

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Kershaw County

Honorable Clifton Newman, Circuit Court Judge

RECEIVED
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S.C. SUPREME COURT

DERRICK MCDONALD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000317

SUPPLEMENTAL APPENDIX

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Kershaw County

G. Thomas Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DERRICK MCDONALD,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the court committed reversible error by allowing into evidence the statements of appellant's non-testifying co-defendant without adequately redacting his claim of appellant's involvement, as this denied appellant his Sixth Amendment right to confront and cross-examine the witness, as interpreted by Bruton v. United States, 391 U.S. 123 (1968), and its progeny?

2.

Whether the court violated appellant's right to confrontation pursuant to Crawford v. Washington, 541 U.S. 36 (2004) by allowing into evidence the statement of appellant's non-testifying co-defendant, where he gave that statement to law enforcement during their investigation of the crime, and appellant never had the opportunity to confront and cross examine his co-defendant?

STATEMENT OF THE CASE

Appellant was indicted by the Kershaw County Grand Jury for the offenses of murder and first-degree burglary. His co-defendants, Robert Cannon and Christopher Whitehead, were indicted for the same offenses. R. 1553.

Their joint trial was held from May 6-13, 2008 before the Honorable G. Thomas Cooper Jr., and a jury. Marcus Whitlark and Nathan Sheldon represented appellant. Joshua Kendrick represented defendant Robert Cannon. Neil Riley and David Reuwer represented defendant Christopher Whitehead. The Solicitors were John Meadors, Joanna McDuffie and Ron Moak. R. p. 1.

At the conclusion of the trial on May 13, 2008 the jury found each of the three defendants guilty of murder and burglary in the first-degree. R. p. 1501, l. 17- 1502, l. 18.

Judge Cooper sentenced appellant and co-defendant Cannon to thirty-five years imprisonment concurrent on both charges. R. p. 1550, l. 15- 1551, l. 3. Based on co-defendant Christopher Whitehead's prior convictions for attempted armed robbery he was sentenced to life without parole for murder and burglary in the first-degree. R. p. 1548, l. 16- 1549, l. 15.

This appeal follows.

ARGUMENT

1.

The court committed reversible error by allowing into evidence that statement of appellant's non-testifying co-defendant, Robert Cannon, without adequately redacting his claim of appellant's involvement, as this denied appellant his right to confront and cross-examine the witness, as interpreted by *Bruton v. United States*, 391 U.S. 123 (1968), and its progeny. The redacted Cannon statement also violated the holding of *Crawford v. Washington*, 541 U.S. 36 (2004) because the statement given to a law enforcement officer during the course of the investigation of this crime, and appellant could not confront and cross examine the witness who gave the statement. (Issues one and two.)

Relevant Facts

Melissa Davey was the girlfriend of the decedent Joshua Zoch. She worked at the Sonic Restaurant on Hard Scrabble Road where the decedent also worked and had gotten her a job. Davey knew co-defendant Whitehead because he also worked at the Sonic. In addition, co-defendant Cannon also worked at the Sonic, and appellant was a former employee of the same Sonic. R. 560, l. 2 – 563, l. 3.

Davy and the decedent lived together for about two years in Kershaw County. She admitted they argued throughout their relationship. On the Friday night before the fatal encounter on December 13, 2006, Davy confirmed on cross-examination they had a party at her house “if that’s what you want to call it.” R. 563, l. 24 – 564, l. 9; R. 593, ll. 13-24.

Davy testified that the decedent left that night with two of his friends and he brought back crack cocaine. While the decedent was smoking crack Davy “slapped the crack pipe

out of his hand.” The decedent became very angry and he demanded that they all leave. Davy left with her friends Zack and Molly in Davy’s car. The two friends who went with the decedent to get the crack left in their own car. R. 595, l. 1- 596, l. 5.

Davy next spent some time together with the decedent on the following Monday, her day off at the Sonic. “I met up with Josh during the day that day.” Davy gave the decedent sixty dollars that day, and she learned he spent it on crack cocaine. Davy recalled the decedent came by the Sonic on Tuesday morning, December 12, 2006 “but I didn’t talk to him.” R. 611, l. 3 – 612, l. 11.

Co-defendant Whitehead was Davy’s crew leader. Davy readily admitted she did not get along with Whitehead but she said “[I] listened to him, what he had to say at work.” 4-18. Davy confirmed that the decedent had been cooperating with the police at the time because of his drug related problems. R. 613, l. 4 – 620, l. 15.

Zachary Waltemath testified that the decedent had come up to the Sonic on Monday to “talk to Melissa [Davy] because they had got in an argument over the weekend and they were trying to resolve things or something.” Waltemath recalled that on the night of Monday, December 12, 2006 Whitehead called him twice and “he wanted me to call Josh and see what he was doing because he wanted to go over there and fight him or something.” Waltemath told Whitehead he did not want to get involved “with anything like that.” R. 385, l. 17 – 388, l. 8.

On Wednesday, December 13, 2006 Waltemath went to work at about 10:00 a.m., and Davy was going to take time home after work at 5:00. “But first she wanted to stop by her house to get her toothbrush and extra clothes or something because she hadn’t been there [the house she shared with the decedent] in a few days . . . And we got there. And she

walked in the house, freaked out and saw him.” Waltemeth looked inside the house and saw the decedent lying on the floor. He was dead. R. 388, l. 9 – 391, l. 18.

Patricia Heathcoe owned and managed the Sonic. The decedent, co-defendant Cannon and appellant all worked for her at one time. Co-defendant Whitehead still worked for her on Wednesday December 13, 2006, the day the decedent’s body was discovered. Heathcoe said Whitehead was a good employee and he worked his full shift on Tuesday, December 12, 2006. However, Heathcoe said on Wednesday, December 13, 2006 Whitehead showed up with a scratch under his eye. The following day, Thursday, December 14, 2006 she said Whitehead “was limping around and he was wanting a Workman’s Comp form filled out on his leg.” Heathcoe related that Whitehead claimed to have been hurt at work and Whitehead “got real cocky” stating “a friend of his got screwed by falling and not getting a report filled out and ended up paying his own bills.” Heathcoe said she had her daughter processed Whitehead’s Workman’s Compensation form. R. 436, 16 – 448, l. 10.

The next morning, a Friday, Heathcoe got a call from her employee, Cecile Trapp, who told her “that Chris had walked out on her.” Heathcoe said she “freaked out” because she knew this left her employee alone at 6:55 a.m. at the Sonic. Heathcoe said she telephoned Whitehead and asked what was wrong with him having walked off of his shift leaving the other young woman alone. “[H]e was just ranting. You know, I don’t need that f’g job. I’ve got problems. I’m about to move to Aiken.” Heathcoe said all this surprised her because Whitehead had always been polite and a good employee. R. 445, l. 4 – 452, l. 12.

Cecile Trapp recalled that Whitehead was limping at work on Wednesday, December 13, 2006 and he had not been limping the day before. She recalled on the morning of Friday, December 15, 2006 Whitehead talked to his mom and “he kind of freaked out and was just like he had to go.” Trapp said she pleaded with Whitehead to stay but he said he had to leave. Trapp also remembered that Whitehead told her the day before that his mother took his telephone away. R. R. 478, l. 15 – 489, l. 23.

There was evidence others knew that the decedent had hit Davy in the past, but Davy would only acknowledge the decedent had hit her “one time.” R. 580, ll. 9-14. Trapp testified she had heard during this time period that “Whitehead was going to fight him [the decedent].” R. 489, ll. 16-23.

The state’s theory of the case was that Whitehead spearheaded the burglary and attack on the decedent and that co-defendant Cannon and appellant were involved for whatever reason. One motive was thought to be that the decedent was a police informant. Whitehead became belligerent with the police and he refused to cooperate. Michael Jenkins testified that he was in jail with Whitehead after the crime and he said Whitehead was bragging about having killed the decedent, and how “when they went back to school they were going to be respected and jaws were going to drop and all this and just bragging.” R. 1221, l. 10 – 1240, l. 6.

Bruton and Crawford

Co-defendant Cannon and Whitehead gave the police statements implicating Whitehead and themselves in the burglary that lead to the death of Joshua Zoch. See State’s exhibits 2 and 4 for identification, and State’s 103 and 104 (the redacted statements). R. p. 1570-1575. As seen, each of the three defendants had worked at the same Sonic restaurant

at one point. Helen Zoch, the decedent's mother, acknowledged the decedent was a police informant and "he was buying from someone that the police wanted to close down as a dealer." R. p. 1284, ll. 18-24.

Ms. Zoch testified that on December 12, 2006, the day before the murder, she tried to have the decedent check himself into Morris Village. However, the decedent wanted to talk to Davy, his girlfriend, whom he had just separated from, before he checked himself in Morris Village. Consequently, the decedent did not check into the facility that day. R. p. 1274, l. 8- 1281, l. 14.

As seen above, Davy went by the house she shared with the decedent on December 13, 2006 to collect some of her personal items. Helen Zoch said she was on the cell phone with Davy when Davy opened the door and found the decedent's dead body. Ms. Zoch instructed Davy to call 911 and told her "I'll be right there." R. p. 1281, ll. 6-14.

Throughout the trial the redaction issue was discussed. Defense counsel Whitlark joined in the objection to the state's proposed redaction. R. p. 432, ll. 4-12. Defense counsel later again joined in a further motion that the state's proposed redactions were insufficient under Bruton v. United States, 391 U.S. 123 (1968). R. p. 627, l. 2- 629, l. 14. Solicitor McDuffie claimed the state's redactions would solve the Bruton problem. She specifically maintained that Bruton would be satisfied "by taking the places where we have the names of the co-defendant crossed out and changing that or whiting it out and having Investor Catoe rewrite "another person." The solicitor claimed this would satisfy Gray v. Maryland, 523 U.S. 185 (1998). The judge said he understood that the state was proposing that the statements be redacted to use "another person" or 'we' or 'they.' The solicitor confirmed that was correct. R. p. 630, ll. 1-11.

Defense counsel stated such redactions were inadequate. Specifically counsel cited State v. Labarge, 275 S.C. 168, 268 S.E.2d 278 (1980), where the Supreme Court held the substitution of "Mr. X" for the defendant's name would not satisfy Bruton v. United States, 391 U.S. 123 (1968). R. p. 630, l. 22- 631, l. 2. Counsel argued jury "will absolutely know" that the statement was referring to the two other co-defendants. R. p. 631, ll. 4-17. Defense counsel repeatedly noted the Supreme Court's opinion in State v. Labarge and argued "our position is that [these redactions] do not satisfy Bruton." T. p. 632, l. 1- 634, l. 9. Defense counsel noted this was a "very powerful confrontation clause" rule issue and that allowing statements into evidence as presently redacted clearly implicated the co-defendants. R. p. 634, l. 10- 637, l. 2.

Defense counsel Sheldon for appellant also noted the heart of Bruton was that the jury should not be able to look at the other two defendants and conclude those must be the "some other people" in the statements. R. p. 637, ll. 3-16. Defense counsel argued the co-defendant's fundamental constitutional rights would be violated if the state's proposed redactions were allowed to stand. R. p. 638, l. 4- 643, l. 17. The judge noted that the objection to the redaction went to appellant McDonald, co-defendant Cannon and co-defendant Whitehead. However the judge overruled the objections to the state's proposed redactions. R. p. 643, ll. 12-22; State's exhibits 103 and 104. R. 1570-1575.

When investigator Danny Catoe went to read the redacted confession of Robert Cannon the objections were renewed. R. p. 735, l. 19 - 738, l. 21. In his statement Cannon noted that he went into the Sonic where the men either worked or had worked wearing a ski mask. He said they all knew this was a joke. "One person said they needed to beat Josh's

ass because he was a snitch.” The rest of the Cannon redacted statement was read to the jury as follows:

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

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

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

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

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

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

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

A: - - "fuck it, because we didn't find weed. And another person pushed the Christmas tree over and it fell on Josh. I told another person, 'let's go', and another person said, 'fuck, we didn't find anything', and another person got mad because we was not there. Before we left another person did take the house phone. I did put a towel on his head because

was bleeding so bad. And another person went to the freezer and got the chicken for a cold press. We all had on Latex gloves. One person had on purple gloves, and me and another -- me and someone else had on purple gloves, and I had clear and purple gloves on. And after that we leave the same way we went in. Then we drop off another person. Then I was dropped off. Then I guess he went home.

R. p. 739, l. 1- 740, l. 23.

It became strikingly obvious in this case that appellant was the person co-defendant Cannon was implicated. That was all the more true because Catoe testified he took the statement at "Robert Cannon's house on December 15, 2006, two days after the murder." R. p. 752, ll. 16-19. Catoe continued "after obtaining this statement, we then obtained an arrest warrant for Mr. Derrick McDonald." R. p. 754, ll. 5-11. Catoe repeated "after speaking with Mr. Cannon, we had another investigator obtain a warrant on Mr. Derrick McDonald." R. p. 755, ll. 8-16.

Appellant strongly maintained that his statement to the police was coerced and should not be considered despite the state's arguments to the contrary. Appellant's allegedly voluntary statement was then read to the jury. R. p. 767, l. 16- 769, l. 19; R. p. 773, l. 7- 776, l. 14.

On cross-examination Catoe denied that he told the seventeen-year-old appellant that if he would give a statement he would be a witness against Chris Whitehead rather than a defendant. R. p. 826, l. 6- 830 l. 12. Catoe also denied appellant told him he did not want to talk without a lawyer while Catoe was giving him these assurances. R. p. 831, l. 8- 832, l. 7. Later in his cross-examination, Catoe would only say he did not remember telling appellant he only wanted him as a witness against Whitehead. R. p. 836, l. 12-14. Catoe denied telling

appellant the trial in which he wanted him to be a witness against Whitehead was going to be “a death penalty trial” R. p. 826, ll. 9-11.

Catoe also admitted there were not any fingerprint, eyewitness, or forensic evidence linking the three co-defendants to the crime scene. R. p. 889, l. 11- 890, l. 11; R. p. 894, ll. 14-17.

Crawford

Defense counsel Sheldon also argued that statements in this case were clearly testimonial under Crawford v. Washington, 541 U.S. 36 (2004), and “we have no chance to cross-examine him.” R. p. 933, ll. 2-19. Sheldon said since appellant could not cross-examine co-defendant Cannon “about who the other people are” that this testimonial statement also violated Crawford v. Washington in addition to Bruton. R. p. 934, l. 5- 936, l. 20. Defense counsel Sheldon said “Crawford specifically applies to an interrogation” and he continued to argue that in addition to Bruton the redacted statements violated Crawford v. Washington. R. p. 936, l. 4-940, l. 6.

The solicitor continued to argue under Bruton the statements did not implicate appellant McDonald and that the defense was not entitled to any relief. R. p. 939, l. 18- 940, l. 18.

The judge later put on the record his opinion that the redacted statements did not violate Crawford v. Washington, and that there was no violation of appellant’s right to confrontation. R. p. 990, l. 10- 991, l. 17. Defense counsel Whitlark on behalf of appellant continued to argue that the statement of Cannon violated both Bruton and Crawford. R. p. 992, l. 3- 1005, l. 4.

DISCUSSION

I.

The court committed reversible error by allowing into evidence that statement of appellant's non-testifying co-defendant, Robert Cannon, without adequately redacting his claim of appellant's involvement, as this denied appellant his right to confront and cross-examine the witness, as interpreted by *Bruton v. United States*, 391 U.S. 123 (1968), and its progeny.

Defense counsel correctly argued that redacted statements in this case violated the holdings of *Bruton v. United States*, 391 U.S. 123 (1968) and *State v. Labarge*, 275 S.C. 168, 268 S.E.2d 278 (1980), See, also, *Gray v. Maryland*, 523 U.S. 185, 197 (1998); *Richardson v. Marsh*, 481 U.S. 200 (1987).

In this case, as in *Bruton*, during appellant's joint trial the admission of his non-testifying co-defendant's statement clearly implicated appellant in the crime and therefore violated his rights under the Confrontation Clause. The court in *Richardson v. Marsh* noted that *Bruton* can be complied with by redaction. Here, however, as in *State v. Holder*, 382 S.C. 278, 676 S.E.2d 690, 694 (2009), given the context of this record, Cannon's statement clearly implied appellant as another person involved in the burglary and murder.

Further, defense counsel correctly argued that this case was not any different than *State v. Labarge* where the state claimed the redaction of the co-defendant's name being replaced with "Mr. X" solved the problem. Defense counsel went to great lengths to repeatedly object to these redactions and to explain why they violated the co-defendant's rights to Confrontation to cross-examination.

Further, Catoe testified that he immediately after obtaining the inculpatory statement from co-defendant Cannon he obtained an arrest warrant for appellant. There should serious argument as to the identity of the person Cannon was implicating.

As seen, there was no forensic evidence in this case linking appellant to the crime and he did not appear to have any motive to participate in this crime against the decedent. There is no way to determine whether the jury considered appellant's statement or rejected it as coerced as defense counsel argued and the judge instructed. R. 1452, ll. 2225. Defense counsel Whitlark reminded the jury that appellant was only seventeen-years-old at the time, "and they're telling you, you want to be a witness in a case or do you want to be a defendant in a death penalty case." R. p. 1421, ll. 16-22. Defense counsel told the jurors that the police were putting their pride in obtaining a conviction above appellant's freedom. R. p. 1421, l. 25- 1422, l. 6.

Defense counsel Whitlark also reminded the jury that appellant was told that the police just wanted his help in convicting Whitehead. Counsel noted that appellant had also asked for and been denied an attorney, and that both of young Robert Cannon's parents were given the impression that they could leave town while they spoke with Cannon. Cannon was charged with murder in their absence. R. p. 1434, ll. 2-10.

II.

The redacted Cannon statement also violated the holding of *Crawford v. Washington*, 541 U.S. 36 (2004) because the statement given to a law enforcement officer during the course of the investigation of this crime, and appellant could not confront and cross examine the witness who gave the statement.

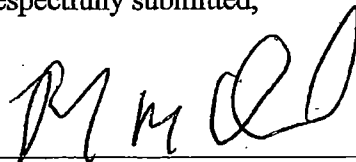
In addition to the statement of co-defendant Cannon being used against appellant in violation of Bruton it also violated Crawford v. Washington, 541 U.S. 36 (2004). As in Crawford v. Washington, co-defendant Cannon's statement was given during the course of a criminal investigation. Co-defendant Cannon's statement to the police implicated appellant in the burglary and murder and appellant never had an opportunity to confront and cross-examine Cannon.

This case involves a classic Crawford v. Washington violation since Cannon's statement to Catoe in the course of his criminal investigation was clearly testimonial. Since appellant's right to confrontation to under Bruton and Crawford were violated, appellant should be granted a new trial.

CONCLUSION

By reason of the foregoing arguments, appellant's convictions should be reversed and this case remanded to the Richland County Court of General Sessions for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

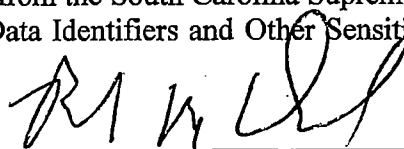
Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of June, 2010

CERTIFICATE OF COUNSEL

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

A handwritten signature in black ink, appearing to read "R. M. Dudek", written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

June 17, 2010

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

RESPONDENT,

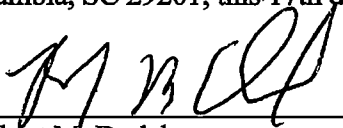
V.

DERRICK MCDONALD,

APPELLANT

CERTIFICATE OF SERVICE

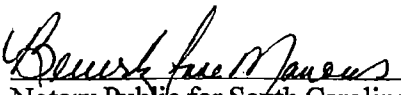
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 17th day of June, 2010.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of June, 2010.



(L.S.)
Notary Public for South Carolina

My Commission Expires: November 9, 2019

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of General Sessions
G. Thomas Cooper, Jr., Circuit Court Judge

The State,

Respondent,

vs.

Derrick McDonald,

Appellant.

FINAL BRIEF OF RESPONDENT

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I.

The trial judge did not err in admitting, in the joint trial, the statement of co-defendant Cannon which was properly redacted as to appellant's name and did not otherwise facially incriminate appellant.	10
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II.

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APPELLANT'S STATE OF ISSUES ON APPEAL

1.

Whether the court committed reversible error by allowing into evidence the statements of appellant's non-testifying co-defendant without adequately redacting his claim of appellant's involvement, as this denied appellant his Sixth Amendment right to confront and cross-examine the witness, as interpreted by Bruton v. United States, 391 U.S. 123 (1968), and its progeny?

II.

Whether the court violated appellant's right to confrontation pursuant to Crawford v. Washington, 541 U.S. 36 (2004) by allowing into evidence the statement of appellant's non-testifying co-defendant, where he gave that statement to law enforcement during their investigation of the crime, and appellant never had the opportunity to confront and cross examine his co-defendant?

(FBOA, p. 3).

RESPONDENT'S STATEMENT OF THE CASE

A Kershaw County Grand Jury indicted appellant, Derrick McDonald, for burglary first degree, and murder. (R. p. 1553-56). Marcus Whitlark, Esq., and Nathan Sheldon, Esq., represented appellant on the charges. A jury trial was held May 5-9, 2006, before the Honorable G. Thomas Cooper, Jr. Appellant was tried along with co-defendants Robert Cannon and Christopher Whitehead. After a break in the proceedings, the jury continued deliberations on May 13, 2009. They ultimately returned a verdict of guilty as charged as to all three defendants. (R. p. 1501, line 17 - p. 1502, line 15). The judge sentenced appellant to thirty-five (35) years imprisonment. (R. p. 1550, lines 15-21). This appeal follows.

RESPONDENT'S STATEMENT OF FACTS

On Tuesday, December 12, 2006, the victim, Joshua Zoch, was brutally murdered in his home. The evidence at trial established that the burglary and murder occurred at approximately 11:30 that night.

Zachary Waltemath, then an employee at the local Sonic along with co-defendant Whitehead, testified that at approximately 7:00 or 8:00 that night, Whitehead called him and asked him to call the victim "and see what he's doing because he wanted to go over there and fight him or something." Waltemath decline. Whitehead called back shortly after and asked if Waltemath had tried to call him. He responded he had not, and Whitehead indicated he wanted Waltemath to call him. Waltemath had "hung out" with Whitehead on several occasions. He was sure that it was Whitehead who called him that night. (R. p. 378, line 12 - p. 380, line 21; p. 384, line 3 - p. 387, line 10).

Allen Brown, a manager at the local Sonic, testified that all three co-defendants, appellant, Whitehead, and Cannon, were together that evening. At approximately 10:00 p.m., Whitehead, along with appellant, and Cannon, both of whom had formerly worked at the Sonic, were in the kitchen area. Cannon was wearing a ski mask, and was told to take it off. Whitehead, though an employee, was not working at that time. Brown told Whitehead that he should not be in the employee area when he was not actually working, and told the others that they could not be in the employee area either. Brown instructed all three to leave. (R. p. 319, line 12 - p. 324, line 14).

Christopher Rust, also an employee at Sonic who was working that same evening, confirmed that all three left at the same time. (R. p. 361, lines 1-22). Rust also recalled that Whitehead drove a car with "noticable" muffler noise. (R. p. 371, line 20 - p. 372, line 5).

At approximately 11:30 p.m., neighbor to the victim, Cosmo Baccamo, testified that he was outside with his son's dog and heard "a lot of knocking noise, loud, like somebody kicking something or slamming doors" and, "about ten minutes later," he heard "excited" and loud male voices, a door slam, and a car, with a loud muffler, take off. (R. p. 337, line 25 - p. 339, line 15).

Later that same night, at approximately 1:30, appellant went to Rust's home. He was upset and asked to stay the night at Rust's house. He claimed he had an argument with his mother. Rust allowed him to stay, then took him to his mother's home the next morning on his way to school. (R. p. 363, line 7 - p. 365, line 8).

Patricia Heathcoe, part owner of the Sonic, testified that on Wednesday, December 13, 2006, the day after the murder, Whitehead came to work at Sonic with a scratch under one eye, a noticeable limp, and complaining that his ankle hurt. He did not have the injuries the previous day when he had worked an early shift. Whitehead told Heathcoe he had "slipped and fell." He denied needing to go the doctor. (R. p. 443, line 19 - p. 445, line 23). On Thursday, Whitehead demanded that a Worker's Compensation claim be filed. Because business was slow, Heathcoe had intended to let Whitehead go home that day, but "he got real adamant. Whitehead didn't want to leave, you know, until the Workman's Comp form was filled out on him." He wanted to report his injuries as occurring on the 12th. Heathcoe noted that Whitehead never went to a doctor. (R. p. 446, line 15 - p. 448, line 17). On Friday, Whitehead walked out of work, leaving the crew short-handed. Heathcoe called Whitehead on his cell phone and he became belligerent:

... the first thing he said to me was, F Sonic. I said, "Chris, what is wrong with you?" And he started just ranting. I said, "you walked out and left Cecile by herself." I said, "Why would you do that?" And he was just ranting. You know, I don't need that f'g job. I've got problems. I'm about

to move to Aiken. And I was just trying to talk to him. I mean, he was just -
- I never heard him sound like that ever. ...

(R. p. 449, line 1 - p. 451, line 14).

"Cecile," as referenced in the above conversation, was Cecile Trapp. Trapp testified that she worked Tuesday morning with Whitehead and all was well. She went back to Sonic Tuesday night, to eat and check her schedule, and confirmed, like Rust, that Whitehead and Cannon came by the store that night, and that Cannon was wearing a ski mask. Whitehead was not limping either that day, or when she saw him later that night. On Wednesday, however, Whitehead came into work "complaining that his ankle was hurting, and he had a scratch on his face." Appellant told Trapp "that he had got into like a play fight with his cousin and that he hurt his ankle and his cousin accidentally scratched him on his face." He was also limping. Further, Whitehead advised Trapp that he intended to "pretend that he fell on grease and hurt his ankle so that Ms. Pat could pay for the hospital bills." (R. p. 476, line 13 - p. 479, line 25; p. 484, lines 20-24). On Friday, Whitehead was with Trapp to open the Sonic, when his mother drove up. After speaking with his mother, Whitehead "kind of freaked out and was just like, 'I have to go'." He would not tell Trapp what was happening, but simply left immediately. (R. p. 481, line 19 - p. 483, line 1).

Victim's longtime, live-in girlfriend, Melissa Davy, was absent from the victim's home at the time of the burglary and murder, the two having had a disagreement over victim's drug use. Victim had hosted a party at their home on Friday, December 8, 2006 that lasted into the early morning hours of Saturday, December 9, 2006. At approximately 2:00 a.m. that Saturday, Davy left with friends Zachary Waltermath and his sister Molly, after a fight about victim's drug use, specifically his smoking crack cocaine (though marijuana may also have "possibly" been used at the party, as well), and after his request that they leave the

house. (R. p. 563, line 13 - p. 565, line 17; 593, line 16 - p. 596, line 12; p. 610, line 15 - p. 611, line 2). Davy would later spend time with the victim on Monday, December 11, 2006. (R. p. 567, line 1 - p. 568, line 19). She last spoke to him when he called her at approximately 6:00 or 7:00 that night. (R. p. 569, lines 14-19). The next day, Tuesday, December 13, 2006, at approximately 5:30, p.m., after completing her work shift at Sonic, Davy went back to the victim's home with Zach and Molly. The lights were off and victim's car was backed into the garage, which was unusual for the victim and alerted Davy that things were not right. She called victim's grandmother, Helen Zoch, who had purchased the home for victim to rent, (R. p. 1271, lines 14-24), and stayed on the phone with the grandmother as she entered the home. She saw victim's lifeless body and called 911. (R. p. 572, line 9 - p. 575, line 23).

Helen Zoch testified that she had spent time with victim the day before the burglary and murder and hoped to help him with his drug problem. In fact, victim had planned to enter Morris Village but wanted to talk to Ms. Davy first. The next day, Ms. Zoch called at 7:30 in the morning, but had not gotten an answer. At approximately 2:00 p.m., she went by the home, noticed the victim's car was backed in the garage, which was unusual, but she did not try to enter the home. (R. p. 1272, line 6 - p. 1274, line 24; p. 1278, line 11 - p. 1280, line 11). She testified that she was aware that her grandson had worked with the police, making drug buys for them. (R. p. 1284, lines 9-24). (See also R. p. 619, lines 19-25).

Investigating officers found the victim's home a "complete mess" with the victim's body "in the middle of it." (R. p. 692, lines 13-17). The back door had been kicked in. (R. p. 675, lines 13-25). The investigation began to focus on Whitehead, appellant and Cannon. Whitehead informed the investigating officers he "didn't know a damned thing about"

victim's murder. (R. p. 717, line 18 - p. 718, line 5). Both appellant and Cannon similarly denied any direct knowledge or involvement in their initial statements to police. (R. p. 721, lines 21-25; p. 732, lines 14-25). However, Cannon later gave a detailed confession to officers, implicating Whitehead and appellant, which was, of course, redacted for presentation at trial to avoid *Bruton*¹ issues. The statement included not only the grisly facts of the vicious beating— such as the attack on the victim while he slept, dragging him off his couch, using the victim's bat to strike the victim on his head – but also that victim was selected because he was thought to be a “snitch” and for his drugs. Cannon's details included that one person took frozen chicken from the kitchen and place it on the victim's head wounds in an attempt to stop the bleeding, that they hit the victim with a glass object, that they first went to the local Walmart for supplies and used the purchased purple latex gloves during the attack and wore ski masks, and that the attack occurred at victim's home at approximately 11:30. (R. p. 748, line 25 - p. 752, line 15; State's Exhibits 2 and 103). Cannon later supplemented his statement voluntarily with a list of items he recalled taking from the home, including DVDs, a DVD player, presents, hair clippers, and cellphones, (R. p. 1022, line 16 - p. 1023, line 17), and gave an additional statement in which he admitted kicking the victim, (R. p. 1026, lines 3-16).

Appellant also confessed to the crime in detail. Like Cannon's statement, his statement was also redacted before introduction. (State's Exhibit 104). The statement referenced going to the local Wal-Mart and buying a ski mask and a box of purple gloves; that one of them called “Zach” to see if someone was home; that all of them kicked in a sturdy back door; that one person “picked up a glass bowl with flower petals in it, picked it

¹ *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620 (1968). See also *State v. Holder*, 382 S.C. 278, 283, 676 S.E.2d 690, 693 (2009).

up over his head and hit Josh in the head with it while Josh was asleep on the couch"; that another person dragged victim off the couch; that he repeatedly hit victim with his fists then hit him in the back of the head using the victim's bat; that they were searching for drugs and money; that another person kicked and stomped the victim, and, eventually, someone pulled a Christmas tree over on him. He also claimed someone else left the house with "plastic bags of stuff" and gave him some "DVD's and stuff." (R. p. 773, line 15 - p. 775, line 21). In particular, as to the beating, appellant confessed as follows (again, as reflected in the redacted statement read at trial):

... I first grabbed a bat that was against the wall and I started hitting Josh in the body. Then another person tried to stop me to ask Josh a question about where the money and dope was, and I couldn't stop the bat. I couldn't stop the bat and I hit Josh in the back of the head. I also think I hit him one time in the temple area of his head. Josh then started bleeding more and I got scared. That's when another person and another person started kicking and stomping Josh. ... The last thing I saw another person pushing the tree over on Josh...

(R. p. 775, lines 2-9).

Further, at the time of his arrest, when driving to the sheriff's department and before giving his detailed statement, appellant volunteered to officers that, "This is the way we came that night." (R. p. 954, line 4 - p. 955, line 3).

Whitehead, though he did not give a confession to officers, was twice overheard by another inmate, Michael Jenkins, at the detention center bragging about the killing, identifying the home where the murder occurred, and calling the victim's name. (R. p. 1221, line 10 - p. 1222, line 8). This caught Jenkins' attention as he had known the victim. (R. p. 1222, lines 9-20). A detention center officer confirmed that Jenkins had been in the cell next to Whitehead at the time the initial conversation was overheard. (R. p. 1257, lines 15-20).

Forensic pathologist Joel Sexton, M.D., testified that at autopsy, he identified "at

least six" and possibly eight "injuries or blows were inflicted to the head that were each capable of causing death," with wounds inflicted on the top and back of head and behind the left ear, along with abrasions and cuts to the face, injuries on legs, abrasions on knees and on the abdomen. (R. p. 1091, line 15 - p. 1096, line 8; p. 1098, line 19 - p. 1099, line 16; p. 1100, line 21 - p. 1105, line 4). From the wounds and autopsy and from looking at scene photos, the pathologist was able to opine that two blows were inflicted on the couch, but that the victim either came off, or was pulled off, the sofa and was hit on the floor with a "cylindrical and linear" object such as the bat (State's 99), and that he was hit on the head with a glass potpourri bowl, remnants of same still being on the couch. (R. p. 1123, line 17 - p. 1125, line 14). He also confirmed that testing showed a prior use of cocaine and marijuana. (R. p. 1127, lines 11-17).

Investigators obtained a copy of a receipt from the local Wal-Mart confirming a purchase of a ski mask and purple gloves on December 12, 2006 at 10:43 (R. p. 1058, line 7 - p. 1061, line 5). Ms. Davy testified that victim's grandparents had provided a bat to keep in their residence for protection. (R. p. 590, line 4 - p. 591, line 12). Ms. Zoch testified that she had recently replaced the back door to the home with another sturdier door prior to the burglary and murder. (R. p. 1282, line 17 - p. 1283, line 6). Photos from the scene also confirmed the use of the latex gloves, the bat, the placement of the frozen chicken near victim's head, the broken glass bowl, and the overturned lamp and Christmas tree. (R. p. 711, line 3 - p. 713, line 19; p. 1106, line 1-7). In sum, the physical evidence supported the detailed confessions of both Cannon and appellant, and the details overheard in appellant's detention center conversations.

ARGUMENT

I.

The trial judge did not err in admitting, in the joint trial, the statement of co-defendant Cannon which was properly redacted as to appellant's name and did not otherwise facially incriminate appellant.

Relevant Facts:

All three co-defendants, appellant, Whitehead and Cannon, were tried at the same time. Before the statements appellant and Cannon made to Investigator Catoe were offered into evidence, the State offered to redact, and did redact, all references to the other co-defendants in both statements.² (R. p. 629, line 16 - p. 630, line 20). Defense counsel objected, arguing that the redaction "would violate *Bruton* because the statement clearly implicates someone else and it's obviously prejudicial to the people who are sitting right here." (R. p. 631, lines 4-17).³ Defense counsel relied on *Bruton* and *State v. LaBarge*, 275 S.C. 168, 268 S.E.2d 278 (1980), and argued the offered replacement of appellant's name with the phrase "another person" was "no different than replacing the name with "Mr. X, which was criticized in *LaBarge*. (R. p. 632, line 11 - p. 633, line 5). The State clarified that *LaBarge* was a 1980 case, and further case law had defined the parameters of permissible redaction, such as *Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151 (1988). (R. p. 635, lines 20-24). Defense counsel recognized that current law supported the redaction of the name and

² Investigator Catoe first testified to what Cannon told him, (i.e. an oral statement), and then the written statement was identified and read to the jury. Appellant's brief quotes the oral statement as the written statement. (FBOA, pp. 11-12, citing R. p. 739, line 1 - p. 740, line 23). The written statement, as read, is actually on R. p. 748, line 25 - p. 751, line 18. Additionally, as will be seen *infra*, Cannon made other statements to Lt. Crawford that were handled separately. (See R. p. 924, line 20 - p. 926, line 8; p. 933, lines 2-8).

³ Counsel for Cannon, Mr. Kendrick, argued for all three defendants. (R. p. 627, lines 8-18; p. 643, lines 18-22).

substitution of the phrases "another guy" or "another person," as offered by the State. (R. p. 635, line 11- p. 636, line 6; p. 638, line 4 -p.639, line 23). Even so, defense counsel offered a redaction to change the facts of the confession to suggestion only single involvement in the burglary and murder, (for example, changing "We pulled up at Josh's house" to "I pulled up to Josh's about 11:30"). (R. p. 643, lines 2-11). After discussion on the current state of the law, the trial judge allowed the redaction. (R. p. 633, line 25-p. 643, line 17). Counsel objected to the statements when offered at trial. (R. p.738, lines 20-21).

On appeal, appellant argues "during appellant's joint trial the admission of his non-testifying co-defendant's statements clearly implicated appellant in the crime and therefore violated his rights under the Confrontation Clause." (FBOA, p. 14). Thus, he reasons, the redaction was inadequate. (FBOA, pp. 14-15).

Discussion:

The gist of the appellant's argument appears two fold. First, he apparently argues that, in generally, redaction can be made, but only if no reference to any co-defendant, either in name or action, remains in the statement.⁴ In other words, the statement cannot even infer the existence of another individual. Second, he argues that in his particular case, the investigating officer "testified that he immediately after obtaining the inculpatory statements from co-defendant Cannon he obtained an arrest warrant for appellant" which "should" create a "serious argument as to the identity of the person Cannon was implicating." (FBOA, p. 15). In other words, in light of this other testimony, the redaction was insufficient to hide the identity of the co-defendant. Respondent will address each point separately.

⁴ All three co-defendants have appealed. Respondent notes that co-defendant Whitehead has raised the same issue in his brief, and the issue is, as of this filing, pending before the Court in his appeal, as well.

As to his first point, appellant conceded below that current precedent does not require such radical redaction, and specifically argued for an extension of the present rule. (R. p. 638, line 4 - p. 639, line 21). The trial judge declined to extend the redaction rules noting his concern that such redaction would “change[] the meaning of the entire statement by creating the impression that these parties acted independently.” (R. p. 639, lines 10-15; p. 643, lines 12-17). The astute trial judge correctly identified the glaring unfairness in the requested extension. Not only does appellant’s offered extension of the redaction rules exceed that which appellant is entitled to in order to protect his right to confrontation, if allowed, the result would be to tinker with the facts, creating confusion and misleading of the jury. The trial judge appropriately denied the request to extend the redaction rules.

“The constitutional right to confront and cross-examine witnesses is essential to a fair trial in that it promotes reliability in criminal trials and insures [sic] that convictions will not result from testimony of individuals who cannot be challenged at trial.” *State v. Page*, 378 S.C. 476, 481, 663 S.E.2d 357, 359 (Ct.App. 2008), *rehearing denied* June 29, 2009, *quoting State v. Martin*, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987). “[A] non-testifying codefendant’s statement that expressly inculcates the defendant violates the defendant’s rights under the Confrontation Clause” and is inadmissible. *State v. Holder*, 382 S.C. 278, 283, 676 S.E.2d 690, 693 (2009), *citing Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620 (1968). “Redaction has come into play as a tool to allow admission of a co-defendant’s confession *against the confessor in a joint trial*. The point of redaction is to permit the confession to be used against the non-testifying confessor, while avoiding implicating his co-defendants.” *State v. Holmes*, 342 S.C. 113, 119, 536 S.E.2d 671, 674 (2000)(emphasis in original), *citing Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702 (1987); *Gray v.*

Maryland, 523 U.S. 185, 118 S.Ct. 1151 (1998).

Thus, if, in a joint trial, a non-testifying co-defendant's statement is admitted, referenced to the defendant must be redacted for the statement to be admissible. *State v. Martin*, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987). *See also State v. Avery*, 374 S.C. 524, 534, 649 S.E.2d 102, 107 (Ct.App. 2007) ("In this case, all statements from Avery's co-defendant that referred to Avery were redacted precisely so Avery's right to confront his witness would not be impinged."). Statements that connect the defendant "only when linked to other evidence introduced at trial," do not offend the *Bruton* rule. *Holder*, 382 S.C. at 284, 676 S.E.2d at 693. 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, 676 S.E.2d at 694. 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*. *Id.*, 382 S.C. at 285, 676 S.E.2d at 694. 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 v. Maryland*, 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, 280 (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).

Here, the State used the neutral phrase, “another person,” and avoided any *Bruton* violation. Respondent notes that the trial judge carefully reviewed the breadth and context of the statements for any other indication of direct implication. For instance, the judge noted that others were referenced in the statements such as “Leroy” and the generic term “we” could apply to Leroy and the co-defendant. (R. p. 641, line 12 - p. 642, line 5). (See also R. p. 749, lines 2-10). When requested to omit the statement that referenced another’s “blue Honda Accord,” that reference was omitted as witnesses had testified that Whitehead drove a blue Honda. (R. p. 645, lines 7-22). (See, for example, R. p. 481, lines 4-9). When the two redacted statements are reviewed, it is very clear that the statements only directly inculcate the statement’s maker. The remainder of each statement is very generic, and, though it may certainly be one interpretation, the statements do not actually even limit participation to three, such as the three defendants then on trial. (See R. 748, line 25 - p. 752, line 15; p. 773, line 15 - p. 775, line 21). (See also State’s Exhibits 103 and 104).

As to appellant’s second point – that Investigator Catoe testified that after taking Cannon’s statement, the investigating officer obtained an arrest warrant for appellant, thus, there should have been “serious argument as to the identity” of the person(s) referenced in Cannon’s statement – this argument is not preserved for appeal as it was not raised below. See, e.g., *State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (issue not preserved when one ground is raised to the trial court and another ground is raised on appeal). Moreover, appellant does not argue an inescapable inference; rather, he argues there

should have been "*serious argument* as to the identity" of the person(s). (emphasis added). Clearly, the redaction has proved its worth. Moreover, as established above, there is no infirmity if *other* evidence at trial indicates identity. *Holder*. At bottom, appellant is arguing that other evidence considered in connection with the statement may indicate identification. Precedent is clearly against him. Even so, the referenced passage is not represented in full in appellant's brief, and reviewing the investigator's response in context shows the testimony shows no direct link to Cannon's statement:

Q What happened next in the investigation? What did you do next?

A After obtaining this statement, we then obtained an arrest warrant for Mr. Derrick McDonald.

Q Now, you had previously talked to Derrick McDonald that day?

A I had.

Q Briefly?

A That's correct.

Q You told us. The oral statement you've already given us. Did you leave a card and say call me or anything?

A I left and told him if he could think of anything else when his mother got home to call me.

Q And did you receive a call from the McDonalds' household?

A I did receive a call from there.

Q When was that?

A This was shortly after I had taken this statement.

Q And as a result of that, what, if anything, did you tell the McDonald residence you would do?

A I told the McDonald residence that I would be there just as soon as I finished up what I was doing.

(R. p. 754, line 5 - p. 755, line 2).

When read in the context, the testimony shows continuing, and separate, lines of investigation at that point. It is far from an inescapable inference that Cannon clearly implicated appellant in Cannon's statement to investigating officers thus they were then, and only then, able to obtain a warrant. The testimony is read most naturally as an explanation of the order of investigation, not an inescapable conclusion of implication. There is no error.

Again, the redaction was proper and protected appellant's right to confrontation by ensuring that no facially incriminating statement was evident. Moreover, the trial judge also instructed the jury that evidence admitted solely for its connection to one co-defendant may only be considered in connection with that co-defendant, and not against the remaining co-defendants. (R. p. 1449, lines 8-12). Clearly, the statements came in against only their makers. Again, there could be no confrontation issue. However, even if the redaction was not sufficient, and this Court should find error, there is overwhelming evidence of guilt such that any error could only be harmless on this record.

"Violations of the Confrontation Clause are subject to a harmless error analysis." *Holder*, 382 S.C. at 285, 676 S.E.2d at 694. Though the considerations vary – including overwhelming evidence of guilt absent the error, whether the evidence was cumulative to other properly admitted evidence, and the overall importance of the testimony – to find a violation harmless, the error must be deemed harmless beyond a reasonable doubt in the context of the entire record. *Id.*, 382 S.C. at 285-286, 676 S.E.2d at 694-695. Here, guilt is not merely premised on inferences from Cannon's statement. Appellant confessed. Specifically, he confessed to participating in entry into the victim's home, and beating the victim about the head with a bat. (R. p. 773, line 15 - p. 775, line 21). Additionally, the

details of his confession were corroborated by the physical evidence. First, and foremost, of those details are the injuries to the victim's head. Forensic pathologist Joel Sexton, M.D., testified that at autopsy, he identified "at least six" and possibly eight "injuries or blows were inflicted to the head that were each capable of causing death," with wounds inflicted on the top and back of head and behind the left ear, along with abrasions and cuts to the face, injuries on legs, abrasions on knees and on the abdomen. (R. p. 1091, line 15 - p. 1096, line 8; p. 1098, line 19 - p. 1099, line 16; p. 1100, line 21 - p. 1105, line 4). Dr. Sexton also opined that two blows were inflicted on the couch, but that the victim either came off, or was pulled off, the sofa and was hit on the floor with a "cylindrical and linear" object such as the bat (State's 99), and that he was hit on the head with a glass potpourri bowl, remnants of same still being on the couch. (R. p. 1123, line 17 - p. 1125, line 14). Moreover, investigators obtained a copy of a receipt from the local Wal-Mart confirming a purchase of a ski mask and purple gloves on December 12, 2006 at 10:43 (R. p. 1058, line 7 - p. 1061, line 5). Ms. Davy testified that victim's grandparents had provided a bat to keep in their residence for protection. (R. p. 590, line 4 - p. 591, line 12). Ms. Zoch testified that she had recently replaced the back door to the home with another sturdier door prior to the burglary and murder. (R. p. 1282, line 17 - p. 1283, line 6). Photos from the scene also confirmed the use of the latex gloves, the bat, the broken glass bowl, and the overturned Christmas tree. (R. p. 711, line 3 - p. 713, line 19; p. 1106, line 1-7). These details are all mentioned in appellant's statement. (See R. p. 773, line 15 - p. 775, line 21). Lastly, witness testimony from Allen Brown and Christopher Rust placed appellant with the co-defendants immediately before the burglary and murder, (R. p. 319, line 12 - p. 324, line 14; p. 361, lines 1-22), and Rust saw a visibly upset appellant immediately after the burglary and murder, (R. p. 363,

line 7 - p. 365, line 8). In light of this solid evidence of guilt, any error in the redaction could only be harmless beyond a reasonable doubt.

However, the statements were properly redacted and there is no error. Appellant's argument to the contrary should be rejected.

II.

Because co-defendant Cannon's statement was properly redacted, there was no *Crawford* violation.

Relevant Facts:

Counsel for Cannon, who argued for all three co-defendant in regard to redacting the statements from appellant and Cannon taken by Investigator Catoe, (R. p. 627, lines 15-16), did not include an argument on *Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354 (2004) in regard to those statements. However, the statements were redacted pursuant to *Bruton* and thereafter read into the record. (R. p. 748, line 25 - p. 752, line 19; p. 773, line 15 - p. 775, line 21). Counsel for appellant argued, some three hundred (300) pages in the transcript later, that another statement from Cannon taken by Lt. Crawford (relating they all "hit the door" together but maintaining he was "still last,") violated *Crawford v. Washington*. (R. p. 936, line 4 - p. 937, line 17). The trial judge specifically noted that the objection was not raised as to the written statements that had already been redacted and admitted. (R. p. 936, lines 11-15). Counsel offered, "the other statements should have been suppress due to Crawford, too. But this is different...." (R. p. 936, line 22 - p. 937, line 1). The trial judge specifically asked about the later statement alone. (R. p. 937, lines 2-3). The judge eventually ended argument by directing the solicitor to call the next witness. (R. p. 940, lines 11-14). Before calling Lt. Crawford, however, the trial judge placed his ruling on the record:

... it is my opinion that a properly redacted statement; that is, the statement taken by this officer, Crawford -- its not a pun -- does not offend Crawford if it is properly redacted.

And as -- in other words, I'm not -- I cant's say; I certainly don't want to say that Bruton and Crawford address the same issues. But I think because your clients, if it's a properly redacted statement, does not involve or does not implicate either of the other two defendants, then I think it's admissible. ...

(R. p. 990, lines 10-22).

Discussion:

In *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354 (2004), 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 appellant and admitted only against Cannon — the defendant who made the statement — not against appellant. *Crawford* could not apply. Appellant's confrontation rights were protected by redaction under *Bruton*, *supra*.

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. Further, to prevent any possible misuse of the statement for its offered purpose, the trial judge specifically instructed the jury that evidence admitted solely for its connection to one co-defendant may only be considered in connection with that co-defendant, and not against the remaining co-defendants. (R. p. 1449, lines 8-12). Again, *Crawford* simply is not applicable, and appellant's confrontation rights were protected by redaction.

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 Chén*, 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 Cannon’s statement was properly redacted, (See R. p. 1026, lines 10-12, “We hit the back door but I was still last. The victim grabbed my leg during the incident and I kicked him.”), there is neither a *Bruton* or a *Crawford* issue. To the extent appellant is attempting to argue a violation of *Crawford* in regard to Cannon’s first statement, the issue is not preserved for review. *Frieburger, supra*. 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*.

Appellant’s argument to the contrary should be rejected.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment, conviction, and sentence of the lower court should be affirmed.

Respectfully submitted,

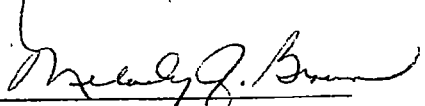
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June 17, 2010.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of General Sessions
G. Thomas Cooper, Jr., Circuit Court Judge

The State,

Respondent,

vs.

Derrick McDonald,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR. The undersigned also certifies that the Final Brief is in compliance with the South Carolina Supreme Court's Order of August 13, 2007.

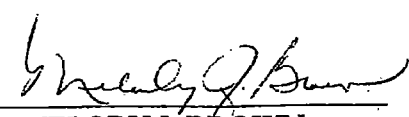
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June 17, 2010.
Columbia, South Carolina.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Derrick McDonald, Appellant.

Appellate Case No. 2008-104547

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

Opinion No. 5033
Heard June 19, 2012 – Filed September 12, 2012

AFFIRMED

Chief Appellate Defender Robert Michael Dudek, of
Columbia, for Appellant.

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

SHORT, J.: Derrick McDonald appeals from his convictions of murder and burglary in the first degree. He argues the trial court erred in admitting the statement of his non-testifying co-defendant, given to a law enforcement officer during the course of the investigation, without adequately redacting the portions of the co-defendant's statement implicating McDonald because it denied him of his right to confront and cross-examine the witness. We affirm.

FACTS

Josh Zoch died from multiple blunt force trauma to his head after being beaten with a baseball bat the night of December 12, 2006. Zoch, McDonald, Christopher Whitehead, and Robert Cannon all worked at the same Sonic Restaurant at one time. McDonald and Cannon both gave statements to police admitting their and Whitehead's involvement in the murder. Cannon told the police they had beaten Zoch to punish him for being a "snitch."¹ Whitehead told the police he did not know a "damn thing" about Zoch's murder.

McDonald, Whitehead, and Cannon were tried together as co-defendants in May 2008. None of the three co-defendants testified at trial. The jury found all three guilty, and the trial court sentenced Cannon and McDonald each to two concurrent terms of thirty-five years imprisonment for murder and first-degree burglary. The court sentenced Whitehead to two concurrent sentences of life without parole for murder and first-degree burglary.² This appeal followed.

LAW/ANALYSIS

McDonald argues the trial court erred in allowing Cannon's written statement into evidence without adequately redacting the portions of the co-defendant's statement implicating McDonald because it denied him his right to confront and cross-examine the witness. We disagree.

"The Confrontation Clause of the Sixth Amendment, which was extended to the states by the Fourteenth Amendment, guarantees the right of a criminal defendant

¹ Throughout the trial, it was mentioned that Zoch was a police informant who had committed at least one first-degree burglary.

² The trial court sentenced him to life without parole pursuant to section 17-25-45 of the South Carolina Code because of his 2005 guilty plea to attempted armed robbery. S.C. Code Ann. § 17-25-45 (Supp. 2011).

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 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 United States Supreme Court held a non-testifying co-defendant's confession that inculcates 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 Supreme Court clarified the rule announced in *Bruton* is a "narrow" one that applies only when the statement implicates the defendant "on its face," and the rule does not apply to statements that only become incriminating when linked to other evidence introduced at trial, such as the defendant's own testimony. In *State v. Evans*, 316 S.C. 303, 307, 450 S.E.2d 47, 50 (1994), our supreme court held *Bruton* did not bar a statement that "on its face" did not incriminate Evans even though its incriminating import was certainly inferable from other evidence that was properly admitted against him.

The *Richardson* court also noted *Bruton* can be complied with by the use of redaction:

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 redaction has come into play as a tool to allow 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 avoiding implicating the co-defendant). However, in *Gray v. Maryland*, 523 U.S. 185, 192 (1998), the Supreme Court noted the *Richardson* decision limited the scope of *Bruton* to instances where the reference to the defendant was on the face of the statement; therefore, a statement that substituted blanks and the word 'delete' for the petitioner's proper name falls within the class of statements to which *Bruton's* protections apply. The court explained:

Redactions that simply replace a name with an obvious blank space or a word such as "deleted" or a symbol or other similarly obvious indications of alteration, however, leave statements that, considered as a class, so closely resemble *Bruton's* unredacted statements that, in our view, the law must require the same result.

Id. at 192. Further, this court has held the "Confrontation Clause is not violated when a defendant's name is redacted but other evidence links the statement's application to the defendant, if a proper limiting instruction is given." *Page*, 378 S.C. at 482, 663 S.E.2d at 359.

At trial, the State argued replacing the co-defendants' names in Cannon's written statement with "another person" would resolve any confrontation problem.³ Cannon's attorney objected on behalf of all three co-defendants, arguing the limited redaction would not satisfy *Bruton* and *State v. LaBarge*, 275 S.C. 168, 268 S.E.2d 278 (1980), "because the statement clearly implicates someone else and it's obviously prejudicial to the people who are sitting right here." Further, he stated "there's an easier way to do it, which is simply to not put a reference to what someone else did." The following colloquy occurred between Cannon's attorney and the judge:

The Court: But that's not the law. . . . We've been over this. I mean, I've been over this many times. And the courts have said when replacing the offensive language with "the other person," "the other guy" or "we" or "they" when there's no reference, specific reference to a co-defendant, it satisfies *Bruton*.

³ Following a *Jackson v. Denno*, 378 U.S. 368 (1964), hearing, the judge ruled Cannon's statement was admissible.

Mr. Kendrick: Your Honor, and I understand that. I am just arguing my position for this record, is that that [sic] does not satisfy *Bruton*. I know you're ruling I'm wrong, but I have to put it on the record.

The judge ruled in favor of the State. Counsel renewed their objections when the State introduced Cannon's statement into evidence.

In summary, Cannon stated he and at least two others decided to "beat [Zoch's] ass because he is a snitch." The group arrived at Zoch's house at approximately 11:30 p.m. on December 12, 2006, and "busted" the side door in, finding Zoch asleep on the couch. Cannon's statement, when redacted, read:

[W]e went to Sonic. I had on a ski mask . . . We then left Sonic and went to the Two Notch Walmart [sic] and another person got a ski mask. So we went riding and another person said [']you know we need to do something with these ski mask[s'], and I ask, and another person ask [']like what?'] and another person said [']like beat [Zoch's] ass because he's a snitch['] and I told another person I didn't think he was a snitch. Another person then ask if me and another person wanted to ride and we said whatever. . . . That was about 11 pm. . . . We pulled up to [Zoch's] about 11:30 pm. . . . Another person went to the side door and another person busted it in. . . . [Zoch] was asleep on the couch and another person yelled [']hey Bitch,['] and when [Zoch] looked up, another person hit [Zoch] with a glass lamp. Right after that . . . another person drag[ged] him off the couch part of the way. Then another person started pressuring another person to hit [Zoch] with the bat that was in the house and another person then hit [Zoch] in the back of [his] head. After that [Zoch] was basicly [sic] crawling trying to get up . . . At that time another person kicked [Zoch] in the ribs and ask[ed] [Zoch] where the weed was and [Zoch] was just grunting. That[s] when another person ask[ed] me to check the room and we started pulling draws [sic] and another person flipped the

mattress . . . Then [Zoch] went unconscious and I got [Zoch] a towel and put it to his head. Another person said, [']fuck, we don't have anything['] and pushed the Christmas tree over on [Zoch]. Another person then got mad again and took the house phone. But before another person left, he got some frozen chicken from the freezer and put it on [Zoch]'s head to try and stop the bleeding. After that we went back out the same way we came in.

Cannon also answered some questions in his statement:

Q. Did you[,] another person[,] and another person have on gloves?

A. Yes.

Q. What kind of gloves?

A. Purple latex and I had on 2 pair WHT [sic] and purple ones on top.

Q. Where was the bat from that was used to hit [Zoch]?

A. It was in [Zoch's] house. I just looked over their [sic] and another person picked it up.

Q. What were you[,] another person[,] and another person wearing that night?

A. Black pants and shirts and ski mask.

Q. What color was the ski mask?

A. Mine was black and theirs was [sic] black or dark blue.

The court also gave the jury a limiting instruction:

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

On appeal, McDonald argues that given the context of the record, Cannon's written statement clearly implicated him as a person involved in the burglary and murder of Zoch. Therefore, its admission violated his rights under the Confrontation Clause. He argues this case is similar to *LaBarge*, 275 S.C. 168, 268 S.E.2d 278. In *LaBarge*, the State presented a confession given by his co-defendant that

implicated LaBarge in the crimes and, in accordance with *Bruton*, the statement was redacted in an attempt to exclude all direct references to LaBarge. *Id.* at 170, 268 S.E.2d at 279-80. Where the name "LaBarge" appeared, "Mister X" was substituted; however, in light of other testimony, "Mister X" pointed directly to LaBarge. *Id.* at 170, 268 S.E.2d at 280. Regardless, the court did not specifically hold the redaction would not have satisfied *Bruton*, but simply stated, "It can be forcefully argued that the method of redacting was ineffective." *Id.* 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 court held the redaction was analogous to that in *Gray* because, despite the redaction, it was apparent the co-defendant was referring to Holder, and the inference was one that could be made even without reliance on the other testimony developed at trial. *Id.* Therefore, the 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 contrast, in *United States v. Akinkoye*, 185 F.3d 192, 198 (4th Cir. 1999), the Fourth Circuit Court of Appeals held the defendants were not prejudiced because the confessions were retyped to replace the defendants' respective names with the neutral phrases "another person" or "another individual." Also, in *United States v. Vogt*, 910 F.2d 1184, 1191-92 (4th Cir. 1990), the Fourth Circuit Court of Appeals held that a redacted statement, in which the co-defendant's name was replaced with the word "client," did not on its face impermissibly incriminate the co-defendant even though the incriminating import was inferable from other evidence. The court further stated that even though it may not be easy for a jury to obey the cautionary instruction, "there does not exist the overwhelming probability of their inability to do so that is the foundation of *Bruton's* [rule]." *Id.* at 1192 (quoting *Richardson v. Marsh*, 481 U.S. at 208).

We find that the neutral phrase "another person" inserted into Cannon's statement avoided any *Bruton* violation. The redacted statement only implicates the statement's maker, and it does not limit the participants to three, which would implicate the three defendants on trial. Further, the court gave the jury a limiting instruction. Therefore, we find the trial court properly allowed Cannon's redacted statement into evidence.

McDonald also argues Cannon's written statement was a violation of *Crawford v. Washington*, 541 U.S. 36 (2004), because the statement was given during the course of an investigation, and McDonald did not have an opportunity to confront and cross-examine Cannon.

Counsel for Cannon argued for all three co-defendants concerning redacting Cannon's written statement to the police. Counsel's argument was based on *Bruton* and did not mention *Crawford v. Washington*. Counsel did not raise a *Crawford* violation until hundreds of pages later in the transcript in regard to an oral statement made by Cannon during a polygraph exam. The judge noted this was the first time *Crawford* was mentioned, and Cannon's previous redacted statement had already been admitted. Counsel stated, "[F]or the record, I'm going to go ahead and put on the record that the other statements should have been suppressed due to *Crawford*, too." Because the *Crawford* issue was not raised when Cannon's written statement was redacted and admitted, this issue is not preserved for our review. See *State v. Hoffman*, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review."); *State v. Burton*, 326 S.C. 605, 609, 486 S.E.2d 762, 764 (Ct. App. 1997) ("Failure to object when the evidence is offered constitutes a waiver of the right to object."); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (holding an issue is not preserved for appeal where one ground is raised below and another ground is raised on appeal).

CONCLUSION

Accordingly, McDonald's convictions for murder and burglary in the first degree are

AFFIRMED.

HUFF, J., concurs.

FEW, C.J., concurs in a separate opinion.

FEW, C.J., concurring: I concur in the majority opinion insofar as it holds that the use of the term "another person" satisfied the requirements of *Bruton v. United States*, 391 U.S. 123 (1968). However, I disagree with the majority's treatment of *Crawford v. Washington*, 541 U.S. 36 (2004). *Crawford* relates to the question of whether the Sixth Amendment right of confrontation is implicated by a particular statement. See *State v. Ladner*, 373 S.C. 103, 111, 644 S.E.2d 684, 688 (2007) (recognizing that *Crawford* held the confrontation clause is implicated *if* the statement is testimonial). The State agrees Cannon's statement is testimonial, and therefore McDonald had the right to confront Cannon. In my opinion, therefore, the *Crawford* issue the majority holds is unpreserved was never an issue at all, and there is no need to discuss *Crawford*. The question is properly analyzed under *Bruton*.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

DERRICK McDONALD,

APPELLANT

Appeal from Kershaw County

G. Thomas Cooper, Circuit Court Judge

Opinion No. 5033

Appellate Case No. 2008-104547

PETITION FOR REHEARING

Petitioner seeks rehearing pursuant to Rule 221(a), SCACR because this Court may have overlooked the fact that simply inserting "another person" into Cannon's redacted statement did not solve the Bruton v. United States, 391 U.S. 123, 126-137 (1968) problem because Cannon's statement focused on the Sonic restaurant and the three young men -- co-defendants at trial -- involved in the situation. Therefore, again, *in the context of this case* it was readily apparent that Cannon's statement implicated appellant Derrick McDonald and co-defendant Christopher Whitehead.

Further, and importantly, Investigator Catoe testified he took the statement at Cannon's house on December 15, 2006 -- two days after the murder -- and, "after obtaining this statement we then obtained an arrest warrant for Mr. Derrick McDonald." This Court respectfully must consider Cannon's statement in the context of all the evidence that was before the jury. Simply adding "another person" to the redacted statement did not solve the Bruton problem.

Crawford v. Washington

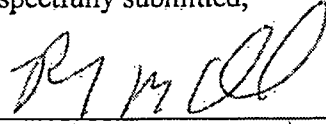
Further, appellant Derrick McDonald respectfully asserts that this Court should have considered the Crawford v. Washington, 541 U.S. 36 (2004) issue because defense counsel specifically noted that "Crawford specifically applies to an interrogation" and that appellant could not cross-examination co-defendant Cannon "about who the other people are, in his statement." R. 934, l. 5 -- 940, l. 6.

The judge **ruled** the redacted statements did not violate Crawford v. Washington, and that there was no violation of appellant's right to confrontation. R. 990, l. 10 -- 991, l. 17. The trial court ruled -- albeit incorrectly -- on the Crawford v. Washington issue, and this Court therefore should consider the Crawford v. Washington issue. "[I] certainly don't want to say that Bruton and Crawford address the same issue. But I think because your clients, if it's a properly redacted statement, does not involve or does not implicate either of the other two defendants, then I think it's admissible. That's what I think. I may be wrong but I've been wrong before." R. 990, ll. 10-23.

Respectfully, this Court's reference to Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998), for the proposition that an issue cannot be raised for the first time on appeal but must raised to and ruled upon by the trial judge simply has no application to the present case. The judge ruled the redacted statement did not violate Crawford v. Washington and Appellant Derrick

McDonald's right to confront and cross-examine co-defendant Cannon. Appellant McDonald respectfully requests rehearing.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

This 27th day of September, 2012.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

THE STATE,

RESPONDENT,

V.

DERRICK McDONALD,

APPELLANT

CERTIFICATE OF SERVICE

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



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 27th day
of September, 2012.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013.

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of General Sessions
G. Thomas Cooper, Jr., Circuit Court Judge

The State,

Respondent,

vs.

Derrick McDonald,

Appellant.

Appellate Case No. 2008-104547

RETURN TO PETITION FOR REHEARING

This Court issued an opinion in the captioned case on September 12, 2012, affirming Petitioner McDonald's convictions for murder and burglary first degree. *State v. McDonald*, Op. No. 5033 (S.C.Ct.App. filed September 12, 2012). Petitioner filed a petition for rehearing on September 27, 2012. By letter dated September 28, 2012, this Court requested Respondent file a return to the petition. Pursuant to Rules 221 and 240, SCACR, and at the request of the Court, Respondent now makes a return to the petition, and submits the petition for rehearing should be denied. In support of this position, Respondent would respectfully show the Court:

1. Petitioner first complains the Court erred in finding the substitution of the phrase "another person" for Petitioner's name in Co-Defendant Cannon's statement was insufficient to comply with *Bruton v. United States*, 391 U.S. 123 (1968). (Petition for Rehearing, p. 1). He fails to state with any "particularity the points supposed to have been overlooked or misapprehended by

the court” in the referenced opinion in support of his complaint. See Rule 221 (a), SCACR (“A petition for rehearing ... shall state with particularity the points supposed to have been overlooked or misapprehended by the court.”). At any rate, the record and case law fully support the Court’s decision.

This Court resolved the issue as follow:

We find that the neutral phrase “another person” inserted into Cannon’s statement avoided any *Bruton* violation. The redacted statement only implicates the statement’s maker, and it does not limit the participants to three, which would implicate the three defendants on trial. Further, the court gave the jury a limiting instruction. Therefore, we find the trial court properly allowed Cannon’s redacted statement into evidence.

(Opinion, at [unnumbered] p. 7).

It is well-established that “a non-testifying codefendant’s statement *that expressly inculcates* the defendant violates the defendant’s rights under the Confrontation Clause” and is inadmissible. *State v. Holder*, 382 S.C. 278, 283, 676 S.E.2d 690, 693 (2009), *citing Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620 (1968) (emphasis added). As this Court found, there is no question that Petitioner’s name was redacted from Cannon’s statement and nothing in the statement “expressly inculcates” Petitioner. However, Petitioner apparently argues the redaction was accomplished in such a manner that would still “expressly” identify Petitioner. According to Petitioner, the “problem” with the sufficiency of the redacted statement is that the “statement focused on the Sonic restaurant and the three young men....” (Petition for Rehearing, p. 1). However, the redaction rules do not require that a statement be altered as to the facts of the event or to eradicate any suggestion of another’s involvement – that would be patently misleading.

Petitioner conceded below that current precedent does not require radical redaction that would completely obscure reference to any accomplice and specifically asked for an extension of precedent. (See R. p. 638, line 4 - p. 639, line 21). The trial judge declined to extend the redaction rules noting his concern that it would essentially “create two factual scenarios with these statements that don’t reflect what the defendants told the police” which would be “deceptive to the jury,” and, simply, “that’s just not what the statements say.” (R. p. 639, lines 2-15). (See also R. p. 643, lines 2-17).

Petitioner apparently argues, though, that the redacted statement at issue here could implicate three actors which in turn could implicate the two co-defendants tried with Cannon. (See Petition for Rehearing, p. 1). Again, he has failed to show error. Statements that depend on identification “only when linked to other evidence introduced at trial,” do not offend the *Bruton* rule. *Holder*, 382 S.C. at 284, 676 S.E.2d at 693. As the Court found, nothing in Cannon’s statement definitively points to three actors. The record supports this finding.

Not only did the State fairly use the neutral phrase “another person,” but the trial judge also carefully reviewed the statements for any other indication of direct implication – including a link to who was at Sonic prior to the burglary and murder. For instance, the trial judge noted that a “Leroy” was referenced in Cannon’s statement, and use of the generic term “we” in describing who went to Sonic could apply to Leroy and Cannon. (R. p. 641, lines 12 - 24). (See also R. p. 749, lines 2-10). The remainder is very generic, and, though it may certainly be one interpretation, the statement does not actually limit participation to three, such as the three defendants then on trial. (See R. 748, line 25 - p. 752, line 15; p. 773, line 15 - p. 775, line 21). (See also State’s Exhibits 103 and 104). In short, the redaction, though it still allows the correct reading that another or others were involved,

the other or others were not directly identified by name or number. The redaction was proper.

Moreover, as noted by the Court, the trial judge also instructed the jury that evidence admitted solely for its connection to one co-defendant may only be considered in connection with that co-defendant, and not against the remaining co-defendants. (Opinion at [unnumbered] p. 7). (See also R. p. 1449, lines 8-12). This instruction ensured the statement would only be considered in regard to Cannon's participation. The redaction, thus, adequately protected Petitioner's rights, and the statement was fairly admitted against Cannon in this joint trial. There is no error.

2. Petitioner next complains that identification could be made, even with the redaction, by virtue of Investigator Catoe's testimony – essentially the testimony he obtained a warrant for Petitioner after taking Cannon's statement. (See Petition for Rehearing, p. 2). The Court does not reference this argument specifically in the opinion. Respondent submits, as it did in the Final Brief of Respondent, (see FBOR, p. 14), that such an argument is procedurally barred as it was not raised below. Even so, Petitioner's argument depends on a parsing of the testimony and is not factually sustainable when the testimony is reviewed in context:

Q What happened next in the investigation? What did you do next?

A After obtaining this statement, we then obtained an arrest warrant for Mr. Derrick McDonald.

Q Now, you had previously talked to Derrick McDonald that day?

A I had.

Q Briefly?

A That's correct.

Q You told us. The oral statement you've already given us. Did you leave a card and say call me or anything?

A I left and told him if he could think of anything else when his mother got home to call me.

Q And did you receive a call from the McDonalds' household?

A I did receive a call from there.

Q When was that?

A This was shortly after I had taken this statement.

Q And as a result of that, what, if anything, did you tell the McDonald residence you would do?

A I told the McDonald residence that I would be there just as soon as I finished up what I was doing.

(R. p. 754, line 5 - p. 755, line 2).

When read in the context, the testimony shows continuing, and separate, lines of investigation at that point. It is far from an inescapable inference that Cannon clearly implicated Petitioner in Cannon's statement to investigating officers thus they were then, and only then, able to obtain a warrant. The testimony is read most naturally as an explanation of the order of investigation, not an inescapable conclusion of implication.

At bottom, Petitioner is arguing that other evidence considered in connection with the statement may indicate identification which violates *Bruton*. Again, precedent is clearly against him. *Holder*, 382 S.C. at 284, 676 S.E.2d at 693 (statements that connect the defendant "only when linked to other evidence introduced at trial," do not offend the *Bruton* rule"). Even so, reviewing the investigator's response in context shows the testimony shows no inescapable link to Cannon's statement in light of the various other parts of the investigation. There is no error.

3. Petitioner next complains the Court erred in finding his issue raising a *Crawford v. Washington*, 541 U.S. 36, 59 (2004) violation was procedurally barred. He argues that because the trial judge ruled on the issue, the issue could not be procedurally barred. (Petition for Rehearing, p. 2). Petitioner is incorrect in his reading of the record.

Cannon's written statement was redacted pursuant to *Bruton* and thereafter read into the record. (R. p. 748, line 25 - p. 752, line 19). Defense counsel argued, some three hundred (300) pages in the transcript later, that another statement from Cannon taken by Lt. Crawford (relating they all "hit the door" together but maintaining he was "still last,") violated *Crawford v. Washington*. (R. p. 936, line 4 - p. 937, line 17). The trial judge specifically noted that the objection was not raised as to the written statement that had already been redacted and admitted. (R. p. 936, lines 11-15). Counsel offered, "*the other statements* should have been suppress due to Crawford, too. *But this is different....*" (R. p. 936, line 22 - p. 937, line 1) (emphasis added). The trial judge ruled in regard to this later statement:

... it is my opinion that a properly redacted statement; that is, the statement taken by this officer, Crawford - - its not a pun - - does not offend Crawford if it is properly redacted.

And as - - in other words, I'm not - - I cant's say; I certainly don't want to say that Bruton and Crawford address the same issues. But I think because your clients, if it's a properly redacted statement, does not involve or does not implicate either of the other two defendants, then I think it's admissible. ...

(R. p. 990, lines 10-22).

In his Final Brief of Appellant, Petitioner does not reference this later statement at all; rather, his issue challenges the written statement.¹ (See FBOA, pp. 10-12).

¹ Petitioner's brief quotes the statement at R. p. 739, line 1 - p. 740, line 23. (FBOA, p. 12). Investigator Catoe first testified to what Cannon told him, (*i.e.*, an oral statement), and then

As a first matter, Petitioner was obviously too late to raise the *Crawford* argument to prevent admissibility of Cannon's written statement because his written statement was *already in the record before the argument on Crawford in regard to another statement was ever raised*. Further, he does not contest the second statement from Cannon to Lt. Crawford in the Final Brief of Appellant. This Court correctly found the *Crawford v. Washington* issue procedurally barred. The issue was not properly preserved for review on the merits.

4. Petitioner lastly complains that *Crawford* should prevent admissibility of the redacted statement. (Petition for Rehearing, p. 2). Even if the procedural bar could be avoided, Petitioner would still not be entitled to any relief as *Crawford* is simply not applicable.

In *Crawford*, 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. However, the statement at issue here was redacted as to Petitioner and admitted only against Cannon — the defendant who made the statement — not against Petitioner. *Crawford* could not apply. See also *State v. Holmes*, 342 S.C. 113, 119, 536 S.E.2d 671, 674 (2000), citing *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702 (1987) (“Redaction has come into play as a tool to allow admission of a co-defendant’s confession *against the confessor in a joint trial*. The point of redaction is to permit the confession to be used against the non-testifying confessor, while avoiding implicating his co-defendants.”) (emphasis in original).² Here, Cannon’s statement was

the written statement was identified and read to the jury. (See R. p. 748, line 25 - p. 752, line 19. Petitioner’s brief simply quotes the oral statement as the written statement. At any rate, it is clear that the focus is on the statements given for the written statement.

² *Holmes* is particularly illustrative of the point as the Supreme Court of South Carolina pointedly noted the difference between a redacted statement offered in a joint trial compared to a redacted statement coming in at the trial of a single defendant. A redacted statement from a co-

offered against Cannon, not against Petitioner. Petitioner's confrontation rights were protected by redaction under *Bruton*, *supra*. See also *United States v. Ramos-Cardenas*, 524 F.3d 600, 609-610 (5th Cir. 2008) ("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. Lung Fong Chen*, 393 F.3d 139, 150 (2nd Cir. 2004) ("there is no separate *Crawford* problem, and we see no indication that *Crawford* overrules *Richardson* or expands the holding of *Bruton*."); *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...").

Again, to the extent Petitioner is attempting to argue a violation of *Crawford* in regard to Cannon's first statement, the issue is not preserved for review. *Frieburger*, *supra*. Further, because Cannon's statement to Lt. Crawford was properly redacted, (See R. p. 1026, lines 10-12, "We hit the back door but I was still last. The victim grabbed my leg during the incident and I kicked him."), there is neither a *Bruton* or a *Crawford* issue in regard to this later statement. Simply, there is no *Crawford* error.

CONCLUSION

For all the foregoing reasons, Respondent submits that Petitioner has failed to show that

defendant coming in during a single defendant trial must be offered against the defendant on trial – *Bruton* cannot apply as the statement is not being offered against its maker. That is not the case here, and *Bruton* is applicable. Further, *Bruton* and the line of cases stemming from *Bruton* specifically work to protect the right to confrontation by removing any directly inculpatory statements, thus, not creating a situation where the other co-defendant is "accused" and has the right to confront such accuser. In sum, *Bruton* resolves the confrontation concern in a joint trial.

rehearing is warranted. The petition should be denied.

Respectfully submitted,

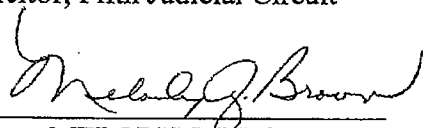
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October 8, 2012.
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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of General Sessions
G. Thomas Cooper, Jr., Circuit Court Judge

The State,

Respondent,

vs.

Derrick McDonald,

Appellant.

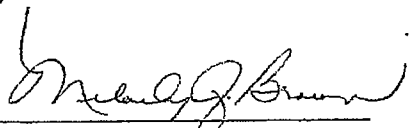
Appellate Case No. 2008-104547

PROOF OF SERVICE

I, Melody J. Brown, certify that I have served the *Return to the Petition for Rehearing* on Petitioner McDonald by depositing a copy of same in the United States mail, postage prepaid, addressed to his attorney of record:

Robert M. Dudek, Chief Appellate Defender
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This 8th day of October, 2012.


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The South Carolina Court of Appeals

The State, Respondent,

v.

Derrick McDonald, Appellant.

Appellate Case No. 2008-104547

ORDER

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

John Cannon, Jr. J.
Thomas E. Huff J.
Paul E. Short, Jr. J.

Columbia, South Carolina

cc:

Robert Michael Dudek

Melody Jane Brown

RECEIVED

SC OFFICE OF
APPELLATE DEFENSE

FILED

November 30, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Opinion No. 5033 (S.C. Ct. App. filed 9/12/2012)
07-GS-28-15 thru 20.

THE STATE,

RESPONDENT,

V.

DERRICK MCDONALD,

PETITIONER

Appellate Case No. 2012-213686

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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1. The Court of Appeals erred by holding the trial court did not commit reversible error by allowing into evidence the statements of petitioner's non-testifying co-defendant without adequately redacting his claim of petitioner's involvement, as this denied petitioner his Sixth Amendment right to confront and cross-examine the witness, as interpreted by Bruton v. United States, 391 U.S. 123 (1968), and its progeny.....	14
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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 11/30/2012.

QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred by holding the trial court did not commit reversible error by allowing into evidence the statements of petitioner's non-testifying co-defendant without adequately redacting his claim of petitioner's involvement, as this denied petitioner his Sixth Amendment right to confront and cross-examine the witness, as interpreted by Bruton v. United States, 391 U.S. 123 (1968), and its progeny?

2.

Whether the Court of Appeals erred by holding the Crawford v. Washington, 541 U.S. 36 (2004) issue was not preserved since the issue was raised along with Bruton, it involves the same essential principle of confrontation, the lower court ruled Crawford was not violated, and the lower court had violated petitioner's right to confrontation under Crawford by allowing into evidence the statement of petitioner's non-testifying co-defendant, where he gave that statement to law enforcement during their investigation of the crime, it was testimonial, and petitioner never had the opportunity to confront and cross examine his co-defendant?

STATEMENT OF THE CASE

Petitioner was indicted by the Kershaw County Grand Jury for the offenses of murder and first-degree burglary. His co-defendants, Robert Cannon and Christopher Whitehead, were indicted for the same offenses. R. 1553.

Their joint trial was held from May 6-13, 2008 before the Honorable G. Thomas Cooper Jr., and a jury. Marcus Whitlark and Nathan Sheldon represented petitioner. Joshua Kendrick represented defendant Robert Cannon. Neil Riley and David Reuwer represented defendant Christopher Whitehead. The Solicitors were John Meadors, Joanna McDuffie and Ron Moak. R. 1.

At the conclusion of the trial on May 13, 2008 the jury found each of the three defendants guilty of murder and burglary in the first-degree. R. 1501, l. 17- 1502, l. 18.

Judge Cooper sentenced petitioner and co-defendant Cannon to thirty-five years imprisonment concurrent on both charges. R. 1550, l. 15- 1551, l. 3. Based on co-defendant Christopher Whitehead's prior convictions for attempted armed robbery he was sentenced to life without parole for murder and burglary in the first-degree. R. 1548, l. 16-1549, l. 15.

The Court of Appeals affirmed in State v. Derrick McDonald, 400 S.C. 272, 734 S.E.2d 167 (Ct. App 2012).. App. 1-9. Petitioner filed for rehearing on September 27, 2012. App. 10-13. The state filed a return to petition for rehearing on October 8, 2012. App. 14-23. The petition for rehearing was denied on November 30, 2012. App. 24.

This petition for a writ of certiorari follows.

STATEMENT OF FACTS

Melissa Davey was the girlfriend of the decedent Joshua Zoch. She worked at the Sonic Restaurant on Hard Scrabble Road where the decedent also worked and had gotten her a job. Davey knew co-defendant Whitehead because he also worked at the Sonic. In addition, co-defendant Cannon also worked at the Sonic, and Petitioner McDonald was a former employee of the same Sonic. R. 560, l. 2 – 563, l. 3.

Davy and the decedent lived together for about two years in Kershaw County. She admitted they argued throughout their relationship. On the Friday night before the fatal encounter on December 13, 2006, Davy confirmed on cross-examination they had a party at her house “if that’s what you want to call it.” R. 563, l. 24 – 564, l. 9; R. 593, ll. 13-24.

Davy testified that the decedent left that night with two of his friends and he brought back crack cocaine. While the decedent was smoking crack Davy “slapped the crack pipe out of his hand.” The decedent became very angry and he demanded that they all leave. Davy left with her friends Zack and Molly in Davy’s car. The two friends who went with the decedent to get the crack left in their own car. R. 595, l. 1- 596, l. 5.

Davy next spent some time together with the decedent on the following Monday, her day off at the Sonic. “I met up with Josh during the day that day.” Davy gave the decedent sixty dollars that day, and she learned he spent it on crack cocaine. Davy recalled the decedent came by the Sonic on Tuesday morning, December 12, 2006 “but I didn’t talk to him.” R. 611, l. 3 – 612, l. 11.

Co-defendant Whitehead was Davy’s crew leader. Davy readily admitted she did not get along with Whitehead but she said “[I] listened to him, what he had to say at work.” 4-18. Davy confirmed that the decedent *had been cooperating with the police* at the time because of his drug related problems. R. 613, l. 4 – 620, l. 15.

Zachary Waltemath testified that the decedent had come up to the Sonic on Monday to “talk to Melissa [Davy] because they had got in an argument over the weekend and they were trying to resolve things or something.” Waltemath recalled that on the night of Monday, December 12, 2006 Whitehead called him twice and “he wanted me to call Josh and see what he was doing because he wanted *to go over there and fight him or something.*” Waltemath told Whitehead he did not want to get involved “with anything like that.” R. 385, l. 17 – 388, l. 8. (emphasis added).

On Wednesday, December 13, 2006 Waltemath went to work at about 10:00 a.m., and Davy was going to take time home after work at 5:00. “But first she wanted to stop by her house to get her toothbrush and extra clothes or something because she hadn’t been there [the house she shared with the decedent] in a few days . . . And we got there. And she walked in the house, freaked out and saw him.” Waltemath looked inside the house and saw the decedent lying on the floor. He was dead. R. 388, l. 9 – 391, l. 18.

Patricia Heathcoe owned and managed the Sonic. *The decedent, co-defendant Cannon and Petitioner McDonald all worked for her at one time.* Co-defendant Whitehead still worked for her on Wednesday December 13, 2006, the day the decedent’s body was discovered. Heathcoe said Whitehead was a good employee and he worked his full shift on Tuesday, December 12, 2006. However, Heathcoe said on Wednesday, December 13, 2006 Whitehead showed up with a scratch under his eye. The following day, Thursday, December 14, 2006 she said Whitehead “was limping around and he was wanting a Workman’s Comp form filled out on his leg.” Whitehead claimed to have been hurt at work and Whitehead “got real cocky” stating “a friend of his got screwed by falling and not getting a report filled out and ended up paying his own bills.” Heathcoe had Whitehead’s Workman’s Compensation form yeah processed. R. 436, 16 – 448, l. 10.

The next morning, a Friday, Heathcoe got a call from her employee, Cecile Trapp, who told her “that Chris [Whitehead] had walked out on her.” Heathcoe said she “freaked out” because she knew this left her employee alone at 6:55 a.m. at the Sonic. Heathcoe telephoned Whitehead and asked what was wrong with him having walked off of his shift leaving the other young woman alone. “[H]e was just ranting. You know, I don’t need that f’g job. *I’ve got problems. I’m about to move to Aiken.*” Heathcoe said all this surprised her because Whitehead had always been polite and a good employee. R. 445, l. 4 – 452, l. 12. (emphasis added).

Cecile Trapp recalled that Whitehead was limping at work on Wednesday, December 13, 2006 and he had not been limping the day before. On the morning of Friday, December 15, 2006 Whitehead talked to his mom and “he kind of freaked out and was just like he had to go.” Trapp said she pleaded with Whitehead to stay but he said he had to leave. Whitehead told her the day before that his mother took his telephone away. R. 478, l. 15 – 489, l. 23.

There was evidence others knew that the decedent had hit Davy in the past, but Davy would only acknowledge the decedent had hit her “one time.” R. 580, ll. 9-14. Trapp testified she had heard during this time period that “Whitehead was going to fight him [the decedent].” R. 489, ll. 16-23.

The state’s theory of the case was that Whitehead spearheaded the burglary and attack on the decedent and that co-defendant Cannon and Petitioner McDonald were involved for whatever reason. One motive was thought to be that the decedent *was a police informant*. Whitehead became belligerent with the police and he refused to cooperate. Michael Jenkins testified that he was in jail with Whitehead after the crime and he said Whitehead was bragging about having killed the decedent, and how “when they went back to school they were going to be respected and jaws were going to drop and all this and just bragging.” R. 1221, l. 10 – 1240, l. 6.

Bruton and Crawford

Co-defendant Cannon and Whitehead gave the police statements implicating Whitehead and themselves in the burglary that lead to the death of Joshua Zoch. See State's exhibits 2 and 4 for identification, and State's 103 and 104 (the redacted statements). R. 1570-1575. As seen, each of the three defendants *had worked at the same Sonic restaurant at one point*. Helen Zoch, the decedent's mother, acknowledged the decedent was a police informant and "he was buying from someone that the police wanted to close down as a dealer." R. 1284, ll. 18-24.

Ms. Zoch testified that on December 12, 2006, the day before the murder, she tried to have the decedent check himself into Morris Village. However, the decedent wanted to talk to Davy, his girlfriend, whom he had just separated from, before he checked himself in Morris Village. Consequently, the decedent did not check into the facility that day. R. 1274, l. 8- 1281, l. 14.

Throughout the trial the redaction issue was discussed. Defense counsel Whitlark for Petitioner McDonald joined in the objection to the state's proposed redaction. R. 432, ll. 4-12. Defense counsel later again joined in a further motion that the state's proposed redactions were insufficient under Bruton v. United States, 391 U.S. 123 (1968). R. 627, l. 2- 629, l. 14. Solicitor McDuffie claimed the state's redactions would solve the Bruton problem. She specifically maintained that Bruton would be satisfied "by taking the places where we have the names of the co-defendant crossed out and changing that or whiting it out and having Investor Catoe rewrite "another person." The solicitor claimed this would satisfy Gray v. Maryland, 523 U.S. 185 (1998). The judge said he understood that the state was proposing that the statements be redacted to use "another person" or 'we' or 'they.'" The solicitor confirmed that was correct. R. 630, ll. 1-11.

Defense counsel stated such redactions were inadequate. Specifically counsel cited this Court's pragmatic opinion in State v. Labarge, 275 S.C. 168, 268 S.E.2d 278 (1980), where it held

the substitution of "Mr. X" for the defendant's name would not satisfy Bruton v. United States, 391 U.S. 123 (1968). R. 630, l. 22- 631, l. 2. Counsel argued jury "will absolutely know" that the statement was referring to the two other co-defendants. R. 631, ll. 4-17. Defense counsel repeatedly noted the opinion in State v. Labarge and argued "our position is that [these redactions] do not satisfy Bruton." R. 632, l. 1- 634, l. 9. Defense counsel noted this was a "very powerful confrontation clause" rule issue and that allowing statements into evidence as presently redacted clearly implicated the co-defendants. R. 634, l. 10- 637, l. 2.

Defense counsel Sheldon for Petitioner McDonald also noted the heart of Bruton was that the jury should not be able to look at the other two defendants and conclude those must be the "some other people" in the statements. R. 637, ll. 3-16. Defense counsel argued the co-defendant's fundamental constitutional rights would be violated if the state's proposed redactions were allowed to stand. R. 638, l. 4- 643, l. 17. The judge noted that the objection to the redaction went to Petitioner McDonald, co-defendant Cannon and co-defendant Whitehead. However the judge overruled the objections to the state's proposed redactions. R. 643, ll. 12-22; State's exhibits 103 and 104: R. 1570-1575.

When investigator Danny Catoe went to read the redacted confession of Robert Cannon the objections were renewed. R. 735, l. 19 - 738, l. 21. In his statement Cannon noted that he went into the Sonic where the men either worked or had worked wearing a ski mask. He said they all knew this was a joke. "One person said they needed to beat Josh's ass because he was a snitch." The rest of the Cannon redacted statement was read to the jury as follows:

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

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

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

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

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

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

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

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

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

R. 739, l. 1-740, 123.

It became strikingly obvious in this case that Petitioner McDonald was the person co-defendant Cannon was implicating. That was all the more true because Catoe testified he took the

statement at "Robert Cannon's house on December 15, 2006, two days after the murder." R. 752, ll. 16-19. **Catoe continued "after obtaining this statement, we then obtained an arrest warrant for Mr. Derrick McDonald."** R. 754, ll. 5-11. Catoe repeated **"after speaking with Mr. Cannon, we had another investigator obtain a warrant on Mr. Derrick McDonald."** R. 755, ll. 8-16. (emphasis added).

Petitioner McDonald strongly maintained that his statement to the police was coerced and should not be considered despite the state's arguments to the contrary. Petitioner's allegedly voluntary statement was then read to the jury. In this statement Petitioner stated that he decided to go to the Sonic and he talked "to them" about getting a job. They then went to the Walmart and we got a ski mask and a box of the latex clubs that were purple." R. 767, l. 16- 769, l. 19; R. 773, l. 7- 776, l. 14.

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

On cross-examination Catoe denied that he told seventeen-year-old Petitioner **that if he would give a statement he would be a witness against Chris Whitehead rather than a defendant.** R. 826, l. 6- 830 l. 12. *Catoe also denied petitioner told him he did not want to talk without a lawyer while Catoe was giving him these assurances.* R. 831, l. 8- 832, l. 7. Later in his cross-examination, Catoe would only say **he did not remember telling petitioner he only wanted him as a witness against Whitehead.** R. 836, l. 12-14. Catoe denied telling petitioner the trial in which he wanted him to be a witness against Whitehead *was going to be "a death penalty trial"* R. 826, ll. 9-11. (emphasis added).

Catoe also admitted there were not any fingerprint, eyewitness, or forensic evidence linking the three co-defendants to the crime scene. R. 889, l. 11- 890, l. 11; R. 894, ll. 14-17.

Crawford

Defense counsel Sheldon for Petitioner McDonald also argued that statements in this case were clearly testimonial under Crawford v. Washington, 541 U.S. 36 (2004), and "we have no chance to cross-examine him." R. 933, ll. 2-19. Sheldon said since Petitioner McDonald could not cross-examine co-defendant Cannon "about who the other people are" that this testimonial statement also violated Crawford v. Washington in addition to Bruton. R. 934, l. 5- 936, l. 20. Defense counsel Sheldon said "Crawford specifically applies to an interrogation" and he continued to argue that in addition to Bruton the redacted statements violated Crawford v. Washington. R. 936, l. 4-940, l. 6.

The solicitor continued to argue under Bruton the statements did not implicate Petitioner McDonald and that the defense was not entitled to any relief. R. 939, l. 18- 940, l. 18.

The judge later put on the record **his opinion that the redacted statements did not violate Crawford v. Washington, and that there was no violation of petitioner's right to**

confrontation. R. 990, l. 10- 991, l. 17. Defense counsel Whitlark on behalf of petitioner continued to argue that the statement of Cannon violated both Bruton and Crawford. R. 992, l. 3- 1005, l. 4.

Defense counsel told the jury to consider the circumstances of this case. “You grab a 17-year-old kid at his house and you are going, hi, were the police. We want to talk to you about a murder. You’re a 17 years old. And they’re telling you, you want to be a witness in a case or do you want to be a defendant in a death penalty case? R. 1421, l. 16 – 1423, l. 10.

The trial judge instructed the jury that it would make the ultimate decision of whether a defendant’s statement was made freely and voluntarily of his own free will. The judge told the jury it could consider the defendant’s age his mental ability or capacity, the nature of the questioning, and whether he was advised of his right to have a lawyer present and other factors. R. 1481, ll. 3-25. Since there was only a general verdict rendered in this case there is no way to determine if the jury determined whether or not Petitioner McDonald’s statement was freely and voluntarily given.

Court of Appeals

The Court of Appeals cited this court’s opinions in State v. LaBarge 275 S.C. 168, 268 S.E.2d 278 (1980), and State v. Holder, 382 S.C. 278, 285–286, 676 S.E.2d 690, 694 (2009). The court noted that this court in LaBarge held that substitute “Mr.X “was insufficient “in light of other testimony” since Mr. X pointed directly at LaBarge. App. 6-7.

The Court of Appeals held, nonetheless, “we find the neutral phrase ‘another person’ inserted into Cannon statement avoided any Bruton violation. The court noted that a limiting instruction was given, and held the trial judge properly admitted the redacted statement. App. 6-7.

1.

The Court of Appeals erred by holding the trial court did not commit reversible error by allowing into evidence the statements of petitioner's non-testifying co-defendant without adequately redacting his claim of petitioner's involvement, as this denied petitioner his Sixth Amendment right to confront and cross-examine the witness, as interpreted by Bruton v. United States, 391 U.S. 123 (1968), and its progeny.

Defense counsel correctly argued that redacted statements in this case violated the holdings of Bruton v. United States, 391 U.S. 123 (1968) and State v. Labarge, 275 S.C. 168, 268 S.E.2d 278 (1980), See, also, Gray v. Maryland, 523 U.S. 185, 197 (1998); State v. LaBarge 275 S.C. 168, 268 S.E.2d 278 (1980); State v. Holder, 382 S.C. 278, 285–286, 676 S.E.2d 690, 694 (2009). The Court of Appeals respectfully erred by holding otherwise.

In this case, as in Bruton, during petitioner's joint trial the admission of his non-testifying co-defendant's statement clearly implicated Petitioner McDonald in the crime and therefore violated his rights under the Confrontation Clause. The court in Richardson v. Marsh, 481 U.S. 200 (1987) noted that Bruton can be complied with by redaction. Here, however, as in State v. Holder, 382 S.C. 278, 676 S.E.2d 690, 694 (2009), given the context of this record, Cannon's statement clearly implicated petitioner as "another person" involved in the burglary and murder.

Further, the practical policy reasons favoring joint trials (mostly large drug trials in federal court) discussed in Richardson v. Marsh cannot, as a matter of fundamental fairness, decimate a defendant's right to confrontation where it becomes apparent the non-testifying defendant is naming the defendant as his accomplice in the murder. This Court has often warned against the dangers of such joint trials, and here the danger was apparent before the trial ever started.

“We urge the state to carefully consider all the available alternatives before deciding to try co-defendants jointly, especially in a capital case. While we realize there will be circumstances in which a joint trial will be the best route to follow, the decision to pursue this route should be made only after giving due deliberation to the inherent problems, such as redacted statements, which arise from joint trials.” State v. Bellamy, 293 S.C. 103, 106 359 S.E.2d 63, 65 (1987). *overruled on other grounds in* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (S.C. May 20, 1991).

While this was not a “mass trial,” trying these three defendants together, with these redacted statements, very definitely had the impermissible spill-over effect of a guilty verdict for each because they were, as stated below, joined at the hip -- especially in the manner the state tried this case: “We take this occasion to remind prosecutors of the pitfalls inherent in mass conspiracy trials. More than forty years ago this Court stated, “It is always cumbersome to try a great number of defendants at one time.... With such a large number [of defendants] there might be a danger of some of them being lost sight of by the jury, and their case considered by the jury in a vague way.” State v. Gunn, 313 S.C. 124, 138, 437 S.E.2d 75, 83 (1993).

The men were joined at the hips by their tie to the Sonic. They were the three defendants on trial, and both Petitioner McDonald and co-defendant Cannon had given statements to the police.

Defense counsel correctly argued that this case was not any different than State v. Labarge where the state claimed the redaction of the co-defendant’s name being replaced with “Mr. X” solved the problem. Defense counsel went to great lengths to repeatedly object to these redactions and to explain why they violated the co-defendant’s rights to Confrontation to cross-examination.

Further, Catoe testified that he immediately after obtaining the inculpatory statement from co-defendant Cannon he obtained an arrest warrant for petitioner. The solicitor, like the prosecutor in Richardson v. Marsh, made the utility of the limiting instruction highly questionable by the

manner in which the case was tried. Here, by eliciting testimony Petitioner McDonald was arrested immediately after Cannon made his inculpatory statement. It seems beyond question that it is difficult for a jury to follow a limiting instruction in a Bruton case under the best of circumstances.

Petitioner McDonald did not appear to have any motive to participate in this crime against the decedent. As stated, there is no way to determine whether the jury considered petitioner's statement or rejected it as coerced as defense counsel argued and the judge instructed. R. 1452, ll. 2225. Defense counsel Whitlark reminded the jury that petitioner was only seventeen-years-old at the time, "and they're telling you, you want to be a witness in a case or do you want to be a defendant in a death penalty case." R. p. 1421, ll. 16-22. Defense counsel told the jurors that the police were putting their pride in obtaining a conviction above petitioner's freedom. R. p. 1421, l. 25- 1422, l. 6.

Defense counsel Whitlark also reminded the jury that petitioner was told that the police just wanted his help in convicting Whitehead. Counsel noted that petitioner had also asked for and been denied an attorney, and that both of young Robert Cannon's parents were given the impression that they could leave town while they spoke with Cannon. Cannon was charged with murder in their absence. R. p. 1434, ll. 2-10. The Court of Appeals should respectfully be reversed in this case.

2.

The Court of Appeals erred by holding the Crawford v. Washington, 541 U.S. 36 (2004) issue was not preserved since the issue was raised along with Bruton, it involves the same essential principle of confrontation, the lower court ruled Crawford was not violated, and the lower court had violated petitioner's right to confrontation under Crawford by allowing into evidence the statement of petitioner's non-testifying co-defendant, where he gave that statement to law enforcement during their investigation of the crime, it was testimonial, and petitioner never had the opportunity to confront and cross examine his co-defendant.

First, as seen above, the judge ruled that the redacted statement did not violate the holding of Crawford v. Washington, 541 U.S. 36 (2004). Crawford and Bruton both involved the same principle: That a defendant cannot be denied his right of confrontation by the admission of a statement of a non-testifying witness. The judge did not think he was under an unfair advantage regarding the Crawford issue being raised, it was closely related to Bruton anyway, and the Court of Appeals should have addressed the issue since the trial judge ruled on it. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) is, respectfully, inapplicable. App. 8.

In Crawford, the Court held that a statement given by a non-testifying witness to a police officer, was testimonial, and it was no longer admissible simply because it was deemed reliable under Ohio v. Roberts, 448 U.S. 56 (1980). If the statement is given to law enforcement, where the defendant has had no previous opportunity to cross-examine the non-testifying witness, it is not admissible.

In addition to the statement of co-defendant Cannon being used against petitioner in violation of Bruton it also violated Crawford. As in Crawford, co-defendant Cannon's statement was given during the course of a criminal investigation. Co-defendant Cannon's statement to the

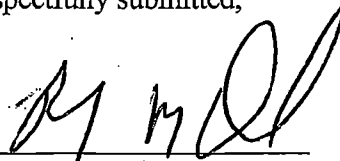
police implicated petitioner in the burglary and murder and petitioner never had an opportunity to confront and cross-examine Cannon.

This case involves a classic Crawford v. Washington violation since Cannon's statement to Catoe in the course of his criminal investigation was clearly testimonial. Since petitioner's right to confrontation to under Bruton and Crawford were violated, petitioner should be granted a new trial.

CONCLUSION

By reason of the foregoing arguments, the petition for writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 1st day of March, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Opinion No. 5033 (S.C. Ct. App. filed 9/12/2012)
07-GS-28-15 thru 20.

THE STATE,

RESPONDENT,

V.

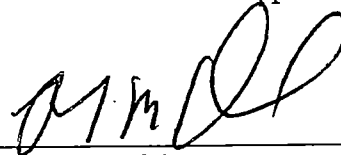
DERRICK MCDONALD,

PETITIONER

Appellate Case No. 2012-213686

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Melody J. Brown, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and the S.C. Court of Appeals this 1st day of March, 2013.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 1st day
of March, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: ~~October 2, 2013~~
NOVEMBER 16, 2022.

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM KERSHAW COUNTY
Court of General Sessions
G. Thomas Cooper, Jr., Circuit Court Judge

On Petition for Writ of Certiorari to the Court of Appeals
Opinion No. 5033 (S.C.Ct. App. filed September 12, 2012)

The State, Respondent,
vs.

Derrick McDonald, Petitioner.

Appellate Case No.: 2012-213686

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I.

The Court of Appeals did not err in affirming the trial judge's ruling that substitution of the neutral phrase "another person" for Petitioner's name in Cannon's statement was proper and adequate redaction under <i>Bruton v. United States</i> , 391 U.S. 123 (1968) and its progeny when such redaction not only completely removed Petitioner's name but the statement also did not otherwise facially incriminate Petitioner.....	10
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II.

The Court of Appeals did not err in finding Petitioner's <i>Crawford v. Washington</i> issue procedurally barred when the <i>Crawford</i> argument was not raised at all in regard to redaction of the written statement contested on appeal, but only raised 300 pages later in the transcript in reference to a second statement. At any rate, because co-defendant Cannon's statement was properly redacted, there was no <i>Crawford</i> violation.	19
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PETITIONER'S QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred by holding the trial court did not commit reversible error by allowing into evidence the statements of petitioner's non-testifying co-defendant without adequately redacting his claim of petitioner's involvement, as this denied petitioner his Sixth Amendment right to confront and cross-examine the witness, as interpreted by Bruton v. United States, 391 U.S. 123 (1968), and its progeny?

2.

Whether the Court of Appeals erred by holding the Crawford v. Washington, 541 U.S. 36 (2004) issue was not preserved since the issue was raised along with Bruton, it involves the same essential principle of confrontation, the lower court ruled Crawford was not violated, and the lower court had violated petitioner's right to confrontation under Crawford by allowing into evidence the statement of petitioner's non-testifying co-defendant, where he gave that statement to law enforcement during their investigation of the crime, it was testimonial, and petitioner never had the opportunity to confront and cross examine his co-defendant?

(Cert. Petition, p. 3).

RESPONDENT'S COUNTER STATEMENT OF QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred in affirming the trial judge's ruling that substitution of the neutral phrase "another person" for Petitioner's name in Cannon's statement was proper and adequate redaction under Bruton v. United States, 391 U.S. 123 (1968) and its progeny when such redaction not only completely removed Petitioner's name but the statement also did not otherwise facially incriminate Petitioner.

Whether the Court of Appeals erred in finding Petitioner's Crawford v. Washington issue procedurally barred when the Crawford argument was not raised at all in regard to redaction of the written statement contested on appeal, but only raised 300 pages later in the transcript in reference to a second statement which was not contested on appeal. At any rate, because co-defendant Cannon's statement was properly redacted, there was no Crawford violation.

RESPONDENT'S STATEMENT OF THE CASE

A Kershaw County Grand Jury indicted Petitioner, Derrick McDonald, in February 2007, for burglary first degree, and murder. (R. p. 1553-56). Marcus Whitlark, Esq., and Nathan Sheldon, Esq., represented Petitioner on the charges. A jury trial was held May 5-9, 2006, before the Honorable G. Thomas Cooper, Jr. Petitioner was tried along with co-defendants Robert Cannon and Christopher Whitehead. After a break in the proceedings, the jury continued deliberations on May 13, 2009. The jury ultimately returned a verdict of guilty as charged as to all three defendants. (R. p. 1501, line 17 - p. 1502, line 15). The judge sentenced Petitioner to thirty-five (35) years imprisonment. (R. p. 1550, lines 15-21). Petitioner appealed.

After full briefing and oral argument, the South Carolina Court of Appeals affirmed the conviction in *State v. McDonald*, Opinion No. 5033 (S.C.Ct.App. filed September 12, 2012).¹ (App. pp. 1-9). Petitioner filed a petition for rehearing on September 27, 2012. (App. pp. 10-12). The State, at the request of the Court of Appeals, made a return to the petition on October 8, 2012. (App. pp. 14-22). The Court of Appeals denied the petition on November 30, 2012. (App. p. 24).

Petitioner filed a petition for writ of certiorari in the Court on March 1, 2013. This return follows.

¹ Reported at 400 S.C. 272, 734 S.E.2d 167 (Ct.App. 2012).

RESPONDENT'S STATEMENT OF FACTS

On Tuesday, December 12, 2006, the victim, Joshua Zoch, was brutally murdered in his home. The evidence at trial established that the burglary and murder occurred at approximately 11:30 that night.

Zachary Waltemath, then an employee at the local Sonic along with co-defendant Whitehead, testified that at approximately 7:00 or 8:00 that night, Whitehead called him and asked him to call the victim "and see what he's doing because he wanted to go over there and fight him or something." Waltemath decline. Whitehead called back shortly after and asked if Waltemath had tried to call him. He responded he had not, and Whitehead indicated he wanted Waltemath to call him. Waltemath had "hung out" with Whitehead on several occasions. He was sure that it was Whitehead who called him that night. (R. p. 378, line 12 - p. 380, line 21; p. 384, line 3 - p. 387, line 10).

Allen Brown, a manager at the local Sonic, testified that all three co-defendants had worked at Sonic. Petitioner, Whitehead (who was still employed at the time), and Cannon, were together that evening. At approximately 10:00 p.m., Whitehead, Petitioner, and Cannon were in the kitchen area. Cannon was wearing a ski mask, and was told to take it off. Brown instructed all three to leave. (R. p. 319, line 12 - p. 324, line 14). Christopher Rust, also an employee at Sonic who was working that same evening, confirmed that all three left at the same time. (R. p. 361, lines 1-22). Rust also recalled that Whitehead drove a car with "noticeable" muffler noise. (R. p. 371, line 20 - p. 372, line 5).

At approximately 11:30 p.m., a neighbor to the victim, Cosmo Baccamo, testified that he was outside with his son's dog and heard "a lot of knocking noise, loud, like somebody kicking something or slamming doors" and, "about ten minutes later," he heard "excited" and

loud male voices, a door slam, and a car, with a loud muffler, take off. (R. p. 337, line 25 - p. 339, line 15).

Later that same night, at approximately 1:30, Petitioner went to Rust's home. He was upset and asked to stay the night at Rust's house. He claimed he had an argument with his mother. Rust allowed him to stay, then took him to his mother's home the next morning on his way to school. (R. p. 363, line 7 - p. 365, line 8).

Patricia Heathcoe, part owner of the Sonic, testified that on Wednesday, December 13, 2006, the day after the murder, Whitehead came to work at Sonic with a scratch under one eye, a noticeable limp, and complaining that his ankle hurt. He did not have the injuries the previous day when he had worked an early shift. Whitehead told Heathcoe he had "slipped and fell." (R. p. 443, line 19 - p. 445, line 23). On Thursday, Whitehead demanded that a Worker's Compensation claim be filed. Because business was slow, Heathcoe had intended to let Whitehead go home that day, but "he got real adamant. Whitehead didn't want to leave, you know, until the Workman's Comp form was filled out on him." He wanted to report his injuries as occurring on the 12th. Heathcoe noted that Whitehead never went to a doctor. (R. p. 446, line 15 - p. 448, line 17). On Friday, Whitehead walked out of work, leaving the crew short-handed. Heathcoe called Whitehead on his cell phone and he became belligerent:

... the first thing he said to me was, F Sonic. I said, "Chris, what is wrong with you?" And he started just ranting. I said, "you walked out and left Cecile by herself." I said, "Why would you do that?" And he was just ranting. You know, I don't need that f'g job. I've got problems. I'm about to move to Aiken. And I was just trying to talk to him. I mean, he was just - I never heard him sound like that ever. ...

(R. p. 449, line 1 - p. 451, line 14).

"Cecile," as referenced in the above conversation, was Cecile Trapp. Trapp testified that she worked Tuesday morning with Whitehead and all was well. She went back to Sonic Tuesday night, to eat and check her schedule, and confirmed, like Rust, that Whitehead and Cannon came by the store that night, and that Cannon was wearing a ski mask. Whitehead was not limping either that day, or when she saw him later that night. On Wednesday, however, Whitehead came into work "complaining that his ankle was hurting, and he had a scratch on his face." He told Trapp "that he had got into like a play fight with his cousin and that he hurt his ankle and his cousin accidentally scratched him on his face." He was also limping. Further, Whitehead advised Trapp that he intended to "pretend that he fell on grease and hurt his ankle so that Ms. Pat could pay for the hospital bills." (R. p. 476, line 13 - p. 479, line 25; p. 484, lines 20-24). On Friday, Whitehead was with Trapp to open the Sonic, when his mother drove up. After speaking with his mother, Whitehead "kind of freaked out and was just like, 'I have to go'." He would not tell Trapp what was happening, but simply left immediately. (R. p. 481, line 19 - p. 483, line 1).

Victim's longtime, live-in girlfriend, Melissa Davy, was absent from the victim's home at the time of the burglary and murder, the two having had a disagreement over victim's drug use. Victim had hosted a party at their home on Friday, December 8, 2006 that lasted into the early morning hours of Saturday, December 9, 2006. At approximately 2:00 a.m. that Saturday, Davy left with friends Zachary Waltermath and his sister Molly, after a fight about victim's drug use, specifically his smoking crack cocaine (though marijuana may also have "possibly" been used at the party, as well), and after his request that they leave the house. (R. p. 563, line 13 - p. 565, line 17; 593, line 16 - p. 596, line 12; p. 610, line 15 - p. 611, line 2). Davy would later spend time with the victim on Monday, December 11, 2006.

(R. p. 567, line 1 - p. 568, line 19). She last spoke to him when he called her at approximately 6:00 or 7:00 that night. (R. p. 569, lines 14-19). The next day, Tuesday, December 13, 2006, at approximately 5:30, p.m., after completing her work shift at Sonic, Davy went back to the victim's home with Zach and Molly. The lights were off and victim's car was backed into the garage, which was unusual for the victim and alerted Davy that things were not right. She called victim's grandmother, Helen Zoch, who had purchased the home for victim to rent, (R. p. 1271, lines 14-24), and stayed on the phone with the grandmother as she entered the home. She saw victim's lifeless body and called 911. (R. p. 572, line 9 - p. 575, line 23).

Helen Zoch testified that she had spent time with victim the day before the burglary and murder and hoped to help him with his drug problem. In fact, victim had planned to enter Morris Village but wanted to talk to Ms. Davy first. The next day, Ms. Zoch called at 7:30 in the morning, but had not gotten an answer. At approximately 2:00 p.m., she went by the home, noticed the victim's car was backed in the garage, which was unusual, but she did not try to enter the home. (R. p. 1272, line 6 - p. 1274, line 24; p. 1278, line 11 - p. 1280, line 11). She testified that she was aware that her grandson had worked with the police, making drug buys for them. (R. p. 1284, lines 9-24). (See also R. p. 619, lines 19-25).

Investigating officers found the victim's home a "complete mess" with the victim's body "in the middle of it." (R. p. 692, lines 13-17). The back door had been kicked in. (R. p. 675, lines 13-25). The investigation began to focus on Whitehead, Petitioner and Cannon. Whitehead informed the investigating officers he "didn't know a damned thing about" victim's murder. (R. p. 717, line 18 - p. 718, line 5). Both Petitioner and Cannon similarly denied any direct knowledge or involvement in their initial statements to police. (R. p. 721,

lines 21-25; p. 732, lines 14-25). However, Cannon later gave a detailed confession to officers, implicating Whitehead and Petitioner, which was, of course, redacted for presentation at trial to avoid *Bruton*² issues. The statement included not only the grisly facts of the vicious beating – such as the attack on the victim while he slept, dragging him off his couch, using the victim’s bat to strike the victim on his head – but also that victim was selected because he was thought to be a “snitch” and for his drugs. Cannon’s details included that one person took frozen chicken from the kitchen and place it on the victim’s head wounds in an attempt to stop the bleeding; that they hit the victim with a glass object, that they first went to the local Walmart for supplies and used the purchased purple latex gloves during the attack and wore ski masks; and, that the attack occurred at victim’s home at approximately 11:30. (R. p. 748, line 25 - p. 752, line 15; State’s Exhibits 2 and 103). Cannon later supplemented his statement voluntarily with a list of items he recalled taking from the home, including DVDs, a DVD player, presents, hair clippers, and cellphones, (R. p. 1022, line 16 - p. 1023, line 17), and gave an additional statement in which he admitted kicking the victim, (R. p. 1026, lines 3-16).

Petitioner also confessed to the crime in detail. Like Cannon’s statement, his statement was also redacted before introduction. (State’s Exhibit 104). The statement referenced going to the local Walmart and buying a ski mask and a box of purple gloves; that one of them called “Zach” to see if someone was home; that all of them kicked in a sturdy back door; that one person “picked up a glass bowl with flower petals in it, picked it up over his head and hit Josh in the head with it while Josh was asleep on the couch”; that another person dragged victim off the couch; that he repeatedly hit victim with his fists then hit him

² *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620 (1968). See also *State v. Holder*, 382 S.C. 278, 283, 676 S.E.2d 690, 693 (2009).

in the back of the head using the victim's bat; that they were searching for drugs and money; that another person kicked and stomped the victim, and, eventually, someone pulled a Christmas tree over on him. He also claimed someone else left the house with "plastic bags of stuff" and gave him some "DVD's and stuff." (R. p. 773, line 15 - p. 775, line 21). In particular, as to the beating, Petitioner confessed as follows (again, as reflected in the redacted statement read at trial):

... I first grabbed a bat that was against the wall and I started hitting Josh in the body. Then another person tried to stop me to ask Josh a question about where the money and dope was, and I couldn't stop the bat. I couldn't stop the bat and I hit Josh in the back of the head. I also think I hit him one time in the temple area of his head. Josh then started bleeding more and I got scared. That's when another person and another person started kicking and stomping Josh. ... The last thing I saw another person pushing the tree over on Josh...

(R. p. 775, lines 2-9).

Further, at the time of his arrest, when driving to the sheriff's department and before giving his detailed statement, Petitioner volunteered to officers that, "This is the way we came that night." (R. p. 954, line 4 - p. 955, line 3).

Whitehead, though he did not give a confession to officers, was twice overheard by another inmate, Michael Jenkins, at the detention center bragging about the killing, identifying the home where the murder occurred, and calling the victim's name. (R. p. 1221, line 10 - p. 1222, line 8). This caught Jenkins' attention as he had known the victim. (R. p. 1222, lines 9-20). A detention center officer confirmed that Jenkins had been in the cell next to Whitehead at the time the initial conversation was overheard. (R. p. 1257, lines 15-20).

Forensic pathologist Joel Sexton, M.D., testified that at autopsy, he identified "at least six" and possibly eight "injuries or blows were inflicted to the head that were each capable of causing death," with wounds inflicted on the top and back of head and behind the

left ear, along with abrasions and cuts to the face, injuries on legs, abrasions on knees and on the abdomen. (R. p. 1091, line 15 - p. 1096, line 8; p. 1098, line 19 - p. 1099, line 16; p. 1100, line 21 - p. 1105, line 4). From the wounds and autopsy and from looking at scene

photos, the pathologist was able to opine that two blows were inflicted on the couch, but that the victim either came off, or was pulled off, the sofa and was hit on the floor with a "cylindrical and linear" object such as the bat (State's 99), and that he was hit on the head with a glass potpourri bowl, remnants of same still being on the couch. (R. p. 1123, line 17 - p. 1125, line 14). He also confirmed that testing showed a prior use of cocaine and marijuana. (R. p. 1127, lines 11-17).

Investigators obtained a copy of a receipt from the local Walmart confirming a purchase of a ski mask and purple gloves on December 12, 2006 at 10:43 (R. p. 1058, line 7 - p. 1061, line 5). Ms. Davy testified that victim's grandparents had provided a bat to keep in their residence for protection. (R. p. 590, line 4 - p. 591, line 12). Ms. Zoch testified that she had recently replaced the back door to the home with another sturdier door prior to the burglary and murder. (R. p. 1282, line 17 - p. 1283, line 6). Photos from the scene also confirmed the use of the latex gloves, the bat, the placement of the frozen chicken near victim's head, the broken glass bowl, and the overturned lamp and Christmas tree. (R. p. 711, line 3 - p. 713, line 19; p. 1106, line 1-7). In sum, the physical evidence supported the detailed confessions of both Cannon and Petitioner, and the details overheard in Whitehead's detention center conversations.

ARGUMENT

I.

The Court of Appeals did not err in upholding the trial judge's ruling that substitution of the neutral phrase "another person" for Petitioner's name in Cannon's statement was proper and adequate redaction under *Bruton v. United States*, 391 U.S. 123 (1968) and its progeny.

Relevant Facts:

All three co-defendants, Petitioner, Whitehead and Cannon, were tried at the same time. Before the statements Petitioner and Cannon made to Investigator Catoe were offered into evidence, the State offered to redact, and did redact, all references to the other co-defendants in both statements.³ (R. p. 629, line 16 - p. 630, line 20). Defense counsel objected, arguing that the redaction "would violate *Bruton* because the statement clearly implicates someone else and it's obviously prejudicial to the people who are sitting right here." (R. p. 631, lines 4-17).⁴ Defense counsel relied on *Bruton* and *State v. LaBarge*, 275 S.C. 168, 268 S.E.2d 278 (1980), and argued the offered replacement of Petitioner's name with the phrase "another person" was "no different than replacing the name with "Mr. X, which was criticized in *LaBarge*. (R. p. 632, line 11- p. 633, line 5). The State clarified that *LaBarge* was a 1980 case, and further case law had defined the parameters of permissible redaction, such as *Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151 (1988). (R. p. 635, lines

³ Investigator Catoe first testified to what Cannon told him, (*i.e.* an oral statement), and then the written statement was identified and read to the jury. Petitioner's brief to the Court of Appeals quoted the oral statement as the written statement. (FBOA, pp. 11-12, citing R. p. 739, line 1 - p. 740, line 23). He does so again here. (Cert. Petition, p. 10). The written statement, as read, is actually on R. p. 748, line 25 - p. 751, line 18. Additionally, as will be seen *infra*, Cannon made other statements to Lt. Crawford that were handled separately. (See R. p. 924, line 20 - p. 926, line 8; p. 933, lines 2-8).

⁴ Counsel for Cannon, Mr. Kendrick, argued for all three defendants. (R. p. 627, lines 8-18; p. 643, lines 18-22).

20-24). Defense counsel recognized that current law supported the redaction of the name and substitution of the phrases “another guy” or “another person,” as offered by the State. (R. p. 635, line 11- p. 636, line 6; p. 638, line 4 -p.639, line 23). Even so, defense counsel offered a redaction to change the facts of the confession to suggestion only single involvement in the burglary and murder, (for example, changing “We pulled up at Josh’s house” to “I pulled up to Josh’s about 11:30”). (R. p. 643, lines 2-11). After discussion on the current state of the law, the trial judge allowed the redaction as proposed by the State. (R. p. 633, line 25-p. 643, line 17). Counsel objected to the statements when offered at trial. (R. p.738, lines 20-21).

In the Court of Appeals, Petitioner argued that “the admission of his non-testifying co-defendant’s statements clearly implicated Petitioner in the crime and therefore violated his rights under the Confrontation Clause.” (FBOA, p. 14). Thus, he reasoned, the redaction was inadequate. (FBOA, pp. 14-15). The Court of Appeals resolved in the issue finding:

We find the neutral phrase “another person” inserted into Cannon’s statement avoided any *Bruton* violation. The redacted statement only implicates the statement’s maker, and it does not limit the participants to three, which would implicate the three defendants on trial. Further, the court gave the jury a limiting instruction. Therefore, we find the trial court properly allowed Cannon’s redacted statement into evidence.

(App. p. 7).

In the petition for rehearing, Petitioner argued the Court of Appeals erred in finding the substitution of the phrase “another person” was sufficient “*in the context of this case*” where three co-defendants were tried. (App. p. 10) (emphasis in original). He urged the Court of Appeals to reconsider the ruling “in the context of all the evidence that was before the jury,” including the fact that Investigator Catoe had testified that after taking the statement, investigators obtained an arrest warrant for Petitioner. (App. p. 11).

Discussion:

The gist of the Petitioner's argument appears two fold. First, he apparently argues that, in generally, redaction can be made, but only if no reference to any co-defendant, either in name or action, remains in the statement. In other words, the statement cannot even infer the existence of another individual. Because other evidence put the three together, he argues, the redaction here could not be sufficient. (Cert. Petition, p. 14, "The men were joined at the hips by their tie to the Sonic. They were the three defendants on trial, and both Petitioner McDonald and co-defendant Cannon had given statements to the police."). Second, Investigator's Catoe's testimony that they obtain an arrest warrant for Petitioner after taking the statement further identifies Petitioner. (Cert. Petition, p. 15). Neither point shows error.

As to his first point, Petitioner conceded at trial that current precedent does not require such radical redaction, and specifically argued for an extension of the present rule. (R. p. 638, line 4 - p. 639, line 21).⁵ The trial judge declined to extend the redaction rules noting his concern that such redaction would "change[] the meaning of the entire statement by creating the impression that these parties acted independently." (R. p. 639, lines 10-15; p. 643, lines 12-17). The astute trial judge correctly identified the glaring unfairness in the requested extension. Not only does Petitioner's offered extension of the redaction rules exceed that which Petitioner is entitled to in order to protect his right to confrontation, if allowed, the result would be to tinker with the facts, creating confusion and misleading of the jury. The trial judge appropriately denied the request to extend the redaction rules.

"The constitutional right to confront and cross-examine witnesses is essential to a fair trial in that it promotes reliability in criminal trials and insures [sic] that convictions will not

⁵ This issue is also before the Court by way of the separate petition filed by co-defendant Whitehead.

result from testimony of individuals who cannot be challenged at trial.” *State v. Page*, 378 S.C. 476, 481, 663 S.E.2d 357, 359 (Ct.App. 2008), *rehearing denied* June 29, 2009 (quoting *State v. Martin*, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987)). “[A] non-testifying codefendant’s statement that expressly inculpatates the defendant violates the defendant’s rights under the Confrontation Clause” and is inadmissible. *State v. Holder*, 382 S.C. 278, 283, 676 S.E.2d 690, 693 (2009) (citing *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620 (1968)). “Redaction has come into play as a tool to allow admission of a co-defendant’s confession *against the confessor in a joint trial*. The point of redaction is to permit the confession to be used against the non-testifying confessor, while avoiding implicating his co-defendants.” *State v. Holmes*, 342 S.C. 113, 119, 536 S.E.2d 671, 674 (2000) (emphasis in original) (citing *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702 (1987)); *Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151 (1998).

Thus, if, in a joint trial, a non-testifying co-defendant’s statement is admitted, referenced to the defendant must be redacted for the statement to be admissible. *State v. Martin*, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987). *See also State v. Avery*, 374 S.C. 524, 534, 649 S.E.2d 102, 107 (Ct.App. 2007) (“In this case, all statements from Avery’s co-defendant that referred to Avery were redacted precisely so Avery’s right to confront his witness would not be impinged.”). Statements that connect the defendant “only when linked to other evidence introduced at trial,” do not offend the *Bruton* rule. *Holder*, 382 S.C. at 284, 676 S.E.2d at 693. However, redaction of the defendant’s name alone may not suffice to protect rights.

It is given that at least one other person is implicated in any redaction. That is not error. The danger is not acknowledging that at least one other person was involved. The

danger is in identifying a certain individual — the defendant — when that defendant cannot confront his accuser. As such, “one must look at the *kind* of inferences that are necessary to make a connection to the defendant, not the simple *fact* that there are inferences, to determine

the applicability of *Bruton*. *Holder*, 382 S.C. at 284, 676 S.E.2d at 694. This Court found in *Holder*, for example, that use of the pronoun “she” when there is only one co-defendant, and she is female, still identifies the co-defendant and offends *Bruton*. *Id.*, 382 S.C. at 285, 676 S.E.2d at 694. 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 specific identification being hidden from the juror would also appear to point directly to a co-defendant and would offend *Bruton*. *See, for example, Gray v. Maryland*, 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, 280 (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 found 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).

Here, the State used the neutral phrase, “another person,” and avoided any *Bruton* violation. Respondent notes that the trial judge carefully reviewed the breadth and context of the statements for any other indication of direct implication. For instance, the judge noted that others were referenced in the statements such as “Leroy” and the generic term “we” could apply to Leroy and the co-defendant. (R. p. 641; line 12 - p. 642, line 5). (See also R.

p. 749, lines 2-10). The judge also ordered redaction of the reference to someone's "blue Honda Accord," as witnesses had testified that Whitehead drove a blue Honda. (R. p. 645, lines 7-22). (See, for example, R. p. 481, lines 4-9). The remainder of each statement is very generic, and, though it may certainly be one interpretation, the statements do not actually even limit participation to three, such as the three defendants then on trial. (See R. 748, line 25 - p. 752, line 15; p. 773, line 15 - p. 775, line 21). (See also State's Exhibits 103 and 104).

As to Petitioner's second point – that Investigator Catoe testified that after taking Cannon's statement, the investigating officer obtained an arrest warrant for Petitioner, this argument is not preserved for appeal as it was not raised at trial. *See, e.g., State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (issue not preserved when one ground is raised to the trial court and another ground is raised on appeal). It is not addressed in the Court of Appeals opinion, and there is no ruling by the Court of Appeals to review here. At any rate, the identification is not as clear as Petitioner submits.

In the Court of Appeals, Petitioner did not argue an inescapable inference; rather, he argued there could be "*serious argument* as to the identity" of the person. (See FBOA, p. 15). (emphasis added). This merely shows the redaction proved its worth. There is no infirmity if *other* evidence at trial indicates identity. *Holder, supra*. At bottom, Petitioner is arguing that other evidence considered in connection with the statement may indicate identification. Precedent is clearly against him. Even so, reviewing the investigator's response in context shows the testimony does not directly link information in Cannon's statement to the basis for the subsequent warrant:

- Q What happened next in the investigation? What did you do next?
- A After obtaining this statement, we then obtained an arrest warrant for Mr. Derrick McDonald.

Q Now, you had previously talked to Derrick McDonald that day?

A I had.

Q Briefly?

A That's correct.

Q You told us. The oral statement you've already given us. Did you leave a card and say call me or anything?

A I left and told him if he could think of anything else when his mother got home to call me.

Q And did you receive a call from the McDonalds' household?

A I did receive a call from there.

Q When was that?

A This was shortly after I had taken this statement.

Q And as a result of that, what, if anything, did you tell the McDonald residence you would do?

A I told the McDonald residence that I would be there just as soon as I finished up what I was doing.

(R. p. 754, line 5 - p. 755, line 2).

When read in the context, the testimony shows continuing, and separate, lines of investigation at that point. It is far from an inescapable inference that Cannon clearly, by name, implicated Petitioner in the statement to investigating officers or that they used that information alone to obtain a warrant. The testimony is read most naturally as an explanation of the order of investigation, not an inescapable conclusion of implication.

Again, the redaction was proper and protected Petitioner's right to confrontation by ensuring that no facially incriminating statement was evident. Moreover, as the Court of Appeals noted, the trial judge also instructed the jury that evidence admitted solely for its

connection to one co-defendant may only be considered in connection with that co-defendant, and not against the remaining co-defendants which provided further protection of Petitioner's rights. (App. pp 6-7). (See also R. p. 1449, lines 8-12). However, even if the redaction was not sufficient, and this Court should find error, there is overwhelming evidence of guilt such that any error could only be harmless on this record.

"Violations of the Confrontation Clause are subject to a harmless error analysis." *Holder*, 382 S.C. at 285, 676 S.E.2d at 694. Though the considerations vary – including overwhelming evidence of guilt absent the error, whether the evidence was cumulative to other properly admitted evidence, and the overall importance of the testimony – to find a violation harmless, the error must be deemed harmless beyond a reasonable doubt in the context of the entire record. *Id.*, 382 S.C. at 285-286, 676 S.E.2d at 694-695. Here, guilt is not merely premised on inferences from Cannon's statement. Petitioner confessed. Specifically, he confessed to participating in entry into the victim's home, and beating the victim about the head with a bat. (R. p. 773, line 15 - p. 775, line 21). Additionally, the details of his confession were corroborated by the physical evidence. First, and foremost, of those details are the injuries to the victim's head. Forensic pathologist Joel Sexton, M.D., testified that at autopsy, he identified "at least six" and possibly eight "injuries or blows were inflicted to the head that were each capable of causing death," with wounds inflicted on the top and back of head and behind the left ear, along with abrasions and cuts to the face, injuries on legs, abrasions on knees and on the abdomen. (R. p. 1091, line 15 - p. 1096, line 8; p. 1098, line 19 - p. 1099, line 16; p. 1100, line 21 - p. 1105, line 4). Dr. Sexton also opined that two blows were inflicted on the couch, but that the victim either came off, or was pulled off, the sofa and was hit on the floor with a "cylindrical and linear" object such as the

bat (State's 99), and that he was hit on the head with a glass potpourri bowl, remnants of same still being on the couch. (R. p. 1123, line 17 - p. 1125, line 14). Moreover, investigators obtained a copy of a receipt from the local Walmart confirming a purchase of a ski mask and purple gloves on December 12, 2006 at 10:43 (R. p. 1058, line 7 - p. 1061, line 5). Ms. Davy testified that victim's grandparents had provided a bat to keep in their residence for protection. (R. p. 590, line 4 - p. 591, line 12). Ms. Zoch testified that she had recently replaced the back door to the home with another sturdier door prior to the burglary and murder. (R. p. 1282, line 17 - p. 1283, line 6). Photos from the scene also confirmed the use of the latex gloves, the bat, the broken glass bowl, and the overturned Christmas tree. (R. p. 711, line 3 - p. 713, line 19; p. 1106, line 1-7). These details are all mentioned in Petitioner's own statement. (See R. p. 773, line 15 - p. 775, line 21). Lastly, witness testimony from Allen Brown and Christopher Rust placed Petitioner with the co-defendants immediately before the burglary and murder, (R. p. 319, line 12 - p. 324, line 14; p. 361, lines 1-22), and Rust saw a visibly upset Petitioner immediately after the burglary and murder, (R. p. 363, line 7 - p. 365, line 8). In light of this solid evidence of guilt, any error in the redaction could only be harmless beyond a reasonable doubt.

However, the statements were properly redacted and the Court of Appeals properly affirmed the trial judge's ruling. There is no error.

II.

The Court of Appeals did not err in finding Petitioner's *Crawford v. Washington* issue procedurally barred when the *Crawford* argument was not raised at all in regard to redaction of the written statement contested on appeal, but only raised 300 pages later in the transcript in reference to a second statement. At any rate, because co-defendant Cannon's statement was properly redacted, there was no *Crawford* violation.

Relevant Facts:

Counsel for Cannon, who argued for all three co-defendant in regard to redaction of the statements given by Cannon and Petitioner, as taken by Investigator Catoe, (R. p. 627, lines 15-16), did not include an argument on *Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354 (2004) in regard to those statements and/or redaction. However, the statements were redacted pursuant to *Bruton* and thereafter read into the record. (R. p. 748, line 25 - p. 752, line 19; p. 773, line 15 - p. 775, line 21).

Counsel for Petitioner argued, some three hundred (300) pages in the transcript later, that another statement from Cannon taken by Lt. Crawford (relating they all "hit the door" together but maintaining he was "still last,") violated *Crawford v. Washington*. (R. p. 936, line 4 - p. 937, line 17). The trial judge specifically noted that the objection was not raised as to the written statements, and that those written statements had already been redacted and admitted. (R. p. 936, lines 11-15). Counsel offered, "the other statements should have been suppress due to Crawford, too. But this is different...." (R. p. 936, line 22 - p. 937, line 1). The trial judge specifically asked about the later statement alone. (R. p. 937, lines 2-3). The judge eventually ended argument by directing the solicitor to call the next witness. (R. p. 940, lines 11-14). Before calling Lt. Crawford, however, the trial judge placed his ruling on the record:

... it is my opinion that a properly redacted statement; that is, the statement taken by this officer, Crawford - - its not a pun - - does not offend Crawford if it is properly redacted.

And as - - in other words, I'm not - - I cant's say; I certainly don't want to say that Bruton and Crawford address the same issues. But I think because your clients, if it's a properly redacted statement, does not involve or does not implicate either of the other two defendants, then I think it's admissible. ...

(R. p. 990, lines 10-22).

In the Court of Appeals, Petitioner argued that "[i]n addition to the statement of co-defendant Cannon being used against [Petitioner] in violation of Bruton it also violated Crawford v. Washington, 541 U.S. 36 (2004)." (FBOA, p. 16).

The Court of Appeals found the issue procedurally barred:

Counsel for Cannon argued all three co-defendants concerns redacting Cannon's written statement to the police. Counsel's argument was based on *Bruton* and did not mention *Crawford v. Washington*. Counsel did not raise a *Crawford* violation until hundreds of pages later in the transcript in regard to an oral statement made by Cannon during a polygraph exam. The judge noted this was the first time *Crawford* was mentioned, and Cannon's previous redacted statement has already been admitted. Counsel stated, "[F]or the record, I'm going to go ahead and put on the record that the other statements should have been suppressed due to *Crawford*, too." Because the *Crawford* issue was not raised when Cannon's written statement was redacted and admitted, this issue is not preserved for our review. ...

(App. p. 8).

In a concurrence to the opinion, Chief Judge Few wrote:

... the *Crawford* issue the majority holds is unpreserved-was never an issue at all, and there is no need to discuss *Crawford*. The question is properly analyzed under *Bruton*.

(App. p. 9).

In the petition to this Court, Petitioner argues that the issue was preserved, and there was a violation of both *Crawford* and *Bruton*. (Cert. Petition, p. 17).

Discussion:

In *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354 (2004), 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 Cannon — the defendant who made the statement. *Crawford* could not apply. In short, the statement was not admitted against Petitioner, but against Cannon. Petitioner's confrontation rights were protected by redaction under *Bruton, supra*.

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. Further, to prevent any possible misuse of the statement for its offered purpose, the trial judge specifically instructed the jury that evidence admitted solely for its connection to one co-defendant may only be considered in connection with that co-defendant, and not against the remaining co-defendants. (R. p. 1449, lines 8-12). Again, *Crawford* simply is not applicable, and Petitioner's confrontation rights were protected by redaction.

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 Cannon’s statement was properly redacted, (See R. p. 1026, lines 10-12, “We hit the back door but I was still last. The victim grabbed my leg during the incident and I kicked him.”), there is neither a *Bruton* nor a *Crawford* issue. However, as asserted above, Petitioner’s attempt to argue a violation of *Crawford* in regard to Cannon’s first statement – the written statement – is procedurally barred. *Frieburger, supra*. The Court of Appeals properly applied the bar and the issue is not available for review.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

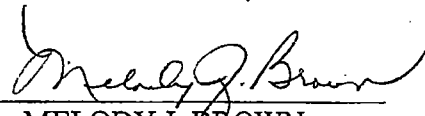
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ATTORNEYS FOR RESPONDENT

May 1, 2013.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM KERSHAW COUNTY

Court of General Sessions
G. Thomas Cooper, Jr., Circuit Court Judge

On Petition for Writ of Certiorari to the Court of Appeals
Opinion No. 5033 (S.C.Ct. App. filed September 12, 2012)

The State,

Respondent,

vs.

Derrick McDonald,

Petitioner.

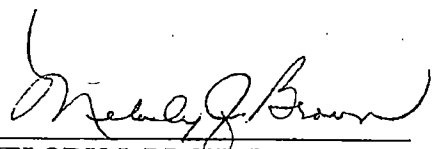
Appellate Case No.: 2012-213686

PROOF OF SERVICE

I, Melody J. Brown, certify that I have served the *Return to Petition for Writ of Certiorari* on Petitioner depositing a copy of same in the United States mail, postage prepaid, addressed to his attorney of record:

Robert M. Dudek, Chief Appellate Defender
South Carolina Commission on Indigent Defense,
Division of Appellate Defense
Post Office Box 11589
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This 1st day of May, 2013.


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ATTORNEY FOR RESPONDENT

The Supreme Court of South Carolina

The State, Respondent,

v.

Derrick McDonald, Petitioner.

Appellate Case No. 2012-213686

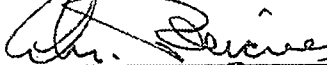
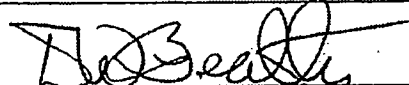
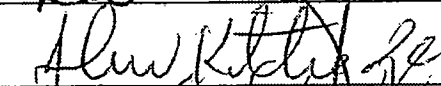
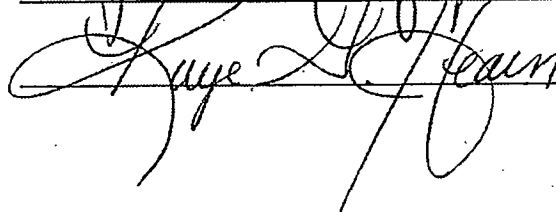
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APPELLATE COUNSEL

ORDER

This matter is before the Court on a petition for a writ of certiorari to review the Court of Appeals' decision in *State v. McDonald*, 400 S.C. 272, 734 S.E.2d 167 (Ct. App. 2012). We grant the petition for a writ of certiorari as to petitioner's Question I. We deny the petition as to Question II. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.

	C.J.
	J.
	J.
	J.
	J.

Columbia, South Carolina
February 21, 2014

cc:

Honorable Jenny Kitchings

Robert Michael Dudek, Esquire

Melody Jane Brown, Esquire

Joyce McDonald

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Kershaw County

G. Thomas Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DERRICK MCDONALD,

PETITIONER

BRIEF OF PETITIONER

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ISSUE PRESENTED

Whether the Court of Appeals erred by holding the trial court did not commit reversible error by allowing into evidence the statements of petitioner's non-testifying co-defendant without adequately redacting his claim of petitioner's involvement, as this denied petitioner his Sixth Amendment right to confront and cross-examine the witness, as interpreted by Bruton v. United States, 391 U.S. 123 (1968), and its progeny?

STATEMENT OF THE CASE

Petitioner was indicted by the Kershaw County Grand Jury for the offenses of murder and first-degree burglary. His co-defendants, Robert Cannon and Christopher Whitehead, were indicted for the same offenses. R. 1553.

Their joint trial was held from May 6-13, 2008 before the Honorable G. Thomas Cooper Jr., and a jury. Marcus Whitlark and Nathan Sheldon represented petitioner. Joshua Kendrick represented defendant Robert Cannon. Neil Riley and David Reuwer represented defendant Christopher Whitehead. The solicitors were John Meadors, Joanna McDuffie and Ron Moak. R. p. 1.

At the conclusion of the trial on May 13, 2008 the jury found each of the three defendants guilty of murder and burglary in the first-degree. R. p. 1501, l. 17- 1502, l. 18.

Judge Cooper sentenced petitioner and co-defendant Cannon to thirty-five years imprisonment concurrent on both charges. R. p. 1550, l. 15- 1551, l. 3. Based on co-defendant Christopher Whitehead's prior convictions for attempted armed robbery he was sentenced to life without parole for murder and burglary in the first-degree. R. p. 1548, l. 16-1549, l. 15.

The Court of Appeals affirmed petitioner's convictions in State v. McDonald, 400 S.C. 272, 734 S.E.2d 167 (2012). App. 1-9. Petitioner sought rehearing. App. 11-13. The state filed a return to the petition for rehearing. App. 14-23. Rehearing was denied. App. 24.

Petitioner then sought certiorari from this Court which was granted on the present issue.

ARGUMENT

The Court of Appeals erred by holding that the trial court did not commit reversible error by allowing into evidence the statements of petitioner's non-testifying co-defendant without adequately redacting his claim of petitioner's involvement, as this denied petitioner his Sixth Amendment right to confront and cross-examine the witness, as interpreted by Bruton v. United States, 391 U.S. 123 (1968), and its progeny.

Relevant facts

Melissa Davy was the girlfriend of the decedent Joshua Zoch. She worked at the Sonic Restaurant on Hard Scrabble Road where the decedent Joshua also worked. The decedent had gotten Davey her job at Sonic. Davey knew co-defendant Whitehead because he also worked at the Sonic. In addition, co-defendant Cannon also worked at the Sonic and Petitioner McDonald was a former employee of the same Sonic. R. 560, l. 2 – 563, l. 3.

Davy and the decedent lived together for about two years in Kershaw County. She admitted they argued throughout their relationship. On the Friday night before the fatal encounter on December 13, 2006, Davy confirmed on cross-examination they had a party at her house “if that’s what you want to call it.” R. 563, l. 24 – 564, l. 9; R. 593, ll. 13-24.

Davy testified that the decedent left that night with two of his friends and he brought back crack cocaine. While the decedent was smoking crack Davy “slapped the crack pipe out of his hand.” The decedent became very angry and he demanded that they all leave. Davy left with her friends Zack and Molly in Davy’s car. The two friends who went with the decedent to get the crack left in their own car. R. 595, l. 1- 596, l. 5.

Davy next spent some time together with the decedent on the following Monday, her day off at the Sonic. “I met up with Josh during the day that day.” Davy gave the decedent sixty dollars

that day, and she learned he spent it on crack cocaine. Davy recalled the decedent came by the Sonic on Tuesday morning, December 12, 2006 “but I didn’t talk to him.” R. 611, l. 3 – 612, l. 11.

Co-defendant Whitehead was Davy’s crew leader. Davy readily admitted she did not get along with Whitehead but she said “[I] listened to him, what he had to say at work.” R. 613, 4-18. Davy confirmed that the decedent *had been cooperating with the police* at the time because of his drug related problems. R. 613, l. 4 – 620, l. 15.

Zachary Waltemath started working at the Sonic “around Halloween” of 2006. R. 376, ll. 8-17. He testified that the decedent had come up to the Sonic on Monday, December 12, 2006 to “talk to Melissa [Davy] because they had got in an argument over the weekend and they were trying to resolve things or something.” Waltemath recalled that Monday night Whitehead called him twice and “he wanted me to call Josh and see what he was doing because he wanted *to go over there and fight him or something.*” Waltemath told Whitehead he did not want to get involved “with anything like that.” R. 385, l. 17 – 388, l. 8. (emphasis added).

On Wednesday, December 13, 2006 Waltemath went to work at about 10:00 a.m., and Davy was going to take time home after work at 5:00. “But first she wanted to stop by her house to get her toothbrush and extra clothes or something because she hadn’t been there [the house she shared with the decedent] in a few days . . . And we got there. And she walked in the house, freaked out and saw him.” Waltemath looked inside the house and saw the decedent lying on the floor. He was dead. R. 388, l. 9 – 391, l. 18.

Patricia Heathcoe owned and managed the Sonic. *The decedent, co-defendant Cannon and Petitioner McDonald all worked for her at one time.* Co-defendant Whitehead still worked for her on Wednesday December 13, 2006, the day the decedent’s body was discovered. Heathcoe said Whitehead was a good employee and he worked his full shift on Tuesday, December 12, 2006.

However, Heathcoe said on Wednesday, December 13, 2006 Whitehead showed up with a scratch under his eye. The following day, Thursday, December 14, 2006 she said Whitehead “was limping around and he was wanting a Workman’s Comp form filled out on his leg.” Whitehead claimed to have been hurt at work and Whitehead “got real cocky” stating “a friend of his got screwed by falling and not getting a report filled out and ended up paying his own bills.” Heathcoe had Whitehead’s Workman’s Compensation form processed. R. 436, 16 – 448, l. 10.

The next morning, a Friday, Heathcoe got a call from her employee, Cecile Trapp, who told her “that Chris [Whitehead] had walked out on her.” Heathcoe said she “freaked out” because she knew this left her employee alone at 6:55 a.m. at the Sonic. Heathcoe telephoned Whitehead and asked what was wrong with him having walked off of his shift leaving the other young woman alone. “[H]e was just ranting. You know, I don’t need that f’g job. *I’ve got problems. I’m about to move to Aiken.*” Heathcoe said all this surprised her because Whitehead had always been polite and a good employee. R. 445, l. 4 – 452, l. 12. (emphasis added).

Cecile Trapp recalled that Whitehead was limping at work on Wednesday, December 13, 2006 and he had not been limping the day before. Trapp said that on Thursday, December 14, 2006, Whitehead told her his mother took his telephone away. On the morning of Friday, December 15, 2006 Whitehead talked to his mom and “he kind of freaked out and was just like he had to go [leave work].” Trapp said she pleaded with Whitehead to stay but he said he had to leave. R. 478, l. 15 – 489, l. 23. Trapp testified she had heard during this time period that “Whitehead was going to fight him [the decedent].” R. 489, ll. 16-23.

There was evidence others knew that the decedent had hit Davy in the past. Davy would only acknowledge the decedent had hit her “one time.” R. 580, ll. 9-14.

The state's theory of the case was that Whitehead spearheaded the burglary and attack on the decedent and that co-defendant Cannon and Petitioner McDonald were involved for whatever reason. One motive was thought to be that the decedent *was a police informant*. Whitehead became belligerent with the police and he refused to cooperate. Michael Jenkins testified that he was in jail with Whitehead after the crime and he said Whitehead was bragging about having killed the decedent, and how "when they went back to school they were going to be respected and jaws were going to drop and all this and just bragging." R. 1221, l. 10 – 1240, l. 6.

Bruton

Co-defendant Cannon gave Investigator Catoe a five page statement on December 15, 2006 placing himself at the crime scene, and he implicated Whitehead as the leader in the burglary that lead to the decedent's death, and petitioner as a lesser participant. R. 1561-1565; r. 1570-1574. As seen, each of the three defendants *had worked at the same Sonic restaurant at one point*. Helen Zoch, the decedent's mother, acknowledged the decedent was a police informant and "he was buying from someone that the police wanted to close down as a dealer." R. 1284, ll. 18-24.

Ms. Zoch testified that on December 12, 2006, the day before the murder, she tried to have the decedent check himself into Morris Village. However, the decedent wanted to talk to Davy, his girlfriend, whom he had just separated from, before he checked himself in Morris Village. Consequently, the decedent did not check into the facility that day. R. 1274, l. 8- 1281, l. 14.

Throughout the trial the redaction issue was discussed. In Cannon's statement to Investigator Catoe he said Whitehead told them they needed to beat "Josh's ass because he was a snitch." Whitehead knocked on the decedent's door, and then "busted in" a side door when the decedent did not answer. Cannon described how he and petitioner followed Whitehead in "[t]o watch the fight." R. 1662. Cannon described how Whitehead beat the decedent, and "started

pressuring D.J. to hit Josh with the bat that was in the house and DJ then hit Josh in the back of the head.” Cannon said that “[t]he whole time Chris was talking shit to him about being a snitch. At that time Chris kicked Josh in the ribs. And ask (sic) Josh where the weed was and Josh was just grunting. That (sic) when Chris asked me to check the room and we started pulling draws (sic) and Chris flipped over the mattress and DJ was just standing their (sic). Then Josh went unconscious and I got Josh a towel and put it on his head. Chris said fuck we don’t have anything and pushed the Christmas tree over on Josh.” R. 1562-1563.

Cannon told Catoe that “[B]efore Chris left he got some frozen chicken from the freezer and put it on Josh’s head to try and stop the bleeding. After that we went back out the same way we came in. We left and Chris dropped DJ off 1st and me second and I guess he went home.” R. 1563-1564.

Defense counsel Whitlark (for Petitioner McDonald) joined in the objection to the state’s proposed redaction of this statement. R. 432, ll. 4-12. Defense counsel later again joined in a further motion that the state’s proposed redactions were insufficient under Bruton v. United States, 391 U.S. 123 (1968). R. 627, l. 2- 629, l. 14. Solicitor McDuffie claimed the state’s redactions would solve the Bruton problem. She specifically maintained that Bruton would be satisfied “by taking the places where we have the names of the co-defendant crossed out and changing that or whiting it out and having Investor Catoe rewrite “*another person*.” The solicitor claimed this would satisfy Gray v. Maryland, 523 U.S. 185 (1998). The judge said he understood that the state was proposing that the statements be redacted to use “another person” or ‘we’ or ‘they.’” The solicitor confirmed that was correct. R. 630, ll. 1-11.

Defense counsel stated such redactions were inadequate. Specifically counsel cited this Court’s pragmatic opinion in State v. Labarge, 275 S.C. 168, 268 S.E.2d 278 (1980), where it held

the substitution of "Mr. X" for the defendant's name would not satisfy Bruton v. United States, 391 U.S. 123 (1968). R. 630, l. 22- 631, l. 2. Counsel argued the jury "will absolutely know" that the statement was referring to the two other co-defendants. R. 631, ll. 4-17.

Defense counsel repeatedly noted the opinion in State v. Labarge and argued "our position is that [these redactions] do not satisfy Bruton." R. 632, l. 1- 634, l. 9. Defense counsel noted this was a "very powerful confrontation clause" rule issue and that allowing statements into evidence as presently redacted clearly implicated the co-defendants. R. 634, l. 10- 637, l. 2.

Defense counsel Sheldon for Petitioner McDonald also noted the heart of Bruton was that the jury should not be able to look at the other two defendants and conclude those must be the "some other people" in the statements. R. 637, ll. 3-16. Defense counsel argued the co-defendant's fundamental constitutional rights would be violated if the state's proposed redactions were allowed to stand. R. 638, l. 4- 643, l. 17. The judge noted that the objection to the redaction went to Petitioner McDonald, co-defendant Cannon and co-defendant Whitehead. However the judge overruled the objections to the state's proposed redactions. R. 643, ll. 12-22; State's exhibits 103 and 104. R. 1570-1575.

Before investigator Danny Catoe read the redacted confession, state's exhibit 103, of Robert Cannon the objections were renewed. R. 735, l. 19 - 748, l. 23. In his statement, Cannon noted that he went into the Sonic where the men either worked or had worked wearing ski masks as a joke. "Another person said we need to do something with these mask (sic), and I ask and another person asked like what. And another person said like beat Joshs (sic) ass because he's a snitch . . ." R. 1570. The rest of the Cannon redacted statement, in pertinent part, stated:

Another person then ask (sic) if me and another person wanted to ride and we said whatever. Because I had nothing else to do and no certain time to be home. It was about 11 p.m. Another

person was real quiet in the car while we were going to Josh's house. We pulled up to Josh's about 11:30 p.m.

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

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

R. 1570-1573. (emphasis added).

Investigator Catoe read the Cannon confession to the jury. R. 739, l. 1 - 740, l. 23 It's strikingly obvious in this case that Petitioner McDonald was the person co-defendant Cannon was implicating along with Whitehead. That was certainly true before Catoe testified he took the statement at "Robert Cannon's house on December 15, 2006, two days after the murder." R. 752, ll. 16-19. **Catoe continued "after obtaining this statement, we then obtained an arrest warrant for Mr. Derrick McDonald."** R. 754, ll. 5-11. Catoe repeated **"after speaking with Mr. Cannon,**

we had another investigator obtain a warrant on Mr. Derrick McDonald.” R. 755, ll. 8-16. (emphasis added). Any possible weak argument the state had that Cannon had not implicated Petitioner McDonald in the crime was now removed. Even before this devastating final nail in the coffin, it was apparent that Cannon, on the face of his statement, was implicating Petitioner McDonald in this Sonic centered murder as being another person involved in the crime with him and Whitehead.

Petitioner McDonald strongly maintained that his statement to the police was coerced and should not be considered despite the state’s arguments to the contrary. Petitioner’s allegedly voluntary statement was then read to the jury. In this statement Petitioner stated that he decided to go to the Sonic and he talked “to them” about getting a job. They then went to the Walmart and “we got a ski mask and a box of the latex clubs that were purple.” R. 767, l. 16- 769, l. 19; R. 773, l. 7- 776, l. 14.

One of the men called Zack to see if Josh was at home and see who was there. “Then we started planning a whole thing...” Petitioner McDonald said he was to stay outside and “to make sure nobody came up.” “So he went to the side door and we all kicked the door on the count of 3. The door opened. Another person went in, another person, then me. I turned around, closed the door, and I went to the other room to look out the window, and my name was called. And I went into the living room. They were talking low, and another person went to the light switch at the dining room area and cut the light on. And another person was on the couch asleep ... Josh was on the couch asleep. And another person took a bowl over his head and smashed it on Josh’s head. At that point that’s when I looked to the left and saw a wooden bat. And I started hitting him on the body. That’s one another person stopped me to ask Josh a question. And that’s when the bat hit

Josh in the face. That's when he really started bleeding and I got scared and dropped the bat." R. 767, l. 1- 769, l. 17.

On cross-examination Catoe denied that he told seventeen-year-old Petitioner **that if he would give a statement he would be a witness against Chris Whitehead rather than a defendant.** R. 826, l. 6- 830 l. 12. Catoe *also denied petitioner told him he did not want to talk without a lawyer while Catoe was giving him these assurances.* R. 831, l. 8- 832, l. 7. Later in his cross-examination, Catoe would only say **he did not remember telling petitioner he only wanted him as a witness against Whitehead.** R. 836, l. 12-14. Catoe denied telling petitioner that the trial in which he wanted him to be a witness against Whitehead *was going to be "a death penalty trial"* R. 826, ll. 9-11. (emphasis added).

Catoe also admitted there were not any fingerprint, eyewitness, or forensic evidence linking the three co-defendants to the crime scene. R. 889, l. 11- 890, l. 11; R. 894, ll. 14-17.

Jury argument on Petitioner McDonald's statement

Defense counsel told the jury to consider the circumstances of this case when deciding whether petitioner's statement was voluntarily tendered given the promise made to him. "You grab a 17-year-old kid at his house and you are going, hi, were the police. We want to talk to you about a murder. You're a 17 years old. And they're telling you, *you want to be a witness in a case or do you want to be a defendant in a death penalty case?*" R. 1421, l. 16 – 1423, l. 10. (emphasis added).

Jury charge on voluntariness of the statement

The trial judge instructed the jury that it would make the ultimate decision of whether a defendant's statement was made freely and voluntarily of his own free will. The judge told the jury it could consider the defendant's age his mental ability or capacity, the nature of the questioning, and whether he was advised of his right to have a lawyer present and other factors. R. 1481, ll. 3-25.

Since there was only a general verdict rendered in this case there is no way to determine if the jury determined whether or not Petitioner McDonald's statement was freely and voluntarily given.

Court of Appeals

The Court of Appeals cited this Court's opinions in State v. LaBarge, 275 S.C. 168, 268 S.E.2d 278 (1980), and State v. Holder, 382 S.C. 278, 285–286, 676 S.E.2d 690, 694 (2009). The court noted that this Court in LaBarge held that substituting "Mr. X" "was insufficient" "in light of other testimony" since "Mr. X" pointed directly at LaBarge. App. 6-7.

The Court of Appeals held, nonetheless, "we find the neutral phrase 'another person' inserted into Cannon statement avoided any Bruton violation. The court noted that a limiting instruction was given, and held the trial judge properly admitted the redacted statement. App. 6-7.

Discussion

Defense counsel correctly argued that redacted statements in this case violated the holdings of Bruton v. United States, 391 U.S. 123 (1968) and State v. Labarge, 275 S.C. 168, 268 S.E.2d 278 (1980), See, also, Gray v. Maryland, 523 U.S. 185, 197 (1998) State v. Holder, 382 S.C. 278, 285–286, 676 S.E.2d 690, 694 (2009); State v. Henson, 407 S.C. 154, 754 S.E.2d 508 (2014). The Court of Appeals, respectfully, erred by holding otherwise.

In this case, as in Bruton, during petitioner's joint trial the admission of his non-testifying co-defendant's statement clearly implicated Petitioner McDonald in the crime and therefore violated his rights under the Confrontation Clause. The Court in Richardson v. Marsh, 481 U.S. 200 (1987) noted that Bruton can be complied with by redaction. Here, however, as in State v. Holder, 382 S.C. 278, 676 S.E.2d 690, 694 (2009), and State v. Henson, 407 S.C. 154, 754 S.E.2d 508 (2014), Cannon's statement clearly implicated petitioner as "another person" involved in the burglary and murder.

Further, the practical policy reasons favoring joint trials (mostly large drug trials in federal court) discussed in Richardson v. Marsh cannot, as a matter of fundamental fairness, decimate a defendant's right to confrontation where it becomes apparent the non-testifying defendant is naming the defendant as his accomplice in the murder. This Court has often warned against the dangers of such joint trials, and here the danger was apparent before the trial ever started.

"We urge the state to carefully consider all the available alternatives before deciding to try co-defendants jointly, especially in a capital case. While we realize there will be circumstances in which a joint trial will be the best route to follow, the decision to pursue this route should be made only after giving due deliberation to the inherent problems, such as redacted statements, which arise from joint trials." State v. Bellamy, 293 S.C. 103, 106 359 S.E.2d 63, 65 (1987). *overruled on other grounds in* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

While this was not a "mass trial," trying these three Sonic defendants together, with these redacted statements, very definitely had the impermissible spill-over effect of a guilty verdict for each because they were, as stated below, joined at the hip -- especially in the manner the state tried this case: "We take this occasion to remind prosecutors of the pitfalls inherent in mass conspiracy trials. More than forty years ago this Court stated, "It is always cumbersome to try a great number of defendants at one time.... With such a large number [of defendants] there might be a danger of some of them being lost sight of by the jury, and their case considered by the jury in a vague way." State v. Gunn, 313 S.C. 124, 138, 437 S.E.2d 75, 83 (1993).

The men were joined at the hip by their tie to the Sonic. They were the three defendants on trial, and Cannon's statement clearly referred to Petitioner McDonald and co-defendant Whitehead. Defense counsel correctly argued that this case was not any different than State v. Labarge where

the state claimed the redaction of the co-defendant's name being replaced with "Mr. X" solved the problem.

In Henson, this Court cited to Gray v. Maryland, 523 U.S. 185, 196 (1998), wherein the confession was redacted with blanks rather than neutral pronouns, and noted that the Gray Court "clarified that Richardson did not turn on whether the confession admitted required an inference in order to incriminate the defendant, but on the kind of inference required. Id. at 196, 118 S.Ct. 1151. Ultimately, the Court held 'The inferences at issue here involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial. Moreover, the redacted confession with the blank prominent on its face, in Richardson's words, 'facially incriminat[es]' the codefendant. Id. at 196, 118 S.Ct. 1151 (alteration in original). In other words, the Court brought within Bruton's prohibition those confessions which **facially incriminate through inference.**" State v. Henson, 407 S.C. 154, 164, 754 S.E.2d 508, 513 (2014). (emphasis added).

This Court in Henson continued: "Gray did not directly address confessions redacted through the use of neutral pronouns as was done here. However, following Gray, in State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009), this Court held, consistent with many other courts considering the issue, that even a confession redacted through the use of neutral pronouns violates the Confrontation Clause if it facially incriminates a nonconfessing codefendant. Id. at 285–86, 676 S.E.2d at 694. This follows directly from Gray where the holding turned on the fact that despite redaction the statements were 'directly accusatory' and 'obviously refer[ed] directly to someone, often obviously the defendant.' Gray, 523 U.S. at 194, 196, 118 S.Ct. 1151. In short, where redacted

confessions use neutral pronouns which facially refer to a codefendant, they violate the Confrontation Clause.” State v. Henson, 407 S.C. 154, 164, 754 S.E.2d 508, 513 (2014).

This Court in Henson cited favorably to United States v. Richards, 241 F.3d 335 (3d Cir.2001), wherein the appellant and a codefendant were tried jointly for robbing an armored car and the codefendant's redacted confession was admitted into evidence. *Id.* at 341. “The redacted confession did not refer to the appellant by name but referred to him as the codefendant's ‘friend.’” *Id.* The court held the ‘reference to his ‘friend’ was just as blatant and incriminating of [the appellant] as the word ‘deleted’ in the Gray case.” *Id.* The court explained that the confessor's statement ‘referred to the existence of three participants in the crime—[the confessor], the ‘inside man,’ and ‘my friend.’ Since the ‘inside man’ was easily identified as the driver of the Brink's van, the reference to ‘my friend’ sharply incriminated [the appellant], the only other person involved in the case.” *Id.* Thus, knowing only who the parties were and the fact that the appellant sat before them as a defendant, the jury would likely infer that the statement referred to the appellant as a participant in the crime. Therefore, the confession directly implicated the appellant and violated the Confrontation Clause.” State v. Henson, 407 S.C. 154, 165, 754 S.E.2d 508, 514 (2014).

This Court also cited Stanford v. Parker, 266 F.3d 442 (6th Cir.2001), in which the petitioner was tried jointly with a coconspirator. *Id.* at 449. “His codefendant's confession was redacted to replace the petitioner's name with “the other person” and then read into evidence by a detective. *Id.* at 456. On appeal of the denial of his habeas corpus petition, the court held the redaction would not have prevented the jury from inferring that the confession referred to the petitioner and thus, the admission of the confession violated the Confrontation Clause. *Id.* at 457. The court reasoned the jury would make the inference because the petitioner ‘sat as a defendant before the jury’ and the confession was offered into evidence by the prosecution which the jury

knew was seeking the petitioner's conviction. Id.” State v. Henson, 407 S.C. 154, 165, 754 S.E.2d 508, 514 (2014).

Finally, this Court in Henson cited the Arkansas Supreme Court’s opinion on a similar issue in Jefferson v. State, 359 Ark. 454, 198 S.W.3d 527 (2004), involving three men who robbed a bank courier, one pled guilty, and the other two were tried jointly. Id. at 529–30. “A codefendant’s confession was admitted into evidence after changing the appellant’s name therein to ‘he,’ ‘they,’ or ‘some other guy.’ Id. at 530–31. The court found it was clear from the redacted statement that a third person participated in the crime. Id. at 535. The court concluded the confession ‘obviously directly referred to [the appellant], an inference that the jury easily could have drawn from [the appellant’s] status as a codefendant and the State’s concession that [the codefendant] was the shooter.’ Id. at 536. Accordingly, it held the admission of the confession violated the Confrontation Clause. Id.” State v. Henson, 407 S.C. 154, 166, 754 S.E.2d 508, 514 (2014).

Defense counsel here went to great lengths to repeatedly object to these redactions and to explain why they violated the right to Confrontation and to cross-examination. Further, the “another person” awkwardly inserted in Cannon’s confession in this case was even more obvious than the cases finding Bruton violations cited by this Court in Henson, supra. Petitioner McDonald was jointly tried with Whitehead and Cannon. The jury could look over and see petitioner and Whitehead as the Cannon confession was read.

Moreover, the solicitor, after all, was arguing that Petitioner McDonald and Whitehead were involved with Cannon in committing the crime. See Gray v. Maryland, 523 U.S. 185, 193 (1998). The solicitor went through Cannon’s statement in detail while arguing Cannon downplayed his involvement in the crime, and described how the police proceeded to Petitioner’s house to arrest him. R. 1354, l. 13 – 1362, l. 8.

As seen, Investigator Catoe testified that immediately after obtaining the inculpatory statement from co-defendant Cannon he obtained an arrest warrant for petitioner. Here, by eliciting testimony Petitioner McDonald was arrested immediately after Cannon made his inculpatory statement removed **any doubt** a limiting instruction could be effective. It is important to note that petitioner's involvement in the crime was apparent from the Cannon statement, and it was not apparent **only** by reference to Catoe's testimony about immediately arresting petitioner after taking Cannon's statement.¹

Petitioner McDonald did not appear to have any motive to participate in this crime against the decedent. As stated, there is no way to determine whether the jury considered petitioner's statement or rejected it as coerced as defense counsel argued and the judge instructed. R. 1452, ll. 2225. Defense counsel Whitlark reminded the jury that petitioner was only seventeen-years-old at the time, "and they're telling you, you want to be a witness in a case or do you want to be a defendant in a death penalty case." R. p. 1421, ll. 16-22. Defense counsel told the jurors that the police were putting their pride in obtaining a conviction above petitioner's freedom. R. p. 1421, l. 25- 1422, l. 6.

Defense counsel Whitlark also reminded the jury that petitioner was told that the police just wanted his help in convicting Whitehead. Counsel noted that petitioner had also asked for and been denied an attorney, and that both of young Robert Cannon's parents were given the impression that they could leave town while they spoke with Cannon. Cannon was charged with murder in their

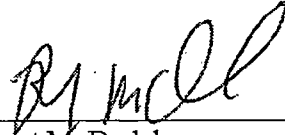
¹ Conversely, in Richardson v. Marsh, 481 U.S. 200, 208 (1987), the Court dealt with a case where a co-defendant's statement was **not** incriminating against Marsh on its face, but **only became so** when linked with Marsh's own testimony admitting her presence at the crime scene which came later during the trial. The confession here was incriminating against Petitioner McDonald on its face. Investigator Catoe's testimony removed **any doubt** that Cannon had implicated petitioner in his statement to the police.

absence. R. p. 1434, ll. 2-10. The admission of the confession of the non-testifying co-defendant in this case violated the holdings of Bruton, Gray, and Petitioner McDonald's right to confrontation. The Court of Appeals should respectfully be reversed in this case.

CONCLUSION

By reason of the foregoing argument, the opinion of the Court of Appeals should be reversed and petitioner McDonald granted a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. M. Dudek", written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 13th day of May, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Kershaw County

G. Thomas Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

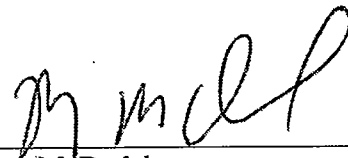
V.

DERRICK MCDONALD,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on Melody J. Brown, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 13th day of May, 2014.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

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

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

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM KERSHAW COUNTY
Court of General Sessions
G. Thomas Cooper, Jr., Circuit Court Judge

On Certiorari to the Court of Appeals
Opinion No. 5033 (S.C.Ct. App. filed September 12, 2012)

The State,		Respondent,
	vs.	
Derrick McDonald,		Petitioner.

Appellate Case No.: 2012-213686

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PETITIONER'S ISSUE PRESENTED

Whether the Court of Appeals erred by holding the trial court did not commit reversible error by allowing into evidence the statements of petitioner's non-testifying co-defendant without adequately redacting his claim of petitioner's involvement, as this denied petitioner his Sixth Amendment right to confront and cross-examine the witness, as interpreted by Bruton v. United States, 391 U.S. 123 (1968), and its progeny?

(BOP, p. 3).

RESPONDENT'S COUNTER STATEMENT OF ISSUE PRESENTED

Whether the Court of Appeals erred in affirming the trial judge's ruling that substitution of the neutral phrase "another person" for Petitioner's name in co-defendant Cannon's statement was proper and adequate redaction under *Bruton v. United States*, 391 U.S. 123 (1968) and its progeny when such redaction not only completely removed Petitioner's name but the statement also did not otherwise facially incriminate Petitioner.

RESPONDENT'S STATEMENT OF THE CASE

A Kershaw County Grand Jury indicted Petitioner, Derrick McDonald, in February 2007, for burglary first degree and murder. (R. p. 1553-56). Marcus Whitlark, Esq., and Nathan Sheldon, Esq., represented Petitioner on the charges. A jury trial was held May 5-9, 2006, before the Honorable G. Thomas Cooper, Jr. Petitioner was tried along with co-defendants Robert Cannon and Christopher Whitehead. After a break in the proceedings, the jury continued deliberations on May 13, 2009. The jury returned a verdict of guilty as charged as to all three defendants. (R. p. 1501, line 17 - p. 1502, line 15). The judge sentenced Petitioner to thirty-five (35) years imprisonment. (R. p. 1550, lines 15-21). Petitioner appealed.

In his final brief filed June 17, 2010 in the South Carolina Court of Appeals, Petitioner raised the following two issues:

1.

Whether the court committed reversible error by allowing into evidence the statements of appellant's non-testifying co-defendant without adequately redacting his claim of appellant's involvement, as this denied appellant his Sixth Amendment right to confront and cross-examine the witness, as interpreted by Bruton v. United States, 391 U.S. 123 (1968), and its progeny?

2.

Whether the court violated appellant's right to confrontation pursuant to Crawford v. Washington, 541 U.S. 36 (2004) by allowing into evidence the statement of appellant's non-testifying co-defendant, where he gave that statement to law enforcement during their investigation of the crime, and appellant never had the opportunity to confront and cross examine his co-defendant?

(FBOA, p. 3).

The South Carolina Court of Appeals heard oral argument on the issues presented on June 19, 2012. On September 12, 2012, the Court of Appeals affirmed Petitioner's

convictions in *State v. McDonald*, Opinion No. 5033 (S.C.Ct.App. filed September 12, 2012).¹ (App. pp. 1-9). Petitioner filed a petition for rehearing on September 27, 2012. (App. pp. 10-12). The State, at the request of the Court of Appeals, made a return to the petition on October 8, 2012. (App. pp. 14-22). The Court of Appeals denied the petition on November 30, 2012. (App. p. 24).

Petitioner filed a petition for writ of certiorari in the Court on March 1, 2013, and sought review of the following two issues:

1.

Whether the Court of Appeals erred by holding the trial court did not commit reversible error by allowing into evidence the statements of petitioner's non-testifying co-defendant without adequately redacting his claim of petitioner's involvement, as this denied petitioner his Sixth Amendment right to confront and cross-examine the witness, as interpreted by Bruton v. United States, 391 U.S. 123 (1968), and its progeny?

2.

Whether the Court of Appeals erred by holding the Crawford v. Washington, 541 U.S. 36 (2004) issue was not preserved since the issue was raised along with Bruton, it involves the same essential principle of confrontation, the lower court ruled Crawford was not violated, and the lower court had violated petitioner's right to confrontation under Crawford by allowing into evidence the statement of petitioner's non-testifying co-defendant, where he gave that statement to law enforcement during their investigation of the crime, it was testimonial, and petitioner never had the opportunity to confront and cross examine his co-defendant?

(Petition, p. 3).

On May 1, 2013, Petitioner filed a return to the petition. By Order dated February 21, 2014, this Court granted review of Issue I.

On May 13, 2014, Petitioner filed his Brief of Petitioner. This Brief of Respondent follows.

¹ Reported at 400 S.C. 272, 734 S.E.2d 167 (Ct.App. 2012).

RESPONDENT'S STATEMENT OF FACTS

On Tuesday, December 12, 2006, the victim, Joshua Zoch, was brutally murdered in his home. The evidence at trial established that the burglary and murder occurred at approximately 11:30 that night.

Zachary Waltemath, then an employee at the local Sonic along with co-defendant Whitehead, testified that at approximately 7:00 or 8:00 that night, Whitehead called him and asked him to call the victim "and see what he's doing because he wanted to go over there and fight him or something." Waltemath decline. Whitehead called back shortly after and asked if Waltemath had tried to call him. He responded he had not, and Whitehead indicated he wanted Waltemath to call him. Waltemath had "hung out" with Whitehead on several occasions. He was sure that it was Whitehead who called him that night. (R. p. 378, line 12 - p. 380, line 21; p. 384, line 3 - p. 387, line 10).

Allen Brown, a manager at the local Sonic, testified that all three co-defendants had worked at Sonic. Petitioner, Whitehead (who was still employed at the time), and Cannon, were together that evening. At approximately 10:00 p.m., Whitehead, Petitioner, and Cannon were in the kitchen area. Cannon was wearing a ski mask, and was told to take it off. Brown instructed all three to leave. (R. p. 319, line 12 - p. 324, line 14). Christopher Rust, also an employee at Sonic who was working that same evening, confirmed that all three left at the same time. (R. p. 361, lines 1-22). Rust also recalled that Whitehead drove a car with "noticeable" muffler noise. (R. p. 371, line 20 - p. 372, line 5).

At approximately 11:30 p.m., a neighbor to the victim, Cosmo Baccamo, testified that he was outside with his son's dog and heard "a lot of knocking noise, loud, like somebody kicking something or slamming doors" and, "about ten minutes later," he heard "excited" and

loud male voices, a door slam, and a car, with a loud muffler, take off. (R. p. 337, line 25 - p. 339, line 15).

Later that same night, at approximately 1:30, Petitioner went to Rust's home. He was upset and asked to stay the night at Rust's house. He claimed he had an argument with his mother. Rust allowed him to stay, then took him to his mother's home the next morning on his way to school. (R. p. 363, line 7 - p. 365, line 8).

Patricia Heathcoe, part owner of the Sonic, testified that on Wednesday, December 13, 2006, the day after the murder, Whitehead came to work at Sonic with a scratch under one eye, a noticeable limp, and complaining that his ankle hurt. He did not have the injuries the previous day when he had worked an early shift. Whitehead told Heathcoe he had "slipped and fell." (R. p. 443, line 19 - p. 445, line 23). On Thursday, Whitehead demanded that a Worker's Compensation claim be filed. Because business was slow, Heathcoe had intended to let Whitehead go home that day, but "he got real adamant. Whitehead didn't want to leave, you know, until the Workman's Comp form was filled out on him." He wanted to report his injuries as occurring on the 12th. Heathcoe noted that Whitehead never went to a doctor. (R. p. 446, line 15 - p. 448, line 17). On Friday, Whitehead walked out of work, leaving the crew short-handed. Heathcoe called Whitehead on his cell phone and he became belligerent:

... the first thing he said to me was, F Sonic. I said, "Chris, what is wrong with you?" And he started just ranting. I said, "you walked out and left Cecile by herself." I said, "Why would you do that?" And he was just ranting. You know, I don't need that f'g job. I've got problems. I'm about to move to Aiken. And I was just trying to talk to him. I mean, he was just - I never heard him sound like that ever. ...

(R. p. 449, line 1 - p. 451, line 14).

"Cecile," as referenced in the above conversation, was Cecile Trapp. Trapp testified that she worked Tuesday morning with Whitehead and all was well. She went back to Sonic Tuesday night, to eat and check her schedule, and confirmed, like Rust, that Whitehead and Cannon came by the store that night and that Cannon was wearing a ski mask. Whitehead was not limping either that day, or when she saw him later that night. On Wednesday, however, Whitehead came into work "complaining that his ankle was hurting, and he had a scratch on his face." He told Trapp "that he had got into like a play fight with his cousin and that he hurt his ankle and his cousin accidentally scratched him on his face." He was also limping. Further, Whitehead advised Trapp that he intended to "pretend that he fell on grease and hurt his ankle so that Ms. Pat could pay for the hospital bills." (R. p. 476, line 13 - p. 479, line 25; p. 484, lines 20-24). On Friday, Whitehead was with Trapp to open the Sonic, when his mother drove up. After speaking with his mother, Whitehead "kind of freaked out and was just like, 'I have to go'." He would not tell Trapp what was happening, but simply left immediately. (R. p. 481, line 19 - p. 483, line 1).

Victim's longtime, live-in girlfriend, Melissa Davy, was absent from the victim's home at the time of the burglary and murder, the two having had a disagreement over victim's drug use. Victim had hosted a party at their home on Friday, December 8, 2006 that lasted into the early morning hours of Saturday, December 9, 2006. At approximately 2:00 a.m. that Saturday, Davy left with friends Zachary Waltermath and his sister Molly, after a fight about victim's drug use, specifically his smoking crack cocaine (though marijuana may also have "possibly" been used at the party, as well), and after his request that they leave the house. (R. p. 563, line 13 - p. 565, line 17; 593, line 16 - p. 596, line 12; p. 610, line 15 - p. 611, line 2). Davy would later spend time with the victim on Monday, December 11, 2006.

(R. p. 567, line 1 - p. 568, line 19). She last spoke to him when he called her at approximately 6:00 or 7:00 that night. (R. p. 569, lines 14-19). The next day, Tuesday, December 13, 2006, at approximately 5:30, p.m., after completing her work shift at Sonic, Davy went back to the victim's home with Zach and Molly. The lights were off and victim's car was backed into the garage, which was unusual for the victim and alerted Davy that things were not right. She called victim's grandmother, Helen Zoch, who had purchased the home for victim to rent, (R. p. 1271, lines 14-24), and stayed on the phone with the grandmother as she entered the home. She saw victim's lifeless body and called 911. (R. p. 572, line 9 - p. 575, line 23).

Helen Zoch testified that she had spent time with victim the day before the burglary and murder and hoped to help him with his drug problem. In fact, victim had planned to enter Morris Village but wanted to talk to Ms. Davy first. The next day, Ms. Zoch called at 7:30 in the morning, but had not gotten an answer. At approximately 2:00 p.m., she went by the home, noticed the victim's car was backed in the garage, which was unusual, but she did not try to enter the home. (R. p. 1272, line 6 - p. 1274, line 24; p. 1278, line 11 - p. 1280, line 11). She testified that she was aware that her grandson had worked with the police, making drug buys for them. (R. p. 1284, lines 9-24). (See also R. p. 619, lines 19-25).

Investigating officers found the victim's home a "complete mess" with the victim's body "in the middle of it." (R. p. 692, lines 13-17). The back door had been kicked in. (R. p. 675, lines 13-25). The investigation began to focus on Whitehead, Petitioner and Cannon. Whitehead informed the investigating officers he "didn't know a damned thing about" the victim's murder. (R. p. 717, line 18 - p. 718, line 5). Both Petitioner and Cannon similarly denied any direct knowledge or involvement in their initial statements to police. (R. p. 721,

lines 21-25; p. 732, lines 14-25). However, Cannon later gave a detailed confession to officers, implicating Whitehead and Petitioner, which was, of course, redacted for presentation at trial to avoid *Bruton*² issues. The statement included not only the grisly facts of the vicious beating – such as the attack on the victim while he slept, dragging him off his couch, using the victim’s bat to strike the victim on his head – but also that victim was selected because he was thought to be a “snitch” and for his drugs. Cannon’s details included that one person took frozen chicken from the kitchen and place it on the victim’s head wounds in an attempt to stop the bleeding; that they hit the victim with a glass object, that they first went to the local Walmart for supplies and used the purchased purple latex gloves during the attack and wore ski masks; and, that the attack occurred at victim’s home at approximately 11:30. (R. p. 748, line 25 - p. 752, line 15; State’s Exhibits 2 and 103). Cannon later supplemented his statement voluntarily with a list of items he recalled taking from the home, including DVDs, a DVD player, presents, hair clippers, and cellphones, (R. p. 1022, line 16 - p. 1023, line 17), and gave an additional statement in which he admitted kicking the victim, (R. p. 1026, lines 3-16).

Petitioner also confessed to the crime in detail. Like Cannon’s statement, his statement was also redacted before introduction. (State’s Exhibit 104). The statement referenced going to the local Walmart and buying a ski mask and a box of purple gloves; that one of them called “Zach” to see if someone was home; that all of them kicked in a sturdy back door; that one person “picked up a glass bowl with flower petals in it, picked it up over his head and hit Josh in the head with it while Josh was asleep on the couch”; that another person dragged victim off the couch; that he repeatedly hit victim with his fists then hit him

² *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620 (1968). See also *State v. Holder*, 382 S.C. 278, 283, 676 S.E.2d 690, 693 (2009).

in the back of the head using the victim's bat; that they were searching for drugs and money; that another person kicked and stomped the victim, and, eventually, someone pulled a Christmas tree over on him. He also claimed someone else left the house with "plastic bags of stuff" and gave him some "DVD's and stuff." (R. p. 773, line 15 - p. 775, line 21). In particular, as to the beating, Petitioner confessed as follows (again, as reflected in the redacted statement read at trial):

... I first grabbed a bat that was against the wall and I started hitting Josh in the body. Then another person tried to stop me to ask Josh a question about where the money and dope was, and I couldn't stop the bat. I couldn't stop the bat and I hit Josh in the back of the head. I also think I hit him one time in the temple area of his head. Josh then started bleeding more and I got scared. That's when another person and another person started kicking and stomping Josh. ... The last thing I saw another person pushing the tree over on Josh...

(R. p. 775, lines 2-9).

Further, at the time of his arrest, when driving to the sheriff's department and before giving his detailed statement, Petitioner volunteered to officers, "This is the way we came that night." (R. p. 954, line 4 - p. 955, line 3).

Whitehead, though he did not give a confession to officers, was twice overheard by another inmate, Michael Jenkins, at the detention center bragging about the killing, identifying the home where the murder occurred, and calling the victim's name. (R. p. 1221, line 10 - p. 1222, line 8). This caught Jenkins' attention as he had known the victim. (R. p. 1222, lines 9-20). A detention center officer confirmed that Jenkins had been in the cell next to Whitehead at the time the initial conversation was overheard. (R. p. 1257, lines 15-20).

Forensic pathologist Joel Sexton, M.D., testified that at autopsy, he identified "at least six" and possibly eight "injuries or blows were inflicted to the head that were each capable of causing death," with wounds inflicted on the top and back of head and behind the

left ear, along with abrasions and cuts to the face, injuries on legs, abrasions on knees and on the abdomen. (R. p. 1091, line 15 - p. 1096, line 8; p. 1098, line 19 - p. 1099, line 16; p. 1100, line 21 - p. 1105, line 4). From the wounds and autopsy and from looking at scene photos, the pathologist was able to opine that two blows were inflicted on the couch, but that the victim either came off, or was pulled off, the sofa and was hit on the floor with a "cylindrical and linear" object such as the bat (State's 99), and that he was hit on the head with a glass potpourri bowl, remnants of same still being on the couch. (R. p. 1123, line 17 - p. 1125, line 14). He also confirmed that testing showed a prior use of cocaine and marijuana. (R. p. 1127, lines 11-17).

Investigators obtained a copy of a receipt from the local Walmart confirming a purchase of a ski mask and purple gloves on December 12, 2006 at 10:43 (R. p. 1058, line 7 - p. 1061, line 5). Ms. Davy testified that victim's grandparents had provided a bat to keep in their residence for protection. (R. p. 590, line 4 - p. 591, line 12). Ms. Zoch testified that she had recently replaced the back door to the home with another sturdier door prior to the burglary and murder. (R. p. 1282, line 17 - p. 1283, line 6). Photos from the scene also confirmed the use of the latex gloves, the bat, the placement of the frozen chicken near victim's head, the broken glass bowl, and the overturned lamp and Christmas tree. (R. p. 711, line 3 - p. 713, line 19; p. 1106, line 1-7). In sum, the physical evidence supported the detailed confessions of both Cannon and Petitioner, and the details overheard in the third co-defendant's (Whitehead's) detention center conversations.

ARGUMENT

The Court of Appeals did not err in upholding the trial judge's ruling that substitution of the neutral phrase "another person" for Petitioner's name in Cannon's statement was proper and adequate redaction under *Bruton v. United States*, 391 U.S. 123 (1968) and its progeny.

Relevant Facts:

All three co-defendants, Petitioner, Whitehead and Cannon, were tried at the same time. Before the statements Petitioner and Cannon made to Investigator Catoe were offered into evidence, the State offered to redact, and did redact, all references to the other co-defendants in both statements.³ (R. p. 629, line 16 - p. 630, line 20). Defense counsel objected and argued the redaction "would violate *Bruton* because the statement clearly implicates someone else and it's obviously prejudicial to the people who are sitting right here." (R. p. 631, lines 4-17).⁴ Defense counsel relied on *Bruton* and *State v. LaBarge*, 275 S.C. 168, 268 S.E.2d 278 (1980) to argue the offered replacement of Petitioner's name with the phrase "another person" was "no different than" replacing the name with "Mr. X," which was criticized in *LaBarge*. (R. p. 632, line 11- p. 633, line 5).

³ Investigator Catoe first testified to what Cannon told him, (*i.e.* an oral statement), and then the written statement was identified and read to the jury. Petitioner's brief to the Court of Appeals quoted the oral statement as the written statement. (FBOA, pp. 11-12, citing R. p. 739, line 1 - p. 740, line 23). He again referenced that statement in his petition for writ of certiorari to this Court. (Cert. Petition, p. 10). In his brief to this Court, Petitioner apparently quotes the written statement, but again cites to the incorrect section of the record where the statement was read. (See BOP, p. 11, citing R. p. 739, l. 1-740, 123). The written statement, as read, is actually on R. p. 748, line 25 - p. 751, line 18. Cannon made other statements to Lt. Crawford that were handled separately. (See R. p. 924, line 20 - p. 926, line 8; p. 933, lines 2-8).

⁴ Counsel for Cannon, Mr. Kendrick, argued for all three defendants. (R. p. 627, lines 8-18; p. 643, lines 18-22).

The State argued that *LaBarge* was a 1980 case, and further case law had defined the parameters of permissible redaction, such as *Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151 (1988). (R. p. 635, lines 20-24).

Defense counsel recognized that current law supported the redaction of the name and substitution of the phrases “another guy” or “another person,” as offered by the State. (R. p. 635, line 11 - p. 636, line 6; p. 638, line 4 - p. 639, line 23). Even so, defense counsel offered a redaction to change the facts of the confession to suggestion only single involvement in the burglary and murder, (for example, changing “We pulled up at Josh’s house” to “I pulled up to Josh’s about 11:30”). (R. p. 643, lines 2-11).

After discussion on the current state of the law, the trial judge allowed the redaction as proposed by the State. (R. p. 633, line 25 - p. 643, line 17). Counsel objected to the statements when offered at trial. (R. p. 738, lines 20-21).

In the Court of Appeals, Petitioner argued that “the admission of his non-testifying co-defendant’s statements clearly implicated Petitioner in the crime and therefore violated his rights under the Confrontation Clause.” (FBOA, p. 14). Thus, he reasoned, the redaction was inadequate. (FBOA, pp. 14-15). The Court of Appeals resolved in the issue finding:

We find the neutral phrase “another person” inserted into Cannon’s statement avoided any *Bruton* violation. The redacted statement only implicates the statement’s maker, and it does not limit the participants to three, which would implicate the three defendants on trial. Further, the court gave the jury a limiting instruction. Therefore, we find the trial court properly allowed Cannon’s redacted statement into evidence.

(App. p. 7).

In the petition for rehearing, Petitioner argued the Court of Appeals erred in finding the substitution of the phrase “another person” was sufficient “*in the context of this case*” where three co-defendants were tried. (App. p. 10) (emphasis in original). He urged the

Court of Appeals to reconsider the ruling “*in the context of all the evidence that was before the jury*,” including the fact that Investigator Catoe had testified that after taking the statement, investigators obtained an arrest warrant for Petitioner. (App. p. 11) (emphasis added).

Discussion:

The gist of the Petitioner’s argument appears twofold. First, he apparently argues that, in general, redaction can be made, but only if no reference to any co-defendant, either in name or action, remains in the statement. In other words, the statement cannot even infer the existence of another individual. Because, he argues, if other evidence puts the three together, the redaction could not be sufficient in the instant case. (See BOP, p. 15, “The men were joined at the hip by their tie to the Sonic. They were the three defendants on trial and Cannon’s statement clearly referred to Petitioner McDonald and co-defendant Whitehead.”). (See also BOP, p. 18, “Petitioner McDonald was jointly tried with Whitehead and Cannon. The jury could look over and see petitioner and Whitehead as the Cannon confession was read.”). Second, Petitioner argues that Investigator’s Catoe’s testimony that they obtain an arrest warrant for Petitioner after taking the statement further identifies Petitioner. (BOP, p. 19). Neither point shows error.

As to his first point, Petitioner conceded at trial that current precedent does not require such radical redaction, and specifically argued for an extension of the present rule. (R. p. 638, line 4 - p. 639, line 21).⁵ The trial judge declined to extend the redaction rules

⁵ This issue is also before the Court by way of the separate petition filed by co-defendant Whitehead. This Court granted certiorari in Mr. Whitehead’s appeal by Order dated February 21, 2014. Mr. Cannon did not raise a *Bruton* issue in his appeal. Mr. Cannon’s convictions were affirmed by the Court of Appeals in an unpublished opinion issued June 8, 2011.

noting his concern that such redaction would “change[] the meaning of the entire statement by creating the impression that these parties acted independently.” (R. p. 639, lines 10-15; p. 643, lines 12-17). The astute trial judge correctly identified the glaring unfairness in the requested extension. Not only does Petitioner’s offered extension of the redaction rules exceed that which Petitioner is entitled to in order to protect his right to confrontation, if allowed, the result would grant permission to tinker with the facts, creating confusion and misleading of the jury. The trial judge appropriately denied the request to extend the redaction rules.

“The constitutional right to confront and cross-examine witnesses is essential to a fair trial in that it promotes reliability in criminal trials and insures [sic] that convictions will not result from testimony of individuals who cannot be challenged at trial.” *State v. Page*, 378 S.C. 476, 481, 663 S.E.2d 357, 359 (Ct.App. 2008), *rehearing denied* June 29, 2009 (quoting *State v. Martin*, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987)). “[A] non-testifying codefendant’s statement that expressly inculcates the defendant violates the defendant’s rights under the Confrontation Clause” and is inadmissible. *State v. Holder*, 382 S.C. 278, 283, 676 S.E.2d 690, 693 (2009) (citing *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620 (1968)). “Redaction has come into play as a tool to allow admission of a co-defendant’s confession *against the confessor in a joint trial*. The point of redaction is to permit the confession to be used against the non-testifying confessor, while avoiding implicating his co-defendants.” *State v. Holmes*, 342 S.C. 113, 119, 536 S.E.2d 671, 674 (2000) (emphasis in original) (citing *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702 (1987); *Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151 (1998)).

Thus, if, in a joint trial, a non-testifying co-defendant's statement is admitted, reference to the other named defendant must be redacted for the statement to be admissible. *State v. Martin*, 292 S.C. 437, 439, 357 S.E.2d 21, 22 (1987). See also *State v. Avery*, 374 S.C. 524, 534, 649 S.E.2d 102, 107 (Ct.App. 2007) ("In this case, all statements from Avery's co-defendant that referred to Avery were redacted precisely so Avery's right to confront his witness would not be impinged."). Statements that connect the defendant "only when linked to other evidence introduced at trial," do not offend the *Bruton* rule. *Holder*, 382 S.C. at 284, 676 S.E.2d at 693. However, redaction of the defendant's name alone may not suffice to protect rights.

It is given that at least one other person is implicated in any redaction. That is not error. The danger is not *acknowledging* that at least one other person was involved. The danger is in *identifying* a certain individual – the co-defendant then on trial – when that co-defendant then on trial cannot confront his accuser. As such, "one must look at the *kind* of inferences that are necessary to make a connection to the defendant, not the simple *fact* that there are inferences, to determine the applicability of *Bruton*." *Holder*, 382 S.C. at 284, 676 S.E.2d at 694.

This Court found in *Holder*, for example, that use of the pronoun "she" when there is only one co-defendant, and she is female, still identifies the co-defendant and offends *Bruton*. *Id.*, 382 S.C. at 285, 676 S.E.2d at 694. This Court has just recently affirmed this very concept in *State v. Henson*, 407 S.C. 154, 754 S.E.2d 508 (2014) (finding redaction error where statement by one of two males involved in crime referenced "I" and also "the guy that did the shooting" thereby identifying the defendant, the only other male). Likewise, 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) (“Although Sessions’ statement does not expressly implicate appellant by name, we find that the physical descriptions had the same effect; they incriminated appellant by implicating him as an accomplice. Thus, we hold that physical descriptions must be redacted from a nontestifying co-defendant’s statement in order to protect a defendant’s right of confrontation.”).

The use of a phrase which reflects a pointed specific identification being hidden from the juror would also appear to point directly to a co-defendant and would offend *Bruton*. See, for example, *Gray v. Maryland*, 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, 280 (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. See also *United States v. Richards*, 241 F.3d 335, 341 (3rd Cir. 2001) (redaction insufficient where three people involved in crimes related to armed robbery of an armored car, statement of co-defendant redacted to reference “inside man” and “friend,” when “inside man” could only be driver of armored car thereby identifying defendant as “friend”).

In short, the court must ensure even with redaction, that the statements do not “obviously refer directly to ... the defendant” based upon “inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial.” *Gray*, 523 U.S. at 196. Thus, the quality or sufficiency of the redaction in the particular circumstances at trial will be considered. This does not imply that the statement cannot be consistent with other evidence of guilt; rather, the redaction of the statement, by whatever

means, must not still result, from the statement alone, in immediate identification of another co-defendant also on trial. *United States v. Williams*, 936 F.2d 698, 700 -701 (2nd Cir. 1991) (“the appropriate analysis to be used when applying the *Bruton* rule requires that we view the redacted confession in isolation from the other evidence introduced at trial. If the confession, when so viewed, does not incriminate the defendant, then it may be admitted with a proper limiting instruction even though other evidence in the case indicates that the neutral pronoun is in fact a reference to the defendant. This analysis is adopted directly from *Richardson* itself, and the principal extension of *Richardson* by our decisions is that they allow redacted confessions to refer to accomplices with neutral pronouns.”).⁶

The Fourth Circuit has found 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). Other circuit courts have similarly approved the use of such terms as “we”, “another guy,” and “someone.” *United States v. Edwards*, 159 F.3d 1117, 1125 (1998) (collecting cases). Our case law has similarly upheld redaction using neutral terms. *See State v. Garrett*, 350 S.C. 613, 620-621, 567 S.E.2d 523, 526 (Ct.App. 2002) (use of “another guy” in redaction). Here, the State used the neutral phrase, “another person,” and avoided any *Bruton* violation. This is so for two specific reasons, one, the neutral term itself, and two, the fact that no other information specifically identified the co-defendants, *either* petitioner or Whitehead.

⁶ The Second Circuit has just recently underscored that it is not just the neutral pronoun or phrase at issue, but also its relation to the remainder of the statement and number and identification of the other defendants that should be considered. *See United States v. Taylor*, 745 F.3d 15, 29 (2nd Cir. 2014).

The trial judge carefully reviewed the breadth and context of the statements for any other indication of direct identification. For instance, the judge noted that others were referenced in the statements such as “Leroy” and the generic term “we” could apply to Leroy and the co-defendant. (R. p. 641, line 12 - p. 642, line 5). (See also R. p. 749, lines 2-10). The judge also ordered redaction of the reference to someone’s “blue Honda Accord,” as witnesses had testified that Whitehead drove a blue Honda. (R. p. 645, lines 7-22). (See, for example, R. p. 481, lines 4-9). The remainder of each statement is very generic, and, though it may certainly be one interpretation, the statements do not actually even limit participation to three, such as the three defendants then on trial. (See R. 748, line 25 - p. 752, line 15; p. 773, line 15 - p. 775, line 21). (See also State’s Exhibits 103 and 104). *See Priester v. Vaughn*, 382 F.3d 394, 401 (3rd Cir. 2004) (distinguishing sufficiency of redaction looking at number of people possibly involved: “in this case there were at least fifteen perpetrators involved in the shooting, and the phrases ‘the other guy’ or ‘another guy’ are bereft of any innuendo that ties them unavoidably to Priester” thus, “the replacement was [not] tantamount to an explicit reference to the co-defendant”).

As to Petitioner’s second point – that Investigator Catoe testified that after taking Cannon’s statement, the investigating officer obtained an arrest warrant for Petitioner – his argument is not preserved for appeal as it was not raised at trial. *See, e.g., State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (issue not preserved when one ground is raised to the trial court and another ground is raised on appeal). It is not addressed in the Court of Appeals opinion, and there is no ruling by the Court of Appeals to review here. At any rate, the identification is not as clear as Petitioner submits.

In the Court of Appeals, Petitioner did not argue an inescapable inference; rather, he argued there could be "*serious argument* as to the identity" of the person. (See FBOA, p. 15). (emphasis added). This merely shows the redaction proved its worth. There is no infirmity if *other* evidence at trial indicates identity. *Holder, supra*. At bottom, Petitioner is arguing that other evidence considered in connection with the statement may indicate identification. Precedent is clearly against him. Even so, and critically, reviewing the investigator's response in context shows the testimony *does not* directly link information in Cannon's statement to the basis for the subsequent warrant:

Q What happened next in the investigation? What did you do next?

A After obtaining this statement, we then obtained an arrest warrant for Mr. Derrick McDonald.

Q Now, you had previously talked to Derrick McDonald that day?

A I had.

Q Briefly?

A That's correct.

Q You told us. The oral statement you've already given us. Did you leave a card and say call me or anything?

A I left and told him if he could think of anything else when his mother got home to call me.

Q And did you receive a call from the McDonalds' household?

A I did receive a call from there.

Q When was that?

A This was shortly after I had taken this statement.

Q And as a result of that, what, if anything, did you tell the McDonald residence you would do?

A I told the McDonald residence that I would be there just as soon as I finished up what I was doing.

(R. p. 754, line 5 - p. 755, line 2).

When read in the context, the testimony shows continuing, and separate, lines of investigation at that point. It is far from an inescapable inference that Cannon clearly, by name, implicated Petitioner in the statement to investigating officers or that they used that information alone to obtain a warrant. The testimony is read most naturally as an explanation of the order of investigation, not an inescapable conclusion of implication. *Compare State v. Johnson*, 390 S.C. 600, 703 S.E.2d 217 (2010) (finding *Bruton*-type issue where questions pointedly linked investigation *plus* speaking with co-defendants in explain how appellant's arrest came about).⁷

Again, the redaction was proper and protected Petitioner's right to confrontation by ensuring that no facially incriminating statement was offered. Moreover, as the Court of Appeals noted, the trial judge also instructed the jury that evidence admitted solely for its connection to one co-defendant may only be considered in connection with that co-defendant, and not against the remaining co-defendants which provided further protection of Petitioner's rights. (App. pp 6-7). (See also R. p. 1449, lines 8-12). However, even if the redaction was

⁷ Interestingly, the original unredacted statement in *Johnson* did not implicate Johnson. In that case, it was the actual redaction that could lead to speculation *Johnson* was named which would have allowed a factually incorrect finding. When redaction works properly, the facts of the incident provide identification of the co-defendant or co-defendants – the statement does not. Thus the emphasis on whether the statement is *facially* incriminating. The statement is never used as substantive evidence against the person whose name has been redacted. However, the statement is considered in regard to the statement's maker and the facts of the crime admitted must support the basic facts of the event as gleaned from the properly admitted evidence to avoid creating false exculpatory material – another factual incorrect finding similar to the one that this Court has previously indicated in *Johnson* must be avoided.

not sufficient, and this Court should find error, there is overwhelming evidence of guilt. Any such error could only be harmless on this record.

“Violations of the Confrontation Clause are subject to a harmless error analysis.” *Holder*, 382 S.C. at 285, 676 S.E.2d at 694. Though the considerations vary – including overwhelming evidence of guilt absent the error, whether the evidence was cumulative to other properly admitted evidence, and the overall importance of the testimony – to find a violation harmless, the error must be deemed harmless beyond a reasonable doubt in the context of the entire record. *Id.*, 382 S.C. at 285-286, 676 S.E.2d at 694-695. Here, guilt is not merely premised on inferences from Cannon’s statement. Petitioner confessed. Specifically, he confessed to participating in entry into the victim’s home, and beating the victim about the head with a bat. (R. p. 773, line 15 - p. 775, line 21). Additionally, the details of his confession were corroborated by the physical evidence. First, and foremost, of those details are the injuries to the victim’s head. Forensic pathologist Joel Sexton, M.D., testified that at autopsy, he identified “at least six” and possibly eight “injuries or blows were inflicted to the head that were each capable of causing death,” with wounds inflicted on the top and back of head and behind the left ear, along with abrasions and cuts to the face, injuries on legs, abrasions on knees and on the abdomen. (R. p. 1091, line 15 - p. 1096, line 8; p. 1098, line 19 - p. 1099, line 16; p. 1100, line 21 - p. 1105, line 4). Dr. Sexton also opined that two blows were inflicted on the couch, but that the victim either came off, or was pulled off, the sofa and was hit on the floor with a “cylindrical and linear” object such as the bat (State’s 99), and that he was hit on the head with a glass potpourri bowl, remnants of same still being on the couch. (R. p. 1123, line 17 - p. 1125, line 14). Moreover, investigators obtained a copy of a receipt from the local Walmart confirming a purchase of a ski mask

and purple latex gloves on December 12, 2006 at 10:43 (R. p. 1058, line 7 - p. 1061, line 5). Ms. Davy testified that victim's grandparents had provided a bat to keep in their residence for protection. (R. p. 590, line 4 - p. 591, line 12). Ms. Zoch testified that she had recently replaced the back door to the home with another sturdier door prior to the burglary and murder. (R. p. 1282, line 17 - p. 1283, line 6). Photos from the scene also confirmed the use of the latex gloves, the bat, the broken glass bowl, and the overturned Christmas tree. (R. p. 711, line 3 - p. 713, line 19; p. 1106, line 1-7). These details are all mentioned in Petitioner's own statement. (See R. p. 773, line 15 - p. 775, line 21). Lastly, witness testimony from Allen Brown and Christopher Rust placed Petitioner with the co-defendants immediately before the burglary and murder, (R. p. 319, line 12 - p. 324, line 14; p. 361, lines 1-22), and Rust saw a visibly upset Petitioner immediately after the burglary and murder, (R. p. 363, line 7 - p. 365, line 8). In light of this solid evidence of guilt, any error in the redaction of the co-defendant's statement could only be harmless beyond a reasonable doubt.

However, the statements were properly redacted and the Court of Appeals properly affirmed the trial judge's ruling. The Court of Appeals opinion should be affirmed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the opinion of the Court of Appeals should be affirmed.

Respectfully submitted,

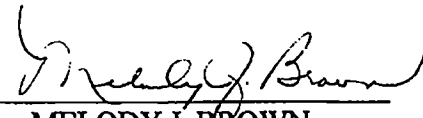
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June 12, 2014.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM KERSHAW COUNTY
Court of General Sessions
G. Thomas Cooper, Jr., Circuit Court Judge

On Certiorari to the Court of Appeals
Opinion No. 5033 (S.C.Ct. App. filed September 12, 2012)

The State, Respondent,
vs.
Derrick McDonald, Petitioner.

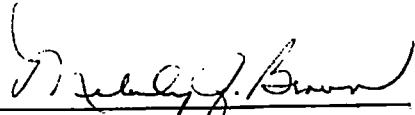
Appellate Case No.: 2012-213686

PROOF OF SERVICE

I, Melody J. Brown, certify that I have served the *Brief of Respondent* on Petitioner depositing a copy of same in the United States mail, postage prepaid, addressed to his attorney of record:

Robert M. Dudek, Chief Appellate Defender
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**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State, Respondent,

v.

Derrick McDonald, Petitioner.

Appellate Case No. 2012-213686

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

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

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

AFFIRMED AS MODIFIED

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Columbia, for Petitioner.

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Respondent.

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

I.

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

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

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

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

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

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

II.

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

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

On Tuesday the 12th December 2006 at 2:00 p.m. *another person* got off of work and picks me up. We go to the mall and I got a new cell phone and shoes. We then went to pick up *another person* and then we went to McDonalds in Blythwood and eat and from there we went to Sonic. I had on a ski mask and was joking around while *another person* talked to a girl in the back and *another person* was talking to Leroy. I don't know Leroy's last name. We then left Sonic and went to the Two Notch Walmart and *another person* got a ski mask. So we went riding and *another person* said you know we need to do something with these mask, and I ask and *another person* ask like what. And *another person* said like beat Josh's ass because he's a snitch, and I told *another person* I didn't think he was a snitch. *Another person* then ask if me and *another person* wanted to ride and we said whatever.

Because I had nothing else to do and no certain time to be home, that was about 11 p.m. *Another person* was real quiet in the car while we were going to Josh's house. We pulled up to Josh's about 11:30 p.m. *another person* knocked on the front door and Josh didn't answer. So *another person* said that he was going to pull one of my moves and

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

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

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

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

A: Yes.

Q: What kind of gloves?

A: Purple latex and I had on 2 pair white and purple ones on top.

Q: Where was the bat from that was used to hit Josh?

A: It was in Josh's house. I just looked over their and *another person* picked it up.

Q: What were you, *another person*, and *another person* wearing that night?

A: Black pants and shirts and ski mask.

Q: What color was the ski mask?

A: Mine was black and theirs was black or dark blue.

Q: Did you change cloths that night after the incident?

A: Yes and *another person* done something with them.

No defendant testified.

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

III.

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

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

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

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

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

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

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

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

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

Moreover, we reject the State's invitation to find no Confrontation Clause violation based on the trial court's limiting instruction. The presence of a limiting instruction is not curative here, as it was not in *Bruton*, for "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton*, 391 U.S. at 135 (citations omitted). We hold that the court of appeals erred in finding that the

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

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

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

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

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

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

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

IV.

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

AFFIRMED AS MODIFIED.

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

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

ROBERT CANNIAN
Name

[REDACTED]
Social Security Number

[REDACTED] TROWBRIDGE
Address

12/15/01
Current Date

9:20 PM
Current Time

Columbia, S.C. 29229
City, State, Zip Code

[REDACTED]
Date of Birth

[REDACTED]
Home Phone

[REDACTED]
Work Phone

On Tuesday the 12th December 2006 AT 2:00pm Chris Whitehead got off of work AND picks me up. We go to the mall & I got a new Cell Phone & shoes. We then went to pick up (DJ) DERRICK McDonald and then we went to McDonalds in Blythwood and eat and from there we went to Sonic. I had on a ski mask and was joking around while Chris talked to a girl in the back and DJ was talking to Leroy. I don't know Leroy's last name. We then left Sonic and went to the two notch Walmart and Chris and DJ got a ski mask. So we went riding and Chris said you know we need to do something with these mask, and I ask and DJ ask like what. and Chris said like beat ^{JASHLY} ~~Chris~~ ass. because he's a snitch, and I told Chris I didn't think he was a snitch. He (Chris) then ask if me and DJ wanted to ride and we said whatever.

I have made the foregoing statement freely and voluntarily, without fear, threat, promise of reward or hope of reward of any kind. This is to certify that I have read or had read to me the foregoing statement consisting of 5 pages and a true copy has been given to me this date.

[Signature]
Signature of Individual Giving Statement

[Signature]
Witness

Page 1 of 5 Pages

[Signature]
Witness

Name

Social Security Number

Address

Current Date

Current Time

City, State, Zip Code

Date of Birth

Home Phone

Work Phone

Because I had nothing else to do and no certain time to be home, THAT was about 11pm DS was Real Quiet in the car while we were going to Josh's house, We pulled up to Josh's about 11:30pm, Chris knocked on the front door and Josh didn't answer. So Chris said that he was going to pull one of my moves and kick the door. So Chris went to the side door and he (Chris) busted it in. He went in first and me + DS followed him to watch the fight. Josh was asleep on the couch and Chris yelled hey Bitch, and when Josh looked up, Chris HIT him with a glass lamp. Right AFTER THAT Josh was in a daze and Chris drags him off the couch part of the way THEN Chris started pressuring DS to hit Josh with the bat that was in the house and DS then hit Josh in the back of

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[Signature]

Signature of Individual Giving Statement

Witness

Witness

Page 2 of 5 Pages

Name

Social Security Number

Address

Current Date

Current Time

City, State, Zip Code

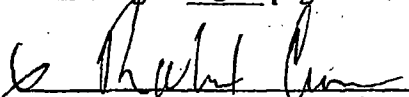
Date of Birth

Home Phone

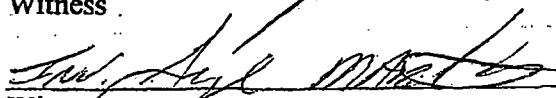
Work Phone

HEAD. AFTER THAT JOSH WAS BASICLY CRAWLING TRYING TO GET UP. AND THE WHOLE TIME CHRIS WAS TALKING SHIT TO HIM ABOUT BEING A SNITCH. AT THAT TIME CHRIS KICKED JOSH IN THE RIBS, AND ASK JOSH WHERE THE WEED WAS AND JOSH WAS JUST GRUNTING. THAT WHEN CHRIS ASK ME TO CHECK THE ROOM AND WE STARTED PULLING DRAWS AND CHRIS SLIPPED THE MATTRESS, AND DJ WAS JUST STANDING THEIR. THEN JOSH WENT UNCONCIOUS AND I GOT JOSH A TOWEL AND PUT IT TO HIS HEAD. CHRIS SAID FUCK WE DON'T HAVE ANYTHING AND PUSHED THE CHRISTMAS TREE OVER ON JOSH. CHRIS THEN GOT MAD AGAIN AND TOOK THE HOUSE PHONE. BUT BEFORE CHRIS LEFT HE GOT SOME FROZEN CHICKEN FROM THE FREEZER AND PUT IT ON JOSH'S HEAD TO TRY AND STOP THE BLEEDING. AFTER THAT WE WENT BACK OUT THE SAMEWAY WE CAME IN.

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Witness


Witness

Name

Social Security Number

Address

Current Date

Current Time

City, State, Zip Code

Date of Birth

Home Phone

Work Phone

we left and Chris dropped DJ OFF 1ST and me second and I guess he went home.

(Q) Did you Chris & DJ have on gloves? (A) yes.

Q WHAT KIND OF gloves?

(A) Purple Latex, and I had on 2 PAIR WHT and purple ones on top.

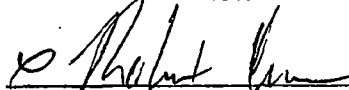
(Q) WHO'S CAR WAS YOU AND CHRIS AND DJ IN THAT NIGHT?

(A) Chris's Blue Honda Accord.

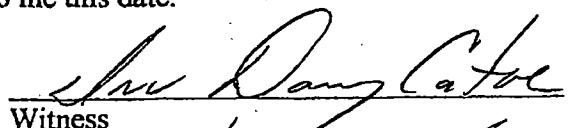
(Q) WHERE WAS THE BAT FROM THAT WAS USED TO HIT JOSH?

(A) IT WAS IN JOSH'S house, I JUST LOOKED OVER THEIR AND DJ PICKED IT UP.

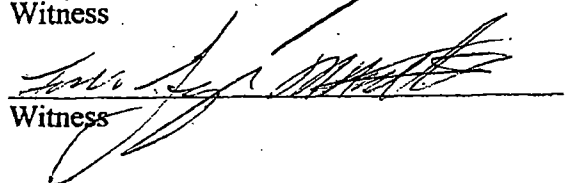
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Signature of Individual Giving Statement



Witness



Witness

Name

Social Security Number

Address

Current Date

Current Time

City, State, Zip Code

Date of Birth

Home Phone

Work Phone

Q) WHAT WERE YOU, CHRIS & DJ WEARING THAT NIGHT?

A) BLACK PANTS and SHIRTS and SKI MASK.

Q) WHAT COLOR WAS THE SKI MASK?

A) MINE WAS BLACK AND THEIRS WAS BLACK OR DARK BLUE.

Q) DID YOU CHANGE CLOTHES THAT NIGHT AFTER THE INCIDENT?

A) YES, AND CHRIS DONE SOMETHING WITH THEM.

I ASK INV DANNY CATOE TO WRITE THIS FOR ME AND THIS IS IN MY OWN WORDS AS THEY ARE WRITTEN.

X *[Signature]*

12-15-06- 9:51 PM

I have made the foregoing statement freely and voluntarily, without fear, threat, promise of reward or hope of reward of any kind. This is to certify that I have read or had read to me the foregoing statement consisting of 5 pages and a true copy has been given to me this date.

[Signature]

Signature of Individual Giving Statement

[Signature]

Witness

Page 5 of 5 Pages

[Signature]

Witness

Derrick McDonald

Name

[REDACTED]
Social Security Number[REDACTED]
Address

Boney Rd

12-16-06
Current Date12:24am
Current TimeBlythe Wood SC 29016
City, State, Zip Code[REDACTED]
Date of Birth[REDACTED]
Home Phone[REDACTED]
Work Phone

About 5:30 or 6:00pm Tuesday the 12th - 2006, OF December Chris white head AND Robert Came to my house. And ASK IF I WANTED TO MAKE some money. AFTER A WHILE I DECIDED TO go with them. We left AND WENT TO SONIC AND I check on trying to get my JOB BACK. AFTER we left the Sonic we went to WALMART on two notch and bought a SKI mask and some a BOX OF Purple latex gloves. WE WERE STILL IN THE Parking lot when Chris call ZACH, and ask him to see if someone was AT home. ZACH told him that he would call back in 10 min but Chris call him back and told him the Situation was being handled.

THE THATS WHEN ~~THE~~ ^{THEY} STARTED planning on how we WERE going to get into the house but you still didn't know whos house it was going to be.

I have made the foregoing statement freely and voluntarily, without fear, threat, promise of reward or hope of reward of any kind. This is to certify that I have read or had read to me the foregoing statement consisting of 04 pages and a true copy has been given to me this date

Derrick McDonald

Signature of Individual Giving Statement

[REDACTED]
Witness

Name

Social Security Number

Address

Current Date

Current Time

City, State, Zip Code

Date of Birth

Home Phone

Work Phone

I didn't know who's house it was until we were already there. Chris had told me that I was ~~not~~ ^{to} stay put outside to make sure no one came up. So Chris parked beside the road in front of the house and we went to the side door. The door was sturdy and we all the kicked the door on the count of (3). Chris + Robert went in and myself and I shut the door behind me and I went to another window to watch out. THATS when my name was and I went into the living Room, dining Room AREA. CHRIS then cut on the lights and picked up a glass bowl with Flower Pedals in it picked it up over his head a hit Josh in the head with it while Josh was asleep on the couch. THEN Chris draged Josh out the couch. ~~and~~ But I first grabed abot that was against the wall and I started hitting JOSH in the Body.

I have made the foregoing statement freely and voluntarily, without fear, threat, promise of reward or hope of reward of any kind. This is to certify that I have read or had read to me the foregoing statement consisting of 24 pages and a true copy has been given to me this date.

Derrick McDaniel
Signature of Individual Giving Statement

Shirley Denny Coker
Witness

Page 2 of 24 Pages

Witness

Name

Social Security Number

Address

Current Date

Current Time

City, State, Zip Code

Date of Birth

Home Phone

Work Phone

THEN Chris tried to stop me to ask Josh a Question about where the money + Dope was, And I could stop the bat and I hit Josh in the back OF THE HEAD. I also think I hit him one time in the temple AREA OF his head. Josh then STARTED Bleeding more and I got scared. THATS when Robert + Chris started Kicking and stomping Josh. Chris then told me to go get the CAR and pull it up. THE last thing I SAW was chris pushing the tree over on. Josh. Then Chris + Robert came out with Plastic bags OF STUFF and told me to pop the Trunk I did and got in the BACK Seat. Then Chris dropped me OFF AT my house a gave some AIDS and STUFF THAT I didn't want. So I burned them and my cloths in a burn Barrel AT my house. All OF my cloths + shoes and everything burned Completely up.

I have made the foregoing statement freely and voluntarily, without fear, threat, promise of reward or hope of reward of any kind. This is to certify that I have read or had read to me the foregoing statement consisting of 3 pages and a true copy has been given to me this date.

Derrick McDonald
Signature of Individual Giving Statement

Donny Coker
Witness

Page 3 of 9 Pages

Witness

Name

Social Security Number

Address

Current Date

Current Time

City, State, Zip Code

Date of Birth

Home Phone

Work Phone

I Ask INV Danny Catoe to WRITE my
STATEMENT for me and this is WRITTEN
in my own words.

Derrick McDonald
12-16-06 -

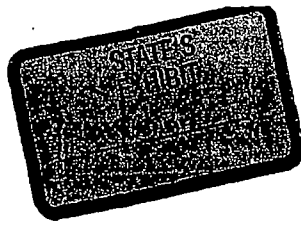
I have made the foregoing statement freely and voluntarily, without fear, threat, promise of reward or hope of reward of any kind. This is to certify that I have read or had read to me the foregoing statement consisting of 4 pages and a true copy has been given to me this date.

Derrick McDonald
Signature of Individual Giving Statement

INV Danny Catoe
Witness

Page 4 of 4 Pages

Witness



Name

ROBERT CANNIANI

Social Security Number

Address

T BOWBRIDGE

Current Date

12/15/01

Current Time

9:20 PM

Columbia, S.C., 29229

City, State, Zip Code

Date of Birth

Home Phone

Work Phone

On Tuesday the 12th December 2006 AT 2:00pm Another Person got off of work AND picks me up. We go to the mall & I got a New Cell Phone & shoes. We then went to pick up Another Person and then we went to McDonalds in Blythwood and eat and From THERE WE WENT to Sonic. I had on a ski mask and was joking around while Another Person talked to a girl IN the back AND Another Person was talking to Leroy. I don't know Leroy's LAST name. We then left Sonic and went to the Two notch walmart AND Another Person got a ski mask. So we went riding and Another Person said you know we need to do something with these mask, AND I ask and Another Person ask like what. and Another Person said like beat ~~Another Person~~ ass. because hes a Snitch, and I told Another Person I didn't think he was a snitch Another Person then ask if me and Another Person wanted to ride and we said whatever.

I have made the foregoing statement freely and voluntarily, without fear, threat, promise of reward or hope of reward of any kind. This is to certify that I have read or had read to me the foregoing statement consisting of 5 pages and a true copy has been given to me this date.

Signature of Individual Giving Statement

Witness

Witness

Name

Social Security Number

Address

Current Date

Current Time

City, State, Zip Code

Date of Birth

Home Phone

Work Phone

Because I had nothing else to do and no certain time to be home, THAT was about 11pm another person was Real Quiet in the car while we were going to Josh's house. We pulled up to Josh's about 11:30pm another person knocked on the front door and Josh didn't answer. So another person said that he was going to pull one of my moves and kick the door. So another person went to the side door and he another person busted it in. He went in first and me + another person followed him to watch the fight. Josh was asleep on the couch and another person yelled hey Bitch, and when Josh looked up, another person HIT him with a glass lamp. Right AFTER THAT Josh was in a daze and another person drags him off the couch part of the way THEN another person started pressuring another person to hit Josh with the bat that was in the house and another person then hit Josh in the back of

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[Signature]
Signature of Individual Giving Statement

[Signature]
Witness

Page 2 of 5 Pages

[Signature]
Witness

Name

Social Security Number

Address

Current Date

Current Time

City, State, Zip Code

Date of Birth

Home Phone

Work Phone

HEAD. AFTER THAT JOSH was basically crawling trying to get up. and the whole time Another Person was talking SHIT to him about being a Snitch. AT that time Another Person kicked Josh in the Ribs, And ask Josh where the weed was and Josh was just grunting. That when Another Person Ask me to check the room and we started pulling draws and Another Person flipped the mattress and Another Person was just standing there. Then Josh went unconscious and I got Josh a towel and put it to his head. Another Person said fuck we don't have anything and pushed the Christmas tree over on Josh. Another Person then got mad again and took the house phone. But before Another Person left he got some frozen chicken from the freezer and put IT on Josh's head to try and stop the Bleeding. AFTER that we went BACK out the same way we came IN.

I have made the foregoing statement freely and voluntarily, without fear, threat, promise of reward or hope of reward of any kind. This is to certify that I have read or had read to me the foregoing statement consisting of 5 pages and a true copy has been given to me this date.

[Signature]
Signature of Individual Giving Statement

[Signature]
Witness

Page 3 of 5 Pages

[Signature]
Witness

Name

Social Security Number

Address

Current Date

Current Time

City, State, Zip Code

Date of Birth

Home Phone

Work Phone

we left and another person dropped ^{another} person off 1st and me second and I guess he went home.

Q) Did you ^{another} person & ^{another} person have on gloves? (A) Yes.

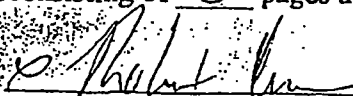
Q) WHAT kind of gloves?

A) Purple latex and I had on 2 pair wht and purple ones on top.

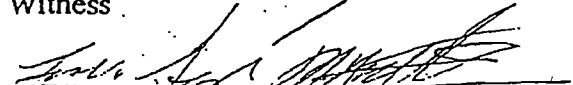
Q) WHERE was the BAT from that was used to hit Josh?

A) IT was IN Josh's house. I just looked over their and ^{another} person picked it up.

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Signature of Individual Giving Statement


Witness


Witness

Name

Social Security Number

Address

Current Date

Current Time

City, State, Zip Code

Date of Birth

Home Phone

Work Phone

Q WHAT WERE YOU ^{AND THE PERSON AND THE PERSON} WEARING THAT NIGHT?

A BLACK PANTS and shirts and ski mask.

Q WHAT COLOR WAS THE SKI MASK?

A MINE WAS black and theirs was black or DARK BLUE.

Q DID YALL CHANGE CLOTHS THAT NIGHT AFTER THE INCIDENT?

A YES and another person done something with them.

I ASK IND. DANNY CATOE TO WRITE THIS FOR ME AND THIS IS IN MY OWN WORDS AS THEY ARE WRITTEN.

X Thaddeus
12-15-06 9:51pm

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Signature of Individual Giving Statement

Witness

Page 5 of 5 Pages

Witness

Derrick McDonald

Name

[REDACTED]

Social Security Number

[REDACTED] Boney Rd

Address

12-16-06

Current Date

12:24am

Current Time

Blythewood SC 29016

City, State, Zip Code

[REDACTED]

Date of Birth

[REDACTED]

Home Phone

[REDACTED]

Work Phone

About 5:30 or 6:00pm Tuesday the 12th - 2006
 of December Another Person AND Another Person
 Came to my house. And Ask IF I WANTED TO
 MAKE some money AFTER A WHILE I DECIDED TO
 go with them. We left AND WENT TO SONIC
 AND I check on trying to get my JOB BACK.
 AFTER we left the Sonic we went to WALMART
 on two notch and bought a ski mask and some
 a box of purple latex gloves. WE WERE STILL
 IN THE parking lot when Another Person^{PERSON} call Zach, and
 ask him to see if someone was AT home.
 Zach told him that he would call back in 10 min
 but Another Person^{PERSON} call him back and told him the
 situation was being handled.
 THE THATS WHEN ~~THE~~^{THEY} STARTED planning on how
 we were going to get into the house but you
 still didn't know whos house it was going to
 be.

I have made the foregoing statement freely and voluntarily, without fear, threat, promise of reward or
 hope of reward of any kind. This is to certify that I have read or had read to me the foregoing statement
 consisting of 4 pages and a true copy has been given to me this date

Derrick McDonald

Signature of Individual Giving Statement

[REDACTED]

Witness

Name

Social Security Number

Address

Current Date

Current Time

City, State, Zip Code

Date of Birth

Home Phone

Work Phone

I didn't know who's house it was until we were already there. Another Person had told me that I was ~~not~~ ^{to} stay put outside to make sure no one came up. So Another Person parked beside the Road in front of THE house and we went to the side door. THE door was sturdy and we all the kicked the door on the count of (3). Another Person + Another Person went in and myself and I shut the door behind me and I went to another window to watch out. THATS when my name was and I went into the living Room, dining Room AREA. Another Person then cut on the lights and picked up a glass bowl with Flower Pedals in it picked it up over his head a hit Josh in the head with it while Josh was asleep on the Couch. THEN Another Person dragged Josh out the Couch. ~~and~~ BUT I FIRST grabed a bat that was against the wall and I started hitting JOSH in the Body.

I have made the foregoing statement freely and voluntarily, without fear, threat, promise of reward or hope of reward of any kind. This is to certify that I have read or had read to me the foregoing statement consisting of 24 pages and a true copy has been given to me this date.

Derrick McDaniel
Signature of Individual Giving Statement

Mr. Danny Cole
Witness

Name

Social Security Number

Address

Current Date

Current Time

City, State, Zip Code

Date of Birth

Home Phone

Work Phone

THEN ~~ANOTHER PERSON~~ tried to stop me to ask Josh a Question about where the money + Dope was, and I could stop the bat and I hit Josh in the back of THE HEAD. I also think I hit him one time in the temple area of his head. Josh then started bleeding more and I got scared. THATS when ~~ANOTHER PERSON~~ ~~ANOTHER PERSON~~ started kicking and stomping Josh ~~ANOTHER PERSON~~ then told me to go get the car and pull it up. THE last thing I saw was ~~ANOTHER PERSON~~ pushing the tree over on Josh. Then ~~ANOTHER PERSON~~ ~~ANOTHER PERSON~~ came out with plastic bags of stuff and told me to pop the trunk I did and got in the BACK Seat. Then ~~ANOTHER PERSON~~ dropped me off at my house and gave some AIDS and stuff that I didn't want. So I burned them and my cloths in a burn Barrel at my house. All of my cloths + shoes and everything burned completely up.

I have made the foregoing statement freely and voluntarily, without fear, threat, promise of reward or hope of reward of any kind. This is to certify that I have read or had read to me the foregoing statement consisting of 3 pages and a true copy has been given to me this date.

Derrick McDonald

Signature of Individual Giving Statement

Shirley D. Cate

Witness

age 3 of 9 Pages

Witness

Name

Social Security Number

Address

Current Date

Current Time

City, State, Zip Code

Date of Birth

Home Phone

Work Phone

I Ask INV Danny Catoe to write my
STATEMENT for me and this is written
in my own words.

Derrick McDonald

12-16-06-

I have made the foregoing statement freely and voluntarily, without fear, threat, promise of reward or hope of reward of any kind. This is to certify that I have read or had read to me the foregoing statement consisting of 4 pages and a true copy has been given to me this date.

Derrick McDonald

Signature of Individual Giving Statement

Witness

INV Danny Catoe