No. _____

In The

Supreme Court of the United States

BRYAN LAMAR BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A suspect in a burglary and homicide called a detective to cooperate. The detective asked him which vehicle he and the others had taken to commit the crimes and he replied that "they took [Petitioner's] truck." The detective was permitted to testify to the suspect's statement at his joint jury trial with Petitioner over Petitioner's objection that it violated his *Bruton* Confrontation Clause rights. The court only gave a limiting instruction.

The Fourth Circuit held the statement did not violate *Bruton* because it did not facially incriminate him. It also held, in a total of one paragraph, that it was harmless error anyway because other evidence supported his conviction. It made no attempt to determine whether the jury *would* have found Petitioner guilty in the absence of the statement.

The questions presented are:

1. Does a statement facially incriminate a person for purposes of *Bruton* Confrontation Clause analysis when one defendant says that as a group they took the other defendant's truck to commit a crime?
2. Does a sufficiency-of-the-evidence harmless error analysis comport with this Court's precedent regarding how to apply harmless error review to a constitutional violation?

PARTIES TO THE PROCEEDING

United States of America

Joseph Benson
Case No. 18-4539(L)

Bryan Lamar Brown
Case No. 18-4540

Mark Xavier Wallace
Case No. 18-4577

**Defendants Benson and Wallace have not joined in this petition for certiorari

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The opinion of the United States Court of Appeals is reported at 957 F.3d 218 (4th Cir. 2020) and appears at page App. A of this petition.

JURISDICTION

The district court in the Eastern District of Virginia had jurisdiction over this criminal case pursuant to 18 U.S.C. § 3231. The U.S. Court of Appeals for the Fourth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 following final judgments of conviction. The court of appeals issued its opinion and judgment on April 24, 2020. The court denied a timely petition for rehearing en banc on June 1, 2020; a copy of the order denying rehearing appears at page App. B of this petition.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). On March 19, 2020, this Court issued an order providing that "the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the … order denying a timely petition for rehearing."

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him…." U.S. Const. amend. VI.

STATEMENT OF THE CASE

Unidentified assailants forcibly entered a home and fatally shot the owner in an attempted robbery in Newport News, Virginia in March 2009. DNA from blood at the scene matched with a suspect named Joseph Benson, who was in town visiting Mark Wallace, a mutual friend of Benson and Petitioner.

Benson, Wallace, Petitioner and a fourth person were tried jointly before a jury in the federal district court in Norfolk, Virginia. At trial, the admissible evidence against Petitioner was threefold. First, a local drug dealer testified that Petitioner talked to him on the street about his role in driving everyone to the house for a planned burglary that escalated when two of the others stormed the house and killed the owner. The witness acknowledged that he hoped to get a cut in his 150-month sentence in an unrelated case for his testimony. Second, cell phone records showed that Petitioner and Wallace called each other on a daily basis, including a number of calls in the hours before and after the burglary, and that Wallace also made frequent calls with Benson and the fourth defendant on the day of the crimes. Third, evidence showed that Petitioner trafficked in firearms from Virginia to New York and that about seven hours after the crimes, Petitioner called New York to sell the two guns that ballistics tests later proved had been used in the crimes, one of which Petitioner referred to as "my Smith [and Wesson]." In the wiretapped call, Petitioner was in no hurry to get rid of the guns, saying he wanted top dollar for them and that he was willing to wait until the next week to make the sale.

The evidence was sufficient to support a finding that Petitioner knowingly participated in, and contributed a firearm to, the residential crime. However, if the jury discounted the word of the local drug dealer looking for a time cut, the remaining cell phone records and gun trafficking evidence supported a finding that Petitioner got involved only after the fact to sell some guns for his friend Wallace. Even if Wallace told Petitioner after the fact how the guns had been used, Petitioner would not have been guilty of those crimes. In addition, Petitioner's willingness to hold on to the guns supported a finding that he did not even know how the guns had been used.

Against this backdrop, the trial court allowed the jury to hear testimony from a detective that Wallace told him the group had taken Petitioner's truck to commit the crimes. Specifically, the detective testified that Wallace had called him expressly to cooperate in the homicide investigation. The detective testified that Wallace told him that he [Wallace] was "just a thief," and that "this particular incident was supposed to be a burglary." He then testified that he spoke again with Wallace expressly about the homicide and asked Wallace "which vehicle they, meaning he and others, took to this incident," and in response, Wallace stated that "they took Bryan Brown's truck."

The statement was inadmissible against Petitioner. It directly implicated him in the burglary and homicide and was the only evidence that directly supported the cooperating witness's testimony. He objected to its entry into evidence in his joint trial with Wallace and moved for a mistrial. The court

overruled the objection and only gave a limiting instruction to the jury to disregard the statement. Wallace did not testify, and Petitioner never had the opportunity to cross examine him.

Petitioner was convicted of Use of a Firearm in the Commission of a Crime of Violence Resulting in Death (18 U.S.C. 924(c) and (j). He was sentenced to 540 months.

Petitioner raised *Bruton* on appeal to the Fourth Circuit. He argued that Wallace's out-of-court statement was inadmissible against him as hearsay and that because it was testimonial in nature and facially incriminated him, *Bruton* compelled that a limiting instruction was insufficient to protect his Confrontation Clause rights. Further, Petitioner argued that the *Bruton* error was not harmless error beyond a reasonable doubt, the standard required for a violation of his constitutional rights.

The Fourth Circuit held that "[a]lthough it is a close question, … [Wallace's] statement did not present a *Bruton* issue because it was not facially incriminating as to [Petitioner]." Appendix A, ECF 93 at 18. It cited *Richardson v. Marsh,* 481 U.S. 200, 208, for the proposition that "[t]o implicate *Bruton*, a statement cannot incriminate 'inferentially'— that is, 'only when linked with evidence introduced later at trial,'" – and concluded that "[a]t most, there was the possibility that the jury might infer that because Petitioner's truck was involved, so was he." *Id.*

The court also held that any *Bruton* error was harmless. Appendix A, ECF 93 at 19. The court's harmless error analysis in its entirety was that:

> Brown himself admitted to Douglas that he owned the truck used to transport the Defendants to Joseph's house; that he helped to plan the crime; and that he was present when the other participants kicked the front door in (a description corroborated by crime scene investigators). Brown's own statements thus subsumed Wallace's passing reference to his truck by supplying far more incriminating information. And the Government presented additional evidence that Brown armed and transported his codefendants—including his wiretap statement that he owned one of the firearms used to kill Joseph and his sale of the weapon—and his repeated communications with Wallace (the chief organizer) directly before and after the murder. ECF 93 at 19-20.

One judge on the panel concurred in the harmless error finding, without explanation, but opined that the detective's testimony did indeed violate *Bruton*. ECF 93 at 35.

REASONS FOR GRANTING THE PETITION

I. A WRIT IS WARRANTED BECAUSE THE CIRCUIT DECISION CONFLICTS WITH THIS COURT'S PRECEDENT AND INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE REGARDING CONFRONTATION CLAUSE *BRUTON* RIGHTS.

Wallace's statement incriminates Petitioner on its face. To permit the Fourth Circuit's published decision to remain will significantly erode existing *Bruton* rights articulated by this Court in *Richardson v. Marsh*, 481 U.S. 200 (1987), and its progeny.

The jury heard testimony that Wallace called the detective expressly to discuss his role within a larger group of people who engaged in an "incident" referred to by Wallace and the detective as either a "burglary" or "homicide,"

acts that by their very label convey criminality and thus need no further explanation to incriminate anyone involved. The jury heard that the detective asked Wallace "which vehicle they, meaning he and others, took to this incident," and in response, Wallace said that "they took Bryan Brown's truck." The subjects of the conversation were a group of people engaged in a crime referred to as "they" or "he and others." No antecedent suggested a larger context that included people outside of this group of conspirators. Wallace did not say or suggest that they "borrowed" Petitioner's truck or "stole" Petitioner's truck or use any other verb or phrase that would suggest that Wallace was placing Petitioner outside of the antecedent "they" who had committed the crimes.

Also, Wallace did not use a verb or phrase to suggest that Petitioner was not aware of the use of his truck to drive to the burglary. Even if Petitioner were not present, use of his truck would still incriminate him as an accessory-before-the-fact unless he were truly ignorant of why a group of men decided to drive off in his truck. Given the express criminality of the purpose for using his truck, the only way this statement did **not** incriminate Petitioner on its face is if the fact finder concluded not only that Petitioner was not present in the truck despite it being used expressly to facilitate a crime, but also concluded that the criminal "they" somehow came to possess and use Petitioner's truck without his knowledge of their intended use. In short, to find that the statement did **not** incriminate Petitioner on its face, one would have to speculate that "they"

stole Petitioner's truck – a fact left out by Wallace – or borrowed it but also lied to Petitioner about their intended use.

Nonetheless, the Fourth Circuit panel majority held that Wallace did not incriminate Petitioner and asserted that *Bruton* "does not apply to statements that incriminate inferentially," citing *Richardson*, 481 U.S. at 208. However, the majority misread this Court's holding in *Richardson* and actually undermined an express example of facial incrimination provided by this Court in that opinion.

The *Richardson* Court held that a co-defendant's out of court statement did not violate *Bruton* when the trial court redacted the defendant's name from the statement so that it was no longer "incriminating on its face … [but] became so only when linked with evidence introduced later at trial…." 481 U.S. 200, 208 (1987). The *Richardson* Court contrasted this redaction scenario – which, of course, did not happen with Petitioner – with the facts of *Bruton*, where a "codefendant's confession [that] 'expressly implicat[ed]' the defendant as his accomplice 'prove[d] powerfully incriminating.'" *Id*., citing *Bruton*, 391 U.S. 123, 135.

The *Richardson* Court summed up the difference between facial incrimination that violates *Bruton* and inferential incrimination that does not by observing that "[s]pecific testimony that '**the defendant helped me commit the crime'** is more vivid than inferential incrimination." *Id*. (emphasis added).

But the logic of the Fourth Circuit opinion compels a holding that saying someone "helped me commit the crime" actually does not incriminate on its face because it leaves out whether that person acted with criminal intent or knowledge. Following the Fourth Circuit panel majority, one would conclude that "the mere possibility" that a defendant was aware that his act furthered a crime "does not mean that [the] statement was facially incriminating." (quoting majority at ECF 93 at 18).

This Court in *Gray v. Maryland,* 523 U.S. 185 (1998), expressly disapproved of the Fourth Circuit's literalism that undermines this Court's holding in *Bruton* and its progeny. In *Gray*, the trial court admitted codefendant Bell's confession into evidence, in which Gray's name was redacted, immediately after which the prosecutor was permitted to ask the detective if he was then able to arrest Gray based on Bell's statement. This Court held this violated *Bruton* even though it "concede[d] that the jury must use inference to connect the statement in this redacted confession with the defendant." 523 U.S. at 195. This Court noted that, commonsensically, "inference pure and simple cannot make the critical difference, for if it did, then *Richardson* would also place outside *Bruton's* scope confessions that use shortened first names, nicknames, or descriptions as unique as the red-haired, bearded, one-eyed man-with-a-limp." *Id.* (internal quotations omitted).

As aptly stated by this Court in *Gray*, "*Richardson* must depend in significant part upon the *kind* of, not the simple *fact* of, inference." 523 U.S. at

196 (emphasis in original). The *Gray* Court noted that "*Richardson's* inferences involved statements that **did not refer directly to the defendant himself** and which became incriminating 'only when linked with evidence introduced later at trial.' (quoting *Richardson*, 481 U.S., at 208)(emphasis added). *Id.* In contrast, the *Gray* Court noted that "[t]he inferences at issue here [in *Gray*] involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial. *Id.*

Similarly, in Petitioner's case, Wallace's statement "obviously refer[s] directly to … the defendant [Brown]," *Id.*, and the jury would understand quite obviously, by commonsense inference, that Wallace was referring to Petitioner as a participant, thus involving "inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." *Id.*

In this light, it is appropriate for the court to issue a writ to ensure that circuit *Bruton* jurisprudence remains consistent with this Court's clearly articulated precedent.

II. A WRIT IS WARRATNED TO MAINTAIN UNIFORMITY OF THE COURT'S DECISIONS AND TO REMOVE ANY CONFLICT WITH COURT PRECEDENT RELATED TO HARMLESS ERROR REVIEW WHEN CONSTITUTIONAL RIGHTS ARE VIOLATED.

The Fourth Circuit failed to articulate and apply the correct harmless error standard in direct conflict with this Court's precedent.

Before a *Bruton* violation can be held harmless, "the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman*

v. California, 386 U.S. 18, 24 (1967). "It is therefore not enough that [a] jury **could** have found [a defendant] guilty absent the supposed constitutional violation, for such an analysis improperly conflates sufficiency-of-the-evidence review with the appropriate *Chapman* standard." *United States v. Holness*, 706 F.3d 579, 598 (4th Cir. 2013) (internal citations omitted)(emphasis added). Instead, for all cases subject to *Chapman* review, "the harmless-error inquiry must be essentially the same: is it clear beyond a reasonable doubt that a rational jury **would** have found the defendant guilty absent the error?" *Neder v. United States*, 527 U.S. 1, 18 (1999)(emphasis added). As jury verdicts require unanimity, this standard requires a finding beyond a reasonable doubt that not one juror **would** have failed to convict in the absence of hearing the improper evidence.

The Fourth Circuit did not articulate or apply this standard. It cited no authority on what standard applies, leaving a troubling precedent in a published decision that suggests a court can substitute conclusory statements of "harmless error" for a quantitative assessment of the record as it would appear in the absence of the constitutional error. *Compare with United States v. Rand,* 835 F.3d 451, 460 (4th Cir. 2016) (*Chapman* harmless error "analysis requires a reviewing court to quantitatively assess the effect of the error in the context of other evidence presented at trial."). This is fundamentally different from simply listing the sufficiency of admissible evidence from which the jury **could** have found a defendant guilty.

This sufficiency-of-the-evidence review is precisely what the short paragraph of harmless error review from the Fourth Circuit decision sounds like (quoted in its entirety in the Statement of the Case, above). For example, it inappropriately takes as a given that "[Petitioner] himself admitted to [the cooperating witness] that he owned the truck used to transport the Defendants to Joseph's house" and that he further confessed to [the cooperating witness] about his role in the offense, and from this concludes that "[Petitioner's] own statements thus subsumed Wallace's passing reference to his truck …." Appendix, ECF 93 at 19.

Viewing the evidence in the light most favorable to the government – and thus taking all evidence against a defendant to be true – is appropriate for sufficiency-of-the-evidence review but applying it to *Chapman* review negates the whole point of beyond-a-reasonable-doubt analysis.

This Court has made in clear that if a *Bruton* violation is established, the very question is whether the jury still would have been convinced beyond a reasonable doubt of the defendant's guilt by the remaining evidence in the absence of the evidence that violated *Bruton* – in this case, Wallace's statement to the detective. This includes an assessment of whether the jury still would have believed the local drug dealer looking for a cut in his sentence about Petitioner's confession had they not heard this "confession" corroborated by Wallace through the testimony of the detective. A reasonable jury would recognize the drug dealer's motive to lie and expect substantial corroborative

evidence before using his testimony as a basis to convict. But the Fourth Circuit did not articulate a standard by which it can be concluded that it applied this Court's holding in *Chapman*, and its actual analysis belies any effort to assess whether the jury would have found the drug dealer believable in the absence of the detective's testimony.

Tellingly, the Fourth Circuit's harmless error review did not mention any evidence or inferences *favorable* to Petitioner. Instead, it focused only on admissible evidence that supported his conviction, a hallmark of sufficiency-of-the-evidence review. It lacked any attempt at assessing whether the jury **would** have changed its assessment of the weight of the evidence had it not been provided inadmissible corroborative testimony to rely on in the mix.

In fact, of the admissible evidence, the phone evidence was not very probative. Evidence established that Petitioner and Wallace were friends who had called each other almost daily in the prior year and a half. The gun evidence was more probative but, standing alone, was also consistent with Petitioner being an accessory-after-the-fact or not even knowing about the crimes.

Of course, it is not to be expected that this Court at this time weigh the evidence closely to determine if the *Bruton* violation was harmless beyond a reasonable doubt. Rather, it was the obligation of the Fourth Circuit to apply this Court's unambiguous precedent mandating a beyond-a-reasonable-doubt analysis rather a sufficiency-of-the-evidence analysis, which the Fourth

Circuit did not do. It is appropriate for the Court to grant a writ to ensure that the *Chapman* harmless error review is applied faithfully by the circuits when *Bruton* violations arise.

The Fourth Circuit opinion ignores this Court's clear precedent on both constitutional harmless error review and what it means for a statement to be incriminating for *Bruton* purposes. In such developed areas of law, where this Court articulates standards that lower courts must then apply to unique circumstances, it is unlikely that a circuit split will develop to invite a review to ensure faithful adherence to this Court's rulings. It is unlikely, after all, that another circuit will have to address anytime soon whether it facially incriminates a defendant when another defendant says they took his car to commit a crime. But if specific cases such as Petitioner's are not reviewed, then this Court's *Bruton* and harmless error jurisprudence will continue to be ignored.

For these reasons, the writ should be granted.

Respectfully submitted,

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