[J-144-2000]
THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 244 Capital Appeal Docket
	:	
Appellee,	:	Appeal from the Order of the Court of
	:	Common Pleas of Philadelphia County,
	:	dated April 30, 1998 at No. 9501-580 2/3
v.	:	
	:	
	:	
MICHAEL OVERBY,	:	ARGUED: October 17, 2000
	:	
Appellant.	:	
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DISSENTING OPINION

MR. JUSTICE CASTILLE **DECIDED: October 24, 2002**

The Court's grant of a new trial today under authority of Bruton v. United States, 391 U.S. 123 (1968), results from a misapprehension of the material facts; a troubling application of this Court's already-embattled relaxed waiver practice to reach a fictional claim the Court perceives *sua sponte*; a consequent imposition of a burden of proof upon the appellee which it could not possibly have foreseen and which the Court affords the appellee no opportunity even to attempt to discharge; and, finally, a misapprehension of the Sixth Amendment Confrontation Clause jurisprudence that governed at the time of the 1995-1996 trials in this matter, which necessarily calls into question the continuing vitality of this Court's recent decision in Commonwealth v. Lopez, 739 A.2d 485 (Pa. 1999). I am compelled to respectfully dissent.

The Court goes to rather extraordinary lengths to overturn the verdict in this capital case. First, rather than review the relevant claim of ineffective assistance of trial counsel which is actually forwarded and argued by the parties, the Court invokes the relaxed waiver practice to *sua sponte* **convert** that issue into a claim sounding in trial court error under Bruton. The Court then declares that the Bruton issue it prefers to decide was preserved by contemporaneous objection below, when the record conclusively demonstrates that it was not. By *sua sponte* altering the issue actually raised and briefed by the parties in favor of its own waived issue, the Court imposes a new and unforeseeable burden upon appellee, the Commonwealth, to prove harmless error beyond a reasonable doubt. Yet the Court affords the Commonwealth no opportunity even to attempt to carry the retroactive burden imposed upon it. Having dispensed with actual advocacy from the parties on the dispositive issue it raises, the Court plows ahead and ultimately concludes that the Commonwealth failed to carry its unknowable burden. Although appellate courts have the power to **affirm** judgments below for reasons of record not forwarded by the parties, the Court today takes the extraordinary step of **reversing** a capital judgment upon an issue neither raised here nor preserved below.

Having devised its own claim of "trial court error" under Bruton, altered the review standard, reversed the ultimate burden to prove prejudice, and then proceeded in its solipsistic course unfettered by what actually occurred at trial below and is actually raised on appeal, the Court's substantive resolution of the Bruton claim is, predictably enough, problematic. In holding that co-defendant Dwayne Elliott's redacted statement is defective under Bruton, the Court does not look at the face of the statement -- despite the fact that the Court purports to recognize that such is the required analysis under the state of Bruton law in trials such as these, which predated Gray v. Maryland, 523 U.S. 185 (1998) -- but instead engages in speculation on what the juries might have surmised or inferred from **other evidence** introduced at the trials. By looking to evidentiary inferences or "contextual

implications" outside Elliott's redacted statement to resolve its Bruton claim, the Court retroactively applies the analytical approach pioneered in Gray -- notwithstanding that this Court has already held that Gray established a new constitutional rule that should not be applied retroactively. See Commonwealth v. Lopez, supra.

If the Court were to overrule Lopez and state that it was applying Gray retroactively in granting relief, its analytical approach would possess the virtue of internal consistency. The decision would still be wrong -- since no Bruton claim was even preserved for retroactive application and since Gray obviously established a new constitutional rule -- but it would at least be internally consistent. Unfortunately, the Court's approach introduces both inconsistency and uncertainty into the status of pre-Gray Bruton law in Pennsylvania. The Court cannot have it both ways: if it is pre-Gray law that applies, as the Court says, then the analysis of the propriety of the non-objected-to redaction here is limited to the statement. And, since appellant does not go by the name of "Mr. A" or "Mr. X," Elliott's redacted statement, which contains no references to appellant by name (or even by nickname), obviously was acceptable in 1995 and 1996. Indeed, the manner in which Elliott's statement was redacted is materially identical to redactions that were approved by this Court in decisions that were contemporaneous with the trials in this matter. That fact, no doubt, explains why trial counsel, who had to try this case without the luxury of Gray-based hindsight, raised no objection.

The effect of the Court's nimble reconstitution of the records and the issue presented, its reduction of the advocates' briefs to irrelevancies, and its facility in massaging the governing law with the liniment of its future insight, is an unnecessary, revisionist, and erroneous Bruton holding. When all of its alchemy is said and done, the Court essentially holds that, at the time of appellant's trials in 1995 and 1996 -- *i.e.*, years before Gray was argued or decided and at a time when Richardson v. Marsh, 481 U.S. 200 (1987) was the U.S. Supreme Court's most recent pronouncement on Bruton -- U.S.

Supreme Court decisional law **dictated** that it was **improper** to employ a symbol such as "X" in place of the defendant's name, when redacting a non-testifying co-defendant's confession for Bruton purposes.

The lead opinion holds that the trial court "erred" under Bruton when it supposedly admitted into evidence at both trials, via the preliminary hearing testimony of an unavailable witness, the statement of appellant's co-defendant, Elliott, which had originally named appellant as the person who strangled the victim, but which was redacted to substitute the letters "X" or "A" whenever appellant's name appeared. As redacted, Elliott's statement, on its face, did not implicate appellant in the slightest. The statement requires inferences from or linkage to other evidence at the trials detailing appellant's role in the murder to reveal that the "X" or "A" referred to in the statement was appellant. Although the redaction here was not so obvious an alteration as that at issue in Gray (where either the word "deleted" or a blank space was substituted for the defendant's name), I do not dispute that the redaction would be problematic under the reasoning employed in the 5-4 majority decision in Gray. Thus, if appellant had anticipated and preserved a Gray claim which the trial court had overruled, and if Gray applied retroactively, the trial court may well have "erred" in admitting Elliott's statement. But, in addition to the fact that this Court held in Lopez that Gray does not apply retroactively, appellant in point of fact **never** objected that the form of redacting Elliott's statement violated Bruton, much less did he anticipate Gray; *i.e.*, he never argued that the substitution of letters for his name facially incriminated him in the same way as the use of the defendant's proper name in Bruton, even though it required inference or linkage by the jury to draw the incriminating connection.

To the extent that the lead opinion states that trial counsel "objected to the admission of [Elliott's] statement and then also objected to the redaction," and thereby preserved "the question of trial court error" under Bruton, Slip op. at 5-6 n.12, it has misapprehended the record, for no such objection was forwarded. It appears that the Court

has confused Elliott's redacted statement with the police statement of witness Nicole Schneyder, which included an account of a conversation she had with appellant on the day before the murder. At both trials, appellant objected not to the alteration of co-defendant **Elliott's** statement, but to the alteration of **Schneyder's** statement. Schneyder's statement had been introduced during her testimony at the preliminary hearing, where she was subject to cross-examination. Schneyder recanted by the time of the first trial, however, and therefore her preliminary hearing testimony, which included the account of the conversation with appellant which was included in her police statement, was introduced at both trials through the testimony of Detective Dominic Mangoni.

In reciting Schneyder's preliminary hearing testimony, the detective inadvertently substituted the letter "X" for appellant's name and nickname in Schneyder's police statement accounting for her conversation with appellant. See N.T. 11/21/95, p. 64-66; N.T. 7/12/96, p. 22. In short, the detective, perhaps wrongly assuming that since Elliott's statement had been redacted to remove references to appellant, Schneyder's needed to be altered too, effectively "redacted" Schneyder's testimony and account. Appellant's trial counsel, who was obviously alert to this, objected because the detective's "redaction" of **witness Schneyder's statement** "filled in the equation for the jury," N.T. 11/21/95, p. 64 -- *i.e.*, it could lead the jury to infer that Elliott in fact was referring to appellant when the letter "X" was used in his redacted statement. The potential harm was more obvious because, after the objection, the detective corrected himself and re-read Schneyder's testimony to refer to appellant by name and nickname, rather than by the letter "X."

Thus, the nature of the objection actually lodged by appellant at these trials was not that co-defendant **Elliott's** statement was improperly redacted under Bruton because the letter "X" was used, as the Court now mistakes, but rather that the statement of unavailable witness **Schneyder**, who had been subject to cross-examination, was erroneously altered by the detective and that appellant was prejudiced because that alteration could lead the

jury to connect appellant to the "X" referred to in Elliott's statement, even though Elliott's statement was not introduced against appellant. Appellant's actual objection, thus, did not have to do with Bruton or the adequacy of the redaction of Elliott's statement at all. The objection to Mangoni's rendering of Schneyder's testimony was effectively identified and forwarded by trial counsel and certainly warranted a response from the trial court. But it is not the ineffective assistance of counsel claim appellant now raises, which assails counsel for failing to object to the redaction of Elliott's statement under Bruton, and it is decidedly not the claim of Bruton trial court error that the lead opinion raises *sua sponte,* which assails the trial court for allegedly "admitting" Elliott's improperly redacted statement. Moreover, unlike the issue the Court formulates, the claim that trial counsel raised was one that bears some relationship to what actually occurred at trial, and counsel's objection led to an immediate response from the trial court. Thus, immediately after appellant objected to Mangoni's substitution of the letter "X" for appellant's name and nickname in Schneyder's statement at the second trial, the trial court instructed the jury as follows:

> Members of the jury, when a statement is read by someone, it is evidence against that person only. There is a witness who is out of court and it's bringing in for a very limited purpose, just to see whether or not it's different than the way she testified at the first hearing, that's all. So with that, I'll permit the proceeding to go forward.

N.T. 7/12/1996, at 22. Apparently satisfied with this response, trial counsel did not object to the adequacy of this charge under Bruton, or propose a different or supplemental charge.[1]

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[1] At the first trial, the trial court issued a general Bruton charge at the end of the case. N.T. 11/22/1995, p. 26. This Court has indicated that the preferable practice is to give the charge sooner, as occurred at the second trial. Commonwealth v. Covil, 378 A.2d 841, 845 (Pa. 1977) ("[Although a] limiting instruction may be given either as the evidence is admitted or as part of the general charge. . . . [w]e emphasize . . . that it is better to give the limiting instruction at the time the evidence is admitted.") (citations omitted). At neither trial (continued…)

I assume that the redaction of **Elliott's statement**, as opposed to the redaction of Schneyder's testimony which the Court has apparently confused with Elliott's statement, was either undertaken by the prosecutor with the input of appellant's trial counsel, or that trial counsel saw no legitimate issue arising from the prosecutor's proposed redaction. Whatever may have been the circumstances surrounding the redaction, the simple, indisputable and unavoidable fact is that no issue involving its adequacy under Bruton was ever raised before the trial court, such that the trial court was called upon either to approve or disapprove the alteration. Thus, the unequivocal answer to the metamorphosed question *sua sponte* raised by the lead opinion -- Did the trial court err in "admitting" the redacted statement? -- can only be, "No, it did not."

The trial judge is not an advocate, but a neutral arbiter interposed between the parties and their advocates, guiding the course of the trial, and deciding the legal issues that are brought to his attention by the parties through timely and proper motions, objections, and argument. With certain rare exceptions -- none of which are involved here -- the trial judge is not duty-bound to raise additional arguments on behalf of one party or another such that, if and when the judge fails to do so, he has "erred." In those instances where the law does not require the judge to take some affirmative action, and the issue is not raised before the judge, there cannot have been any "trial court error." In our system of jurisprudence, the "error" which arises from foregone objections and arguments, if there is one, rests with the belatedly aggrieved party who failed to bring the matter to the judge's attention. Unlike the lead opinion and the concurrence, appellant understands this

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(…continued)
did appellant object to the timing or adequacy of the court's remedial response to the objection to Mangoni's testimony.

fundamental truth; that is obviously why he raises his Bruton claim exclusively under the rubric of counsel ineffectiveness.

I believe that our review of alleged "errors" made by trial judges should be confined to their actual decisions and to the known and knowable legal principles which actually governed at the time of trial. One could surmise that most trials would be deemed rife with reversible trial court error if reviewing courts blithely suspended principles of issue preservation and ignored principled limitations governing the retroactive application of future decisions. Given the ever-changing landscape in micro-managed capital cases,[2] there probably is not a capital trial in the land that could survive a scrutiny conducted in the hindsight of future decisions. But no rational system of review can operate in such a back-to-the-future fashion. The Court's reversal of the judgment below on the basis of a non-existent and non-raised error calls to mind why we abrogated fundamental error review almost thirty years ago, *i.e.*, because that theory "never developed into a principled test, but has remained essentially a vehicle for reversal when the predilections of a majority of an appellate court are offended." Dilliplaine v. Lehigh Valley Trust Co., 322 A.2d 114, 116-17 (Pa. 1974).

The Court's profound error in detecting a preserved Bruton claim where none exists is compounded by its torturing of the appellate pleadings in order to reach that non-existent claim. I disagree with the Court's apparent belief that the relaxed waiver doctrine permits conversion of claims of trial counsel ineffectiveness into fictional claims of trial court "error" for failing to *sua sponte* raise novel claims on behalf of a party.

Unlike the Court, appellant's capable appellate lawyer, who is other than trial counsel, recognizes and asserts that appellant never objected to the manner in which

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[2] See Morgan v. Illinois, 504 U.S. 719, 751 (1992) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) (adverting to "the fog of confusion that is our annually improvised Eighth Amendment, 'death is different' jurisprudence").

Elliott's statement was redacted under Bruton. Indeed, counsel specifically and repeatedly frames his issue as one of trial counsel's ineffectiveness for **failing to object** to the manner of redaction and failing to seek severance. This framing of the issue, including the accurate factual averment that trial counsel did not object, is repeated in the Statement of Questions Involved, Appellant's Brief at 3; in the Summary of the Argument, id. at 23; in the Argument heading, id. at 41; in the actual Argument itself, see, e.g., id. at 45 ("Trial counsel was ineffective when he failed to object to the manner of redaction") and 48 (same); and in the conclusion to the Brief. Id. at 87.

In developing his distinct Sixth Amendment claim sounding in the right to effective counsel, appellant cites Gray as supposed proof of the inadequacy of the redaction here, and also avers that the trial court "erred in the manner in which the [statements] were redacted." The latter statement is inaccurate since, as noted, the trial court did not perform the redaction of Elliott's statement and, as appellant concedes, trial counsel never objected to it. The inaccuracy is irrelevant to the claim appellant actually raises, however, since appellant's legal claim sounds in trial counsel's alleged ineffectiveness. It does not matter, for appellant's purposes, whether the redaction was accomplished by the court or the prosecutor, or even the parties in consultation; he faults trial counsel for failing to see to it that the statement was otherwise edited or excluded, or a separate trial secured. Of course, it is common to raise claims of counsel ineffectiveness in this fashion, *i.e.*, by focusing on an event at trial and questioning the objective reasonableness of counsel's handling of the issue. Appellant's claim of counsel ineffectiveness thus is cogent, focused and reviewable.

The Commonwealth, in an able response to which the Court blinds its eyes, joins the issue actually raised by appellant and seizes upon the flaw in appellant's relying upon the future decision in Gray to prove trial counsel ineffective. Thus, the Commonwealth cites settled law and argues that counsel cannot be deemed ineffective for failing to anticipate

Gray. See, e.g., Lopez, 739 A.2d at 499 n.18; Commonwealth v. Fowler, 703 A.2d 1027, 1029 (Pa. 1997). In this regard, the Commonwealth accurately notes that, at the time of the trials here, this type of redaction was permissible under the decisions of the U.S. Supreme Court and of this Court, so long as a Bruton instruction accompanied the redaction.

The Court concedes that appellant states his claim as one of counsel ineffectiveness, but converts it into one of trial court error notwithstanding, by asserting that, "in the argument portion of his brief [appellant] also raises and develops the assertion that the trial court erred in admitting the statements given the manner in which they were redacted [and] in light of [a]ppellant's full development of this issue in a direct capital appeal matter, it is unnecessary to address the issue in terms of trial counsel's ineffectiveness." Invoking this Court's amorphous direct capital appeal relaxed waiver practice, the lead opinion concludes that "it would be inappropriate … to decline review of the issue related to the alleged trial court error, merely on the basis of what amounts to appellant's awkward phrasing of the Statement[] of Questions Involved." Slip op. at 5-6 n.12.

This is a startling and rather implausible excuse for the Court's unilateral action here. Appellate counsel should not be erroneously accused of "awkward[ly] phrasing" his issue, much less should his appellate litigation decisions be *sua sponte* second-guessed, merely because the Court for some odd reason is more interested in a fictional claim it tortures from the record in order to retroactively apply future law. To repeat, the claim of trial court Bruton error that the Court conjures is not one that was available to appellate counsel as a preserved claim of error **because it was never raised in the court below.** Moreover, it was not raised below for obvious reasons: the Gray decision, which is essential to the Court's retrofitted inference/contextual approach to Bruton, did not yet exist. Counsel acted in a thoroughly responsible fashion in briefing his appellate claim in the only appropriate manner actually available.

Most claims of counsel ineffectiveness having to do with record matters at trial (as opposed to claims involving failures of investigation or preparation) necessarily are derivative of events at trial -- *i.e.*, counsel is faulted for failing to object, or for failing to raise the most appropriate objection, etc. Cf. Commonwealth v. (Craig) Williams, 782 A.2d 517, 525 n.5 (Pa. 2001). This Court has routinely reviewed such claims of counsel ineffectiveness on direct appeal without *sua sponte* converting them into waived and fictional claims of alleged "trial court error." See, e.g., Commonwealth v. Rizzuto, 777 A.2d 1069, 1083 (Pa. 2001); Commonwealth v. (Christopher) Williams, 720 A.2d 679, 685 (Pa. 1998); Commonwealth v. Howard, 645 A.2d 1300, 1304 (Pa. 1994).

Some better explanation for the Court's alchemy is demanded because whether a claim is reviewed as a claim of counsel ineffectiveness or is converted into a fictional claim of "trial court error" may be outcome-determinative. As Mr. Justice Cappy noted in Howard:

> [A] defendant is required to show actual prejudice [in order to prevail on a claim of ineffective assistance of counsel]; that is, that counsel's ineffectiveness was of such magnitude that it "could have reasonably had an adverse effect on the outcome of the proceedings." . . . This standard is different from the harmless error analysis that is typically applied when determining whether the trial court erred in taking or failing to take certain action. The harmless error standard . . . states that "[w]henever there is a 'reasonable possibility' that an error 'might have contributed to the conviction,' the error is not harmless." This standard, which places the burden on the Commonwealth to show that the error did not contribute to the verdict beyond a reasonable doubt, is a lesser standard than the [ineffectiveness] prejudice standard, which requires the defendant to show that counsel's conduct had an actual adverse effect on the outcome of the proceedings. This distinction appropriately arises from the difference between a direct attack on error occurring at trial and a collateral attack on the stewardship of counsel. In a collateral attack, we first presume that counsel is effective, and that not every error by counsel can or will result in a constitutional violation of a defendant's Sixth Amendment right to counsel. . . .

645 A.2d at 1307 (citations omitted). This distinction in the treatment of claims of error as opposed to claims sounding in a deprivation of counsel is not arbitrary, but rather is an ineluctable function of the essential difference between a preserved claim of trial court error, and a Sixth Amendment claim, not raised before, sounding in ineffective assistance of counsel.

As Mr. Justice Cappy's teaching in Howard also suggests, judicial conversion of a claim of counsel ineffectiveness into a fictional claim of trial court error has a practical effect on the parties -- an effect that the Court today cavalierly ignores. In proceeding to award relief in this case, the lead opinion ultimately concludes that the Commonwealth failed to carry its burden of proving harmless error. Slip op. at 17-18. But the Commonwealth most likely had no clue that such a burden existed, since it understandably responded to the claim of counsel ineffectiveness that appellant actually raised, and not the fictional claim of "trial court error" that the Court has devised on appellant's behalf. Even in a capital case, the government should be entitled to fair treatment. Both as a matter of fundamental fairness and as a matter of ensuring quality appellate decision-making, when a court perceives and raises an issue *sua sponte* that alters the review standard and imposes a new and unanticipated burden on a party, the court should, at a minimum, permit the affected party an opportunity to address its new burden. A court looking at a cold record, without benefit of argument, lacks the trained eye of the interested advocate. Apparently, it never even occurs to the Court that the record upon harmless error review might appear differently if it had the benefit of actual advocacy on the dispositive question it has injected. The Court's alchemy has waylaid the Commonwealth and deprived it of an opportunity to be heard. The Commonwealth, like the "erring" trial court, simply falls victim to the Court's thunderbolt today.

The Court's issue conversion and faulting of the trial court for failing to *sua sponte* raise an issue are dire enough. What is worse is that, on the merits of the Bruton claim it

raises, the Court evaluates the fictional "trial court error" not pursuant to the state of the law which governed at the time of appellant's trial, but in a fashion that obviously derives from the U.S. Supreme Court's subsequent decision in Gray. The lead opinion's survey of Bruton law is accurate so far as it goes. It notes that Bruton held that a defendant is deprived of his Sixth Amendment right of confrontation when a confession of a nontestifying co-defendant is introduced at their joint trial and **explicitly** names and powerfully incriminates the defendant, even if the jury is instructed to consider the confession only against the co-defendant; that, in Richardson, the Court declined to extend the Bruton rule to co-defendant confessions that incriminate the defendant only by inference or linkage to other evidence; and that, most recently, the Gray Court acknowledged that Richardson had placed statements that incriminate by mere inference entirely outside the scope of Bruton, but altered that analysis so that statements which, despite redaction, still "obviously refer directly to someone, often obviously the defendant, and involve inferences that a jury ordinarily could make immediately[,]" violate Bruton's protective rule. In addition, the lead opinion accurately notes that this Court's Confrontation Clause jurisprudence has been coterminous with federal law. Thus, in Commonwealth v. Johnson, 378 A.2d 859 (Pa. 1977), this Court held that the Commonwealth may introduce into evidence the redacted statement of a non-testifying co-defendant at a joint trial so long as the statement does not expressly refer to the defendant. Also, prior to Gray, this Court had held in Commonwealth v. Lee, 662 A.2d 645 (Pa. 1995), cert. denied, 517 U.S. 1211 (1996) and again in Commonwealth v. Miles, 681 A.2d 1295 (Pa. 1996) that the substitution of the letter "X" or a similar symbol for the defendant's name did not violate Bruton. (It should be noted that, although the lead opinion relies upon Miles, that decision was not handed down until July 31, 1996, which was **after** both trials in this case.)

Despite recognizing that, under pre-Gray law, co-defendant statements that incriminate only by inference fall outside the scope of Bruton, the lead opinion inexplicably

holds that Elliott's redacted statement violates Bruton because it "expressly implicated [a]ppellant in the crime in violation of the Confrontation Clause." Slip op. at 12. This simply is not so. As redacted, Elliott's statement never referred to appellant by name or even by nickname; instead, the letters "A" or "X" were substituted for his name. A link to appellant could only be found by looking to other evidence at the trials which detailed the primary role appellant played in strangling Lillian Gaines. Tellingly, in finding that Elliott's statement "expressly implicated" appellant, both the lead opinion and the concurrence look not to the face of the statement, but instead to other events at these trials: specifically, Detective Mangoni's botched reading of **Schneyder's** preliminary hearing testimony. Thus, in reviewing the first trial, the lead opinion emphasizes that, when Mangoni read Schneyder's account of her conversation with appellant and inadvertently substituted the letter "X" for appellant's name, "the 'X' clearly referred to [a]ppellant since the statement was identical to the statement attributed to him in Schneyder's previous statement." Slip op. at 15. This error was compounded, the lead opinion reasons, when, immediately after counsel's objection to the Detective's lapse, Mangoni re-read the statement, this time replacing the "X" with appellant's name. On this record, the lead opinion determines that the jury could "surmise" or "reasonably infer" -- *i.e.*, that the jury could conclude from context or inference or "evidentiary links" -- that the "X" referred to in Elliott's statement was appellant, even though nothing in that statement *qua* statement remotely suggested any such thing. Continuing in its inference/evidentiary linkage analysis, the lead opinion next reasons that the error at the second trial, the trial which resulted in appellant's murder conviction, was even more egregious because the jury was apprised that "X" was "Hickey," appellant's nickname, when Mangoni read Schneyder's police statement, and appellant had already been identified as "Hickey" throughout that trial. Id.

In my view, the Court's finding of a Bruton violation based not upon the co-defendant's actual statement, but upon inferences that the juries may have drawn from

other events at these trials is patently erroneous under the pre-Gray state of the law that prevailed when these trials were conducted. At that time, the most recent and governing U.S. Supreme Court decision was Richardson. In Richardson, although the co-defendant's confession was redacted to remove all reference to the defendant, the defendant still argued that admission of the co-defendant's confession violated her confrontation rights because it implicated her in the crime when linked with other evidence. As this Court recently noted in Commonwealth v. Travers, 768 A.2d 845, 848 (Pa. 2001), the Richardson Court "expressly rejected the theory of contextual implication, recognizing the 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." In rejecting the theory, the Richardson Court noted that, when incrimination is merely inferential, "it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence." Richardson, 481 U.S. at 208. Thus, **at the time these cases were tried**, if linkage with other evidence was required for the co-defendant's statement to incriminate the accused, a proper limiting instruction was sufficient to satisfy Bruton. Importantly for present purposes, the Richardson Court also was careful to express "no opinion" on the admissibility of a confession where the redaction consists of replacing the defendant's name "with a symbol or neutral pronoun." Id. at 211 n.5. That, of course, is the form of redaction that was employed, without objection below, here.

The High Court's subsequent decision in Gray expressly reaffirms that such was the state of pre-Gray law. The majority in Gray noted that its task was to "**decide a question that Richardson left open**, namely, whether redaction that replaces a defendant's name with an obvious indication of deletion, such as a blank space, the word "deleted," **or a similar symbol**, still falls within Bruton's protective rule." 523 U.S. at 192 (emphases supplied). In ultimately holding, for the first time, that such a redaction did fall within Bruton, the Court candidly acknowledged the tension between that new holding and the previously

prevailing law under Richardson. Indeed, this was so much the case that the Gray majority expressly "conceded" both that Richardson had "placed outside the scope of Bruton's rule those statements that incriminate inferentially" and that in a situation where a mere symbol of redaction was used, such as in Gray (and such as occurred here), "the jury must use inference to connect the statement … with the defendant." 523 U.S. at 195. The Court then went on to explain why its **departure** from Richardson's no-inferences rule was warranted. In short, then, it was not until Gray that the U.S. Supreme Court held -- and, even then, only by a narrow 5-4 margin -- that inferences from other parts of the record could properly be employed to prove a Bruton violation.

In this case, Elliott's redacted statement, viewed on its own, did not implicate appellant **at all**. As corroborated by the analyses employed by the lead opinion and the concurrence here, it requires reference to and inferences from other evidence to find anything in the redacted statement that could be said to implicate appellant. In light of this indisputable fact, the grant of relief here is nothing short of unfathomable.

I realize that the lead opinion has attempted to obscure its reliance on the analytical approach approved for the first time in Gray by moving its discussion of Gray to a footnote and insisting that it "does not rely on the holding in Gray" but, rather, looks to the decision "only for the [U.S. Supreme] Court's clarification of the distinction between Bruton and [Richardson v.] Marsh." Id. But I fear that the lead opinion "doth protest too much," William Shakespeare, *Hamlet, Prince of Denmark,* act 3, sc. 2, and its actual analysis, which looks beyond Elliott's statement to consider other evidence at the trials and speculates as to what the juries might have "surmised" from that other evidence, thoroughly "informs against" its protestation. Id., act iv, sc. 32. The statement "X and I (or A and I) committed a crime" does not facially incriminate anyone but the speaker. In 1995 and 1996, replacing the defendant's name with a letter was a common method of redaction in this Commonwealth --

one which this Court, when Gray was truly "absent" from its consideration because it did not yet exist, repeatedly approved.

It may well be true, as the lead opinion concludes, that when Detective Mangoni inadvertently referred to appellant as "X" when reciting Schneyder's preliminary hearing testimony, the jury could have "reasonably infer[red]" that the "X" that had been used in Elliott's statement also referred to appellant. But the redaction of Elliott's statement did not remotely convey that point on its own; instead, inference or linkage to Mangoni's testimony is required to make that leap. That being so, under Richardson, which was the governing authority at the time of the trials here, Elliott's redacted statement was properly admissible with a limiting instruction -- which no doubt explains why appellant's counsel did not object to the redaction. Furthermore, when the detective erroneously redacted **Schneyder's** testimony, including her reference to appellant by name and nickname, appellant's trial counsel acted effectively in forwarding a timely and specific objection, to which the trial court responded in a fashion which appellant has not challenged.

Since the Court's Bruton analysis is so obviously erroneous under Richardson, I fear that what is really at work here is a *sub silentio* overruling of this Court's decision in Commonwealth v. Lopez on the question of whether Gray applies retroactively. The lead opinion recognizes that this Court in Lopez held that Gray constituted a new rule of law which cannot apply retroactively. Slip op. at 10 n.15. However, three Justices -- all of whom join in the Court's determination today to reverse the trial court's judgment of sentence and remand for a new trial -- disagreed with the majority in Lopez on that point, stating that they "view[ed] the United States Supreme Court's decision in Gray as a rational application of the principles enunciated in Bruton rather than as a change in the law." 739 A.2d at 507. In employing a Gray-dependent "contextual implication" analysis here, rather than the analysis dictated by the Richardson standard that actually governed in 1995-1996,

it may be that the Court intends to *sub silentio* overrule the Lopez majority in favor of the failed concurrence.

Given this prospect, it is worth offering some brief comment on whether Gray should apply retroactively, notwithstanding that Lopez already said that it does not. I believe that Mr. Justice Nigro got it right in his majority opinion in Lopez when he held that Gray represented a change in the law. The U.S. Supreme Court's non-retroactivity/new rule jurisprudence, which derives from Justice O'Connor's seminal decision in Teague v. Lane, 489 U.S. 288 (1989), does not turn upon whether a new decision involves a "rational application" of principles found in previous precedents. Indeed, most if not all constitutional decisions from the High Court at least attempt to follow, apply, and build upon what has gone before; and few, if any, of those decisions could be accused of "irrationally" departing from prior law. Instead of employing the "rational application" test for retroactivity posed by the Lopez concurrence, the U.S. Supreme Court's rather more sophisticated analysis focuses on whether the constitutional rule invoked by the defendant was "**dictated** by precedent" in existence at the relevant time. 489 U.S. at 301 (emphasis original). If reasonable jurists could have disagreed over the point, the constitutional rule is new and cannot be applied retroactively. Lambrix v. Singletary, 520 U.S. 518, 528 (1997) (new rule is not dictated by precedent unless it would be "apparent to all reasonable jurists"); Caspari v. Bohlen, 510 U.S. 383, 393 (1994) (same); Gilmore v. Taylor, 508 U.S. 333, 347 (1993) (O'Connor, J., concurring) (employing "susceptible to debate among reasonable jurists" test for new rule). Accord Williams v. Taylor, 529 U.S. 362, 409-13 (2000) (Majority Opinion of Court by O'Connor, J., on this point) (discussing dictated by precedent/ reasonable jurist

test); id. at 381-84 (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ. on this point) (same). [3]

It would be difficult in the extreme to characterize the contextual implication rule that emerged from Gray, and which the lead opinion applies here, as one that was **dictated** by the existing Bruton/Richardson precedent. First, as Mr. Justice Breyer explicitly noted in the Gray majority opinion, the question before the Court in that case -- *i.e.,* "whether redaction that replaces a defendant's name with an obvious indication of deletion, such as a blank space, the word 'deleted' or a similar symbol, still falls within Bruton's protective rule" -- was "a question that Richardson left open." 523 U.S. at 192. Moreover, the Gray majority admitted that Richardson in fact had placed such statements, which require inferences to incriminate, outside of Bruton. Thus, Gray explicitly broke with previous precedent. Finally, no less than four reasonable jurists who participated in the Gray decision (Chief Justice Rehnquist, as well as Justices Scalia, Kennedy and Thomas) disagreed over whether the majority view in Gray was consistent with the principles undergirding the Bruton decision, much less whether the majority's view was "dictated" by that precedent and Richardson. In my view, then, Justice Nigro was unquestionably correct in Lopez when he concluded that Gray was a new rule. It is wrong for the Court today to contradict that holding with nary a word of explanation or illumination.

Moreover, even if Gray were deemed a retroactively applicable decision, appellant would not be entitled to its benefit. "Case law is clear . . . that in order for a new rule of law to apply retroactively to a case pending on direct appeal, the issue had to be preserved at 'all stages of adjudication up to and including the direct appeal.'" Commonwealth v. Tilley, 780 A.2d 649, 652 (Pa. 2001) (quoting Commonwealth v. Cabeza, 469 A.2d 146, 148 (Pa.

[3] The United States Supreme Court has recently reaffirmed the importance of accounting for retroactivity principles in determining the applicability of new rules, in the federal habeas context. Horn v. Banks, 122 S.Ct. 2147 (2002).

1983)). *Sub judice*, appellant, having failed to advance any argument at trial approximating the then-nonexistent Gray rule -- indeed, appellant made no attempt even to challenge Elliott's statement under then-prevailing Bruton law -- is not entitled to the retroactive benefit of Gray on appeal.

Finally, I add some brief comment on the concurring opinion authored by Madame Justice Newman. Like the lead opinion, the concurrence apparently views the issue here as one sounding in trial court error under Bruton/Gray, not as the claim of counsel ineffectiveness briefed by the parties, and then analyzes the claim under a contextual implication approach. Concurring Slip op. at 9. In my view, the concurrence commits the same multiple errors as the lead opinion in this regard.

The concurrence goes on to address a broader question, also not argued by the parties, of whether joint trials should be done away with in instances where Bruton issues may arise. Id. at 1. The concurrence expresses the view that "in all cases where there are multiple defendants, where one or more of the defendants has given a confessionary statement, where one or more of the defendants who gave confessionary statements will not testify, and where the Commonwealth plans to introduce the confessionary statement(s), the trial should be severed to avoid any possibility of running afoul of the Confrontation Clause." Id. at 1-2. The only limitation the concurrence would place on such a blanket rule is that "where there is no chance that the confessionary statement will prejudice the non-confessing co-defendant, it may be admitted and separate trials are not necessary." Id. at 2.

In response, I would note initially that this view, which derives from the dissenting opinion in Richardson, was expressly rejected by the six-justice majority in that case, with the following analysis:

> One might say, of course, that a certain way of assuring compliance [with Bruton] would be to try defendants separately whenever an incriminating statement of one of them is sought

> to be used. That is not as facile or as just a remedy as might seem. Joint trials play a vital role in the criminal justice system, accounting for almost one-third of federal criminal trials in the past five years. Many joint trials -- for example, those involving large conspiracies to import and distribute illegal drugs -- involve a dozen or more codefendants. Confessions by one or more of the defendants are commonplace -- and indeed the probability of confession increases with the number of participants, since each has reduced assurance that he will be protected by his own silence. It would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability -- advantages which sometimes operate to the defendant's benefit. Even apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.

481 U.S. at 209-10 (citation omitted). See also Commonwealth v. Wharton, 607 A.2d 710, 718 n.5 (Pa. 1992) (Opinion by Zappala, J.) (recognizing that Richardson "rejected a rule of automatic severance of co-defendants' trials in these situations because of the 'vital role in the criminal justice system' which joint trials play"). Accord Commonwealth v. Travers, 768 A.2d at 847 ("Both this Court and the United States Supreme Court have recognized that joint trials of co-defendants play a crucial role in the criminal justice system"). Here, no less than in Wharton, our role in reviewing the federal claim requires us to effectuate the judgment of the Supreme Court majority, which rejected this alternative. Wharton. There is not now an absolute Sixth Amendment bar to joint trials involving confessions by non-testifying co-defendants, and there was no such prohibition when appellant was tried.

In addition, the test proposed by the concurrence is unworkable as a practical matter. There is no requirement that a defendant must state before the defense presentation whether the defendant will testify or will not testify -- much less is there a requirement that he be held to any stated position. Therefore, a trial court would not know whether to grant a separate trial for that defendant. The defense would be able to control the severability question by simply stating that the non-confessing defendant will not testify, when there is nothing that would prevent the defendant from testifying in a trial that was severed.

Further, it is practically impossible to determine whether there is "no chance that the confessionary statement will prejudice the non-confessing co-defendant." Since joint trials typically involve conspiracies, every redacted statement possesses at least a prospect of "spillover" prejudice; otherwise, such statement would be irrelevant to the issue of guilt or innocence of the confessing defendant. Indeed, that is why the U.S. Supreme Court created the Bruton exception to the rule that cautionary charges are alone always sufficient to avoid spillover prejudice. Nowhere in the law is there a "no chance of prejudice" standard when applied to evidentiary rulings. The scenario proposed by the concurrence joined by Chief Justice Zappala notwithstanding his majority authorship in Wharton would place a tremendous burden on the criminal justice system and be a waste of limited judicial resources.

The law expects trial judges to be impartial and competent in the law; it does not expect them to be clairvoyant or psychic. Because the trial court's failure to be prescient is not grounds for a new trial, I cannot join the Court's grant of relief on the fictional claim of

trial court error it has raised *sua sponte* here. For all of the above reasons, I respectfully dissent.