OCT 2 2 2015

S.C. Supreme Court

No. __________

In the Supreme Court of the United States

CHRISTOPHER WHITEHEAD, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

LANELLE CANTEY DURANT
Counsel of Record
Appellate Defender
SOUTH CAROLINA COMMISSION
ON INDIGENT DEFENSE
DIVISION OF APPELLATE DEFENSE
Post Office Box 11589
Columbia, South Carolina 29211-1589
(803) 734-1330
ldurant@*sccid.sc.gov*

QUESTION PRESENTED

Whether the South Carolina Supreme Court erred in finding that the error of the trial court in admitting into evidence the statements of Petitioner Whitehead's two non-testifying co-defendants, which the Court found was a violation of the Sixth Amendment Confrontation Clause, was harmless error but did not apply the beyond a reasonable doubt standard as required for constitutional violations pursuant to Chapman v. California, 386 U.S. 18 (1967).

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the South Carolina Supreme Court were Petitioner Christopher Whitehead and the Respondent State of South Carolina.

TABLE OF CONTENTS

QUESTION PRESENTED 1

PARTIES TO THE PROCEEDINGS BELOW 2

TABLE OF CONTENTS 3

APPENDIX INDEX 4

TABLE OF AUTHORITIES 5

CITATION TO OPINION BELOW 7

JURISDICTION 7

CONSTITUTIONAL PROVISION INVOLVED 7

STATEMENT 8

REASONS FOR GRANTING THE WRIT 13

CONCLUSION 19

APPENDIX

1. South Carolina Court of Appeals Opinion A1

2. Petition for Rehearing to the South Carolina Court of Appeals A4

3. South Carolina Court of Appeals Order Denying Rehearing A10

4. Petition for Certiorari to the South Carolina Supreme Court A11

5. South Carolina Supreme Court Order Granting Certiorari A25

6. Brief of Petitioner A26

7. South Carolina Supreme Court Opinion State v. Whitehead
Op. No. 2015-MO-033 (Filed June 10, 2015) A41

8. South Carolina Supreme Court Opinion State v. McDonald
412 S.C. 133, 771 S.E. 2d 840 (2015) [1] A43

9. Petition for Rehearing to the South Carolina Supreme Court A52

10. South Carolina Supreme Court Order Denying Petition for Rehearing A58

---

[1] McDonald and Petitioner were co-defendants whose oral arguments were heard the same day in the South Carolina Supreme Court. The Supreme Court incorporated by reference the published opinion of McDonald into Petitioner's unpublished opinion.

TABLE OF AUTHORITIES

CASES

Arizona v. Fulminante, 499 U.S. 279 (1991) 13, 17

Brecht v. Abrahamson, 507 U.S. 619 (1993) 13

Bruton v. United States, 391 U.S. 123 (1968) 9, 11, 12, 13, 14, 15, 17

Chapman v. California, 386 U.S. 18 (1967) 1, 13, 15, 17, 18

Delli Paoli v. United States,352 U.S. 232 (1957) 12

Gray v. Maryland, 523 U.S.185 (1998) 13

Harrington v. California, 395 U.S. 250 (1969) 15

Richardson v. Marsh, 481 U.S. 200 (1987) 13

Schneble v. Florida, 405 U.S. 427 (1972) 14, 15, 18

State v. LaBarge, 275 S.C. 168, 268 S.E.2d 278 (1980) 9

State v. McDonald, 412 S.C. 133, 771 S.E.2d 840 (2015) 4, 7, 14

State v. Whitehead, Op. No. 2015-MO-033 (filed June 10, 2015) 4, 7, 8, 14

State v. Whitehead, Op. No. 2012-UP-526 (Ct. App. filed September 12, 2012) 4, 8

Yates v. Evatt, 500 U.S. 391 (1991) 17

STATUTES

28 U.S.C. § 1257(a) 7

S.C. Code section 17-25-45 8

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI 7

IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Christopher Whitehead asks this Court to issue a writ of certiorari to review the decision of the South Carolina Supreme Court in this case.

CITATION TO OPINION BELOW

The South Carolina Supreme Court's opinion is unreported: The State v. Christopher Whitehead, Opinion No. 2015-MO-033 (Filed June 10, 2015). The opinion is reproduced in the Appendix to this petition at pages App. 41-42. The opinion below decided Petitioner's constitutional issue solely by reference to the co-defendant's opinion. Therefore, a copy of State v. McDonald, 412 S.C. 133, 771 S.E.2d 840 (2015) which contains the Bruton analysis applied to Petitioner's case, is also included in the Appendix at pages App. 43-51. Rehearing denied August 5, 2015. App.58.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on June 10, 2015. App. 41-42. The Petitioner's petition for rehearing was denied on August 5, 2015. App.58. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a), Petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

> Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him; and to have the compulsory process for obtaining witnesses in his favor.

STATEMENT OF THE CASE

On May 5 through 13, 2008, Christopher Whitehead and two co-defendants, Robert Cannon and Derrick McDonald, stood trial in Kershaw County before Judge G. Thomas Cooper and a jury, on indictments charging them with murder and first-degree burglary. Your Petitioner, Whitehead, was represented by Neil Riley and David Reuwer. The state was represented by John Meadors, Joanna McDuffie, and Ron Moak. The jury returned a verdict of guilty as indicted. Judge Cooper sentenced Whitehead to life without parole on both the murder and burglary first degree pursuant to S.C. Code section 17-25-45, predicated upon a 2005 conviction by guilty plea to attempted armed robbery. Cannon and McDonald each received concurrent sentences of thirty-five years. Whitehead's attorney filed a notice of appeal. The Division of Appellate Defense of the South Carolina Commission on Indigent Defense perfected the appeal. The Court of Appeals affirmed Whitehead's convictions and sentences on September 12, 2012. State v. Whitehead, Op. No. 2012-UP-526 (Ct. App. filed September 12, 2012). App.1-3. Appellate counsel filed a petition for rehearing on September 27, 2012. App.4-8. The Court of Appeals issued an order on November 30, 2012 denying the petition for rehearing. App.10. A petition for a writ of certiorari was filed to the South Carolina Supreme Court. App. 11 -23. The Supreme Court granted certiorari on the instant issue on February 21, 2014. App. 25. Oral arguments in both cases were heard on December 11, 2014. The South Carolina Supreme Court affirmed Whitehead's convictions and sentences on June 10, 2015. State v. Whitehead, Op.No. 2015-MO-033 (filed June 10, 2015). App.41-42. Appellate counsel filed a petition for rehearing on June 23, 2015 which was denied on August 5, 2015.App.58.

RELEVANT FACTS

Each of the three young men, who were the co-defendants, and the victim, Joshua Zoch, had worked at the same Sonic restaurant in Camden, South Carolina,at one point. At the time of his death, Zoch was a police informant who had committed at least one first-degree burglary of his own. R. p. 619 line 19- R. p. 620 line 15; R. p. 801 lines 20-25; R. p. 1284 line 9- R. p. 1285 line 2.

Both Cannon and McDonald told the police, in written statements, that they and Whitehead had beaten Zoch to death while punishing him for being a snitch. (The introduction of these statements, even as redacted to refer to Whitehead as "another person," was the basis of the appeal as a violation of the Confrontation Clause.) Petitioner Whitehead, on the other hand, told the police that he did not know "a damn thing" about Zoch's murder. R. p. 717 line 18- R. p. 718 line 5.

Co-defendants Cannon and McDonald gave the police statements implicating themselves and Whitehead in Zach's killing. Neither testified at trial. The State argued that replacing Whitehead's name with "another person" in the statements would resolve any confrontation problem. R. p. 629 line 16- R. p. 630 lines 20. The defense responded that this limited redaction would not satisfy Bruton v. United States, 391 U.S. 123 (1968), and State v. LaBarge, 275 S.C. 168, 268 S.E.2d 278 (1980), "because the statement clearly implicates someone else and it's obviously prejudicial to the people who are sitting right here." R. p. 631 lines 4-17. "[T]here's an easier way to do it," counsel continued, "which is simply to not put a reference to what someone else did." R. p. 637 lines 20 -22. Ultimately, the judge ruled in favor of the State. R. p. 643 lines 12-17.

Counsel unsuccessfully renewed the objection when the State introduced Cannon and McDonald's statements into evidence. R. p. 734 lines 16-21. Cannon's statement, even as redacted, alleges that "someone else pressured another person to hit Josh with the bat, and the other person hit Josh with the bat." Cannon's statement provided:

He asked if I wanted to ride. I said I had nothing else to do. It was about 11 p.m. or so. Someone else was in the car and he was quiet. So we go to Josh's house and pull up about 11:30. Another person knocked on the front door and Josh didn't answer. Another person said, 'I'm going to pull your move and kick in the door.' He kicked the side door and runs in. And I go behind him to see the fight. So Josh is asleep on the couch, and another person "- - pardon the wording here; it's what he told me - - "like, 'he, bitch.' And when he looked up, he hit him with a glass" - - what he described as a glass lamp.

After that Josh was in a daze and he drags him off the couch. And he - - someone else pressured another person to hit Josh with the bat. Josh was half way on the couch at the time. And then they took the bat from this other person. So after that, the other person starts talking - - this is his words- - "starts talking shit to Josh. Josh was basically crawling while another person was talking about Josh being a snitch. So then I wouldn't"--

Q: Did he say: "So then I wouldn't"?

A: Yes. "So then I wouldn't have"- - let's see. That's my scribble. "So then" - -

Q: "So I wouldn't have to beat him"?

A: --"I wouldn't have to beat someone's ass. So I went pulling drawers. And he "- - talking about another person - - "flipped the mattress. We were looking for weed. So the man was unconscious. Another person then said" - -

Q: Just say it, I mean if that's what he said.

A: - - "fuck it, because we didn't find weed. And another person pushed the Christmas tree over and it fell on Josh. I told another person, 'let's go', and another person said, 'fuck, we didn't find anything', and another person got mad because we was not there. Before we left another person did take the house phone. I did put a towel on his head because it was bleeding so bad. And anther person went to the freezer and got the chicken for a cold press. We all had on Latex gloves. One person had on purple gloves, and me and another - - me and someone else had on purple gloves, and I had clear and purple gloves on. And after that we leave the same way we went in. Then we drop off another person. Then I was dropped off. Then I guess he went home.

R. p. 738 line 22- R. p. 740 line 23; R. p. 748 line 24- R. p. 752 line 15.

According to Co-defendant McDonald's statement, one of the men called Zack to see if Josh was at home and see who was there. "Then we started planning the whole thing…" McDonald said he was to stay outside and "to make sure nobody came up."

> So he went to the side door and we all kicked the door on a count of 3. The door opened. Another person when and, another person, then me. I turned around, close the door, and I went to the other room to look out the window, and my name was called. And I went into the living room. They were talking low, and another person went to the light switch at the dining room area and cut the light on. And another person was on the couch asleep… Josh was on the couch asleep. And another person took a glass bowl over his head and smashed it on Josh's head. At that point that's when I looked to the left and saw a bat. And I started hitting him on the body. That's when one another person stopped me to ask Josh question and that's when the bat hit Josh in the face. That's when he really started bleeding and I got scared and dropped the bat.

R. 767, l. – 769, l. 17; R. p. 774 lines 22-25;R. p. 775 lines 2-11.

After he beat Josh with the bat, McDonald continued, "[t]hat's when another person and another person started kicking and stomping Josh." R. p. 775 lines 9-11.

No rational juror who heard Cannon and McDonald's statements to the police could have deduced anything other than that Whitehead was the third "person" who had attacked Josh. Bruton expressly holds that the use of a limiting instruction will not cure the error. Thus, the tepid instruction given in this case is of no avail:

> Now, some of the evidence in this case may have been admitted solely because of its relationship to the case against one of the defendants. This evidence can not be considered in the case of any of the other defendants.

R. p. 1449 lines 8-12.

Bruton v. United States, 391 U.S. 123 (1968), holds that the use of a limiting instruction

will not cure the error. Obviously, the South Carolina Court's decision that it was error to admit the statements includes a finding that this judicial statement was unavailing. Indeed, Bruton itself overruled Delli Paoli v. United States,352 U.S. 232 (1957), case to the contrary.

The confessions of the two co-defendants implicating Whitehead were not harmless. Even with the redactions and the added words of "another person", the jury had to acknowledge the existence of Whitehead

A jailhouse snitch, Michael Jenkins, testified that he had overheard a conversation in which the participants, one of whom he later identified by his voice as Whitehead, discussed the incident and "just bragging about how they were killers now." R. p. 1221 line 10- R. p. 1222 line 20; R. p. 1226 line 20- R. p. 1227 line 9.

None of the three co-defendants testified.

REASON FOR GRANTING THE WRIT: ACKNOWLEDGED BRUTON VIOLATION NOT HARMLESS ERROR

The Confrontation Clause of the Sixth Amendment, applicable to the states under the Fourteenth Amendment, guarantees the right of a criminal defendant to confront and cross examine witnesses against him. Richardson v. Marsh, 481 U.S. 200 (1987). In Bruton, 391 U.S. at 136-37, the United States Supreme Court held that, in a joint trial, the admission of a non-testifying co-defendant's statement that expressly incriminates the defendant violates his right under the Confrontation Clause. In Richardson, 481 U.S. at 207-8, the Court held that the rule announced in Bruton does not apply where the statement becomes incriminating only when linked to other evidence introduced at trial, such as the defendant's own testimony. It also noted that "Bruton can be complied with by redaction." Id.

In Gray v. Maryland, 523 U.S. 185, 197 (1998), the Court held that a statement which "substituted blanks and the word 'delete' for the petitioner's proper name falls within the class of statements to which Bruton's protections apply."

In Arizona v. Fulminante, 499 U.S. 279 (1991) the United States Supreme Court held that constitutional violations were trial errors subject to a harmless error analysis. In Brecht v. Abrahamson, 507 U.S. 619 (1993), The Supreme Court held that the Court, in reviewing claims of constitutional error, consistently applied the standard described in Chapman v. California, 386 U.S. 18 (1967) that the error must be harmless beyond a reasonable doubt.

Though violations of the Confrontation Clause are subject to a harmless error analysis, the error in Whitehead's case could not possibly have been harmless, given the paucity of evidence against Whitehead. There was no forensic evidence linking any of the three co-defendants to the crime scene. R.889, ll. 11- R. 890, ll. 11; R. 894, ll. 14-17.

The South Carolina Supreme Court ruled that while the admission of the codefendants' statements violated the Confrontation Clause pursuant to Bruton v. United States, 391 U.S. 123 (1968), this error was harmless in light of the overwhelming evidence of guilt.

The Court issued an unpublished opinion in Whitehead's case, State v. Whitehead, Op. No. 2015-MO-033 (filed June 10, 2015) citing the reasons for the decision as set forth in the case of Whitehead's co-defendant, State v. McDonald, 412 S.C. 133, 771 S.E.2d 840 (2015).

In State v. McDonald, id., the State Supreme Court held that the Court of Appeals erred in finding that the admission of the third co-defendant, [Cannon's], redacted confession did not violate McDonald's Confrontation Clause rights. The Court relied on the case of Schneble v. Florida, 405 U.S. 427 (1972) which held that the mere finding of a violation of the [Confrontation Clause] in the course of the trial, however, did not automatically require reversal of the ensuing criminal conviction.

The State Supreme Court then held that given the extensive evidence of guilt in McDonald's case where he also gave a statement confessing, the Bruton[2] violation was harmless beyond a reasonable doubt. The Court again cited Schneble, *supra*, which found that a Bruton violation was harmless error when the details of petitioner's [confession] were internally consistent, were corroborated by objective evidence, and were not contradicted by any other evidence in the case.

Schneble does not apply to Christopher Whitehead's case because Whitehead did not confess and did not give a statement.

In Schneble, id., the defendant Schneble gave a detailed confession of how he murdered the victim, and the location of the body. He initially admitted knowledge of the murder and claimed that his co-defendant, Snell, shot the victim while Schneble was away from the car. He then conceded

[2] Bruton v. United States, 391 U.S. 123 (1968).

that this first statement was false, and he gave the details of how he strangled the victim, Mrs. Collier. His co-defendant Snell gave a statement claiming that Schneble never left him alone in the car with the victim.

The United States Supreme Court found that the minds of the average jury would not have found that the State's case was any less persuasive if Snell's statement had been excluded. Therefore, the Court concluded that the error of admitting Snell's statement when he did not testify was harmless error. The Court wrote that without Schneble's confession and the resulting discovery of the body, the State's case against Schneble was virtually non-existent. The U. S. Supreme Court cited Chapman v. California, *supra,* for the proposition that unless there was a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal was not required.

The Court in Schneble v. Florida, *supra*, cited the case of Harrington v. California, 395 U.S. 250 (1969). Harrington and three co-defendants were tried for murder. One co-defendant confessed and testified for the state implicating Harrington. The other two co-defendants gave statements which corroborated Harrington's presence at the scene. Harrington gave a statement admitting that he was at the scene of the crime but denied any complicity. This Court held that any violation of Bruton was harmless error.

Whitehead's case is distinguished from both Schneble and Harrington because Whitehead did not give a statement and did not confess. The only evidence placing Whitehead at the scene of this crime were the statements of the two co-defendants McDonald and Cannon. Therefore, it cannot be said that this error of admitting the confessions of McDonald and Cannon implicating Whitehead was harmless beyond a reasonable doubt. In Chapman v. California, *supra*, the United States Supreme Court held: Before a federal constitutional error can be held harmless, the reviewing court must be able to declare a belief that it was harmless beyond a reasonable doubt.

The State Supreme Court held that this error was harmless in view of the overwhelming evidence of guilt. However, the remaining evidence was not overwhelming. Whitehead's alleged statement to a co-worker that he wanted to go to victim's house and fight him was not indicative that he planned to murder the victim. R.p. 385, line 17 – R.p.388, line 8.

Whitehead showing up at work with a limp is purely circumstantial as far as implicating him in the murder. R.p. 436, line 16 – R. p. 448, line 10. Whitehead telling his manager that he had problems and was moving was not evidence of guilt for a young man. R. p. 445, line 4 – R. p. 452, lone 12. Under Bruton and its progeny, it goes without saying that the statements of Cannon and McDonald do not constitute evidence against Whitehead for the purpose of satisfying the State's burden of proof. This leaves only the testimony of the jailhouse snitch, who claimed that he had overheard a conversation in which the participants, one of whom he later claimed to identify by his voice as Whitehead, discussed Zoch's killing and "just bragging about how they were killers now." R. p. 1221 line 10- R. p. 1222 line 20; R. p. 1226 line 20- R. p. 1227 line 9. But this witness never testified that Whitehead had admitted any degree of involvement in the incident.

Officer Craven Harvey who worked at the Kershaw County Detention Center where the jailhouse snitch, Michael Jenkins, and Whitehead were housed, testified that both were housed in A Pod. R. p. 1254, line 15-25; R. p. 1257, line. 8 – 23. Officer Harvey also confirmed that A Pod had six cells which could house eighteen to twenty-four inmates. F Pod was right above A Pod and also had six cells which could house eighteen to twenty-four inmates. The vents between A Pod and F Pod were connected and the vents between the cells were connected. Voices could be heard between the vents. R. p. 1262, line 1 – R. p. 1264, line 18. Therefore, the voice heard by the inmate Jenkins could have been one of many.

Michael Jenkins was not a credible witness because the victim had been a friend of his. R. p.

1233, line 3 – R. p. 1234, line 12. But for the dubious testimony of this "snitch," a directed verdict would have been in order. This is not overwhelming evidence.

In his closing argument, the solicitor argued the veracity of the co-defendants' statements. He argued that the defense would try to take the jury's attentions away from the statement where the co-defendant said he got a bat and hit him. R. p. 1329, lines 9 – 14. The solicitor asked where was Whitehead's confession? R. p. 1341, line 15. The solicitor said: "There's no question the three of them were together shortly after 10:00 or 10:20, undisputed. **Now that's in the statement**."[emphasis added]. R. p. 1344, lines 14 – 17.

Accordingly, based on the solicitor's argument, it can fairly be assumed the jury considered the evidence of the statements against Petitioner. Given their extensive recitation of "another person's" involvement, it is fatuous to declare this Bruton error here is harmless beyond a reasonable doubt.

The State Supreme Court held that the admission of the statements of Whitehead's two co-defendants violated the Confrontation Clause. Therefore, this Court needs to apply the harmless error standard for federal constitutional error which is harmless beyond a reasonable doubt as stated in Chapman v. California, *supra.*

In Arizona v. Fulminante, *supra,* this Court held that the "Supreme Court has the power to review the record *de novo* in order to determine an error's harmlessness."

In Yates v. Evatt, 500 U.S. 391 (1991), this Court held that the South Carolina Supreme Court failed to apply the proper harmless error standard as stated in Chapman v. California, *supra,* and the unconstitutional jury instructions on malice could not be excused as harmless error.

In Yates' case, the trial judge charged the jury: "I tell you that if the facts proven are sufficient to raise a presumption of malice, that presumption is rebuttable; that is, it is not conclusive

on you, but it is rebuttable by the rest of the evidence. I tell you also, that malice is implied or presumed from the use of a deadly weapon. I further tell you that when the circumstances surrounding the use of that deadly weapon have been put into evidence and testified to, the presumption is removed."

This Court found that an "error does not contribute to a verdict" only if it is unimportant in relation to everything else the jury considered on the issue in question as revealed in the record." The decision provided:

> The State Supreme Court employed a deficient standard of review....It does not satisfy *Chapman's* concerns because it fails to determine whether the jury's verdict did rest on that evidence as well as on the presumptions, or whether that evidence was of such compelling force as to show beyond a reasonable doubt that the presumptions must have made no difference in reaching the verdict.

This Court found that the errors were not harmless and reversed Yates' case.

This Court should grant certiorari based on two erroneous holdings by the State Supreme Court:

1. the State Court erroneously applied the holding in Schneble v. Florida, *supra,* to Whitehead's case because Whitehead did not give a detailed statement to police confessing; what the snitch heard is qualitatively not the same;
2. the State Court did not apply the "harmless beyond a reasonable doubt" standard this Court set in Chapman v. California, *supra,* in their harmless error analysis.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests this Court grant the writ of certiorari to allow full briefing on this issue.

Respectfully submitted,

LANELLE CANTEY DURANT
Counsel of Record
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589
(803) 734-1330

October 22, 2015

ATTORNEY FOR PETITIONER

No. ______

In the Supreme Court of the United States

CHRISTOPHER WHITEHEAD, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

CERTIFICATE OF SERVICE

I certify that copies of the petition for writ of certiorari and appendix in this case have been served upon opposing counsel, Melody Brown, by mailing copies in envelopes properly addressed with postage prepaid to the Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211 on this 22nd day of October, 2015.

LaNelle Cantey DuRant
Counsel of Record

SWORN TO BEFORE me
this 22nd day of October, 2015.

______________________(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.

No. _______

In the Supreme Court of the United States

CHRISTOPHER WHITEHEAD, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

APPENDIX

LANELLE CANTEY DURANT
Counsel of Record
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

APPENDIX

1. South Carolina Court of Appeals Opinion A1

2. Petition for Rehearing to the South Carolina Court of Appeals A4

3. South Carolina Court of Appeals Order Denying Rehearing A10

4. Petition for Certiorari to the South Carolina Supreme Court A11

5. South Carolina Supreme Court Order Granting Certiorari A25

6. Brief of Petitioner A26

7. South Carolina Supreme Court Opinion State v. Whitehead
   Op. No. 2015-MO-033 (Filed June 10, 2015) A41

8. South Carolina Supreme Court Opinion State v. McDonald
   412 S.C. 133, 771 S.E. 2d 840 (2015) [1] A43

9. Petition for Rehearing to the South Carolina Supreme Court A52

10. South Carolina Supreme Court Order Denying Petition for Rehearing A58

---

[1] McDonald and Petitioner were co-defendants whose oral arguments were heard the same day in the South Carolina Supreme Court. The Supreme Court incorporated by reference the published opinion of McDonald into Petitioner's unpublished opinion.

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(D)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

RECEIVED

v.

Christopher Ryan Whitehead, Appellant.

Appellate Case No. 2008-103966

Appeal From Kershaw County
G. Thomas Cooper, Jr., Circuit Court Judge

Unpublished Opinion No. 2012-UP-526
Heard June 19, 2012 – Filed September 12, 2012

AFFIRMED

Senior Appellate Defender Joseph L. Savitz, III, and Appellate Defender LaNelle Cantey DuRant, both of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Melody Jane Brown, all of Columbia, and Solicitor Daniel E. Johnson, of Columbia, for Respondent.

PER CURIAM: Christopher Whitehead appeals from his convictions of murder and burglary in the first degree, arguing the trial court erred in (1) allowing into evidence the statements of his two non-testifying co-defendants without adequately redacting their claims of his involvement because it denied him of his right to confront and cross-examine the witnesses; and (2) not directing a verdict acquitting him of murder and burglary because the State's evidence established nothing more than a mere suspicion of guilt.

Josh Zoch died from multiple blunt force trauma to his head after being beaten with a baseball bat the night of December 12, 2006. Zoch, Whitehead, Derrick McDonald, and Robert Cannon all worked at the same Sonic Restaurant at one time. McDonald and Cannon both gave statements to police admitting their and Whitehead's involvement in the murder. Whitehead, McDonald, and Cannon were tried together as co-defendants in May 2008. None of the three co-defendants testified at trial. The jury found all three guilty, and the trial court sentenced Whitehead to two concurrent sentences of life without parole for murder and first-degree burglary due to his 2005 guilty plea to attempted armed robbery. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to Whitehead's argument that the trial court erred in allowing McDonald's and Cannon's statements into evidence without adequately redacting the portions of their statements implicating Whitehead because it denied him his right to confront and cross-examine the witnesses: *State v. McDonald*, Op. No. 5033 (S.C. Ct. App. filed September 12, 2012) (finding the neutral phrase "another person" inserted into Cannon's statement avoided any *Bruton v. United States*, 391 U.S. 123 (1968), violation because the redacted statement only implicated the statement's maker, and did not limit the participants to three, which would implicate the three defendants on trial; therefore, the trial court properly allowed Cannon's redacted statement into evidence).

2. As to Whitehead's argument that the trial court erred in not directing a verdict acquitting him of murder and burglary because the State's evidence only established a mere suspicion of guilt: *State v. Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998) (stating the trial court is concerned with the existence of evidence rather than its weight when considering a directed verdict motion); *State v. Sanders*, 388 S.C. 292, 299, 696 S.E.2d 592, 596 (Ct. App. 2009) ("'In reviewing the denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the

accused, an appellate court must find that the case was properly submitted to the jury.'" (quoting *Kelsey*, 331 S.C. at 62, 502 S.E.2d at 69)); *State v. Cherry*, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004) ("[A] trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.").

AFFIRMED.

FEW, C.J., and HUFF and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

CHRISTOPHER RYAN WHITEHEAD,

APPELLANT

Appeal from Kershaw County

G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 2012-UP-526

PETITION FOR REHEARING

The Court of Appeals affirmed the above named appellant's conviction and sentence on September 12, 2012. In support of this petition for rehearing, which is being submitted on today's date pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, appellant submits the following:

Whitehead argued two issues on appeal: (1) the trial judge committed reversible error by allowing into evidence the statements of appellant's two non-testifying codefendants without adequately redacting their claims of appellant's involvement, as this denied his Sixth Amendment right to confront and cross-examine witnesses, as interpreted by *Bruton v. United States*, 391 U.S. 123 (1968), and its progeny; (2) the trial judge erred by refusing to direct a verdict acquitting

appellant of murder and burglary, since the State's evidence against him established nothing more than a mere suspicion of guilt.

The Court of Appeals affirmed the trial court on both issues. On Issue One, the Court found there was no violation pursuant to Bruton V. United States, 391 U.S. 123 (1968) because the co-defendant's redacted statement only implicated the statement's maker and did not limit the participants to three which would have implicated the three defendants on trial, so the trial court properly allowed the redacted statement into evidence. On Issue Two, the court of Appeals held that the trial court was concerned with the existence of evidence rather then its weight when considering a directed verdict motion.

ISSUE ONE: Co-defendants Cannon and McDonald gave the police statements implicating themselves and Whitehead in Zoch's killing. Neither testified at trial. The State argued that replacing Whitehead's name with "another person" in the statements would resolve any confrontation problem. R. p. 629 line 16- R. p. 630 lines 20. The defense responded that this limited redaction would not satisfy *Bruton v. United States*, 391 U.S. 123 (1968), and *State v. LaBarge*, 275 S.C. 168, 268 S.E.2d 278 (1980), "because the statement clearly implicates someone else and it's obviously prejudicial to the people who are sitting right here." R. p. 631 lines 4-17. "[T]here's an easier way to do it," counsel continued, "which is simply to not put a reference to what someone else did." R. p. 637 lines 20 -22. Ultimately, the judge ruled in favor of the State. R. p. 643 lines 12-17.

Counsel unsuccessfully renewed the objection when the State introduced Cannon and McDonald's statements into evidence. R. p. 734 lines 16-21. Cannon's statement, even as redacted, alleges that "someone else pressured another person to hit Josh with the bat, and the other person hit Josh with the bat." R. p. 738 line 22- R. p. 740 line 23; R. p. 748 line 24- R. p. 752 line 15. McDonald's statement reveals that he was the person who beat Zoch with a baseball bat. R. p. 768 lines 16-21; R. p. 775 lines 2-8. His statement also asserts that "[a]nother person ... picked up a

glass bowl with flower petals in it ... and hit Josh in the head with it while Josh was asleep on the couch." R. p. 774 lines 22-25. After he beat Zoch with the bat, McDonald continued, "[t]hat's when another person and another person started kicking and stomping Josh." R. p. 775 lines 9-11.

The Confrontation Clause of the Sixth Amendment, applicable to the states under the Fourteenth Amendment, guarantees the right of a criminal defendant to confront and cross examine witnesses against him. *Richardson v. Marsh*, 481 U.S. 200 (1987). In *Bruton*, 391 U.S. at 136-37, the United States Supreme Court held that, in a joint trial, the admission of a non-testifying co-defendant's statement that expressly incriminates the defendant violates his right under the Confrontation Clause. In *Richardson*, 481 U.S. at 207-8, the Court held that the rule announced in *Bruton* does not apply where the statement becomes incriminating only when linked to other evidence introduced at trial, such as the defendant's own testimony. It also noted that "*Bruton* can be complied with by redaction." *Id.*

In *Gray v. Maryland*, 523 U.S. 185, 197 (1998), the Court held that a statement which "substituted blanks and the word 'delete' for the petitioner's proper name falls within the class of statements to which *Bruton's* protections apply."

> The [*Bruton*] majority reasoned that one must look at the *kind* of inferences that are necessary to make a connection to the defendant, not the simple *fact* that there are inferences to determine the applicability of *Bruton*. *Richardson* involves statements that did not directly refer to the defendant, but which became incriminating only when linked to other evidence developed at trial. However, the *Gray* Court stated "[t]he inferences at issue here [in *Gray*] involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, which involve inferences that a jury could ordinarily make immediately, even [if the statement was] the very first item introduced at trial." Thus, the statements are protected under *Bruton* because in such instances the defendant is implicated almost as if there was a direct reference, and the connection does not depend on other evidence introduced at trial. [Citations omitted.]

State v. Holder, 382 S.C. 278, 676 S.E.2d 690, 694 (2009); see, also, *State v. LaBarge* (defendant identified as "Mr. X" in co-defendant's statement).

The Court of Appeals held that the because the redacted statement only implicated the statement's maker, there was no Bruton violation because it did not limit the participants to three. The Court misapprehended the issue as no rational juror who heard Cannon and McDonald's statements to the police could have deduced anything other than that Whitehead was the third "person" who had attacked Zoch. The statements clearly indicated that three people were involved. There was no indictaion of any more than three.

Bruton holds that the use of a limiting instruction will not cure the error. In the opinion of Whitehead's co-defendant which was cited in Whitehead's opinion, State v. McDonald, Op. No. 5033 (Ct. App. filed September 12, 2012), the Court of Appeals quoted the jury instruction given and relied on this instruction in finding that the redacted statement of Cannon was properly admitted. However, the limiting instruction given was confusing, prejudicial, and not proper.

Though violations of the Confrontation Clause are subject to a harmless error analysis, *State v. Holder*, the error could not possibly have been harmless, given the paucity of evidence against Whitehead.

For this reason, the Court should reverse Whitehead's convictions and remand for a new trial.

ISSUE TWO: Under *Bruton* and its progeny, it goes without saying that the statements of Cannon and McDonald do not constitute evidence against Whitehead for the purpose of satisfying the State's burden of proof. This leaves only the testimony of the jailhouse snitch, who claimed that he had overheard a conversation in which the participants, one of whom he later identified by his voice as Whitehead, discussed Zoch's killing and "just bragging about how they were killers now." R. p. 1221 line 10- R. p. 1222 line 20; R. p. 1226 line 20- R. p. 1227 line 9. But this witness never testified that Whitehead had admitted any degree of involvement in the incident.

At the conclusion of the State's case, defense counsel moved for a directed verdict on the ground that the State's evidence did not rise above a mere suspicion that Whitehead was guilty. R.

p. 1302 line 22- R. p. 1309 line 3. The judge denied the motion. R. p. 1314 line 12- R. p. 1315 line 9.

A defendant is entitled to a directed verdict when the State fails to produce any evidence of the offense charged. *State v. McCombs*, 368 S.C. 489, 629 S.E.2d 361 (2006). The defendant is entitled to a directed verdict when the evidence merely raises a suspicion he is guilty. *State v. Hernandez*, 382 S.C. 620, 677 S.E.2d 603 (2009); *State v. Mitchell*, 341 S.C. 406, 535 S.E.2d 126 (2000).

The Court of Appeals held that the trial court was concerned with the existence of evidence rather than its weight. The coür misapprehended the issue. Although the snitch testified that he overheard Whitehead discussing the charges with other, unidentified inmates, he did not testify that Whitehead admitted his guilt. The balance of the State's evidence – the fact that Whitehead was observed limping the day after Zoch's killing for example – did not satisfy the State's burden of putting forth some evidence that Whitehead is guilty of murder and burglary.

For this reason, the Court should direct a verdict acquitting Whitehead of those charges.

THEREFORE, we respectfully ask the Court of Appeals to reconsider its rulings.

Respectfully submitted,

LaNelle Cantey DuRant
Appellate Defender

This 27th day of September, 2012.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Kershaw County

G. Thomas Cooper, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRISTOPHER RYAN WHITEHEAD,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Melody J. Brown, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 27th day of September, 2012.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 27th day
of September, 2012.
____________________(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

The South Carolina Court of Appeals

The State, Respondent,

v.

Christopher Ryan Whitehead, Appellant.

Appellate Case No. 2008-103966

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

John Cannon Few, J.

Thomas E. Huff, J.

Paul E. Short, Jr., J.

Columbia, South Carolina

RECEIVED

SC OFFICE OF
APPELLATE DEFENSE

cc:
Robert Michael Dudek
Melody Jane Brown
LaNelle Cantey DuRant

FILED
November 30, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Kershaw County

G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 2012-UP-526 (S.C. Ct. App. filed 9/12/2012)

07-GS-28-00019, 00022

THE STATE,

RESPONDENT,

V.

CHRISTOPHER RYAN WHITEHEAD,

PETITIONER

APPELLATE CASE NO. 2012-213683

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

INDEX

INDEX 1

CERTIFICATE OF COUNSEL 2

QUESTIONS PRESENTED 3

STATEMENT OF THE CASE 4

ARGUMENT I 6

ARGUMENT II 10

CONCLUSION 12

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on November 30, 2012.

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in affirming the trial judge who committed reversible error by allowing into evidence the statements of appellant's two non-testifying codefendants without adequately redacting their claims of appellant's involvement, as this denied his Sixth Amendment right to confront and cross-examine witnesses, as interpreted by *Bruton v. United States*, 391 U.S. 123 (1968), and its progeny.

II. Whether the Court of Appeals erred in affirming the trial judge who erred by refusing to direct a verdict acquitting appellant of murder and burglary, since the State's evidence against him established nothing more than a mere suspicion of guilt.

STATEMENT OF THE CASE

Procedural History

On May 5 through 13, 2008, Christopher Whitehead and two co-defendants, Robert Cannon and Derrick McDonald, stood trial in Kershaw County before Judge G. Thomas Cooper and a jury, on indictments charging them with murder and first-degree burglary. Whitehead was represented by Neil Riley and David Reuwer. The state was represented by John Meadors, Joanna McDuffie, and Ron Moak. The jury returned a verdict of guilty as indicted. Judge Cooper sentenced Whitehead to life without parole on both the murder and burglary first degree pursuant to S.C. Code section 17-25-45 and a 2005 conviction by guilty plea to attempted armed robbery. Cannon and McDonald each received concurrent sentences of thirty-five years Whitehead's attorney filed a notice of appeal. The Office of Appellate Defense perfected the appeal. The Court of Appeals affirmed Whitehead's convictions and sentences on September 12, 2012. State v. Whitehead, Op. No. 2012-UP-526 (Ct. App. filed September 12, 2012). App. 1 – 3. Appellate counsel filed a petition for rehearing on September 27, 2012. App. 8. The Court of Appeals issued an order on November 30, 2012 denying the petition for rehearing. App. 10. This petition for a writ of certiorari to the Court of Appeals follows.

Relevant Facts

Each of the three young men and the victim, Joshua Zoch, had worked at the same Sonic restaurant at one point. At the time of his death, Zoch was also a police informant who had committed at least one first-degree burglary of his own. R. p. 619 line 19- R. p. 620 line 15; R. p. 801 lines 20-25; R. p. 1284 line 9- R. p. 1285 line 2.

Cannon and McDonald told the police that they and Whitehead had beaten Zoch to death while punishing him for being a snitch. (The introduction of these statements, even as redacted to refer to Whitehead as "another person," is the basis of the first issue of this appeal.) Whitehead, on the other hand, told the police that he did not know "a damn thing" about Zoch's murder. R. p. 717 line 18- R. p. 718 line 5.

A jailhouse snitch testified that he had overheard a conversation in which the participants, one of whom he later identified by his voice as Whitehead, discussed the incident and "just bragging about how they were killers now." R. p. 1221 line 10- R. p. 1222 line 20; R. p. 1226 line 20- R. p. 1227 line 9. (The insufficiency of the State's evidence gives rise to the second issue in this appeal.)

None of the three co-defendants testified.

ARGUMENT

I.

The Court of Appeals erred in affirming the trial judge who committed reversible error by allowing into evidence the statements of appellant's two non-testifying codefendants without adequately redacting their claims of appellant's involvement, as this denied his Sixth Amendment right to confront and cross-examine witnesses, as interpreted by *Burton v. United States*, 391 U.S. 123 (1968), and its progeny.

Co-defendants Cannon and McDonald gave the police statements implicating themselves and Whitehead in Zach's killing. Neither testified at trial. The State argued that replacing Whitehead's name with "another person" in the statements would resolve any confrontation problem. R. p. 629 line 16- R. p. 630 lines 20. The defense responded that this limited redaction would not satisfy *Bruton v. United States*, 391 U.S. 123 (1968), and *State v. LaBarge*, 275 S.C. 168, 268 S.E.2d 278 (1980), "because the statement clearly implicates someone else and it's obviously prejudicial to the people who are sitting right here." R. p. 631 lines 4-17. "[T]here's an easier way to do it," counsel continued, "which is simply to not put a reference to what someone else did." R. p. 637 lines 20 -22. Ultimately, the judge ruled in favor of the State. R. p. 643 lines 12-17.

Counsel unsuccessfully renewed the objection when the State introduced Cannon and McDonald's statements into evidence. R. p. 734 lines 16-21. Cannon's statement, even as redacted, alleges that "someone else pressured another person to hit Josh with the bat, and the other person hit Josh with the bat." R. p. 738 line 22- R. p. 740 line 23; R. p. 748 line 24- R. p. 752 line 15. McDonald's statement reveals that he was the person who beat Zoch with a baseball bat. R. p. 768 lines 16-21; R. p. 775 lines 2-8. His statement also asserts that "[a]nother person ... picked up a glass bowl with flower petals in it ... and hit Josh in the head with it while Josh was asleep on the

couch." R. p. 774 lines 22-25. After he beat Zoch with the bat, McDonald continued, "[t]hat's when another person and another person started kicking and stomping Josh." R. p. 775 lines 9-11.

The Confrontation Clause of the Sixth Amendment, applicable to the states under the Fourteenth Amendment, guarantees the right of a criminal defendant to confront and cross examine witnesses against him. *Richardson v. Marsh*, 481 U.S. 200 (1987). In *Bruton*, 391 U.S. at 136-37, the United States Supreme Court held that, in a joint trial, the admission of a non-testifying co-defendant's statement that expressly incriminates the defendant violates his right under the Confrontation Clause. In *Richardson*, 481 U.S. at 207-8, the Court held that the rule announced in *Bruton* does not apply where the statement becomes incriminating only when linked to other evidence introduced at trial, such as the defendant's own testimony. It also noted that "*Bruton* can be complied with by redaction." *Id.*

In *Gray v. Maryland*, 523 U.S. 185, 197 (1998), the Court held that a statement which "substituted blanks and the word 'delete' for the petitioner's proper name falls within the class of statements to which *Bruton's* protections apply."

> The [*Bruton*] majority reasoned that one must look at the *kind* of inferences that are necessary to make a connection to the defendant, not the simple *fact* that there are inferences to determine the applicability of *Bruton*. *Richardson* involves statements that did not directly refer to the defendant, but which became incriminating only when linked to other evidence developed at trial. However, the *Gray* Court stated "[t]he inferences at issue here [in *Gray*] involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, which involve inferences that a jury could ordinarily make immediately, even [if the statement was] the very first item introduced at trial." Thus, the statements are protected under *Bruton* because in such instances the defendant is implicated almost as if there was a direct reference, and the connection does not depend on other evidence introduced at trial. [Citations omitted.]

State v. Holder, 382 S.C. 278, 676 S.E.2d 690, 694 (2009); see, also, *State v. LaBarge* (defendant identified as "Mr. X" in co-defendant's statement).

No rational juror who heard Cannon and McDonald's statements to the police could have deduced anything other than that Whitehead was the third "person" who had attacked Zoch. Though *Bruton* holds that the use of a limiting instruction will not cure the error, the instruction given in this case was particularly tepid:

> Now, some of the evidence in this case may have been admitted solely because of its relationship to the case against one of the defendants. This evidence can not be considered in the case of any of the other defendants.

R. p. 1449 lines 8-12. Though violations of the Confrontation Clause are subject to a harmless error analysis, *State v. Holder*, the error could not possibly have been harmless, given the paucity of evidence against Whitehead.

The Court of Appeals held that there was no violation pursuant to Bruton v. United States, 391 U.S. 123 (1968) because the co-defendant's redacted statement only implicated the statement's maker and did not limit the participants to three which would have implicated the three defendants on trial, so the trial court properly allowed the redacted statement into evidence. App. 2.

The Court of Appeals misapprehended the issue. *Bruton* holds that the use of a limiting instruction will not cure the error. In the opinion of Whitehead's co-defendant which was cited in Whitehead's opinion, State v. McDonald, Op. No. 5033 (Ct. App. filed September 12, 2012), the Court of Appeals quoted the jury instruction given and relied on this instruction in finding that the redacted statement of Cannon was properly admitted. However, the limiting instruction given was confusing, prejudicial, and not proper.

Though violations of the Confrontation Clause are subject to a harmless error analysis, *State v. Holder*, the error could not possibly have been harmless, given the paucity of evidence against Whitehead.

For this reason, the Court should grant certiorari and reverse Whitehead's convictions and remand for a new trial.

ARGUMENT

II.

The Court of Appeals erred in affirming the trial judge who erred by refusing to direct a verdict acquitting appellant of murder and burglary, since the State's evidence against him established nothing more than a mere suspicion of guilt.

Under *Bruton* and its progeny, it goes without saying that the statements of Cannon and McDonald do not constitute evidence against Whitehead for the purpose of satisfying the State's burden of proof. This leaves only the testimony of the jailhouse snitch, who claimed that he had overheard a conversation in which the participants, one of whom he later identified by his voice as Whitehead, discussed Zoch's killing and "just bragging about how they were killers now." R. p. 1221 line 10- R. p. 1222 line 20; R. p. 1226 line 20- R. p. 1227 line 9. But this witness never testified that Whitehead had admitted any degree of involvement in the incident.

At the conclusion of the State's case, defense counsel moved for a directed verdict on the ground that the State's evidence did not rise above a mere suspicion that Whitehead was guilty. R. p. 1302 line 22- R. p. 1309 line 3. The judge denied the motion. R. p. 1314 line 12- R. p. 1315 line 9.

A defendant is entitled to a directed verdict when the State fails to produce any evidence of the offense charged. *State v. McCombs*, 368 S.C. 489, 629 S.E.2d 361 (2006). The defendant is entitled to a directed verdict when the evidence merely raises a suspicion he is guilty. *State v. Hernandez*, 382 S.C. 620, 677 S.E.2d 603 (2009); *State v. Mitchell*, 341 S.C. 406, 535 S.E.2d 126 (2000).

Although the snitch testified that he overheard Whitehead discussing the charges with other, unidentified inmates, he did not testify that Whitehead admitted his guilt. The balance of the State's

evidence — the fact that Whitehead was observed limping the day after Zoch's killing for example — did not satisfy the State's burden of putting forth some evidence that Whitehead is guilty of murder and burglary.

The Court of Appeals held that the trial court was concerned with the existence of evidence rather then its weight when considering a directed verdict motion. App. 2-3.

The Court misapprehended the issue. Although the snitch testified that he overheard Whitehead discussing the charges with other, unidentified inmates, he did not testify that Whitehead admitted his guilt. The balance of the State's evidence — the fact that Whitehead was observed limping the day after Zoch's killing for example — did not satisfy the State's burden of putting forth some evidence that Whitehead is guilty of murder and burglary.

For this reason, the Court should direct a verdict acquitting Whitehead of those charges.

CONCLUSION

Based on the above, certiorari should be granted, the convictions and sentences reversed, and the case remanded for a directed verdict on Issue Two or a new trial.

Respectfully submitted,

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER.

This 30th day of January, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Kershaw County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 2012-UP-526 (S.C. Ct. App. filed 9/12/2012)
07-GS-28-00019, 00022

THE STATE,

RESPONDENT,

V.

CHRISTOPHER RYAN WHITEHEAD,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Melody J. Brown, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and the S.C. Court of Appeals, this 30th day of January, 2013.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 30th day
of January, 2013.

_____________________(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022

The Supreme Court of South Carolina

The State, Respondent,

v.

Christopher Ryan Whitehead, Petitioner.

Appellate Case No. 2012-213683

RECEIVED

FEB 21 2014

SC OFFICE OF
APPELLATE DEFENSE

ORDER

This matter is before the Court on a petition for a writ of certiorari to review the Court of Appeals' decision in *State v. Whitehead*, Op. No. 2012-UP-526 (S.C. Ct. App. filed Sept. 12, 2012). We grant the petition for a writ of certiorari as to petitioner's Question I. We deny the petition as to Question II. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.

C.J.

J.

J.

J.

J.

Columbia, South Carolina
February 21, 2014

cc:
Honorable Jenny Kitchings
Melody Jane Brown, Esquire
LaNelle Cantey DuRant, Esquire
Joyce McDonald

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Kershaw County

G. Thomas Cooper, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRISTOPHER RYAN WHITEHEAD,

PETITIONER

APPELLATE CASE NO. 2012-213683

BRIEF OF PETITIONER

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

INDEX

INDEX 1

TABLE OF AUTHORITIES 2

ISSUE PRESENTED 3

STATEMENT 4

ARGUMENT 5

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Arizona v. Fulminante, 499 U.S. 279 (1991)........ 11

Brecht v. Abrahamson, 507 U.S. 619 (1993)........ 11

Bruton v. United States, 391 U.S. 123 (1968)........ 3, 6, 8, 10

Chapman v. California, 386 U.S. 18 (1967)........ 11

Gray v. Maryland, 523 U.S.185 (1998)........ 9

Richardson v. Marsh, 481 U.S. 200 (1987)........ 8, 9

Stanford v. Parker, 266 F.3d 442 (6th Cir. 2001)........ 11

State v. Bellamy, 293 S.C. 103, 359 S.E.2d 63 (1987)........ 9

State v. Henson, 754 S.E.2d 508, (2014)........ 10, 11

State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009)........ 9, 11

State v. LaBarge, 275 S.C. 168, 268 S.E.2d 278 (1980)........ 6, 9

State v. McDonald, Op. No. 5033 (Ct. App. filed September 12, 2012)........ 10

State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)........ 9

State v. Whitehead, Op. No. 2012-UP-526 (Ct. App. filed September 12, 2012)........ 4

Constitutional Provisions

U.S. Const. amend. VI........ 3, 6, 8

ISSUE PRESENTED

Whether the Court of Appeals erred in affirming the trial judge who committed reversible error by allowing into evidence the statements of appellant's two non-testifying codefendants without adequately redacting their claims of appellant's involvement, as this denied his Sixth Amendment right to confront and cross-examine witnesses, as interpreted by Bruton v. United States, 391 U.S. 123 (1968), and its progeny.

STATEMENT

On May 5 through 13, 2008, Christopher Whitehead and two co-defendants, Robert Cannon and Derrick McDonald, stood trial in Kershaw County before Judge G. Thomas Cooper and a jury, on indictments charging them with murder and first-degree burglary. Whitehead was represented by Neil Riley and David Reuwer. The state was represented by John Meadors, Joanna McDuffie, and Ron Moak. The jury returned a verdict of guilty as indicted. Judge Cooper sentenced Whitehead to life without parole on both the murder and burglary first degree pursuant to S.C. Code section 17-25-45 and a 2005 conviction by guilty plea to attempted armed robbery. Cannon and McDonald each received concurrent sentences of thirty-five years Whitehead's attorney filed a notice of appeal. The Office of Appellate Defense perfected the appeal. The Court of Appeals affirmed Whitehead's convictions and sentences on September 12, 2012. State v. Whitehead, Op. No. 2012-UP-526 (Ct. App. filed September 12, 2012). App. 1 – 3. Appellate counsel filed a petition for rehearing on September 27, 2012. App. 8. The Court of Appeals issued an order on November 30, 2012 denying the petition for rehearing. App. 10. A petition for a writ of certiorari was filed to the Supreme Court. The Supreme Court granted certiorari on Issue One on February 21, 2014. This brief of petitioner follows.

STATEMENT OF FACTS

Each of the three young men and the victim, Joshua Zoch, had worked at the same Sonic restaurant at one point. At the time of his death, Zoch was also a police informant who had committed at least one first-degree burglary of his own. R. p. 619 line 19- R. p. 620 line 15; R. p. 801 lines 20-25; R. p. 1284 line 9- R. p. 1285 line 2.

Both Cannon and McDonald told the police that they and Whitehead had beaten Zoch to death while punishing him for being a snitch. (The introduction of these statements, even as redacted to refer to Whitehead as "another person," is the basis of this appeal.) Petitioner Whitehead, on the other hand, told the police that he did not know "a damn thing" about Zoch's murder. R. p. 717 line 18- R. p. 718 line 5.

A jailhouse snitch testified that he had overheard a conversation in which the participants, one of whom he later identified by his voice as Whitehead, discussed the incident and "just bragging about how they were killers now." R. p. 1221 line 10- R. p. 1222 line 20; R. p. 1226 line 20- R. p. 1227 line 9.

None of the three co-defendants testified.

ARGUMENT

The Court of Appeals erred in affirming the trial judge who committed reversible error by allowing into evidence the statements of appellant's two non-testifying codefendants without adequately redacting their claims of appellant's involvement, as this denied his Sixth Amendment right to confront and cross-examine witnesses, as interpreted by Bruton v. United States, 391 U.S. 123 (1968), and its progeny.

Co-defendants Cannon and McDonald gave the police statements implicating themselves and Whitehead in Zach's killing. Neither testified at trial. The State argued that replacing Whitehead's name with "another person" in the statements would resolve any confrontation problem. R. p. 629 line 16- R. p. 630 lines 20. The defense responded that this limited redaction would not satisfy Bruton v. United States, 391 U.S. 123 (1968), and State v. LaBarge, 275 S.C. 168, 268 S.E.2d 278 (1980), "because the statement clearly implicates someone else and it's obviously prejudicial to the people who are sitting right here." R. p. 631 lines 4-17. "[T]here's an easier way to do it," counsel continued, "which is simply to not put a reference to what someone else did." R. p. 637 lines 20 -22. Ultimately, the judge ruled in favor of the State. R. p. 643 lines 12-17.

Counsel unsuccessfully renewed the objection when the State introduced Cannon and McDonald's statements into evidence. R. p. 734 lines 16-21. Cannon's statement, even as redacted, alleges that "someone else pressured another person to hit Josh with the bat, and the other person hit Josh with the bat."

> He asked if I wanted to ride. I said I had nothing else to do. It was about 11 p.m. or so. Someone else was in the car and he was quiet. So we go to Josh's house and pull up about 11:30. Another person knocked on the front door and Josh didn't answer. Another person said, 'I'm going to pull your move and kick in the door.' He

kicked the side door and runs in. And I go behind him to see the fight. So Josh is asleep on the couch, and another person "- - pardon the wording here; it's what he told me - - "like, 'he, bitch.' And when he looked up, he hit him with a glass" - - what he described as a glass lamp.

After that Josh was in a daze and he drags him off the couch. And he - - someone else pressured another person to hit Josh with the bat. Josh was half way on the couch at the time. And then they took the bat from this other person. So after that, the other person starts talking - - this is his words- - "starts talking shit to Josh. Josh was basically crawling while another person was talking about Josh being a snitch. So Then I wouldn't"--

Q: Did he say: "So then I wouldn't"?

A: Yes. "So then I wouldn't have"- - let's see. That's my scribble. "So then" - -

Q: "So I wouldn't have to beat him"?

A: --"I wouldn't have to beat someone's ass. So I went pulling drawers. And he "- - talking about another person - - "flipped the mattress. We were looking for weed. So the man was unconscious. Another person then said" - -

Q: Just say it, I mean if that's what he said.

A: - - "fuck it, because we didn't find weed. And another person pushed the Christmas tree over and it fell on Josh. I told another person, 'let's go', and another person said, 'fuck, we didn't find anything', and another person got mad because we was not there. Before we left another person did take the house phone. I did put a towel on his head because was bleeding so bad. And anther person went to the freezer and got the chicken for a cold press. We all had on Latex gloves. One person had on purple gloves, and me and another - - me and someone else had on purple gloves, and I had clear and purple gloves on. And after that we leave the same way we went in. Then we drop off another person. Then I was dropped off. Then I guess he went home.

R. p. 738 line 22- R. p. 740 line 23; R. p. 748 line 24- R. p. 752 line 15.

According to McDonald's statement, one of the men called Zack to see if Josh was at home and see who was there. "Then we started planning a whole thing..." Petitioner McDonald said he was to stay outside and "to make sure nobody came up." "So he went to the side door and we all kicked the door on a count of 3. The door opened. Another person when and, another person, then me. I turned around, close the door, and I went to the other room to look out the window, and my name was called. And I went into the living room. They were talking low, and another person went to the light switch at the dining room area and cut the light on. And another person was on the couch asleep... Josh was on the couch asleep. And another person took a glass bowl over his head and smashed it on Josh's head. At that point that's when I looked to the left and saw a bat. And I started hitting him on the body. That's when one another person stopped me to ask Josh question and that's when the bat hit Josh in the face. That's when he really started bleeding and I got scared and dropped the bat." R. 767, l.– 769, l. 17; R. p. 774 lines 22-25;R. p. 775 lines 2-11.

After he beat Josh with the bat, McDonald continued, "[t]hat's when another person and another person started kicking and stomping Josh." R. p. 775 lines 9-11.

The Confrontation Clause of the Sixth Amendment, applicable to the states under the Fourteenth Amendment, guarantees the right of a criminal defendant to confront and cross examine witnesses against him. Richardson v. Marsh, 481 U.S. 200 (1987). In Bruton, 391 U.S. at 136-37, the United States Supreme Court held that, in a joint trial, the admission of a non-testifying co-defendant's statement that expressly incriminates the defendant violates his right under the Confrontation Clause. In Richardson, 481 U.S. at 207-8, the Court held that the rule announced in Bruton does not apply where the statement becomes incriminating only when linked to other evidence introduced at trial, such as the defendant's own testimony. It also noted that "Bruton can be complied with by redaction." Id.

In State v. Bellamy, 293 S.C. 103, 359 S.E.2d 63, 65 (1987), overruled on other grounds in State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), the Supreme Court urged the state to consider all available alternatives before deciding to try co-defendants jointly. The Court wrote that "the decision to pursue this route should be made only after giving due deliberation to the inherent problems, such as redacted statements, which arise in joint trials."

In Gray v. Maryland, 523 U.S. 185, 197 (1998), the Court held that a statement which "substituted blanks and the word 'delete' for the petitioner's proper name falls within the class of statements to which Bruton's protections apply."

> The [Bruton] majority reasoned that one must look at the *kind* of inferences that are necessary to make a connection to the defendant, not the simple *fact* that there are inferences to determine the applicability of Bruton. Richardson involves statements that did not directly refer to the defendant, but which became incriminating only when linked to other evidence developed at trial. However, the Gray Court stated "[t]he inferences at issue here [in Gray] involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, which involve inferences that a jury could ordinarily make immediately, even [if the statement was] the very first item introduced at trial." Thus, the statements are protected under Bruton because in such instances the defendant is implicated almost as if there was a direct reference, and the connection does not depend on other evidence introduced at trial. [Citations omitted.]

In Gray, the court wrote that the confession referred directly to the "existence' of the non-confessing defendant which was distinguished from Richardson. See also, State v. LaBarge (defendant identified as "Mr. X" in co-defendant's statement).

In State v. Holder, 382 S.C. 278, 676 S.E.2d 690, 694 (2009), the South Carolina Supreme court held that even a confession redacted through the use of neutral pronouns violates the Confrontation Clause if it facially incriminates a non confessing co-defendant.

No rational juror who heard Cannon and McDonald's statements to the police could have deduced anything other than that Whitehead was the third "person" who had attacked Josh. Bruton expressly holds that the use of a limiting instruction will not cure the error. Thus, the tepid instruction given in this case is of no avail:

> Now, some of the evidence in this case may have been admitted solely because of its relationship to the case against one of the defendants. This evidence can not be considered in the case of any of the other defendants.

R. p. 1449 lines 8-12.

The Court of Appeals held that there was no violation pursuant to Bruton v. United States, 391 U.S. 123 (1968) because the co-defendant's redacted statement only implicated the statement's maker and did not limit the participants to three which would have implicated the three defendants on trial, so the trial court properly allowed the redacted statement into evidence. App. 2.

The Court of Appeals misapprehended the issue. Bruton holds that the use of a limiting instruction will not cure the error. In the opinion of Whitehead's co-defendant which was cited in Whitehead's opinion, State v. McDonald, Op. No. 5033 (Ct. App. filed September 12, 2012), the Court of Appeals quoted the jury instruction given and relied on this instruction in finding that the redacted statement of Cannon was properly admitted. However, the limiting instruction given was confusing, prejudicial, and a fundamental legal error violating the express language of Bruton. The Court of Appeals held that the neutral phrase "another person" in Cannon's statement avoided any Bruton violation because the redacted statement only implicated the statement's maker.

In State v. Henson, 754 S.E.2d 508, (2014), the Supreme Court reversed the case for a new trial because the admission of the co-defendant's redacted confession during the joint trial violated the defendant's rights under the Confrontation Clause. The co-defendant's confession identified

three individuals by name as committing the crime and acknowledged that another male participated and fired the fatal shots, but left that person unnamed but used a neutral pronoun. The solicitor had stated in his opening that four individuals committed the crime.

The Supreme court in Henson, Id. cited the case of Stanford v. Parker, 266 F.3d 442 (6th Cir. 2001), where the petitioner and a co-conspirator were tried jointly. The co-defendant's confession had been redacted with "the other person" being used to replace petitioner's name. On appeal of his habeas corpus petition, the court held that the confession violated the Confrontation Clause because the "redaction would not have prevented the jury from inferring that the confession referred to the petitioner because he sat as a defendant before the jury. The prosecution offered the confession into evidence, and the jury knew the prosecution was seeking to convict the petitioner.

Though violations of the Confrontation Clause are subject to a harmless error analysis, State v. Holder, *supra,* the error in Whitehead's case could not possibly have been harmless, given the paucity of evidence against Whitehead. There was no forensic evidence linking any of the three co-defendants to the crime scene. R.889, ll. 11- R. 890, ll. 11; R. 894, ll. 14-17. The Supreme Court held in Henson that before an error can be held harmless beyond a reasonable doubt, the court must determine whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. In Arizona v. Fulminante, 499 U.S. 279 (1991) the United States Supreme Court held that constitutional violations were trial errors subject to a harmless error analysis. In Brecht v. Abrahamson, 507 U.S. 619 (1993), The Supreme Court held that the Court, in reviewing claims of constitutional error, consistently applied the standard described in Chapman v. California, 386 U.S. 18 (1967) that the error must be harmless beyond a reasonable doubt.

The confessions of the two co-defendants implicating Whitehead were not harmless. Even with the redactions and the added words of "another person", the jury had to acknowledge the existence of Whitehead.

CONCLUSION

Based on the above, Whitehead's convictions and sentences should be reversed, and the case remanded for a new trial.

Respectfully submitted,

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER.

This 13th day of May, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Kershaw County
G. Thomas Cooper, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRISTOPHER RYAN WHITEHEAD,

PETITIONER.

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on Melody J. Brown, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Christopher Whitehead, #328345, Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 13th day of May, 2014.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

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

____________________(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Christopher Ryan Whitehead, Petitioner.

Appellate Case No. 2012-213683

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Kershaw County
G. Thomas Cooper, Jr., Circuit Court Judge

Memorandum Opinion No. 2015-MO-033
Heard December 11, 2014 – Filed June 10, 2015

AFFIRMED AS MODIFIED

Appellate Defender LaNelle Cantey DuRant, of Columbia, for Petitioner.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General Melody J. Brown, and

Solicitor Daniel E. Johnson, all of Columbia, for the Respondent.

JUSTICE KITTREDGE: We granted a writ of certiorari to review the court of appeals' unpublished opinion in *State v. Whitehead*, Op. No. 2012-UP-526 (S.C. Ct. App. filed Sept. 12, 2012). For the reasons set forth in *State v. McDonald*, 412 S.C. 133, 771 S.E.2d 840 (2015), we affirm as modified. While the admission of the codefendants' statements violated the Confrontation Clause,[1] in view of the overwhelming evidence of guilt, the error was harmless.

AFFIRMED AS MODIFIED.

TOAL, C.J., PLEICONES, BEATTY and HEARN, JJ., concur.

---

[1] U.S. Const. amend. VI; *see Bruton v. United States*, 391 U.S. 123 (1968).

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Derrick McDonald, Petitioner.

Appellate Case No. 2012-213686

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Kershaw County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 27515
Heard December 11, 2014 – Filed April 22, 2015

AFFIRMED AS MODIFIED

Chief Appellate Defender Robert M. Dudek, of Columbia, for Petitioner.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Senior Assistant Attorney General Melody J. Brown, and Solicitor Daniel E. Johnson, all of Columbia, for Respondent.

JUSTICE KITTREDGE: Petitioner Derrick McDonald and two codefendants were convicted of murder and first-degree burglary. The court of appeals affirmed, rejecting McDonald's argument that his Confrontation Clause rights were violated when the trial court admitted the redacted confession of one of his nontestifying codefendants. We granted a writ of certiorari to review the court of appeals' decision in *State v. McDonald*, 400 S.C. 272, 734 S.E.2d 167 (Ct. App. 2012). We find the court of appeals erred, for the jury would readily infer from the face of the codefendant's confession that it referred to and incriminated McDonald. We nevertheless affirm McDonald's conviction, for the error was harmless in light of the overwhelming evidence of guilt.

I.

McDonald, Christopher Whitehead, Robert Cannon and Joshua Zoch (Victim) worked together at various times at a Sonic fast food restaurant in Columbia, South Carolina. On the evening of December 12, 2006, Victim was brutally murdered in his Kershaw County home. McDonald, Whitehead, and Cannon were charged, tried together, and convicted of burglarizing Victim's home and murdering him.

Earlier on the day of the murder, Whitehead called a co-worker looking for Victim. Whitehead wanted to know if Victim would be home that evening. According to the co-worker, Whitehead wanted to go over to Victim's home to fight him. Whitehead was upset because he believed Victim was a "snitch" who was cooperating with the police in various drug investigations.

At approximately 10:00 in the evening, Whitehead, McDonald and Cannon arrived together at Sonic in Whitehead's car. Cannon was wearing a ski mask, and the assistant manager on duty told all three men to leave the premises. The trio left Sonic together in Whitehead's car and drove to a Wal-Mart, where they purchased a ski mask and latex gloves.

Victim's brutally beaten body was discovered in his home the next day by his girlfriend. Victim was beaten to death by multiple objects. The forensic pathologist testified that he identified between six and eight injuries to Victim's head that were each independently capable of causing death.

The investigation quickly focused on Whitehead, McDonald, and Cannon (Defendants). Investigators spoke to Cannon, who gave a detailed confession implicating all of the Defendants in Victim's murder. Following Cannon's confession, McDonald and Whitehead were arrested. McDonald also confessed

and admitted that the Defendants, after going to Wal-Mart, drove to Victim's home and broke in and killed him. Defendants punched and kicked Victim repeatedly and hit him with a baseball bat and a lamp.

II.

Defendants were indicted on charges of first-degree burglary and murder. The State chose to try the Defendants jointly and sought to introduce McDonald's and Cannon's confessions during its case-in-chief. Defense counsel and the State argued about how the confessions should be redacted in order to comply with the Confrontation Clause. The State contended redacting the confessions using the neutral phrase "another person" was sufficient, while defense counsel insisted on redacting all references to anyone other than the confessing defendant in each of the statements. The trial court overruled defense counsel's objections and instructed the State to redact the confessions using the phrase "another person." The confessions were admitted over counsel's objection.

According to Cannon's statement, with "another person" substituted for the names of the codefendants:

> On Tuesday the 12th December 2006 at 2:00 p.m. *another person* got off of work and picks me up. We go to the mall and I got a new cell phone and shoes. We then went to pick up *another person* and then we went to McDonalds in Blythwood and eat and from there we went to Sonic. I had on a ski mask and was joking around while *another person* talked to a girl in the back and *another person* was talking to Leroy. I don't know Leroys last name. We then left Sonic and went to the Two Notch Walmart and and *another person* got a ski mask. So we went riding and *another person* said you know we need to do something with these mask, and I ask and *another person* ask like what. And *another person* said like beat Josh's ass because he's a snitch, and I told *another person* I didn't think he was a snitch. *Another person* then ask if me and *another person* wanted to ride and we said whatever.
>
> Because I had nothing else to do and no certain time to be home, that was about 11 p.m. *Another person* was real quiet in the car while we were going to Josh's house. We pulled up to Josh's about 11:30 p.m. *another person* knocked on the front door and Josh didn't answer. So *another person* said that he was going to pull one of my moves and

kick the door. So *another person* went to the side door and he *another person* busted it in.

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

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

Q: Did you, *another person, and another person* have on gloves?
A: Yes.

Q: What kind of gloves?
A: Purple latex and I had on 2 pair white and purple ones on top.

Q: Where was the bat from that was used to hit Josh?
A: It was in Josh's house. I just looked over their and *another person* picked it up.

Q: What were you, *another person, and another person* wearing that night?
A: Black pants and shirts and ski mask.

Q: What color was the ski mask?
A: Mine was black and theirs was black or dark blue.

Q: Did you change cloths that night after the incident?
A: Yes and *another person* done something with them.

No defendant testified.

The jury found Defendants guilty of both charges. McDonald appealed,[1] contending that his Confrontation Clause rights were violated by the admission of Cannon's redacted confession, arguing that given the context, Cannon's written confession clearly implicated McDonald in the crimes. The court of appeals affirmed, "find[ing] that the neutral phrase 'another person' inserted into Cannon's statement avoided any [Confrontation Clause] violation."[2] *State v. McDonald*, 400 S.C. at 279, 734 S.E.2d at 170. We now review the court of appeals' Confrontation Clause determination.

III.

"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 v. Marsh*, 481 U.S. 200, 206 (1987) (quoting U.S. Const. amend. VI). This constitutional right "include[s] the right to cross-examine those witnesses." *Pointer v. Texas*, 380 U.S. 400, 401 (1965). In *Bruton v. United States*, the United States Supreme Court held that a defendant's Confrontation Clause rights are violated when a nontestifying codefendant's confession that implicates the defendant is admitted during a joint trial. 391 U.S. 123, 127–28 (1968). The Court noted that these "powerfully incriminating extrajudicial statements of a codefendant" are not only "devastating

[1] Whitehead also raised a Confrontation Clause challenge on appeal, and the court of appeals affirmed his conviction in an unpublished opinion. *State v. Whitehead*, Op. No. 2012-UP-526 (S.C. Ct. App. filed Sept. 12, 2012). This Court granted a writ of certiorari to review the court of appeals' decision.

[2] McDonald also argued in the court of appeals that the admission of Cannon's statement violated *Crawford v. Washington*, 541 U.S. 36 (2004). The court of appeals held that issue to be unpreserved. *State v. McDonald*, 400 S.C. at 279–80, 734 S.E.2d at 171. This Court denied certiorari as to the *Crawford* issue.

to the defendant but [also] their credibility is inevitably suspect." *Id.* at 135–136. "While appearing to establish a bright-line rule against the admission of a codefendant's confession which incriminates a defendant, the [*Bruton*] Court acknowledged there are alternatives which may allow the admission of a confession while still protecting a defendant's Confrontation Clause rights and in a footnote, mentioned redaction as one of those alternatives." *State v. Henson*, 407 S.C. 154, 162, 754 S.E.2d 508, 512 (2014) (citing *Bruton*, 391 U.S. at 133–34. 134 n.10).

The Supreme Court has revisited the issue twice since *Bruton*. In *Richardson v. Marsh*, the Court addressed the issue of whether the Confrontation Clause is violated "when the codefendant's confession is redacted to omit any reference to the defendant, but the defendant is nonetheless linked to the confession by evidence properly admitted against him at trial." 481 U.S. 200, 202 (1987). The Court held that there was no Confrontation Clause violation "by the admission of a nontestifying codefendant's confession with a proper limiting instruction" when "the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." *Id.* at 211. The Court expressly declined to opine "on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." *Id.* at 211 n.5.

Eleven years later, the Supreme Court reached that issue in *Gray v. Maryland*, 523 U.S. 185 (1998). The defendant's name in *Gray* was redacted by using the word "deleted" or inserting a blank space, and the Court found that "redaction that replaces a defendant's name with an obvious indication of deletion, such as a blank space, the word 'deleted,' or a similar symbol, still falls within *Bruton*'s protective rule" as it "refers directly to the 'existence' of the nonconfessing codefendant." *Id.* at 192. The Court noted that "the obvious deletion may well call the jurors' attention specially to the removed name." *Id.* at 193. "By encouraging the jury to speculate about the reference, the redaction may overemphasize the importance of the confession's accusation—once the jurors work out the reference." *Id.* "In other words, the Court brought within *Bruton*'s prohibition those confessions which facially incriminate through inference." *Henson*, 407 S.C. at 164, 754 S.E.2d at 513.

This Court has followed *Gray*. First, in *State v. Holder*, the Court held that the admission of a nontestifying codefendant's oral statement which replaced the defendant's name with "she" violated the Confrontation Clause "because the jury could readily determine that the statement referred to [defendant] as she was the only female defendant." 382 S.C. 278, 285, 676 S.E.2d 690, 694 (2009). More

recently, in *Henson*, we found that the State's use of a nontestifying codefendant's confession that replaced defendant's name with "the guy," "he," and "him" violated the Confrontation Clause because "the jury could infer from the face of [nontestifying codefendant's] confession without relying on any other evidence, that the confession referred to and incriminated [the defendant.]" 407 S.C. at 166, 754 S.E.2d at 514.

In the instant case, Cannon's confession was redacted using the phrase "another person." However, even a casual reading of the confession makes it apparent that the confession describes the actions of Cannon and two other male individuals. For example, Cannon's confession begins: "On Tuesday the 12th December [sic] 2006 at 2:00 p.m. *another person* got off of work and picks [sic] me up. We go [sic] to the mall and I got a new cell phone and shoes. We then went to pick up *another person* . . . ." Moreover, the redacted version of Cannon's statement repeatedly uses the pronouns "he" and "him," clearly indicating that the unnamed individuals in the confession were male. In light of the fact that there were three male defendants in the trial, the jury was left with the inescapable conclusion that Cannon's confession referred to McDonald and Whitehead, who were seated at counsel table.[3] Under *Bruton* and its progeny, this is insufficient to satisfy the demands of the Confrontation Clause. *See Gray*, 523 U.S. at 196 ("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 . . . ."); *Henson*, 407 S.C. at 164, 754 S.E.2d at 513 (stating that *Bruton* prohibits statements "which facially incriminate through inference").

Moreover, we reject the State's invitation to find no Confrontation Clause violation based on the trial court's limiting instruction. The presence of a limiting instruction is not curative here, as it was not in *Bruton*, for "there 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." *Bruton*, 391 U.S. at 135 (citations omitted). We hold that the court of appeals erred in finding that the

---

[3] We also note that immediately after the investigator read Cannon's confession to the jury, the solicitor asked, "What happened next in the investigation? What did you do next?" The investigator responded, "After obtaining [Cannon's] statement, we then obtained an arrest warrant for Mr. Derrick McDonald." The inescapable conclusion is that Cannon's statement inculpated McDonald.

admission of Cannon's redacted confession did not violate McDonald's Confrontation Clause rights.

"The mere finding of a violation of [the Confrontation Clause] in the course of the trial, however, does not automatically require reversal of the ensuing criminal conviction." *Schneble v. Florida*, 405 U.S. 427, 430 (1972). "In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error." *Id.* In this case, we find that the overwhelming evidence of McDonald's guilt renders the error harmless beyond a reasonable doubt.

We first note the presence of strong evidence of guilt, apart from the erroneous admission of Cannon's confession. On the evening of the murder, Whitehead informed a co-worker that he intended to go over to Victim's home to fight him. Later that evening, around 10:00 p.m., Defendants arrived at the Sonic, with Cannon donning a ski mask. The shift manager told the Defendants to leave. An on-duty employee then observed Defendants leave together. That employee testified that Whitehead drove a four-door sedan with a noticeably loud muffler sound. Investigators obtained a receipt from the Wal-Mart on Two Notch Road in Columbia, which confirmed that a ski mask and purple latex gloves were purchased at 10:43 p.m. on the night of the murder. At approximately 11:30 p.m., near the time of Victim's murder, Victim's neighbor took his dog outside and heard "a lot of knocking noise[s], loud, like somebody kicking something or slamming doors." About ten minutes later, the neighbor heard "a lot of noise" and "a lot of people getting excited." He then heard a loud muffler sound and observed headlights in the road. A short time later, at about 1:30 a.m., McDonald showed up at a co-worker's house and was visibly upset. The co-worker testified that, although McDonald did stay at his house from time to time, this was the first time McDonald had showed up so late. In addition, the morning after the murder, Whitehead showed up to work at the Sonic with a scratch under one of his eyes and a limp. He began acting strange and lied to his manager about the source of the injuries, claiming that he fell at work. Several days later, he walked out of work during a shift and told his manager that he's "got problems" and was "about to move to Aiken." We find this evidence of guilt, independent of Cannon's confession, compelling.

Beyond the independent evidence of guilt, McDonald gave a confession that was entirely consistent with Cannon's confession. McDonald's confession detailed going to the restaurant with Whitehead and Cannon, purchasing a ski mask and

gloves from Wal-Mart, arriving at Victim's home, kicking in the door, hitting Victim repeatedly in the body and head with a baseball bat, and stealing various items from Victim's home. The properly admitted evidence at trial aligns with the details McDonald provided in his confession. In addition to the corroboration of the purchase at Wal-Mart, part of a purple latex glove was found at the crime scene. Victim's girlfriend further testified that Victim kept a baseball bat at his home, which investigators also found at the crime scene.

Given the extensive evidence of guilt, we conclude that the *Bruton* violation was harmless beyond a reasonable doubt. *See Schneble*, 405 U.S. at 431 (finding a *Bruton* violation to be harmless error when the "details of petitioner's [confession] were internally consistent, were corroborated by other objective evidence, and were not contradicted by any other evidence in the case").[4]

IV.

We conclude that the admission of Cannon's redacted confession violated McDonald's Confrontation Clause rights. However, in light of the overwhelming evidence of guilt, we determine that that the error in this case was harmless beyond a reasonable doubt. We affirm the court of appeals as modified.

AFFIRMED AS MODIFIED.

TOAL, C.J., PLEICONES, BEATTY and HEARN, JJ., concur.

---

[4] Although we find the error in this case harmless, we take this opportunity to repeat our cautionary warning from almost three decades ago when we "urge[d] the [S]tate to carefully consider all the available alternatives before deciding to try co-defendants jointly." *State v. Bellamy*, 293 S.C. 103, 106, 359 S.E.2d 63, 65 (1987), overruled on other grounds by *State v. Torrence*, 305 S.C. 45, 69 n.5, 406 S.E.2d 315, 328 n.5 (1991). "While we realize there will be circumstances in which a joint trial will be the best route to follow, the decision to pursue this route should be made only after giving due deliberation to the inherent problems, such as redacted statements, which arise from joint trials." *Id.*

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

THE STATE,

RESPONDENT,

V.

CHRISTOPHER RYAN WHITEHEAD,

PETITIONER

APPELLATE CASE NO. 2012-213683

Appeal from Kershaw County

G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 2012-UP-526

PETITION FOR REHEARING

On June 10, 2015, this Court affirmed as modified the conviction of Petitioner Christopher Ryan Whitehead for murder and first-degree burglary for which he received a sentence of life without parole. This Court ruled that while the admission of the codefendants' statements violated the Confrontation Clause pursuant to Bruton v. United States, 391 U.S. 123 (1968), this error was harmless in light of the overwhelming evidence of guilt. This petition for rehearing is submitted in opposition to the harmless error ruling.

This Court issued an unpublished opinion in Whitehead's case, State v. Whitehead, Op. No. 2015-MO-033 (filed June 10, 2015) citing the reasons for the decision as set forth in the case of

Whitehead's co-defendant, State v. McDonald, 412 S.C. 133, 771 S.E.2d 840 (2015). In State v. McDonald, id., this Court held that the Court of appeals erred in finding that the admission of the third co-defendant, [Cannon's], redacted confession did not violate McDonald's Confrontation Clause rights. This Court relied on the case of Schneble v. Florida, 405 U.S. 427 (1972) which held that the mere finding of the [Confrontation Clause] in the course of the trial, however, did not automatically require reversal of the ensuing criminal conviction.

This Court then held that given the extensive evidence of guilt in McDonald's case where he also gave a statement confessing, the Bruton[1] violation was harmless beyond a reasonable doubt. This Court again cited Schneble, *supra*, which found that a Bruton violation was harmless error when the details of petitioner's [confession] were internally consistent, were corroborated by objective evidence, and were not contradicted by any other evidence in the case.

Schneble does not apply to Christopher Whitehead's case because Whitehead did not confess and did not give a statement.

In Schneble, id., the defendant Schneble gave a detailed confession of how he murdered the victim, and the location of the body. He initially admitted knowledge of the murder and claimed that his co-defendant, Snell, shot the victim while Schneble was away from the car. He then conceded that this first statement was false, and he gave the details of how he strangled the victim, Mrs. Collier. His co-defendant Snell gave a statement claiming that Schneble never left him alone in the car with the victim.

The United States Supreme Court found that the minds of the average jury would not have found that the State's case was any less persuasive if Snell's statement had been excluded. Therefore, the Court concluded that the error of admitting Snell's statement when he did not testify

[1] Bruton v. United States, 391 U.S. 123 (1968).

was harmless error. The Court wrote that without Schneble's confession and the resulting discovery of the body, the State's case against Schneble was virtually non-existent. The U. S. Supreme Court cited Chapman v. California, 386 U.S. 18 (1967) for the proposition that unless there was a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal was not required.

The Court in Schneble v. Florida, *supra*, cited the case of Harrington v. California, 395 U.S. 250 (1969). Harrington and three co-defendants were tried for murder. One co-defendant confessed and testified for the state implicating Harrington. The other two co-defendants gave statements which corroborated Harrington's presence at the scene. Harrington gave a statement admitting that he was at the scene of the crime but denied any complicity. The Supreme Court held that any violation of Bruton was harmless error.

Whitehead's case is distinguished from both Schneble and Harrington because Whitehead did not give a statement and did not confess. The only evidence placing Whitehead at the scene of this crime were the statements of the two co-defendants McDonald and Cannon. Therefore, it cannot be said that this error of admitting the confessions of McDonald and Cannon implicating Whitehead was harmless beyond a reasonable doubt. In Chapman v. California, *supra*, the United States Supreme Court held: Before a federal constitutional error can be held harmless, the reviewing court must be able to declare a belief that it was harmless beyond a reasonable doubt.

This Court held that this error was harmless in view of the overwhelming evidence of guilt. However, the remaining evidence was not overwhelming. Whitehead's alleged statement to a co-worker that he wanted to go to victim's house and fight him was not indicative that he planned to murder the victim. The Sonic Restaurant employee identified Whitehead as driving a four door sedan with a loud muffler. A neighbor of the victim reported hearing a loud muffler sound.

However, the neighbor did not identify a four door sedan. Whitehead showing up at work with a limp is purely circumstantial as far as implicating him in the murder. Whitehead telling his manager that he had problems and was moving was not evidence of guilt for a young man. Under *Bruton* and its progeny, it goes without saying that the statements of Cannon and McDonald do not constitute evidence against Whitehead for the purpose of satisfying the State's burden of proof. This leaves only the testimony of the jailhouse snitch, who claimed that he had overheard a conversation in which the participants, one of whom he later identified by his voice as Whitehead, discussed Zoch's killing and "just bragging about how they were killers now." R. p. 1221 line 10- R. p. 1222 line 20; R. p. 1226 line 20- R. p. 1227 line 9. But this witness never testified that Whitehead had admitted any degree of involvement in the incident.

Officer Craven Harvey who worked at the Kershaw County Detention Center where the jailhouse snitch, Michael Jenkins, and Whitehead were housed, testified that both were in A Pod. R. p. 1254, line 15-25; R. p. 1257, line. 8 – 23. Officer Harvey also confirmed that A Pod had six cells which could house eighteen to twenty-four inmates. F Pod was right above A Pod and also had six cells which could house eighteen to twenty-four inmates. The vents between A Pod and F Pod were connected and the vents between the cells were connected. Voices could be heard between the vents. R. p. 1262, line 1 – R. p. 1264, line 18. Therefore, the voice heard by the inmate Jenkins could have been on of many.

Michael Jenkins was not a credible witness because the victim had been a friend of his. R. p. 1233, line 3 – R. p. 1234, line 12. But for the dubious testimony of this "snitch," a directed verdict would have been in order. This is not overwhelming evidence.

In his closing argument, the solicitor argued the veracity of the co-defendants' statements. He argued that the defense would try to take the jury's attentions away from the statement where the

co-defendant said he got a bat and hit him. R. p. 1329, lines 9 – 14. The solicitor asked where was Whitehead's confession? R. p. 1341, line 15. The solicitor said: "There's no question the three of them were together shortly after 10:00 or 10:20, undisputed. Now that's in the statement." R. p. 1344, lines 14 – 17.

This Court held that the admission of the statements of Whitehead's two co-defendants violated the Confrontation Clause. Therefore, this Court needs to apply the harmless error standard for federal constitutional error which is harmless beyond a reasonable doubt as stated in Chapman v. California, *supra.*

WHEREFORE, we respectfully request this Court to reconsider its ruling and grant Whitehead a new trial.

Respectfully submitted,

LaNelle Cantey DuRant
Appellate Defender

This 23rd day of June, 2015.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Kershaw County
G. Thomas Cooper, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRISTOPHER RYAN WHITEHEAD,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Melody J. Brown, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Christopher Ryan Whitehead, #328345, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 23rd day of June, 2015.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

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

_______________(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.

The Supreme Court of South Carolina

The State, Respondent,

v.

Christopher Ryan Whitehead, Petitioner.

Appellate Case No. 2012-213683
Lower Court Case Nos. 2007GS2800022 & 2007GS2800019

ORDER

The Petition for Rehearing filed in the above entitled matter is denied.

_______________ C.J.

_______________ J.

_______________ J.

_______________ J.

_______________ J.

Columbia, South Carolina
August 5, 2015

AUG 5 2015

cc:
Donald J. Zelenka, Esquire
Daniel Edward Johnson, Esquire
LaNelle Cantey DuRant, Esquire
Melody Jane Brown, Esquire
The Honorable Joyce McDonald