

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Kershaw County

G. Thomas Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DERRICK MCDONALD,

PETITIONER

2012-213686

BRIEF OF PETITIONER

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ISSUE PRESENTED

Whether the Court of Appeals erred by holding the trial court did not commit reversible error by allowing into evidence the statements of petitioner's non-testifying co-defendant without adequately redacting his claim of petitioner's involvement, as this denied petitioner his Sixth Amendment right to confront and cross-examine the witness, as interpreted by Bruton v. United States, 391 U.S. 123 (1968), and its progeny?

STATEMENT OF THE CASE

Petitioner was indicted by the Kershaw County Grand Jury for the offenses of murder and first-degree burglary. His co-defendants, Robert Cannon and Christopher Whitehead, were indicted for the same offenses. R. 1553.

Their joint trial was held from May 6-13, 2008 before the Honorable G. Thomas Cooper Jr., and a jury. Marcus Whitlark and Nathan Sheldon represented petitioner. Joshua Kendrick represented defendant Robert Cannon. Neil Riley and David Reuwer represented defendant Christopher Whitehead. The solicitors were John Meadors, Joanna McDuffie and Ron Moak. R. p. 1.

At the conclusion of the trial on May 13, 2008 the jury found each of the three defendants guilty of murder and burglary in the first-degree. R. p. 1501, l. 17- 1502, l. 18.

Judge Cooper sentenced petitioner and co-defendant Cannon to thirty-five years imprisonment concurrent on both charges. R. p. 1550, l. 15- 1551, l. 3. Based on co-defendant Christopher Whitehead's prior convictions for attempted armed robbery he was sentenced to life without parole for murder and burglary in the first-degree. R. p. 1548, l. 16-1549, l. 15.

The Court of Appeals affirmed petitioner's convictions in State v. McDonald, 400 S.C. 272, 734 S.E.2d 167 (2012). App. 1-9. Petitioner sought rehearing. App. 11-13. The state filed a return to the petition for rehearing. App. 14-23. Rehearing was denied. App. 24.

Petitioner then sought certiorari from this Court which was granted on the present issue.

ARGUMENT

The Court of Appeals erred by holding that the trial court did not commit reversible error by allowing into evidence the statements of petitioner's non-testifying co-defendant without adequately redacting his claim of petitioner's involvement, as this denied petitioner his Sixth Amendment right to confront and cross-examine the witness, as interpreted by Bruton v. United States, 391 U.S. 123 (1968), and its progeny.

Relevant facts

Melissa Davy was the girlfriend of the decedent Joshua Zoch. She worked at the Sonic Restaurant on Hard Scrabble Road where the decedent Joshua also worked. The decedent had gotten Davy her job at Sonic. Davy knew co-defendant Whitehead because he also worked at the Sonic. In addition, co-defendant Cannon also worked at the Sonic and Petitioner McDonald was a former employee of the same Sonic. R. 560, l. 2 – 563, l. 3.

Davy and the decedent lived together for about two years in Kershaw County. She admitted they argued throughout their relationship. On the Friday night before the fatal encounter on December 13, 2006, Davy confirmed on cross-examination they had a party at her house “if that’s what you want to call it.” R. 563, l. 24 – 564, l. 9; R. 593, ll. 13-24.

Davy testified that the decedent left that night with two of his friends and he brought back crack cocaine. While the decedent was smoking crack Davy “slapped the crack pipe out of his hand.” The decedent became very angry and he demanded that they all leave. Davy left with her friends Zack and Molly in Davy’s car. The two friends who went with the decedent to get the crack left in their own car. R. 595, l. 1- 596, l. 5.

Davy next spent some time together with the decedent on the following Monday, her day off at the Sonic. “I met up with Josh during the day that day.” Davy gave the decedent sixty dollars

that day, and she learned he spent it on crack cocaine. Davy recalled the decedent came by the Sonic on Tuesday morning, December 12, 2006 “but I didn’t talk to him.” R. 611, l. 3 – 612, l. 11.

Co-defendant Whitehead was Davy’s crew leader. Davy readily admitted she did not get along with Whitehead but she said “[I] listened to him, what he had to say at work.” R. 613, 4-18. Davy confirmed that the decedent *had been cooperating with the police* at the time because of his drug related problems. R. 613, l. 4 – 620, l. 15.

Zachary Waltemath started working at the Sonic “around Halloween” of 2006. R. 376, ll. 8-17. He testified that the decedent had come up to the Sonic on Monday, December 12, 2006 to “talk to Melissa [Davy] because they had got in an argument over the weekend and they were trying to resolve things or something.” Waltemath recalled that Monday night Whitehead called him twice and “he wanted me to call Josh and see what he was doing because he wanted *to go over there and fight him or something.*” Waltemath told Whitehead he did not want to get involved “with anything like that.” R. 385, l. 17 – 388, l. 8. (emphasis added).

On Wednesday, December 13, 2006 Waltemath went to work at about 10:00 a.m., and Davy was going to take time home after work at 5:00. “But first she wanted to stop by her house to get her toothbrush and extra clothes or something because she hadn’t been there [the house she shared with the decedent] in a few days . . . And we got there. And she walked in the house, freaked out and saw him.” Waltemath looked inside the house and saw the decedent lying on the floor. He was dead. R. 388, l. 9 – 391, l. 18.

Patricia Heathcoe owned and managed the Sonic. *The decedent, co-defendant Cannon and Petitioner McDonald all worked for her at one time.* Co-defendant Whitehead still worked for her on Wednesday December 13, 2006, the day the decedent’s body was discovered. Heathcoe said Whitehead was a good employee and he worked his full shift on Tuesday, December 12, 2006.

However, Heathcoe said on Wednesday, December 13, 2006 Whitehead showed up with a scratch under his eye. The following day, Thursday, December 14, 2006 she said Whitehead “was limping around and he was wanting a Workman’s Comp form filled out on his leg.” Whitehead claimed to have been hurt at work and Whitehead “got real cocky” stating “a friend of his got screwed by falling and not getting a report filled out and ended up paying his own bills.” Heathcoe had Whitehead’s Workman’s Compensation form processed. R. 436, 16 – 448, l. 10.

The next morning, a Friday, Heathcoe got a call from her employee, Cecile Trapp, who told her “that Chris [Whitehead] had walked out on her.” Heathcoe said she “freaked out” because she knew this left her employee alone at 6:55 a.m. at the Sonic. Heathcoe telephoned Whitehead and asked what was wrong with him having walked off of his shift leaving the other young woman alone. “[H]e was just ranting. You know, I don’t need that f g job. *I’ve got problems. I’m about to move to Aiken.*” Heathcoe said all this surprised her because Whitehead had always been polite and a good employee. R. 445, l. 4 – 452, l. 12. (emphasis added).

Cecile Trapp recalled that Whitehead was limping at work on Wednesday, December 13, 2006 and he had not been limping the day before. Trapp said that on Thursday, December 14, 2006, Whitehead told her his mother took his telephone away. On the morning of Friday, December 15, 2006 Whitehead talked to his mom and “he kind of freaked out and was just like he had to go [leave work].” Trapp said she pleaded with Whitehead to stay but he said he had to leave. R. 478, l. 15 – 489, l. 23. Trapp testified she had heard during this time period that “Whitehead was going to fight him [the decedent].” R. 489, ll. 16-23.

There was evidence others knew that the decedent had hit Davy in the past. Davy would only acknowledge the decedent had hit her “one time.” R. 580, ll. 9-14.

The state's theory of the case was that Whitehead spearheaded the burglary and attack on the decedent and that co-defendant Cannon and Petitioner McDonald were involved for whatever reason. One motive was thought to be that the decedent *was a police informant*. Whitehead became belligerent with the police and he refused to cooperate. Michael Jenkins testified that he was in jail with Whitehead after the crime and he said Whitehead was bragging about having killed the decedent, and how "when they went back to school they were going to be respected and jaws were going to drop and all this and just bragging." R. 1221, l. 10 – 1240, l. 6.

Bruton

Co-defendant Cannon gave Investigator Catoe a five page statement on December 15, 2006 placing himself at the crime scene, and he implicated Whitehead as the leader in the burglary that lead to the decedent's death, and petitioner as a lesser participant. R. 1561-1565; r. 1570-1574. As seen, each of the three defendants *had worked at the same Sonic restaurant at one point*. Helen Zoch, the decedent's mother, acknowledged the decedent was a police informant and "he was buying from someone that the police wanted to close down as a dealer." R. 1284, ll. 18-24.

Ms. Zoch testified that on December 12, 2006, the day before the murder, she tried to have the decedent check himself into Morris Village. However, the decedent wanted to talk to Davy, his girlfriend, whom he had just separated from, before he checked himself in Morris Village. Consequently, the decedent did not check into the facility that day. R. 1274, l. 8- 1281, l. 14.

Throughout the trial the redaction issue was discussed. In Cannon's statement to Investigator Catoe he said Whitehead told them they needed to beat "Josh's ass because he was a snitch." Whitehead knocked on the decedent's door, and then "busted in" a side door when the decedent did not answer. Cannon described how he and petitioner followed Whitehead in "[t]o watch the fight." R. 1662. Cannon described how Whitehead beat the decedent, and "started

pressuring D.J. to hit Josh with the bat that was in the house and DJ then hit Josh in the back of the head.” Cannon said that “[t]he whole time Chris was talking shit to him about being a snitch. At that time Chris kicked Josh in the ribs. And ask (sic) Josh where the weed was and Josh was just grunting. That (sic) when Chris asked me to check the room and we started pulling draws (sic) and Chris flipped over the mattress and DJ was just standing their (sic). Then Josh went unconscious and I got Josh a towel and put it on his head. Chris said fuck we don’t have anything and pushed the Christmas tree over on Josh.” R. 1562-1563.

Cannon told Catoe that “[B]efore Chris left he got some frozen chicken from the freezer and put it on Josh’s head to try and stop the bleeding. After that we went back out the same way we came in. We left and Chris dropped DJ off 1st and me second and I guess he went home.” R. 1563-1564.

Defense counsel Whitlark (for Petitioner McDonald) joined in the objection to the state’s proposed redaction of this statement. R. 432, ll. 4-12. Defense counsel later again joined in a further motion that the state’s proposed redactions were insufficient under Bruton v. United States, 391 U.S. 123 (1968). R. 627, l. 2- 629, l. 14. Solicitor McDuffie claimed the state’s redactions would solve the Bruton problem. She specifically maintained that Bruton would be satisfied “by taking the places where we have the names of the co-defendant crossed out and changing that or whiting it out and having Investor Catoe rewrite “*another person*.” The solicitor claimed this would satisfy Gray v. Maryland, 523 U.S. 185 (1998). The judge said he understood that the state was proposing that the statements be redacted to use “another person” or ‘we’ or ‘they.’” The solicitor confirmed that was correct. R. 630, ll. 1-11.

Defense counsel stated such redactions were inadequate. Specifically counsel cited this Court’s pragmatic opinion in State v. Labarge, 275 S.C. 168, 268 S.E.2d 278 (1980), where it held

the substitution of “Mr. X” for the defendant’s name would not satisfy Bruton v. United States, 391 U.S. 123 (1968). R. 630, l. 22- 631, l. 2. Counsel argued the jury “will absolutely know” that the statement was referring to the two other co-defendants. R. 631, ll. 4-17.

Defense counsel repeatedly noted the opinion in State v. Labarge and argued “our position is that [these redactions] do not satisfy Bruton.” R. 632, l. 1- 634, l. 9. Defense counsel noted this was a “very powerful confrontation clause” rule issue and that allowing statements into evidence as presently redacted clearly implicated the co-defendants. R. 634, l. 10- 637, l. 2.

Defense counsel Sheldon for Petitioner McDonald also noted the heart of Bruton was that the jury should not be able to look at the other two defendants and conclude those must be the “some other people” in the statements. R. 637, ll. 3-16. Defense counsel argued the co-defendant’s fundamental constitutional rights would be violated if the state’s proposed redactions were allowed to stand. R. 638, l. 4- 643, l. 17. The judge noted that the objection to the redaction went to Petitioner McDonald, co-defendant Cannon and co-defendant Whitehead. However the judge overruled the objections to the state’s proposed redactions. R. 643, ll. 12-22; State’s exhibits 103 and 104. R. 1570-1575.

Before investigator Danny Catoe read the redacted confession, state’s exhibit 103, of Robert Cannon the objections were renewed. R. 735, l. 19 - 748, l. 23. In his statement, Cannon noted that he went into the Sonic where the men either worked or had worked wearing ski masks as a joke. “Another person said we need to do something with these mask (sic), and I ask and another person asked like what. And another person said like beat Joshs (sic) ass because he’s a snitch . . .” R. 1570. The rest of the Cannon redacted statement, in pertinent part, stated:

Another person then ask (sic) if me and another person wanted to ride and we said whatever. Because I had nothing else to do and no certain time to be home. It was about 11 p.m. Another

person was real quiet in the car while we were going to Josh's house. We pulled up to Josh's about 11:30 p.m.

Another person knocked on the front door and Josh didn't answer. So another person said that he was going to pull one of my moves and kick the door. So another person went to the side door and he another person (sic) busted it in. *He went in first and me and another person followed him to watch the fight.* Josh was asleep on the couch and another person yelled hey bitch, and when Josh looked up, another person hit him with a glass lamp. Right after that Josh was in a daze and another person drags him off the couch part of the way. *Then another person started pressuring another person to hit Josh with the bat that was in the house and another person then hit Josh in the back of head (sic).* After that Josh was basicly (sic) crawling trying to get up. [A]nd the whole time another person was talking shit to him about being a snitch. At that time another person kicked Josh in the ribs, and ask (sic) Josh where the weed was and Josh was just grunting. That when (sic) another person ask me to check the room and we started pulling draws (sic) and another person flipped the mattress and another person was just standing their (sic). Then Josh went unconscious (sic) and I got Josh a towel and put it to his head. Another person said fuck we don't have anything and pushed the Christmas tree over on Josh. Another person then got mad again and took the house phone. But before another person left he got some frozen chicken from the freezer and put it on Josh's head to try and stop the bleeding. After that we went back out the same way we came in.

We left and another person dropped another person off 1st and me second and I guess he went home.

R. 1570-1573. (emphasis added).

Investigator Catoe read the Cannon confession to the jury. R. 739, l. 1 - 740, l 23 It's strikingly obvious in this case that Petitioner McDonald was the person co-defendant Cannon was implicating along with Whitehead. That was certainly true before Catoe testified he took the statement at "Robert Cannon's house on December 15, 2006, two days after the murder." R. 752, ll. 16-19. **Catoe continued "after obtaining this statement, we then obtained an arrest warrant for Mr. Derrick McDonald."** R. 754, ll. 5-11. Catoe repeated **"after speaking with Mr. Cannon,**

we had another investigator obtain a warrant on Mr. Derrick McDonald.” R. 755, ll. 8-16. (emphasis added). Any possible weak argument the state had that Cannon had not implicated Petitioner McDonald in the crime was now removed. Even before this devastating final nail in the coffin, it was apparent that Cannon, on the face of his statement, was implicating Petitioner McDonald in this Sonic centered murder as being another person involved in the crime with him and Whitehead.

Petitioner McDonald strongly maintained that his statement to the police was coerced and should not be considered despite the state’s arguments to the contrary. Petitioner’s allegedly voluntary statement was then read to the jury. In this statement Petitioner stated that he decided to go to the Sonic and he talked “to them” about getting a job. They then went to the Walmart and “we got a ski mask and a box of the latex clubs that were purple.” R. 767, l. 16- 769, l. 19; R. 773, l. 7- 776, l. 14.

One of the men called Zack to see if Josh was at home and see who was there. “Then we started planning a whole thing...” Petitioner McDonald said he was to stay outside and “to make sure nobody came up.” “So he went to the side door and we all kicked the door on the count of 3. The door opened. Another person went in, another person, then me. I turned around, closed the door, and I went to the other room to look out the window, and my name was called. And I went into the living room. They were talking low, and another person went to the light switch at the dining room area and cut the light on. And another person was on the couch asleep ... Josh was on the couch asleep. And another person took a bowl over his head and smashed it on Josh’s head. At that point that’s when I looked to the left and saw a wooden bat. And I started hitting him on the body. That’s one another person stopped me to ask Josh a question. And that’s when the bat hit

Josh in the face. That's when he really started bleeding and I got scared and dropped the bat." R. 767, l. 1- 769, l. 17.

On cross-examination Catoe denied that he told seventeen-year-old Petitioner **that if he would give a statement he would be a witness against Chris Whitehead rather than a defendant.** R. 826, l. 6- 830 l. 12. *Catoe also denied petitioner told him he did not want to talk without a lawyer while Catoe was giving him these assurances.* R. 831, l. 8- 832, l. 7. Later in his cross-examination, Catoe would only say **he did not remember telling petitioner he only wanted him as a witness against Whitehead.** R. 836, l. 12-14. Catoe denied telling petitioner that the trial in which he wanted him to be a witness against Whitehead *was going to be "a death penalty trial"* R. 826, ll. 9-11. (emphasis added).

Catoe also admitted there were not any fingerprint, eyewitness, or forensic evidence linking the three co-defendants to the crime scene. R. 889, l. 11- 890, l. 11; R. 894, ll. 14-17.

Jury argument on Petitioner McDonald's statement

Defense counsel told the jury to consider the circumstances of this case when deciding whether petitioner's statement was voluntarily tendered given the promise made to him. "You grab a 17-year-old kid at his house and you are going, hi, were the police. We want to talk to you about a murder. You're a 17 years old. And they're telling you, *you want to be a witness in a case or do you want to be a defendant in a death penalty case?*" R. 1421, l. 16 – 1423, l. 10. (emphasis added).

Jury charge on voluntariness of the statement

The trial judge instructed the jury that it would make the ultimate decision of whether a defendant's statement was made freely and voluntarily of his own free will. The judge told the jury it could consider the defendant's age his mental ability or capacity, the nature of the questioning, and whether he was advised of his right to have a lawyer present and other factors. R. 1481, ll. 3-25.

Since there was only a general verdict rendered in this case there is no way to determine if the jury determined whether or not Petitioner McDonald's statement was freely and voluntarily given.

Court of Appeals

The Court of Appeals cited this Court's opinions in State v. LaBarge 275 S.C. 168, 268 S.E.2d 278 (1980), and State v. Holder, 382 S.C. 278, 285–286, 676 S.E.2d 690, 694 (2009). The court noted that this Court in LaBarge held that substituting “Mr.X “was insufficient “in light of other testimony” since “Mr. X” pointed directly at LaBarge. App. 6-7.

The Court of Appeals held, nonetheless, “we find the neutral phrase ‘another person’ inserted into Cannon statement avoided any Bruton violation. The court noted that a limiting instruction was given, and held the trial judge properly admitted the redacted statement. App. 6-7.

Discussion

Defense counsel correctly argued that redacted statements in this case violated the holdings of Bruton v. United States, 391 U.S. 123 (1968) and State v. Labarge, 275 S.C. 168, 268 S.E.2d 278 (1980), See, also, Gray v. Maryland, 523 U.S. 185, 197 (1998) State v. Holder, 382 S.C. 278, 285–286, 676 S.E.2d 690, 694 (2009); State v. Henson, 407 S.C. 154, 754 S.E.2d 508 (2014). The Court of Appeals, respectfully, erred by holding otherwise.

In this case, as in Bruton, during petitioner's joint trial the admission of his non-testifying co-defendant's statement clearly implicated Petitioner McDonald in the crime and therefore violated his rights under the Confrontation Clause. The Court in Richardson v. Marsh, 481 U.S. 200 (1987) noted that Bruton can be complied with by redaction. Here, however, as in State v. Holder, 382 S.C. 278, 676 S.E.2d 690, 694 (2009), and State v. Henson, 407 S.C. 154, 754 S.E.2d 508 (2014), Cannon's statement clearly implicated petitioner as “another person” involved in the burglary and murder.

Further, the practical policy reasons favoring joint trials (mostly large drug trials in federal court) discussed in Richardson v. Marsh cannot, as a matter of fundamental fairness, decimate a defendant's right to confrontation where it becomes apparent the non-testifying defendant is naming the defendant as his accomplice in the murder. This Court has often warned against the dangers of such joint trials, and here the danger was apparent before the trial ever started.

"We urge the state to carefully consider all the available alternatives before deciding to try co-defendants jointly, especially in a capital case. While we realize there will be circumstances in which a joint trial will be the best route to follow, the decision to pursue this route should be made only after giving due deliberation to the inherent problems, such as redacted statements, which arise from joint trials." State v. Bellamy, 293 S.C. 103, 106 S.E.2d 63, 65 (1987). *overruled on other grounds in* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

While this was not a "mass trial," trying these three Sonic defendants together, with these redacted statements, very definitely had the impermissible spill-over effect of a guilty verdict for each because they were, as stated below, joined at the hip -- especially in the manner the state tried this case: "We take this occasion to remind prosecutors of the pitfalls inherent in mass conspiracy trials. More than forty years ago this Court stated, "It is always cumbersome to try a great number of defendants at one time.... With such a large number [of defendants] there might be a danger of some of them being lost sight of by the jury, and their case considered by the jury in a vague way." State v. Gunn, 313 S.C. 124, 138, 437 S.E.2d 75, 83 (1993).

The men were joined at the hip by their tie to the Sonic. They were the three defendants on trial, and Cannon's statement clearly referred to Petitioner McDonald and co-defendant Whitehead. Defense counsel correctly argued that this case was not any different than State v. Labarge where

the state claimed the redaction of the co-defendant's name being replaced with "Mr. X" solved the problem.

In Henson, this Court cited to Gray v. Maryland, 523 U.S. 185, 196 (1998), wherein the confession was redacted with blanks rather than neutral pronouns, and noted that the Gray Court "clarified that Richardson did not turn on whether the confession admitted required an inference in order to incriminate the defendant, but on the kind of inference required. Id. at 196, 118 S.Ct. 1151. Ultimately, the Court held "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 incriminat[es]' the codefendant. Id. at 196, 118 S.Ct. 1151 (alteration in original). In other words, the Court brought within Bruton's prohibition those confessions which **facially incriminate through inference.**" State v. Henson, 407 S.C. 154, 164, 754 S.E.2d 508, 513 (2014). (emphasis added).

This Court in Henson continued: "Gray did not directly address confessions redacted through the use of neutral pronouns as was done here. However, following Gray, in State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009), this Court held, consistent with many other courts considering the issue, that even a confession redacted through the use of neutral pronouns violates the Confrontation Clause if it facially incriminates a nonconfessing codefendant. Id. at 285–86, 676 S.E.2d at 694. This follows directly from Gray where the holding turned on the fact that despite redaction the statements were 'directly accusatory' and 'obviously refer[ed] directly to someone, often obviously the defendant.' Gray, 523 U.S. at 194, 196, 118 S.Ct. 1151. In short, where redacted

confessions use neutral pronouns which facially refer to a codefendant, they violate the Confrontation Clause.” State v. Henson, 407 S.C. 154, 164, 754 S.E.2d 508, 513 (2014).

This Court in Henson cited favorably to United States v. Richards, 241 F.3d 335 (3d Cir.2001), wherein the appellant and a codefendant were tried jointly for robbing an armored car and the codefendant's redacted confession was admitted into evidence. *Id.* at 341. “The redacted confession did not refer to the appellant by name but referred to him as the codefendant's ‘friend.’ *Id.* The court held the ‘reference to his ‘friend’ was just as blatant and incriminating of [the appellant] as the word ‘deleted’ in the Gray case.” *Id.* The court explained that the confessor's statement ‘referred to the existence of three participants in the crime—[the confessor], the ‘inside man,’ and ‘my friend.’ Since the ‘inside man’ was easily identified as the driver of the Brink's van, the reference to ‘my friend’ sharply incriminated [the appellant], the only other person involved in the case.” *Id.* Thus, knowing only who the parties were and the fact that the appellant sat before them as a defendant, the jury would likely infer that the statement referred to the appellant as a participant in the crime. Therefore, the confession directly implicated the appellant and violated the Confrontation Clause.” State v. Henson, 407 S.C. 154, 165, 754 S.E.2d 508, 514 (2014).

This Court also cited Stanford v. Parker, 266 F.3d 442 (6th Cir.2001), in which the petitioner was tried jointly with a coconspirator. *Id.* at 449. “His codefendant's confession was redacted to replace the petitioner's name with “the other person” and then read into evidence by a detective. *Id.* at 456. On appeal of the denial of his habeas corpus petition, the court held the redaction would not have prevented the jury from inferring that the confession referred to the petitioner and thus, the admission of the confession violated the Confrontation Clause. *Id.* at 457. The court reasoned the jury would make the inference because the petitioner ‘sat as a defendant before the jury’ and the confession was offered into evidence by the prosecution which the jury

knew was seeking the petitioner's conviction. Id.” State v. Henson, 407 S.C. 154, 165, 754 S.E.2d 508, 514 (2014).

Finally, this Court in Henson cited the Arkansas Supreme Court’s opinion on a similar issue in Jefferson v. State, 359 Ark. 454, 198 S.W.3d 527 (2004), involving three men who robbed a bank courier, one pled guilty, and the other two were tried jointly. Id. at 529–30. “A codefendant’s confession was admitted into evidence after changing the appellant’s name therein to ‘he,’ ‘they,’ or ‘some other guy.’ Id. at 530–31. The court found it was clear from the redacted statement that a third person participated in the crime. Id. at 535. The court concluded the confession ‘obviously directly referred to [the appellant], an inference that the jury easily could have drawn from [the appellant’s] status as a codefendant and the State’s concession that [the codefendant] was the shooter.’ Id. at 536. Accordingly, it held the admission of the confession violated the Confrontation Clause. Id.” State v. Henson, 407 S.C. 154, 166, 754 S.E.2d 508, 514 (2014).

Defense counsel here went to great lengths to repeatedly object to these redactions and to explain why they violated the right to Confrontation and to cross-examination. Further, the “another person” awkwardly inserted in Cannon’s confession in this case was even more obvious than the cases finding Bruton violations cited by this Court in Henson, supra. Petitioner McDonald was jointly tried with Whitehead and Cannon. The jury could look over and see petitioner and Whitehead as the Cannon confession was read.

Moreover, the solicitor, after all, was arguing that Petitioner McDonald and Whitehead were involved with Cannon in committing the crime. See Gray v. Maryland, 523 U.S. 185, 193 (1998). The solicitor went through Cannon’s statement in detail while arguing Cannon downplayed his involvement in the crime, and described how the police proceeded to Petitioner’s house to arrest him. R. 1354, l. 13 – 1362, l. 8.

As seen, Investigator Catoe testified that immediately after obtaining the inculpatory statement from co-defendant Cannon he obtained an arrest warrant for petitioner. Here, by eliciting testimony Petitioner McDonald was arrested immediately after Cannon made his inculpatory statement removed **any doubt** a limiting instruction could be effective. It is important to note that petitioner's involvement in the crime was apparent from the Cannon statement, and it was not apparent **only** by reference to Catoe's testimony about immediately arresting petitioner after taking Cannon's statement.¹

Petitioner McDonald did not appear to have any motive to participate in this crime against the decedent. As stated, there is no way to determine whether the jury considered petitioner's statement or rejected it as coerced as defense counsel argued and the judge instructed. R. 1452, ll. 2225. Defense counsel Whitlark reminded the jury that petitioner was only seventeen-years-old at the time, "and they're telling you, you want to be a witness in a case or do you want to be a defendant in a death penalty case." R. p. 1421, ll. 16-22. Defense counsel told the jurors that the police were putting their pride in obtaining a conviction above petitioner's freedom. R. p. 1421, l. 25- 1422, l. 6.

Defense counsel Whitlark also reminded the jury that petitioner was told that the police just wanted his help in convicting Whitehead. Counsel noted that petitioner had also asked for and been denied an attorney, and that both of young Robert Cannon's parents were given the impression that they could leave town while they spoke with Cannon. Cannon was charged with murder in their

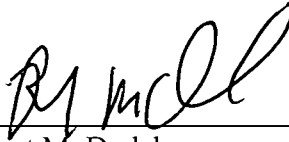
¹ Conversely, in Richardson v. Marsh, 481 U.S. 200, 208 (1987), the Court dealt with a case where a co-defendant's statement was **not** incriminating against Marsh on its face, but **only became so** when linked with Marsh's own testimony admitting her presence at the crime scene which came later during the trial. The confession here was incriminating against Petitioner McDonald on its face. Investigator Catoe's testimony removed **any doubt** that Cannon had implicated petitioner in his statement to the police.

absence. R. p. 1434, ll. 2-10. The admission of the confession of the non-testifying co-defendant in this case violated the holdings of Bruton, Gray, and Petitioner McDonald's right to confrontation. The Court of Appeals should respectfully be reversed in this case.

CONCLUSION

By reason of the foregoing argument, the opinion of the Court of Appeals should be reversed and petitioner McDonald granted a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. M. Dudek", written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 13th day of May, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Kershaw County

G. Thomas Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

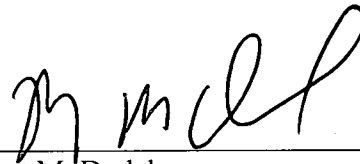
V.

DERRICK MCDONALD,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on Melody J. Brown, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 13th day of May, 2014.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 13th day
of May, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 24, 2021