STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Sumter County
Honorable William Jeffrey Young, Circuit Court Judge
Appellate Case No: 2011-199366
Opinion dated November 5, 2014

THE STATE,

Respondent,

v.

DANIEL D'ANGELO JACKSON,

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. The Court of Appeals opinion was issued on November 5, 2014 and concluded the admission of co-defendant Reginald Canty's redacted statements during joint murder trial violated Daniel Jackson's 6th Amendment right of confrontation and that the error was not harmless error. State v. Daniel D'Angelo Jackson, _ S.C. _, _ S.E.2d _, 2014 Westlaw 5654283 (S.C. App. November 5, 2014). Respondent submits that the issues raised in Jackson concerning the admission of a non-testifying co-defendant's confessions against the co-defendant and the complete redaction of Jackson's name by the use of the neutral pronoun "another person" involve a legal principle of major importance concerning the manner that joint trials are handled in South Carolina and it is therefore proper for rehearing under SCACR Rule 221 and certiorari

under SCACR Rule 242 should rehearing be denied. Respondent submits that the Court of Appeals misapprehended certain points, both legal and factual, as set forth below, in support of the petition for rehearing.

1. The admission of Canty's Statements against Canty did not violate the Confrontation Clause where specific reference to Jackson was removed through the use of neutral pronouns that referred to either "another person" or "other person" which did not incriminate Jackson "on the face" of each of the admitted statements.

In the Court's opinion, it concluded that "[E]valuating the content of Canty's redacted statements in context, we find the admission of the statements violated Jackson's right to confront and cross-examine Canty." Respondent submits that the references made directly to Jackson in the series of statements was "adequately obscured." The Court focused on the reference in the fifth statement about "another person" purchasing a "Little Debbie" snack cake to resolve that the reference in the statement was to Jackson rather than "another person." The opinion states: "the conclusion that Canty was referring to Jackson was inescapable on the face of the statement, despite the removal of Jackson's name. When the jury then heard "another person" was one of the men who attacked the pizza man at the mobile home park, the statement obviously and immediately incriminated Jackson."

The problem with the Court's reading of the statements reflects a misapprehension of the manner that a jury would hear the statement. Under the court's conclusion "another person" would always refer to the same person, i.e., "another person #1." However, a fairer reading of the statements does not require the jury to assume that "another person" is always the same person. To the contrary, "another person" would as reasonably suggest that its use is a different person than the earlier reference.

Neither Bruton nor its progeny require gender-neutral redaction nor forbid the use of neutral pronouns. See e.g. Gray v. Maryland, 523 U.S. 185, 196 (1998) (suggesting the

substitution of the phrase "some other guys" for "deletion, deletion" did not violate Gray's Confrontation Rights under Bruton). Similarly, the fact that a non-testifying co-defendant's statement limits the amount of potential participants involved does not create a per se Bruton violation. In Jackson's case, there was no evident limitation within the redacted statement, which varied from one participant to three additional actors to an ambiguous unidentified number of other persons. In fact, South Carolina has rejected both of these contentions. See State v. McDonald, 400 S.C. 272, 734 S.E.2d 167 (Ct. App. 2012), (cert. granted.), (finding that the use of the neutral term "another person" was acceptable in a redaction); State v. Garrett, 350 S.C. 613, 620-21, 567 S.E.2d 523, 526 (Ct. App. 2002)(finding the admission of a redacted statement made by Garrett's non-testifying co-defendant, Davis, in Davis and Garrett's joint trial did not violate Garrett's Confrontation Rights despite the fact the redacted statement used the phrase "the other guy" and Garrett was the only other male on trial). Rather, as was the case in Gray, a redacted statement violates Bruton and its progeny only when the inferences flowing from the redactions contained within the statement "obviously refer . . . [to] the defendant" such that "were the confession the very first item introduced at trial" the jury could "immediately" construe the statement against the accused. See e.g. Gray, 523 U.S. at 196("The inferences at issue here involve statements that, despite redaction, obviously refer 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."). Therefore, in a case such as this where there are no obvious redactions in Canty's statements, the redacted statements do not facially incriminate Appellant. Respondent submits that the trial judge did not err in admitting the properly redacted statements of Canty that removed any specific reference to Jackson by the reasonable use of the terms "another person" or "other person." [1]

1 Statements that connect the defendant "only when linked to other evidence introduced at trial," do not

Gray differentiates between statements that incriminate by inference or only when linked with later evidence and those that obviously refer to a particular person or involve inferences a jury could make even without additional evidence. Id. at 196, 118 S.Ct. 1151. Only in the latter instance does a constitutional violation occur. Id.[2] For example, in response to the question, "Who was in the group that beat [the victim]?," the response "Me, deleted, deleted, and a few other guys" obviously incriminates two codefendants of the crime of murdering the victim. Id.

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offend the Bruton rule. State v. Holder, 382 S.C. 278, 284, 676 S.E.2d 690, 693 (2009). However, redaction of the defendant's name alone may not suffice to protect rights. "[O]ne must look at the kind of inferences that are necessary to make a connection to the defendant, not the simple fact that there are inferences, to determine the applicability of Bruton. Holder, 382 S.C. at 284. For example, use of the pronoun "she" when there is only one co-defendant, and she is female, still identifies the co-defendant and offends Bruton. Holder, 382 S.C. at 285. Moreover, physical descriptions that identify the co-defendant are similarly unacceptable. State v. Singleton, 303 S.C. 313, 315, 400 S.E.2d 487, 488 (1991). The use of a phrase which reflects a pointed identification being hidden from the juror would also appear to point directly to a co-defendant and would offend Bruton. See, for example, Gray, 523 U.S. at 196(referencing pointed identification of "me, deleted, deleted, and a few other guys" insufficient)(emphasis added); State v. LaBarge, 275 S.C. 168, 170, 268 S.E.2d 278 (1980) (substitution of "Mr. X" for name likely insufficient). The Court in Gray expressed the preference for the use of general terms, such as changing the redaction from specific deletion, i.e. "Me, deleted, deleted, and a few other guys," to "Me and a few other guys." 523 U.S. at 196. The Fourth Circuit has also noted that a "neutral phrase" such as "another person" or "another individual" does not directly implicate the co-defendant. United States v. Akinkoye, 185 F.3d 192, 198 (4th Cir. 1999). See, e.g., United States v. Lighty, 606 F.3d 321, 376–77 (4th Cir.2010) (redacted statement of codefendant that he was accompanied by "three other people" did not violate Bruton); United States v. Jass, 569 F.3d 47, 61–63 (2nd Cir.2009) (substitution of "another person" in place of defendant's name did not violate Bruton); Ky Minh Pham v. Hickman, 262 F. App'x 35, 37 (9th Cir. 2007)(use of "friends," "people," "men," "they," "guys," and "someone" did not violate Bruton).

2 Many circuits, like the Tenth Circuit in United States v. Verduzco-Martinez, 186 F.3d 1208, 1213–14 (10th Cir., 1999) (use of "another person" did not violate confrontation clause); , have permitted admission of a redacted statement using a neutral pronoun, even if other evidence would link the co-defendant to the redacted confession, so long as the redacted statement is not facially incriminatory with respect to the non-testifying co-defendant. See, e.g., United States v. Vega Molina, 407 F.3d 511, 519-21 (1st Cir.2005) (holding that non-testifying co-defendant's redacted confession, describing crimes in detail, acknowledging his participation in them, but using terms such as "other individuals" or "another person" when mentioning his co-defendants, was not so powerfully incriminating to bring Bruton proscription to bear)

Many courts, however, have also recognized that there are circumstances where no redaction or neutral pronoun substitution will suffice to eliminate a Sixth Amendment violation. See Stanford v. Parker, 266 F.3d 442, 456-57 (6th Cir. 2001)(concluding that Confrontation Clause was violated because "other person" in confession would not prevent jury from inferring confession referred to defendant); United States v. Hoover, 246 F.3d 1054, 1059 (7th Cir. 2001)(holding that "incarcerated leader" clearly referred to defendant in violation of Bruton because it was no more than obvious pseudonym and that to "adopt a four-corners rule would be to undo Bruton in practical effect"); Richards, 241 F.3d, 341(determining that Confrontation Clause was violated by admission of co-defendant's confession that referred to "friend" and "inside man"); United States v. Gonzalez, 183 F.3d 1315, 1321-22 (11th Cir.1999) (concluding that there was a Confrontation Clause violation because prosecutor's presentation of redacted confession implicated precise number (four) of confessor's co-defendants), overruled on other grounds, United States v. Diaz, 248 F.3d 1065 (11th Cir.2001); United States v. Payne, 923 F.2d 595, 597 (8th Cir. 1991)(holding that confession indicating plan to help "someone" escape from prison violated Confrontation Clause because everyone at trial knew that "someone" meant defendant).

(internal quotation marks omitted). After Gray, however, the Fourth Circuit has continued to allow general references to "another person" or "another individual" in such statements, because "[t]he Supreme Court has strongly implied that such statements do not offend the Sixth Amendment." United States v. Akinkoye, 185 F.3d 192, 198 (4th Cir. 1999). The implication to which Akinkoye refers is the Supreme Court's explicit pondering in Gray about "[w]hy could the witness not, instead, have said: 'Question: Who was in the group that beat [the victim]? Answer: Me and a few other guys,' " suggesting that such a neutral response would have been acceptable. Gray, 523 U.S. at 196. In Akinkoye, the non-testifying co-defendants' confessions were retyped, with the defendants' respective names replaced with the neutral phrase "another person" or "another individual," and the statements were read to the jury. Akinkoye, 185 F.3d at 198. So redacted, neither confession facially implicated the other defendant. Id. [3] In McDonald, 400 S.C. 272 (cert. granted), the Court of Appeals concluded that Bruton was not violated where the defendant's name, like in this case, was redacted and replaced by the neutral phrase "another

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3 In U.S. v. Lighty, 616 F.3d 321, 376 -377 (4th Cir. 2010), the Court found no constitutional violation in Flood's case. CW's testimony concerning the statements made by Lighty were found to be like those in Akinkoye and unlike the offending statements in Gray. In Gray, the defendants' names were redacted in response to the direct question of who beat the victim. It was clear to the jury upon hearing the non-testifying codefendant's response that the statement had been altered by the deletion of two names. Gray, 523 U.S. at 196, 118 S.Ct. 1151. There, as in Akinkoye, there was no way to facially identify the three other people without more information. Also, unlike in Gray, the 4th Circuit determined that it would have been unclear to the jury that the statements had been altered at all. Indeed, only when Lighty's out-of-court statement to CW is linked with in-court testimony, which Flood had an opportunity to challenge through cross-examination, might one infer that the out-of-court statement refers to Flood. Following Gray, the Fourth Circuit Court of Appeals applied this reasoning to general references to "another person" or "another individual" in Akinkoye v. United States, 185 F.3d 192, 198 (4th Cir. 1999). Specifically, the Fourth Circuit said that redacted statements taken from Akinkoye, a male, and Afolabi, a female, each of which utilized the redaction mentioned above, and were offered only against themselves in their joint trial, did not violate either of their rights under the Confrontation Clause, despite the fact their statements said that another person aided them in committing the charged offenses. Id. In so holding, the Fourth Circuit said, "[t]he Supreme Court has strongly implied that such statements do not offend the Sixth Amendment." Id. Thus, the proposition from Gray, that redactions which are not readily apparent to a juror and do not ask them to speculate whose identity is being concealed, but are instead, accepted at face value, do not violate ones Confrontation Right's under Bruton.

The Fourth Circuit has recently relied upon Akinkoye in United States v. Cone, 714 F.3d 197 (4th Cir. 2013). In Cone, the Court held that the substitution of the name "another individual" sufficient to protect the defendant's rights. Id. 714 F.3d at 218. As the Court therein stated: "**only reference to other evidence could the jury arrived at the conclusion that [the defendant] was the subject of Cone's out of court statement. In such circumstances , we have concluded that the Confrontation Clause is not offended.**"

person." The statement therein only implicated the statement's maker and did not limit participation to the three defendant's on trial.

The Court of Appeals erred in its assessment in this case. First, the method of redaction utilized in the non-testifying co-defendant's statement did not require the jury to speculate or fill in any obvious blanks with the non-testifying co-defendant's name. And second, since it did not, it also did not facially incriminate the accused? Because neither of these were correctly resolved, rehearing is proper.

The various redacted statements did not facially incriminate Jackson. There was no reference to Jackson "on the face" of any of the statements by Canty. The various and multiple references to "another person" "other person" at the time of the killing could not be always read by the jury to facially refer to the Appellant without otherwise being linked with other evidence. Contrary to the claim of Appellant and Court of Appeals, the evidence would require linkage to the other evidence presented. The jury could not have made any connection without relying upon other evidence presented at trial.

Second, the Court misapprehended the way a jury would have construed the statements. The number of other unidentified participants was unclear within the statements, as redacted, and inconsistent from the various statements. Concerning the crime scene, the number of involved participants were either one person [(State Exhibit 9, R.p. 767, ll. 9-10)("looked like it could be James or J-boy")], [State Exhibit 8, R.p. 765, ll. 1-8 ("I see two people fighting and I hear someone said no, stop, then I hear gunfire ... and the person that was holding the gun had a hoodie")], two persons [(State Exhibit 9, R.p. 767, ll. 17-18)("I hear more than one footsteps running)], [State Exhibit 3, R. 40-47, ("I saw a white man wrestling with a tall black man over a gun, the black man told him to stop, and then I heard a gunshot. The other person was standing

next to the van looking at the guys wrestle. The other guy had a handgun that looked like a revolver. After the gunfire everyone ran ...")]; (R.p. 574, ll. 9-13)(he stood in his yard by the gate and saw a black male struggling with the pizza man and another black male holding a revolver ..."), three males with hoodies, (State Exhibit 5, R.p. 581, ll. 1-8)("The pizza man was met by three males with hoodies. Another person was one of the males, and I didn't - - and I don't know who the other two were. The pizza man was trying to take the gun rifle away from the black male, and the black male told the pizza man to stop and then the gun fired.") or an unclear amount of perpetrators due to the ambiguity in the Canty's written usage of "another person." See (State Exhibit 7, R.p. 586, l. 25 – p. 587, l. 9)("another person went to the back of the trailer, and he wait for the pizza man to come, they started to rob the man. The pizza man was trying to take the gun away from another person, and this person said stop. And after he said stop, he shot the pizza man ... he stayed there for a second. Then he ran. It looked like another person running away with the other person around the car."). The use of neutral pronouns in each of the co-defendant's statements removed the jury's speculation that a redaction had occurred. Rather, it enhanced Jackson's own argument that Canty's statements were inconsistent and lacked credibility. Contrary to the assessment of the Court of Appeals, the jury is hearing all these various references to "another person" or "other person" which allows for various construction. The jury did not have the unredacted version to bias their review aor suggest that "another person" was always the same person. Even if they realized that the purchaser of the Little Debbie was Jackson as "another person," it did not require that the person be the same person who killed in the statements. A reasonable juror looking only at each of the "confessions" themselves would not be able to reasonably infer that Jackson was the trigger person or another person identified at the crime scene from any of the statements. This is a major

fault in the assessment.

The reference to the purchase of a Little Debbie snack cake in the redacted statement by the "other person" (R.p. 574, ll. 1-3), "another person" (R.p. 579, ll. 19-24) or "the other person bought a snack cake" (R.p. 558, l. 25 – p. 559, l. 2) did not create Bruton error. These are not facially incriminating statements against Jackson. Unlike Gray, this reference would not be read to refer obviously to Jackson even if the statements were the first piece of evidence at the trial. Any significance to the purchase if a Little Debbie cake had to be developed through the trial evidence. The clerk testified "they" came in and bought a Little Debbie cake, but he could not identify who bought it. R. 260-61, 275. Another employee was able to identify Jackson from the video. R. 296. Subsequently, a Little Debbie wrapper was found near the crime scene. R. 374, 416-18. However, there was nothing that could identify the particular wrapper to a purchase that evening. R. 428, 858. This reference did not refer "on its face" to Jackson, although it was plainly inferable through the other evidence that was properly admitted against him. However, the statement did not plainly indicate that this person was the only person involved in the crime.

Further, the degree of inference is slight due to the multiple possibilities of "another" or "other" persons within the individual statements. The inferential connection to the trigger person or the person with the revolver is tenuous and is not "facially incriminating" to Jackson than it is to the hooded unidentified person in the video at the grocery store. R. 281 (State Exhibit 18, State Exhibit 20, 21:01:09). Simply put, these statements do not incriminate Jackson on their face. A juror would not know what or anything that Jackson did from the statements. It may have been Marcus Branch, Desmond Canty, Junior's nephew, or the unidentified man in the black hoodie in the store or any "other person" or other persons. This extensive redaction of Canty's

statements were consistent with Bruton-Richardson-Gray.

The attenuated reference to "another person" or "other person" is distinguishable from cases recently addressed by the court. Unlike Henson, the Canty statements would not be read to facially refer specifically to Jackson. To the contrary, the jury here would have to refer to other evidence to determine what role Appellant had in the crime. Unlike Henson, no other co-defendants were named though there were multiple other unnamed persons suggested in the statements. The jury could not assume from the face of any statement what Jackson did. Similarly, unlike Holder, the various statements had other individuals who were unidentified and did not uniquely point to Jackson as it did in Holder who was the only female on trial, where the jury would likely infer the reference to Holder. Similarly, the specific reference to "James or J-boy" was not a reference to the appellant and did not implicate any Bruton issue. In fact, it is not clear from the statement how many were involved.

Further, there was no singular "another person" identified in the various statements who had a particular role that the jury would have only inferred was Jackson. From the collateral evidence presented to the jury, it was clear that Jackson was identified by the store employee on the video. R. 296. His presence at the store was conceded by his counsel in his opening and closing statement. R. 173, 977, 982-83, 998. Similarly, it was shown that someone bought a Little Debbie snack on the video, but one of the employees was unable to identify who or what was brought. R. 260-64, 287. But see Tr. 275 (on video fairer skinned person purchases Little Debbie).[4] Contrary to Henson, Holder, and State v. LaBarge, 275 S.C. 168, 268 S.E.2d 278

4 There were references to the other person seen on the video in the store wearing a black hooded sweatshirt. R. 280-81. Counsel Wilder presented this unidentified individual as leaving the store prior to Jackson in support of his theory. R. 183. He similarly referenced this unknown person in the hooded jacket in his closing. R. 977, 982. He also notes that this person left before an employee named Junior's nephew, who both left before Jackson and Canty, during the critical time period. R. 981-82. See also, R. 258, 274-76, 284. The nephew was seen dancing in the store and walked to the right when he left. R. 282. However, the employee could not tell on the video what way the hooded sweatshirt man left. R. 281.

(1980)(replacement of "LaBarge" to "Mister X" pointed directly to Defendant), it cannot be said that "another person" or "other person" at any or all times pointed to Jackson. Similar to McDonald, 400 S.C., 274-276 (S.C. App. 2012), the "another person" phrase only implicated Canty and did not limit the participants or their discrete roles in the killing.

The Court also suggested the manner of the redactions where Jackson's name was removed and replaced with "another person" or "other person" was clumsy and invited the jury to speculate about the identity and suggest an obvious deletion. While it may suggest bad grammar, it does not support the concern about obvious deletions previously criticized. It was only through the eyes the Court of Appeals with the knowledge of who Canty was specifically referring to that allowed the resolution that was made by the Court in its "bad grammar" equals obvious deletion assessment. Contrary to the conclusion of the Court of Appeals, it is equally reasonable that the juror would read the redacted statements use of another person at face value rather than constructing it a manner that would lead to the assertion that it was always the same person. To assert that the multiple use of the phrase "another person" caused it to lose its effectiveness to obscure cannot stand closer scrutiny when viewing each statement in totality rather than through parsing of a few individual sentences from the separate statements was an error of law because a reasonable juror would not have similarly parsed those sentences in light of the entire statements.

2. The Court of Appeals misapprehended the record where the trial court did not violate the Appellant's Sixth and Fourteenth Amendment rights to confront and cross-examine witnesses pursuant to Crawford v. Washington, 541 U.S. 36 (2004), by allowing five statements by Appellant's non-testifying co-defendant into evidence, which did not directly implicate Appellant in the murder and armed robbery due to the redaction of Appellant's name with neutral pronouns and it use only against Canty.

Due to the co-defendant's exercise of his Fifth Amendment right not to testify, he was unavailable as a witness and Appellant had no prior opportunity to cross-examine his accuser.

Thus, the introduction of the inadequately redacted statements violated Appellant's Sixth and Fourteenth Amendment rights to cross-examine and confront the witnesses against him. Crawford, 541 U.S. at 42. However, Respondent submits that the statements were not introduced against the Appellant, but against his co-defendant – the maker of the statements. Thus his confrontation right was not violated because it was not a witness against him. The Court of Appeals misapprehended the law and Crawford in concluding that it was a violation of the Confrontation Clause and the decision of this Court and the South Carolina Supreme Court that suggest or hold otherwise are improperly decided.

In Crawford, 541 U.S. 68, the Supreme Court held that testimonial statements of unavailable witnesses are admissible against a defendant only where there had previously been an opportunity for confrontation. Otherwise, the admission of such statements offends a defendant's rights under the Confrontation Clause. Id. However, the statement at issue here was redacted as to Petitioner and admitted only against Canty - the defendant who made the statement. Crawford could not apply. In short, the statement was not admitted against Petitioner, but against Canty. Petitioner's confrontation rights were protected by redaction under Bruton, 391 U.S. 123

In Bruton, the Supreme Court held that "admission of [the co-defendant's] confession in [a] joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." 391 U.S. at 126. Thus, to avoid a confrontation right violation, and for the statement to be admissible, any such statement must be redacted to avoid directly implicating (by name or direct, or inescapable inference) a defendant's co-defendant. Id, Gray, supra, Holder, supra. Here the statement was properly redacted which prevented any Confrontation Clause issue.

Crawford' s main concern was for a defendant's right "to be confronted with the witnesses against him." Crawford, 541 U.S. at 42. Crawford did not abrogate the Supreme Court's prior holdings in Bruton or Marsh, which found no Sixth Amendment violation when the admitted statement is not facially incriminating. See Crawford, 541 U.S. at 57(finding its decision consistent with other Confrontation Clause cases, including Bruton; Richardson, 481 U.S. at 206("Ordinarily, 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"). Thus, while co-defendant Canty's statements are testimonial, the admission did not violate the petitioner's confrontation rights because it did not implicate Appellant. Appellant had no need for cross-examination because the testimonial evidence did not reference him or implicate him in any crime. Crawford is therefore inapplicable. See, e.g., U.S. v. Akefe, 2010 WL 2899805, at 25-26 (S.D.N.Y. July 21, 2010).5

3. The Admission of the Redacted Statements was Harmless Error. The Court of Appeals misapprehended the record and the effect of the admission of the statements when viewed against the separate evidence of guilt to Jackson.

Even if Jackson's Confrontation Clause rights were violated, a harmless-error analysis must be applied. "Whether the error is harmless depends upon a host of factors, including: (1) the importance of the witness's testimony in the prosecution's case, (2) whether the testimony was cumulative, (3) the presence or absence of evidence corroborating or contradicting the testimony

5 In regard to a similar situation, the Fifth Circuit found that "while Crawford certainly prohibits the introduction of a codefendant's out-of-court testimonial statement against the other defendants in a multiple-defendant trial, it does not signal a departure from the rules governing the admittance of such a statement against the speaker-defendant himself, which continue to be provided by Bruton, Richardson, and Gray." United States v. Ramos-Cardenas, 524 F.3d 600, 609-610 (5th Cir. 2008). By the same logic, the Second Circuit, also in reviewing a Bruton redaction, found "there is no separate Crawford problem, and we see no indication that Crawford overrules Richardson or expands the holding of Bruton." United States v. Lung Fong Chen, 393 F.3d 139, 150 (2nd Cir. 2004). See also United States v. Williams, 429 F.3d 767, 773 n.2 (8th Cir. 2005)("We note that Crawford did not overrule Bruton and its progeny"). Applying the same logic here, because Canty's statements were properly redacted of any specific reference to Jackson by the use of neutral pronouns. At any rate, as shown in the prior argument in the instant brief, that statement was properly redacted; thus, there could be no error under the Confrontation Clause. Ramos-Cardenas.

of the witness on material points, (4) the extent of cross-examination otherwise permitted, and (5) the overall strength of the prosecution's case." Delaware v. Van Arsdall, 475 U.S. at 684. The Court of Appeals failed to recognize that the strongest evidence against the guilt of Jackson was not the statements of Canty (which did not directly implicate Jackson) , but the possession of the weapon. As the court acknowledge the evidence was "strong" against Jackson, but the Court sought to mitigate the strength by characterizing it as "purely circumstantial." However, the fact that the case is based upon circumstantial evidence rather than eyewitness or a personal confession does not preclude the obvious conclusion that the admission of the statements against Canty was harmless beyond a reasonable doubt against Jackson.

The Appellant conceded being in the store contemporaneous to when the telephone call setting up the pizza man was made. R. 173, 977, 998. Jackson was identified with Canty at the store on the video. R. 296. Upon arrest, Jackson made an inculpatory statement when served with the armed robbery warrant that "how could I be charges with armed robbery if I didn't steal anything from the pizza man." R.p. 595, ll. 1-2. His guilty knowledge was reflected in his hiding when the police came to his aunt's apartment in Summerton and watched them leave before returning. R.p. 595, ll. 5-7. Also, R. 486-88. The day after the shooting, an empty-handed Jackson was picked up by his uncle Isaac Boyd at a motel in Sumter and he asked him to take him to Curtis Wheeler's house to pick up clothes and Jackson and Wheeler went to an abandoned trailer. R. 507-510. After Jackson brought a clothes basket back, Boyd saw a rifle which Jackson took into his aunt's house. R. 510-11. Jackson asked Boyd to lie for him and tried to get Boyd to hold the rifle. R. 511, 516, 518. Jackson asked Toya Rush on the evening of January 12, 2008 for socks and gloves, but she claimed she did not give him any. R. 914-15. The rifle that was recovered from the apartment of Jackson's aunt was identified as one of the fired

two murder weapons through ballistic testing of the rifle and the fired bullet. [State Exh. 58-A]. R. 486, 490, 496, 502, 510-11, 673-77.

Further, a pizza box with pizza in it and a warmer from Sambino's were recovered on January 22, 2008 at St. Mark's Court. R. 386, 408, 803. Also R. 204-05. This was the location where Jackson's uncle took him where the Winchester model 94 rifle was picked up. R. 386, 408, 508, 803. On the night of the crime, 3 large pizzas were ordered. R. 198. At the crime scene on January 13, two pizza boxes had been recovered. R. 381-82, 384.

The Appellant claims that to satisfy the harmless error standard, there needed to be additional forensic evidence such as fingerprints or DNA specifically linking him to the crime scene. This is not necessary. There are specific links to the crime scene from the rifle in his identified in his possession, the pizza and a pizza warmer from the crime located where Appellant recovered the rifle the day after the shooting. His assessment would be more evidence would have been helpful, but it does not preclude the reasonable conclusion that the available evidence satisfied harmless error.

Under these discrete circumstances, any error was harmless. The Court of Appeals misapprehended the record in dismissing the claim. Contrary to the parentheticals in the cited cases by the Court of Appeals, the assessment of whether an evidentiary error in harmless error must be done on a case by case basis and not by a characterization of the evidence. Here. The evidence was overwhelming such that the admission of the statements if error was harmless.

CONCLUSION

For the aforementioned reasons, the State respectfully asks this Court to grant the petition for rehearing and affirm the judgment and conviction and sentences.

Respectfully Submitted,

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ATTORNEYS FOR RESPONDENT

November 20, 2014

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the RESPONDENT'S Petition for Rehearing in the foregoing action by depositing copies in the United States Mail, postage prepaid, to Carmen V. Ganjehsani Appellant Defender, Division of Appellate Defense, P. O. Box 11589, Columbia, SC 29211 this 20th day of November, 2014.

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November 20, 2014

Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: The State v. Daniel D'Angelo Jackson
Appellate Case No. 2011-199366

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of the State's Petition for Rehearing in the above-referenced case for filing. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Donald J. Zelenka
Senior Assistant Deputy Attorney General

DJZ/lbb
Enclosures

cc: Carmen Ganjehsani, Esquire
Ernest A. Finney, III, Solicitor
Trisha Allen, Victim Assistance