UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

ARTHUR JOHNSON **Petitioner-Plaintiff,** **v.** **ROBERT GILMORE,** Superintendant **DISTRICT ATTORNEY'S OFFICE** **Defendant-Respondent.**	)	**2:16-cv-04661-BMS**

Amended 2254 Petition

1. **Arthur Johnson**, through counsel, **Craig M. Cooley**, respectfully submits his *Amended 2254 Petition*, which is presented in good faith and based on the following facts and points of authority.

> **Claim #1: The trial court erred when it admitted Tyrone Wright's redacted statement he gave to Detective Burns because Wright's statement was insufficiently redacted making it patently obvious Mr. Johnson was the other individual referred to in Wright's statement, violating Mr. Johnson's confrontation and due process rights. The trial court's error was prejudicial because there is a reasonable likelihood Wright's insufficiently redacted statement may have affected the jury's decision to convict Mr. Johnson of first-degree murder. The state courts' rejection of Mr. Johnson's *Bruton* claim contravenes clearly-established U.S. Supreme Court case law. Based on the facts presented to the state courts, no fairminded jurist**

would have rejected Mr. Johnson's *Bruton* claim. Mr. Johnson is entitled to a writ of habeas corpus. U.S. Const. admts. V, VI, XIV.

A. Facts in Support of *Bruton* Claim

2. During the prosecutor's opening statements, she made it crystal clear to the jury that only three men were involved in Donnie Skipworth's murder: Arthur Johnson, Tyrone Wright, and Abbas Parker:

> The evidence will show that Tyrone Wright picked up and chauffeured Arthur Johnson and their accomplice, Abbas Parker, knowing they were armed, knowing they wanted to shoot and kill Donnie Skipworth, and that they laid in wait with the car running around the corner so that they could make their escape.
>
> The evidence will show that Arthur Johnson armed himself with a .9-millimeter handgun... and he fired one, two, three, four, five, six shots into Donnie Skipworth's body... You will *hear* and you will see how Arthur Johnson struck Donnie Skipworth in the chest... [.]
>
> ...
>
> You will hear evidence of how Tyrone Wright picked [Donnie Skipworth] up in a white Pontiac mini van; how [Wright] picked not only Arthur Johnson up armed, announcing his intentions to go shoot and kill Donnie, but how [Wright] also picked up a second individual by the name Abbas Parker; Baz, as they call him. [Baz] was also armed. [Baz] also announced his intention to go along with Art Johnson and shoot and kill Donnie Skipworth.
>
> They went around and parked the car at 28th and Thompson. Tyrone remained with the car still running until he heard the shots, and only Abbas Parker made it back to his van. He took off. Art Johnson ran towards 29th Street not to be seen of or heard of again for awhile.

...

> Detectives continued to work the case and eventually were lead to the white mini van that was identified by firefighters who watched it take off after a man armed with a gun jumped in it and fled from the scene. Eventually, the investigation lead [sic] them to Tyrone Wright, and when *Tyrone Wright was interviewed, he gave a full confession*; he was involved in this senseless tragedy.[1]

3. Tyrone Wright's trial counsel was Gary Server. During Server's opening statements, he discussed the circumstances leading to Wright's confession. Server alleged Detective Burns took an initial statement from Wright, but when Burns sat down to type the statement, he realized he needed more information in the statement before he could properly charge Wright with first-degree murder. Wright's various statements at this point, according to Server, had mentioned nothing about Arthur Johnson and Abbas Parker. It is at this point, however, Server informed the jury that Wright ultimately told detectives that Arthur Johnson and Abbas Parker "went there to shoot" Donnie Skipworth:

> And you are also going to hear that when it came time for the written statement that Detective Burns neatly typed it out on the word processor and that he purports to give it to Mr. Wright to sign, but Detective Burn didn't have precisely the information about the prior knowledge in that statement that he wanted, that, I would submit, he needed in order to charge Mr. Wright, and so at that point, miraculously, after being in custody for a day, Mr. Wright suddenly picks up the pen and *writes down something to the effect of, oh, yes, I know*

[1] NT, Trial, 1/28/2010, pp. 23, 24, 31.

> *that Arthur and Abbas went there to shoot Donnie Skipworth.*[2]

4. After asking for a sidebar, Mr. Johnson's trial attorney, Joseph Santaguida, immediately moved for a mistrial: "[Server] said that Tyrone gave a statement and he said that Abbas and Arthur Johnson did this, which is not going to be allowed because the statement is redacted, which is the reason I didn't want them tried together."[3] The prosecutor objected and asked Server "to try to cure" the *Bruton* problem created by, what Server claimed, was "inadvertent error."[4]

5. The trial court denied the mistrial request and told Server he could "correct" himself if he was "in error." Server replied,

> I am just going to say that--I am not going to say anything about a mistake. I am just going to say that it is alleged that Mr. Wright's statement said that Abbas and another guy were the shooters, and that you are going to have to determine something to the effect that was correct.[5]

6. After the sidebar, the trial court told the jury Server "inadvertently misspoke at some point during his statements," that it was "allow[ing] him an opportunity to clarify and correct" his statements, and that it was "to ignore the last statements that [Server] made."[6] Server re-addressed the jury. He mentioned Wright's

[2] NT, Trial, 1/28/2010, pp. 55-56.
[3] NT, Trial, 1/28/2010, p. 56.
[4] NT, Trial, 1/28/2010, pp. 56, 57.
[5] NT, Trial, 1/28/2010, p. 57.
[6] NT, Trial, 1/28/2010, p. 58.

confession again and how Wright allegedly told detectives that him, Abbas Parker, "and another guy" conspired to kill, and in fact killed, Skipworth:

> As I was discussing, it is the totality of the circumstances of the statement that are one of the issues that you have to decide in this case. You will have to decide not only whether the statement was voluntary and knowing and authentic, meaning that those are Tyrone Wright's words, but you will have to decide upon the veracity of the statement; that is, whether Tyrone's alleged purported statement that Abbas and *another guy* were involved in this with him and that he knew that Abbas and another guy went there to shoot Donnie Skipworth is true and accurate.[7]

7. The Commonwealth presented Aaron Taylor. The Commonwealth alleged Taylor gave a statement on June 25, 2008 alleging that Mr. Johnson bragged to him (Taylor) that he (Johnson) shot and killed Skipworth in retaliation for Skipworth shooting and killing Mr. Johnson's friend, Darnell Shaw, two years earlier on Newkirk Street.[8] Once on the stand, though, Taylor said he was "forced" to sign the June 25, 2008 statement and that the statement was false because he had not seen Mr. Johnson in years.[9] After Taylor testified, the prosecutor introduced, as exhibit C-40, a MySpace page photograph of Abbas Parker and Mr. Johnson.

8. After the prosecutor introduced the MySpace page photograph, Server objected to the inclusion of Abbas Parker's name in Wright's altered statement:

[7] NT, Trial, 1/28/2010, p. 58.
[8] NT, Trial, 1/28/2010, p. 87.
[9] NT, Trial, 1/28/2010, pp. 69-70, 87, 92, 96, 100.

> The other thing is now Ms. Wechsler (the prosecutor) indicates to use she is going to put this type of evidence, she has already got Mr. Parker's picture and name before the jury through [Lt. Hutchins], and this picture purports to show Mr. Parker and Mr. Johnson – that middle guy, I don't know who that is. I am hoping we will just agree that that is not Mr. Wright, but perhaps because of evidence like this, and by putting in the name Abbas Parker in [Wright's] statement, what that really does is that destroys any *Bruton* [sic] protections that Arthur Johnson may normally realize because the jury is going to see from this photograph and extrapolate from [Wright's] statement that the other guy is Mr. Johnson. So I am just wondering if we shouldn't be voicing an objection to the name Abbas Parker appearing in my client's statement, and I think Mr. Santaguida has an objection to this photograph and any inference or arguments that could be made from [Wright's] statement or anything else.[10]

9. Santiguida joined the objection and placed his own objections on the record:

> Judge, that is an excellent objection. I would like to add a couple things.
>
> Number one, I don't see how it assists the Commonwealth in any way by using one of the names and blank. [The prosecutor's] purpose to introduce that statement is against Mr. Wright. So if the statement was read, I drove A and B... that is the purpose of that statement, to say that his complicity – what is the difference who drove? And then, Judge, it renders moot any protection by blanking his name. They have already shown that Abbas Parker's name is in the case. I don't know where they got this [photograph from]. I don't know what it is. It is a photograph. I don't know where they got it. this is the first time I have seen it, but it is a photograph of – I don't even know who this guy is. I guess they are going to say it is Abbas Parker and I am

[10] NT, Trial, 2/1/2010, p. 119.

> not so sure this is the defendant, but let's assume for argument it is. *So if they show these two guys were friendly in December of 2007, now they are going to introduce the statement by Wright I drove Abbas Parker and B. Dah. Who else can they be considering?* So it would render any protection of the *Bruten* [sic] protection. Either [the prosecutor] has to leave both out for any reason. In other words, why can't she just say... I drove two people or I drove A and B. How does it help [the prosecution] that one of the names is mentioned?
>
> ....
>
> And that far outweighs the prejudice. I mean, obviously, you can see the prejudice to Mr. Johnson is extremely... high. So [the prosecutor] being able to use the word Abbas Parker, I don't see how that strengthens her case in any way[.][11]

10. The prosecutor countered, arguing there was no *Bruton* issue because Mr. Johnson did not have a Sixth Amendment right to confront Wright:

> As to this *Bruten* [sic] issue, there is no *Bruten* [sic] issue because *Bruten* [sic] is invoked by a defendant when there is a sixth amendment right to confrontation. That is not at play in this case because Art Johnson doesn't have the right to confront Tyrone Wright, who has made the statement against him, and so the statement is redacted.[12]

11. The prosecutor also argued that Aaron Taylor–or at least his statement to detectives–connected Abbas Parker with Mr. Johnson.[13]

12. Santiguida argued the prosecutor mischaracterized Taylor's testimony because Taylor never placed Abbas Parker and Mr. Johnson together:

[11] NT, Trial, 2/1/2010, pp. 120-121.
[12] NT, Trial, 2/1/2010, p. 122.
[13] NT, Trial, 2/1/2010, p. 122.

> The decision that is made is Taylor, in his statement, he never puts Arthur Johnson and Abbas Parker together. Nobody puts them together committing this crime. So how [the prosecutor] is trying to do it is by using this [MySpace] photograph [with Abbas and Mr. Johnson pictured together] to show that these two guys are friendly, know each other, and then using the statement of Wright, where one guy is mentioned and they are using blank for the other person.
>
> ...
>
> It makes it moot. It makes deleting Arthur Johnson's name moot by allowing this [MySpace] photograph and then saying Abbas Parker and blank. Who else would [Wright] be talking about? No instruction, Judge, you could give is strong enough.[14]

13. The trial court denied Santaguida's motion.[15]

14. The prosecutor called Detectives Burns, who interviewed Wright, to read Wright's statement, question-for-question, into the record.

a. Wright's answers to Detective Burns' questions informed the jury he had to have known the "other guy's" name because Wright had known the "other guy" since middle school:

> Question: Do you know the decedent, Donnie Skipworth?
>
> Answer: Yes. I went to school with his brother, Dion.
>
> Question: Were you present when Donnie Skipworth was shot and killed?
>
> Answer: No. I told you that I was around the corner of 28th and Thompson Street.

[14] NT, Trial, 2/1/2010, pp. 125, 126.
[15] NT, Trial, 2/1/2010, p. 126.

> Question: Do you know who shot and killed Donnie Skipworth?
>
> Answer: Yeah. It was Baz and some other guy.
>
> Question: How long have you know that other guy?
>
> Answer: *Since middle school*. I know both of them since middle school.
>
> Question: Do you know Baz's full name?
>
> Answer: His last name is Parker.
>
> Question: I am showing you two photographs of *black males*. Do you recognize either of these two males?
>
> Answer: Yeah. This is Baz and this is the other guy.
>
> Question: Are these the two males that shot and killed Donnie Skipworth?
>
> Answer: Yes.[16]

b. When Burns asked Wright to describe the events leading to Skipworth's murder, Wright told him:

> Yeah. That night, me and Baz were driving around in my van, the white one that you guys got. We were down Broad Street driving around looking for girls coming out of the clubs. Then I drove back to 29th Street; that is where he be at. I was driving down Master Street and I seen *some guy*. He was walking down Master right by Newkirk. He flagged us down and I pulled over. Then he opened up my side door and was standing there talking to us. He [*i.e.*, the other guy] said that he seen Donnie

[16] NT, Trial, 2/3/2010, pp. 53-54.

> [Skipworth] up on Thompson Street and he was going to go up and talk to him. Baz was like, I'm a [sic] walk up with you. Baz got out of the van and spoke with [the other guy] and then [the other guy] says to me, yoh [sic], meet us around on 28th and Thompson Street. Then he and Baz walked up Newkirk and I pulled off. I drove up Dover Street to Jefferson and then down 28th Street and pulled over at Thompson, across the street from the firehouse. I shut the engine off and waited. I was probably there for a minute or two when I heard the gunshots coming from around the corner. As soon as I heard the shots, I started the car back up. I thought maybe he or Baz had got shot and I was about to get out of the car, but then I seen Baz come running around the corner. He jumps in the van and starts yelling, we out, we out, we out, pull off. I pulled off and drove down 28th Street.[17]

c. When Burns asked, "Did Baz tell you what happened when he got in the van?" Wright replied, "I asked him what happened and he was like, Donnie got shot, the other guy shot Donnie."[18] When Burns asked, "Did Baz tell you that he shot Donnie?" Wright said, "No. He had a gun, but all he said was that the other guy shot Donnie."[19]

d. Burns then asked Wright if "the other guy had a gun" that night. Wright's response informed the jury he had to have known the "other guy" because Wright "always" saw the "other guy" with the black semiautomatic handgun:

> Yeah. I seen him with it right before the shooting down on Master Street. When I pulled up to him on Master, he was standing at my sliding door and had his hands up on

[17] NT, Trial, 2/3/2010, pp. 54-55.
[18] NT, Trial, 2/3/2010, p. 56.
[19] NT, Trial, 2/3/2010, p. 56.

> the roof of the van talking. He had the gun stuck in his pants and I could see it. It was a black semi auto with lines on the back of the grip, like grooves cut in the back of the grip. He *always had that gun*.[20]

e. Burns asked Wright why "the other guy" shot Skipworth. Wright said he did not know the motive the night of the shooting, but said he learned of the motive the next day:

> The whole neighborhood was talking about it. Everyone was saying that the other guy shot the boy over Donnie killing some boy named Nel [*i.e.*, Darnell] two years ago on Newkirk Street. Nel was supposed to the [the other guy's] boy. Everybody was saying that the cops were looking for a white van; that's why I didn't drive my van after that. You guys found my van right where I left it that night.[21]

f. At the end of Wright's interrogation, after Wright had signed and initialed the four-page statement Burns had typed, Burns asked Wright if he "got the whole statement out[.]"[22] At this point, according to Burns, Wright handwrote the following addendum to his typed statement, "[E]verything is the truth except the other part about the other guy saying he is going to talk to Donnie. He really said he was going to try to shoot at Donnie."[23]

[20] NT, Trial, 2/3/2010, p. 57.
[21] NT, Trial, 2/3/2010, p. 58.
[22] NT, Trial, 2/3/2010, p. 60.
[23] NT, Trial, 2/3/2010, p. 61.

g. The prosecutor then asked Burns a series of questions that informed the jury Wright knew the "other guy's" name because, during his interrogation, Wright wrote the "other guy's" name under the "other guy's" photograph:

> Q. Turning to what is page seven, just briefly, is it a picture of someone that the defendant later identifies?
>
> A. Yes.
>
> Q. The defendant, Tyrone Wright, identifies?
>
> A. Yes.
>
> Q. Did [Wright] put his signature on the picture?
>
> A. Yes, he did.
>
> Q. *Did he write the person's name in his handwriting?*
>
> A. *Yes*.
>
> Q. Turning to the next page, which is page eight, is there a picture of someone?
>
> A. Yes.
>
> Q. Whose picture is that?
>
> A. According to my copy, I believe it might be backwards. I have it as the decedent. I believe it actually was in reverse.
>
> Q. Put Donnie's first?
>
> A. Yes.

> Q. Does [Wright] put his signature underneath Donnie Skipworth's picture?
>
> A. Yes.
>
> Q. Did [Wright] also write Donnie's first name on the picture?
>
> A. Yes.
>
> Q. Turning to what is page nine, is there Abbas Parker's picture?
>
> A. There is.
>
> Q. Is [Wright's] signature under Abbas Parker's picture?
>
> A. Yes.
>
> Q. Did [Wright] also write the name at the top?
>
> A. He wrote his first name at the top, yes.[24]

h. During cross-examination, Burns explained again how Wright knew that Parker and the other guy had guns and were planning to shoot Skipworth:

> And if could offer it in a context about how it came when he was going through his statement, that Mr. Wright knew when Baz had come back to the van, according to his statement, that Baz had a gun. He knew that the other guy, prior to the other guy and Baz leaving the van, that the other guy had a gun. Based on that, that is what prompted our conversation; like, we want to get the whole truth out, like did you know what was going to happen. He acknowledged that he knew a shooting was going to go down as opposed to them going up to talk to Donnie, that was the acknowledgement, and based on

[24] NT, Trial, 2/3/2010, pp. 62-63.

> that he, he meaning Mr. Wright, was asked to add that, make that correction, and he was asked basically to put it in his own words, which he did.[25]

i. On redirect-examination, the prosecutor asked Burns a series of questions that *again* informed the jury Wright knew the "other guy's" name:

> Q. You said that [Wright] was quick to give up one person; it that right?
>
> A. That's right.
>
> Q. And not so quick to give up another?
>
> A. Correct.
>
> Q. Who was he quick to give up; the other guy or Baz?
>
> A. He came around with Baz's name first *and then came around with the name of the other guy*.
>
> Q. You will agree with me–and he also identified them by photograph?
>
> A. He did.
>
> Q. And you will agree with me that of the two, Baz and the other guy, it would appear that the other guy is the worse, because –
>
> Mr. Santaguida: Objection.
>
> The Court: Sustained.[26]

[25] NT, Trial, 2/3/2010, pp. 110-111.
[26] NT, Trial, 2/3/2010, p. 211.

15. After Burns' testimony, Santaguida moved for a mistrial based on the prosecutor's attempt to paint "the other guy" as "the worse" of the two. Santaguida argued that having to object to these improper statements put him and Mr. Johnson in a catch-22:

> Judge, [the prosecutor's]... inappropriate questions about some of the things said in the statement forces me to make an objection, puts me in the spot, where I am objecting. Why I am objecting to them, I have to because they are prejudicial. They are saying which one of the two guys, if they surmise that the person they are talking about... is Mr. Johnson, puts me in a position where I have to object and it is defeating the whole purpose of deleting his name from the statement.
>
> ...
>
> I shouldn't have had to object, that is my – by my objecting, I can't win either way. If I don't object, something detrimental gets in. If I do object, they are saying why is he objecting, it doesn't apply to Johnson.[27]

16. The trial court denied Santaguida's mistrial motion.[28]

17. During closing arguments, the prosecutor urged the jury to use its "common sense" when it considered the evidence:

> Ladies and gentlemen, there are no, make no mistakes about it, there are no coincidences in a murder case. There are none; there are none. And for defense counsel to pick apart and piecemeal all the facts and the evidence, you need to keep your wits about you and your common sense as you deliberate upon the facts and the

[27] NT, Trial, 2/3/2010, pp. 220-221.
[28] NT, Trial, 2/3/2010, p. 221.

> evidence that you received right here from the witness stand…[.][29]

18. The prosecutor then repeatedly told the jury Mr. Johnson was the gunman who shot and killed Donnie Skipworth:

> It is the truth. It is the truth of the motive and the reasons why Donnie Skipworth, when he went back to his neighborhood and when he went back to hustling and when he was there, for no lack of a better word, for show again in all his glory running that block, that a kid like Art Johnson, whose family had been done wrong by Donnie Skipworth, would get made enough to go back around and shoot to kill him.[30]

19. The prosecutor, more importantly, referenced Tyrone Wright's confession as evidence in support of Mr. Johnson's guilt, prompting Santaguida to object:

> Ms. Weschler: There is no coincidence in a murder case and there is no coincidence when you hear or Detective Burns heard from Tyrone Wright on May 9, only five days after Donnie Skipworth's death, on May 9, that the whole neighborhood was talking about it, and everyone was saying that the other guy shot Donnie –
>
> Mr. Santaguida: Judge, I am going to ask to see you at sidebar.
>
> Ms. Weschler: Over killing some boy named Nell –
>
> The Court: Overruled, counsel. I will hold it under advisement.

[29] NT, Trial, 2/4/2010, p. 107.
[30] NT, Trial, 2/4/2010, p. 111.

> Ms. Weschler: -- that he shot the boy over Donnie killing some boy named Dell two years ago on Newkirk Street.[31]

20. After the trial court overruled Santaguida's objection, the prosecutor referenced Wright's confession again in support of Mr. Johnson's guilt:

> And so what do we know about this killing? What do we know? Well, we know that Tyrone Wright picked up his friend, Abbas Parker, and that they rolled down Master Street and saw some guy. We know that that guy was carrying, we even know that he was carrying because Tyrone was kind enough to explain in detail the gun that that guy had, and he described it as a black semi auto with lines on the back of the grip… [.]
>
> …
>
> [Wright] told us that that other guy armed himself with this gun and that they went around to the 1300 block of Newkirk. [The other guy] said meet me at 28th Street and Thompson… and that is what Tyrone Wright did. Not a coincidence that Dion Skipworth says when he sees Art Johnson walk up the street… [he sees] a semiautomatic in his hand… It is no coincidence. Abbas Parker, a person named by Tyrone Wright in his statement, it is no coincidence that he is a friend of Art Johnson[.][32]

21. When the prosecutor referenced Wright's confession once more, Santaguida again objected:

> What else is consistent? Well, we know that the other guy had a gun with the lines on the back of the grip with the grooves that were in the back, and [the firearms examiner] told you, and the physical evidence, you are right, can't lie; everything was .9-millimeter. And the physical evidence matches not only what Dion Skipworth sees, but that Tyrone tells.

[31] NT, Trial, 2/4/2010, pp. 111-112.
[32] NT, Trial, 2/4/2010, pp. 113-114.

> .... And so you know that Dion Skipworth is being truthful and honest and consistent about the circumstances of his brother's killing because Tyrone Wright gave us who had the revolver; Tyrone Wright tells us that it was Abbas Parker with a revolver out there. And Tyrone Wright tells us that the other one shot. [Wright] said, Baz said the other guy shot, the other guy shot Donnie What does he say?
>
> Mr. Santaguida: Judge, I have another objection.
>
> The Court: I will hold it under advisement, counsel.[33]

22. The prosecutor then read, word-for-word, from Wright's statement:

> Ms. Wechsler: Did Baz tell you what happened when he got in the van?
>
> Answer: I asked him what happened and he was like Donnie got shot. The other guy shot Donnie.
>
> Question: Did he tell you how he shot Donnie?
>
> Answer: No.
>
> Question: Did Bax tell you that he shot Donnie?
>
> Answer: No. He had a gun, but all he said was, the other guy shot Donnie.
>
> ...
>
> Question: Do you know where the other guy went after the shooting?

[33] NT, Trial, 2/4/2010, pp. 119-120.

Answer: Baz told me he ran toward 29th and Thompson, but I haven't seen him since.

And where is that, ladies and gentlemen?

It is away, it is away from the decedent in the corner; it is away and around–away from – it is way and away at the property line from where Dion Skipworth went, because Dion told you he left and he went to 1322. He ran away and after the shooting, the main shooting, when after those gunshots fire started, he ran. He didn't have an opportunity to see a guy who maybe left off on. He then ran back that way and got back in the car.

Question: Did you know if the other guy had a gun that night?

Answer: Yes. I seen him with it right before the shooting down on Master Street. And when I pulled up to him on Master, he was standing at my sliding door and he had his hands on the roof of the van talking. He had the gun stuck in his pants and I could see it. It was a black semiautomatic with lines on the back of the grip, live grooves cut in the back of the grip. He *always* has that gun.

Question: What did you find out about it the next day?

Answer: The whole neighborhood was talking about it. Everyone was saying that the other guy shot the boy over Donnie killing some boy named Nell two years ago. Nell was supposed to have been his boy… [.]

> Detective Burns took a statement from Tyrone Wright on May 9 and I don't think it is too far afoul to say that Burns, your main focus wasn't getting the getaway driver, he wanted shooters. He is a homicide detective and lest we all forget that things were a little inconvenient for Tyrone Wright, there is a dead man on the 1300 block of North Newkirk Street in your city, ladies and gentlemen.[34]

23. When the prosecutor discussed the charges, particularly first-degree murder, she argued:

> … First degree murder requires specific intent. You have to specifically intend to kill someone… [with] premeditation. What do you know from the facts and circumstances here? You know that Art Johnson premeditated on this murder. You know it because he carried a gun on his person. He walked around to where Donnie Skipworth was merely standing… and [Mr. Johnson] took someone else with him that was also armed… [.][35]

24. When the prosecutor discussed the conspiracy charge against Tyrone Wright she mentioned Mr. Johnson's name as the "other guy":

> … But Tyrone Wright knew and helped and promoted and facilitated Abbas Parker and Arthur Johnson going around there and shooting to kill Donnie Skipworth. Why. [Wright] tells you in his very own statement. He tells you that he knows that *Art is going to go around* – excuse me – he knows Abbas says he was going. [Wright] said they told me to meet them on 28th and Thompson. [Wright] did that, knowing that the other guy was armed with that semiautomatic weapon, he did that. [Wright] went around to 28th. [Wright] knew they

[34] NT, Trial, 2/4/2010, pp. 120-122.
[35] NT, Trial, 2/4/2010, p. 137.

> were going to walk up there and he left that car idling, so that he could cart them off after it occurred.[36]

25. The prosecutor then argued that Tyrone Wright had to have "conspired" with Mr. Johnson because he lied twice to Detective Burns during his interrogation:

> How else do you know [Tyrone Wright] was in agreement? Well, he walked into Homicide and to Jim Burns' face, he lied two different ways about having anything to do with that car, about having anything to do with it and knowing anything about Donnie Skipworth. So what does that tell you? He knows he has something to hide. He was in agreement and he conspired with [Mr. Johnson] to go carry out the shooting and kill Donnie Skipworth.[37]

26. After the prosecutor ended her closing, Santaguida expounded upon the objections he made during the prosecutor's closing arguments:

> Judge, [the prosecutor] must have made five references in speaking about Mr. Wright's statement referring to Mr. Johnson. Twice, she used the name Art. She was reading the statement and twice she said Art and then... corrected herself. But on at least three occasions when she was referring to what [Wright] said, then she just mentioned Mr. Johnson's name. She said he drove him, then Art Johnson put two bullets, three bullets, so there was no other way, no other inference that the jury can take from that. They probably know that, anyway, but I mean, certainly, it is clearer now.[38]

27. When the trial court disagreed, Santaguida argued:

[36] NT, Trial, 2/4/2010, pp. 140-141.
[37] NT, Trial, 2/4/2010, p. 142.
[38] NT, Trial, 2/4/2010, p. 145.

> Twice, she did. Twice, she did. Twice, she said. First, she looked at it and said then Art, then the other guy. So twice, she did mention his first name, but on the other occasions, the only inference you could make, what she was saying is the person she was talking about was Mr. Johnson.[39]

28. The prosecutor denied Santaguida's allegations and the trial court denied Santaguida's mistrial request.[40]

29. During jury instructions, the trial court gave the following instruction regarding Tyrone Wright's statement:

> I will no instruct you in more detail about the rules which you must following in dealing with [Tyrone Wright's] statement. First and foremost, one of the rules that restricts you despite the evidence offered to show that Defendant Wright made a concerning the crime charged is as follows; a 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 Wright if you believe he made the statement voluntarily. You may not, however, consider the statement as evidence against Defendant Johnson. You must not use the statement in any way against Defendant Johnson.[41]

30. During jury instructions, the trial court also spent a great deal of time explaining and contrasting conspiratorial liability with accomplice liability.[42] The gist of the instructions was that Tyrone Wright either conspired with Mr. Johnson

[39] NT, Trial, 2/4/2010, p. 146.
[40] NT, Trial, 2/4/2010, pp. 151-152.
[41] NT, Trial, 2/4/2010, pp. 169-170.
[42] NT, Trial, 2/4/2010, pp. 179-187.

to specifically kill Donnie Skipworth or that Wright assisted or helped Mr. Johnson in the killing of Donnie Skipworth.

31. Jury deliberations began on February 4, 2010 and continued for the next eight days,-February 5th, 8th, 9th, 10th, 11th, and 12th. During deliberations, the jury asked two questions regarding Tyrone Wright's statement. On February 5, 2010, at 3:00 p.m., the jury sent this note to the trial court, "The jurors request to see Tyrone Wright's Statement (C-71)."[43] The trial court wrote back and said, "Tyrone Wright's statement (C-71) will not be sent to you. You must rely on your recollection."[44]

32. On February 9, 2010, at 11:40 a.m., the jury sent the following note informing the trial court it had reached a unanimous verdict regarding Tyrone Wright, but needed more time to deliberate the charges against Mr. Johnson:

> Your Honor,
>
> At this point, we the jurors have reached a unanimous verdict with regard to the charges against Tyrone Wright. After considerable deliberation, we have been unable to reach a unanimous verdict on the charges against Arthur Johnson. We respectfully request any suggestions or guidance you can provide us at this time.[45]

33. The jury convicted Tyrone Wright of third-degree murder, but acquitted him of conspiracy.

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[43] Ex. 1.
[44] Ex. 1.
[45] Ex. 2.

34. On February 12, 2010, at 12:30 p.m., the jury sent their second note regarding Tyrone Wright's statement and the prosecutor's closing arguments where she told the jury to use its common sense when reviewing the Commonwealth's evidence, including Tyrone Wright's statement:

> Your Honor,
>
> We the jurors have a question about your instruction regarding Tyrone Wright's statement. You had instructed us that Tyrone Wright's statement may only be used against Tyrone Wright and not against Arthur Johnson. We also recall the Commonwealth saying that we are not being asked to turn off our common sense. We would like to confirm that in order to comply with your instruction, we must not make any inferences stemming from the statement, or use the statement to help draw a more complete picture of the alleged crime in our minds when considering the case against Arthur Johnson. Our understanding is that our instruction is to push the statement from our minds and pretend it never existed when we are considering the case against Mr. Johnson. Is this correct?[46]

35. Shortly after the trial court reinstructed the jury regarding Tyrone Wright's statement, the jury convicted Mr. Johnson of first-degree murder and possession of an instrument of crime.

B. AEDPA's Applicability, Requirements, and Standards

36. AEDPA's requirements reflect a "presumption that state courts know and follow the law," *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002); *accord Burt v. Titlow*, 134 S.Ct. 10, 15 (2013), and AEDPA "is designed to confirm that state courts are the

[46] Ex. 3.

principal forum for asserting constitutional challenges to state convictions." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). AEDPA, therefore, demands that "state-court decisions be given the benefit of the doubt[.]" *Felkner v. Jackson*, 562 U.S. 594, 598 (2011); *accord Woods v. Etherton*, 136 S. Ct. 1149, 1153 (2016).

37. AEDPA "create[d] an independent, high standard to be met before a federal court may issue a writ of habeas corpus to set aside state-court rulings." *Uttecht v. Brown*, 551 U.S. 1, 10 (2007). AEDPA's purpose "is to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction." *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (quotations and citation omitted). In the end, AEDPA's "standard is demanding but not insatiable," *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005), because "deference does not imply abandonment or abdication of judicial review" nor does it "by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

1. Timeliness

38. Under 28 U.S.C. § 2244(d)(1)(A), once a state prisoner's conviction becomes final, he has 1-year to file his 2254 petition. *Jimenez v. Quarterman*, 555 U.S. 113, 114 (2009). A state conviction becomes final "when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of

certiorari has elapsed or a timely filed petition has been finally denied." *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994).

39. Under 28 U.S.C. § 2244(d)(2), if a defendant "properly filed" his post-conviction petition within 1-year of his conviction becoming final, AEDPA's 1-year limitations period is tolled. Tolling "provides both litigants and States with an opportunity to resolve objections at the state level, potentially obviating the need for a litigant to resort to federal court." *Wall v. Kholi*, 131 S.Ct. 1278, 1288 (2011). A timely filed post-conviction petition is considered "properly filed" under § 2244(d)(2). *Pace v. DiGuglielmo*, 544 U.S. 408, 413 (2005). AEDPA's 1-year limitation period is "tolled only while state courts review the [post-conviction] application," meaning if a post-conviction petitioner files a certiorari petition with the Supreme Court, the time between the certiorari petition's filing and denial is not tolled because the Supreme Court is not a "state court." *Lawrence v. Florida*, 549 U.S. 327, 332 (2007).

2. Exhaustion and Fair Presentation

40. Before seeking § 2254 relief, a state prisoner must exhaust available state remedies, 28 U.S.C. § 2254(b)(1)(A), which affords the State the "opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (quoting *Picard v. Connor*, 404 U.S. 270, 275 (1971)).

The petitioner bears the burden of demonstrating he exhausted all available state remedies. *O'Halloran v Ryan*, 835 F.2d 506, 508 (3d Cir. 1987).

41. To provide the State with the necessary "opportunity," the prisoner must "fairly present" his claims in each appropriate state court, including a discretionary state court (*e.g.*, state supreme court). *Duncan v. Henry*, 513 U.S. at 365-366; *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). "[O]rdinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so." *Baldwin v. Reese*, 541 U.S. 27, 32 (2004).

42. A petitioner can fairly present his claims through: "(a) reliance on pertinent federal cases; (b) reliance on state cases employing constitutional analysis in like fact situations; (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution; and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation." *Nara v. Frank*, 488 F.3d 187, 197-98 (3d Cir. 2007).

3. Merit Analysis of Exhausted Claims

43. A federal court may *not* grant relief with respect to any federal claim that was *adjudicated on the merits* in state court, *unless* the state court's adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1) & (2).

a. Adjudicated on the Merits

44. Under the "adjudicated on the merits" prong, "a judgment is normally said to have been rendered 'on the merits' only if it was 'delivered after the court… heard and *evaluated* the evidence and the parties' substantive arguments." *Johnson v. Williams*, 133 S.Ct. 1088, 1097 (2013) (citation omitted) (emphasis in original). Moreover, "if the state-law rule subsumes the federal standard–that is, if it is at least as protective as the federal standard–then the federal claim may be regarded as having been adjudicated on the merits." *Id.* at 1096; *accord Early v. Packer*, 537 U.S. 3, 8 (2002).

45. If the petitioner seeks discretionary review from the State's highest court, after the State's intermediate appellate court adjudicated the federal claim on the merits, and the State's highest court summarily rejects the petitioner's request for discretionary review, the summary rejection is still considered an adjudication on

the merits. *Kernan v. Hinojosa*, 136 S. Ct. 1603, 1606 (2016); *Harrington v. Richter*, 562 U. S. 86, 99 (2011).

b. Clearly-Established Federal Law

46. In *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court said "clearly established Federal law" under § 2254(d)(1) "refers to the holdings, as opposed to the dicta, of [the] Court's decisions as of the time of the relevant state-court decision." *Id*. at 412; *accord Howes v. Fields*, 565 U.S. 499, 505 (2012); *Carey v. Musladin*, 549 U.S. 70, 74 (2006). "[C]ircuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court.'" *Glebe v. Frost*, 135 S.Ct. 429, 431 (2014). AEDPA, as a result, "prohibits the federal courts of appeals from relying on their own precedent to conclude that a particular constitutional principle is 'clearly established.'" *Lopez v. Smith*, 135 S.Ct. 1, 2 (2014). However, "an appellate panel may, in accordance with its usual law-of-the-circuit procedures, look to circuit precedent to ascertain whether it has already held that the particular point in issue is clearly established by Supreme Court precedent[.]" *Marshall v. Rodgers*, 133 S.Ct. 1446, 1450 (2013).

47. If the specific constitutional violation or duty presented by a petitioner has not been clearly-established by the Supreme Court's holdings, AEDPA relief is not warranted. *Bobby v. Dixon*, 565 U.S. 23, 28 (2011); *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009); *Wright v. Van Patten*, 552 U.S. 120, 125 (2008); *Carey v. Musladin*,

549 U.S. at 76. However, if a federal claim is based on a "more general standard," *e.g.*, *Brady* or *Strickland* claims, AEDPA relief is warranted "if the state-court decision unreasonably applied the more general standard[.]" *Knowles v. Mirzayance*, 556 U.S. at 122.

c. Contrary To or Unreasonable Application of Clearly-Established Federal La

(1). The Standard

48. A federal court's § 2254(d)(1) review "is limited to the record that was before the state court that adjudicated the prisoner's claim on the merits." *Greene v. Fisher*, 565 U.S. at 38; *Cullen v. Pinholster*, 563 U.S. 170, 181-182 (2011). An "unreasonable application" of the Supreme Court's clearly-established holdings must be "'objectively unreasonable,'" not merely wrong; even "clear error" will not suffice. *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003); *accord White v. Woodall*, 134 S.Ct. 1697, 1702 (2014); *Cavazos v. Smith*, 565 U.S. 1, 2 (2011). In other words, if the state court's rejection of a federal claim was wrong, but "reasonable," AEDPA relief is not warranted. *Hardy v. Cross*, 565 U.S. 65, 71-72 (2011) ("Under AEDPA, if the state-court decision was reasonable, it cannot be disturbed.").

49. A state court's rejection of a federal claim is reasonable "so long as fairminded jurists could disagree on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. at 101 (quotations and citation omitted). Stated differently, the petitioner "must show that the state court's ruling… was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id*. at 103; *accord Woods v. Donald*, 135 S.Ct. 1372, 1376 (2015) ("[F]ederal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong."); *Metrish v. Lancaster*, 133 S.Ct. 1781, 1786-1787 (2013).

(2). Application of Standard

50. To determine whether a state court unreasonably applied a clearly-established legal principle, the federal court must consider the rule's nature and specificity. *Renico v. Lett*, 559 U.S. 766, 776 (2010). The "more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004); *accord Parker v. Matthews*, 132 S. Ct. 2148, 2155 (2012); *Renico v. Lett*, 559 U.S. at 776. Thus, "where the precise contours of the right remain unclear, state courts enjoy broad discretion in their adjudication of a prisoner's claims." *White v. Woodall*, 134 S.Ct. at 1705 (quotations and citation omitted). Moreover, "if the circumstances of a case are only 'similar

to' our precedents, then the state court's decision is not 'contrary to' the holdings in those cases." *Woods v. Donald*, 135 S. Ct. at 1376.

51. Section 2254(d)(1), however, does not require an "identical factual pattern before a [clearly-established] legal rule must be applied.'" *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007); *accord Marshall v. Rodgers*, 133 S.Ct. at 1449 ("[T]he lack of a Supreme Court decision on nearly identical facts does not by itself mean that there is no clearly established federal law, since a general standard from this Court's cases can supply such law."). To the contrary, state courts must reasonably apply the rules "squarely established" by the Supreme Court's holdings to the facts of each case. *Knowles v. Mirzayance*, 556 U.S. at 122.

52. "[T]he difference between applying a rule and extending it is not always clear," but "[c]ertain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt." *Yarborough v. Alvarado*, 541 U.S. at 666; *accord Carey v. Musladin*, 549 U.S. at 81 (Kennedy, J., concurring in judgment) ("While general rules tend to accord courts more leeway . . . in reaching outcomes in case-by-case determinations, AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied[.]"); *cf. Wright v. West*, 505 U.S. 277, 308-309 (1992) (Kennedy, J., concurring in judgment). To require such specificity and identicalness runs contrary to the writ's long-standing purpose of rectifying

extreme malfunctions in state criminal justice systems. *Cf. Carey v. Musladin*, 549 U.S. at 79 (Stevens, J., concurring in judgment) (AEDPA "itself provides sufficient obstacles to obtaining habeas relief without placing a judicial thumb on the warden's side of the scales.").

d. Unreasonable Factual Determination

53. Under 28 U.S.C. § 2254(e)(1), state court factual findings are "presumed to be correct," but the petitioner can rebut this presumption with "clear and convincing evidence." *Rice v. Collins*, 546 U.S. 333, 338-339 (2006); *Miller-El v. Dretke*, 545 U.S. at 240. The "question whether a state court errs in determining the facts is a different question from whether it errs in applying the law." *Rice v. Collins*, 546 U.S. at 342. While "[t]he term 'unreasonable' is no doubt difficult to define," *Williams v. Taylor*, 529 U.S. at 410, the Supreme Court has held that "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010); *accord Williams v. Taylor*, 529 U.S. at 411. Thus, even if "[r]easonable minds reviewing the record might disagree" about the factual finding(s) in question, "on habeas review that does not suffice to supersede the trial court's… [factual] determination[s]." *Rice v. Collins*, 546 U.S. at 342; accord *Brumfield v. Cain*, 135 S. Ct. 2269, 2277 (2015).

e. Prejudice

54. The test for whether a federal constitutional error was harmless "depends on the procedural posture of the case." *Davis v. Ayala*, 135 S.Ct. 2187, 2197 (2015). On direct appeal, the harmlessness standard is the one prescribed in *Chapman v. California*, 386 U.S. 18 (1967): "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id*. at 24.

55. Assuming the state courts adjudicated the prejudice/harmlessness competent of a particular federal claim on the merits, the prejudice/harmlessness standard is different during habeas proceedings, where the petitioner is "not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.'" *Brecht v. Abrahamson, 507 U.S. 619*, 637 (1993) (quoting *United States* v. *Lane*, 474 U.S. 438, 449 (1986)). Under *Brecht*, relief is proper only if the federal court has "grave doubts" about whether a federal trial error had a "substantial and injurious effect or influence" on the jury's verdict(s). *O'Neal* v. *McAninch*, 513 U.S. 432, 436 (1995). In other words, there "must be more than a 'reasonable possibility' that the error was harmful." *Davis v. Ayala*, 135 S.Ct. at 2198.

56. When a *Chapman* decision is reviewed under AEDPA, "a federal court may not award habeas relief under § 2254 unless *the harmlessness determination itself* was unreasonable," *Fry v. Pliler*, 551 U.S. 112, 119 (2007) (emphasis in original), or "so

lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Ritcher v. Harrington*, 562 U.S., at 103; *accord Davis v. Ayala*, 135 S.Ct. at 2199.

57. If the state courts reviewed the petitioner's federal claim, yet never addressed the claim's prejudice/harmlessness component, the prejudice/harmlessness component was not adjudicated "on the merits," making AEDPA deference inapplicable, and forcing the Court to review the prejudice/harmlessness component *de novo*. *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (holding *de novo* review of the allegedly deficient performance of petitioner's trial counsel was necessary because the state courts had failed to address this prong of *Strickland* analysis); *Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (holding *de novo* review of the prejudice prong of *Strickland* was required where the state courts rested their rejection of an ineffective assistance claim on the deficient performance prong and never addressed the issue of prejudice); *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (same). Under *de novo* review, a trial error is *not* harmless if there is "a reasonable possibility" it "might have contributed to the conviction[.]" *United States v. Bagley*, 473 U.S. 667, 679 n.9 (1985).

C. Timeliness of Mr. Johnson's 2254 Petition

58. Mr. Johnson's 2254 petition is timely. On April 20, 2012, Mr. Johnson filed a timely *Petition for Allowance of Appeal* ("PAA") with the Pennsylvania Supreme Court (200 EAL 2012), which was denied on November 8, 2012. Mr. Johnson did not file a certiorari petition with the U.S. Supreme Court, making his conviction final 90 days thereafter on February 6, 2013. U.S. S.Ct. R. 13.

59. Under 28 U.S.C. § 2244(d)(1), Mr. Johnson had one year (or 365 days) from February 6, 2013 to file his 2254 petition. Mr. Johnson, though, timely filed his PCRA petition on November 13, 2013, tolling AEDPA's 1-year limitations period until he exhausted his PCRA remedies. 28 U.S.C. § 2244(d)(2). There are 280 days between February 6, 2013 and November 13, 2013, meaning once Mr. Johnson exhausted his PCRA remedies, he had 85 days to file his 2254 petition.

60. On May 6, 2016, the Pennsylvania Superior Court affirmed the dismissal of Mr. Johnson's PCRA petition. Mr. Johnson had 30 days to file a PAA with the Pennsylvania Supreme Court, which he chose not to file,[47] meaning his PCRA remedies expired on June 5, 2016. AEDPA's 1-year clock, therefore, began to run again on June 5, 2016. Mr. Johnson had 85 days from June 5, 2016–or until August

[47] Pursuant to a Pennsylvania Supreme Court Order, an individual convicted of a crime in Pennsylvania need not lodge a discretionary appeal to that court to exhaust his or her direct appeal rights; appeal to the Superior Court suffices. *In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases*, No. 218 Judicial Administration Docket No. 1 (Pa. May 9, 2000). Thus, Mr. Johnson did not have to fairly present his federal claims to the Pennsylvania Supreme Court to exhaust his PCRA remedies.

29, 2016–to file his 2254 petition. Mr. Johnson filed his 2254 petition on August 26, 2016, making his 2254 petition timely.

D. The Supreme Court's Clearly-Established *Bruton* Case Law

1. *Bruton v. United States*

61. In *Bruton v. United States*, 391 U.S. 123 (1968), the Supreme Court held that a defendant's Sixth Amendment confrontation right is violated when his non-testifying co-defendant's statement, which explicitly named the defendant as a participant in the charged crime, is introduced at their joint trial, even if the jury is instructed to consider the co-defendant's confession only against the co-defendant, and not the defendant. The Supreme Court explained why a jury instruction, limiting the co-defendant's statement to only the co-defendant, did not adequately protect the defendant's confrontation and fair trial rights:

> 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[.]

Id. at 135-136.

2. *Harrington v. California*

62. In *Harrington v. California*, 395 U.S. 250 (1969), Harrington was jointly tried with three other men, Bosby, Rhone, and Cooper, for first-degree murder. Harrington was white; Bosby, Rhone, and Cooper were all black. Bosby, Rhone, and Cooper confessed, and their confessions implicated Harrington, but not by name. Cooper, for instance, did not name Harrington, but told detectives that the fourth guy who participated in the victim's killing was "the white boy" or "the white guy." *Id*. at 253. Bosby also did not name Harrington, but described the fourth guy as a "blond-headed… white guy." *Id*. The State jointly prosecuted all four men. At trial, Bosby and Cooper did not testify, but the trial court admitted their confessions, albeit with an instruction informing the jury it could only consider the confessions against the confessors and not Harrington. *Id*.

63. On appeal, the Supreme Court held that the introduction of Bosby's and Cooper's confessions violated Harrington's confrontation rights under *Bruton*, even though Bosby's and Cooper's confessions did not explicitly name Harrington. The Supreme Court, however, found the *Bruton* error harmless based on other evidence presented at trial, including Harrington's own trial testimony placing him at the crime scene at the time of the killing. *Id*. at 253-254.

3. *Cruz v. New York*

64. In *Cruz v. New York*, 481 U.S. 186 (1987), the Supreme Court addressed another permutation of *Bruton* and held that "where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant, the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, *and* even if the defendant's own confession is admitted against him." *Cruz v. New York*, 481 U.S. at 193 (emphasis added).

65. In *Richardson* v. *Marsh*, 481 U.S. 200 (1987), the Supreme Court considered a redacted confession. The case involved a joint murder trial of Marsh and Williams. The State had redacted Williams' confession, so as to "omit all reference" to Marsh, "indeed, to omit all indication that *anyone* other than… Williams" and a third person (Martin) had "participated in the crime." *Id*. at 203 (emphasis in original). The trial court also instructed the jury not to consider Williams' confession against Marsh. *Id*. at 205.

66. As redacted, the confession indicated that Williams and Martin had discussed the murder in the front seat of a car while they traveled to the victim's house. *Id*. at 203-204 n.1. The redacted confession contained no indication whatsoever that Marsh--*or any other person*--was in the car with Williams and Martin. Later in the trial, however, Marsh testified that she was in the back seat of the car. *Id*. at 204.

"For that reason, in context, the confession still could have helped convince the jury that Marsh knew about the murder in advance and therefore had participated knowingly in the crime." *Gray v. Maryland*, 523 U.S. 185, 191 (1998) (summarizing *Marsh*).

67. The Supreme Court held that this redacted confession fell outside *Bruton*'s scope and was admissible. The Supreme Court described the confession in *Bruton* as "incriminating on its face" because it had "expressly implicated" Bruton. *Richardson v. Marsh*, 481 U.S. at 208. By contrast, Williams' confession amounted to "evidence requiring linkage" in that it "became" incriminating with respect to Marsh "only when linked with evidence introduced later at trial." *Id.* The Supreme 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 (emphasis added). Notably, the Supreme Court added, "We express no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or *neutral pronoun*." *Id*., at 211, n.5 (emphasis added).

4. *Gray v. Maryland*

68. In *Gray v. Maryland*, 523 U.S. 185 (1998), the Supreme Court answered the question left unanswered in *Marsh*, *i.e.*, when a co-defendant's statement, which explicitly implicates the defendant, is redacted and replaced with a symbol or neutral pronoun, is this type of redaction or alteration acceptable under *Bruton* and the Confrontation Clause? As the Supreme Court saud, it had to "decide whether these substitutions" made a "significant legal difference" under *Bruton*; the Court said they "do not and that *Bruton's* protective rule applies" in these situations. *Id*. at 188.

69. In *Gray*, co-defendant, Anthony Bell, confessed and expressly named Gray in his confession and said Gray participated in the victim's beating death. The State jointly tried Bell and Gray. Over Gray's objection, the trial court permitted the State to introduce Bell's confession after the prosecution altered it by substituting for Gray's name in the confession a blank space or the word "deleted." *Id*. at 188. The altered confession, for example, responded to the question, "Who was in the group that beat Stacey," with the phrase, "Me, _____, and a few other guys." And when the prosecutor called an officer to the stand to read the confession into the record, the officer said the word "deleted" or "deletion" where the blank spaces appeared. *Id*. at 192.

70. The Supreme Court said Bell's confession, "like that in *Bruton*, referred to, and directly implicated another defendant." *Id*. at 192. The Supreme Court said Bell's altered confession differed significantly from Williams' confession in *Richardson* because Bell's altered "confession refer[red] directly to the 'existence' of the nonconfessing defendant." *Id*. The Supreme Court held that this type of alteration, which "simply replace[d] a name with an *obvious* blank space or a word such as 'deleted' or a symbol or other similarly *obvious indications of alteration*," violated *Bruton* because these types of alterations "so closely resemble[d] *Bruton's* unredacted statements[.]" *Id*. at 192 (emphasis added). The Supreme Court identified multiple reasons supporting its holding.

71. *First*, the Supreme Court said "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." *Id*. at 193. This, the Supreme Court said, "is true even when the State does not blatantly link the defendant to the deleted name[.]" *Id*. The Supreme Court illustrated this point with a hypothetical confession that read, "I, Bob Smith, along with Sam Jones, robbed the bank." From the Supreme Court's perspective,

> 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, in the phrase "I, Bob Smith, along with, robbed the bank," 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. A more sophisticated juror, wondering if the blank refers to someone else, might also wonder how, if it did, the prosecutor could argue the confession is reliable, for the prosecutor, after all, has been arguing that Jones, not someone else, helped Smith commit the crime.

Id. at 193.

72. *Second*, the Supreme Court said "the obvious deletion may well call the jurors' attention specially to the removed name." *Id*. at 193. By "encouraging the jury to speculate about the reference, the redaction," the Supreme Court stressed, "may *overemphasize* the importance of the confession's accusation–once the jurors work out the reference." *Id*. (emphasis added) It is for this reason the Supreme Court said that "blacking out" the defendant's name was "futile" because jurors will know, without the "slightest doubt," whose name had been blacked out. *Id*. at 193 (quotations and citation omitted). The Supreme Court, therefore, described blacking out and other "similar redactions" as "devices… so obvious" that they "emphasize the identity of those they purported to conceal." *Id*. at 194 (quotations and citation omitted).

73. *Third*, the Supreme Court examined the grammatical functioning of Anthony Bell's altered confession and "similarly obvious alteration[s]" and whether they functioned in the same way as the explicit confession in *Bruton*. The Supreme Court said the *Bruton* confession and statements altered to "leave a blank or other similarly obvious alteration," functioned "the same way grammatically" because both are "directly accusatory." *Id*. at 194. In *Bruton*, the co-defendant's confession "used a proper name" that pointed "explicitly to an accused defendant," while the "blank space in an obviously redacted confession also points directly to the defendant, and it accuses the defendant in a manner similar to [the co-defendant's] use of Bruton's name or to a testifying codefendant's accusatory finger." *Id*. at 194. The Supreme Court said this factor distinguished it from *Richardson* because, unlike Bell's altered confession that "point[ed] directly to" Gray, Williams' redacted confession in *Richardson* eliminated all indications someone else, *i.e*., Marsh, may have participated in the victim's beating death with Williams and Martin. *Id*. at 194.

74. In the end, the Supreme Court held that "redactions that replace a proper name with an obvious blank, the word 'delete,' a symbol, or *similarly notify the jury that a name has been deleted* are similar enough to *Bruton's* unredacted confessions as to warrant the same legal results." *Id*. at 195 (emphasis added).

75. In so holding, the Supreme Court rejected the State's reliance on *Richardson*. The Supreme Court conceded the jury had to "use inference to connect the statement in [Bell's] redacted confession" to Gray and it conceded that *Richardson* "placed outside the scope of *Bruton's* rule those statements that incriminate inferentially." *Id*. at 195. The Supreme Court, however, said "inference pure and simple" did not make the "critical difference" in *Richardson*, if it had, *Richardson* would have "also place[d] 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,' and perhaps even full names of defendants who are always known by a nickname." *Id*. at 195 (citation omitted). Citing *Harrington*, the Supreme Court said it had already "assumed… that nicknames and specific descriptions fall inside, not outside, *Bruton's* protection." *Id*. at 195.

76. *Richardson*, in other words, "must depend in significant part upon the *kind of*, not the simple fact of, inference." *Id*. at 196 (emphasis added). *Richardson's* inferences, the Supreme Court said, "involved statements that did not refer directly to the defendant himself and which became incriminating 'only when linked with evidence introduced later at trial.'" *Id*. (quoting *Richardson v. Marsh*, 481 U.S. at 208). The "inferences at issue" in *Gray*, however, "obviously refer directly to someone, often the defendant, 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." *Id*. at 196. Furthermore, the Supreme Court said Bell's "redacted confession… 'facially incriminate[d]" Gray because the "accusation" made by Bell's redacted confession "is more vivid than inferential incrimination, and hence more difficult to thrust out of mind." *Id*. (quoting *Richardson v. Marsh*, 481 U.S. at 208, 209).

E. The Pennsylvania Superior Court's Opinion

77. Mr. Johnson raised and fairly presented a *Bruton* claim on direct appeal before the Pennsylvania Superior Court.[48] Mr. Burton cited *Bruton v. United States*, 391 U.S. 123 (1968), *Gray v. Maryland,* 523 U.S. 185 (1998), *Richardson v. Marsh*, 481 U.S. 200 (1987), and *Cruz v. New York*, 481 U.S. 186 (1987).

78. The Pennsylvania Superior Court rejected the "trial error" component of the *Bruton* claim on the merits.[49] The Superior Court cited and briefly summarized *Bruton*, but then said, "After *Bruton*, the [U.S.] Supreme Court permitted introduction of redacted confessions that omit any reference to the co-defendant."[50] The Superior Court cited *Commonwealth v. Travers*, 768 A.2d 845 (Pa. 2001), which in turn cited *Richardson* and *Gray* for this proposition. Citing *Travers* once more, the Superior Court said, "the [U.S.] Supreme Court 'recognized an important distinction between co-defendant confession that expressly incriminate the defendant and those that become incriminating only when linked

[48] Doc. 1, Ex. 6, pp. 12-16.
[49] Doc. 1, Ex. 7, pp. 8-11.
[50] Doc. 1, Ex. 7, p. 9.

to other evidence properly introduced at trial.'"[51] The Superior Court then said, "redaction of a co-defendant's confession combined with an appropriate limiting instruction became the approved method of eliminating any potential for unfair prejudice."[52]

79. The Superior Court then discussed *Travers*. In *Travers*, the co-defendant's confession explicitly named the defendant, but at trial the prosecution used the "neutral pronoun"–"the other guy"–when the co-defendant's confession explicitly mentioned the defendant by name.[53] *Travers* held that the neutral pronoun–"the other guy"–was an "acceptable means of alleviating the Sixth Amendment problem because it [was] 'not an obvious alteration at all' as compared to an obvious deletion of the defendant's name with nothing more to take its place.'"[54]

80. Based on *Travers*, the Superior Court rejected Mr. Johnson's *Bruton* claim because the "facts" in Mr. Johnson's case were "precisely in line with *Travers*,"[55] *i.e.*, Tyrone Wright's altered statement replaced Mr. Johnson's name with these "neutral" pronouns–"some other guy," "some guy," "him," "he," or "the other guy" and the trial court twice instructed the jury that Tyrone Wright's statement could not be used against. Mr. Johnson.

[51] Doc. 1, Ex. 7, p. 9 (quoting *Commonwealth v. Travers*, 768 A.2d at 847).
[52] Doc. 1, Ex. 7, pp. 9-10.
[53] Doc. 1, Ex. 7, p. 10.
[54] Doc. 1, Ex. 7, p. 10 (quoting *Commonwealth v. Travers*, 786 A.2d at 850, 851).
[55] Doc. 1, Ex. 7, pp. 10-11.

F. AEDPA's Applicability to the Pennsylvania Superior Court's Adjudication of Mr. Johnson's *Bruton* Claim

1. *Gray* Controls this Case

81. *Gray* controls the outcome of Mr. Johnson's *Bruton* claim. In *Gray*, as mentioned, the Supreme Court addressed an alteration where the prosecution replaced the nonconfessing defendant's name with the words "delete" or "deletion." The Supreme Court found this alteration constitutionally inadequate for a variety of reasons, the most significant ones being that (1) the alteration was "obvious" to the jury and (2) the confession, though redacted, still "directly implicated another defendant." *Gray v. Maryland*, 523 U.S. at 192.

a. In regards to the second factor, the Supreme Court said this fact distinguished it from *Richardson* in a *constitutionally significant way* because the redacted confession in *Gray* "refer[red] directly to the 'existence of the nonconfessing defendant," whereas the altered confession in *Richardson* removed all reference to the nonconfessing defendant's existence. In *Richardson*, in other words, had Marsh, *i.e.*, the nonconfessing defendant, not testified and placed herself in the car with Williams and Martin shortly before the murder, the *Richardson* jury had no other evidence before it regarding Marsh's existence.

b. In regards to the first factor, when a statement is altered in a way that makes it immediately apparent a name has been altered or removed, the Supreme Court said this is unconstitutional because "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." *Id*. at 193. This, the Supreme Court said, "is true even when the State does not blatantly link the defendant to the deleted name[.]" *Id*. An "obvious" alteration, the Supreme Court said, "may well call the jurors' attention specially to the removed name" and cause jurors to "speculate about" the alteration, which in turn "may overemphasize the importance of the confession's accusation–once the jurors work out the reference." *Id*. at 193. Obvious alterations, the Supreme Court added, function "the same way grammatically" as the explicit *Bruton*'s unredacted because both are "directly accusatory." *Id*. at 194.

c. In short, the Supreme Court held that "redactions that replace a proper name with an obvious blank, the word 'delete,' a symbol, or *similarly notify the jury that a name has been deleted* are similar enough to *Bruton's* unredacted confessions as to warrant the same legal results." *Id*. at 195 (emphasis added). Based on *Gray*, therefore, it is clearly-established that alterations which notify the jury of (1) the existence of a nonconfessing defendant *and* that (2) a name has been changed or removed from the co-defendant's statement violates *Bruton*.

82. Here, based on (1) the prosecutor's opening statements, (2) the manner in which the prosecutor altered Tyrone Wright's confession, (3) the substance of Tyrone Wright's confession, and (4) the statements and arguments by Tyrone

Wright's counsel, Gary Server, and the prosecutor, the jury was repeatedly notified of (a) the existence of a nonconfessing defendant and that (b) Mr. Johnson's name had been changed to "the other guy."

a. Prosecutor's Opening Statements: From the moment Mr. Johnson's trial started, the prosecutor told the jury only three people were responsible for Donnie Skipworth's murder: (1) Tyrone Wright, (2) Abbas Parker, and (3) Arthur Johnson. The prosecutor then told the jury Mr. Johnson was the one who actually shot and killed Skipworth. The prosecutor then told the jury Tyrone Wright gave a "full confession."[56] The effortless and reasonable inference from the prosecutor's opening statement is that Tyrone Wright's "full confession" implicated Mr. Johnson as the shooter.

b. Gary Server's Opening Statements: If the jurors had not yet figured out that Tyrone Wright must have identified Mr. Johnson as the gunman, jurors immediately figured it out when Server told them that Wright wrote "down something to the effect of, oh, yes, I know that *Arthur* and Abbas went there to shoot Donnie Skipworth."[57] After Santaguida objected, the trial court told the jury Server "misspoke" and instructed it to "ignore" Server's "last statement,"[58] but the damage was already done and the trial court's "please ignore the last statement"

[56] NT, Trial, 1/28/2010, p. 31.
[57] NT, Trial, 1/28/2010, pp. 55-56.
[58] NT, Trial, 1/28/2010, p. 58.

instruction did little to cure the tremendous damage caused by Server's comment. As the Supreme Court stressed in *Bruton*:

> It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information. Nevertheless... 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 v. United States, 391 U.S. at 135.

c. Server's mentioning of Mr. Johnson by name falls squarely into this category of "information."

d. Manner of Alteration: The prosecutor changed Mr. Johnson's name to the "other guy" in Tyrone Wright's statement. This alteration explicitly informed the jury of the existence of a nonconfessing defendant, distinguishing it from *Richardson* and aligning it with *Gray*. Moreover, when the "other guy" alteration is coupled with the prosecutor's opening statements and closing arguments, the jury used its common sense to immediately conclude the "other guy" was Mr. Johnson. The jury's February 12, 2010 note to the trial court makes this point clear:

> We the jurors have a question about your instruction regarding Tyrone Wright's statement. You had instructed us that Tyrone Wright's statement may only be used against Tyrone Wright and not against Arthur Johnson. We also recall the Commonwealth saying that we are not being asked *to turn off our common sense*. We would like to confirm that in order to comply with

> your instruction, we must not make any inferences stemming from the statement, or use the statement to help draw a more complete picture of the alleged crime in our minds when considering the case against Arthur Johnson. Our understanding is that our instruction is to push the statement from our minds and pretend it never existed when we are considering the case against Mr. Johnson. Is this correct?[59]

e. Substance of Tyrone Wright's Statement: Detective Burns read Tyrone Wright's statement word-for-word into the record. During the prosecutor's closing arguments, she re-read Wright's statement word-for-word. Wright's statement told the jury these facts about the "other guy": (1) Wright had known the "other guy" since middle school;[60] (2) Wright knew the "other guy's" name because, as Detective Burns testified, Wright told him (Burns) the "other guy's" name and then wrote the "other guy's" name on the "other guy's" photograph during his (Wright's) interrogation;[61] and (3) Wright frequently saw and interacted with the "other guy" because, according to Wright, the "other guy" "always" carried the semiautomatic handgun the "other guy" possessed the night of the shooting.[62]

f. These facts made the obvious more obvious, if that was possible. The jury, for instance, would have easily followed this train of thought: If Wright had known the "other guy" since middle school, knew he always carried a black semiautomatic

[59] Ex. 3.
[60] NT, Trial, 2/3/2010, pp. 53-54.
[61] NT, Trial, 2/3/2010, pp. 62-63, 211.
[62] NT, Trial, 2/3/2010, p. 57; NT, Trial, 2/4/2010, p. 122.

handgun, and knew his name, why are they not mentioning the "other guy" by his real name, Arthur Johnson?

g. Prosecutor's Closing Arguments: The prosecutor's closing arguments mirrored her opening statements. She repeatedly argued Mr. Johnson shot and killed Donnie Skipworth and supported her argument by repeatedly referring to Tyrone Wright's statement. Like her opening statements, the easy and reasonable inference from the prosecutor's closing arguments is that Wright implicated Mr. Johnson as the gunman in his statement.

83. Simply put, the *Bruton* error in Mr. Johnson's case is equal to, if not greater than, the *Bruton* error in *Gray* and the best evidence to prove this point is the jury's February 12, 2010 note to the trial court. Consequently, the Pennsylvania Superior Court's adjudication of Mr. Johnson's *Bruton* claim was not only wrong, it was objectively unreasonable.

2. The Superior Court Incorrectly Applied the Supreme Court's Clearly-Established *Bruton* Case Law

84. The Superior Court made two objectively unreasonable mistakes when it applied the Supreme Court's *Bruton* case law to Mr. Johnson's case.

a. *First*, the Superior Court mischaracterized the key distinguishing fact in the Supreme Court's *Bruton* cases. According to the Superior Court, the "important distinction" was between confessions that "expressly incriminate" the defendant and those that "become incriminating only when linked to other

evidence properly introduced at trial."[63] The Superior Court then said, "redaction of a co-defendant's confession combined with an appropriate limiting instruction [is] the approved method of eliminating any potential for unfair prejudice."[64]

b. This is an objectively unreasonable interpretation and/or application of *Bruton*, *Richardson*, and *Gray*. Although the Superior Court cited *Gray*, its *analysis* not only stopped with *Richardson*, it interpreted and applied *Richardson* in an objectively unreasonable way. Yes, *Richardson* distinguished between confessions that "expressly incriminate" and those that "become incriminating only when linked to other evidence properly introduced at trial." However, before making this distinction, *Richardson* made another important distinction that played a more significant role in its holding: Williams' redacted confession mentioned nothing about the existence of Marsh, *i.e.*, the third accomplice. Thus, had Marsh not testified and placed herself in the same car as Williams and Tank, the jury would have never known Williams and Tank drove to the victim's house with Marsh.

c. *Gray* only hammered home the significance of this fact, *i.e.*, whether the altered confession explicitly informed the jury of the existence of a nonconfessing defendant, and held that "redactions that replace a proper name with an obvious blank, the word 'delete,' a symbol, or *similarly notify the jury that a name has been*

[63] Doc. 1, Ex. 7, p. 9 (quoting *Commonwealth v. Travers*, 768 A.2d at 847).
[64] Doc. 1, Ex. 7, pp. 9-10.

deleted are similar enough to *Bruton's* unredacted confessions as to warrant the same legal results." *Id*. at 195 (emphasis added).

d. The Superior Court mentioned nothing about the fact Tyrone Wright's altered statement explicitly informed the jury of the existence of a nonconfessing defendant. The failure to consider this critical component of *Richardson* and *Gray* into its analysis renders the Superior Court's adjudication objectively unreasonable.

85. *Second*, the Superior Court held Tyrone Wright's altered confession was permissible under *Bruton* because the alteration "[was] not an obvious alteration at all[.]"[65] This holding, be it a legal conclusion or factual finding, is objectively unreasonable not only under *Gray*, but under basic common sense, and the jury's last note to the trial court on February 12, 2010 regarding Wright's confession, proves this point by clear and convincing evidence.[66]

86. As thoroughly established, fairminded jurists would agree that Tyrone Wright's altered confession not only identified the existence of a nonconfessing defendant, it was "obviously" altered to remove Mr. Johnson's name and that it took jurors a *nanosecond* to figure out that the "other guy" was Mr. Johnson. Consequently, to hold that the "other guy" alteration "was not an obvious alteration" is objectively unreasonable.

[65] Doc. 1, Ex. 7, p. 10.
[66] Ex. 3.

87. More specifically, the Supreme Court's opinion in *Gray*, which methodically identified the types of alterations and redactions that violated *Bruton*, made the *Bruton* error in Mr. Johnson's case so apparent that "fairminded jurists could [*not*] disagree on the [in]correctness" of the Superior Court's adjudication of Mr. Johnson's *Bruton* claim. *Harrington v. Richter*, 562 U.S. at 101. Stated differently, the Superior Court's adjudication of Mr. Johnson's *Bruton* claim is "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. at 103.

3. Prejudice

88. Confrontation violations are subject to harmless error analysis. *Delaware v. Van Arsdall*, 475 U.S. 673, 681-682 (1986). The Pennsylvania Superior Court, however, did not adjudicate the harmlessness/prejudice component of Mr. Johnson's *Bruton* claim because it concluded Tyrone Wright's altered statement did not violate *Bruton*. AEDPA's deference standard, therefore, is inapplicable and the Court must review the harmlessness/prejudice component *de novo*. *Porter v. McCollum*, 558 U.S. at 39; *Rompilla v. Beard*, 545 U.S. at 390; *Wiggins v. Smith*, 539 U.S. at 534. Under *de novo* review, a trial error is *not* harmless if there is "a reasonable possibility" it "might have contributed to the conviction[.]" *United States v. Bagley*, 473 U.S. at 679 n.9.

89. There is a reasonable likelihood Tyrone Wright's inadequately altered statement may have affected the jury's decision to convict Mr. Johnson of first-degree murder. The only two witnesses who implicated Mr. Johnson were Aaron Taylor and Dion Skipworth, but both presented with significant credibility issues that raised doubts about the truthfulness of their statements and testimony. Wright's inadequately altered statement, however, minimized, if not entirely erased, these doubts and issues because the identity of the "other guy" was patently obvious from the get-go.

a. The Commonwealth presented Aaron Taylor.

i. The Commonwealth argued Taylor gave a statement on June 25, 2008 alleging that Mr. Johnson bragged to him (Taylor) that he (Johnson) shot and killed Donnie Skipworth in retaliation for Skipworth shooting and killing Mr. Johnson's friend, Darnell Shaw, two years earlier on Newkirk Street.[67]

ii. Once on the stand, though, Taylor said he was "forced" to sign the June 25, 2008 statement and that the statement was false because he had not seen Mr. Johnson in years.[68]

b. The Commonwealth presented Dion Skipworth, Donnie Skipworth's brother.

i. Dion repeatedly admitted he and his brother sold drugs for a living.

[67] NT, Trial, 1/28/2010, p. 87.
[68] NT, Trial, 1/28/2010, pp. 69-70, 87, 92, 96, 100.

ii. Dion testified he knew Mr. Johnson, Wright, and Abbas from the neighborhood and said Mr. Johnson, Wright, and Abbas hung out together on a regular basis.[69]

iii. Dion testified he, Donnie, Jermaine, and Larry were on the 1300 block of Newkirk selling drugs shortly before the shooting. They were sitting around and talking when Mr. Johnson walked up and opened fire. Dion testified Mr. Johnson did not say a word to the group before he aimed directly at Donnie and fired. Dion said he also recognized Mr. Johnson by the way Mr. Johnson was walking when he approached the group. Dion testified he did not see anyone with Mr. Johnson when the shooting occurred and said he last saw Mr. Johnson the day of the shooting on May 4, 2008.[70]

iv. Although Dion claimed to have immediately recognized Mr. Johnson as the gunman, he testified he did not speak with responding officers or his family that night and identify Mr. Johnson as the gunman. According to Dion, people from where he came from are not "allowed" to speak with the police. Dion testified he told a few family members and friends that Mr. Johnson was the gunman the day after the shooting on May 5, 2008.[71]

[69] NT, Trial, 2/1/2010, pp. 155, 156, 160, 171.
[70] NT, Trial, 2/1/2010, pp. 172-180, 201-204.
[71] NT, Trial, 2/1/2010, pp. 182-186.

v. Dion, though, said he changed his mind and eventually spoke with detectives three months after the shooting on August 19, 2008. During his interview, Dion did not mention Tyrone Wright's or Abbas Parker's name and at trial he testified he had no knowledge that Wright and Parker were involved in his brother's shooting.[72] Dion said he decided to testify against Mr. Johnson because Donnie "was due justice" for being "gunned down for no reason."[73]

vi. On cross-examination, Dion denied speaking with Officer Lozada at the scene the night of the shooting, despite Lozada's report and testimony to the contrary.[74] Dion claimed none of the responding officers questioned him at the scene because responding officers were more concerned with treating his brother.[75] Dion then claimed he, in fact, spoke with "someone" at the scene and that he told this person his brother had been shot, but Dion never told this person or responding officers that he knew the gunman and the motive behind the shooting.[76]

90. Dion Skipworth and Aaron Taylor had significant credibility issues.

a. Dion Skipworth is a known drug dealer who did not identify his brother's killer for more than three months despite claiming to have immediately recognized Mr. Johnson as the gunman. A legitimate question for the jury,

[72] NT, Trial, 2/1/2010, pp. 187-193.
[73] NT, Trial, 2/1/2010, pp. 184, 191
[74] NT, Trial, 2/1/2010, p. 205.
[75] NT, Trial, 2/1/2010, p. 205.
[76] NT, Trial, 2/1/2010, p. 217.

therefore, was whether Dion actually saw the gunman open fire or whether he heard through word-of-mouth on the streets or merely assumed that Mr. Johnson was responsible for his brother's murder. Put differently, Dion's testimony raised doubt as to whether he actually witnessed the shooting and captured an adequate view of the gunman to identify the gunman as Mr. Johnson.

b. Aaron Taylor denied making the statement the prosecutor claimed he made that incriminated Mr. Johnson. Taylor also said he had not seen Mr. Johnson for years. The jury, therefore, had to determine whether Taylor actually made the statement, and if he did, whether he gave it voluntarily or involuntary. Simply put, Taylor's testimony presented with legitimate doubts as to whether Mr. Johnson actually confessed to him to being the gunman who shot and killed Donnie Skipworth.

91. There is a reasonable likelihood, however, Tyrone Wright's obviously and inadequately altered statement may have minimized, if not entirely extinguished, the reasonable doubts the jury had regarding Dion Skipworth's and Aaron Taylor's testimony. Based on the jury's February 12, 2010 note to the trial court, the jury clearly knew the identity of the "other guy" and did so from the very beginning, which is not surprising because this is the crux of Mr. Johnson's *Bruton* claim, *i.e.*, Tyrone Wright's statement was so inadequately altered that it not only made Mr. Johnson's identity obvious, it placed undue emphasis on him because jurors were

likely confused why all the trial participants kept referring to Mr. Johnson as the "other guy."

92. The jury's eight days of deliberations and its very last question to the trial court on February 12, 2010 regarding Tyrone Wright's statement makes it self-evident that there is a reasonable likelihood Tyrone Wright's statement may have impacted the jury's decision to convict Mr. Johnson of first-degree murder. Had jurors viewed Dion Skipworth and Aaron Taylor as credible witnesses, it would not have taken them eight days to reach a verdict. Moreover, after the trial court re-instructed the jury regarding Tyrone Wright's statement on February 12, 2010, the jury returned a short while later with its first-degree murder verdict.

93. The *Bruton* error was not harmless and Mr. Johnson is entitled to a new trial.

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94. The habeas corpus writ is structured to "guard against extreme malfunctions in the state criminal justice systems." *Harrington v. Richter*, 562 U.S. at 102-103 (quoting *Jackson v. Virginia*, 443 U.S. at 332 n.5 (Stevens, J., concurring)). Indeed, the "very nature of the writ… demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 291 (1969). The writ, in other words, "is a bulwark against convictions that violate fundamental fairness." *Wainwright v. Sykes*, 433 U.S. 72, 97 (1977) (Stevens, J., concurring).

95. An extreme malfunction occurred here because the Pennsylvania Superior Court's adjudication of Mr. Johnson's *Bruton* claim was contrary to and an unreasonable application of the Supreme Court's clearly-established *Bruton* case law. More specifically, the Supreme Court's opinion in *Gray*, which methodically identified the types of alterations or redactions that violated *Bruton*, made the *Bruton* error in Mr. Johnson's case so apparent that "fairminded jurists could [*not*] disagree on the [in]correctness" of the Superior Court's adjudication of Mr. Johnson's *Bruton* claim. *Harrington v. Richter*, 562 U.S. at 101. Stated differently, the Superior Court's adjudication of Mr. Johnson's *Bruton* claim is "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. at 103.

G. Conclusion

96. WHEREFORE, based on the forgoing facts and case law, Mr. Johnson respectfully requests the Court to issue a writ of habeas corpus because his convictions are unconstitutional under the Federal Constitution, to grant Mr. Johnson's immediate release, and to instruct the Commonwealth it can retry Mr. Johnson, if it so chooses, but it must do so in a reasonable amount of time.

Respectfully submitted this the **25th day** of **January, 2017**.

/s/Craig M. Cooley
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CERTIFICATE OF SERVICE

On **January 24, 2017**, counsel e-filed this pleading with the ECF system and the Commonwealth has e-service so it received an emailed PDF copy of this pleading.