CASE NO. _____ EIGHTEEN DISTRICT

NORTH CAROLINA SUPEME COURT

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RONNIE LEE KIMBLE,
PETITIONER,)
) FROM GUILFORD (97CRS-39580; 23654; 98CRS-23485)

V.
) FROM COA99-981

STATE OF NORTH CAROLINA,
RESPONDEDNT,)

****

PETITION FOR WRIT OF CERTIORARI

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Now Comes the Petitioner, Ronnie Lee Kimble, who respectfully petitions the Supreme Court of North Carolina to issue its writ of certiorari pursuant to Rule 21 (a) (2) of the Rules of Appellate Procedure to review the N.C. of Appeals' blatant, erroneous application of U.S. Supreme Court case law.

STATEMENT OF THE CASE

This case came on for trial during the August 3, 1998 session of Guilford County Criminal Superior Court before Judge C. Preston Cornelius. The defendant was tried capitally before a jury and found guilty of first degree murder in 97CRS-39580; conspiracy to commit murder in 97CRS-23654 and first degree arson in 98CRS-23485. At the sentencing proceeding the jury recommended life imprisonment without parole, and the Court imposed the sentence. (Rp. 54). In addition, the court sentenced the defendant to 55

to 75 months on the arson charge to run at the expiration of the life sentence and 135 to 171 months on the conspiracy charge to run at the expiration of the arson sentence.

On October 3, 2000, the N.C. Court of Appeals released its opinion which denied petitioner relief. Petitioner's counsel "did not" petition this Court for review. Petitioner does not know Criminal Law and Procedure, and unable to petition this Court after the Court of Appeals denied him relief.

For a statement of the facts, please see the opinion of the Court of Appeals.

REASONS WHY WRIT SHOULD BE GRANTED

This Court should grant this petition because the ruling of the N.C. Court of Appeals is "contrary to, [and] involves an unreasonable application of, clearly established U.S. Supreme Court law."

In petitioner's appeal, the petitioner used Lilly v. Virginia, 527 U.S. 116, 144 L.Ed.2d 117 (1999) to show how he clearly was entitled to a new trail. The Court of Appeals completely misinterpreted Lilly and denied petitioner relief. The Court of Appeals' misinterpretation of Lilly was so blatant, that it was commented on by the author of Brandis & Brown on North Carolina Evidence Sixth Edition s 228 note 721, on page 244, the author wrote: "In State v. Kimble, 140 N.C. App. 153, 535 S.E.2d 882 (2000)... The author questions this court's final dictum on these issues. Under the Court's analysis in Lilly, as well as under the reasoning of Williamson v. United States, supra note 710, decided under Fed.R.Evid. 804(b) (3), the portion of the statement that inculpated defendant was not against dilatant's interest and should have been redacted." (Note: This was only recently brought to petitioner's attention by another inmate who has assisted petitioner).

The N.C. Court of Appeals clearly made an unreasonable application of the U.S. Supreme Court's ruling in Lilly. Petitioner presents his argument to this Court by "exactly" as it was presented to the N.C. Court of Appeals. The Court of Appeals "published" petitioner's case, and this erroneous application of U.S. Supreme Court case law should be reversed.

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING INTO EVIDENCE HEARSAY STATEMENT OF CODEFENDANT TED KIMBLE IN VIOLATION OF THE DEFENDANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO CONFRONT AND CROSS EXAMINE THE WITNESSES AGAINST HIM AS WELL AS IN VIOLATION OF NORTH CAROLINA LAW.

Assignment of error number 2. Record p 83.

In order for hearsay statement of a codefendant to be admissible against a defendant at trial they must qualify under some firmly rooted exception of the hearsay rule. Ohio v. Roberts, 448 U.S. 56 (1980). This is true even if, in a joint trail, the court instructs the jury the hearsay statements are not to be considered against the non-declarant defendant. Bruton v. U.S., 391 U.S. 123 (1968). Even though in the case sub judice codefendant Ted Kimble was not on trail with the defendant, the confrontation issues are just limiting on the state because Ted Kimble would not testify, i.e., he was called in voir dire before the court and invoked his Fifth Amendment Privilege not to testify. (T p 851). However, after hearing the defendant's motion in liming regarding hearsay statements made by Ted Kimble and repeated objections to specific testimony, the trial court ruled Ted Kimble's statements admissible on the grounds they qualified under the coconspirator exception of Rule 801(d)(E). Case law interpreting the rule is well settled: in order to be admissible the statements

must be made "during the course and in furtherance of the conspiracy," that is "made by a party to it [the conspiracy] and in pursuance of its objectives." Rule 801 (d) (E); State v. Marlow, 334 N.C. 273, 282 (1993), quoting State v. Mahaley, 332 N.C. 583, 593-94 (1992)

Although undersigned counsel raised some 19 assignments of error (basically all hearsay statements attributed to Ted Kimble), for purposes of this issue counsel would focus on the most damaging statements. Representative of the incriminating statements offered by the prosecution through Nicholes and Pardee was the testimony by Pardee. Pardee testified that he had been involved with Ted Kimble and Robert Nicholes in a theft ring that had stolen building supplies from houses under construction and on two occasions, items from retail stores, Home Depot and Northern Hydraulics. (T pp 1109-20). After telling the jury he was testifying pursuant to a deal with the prosecution for leniency on his felony charges from the theft ring, he testified that in late January of 1997 he was working for Ted Kimble at his building supply store and asked him if something was bothering him. (T p 1121). It is critical to note that this conversation took place more than two years after the murder of Patricia Kimble. According to Pardee, Ted Kimble then proceeded to indicate what was 'bothering him.' In answer to Pardee's request to be more explicit about what he meant, Pardee testified this exchange took place: "I asked him if he had any -- if he did it [the murder of his wife]. He said no, his brother Ronnie did it." (T p 1121). Pardee told the jury that Ted then told him on the night his wife was murdered he closed up Lyles Building Materials about 5:30 and then drove to his part-time job. (T pp 1121-22). Pardee testified That Ted Kimble told him the murder was committed for the insurance money, but admitted

essentially that he realized that he wasn't going to be able to collect the policy wasn't in effect because his wife had not taken a physical. (T p 1122).

The prosecution also offered a double hearsay statement purported from Ted Kimble to Pardee that Pardee never testified to. This was brought in through Ann Mauney, an insurance investigator who testified Pardee told her: "Ted said his brother, Ronnie, had taken care of the murder, because he, Ted, didn't want to be married anymore." (T p 2659). In addition, the prosecution offered the testimony of Robert Nicholes who told the jury that after he had become close to Ted in the theft ring, Ted, while not admitting that he had killed his wife, did admit that he was involved: "And I flat out asked him 'Did you have anything to do with — or did you kill Patricia, or kill your wife?' And he said no. And then I asked if he had anything to do with it, and he said yes, he did." (T p 1032). When coupled With Pardee's statement, this was the equivalent of naming the defendant as the 'trigger man.'

In order for these statements to be admissible, this Court must be convinced that first, the statements were made during the course of this conspiracy and second that they were made in furtherance of the conspiracy. * Rule 801(d) (E); State v. Marlow, 334 N.C. 273, 282 (1993); State v. Mahaley, 332 N.C. 583, 593-94 (1992). Pardee puts the time of his statement at the end of January 1997 and Nichole's statement has to have been around the same time because his explanation is that Ted confided in him only when they became active in the theft ring together and that ran from approximately January 1997 until the end

*Counsel will concede that the state made a prima facie showing of a conspiracy based the circumstantial evidence presented.

of March of that year. Patricia Kimble was killed October 9, 1995, well over a year before, any conspiracy had long since ended.

The conspiracy alleged by the prosecution is set out in the indictment:

> "...on or about October 9, 1995, the Defendant, Ronnie Lee Kimble did unlawfully, willfully, and feloniously that [sic] conspire, combine, confederate, and agree with Theodore Mead Kimble to commit the felony of murder in the first degree, in that Ronnie Lee Kimble did agree with Theodore Mead Kimble to murder, and slay Patricia Kimble in violation on N.C. Gen. Stat. 14-17, and the common law of the State of North Carolina."

The prosecution's own indictment established that the goal of the conspiracy, namely the murder of Patricia Kimble, had been completed more than two years before Ted Kimble had supposedly made the hearsay statements. Significantly, the indictment says nothing about an agreement, implicit or explicit, to conceal the stated object: the murder of Patricia Kimble. More importantly, the conspiracy indictment says nothing about insurance fraud as a goal of the conspiracy. The state will doubtless raise two arguments in an attempt to rebut the clear language of the indictment: first, that the conspiracy was not limited to the simple act of murdering Patricia Kimble, but embraced other objectives, primarily Ted Kimble's receipt of insurance money upon her death and secondly, that the conspiracy implicitly embraced an objective of concealment which served to perpetuate the conspiracy. Both of these issues are controlled by the decision of the United States Supreme Court. In Krulewitch v. United States, 336 U.S. 440 (1949) the government attempted to persuade the nation's highest Court on the identical issues that the hearsay was admissible on the grounds that it was in furtherance of the continuing implied agreement to conceal the conspiracy after its primary objective had been completed. The Supreme Court flatly rejected this argument, holding that the hearsay statements must be made in furtherance of conspiracy charged, reversing

the defendant's conviction on that ground. Id. At 442-43. North Carolina has adopted the position of Krulewitch in State v. Tilley, 292 N.C. 132, 141 (1977) holding that admission of statements by coconspirators made two weeks after the murder was error. However, North Carolina law was well settled on this issue long before the U.S. Supreme Court decided Krulewitch. As far back as State v. Dean, 35 N.C. 63, and State v. Ritter, 197 N.C. 113, 116, 147 S.E. 733, 734 (1929) this state had followed the position set out in Ritter: "[D]eclarations of one of the conspirators, made after the offense has been committed and in the absence of the others, are not competent against the others, because not uttered in furtherance of the common design" quoted with approval in State v. Branch, 288 N.C. 514, 531 (1075). Thur, the basic law of North Carolina has been and continues to be that statements not made in furtherance of the conspiracy were not admissible even before the Supreme Court decided Krulewitch.

Even if the state were to argue (ignoring Krulewitch, the indictment and North Carolina case law) an unstated objective of the conspiracy was the insurances money, the evidence is clear that by this time, over two years after Patricia Kimble's death, the conspiracy is dead. The state's own hearsay statements from Ted Kimble demonstrates this. Ted admits to Pardee that "he wished that the policy would have been in effect," (T p 1122) showing clearly that he knows that there is no chance of collecting on the insurance policy.

Nor can it be argued that even if the trail court admitted the hearsay statements of Ted Kimble wrongly under the coconspirator exception, they are admissible as statements against penal interest. Just this past term, the U.S. Supreme Court has foreclosed the argument that an accomplice's statement inculpating another falls within a firmly rooted

hearsay exception when that exception is a statement against penal interest. Lilly v. Virginia, 65 Crim. Law Rptr. 327 (Decided 6-10-99). Writing for a plurality Justice Stevens noted:

> "The decisive fact which we make explicit today, is that accomplice's confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Claus jurisprudence."

Lilly at 65 Crim. Law Rptr. 332. It matters not that the state can produce independently corroborating evidence:

> "We have squarely rejected the notion that "evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears "particularized guarantees of trustworthiness,"

Id. At 333 quoting Idaho v. Wright, 497 U.S. 805, 822 (1990). Just as in the case before this Court, the codefendant brother was called to testify at his brother's trail and invoked his Fifth Amendment privilege. The state introduced his statement to police under the hearsay exception for statement against penal interest. The U.S. Supreme Court concluded that although the non-testifying brother's statement was against his penal interest, it was insufficient to overcome Confrontation Clause mandates because of the inherent unreliability of accomplice confessions which implicate codefendants, notwithstanding their self incriminating nature. We have an almost identical situation in the defendant's case down to the fact that it pits brother against brother.

Finally, admitting the statements of Pardee and Nicholes was not harmless error. The state's case against Ronnie Kimble, with the exception of the hearsay statements of Pardee, Nicholes and Mitch Whidden, consisted almost entirely of building a circumstantial case Against Ted Kimble for the murder of his wife for insurance money and freedom from

marriage and then arguing that he must have recruited his brother as the "trigger man" because they were so close. The evidence portion of the trial began at approximately 9:30 a.m. on Monday, August 14, 1998, and it was not until after four full days of testimony that Ronnie Kimble's name was even mentioned by a substantive witness, and that only-to say that he and Ted had an animated conversation, the substance of which was not even heard by the witness, more than a month after Patricia's death. (T pp 815-16).

CONCLUSION

Petitioner respectfully contends, without the benefit of the improperly admitted hearsay accusations of his brother, the jury would not have been able to find the petitioner guilty beyond a reasonable doubt.

For the foregoing reasons, petitioner requests that this Court grant him a new trial for the violation of his Sixth Amendment right to confront witness as interpreted by the U.S. Supreme Court in Lilly v. Virginia, supra.

In the even that this Court determines that oral argument is necessary, petitioner request that this Court appoint him counsel.

Respectfully Submitted, this _____ day of _____, 2005.

By: _____
(Petitioner)

_____

_____
(Address)

PETITIONER'S VERIFICATION OF CERTIORARI PETITION

I, Ronnie Lee Kimble, being first duly sworn, depose and say that I am the petitioner in the above matter, that I have read the foregoing Petition For A Writ of Certiorari and the contents thereof are true of my own knowledge, except as to those matters stated "upon information and belief,' I am informed and believe them to be true.

Respectfully Submitted, this 6 day of October, 2005.

By: Ronnie L Kimble
(Petitioner)

PO Box 909

Taylorsville NC 28681
(Address)

Sworn to and subscribed before me

this 6 day of october, 2005.

(Notary Public)

My commission expires: April 1, 2008

CERTIFICATE OF SERVICE

I, Ronnie Lee Kimble, do hereby certify the foregoing Petition For Writ of Certiorari was duly served on the following via U.S. postage prepaid and properly addressed as follows:

Clerk of Court
N.C. Supreme Court
P.O. Box 2170
Raleigh, N.C. 27602

N.C. Attorney General Roy Cooper
N.C. Dept. of Justice
P.O. Box 629
Raleigh, N.C. 27602-0629

This 6 day of October, 2005.

By: Ronnie L Kimble
(Petitioner)

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