No. 22-196

In the Supreme Court of the United States

ADAM SAMIA, PETITIONER

v.

UNITED STATES OF AMERICA

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Cases—continued:

Constitution:

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There is a deep, longstanding, and widely recognized conflict among the courts of appeals on the question whether the admission of a codefendant's redacted out-of-court confession violates the Confrontation Clause where the confession immediately inculpates a defendant based on the surrounding context. The court of appeals erred by considering the confession in isolation when analyzing whether a Confrontation Clause violation occurred. This case is an excellent vehicle for resolving the conflict on an important question of constitutional law.

The government wanly argues that petitioner "overstates the scope of any disagreement" in the courts of appeals. But in the Solicitor General's understated parlance, that is familiar code for "there is a circuit conflict here that may warrant the Court's review." While the

government attempts to whittle down that conflict, it ultimately cannot explain away any, much less all, of the many cases that have rejected the approach taken below.

Tellingly, the government devotes significant attention to the merits. But it fails to come to grips with the fundamental problem that this case presents. The government's position would seemingly permit redactions using neutral language and prohibit only redactions using brackets or blank spaces. That distinction is formalism run wild: it makes no sense where the surrounding context would render either type of redaction equally ineffective, resulting in the exact prejudice to the defendant the *Bruton* rule is designed to prevent.

The government's case-specific merits arguments are also unavailing. The admission of the redacted out-of-court confession here was highly incriminating in light of the surrounding context. And while the government strains to argue that this case is a suboptimal vehicle for resolving the conflict, its arguments are painfully weak. At trial, the government specifically relied on the confession here as some of the "most crucial" evidence that would prove petitioner's guilt.

This is precisely the sort of case that the Court should take. It presents the Court with the opportunity to dispel longstanding uncertainty on a constitutional question of great practical importance and to provide much-needed guidance to prosecutors, defendants, and lower courts alike. The petition for a writ of certiorari should be granted.

A. The Decision Below Implicates A Conflict Among The Courts Of Appeals

The government does not dispute the existence of a conflict on the question presented. Instead, it merely contends that petitioner has "overstate[d] the scope of any disagreement." Br. in Opp. 13. That is wrong.

1. To begin with, the government does not contest (Br. in Opp. 15) that the decision below conflicts with *United States* v. *Schwartz*, 541 F.3d 1331 (11th Cir. 2008), cert. denied, 556 U.S. 1174 and 556 U.S. 1330 (2009). That would ordinarily be enough, in itself, to warrant the Court's review. Yet the government suggests that the resulting conflict is insufficient because the "Eleventh Circuit's case law may be internally inconsistent on this issue." Br. in Opp. 15-16. No such inconsistency exists.

In *Schwartz*, the codefendant's redacted confession immediately inculpated the defendant based on the surrounding context. The confession referred to conduct by companies controlled by the defendant, and the record contained significant evidence concerning "the extent of [the defendant's] ownership and control" of those companies. 541 F.3d at 1352. The jury thus would have immediately equated the companies mentioned in the confession with the defendant, despite the redactions. See *ibid.*

By contrast, the redacted confession in *United States* v. *Williamson*, 339 F.3d 1295 (11th Cir. 2003), cert. denied, 540 U.S. 1184 (2004), did not immediately inculpate the other defendants, even when considered in light of the surrounding context. See Br. in Opp. 16. There, defendant McKee, a local official, said in his out-of-court confession that he had received payments to pass a resolution and provide favorable prices to a local company. See 339 F.3d at 1302. In order for that confession to have inculpated the other defendants—who ran the local company—the jury would have needed to infer *both* that the

company had made the payments to the official *and* that the defendants were involved in the making of those payments. See *id.* at 1303. "[E]ven assuming that it [was] self-evident" that the company had made the payments, the Eleventh Circuit concluded, naming the company was insufficient "facially [to] implicate" the defendants without "additional, independent evidence." *Ibid.*

Schwartz and *Williamson* are thus entirely consistent. Under *Schwartz*, the surrounding context is relevant to determine whether a codefendant's redacted out-of-court confession immediately inculpates the defendant. But under *Williamson*, if the confession is not immediately inculpatory, no constitutional violation occurs (assuming an appropriate limiting instruction), even if other trial evidence supports an inference that the confession incriminates the defendant.[*]

2. The government seeks to downplay the conflict between the decision below and the decisions cited by petitioner from the Third, Seventh, and Ninth Circuits. See Br. in Opp. 13-15. Those efforts are unavailing.

The government begins by noting (Br. in Opp. 14) that, in some of the relevant decisions from those courts, the Confrontation Clause violation was harmless (or not reversible on plain-error review). But that is entirely irrelevant. Those courts still found that a violation occurred—and they did so by considering whether the confession was immediately inculpatory in light of the surrounding context. See Pet. 13-17. That is all that is required to create a conflict on the question presented.

The government also suggests that the consideration of context was unnecessary in the cases from the Third,

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[*] *United States* v. *Brazel*, 102 F.3d 1120 (11th Cir.), cert. denied, 522 U.S. 822 (1997), predated this Court's decision in *Gray* v. *Maryland*, 523 U.S. 185 (1998), and thus is entitled to little weight. See Br. in Opp. 16.

Seventh, and Ninth Circuits, because the redactions in those cases were "ineffective on their face." Br. in Opp. 14. The government can make that argument only by selectively quoting the cases and ignoring their actual reasoning.

In the Third Circuit's decision in *United States* v. *Richards*, 241 F.3d 335, cert. denied, 533 U.S. 960 (2001), the codefendant's out-of-court confession referred to "the existence of three participants" in the robbery of an armored car: the codefendant, an "inside man," and a "friend." *Id.* at 341. Only by looking to the surrounding context could the Third Circuit conclude that the "inside man" was obviously the driver of the armored car, with the result that the reference to the "friend" incriminated the defendant—"the only other person involved in the case." *Ibid.*

United States v. *Hardwick*, 544 F.3d 565 (3d Cir. 2008), is to the same effect. There, the confession of codefendant Murray referred to "others in [a] van," and "the unavoidable inference was that [the others] were the ones" who left the van to murder an individual. *Id.* at 573. Murray's confession "explicitly excluded" himself and the only other identified passenger from the "others" who left the van, and the only individuals charged with murder were defendants Hardwick and Restro. See *ibid.* Based on that context, the Third Circuit concluded that admission of the confession violated Hardwick and Restro's Confrontation Clause rights. See *ibid.*

The Seventh Circuit likewise considered surrounding context, and expressly rejected the government's argument that only the "four corners of the confession" were relevant, in *United States* v. *Hoover*, 246 F.3d 1054 (2001). There, the codefendant's out-of-court confession referred to an "incarcerated leader" of a gang and an "unincarcerated leader." *Id.* at 1059. Only by relying on surrounding

context—namely, evidence that defendant Hoover ran the gang from state prison and that another defendant led the gang from the outside—did the Seventh Circuit conclude that admission of the redacted confession violated the Confrontation Clause. See *ibid.*

So too, the Ninth Circuit's decision in *United States* v. *Mayfield*, 189 F.3d 895 (1999), relied on context beyond the four corners of the redacted out-of-court confession. In that case, the confession referred only to an unnamed "individual." See *id.* at 902. But testimony elicited about the confession established that the "individual" was the man who was the "drug ringleader," and other evidence and argument during closing statements made clear that the ringleader was defendant Mayfield. See *ibid.* Based on that context, the Ninth Circuit concluded that admission of the redacted confession violated the Confrontation Clause. See *ibid.*

3. Finally on this score, the government argues that the decisions of the First and D.C. Circuits cited by petitioner "did not involve a finding of *Bruton* error and thus do not suggest that those courts would necessarily have found such error here." Br. in Opp. 13. That is too clever by half. It is true that those courts ultimately found no Confrontation Clause violation in the cited cases. But the government does not contest that the First Circuit adopted the legal rule that an assessment of a redacted confession "requires careful attention to * * * the text of the statement itself and to the context in which it is proffered." *United States* v. *Vega Molina*, 407 F.3d 511, 520, cert. denied, 546 U.S. 919 (2005). Nor does the government dispute that the D.C. Circuit reached its conclusion in *United States* v. *Straker*, 800 F.3d 570 (2015), cert. denied, 577 U.S. 1147 (2016), only after "[v]iewing the text of the statements as a whole and in the context of the facts and evidence in the case." *Id.* at 598.

For present purposes, the salient point is that the First and D.C. Circuits adopted and applied petitioner's contextual approach, as did all four of the other circuits on which petitioner relies. Those circuits are in conflict with the numerous circuits to have adopted the four-corners approach, including the Second Circuit below. That conflict will not abate without the Court's intervention.

B. The Decision Below Is Incorrect

The government devotes significant attention to the merits (Br. in Opp. 6-12), arguing that the court of appeals correctly declined to consider the context surrounding the introduction of Stillwell's confession when assessing whether a Confrontation Clause violation occurred. Although the merits are ultimately a matter for another day, the government's arguments are invalid.

1. While the government argues that the court of appeals "correctly applied" this Court's precedents to the facts, Br. in Opp. 9, it is conspicuously vague as to why. The government does not dispute that this case falls in a gap between *Richardson* v. *Marsh*, 481 U.S. 200 (1987), on the one hand, and *Gray* v. *Maryland*, 523 U.S. 185 (1998), on the other. See Br. in Opp. 6-9. Yet the government seems to take the position that a redacted confession violates the Confrontation Clause only in cases exactly like *Gray* itself, where the fact of the redaction is clear on the confession's face—that is, where the redacted confession refers to "me and [another person]," but not where the redacted confession refers to "me and another person." See *id.* at 9-10.

The government's apparent position suffers from two major flaws. *First*, this Court's precedents simply do not support it. While *Richardson* "placed outside the scope of *Bruton*'s rule those statements that incriminate inferentially," *Gray* makes clear that *Richardson*'s rule depends

on "the *kind* of, not the simple *fact* of, inference." 523 U.S. at 195-196. Any incriminating inference in *Richardson* did not arise from the reference to an unnamed accomplice in the introduced confession, because the confession there was redacted to "omit all indication that *anyone* other than [two named individuals] participated in the crime." 481 U.S. at 203. By contrast, the confession in *Gray* "obviously refer[red] directly to someone, often obviously the defendant, and [it] involve[d] inferences that a jury ordinarily could make immediately." 523 U.S. at 196. *Gray* necessarily requires the consideration of *some* context; after all, in the absence of any context whatsoever, a bracketed redaction (like the one above) no more refers to the defendant on trial than does a confession that omits any reference to an accomplice's existence.

Second, the government's apparent distinction is ephemeral. Depending on context, the use of "neutral language" to make a redaction may be just as immediately incriminating as the use of brackets or blank space. Consider, for example, a trial for robbery against two defendants, where the government introduces one defendant's out-of-court confession that he and "another person" committed the robbery. In light of the fact that there are only two defendants on trial, the reference to "another person" refers to the second defendant to the same extent that a bracketed "[another person]" (or "[ ]") would. And those redactions would be equally ineffective where, as here, the prosecution expressly linked the non-confessing defendant to the unnamed person in its opening statement. See Pet. 8. However the redaction is made, the risk of prejudice to the defendant is obvious. In the words of Judge Easterbrook, such an approach would "undo *Bruton* in practical effect." *Hoover*, 246 F.3d at 1059.

2. The government's case-specific merits arguments (Br. in Opp. 11-12) are also unavailing. For starters, the

government's suggestion that the application of the correct legal standard here would be "entirely factbound," *id.* at 11, is passing strange. In petitioner's view, the court of appeals analyzed petitioner's Confrontation Clause claim under the incorrect legal standard. The Court should grant review to decide the correct standard. And if the Court agrees that the court of appeals erred, it can either apply the correct standard itself or remand for the court of appeals to do so in the first instance, consistent with ordinary practice.

The government next argues that petitioner's reliance on the prosecution's opening and closing statements as the relevant context is "conceptually misplaced," because "other trial evidence" permitted the prosecution to argue that petitioner was the shooter. Br. in Opp. 11. But that completely misses the point. Even if there was other evidence of guilt, it does not alter the fact that, after hearing the prosecution's statements, the jury would have immediately inferred that Stillwell had identified petitioner as his alleged accomplice in the confession and that the government was altering the confession to avoid using petitioner's name. See Pet. 25-26. At most, the existence of other evidence goes to the harmlessness of any Confrontation Clause violation; it has no bearing on the existence of the violation, which depends on whether the confession was immediately inculpatory based on the surrounding context. See p. 11, *infra*.

The government further contends that, "in light of the vastness of LeRoux's criminal enterprise," the inference that petitioner was the unnamed accomplice identified in Stillwell's confession was not sufficiently overwhelming so as to violate the Confrontation Clause. Br. in Opp. 12. But that is an odd contention where there were only three defendants in the courtroom; the government argued that petitioner was the person who shot the victim; and the

other two defendants did not dispute the government's arguments concerning their supporting roles in the crime. That context created an overwhelming inference that petitioner was the unnamed accomplice in Stillwell's confession. And it is hardly "outside the scope of the question presented," *ibid.*, to note that the government could have cured the *Bruton* problem by "omitting all references to petitioner's existence," Pet. 25; that would have brought the confession within the rule of *Richardson*. As it stood, however, the admission of a confession that effectively identified petitioner violated the Confrontation Clause.

C. This Case Is An Excellent Vehicle For Considering The Question Presented

Contrary to the government's assertions (Br. in Opp. 16-17), this case is a suitable vehicle for resolving the longstanding conflict on the question presented.

1. The government first contends that petitioner waived his ability to challenge the four-corners approach applied by the court of appeals because petitioner "'conced[ed]' the 'correctness' of circuit precedent in the proceedings below." Br. in Opp. 16 (quoting *United States* v. *Williams*, 504 U.S. 36, 45 (1992)). That is utter nonsense. In its briefing below, the government asserted that it was "well settled" in the Second Circuit that "the redacted confession must be reviewed 'separate and apart from any other evidence admitted at trial.'" Gov't C.A. Br. 85. Petitioner responded that the government's assertion was "true, but beside the point, because the government's opening statement was not evidence." Pet. C.A. Reply Br. 27-28. That was plainly not a concession that the Second Circuit's four-corners approach was correct as a matter of constitutional law; at most, it was an effort to prevail under it. And the government acknowledges the familiar principle that petitioner was not required to raise

a futile challenge to the Second Circuit's existing rule in order to preserve the right to seek review from this Court. See, *e.g.*, *US Airways, Inc.* v. *McCutchen*, 569 U.S. 88, 101 n.7 (2013).

2. Finally, the government sheepishly asserts (Br. in Opp. 17) that review is unwarranted because any Confrontation Clause violation was harmless beyond a reasonable doubt. But the court of appeals did not address the question of harmlessness, and this Court "ordinarily leaves it to lower courts to pass on the harmlessness of error in the first instance." *Ring* v. *Arizona*, 536 U.S. 584, 609 n.7 (2002). Any potential harmlessness thus presents no obstacle to review.

Regardless, it is rich for the government to suggest that the erroneous introduction of Stillwell's confession was harmless. In its opening statement, the government specifically referred to Stillwell's confession as some of the "most crucial" evidence that would prove petitioner's guilt. C.A. App. 466, 468. In fact, the only statement from any individual with first-hand knowledge was Stillwell's redacted confession inculpating petitioner. In addition, there was no physical evidence that petitioner participated in the murder.

Under the reasonable-doubt standard applicable to constitutional errors, "[a]n error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot * * * be conceived of as harmless." *Chapman* v. *California*, 386 U.S. 18, 23-24 (1967). The government's harmless-error argument, which the court of appeals did not adopt, is nowhere near compelling enough to provide a basis for denying review—particularly in the face of a clear circuit conflict on an undeniably important question of constitutional law.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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