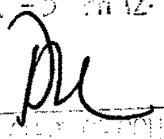


1 **FOR PUBLICATION**

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SUPERIOR COURT

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4 **IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

BY: 
DEPUTY CLERK OF COURT

5 **COMMONWEALTH OF THE**
6 **NORTHERN MARIANA ISLANDS,**

) **CRIM. CASE NO. 14-0014**
)
)

7 **Plaintiff,**

8 **v.**

) **ORDER DENYING**
) **COMMONWEALTH'S MOTION TO**
) **ALLOW USE OF REDACTED**
) **STATEMENTS per BRUTON DOCTRINE**

9 **PARVEJ MD. BARPERY and DAISINA**
10 **SUDA,**

11 **Defendants.**

12 **I. INTRODUCTION**

13 This matter was heard on April 16, 2014 in Courtroom 220A. Defendant Parvej Barpery was
14 present and represented by Daniel Guidotti. Defendant Daisina Suda was present and represented
15 by Samuel Mok. The Commonwealth was represented by Assistant Attorney General Peter
16 Prestley. The Commonwealth requests an order finding that the proposed redactions of statements
17 made by Defendant Suda do not violate the confrontation rights of Defendant Barpery.

18 Based on a review of the filings, oral arguments, and applicable law, the Court denies the
19 Commonwealth's request and finds that the proposed redacted statements would violate Defendant
20 Barpery's confrontation rights unless Defendant Suda testifies and is subject to cross-examination
21 about those statements.

22 **II. BACKGROUND**

23 Defendants Suda and Barpery each face one count of Sexual Assault in the First Degree, in
24 violation of 6 CMC § 1301(a)(1) and one count of Disturbing the Peace, in violation of 6 CMC

1 § 3101(a). On April 16, 2014, over Defendants' objections, the Court granted the Commonwealth's
2 motion to try the Defendants jointly. The Commonwealth alleges that in May of 2013 Defendant
3 Barpery sexually assaulted Defendant Suda's seventeen-year-old daughter by penetrating her
4 vagina with his penis, engaging in cunnilingus, and touching her breast. The Commonwealth
5 alleges that Defendant Suda aided Defendant Barpery in the sexual assault by transporting her
6 daughter to the scene of the sexual assault, yelling at her, and physically restraining the daughter
7 during the sexual assault.

8 In January of 2014, Defendant Suda made two different statements during the investigation
9 of the alleged offense implicating herself and Defendant Barpery in the alleged sexual assault. The
10 Commonwealth redacted the statements, removing references to Defendant Barpery by name. On
11 March 13, 2014 the Commonwealth filed a motion requesting a court order finding that introducing
12 the proposed statements as evidence at trial would not violate Defendant Barpery's confrontation
13 rights. The Commonwealth also provided a proposed limiting instruction to be used during trial.
14 The Commonwealth did not provide to the Court the text of the original statements or a description
15 of how these statements were obtained. The Commonwealth argues that by replacing Defendant
16 Barpery's name with neutral pronouns, the redacted statements are constitutionally permissible and
17 not a violation of the defendant's confrontation rights.

18 The Court heard argument on this matter on April 16, 2014. At the hearing, Defendant
19 Barpery orally opposed the Commonwealth's motion, arguing that introduction of the redacted
20 statements would violate the Defendant's confrontation rights in two ways. First, because
21 Defendant Barpery will be sitting in the courtroom, the jury need only make a one-step inference to
22 determine that the neutral pronouns in Defendant Suda's statements refer to him. Second, because
23 two different statements were made by Defendant Suda, Defendant Barpery's confrontation rights
24 will be violated because he will be unable to cross-examine Defendant Suda about the

1 inconsistencies between those statements. On April 30, 2014, Defendant Barperly filed a one-
2 paragraph written opposition to the Commonwealth’s motion, stating that the redacted statements
3 are inadmissible under *Bruton v. United States*, 391 U.S. 123 (1968).

4 Defendant Suda expresses no opinion concerning this motion.

5 **III. LEGAL STANDARD**

6 At a joint trial, the introduction of a non-testifying codefendant’s confession that names the
7 defendant and implicates him in a crime violates the defendant’s right to confront witnesses against
8 him. *Bruton v. United States*, 391 U.S. 123, 126 (1968); U.S. Const. amend. VI.¹ Such a violation
9 occurs even if a limiting instruction is given to the jury, instructing them to consider the
10 codefendant’s confession only against the codefendant. *Bruton*, 391 U.S. at 136-37. “[C]ertain
11 ‘powerfully incriminating extrajudicial statements of a codefendant’—those naming another
12 defendant—considered as a class, are so prejudicial that limiting instructions cannot work.” *Gray v.*
13 *Maryland*, 523 U.S. 185, 192 (1998) (quoting *Richardson v. Marsh*, 481 U.S. 200, 207 (1987) and
14 citing *Bruton*, 391 U.S. at 135). Similarly, redacted statements of a non-testifying codefendant
15 “that simply replace a name with an obvious blank space or a word such as ‘deleted’ or a symbol or
16 other similarly obvious indications of alteration,” are not admissible in a joint trial. *Id.* at 192. The
17 protections of *Bruton* also extend to codefendant confessions that include the defendant’s nickname
18 or specific descriptions of the defendant. *Id.* at 195 (citing *Harrington v. California*, 395 U.S. 250,
19 253 (1969)).

20 However, there is no violation of the defendant’s confrontation rights where a codefendant’s
21 confession is accompanied by an appropriate limiting instruction and is redacted to omit “not only
22 _____

23 ¹ The protections of the Sixth Amendment of the United States Constitution apply to the states through the due process
24 clause of the Fourteenth Amendment of the United States Constitution, and to the Commonwealth through Section 501
of the Covenant. *See Cole v. Arkansas*, 333 U.S. 196, 201 (1948); Covenant to Establish a Commonwealth of the
Northern Mariana Islands in Political Union with the United States of America, 48 U.S.C. § 1801 note.

1 the defendant's name, but any reference to his or her existence." *Richardson*, 481 U.S. at 204, 211.
2 Such a redacted confession is not facially incriminating, but instead relies on linkage with other
3 evidence introduced at trial to become so. *Id.* at 208. Standing alone, the fact that the jury has to
4 make an inference to see that the defendant is implicated in the codefendant's confession is not
5 determinative of whether a redacted confession avoids violating the defendant's confrontation
6 rights. *Gray*, 523 U.S. at 195. Instead, it is the "kind of, not the simple fact of, inference," that must
7 be considered. *Id.* at 196 (emphasis in original). A defendant's confrontation rights may be violated
8 where the introduced statements, "despite redaction, obviously refer directly to someone, often
9 obviously the defendant, and involve inferences that a jury ordinarily could make immediately,
10 even were the confession the very first item introduced at trial." *Id.*

11 The United States Supreme Court has explicitly "express[ed] no opinion on the admissibility
12 of a confession in which the defendant's name has been replaced with a . . . neutral pronoun."
13 *Richardson*, 481 U.S. at 211 n.5.² Nor is there any case law in this jurisdiction applying the Bruton
14 rule. Many state and federal courts have considered the constitutionality of admitting statements of
15 a non-testifying codefendant that are redacted by replacing the defendant's name with neutral
16 pronouns, and these courts have come up with varying results. *Compare United States v. Vasilakos*,
17 508 F.3d 401, 408 (6th Cir. 2007) ("We think the rule followed by the Fourth, Eighth, and Tenth
18 Circuits that permits the introduction of a declarant-codefendant's self-incriminating, extra-judicial
19 statement, in a joint trial, where the defendant's name is redacted and a neutral term is substituted,
20 avoids any Sixth Amendment or Bruton violation."); *with Wash. v. Sec'y of Pa. Dep't of Corrs.*,
21 726 F.3d 471, 477 (3d Cir. 2013) ("We have no doubt that redactions replacing names with neutral
22 pronouns and phrases will often fit comfortably within the range of acceptable approaches outlined

23 ² The original footnote stated "We express no opinion on the admissibility of a confession in which the defendant's
24 name has been replaced with a symbol or neutral pronoun." However, as discussed above, the U.S. Supreme Court
addressed the issue of replacing a name with a symbol in *Gray v. Maryland*, 523 U.S. 185 (1998).

1 by *Bruton*, *Richardson*, and *Gray*. This is not one of those cases.”); *United States v. Eskridge*, 164
2 F.3d 1042, 1044 (7th Cir. 1998) (“Clearly, the use of [codefendant’s] confession with the word
3 ‘another’ in place of [defendant’s] name falls within the class of statements described in *Gray* as
4 violative of *Bruton*.”); *United States v. Gillam*, 167 F.3d 1273, 1276 (9th Cir. 1999) (finding a
5 *Bruton* error where the codefendant’s redacted statement made three indirect references to the
6 defendant as “someone who worked at the FDA” who “was getting ready to retire.”); and *United*
7 *States v. Vejar-Urias*, 165 F.3d 337, 340 (5th Cir. 1999) (“Where . . . it is obvious from
8 consideration of the confession as a whole that the redacted term was a reference to the defendant,
9 then admission of a codefendant’s confession that also inculcates the defendant does violate *Bruton*,
10 regardless of whether the redaction was accomplished by use of a neutral pronoun or otherwise.”).

11 **IV. DISCUSSION**

12 The case at hand involves an alleged crime of sexual assault that was perpetrated by only
13 two individuals, Defendant Barpery who allegedly committed the assault, and Defendant Suda who
14 allegedly aided in the assault. The Commonwealth seeks a finding from this Court that the redacted
15 statements of Defendant Suda taken on January 10, 2014 and January 15, 2014 will not violate
16 Defendant Barpery’s confrontation rights if admitted at the joint trial of the Defendants, even if
17 Defendant Suda does not testify. The two redacted statements replace Defendant Barpery’s name
18 with the phrase “another person.” For example, the January 10, 2014 statement says in part:

19 [M]y 17-year-old daughter [], my 3-year-old son [], another person, and I took a
20 taxi to the San Jose Motel, where we ate dinner and I drank 3 cans of Busch Ice. . . .
21 The next day, [my 17-year-old daughter] told me she was sexually assaulted and said
she couldn’t believe that I made it happen. I told her I didn’t remember anything
because I was drunk.³

22 The January 15, 2014 statement reads in part:

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24 ³ The redacted statement as proposed by the Commonwealth includes the names of the minors. The Court removes those names here to protect their privacy.

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[My 17-year-old daughter] told me I was holding her leg while she was sexually assaulted in the motel room. I told her I was sorry and that I couldn't do anything because I was threatened and I was scared. I was in the motel room during the sexual assault but was too scared to do anything.

[My 17-year-old daughter], [my 3-year-old son], another person and I took a taxi to the San Jose Motel. My nephew [] was outside at the time. He asked what we were going to do in the motel room and I told him we were going to spend some family time. I put [my 3-year-old son] in the shower. I was drinking beer quickly in the motel room because I was scared. [My 17-year-old-daughter] was naked, crying really loud, and screaming. I held [her] leg while she was sexually assaulted because I was scared.

The Court considers whether these redacted statements are the kind of “powerfully incriminating extrajudicial statements of a codefendant” that cannot be admitted under *Bruton*. *Bruton*, 391 U.S. at 135. The Court considers whether the redacted statements “obviously refer directly to someone . . . and involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial.” *Gray*, 523 U.S. at 196.

In *Richardson*, the U.S. Supreme Court found that there was no confrontation violation where the redacted statement of the codefendant included only references to the codefendant and a third person, and no reference was even made to the existence of the defendant. *See Richardson*, 481 U.S. at 203, 203 n.1. Unlike the redacted statements in *Richardson*, the proposed statements in this case indicate that there was another person who travelled to the hotel with the codefendant, the alleged victim, and a three-year-old child, and that person would be involved in spending “family time” with the group. *See id.*; *United States v. Gillam*, 167 F.3d 1273, 1276 (9th Cir. 1999) (redacting the codefendant’s statement to replace defendant’s name with references to “someone who worked at the FDA” who “was getting ready to retire” was a *Bruton* violation); *and Wash. v. Sec’y of Pa. Dep’t of Corrs.*, 726 F.3d 471, 476-77 (3d Cir. 2013) (codefendant’s confession replacing the defendant’s name with “someone I know” or “the driver” violated the defendant’s confrontation rights).

1 Even more concerning, Defendant Suda’s statements are directly accusatory as they describe
2 a sexual assault that she did not perpetrate. *See Gray*, 523 U.S. at 194 (recognizing that “directly
3 accusatory” extrajudicial statements “create[] a special, and vital, need for cross-examination—a
4 need that would be immediately obvious had the codefendant pointed directly to the defendant in
5 the courtroom itself.”); *cf. Richardson*, 481 U.S. at 208 (“Specific testimony that ‘the defendant
6 helped me commit the crime’ is more vivid than inferential incrimination.”). Defendant Suda’s
7 statement does not use Defendant Barpery’s name, nor does it include the word “deletion” making
8 it obvious that the statement was redacted. *See Bruton*, 391 U.S. at 124 (codefendant’s confession
9 included defendant’s name); *and Gray*, 523 U.S. at 192 (codefendant’s confession included obvious
10 indication of deletion). However, Defendant Suda’s redacted confession, when viewed as a whole,
11 is facially incriminating against “another person” who was in the hotel room and sexually assaulted
12 her daughter. *See United States v. Vejar-Urias*, 165 F.3d 337, 340 (5th Cir. 1999).

13 Unlike cases involving large conspiracies with multiple defendants, where a neutral pronoun
14 could refer to any number of people, the allegations in this case involve only two codefendants,
15 Defendant Barpery who is alleged to have sexually assaulted Defendant Suda’s seventeen-year-old
16 daughter, and Defendant Suda who is alleged to have restrained her daughter during the sexual
17 assault. *See United States v. Sutton*, 337 F.3d 792, 800 (7th Cir. 2003) (distinguishing that case in
18 which there was no Bruton violation from *United States v. Eskridge*, 164 F.3d 1042 (7th Cir. 1998),
19 where there was a Bruton violation, because in *Eskridge*, “there were only two people involved in
20 the crime altogether, and any reference to ‘another’ person would necessarily refer to the co-
21 defendant”). Here, Defendant Suda’s statements describe four people, herself, her two minor
22 children and “another person.” The statements describe that these four people travelled to a hotel
23 room together and that inside the hotel room, one of the children was in the bath and Defendant
24 Suda held down the other child’s leg while she was sexually assaulted by a fourth person. From the

1 statement, it is clear that there were only two people allegedly involved in the crime, and only two
2 people are on trial; so, as in *Eskridge*, the reference to “another person” refers to Defendant
3 Barpery. *See Sutton*, 337 F.3d at 800.

4 Finally, the Court finds that even if Defendant Suda’s redacted statements were the first
5 piece of evidence to be introduced at trial, the jury could infer from those statements the fourth
6 person in the hotel room, the person who committed the sexual assault, was Defendant Barpery.
7 Thus, even though evidence introduced after the redacted confessions, such as the testimony of the
8 alleged victim, may confirm that inference, such external evidence would not be necessary to make
9 the inference. *See Gray*, 523 U.S. at 195.

10 In sum, the Court finds that should Defendant Suda decide against testifying at trial, the
11 admission of her redacted confessions would violate Defendant Barpery’s confrontation rights.
12 Although the redacted statements remove all instances of Defendant Barpery’s name, they do not
13 remove all references to his existence. *See Richardson*, 481 U.S. at 203, 211. Furthermore only two
14 people are alleged to be involved in the crimes charged, so the reference by Defendant Suda to
15 “another person” in her redacted statements is akin to her taking the stand and pointing her finger at
16 Defendant Barpery, only here, Defendant Barpery would not have the opportunity to cross-examine
17 Defendant Suda. *See Gray*, 523 U.S. at 194. Thus, the introduction of the proposed redacted
18 statements would violate Defendant Barpery’s confrontation rights, even if the jury were presented
19 with a limiting instruction. *See Bruton*, 391 U.S. at 126.

20 V. CONCLUSION

21 Accordingly, the Court **DENIES** the Commonwealth’s motion to allow use of redacted
22 statements.

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IT IS SO ORDERED this th 5 day of May, 2014.



JOSEPH N. CAMACHO
Associate Judge