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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals
Op. No. 5278, filed November 5, 2014, rehearing denied December 17, 2014
From Sumter County
Honorable William Jeffrey Young, Circuit Court Judge
Appellate Case No: 2015-000078

THE STATE,

Petitioner,

V.

DANIEL D'ANGELO JACKSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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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.

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.

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.

STATEMENT OF THE CASE

The Appellant, Daniel D'Angelo Jackson, was jointly indicted at the September 11, 2008 term of the Court of General Sessions for murder and armed robbery with his co-defendant Reginald Canty. R. 43. 2008-GS-43-0993 (ROA 1073-74). The case involved the January 12, 2008 murder of William Flexon. Jackson was represented at trial by Arthur H. Wilder. Canty was represented by Garryl L. Deas, Jr. of the Sumter County Bar. They proceeded to trial on August 8, 2011 before the Honorable William Jeffrey Young, Presiding Judge. The case was prosecuted by Assistant Solicitor John P. Meadors of the Third Circuit Solicitor's Office.

On August 11, 2011, the jury found the Appellant and his co-defendant guilty on both counts. R. 1044-45. Judge Young sentenced Canty to thirty (30) years for murder and thirty (30) years for armed robbery, concurrent. R. 1065. Jackson was sentenced to life imprisonment for murder and thirty (30) years for armed robbery. R. 1066.

A motion to reconsideration, judgment NOV, mistrial and motion for a new trial was made on August 16, 2011. ROA 1067. Judge Young denied the motion on August 23, 2011.

The Appellant timely appealed the conviction and sentence on September 7, 2011. In the appeal, the Appellant presented the following issues in his Final Brief of Appellant:

I. Did the trial court err in admitting into evidence five statements made by Appellant's non-testifying co-defendant without adequately redacting the portions implicating Appellant in violation of his Sixth and Fourteenth Amendment rights to confront and cross-examine witnesses against him, as interpreted by Bruton v. United States, 391 U.S. 123 (1968) and its progeny?

II. Did the trial court violate 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 implicated Appellant in the murder and armed robbery?

III. Did the trial court err in refusing to grant Appellant's motion for severance where Appellant's joint trial compromised his right to confront and cross-examine his accuser by admitting five inculpating statements from his non-testifying co-defendant?

IV. Did the trial court err in denying Appellant's motion for a mistrial when the non-testifying co-defendant's statements were not adequately redacted and a State's witness committed a Bruton-type error?

V. Did the trial court err in refusing to quash the jury panel pursuant to Appellant's Batson motion where the State's explanation for striking two African-American jurors was that the jurors did not want to serve on the jury, and where the State also failed to provide an explanation for striking another African-American juror?

Final Brief of Appellant, p. 1.

Subsequent to the filing of the State's Initial Brief of Respondent, the Prior to the filing of the State's Initial Brief of Respondent, the State moved to have the case transferred or certified to the Supreme Court pursuant to SCACR Rule 204 without objection on February 4, 2014. On March 19, 2014, the Supreme Court of South Carolina denied the motion. The Final Brief of Respondent was filed March 25, 2014. The matter was heard on June 10, 2014.

On November 5, 2014, the South Carolina Court of Appeals reversed the conviction and remanded for a new trial. The basis was a conclusion the admission of co-defendant Reginald Canty's statements violated the Confrontation Clause based upon the manner of the redaction of the statements by the use of neutral pronouns. The Court of Appeals further concluded that the admission of the redacted statements was not harmless. The Court of Appeals declined to address the remaining issues concerning the selection of the jury panel against a Batson v. Kentucky, 476 U.S. 79 (1986) challenge. State v. Daniel D'Angelo Jackson, Appellate Case No. 2011-199366 (S.C. Ct.App. November 5, 2014).

The State made a timely petition for rehearing on November 20, 2014. In the petition, the State contended under SCACR Rule 242 that the Court of Appeals erred in misapprehending certain legal and factual points in their opinion including:

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.

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.

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.

Petition for Rehearing, p. 2, 10, 12. On December 17, 2014, the South Carolina Court of Appeals issued it Order denying the Petition for rehearing.

This petition for writ of certiorari follows.

THE STATE'S STATEMENT OF THE FACTS

William Flexon, a pizza delivery man, was gunned down to death by two shots on January 12, 2008 at an abandoned trailer at Lot 7, Cherryvale Road in Sumter County. He was lured there by the Appellant and co-defendant Reginald Canty in a robbery plot.

The incident begins at Sambino's owned by Tanya Knudson. R. 189. Around 8:04 pm that night, Sambino's received a telephone call from a male-like voice ordering three large pizzas (pepperoni, sausage, double cheese). R. 192-93, 743-44, 746. State Exhibit 82. When asked, Tanya was told the call was being made from a pay phone. R. 193. The delivery was to go to Lot No. 7, O.C. Mobile Home Park in Cherryvale. R. 197. Tanya takes the order.

The next delivery person scheduled was Al. However, the victim, William "Bill" Flexon, takes the order instead.[1] R. 200-01. Before the order is taken, Sumter County Deputy Sheriff Jennifer Griffin, now Thomas, is eating at Sambino's and sees Flexon leave with the pizzas. R.

[1] Flexon had worked at Sambino's as a delivery driver for 3 years. R. 190-91.

202.

Deputy Thomas later receives a call about shots being fired at Cherryvale. R. 203. She leaves Sambino's, goes to Lot 7 at the O.C. Mobile Home Park and finds Bill Flexon's body on the ground. R. 308.

Tanya learns that it is her delivery carrier who was shot. R. 203. She leaves and goes to the mobile home park and gets into contact with Sergeant Burnish. R.p. 204, 213, ll. 18-25. [Tanya records the number for the call as 415-656-1073. R.p. 196, l. 4; p. 214, ll. 18-25.] Tanya identifies the closest pay phone to Sambino's as being at the Cherryvale Grocery. R.p. 204, ll. 8-11.

They go to the Cherryvale Grocery and speak with Eugene Mackovitch. R.p. 259-261. A video from the camera reveals that two men came into the grocery. R.p. 260-261. Mackovitch is not able to identify the defendants, although he stated that they look familiar. R. 271.

One of them is subsequently identified as co-defendant Daniel Jackson by Anitta Shannon, a grocery employee after viewing the video as the fairer skinned male on Sunday January 13, 2008. R.p. 294-96, 303, 713-756. [Canty is subsequently identified from the video by Investigator Burnish on January 14. R.p. 770-71.] Mackovitch sold one of the two a "Little Debbie" snacks. R.p. 261-62, 275. However, the one who purchased the snack leaves with the snack in his right hand. R.p. 267.[2] After leaving, Mackovitch saw them turn to the right toward where the payphone is located. R. p. 268-69, 276-77. Mackovitch states that he does not use the pay phone. R.p. 271. Another person is also seen in the video in a black hooded jacket. R.p. 837-

[2] The only incident Mackovitch could remember from that night was when a couple individuals came in and were in the back and Mackovitch had other customers coming in and out and he thought he saw one of the people put something in their pocket. Then they came to the counter and bought a Little Debbie Snack. As they were leaving, Mackovitch went around the counter and approached him and asked if he had anything in his pocket. The person said no and then Mackovitch let him go. R.p. 260-61,

38 (confirms black hooded individual in store video). See also, R. p. 978-79, 982 (closing Argument of Counsel Wilder concerning other person in black hoodie at the store in the video).

State Exhibit 24 is a Little Debbie snack wrapper and appears to be a product sold in Cherryvale Grocery. R.p. 269-70, 853. See also State Exhibit 86. (photograph of wrapper near vehicle tire). R.p. 858. The sell by date on the wrapper is 1/22. Cherryvale Grocery receives fresh product in the store. R.p. 269-70. This exhibit was discovered on the side of the road near the entrance to lot 7. R.p. 374. It was 137 feet away from the victim's body. R.p. 416-18. There was insufficient ridge detail on the wrapper for positive fingerprint identification. R.p. 428. At the crime scene, evidence is gathered, including two pizza boxes from Sambino's. R.p. 221, 223, 381-82.

Based upon law enforcement leads, they go to co-defendant Jackson's aunt, Andrea Russell. R.p. 486-87. Jackson had been there, but fled when the police arrived. R.p. 485-87.[3] However, after the police leave, he returns. R.p. 488. Andrea Russell subsequently calls the Clarendon County Sheriff's Office and advises them that she found a rifle under her futon and asks them to come and get it. R.p. 446. They retrieve the rifle and a box of bullets that she says were not hers. R.p. 446-450, 490, 774. Russell states she discovered the rifle while vacuuming that day. In addition, Russell states that she had some peanut butter on the morning in question and nothing was in her jar but later that same evening when she opened the peanut butter jar there was a shell casing in the jar. R.p. 491-93.

Evidence was presented that Jackson had called Isaac Boyd's wife on January 13 asking him to be picked up from the American Inn in Sumter. R.p. 507. Boyd is Jackson's uncle. He

[3] Jackson made a statement after being read his arrest warrants about seeing law enforcement come to the apartment complex which caused him to run away. Further, after the warrants were served on him and read to him, Jackson asked how he could be charged with armed robbery if he did not take any money from the pizza man. R.p. 778.

testified that he picked him up and took him to Curtis Wheeler's place to pick something up. While Boyd stayed in the car, he saw Jackson and Wheeler go to an abandoned trailer by the woods. Jackson had told Boyd that he needed to pick up some clothes. Jackson returns with a clothes basket, but Boyd did not realize that there was a rifle in the basket until he got back to Sumter. R.p. 510-11. At that time Boyd takes Jackson to his aunt's house (Andrea Russell). While this occurred on a Sunday night, Boyd claimed that Jackson asked him to lie and say that it was Saturday night. R.p. 511.

Law enforcement searches co-defendant Canty's house and finds a 30-30 shell casing under his bed while searching for a weapon in a consent search. R.p. 630. See State Exhibit 75. R.p. 693.

During the autopsy, law enforcement learns that there were two bullets removed from the victim. R.p. 460-61, 769. SLED forensics firearms examiner Tracy Thrower determined that the bullets came from two different firearms. R.p. 672. He opined that one of the bullets came from the rifle (.30 caliber rifle style bullet) located under the futon at Jackson's aunt's home. R.p. 676-77. He opined that the other bullet did not come from the Winchester rifle. He stated that the bullet was too large in diameter. R.p. 678, 691. He also opined that the cartridge, State Exhibit 69, was fired from the Winchester rifle. R.p. 679. This cartridge was recovered from the peanut butter jar at Andrea Russell's home. R.p. 492. In response to a leading question from Jackson's counsel, Thrower also opined that the cartridge found under Canty's bed was fired by the rifle at some point. R.p. 696, ll. 1-23. State Exhibit 71. Subsequently, Investigator Burnish testifies that he recovered the 30-30 shell casing from underneath Canty's bed, had it sent to SLED, received information that the shell casing was fired from the rifle and then warrants were issued for Canty. R.p. 783-84.

Investigator Burnish went to Canty's front porch and determined that Canty would not have been able to see lot 7 from that position, which is contrary the Canty's January 25, 2008 statement. R.p. 792, ll. 4-9. Investigator West also stated that he could not see Lot 7 from Canty's porch when they were conducting the search. R.p. 654. West stated that someone sitting on the porch of Canty's home who said they were watching the area where the shooting occurred would not be able to see because of the bush. R.p. 629, 654.

On January 13, law enforcement speaks with the co-defendant Reginald Canty. R.p. 760-65. In his initial statement, he denies any knowledge of the crime. In his next statement, Canty states he was there. R.p. 767-68. However, in these initial statements to Deputy Burnish, Canty did not state that someone had asked him if he wants to rob the pizza man, R.p. 768-69. State Exhibit 8, State Exhibit 9. These statements are set forth in detail within Argument I of the Final Brief of Respondent.

Officer Burnish stated that on January 13 Canty gave a second statement that concluded at 6:00 PM. R.p. 766. In this statement, Canty describes: "I see the two people fighting, and I hear the gunfire, and I see the man fell on the ground, fell down . . . And the bad guy ran. He looked like he could be James or J-Boy because he had a black hoodie with a dragon on the back with short pants with blue designs on the pockets . . ." R.p. 767, ll. 2-18. (Emphasis added) (James or J-Boy is never identified in the trial record.). State Exhibit 9.

Reginald Canty gave another series of statements to law enforcement. Canty was 16 years old at the time. The next contact with Canty was on January 15, 2008 by Investigator West at 10:35 am. R.p. 557, l. 16- p. 560, l. 25. State Exhibit 3. On January 17, 2008 at 3:34 PM, Reginald Canty made another statement to Investigator West, with his mother, Dorothy Canty present. R.p. 564-65. R.p. 580. R.p. 580, l. 19- p. 581, l. 10. State Exhibit 5. On January 25,

2008, Investigator West again talked with Canty with his mother present. R.p. 584-87. State Exhibit 7.

Investigator West had an interview with Appellant Jackson on January 16, 2008 at 9:03 PM. R.p. 593. Investigator West stated that at that time he gave Jackson his Miranda rights which Jackson waived. At that point West served Jackson with murder and armed robbery warrants. After being served with the armed robbery warrant, Jackson said "how could I be charged with armed robbery if I didn't steal anything from pizza man." R.p. 595, ll. 1-2. Jackson also told West that he saw the police coming to his aunt's apartment in Summerton and ran away, but watched the police while they were there. R.p. 595, ll. 5-7. See also, R.p. 646-647. Officer Burnish was present during this interview with Jackson. R.p. 778-79.

In front of the jury, a number of redacted statements of co-defendant Canty were presented. These statements are set forth in detail in the Final Brief of Respondent, p. 11-15, which is incorporated by reference.

REASONS WHY CERTIORARI SHOULD BE GRANTED

The Court of Appeals opinion 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). The State 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 pronouns of "another person" "other person" "other guy" involve a legal principle of major importance concerning the manner that joint trials are handled in South Carolina and it is therefore proper for certiorari. The statements that the jury heard were redacted in such a way to satisfy the mandates of Bruton v. United States, 391 U.S. 123 (1968). **At the outset, the State recognizes that this petition may be affected by the pending decision in State v. Derrick McDonald, Appellate Case No. 2012-213696 which was argued before this Court on December 11, 2014 in which a similar issue concerning the effect of the neutral pronoun in redaction is presented.**

The State submits that certiorari is appropriate when the Court of Appeals misapprehended certain points, both legal and factual, as set forth below.

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" "other guy" which did not incriminate Jackson "on the face" of each of the admitted statements.

The Court of Appeals 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." The State 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 lower 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. The State 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." [4]

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

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.[5] 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. (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,

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5 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).

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. [6] 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 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, certiorari is proper.

The various redacted statements did not facially incriminate Jackson. There was no

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6 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.**"

reference to Jackson "on the face" in any of the redacted 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 Jackson 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 of Appeals misapprehended the way a jury would have construed the redacted statements. The number of other unidentified participants was unclear within the statements, as redacted, and inconsistent between the various statements. Concerning the crime scene, the number of involved participants described 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, When the pizza man came, 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 "critical inquiry is ... not whether a jury might infer from other facts (whether evidence admitted at trial or circumstances such as the number of defendants on trial) that a declarant's neutral allusion to a confederate might have referenced the defendant." U.S. v. Jass, 569 F.3d 47, at 61 (2nd Cir. 2009). Rather, "the appropriate analysis to be used when applying the Bruton rule requires that [the court] view the redacted confession in isolation from the other evidence introduced at trial." U.S. v. Williams, 936 F.2d 698 at 700-01 (2nd Cir. 1991) ("If the confession, when so viewed, does not incriminate the defendant, then it may be admitted with a proper limiting instruction even though other evidence in the case indicates that the neutral pronoun is in fact a reference to the defendant."); see also Jass, 569 F.3d at 62 ("In making this determination, we view the redacted statement in isolation to evaluate its impact on a jury." (citing Richardson v. Marsh, 481 U.S. at 208–09.

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 defense argument that Canty's statements were inconsistent and lacked credibility. Contrary to the assessment of the Court of Appeals, the jury is only hearing all these various references to "another person" or "other person" "other guy" which allows for various construction. The jury did not have the unredacted version to bias their review or suggest that "another person" was always the same

person, i.e., "another person #1." Cf. State v. Fisher, 338 P.3d 897 (Wash. 2014) (Admission into evidence of nontestifying codefendant's out-of-court incriminating statements violated defendant's rights under confrontation clause, despite redaction and substitution of "first guy" for defendant's name, in joint prosecution of defendants for first degree murder; there were only three participants in crime and two defendants, and although the statements appeared facially neutral, the record revealed that the jury could easily infer that "first guy" was defendant). In fact, contrasting between the statements another person pre-redaction statement referred to individuals other than Jackson through the use of neutral pronouns. See R.p. 85, l. 17-17 ("other guy"); p. 94, l. 22 ("another black male"); p. 103, l. 17 ("another person"). Even if the jury accepted from the statement that the purchaser of the Little Debbie snack cake was Jackson as "another person," it did not require the specified person to be the same person who killed the victim in the statements. The identity information arose from the other evidence, not plainly from the series of conflicting statements. A reasonable juror looking only at each of the "confessions" themselves would not be able to presume that Jackson was the trigger person or "another person" identified at the crime scene from any of the redacted statements. This is a major fault in the Court of Appeals assessment.

The references to the purchaser 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. These references in the statements 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 redactions in Canty's statements were consistent with Bruton-Richardson-Gray.7

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

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7 Redactions or substitutions are consistent with Bruton "if the altered statement uses words 'that might actually have been said by a person admitting his own culpability in the charged conspiracy while shielding the specific identity of his confederate.'" U.S. v. Taylor, 745 F.3d 15, at 28 (2nd Cir. 2014) (quoting U.S. v. Jass, 569 F.3d 47 at 62 (2nd Cir. 2009)); see also United States v. Tutino, 883 F.2d 1125, 1135 (2d Cir.1989) (upholding redacted statement where "the jury never knew that [the declarant's] original statement named names"). For example, the Second Circuit has previously allowed proper names to be replaced by "another person," Jass, 569 F.3d at 59; "my neighbor," United States v. Yousef, 327 F.3d 56, 149 (2d Cir.2003); "he," United States v. Kyles, 40 F.3d 519, 526 (2d Cir.1994); "this guy," "another guy," and "similar language," United States v. Williams, 936 F.2d 698, 699, 701 (2d Cir.1991); "friend," United States v. Benitez, 920 F.2d 1080, 1087 (2d Cir.1990); and "others," "other people,"and "another person," Tutino, 883 F.2d at 1135. Accord, U.S. v. Ashburn, _ F.Supp. _, 2014 Westlaw 7403851 (E.D.N.Y. 2014)

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 Canty statements. The jury could not assume from the face of any statement what Jackson did as opposed to one of the apparent "another person" or "other person." 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.

Most importantly, there was no singular "another person" identified in the various statements who only had a particular role that the jury would have only presumed 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. However, Jackson's presence at the store was conceded by his counsel in his opening and closing statements. R. 182-183, 979, 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 bought the item or what particular item was brought. R. 260-64, 287. But see Tr. 275 (on video fairer skinned person purchases Little Debbie).[8] Unlike Henson, Holder, and State v. LaBarge, 275 S.C. 168, 268 S.E.2d 278 (1980)(replacement of "LaBarge" to "Mister X" pointed directly to Defendant), it cannot be said that "another person" or "other

8 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.

person" at any or all times pointed to Jackson (or the same "another person"). Similar to State v. McDonald, 400 S.C., 274-276 (S.C. App. 2012), the "another person" phrase only implicated co-defendant Canty and did not limit the other participants or their discrete roles in the killing.

While the redaction language may appear to be cumbersome, the substitutions do not rise to the level of reoccurring awkward circumlocutions that contributed to the Second Circuit's holding in U.S. v. Taylor, 745 F.3d 15, at 29 (2nd Cir. 2014) (disapproving redacted statements such as, "[t]he robbery was the idea of the person who waited with Luana Miller and Taylor at the gas station," and "Luana Miller and the other person who had waited with Taylor at the gas station came up with the plan"). The Court of Appeals 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 unredacted knowledge of who Canty was specifically referring to that allowed the resolution that was made by the Court of Appeals in its "bad grammar" equals obvious deletion conclusion. Contrary to the finding 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 them in a manner that would lead to the assertion that it was always the same person. To additionally assert that the multiple use of the phrase "another person" caused it to lose its effectiveness to obscure cannot withstand closer scrutiny when viewing each individual 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 opportunity to cross-examine him concerning the various statement he made that were introduced against Canty. The State 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 Canty was not a witness against Jackson. The Court of Appeals misapprehended the law and Crawford v. Washington in concluding that it was a violation of the Confrontation Clause and the decisions of this Court.

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 does 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, 568 Fed. Appx 1 (2nd Cir. May 28, 2014) [9]

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

9 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.

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 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 in his opening statement (and closing statement) being in the store with Canty on a video to be introduced contemporaneous to when the telephone call setting up the pizza man was made. R. 183. See also R. p. 979, l. 20, p. 998, ll. 13 ("we know Mr. Jackson went in the store that night. We know he was there when the call was placed from the outside cell phone"). 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 Taya 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 Edh. 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 is 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 writ of certiorari, vacate the decision of the Court of Appeals and remand to the Court of Appeals for consideration of the remaining issues.

Respectfully Submitted,

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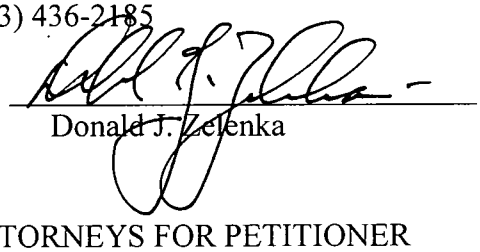
By: 
Donald J. Zelenka

January 23, 2015

ATTORNEYS FOR PETITIONER

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals
Op. No. 5278, filed November 5, 2014, rehearing denied December 17, 2014
from Sumter County
Honorable William Jeffrey Young, Circuit Court Judge
Appellate Case No: 2015-000078

THE STATE,

Petitioner,

v.

DANIEL D'ANGELO JACKSON,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that the South Carolina Court of Appeals denied the State of South Carolina's petition for rehearing on December 17, 2014.

This 23rd day of January, 2015.

DONALD J. ZELENKA

STATE OF SOUTH CAROLINA
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DANIEL D'ANGELO JACKSON,

Respondent.

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the Petition for Writ of Certiorari and Appendix to the Petition by depositing copies in the United States Mail, postage prepaid, to Laura Ruth Baer, Appellant Defender, Division of Appellate Defense, P. O. Box 11589, Columbia, SC 29211 this 23rd day of January 2015.

DONALD J. ZELENKA
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ALAN WILSON
ATTORNEY GENERAL

January 23, 2015

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P. O. Box 11330
Columbia, SC 29211

Re: The State v. Daniel D'Angelo Jackson
Appellate Case No. 2015-000078

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the ***Petition for Writ of Certiorari by State of South Carolina,*** along with original and copy of the ***Appendix***, 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/
Enclosures

cc: Laura R. Baer, Esq.
Ernest A. Finney, III, Solicitor
Trisha Allen, Victims Assistance