No. 22-196

In the Supreme Court of the United States

ADAM SAMIA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE PETITIONER

KANNON K. SHANMUGAM
Counsel of Record
WILLIAM T. MARKS
BRIAN M. LIPSHUTZ
MATTEO GODI
ELIZABETH A. NORFORD
MORGAN J. SANDHU
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

QUESTION PRESENTED

Whether the admission of a codefendant's redacted out-of-court confession that immediately inculpates a defendant based on the surrounding context violates the defendant's rights under the Confrontation Clause of the Sixth Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Page

Page

Miscellaneous—continued:

In the Supreme Court of the United States

No. 22-196

ADAM SAMIA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is unreported. The district court's ruling denying petitioner's motion to sever or to exclude the confession was delivered orally (J.A. 19-25).

JURISDICTION

The judgment of the court of appeals was entered on April 20, 2022. On July 14, 2022, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including September 2, 2022. The petition was filed on August 30, 2022, and granted on December 13, 2022. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *.

STATEMENT

The Confrontation Clause of the Sixth Amendment restricts the prosecution's ability to use the out-of-court confession of a nontestifying codefendant in a joint criminal trial. In particular, the prosecution may not use one defendant's confession as evidence of another's guilt where the confession accuses the other defendant of participating in the charged crime. In *Bruton* v. *United States*, 391 U.S. 123 (1968), the Court held that the use of a limiting instruction cannot eliminate the resulting Confrontation Clause violation, because the risk is too great that the jury will be unable to cabin its consideration of the confession to the confessing defendant (against whom it is properly admitted).

In two later cases, the Court applied that reasoning to redacted confessions. In one, the Court held that no Confrontation Clause violation occurs where the redacted confession omits any reference to the existence of an unnamed accomplice and the jury receives a limiting instruction. But in the other, the Court held that a Confrontation Clause violation remains where the jury is likely to infer that the confession identifies the nonconfessing defendant as an accomplice because that defendant's name is replaced with an obvious indication of deletion, such as a blank space or the word "deleted." The question presented here is whether the admission of a codefendant's confession, redacted using a placeholder such as the

phrase "another person," similarly violates the Confrontation Clause where the confession inculpates the nonconfessing defendant based on the surrounding context.

Petitioner was tried along with two codefendants for the murder of a real-estate agent in the Philippines. Neither of petitioner's codefendants disputed that they had participated in the murder; they contested only the government's jurisdiction over the crime. Petitioner alone maintained his innocence. The district court denied petitioner's motion to sever his trial and allowed the prosecution to introduce the out-of-court confession of petitioner's codefendant, who had named him as the person who pulled the trigger.

To address the obvious Confrontation Clause concern, the prosecution redacted petitioner's name and replaced it with references to the "other person" or a similar phrase. The prosecution nevertheless referred to the confession in its opening argument as some of the "most crucial" evidence that would prove its theory that petitioner was the shooter. When introducing the confession through the testimony of one of its agents, the prosecution proceeded to question the agent about the "other person," eliciting additional details about that person and his role in the murder. The prosecution subsequently introduced evidence that directly linked petitioner as the unnamed accomplice in the confession. Over petitioner's objection, the district court held that the redactions were sufficient to avoid violating petitioner's confrontation right.

The court of appeals affirmed. It applied existing circuit precedent that instructed a court to assess the redacted confession in isolation from the surrounding context in determining whether it incriminates the defendant. The court of appeals thus declined to consider the redacted confession in the greater context of the trial. Looking only at the four corners of the confession, the

court held that admission of the confession did not violate petitioner's confrontation right because references to him had been redacted using placeholders.

That decision was erroneous. This Court's cases applying *Bruton* establish a common-sense and administrable rule: the redaction of a confession does not eliminate the Confrontation Clause violation where the jury is likely to ascertain that the confessing defendant identified the nonconfessing defendant as an accomplice. And because the jury does not hear the confession in isolation, a court cannot accurately make the necessary determination without assessing the broader context of the trial. When assessing the admissibility of a nontestifying codefendant's confession, therefore, a court should consider the number of defendants on trial, the prosecution's arguments, the questioning surrounding the introduction of the confession, and the other evidence in the prosecution's case in chief—aspects of the case that are either knowable in advance of trial or within the prosecution's unique control.

Under that approach, the admission of the codefendant confession in this trial violated petitioner's confrontation right. The judgment of the court of appeals should be vacated and the case remanded for a new trial.

A. Background

The Confrontation Clause of the Sixth Amendment sets out "one of the bedrock constitutional protections afforded to criminal defendants." *Hemphill* v. *New York*, 142 S. Ct. 681, 690 (2022). It 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. Because "[t]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by

the courts," it permits "only those exceptions established at the time of the founding." *Crawford* v. *Washington*, 541 U.S. 36, 54 (2004).

Joint trials give rise to unique Confrontation Clause problems because of a criminal defendant's right not to testify at trial. See U.S. Const. Amend. V; *Minnesota* v. *Murphy*, 465 U.S. 420, 426 (1984). If one defendant confesses to the crime before trial, the prosecution can use the confession against the confessing defendant at trial as an admission by an opposing party. See Fed. R. Evid. 801(d)(2)(A). If the confession names another defendant as an accomplice, however, the nonconfessing defendant will lack any opportunity to cross-examine the confessing defendant if the latter chooses not to take the stand. In such a situation, the Confrontation Clause prohibits the admission of the out-of-court confession as evidence of the nonconfessing defendant's guilt. See, *e.g.*, *Bruton*, 391 U.S. at 126-128.

In some circumstances, an instruction that the jury not consider an out-of-court statement as evidence of a defendant's guilt can avoid a Confrontation Clause violation, on the theory that the declarant is no longer acting as a witness "against" the defendant. See, *e.g.*, *Cruz* v. *New York*, 481 U.S. 186, 190 (1987). But in *Bruton*, *supra*, this Court held that such a limiting instruction cannot avoid the Confrontation Clause violation created by the use of a codefendant's confession that names the defendant as an accomplice. See 391 U.S. at 137. The Court reasoned that "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Id.* at 135.

In two later cases, the Court considered the admissibility of a codefendant's out-of-court confession that was

redacted in an attempt to avoid a Confrontation Clause violation. In *Richardson* v. *Marsh*, 481 U.S. 200 (1987), the prosecution had redacted the codefendant's confession so as to "omit all indication that *anyone* other than [the codefendant]" and a named third individual had "participated in the crime." *Id.* at 203. Yet when the defendant took the stand in her own case, she made statements that, when considered together with the confession, rendered the confession incriminating. See *id.* at 208. The Court held that, because the confession itself was redacted to "eliminate not only the defendant's name, but any reference to his or her existence," it was admissible. *Id.* at 211.

By contrast, in *Gray* v. *Maryland*, 523 U.S. 185 (1998), the Court held that a codefendant's confession was inadmissible where the prosecution had redacted it by substituting a blank space or the word "deleted" for the defendant's name. See *id.* at 188. Unlike the confession in *Richardson*, the confession in *Gray* "refer[red] directly to the *existence* of the nonconfessing defendant." *Id.* at 192 (internal quotation marks omitted; emphasis added). The Court explained that, where the fact of redaction is obvious, the jury will "realize that the confession refers specifically to the defendant," even if the prosecution does not "blatantly link the defendant to the deleted name." *Id.* at 193. Such a situation, the Court reasoned, implicates the concerns animating *Bruton* with full force. See *id.* at 192.

B. Facts And Procedural History

1. Before his prosecution, petitioner worked as a security guard and lived on his family's farm in rural North Carolina. In 2011, he traveled to the Philippines, where he expected to do security work for a company called Echelon Associates. As it turned out, Echelon was a front

company for Paul LeRoux, a South African who ran a sophisticated criminal empire spanning four continents. *United States* v. *Hunter*, 32 F.4th 22, 26 (2d Cir. 2022); Pet. C.A. App. 855-856, 871.

In January 2012, LeRoux ordered the murder of Catherine Lee, a Filipina real-estate agent who LeRoux believed had stolen money from him. Lee was found dead from gunshot wounds the following month. Later that year, the Drug Enforcement Agency (DEA) arrested LeRoux, and he became a cooperating witness for the government. *Hunter*, 32 F.4th at 26; J.A. 67-68, 79, 110-111, 130.

The government later arrested Joseph Hunter, Carl David Stillwell, and petitioner in connection with the murder. The government's theory of the case was that Hunter hired two men who posed as real-estate buyers named "Bill Maxwell" and "Tony." The two men visited two properties with Lee on the day of the murder, interacting with six witnesses. After visiting the second property with Lee, the men killed her while she was riding with them in a van. The government believed that Stillwell was "Bill Maxwell" and petitioner was "Tony." J.A. 195-196; Pet. C.A. App. 227-234, 380-382.

The six witnesses who met the men gave statements to Philippine and American law enforcement, and their descriptions were used to prepare composite sketches of the killers. Neither sketch resembles petitioner. Three years later, American law-enforcement agents presented all six witnesses with photo arrays. Two of the witnesses identified photos of Stillwell as "Bill Maxwell," and two others selected a photo that was very similar to Stillwell's. Crucially, however, not one of the six witnesses identified petitioner's photo as "Tony." Pet. C.A. App. 21-22, 380-382.

In a recorded interview with the Drug Enforcement Agency, Stillwell admitted to being in the vehicle when the victim was killed. But Stillwell claimed he was merely the driver, and he identified petitioner as the shooter. J.A. 42, 76.

2. Hunter, Stillwell, and petitioner were indicted in the Southern District of New York on charges of murder for hire and conspiracy to commit murder for hire, in violation of 18 U.S.C. 1958(a); conspiracy to murder and kidnap in a foreign country, in violation of 18 U.S.C. 956; and using and carrying a firearm during a crime of violence, in violation of 18 U.S.C. 924(j). Stillwell and petitioner were also indicted for conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h). The indictment alleged that defendants planned the conspiracy partly in the United States. J.A. 1-18.

Petitioner filed a pretrial motion to sever his trial or, in the alternative, to exclude the confession; he argued that, if Stillwell's out-of-court confession were introduced at a joint trial, it would violate his confrontation right. See D. Ct. Dkt. 410. The prosecution acknowledged that Stillwell's statements implicated petitioner; it proposed redactions to the interview transcript and provided notice of its intent to introduce the confession through an agent's testimony in light of the difficulty of redacting the video recording. See D. Ct. Dkt. 420, at 28-31 & n.10; J.A. 49-50. After requiring additional redactions, the district court denied the motion, ruling orally that introducing the confession in a joint trial did not violate the Confrontation Clause. J.A. 19-25.

3. The prosecution tried Hunter, Stillwell, and petitioner in a two-week trial.

a. In its opening argument, the prosecution theorized that Stillwell drove a van while petitioner "was in the passenger seat," and that petitioner pulled out a gun, "turned

around, aimed carefully and shot [Lee]." J.A. 52. The prosecution then listed some of the "most crucial testimony" it would use to support that theory. J.A. 58. Referring to the confession that could be considered only against petitioner, the prosecution stated that "Stillwell admitted to driving the car while the man he was with turned around and shot [Lee]." *Ibid.*

In Stillwell's opening argument, counsel conceded that Stillwell was "the driver of the vehicle" and was "in the van with the victim" when the shooting occurred. J.A. 64. Stillwell disputed the charges only on the ground that he did not know about the object of the conspiracy until he reached the Philippines. J.A. 63. Counsel for Hunter also did not dispute that Hunter was involved in the conspiracy. J.A. 61-62.

b. In its case in chief, the prosecution presented oral testimony about Stillwell's confession through Eric Stouch, the DEA agent who conducted the interview. J.A. 74. As is relevant here, Agent Stouch testified as follows:

Q. During your interview, did you ever ask Mr. Stillwell whether he had ever been out of the country?

A. Yes.

Q. What did he say?

A. He said he had been overseas once.

Q. Did he indicate where he had gone?

A. The Philippines.

Q. Did he say when?

A. Yes.

Q. When was that?

A. Late 2011 or 2012.

* * *

Q. Did Mr. Stillwell indicate whether he had gone [to the Philippines] alone or with someone else?

A. He stated that he had met somebody else over there.

Q. Did he describe where he and the person that he met over there stayed while in the Philippines?

A. Yes, he explained that he and the other person initially stayed at a hotel, but then moved to what he described as a condo or apartment-type complex in the old capital area of the city.

Q. And he stated that they lived together?

A. Yes.

Q. Stayed in the same place?

A. Yes.

Q. To his knowledge, did the person that he was with in the Philippines ever carry a firearm?

A. Yes.

Q. Did he describe what kind of firearm it was?

A. He described it as a full-size, four-inch gun of some nature, but could not recall whether it was a nine millimeter, .22, or .45 caliber.

Q. Did he notice any other features of the firearm?

A. Yeah, he recalled that it had a threaded barrel.

* * *

Q. Was there a particular occasion that he remembered that individual having that gun in their possession?

A. Yes.

Q. When was that?

A. He described a time when he and that other individual had traveled outside of Manila to view a property and that he had observed a gun then.

* * *

Q. Did he say where [the victim] was when she was killed?

A. Yes. He described a time when the other person he was with pulled the trigger on that woman in a van that he and Mr. Stillwell was driving.

J.A. 74-77; see J.A. 26-48. The district court instructed the jury that Stouch's testimony was "only admissible as to Mr. Stillwell and not as to [petitioner] and Mr. Hunter." J.A. 78, 222.

The prosecution also introduced surveillance footage secretly taken of Hunter at a home in Thailand owned by LeRoux. In the recording, Hunter spoke openly with a third party about his hiring of two men to kill a real-estate agent in the Philippines. Hunter did not state the men's names. J.A. 227-229; Pet. C.A. App. 527, 532.

During the remainder of its case, the prosecution introduced evidence linking petitioner to the "other person" identified in Stillwell's redacted confessions. In particular, the prosecution elicited testimony that Stillwell and petitioner had coordinated their travel, met shortly after their arrival in the Philippines, and lived together there. J.A. 103-105, 132-133, 135-136.

c. Despite petitioner's efforts to procure testimony from the six witnesses, he was unable to do so. Because those witnesses resided in the Philippines, petitioner lacked the power to subpoena them for the trial. The Phil-

ippine government denied letters rogatory seeking to depose the witnesses, Pet. C.A. App. 281, and the district court denied petitioner's motion to introduce the witnesses' statements and the police sketches under Federal Rule of Evidence 807, *id.* at 423-426.

Petitioner instead testified in his own defense, explaining that he joined Echelon to perform security work and that in the Philippines he did such work and was often "an errand boy." Pet. C.A. App. 872. He denied that he participated in or was aware of the murder. *Id.* at 854, 870, 877. Neither Hunter nor Stillwell testified at trial.

d. The prosecution raised Stillwell's confession again during its closing argument. The prosecution first replayed the surveillance video taken of Hunter and argued that the video was "admissible against all three defendants" and was "devastating" evidence of their guilt. J.A. 199. The prosecution then turned to Stillwell's confession. Despite recognizing that "Stillwell's confession was admissible only against him," the prosecution proceeded to recount how Stillwell had "described a time when the other person he was with [in the Philippines] pulled the trigger on that woman in a van that Stillwell was driving." *Ibid.*

Neither Stillwell nor Hunter disputed in their closing arguments that they were part of a conspiracy to murder the victim. Instead, they made only the jurisdictional argument that they were not in the United States at the time they entered into or participated in the conspiracy. J.A. 214, 218-219. Petitioner, by contrast, continued to maintain his innocence. Pet. C.A. App. 948.

The jury convicted all three defendants on all counts. Petitioner was sentenced to life in prison. J.A. 242-250.

4. The court of appeals affirmed in relevant part. Pet. App. 1a-17a. At the outset, the court of appeals acknowledged that "the admission of a non-testifying defendant's

confession incriminating a co-defendant without the opportunity for cross-examination is prejudicial error in violation of the Sixth Amendment's Confrontation Clause." *Id.* at 10a. But the court reasoned that the prejudice "may be avoided * * * by a non-obvious redaction" of the confession which "eliminate[s] any references to the defendant." *Ibid.* (citation omitted). The court explained that, in considering whether a redaction through the use of a placeholder (such as "another person") is sufficient, a court should ask "whether the neutral allusion [to the codefendant] sufficiently conceals the fact of explicit identification to eliminate the overwhelming probability that a jury hearing the confession at a joint trial will not be able to follow an appropriate limiting instruction." *Id.* at 11a (citation omitted; alteration in original).

The court of appeals rejected petitioner's argument that, given the context, "jurors would immediately infer that Stillwell's references to 'another person' referred to [petitioner] himself." Pet. App. 11a. The court instead relied on circuit precedent requiring a court to consider the redacted statement "separate and apart from any other evidence admitted at trial." *Ibid.* (citation omitted). Applying that approach, the court of appeals concluded that the redactions avoided any prejudicial error simply because Agent Stouch used "neutral terms" that did not "explicit[ly] identif[y]" petitioner. *Ibid.* (citation omitted; alterations in original).

SUMMARY OF ARGUMENT

The question presented in this case is whether, in a joint trial, the admission of one defendant's redacted out-of-court confession that immediately inculpates another defendant based on the surrounding context violates the nonconfessing defendant's right under the Confrontation Clause. The answer to that question is yes. This Court's

cases establish a practical rule that redaction is insufficient to avoid a Confrontation Clause violation if the jury is likely to infer that the confession identifies the defendant as an accomplice. Where the surrounding context of the trial creates that condition, the confession must be excluded. Because the confession in this case readily falls within that category, it should have been excluded, and the court of appeals' judgment upholding petitioner's conviction should be vacated.

A. The Confrontation Clause protects a defendant's right to confront the witnesses against him. Confrontation ordinarily occurs through cross-examination at trial. But in a joint trial, a confessing codefendant has the right not to testify (and routinely exercises that right). For that reason, confrontation may be impossible if the prosecution seeks to use a nontestifying defendant's confession that also incriminates another defendant.

In *Bruton* v. *United States*, 391 U.S. 123 (1968), the Court held that a limiting instruction cannot avoid the Confrontation Clause violation occasioned by the admission of a nontestifying defendant's confession that identifies another defendant as an accomplice. The Court reasoned that, when a jury is asked to consider a confession with respect to one defendant yet to ignore the same confession with respect to another, there is a high risk that jurors will fail to follow that instruction. In the face of that risk, the Court concluded, the potential consequences for the nonconfessing defendant are so "devastating" that exclusion of the confession is necessary.

B. This Court has twice applied the *Bruton* rule in the context of redacted confessions. In *Richardson* v. *Marsh*, 481 U.S. 200 (1987), the Court held that a limiting instruction is sufficient to prevent a Confrontation Clause violation where the confession is redacted so as to eliminate *any* reference to the existence of an unnamed accomplice.

In *Gray* v. *Maryland*, 523 U.S. 185 (1998), the Court reached the opposite conclusion where the name of the nonconfessing defendant was replaced with the word "deleted" or a blank space, because such an obvious redaction made it likely that the jury would infer that the confession referred to the other defendant on trial.

Richardson and *Gray*, together with *Bruton*, establish a straightforward rule: the admission of a redacted confession violates a defendant's confrontation right where the jury is likely to infer that the confessing defendant named the nonconfessing defendant as an accomplice. Any such confession implicates the concerns animating the *Bruton* rule with full force, and focusing on the jury's ability to ascertain the inculpatory nature of the confession comports with the Court's reasoning in *Richardson* and *Gray*.

While the law ordinarily presumes that a jury follows its instructions, it would blink reality to exclude a confession from the scope of the *Bruton* rule simply because it uses a placeholder, rather than an obvious redaction, if the jury can nevertheless draw the very inference that *Bruton* seeks to prevent. In addition, basic fairness calls for the exclusion of such a confession, because it would not be admissible at all in an individual trial. The defendant should not suffer prejudice, and the prosecution should not obtain a windfall, from the decision to proceed with a joint trial.

C. In the decision below, the court of appeals mandated that the nontestifying codefendant's redacted confession be considered in isolation from the broader context of its use at trial when assessing whether its admission violated petitioner's confrontation right. That was erroneous. A jury does not hear evidence in isolation.

Even when a confession is redacted, the jury may nevertheless infer from the surrounding context that the confession directly inculpates a nonconfessing defendant.

For example, in a trial involving only a small number of codefendants, a redaction with a placeholder is likely to be ineffective. Such a redaction may similarly fail where the prosecution's arguments and questions tie the nonconfessing defendant to the details in the redacted confession. And if the remainder of the evidence the prosecution chooses to introduce directly ties the defendant to the confession, that too may render the redaction worthless. If the broader context of trial makes it likely that the jury will infer that the confessing defendant identified the nonconfessing defendant as an accomplice, introduction of the confession raises the precise concerns at issue in *Bruton* and thus warrants application of the *Bruton* rule.

In adopting and applying the *Bruton* rule, this Court has emphasized the importance of courts' being able to determine the admissibility of a nontestifying codefendant's confession in advance of trial. The Court can ensure that a pretrial determination of admissibility remains possible by limiting the relevant context to those aspects of the case knowable in advance of trial or wholly within the prosecution's control: in particular, the number of defendants on trial; the prosecution's opening and closing arguments; the line of questioning surrounding the introduction of the confession; and the other evidence the prosecution presents in its case in chief.

Under such a rule, the prosecution would have at least three options if a court were to determine, after considering the relevant context, that admission of a proposed redacted confession would present a Confrontation Clause problem. The prosecution could redact the confession to eliminate any reference to the existence of an unnamed accomplice; try the confessing defendant individually; or

proceed in a joint trial without the confession. Putting the prosecution to that choice is a modest price to pay in order to protect a fundamental constitutional right.

D. At petitioner's trial, the prosecution introduced the confession of his codefendant Carl David Stillwell, who did not testify. That confession, which originally named petitioner as the person who shot the victim, was redacted to replace his name with placeholders such as the "other person." The relevant context, however, easily allowed the jury to ascertain that the "other person" was petitioner. The prosecution's questioning surrounding the confession elicited detailed testimony concerning Stillwell's knowledge of and relationship with the "other person"—details that tracked evidence that the prosecution later introduced in its case in chief. The prosecution's opening and closing arguments reinforced Stillwell's story that he was driving the van when petitioner shot the victim from the passenger seat. And with just three defendants on trial, and the other two defendants not contesting their involvement in the scheme, jurors needed only to look at the defense table in order to determine the identity of the "other person" in Stillwell's confession.

In short, the relevant context rendered any redaction ineffective to prevent a violation of petitioner's confrontation right. With Stillwell's confession excluded, petitioner is entitled to a new trial. The judgment of the court of appeals should therefore be vacated.

ARGUMENT

THE CONFRONTATION CLAUSE PROHIBITS THE ADMISSION OF A NONTESTIFYING CODEFENDANT'S CONFESSION THAT IMMEDIATELY INCULPATES THE DEFENDANT BASED ON THE SURROUNDING CONTEXT

Under this Court's precedents, the redaction of a nontestifying codefendant's confession is insufficient to avoid a violation of the Confrontation Clause where the jury is likely to infer that the confessing defendant identified the nonconfessing defendant as an accomplice. Because the jury does not receive such a confession in isolation, a court cannot blind itself to the broader context of trial when assessing whether the confession is admissible. Here, the admission of the nontestifying codefendant's confession, when considered in light of the relevant context, violated petitioner's confrontation right.

A. Admission Of A Nontestifying Codefendant's Confession That Identifies The Defendant As An Accomplice Violates The Confrontation Clause

In the context of a joint trial, the Confrontation Clause prohibits the prosecution's use of a nontestifying codefendant's confession to prove another defendant's guilt. In *Bruton* v. *United States*, 391 U.S. 123 (1968), the Court held that a jury instruction to consider the confession only as to the confessing defendant is insufficient to prevent a violation of another defendant's confrontation right where the confession identifies the nonconfessing defendant as an accomplice.

1. The Confrontation Clause 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. Under that provision, if "a witness who makes testimonial statements * * * against a defendant" is "unavailable" at trial, "his prior testimony

will be introduced only if the defendant had a prior opportunity to cross-examine him." *Giles* v. *California*, 554 U.S. 353, 358 (2008).

The Confrontation Clause represents both a codification and a rejection of historical practice. Although the confrontation right has its roots in Roman law, see *Coy* v. *Iowa*, 487 U.S. 1012, 1015 (1988), the Sixth Amendment right finds its most "immediate source" in the common-law rule "condition[ing] admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine." *Crawford* v. *Washington*, 541 U.S. 36, 43, 54 & n.5 (2004) (citations omitted). At the same time, "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure" that once prevailed, "particularly its use of *ex parte* examinations as evidence against the accused." *Id.* at 50; see *Mattox* v. *United States*, 156 U.S. 237, 242 (1895).

Because the Confrontation Clause codifies the right to cross-examine adverse witnesses and rejects the use of ex parte declarations at trial, the admission of a nontestifying codefendant's confession in a joint trial necessarily raises constitutional concerns. Such a confession is admissible against the confessing defendant as an admission by an opposing party. See Fed. R. Evid. 801(d)(2)(A). But as soon as the confession becomes "part of the body of evidence that the jury may consider in assessing [a codefendant's] guilt," the confessing defendant is "considered to be a witness 'against' [the nonconfessing] defendant for purposes of the Confrontation Clause." *Cruz* v. *New York*, 481 U.S. 186, 190 (1987); cf. *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 313-314 (2009). Accordingly, where two defendants are tried jointly, the Confrontation Clause prohibits the admission of one defendant's pretrial confession against the other unless the confessing defendant

testifies. See *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987).

Confrontation through cross-examination ordinarily occurs at trial. In a joint criminal trial, however, the confessing codefendant has the right not to testify (and frequently exercises that right). See U.S. Const. Amend. V; *Minnesota* v. *Murphy*, 465 U.S. 420, 426 (1984). No confrontation is thus possible unless "the confessing defendant waives his Fifth Amendment rights so as to permit cross-examination." *Cruz*, 481 U.S. at 190.

2. Because the right to confront adverse witnesses is "[o]ne of the fundamental guaranties of life and liberty," *Kirby* v. *United States*, 174 U.S. 47, 55 (1899), and "essential to a fair trial," *Alford* v. *United States*, 282 U.S. 687, 692 (1931), this Court has been "zealous to protect [it] from erosion." *Greene* v. *McElroy*, 360 U.S. 474, 497 (1959). One of those safeguards is the rule first articulated in *Bruton*: namely, that the prosecution may not introduce a nontestifying codefendant's confession that names a jointly tried defendant as an accomplice, even when the confession is coupled with a limiting instruction that the jury consider it only with respect to the confessing defendant.

Bruton involved a joint trial against two defendants—Bruton and Evans—charged with robbing a jewelry store that doubled as a contract branch of the United States Postal Service. See 391 U.S. at 123-124. After his arrest, Evans confessed to a postal inspector that he and Bruton had committed the robbery. At Evans and Bruton's joint trial, the inspector testified about Evans's confession, which was admitted into evidence as an admission by an opposing party. See *id.* at 124, 128 n.3. The district court then instructed the jury that it could consider the confession solely against Evans, and that it should disregard the

confession in determining Bruton's guilt or innocence. See *id.* at 125 & n.2.

This Court held that admission of the confession violated the defendant's confrontation right, even in the face of the limiting instruction. The Court began from the proposition that, "[i]f it were true that the jury disregarded the reference to the codefendant, no question would arise under the Confrontation Clause, because by hypothesis the case is treated as if the confessor made no statement inculpating the nonconfessor." 391 U.S. at 126. But the Court rejected the premise that a limiting instruction could realistically accomplish that feat.

As the Court explained, it had rejected similar reliance on a limiting instruction in *Jackson* v. *Denno*, 378 U.S. 368 (1964). There, the Court considered a state procedure under which the jury was to consider the voluntariness of a confession and then ignore any confession it found involuntary. See *Bruton*, 391 U.S. at 128-129. The Court "expressly rejected the proposition that a jury, when determining the confessor's guilt, could be relied on to ignore his confession of guilt," even if it "f[ound] the confession involuntary." *Id.* at 129.

In *Bruton*, the Court concluded that the same result was warranted with respect to confessions of nontestifying codefendants. "[T]oo often," the Court explained, limiting instructions are "intrinsically ineffective," because "the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors." 391 U.S. at 129. And in cases involving "the admissible confession of one defendant [that] inculpates another defendant," the jury's task would be "even more difficult" than in *Jackson*: because "the confession is never deleted from the case," the jury would have the "overwhelming" task of "segregat[ing] evidence into separate intellectual boxes," consid-

ering the confession "in determining the guilt or innocence of the declarant," and then "ignoring it in determining the guilt or innocence of any codefendants of the declarant." *Id.* at 130-131. The Court also recalled Justice Frankfurter's point in his dissent in *Delli Paoli* v. *United States*, 352 U.S. 232 (1957), that the prosecution "should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." *Bruton*, 391 U.S. at 129 (citation omitted).

The Court acknowledged that "[n]ot every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions." 391 U.S. at 135. Yet the Court reasoned that "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Ibid.*

One such context, the Court observed, is where "powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial." 391 U.S. at 135-136. Such a confession is "devastating to the defendant," and the confession's "credibility is inevitably suspect" because of the confessing defendant's "recognized motivation to shift blame onto others." *Id.* at 136; see *Lee* v. *Illinois*, 476 U.S. 530, 541 (1986). The lack of adversarial testing through cross-examination then "intolerably compound[s]" that unreliability, *Bruton*, 391 U.S. at 136, creating "a serious risk that the issue of guilt or innocence may not have been reliably determined," *Roberts* v. *Russell*, 392 U.S. 294, 295 (1968) (per curiam). The Court reasoned that "the Confrontation

Clause was directed" at precisely that type of "threat[] to a fair trial." *Bruton*, 391 U.S. at 136.*

B. Redaction Does Not Eliminate A Confrontation Clause Violation If The Jury Is Likely To Infer That The Confessing Defendant Identified The Nonconfessing Defendant As An Accomplice

On two previous occasions, this Court has applied the *Bruton* rule to the confessions of nontestifying codefendants that were redacted to avoid naming other defendants as accomplices. Those cases establish a practical rule based on how the jury is likely to receive the confession: namely, that redaction does not eliminate a Confrontation Clause violation where the jury is likely to infer that the

---

* In *Crawford*, *supra*, the Court placed a renewed emphasis on the history of the confrontation right when interpreting the Confrontation Clause. See 541 U.S. at 42-56, 60. We are unaware of any case from the time of the Founding holding that a codefendant's confession is admissible in a joint criminal trial as long as the jury is instructed not to consider the confession as to the nonconfessing defendant. There are two reasons to be especially cautious about drawing any contrary conclusions from the history here. *First*, jury instructions, as we know them today, did not exist until decades after the Founding. See, *e.g.*, William E. Nelson, *Americanization of the Common Law* 165-168 (1975); Albert W. Alschuler & Andrew G. Deiss, *Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 903-906 (1994); William W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 Cal. L. Rev. 731, 732-737 (1981). *Second*, during the century leading up to the ratification of the Constitution, criminal procedure was undergoing seismic change; during the 17th and early 18th century, criminal defendants in England did not have the right to counsel and were expected to defend themselves at trial through their own unsworn statements. See, *e.g.*, John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 Mich. L. Rev. 1047, 1049-1054, 1068 (1994); J.M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 L. & Hist. Rev. 221, 222-223 (1991).

confessing defendant named the nonconfessing defendant as an accomplice.

1. The first of this Court's cases addressing the admissibility of a redacted confession is *Richardson*, *supra*. There, the prosecution charged three defendants—Marsh, Williams, and Martin—for killing two people and assaulting another. See 481 U.S. at 202. The surviving victim testified at trial that Williams and Martin robbed her at gunpoint inside her home while Marsh guarded the door. See *ibid.* According to the witness, Martin then shot her and the other victims, who were at her house. See *ibid.*

Marsh and Williams were tried jointly, and the prosecution introduced a redacted version of a confession given by Williams shortly after his arrest. See 481 U.S. at 202. Williams had confessed that, in the car on the way to the victims' house, Martin gave him a gun and said that he intended to "take [the residents] out after the robbery." *Id.* at 203 n.1. The confession was redacted, however, to "omit all reference to [Marsh]—indeed, to omit all indication that *anyone* other than Martin and Williams participated in the crime." *Id.* at 203. Williams did not testify, and the trial court instructed the jury not to consider the statement against Marsh. See *id.* at 204.

Marsh took the stand in her defense. She testified that she was sitting in the back seat of the car driven by Martin to the victims' house but stated that she could not hear the conversation between Martin and Williams because of the volume of the radio. See 481 U.S. at 204. During closing arguments, the prosecution linked Marsh to the confession through her testimony, arguing that it was implausible that she was in the car yet did not hear the conversation about robbing and killing the victims. See *id.* at 205. The jury convicted Marsh of felony murder and assault. See *ibid.*

On federal habeas review, this Court held that no violation of the confrontation right occurred because the confession was "redacted to eliminate not only the defendant's name, but any reference to his or her existence," and the trial court gave a proper limiting instruction. 481 U.S. at 211. The Court explained that, unlike the confession in *Bruton*, the confession before it was not "incriminating on its face," but instead became incriminating only when combined with "evidence introduced later at trial": namely, "the defendant's own testimony" that she was in the car when Martin and Williams discussed killing the victims after the robbery. *Id.* at 208. In other words, nothing in the confession itself would have allowed the jury to infer that "*anyone* other than Martin and Williams" was in the car, *id.* at 203; the sole reason the confession became incriminating was because Marsh's own testimony made it so. Where the confession itself gave rise to no inference that anyone else was involved, the Court reasoned, "the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget." *Id.* at 208.

The Court also focused on the "practical effects" of applying the *Bruton* rule to confessions that "incriminat[e] by connection." 481 U.S. at 209. In particular, the Court expressed concern that doing so would make it impossible either to admit redacted confessions at all or to determine the admissibility of a confession before trial. See *id.* at 209. The Court reasoned that a rule requiring a trial judge to assess the admissibility of a confession after the close of trial would "lend[] itself to manipulation by the defense" and would result in "numerous mistrials and appeals." *Ibid.* The Court acknowledged that the prosecution had the option of trying the defendants separately or forgoing use of the confession altogether, but it viewed

those costs as "too high" in the context of a confession that had been redacted to omit "any reference to [the defendant's] existence." *Id.* at 210, 211.

2. The Court most recently addressed the admissibility of a redacted confession in *Gray* v. *Maryland*, 523 U.S. 185 (1998). That case involved the joint trial of two defendants—Bell and Gray—for the murder of a man who died after a severe beating. See *id.* at 188. Bell confessed to law enforcement that he, Gray, and a third individual who died before the trial participated in the beating. See *ibid.* At trial, the prosecution introduced a redacted version of the confession in which the names of Gray and the third individual were replaced with the word "deleted" or a blank space. See *id.* at 192.

The Court held that admission of the confession violated the Confrontation Clause. See 523 U.S. at 192. Redactions that replace a name with an "obvious indication[] of alteration," the Court determined, "so closely resemble *Bruton*'s unredacted statements" that they must be excluded from trial. *Ibid.* The Court viewed the redactions as ineffective because the jury was likely to "realize that the confession refers specifically to the defendant," even if the prosecution had not "blatantly link[ed] the defendant to the deleted name." *Id.* at 193. Positing an example where defendant Jones and codefendant Smith are tried jointly and Smith's confession is admitted with obvious redactions, the Court explained that a juror wondering whom Smith had in fact named "need only lift his eyes to Jones, sitting at counsel table, to find what will seem the obvious answer." *Ibid.*

Making matters worse, "the judge's instruction not to consider the confession as evidence against Jones" will "provide an obvious reason" for the omission. 523 U.S. at 193. A juror may also wonder how, if the unnamed accom-

plice was not Jones, "the prosecutor could argue the confession is reliable," given that the prosecutor "has been arguing that Jones, not someone else, helped Smith commit the crime." *Ibid.* The Court further reasoned that the "obvious deletion may well call the jurors' attention specially to the removed name," "encouraging the jury to speculate about the reference." *Ibid.*

In reaching its decision, the Court "concede[d] that *Richardson* placed outside the scope of *Bruton*'s rule those statements that *incriminate* inferentially" and that the jury "must use inference to connect the statement" in the confession before it with the defendant. 523 U.S. at 195 (emphasis added). As the Court explained, however, "inference pure and simple cannot make the critical difference," because then the *Bruton* rule would not apply even to confessions that make the identity of the unnamed accomplice obvious: for example, "shortened first names, nicknames, descriptions as unique as the red-haired, bearded, one-eyed man-with-a-limp, and perhaps even full names of defendants who are always known by a nickname." *Ibid.* (internal quotation marks and citation omitted). The Court had previously assumed that such confessions implicate the Confrontation Clause, see *Harrington* v. *California*, 395 U.S. 250, 253 (1969), and the government conceded that the *Bruton* rule should apply in those circumstances, see *Gray*, 523 U.S. at 195.

The Court thus concluded that the outcome in *Richardson* depended on the "*kind* of, not the simple *fact* of, inference." *Gray*, 523 U.S. at 196. In *Richardson*, the confession "did not refer directly to the defendant himself" and "*became incriminating* only when linked with evidence introduced later at trial" (namely, the defendant's own testimony). *Ibid.* (internal quotation marks and citation omitted; emphasis added). By contrast, the inferences in *Gray* involved statements that "obviously refer

directly to someone, often obviously the defendant," and "involve inferences that a jury ordinarily could make immediately." *Ibid.* The Court concluded that the *Bruton* rule applies to such inferences. See *ibid.*

The Court further concluded that the "policy reasons" articulated in *Richardson* were inapposite. 523 U.S. at 196. Because the use of obvious redactions is "easily identified prior to trial and does not depend, in any special way, upon the other evidence introduced in the case," including such redactions within the *Bruton* rule did not create a risk of frequently "provok[ing] mistrials" or unnecessarily compelling the prosecution to choose whether to forgo the use of a codefendant confession or instead to forgo a joint trial. *Id.* at 197.

3. *Richardson* and *Gray*, together with *Bruton*, establish a practical rule concerning the admissibility of codefendant confessions in joint trials. Under those cases, the admission of a redacted confession violates the Confrontation Clause where the jury is likely to infer that the confessing defendant identified the nonconfessing defendant as an accomplice.

The concerns animating the *Bruton* rule apply with full force where the jury is likely to ascertain, despite redactions, that the original confession directly inculpated the defendant. This Court's central insight in *Bruton* is that such a confession is so "powerfully incriminating" that there is a "great" risk that the jury "will not, or cannot, follow instructions" limiting use of the confession to the confessing defendant. 391 U.S. at 135. As the Court recognized in *Gray*, that same risk arises where a redacted confession "directly accus[es]" an unnamed accomplice and the jury is likely to realize that the nonconfessing defendant is the unnamed person. 523 U.S. at 194. By contrast, in *Richardson*, there was no basis for the jury to

infer that the confessing defendant named the nonconfessing defendant as an accomplice, for the simple reason that the redacted confession did not refer at all to the presence of an unnamed accomplice. See 481 U.S. at 203.

A rule that focuses on the jury's ability to ascertain the directly accusatory nature of the confession explains the competing discussions of inferences in *Richardson* and *Gray*. In *Richardson*, it made good sense to say that the "inferential incrimination" there was unlikely to undermine the jury's ability to comply with a limiting instruction. 481 U.S. at 208. What the Court in *Bruton* found so "devastating" that it would undermine the ability of the jury to follow instructions was the knowledge that one defendant directly accused the other of complicity. But the confession in *Richardson* did not provide the jury with any basis to reach such a conclusion. On the other hand, in *Gray*, the confession directly accused *someone*, and it allowed the jury to infer that the unnamed accomplice was the other defendant. It is *that* inference that directly implicates the concern in *Bruton* and triggers application of the Confrontation Clause.

While *Gray* itself involved a confession containing obvious indications of redaction, the risk it identified exists in the context of any redacted confession where the jury is likely to infer that the confessing defendant identified the nonconfessing defendant as an accomplice. The risk arises from the fact that the jury is likely to ascertain the accusatory nature of the confession—not the precise reason the inference is obvious. Once the jury recognizes that a confession directly inculpates the defendant, the confession becomes "devastating" in the way *Bruton* recognized, creating the same "great" risk that the jury will not follow a limiting instruction. 391 U.S. at 135-136.

That risk is present even where, as here, a placeholder is used to redact the defendant's name. If an agent testifies that one of the defendants confessed that he and "another guy" planned and committed the "robbery," the jury will naturally assume that the "other guy" is the other defendant. After all, it will jump out to the jury that the prosecution found out about an unnamed accomplice without following up and asking whether the confessing defendant had identified that accomplice. And if the confessing defendant had identified someone other than the nonconfessing defendant, the jury might "wonder how * * * the prosecut[ion] could argue the confession is reliable." *Gray*, 523 U.S. at 193. The use of placeholders can thus stand out to a jury and give rise to the inference that the Court warned of in *Bruton*.

To be sure, the Court has described *Bruton* as an exception to the "general rule" that jurors follow their instructions. See, *e.g.*, *Richardson*, 481 U.S. at 206, 208. But when a directly accusatory out-of-court statement is admitted at a joint trial, the jury is being "expected to perform the overwhelming task of considering it in determining the guilt or innocence of the declarant and then of ignoring it in determining the guilt or innocence of any codefendants of the declarant." *Bruton*, 391 U.S. at 131. As Judge Friendly put it, "[n]ot even appellate judges can be expected to be so naive as really to believe that all twelve jurors [will] succeed[] in performing what Judge L[earned] Hand aptly called 'a mental gymnastic which is beyond, not only their powers, but anybody's else.'" *United States* v. *Bozza*, 365 F.2d 206, 215 (2d Cir. 1966) (quoting *Nash* v. *United States*, 54 F.2d 1006, 1007 (2d Cir. 1932)); see *Delli Paoli*, 352 U.S. at 247-248 (Frankfurter, J., dissenting).

The same mental gymnastics are involved with consideration of any confession from which the jury is likely to

infer that the confessing defendant identified the nonconfessing defendant as an accomplice—whether redactions are made using obvious blanks (as in *Gray*) or placeholders (as here). If the jury recognizes the directly accusatory nature of the confession, the jury instruction will ask the jurors to consider everything about the confession *except* the obvious accusation. As this Court has observed in a related context involving hearsay evidence, "[d]iscrimination so subtle is a feat beyond the compass of ordinary minds." *Shepard* v. *United States*, 290 U.S. 96, 104 (1933).

In addition, a confession that has been redacted ineffectively should be excluded as a matter of basic fairness. The confession of a nontestifying accomplice would be classic hearsay, and thus inadmissible, if the prosecution were to proceed against the nonconfessing defendant in an individual trial. There would thus be no opportunity for the jury to speculate whether the defendant is the unnamed accomplice in the confession, because the issue would simply not arise. It is fundamentally unfair for the prosecution to use a joint trial to obtain "the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider"—a windfall that derives from the prosecution's own choice to try defendants jointly. *Bruton*, 391 U.S. at 129 (citation omitted).

It is true, of course, that joint trials promote "efficiency" and avoid a situation in which the prosecution would have to "present[] the same evidence again and again." *Richardson*, 481 U.S. at 210. But as the Court recently reiterated, the "legitimate demands of the adversarial system" do not "override the rights the Constitution confers upon criminal defendants." *Hemphill* v. *New York*, 142 S. Ct. 681, 692 (2022) (citation omitted). While the prosecution may have valid motivations (as well as

strategic ones) for preferring joint trials, the law does not treat that preference as absolute. See Fed. R. Crim. P. 14; *Zafiro* v. *United States*, 506 U.S. 534, 539 (1993).

Accordingly, it matters not whether the prosecution redacts a confession using the word "deleted," a blank space, or a placeholder. If the jury will likely infer that the confessing defendant identified the nonconfessing defendant as an accomplice, the *Bruton* rule should apply.

C. A Court Should Consider Context Within The Prosecution's Knowledge And Control When Assessing Whether The Admission Of A Redacted Confession Violates The Confrontation Clause

In the decision below, the court of appeals declined to consider evidence beyond the four corners of the nontestifying codefendant's confession when assessing the admissibility of the confession, instead considering only whether the confession, in isolation, inculpates the defendant. See Pet. App. 10a-12a. A jury, however, does not hear a confession in isolation, and "[v]ery little evidence is incriminating when viewed" on its own. *United States* v. *Hoover*, 246 F.3d 1054, 1059 (7th Cir.), cert. denied, 534 U.S. 1033 (2001). It is thus critical that a court consider the surrounding context when assessing whether the jury is likely to ascertain that the confession of a nontestifying codefendant identifies the defendant as an accomplice.

At the same time, as the Court recognized in *Richardson*, consideration of the defense's case in the analysis could create practical problems: most notably, that a court could not assess before trial whether admission of a confession violates the Confrontation Clause. See pp. 25-26, *supra*. Accordingly, the Court may wish to limit the consideration of context to those aspects of the case that are either knowable in advance of trial or within the prosecution's control. That approach would strike an appro-

priate balance by avoiding the practical problems identified in *Richardson* while still preventing the prosecution from obtaining a windfall through its decision to try the defendants jointly.

1. As an initial matter, a true four-corners approach to the *Bruton* rule cannot possibly be correct. After all, under such a rule, even the redacted confession at issue in *Gray* would be admissible, because the jury would have had to look outside the confession to link the nonconfessing defendant with the blank spaces in the confession. *See* 523 U.S. at 195-196. Indeed, in *Gray*, the government conceded that the *Bruton* rule excludes redacted confessions that allow the jury to make the link between the confession and the nonconfessing defendant based on that defendant's physical characteristics or nickname. See *id.* at 195. But making such a link likewise requires the jury to look beyond the confession, whether to the defendant's physical appearance or to evidence establishing the defendant's nickname.

The government took a consistent position in *Richardson*. There, the government conceded that, "[i]n a proper case, it would be appropriate to look beyond the confession itself" in order to determine whether the admission of a confession violated the *Bruton* rule. Tr. of Oral Arg. at 28, *Richardson*, *supra* (No. 85-1433). Indeed, the government went so far as to say that it "d[id]n't think it's possible to take the position that the confession alone has to provide all the clues." *Ibid.* That position is flatly inconsistent with a pure four-corners approach that eschews reliance on context.

A four-corners approach would also invite prosecutorial abuse. As long as the confession itself does not expressly name the nonconfessing defendant or use obvious redactions, the prosecution would have free rein to attempt to link the nonconfessing defendant to the unnamed

accomplice in the confession. For example, an agent could testify that the confessing defendant stated that he and "another person" committed the crime using a particular make and model vehicle, with a particular bumper sticker, owned by that "other person," and the prosecution could immediately call a witness to testify that the nonconfessing defendant owned that particular make and model vehicle with that particular bumper sticker. A prosecutor could even expressly remark during closing arguments: "Who is the 'other person' in the confession? Think about the car owned by [the nonconfessing defendant]."

Such conduct would subvert the very purpose of the *Bruton* rule. Indeed, the Court recognized as much in *Richardson* when it expressed concern that the prosecutor's closing argument, which linked the nonconfessing defendant to the redacted confession, "sought to undo the effect of the limiting instruction by urging the jury to use [the] confession in evaluating [the nonconfessing defendant's] case." 481 U.S. at 211. A four-corners approach would enable prosecutors to do exactly that.

It is thus clear that consideration of *some* context outside the four corners of a redacted confession is necessary to ensure compliance with the *Bruton* rule. The question, then, is what context is appropriate for courts to consider.

2. The experience of the courts of appeals demonstrates that the number of defendants at trial, the prosecution's arguments, the questioning surrounding the introduction of the confession, and the other evidence in the prosecution's case can all render a redaction in a confession inadequate for purposes of the *Bruton* rule.

a. In a joint trial involving only a small number of defendants, redacting a codefendant's confession by replacing the defendant's name with a placeholder may be ineffective. For example, a case will sometimes "involve[] so

few defendants" that even a redacted statement in isolation will "leave[] little doubt in the listener's mind about the identity of" the unnamed accomplice. *United States* v. *Vega Molina*, 407 F.3d 511, 520 (1st Cir. 2005). In such a case, even "[a] juror who does not know the law," curious about the identity of the person described in the confession, "need only lift his eyes to [the nonconfessing defendant], sitting at counsel table, to find what will seem the obvious answer." *Gray*, 523 U.S. at 193.

The same is not necessarily true in a larger joint trial. For instance, where there are "seven defendants standing trial and four cooperating co-conspirators who testified against them, plus several unindicted individuals whom the cooperators implicated," a redacted confession will not inevitably present to the jury a connection "between the persons described and any of the alleged co-conspirators standing trial, let alone a particular defendant." *United States* v. *Straker*, 800 F.3d 570, 599 (D.C. Cir. 2015). Similarly, in a case where there are "at least fifteen perpetrators in various cars involved in [a] shooting," redacting a codefendant's confession with phrases such as "the other guy" or "another guy" does not create "any innuendo that tie[s] them unavoidably" to a particular defendant. *United States* v. *Hardwick*, 544 F.3d 565, 573 (3d Cir. 2008) (citation omitted).

b. A jury hearing a codefendant's confession will also be aware of the prosecution's theory of the case, as set out in its arguments. On the front end, no redaction will succeed in protecting the defendant's confrontation right if the prosecution's opening argument makes clear that the redacted confession most logically refers to the nonconfessing defendant. On the back end, the prosecution's closing argument can "undo the effect of the limiting instruction" by inviting the jury to make the very inference

the court has warned against. *Richardson*, 481 U.S. at 211.

Consider a hypothetical trial of three defendants for bank robbery. The prosecution's theory, articulated to the jury in its opening argument, is that the first defendant pulled a gun on the teller, the second defendant held the bag with the money, and the third defendant drove the getaway car. If the prosecution introduces the bagholder's confession that he held the bag, "another guy" pulled the gun on the teller, and "another guy" drove the getaway car, the jury will naturally assume that the bagholder in fact named his codefendants—particularly after the court instructs the jury not to consider the confession against the codefendants. See *Gray*, 523 U.S. at 193. And the urge for the jury to ignore any limiting instruction becomes all the stronger if the prosecution discusses the confession in its closing.

c. Beyond the number of defendants and the prosecution's arguments, a jury will also interpret a codefendant's confession in light of the questioning immediately preceding or following its introduction. In some cases, that questioning can "blatantly link the defendant to the deleted name," *Gray*, 523 U.S. at 193, making it likely that the jury will infer that the defendant and the unnamed accomplice are one and the same.

Gray itself is an example. There, immediately after the detective read Bell's confession at trial, the prosecutor asked the detective whether, "after Bell gave [the detective] that information, [authorities] subsequently were able to arrest Mr. Kevin Gray." 523 U.S. at 188-189. The detective responded: "That's correct." *Id.* at 189. Stressing the timing of the prosecutor's question—asked "as soon as the officer had finished reading the redacted statement" into evidence—the Court explained that questioning in such close proximity to the redacted confession

can be "so prejudicial that limiting instructions cannot work." *Id.* at 192.

d. Finally in this regard, a jury hearing a codefendant's confession will consider it in light of the rest of the evidence introduced "against" the defendant as part of the prosecution's case. As Judge Easterbrook has explained, members of the jury are not "persons unaware of the other evidence offered at trial," and to discount their exposure to all but the "four corners" of the confession ignores the rationale underpinning *Bruton*. *Hoover*, 246 F.3d at 1059. If the prosecution's evidence creates a direct link between the nonconfessing defendant and details elicited in the confession about the unnamed accomplice, it can render any redaction ineffective.

Consider *United States* v. *Schwartz*, 541 F.3d 1331 (11th Cir. 2008), cert. denied, 556 U.S. 1130 (2009). There, the court assessed the admissibility of a redacted confession discussing a "fraudulent scheme to sell high-yield promissory notes" issued by companies owned by Schwartz and a codefendant. *Id.* at 1332. The redacted confession "did not inculpate Schwartz by name" but instead "named corporations he owned or controlled." *Id.* at 1340. After the confession was admitted, however, at least three prosecution witnesses—adding up to "the equivalent of about five trial days out of a total of only fifteen in the [g]overnment's case in chief"—testified about Schwartz's ownership and control of those corporations. *Id.* at 1352. The import of that testimony, the court explained, "would not have been lost on the jury": the confession "compelled an inference" that Schwartz had committed a crime, because other trial evidence "was sufficient to link" him to the corporations even without "naming him." *Id.* at 1351-1352.

3. Because the broader context of trial can render a redaction entirely ineffective, focusing solely on the four

corners of a redacted confession and ignoring that broader context would "undo *Bruton* in practical effect." *Hoover*, 246 F.3d at 1059. As explained above, see pp. 28-30, the inquiry under *Bruton*, *Richardson*, and *Gray* is whether the jury is likely to infer that the nontestifying codefendant named the defendant as an accomplice in the confession. Whether the jury draws that inference from the confession alone or from the confession in conjunction with the broader context of the trial, it is still reaching the very conclusion that the Court in *Bruton* determined would render any limiting instruction ineffective. Even if it could meaningfully be done, a rule artificially cabining a court's consideration to the four corners of a confession is nothing more than blind formalism.

And again, such a rule would provide the prosecution with a windfall. As already noted, see p. 31, the confession would not be admissible at all in a trial involving only the nontestifying codefendant. But such a rule would allow the admission of a confession that, in context, tempts the jury to speculate whether the defendant is the unnamed accomplice in the confession. While efficiency (in the form of joint trials) is a laudable goal, it cannot come at the price of severe prejudice to a criminal defendant whose life or liberty is on the line.

For those reasons, the admissibility of a nontestifying codefendant's confession must be assessed in the broader context of the trial. Only by considering that context can a court avoid the acute risk that the jury will ascertain that the confession names the defendant as an accomplice and fail to comply with any limiting instruction. At the same time, one of the factors "deemed relevant in this area" is the ability of a court to determine "in advance of trial" whether admission of a confession would violate the Confrontation Clause. *Cruz*, 481 U.S. at 193. In particu-

lar, the Court expressed concern in *Richardson* that considering *all* of the evidence at trial would make pretrial determination of admissibility impossible and would "result in numerous mistrials and appeals." 481 U.S. at 209.

The Court can avoid those practical consequences by narrowing the analysis to the aspects of the case that are either knowable in advance of trial or wholly within the prosecution's control. For instance, the prosecution will know in advance of trial the number of defendants and will be able to determine whether, based on that number, redactions using placeholders will be ineffective. The prosecution further controls what evidence it introduces; what witnesses it presents; and the questioning surrounding the introduction of the confession. The prosecution is also aware of its own theory of the case before trial begins. While the prosecution may not have its opening and closing arguments precisely mapped out in limine, the content of those arguments is obviously in its hands.

A court should thus consider all of those aspects of the case when assessing whether the admission at trial of a nontestifying codefendant's confession violates the Confrontation Clause, even if practical considerations weigh against the plenary consideration of all of the evidence at trial. Many courts of appeals have long assessed the inculpatory effect of a redacted confession in light of the broader context of the trial. See, *e.g.*, *Straker*, 800 F.3d at 596; *Hardwick*, 544 F.3d at 572-573; *Schwartz*, 541 F.3d at 1351. None of those courts has expressed concerns about the administrability of such an approach.

4. Consideration of the number of defendants on trial, the prosecution's arguments, the questioning surrounding the introduction of the confession, and the other evidence in the prosecution's case would not unreasonably constrain the prosecution. If a court were to determine, after considering the relevant context, that admission of a

proposed redacted confession would present a Confrontation Clause problem, the prosecution would have at least three options.

To begin with, the prosecution could redact the confession to eliminate "not only the defendant's name, but any reference to his or her existence." *Richardson*, 481 U.S. at 211. That is what the prosecution did in *Richardson*, and it will often be an option—particularly where the confession is introduced through law-enforcement testimony. See, *e.g.*, *United States* v. *Powell*, 732 F.3d 361, 377 (5th Cir. 2013) (noting that the confessing defendant's testimony "focused the listener on what [the defendant] said, did, knew, or observed" and "did not indicate the existence of anybody else"); *United States* v. *Veras de los Santos*, 184 Fed. Appx. 245, 256 (3d Cir. 2006) (noting that "[t]he revised statement eliminated all references to the existence of a coconspirator," only "suggest[ing] obliquely that [the confessing defendant] transferred money from [another coconspirator] to another person"); *United States* v. *Barrera-Medina*, 139 Fed. Appx. 786, 795 (9th Cir. 2005) (noting, in a multidefendant case in which two defendants confessed, that the confessions could be redacted with the pronoun "we" as long as neither confession referred in any way to the third defendant).

To be sure, there may be some circumstances in which the prosecution will not be able to remove all references to an accomplice from a confession. There may also be circumstances in which, as a matter of trial strategy, the prosecution will feel that introducing a confession that removes such references is either too burdensome or too confusing for the jury. But in those situations, the prosecution would still have at least two options: it could proceed in a joint trial without the confession, or it could try the confessing defendant individually (using the confession, consistent with the Confrontation Clause, only in the

individual trial). In some joint trials, moreover, the prosecution may be able to proceed with a confession redacted using placeholders as long as the prosecution refrains from making arguments and eliciting information that make it likely the jury will infer that the confession names any nonconfessing defendant as an accomplice.

Once again, it is true that joint trials promote efficiency in the adversarial system. See pp. 31-32, *supra*. It is also true that confessions are "essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Richardson*, 481 U.S. at 210 (citation omitted). But the answer to the prosecution's dilemma is not to do away with the Confrontation Clause; it is for the prosecution to choose between options that respect the defendant's confrontation right. If the prosecution would not have the benefit of the confession in an individual trial against the defendant, it should not be able to dangle the confession before the jury in a way that invites the jury to use it against the defendant anyway. The prosecution is not entitled to shade the line simply because a defendant is subject to a joint trial.

D. The Admission Of The Confession In This Case Violated The Confrontation Clause

In this case, the prosecution introduced the out-of-court confession of petitioner's codefendant Carl David Stillwell through the testimony of a federal agent. The agent replaced petitioner's name in his testimony with placeholders such as "the other person." J.A. 74-77. Despite those redactions, the surrounding context allowed the jury readily to ascertain that Stillwell had named petitioner as an accomplice. The admission of the confession thus violated petitioner's confrontation right.

1. For starters, the prosecution's line of questioning surrounding the confession made clear that Stillwell knew

the identity of the unnamed accomplice and had provided that information to the government. The prosecution elicited testimony that Stillwell confessed that he "met somebody else" in the Philippines and that he and "the other person initially stayed at a hotel" but then "lived together" in "a complex in the old capital area of the city." J.A. 75. Stillwell explained that "the person that he was with in the Philippines" carried a firearm: specifically, a .22- or .45-caliber handgun with a threaded barrel for attaching a suppressor. *Ibid.* Stillwell recounted "th[e] individual having that gun in their possession" when "he and that other individual traveled" together to "view a property" outside of Manila. J.A. 76. And Stillwell described when that same "other person he was with pulled the trigger on [the victim] in a van" that Stillwell was driving. *Ibid.*

The prosecution's questioning made it obvious that Stillwell had named the "other person" in his confession. The placeholders "obviously refer[red] directly to someone." *Gray*, 523 U.S. at 196. And the prosecution's decision to elicit testimony without ever asking for details about who the other person was, or whether Stillwell knew that person, would stand out to the jury. A juror would surely doubt that Stillwell provided all of those details about the "other person" without saying who he was. (If one were trying to protect the accomplice, why provide any such details at all?) Common sense dictates that the questioning surrounding the introduction of the confession "notif[ied] the jury" that the prosecution was tiptoeing around the accomplice's identity. *Id.* at 195.

2. The jury would also infer that Stillwell named petitioner as an accomplice from the prosecution's theory of the case, as set out in its opening and closing arguments, and from the number of defendants on trial. Here, the

trial involved three defendants: Hunter, Stillwell, and petitioner. The prosecution opened its case by setting forth its theory that Stillwell and petitioner "had been hired by" Hunter to kill the victim and that the victim was riding in the backseat of a van driven by Stillwell, with petitioner "in the passenger seat," when petitioner pulled out a gun, "turned around, aimed carefully and shot [her]." J.A. 52. The prosecution thus linked each defendant with a role in the crime—petitioner as shooter, Stillwell as driver, and Hunter as boss. Most egregiously, the prosecution then told the jury that some of the "most crucial testimony" that would prove the foregoing theory was the "firsthand accounts of what happened," including Stillwell's confession to "driving the car while the man he was with turned around and shot [the victim]." J.A. 58.

The prosecution drove home those points in its closing argument. The prosecution contended that the jury "kn[e]w what happened[:] * * * Stillwell was driving, [petitioner] was in the passenger seat, [the victim] was in the rear seat," and petitioner "turned around and shot" her. J.A. 196. In explaining how the jury knew as much, the prosecution again drew on Stillwell's confession and emphasized the details that he disclosed about "the other person he was with." J.A. 199.

What is more, throughout the case, neither codefendant disputed the prosecution's theory. Stillwell confessed to being the driver, and Hunter did not dispute his supervisory role. J.A. 61-64, 214-216. The only defense offered by both men was that the government lacked jurisdiction over them because the conspiracy originated in the Philippines and not the United States. J.A. 63-67, 214-216, 219-220. Petitioner alone offered a substantive defense.

With only three defendants at trial, only petitioner as the plausible "other person" in the van, and only petitioner challenging the prosecution's theory, the broader

context of the trial itself placed petitioner in the center of Stillwell's confession. Indeed, if the confession referred to someone other than petitioner, the jury would wonder how the prosecution could believe the confession to be reliable, "for the prosecut[ion] * * * ha[d] been arguing that [petitioner], not someone else, helped [Stillwell] commit the crime." *Gray*, 523 U.S. at 193. And with petitioner's two codefendants conceding their involvement, a juror "need only lift his eyes to [petitioner], sitting at counsel table, to find what will seem the obvious answer" to the question of whom Stillwell named as the shooter. *Ibid.*

3. Other evidence in the prosecution's case in chief also linked petitioner with the particular information it elicited about the unnamed accomplice in the confession. For example, Stillwell had claimed in his confession that the "other person" who killed the victim was the same person that he had met up with in the Philippines and lived with while he was there. J.A. 75. The prosecution later presented evidence that Stillwell and petitioner made plans to meet in the Philippines, met up there, and ultimately lived together. J.A. 103-105, 132-133, 135-136.

If any doubt remained about who was the unnamed accomplice in Stillwell's confession, that evidence would have dispelled it. It corroborated the details of the confession, put petitioner in the frame as the unnamed "other person," and thereby enabled the jury to infer that Stillwell had in fact named petitioner as the accomplice in his confession.

* * * * *

Considered in light of the surrounding context, the admission of Stillwell's confession violated the Confrontation Clause. The questioning surrounding the introduction of the confession; the prosecution's statements in

opening and closing arguments; the number of defendants on trial; and the other evidence in the prosecution's case in chief all supported the inference that Stillwell had named petitioner as the accomplice in his confession. Where, as here, redactions are insufficient to prevent the jury from reaching that conclusion, there is a serious risk that the jury will not follow an instruction to consider the confession only as to the confessing defendant. Because petitioner had no opportunity to cross-examine Stillwell about his confession, the admission of that confession violated petitioner's confrontation right. With Stillwell's confession excluded, petitioner is entitled to a new trial, and the judgment of the court of appeals should be vacated.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case remanded for further proceedings.

Respectfully submitted.

KANNON K. SHANMUGAM
WILLIAM T. MARKS
BRIAN M. LIPSHUTZ
MATTEO GODI
ELIZABETH A. NORFORD
MORGAN J. SANDHU
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

JANUARY 2023