apply to allow Harris' statement to be admitted in Williamson's trial. Likewise, Robinson's statements could not be used against Powell in this case. No hearsay exception applied.

B.3. Preserved Error Was Not Harmless

There were no eyewitnesses to the murders of Shantrell and Gavonte. Additionally, there was no physical evidence linking Powell to the crime. There was no direct evidence and not a shred of

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[62]In *Kay v. United States*, 421 F.2d 1007 (9th Cir. 1970), it was held that the confrontation clause is not violated by admitting into evidence the extra-judicial statements of a co-defendant made during the perpetration of the crime. *Res gestae* is defined as "events speaking for themselves under the immediate pressure of the occurrence, through the instructive, impulsive and spontaneous words and acts of the participants, and not the words of the participants when narrating the events." Robinson's statements were not res gestae.

[63]The Court in *Williamson* also clarified that the term "statement" in the Rules of Evidence means single remarks, rather than extended declarations, so that only those remarks within a confession that are individually self-inculpatory are covered by the exception. The bulk of most statements are inadmissible hearsay as they are self-exculpatory, neutral, attempt to shift blame or curry favor, or make collateral statements. A court may not just assume that a statement is self-inculpatory because it is part of a fuller confession, especially when the statement implicates someone else. In this case, Robinson's statements to police that implicate Kirk or deny culpability were not admissible.

forensic evidence that incriminated Kirk Powell. Powell's proximity to Robinson was the only circumstantial evidence against Powell. The State's case was entirely circumstantial and weak.

While the State had 21 witnesses, none of them had much to say about Powell. They testified only about Robinson's criminal behavior. The statements that Robinson made during the search of his house and car, in his custodial statement to police, and to Leante and Rachel, were the State's only evidence to connect loose ends in this case and was the strongest evidence presented by the State. There was no other evidence linking Kirk Powell to the murders, obstruction, or conspiracy to do either. Robinson's statements cannot be regarded as merely cumulative as there was no other evidence to implicate Powell except his association and presence with Robinson.

Sixth Amendment Confrontation errors are subject to a *Chapman v. California*,[64] harmless error analysis. The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. The factors to be considered are the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.[65]

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[64] *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). *See also Delaware v. Van Arsdall*, 475 U.S. 673 at 684, 106 S. Ct. 1431 at 1438; *State v. Hawkins*, 96-0766 (La.1/14/97), 688 So. 2d 473, 478; *State v. Wille*, 559 So. 2d 1321, 1332 (La.1990).

[65] *Delaware v. Van Arsdall*, 475 U.S. at 684, 106 S. Ct. at 1438; *State v. Robinson*, 01-273, pp. 9-10 (La. 5/17/02), 817 So. 2d 1131, 1137

The Louisiana Supreme Court denied discretionary review of this case in a 4-3 decision. **Pet. App. B** The Louisiana Court of Appeal feebly tried to avoid the reversible errors in this case by erroneously finding a waiver when one does not appear in the record and claiming that the issue was not preserved for review. Nonetheless, the Court of Appeal's opinion addresses the issues and mistakenly upholds the use of Robinson's statements and even relies on them in their review.

In fact, Kirk Powell preserved his complaints about being jointly tried with Robinson and Robinson's evidence in every way available.[66] Moreover, co-defendants Terence and Ronald successfully severed their cases and under La. C.Cr.P. Art. 842,[67] rulings on motions and objections made by one defendant apply to all co-defendants.[68] Powell's pre trial Motion to Quash for Misjoinder, that was re-urged repeatedly throughout trial, certainly met the requirements of La. C.Cr.P. art. 841(A).[69]

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[66]Powell joined in a Motion to Sever and Motion to Quash for Misjoinder early in the proceedings. (V1,78-85,130-133) Severance was denied. (V3, 637,988) Powell's motion in liminae to prevent the State from using statements of jointly tried co-defendants was also denied. (V10,8-13, 344) His motion to quash for misjoinder was denied before trial (V4, 985-986) and again during trial. (V4,682-684). He entered a continuing objection. (V10,36) and made multiple objections to hearsay.

[67]The Court of Appeal incorrectly said "there is no indication in the record that either Defendant filed his own motion to sever Defendants, nor is there any indication that they joined either of their former Co-Defendant's motions." **Pet. App.A** La. C.Cr.P. Art. 842 joins the motions.

[68]La. C.Cr.P. Art. 842 states, "If an objection has been made when more than one defendant is on trial, it shall be presumed, unless the contrary appears, that the objection has been made by all the defendants." *State v. Weary*, 2003-3067, p. 25 (La. 4/24/06), 931 So. 2d 297, 315; *State v. LaCaze*, 1999-0584 p. 21 n.37 (La. 1/25/02), 824 So. 2d 1063, 1079; *State v. Lavigne,* 412 So. 2d 993 (La. 1982). Even though a defendant had not made a motion for severance, because his co-defendant had done so, the co-defendant's motion was presumed to have been made on behalf of both defendants. *State v. Webb*, 424 So. 2d 233 (La. 1982).

[69]An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence. ... *It is sufficient that a party, at the time the ruling or order of the court is made or*

The admission of Robinson's out of court statements in the joint trial was not harmless. It has been held that *Bruton* violations can be harmless only where the statement inculpating the co-defendant is merely cumulative to other evidence offered at trial. That is not the case here. Robinson's out of court statements and the videos were essential to prosecution's case as the only inference of identity and intent.

Robinson's statement about "getting them bitches" set the time and place of the murders that was used against Powell due to his proximity. Robinson's alleged out of court statement "time to clean up" was the sole evidence of conspiracy to obstruct and obstruction of justice that implicated Kirk Powell in a way that no other evidence did. Robinson's audio and video statements further implicate Powell in this circumstantial evidence case.[70] The well preserved errors were not harmless.

The State took absolutely no precautions in regard to Robinson's statements that might allow statements otherwise excluded by *Bruton*.[71] There were no redactions. The videos were played in full. There was no limiting jury instruction that prohibited their use against Robinson only. Where the State was going to use these statements, it was the State's duty to move for separate trials under

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sought, makes known to the court the action which he desires the court to take, or of his objections to the action of the court, and the grounds therefor.

[70]In *State v. Micelli* 301 So. 2d 577 (La. 1974), the Court held that the reading of the coconspirator's statement that Micelli was a participant to the burglary after his co-conspirator refused to testify violated the defendant's right of confrontation. The Court further held that although the error might be perceived as harmless because there was other evidence that independently established Micelli's guilt, the Court reversed the conviction finding the error constituted a substantial violation of Micelli's federal and state constitutional rights.

[71]*Bruton*, 391 U.S. at 137, 88 S. Ct. at 1628; *Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151 (1998). See also *State v. Wright*, 225 So.2d 201 (La. 1969). *Cruz, supra.*

Gray and *Zafiro*, supra.[72] If the prosecutor is unable to redact a defendant's statement to remove incriminating references to a co-defendant, yet intends to use that statement against the defendant at trial, the defendants must be severed.[73] Kirk Powell is entitled to a new, separate, fair trial.

Under these circumstances, it cannot be said that the guilty verdicts actually rendered in this trial were surely unattributable to the errors of misjoinder and of admitting Robinson's out of court statements.[74] Reversal is mandated when there is a reasonable possibility the evidence might have contributed to the verdict.[75] This writ application should be granted. Powell's conviction must be set aside, his sentence vacated, and the case remanded for a new trial against Kirk Powell individually.

CONCLUSION

In view of the facts and law set forth herein and the entire record of the case, the Petitioner-defendant, Kirk Powell, prays that this Honorable Court grant this Petition for Writ of Certiorari and remand with an order for a new trial due to the misjoinder of his case with co-defendant Robinson which deprived him of a fair trial. Further, a new trial should be ordered due to the State's impermissible use of Robinson's out of court statements in the joint trial when the State did not prove an exception to the hearsay rule. The district court's admission of Robinson's statements into

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[72]*State v. Jenkins* 340 So.2d 157 (La. 1976).

[73]See *State v. Johnson*, 96-0959 (La. 6/28/96), 675 So. 2d 1098; *State v. Hunter*, 59 So. 3d 1258, 1259 (La. 2011), concurring opinion.

[74]In *Sullivan v. Louisiana,* 508 U.S. 275,279, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), the Supreme Court clarified that the inquiry "is ... whether the guilty verdict actually rendered in this trial was surely unattributable to the error." See also *State v. Code,* 627 So.2d 1373, 1384 (La. 1993).

[75]*Chapman v. California*, 386 U.S. 18, 23, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967); *State v. Gibson,* 391 So.2d 421, 426-27 (La. 1980).

evidence in a joint trial deprived Powell of his right of confrontation and cross examination. The errors were not harmless.

Respectfully submitted,

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