No. 23-____

In the Supreme Court of the United States

VANCE COLLINS, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant's rights under the Confrontation Clause of the Sixth Amendment are violated by the admission of a non-testifying codefendant's out-of-court statement where references to the defendant are either deleted or replaced with neutral pronouns, but the statement still facially incriminates the defendant due to surrounding context.

RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

United States v. Collins, Crim No. 19-395 (May 12, 2021) (judgment)

United States Court of Appeals (2d Cir.):

United States v. Collins, No. 21-1291 (Jan. 19, 2023) (summary order)

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PETITION FOR A WRIT OF CERTIORARI

Vance Collins respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is unreported and was issued on January 19, 2023. App. at A1-A16. The relevant ruling of the district court was decided on August 11, 2020. App. at A17-A18.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 2023. On April 21, 2023, Justice Sotomayor extended the time to file a petition for a writ of certiorari to June 19, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

STATEMENT OF THE CASE

I. Introduction

Petitioner's case involves the unresolved question of whether the Confrontation Clause of the Sixth Amendment is violated by admission of a non-

testifying codefendant's out-of-court statement where references to the defendant are either deleted or replaced with neutral pronouns, but the statement still facially incriminates the defendant due to surrounding context. On December 13, 2022, the Court granted certiorari to address this question in *Samia v. United States*, 143 S. Ct. 542 (2022) (No. 22-196). Petitioner's case reflects the same need for clarity among the circuits in how to assess whether a redacted statement is facially incriminating. The Court should therefore hold this petition pending *Samia*'s resolution, and then grant, vacate, and remand as appropriate based on its opinion.

In *Bruton v. United States*, this Court held that it violates a defendant's rights under the Confrontation Clause of the Sixth Amendment when the incriminating statement of a non-testifying codefendant is admitted at their joint trial, even if the jury is instructed to consider the statement only against the codefendant. 391 U.S. 123, 137 (1968). The Court extended its *Bruton* analysis in two subsequent cases, approving statements redacted to remove all mention of the defendant's existence, while prohibiting redacted statements that still facially incriminate the defendant. *Richardson v. Marsh*, 481 U.S. 200, 211 (1987); *Gray v. Maryland*, 523 U.S. 185, 197 (1998). Following *Richardson* and *Gray*, a conflict emerged in the federal circuits over how best to evaluate whether a redacted statement incriminates a defendant.

Petitioner's Sixth Amendment rights were violated when his non-testifying codefendant's redacted post-arrest statement was admitted during their joint trial. Viewed in context, the redacted statement facially incriminated Petitioner and

created a "substantial risk" the jury used it to assess his guilt. *Bruton*, 391 U.S. at 126.

Petitioner and his codefendant, Ramon Ramirez, were tried jointly for allegedly hiring two people to murder a man having an affair with Mr. Ramirez's wife. Prior to trial, the government moved to introduce redacted portions of Mr. Ramirez's post-arrest statement, which Petitioner opposed. Following a hearing, the district court held the redacted statement admissible pending additional edits. The approved statement either removed Petitioner's name or replaced it with "someone," "guy," or "his." Petitioner maintained his objection. At trial, the government introduced the redacted transcript as an exhibit, and a testifying agent read it into the record. The jury received no limiting instruction to consider the statement only against Mr. Ramirez. Viewed in context with the government's opening and evidence, the redacted statement facially incriminated Petitioner. Further, during closing arguments, the government directly linked Petitioner with the statement multiple times.

The court of appeals affirmed admissibility of the redacted statement. Second Circuit precedent requires courts to consider redacted statements separate and apart from any other evidence, so the court looked only to the statement's use of neutral pronouns before finding it satisfied the Sixth Amendment.

A circuit conflict exists among the courts of appeal over whether to evaluate redacted codefendant confessions using the "four-corners" approach employed by the Second Circuit or to consider the confession's surrounding context. In light of this

conflict, and that Petitioner's case concerns the same question pending in *Samia*, the Court should hold this petition, and then grant, vacate, and remand as appropriate following its decision in *Samia*.

II. Relevant Legal Precedent

The Confrontation Clause of the Sixth Amendment provides that a criminal defendant has the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. Out-of-court testimonial statements, including post-arrest statements, cannot be introduced against a criminal defendant at trial unless the person who made the statement is subjected to cross-examination. *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004).

This Court held in *Bruton v. United States* that a defendant's Confrontation Clause right is violated by admission at trial of a non-testifying codefendant's confession that incriminates the defendant. *Bruton*, 391 U.S. at 137-38. In that case, a postal inspector testified that a codefendant confessed that he and the defendant committed the armed robbery, but the trial judge instructed the jury to consider the confession only against the codefendant. *Id.* at 124-25. Despite the jury instruction, the Court reversed petitioner's conviction, "because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt." *Id.* at 126. A codefendant's incriminating extrajudicial statements are "devastating to the defendant" and "their credibility is inevitably suspect." *Id.* at 136. The Court explained that allowing these statements to be "spread before the jury" is 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 the defendant that the practical and human limitations of the jury system cannot be ignored." *Id.* at 135-36.

Following *Bruton*, the Court held in *Richardson v. Marsh* that the Confrontation Clause permits admission, with a proper limiting instruction, of a non-testifying codefendant's statement that is redacted to eliminate all reference to the defendant's existence. 481 U.S. at 211 (1987). In *Richardson*, the redacted confession described a conversation between the codefendant and a third person, omitting all indication that anyone else participated in the crime. *Id.* at 203. The statement only linked to the defendant when she herself testified at trial. *Id.* at 204. The Court distinguished between the facially incriminating confession in *Bruton*, which explicitly implicated the defendant, and the redacted confession in *Richardson*, which only inferentially incriminated the defendant when linked with other evidence. *Id.* at 208-09. The *Richardson* confession could only incriminate via inference since the redactions eliminated all reference to the defendant's existence. Thus, there was no violation of the Confrontation Clause.

Finally, in *Gray v. Maryland*, the Court held that a redacted codefendant statement falls within the scope of *Bruton* when the redactions are obvious to the jury. 523 U.S. at 195 (1998). In *Gray*, the prosecution redacted the codefendant's statement by replacing the defendant's name with either a blank space or the word "deleted." *Id.* at 188. The Court reasoned a jury will often immediately realize that an obviously altered statement refers to the defendant, and a juror wondering who

the blank refers to "need only lift his eyes to [the defendant] sitting at counsel table to find what will seem the obvious answer." *Id.* at 193. The Court also noted that a juror might wonder how the prosecutor could argue a statement is reliable if it referred to someone other than the defendant. *Id.* Recognizing that these connections require jury inference, the Court distinguished this type of inference from the inferential incrimination in *Richardson*. *Id.* at 195-96. The inferences at issue in *Gray* "involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately." *Id.* at 196. The Court also observed that *Bruton*'s scope extends to redacted statements containing nicknames or physical descriptions of a defendant. *Id.* at 195.

This Court has yet to address whether assessing the facial incrimination of a redacted codefendant statement is limited to the statement itself or whether it should be considered alongside relevant context. This question is currently pending before the Court in *Samia v. United States*, 143 S. Ct. 542 (2022) (No. 22-196).

III. Factual Background

Petitioner is of Jamaican descent and a life-long resident of Bronx, New York. Petitioner practices the Afro-Cuban religion Santería, and through his religious practice met his codefendant, Ramon Ramirez. App. at A136; A159. Petitioner and Mr. Ramirez share the same "godfather" or religious mentor, making them "godbrothers," a meaningful relationship in Santería. App. at A136. In 2017, Mr. Ramirez confided in Petitioner that his wife was having an affair with a man named

Eric Santiago. App. at A135. Petitioner sympathized with Mr. Ramirez and agreed to help either scare or beat up Mr. Santiago. *Id.*

Petitioner was also the religious mentor and friend of cooperating witness, Jakim Mowatt. App. at A160. On October 29, 2018, Mr. Mowatt was arrested pursuant to various warrants for numerous felonies. App. at A147. Mr. Mowatt also confessed to an unrelated August 2018 murder he committed with fellow cooperator, Barry Johnson. App. at A148. Hoping for leniency, Mr. Mowatt informed police about numerous alleged crimes, including that Petitioner and Mr. Ramirez purportedly hired him and Mr. Johnson to murder Mr. Santiago. App. at A149. Mr. Mowatt said he and Mr. Johnson traveled to Queens together to conduct surveillance of Mr. Santiago. App. at A143-A145. During this trip they spoke with Mr. Santiago and asked him for directions but did not harm him in any way. App. at A146. Mr. Johnson was arrested in December 2018 for the August murder and also agreed to cooperate. App. at A161-A162.

Petitioner and Mr. Ramirez were arrested on June 13, 2019, for the alleged murder-for-hire plot. App. at A166. Petitioner and Mr. Ramirez were both charged with conspiracy to commit murder-for-hire and murder-for-hire under 18 U.S.C. § 1958, and Petitioner was charged with illegal firearm possession under 18 U.S.C. § 922(g)(1).[1] App. at A44-A48. The government believed Mr. Mowatt that the

[1] Three firearms were seized during a "protective sweep" of Petitioner's home following his arrest outside where he purportedly requested to go inside for a jacket (Petitioner denies making this request). Two of the firearms were inoperable and being used as part of Petitioner's Santería practice. App. at A167-A168.

original plan to scare or beat up Mr. Santiago eventually shifted to murder, and that Petitioner and Mr. Ramirez hired Mr. Mowatt and Mr. Johnson to kill him.

During a recorded interview following his arrest, Mr. Ramirez answered police questions regarding the alleged plan to harm Mr. Santiago. App. at A72-A90. Mr. Ramirez stated that he told Petitioner about his wife's affair, and that Petitioner said he would "take care of it," offering to beat up Mr. Santiago. App. at A76; A85. Prompted by police questions, Mr. Ramirez confirmed he had given Petitioner Mr. Santiago's photo and address. App. at A77-A78. He expressed frustration Petitioner did not look for Mr. Santiago. App. at A77. Mr. Ramirez also remembered seeing a gun at Petitioner's house and meeting two other men. Again from agent prompting, Mr. Ramirez affirmed that he, Petitioner, and one of the men went to the Jamaican restaurant, Fish N' Tings, and that they picked up the man at his home in Westchester County. App. at A86-A87. Mr. Ramirez described the other man as tall and looking "Puerto Rican," but having a Jamaican accent like Petitioner. App. at A82. Mr. Ramirez also told police that Petitioner asked for money to pay this man to follow Mr. Santiago and beat him up, and that Mr. Ramirez gave Petitioner $2,000. App. at A88-A89.

Prior to trial, the government moved to introduce a redacted transcript of Mr. Ramirez's post arrest statement. App. at A49-A94. The government's proposed redactions either removed Petitioner's name or replaced it with words like "someone," "guy," or "his." App. at A73-A90. Petitioner objected to the redacted statement, arguing it violated his confrontation right under *Bruton* since the

statement clearly implicated Petitioner. App. at A95-A114. Mr. Ramirez also objected to the redactions under Federal Rule of Evidence 106, arguing they distorted Mr. Ramirez's statement and excluded exculpatory information. App. at A181-A182.

The district court held a hearing on August 11, 2020, where both Petitioner and Mr. Ramirez reiterated their objections to the redacted statement. The court ordered the government to make additional changes, including changing "someone" to "a guy" and "in his balcony" to "in front of his house" out of concern Petitioner might be identified through other evidence showing his house. App. at A28-A29. The court ruled orally that the redacted statement now satisfied *Bruton*, citing Second Circuit precedent approving neutral word substitutions and requiring redacted statements be evaluated "standing alone." App. at A33-A36. Petitioner continued his objection. App. at A29. The court issued a written order reiterating its decision to admit the redacted statement. App. at A17-A18.

During opening arguments, the government reported to the jury that Mr. Ramirez told Petitioner about his wife's affair, "and together, they made a plan to take care of the situation." App. at A133. The government also stated that Petitioner approached "a member of [his] gang" and "got him to agree to do the murder" by promising payment. *Id.*

Mr. Mowatt and Mr. Johnson both testified at trial. On direct examination, Mr. Mowatt testified he first met Mr. Ramirez at Petitioner's house in summer 2017 and authenticated a photograph of Petitioner's house. App. at A135. He also

testified that he, Petitioner, and Petitioner's cousin were in front of Petitioner's house when Mr. Ramirez came over and gave Petitioner Mr. Santiago's photograph and address information, which Petitioner then gave to Mr. Mowatt. App. at A137-A138. He described a time when Mr. Ramirez saw a gun at Petitioner's house. App. at A139. He also testified that he, Mr. Ramirez and Petitioner went together to Fish N' Tings restaurant in the Bronx, and that once Mr. Ramirez and Petitioner drove to his house in Yonkers, which is located in Westchester County. App. at A140-A142. Mr. Johnson testified that he never met or spoke with either Petitioner or Mr. Ramirez. App. at A163-A165.

The government introduced Mr. Ramirez's redacted post-arrest statement as Exhibit 601T and asked Supervisory Senior Resident Agent Brendan Kenney ("Agent Kenney") to read it into the record. App. at A169. The prosecutor read the police questions, while Agent Kenney read Mr. Ramirez's responses. *Id.* The relevant portions of the redacted statement are reproduced here:

> **Agent**: So, at what point did you tell someone about the situation that you had?
>
> **Ramirez**: When uh, when I came back from Cuba. Because it was still after all that happened and I mentioned it to a guy and he said "Don't worry about it, I'll take care of it." And that was what I—what was the comment, you know. I didn't tell him to do anything you know, he said he's gonna take care of him you know like scare him to go away from my wife.
>
> ***
>
> **Agent**: But, but you provided him a photo of Ramsey.[2]
>
> **Ramirez**: Yes, it's on the internet.

[2] Eric Santiago testified that he is known by the nickname "Ramsey." App. at A134.

Agent: And, and an envelope with the address on it.

Ramirez: That's what I'm saying, I'm giving the address and the picture to him.

***

Ramirez: Yeah, I gave him the address, but he never went there because like I told you before he's bullshitting.

Agent: Yeah, do you remember, do you remember the guy he introduced you to? That was gonna handle it.

Ramirez: He, uh, I met a couple of guys that was supposed to be his friends. He didn't tell me who was gonna handle it. He told me, "Give me the address and his picture."

***

Agent: What'd they look like?

Ramirez: They look like uh, Puerto Rican or Panamanian but they had the same accents, like the Jamaican accent, like Carribean accent.

Agent: How tall?

Ramirez: They was taller than me like around maybe 5'll".

***

Ramirez: So, I went there one day and he was in front of the house.

Agent: Right.

Ramirez: So, one time I met him there, he was with them drinking.

***

Agent: You see any guns that day?

Ramirez: I seen a gun one day that I went to his house, like I said before he tried to impress me, he bought a gun, I think it was 30 or something like that. And he flip it like that.

Agent: Why did he show you the gun?

Ramirez: Like I said before, you know, they try to impress you because what happen is I'm not in that world—I'm not in that type of people here.

***

Ramirez: When we are in the room, he told me, you know, I told him the story what happened and he said, "That's fucked up-"

Agent: Okay-

Ramirez: "I'm gonna fuck him up," yeah, you know "give him a beat," or something like that.

Agent: Where else did you guys have conversations?

Ramirez: We have in his house, most of the time was in his house.

Agent: You remember the restaurant?

Ramirez: We went to a Jamaican restaurant, yeah we went to a Jamaican restaurant.

Agent: Do you remember what it was called?

Ramirez: I don't remember the name, I know it's in the Bronx, yeah in the Bronx.

Agent: Fish N' Tings?

Ramirez: Fish N' Tings, yeah, Fish N' Tings, yeah.

***

Agent: The other guy that was with you guys when you were at the restaurant — did you ever go to his house?

Ramirez: No. Oh yeah, one time — we went to pick him up in Westchester. I tell you he's from Westchester — we went to pick him up from somewhere in Westchester.

***

Agent: But when did it change that he wanted money?

> **Ramirez**: To be honest, never ask me for money. I was helping him because . . . and he told me at one point—you're right on that one—one time he told me, "I need money so I could give it to this guy money," but he never, he never give me price for to do what he does.
>
> **Agent**: He said, "I need money to give it to the guy who was gonna do it"?
>
> **Ramirez**: He said, yeah, "The guy is supposed to, you know, to follow this guy and beat him" and stuff like that. "I need some money" –so I give him some money . . .
>
> **Agent**: How much — how much did you give him?
>
> **Ramirez**: Two thousand dollars, I think.
>
> App. at A115-A131.

No limiting instruction was provided to the jury that the statement should only be considered against Mr. Ramirez and not Petitioner.

Throughout its closing, the government frequently referred to Mr. Ramirez's redacted statement, discussing its importance and clearly identifying Petitioner as the statement's unnamed "someone." For example, the government stated:

> "Nobody seriously disputes th[at] Ramirez asked for someone to do something to Santiago. Ramirez admits it in his post-arrest. . . .Ramirez had conspired with Collins to hire these two men to commit the murder. So let's now talk about why Ramirez and Collins hired someone to murder Santiago. . . Ramirez himself admits it. Look what he told the FBI after he was arrested. It's Government Exhibit 601T." App. at A170-A171.

And later:

> "In fact, Ramirez admitted all of this. He admitted that after he found out his wife was sleeping with Eric Santiago, he spoke to someone who said: 'Don't worry about it; I'll take care of it.' He said this person was gonna 'fuck up Eric Santiago.' And Ramirez admitted that he gave this person a photo of Santiago. He gave the guy an envelope with Santiago's address on it. He admitted how he got the address. He took it from his wife's pocketbook. And you already know how he got this handwritten address on the back of the bill . . . . Ramon Ramirez admits that he tracked down Santiago's picture and

address so that someone could find Santiago and fuck him up. Everything Mowatt said about all of that was, obviously, true because Ramirez himself admits it. Mowatt was honest with you when he told you that, at first, Ramirez just wanted Santiago to be hurt badly, not killed. . . . It was Collins who gave Mowatt his new marching orders. Collins didn't mince words either." App. at A172-A173.

Then:

"Collins had staged this whole scene just to show Ramirez that Mowatt was up to the job of murdering Santiago. And this is another point that even Ramirez admits is true. . . . Ramirez says they were trying to impress him and show him they're tough because he's not in that world. . . . And Ramirez admits that he told the man about the situation with Santiago . . . . That's the same day Ramirez, Collins and Mowatt all went to eat together at Fish N' Tings." App. at A174-A175.

Next:

"You also heard how angry Collins and Ramirez were getting that all these months were passing and Mowatt still hadn't actually killed Santiago. Look what Ramirez said in his post-arrest statement. . . . You know how angry Ramirez was, because he admitted it himself, saying these guys were bullshitters who couldn't get the job done. You know how angry Collins was because Mowatt told you." App. at A176-A177.

And finally:

"Then there is Ramirez, he was arrested and gave a post-arrest statement that same day. You heard it. We talked about some of it today. Ramirez admitted to almost everything. He admitted he was mad that his wife was sleeping with Eric Santiago. He admitted that he arranged for some guys to hurt Santiago. He admitted to meeting with him multiple times including at Fisn N' Tings. He admitted that he knew those guys had criminal records, knew they were armed, saw them flashing a gun at the same time Ramirez was talking to them about fucking up Santiago. He admitted that he got them Santiago's pictures. He admitted that he used a GPS tracker to find Santiago's address and then got them the address. He admitted that he gave them money. . . . But Ramirez wasn't counting on the fact that you would be hearing from the hitmen themselves. They knew why they had been hired. . . . That's why they were constantly reporting back to Collins, and then Collins to Ramirez, letting them know they were getting close. . . . That's the evidence. . . . You heard how Ramirez was the man who put it all into motion.

> . . . And Collins agreed to recruit an actual hitman to carry out the job." App. at A178-A180.

The jury returned guilty verdicts on all three counts, and the district court sentenced Petitioner to 144 months' imprisonment. App. at A37-A43.

The court of appeals affirmed the judgments of the district court, including the admissibility of Mr. Ramirez's post-arrest statement. App. at A1-A16. The court noted, "[i]n a joint trial, the admission of a non-testifying defendant's confession is prejudicial error in violation of the Confrontation Clause only to the extent that it incriminates a co-defendant." App. at A11. And that "prejudice from such a confession may be avoided by a 'non-obvious redaction' that removes 'any references to the [non-testifying] defendant.'" *Id.* (quoting *United States v. Lyle*, 919 F.3d 716, 733 (2d Cir. 2019)). In determining whether the redacted confession satisfied *Bruton*, the court noted that Second Circuit precedent requires it "view the redacted statement 'separate and apart from any other evidence admitted at trial.'" App. at A12 (quoting *Lyle*, 919 F.3d at 733). The court then held that the redactions to Mr. Ramirez's statement did not violate *Bruton* since they used neutral pronouns. App. at A12-A13.

The court of appeals stated in a footnote that this Court's granting of certiorari in *Samia* could influence Petitioner's case, but that it need not wait to issue its decision as any error was harmless. App. at A13 n.2. The court of appeals did not conduct a harmless error analysis, but instead relied on its previous review of the sufficiency of the evidence. *Id.*

REASONS FOR GRANTING THE WRIT

A circuit conflict exists among the courts of appeal regarding how to assess whether a redacted co-defendant statement facially incriminates a defendant. The First, Third, Seventh, Nineth, Eleventh, and D.C. Circuits hold courts must look beyond the "four corners" of the statement to the context surrounding its admission, while the Second, Fourth, Eighth, and Tenth Circuits hold that statements should be viewed in isolation, apart from any other evidence. Acknowledging the necessity to resolve this conflict, the Court granted certiorari in *Samia v. United States*. Petitioner's case again demonstrates why the Second Circuit's "four corners" approach is erroneous and incompatible with this Court's precedent. The Court should hold this petition pending its decision in *Samia*, then grant, vacate, and remand as appropriate.

I. The Circuit Conflict Over *Bruton* Case Law

The First, Third, Seventh, Nineth, Eleventh and D.C. Circuits require courts to consider both the redacted statement and its surrounding context to determine whether it facially incriminates the defendant.

i. In *United States v. Vega Molina*, the First Circuit observed, "[t]he application of *Bruton*, *Richardson*, and *Gray* to redacted statements that employ phraseology such as 'other individuals' or 'another person' requires careful attention to both text and context, that is, to the text of the statement itself and to the context in which it is proffered." 407 F.3d 511, 520 (1st Cir. 2005); *see also United States v.*

de Leon-De La Rosa, 17 F.4th 175, 194 (1st Cir. 2021) (asserting "[t]he Court made clear in *Gray* that the bare text of the codefendant's confession in isolation does not control the *Bruton* inquiry"). The court held that the redacted statement did not violate *Bruton* because, when taken in context, there was not a "compelling inference" that the statement referred to the defendants given "the distinct possibility that people besides those who were on trial may have been involved." 407 F.3d at 521.

ii. Comparably, the Third Circuit found a *Bruton* violation in *United States v. Richards*, where there were only three participants in the crime, and the redacted codefendant confession replaced the other two defendants' names with the "inside man" and "my friend." 241 F.3d 335, 341 (3d Cir. 2001), *cert. denied*, 533 U.S. 960 (2001). The court found the confession's reference to the codefendant's "friend" "just as blatant and incriminating of [the defendant] as the word 'deleted' in the *Gray* case." *Id.*

Recently, in *United States v. McIntosh*, the court stated it "'take[s] a holistic approach'" with possible *Bruton* violations and must "evaluate whether the testimony as presented to the jury could implicate [the defendant] when considered 'in the context of the entire record.'" No. 18-2696, 2022 WL 212310, at *2 (3d Cir. Jan. 25, 2022) (quoting *Johnson v. Superintendent Fayette SCI*, 949 F.3d 791, 796 (3d Cir. 2020)).

iii. In *United States v. Hoover*, the Seventh Circuit found a *Bruton* error where the government replaced the two defendants' names with "incarcerated

leader" and "unincarcerated leader." 246 F.3d 1054, 1059 (7th Cir. 2001) (noting "[o]nly a person unfit to be a juror could have failed to appreciate that the 'incarcerated leader' and 'unincarcerated leader' were [the defendants]"). The court rejected "the proposition that *Bruton* and *Gray* permit the use of placeholders when their incriminating nature is not apparent to persons unaware of the other evidence offered at trial." *Id.* Instead, the court reasoned that, "[v]ery little evidence is incriminating when viewed in isolation; even most confessions depend for their punch on other evidence," so "[t]o adopt a four-corners rule would be to undo *Bruton* in practical effect." *Id.*

Distinguishing *Hoover*, the court found no violation where the government replaced the defendant's name with "straw buyer" since it "could refer to anyone." *United States v. Green*, 648 F.3d 569, 576 (7th Cir. 2011). The court concluded *Richardson* and *Gray* are satisfied if "the redaction does not 'obviously' refer to the defendant." *Id.* at 575. The court "recognized that such a delicate determination requires case-by-case consideration rather than a brightline rule." *Id.*

iv. Looking again to surrounding context, the Ninth Circuit found no *Bruton* violation where two codefendant confessions were redacted using neutral pronouns like "we," "our," and "they." *United States v. Barrera-Medina*, 139 F. App'x 786, 795 (9th Cir. 2005). The court noted that the testifying detective's testimony and the redacted confessions do not "reference any of the [defendants] by name nor make reference to their existence." *Id.* Instead, since only these two

codefendants confessed, and the redacted confessions were introduced back-to-back, the jury may have believed only those two codefendants were involved. *Id.*

v. Under Eleventh Circuit precedent, "the admission of a co-defendant's statement that contains neutral pronouns does not violate the Confrontation Clause so long as the statement does not compel a direct implication of the defendant's guilt." *United States v. Taylor*, 186 F.3d 1332, 1336 (11th Cir. 1999). Applying the surrounding case facts, the court found no *Bruton* violation where a codefendant's statement was redacted to eliminate the words "we" and "it." *Id.* at 1334-35. The court distinguished *Taylor* from cases where statements with neutral pronouns "could only be understood to refer to the defendants" due to the number of defendants, evidence on the record, or connections made by the prosecutor at closing. *Id.* at 1337. *Taylor* involved "a large conspiracy with many members," trial evidence showed other people were involved, and "the Government did not directly link the neutral pronouns to Scott at any point in its closing argument." *Id.*; *see also United States v. Schwartz*, 541 F.3d 1331, 1351 (11th Cir. 2008) (asserting "a defendant's confrontation right is violated when the court admits a codefendant statement that, in light of the Government's whole case, compels a reasonable person to infer the defendant's guilt").

vi. The District of Columbia Circuit also looks to surrounding context to evaluate redacted codefendant statements. In *United States v. Straker*, the court observed: "The adequacy under the Confrontation Clause of redacting a non-testifying codefendant's statement depends on how effectively the redaction

eliminates the statement's accusatory implication. Evaluations of such effectiveness are necessarily contextual." 800 F.3d 570, 596 (D.C. Cir. 2015). After "[v]iewing the text of the statements as a whole and in the context of the facts and evidence in the case," the court found no Sixth Amendment violation where codefendant statements were redacted to remove references identifying other defendants wherever possible, and names were otherwise replaced with neutral pronouns. *Id.* at 598. The court concluded that because the evidence identified over a dozen men involved with the charged crimes, including the seven on trial, the redacted confessions, accompanied by limiting instructions, "supported no 'inevitable association' between the persons described and any of the alleged co-conspirators standing trial, let alone a particular defendant." *Id.* at 599.

In contrast, the Fourth, Eighth, and Tenth Circuits join the Second Circuit in holding that a redacted statement must be viewed in isolation.[3]

i. In the Fourth Circuit, a codefendant's redacted statement is admissible if it "refer[s] to the existence of another person through neutral phrases." *United States v. Min*, 704 F.3d 314, 321-22 (4th Cir. 2013). In *Min*, the court found no *Bruton* violation since the redacted statement replaced the names of other defendants with "another person," "a third person," "others," and "one of the others." *Id.* at 319. The court limited its analysis to the statement itself, noting it was "[w]ritten in the third person and in grammatically correct phrases," and "referred

[3] The Fifth and Sixth Circuits have yet to rule on this question. *See e.g.*, *United States v. Powell*, 732 F.3d 361, 377 (5th Cir. 2013) (mentioning that Fifth Circuit Confrontation Clause precedent follows *Richardson*); *United States v. Vasilakos*, 508 F.3d 401, 407 (6th Cir. 2007) (noting "[s]ince *Gray*, the Sixth Circuit has not announced precisely what type of redactions are acceptable under *Bruton*").

generally" to "some number of individuals who could, or could not, be the other defendants." *Id.* at 321. In a footnote, the court noted that "the confession strongly corroborated other inculpatory evidence presented at trial," but that "confessions do not become facially incriminatory when the government introduces evidence at trial that links the confession to other defendants." *Id.* at 321 n.5.

ii. In *United States v. Logan*, the Eighth Circuit held that "the admissibility of a confession under *Bruton* is to be determined by viewing the redacted confession in isolation from the other evidence admitted at trial." 210 F.3d 820, 822 (8th Cir. 2000). The court found admissible a codefendant confession where a detective testified that the codefendant "said that he planned and committed the relevant robbery with 'another individual.'" *Id.* at 821. The dissent in *Logan*, argued that in *Gray*, this Court "back[ed] away from the narrow, 'four-corners' analysis that the majority now endorses." *Id.* at 825.

iii. And the Tenth Circuit held in *United States v. Verduzco-Martinez* that "where a defendant's name is replaced with a neutral pronoun or phrase there is no *Bruton* violation, providing that the incrimination of the defendant is only by reference to evidence other than the redacted statement and a limiting instruction is given to the jury." 186 F.3d 1208, 1214 (10th Cir. 1999). The court found admissible a codefendant confession where the testifying police officer substituted "another person" for the defendant's name. *Id.* at 1213-14. The court commented, "[t]he fact that [the codefendant's] redacted statements may have inferentially

incriminated [the defendant] when read in context with other evidence does not create a *Bruton* violation." *Id.* at 1215.

The Court has already acknowledged the necessity to resolve this conflict by granting certiorari in *Samia*, and for the same reason this petition should be held pending the Court's decision, then granted, reversed and remanded as appropriate.

II. The Decision Below Is Erroneous and Fails to Comply with Court Precedent

The court of appeals' requirement that redacted codefendant statements be viewed in isolation, and that therefore redactions using neutral pronouns always satisfy the Confrontation Clause, is erroneous and conflicts with this Court's precedent. Such an inflexible rule misconstrues *Gray* and contravenes *Bruton*'s core objective—protecting Sixth Amendment rights. Petitioner's case, like *Samia*, illustrates why surrounding context must be used in assessing whether a redacted statement is facially incriminating. For this reason too, the Court should hold Petitioner's case pending *Samia*'s resolution, then grant, vacate, and remand as appropriate.

i. *Gray*'s holding extends beyond prohibiting redactions using blank spaces and the word "deleted." 523 U.S. at 197. The Court reasoned that such "obvious indications of alteration" will cause a jury to immediately infer the confession refers to the defendant. *Id.* at 192-93. Conceding the jury must use *some* inference to connect the redacted confession and defendant, the Court distinguished this immediate inference from the inferential incrimination at issue in *Richardson*. *Id.* at 195-96. The confession in *Richardson* removed all mention of the defendant's

existence, so it could only inculpate through linkage with other evidence. *Id.* at 197. In *Gray*, the redacted statement facially incriminated the defendant because it "obviously refer[red] directly to someone, often obviously to the defendant," and "involve[d] inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." *Id.* at 196. *Gray*'s reasoning extends to any redacted statements that facially incriminate a defendant through immediate juror inference. *Id.* at 197. The case suggests other immediate inferences might include the number of defendants, the indicted conduct, nicknames, specific descriptions, the prosecutor's theory of the case, and any other obvious reference to the defendant. *Id.* at 192-96.

In *United States v. Jass*, the court of appeals held that *Gray* did not overrule its prior precedent. 569 F.3d 47, 58 (2d Cir. 2009). Instead, the court continues to follow its holding in *United States v. Tutino*, "that a redacted statement in which the names of co-defendants are replaced by neutral pronouns, with no indication to the jury that the original statement contained actual names, and where the statement standing alone does not otherwise connect co-defendants to the crimes, may be admitted without violating a co-defendant's *Bruton* rights." 883 F.2d 1125, 1135 (2d Cir. 1989). The *Tutino* "four-corners" test is inconsistent with the immediate inferences at issue in *Gray*, which are necessarily contextual.

Clearly uncomfortable bypassing *Gray*, the *Jass* court notes that its "*Tutino* line of precedents should not be understood to hold that *Bruton* concerns can invariably be resolved by the substitution of neutral pronouns for redacted names."

569 F.3d at 56 n.5. However, in practice, including in Petitioner's case, the court of appeals automatically applies the *Tutino* rule, never finding a Confrontation Clause violation where there are neutral pronouns. *See United States v. Lyle*, 919 F.3d 716, 733 (2d Cir. 2019) (asserting "[w]e have consistently held that the introduction of a co-defendant's confession with the defendant's name replaced by a neutral noun or pronoun does not violate *Bruton*"). In practice, this mechanized standard cannot adequately diminish the "substantial risk" that a jury will look to a codefendant statement when determining a defendant's guilt. *Bruton*, 391 U.S. at 126. Mitigating this risk to protect confrontation rights is the crux of *Bruton* and must be the goal of any rule governing its application.

ii. In Petitioner's case, the court of appeals considered Mr. Ramirez's redacted statement "separate and apart from any other evidence admitted at trial." App. at A12 (quoting *Lyle*, 919 F.3d at 733). Turning a blind eye to numerous immediate and inculpatory inferences both in the statement and its surrounding context, the court of appeals held that the statement satisfied *Bruton* because Petitioner's name was replaced by neutral nouns or pronouns. App. at A12. This scant review fails to satisfy this Court's precedent and refutes the *Jass* court's promise that *Tutino* will not be so mechanically applied. 569 F.3d at 55 n.4.

For example, the court of appeals did not acknowledge there were only two defendants at Petitioner's trial, so Mr. Ramirez's references to "someone" and "a guy" could only refer to Petitioner, especially since the superseding indictment and

government opening identified the defendants as the only two individuals seeking to hire someone to harm Mr. Santiago. App. at A132-A133.

The redacted statement also reads oddly because the police officer only asks for the names and descriptions of the men Mr. Ramirez meets at Petitioner's house, but never Petitioner. App. at A123-A124. When asked about Mr. Mowatt, Mr. Ramirez describes him as looking "Puerto Rican or Panamanian," but having the same Jamaican accent as Petitioner and being around 5'11" tall. *Id.* It would have been obvious to the jury that Petitioner was the person Mr. Ramirez already knew, since he has darker skin, is clearly shorter than 5' ll" and has a Jamaican accent. *See Gray*, 523 U.S. at 195 (confirming that physical descriptions like age, height, weight and hair color fall inside *Bruton*'s scope).

The government's evidence, including Mr. Mowatt's testimony about meeting Mr. Ramirez at Petitioner's house, showing him the gun, going to Fish N' Tings, and getting picked up by Petitioner and Mr. Ramirez in Westchester, also made it clear who the redacted statement was referencing. And most consequentially, during closing the government told the jury numerous times that the "someone" identified by Mr. Ramirez referred to Petitioner and used the statement as a framework to connect all the government evidence together. Since there was no limiting instruction, it is unquestionable that the jury used Mr. Ramirez's statement as evidence against Petitioner, thereby violating his Confrontation Clause right.

iii. The court of appeals below also declined to perform the required harmless error analysis in evaluating Petitioner's *Bruton* claim. To hold a federal

constitutional error harmless, "the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). With a *Bruton* claim, the government must "me[et] its burden of demonstrating that the admission of the confession. . .did not contribute to [the defendant's] conviction." *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991). The court of appeals held that even if the district court erred in admitting Mr. Ramirez's statement, "any such error was harmless beyond a reasonable doubt. . . . As explained above, the properly admitted evidence of Collins's guilt was nothing short of overwhelming . . . ." App. at A13 n.2. Instead of testing the government's burden regarding the redacted statement's harm, the court of appeals relied on its sufficiency of the evidence analysis. *Id.* This impermissibly shifted the government's burden to Petitioner.

Viewing the redacted statement in isolation also hindered the harmless error analysis, since the weight of Mr. Ramirez's statement is most apparent in its effect on other evidence. The other evidence against Petitioner was circumstantial and conflicting. The alleged victim Mr. Santiago never met Petitioner, and neither did Mr. Johnson, the other cooperating witness. App. at A164. While this supposed murder-for-hire plot inexplicably carried on for over a year, no harm ever came to Mr. Santiago, and there was no evidence Mr. Mowatt or Mr. Johnson ever received any kind of payment. Petitioner was friends with Mr. Ramirez and Mr. Mowatt, so their phone calls prove little. Aside from Mr. Ramirez's statement, the government relied almost entirely on Mr. Mowatt's testimony, which was inconsistent and

strongly motivated by his hope for leniency. Mr. Mowatt also testified to being under the influence of various narcotics, including cocaine, crack-laced marijuana and MDMA, during the entire course of the conspiracy. App. at A150-A158.

Given the numerous inconsistencies in Mr. Mowatt's testimony, the few sections corroborated by Mr. Ramirez's statement were very important to the government's case. This is evident in how it used the statement at closing to frame the evidence as a whole, often trying to link it with Mr. Mowatt's testimony to increase its reliability. Allowing Mr. Ramirez's statement to be introduced against Petitioner without a limiting instruction was harmful beyond a reasonable doubt.

CONCLUSION

The Court should hold this petition for writ of certiorari pending the resolution of *Samia v. United States*, and then grant, vacate, and remand as appropriate based on its opinion.

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Respectfully submitted,

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