[J-18-2024] [MO: Donohue, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 31 EAP 2021
	:	
Appellee	:	Appeal from the Judgment of the
	:	Superior Court entered on April 12,
	:	2021 at No. 803 EDA 2020 affirming
v.	:	the Judgment of Sentence entered
	:	on February 28, 2017 in the Court of
	:	Common Pleas of Philadelphia
MICHAEL JONES,	:	County, Criminal Division at No. CP-
	:	51-CR-0003755-2016.
Appellant	:	
	:	ARGUED: May 18, 2022
	:	
	:	RESUBMITTED: January 31, 2024

DISSENTING OPINION

CHIEF JUSTICE TODD **DECIDED: October 24, 2024**

We granted review in this case to consider whether Appellant Michael Jones' Sixth Amendment right to confrontation was violated when the redacted statement of his non-testifying co-defendant was admitted at trial. The majority answers this question in the affirmative. For the reasons set forth below, I conclude that, pursuant to the United States Supreme Court's decision in *Samia v. United States*, 599 U.S. 635 (2023), Appellant's confrontation clause rights were not violated. Hence, I dissent.

At approximately 3:40 a.m. on February 6, 2016, Appellant and his friend, Syheed Wilson, disembarked from a SEPTA train car on Broad Street in Philadelphia and met up with a third friend, Keirston Carroll, who exited from a separate train car. The three then hailed a taxi driven by Alex Destin (the "Victim"). Appellant sat in the front passenger seat, and Wilson and Carroll sat in the back seat. Appellant instructed the Victim to drive

to a particular address, and, as the taxi approached the address, Appellant told the Victim not to move and pointed a gun at his head. The Victim continued driving, at which point Appellant shot him twice; the first bullet grazed the Victim's forehead, and the second struck his right ear. Appellant then jumped out of the moving taxi and fled on foot. Wilson, who was still in the backseat of the taxi with Carroll, told the Victim to stop the car. When the Victim continued driving, Wilson shot him in the bicep, at which time the Victim lost control of the taxi and hit a parked car. The Victim exited the taxi, and ran to find help; he soon encountered a police officer who took him to the hospital for treatment. Wilson and Carroll also exited the taxi and fled on foot.

SEPTA security cameras captured video footage of Appellant, Wilson, and Carroll prior to the shooting, and the footage was released to various media outlets across the city. Colin Houston, who owned a restaurant – Jack's Firehouse − where both Appellant and Wilson were employed, saw the footage, contacted the police, and identified Wilson and Appellant as his employees. Ultimately, all three individuals were arrested.

On February 23, 2016, Detective Timothy Quinn of the Philadelphia Police Department interviewed Wilson about the incident that occurred on February 6, 2016. Wilson gave a statement claiming that Appellant was solely responsible for the shooting. At the time of the interview, police showed Wilson a still photograph taken from the SEPTA security footage and asked him to identify the people in the photo. Wilson indicated "That is me in back that is Bae with the purse and Mike in the gray jacket." Investigation Interview Record, Commonwealth's Exhibit 39.[1] Appellant and Wilson were charged with attempted murder,[2] robbery,[3] conspiracy,[4] aggravated assault,[5] and

[1] Wilson referred to Carroll, his girlfriend, as "Bae."
[2] 18 Pa.C.S. § 901.
[3] *Id.* § 3701(a)(1)(ii).
[4] *Id.* § 903.
[5] *Id.* § 2702(a)(1).

weapons offenses,[6] and Carroll was charged with aggravated assault, robbery, and conspiracy. The three cases were consolidated for trial.

Prior to trial, Appellant's counsel filed a motion to exclude Wilson's statement identifying Appellant as a perpetrator in the crime pursuant to *Bruton v. United States*, 391 U.S. 123 (1968) (admission at a joint trial of a non-testifying co-defendant's statement incriminating the defendant violated the defendant's Confrontation Clause rights). Appellant also sought to preclude admission of photographs that were taken of Victim when Victim was in the hospital. Relevantly, the trial court denied Appellant's motion to exclude Wilson's statement, but ordered that specific references to Appellant and Carroll in Wilson's statement be replaced with the phrase "my friend." *See, e.g.*, *Commonwealth v. Travers*, 768 A.2d 845 (Pa. 2001) (holding that replacement of defendant's name with the phrase "the other man" in a non-testifying co-defendant's statement, when combined with a cautionary jury instruction, sufficiently protected the defendant's Confrontation Clause rights).

At trial, the Commonwealth presented, *inter alia*, the testimony of Houston, who testified that he owned Jack's Firehouse restaurant; that Appellant and Wilson both worked at the restaurant; that the two men were friends outside of work; and that Wilson had helped Appellant get the job. N.T., 10/27/16, at 125. Wilson did not testify at trial; however, immediately after Houston testified, over Appellant's renewed *Bruton* objection, Detective Quinn was asked to read into the record the statement Wilson gave to police. As Detective Quinn specifically referred to the statement as "redacted," the jury was aware that the statement contained redactions.

The redacted statement read, in relevant part:

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[6] *Id.* § 6106(a)(1).

Myself and my friend had clocked out of work about 10:00 to 11:00 p.m. on February 5th. We work at Jack's Firehouse . . . . We went [to] a party up in West Philly. I told my friend[] to call me when she was done. She work[s] at the one on Fox Street. Myself and my friend[] had gotten on the subway about 2:00 a.m. to 2:30 a.m.

* * *

We [met] my friend that was at Tasker-Morris station. She just happened to be on the same train, not the same car. My friend and I see her when we get off the subway. The three of us begin to walk together.

My friend flagged down a cab as soon as we got out the subway. We think my friend was going to pay for it. He gets in the front seat. I got in the backseat. I was behind the driver and she was behind my friend.

My friend – my friend in the front told the driver to go to 28th and Tasker. I was talking to my friend in the back. We get to the corner of 27th and Morris Street. My friend out of nowhere [pulls a gun out].

My friend in the front seat takes his right hand and looking forward points the gun at the cabdriver and said "give that shit up." The cabdriver, waving his hands as he was driving trying to get the gun. A shot went off towards the cabdriver's arm. Only one shot went off.

Myself and my friend were in the backseat. My friend in the front seat just bails out of the cab. We tried to get out but we could not because of the locks. The cabdriver was speeding straight down the road. He was bleeding from the arm. Myself and my friend in the back were telling him to stop. The cabdriver bangs out at, I think 24th and Tasker. The cabdriver got out of the cab. Myself and my friend in the back were still locked inside the car.

We see a cop car pull up. We are still in the cab. The cop gets out and looks at the man, see that he is shot. Then then the cop puts the cabdriver inside the cop car. We were kicking and banging the door. We see a black lady on the phone. We said, yo, can you let us out? The lady unlocked

> the door. I told my friend in the back to come on. I see my friend that was in the front at the corner where we crashed out. He still had the pistol out. We were still drunk. We went to my house, the three of us.

Id. at 186-88.

Additionally, Detective Quinn read into evidence the following statement (in redacted form) by Wilson when he was asked in his interview to identify the individuals in the still photograph from the SEPTA video: "That is me in the back, that is my friend with the purse and my friend from work in the gray jacket." *Id.* at 189. Appellant did not lodge a specific objection to the introduction of Wilson's identification of Appellant in the still photograph or video footage. Detective Quinn further recounted that Wilson denied owning a gun; denied possessing or discharging a gun that evening; and denied knowing that Appellant intended to rob the Victim. *Id.* at 189-90.

Before the jury retired to deliberate, the court instructed that it could consider Wilson's statement only as evidence against Wilson, and not the other defendants. Appellant did not challenge the timing of the trial court's instructions. Ultimately, the jury convicted Appellant and Wilson of all charges; Carroll was acquitted.

In his *nunc pro tunc* appeal to the Superior Court, Appellant argued that, pursuant to *Bruton*, the admission of Wilson's redacted statement violated his rights under the Confrontation Clause. The Superior Court affirmed Appellant's judgment of sentence, concluding that Wilson's redacted statement to police was properly admitted. *Commonwealth v. Jones*, 2021 WL 1345560 (Pa. Super. filed Apr. 12, 2021). The court first recognized that, under *Bruton*, the admission at a joint trial of a non-testifying co-defendant's statement that incriminates the defendant violates the Confrontation Clause, even if the trial court issues a cautionary instruction to the jury. The court observed, however, that in *Richardson v. Marsh*, 481 U.S. 200 (1987), the United States Supreme

Court recognized a distinction between statements that expressly incriminate a defendant, and those which are incriminating only when linked to other evidence properly introduced at trial, and that the high Court held that a co-defendant's statement may be admitted if the defendant's name is redacted and the trial court issues a limiting instruction.

The Superior Court also cited this Court's decision in *Travers*, *supra*, for the proposition that the admission at trial of a non-testifying co-defendant's statement to police, in which references to a defendant's name are replaced with a neutral pronoun or other term, such as the phrase "the other man," when accompanied by a cautionary instruction to the jury that the statement can only be used against the co-defendant, does not violate a defendant's rights under the Confrontation Clause. The court below concluded that, because the phrase "my friend" in Wilson's redacted statement was "facially neutral, and any connection drawn between the redacted name and [Appellant] was established through other independent evidence," and because the trial court issued a cautionary instruction to the jury, there was no violation of Appellant's Sixth Amendment rights. *Jones*, 2021 WL 1345560, at *3.

We granted Appellant's petition for allowance of appeal to determine whether the trial court's admission of Wilson's redacted statement, which, in combination with other properly admitted evidence − specifically, the testimony of Colin Houston − clearly identified Appellant as a participant in the crime, violated Appellant's Confrontation Clause rights under the Sixth Amendment to the United States Constitution and Article I, § 9 of the Pennsylvania Constitution.[7]

[7] In granting Appellant's Petition for Allowance of Appeal, this Court adopted his recitation of the issue, which included a claim that admission of Wilson's redacted statement violated Appellant's rights under both the Sixth Amendment and Article I, § 9 of the Pennsylvania Constitution (providing "[i]n all criminal prosecutions the accused hath a right . . . to be confronted with the witnesses against him"). However, beyond a (continued…)

The Confrontation Clause of the Sixth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The right of confrontation includes the right to cross-examine witnesses. *Richardson*, 481 U.S. at 206. The United States Supreme Court has considered whether a defendant's Confrontation Clause rights were violated when a co-defendant's out-of-court statement implicating the defendant was admitted at a joint trial under a variety of circumstances.

In *Bruton*, George Bruton and his co-defendant, William Evans, were charged with the federal crime of armed postal robbery. Evans orally confessed to a postal inspector that he and Bruton committed the crime, and the confession was admitted at their joint trial, although the trial court instructed the jury that the confession could only be considered against Evans.[8] Both men were convicted and subsequently appealed. The appellate court set aside Evans' conviction on the ground that his oral confession was improperly admitted at trial based on *Miranda v. State of Arizona*, 384 U.S. 436 (1966). However, relying on *Delli Paoli v. United States*, 352 U.S. 232 (1957), for the proposition that a jury is capable of following clear instructions of the trial court that one co-defendant's confession may only be used against him, and not against his co-defendants, the appellate court affirmed Bruton's conviction, noting that the trial judge instructed the jury that Evans' confession was inadmissible hearsay against Bruton and could only be used against Evans. The United States Supreme Court granted review to reconsider its holding in *Delli Paoli*.

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restatement of the issue on which we granted appeal, Appellant's brief does not contain any reference to, or discussion of, Article I, § 9.

[8] In fact, Evans made two oral confessions, one in which he specifically named Bruton, and another in which he admitted he had an accomplice whom he would not name.

In an opinion authored by Justice Brennan, the high Court expressly overruled *Delli Paoli*, and reversed Bruton's conviction, concluding, "because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining [Bruton's] guilt," the admission of Evans' confession at the joint trial violated Bruton's "right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." *Bruton*, 391 U.S. at 126.

In doing so, the Court observed that the "basic premise of *Delli Paoli* was that it is 'reasonably possible for the jury to follow' sufficiently clear instructions to disregard the confessor's extrajudicial statement that his codefendant participated with him in committing the crime." *Id.* (quoting *Delli Paoli*, 352 U.S. at 239). The *Bruton* Court explained, however, that since its decision in *Delli Paoli*, the Court had "effectively repudiated" that premise. *Id.* at 128. Specifically, the *Bruton* Court observed that, in *Jackson v. Denno*, 376 U.S. 368 (1964), it rejected the notion that a jury, "when determining the confessor's guilt, could be relied on to ignore his confession of guilt should it find the confession involuntary." *Bruton*, 391 U.S. at 129. In support of its conclusion, the *Bruton* Court relied, in part, on Justice Frankfurter's dissenting opinion in *Delli Paoli*, in which he stated:

> The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell.

Id. (quoting *Delli Paoli*, 352 U.S. at 247 (Frankfurter, J., dissenting)).[9]

The *Bruton* Court recognized the benefits of joint trials, stating: "[j]oint trials do conserve state funds, diminish inconvenience to witnesses and public authorities, and

[9] Justice Frankfurter's dissent was joined by Justices Black, Douglas, and Brennan.

avoid delays in bringing those accused of crime to trial." *Id.* at 134. Nevertheless, the Court found persuasive the dissenting statement by Judge Lehman in *People v. Fisher*:

> We still adhere to the rule that an accused is entitled to confrontation of the witnesses against him and the right to cross-examine them[.] . . . We destroy the age-old rule which in the past has been regarded as a fundamental principle of our jurisprudence by a legalistic formula, required of the judge, that the jury may not consider any admissions against any party who did not join in them. We secure greater speed, economy, and convenience in the administration of the law at the price of fundamental principles of constitutional liberty. That price is too high.

164 N.E. 336, 341 (N.Y. Ct. App. 1928) (Lehman, J., dissenting).

Finally, the *Bruton* Court acknowledged that, in many cases, it may be presumed that a jury will follow a court's clear instructions. The Court noted that "[n]ot every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions." 391 U.S. at 135. However, the Court concluded:

> 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. It was against such threats to a fair trial that the Confrontation Clause was directed.

Id. at 135-36 (citations and footnotes omitted).

Nearly 20 years after *Bruton*, the high Court considered whether that decision applied when a confession of a non-testifying co-defendant which had been altered to

remove the defendant's name, as well as any reference to his existence, was admitted at trial and a proper limiting instruction was given by the trial court. In *Richardson v. Marsh*, three individuals − Gloria Richardson, Benjamin Williams, and Kareem Martin − were charged with murder, robbery, and assault. At Richardson's and Williams' joint trial, Williams' confession, which had been redacted to omit all indication that anyone other than he and Martin participated in the crime, was admitted into evidence, over Richardson's objection. The trial judge instructed the jury that Williams' confession could not be considered against Richardson. Richardson was convicted, and, on appeal, the appellate court affirmed. The Michigan Supreme Court denied further review, and Richardson filed a petition for writ of *habeas corpus*. Richardson was denied relief at the district court level, but the Sixth Circuit Court of Appeals reversed, holding that, in light of the inculpatory value of the confession when compared to the other evidence of Richardson's intent introduced at trial, Richardson's rights under the Confrontation Clause had been violated.

On grant of *certiorari*, the high Court reversed. In concluding that there was no *Bruton* violation under the circumstances of the case, the Court reasoned:

> There is an important distinction between this case and *Bruton,* which causes it to fall outside the narrow exception we have created. In *Bruton,* the codefendant's confession "expressly implicat[ed]" the defendant as his accomplice. Thus, at the time that confession was introduced there was not the slightest doubt that it would prove "powerfully incriminating." By contrast, in this case the confession was not incriminating on its face, and became so only when linked with evidence introduced later at trial (the defendant's own testimony).
>
> Where the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence. Specific testimony that "the defendant helped me commit the crime" is more vivid than inferential incrimination, and hence more difficult to thrust out

> of mind. Moreover, with regard to such an explicit statement the only issue is, plain and simply, whether the jury can possibly be expected to forget it in assessing the defendant's guilt; whereas with regard to inferential incrimination the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget. In short, while it may not always be simple for the members of a jury to obey the instruction that they disregard an incriminating inference, there does not exist the overwhelming probability of their inability to do so that is the foundation of *Bruton*'s exception to the general rule.
>
> Even more significantly, evidence requiring linkage differs from evidence incriminating on its face in the practical effects which application of the *Bruton* exception would produce. If limited to facially incriminating confessions, *Bruton* can be complied with by redaction—a possibility suggested in that opinion itself. If extended to confessions incriminating by connection, not only is that not possible, but it is not even possible to predict the admissibility of a confession in advance of trial. The "contextual implication" doctrine articulated by the Court of Appeals would presumably require the trial judge to assess at the end of each trial whether, in light of all of the evidence, a nontestifying codefendant's confession has been so "powerfully incriminating" that a new, separate trial is required for the defendant. This obviously lends itself to manipulation by the defense—and even without manipulation will result in numerous mistrials and appeals.

Richardson, 481 U.S. at 208-09 (citations and footnote omitted).

More than a decade after *Richardson*, the high Court, in *Gray v. Maryland,* 523 U.S. 185 (1998), contemplated a prosecution in which the appellant's name in his non-testifying co-defendant's confession was replaced with either the word "deleted," or a blank space, and introduced at trial. Appellant John Gray's co-defendant, Anthony Bell, had confessed to police that he, Gray, and a third individual fatally beat a man. After the third individual died, Gray and Bell were tried jointly for murder. Although Bell did not testify, the trial court allowed a redacted version of his confession to be read into evidence by a detective. In reading the confession, the detective substituted Gray's and the third

individual's name with the word "deleted" or "deletion." *Id.* at 188. Immediately after he read Bell's confession, the detective was asked whether, after obtaining the confession, he was "able to arrest" Gray, and the detective responded in the affirmative. *Id.* at 188-89. Moreover, a written copy of Bell's confession was admitted into evidence, with the names of Gray and the third individual replaced by blank spaces separated by commas.

Gray was convicted, and the Maryland Court of Special Appeals reversed, finding the use of Bell's confession violated Gray's rights under *Bruton*. The state's high court disagreed, and reinstated Gray's conviction. On grant of *certiorari*, the United States Supreme Court reversed, concluding Gray was entitled to relief because, unlike the redacted confession in *Richardson*, Bell's confession "refers directly to the 'existence' of the nonconfessing defendant." *Id*. at 192. The Court expounded:

> 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 unredacted statements that, in our view, the law must require the same result.
>
> For one thing, a jury will often react similarly to an unredacted confession and a confession redacted in this way, for the jury will often realize that the confession refers specifically to the defendant . . . . Consider a simplified but typical example, a confession that reads "I, Bob Smith, along with Sam Jones, robbed the bank." To replace the words "Sam Jones" with an obvious blank will not likely fool anyone. A juror somewhat familiar with criminal law would know immediately that the blank . . . refers to defendant Jones. A juror who does not know the law and who therefore wonders to whom the blank might refer need only lift his eyes to Jones, sitting at counsel table, to find what will seem the obvious answer, at least if the juror hears the judge's instruction not to consider the confession as evidence against Jones, for that instruction will provide an obvious reason for the blank . . . .
>
> For another thing, the obvious deletion may well call the jurors' attention specially to the removed name. By encouraging the jury to speculate about the reference, the redaction may

> overemphasize the importance of the confession's accusation . . . .

Id. at 192-93.

The high Court in *Gray* acknowledged that, in the case before it, the jury would have had to use inference to connect the redacted statement to Gray. It explained, however, that

> inference pure and simple cannot make the critical difference, for if it did, then *Richardson* would also place outside *Bruton*'s scope confessions that use shortened first names, nicknames, descriptions as unique as the "red-haired, bearded, one-eyed man-with-a-limp," *United States v. Grinnell Corp.*, [384 U.S. 563, 591 (1966)], and perhaps even full names of defendants who are always known by a nickname. This Court has assumed, however, that nicknames and specific descriptions fall inside, not outside, *Bruton*'s protection. *See Harrington v. California*, [395 U.S. 250, 253 (1969)] (assuming *Bruton* violation where confessions describe codefendant as the "white guy" and gives a description of his age, height, weight, and hair color).

Id. at 195. Thus, the Court reasoned:

> *Richardson* must depend in significant part upon the *kind* of, not the simple *fact* of, inference. *Richardson*'s inferences involved statements that did not refer directly to the defendant himself and which became incriminating "only when linked with evidence introduced later at trial." The inferences at issue here involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial. Moreover, the redacted confession with the blank prominent on its face, in *Richardson*'s words, "*facially* incriminat[es]" the codefendant. Like the confession in *Bruton* itself, the accusation that the redacted confession makes "is more vivid than inferential incrimination, and hence more difficult to thrust out of mind."

Id. at 196 (emphasis original, citations omitted).

This Court has applied the foregoing decisions on several occasions, including in our decision in *Commonwealth v. Travers*. In *Travers*, we considered whether the

replacement of the appellant's name with the phrase "the other man" in his non-testifying co-defendant's confession, when combined with the trial court's cautionary charge to the jury, was sufficient to protect the appellant's right to confrontation. We began by examining the high Court's decisions in *Bruton*, *Richardson*, and *Gray*, and observed that the Court in *Gray*:

> refined *Richardson*, concluding that inference "pure and simple" could not make the critical difference in a *Bruton* analysis, since that would exclude shortened first names, nicknames, unique descriptions and the like from *Bruton*'s sweep, while the Court, in other cases, had already at least assumed that the rule would cover those circumstances. [*Gray*, 523 U.S. at 195]. The Court therefore concluded that, in cases requiring an inference to connect the redacted statement to the defendant, it was the "kind of" inference involved that mattered in the *Bruton* analysis. *Id.* at 196 [ ]. The Court then contrasted the inference in *Richardson* with the inference in *Gray*. In *Richardson*, the inference involved statements that did not directly refer to the defendant himself and "which became incriminating 'only when linked with evidence introduced later at trial.'" *Id., quoting Richardson*, 481 U.S. at 208 [ ]. In contrast, *Gray* involved statements that, despite redaction, "obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." 523 U.S. at 196 [ ]. In such an instance, the Court noted, the redacted confession, though not naming the defendant, nevertheless "facially incriminates"[10] him, and "'is more vivid than inferential incrimination, and hence more difficult to thrust out of mind.'" *Id., quoting Richardson*, 481 U.S. at 208.

Travers, 768 A.2d at 849-50.

We then noted that, while *Richardson* did not specifically answer the question of whether a redaction that substitutes a neutral pronoun, such as "the other man," rather

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[10] As observed by Justice Scalia in his dissenting opinion in *Gray*, the *Gray* majority's characterization of the redacted confession as "facially" incriminating was inaccurate, in that, if a statement requires inference to be incriminating, by definition, it is not "facially" incriminating. *See Gray*, 523 U.S. at 201 (Scalia, J., dissenting).

than a symbol of deletion, is sufficient to protect a defendant's Sixth Amendment rights, "the *Gray* Court's reasoning, including its distinction of *Richardson*, leaves little question that this sort of redaction is appropriate under the Sixth Amendment." *Id.* at 850-51. We elaborated:

> The rationale employed in *Gray* makes clear that the "kind of" redaction employed here does not implicate *Bruton* concerns in the same way as a statement that incriminates the defendant on its face, either by actually naming him or by an obvious method of deletion that no less certainly points the finger at him. The redacted statement here neither referred to appellant by name (the *Bruton* proscription) nor did it contain an obvious indication of a deletion or an alteration that was the functional equivalent of naming him (the *Gray* proscription). Indeed, use of a neutral pronoun is not an obvious alteration at all: "For all the jury knew, these were [the non-testifying co-defendant's] actual words, not a modified version of them." The "other man" reference employed here was certainly not the sort of reference which, "even were the confession the very first item introduced at trial," obviously referred to the defendant. . . . Instead, as in *Richardson,* the redacted statement could become incriminating only through independent evidence introduced at trial which established the defendant's complicity and, even then, only if it is assumed that the jury ignored the court's charge.

Id. at 851 (citations omitted).

We concluded in *Travers* that, because the statement "was not powerfully incriminating on its face," the replacement of the appellant's name with the phrase the "other man" in the non-testifying co-defendant's statement, in combination with the trial court's cautionary instruction to the jury, sufficiently protected the appellant's Sixth Amendment right to confrontation. *Id.*

We again considered the propriety of the admission of a non-testifying co-defendant's redacted confession in *Commonwealth v. Daniels*, 104 A.3d 267 (Pa. 2014). In *Daniels*, four defendants, including Henry Daniels and Kevin Pelzer, were jointly tried

for the brutal kidnapping and murder of a sixteen-year-old boy. Each of the co-defendants made a statement to the police, and the statements were redacted by replacing the various co-defendants' names with the term "him," or the phrase "the other guy," and admitted at trial. *Id.* at 293. The trial court issued an instruction that the respective statements could only be used against the defendant who made the statement.

In seeking collateral post-conviction relief, Daniels and Pelzer argued they were entitled to new guilt-phase trials because their appellate counsel were ineffective for failing to raise on direct appeal a *Bruton* claim. Specifically, they claimed that the redacted statements were interlocking[11] and so powerfully incriminating that neither redaction, nor the trial court's instruction to the jury, was sufficient to protect their rights under *Bruton*. The Commonwealth, in response, maintained there can be no *Bruton* violation unless a redacted statement is incriminating on its face, without linkage to other evidence. Pelzer, in particular, asserted that, even when a jury is instructed not to consider a non-testifying co-defendant's interlocking confession against his co-defendant, "contextual implication" may result in a violation of a defendant's rights under the Confrontation Clause, as recognized in *Vazquez v. Wilson*, 550 F.3d 270, 278 (3rd Cir. 2008).

In affirming the lower court's denial of collateral relief under *Bruton*, we stated:

> Under governing precedent, the underlying *Bruton* claim is without merit, and thus the collateral claim focusing upon appellate counsel lacks merit. We need not engage the parties' reliance upon decisional law from other jurisdictions, including the Third Circuit U.S. Court of Appeals, because those cases do not control, . . . and there is ample decisional case law from this Court following and applying *Bruton*.
>
> The general rule in a joint trial of co-defendants is that the law presumes that the jury can follow an appropriate instruction,

[11] Confessions are considered "interlocking" when each defendant's account of the events substantially corroborates the account of the other. *Commonwealth v. Wharton*, 607 A.2d 710, 716 (Pa. 1992).

> which explains that evidence introduced with respect to only one defendant cannot be considered against other defendants. *Bruton* departed from this salutary general rule only by concluding that where there are "powerfully incriminating statements" admitted against a non-testifying co-defendant who stands side by side with the accused, such statements can be devastating as well as inherently suspect when they shift the blame to the accused. . . . Following *Bruton*, the U.S. Supreme Court has approved redaction and a limiting instruction as a means of eliminating the possible spillover prejudice arising from the admission of a non-testifying co-defendant's confession against that co-defendant at a joint trial. *Richardson v. Marsh*, 481 U.S. 200 . . . (1987). *Bruton* and its progeny establish Sixth Amendment norms governing state criminal trials, and this Court has had ample opportunity to consider and apply the precepts. In our own implementation of this federal law, we have explained that the challenged co-defendant's statement must be incriminating on its face and that redactions involving the substitution of neutral pronouns (such as those used here) instead of names or other obvious methods of deletion, do not obviously identify the other co-defendants. *Commonwealth v. Roney,* [79 A.3d 595, 624 (Pa. 2013)].[12]

104 A.3d at 294.

We concluded that, as Pelzer and Daniels identified "no specific redaction that reflects an obvious method of deletion that would have invited the jury to substitute one or another co-defendant's name," and the trial court issued an appropriate limiting instruction, counsel could not be deemed ineffective for failing to object to the method of redaction used by the trial court, which had been "specifically approved" by the United States Supreme Court and this Court. *Id.* at 294-95.

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[12] In *Roney*, a redacted version of a statement by Roney's non-testifying codefendant, which incriminated Roney, was read into evidence at trial; however, all mention of Roney and a third participant was removed, and the statement referred only to "other people." 79 A.3d at 625. Further, on appeal, Roney did not challenge the admissibility of the redacted statement under *Bruton*, but, rather, challenged the prosecutor's elicitation of testimony from the wife of a third co-defendant that the redacted statement implicated Roney.

Most recently, on June 23, 2023, during the pendency of Appellant's appeal, the United States Supreme Court issued its decision in *Samia v. United States*, *supra*. Therein, the petitioner, Adam Samia, was tried jointly with two other individuals, including Carl Stillwell, for offenses arising out of a murder-for-hire. Prior to trial, the government sought to introduce Stillwell's post-arrest confession, wherein he admitted that he was in the vehicle in which the victim was killed, but identified Samia as the shooter. As Stillwell was not going to testify at trial, the government proposed introducing the confession through the testimony of a Drug Enforcement Administration ("DEA") agent, who would present Stillwell's confession in a manner that eliminated Samia's name and excluded obvious indications of redaction. The federal district court granted the government's request, and, at trial, a DEA agent testified to the substance of Stillwell's confession, with all refences to Samia replaced with the term the "other person." Additionally, the district court instructed the jury that Stillwell's confession was only admissible against Stillwell and not against his co-defendants. All three individuals were convicted.

Samia appealed, asserting that the admission of Stillwell's confession violated his Confrontation Clause rights because other evidence presented at trial enabled the jury to immediately infer that the "other person" referred to in Stillwell's confession was, in fact, Samia. The Second Circuit Court of Appeals, relying on its prior decisions approving the practice of replacing a defendant's name in a non-testifying co-defendant's confession with a neutral noun or pronoun, affirmed.

On appeal, the high Court affirmed, holding that the admission of a co-defendant's redacted confession that (1) does not directly inculpate the defendant, and (2) is accompanied by a proper limiting instruction, does not violate the Confrontation Clause, even if the confession becomes incriminating when linked with other evidence introduced at trial. In a majority opinion written by Justice Thomas, the Court explained that the

admission of a non-testifying co-defendant's confession which has been altered to remove a defendant's name, when coupled with a limiting instruction, is consistent with historical evidentiary practice, and is "in accord with the law's broader assumption that jurors can be relied upon to follow the trial judge's instructions." *Id.* at 646.[13] The Court noted that *Bruton's* recognition of a "narrow exception," *id.* at 647, to this presumption applies only to confessions that directly implicate a defendant, and emphasized that, in *Richardson*, the Court declined to expand the *Bruton* rule to redacted confessions that inculpate a defendant when viewed in conjunction with other evidence.

Recognizing that the Court in *Gray* determined that a redacted confession that simply replaces a defendant's name with a blank space or other obvious sign of deletion is so similar to the unredacted statement in *Bruton* so as to require exclusion, the Court held that Stillwell's confession did not violate *Bruton* or *Gray*, and suggested that "it would not have been feasible to further modify Stillwell's confession to make it appear, as in *Richardson*, that he had acted alone." *Id.* at 653. The Court further opined:

> [E]diting the statement to exclude mention of the "other person" may have made it seem as though Stillwell and [the victim] were alone in the van at the time [the victim] was shot. Such a scenario may have led the jurors−who sat in judgment of both Samia and Stillwell−to conclude that Stillwell was the shooter, an obviously prejudicial result.

Id.

Finally, the Court determined that the "[t]he Confrontation Clause rule that Samia proposes would require federal and state trial courts to conduct extensive pretrial hearings to determine whether the jury could infer from the Government's case in its

[13] Chief Justice Roberts and Justices Alito, Gorsuch, and Kavanaugh joined the majority opinion. Justice Barrett authored an opinion concurring in part and concurring in the judgment. Justice Kagan authored a dissenting opinion, in which Justices Sotomayor and Jackson joined, and Justice Jackson authored a separate dissenting opinion.

entirety that the defendant had been named in an altered confession," an approach the Court suggested would be "burdensome" and "far from foolproof." *Id.* at 654 (citations omitted).

In rejecting Samia's argument that "the Government may choose to forgo use of the confession entirely, thereby avoiding the need for severance," the high Court explained that confessions are "essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Id.* at 655 (citation omitted). Further, the Court elaborated as to the additional benefits of joint trials:

> Joint trials have long "play[ed] a vital role in the criminal justice system," preserving government resources and allowing victims to avoid repeatedly reliving trauma. Further, joint trials encourage consistent verdicts and enable more accurate assessments of relative culpability. Also, separate trials "randomly favo[r] the last-tried defendants who have the advantage of knowing the prosecution's case beforehand."

Id. at 654 (citations omitted).

In the case *sub judice*, Appellant maintains that the trial court erred in admitting Wilson's redacted statement because it was "facially incriminating," in that it made "numerous direct references to Appellant's existence."[14] Appellant's Brief at 23. Specifically, Appellant highlights Wilson's statement that "[m]yself and my friend had clocked out of work about 10:00 to 11:00 p.m. on February 5th. We work at Jack's Firehouse." *Id.* at 24. Conceding that the jury would have to infer that Appellant was the friend referred to in the statement, *see id* at 24-25, Appellant argues that requiring a jury to infer such a connection does not render the reference neutral, and, indeed, he maintains that the above reference was unique. In this regard, Appellant suggests that

[14] As noted below, while Appellant initially characterizes Wilson's redacted statement as "facially incriminating," he appears to recognize that the jury would, to some extent, need to infer that he was the "friend" to which Wilson referred.

the reference was as facially incriminating as the example of a "red-haired, bearded, one-eyed man-with-a-limp" utilized by the high Court in *Gray*. *Id.* at 25.

Appellant further contends that Houston's testimony that both Appellant and Wilson were employees at Jack's Firehouse and were friends outside of work, which immediately preceded the reading of Wilson's redacted statement, "compelled the jury to conclude that [Wilson's] friend who worked at Jack's Firehouse" was, in fact, Appellant; thus, he maintains the jury was incapable of following the trial court's instruction that Wilson's redacted statement could be considered against only Wilson. *Id.* at 35. In this regard, Appellant compares this case to *United States v. Richards*, 241 F.3d 335, 346 (3d Cir. 2001), wherein the appellate court held that the admission of a redacted confession of the appellant's non-testifying co-defendant, in which the appellant's name was replaced with the phrase "my friend," violated *Bruton* because the reference strongly incriminated the appellant, and the implication was strengthened by the prosecutor's presentation of the testimony of appellant's mother, who testified that the appellant and his co-defendant were friends.

Appellant additionally avers that the Superior Court's application of a "blanket rule, derived from *Travers*, that any redaction that would require a juror to consider an additional piece of information outside the confession in order to identify the coconspirator being referred to" sufficiently protects the defendant's right to confrontation under *Richardson* is unreasonable. Appellant's Brief at 31.[15]

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[15] Several courts have interpreted our decision in *Travers* as establishing, or coming close to establishing, a bright-line rule. *See*, *e.g.*, *Washington v. Sec'y Pa. Dep't of Corrections*, 801 F.3d 160, 166 (3d Cir. 2015) (observing that the Pennsylvania Superior Court "applied a blanket rule, derived from [*Travers*], that any redaction that would require a require a juror to consider an additional piece of information outside the confession in order to identify the coconspirator being referred to automatically falls inside the realm of *Richardson*"); *Vazquez,* 550 F.3d at 281 (recognizing that this Court in *Travers* "came close to endorsing a bright-line rule that when terms like 'my boy,' the 'other guy,' or the (continued…)

Finally, Appellant contends that the high Court's recent decision in *Samia* "did not overrule" *Bruton*, *Richardson*, or *Gray*. Appellant's Supplemental Brief at 6. In so arguing, he notes that *Samia* "cited" *Gray,* which held that "certain obviously redacted confessions might be 'directly accusatory,' and thus fall within *Bruton's* rule;" and "inference pure and simple cannot make the critical difference" in determining whether a confession violates *Bruton*; rather, it depends on the kind of inference. *Id.* at 6-7. Thus, he maintains that, notwithstanding the United States Supreme Court's recent decision in *Samia*, the admission of Wilson's redacted statement violated his Confrontation Clause rights.

The Commonwealth, which, prior to the issuance of *Samia*, agreed with Appellant's position that the admission of Wilson's redacted statement violated his Confrontation Clause rights, albeit while arguing that its admission was harmless error, now avers that, under *Samia*, the admission of Wilson's redacted statement was proper. It maintains:

> The U.S. Supreme Court's decision in *Samia v. U.S.* requires this Court to affirm the Superior Court's determination that a facially neutral redaction, accompanied by an appropriate jury instruction, is sufficient to protect a defendant's rights under the Federal Confrontation Clause, regardless of how apparent it might be to a reasonable juror that the redacted language implicates a defendant who has no opportunity to confront the person who made the accusatory statement.

Commonwealth's Supplemental Brief at 9.

The Commonwealth further observes that "[t]he *Samia* ruling is essentially the same as this Court's ruling in [*Travers*]. While the Commonwealth's position is more akin to that of the dissenting justices [in *Samia*], the majority's holding in *Samia* is binding on this Court when interpreting the Federal Constitution's 6th Amendment protections." *Id.* at 9-10.

'other man' are used to substitute for an actual name in a statement admitted at trial there cannot be a *Bruton* violation").

To the extent there was any question as to the propriety of this Court's holding in *Travers* that a court's replacement of a defendant's name with the phrase "the other man" in a non-testifying co-defendant's statement, when combined with a cautionary jury instruction, sufficiently protects a defendant's Confrontation Clause rights, *Samia* has expressly answered that question: the Confrontation Clause is "not violated by the admission of a nontestifying codefendant's confession that did not *directly* inculpate the defendant and was subject to a proper limiting instruction." 599 U.S. at 655 (emphasis added). In fact, the Majority does not dispute this. *See* Majority Opinion at 23 (the Court in *Samia* "concluded that the Confrontation Clause is not violated by admission of a non-testifying codefendant's confession that does not directly inculpate the defendant and is subject to a proper limiting instruction"); *id.* ("The *Samia* opinion undoubtedly foreclosed arguments regarding confessions which inferentially incriminate a defendant."); *id*. ("There is no doubt that *Samia* narrowed the application of *Bruton* principles.").

However, despite acknowledging the impact of *Samia*, the majority explains that *Samia* "requires this Court to focus on *two* absolute prohibitions: a confession cannot directly incriminate the defendant or use obvious redactions," *id.* at 24 (emphasis added), and claims it "cannot ignore that the jury in this case was told that the statement was redacted in multiple ways." *Id.*[16] Specifically, the majority observes that the prosecutor, when questioning Detective Quinn about Wilson's statement, instructed the detective to read from the "typed version that was provided to you by me[.]" N.T., 10/27/16, at 185. The majority further highlights that "[t]he prosecutor also instructed the detective to read

[16] In *Commonwealth v. Cannon*, 22 A.3d 210 (Pa. 2011), we held that, although "a *Bruton* violation may arise when a prosecutor discloses to the jury that the co-defendant's statement has been redacted and *unequivocally* identifies the defendant as the individual whose name was removed," where the prosecutor did not directly inculpate the defendant, and the trial court issued appropriate cautionary instructions, no *Bruton* violation occurs. *Id.* at 219 (emphasis added).

from 'the printed version I gave you' of codefendant Carroll's statement and then had to correct the detective who had inadvertently read the statement as identifying 'my boyfriend[,]' thus identifying which friend was her boyfriend (Wilson) and which was not (Jones)." Majority Opinion at 24 (quoting N.T., 10/27/16, at 193-94).

Initially, I note that Appellant does not challenge the admission of Carroll's statement, only Wilson's. Thus, there is no basis for the Majority's discussion of the introduction of Carroll's redacted statement. Furthermore, no party, including Appellant, suggests that Detective Quinn broke the redaction by identifying Appellant as the "friend" to whom Wilson referred in his statement. Rather, the only stated basis for Appellant's challenge to the admission of Wilson's statement is his contention that Wilson's statement that he and Appellant were friends and worked together at Jack's Firehouse, when viewed *in combination with* Houston's prior testimony that Wilson and Appellant were both employees at Jack's Firehouse and were friends outside of work, was "tantamount to saying Appellant's name." Appellant's Brief at 38. As Appellant did not argue before the Superior Court, or in his petition for allowance of appeal to this Court, that his confrontation clause rights were violated as a result of any break in redaction, that issue has been waived, and, in my view, the majority errs in addressing it *sua sponte*.

Notwithstanding its *sua sponte* discussion of the above issue, the majority concludes that it "need not address whether telling the jury that the statements were redacted alone renders this a violation of the *Bruton* prohibition," because "other aspects of the statement inform our analysis." Majority Opinion at 24. In particular, the majority holds that Detective Quinn's testimony indicating that Wilson identified Appellant as "my friend" when Wilson was shown a still photograph from the SEPTA video footage, which also was shown to the jury, "directly incriminates [Appellant] and requires no inferences." *Id.* at 24-25. The majority compares Wilson's identification of Appellant to the description

of the "red-haired, bearded, one-eyed man-with-a-limp" which the high Court held was impermissible in *Gray*. In the majority's view, Wilson's statement "was not meaningfully different from handing jurors a statement that substituted [Appellant's] picture for his name." Majority Opinion at 25.

Again, however, I note that Appellant has not argued, before the lower courts or this Court, that Wilson's identification of Appellant as "my friend" from the SEPTA photograph directly incriminated him. Thus, that argument is waived, and, in my view, the majority improperly raises it *sua sponte*.

In summary, I recognize that, through Houston's testimony, it would have required the barest of inferences for the jury to conclude that the "friend" referred to in Wilson's statement was Appellant. However, based on the Supreme Court's most recent decision in *Samia*, because Wilson's redacted statement did not *directly* implicate Appellant by identifying him by name, as was the case in *Bruton*, nor contain obvious deletions, such as blank spaces or the word "deleted," as in *Gray*, and because the trial court issued a proper limiting instruction to the jury, I am constrained to conclude that the admission of Wilson's redacted statement did not violate Appellant's rights under the Confrontation Clause.

For these reasons, I dissent.

Justices Dougherty and Mundy join this dissenting opinion.