

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

---

RESPONDENT'S BRIEF IN OPPOSITION

William R. Toal, III  
Assistant District Attorney  
(counsel of record for respondent)  
(Member of the Bar of the United States  
Supreme Court)

A. Sheldon Kovach  
Senior Deputy District Attorney  
Chief, Law and Appeals Unit

Katayoun M. Copeland  
District Attorney

Delaware County Court House  
201 West Front Street  
Media, PA 19063  
(610) 891-4210

## QUESTIONS PRESENTED

Petitioner, Rita Pultro, was convicted of First Degree Murder in the Delaware County Court of Common Pleas. During her joint trial with two other co-defendants a non-testifying co-defendant's statement, in which all references to petitioner were replaced with neutral phrases and pronouns, was admitted into evidence. There were no awkward or obvious redactions in the co-defendant's statement. The jury was instructed not to consider the co-defendant's statement as evidence against petitioner. The state courts held that the admission of the redacted statement did not violate the Confrontation Clause. A jury would have heard the overwhelming evidence of petitioner's guilt even if petitioner's case was severed from her co-defendant's trial.

Should a court look beyond the face of the statement to determine if the redaction employed provided sufficient protections to petitioner under the Confrontation Clause?

Did the state courts properly apply this Court's requirements regarding redactions sufficiently to protect petitioner's Confrontation Clause rights and permit a joint trial?

In this case, would the application of the contextual implication approach to Confrontation Clause issues of joinder/severance make any difference in the outcome where there was overwhelming evidence of petitioner's guilt?

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
TABLE OF AUTHORITIES.....	iii
ORDERS AND OPINIONS BELOW.....	1
STATEMENT OF JURISDICTION.....	2
CONSTITUTIONAL PROVISIONS INVOLVED.....	2
COUNTER STATEMENT OF THE CASE.....	3
REASONS FOR DENYING THE WRIT.....	8
BECAUSE THE STATE COURTS PROPERLY APPLIED THIS COURT'S REQUIREMENTS REGARDING WHEN AND HOW A REDACTION OF A CO-DEFENDANT'S STATEMENT IS APPROPRIATE TO PROTECT A DEFENDANT'S CONFRONTATION CLAUSE RIGHTS IN A JOINT TRIAL AND BECAUSE THE VERDICT WOULD BE THE SAME IN THIS CASE REGARDLESS OF WHICH ANALYTICAL APPROACH TO <u>BRUTON</u> ISSUES IS USED, THIS COURT SHOULD NOT GRANT <u>CERTIORARI</u> REVIEW IN THIS CASE.....	8
A. <u>Bruton</u> and the redaction of statements to overcome issues related to the Confrontation Clause.....	9
B. <u>The Circuit Split</u> .....	12
C. This Court's review is unwarranted because the redaction in this case was in accordance with <u>Bruton</u> , <u>Richardson</u> and <u>Gray</u> in using neutral terms and non-obvious or awkward redactions to prevent a juror from determining from the statement itself to whom the co-defendant was referring.....	16
D. Review should be denied because the evidence against petitioner was so overwhelming that, no matter which analytical approach is applied, the outcome for petitioner would be the same.....	17
CONCLUSION.....	20

## TABLE OF AUTHORITIES

### **Federal Cases**

<u>Bruton v. United States</u> , 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).....	6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 18
<u>Clark v. Maggio</u> , 737 F.2d 471 (5th Cir. 1984), <u>cert. denied</u> , 470 U.S. 1055, 105 S.Ct. 1761 (1985)....	11
<u>Eley v. Erickson</u> , 712 F.3d 837 (3rd Cir. 2013).....	15
<u>Gray v. Maryland</u> , 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998).....	6, 8, 9, 10, 11, 12, 13, 15, 16
<u>Pabon v. Mahanoy</u> , 654 F.3d 385 (3rd Cir. 2011).....	16
<u>Richardson v. March</u> , 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987).....	6, 8, 9, 10, 11, 12, 13, 15, 16
<u>United States v. Akinkoye</u> , 185 F.3d 192 (4th Cir. 1999).....	13
<u>United States v. Edwards</u> , 159 F.3d 1117 (8th Cir. 1998).....	13
<u>United States v. Garcia</u> , 836 F.2d 385 (8th Cir. 1987).....	11
<u>United States v. Green</u> , 648 F.3d 569 (7th Cir. 2011).....	14

<u>United States v. Halteh</u> , 224 Fed.Appx. 210 (4th Cir. 2007) .....	13
<u>United States v. Jass</u> , 569 F.3d 47 (2nd Cir. 2009) .....	14
<u>United States v. Lane</u> , 474 U.S. 438, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986) .....	17
<u>United States v. Lighty</u> , 616 F.3d 321 (4th Cir. 2010).....	13
<u>United States v. Logan</u> , 210 F.3d 820 (8th Cir. 2000).....	14
<u>United States v. Taylor</u> , 186 F.3d 1332 (11th Cir. 1999).....	15
<u>United States v. Valde</u> , 146 F.3d 547 (8th Cir. 1998), <u>cert. denied</u> 525 U.S. 938, 119 S.Ct. 355 (1998) .....	15
<u>United States v. Vasilakos</u> , 508 F.3d 401 (6th Cir. 2007).....	14
<u>United States v. Verduzco-Martinez</u> , 186 F.3d 1208 (10th Cir. 1999).....	14
<u>United States v. Yousef</u> , 327 F.3d 56 (2nd Cir. 2003) .....	15
<u>Vazquez v. Wilson</u> , 550 F.3d 270 (3rd Cir. 2008).....	6
<u>Zafiro v. United States</u> , 506 U.S. 534, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993) .....	11

## **State Cases**

Commonwealth v. Travers,  
564 Pa. 362, 768 A.2d 845 (2001) ..... 6, 13

State v. Weaver,  
219 N.J. 131, 97 A.3d 663 (2014) ..... 16

## **Federal Statutes**

28 U.S.C. §1257(a) ..... 2

OPINIONS AND ORDERS BELOW

The May 8, 2016 opinion of the Delaware County Court of Common Pleas [Delaware County Dkt. No. CP-23-CR-7119-2013] is reproduced in petitioner's certiorari petition as petitioner's Appendix A. The December 8, 2017 memorandum opinion of the Pennsylvania Superior Court [Pennsylvania Superior Court Dkt. No. 1593 EDA 2013] is reproduced in petitioner's certiorari petition as petitioner's Appendix B. The July 24, 2018 per curiam order of the Pennsylvania Supreme Court [Pennsylvania Supreme Court Dkt. No. 164 MAL 2018] is reproduced in petitioner's certiorari petition as petitioner's Appendix C. Petitioner did not include the pre-trial order denying petitioner's motion seeking to sever her trial from that of co-defendant Wiggins.

STATEMENT OF JURISDICTION

This Court has jurisdiction to consider the petition pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution which provides, in relevant part:

In all criminal prosecution, the accused shall enjoy the right...to be confronted with the witnesses against him...

## COUNTER-STATEMENT OF THE CASE

Jason McClay was a store manager at a Rite Aid store located in the City of Chester, Delaware County, Pennsylvania. On September 19, 2013, during a robbery at the Rite Aid store, he was shot and killed by petitioner, Rita Pultro.

Prior to the murder of Jason McClay, a series of robberies at the Chester Rite Aid store were planned and carried out using inside information provided by Tariq Mahmud, a loss prevention agent at the Chester Rite Aid store. Mr. Mahmud and his friends, Ashaniere White and Christopher Parks, conspired to rob the Chester Rite Aid store. Mr. Mahmud told Ms. White and Mr. Parks how much money was in the store's safe, who was working, and where the blind spots in the store's security video surveillance system were located. Mr. Mahmud also specifically warned them not to try to rob the store when Mr. McClay was working because Mr. McClay was a former Marine who would fight back.

On August 19, 2013, Ms. White and Mr. Parks robbed the Rite Aid store while Mr. Mahmud was on duty and Mr. McClay was not on duty. On August 26, 2013, and on September 4, 2013, Ms. White and Mr. Parks attempted to rob the Rite Aid store again but other Rite Aid store employees recognized Ms. White so they had to abort their plans.

Mr. Mahmud, Ms. White and Mr. Parks then recruited David Wiggins to assist them in their plans to rob the Rite Aid store. Mr. Wiggins insisted that petitioner also be added to their team and the others agreed to his suggestion.

On September 19, 2013, Mr. McClay was supposed to go home after his day-shift ended but he stayed on to work another shift when another store manager called out that day. Mr. Mahmud also called out from work that day.

Mr. Wiggins and petitioner entered the Rite Aid store at approximately 9:45 p.m. and they, in accordance with the plan made with Mr. Mahmud, went to the light bulb shelves to pick up a package of light bulbs. They then complained to a cashier that the price was too high and asked to see a manager. Mr. McClay attended to the "customers" who had returned to the light bulb section which, Mr. Mahmud told them, was out of the range of the security camera. There, Mr. Wiggins grabbed Mr. McClay and told him to take them to the store safe. Mr. McClay wrestled with Mr. Wiggins. Petitioner shot Mr. McClay in the base of his neck, killing him. Mr. Wiggins and petitioner left the store and re-joined their colleagues in the parking lot. They all then drove back to Philadelphia together.

Investigation into the shooting revealed that Mr. Wiggins left fingerprints and a palm print in the store at the crime scene. Store employees identified Mr. Wiggins and he was arrested on September 21, 2013. During questioning by the police, Mr. Wiggins admitted his role in the robbery and he identified petitioner as the other person with him.

Petitioner was arrested on September 22, 2013. Police recovered a cell phone on which petitioner made inculpatory text messages admitting that she had "caught a body" and needed a "place to lay low." She also made admissions to others about a

“robbery gone wrong.” Petitioner also told a friend that “her brother” was facing a possible death penalty but he would not die for her.

Store surveillance video provided images of both Mr. Wiggins and petitioner. Petitioner was identified by her own sister from security camera photos taken at the Rite Aid store. Text messages sent between petitioner and petitioner’s sister revealed that petitioner was planning to leave town after the murder.

Ms. White, Mr. Parks and Mr. Mahmud were subsequently arrested for their roles in the robberies and murder. Ms. White and Mr. Parks both gave statements to police admitting their roles in the robberies and murder. Both entered guilty pleas and agreed to testify at trial against the others.

Police investigation revealed numerous cell phone conversations and inculpatory text messages between the individuals who planned and carried out the robberies.

Petitioner, Mr. Wiggins and Mr. Mahmud did not enter guilty pleas and their cases were joined for a joint trial. Petitioner filed a pre-trial motion seeking, inter alia, to sever her case from that of Mr. Wiggins because the statement that Mr. Wiggins provided to the police implicated petitioner by name. According to petitioner’s pre-trial motion, even if the statement by Mr. Wiggins was redacted to eliminate references to petitioner and even to her gender, based on other evidence in the case, jurors would still be able to figure out that she was the person that Mr. Wiggins was talking about in his statement.

In denying the pretrial motion to sever the trials, the trial court, relying upon Commonwealth v. Travers, 564 Pa. 362, 768 A.2d 845 (2001) and its interpretation of Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); Richardson v. March, 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), determined that the redacted statement of Mr. Wiggins satisfactorily protected the rights of petitioner in that it eliminated any reference to petitioner or her gender. One could not tell from reading the statement itself the person to whom Mr. Wiggins was referring.

Petitioner, Mr. Wiggins, and Mr. Mahmud were tried jointly and each was convicted for his or her role in the robberies and murder. Petitioner was convicted of First Degree Murder, Robbery, Firearms without a License, and Conspiracy. Petitioner was sentenced to a term of life imprisonment for First Degree Murder and to concurrent terms of from 10 to 20 years of imprisonment for both Robbery and Conspiracy. She was also sentenced to a concurrent term of from 3 ½ to 7 years of imprisonment for Firearms without a License.

On appeal, petitioner, relying upon a Third Circuit Court of Appeals decision in Vazquez v. Wilson, 550 F.3d 270 (3rd Cir. 2008), claimed that the Pennsylvania Supreme Court interpretation of Bruton is incorrect. According to petitioner, it is not enough that the statement of a co-defendant is redacted so that nobody can tell from the statement who the person is being referred to or even the person's gender. According to petitioner, even with a cautionary instruction to insure that the jury

knows that it can only use a co-defendant's statement as evidence against the co-defendant who made it, redaction is inadequate if it is possible for a juror to figure out who the other person in the co-defendant's statement is by considering other evidence in the case. According to petitioner, the "contextual implication theory" is what applies and a severance of trials is required whenever it might be possible for a jury to figure out who the person referred to in a co-defendant's statement is even when the statement is redacted to remove the person's name, gender or other identifying information.

On direct appeal, the Pennsylvania Superior Court rejected petitioner's claim, rejected the contextual implication theory, and rejected the Third Circuit's approach to Bruton. [Pennsylvania Superior Court Dkt. No. 1593 EDA 2015, memorandum opinion, filed 12/8/17]. A petition for re-argument was denied by the Pennsylvania Superior Court. [Pennsylvania Superior Court Dkt. No. 1593 EDA 2015, order filed 2/14/18]. A petition seeking Allowance of Appeal was subsequently denied by the Pennsylvania Supreme Court by per curiam order dated July 24, 2018. [Pennsylvania Supreme Court Dkt. No. 164 MAL 2018].

REASONS FOR DENYING THE WRIT

BECAUSE THE STATE COURTS PROPERLY APPLIED THIS COURT'S REQUIREMENTS REGARDING WHEN AND HOW A REDACTION OF A CO-DEFENDANT'S STATEMENT IS APPROPRIATE TO PROTECT A DEFENDANT'S CONFRONTATION CLAUSE RIGHTS IN A JOINT TRIAL AND BECAUSE THE VERDICT WOULD BE THE SAME IN THIS CASE REGARDLESS OF WHICH ANALYTICAL APPROACH TO BRUTON ISSUES IS USED, THIS COURT SHOULD NOT GRANT CERTIORARI REVIEW IN THIS CASE.

The instant case is not an appropriate or suitable vehicle for this Court to address the split of authority among certain federal circuit courts and state supreme courts concerning the correct approach for addressing issues stemming from Bruton involving the redaction of statements to avoid prejudice to a non-testifying co-defendant who is mentioned and implicated in the crime by the statement of another co-defendant where both co-defendants are being tried jointly. Regardless of the analytical approach that a court were to employ, regarding Bruton and whether to join or sever the co-defendant's cases, the verdict for petitioner in this case would be the same.

Respondents acknowledge that a split of authority exists regarding the correct approach to address Bruton related issues. The split involves two analytical approaches, a majority and a minority approach. The Pennsylvania state courts applied the majority approach which is firmly based upon this Court's decisions in Bruton, Richardson and Gray. It permits a joint trial following a redaction of a co-defendant's statement. The minority approach, precluding joint trials where a contextual implication of a codefendant is involved, is an approach which was

rejected by this Court in Richardson. Using the majority approach, a non-obvious redaction to a co-defendant's statement, which uses neutral phrases to make it impossible for the jury to know by reading the statement who is being referenced in the statement, is adequate to protect a non-testifying co-defendant's Confrontation Clause rights in a joint trial. Using the minority contextual implication approach, a severance of co-defendants' trials is required whenever it is possible that a juror might be able to figure out who is being referred to in a co-defendant's statement from other evidence, other than the statement itself, presented in the case.

Even if this Court were to adopt the minority contextual implication approach, advocated by petitioner, such a rule would not change the outcome in the instant case based upon application of the harmless error analysis. Whether the contextual implication approach was applied or not, and whether petitioner's trial was severed from her co-defendant's or not, the evidence of petitioner's guilt was so overwhelming that the result would not change. A better vehicle for addressing Bruton-related Confrontation Clause issues would be a case where the verdict or outcome would likely be different depending upon the analytical approach applied.

A. Bruton and the redaction of statements to overcome issues related to the Confrontation Clause.

Three cases from this Court define the parameters of a Confrontation Clause violation resulting from the admission of a statement from a non-testifying codefendant: Bruton v. United States, supra; Richardson v. Marsh, supra; and Gray v. Maryland, supra.

In Bruton, this Court concluded that “a defendant is deprived of his rights under the Confrontation Clause when his non-testifying co-defendant’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 co-defendant.” Richardson, 481 U.S. at 201-02, 107 S.Ct. at 1705.

Later, in Richardson, this Court explicitly approved of a redaction as a means to avoid a Bruton violation. Richardson provided two key holdings: first that “Bruton can be complied with by redaction.” Richardson, 481 U.S. at 209, 107 S.Ct. at 1708. And second, a redacted statement that only becomes incriminating by inference, when linked to other evidence, is permissible. Richardson, 481 U.S. at 208-09, 107 S.Ct. at 1708. This Court, in Richardson, reasoned that jurors are presumed to follow their instructions, and that this presumption applies when explicit references to the co-defendant have been removed. When a co-defendant’s statement incriminates only inferentially, the jury can be presumed not to use one co-defendant’s confession against another, in accordance with the trial court’s charge. Id. at 210-11, 107 S.Ct. at 1709.

Finally, in Gray, this Court addressed a confession “which substituted blanks and the word ‘deleted’ for the petitioner’s proper name.” This Court held that such obvious, artificial redactions fall “within the class of statements to which Bruton’s protections apply.” Gray, 523 U.S. at 197, 178 S.Ct. at 1157. This is common sense – a suspect, confessing to the police, would not use the word “deleted” or “blank” to

refer to someone else. The jury would know that the statement had been redacted, and could infer that it is the defendant who is being protected.

Gray did not directly involve a redaction that was neutral and not obvious or awkward, but the Court explicitly indicated that a neutral, natural-sounding redaction employing a phrase such as "Me and a few other guys," would pass constitutional muster. Gray, 523 U.S. at 196-198, 118 S.Ct at 157. Furthermore, this Court, in Gray, cited with approval two Court of Appeals decisions that endorsed the use of neutral redactions. See: Gray, 523 U.S. at 197 citing United States v. Garcia, 836 F.3d 385, 389 n.5 (8<sup>th</sup> Cir. 1987) (where co-defendant's statement was redacted to replace defendant's name with "someone", the Court held that "indirect inculpatory effect" from this neutral redaction did not violate Bruton), and Clark v. Maggio, 737 F.2d 471, 477 (5<sup>th</sup> Cir. 1984) (redactions that refer to "the number of persons involved" are lawful, despite possibility that jurors might infer from other evidence the identities of other participants), cert. denied, 470 U.S. 1055, 105 S.Ct. 1761 (1985)).

Redaction rules must be assessed in light of two policies emphasized by this Court. First, joint trials are favored in the criminal justice system, for various reasons. See e.g., Richardson, 481 U.S. at 209-10, 107 S.Ct. at 1708-1709. ("Joint trials play a vital role in the criminal justice system"..."joint trials generally serve the interests of justice"). See also Zafiro v. United States, 506 U.S. 534, 537, 113 S.Ct. 933, 937, 122 L.Ed.2d 317 (1993) ("there is a preference in the federal system for joint trials of defendants who are indicted together"). Redaction requirements

must not be construed in such a way that they will “forc[e] prosecutors too often to abandon use either of the confession or of a joint trial.” Gray, 523 U.S. at 196, 118 S.Ct. at 1157, citing Richardson, 481 U.S. at 209, 107 S.Ct. at 1708.

Second, redaction requirements must be “easily predict[able]”. Thus, this Court has recommended against assessing statements “by connection” to the evidence admitted at trial. “The Richardson Court...feared that the inclusion within Bruton’s protective rule, of confessions that incriminated ‘by connection’ too often would provoke mistrials, or would necessarily lead prosecutors to abandon the confession or joint trial, because neither the prosecutors nor the judge could easily predict, until after the introduction of all the evidence, whether or not Bruton had barred use of the confession.” Gray, 523 U.S. at 197, 118 S.Ct. at 1157.

The scope of Bruton must be interpreted with these policy restrictions in mind. The rule allowing redactions must be workable and the exceptions must be no broader than absolutely necessary.

#### B. The Circuit Split

1. Majority view – joint trials and redactions are permitted when the redactions are not obvious from the face of the statement.

In this case, the Pennsylvania Superior Court followed Pennsylvania Supreme Court precedent, which finds its roots in cases from the Fourth and Eighth Circuits and is consistent with the standards used in the Second, Sixth, Seventh and Tenth Circuits. These courts, like Pennsylvania, have drawn a distinction

between redacted statements that are incriminating on their face (through awkward or obvious deletions) and redactions that become incriminating only when linked to other evidence.

In 2001, the Pennsylvania Supreme Court joined the Eighth and Fourth Circuits in concluding that Gray did not revive the contextual implication doctrine that was rejected by the Court in Richardson. See: Commonwealth v. Travers, supra. Rather, “general references to ‘another person’ or ‘another individual’” are approved “because ‘[t]he Supreme Court has strongly implied that such statements do not offend the Sixth Amendment.’” United States v. Halteh, 224 Fed.Appx. 210, 218 (4<sup>th</sup> Cir. 2007) (unpublished), citing United States v. Akinkoye, 185 F.3d 192, 198 (4<sup>th</sup> Cir. 1999).

Redaction through neutral pronouns is more like the redaction approved in Richardson and less like the method disallowed in Gray because “there [is] no way to facially identify [co-defendants] without more information” and “it would have been unclear to the jury that the statements had been altered at all.” United States v. Lighty, 616 F.3d 321, 377 (4<sup>th</sup> Cir. 2010). “Unlike use of the word ‘deleted,’...use of pronouns ‘we’ and ‘they’ or...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 with other evidence.” United States v. Edwards, 159 F.3d 1117, 1125 (8<sup>th</sup> Cir. 1998). Though a jury could use inferences to reach the same improper conclusion (also true in Richardson), in this context, it remains

proper to assume the general rule that juries are presumed to follow instructions.

Id.

Ultimately, to determine if the redaction was “obvious” (and, therefore, improper), the redacted statement should be considered “in isolation from the other evidence admitted at trial.” United States v. Logan, 210 F.3d 820, 822 (8<sup>th</sup> Cir. 2000) (en banc). See also United States v. Vasilakos, 508 F.3d 401, 407 (6<sup>th</sup> Cir. 2007) (the government may avoid a Bruton violation...by replacing a defendant’s name with ‘another person’ or ‘another individual’); United States v. Verduzco-Martinez, 186 F.3d 1208, 1214 (10<sup>th</sup> Cir. 1999) (explaining “[a]lthough it is possible to infer that the ‘another person’ referred to is [co-defendant], it is not an inference that can be made immediately from the statements alone or without additional evidence.”). These courts agree that an evaluation of any redaction must begin by determining if redaction is such that it “indicated to the jury that the original statement contained actual names.” United States v. Jass, 569 F.3d 47, 61 (2<sup>nd</sup> Cir. 2009), cert. denied, 558 U.S. 1159, 130 S.Ct. 2128 (2010).

Several circuits have expressly endorsed redaction methods that replaced the defendant’s name with a description of his role in the crime. For example, the Seventh Circuit approved the use of the phrase “straw buyer” because “unlike an alias or a pseudonym used to disguise a single individual, ‘straw buyer’ is more similar to an anonymous reference such as ‘another person’ or ‘individual.’” United States v. Green, 648 F.3d 569, 575 (7<sup>th</sup> Cir. 2011). Though a jury might be able to deduce (through the evidence admitted at trial and the prosecutor’s decision to

charge this defendant) that the defendant “was the straw buyer...by comparing to the other evidence presented at trial..., [t]he Supreme Court has distinguished this type of acceptable indirect inference from an acceptable immediate inference.” Id. at 576, comparing Gray, 523 U.S. at 195-96, 118 S.Ct. at 1151 and Richardson, 481 U.S. at 208, 107 S.Ct. at 1702. See also United States v. Yousef, 327 F.3d 56, 150 (2<sup>nd</sup> Cir. 2003) (use of word “neighbor” as substitute for defendant’s name in redacted co-defendant’s statement was proper under Bruton, Gray, and Richardson), cert. denied, 540 U.S. 933, 124 S.Ct. 353 (2003); United States v. Taylor, 186 F.3d 1332 (11<sup>th</sup> Cir. 1999). (redacted statement which replaced defendant’s name with, among other things, “the captain” did not violate right of confrontation); United States v. Valde, 146 F.3d 547, 551-52 (8<sup>th</sup> Cir. 1998), cert. denied, 525 U.S. 938, 119 S.Ct. 355 (1998) (reference in co-defendant’s statement to “accomplice” did not violate Gray; only by linking confession to other evidence could jury infer accomplice’s identity).

2. Minority view – any potential contextual implication requires severance of trials.

The Third Circuit Court of Appeals has read Richardson narrowly, concluding that the case’s “holding is explicitly limited to a confession that is redacted to eliminate ‘not only the defendant’s name, but any reference to his...existence.’” Eley v. Erickson, 712 F.3d 837, 859 (3<sup>rd</sup> Cir. 2013), quoting Richardson, 481 U.S. at 211, 107 S.Ct. at 1702. In this minority view, a reviewing court is required to look at the evidence admitted during the trial and the prosecutor’s arguments to determine if the jury could infer that the statement “named” the defendant. Id.

In this minority view, the Third and Ninth Circuits do not even limit their analysis to the evidence admitted during the trial, but also consider the number of co-defendants in the case and the “indefinite” nature of the redactions used. Where the number of co-defendants on trial matches the number of individuals neutrally referenced in the statement, these courts have held that the jury would necessarily have determined that the defendant’s name was deleted from the statement. Pabon v. Mahanoy, 654 F.3d 385, 395 (3rd Cir. 2011).

These two circuit courts have been joined by the New Jersey Supreme Court. Relying on Third Circuit cases, that court has held that where “the nature of the linkage between the redacted statement and other evidence directly identified the defendant as the shooter,” the redaction is rendered “utterly ineffective” and its admission violates the Confrontation Clause. State v. Weaver, 219 N.J. 131, 97 A.3d 663, 676 (2014).

C. This Court’s review is unwarranted because the redaction in this case was in accordance with Bruton, Richardson and Gray in using neutral terms and non-obvious or awkward redactions to prevent a juror from determining from the statement itself to whom the co-defendant was referring.

The Wiggins statement in this case was redacted to eliminate the possibility for anyone reading it to discern from the statement itself that petitioner was the person to whom Mr. Wiggins was referring. There was no awkward wording or tell-tale omissions or other changes which made the redaction obvious. Instead, there were only neutral terms and natural sounding comments from which one could not

tell a redaction had occurred let alone discern who the other person was. Petitioner does not suggest that the redaction used in this case is obvious, awkward, or indicates in any way in the statement itself that she is the person referenced by Mr. Wiggins. It was only from linkage to other evidence in the case that one might discern that petitioner was the other person referenced by Mr. Wiggins.

D. Review should be denied because the evidence against petitioner was so overwhelming that, no matter which analytical approach is applied, the outcome for petitioner would be the same.

Issues regarding the joinder/severance of co-defendants' trials are subject to a harmless error review. See: United States v. Lane, 474 U.S. 438, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986) (improper joinder of defendants does not in and of itself violate the Constitution and misjoinder of defendants is subject to a harmless error analysis.)

In the instant case, the evidence against petitioner included statements she made to a friend saying she needed a place to lay low because she "caught a body" at the Rite Aid. Petitioner explained to her friend that she was involved in a "robbery gone wrong" and, referring to Mr. Wiggins, said the police were talking to her "brother" about the death penalty but that he was not going to die for her. Petitioner was also identified by her ex-sister-in-law from a photo taken from surveillance cameras. That witness stated that the red hoodie that petitioner was wearing during the robbery/murder belonged to the witness' brother and the Kemar that she was wearing belonged to petitioner.

Petitioner's own sister, Kelly Pultro, identified petitioner from surveillance photos showing her at the Chester Rite Aid store.

Petitioner told another friend, Willie Valazquez, that she shot someone.

Upon being arrested, petitioner told the police that, "you guys are good, I was wondering when you guys were coming to get me..."

Co-conspirator Mr. Parks testified that he drove petitioner and Mr. Wiggins to the Chester Rite Aid store on September 19 to carry out the robbery. Mr. Parks testified that Mr. Wiggins had the gun when petitioner and Mr. Wiggins exited the car and entered the Rite Aid store. A photo from the Rite Aid surveillance cameras showed petitioner with the gun in her hand as she and Mr. Wiggins exited the Rite Aid store after the robbery/murder. After the robbery/murder, as the petitioner and Mr. Wiggins returned to the car, Mr. Wiggins announced that they "caught a body" as they drove off together.

The police recovered text messages and phone call history data from Mr. Wiggins' cell phone which linked petitioner to Mr. Wiggins and the robbery plans.

Even if petitioner was tried separately from Mr. Wiggins and even if the jury did not hear Mr. Wiggins' statement, it would not have changed the verdict of this case for petitioner. Any purported error in joining the co-defendants' trials failed to have a "substantial influence" on the verdict under the circumstances of this case.

In her certiorari petition, petitioner has failed to acknowledge or address the application of a harmless error analysis to this case. This Court, however, in choosing an appropriate case to review the correct approach for handling Bruton

issues and how and when to join or sever cases involving a statement from one co-defendant which references another non-testifying co-defendant, must take into account the effect that a harmless error analysis would have on the case and the principle of law being addressed. Because of the circumstances of the case, certiorari review should not be granted.

## CONCLUSION

For all of the aforementioned reasons, the petition seeking certiorari review should be denied.

Respectfully submitted,

*/s/ William R. Toal, III*  
William R. Toal, III  
Assistant District Attorney  
(counsel of record)

## CERTIFICATION OF WORD COUNT

Pursuant to the Rules of the United States Supreme Court, I, William R. Toal, III, hereby certify that the foregoing brief:

1. complies with the requirements set forth in the Rules of the United States Court Rule 33.1(h) as the brief consists of 20 pages and 4,531 words and;
2. complies with the typeface requirements of the Rules of the United States Supreme Court Rule 33.1(b) using a proportionally spaced typeface of Century Schoolbook 12.

/s/ William R. Toal, III  
William R. Toal, III  
Assistant District Attorney  
(counsel of record)

Date: March 29, 2019

**PROOF OF SERVICE**

WILLIAM R. TOAL, III, Assistant District Attorney, hereby certifies that on March 29, 2019, he served the persons in the manner indicated below, which service satisfies the requirements of the Rules of the United States Supreme Court Rule No. 29.

**FIRST-CLASS MAIL  
AS FOLLOWS:**

William Patricck Wismer, Esquire  
30 W. Third Street  
Media, PA 19063  
(610) 566-3090  
(Attorney for Petitioner)

/s/ William R. Toal, III

William R. Toal, III ID# 42549  
Assistant District Attorney  
Office of the District Attorney  
Delaware County Court House  
201 West Front Street  
Media, PA 19063-2783  
Phone: (610) 891-4210  
E-mail: [toalb@delaware.co.pa.us](mailto:toalb@delaware.co.pa.us).  
(Attorney for Respondent)  
(counsel of record)  
(Member of the Bar of the United States  
Supreme Court)