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
Unpublished Opinion No. 2012-UP-526 (S.C. Ct. App. filed September 12, 2012)

The State, Respondent,

vs.

Christopher Ryan Whitehead, Petitioner.

Appellate Case No.: 2012-213683

RETURN TO PETITION FOR WRIT OF CERTIORARI

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The Court of Appeals did not err in upholding the trial judge's ruling denying the motion for a directed verdict when the ruling was based on a proper review of the evidence which centered on the existence of evidence, not its weight. When viewed in the light most favorable to the State, there was evidence of 1) expressed malice only hours before the murder; 2) a compressed time frame of opportunity for the murder; 3) identification of Petitioner in the company of co-defendants Cannon and McDonald, who confessed to their participation in the burglary and beating, a mere hour or so before the murder; 4) Petitioner wore scars and injuries after the vicious beating and kicking in of the door to the home the day after the murder which he did not have when last seen at Sonic approximately an hour before the murder; 5) Petitioner walked off his job just three days after the murder and expressed an intent to flee the county; and, finally, 6) Petitioner was overheard talking about the murder, and expressing pride in being the "killers." 19

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PETITIONER'S QUESTIONS PRESENTED

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

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

(Cert. Petition, 3).

RESPONDENT'S COUNTER STATEMENT OF QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in upholding the trial judge's ruling that substitution of the neutral phrase "another person" for the appellant's name was proper and adequate redaction under *Bruton v. United States*, 391 U.S. 123 (1968) and its progeny.

II. Whether the Court of Appeals erred in upholding the trial judge's ruling denying the motion for a directed verdict where the trial judge's ruling was based on proper review of the evidence which centered on the existence of evidence, not its weight.

RESPONDENT'S STATEMENT OF THE CASE

A Kershaw County Grand Jury indicted Petitioner, Christopher Ryan Whitehead, for burglary first degree, and murder. (R. p. 1557-60). Neil Riley, Esq., and David Reuwer, 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 Derrick McDonald. After a break in the proceedings, the jury continued deliberations on May 13, 2009, and returned a verdict of guilty as charged. (R. pp. 1501-1502). The judge sentenced Petitioner to life without the possibility of parole pursuant to the recidivist statute. (R. p. 1548, line 16 - p. 1549, line 15). Petitioner appealed.

Senior Appellate Defender Joseph L. Savitz, III, initially represented Petitioner on appeal. On June 17, 2010, counsel filed Petitioner's Final Brief of Appellant in the South Carolina Court of Appeals and raised the following issues:

> I. The trial judge committed reversible error by allowing into evidence the statements of appellant's two non-testifying codefendants without adequately redacting their claims of appellant's involvement, as this denied his Sixth Amendment right to confront and cross-examine witnesses, as interpreted by *Bruton v. United States*, 391 U.S. 123 (1968), and its progeny.
>
> II. The trial judge erred by refusing to direct a verdict acquitting appellant of murder and burglary, since the State's evidence against him established nothing more than a mere suspicion of guilt.

(FBOA, p. 3).

The State filed its final brief on June 17, 2010. The Court of Appeals called the case for oral argument on June 19, 2012. Appellate Defender LaNelle Cantey Durant, was substituted as counsel for Petitioner. On September 12, 2012, the Court of Appeals affirmed the conviction in an unpublished opinion. (App. pp. 1-3). Petitioner filed a petition for

rehearing on September 27, 2012, (App. pp. 4-8), which was denied on November 30, 2012, (App. p. 10).

On January 30, 2013, Petitioner filed a petition for writ of certiorari in this Court and presented the following questions:

> I. Whether the Court of Appeals erred in affirming the trial judge who committed reversible error by allowing into evidence the statements of appellant's two non-testifying codefendants without adequately redacting their claims of appellant's involvement, as this denied his Sixth Amendment right to confront and cross-examine witnesses, as interpreted by *Bruton v. United States*, 391 U.S. 123 (1968), and its progeny.
>
> II. Whether the Court of Appeals erred in affirming the trial judge who erred by refusing to direct a verdict acquitting appellant of murder and burglary, since the State's evidence against him established nothing more than a mere suspicion of guilt.

(Cert. Petition, p. 2).

This return 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, who, along with Petitioner, was then an employee at the local Sonic, testified that at approximately 7:00 or 8:00 that night, Petitioner 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. Petitioner called back shortly after and asked if Waltemath had tried to call him. He responded he had not, and Petitioner indicated he wanted Waltemath to call him. Waltemath worked with Petitioner, and had "hung out" with him on several occasions. He was sure that it was Petitioner who called him that night. (R. p. 378, line 12 - p. 380, line 21; p. 384, line 11 - p. 387, line 10).

At approximately 10:00 p.m. that evening, Allen Brown, a manager at the local Sonic, testified that all three co-defendants, Petitioner, Derrick McDonald, and Robert Cannon, were together that evening. Petitioner, who then worked at the Sonic, along with McDonald, 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. Petitioner, though an employee, was not working at that time. Brown told Petitioner that he should not be in the employee area when he was not actually working. Brown instructed all three to leave. Brown testified that he knew that Petitioner and Cannon "hung out together." (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 Petitioner drove a car with "noticeable" 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, 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, McDonald 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, Petitioner 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. Petitioner 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, Petitioner demanded that a Worker's Compensation claim be filed. Because business was slow, Heathcoe had intended to let Petitioner go home that day, but "he got real adamant. He 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 Petitioner never went to a doctor. (R. p. 446, line 15 - p. 448, line 17). On Friday, Petitioner walked out of work, leaving the crew short-handed. Heathcoe called Petitioner 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 Petitioner and all was well. She went back to Sonic Tuesday night, to eat and check her scheduled, and confirmed, like Rust, that Petitioner and Robert Cannon came by the store that night, and that Cannon was wearing a ski mask. Petitioner was not limping either that day, or when she saw him later that night. On Wednesday, however, Petitioner came into work "complaining that his ankle was hurting, and he had a scratch on his face." Petitioner 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, Petitioner 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, Petitioner was with Trapp to open the Sonic, when Petitioner's mother drove up. After speaking with his mother, Petitioner "kind of freaked out and was just like, 'I have to go'." Petitioner 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), 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 12, 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 Petitioner, McDonald and Cannon.

Petitioner 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 McDonald 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 Petitioner and McDonald (which was, of course, redacted for presentation at trial to avoid *Bruton*[1] issues), that 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, which he kept in the house for protection, on the victim's 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 the three 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 Exhibit 2). 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).

McDonald would also confess to the crime, in detail. Like Cannon's statement, his statement was also redacted before introduction. The statement referenced that the three went to the local Wal-Mart and bought a ski mask and a box of purple gloves; one of them called "Zach" to see if someone was home; all three kicked in a sturdy back door; one person "picked up a glass bowl with flower petals in it, picked it up over his head and hit Josh in the

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[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).

head with it while Josh was asleep on the couch"; 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; they were searching for drugs and money; and another kicked and stomped the victim, and, eventually, pulled a Christmas tree over on him. He 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).

Petitioner, 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:

> I heard conversation coming next to me, in the cell next to me, someone was speaking about Rocky Branch, Josh and how he had a piece of sh** trailer that was easy to get into... just bragging about how they were killers now. When they went back to school the were going to be respected and jaws were going to drop and all this and just bragging....

(R. p. 1221, line 10 - p. 1222, line 8).

This particularly caught Jenkins' attention as he had known the victim, Josh. (R. p. 1222, lines 9-20). He would meet Petitioner again, and, again, Petitioner was speaking of the incident. Jenkins could positively identify Petitioner's voice, both from the cell conversation, and seeing Petitioner later, several times. The last time, in the multipurpose room, where Petitioner made his second overheard statement about the burglary and murder, Jenkins actually "reached for him, got pulled apart by Officer Jenkins." (R. p. 1224, line 19 - p. 1227, line 25). A detention center officer confirmed that Jenkins had been in the cell next to Petitioner 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 his 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 McDonald, and the details overheard in Petitioner's detention center conversations. The physical evidence also supported the inferences of guilt from Petitioner's injuries, given the timing, type, and nature of the injuries.

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 the Petitioner's name was proper and adequate redaction under *Bruton v. United States*, 391 U.S. 123 (1968) and its progeny. The trial judge properly admitted the statements in the joint trial when the statements were not only properly redacted as to Petitioner's name but also did not otherwise facially incriminate Petitioner.

Relevant Facts:

All three co-defendants, Petitioner, Cannon, and McDonald, were tried at the same time. The State offered to redact, and did redact, all references to the co-defendants in both the Cannon statement and the McDonald statement. (R. p. 629, line 16 - p. 630, line 20). Defense counsel objected in 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).[2] 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 20-24). Defense counsel recognized that current law supported the redaction of Petitioner's name and substitution of "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

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

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. 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 error in the redaction. He argued that "[n]o rational juror who heard Cannon and McDonald's statements to police could have deduced anything other than that Whitehead was the third 'person' who had attacked Zoch," and admission of the redacted statements offended the holding of *Bruton*. (FBOR, pp. 5-7).

The Court of Appeals in a *per curiam* unpublished opinion relying on the published opinion in co-defendant McDonald's appeal,[3] resolved the issue as follows:

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

(App. p. 2).

In his petition for rehearing, Petitioner argued:

> The Court of Appeals held that ... because the redacted statement only implicated the statement's maker, there was no Bruton violation because it

[3] Co-defendant Cannon's appeal was previously heard in the Court of Appeals and denied by unpublished opinion issued June 8, 2011. Mr. Cannon, however, did not raise a *Bruton* issue.

> did not limit the participants to three. The Court misapprehended the issue as no rational juror who heard Cannon and McDonald's statements to the police could have deduced anything other than that Whitehead was the third "person" who had attacked Zoch. There statements clearly indicated that three people were involved. There was no indication of any more than three.

(App. p. 7).

He further argued the limiting instruction was insufficient o cure the error as "the limiting instruction given was confusing, prejudicial, and not proper." (App. p. 7). Lastly, he argued the error could not be harmless "given the paucity of evidence against Whitehead." (App. p. 7).

In his petition to this Court, Petitioner again argues "[n]o rational juror who heard [the] statements ... could have deduced anything other than Whitehead was the third 'person' who had attacked Zoch." (Cert. Petition, p. 8). He also argues the limiting instruction was insufficient and "particularly tepid." (Cert. Petition, p. 8). Lastly, he argues that the error could not be harmless "given the paucity of evidence against Whitehead." (Cert. Petition, p. 8).

Discussion:

The gist of Petitioner's argument appears to be that redaction can be made, but only if no reference to any co-participant remains in the statement. He admitted at trial that current precedent does not require such 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 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. Further, he properly admitted the co-defendants' statements, redacted under the current rules, and without referenced to other co-defendants by name or other identifiers, in the joint trial. The Court of Appeals correctly affirmed his ruling.

"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 inculpates 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) (*citing Richardson v. Marsh,* 481 U.S. 200, 107 S.Ct. 1702 (1987) (emphasis in original); *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 identifying 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 jury 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 statement that referenced another's "blue Honda Accord," was omitted as witnesses had testified that Petitioner 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 inculpate 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). Again, the redaction was proper and protected Petitioner'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). Petitioner's rights were adequately protected.

If, however, this Court should disagree the redaction was sufficient, such an error would not warrant reversal as 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. While Petitioner argued below that the statements were essentially the only evidence tying Petitioner to the burglary and murder, (R. p. 633, lines 9-15), and argues a "paucity of evidence against" Petitioner on appeal, (FBOA, p. 7) (Cert. Petition, p. 8), the record easily rebuffs such assertions. For instance, Zachary Waltemath testified that Petitioner called him on the night of the burglary and murder to enlist his help in determining whether the victim was home because "he wanted to go over there and fight" the victim. (R. p. 385, line 17 - p. 387, line 10). Christopher Rust testified that Petitioner drove a car with a "noticeable" muffler noise. (R. p. 371, line 20 - p. 372, line 5). The victim's neighbor, Cosmo Baccamo, testified that at approximately 11:30 he heard the sounds of "somebody kicking something or slamming doors," male voices, and then a car, with a loud muffler, take off. (R. p. 337 line 25 - p. 339, line 15). Victim was brutally beaten, kicked and bludgeoned. (R. p. 1123, line 17 - p. 1125, line 14). The back door to the home had been kicked in. (R. p. 675, lines 13-25). Petitioner showed up for work the next day, suffering from injuries, specifically limping, which is, of course, consistent with a fight and or kicking in a door. (R. p. 444, line

20 - p. 445, line 23). Just three days after the murder, Petitioner walked off his job, and stated his intent to flee the county. (R. p. 449, line 1 - p. 451, line 14). Finally, Michael Jenkins, heard Petitioner twice brag about the murder, identifying the home where the murder occurred, relating how the trailer was "easy to get into," bragging about being known as "killers," and calling the victim's name. (R. p. 1221, line 10 - p. 1222, line 8; p. 1224, line 19 - p. 1227, line 25).

As a whole, the evidence against Petitioner, though in large part circumstantial, is none the less overwhelming. The co-defendants' statements do not detract or add to these facts. Though surely the evidentiary pieces fit well to reflect a picture of guilt, the redacted statements do not facially incriminate Petitioner, and other specific and separate evidence of guilt, as shown above – including Petitioner's own professed involvement in the burglary and murder – again, when considered as a whole, constitutes overwhelming evidence of guilt. Any error could only be harmless based on this record.

However, Respondent submits the statements were properly redacted and the Court of Appeals reasonably found no error in the trial judge's ruling.

II.

The Court of Appeals did not err in upholding the trial judge's ruling denying the motion for a directed verdict when the ruling was based on a proper review of the evidence which centered on the existence of evidence, not its weight. When viewed in the light most favorable to the State, there was evidence of 1) expressed malice only hours before the murder; 2) a compressed time frame of opportunity for the murder; 3) identification of Petitioner in the company of co-defendants Cannon and McDonald, who confessed to their participation in the burglary and beating, a mere hour or so before the murder; 4) Petitioner wore scars and injuries after the vicious beating and kicking in of the door to the home the day after the murder which he did not have when last seen at Sonic approximately an hour before the murder; 5) Petitioner walked off his job just three days after the murder and expressed an intent to flee the county; and, finally, 6) Petitioner was overheard talking about the murder, and expressing pride in being the "killers."

Relevant Facts:

At trial, defense counsel argued the State lacked any direct or substantial circumstantial evidence as to Petitioner's guilt. Specifically, defense counsel argued 1) that there was "some evidence" that established Petitioner had "a peeve, possibly a peeve with the deceased" but that there were others who could have peeves as well; and, 2) that there was testimony from the "jail house snitch," but reliability was a factor, and, at any rate, the "statement has to do with the future... we're going to be heros when we go back to school" and "doesn't have to do with the past" and "doesn't say that Christopher Whitehead had anything to do with it." Defense counsel argued the evidence amounted only to "mere suspicion." (R. p. 1302, line 13 - p. 1309, line 3).

The State responded by reviewing more of the evidence supportive of guilt, including 1) the phone call to Waltemath; 2) that Petitioner was with the co-defendants the same night; 3) that Petitioner's car had a loud muffler and a loud muffler was identified by victim's neighbor; 4) the injuries to Petitioner the next day; 5) and, finally, the statement to the

jailhouse informant that indicated pride in becoming killers. (R. p. 1309, line 5 - p. 1312, line 24).

The trial judge reasoned that there was both direct evidence and circumstantial evidence presented and denied the motion. (R. p. 1312, line 25- p. 1315, line 9).

In the Court of Appeals, Petitioner argued that the only testimony supporting guilt is the "testimony of a jailhouse snitch,"and that testimony does not reflect that Petitioner "admitted any degree of involvement in the incident." (FBOA, p. 8). He further argued that the "balance of the State's evidence - the fact that Whitehead was observed limping the day after Zoch's killing, for example - did not satisfy the State's burden" of showing evidence sufficient to defeat Petitioner's directed verdict motion. (FBOA, p. 9).

The Court of Appeals resolved the issue as follows:

> 2. As to Whitehead's argument that the trial court erred in not directing a verdict acquitting him of murder and burglary because the State's evidence only established a mere suspicion of guilt: *State v. Kelsey*, 331 S.C. 50, 62, 502 S.E.2d 63, 69 (1998) (stating the trial court is concerned with the existence of evidence rather than its weight when considering a directed verdict motion); *State v. Sanders*, 388 S.C. 292, 299, 696 S.E.2d 592, 596 (Ct.App. 2009) ("'In reviewing the denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the State, and if there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove guilt of the accused, an appellate court must find that the case was properly submitted to the jury.'" (quoting *Kelsey*, 331 S.C. at 62, 502 S.E.2d at 69)); *State v. Cherry*, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004) ("[A] trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis.")

(App. pp. 2-3).

In his petition for rehearing, Petitioner argued the Court of Appeals "misapprehended the issue," as the informant's statement did not reflect that Petitioner actually "admitted his guilt." (App. p. 8). He argued further that "[t]he balance of the State's evidence – the fact

that Whitehead was observed limping the day after Zoch's killing for example – did not satisfy the State's burden of putting forth some evidence that Whitehead is guilty of murder and burglary." (App. p. 8).

In his Petition to this Court, Petitioner again argues the Court of Appeals misapprehended the evidence in that the informant's statement did not reflect a statement of guilt. (Cert. Petition, p. 11). He also argues again that the "balance of the State's evidence" did not otherwise "satisfy the State's burden of putting forth some evidence that Whitehead is guilty of murder and burglary." (Cert. Petition, p. 11).

Discussion:

A defendant is only entitled to a directed verdict of acquittal if the State fails to offer proof of the offense charge, or its proof merely raises a suspicion of guilt. *State v. Buckmon*, 347 S.C. 316, 321, 555 S.E.2d 402, 404 (2001). When reviewing the trial judge's denial of a motion for a directed verdict, the appellate court will view the evidence in the light most favorable to the State. *Id. See also State v. Frazier*, 375 S.C. 575, 581, 654 S.E.2d 280, 283 (2007). "If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury." *State v. Freiburger*, 366 S.C. 125, 136, 620 S.E.2d 737, 743 (2005); *State v. Weston,* 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); *State v. Zeigler*, 364 S.C. 94, 102, 610 S.E.2d 859, 863 (Ct. App. 2005), *cert. denied* (Jan. 31, 2007). Conversely, "[t]he court should grant a directed verdict motion when the evidence presented merely raises a suspicion of guilt." *Frazier,* 375 S.C. at 581, 654 S.E.2d at 283. "'Suspicion' implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." *Id.*

"[A] trial judge is not required to find that the evidence infers guilt to the exclusion of any other reasonable hypothesis." *Id.* (citations omitted).

"The appellate court may reverse the trial judge's denial of a motion for a directed verdict only if there is no evidence to support the judge's ruling." *State v. Stanley*, 365 S.C. 24, 42, 615 S.E.2d 455, 464 (Ct. App. 2005). Here, there is ample evidence supporting the trial judge's denial of Petitioner's directed verdict motion, and the Court of appeals correctly affirmed his ruling.

Petitioner contacted Waltemath on the night of the murder in an attempt to determine whether the victim was home because "he wanted to go over there and fight" the victim. (R. p. 385, line 17 - p. 387, line 10). This constitutes an expressed intent to do harm to the victim on the night of the murder. Moreover, Allen Brown, a manager of the local Sonic, testified that Petitioner was in the company of the co-defendants on the night of the murder, approximately one hour before the murder, (R. p. 322, line 13 - p. 324, line 14), which was also confirmed by Sonic employees Christopher Rust, (R. p. 361, lines 4-22), and Cecile Trapp, (R. p. 484, lines 16-24). The co-defendants, both, confessed their participation in the burglary and beating at victim's house at approximately 11:30.[4] (R. p. 748, line 25 - p. 752, line 15; p. 773, line 15 - p. 775, line 21). Rust testified that Petitioner drove a car with a "noticable" muffler noise. (R. p. 371, line 20 - p. 372, line 5). The victim's neighbor, Cosmo Baccamo, testified that he heard the sounds of "somebody kicking something or slamming doors," male voices, and then a car, with a loud muffler, take off, at approximately

[4] Respondent notes that reliance on this evidence is not inconsistent with the response to the first issue. As noted, 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. This argument is premised precisely on the fact that the connection is possible only when "linked to other evidence introduced at trial." *Id.*

11:30 p.m. (R. p. 337 line 25 - p. 339, line 15). Victim was brutally beaten, kicked and bludgeoned. (R. p. 1123, line 17 - p. 1125, line 14). The back door to the home had been kicked in. (R. p. 675, lines 13-25). Petitioner showed up for work the next day, suffering from injuries, specifically limping, which is, of course, consistent with a fight and or kicking in a door. (R. p. 444, line 20 - p. 445, line 23). Just three days after the murder, Petitioner walked off his job, and stated his intent to flee the county. (R. p. 449, line 1 - p. 451, line 14). Finally, Michael Jenkins, heard Petitioner twice brag about the murder, identifying the home where the murder occurred, relating how the trailer was "easy to get into," bragging about being known as "killers," and calling the victim's name. (R. p. 1221, line 10 - p. 1222, line 8; p. 1224, line 19 - p. 1227, line 25). Clearly, there is both direct and substantial circumstantial evidence supporting the trial judge's decision, and the motion for directed verdict was properly denied.

The major flaw in Petitioner's argument is that it omits reference to all the evidence of guilt as reviewed above. Moreover, Petitioner's argument attacking the informant's testimony fails because of his insistence on only one inference, and that taken in the light most favorable *to the defendant.* First, that is not the test. Second, the import of the statement is for the jury, as it is for the jury to decide what, if any, weight to assign the evidence. Without doubt, the testimony reflected that Petitioner knew about the crime, and expressed pride in the crime. That is evidence of his involvement. Lastly, Petitioner's argument that the "balance of the State's evidence" was insufficient to "satisfy the State's burden" is not only vague, and but also the one example referenced (the evidence of limping), again rests on a view of the offered evidence in the light most favorable to the

defendant, which, of course, is not the test. Again, the record fully supports the trial judge's ruling, and the Court of Appeals properly affirmed the trial judge's ruling.

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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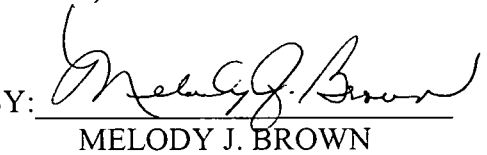
BY: 
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May 1, 2013.
Columbia, South Carolina.

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
Unpublished Opinion No. 2012-UP-526 (S.C. Ct. App. filed September 12, 2012)

The State, Respondent,

vs.

Christopher Ryan Whitehead, Petitioner.

Appellate Case No.: 2012-213683

PROOF OF SERVICE

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

LaNelle Cantey Durant, Appellate Defender
South Carolina Commission on Indigent Defense,
Division of Appellate Defense
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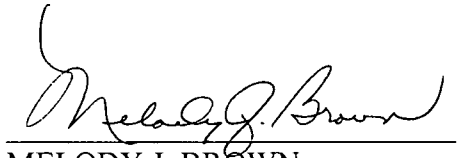
This 1st day of May, 2013.



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