ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County
William Jeffrey Young, Circuit Court Judge

Appellate Case No. 2011-199366

THE STATE,

Respondent,

v.

DANIEL D'ANGELO JACKSON,

Appellant

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

APPELLANT'S STATEMENT OF ISSUE ON APPEAL 1

RESPONDENT'S STATEMENT OF THE CASE 2

RESPONDENT'S STATEMENT OF THE FACTS 2

ARGUMENT

I. The trial judge did not err in admitting, in the joint trial, the statements of co-defendant Reginald Canty, which were properly redacted as to Appellant Jackson's name and did not facially incriminate Jackson. 8

HOW THIS ISSUE WAS RAISED AT TRIAL 10

WHAT THE JURY HEARD 11

MOTIONS 15

STANDARD OF REVIEW 16

The Confrontation Clause and the Admission of a Statement made by a Non-Testifying Co-Defendant in a Joint Trial. 16

Appellant's Confrontation Rights were not violated since the method used to redact Canty's various and inconsistent statements did not leave the jury to speculate or fill in any obvious blanks and Canty's statements do not "facially incriminate" Appellant Jackson. 23

HARMLESS ERROR 31

II. The trial court did not violate the Appellant's Sixth and Fourteenth Amendment rights to confront and cross-examine witnesses pursuant to Crawford v. Washington, 541 U.S. 36 (2004), by allowing five statements by Appellant's non-testifying co-defendant into evidence, which did not directly implicate Appellant in the murder and armed robbery due to the redaction of Appellant's name with neutral pronouns and it use only against Canty. 32

III. The trial court did not abuse its discretion in denying Appellant's motion for severance. 35
a. STANDARD OF REVIEW 35
b. HOW THE ISSUE WAS RAISED AT TRIAL 36
c. ANALYSIS 38

IV. The trial court did not abuse its discretion in denying motions for mistrial based upon the redactions of Canty's statements and the admission of evidence. 39
a. Reference to Jackson as a Suspect – Evidence Struck and Curative Instruction Given. 39
b. Mistrials Motion Related to Inadequate Redaction. 41
c. Little Debbie Purchase and Wrapper. 42

V. The trial judge did not err in finding the prosecution did not violate the mandates of Batson v. Kentucky in its strikes of two African American jurors (#157, #32) for the reason that they had indicated that they did not want to serve on the jury based upon their responses. Further, any error in the failure to indicate that basis for not stating the basis for striking juror #140, a potential second alternate, was not reversible error where the juror would not have been seated and the Appellant failed to assert this ground before the trial judge. (Initial Brief of Appellant, Argument V, pp. 3-4, pp. 22-26). 44

The Alternate Issue Is Not Preserved For Appeal. 44

STANDARD OF REVIEW 45

HOW THE ISSUE WAS RAISED BELOW 49

The State's Response to the Batson Inquiry 52

The Trial Court's Rejection. 54

ANALYSIS 54

The Argument is Not Preserved and Conclusory. 55

The Solicitor's Reasons for Striking Each Juror Were Race-Neutral 56

CONCLUSION 59

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases

Batson v. Kentucky,
476 U.S. 79 (1986) .... passim
Bruton v. United States,
391 U.S. 123 (1968) .... passim
Com. v. McGlone,
716 A.2d 1280 (Pa. Super. Ct. 1998) 20
Crawford v. Washington,
541 U.S. 36 (2004) .... passim
Cruz v. New York,
481 U.S. 186, (1987) 17
Delaware v. Van Arsdall,
475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) 31
Gray v. Maryland,
523 U.S. 185 (1998) .... passim
Harrington v. California,
395 U.S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969) 31
Hernandez v. New York,
500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991) 49
In re McCracken,
346 S.C. 87, 551 S.E.2d 235 (2001) 42, 56
I'On, L.L.C. v. Town of Mt. Pleasant,
338 S.C. 406, 526 S.E.2d 716 (2000) 56
Jackson v. Denno,
378 U.S. 368 (1964) 10, 36
Jefferson v. State,
359 Ark. 454, 198 S.W.3d 527 (2004) 10
Ky Minh Pham v. Hickman,
262 F. App'x 35 (9th Cir. 2007) 19
Miller-El v. Dretke,
545 U.S. 231, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005) 47, 48
Nordlinger v. Hahn,
505 U.S. 1, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992) 48
Norris v. State of Alabama,
294 U.S. 587, 55 S. Ct. 579, 79 L. Ed. 1074 (1935) 46
Payton v. Kearse,
329 S.C. 51, 495 S.E.2d 205 (1998) 48
People v. Carillo,
9 A.D.3d 333, 780 N.Y.S.2d 143 (2004) 47
Priester v. Vaughn,
382 F.3d 394 (3d Cir. 2004) 10
Purkett v. Elem,
514 U.S. 765, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995) 45, 46, 47

Richardson v. Marsh,
481 U.S. 200 (1987) 17, 34
Robinson v. United States,
878 A.2d 1273 (D.C. 2005) 47
Solomon v. City Realty Co.,
262 S.C. 198, 203 S.E.2d 435 (1974) 42, 55
Stanford v. Parker,
266 F.3d 442 (6th Cir. 2001) 10, 20
Startzell v. City of Philadelphia, Pennsylvania,
533 F.3d 183 (3d Cir. 2008) 47
State v. Adams,
322 S.C. 114, 470 S.E.2d 366 (1996) 46, 48
State v. Brannon,
388 S.C. 498, 697 S.E.2d 593 (2010) 29
State v. Brown,
317 S.C. 55, 451 S.E.2d 888 (1994) 30
State v. Byers,
392 S.C. 438, 710 S.E.2d 55 (2011) 29
State v. Cochran,
369 S.C. 308, 631 S.E.2d 294 (Ct. App. 2006) 48
State v. Cope,
405 S.C. 317, 748 S.E.2d 194 (2013) 35
State v. Craig,
267 S.C. 262, 227 S.E.2d 306 (1976) 41
State v. Dennis,
337 S.C. 275, 523 S.E.2d 173 (1999) 17, 35
State v. Edwards,
384 S.C. 504, 682 S.E.2d 820 (2009) 49
State v. Flynn,
368 S.C. 83, 627 S.E.2d 763 (Ct. App. 2006) 56
State v. Ford,
334 S.C. 59, 512 S.E.2d 500 (1999) 58
State v. Garrett,
350 S.C. 613, 567 S.E.2d 523 (Ct. App. 2002) 9, 22
State v. George,
323 S.C. 496, 476 S.E.2d 903 (1996) 41
State v. Giles, 2014 WL 130525 (January 15, 2014) 45, 46, 47,56
State v. Green,
306 S.C. 94, 409 S.E.2d 785 (1991) 59
State v. Haigler,
334 S.C. 623, 515 S.E.2d 88 (1999) 48
State v. Halcomb,
382 S.C. 432, 676 S.E.2d 149 (Ct. App. 2009) 36
State v. Hernandez,
386 S.C. 655, 690 S.E.2d 582 (Ct. App. 2010) 16
State v. Henson, 2014 Westlaw 229891 (January 22, 2014) 9, 21

State v. Holder,
382 S.C. 278, 676 S.E.2d 690 (2009) 19, 22
State v. Holmes,
342 S.C. 113, 536 S.E.2d 671 (2000) 17
State v. Johnson,
302 S.C. 243, 395 S.E.2d 167 (1990) 58
State v. Johnson,
390 S.C. 600, 703 S.E.2d 217 (2010) 22
State v. Kelsey,
331 S.C. 50, 502 S.E.2d 63 (1998) 35
State v. LaBarge,
275 S.C. 168, 268 S.E.2d 278 (1980) 19, 28
State v. Martin,
292 S.C. 437, 357 S.E.2d 21 (1987) 16
State v. Martinez,
294 S.C. 72, 362 S.E.2d 641 (1987) 44, 58
State v. McCord,
349 S.C. 477, 562 S.E.2d 689 (Ct. App. 2002) 41
State v. McCray,
332 S.C. 536, 506 S.E.2d 301 (1998) 48
State v. McDonald,
400 S.C. 272, 734 S.E.2d 167 (Ct. App. 2012) 9, 21, 22, 28
State v. Page,
378 S.C. 476, 663 S.E.2d 357 (Ct. App. 2008) 18
State v. Rayfield,
357 S.C. 497, 593 S.E.2d 486 (Ct. App. 2004) 48
State v. Robinson,
305 S.C. 469, 409 S.E.2d 404 (1991) 44
State v. Scott,
406 S.C. 108, 749 S.E.2d 160 (Ct. App. 2013) 48
State v. Shuler,
344 S.C. 604, 545 S.E.2d 805 (2001) 45
State v. Singleton,
303 S.C. 313, 400 S.E.2d 487 (1991) 19
State v. Smith,
162 Wash. App. 833, 262 P.3d 72 (2011) 20
State v. Stuckey,
347 S.C. 484, 556 S.E.2d 403 (Ct.App.2001) 36
State v. Thompson,
352 S.C. 552, 575 S.E.2d 77 (Ct. App. 2003) 30
State v. Tucker,
319 S.C. 425, 462 S.E.2d 263 (1995) 30
State v. Walker,
366 S.C. 643, 623 S.E.2d 122 (Ct. App. 2005) 41
State v. Wiley,
387 S.C. 490, 692 S.E.2d 560 (Ct. App. 2010) 40

State v. Williams,
379 S.C. 399, 665 S.E.2d 228 (Ct. App. 2008) 48
U.S. v. Akefe,
2010 WL 2899805 (S.D.N.Y. July 21, 2010) 34
United States v. Akinkoye,
185 F.3d 192 (4th Cir. 1999) 20, 21
United States v. Briscoe,
896 F.2d 1476 (7th Cir. 1990) 20
United States v. Cone,
714 F.3d 197 (4th Cir. 2013) 21
United States v. Davis,
154 F.3d 772 (8th Cir. 1998) 48
United States v. Edwards,
159 F.3d 1117 (8th Cir. 1998) 10, 18
United States v. Garrison,
849 F.2d 103 (4th Cir. 1988) 57
United States v. Gonzalez,
183 F.3d 1315(11th Cir.1999) 20
United States v. Hoac,
990 F.2d 1099 (9th Cir. 1993) 19
United States v. Hoover,
246 F.3d 1054 (7th Cir. 2001) 20
United States v. Jass,
569 F.3d 47 (2d Cir. 2009) 19
United States v. Logan,
210 F.3d 820 (8th Cir.2000) 19
United States v. Lung Fong Chen,
393 F.3d 139 (2d Cir. 2004) 34
United States v. Najjar,
300 F.3d 466 (4th Cir. 2002) 38
United States v. Payne,
923 F.2d 595 (8th Cir. 1991) 20
United States v. Ramos-Cardenas,
524 F.3d 600 (5th Cir. 2008) 34
United States v. Richards,
241 F.3d 335 (3d Cir. 2001) 10, 20
United States v. Vasilakos,
508 F.3d 401 (6th Cir. 2007) 10
United States v. Vega Molina,
407 F.3d 511 (1st Cir.2005) 19
United States v. Vejar-Urias,
165 F.3d 337 (5th Cir.1999) 19
United States v. Verduzco-Martinez,
186 F.3d 1208 19
United States v. Williams,
429 F.3d 767 (8th Cir. 2005) 34

United States v. Williams,
936 F.2d 698 (2d Cir. 1991) 19
United States v. Yousef,
327 F.3d 56 (2d Cir. 2003) 39
Zafiro v. United States,
506 U.S. 534, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993) 35
Zakour v. UT Med. Grp., Inc.,
215 S.W.3d 763 (Tenn. 2007) 48

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

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

II. Did the trial court violate Appellant's Sixth and Fourteenth Amendment rights to confront and cross-examine witnesses pursuant to Crawford v. Washington, 541 U.S. 36 (2004), by allowing five statements by Appellant's non-testifying co-defendant into evidence, which implicated Appellant in the murder and armed robbery?

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

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

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

RESPONDENT'S STATEMENT OF THE CASE

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

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

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

The Appellant timely appealed the conviction and sentence on September 7, 2011. This briefing follows.

RESPONDENT'S STATEMENT OF THE FACTS

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

The incident begins at Sambino's owned by Tanya Knudson. R. 189. Around 8:04 pm that night, Sambino's received a telephone call from a male-like voice ordering three large pizzas

(pepperoni, sausage, double cheese). R. 192-93, 743-44, 746. State Exhibit 82. When asked, Tanya was told the call was being made from a pay phone. R. 193. The delivery was to go to Lot No. 7, O.C. Mobile Home Park in Cherryvale. R. 197. Tanya takes the order.

The next delivery person scheduled was Al. However, the victim, William "Bill" Flexon, takes the order instead.[1] R. 200-01. Before the order is taken, Sumter County Deputy Sheriff Jennifer Griffin, now Thomas, is eating at Sambino's and sees Flexon leave with the pizzas. R. 202.

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

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

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

One of them is subsequently identified as co-defendant Daniel Jackson by Anitta Shannon, a grocery employee after viewing the video as the fairer skinned male on Sunday

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

January 13, 2008. R.p. 294-96, 303, 713-756. [Canty is subsequently identified from the video by Investigator Burnish on January 14. R.p. 770-71.] Mackovitch sold one of the two a "Little Debbie" snack. R.p. 261-62, 275. However, the one who purchased the snack leaves with the snack in his right hand. R.p. 267.[2] After leaving, Mackovitch saw them turn to the right toward where the payphone is located. R. p. 268-69, 276-77. Mackovitch states that he does not use the pay phone. R.p. 271. Another person is also seen in the video in a black hooded jacket. R.p. 837-38 (confirms black hooded individual in store video). See also, R. p. 978-79, 982 (closing Argument of Counsel Wilder concerning other person in black hoodie at the store in the video).

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

Based upon law enforcement leads, they go to co-defendant Jackson's aunt, Andrea Russell. R.p. 486-87. Jackson had been there, but fled when the police arrived. R.p. 485-87.[3]

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

[3] See the statement Jackson made when being read his arrest warrants about seeing law enforcement come

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

Evidence was presented that Jackson had called Isaac Boyd's wife on January 13 asking him to be picked up from the American Inn in Sumter. R.p. 507. Boyd is Jackson's uncle. He testified that he picked him up and took him to Curtis Wheeler's place to pick something up. While Boyd stayed in the car, he saw Jackson and Wheeler go to an abandoned trailer by the woods. Jackson had told Boyd that he needed to pick up some clothes. Jackson returns with a clothes basket, but Boyd did not realize that there was a rifle in the basket until he got back to Sumter. R.p. 510-11. At that time Boyd takes Jackson to his aunt's house (Andrea Russell). While this occurred on a Sunday night, Boyd claimed that Jackson asked him to lie and say that it was Saturday night. R.p. 511.

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

During the autopsy, law enforcement learns that there were two bullets removed from the

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to the apartment complex and that he ran out, away. Further, after the warrants were served on him, were read, he (Jackson) asked the question how can he be charged with armed robbery if he did not take any money from the pizza man. R.p. 778.

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

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

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

Exhibit 8, State Exhibit 9. These statements are set forth in detail within Argument I.

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

Reginald Canty gave another series of statements to law enforcement. Canty was 16 years old at the time. These statements are set forth in Argument I. The next contact with Canty was on January 15, 2008 by Investigator West at 10:35 am. R.p. 557, l. 16- p. 560, l. 25. State Exhibit 3. On January 17, 2008 at 3:34 PM, Reginald Canty made another statement to Investigator West, with his mother, Dorothy Canty present. R.p. 564-65. R.p. 580. R.p. 580, l. 19- p. 581, l. 10. State Exhibit 5. On January 25, 2008, Investigator West again talked with Canty with his mother present. R.p. 584-87. State Exhibit 7.

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

ARGUMENT I

I. The trial judge did not err in admitting, in the joint trial, the statements of co-defendant Reginald Canty, which were properly redacted as to Appellant Jackson's name and did not facially incriminate Jackson.

The Appellant contends that he is entitled to a new trial under Bruton v. United States, 391 U.S. 123 (1968), and its progeny because co-defendant Reginald Canty's statements were inadequately redacted. Within his argument, he claims that the state failed to redact "gender and race" and failed to redact information of familiarity by Canty with the other person. " Initial Brief of Appellant, p. 13. He further contends – apparently for the first time - that the Solicitor failed to redact the term "j-boy" from an earlier statement contending that this was the Appellant's nickname, although that argument was never named below and there was no showing in the trial record that that this was the Appellant's nickname or even a reference to the Appellant. See R. p, 129, l. 9, p. 767, ll. 9-10, p, 807, l. 13. (references to "James or J-boy"). He contends that the admission of evidence that connected the Appellant with the some of the statement of Canty concerning the purchase of a Little Debbie cake removed the effect of the redaction and therefore violating Bruton.

In response, the State submits neither Bruton nor its progeny require gender-neutral redaction nor forbid the use of neutral pronouns. See e.g. Gray v. Maryland, 523 U.S. 185, 196 (1998) (suggesting the substitution of the phrase "some other guys" for "deletion, deletion" did not violate Gray's Confrontation Rights under Bruton). Similarly, the fact that a non-testifying co-defendant's statement limits the amount of potential participants involved does not create a *per se* Bruton violation. In Jackson's case, there was no evident limitation within the redacted statement, which varied from one participant to three additional actors to an ambiguous

unidentified number of other persons. In fact, South Carolina has rejected both of these contentions. See State v. McDonald, 400 S.C. 272, 734 S.E.2d 167 (Ct. App. 2012), reh'g denied (Nov. 30, 2012), (finding that the use of the neutral term "another person" was acceptable in a redaction); State v. Garrett, 350 S.C. 613, 620-21, 567 S.E.2d 523, 526 (Ct. App. 2002)(finding the admission of a redacted statement made by Garrett's non-testifying co-defendant, Davis, in Davis and Garrett's joint trial did not violate Garrett's Confrontation Rights despite the fact the redacted statement used the phrase "the other guy" and Garrett was the only other male on trial). Rather, as was the case in Gray, a redacted statement violates Bruton and its progeny only when the inferences flowing from the redactions contained within the statement "obviously refer . . . [to] the defendant" such that "were the confession the very first item introduced at trial" the jury could "immediately" construe the statement against the accused. E.g. Gray, 523 U.S. at 196("The inferences at issue here involve statements that, despite redaction, obviously refer to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial."). Therefore, in a case such as this where there are no obvious redactions in Canty's statements, the redacted statements do not facially incriminate Appellant. Respondent submits that the trial judge did not err in admitting the properly redacted statements of Canty that removed any specific reference to Jackson by the reasonable use of the terms "another person" or "other person."

As set forth below, this case is distinguishable from State v. Henson (Davontay), Op. No. 27354, _ S.C. _, _ S.E.2d _, 2014 Westlaw 229891 (January 22, 2014) since the redaction would

not be seen to obviously refer to Jackson.[4]

Respondent submits that State Exhibits 3, 5, 7, 8, and 9, as redacted were properly admitted against Canty and not against Jackson. There was no Confrontation Clause problem.

HOW THIS ISSUE WAS RAISED AT TRIAL.

Prior to trial, a hearing was held pursuant to Jackson v. Denno, 378 U.S. 368 (1964), to determine the admissibility of the five statements made to law enforcement by Appellant's co-defendant, Reginald Canty. R. 79-150; State's Exhibit # 3 (Statement by Canty); State's Exhibit #

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4 In Henson, the Court recently relied upon 3rd Circuit cases in United States v. Richards, 241 F.3d 335 (3rd Cir. 2001) to suggest that any use of a neutral pronoun replacement was error. Subsequent to Richards, the Third Circuit rejected that reading of Richards in Priester v. Vaughn, 382 F.3d 394 (3rd Cir. 2004). In Priester, the Third Circuit found replacing "other guy" in the statements for the other defendants made the roles unclear and the statement difficult to follow, but did not violate Bruton. The Third Circuit relied upon 3rd Circuit cases in Richards, 241 F.3d 335 to suggest that any use of a neutral pronoun replacement was error. The Third Circuit limited its holding in Richards where the use of the word "friend" combined with the testimony unequivocally limited it to the defendant. In Priester, where there were numerous alleged perpetrators involved in the shooting, "the phrases 'the other guy' or 'another guy' are bereft of any innuendo that ties then unavoidably to Priester." The Court found: "In Richards, the replacement was tantamount to an explicit reference to the co-defendant; the same cannot be said for the redaction in the instant case." Priester, 382 F.3d at 400-401. Similar to Priester, the use of the neutral pronouns here do not contain nicknames or descriptions that directly implicate Jackson.

In the Sixth Circuit case relied upon in Henson, Stanford v. Parker, 266 F.3d 442 (6th Cir. 2001), the Sixth Circuit concluded that the redacted phrase "the other person" was insufficient to infer it referred to the defendant. However, the Sixth Circuit found the reference harmless Bruton error where the defendant had made admissions and forensic evidence supported the conviction. The Court felt the other person reference in the statement was unlikely to be seen as other than the Appellant rather than a named third party where the State was pushing for the conviction of the defendant as the shooter. However, the Sixth Circuit in United States v. Vasilakos, 508 F.3d 401 (6th Cir. 2007), limited the holding Stanford and reached an opposite result concluding that "the government may avoid a Bruton violation by replacing the name with a neutral term such as "another person", "another individual", or "the person", relying upon Akinkoye, 185 F.3d 192 in its rejection of Stanford.[4] As the various Courts have held, the admission of the statement should be viewed in isolation from the other evidence at the trial. Unlike Gray, the redaction of the word "deleted" which pointed directly to the defendant, these neutral references were without an indication that there was a redaction of Jackson's name.

The possible reliance upon Jefferson v. State, 359 Ark. 454, 198 S.W.3d 527 (2004) is also misplaced. In Jefferson, three were involved in a crime and one defendant pled guilty and two were jointly tried. Similar to Holder, the neutral references from the co-defendant's statement made it clear that a third person was involved and it was obviously directed to the appellant. However, the court distinguished United States v. Edwards, 159 F.3d 1117 (8th Cir. 1998) which concluded that referring to joint activity by neutral pronouns or indefinite words such as someone did not draw attention and in most situations no incriminating. In Edwards, there was a large cast of characters and some of the admission inculpated nondefendants weakening any inference that the use of "they" or "someone" referred to the declarant's co-defendant. Here, there are many references within the statements to an indefinite number of other persons weakening the inference. The present situation is more akin to Edwards than Jefferson.

5 (Statement by Canty); State's Exhibit # 7 (Statement by Canty); State's Exhibit # 8 (Statement by Canty); State's Exhibit # 9 (Statement by Canty); Court's Exhibit # 9 (Collection of Statements). Officers Dominick West and Robert Burnish of the Sumter County Sheriff's Office testified at the Jackson v. Denno hearing. The trial court ultimately found that the co-defendant's statements to law enforcement were admissible because the statements "were made freely and voluntarily." R. 150, ll. 6-14.

Prior to the admission of the statements, the Solicitor proposed that every time it states DeAngelo or a form of the Appellant's name that it be replaced with the term "another person. R.p. 546, ll. 5-6. The prosecutor and counsel went through the particular statements and how they would be read using the term "another person" and removed one line completely. R.p. 546-550, l. 8. [Note – "James " or "J-boy" is not redacted in this process.]

The trial judge declared that this satisfied the requirements of Bruton. R.p. 550, ll. 9-10. The defense noted that there were references where Canty stated "something like I heard him say." Counsel Wilder stated that he was objecting based upon the whole process and the problem of being able to confront his witnesses. In camera, the prosecution clarified with the witness the requirements of stating "another person" in any of the five references on the oral statement. R.p. 552-53. The defense did not assert other redactions were specifically necessary concerning either gender, race or familiarity.

WHAT THE JURY HEARD

Canty's statements were subsequently entered into evidence over defense counsel's objection and were read aloud to the jury. R. 563, 1. 19 – p. 564, l. 3; R. 583, ll. 4-9; R. 587, l. 22 – p. 588, l. 3; R. 761, ll. 8-13; Tr. 765, ll. 20-25; State's Exhibits # 3, # 5, # 7, # 8, # 9.

Former investigator West testified about the redacted January 15, 2008, 10:35 am statement to the jury by Canty :

> On the night of the shooting, **another person** asked my cousin Desmond Canty to take him to Cherryvale Grocery. I went along. I went along because I needed batteries. After arriving at the store, me and **another person** got out of the car and went to use the pay phone. So I stood beside him swinging my phone and I overheard him stating . . . he wanted to order 3 large pizzas: one all pepperoni, one all cheese, and I didn't hear the other one. He told him while on the phone with the order that the address 1128 Cherryvale Drive, lot 7. He got off the phone and we went in the store. I went to look for some batteries, and **the other person** brought a snack cake. While I was in the store, the manager approached me and asked me what I took, and I told him nothing, that I had my phone. **Another person** was standing to the door waiting for me. After we left the store, we was going back home, and **the other person** asked to be dropped off at Oaklawn, but we had already passed it. So, we went back to -we went back home, and the **other person** left walking. I went inside and then came back outside to sit on the porch. As I came out the house, I saw **the other person** walk by. I asked where, where where he going, and he said nothing and walked toward the back of the mobile home park. Tonya Rush, who stayed beside me, she told me to watch her house. I went to the house and got something to drink, sat on the porch, and I saw car lights where lot 7 is. I went-I went to my fence. I saw a white man wrestling with a tall black man over a gun. The black man told him to stop, and then I heard a gunshot. The **other person** was standing next to the van looking at the guys wrestle. **The other guy** had a handgun that looked like a revolver. After the gunfire, everyone ran. I ran in the house. I told my moms what I saw later on that night. I wasn't truthful to law enforcement at the beginning because I was nervous and scared because I never saw anyone get killed before.

R.p. 557, l. 16- p. 560, l. 25. State Exhibit 3. (emphasis added).

Investigator West testified about another statement Canty gave on January 17, 2008 at 3:34 PM. R.p. 573. Investigator West reported this new oral statement, as redacted was as follows:

> Reginald Canty was brought to LEC, Law Enforcement Center, accompanied by his aunt, Ms. Glover. Reggie's mother, Dorothy Canty, arrived at the LEC and the interview began. I started by advising Reginald of his Miranda Rights, and he signed the waiver of rights form in front of his mother due to the fact that he was being charged at the present time. After reading him his Miranda

> right, I then advised Reginald that his story in the past was inconsistent and that he needed to be truthful from here on out. **Reginald began telling the story of the events that happened on how he was at home and another person approached him and asked him whether he wanted to make any money by robbing a pizza man**, and he told him yes. Reginald then stated he asked his cousin, Desmond Canty, to take him and **another person** to the store, Cherryvale Grocery, where he stated that **another person** made a phone-made a telephone call to Sambinos Pizza Restaurant. Reginald then stated that they went inside the store, and he wanted to buy some batteries, but did not-they did not have the kind he wanted. Reginald stated that **the other person** brought a Debbie snake cake and left the store. I then asked what-I then asked what did they do next. And he stated they went back to his house, and **another person** walked back to the rear or to the mobile home park, O.C. Mobile Home Park, and **watched until the pizza man drove up in the van. He began to say he stood in his yard by the gate and saw a black male struggling with the pizza man and another black male holding a revolver. I asked him how he knew it was a revolver**, and it being dark with no lighting on, and he said there was a glare coming from the gun. **He then said-he then stated it was not supposed to happen like that. And I asked him what did he mean by that, and he said that the pizza man was not supposed to get shot. He stated it was an accident. His mother then asked him how he knew it was an accident, and you said you weren't there. How you knew it was a revolver and it was dark outside. Reginald then began to cry. He stated that he did not shoot and kill anyone. He kept saying it was a accident, and he kept saying he wasn't there. So, I asked him there is no way you can say it was a accident and you weren't there, and he put his head on the table and continued to cry.** Reginald then stated that the suspects ran away and he ran in the house.

R.p. 572, l. 24 – p. 575, l. 25 (emphasis added).[5] During this meeting, State Exhibit 5, a written statement was prepared. The oral statement that was recorded above was then written out onto a written statement form by Canty and was then read by Investigator West aloud. The written statement (similar as the oral one above with a few minor differences) begins on R.p. 579 and continues thru R.p. 580. Beginning at R.p. 580, l. 19, the statement goes into when the pizza man arrived and the written statement is more detailed than the oral one. The written statement

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5 During the oral part of the 1/17/08 interview with Canty, Canty told West that he did not shoot or kill anyone. R.p. 597. Canty also claimed that it was the "other person" that made the call that night. R.p. 600.

reads:

> Toya left. I then went and sat on my porch until the pizza man came. I saw a silver in color Chrysler van pulled up, and it pulled up to the back where **another person was-the other person** was. The pizza man stayed in his vehicle for approximately 3 minutes, and he then-and then-he then got out and went to the abandoned residence, lot number 7, and saw the door open and turn around and went back to his vehicle real fast. **The pizza man was met by three males with hoodies. Another person** was one of the males, and I didn't-and I don't know who the other two were. **The pizza man was trying to take the gun rifle away from the black male, and the black male told the pizza man to stop, and then the gun fired.** After I saw the man got shot, I ran in the house and told my moms I heard a gunshot.

R.p. 580, l. 19- p. 581, l. 10. State Exhibit 5.

On January 25, 2008, Investigator West again talked with Canty with his mother present.

R.p. 584-87. At this time, Canty wrote out State Exhibit 7 which read as follows:

> When we got home, **another person** went to the back of the trailer, **and he wait at the back for the pizza man to come. When the pizza man came, they started to rob the man.** The pizza man was trying to take the gun from **another person,** and **this person** said stop. And after he said stop, he shot the pizza man. It's a-then he stayed there for a second. Then he ran. It looked like it was **another person** running away with **the other person** around the car.

R.p. 586, l. 25- p. 587, l. 9.

In addition to these redacted statements, statements Canty gave on January 13, 2008 before the above were presented after redaction. In State Exhibit 8, as redacted and presented to the jury, Canty stated to Officer Burnish and Horton at the Peach Orchard and put in writing:

> I leave Toya's house, and she asked me to watch her house. When she leave. So, I went and sat on my step and I seen lights. So, I went to see what [who] it was, and then that's when I see two people fighting, and I hear somebody say no, stop. I hear the gunfire. So, I went into the house and told my mother. The gun looked like a rifle and the person that was holding the gun had a hoodie, but I couldn't see his face.

R.p. 764, ll. 4-13, 23 - p. 765, l. 8. State Exhibit 8.

Officer Burnish stated that he had a second opportunity to speak with Canty that date around 4:45 and Canty gave a statement that concluded at 6:00 PM. R.p. 766. In this statement, Canty stated:

> I leave Toya house and she ask me to watch her house when she leave. So, I went and sit on my step and I seen a light. So, I went to the end of my gate, and I seen the two people fighting, and I hear the gunfire, and I see the man fell on the ground, fell down. . .And the bad guy ran. He looked like **he could be James or J-Boy because he had a black hoodie with a dragon on the back with short pants** with blue designs on the pockets, and the front of the hoodie looked like it zips up with a black bandana on his face. **I think it got to be J-Boy** because he was out there around 3 p.m. that day. He shot the man with a long rifle and then ran around the car. Then I hear more than one footsteps running.

R.p. 767, ll. 2-18. (emphasis added) ("James or J-Boy" is never identified in the trial record.). State Exhibit 9.

MOTIONS

After the state had rested its case, the defense made a motion for a directed verdict, and in the alternative, a mistrial. The defense argued : "Either the statements have been improperly redacted in order to get some circumstantial evidence . . . [, or there is no evidence in the record pertaining to [Appellant's guilt]." R.p. 873, 1. 19 – p. 877, 1. 12 (emphasis added). Defense counsel Wilder stated the prosecution failed to find any fingerprints or DNA linking Appellant to the crime scene or the items allegedly involved in the offense. R.p. 874, ll. 15-20. The trial court denied both the motion for a directed verdict and the motion for a mistrial. R.p. 878, ll. 13-21.

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

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

R.p. 1052, ll. 19-23. Defense counsel further argued, "[T]hose rights were not afforded [to Appellant] because of the joint trial, the nature of the joint trial, and the denial of our motion for severance." R.p. 1052, 1. 25 – p. 1053, 1. 2. The trial court denied the renewed motion for a mistrial and the and the motion for a new trial. R.p. 1054, ll. 17-21.

Defense counsel filed a motion for reconsideration on August 16, 2011, arguing the trial court should have granted either the motion for a mistrial or the motion for a new trial. ROA 1067-1071. The trial court denied the motion for reconsideration in a written Order on August 24, 2011. ROA 1072.

STANDARD OF REVIEW

In criminal cases, appellate courts sit only to review errors of law and are bound by the factual findings of the trial court unless they are found to be clearly erroneous. State v. Hernandez, 386 S.C. 655, 659, 690 S.E.2d 582, 584 (Ct. App. 2010).

The Confrontation Clause and the Admission of a Statement made by a Non-Testifying Co-Defendant in a Joint Trial.

An accused's constitutional right to confront and cross-examine witnesses against him is essential to a fair trial in that it promotes reliability in criminal trials and ensures convictions will not result from testimony of individuals who cannot be challenged at trial. State v. Martin, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987). Specifically, the introduction of a non-testifying co-defendant's statement which implicates a different defendant violates that defendant's right to

confrontation because there is no opportunity to cross-examine the co-defendant on his statement. Bruton, 391 U.S. at 136-37. Indeed, the Bruton Court held the right to confrontation is so fundamental that limiting instructions alone are an inadequate substitute for safeguarding one's confrontation rights. Id. see also Gray, 523 U.S. at 194-95(stating that because the use of an accomplice's confession "creates a special, and vital, need for cross-examination," a prosecutor desiring to offer such evidence must either comply with Bruton, hold separate trials, use separate juries, or abandon the use of the confession); Id. at 200, (Scalia, J., dissenting) (concluding a codefendant's confessions "may not be considered for the purpose of determining [the defendant's] guilt."); Richardson v. Marsh, 481 U.S. 200, 206 (1987) ("[W]here two defendants are tried jointly, the pretrial confession of one cannot be admitted against the other unless the confessing defendant takes the stand"); Cruz v. New York, 481 U.S. 186, 189-190, (1987) (same); State v. Dennis, 337 S.C. 275, 523 S.E.2d 173 (1999)(highlighting that in Bruton, the Supreme Court held a defendant's rights under the Confrontation Clause of the Sixth Amendment are violated by the admission of a non-testifying co-defendant's confession that inculpates a defendant, even if a cautionary instruction is given).

In the wake of Bruton, redaction has come into play as a tool to allow for the admission of a co-defendant's statement in a joint trial. State v. Holmes, 342 S.C. 113, 119, 536 S.E.2d 671, 674 (2000). The purpose of redaction is to allow for the introduction of a statement against a non-testifying defendant who previously gave a statement, while avoiding implicating his co-defendant. Id. This is possible because the Confrontation Clause is not violated when a defendant's name is redacted but other evidence links the statement's application to the defendant and a proper limiting instruction is given. See Richardson, 481 U.S. at 211("[T]he

Confrontation Clause is not violated by the admission of a non-testifying co-defendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence."); see also Gray, 523 U.S. at 195; State v. Page, 378 S.C. 476, 481-482, 663 S.E.2d 357, 359-60 (Ct. App. 2008).

Nevertheless, redactions which obviously identify the defendant, even without naming him, create a constitutional violation that, like the unredacted statement in Bruton, cannot be cured by a jury instruction. Gray, 523 U.S. at 195-96.[6] In particular, Gray differentiates statements that incriminate by inference or when linked with later evidence from those that obviously refer to a particular person or involve inferences a jury could make without additional evidence. Id. at 196. Indeed, only in the latter instance does a constitutional violation occur. Id.

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6 For example, in Gray, a case in which a group of six were involved in the beating death of the victim, of which only Gray and Bell were tried on charges of murder, Bell's redacted confession, which was supposed to be offered only against him, was found to implicate Gray because the statement, when read to the jury, went as follows:

> Question: "Who was in the group that beat [the victim]?,"
> Response: "Me, deleted, deleted, and a few other guys."

Id.. In reversing, the Gray Court found the response "Me, deleted, deleted, and a few other guys" obviously incriminated Gray thereby violating his confrontation rights, because the use of "deleted" basically asked the jury to fill in the blank and question who was deleted and why. Id. at 193. Further explaining the Gray problem, the Court opined:

> [T]he obvious deletion may well call the jurors' attention specially to the removed name. 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. That is why Judge Learned Hand, many years ago, wrote in a similar instance that blacking out the name of a codefendant not only "would have been futile... [T]here could not have been the slightest doubt as to whose names had been blacked out," but "even if there had been, that blacking out itself would have not only laid the doubt, but underscored the answer.

Id. at 193-194. Illustrating the difference between an appropriate and inappropriate redaction, the Gray Court then provided an example taking the inappropriate redaction and asking, "[w]hy could the witness not, instead, have said:

> Question: "Who was in the group that beat [the victim]?"
> Response: "Me and a few other guys."

Id. at 196. In other words, Gray illustrated that an obviously redacted statement which leaves the jury to "speculate" about the reasons the identity of a person is concealed, is at odds with the Confrontation Clause, but a statement, which on its face, does not appear to conceal a person's identity is constitutionally permissible because the jury is likely to accept the statement at face value rather than questioning it. Id. at 193-96.

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Gray differentiates between statements that incriminate by inference or only when linked with later evidence and those that obviously refer to a particular person or involve inferences a jury could make even without additional evidence. Id. at 196, 118 S.Ct. 1151. Only in the latter instance does a constitutional violation occur. Id.[8] For example, in response to the question,

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

8 Many circuits, like the Tenth Circuit in United States v. Verduzco-Martinez, 186 F.3d 1208, 1213–14 (10th Cir., 1999) (use of "another person" did not violate confrontation clause);, have permitted admission of a redacted statement using a neutral pronoun, even if other evidence would link the co-defendant to the redacted confession, so long as the redacted statement is not facially incriminatory with respect to the non-testifying co-defendant. See, e.g., United States v. Vega Molina, 407 F.3d 511, 519-21 (1st Cir.2005) (holding that non-testifying co-defendant's redacted confession, describing crimes in detail, acknowledging his participation in them, but using terms such as "other individuals" or "another person" when mentioning his co-defendants, was not so powerfully incriminating to bring Bruton proscription to bear); United States v. Logan, 210 F.3d 820, 822 (8th Cir.2000) (determining there was no Sixth Amendment violation where officer testified that co-defendant said that he and "another individual" had planned and committed robbery); United States v. Akinkoye, 185 F.3d 192, 198 (4th Cir.1999) (affirming denial of motion to sever because retyped versions of confessions replaced defendants' respective names with phrases "another person" or "another individual"); United States v. Vejar-Urias, 165 F.3d 337, 339 (5th Cir.1999) ("[T]his court has found on several occasions that admitting redacted confessions in which a pronoun was substituted for the defendant's name did not violate Bruton."); United States v. Hoac, 990 F.2d 1099, 1106-07 (9th Cir. 1993)(holding there was no Bruton error in admitting redacted confession in which "individuals" substituted for defendant's name where jury was aware that several people were involved in conspiracy, including one who was not tried jointly); United States v. Williams, 936 F.2d 698, 699 (2nd Cir. 1991)(determining that co-defendant's confession may be

"Who was in the group that beat [the victim]?," the response "Me, deleted, deleted, and a few other guys" obviously incriminates two codefendants of the crime of murdering the victim. Id. (internal quotation marks omitted). After Gray, however, the Fourth Circuit has continued to allow general references to "another person" or "another individual" in such statements, because "[t]he Supreme Court has strongly implied that such statements do not offend the Sixth Amendment." United States v. Akinkoye, 185 F.3d 192, 198 (4th Cir. 1999). The implication to which Akinkoye refers is the Supreme Court's explicit pondering in Gray about "[w]hy could the witness not, instead, have said: 'Question: Who was in the group that beat [the victim]? Answer: Me and a few other guys,' " suggesting that such a neutral response would have been acceptable. Gray, 523 U.S. at 196. In Akinkoye, the non-testifying co-defendants' confessions were retyped, with the defendants' respective names replaced with the neutral phrase "another person" or "another individual," and the statements were read to the jury. Akinkoye, 185 F.3d at 198. So

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admitted with limiting instruction where redaction replaces reference to defendant with neutral pronoun); United States v. Briscoe, 896 F.2d 1476, 1502 (7th Cir. 1990)(holding that co-defendant's statement that "we" concealed packages did not violate defendant's confrontation rights because "we" did not directly implicate defendant in knowing possession of heroin). See also, State v. Smith, 162 Wash. App. 833, 851, 262 P.3d 72, 81 (2011)(approving use of neutral pronoun "other' and "another" in redaction did not violate Bruton); Com. v. McGlone, 716 A.2d 1280 (Pa. Super. Ct. 1998)(The redaction "used non-obvious substitutions that nonetheless acknowledged the defendant's existence such as 'other person' or 'another man,' was not Bruton error)

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

redacted, neither confession facially implicated the other defendant. Id. [9]

Recently, the South Carolina Supreme Court addressed another Bruton issue in State v. Henson (Davontay), Op. No. 27354, _ S.C. _, _ S.E.2d _, 2014 Westlaw 229891 (January 22, 2014).[10] In Henson, the South Carolina Supreme Court found that the manner of redaction violated the mandates of Bruton. In particular, the Court stated in assessing the particular circumstances that "the jury could infer from the face of Reid's confession **without relying on any other evidence**, that the confession referred to and incriminated Henson":

> In his opening statement the solicitor asserted that four individuals—Henson, Reid, Ervin, and Newman—committed the crimes and that Henson was the shooter. Reid's redacted confession was offered into evidence by the solicitor. It identified three individuals by name as committing the crimes and

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

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

10 At the time of the filing of the Initial Brief of Respondent, State v Henson is awaiting action concerning a petition for rehearing to be made to the South Carolina Supreme Court. State v. McDonald has certiorari pending in the South Carolina Supreme Court.

acknowledged that another male participated and fired the fatal shots, but left that person unnamed. *The jury likely would infer that Henson—a male, seated before them as a defendant,* ***and the only defendant not named in the confession****—was the fourth individual and the shooter referenced in Reid's confession. The jury also could presume the solicitor would not both assert that Henson was the fourth conspirator and offer the confession into evidence if the solicitor believed the confession referred to anyone other than Henson.*

Henson, supra. (emphasis added).[11]

Also, in McDonald, 400 S.C. 272 (cert. pending), the Court of Appeals concluded that Bruton was not violated where the defendant's name, like in this case, was redacted and

11 Previously in State v. Garrett, 350 S.C. 613, 567 S.E.2d 523, 526 (Ct. App. 2002), the Court of Appeals adopted the same reading of Bruton and its' progeny when it found that a redacted statement in which Garrett's name was replaced with the redaction, **"the other guy"** did not violate Garrett's Right to Confrontation, despite the fact that both Garrett and Davis, who were both males, were tried jointly. In Garrett, the victims were beaten, forced into the trunk of their car, and driven around by their assailants until they managed to escape. Garrett was identified as a suspect and tried with co-defendant Davis. Davis did not testify at trial, but the State introduced his redacted statement implicating himself, China, Cunningham, and **"another guy"** in the crime. Based upon this statement, Garrett moved for severance prior to the statement's admission, arguing the statement was inherently prejudicial because it implicated him as the **"other guy."** Id., 567 S.E.2d at 524-25. The trial court rejected this argument and on appeal, the Garrett Court upheld the trial court's denial of the severance motion finding that because the redacted statement did not incriminate Garrett, "on its face," and was accompanied by the appropriate limiting instruction, Garrett's Confrontation Rights were not at issue. Id., 567 S.E.2d at 526. Thus, Garrett essentially took the rationale from Gray, that the introduction of a redacted statement from a non-testifying co-defendant which does not appear to conceal a person's identity is constitutionally permissible so long as the statement does not implicate the accused on its' face, and applied it to essentially the same factual scenario that are present here.

In the aftermath of Garrett, South Carolina Courts have consistently applied the rule from Gray in determining whether redactions sufficiently protect the accused, and, if so, considering whether the statement made by the non-testifying co-defendant is facially incriminating. Specifically, in State v. Holder, 382 S.C. 278, 285-86, 676 S.E.2d 690, 694 (2009) a homicide by child abuse case, our Supreme Court found the redacted statement from Holder's co-defendant stating that he "felt like she had been inflicting [bruises]" on the victim, Holder's young son, was facially incriminating and therefore, the admission of the statement was error. In other words, while the redaction itself, in this case the use of the word "she" was appropriate, the statement was still facially incriminating based on the allegations Holder faced. Specifically, because Holder was charged with homicide by child abuse and she was the primary caretaker of the victim, who was her young son, the statement made by Holder's co-defendant indicating that he believed "she" was responsible for his injuries to the victim clearly incriminated Holder on its' face. Id. Therefore, Holder is clearly a fact-driven holding in that the statement when viewed against the allegations Holder was facing essentially resulted in a perfect storm of facts and circumstances which made the redacted statement at issue facially incriminating.

Holder, is quite different from the situation in State v. Johnson, 390 S.C. 600, 606-07, 703 S.E.2d 217, 220 (2010) insofar as Johnson, like the court in Gray, found the type of redaction utilized, specifically the use of a black magic marker to redact references to Johnson, created a Gray situation. In particular, the Johnson Court observed "the redacted confession clearly has a name eliminated from it, and the jury was charged about this omission" but later explained, "[t]his type of instruction cannot mitigate a Confrontation Clause violation." Id.

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

Thus, it seems clear that South Carolina's courts, like the Supreme Court of the United States, ask two questions when reviewing the admission of a redacted statement in Bruton-type situations. First, does the method of redaction utilized in the non-testifying co-defendant's statement require the jury to speculate or fill in any obvious blanks with the non-testifying co-defendant's name? And second, if it does not, does the statement itself facially incriminate the accused?

Appellant's Confrontation Rights were not violated since the method used to redact Canty's various and inconsistent statements did not leave the jury to speculate or fill in any obvious blanks and Canty's statements do not "facially incriminate" Appellant Jackson.

In his brief, for the first time the Appellant contends that the State failed to redact references to Appellant's race and gender in the co- defendant' s statements. R.p. 572, l. 24 – p. 575, l. 22; R.p. 578, l. 11 – p. 581, l. 10; p. 586, l. 10 – p. 587, 1. 9; State's Exhibit # 3, # 5, # 7, # 8, # 9. Specifically, the solicitor failed to redact the pronouns in the co-defendant's statements (e.g., referring to Appellant as "Him" and "He"). In State's Exhibit # 5, the solicitor redacted Appellant's name, but failed to redact the reference to gender and the co-defendant's familiarity with the person: "The pizza man was met by 3 males with hoodies, another person was one of the males and I don't know who the other two were." The Appellant further claims that when examining State's Exhibit # 5 and # 7, these statements reveal race and gender of the unidentified person ("black male"). He further claims for the first time that in State's Exhibit # 9, the solicitor failed to redact "j-boy," and claims it is Appellant's nickname, but nothing in the

records suggests that "j-boy" is the Appellant's nickname or street name and no reference is made to that alleged name connection at trial. The Appellant then also complains that read and emphasized the importance of the co-defendant's statements during his closing argument. R.p. 1003, l. 6 – p. 1027, l. 16.

The various redacted statements did not facially incriminate Jackson. First, there was no reference to Jackson "on the face" of any of the statements. Within his brief, for the first time, the Appellant claims that reference in the second statement that Canty made on January 13, 2008 [State Exhibit 9] to "James or J-boy" was a direct reference to Appellant Jackson. Initial Brief of Appellant, p.13. However, at no time was Appellant Jackson equated with the identity of "James or J-boy" reflected in State Exhibit 9. At no time did Jackson's counsel specifically object to the particular inclusion of "J-boy" in the redacted version of Exhibit 9. At no time did the State ever assert that "James or J-boy" referred to in Exhibit 9 was Appellant or the person with "a black hoodie with a dragon the back." Contrary to the assertion, this was not a direct facial reference to the Appellant.

Second, the various and multiple references to "another person" "other person" at the time of the killing could not be always read to facially refer to the Appellant without otherwise being linked with other evidence. Contrary to the claim of Appellant, the evidence would require linkage to the other evidence presented. The jury could not have made any connection without relying upon other evidence presented at trial.

The number of other unidentified participants was unclear and inconsistent from the various statements. Concerning the crime scene, the number of involved participants were either one person [(State Exhibit 9, R.p. 767, ll. 9-10)("looked like it could be James or J-boy")], [State

Exhibit 8, R.p. 765, ll. 1-8 ("I see two people fighting and I hear someone said no, stop, then I hear gunfire ... and the person that was holding the gun had a hoodie")], two persons [(State Exhibit 9, R.p. 767, ll. 17-18)("I hear more than one footsteps running)], [State Exhibit 3, R. 40-47, ("I saw a white man wrestling with a tall black man over a gun, the black man told him to stop, and then I heard a gunshot. The other person was standing next to the van looking at the guys wrestle. The other guy had a handgun that looked like a revolver. After the gunfire everyone ran ...")]; (R.p. 574, ll. 9-13)(he stood in his yard by the gate and saw a black male struggling with the pizza man and another black male holding a revolver ..."), three males with hoodies, (State Exhibit 5, R.p. 581, ll. 1-8)("The pizza man was met by three males with hoodies. Another person was one of the males, and I didn't - - and I don't know who the other two were. The pizza man was trying to take the gun rifle away from the black male, and the black male told the pizza man to stop and then the gun fired.") or an unclear amount of perpetrators due to the ambiguity in the Canty's written usage of "another person." See (State Exhibit 7, R.p. 586, l. 25 – p. 587, l. 9)("another person went to the back of the trailer, and he wait for the pizza man to come, <u>they</u> started to rob the man. The pizza man was trying to take the gun away from another person, and this person said stop. And after he said stop, he shot the pizza man ... he stayed there for a second. Then he ran. It looked like another person running away with the other person around the car."). The use of neutral pronouns in each of the co-defendant's statements removed the jury's speculation that a redaction had occurred. Rather, it enhanced Jackson's own argument that Canty's statements were inconsistent and lacked credibility. A reasonable juror looking only at each of the "confessions" themselves would not be able to reasonably infer that Jackson was the trigger person or another person identified at the crime scene from any of the

statements.

The Appellant complains that the statement referred to the Appellant's gender when it referred to "3 males with hoodies, another person was one of the males." State Exhibit 5. Unlike Holder, the reference to "male" was not a limiting reference that a juror could infer facially referred only to Jackson. Similarly, any reference to "black male" would not be inferred to be solely identifying Jackson on the face of the statement. In fact, reviewing the unredacted State Exhibits 3 and 5, this reference to "black man" was to an unnamed individual other than Jackson. Compare R.p. 85, ll. 11-23 (unredacted Exhibit 3) with R.p. 560, ll. 14-25. Compare R.p. 94, ll. 19–25 (unredacted Exhibit 5); R.p. 574. ll. 9-14 Both were ambiguous references in the redactions.

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

him. However, the statement did not plainly indicate that this person was the only person involved in the crime.

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

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

Further, there was no singular "another person" identified in the various statements who had a particular role that the jury would have only inferred was Jackson. From the collateral evidence presented to the jury, it was clear that Jackson was identified by the store employee on the video. R. 296. His presence at the store was conceded by his counsel in his opening and closing statement. R. 173, 977, 982-83, 998. Similarly, it was shown that someone bought a Little Debbie snack on the video, but one of the employees was unable to identify who or what was brought. R. 260-64, 287. But see Tr. 275 (on video fairer skinned person purchases Little Debbie).[12]

Contrary to Henson, Holder, and State v. LaBarge, 275 S.C. 168, 268 S.E.2d 278 (1980)(replacement of "LaBarge" to "Mister X" pointed directly to Defendant), it cannot be said that "another person" or "other person" at any or all times pointed to Jackson. Similar to McDonald, 400 S.C., 274-276(S.C.App. 2012), the "another person" phrase only implicated Canty and did not limit the participants or their discrete roles in the killing.

In the Final Portion of his initial argument, the Appellant complains that the following testimony from Officer Burnish was Bruton error. In particular,

Q: You were not there when Mr. Canty [co-defendant] gave a statement on the 15th?
A: I was in the building; I was not present for that statement.
Q: Now, what happened and what did you do next in your investigation?
A: Based on the information that was received on that date is when we issued warrants for the arrest of Mr. Jackson.
Q: Now, did you go look for Mr. Jackson?

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

A: Yes, we did.

R.p. 772, ll. 1-11 (emphasis added). No objection was made to the inquiry by any counsel.

Respondent submits that claim the Petitioner about R. 772 is making is not preserved for the appeal due to the lack of a contemporaneous objection. "For an objection to be preserved for appellate review, the objection must be made at the time the evidence is presented ... and with sufficient specificity to inform the circuit court judge of the point being urged by the objector." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011). "Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review." State v. Brannon, 388 S.C. 498, 502, 697 S.E.2d 593, 595 (2010). Here, no objection was made concerning the reference. It is not preserved.

Assuming arguendo that matter may be considered, the Appellant claims regardless of the inadequate redactions addressed above, it was apparent given the context of the record that the non-testifying co-defendant was referring to Appellant in his five statements to law enforcement and particular the January 15 statement. State Exhibit 3, R.p. 556-563. Respondent submits that this claimed inference concerning the statements does not create a Bruton error. First, other information had been developed prior to that point concerning Jackson. This included the identification of Appellant Jackson in the video by January 13, 2008. R.p. 294-96,770. He was immediately a suspect at that point on January 13, 2008. R. 376. Canty was recognized on January 14 as being the person with Jackson and that they had spoken to Canty previously. R.p. 771. The statements that Canty gave on January 13, State Exhibit 8 and State Exhibit 9 did not say anything about either Jackson or about another person asking him to rob a pizza man. R.p. 764-68. In the January 15 unredacted statement, it indicated only that "Deangelo was standing by

the van looking at the guys wrestling. R.p. 83-85. A reference to an unnamed "tall black man" was in the unredacted statement and references to Desmond Canty and DeAngelo Jackson were later redacted from the statement to another person or other person throughout. R.p. 83-85, 557-561. Furthermore, the questioning on R.p. 772 did not reference any specific information that was gained from the statement against Jackson or other information that may have been received.

However, the Appellant tries to read too much into the inferences he suggests about the testimony at R.p. 772. Simply put the officer testified that based upon the unstated information he had received, a warrant was issued for Appellant. For several reasons we find no error in the admission of the above testimony. First, Officer Burnish never repeated the January 15 statements made by Canty. Rather, he testified only to the conclusions he made based on what his investigation had thus far revealed. See State v. Brown, 317 S.C. 55, 63, 451 S.E.2d 888, 893 (1994) State v. Thompson, 352 S.C. 552, 558, 575 S.E.2d 77, 81 (Ct. App. 2003) finding officers' statements explaining why they began their surveillance of defendant's apartment were not hearsay); State v. Thompson, 352 S.C. 552, 558, 575 S.E.2d 77, 81 (Ct.App.2003) (" '[A]n out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken.' " (quoting Brown, 317 S.C. at 63, 451 S.E.2d at 894)). Furthermore, Burnish did not testify to any specific statements that identified Jackson. Because this testimony did not constitute hearsay, the trial court did not abuse its discretion in admitting it. See State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995)(stating the admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion). For all the foregoing reasons, his first argument is without merit.

HARMLESS ERROR

Any error in the admission of the statements was harmless error. Harrington v. California, 395 U.S. 250, 254, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969); Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986); State v. Holder. Thus, even if Jackson's Confrontation Clause rights were violated, a harmless-error analysis must be applied. "Whether the error is harmless depends upon a host of factors, including: (1) the importance of the witness's testimony in the prosecution's case, (2) whether the testimony was cumulative, (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, (4) the extent of cross-examination otherwise permitted, and (5) the overall strength of the prosecution's case." Van Arsdall, 475 U.S. at 684.

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

January 12, 2008 for socks and gloves, but she claimed she did not give him any. R. 914-15. The rifle that was recovered from the apartment of Jackson's aunt was identified as one of the fired two murder weapons through ballistic testing of the rifle and the fired bullet. [State Exh. 58-A]. R. 486, 490, 496, 502, 510-11, 673-77.

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

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

Under these discrete circumstances, any error was harmless.

ARGUMENT 2 – Crawford and Bruton

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

Respondent incorporates by reference its argument from Argument One that the redacted

statements did not implicate Appellant where his name was removed from the multifarious statements made by him. The Appellant claims the five statements made to law enforcement by Appellant's non-testifying co-defendant were testimonial and were crucial to the State's case against Appellant. R. 79-150. Due to the co-defendant's exercise of his Fifth Amendment right not to testify, he was unavailable as a witness and Appellant had no prior opportunity to cross-examine his accuser. Thus, the introduction of the inadequately redacted statements violated Appellant's Sixth and Fourteenth Amendment rights to cross-examine and confront the witnesses against him. Crawford, 541 U.S. at 42. However, Respondent submits that the statements were not introduced against the Appellant, but against his co-defendant – the maker of the statements. Thus his confrontation right was not violated because it was not a witness against him.

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

In Bruton, the Supreme Court held that "admission of [the co-defendant's] confession in [a] joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." 391 U.S. at 126. Thus, to avoid a confrontation right violation, and for the statement to be admissible, any such statement must be redacted to avoid directly implicating

(by name or direct, or inescapable inference) a defendant's co-defendant. Id, Gray, supra, Holder, supra. Here the statement was properly redacted which prevented any Confrontation Clause issue.

Crawford' s main concern was for a defendant's right "to be confronted with the witnesses against him." Crawford, 541 U.S. at 42. Crawford did not abrogate the Supreme Court's prior holdings in Bruton or Marsh, which found no Sixth Amendment violation when the admitted statement is not facially incriminating. See Crawford, 541 U.S. at 57(finding its decision consistent with other Confrontation Clause cases, including Bruton; Richardson, 481 U.S. at 206("Ordinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness 'against' a defendant if the jury is instructed to consider that testimony only against a codefendant"). Thus, while co-defendant Canty's statements are testimonial, the admission did not violate the petitioner's confrontation rights because it did not implicate Appellant. Appellant had no need for cross-examination because the testimonial evidence did not reference him or implicate him in any crime. Crawford is therefore inapplicable. See, e.g., U.S. v. Akefe, 2010 WL 2899805, at 25-26 (S.D.N.Y. July 21, 2010).13

Assuming Caldwell error, harmless error analysis applies. The Appellant claims any

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

error in the use of the statements could not be harmless error. He asserts that the failure to specifically have either fingerprints or DNA linking him to the crime scene removes the possible error. As set forth in the conclusion of argument one, the admission of the statements were harmless.

SEVERENCE ISSUE

III. The trial court did not abuse its discretion in denying Appellant's motion for severance.

Appellant contends the trial court erred in denying the motion for severance made by his counsel. He claims that the joint trial compromised his right to confront and cross-examine his accuser where five statements were introduced at the trial. Initial Brief of Appellant, p. 17-18. However, he fails to articulate the basis as to why the introduction of the statements of co-defendant Canty, after redaction, required that severance be granted in the trial court's discretion. The trial judge did not err in denying severance.

STANDARD OF REVIEW

In South Carolina, criminal defendants who are jointly tried for murder are not entitled to separate trials as a matter of right. State v. Cope, 405 S.C. 317, 748 S.E.2d 194 (2013); State v. Kelsey, 331 S.C. 50, 73, 502 S.E.2d 63, 75 (1998). Motions for a severance are addressed to the discretion of the trial court. Kelsey, 502 S.E.2d at 75. A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a co-defendant or prevent the jury from making a reliable judgment about a codefendant's guilt. State v. Dennis, 337 S.C. 275, 282, 523 S.E.2d 173, 176 (1999) (citing Zafiro v. United States, 506 U.S. 534, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993)). Furthermore, "[a]n appellate court should not reverse a

conviction achieved at a joint trial in the absence of a reasonable probability that the defendant would have obtained a more favorable result at a separate trial." State v. Stuckey, 347 S.C. 484, 497, 556 S.E.2d 403, 409 (Ct.App.2001).

Where a solicitor determines that a joint trial or, alternatively, separate trials of criminal co-defendants would best facilitate the efficient administration of her prosecutorial duties, a trial court may still, in its sound discretion, grant severance or order joinder, respectively, to protect a defendant's right to a fair trial. See State v. Halcomb, 382 S.C. 432, 439, 676 S.E.2d 149, 152 (Ct. App. 2009)(stating a decision on whether to grant or deny a motion for severance is subject to a trial court's sound discretion). Thus, a trial court's decision to grant or deny a motion opposing the solicitor's election of either joint or separate trials will not be disturbed on appeal absent an abuse of the trial court's discretion. Cf. Halcomb, 676 S.E.2d at 153(stating a trial court's decision to deny a motion for severance will not be disturbed absent an abuse of discretion). Further, when the trial judge bases this determination "upon a just and proper consideration of the particular circumstances which are presented to the court in each case," an abuse of discretion does not result. Halcomb, 676 S.E.2d at 153. An example of a specific trial right that may be prejudiced from a joint trial is the constitutional right to cross-examination when one codefendant's confession expressly implicates another codefendant but the confessor does not take the witness stand. Bruton, 391 U.S., 135.

HOW THE ISSUE WAS RAISED AT TRIAL

Defense counsel renewed his motion for severance after the Jackson v. Denno hearing was completed. Counsel stated that the trial court had the various statements from Canty which go from (in unredacted form) from Jackson being was not involved in it, that he didn't do it and

then Canty started adding Jackson in it a little bit that he was present, but did not shoot the weapon. R.p. 148, ll. 11-18. Counsel Wilder asserted that the co-defendant's statement is in his own handwriting. Counsel asserted that if there was a separate trial, "if we were to go into any of those statements, that the defense would have a right to go into all of them to show that he changed them over time, and that Canty made different statements. He asserted that this would go to the credibility of the anything that Canty said. R.p. 148-49. [14] Counsel stated that it would be difficult to redact the statements of Canty, because he felt it would still cast an inference because there are two defendants at trial. R.p. 149, ll. 10-14. Counsel stated that saying "Mr. Blank did so an so" would occur and counsel moved that the statements be thoroughly redacted if they were admitted. R. 149. Counsel stated that it all goes to the question of whether it is fair to try these two together and that he believed it was not. R.p. 149, ll. 18-20.

The solicitor urged that the statements could be successfully redacted. R. 150-51. The trial court denied defense counsel's motion for severance of Appellant's joint trial after he ruled the statements were admissible. R.p. 151, l. 23 – p. 152, l. 2.

In the post-verdict motion of the Appellant, counsel re-asserted the failure to grant the severance issue. ROA 1068. Motion for Reconsideration, p. 2, Section 3. In the motion, Jackson contended that failure to grant the motion deprived him of a fair trial because Canty did not testify and that he was deprived of his right to cross-examine him. He claimed that if Canty's statements were to be believed, the only member of the traveling party who could have placed

14 Respondent notes that after the redacted statements were introduced, Jackson's counsel attacked the credibility of the statements through the law enforcement officers by revealing and emphasizing the inconsistencies in the statement. R.p. 629, ll. 16-23. The defense counsel further question Deputy Burnish about seeing an individual in a black hoodie (not Jackson) in the video at the store . R. 837-38. Defense counsel uses this in his closing argument to suggest that person made the telephone call. R.p. 978-79, 982.

the telephone call to order pizza would have been Desmond Canty while Jackson and Canty were in the store. He asserts he was denied his opportunity to show Canty's motive in naming Jackson rather than Desmond Canty was to protect Desmond from being identified as the person who made the call. He further urged that the redaction of the statements failed to remove identifying information. Further, Jackson argued that in the in camera hearing Canty admitted writing another statement that would show that Canty was not a credible person. Id. He further claims that it caused him to forfeit his right to last argument because his counsel did not offer any exhibits during the state's case. Id. Judge Young denied the motions. ROA 1072 Order dated August 23, 2011.

ANALYSIS

In his argument before this Court, the Appellant fails to show or argue prejudice from the trial court's failure to sever the case from Canty. In his brief, he only asserts that the defense presented five (5) inculpatory statements of the co-defendant into evidence. However, as noted in the earlier arguments, the statements of Canty were redacted to remove any identification of Appellant Jackson and left it to the jury to determine from the other evidence whether Jackson was a participant in the crime. Contrary to the claims of Appellant the use of "another person" was not conclusive term necessarily relating to the same person. Further, evidence was presented about another individual at the scene who wore a black hoodie who had not been identified. Here, Appellants maintain that severance was required under Bruton, 391 U.S. 123, regarding their co-defendants' out-of-court admissions.

Even assuming that non-testimonial statements of co-defendants can create a Bruton problem after Crawford, the admission of the statements by the codefendant did not violate

Bruton because the statements made no mention of the names of anyone else involved nor provided a means of identifying them. See United States v. Najjar, 300 F.3d 466, 475 (4th Cir. 2002)("A Bruton problem exists only where a co-defendant's statement on its face implicates the defendant."). Accord, United States v. Lighty, 616 F.3d 321, 350 (4th Cir. 2010)("to protect Flood's Confrontation Clause rights in this case, the district court refused to allow CW to refer to Flood, Wilson, and Mathis by name, but permitted CW to make reference to "three other people." "Such redactions are permissible so long as the redaction does not distort the statements' meaning, exclude substantially exculpatory information, or change the tenor of the utterance as a whole" citing United States v. Yousef, 327 F.3d 56, 150 (2nd Cir. 2003).

Respondent respectfully submit that the trial judge did not abuse his discretion in denying the motion to sever where no prejudice is shown.

ARGUMENT IV MISTRIAL

IV. The trial court did not abuse its discretion in denying motions for mistrial based upon the redactions of Canty's statements and the admission of evidence.

In his fourth argument, the Appellant contends that the trial court erred in rejecting various motions for a mistrial on three occasions..

I. Reference to Jackson as a Suspect – Evidence Struck and Curative Instruction Given.

Appellant claims that the first error in refusing a mistrial occurred when Officer Thomas "incorrectly" stated that Appellant was a suspect based on her investigative report on the night of the murder. R. 329-30. The record reveals that Canty's counsel elicited the following testimony during cross- examination of Officer Jennifer Thomas of the Sumter County Sheriff's

Office:

Q: And then [the report taken on the night of the murder) also states that you spoke with someone by the name of Linda Canty.

A: Yes, sir.

Q: And also on your report, it indicates that a suspect is Daniel Jackson [Appellant]

R.p, 329, ll. 3-7. Defense counsel contemporaneously objected, and outside the presence of the jury, moved for a mistrial. R.p. 330, ll. 1-2. Defense counsel argued that the report is prejudicial as "rank hearsay" and requested that the trial court strike the question and answer. R.p. 329, l. 18 – p. 330, 1. 7. The trial court noted, "Well, how is it prejudicial for your client? He's a defendant in the courtroom. I mean, they [the jury] would have to suspect that at some point in time his [Appellant's] name would come into play." R.p. 330, ll. 8-11. Defense counsel further argued, "[The State is] posturing as though [Appellant] was a suspect . . . on that particular night when the report was issued, and I object to that." R.p. 330, ll. 12-15. The trial court refused to grant the mistrial motion, but agreed to strike the witness' answer. R.p. 331, ll. 5-8. The trial court also granted defense counsel's request for a curative instruction. R.p. 331, 1. 15 – p. 332, l. 8. It instructed the jury that it "sustained the objection" and "ask that the jury disregard the last statement of the witness." R.p. 332, ll. 5-8.

"The decision to grant or deny a mistrial is within the sound discretion of the trial court." State v. Wiley, 387 S.C. 490, 692 S.E.2d 560 (Ct. App. 2010). "The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." Id. "The power of the trial court to declare a mistrial should be used with the greatest caution under urgent circumstances and for very plain and obvious reasons stated on the record by the trial court." Id.

"A mistrial should only be granted when absolutely necessary, and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial." Id. "The granting of a motion for a mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way." Id. at 495–96, 692 S.E.2d at 563.

Here, the trial judge sustained the objection and struck the reference to Appellant as a suspect. A curative instruction was immediately given to disregard. A curative instruction is generally deemed to have cured any alleged error. State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct. App. 2005). "If the trial judge sustains a timely objection to testimony and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured." State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996); State v. Craig, 267 S.C. 262, 227 S.E.2d 306 (1976); State v. McCord, 349 S.C. 477, 562 S.E.2d 689 (Ct. App. 2002). Relief is not warranted on this initial assertion.

II. Mistrials Motion Related to Inadequate Redaction.

In his second assertion, he claims that mistrial motion related to the redactions were improperly denied. In particular, counsel Wilder moved for a mistrial after the close of the State's case, arguing that the State failed to adequately redact the non-testifying co-defendant's statements. R.p. 873, 1. 19 – p. 877, 1. 12. The trial court denied the motion for a mistrial. R.p. 878, ll. 13-21. Counsel Wilder renewed his prior motions for a mistrial and subsequently moved for a new trial after the jury found Appellant guilty. R.p. 943, 1. 1 – p. 944, 1. 21; p. 1051, 1. 24 – p. 1052, 1. 6. Defense counsel argued:

> [T]he only logical inference would be that the jury must have decided to use those statements that Mr. Canty [co- defendant] gave against Mr. Jackson [Appellant], which we don't believe should be permitted under the law of Bruton,

> the confrontation of issues. The right that [Appellant] has under the United States Constitution and [the] constitution of our state, Your Honor.

R.p. 1052, ll. 19-23. The trial court denied both motions. R.p. 1054, ll. 17-21.

Respondent submits that related to this mistrial motion, it is grounded on the claims addressed in argument one. For the reasons set forth within argument one, Respondent submits that there was no error shown concerning the redactions. His claims otherwise are without merit. The judge did not abuse his discretion in denying the motions.

III. Little Debbie Purchase and Wrapper.

In his brief, Jackson asserts in passing that the trial court admitted prejudicial and improper evidence in admitting the evidence of the purchase of the Little Debbie at the grocery and the later admission of a "Little Debbie " snack wrapper found near the crime scene. He does not address why this admission was improper. A conclusory argument must be rejected in an appeal. See In re McCracken, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001)(holding an issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory); see also Solomon v. City Realty Co., 262 S.C. 198, 201, 203 S.E.2d 435, 436 (1974)(deeming a conclusory argument abandoned).

Further, the evidence concerning the purchase of a Little Debbie snack was relevant and admissible. The significance to the purchase if a Little Debbie cake had to be developed through the trial evidence. The clerk testified "they" came in and bought a Little Debbie cake, but he could not identify who bought it. R. 260-61, 264, 275. He identified him on the video as the fairer skinned of the two who entered the store. R. 275. In trying to limit the weight of the evidence, counsel Wilder pointed out that the store sold 15-20 different kinds of "Little Debbie "

snack cakes and did not recall which one he sold on that date. R. 277. Another employee was able to identify Jackson from the video. R. 296. A Little Debbie wrapper was found near at the entrance to the lot the crime scene at the side of the road and photographed the incident day after 9 PM, although another officer did not recall seeing it that night. R. 337, 374-75, 416-18. It was estimated that the wrapper [State Exhibit 86] was found 137 feet from where the victim's body was discovered and near a vehicle. However, there was insufficient ridge detail to get a fingerprint from the wrapper. R. 428. A photograph of the wrapper was introduced. The objection to the admission of the photograph was that it was "outside of the crime scene." R.p. 856-58, ll. 12-14.

Plainly the evidence concerning the presence of the Appellant purchasing a Little Debbie snack cake at a location in close proximity to where the set-up telephone call was made for pizza and the presence of a Little Debbie snack wrapper near the crime scene location the night of the killing is relevant evidence. Contrary to the claims underlying the Appellant's conclusory argument or the "outside the crime scene" objection, the connection of the wrapper and the purchase was relevant. The jury was aware that the vehicle that it was located near that night was outside of the crime scene tape, but that location does not define relevant evidence's admissibility. R. 856-57. There is no legal requirement that evidence must be supported by either fingerprint or DNA to be admissible under these circumstance. The defense had the opportunity to challenge the weight of the presence of the particular wrapper. However, that did not make its admission improper or unduly prejudicial. His suggestions otherwise do not require a new trial.

BATSON ISSUE

V. **The trial judge did not err in finding the prosecution did not violate the mandates of Batson v. Kentucky in its strikes of two African American jurors (#157, #32) for the reason that they had indicated that they did not want to serve on the jury based upon their responses. Further, any error in the failure to indicate that basis for not stating the basis for striking juror #140, a potential second alternate, was not reversible error where the juror would not have been seated and the Appellant failed to assert this ground before the trial judge. (Initial Brief of Appellant, Argument V, pp. 3-4, pp. 22-26).**

Appellant contends the trial court erred in concluding that there was no violation of the mandates of Batson v. Kentucky, 476 U.S. 79 (1986) in the prosecutors use of the peremptory challenges against African American venirepersons. In particular, the Appellant questions the prosecutions use of the peremptory challenges against two female venirepersons (#32 and #157) claiming that they had indicated during the voir dire a desire to not serve as a juror. A review of the preliminary jury voir dire record, in addition to the record of the striking of the jury in the case supports the race neutral reasons given by the prosecution and the validity of the trial court's rejection of the issue under Batson.

A. The Alternate Issue Is Not Preserved For Appeal.

The Appellant also claims that the failure by the State to indicate its reason for striking juror #140 – Walnetta Spears – a potential second alternate juror was fatal. Two reasons demand that this claim be rejected. The Appellant did not raise this particular assertion about the failure to specify the reasons for the strike of juror #140 to the trial judge and it is not preserved for this appeal. Accord State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991) ("[A]s to the striking of Juror Leaks, the potential alternate for whom no explanation was given, appellant waived any error in the Solicitor's lack of explanation by failing to raise it below). See State v. Martinez, 294

S.C. 72, 362 S.E.2d 641 (1987)").[15] Any potential error does not warrant a new trial under these circumstances.

STANDARD OF REVIEW

"Whether a Batson violation has occurred must be determined by examining the totality of the facts and circumstances in the record." State v. Shuler, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001). "Appellate courts give the trial judge's finding great deference on appeal, and review the trial judge's ruling with a clearly erroneous standard." Id. "A finding is clearly erroneous if it is not supported by the record." Id. at 620, 545 S.E.2d at 813.

"In Purkett v. Elem, 514 U.S. 765, 767, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995), the Supreme Court of the United States explained the proper procedure for a Batson hearing as follows:

> Under our Batson jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

Recently, the South Carolina Supreme Court addressed step two of the Batson analysis in State v. Giles, 407 S.C. 14, 754 S.E.2d 261, (January 15, 2014). In Giles, the Court initially summarized Batson, stating:

> If a sufficient showing is made, the trial court will move to the second step in the process, which requires the proponent of the challenge to provide a race neutral explanation for the challenge. Id. If the trial court finds that burden has been met, the process will proceed to the third step, at which point the trial court must determine whether the opponent of the challenge has proved purposeful

15 Respondent notes that alternate juror 145 Lakeisha Stubbs replaced juror 159 Jaron Wilson and participated in deliberations. R.p. 153-58.

> discrimination. 476 U.S. at 98. The ultimate burden always rests with the opponent of the challenge to prove purposeful discrimination.
>
> In addressing the second step of the process, the United States Supreme Court held that general assertions, such as a mere denial of discriminatory motive or assurance the challenges were exercised in good faith, are not sufficient to rebut a prima facie showing of a race based challenge. 476 U.S. at 97–98. The Court noted that if such general assertions were sufficient, "the Equal Protection Clause 'would be but a vain and illusory requirement.' " 476 U.S. at 98 (quoting Norris v. State of Alabama, 294 U.S. 587, 598, 55 S. Ct. 579, 79 L. Ed. 1074 (1935)). *Accordingly, the Court, while not requiring the explanation to rise to the level of justifying the exercise of a challenge for cause, held the proponent of the strike must give a clear and reasonably specific explanation of legitimate reasons for exercising the challenge.* 476 U.S. at 98 n. 20.

Giles, supra. (emphasis added).

In Giles, the Court overruled a portion of State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) overruled by State v. Giles, supra. concerning its position that a proponent of a peremptory challenge has no burden of presenting a reasonably specific and legitimate explanation for the challenge at the second step of the Batson process. In Purkett, 514 U.S. 765, the Court had clarified that the issue at that step is the facial validity of the explanation provided by the proponent of the strike, and the explanation need not be persuasive or even plausible. Purkett, 514 U.S. at 768. The Giles Court found that Court in Purkett went so far as to state the reason does not have to make sense, and even a silly or superstitious reason may suffice because it is not until the third step of the Batson process that the persuasiveness of the explanation becomes relevant. Id. The Purkett Court noted that it is at that stage that the trial court determines whether the opponent of the strike has met the burden of proving purposeful discrimination and will probably find implausible or fantastic justifications to be pretexts for discriminatory intent. Id.

The South Carolina Supreme Court in Giles then analyzed the decision in Miller-El v. Dretke, 545 U.S. 231, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005). There, the Court concluded that the Court did not, in Purkett, abandon the requirement set forth in Batson that at the second stage of the Batson process a proponent of a strike "give a clear and reasonably specific explanation of his legitimate reasons for exercising the challenge." Miller-El, 545 U.S. 231. The Court concluded its assessment of step two in Batson must be re-evaluated and Adams revised:

> We likewise find, based on a harmonization of Batson, Purkett and Miller–El, that in order for the explanation provided by the proponent of a peremptory challenge at the second stage of the Batson process to be legally sufficient and not deny the opponent of the challenge, as well as the trial court, the ability to safeguard the right to equal protection, it need not be persuasive, or even plausible, but it must be clear and reasonably specific such that the opponent of the challenge has a full and fair opportunity to demonstrate pretext in the reason given and the trial court to fulfill its duty to assess the plausibility of the reason in light of all the evidence with a bearing on it. Reasonable specificity is necessary because comparison to other members of the venire for purposes of a disparate treatment analysis, which is often used at the third step of the Batson process to determine if purposeful discrimination has occurred, is impossible if the proponent of the challenge provides only a vague or very general explanation. **The explanation given may in fact be implausible or fantastic, as noted in Purkett, but it may not be so general or vague that it deprives the opponent of the challenge of the ability to meet the burden to show, or the trial court of the ability to determine whether, the reason given is pretextual.** *The proponent of the challenge must provide an objectively discernible basis for the challenge that permits the opponent of the challenge and the trial court to evaluate it. The trial judge need not proceed to step three of the Batson process when no constitutionally permissible reason has been proffered at step two.*

Giles, supra.[16]

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16 In Giles, the Supreme Court concluded that an explanation given by the proponent of a strike that "he did not feel the jurors were right for the jury" was "no reason at all." The Court equated it to reasons that had been rejected on grounds that the explanations given were not sufficiently clear and specific to provide a factual basis that courts can review for legitimacy, including "gut feeling" explanations. Alex v. Rayne Concrete Svc., 951 So. 2d 138, 153 (La. 2007). See e.g., Robinson v. United States, 878 A.2d 1273 (D.C. 2005)(finding prosecutor's statement that he "just didn't like" the stricken venireperson did not furnish the clear and reasonably specific explanation of his legitimate reasons for striking that juror that was required); People v. Carillo, 9 A.D.3d 333, 780 N.Y.S.2d 143 (2004)(finding prosecutor's explanation that his peremptory challenge of a prospective juror was not based on

"At step three, the opponent of the strike must show the reason offered, though facially race-neutral, was actually mere pretext to engage in purposeful racial discrimination." State v. Cochran, 369 S.C. 308, 315, 631 S.E.2d 294, 298 (Ct. App. 2006)(citing Adams, 322 S.C. at 124, 470 S.E.2d at 372). "The burden of persuading the court that a Batson violation has occurred remains at all times on the opponent of the strike." State v. Haigler, 334 S.C. 623, 629, 515 S.E.2d 88, 91 (1999). "This burden is generally established by showing similarly situated members of another race were seated on the jury." Cochran, 369 S.C. at 315. [17]

South Carolina has rejected the "dual-motivation" doctrine in Batson cases, and instead, "South Carolina follows the 'tainted' approach whereby a discriminatory explanation for the exercise of a peremptory challenge will vitiate other nondiscriminatory explanations for the strike." State v. Rayfield, 357 S.C. 497, 503, 593 S.E.2d 486, 489 (Ct. App. 2004) aff'd, 369 S.C. 106, 631 S.E.2d 244 (2006)(citing Payton v. Kearse, 329 S.C. 51, 59, 495 S.E.2d 205, 210

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anything in particular, he "just did not get a good feel from her," "amounted to, in essence, no explanation at all"); Zakour v. UT Med. Grp., Inc., 215 S.W.3d 763 (Tenn. 2007)(finding explanation that six prospective female jurors were stricken because of their body language, without providing more detail, was not clear, reasonably specific, legitimate and reasonably related to the particular case being tried).

17 For the purpose of demonstrating potential jurors are similarly situated under Batson, potential jurors are not required to be "identical in all respects." Miller-El v. Dretke, 545 U.S. 231, 247 n. 6, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005)("A per se rule that a defendant cannot win a Batson claim unless there is an exactly identical white juror would leave Batson inoperable; potential jurors are not products of a set of cookie cutters."). Rather, the potential jurors need only be alike "'in all relevant aspects.' " Startzell v. City of Philadelphia, Pennsylvania, 533 F.3d 183, 203 (3rd Cir. 2008)(quoting Nordlinger v. Hahn, 505 U.S. 1, 10, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992)). In determining whether potential jurors are similarly situated, our courts have focused their inquiry on whether there are meaningful distinctions between the individuals compared. See State v. McCray, 332 S.C. 536, 540, 506 S.E.2d 301, 302 (1998)–03 (1998) (finding three white jurors who were seated on the jury were not similarly situated to four black jurors who were struck from the jury because "[t]he white jurors did not have the same relationship to law enforcement as the black jurors" when the black jurors had relatives or friends who, at the time of the trial, were employed in law enforcement, and the relatives or friends of the white jurors were no longer employed in law enforcement); State v. Williams, 379 S.C. 399, 401, 665 S.E.2d 228, 230 (Ct. App. 2008)(holding the trial court erred in finding an unemployed juror was similarly situated to an employed juror whose spouse was unemployed); State v. Scott, 406 S.C. 108, 749 S.E.2d 160 (Ct. App. 2013)(sufficient distinctions between a teacher and a warehouse manager]. Cf. United States v. Davis, 154 F.3d 772, 781 (8th Cir. 1998)(finding there was a sufficient distinction between the challenged juror who worked as a drug counselor and several seated jurors who worked as drug prevention volunteers to defeat a Batson challenge).

(1998)).

The South Carolina Supreme Court explained:

> Whether a Batson violation has occurred must be determined by examining the totality of the facts and circumstances in the record. The opponent of the strike carries the ultimate burden of persuading the trial court that the challenged party exercised strikes in a discriminatory manner. Appellate courts give the trial judge's finding great deference on appeal and review the trial judge's ruling with a clearly erroneous standard.

State v. Edwards, 384 S.C. 504, 509, 682 S.E.2d 820, 822 (2009)(internal citations omitted). The trial court's finding of purposeful discrimination rests on its evaluation of demeanor and credibility. Edwards, 682 S.E.2d at 823. "Often the demeanor of the challenged attorney will be the best and only evidence of discrimination, and an 'evaluation of the [attorney's] mind lies peculiarly within a trial [court's] province.'" Id. (quoting Hernandez v. New York, 500 U.S. 352, 365, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)).

HOW THE ISSUE WAS RAISED BELOW

At the beginning of the court term, there was general *voir dire* of the potential jurors by Judge Young. During the initial questioning concerning whether any member of the jury panel was incapable by reason of mental or physical infirmity to render efficient jury service [R.p. 13, l. 5-6], venireperson **#32 Essie Dallas** responded. She declared that she was disabled with two artificial knees, had deteriorating bone osteoarthritis and had fibromyalgia. R.p. 14, ll. 19-23. Upon request by the court, she stated that she did not bring a doctor's excuse. However, she reported to the Court that she had an appointment Friday and kept her two grandchildren. R.p. 14, ll. 1-2. Judge Young stated that it did not keep her out of jury service, concluding that "if you can keep your kids, you can serve as a juror." R.p. 15, ll. 3-4.

Judge Young asked if there was any member of the panel "who is a school employee whose service this week would conflict with his or her activities as a school employee" which he defined as "employed as a teacher, certified personnel at the building level, or a school bus driver, or a school system or school district ..." and wished to be exempt. R.p. 20, l. 21- p. 22, l. 5. In response to the question, venireperson **#157 Patricia Williams** stated that she was employed at the school district as an attendance supervisor and was scheduled to work tomorrow (August 9, 2012). R.p. 21, l. 24- p. 22, l. 4. She stated that school starts for her tomorrow, but that the students would not return until after August 16th. She acknowledged to the judge that she would not have to worry about attendance until after August16th, but that they were in the process of getting ready for the student's return. R.p. 22, ll. 4-12. Judge Young stated that he was getting low on jurors and was "going to keep you on this week because there's no other time to transfer you to until next summer." R.p. 22, ll. 13-15.

The following chart represents the use of the peremptory challenges by the parties.

Juror #	Name	Race/Sex	State	Canty	Jackson	Seated
64	**Wayne Green**	**AA/M**	**1**			
47	Deneen Fioritto	W/F		1		
157*	**Patricia Williams**	**AA/F**	**2**			
75	Perry Hendrix	WM		2		
60	*Sherry Glasscho*	*AA/F*				*1*
30	**Terry Crowder**	**AA/F**	**3**			
100	*Michael Knight*	*WM*				*2*
167	**Marion Thomas**	**AA/M**	**4**			

46	**Jason Evans (Tr.p. 35, l.1-4)**	**AA/M**	**5**			
32*	**Essie Davis**	**AA/F**	**6**			
28	**Linda Cooper**	**AA/F**	**7**			
13	Sherrie Benenhaley	W/F		3		
115	*Kelly McMillian*	*WF*				*3*
109	Sean McCombs	WM			1	
120	*Charles Mullins*	*Asian/M*				*4*
143	Martin Stegner	WM		4		
124	*Thomas Nissan*	*Asian M*				*5*
6	*Erin Andrews*	*WF*				*6*
123	Lisa Ottenschot-Newman	WF			2	
34	*Connie Davis*	*AAF*				*7*
159	*Jaron Wilson*	*Asian M*				*8* ***(Removed Tr.p. 194-199 – replaced by Juror 145).***
155	*Marcus White*	*AA/M*				*9*
82	*Johnnie Holland*	*AA/M*				*10*
132	*Robert Rogers*	*WM*				*11*
43	Angela Edwards	WF		5		
164	Beckham Harris, Jr.	WM			3	
166	**Shawn McLaughlin**	**WM**	**8**			

165	Terry Hearst	WF		6		
144	*Wendy Stickle*	*WF*				*12*
ALTERNATES						
17	*Iesha Bradley*	*AA/F*				*1*
140*	**Walnetta Spears**	**AA/F**	**1**			
145	*Lakeisha Stubbs*	*AA/F*				***2 Served (Tr.p. 194-199)in lieu of juror 159***

R.p. 57-69.

During jury selection, after the State's strike of Marion Thomas #167, defense counsel Wilder informed the trial court, "Your Honor, we'd ask that the record reflect a motion to be heard later." R.p. 60, ll. 17-18. At the conclusion of jury selection, defense counsel moved to quash the jury panel pursuant to Batson, 476 U.S. 79, based on the State striking African-American jurors. R.p. 71, ll. 9-24; p. 73, ll. 9-22. The State had struck eight African-American 1jurors: (1) juror #64 - Wayne Green; (2) juror #157-Patricia Williams; (3) juror #30-Terry Crowder; (4) juror #167-Marion Thomas; (5) juror #46-Jason Evans; (6) juror #32-Essie Dallas; (7) juror #28-Linda Cooper; and (8) juror #140-Walnetta Spears. R. 57-69.

The State's Response to the Batson Inquiry

Because he had struck African-American jurors, consistent with state practice, Deputy Solicitor Meadors was required to respond to the trial court with his reasons to determine if they were race neutral.

MR. MEADORS: Judge, as to juror number **64, Mr. Griffin** was assisting me in this, and he has **pending burglary charges**. Everyone on this list had had a pending or a serious conviction or charge -- I don't care if they're black, white, or

purple -- I struck them. Anything beside a traffic offense, which I never use, but if there's a serious offense out there that's either still pending or convicted or we're not sure, I struck them. I have a burglary charge for this individual. That's why I struck him.

THE COURT: Mr. Green, there was burglary charge pending?

MR. MEADORS: Yes, sir. That's juror number 64.

THE COURT: Right.

MR. MEADORS: **Judge, juror, juror number 157 [Patricia Williams]. Judge, as we approached -- I've done this my whole career. People that want off, I don't put on. There were several people that wanted off Your Honor transferred.** This next juror, 157, wanted off. I believe she was the attendance coordinator. It was obvious to me -- not, not disagreeing with you keeping her on, Judge, but it was obvious to me she wanted off. And everyone that wanted off, that is my reason that I chose not to present her. Your Honor, **number 30 [Terry Crowder]** has charges, and I don't know. They're from Baltimore, but they're charges of possession of heroin, intent to distribute, possession of Valium with intent to distribute, possession of paraphernalia with intent to inject something, nuisance, conspiracy to violate the drug laws, possession of narcotics. That's why I struck her, Judge.

THE COURT: All right.

MR. WILDER: Your Honor, did he say she has a conviction for that?

THE COURT: She has pending charges showing up on her sheet. . . .

MR. MEADORS: As I said, everybody ---

MR. WILDER: She had pending charges?

THE COURT: She has pending charges.

MR. WILDER: All right.

MR. MEADORS: I forgot where I was now, Judge.

THE COURT: Mr. Thomas.

MR. MEADORS: **167. I struck everyone that came up unemployed**, that stated they were unemployed. And while we're at there, he is a black male, juror 166 [Shawn McLaughlin]. Number right next to him, Judge, is a white male. He's unemployed. I struck him, too. **Juror number 46, [Jason Evans]** Your Honor, has a -- came up, I believe came up when we were all present, said he had a gun charge that's pending. That's why I struck him. **Juror number 32 [Essie Davis]** also in my notes had said she did not want to serve. I had written that down. That was consistent with that. And finally, juror number **28 [Linda Cooper]**, Judge, fraudulent check convictions, false statement to obtain benefits convictions, other fraudulent check convictions, just convictions of fraud and deceit, and that's why I respectfully struck that juror. Again for the record, all of their strikes were exercised against white individuals. Your Honor, I think I provided a race-neutral reason for each one of them. We would respectfully ask you keep this jury. Thank you.

R.p. 74, l. 8 - p. 76, l. 19.

Defense counsel Wilder for Appellant Jackson stated that he would leave it in the Court's discretion. He stated that if the Court find those reasons satisfactory, I have nothing to say. R. 76-77.

The Trial Court's Rejection.

Judge Young then concluded that he had looked at the jury and noted that they are not entitled to a perfect jury, but certainly the ones who have pending charges, I find that to be race neutral and deny your motion. R.p. 77, ll. 3-7.

ANALYSIS

In his brief before this Court, Appellant merely states that the assistant solicitor's reasons for striking the African American jurors were insufficient. *Initial Brief of Appellant*, p. 25, para. 2. In the heading of his argument he states that the explanation for striking two of the jurors was because they did not want to serve on the jury and the potential alternate for who a reason was not given nor asked for by the judge. Initial Brief of Respondent, p. 22. However, in the

argument, Appellant refers to four individual jurors that the Solicitor did not assert had either a prior conviction or criminal charges pending - #147 (Patricia Williams), #167 (Marion Thomas), # 32 (Essie Davis) and potential alternate #140 (Walnetta Spears). Id., p. 24-25. Respondent submits that prosecution complied with the mandates of Batson and provided race neutral reasons for the use of the peremptory challenges on each of the potential jurors who could have been qualified to serve.

The Argument is Not Preserved and Conclusory.

First, however, a review of the record reveals his present argument before this Court concerning venirepersons #157, #167, and #32 is likely not preserved. As noted above, after the prosecution gave his reasons for the use of the strikes on these particular jurors, the defense counsel abandoned any specific challenge. Particularly, when asked by the Court whether he had any response to the Solicitor's statement of reasons, defense counsel Wilder stated that he had no response other than: "just leave it to your Honor's discretion. If you find those reasons satisfactory, I have nothing else to say." R.p. 76, l. 25- p. 77, l. 2.

In this appeal, Appellant claims that the reasons given for these three jurors was insufficient. *Initial Brief of Appellant*, p. 25 (Based [upon] the solicitor's insufficient explanations for striking the African American jurors. . ."). At no time did defense counsel assert or the trial judge find that the Solicitor's reasons for striking the particular jurors insufficient. This conclusory argument – raised within this appeal for the first time – must be inadequate to preserve the issue for an appeal. At no time was it suggested below to the trial that the grounds were insufficient and particularly the trial court did not find that the reasons were insufficient. See also I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716,

724 (2000)(stating the "losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments"). For this threshold reason, this issue must be dismissed. See State v. Flynn, 368 S.C. 83, 84, 627 S.E.2d 763, 764 (Ct. App. 2006)(the Court concluded the appellant had offered no evidence other than a conclusory assertion of racial motivation, we find the trial court did not err in failing to find a Batson violation."). See In re McCracken, 346 S.C., 92(holding an issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory); see also Solomon, 262 S.C., 201(deeming a conclusory argument abandoned).

The Solicitor's Reasons for Striking Each Juror Were Race-Neutral.

Viewing the totality of the circumstances that the trial judge was presented, Respondent submits that the specific reasons given by the state were race neutral and the trial judge properly denied the motion. Each of the reasons for the particular jurors was not "general or vague" and provided the trial court and opponent the ability to determine whether, the reason given is pretextual and gave an objectively discernible basis for the challenge that permits the opponent of the challenge and the trial court to evaluate it. See Giles. supra.

Respondent submits that the prosecution used a "race-neutral" reason in removing the potential jurors who had expressed a desire in the voir dire to not serve as a juror. Other than the potential alternate, the Appellant appears to only be challenging the two potential jurors who were removed basis upon the expressed attempt to be excused and removed from the jury pool. Solicitor Meadors indicated that "Judge, juror, juror number 157. Judge, as we approached I've done this my whole career. People that want off, I don't put on. There were several people that wanted off Your Honor transferred . . ." and "Juror number 32 also in my notes had said she did

not want to serve. I had written that down. That was consistent with that" R.p. 74, ll. 22-24, p. 76, ll. 7-9.

This was not based upon a "gut feeling" about either of the jurors but upon discernible evidence presented during the general voir dire of the jurors in the question of the jurors. **Venireperson #32 Essie Dallas** declared that she was disabled in response to the general inquiry about whether the juror was incapable of rendering by reason of mental or physical infirmity from rendering efficient jury service. R.p. 14, ll. 19-23. Upon request by the court, she stated that she did not bring a doctor's excuse. However, she reported to the Court that she had an appointment Friday and kept her two grandchildren. R.p. 14, ll. 1-2. Judge Young stated that did not keep her out of jury service, concluding that "if you can keep your kids, you can serve as a juror." R.p. 15, ll. 3-4. The record evidence support the basis for the use of the Solicitor's strike. See e.g., United States v. Garrison, 849 F.2d 103, 106 (4th Cir. 1988)("A prosecutor is justified in striking jurors that he or she perceives to be inattentive or uninterested").

Similarly, venireperson **#157 Patricia Williams**, in response to a general inquiry about whether the potential juror "is a school employee whose service this week would conflict with his or her activities as a school employee" [R.p. 20, l. 21- p. 22, l. 5] responded that she was employed at the school district as an attendance supervisor and was scheduled to work tomorrow (August 9, 2012). R.p. 21, l. 24- p. 22, l. 4. She stated that school starts for her tomorrow, but that the students would not return until after August 16th. Although school attendance was not at issue until after August16th, she declared they were in the process of getting ready for the student's return. R.p. 22, ll. 4-12. Judge Young stated that he was getting low on jurors and was "going to keep you on this week because there's no other time to transfer you to until next

summer." R.p. 22, ll. 13-5. Again, the record supports the solicitor's basis for the strike.[18]

Respondent submits that the expressed attempt by potential jurors to avoid jury service is a race-neutral reason. The Petitioner has not suggested nor shown otherwise.

In addition, the Appellant appears to accept the solicitor's basis for using the remaining strikes against potential jurors with criminal convictions or potential charges as race neutral:

(1) Juror #64 - Wayne Green – burglary charge pending.
(2) Juror #30-Terry Crowder – "charges, and I don't know. They're from Baltimore, but they're charges of possession of heroin, intent to distribute, possession of Valium with intent to distribute, possession of paraphernalia with intent to inject something, nuisance, conspiracy to violate the drug laws, possession of narcotics".
(3) Juror #46-Jason Evans – "a gun charge that's pending." [See also R.p. 12, ll. 8-23.
(4) Juror #28-Linda Cooper – " fraudulent check convictions, false statement to obtain benefits convictions, other fraudulent check convictions, just convictions of fraud and deceit."

Respondent submit that the presence of criminal convictions and/or pending criminal charges is a race neutral reason. See Martinez, 294 S.C. 72 (possible criminal records may be race-neutral reasons for a strike).

The remaining excluded juror, #167 - Marion Thomas was excused because he was unemployed. Solicitor Meadors noted that he had excluded Caucasian juror #166 Shawn McLaughlin also because he was unemployed, defeating any claim of pretext of similarly situated persons. The use of a strike against unemployed has been upheld by the court to be race neutral. See State v. Ford, 334 S.C. 59, 512 S.E.2d 500 (1999)(lack of employment or place or type of employment may be race-neutral reason for strike); State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990)(potential juror's knowledge of and association with defendant may be race-

18 Respondent further note that a review of the record of the pretrial inquiries reveals that none of the potential jurors that he seated and had an opportunity to strike expressed any desire on the record to avoid jury duty that term. Thus, had step three been involved there could not have been any showing of pretext because no similarly situated person was seated.

neutral reason for strike); State v. Green, 306 S.C. 94, 409 S.E.2d 785 (1991)(unemployment may be race-neutral reason for a strike).

For each of the reasons set forth previously, Respondent submit that this argument of Appellant is without merit. A new trial should be denied.

CONCLUSION

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

Respectfully Submitted,

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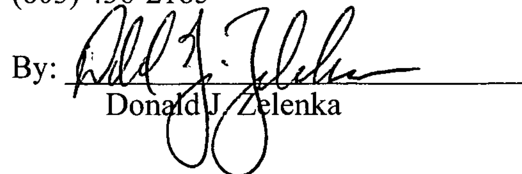
By: 
Donald J. Zelenka

March 25, 2014

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County
William Jeffrey Young, Circuit Court Judge

Appellate Case No. 2011-199366

THE STATE,

Respondent,

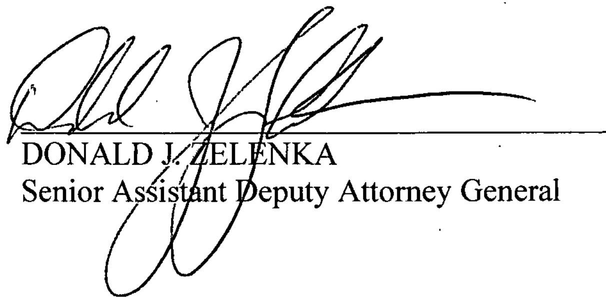
v.

DANIEL D'ANGELO JACKSON,

Appellant

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court entitled A Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.



DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

March 25, 2014

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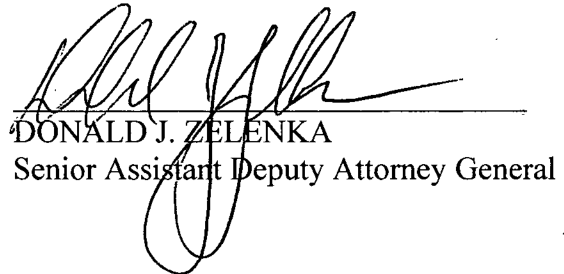
SC Court of Appeals

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the ***Final Brief of Respondent*** in the foregoing action by depositing copies in the InterAgency Mail to Carmen V. Ganjehsani, Appellate Defender, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 25th day of March, 2014.



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