IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ARTHUR JOHNSON	)	
	)	
Appellant-Plaintiff,	)	
	)	
v.	)	**No. 18-2423**
	)	
SUPERINTENDENT, FAYETTE-SCI	)	
	)	
Appellee-Respondent.	)	
	)	

APPELLANT'S OPENING BRIEF

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STATEMENT OF JURISDICTION

On May 30, 2018, the Honorable Berle M. Schiller dismissed Mr. Johnson's federal petition and refused to grant a COA.[1] On June 25, 2018, Mr. Johnson appealed.[2] On July 7, 2018, he filed a COA application regarding the "prejudice" issue,[3] which this Court granted on January 11, 2019.[4] This Court has jurisdiction under 28 U.S.C §§ 1291 and 2253.

RELATED CASES

Mr. Johnson is unaware of other related cases that are completed, pending, or about to be presented before this Court or other agency, state or federal.

ISSUES PRESENTED

1. The District Court correctly held that the Superior Court unreasonably applied *Bruton*'*s* clearly-established principles

2. The District Court erred by reviewing the *Bruton* claim's "prejudice" component under AEDPA's deferential standard of review – when the correct standard of review was *de novo*

3. Under *de novo* review, it is reasonably possible Wright's redacted confession may have affected the jury's verdicts, warranting a new trial

[1] JA 153.
[2] JA 154-155.
[3] JA 156-180.
[4] JA 189-190.

INTRODUCTION

The Commonwealth jointly tried Arthur Johnson, Abbas Parker, and Tyrone Wright for Donnie Skipworth's May 4, 2008 shooting death. Before trial, Wright gave a statement implicating Mr. Johnson by name. At trial, the prosecutor introduced Wright's statement against Mr. Johnson. Instead of mentioning Mr. Johnson's name, the prosecutor used the phrase "the other guy." Mr. Johnson repeatedly objected to the alteration on *Bruton* grounds. Wright never testified, so Mr. Johnson never had an opportunity to confront him.

Based on (1) the prosecutor's opening statements, (2) the way the prosecutor altered Wright's statement, (3) the substance of Wright's confession, and (4) the statements and arguments by the prosecutor and Wright's counsel, the jury was repeatedly notified of (a) the existence of a nonconfessing defendant, (b) that Mr. Johnson was the nonconfessing defendant, and (3) Mr. Johnson's name had been changed to "the other guy" in Wright's statement.

Jury deliberations began on February 4, 2010 and continued February 5th, 8th, 9th, 10th, 11th, and 12th. During deliberations, the jury asked two questions regarding 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)."[5] The trial

[5] JA 552.

court wrote back, "Tyrone Wright's statement (C-71) will not be sent to you. You must rely on your recollection."[6]

On February 9, 2010, at 11:40 a.m., the jury sent another note saying it had reached a unanimous verdict regarding Wright but needed more time to deliberate the charges against Mr. Johnson.[7] The jury convicted Wright of third-degree murder but acquitted him of conspiracy. On February 12, 2010, at 12:30 p.m., the jury sent another note regarding Wright's statement and the prosecutor's closing arguments where she said to use common sense when reviewing 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?[8]

[6] JA 552.
[7] JA 554.
[8] JA 555.

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

On direct appeal, Mr. Johnson raised a *Bruton* claim.[9] The Pennsylvania Superior Court adjudicated the claim's "trial error" component but said "the other guy" reference did not violate *Bruton*.[10] The Superior Court did *not* adjudicate the claim's "prejudice" component. Mr. Johnson presented his *Bruton* claim to the Pennsylvania Supreme Court,[11] but it denied review.[12]

On August 26, 2016, Mr. Johnson filed his federal petition and raised a *Bruton* claim,[13] which he amended on January 25, 2017.[14] On January 26, 2018, the Magistrate Judge issued its *Report & Recommendation* ("R&R"), and correctly concluded that, even under AEDPA, Wright's statement had been inadequately redacted under *Bruton v. United States*, 391 U.S. 123 (1968) and its progeny.[15] The Magistrate Judge, though, reviewed the "prejudice" component under the "substantial and injurious" standard, *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), that required Mr. Johnson to establish

[9] JA 196-202.
[10] JA 203-206.
[11] JA 207-214.
[12] JA 215-217.
[13] JA 9-33.
[14] JA 34-99.
[15] JA 105-113.

"actual prejudice." *Davis v. Ayala*, 135 S. Ct. 2187, 2197 (2015), which the Magistrate Judge said he could not prove.[16]

On May 29, 2018, Mr. Johnson filed his objections, explaining that he was entitled to *de novo* review regarding the "prejudice" component because the state courts never adjudicated this component.[17] On May 30, 2018, though, the District Court adopted the R&R and dismissed his petition.[18]

The Magistrate Judge and District Court both erred. The correct standard of review is *de novo*, which requires the Court to ask whether it is reasonably likely the trial error may have affected the jury's verdicts. *United States v. Bagley*, 473 U.S. 667, 679 n.9 (1985). Mr. Johnson is entitled to relief under the harmless error standard because it is reasonably likely Wright's unconstitutionally redacted statement may have affected the jury's verdicts.

[16] JA 113-119.
[17] JA 121-152.
[18] JA 153.

STATEMENT OF FACTS

During the prosecutor's opening statements, she told jurors only three men had been involved in Donnie Skipworth's May 4, 2008 shooting death: Arthur Johnson, Tyrone Wright, and Abbas Parker (aka "Baz"). She also said Wright had given a "full confession."[19] Wright's attorney was Gary Server. During Server's opening statements, he told jurors Wright had confessed that Mr. Johnson and Parker "went there to shoot" Donnie Skipworth.[20] Mr. Johnson's attorney, Joseph Santaguida, moved for a mistrial and argued the Commonwealth should not be jointly trying Mr. Johnson and Wright due to the obvious *Bruton* problem.[21] The prosecutor objected and asked Server "to cure" the *Bruton* problem created by, what Server claimed, was an "inadvertent error."[22]

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.[23]

---

[19] JA 318, 320 (NT, Trial, 1/28/2010, pp. 23, 24, 31). Counsel generally does not cite to the trial transcripts, and instead cites to the JA, but because the transcripts are produced 4-pages per page, identifying the correct transcript page(s) by only citing the JA will take considerably more time for the Court without specific page citations. Thus, counsel cites to the JA first and puts the specific transcript page(s) in parentheticals for the Court's convenience.

[20] JA 326 (NT, Trial, 1/28/2010, pp. 55-56)

[21] JA 326 (NT, Trial, 1/28/2010, p. 56).

[22] JA 327 (NT, Trial, 1/28/2010, pp. 56, 57).

[23] JA 327 (NT, Trial, 1/28/2010, p. 57).

After the sidebar, the trial court told jurors Server had "inadvertently misspoke," that it was "allow[ing] him an opportunity to clarify and correct" his misstatement, and that jurors were "to ignore" Server's "last statements[.]"[24] Server mentioned Wright's confession again and how Wright had told detectives that he, Parker, "and another guy" had conspired to kill, and in fact killed, Donnie Skipworth.[25]

The Commonwealth presented Aaron Taylor and claimed he had given a statement on June 25, 2008 alleging that Mr. Johnson had confessed to him to shooting and killing Donnie Skipworth in retaliation for Donnie shooting and killing Mr. Johnson's friend, Darnell Shaw, two years earlier on Newkirk Street.[26] At trial, 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.[27] After Taylor testified, the prosecutor introduced (C-40) a MySpace page photograph of Parker and Mr. Johnson.

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

> 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,

[24] JA 328 (NT, Trial, 1/28/2010, p. 58).
[25] JA 328 (NT, Trial, 1/28/2010, p. 58).
[26] JA 334 (NT, Trial, 1/28/2010, p. 87).
[27] JA 330, 334, 335, 336, 337 (NT, Trial, 1/28/2010, pp. 69-70, 87, 92, 96, 100).

> 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.[28]

Santaguida 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 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?
>
> ….

[28] JA 389 (NT, Trial, 2/1/2010, p. 119).

> 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[.][29]

The prosecutor argued there was no *Bruton* issue because Mr. Johnson did not have a right to confront Wright.[30] The prosecutor also argued that Taylor – or at least his statement – connected Parker with Mr. Johnson.[31] Santaguida made another mistrial request and argued the prosecutor had mischaracterized Taylor's testimony because Taylor never placed Parker and Mr. Johnson together. He also argued no instruction would remove the *Bruton* problem, or the prejudice already created by Wright's statement, because it was so obvious Mr. Johnson was "the other guy."[32] The trial court denied Santaguida's mistrial request.[33]

The prosecutor called Detectives Burns, who had interviewed Wright, to read Wright's statement, question-for-question, into the record. Wright's answers told jurors that he had to have known "the other guy's" name because Wright said he had known "the other guy" since middle school:

> Q. Do you know the decedent, Donnie Skipworth?
>
> A. Yes. I went to school with his brother, Dion.

[29] JA 389 (NT, Trial, 2/1/2010, pp. 120-121).
[30] JA 390 (NT, Trial, 2/1/2010, p. 122). The prosecutor was obviously wrong.
[31] JA 390 (NT, Trial, 2/1/2010, p. 122).
[32] JA 390-391 (NT, Trial, 2/1/2010, pp. 125, 126).
[33] JA 391 (NT, Trial, 2/1/2010, p. 126).

Q. Were you present when Donnie Skipworth was shot and killed?

A. No. I told you that I was around the corner of 28th and Thompson Street.

Q. Do you know who shot and killed Donnie Skipworth?

A. Yeah. It was Baz and some other guy.

Q. How long have you know that other guy?

A. *Since middle school.* I know both of them since middle school.

Q. Do you know Baz's full name?

A. His last name is Parker.

Q. I am showing you two photographs of *black males.* Do you recognize either of these two males?

A. Yeah. This is Baz and this is the other guy.

Q. Are these the two males that shot and killed Donnie Skipworth?

A. Yes.[34]

When Burns asked Wright to describe the events leading to Donnie Skipworth's murder, Wright said:

[34] JA 454 (NT, Trial, 2/3/2010, pp. 53-540).

> 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 [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.[35]

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."[36] When Burns asked, "Did Baz tell you that he shot Donnie?" Wright said, "No. [Baz] had a gun, but all he said was that the other guy shot Donnie."[37] Burns then asked if "the other guy had a gun" that night. Wright's response informed jurors he had to have known "the other guy" because Wright "always" saw "the other

[35] JA 454 (NT, Trial, 2/3/2010, pp. 54-55).
[36] JA 455 (NT, Trial, 2/3/2010, p. 56).
[37] JA 455 (NT, Trial, 2/3/2010, p. 56).

guy" with the black semiautomatic handgun he saw that night.[38] Burns asked why "the other guy" had shot Donnie Skipworth. Wright said he did not know the motive the night of the shooting, but said he learned of it the next day, and it concerned Darnell Shaw's shooting death, because Shaw was "the other guy's" friend.[39]

At the end of Wright's interrogation, after he had signed a four-page statement Burns had typed for him, Burns asked Wright if he had "got the whole statement out[.]"[40] 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."[41] The prosecutor then asked Burns several questions that informed jurors Wright, in fact, knew "the other guy's" name because Wright had written "the other guy's" name under "the other guy's" photograph.[42]

During cross-examination, Burns explained again how Wright knew that Parker and "the other guy" had guns and had planned to shoot Donnie Skipworth.[43] On redirect, Burns told jurors again that Wright knew "the other guy" because Wright had given him "the other guy's" name.[44] The prosecutor then asked, "And you will agree

[38] JA 455 (NT, Trial, 2/3/2010, p. 57).
[39] JA 455 (NT, Trial, 2/3/2010, p. 58).
[40] JA 456 (NT, Trial, 2/3/2010, p. 60).
[41] JA 456 (NT, Trial, 2/3/2010, p. 61).
[42] JA 456 (NT, Trial, 2/3/2010, pp. 62-63).
[43] JA 468 (NT, Trial, 2/3/2010, pp. 110-111).
[44] JA 493 (NT, Trial, 2/3/2010, p. 211).

with me that of the two, Baz and the other guy, it would appear that the other guy is the worse, because," at which point Santaguida objected, and the trial court sustained the objection.[45]

After Burns testified, Santaguida requested another 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 *Bruton* catch-22.[46] The trial court denied the mistrial motion.[47]

During closing arguments, the prosecutor urged the jury to use its "common sense" when evaluating Wright's statement.[48] The prosecutor then repeatedly said Mr. Johnson was the gunman who shot and killed Donnie Skipworth.[49] The prosecutor also referenced Wright's confession as evidence in support of Mr. Johnson's guilt, prompting Santaguida to object.[50] After the trial court overruled the objection, the prosecutor referenced Wright's confession again in support of Mr. Johnson's guilt.[51]

[45] JA 493 (NT, Trial, 2/3/2010, p. 211).
[46] JA 496 (NT, Trial, 2/3/2010, pp. 220-221).
[47] JA 496 (NT, Trial, 2/3/2010, p. 221).
[48] JA 527 (NT, Trial, 2/4/2010, p. 107).
[49] JA 528 (NT, Trial, 2/4/2010, p. 111).
[50] JA 528-529 (NT, Trial, 2/4/2010, pp. 111-112).
[51] JA 529 (NT, Trial, 2/4/2010, pp. 113-114).

When the prosecutor referenced Wright's confession once more, Santaguida again objected, but the trial court overruled the objection.[52] The prosecutor then read, word-for-word, from Wright's statement for the next three pages of transcripts.[53]

When the prosecutor discussed the first-degree murder charges, she indirectly referenced Wright's statement:

> … 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*… [.][54]

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

> … 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 were going to walk up there and he left that car idling, so that he could cart them off after it occurred.[55]

[52] JA 530-531 (NT, Trial, 2/4/2010, pp. 119-120).
[53] JA 531 (NT, Trial, 2/4/2010, pp. 120-122).
[54] JA 535 (NT, Trial, 2/4/2010, p. 137).
[55] JA 536 (NT, Trial, 2/4/2010, pp. 140-141).

The prosecutor then argued that Wright had to have "conspired" with Mr. Johnson because he had lied twice to Burns during his interrogation.[56]

Once the prosecutor ended her closing, Santaguida explained the objections he had made during her closing. From Santaguida's perspective, it was beyond dispute that the jury knew Mr. Johnson was "the other guy":

> 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.[57]

When the trial court disagreed, Santaguida argued:

> 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.[58]

The prosecutor denied Santaguida's allegations and the trial court denied his mistrial request.[59]

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[56] JA 536 (NT, Trial, 2/4/2010, p. 142).
[57] JA 537 (NT, Trial, 2/4/2010, p. 145).
[58] JA 537 (NT, Trial, 2/4/2010, p. 146).
[59] JA 538-539 (NT, Trial, 2/4/2010, pp. 151-152).

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

> I will now instruct you in more detail about the rules which you must following in dealing with [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.[60]

Deliberations began on February 4, 2010 and continued for six full days – February 5th, 8th, 9th, 10th, 11th, and 12th. On February 5, 2010, at 3:00 p.m., the jury sent a note asking "to see Tyrone Wright's statement (C-71)."[61] The trial court wrote back, "Tyrone Wright's statement (C-71) will not be sent to you. You must rely on your recollection."[62] On February 9, 2010, at 11:40 a.m., jurors sent another note saying it had reached a unanimous verdict regarding Wright but needed more time to deliberate the charges against Mr. Johnson.[63] The jury convicted Wright of third-degree murder but not conspiracy.

[60] JA 543 (NT, Trial, 2/4/2010, pp. 169-170).
[61] JA 552.
[62] JA 552.
[63] JA 554.

On February 12, 2010, at 12:30 p.m., jurors sent another note regarding Wright's statement and the prosecutor's closing arguments:

> 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?[64]

Shortly after the trial court reinstructed the jury regarding Wright's statement, the jury reached its verdicts.

[64] JA 555.

SUMMARY OF ARGUMENT

First, the District Court correctly concluded the Pennsylvania Superior Court's adjudication of the *Bruton* claim's "trial error" component was objectively unreasonable. *Bruton* and its progeny clearly establish that alterations that notify the jury of (1) the existence of a nonconfessing defendant *and* that (2) a name had been changed or removed from the co-defendant's statement violates *Bruton*. Wright's statement repeatedly informed jurors about the existence of a nonconfessing defendant and it was beyond obvious that Mr. Johnson's name had been changed to "the other guy."

Second, the District Court erred by reviewing the *Bruton* claim's "prejudice" component under the actual prejudice standard. The Pennsylvania Superior Court never adjudicated the "prejudice" component, meaning AEDPA's deferential standard of review did not apply. Instead, review should have been *de novo*.

Third, under *de novo* review, Mr. Johnson is entitled to a new trial because the *Bruton* error was not harmless, *i.e.*, it is reasonably likely Wright's inadequately redacted statement may have impacted the jury's verdicts.

ARGUMENTS

I. The District Court correctly held that the Superior Court unreasonably applied *Bruton*'s clearly-established principles

A. Standard of review

The Court exercises plenary review over the District Court's legal conclusions. *United States v. Bansal*, 663 F.3d 634, 660 (3d Cir. 2011).

B. Introduction

There is no dispute Mr. Johnson fairly presented his *Bruton* claim to the state courts, that the Pennsylvania Superior Court adjudicated the claim's "trial error" component, and for this reason AEDPA's deferential standard of review applies to this component. Thus, the initial issue concerns *how* the state courts adjudicated this component. The Magistrate Judge and District Court both said the Superior Court unreasonably applied *Bruton*'s case law. Under plenary review, the Court will find this conclusion correct.

C. AEDPA merit analysis

Under AEDPA, a federal court may grant relief regarding any claim adjudicated "on the merits" when the state court's adjudication "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[.]" 28 U.S.C. § 2254(d)(1).

The Superior Court adjudicated the "trial error" component "on the merits." Identifying the clearly-established Supreme Court case law is also easy because this is a straightforward *Bruton* claim. Consequently, the key issue is whether the Superior Court's adjudication was "contrary to, or involved an unreasonable application" of the Supreme Court's clearly-established *Bruton* case law.

1. The "contrary to" or "unreasonable application" prong: the *Harrington* standard

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. 34, 38 (2011); *Cullen v. Pinholster*, 563 U.S. 170, 181-182 (2011). An "unreasonable application" of a clearly-established Supreme Court principle must be "objectively unreasonable," not merely wrong; even "clear error" will not suffice. *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003). Consequently, if the state court's rejection of a federal claim was "reasonable," AEDPA relief is unwarranted. *Hardy v. Cross*, 565 U.S. 65, 72 (2011).

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. 86, 101 (2011). 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.

2. Applying the *Harrington* standard

Whether a state court unreasonably applied a clearly-established rule, turns on 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). 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*, 572 U.S. 415, 424 (2014). Moreover, if the "circumstances of a case are only 'similar to' [Supreme Court] precedents, then the state court's decision is not 'contrary to' the holdings in those cases." *Woods v. Donald*, 135 S. Ct. 1372, 1377 (2015).

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*, 569 U.S. 58, 62 (2013). Instead, 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. 111, 122 (2009). "[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. 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. 70, 79 (2006) (Stevens, J., concurring). In the end, when "the

requirement set forth in § 2254(d)(1) is satisfied[,]… [a] federal court must then resolve the claim without the deference AEDPA otherwise requires." *Panetti v Quarterman*, 551 U.S. at 953; *Vickers v. Superintendent Graterford SCI,* 858 F.3d 841, 848-889 (3d Cir. 2017).

D. Identifying the Supreme Court's clearly-established case law and the clearly-established constitutional principles articulated in these cases and determining whether the state courts unreasonably interpreted or applied these constitutional principles

"[C]learly established Federal law… refers to the holdings, as opposed to the dicta, of [the] [Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). Accordingly, the first task a federal court must do is identify the clearly-established Supreme Court case law in place when the state courts adjudicated the petitioner's federal claim. *Shoop v. Hill*, No. 18-56, 2019 U.S. LEXIS 13, at *4 (Jan. 7, 2019). Between 2010 and 2012, when the state courts adjudicated Mr. Johnson's *Bruton* claim, the clearly-established case law is easily identifiable: *Bruton v. United States*, 391 U.S. 123 (1968); *Harrington v. California*, 395 U.S. 250 (1969)*; Cruz v. New York*, 481 U.S. 186 (1987); *Richardson* v. *Marsh*, 481 U.S. 200 (1987); *Gray v. Maryland*, 523 U.S. 185 (1998).

1. The clearly-established *Bruton* case law

In *Bruton v. United States*, 391 U.S. 123 (1968), the Supreme Court held that a defendant's confrontation rights are 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. The Supreme Court explained why a cautionary instruction 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.

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 had confessed, and their confessions implicated Harrington, but not by name. Cooper, for instance, told detectives that the fourth guy who had participated in the murder was "the white boy" or "the white guy." *Id.* at 253. Bosby also 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 jurors they could only consider the confessions against the confessors and not Harrington. *Id.*

On appeal, the Supreme Court said the introduction of Bosby's and Cooper's confessions violated *Bruton*, even though their confessions did not explicitly name Harrington. The Supreme Court, however, found the *Bruton* error harmless because other evidence, including Harrington's own trial testimony, placed him at the crime scene at the time of the killing. *Id.* at 253-254.

In *Cruz v. New York*, 481 U.S. 186 (1987), the Supreme Court addressed another permutation of *Bruton* and held that "where a non-testifying 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." *Id.* at 193.

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's confession, 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 jurors not to consider Williams's confession against Marsh. *Id.* at 205.

As redacted, the confession indicated 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, moreover, 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 car's back seat. *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. at 191 (summarizing *Marsh*).

The Supreme Court said the redacted confession was admissible under *Bruton*. 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, though, Williams's confession amounted to "evidence requiring linkage" in that it "became" incriminating regarding Marsh "only when linked with evidence introduced later at trial." *Id.* The Supreme Court said "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.

Gray v. Maryland, 523 U.S. 185 (1998) 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 alteration acceptable under *Bruton*? The Supreme Court said it had to "decide whether these substitutions"

made a "significant legal difference" under *Bruton*. The Supreme Court said they "do not and that *Bruton's* protective rule applies" in these situations. *Id.* at 188.

In *Gray*, co-defendant, Anthony Bell, had confessed and explicitly named Gray in his confession, and said Gray had 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 had altered it by replacing Gray's name with either 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 Bell's confession into the record, the officer said the word "deleted" or "deletion" where the blank spaces appeared. *Id.* at 192.

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's confession in *Richardson* because Bell's "confession refer[red] directly to the 'existence' of the nonconfessing defendant." *Id.* The Supreme Court said 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.

First, it 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 "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.

Second, it 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.* 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 has been blacked out. *Id.* at 193. The Supreme Court, therefore, described blacking out and other "similar redactions" as "devices… so obvious" that they "emphasize the identity of those they purport[] to conceal." *Id.* at 194.

Third, the Supreme Court examined the grammatical functioning of 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's redacted confession in *Richardson* eliminated all indications that someone else, *i.e.*, Marsh, may have participated in the victim's beating death. *Id.* at 194.

In the end, the Supreme Court said, "[R]edactions 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.

2. The Superior Court's adjudication of the *Bruton* claim

The Superior Court adjudicated and rejected the *Bruton* claim's "trial error" component.[65] The Superior Court cited and briefly summarized *Bruton*, but then said, "After *Bruton*, the Supreme Court permitted introduction of redacted confessions that omit any reference to the co-defendant."[66] 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 Supreme Court 'recognized an important distinction between co-defendant confessions that expressly incriminate the defendant and those that become incriminating only when linked to other evidence properly introduced at trial.'"[67] 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."[68]

[65] JA 204-205.
[66] JA 205.
[67] JA 205 (quoting *Commonwealth v. Travers*, 768 A.2d 845, 847 (2001)).
[68] JA 205.

The Superior Court then discussed *Travers*. In *Travers*, the co-defendant's confession explicitly named the defendant, but at trial the prosecution had used the "neutral pronoun" – "the other guy" – when the co-defendant's confession explicitly mentioned the defendant by name.[69] *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.'"[70]

Based on *Travers*, the Superior Court rejected Mr. Johnson's *Bruton* claim because the "facts" in his case were "precisely in line with *Travers*,"[71] *i.e.*, 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 Wright's statement could not be used against. Mr. Johnson.

3. The Superior Court's objectively unreasonable application of the *Bruton* case law

a. *Gray* controls Mr. Johnson's case

Based on *Gray*, it is clearly-established that alterations that 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*. Consequently, the Superior Court's adjudication of the *Bruton* claim's "trial error" component was objectively

[69] JA 205.
[70] JA 205 (quoting *Commonwealth v. Travers*, 786 A.2d at 850, 851).
[71] JA 205.

unreasonable. Based on (1) the prosecutor's opening statements, (2) the manner in which the prosecutor had altered Wright's confession, (3) the substance of Wright's confession, and (4) the statements and arguments by Gary Server and the prosecutor, the jury was repeatedly notified of (a) the existence of a nonconfessing defendant, (b) that Mr. Johnson was the nonconfessing defendant, and (c) that his name had been changed to "the other guy."

Prosecutor's opening statements: From the moment Mr. Johnson's trial began, the prosecutor told the jury only three people were responsible for Donnie Skipworth's murder: (1) Wright, (2) Parker, and (3) Mr. Johnson. The prosecutor then told jurors Mr. Johnson was the one who shot and killed Donnie Skipworth. The prosecutor then told jurors Wright had given a "full confession."[72] The easy inference from the prosecutor's opening statement is that Wright's "full confession" implicated Mr. Johnson as the shooter.

Gary Server's opening statements: If the jurors had not yet figured out that Wright had identified Mr. Johnson, they immediately figured it out when Server told them that Wright had identified Mr. Johnson to detectives.[73] After Santaguida objected, the trial court told jurors that Server had "misspoke" and instructed them to "ignore"

[72] JA 320 (NT, Trial, 1/28/2010, p. 31).
[73] JA 326 (NT, Trial, 1/28/2010, pp. 55-56).

his misstatement.[74] The prejudice, though, had already been done. *Bruton v. United States*, 391 U.S. at 135.

Manner of alteration: The prosecutor changed Mr. Johnson's name to "the other guy." This alteration explicitly informed jurors of the existence of a nonconfessing defendant, distinguishing it from *Richardson* and aligning it with *Gray*. Moreover, when the alteration is coupled with the prosecutor's opening statements and closing arguments, and Burns's testimony, jurors used their "common sense" to immediately conclude "the other guy" was none other than Mr. Johnson. The jury's February 12, 2010 note makes this point crystal clear.[75]

Substance of Wright's confession: Burns read Wright's confession word-for-word into the record. During the prosecutor's closing arguments, she re-read Wright's confession. Wright's confession told jurors these facts about "the other guy": (1) Wright had known "the other guy" since middle school;[76] (2) Wright knew "the other guy's" name because, as Burns said, Wright had told him "the other guy's" name and then wrote "the other guy's" name on "the other guy's" photograph;[77] and (3) Wright had frequently seen and interacted with "the other guy" because, according to Wright,

[74] JA 327 (NT, Trial, 1/28/2010, p. 58).
[75] JA 555.
[76] JA 454 (NT, Trial, 2/3/2010, pp. 53-54).
[77] JA 456, 493 (NT, Trial, 2/3/2010, pp. 62-63, 211).

the other guy "always" carried the black semiautomatic handgun he (Wright) allegedly saw the night of the shooting.[78]

These facts made the obvious more obvious. The jury, for instance, would have easily followed this train of thought: If Wright has known "the other guy" since middle school, knew that he always carried a black semiautomatic handgun, and knew his name, why are they not mentioning "the other guy" by his real name, Arthur Johnson?

Prosecutor's closing arguments: The prosecutor's closing arguments mirrored her opening statements. She repeatedly argued Mr. Johnson had shot and killed Donnie Skipworth and supported her argument by repeatedly referring to Wright's confession. Like her opening statements, the easy inference is that Wright had implicated Mr. Johnson as the gunman.

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. Consequently, the Superior Court's adjudication of Mr. Johnson's *Bruton* claim was not only wrong, it was objectively unreasonable.

b. The Superior Court's opinion and why it is objectively unreasonable under *Gray*

The Superior Court made two objectively unreasonable mistakes.

First, the Superior Court mischaracterized the key distinguishing fact in the Supreme Court's *Bruton* cases. According to the Superior Court, the "important

[78] JA 455, 531 (NT, Trial, 2/3/2010, p. 57; NT, Trial, 2/4/2010, p. 122).

distinction" was between confessions that "expressly incriminate" the defendant and those that "become incriminating only when linked to other evidence properly introduced at trial."[79] 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."[80]

This is an objectively unreasonable interpretation 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 a far more important distinction that played a more significant role in its holding: Williams's 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 Martin, the jury would have never known that Williams and Martin drove to the victim's house with Marsh in the back seat.

Gray 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

[79] JA 205 (quoting *Commonwealth v. Travers*, 768 A.2d at 847).
[80] JA 205.

'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." *Gray v. Maryland*, 523 U.S. at 195. The Superior Court, though, mentioned nothing about the fact 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* renders the Superior Court's adjudication objectively unreasonable.

Second, the Superior Court said Wright's altered confession was permissible under *Bruton* because the alteration "[was] not an obvious alteration at all[.]"[81] 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 on February 12, 2010 proves this point by clear and convincing evidence.[82]

Consequently, fairminded jurists would agree that 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 none other than Mr. Johnson. Consequently, to hold that "the other guy" alteration "was not an obvious alteration" is objectively unreasonable. More specifically, *Gray* and its strong emphasis on the types of alterations and redactions that violated *Bruton*, made the *Bruton* error in Mr. Johnson's case so apparent that

[81] JA 205.
[82] JA 555.

"fairminded jurists could [*not*] disagree on the [in]correctness" of the Superior Court's adjudication. *Harrington v. Richter*, 562 U.S. at 101.

c. The District Court correctly concluded the Superior Court's adjudication was objectively unreasonable

The District Court adopted the R&R's findings and conclusions. The R&R said the Superior Court had unreasonably applied the *Bruton* case law.[83] This conclusion is correct because it is based on several findings that are not clearly erroneous. *United States v. Sokolow*, 91 F.3d 396, 415 (3d Cir. 1996) (district court's findings are reviewed for clear error). A finding is clearly erroneous when the Court is "left with a definite and firm conviction that a mistake has been committed." *United States v. Grape*, 549 F.3d 591, 603-04 (3d Cir. 2008). Consequently, even if the Court might find the facts differently, it must defer to the District Court's findings unless it is "convinced that the record cannot support those findings." *Id.*

Here, the record supports the following findings and conclusions by the Magistrate Judge: (1) Wright's statement was "insufficiently redacted" under *Bruton*,[84] (2) "when considered in the context of the trial in its entirety, Wright's redacted statement implicated [Mr. Johnson],"[85] (3) that, "considered in context, the redactions were an obvious sign that the statement had been altered to remove [Mr. Johnson's]

[83] JA 108.
[84] JA 106.
[85] JA 109.

name,"[86] (4) that, "[b]y simple process of elimination, the jury could conclude that [Mr. Johnson] was 'the other guy' in Wright's statement,"[87] (5) that the jury needed to look no "further than the opening statements to surmise that [Mr. Johnson] was 'the other guy' named in Wright's statement,"[88] (6) that Wright easily and "explicitly named Baz" (*i.e.*, Parker) in his statement, but did not name "the other guy," even though he had told detectives he had known the other guy "since middle school,"[89] (7) that the jury would find it quite "curious" why detectives had never asked Wright "the other guy's" name even though Wright had said "the other guy" was the "actual shooter,"[90] (8) that the detectives' "lack of curiosity about the shooter's name, while asking for Baz's full name, was likely to raise confusion or suspicion in the jurors' minds" because detectives "[s]urely… would have wanted the name of the person who shot Donnie,"[91] (9) that the prosecutor's closing arguments "essentially unmask[ed]" Mr. Johnson as "the other guy" in Wright's statement,[92] and (10) that "despite the redactions," it "was clear that Wright's statement referred to [Mr. Johnson]," when "considered in context" of the trial's "entirety," because the "redactions pointed to [Mr. Johnson] as the shooter,

[86] JA 111.
[87] JA 111.
[88] JA 111-112.
[89] JA 112.
[90] JA 112.
[91] JA 112.
[92] JA 112-113. In *Brown v. Superintendent Greene SCI*, 834 F.3d 506, 517 (3d Cir. 2016), this Court held that *Bruton* extends to closing arguments. *Accord Whitaker v. Superintendent Coal Twp. SCI*, 721 F. App'x 196, 203 (3d Cir. 2018).

creating a risk that despite the trial court's limiting instructions, the jury considered Wright's statement against [Mr. Johnson]" without Mr. Johnson "having the right to confront and discredit Wright's statement."[93]

The correctness of these findings, moreover, makes the Magistrate Judge's legal conclusions correct as well, even under *de novo* review. Accordingly, there is ample evidence, factually and legally, supporting the District Court's adoption of the R&R's findings and conclusions that the Superior Court unreasonably applied the *Bruton* case law. Thus, the Court should affirm the District Court's findings and conclusions regarding the *Bruton* claim's "trial error" component.

[93] JA 113.

II. The District Court erred by reviewing the *Bruton* claim's "prejudice" component under AEDPA's deferential standard of review – when the correct standard of review was *de novo*

A *Bruton* claim has two components: (1) a "trial error" component; and (2) a "prejudice" component. When addressing the "trial error" component, the reviewing court must determine whether the trial court's actions violated *Bruton*. If the reviewing court concludes the trial court's actions did not violate *Bruton*, it can stop its analysis at that point, meaning it need not address the "prejudice" component. However, there is nothing stopping the reviewing court from also adjudicating the "prejudice" component "on the merits" even if it has already concluded the trial court did not violate *Bruton*.

Here, the Superior Court "adjudicated" the *Bruton* claim's "trial error" component, but once it (unreasonably) concluded that Wright's redacted confession did not violate *Bruton*, it never adjudicated the claim's "prejudice" component.[94] This is significant because AEDPA only requires substantial deference for those "components" of federal claims "adjudicated" by the state courts "on the merits." If the state courts "adjudicate" only one "component" of the petitioner's federal claim and refuse to "adjudicate" the remaining "component(s)," a federal habeas court must only give AEDPA deference to the "component" adjudicated on the merits. No

[94] JA 205.

deference is warranted for the unadjudicated "component(s)," meaning the federal habeas court must review the unadjudicated "component(s)" *de novo*.

Again, because the District Court adopted the R&R, the Court must review how the R&R addressed the *Bruton* claim's "prejudice" component. The R&R adjudicated this component under the "substantial and injurious" standard, *Brecht v. Abrahamson*, 507 U.S. at 637, meaning Mr. Johnson had to prove "actual prejudice." *Davis v. Ayala*, 135 S. Ct. at 2197.[95] The Magistrate Judge erred. It should have reviewed the "prejudice" component *de novo* for harmless error because the Superior Court never "adjudicated" the prejudice "component" and *Porter v. McCollum*, 558 U.S. 30, 39 (2009), *Rompilla v. Beard*, 545 U.S. 374, 390 (2005), and *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) make this obvious. Indeed, in his objections, Mr. Johnson explained why *Porter*, *Rompilla*, and *Wiggins* required *de novo* review,[96] but the District Court adopted the R&R the day after Mr. Johnson filed his objections and granted no COAs.[97] Likewise, Mr. Johnson reargued *Porter*, *Rompilla*, and *Wiggins* in his COA application,[98] and based on these cases, the Court granted the application.[99] Mr. Johnson will not rehash the facts in these cases because the error is obvious. *De novo* review is the correct standard of review.

[95] JA 114.
[96] JA 126-132.
[97] JA 153.
[98] JA 156-188.
[99] JA 189-190.

III. Under *de novo* review, it is reasonably possible Wright's redacted confession may have affected the jury's verdicts, warranting a new trial

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. Mr. Johnson is entitled to relief based on this standard because it is reasonably likely Wright's inadequately redacted confession may have contributed to the jury's verdicts. 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 veracity of their testimony and/or statements. Wright's inadequately altered confession, however, minimized, if not entirely erased, these doubts because the identity of "the other guy" was obvious from the get-go.

A. Aaron Taylor

1. Trial testimony

At trial, the Commonwealth claimed Taylor had given a *voluntary* statement on June 25, 2008 (C-1), alleging Mr. Johnson had confessed to him, approximately one to two weeks after the murder, that he had shot and killed Donnie Skipworth in retaliation for Donnie shooting and killing his (Johnson's) friend, Darnell Shaw, two years earlier.[100]

[100] JA 332-334 (NT, Trial, 1/28/2010, pp. 79-87).

At trial, though, Taylor said he was "forced" to sign the June 25, 2008 statement.[101] In support of his claim, Taylor said he never went to Homicide to report any alleged conversation he had with Mr. Johnson regarding Donnie Skipworth's murder. Instead, Taylor said he was arrested in the 15th District on a drug charge and taken to the local precinct. Once there, Homicide detectives transported him to Homicide where they interrogated him about Donnie Skipworth's murder for several hours – many of which were in the wee morning hours of June 25, 2008.[102] Indeed, C-1 reveals Taylor gave his statement at 4:00 a.m. on June 25, 2008.[103] Taylor also repeatedly said C-1 was false because he had not seen Mr. Johnson in years and had never spoke with him regarding Donnie Skipworth's murder.[104] Taylor also denied signing the statement (C-1). He admitted to signing photographs during, but denied signing his signature on C-1.[105]

2. The R&R's findings regarding Aaron Taylor are irrelevant or not supported by the record

The R&R found that "other evidence corroborated Taylor's statement… that [Mr. Johnson] killed [Donnie] in retaliation for his involvement in Darnell Shaw's murder[.]"[106] This "other evidence" came from Detectives Hagan and Burns. For

[101] JA 330 (NT, Trial, 1/28/2010, p. 69).
[102] JA 330 (NT, Trial, 1/28/2010, pp. 70-71).
[103] JA 332-333 (NT, Trial, 1/28/2010, pp. 80-81).
[104] JA 334, 336, 337, 338 (NT, Trial, 1/28/2010, pp. 87, 94, 100, 102-103).
[105] JA 335-336 (NT, Trial, 1/28/2010, pp. 92-94).
[106] JA 116-117.

instance, in his statement (C-1), Taylor allegedly said Donnie Skipworth "had somebody kill Darnell [Shaw]," and "the other guy took the blame for the whole thing."[107] According to R&R, Hagan had corroborated this portion of C-1 when he "testified that a friend of [Donnie's] confessed to killing Shaw, and [Donnie] was one of the 'pertinent witnesses' in the Darnell Shaw murder case."[108] Likewise, in C-1, Taylor allegedly said Mr. Johnson had shot Donnie Skipworth out of retaliation for Darnell Shaw's murder. According to the R&R, Burns had corroborated this portion of C-1 when he told jurors he believed the shooting was retaliatory based on the number of times Donnie had been shot.[109]

These are similarities and facts without substance. That someone shot Donnie Skipworth in retaliation is unsurprising because Donnie, his brother Dion, and the entire Skipworth family made thousands of dollars a day selling cocaine.[110] Outside of the so-called "revenge" portion of C-1, however, the Commonwealth presented no evidence to corroborate Taylor's most significant claim, *i.e.*, Mr. Johnson's alleged confession.

This brings us to the most glaring problem with C-1, which is the total absence of questions regarding the alleged conversation Taylor supposedly had with Mr. Johnson or the conversation Taylor allegedly overheard where Mr. Johnson allegedly

[107] JA 343 (NT, Trial, 1/28/2010, pp. 123-124).
[108] JA 117.
[109] JA 117.
[110] JA 409 (NT, Trial, 2/1/2010, pp. 198-199).

confessed. According to C-1, detectives did not ask a single follow-up question when Taylor allegedly said, "I heard this young boy, Art, talking about how he did it, he killed Donnie and how nobody had to worry about what he, meaning Donnie, had done to Darnell."

For instance, detectives did not ask: What day of the week did this conversation occur? What part of the day did it occur? Where exactly did it occur? Did the conversation occur indoors or outside? If indoors, what building or residence did it occur in and why were Taylor and Mr. Johnson at this location at the same time on this day? What was the context in which Taylor met with or ran into Mr. Johnson? What was the substance of their conversation before Mr. Johnson made his admission? Were there others with Taylor or Mr. Johnson when Mr. Johnson confessed? If so, who were they, and did they also hear Mr. Johnson's confession?

In the end, because there are so many questions left unanswered about Mr. Johnson's alleged confession to Taylor, Taylor's trial testimony was not the linchpin to the Commonwealth's case. Instead, it was Wright's statement.

B. Dion Skipworth

1. Trial testimony

Dion Skipworth, Donnie's brother, testified and repeatedly admitted he, Donnie, and his family sold cocaine for a living. He described the family business as a drug

"monopoly."[111] On the night of the shooting, he said he, Donnie, Larry, and Jermaine, had been selling cocaine on the corner of Newkirk Street for six hours.[112] Dion testified he knew Mr. Johnson, Wright, and Parker from the neighborhood and said Mr. Johnson, Wright, and Parker regularly hung out together. Dion contradicted this point, though, when he later said he only saw Mr. Johnson occasionally.[113]

Dion said while he, Donnie, Larry, and Jermaine sat on the corner of Newkirk Street, Mr. Johnson walked up and opened fire. Dion said Mr. Johnson did not say a word before he aimed directly at Donnie and fired. Dion said he also recognized Mr. Johnson by the way he walked as he approached the group. Dion said he did not see anyone with Mr. Johnson and said he last saw Mr. Johnson the day of the shooting on May 4, 2008.[114]

Although Dion claimed to have immediately recognized Mr. Johnson as the gunman, he said he did not speak with responding officers or his family and friends that night and therefore did not identify Mr. Johnson as the gunman to anyone. According to Dion, people from his neighborhood were not "allowed" to speak with the police, if they did, they would be labeled a "snitch," putting their lives at risk.[115]

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[111] JA 409 (NT, Trial, 2/1/2010, pp. 198-199).
[112] JA 400-401, 402, 403 (NT, Trial, 2/1/2010, pp. 162-169, 173, 177).
[113] JA 402 (NT, Trial, 2/1/2010, pp. 170-171).
[114] JA 402-404 (NT, Trial, 2/1/2010, pp. 171-180).
[115] JA 405 (NT, Trial, 2/1/2010, pp. 183-184).

Dion, though, said he told a few family members and a friend, *i.e.*, his brother Doug, his cousin Derrell, and his friend Jermaine, that Mr. Johnson was the gunman the day after the shooting on May 5, 2008. Doug, Derrell, and Jermaine, however, never went to the police to report Dion's alleged identification of Mr. Johnson, nor did they testify at trial to corroborate this aspect of Dion's testimony.[116] Dion contradicted this aspect of his testimony on cross-examination when he said he told no one – not even family or friends – that he knew the shooter was Mr. Johnson.[117]

Dion, moreover, implied that he, Jermaine, and Larry all saw and recognized the shooter as Mr. Johnson.[118] Jermaine and Larry, though, never gave a statement identifying Mr. Johnson, nor did they testify at the preliminary hearing or trial and identify Mr. Johnson.

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[116] JA 405-406 (NT, Trial, 2/1/2010, pp. 184-185). At trial, while crossing Dion, Santaguida accused him of fabricating his identification of Mr. Johnson because he simply wanted someone arrested for Donnie's murder. JA 414 (NT, Trial, 2/1/2010, pp. 219-220). Based on Santaguida's allegation, the Commonwealth could have introduced Doug, Derrell, and Jermaine as "prior consistent statement" witnesses to testify about Dion's alleged identification of Mr. Johnson on May 5, 2008. "[A] prior declaration of a witness whose testimony has been attacked and whose credibility stands impeached, which, considering the impeachment, the court will allow to be proved by the person to whom the declaration was made, in order to support the credibility of the witness." *Commonwealth v. Hutchinson*, 556 A.2d 370, 372 (Pa. 1989). Such testimony is admissible if it is alleged that the witness's present testimony is recently fabricated or a result of corrupt motives, *Commonwealth v. Gaddy*, 362 A.2d 217, 223 (Pa. 1976), and the prior statements are being offered to rehabilitate the witness by "showing that that which the witness now testifies to has not been recently fabricated." *Id.*; *accord Commonwealth v. Hutchinson*, 556 A.2d at 372.

[117] JA 412 (NT, Trial, 2/1/2010, p. 211).

[118] JA 403 (NT, Trial, 2/1/2010, p. 176).

Dion 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 Wright or Parker, and at trial he said he had no knowledge that either were involved in Donnie's shooting. Dion said he "eventually" came forward and identified Mr. Johnson because Donnie "was due justice" for being "gunned down for no reason."[119]

On cross-examination, Dion denied speaking with Officer Lozada at the scene, despite Lozada's report and testimony to the contrary.[120] Lozada, the first responding officer, testified, via stipulation, that she had spoken with Dion at the scene at 12:07 a.m.[121] Lozada spoke with Dion, but according to Lozada, Dion mentioned nothing about immediately identifying the gunman as Mr. Johnson. Dion, on the other hand, claimed none of the responding officers had questioned him at the scene.[122] Thus, according to Dion, despite responding to the shooting, none of the responding officers thought it was important to question the first witness on the scene, *i.e.*, Dion, about whether he saw the shooting, and if so, what he had seen and heard before, during, and after the shooting.

[119] JA 406, 407, 418 (NT, Trial, 2/1/2010, pp. 187, 190-191, 236-237).
[120] JA 410-411 (NT, Trial, 2/1/2010, pp. 205-208).
[121] JA 463, 511 (NT, Trial, 2/3/2010, p. 89; NT, Trial, 2/4/2010, pp. 42-43).
[122] JA 410-411 (NT, Trial, 2/1/2010, pp. 205-206).

2. The R&R's findings regarding Dion Skipworth are irrelevant or not supported by the record

The R&R said Dion's "eyewitness account was similarly corroborated by other evidence."[123] Dion, for instance, said the shooting occurred "around midnight," he heard more than one gunshot, he ran to his cousin's house where he stayed for five to ten minutes, before returning to the scene and learning Donnie had been shot several times.[124] According to the R&R, firefighters Hutchins and Banks corroborated Dion's testimony because they both testified they were on duty in the area and heard multiple gunshots around midnight.[125] The R&R also found that Lozada corroborated Dion's testimony because her stipulation said she had spoken with Dion at the scene at 12:07 a.m.[126]

Again, these are similarities and facts without substance. More importantly, Hutchins's, Banks's, and Lozada's testimony does not even prove that Dion witnessed the shooting. Instead, their testimony merely proves Dion came to the scene *after* the shooting had occurred because none of the three witnessed the shooting and none saw Dion allegedly fleeing the scene after the shooting. Dion could have easily heard the gunshots from another location, like his cousin's house, and ran to the scene by merely following and listening to the police sirens responding to the scene.

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[123] JA 117.
[124] JA 402, 403, 404, 410 (NT, Trial, 2/1/2010, pp. 173, 177, 178-179, 181, 202).
[125] JA 117-118.
[126] JA 118.

Simply put, while Hutchins, Banks, and Lozada corroborated certain aspects of Dion's testimony, their testimony provided zero corroboration regarding the most significant aspect of his testimony, *i.e.*, his testimony identifying Mr. Johnson as the shooter. Indeed, if the Commonwealth wanted powerful and impactful corroboration evidence, it should have presented Larry and Jermaine because, according to Dion, both recognized Mr. Johnson as the shooter. The Commonwealth, though, never interviewed, subpoenaed, or presented Larry and Jermaine to corroborate Dion's identification testimony and to constitute substantive evidence of Mr. Johnson's guilt.

C. Credibility problems with Aaron Taylor and Dion Skipworth

Dion and Taylor had significant credibility issues. Dion is a known drug dealer who did not identify his brother's killer for more than three months despite claiming he immediately recognized the gunman. A legitimate question for the jury, therefore, was whether Dion saw the gunman or, as Santaguida suggested during cross-examination,[127] he heard through word-of-mouth on the streets or merely assumed that Mr. Johnson was responsible. Dion's testimony, therefore, raised doubt as to whether he witnessed the shooting and captured an adequate view of the gunman to identify him as Mr. Johnson.

[127] JA 414 (NT, Trial, 2/1/2010, pp. 219-220).

Taylor denied making the statement (C-1) the prosecutor claimed he had made that incriminated Mr. Johnson. Taylor also said he had not seen Mr. Johnson for years. The jury, therefore, had to determine whether Taylor made the statement, and if he had, whether he had done so voluntarily. Likewise, if the jury determined his statement was voluntary, it still had to decide whether the statement was true. That Taylor gave so few details about Mr. Johnson's alleged confession made this task presumably quite difficult. Simply put, Taylor's testimony presented with legitimate doubts as to whether Mr. Johnson confessed.

There is a reasonable likelihood, however, that Wright's inadequately redacted statement may have minimized, if not entirely extinguished, the doubts created by Dion's and Taylor's testimony. Based on the jury's February 12, 2010 note, the jury clearly knew the identity of "the other guy." And again, Mr. Johnson need not prove actual prejudice, he need only demonstrate that it is reasonably likely the *Bruton* error *may have* affected the jury's verdicts - a much lower standard.

The eight days of deliberations also undermines the Magistrate Judge's finding that the Commonwealth's case against Mr. Johnson was "sufficiently strong."[128] If the Commonwealth's case was so strong, it would not have taken the jury eight days to reach its verdicts. Put differently, had jurors viewed Dion and Taylor as credible

[128] JA 113.

witnesses, they would have reached their verdicts quickly because one identified Mr. Johnson as the gunman and one said Mr. Johnson confessed.

Thus, the eight days of deliberations represent strong evidence that jurors struggled with Dion's and Taylor's credibility and testimony. Wright's statement, though, helped jurors navigate through these struggles. Indeed, after the trial court re-instructed the jury regarding Wright's statement on February 12, 2010, the jury returned a short while later with its verdicts. The length of deliberations, therefore, demonstrates the *Bruton* error was not harmless.

Stated differently, it is reasonably likely the jury's apparent awareness of Mr. Johnson as "the other guy" – based on the *Bruton* error – may have impacted its credibility assessments of Taylor and Dion, which in turn impacted its verdicts. For instance, based on the fact the jury obviously knew Mr. Johnson to be "the other guy," it is reasonably likely the jury may have used this apparent inference when assessing Taylor's statement. The jury, for example, could have concluded that because Wright implicated Mr. Johnson, this made the key aspect of Taylor's statement more credible and believable, *i.e.*, while we have doubts about Taylor's statement, the fact Wright also implicated Mr. Johnson renders our doubts insufficient to constitute reasonable doubt, and gives us sufficient evidence to believe Taylor's statement is likely true, despite our doubts.

The same reasoning can be applied to the jury's assessment of Dion's credibility. The jury, for example, could have concluded that because Wright implicated Mr. Johnson, this made the key aspect of Dion's testimony more credible and believable, *i.e.*, while we have doubts about Dion's identification testimony, and why he took so long to identify Mr. Johnson, that Wright also implicated Mr. Johnson renders our doubts insufficient to constitute reasonable doubt, and gives us sufficient evidence to believe that Dion's identification testimony, though questionable, is likely true, despite our doubts.

Moreover, it is reasonably likely the jury may have then combined these *Bruton* enhanced credibility determinations to make each credibility determination stronger and more justifiable. For instance, after finding Dion's identification testimony more credible, thanks to *Bruton* error, it is reasonably likely the jury may have used this enhanced credibility determination to find Taylor's statement even more credible, *i.e.*, if Dion's identification testimony is likely true, based on Wright's statement, then Taylor's statement is likely true as well, despite our doubts.

The same reasoning applies to Dion. After finding Taylor's statement more credible, thanks to *Bruton* error, it is reasonably likely the jury may have used this enhanced credibility determination to find Dion's identification testimony more credible, *i.e.*, if Taylor's statement is likely true, based on Wright's statement, then Dion's identification testimony is likely true as well, despite our doubts.

In the end, the *Bruton* error was not harmless and Mr. Johnson is entitled to a new trial.

D. Other clearly erroneous R&R findings

The Magistrate Judge found that Wright's statement was "largely cumulative of other evidence presented at trial."[129] The Magistrate Judge then mentioned the firearms evidence, the fact officers had heard "a lot" of gunshots, the fact officers saw a male get into a van, which was allegedly linked to Wright, and the fact Taylor said he had heard Mr. Johnson confess.[130] The Magistrate Judge's "cumulativeness" finding is *irrelevant* because, if Wright's statement had been properly redacted, the jury would have had no idea Wright even mentioned a second co-defendant, meaning the jury would have never heard the phrase "the other guy." And let's be honest, the linchpin of the Commonwealth's case was the phrase – "the other guy" – because it was obvious Mr. Johnson was "the other guy."

For instance, Wright's statement said that right before the shooting, he saw "the other guy" with "a black semi auto [handgun]," and Kenneth Lay, the firearms expert, testified that the FCCs collected from the scene could have been fired by a semiautomatic Glock pistol.[131] The damaging evidence here, however, is *not* Lay's firearms testimony, but the obvious inference that Mr. Johnson was "the other guy"

[129] JA 118.
[130] JA 118-119.
[131] JA 118.

holding the semiautomatic handgun. Thus, this is the fundamental problem with the Magistrate Judge's "cumulativeness" finding. It fails to realize that had Wright's statement been properly redacted, the "cumulativeness" finding collapses under its own weight, *i.e.*, it would simply consist of Wright identifying facts about the shooting that he knew to be true because, *drum roll please*, he participated/conspired in the shooting. However, that Wright's statement was consistent with facts of the shooting, does not lead to a reasonable inference that Mr. Johnson must have been the shooter because, again, the jury would have never known that Wright identified a second co-defendant in his statement. For all the jury knew, then, was that either Wright or Parker fired the fatal shots that killed Donnie Skipworth.

And this is crux of the prejudice argument: if Wright's statement had been properly redacted, the jury only would have heard about Wright and Parker participating in the shooting. Every reference to a nonconfessing co-defendant, *i.e.*, Mr. Johnson, would have been removed from Wright's statement. Thus, based on Wright's properly redacted statement, the jury would presumably believe that only he and Parker had participated in the shooting.

However, the jury would then have to reconcile Wright's properly redacted statement with Dion's identification testimony and Taylor's confession testimony. Reconciling these conflicting narratives, though, would have raised considerable, if not reasonable, doubt for a simple reason: Wright admitted to participating in the shooting, and his properly redacted statement mentions nothing about Mr. Johnson or a second

co-defendant. Based on this, a reasonable juror would ask: Wright said he and Parker participated in the shooting, but he never mentioned Mr. Johnson. How, then, can Dion's identification testimony be accurate? Likewise, how can Taylor's confession testimony be true, meaning why would Mr. Johnson falsely confess to a murder that, according to Wright's statement, he did not participate in?

Lastly, the Magistrate Judge's "cumulativeness" finding should be given short shrift because the Magistrate Judge used the wrong prejudice standard.

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

CONCLUSION

WHEREFORE, Mr. Johnson respectfully requests the following relief:

1. That the Court affirm the District Court's "trial error" holding that the state courts unreasonably applied *Bruton*;

2. That the Court reverse the District Court's decision to apply the actual prejudice standard and review Mr. Johnson's *Bruton* claim *de novo* for harmless error; and

3. That the Court grant Mr. Johnson a new trial because the *Bruton* error was not harmless.

Respectfully submitted this the 19th day of February, 2019.

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CERTIFICATE OF SERVICE

On February 19, 2019, 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.

COMBINED CERTIFICATIONS

1. Undersigned counsel are members of the bar of the United States Court of Appeals for the Third Circuit. L.A.R. 28.3(d).

2. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,872 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

3. I certify that today I served a copy of this opening brief and joint appendix on opposing counsel, ADA Jennifer O. Andress, electronically through this Court's docketing system.

4. The text of the electronic brief is identical to the text in the paper copies. L.A.R. 31.1(c).

5. The Avast Antivirus virus detection program, version 17.9.2322, has been run on this file and no virus was detected. L.A.R. 31.1(c).

6. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Garamond.