STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

William Jeffrey Young, Circuit Court Judge

Opinion No. 5278 (S.C. Ct. App. filed 11/5/2014)

08-GS-43-993.

THE STATE,

PETITIONER,

V.

DANIEL D'ANGELO JACKSON,

RESPONDENT

APPELLATE CASE NO. 2015-000078

RETUIRN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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STATEMENT OF QUESTIONS PRESENTED

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 [sic] 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.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. The Court of Appeals correctly held that the Trial Court erred in admitting into evidence statements made by Jackson's non-testifying co-defendant without adequately redacting the portions implicating Jackson 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.

2. The Court of Appeals correctly held that the Trial Court erred in admitting into evidence statements made by Jackson's non-testifying co-defendant where the statements implicated Jackson thus violating his Sixth and Fourteenth Amendment rights to confront and cross-examine witnesses, as interpreted by Crawford v. Washington, 541 U.S. 36 (2004), because Canty's out-of-court statements remained testimonial and Canty did not testify at the co-defendants' joint trial.

3. The Court of Appeals correctly held that admission of the non-testifying co-defendant's redacted statements was not harmless error where the remaining evidence against Jackson was not overwhelming.

COUTERSTATEMENT OF THE FACTS

Background

On January 12, 2008, William Flexon died from gunshot wounds while delivering three pizzas from Sambino's Pizza to a vacant lot in a mobile home park in Sumter County. Based on the five statements given to law enforcement by Jackson's co-defendant, Reginald Canty, and the subsequent investigation by the Sumter County Sheriff's Office, Jackson was charged with the murder and armed robbery of William Flexon. On August 8-12, 2011, Jackson was tried jointly with Canty before the Honorable William Jeffrey Young and a jury. Jackson was represented by Arthur H. Wilder, Canty was represented by Garryl L. Deas, and the State was represented by assistant solicitor John P. Meadors.

Jackson v. Denno Hearing

Pre-trial, a hearing was held pursuant to Jackson v. Denno, 378 U.S. 368 (1964), to determine the admissibility of the five inconsistent statements made to law enforcement by Jackson's co-defendant, Reginald Canty. R. 79 – 150; State's Exhibit # 3 (Statement by Canty), R. 1075; State's Exhibit # 5 (Statement by Canty), R. 1077; State's Exhibit # 7 (Statement by Canty), R. 1079; State's Exhibit # 8 (Statement by Canty), R. 1080; State's Exhibit # 9 (Statement by Canty), R. 1081; Court's Exhibit # 9 (Collection of Statements), Suppl. R. 1. Officers Dominick West and Robert Burnish of the Sumter County Sheriff's Office testified at the Jackson v. Denno hearing. The trial court ultimately found that the co-defendant's statements to law enforcement were admissible because the statements "were made freely and voluntarily." R. 150, ll. 6-14.

Motion for Severance of Joint Trial

Defense counsel moved for severance of Jackson's joint trial because co-defendant's statements to law enforcement affected Jackson's right to cross-examine and confront witnesses

against him. R. 148, l. 11 – 150, l. 2. Defense counsel argued that he could not properly attack the co-defendant's credibility in making those five statements to law enforcement in a joint trial, particularly when the statements alleged varying levels of Jackson's culpability in the murder and armed robbery. R. 148, l. 19 – 149, l. 9. Defense counsel also argued that a joint trial denied Jackson his right to a fair trial because redacting Jackson's name from his co-defendant's statements cannot cure the prejudice created by the statements if the co-defendant does not testify in this joint trial. R. 149, l. 10 – 150, l. 2. The trial court denied defense counsel's motion for severance of Jackson's joint trial. R. 151, l. 23 – 152, l. 2.

First Motion for a Mistrial

Counsel for the co-defendant elicited the following testimony during cross-examination of Officer Jennifer Thomas of the Sumter County Sheriff's Office:

> Q: And then [the report taken on the night of the murder] also states that you spoke with someone by the name of Linda Canty.
>
> A: Yes, sir.
>
> Q: And also on your report, it indicates that a suspect is Daniel Jackson [Appellant].

R. 329, ll. 3-7. Defense counsel contemporaneously objected, and outside the presence of the jury, moved for a mistrial. R. 330, ll. 1-2. Defense counsel argued that the report is prejudicial as "rank hearsay" and requested that the trial court strike the question and answer. R. 329, l. 18 – 330, l. 7. The trial court noted, "Well, how is it prejudicial for your client? He's a defendant in the courtroom. I mean, they [the jury] would have to suspect that at some point in time his [Jackson's] name would come into play." R. 330, ll. 8-11. Defense counsel further argued, "[The State is] posturing as though [Jackson] was a suspect . . . on that particular night when the report was issued, and I object to that." R. 330, ll. 12-15. The trial court refused to grant the mistrial motion, but

agreed to strike the witness' answer and defense counsel's request for a curative instruction.[1] R. 331, ll. 5-8, R. 331, l. 15 – 332, l. 8.

Bruton Redactions and Crawford

At trial, the State redacted the co-defendant's statements by replacing the references to Jackson's name with inserting "another person" or "other person" in its place. R. 545, l. 9 – 550, l. 8. The trial court found the redactions satisfied the requirements set forth in Bruton, 391 U.S. 123. R. 550, ll. 9-10. Defense counsel objected and argued that the redactions do not satisfy Bruton. R. 550, l. 16 – 551, l. 8. The trial court overruled defense counsel's objection. R. 551, ll. 8-9. The co-defendant's statements were subsequently entered into evidence over defense counsel's objection and were read aloud to the jury. R. 563, l. 19 – 564, l. 3; R. 583, ll. 4-9; R. 587, l. 22 – 588, l. 3; R. 761, ll. 8-13; R. 765, ll. 20-25; State's Exs. # 3, 5, 7, 8, 9; 1075-1081. The primary statements relied upon by the State were Canty's fourth and fifth written statements, both of which were read to the jury. Canty's fourth written statement, after redaction, read as follows:

> On the night of the shooting ***another person*** asked my cousin (Desmond Cantey) to take ***him*** to Cherryvale Grocery Store. I went along cause I needed batteries. After arriving at the store me and ***another person*** got out the car and went to use the payphone so I stood beside ***him*** swinging my phone and I overheard ***him*** stated ***he*** wanted to order 3 large pizzas (1) all pepperoni and (1) all cheese and I didn't hear the other one. ***He*** told them while on the phone with the order that the address 1128 Cherryvale Drive, lot 7. ***He*** got off the phone and we went in the store. I went to look for some batteries and ***another person*** brought [sic] a snack cake. While I was in the store the manager approached me and asked what I took and I told him nothing that I had my phone. ***Another person*** was standing to the door waiting for me. After we left the store we was going back home and ***another person*** asked to be dropped off at Oaklawn but we already had past it so we went back home and ***another person*** left walking. I went inside and then came back outside to sit on the

[1] While the record indicates that it was the witness' answer that was struck, the transcript does not reflect that she gave an answer prior to defense counsel's objection.

> porch. As I came out the house I saw ***another person*** walk by and I asked where ***he*** going and ***he*** stated nothing and walked towards the back of the mobile home park. Toya Rush who stays beside she told me to watch her house while she was gone. I went to the house and got something to drink and sat on the porch and I saw car lights where lot [lot number redacted] is and I went to my fence. 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. ***Another 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 gun fired everyone ran. I ran in the house. I told my moms what I saw later on that night. I wasn't truthful to law enforcement in at the beginning because I was nervous and scared because I never saw anyone get killed before.

R. 1075 – 1076 (State's Ex. 3) (emphasis added). Canty's fifth written statement, after redaction, read as follows:

> I was standing by the mailboxes in OC Mobile Home park when ***another person*** I know by ***another name*** come up to me and ask whether I want to be apart of robbing a pizza man and I said yes cause I didn't want the other guys to laugh and pick at me. ***Another person*** told me to ask my cousin to take us to the store. I was going to get batteries. My cousin name is Desmond Cantey. ***He*** told me ***he*** was going to call Sambino's and order some pizzas. We went to Cherryvale Grocery. ***Another person*** used the payphone right next to the trash can (green) and called Sambino's. ***Another person*** order 3 large pizzas (pepperoni + cheese) is all I heard ***he*** asked for. We then went in the store and I looked for the batteries but they didn't have any. ***Another person*** brought [sic] a Debbie Snack Cake (Dounut Sticks). We went back to my house and ***he*** went to the back where the trash cans were and I sat on the blue caprice next to Toya's house. Toya stays next door to us, Toya asked me to watch her house while she was gone. Toya left I then went to sit on my porch until the pizza man came. I saw a silver in color Crysler van pulled up and pulled to the back where ***another person*** was. The pizza man stayed in his vehicle for approximately 3 minutes and he then got out went to the abandoned residence (Lt. 7) and saw the door open and turn around went back to his vehicle real fast. The pizza man was met by 3 males with hoodies. ***Another person*** was one of the males 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***. ***The black male*** told the pizza man to stop and then the gun fired. After I saw the man got shot I ran in the house and told my moms I heard a gunshot.

R. 1077 – 1078 (State's Ex. 5) (emphasis added).

The State failed to redact references to Jackson's race and gender in the co-defendant's statements. R. 572, l. 24 – 575, l. 22; R. 578, l. 11 – 581, l. 10; R. 586, l. 10 – 587, l. 9; State's Exhibits # 3, # 5, # 7, # 8, # 9, R. 1075-1081. Specifically, the solicitor failed to redact the pronouns in the co-defendant's statements (e.g., referring to Appellant as "Him" and "He"). In State's Exhibit # 5, the solicitor redacted Jackson's name, but failed to redact the reference to Jackson's gender and the co-defendant's familiarity with Jackson: "The pizza man was met by 3 males with hoodies, ***[another person] was one of the males*** and I don't know who the other two were." (emphasis added). When examining State's Exhibit # 5 and # 7, these statements reveal Jackson's race and gender ("black male"). The solicitor also read and emphasized the importance of the co-defendant's statements during his closing argument. R. 1003, l. 6 – 1027, l. 16.

Furthermore, the co-defendant's statements note that Jackson a/k/a "another person" bought a Little Debbie snack cake from a convenience store with the co-defendant prior to the murder. R. 558, l. 15 – 559, l. 5; R. 572, l. 24 – 575, l. 22; R. 578, l. 11 – 581, l. 10; State's Exhibits # 3; State's Exhibit # 5. R. 1075 - 1077. There was no doubt that "another person" referred to Jackson when Canty's statements were read aloud because ***prior*** to its introduction of the co-defendant's statements the State established that Jackson bought a Little Debbie snack cake at Cherryvale Grocery prior to the murder. R. 260, l. 18 – 276, l. 8. First, the State called the store clerk at Cherryvale Grocery who was working on the night of the incident and testified that he sold a Little Debbie snack cake to the lighter skinned of two individuals that came in the store together that night. R. 260, ll. 23-24; R. 264, ll. 9-13; R. 275, l. 1 – 276, l. 6; R. 287, l. 6 – 288, l. 9. However, he admitted on cross-examination that he had no idea if the Little Debbie snack wrapper marked as State's Exhibit # 24 was the snack cake purchased on the night of the murder. R. 287, l. 6 – 288, 18.

The State also called Anitta Shannon, another clerk from Cherryvale Grocery, who identified Jackson as one of the individuals shown on the store's surveillance video, who was the fairer skinned African-American male on the video. R. 293, l. 25 – 294, 21; R. 295, l. 23 – 296, l. 3.

The trial court ultimately admitted the Little Debbie snack wrapper and photograph of the snack cake into evidence over defense counsel's objection. R. 858, l. 1 – 859, l. 20; State's Exhibit # 24; State's Exhibit # 85; State's Exhibit # 86. The solicitor established and focused on the fact that a Little Debbie cake wrapper was found in the trailer park after the murder (one-hundred and thirty-seven feet away from the decedent's van). R. 371, l. 17 – 376, l. 6; R. 389, ll. 10-15; R. 395, l. 22 – 453, l. 2; R. 396, l. 1 – 403, l. 19; R. 415, l. 16 – 419, l. 22; R. 853, l. 18 – 859, l. 20. Investigator Raymond Mackessy admitted on cross-examination that no fingerprints were found on the Little Debbie Snack wrapper and that he does not know how the snack wrapper got there. R. 403, ll. 8-19; R. 418, l. 20 – 419, l. 22. Both the solicitor and counsel for co-defendant Canty reiterated that Jackson purchased the Little Debbie snack cake wrapper in their closing arguments. R. 969, l. 21 – 970, l. 5; R. 1022, ll. 9-14.

Additionally, the solicitor elicited the following testimony from Officer Burnish:

Q: You were not there when Mr. Canty [co-defendant] gave a statement on the 15th?

A: I was in the building; I was not present for that statement.

Q: Now, what happened and what did you do next in your investigation?

A: ***Based on the information that was received on that date is when we issued warrants for the arrest of Mr. Jackson.***

Q: Now, did you go look for Mr. Jackson?

A: Yes, we did.

R. 772, ll. 1-11 (emphasis added).

Second Motion for a Mistrial

At the close of the State's case, defense counsel moved for a directed verdict, and in the alternative, a mistrial: "Either the statements have been ***improperly redacted*** in order to get some circumstantial evidence . . . [, o]r there is no evidence in the record pertaining to [Jackson's guilt]." R. 873, l. 19 – 877, l. 12 (emphasis added). Defense counsel noted that the State failed to find any fingerprints or DNA linking Jackson to the crime scene or the items allegedly involved in the offense.[2] R. 874, ll. 15-20. The trial court denied both the motion for a directed verdict and the motion for a mistrial. R. 878, ll. 13-21.

Renewed Motions for a Mistrial and Motion for a New Trial

Defense counsel renewed his prior motions for a mistrial and subsequently moved for a new trial after the jury found Jackson guilty as charged. R. 943, l. 1 – 944, l. 21; R. 1051, l. 24 – 1052, l. 6. Defense counsel argued:

> [T]he only logical inference would be that the jury must have decided to use those statements that Mr. Canty [co-defendant] gave against Mr. Jackson, which we don't believe should be permitted under the law of Bruton, the confrontation of issues. The right that [Jackson] has under the United States Constitution and [the] constitution of our state, Your Honor.

R. 1052, ll. 19-23. Defense counsel further argued, "[T]hose rights were not afforded [to Jackson] because of the joint trial, the nature of the joint trial, and the denial of our motion for severance." R. 1052, l. 25 – 1053, l. 2. The trial court denied the renewed motion for a mistrial and the motion for a new trial. R. 1054, ll. 17-21. Defense counsel filed a motion for reconsideration on August 16, 2011, which was denied by the trial court in a written Order on August 24, 2011. R. 1067; R. 1072.

[2] R. 356; R. 396 – 439; R. 698 – 710; R. 721 – 722; R. 730 – 731.

ARGUMENT

1. The Court of Appeals correctly held that the Trial Court erred in admitting into evidence 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.

The State chose to hold a joint trial of Jackson and his co-defendant, Reginald Canty, for the offenses of murder and armed robbery despite their intention to introduce Canty's prior statements, much of which was a detailed narrative of Jackson's alleged involvement in the crime. The trial court denied Jackson's severance motion and approved redaction of Canty's statements over counsel's objections that the redaction did not cure the confrontation and cross-examination issues pursuant to Bruton and Crawford. Despite the use of "another person" and "other person" in place of Jackson's name, the jury could easily identify the replacement due to their frequency and the awkward syntax created. The jury could also easily discern that the references were to Jackson due to the failure to redact key identifying information, including "another person's" purchase of a Little Debbie snack cake that evening. Additionally, no limiting instruction was given to the jury that they should consider Canty's statements only in their determination as to Canty and not against Jackson and the State relied heavily on Canty's statements in its closing argument.[3] The Court of Appeals found that the trial court erred in ruling that the redaction was sufficient because the jury would still infer Canty's statements incriminated Jackson on their face through immediate and obvious

[3] The Court of Appeals found that the failure to give a limiting instruction was not preserved because no request for such an instruction was made at trial and the issue was not raised in Appellant's brief. App. 117 – 118. However, consideration of the lack of limiting instruction is still proper to the extent that it undermines the State's argument that Canty's statements were considered only against Canty and not against Jackson. As such, the Court of Appeals properly considered the lack of limiting instruction in distinguishing State v. McDonald, 400 S.C. 272, 734 S.E.2d 167 (Ct. App. 2012), *cert. granted*, Appellate Case No. 2012-213686, and in its harmless error analysis.

inference. Because Canty exercised his Fifth Amendment right not to testify, admission of the statements violated Jackson's Sixth and Fourteenth Amendment rights to confront and cross-examine witnesses against him.

The State argues that *certiorari* should be granted because the redaction issue presented in the present case involves "a legal principle of major importance concerning the manner that joint trials are handled in South Carolina." Pet. for Cert., p. 10. However, the law regarding the proper considerations in determining whether to sever trials of co-defendants and how to address statements of co-defendants in the event of joint trials is well-established. Jackson did not seek further clarification of the law on direct appeal, but rather sought proper application of the existing law to the facts of his case. The issue was not whether neutral pronouns may be sufficient in some cases, as the case law makes clear that it may be, but rather whether the redaction was sufficient in ***this*** case to remedy an obvious and immediate inference that the co-defendant's statements implicated Jackson. The Court of Appeal's decision was based on a lengthy and complete analysis of the abundant precedent regarding redaction resulting in its finding that under the specific facts of Jackson's case the redaction was insufficient.

The State further contends that *certiorari* should be granted because the Court Appeals misapprehended points of law and fact. As discussed more fully below, there was no misapprehension in the Court of Appeal's decision. The Court issued a lengthy opinion setting forth the facts and law applicable to the present case, specifically distinguishing the cases cited by Petitioner in its Brief to the lower appellate court and clarifying Petitioner's misinterpretation of the applicable case law.

The Court of Appeals applied the correct legal standard in finding that admission of the non-testifying co-defendant's statements violated Jackson's rights under the Confrontation Clause. "The

Confrontation Clause of the Sixth Amendment, which was extended to the states by the Fourteenth Amendment, guarantees the right of a criminal defendant to confront witnesses against him, and this includes the right to cross-examine witnesses." State v. Holder, 382 S.C. 278, 283, 676 S.E.2d 690, 693 (2009); see U.S. CONST. AMENDS. VI and XIV. In Crawford v. Washington, 541 U.S. 36, 50-51 (2004), the United States Supreme Court held that testimonial out-of-court statements are not admissible under the Confrontation Clause unless the witness is unavailable and the defendant had prior opportunity to cross-examine the witness. In Bruton v. United States, 391 U.S. 123, 126-137 (1968), the Court held that a non-testifying co-defendant's confession that inculpates another defendant is inadmissible at their joint trial, even if the jury is instructed that the confession can only be used as evidence against the confessor, because of the substantial risk that the jury would look to the incriminating extrajudicial statements in determining the other's guilt. The Court of Appeals correctly interpreted Gray and Henson to require both a proper limiting instruction and redaction of the statement so that it does not incriminate the other defendant on its face either explicitly or by obvious and immediate implication in order for a non-testifying co-defendant's confession to be admitted. See Gray v. Maryland, 523 U.S. 185, 192 (1998); State v. Henson, 407 S.C. 154, 161-64, 754 S.E.2d 508, 512-13 (2014); see also Richardson v. Marsh, 481 U.S. 200, 211 (1987) (holding a non-testifying codefendant's confession can be admitted only if it "is redacted to eliminate not only the defendant's name, but any reference to his or her existence."). Thus, the proper inquiry, as articulated by the Court of Appeals, is "whether the exact words used for redaction, in context with the other evidence, adequately obscured the reference to the defendant such that the jury would not obviously and immediately infer that Canty was referring to Jackson." App. 113.

The State contends that the method of redaction used in the present case was such that the statements did not facially incriminate Jackson and thus did not violate Bruton. However, the United States Supreme Court's more recent decision in Gray "brought within Bruton's prohibitions those confessions which facially incriminate through inference." Henson, 407 S.C. at 164, 754 S.E.2d at 513. The Court of Appeals correctly found that the inclusion of the reference to the Little Debbie snack cake left little doubt as to the identity of the "other person" referenced in Canty's statement and that despite the redaction the statement obviously referred directly to the defendant based on inferences that a jury ordinarily could make immediately. App. 108 – 113. The Court of Appeals rejected the State's contention, repeated in its Petition for Certiorari, that the statement would not refer obviously to Jackson had it been the first piece of evidence at the trial such that the statement did facially incriminate Jackson, recognizing that the State was merely pulling phrases from the case law in support of its position. App. 111 – 113. The Court of Appeals refused to interpret Gray, Henson, or Holder, as "forbid[ing] [the Court] from relying on other evidence to conclude a juror would infer Canty's statements incriminated Jackson on their face." The Court of Appeals noted that in Gray, the United States Supreme Court relied in part on other evidence – the testimony of a police detective that the co-defendant's statement resulted in Gray's arrest – introduced after the admission of the co-defendant's statement.

The Court of Appeals also cited United States v. Schwartz, 541 F.3d 1331, 1340 (11th Cir. 2008), where though the redacted statement did not inculpate Schwartz by name but rather by naming corporations he owned or controlled, the court found a Bruton violation. The Schwartz court noted that in evaluating a Bruton claim, it must "examine the whole record to determine whether a reasonable juror was compelled to draw an inference of Schwartz's guilt from the codefendant statements." 541 F.3d at 1340 (citing Harrington v. California, 395 U.S.

250, 254 (1969) ("Our judgment must be based on our own reading of the record and on what seems to us to have been the probable impact of the codefendant statements on the minds of an average jury.")). After careful evaluation of the case law, the Eleventh Circuit determined "the proper Bruton standard is clear from a close reading of Bruton, Richardson, Gray, and our subsequent Bruton decisions: a defendant's confrontation right is violated when the court admits a codefendant statement that, in light of the Government's whole case, compels a reasonable person to infer the defendant's guilt." Id. at 1351. In further support of the propriety of evaluating Bruton violations by considering the redacted statement in the context of the trial record, the Court of Appeals cited State v. Johnson, 390 S.C. 600, 703 S.E.2d 217 (2010) (holding that despite redaction, there was a Bruton violation because the detective testified that Johnson's arrest was based in part on the conversation in which the co-defendant gave his confession, effectively telling the jury that the co-defenfant's unredacted statement named Johnson), United States v. Hoover, 246 F.3d 1054 (7th Cir. 2001) ("Very little evidence is incriminating when viewed in isolation; even most confessions depend for their punch on other evidence. To adopt a four–corners rule would be to undo Bruton in practical effect."), United States v. Mayfield, 189 F.3d 895 (9th Cir. 1999), and United States v. Weaver, 97 A.3d 663 (N.J. 2014).

The Court of Appeals further found that the manner and number of redactions in the present case "exacerbate the Bruton problem," noting that the frequent substitutions resulted in a loss of effectiveness and interfered with the syntax of the sentences such that it drew the listener's attention to the redaction, causing jurors to speculate about the reference. This is not a matter of parsing out sentences as the State contends, but rather a matter of looking at the statements as whole. In its analysis, the Court of Appeals cited several cases warning against a

manner of redaction that shows obvious deletion, signs of alteration, and encourages speculation about the reference. The Court of Appeals noted over 30 redactions to "another person" or "other person" in the present case and that the substitutions were not intertwined into the narrative, which caused the redaction to lose its effectiveness. App. 113 – 115.

Additionally, the Court of Appeals found that the State's argument that Canty's statement was reliable, along with its request that the jury convict Jackson, consequently meant that the State wanted the jury to believe that the "other person" in Canty's statements was Jackson. This was particularly true where the State was prosecuting Canty under the "hand of one is the hand of all" necessitating the jury to find that Canty jointed with Jackson, who would the necessarily be the individual referred to in Canty's statement. App. 115 – 116. The Court of Appeals then distinguished the facts of the present case from United States v. Vasilakos, 508 F.3d 401 (6th Cir. 2007) Priester v. Vaughn, 382 F.3d 394 (3rd Cir. 2004), and State v. McDonald, 400 S.C. 272, 734 S.E.2d 167 (Ct. App. 2012), *cert. granted*, Appellate Case No. 2012-213686, finding that it was the specific facts of those cases that led to findings that the statements did not incriminate the co-defendants. App. 118 – 121.

The State argues that the use of "other person" and "another person" could have referred to multiple people throughout Canty's statement and not necessarily to one individual. Thus, the State contends that in Canty's fifth statement alone, Canty could have been referring to one person as asking him if he was interested in robbing a pizza man, a second individual as the one who asked him to get his cousin to take him to the store, a third individual as the one who used the pay phone to call Sambino's, a fourth individual as the one who ordered the pizzas, a fifth individual as the one who bought the Debbie snack cake, and a sixth individual as the one who was with two other males and approached the pizza man. Under this reasoning, looking at all of

Canty's statements, he could have been incriminating over two dozen people. However, such an interpretation is not logical in light of the totality of the statements and the fact that Respondent was the one individual sitting at the trial table next to Canty. As noted by the Court of Appeals, the statements themselves included cues that "another person" and "other person" were referring to only one individual. In his fifth statement, Canty said "[a]nother person was one of the males, I didn't -- I don't know who the other two were." This indicated to the jury that Canty knew only one the males, referred to as "another person," logically meaning that his prior references to "another person" were referring to the same known person.

Additionally, the questioning by the solicitor and co-defendant's counsel both made clear that the statements referred to only one individual. Canty's counsel drew attention to the troublesome portion of the fifth statement, asking: "Then he indicates in this statement that he, that the pizza man was met by three males with hoodies. Is that correct? ... And that ***one of the males was the other person***? ... And he states he doesn't know who the other two were?" R. 617, l. 20 – 618, l. 2. Canty's counsel also highlighted the fact that Canty did not indicate that he called Sambino's but rather that "***the*** other person" called and that the only difference between his statements was his later detail "as to ***the*** other person" R. 600, ll. 1-6; R. 608, l. 23 – 609, l. 20; R. 610, ll. 5-8; R.615, l. 5 – 616, l. 2; R. 618, ll. 12-15; R. 624, ll. 1-19; R. 968, ll. 14-19. The solicitor also inquired about Canty's statements, stating "[h]e just kept adding about another person, but not his role." R. 842, ll. 23-24. He then asked: "And then he mentions another person, right? ... As the shooter? ... Has ***this*** person again in the fourth statement, correct? ... And then the fifth statement again says about there's another shooter? ... Another person, right? ... He mentions ***that*** person again?" R. 842, l. 15 – 843, l. 7.

The Court of Appeals properly found that frequency and method of redaction drew jury's attention to it and caused them to speculate as to the individual referenced in the original statement. The evidence of Jackson's purchase of the snack cake specifically identified Jackson as "another person" and "the other person" referenced in the statements. The questions and argument of Canty's defense attorney and the solicitor solidified this connection for the jury. Therefore, the Court of Appeals did not err in its application of Bruton and its progeny to the facts of the present case and properly found that the redaction was insufficient in the present case to remove the obvious inference that Canty's statement inculpated Jackson. The Petition for Writ of Certiorari should be denied.

2. The Court of Appeals correctly held that the Trial Court erred in admitting into evidence statements made by Jackson's non-testifying co-defendant where the statements implicated Jackson thus violating his Sixth and Fourteenth Amendment rights to confront and cross-examine witnesses, as interpreted by Crawford v. Washington, 541 U.S. 36 (2004), because Canty's out-of-court statements remained testimonial and Canty did not testify at the co-defendants' joint trial.

As discussed *supra*, Canty's statements do incriminate Jackson. There could have been no doubt that the "other person" or "another person" referenced in the statements referred to Jackson. Because of the Bruton violation, the Court of Appeals correctly found that admission of the statements violated Jackson's rights of confrontation and cross-examination. Though both Bruton and Crawford were raised by defense counsel at trial and in the Jackson's Brief on direct appeal, the Court of Appeals did not specifically address Crawford v. Washington, 541 U.S. 36 (2004). This was not error on their part because the Court of Appeals was not required to address the Crawford issue after having found that the statements violated the requirements of Bruton and its progeny. Nevertheless, the State has raised Crawford in its Petition for Certiorari, arguing that Crawford

should not apply because the statements at issue were sufficiently redacted and admitted only against Canty.

The Confrontation Clause guarantees the accused the right to confront those testifying against him in court and further defines the scope of the admissibility of statements against him made by witnesses out-of-court. See Coy v. Iowa, 487 U.S. 1012 (1988). A defendant exercises his right of confrontation through cross-examination, which has been described as the "greatest legal engine ever invented for the discovery of truth." Green, 399 U.S. at 158 (internal quotations omitted). In Crawford, the Supreme Court held that testimonial out-of-court statements by a non-testifying witness are inadmissible under the Confrontation Clause, unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. 541 U.S. 36. Notably, statements given to police during the course of law enforcement's investigation are testimonial. See Davis v. Washington, 547 U.S. 813, 22 (2006).

The Bruton court cited Crawford only twice in its opinion, both times in support of the unreliability and "the recognized motivation to shift blame onto others" surrounding a co-defendant's accusatory confession, resulting in a "special suspicion" of such statements. 391 U.S. 123, 136 n. 11, 141. The Bruton court further noted that "[t]he unreliability of such evidence is intolerably compounded when the alleged accomplice . . . does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed." Id. at 136. The Bruton Court determined that the confrontation issue cannot be remedied by a limiting instruction alone. Id. at 128-29. Thus, both Crawford and Bruton are grounded in the Confrontation Clause, with the latter implicating the former in the more specific circumstance of admission of a non-testifying co-defendant's testimonial statement inculpating the other co-defendant. Bruton and its progeny provide that in some cases redaction

can be sufficient to remove the testimonial nature of the statement, along with a proper limiting instruction. See Gray v. Maryland, 523 U.S. 185, 192 (1998); State v. Henson, 407 S.C. 154, 161-64, 754 S.E.2d 508, 512-13 (2014).

Because of the Bruton violation presented in this case, discussed *supra*, the five statements made to law enforcement by Jackson's non-testifying co-defendant remained testimonial and were crucial to the State's case against Jackson. R. 79 – 150. Due to the co-defendant's exercise of his Fifth Amendment right not to testify, he was unavailable as a witness and Jackson had no prior opportunity to cross-examine his accuser. Thus, the introduction of the inadequately redacted statements violated Jackson's Sixth and Fourteenth Amendment rights to cross-examine and confront the witnesses against him. See Crawford, 541 U.S. at 42.

Moreover, to say that the statement was admitted against Canty only is an overstatement where no limiting instruction was given and the State argued the statement's reliability in closing such that the jury could consequently infer that the other individual referenced in the statement was Jackson since the State was trying Canty and Jackson together. Additionally, the solicitor's closing argument directly linked Jackson as the "other person" referenced in Canty's statement. He argued "clearly Mr. Jackson got a Debbie snack cake," which was the unique identifier essential to the Court of Appeals' majority opinion. R. 1022, 9-10. The solicitor also reminded the jury of Canty's statement that he and "another person" went outside the store and he heard "another person" make a phone call ordering three large pizzas and that there is no doubt that "these ***two*** individuals," Canty and Jackson, were there when the phone call to Sambino's was placed. R. 1007, 1-3 and 12-15. He then went on to argue that Jackson was the one who called Sambino's based on the alleged false

name given over the phone,[4] consequently meaning that Jackson was the caller referred to in Canty's statements, by stating: "Here's what I forgot. ... What's the name? Where did he get the name Jesse? Was he trying to be funny, Jesse Jackson? And I don't mean that funny, but it's that ironic. That just hit me. I don't know. I don't know. Jesse." R. 107, 21 – 1008, 6. After reading the specific portion of Canty's statement referencing "another person" using the pay phone, the solicitor asks the jury if there is "any doubt who was at the phone when the phone call was made?" R. 1009, 16 – 1010, 1. Immediately after reading another portion of Canty's statement, the solicitor argues: "That's the 15th. Law enforcement gets a warrant for Jackson. They go and start to look for Jackson." R. 1012, 16-17. After reading another portion of Canty's statements, the solicitor argues "***They*** put it in motion. ***They*** put it in motion. Take ***them*** to the store, Cherryvale, where he stated: Another person made the telephone call to Sambino's Pizza." The use of "they" and "them" is an obvious a reference to the co-defendants, consequently meaning that Canty's statement is implicating himself and Jackson. Finally, the solicitor argued "[h]e was set up by a planned agreement that was carried out when ***they*** went to Cherryvale and made a phone call, ***Mr. Canty and Mr. Jackson***, and ***they*** came back and ***they*** waited on him." R. 1027, 3-6. Thus, beyond the lack of a limiting instruction, the State argued in its closing that Jackson was the individual referenced in Canty's statements.

This Court has expressed that while severance of trials impacts judicial economy and State resources, these factors should not take precedence over the protection of a defendant's constitutional rights. Henson, 407 S.C. at 162, 754 S.E.2d at 512. Here, the Court of Appeals correctly found that the trial court erred in determining that Canty's statements were sufficiently

[4] The owner of Sambino's testified that the person who ordered the pizzas for delivery at the location where the victim was killed gave the name "Jesse." R. 199, ll. 16-20.

redacted to not implicate Jackson. Perhaps there is some method of redaction that would have been sufficient for a joint trial of Canty and Jackson, but the method approved by the trial court was not sufficient.[5] Here, Canty's prior statements remained testimonial, inculpating Jackson. Due to Canty's exercise of his Fifth Amendment right not to testify, he was not available to be cross-examined. Thus, admission of Canty's statements without sufficient redaction consequently violated Jackson's right under the Confrontation Clause to cross-examine his accuser. The Petition for Writ of Certiorari should be denied.

3. The Court of Appeals correctly held that admission of the non-testifying co-defendant's redacted statements was not harmless error where the remaining evidence against Petitioner was not overwhelming.

The Court of Appeals found the erroneous admission of Canty's statement was not harmless because the statements contributed to his guilty verdict and the remaining evidence was not overwhelming. App. 121 – 122. The Court of Appeals applied the correct law to its assessment of the harmless error. In Henson, this Court summarized the harmless error analysis as follows:

> Before an error can be held harmless, a court must find the error harmless beyond a reasonable doubt. That requires a court to determine whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. In the context of Confrontation Clause violations through the admission of a codefendant's confession, the harmless error standard has been formulated as: In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by

[5] In some cases the complete deletion of any reference to another individual is sufficient, though in the present case the State was prosecuting Canty under the "hand of one is the hand of all" doctrine such that complete deletion may have impacted their case against Canty. Thus, this is likely a case where severance was the best and proper method of balancing the State's right to present its case and the defendants' constitutional rights.

> comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error.

407 S.C. at 166-67, 754 S.E.2d at 515 (internal citations and quotations omitted). In its analysis in the present case, the Court of Appeals cited the fact that the statements were the only direct evidence that Jackson planned the robbery, placed the call to Sambino's, and shot the victim; the State emphasized the statements throughout trial and especially during its closing argument; and no limiting instruction was given. App. 121. While the Court of Appeals did characterize the remaining evidence as strong, it noted that the evidence was purely circumstantial and that it could not find it "clear beyond a reasonable doubt that the improper use of the admission was harmless error." App. 122.

The State contends that the Court of Appeal's erred in its finding because the circumstantial evidence against Jackson was overwhelming and harmless error does not require forensic evidence linking Jackson to the crime. However, the co-defendant's statements in the present case contained inconsistent information and varying levels of Jackson's culpability in the murder and armed robbery. Additionally, removing Canty's statement from consideration, no witness identified Jackson as the shooter or even present at scene of the incident. Jackson's fingerprints were not found on the rifle, ammunition, shell casing, abandoned cell phone, pizza box, or victim's car, and his DNA did not match the foreign DNA under the victim's fingernails. R. 403, ll. 16-19 (no match on cellphone or two pizza boxes near scene); R. 698, l. 10 – 699, l. 16 (no match to fingernail scrapings); R. 710, ll. 8-10 (no match to fingernail scrapings); R. 721, l. 5 – R. 722, l. 19 (no match on pay phone, victim's vehicle, and pizza boxes); R. 732, 22 – 736, 7 (no match on rifle, cartridges, holder, or Styrofoam cartridges). Rather, the circumstantial

evidence showed at most that Jackson was an accessory after the fact, but more likely that he was the "fall guy" for the real culprits.

Despite the surveillance video showing Jackson purchase a snack cake on the night of the incident, the State could not link the wrapper found 137 feet from the victim's body to the Cherryvale Grocery or to Jackson. R. 288, ll. 1-19; R. 403, ll. 9-15. The evidence showed that Jackson obtained the rifle and ammunition only after the murder – there is no proof that he possessed or fired the weapon previously. R. 508, l. 23 – 510, 10; R. 692, l. 9 – 693, 5. Further, though he initially left his aunt's apartment when he saw police arriving in the vicinity, Jackson turned himself in once he learned that officers were looking for him. R 491, ll. 11-14; R. 832, l. 3 – 833, 25; 850, ll. 7-8; R. 930, ll. 9-16. Notably, he made no efforts to discard or destroy the rifle before he went to the police station, which would be an obvious step to take if he had knowledge it was used in an armed robbery and murder. Any allegedly incriminating statement made by Jackson upon service with the warrants is only such if the murder warrant was served prior to the statement, which the officers could not conclusively confirm. Thus, while Jackson's later possession of the rifle and presence at the location where a missing pizza box and bag were found may be some evidence of Jackson's involvement as an accessory after the fact, they are not overwhelming evidence of his guilt for murder or armed robbery.

Further, Jackson had a reasonable defense theory, supported by the evidence, that he was set up by the individuals who really carried out this crime, which may include Marcus Branch, Anthony Rush (a.k.a "Chops"), Curtis Wheeler, and Reginald Canty. Jackson was not seen with the rifle until the day after the incident, after Jackson's uncle took him to see Curtis Wheeler and the two went to a vacant trailer on St. Mark Circle. R. 508, l. 23 – 510, 10. Additionally, a

broken cell phone was found near the scene and its owner never identified.[6] Marcus Branch "left" his cell phone at the home of "Chops,"[7] identified at trial as Anthony Rush, who lived in the same mobile home park where the incident took place and went to retrieve it the day after the murder. R, 818, ll. 15-25; R. 824, l. 1 – 825, l. 5; R. 909, l. 17 – 910, l. 11. Additionally, Anthony Rush drove a blue car, and according to Canty's statement after he returned from the grocery store he sat on a blue Caprice next to Toya's house, indicating that at the very least Anthony Rush's vehicle was present in the mobile home park just before the crime. R. 910, 18 – 911, 2. Latoya Rush, sister of Anthony Rush and best friend to Canty's sister, provided inconsistent testimony regarding who was at her trailer on the night of the incident, stating at first that she could not confirm whether Marcus Branch was there because she "always had people at [her] house," R. 909, l. 23 – 910, l. 3, then testifying that she remembered seeing Jackson at her house earlier that night and that "my brother and his friends, they all was, all was in the house" R. 914, ll. 4- 16, and later saying that no one else could confirm Jackson was there because "no one was there with us" but that he arrived "a little while before [she] left to go to McDonald's." R. 916, ll. 23-24; R. 971, ll. 7-10.

Without Canty's statements, the evidence only conclusively shows that Jackson went to the grocery store that night and purchased some sort of snack and took possession of a rifle and ammunition the day after the shooting. At most Jackson was an accessory after the fact, but more likely he was just the patsy for the real criminals. The circumstantial evidence of Jackson's guilt for

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[6] Testimony corroborated that Jackson was using his cell phone the night of and day after the incident. R. 521, 7-13;

[7] The lead investigator testified that law enforcement did not know the name of the individual called "Chops" referenced in Marcus Branch's statement. R. 824, 11 – 825, 7. However, on cross-examination of Latoya "Toya" Rush, she testified that he brother lived with her in the O.C. mobile home park and was known by the nickname "Chops." R. 909, 14-20.

armed robbery and murder were not overwhelming and the few allegedly incriminating pieces were far less so absent consideration of Canty's statement. See State v. Gracely, 399 S.C. 363, 377, 731 S.E.2d 880, 887 ("In a case built on circumstantial evidence, including testimony from witnesses with such suspect credibility, a ruling preventing a full picture of the possible bias of those witnesses cannot be harmless."); see also State v. Henson, 407 S.C. 154, 167, 754 S.E.2d 508, 515 (2014); State v. King, 334 S.C. 504, 514-15, 514 S.E.2d 578, 583-84 (1991). Moreover, the jury was give no instruction that it should consider Canty's statements only against Canty and not against Jackson, an important fact in light of the solicitor's reliance on Canty's statements during his closing argument. Therefore, the Court of Appeals correctly found that Canty's statement contributed to Jackson's conviction and that the prejudicial effect was not so insignificant as to constitute harmless error. The Petition for Writ of Certiorari should be denied.

CONCLUSION

For the reasons set forth herein, Respondent Daniel D'Angelo Jackson requests this Court to deny the State's Petition for a Writ of Certiorari.

Respectfully submitted,

Laura R. Baer
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 23rd day of February, 2015.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Sumter County

William Jeffrey Young, Circuit Court Judge

Opinion No. 5278 (S.C. Ct. App. filed 11/5/2014)
08-GS-43-993.

THE STATE,

PETITIONER,

V.

DANIEL D'ANGELO JACKSON,

RESPONDENT

APPELLATE CASE NO. 2015-000078

CERTIFICATE OF SERVICE

I certify that a true copy of return the petition for writ of certiorari, in this case has been served on Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Daniel D'Angelo Jackson #323881, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 23rd day of February, 2015.

Laura R. Baer
Appellate Defender
ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 23rd day
of February, 2015.

Bailey Reed (L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021