ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Sumter County

William Jeffrey Young, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

DANIEL D'ANGELO JACKSON,

APPELLANT

APPELLATE CASE NO. 2011-199366

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# INITIAL BRIEF OF APPELLANT

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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?

## STATEMENT OF THE CASE

On September 11, 2008, the Sumter County Grand Jury indicted Appellant Daniel Jackson for murder and armed robbery. R. *.

On August 8, 2011, Appellant and his co-defendant, Reginald Canty, proceeded to trial before the Honorable William Jeffrey Young and a jury. Tr. 1. Arthur Wilder represented Appellant, and Garryl Deas represented the co-defendant, while Deputy Solicitor John Meadors represented the State.

On August 12, 2011, the jury found Appellant and his co-defendant guilty as charged. Tr. 1235, l. 18 – 1241, l. 14. The trial court sentenced Appellant to life imprisonment on the murder conviction and thirty years imprisonment on the armed robbery conviction. Tr. 1262, ll. 6-13. The trial court also sentenced the co-defendant to thirty years imprisonment on both convictions, to run concurrently. Tr. 1261, ll. 6-16.

This appeal follows.

## STATEMENT OF FACTS

### Background

On January 12, 2008, William Flexon died from gunshot wounds while delivering three pizzas to a vacant lot in a mobile home park in Sumter County. Based on the five statements given to law enforcement by Appellant's co-defendant, Reginald Canty, and the subsequent investigation by the Sumter County Sheriff's Office, Appellant and his co-defendant were charged with the murder and armed robbery of William Flexon and later tried jointly before a jury.

### Jury Selection (*Batson* Motion)

During jury selection, defense counsel informed the trial court, "Your Honor, we'd ask that the record reflect a motion to be heard later." Tr. 34, ll. 17-18. At the conclusion of jury selection, defense counsel moved to quash the jury panel pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), based on the State striking African-American jurors. Tr. 45, ll. 9-24; Tr. 47, ll. 9-22. The State struck eight African-American jurors: (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. Tr. 31 – 43.

Based on the assertion of racial discrimination, the trial court requested that the State give race-neutral reasons for striking the eight African-American jurors. Tr. 48, l. 2. Despite the solicitor's statement, that "every [juror] on this list had . . . a serious conviction or charge[,]" the solicitor failed to show a conviction or pending charge for half of the African-American jurors struck: (1) #157—Patricia Williams; (2) #167—Marion Thomas; (3) #32—Essie Dallas; and (4) #140—Walnetta Spears. Tr. 48, l. 8 – 50, l. 18.

(1) Juror #157—Patricia Williams: The solicitor claimed, "[I]t was obvious to me she wanted off. And everyone that wanted off, that is my reason that I chose not to present her." Tr. 48, l. 22 – 49, l. 5.

(2) Juror #167—Marion Thomas: The Solicitor noted that this juror was unemployed and that he struck an unemployed white male. Tr. 49, l. 24 – 50, l. 3.

(3) Juror #32—Essie Dallas: The solicitor maintained, "[I]n my notes . . . said she did not want to serve." Tr. 50, ll. 7-9.

(4) Juror #140—Walnetta Spears: The solicitor failed to provide an explanation for striking this juror.

Defense counsel then told the trial court, "If you find those reasons satisfactory, I have nothing else to say." Tr. 51, ll. 1-2. The trial court ruled, "Well, I looked at the jury ... you're not entitled to the perfect jury or to one of all - - but certainly the ones who have pending charges, I find that to be race neutral and deny your motion. . . . And for your record, your motion is denied." Tr. 51, ll. 3-12.

***Jackson v. Denno* Hearing**

Pre-trial, a hearing was held pursuant to *Jackson v. Denno*, 378 U.S. 368 (1964), to determine the admissibility of the five statements made to law enforcement by Appellant's co-defendant, Reginald Canty. Tr. 114 – 186; State's Exhibit # 3 (Statement by Canty); State's Exhibit # 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." Tr. 186, ll. 6-14.

**Motion for Severance of Joint Trial**

Defense counsel moved for severance of Appellant's joint trial because co-defendant's statements to law enforcement and Appellant's right to cross-examine and confront witnesses against him. Tr. 184, l. 11 – 186, l. 2. Defense counsel argued that he could not properly attack the co-defendant's credibility in making those five statements to law enforcement in a joint trial, particularly when the statements contained varying levels of Appellant's culpability in the murder and armed robbery. Tr. 184, l. 19 – 185, l. 9. Defense counsel also argued that a joint trial denied Appellant his right to a fair trial because redacting Appellant's name from his co-defendant's statements cannot cure the prejudice created by the statements if the co-defendant does not testify in this joint trial. Tr. 185, l. 10 – 186, l. 2. The trial court denied defense counsel's motion for severance of Appellant's joint trial. Tr. 187, l. 23 – 188, l. 2.

**First Motion for a Mistrial**

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

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

Tr. 386, ll. 3-7. Defense counsel contemporaneously objected, and outside the presence of the jury, moved for a mistrial. Tr. 387, 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. Tr. 386, l. 18 – 387, l. 7. The trial court noted, "Well, how is it prejudicial for your client? He's a defendant in the courtroom. I mean, they [the jury] would have to suspect that at some point in time his [Appellant's] name would come into play." Tr. 387, 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." Tr .387, ll. 12-15. The trial court refused to grant the mistrial motion, but agreed to strike the witness' answer. Tr. 388, ll. 5-8. The trial court also granted defense counsel's request for a curative instruction. Tr. 388, l. 15 – 389, l. 8.

***Bruton* Redactions and *Crawford***

At trial, the State redacted the co-defendant's statements by replacing the references to Appellant's name with inserting "another person" in its place. Tr. 602, l. 9 – 607, l. 8. The trial court found the redactions satisfied the requirements set forth in *Bruton*, 391 U.S. 123. Tr. 607, ll. 9-10. Defense counsel objected and argued that the redactions do not satisfy *Bruton* and prevent defense counsel from cross-examining the co-defendant. Tr. 607, l. 16 – 608, l. 8. The trial court overruled defense counsel's objection. Tr. 608, ll. 8-9. The co-defendant's statements were subsequently entered into evidence over defense counsel's objection and were read aloud to the jury. Tr. 620, l. 19 – 621, l. 3; Tr. 640, ll. 4-9; Tr. 644, l. 22 – 645, l. 3; Tr. 898, ll. 8-13; Tr. 902, ll. 20-25; State's Exhibits # 3, # 5, # 7, # 8, # 9.

The State failed to redact references to Appellant's race and gender in the co-defendant's statements. Tr. 629, l. 24 – 632, l. 22; Tr. 635, l. 11 – 638, l. 10; Tr. 643, l. 10 – 644, l. 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 Appellant's gender and the co-defendant's familiarity with Appellant: "The pizza man was met by 3 males with hoodies, ***[another person] was one of the males*** and I don't know who the other two were." (emphasis added). When examining State's Exhibit # 5 and # 7, these statements reveal Appellant's race and gender ("black male"). In State's Exhibit # 9, the solicitor failed to redact Appellant's nickname: "j-boy." The solicitor also read and emphasized the importance of the co-defendant's statements during his closing argument. Tr. 1187, l. 6 – 1211, l. 16.

Furthermore, the co-defendant's statements note that Appellant a/k/a "another person" bought a Little Debbie snack cake from a convenience store with the co-defendant prior to the murder. Tr. 615, l. 15 – 616, l. 5; Tr. 629, l. 24 – 632, l. 22; Tr. 635, l. 11 – 638, l. 10; State's Exhibits # 3; State's Exhibit # 5. Notably, the State established that, *prior* to the introduction of the co-defendant's statements, Appellant bought a Little Debbie snack cake while in a convenience store prior to the murder. Tr. 317, l. 18 – 333, l. 8. The trial court sustained defense counsel's objection after the solicitor sought to enter a little Debbie snack wrapper into evidence. Tr. 326, ll. 9-20. Counsel for the co-defendant also established that the Little Debbie snack cake was sold to the "fairer skinned gentleman." Tr. 332, l. 8 – 333, l. 6. The convenience store clerk testified on cross-examination that he had no idea if the Little Debbie snack wrapper marked as State's Exhibit # 24 was the snack cake purchased on the night of the murder. Tr. 344, l. 6 – 345, l. 9.

The solicitor later sought to enter pictures of a Little Debbie snack cake wrapper, and defense counsel objected to the admissibility of these photographs. Tr. 418, l. 7 – 419, l. 25. The trial court stated, "I'll rule on that at the appropriate time." Tr. 420, ll. 3-4. The solicitor then established and focused on the fact that a Little Debbie cake wrapper was

found in the trailer park after the murder (one-hundred and thirty-seven feet away from the decedent's van). Tr. 431, l. 17 – 433, l. 6; Tr. 446, ll. 10-15; Tr. 452, l. 22 – 453, l. 2; Tr. 459, l. 1 – 460, l. 19; Tr. 472, l. 16 – 476, l. 22; Tr. 995, l. 18 – 1001, l. 20. Investigator Raymond Mackessy admitted on cross-examination that no fingerprints were found on the Little Debbie Snack wrapper and that he does not know how the snack wrapper got there. Tr. 460, ll. 8-19; Tr. 475, l. 20 – 476, l. 22. The trial court ultimately admitted the Little Debbie snack wrapper and photograph of the snack cake into evidence over defense counsel's objection. Tr. 1000, l. 1 – 1001, l. 20; State's Exhibit # 24; State's Exhibit # 85; State's Exhibit # 86. Both the solicitor and counsel for the co-defendant reiterated that Appellant purchased the Little Debbie snack cake wrapper in their closing arguments. Tr. 1153, l. 21 – 1154, l. 5; Tr. 1206, ll. 9-14.

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

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

Tr. 909, ll. 1-11 (emphasis added).

**Second Motion for a Mistrial**

At the close of the State's case, defense counsel moved for a directed verdict, and in the alternative, a mistrial: "Either the statements have been ***improperly redacted*** in order to

get some circumstantial evidence . . . [, o]r there is no evidence in the record pertaining to [Appellant's guilt]." Tr. 1015, l. 19 – 1019, l. 12 (emphasis added). Defense counsel noted that the State failed to find any fingerprints or DNA linking Appellant to the crime scene or the items allegedly involved in the offense.[1] Tr. 1016, ll. 15-20. The trial court denied both the motion for a directed verdict and the motion for a mistrial. Tr. 1020, ll. 13-21.

**Renewed Motions for a Mistrial and Motion for a New Trial**

Defense counsel renewed his prior motions for a mistrial and subsequently moved for a new trial after the jury found Appellant guilty as charged. Tr. 1126, l. 1 – 1127, l. 21; Tr. 1244, l. 24 – 1245, l. 6. Defense counsel argued:

> [T]he only logical inference would be that the jury must have decided to use those statements that Mr. Canty [co-defendant] gave against Mr. Jackson [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.

Tr. 1245, 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." Tr. 1245, l. 25 – 1246, l. 2. The trial court denied the renewed motion for a mistrial and the motion for a new trial. Tr. 1247, 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. R. *. The trial court denied the motion for reconsideration in a written Order on August 24, 2011. R. *.

[1] Tr. 413; Tr. 453 – 498; Tr. 781 – 793; Tr. 810 – 811; Tr. 838 – 839.

## ARGUMENT

**I. The trial court erred 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.**

"The Confrontation Clause of the Sixth Amendment, which was extended to the states by the Fourteenth Amendment, guarantees the right of a criminal defendant to confront witnesses against him, and this includes the right to cross-examine witnesses." *State v. Holder*, 382 S.C. 278, 283, 676 S.E.2d 690, 693 (2009); *See* U.S. Const. amends. VI and XIV. In *Crawford v. Washington*, 541 U.S. 36, 50-51 (2004), the United States Supreme Court held that testimonial out-of-court statements are not admissible under the Confrontation Clause unless the witness is unavailable and the defendant had prior opportunity to cross-examine the witness. In *Bruton v. United States*, 391 U.S. 123, 126-137 (1968), the Court held that a non-testifying co-defendant's confession that inculpates another defendant is inadmissible at their joint trial, even if the jury is instructed that the confession can only be used as evidence against the confessor, because of the substantial risk that the jury would look to the incriminating extrajudicial statements in determining the other's guilt.

In *Richardson v. Marsh*, 481 U.S. 200, 207-08 (1987), the Court clarified that the rule announced in *Bruton* applies only when the co-defendant's statement implicates the defendant "on its face" and does not apply to statements that only become incriminating when linked to other evidence introduced at trial. The *Richardson* court also held that an adequate redaction cures a *Bruton* violation:

> Even more significantly, evidence requiring linkage differs from evidence incriminating on its face in

> the practical effects which application of the Bruton exception would produce. If limited to facially incriminating confessions, Bruton can be complied with by redaction – a possibility suggested in that opinion itself. If extended to confessions incriminating by connection, not only is that not possible, but it is not even possible to predict the admissibility of a confession in advance of trial.

*Richardson*, 481 U.S. at 208-09 (citation omitted); *See State v. Page*, 378 S.C. 476, 482, 663 S.E.2d 357, 359 (Ct. App. 2008) (stating redactions are a tool to allow the admission of a co-defendant's confession against the confessor in a joint trial because it permits the confession to be used against the non-testifying confessor, while not implicating the co-defendant). Notably, the statements in *Richardson* did not directly refer to the defendant; instead, the statements became incriminating only when linked to other evidence developed at trial. *Id.* at 196.

In *Gray v. Maryland*, 523 U.S. 185 (1998), the Court considered *Bruton's* application when the redaction consists of replacing the defendant's name with an obvious blank space, a symbol, or a word such as "deleted." The *Gray* Court noted that the *Richardson* decision had limited the scope of *Bruton* to instances where the reference to the defendant was on the face of the co-defendant's statement. Yet, the *Gray* Court held that a statement which "substituted blanks and the word 'delete' for the petitioner's proper name[] falls within the class of statements to which *Bruton*'s protections apply." *Id.* at 197. The *Gray* Court reasoned that a trial court must look at the *type* of inferences which are necessary to make a connection to the defendant, not the fact that there are inferences, to determine the applicability of *Bruton*. *Id.* at 196. The *Gray* Court stated, "*The inferences at issue here involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences*

*that a jury ordinarily could make immediately, even [if the statement was] the very first item introduced at trial.*" *Id* (emphasis added). Thus, the *Gray* Court held that the statements applied under *Bruton* because the statements implicated the defendant the same as if there was a direct reference, and the connection did not depend on other evidence introduced at trial. *Id.* at 196-97.

Similarly, in *State v. Holder*, 382 S.C. 278, 285-86, 676 S.E.2d 690, 694 (2009), our Supreme Court found the substitution of Holder's name with the pronoun "she" was insufficient to obscure her identity because the jury could readily determine the statement referred to her as she was the only female defendant. The *Holder* court held that the redaction was analogous to the redactions in *Gray* because, despite the redaction, it was apparent the co-defendant was referring to Holder, and the inference was one that was obvious even without relying on the other testimony developed at trial. *Id.* Therefore, the *Holder* court found the admission of the redacted statement violated Holder's rights under the Confrontation Clause because her co-defendant did not testify and was not subject to cross-examination. *Id.* at 286, 676 S.E.2d at 694.

In this case, the trial court violated Appellant's 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. Specifically, the trial court erred in admitting into evidence five statements made by Appellant's non-testifying co-defendant without adequately redacting the portions implicating Appellant, particularly when the solicitor read the non-testifying co-defendant's statements aloud to the jury. Tr. 602, l. 9 – 608, l. 9; Tr. 620, l. 19 – 621, l. 3; Tr. 640, ll. 4-9; Tr. 644, l. 22 – 645, l. 3; Tr. 898, ll. 8-13; Tr. 902, ll. 20-25; State's Exhibits # 3, # 5, # 7, # 8, # 9. *See State v. Martin*, 292 S.C. 437,

439, 357 S.E.2d 21, 22 (1987) (noting "[t]he constitutional right to confront and cross-examine witnesses is essential to a fair trial in that it promotes reliability in criminal trials and insures that convictions will not result from testimony of individuals who cannot be challenged at trial").

The redactions were inadequate because the State failed to redact references to Appellant's race and gender in the co-defendant's statements. For example, 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 State redacted Appellant's name, but failed to redact the reference to Appellant's gender and the co-defendant's familiarity with Appellant: "The pizza man was met by 3 males with hoodies, ***[another person] was one of the males*** and I don't know who the other two were." (emphasis added). When examining State's Exhibits # 5 and # 7, the statements reveal the Appellant's race and gender ("black male"). In State's Exhibit # 9, the solicitor failed to redact Appellant's nickname: "j-boy." The solicitor also read and emphasized the importance of the co-defendant's statements during his closing argument. Tr. 1187, l. 6 – 1211, l. 16.

Furthermore, the non-testifying co-defendant's statements implicated Appellant the same as a direct reference because of the irrelevant and prejudicial testimony and evidence presented at trial regarding the Little Debbie snack wrapper. Tr. 317, l. 18 – 333, l. 8; Tr. 344, l. 6 – 345, l. 9; Tr. 418, l. 7 – 420, l. 4; Tr. 431, l. 17 – 433, l. 6; Tr. 446, ll. 10-15; Tr. 452, l. 22 – 453, l. 2; Tr. 459, l. 1 – 460, l. 19; Tr. 472, l. 16 – 476, l. 22; Tr. 995, l. 18 – 1001, l. 20; State's Exhibit # 24; State's Exhibit # 85; State's Exhibit # 86. Appellant was further prejudiced by this irrelevant and prejudicial evidence because both the solicitor and counsel for the co-defendant reiterated that Appellant purchased the Little Debbie snack

cake wrapper in their closing arguments. Tr. 1153, l. 21 – 1154, l. 5; Tr. 1206, ll. 9-14.

The solicitor also elicited the following improper testimony from Officer Burnish:

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

Tr. 909, ll. 1-11 (emphasis added); *See State v. Johnson*, 390 S.C. 600, 703 S.E.2d 217 (2010) (finding the admission of a non-testifying co-defendant's testimonial confession to an investigator violation the *Bruton* doctrine). Therefore, regardless of the inadequate redactions, 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 the inference was one that was obvious even without relying on the other testimony presented at trial. *See Gray*, 523 U.S. 185; *see also Holder*, 382 S.C. at 285-86, 676 S.E.2d at 694.

## II. The trial court violated 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.

"The Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *Crawford v. Washington*, 541 U.S. 36, 42 (2004) (quoting U.S. Const. amend. VI). The Confrontation Clause is applicable to the states under the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400 (1965). The South Carolina constitution provides the same protection to criminal defendants. S.C. Const. art. I, § 14; *See State v. Green*, 269 S.C. 657, 661, 239 S.E.2d 485, 487 (1977). The right of confrontation is essential to a fair trial in that it promotes reliability in criminal trials and ensures that convictions will not result from testimony of individuals who cannot be challenged at trial. *California v. Green*, 399 U.S. 149 (1970); *State v. Gillian*, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004).

The Confrontation Clause guarantees the accused the right to confront those testifying against him in court and further defines the scope of the admissibility of statements against him made by witnesses out-of-court. *See Coy v. Iowa*, 487 U.S. 1012 (1988). A defendant exercises his right of confrontation through cross-examination, which has been described as the "greatest legal engine ever invented for the discovery of truth." *Green*, 399 U.S. at 158 (internal quotations omitted). Notably, statements given to police during the course of law enforcement's investigation are testimonial. *See Davis v. Washington*, 547 U.S. 813, 22 (2006) (holding the Confrontation Clause of the Sixth Amendment, as interpreted in *Crawford v. Washington*, does not apply to "non-

testimonial" statements not intended to be preserved as evidence at trial).

In addition to the *Bruton* violation presented in this case, 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. Tr. 114 – 186. 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.

The error in this case was not harmless for three reasons. First, the State failed to find any fingerprints or DNA linking Appellant to the crime scene or the items allegedly involved in the offense. Tr. 413; Tr. 453 – 498; Tr. 781 – 793; Tr. 810 – 811; Tr. 838 – 839. Second, the co-defendant's statements contained inconsistent information and varying levels of Appellant's culpability in the murder and armed robbery. Third, the co-defendant's statements coupled with the irrelevant and improper testimony and evidence presented at trial (e.g., the Little Debbie snack cake and Officer Burnish's testimony) denied Appellant his right to a fair trial by adversely affecting the jury's verdict.

**III. The trial court erred 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.**

Criminal defendants who are jointly tried are not entitled to separate trials as a matter of right, and a defendant who alleges he was improperly tried jointly must show prejudice before an appellate court will reverse his conviction. *See State v. Dennis*, 337 S.C. 275, 281, 523 S.E.2d 173, 176 (1999). The United States Supreme Court has held that severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt. *Zafiro v. United States*, 506 U.S. 534 (1993); *see also Dennis*, 337 S.C. at 282, 523 S.E.2d at 176. This Court has held that an 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. *Hughes v. State*, 346 S.C. 554, 559, 552 S.E.2d 315, 317 (2001). This Court has further held that cautionary instructions "may help protect the individual rights of each defendant and ensure that no prejudice results from a joint trial." *Dennis*, 337 S.C. at 280, 523 S.E.2d at 176. Motions for severance are addressed to the discretion of the trial court. *State v. Nichols*, 325 S.C. 111, 122, 481 S.E.2d 118, 124 (1997).

In *Bruton*, 391 U.S. 135-137, the United States Supreme Court held that an example of a specific trial right that may be prejudiced due to a joint trial is the constitutional right to cross-examination when a co-defendant's confession expressly implicates another co-defendant, but the confessor fails to testify during the trial. A curative instruction cannot remedy this violation. *Id.* Thus, the trial court erred 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. Tr. 184, l. 11 – 188, l. 2; *See State v. Singleton*, 303 S.C. 313, 315, 400 S.E.2d 487, 488 (1991) ("[W]e admonish trial judges to be cautious in allowing joint trials. While joint trials are permissible, trial judges must carefully consider problems which may arise from a joint trial, ***such as redacted statements, and must assure protection of a defendant's constitutional right to confront witnesses against him***.") (quoting *State v. Bellamy*, 293 S.C. 103, 359 S.E.2d 63 (1987) (emphasis added)).

## IV. The trial court erred 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.

In determining whether to grant a mistrial, our Supreme Court has noted that "[t]he less than lucid test is . . . whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment." *State v. Prince,* 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). Specifically, the trial court is to consider the following factors when ruling on a motion for mistrial: (1) the character of the testimony; (2) the circumstances under which it was offered; (3) the nature of the case; (4) other testimony in the case; and (5) "perhaps other matters." *State v. Craig*, 267 S.C. 262, 269, 227 S.E.2d 306, 310 (1976). Therefore, although the decision to grant or deny a mistrial is within the trial court's discretion, such discretion is not unfettered. *See State v. Edwards*, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007).

In this case, defense counsel moved for a mistrial on three separate occasions. The first mistrial motion occurred when Officer Thomas incorrectly stated that Appellant was a suspect based on her investigative report on the night of the murder. Tr. 386, l. 3 – 387, l. 15. The trial court refused to grant the mistrial motion, but agreed to strike the witness' answer and granted defense counsel's request for a curative instruction. Tr. 388, l. 5 – 389, l. 8. Defense counsel again 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. Tr. 1015, l. 19 – 1019, l. 12. The trial court denied the motion for a mistrial. Tr. 1020, ll. 13-21. Defense counsel then renewed his prior motions for a mistrial and subsequently moved for a new trial after the jury found Appellant guilty as charged. Tr. 1126, l. 1 – 1127, l. 21;

Tr. 1244, l. 24 – 1245, l. 6. Defense counsel argued:

> [T]he only logical inference would be that the jury must have decided to use those statements that Mr. Canty [co-defendant] gave against Mr. Jackson [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.

Tr. 1245, ll. 19-23. The trial court ultimately denied both motions. Tr. 1247, ll. 17-21.

Notably, the solicitor also elicited the following improper testimony from Officer Burnish:

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

Tr. 909, ll. 1-11 (emphasis added); *See State v. Johnson*, 390 S.C. 600, 703 S.E.2d 217 (2010) (finding the admission of a non-testifying co-defendant's testimonial confession to an investigator violation the *Bruton* doctrine). Appellant was further prejudiced by the admission of the irrelevant testimony and evidence presented at trial concerning the Little Debbie snack wrapper. Tr. 317, l. 18 – 333, l. 8; Tr. 344, l. 6 – 345, l. 9; Tr. 418, l. 7 – 420, l. 4; Tr. 431, l. 17 – 433, l. 6; Tr. 446, ll. 10-15; Tr. 452, l. 22 – 453, l. 2; Tr. 459, l. 1 – 460, l. 19; Tr. 472, l. 16 – 476, l. 22; Tr. 995, l. 18 – 1001, l. 20; State's Exhibit # 24; State's Exhibit # 85; State's Exhibit # 86.

Based on the prejudicial testimony and evidence presented at trial establishing Appellant as the "another person" in his non-testifying co-defendant's statements, "the ends of public justice" require that Appellant receive a new trial. *See* 75A Am. Jur. 2d Trial § 502 (1991) ("Whether an offer of improper evidence requires a reversal depends upon the character and importance of the evidence offered and the good or bad faith of counsel, and each case must be judged on its own circumstances. The vital inquiry usually is whether or not the verdict was substantially influenced by the impropriety.") (footnotes omitted). Accordingly, the trial court erred in denying Appellant's motions for a mistrial. *See Prince,* 279 S.C. 30, 33, 301 S.E.2d 471.

## V. The trial court erred 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.

A criminal defendant has the right to a fair trial by an impartial jury under the federal and state constitutions. *See* U.S. Const. Amend. VI; *see also* S.C. Const. art. I, § 14; *State v. Salters*, 273 S.C. 501, 257 S.E.2d 502 (1979. This guarantee includes the right to a selection process that is unbiased and fair to the defendant and the jurors. *See Powers v. Ohio*, 499 U.S. 400, 410-16 (1991). The United States Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment prohibits the prosecution from striking potential jurors on the basis of race. *Batson v. Kentucky*, 476 U.S. 79 (1986). Consequently, a trial court must hold a *Batson* hearing when members of a cognizable racial group are struck and the opposing party requests a *Batson* hearing. *See State v. Haigler*, 334 S.C. 623, 629, 515 S.E.2d 88, 90 (1999).

*Batson* and its progeny "protect the defendant's right to a fair trial by a jury of the defendant's peers, protect each venire person's right not to be excluded from jury service for discriminatory reasons, and preserve public confidence in the fairness of our system of justice by seeking to eradicate discrimination in the jury selection process." *State v. Rayfield*, 369 S.C. 106, 112, 631 S.E.2d 244, 247 (2006). Therefore, "[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder v. Louisiana*, 552 U.S. 472 (2008).

Furthermore, "[w]hether a *Batson* violation has occurred must be determined by examining the totality of the facts and circumstances in the record." *State v. Edwards*, 384 S.C. 504, 509, 682 S.E.2d 820, 822 (2009). The trial court's finding of purposeful

discrimination rests on its evaluation of demeanor and credibility. *Id.* at 509, 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 (1991)). This court will give the trial court's finding great deference on appeal and review the trial court's ruling under the "clearly erroneous" standard. *Id.*, 384 S.C. at 509, 682 S.E.2d at 822.

In *Purkett v. Elem*, 514 U.S. 765, 767 (1995), the United States Supreme Court set forth the procedures for a trial court to follow when a party challenges a peremptory strike. The South Carolina Supreme Court adopted that procedure in *State v. Adams*, 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996). Specifically, *Batson* challenges follow a three step process: (1) the opponent of the strike requests a hearing and asserts a *prima facie* case of racial or gender discrimination; (2) the proponent of the strike must offer a race or gender neutral explanation; and then (3) the opponent must show the race or gender neutral explanation was mere pretext. *See State v. Cochran*, 369 S.C. 308, 314, 631 S.E.2d 294, 298 (Ct. App. 2006).

The "second step of this process does not demand an explanation that is persuasive, or even plausible." *Purkett*, 514 U.S. at 767-68. The South Carolina Supreme Court recognized that the proponent of the strike does not carry "any burden of presenting reasonably specific, legitimate explanations for the strikes. *Adams*, 322 S.C. at 123, 470 S.E.2d at 371; *See Purkett*, 514 U.S. at 768 (finding unless discriminatory intent is inherent in the explanation, it is deemed race neutral at step two).

During the third step, the moving party "must show the reason offered, though facially race-neutral, was actually mere pretext to engage in purposeful racial discrimination." *Cochran*, 369 S.C. at 315, 631 S.E.2d at 298 (citing *Adams*, 322 S.C. at 124, 470 S.E.2d at 372). "This burden is generally established by showing similarly situated members of another race were seated on the jury." *Id.* "Unless the discriminatory intent is inherent in a fundamentally implausible explanation, the opponent of the strike must make a bona fide showing that the proponent of the strike seated a juror who shared nearly every quality with the struck juror other than race to establish pretext." *Id.*

However, "[u]nder some circumstances, the explanation given by the proponent may be so fundamentally implausible the trial judge may determine the explanation was mere pretext, even without a showing of disparate treatment." *Edwards*, 384 S.C. at 508-09, 682 S.E.2d at 822. Accordingly, if the trial judge determines the race and gender neutral explanations were mere pretext, then the trial court must quash the jury panel and select a new jury. *Cochran*, 369 S.C. at 315, 631 S.E.2d at 298; *See Riddle v. State*, 314 S.C. 1, 14, 443 S.E.2d 557, 565 (1994) (finding courts will examine the totality of the facts and circumstances in the record to determine if a *Batson* violation has occurred); *see also State v. Johnson*, 302 S.C. 243, 395 S.E.2d 167 (1990) (finding the composition of the jury panel is also a factor that may be considered when determining whether a party engaged in purposeful discrimination).

In this case, the totality of the facts and circumstances surrounding the selection of the jury demonstrates that a *Batson* violation occurred and that the trial court erred by not quashing the jury panel. Tr. 51, ll. 3-12; *See generally State v. Edwards*, 384 S.C. 504, 509, 682 S.E.2d 820, 822 (2009) (finding "[w]hether a *Batson* violation has occurred must be

determined by examining the totality of the facts and circumstances in the record"). Specifically, the solicitor struck eight African-American jurors and one white juror during jury selection. Tr. 31 – 43. Despite the solicitor's statement, that "every [juror] on this list had . . . a serious conviction or charge[,]" the solicitor failed to show a conviction or pending charge for half of the African-American jurors struck: (1) #157—Patricia Williams; (2) #167—Marion Thomas; (3) #32—Essie Dallas; and (4) #140—Walnetta Spears. Tr. 48, l. 8 – 50, l. 18.

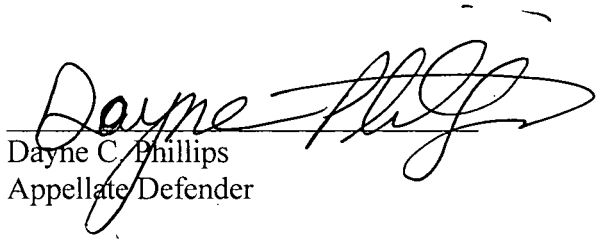
As for juror #157—Patricia Williams, the solicitor claimed: "[I]t was obvious to me she wanted off. And everyone that wanted off, that is my reason that I chose not to present her." Tr. 48, l. 22 – 49, l. 5. Concerning juror #167—Marion Thomas, the Solicitor noted that this juror was unemployed and that he struck an unemployed white male. Tr. 49, l. 24 – 50, l. 3. Regarding juror #32—Essie Dallas, the solicitor maintained, "[I]n my notes . . . said she did not want to serve." Tr. 50, ll. 7-9. Notably, the solicitor failed to provide an explanation for striking juror #140—Walnetta Spears.

Based the solicitor's insufficient explanations for striking the African-American jurors, the trial court ruled, "Well, I looked at the jury . . . you're not entitled to the perfect jury or to one of all - - but certainly the ones who have pending charges, I find that to be race neutral and deny your motion. . . . And for your record, your motion is denied." Tr. 51, ll. 3-12. Therefore, the trial court erred in refusing to quash the jury panel pursuant to Appellant's *Batson* motion and the final composition of the jury. Tr. 51, ll. 3-12; *See Batson*, 476 U.S. 79; *see also Edwards*, 384 S.C. at 508-09, 682 S.E.2d at 822.

## CONCLUSION

For the foregoing reasons, Appellant Daniel Jackson respectfully requests that this Court reverse his convictions and sentences and remand this case to the Sumter County Court of General Sessions for a new trial.

Respectfully submitted,



Dayne C. Phillips
Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of February, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Sumter County

William Jeffrey Young, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

DANIEL D'ANGELO JACKSON,

APPELLANT

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**DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL**

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Appellant proposes the following be included in the Record on Appeal:

(1) True–billed indictments;

(2) Transcript of proceeding: 1–51; 113–188; 287–715; 781–793; 801–818; 838–849; 886–987; 993–1026; 1126–1134; 1142– 1211; 1235–1241; 1244–1247; 1260–1262;

(3) State's Exhibit # 3 (Statement by Canty);

(4) State's Exhibit # 5 (Statement by Canty);

(5) State's Exhibit # 7 (Statement by Canty);

(6) State's Exhibit # 8 (Statement by Canty);

(7) State's Exhibit # 9 (Statement by Canty);

(8) State's Exhibit # 24 (Snack Wrapper);

(9) State's Exhibit # 85 (Photograph);

(10) State's Exhibit # 86 (Photograph);

(11) Court's Exhibit # 9 (Collection of Statements).

I certify that this designation contains no matter which is irrelevant to this appeal.

February 21st, 2013

Dayne C. Phillips
Appellate Defender

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CERTIFICATE OF SERVICE

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The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Columbia, SC 29201, this 21st day of February, 2013, and Daniel Jackson at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010.

Dayne C. Phillips
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 21st day of February, 2013.

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013.