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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from York County

Honorable John C. Hayes, III, Circuit Court Judge

Appellate Case No: 2011-204008

THE STATE,

Respondent,

v.

DAVONTAY HENSON,

Appellant.

PETITION FOR REHEARING

Comes now Respondent, above named, by and through the Attorney General of South Carolina, and pursuant to Rule 221(a), SCACR, hereby respectfully petitions this Court for rehearing.

STATEMENT OF THE CASE

On October 1, 2009, shortly before 11:00 PM, Tyrone King, Kenny Cunningham and Maurice Jackson were robbed at gunpoint on the front porch of Jackson's Rock Hill home. (R. 97, 166-67, 197-98, 216). During the course of the robbery, King, Cunningham and Jackson were all shot at by a black male, who according to witnesses, was wearing all black and was accompanied by a female in pink pants and a grey sweatshirt. (R. 103-04, 167, 170, 200, 216).

While Jackson escaped without being shot, Cunningham was shot in the leg and foot. (R. 104, 171). King, who was shot in the head, died from his injuries. (R. 172, 693, 698, 702).

The ensuing investigation culminated in the arrest of Samantha Ervin, Aileen Newman, Donta Reid and Davontay Henson ("Appellant").[1] (R. 467, 479). The four were subsequently charged with murder, assault and battery with intent to kill ("ABWIK"), armed robbery, possession of a firearm during the commission of a violent crime and criminal conspiracy. (R. 389, 467, 479, 618-19). Prior to trial, Ervin pled guilty to the armed robbery charges in addition to criminal conspiracy. (R. 389). Additionally, Newman pled guilty to the armed robbery charges, criminal conspiracy and one count of ABWIK.[2] (R. 618-19). Meanwhile, Reid and Appellant invoked their respective rights to trial by jury and on November 14-18, 2011, stood trial before the Honorable John C. Hayes, III and a jury. (R. 1). At trial, Reid was represented by Melissa Inzerillo and Ashley Anderson while Appellant was represented by Derek Chiarenza. (R. 1). The State was represented by Kevin Brackett and Willie Thompson. (R. 1).

At the conclusion of their joint trial, Appellant was convicted on all charges while Reid was found not guilty of the murder charge, but guilty as to criminal conspiracy, armed robbery, possession of a weapon during the commission of a violent crime and, as a lesser-included offense of the ABWIK charges, assault and battery of a high and aggravated nature ("ABHAN").[3] (R. 878-79). Appellant subsequently sought appellate review in the Court of Appeals arguing *inter alia*, that his Confrontation Rights were violated when the trial court denied his motion for severance and admitted a redacted statement made by Reid, his

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[1] As a result of information conveyed by Reid to authorities, Darius "Duke" Jeter was also arrested, however, authorities subsequently cleared Jeter from any wrongdoing in the incident. (R. 297-98, 299-300, 301, 338-39).

[2] Both Ervin and Newman, as part of their plea agreement, gave statements and agreed to testify against Reid and Henson in exchange for the dismissal of the murder and firearms charges. (R. 389-391, 618-19).

[3] Reid's case is currently on appeal before this Court. At issue are the admissibility of Reid's fourth statement to police and whether Reid was entitled to directed verdict on the firearms charge under an accomplice liability theory. See State v. Reid, Appellate Case No. 2011-204288.

nontestifying codefendant. Br. of App. at 12. The case was transferred to this Court, which agreed with Appellant and reversed on the basis that Reid's statement, although seamlessly redacted, facially incriminated Appellant because the redactions utilized by the trial court, namely "the guy who did the shooting," "the guy," "him," and "he," could result in the jury inferring that "the confession referred to and incriminated Henson." State v. Henson, Op. No. 27354 (filed Jan. 22, 2014) at 10. The State now seeks rehearing.

SUMMARY OF PETITION FOR REHEARING

The Court, by concluding the trial court's redactions, could result in the jury disregarding its instructions[4] and inferring that Reid's confession "incriminated Henson," has misapprehended the Supreme Court's holding from Gray v. Maryland, 523 U.S. 185 (1998) as Gray neither modified, nor clarified, the Supreme Court's ruling from Richardson v. Marsh, 481 U.S. 200 (1987) which explained that Bruton's protective rule does not extend to confessions which incriminate inferentially. As a result of this misunderstanding, the Court has erroneously interpreted the phrase, "facially incriminating" and in doing so, has extended the Sixth Amendment's Confrontation Clause to include unknown individuals who although implicated, are not identified within a nontestifying codefendant's statement. The effect of such an unwarranted extension of Bruton, aside from gutting the almost invariable assumption that jurors follow their instructions, will do more than just dispensing with neutral pronoun redaction, it will also result in a substantial burden to this State and its' prosecutors by creating a *de facto* rule of severance. Because such an extension of Bruton is not supported by the case law, is at odds with

[4] Notably, the standard set forth in Bruton v. U.S., 391 U.S. 123, 135 (1968) is not, as stated by this Court at page 10 of its opinion, whether the jury "could infer from the face of the confession . . . that the confession referred to and incriminated [the defendant]," but is instead whether the extra judicial statement introduced against the declarant-codefendant "powerfully incriminates" the nontestifying codefendant. See Bruton, 391 U.S. at 135; see also U.S. v. Schwartz, 541 F.3d 1331, 1349 (11th Cir. 2008) (citing Bruton, 391 U.S. at 135 ("In Bruton, the Supreme Court held that the admission of 'powerfully incriminating extrajudicial statements of a codefendant' violates the Sixth Amendment's Confrontation Clause, even if the court issues an instruction to the jury not to consider the statement as evidence against the defendant.").

the text of the Sixth Amendment's Confrontation Clause, represents a significant departure from the presumption that jurors follow the law and substantially burdens South Carolina's prosecutors, the State respectfully requests that this Court grant rehearing.

ARGUMENTS

I. *Gray* neither Modified nor Clarified the Supreme Court's Holding from *Richardson* that Confessions which Incriminate Inferentially are Placed Outside of *Bruton* Meaning this Court Misapprehended the Effect of *Gray*, Especially as it Relates to the Phrase, "Facially Incriminating" and in doing so, has Extended the Confrontation Clause to Include Unnamed Individuals who are not Identified in a Nontestifying Codefendant's Statement

The Court correctly explains that "Richardson limited Bruton to facially incriminating confessions and placed confessions that 'incriminate inferentially' outside Bruton." See Henson, Op. No. 27354 at 8. Next, the Court characterized Gray as clarifying Richardson, and cites the following quote from Gray:

> The inferences at issue here involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial. Moreover, the redacted confession with the blank prominent on its face, in *Richardson's* words, "*facially* incriminate[es]" the codefendant.

Id. at 196. The Court then concludes Gray "brought within Bruton's prohibition those confessions which facially incriminate through inference." See Henson, Op. No. 27354 at 8.

The State respectfully disagrees with the Court's characterization of the holding in Gray, as Gray should not be read to modify or clarify the Richardson Court's holding that Bruton's protective rule does not extend to statements that incriminate inferentially. The State submits this misapprehension of the Gray Court's holding regarding inferential incrimination has resulted in an overly broad understanding of the phrase "facially incriminating" which in turn has

extended Confrontation Clause rights to include unnamed individuals who are not identified within a nontestifying codefendant's statement.

A. *Gray* Neither Modified nor Clarified the Supreme Court's Ruling in *Richardson* regarding Statements that Incriminate Through Inference

As noted by other courts that have interpreted Gray, including the Third Circuit, which issued the Richards case cited in this Court's opinion, the Supreme Court neither modified, nor clarified it's holding from Richardson, that Bruton's protective rule does not extend to confessions which incriminate inferentially, but instead answered a narrow question regarding the sufficiency of redaction. See Priester v. Vaughn, 382 F.3d 394, 400 (3rd Cir.) ("Priester argues that the Supreme Court's decision in Gray v. Maryland, and this Court's decision in United States v. Richards, clarify the rule set forth in Richardson . . . [w]e find this unpersuasive.") (internal citations omitted). This was noted in Priester, where the Third Circuit, using the words of the Gray Court, explained that certiorari was only granted in Gray, "in order to consider Bruton's application to a redaction that replaces a name with an obvious blank space or symbol or word such as deleted." Priester, 382 F.3d at 400 (quoting Gray, 523 U.S. at 188).

In reconciling Gray and Richardson, the Third Circuit, consistent with the position advanced by the State in this case,[5] said:

> The Court in Gray explained that the key difference between Gray and Richardson was the extent to which the statement's alterations directly connected the statement to the defendant, as "nicknames and specific descriptions fall inside, not outside, Bruton's protection." The reasons given in Gray for holding such redactions impermissible-such as "an obvious blank will not likely fool anyone," "the obvious deletion may well call jurors' attention specially to the removed name," and that "a blank or some other similarly obvious alteration" are "directly accusatory," do not apply to the instant case.

[5] See Br. of Resp. at p. 13 ("In other words, Gray illustrated that an obviously redacted statement which leaves the jury to "speculate" about the reasons the identity of a person is concealed, is at odds with the Confrontation Clause, but a statement, which on its face, does not appear to conceal a person's identity is constitutionally permissible because the jury is likely to accept the statement at face value rather than questioning it.").

Priester, 382 F.3d at 400 (internal citations omitted). Thus, the Third Circuit, following U.S. v. Richards, subsequently read the holding from Gray in a manner consistent with the State's argument—that Gray simply answered the narrow question presented, which was whether Bruton should apply to, "a redaction that replaces a name with an obvious blank space or symbol or word such as deleted"— and did not revisit the Richardson Court's holding that redacted statements which inferentially incriminate a nontestifying codefendant do not violate Bruton.

This construction of Richardson and Gray was also endorsed by the Fourth Circuit in Akinkoye v. United States, 185 F.3d 192, 198 (4th Cir. 1999) where the court explained that the basis for the Bruton violation in Gray was simply the method of redaction utilized by the state court, particularly the use of blank spaces and the testimony of an officer who read the blank spaces in the redacted statement as "deleted." Id. at 198-99. Specifically, the Fourth Circuit explained:

> In Gray, the non-testifying codefendant's statement was redacted by the government and read into evidence. The statement was redacted by simply replacing the defendant's name with blank spaces or the word "deleted." The officer who read the statement into evidence indicated where the blanks and deletions were in the statement. For example, one exchange proceeded as follows:
>
> > Q: Who was in the group that beat [the victim]?
> >
> > A: Me, [an empty space was left here], [another empty space] and a few other guys.
>
> When that passage was read to the jury, the officer reading it said "deleted" where the blank spaces appeared. The Supreme Court concluded that the statements obviously referred to the existence of the defendant and implicated him, in light of the follow-up questions asked by the prosecutor.

Id. at 198-99 (internal citations omitted).

The Fourth Circuit most recently confirmed its view from Akinkoye, that Gray's holding should be limited to the narrow question presented, in U.S. v. Cone, 714 F.3d 197, 218 (4th Cir.

2013). There, the Fourth Circuit confirmed that Akinkoye accurately summarized the relationship between Richardson and Gray stating, "we summarized Supreme Court precedent as holding that 'if a redacted confession of a non-testifying codefendant given to the jury (by testimony or in writing) shows signs of alteration such that it is clear that a particular defendant is implicated, the Sixth Amendment has been violated.'" Id. at 218. In other words, Gray should not be read so broadly so as to overrule the holding in Richardson, but should instead be read in harmony with Richardson meaning that it should be limited to narrow question which was before the court—whether the usage of blank spaces and the testimony "deleted" constituted a sufficient redaction under Bruton.

B. The View that *Gray* did not Overrule the *Richardson* Court's Rejection of Inferential Incrimination is not an Outlier, but is a Viewpoint held by Nearly Every Federal Circuit Court of Appeals

The State submits its view of the relationship between the holdings in Gray and Richardson, namely that Gray did not disturb the Richardson Court's rejection of inferential incrimination, is not an outlier, but is instead a widely-held viewpoint. For example, in addition to both the Third and Fourth Circuit Courts of Appeals, other Federal Circuit Courts have acknowledged that Gray did not extend Bruton's protections to statements that incriminate inferentially.[6]

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[6] See U.S. v. Vega Molina, 407 F.3d 511, 520-21 (1st Cir. 2007) (citing to Richardson's rule, that Bruton does not extend to inferentially incriminating statements, and further detailing that Gray was limited to the sufficiency of obvious redactions); U.S. v. Jass, 569 F.3d 47, 58 (2nd Cir. 2009) ("In Gray, the Supreme Court applied the rules announced in Bruton and Richardson but did not break new ground or impose a new obligation on the States or Federal Government."); U.S. v. Ramos-Cardenas, 524 F.3d 600, 607-08 (5th Cir. 2008) (explaining that Gray did not overrule the Richardson Court's holding that statements which incriminate inferentially are not protected by Bruton, but instead dealt with the narrow question of the sufficiency of redactions); U.S. v. Vasilikos, 508 F.3d 401, 407 (6th Cir.) (explaining the Gray Court reaffirmed the Richardson Court's rejection of inferential incrimination and addressed the limited question of the sufficiency of redaction); U.S. v. Sutton, 337 F.3d 792, 799-800 (7th Cir. 2003) (concluding that Gray dealt with only obvious redactions and did not overrule the holding from Richardson that statements which incriminate only by inference are constitutionally acceptable under Bruton); U.S. v. Sandstrom, 594 F.3d 634, 647-48 (8th Cir. 2010) (noting Richardson held there was no Confrontation Clause violation when a statement only incriminates through inference and further detailing the Confrontation Clause issue in Gray stemmed from inadequate redactions); Mason v. Yarborough, 447 F.3d 693, 695-96 (9th Cir. 2006) ("Richardson specifically

In fact, the Sixth Circuit Court of Appeals, which issued Stanford v. Parker, 266 F.3d 442 (6th Cir. 2001), a case relied upon by this Court in the present case, subsequently limited its holding in Stanford and relied upon the Fourth Circuit's interpretation of Richardson and Gray. See U.S. v. Vasilakos, 508 F.3d 401 (6th Cir. 2007) (limiting Stanford and endorsing the Fourth Circuit's application of both Richardson and Marsh). In Vasilakos, the Sixth Circuit, like the First, Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, Eleven and Twelfth Circuits, described the relationship between Richardson and Marsh saying, "[a]lthough the Gray Court reaffirmed Richardson's holding that Bruton does not preclude statements that incriminate only inferentially, the Court determined that redactions which replace a defendant's name with an obvious blank or the word "deleted" call jurors' attention specifically to the removed name." Id. at 407. Thus, like the First through Fifth and Seventh through Twelfth Circuits, the Sixth Circuit rejected this Court's view of the expansive effect of Gray and instead limited Gray to the narrow question before the Gray Court—whether redactions such as blank space or deleted were a sufficient form of redaction.

C. The Court's Misapprehension of the Effect of *Gray* has Resulted in an Entirely Different Understanding of the Phrase "Facially Incriminating"

Understanding that Gray did not modify or clarify the Richardson Court's holding regarding inferential incrimination, the next question to answer is simply what effect, if any, does this misapprehension have on the Court's holding in the present case? As detailed below,

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exempts a statement, not incriminating on its face, that implicates the defendant only in connection to other admitted evidence. On the other hand, the mere removal of a codefendant's name from a statement that obviously refers to the defendant, does not insulate the statement from Bruton scrutiny.") (internal citations omitted); Spears v. Mullin, 343 F.3d 1215, 1231-32 (10th Cir. 2003) (citing Richardson's rejection of inferential incrimination and adding that Gray dealt with the limited issue of proper modification); U.S. v. Thomas, 271 Fed. App'x 818, 824 (11th Cir. 2007) ("The Confrontation Clause also is violated when a facially incriminating statement is redacted to replace the defendant's name with an obvious indication of deletion, such as a blank space, the word deleted, or a similar symbol. No Bruton problem exists, however, when the statement is not incriminating on its face, and became so only when linked with evidence introduced later at trial.") (internal quotations omitted) (internal citations omitted).

the State submits the effect of this misapprehension appears to have created a different understanding in the eyes of this Court as to the meaning of the phrase "facially incriminating"

In Richardson, the Court explained the differences between Bruton and Richardson stating:

> There is an important distinction between this case and Bruton, which causes it to fall outside the narrow exception we have created. In Bruton, *the codefendant's confession "expressly implicat[ed]" the defendant as his accomplice*. Thus, at the time that confession was introduced there was not the slightest doubt that it would prove "powerfully incriminating." By contrast, *in this case the confession was not incriminating on its face*, and became so only when linked with evidence introduced later at trial.

Id. at 208 (emphasis added) (internal citations omitted). Stated differently, the Richardson Court found that a statement was facially incriminating only when the confession expressly implicated the non-testifying co-defendant, and even then, only when such a confession is "powerfully incriminating." The result of this holding is that a nontestifying codefendant's confession cannot, under Richardson, become facially incriminating when combined with other evidence as occurred in the present case.[7] As stated in Richardson, the rationale for this understanding is as follows:

> Where the necessity of . . [evidentiary] linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence. Specific testimony that "the defendant helped me commit the crime" is more vivid than inferential incrimination, and hence more difficult to thrust out of mind. Moreover, with regard to such an explicit statement the only issue is, plain and simply, whether the jury can possibly be expected to forget it in assessing the defendant's guilt; whereas with regard to inferential incrimination the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget. In short, while it may not always be simple for the members of a jury to obey the instruction that they disregard an incriminating inference, there does not exist the

[7] This of course does not mean that the redactions utilized by a court cannot be insufficient, that is the obvious holding from Gray. However, as discussed both in the State's brief, Gray and a variety of other authorities, a redaction only becomes insufficient when the jury, instead of assuming a statement is not altered, is aware of the statement's alteration and is naturally asked to fill in the obvious blank created by an obvious alteration in the statement.

> overwhelming probability of their inability to do so that is the foundation of Bruton's exception to the general rule.

Id. at 208.

Combining the holding from Richardson with the understanding of Gray discussed thoroughly above—that Gray did not overrule Richardson's rejection of inferential incrimination—the State submits the phrase "facially incriminating" must be interpreted consisted with the Supreme Court's holding in Richardson. That is, a nontestifying codefendant's confession can only be facially incriminating where, as in Bruton, "the codefendant's confession "expressly implicates" and "powerfully incriminates" the defendant. Id. at 208. Thus, it is the State's position that this Court's expansive understanding of the phrase "facially incriminating" which was demonstrated in the present case, is one which clearly goes beyond the Supreme Court's understanding of the phrase in Richardson, a case which was not modified by Gray, and is simply at odds with the Bruton trilogy of cases. In light of this, State asks the Court to consider this point in rehearing, or in the alternative, substitute an opinion consistent with this reasoning.

D. The Court's Expansive Interpretation of the Phrase "Facially Incriminating" in this case results in an Extension of Confrontation Clause Rights to Individuals that while Arguably Incriminated in a Redacted Statement, are not Expressly Identified and should not be Protected by the Sixth Amendment

"The Confrontation Clause of the Sixth Amendment, extended against the States by the Fourteenth Amendment, guarantees the right of a criminal defendant to be confronted with the witnesses against him." Richardson, 481 U.S. at 206. "The right of confrontation includes the right to cross-examine witnesses." Id. "Therefore, where two defendants are tried jointly, the pretrial confession of one cannot be admitted against the other unless the confessing defendant takes the stand." Id. The Supreme Court explained in Richardson however, that, "[o]rdinarily, a

witness whose testimony is introduced at a joint trial is not considered to be a witness 'against' a defendant if the jury is instructed to consider that testimony only against a codefendant." Richardson, 481 U.S. at 206. The Court added its reasoning behind this statement stating, "[t]he law almost invariabl[y] assum[es] that jurors follow such limiting instructions. Id. (internal quotations omitted). Continuing, the Richardson Court said:

> The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process. On the precise facts of Bruton, involving a facially incriminating confession, we found that accommodation inadequate. As our discussion above shows, *the calculus changes when confessions that do not name the defendant are at issue*. While we continue to apply Bruton where we have found that its rationale validly applies, we decline to extend it further. We hold that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence.

Id. at 207 (emphasis added).

Here, the State submits the result of this Court's finding, that despite a jury instruction, a neutral pronoun redaction which neither "expressly implicates," nor "powerfully incriminates" violates Bruton and as a result, the Confrontation Clause, is in error since, as discussed above, the Confrontation Clause requires more. Bruton and the Confrontation Clause require that a statement: (1) expressly implicate and (2) powerfully incriminate. Richardson, 481 at 207. In this case, the State agrees that the redaction "the guy who did the shooting" and "the guy that did the shooting" are incriminating, however, as mentioned above, the redactions utilized in the statement do not "expressly implicate" a specific individual and therefore are not "facially incriminating." Rather, as discussed in the State's brief and reiterated at oral argument, Richardson requires that the statement itself must express "who" the guy who did the shooting is in order for it to facially incriminate Henson. Moreover, the State stresses that Gray did not

change this holding. As a result, the Court's finding that the redactions utilized violate both Bruton and the Confrontation Clause has the effect of extending the Confrontation Clause to unidentified individuals, which is of course at odds with the text of the Sixth Amendment. Indeed, as noted by the Richardson Court, the Confrontation Clause only "guarantees the right of a criminal defendant to be confronted with the *witnesses against him.*" Richardson, 481 U.S. at 206 (emphasis added). Thus, while Reid's statement certainly incriminates "the guy who did the shooting" it did not incriminate Davontay Henson meaning Reid is not a witness against Henson for purposes of the Confrontation Clause, especially since the trial Court gave the proper limiting instruction. Id. at 207. Instead, Reid's statement only becomes incriminating to Henson when other evidence, notably the testimony from Newman and Ervin, identifies that Davontay Henson is "the guy who did the shooting." Therefore, because Richardson, as well as at least Twelve Federal Circuit Courts of Appeals have all interpreted Gray as not disturbing the Richardson Court's rejection of inferential incrimination, neither the Bruton trilogy of cases, nor the Confrontation Clause are violated by the neutral pronoun redactions utilized in this case.[8]

E. The Effect of Failing to Revisit the Court's Opinion in the Present Case would Undermine the Rule that Juries are Presumed to Follow their Instructions and Create a *de facto* Rule of Severance

The State submits the effect of failing to revisit this Court's opinion in the present case would be detrimental to both the law as well as prosecutors throughout this State. First, as

[8] Moreover, the State notes that the form of redaction utilized by the trial court in this case is consistent with the example provided in Gray and noted in the State's brief insofar as the redactions were seamless and there was no risk the jury, when reviewing the statement, would do anything but evaluate the statement on its face (i.e. the jury would have no reason to fill in any obvious blanks as was the case in Gray). Additionally, as noted in the State's brief, the substance of the redaction utilized by the trial court was clearly consistent with both the example provided in Gray and the redactions that were approved of by the Court of Appeals in State v. Garrett, 350 S.C. 613, 567 S.E.2d 523, 526 (Ct. App. 2002). Specifically, the Gray Court, by using the phrase "some other guys" in a case with five other men at least tacitly approved of the redaction used in this case. Further, the redactions used by the trial court in this case are consistent with previous precedent from the Court of Appeals in Garrett. Thus, it cannot be said that the use of the phrase "the guy who done the shooting," "the guy who did the shooting," "the guy," "him," and "he" are at odds with the redactions "some other guy" that were used in Garrett, especially where both cases involved only two co-defendants with only one of the two co-defendants in each case providing a statement.

detailed in Section I(D), Bruton is a limited exception to the rule that juries are presumed to follow the law. Richardson, 481 U.S. at 206-07. As stated in Bruton:

> [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial

391 U.S. at 135-36. However, as was noted in Richardson, the basis for the exception to the rule that juries are presumed to follow the law in Bruton was based upon the fact that the declarant-codefendant implicated Bruton, by name, in his statement and was unavailable for cross-examination. 481 U.S. at 208. However, as explained above, the Richardson Court stressed the importance of the presumption that jurors follow the law and failed to extend Bruton to statements which only incriminate inferentially because:

> Where the necessity of . . [evidentiary] linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence. Specific testimony that "the defendant helped me commit the crime" is more vivid than inferential incrimination, and hence more difficult to thrust out of mind. Moreover, with regard to such an explicit statement the only issue is, plain and simply, whether the jury can possibly be expected to forget it in assessing the defendant's guilt; whereas with regard to inferential incrimination the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget. In short, while it may not always be simple for the members of a jury to obey the instruction that they disregard an incriminating inference, there does not exist the overwhelming probability of their inability to do so that is the foundation of Bruton's exception to the general rule.

Id. at 208. The State believes the Court's logic in failing to extend Richardson is important because the jury system is largely predicated on the idea that jurors follow instructions. For instance, we assume jurors will follow limiting instructions and that they will comprehend a jury charge—jury charges which in a criminal case include the burden of proof, presumption of innocence, the elements to the charged offense, lesser-included offense if applicable as well as

any potential defenses. Here, if the present holding stands, the State submits the presumption that jurors will follow the law would take a serious blow since the redacted statement at issue does not expressly implicate Henson and unlike the confession in Bruton, is not powerfully incriminating, especially when redacted. Moreover, because the jury was charged that Reid's confession could be used only against Reid, the indictments against Henson were not evidence, and the fact Henson was charged did not mean Henson was guilty, a reversal on these facts clearly shows a deep distrust in the presumption that juries follow the law. What is even more discouraging is that it shows a deep mistrust in a juries' ability to understand the presumption of innocence and the State's burden of proof. We believe that jurors not only comprehend these instructions, but correctly discharge their duties to follow the law as given to them by the trial court. Because the trial court's instruction were correct in this instance, we believe this Court should revisit its' holding or substitute an opinion to address this issue.[9]

Furthermore, if this Court does not address its misapprehension of the Gray Court's holding and the domino effect such a misapprehension has on the legal standards in this case, including the standard for determining whether a statement is facially incriminating, the effect of this undisturbed holding would create a *de facto* rule of separate trials. However, as the Richardson Court said, joint trials are vitally important in the criminal justice system, because they promote efficiency, allowing many times for the trial of large conspiracies and prevent witnesses, especially victims, from having to repeatedly come to trial and relive potentially

[9] The State further submits that even if this Court continues to believe the redactions at issue constitute a Bruton violation, the presumption that jurors follow the law would be strong evidence that any error was harmless. Indeed, the fact that the jury was charged that it could not hold Reid's statement against him, that they should not consider the fact that Henson was indicted and was on trial, that their verdict must be based upon the evidence, and the State must overcome the presumption of innocence beyond a reasonable doubt, suggests that, at bottom, any error would be harmless beyond a reasonable doubt. It seems obvious here that Henson's conviction was not based upon Reid's redacted statement, but upon his associates testimony, which was largely corroborated by the independent individual who witnessed the shooting. Notably, all of the testimony against Henson came from individuals who were present at trial and were subject to cross-examination so as to allow the jury to accurately evaluate their credibility. Accordingly, the State also asks this Court to consider this in any potential harmless error analysis.

traumatizing events. 481 U.S. at 209-10. Additionally, separate trials, in the words of Justice Scalia can, "impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again . . . and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case before hand." Id. Because this does not serve the interest of justice, but instead hinders it, the State submits this Court should grant rehearing to consider the effect its' misapprehension of Gray has on this State's prosecutors and their already scant resources.

CONCLUSION

In conclusion, the State respectfully asks this Court to reconsider its' ruling because the Court, in concluding the trial court's redactions could result in the jury disregarding its instructions and inferring that Reid's confession "incriminated Henson," has misapprehended the Supreme Court's holding from Gray v. Maryland, 523 U.S. 185 (1998). The result of this misapprehension had lead the Court to erroneously interpret the phrase, "facially incriminating" and in doing so, has extended the Sixth Amendment's Confrontation Clause beyond its' reach to include unknown individuals who although implicated, are not identified within a nontestifying codefendant's statement. The effect of such an unwarranted extension of Bruton, will severely affect the assumption that jurors follow their instructions and will also result in a substantial burden to this State and its' prosecutors by creating a *de facto* rule of severance. Because such an extension is not supported by the Bruton trilogy of cases, is at odds with the text of the Sixth Amendment's Confrontation Clause, represents a significant departure from the presumption that jurors follow the law and substantially burdens South Carolina's prosecutors, the State respectfully requests that this Court grant rehearing.

Respectfully Submitted,

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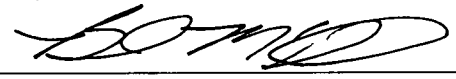

Brendan J. McDonald
Bar No. 77784

ATTORNEY(S) FOR RESPONDENTS

February 6, 2014.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from York County

John C. Hayes, III, Circuit Court Judge

Appellate Case No. 2011-204008

THE STATE,

RESPONDENT,

V.

DAVONTAY HENSON,

APPELLANT.

PROOF OF SERVICE

I, Brendan J. McDonald, counsel for the Respondent, certify that I have served the within Petition for Rehearing on Appellant by depositing two (2) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney of record, Susan B. Hackett, SCCID/Division of Appellate Defense, 1330 Lady Street, Ste. #401, Columbia, SC 29201-3332.

I further certify that all parties required by Rule to be served have been served.

This 6th day of February, 2014.

Brendan J. McDonald
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