_____ Term

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RITA PULTRO
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA
Respondent

On Petition for Writ of *Certiorari* to the
Pennsylvania Superior Court

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE QUESTION

Petitioner Rita Pultro was convicted by a jury in Delaware County, Pennsylvania of First Degree Murder. At trial a nontestifying codefendant's confession was admitted into evidence. The confession was redacted to remove Petitioner's name yet it still referred to another person. The redacted confession directly accused the Petitioner when, considered alongside other evidence, left no other conclusion but that the person referred to in the confession was the Petitioner.

Should a court look beyond the four corners of a nontestifying codefendant's confession to determine if introduction of the confession violates the Confrontation Clause?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Rita Pultro respectfully prays that a Writ of *Certiorari* issue to review the judgment of the Pennsylvania Superior Court, entered December 8, 2017, which affirmed the lower court judgment of sentence. On December 21, 2017, Petitioner filed an Application for Reargument, which was denied by Order entered February 14, 2018. On March 8, 2018, Petitioner filed a Petition for Allowance of Appeal in the Pennsylvania Supreme Court. This Petition was denied on July 24, 2018. The Memorandum Opinion and Order of the Pennsylvania Superior Court, at No. 1593 EDA 2015, 181 A3d 1209, 2017 Pa. Super. UNPUB. Lexis 4488, is attached hereto at Appendix B. The opinion of the Delaware County Court of Common Pleas, at No. CP-23-CR-0000007119-2013, entered May 1, 2015, George A. Pagano, Judge, is attached hereto at Appendix B.

JURISDICTION

The Pennsylvania Superior Court affirmed the judgment of sentence in this matter on December 8, 2017 and denied Petitioner's Application for Reargument on February 14, 2018. The Pennsylvania Supreme Court denied Petitioner's Petition for Allowance of Appeal on July 24, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The 6th Amendment to the United States Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The 14TH to the United States Constitution provides, in pertinent part:

" . . . nor shall any State deprive any person of life, liberty, or property, without due process of law."

PETITIONER'S STATEMENT OF THE CASE

On September 19, 2013, Jason McClay was shot and killed during a robbery attempt at the Rite Aid store, located in Chester, Pennsylvania. Petitioner Rita Pultro was arrested on September 22, 2013 for the homicide; also arrested and charged were David Wiggins, Tariq Mahmud, Christopher Parks and Ashaniere White. Parks and White confessed to their roles in the September 19, 2013 homicide as well as robberies at the same store on three occasions prior to the September 19, 2013 incident during which McClay was killed. David Wiggins confessed to police to his role in the September 19, 2013 incident and in his confession he implicated Petitioner Rita Pultro. Petitioner Pultro was tried jointly with co-defendants David Wiggins and

Tariq Mahmud; Parks and White testified on behalf of the prosecution in exchange for reduced sentences.

Prior to the commencement of trial, on August 28, 2014, Petitioner Pultro timely filed Omnibus Pre-Trial Motions, wherein she moved the trial court to sever her trial from that of David Wiggins. In her Motion, Petitioner contended that " . . . the statement of Wiggins is powerfully incriminating with respect to [Petitioner] Pultro. The statement, even if redacted, would directly and facially incriminate [Petitioner] Pultro, as opposed to a more tenuous implication by reference to other evidence admitted at trial, *Gray vs. Maryland,* 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294(1998) . . .." Omnibus Pre-Trial Motion, paragraph 74. Petitioner further contended that trying her jointly with Wiggins " . . . would deny [Petitioner] due process and a fair trial, as guaranteed by the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution . . ." *Id,* at paragraph 77. The trial court denied Petitioner's severance motion by way of Order entered December 24th, 2014:

> AND NOW, this 24th day of December, 2014 upon consideration of Defendant's Motion to Sever from Wiggins trial, filed August 28, 2914, and hearing thereon, it is hereby Ordered that said Motion is denied.
>
> BY THE COURT
>
> _____
> George A. Pagano, J.

On direct appeal to the Pennsylvania Superior Court, Petitioner Pultro preserved the issue by inclusion in her Statement of Matters Complained of on Appeal under Pennsylvania Rule of Appellate Procedure, Pa.R.A.P. 1925(b), as follows:

> The trial court committed legal error and abuse of discretion and violated the [Petitioner's] rights to due process of law, a fair trial and to confront witnesses against her as guaranteed by the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution . . . in denying [Petitioner's pre-trial motion to sever her trial from that of co-defendant Wiggins; Wiggins made a confession that was introduced at trial that, when combined with other evidence admitted, strongly incriminated [Petitioner]Pultro.

STATEMENT OF MATTERS COMPLAINED OF ON APPEAL PURSUANT TO PA.R.A.P. RULE 1925(B), paragraph 2. Petitioner thereafter briefed the federal constitutional question in the Pennsylvania Superior Court, *Commonwealth vs. Rita Pultro,* 1593 EDA 2015, BRIEF FOR THE APPELLANT, pp. 4, 27-34. The Pennsylvania Superior Court affirmed the judgment of sentence by way of Order and Memorandum Opinion entered December 8, 2017. On December 21, 2017, Petitioner filed with the Pennsylvania Superior Court an Application for Reargument, which was denied February 14, 2018. On March 8, 2018, Petitioner Pultro filed with the Pennsylvania Supreme Court a Petition for Allowance of Appeal, at No. 164 MAL 2018; Petitioner asked that the Court review the question of whether its ruling in *Commonwealth vs. Traverse,* 564 Pa. 362, 768 A2d 845 (2001), allowing for the admission of a non-testifying co-defendant's confession to be

introduced against the defendant by simply replacing any reference to the non-confessing defendant with a neutral pronoun and providing a limiting instruction, adequately protects the non-confessing defendant's rights under the Confrontation Clause. Petitioner Pultro also asked the Court to consider the question of whether her federal Confrontation Clause rights were violated in the within matter by the trial court's denial of her severance motion and the introduction of Wiggins' redacted confession, PETITION FOR ALLOWANCE OF APPEAL, at P. 2. The Pennsylvania Supreme Court denied the Petition for Allowance of Appeal by way of Order entered July 24, 2018.

In his unredacted confession, Wiggins told police that he and "Rita" "hooked up" and that they had a plan to rob the Rite Aid Store. Wiggins told police Rita's last name is "Pultol" or "Petra", and that she worked as a bartender at a bar in Philadelphia called 25 & Up. Wiggins described Rita as Caucasian, 5'7 to 5'8 with blue eyes and long hair. Wiggins told police that Rita came to him a few days prior with a plan to rob the store, detailing that it would be an easy robbery because two females were supposed to be working and a lot of cash was in the store. Wiggins said he spoke with Rita about it at the bar where she worked. Wiggins told police that the night of the shooting he and Rita were driven from Philadelphia to the store in Chester by a white male in a white pick-up truck. He said Rita was wearing a red hooded sweatshirt, blue jeans and a white scarf. At the Rite Aid, Wiggins said that

Rita went into the store first and he followed. He said they met up at the light bulb aisle and that Rita took light bulbs to the front of the store and came back with the manager, the decedent. Wiggins said that it was just the three of them there and he grabbed the manager by the shirt and demanded to be taken to the safe. Wiggins said that when the manager resisted, he heard a "pop" and ran out of the store. Wiggins said he never saw Rita with a gun. When they got back to the pick-up truck, he asked what happened and that Rita replied that "I did what I had to do". The three then drove back to Philadelphia.

At trial, the Commonwealth introduced other evidence that showed Petitioner Pultro's participation in the robbery. The Commonwealth presented the testimony of Christopher Parks, who testified that he drove David Wiggins and Petitioner Pultro from Philadelphia to the Rite Aid Store in Chester. Parks testified that at the store, Wiggins and Petitioner left his vehicle and went into the store. After the shooting, Wiggins and Pultro returned to Parks' vehicle and the three drove back to Philadelphia. Parks stated that when Wiggins and Petitioner Pultro got out of the car Wiggins was in possession of a handgun and had the gun in his possession when they returned to the car. The Commonwealth also introduced video footage extracted from the video surveillance system inside the Rita Aid Store. This footage showed Wiggins and Petitioner Pultro inside the store prior to the shooting but does not show the actual shooting. The Commonwealth also

introduced testimony of Sevan So, Petitioner Pultro's co-worker. So testified that Petitioner left work on September 19, 2013 prior to the shooting and returned several hours later. So stated that a news story of the shooting aired on a local television station and that the story displayed a still photograph of Petitioner Pultro inside the store that had been extracted from the video surveillance footage. The Commonwealth also introduced testimony of an acquaintance of Petitioner Pultro who stated that she admitted to him that she shot the victim. Finally, the Commonwealth introduced text messages received by one Shakeia Miller, from "Rita", saying that she, Rita, had "caught a body".

The Commonwealth introduced a redacted version of Wiggins' confession. It states as follows regarding Petitioner Pultro:

Q Question: "And you start walking in?"

A "Yes, sir."

Q "You go in?"

A "Yes, sir."

Q Where do you go?"

A "I just start walking around the store down and met up in the aisle where the light bulbs was at."

Q And more of a statement, but the question goes, "Okay". And then you ask a question, and you're identified: "So when you guys finally met back at the light bulbs?" Answer?

A "Yes, sir."

Q Question: "Was anything said like let's go get it?"

The questioning continued:

A "No, sir. The manager came. He bent down, and went to show what lights they had. I grabbed him and said take me to the safe. We got into an altercation."

Q Question: "How did you grab him?"

A From the back of his shoulders like the back of his shirt, grip it up his shirt."

Q Question: "Did you act like you had anything in his back like your two fingers?"

A "No, sir. Both of my hands were on him."

Q Question: "Okay. You told him take me to the safe."

A "Yes, sir."

Q "And what happens then? (sic).

A "We start struggling. He gripped me up. I gripped him up. Then I pushed him off me. Went to turn and run, and I was running, I heard a pop."

Q Question: "Was there anyone else when you heard that pop?"

A Yeah, it was just us in the aisle right there."

Q Question: "Okay. You leave first?"

A "Yes, sir."

Q Question: "Okay. And at what point did you ever see that gun?"

A "No, sir. After me and him got into the altercation like I wasn't even really paying attention. As he was tussling, I pushed him off me, I turned out of the aisle to my left and started running."

Q Question by Detective Tyler: "And where did you go once you went out the door, make a right, Left?"

A "I made a right, went back and looked – went into the back of the Rite Aid out the parking lot, jumped into the truck."

Q Question: "Did you get into the truck first, and when you take out, where's everyone seated at?"

A "The other person's seated in the front."

Q Question: Drivers. I mean passenger side."

A "Yes, sir."

Q Question: "You're in the middle?"

A "Yes, sir – no, I'm in the back of the truck. It was a four-door."

While references to Petitioner Pultro by name have been removed, the statement nonetheless makes reference to a companion of Wiggins who's " . . . seated in the front." The redacted statement makes two points clear: that

Wiggins was not alone when he entered the store for the robbery, and that he did not shoot the victim.

The trial court found that Wiggins' confession, in its redacted form, did not amount to a violation of Petitioner's Confrontation Clause rights. The court relied on the ruling of the Pennsylvania Supreme Court in *Commonwealth vs. Taverse,* 564 Pa. 362, 768 A2d 845 (2001), in finding that as Wiggins' confession was redacted to remove any direct reference to Petitioner Pultro, replaced with the term "the other person", together with a limiting instruction on the use by the jury of Wiggins' confession, adequately protected Petitioner Pultro's Confrontation Clause rights, Appendix A p. 2.

On direct appeal to the Pennsylvania Superior Court, Petitioner Pultro contended that Pennsylvania's interpretation of *Bruton vs. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d (1968), *Gray vs. Maryland,* 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998) and *Richardson vs. March,* 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987), as set out in *Traverse, supra,* is incorrect. Petitioner also contended that her Confrontation Clause rights were violated by the introduction of Wiggins' confession, as the jury could glean from other evidence that the confession implicates her as the person who shot and killed the victim. Petitioner Pultro alluded to *Vazquez vs. Wilson,* 550 F3d 270 (3rd Cir. 2008), in which the Third Circuit Court of Appeals held that ". . . the nature of the linkage between the redacted statement and other evidence in the record is vitally important in

determining whether a Defendant's Confrontation Clause rights have been violated." 550 F3d at 278, quoting *United States vs. Hardwick,* 544 F3d 565 at 573, (3rd Cir. 2008). Petitioner Pultro contended that as Wiggins' confession made clear that he did not act alone inside the store and that he did not shoot the victim, combined with other evidence showing that Petitioner Pultro accompanied Wiggins inside the store during the robbery, the jury could easily conclude that Wiggins told police that Petitioner Pultro shot the victim, BRIEF FOR THE APELLANT, 27-34.

The Pennsylvania Superior Court ruled that the Pennsylvania Supreme Court has rejected the Petitioner's "contextual implication" argument and has repeatedly held that replacing any reference to the Petitioner with a neutral pronoun, and providing a cautionary instruction to the jury, would eliminate any Confrontation Clause problem that arises from the admission at a joint trial of the confession of a non-testifying co-defendant:

> Moreover, the Pennsylvania Supreme Court has repeatedly rejected a "contextual implication" theory – that is, the linkage between the redacted statement and other evidence to implicate a specific defendant – "as a blanket rule." *Commonwealth vs. Rainey,* 928 A2d 215, 227 (Pa. 2007). Instead, our Supreme Court instructs that the danger posed by contextual implication "merely requires the trial court, and the reviewing court, to balance the interests, *i.e.,* the potential prejudice to the defendant versus the probative value of the evidence, the possibility of minimizing the prejudice, and the benefits to the criminal justice system of conducting joint trials." *Id.* (citation omitted).

Appendix B, at 14. The Superior Court also observed that it is not bound by *Vazquez vs. Wilson, id,* at 17. As set out above, the Pennsylvania Supreme Court denied Petitioner's Petition for Allocatur.

WHY THE PETITION SHOULD BE GRANTED

Rule 10(b) – The decision of the Pennsylvania Superior Court conflicts with a decisions of several United States Circuit Courts of Appeals

This case satisfies the criteria set out in Supreme Court Rule 10(b), that the Pennsylvania Superior Court has decided an important federal question in a way that conflicts with a decision of a United States Court of Appeals. Wiggins' confession in the within matter is "testimonial" in nature and subject to the protections of the Confrontation Clause, *Crawford vs. Washington,* 541 U.S. 36 (2004); *Melendez-Diaz vs. Massachusetts,* 557 U.S. 305 (2009).

The pertinent federal law at issue is the Sixth Amendment right of a criminal defendant to "be confronted with the witnesses against him." U.S. Const. amend. VI. The contours of this right relative to Petitioner Pultro were established in three decisions of this Court: *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968); *Richardson v. Marsh*, 481 U.S. 200, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987); and *Gray v. Maryland*, 523 U.S. 185, 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998). In *Bruton*, a postal inspector testified at trial that one codefendant, Evans, confessed to committing an

armed robbery and had named his codefendant Bruton as his accomplice. The trial judge "instructed the jury that although Evans' confession was competent evidence against Evans it was inadmissible hearsay against petitioner and therefore had to be disregarded in determining petitioner's guilt or innocence." *Bruton*, 391 U.S. at 125. The *Bruton* Court held that a criminal defendant is deprived of his constitutional right to confrontation when a non-testifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, regardless of whether the judge has given the jury a limiting instruction to consider the confession only with regards to the confessor. 391 U.S. at 126. In short, the Court "recognized a narrow exception" to the presumption that a jury will follow the instructions of the trial court, *Richardson*, 481 U.S. at 207, noting that under these circumstances "the risk that a jury will not or cannot, follow the 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. Next, in *Richardson*, one non-testifying codefendant's confession to an assault and murder that was given to police was admitted at the codefendants' joint trial. The confession was redacted to omit all reference to Clarissa Marsh, one of the other codefendants being tried at that time. *Richardson*, 481 U.S. at 203. Further, the jury was given a limiting instruction to not use the confession in any way against the other codefendants, including Marsh. *Id.* at 205. Marsh objected to the confession's

admission under *Bruton* as a violation of her right to confrontation. The *Richardson* Court held that " . . . the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but *any reference* to his or her existence." *Id.* at 211. When a confession has been completely sanitized in this fashion, the *Richardson* Court explained, "a judge's instruction may well be successful" and "there does not exist the overwhelming probability" that a jury will be unable to disregard the incriminating statement. *Id.* at 208.

Most recently came *Gray*. There, a non-testifying codefendant's confession to beating a person to death was admitted after it was redacted by substituting a blank space or the word "deleted" for the defendants' names. *Gray*, 523 U.S. at 188. When the confession was read in court, the detective who read it into evidence said the words "deleted" or "deletion" whenever either of the codefendants' names appeared. *Id.* One of the codefendants challenged the admission of the confession into evidence, despite the judge giving a limiting instruction. The *Gray* Court took the opportunity to delineate the boundaries of the exception to the constitutional right to confrontation. It wrote that in *Gray*, "unlike *Richardson's* redacted confession, this confession refers directly to the 'existence' of the nonconfessing defendant." *Id.* at 192. It held that, redaction that replaces a defendant's name with an obvious indication of deletion . . . still falls within

Bruton's protective rule. . . . Redactions that simply replace a name with an obvious blank space . . . 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.* This is because "the obvious deletion may well call the jurors' attention specially to the removed name [and] . . . [is] directly accusatory." *Id.* at 193-94.

In *Commonwealth vs. Traverse,* 564 Pa. 362, 768 A2d 845 (2001), the Pennsylvania Supreme Court ruled that redaction of a non-testifying co-defendant's confession at a joint trial, which replaced any direct reference to the defendant with neutral terms such as "the other man", when accompanied by a cautionary charge, was sufficient to protect the Petitioner's Confrontation Clause rights under *Bruton vs. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), and the more recent decision in *Gray vs. Maryland,* 523 U.S. 185, 118 S.Ct.1151, 140 L.Ed.2d. 294 (1998). After analyzing *Gray* and *Richardson vs. March,* 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987), the Court ruled that " . . . in light of the governing principles in this area, as most recently elucidated in *Gray,* the redaction here, combined with the trial court's accurate and repeated cautionary charge, sufficed to protect [defendant]'s Sixth Amendment right to confrontation." 768 A2d at 851.

The approach espoused in *Traverse* conflicts with the interpretation of *Bruton, Richardson* and *Gray* of several of the Circuit Courts of Appeals. In *Vazquez vs. Wilson,* 550 F3d 270 (3rd Cir. 2008), the Third Circuit Court of Appeals addressed the question of whether a co-defendant's statement, redacted to replace all mention of the complaining defendant with a neutral pronoun, coupled with a curative instruction, is sufficient in all cases to protect the complaining defendant's Confrontation Clause rights. Vazquez was tried and convicted of First Degree Murder in a joint trial with one Gilbert Santiago, who was acquitted.

In *Vazquez,* the victim was shot and killed while riding in a taxi in Philadelphia; the shots came from a Buick that had been following the taxi. The taxi driver, learning the passenger had been shot, drove him to a hospital where he died. Police pursued the Buick but the driver sped away.Vazquez, a passenger in the Buick, threw a handgun from the vehicle, then jumped out and fled on foot. Santiago, who drove the Buick, was arrested and confessed to police that he drove the car and that Vazquez fired the handgun at the taxi. Vazquez was tried jointly with Santiago. The Commonwealth introduced Santiago's statement, redacted to remove mention of Vazquez by name, 550 F3d at 272-273.

The *Vazquez* Court analyzed the *Bruton* issue with an eye towards " . . . the record before the trial court when it overruled an objecting defendant's contention that a codefendant's statement should have been excluded even in

redacted form" 550 A3d at 277. The Court observed that it had concluded in *United States vs. Hardwick,* 544 F3d 565 (3rd Cir. 2008) that *Bruton, Richardson vs. Marsh,* 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d (1987), *Gray vs. Maryland,* 523 U.S. 185, 118 S.Ct. 1151, 140 L.Rd.2d 1998), *United States vs. Richards,* 241 F3d 335 (3rd Cir. 2001) and *Priester vs. Vaughn,* 382 F3d 394 (3rd Cir. 2004) underscore " . . . that the nature of the linkage between the redacted statement and the other evidence in the record is vitally important in determining whether a defendant's Confrontation Clause right has been violated." 544 F3d at 573. The Court acknowledged that " . . ordinarily the use of a term like 'the other guy' will satisfy *Bruton.*" 550 F3d at 281-282, but nonetheless found that the ruling of the Pennsylvania Superior Court was an unreasonable application of *Bruton, Richardson* and *Marsh, ". . .* to hold that their use always will be sufficient for that purpose." *Id.* The *Vazquez* Court then reversed the district court's denial of *habeas corpus* relief, finding that the redaction was inadequate to quell the Confrontation Clause concerns:

> The fact that there were only two possible shooters under Santiago's statement should have made clear to the trial court that, whether or not the jury credited the statement in its entirety, it was almost certain to conclude that the individual Santiago described in his redacted statement as "my boy" or "the other guy" as the shooter was Vazquez because Rivera was not on trial and the Commonwealth argued that Vazquez fired the fatal shot. *See Hardwick,* 544 F.3d at 573. Thus, we are constrained to reverse the order of the District Court and grant habeas corpus relief for if this case does not involve "an unreasonable application of clearly established Federal law, as determined by the Supreme Court

> of the United States," it is difficult to conceive of any case that could meet that admittedly exacting standard.

Id, at 281.

In a decision that came after *Richardson* but pre-dated *Gray,* the 11th Circuit Court of Appeals, in *United States vs. Foree,* 43 F3d 1572 (11th Cir. 1995), acknowledged the holding in *Richardson* that a co-defendant's confession that is not incriminating on its face but becomes so only when linked to other evidence introduced at trial, need not be excluded where it is " . . . is "redacted to eliminate not only the defendant's name, but any reference to his or her existence," and the jury is given a proper limiting instruction. The Court concluded that if " . . . the codefendant's statement makes no reference to the defendant's name but still discusses his existence, its admission at a joint trial is not violative of *Bruton* unless 'the jury would logically conclude *from the other evidence in the record that the neutral pronoun or general word indeed represented the defendant.*'" *United States v. Mendoza Cecelia*, 963 F.2d 1467, 1481 (11th Cir.), cert. denied, U.S. , 113 S. Ct. 436, 121 L. Ed. 2d 356 (1992), 43 F3d at 1576 (italics provided).

In *United States vs. Green,* 648 F3d 569, (7th Cir. 2011), the 7th Circuit acknowledged that " . . . a redacted confession of a nontestifying co-defendant may be admitted as long as the redaction does not 'obviously' refer to the defendant." The Court observed, however, that the protection of Confrontation Clause rights in this context is not always as simple as

redaction of the nontestifying defendant's name, replaced with neutral pronouns:

> This determination, focusing on the minutiae of the substituted word or phrase and surrounding context, is not always easy to make. See *Gray*, 523 U.S. at 195-96. A district court's evaluation becomes especially difficult when the defendant's identity *can be established through other evidence offered at trial,* as here. Statements that "despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately" are prohibited under *Bruton. Id.* at 196; see also *United States v. Brooks,* 125 F.3d 484, 501 (7th Cir. 1997) (describing the *Richardson* Court's distinction between "specific testimony" identifying the defendant and an "inferential incrimination"). This case falls close to that subtle line.

648 F3d at 575 (italics provided). In *United States vs. Edwards,* 159 F3d 1117 (8th Cir. 1998), the 8th Circuit ruled that "contextual implication" is indeed relevant in determining whether a co-defendant's confession, redacted in a manner that would satisfy *Traverse,* would eliminate any Confrontation Clause concerns:

> Unlike use of the word "deleted," which directs the jury's attention to an obvious redaction, referring to joint activity by use of the pronouns "we" and "they," or by use of indefinite words such as "someone," does not draw attention to the redaction and thus, in most situations, will not be incriminating *unless linked to a codefendant by other trial evidence.*

159 F3d at 1126 (italics provided). The *Edwards* Court observed that because the government's case made reference to " . . . a large cast of characters . . ." who were connected to the defendants in various ways, use of words such as

"they" and "someone", would not necessarily refer to any one specific co-defendant, weakening any improper inference to be drawn by the jury, *id.*

The Second Circuit would disallow a statement of a nontestifying co-defendant, where the self contained redacted statement, even without reference to other evidence in the record, nonetheless signaled that the statement had been altered, *United States vs. Taylor,* 745 F3d 15 (2nd Cir. 2014). This is so where the "possibility of a neutral-word substitution" is so "conspicuously awkward" that the alteration becomes obvious, 745 F3d at 29-30. In *Taylor,* the redaction suggested that the original, unredacted statement, had identified by name the confessor's confederates:

> The redactions here suggest that Taylor's original statements contained actual names. Throughout, Luana Miller's name is used--without redaction--conjoined with reference to persons who are unnamed: "LUANA MILLER and two other individuals"; "The person waiting with LUANA MILLER and TAYLOR"; and "TAYLOR, LUANA MILLER, and the driver." If Taylor had been trying to avoid naming his confederates, he would not have identified one of them--Miller--in the very phrase in which the names of the other confederates are omitted.5 The jurors would notice that Miller is the one person involved who was cooperating, and would infer that the obvious purpose of the meticulously crafted partial redaction was to corroborate Miller's testimony against the rest of the group, not to shield confederates. Moreover, the wording of the statement suffers from stilted circumlocutions: "The robbery was the idea of the person who waited with Luana Miller and Taylor at the gas station"; "Luana Miller and the other person who had waited with Taylor at the gas station came up with the plan"; "[A]ll four of them went to the house of the mother of one of the other individuals." And reference to "two other individuals" is suspiciously closer to the speech of a prosecutor than that of a perpetrator.

Id. And in *United States vs. Macias,* 387 F3d 509 (6th Cir. 2004), the 6th Circuit found that a redacted statement that referred to the defendant as "subject two who resides on Quest Drive", facially incriminated the defendant as the " . . . description of subject two was sufficiently specific that it could have referred only to Macias." 387 F3d at 519.

This is a question of substantial importance. The Pennsylvania Supreme Court has consistently ignored the extent to which other evidence introduced at trial affects the accusatory nature of a nontestifying codefendant's confession when evaluating whether a redacted confession pierces the Confrontation Clause, *see, Traverse, supra,* 768 A2d at 851; *Commonwealth vs. Rainey,* 928 A2d 215, 227 (Pa. 2007); *Commonwealth vs. Daniels,* 104 A3d 267 (Pa. 2014). In the within matter, the redacted confession did not name Petitioner but nonetheless referred to a second person who accompanied Wiggins into the store and actually committed the homicide. Other evidence left no doubt that the other person referred to in the redacted statement was Petitioner Pultro. Pennsylvania's position sharply contrasts with that of the Third Circuit, as well as the Seventh, Eighth and Eleventh Circuits. These Courts of Appeals take a more measured approach than Pennsylvania's "bright line rule"; while the focus remains on whether the redacted confession is facially incriminating to the Petitioner, the more expansive approach is to continue the analysis beyond replacement of Petitioner's name with a neutral pronoun. As a case in which a redacted statement directly accuses the

Petitioner when compared with other evidence, this case presents the perfect vehicle for this Court to further define the parameters of its prior holdings in *Bruton, Richardson* and *Gray*.

CONCLUSION

WHEREFORE, for all the reasons set forth above, Petitioner Rita Pultro respectfully requests that the Court issue a writ of certiorari to the Superior Court of Pennsylvania.

Respectfully submitted,

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APPENDIX A

Opinion of the Delaware County, Pennsylvania, Court of Common Pleas, at No. CP-23-CR-0007119-2013

IN THE COURT OF COMMON PLEAS OF DELAWARE COUNTY, PENNSYLVANIA

COMONWEALTH OF PENNSYLVANIA, :

: No. CP-23-CR-0007119-2013

v. :

RITA PULTRO, :

Christopher DiRosato, Esq., Attorney for Commonwealth

William Wismer, Esq., Attorney for Defendant

May 18, 2016

Pagano, J.

OPINION

BACKGROUND

On February 11, 2015, following a jury trial, Rita Pultro (Defendant) was convicted of first degree murder; robbery, infliction of serious bodily injury; firearms not to be carried without a license; and conspiracy to robbery. The charges arose from the shooting death of Jason McClay during an attempted robbery of the Rite Aid in Chester, Pennsylvania.

On September 19, 2013, at approximately 9:54 p.m., Chester City police officers were dispatched to the Rite Aid store located at 2722 West 9th Street, Chester City, PA to investigate reports of a shooting. Upon arrival, Chester Police discovered the body of the victim, Jason McClay, lying in one of the aisles. Crozer-Chester Medical center Paramedics arrived and pronounced Jason McClay dead at 10:01 p.m.

Chester City police and detectives from the Delaware County Criminal Investigation Division (CID) processed the crime scene. Rite Aid surveillance video captured the events surrounding the robbery and shooting of Jason McClay. Police recovered a palm print from the entrance/exit doors of the Rite Aid store. The palm print belonged to the co-defendant, David Wiggins.

On September 21, 2013, police took David Wiggins into custody. David Wiggins gave a statement to CID Detective David Tyler and Chester Detective Nelson Collins. In the statement, David Wiggins identified Rita Pultro as a participant in the robbery and murder.

On September 22, 2013, detectives contacted the Defendant's sister, Kelly Pultro. She identified the Defendant from a still photo taken from the Rite Aid surveillance videos. Ms. Pultro provided CID detectives with the Defendant's new cell phone number (267-975-845) and her old cell phone number (267-582-2821). Ms. Pultro assisted the Detectives in locating the Defendant at 1320 Harrison Street, Philadelphia, PA. Police located and seized a Kyocera model S2151 cell phone near the Defendant.

Detective David Tyler arrived at 1320 Harrison Street and took the Defendant to the kitchen. Detective Tyler read the Defendant her Miranda rights from the written Delaware County CID "Procedure Before Questioning" form. After Detective Tyler read the Defendant her rights, the Defendant initialed and signed the form and indicated she would waive her Miranda rights and answer questions. Detective Tyler asked the Defendant whether the Defendant knew why she was being arrested. The Defendant stated: "Yes, the Rite Aid robbery in Chester." Detective Tyler then asked the Defendant what she did with her red jacket and head bandana. The Defendant replied that she tossed them coming back on I-95. Detective Tyler asked where

the gun was. The Defendant stated: "I don't know." When asked again, the Defendant stated that she wanted a lawyer. At that time the interview stopped.

Detective transported the Defendant from Philadelphia to Chester. During the ride the Defendant stated, without solicitation, that: "You guys are good, I was wondering when you guys were coming to get me, matter of fact last night I thought you guys had me last night, when I saw a Philadelphia officer look at me and get out of his car, but he got back in his car and left."

On September 22, 2013, police filed a criminal complaint charging the Defendant with First Degree Murder, Second degree Murder, Third Degree Murder, Robbery, Conspiracy to Robbery and other related offenses.

On September 25, 2013, detective Michael Jay of the Delaware County CID applied for a search warrant for the contents of the Kyocera Model S2151 cell phone. Magisterial District Judge Spencer Seaton approved the warrant.

On September 26, 2013, Detective Jay applied and received approval for two search warrants. The first warrant related to Defendant's old cell phone number 267-582-2821 seeking all subscriber information, billing, records for toll calls, text messages, and cell tower data. The carrier for this phone was Cricket Communications c/o Neustar, Inc. The second warrant sought the same information for the Defendant's new telephone number of 267-975-8452. The carrier for that phone was Sprint.

On October 2, 2014, co-defendants, Tariq Mahmud, Ashaniere White, and Christopher Parks were arrested for their roles in the planning and commission of the robbery and murder. At the Defendant's arraignment on December 3, 2013, the Commonwealth filed a Notice of Proposed Joinder under Pa.R.Crim.P. 582, joining the Defendant's case with that of David

Wiggins (T# 7117-13), Tariq Mahmud (T# 7123-13), Christopher Parks (T#7124-13) and Ashaniere White.

On October 22, 2014, Defendant filed an Omnibus Pre-trial Motion pursuant to Pa.R.Crim.P 578. The Defendant sought the following relief: 1) Motion to Suppress the Statement of the Defendant, 2) Motion to Suppress Evidence – Contents of Defendant's Cellular Telephone – Lack of Probable Cause, 3) Motion to Suppress Evidence – Cellular Telephone Subscriber Information- Sprint – Lack of Probable Cause in search Warrant/Affadavit, 4) Motion for Suppression of Evidence – Telephone Subscriber Information – Cricket Nuestar – Lack of Probable Cause in Search Warrant/Affadavit, 5) Motion for Severance – David Wiggins, CP-23-CR-7117-2013), 6) Motion for Severance – Christopher Parks, Tariq Mahmud and Ashaniere White, and 7) Motion for Change of Venue. After a hearing, all motions were denied.

At trial, the evidence presented against Defendant was overwhelming. The jury viewed security footage capturing the shooting, and death of Jason McClay. The security video also captured the image of the Defendant as she fled the store. Finally, text messages authored by the Defendant established that she shot and killed the Rite Aid employee, while attempting to commit a robbery of the store. The jury found Defendant guilty of first degree murder; robbery, infliction of serious bodily injury; firearms not to be carried without a license; and conspiracy to robbery.

DISCUSSION ON THE DEFENDANT'S APPEAL

Defendant has timely filed a Concise Statement of Matters Complained of on Appeal in accordance with Pa.R.A.P. 1925(b)(4). The Defendant raises the following six issues on appeal: 1) the Defendant's pretrial motion to suppress contents of a cell phone seized from the person of the Defendant at the time of her arrest should have been granted because the search warrant

failed to set out probable cause that incriminating evidence or evidence of the homicide would be found in the cellphone; 2) the Defendant's pre-trial motion to sever her trial from that of co-defendant David Wiggins should have been granted because Wiggins made a confession that, when combined with other evidence admitted, strongly incriminated Defendant Pultro; 3) the Defendant's pre-trial motion to sever her trial from that of co-defendant Tariq Mahmud should have been granted because the evidence introduced against Mahmud would not be admissible against Defendant Pultro at her trial; 4) The trial court committed legal error and abused its discretion in admitting into evidence text messages because they were not properly authenticated as authored by Rita Pultro; 5) the Defendant's pretrial motion for change of venue and change of venire should have been granted because the amount of publicity generated was prejudicial to the Defendant; 6) the trial court committed legal error and abused its discretion in allowing the jurors to view the text messages after the jury commenced deliberations.

1. Motion to Suppress Cell Phone Contents

Defendant contends the trial court committed legal error and abuse of discretion in denying her pretrial motion to suppress, as evidence, contents of the cellular telephone, a Kyocera Model s2151, seized from the person of the Defendant at the time of her arrest. Defendant contends that the search warrant issued for the search of the telephone failed to set out probable cause that incriminating information or evidence of the homicide for which Defendant was arrested would be found within the contents of the telephone. As a result of the search, police extracted incriminating text messages alleged to have been sent by the Defendant to another that were introduced against the Defendant at trial. Defendant contends that the search of the telephone under the authority of the warrant violated rights guaranteed the Defendant by

the Fourth, Fifth, and Sixth Amendments to the United States constitution and Article I Sections 8 and 9 of the Pennsylvania Constitution.

In an appeal following the denial of a motion to suppress evidence, an appellate court examines "the evidence of the Commonwealth and so much evidence for the defense as remains un-contradicted when read in context of the record as a whole." Commonwealth v. Jones, 988 A.2d 649, 654 (Pa. 2010). The appellate court may consider the evidence presented both at the suppression hearing and at trial. Commonwealth v. Charleston, 16 A. 3d 505, 516 (Pa. Super. 2011). The appellate court determines "whether the suppression court's factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct." Id. Its review of the application of the law to the facts is plenary. Id.

"Probable cause to search [exists] where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found." Ornelas v. United States, 517 U.S. 690 (1996); see also Commonwealth v. Thomas, 448 Pa. 42, 292 A.2d 352, 357 (1972) ("Probable cause exists where the facts and circumstances within the affiant's knowledge and of which he has a reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that a search should be conducted.")

The United States Supreme Court established a "totality of the circumstances" test for determining whether a request for a search warrant under the Fourth Amendment is supported by probable cause. Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L.Ed.2d 527 (1983). The Pennsylvania Supreme Court adopted the totality of the circumstances test for purposes of

making and reviewing probable cause determinations under Article I, Section 8 of the Pennsylvania Constitution. Commonwealth v. Gray, 509 Pa. 476, 503 A.2d 921 (1986).

"In dealing with probable cause... as the very name implies, we deal with probabilities. These are not technical; they are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Gates 462, U.S. at 231. Whether probable cause exists must be considered in light of the totality of the circumstances as seen through the eyes of a trained police officer. See Commonwealth v. Thompson, 985 A.2d 928 (Pa. 2009).

A search may be used as an investigatory tool, under appropriate circumstances. See Jones, *supra*, 988 A.2d at 657-58; Commonwealth v. Butler, 448 Pa. 128, 291 A.2d 89, 90 (1972) (search and seizure may be for "purely evidentiary items" where there is a nexus between the items to be seized and the suspected crime.) See also Pa.R.Crim.P. 203.[1]

In this case, CS-1 is the search warrant and affidavit of probable cause for Kyocera phone, model S2151. The search warrant and affidavit of probable cause were submitted by Delaware County CID Detective Michael Jay and Chester Detective Nelson Collins on September 25, 2013. Magisterial District Judge Spencer Seaton approved the warrant the same day. See CS-1, p. 1.

On Sunday, September 22, 2013, three days after the murder, Detectives interviewed a witness who has known the Defendant for more than twenty years. This witness had communicated with the Defendant on Friday, September 20, 2013 and Sunday, September 22,

[1] Pa. R. Crim. P. 201. Purpose of Warrant: "A search warrant may be issued to search for and to seize (1) contraband, the fruits of a crime, or things otherwise criminally possessed; or (2) property that is or has been used as the means of committing a criminal offense; or (3) property that constitutes evidence of the commission of a criminal offense.

2013; one day after the murder and three days after the murder via cellular phone. Defendant authored text messages and provided the number 267-975-8452. The witness identifies the Defendant from a still taken from the Rite Aid surveillance video. She led Detectives to the residence where the Defendant was found. Thus, probable cause existed that the Defendant participated in the robbery/murder, had communicated via cellular phone with a known number following the robbery and murder and permits the reasonable inference that the Defendant is in possession of a cellular phone. See CS-1, p. 3, ¶ 7.

On Sunday, September 22, 2013, when the Defendant was taken into custody she had the Kyocera cell phone, model S2151, in her possession. She was Mirandized and when asked if she knew why she was being arrested, answered, "Yes, it's because of the robbery in Chester." Police learned from other persons that the Defendant had communicated with other persons via cell calls and text messaging from Friday, September 20, 2013 through the date of her arrest. These factors establish probable cause that Rita Pultro participated in the robbery/murder and possessed a cell phone, and also establish a fair probability that the cell phone recovered is the one the Defendant used to communicate on the day of and following her participation in the robbery and murder. See CS-1, p. 4, ¶ 8.

The affidavit indicated that Detective Michael Jay is a homicide detective who has handled numerous investigations where cellular phones have been used by the actors before, during and after the commission of the crime. He was aware, through training and experience, that persons who conspire to commit crime together may use various forms of communication, including cellular telephones to plan the crime or communicate information subsequently in an attempt to conceal crime. See CS-1, p. 3, ¶¶ 9, 10.

As previously noted when evaluating the existence of probable cause to search using the totality of the circumstances, one factor to look at is the officer's experience. See Thompson, *supra*. Detective Jay is an experienced homicide detective. Through his training and prior experience he knows that people have utilized cell phones after the commission of a murder in an attempt to conceal the crime. He discovered evidence that demonstrated: 1) Rita Pultro had been identified by her co-conspirator as his accomplice in the robbery/murder; 2) two witnesses identified the Defendant from a still image from the Rite Aid surveillance video including distinctive clothing; 3) has made a tacit admission to her involvement in the robbery and was found in possession of a cell phone; and 4) the Defendant communicated with others subsequent to the robbery via cellular telephone.

The magisterial district judge, when reviewing Detective Jay's affidavit in a practical, common-sense, non-technical fashion, through the eyes of a trained officer, given all of the circumstances set forth in the affidavit, determined there was a fair probability that evidence of the commission of the robbery and murder of Jason McClay in the forms of the communication the warrant sought, would be found on the Kyocera model S2151.

Thus, the magisterial judge's decision to issue the warrant is supported by substantial evidence. Accordingly, the Defendant's Omnibus Motion seeking suppression of the results of the search of the Kyocera cell phone, model S2151 were properly denied.

2. Motion to Sever Trial From Codefendant Wiggins

Defendant requested that the trial court grant her motion to sever her trial from that of co-defendant Wiggins. Defendant contends that a codefendant's confession, which was introduced at trial, gave rise to an inference that, when combined with other evidence, strongly incriminated

Defendant in violation of her rights to due process, a fair trial, and to confront witnesses against her.

The decision to sever co-defendant's trials lies within the trial court's discretion, and will not be disturbed absent an abuse thereof. Commonwealth v. Birdsong, 611 Pa. 203, 24 A.2d 319, 336 (2011) (citation omitted); Commonwealth v. Travers, 564 Pa. 362, 768 A.2d 845, 846-847 (2001). Joint Trials are favored when judicial economy will be served by avoiding the expensive and time-consuming duplication of evidence and where the Defendants are charged with conspiracy. Id.; Commonwealth v. Jones, 542 Pa. 464, 668 A.2d 491, 501 (1995). See also Richardson v. Marsh, 481 U.S. 200, 209, 107 S. Ct. 1701, 1708 (1987)

> It would impair both the efficiency and the fairness of the criminal justice system to require … that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience, and sometimes trauma of testifying, and randomly favoring the last tried defendants who have the advantage of knowing the prosecution's case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability.

Richardson, 481 U.S. at 201, 107 S. Ct. at 1708-09.

Under the Confrontation Clause of the Sixth Amendment, a criminal defendant has a right to confront witnesses against him. Commonwealth v. Rivera, 565 Pa. 289, 773 A.2d 131, 137 (2001). The United States Supreme Court created a narrow exception to the general rule that cautionary instructions are sufficient to eradicate any potential prejudice in joint trials. See Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L.Ed 476 (1968)). The Pennsylvania Supreme Court recognized this exception, finding that a defendant "is deprived of his rights under the Confrontation Clause when his non-testifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant." Richardson v. Marsh, 481 U.S. 200, 201–202, 107

S. Ct. 1702, 1704 (1987) (summarizing holding of Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed 476 (1968)).

If a non-testifying co-defendant's confession directly and powerfully implicates the defendant in the crime, then an instruction to the jury to consider the evidence only against the co-defendant is insufficient, essentially as a matter of law, to protect the defendant's confrontation rights. Commonwealth v. Brown, [592 Pa. 376,] 925 A.2d 147, 157 (2007) (citing Bruton, 391 U.S. at 135–36, 88 S. Ct. 1620). Thus, "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, 88 S. Ct. 1620.

The "Confrontation Clause is not violated by the admission of a non-testifying co-defendant'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." Richardson, 481 U.S. at 211, 107 S. Ct. 1702. The statement must be redacted in a manner that preserves its narrative integrity without referring to the defendant to comport with the principles of Bruton. Travers, supra at 367-68, 768 A.2d at 848 (citation omitted). The United States Supreme Court stated that the substitution of an obvious blank space, a symbol, or a word that has been included in place of a person's name "[does] not make a significant legal difference" and falls within the scope of Bruton. Gray v. Maryland, 523 U.S. 185, 188-92 (1998) ("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 leave statements that, considered as a class, so closely resemble Bruton's un-redacted statements as to warrant the same legal results.").

The Pennsylvania Supreme Court summarized the status of the Sixth Amendment regarding statements made by co-defendants by noting:

> As a general matter, when read together, Bruton, Richardson, and Gray stand for the notion that a statement of a non-testifying co-defendant, provided that the trial court gives a limiting instruction to the jury admonishing them to consider the statement against solely the declarant, will violate the Confrontation Clause only when the jury can tell from the face of the statement to whom the statement refers, the Confrontation Clause rights of the defendant are not violated.

Commonwealth v. Miller, 819 A.2d 504, 512, (Pa. 2002).

Accordingly, under Pennsylvania law, the defendant's confrontation rights are not violated when the neutral phrase "the guy" and "the other guy" is substituted for the defendant's name. See Commonwealth v. Travers, 564 Pa. 362, 768 A.2d 845, 851 (2001)(finding redacted statements trigger Confrontation Clause concerns under Bruton only if redacted statement on its face ties defendant to the crime but not if incrimination arises from linkage to other evidence in case).

Bearing these standards in mind, in the instant case, the co-defendant's statements were sufficiently redacted to remove all express references to the Defendant. This redaction, coupled with a cautionary instruction[2], comports with the United States and Pennsylvania Supreme Court's rulings and sufficiently brings codefendant David Wiggins' statement outside the prohibitions of Bruton.

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[2] The cautionary instruction stated:

> "There's a rule that restricts use by you of the evidence offered to show that the Defendant, David Wiggins, made a statement concerning the crimes charged. The statement made before trial may be considered as evidence only against the Defendant who made that statement. Thus, you may consider the statement as evidence against the Defendant David Wiggins if you believe he made the statement voluntarily. You must not consider the statement as evidence against any of the other Defendants."

[N.T. pg. 24, 02/11/2015]

The redactions to codefendant Wiggins' statements eliminated the existence of any express incrimination. Furthermore, the proposed reactions vitiated any inferential reference to the Defendant in context with other Commonwealth evidence. For example, in an exchange between Detective Tyler and David Wiggins, Wiggin's repeatedly referenced Pultro using the pronoun "she." Because Defendant Pultro is the sole female Defendant, the jury could infer that codefendant Wiggins referred to Pultro in his statement.

The redacted statement replaced the feminine pronoun "she" with gender neutral phrases such as "this person", "the other person" and "they." Thus, while codefendant Wiggins' original statement[3] gave rise to an impermissible inference when considered with other evidence given at trial, the redacted statement[4] sufficiently protected Defendant's rights. Accordingly, the trial court did not commit legal error or abuse its discretion by denying Defendant Pultro's motion to sever her trial from that of codefendant Wiggins.

3. Motion to Sever Trial From Codefendant Mahmud

The decision whether to grant a defense motion for severance is within the sound discretion of the trial court, and must not be disturbed on appeal absent a manifest abuse of that discretion.

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[3] The original un-redacted statement provided:

> "Well, she came to me with the plan a couple of days before we were supposed to do it she was supposed to be at the Rite Aid out of Chester. She told me a fat girl was supposed to be working and short brown skinned girl was supposed to be working."

Commonwealth Brief, Oct. 23, 2014 at 27 (emphasis in original).

[4] When introduced at trial the redacted statement provided:

> "Well, this person came to me with a plan a couple of days before we were supposed to do it. They was supposed to be at the Rite Aid out of Chester. This person told me a tall, fat girl was supposed to be working and a short, brown skinned girl was supposed to be working."

[N.T. pg. 132-33, 02/09/2015] (emphasis added).

Commonwealth v. Lopez, 739 A.2d 485, 501 (Pa. 1999). The preference for joint trials is reflected in Rule 582 of the Pennsylvania Rules of Criminal Procedure. Rule 582, which states:

> (1) Offenses charged in separate indictments or informations may be tried together if:
>
> (a) the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion; or
>
> (b) the offenses charged are based on the same act or transaction.
>
> (2) Defendants charged in separate indictments or informations may be tried together if they are alleged to have participated in the same acts or transactions or in the same series of acts or transactions constituting an offense or offenses.

Pa.R.Crim.P. 582.

With regard to the severance of offenses or defendants, "[T]he court may order separate trials of offenses or defendants, or provide other appropriate relief, if it appears that any party may be prejudiced by offenses or defendants being tried together." Pa.R.Crim.P. 583.

Joint proceedings are preferred, especially where defendants are charged with conspiracy. Commonwealth v. Jones, 610 A.2d 931, 936 (Pa. 1992); Commonwealth v. Chester, 587 A.2d 1367, 1372-73 (Pa. 1991) ("Joint trials are advisable where conspiracy is charged"). "A joint trial of co-defendants in an alleged conspiracy is preferred not only in this Commonwealth, but throughout the United States." Commonwealth v. Colon, 846 A.2d 747, 753 (Pa. Super. 2004) (citing Commonwealth v. Travers, 768 A.2d 845, 847 (Pa. 2001)). "Separate trials of co-defendants should be granted only where the defenses of each are antagonistic to the point where such individual differences are irreconcilable and a joint trial would result in prejudice." Commonwealth v. Lambert, 603 A.2d 568, 573 (Pa. 1992).

"The mere fact that a co-defendant might have a better chance of acquittal if tried separately is not sufficient to grant a motion to sever." Commonwealth v. Patterson, 546 A.2d 596, 600 (Pa. 1988); see Zafiro v. United States, 506 U.S. 534, 540 (1993) (defendants "not entitled to severance merely because they may have a better chance of acquittal in separate trials");

Commonwealth v. Rivera, 773 A.2d 131, 137 (Pa. 2001) ("The defendant bears the burden of proving that he was prejudiced by the decision not to sever, and he must show real potential for prejudice rather than mere speculation"). "In the absence of manifest prejudice where the movant is unable to demonstrate the existence of antagonistic or irreconcilable defenses, therefore, our law does not approve of separate trials." Lambert, 603 A.2d at 574.

In the instant case the Defendant failed to prove she was prejudiced by the decision not to sever. Additionally, Defendant likewise failed to prove the existence of antagonistic or irreconcilable defenses with respect to the other two codefendants. Accordingly, the trial court did not abuse its discretion by denying Defendant Pultro's motion to sever her trial from that of codefendant Mahmud.

4. Authentication of Text Messages

Appellant argues that the trial court committed legal error and abused its discretion by admitting text messages into evidence because they were not sufficiently authenticated. The text messages at issue, purported to have been sent to Zakiea Miller, contained Defendant's apparent admission to First Degree Murder. Appellant argues that these text messages lack authentication in that there was no direct or circumstantial proof that Defendant Pultro authored the text messages.

Admission of evidence is within the sound discretion of the trial court and will be reversed only upon a showing that the trial court clearly abused its discretion. Commonwealth v. Lilliock, 740 A.2d 237 (Pa. Super.1999). Generally, the requirement of authentication or identification as a condition precedent to the admissibility of evidence is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. See Pa. R.E. 901(a). "[A]uthentication of electronic communications, like documents, requires more than

mere confirmation that the number or address belonged to a particular person. Circumstantial evidence, which tends to corroborate the identity of the sender, is required." Commonwealth v. Koch, 39 A.3d 996, 1005 (Pa.Super.2011) (Koch I).

The Pennsylvania Supreme Court, referencing Rule 901, explained the ways in which text messages could be authenticated by using: (1) first-hand corroborating testimony from either the author or the sender; and/or (2) circumstantial evidence, which includes distinctive characteristics like information specifying the author-sender, reference to or correspondence with relevant events preceding or following the communication in question; or (3) any other facts or aspects of the communication that signify it to be what its proponent claims it to be. Commonwealth v. Koch, 106 A.3d 705, 1002 (2014) (Koch II).

First, Zakiea Miller's testimony provided circumstantial evidence that sufficiently authenticated the text messages as being authored by Rita Pultro when considered with other direct and circumstantial evidence. For example, the sender of the text identified herself as Zakiea's "wife," a term the two previously used to refer to each other. The testimony reads as follows:

> Q. The person representing themselves as Rita says, it's your wife Rita. Again did you and Rita Pultro ever talk to each other or describe each other as wives?
> A. Yes.
> Q. So when you saw that, it's your wife, Rita, who did you believe you were responding to?
> A. Rita.
> Q. Rita who?
> A. Pultro.

[N.T. pg. 208, 02/02/2015](emphasis added).

The sender of the text messages also displayed specific knowledge of the events surrounding the commission of the crime:

Q. You respond, what's good? What did the person representing themselves as Rita say?
A. Honestly, I need a place to lay low or lol low.
Q. What was your response?
A. Why you say that?
Q. Because you see the news about Rite Aid.
A. No, what happened?
Q. The person representing themselves as Rita, what did they say in Photograph 21C?
A. Death.

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A. Caught a body.
Q. And again, what does, I caught a body mean to you?
A. For us, in Delaware, it means that I killed somebody or somebody got shot, basically.
Q. Okay. And then 21D. Please keep your voice up. What did you respond?
A. What? Who was it?
Q. What did the person who indicated themselves to be Rita, say in response?
A. It was a robbery gone wrong, bull-in-bull, shot my brother so –

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Q. You respond, I heard that. And they know that it was you, meaning the boys in blue.
A. Yeah.
Q. What did the person representing themselves as Rita say?
A. No, they got my brother and they talking death penalty and he not going to die for me.
Q. Photograph G. What did you respond?

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A. Excuse me, mom. Yo, that shit is crazy. You by yourself?
Q. What did the person representing themselves as Rita say?
A. No, I'm with my husband right now.

[N.T. pg. 209-15, 02/02/2015].

Second, the summary cell phone analysis report prepared by Detective Edmund Pisani, who was assigned to the Delaware County Criminal Investigation Division's Computer Forensic

Unit, provided further circumstantial evidence showing that the text messages at issue were authored by Rita Pultro.

Detective Pisani testified that his report revealed the contents of the cell phone, e.g. contacts, call logs, text messages, and pictures. The testimony created a strong inference that Rita authored the text messages. The contact list included a contact under the name "Zekia" and the phone's text messages discussed criminal activity resulting in the death of a Rite Aid worker. He testified as follows:

Q. When you went through the contacts did you find a contact by the name of Zekia?
A. Yes.
***
Q. Did you find a conversation between this phone and the contact Zekia?
A. Yes.
***
Q. And the conversation that you observed between the phone and the individual named Zekia, what was – without going through each photograph, what was the contents of the conversations?
A. Of the messages exchanged?
Q. Yes.
A. Talking about the Rite Aid homicide and robbery.
Q. And it starts out I caught a body?
A. Yes.

[N.T. pg. 246-50, 02/06/2015].

Third, Detective Pasini testified that the cell phone contained a picture of Rita Pultro. He testified as follows:

Q. Those pictures you have, one is of Ms. Pultro? Do you still have it in front of you?
A. Yes.

[N.T. pg. 261, 02/06/2015].

The testimony of Zakiea Miller and Detective Pasini satisfied the higher burden required to authenticate an electronic communication. The witness testimony established that the author

of the message: (1) knew that Rita Pultro referred to Zakiea Miller as "wife;" (2) knew specific details about the robbery; and (3) photographed Rita Pultro. The evidence, when viewed together is sufficient to prove Rita Pultro authored the text messages. Because the Commonwealth met its burden, the trial court did not commit legal error or abuse its discretion by admitting the text messages into evidence.

5. Motion For Change of Venue and Venire

"A change of venue becomes necessary when the trial court determines that a fair and impartial jury cannot be selected in the county in which the crime occurred." Com. v. Chmiel, 612 Pa. 333, 404, 30 A.3d 1111, 1152 (2011) (quoting Com. v. Karenbauer, 552 Pa. 420, 715 A.2d 1086, 1092 (1998)). A request for a change of venue based upon the claimed existence of pre-trial publicity prejudicial to the defendant's right to trial before an impartial jury is addressed to the sound discretion of the trial court whose decision will not be disturbed absent an abuse of discretion. Chmiel, 612 Pa. at 403-404, 30 A.3d at 1152. As a general rule, for a defendant to be entitled to a change in venue because of pre-trial publicity, the defendant must show that the publicity caused actual prejudice by preventing the empanelling of an impartial jury. Com. v. Briggs, 608 Pa. 430, 466, 12 A.3d 291, 313 (2011), cert, denied, 132 S. Ct. 267 (U.S. 2011).

There is an exception to the requirement that the Defendant demonstrate actual prejudice, and pre-trial publicity will be presumed to have been prejudicial if the defendant is able to prove that the pre-trial publicity: (1) was sensational, inflammatory, and slanted toward conviction, rather than factual and objective; (2) revealed the defendant's prior criminal record, if any, or referred to confessions, admissions or reenactments of the crime by the defendant; or (3) was derived from official police or prosecutorial reports. Chmiel, *supra*; Com. v. Tharp, 574 Pa. 202, 219, 830 A.2d 519, 529 (2003), cert. denied, 541 U.S. 1045 (2004). Even if the Defendant proves the

existence of one or more of these circumstances, a change of venue still is not warranted "unless the defendant also demonstrates that the presumptively prejudicial pre-trial publicity 'was so extensive, sustained, and pervasive that the community must be deemed to have been saturated with it, and that there was insufficient time between the publicity and the trial for any prejudice to have dissipated.'" Briggs, 608 Pa. at 468, 12 A.3d at 314 (quoting Tharp, supra).

With respect to the determination of whether there was an adequate cooling off period to dissipate the effect of presumptively prejudicial media coverage, the Pennsylvania Supreme Court noted: "[W]hat prospective jurors tell us about their ability to be impartial will be a reliable guide to whether the publicity is still so fresh in their minds that it has removed their ability to be objective." Briggs 608 Pa. at 314, 12 A.3d at 468-69 (quoting Com. v. Robinson. 581 Pa. 154, 195-196, 864 A.2d 460, 484 (2004)), cert. denied, 546 U.S. 983 (2005)).

The Supreme Court has recognized that "the trial court is in the best position to assess the atmosphere of the community and to judge the necessity of any requested change." Briggs, 608 Pa. at 466, 12 A.3d at 313 (quoting Tharp, 574 Pa. at 219, 830 A.2d at 529). "In reviewing the trial court decision not to grant a change of venue, the focus of our inquiry is to determine whether any juror formed a fixed opinion of the defendant's guilt or innocence due to the pre-trial publicity." Id. (citing Com. v. Drumheller, 570 Pa. 117,132, 808 A.2d 893, 902 (2002)).

Defendant's proffered evidence in the form of internet searches and Delaware County Daily Times articles, while at times appeared prejudicial, failed to demonstrate that the pretrial publicity was so extensive, sustained or pervasive the Delaware County community must be deemed to have been saturated with it. With regard to the Delaware County Daily Times articles, the amount of time between the article publication date and the scheduled trial date was sufficient to allow any prejudice resulting from pretrial publicity to dissipate.

Both parties stipulated to admitting the internet search results. The search results demonstrate that the "cooling off" period sufficiently eliminated any presumptively prejudicial pretrial publicity existed. The Defendant offered thirteen articles within a 100 day span, only three of which might be considered presumptively prejudicial.

The *voir dire* examination demonstrated that any prejudicial pretrial publicity did not result in the prospective jurors' prejudice. Each juror stated their ability to be objective and follow the fundamental principles of law in the court's charge. The trial court, therefore, did not commit legal error or abuse its discretion by denying Defendant's motion for change of venue and venire.

6. Text Messages Viewed During Jury Deliberations

The trial court did not abuse its discretion or commit legal error in permitting the jury to review text messages, authored by Rita Pultro and sent to Zekeia Miller, while in the courtroom after beginning jury deliberations. Pennsylvania Rule of Criminal Procedure 646 governs materials permitted to be in the possession of the jury. See Pa.R.Crim.P. 646. Section (a) provides that "Upon retiring, the jury may take with it such exhibits as the trial judge deems proper except as provided in paragraph (C)." Id. Section (C) (2) prohibits the jury from possessing a copy of any written or otherwise recorded confession by the defendant. Id.

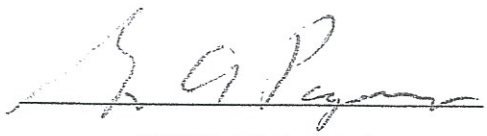
In Commonwealth v. Morton, 774 A.2d 750 (Pa. Super. 2001), the Superior Court of Pennsylvania reviewed whether the trial court abused its discretion by permitting the jury to read defendant's confession in the jury box. Id. The trial court did not permit the jury to take the confession into the deliberation room. Id. The Superior Court held that the trial court did not err; reasoning that the overriding concern of the prohibition against written confessions going out

with the jury is that the physical presence of the confession within the jury room may cause it to be emphasized over other evidence in the form of testimony heard from the witness stand. Id.

Here, the jury viewed the text messages while in the jury box, not the deliberation room. The trial court advised the jury "not to talk among themselves" and simply "look and observe C-21" while in the jury box. [N.T. pg. 116, 02/11/2015]. Defendant did not object with specificity; responding, "I don't have – I can't answer that now judge" when asked for the basis of his objection. [N.T. pg. 105, 02/11/2015]. Moreover, Defendant's counsel stated that he "doesn't know" how allowing the jury to view admitted evidence in the courtroom would be an abuse of the trial court's discretion. Id. The Defendant, therefore, failed to provide a basis on which it could correct any error. Accordingly, the trial court did not commit legal error or abuse its discretion.

CONCLUSION

For the foregoing reasons, the decision of the Trial Court should be Affirmed.



GEORGE A. PAGANO, J.

APPENDIX B

Memorandum Opinion and Order of the Pennsylvania Superior Court, at No. 1593 EDA 2015

J-A02036-17

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA v. RITA ELIZABETH PULTRO Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1593 EDA 2015

Appeal from the Judgment of Sentence May 1, 2015
in the Court of Common Pleas of Delaware County Criminal Division
at No(s): CP-23-CR-0007119-2013

BEFORE: OTT, RANSOM, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED DECEMBER 08, 2017**

Appellant, Rita Elizabeth Pultro, appeals[1] from the judgment of sentence entered in the Delaware County Court of Common Pleas after a jury found her guilty of murder of the first degree,[2] robbery,[3] conspiracy,[4] and carrying a firearm without a license.[5] Appellant claims that the trial court erred in denying her motion to suppress evidence obtained from a search of her cellphone, denying her motions to sever her case from her

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* Former Justice specially assigned to the Superior Court.

[1] The appeals of Appellant's codefendants, Tariq Mahmud and David Wiggins, are listed at J-A02035-17 and J-A02037-17, respectively.

[2] 18 Pa.C.S. § 2502(a).

[3] 18 Pa.C.S. § 3701(a)(1)(i).

[4] 18 Pa.C.S. § 903.

[5] 18 Pa.C.S. § 6106(a).

codefendants, and admitting into evidence incriminating messages from her cellphone without adequate authentication. We affirm.

Appellant's conviction arises from the killing of Jason McClay at a Rite Aid store in the City of Chester, where McClay was a manager. The Commonwealth alleged the following. In August and September 2013, Tariq Mahmud was employed as loss prevention agent at the Rite Aid store. Mahmud, Ashaniere White, and Christopher Parks planned to rob the Rite Aid store. Mahmud told White and Parks about how much money was kept in the store's safe, who was working, and about blind spots in the store's video surveillance system. Mahmud warned them not to try to rob the store when McClay was working, because he was a former marine who would fight back.

On August 19, 2013, White and Parks robbed the Rite Aid store when McClay was not on duty. On August 26 and September 4, 2013, White and Parks again attempted to rob the store, but employees recognized White.

Mahmud, White, and Parks thereafter sought the assistance of new people to rob the store, and brought David Wiggins into their plans. Wiggins wanted another individual, Appellant, to participate as well. The group planned a robbery for September 18, 2013, but postponed it until September 19, 2013.

On September 19, 2013, McClay worked the day shift at the Rite Aid store and stayed for the evening shift due to the unavailability of another manager, Serita Cottman. Mahmud called out from work that day. At

approximately 9:45 p.m., an employee saw a white female, later identified as Appellant, and a black male, later identified as Wiggins, enter the store. Appellant retrieved a light bulb and took it to the counter. When the employee told her the amount due, Appellant complained that it was too expensive, placed the item back on the shelf, and asked to see the manager. McClay went back to the aisle, and he and Appellant began discussing lightbulbs. Wiggins then grabbed McClay and told McClay to take him to the safe. Wiggins and McClay began wrestling until Appellant shot McClay at close range at the base of his neck and killed him. Appellant and Wiggins fled from the store and left the scene in a vehicle driven by Parks.

The investigation into the shooting revealed that Wiggins left a palm print in the Rite Aid store. Investigators obtained a photograph of Wiggins and showed it to two employees, and they both identified Wiggins as one of the robbers. Wiggins was arrested on September 21, 2013, and admitted his role in the robbery. Wiggins identified Appellant as the other person with him in the store. Investigators also learned that Appellant was in contact with her friends and sister and obtained a new cellphone after the killing.

Appellant was arrested on September 22, 2013. Following her arrest, investigators obtained a warrant to search to Appellant's new phone. The search of Appellant's cellphone revealed that Appellant made inculpatory statements to her friend, whom she referred to as her wife, indicating that she "caught a body" and needed a "place to lay low." N.T., 2/2/15, at 208.

Appellant referenced the Rite Aid store in the news and also related that there was "a robbery gone wrong," and that police told "her brother" that he could face the death penalty, but she would not let him die for her. ***Id.*** at 209-10, 211.

Mahmud, Parks, and White were subsequently arrested. Parks and White pleaded guilty to third-degree murder in exchange for their cooperation, and the Commonwealth dropped charges of second-degree murder against them.

Appellant filed an omnibus pretrial motion seeking suppression of the evidence obtained from her phone and severance of her trial from codefendants. The trial court denied the motions on December 24, 2014.

Appellant, Mahmud, and Wiggins proceeded to a joint jury trial for the September 19, 2013 robbery and killing of McClay. Parks and White testified against them. The Commonwealth also introduced numerous text messages between the various parties, as well as Appellant's messages to her friend. The jury found Appellant guilty of first-degree murder, robbery, and conspiracy. The trial court sentenced Appellant to life imprisonment on May 1, 2015.

Appellant timely appealed and complied with the trial court's order to submit a Pa.R.A.P. 1925(b) statement. This appeal followed.

Appellant presents the following questions for review:

> 1. Whether the search of Appellant's cell phone, seized incident to her arrest, was in violation of the Fourth and

> Fourteenth Amendments to the United States Constitution and Article 1 Section 8 of the Pennsylvania Constitution, where the warrant issued for the search of the phone failed to establish probable cause that the phone contained evidence of the crime.
>
> 2. Whether Appellant's rights to a fair trial, due process of law and confrontation of witnesses under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1 Sections 8 and 9 of the Pennsylvania Constitution, were violated by denial of Appellant's motion to sever her trial from co-defendant David Wiggins, where Wiggins' confession to police, redacted to remove references to Appellant by name, nonetheless implicated Appellant by virtue of other evidence introduced at trial.
>
> 3. Whether Appellant's right to due process and a fair trial, guaranteed by the Fourth, Fifth and Sixth Amendments to the United States Constitution and Article I Sections 8 and 9 of the Pennsylvania Constitution, as well as Pa.R.Crim.P. Rules 582 and 583, violated by the joinder of Appellant's trial with co-defendant Tariq Mahmud, where evidence was introduced at the joint trial that Mahmud was involved in three prior robberies of the same store, robberies in which Appellant played no part and evidence of which would not have been admissible at Appellant's trial.
>
> 4. Whether the trial court committed error of law and abuse of discretion, and violated Appellant's right to a fair trial and due process of law, in admitting into evidence, incriminating text messages obtained from Appellant's cell phone, where the Commonwealth failed to properly authenticate the text messages.

Appellant's Brief at 4-5.

Appellant first claims that the trial court erred in denying her motion to suppress evidence obtained from her cellphone pursuant to a search warrant. Relying on ***Commonwealth v. Wright***, 99 A.3d 565 (Pa. Super. 2012), she contends that the affidavit of probable cause failed to

demonstrate that the phone was of evidentiary value or contained information related to the crimes. We disagree.

When reviewing a trial court's denial of a motion to suppress evidence obtained pursuant to warrant,

> [we are] limited to determining whether the suppression court's factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Because the Commonwealth prevailed before the suppression court, we may consider only the evidence of the Commonwealth and so much of the evidence for the defense as remains uncontradicted when read in the context of the record as a whole. Where the suppression court's factual findings are supported by the record, [the appellate court is] bound by [those] findings and may reverse only if the court's legal conclusions are erroneous. Where . . . the appeal of the determination of the suppression court turns on allegations of legal error, the suppression court's legal conclusions are not binding on an appellate court, whose duty it is to determine if the suppression court properly applied the law to the facts. Thus, the conclusions of the courts below are subject to [ ] plenary review.

Commonwealth v. Parker, 161 A.3d 357, 361-62 (Pa. Super. 2015) (citation omitted).

> Article I, Section 8 and the Fourth Amendment each require that search warrants be supported by probable cause. "The linch-pin that has been developed to determine whether it is appropriate to issue a search warrant is the test of probable cause." "Probable cause exists where the facts and circumstances within the affiant's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that a search should be conducted."
>
> [T]he United States Supreme Court established the "totality of the circumstances" test for determining

whether a request for a search warrant under the Fourth Amendment is supported by probable cause. [The Pennsylvania Supreme] Court adopted the totality of the circumstances test for purposes of making and reviewing probable cause determinations under Article I, Section 8. In describing this test, [the Pennsylvania Supreme Court] stated:

> Pursuant to the "totality of the circumstances" test . . . the task of an issuing authority is simply to make a practical, common-sense decision whether, given all of the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. . . . It is the duty of a court reviewing an issuing authority's probable cause determination to ensure that the magistrate had a substantial basis for concluding that probable cause existed. In so doing, the reviewing court must accord deference to the issuing authority's probable cause determination, and must view the information offered to establish probable cause in a common-sense, non-technical manner.
>
> * * *
>
> [Further,] a reviewing court [is] not to conduct a *de novo* review of the issuing authority's probable cause determination, but [is] simply to determine whether or not there is substantial evidence in the record supporting the decision to issue the warrant.

As our United States Supreme Court stated: "A grudging or negative attitude by reviewing courts towards warrants . . . is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant; courts should not invalidate warrants by interpreting affidavits in a hypertechnical, rather than a commonsense, manner."

Commonwealth v. Jones, 988 A.2d 649, 655-56 (Pa. 2010) (citations and footnote omitted). A search warrant generally is required to search the contents of a cellphone. ***See Riley v. California***, 134 S. Ct. 2473 (2014).

In ***Wright***, the police executed a warrant to arrest the defendant for a double homicide and a detective seized a cellphone on the nightstand next to where the defendant was found sleeping. ***Wright***, 99 A.3d at 567-68. The trial court granted the defendant's motion to suppress concluding that the phone was not seized incident to arrest. ***Id.*** at 568. The Commonwealth appealed.

The ***Wright*** Court affirmed, holding that the seizure of the cellphone was improper under the plain view doctrine because the Commonwealth established that the incriminating nature of the cellphone was not immediately apparent. ***Id.*** at 569-70. The Court observed that an item may be immediately incriminating when officers "articulate specific evidence tying the seized object to the crime under investigation." ***Id.*** at 570 (discussing ***Commonwealth v. Ellis***, 662 A.2d 1043 (Pa. 1995), ***Commonwealth v. Jones***, 988 A.2d 652 (Pa. 2010), and ***Commonwealth v. McEnany***, 667 A.2d 1148 (Pa. Super. 1995)). In the case before it, however, the detective seized the defendant's phone merely because "cell phones often have crucial pieces of evidence for our case," the defendant had a prior relationship with one of the victims, and the detective suspected that "he would find communication between the two shortly prior to the

murder." ***Id.*** The Court concluded that the detective's testimony fell short of evidence linking the phone to a crime and it was "pure conjecture" to believe that the phone or its contents were incriminating. ***Id.*** We emphasized that there was no evidence that the defendant had called the victim, as in ***McEnany***, and no physical evidence, such as blood, on the phone itself, as in ***Jones***. ***Id.***

Instantly, the affidavit of probable cause recited facts related to the initial investigation into the killing of McClay, including the identification of Wiggins, Wiggins' arrest, and Wiggins' identification of Appellant as his accomplice. Of relevance to this appeal, the affidavit contained information that two individuals identified Appellant from surveillance photographs taken at the Rite Aid, that one of those witnesses, who knew Appellant for more than twenty years, communicated with Appellant by phone and text message within three days after the murder. The affidavit further stated:

> It was also learned during this investigation that [Appellant] communicated with persons other than witness #6 via cellular telephone calls and text messaging on or about Friday September 20, 2013 trough [sic] Sunday September 22, 2013.
>
> Your Affiant Detective Michael Jay, Delaware County Criminal Investigation Division Homicide Unit was assigned to assist with this investigation. Your Affiant has conducted and participated in numerous Homicide investigations, where cellular telephones were used by the actors and or victims before, during and after the crime.
>
> Your Affiant knows through training and experience that persons who conspire to commit crime together may use various forms of communication, including, but not limited

> to cellular telephones, to plan the crime or communicate information subsequently in an attempt to conceal the crime. Your Affiant also knows that demonstrating communication between two persons involved in a crime may assist in providing evidence of the conspiracy.

Aff. of Probable Cause, 9/25/13, at 4. Lastly, when taken into custody, Appellant had the cellphone in her possession and admitted that she was aware she was under investigation for "the robbery in Chester." ***Id.***

Thus, the affidavit of probable cause presented evidence far stronger than in ***Wright***, and the trial court correctly ruled that there was probable cause to search Appellant's phone. ***See*** Trial Ct. Op., 5/18/16, at 7-9. The affidavit established a fair probability that Appellant was a participant in the robbery and shooting and had conspired to do so. In addition, Appellant used the phone to communicate several days after the shooting and admitted she was a suspect for the robbery in Chester. Accordingly, there was probable cause to believe that evidence related to a conspiracy, a robbery, and the resulting the homicide could be found in Appellant's phone. ***See Jones***, 988 A.2d at 655–56. Accordingly, no relief is due.

Appellant's second and third claims focus on the trial court's denial of her motions to sever her case from her codefendants. Our review is governed by the following precepts:

> Whether cases against different defendants should be consolidated for trial "is within the sole discretion of the trial court and such discretion will be reversed only for a manifest abuse of discretion or prejudice and clear injustice to the defendant." Procedurally, Rule 582 of the Pennsylvania Rules of Criminal Procedure governs the

joinder of separate criminal informations. Rule 582 dictates, in pertinent part, as follows:

> (1) Offenses charged in separate indictments or informations may be tried together if:
>
> (a) the evidence of each of the offenses would be admissible in a separate trial for the other and is capable of separation by the jury so that there is no danger of confusion; or
>
> (b) the offenses charged are based on the same act or transaction.

Pa.R.Crim.P. 582(A). The severance of offenses is governed by Pa.R.Crim.P. 583, which states that the trial court "may order separate trials of offenses or defendants, or provide other appropriate relief, if it appears that any party may be prejudiced by offenses or defendants being tried together." Pa.R.Crim.P. 583.

Based upon these rules, our Supreme Court has formulated the following test for deciding the merits of a motion to sever:

> Where the defendant moves to sever offenses not based on the same act or transaction that have been consolidated in a single indictment or information, or opposes joinder of separate indictments or informations, the court must [ ] determine: [1] whether the evidence of each of the offenses would be admissible in a separate trial for the other; [6] [2] whether such evidence is capable of separation by the jury so as to avoid danger of confusion; and, if the answers to these inquiries are in the affirmative,

---

[6] The parties contest whether the admissibility of evidence prong is proper when analyzing the joinder of cases involving separate defendants whose offenses arise from a single incident. ***See*** Appellant's Brief at 36-37; Commonwealth's Brief at 44-45 (discussing ***Commonwealth v. O'Neil***, 108 A.3d 900 (Pa. Super. 2015)).

> [3] whether the defendant will be unduly prejudiced by the consolidation of offenses.

Commonwealth v. Melvin, 103 A.3d 1, 28-29 (Pa. Super. 2014) (some citations omitted).

> "[J]oint trials are preferred where conspiracy is charged. [Nevertheless, s]everance may be proper where a party can establish the co-defendants' defenses are so antagonistic that a joint trial would result in prejudice. . . . However, the party seeking severance must present more than a mere assertion of antagonism[.]"

Commonwealth v. Housman, 986 A.2d 822, 934 (Pa. 2009).

In her second issue, Appellant asserts that she was entitled to a separate trial from Wiggins because she suffered a ***Bruton***[7] violation based on the admission of Wiggins' confession. She asserts that the trial evidence made clear that she was the individual referred to in Wiggins' statement detailing the September 21, 2013 robbery, despite the redactions to the statement. Appellant acknowledges that the Pennsylvania Supreme Court has held that certain redactions of a non-testifying codefendant's confession do not violate ***Bruton***. Nevertheless, she argues that the United States Third Circuit Court of Appeals decision in ***Vazquez v. Wilson***, 550 F.3d 270 (3d Cir. 2008), stands as "an example why Pennsylvania's approach to ***Bruton*** and its progeny, as set out in [***Commonwealth v. Travers***, 768 A.2d 845 (Pa. 2001)], is incorrect." Appellant's Brief at 33. No relief is due.

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[7] ***Bruton v. United States***, 391 U.S. 123 (1968).

In ***Travers***, the Pennsylvania Supreme Court set forth guidance regarding ***Bruton*** claims.

> In ***Bruton***, the trial court admitted into evidence at a joint trial the confession of Bruton's non-testifying co-defendant, which named and incriminated Bruton in the armed robbery on trial. The court instructed the jury that the confession "if used, can only be used against [Bruton's co-defendant]," and could not be considered in the case against Bruton. The Supreme Court reversed, holding that the admission of the facially incriminating statement by the non-testifying co-defendant violated Bruton's right of cross-examination guaranteed by the confrontation clause of the Sixth Amendment, notwithstanding the jury charge. The Court reasoned that:
>
> > 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 . . . Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect. . . . The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination.
>
> In response to ***Bruton***, courts approved the practice of redacting confessions of non-testifying co-defendants to remove references that expressly implicated the defendant.

Travers, 768 A.2d at 847 (citations omitted). After tracing United States Supreme Court decisions following ***Bruton***, the ***Travers*** Court held that

redaction of a non-testifying codefendant's with neutral pronouns, coupled with cautionary instructions, would not violate ***Bruton***. ***Id.*** at 851.

Moreover, the Pennsylvania Supreme Court has repeatedly rejected a "contextual implication theory"—that is, the linkage between the redacted statement and other evidence to implicate a specific defendant—"as a blanket rule." ***Commonwealth v. Rainey***, 928 A.2d 215, 227 (Pa. 2007). Instead, our Supreme Court instructs that the danger posed by contextual implication "merely requires the trial court, and the reviewing court, to balance the interests, *i.e.*, the potential prejudice to the defendant versus the probative value of the evidence, the possibility of minimizing the prejudice, and the benefits to the criminal justice system of conducting joint trials." ***Id.*** at 228 (citation omitted).

Here, the statement by Wiggins implicating Appellant was redacted and presented to the jury in the following exchange between the Commonwealth and Detective David Tyler:

> [Commonwealth:] And question at page 2: "And we're going to ask you a few questions. Tell us about what happened that night." What was Mr. Wiggins' response?
>
> A "Me and this other person, we hooked up. They said we're supposed to rob the Rite Aid that night."
>
> Q Question: "And how long have you known the other person?"
>
> A Answer: "For a couple weeks now, three to be exact."

Q Question: "Okay. All right. Tell us what about how -- what was planned or what happened?"

A Answer: "Well, this person came to me with a plan a couple days before we were supposed to do it. They was supposed to be at the Rite Aid out of Chester. This person told me a tall, fat girl was supposed to be working and a short, brown-skinned girl was supposed to be working."

Q Question: "At the Rite Aid that night?"

***

Q . . . "So the other person parks the car up on just say on 10th Street underneath some trees. That's where you guys got out?" Answer?

A "Yes, sir."

Q Question: "And you start walking in?"

A "Yes, sir."

Q Question: "You go in?"

A "Yes, sir."

Q "Where do you go?"

A "I just start walking around the store down and met up in the aisle where the light bulbs was at."

Q And this is Detective Collins: "Was anyone else in the store? Could you tell if anyone else was in the store that wasn't an employee?"

A "I mean, I think it was like two customers in the store. If people -- it was a man and a woman in the pharmacy."

Q And more of a statement, but the question goes, "Okay." And then you ask a question, and you're identified: "So when you guys finally meet back at the light bulbs?" Answer?

A "Yes, sir."

> Q Question: "Was anything said like let's go get it?"
>
> A "No, sir. The manager came. He bent down, and went to show what lights they had. I grabbed him and said take me to the safe. We got into an altercation."
>
> Q Question: "How did you grab him?"
>
> A "From the back of his shoulders like the back of his shirt, grip it up his shirt."
>
> Q Question: "Did you act like you had anything in his back like your two fingers?"
>
> A "No, sir. Both of my hands were on him."
>
> Q Question: "Okay. You told him take me to the safe."
>
> A "Yes, sir."
>
> Q "And what happens then?"
>
> A "We start struggling. He gripped me up. I gripped him up. Then I pushed him off me. Went to turn and run, and I was running, I heard a pop."

N.T., 2/9/17, at 132-33, 141-42.

The trial court also issued a cautionary instruction during its charge to the jury:

> There's a rule that restricts use by you of the evidence offered to show that the Defendant, David Wiggins, made a statement concerning the crimes charged. The statement made before trial may be considered as evidence only against the Defendant who made that statement. Thus, you may consider the statement as evidence against the Defendant David Wiggins if you believe he made the statement voluntarily. You must not consider the statement as evidence against any of the other Defendants.

N.T., 2/11/15, at 24.

We conclude that the redactions to Wiggins' statement were neutral, did not expressly implicate Appellant, did not otherwise reveal Appellant's identity, and did not suggest that Appellant's name had been removed. Thus, the redaction comports with Pennsylvania law, and in conjunction with the trial court's cautionary instruction, we have no basis to grant Appellant relief. ***Travers***, 768 A.2d at 847. To the extent that Appellant relies on the federal court's decision ***Vazquez*** in support of a contextual implication theory, that case does not control. ***See Commonwealth v. Daniels***, 104 A.3d 267, 294 (Pa. 2014) (rejecting parties' reliance on ***Vazquez*** as non-binding decision from another jurisdiction). Therefore, we discern no basis to disturb the trial court's refusal to sever the trials of Appellant and Wiggins.

In Appellant's third claim, she claims that she was entitled to a separate trial from Mahmud. She contends, in a single sentence, that the evidence of the prior robbery and attempts to rob the Rite Aid store were inadmissible against her because she was not involved in those incidents. She further suggests that she suffered prejudice because the jury heard extensive testimony regarding those incidents and was cast together with the unsavory characters, including White and Parks, involved in those incidents. No relief is due.

There is no dispute the prior incidents were properly admitted against Mahmud to show knowledge, preparation, planning, and motive related to the conspiracy initiated by him, White, and Parks. While it is apparent that Appellant was not known to Mahmud, White, or Parks at the time of the first three incidents at the Rite Aid store, the prior incidents provided information necessary to the development of this case and Appellant's ultimate role in the robbery at issue at trial. Specifically, although the first robbery was successful, the second two attempts were thwarted because employees recognized White. By the second attempt, the Rite Aid store had posted a wanted poster of White. Mahmud, White, and Parks then elected to bring in an additional person, Wiggins, for the next planned robbery. Wiggins insisted that Appellant participate. Thus, the admission of the robberies was arguably proper against Appellant to establish the history of the case and how she became involved in the robbery of the Rite Aid store. ***See Commonwealth v. Serrano***, 61 A.3d 279, 286 (Pa. Super. 2013) (concluding codefendant's sales of controlled substance in separate county, which led to investigation revealing other defendant's participation in narcotics trafficking, was admissible against other defendant to show history of the other defendant's case).

Even assuming the evidence regarding Mahmud's prior bad acts was not admissible, however, no relief is due. The admissibility or inadmissibility of the evidence in a separate trial is not determinative. ***See Housman***, 986

A.2d at 834-35 (noting codefendant's admission of evidence against the defendant would not have been admissible in a separate trial, but fining no relief was due because prejudice was *de minimis* and did not overcome the factors in favor of the joint trial). The incidents were easily separable in time, by the participants of those crimes, and Appellant's clear lack of participation in the planning or execution of those crimes. Moreover, the evidence presented was not so inflammatory as to render the jury incapable of deciding fairly the charges against Appellant. Additionally, the trial court issued a cautionary instruction with respect to Mahmud's prior bad acts and that they should not be considered when evaluating the charges against any other defendant. Therefore, Appellant's assertion that the trial court erred in denying severance from Mahmud's trial lacks merit.

Appellant's final claim is that the trial court erred when admitting evidence of her text messages without sufficient indicia of authenticity. She argues that no witness testified she authored the inculpatory messages to her friend, and that there was insufficient circumstantial evidence in the content of the messages to establish that she sent them. She notes that the killing of McClay garnered news coverage and the incident at the Rite Aid store was a matter of public knowledge. We disagree.

It is well settled that the

> [a]dmission of evidence is within the sound discretion of the trial court and will be reversed only upon a showing that the trial court clearly abused its discretion. Admissibility depends on relevance and probative value.

> Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact.
>
> ***
>
> Pennsylvania Rule of Evidence 901 provides that authentication is required prior to admission of evidence. The proponent of the evidence must introduce sufficient evidence that the matter is what it purports to be. Pa.R.E. 901(a). Testimony of a witness with personal knowledge that a matter is what it is claimed to be can be sufficient. Pa.R.E. 901(b)(1). Furthermore, electronic writings typically show their source, so they can be authenticated by contents in the same way that a communication by postal mail can be authenticated. Circumstantial evidence may suffice where the circumstances support a finding that the writing is genuine.
>
> ***
>
> [A]uthentication of electronic communications, like documents, requires more than mere confirmation that the number or address belonged to a particular person. Circumstantial evidence, which tends to corroborate the identity of the sender, is required.

Commonwealth v. Koch, 39 A.3d 996, 1002-03, 1005 (Pa. Super. 2011) (citations omitted), *aff'd by evenly divided Court*, 106 A.3d 705 (Pa. 2014).

Instantly, the string of text messages to and from Appellant's friend began with the sender stating, "It's me your wife Rita." The sender then indicated that she had to "lay low" and asked her friend whether she had seen the news about the Rite Aid store. N.T., 2/2/15, at 208-10. The sender then stated she "caught a body." ***Id.*** at 208. At trial, the friend testified that she knew Appellant, and they called each other "wife." These

messages contained information consistent with a person being involved in the crime at Rite Aid. Thus, there was ample circumstantial evidence supporting the trial court's determination that the Commonwealth met its threshold burden of establishing that the text messages were what the Commonwealth purported them to be, namely, messages from Appellant. ***See Koch***, 39 A.3d at 1005. Therefore, Appellant's challenge to the authenticity of the inculpatory message fails.

Judgment of sentence affirmed.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/8/2017

APPENDIX C

Order of the Pennsylvania Supreme Court, at No. 164 MAL 2018 denying Petitioner's Petition for Allowance of Appeal, entered July 24, 2018

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Respondent v. RITA ELIZABETH PULTRO, Petitioner	:	No. 164 MAL 2018 Petition for Allowance of Appeal from the Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 24th day of July, 2018, the Petition for Allowance of Appeal is DENIED.