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

REPLY BRIEF FOR THE PETITIONER

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In *Bruton* v. *United States*, 391 U.S. 123 (1968), this Court established that the Confrontation Clause prohibits the use in a joint criminal trial of a confession from one defendant that identifies another defendant as an accomplice, even in the face of a limiting instruction. The Court has since made clear that the *Bruton* rule applies to a confession that has been redacted to avoid naming the other defendant, where the jury is likely to infer, despite the redaction, that the confession implicated him as the accomplice. And because jurors do not consider confessions in isolation from the broader context of trial, a court should consider that context when assessing whether a redacted confession is admissible. Applied here, that approach required the exclusion of Carl David Stillwell's confession from petitioner's joint trial.

The government attacks the foregoing approach to the *Bruton* rule, but its real beef is with *Bruton* itself. The government attempts to marshal a few pieces of historical evidence against petitioner's approach, but that evidence—almost all of which postdates the Founding—goes not to whether courts should consider context when applying the *Bruton* rule, but to whether *Bruton* was correctly decided in the first instance. That is so much posturing, because the Solicitor General cannot bring herself to ask the Court to overrule *Bruton*.

Instead, the government arbitrarily seeks to limit *Bruton* and *Gray* v. *Maryland*, 523 U.S. 185 (1998), to their facts. But that too is a blundering assault on *Bruton*, because the government's approach would permit the use of a redacted confession that readily allows the jury to discern that the confessing defendant identified the nonconfessing defendant as an accomplice. In the words of Judge Easterbrook, that approach would "undo *Bruton* in practical effect." *United States* v. *Hoover*, 246 F.3d 1054, 1059 (7th Cir. 2001). There is no principled basis for distinguishing between a redacted confession that uses a blank space, on the one hand, and one that uses a placeholder, on the other.

The government repeats (and repeats) that petitioner's approach constitutes a novel "expansion" of the *Bruton* rule. Of course, if one looks only to the *outcomes* of this Court's previous *Bruton* decisions, that is correct—or else there would be nothing for the Court to do here. But the *reasoning* of those decisions tells a very different story. Consistent with that reasoning, a majority of the federal courts of appeals to have addressed the question, and many state courts, have adopted a contextual approach to the *Bruton* rule. And the government identifies no case—not one—raising administrability concerns with that approach. As former judges, prosecutors,

and defense attorneys have explained in the many amicus briefs supporting petitioner, there is no reason to think that the contextual approach either has created or will create any problems for the administration of criminal justice, especially because the government always has the option of separate trials.

Tellingly, when it comes to defending the conduct of the prosecutors in this case, the government has almost nothing to say. Taking advantage of the Second Circuit's government-friendly rule, those prosecutors exploited Stillwell's confession to the hilt: they described it as some of the "most crucial testimony" in the case and introduced evidence that directly linked petitioner as the unnamed accomplice in the confession. Under those circumstances, it was likely—indeed, nearly certain—that the jury would infer that the confession implicated petitioner. That is precisely the inference that renders a limiting instruction ineffective and gives rise to a Confrontation Clause violation; the government does not dispute that the jury likely drew it here. And in a case where there was no eyewitness testimony or physical evidence of petitioner's guilt, the government cannot possibly show that the resulting violation was harmless beyond a reasonable doubt.

If *Bruton* is to mean anything, petitioner is entitled to a new trial without the admission of Stillwell's unconfronted confession. The judgment below should be vacated.

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

The government begins by arguing that courts ordinarily presume that a jury will follow limiting instructions (Br. 14-16) and that, before *Bruton*, courts admitted confessions like the one at issue here (Br. 16-19). Those ar-

guments, however, apply equally to unredacted confessions that expressly name another defendant as an accomplice—the very type of confession at issue in *Bruton* itself. The government does not ask the Court to revisit *Bruton*, and its arguments are unpersuasive in any event.

1. The government first insinuates (Br. 14-16) that there is an unsustainable tension between *Bruton* and the presumption that a jury will follow limiting instructions. But the Court considered and rejected that argument in *Bruton*. As the Court explained, "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." 391 U.S. at 135; see *United States* v. *Bozza*, 365 F.2d 206, 215 (2d Cir. 1966) (Friendly, J.). Courts have now applied *Bruton* for over fifty years, and there is no reason to think that a decision in petitioner's favor here on the exact scope of the *Bruton* rule will somehow spell the demise of the presumption.

2. As for the government's unlabeled argument that *Bruton* is inconsistent with historical practice (Br. 16-19), it suffers from several obvious flaws.

a. The government cites no evidence that *Bruton* and its progeny are inconsistent with the original meaning of the Confrontation Clause. The text of the clause "admit[s] only those exceptions established at the time of the [F]ounding." *Crawford* v. *Washington*, 541 U.S. 36, 54 (2004). But the government's only pre-Founding authority says nothing about the question in *Bruton*; it states only the broad (and uncontroverted) principle that "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 604 (7th ed. 1787) (footnotes omitted); see, *e.g.*, *Tong's Case*, Kel. J. 17, 18, 84 Eng. Rep. 1061, 1062 (1662). The government's earliest post-Founding American authority is a treatise from 1842—more than half a century after the ratification of the Sixth Amendment. See Br. 17.

b. At most, the government's post-ratification evidence reveals a lack of early consensus on the questions presented in *Bruton* and its progeny. The 1816 English treatise on which the government prominently relies explained that "the whole of what the prisoner said must be fully stated" in the case of an oral confession, even if "it may happen, that some part of it concerns other prisoners who are tried on the same indictment." Samuel March Phillipps, *A Treatise on the Law of Evidence* 82 (1st American ed. 1816). But the same treatise explained that a confession "reduced into writing" might be excerpted "if that part which relates to the other prisoners is capable of being separated and detached from the rest, and can be omitted without affecting in any degree the prisoner's narrative against himself." *Ibid.* By 1829, the same treatise observed that written confessions were "commonly" not read in full. Samuel March Phillipps, *A Treatise on the Law of Evidence* 116 (7th London ed. 1829).

The rule remained unsettled throughout the nineteenth century, both in the United States and in England. A digest cited by the government (Br. 18 n.1) observed that at least some "doubt arises as to the propriety" of allowing "a confession by one prisoner" that "implicates the other prisoners by name." David Power & Henry Roscoe, *Roscoe's Digest of the Law of Evidence in Criminal Cases* 52 (4th ed. 1857). Other treatises cited by the government (Br. 17, 19, 33, 34) catalogued conflicting decisions. See 3 John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* § 2100, at 2841 n.5

(1904); 1 Simon Greenleaf, *A Treatise on the Law of Evidence* § 218, at 254 n.1 (1842). And throughout the nineteenth century, courts frequently severed trials in cases involving codefendant confessions. See NYCDL Br. 21-22.

The later cases from this Court (and state courts) cited by the government (Br. 18-19) are similarly inconclusive. It is unclear whether the confessing defendants testified in *Sparf* v. *United States*, 156 U.S. 51 (1895), or *United States* v. *Ball*, 163 U.S. 662 (1896). Either way, the Court did not discuss the constitutional right to confront witnesses, as opposed to the admissibility of the confessions under evidentiary rules. And of course, the Court did not definitively resolve the constitutionality of codefendant confessions until *Bruton*.

c. If the government's historical evidence proves anything, it proves too much. The authorities that arguably support its position would permit even a confession that accuses a defendant by name. But the government does not have the courage to urge that *Bruton* be overruled.

In fact, as petitioner has explained, the historical evidence supplies no clear answer on the admissibility of codefendant confessions with limiting instructions. The government agrees that jury instructions as we know them today did not exist at the time of the Founding, see Br. 34, and codefendants routinely spoke at trial during that period because defense counsel "appeared only in a minority of cases," J.M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 L. & Hist. Rev. 221, 236 (1991); see *id.* at 227 tbl.1. In all events, this Court has already settled the meaning of the Confrontation Clause in the context of codefendant confessions more generally; for present purposes, the key point is that the

historical evidence has nothing to say about the specific question presented here.

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

Together with *Bruton*, this Court's decisions in *Richardson* v. *Marsh*, 481 U.S. 200 (1987), and *Gray*, *supra*, establish the rule that a codefendant's redacted confession is inadmissible in a joint trial where the jury is likely to infer that the confessing defendant identified the nonconfessing defendant as an accomplice. That rule reflects the common-sense notion that, when a jury draws an inference that a confession accuses a nonconfessing defendant, the confession will become "powerfully incriminating" and thus create a "great risk" that the jury "will not, or cannot, follow instructions" limiting the use of the confession. *Bruton*, 391 U.S. at 135.

The government rejects that approach in favor of a formalistic distinction. In the government's view, the *Bruton* rule applies only where a codefendant's confession "expressly names the defendant" or is "otherwise directly accusatory." Br. 30 (internal quotation marks, citations, and emphasis omitted). But the government proceeds to limit the category of "directly accusatory" confessions to those that use nicknames or unique physical descriptions or that have been redacted using blank spaces or symbols. See Br. 30-32. The government would thus draw an arbitrary line around the types of confessions disapproved of in *Bruton* and *Gray* and decline to apply the *Bruton* rule to confessions redacted using placeholders—even where, as here, it is overwhelmingly likely that such a confession directly inculpates the nonconfessing defendant. The government's rule is incoherent, and it rests on a misreading of the Court's precedents.

1. The government contends (Br. 27) that confessions redacted using placeholders do not violate the Confrontation Clause, because any inference required to connect a placeholder to a nonconfessing defendant is insufficiently "vivid" to lead a jury to ignore a limiting instruction.

That argument blinks reality. There are many situations in which the identity of the unnamed accomplice would be so obvious to the jury that the use of a placeholder such as "another person" would not protect the nonconfessing defendant. Indeed, this is precisely such a case. Here, the inference that the confessing defendant identified petitioner as his accomplice was likely; indeed, it was "virtually inescapable." U.S. Br. 31. The prosecution functionally identified petitioner as the unnamed accomplice by first eliciting Stillwell's detailed statements that he had met up in the Philippines and lived with the unnamed accomplice (making it obvious he had named the accomplice in his confession), then proceeding to present evidence that Stillwell had met up in the Philippines and lived with petitioner. It would be arbitrary to shield such a directly accusatory confession from the *Bruton* rule merely because it does not take the same form as the confessions disapproved of in *Bruton* and *Gray*. See Law Professors Br. 5.

The government argues (Br. 31) that confessions redacted using placeholders are different because they accuse only "indirectly" based on inferences about the unnamed accomplice's identity. But a confession using a placeholder, no less than a confession using a nickname or a blank space, is directly accusatory of *someone*. And in any of those cases, the inference that the unnamed accomplice is the nonconfessing defendant may be more or less strong: take the example of a confession redacted using a blank space or a symbol, but where the unnamed accom-

plice could be any one of multiple defendants (or a cooperating witness or undercover officer whose identity is being protected). As the government admits, even the jury in *Gray* "had to draw an 'inference'" from facts outside the confession to recognize that it was "the [nonconfessing defendant's] name [that] had been taken out." Br. 31.

When a confession does not expressly name the defendant, a jury will always have to look beyond the four corners of the confession *to some extent* to identify the defendant as the unnamed accomplice. The government seemingly suggests that a confession using a placeholder is different because the jury would have to assess the "trial evidence" to determine whether the defendant was the unnamed accomplice. Br. 31; see Br. 27 (suggesting that *Richardson* drew an "intrinsic/extrinsic line"). But even if that may not have been true in *Gray* itself, a jury will often have to rely on trial evidence to link a nickname or unique description to a nonconfessing defendant; indeed, whether a nickname applies to a particular defendant may be disputed (as it was in this case). See Law Professors Br. 6-7.

Conversely, in many cases involving confessions using placeholders, trial evidence is unnecessary for the jury to infer the identity of the unnamed accomplice. When the inference is obvious based on the number of defendants on trial, the line of questioning introducing the confession, or the prosecution's arguments, a jury can make the connection between the nonconfessing defendant and the placeholder "immediately"—even if the confession is the first item introduced at trial. See *Gray*, 523 U.S. at 196.

In short, like confessions redacted using blank spaces or symbols, confessions redacted using placeholders can give rise to the same "overwhelming probability" of prejudice that justifies the *Bruton* rule. That is why, contrary

to the government's suggestion (Br. 42-43), the prosecution would obtain an unfair windfall under a categorical rule permitting the use of placeholders: by proceeding with a joint trial, the government could benefit from the very prejudice the *Bruton* rule seeks to prevent, as it did here. The government offers no logical rationale for its position that confessions using placeholders should be treated differently from confessions using blank spaces; indeed, in *Gray*, the government took the position that the two types of confessions were indistinguishable for Confrontation Clause purposes. See Oral Arg. Tr. at 46, *Gray*, *supra* (No. 96-8653) (statement of Mr. McLeese).

2. The flaws in the government's approach flow from its misreading of *Richardson* and *Gray*.

As to *Richardson*: the government derives its proposed rule from the Court's statement in *Richardson* that, where "linkage" by "inference" between the confession and other trial evidence is necessary for the confession to become incriminating, "it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence." 481 U.S. at 208; see U.S. Br. 22. But the government simply ignores the context in which that statement was made.

The confession in *Richardson* was redacted to "omit all indication that *anyone* other than [the confessing defendant and a named third party] participated in the crime." 481 U.S. at 203. The confession was thus no longer directly accusatory of an accomplice. Instead, it "merely disclosed a non-accusatory fact" as to the nonconfessing defendant: namely, that her two codefendants planned the crime during a car ride. NACDL Br. 18. While that fact became prejudicial after the nonconfessing defendant took the stand and placed herself in the car described in the confession, the form of prejudice she faced was not that identified in *Bruton*: namely, prejudice

arising from "finger-pointing by a nontestifying co-defendant." U.S. Br. 35.

The government argues that the Court did not "attach critical significance" to the "complete omission" of the nonconfessing defendant in *Richardson*. Br. 29. But as the government concedes a few pages earlier, the Court expressly limited its holding in *Richardson* to cases in which the redaction "eliminate[s] * * * any reference to [the nonconfessing defendant's] existence" altogether. Br. 23-24 (quoting 481 U.S. at 211 & n.5). And in *Gray*, the Court emphasized that the confession in *Richardson* did not "refer[] directly to the 'existence' of the nonconfessing defendant" at all, contrasting that confession with the one before it, which "obviously refer[red] directly to someone." 523 U.S. at 192, 196. The fact that the confession in *Richardson* eliminated any reference to the nonconfessing defendant was thus crucial to the Court's holding.

As to *Gray*: the government asserts (Br. 25, 31) that *Gray* supports its position on the ground that a confession using obvious redactions is "*facially* incrimin[atory]," 523 U.S. at 196 (citation omitted), whereas one using placeholders is not. Ironically, the government made the opposite argument in *Gray* itself. There, the government argued that a confession using obvious redactions is "not facially incriminating" because it becomes incriminating only after the jury "review[s] the confession's descriptions of the conduct of the unidentified person" and then determines whether those descriptions "coincide" with the "other trial evidence." U.S. Br. at 19, 21. Because an inference is required to link an obviously redacted confession to the nonconfessing defendant, the government contended, there is no "'overwhelming probability' that jurors could not follow a limiting instruction" in the context of such confessions. *Id.* at 21.

In *Gray*, the Court determined that the redacted confession was "*facially* incriminat[ing]" because the confession "obviously refer[red] directly to someone, often obviously the defendant." 523 U.S. at 196 (citation omitted). Thus, when the Court said that "*Richardson* must depend in significant part upon the *kind* of, not the simple *fact* of, inference," *ibid.*, it was saying that the *Bruton* rule applies only when *a directly accusatory statement in the confession* allows the jury to infer that the confessing defendant identified the nonconfessing defendant as an accomplice. The inference at issue here is no different in kind from the inference in *Gray*. Again, the redacted confession facially incriminates *someone*; the only question is how readily the jury can determine who that someone is. Accordingly, if *Richardson* and *Gray* "alone resolve the question presented," U.S. Br. 35, they resolve it in petitioner's favor.

3. Most ambitiously, the government argues (Br. 31-32) that, in *Gray*, the Court "endorsed" the use of placeholders. That is a gross overreading of *Gray*. In the relevant portion of the opinion, the Court noted that it had expressed concern in *Richardson* that redaction of some confessions would "not [be] possible." *Gray*, 523 U.S. at 196 (quoting *Richardson*, 481 U.S. at 209). The Court responded to that concern by noting that the redacted confession before it—"Me, deleted, deleted, and a few other guys"—could easily be redacted further to read, "Me and a few other guys." *Ibid.* In so doing, however, the Court was merely noting that further redaction was feasible; it was not categorically stating that the use of placeholders would always comply with the Confrontation Clause.

To be sure, the use of placeholders *can* be constitutionally permissible, depending on the context. For example, where there are a large number of defendants on trial, the jury may be unlikely to infer that a reference to a "few

other guys" participating in a crime incriminates any or all of those defendants. But in other contexts—such as here, where the "other person" could plausibly only have been petitioner—the jury may be likely to infer the identity of an unnamed accomplice despite the use of a placeholder.

The government contends that, if the use of placeholders is impermissible, a confession that *actually* used a placeholder "would logically have to be excluded." Br. 32 (emphasis omitted). That does not follow. When a confessing defendant actually describes an accomplice using a phrase such as "another person," the interviewing agent will inevitably ask the confessing defendant to identify that individual. And if the confessing defendant either refuses to or cannot answer, then his answer will become part of his confession and can be introduced at trial. And the fact that the confessing defendant did not identify the accomplice will dispel the inference that *Bruton* deemed problematic and thus mitigate any Confrontation Clause concern.

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

Because a jury does not consider a confession in isolation, a court should consider the broader context of trial—or at least those aspects that are knowable in advance of trial or are within the prosecution's control—when considering the prosecution's use of a codefendant's redacted confession with a limiting instruction. In *Richardson*, the government acknowledged that it would not be "possible to take the position that the confession alone has to provide all the clues." Oral Arg. Tr. at 28, *Richardson*, *supra* (No. 85-1433) (statement of Mr. Robbins). Today, however, the government argues (Br. 35-43) that the Court

should require lower courts to blind themselves to context, even if doing so results in the admission of a confession that obviously inculpates a nonconfessing defendant. The government offers no valid justification for its rigidly formalistic approach.

1. The government repeatedly incants that the consideration of the broader context of trial would constitute an "expansion" of the *Bruton* rule and result in a "judicially imposed sea change in criminal procedure." Br. 40, 43; see Br. 10, 29, 32, 34, 38, 42, 44. But as discussed above, that approach follows from the reasoning of this Court's precedents. And a majority of the federal courts of appeals to have addressed the issue have assessed the inculpatory effect of a redacted confession in light of the surrounding context. See Pet. 13-21. It would thus hardly work a "sea change" for the Court to adopt that approach.

The government also derides petitioner's approach as "gerrymandered," because petitioner proposes limiting the consideration of context to those aspects of the case knowable in advance of trial or within the prosecution's control. See U.S. Br. 37. That is ironic coming from the government, which seeks to draw an unprincipled line around the outcomes of this Court's existing precedents. But petitioner's proposed limitation flows directly from this Court's cases: one of the factors the Court has deemed "relevant in this area" is the ability to determine the admissibility of a confession "in advance of trial." *Cruz* v. *New York*, 481 U.S. 186, 193 (1987). Such a limitation strikes an appropriate balance between avoiding the practical problems with a broader rule that would make it difficult to determine admissibility before trial, see *Richardson*, 481 U.S. at 209, while preventing the form of prejudice the *Bruton* rule seeks to avoid.

2. Trying another tack, the government contends that consideration of context would lead to protracted pretrial proceedings in which the prosecution would have to "preclear[]" its entire trial presentation. Br. 37. That concern is overblown.

Under a contextual approach, the prosecution need not preview its entire case before trial when litigating a *Bruton* issue. All the government must do is to identify the details from the confession that it plans to elicit, as well as any other evidence in its case in chief that could plausibly link the nonconfessing defendant to the unnamed accomplice in the confession. If the court were to allow the prosecution to use the confession at trial, the prosecution would still be required to avoid creating any improper linkage. If the prosecution came close to the line at trial, defense counsel could object, and the court could address the issue in a sidebar or conference. All the while, the court would retain the authority to guide the proceedings to avoid any violation of the *Bruton* rule.

The government provides no reason to believe that such an approach would create any practical difficulties. Again, a majority of the federal courts of appeals to have addressed the issue—and many state courts—have adopted the contextual approach to the *Bruton* rule. See, *e.g.*, Pet. 13-21; *Davis* v. *State*, 528 S.E.2d 800, 805 (Ga. 2000); *State* v. *Boucher*, 718 A.2d 1092, 1096 (Me. 1998); *Bryant* v. *State*, 565 So. 2d 1298, 1303 (Fla. 1990); see also NAFD Br. 7-17. The government has not identified a single court that has voiced concerns about the administrability of that approach; as in *Gray*, that should be fatal to its argument. See 523 U.S. at 197 (noting that "several [c]ircuits have interpreted *Bruton* similarly for many years" without "any significant practical difficulties"). In addition, courts have ample experience examining the broader context of trial, including the likely trial evidence,

when making in limine determinations about the admissibility of other types of evidence. See Judges & Prosecutors Br. 9; NAFD Br. 17.

3. The contextual approach leaves prosecutors with at least three options if a redacted confession is deemed to violate the *Bruton* rule: further redact the confession to eliminate any reference to any unnamed accomplice; try the confessing defendant separately; or proceed without the confession. The government argues that those options would "be of little utility for prosecutors." Br. 38. But it provides no valid explanation for why that is so.

The government focuses on the benefits joint trials and confessions provide to the criminal-justice system. Of course, the prosecution is never entirely forbidden from using a confession, because it can always do so in an individual trial against the confessing defendant. But more broadly, the government completely ignores the other side of the ledger. Under the government's approach, there would unquestionably be redacted confessions admitted at trial that obviously inculpate nonconfessing defendants. Even if the blanket exclusion of redacted confessions from joint trials is not warranted, the government fails to explain why the benefits of a joint trial should defeat a defendant's confrontation right in such a case.

Contrary to the government's contention, moreover, "[p]etitioner's true solution" here is not for "the prosecution [to] forgo a joint trial" in most circumstances. Br. 39. Some confessions using placeholders will be admissible on their own. And further redaction to omit any reference to the existence of the nonconfessing defendant will resolve many other cases. Only if further redaction is infeasible must the prosecution consider either trying the confessing defendant individually or proceeding without the confession in a joint trial.

The government contends (Br. 28-29) that, in this case, further redaction of Stillwell's confession would have been infeasible. Of course, that would be of no concern in a new trial on remand, because the prosecution could not use the confession. But even in the joint trial that took place below, the government could have redacted the confession further. For example, the government could have limited the agent's testimony to Stillwell's statements that he went to the Philippines, participated in the murder while he was there, and received payment for his role in the murder. See J.A. 74-77. While the government may believe that the additional details in the confession would have been helpful to "establish [other] elements of the charged crimes," Br. 28, it could have relied on other evidence to do so—particularly given that Stillwell did not contest his participation in the murder.

The government speculates that Stillwell might have objected to further redaction on the ground that it would "have given rise to ambiguity about whether Stillwell himself was the one who shot Lee." Br. 28. Even if such an objection had been raised, and even if the district court had rejected further redaction, it would mean only that the government would have needed to try Stillwell individually. And given that Stillwell did not dispute his involvement in the murder and contested only the government's jurisdiction, any separate trial would have not been unduly burdensome.

4. The government suggests (Br. 43) that any Confrontation Clause problem created by a redacted confession could be addressed though severance or exclusion under the rules of evidence. But that is a false hope. Any criminal-defense attorney knows that the standard for severance is an impossibly high one: severance is warranted only if there is a "serious risk" that a joint trial

would "compromise a specific trial right of one of the defendants" or "prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro* v. *United States*, 506 U.S. 534, 539 (1993); see Fed. R. Crim. P. 14. And exclusion of evidence due to "unfair prejudice" requires that the prejudice "substantially outweigh[]" the evidence's probative value. Fed. R. Evid. 403. A confession is obviously highly probative of the confessing defendant's guilt, and the government's position is that a limiting instruction eliminates any prejudice from use of a confession redacted using placeholders. See Br. 30-32. If the Court were to hold as much here as a constitutional matter, it is unclear how a defendant could ever obtain relief though severance or exclusion.

D. The Admission Of The Confession In This Case Violated The Confrontation Clause, And Vacatur Of Petitioner's Convictions Is Warranted

Considered in the broader context of trial, the redacted version of Stillwell's confession allowed the jury easily to infer that Stillwell had identified petitioner as the shooter. This case is the poster child for the easy circumvention of the *Bruton* rule that would result if the Court were to adopt the government's approach. Petitioner's convictions should be vacated and the case remanded for a new trial.

1. The government does not dispute (Br. 26-29) that it is likely—indeed, overwhelmingly so—that the jury inferred that Stillwell named petitioner as his accomplice.

To begin with, it was apparent that Stillwell had named someone in his confession. The government elicited detailed testimony that Stillwell confessed to meeting "somebody else" in the Philippines, living with "the other person," and then traveling with "that other individual" to the site where "the other person" murdered the victim. J.A. 75-76. No rational juror would have failed to notice

that Stillwell repeatedly referred to another person, yet the interviewing agent never asked the logical question of who the other person was. Under those circumstances, any rational juror would have suspected that the confession had been redacted.

The government weakly speculates that the jury could have assumed that Stillwell declined to name his accomplice "out of loyalty, fear, or some other reason." Br. 27. But the jury would still have wondered why the agent did not ask the question. And if Stillwell had been trying to protect his accomplice, he surely would not have named the accomplice as the shooter and given federal agents so many details with which to identify him.

In addition, it was apparent that Stillwell had identified petitioner as his accomplice. Only three defendants were on trial, and the two other than petitioner did not contest their involvement in the crime. From the first minutes of the opening argument, the prosecution linked each defendant with a role in the crime—petitioner as the shooter, Stillwell as the driver, and Joseph Hunter as the boss. J.A. 52-57. Neither Hunter nor Stillwell challenged the government's assignment of roles. And in its opening argument, the prosecution proceeded to call Stillwell's confession some of the "most crucial testimony" in the case. J.A. 58.

The government does not dispute any of this. Instead, it argues the jury might have speculated that a fourth member of the LeRoux organization was the shooter. See Br. 28. That is a most unlikely inference—and not simply because, if Stillwell had been referring to someone else, the jury might "wonder how * * * the prosecut[ion] could argue that the confession was reliable." *Gray*, 525 U.S. at 193. There were only three defendants at trial, and it was uncontested that Hunter was the boss and Still-

well was the driver. Assuming the jury took the government's presentation of the case at face value, that left only petitioner as the potential shooter.

If there were any doubt that the jury likely inferred that Stillwell had identified petitioner as his accomplice, it would be dispelled by the remaining evidence. The prosecution presented evidence that Stillwell and petitioner met in the Philippines and lived together, consistent with Stillwell's account in his confession. J.A. 75, 103-105, 132-133, 135-136. There is thus little doubt that the jury inferred that Stillwell named petitioner as his accomplice.

2. This case well illustrates the potential for prosecutorial abuse if the Court were to adopt the government's approach. It is true that, even under the government's approach, prosecutors will be forbidden from "urging the jury to use a confession for an improper purpose." U.S. Br. 40 (internal quotation marks and citation omitted). But the experienced prosecutors in this case (from the Southern District of New York) walked right up to that line. Again, in its opening argument, the prosecution called Stillwell's confession some of the "most crucial testimony" in the case. At trial, the prosecution elicited details about the unnamed accomplice and then presented evidence linking petitioner with those details. And in its closing argument, the prosecution again drew on Stillwell's confession. J.A. 199.

The most the government can say in defense of the prosecutors is that the prosecution did not "mention petitioner by name" when referring to Stillwell's confession and repeated the court's limiting instruction on one occasion. Br. 41-42. That is all well and good, but the reality is that the prosecution used Stillwell's confession functionally to identify petitioner. Nothing more is required to bring this case within the ambit of the *Bruton* rule.

3. Finally, the government contends (Br. 43-47) that any error was harmless. That contention lacks merit. The government primarily rests its argument on the testimony of two cooperating witnesses—Paul LeRoux and Timothy Vamvakias—with no direct knowledge of the murder. And as for the other evidence on which the government relies, none of it physically ties petitioner to the murder. Especially in a case where there was no eyewitness testimony or physical evidence of petitioner's guilt, "[a]n error in admitting plainly relevant evidence"—here, Stillwell's confession—"which possibly influenced the jury adversely to a litigant cannot * * * be conceived of as harmless" beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18, 23-24 (1967). And it would be ironic to hold harmless the erroneous admission of evidence that the prosecution itself described as some of the "most crucial evidence" in the case. J.A. 58.

At most, the Court should remand for the court of appeals to decide the question of harmlessness. The government raised harmlessness at the certiorari stage, see Br. in Opp. 17, and the Court nevertheless granted review to decide the Confrontation Clause question. Especially because the court of appeals did not pass on harmlessness, it would be appropriate to give it the opportunity to do so in the first instance. See *Neder* v. *United States*, 527 U.S. 1, 25 (1999); U.S. Br. 44.

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

Respectfully submitted.

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