No. 22-196

In the Supreme Court of the United States

ADAM SAMIA, AKA SAL, AKA ADAM SAMIC, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Sixth Amendment's Confrontation Clause barred the admission of a nontestifying co-defendant's statement during a joint trial, when it was modified so as not to facially inculpate petitioner and accompanied by a limiting instruction to consider it only against the co-defendant, on the theory that other trial evidence would nevertheless "likely" lead the jury to link it to petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is not published in the Federal Reporter but is available at 2022 WL 1166623. The relevant ruling of the district court 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 for a writ of certiorari 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 Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the ac-

cused shall enjoy the right * * * to be confronted with the witnesses against him." U.S. Const. Amend. VI.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to commit murder for hire, in violation of 18 U.S.C. 1958(a); murder for hire, in violation of 18 U.S.C. 1958(a); conspiring to kidnap and murder in a foreign country, in violation of 18 U.S.C. 956(a)(1); using or carrying a firearm during and in relation to murder, in violation of 18 U.S.C. 924(c)(1)(A) and (j); and conspiring to launder money, in violation of 18 U.S.C. 1956(h). Pet. App. 2a. He was sentenced to life plus ten years of imprisonment, to be followed by five years of supervised release. J.A. 244-245. The court of appeals affirmed in part, vacated in part, and remanded. Pet. App. 1a-17a.

1. Petitioner worked as a hitman for Paul LeRoux, the head of "a transnational criminal organization" engaged in criminal conduct ranging from "arms and technology dealings with Iran and North Korea," to "attempts at minor warlordism in Africa," to "the plotting of a coup d'état in the Seychelles." 32 F.4th 22, 26. The LeRoux organization's activities included "money laundering, drug and weapons trafficking, and various acts of violence, including murder." *Ibid.* LeRoux accordingly employed a team of "mercenaries," through a front company called "Echelon Associates," to administer "beatings, shootings[,] intimidation[,] and if necessary, killings." J.A. 80-81, 137.

a. Petitioner was recruited as a mercenary for Echelon in 2008. J.A. 78-79, 140. He expressed willingness to do "wet work"—*i.e.*, "assassinations, but up close and personal." J.A. 142. He worked for Echelon

in the Philippines, Hong Kong, the Republic of the Congo, the Democratic Republic of the Congo, and Papua New Guinea. C.A. Supp. App. 21-24, 71; see J.A. 170-172. He stayed in touch with LeRoux's associates afterward, C.A. Supp. App. 73-85, and one later reached out to see if petitioner was interested in "bonus" work—*i.e.*, "murder assassination[s]"—handling "clean up with our problem people." *Id.* at 86; see J.A. 86-87, 148-149. Petitioner responded with interest. C.A. Supp. App. 86.

b. In 2011, LeRoux directed one of his managers, Joseph Hunter, to assemble "a new kill team" to commit murders in the Philippines. J.A. 92-93. Hunter recruited petitioner, telling him that "Boss" wanted him to come to the Philippines "for Ninja stuff." J.A. 231; see J.A. 232-233 (Hunter similarly instructing petitioner to be "prepared to do Ninja stuff" and deliver "the end result"). Petitioner had suggested his friend Carl David Stillwell to Hunter as a "good second guy." J.A. 89-90, 159-160. In January 2012, petitioner and Stillwell traveled to Manila. J.A. 104-105, 135, 237.

After the kill team arrived, they were tasked with the murder of Catherine Lee, a local real-estate broker who LeRoux believed had stolen money from him. J.A. 90-91, 106-112. LeRoux told Hunter that petitioner and "his partner," Stillwell, could "pretend to be real estate buyers" and murder Lee. J.A. 111.

On February 13, 2012, Lee was found dead "[i]n a vacant lot beside a pile of garbage." J.A. 68. She had been shot twice in the face at close range. J.A. 70-72. Three days after Lee's body was found, petitioner and Stillwell started transferring sums of money back to the United States in increments of less than $10,000; petitioner transferred a total of $32,000. J.A. 238-239.

Hunter later described to another Echelon associate, Timothy Vamvakias, how petitioner and Stillwell had killed Lee while driving with her to look at properties. J.A. 151-153. And Hunter divulged the details of the murder again during a meeting with mercenary recruits in Thailand that was secretly recorded by U.S. law enforcement. J.A. 227-229, 240-241.

2. LeRoux was arrested by the Drug Enforcement Administration (DEA) in 2012 and became a cooperating witness. J.A. 130. Hunter was arrested in 2013, and petitioner and Stillwell were arrested in 2015. D. Ct. Doc. 414, at 15 (July 31, 2017).

When law-enforcement agents searched petitioner's home after his arrest, they found (among other things) a camera containing surveillance photographs of Lee's businesses, C.A. Supp. App. 279, 282-286, and a key to the van in which Lee was murdered, J.A. 156-157. During Stillwell's arrest, law enforcement found a cell phone with thumbnail images of Lee's dead body. C.A. Supp. App. 236-237. In a post-arrest interview, Stillwell waived his *Miranda* rights and confessed that he had been an accomplice to Lee's murder. J.A. 74-77.

In 2017, a federal grand jury returned a superseding indictment charging petitioner and Stillwell with conspiring to commit murder for hire, in violation of 18 U.S.C. 1958(a); murder for hire, in violation of 18 U.S.C. 1958(a); conspiring to kidnap and murder in a foreign country, in violation of 18 U.S.C. 956(a)(1); using or carrying a firearm during and in relation to murder, in violation of 18 U.S.C. 924(c)(1)(A) and (j); and conspiring to launder money, in violation of 18 U.S.C. 1956(h). J.A. 1-15. The indictment also charged Hunter with all but the money-laundering

count. *Ibid.* LeRoux separately pleaded guilty to seven felonies. J.A. 130.

3. Hunter, Stillwell, and petitioner were tried jointly. Before trial, the government filed a motion in limine regarding the admissibility of Stillwell's post-arrest statement confessing to his complicity in Lee's murder. D. Ct. Doc. 414. The government recognized that Stillwell's statement named petitioner as his partner in murdering Lee, and that in light of Stillwell's decision not to testify, using the statement in its original form could run afoul of *Bruton* v. *United States*, 391 U.S. 123 (1968). *Bruton* "held that a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the codefendant." *Richardson* v. *Marsh*, 481 U.S. 200, 207 (1987). The government therefore sought to introduce a modified version of Stillwell's statement, through oral testimony, that both eliminated petitioner's name and avoided any obvious redactions. D. Ct. Doc. 414, at 42 & n.10; see J.A. 26-48 (written version of statement with proposed modifications).

At a hearing on the motion in limine, the district court generally approved the government's approach to introducing Stillwell's statement. J.A. 20-25. But the court required the government to make additional changes to the written version of the statement to eliminate any remaining "explicit references" to petitioner or "stilted or ungrammatical sentences." J.A. 24. The government complied, see C.A. App. 385, and planned to introduce the modified version of Stillwell's statement through the testimony of the DEA agent

who interviewed him, see J.A. 49-50 (summary of agent's expected testimony).

On the second day of the two-week joint trial, the DEA agent testified regarding Stillwell's statement in a manner consistent with its approved form. J.A. 73-77. In view of the conspiracy charges against Stillwell (which required at least one co-conspirator) and the nature of Stillwell's admission (which, in its original form, had named petitioner as the actual shooter), the government introduced the most relevant portions of the agent's testimony 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 Mr. Stillwell indicate whether he had gone 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. 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. 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. And at any point during the interview did you ask him about the murder of Catherine Lee?

A. Yes.

* * * * *

Q. What did he say about it?

A. He stated, "I did not kill anybody gentlemen but I was there and things I may have done led to that."

Q. Did he say where she 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. 74-76. Later in the DEA agent's testimony, the district court instructed the jury that the agent's testimony was admissible only as to Stillwell, not as to petitioner or Hunter. J.A. 78. The court provided a similar instruction before the jury began its deliberations. J.A. 222.

Subsequently, LeRoux and Vamvakias (who also cooperated with the government) testified that petitioner and a partner murdered Lee. J.A. 78-79, 88-89, 92-93, 96-100, 102-103, 110-111, 120-129, 136, 151-153. In addition, the prosecution played the secret recording in which Hunter explained how the murder was carried out. J.A. 228-229. And the government showed the jury e-mails from petitioner, Hunter, LeRoux, and others. *E.g.*, J.A. 230-233, 236; C.A. Supp. App. 79-81, 110-120, 200, 210.

Petitioner testified in his own defense. He admitted to working for Echelon, see C.A. App. 856-863, traveling to the Philippines with Stillwell on Hunter's instructions, *id.* at 870-871, and recommending Stillwell to Hunter as an "assistant" and a "good second guy to help out," J.A. 159-160. But petitioner claimed that he never participated in "any crimes at all" during his involvement with LeRoux or Echelon, including in the Philippines. C.A. App. 870; see *id.* at 862, 877. He testified that "ninja stuff" was a reference to martial arts, *id.* at 867-868, 880-881, and that he was paid a salary for "training [] local people" in "[m]artial arts," driving people to the airport, and taking photos of "property for sale," *id.* at 871-872; see *id.* at 873, 876, 894-895.

The jury returned guilty verdicts on all counts against all three defendants. J.A. 222-226. The district court sentenced petitioner to a combined term of life plus ten years of imprisonment, to be followed by five years of supervised release. J.A. 244-245.

4. The court of appeals affirmed in part, vacated in part, and remanded. Pet. App. 1a-17a. The court agreed with the parties that three of petitioner's convictions required vacatur because they were predicated, directly or indirectly, on 18 U.S.C. 924(c)(3)(B), which this Court held to be unconstitutionally vague in *United States* v. *Davis*, 139 S. Ct. 2319 (2019). Pet. App. 4a. But the court of appeals rejected petitioner's other claims and upheld his remaining convictions for conspiring to kidnap and murder in a foreign country and conspiring to launder money. *Id.* at 4a-5a, 8a-12a, 17a.

As relevant here, the court of appeals found that the admission of the modified version of Stillwell's statement through the DEA agent's testimony did not violate petitioner's rights under the Confrontation Clause. Pet. App. 10a-12a. Relying on circuit precedent that petitioner did not contest, the court explained that such a "'non-obvious redaction'" of a co-defendant's confession to replace references to the defendant with "'neutral noun[s] or pronoun[s]'" had been upheld against *Bruton* challenges. *Id.* at 10a-11a (quoting *United States* v. *Lyle*, 919 F.3d 716, 733 (2d Cir. 2019), cert. denied, 140 S. Ct. 846 (2020)). And the court observed that Stillwell's modified statement, "[v]iewed 'separate and apart from any other evidence,' * * * d[id] not 'explicitly identify'" petitioner. *Id.* at 11a (citations omitted; brackets altered).

SUMMARY OF ARGUMENT

The court of appeals correctly upheld the admission of Stillwell's modified statement, which did not facially incriminate petitioner and was subject to repeated instructions to consider it only as to Stillwell. In contending otherwise, petitioner would erode the bedrock presumption that juries conscientiously follow their instructions by expanding the limited exception in *Bruton* v. *United States*, 391 U.S. 123 (1968), beyond co-defendant confessions with explicit or immediately obvious references to the defendant. The Court has previously rejected such an ahistorical and impractical expansion of the *Bruton* exception, and it should do so again here.

A. The Confrontation Clause forbids the admission of a testimonial statement "against" a criminal defendant when the accused has no opportunity for cross-examination. Both the text and common-law history reinforce that a statement is not offered "against" the defendant, U.S. Const. Amend. VI, when the jury is instructed not to consider that evidence in determining his guilt.

Bruton created a narrow exception to that rule for nontestifying co-defendant confessions that "expressly implicat[e]" the defendant and are thus so "powerfully incriminating" that a jury cannot help but consider the confession against the defendant. 391 U.S. at 124 n.1, 135-136. But *Bruton* recognized that redactions may eliminate such a problem. And when the defendant in *Richardson* v. *Marsh*, 481 U.S. 200 (1987), urged the Court to expand *Bruton*'s "narrow exception," *id.* at 207, to include confessions linkable to the defendant through other trial evidence, the Court refused. As the Court further clarified in *Gray* v. *Maryland*, 523

U.S. 185 (1998), the *Bruton* exception is cabined to "*facially*" incriminatory confessions that include the defendant's name, a close corollary, or a redaction so obvious (like a "blank space or the word 'deleted'") that they might as well name the defendant. *Id.* at 188, 196 (citation omitted).

In this case, the prosecution permissibly introduced, through oral testimony, a modified version of a post-arrest statement by petitioner's co-defendant, with references to petitioner replaced by generic terms like "somebody else" and "the other person." As the Court expressly recognized in *Gray*, a modification with a natural-sounding and nonspecific reference to the defendant—*e.g.*, a reference to "other guys" who participated in the crime—does not trigger the concern identified in *Bruton*. 523 U.S. at 196. Even if a juror could inferentially link such a modified confession to the defendant through trial evidence, a confession that incriminates only by way of contextual inference does not give rise to an overwhelming risk that jurors will disobey the court's instructions to limit the statement's use to the purpose for which it was offered.

B. Petitioner thus flouts precedent in arguing that the admission of a modified confession violates the Confrontation Clause "where the jury is likely to infer that the confessing defendant identified the nonconfessing defendant"—a prediction that he would have courts make using a multi-factor test that focuses on "surrounding context." Br. 14, 28. This Court has already rejected the possibility of a *Bruton* violation based on a confession that becomes incriminating "only when linked with evidence introduced later at trial." *Richardson*, 481 U.S. at 208; see *Gray*, 523 U.S. at 196.

And under petitioner's test, the same generically worded confession that would be admissible as a literal transcription of the co-defendant's statement would nonetheless be inadmissible if—unbeknownst to the jury—it were in fact one that had been modified to remove the defendant's name. The Confrontation Clause does not call for such an illogical result.

Petitioner's contextual rule would also have unwarranted negative effects on federal and state criminal-justice systems. His totality-of-the-circumstances inquiry—even if artificially limited to contextual factors deemed within the prosecutor's "control" or "knowable" ahead of trial (Br. 16)—would inevitably lead to burdensome pretrial proceedings in which the prosecution, but not the defense, must preclear the details of its case. And in the probable event that the trial court perceives a *Bruton* problem—due to the expansiveness of petitioner's test, an overabundance of caution, or both—the prosecutor's only realistic option in most instances would be to try the defendants in multiple separate trials.

The Court has already found that result intolerable in light of the essential role of joint trials in the fair administration of justice. See *Richardson*, 481 U.S. at 209-210. Petitioner offers no reason to upset the balance that the Court has previously struck—let alone so dramatically.

C. Even if the Court were inclined to extend *Bruton* to the much larger class of statements that petitioner's proposal would encompass, petitioner would still not be entitled to relief. Any Confrontation Clause error in his case was harmless beyond a reasonable doubt. Overwhelming evidence—from mutually reinforcing witness testimony to financial records to physical evi-

dence recovered from petitioner's home—established that petitioner conspired to murder Catherine Lee and laundered the money he received as payment for the crime.

ARGUMENT

ADMITTING THE MODIFIED VERSION OF STILLWELL'S STATEMENT DID NOT VIOLATE PETITIONER'S CONFRONTATION RIGHT

This Court's decision in *Bruton* v. *United States*, 391 U.S. 123 (1968), created a narrow exception to the fundamental principle that jurors are presumed to follow instructions to consider evidence only for particular purposes. Together with *Richardson* v. *Marsh*, 481 U.S. 200 (1987), and *Gray* v. *Maryland*, 523 U.S. 185 (1998), *Bruton* singles out a particular type of statement deemed so inflammatory that a jury should not see it even with a limiting instruction: namely, a codefendant's out-of-court confession that facially implicates the defendant by directly naming him, using an equivalently personalized descriptor, or including an explicit and obvious redaction.

The modified statement here did none of those things. It instead included neutral nouns and pronouns of the sort that were approved in *Gray* and correspond to normal speech. It was therefore a statement that would have been admissible if it were literally what Stillwell had said, and it makes little sense to exclude the exact same words simply because they resulted from a modification made for the precise purpose of accommodating *Bruton* concerns. The jury should instead be presumed, as usual, to have obeyed the district court's instruction to consider the statement as evidence against Stillwell only. Petitioner's contrary approach would be antihistorical, at odds with

this Court's precedents, difficult to predictably administer, and costly to the judicial system. The Court should reject his proposal.

A. The Admission Of A Natural-Sounding, Anonymized Version Of Stillwell's Statement Was Consistent With Historical Practice And This Court's Precedents

The Sixth Amendment's 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. "Ordinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness 'against' a defendant if the jury is instructed to consider that testimony only against a codefendant." *Richardson*, 481 U.S. at 206; see *Bruton*, 391 U.S. at 126. That understanding of the Clause not only follows directly from its text, but also embodies "the almost invariable assumption of the law that jurors follow their instructions." *Richardson*, 481 U.S. at 206. And it is reflected in both historical practice and this Court's precedents, with which the lower courts' approach here was in full accord.

1. The presumption that jurors follow their instructions is a core tenet of our legal system

The legal system presumes "that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." *United States* v. *Olano*, 507 U.S. 725, 740 (1993) (citation omitted). It is the rare trial, civil or criminal, that does not involve some evidence that is admissible only against a particular party, or only for a particular purpose, and not

others. Accordingly, when a jury of laypersons is the finder of fact, the court "restrict[s] the evidence to its proper scope and instruct[s] the jury accordingly." Fed. R. Evid. 105. Without a strong presumption that such instructions are effective, jury trials could not function.

This Court has adhered to that presumption in a wide variety of contexts, including when constitutional rights are implicated. The Court has presumed, for example, that jurors will follow instructions to not draw an adverse inference from a defendant's decision not to testify, *Lakeside* v. *Oregon*, 435 U.S. 333, 340 (1978); to consider an unwarned confession for impeachment purposes only, *Harris* v. *New York*, 401 U.S. 222, 223-224 (1971); to disregard inadmissible eyewitness evidence, *Watkins* v. *Sowders*, 449 U.S. 341, 347 (1981); to consider a defendant's prior conviction only for purposes of sentencing and not guilt, *Marshall* v. *Lonberger*, 459 U.S. 422, 438 n.6 (1983); and to consider death-penalty-related evidence against only one defendant and not another, *Kansas* v. *Carr*, 577 U.S. 108, 124-125 (2016).

As those examples illustrate, even in "sensitive" and "life-and-death matters," "juries are presumed to follow the court's instructions." *CSX Transp., Inc.* v. *Hensley*, 556 U.S. 838, 841 (2009) (per curiam). The presumption has been justified by confidence in jurors to conscientiously carry out their task. See, *e.g.*, *Pennsylvania Co.* v. *Roy*, 102 U.S. 451, 459 (1880) ("The presumption should not be indulged that the jury were too ignorant to comprehend, or were too unmindful of their duty to respect, instructions as to matters peculiarly within the province of the court to determine."). And doubts about the jury's ability to do so

lack robust "empirical support." 21A Charles Alan Wright et al., *Federal Practice and Procedure* § 5066 & nn.135-138 (2d ed. 2005 & Supp. 2022) (noting flaws in attempted studies).

The presumption also has solid "pragmatic" justification, "rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process." *Richardson*, 481 U.S. at 211. Disregarding the presumption, or creating unnecessary exceptions to it, "would make inroads into th[e] entire complex code of state criminal evidentiary law" as well as federal evidentiary law, "and would threaten other large areas of trial jurisprudence." *Spencer* v. *Texas*, 385 U.S. 554, 562 (1967); see *Pennsylvania Co.*, 102 U.S. at 459 (observing that a contrary rule "would often seriously obstruct the course of business in the courts").

2. Courts historically treated jury instructions as sufficient to address the potential prejudice of a nontestifying co-defendant's confession

This Court has previously "turn[ed] to the historical background of the [Confrontation] Clause to understand its meaning." *Crawford* v. *Washington*, 541 U.S. 36, 43 (2004). Undertaking that inquiry here reveals a longstanding practice under which a nontestifying co-defendant's confession was admissible in a joint trial so long as the jury was properly instructed not to consider it against the nonconfessing defendant.

As one authoritative treatise explained shortly after the Founding:

> The confession of a prisoner is not to be taken in parts, but the whole together[.] * * * [A]lthough it

> may happen that some part of it concerns other prisoners who are tried on the same indictment * * * all that can be done is to direct the jury not to take into their consideration such parts as affect the other prisoners.

S. M. Phillipps, *A Treatise on the Law of Evidence* 83 (1816) (Phillipps); cf., *e.g.*, *Gaines* v. *Relf*, 53 U.S. (12 How.) 472, 533-534 (1852) (relying on Phillipps treatise).

Other contemporary authorities were in accord. See 1 Simon Greenleaf, *A Treatise on the Law of Evidence* § 218, at 253-254 (1842) ("[I]f the confession implicates other persons by name, yet it must be proved as it was made, not omitting the names; but the Judge will instruct the jury, that it is not evidence against any but the prisoner who made it."); 1 Thomas Starkie, *Practical Treatise on the Law of Evidence* 449-450 (4th ed. 1832) ("It sometimes happens that evidence, which is admitted for one purpose, may be no evidence for another purpose, and in such cases a Jury is bound to apply the evidence so far only as it is legally applicable. Thus, if *A.* and *B.* be tried at the same time, a confession made by one, but which criminates the other, ought not to operate with the Jury against the latter.").

While it was suggested that a written confession "might perhaps" be redacted to remove material relating to co-defendants, if such material were severable and could "be omitted without affecting in any degree the prisoner's narrative against himself," Phillipps 83, Wigmore observed that the "favored" practice in the United States was in fact to admit the whole statement—*including* the co-defendants' names—with a limiting instruction. 3 John Henry Wigmore, *A Trea-*

tise on the System of Evidence in Trials at Common Law § 2100 n.5, at 2841 (1904) (Wigmore).[1]

This Court's 19th-century cases reflect that practice. In *Sparf* v. *United States*, 156 U.S. 51 (1895), the Court held that, "as the declarations of [a co-defendant] were not, in any view of the case, competent evidence against" the defendant, the trial court "should have excluded them as evidence against" the defendant but "admitted them against" the declarant. *Id.* at 58. And in *United States* v. *Ball*, 163 U.S. 662 (1896), the Court held that three defendants were

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[1] The English courts debated the issue during this period, with many likewise ruling that a defendant's confession should be provided without omitting a co-defendant's name. See David Power & Henry Roscoe, *Roscoe's Digest of the Law of Evidence in Criminal Cases* 52-53 (4th ed. 1857) (Roscoe); see, *e.g.*, *R* v. *Walkley*, (1833) 172 Eng. Rep. 1196, 1196 (Oxford Cir.) (explaining, in case where one defendant's confession named another defendant, that "[w]e must have exactly what was said" and "[t]he point has been much considered by the Judges"); *R* v. *Hall*, (1833) 168 Eng. Rep. 979, 979 (ordering "the whole of the examination of the prisoner to be read, though it directly implicated the other"); *R* v. *Hearne*, (1830) 172 Eng. Rep. 676, 676 (Littledale, J.) ("The witness must mention the name. * * * [B]ut I shall tell the Jury that it is not evidence against [the other defendant]."); *R* v. *Fletcher*, (1829) 172 Eng. Rep. 691, 691-692 (Littledale, J.) ("I am now satisfied that the whole of the letter must be read. But I shall take care to make such observations to the Jury, as will prevent its having any injurious effect against the other prisoners; and I shall tell the Jury that they ought not to pay the slightest attention to this letter, except so far as it goes to affect the person who wrote it."). But see *Barstow's Case*, (1831) 168 Eng. Rep. 979, 979 ("I know that is [Littledale's] opinion, but I do not like it; I do not think it the fair way."). As discussed further below, courts taking the contrary view nonetheless admitted modified versions of the confessions. See pp. 33-34, *infra*.

properly tried together for murder, despite the admission of statements made by one defendant after the killing, because the trial court had "said, in the presence of the jury, that, of course," the defendant's statements "would be only evidence against him." *Id.* at 672.

The practices of state courts likewise bear out Wigmore's observation. Before the Confrontation Clause was held to apply to the States through the Fourteenth Amendment, see *Pointer* v. *Texas*, 380 U.S. 400, 403 (1965), virtually every state constitution contained a provision substantially equivalent to it. See 5 John Henry Wigmore, *Evidence* § 1397, at 155-158 n.1 (Chadbourn rev. ed. 1974). This Court has accordingly viewed "[e]arly state decisions" as "shed[ding] light upon the original understanding of the common-law right" of confrontation. *Crawford*, 541 U.S. at 49. And state courts admitted confessions of a nontestifying co-defendant even when the statements named the defendant, so long as a limiting instruction was provided. See, *e.g.*, *State* v. *Workman*, 15 S.C. 540, 545 (1881); *Jones* v. *Commonwealth*, 72 Va. 836, 839-840 (1878); *Collins* v. *State*, 5 S.W. 848, 850-851 (Tex. Ct. App. 1887), abrogated on other grounds by *Freeman* v. *State*, 30 S.W.2d 330 (Tex. Crim. App. 1930); see also 3 Wigmore § 2101, at 2841 n.5 (citing cases).

3. This Court's later decisions created a narrow exception for a nontestifying co-defendant's facially inculpatory statement

In 1968, the Court in *Bruton* adopted "a narrow exception" to the presumption that juries follow their instructions, and to historical practice (which was neither briefed nor addressed in the case), by holding that

"a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the codefendant." *Richardson*, 481 U.S. at 207; see *Carr*, 577 U.S. at 125 (similarly describing *Bruton* as "a narrow departure from the presumption that jurors follow their instructions"). The Court has refused, however, to expand that exception beyond true cases of "facial" incrimination, in which the nontestifying co-defendant's statement either names the defendant, includes similar identifying information (like a nickname or physical description), or is so obviously redacted that the jury is virtually certain to see through its unmistakable artificiality. Only those circumstances have been deemed to give rise to such an "'overwhelming probability' that the jury will be unable to follow the court's instructions," *Greer* v. *Miller*, 483 U.S. 756, 766 n.8 (1987) (quoting *Richardson*, 481 U.S. at 208), that the usual presumption must give way.

a. In *Bruton*, the Court confronted a joint trial in which a district court had admitted a post-arrest confession by Bruton's co-defendant that "expressly" accused Bruton, by name, of participating in a postal robbery. 391 U.S. at 124 & n.1; see App. at 80, *Bruton*, *supra* (No. 67-705) (challenged testimony). The Court acknowledged that "[i]f it were true that the jury disregarded the reference to the [nonconfessing defendant], no question would arise under the Confrontation Clause." *Bruton*, 391 U.S. at 126. But the Court nonetheless deemed the confession of Bruton's co-defendant so "powerfully incriminating" of Bruton as to create a "context[] in which the risk that the jury

will not, or cannot, follow instructions is so great, and the consequences of failure so vital to [Bruton], that the practical and human limitations of the jury system cannot be ignored." *Id.* at 135.

At the same time, the Court recognized the potential for "alternative ways" of allowing "the prosecution * * * the benefit of the confession to prove the confessor's guilt" in a joint trial, without creating the same degree of risk that the jury would disregard its instructions and use the confession against a nonconfessing defendant. *Bruton*, 391 U.S. at 133-134 & n.10. And over the next two decades, the Court declined to expand *Bruton*, finding no confrontation error when a prosecutor used a nontestifying co-defendant's confession during an opening statement, *Frazier* v. *Cupp*, 394 U.S. 731, 734-736 (1969); when a court admitted the confession of a co-defendant who testified but denied making the confession, *Nelson* v. *O'Neil*, 402 U.S. 622, 624, 629-630 (1971); and when a jury was permitted to use a co-defendant's confession against a nonconfessing defendant for nonhearsay rebuttal purposes, *Tennessee* v. *Street*, 471 U.S. 409, 414-417 (1985).

b. The Court's subsequent decision in *Richardson* clarified *Bruton*'s "narrow" scope even more directly. 481 U.S. at 207. *Richardson* made clear that *Bruton* permits the admission of a co-defendant's redacted confession when accompanied by a limiting instruction, even if the confession would incriminate the defendant "when linked with evidence introduced later at trial." *Id.* at 208; see *id.* at 208 n.3.

The defendant in *Richardson*, Clarissa Marsh, was tried jointly with another co-defendant, Benjamin Williams, for assault and murder. 481 U.S. at 202. The prosecution introduced a post-arrest confession by

Williams describing an incriminating conversation between Williams and another indicted defendant, Kareem Martin, as they drove to the scene of their planned robbery. *Id.* at 203-204. That conversation showed a prior intent to kill the victims. *Id.* at 206. Williams's confession had been "redacted to omit all reference" to Marsh's presence, and the jury was told that they could not use it against Marsh. *Id.* at 203; see *id.* at 204. But Marsh later testified that she was also in the car (though she claimed she could not hear anything the others said). *Id.* at 204. And during the closing argument, the prosecutor expressly "linked [Marsh] to the portion of Williams' confession describing his conversation with Martin in the car," *id.* at 205, by arguing that Marsh's testimony that she could not hear the conversation was not credible, *id.* at 205 n.2.

The Court rejected Marsh's Confrontation Clause claim, holding that a confession that incriminates the defendant only by "linkage" falls outside the *Bruton* exception. *Richardson*, 481 U.S. at 208. The Court observed that "[w]here the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence." *Ibid.* The Court explained that a co-defendant confession that actually names the defendant is "more vivid" and therefore "more difficult to thrust out of mind," even upon an instruction to disregard it, than one that implicates the defendant only by "inferential incrimination." *Ibid.* For the latter type of confession, the limiting 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." *Ibid.*

"Even more significantly," the Court continued, "evidence requiring linkage differs from evidence incriminating on its face in the practical effects which application of the *Bruton* exception would produce." *Richardson*, 481 U.S. at 208. Applying the *Bruton* exception to facially incriminating confessions merely requires redactions. *Id.* at 208-209. But for "confessions incriminating by connection," not only is redaction often infeasible, but it would likely not even be possible to determine the statement's admissibility before trial—or, at least, not without "a pretrial hearing at which prosecution and defense would reveal the evidence they plan to introduce, enabling the court to assess compliance with *Bruton ex ante*." *Id.* at 209. Such a hearing "would be time consuming and obviously far from foolproof." *Ibid.*

The Court also refused to adopt an approach under which the only realistic options for prosecutors would be to forgo use of either joint trials or co-defendant confessions. *Richardson*, 481 U.S. at 209-210. The Court emphasized that "[j]oint trials play a vital role in the criminal justice system," by conserving public resources, avoiding inconsistent verdicts, and "enabling more accurate assessment of relative culpability." *Id.* at 209-210. And the Court similarly found the "price" of excluding confessions from joint trials to be "too high," as such confessions are "'essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'" *Id.* at 210 (citation omitted).

Richardson reserved the question whether to extend *Bruton* to "a confession in which the defendant's name has been replaced with a symbol or neutral pronoun," as opposed to one that "eliminate[s] * * * any

reference to his or her existence" altogether. 481 U.S. at 211 & n.5. And because the prosecutor in *Richardson* had "sought to undo the effect of the limiting instruction by urging the jury to use Williams' confession in evaluating [Marsh's] case," the Court remanded for further consideration of that separate Confrontation Clause claim. *Id.* at 211.

c. Later, in *Gray*, the Court did indeed confront the symbol-replacement issue, in the context of a confession with conspicuous redactions. *Gray* held that such a confession could not escape the *Bruton* rule, but distinguished that form of recognizable alteration from modifications that use neutral pronouns to produce more natural-sounding statements.

Gray and a co-defendant, Anthony Bell, were tried jointly for beating Stacey Williams to death. *Gray*, 523 U.S. at 188. Bell did not testify, and the trial court admitted Bell's post-arrest confession to participating in the beating as part of a group that included Gray and another man (Jacquin Vanlandingham). *Id.* at 188-189. In doing so, the court failed to require smooth redactions, and instead allowed a detective to read Bell's statement to the jury with the word "deleted" or "deletion" whenever Gray's or Vanlandingham's names appeared; their names were replaced with overt blank spaces in the written version. *Id.* at 188-189, 192.

This Court concluded that, because the confession contained "obvious indication[s] of deletion," it "so closely resemble[d] *Bruton*'s unredacted statements that * * * the law must require the same result." *Gray*, 523 U.S. at 192. The Court reasoned that co-defendant confessions containing explicit redactions are as "directly accusatory" as confessions that include the nonconfessing defendant's name because the bla-

tant redaction "points directly to the defendant" in the same way. *Id.* at 194.

The Court recognized that *Richardson* "placed outside the scope of *Bruton*'s rule those statements that incriminate inferentially," and acknowledged that an inference was technically required for the redacted confession to incriminate Gray. *Gray*, 523 U.S. at 195. But the Court deemed the "*kind* of" inference required to connect an explicit redaction like "deleted" with the defendant to differ from an inference that would depend on linkage with extrinsic trial evidence. *Id.* at 196. It characterized the former kind of inference as akin to the minimal step required to connect a defendant with a nickname or a close physical description. *Id.* at 195-196. Accordingly, the Court viewed the redacted confession to be, "in *Richardson*'s words, '*facially* incrimina[tory].'" *Id.* at 196 (quoting 481 U.S. at 209).

In that circumstance, the Court found *Richardson*'s practical concerns inapplicable, on the ground that a confession that does not incriminate "'by connection'" to trial evidence would "normally" be "possible" to modify more unobtrusively to avoid any *Bruton* issue. *Gray*, 523 U.S. at 196-197 (quoting *Richardson*, 481 U.S. at 209). To illustrate the point, *Gray* provided an example of how Bell's confession could have been easily modified to conform with *Bruton*. Bell's answer to the question "Who was in the group that beat Stacey?" had been redacted to say: "Me, deleted, deleted, and a few other guys." *Id.* at 196. The Court explained that Bell's answer could have been instead modified to read: "Me and a few other guys." *Ibid.* The availability of that alternative featured prominently in the *Gray* oral argument as well; 11 questions referred to

it. See Tr. of Oral Arg. at 4-6, 10-13, 21-22, 37-38, 44, 46, *Gray*, *supra* (No. 96-8653).

4. The district court correctly determined that the **Bruton** *exception did not apply here*

Here, the district court's admission of Stillwell's modified statement—coupled with clear instructions that the jury was to consider it only against Stillwell, and not against the other two defendants, see J.A. 78, 222—stayed fully within the guardrails set in *Bruton*, *Richardson*, and *Gray*. The admission of the statement undisputedly avoided the problem encountered in *Bruton* itself—a failure to remove a defendant's name from a nontestifying co-defendant's confession. And Stillwell's modified statement in no way resembled the redacted confession in *Gray*, with obvious signs of alteration like the word "deleted," a blank, or a symbol. Instead, the prosecution modified its questions and the DEA agent's testimony to conform to a type of confession that *Gray* held out as admissible: one that (by necessity) still referred to someone else's existence, but with a natural-sounding replacement like the "other guy." See 523 U.S. at 196; compare pp. 6-8, *supra*.

a. In answering the prosecutor's questions about what Stillwell had said, the DEA agent used phrases like "somebody else," "the other person," and the "other individual." J.A. 75-77; see *Gray*, 523 U.S. at 197 (citing the approach in *United States* v. *Garcia*, 836 F.2d 385 (8th Cir. 1987), with approval); *Garcia*, 836 F.2d at 389-391 (finding no *Bruton* violation where the statement was modified to refer to the co-defendant delivering drug proceeds to "someone"). And because the substance of Stillwell's confession was relayed through back-and-forth questioning—rather than the agent reading the written transcript of Still-

well's interview verbatim—the prosecutor's and the agent's use of phrases like "the other person" did not leap out as unmistakable alterations of what Stillwell had actually said. To the extent that a juror might nevertheless have been tempted to infer that the phrases referred to petitioner, cf. Pet. Br. 44, that is exactly the kind of "linkage" inference that *Richardson* and *Gray* recognize as curable through a limiting instruction of the sort that the district court gave, and later repeated. J.A. 78, 222.

As *Richardson* instructs, and as *Gray* acknowledges, such confessions that incriminate based on their connection to other trial evidence "fall outside the narrow exception [*Bruton*] created." *Richardson*, 481 U.S. at 208; see *Gray*, 523 U.S. at 196 (contrasting obviously redacted confessions with those that become incriminating "only when linked with evidence introduced later at trial") (citation omitted). That clear and administrable intrinsic/extrinsic line makes sense both in general and in this case. Because Stillwell's statement did not "obviously refer directly" to petitioner's participation in the same crime, *Gray*, 523 U.S. at 196, a juror would not need to attempt to "forget" such a "vivid" reference, *Richardson*, 481 U.S. at 208. It is therefore reasonable to presume that a juror would have obeyed the judge's instruction and declined to venture down a forbidden "path of inference" in the first place. *Ibid.*

The jurors in this case had other alternative inferences to draw. A juror might have thought that the nondescript phrasing came verbatim from Stillwell, who deliberately declined to identify his accomplice out of loyalty, fear, or some other reason. Cf., *e.g.*, *United States* v. *Nuñez-Rodriguez*, 92 F.3d 14, 22-23

(1st Cir. 1996). Even beyond that, LeRoux ran a sizable criminal organization, with numerous "mercenaries" and employees other than petitioner working for him, including in the Philippines. See J.A. 82, 107, 111, 116, 128-129. A juror might well have paused before assuming that Stillwell was naming petitioner, as opposed to one of the other mercenaries, an employee who was not a regular mercenary, or a contract killer hired specifically for the Lee murder. Petitioner's own testimony encouraged such doubts. He told the jury that Hunter gave Stillwell his "jobs" directly without going through petitioner; that on "[m]any" days in the Philippines, Stillwell and petitioner were not doing the same thing; and that Stillwell and petitioner did not discuss their respective assignments. C.A. App. 872; see *id.* at 881, 888, 890, 892, 907.

b. It would have been infeasible to further modify Stillwell's statement to make it appear that Stillwell acted alone. Stillwell was charged with conspiracy, and he did not confess to being the shooter. The description of the two men's coordination (Stillwell did not admit to receiving direct orders from Hunter on the matter) and the anonymized description of petitioner's act of murdering Lee were necessary to establish the elements of the charged crimes. Indeed, omitting or eliding an accomplice's role in the van might have given rise to ambiguity about whether Stillwell himself was the one who shot Lee, to Stillwell's obvious prejudice.

Bruton does not require the government to open itself up to an argument from the confessing defendant that the modified confession was materially false. Although the particular circumstances of the confession in *Richardson* allowed for a nonprejudicial redaction to

omit one of two accomplices altogether, the Court has not made complete eradication a prerequisite for steering clear of *Bruton*'s narrow boundaries. *Richardson*'s analysis—which focused on the class of confessions that incriminate by "linkage"—did not attach critical significance to Marsh's complete omission. See 481 U.S. at 208-209; see also *id.* at 203 (introducing that feature of the redacted statement with the word "indeed"). And *Gray*'s proposed "other guys" redaction would itself still indicate the presence of others, potentially including Gray. 523 U.S. at 196. So long as a redaction does not explicitly or ham-handedly point a finger at the defendant, it does not mandate an exception to the normal presumption that jurors follow their instructions. See *ibid.*

B. Petitioner's Proposed Expansion Of The *Bruton* Exception Is Contrary To Precedent, Conceptually Unsound, And Practically Flawed

For petitioner to obtain relief in this case, this Court would have to do precisely what it has repeatedly "declined" to do—"extend [the *Bruton*] exception." *Carr*, 577 U.S. at 125; see p. 21, *supra*. And far from providing a novel basis for doing so, petitioner proposes an extension that cannot be reconciled with *Richardson* and *Gray*—specifically, that the *Bruton* exception applies whenever the jury is viewed as "likely" to "infer," based on "the broader context of trial," that a modified confession originally "identified" the defendant (Br. 16). That extension finds no support in the scope of the confrontation right at common law. And it gives rise to the same intolerable "practical effects" that the Court avoided in *Richardson*. 481 U.S. at 208-209. To the extent that petitioner identifies countervailing concerns in this area, this Court's precedents

and existing rules of evidence and criminal procedure already provide trial courts with tools to address them. There is no need to adopt petitioner's proposal as an inflexible rule of constitutional law, and considerable reason not to do so.

1. The* Bruton *exception requires an "overwhelming probability" that the jury will disregard its instructions

Petitioner acknowledges—indeed, embraces—that his "likely to infer" standard would require a court to take into account not only the confession itself but the "surrounding context" because the jury "does not hear evidence in isolation." Br. 32. And by "surrounding context," petitioner includes whatever is "knowable" by the prosecution, or else "within the prosecution's control," "in advance of trial." *Ibid.*

That proposal has no foothold in this Court's precedents. *Bruton*'s "foundation" is the presence of an "*overwhelming probability*" that the jury will disobey an instruction to consider the confession only against the confessing co-defendant. *Richardson*, 481 U.S. at 208 (emphasis added); see *Greer*, 483 U.S. 766 n.8 (the "normal[] presum[ption]" that the jury follows instructions applies "unless there is an 'overwhelming probability' that the jury will be unable" to do so) (citation omitted). *Gray*, in turn, recognizes that an "overwhelming probability" of disobedience may exist—and thus give rise to a confrontation violation—only when a confession expressly names the defendant, or is otherwise "*directly* accusatory." 523 U.S. at 194 (emphasis added).

A statement whose incriminating character rests on the assumed likelihood of extrinsic, rather than facial, connection does not directly accuse anyone, and is not

"ineradicable, as a practical matter, from the jury's mind." *Carr*, 577 U.S. at 125. It at most accuses indirectly—and even then, only if the juror forms the requisite chain of inferences. *Richardson* makes clear that "[w]here the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence." 481 U.S. at 208. And as petitioner acknowledges (Br. 27), *Gray* did not purport to overturn that rule. See 523 U.S. at 195 (recognizing that *Richardson* "placed outside the scope of *Bruton*'s rule those statements that incriminate inferentially").

In *Gray*, "the redacted confession with the blank prominent on its face, in *Richardson*'s words, '*facially* incriminat[ed]' the codefendant" because it was viewed as immediately telling the jury that the co-defendant's name had been taken out. *Gray*, 523 U.S. at 196 (citation omitted). While the jury might technically have had to draw an "inference" to form that realization, that inference was deemed to be both virtually inescapable and independent of the jury's assessment of other trial evidence. It was an inference that the jury would make "immediately, even were the confession the very first item introduced at trial." *Ibid.* *Bruton* also extends to "confessions that use shortened first names, nicknames, [and] descriptions as unique as the 'red-haired, bearded, one-eyed man-with-a-limp,'" *id.* at 195 (citation omitted), which are close corollaries of (and sometimes even better identifiers than) proper names and likewise typically removable.

Under petitioner's proposed approach, even the *Gray*-endorsed alternative of a confession that refers neutrally to "a few other guys," 523 U.S. at 196, would be on shaky, if not broken, ground. For instance, a ju-

ror hearing the hypothetical *Gray* confession might wonder why the prosecutor did not follow up about the identity of the "other guys" in the "group that beat Stacey." *Ibid.*; see Pet. Br. 30. It might also have struck a juror as odd that the question asked about the members of "the group," and yet the confessing defendant only identified himself. *Gray*, 523 U.S. at 196; see Pet. Br. 42. But as *Gray*'s approval of the "other guys" formulation demonstrates, *Bruton*'s application does not turn on such nuances. Cf. 523 U.S. at 197 (stressing bright-line nature of the Court's rule regarding obvious redactions).

Instead, natural-sounding modifications like "other guys"—or the "somebody else" phrasing at issue here—have been viewed as permissible. Otherwise, a confession worded that way would logically have to be excluded *even if the confessing co-defendant actually said it*. But even petitioner does not go that far. See Br. 15 (arguing only that "the admission of a *redacted* confession" is unconstitutional if the jury is likely to infer that it originally "named" the defendant) (emphasis added). And petitioner offers no reason why the exact same confession—for instance, "I killed her, but someone else helped me"—should be admissible or inadmissible based solely on whether the confessing defendant originally provided a name. The clear-cut lines in *Bruton* and *Gray* avoid such inconsistency.

2. Petitioner's proposed expansion of* Bruton *is inconsistent with the historical scope of the confrontation right

Petitioner's proposed contextual rule also lacks any foundation in the common law or historical practice. As petitioner all but acknowledges, see Br. 23 n.*, he has no historical support for the proposition that the

Confrontation Clause prohibits the admission of a co-defendant's confession that does not expressly implicate the defendant and is accompanied by a limiting instruction. Instead, petitioner asserts that no case "from the time of the Founding" shows "that a codefendant's confession is admissible in a joint criminal trial" when "the jury is instructed not to consider the confession as to the nonconfessing defendant." *Ibid.* But as discussed above, considerable authority, beginning in the early 19th century, takes precisely that approach. See pp. 16-19, *supra*.

The historical evidence also indicates that where courts *did* require changes to the confession, they required only minimal redactions to remove the nonconfessing defendant's name. See 2 Wigmore, § 1076, at 1277 (noting that "some [English] judges at one time favored the practice of omitting the name of B, or any other co-defendant, in the proof of the confession [of A]"); 3 Wigmore § 2100, at 2841 (noting that, where confessions were not admissible against third persons, "the names of such persons were by most [English] judges ordered to be omitted"). But see n.1, *supra*. Indeed, the district court's approach here was anticipated in a reporter's note to an 1830 decision that is cited in multiple treatises:

> The practice has been, in reading confessions, to omit the names of other accused parties, *and where they are used to say 'another person' 'a third person,' &c.*, where more than one other prisoner was named; and some Judges have even directed witnesses, who came to prove verbal declarations, to omit the names of those persons in like manner.

R v. *Clewes*, (1830) 4 C. & P. 220, 225, 172 Eng. Rep. 678, 680 (emphasis added); see 3 Wigmore § 2102, at 2841 n.5; Roscoe 52-53.

Petitioner's rationales for an ahistorical result lack merit. He asserts that jury instructions "as we know them" did not "exist until decades after the Founding," Br. 23 n.*—an apparent reference to the fact that, for a time, juries could be allowed to decide questions of law for themselves. But that tide had turned by the early 19th century. See *United States* v. *Battiste*, 24 F. Cas. 1042, 1043 (D. Mass. 1835) (Story, J.) ("It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court."); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 907 (1994) (explaining that "sentiment had changed" by 1835); William E. Nelson, *Americanization of the Common Law* 169 (1975) (explaining that in Massachusetts, by 1810, "it was clear that the instructions of the court, originally advisory, had become mandatory and therefore that juries no longer had the power to determine the law"). Correspondingly, this Court has long adhered to the core principle that juries follow their instructions. See *Pennsylvania Co.*, 102 U.S. at 458-459; *Gregory* v. *Morris*, 96 U.S. 619, 626 (1878). Regardless, that juries may have been entrusted with *greater* discretion during the Founding era is no reason to *expand* the restriction that *Bruton* places on the evidence that they are permitted to hear.

Petitioner likewise errs in asserting (Br. 23 n.*) that history is not probative because "during the 17th and early 18th centuries, criminal defendants in England * * * were expected to defend themselves." One

of his own sources states that defense counsel began to appear in the 1720s and 1730s and were "familiar figures" by the end of that century. J. M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 Law & Hist. Rev. 221, 221-222 (1991). In any event, if petitioner is suggesting that, in the absence of defense counsel, the law did not have occasion to address the situation of co-defendant confessions, the basis for that view is unclear. As explained above, under the common law, "the confession of the defendant himself * * * hath always been allowed to be given in evidence against the party confessing, but not against others." 2 William Hawkins, *A Treatise of the Pleas of the Crown* 603-604 (7th ed. 1787) (footnote omitted); see also Starkie 449; Phillipps 82-83; *Crawford*, 541 U.S. at 45.

To the extent that *Bruton*, without addressing historical practice, departed from that practice in clear-cut cases of obvious finger-pointing by a nontestifying co-defendant, the decision provides no license for petitioner's much more expansive deviation. Whatever the historical bona fides of the *Bruton* rule more generally, it is clear that petitioner's approach lacks meaningful grounding in the historical scope of the Confrontation Clause. That is all the more reason to reject it.

***3. Petitioner's approach would introduce the negative "practical effects" that the Court avoided in* Richardson *and* Gray**

Petitioner's proposal is also unsound as a practical matter. This Court's *Bruton* precedents are relevant not only for their holdings—which alone resolve the question presented—but also for their requirement that any reconsideration of *Bruton*'s scope be attentive

to the "practical effects which application of the *Bruton* exception" to a particular class of confessions "would produce." *Richardson*, 481 U.S. at 208; see *Gray*, 523 U.S. at 196-197. Petitioner's multi-factor approach for determining whether a modified confession impermissibly inculpates a defendant in "the broader context of the trial" (Br. 4) would give rise to the same real-world difficulties that this Court was unwilling to accept in *Richardson*. That overbroad standard is unpredictable and effectively invites severance in most cases where one defendant confesses, thereby "impair[ing] both the efficiency and the fairness of the criminal justice system." *Richardson*, 481 U.S. at 210. Given that "calculus," the *Bruton* exception should not be redefined to encompass petitioner's proposed test. *Id.* at 211.

a. As discussed, petitioner would have the Court extend *Bruton* to prohibit the admission—even with a limiting instruction—of co-defendant confessions when the jury is deemed "likely to ascertain," based on "surrounding context," that the statement was modified to remove a reference to the defendant. Br. 32. And petitioner would hinge that contextual analysis on a multitude of factors that, in his view, "can" create a *Bruton* problem, either together or in isolation—such as the number of defendants on trial, the opening and closing statements, the questioning immediately preceding or following the confession's introduction, and other evidence at trial. Br. 34-37.

This Court has recognized, however, that such a "contextual implication" approach would make it impossible "to predict the admissibility of a confession in advance of trial" and would "obviously lend[] itself to manipulation by the defense." *Richardson*, 481 U.S. at

209. Petitioner thus preemptively offers a caveat to his own test. He suggests that the Court "may wish to limit" the relevant context "to those aspects of the case that are either knowable in advance of trial or within the prosecution's control." Br. 32. But that suggestion itself lacks logical foundation or internal coherence. It would inexplicably allow the admission of confessions that are incriminating when linked to evidence, argument, or questioning proffered by any defendant (not just the complaining defendant)—even if they enable the same inferences on which petitioner seeks to rely here. See Br. 42-44.

In any event, even that gerrymandered qualification will not "avoid[] the practical problems identified in *Richardson*." Pet. Br. 32-33. With or without it, petitioner's approach would still require a trial court conducting the *Bruton* inquiry to account for much of the evidence at trial, as well as features of the proceeding that a reviewing court might later deem "knowable" in hindsight. The risk of triggering a *Bruton* violation and mistrial based on any of petitioner's contextual factors would also inevitably lead to pretrial proceedings in which the prosecution—but not the defense—would have to preview its case in detail for the other side, preclearing everything from opening and closing statements, to the prosecutor's questions, to the order of witnesses.

Such proceedings "would be time consuming and obviously far from foolproof," *Richardson*, 481 U.S. at 209, and would lead to unpredictable results and inconsistent outcomes in similar cases. And because petitioner maintains that his rule is required by the Constitution, he would impose the burdens of his approach not only on the federal system, but also upon the crim-

inal courts of all 50 States. He does not, and cannot, justify such a disruptive new rule of criminal procedure. See *Spencer*, 385 U.S. at 563-564.

b. Adoption of petitioner's malleable standard would have the additional effect of causing courts (even if just self-protectively) to classify virtually all co-defendant confessions that reference another defendant as constitutionally problematic. And the "options" that petitioner identifies to cure that problem (Br. 39-41) will be of little utility for prosecutors.

Petitioner suggests (Br. 40-41) that the prosecution can simply decline to introduce the co-defendant's confession altogether. "That price * * * is too high." *Richardson*, 481 U.S. at 210. "Voluntary confessions are not merely a proper element in law enforcement, they are an unmitigated good, essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Maryland* v. *Shatzer*, 559 U.S. 98, 108 (2010) (citations and internal quotation marks omitted).

Petitioner alternatively suggests that prosecutors can "redact the confession to eliminate 'not only the defendant's name, but any reference to his or her existence.'" Br. 40 (quoting *Richardson*, 481 U.S. at 211). He correctly recognizes, however, that such an approach will not always be feasible. *Ibid.* As discussed above, this is a case in point. See p. 28, *supra*. Many other cases will likewise involve scenarios in which the presence and actions of someone else are necessary to preserve essential aspects of the co-defendant's confession. See *Gray*, 523 U.S. at 203 (Scalia, J., dissenting) (pointing out that "[f]or inchoate offenses—conspiracy in particular—redaction to delete all reference to a confederate would often ren-

der the confession nonsensical"). Excessive redactions can also unfairly prejudice the confessing defendant by falsely portraying him as solely responsible for the crime or by rendering the confession inconsistent with other defense evidence. See, *e.g.*, *Ex parte Sneed*, 783 So. 2d 863, 865, 868-871 (Ala. 2000) (per curiam), cert. denied, 531 U.S. 1183 (2001).

Petitioner's true solution to the problem he would create thus appears to be, in most instances, that the prosecution forgo a joint trial and try the confessing defendant individually. Br. 40-41; cf. NAFD Br. 22 (arguing that fewer joint trials is "a feature, not a bug"). But *Richardson* found that option unacceptable as well—and with good reason. "Joint trials play a vital role in the criminal justice system." *Richardson*, 481 U.S. at 209. They are "not only permissible," they are "often preferable when the joined defendants' criminal conduct arises out of a single chain of events." *Carr*, 577 U.S. at 125; see *Zafiro* v. *United States*, 506 U.S. 534, 537 (1993) (noting the "preference in the federal system for joint trials of defendants who are indicted together").

That is in part for reasons of efficiency, see Pet. Br. 38, but not efficiencies with which the judicial system could readily dispense. Joint trials conserve public resources and spare victims and witnesses the hardship of repeated individual trials. Without joint trials, prosecutors would have to "bring separate proceedings, presenting the same evidence again and again, [and] requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying." *Richardson*, 481 U.S. at 210. Trying defendants involved in the same scheme seriatim also "randomly favor[s] the last-tried defendants who have the ad-

vantage of knowing the prosecution's case beforehand." *Ibid.* And it risks the "scandal and inequity of inconsistent verdicts." *Ibid.*

In contrast, "[j]oint trials generally serve the interests of justice" by "enabling more accurate assessment of relative culpability." *Richardson*, 481 U.S. at 210; see *Buchanan* v. *Kentucky*, 483 U.S. 402, 418 (1987) (observing that joint trials enable a jury "to arrive more reliably at its conclusions regarding the guilt or innocence of a particular defendant"). This case provides no greater reason than *Richardson* or *Gray* to discourage joint trials in service of an illogical and impractical expansion of the *Bruton* exception. Cf. *Gray*, 523 U.S. at 197 (emphasizing that its prohibition on obvious redactions would not "unnecessarily lead prosecutors to abandon the confession or joint trial").

4. Petitioner identifies no meaningful policy justifications for his proposed expansion of Bruton

Petitioner's additional efforts to supply a policy justification for his expansion of the *Bruton* exception lack merit.

a. Petitioner errs in contending (Br. 33-34) that adhering to *Bruton*'s existing limits "invite[s] prosecutorial abuse" because it gives the prosecutor "free rein to attempt to link the nonconfessing defendant to the unnamed accomplice in the confession." Regardless of the *Bruton* exception's scope, prosecutors are forbidden from attempting "to undo the effect of [a] limiting instruction" by "urging the jury" to use a confession for an improper purpose. *Richardson*, 481 U.S. at 211. Indeed, *Richardson* itself found error on that precise alternative basis. See *ibid.*

To the extent that petitioner is arguing that such an attempt happened here, see Pet. Br. 8-9, 12, 43, he

never raised that objection in the trial court, and he had no foundation to do so because the prosecutor's arguments did not urge the jury to use Stillwell's confession against petitioner. Petitioner notes that in the opening and closing arguments, the prosecutor characterized the evidence as showing that petitioner "turned around" and "shot" Lee. Br. 43 (quoting J.A. 52 and 196). But evidence wholly independent of Stillwell's confession showed that petitioner sat in the passenger seat, Lee was in the backseat, and petitioner "turned around" to shoot Lee. See J.A. 152 (fellow mercenary Vamvakias testifying that "Adam [*i.e.*, petitioner] continued into the van—in the passenger seat while his friend was driving and at some point he just turned around while they were driving and shot Catherine Lee who was sitting in the backseat with a .22 automatic pistol with a silencer"); see also J.A. 228-229 (Hunter telling mercenary recruits during the recorded conversation that he instructed Lee's killers to "[t]urn around and shoot her" in the car while driving).

Petitioner also objects to the prosecutor telling the jury, during the opening, that "some of the most crucial testimony you'll hear will be the * * * firsthand accounts of what happened," and then mentioning Stillwell's confession in the same paragraph. J.A. 58; see Br. 9, 43.[2] But the prosecutor's brief reference to Stillwell's confession was highly probative of Stillwell's own guilt, did not mention petitioner by name, and was

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[2] Petitioner's statement could be read to suggest that, in the opening argument, the prosecutor referred to Stillwell's confession right after explaining how petitioner "turned around * * * and shot [Lee]." Br. 8-9. But those two sentences were separated by many paragraphs and transcript pages. See J.A. 52, 58.

subject to the court's twice-delivered limiting instruction that Stillwell's statement be considered only against Stillwell himself. Moreover, as petitioner acknowledges (Br. 12), the prosecutor's closing argument expressly reminded the jury that Stillwell's statement could not be considered against petitioner and Hunter. J.A. 199. The prosecution was not required to deliver that admonishment *every* time the statement was mentioned.

b. Petitioner's argument that the prosecution obtains a "windfall," or that a defendant experiences "unfair[ness]," unless the *Bruton* exception is expanded to account for the "broader context of trial" (Br. 31, 38) simply begs the question in this case. The premise of the argument—that the prosecution would enjoy the advantage of evidence that would be inadmissible in a severed trial—is at odds with the "almost invariable presumption" that juries follow their instructions. *Richardson*, 481 U.S. at 206; see pp. 14-16, *supra*. The question is whether that presumption has been overcome, see p. 30, *supra*, and petitioner's "unfairness" argument provides no independent answer.

The argument also proves far too much. Overaccommodating that concern, to the detriment of countervailing considerations, would imply that *no* confession of a nontestifying co-defendant could ever be admitted in a joint trial—contrary to what this Court has held. See *Richardson*, 481 U.S. at 208 & n.3, 211; *Gray*, 523 U.S. at 196-197. As the Court has observed, "all joint trials, whether of several codefendants or of one defendant charged with multiple offenses, furnish inherent opportunities for unfairness when evidence submitted as to one crime (on which there may be an acquittal) may influence the jury as to a totally differ-

ent charge." *Spencer*, 385 U.S. at 562. But joint trials have long been permissible—and, indeed, recognized as playing a critical role in the fair and efficient administration of justice. See *United States* v. *Marchant*, 25 U.S. (12 Wheat.) 480, 482-483, 485 (1827) (Story, J.); see also *Zafiro*, 506 U.S. at 538-539 (noting that "[Federal Rule of Criminal Procedure] 14 does not require severance even if prejudice is shown"); *Carr*, 577 U.S. at 124-125; pp. 39-40, *supra*.

Trial judges have the ability to sever in appropriate cases, even if not constitutionally compelled to do so. See Fed. R. Crim. P. 14(a); see also *Zafiro*, 506 U.S. at 539. Judges also have the ability to mitigate potential imbalances through less disruptive measures. If the probative value of a confession, or a portion of a confession, is substantially outweighed by the danger of unfair prejudice to another defendant, a district court has discretion to exclude the evidence under Federal Rule of Evidence 403. And should such tools, combined with the *Bruton* guardrails previously established in this Court's decisions, prove inadequate in a substantial number of cases, the situation can be addressed through a state or federal rule of evidence, where the competing imperatives can be weighed to reach a workable compromise for all parties.

But a judicially imposed sea change in criminal procedure, in every courtroom in the country, is no more justified now than it has been in the past—when the Court has rejected it. An approach that denies the ameliorating effects of a limiting instruction is not, and should not be, the law.

C. Petitioner's Convictions Should Stand In Any Event

Even if this Court were to extend *Bruton* and hold that the admission of Stillwell's modified confession

violated petitioner's confrontation right, petitioner would still not be entitled to relief because any violation was harmless beyond a reasonable doubt. See *Harrington* v. *California*, 395 U.S. 250, 252-254 (1969) (applying prejudice standard in *Chapman* v. *California*, 386 U.S. 18 (1967), to uphold verdict notwithstanding *Bruton* error).

Although the Court may leave the prejudice inquiry for the court of appeals to conduct in the first instance, this Court "plainly ha[s] the authority" to assess harmlessness itself. *United States* v. *Hasting*, 461 U.S. 499, 510 (1983). The Court has exercised that authority in the *Bruton* context before. See *Harrington*, 395 U.S. at 254; *Brown* v. *United States*, 411 U.S. 223, 230-232 (1973); *Schneble* v. *Florida*, 405 U.S. 427, 430-432 (1972). And given that petitioner points the Court toward the other evidence in his case as a reason for expanding *Bruton*, the Court would be well-positioned to conduct the harmlessness inquiry if it were to adopt his proposal.

With or without any violation of the district court's instruction to consider Stillwell's statement only against Stillwell, the trial evidence definitively established petitioner's guilt, and the outcome would have been the same. Two witnesses—LeRoux and Vamvakias—testified that Hunter told them that petitioner and his partner carried out Lee's murder by posing as real-estate buyers, that petitioner shot Lee with a .22-caliber pistol while traveling in a van, and that the team "dumped" Lee's body, with LeRoux specifying that the body was left by a pile of garbage. J.A. 106-111, 120-129, 136, 151-153. Those witnesses' testimony was corroborated by, among other things, Hunter's description of the killing during the secretly

recorded Thailand meeting, J.A. 228-229; the location where Lee's body was in fact found, J.A. 68; Lee's autopsy, J.A. 70-72; the photographs of Lee's businesses on petitioner's camera, C.A. Supp. App. 279; and the discovery, at petitioner's residence, of the key to the van in which Lee was murdered, J.A. 155-157.

The evidence also showed that, in the three weeks following the murder, petitioner transferred a total of $32,000 from the Philippines to the United States. J.A. 238-239. On the day after Lee's body was found, petitioner sent a Facebook message to a friend remarking that it is "much easier to put down a person than a dog!!" J.A. 234-235. A laptop later found in petitioner's residence had been used that same day to search the Internet for news stories from the capital of the province where Lee's body had been dumped. C.A. Supp. App. 252, 257, 261-262. And petitioner repeatedly attempted to wipe data from that laptop, including a few days after he learned from a fellow mercenary that LeRoux had been cooperating with the government. *Id.* at 168, 274; see J.A. 193, 205-206.

The prosecution also introduced numerous e-mails that corroborated LeRoux's and Vamvakias's mutually reinforcing testimony and Hunter's recorded description. For example, Hunter told petitioner that "Boss" wanted him and Stillwell to "come here together for Ninja stuff," and warned petitioner that he "will be paid to do a job with a result. The key word is result." J.A. 231-233; see J.A. 94-101. Less than three weeks before the murder, Hunter notified LeRoux that petitioner and Stillwell would be owed $35,000 apiece "upon Mission Success." J.A. 236; see J.A. 120-121, 124-125. Two days after the murder, petitioner sent Hunter an "expense report" seeking reimbursement

for "tools," which the evidence showed was a reference to guns. C.A. Supp. App. 114-119 (capitalization omitted); see C.A. App. 590; J.A. 122. And a few months afterward, in the midst of a dispute about another assignment, Hunter complained that petitioner had "do[ne] one sloppy job, which could have endangered everyone, and left." C.A. App. 595; see *id.* at 594-595; see also J.A. 228 (Hunter describing Lee's murder as "sloppy").[3]

In comparison to all of that evidence, petitioner's own excuse for traveling to the Philippines at Hunter's behest—training locals in martial arts, see p. 8, *supra*—would not have been credited by the jury. And he errs in relying (Br. 7, 11-12) on the non-admitted hearsay testimony of witnesses in the Philippines who helped to prepare composite sketches and reviewed photo arrays. The district court excluded that evidence as unreliable for multiple reasons—including the three-year gap between Lee's murder and the photo array, the fact that the witnesses saw the suspects when their features were purposefully concealed, and Hunter's mockery of the sketches' inaccuracy on the secret recording. C.A. App. 423-426, 433; C.A. Supp. App. 405-410. The court of appeals affirmed that evidentiary decision, Pet. App. 8a-10a, and petitioner does not challenge it here.

Thus, even if the jury had disregarded the district court's repeated instructions not to consider Stillwell's statement as evidence against petitioner, the statement would have been "merely cumulative of other overwhelming and largely uncontroverted evidence

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[3] Petitioner left the Philippines in March 2012, shortly after Lee's murder. J.A. 239.

properly before the jury." *Brown*, 411 U.S. at 231; see *Schneble*, 405 U.S. at 431. Petitioner's convictions should therefore be affirmed, irrespective of the statement's admissibility. At most, the Court should vacate the judgment and remand for the court of appeals to conduct the harmlessness analysis in the first instance.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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