21 April 2015

Mr. Robert Louis Garrett Jr.
SCDC #: 291096
Lee CI ~ ~ ~ ~ RHU 164
990 Wisacky Highway
Bishopville, S. Caro. 29010

The Honorable Daniel E. Shearouse, Clerk
South Carolina Supreme Court
Post Office Box 11330
Columbia, S. Caro. 29211

RE: Robert Louis Garrett Jr. v. State Of South Carolina
Appellate Case No. 2014-001712; 1997-GS-43-1092;
2009-CP-43-2965; 2012-CP-43-2007

Dear Mr. Shearouse:

Enclosed for filing is my Notice Of Appeal And Motion For Appointment Of Outside Counsel. I've repeatedly petitioned this Court to entertain and rule on this matter, as the Confrontation Clause Issue involved is DISPOSITIVE and warrent the REINSTATEMENT of my original trial court's GRANT OF A NEW TRIAL WITH NO CO-DEFENDANTS INVOLVED, I'm just glad that the appellate process has finally run it's course and it now falls on the shoulders of this Court to "Mend Justice" in this matter.

Attorney General Alan McCrory Wilson and the South Carolina Attorney General's Office put forth a VERY STRONG argument to this Court in their Petition For Rehearing trying to convince you to revisit your LANDMARK ruling in State v. Henson, specificly arguing and pointing out that the said ruling "Created New Law And Standards" that state prosecutors would have to adhere to, and moreso..... AG Wilson and his Office argued that if this Court DID NOT SEE FIT TO OVERTURN/REVERSE the South Carolina Court Of Appeals' 10 June 2002 Reverse And Remand For Sentencing of my original trial court's GRANT OF A NEW TRIAL, then this Court in their opinion had in fact ERRED by reversing Henson's case and should revisit it to conform to the old precedence (State v. Garrett, my case). This Court refused to revisit Henson, even though it as AG Wilson argued "Created New Law And Standards", so in the interest of "Mending Justice" the only thing left to do is revisit my case and conform it to the new standards created in Henson.

I am attacking this case pursuant to the new standards set up in Henson in the Sumter County Court Of Common Pleas as well, and because as I pointed out earlier the "Confrontation Clause Issue" in this matter is DISPOSITIVE, this Court could save the State Of South Carolina alot of time and resources that'll be needed to conduct Discovery, Interrogatories, Production Of Evidence/Documents, Evidentiary Hearings, etc. if this Court would entertain this SERIOUS matter and exercise it's authority to reinstate my herein refevenced trial court's GRANT OF A NEW TRIAL that was erroneously reversed by the Court of Appeals back in June 2002. Unlike Henson who was only incarcerated for a few years before this Court's January 2014 ruling that granted him a new trial, I've been incarcerated for almost 18 YEARS and I'm not asking to be granted a new trial, I'm merely asking that the new trial I was ALREADY GRANTED be reinstated; In my opinion, it's because of that the South Carolina Court Of Appeals refused to hear my appeal because I'm indigent and didn't have the money to order and PAY FOR the transcripts NEEDED in order to perfect an appeal.

RLGJ This letter, enclosed motion and exhibits are hereby serving as my PLEA for this Court to entertain this matter, AS AN EXORBITANT AMOUNT OF EXTRAORDINARY CIRCUMSTANCES EXIST for you to do so. With that said, I respectfully ask that this Court come to "Justice's Rescue" in this matter by reinstating my trial court's GRANT OF A NEW TRIAL, or in the alternative appoint outside counsel so that the transcripts that the South Carolina Court Of Appeals used as a rationale not to hear my case can be ORDERED AND PAID FOR, and ultimately an appeal can be perfected that warrent the relief herein mentioned.

_WITH TRUTH AND GRACE,
Robert L. Gawett Jr.
RLGJ Robert L. Gawett Jr.

ENCLOSURES: Table Of Contents (66 Pages Total)

NOTE: Because I've had problems in the past regarding "Proof of Service", I respectfully ask that you "time-stamp" these pleadings and forward me a copy. RLGJ

Table Of Contents For 21 April 2015

Robert L. Garrett Jr.

Robert L. Garrett Jr.

RECEIVED
APR 30 2015
SC SUPREME COURT

The State Of South Carolina
In The Supreme Court

Appeal From Sumter County
In The Court Of General Sessions
Third Judicial Circuit

29B Motion Hearing..... Held Before
The Honorable George C. James Jr.; Sitting For
Original Trial Court (The Honorable Marc H. Westbrook, Deceased)

Appellate Case No. 2014-001712

ROBERT LOUIS GARRETT JR. . . . . APPELLANT,

V.

THE STATE OF SOUTH CAROLINA. . . . . RESPONDENT.

~ Notice Of Appeal And Motion For
Appointment Of Outside Counsel ~

The Appellant, Robert Louis Garrett Jr., hereby appeals the 23 July 2014 Order of the Honorable George C. James Jr. refusing to REINSTATE Appellant's original trial court's GRANT OF A NEW TRIAL. Appellant filed a Notice Of Appeal, Motion To Transfer Case And Motion For Appointment Of Outside Counsel to this Court back on 31 July 2014, but this Court transferred this matter to the South Carolina Court Of Appeals (By way of an Order signed on 13 August 2014). The Deputy Clerk Of Court, Ms. V. Claire Allen, however signed an Order dismissing the action because Appellant is currently indigent, the South Carolina Department of Corrections doesn't provide him with any jobs that pay any wages, and thus he is not at liberty to order AND PAY FOR the transcripts NEEDED to perfect an appeal.

Ms. Allen sent a REMITTITUR to the lower court back on 26 March 2015, and because her actions were an attempt to hamper the judicial machinery of the South Carolina Court Of Appeals from "correcting" it's erroneous 10 June 2002 ruling that reversed Appellant's original trial court's GRANT OF A NEW TRIAL (Especially in light of what the South Carolina Attorney General Office labeled as "New Law And Standards" created in this court's recent ruling in State v. Henson 407 S.C. 154, 754 S.E. 2d, January 2014), Appellant now moves for this Court to entertain this matter, as EXTRAORDINARY CIRCUMSTANCES exist in abundance,

and it is THIS COURT that holds the authority to reinstate the herein refevenced GRANT OF A NEW TRIAL.

As this matter involves "New Law And Standards", Appellant ask that this Court grant his Motion For Appointment Of Outside Counsel so that the said counsel can order AND PAY FOR the transcripts NEEDED to perfect this appeal, the process to reinstating the herein refevenced grant of a new trial can get under way, and moreso Appellant can after over fif--teen(15) years receive the NEW TRIAL he was granted so that he can clear his name once and for all of these charges.

Robert L. Garrett Jr.

Robert L. Garrett Jr.
SCDC # 291096
Lee CI ~ ~ ~ ~ RHU 164
990 Wisacky Highway
Bishopville, S. Caro. 29010

RLGJ

21 April 2015

Other Counsel of Record:

Mr. Alan M. Wilson, Attorney General
South Carolina Attorney General's Office
Post Office Box 11549
Columbia, S. Caro. 29211

Mr. Ernest A. Finney, III
Sumter County Solicitor's Office
215 North Harvin Street
Sumter, S. Caro. 29150

21 April 2015

Mr. Robert L. Garrett Jr.
SCDC #291096
Lee CI ~ ~ ~ ~ RHU 164
990 Wisacky Highway
Bishopville, S. Caro. 29010.

The Honorable James C. Campbell
Clerk Of Court, Sumter County
215 N. Harvin Street, Room 303
Sumter, S. Caro. 29150

RE: Robert Louis Garrett Jr v. State Of South Carolina
Appellate Case No. 2014-001712; 1997-GS-43-1092;
2009-CP-43-2965; 2012-CP-43-2007

Dear Mr. Campbell:

Enclosed for filing is a Notice Of Appeal And Motion For Appointment Of Outside Counsel in the above case. Because I've had problems in the past regarding "Proof Of Service", please forward me a "time-stamped" copy of these pleadings back at your very earliest convenience.

Thankhs in advance, good day to you and the Court, and as always, God bless.

WITH TRUTH AND GRACE,
Robert L. Garrett Jr.

RLGJ

CC: The Honorable Daniel E. Shearouse, Clerk (Supreme Court Of S. Caro.)
The Honorable V. Claire Allen, Deputy Clerk (Court Of Appeals Of S. Caro.)
Attorney General Alan M. Wilson, S. Caro.
Solicitor Ernest A. Finney, III (Sumter County)

ENCLOSURES:

21 April 2015

Mr. Robert Louis Garrett Jr.
SCDC # 291096
Lee CI ~ ~ ~ ~ RHU 164
990 Wisacky Highway
Bishopville, S. Caro. 29010

Mr. Alan McCrory Wilson, AG
South Carolina Attorney General's Office
Post Office Box 11549
Columbia, S. Caro. 29211

RE: Robert Louis Garrett Jr. v. State of South Carolina
Appellate Case No. 2014-001712; 1997-GS-43-1092;
2009-CP-43-2965; 2012-CP-43-2007

Dear AG Wilson:

Enclosed please find a copy of my Notice of Appeal And Motion For Appointment Of Outside Counsel. Pursuant to you and your office's argument in your Petition For Rehearing for the State v. Henson case (January 2014, Supreme Court), I respectfully ask that you and your office assist "Justice" by not standing in opposition to my original trial court's grant of a new trial being REINSTATED.

Thankhs in advance for your anticipated help and cooperation, good day to you and your's, and as always God bless.

WITH TRUTH AND GRACE,
Robert L. Garrett Jr.

RLGJ

cc: The Honorable Daniel E. Shearouse, Clerk Of Court (S. Caro. Supreme Court)

ENCLOSURES

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

March 26, 2015

The Honorable James C. Campbell
Sumter County Judicial Center
215 N Harvin St Rm 303
Sumter SC 29150-4974

REMITTITUR

Re: The State v. Robert L. Garrett, Jr.
Lower Court Case No. 1997GS4301092
Appellate Case No. 2014-001712

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Robert L. Garrett, #291096
Alan McCrory Wilson, Esquire
Salley W. Elliott, Esquire

The State Of South Carolina
In The Supreme Court

Appeal From Sumter County
In The Court Of General Sessions
Third Judicial Circuit

29B Motion Hearing..... Held Before
The Honorable George C. James Jr.; Sitting For
Original Trial Court (The Honorable Marc H. Westbrook, Deceased)

Appellate Case No. 2014-001712

ROBERT LOUIS GARRETT JR. — APPELLANT,

V.

THE STATE OF SOUTH CAROLINA — RESPONDENT.

PROOF OF SERVICE

I, Robert Louis Garrett Jr., certify that I have served the Notice of Appeal And Motion For Outside Counsel on the Respondents addressed to Mr. Alan M. Wilson, South Carolina Attorney General's Office, Post Office Box 11549, Columbia, S. Cavo 29211 and Mr. Ernest A. Finney, Sumter County Solicitor's Office, 215 North Harvin Street, Sumter, S. Cavo. 29150, by depositing a copy of it in the United States Mail, postage prepaid, on 21 April 2015. I likewise deposited the same addressed to Mr. James C. Campbell, Sumter County Clerk Of Court, 215 N. Harvin St., Sumter, S. Cavo. 29150 and Ms. V. Claive Allen, Deputy Clerk Of Court, South Carolina Court Of Appeals, Post Office Box 11629, Columbia, S. Cavo., 29211.

Robert L. Garrett Jr.

RLGJ

Robert L. Garrett Jr.
SCDC #291096
Lee CI ~~~~ RHU 164
990 Wisacky Hwy.
Bishopville, S. Cavo. 29010

21 April 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from York County

Honorable John C. Hayes, III, Circuit Court Judge

Appellate Case No: 2011-204008

THE STATE,

Respondent,

v.

DAVONTAY HENSON,

Appellant.

PETITION FOR REHEARING

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

STATEMENT OF THE CASE

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

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

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

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

[1] As a result of information conveyed by Reid to authorities, Darius "Duke" Jeter was also arrested, however, authorities subsequently cleared Jeter from any wrongdoing in the incident. (R. 297-98, 299-300, 301, 338-39).
[2] Both Ervin and Newman, as part of their plea agreement, gave statements and agreed to testify against Reid and Henson in exchange for the dismissal of the murder and firearms charges. (R. 389-391, 618-19).
[3] Reid's case is currently on appeal before this Court. At issue are the admissibility of Reid's fourth statement to police and whether Reid was entitled to directed verdict on the firearms charge under an accomplice liability theory. See State v. Reid, Appellate Case No. 2011-204288.

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

SUMMARY OF PETITION FOR REHEARING

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

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

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

ARGUMENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

Id. at 208.

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

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

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

~ Exhibit A5
30 August 2014 Encl
Attorney General's Petition for Rehearing

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

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

Id. at 207 (emphasis added).

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

#2

~ Exhibit AG ~
30 August 2014 Enclosure
Attorney General's Petition For Rehearing

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

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

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

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

Because Henson was not a party to Garrett v. State, must be revisited and reversed.

#3

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

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

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

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

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

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

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

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

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

CONCLUSION

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

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Saluda County

Marc H. Westbrook, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT LOUIS GARRETT,

PETITIONER.

PETITION FOR WRIT OF CERTIORARI

AILEEN P. CLARE
Assistant Appellate Defender

South Carolina Office
of Appellate Defense
1122 Lady Street, Suite 940
Columbia, S. C. 29201

ATTORNEY FOR PETITIONER.

Sept 24 2002

INDEX

55A

QUESTIONS PRESENTED

I. Was the state's argument procedurally barred on appeal, when it was not raised below?

II. Are the state's and the Court of Appeals' references to the inconsistent verdict rule misplaced, when the rule never applied to cases involving co-defendants, but only to those involving multiple-count indictments?

II. Did the trial judge properly exercise his discretionary duty to invalidate a verdict that is not supported by the evidence?

STATEMENT OF THE CASE

Petitioner and a co-defendant, Arthur Tyrone Davis (Davis), were jointly indicted for carjacking, possession of a firearm, criminal conspiracy, and two counts each of kidnapping, assault and battery with intent to kill (ABIK), and armed robbery. The defendants were tried together during the January, 2000, term of the Sumter County Court of General Sessions before the Honorable Marc H. Westbrook and a jury. The jury returned the following verdicts. Both defendants were acquitted of ABIK and armed robbery. Both defendants were convicted of conspiracy, two counts of ABHAN, and possession of a weapon during a the commission of a violent crime. As to carjacking, and both counts of kidnapping, the jury acquitted Davis but convicted petitioner.

After reading the verdicts and hearing motions, the trial court granted petitioner's motion for a new trial. The state appealed. The Court of Appeals reversed, State v. Garrett, Opinion No. 3515 (S.C. Ct. App. filed June 10, 2002).

This petition follows.

RELEVANT FACTS

Paul France (France) and Joseph Chiappone (Chiappone) were stationed at Sumter Air Force Base in 1997. At around 11:00 p.m. on the night of April 14, the men went to an off-base car wash in France's car. France was inside, under the steering wheel, and Chiappone was outside the car, when France heard some voices outside and was "yanked" outside. France testified that he was placed on the ground and assaulted by an unknown number of people. He and Chiappone's pockets were emptied, as was the trunk of France's car. Both men were placed in the trunk and driven away. France disabled a tail-light to get the attention of the car following them. The cars collided and stopped. A person armed with a pistol ordered France and Chiappone the men out of the trunk. The men were separated, ordered to strip, and physically assaulted. France identified the assailants as black males. Two of them assaulted him. Others assaulted Chiappone, who was about ten feet away. France and Chiappone stripped naked, except for socks. France noticed a black Bronco and a green Oldsmobile nearby. The men were returned to the trunk, and all three vehicles left the scene, driving recklessly. They finally stopped, perhaps because of a flat tire. France heard several (more than two) voices outside. It appeared that two of the assailants wanted to leave immediately and one wanted to shoot the men. The trunk opened, and the men were removed and thrown to the ground. Shots were fired. The attackers drove away after one of them said they'd return in five minutes to "finish them off." France and Chiappone had both been shot. They found the keys on top of the car and drove away. A nearby resident called the police after they knocked on the door. Officers and an ambulance arrived. About 120 compact discs had been taken from the car. Neither of the victims could identify their attackers. Chiappone testified that there were two men at the car-wash and at least four at the final stop, all of whom left together in a Bronco. ROA p.10, lines 4

- p. 40, line 25; Supp ROA p. 1, line 1 – p. 2, line 15. ROA p. 55, line 1 – p. 70, line 25; Supp. ROA p. 23, lines 1- 6.

Police recovered clothes, shell casings, blood, and fingerprints, but none were traced to the defendants. At a trailer home maybe rented by petitioner, but also apparently occupied by Davis, they seized some shell casings, compact discs, shoes, and a Hardee's employee tag bearing Davis' name. They did not recover a weapon or any shoes that matched scene imprints. The fired shells were physically dissimilar to shells recovered from the trailer. They did not recover France's wallet. Supp. ROA p. 24, line 2 - p. 33, line 21; p. 34, line 11 – p. 35, line 25; Supp ROA p. 40, line 2; ROA p. 77, line 5 - p. 260 , line 25; Supp. ROA p. 41, lines 1-20 ; Supp ROA p. 43, lines 16 - 25.

The following took place during Davis' cross-examination of an investigating police officer:

> Mr. Weissenstein (Davis counsel): Now you said you conducted a search of the mobile home at Briarcliff Mobile Home Park, that according to your information, was rented by [petitioner]? Is that right?
>
> A: Yes, sir.
>
> Mr. Johnson: (Petitioner counsel): Objection, Your Honor. I'd like to move for a severance.
>
> The Court: I am going to sustain the objection at this time. Go ahead, Mr. Weissentstein.
>
> Mr. Weissenstein: Did you attempt to conduct any searches of a residence for Mr. Davis?
>
> A: No, sir.
>
> Q: Did you attempt to search the home of Mr. Davis' mother?
>
> A: There was a search conducted at one time. I don't believe it was on this case. I would have to see the documentation before I could answer that factually, accurately. ROA p. 42, lines 7 - 25.

A third co-defendant, Desmond Cunningham (Cunningham), testified against petitioner and Davis as a condition of his prior guilty plea. He admitted his presence but denied any participation

in the crimes. He testified that the group was together the night of the incident, and that petitioner and a fourth co-defendant, Andre China (China), approached two men at the car wash. Davis was with Cunningham parked nearby. China and petitioner placed the men in the trunk, and petitioner drove away in their car. China followed in petitioner's car, and Cunningham and Davis followed in the Blazer. Davis and Cunningham noticed the tail-lights go out and flagged petitioner. Petitioner and China removed the men and beat them. Cunningham testified that petitioner was armed, but that Davis actually committed the shootings with a rifle located in Cunningham's car. On cross-examination, he conceded that his original statements to police did not implicate petitioner in the kidnapping. The statement also did not mention how the men arrived in the trunk. ROA p. 80, line 13 - p. 81, line 18; p. 89, line 4 - p. 101, line 25; Supp. ROA p. 45, line 10; p. 46, lines 15 - 25; Supp. ROA p. 47, line 2 - p. 49, line 5; Supp ROA p. 50, lines 6 - 20

Seventeen days after the incident, police took a statement from co-defendant Davis. Davis moved to suppress the statement. Retired Officer James Hooks testified that he was investigating several crimes against numerous suspects, including Davis and petitioner.[1] Davis was arrested, and Officer Hicks had him transported to a police station, where Davis and asked for his lawyer, Murrell Smith. Mr. Smith was summoned to the station. After conferring with Davis, Mr. Smith approached Mr. Hicks with "a deal": Davis would submit a full confession in exchange for a ten year, nonviolent sentence. Mr. Hicks agreed after contacting the solicitor's office. Davis admitted his participation in three crimes, including the instant charges. The plea bargain was later disallowed by a judge, apparently because Davis had been untruthful. At the hearing, Davis

[1] At the time of trial, Mr. Hicks was under indictment by the state grand jury and had retired from the police force. Indictment No. 99-GS-47-24 (ROA p. 226). Subsequently, Mr. Hicks was convicted for his participation in a widely-publicized embezzlement case involving funds misappropriated from Sumter County School District #17.

testified that he would not have given the statement if he had not been promised a ten-year nonviolent plea. ROA p. 188, line 11 - p. 194, line 15; p. 213, line 4 - p. 214, line 3.

Davis' statement implicated petitioner by name as a participant in the instant crimes. The solicitor redacted the statement to refer to petitioner only as "another guy." The court ruled that the statement was admissible, and granted Davis' motion to refer to the broken plea agreement during testimony. Petitioner moved for a separate trial on the basis that that information would unfairly advantage Davis' defense at the expense of petitioner's defense: petitioner was charged only in this crime, but the jury could infer that he participated in everything admitted by Davis. Supp. ROA p. 3, line 14 – p. 5, line 25; ROA p. 51, line 24. The Court responded as follows:

> At this point, I am going to deny [the motion to sever]. The motion however, as you know, a motion to sever can always be raised at any point when it becomes necessary. And frankly, I can foresee a situation where it may become appropriate later on. ROA p. 52, lines 3 - 12.

Later, petitioner moved for a severance on the basis that the state would produce evidence against Davis, connected to unrelated crimes for which petitioner was not charged, allegedly found in a search of petitioner's rented mobile home. The court did not immediately rule on the second motion, but took it under advisement. Supp. ROA p. 6, line 7 - p. 17, line 14; p. 18, line 15 - p. 21, line 18; p. 22, lines 11 - 15.

The redacted statement was published to the jury by Mr. Hicks, as follows:

> **Another guy** and I were together all day.. Desmond Cunningham, Andre China, and I, Arthur Davis, decided to go to B.J.'s Club in Lynchburg. We were leaving out of Briarcliff Trailer Park when we saw two whi[t]e males at the car wash on Highway 441. They were cleaning their cars. Andre and **this other guy** got out of the car and robbed them. After they robbed them, they, Andre and **the other guy**, took the airmen's car. They had the two airmen in the trunk of the car.
>
> We drove down Queen Chapel Road going towards the club. We stopped. The airmen had pulled the taillights out the back of the car, and they were in the trunk. We made the airmen take their clothes off. We beat them up, and put them back in the trunk of the car. Then we proceeded to go to the club. We got lost, but came back up on highway 441 still.

And then we decided to get rid of the car, and let them go. We got them out of the car, and told them to lay down. Then I shot both of the airmen in the butt. ROA p. 102, line 15 - p. 103, line 9 (emphasis added).

After the statement was read to the jury, petitioner immediately moved for a severance or mistrial. He argued that the co-defendant's defenses were antagonistic. He also argued that the statement, even in its redacted form, was irreparably prejudicial. The "other guy" was not a neutral phrase, because under the circumstances it could be no one but petitioner. The statement would not be admissible against petitioner in a separate trial, because it was offered here as the co-defendant's self-incriminating statement, and not as evidence against petitioner. After the state rested its case, the court stated that it was denying the motion to sever "at this point." ROA p. 105, line 3 - p. 108, line 9; p. 112, lines 2 - 15; p. 113, lines 7 - 16.

The jury convicted both defendants of aggravated assault and battery (ABHAN) and conspiracy, but acquitted them both of ABIK and robbery. Petitioner was convicted of carjacking, but Davis was acquitted. Petitioner was convicted of kidnapping, but Davis was acquitted. Davis was convicted of possession of a weapon during the commission of a violent crime, but petitioner was acquitted. ROA p. 138, line 25 - p. 143, line 25. The judge made the following comments after the verdicts were read:

The Court: I was going to ask you if you want to take some motions before the jury is dismissed . . . The reason I say this, because I'm having a little trouble making heads or tails of what the jury's verdict was on all this.

Mr. Johnson: That's why I'm asking you to grant a new trial.

The Court: I'm trying to figure out how they came up with what they did. However that's -- I don't know that there's any way we could actually make them go back and do anything if there were are any questions from them. We'll bring them in and poll them. ROA p. 144, lines 4 - 23.

Petitioner renewed his motion for severance after the jury was polled. He argued that the admission of Davis statement was prejudicial because the "redacted" person was obviously petitioner. Petitioner argued that the verdict was "inconsistent" in that no evidence suggested he was armed, although he was convicted of that charge. While there was evidence of larceny, and Davis admitted to shooting the victims, he was not convicted of armed robbery. Petitioner additionally argued that his defense was fatally compromised by Mr. Davis' statement and by the joint trial. ROA p. 154, line 3 - p. 159, line 7.

After reading the verdict, polling the jury, and hearing petitioner's renewed motions, the court made the following comments:

> Counsel, I am a little bothered . . . apparently . . . this jury decided that the hand of one was not the hand of all. And it's strange how they kind of did it. But they convicted Mr. Garrett of some offenses when everyone else was involved.
>
> Mr. Davis admitted to shooting both the airmen, and yet they did not convict him of assault and battery with intent to kill. That one I haven't figured out yet, but of course that's within the jury's purview. As Mr. Garrett, however, my concern is that somehow . . . really just didn't [get] fair treatment from the jury. . . . Somehow he got struck on some things that he did. And got stuck on some things that someone else did.
>
> It's almost like they used the theory of the hand of one is the hand of all on Mr. Garrett, but they didn't use the same theory with Mr. Davis . . . .
>
> Let me note [to the solicitor] . . . I also was concerned no question you were correct legally on the motion to sever, but I cannot help but think that perhaps the fact that I did not grant the motion to sever, caused Mr. Garrett to be prejudiced by some of the things the way they worked out. ROA p. 160, line 12 - p. 162, line 23.

I just think it's appropriate to give [petitioner] a chance for a new trial without a co-defendant involved. I am going to have to grant your motion on that. ROA p. 162, line 24 - p. 163, line 1.

ARGUMENT

I. Was the state's argument procedurally barred on appeal, when it was not raised below?

At the Court of Appeals, the state argued that the trial court improperly granted petitioner a mistrial on the basis of the inconsistent-verdict rule, which has been abolished in criminal cases. The argument is not properly before the Court because it was not raised below. The Court of Appeals erred by considering it, and this Court should reverse.

Issues not raised in trial court should not be considered on appeal. State v. Avery, 333 S.C. 284, 509 S.E.2d 476 (1999); Scoggins v. McClellion, 321 S.C. 264, 468 S.E.2d 12 (1996). Trial objections must be specific, and a party may not argue one ground below and another ground on appeal. State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000); State v. McCray, 332 S.C. 536, 506 S.E.2d 301 (1998); State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct. App. 2001); State v. Blurton, 342 S.C. 500, 537 S.E.2d 291 (Ct. App. 2000).

The trial transcript contains no mention of the abolished rule against inconsistent verdicts. The state may not raise on direct appeal, and the Court of Appeals should not have addressed it. This Court should enforce its procedural rules and reverse the Court of Appeals.

II. Are the state's and the Court of Appeals' references to the inconsistent verdict rule misplaced, when the rule never applied to cases involving co-defendants, but only to those involving multiple-count indictments?

Assuming for the sake of argument that the state's argument regarding the inconsistent-verdict rule was properly before the Court of Appeals, it should not have prevailed. The trial court granted appellant a new trial on the bases that petitioner was prejudiced by the joint trial and that the evidence was incompatible with the jury's verdict. The court reached his conclusion, in part, by considering the verdicts of each defendant and the evidence presented at trial. Its examination necessarily included some comparisons between the verdicts. The mistrial was granted after the court found that the varying evidence against each defendant confused the jury. Specifically, the court found that the jury ignored its instructions regarding accomplice liability.

The inconsistent-verdict rule has been abolished in criminal cases. See State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991).[2] However, the rule would not have applied to appellant in any event. Even if it mistakenly believed that the rule was valid, the trial court would not have relied on it. In the past, the inconsistent-verdict rule applied only to cases where a single defendant faced a multi-count indictment. The rule prohibited internally inconsistent verdicts on multiple charges. See Alexander, supra, at 303 S.C. 382, 401 S.E.2d 146 (defendant acquitted of kidnapping but convicted of CSC); State v. Lynn, 277 S.C. 222, 284 S.E.2d 786 (1981). There are no reported South Carolina cases where co-defendants with differing verdicts raised the inconsistent-verdict rule. See State v. Hall, 268 S.C. 524, 235 S.E.2d 112 (1977); State v. Amerson, 244 S.C. 374, 137

[2]Strangely, the inconsistent-verdict rule has survived in the civil arena. See, e.g., Stevens v. Allen, 342 S.C. 47, 536 S.E.2d 663 (2000); Hundley v. Rite Aid, 339 S.C. 285, 529 S.E.2d 45 (Ct. App. 2000); Krepps v. Ausen, 324 S.C. 597, 497 S.E.2d 290 (Ct. App. 1996). This discrepancy, although seemingly incompatible with the heightened

S.E.2d 284 (1964) (defining inconsistent verdicts as multiple inconsistent verdicts against a single defendant); State v. Mercado, 263 S.C. 304, 210 S.E.2d 459 (1974); State v. McFadden, 259 S.C. 616, 193 S.E.2d 536 (1972) ; Young v. State, 259 S.C. 383, 192 S.E.2d 212 (1972); State v. Gore, 257 S.C. 30, 185 S.E.2d 826 (1971); State v. Duck, 210 S.C. 94, 41 S.E.2d 628 (1947).

The inconsistent-verdict rule never applied to multiple-defendant cases. See State v. Rush, 129 S.C. 43, 123 S.E. 765 (1924) (holding that the rule did not necessarily apply where the same evidence was used against multiple defendants with inconsistent results); State v. Wade, 95 S.C. 387, 79 S.E. 106 (1913) (holding inconsistent-verdict rule did not prevent conviction of a man for fornication and simultaneous acquittal of his alleged consort); State v. Stone, 87 S.C. 372, 69 S.E. 659 (1910).

The abolition of the inconsistent-verdict rule did not revoke the trial court's power to nullify a verdict that is inconsistent *with the evidence*. Petitioner's trial court concluded that the verdicts reflected confusion or mistake on the jury's part, in particular a misunderstanding or failure to apply its instructions on accomplice liability. Exercising his sound discretion (see Argument III, below), he granted a new trial. The Court of Appeals should have respected the lower court's sound exercise of discretion, affirmed the ruling, and ordered a new trial.

---

protection otherwise afforded criminal defendants, has not been reconciled. Respondent respectfully invites the Court to do so now.

III. Did the trial judge properly exercise his discretionary duty to invalidate a verdict that is not supported by the evidence?

The court granted a new trial on two bases: (1) that its earlier refusal to grant petitioner's motion to sever was erroneous, and (2) that verdict was not consistent with the evidence. The Court of Appeals erred in agreeing with the state that the trial court abused its discretion.

Under the "thirteenth juror" doctrine, the trial judge is charged with seeing that justice is done. Haselden v. Davis, 341 S.C. 486, 534 S.E.2d 295 (2000); Worrell v. South Carolina Power Co., 186 S.C. 306, 195 S.E. 638 (1938). The judge has the duty and the authority to grant a new trial if he finds that justice has been offended. Id; Wall v. Suits, supra; State v. Anderson, 18 S.C.L. 565, 2 Bail. 565 (S.C. 1832). Specifically, a judge may grant a new trial if the verdict reflects the jury's confusion or is not supported by the evidence. Id.; Sorin, supra; Folkens, supra; Mooneyham, supra; Wall v. Suits, supra; Bailey v. Peacock, 318 S.C. 13, 455 S.E.2d 690 (1995); Johnson v. Hoechst Celanese Corp., 317 S.C. 415, 453 S.E.2d 908 (Ct. App. 1995).

While a mistrial should only be granted in cases of manifest necessity, whether to grant one is wholly committed to the trial court's sound discretion. Wall v. Suits, 318 S.C. 377, 458 S.E.2d 43 (1995); State v. Kighton, 334 S.C. 125, 512 S.E.2d 117 (1999), cert. denied, Aug. 23, 1999. An order granting or denying a new trial will not be disturbed on appeal unless the decision is wholly unsupported by the evidence or controlled by an error of law. Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (1996). If the order granting a new trial is based *solely* on an error of law, it is appealable. Southern Railway Co. v. Coltex, Inc., 285 S.C. 213, 329 S.E.2d 736 (1985). If a new trial was granted because the verdict was contrary to the evidence, the order is not reviewable if it is supported by any evidence in the record. Id.; State v. Smith, 316 S.C. 53, 447 S.E.2d 175 (1993);

South Carolina Department of Highways and Public Transportation v. Mooneyham, 275 S.C. 205, 269 S.E.2d 329 (1980).

The trial court's order was based partly on its earlier failure to grant a severance, especially in light of the prejudice created by Davis' statement. This is a legal ruling amply supported by precedent and the evidence. A statement made by a non-testifying co-defendant, which implicates the defendant or seeks to spread blame to him, is inadmissible. Lilly v. Virginia, 527 U.S. 116, 119 S.Ct. 1887 (1999). The statement may be used *only against its maker*, and only if all references to the defendant are redacted such that the defendant is not implicated. Gray v. Maryland, 523 U.S. 185, 118 S.Ct. 1151 (1998); State v. Holmes, 342 S.C. 113, 536 S.E.2d 671 (2000). If a redacted confession shows signs of alteration such that it is clear that the defendant is implicated, the Sixth Amendment has been violated. U.S. v. Akinkoye, 185 F.3d 192 (4th Cir. 1999).

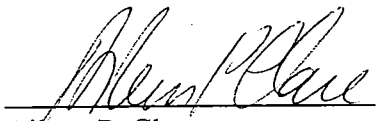
In petitioner's case, the court vacillated throughout the trial on the subject of severance. Also, it is perfectly obvious, given the context of Davis' statement's admission to the jury, that the "other guy" was petitioner. The statement was not used only to implicate its maker (Davis), but against both boys, which violates Gray and Holmes. The court, which was never strongly convinced of the propriety of a joint trial, decided to grant petitioner's continuing motion because the verdict exposed the statement's prejudice. The court also concluded that the verdict was inconsistent with the evidence. Exercising its vested authority, the court granted a new trial. Since the decision is supported by evidence on the record and is not an error of law, the Court of Appeals should have affirmed. This Court should reversed the Court of Appeals, affirm the trial court, and order a new trial.

CONCLUSION

The Court of Appeals erred by reversing the lower court's sound exercise of discretion in ordering a new trial. This Court should reverse and order a new trial.

Petitioner has been jailed since his initial arrest in 1997, without a final conviction. To preserve his future rights, he hereby demands a speedy trial.

Respectfully submitted,



Aileen P. Clare
Assistant Appellate Defender

ATTORNEY FOR PETITIONER.

This 24th day of September, 2002

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

Marc H. Westbrook, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT L. GARRETT,

APPELLANT

FINAL BRIEF OF APPELLANT

ROBERT M. PACHAK
Assistant Appellate Defender

South Carolina Office
of Appellate Defense
1205 Pendleton Street, Room 306
Columbia, S. C. 29201
(803) 734-1330

ATTORNEY FOR APPELLANT.

Generally, admission of a statement made by a non-testifying co-defendant and implicating the defendant violates the Confrontation Clause and is inadmissible. State v. Holmes, 342 S.C. 113, 118, 536 S.E.2d 671, 673 (2000). However, such a statement is admissible against the confessor in a joint trial if references to the co-defendant are redacted so as not to implicate the co-defendants. Id. at 119, 536 S.E.3d at 674. Davis's statement was redacted to omit specific mention of Garrett and was limited in scope to events occurring the night of the crime in question. Moreover, the trial judge issued a curative instruction in his charge that Davis's statement should only be considered against Davis. Because the statement was redacted and a curative instruction given, we find there was no violation of the Confrontation Clause even given the State's other evidence indicating Garrett was the "other guy". See State v. Evans, 316 S.C. 303, 307, 450 S.E.2d 47, 50 (1994) (holding co-defendant's statement admissible because "the statement did not 'on its face' incriminate [defendant], although its incriminating import was certainly inferable from other evidence that was properly admitted against him").

For the foregoing reasons, we reverse the trial judge's grant of a new trial and remand for sentencing.

REVERSED AND REMANDED.

HUFF and HOWARD, JJ., concur.

TABLE OF CONTENTS

751

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

STATEMENT OF ISSUES ON APPEAL

Whether the trial court erred in refusing to grant a severance or a mistrial when it allowed the use of a confession by a non-testifying co-defendant to implicate appellant?

STATEMENT OF THE CASE

Appellant was tried with a co-defendant, Arthur Davis, on a multi-count indictment from the December 1997 term of the Sumter County Grand Jury. Trial proceeded on January 18-20, 2000, before the Honorable Marc H. Westbrook and a jury. Appellant was convicted of the following charges along with their respective sentences:

Carjacking - 20 years;

Kidnapping, 2 counts – 30 years each;

ABHAN, 2 counts – 10 years each;

Possession of a weapon – 5 years;

Conspiracy – 5 years.

This appeal follows.

ARGUMENT

The trial court erred in refusing to grant a severance or a mistrial when it allowed the use of a confession by a non-testifying co-defendant to implicate appellant.

On April 14, 1997, Paul France and Joe Chiappone were kidnapped, carjacked, beaten and shot by four suspects who drove up to the victims in two cars. Neither of the victims could identify any of the suspects. Fingerprints, tire tracks, and shoe prints also, for one reason or another, could not be tied to the suspects.

The state's theory of the case was that appellant and Andre China were in one of the cars that drove up and Arthur Davis and Desmond Cunningham were in the other car. Andre China did not testify at the trial. Arthur Davis was tried as a co-defendant and he did not testify. Desmond Cunningham testified for the state and said that he, China, Davis and appellant were the ones who committed the crimes. (R. p. 204, line 19 – 230, line 10). Cunningham said that the charges against him would be dropped to just conspiracy. (R. p. 233, line 6 – p. 234, line 19).

The state intended to use a statement given by co-defendant Davis to the police, which implicated Davis, China, Cunningham and appellant in the crimes. The state would redact appellant's name so the statement would just mention him as "another guy."

Defense counsel asked for a severance because of the non-testifying co-defendant's statement. (R. p. 64, line 3 – p. 65, line 2). The trial court denied the motion to sever for the time being. (Tr. p. 66, lines 3-19). After Desmond Cunningham testified and his statement was introduced implicating everyone, defense counsel moved for a severance and a mistrial because a jury could only conclude that "another guy" in co-defendant Davis' statement was appellant. (R. p. 276, line 6 – p. 279, line 23). The trial court denied the motion for a

severance again for the time being. (R. p. 280, line 12 – p. 282, line 9). After the state rested, defense counsel again renewed his motion and it was denied by the trial court. (R. p. 289, line 22 – p. 294, line 16; R. p. 295, lines 14-16; R. p. 309, line 11 – p. 310, line 5; R. p. 312, line 25 – p. 314 line 22). The rulings by the trial court denying the motion for a severance or a mistrial were in error.

In Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620 (1968), the United States Supreme Court held that the admission of a co-defendant's confession implicating the defendant at a joint trial when the co-defendant does not take the stand violates the defendant's right to confront and cross-examine a witness against him under the Sixth Amendment. A confession may be admitted when it is redacted to eliminate a defendant's name and any reference to his existence along with a jury instruction not to use the confession in any way against a defendant. Richardson v. Marsh, 481 U.S. 200, 107 S.Ct. 1702 (1987).

The rule enunciated in Bruton also extends to a redacted confession in which the name of the defendant is replaced by a blank space, word "deleted," or similar symbol. Gray v. Maryland, 523 U.S. 185, 118 S.C. 1151 (1998). Redactions that replace a name with an obvious indication of alteration are as prejudicial as unredacted statements. Gray v. Maryland, supra. In State v. LaBarge, 274 S.C. 168, 268 S.E.2d 278 (1980), the South Carolina Supreme Court held that the method of redaction in that case was ineffective when LaBarge's name was substituted with the name "Mister X." The Court said in light of other testimony, "Mr. X" pointed directly to LaBarge.

In the present case, the reference to "another guy" in light of Desmond Cunningham's testimony could only lead to appellant.

In an earlier appeal by the state, this Court suggested that Davis' statement was admissible because it was redacted to omit the specific mention of appellant. State v. Garrett, 350 S.C. 613, 567 S.E.2d 523, 526 (Ct. App. 2002). This statement, however, is not consistent with the above cited precedents. This Court also suggested that the statement was alright because the trial judge issued a curative instruction in his charge that the statement could only be considered against the co-defendant. Garrett, supra, 567 S.E.2d at 526. In Bruton, however, the United States Supreme Court held that limiting instructions do not cure the type of error found here and were not adequate. Bruton, 391 U.S. at 135-138, 88 S.Ct. at 1627-1628.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

ROBERT M. PACKAK
Assistant Appellate Defender

1205 Pendleton Street, Room 306
Columbia, SC 29201
(803) 734-1330

Attorney for Appellant.

October 21, 2003

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

STATEMENT OF ISSUES ON APPEAL

I.

Since this Court previously determined on the State's appeal that the publication of co-defendant's statement did not violate the confrontation clause, the admissibility of the statement is the law of the case and this Court should not review appellant's exception.

II.

Use of neutral pronouns in the redacted co-defendant's statement in place of Garrett's name and nickname sufficiently protected Garrett's rights under the Confrontation Clause.

STATEMENT OF THE CASE

The respondent agrees with the procedural history articulated by this Court in State v. Garrett, 350 S.C. 613, 567 S.E.2d 523 (Ct. App. 2002), which states the following:

> Robert Garrett [appellant] and Arthur Tyrone Davis were jointly indicted and tried for carjacking, possession of a firearm during the commission of a violent crime, criminal conspiracy, and two counts each of kidnaping, assault and battery with intent to kill (ABIK), assault and battery of a high and aggravated nature (ABHAN), possession of a weapon during the commission of a violent crime, and conspiracy. After reading the verdicts and hearing arguments, the trial judge granted Garrett's new trial motion.

Id.

The State appealed and the Court of Appeals reversed and remanded for sentencing in Garrett, supra. Garrett petitioned for rehearing, which was denied. He filed a petition for writ of certiorari to the Supreme Court, which was denied January 24, 2003. Presumably, Garrett has been sentenced. He now appeals the conviction. This brief of respondent follows.

STATEMENT OF FACTS

The respondent adopts the facts articulated in State v. Garrett, 350 S.C. 613, 567 S.E.2d 523 (Ct. App. 2002), as being substantially correct.

ARGUMENT

I.

Since this Court previously determined on the State's appeal that the publication of co-defendant's statement did not violate the confrontation clause, the admissibility of the statement is the law of the case and this Court should not review appellant's exception.

Following the jury verdict, the trial court granted a motion for new trial based on inconsistent verdicts. The State appealed, and this Court found that the trial court erred in granting the motion. State v. Garrett, 350 S.C. 613, 567 S.E.2d 523 (Ct. App. 2002).

In arguing that this Court should affirm the trial court's grant of a new trial, Garrett contended that the motion was granted in part on the earlier failure to grant a severance. Garrett asserted in that appeal that his motion for severance should have been granted due to prejudice created by co-defendant Davis' statement, and that a new trial was necessary to correct the prejudice. This Court rejected that argument and held that the redacted statement, coupled with a curative instruction, did not violate the Confrontation Clause. Id., 350 S.C. at 620-21, 567 S.E.2d at 526-27.

"It is well settled that an undisturbed finding of this court contained within a decision in a previous appeal of the same case is the law of the case." Charleston Lumber Co. v. Miller Housing Corp., 329 S.C. 414, 419, 496 S.E.2d 637, 639 (Ct. App. 1998), *rev'd on other grounds*, 338 S.C. 171, 525 S.E.2d 869 (2000). "Also, when a party makes the same argument it made in a former appeal, the decision in the former appeal is the law of the case." Id., 329 S.C. at 419, 496 S.E.2d at 640. "Matters decided by the appellate court cannot be reheard, reconsidered, or relitigated in the trial court, even under the guise of a different

form." Id, 329 S.C. at 420, 496 S.E.2d at 640 (quoting Ackerman v. McMillan, 324 S.C. 440, 443, 477 S.E.2d 267, 268 (Ct. App. 1996)) (internal quotations omitted). "The decision of the appellate court is final as to all questions decided." Id. (internal quotations omitted).

Garrett argues, as he already did in the State's appeal, that admission of Davis' statement at trial violated the Confrontation Clause. The issue is not proper for appeal because it has already been litigated and determined by this Court. Accordingly, the conviction and sentence should be affirmed.

In the alternative, respondent would submit that the issue is not preserved for review. Counsel for co-defendant Davis renewed his prior motion to suppress Davis' statement. Counsel for Garrett indicated that he reviewed the statement, and because it redacted every reference to Garrett, he had no objection. R. p. 3, line 11 - p. 4, line 3. Garrett later raised a motion for severance; but this was in response to co-defendant's concerns about references to other crimes discussed in Davis' statement. R. pp. 60 - 66. He renewed his motion based on concern of prejudice imputed from mention of any of Davis' other criminal activities. R. p. 87, line 15 - p. 88, line 2.

The statement was published to the jury during the testimony of Mike Hicks. The prosecution asked Hicks if Davis gave a statement, which Hicks answered in the affirmative. Then the prosecution asked the trial court for permission to publish the statement. Davis' counsel made his continuing objection. The trial court gave a detailed instruction to the jury and asked the attorneys if they had an exception to the charge. Only then was the statement finally published. R. p. 273, line 1 - p. 277, line 12. After publication, the prosecution asked seven more questions and was finished with direct examination, when Garrett finally decided

to object and move for a mistrial. For the first time, he complained about the reference in Davis' statement to "the other guy." R. pp. 277 - 281.

Any error in publication of the statement was invited by Garrett's acquiescence and subsequent untimely objection. A party cannot complain of error induced by his own conduct. State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996); State v. Epes, 209 S.C. 246, 39 S.E.2d 769 (1946) (defendant cannot invite error at trial and have it reviewed on appeal); see generally State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000) (finding an issue conceded in trial court is not preserved for review). His prior severance motion failed to put the issue about the sufficiency of the redacted statement before the trial court. "The objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge." McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct. App. 1996). "The same ground argued on appeal must have been argued to the trial judge." Id.

Garrett was given ample opportunity to make his objection to the nature of the redaction before the statement was published. Failing to do so, his objection was untimely and did not preserve the issue for appeal. State v. Norris, 253 S.C. 31, 40, 168 S.E.2d 564, 568 (1969) (finding objection made after a photo was published to the jury came too late).

II.

Use of neutral pronouns in the redacted co-defendant's statement in place of Garrett's name and nickname sufficiently protected Garrett's rights under the Confrontation Clause.

The redacted statement was published to the jury, in relevant part, as follows:

> . . . Another guy and I were together all day. Desmond Cunningham, Andre China, and I, Arthur Davis, decided to go to B.J.'s club in Lynchburg. We were leaving out of Briarcliff Trailer Park when we saw two while [sic] males at the car wash on Highway 441. They were cleaning their cars. Andre and this other guy got out of the car and robbed them. After they robbed them, they, Andre and the other guy, took the airmen's car. They had two airmen in the trunk of the car.
>
> We drove down Queen Chapel Road going towards the club. We stopped. The airmen had pulled the taillights out of the back of the car, and they were in the trunk. We made the airmen take their clothes off. We then beat them up, and put them back in the trunk of the car. Then we proceeded to go to the club. We got lost, but came back up on Highway 441 still. And then we decided to get rid of the car, and let them go. We got them out of the car, and told them to lay down. Then I shot both of the airmen in the butt.
>
> When we left, then we left, and went back to Briarcliff Trailer Park, where the other guy lives at. . . .

R. p. 276, line 16 - p. 277, line 12.

Admission of a statement by a non-testifying defendant against another co-defendant violates that co-defendant's right under the Sixth Amendment to confront witnesses. Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); U.S. Const. amend. VI. However, the redacted statement did not violate Garrett's rights under the Confrontation Clause. In a joint trial, a statement is admissible against the confessing co-defendant if references to the other defendant is redacted. State v. Garrett, 350 S.C. 613, 567 S.E.2d 523 (Ct. App. 2002). However, where the redaction "replaces a defendant's name with an

obvious indication of deletion, such as a blank space, the word 'deleted,' or a similar symbol," the statement will still violate the confrontation clause. Gray v. Maryland, 523 U.S. 185, 192, 118 S.Ct. 1151, 1155, 140 L.Ed.2d 294 (1998). In Gray, an officer published the co-defendant's statement, substituting references to Gray with "blank" or "deleted." In one portion of the co-defendant's statement, he was asked "Who was in the group that beat Stacey?" and the redacted statement read to the jury was: "Me, deleted, deleted, and a few other guys." The Gray Court complained, "could the witness not instead, have said: . . .: 'Me and a few other guys.'" Id. 523 U.S. at 196.

In the instant case, the prosecution followed Gray's suggestion. Garrett's name was not replaced by an obvious indication of deletion. On its face, the statement does not inculpate Garrett. Further, from the text of the statement, its unclear whether "another guy" who had been hanging out with Davis all day, was involved in the incident at all. According to the statement, only Cunningham, China, and Davis decided to go to the club. A logical interpretation of the statement is that "another guy" was not with the other three when leaving. It was "Andre and this other guy" who got out of the car first. So "another guy" and "this other guy" are not necessarily even the same person if reviewing the statement in isolation. From the text of the statement alone, a juror might believe that Davis did not know "other guy". In any event, it's not apparent that the statement has been altered. The jury would not know that the statement submitted into evidence was not the original statement by Davis. See Court's Exhibit 15.[1]

---

[1] Exhibit is currently on file with the Court of Appeals for co-defendant Davis' appeal, still pending before this Court.

Gray has been distinguished by several decisions where the redacted statement does not indicate an obvious indication of deletion. In United States v. Logan, 210 F.3d 820 (8th Cir. 2000), the Court of Appeals found that substitution of "another individual" did not violate the confrontation rights of Logan, even though the statement may have implicated Logan when linked with other evidence introduced at trial. Id. at 822-23. See also United States v. Akinkoye, 185 F.3d 192 (4th Cir. 1999) *cert. denied*, 528 U.S. 177, 120 S.Ct. 1209, 145 L.Ed.2d 1111 (2000) (finding acceptable the use of the term "another person").

In the instant case, the "redacted statement did not reveal to the jury a specific name or the fact that one was omitted. There was no mysterious Mr. 'X' or gaping holes in the narrative read by the detective on the stand." Commonwealth v. McGlone, 716 A.2d 1280, 1285 (Pa. Super. 1998) (finding use of the term "other people" is precisely what the Gray Court suggested). McGlone offers helpful analysis in the instant case. As the Pennsylvania Superior Court noted: "Use of the term 'deleted' or 'X' immediately signals jurors that a specific person was named by the declarant and they, the jurors, are not permitted to know that name. . . . The term 'other man' does not have the same forceful impact." Id. at 1286.

The Tenth Circuit also has held that "where a defendant's name is replaced with a neutral pronoun or phrase there is no Bruton violation, providing that the incrimination of the defendant is only by reference to evidence other than the redacted statement and a limiting instruction is given to the jury." United States v. Verduzco-Martinez, 186 F.3d 1208, 1214 (10th Cir. 1999). In the instant case, a limiting instruction was given to the jury at the time the statement was published and in the instructions to the jury prior to deliberations. R. p. 275, lines 3-7; p. 315, line 24 - p. 316, line 1. Reference to "another

guy" in the instant case does not incriminate Garrett, except perhaps by reference to other evidence in the case. Accordingly, publication of the statement does not violate Garrett's rights under the Confrontation Clause, and the conviction should be affirmed.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECORDED
2014 AUG -6 PM 1:55
JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

Received 12 Aug. 2014
RLGJ

APPEAL FROM SUMTER COUNTY
IN THE COURT OF GENERAL SESSIONS
THIRD JUDICIAL CIRCUIT

293 Motion Hearing ..... Held Before
The Honorable George C. James Jr.; Sitting For
The Honorable Marc H. Westbrook (Now Deceased)

CASE NO: 1997-GS-43-1092

Robert Louis Garrett Jr., ... Appellant,

V.

The State of South Carolina ..... Respondent.

NOTICE OF APPEAL, MOTION TO TRANSFER CASE AND MOTION FOR APPOINTMENT OF OUTSIDE COUNSEL

I, Robert Louis Garrett Jr., currently an indigent/pro se litigant, do hereby appeal the Order Denying Motion For A New Trial for this matter. The hearing for this matter was supposed to be held before The Honorable Marc H. Westbrook, but because of his tragic death it was scheduled to be held before The Honorable R. Ferrell Cothran Jr. on 19 April 2013. Judge Cothran recused himself on the day of the hearing because when he was a Solicitor for Clarendon County back in 1999 he had some type of dealings with one of Appellant's witnesses (Desmund Cunningham). The hearing was therefore rescheduled to be heard by The Honorable George C. James Jr. on 23 July 2013. That hearing was convened on the said date but Judge James disqualified the Sumter County Solicitor's Office (Namely the Honorable Ernest A. Finney, III) because at the conclusion of the July 2013 hearing it came out that back in 1997 when Appellant was first arrested for this matter, his parents (District Elder Robert L. Garrett Sr. and

The Honorable

my appellate court who went way outside the norm and exercised his 13th juror doctrine discretion and granted me a new trial at the conclusion of my trial, even though the jury had found me guilty of 70 felonies

First Lady Naydean P. Garrett) had visited and talked to Solici-tor Finney about representing Appellant, Solicitor Finney came to the Sumter County Detention Center where Appellant was being illeg-ally held, met with Appellant for approximately thirty minutes to a hour, discussed Appellant's case at length (Going as far as to assure Appellant that if Appellant's parents gave him $12,000 to represent him, he, Solicitor Finney, was certain he could nego-tiate a ten year plea agreement), and therefore it was a direct "conflict of interest" for Solicitor Finney to have anything to do with Appellant's case.

Oddly enough, months later (On 21 November 2013) Judge James requested a meeting **"In Chambers And Off The Record"** between Appellant's paid counsel (Jeremy A. Thompson) and Solicitor Finney, at which time he **"changed his mind"** about disqualifying Solicitor Finney. The hearing was therefore recon-vened on 29 May 2014 and because Appellant's paid counsel was **egregiously ineffective** at the July 2013 Hearing (Not properly questioning Appellant's two witnesses and not doing proper dis-covery for this case), Appellant filed a three (3) page motion entitled **"Motion To Be Qualified As Co-Counsel And/Or To Proceed Pro Se** (With twenty-four (24) pages attached and marked as Exhibits 1X, 2X, 3X, 4X, 5X, 6X, 7X and 8X), and because the current statutes won't allow Appellant to keep his **"paid"** counsel and represent himself at the same time, Judge James granted the Motion and Appellant was forced to proceed pro se.

Judge James took the matter under advisement and on the 23 July 2014 (A year after the first hearing was held), he signed the herein referenced Order Denying Motion For A New Trial. On the 28 July 2014 The Honorable James C. Campbell (Clerk Of Court For Sumter County) timestamp-ed the said Order, and on the same day Judge James mailed

Appellant a letter and True Bill Stamped copy of the said Order. The Lee Correctional Institution Mailroom timestamped that they received the Order on the 29 July 2014, and Appellant **signed for and received** the said Order on **30 July 2014** at approximately 5pm (Lt. Barrett Durant and CO York served the said Order).

This matter entails a **very serious** issue of significant public interest, an unprecedented legal principle of **major** importance, **extrinsic fraud** (Committed by two Third Circuit Judges, the South Carolina Attorney General's office and a Public Defenders in Sumter County), **intrinsic fraud** (Committed by all of the above mentioned), **fraud upon the court** (Committed by all of the above mentioned), an unprecedented conflict of interest claim against the herein referenced presiding judge, **gross conduct and egregious ineffective assistance of Appellant's** herein referenced "**paid**" counsel, a serious conflict of interest claim against the Sumter County Solicitor's Office (who argued for the State), a **landmark malicious prosecution** claim against the above mentioned Solicitor's Office (Dating all the way back to the 1997 Administration), which is at the very root of why Appellant is to date **STILL** being **UNLAWFULLY DETAINED** and is what is spurring the above referenced "**Officers Of The Court**" to committed various degrees of **fraud** (With the **sole intent** of hampering the judicial machinery of performing it's usual duties of properly/effectively adjudging this matter), and it entails violations that in their very setting, constitute a **BLATANT denial of fundamental fairness shocking to the "Universal Since Of Justice"**.

Therefore, pursuant to **South Carolina Appeal Court Rule 203(d), 204(a), 204(b), Rule 244 and Rule 245**, Appellant hereby moves for this matter to be transferred to the South Carolina Supreme Court for review, as it will undoubtedly warrent a **landmark decision** similar in nature to the one

it passed down in Butler v. State, 302 S.C. 466, 397 S.E. 2d 87 (1990), and State v. Henson, 407 S.C. 154, 754 S.E. 2d (2014). This will prove true because Appellant's trial court (The deceased Judge Westbrook) for the first time in the history of Sumter County exercised his 13TH Jury Discretion and granted Appellant a New Trial back in January 2000 (Instead of sentencing Appellant), he granted the almost unheard of motion "partially" because of his failure to grant Appellant's severance motion (Stating in quote "... I also was concerned no question you were correct legally on the motion to sever, but I cannot help but think that perhaps the fact that I did not grant the motion to sever, caused Mr. Garrett to be prejudiced by some of the things the way they worked out." Trial Transcript Page 492, line 1-7), the Court of Appeals "unlawfully" overturned Judge Westbrook's grant of a new trial, and because this Honorable Court did not hold the position it now holds as a result of Henson, this Court on a number of occasions did not overturn the Court of Appeals' ruling that overturned Judge Westbrook's grant of a New Trial.

In the words of our Honorable Chief Justice Toal, "No less than the protection of Constitutional Rights is at stake... Justice is not a luxury; it is not subject to the ebbs and flows of political fortune or economic success... It demands constant support and attention", and in the paraphrased words of our Honorable Justice Beatty, "You all have been getting away with too much for too long... The Court will no longer overlook unethical conduct, such as witness tampering, selective and retaliatory prosecution, perjury and suppression of evidence... The pendulum has been swinging in the wrong direction for too long and now it's going in the other direction... You better follow the rules or we are

coming after you and will make an example."; Appellant asks that he **not be punished and blind eyes turned to "Mending Justice"** in this case merely because he's **indigent** and can not retain a Jack Swerling, an Andrew Savage, a Bryan Cave, a Tara Dawn Shurling, or an I.S. Leevy Johnson ..... All of which who would **very easily** litigate and present the issues herein referenced and receive **a far greater amount of respect and scrutiny** than the Appellant will receive for this motion and any subsequent **pro se motions** he's forced to file on his own behalf.

Appointment of Outside Counsel is appropriate for this matter, so Appellant **hereby** ask and request that this Court appoint him counsel; Appellant further **begs** the Court to not do like it incorrectly did back on 28 August 2008 and re-appoint Jeremy A. Thompson to represent him.

CONCLUSION

For the foregoing reasons, pro se Appellant ask that this matter be transferred to the South Caroling Supreme Court, counsel be appointed and the process can get under way to mete justice in this matter and release Appellant from his **"unlawful incarceration"**.

31 July 2014

Robt L. Garrett Jr.
APPELLANT (PROSE)

Other Counsel On Record:
Ernest A. Finney, III, Esquire
3rd Circuit Solicitor
215 North Harvin Street
Sumter, S. Caro. 29150

MR. ROBERT L. GARRETT JR.
SCDC # 291096
LEE CI ~ ~ ~ ~ RHU 164
990 WISACKY HWY.
BISHOPVILLE, S. CARO. 29010

TO:

MR. DANIEL E. SHEAROUSE, CLERK
SOUTH CAROLINA SUPREME COURT
POST OFFICE BOX 11330
COLUMBIA, S. CARO. 29211

LEGAL MAIL ONLY