ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2011-1912
Plaintiff-Appellee,	:	
	:	On Appeal from the Erie
vs.	:	County Court of Appeals,
	:	Sixth Appellate District
THOMAS J. RICKS,	:	
	:	Court of Appeals
Defendant-Appellant.	:	Case No. E-10-022

REPLY BRIEF OF APPELLANT THOMAS J. RICKS

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STATEMENT OF THE CASE AND FACTS

The State of Ohio has submitted that Thomas J. Ricks, the appellant, and his codefendant, Aaron Gipson, visited Chanel Harper and Crystal Poole on the night before Calvin Harper was robbed and murdered. (Aug. 28, 2012, Brief of Appellee, at p. 2). The assertion that Mr. Ricks was the man who was with Mr. Gipson that night was contested at trial. Indeed, Ms. Harper and Ms. Poole identified Mr. Ricks as the person who was with Mr. Gipson. (Apr. 23, 2009, Suppression Hearing Tr. 4-68; Tr. 498-514, 528-540). And Rhonda Farris believed that Mr. Ricks was the man who had approached her apartment before the murder occurred. (*See* Apr. 23, 2009, Suppression Hearing Tr. 71-88; Tr. 560-573). But it was determined that Ms. Poole knew or recognized five of the seven other individuals depicted in the photographic array through which she identified Mr. Ricks. (Apr. 23, 2009, Suppression Hearing Tr. 39-41; Tr. 538-540). Ms. Farris admitted that one of the people who was included in the array was her cousin, and that she knew every other person in the array. (Apr. 23, 2009, Suppression Hearing Tr. 84-85; Tr. 560-573, 588-590). Ms. Harper also admitted that she knew everyone else in the array. (Apr. 23, 2009, Suppression Hearing Tr. 90, 97-98; Tr. 498-514, 526-527).

Further, while Ms. Harper and Ms. Poole had never before seen the man who was with Mr. Gipson, neither witness testified that the group hung out for "a few hours." (*See* Aug. 28, 2012, Brief of Appellee, at p. 2). Rather, Ms. Harper testified that the men left after "[a]bout an hour" or "an hour or two." (Apr. 23, 2009, Suppression Hearing Tr. 91-92; Tr. 504). And Ms. Poole testified that the men left after "maybe hour and a half, two hours," or a "couple of hours," and that Ms. Harper and Mr. Gipson went into another room for a while during that period of time. (Apr. 23, 2009, Suppression Hearing Tr. 27-28; Tr. 533-534).

Mr. Ricks otherwise adheres to the statement of the case and facts contained in his previously filed merit brief. (July 9, 2012, Merit Brief, at pp. 1-6).

ARGUMENT

Proposition of Law: A non-testifying codefendant's inculpatory, testimonial, out-of-court statements may not be admitted at a defendant's trial through the testimony of an investigating officer as non-hearsay for the purpose of explaining the officer's conduct during the course of an investigation. The admission of a codefendant's statements in that regard violates the defendant's right to confront the State's evidence against the defendant, in violation of the defendant's rights under the Sixth and Fourteenth Amendments to the United States Constitution, and Sections 10 and 16, Article I of the Ohio Constitution.

I. Introduction.

The State has argued that Mr. Gipson's incriminating statements were not offered for the truth of the matters asserted because they merely explained police conduct during the investigation. (*See* August 28, 2012, Brief of Appellee, at pp. 6-16). Thus, the State maintains that Mr. Gipson's out-of-court statements were properly admitted and, in any event, the trial court's limiting instruction cured any prejudicial effect that the statements may have had. (*See* August 28, 2012, Brief of Appellee, at pp. 6-16). The State has refused to acknowledge that it actually used Mr. Gipson's statements for critical truth-of-the-matter purposes. And it has failed to realize the highly prejudicial impact that the statements must have had on the jury, despite the fact that the trial court attempted to quell that impact.

First, there can be no doubt that Mr. Gipson's out-of-court statements were testimonial. They came in response to questioning by the police regarding the involvement of Mr. Gipson and his unknown accomplice in the offenses. *See Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); *see also Williams v. Illinois*, 567 U.S. ___, 2012 U.S.

LEXIS 4658, *82-83 (Breyer, J., concurring) ("As the plurality notes, in every post-*Crawford* case in which the Court has found a Confrontation Clause violation, the statement at issue had the primary purpose of accusing a targeted individual."). Second, the statements asserted a matter which was essential and at the heart of the State's case against Mr. Ricks—that Mr. Ricks was the person who robbed and killed Mr. Harper with Mr. Gipson. As such, the natural use that the jury would make of the statements was that Mr. Ricks did, in fact, commit those offenses (because Mr. Gipson, who was clearly involved in the offenses, said so). The statements were thus used for the truth of the matters asserted—that Mr. Ricks robbed and killed Mr. Harper. No curative instruction could right that wrong. *See Lee v. Illinois*, 476 U.S. 530, 542-543, 106 S.Ct. 2056, 90 L.Ed.2d 514 (1986). And because Mr. Gipson, who had great incentive to place the blame elsewhere, was not subjected to cross-examination, the statements were admitted in violation of Mr. Ricks's right to confront the witnesses against him.

The State had motivation to identify a theory by which Mr. Gipson's out-of-court statements could be admitted. The statements were valuable, but impermissible evidence of Mr. Ricks's guilt. The State's motivation came to fruition when the trial court determined that the statements could be disclosed to the jury because the officers needed to explain why they went from place to place. But the State had no substantial need to disclose Mr. Gipson's inculpatory statements if it merely wished to explain how the investigation was conducted. And if it needed to explain those things, it should have stopped well short of bringing forth Mr. Gipson's unchecked, substantially prejudicial identification statements and the inferences which could be drawn from the circumstances under which they were made. Moreover, if the State would have been inconvenienced by its inability to tell the jury about Mr. Gipson's statements, that inconvenience was mandated by the Sixth Amendment. The Confrontation Clause should have

won that battle. But when the trial court failed to restrain the State's use of Mr. Gipson's damaging statements, and determined that the jury would not be unduly moved by the statements, it rendered the Confrontation Clause meaningless. The officer's-conduct-during-an-investigation line of cases is subject to abuse. In this case, such abuse caused the jury to find Mr. Ricks guilty.

II. Reply to the State's proposition of law and arguments.

The State has submitted that the court of appeals "correctly found that incriminating statements made by a codefendant may be offered through the testimony of an investigating officer to explain the officer's conduct in the course of an investigation, so long as a limiting instruction is given to the jury, as was done in the case at bar." (Aug. 28, 2012, Brief of Appellee, at p. 6). Of course, the State's assertion hinges on whether the statements were actually submitted for not-for-the-truth purposes. And here, Mr. Gipson's statements were hearsay. In essence, the State has condoned the lower courts' misunderstanding of this Court's holding in *State v. Thomas*, 61 Ohio St.2d 223, 232, 400 N.E.2d 401 (1980), and the line of cases that followed. *See, e.g.*, *State v. Blevins*, 36 Ohio App.3d 147, 149, 521 N.E.2d 1105 (1987); *State v. Blanton*, 184 Ohio App.3d 611, 2009-Ohio-5334, 921 N.E.2d 1103, ¶ 28-49 (10th Dist.); *State v. Humphrey*, 10th Dist. No. 07AP-837, 2008-Ohio-6302, ¶ 9-13; *State v. Sinkfield*, 2d Dist. No. 16277, 1998 Ohio App. LEXIS 4644, *14-20 (Oct. 2, 1998); *see also State v. Maurer*, 15 Ohio St.3d 239, 262-264, 473 N.E.2d 768 (1984); *State v. Lewis*, 22 Ohio St.2d 125, 131-132, 258 N.Ed. 2d 445 (1970). As Mr. Ricks's case has shown, this Court's direction in *Thomas* can be abused easily to the detriment of the Sixth Amendment.

This Court's holding in *Thomas* was rendered without the guidance of recent Confrontation Clause authority, not the least of which was the decision of the Supreme Court of

the United States in *Crawford*. And since *Thomas*, the misapplication of the hearsay rules and this Court's guidance has created an end-run around the Sixth Amendment's guarantee of confrontation. That is what happened in Mr. Ricks's case. And that is why this Court must instruct the lower courts that the rules of evidence must not be stretched to absurdity and used to undermine the Sixth Amendment.

The State has noted that the court of appeals determined that there was no evidence that Mr. Gipson's statements indicated that he tried to exonerate himself or implicate Mr. Ricks. (Aug. 28, 2012, Brief of Appellee, at p. 6). The court of appeals was wrong. Mr. Gipson was under investigation for the robbery and murder of Mr. Harper, and was being questioned regarding his accomplice. The following trial facts contradict the appellate court's reasoning:

- The prosecutor told the jury that Mr. Gipson had been a "suspect"; that he was taken in by the police to be questioned; that the police wanted to know who was with Mr. Gipson on the night before the murder; that they "tried to identify" that person; that the police drove Mr. Gipson to the area where Mr. Ricks had been staying; that Mr. Gipson pointed out Mr. Ricks; that Mr. Gipson became visibly scared; that the police then obtained a photograph of Mr. Ricks; and that when Mr. Gipson looked at the photograph, he said "that's him." (Tr. 340-342). Mr. Ricks's objections were overruled. (Tr. 340-342).
- Officer Michael Steckel told the jury that he spoke with Mr. Gipson; that he learned that there were *two* suspects; that he was told that the other suspect was called "Peanut"; that he spoke with Mr. Gipson to determine who Peanut was; that Mr. Gipson described Peanut; that the officer drove Mr. Gipson to the area where Peanut (Mr. Ricks) was staying because Mr. Gipson knew Peanut; that they were trying to identify Peanut; that Mr. Gipson *pointed out Peanut and said "that's Peanut"*; that they went back to the

police station and came up with the name Thomas Ricks; that Officer Steckel obtained a photograph of Mr. Ricks; that he showed that photograph to Mr. Gipson; and that Mr. Gipson said "*that's Peanut.*" (Emphasis added.) (Tr. 432-450). Mr. Ricks's objections were overruled under officer's-conduct-during-an-investigation case authority, and a curative instruction was given. (Tr. 432-450).

- During the State's closing argument, the prosecutor highlighted Mr. Gipson's out-of-court statements in arguing that Mr. Ricks committed the crimes. (Tr. 1238-1240).

Moreover, Detective Helen Prosowski said the following when the prosecutor asked her when she discovered Mr. Ricks's identity: "We didn't learn of Thomas Ricks until Canton Police Department had spoken to Aaron Gipson." (Tr. 678). Mr. Ricks's objection was overruled. (Tr. 678). The detective then told the jury: "We had learned of Thomas Ricks' name through Aaron Gipson from the Canton Police Department in Michigan." (Tr. 679).

Mr. Gipson made testimonial assertions that Mr. Ricks was involved in Mr. Harper's murder. He undeniably implicated Mr. Ricks, and the court of appeals simply failed to realize that truth. *See State v. Ricks*, 196 Ohio App.3d 798, 2011-Ohio-5043, 965 N.E.2d 1018, ¶ 69 (6th Dist.). And because the statements came from someone who was guilty of the offenses, and who identified Mr. Ricks as the person who was involved with him, the notion that the curative instruction alleviated the statements' prejudicial impact is highly unlikely. *Lee*, 476 U.S. at 542-543; *see also Bruton v. United States*, 391 U.S. 123, 136, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

The State has noted that admitting incriminating out-of-court statements under the purported justification that the statements merely explain an officer's conduct raises the potential for abuse. (Aug. 28, 2012, Brief of Appellee, at p. 7); *see also Humphrey* at ¶ 11. Mr. Ricks agrees, as that is what happened during his trial. And while the State has noted that such

statements must meet the standards of Evid.R. 403(A), it has failed to acknowledge that Mr. Gipson's statements could not survive such analysis. That is, the State claimed that the statements were necessary to the jury's understanding of the criminal investigation. But again, the State did not need Mr. Gipson's out-of-court statements to get those points across. Thus, the probative value of the statements for that purpose was scant. *See id.* And given the unduly prejudicial effect of Mr. Gipson's unchecked assertions (that Mr. Ricks participated in the Harper murder), the probative value was substantially outweighed by the danger of unfair prejudice. *See id.*

The State has attempted to support its position by citing to the decisions of the Tenth District Court of Appeals in *State v. Payne*, 10th Dist. Nos. 02AP-723, 02AP-725, 2003-Ohio-4891, and *State v. Williams*, 10th Dist. Nos. 02AP-730, 02AP-731, 2003-Ohio-5204. *Payne* is inapposite. In that case, the court of appeals held:

> In the present case, the police had a description of a white Ford Aerostar van and a license plate number. After a check of records, the police learned that the van was registered to an address on Champion Avenue. The police then took steps to watch the address on Champion Avenue looking for the van. When the officers pulled the van over while Marilyn Williams was driving it, they ordered the occupants out of the van. It became apparent that neither defendant nor Williams were in the van. The police asked Marilyn Williams, as well as the other occupants of the van, if they had been driving the van earlier. One of the occupants informed the police that Williams and a friend had driven the van earlier in the day and that they could be found at the address on Bedford. The testimony concerning the statement made by the person in the van regarding who was driving the van earlier was offered to explain why the police ultimately decided to proceed to the Bedford address where defendant and Williams were ultimately apprehended. The statement was admissible.

Id. at ¶ 64.

First, the defendant in *Payne* did not structure his challenge on Confrontation Clause grounds. *See id.* at ¶ 62-64. Second, the out-of-court statements which were considered by the court of appeals in *Payne*, and the statements' potential for undue prejudice, are not like those

involved in Mr. Ricks's case. In *Payne*, a *non-accomplice* told the police that the defendant had been driving a van which was used during a crime. *Id.* at ¶ 64. Further, the out-of-court statements did not directly implicate the defendant, and they were arguably used for not-for-the-truth purposes. But in Mr. Ricks's case, Mr. Gipson was involved in the offenses and identified Mr. Ricks as the other person who was involved. His statements were not used to merely explain how the officers' investigation progressed. Again, if the State wished to have the police explain those things, Mr. Gipson's incriminating statements were not necessary.

Further, as in *Payne*, the defendant in *Williams* did not structure his challenge on Confrontation Clause grounds. *Williams* at ¶ 46-50. And while the court of appeals in *Williams* decided that the out-of-court statements at issue could survive Evid.R. 403 analysis, for the reasons discussed *supra*, Mr. Gipson's statements cannot do the same. Further, while the *Williams* court concluded that a curative instruction was sufficient to cure any prejudicial effect in that case (which may have been so under the facts of that case), the trial court in Mr. Ricks's case could not steer the jury away from the improper impact of Mr. Gipson's hearsay statements.

The State has also contended that the decision of the district court in *Banks v. Wolfe*, S.D.Ohio No. 2:05-cv-00697, 2006 U.S. Dist. LEXIS 35333 (May 30, 2006), supports its position that Mr. Gipson's statements were properly admitted. (Aug. 28, 2012, Brief of Appellee, at pp. 9-12). That case is also inapposite. The district court ultimately held: "For the reasons discussed by the state appellate court, this Court likewise concludes that all of the statements referred to by petitioner were non-testimonial in nature, not offered for the truth of the matter asserted, or constituted harmless error." *Banks*, 2006 U.S. Dist. LEXIS 35333, at *84. A review of the out-of-court statements which were challenged in *Banks* reveals that they were benign, and were either genuinely not hearsay or were exceptions to the hearsay rule. *Id.* at *72-

81. And the statements certainly did not amount to accusations by a codefendant that the accused was directly involved in the offenses. *That* is what happened in Mr. Ricks's case. And for those same reasons, cases which predated *Crawford* and merely held that an officer's statement that an anonymous tip led to the accused's arrest are likewise not on point. (*See* Aug. 28, 2012, Brief of Appellee, at pp. 12-13); *see also State v. Stadmire*, 8th Dist. No. 81188, 2003-Ohio-873, ¶ 38-42.

The State has argued that there was no testimony introduced which indicated that Mr. Ricks was identified by Mr. Gipson as having participated in the Harper offenses. (Aug. 28, 2012, Brief of Appellee, at p. 13). The State is incorrect. Mr. Ricks has highlighted the identification-based uses of Mr. Gipson's testimony in his merit brief and herein. Those instances were many. And contrary to the State's contention, Mr. Gipson's out-of-court statements were facially incriminating. That is, they indicated that "Peanut" (Mr. Ricks) robbed and killed Mr. Harper.

The State has also submitted that because additional efforts were made to identify Mr. Ricks, the admission of Mr. Gipson's hearsay statements did not violate the Confrontation Clause. (Aug. 28, 2012, Brief of Appellee, at p. 14). The State has noted that Officer Steckel testified that when he went back to the police station after he drove Mr. Gipson around so that Mr. Gipson could point out and identify his partner, further efforts were made to obtain the "name identification." (*See* Aug. 28, 2012, Brief of Appellee, at p. 14; Tr. 442-443). Of course, it is transparent that Officer Steckel went back to the police station with Mr. Gipson, and that the name "Thomas Ricks" then surfaced. (*See* Tr. 442-443). There was no additional "link" to incriminate Mr. Ricks. (*See* Aug. 28, 2012, Brief of Appellee, at p. 14-15); *see also Ricks* at ¶ 69. Mr. Gipson pointed to Mr. Ricks and identified him as a person who committed the crimes.

He directly incriminated Mr. Ricks, and Mr. Ricks was denied his right to explore those accusations through Mr. Gipson's placement in the crucible of cross-examination.

Further, courts have considered the impact of out-of-court statements such as those which were made by Mr. Gipson, and the implications which can be drawn from the circumstances under which such statements were made, and held that the accused was denied the right to confrontation. In *United States v. Meises*, 645 F.3d 5, 20-23 (1st Cir.2011), the court of appeals faced a similar question regarding an officer's testimony which disclosed the incriminating out-of-court statements of a non-testifying witness. The court of appeals held the following regarding the appellants' confrontation-based claim:

> In the pertinent portion of the challenged exchange, Cruz was asked, in essence, if Rubis had said anything during his interview that changed the targets of the investigation and prompted the defendants' arrests. Cruz answered affirmatively. The government maintains that the prosecutor's examination was "adroitly focused . . . on the actions that Agent Cruz took after speaking to Rubis," while appellants argue that "[n]o juror of normal intelligence, hearing this exchange, could have failed to get the prosecutor's point that Rubis, in his statement to the agents, had implicated [him] as a co-conspirator." Appellants assert that "the import of this testimony is no less clear than if Rubis had been directly quoted."
>
> We agree with appellants that a reasonable jury could only have understood Cruz to have communicated that Rubis had identified appellants as participants in the drug deal. It makes no difference that the government took care not to introduce Rubis's "actual statements." Although the government could properly seek to rebut Reyes-Guerrero's suggestion that the appellants were innocent bystanders, it did so with testimony that plainly told the jurors that Rubis said they were co-conspirators rather than with the available evidence circumstantially pointing to their culpability.
>
> In *United States v. Maher*, 454 F.3d 13 (1st Cir. 2006), we declined to discuss *Crawford*'s applicability to "testimony from which . . . the jury would necessarily infer that the declarant had said *X*, but which did not itself quote or paraphrase the declarant's statements." *Id.* at 20-21. We observed that the defendant in that case had made "no effort to explain why Crawford should be read to extend" to such statements. *Id.* at 21. Here, the issue is addressed head-on by both appellants. We conclude that the right to cross-examine an out-of-court accuser applies with full force in the circumstances of this case.

The opportunity to cross-examine the declarant "to tease out the truth," *Crawford*, 541 U.S. at 67, is no less vital when a witness indirectly, but still unmistakably, recounts a co-defendant's out-of-court accusation. The concerns animating the right to confrontation are especially acute when the statement at issue originates from an ex parte examination by a law enforcement officer. *See Crawford*, 541 U.S. at 50-51; *id.* at 51 ("An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not."). Hence, if what the jury hears is, in substance, an untested, out-of-court accusation against the defendant, particularly if the inculpatory statement is made to law enforcement authorities, the defendant's Sixth Amendment right to confront the declarant is triggered. *Accord Ryan v. Miller*, 303 F.3d 231, 249 (2d Cir. 2002) ("If the substance of the prohibited testimony is evident even though it was not introduced in the prohibited form, the testimony is still inadmissible."); *United States v. Reyes*, 18 F.3d 65, 69 (2d Cir. 1994) ("[A]lthough the jury was not told exactly what words [the co-defendants] had spoken, [the witness's] testimony clearly conveyed the substance of what they had said.").

Indeed, any other conclusion would permit the government to evade the limitations of the Sixth Amendment and the Rules of Evidence by weaving an unavailable declarant's statements into another witness's testimony by implication. The government cannot be permitted to "circumvent the Confrontation Clause by introducing the same substantive testimony in a different form." *Ryan*, 303 F.3d at 248; *see also, e.g.*, *Mason v. Scully*, 16 F.3d 38, 43 (2d Cir. 1994) ("The fact that the content of [the co-conspirator's] statement to [the detective] was not revealed in detail was immaterial, for the plain implication that the prosecutor sought to elicit . . . was that the conversation . . . led the police to focus on [the defendant]."); *People v. Cruz*, 100 A.D.2d 882, 474 N.Y.S.2d 142, 144 (N.Y. App. Div. 1984) ("The prosecutor's questioning of [the witness] concerning a conversation with [a non-testifying witness], which directly preceded [the witness's] testimony that he made two arrests in the case was improper inasmuch as it was designed to create the impression in the jurors' minds that [the non-testifying witness] had implicated the defendant . . . ."); *People v. Felder*, 108 A.D.2d 869, 485 N.Y.S.2d 576, 577 (N.Y. App. Div. 1985) (finding error where witness testified that "the complainant made a response following which 'we patted down both subjects, placed them in handcuffs, and removed them from the bar,'" because "[e]ven though [the complainant's] response was not admitted into evidence, the testimony left the jurors with the clear impression that . . . the arrests were made as a result of this response").

We therefore reject the government's argument that Cruz's testimony was proper because it omitted "the actual statements" made by Rubis. *See Maher*, 454 F.3d at 23 ("[W]e are on firm ground in warning prosecutors of the risks they face in backdoor attempts to get statements by non-testifying confidential informants before a jury.").

(Citations to case briefs and footnote omitted.) *Meises*, 645 F.3d at 20-23. The court of appeals then held that the appellants were entitled to a new trial. *Id.* at 23-25.

Here, Mr. Gipson's directly incriminating, out-of-court statements were devastating to the defense. The circumstances under which the statements were made should compel this Court to take action and assure that such abuses do not reoccur. *See id.* at 20-25. The State transparently used the statements to tell the jury that Mr. Gipson had incriminated Mr. Ricks. Yet, the State has attempted to convince this Court that Mr. Gipson's statements were not very incriminating, were tangential, and that they did not really suggest that Mr. Gipson said that Mr. Ricks committed a crime. That is disingenuous. Some of the statements were directly incriminating. The remainder suggested two things—that Mr. Ricks robbed and murdered Mr. Harper, and Mr. Gipson knew about it because they acted together. (*See* Tr. 432-450, 678-679). A reasonable jury could only have understood the officers to have testified that Mr. Gipson identified Mr. Ricks as a participant in the crimes against Mr. Harper. *Meises*, 645 F.3d at 21. The State thus proved its case with Mr. Gipson's out-of-court statements "rather than with the available evidence circumstantially pointing" to Mr. Ricks's culpability. *Id.* Under the guise that the State needed its officers to explain their conduct, Mr. Ricks's right to confront Mr. Gipson was violated.

Finally, the State has submitted that there was "overwhelming" evidence which supported Mr. Ricks's convictions, and that Mr. Ricks is thus not entitled to a new trial. (Aug. 28, 2012, Brief of Appellee, at pp. 15-16). The State is incorrect. The trial court's Confrontation Clause errors were not harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, 842 N.E.2d 996 (2006), ¶ 74 ("Whether a Sixth Amendment error was harmless beyond a

reasonable doubt is not simply an inquiry into the sufficiency of the remaining evidence. Instead, the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.").

This was an identity case in which the State sought to connect Mr. Ricks to Mr. Gipson. Again, the eyewitness identifications by Ms. Harper, Ms. Poole, and Ms. Farris were obtained under profoundly suggestive circumstances and should be given little weight. The State's other eyewitness identification was made by Mr. Gipson, and that identification was admitted in error through Mr. Gipson's out-of-court statements. Further, the appellate court's *majority* admitted that "there [was] not a significant amount of corroborating evidence." *See Ricks* at ¶ 48. And when Mr. Gipson's out-of-court statements are compared to other inculpatory evidence which was brought forth against Mr. Ricks—i.e., Mr. Ricks's recorded telephone calls (in which Mr. Ricks did not admit his involvement in the crimes), the bus ticket which connected Mr. Ricks to Michigan, Mr. Ricks's statements to the police in which he denied his past presence in Ohio, and the cell phone records which showed that *Mr. Gipson* was in Sandusky, Ohio around the time of the crimes (Tr. 850-1033)—it cannot be said that the trial court's errors were harmless beyond a reasonable doubt. *See Chapman*, 386 U.S. at 24.

Further, the dissenting court of appeals judge considered the evidence and provided an excellent explanation of why the other eyewitness-identification evidence was of limited value: "[T]he testimony of these witnesses only established appellant's *presence* in the neighborhood on the day of the crimes, whereas the content of Gipson's statements involved him directly *in* the crimes. . . ." (Emphasis sic.) *Ricks* at ¶ 134 (Yarbrough, J., dissenting). He further stated:

> In assessing the impact of this testimony, and despite the limiting instruction, I cannot say conclusively that the jury focused *only* on the other witnesses' testimony to support conviction. Indeed, there is more than a reasonable

> possibility that the erroneously admitted hearsay—and its misuse—contributed to appellant's murder and robbery convictions.

(Emphasis sic.) *Id.* at ¶ 134-135 (Yarbrough, J., dissenting). Mr. Ricks is entitled to a new trial. *See Chapman*, 386 U.S. at 24.

CONCLUSION

This Court's guidance in *Thomas* has been misused to create an impermissible end-run around an accused's right to confront the witnesses against him. The State did not limit its use of Mr. Gipson's statements to not-for-the-truth purposes, and the trial court violated Mr. Ricks's right to confrontation when it allowed those statements into evidence. This Court should not condone Confrontation Clause violations which occurred under the guise of a police officer's need to explain his actions during an investigation.

The effect of Mr. Gipson's testimonial hearsay statements was substantial. The State used them to link Mr. Ricks to Mr. Gipson, when most of the inculpatory evidence pointed to Mr. Gipson. The trial court's errors were not harmless beyond a reasonable doubt, and no jury instruction could cure those errors. For the reasons discussed in Mr. Ricks's previously filed merit brief and herein, this Court must reverse the judgment of the court of appeals and remand Mr. Ricks's case for a new trial on the charges of aggravated robbery and aggravated murder.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing REPLY BRIEF OF APPELLANT THOMAS J. RICKS was forwarded by regular U.S. Mail on this 17th day of September, 2012, to Mary Ann Barylski, Assistant Erie County Prosecuting Attorney, Erie County Prosecutor's Office, 247 Columbus Avenue, Suite 319, Sandusky, Ohio 44870.

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