

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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ADAM SAMIA, AKA SAL,)
AKA ADAM SAMIC,)
 Petitioner,)
 v.) No. 22-196
UNITED STATES,)
 Respondent.)
- - - - -

Pages: 1 through 109
Place: Washington, D.C.
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10
11 Washington, D.C.
12 Wednesday, March 29, 2023
13
14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United
16 States at 10:03 a.m.
17
18 APPEARANCES:
19 KANNON K. SHANMUGAM, ESQUIRE, Washington, D.C.; on
20 behalf of the Petitioner.
21 CAROLINE A. FLYNN, Assistant to the Solicitor General,
22 Department of Justice, Washington, D.C.; on behalf
23 of the Respondent.
24
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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	KANNON K. SHANMUGAM, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	CAROLINE A. FLYNN, ESQ.	
7	On behalf of the Respondent	57
8	REBUTTAL ARGUMENT OF:	
9	KANNON K. SHANMUGAM, ESQ.	
10	On behalf of the Petitioner	105
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
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11
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17
18
19
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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 22-196, Samia versus United States.

Mr. Shanmugam.

ORAL ARGUMENT OF KANNON K. SHANMUGAM
ON BEHALF OF THE PETITIONER

MR. SHANMUGAM: Thank you, Mr. Chief Justice, and may it please the Court:

Over 50 years ago, in Bruton versus United States, this Court held that the admission of a nontestifying defendant's confession that accuses another defendant in a joint trial violates the Confrontation Clause, even in the face of a limiting instruction, in light of the uniquely prejudicial effect that such a confession has on the jury.

This Court has made clear that the Bruton rule applies to a confession that has been redacted to avoid naming another defendant where the jury is likely to infer that the confession implicated that defendant.

The question presented today is whether the manner in which the redaction is

1 carried out is dispositive of the application of
2 the Bruton rule.

3 The Court should hold that it is not.
4 In this case, the prosecution substituted
5 phrases like "the other person" for Petitioner's
6 name, but, having done that, the prosecution
7 used the confession functionally to identify
8 Petitioner.

9 The prosecution's questioning of the
10 agent who took the confession left little doubt
11 that the confessing defendant had named "the
12 other person." Petitioner was the only
13 defendant who plausibly could have been "the
14 other person."

15 The prosecution described the
16 confession as some of the most crucial testimony
17 in the case, and having elicited detailed
18 testimony that "the other person" had met up and
19 lived with the confessing defendant, the
20 prosecution proceeded to present evidence that
21 Petitioner had done just that. In light of
22 those considerations, it is likely, indeed,
23 inevitable, that the jury inferred that the
24 confession here implicated Petitioner.

25 In applying the Bruton rule, lower

1 courts have considered the broader context
2 without any evident difficulty, and doing so
3 appropriately protects a defendant's
4 confrontation right while working minimal
5 prejudice to the government.

6 The government's alternative approach
7 would draw arbitrary and formalistic
8 distinctions and permit ready circumvention of
9 the Bruton rule, as this case illustrates.

10 If Bruton is to mean anything,
11 Petitioner is entitled to a new trial without
12 the introduction of the unconfrosted confession.

13 I welcome the Court's questions.

14 JUSTICE THOMAS: You said that the
15 testimony, the redacted testimony, functionally
16 identified Petitioner and that the jury inferred
17 that it would be the Petitioner.

18 How is the inference and the
19 functional identification testimonial here for
20 Confrontation Clause considerations?

21 MR. SHANMUGAM: So I think we are all
22 in agreement that the Confrontation Clause
23 applies here such that if we were in an
24 individual trial, Crawford would apply.

25 And I would point in particular to

1 this Court's decision in *Melendez-Diaz*, which
2 made clear that for evidence to be testimonial,
3 it need not be on its face directly accusatory
4 against the defendant. This Court indicated
5 that evidence that is hostile to a defendant's
6 interests can qualify as evidence that is
7 against the defendant.

8 JUSTICE THOMAS: So just -- I don't
9 want to -- excuse me for interrupting you.
10 Let's take a step back.

11 Tell me exactly what is said in the
12 testimony that directly speaks of your -- of --
13 of the Petitioner.

14 MR. SHANMUGAM: As in *Gray*, the
15 confession here is directly accusatory. It's
16 directly accusatory of someone.

17 JUSTICE THOMAS: Yeah.

18 MR. SHANMUGAM: And where the --

19 JUSTICE THOMAS: Well, I mean, that
20 could be any of us. So you have to make the
21 connection. How do you get from someone to the
22 Petitioner --

23 MR. SHANMUGAM: Correct. And --

24 JUSTICE THOMAS: -- in the testimony?

25 MR. SHANMUGAM: Correct. And so this

1 is, as in Gray, a situation in which --

2 JUSTICE THOMAS: Well, remember, I was
3 in dissent in Gray.

4 (Laughter.)

5 MR. SHANMUGAM: I do remember that,
6 but I will rely on the Court's reasoning in Gray
7 and explain to you why, if you think that Gray
8 is still the law, that Gray applies here.

9 In Gray, this Court acknowledged that
10 there was an additional step that would have to
11 be taken, an inference that the individual whose
12 name was redacted was, in fact, the defendant.

13 And, in that case, the Court had no
14 trouble in saying that because there was only
15 one defendant who could plausibly have been the
16 individual who was redacted, that that inference
17 could be drawn. And, indeed, the Court went
18 further and said that whenever you have a
19 redaction that is apparent on its face, such a
20 confession would categorically be excluded even
21 if there might be circumstances in which that
22 inference would be less obvious.

23 Our argument is that exactly the same
24 reasoning applies here. And, of course, there
25 is a factual difference, which is that the

1 redaction was not apparent on its face.

2 Our test recognizes that. Our
3 submission would -- is that the redaction here
4 was pretty obvious by virtue of the way in which
5 this confession came in.

6 The confession in this case came in
7 through the interviewing agent who testified.
8 And over the course of many pages -- and this is
9 reproduced in our brief at pages 9 to 11, in the
10 Joint Appendix from 74 to 77 -- the interviewing
11 agent said that the confessing defendant,
12 Stillwell, referred to "another person."

13 I think any juror with those repeated
14 references to another person would wonder,
15 first, why the interviewing agent didn't ask who
16 "the other person" was, and, second, why there
17 were all of these artificial references to
18 "another person."

19 CHIEF JUSTICE ROBERTS: Well, that's
20 --

21 JUSTICE BARRETT: But --

22 CHIEF JUSTICE ROBERTS: -- that's
23 debatable, I guess. Maybe they will wonder,
24 well, why are they saying another person if it
25 was this guy, and it must be because it's

1 somebody else that they don't -- you know,
2 haven't brought -- brought to trial.

3 But you said, if you don't prevail,
4 Bruton would not mean anything. But, I mean,
5 you recognize that we're talking about some kind
6 of sliding scale. In some cases -- and you
7 argue that it's yours -- it'll be very clear who
8 they're talking about. In others, it'll be, you
9 know, maybe an inference, maybe not; a weak
10 inference, and others not.

11 And if you accept that fact, then
12 isn't the question, to what extent does an
13 instruction remove or at least minify the
14 concerns you're -- you're raising?

15 MR. SHANMUGAM: Yes, and our
16 fundamental submission here, Mr. Chief Justice,
17 is that where it is likely that the jury will
18 draw the inference that the confession
19 implicated the nonconfessing defendant, then the
20 concerns of Bruton apply with full force.

21 And the Court is well familiar with
22 what those concerns are, the concern that a
23 jury, once it concludes that the nonconfessing
24 defendant was identified in the confession, will
25 not be able to put that confession out of its

1 mind even in the face of a limiting instruction.

2 Now I would grant you, Mr. Chief
3 Justice, that there are going to be cases where
4 that inference is stronger and cases where that
5 inference is weaker. In our cert briefing and
6 then in our merits briefing, we note that some
7 six federal courts of appeals and, in addition,
8 many state courts have applied the approach that
9 we are advocating here, an approach that
10 appropriately considers the surrounding context
11 in determining how likely it is that the jury is
12 going to draw that inference.

13 Now, notably, many courts, in applying
14 that approach on particular facts, have
15 concluded that the confession can nevertheless
16 still be admitted. And I would point --

17 JUSTICE BARRETT: But would that be --

18 JUSTICE ALITO: At -- at trial -- in
19 your introductory statement, you referred to the
20 manner in which redaction was carried out. But
21 my understanding is that at trial the defense
22 did not propose any alternative redaction. The
23 position of the defense appears to have been
24 that the confession could not be introduced at
25 all, which meant that there had to be a separate

1 trial. Is that correct?

2 MR. SHANMUGAM: So my colleagues at
3 trial argued that there should be severance in
4 this case. The issue of the admissibility of
5 the confession was considered, as it often is in
6 this context, together with a motion to sever in
7 limine. And, of course, the law in the Second
8 Circuit, which we are challenging here today, is
9 that this sort of redaction is sufficient, that
10 it is sufficient to use a placeholder.

11 JUSTICE ALITO: Well, I asked you
12 really a simple factual question. Did the
13 defense propose any alternative way of redacting
14 the confession?

15 MR. SHANMUGAM: So the defense didn't
16 for the simple reason that under the governing
17 law, this redaction was sufficient.

18 Now, under the legal rule that we are
19 advocating now that we're before this Court --

20 JUSTICE ALITO: Well, I think you're
21 dancing around this question. Do you now
22 propose an alternative way in which the
23 confession could have been redacted?

24 MR. SHANMUGAM: So we do believe, as
25 we say in our reply brief, that the confession

1 here could have been redacted further. And
2 because the confession came in --

3 JUSTICE ALITO: But did you preserve
4 that argument at trial? I don't see that you
5 preserved it. You wanted a separate trial, and
6 I don't know why you won't admit it. That's --
7 that's your position.

8 MR. SHANMUGAM: Well, I don't think --

9 JUSTICE ALITO: There has to be a
10 separate trial.

11 MR. SHANMUGAM: -- it's a matter of --
12 so, first, Justice Alito, it's not a matter of
13 preservation precisely because, under our rule,
14 the government -- if this Court were to adopt
15 our rule, consistent with the rule applied by
16 other circuits but not the Second Circuit, the
17 government would have various options as to how
18 to comply with that rule.

19 Now, obviously, our preferred option
20 -- and now this is an academic point because, of
21 course, if this Court were to vacate, there
22 would be a new trial -- but our preferred option
23 then, as now, would be to have an individual
24 trial in which it is undisputed this confession
25 could not come in.

1 JUSTICE ALITO: The redaction here
2 seems to be almost exactly the same as the
3 redaction that the Court in Gray said should
4 have been applied in that case. The Court said
5 why could the witness -- instead of saying
6 deleted, deleted, why could the witness not --
7 and I'm quoting -- why could the witness not
8 instead have said:

9 "Question: Who was in the group that
10 beat Stacy?

11 "Answer: Me and a few other guys."
12 That's just what was done here.

13 MR. SHANMUGAM: And, Justice Alito,
14 the Court said that in the context of addressing
15 the argument that it would not be feasible to
16 redact the confession further.

17 The Court certainly did not suggest
18 that the mere use of placeholders would always
19 avoid a Confrontation Clause violation, and I
20 would grant that this Court's decision in Gray
21 effectively left that question open.

22 I would further note, though, Justice
23 Alito, that when you look at a confession like
24 that, a confession that just says "me and a few
25 other guys," a jury would be much less likely to

1 think that that confession had been redacted or,
2 critically, to link that confession to a
3 particular defendant.

4 When you have a case involving
5 multiple defendants, courts, even applying our
6 approach, often say that the confession is
7 admissible --

8 JUSTICE BARRETT: Even with --

9 MR. SHANMUGAM: -- precisely because
10 --

11 JUSTICE BARRETT: -- when it's two
12 defendants then that it's -- it kind of seems to
13 me that your rule leaves -- leads to the
14 conclusion that if you have only two defendants
15 -- because I had the same question as Justice
16 Alito about "me and a few other guys."

17 The factual difference here is that
18 there was one other guy. So is your rule then
19 that it's not possible if you say "me and
20 another guy" to ever try just two defendants
21 together if you have a nontestifying confession?

22 MR. SHANMUGAM: I -- I -- I -- I think
23 that it is one of the contextual factors. And
24 when you look at what lower courts have done, I
25 think lower courts have differentiated between

1 cases where, for instance, you have a confession
2 that refers to multiple people and there are
3 multiple defendants on one end of the spectrum
4 and on the other end of the spectrum a case like
5 this, where you refer to "the other person," and
6 there's only one person who that could plausibly
7 be.

8 JUSTICE BARRETT: But, Mr. Shanmugam,
9 in your reply brief, when you were talking about
10 how you could redact it further, I mean, I guess
11 I'm kind of drilling down on Justice Alito's
12 point here. It seems to me, without rewriting
13 it to make it misleading so that there's no
14 reference to there being another person in the
15 car, you couldn't really, because there's a
16 difference between substitution through a
17 placeholder and then just kind of rewriting it
18 so it doesn't represent the same thing.

19 So it seems to me, at the end of the
20 day, it boils down to you just can't try two
21 defendants together if you have a nontestifying
22 defendant and a confession.

23 MR. SHANMUGAM: I -- I don't think
24 that that's true, Justice Barrett. And I would
25 recognize that there are going to be cases where

1 redactions, further redactions, are more
2 feasible or less feasible.

3 In this case, precisely because the
4 confession came in through an interviewing
5 agent, it was obviously not a verbatim account
6 of the confession even to begin with.

7 JUSTICE GORSUCH: Well --

8 MR. SHANMUGAM: But we do think --

9 JUSTICE GORSUCH: -- I -- I -- I -- I
10 want to -- I want to pursue Justice Barrett's
11 line of questioning just a little bit further
12 because you -- you -- you do rewrite the
13 confession in a way that refers to no other
14 person at all, and I wonder, does that implicate
15 your co-defendant's due process right to be able
16 to say somebody else did it? Pointing a finger
17 at somebody else is an important right of that
18 defendant too. You would eliminate that.

19 And so it does seem to me that that
20 drives to just exactly what Justice Barrett's
21 suggesting, that in order to balance the rights
22 of both of these defendants, if there's only
23 two, you're always going to have to sever.

24 What's wrong with that?

25 MR. SHANMUGAM: I -- I think that

1 there could be cases, and I believe the
2 government cites one such lower court case in
3 its brief, where the manner of redaction could
4 affect the rights --

5 JUSTICE GORSUCH: How?

6 MR. SHANMUGAM: -- of the confessing
7 defendant, and that could be where --

8 JUSTICE GORSUCH: No, how could you
9 possibly redact when there's only one other
10 person potentially involved?

11 MR. SHANMUGAM: Well, but I -- I don't
12 think that that is true, for instance, on the
13 facts of this case. Now just to be clear --

14 JUSTICE GORSUCH: Show me how. Tell
15 me how.

16 MR. SHANMUGAM: So --

17 JUSTICE GORSUCH: How would you redact
18 it without --

19 MR. SHANMUGAM: -- as we explain in
20 our reply brief, what the government could have
21 done is to have limited the agency -- the
22 agent's testimony to Stillwell's statements that
23 he went to the Philippines, participated in the
24 murder while he was there, and received payment
25 for his role in the murder.

1 JUSTICE GORSUCH: Yeah. Again, it --
2 it eliminates any reference to any other
3 person's involvement, and that implicates the
4 other defendant's due process rights.

5 I'm going to just try one one more
6 time. Have you got any other way you could
7 redact other than the way you suggest in your
8 reply brief? Maybe that's another way of
9 getting at the same question.

10 MR. SHANMUGAM: So I'm not sure
11 exactly how it would have affected Stillwell's
12 due process rights in this instance because I
13 don't think that any --

14 JUSTICE GORSUCH: I'm pretty sure he
15 would have raised that objection. Aren't you?

16 MR. SHANMUGAM: But I'm not sure that
17 it would have been a valid objection, Justice
18 Gorsuch, because it's not entirely clear to me
19 how that would compromise any of his defenses.

20 And I would note that this is a rather
21 artificial discussion here because Stillwell,
22 like Hunter, the other defendant in this case,
23 effectively conceded his involvement in the
24 murder.

25 JUSTICE GORSUCH: Sure.

1 MR. SHANMUGAM: His sole defense in
2 this case was the jurisdictional defense that
3 there was not a sufficient nexus to the
4 United States.

5 JUSTICE GORSUCH: You have -- just --

6 MR. SHANMUGAM: But --

7 JUSTICE GORSUCH: -- just to put a pin
8 on it, you don't have another way to rewrite
9 this confession?

10 MR. SHANMUGAM: Well, it would be open
11 to the government to come up with an alternative
12 manner of redaction that does not make it likely
13 that the jury would draw the inference that the
14 other person is the nonconfessing defendant.

15 JUSTICE BARRETT: That sounds like a
16 no.

17 JUSTICE JACKSON: It -- it sounds
18 like --

19 JUSTICE GORSUCH: I'm going to take it
20 as a no.

21 MR. SHANMUGAM: There are any number
22 of ways in which the gist of what I said could
23 be communicated, but the key point is that the
24 reference to "the other person" would have to be
25 removed.

1 Now I would also add one thing --

2 JUSTICE GORSUCH: So that -- that is a
3 no then.

4 MR. SHANMUGAM: Well, I would add one
5 thing, though, which is an important caveat.
6 One of the alternatives that is available to the
7 government is to introduce confessions but to
8 use them in a manner that does not create the
9 inference. And, as we point out in this case,
10 there were two things that took place.

11 JUSTICE GORSUCH: Could I ask a --
12 a -- a separate line of questioning? I'm sorry.
13 Just -- just -- I think we've got the answer.
14 We've exhausted that one.

15 Isn't there some oddity about the fact
16 that we think limiting instructions are enough
17 when the defendant himself offers a confession,
18 non-Mirandized confession, Harris, and it's used
19 for impeachment purposes, and we tell the jury
20 you only consider it for impeachment purposes.

21 And we -- we treat them as competent
22 to respect that line, even though that's
23 probably the most powerful evidence you could
24 possibly have in a confession by the defendant
25 himself. And -- and -- and none of this applies

1 -- that's point one.

2 Point two is none of this applies in a
3 bench trial. We assume judges can take all this
4 evidence. No confrontation problem arises,
5 we're told. Judges are capable of respecting
6 this line, but jurors somehow are -- we treat
7 them as -- as lesser -- lesser able. I don't
8 know, you go to three years of law school and
9 you're -- you're able to follow rules that you
10 aren't -- 12 jurors aren't -- aren't able to
11 follow?

12 MR. SHANMUGAM: So I think I would say
13 two things in response to that, Justice Gorsuch.

14 The first is that this Court and lower
15 court jurists have long recognized that this is
16 a distinct context because what you are asking
17 the jury to do is to consider confessions which
18 have long been understood to be the most
19 powerful form of evidence as substantive
20 evidence of guilt as to one defendant but not
21 another. And jurists --

22 JUSTICE GORSUCH: Why is it different
23 than the Miranda context with -- with -- with
24 the defendant's own words, his own confession,
25 and we say, ah, you can only consider that for

1 impeachment purposes.

2 MR. SHANMUGAM: Yes.

3 JUSTICE GORSUCH: Put it out of your
4 mind --

5 MR. SHANMUGAM: But --

6 JUSTICE GORSUCH: -- with respect to
7 guilt or innocence.

8 MR. SHANMUGAM: -- but not as
9 substantive evidence of guilt. And I think that
10 numerous --

11 JUSTICE GORSUCH: Yes, I understand
12 that. Why is that a difference that matters?

13 MR. SHANMUGAM: I think because the
14 prejudice in this context is so acute. And that
15 is nothing novel in the law. Jurists such as
16 Judge Hand, Judge Friendly --

17 JUSTICE GORSUCH: Is there any -- I
18 mean, that's a functionalist argument that
19 jurors can't put this out of their mind, but
20 they can put non-Mirandized confessions out of
21 their mind.

22 Do we have any social science to back
23 that up, that distinction --

24 MR. SHANMUGAM: This Court --

25 JUSTICE GORSUCH: -- that one is more

1 impossible for a person to put out of his mind
2 than the other?

3 MR. SHANMUGAM: This Court has long
4 recognized that there are certain circumstances
5 in which juries cannot be expected to perform
6 that task. And it's not just the context of
7 Bruton.

8 In Jackson versus Denno, this Court
9 invalidated a Texas rule under which the jury
10 was to consider the voluntariness of a
11 confession, and the Court concluded that the
12 problem with that rule is that a jury, once it
13 concluded that a confession was involuntary,
14 would not be able to put it out of its mind.

15 And I would actually point all the way
16 back to this Court's decision in Shepherd versus
17 United States in which Justice Cardoza, writing
18 for the Court, said the same thing with regard
19 to an instruction concerning a dying
20 declaration, that that could not be admitted
21 even with a limiting instruction solely as
22 evidence of the dying declarant's state of mind.

23 JUSTICE JACKSON: Mr. Shanmugam, if we
24 --

25 JUSTICE BARRETT: But that's

1 prejudicial, right, but -- sorry, I'll just
2 finish this up, Justice Jackson.

3 It's prejudicial, right, as you said.
4 It's just so prejudicial they can't put it out
5 of their mind, and I had a question about that.

6 On page 18 of your reply brief, you
7 say that 403 wouldn't be sufficient to handle
8 this when you're talking about severance, and
9 you could say, you know, 403 might be some
10 grounds if we said the Sixth Amendment didn't
11 cover this.

12 But, if you concede that 403 wouldn't
13 cover it, then why would we say that it's so
14 prejudicial on the sliding scale the Chief was
15 referring to that it should be kept out on Sixth
16 Amendment grounds?

17 MR. SHANMUGAM: I think we were just
18 making the practical point, Justice Barrett,
19 that if this Court were to write a decision that
20 said that the risk of prejudice in this context
21 was not sufficient to trigger the Bruton rule,
22 then it would be very difficult as a practical
23 matter for defendants to come in and make that
24 argument under Rule 403.

25 JUSTICE BARRETT: Would it be

1 possible? Because, I mean, it seems to me,
2 obviously, constitutional protection is greater
3 than protection from the Federal Rules of
4 Evidence. So wouldn't it be possible to say
5 that even if the Sixth Amendment doesn't apply,
6 that 403 protection must still kick in --

7 MR. SHANMUGAM: I --

8 JUSTICE BARRETT: -- as it would in
9 the Harris context?

10 MR. SHANMUGAM: -- I -- I think that
11 it is possible, but I do think that there would
12 be some real tension with the underlying
13 rationale of Bruton, which is that this is a
14 context in which, as a categorical matter, once
15 the jury draws the inference, the risk of
16 prejudice is so incredibly acute.

17 JUSTICE BARRETT: Thank you.

18 JUSTICE JACKSON: Yes, and I was just
19 going to say, so then wouldn't we be effectively
20 overruling Bruton if we were to hold otherwise?

21 I mean, it seems like the heart of
22 Bruton is that when you have a statement and --
23 when you look at Bruton in combination, say,
24 with Gray, when you have a statement that is not
25 directly naming the defendant, the way, as the

1 Chief Justice said, the jury instruction works
2 is to ensure that it's not being used against
3 him, because the Court says don't use this
4 against you.

5 But, in Bruton, we made clear that
6 it's really impossible for a jury to do that.
7 So, if that's true, if -- if -- if -- I don't --
8 I don't see it as a matter of prejudice
9 necessarily. I see it as operationalizing the
10 Confrontation Clause's requirement that you
11 can't use evidence against a person that they
12 can't interrogate.

13 MR. SHANMUGAM: Well, I think that's
14 exactly right, which is to say that I don't hear
15 the government to dispute that there is a
16 Confrontation Clause violation, to get back to
17 Justice Thomas's first question, at the moment
18 at which a co-defendant's confession is admitted
19 and yet the defendant, the nonconfessing
20 defendant, does not have the ability to
21 cross-examine.

22 So the real question in some sense is
23 whether to create an exception where a limiting
24 instruction is delivered. And I think that the
25 fundamental problem with the government's

1 proposed approach here is that I think it gives
2 rise to the very risk of circumvention that this
3 case well illustrates.

4 JUSTICE JACKSON: Can I just -- that
5 --

6 MR. SHANMUGAM: This was a
7 circumstance --

8 JUSTICE JACKSON: Before you go on, I
9 think that's really important and I just want to
10 understand. So you're saying we're in the world
11 of exception because, at the beginning, with
12 respect to the Confrontation Clause, to the
13 extent that a confession is being introduced,
14 the defendant has a constitutional right to
15 cross-examine the person who made that
16 confession?

17 MR. SHANMUGAM: Mm-hmm.

18 JUSTICE JACKSON: But, because the
19 government made the choice to try these people
20 together, there isn't that right. And the
21 question is, can we use the confession under
22 those circumstances? And this is an exception
23 that would allow for the use.

24 MR. SHANMUGAM: Correct.

25 JUSTICE JACKSON: Is that what you're

1 saying?

2 MR. SHANMUGAM: And I would say three
3 things in response to that. The first is that
4 if one were minded to think about this as an
5 originalist matter, I really do think that the
6 government is approaching this as essentially an
7 exception to the underlying Confrontation Clause
8 right, and it is therefore incumbent on the
9 government to point to some original evidence.
10 The limiting instructions were viewed as
11 sufficient to cure what would otherwise be a
12 Confrontation Clause problem. And, obviously,
13 there is no such evidence.

14 JUSTICE JACKSON: And so that in a
15 way, maybe it doesn't, but I thought these
16 questions about the extent to which you have to
17 come up with some redaction language and it's on
18 you to figure out how to redact this confession
19 seems odd to me insofar as it is the government
20 that is trying to get this evidence in. The
21 defendant's position is sever the trials or
22 don't introduce the evidence.

23 So I don't see it as a situation in
24 which the defendant has to offer to the Court or
25 anyone else language that would successfully

1 allow for the evidence to be introduced against
2 him.

3 MR. SHANMUGAM: And that brings me to
4 my second point, which also I think completes my
5 answer to Justice Gorsuch's question, and that
6 is that what makes this different from
7 run-of-the-mill evidentiary contexts, where
8 you're talking about admitting evidence for one
9 purpose but not another, is that the government
10 has alternative options. And, obviously, the
11 most significant of those options is the ability
12 to try the confessing defendant separately.

13 But there are options short of that.
14 There is the option of making further
15 redactions, which sometimes will come with
16 evidentiary costs, but it is a strategic option
17 available to the government. And --

18 JUSTICE JACKSON: And up to them to
19 propose.

20 MR. SHANMUGAM: And the third option
21 that is available to the government under a
22 contextual approach is that at least in some
23 cases, there may be circumstances in which the
24 confession can be admitted as long as the
25 government doesn't point to contextual evidence

1 that confirms the inference that the confession
2 implicated the nonconfessing defendant.

3 JUSTICE SOTOMAYOR: Counsel --

4 MR. SHANMUGAM: And let me --

5 JUSTICE SOTOMAYOR: -- can I go back
6 to your main point and unpackage it just a
7 little bit further?

8 We have no problem accepting that we
9 can't have hearsay testimony establishing any
10 fact in a trial, correct?

11 MR. SHANMUGAM: Yeah.

12 JUSTICE SOTOMAYOR: Unless there's a
13 well-established --

14 MR. SHANMUGAM: Yes.

15 JUSTICE SOTOMAYOR: -- hearsay
16 exception.

17 MR. SHANMUGAM: The rule of Crawford.

18 JUSTICE SOTOMAYOR: And that doesn't
19 matter whether the statement implicates the
20 defendant or not, meaning it doesn't have to say
21 John Doe did X. If the government wanted to get
22 in evidence about what color the light was at
23 the time of the incident, it can't have a
24 witness swear to it and somebody else come into
25 the trial and testify about it.

1 So they can't use -- we think of
2 confrontation as somebody saying, "He did it."
3 That's not what the Confrontation Clause is
4 about. The Confrontation Clause is about don't
5 present any kind of evidence at a trial without
6 a witness, correct?

7 MR. SHANMUGAM: Correct, and that is
8 the teaching of Melendez-Diaz, which addressed
9 squarely this point.

10 JUSTICE SOTOMAYOR: Exactly. All
11 right. So let's go back to square one.

12 Crawford, our seminal case on
13 testifying defendants, said you can't have
14 admission of hearsay evidence at trial unless
15 there was a well-established exception at the
16 founding, correct?

17 MR. SHANMUGAM: Correct.

18 JUSTICE SOTOMAYOR: And you were
19 explaining to Justice Thomas that at the
20 founding, there hardly were, if ever, any joint
21 trials, correct?

22 MR. SHANMUGAM: There were not many.
23 Certainly not so many as there are today.

24 JUSTICE SOTOMAYOR: And, in the ones
25 there were, most defendants didn't have

1 attorneys, correct?

2 MR. SHANMUGAM: Correct.

3 JUSTICE SOTOMAYOR: So they were
4 basically testifying anyway?

5 MR. SHANMUGAM: Correct. And -- and
6 --

7 JUSTICE SOTOMAYOR: So the first time
8 we're talking about a limiting instruction being
9 an exception to the Confrontation Clause was not
10 at the founding.

11 MR. SHANMUGAM: Correct. And, indeed,
12 jury instructions as we know them today were not
13 really a thing at the time of the founding
14 either.

15 JUSTICE SOTOMAYOR: Exactly.

16 MR. SHANMUGAM: And so I think what
17 we're left with is really the question of how to
18 operationalize Bruton and what would constitute
19 an administrable rule.

20 JUSTICE SOTOMAYOR: How to -- how to
21 --

22 MR. SHANMUGAM: And --

23 JUSTICE SOTOMAYOR: -- how to
24 operationalize Crawford, Bruton, and the
25 accepted wisdom that a prosecutor can't use

1 hearsay against a defendant.

2 MR. SHANMUGAM: And --

3 JUSTICE SOTOMAYOR: I think what some
4 of my colleagues -- let me finish, okay, because
5 I'm trying to get the concept out -- what my
6 colleagues are saying is this is not being used
7 against the defendant; hence, if he's not named,
8 it's not used against him. But what was the
9 insight of Bruton? Now you can pick up where I
10 --

11 MR. SHANMUGAM: And this Court --

12 JUSTICE SOTOMAYOR: -- but answer that
13 question.

14 MR. SHANMUGAM: Yes. And I'll be
15 brief. This Court crossed that bridge even in
16 Richardson, where the Court acknowledged that
17 there could be a Confrontation Clause problem
18 even in the case of a statement that had been
19 redacted to eliminate any reference to the
20 nonconfessing defendant. And that is consistent
21 with Melendez-Diaz.

22 Our fundamental submission to the
23 Court today is that unless this Court wants to
24 revisit Bruton -- and we would submit that that
25 would be profoundly wrong as an originalist

1 matter -- then the question becomes how to
2 implement the Bruton rule in a way that --

3 JUSTICE SOTOMAYOR: All right. So now
4 I thought --

5 MR. SHANMUGAM: -- respects a
6 defendant's confrontation right --

7 JUSTICE SOTOMAYOR: -- there were two
8 tests involved, the Second Circuit's four-corner
9 test and the contextual test that the majority
10 of circuits, six, use and other states use.

11 MR. SHANMUGAM: Correct. And --

12 JUSTICE SOTOMAYOR: So let's narrow in
13 on that question. Is it -- and -- and try to
14 sort of summarize why we should take one
15 approach as opposed to another approach.

16 MR. SHANMUGAM: And let me talk about
17 our proposed approach, which is consistent with
18 the approach that you say --

19 JUSTICE SOTOMAYOR: I don't want
20 yours. I -- I really don't want yours. I want
21 a test that's simple enough to articulate.
22 Yours is, like, multifactor.

23 I see it as three questions, and
24 Justice Barrett kind of looked at it and saw the
25 same thing, which is the three points are really

1 the content of the redacted confession, does it
2 really take out a suggestion that it's this
3 defendant in any way? The -- the content of the
4 indictment. What's the charge? Is it you and
5 another person? And I think that's important.
6 And the second is the number of the defendants.
7 That's what most of the courts are doing,
8 correct?

9 MR. SHANMUGAM: Yes, that's right.
10 And I think that that's broadly consistent with
11 our test. The only two things that we would add
12 are the prosecution's use of the confession and,
13 as we note, the prosecution here --

14 JUSTICE SOTOMAYOR: My -- my
15 colleagues --

16 CHIEF JUSTICE ROBERTS: Thank --

17 JUSTICE SOTOMAYOR: -- are so worried
18 about that because they're afraid that you're
19 going to have a mini-trial before the trial.

20 MR. SHANMUGAM: Well, but I think that
21 that is obviously something that is within the
22 prosecution's control. And our fundamental
23 submission is that however you characterize the
24 exact list of factors that the lower courts have
25 applied, the ones that you've identified are the

1 ones that have been paramount and, in
2 particular, the number of defendants.

3 JUSTICE SOTOMAYOR: All right.

4 MR. SHANMUGAM: And that just affords
5 --

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Thomas?

9 JUSTICE THOMAS: Would you have been
10 satisfied if Stillwell had simply taken the
11 stand?

12 MR. SHANMUGAM: There would have been
13 the ability to confront him -- if he did not
14 invoke his Fifth Amendment privilege against
15 self-incrimination, then there would have been
16 the ability to examine him, yes.

17 JUSTICE THOMAS: And named your -- and
18 named the Petitioner?

19 MR. SHANMUGAM: If -- if he had named
20 the Petitioner but was available for
21 cross-examination, the confrontation right would
22 be fully vindicated.

23 CHIEF JUSTICE ROBERTS: Justice Alito?

24 JUSTICE ALITO: Mr. Shanmugam, your --
25 my colleagues' questions seem to me to have led

1 you into deeper and deeper water, and I want to
2 see whether you really want to go there.

3 Do you want us to examine the question
4 whether Bruton was consistent with the original
5 meaning of the Sixth Amendment?

6 MR. SHANMUGAM: Nobody is asking you
7 to do that. My submission is simply that if you
8 did, we believe that our interpretation would be
9 more consistent with the evidence certainly at
10 the time of the founding and even in the
11 immediate aftermath of the founding.

12 JUSTICE ALITO: Do you want us to do
13 that?

14 MR. SHANMUGAM: Well, we're obviously
15 not asking you to reconsider Bruton. I think
16 that's a question for my friend, Ms. Flynn.

17 JUSTICE ALITO: Well, it seemed --

18 MR. SHANMUGAM: But the government
19 conspicuously --

20 JUSTICE ALITO: -- I thought you --
21 I -- I -- maybe I misunderstood your answer to
22 one of the questions. I thought you agreed that
23 ruling against you would overrule Bruton.

24 Did you agree to that?

25 MR. SHANMUGAM: I -- I think what I

1 would say, consistent with what Justice Jackson
2 suggested in her question, is that to adopt an
3 approach like the government's would undo Bruton
4 in practical effect. And those are not my
5 words. Those are the words of Judge Easterbrook
6 in his opinion for the Seventh Circuit in
7 Hoover, highlighting a very similar situation to
8 the situation --

9 JUSTICE ALITO: Do you think that
10 Richardson overruled Bruton?

11 MR. SHANMUGAM: No, certainly not,
12 because Richardson, as this Court explained in
13 Gray, simply recognized that in a circumstance
14 in which a confession has been redacted to
15 eliminate any accusation against another person,
16 the Bruton rule falls out of the equation.

17 And the mere fact that that confession
18 could be evidence that is used against a
19 defendant when linked with other evidence was
20 not sufficient to trigger Bruton.

21 We have no complaint with that rule,
22 but we simply think that when you have a
23 situation where you have a confession that is
24 directly accusatory of someone, then you're in
25 the world not of Richardson but in the world of

1 Gray.

2 And it is the government that is
3 asking this Court to draw an artificial
4 distinction between a confession that says --
5 brackets "the other person" and a confession
6 that simply says "the other person."

7 JUSTICE ALITO: Didn't Justice
8 Scalia's opinion for the Court in Richardson say
9 that, ordinarily, a witness whose testimony is
10 introduced at a joint trial is not considered to
11 be a witness against a defendant if the jury is
12 instructed to consider that testimony only
13 against a co-defendant?

14 So, if that's a correct understanding
15 of the Confrontation Clause, the question is not
16 whether this case involves an exception to the
17 Confrontation Clause but whether it applies at
18 all on the theory that the person -- that the
19 person who made the confession is not a witness
20 within the meaning of the Sixth Amendment.

21 MR. SHANMUGAM: So even if --

22 JUSTICE ALITO: Do you disagree with
23 that statement in Richardson?

24 MR. SHANMUGAM: I -- I -- I think that
25 the better way to understand it is the way that

1 I suggested earlier, which is that the
2 confrontation right is triggered, the
3 Confrontation Clause problem exists, at the
4 point at which the defendant does not have the
5 ability to confront the witness.

6 And, again, I think that it would be
7 hard to understand Richardson as a case where,
8 in the absence of a limiting instruction, there
9 would still be no confrontation problem,
10 particularly in the wake of this Court's
11 decision in Crawford.

12 JUSTICE ALITO: Okay. One final
13 question about Gray. Isn't it true that in Gray
14 the Court said the inferences at issue here
15 involve statements that -- and I'm putting in an
16 ellipsis here -- a jury ordinarily could make
17 immediately even were the confession the very
18 first item introduced at trial?

19 That seems to be a pretty clear rule,
20 and it wouldn't help you here. What do you make
21 of that? That was just an offhand remark we
22 shouldn't pay any attention to?

23 MR. SHANMUGAM: No. I think that that
24 actually does help us here for the simple reason
25 that all of the considerations that we've

1 discussed, including the considerations that I
2 discussed in my earlier colloquy with Justice
3 Sotomayor, are structural considerations of the
4 sort that a court can comfortably consider in
5 limine.

6 The only potential exception to that
7 is the trial evidence, which was significant in
8 this case because the trial evidence
9 corroborated the other details in the witness's
10 statement, namely, that my client, Petitioner,
11 met up and lived with the confessing defendant
12 in the Philippines.

13 And, as we point out, as long as this
14 Court limits that consideration to the evidence
15 that the government intends to put on in its
16 case-in-chief, it addresses the concern in
17 Richardson that evidence that comes in after the
18 fact obviously could not be taken into account
19 --

20 JUSTICE ALITO: All right.

21 MR. SHANMUGAM: -- in an in limine
22 determination. And lower courts --

23 JUSTICE ALITO: Thank you.

24 MR. SHANMUGAM: -- have had no --

25 JUSTICE ALITO: Thank you.

1 MR. SHANMUGAM: -- problem
2 administering that standard.

3 JUSTICE ALITO: Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you.
5 Justice Sotomayor?

6 JUSTICE SOTOMAYOR: No, thank you.

7 CHIEF JUSTICE ROBERTS: Justice Kagan?

8 JUSTICE KAGAN: I -- I -- I'd also
9 like to ask you about Richardson, Mr. Shanmugam.

10 I think you characterized the holding
11 of Richardson completely accurately, but there
12 is a good deal of language in Richardson which
13 suggests I would say some skepticism about
14 contextual approaches and about the need to show
15 evidentiary linkages.

16 And your approach is a contextual
17 approach. I mean, there's no doubt about that.
18 So -- and some of your amici actually suggest
19 more a bright-line approach as to the problem.

20 So I guess what I would like you to
21 speak about for a bit is why a contextual
22 approach, how does that fit with Richardson, how
23 does -- and how are you going to make it work?

24 MR. SHANMUGAM: Sure. So Richardson,
25 first and foremost, obviously predated this

1 Court's decision in Gray. In Richardson, the
2 Court specifically left open the question that
3 this Court decided in Gray.

4 And, of course, in Gray itself, the
5 Court adopted an approach that requires some
6 consideration of evidence because, after all, in
7 order to make the determination that a redacted
8 confession identifies a defendant, an inference
9 has to be drawn.

10 And even the government recognizes
11 that in cases involving, for instance,
12 nicknames, you're going to have to look to the
13 trial evidence to determine whether or not that
14 nickname implicates a particular defendant.

15 I guess what I would say in terms of
16 the administration of this -- and I would point
17 the Court in particular to the NAFD amicus
18 brief, which is all about this -- is that we've
19 now had 25 years of experience since Gray, and
20 almost instantly, once Gray was decided, courts
21 of appeals and state courts started wrestling
22 with exactly the question presented here,
23 because taking this Court's cue that further
24 redactions could be feasible, of course,
25 prosecutors started doing that.

1 And I think lower courts have really
2 had no difficulty. There's no evidence -- the
3 government doesn't point to any cases where
4 lower courts say this is a mess, this needs to
5 be cleaned up. If they had, we might have
6 pointed to that in our cert petition.

7 Quite to the contrary, lower courts
8 have had no difficulty applying the rule and,
9 parenthetically, in applying the rule sometimes
10 in a way that favors the government. And I
11 would point in particular to the Straker case
12 from the D.C. Circuit, which was a case in which
13 the government prevailed because of the large
14 number of defendants involved.

15 And I would note that the number of
16 defendants is an important consideration, and
17 the second most important consideration is the
18 manner in which the confession comes in. And I
19 think you could have a confession that contains
20 a passing reference to a few other guys on one
21 end of the spectrum and a confession like this
22 one on the other hand, where you had references
23 to another person over many, many pages.

24 And I think the more you have those
25 references, the more details you have about what

1 "the other person" did, which belies the
2 government's weak suggestion that the jury could
3 conclude that the defendant was somehow
4 protecting another individual, the more the jury
5 is going to draw the inference that a redaction
6 has taken place here.

7 And so I don't think the lower courts
8 have had any difficulty applying this approach.
9 It simply requires trial judges to do what they
10 do every day, which is to apply common sense to
11 determine whether the confession, in fact, even
12 as redacted, functionally identifies the
13 nonconfessing defendant.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch?

16 Justice Kavanaugh?

17 JUSTICE KAVANAUGH: Just reading Gray
18 itself and staying within Gray, its concern
19 seems to be the obvious blanks or indication of
20 redaction, and that's it, on pages 196 and 197
21 of Gray.

22 Why isn't that the best way to read
23 Gray?

24 MR. SHANMUGAM: I -- I -- I would
25 grant, Justice Kavanaugh, that in Gray itself,

1 what I think the Court ultimately said is that
2 where a redaction is apparent on the face of the
3 confession, it is essentially categorically
4 likely that the jury would draw the inference
5 that the confession implicated the nonconfessing
6 defendant.

7 And the Court, I think, recognized
8 that that would often and ordinarily be the case
9 but that it might not always be the case. And
10 so that's why I think that the fundamental
11 teaching of Gray is that it's really that latter
12 inquiry that is the fundamental inquiry: How
13 likely is it that the jury is going to draw that
14 inference?

15 And, Justice Kavanaugh, I know a
16 question you're always fond of asking at oral
17 argument is, you know, what adjective do you
18 want to use in the opinion? Is it likely? Is
19 it -- you know, does it have to be a strong or
20 obvious inference?

21 And I think what I would say to you is
22 that on the facts of this case, that doesn't
23 really matter. And lower courts have used
24 different adjectives as to how strong that
25 inference needs to be, but, in a case like this,

1 where you have a lengthy confession with the
2 repeated references to "the other person," the
3 prosecution's use of the confession, the fact
4 that there was only one defendant it could
5 plausibly be, and then, critically, the
6 introduction of this trial evidence that linked
7 Petitioner to the other details in the
8 confession, that this is a circumstance in which
9 it is as near obvious as it could be in the
10 absence of a facially apparent redaction.

11 JUSTICE KAVANAUGH: But isn't this an
12 extension of Gray? In other words, Gray is
13 trying to keep itself consistent with
14 Richardson, as Justice Kagan was raising about
15 Richardson. And so Gray is trying to stay
16 within Richardson but says, well, here's one
17 little aspect of how this confession worked
18 that's problematic. It had blanks in it and so
19 on, and then it proposes an alternative that
20 doesn't have the blanks and refers to the few
21 other guys. And that's kind of all Gray says, I
22 think.

23 MR. SHANMUGAM: But I -- I -- I --

24 JUSTICE KAVANAUGH: I mean, so I -- I
25 take your point that we could go further, but

1 I'm not sure Gray itself gets you there.

2 MR. SHANMUGAM: Well, I think my point
3 is simply that the reasoning of Gray, I think,
4 more strongly supports our approach than the
5 government's approach. And I would recognize
6 that this is a fact pattern that falls somewhere
7 between Gray and Richardson.

8 JUSTICE KAVANAUGH: Mm-hmm.

9 MR. SHANMUGAM: But I would submit,
10 for the reasons that I gave in my last answer,
11 that this is much closer to Gray than
12 Richardson. And I think that this Court can
13 trust lower courts to police that because
14 there's no sign of difficulty. Again, in a
15 majority of the courts of appeals to have
16 considered this issue, some form of the rule
17 that we are advocating has been adopted, and --

18 JUSTICE KAVANAUGH: Well, we have an
19 amicus brief from a lot of states, a real
20 cross-section of states, saying this would be a
21 huge problem. I mean, maybe in the federal
22 courts, some of the federal courts of appeals
23 have adjusted. But they're saying in the states
24 that this could be a real problem.

25 MR. SHANMUGAM: I have no doubt that

1 prosecutors would much prefer to have a rule
2 that permits the use of confessions in precisely
3 the manner that they were used here.

4 But, notably, as we point out in our
5 reply brief, we point to at least three states
6 that signed that amicus brief where the
7 contextual approach that we are advocating has
8 been applied. You would expect them or the
9 United States to point to some difficulty in
10 administration.

11 But, quite to the contrary, courts
12 have applied this approach, they have applied it
13 overwhelmingly in the in limine context when
14 they are considering the issue of suppression
15 together with the issue of severance. And,
16 again, they've had no difficulty doing it. The
17 government has often prevailed. And there will
18 be cases in which there is harmless error after
19 the fact.

20 JUSTICE KAVANAUGH: Right. Okay.
21 Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett?

24 JUSTICE BARRETT: A question about
25 history. So I agree with you that the history

1 that you and the government have cited is not
2 from the founding era, and so I don't think it's
3 determinative of the question. And I understand
4 one reason for that -- and you were pointing
5 this out to Justice Sotomayor -- is that jury
6 instructions weren't a thing at the time.

7 But I just want to clarify. Even if
8 there were no cases that were talking about
9 redaction, were there cases at the time where
10 they just admitted it without redacting it, kind
11 of on the theory that this wasn't a
12 Confrontation Clause violation?

13 MR. SHANMUGAM: So the general rule
14 was, no, that they were not admissible, and we
15 cite Tong's Case and I think Audley's Case is
16 the other dusty 17th Century English precedent
17 that I would cite for that proposition.

18 JUSTICE BARRETT: Right.

19 MR. SHANMUGAM: There was certainly
20 some degree of ongoing dispute about that. I
21 don't want to suggest that the case law was
22 unidirectional, but I think part of the problem
23 is that even when you turn to the 19th Century
24 case law, there were many sources, both
25 treatises and English cases, that contemplated

1 redactions, but they didn't really get into the
2 details of exactly how the redaction should take
3 place, never mind whether redactions would be
4 sufficient in conjunction with limiting
5 instructions.

6 And, really, in the American system,
7 all we really have is a scattering of late 19th
8 Century cases that don't really address the
9 Confrontation Clause issue specifically.

10 So I just think that this is a
11 circumstance in which, if the Court is willing
12 to abide by the Bruton rule -- and, again, we've
13 had 50 years of experience and countless
14 decisions from this Court and lower courts
15 applying it -- the question really becomes how
16 best to implicate the fundamental insight of
17 Bruton, which is that confessions are a
18 different kind of evidence where limiting
19 instructions are insufficient.

20 JUSTICE BARRETT: So I'm going to ask
21 a question about administrability. So do you
22 think I'm right in -- in -- in saying or
23 understanding that even if we adopted the
24 government's approach, it wouldn't eliminate the
25 administrability problem? Because, presumably,

1 you still have a 403 objection, and 403
2 objections, you know, will be hashed out in
3 limine, the district judge might say, I'm going
4 to not rule on that now, we'll see how things
5 develop, or to -- to adjudicate the 403
6 objection presumably is going to be eliciting
7 exactly the kinds of information that you say is
8 relevant here about context, et cetera?

9 MR. SHANMUGAM: And you have the
10 further complexity, as you will well remember
11 from your time as a court of appeals judge, that
12 those decisions are reviewed only for abuse of
13 discretion. And so I would say that --

14 JUSTICE BARRETT: Well, right, right,
15 right, right, right. I'm not asking -- I mean,
16 I think you're sliding into how much protection
17 it gives the defendant because the Sixth
18 Amendment has a more exacting standard of
19 review, whereas, obviously, 403 being -- it's an
20 abuse of discretion standard. But I'm asking
21 about administrability.

22 MR. SHANMUGAM: Well, and I was just
23 making that point in conjunction with the fact
24 that for purposes of the development of the law,
25 the abuse of discretion standard is a

1 complicating factor.

2 But, above and beyond that, I think I
3 would submit -- and you're going to be hearing
4 from Ms. Flynn presently, so she can elaborate
5 on this -- the government's test here is not a
6 terribly clear test. I think that what the
7 government itself acknowledges is that there
8 will be circumstances in which certain types of
9 identification, the use of nicknames, the use of
10 "close" physical descriptions, will be
11 sufficient to come within the scope of the rule.

12 And, further, that in making the
13 determination about whether that's enough for an
14 identification, you have to look to evidence,
15 because there can be cases where there are
16 disputes about whether a defendant goes under a
17 particular nickname.

18 So I think that there are going to be
19 administrability concerns regardless. Our
20 submission is simply that there's no evidence
21 that our predominant approach has caused those
22 concerns.

23 CHIEF JUSTICE ROBERTS: Justice
24 Jackson?

25 JUSTICE JACKSON: So can I just have

1 you give us your ask as cleanly as possible?
2 Because you say that the lower courts have no
3 problem, that they seem to be doing it fine.
4 But you're the Petitioner here, and so I guess
5 you're saying that the Second Circuit's
6 four-corners rule is erroneous and that all we
7 would need to say is something about don't just
8 look at the face of the confession, courts can
9 also consider the rest of the evidence at trial
10 and the inferences that a jury could draw, as
11 they ordinarily do in these other places. Is
12 that what you're asking us to hold?

13 MR. SHANMUGAM: So our fundamental ask
14 for the Court is that the Court should hold --
15 and we would submit that this is entirely
16 consistent with the line of cases leading up to
17 Gray -- that the fundamental question is whether
18 it is likely that the jury would infer that a
19 redacted confession identified the nonconfessing
20 defendant as an accomplice, and, in making that
21 determination, a court can consider both
22 structural and evidentiary factors.

23 And the factors that we emphasize --
24 and I do think this is consistent with what
25 Justice Sotomayor was suggesting -- were, first,

1 the number of defendants; second, the confession
2 itself and the manner in which the confession
3 was presented; third, the prosecution's use of
4 the confession. Those are the structural
5 considerations.

6 And then, fourth, the presentation of
7 evidence, not generically evidence of the
8 defendant's guilt but evidence that specifically
9 links the defendant to details in the
10 confession. So, here, the evidence that
11 Petitioner met up with and lived with Stillwell,
12 Stillwell, of course, having testified that "the
13 other person" did those things.

14 And I would submit that all of that is
15 consistent with what the lower courts have been
16 doing, again, without any difficulties in
17 administration --

18 JUSTICE JACKSON: One final thing with
19 respect to the government's options. At one
20 point, you said this is not going to be a
21 terrible problem for the government because they
22 have several options. And I got two of them,
23 and I think I got the third, but I just wanted
24 to be clear on it.

25 You said the government could not

1 introduce the statement -- this is the
2 Confrontation Clause problem. They could not
3 introduce the statement. That's one. They
4 could not try these people together and
5 introduce the statement only in the confessing
6 defendant's trial. That's two. And then I
7 thought the third option was something like the
8 government could not underscore or emphasize
9 evidence in their joint trial that would bolster
10 the inference that we don't think the jury is
11 entitled to draw.

12 MR. SHANMUGAM: Yes, that's correct.
13 So maybe this is a different case that we still
14 have all of the structural considerations here
15 if the government doesn't present the trial
16 evidence that specifically linked my client to
17 the details in the confession.

18 And I would note that there actually
19 is a fourth option that has been used in the
20 Bruton context, and that is the option of
21 impaneling two juries, one of which would not be
22 present at the time of the introduction of the
23 confession. That practice seems to have fallen
24 into relative desuetude, but it's a practice
25 that courts have used, including in some

1 relatively high-profile cases.

2 JUSTICE JACKSON: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 MR. SHANMUGAM: Thank you.

6 CHIEF JUSTICE ROBERTS: Ms. Flynn?

7 ORAL ARGUMENT OF CAROLINE A. FLYNN
8 ON BEHALF OF THE RESPONDENT

9 MS. FLYNN: Mr. Chief Justice, and may
10 it please the Court:

11 If the jury is instructed not to
12 consider a piece of evidence against a criminal
13 defendant and the jury follows that instruction,
14 then there is no Confrontation Clause problem.

15 This follows from the bedrock
16 principle underlying all jury trials in our
17 legal system. The Bruton exception to that
18 principle simply holds that when it comes to a
19 discrete category of statements, testimonial
20 confessions by co-defendants that expressly name
21 another defendant or are otherwise facially
22 incriminating, we will no longer presume that
23 the jury can obey that instruction.

24 But this Court has taken care to treat
25 the Bruton exception as narrow and it has

1 repeatedly declined to extend it.

2 The Court should decline Petitioner's
3 request here too. First, confessions that
4 replace a defendant's name with a
5 natural-sounding noun or pronoun do not give
6 rise to an overwhelming probability of juror
7 disobedience.

8 As this Court already reasoned in
9 Richardson and reaffirmed in Gray, confessions
10 that incriminate another defendant only
11 inferentially through potential connections to
12 other evidence at trial do not qualify for
13 Bruton's prophylactic treatment.

14 In fact, as has been discussed this
15 morning already, this Court already approved of
16 a confession like this in Gray, one that was
17 modified there to refer to other guys who also
18 committed the crime alongside the confessing
19 defendant.

20 And Petitioner's surrounding context
21 test gives rise to the same practical problems
22 that this Court already identified in Richardson
23 and deemed intolerable: pretrial discovery
24 proceedings, the risk of appellate reversals
25 under a totality-of-the-circumstances standard,

1 and the reality that, to avoid these problems,
2 prosecutors will often be forced to forego
3 confessions for joint trials. As this Court has
4 put it, that price is too high.

5 Petitioner's unprincipled standard
6 will invite erosion of the jury instruction
7 presumption, lacks support in the common law,
8 and will create significant problems for the
9 administration of criminal justice in the
10 federal courts as well as state courts across
11 the country.

12 I welcome the Court's questions.

13 JUSTICE THOMAS: Ms. Flynn, much of
14 your argument sounds like Justice White's
15 dissent in Bruton, and there's been some
16 suggestion that if the Court -- if we rule your
17 way, we are, in effect, overruling or
18 undercutting Bruton.

19 Would you think it would be -- would
20 -- do you think it would be more straightforward
21 to do precisely that, and are you asking us to
22 do that?

23 MS. FLYNN: We are not asking you to
24 overall Bruton and we don't have any need to ask
25 you to overrule Bruton because, especially as

1 clarified by Richardson and Gray, Bruton
2 represents a workable bright-line standard that
3 prosecutors and trial courts across the country
4 can administer. It's a workable accommodation
5 of competing interests in this area.

6 But I do, of course, and our brief
7 emphasized, Bruton is an exception to the
8 presumption that this Court follows everywhere
9 else when it comes to difficult questions that
10 jurors have to deal with in the course of
11 deciding trials.

12 And I think this Court has, while
13 adhering to Bruton, recognized that its logic
14 doesn't expand, for instance, to the
15 circumstance that Justice Gorsuch brought up in
16 Harris versus New York, where it's the
17 defendant's own confession.

18 JUSTICE KAGAN: Well, may -- or -- or
19 I'm sorry. Did --

20 MS. FLYNN: I -- I can name others,
21 but I -- I think you get the gist.

22 (Laughter.)

23 JUSTICE KAGAN: Okay. May I give you
24 a hypothetical?

25 So -- so John and Mary go out and they

1 rob Bill, and they're found out, and they're put
2 on trial, and they're put on trial together.
3 And John has confessed. He said -- let's say he
4 said, Mary and I went out and robbed Bill.

5 Now that's obviously inadmissible
6 under Bruton, correct?

7 MS. FLYNN: Correct.

8 JUSTICE KAGAN: And then suppose
9 instead there's something that says, redacted
10 and I went out and robbed Bill. That's
11 obviously admissible under Gray.

12 MS. FLYNN: Inadmissible under Gray.

13 JUSTICE KAGAN: Inadmissible under
14 Gray.

15 So -- but it's neither of those two
16 things. Instead, the confession says, she and I
17 went out and robbed Bill, or it says, the woman
18 and I went out and robbed Bill.

19 What do we do with that?

20 MS. FLYNN: Because you would have to
21 look outside the corners of the statement itself
22 and look at the rest of the evidence at trial to
23 form the inferential connection that
24 incriminates the other defendant on trial, no,
25 that's not a Bruton issue.

1 Now I would say that you phrased that
2 as "the woman and I" robbed -- I -- I forget who
3 the victim's name was -- but robbed the victim.
4 That could well be a circumstance where the
5 trial court, in ruling in a presumptive
6 severance motion, could decide that further
7 redactions ought to be made as part of its
8 authority to craft a nonseverance remedy, but we
9 don't think it's a constitutional violation.

10 JUSTICE KAGAN: Yeah. I mean, so -- I
11 mean, you're saying that, well, you know, look,
12 I mean, the -- the Court could try to do
13 something about that suggests what the issue is,
14 right? Is that in -- in -- in the hypothetical
15 I gave you, and it's a stylized one, for sure it
16 is, but it's just as good to say "the woman and
17 I went out and robbed Bill" as it is to say
18 "Mary, the person sitting on my left, went out
19 and robbed Bill" in that -- in that case, right?
20 It does the same thing. It identifies the
21 person.

22 MS. FLYNN: I would respectfully
23 disagree. I think "the woman and I" does not --
24 is not the same thing as a direct accusation of
25 the kind this Court was confronting in Bruton,

1 where there was zero ambiguity about who the
2 co-defendant was naming.

3 And that is what the Court sort of
4 honed in on as the triggering condition for this
5 very unique rule where we're not going to assume
6 that the limiting instruction can do the work to
7 keep the jury from thinking about what this
8 piece of evidence means to others.

9 JUSTICE KAGAN: See, I think Gray is
10 just against you there, right? Gray says, you
11 can't do "redacted and I went out and robbed
12 Bill," and then Gray talks about why that is,
13 and it says, look, we know that Richardson
14 talked about inferences, but there are -- you
15 know, there are different kinds of inferences.

16 And where you can just look at a
17 confession and infer pretty much immediately,
18 pretty much automatically, even though there's
19 no name, you know, and it's not just redacted,
20 right, it's like the one-eyed man or --

21 MS. FLYNN: Yeah. That's right.

22 JUSTICE KAGAN: -- or using a nickname
23 or so forth, right? So why doesn't "she" or
24 "the woman" serve that exact same purpose?

25 MS. FLYNN: Well, so a few things in

1 there that I'd like to address if I could, but
2 to first focus on Gray and what reasoning it
3 used to get to the holding in that case.

4 Of course, I will grant that Gray said
5 that some inferences are the kind of inference
6 that we think can give a Brut -- create a Bruton
7 problem, but the Court was very careful to say
8 it's not -- we're not talking here about the
9 kind of inference where you have to look at the
10 rest of the trial evidence.

11 It's just the difference between I am
12 looking at this redacted statement where there
13 is zero ambiguity that this has been changed, it
14 says redacted, redacted, blank, blank, and I --
15 the juror just has to make an inference of
16 what's the reason for that.

17 And the Gray court said the juror can
18 just look up across the courtroom and see the
19 defendant there and, in most circumstances, the
20 juror will immediately draw that connection.

21 So that's not the same --

22 JUSTICE GORSUCH: Why isn't the same
23 connection when it's somebody or another person
24 or she?

25 MS. FLYNN: Because the --

1 JUSTICE GORSUCH: I mean, if jurors
2 can't be expected to follow limiting
3 instructions with respect to delete, delete,
4 delete, why can they be expected to follow
5 limiting instructions when it comes to somebody,
6 somebody else, and somebody else still?

7 MS. FLYNN: Because for the same
8 reasoning that this Court used in Richardson in
9 explaining why --

10 JUSTICE GORSUCH: Well, Richardson had
11 a footnote, five maybe, I don't remember --

12 MS. FLYNN: Right.

13 JUSTICE GORSUCH: -- that said that
14 there's no somebody else referred to anywhere in
15 the confession, so it would take trial evidence
16 to -- to -- to draw that link.

17 Here, you're asking us to go a step
18 further than Richardson and say there's -- there
19 is a reference to somebody else, but using, you
20 know, another word other than the name is better
21 than using a deletion, deletion, deletion. And
22 I guess I'm stuck where Justice Kagan is.

23 And I -- I'm not sure I understand the
24 rationale for that. If we're talking about the
25 functional capacity of jurors to distinguish and

1 follow limiting instructions and the law given
2 to them, we're -- we're told they can't follow
3 it when it's delete, delete, delete, but you're
4 asking us to say they can when it's somebody and
5 somebody else, and I guess I'm just stuck.

6 MS. FLYNN: Right. And I would point
7 you to page 208 of Richardson and also the
8 footnote on that page of the opinion where the
9 Court said, we fully grant that this confession
10 could have been incriminating or would have been
11 incriminating if the jury disregarded its
12 instruction.

13 But the point at which it would become
14 incriminating would be if the jury matched up
15 what was in the confession with what else they
16 heard in trial. That's the moment at which, if
17 the jury makes the connection at all, it will
18 happen later.

19 JUSTICE KAGAN: But here's what --

20 MS. FLYNN: And the Richardson --

21 JUSTICE KAGAN: -- Gray says at page
22 196. It says, the inferences at issue here --
23 and it's -- it's really -- it's distinguishing
24 Richardson, right? It's like, yeah, Richardson
25 talks about some inferences. But it says the

1 inferences at issue here involve statements
2 that, despite redaction, obviously refer
3 directly to someone, often, obviously, the
4 defendant, and which involve inferences that a
5 jury ordinarily could make immediately, even
6 were the confession the very first item
7 introduced at trial.

8 And what I'm suggesting is that there
9 are cases like that. You could have a very high
10 bar as to how immediate or how strong the
11 inference has to be, but acknowledge that, look,
12 I mean, it just -- you know, you can't take the
13 law seriously when it says, "[redacted] and I
14 went out and robbed Bill" is inadmissible, but
15 "the woman and I went out and robbed Bill" can
16 be brought in.

17 MS. FLYNN: The key difference between
18 a case like this and a Gray case is that, in
19 Gray, the jury is unequivocally told this
20 confession has been changed.

21 Here, this could have been something
22 that the defendant actually said or here where
23 it is actually a paraphrase of what the
24 confessing defendant said to --

25 JUSTICE JACKSON: And why wouldn't

1 that be a Confrontation Clause problem even if
2 the defendant said exactly what -- said -- said
3 exactly that? Why -- why would there be no
4 Confrontation Clause problem?

5 MS. FLYNN: You still need a limiting
6 instruction either way so long as you have a
7 testimonial confession. So, yes, you would need
8 the limiting instruction, but, no, I don't think
9 it would be a Bruton problem because there's not
10 a co-defendant -- the equivalent of a
11 co-defendant standing up in the courtroom and
12 making a direct accusation against the person
13 sitting next to them.

14 JUSTICE JACKSON: But how is that
15 consistent with Melendez -- the Melendez case?
16 Melendez-Diaz. I thought, under Melendez-Diaz,
17 you didn't need to have the evidence exactly
18 name the person or be directly incriminating in
19 order to cause the Confrontation Clause issue.

20 MS. FLYNN: I fully agree with that,
21 Justice Jackson, and that's why you need the
22 limiting instruction to say, no matter what --
23 if this confession said nothing about anybody
24 else with Mr. Stillwell, you would still need
25 the limiting instruction to provide the

1 testimonial.

2 JUSTICE JACKSON: No, no, no, I'm not
3 asking about when you need the limiting
4 instruction. I'm just asking the confession, on
5 its face --

6 MS. FLYNN: Right.

7 JUSTICE JACKSON: -- says me and
8 another person did X, or me and the woman robbed
9 John. It doesn't say her name.

10 MS. FLYNN: Yes.

11 JUSTICE JACKSON: I thought, under
12 Melendez-Diaz, it didn't -- it would still cause
13 a confrontation problem, setting aside how we
14 cure it with a limiting instruction or not,
15 because, to the extent that the government
16 introduced it against the defendant, it itself
17 did not need to be directly incriminating.

18 MS. FLYNN: But, if we're not
19 introducing it against the defendant, then
20 there's no Confrontation Clause problem.

21 What we're talking about with Bruton
22 cases -- and Bruton itself even says, if there
23 -- if evidence is introduced in a joint trial
24 just against the confessing defendant and not
25 against the other one and there's a limiting

1 instruction telling the jury this is only
2 evidence as to that defendant, not the other,
3 and the jury follows that instruction, there's
4 no Confrontation Clause problem because it's as
5 if the evidence never came into the other
6 person's trial in the first place.

7 What Bruton says is that sometimes, in
8 certain narrow circumstances or at least as
9 clarified by later decisions, we don't trust
10 juries to follow that limiting instruction. And
11 it's as if the limiting instruction has been --

12 JUSTICE JACKSON: Right.

13 MS. FLYNN: -- knocked out of the
14 case.

15 JUSTICE JACKSON: And so Justice Kagan
16 asked why isn't this one of those times.

17 MS. FLYNN: Right. And if I could try
18 to finish my answer about why Gray is different.
19 So, as I mentioned, that in Gray's
20 circumstances, there's no ambiguity about
21 whether the defendant actually named somebody.
22 It's just a question of why that name was taken
23 out.

24 In this situation, there's at least
25 the initial ambiguity about whether a name was

1 even provided. And, as a matter of the real
2 world, like, confessing defendants don't name
3 names quite frequently. That might be related
4 to why they're going to trial and they didn't
5 plead out.

6 And so, if we agree that if no
7 accusation was, in fact, made by a confessing
8 defendant where they just referred -- for
9 instance, they said something like, I killed
10 her, but somebody else helped me, if we think
11 that can come in because there's no accusation
12 made against somebody else, then our position
13 here is that we ought to be able to redact a
14 statement to make it resemble a confession like
15 that to get rid of the direct accusation and the
16 facial incrimination that Bruton was targeting.

17 JUSTICE KAVANAUGH: Do you --

18 CHIEF JUSTICE ROBERTS: Counsel --

19 JUSTICE SOTOMAYOR: You -- I -- I'm
20 sorry. You presume that you're not using the
21 statement against the defendant. But,
22 contextually, how about the situation -- and
23 there's been examples of this in the case law --
24 I got a confession from somebody, he said he
25 did -- he and someone else did this -- so it's

1 not a she -- and then the detective says after
2 the -- after the conversation, I went and
3 investigated the co-defendant?

4 You're using the confession, aren't
5 you? You're using the confession to have the
6 police officer say, I investigated this
7 individual. So why isn't that, the use against
8 the defendant, contrary to the instruction?

9 MS. FLYNN: Right. So I think the
10 Court --

11 JUSTICE SOTOMAYOR: Or how about --
12 and I'll give you this example -- the most
13 important -- close to this example, not quite.
14 The most important piece of evidence is this
15 confession. Now, jurors, the confession says
16 this Stillwell and someone else did X, Y and Z.
17 We -- this is the proof we have to show you why
18 X, Y, and Z happened. I'm using the confession
19 to prove X, Y, and Z happened in this order in
20 this way.

21 MS. FLYNN: Right. So --

22 JUSTICE SOTOMAYOR: Isn't that use --

23 MS. FLYNN: I think --

24 JUSTICE SOTOMAYOR: -- against the
25 defendant, and why isn't that a Bruton problem?

1 MS. FLYNN: I think, if the
2 prosecution takes a confession that's only
3 admissible against one defendant and it refers
4 to that confession in describing why the other
5 defendant is guilty, that's the impermissible
6 use of a Bruton confession that effectively
7 attempts to undo the effect of the limiting
8 instruction. And this is what the Court said in
9 Richardson near the end of its opinion.

10 But this --

11 JUSTICE SOTOMAYOR: Exactly.

12 MS. FLYNN: -- is a separate --

13 JUSTICE SOTOMAYOR: And so the point
14 is that you can't just rely on the four corners.
15 When a court is being asked to look at a
16 confession, it does need some contextual
17 understanding and some contextual testing to
18 ensure that the confession's not being used
19 improperly, correct?

20 MS. FLYNN: No, because I think what
21 the -- the prosecutorial attempts to undo the
22 limiting instruction scenarios, like in
23 Richardson and also the one the Court mentioned
24 in Gray, you just have to look at, basically,
25 was there prosecutorial misconduct during the

1 opening or closing such that they used the
2 confession and told the jury explicitly to use
3 it against somebody who it wasn't supposed to be
4 admissible against, or did they take a detail
5 that was only in the confession and use that to
6 help prove another defendant's guilt?

7 The -- that's a different sort of
8 variant of Confrontation Clause problem, and I
9 think the Court treated it that way as
10 Richardson. But just the fact that we can have
11 error based on prosecutorial arguments, that's a
12 separate inquiry I don't think that militates
13 towards having an all-contexts-considered
14 standard for deciding whether there was a Bruton
15 violation in terms of a redacted statement.

16 CHIEF JUSTICE ROBERTS: Counsel, I
17 thought I would hear a lot more this morning
18 about what Justice Sotomayor just mentioned, it
19 might have been the first time, about the four
20 corners issue.

21 What is the government's position on
22 that? Was the -- is the Second Circuit rule,
23 which I understand means, when you're addressing
24 this question, you look only at the four corners
25 of the statement, does the government think

1 that's correct?

2 MS. FLYNN: We think the standard is
3 what this Court said in Gray, which is a
4 standard -- or a statement that's facially
5 incriminating. So, yes, in the vast majority of
6 circumstances, that's the four corners of the
7 statement.

8 I mean, we have not disputed in prior
9 cases, and we're not disputing here, that things
10 like nicknames, functional equivalents of the
11 name count, but that's partly because this
12 Court's also looked at the practical
13 ramifications of what comes within the Bruton
14 rule. And we think lower courts have never had
15 a problem with making sure to redact things like
16 nicknames or initials or something like that.

17 And I don't think it follows from, you
18 know, the concession we've made as to that inch
19 that you should go the full mile to let's just
20 bring in all the contexts and make an after-the-
21 fact inquiry on appeal about was there maybe a
22 violation.

23 CHIEF JUSTICE ROBERTS: Well, that's
24 why -- I didn't understand the rule simply to
25 be, you know, you can say this is his nickname.

1 I thought it meant you get into the whole point
2 about, well, depending upon the rest of the
3 evidence, it could be read this way, but if you
4 look at this, it could be read the other way.

5 I mean, is that not the right --
6 that's not how the Second Circuit applies the
7 four-corners rule?

8 MS. FLYNN: I don't understand the
9 Second Circuit to have a different rule about
10 nicknames, but it's also possible that these
11 cases just don't come up because there's never
12 any problem in identifying a nickname in a
13 redacted confession, and courts will readily
14 instruct the government to take that out, not
15 allow the government to put it in.

16 And that can all be done, if not under
17 a Bruton constitutional rule, as just part of
18 the Rule 14 severance inquiry, which we submit
19 is the better way to think about a lot of these
20 questions because, in that context and with
21 rules of evidence and rules of criminal
22 procedure generally, you give more leeway to the
23 states as well to figure out their solutions to
24 these problems to balance the competing
25 interests.

1 JUSTICE KAVANAUGH: Can I ask a
2 question about our precedent? It seems like
3 Bruton adopted a rule. Richardson certainly
4 didn't want to expand that and drew a line
5 rejecting contextual implication and drew that
6 line. And then Gray seemed not to love the line
7 that Richardson drew but said, well, if you use
8 redacted, that's going to give an implication,
9 and we're not going to call that contextual
10 implication; we're going to say that's the same
11 thing as the name itself.

12 Trying to make sense of all those
13 lines is a little difficult, I think, and apply
14 it, and I'm wondering, what do you think the
15 point of Bruton is, and why isn't the point of
16 Bruton implicated here?

17 MS. FLYNN: The -- as I mentioned
18 earlier, I think the core triggering condition
19 that the Court was worried about in Bruton was
20 a -- an unambiguous direct accusation from a
21 co-defendant against another person sitting next
22 to them in the courtroom that couldn't be
23 cross-examined when it came to a testimonial
24 statement.

25 And that's also the phrase that the

1 Court used in Gray to say what kind of
2 statements they were bringing within the Bruton
3 rule but only slightly expanding it.

4 The Court continued to use the phrase
5 "facially incriminating," which it took from
6 Richardson. The Gray court continued to say
7 directly accusatory, not indirectly accusatory
8 by way of connection to things that the jury
9 heard elsewhere at trial.

10 And I -- to sort of double back a
11 little bit to the beginning of Your Honor's
12 question, I think there's plenty in Gray even
13 beyond that that fully accords the line that
14 this Court drew in Richardson.

15 So Gray also takes care to say all of
16 the practical effects that the Court was worried
17 about in Richardson, those won't be implicated
18 by the rule we're drawing here today about
19 redacted, redacted, and blank, blank. It said,
20 that's easily identifiable before trial and
21 fixable, similar to the way that nicknames are.
22 It's not going to cause mistrials. It's not
23 going to cause unpredictable appeals.

24 And the Court even later in the
25 opinion, as we've been discussing, gave the

1 example of redacting using neutral nouns and
2 pronouns and then even after that pointed to
3 lower court cases where the court said, we
4 understand that courts have been doing this
5 approach we're advocating for here and have had
6 no problems.

7 And one of those was the Eighth
8 Circuit Garcia case where, there, the court
9 redacted a statement to refer to the confessing
10 defendant being instructed to give drugs to,
11 rather than the defendant's name Garcia, give
12 drugs to someone. And that was a case the court
13 cited approvingly.

14 JUSTICE KAVANAUGH: And Mr. Shanmugam
15 might have a problem with Richardson in making
16 this argument, but I think what he's suggesting
17 is the point of Bruton is still implicated when
18 it is likely that the jury will come to the
19 conclusion that it's about the defendant, and
20 you're saying that's not good enough.

21 MS. FLYNN: No, because I don't -- I
22 think Richardson says, even if it's possible for
23 jurors to draw connections, and in some cases,
24 it might be a very straightforward connection,
25 we -- because we trust limiting instructions

1 almost invariably in all circumstances, we can
2 trust them again when there is sort of an
3 inflection point or a gate point where the jury
4 isn't being told instantaneously the other
5 defendant did it but is just being told a piece
6 of ambiguous information and later has to form
7 that realization.

8 JUSTICE KAVANAUGH: And can you --

9 JUSTICE SOTOMAYOR: How can you say
10 that about Richardson when Richardson involved a
11 confession that didn't implicate the involvement
12 of anyone else? That's the whole point of
13 Richardson.

14 You're -- you're taking Richardson far
15 beyond its footnote and far beyond its facts.

16 MS. FLYNN: I, of course, agree that
17 the factual facts in Richardson, which the
18 Court, I think, mentioned twice, were that in
19 that particular confession, the mention of the
20 third party being there was able to be taken out
21 entirely.

22 But the logic the Court used -- and
23 this is the split it granted cert to resolve --
24 was about this contextual implication doctrine
25 that lower courts were using where they -- or

1 what was also called the evidentiary linkage
2 doctrine, where they would look at greater
3 context to decide whether an inference could be
4 made.

5 JUSTICE SOTOMAYOR: I -- I -- I -- I
6 --

7 JUSTICE KAGAN: And, Ms. Flynn, I
8 mean, you're -- you're right that there's --
9 there's language in Richardson about inferences,
10 no question, but, I mean, here's the holding of
11 Richardson, right? The Confrontation Clause
12 isn't violated by the admission of a
13 nontestifying co-defendant's confession with a
14 proper limiting instruction when, as here, the
15 confession is redacted to eliminate not only the
16 defendant's name but any reference to his or her
17 existence.

18 I mean, that's the holding of
19 Richardson. There is no reference in the
20 confession to the existence of the defendant.
21 And, yeah, it turned out that there were other
22 things that the jury could link up this piece of
23 testimony and that piece of testimony, and, all
24 of a sudden, it was like, oh, he must have been
25 involved in that thing that the confession was

1 talking about too.

2 But this was a confession that gave
3 you nothing to identify, to target, or so on.
4 That is really far removed from the kinds of
5 confessions that would fall within your rule.

6 MS. FLYNN: I disagree because, in
7 either case, the incrimination only arises later
8 after the jury instruction can intervene and
9 stop the jury from starting down that path of
10 even thinking about what this confession or what
11 the details in the confession mean as to
12 somebody else.

13 And, again, in the circumstance here,
14 the confession -- or the jury could well reason
15 that no accusation was made, and this is just
16 how Mr. Stillwell -- the kind of answers that he
17 gave to the interrogating officers.

18 The other thing I'd say about the
19 actual holding of Gray, of course, there's the
20 footnote and, of course, it was about an
21 existence, but, if all that Richardson stood for
22 was the confessions that don't refer to the
23 existence another person, if that is all that
24 the Court took from it, then I think Gray could
25 have been a very short opinion. There is no

1 dispute in that case that the redacted
2 confession still referred to the existence of
3 other people. But that wasn't the basis.

4 JUSTICE KAGAN: I agree with you that
5 Gray took seriously the language of Richardson
6 as to inferences, but -- but -- but it took it
7 seriously and then it said there are inferences
8 and there are inferences.

9 And -- and -- and Gray, again, said
10 don't take that like gospel. There are
11 inferences and there are inferences. And when
12 you have an inference that the jury can very
13 easily -- you know, and the -- the bar should be
14 high -- but very easily and, indeed, you know,
15 possibly at the very moment that the confession
16 is introduced, that the jury just says, well,
17 she is obviously the person sitting next to him
18 at the defense table, when you have something
19 like that, you -- you -- you -- you -- you --
20 you can't be faithful to Bruton or Gray or even
21 Richardson if you allow that confession to come
22 in.

23 MS. FLYNN: I guess what I would say
24 to that is that Gray took pains to say the kind
25 of inference there is one that arises instantly

1 without jurors having to know anything else
2 about the government's case.

3 Here, Petitioner's whole argument is
4 based on knowing the other details of the crime
5 that would match up with the details that were
6 in the redacted confession.

7 It apparently also depends on what the
8 other defendants are -- the arguments they're
9 making in the case, because he keeps emphasizing
10 that some of the defendants were only making
11 jurisdictional arguments.

12 And that's the kind of inquiry that
13 Gray also said that is not what we're talking
14 about when we're taking this narrow category of
15 redacted confessions or putting it within the
16 scope of the Bruton rule.

17 JUSTICE BARRETT: Ms. Flynn --

18 MS. FLYNN: And the other thing I --

19 JUSTICE BARRETT: Sorry. Finish.

20 MS. FLYNN: I was going to move on to
21 a slightly separate point, but just that, I
22 mean, Bruton's animating rationale, as I talked
23 about, was a direct accusation, but in terms --
24 if the danger here is just the fact that we
25 don't want a jury to ever hear a co-defendant

1 confession that refers to somebody else's
2 participation, I mean, we have those statements
3 all the time.

4 If they're nontestimonial, they come
5 into trial and they're things the jury can
6 consider. That's the co-conspirator exception
7 to the hearsay rule. And we trust that the jury
8 can sift through the evidence and reliably
9 adjudge the defendant's guilt in that
10 circumstance, and so I don't think the fact that
11 we just have a confession that referred to
12 somebody else's existence is so powerful that we
13 don't think limiting instructions can work.

14 JUSTICE BARRETT: Can you imagine --

15 JUSTICE ALITO: There are two --

16 CHIEF JUSTICE ROBERTS: Justice
17 Barrett?

18 JUSTICE BARRETT: Can you imagine any
19 circumstances in which there would be Bruton
20 violations left? Because it seems to me that on
21 the government's understanding of the doctrine,
22 it was like, well, Bruton said it can't be
23 blatant. Then, you know, Richardson said -- you
24 know, Richardson said it's not a problem if --
25 and we can dispute the scope of Richardson, but

1 if the name is not there, Gray said, well, you
2 know, come on, you can't say redacted, redacted,
3 redacted, deleted, deleted, deleted and now, if
4 the case goes your way, all -- you know, lower
5 courts know that all you have to do is say
6 someone, she, or he and it won't be a problem
7 and then you can fix every co-conspirator -- I
8 mean, sorry, every co-defendant's statement to
9 not be a problem.

10 I mean, is that right?

11 MS. FLYNN: I think that the Rule 14
12 severance inquiry can play a role here. Courts
13 can require further redactions or perhaps get
14 rid of details that they don't think the
15 government needs to have in light of the
16 competing interests in the case and the
17 prejudice to the defendant.

18 So I don't think we'll be in a world
19 where --

20 JUSTICE BARRETT: It doesn't matter?

21 MS. FLYNN: -- every confession --
22 yeah. I think we can take these common-sense
23 considerations into account, but trial courts,
24 who are in the best position to weigh those
25 interests --

1 JUSTICE BARRETT: In the same way as
2 you would under 403, right?

3 MS. FLYNN: Yes, exactly. And I think
4 with both those determinations, yes, there's an
5 abuse of discretion standard on appeal, but
6 that's for a good reason, because we trust the
7 district court or the trial court in the state
8 systems to be making -- to be closest to all of
9 the facts, all of the contexts, what's going on
10 in the case, and to make judgment calls that
11 we're not going to open up to relitigation on
12 appeal, where, you know, defense attorneys can
13 just flyspeck the record and say, well, there
14 was that mention of this detail which on top of
15 that other mention of this detail could pose a
16 certain problem.

17 JUSTICE BARRETT: But, I mean, I guess
18 I hear what you -- what you're saying is that
19 all this would now be litigated through the
20 severance, you know, reviewing whether the trial
21 court abused its discretion in refusing to grant
22 severance, but there would be no more real
23 Bruton violations because everybody would know
24 what to do going forward, which is -- which is
25 really narrowing Bruton down.

1 MS. FLYNN: I think that's how -- I
2 mean, we can talk about what the state of play
3 is with respect to the circuits. I do -- I very
4 much disagree with my friend's account of what
5 the actual rule is in the majority of circuits.

6 But, yes, I think, if Bruton has
7 bright-line rules that everybody can identify
8 pretrial and fix, that's a -- a virtue,
9 especially when we've had other cases from this
10 Court saying that, for instance, co-defendant
11 confessions can come in, even when they have a
12 name, so long as they're offered for a different
13 purpose. I think keeping Bruton narrow is
14 consistent with this Court's cases.

15 JUSTICE ALITO: Isn't it true that
16 there are two analytically pure, conceptually
17 pure ways in which the fundamental issue here
18 could be addressed? One -- but they both have
19 their practical problems.

20 One is to say, as was previously the
21 rule, that if the jury is instructed to consider
22 it only against the person who confessed, that
23 cures the problem.

24 The other is to recognize that this
25 issue is never going to arise unless there is

1 some risk or some reason to fear that the
2 confession is going to be held by the jury
3 against the nontestifying co-defendant because
4 they just can't put that out of their minds.
5 It's not realistic to expect them to do that.

6 So those are -- if you -- you take
7 either of those positions, you've got a --
8 you've got a clear rationale.

9 But the Court has not done that. It
10 has drawn lines between these two poles. And so
11 it may be artificial to expect that when you
12 draw that line, it's always going to be able to
13 say why did you draw it there, because the
14 rationale could push you further or it could
15 push you back.

16 So there hasn't been that much
17 discussion here today about why -- both --
18 both are -- both of those -- the rejection of
19 both of those is based on essentially practical
20 concerns because, one -- one, it -- it was found
21 in Bruton and the subsequent -- and in Gray to
22 present too much of a risk for the defendant.
23 And the other, I think, leads you to the
24 conclusion you just can't have joint trials
25 whenever this issue pops up.

1 So why draw the line -- unless we're
2 going to go to one extreme or the other, there's
3 got to be a line. It's not going to be -- it's
4 not going to be able to defend it on -- you
5 know, say this is obviously exactly the right
6 place. Why should the line be drawn where you
7 think it should be drawn?

8 MS. FLYNN: Well, I do think a big
9 part of the analysis is what you were alluding
10 to, is the workability of any line that allows
11 you to start taking context into account. And,
12 you know, of course, I -- I will grant there
13 would be hypotheticals where sometimes that
14 context is readily easier for jurors to perhaps
15 make that connection if they disregard the
16 instruction than others. But I don't know how
17 you would draw a line between that case and ones
18 where there's six pieces of evidence a juror
19 would have to consider.

20 So then we're in a world where you
21 have this kind of totality-of-the-circumstances
22 standard that my friend is proposing here, where
23 -- and combined with such a low threshold
24 standard that we are going to be forced, to
25 avoid the risks of appellate reversal, for us to

1 abandon the joint trial in most instances. And
2 I think that Richardson explained why that's not
3 a palatable outcome. I think Gray made sure to
4 hew that same line. And I believe the amicus
5 brief by other states was already brought up
6 here today, but the states are concerned about
7 that same world in which the criminal justice
8 system and the interests, which are important
9 interests not just to prosecutors but also to
10 witnesses, to courts, and to defendants, all
11 that is sacrificed to get rid of joint trials
12 whenever we have, for instance, a two-defendant
13 trial with a confession.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Justice Thomas?

17 Justice Alito?

18 Justice Sotomayor?

19 JUSTICE SOTOMAYOR: You're not asking
20 us to overrule Bruton, Gray, or Richardson,
21 correct?

22 MS. FLYNN: No, we're not asking you
23 to overrule any of those.

24 JUSTICE SOTOMAYOR: And so what --
25 whatever Justice Alito thinks the line should

1 have been originally, we take the line as it
2 exists, correct?

3 MS. FLYNN: Of course.

4 JUSTICE SOTOMAYOR: And Gray basically
5 set a line different than Richardson, correct?
6 It -- it said that you couldn't take
7 Richardson's point about inferences at face
8 value, went on for a page and a half explaining
9 why, correct?

10 MS. FLYNN: Gray distinguished the
11 kind of inferences -- the inference it was
12 discussing there was the inference from I know
13 this redact -- this -- this confession has been
14 changed to what is the reason. And that's not
15 what we're talking about in this case.

16 JUSTICE SOTOMAYOR: Well, I -- I
17 appreciate that, but the point is that the
18 Second Circuit four-corners approach was before
19 Gray, correct, and it's not revisited post-Gray?

20 MS. FLYNN: I -- it has more recent
21 precedents applying the same approach, but --

22 JUSTICE SOTOMAYOR: But it has not
23 dealt with Gray directly.

24 MS. FLYNN: I think the Second Circuit
25 is taking this Court at its word about neutral

1 redactions like "other guys" or "someone" if you
2 read into Gray in any respect.

3 JUSTICE SOTOMAYOR: But you do admit
4 that some contextual reasoning, like the
5 one-eyed man or an alias, can't be looked at?

6 MS. FLYNN: I think the jury could
7 probably just see the one-eyed man.

8 (Laughter.)

9 MS. FLYNN: I think that's slightly
10 different, but I -- I will -- yes, we have not
11 disputed nicknames, but I think trying to draw a
12 line around nicknames or aliases doesn't take
13 you to the point we're at today. And also, this
14 is just not a nickname/alter ego case.

15 CHIEF JUSTICE ROBERTS: Justice Kagan?

16 JUSTICE KAGAN: I had a question for
17 you, but now I'm sort of intrigued. Do you
18 think the one-eyed man confession can come in?

19 MS. FLYNN: Sorry. No, no. I just
20 mean that that's not -- that is facial because
21 it's a connection. The jury doesn't have to
22 hear the trial evidence to try to piece up the
23 physical description with the person sitting in
24 the courtroom.

25 JUSTICE KAGAN: I see. Okay.

1 You talked a lot about
2 administrability, and -- and, you know, fair --
3 fair enough, but I guess it would be more fair
4 if we didn't have a lot of experience to draw
5 on. There are a lot of court -- circuits that
6 actually are using Mr. Shanmugam's rule as we
7 speak, and as far as I can see, there's been
8 basically no presentation of evidence that
9 anything is going very wrong in those circuits,
10 that there are fewer joint trials, that there
11 are all kinds of terrible situations which
12 people can't get out of. It seems to work
13 pretty well, actually, given -- I mean, you said
14 something like combined with a low threshold
15 standard, but I don't think any courts are using
16 a low threshold standard. They're using a
17 fairly high threshold standard. And with a
18 fairly high threshold standard, it all seems to
19 work just fine.

20 Do you have any evidence to the
21 contrary?

22 MS. FLYNN: So, first, what I'd say is
23 that no court is using as low of a standard as I
24 think you suggested as what Petitioner is
25 offering here.

1 With respect to those courts that are
2 looking at context in some circumstances, I
3 think I would spot them the First, the Third,
4 the Eleventh, and the D.C. And even with the
5 First and the Third, there are conflicting
6 decisions saying we don't look at trial
7 evidence, we don't look at context in that
8 respect. So it's kind of unclear just trying to
9 figure out what's actually going on on the
10 ground in these circuits. But if you are
11 looking for an example of --

12 JUSTICE KAGAN: I might say that
13 that's true even of the Second Circuit, you
14 know, that if you actually look at second
15 opinions, there are plenty of Second Circuit
16 opinions that are looking outside the four
17 corners and trying to make common-sense
18 judgments.

19 MS. FLYNN: Right. And I think that
20 those common-sense judgments, if they're not
21 under Bruton, can be taken care of through other
22 rules of criminal procedure and evidence.

23 But, to point to an example of what
24 we're kind of worried about with Petitioner's
25 approach, Petitioner relies on a case from the

1 Eleventh Circuit called Schwartz, and there, the
2 Eleventh Circuit did say we have to look at the
3 whole record to figure out what are the
4 inferences the juries can draw.

5 And the court then went through six
6 double-column F.3d pages going through the
7 evidence in order and the -- the arguments made
8 by the prosecutor to then conduct the Bruton
9 analysis. There's also a footnote in that case
10 where they acknowledge that they faced a case
11 that had at least facially similar facts and
12 came out a different way on the Bruton question.

13 So that's the kind of -- you know,
14 everything's up for relitigation on appeal and
15 risk of inconsistent ground rules that I think
16 is going to make this very difficult going
17 forward with a contextual inquiry like the one
18 here.

19 JUSTICE KAGAN: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Gorsuch?

22 Justice Kavanaugh?

23 JUSTICE KAVANAUGH: Most of the states
24 haven't been doing anything like what Petitioner
25 says here. Is that your understanding of the

1 state court situation?

2 MS. FLYNN: It -- we haven't seen a
3 comprehensive survey of all of the states, but,
4 no, our understanding is not that the majority
5 rule is to -- to look at context and certainly
6 not the way that Petitioner is offering here.

7 JUSTICE KAVANAUGH: And I just want to
8 look at Gray again and --

9 MS. FLYNN: Mm-hmm.

10 JUSTICE KAVANAUGH: -- Gray and
11 Richardson and try to -- to parse this if we're
12 going to try to give credence to both cases, as
13 Justice Sotomayor rightly says.

14 So, at the top of 196, Gray says:
15 Richardson's inferences involve statements that
16 did not refer directly to the defendant himself
17 and which became incriminating only when linked
18 with evidence introduced later at trial.

19 Okay? So then -- then it goes on and
20 says -- Gray goes on to say here's how we're
21 going to distinguish Richardson. At least I
22 read these as the two key sentences: "The
23 inferences at issue here involve statements
24 that, despite redaction, obviously refer
25 directly to someone, often, obviously, the

1 defendant, and which involve inferences that a
2 jury ordinarily could make immediately even were
3 the confession the very first item introduced at
4 trial. Moreover, the redacted confession with
5 the blank prominent on its face in Richardson's
6 words facially incriminates the co-defendant."

7 So I guess my -- in reading that, I
8 mean, it seems like Gray itself doesn't -- you
9 know, those two sentences in Gray itself, I
10 think, make clear that you can't look at -- make
11 the kind of contextual inference that -- that
12 Petitioner is talking about here. At least
13 that's how I read it.

14 And I'm curious, you know, is that --
15 is that a correct way to read those two
16 sentences, or what am I missing?

17 MS. FLYNN: I fully agree with your
18 reading of those two sentences, and that's how
19 we -- you know, that is the basis for our
20 position that Gray did not cut back on
21 Richardson's discussion about contextual
22 implication or the need to -- or how inferences
23 that depend on linkage to other evidence at
24 trial are outside of Bruton.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

2 JUSTICE KAVANAUGH: I'll leave it
3 there.

4 CHIEF JUSTICE ROBERTS: Oh. Justice
5 Barrett?

6 Justice Jackson?

7 JUSTICE JACKSON: Yeah. Can I just
8 posit a quick hypo and just have you quickly
9 react to it?

10 So you -- you keep mentioning the
11 original confession that doesn't directly
12 implicate the person. So I'm imagining a
13 confession in which the defendant -- the
14 co-defendant says, I killed her, but somebody
15 else helped me. That's the confession.

16 All right. So the first question I
17 have is about the government's maintaining that
18 it would have to sever or their complaining that
19 it might have to sever in that situation.

20 Wouldn't there be the option for the
21 government not to use that statement in a joint
22 trial? That's one option, right, that the
23 government would have?

24 MS. FLYNN: That is an option the
25 government would have. I would say that in

1 Richardson the Court --

2 JUSTICE JACKSON: No, I understand,
3 but I'm just --

4 MS. FLYNN: Yeah. The court --

5 JUSTICE JACKSON: -- I'm just
6 exploring the --

7 MS. FLYNN: Right.

8 JUSTICE JACKSON: So the government
9 could not use that statement at all.

10 MS. FLYNN: Yes.

11 JUSTICE JACKSON: I suppose the
12 government could redact it so it just said, I
13 killed her, period, and not that somebody else
14 helped me, right?

15 MS. FLYNN: They could. I think
16 there's -- as I think came up earlier in the
17 argument, there's competing interests when
18 you're changing a defendant's confession --

19 JUSTICE JACKSON: Okay.

20 MS. FLYNN: -- to just something that
21 they didn't quite say that actually changes
22 the degree of culpability.

23 JUSTICE JACKSON: All right. So, if
24 the government wants to use in the joint trial,
25 I killed her, but somebody else helped me, what

1 if the government's theory of the case is that
2 the defendant is the somebody else and the
3 government puts on all kinds of trial evidence
4 trying to show that related to the confession?

5 Are you saying the court could not --
6 that -- that we don't have a Bruton problem in
7 that situation?

8 MS. FLYNN: If the government puts
9 forward that evidence and connects it to the
10 confession, saying something like, you heard
11 that confession earlier, who do you think that
12 somebody else is, it's probably the person we've
13 been saying --

14 JUSTICE JACKSON: So they don't say
15 that --

16 MS. FLYNN: -- that's a problem --

17 JUSTICE JACKSON: -- but, if they say
18 the confession is the most important piece of
19 evidence in this case, the confession says, and
20 they blow it up really big, I killed her, but
21 somebody else helped me, and there's nobody else
22 involved in this at all, the government is very
23 clear there are only two people sitting at the
24 table, and they keep playing a confession and
25 saying -- and suggesting that we have, you know,

1 two people and a confession that links or -- or
2 implicates two people, you're saying no Bruton
3 problem.

4 MS. FLYNN: I'm -- if -- if in that
5 situation where the -- the prosecutor is saying
6 the thing you have to consider to judge this
7 other defendant guilty is the confession and
8 saying the -- like, emphasizing the confession
9 had two people and who do you think it is, that
10 is a language problem, but --

11 JUSTICE JACKSON: All right. Final
12 question. Do we need a jury instruction for
13 that confession and, if so, why?

14 If you're right that direct
15 implication is really all that gives rise to a
16 Confrontation Clause problem, I don't understand
17 why we even need a jury instruction related to,
18 you know, look at this only with this defendant.

19 MS. FLYNN: My position is that you
20 need a --

21 JUSTICE JACKSON: A limiting
22 instruction.

23 MS. FLYNN: Sorry.

24 JUSTICE JACKSON: Why do we need a
25 limiting instruction in that case?

1 MS. FLYNN: Because the confession is
2 still testimonial and it's still saying
3 something that puts the --

4 JUSTICE JACKSON: But it's saying --
5 the only reason why you need it is because the
6 jury might draw the inference that the somebody
7 else is the defendant, right?

8 MS. FLYNN: No, because my point is
9 that the -- the question of whether something
10 needs a limiting instruction because it would
11 be -- the Confrontation Clause keeps it from
12 being evidence against other people in the case
13 is distinct from the Bruton question.

14 The Bruton question is what do we need
15 to -- what is our fear that the limiting
16 instruction will be ignored. But, as
17 Melendez-Diaz says, so long as a --

18 JUSTICE JACKSON: I'm sorry, can you
19 just answer? So --

20 MS. FLYNN: Sorry.

21 JUSTICE JACKSON: -- if the
22 hypothetical is as I say --

23 MS. FLYNN: Yes.

24 JUSTICE JACKSON: -- do we need a
25 limiting instruction?

1 I thought we needed it to keep the
2 jury from inferring that the somebody else was
3 the other defendant and we -- he wouldn't have
4 a -- have an opportunity to -- to cross-examine,
5 but I don't know whether your answer is yes, we
6 need it for that hypo or no, we don't.

7 MS. FLYNN: Yes, we -- we need the
8 limiting instruction.

9 JUSTICE JACKSON: Why?

10 MS. FLYNN: Because it's a testimonial
11 statement that makes -- that could if it were
12 considered -- if it were admitted as evidence
13 against the defendant could make a fact --

14 JUSTICE JACKSON: But you're saying --

15 MS. FLYNN: -- as to guilt more or
16 less likely.

17 JUSTICE JACKSON: -- it can only --
18 but it can only be admitted as evidence against
19 the defendant if it has his name in it?

20 MS. FLYNN: No. We're saying -- so,
21 to try to illustrate my point, if -- even if the
22 confession just said, I killed her, you would
23 still need the limiting instruction because it's
24 a testimonial statement that can't be
25 cross-examined, that can't be evidence against

1 the defendant regardless of whether it uses
2 another defendant's name.

3 The separate question is Bruton about
4 when we think that limiting instruction won't be
5 effective. And that's where we're attaching the
6 directly accusatory label that we get from Gray
7 and we get from Bruton. So if --

8 JUSTICE JACKSON: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Rebuttal, Mr. Shanmugam?

12 REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM

13 ON BEHALF OF THE PETITIONER

14 MR. SHANMUGAM: Let's start with the
15 government's approach. Ms. Flynn says this
16 morning that the government's approach is a
17 four-corners rule in the vast majority of cases.

18 But that rule it seems to me suffers
19 from two problems. The first is that it's
20 arbitrary because there will be circumstances in
21 which a confession that uses a placeholder will
22 actually create a much stronger inference that
23 the confession implicated the nonconfessing
24 defendant than a confession using brackets.
25 Take the example, for instance, of a confession

1 that uses brackets but in a case involving
2 multiple defendants.

3 But not only is it arbitrary, I would
4 submit that it is difficult to administer, and
5 Ms. Flynn's answers to Justice Kagan's
6 hypothetical well illustrate why.

7 In the John and Mary hypothetical, the
8 government seems to take the position that "the
9 woman and I robbed Bill" would be admissible. I
10 take it that the government's position would be
11 that if the confession instead said, my
12 girlfriend and I robbed Bill, that that would
13 not be admissible because that would be an
14 identification.

15 What about a confession that says, my
16 friend M. and I robbed Bill, the theory being
17 that John had multiple friends named M. Who
18 knows? The one-eyed man is an identification.
19 What about the person who has a tattoo of a
20 green Jayhawk, but it's on his back, where you'd
21 need to have evidence that he had such a tattoo.

22 And so the government's rule doesn't
23 have the benefit of clarity that the government
24 suggests.

25 Now what about our approach? Other

1 than faulting Judge Tjoflat for writing a
2 lengthy opinion, the government doesn't really
3 identify any problems in application with our
4 rule. And we would submit that it's the rule of
5 six circuits, but whether it's six circuits or
6 four, it's the rule in many states. We cite
7 three in our reply brief. I can assure the
8 Court that there are many more. The government
9 doesn't cite any difficulties in administration.

10 And this case well illustrates the
11 problem with the delta between our respective
12 positions. I would really urge the Court to
13 reread the confession in this case and to put
14 itself in the position of a reasonable juror.

15 A reasonable juror would surely --
16 surely wonder why the interviewing agent here
17 didn't ask the question, who is this other
18 person who you keep talking about, and if the
19 individual had, in fact, referred to "the other
20 person," either the agent would have asked that
21 question, which would have provided clarity one
22 way or the other, or defense counsel, equipped
23 with a copy of the prior statement under Jencks,
24 would have asked as the first question, did you
25 ask who this person was, and if the answer is

1 no, that would obviate the Bruton problem. But,
2 obviously, defense counsel could not have done
3 that here.

4 And then, finally, the point of
5 Bruton, which Justice Kavanaugh asked about, the
6 point of Bruton is, as this Court said in
7 Bruton, that co-defendant confessions are
8 devastating and that by virtue of that
9 devastating prejudice, there is, in the words of
10 the Court, a substantial risk that a jury will
11 consider the co-defendant's confession despite a
12 limiting instruction.

13 And not just a majority of the Court
14 in Bruton but jurists from Justice Frankfurter
15 to Judge Hand to Judge Friendly, to Judge Garth
16 in one of the leading post-Gray opinions, to
17 Judge Easterbrook, have all recognized that this
18 is one of the circumstances in which juries
19 cannot be expected to perform the task of
20 considering evidence as substantive evidence of
21 guilt as to one defendant but not another.

22 I'm minded of a familiar phrase from
23 a -- a -- a Fifth Circuit opinion, the exact
24 provenance of which is unclear. If you throw a
25 skunk in the jury box, you can't instruct the

1 jurors not to smell it. And I would submit that
2 this is a case in which the government not only
3 threw a skunk into the jury box but pointed to
4 it repeatedly, and the jury could hardly be
5 expected to ignore it.

6 And the government's approach here
7 would bless that conduct and it would really
8 contravene the first principle of the law, which
9 is common sense. Trial judges are well equipped
10 to apply common sense to make common-sense
11 judgments about whether a particular confession,
12 in fact, identifies a nonconfessing defendant.

13 And, again, to revert to the words of
14 Judge Easterbrook, if this Court were to adopt
15 the government's rule, it really would undo the
16 Bruton rule in practical effect.

17 And so we ask the Court to vacate the
18 judgment of the Second Circuit and to give
19 Petitioner the opportunity to have a new trial
20 free of this unconfronted confession.

21 Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel. The case is submitted.

24 (Whereupon, at 11:42 a.m., the case
25 was submitted.)

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1	<p>accuses ^[1] 3:14 acknowledge ^[2] 67:11 96:10 acknowledged ^[2] 7:9 33:16 acknowledges ^[1] 53:7 across ^[3] 59:10 60:3 64:18 actual ^[2] 82:19 88:5 actually ^[13] 23:15 40:24 42:18 56:18 67:22,23 70:21 94:6,13 95:9,14 100:21 105:22 acute ^[2] 22:14 25:16 ADAM ^[2] 1:3,4 add ^[3] 20:1,4 35:11 addition ^[1] 10:7 additional ^[1] 7:10 address ^[2] 51:8 64:1 addressed ^[2] 31:8 88:18 addresses ^[1] 41:16 addressing ^[2] 13:14 74:23 adhering ^[1] 60:13 adjective ^[1] 46:17 adjectives ^[1] 46:24 adjudge ^[1] 85:9 adjudicate ^[1] 52:5 adjusted ^[1] 48:23 administer ^[2] 60:4 106:4 administering ^[1] 42:2 administrability ^[5] 51:21,25 52:21 53:19 94:2 administrable ^[1] 32:19 administration ^[5] 43:16 49:10 55:17 59:9 107:9 admissibility ^[1] 11:4 admissible ^[7] 14:7 50:14 61:11 73:3 74:4 106:9,13 admission ^[3] 3:13 31:14 81:12 admit ^[2] 12:6 93:3 admitted ^[7] 10:16 23:20 26:18 29:24 50:10 104:12,18 admitting ^[1] 29:8 adopt ^[3] 12:14 38:2 109:14 adopted ^[4] 43:5 48:17 51:23 77:3 advocating ^[5] 10:9 11:19 48:17 49:7 79:5 affect ^[1] 17:4 affected ^[1] 18:11 affords ^[1] 36:4 afraid ^[1] 35:18 after-the ^[1] 75:20 aftermath ^[1] 37:11 agency ^[1] 17:21 agent ^[7] 4:10 8:7,11,15 16:5 107:16,20 agent's ^[1] 17:22 ago ^[1] 3:11 agree ^[7] 37:24 49:25 68:20 71:6 80:16 83:4 98:17 agreed ^[1] 37:22 agreement ^[1] 5:22 ah ^[1] 21:25 AKA ^[2] 1:3,4 alias ^[1] 93:5 aliases ^[1] 93:12 ALITO ^[27] 10:18 11:11,20 12:3,9,12 13:1,13,23 14:16 36:23,24 37:12,17,20 38:9 39:7,22 40:12 41:20,23,25 42:3 85:15 88:15 91:17,25 Alito's ^[1] 15:11 all-contexts-considered ^[1] 74:13 allow ^[4] 27:23 29:1 76:15 83:21 allows ^[1] 90:10 alluding ^[1] 90:9 almost ^[3] 13:2 43:20 80:1 alongside ^[1] 58:18 already ^[5] 58:8,15,15,22 91:5 alternative ^[7] 5:6 10:22 11:13,22 19:11 29:10 47:19 alternatives ^[1] 20:6 ambiguity ^[4] 63:1 64:13 70:20,25 ambiguous ^[1] 80:6 Amendment ^[7] 24:10,16 25:5 36:14 37:5 39:20 52:18 American ^[1] 51:6 amici ^[1] 42:18 amicus ^[4] 43:17 48:19 49:6 91:4 analysis ^[2] 90:9 96:9 analytically ^[1] 88:16 animating ^[1] 84:22 another ^[27] 3:14,21 8:12,14,18,24 14:20 15:14 18:8 19:8 21:21 29:9 34:15 35:5 38:15 44:23 45:4 57:21 58:10 64:23 65:20 69:8 74:6 77:21 82:23 105:2 108:21 Answer ^[10] 13:11 20:13 29:5 33:12 37:21 48:10 70:18 103:19 104:5 107:25 answers ^[2] 82:16 106:5 anybody ^[1] 68:23 anyway ^[1] 32:4 apparent ^[4] 7:19 8:1 46:2 47:10 apparently ^[1] 84:7 appeal ^[4] 75:21 87:5,12 96:14 appeals ^[6] 10:7 43:21 48:15,22 52:11 78:23 APPEARANCES ^[1] 1:18 appears ^[1] 10:23 appellate ^[2] 58:24 90:25 Appendix ^[1] 8:10 application ^[2] 4:1 107:3 applied ^[7] 10:8 12:15 13:4 35:25 49:8,12,12 applies ^[8] 3:20 5:23 7:8,24 20:25 21:2 39:17 76:6 apply ^[6] 5:24 9:20 25:5 45:10 77:13 109:10 applying ^[8] 4:25 10:13 14:5 44:8,9 45:8 51:15 92:21 appreciate ^[1] 92:17 approach ^[32] 5:6 10:8,9,14 14:6 27:1 29:22 34:15,15,17,18 38:3 42:16,17,19,22 43:5 45:8 48:4,5 49:7,12 51:24 53:21 79:5 92:18,21 95:25 105:15,16 106:25 109:6 approaches ^[1] 42:14 approaching ^[1] 28:6 appropriately ^[2] 5:3 10:10 approved ^[1] 58:15</p>	<p>approvingly ^[1] 79:13 arbitrary ^[3] 5:7 105:20 106:3 area ^[1] 60:5 Aren't ^[5] 18:15 21:10,10,10 72:4 argue ^[1] 9:7 argued ^[1] 11:3 argument ^[18] 1:15 2:5,8 3:4,7 7:23 12:4 13:15 22:18 24:24 46:17 57:7 59:14 79:16 84:3 100:17 105:12 arguments ^[4] 74:11 84:8,11 96:7 arise ^[1] 88:25 arises ^[3] 21:4 82:7 83:25 around ^[2] 11:21 93:12 articulate ^[1] 34:21 artificial ^[4] 8:17 18:21 39:3 89:11 aside ^[1] 69:13 aspect ^[1] 47:17 Assistant ^[1] 1:21 assume ^[2] 21:3 63:5 assure ^[1] 107:7 attaching ^[1] 105:5 attempts ^[2] 73:7,21 attention ^[1] 40:22 attorneys ^[2] 32:1 87:12 Audley's ^[1] 50:15 authority ^[1] 62:8 automatically ^[1] 63:18 available ^[4] 20:6 29:17,21 36:20 avoid ^[4] 3:21 13:19 59:1 90:25</p>
2	<p>2023 ^[1] 1:12 208 ^[1] 66:7 22-196 ^[1] 3:4 25 ^[1] 43:19 29 ^[1] 1:12</p>	
3		
4	<p>403 ^[10] 24:7,9,12,24 25:6 52:1,1,5,19 87:2</p>	
5	<p>50 ^[2] 3:11 51:13 57 ^[1] 2:7</p>	
7	<p>74 ^[1] 8:10 77 ^[1] 8:10</p>	
9	<p>9 ^[1] 8:9</p>	
A	<p>a.m ^[3] 1:16 3:2 109:24 abandon ^[1] 91:1 abide ^[1] 51:12 ability ^[5] 26:20 29:11 36:13,16 40:5 able ^[10] 9:25 16:15 21:7,9,10 23:14 71:13 80:20 89:12 90:4 above ^[1] 53:2 above-entitled ^[1] 1:14 absence ^[2] 40:8 47:10 abuse ^[4] 52:12,20,25 87:5 abused ^[1] 87:21 academic ^[1] 12:20 accept ^[1] 9:11 accepted ^[1] 32:25 accepting ^[1] 30:8 accommodation ^[1] 60:4 accomplice ^[1] 54:20 accords ^[1] 78:13 account ^[5] 16:5 41:18 86:23 88:4 90:11 accurately ^[1] 42:11 accusation ^[9] 38:15 62:24 68:12 71:7,11,15 77:20 82:15 84:23 accusatory ^[7] 6:3,15,16 38:24 78:7,7 105:6</p>	<p style="text-align: center;">B</p> <p>back ^[10] 6:10 22:22 23:16 26:16 30:5 31:11 78:10 89:15 98:20 106:20 balance ^[2] 16:21 76:24 bar ^[2] 67:10 83:13 BARRETT ^[28] 8:21 10:17 14:8,11 15:8,24 19:15 23:25 24:18,25 25:8,17 34:24 49:23,24 50:18 51:20 52:14 84:17,19 85:14,17,18 86:20 87:1,17 99:1,5 Barrett's ^[2] 16:10,20 based ^[3] 74:11 84:4 89:19 basically ^[4] 32:4 73:24 92:4 94:8 basis ^[2] 83:3 98:19 beat ^[1] 13:10 became ^[1] 97:17 become ^[1] 66:13 becomes ^[2] 34:1 51:15 bedrock ^[1] 57:15 begin ^[1] 16:6 beginning ^[2] 27:11 78:11 behalf ^[8] 1:20,22 2:4,7,10 3:8 57:8 105:13 belies ^[1] 45:1 believe ^[4] 11:24 17:1 37:8 91:4 bench ^[1] 21:3 benefit ^[1] 106:23 best ^[3] 45:22 51:16 86:24 better ^[3] 39:25 65:20 76:19 between ^[9] 14:25 15:16 39:4 48:7 64:11 67:17 89:10 90:17 107:11 beyond ^[4] 53:2 78:13 80:15,15</p>

Official - Subject to Final Review

<p>big [2] 90:8 101:20 Bill [13] 61:1,4,10,17,18 62:17,19 63:12 67:14,15 106:9,12,16 bit [4] 16:11 30:7 42:21 78:11 blank [5] 64:14,14 78:19,19 98:5 blanks [3] 45:19 47:18,20 blatant [1] 85:23 bless [1] 109:7 blow [1] 101:20 boils [1] 15:20 bolster [1] 56:9 both [10] 16:22 50:24 54:21 87:4 88:18 89:17,18,18,19 97:12 box [2] 108:25 109:3 brackets [3] 39:5 105:24 106:1 bridge [1] 33:15 brief [15] 8:9 11:25 15:9 17:3,20 18:8 24:6 33:15 43:18 48:19 49:5, 6 60:6 91:5 107:7 briefing [2] 10:5,6 bright-line [3] 42:19 60:2 88:7 bring [1] 75:20 bringing [1] 78:2 brings [1] 29:3 broader [1] 5:1 broadly [1] 35:10 brought [5] 9:2,2 60:15 67:16 91: 5 Brut [1] 64:6 Bruton [85] 3:11,20 4:2,25 5:9,10 9:4,20 23:7 24:21 25:13,20,22,23 26:5 32:18,24 33:9,24 34:2 37:4, 15,23 38:3,10,16,20 51:12,17 56: 20 57:17,25 59:15,18,24,25 60:1,7, 13 61:6,25 62:25 64:6 68:9 69:21, 22 70:7 71:16 72:25 73:6 74:14 75:13 76:17 77:3,15,16,19 78:2 79:17 83:20 84:16 85:19,22 87:23, 25 88:6,13 89:21 91:20 95:21 96: 8,12 98:24 101:6 102:2 103:13,14 105:3,7 108:1,5,6,7,14 109:16 Bruton's [2] 58:13 84:22</p>	<p>79:8,12 82:7 83:1 84:2,9 86:4,16 87:10 90:17 92:15 93:14 95:25 96: 9,10 101:1,19 102:25 103:12 106: 1 107:10,13 109:2,23,24 case-in-chief [1] 41:16 cases [27] 9:6 10:3,4 15:1,25 17:1 29:23 43:11 44:3 49:18 50:8,9,25 51:8 53:15 54:16 57:1 67:9 69:22 75:9 76:11 79:3,23 88:9,14 97:12 105:17 categorical [1] 25:14 categorically [2] 7:20 46:3 category [2] 57:19 84:14 cause [4] 68:19 69:12 78:22,23 caused [1] 53:21 caveat [1] 20:5 Century [3] 50:16,23 51:8 cert [3] 10:5 44:6 80:23 certain [4] 23:4 53:8 70:8 87:16 certainly [7] 13:17 31:23 37:9 38: 11 50:19 77:3 97:5 cetera [1] 52:8 challenging [1] 11:8 changed [3] 64:13 67:20 92:14 changes [1] 100:21 changing [1] 100:18 characterize [1] 35:23 characterized [1] 42:10 charge [1] 35:4 CHIEF [30] 3:3,9 8:19,22 9:16 10:2 24:14 26:1 35:16 36:6,23 42:4,7 45:14 49:22 53:23 57:3,6,9 71:18 74:16 75:23 85:16 91:14 93:15 96: 20 98:25 99:4 105:9 109:22 choice [1] 27:19 Circuit [16] 11:8 12:16 38:6 44:12 74:22 76:6,9 79:8 92:18,24 95:13, 15 96:1,2 108:23 109:18 Circuit's [2] 34:8 54:5 circuits [9] 12:16 34:10 88:3,5 94: 5,9 95:10 107:5,5 circumstance [8] 27:7 38:13 47:8 51:11 60:15 62:4 82:13 85:10 circumstances [14] 7:21 23:4 27: 22 29:23 53:8 64:19 70:8,20 75:6 80:1 85:19 95:2 105:20 108:18 circumvention [2] 5:8 27:2 cite [4] 50:15,17 107:6,9 cited [2] 50:1 79:13 cites [1] 17:2 clarified [2] 60:1 70:9 clarify [1] 50:7 clarity [2] 106:23 107:21 Clause [28] 3:15 5:20,22 13:19 26: 16 27:12 28:7,12 31:3,4 32:9 33: 17 39:15,17 40:3 50:12 51:9 56:2 57:14 68:1,4,19 69:20 70:4 74:8 81:11 102:16 103:11 Clause's [1] 26:10 cleaned [1] 44:5 cleanly [1] 54:1 clear [12] 3:19 6:2 9:7 17:13 18:18 26:5 40:19 53:6 55:24 89:8 98:10 101:23</p>	<p>client [2] 41:10 56:16 close [2] 53:10 72:13 closer [1] 48:11 closest [1] 87:8 closing [1] 74:1 co-conspirator [2] 85:6 86:7 co-defendant [12] 39:13 63:2 68: 10,11 72:3 77:21 84:25 88:10 89: 3 98:6 99:14 108:7 co-defendant's [5] 16:15 26:18 81:13 86:8 108:11 co-defendants [1] 57:20 colleagues [4] 11:2 33:4,6 35:15 colleagues' [1] 36:25 colloquy [1] 41:2 color [1] 30:22 combination [1] 25:23 combined [2] 90:23 94:14 come [15] 12:25 19:11 24:23 28:17 29:15 30:24 53:11 71:11 76:11 79: 18 83:21 85:4 86:2 88:11 93:18 comes [6] 41:17 44:18 57:18 60:9 65:5 75:13 comfortably [1] 41:4 committed [1] 58:18 common [4] 45:10 59:7 109:9,10 common-sense [4] 86:22 95:17, 20 109:10 communicated [1] 19:23 competent [1] 20:21 competing [4] 60:5 76:24 86:16 100:17 complaining [1] 99:18 complaint [1] 38:21 completely [1] 42:11 completes [1] 29:4 complexity [1] 52:10 complicating [1] 53:1 comply [1] 12:18 comprehensive [1] 97:3 compromise [1] 18:19 concede [1] 24:12 conceded [1] 18:23 concept [1] 33:5 conceptually [1] 88:16 concern [9] 9:22 41:16 45:18 concerned [1] 91:6 concerning [1] 23:19 concerns [6] 9:14,20,22 53:19,22 89:20 concession [1] 75:18 conclude [1] 45:3 concluded [3] 10:15 23:11,13 concludes [1] 9:23 conclusion [3] 14:14 79:19 89:24 condition [2] 63:4 77:18 conduct [2] 96:8 109:7 confessed [2] 61:3 88:22 confessing [13] 4:11,19 8:11 17:6 29:12 41:11 56:5 58:18 67:24 69: 24 71:2,7 79:9 confession [153] 3:14,18,20,23 4: 7,10,16,24 5:12 6:15 7:20 8:5,6 9: 18,24,25 10:15,24 11:5,14,23,25</p>	<p>12:2,24 13:16,23,24 14:1,2,6,21 15:1,22 16:4,6,13 19:9 20:17,18, 24 21:24 23:11,13 26:18 27:13,16, 21 28:18 29:24 30:1 35:1,12 38: 14,17,23 39:4,5,19 40:17 43:8 44: 18,19,21 45:11 46:3,5 47:1,3,8,17 54:8,19 55:1,2,4,10 56:17,23 58: 16 60:17 61:16 63:17 65:15 66:9, 15 67:6,20 68:7,23 69:4 71:14,24 72:4,5,15,15,18 73:2,4,6,16 74:2,5 76:13 80:11,19 81:13,15,20,25 82: 2,10,11,14 83:2,15,21 84:6 85:1, 11 86:21 89:2 91:13 92:13 93:18 98:3,4 99:11,13,15 100:18 101:4, 10,11,18,19,24 102:1,7,8,13 103:1 104:22 105:21,23,24,25 106:11,15 107:13 108:11 109:11,20 confession's [1] 73:18 confessions [14] 20:7 21:17 22: 20 49:2 51:17 57:20 58:3,9 59:3 82:5,22 84:15 88:11 108:7 confirms [1] 30:1 conflicting [1] 95:5 confront [2] 36:13 40:5 Confrontation [37] 3:15 5:4,20,22 13:19 21:4 26:10,16 27:12 28:7, 12 31:2,3,4 32:9 33:17 34:6 36:21 39:15,17 40:2,3,9 50:12 51:9 56:2 57:14 68:1,4,19 69:13,20 70:4 74: 8 81:11 102:16 103:11 confronting [1] 62:25 conjunction [2] 51:4 52:23 connection [9] 6:21 61:23 64:20, 23 66:17 78:8 79:24 90:15 93:21 connections [2] 58:11 79:23 connects [1] 101:9 consider [14] 20:20 21:17,25 23: 10 39:12 41:4 54:9,21 57:12 85:6 88:21 90:19 102:6 108:11 consideration [4] 41:14 43:6 44: 16,17 considerations [8] 4:22 5:20 40: 25 41:1,3 55:5 56:14 86:23 considered [5] 5:1 11:5 39:10 48: 16 104:12 considering [2] 49:14 108:20 considers [1] 10:10 consistent [13] 12:15 33:20 34:17 35:10 37:4,9 38:1 47:13 54:16,24 55:15 68:15 88:14 conspicuously [1] 37:19 constitute [1] 32:18 constitutional [4] 25:2 27:14 62: 9 76:17 contains [1] 44:19 contemplated [1] 50:25 content [2] 35:1,3 context [22] 5:1 10:10 11:6 13:14 21:16,23 22:14 23:6 24:20 25:9, 14 49:13 52:8 56:20 58:20 76:20 81:3 90:11,14 95:2,7 97:5 contexts [3] 29:7 75:20 87:9 contextual [17] 14:23 29:22,25 34: 9 42:14,16,21 49:7 73:16,17 77:5,</p>
C			
<p>call [1] 77:9 called [2] 81:1 96:1 calls [1] 87:10 came [9] 1:14 8:5,6 12:2 16:4 70:5 77:23 96:12 100:16 cannot [2] 23:5 108:19 capable [1] 21:5 capacity [1] 65:25 car [1] 15:15 Cardoza [1] 23:17 care [3] 57:24 78:15 95:21 careful [1] 64:7 CAROLINE [3] 1:21 2:6 57:7 carried [2] 4:1 10:20 Case [65] 3:4 4:4,17 5:9 7:13 8:6 11:4 13:4 14:4 15:4 16:3 17:2,13 18:22 19:2 20:9 27:3 31:12 33:18 39:16 40:7 41:8 44:11,12 46:8,9, 22,25 50:15,15,21,24 56:13 62:19 64:3 67:18,18 68:15 70:14 71:23</p>			

Official - Subject to Final Review

<p>9 80:24 93:4 96:17 98:11,21 contextually [1] 71:22 continued [2] 78:4,6 contrary [4] 44:7 49:11 72:8 94:21 contravene [1] 109:8 control [1] 35:22 conversation [1] 72:2 copy [1] 107:23 core [1] 77:18 corners [6] 61:21 73:14 74:20,24 75:6 95:17 Correct [28] 6:23,25 11:1 27:24 30: 10 31:6,7,16,17,21 32:1,2,5,11 34: 11 35:8 39:14 56:12 61:6,7 73:19 75:1 91:21 92:2,5,9,19 98:15 corroborated [1] 41:9 costs [1] 29:16 couldn't [3] 15:15 77:22 92:6 Counsel [10] 30:3 36:7 57:4 71:18 74:16 91:15 105:10 107:22 108:2 109:23 count [1] 75:11 countless [1] 51:13 country [2] 59:11 60:3 course [15] 7:24 8:8 11:7 12:21 43: 4,24 55:12 60:6,10 64:4 80:16 82: 19,20 90:12 92:3 COURT [111] 1:1,15 3:10,12,19 4:3 6:4 7:9,13,17 9:21 11:19 12:14,21 13:3,4,14,17 17:2 21:14,15 22:24 23:3,8,11,18 24:19 26:3 28:24 33: 11,15,16,23,23 38:12 39:3,8 40:14 41:4,14 43:2,3,5,17 46:1,7 48:12 51:11,14 52:11 54:14,14,21 57:10, 24 58:2,8,15,22 59:3,16 60:8,12 62:5,12,25 63:3 64:7,17 65:8 66:9 72:10 73:8,15,23 74:9 75:3 77:19 78:1,4,6,14,16,24 79:3,3,8,12 80: 18,22 82:24 87:7,7,21 88:10 89:9 92:25 94:5,23 96:5 97:1 100:1,4 101:5 107:8,12 108:6,10,13 109: 14,17 Court's [11] 5:13 6:1 7:6 13:20 23: 16 40:10 43:1,23 59:12 75:12 88: 14 courtroom [4] 64:18 68:11 77:22 93:24 courts [40] 5:1 10:7,8,13 14:5,24, 25 35:7,24 41:22 43:20,21 44:1,4, 7 45:7 46:23 48:13,15,22,22 49: 11 51:14 54:2,8 55:15 56:25 59: 10,10 60:3 75:14 76:13 79:4 80: 25 86:5,12,23 91:10 94:15 95:1 cover [2] 24:11,13 craft [1] 62:8 Crawford [5] 5:24 30:17 31:12 32: 24 40:11 create [5] 20:8 26:23 59:8 64:6 105:22 credence [1] 97:12 crime [2] 58:18 84:4 criminal [5] 57:12 59:9 76:21 91:7 95:22 critically [2] 14:2 47:5</p>	<p>cross-examination [1] 36:21 cross-examine [3] 26:21 27:15 104:4 cross-examined [2] 77:23 104: 25 cross-section [1] 48:20 crossed [1] 33:15 crucial [1] 4:16 cue [1] 43:23 culpability [1] 100:22 cure [2] 28:11 69:14 cures [1] 88:23 curious [1] 98:14 cut [1] 98:20</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D.C [5] 1:11,19,22 44:12 95:4 dancing [1] 11:21 danger [1] 84:24 day [2] 15:20 45:10 deal [2] 42:12 60:10 dealt [1] 92:23 debatable [1] 8:23 decide [2] 62:6 81:3 decided [2] 43:3,20 deciding [2] 60:11 74:14 decision [6] 6:1 13:20 23:16 24: 19 40:11 43:1 decisions [4] 51:14 52:12 70:9 95: 6 declarant's [1] 23:22 declaration [1] 23:20 decline [1] 58:2 declined [1] 58:1 deemed [1] 58:23 deeper [2] 37:1,1 defend [1] 90:4 defendant [89] 3:14,21,23 4:11,13, 19 6:4,7 7:12,15 8:11 9:19,24 14: 3 15:22 16:18 17:7 18:22 19:14 20:17,24 21:20 25:25 26:19,20 27: 14 28:24 29:12 30:2,20 33:1,7,20 35:3 38:19 39:11 40:4 41:11 43:8, 14 45:3,13 46:6 47:4 52:17 53:16 54:20 55:9 57:13,21 58:10,19 61: 24 64:19 67:4,22,24 68:2 69:16, 19,24 70:2,21 71:8,21 72:8,25 73: 3,5 79:10,19 80:5 81:20 86:17 89: 22 97:16 98:1 99:13 101:2 102:7, 18 103:7 104:3,13,19 105:1,24 108:21 109:12 defendant's [17] 3:13 5:3 6:5 18:4 21:24 28:21 34:6 55:8 56:6 58:4 60:17 74:6 79:11 81:16 85:9 100: 18 105:2 defendants [20] 14:5,12,14,20 15: 3,21 16:22 24:23 31:13,25 35:6 36:2 44:14,16 55:1 71:2 84:8,10 91:10 106:2 defense [10] 10:21,23 11:13,15 19: 1,2 83:18 87:12 107:22 108:2 defenses [1] 18:19 degree [2] 50:20 100:22 delete [6] 65:3,3,4 66:3,3,3</p>	<p>deleted [5] 13:6,6 86:3,3,3 deletion [3] 65:21,21,21 delivered [1] 26:24 delta [1] 107:11 Denno [1] 23:8 Department [1] 1:22 depend [1] 98:23 depending [1] 76:2 depends [1] 84:7 described [1] 4:15 describing [1] 73:4 description [1] 93:23 descriptions [1] 53:10 despite [3] 67:2 97:24 108:11 desuetude [1] 56:24 detail [3] 74:4 87:14,15 detailed [1] 4:17 details [10] 41:9 44:25 47:7 51:2 55:9 56:17 82:11 84:4,5 86:14 detective [1] 72:1 determination [4] 41:22 43:7 53: 13 54:21 determinations [1] 87:4 determinative [1] 50:3 determine [2] 43:13 45:11 determining [1] 10:11 devastating [2] 108:8,9 develop [1] 52:5 development [1] 52:24 difference [6] 7:25 14:17 15:16 22:12 64:11 67:17 different [13] 21:22 29:6 46:24 51: 18 56:13 63:15 70:18 74:7 76:9 88:12 92:5 93:10 96:12 differentiated [1] 14:25 difficult [5] 24:22 60:9 77:13 96: 16 106:4 difficulties [2] 55:16 107:9 difficulty [7] 5:2 44:2,8 45:8 48:14 49:9,16 direct [6] 62:24 68:12 71:15 77:20 84:23 102:14 directly [15] 6:3,12,15,16 25:25 38: 24 67:3 68:18 69:17 78:7 92:23 97:16,25 99:11 105:6 disagree [4] 39:22 62:23 82:6 88: 4 discovery [1] 58:23 discrete [1] 57:19 discretion [5] 52:13,20,25 87:5,21 discussed [3] 41:1,2 58:14 discussing [2] 78:25 92:12 discussion [3] 18:21 89:17 98:21 disobedience [1] 58:7 dispositive [1] 4:1 dispute [4] 26:15 50:20 83:1 85: 25 disputed [2] 75:8 93:11 disputes [1] 53:16 disputing [1] 75:9 disregard [1] 90:15 disregarded [1] 66:11 dissent [2] 7:3 59:15 distinct [2] 21:16 103:13</p>	<p>distinction [2] 22:23 39:4 distinctions [1] 5:8 distinguish [2] 65:25 97:21 distinguished [1] 92:10 distinguishing [1] 66:23 district [2] 52:3 87:7 doctrine [3] 80:24 81:2 85:21 Doe [1] 30:21 doing [8] 5:2 35:7 43:25 49:16 54: 3 55:16 79:4 96:24 done [8] 4:6,21 13:12 14:24 17:21 76:16 89:9 108:2 double [1] 78:10 double-column [1] 96:6 doubt [3] 4:10 42:17 48:25 down [4] 15:11,20 82:9 87:25 draw [2] 5:7 9:18 10:12 19:13 39: 3 45:5 46:4,13 54:10 56:11 64:20 65:16 79:23 89:12,13 90:1,17 93: 11 94:4 96:4 103:6 drawing [1] 78:18 drawn [5] 7:17 43:9 89:10 90:6,7 draws [1] 25:15 drew [4] 77:4,5,7 78:14 drilling [1] 15:11 drives [1] 16:20 drugs [2] 79:10,12 due [3] 16:15 18:4,12 during [1] 73:25 dusty [1] 50:16 dying [2] 23:19,22</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>earlier [5] 40:1 41:2 77:18 100:16 101:11 easier [1] 90:14 easily [3] 78:20 83:13,14 Easterbrook [3] 38:5 108:17 109: 14 effect [5] 3:17 38:4 59:17 73:7 109: 16 effective [1] 105:5 effectively [4] 13:21 18:23 25:19 73:6 effects [1] 78:16 ego [1] 93:14 Eighth [1] 79:7 either [5] 32:14 68:6 82:7 89:7 107: 20 elaborate [1] 53:4 Eleventh [3] 95:4 96:1,2 elicited [1] 4:17 eliciting [1] 52:6 eliminate [5] 16:18 33:19 38:15 51:24 81:15 eliminates [1] 18:2 ellipsis [1] 40:16 else's [2] 85:1,12 elsewhere [1] 78:9 emphasize [2] 54:23 56:8 emphasized [1] 60:7 emphasizing [2] 84:9 102:8 end [5] 15:3,4,19 44:21 73:9 English [2] 50:16,25</p>
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

Official - Subject to Final Review

<p>enough ^[5] 20:16 34:21 53:13 79:20 94:3</p> <p>ensure ^[2] 26:2 73:18</p> <p>entirely ^[3] 18:18 54:15 80:21</p> <p>entitled ^[2] 5:11 56:11</p> <p>equation ^[1] 38:16</p> <p>equipped ^[2] 107:22 109:9</p> <p>equivalent ^[1] 68:10</p> <p>equivalents ^[1] 75:10</p> <p>era ^[1] 50:2</p> <p>erosion ^[1] 59:6</p> <p>erroneous ^[1] 54:6</p> <p>error ^[2] 49:18 74:11</p> <p>especially ^[2] 59:25 88:9</p> <p>ESQ ^[3] 2:3,6,9</p> <p>ESQUIRE ^[1] 1:19</p> <p>essentially ^[3] 28:6 46:3 89:19</p> <p>establishing ^[1] 30:9</p> <p>et ^[1] 52:8</p> <p>even ^[36] 3:16 7:20 10:1 14:5,8 16:6 20:22 23:21 25:5 33:15,18 37:10 39:21 40:17 43:10 45:11 50:7,23 51:23 63:18 67:5 68:1 69:22 71:1 78:12,24 79:2,22 82:10 83:20 88:11 95:4,13 98:2 102:17 104:21</p> <p>everybody ^[2] 87:23 88:7</p> <p>everything's ^[1] 96:14</p> <p>everywhere ^[1] 60:8</p> <p>evidence ^[76] 4:20 6:2,5,6 20:23 21:4,19,20 22:9 23:22 25:4 26:11 28:9,13,20,22 29:1,8,25 30:22 31:5,14 37:9 38:18,19 41:7,8,14,17 43:6,13 44:2 47:6 51:18 53:14,20 54:9 55:7,7,8,10 56:9,16 57:12 58:12 61:22 63:8 64:10 65:15 68:17 69:23 70:2,5 72:14 76:3,21 85:8 90:18 93:22 94:8,20 95:7,22 96:7 97:18 98:23 101:3,9,19 103:12 104:12,18,25 106:21 108:20,20</p> <p>evident ^[1] 5:2</p> <p>evidentiary ^[5] 29:7,16 42:15 54:22 81:1</p> <p>exact ^[3] 35:24 63:24 108:23</p> <p>exacting ^[1] 52:18</p> <p>exactly ^[17] 6:11 7:23 13:2 16:20 18:11 26:14 31:10 32:15 43:22 51:2 52:7 68:2,3,17 73:11 87:3 90:5</p> <p>examine ^[2] 36:16 37:3</p> <p>example ^[6] 72:12,13 79:1 95:11,23 105:25</p> <p>examples ^[1] 71:23</p> <p>exception ^[13] 26:23 27:11,22 28:7 30:16 31:15 32:9 39:16 41:6 57:17,25 60:7 85:6</p> <p>excluded ^[1] 7:20</p> <p>excuse ^[1] 6:9</p> <p>exhausted ^[1] 20:14</p> <p>existence ^[6] 81:17,20 82:21,23 83:2 85:12</p> <p>exists ^[2] 40:3 92:2</p> <p>expand ^[2] 60:14 77:4</p> <p>expanding ^[1] 78:3</p> <p>expect ^[3] 49:8 89:5,11</p>	<p>expected ^[5] 23:5 65:2,4 108:19 109:5</p> <p>experience ^[3] 43:19 51:13 94:4</p> <p>explain ^[2] 7:7 17:19</p> <p>explained ^[2] 38:12 91:2</p> <p>explaining ^[3] 31:19 65:9 92:8</p> <p>explicitly ^[1] 74:2</p> <p>exploring ^[1] 100:6</p> <p>expressly ^[1] 57:20</p> <p>extend ^[1] 58:1</p> <p>extension ^[1] 47:12</p> <p>extent ^[4] 9:12 27:13 28:16 69:15</p> <p>extreme ^[1] 90:2</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>F.3d ^[1] 96:6</p> <p>face ^[10] 3:16 6:3 7:19 8:1 10:1 46:2 54:8 69:5 92:7 98:5</p> <p>faced ^[1] 96:10</p> <p>facial ^[2] 71:16 93:20</p> <p>facially ^[6] 47:10 57:21 75:4 78:5 96:11 98:6</p> <p>fact ^[20] 7:12 9:11 20:15 30:10 38:17 41:18 45:11 47:3 48:6 49:19 52:23 58:14 71:7 74:10 75:21 84:24 85:10 104:13 107:19 109:12</p> <p>factor ^[1] 53:1</p> <p>factors ^[4] 14:23 35:24 54:22,23</p> <p>facts ^[7] 10:14 17:13 46:22 80:15,17 87:9 96:11</p> <p>factual ^[4] 7:25 11:12 14:17 80:17</p> <p>fair ^[3] 94:2,3,3</p> <p>fairly ^[2] 94:17,18</p> <p>faithful ^[1] 83:20</p> <p>fall ^[1] 82:5</p> <p>fallen ^[1] 56:23</p> <p>falls ^[2] 38:16 48:6</p> <p>familiar ^[2] 9:21 108:22</p> <p>far ^[4] 80:14,15 82:4 94:7</p> <p>faulting ^[1] 107:1</p> <p>favors ^[1] 44:10</p> <p>fear ^[2] 89:1 103:15</p> <p>feasible ^[4] 13:15 16:2,2 43:24</p> <p>federal ^[5] 10:7 25:3 48:21,22 59:10</p> <p>few ^[6] 13:11,24 14:16 44:20 47:20 63:25</p> <p>fewer ^[1] 94:10</p> <p>Fifth ^[2] 36:14 108:23</p> <p>figure ^[4] 28:18 76:23 95:9 96:3</p> <p>final ^[3] 40:12 55:18 102:11</p> <p>finally ^[1] 108:4</p> <p>fine ^[2] 54:3 94:19</p> <p>finger ^[1] 16:16</p> <p>finish ^[4] 24:2 33:4 70:18 84:19</p> <p>first ^[23] 3:4 8:15 12:12 21:14 26:17 28:3 32:7 40:18 42:25 54:25 58:3 64:2 67:6 70:6 74:19 94:22 95:3,5 98:3 99:16 105:19 107:24 109:8</p> <p>fit ^[1] 42:22</p> <p>five ^[1] 65:11</p> <p>fix ^[2] 86:7 88:8</p> <p>fixable ^[1] 78:21</p>	<p>FLYNN ^[84] 1:21 2:6 37:16 53:4 57:6,7,9 59:13,23 60:20 61:7,12,20 62:22 63:21,25 64:25 65:7,12 66:6,20 67:17 68:5,20 69:6,10,18 70:13,17 72:9,21,23 73:1,12,20 75:2 76:8 77:17 79:21 80:16 81:7 82:6 83:23 84:17,18,20 86:11,21 87:3 88:1 90:8 91:22 92:3,10,20,24 93:6,9,19 94:22 95:19 97:2,9 98:17 99:24 100:4,7,10,15,20 101:8,16 102:4,19,23 103:1,8,20,23 104:7,10,15,20 105:15</p> <p>Flynn's ^[1] 106:5</p> <p>flyspeck ^[1] 87:13</p> <p>focus ^[1] 64:2</p> <p>follow ^[7] 21:9,11 65:2,4 66:1,2 70:10</p> <p>follows ^[5] 57:13,15 60:8 70:3 75:17</p> <p>fond ^[1] 46:16</p> <p>footnote ^[5] 65:11 66:8 80:15 82:20 96:9</p> <p>force ^[1] 9:20</p> <p>forced ^[2] 59:2 90:24</p> <p>forego ^[1] 59:2</p> <p>foremost ^[1] 42:25</p> <p>forget ^[1] 62:2</p> <p>form ^[4] 21:19 48:16 61:23 80:6</p> <p>formalistic ^[1] 5:7</p> <p>forth ^[1] 63:23</p> <p>forward ^[3] 87:24 96:17 101:9</p> <p>found ^[2] 61:1 89:20</p> <p>founding ^[7] 31:16,20 32:10,13 37:10,11 50:2</p> <p>four ^[6] 73:14 74:19,24 75:6 95:16 107:6</p> <p>four-corner ^[1] 34:8</p> <p>four-corners ^[4] 54:6 76:7 92:18 105:17</p> <p>fourth ^[2] 55:6 56:19</p> <p>Frankfurter ^[1] 108:14</p> <p>free ^[1] 109:20</p> <p>frequently ^[1] 71:3</p> <p>friend ^[3] 37:16 90:22 106:16</p> <p>friend's ^[1] 88:4</p> <p>Friendly ^[2] 22:16 108:15</p> <p>friends ^[1] 106:17</p> <p>full ^[2] 9:20 75:19</p> <p>fully ^[5] 36:22 66:9 68:20 78:13 98:17</p> <p>functional ^[3] 5:19 65:25 75:10</p> <p>functionalist ^[1] 22:18</p> <p>functionally ^[3] 4:7 5:15 45:12</p> <p>fundamental ^[10] 9:16 26:25 33:22 35:22 46:10,12 51:16 54:13,17 88:17</p> <p>further ^[17] 7:18 12:1 13:16,22 15:10 16:1,11 29:14 30:7 43:23 47:25 52:10 53:12 62:6 65:18 86:13 89:14</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>Garcia ^[2] 79:8,11</p> <p>Garth ^[1] 108:15</p>	<p>gate ^[1] 80:3</p> <p>gave ^[5] 48:10 62:15 78:25 82:2,17</p> <p>General ^[2] 1:21 50:13</p> <p>generally ^[1] 76:22</p> <p>generically ^[1] 55:7</p> <p>gets ^[1] 48:1</p> <p>getting ^[1] 18:9</p> <p>girlfriend ^[1] 106:12</p> <p>gist ^[2] 19:22 60:21</p> <p>give ^[11] 54:1 58:5 60:23 64:6 72:12 76:22 77:8 79:10,11 97:12 109:18</p> <p>given ^[2] 66:1 94:13</p> <p>gives ^[4] 27:1 52:17 58:21 102:15</p> <p>GORSUCH ^[29] 16:7,9 17:5,8,14,17 18:1,14,18,25 19:5,7,19 20:2,11 21:13,22 22:3,6,11,17,25 45:15 60:15 64:22 65:1,10,13 96:21</p> <p>Gorsuch's ^[1] 29:5</p> <p>gospel ^[1] 83:10</p> <p>got ^[8] 18:6 20:13 55:22,23 71:24 89:7,8 90:3</p> <p>governing ^[1] 11:16</p> <p>government ^[50] 5:5 12:14,17 17:2,20 19:11 20:7 26:15 27:19 28:6,9,19 29:9,17,21,25 30:21 37:18 39:2 41:15 43:10 44:3,10,13 49:17 50:1 53:7 55:21,25 56:8,15 69:15 74:25 76:14,15 86:15 99:21,23,25 100:8,12,24 101:3,8,22 106:8,23 107:2,8 109:2</p> <p>government's ^[19] 5:6 26:25 38:3 45:2 48:5 51:24 53:5 55:19 74:21 84:2 85:21 99:17 101:1 105:15,16 106:10,22 109:6,15</p> <p>grant ^[7] 10:2 13:20 45:25 64:4 66:9 87:21 90:12</p> <p>granted ^[1] 80:23</p> <p>Gray ^[81] 6:14 7:1,3,6,7,8,9 13:3,20 25:24 38:13 39:1 40:13,13 43:1,3,4,19,20 45:17,18,21,23,25 46:11 47:12,12,15,21 48:1,3,7,11 54:17 58:9,16 60:1 61:11,12,14 63:9,10,12 64:2,4,17 66:21 67:18,19 70:18 73:24 75:3 77:6 78:1,6,12,15 82:19,24 83:5,9,20,24 84:13 86:1 89:21 91:3,20 92:4,10,19,23 93:2 97:8,10,14,20 98:8,9,20 105:6</p> <p>Gray's ^[1] 70:19</p> <p>greater ^[2] 25:2 81:2</p> <p>green ^[1] 106:20</p> <p>ground ^[2] 95:10 96:15</p> <p>grounds ^[2] 24:10,16</p> <p>group ^[1] 13:9</p> <p>guess ^[11] 8:23 15:10 42:20 43:15 54:4 65:22 66:5 83:23 87:17 94:3 98:7</p> <p>guilt ^[8] 21:20 22:7,9 55:8 74:6 85:9 104:15 108:21</p> <p>guilty ^[2] 73:5 102:7</p> <p>guy ^[3] 8:25 14:18,20</p> <p>guys ^[7] 13:11,25 14:16 44:20 47:21 58:17 93:1</p>
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Official - Subject to Final Review

H			
<p>half ^[1] 92:8 Hand ^[3] 22:16 44:22 108:15 handle ^[1] 24:7 happen ^[1] 66:18 happened ^[2] 72:18,19 hard ^[1] 40:7 hardly ^[2] 31:20 109:4 harmless ^[1] 49:18 Harris ^[3] 20:18 25:9 60:16 hashed ^[1] 52:2 hear ^[6] 3:3 26:14 74:17 84:25 87:18 93:22 heard ^[3] 66:16 78:9 101:10 hearing ^[1] 53:3 hearsay ^[5] 30:9,15 31:14 33:1 85:7 heart ^[1] 25:21 held ^[2] 3:12 89:2 help ^[3] 40:20,24 74:6 helped ^[5] 71:10 99:15 100:14,25 101:21 hence ^[1] 33:7 hew ^[1] 91:4 high ^[5] 59:4 67:9 83:14 94:17,18 high-profile ^[1] 57:1 highlighting ^[1] 38:7 himself ^[3] 20:17,25 97:16 history ^[2] 49:25,25 hold ^[4] 4:3 25:20 54:12,14 holding ^[5] 42:10 64:3 81:10,18 82:19 holds ^[1] 57:18 honed ^[1] 63:4 Honor's ^[1] 78:11 Hoover ^[1] 38:7 hostile ^[1] 6:5 however ^[1] 35:23 huge ^[1] 48:21 Hunter ^[1] 18:22 hypo ^[2] 99:8 104:6 hypothetical ^[5] 60:24 62:14 103:22 106:6,7 hypotheticals ^[1] 90:13</p>	<p>20 67:5 98:2 impaneling ^[1] 56:21 impeachment ^[3] 20:19,20 22:1 impermissible ^[1] 73:5 implement ^[1] 34:2 implicate ^[4] 16:14 51:16 80:11 99:12 implicated ^[9] 3:23 4:24 9:19 30:2 46:5 77:16 78:17 79:17 105:23 implicates ^[4] 18:3 30:19 43:14 102:2 implication ^[6] 77:5,8,10 80:24 98:22 102:15 important ^[10] 16:17 20:5 27:9 35:5 44:16,17 72:13,14 91:8 101:18 impossible ^[2] 23:1 26:6 improperly ^[1] 73:19 inadmissible ^[4] 61:5,12,13 67:14 inch ^[1] 75:18 incident ^[1] 30:23 including ^[2] 41:1 56:25 inconsistent ^[1] 96:15 incredibly ^[1] 25:16 incriminate ^[1] 58:10 incriminates ^[2] 61:24 98:6 incriminating ^[9] 57:22 66:10,11,14 68:18 69:17 75:5 78:5 97:17 incrimination ^[2] 71:16 82:7 incumbent ^[1] 28:8 indeed ^[4] 4:22 7:17 32:11 83:14 indicated ^[1] 6:4 indication ^[1] 45:19 indictment ^[1] 35:4 indirectly ^[1] 78:7 individual ^[7] 5:24 7:11,16 12:23 45:4 72:7 107:19 inevitable ^[1] 4:23 infer ^[3] 3:22 54:18 63:17 inference ^[33] 5:18 7:11,16,22 9:9,10,18 10:4,5,12 19:13 20:9 25:15 30:1 43:8 45:5 46:4,14,20,25 56:10 64:5,9,15 67:11 81:3 83:12,25 92:11,12 98:11 103:6 105:22 inferences ^[22] 40:14 54:10 63:14,15 64:5 66:22,25 67:1,4 81:9 83:6,7,8,11,11 92:7,11 96:4 97:15,23 98:1,22 inferential ^[1] 61:23 inferentially ^[1] 58:11 inferred ^[2] 4:23 5:16 inferring ^[1] 104:2 inflection ^[1] 80:3 information ^[2] 52:7 80:6 initial ^[1] 70:25 initials ^[1] 75:16 innocence ^[1] 22:7 inquiry ^[8] 46:12,12 74:12 75:21 76:18 84:12 86:12 96:17 insight ^[2] 33:9 51:16 insofar ^[1] 28:19 instance ^[9] 15:1 17:12 18:12 43:11 60:14 71:9 88:10 91:12 105:25 instances ^[1] 91:1 instantaneously ^[1] 80:4</p>	<p>instantly ^[2] 43:20 83:25 instead ^[5] 13:5,8 61:9,16 106:11 instruct ^[2] 76:14 108:25 instructed ^[4] 39:12 57:11 79:10 88:21 instruction ^[41] 3:16 9:13 10:1 23:19,21 26:1,24 32:8 40:8 57:13,23 59:6 63:6 66:12 68:6,8,22,25 69:4,14 70:1,3,10,11 72:8 73:8,22 81:14 82:8 90:16 102:12,17,22,25 103:10,16,25 104:8,23 105:4 108:12 instructions ^[11] 20:16 28:10 32:12 50:6 51:5,19 65:3,5 66:1 79:25 85:13 insufficient ^[1] 51:19 intends ^[1] 41:15 interests ^[8] 6:6 60:5 76:25 86:16,25 91:8,9 100:17 interpretation ^[1] 37:8 interrogate ^[1] 26:12 interrogating ^[1] 82:17 interrupting ^[1] 6:9 intervene ^[1] 82:8 interviewing ^[5] 8:7,10,15 16:4 107:16 intolerable ^[1] 58:23 intrigued ^[1] 93:17 introduce ^[5] 20:7 28:22 56:1,3,5 introduced ^[11] 10:24 27:13 29:1 39:10 40:18 67:7 69:16,23 83:16 97:18 98:3 introducing ^[1] 69:19 introduction ^[3] 5:12 47:6 56:22 introductory ^[1] 10:19 invalidated ^[1] 23:9 invariably ^[1] 80:1 investigated ^[2] 72:3,6 invite ^[1] 59:6 invoke ^[1] 36:14 involyntary ^[1] 23:13 involve ^[6] 40:15 67:1,4 97:15,23 98:1 involved ^[6] 17:10 34:8 44:14 80:10 81:25 101:22 involvement ^[3] 18:3,23 80:11 involves ^[1] 39:16 involving ^[3] 14:4 43:11 106:1 isn't ^[15] 9:12 20:15 27:20 40:13 45:22 47:11 64:22 70:16 72:7,22,25 77:15 80:4 81:12 88:15 issue ^[16] 11:4 40:14 48:16 49:14,15 51:9 61:25 62:13 66:22 67:1 68:19 74:20 88:17,25 89:25 97:23 it'll ^[2] 9:7,8 item ^[3] 40:18 67:6 98:3 itself ^[14] 43:4 45:18,25 47:13 48:1 53:7 55:2 61:21 69:16,22 77:11 98:8,9 107:14</p>	<p>68:14,21 69:2,7,11 70:12,15 99:6,7 100:2,5,8,11,19,23 101:14,17 102:11,21,24 103:4,18,21,24 104:9,14,17 105:8 Jayhawk ^[1] 106:20 Jencks ^[1] 107:23 John ^[6] 30:21 60:25 61:3 69:9 106:7,17 joint ^[13] 3:15 8:10 31:20 39:10 56:9 59:3 69:23 89:24 91:1,11 94:10 99:21 100:24 Judge ^[12] 22:16,16 38:5 52:3,11 102:6 107:1 108:15,15,15,17 109:14 judges ^[4] 21:3,5 45:9 109:9 judgment ^[2] 87:10 109:18 judgments ^[3] 95:18,20 109:11 juries ^[5] 23:5 56:21 70:10 96:4 108:18 jurisdictional ^[2] 19:2 84:11 jurists ^[4] 21:15,21 22:15 108:14 juror ^[8] 8:13 58:6 64:15,17,20 90:18 107:14,15 jurors ^[11] 21:6,10 22:19 60:10 65:1,25 72:15 79:23 84:1 90:14 109:1 jury ^[66] 3:18,22 4:23 5:16 9:17,23 10:11 13:25 19:13 20:19 21:17 23:9,12 25:15 26:1,6 32:12 39:11 40:16 45:2,4 46:4,13 50:5 54:10,18 56:10 57:11,13,16,23 59:6 63:7 66:11,14,17 67:5,19 70:1,3 74:2 78:8 79:18 80:3 81:22 82:8,9,14 83:12,16 84:25 85:5,7 88:21 89:2 93:6,21 98:2 102:12,17 103:6 104:2 108:10,25 109:3,4 Justice ^[266] 1:22 3:3,10 5:14 6:8,17,19,24 7:2 8:19,21,22 9:16 10:3,17,18 11:11,20 12:3,9,12 13:1,13,22 14:8,11,15 15:8,11,24 16:7,9,10,20 17:5,8,14,17 18:1,14,17,25 19:5,7,15,17,19 20:2,11 21:13,22 22:3,6,11,17,25 23:17,23,25 24:2,18,25 25:8,17,18 26:1,17 27:4,8,18,25 28:14 29:5,18 30:3,5,12,15,18 31:10,18,19,24 32:3,7,15,20,23 33:3,12 34:3,7,12,19,24 35:14,16,17 36:3,6,8,9,17,23,23,24 37:12,17,20 38:1,9 39:7,22 40:12 41:2,20,23,25 42:3,4,5,6,7,7,8 45:14,14,16,17,25 46:15 47:11,14,24 48:8,18 49:20,22,22,24 50:5,18 51:20 52:14 53:23,23,25 54:25 55:18 57:2,3,6,9 59:9,13,14 60:15,18,23 61:8,13 62:10 63:9,22 64:22 65:1,10,13,22 66:19,21 67:25 68:14,21 69:2,7,11 70:12,15,15 71:17,18,19 72:11,22,24 73:11,13 74:16,18 75:23 77:1 79:14 80:8,9 81:5,7 83:4 84:17,19 85:14,15,16,16,18 86:20 87:1,17 88:15 91:7,14,16,17,18,19,24,25 92:4,16,22 93:3,15,15,16,25 95:12 96:19,20,20,22,23 97:7,10,13 98:25,25 99:2,4,4,6,7 100:2,5,8,11,</p>
I		J	
<p>identifiable ^[1] 78:20 identification ^[5] 5:19 53:9,14 106:14,18 identified ^[5] 5:16 9:24 35:25 54:19 58:22 identifies ^[4] 43:8 45:12 62:20 109:12 identify ^[4] 4:7 82:3 88:7 107:3 identifying ^[1] 76:12 ignore ^[1] 109:5 ignored ^[1] 103:16 illustrate ^[2] 104:21 106:6 illustrates ^[3] 5:9 27:3 107:10 imagine ^[2] 85:14,18 imagining ^[1] 99:12 immediate ^[2] 37:11 67:10 immediately ^[5] 40:17 63:17 64:</p>	<p>instantly ^[2] 43:20 83:25 instead ^[5] 13:5,8 61:9,16 106:11 instruct ^[2] 76:14 108:25 instructed ^[4] 39:12 57:11 79:10 88:21 instruction ^[41] 3:16 9:13 10:1 23:19,21 26:1,24 32:8 40:8 57:13,23 59:6 63:6 66:12 68:6,8,22,25 69:4,14 70:1,3,10,11 72:8 73:8,22 81:14 82:8 90:16 102:12,17,22,25 103:10,16,25 104:8,23 105:4 108:12 instructions ^[11] 20:16 28:10 32:12 50:6 51:5,19 65:3,5 66:1 79:25 85:13 insufficient ^[1] 51:19 intends ^[1] 41:15 interests ^[8] 6:6 60:5 76:25 86:16,25 91:8,9 100:17 interpretation ^[1] 37:8 interrogate ^[1] 26:12 interrogating ^[1] 82:17 interrupting ^[1] 6:9 intervene ^[1] 82:8 interviewing ^[5] 8:7,10,15 16:4 107:16 intolerable ^[1] 58:23 intrigued ^[1] 93:17 introduce ^[5] 20:7 28:22 56:1,3,5 introduced ^[11] 10:24 27:13 29:1 39:10 40:18 67:7 69:16,23 83:16 97:18 98:3 introducing ^[1] 69:19 introduction ^[3] 5:12 47:6 56:22 introductory ^[1] 10:19 invalidated ^[1] 23:9 invariably ^[1] 80:1 investigated ^[2] 72:3,6 invite ^[1] 59:6 invoke ^[1] 36:14 involyntary ^[1] 23:13 involve ^[6] 40:15 67:1,4 97:15,23 98:1 involved ^[6] 17:10 34:8 44:14 80:10 81:25 101:22 involvement ^[3] 18:3,23 80:11 involves ^[1] 39:16 involving ^[3] 14:4 43:11 106:1 isn't ^[15] 9:12 20:15 27:20 40:13 45:22 47:11 64:22 70:16 72:7,22,25 77:15 80:4 81:12 88:15 issue ^[16] 11:4 40:14 48:16 49:14,15 51:9 61:25 62:13 66:22 67:1 68:19 74:20 88:17,25 89:25 97:23 it'll ^[2] 9:7,8 item ^[3] 40:18 67:6 98:3 itself ^[14] 43:4 45:18,25 47:13 48:1 53:7 55:2 61:21 69:16,22 77:11 98:8,9 107:14</p>	<p>JACKSON ^[45] 19:17 23:8,23 24:2 25:18 27:4,8,18,25 28:14 29:18 38:1 53:24,25 55:18 57:2 67:25</p>	<p>17,19 85:14,15,16,16,18 86:20 87:1,17 88:15 91:7,14,16,17,18,19,24,25 92:4,16,22 93:3,15,15,16,25 95:12 96:19,20,20,22,23 97:7,10,13 98:25,25 99:2,4,4,6,7 100:2,5,8,11,</p>

Official - Subject to Final Review

19,23 101 :14,17 102 :11,21,24 103 :4,18,21,24 104 :9,14,17 105 :8,9 106 :5 108 :5,14 109 :22	light ^[4] 3 :17 4 :21 30 :22 86 :15 likely ^[12] 3 :22 4 :22 9 :17 10 :11 13 :25 19 :12 46 :4,13,18 54 :18 79 :18 104 :16 limine ^[5] 11 :7 41 :5,21 49 :13 52 :3 limited ^[1] 17 :21 limiting ^[37] 3 :16 10 :1 20 :16 23 :21 26 :23 28 :10 32 :8 40 :8 51 :4,18 63 :6 65 :2,5 66 :1 68 :5,8,22,25 69 :3,14,25 70 :10,11 73 :7,22 79 :25 81 :14 85 :13 102 :21,25 103 :10,15,25 104 :8,23 105 :4 108 :12 limits ^[1] 41 :14 line ^[20] 16 :11 20 :12,22 21 :6 54 :16 77 :4,6,6 78 :13 89 :12 90 :1,3,6,10,17 91 :4,25 92 :1,5 93 :12 lines ^[2] 77 :13 89 :10 link ^[3] 14 :2 65 :16 81 :22 linkage ^[2] 81 :1 98 :23 linkages ^[1] 42 :15 linked ^[4] 38 :19 47 :6 56 :16 97 :17 links ^[2] 55 :9 102 :1 list ^[1] 35 :24 litigated ^[1] 87 :19 little ^[6] 4 :10 16 :11 30 :7 47 :17 77 :13 78 :11 lived ^[3] 4 :19 41 :11 55 :11 logic ^[2] 60 :13 80 :22 long ^[8] 21 :15,18 23 :3 29 :24 41 :13 68 :6 88 :12 103 :17 longer ^[1] 57 :22 look ^[27] 13 :23 14 :24 25 :23 43 :12 53 :14 54 :8 61 :21,22 62 :11 63 :13,16 64 :9,18 67 :11 73 :15,24 74 :24 76 :4 81 :2 95 :6,7,14 96 :2 97 :5,8 98 :10 102 :18 looked ^[3] 34 :24 75 :12 93 :5 looking ^[4] 64 :12 95 :2,11,16 lot ^[6] 48 :19 74 :17 76 :19 94 :1,4,5 love ^[1] 77 :6 low ^[4] 90 :23 94 :14,16,23 lower ^[20] 4 :25 14 :24,25 17 :2 21 :14 35 :24 41 :22 44 :1,4,7 45 :7 46 :23 48 :13 51 :14 54 :2 55 :15 75 :14 79 :3 80 :25 86 :4	14 26 :8 28 :5 30 :19 34 :1 46 :23 68 :22 71 :1 86 :20 matters ^[1] 22 :12 mean ^[32] 5 :10 6 :19 9 :4,4 15 :10 22 :18 25 :1,21 42 :17 47 :24 48 :21 52 :15 62 :10,11,12 65 :1 67 :12 75 :8 76 :5 81 :8,10,18 82 :11 84 :22 85 :2 86 :8,10 87 :17 88 :2 93 :20 94 :13 98 :8 meaning ^[3] 30 :20 37 :5 39 :20 means ^[2] 63 :8 74 :23 meant ^[2] 10 :25 76 :1 Melendez ^[2] 68 :15,15 Melendez-Diaz ^[7] 6 :1 31 :8 33 :21 68 :16,16 69 :12 103 :17 mentioned ^[3] 80 :19 87 :14,15 mentioned ^[5] 70 :19 73 :23 74 :18 77 :17 80 :18 mentioning ^[1] 99 :10 mere ^[2] 13 :18 38 :17 merits ^[1] 10 :6 mess ^[1] 44 :4 met ^[3] 4 :18 41 :11 55 :11 might ^[12] 7 :21 24 :9 44 :5 46 :9 52 :3 71 :3 74 :19 79 :15,24 95 :12 99 :19 103 :6 mile ^[1] 75 :19 militates ^[1] 74 :12 mind ^[9] 10 :1 22 :4,19,21 23 :1,14,22 24 :5 51 :3 minded ^[2] 28 :4 108 :22 minds ^[1] 89 :4 mini-trial ^[1] 35 :19 minify ^[1] 9 :13 minimal ^[1] 5 :4 Miranda ^[1] 21 :23 misconduct ^[1] 73 :25 misleading ^[1] 15 :13 missing ^[1] 98 :16 mistrials ^[1] 78 :22 misunderstood ^[1] 37 :21 Mm-hmm ^[3] 27 :17 48 :8 97 :9 modified ^[1] 58 :17 moment ^[3] 26 :17 66 :16 83 :15 Moreover ^[1] 98 :4 morning ^[4] 3 :4 58 :15 74 :17 105 :16 most ^[13] 4 :16 20 :23 21 :18 29 :11 31 :25 35 :7 44 :17 64 :19 72 :12,14 91 :1 96 :23 101 :18 motion ^[2] 11 :6 62 :6 move ^[1] 84 :20 Ms ^[82] 37 :16 53 :4 57 :6,9 59 :13,23 60 :20 61 :7,12,20 62 :22 63 :21,25 64 :25 65 :7,12 66 :6,20 67 :17 68 :5,20 69 :6,10,18 70 :13,17 72 :9,21,23 73 :1,12,20 75 :2 76 :8 77 :17 79 :21 80 :16 81 :7 82 :6 83 :23 84 :17,18,20 86 :11,21 87 :3 88 :1 90 :8 91 :22 92 :3,10,20,24 93 :6,9,19 94 :22 95 :19 97 :2,9 98 :17 99 :24 100 :4,7,10,15,20 101 :8,16 102 :4,19,23 103 :1,8,20,23 104 :7,10,15,20 105 :15 106 :5	much ^[11] 13 :25 48 :11 49 :1 52 :16 59 :13 63 :17,18 88 :4 89 :16,22 105 :22 multifactor ^[1] 34 :22 multiple ^[5] 14 :5 15 :2,3 106 :2,17 murder ^[3] 17 :24,25 18 :24 must ^[3] 8 :25 25 :6 81 :24
K	M	N	
Kagan ^[21] 42 :7,8 47 :14 60 :18,23 61 :8,13 62 :10 63 :9,22 65 :22 66 :19,21 70 :15 81 :7 83 :4 93 :15,16,25 95 :12 96 :19 Kagan's ^[1] 106 :5 KANNON ^[5] 1 :19 2 :3,9 3 :7 105 :12 Kavanaugh ^[19] 45 :16,17,25 46 :15 47 :11,24 48 :8,18 49 :20 71 :17 77 :1 79 :14 80 :8 96 :22,23 97 :7,10 99 :2 108 :5 keep ^[6] 47 :13 63 :7 99 :10 101 :24 104 :1 107 :18 keeping ^[1] 88 :13 keeps ^[2] 84 :9 103 :11 kept ^[1] 24 :15 key ^[3] 19 :23 67 :17 97 :22 kick ^[1] 25 :6 killed ^[6] 71 :9 99 :14 100 :13,25 101 :20 104 :22 kind ^[22] 9 :5 14 :12 15 :11,17 31 :5 34 :24 47 :21 50 :10 51 :18 62 :25 64 :5,9 78 :1 82 :16 83 :24 84 :12 90 :21 92 :11 95 :8,24 96 :13 98 :11 kinds ^[5] 52 :7 63 :15 82 :4 94 :11 101 :3 knocked ^[1] 70 :13 knowing ^[1] 84 :4 knows ^[1] 106 :18	made ^[14] 3 :19 6 :2 26 :5 27 :15,19 39 :19 62 :7 71 :7,12 75 :18 81 :4 82 :15 91 :3 96 :7 main ^[1] 30 :6 maintaining ^[1] 99 :17 majority ^[7] 34 :9 48 :15 75 :5 88 :5 97 :4 105 :17 108 :13 man ^[5] 63 :20 93 :5,7,18 106 :18 manner ^[8] 3 :25 10 :20 17 :3 19 :12 20 :8 44 :18 49 :3 55 :2 many ^[10] 8 :8 10 :8,13 31 :22,23 44 :23,23 50 :24 107 :6,8 March ^[1] 1 :12 Mary ^[4] 60 :25 61 :4 62 :18 106 :7 match ^[1] 84 :5 matched ^[1] 66 :14 matter ^[13] 1 :14 12 :11,12 24 :23 25 :	NAFD ^[1] 43 :17 name ^[21] 4 :6 7 :12 57 :20 58 :4 60 :20 62 :3 63 :19 65 :20 68 :18 69 :9 70 :22,25 71 :2 75 :11 77 :11 79 :11 81 :16 86 :1 88 :12 104 :19 105 :2 named ^[7] 4 :11 33 :7 36 :17,18,19 70 :21 106 :17 namely ^[1] 41 :10 names ^[1] 71 :3 naming ^[3] 3 :21 25 :25 63 :2 narrow ^[5] 34 :12 57 :25 70 :8 84 :14 88 :13 narrowing ^[1] 87 :25 natural-sounding ^[1] 58 :5 near ^[2] 47 :9 73 :9 necessarily ^[1] 26 :9 need ^[24] 6 :3 42 :14 54 :7 59 :24 68 :5,7,17,21,24 69 :3,17 73 :16 98 :22 102 :12,17,20,24 103 :5,14,24 104 :6,7,23 106 :21 needed ^[1] 104 :1 needs ^[4] 44 :4 46 :25 86 :15 103 :10 neither ^[1] 61 :15 neutral ^[2] 79 :1 92 :25 never ^[5] 51 :3 70 :5 75 :14 76 :11 88 :25 nevertheless ^[1] 10 :15 new ^[4] 5 :11 12 :22 60 :16 109 :19 next ^[3] 68 :13 77 :21 83 :17 nexus ^[1] 19 :3 nickname ^[5] 43 :14 53 :17 63 :22 75 :25 76 :12 nickname/alter ^[1] 93 :14 nicknames ^[8] 43 :12 53 :9 75 :10,16 76 :10 78 :21 93 :11,12 Nobody ^[2] 37 :6 101 :21 non-Mirandized ^[2] 20 :18 22 :20 nonconfessing ^[11] 9 :19,23 19 :14 26 :19 30 :2 33 :20 45 :13 46 :5 54 :19 105 :23 109 :12 none ^[2] 20 :25 21 :2 nonseverance ^[1] 62 :8 nontestifying ^[5] 3 :13 14 :21 15 :21 81 :13 89 :3 nontestimonial ^[1] 85 :4 notably ^[2] 10 :13 49 :4 note ^[6] 10 :6 13 :22 18 :20 35 :13 44 :15 56 :18 nothing ^[3] 22 :15 68 :23 82 :3 noun ^[1] 58 :5 nouns ^[1] 79 :1 novel ^[1] 22 :15 number ^[6] 19 :21 35 :6 36 :2 44 :14,15 55 :1 numerous ^[1] 22 :10	
L			
label ^[1] 105 :6 lacks ^[1] 59 :7 language ^[6] 28 :17,25 42 :12 81 :9 83 :5 102 :10 large ^[1] 44 :13 last ^[1] 48 :10 late ^[1] 51 :7 later ^[6] 66 :18 70 :9 78 :24 80 :6 82 :7 97 :18 latter ^[1] 46 :11 Laughter ^[3] 7 :4 60 :22 93 :8 law ^[13] 7 :8 11 :7,17 21 :8 22 :15 50 :21,24 52 :24 59 :7 66 :1 67 :13 71 :23 109 :8 leading ^[2] 54 :16 108 :16 leads ^[2] 14 :13 89 :23 least ^[8] 9 :13 29 :22 49 :5 70 :8,24 96 :11 97 :21 98 :12 leave ^[1] 99 :2 leaves ^[1] 14 :13 led ^[1] 36 :25 leeway ^[1] 76 :22 left ^[6] 4 :10 13 :21 32 :17 43 :2 62 :18 85 :20 legal ^[2] 11 :18 57 :17 lengthy ^[2] 47 :1 107 :2 less ^[4] 7 :22 13 :25 16 :2 104 :16 lesser ^[2] 21 :7,7			

Official - Subject to Final Review

O			
<p>obey ^[1] 57:23 objection ^[4] 18:15,17 52:1,6 objections ^[1] 52:2 obviate ^[1] 108:1 obvious ^[5] 7:22 8:4 45:19 46:20 47:9 obviously ^[19] 12:19 16:5 25:2 28:12 29:10 35:21 37:14 41:18 42:25 52:19 61:5,11 67:2,3 83:17 90:5 97:24,25 108:2 odd ^[1] 28:19 oddy ^[1] 20:15 offer ^[1] 28:24 offered ^[1] 88:12 offering ^[2] 94:25 97:6 offers ^[1] 20:17 offhand ^[1] 40:21 officer ^[1] 72:6 officers ^[1] 82:17 often ^[7] 11:5 14:6 46:8 49:17 59:2 67:3 97:25 okay ^[7] 33:4 40:12 49:20 60:23 93:25 97:19 100:19 once ^[4] 9:23 23:12 25:14 43:20 one ^[50] 7:15 14:18,23 15:3,6 17:2,9 18:5,5 20:1,4,6,14 21:1,20 22:25 28:4 29:8 31:11 34:14 37:22 40:12 44:20,22 47:4,16 50:4 55:18,19 56:3,21 58:16 62:15 69:25 70:16 73:3,23 79:7 83:25 88:18,20 89:20,20 90:2 96:17 99:22 107:21 108:16,18,21 one-eyed ^[5] 63:20 93:5,7,18 106:18 ones ^[4] 31:24 35:25 36:1 90:17 ongoing ^[1] 50:20 only ^[32] 4:12 7:14 14:14 15:6 16:22 17:9 20:20 21:25 35:11 39:12 41:6 47:4 52:12 56:5 58:10 70:1 73:2 74:5,24 78:3 81:15 82:7 84:10 88:22 97:17 101:23 102:18 103:5 104:17,18 106:3 109:2 open ^[4] 13:21 19:10 43:2 87:11 opening ^[1] 74:1 operationalize ^[2] 32:18,24 operationalizing ^[1] 26:9 opinion ^[9] 38:6 39:8 46:18 66:8 73:9 78:25 82:25 107:2 108:23 opinions ^[3] 95:15,16 108:16 opportunity ^[2] 104:4 109:19 opposed ^[1] 34:15 option ^[11] 12:19,22 29:14,16,20 56:7,19,20 99:20,22,24 options ^[6] 12:17 29:10,11,13 55:19,22 oral ^[6] 1:14 2:2,5 3:7 46:16 57:7 order ^[5] 16:21 43:7 68:19 72:19 96:7 ordinarily ^[6] 39:9 40:16 46:8 54:11 67:5 98:2 original ^[3] 28:9 37:4 99:11 originalist ^[2] 28:5 33:25</p>	<p>originally ^[1] 92:1 other ^[69] 4:5,12,14,18 8:16 12:16 13:11,25 14:16,18 15:4,5 16:13 17:9 18:2,4,6,7,22 19:14,24 23:2 34:10 38:19 39:5,6 41:9 44:20,22 45:1 47:2,7,12,21 50:16 54:11 55:13 58:12,17 61:24 65:20 69:25 70:2,5 73:4 76:4 80:4 81:21 82:18 83:3 84:4,8,18 87:15 88:9,24 89:23 90:2 91:5 93:1 95:21 98:23 102:7 103:12 104:3 106:25 107:17,19,22 others ^[5] 9:8,10 60:20 63:8 90:16 otherwise ^[3] 25:20 28:11 57:21 ought ^[2] 62:7 71:13 out ^[42] 4:1 9:25 10:20 20:9 22:3,19,20 23:1,14 24:4,15 28:18 33:5 35:2 38:16 41:13 49:4 50:5 52:2 60:25 61:1,4,10,17,18 62:17,18 63:11 67:14,15 70:13,23 71:5 76:14,23 80:20 81:21 89:4 94:12 95:9 96:3,12 outcome ^[1] 91:3 outside ^[3] 61:21 95:16 98:24 Over ^[3] 3:11 8:8 44:23 overall ^[1] 59:24 overrule ^[4] 37:23 59:25 91:20,23 overruled ^[1] 38:10 overruling ^[2] 25:20 59:17 overwhelming ^[1] 58:6 overwhelmingly ^[1] 49:13 own ^[3] 21:24,24 60:17</p>	<p>16,18,24 15:5,6,14 16:14 17:10 19:14,24 23:1 26:11 27:15 35:5 38:15 39:5,6,18,19 44:23 45:1 47:2 55:13 62:18,21 64:23 68:12,18 69:8 77:21 82:23 83:17 88:22 93:23 99:12 101:12 106:19 107:18,20,25 person's ^[2] 18:3 70:6 petition ^[1] 44:6 Petitioner ^[27] 1:5,20 2:4,10 3:8 4:8,12,21,24 5:11,16,17 6:13,22 36:18,20 41:10 47:7 54:4 55:11 94:24 95:25 96:24 97:6 98:12 105:13 109:19 Petitioner's ^[6] 4:5 58:2,20 59:5 84:3 95:24 Philippines ^[2] 17:23 41:12 phrase ^[3] 77:25 78:4 108:22 phrased ^[1] 62:1 phrases ^[1] 4:5 physical ^[2] 53:10 93:23 pick ^[1] 33:9 piece ^[8] 57:12 63:8 72:14 80:5 81:22,23 93:22 101:18 pieces ^[1] 90:18 pin ^[1] 19:7 place ^[5] 20:10 45:6 51:3 70:6 90:6 placeholder ^[3] 11:10 15:17 105:21 placeholders ^[1] 13:18 places ^[1] 54:11 plausibly ^[4] 4:13 7:15 15:6 47:5 play ^[2] 86:12 88:2 playing ^[1] 101:24 plead ^[1] 71:5 please ^[2] 3:10 57:10 plenty ^[2] 78:12 95:15 point ^[46] 5:25 10:16 12:20 15:12 19:23 20:9 21:1,2 23:15 24:18 28:9 29:4,25 30:6 31:9 40:4 41:13 43:16 44:3,11 47:25 48:2 49:4,5,9 52:23 55:20 66:6,13 73:13 76:1 77:15,15 79:17 80:3,3,12 84:21 92:7,17 93:13 95:23 103:8 104:21 108:4,6 pointed ^[3] 44:6 79:2 109:3 Pointing ^[2] 16:16 50:4 points ^[1] 34:25 poles ^[1] 89:10 police ^[2] 48:13 72:6 pops ^[1] 89:25 pose ^[1] 87:15 posit ^[1] 99:8 position ^[11] 10:23 12:7 28:21 71:12 74:21 86:24 98:20 102:19 106:8,10 107:14 positions ^[2] 89:7 107:12 possible ^[7] 14:19 25:1,4,11 54:1 76:10 79:22 possibly ^[3] 17:9 20:24 83:15 post-Gray ^[2] 92:19 108:16 potential ^[2] 41:6 58:11 potentially ^[1] 17:10</p>	<p>powerful ^[3] 20:23 21:19 85:12 practical ^[9] 24:18,22 38:4 58:21 75:12 78:16 88:19 89:19 109:16 practice ^[2] 56:23,24 precedent ^[2] 50:16 77:2 precedents ^[1] 92:21 precisely ^[5] 12:13 14:9 16:3 49:2 59:21 predated ^[1] 42:25 predominant ^[1] 53:21 prefer ^[1] 49:1 preferred ^[2] 12:19,22 prejudice ^[7] 5:5 22:14 24:20 25:16 26:8 86:17 108:9 prejudicial ^[5] 3:17 24:1,3,4,14 present ^[5] 4:20 31:5 56:15,22 89:22 presentation ^[2] 55:6 94:8 presented ^[3] 3:24 43:22 55:3 presently ^[1] 53:4 preservation ^[1] 12:13 preserve ^[1] 12:3 preserved ^[1] 12:5 presumably ^[2] 51:25 52:6 presume ^[2] 57:22 71:20 presumption ^[2] 59:7 60:8 presumptive ^[1] 62:5 pretrial ^[2] 58:23 88:8 pretty ^[6] 8:4 18:14 40:19 63:17,18 94:13 prevail ^[1] 9:3 prevailed ^[2] 44:13 49:17 previously ^[1] 88:20 price ^[1] 59:4 principle ^[3] 57:16,18 109:8 prior ^[2] 75:8 107:23 privilege ^[1] 36:14 probability ^[1] 58:6 probably ^[3] 20:23 93:7 101:12 problem ^[42] 21:4 23:12 26:25 28:12 30:8 33:17 40:3,9 42:1,19 48:21,24 50:22 51:25 54:3 55:21 56:2 57:14 64:7 68:1,4,9 69:13,20 70:4 72:25 74:8 75:15 76:12 79:15 85:24 86:6,9 87:16 88:23 101:6,16 102:3,10,16 107:11 108:1 problematic ^[1] 47:18 problems ^[8] 58:21 59:1,8 76:24 79:6 88:19 105:19 107:3 procedure ^[2] 76:22 95:22 proceeded ^[1] 4:20 proceedings ^[1] 58:24 process ^[3] 16:15 18:4,12 profoundly ^[1] 33:25 prominent ^[1] 98:5 pronoun ^[1] 58:5 pronouns ^[1] 79:2 proof ^[1] 72:17 proper ^[1] 81:14 prophylactic ^[1] 58:13 propose ^[4] 10:22 11:13,22 29:19 proposed ^[2] 27:1 34:17 proposes ^[1] 47:19 proposing ^[1] 90:22</p>
P			
	<p>PAGE ^[6] 2:2 24:6 66:7,8,21 92:8 pages ^[5] 8:8,9 44:23 45:20 96:6 pains ^[1] 83:24 palatable ^[1] 91:3 paramount ^[1] 36:1 paraphrase ^[1] 67:23 parenthetically ^[1] 44:9 parse ^[1] 97:11 part ^[4] 50:22 62:7 76:17 90:9 participated ^[1] 17:23 participation ^[1] 85:2 particular ^[10] 5:25 10:14 14:3 36:2 43:14,17 44:11 53:17 80:19 109:11 particularly ^[1] 40:10 partly ^[1] 75:11 party ^[1] 80:20 passing ^[1] 44:20 path ^[1] 82:9 pattern ^[1] 48:6 pay ^[1] 40:22 payment ^[1] 17:24 people ^[10] 15:2 27:19 56:4 83:3 94:12 101:23 102:1,2,9 103:12 perform ^[2] 23:5 108:19 perhaps ^[2] 86:13 90:14 period ^[1] 100:13 permit ^[1] 5:8 permits ^[1] 49:2 person ^[46] 4:5,12,14,18 8:12,14,</p>		

Official - Subject to Final Review

<p>proposition ^[1] 50:17</p> <p>prosecution ^[6] 4:4,6,15,20 35:13 73:2</p> <p>prosecution's ^[5] 4:9 35:12,22 47:3 55:3</p> <p>prosecutor ^[3] 32:25 96:8 102:5</p> <p>prosecutorial ^[3] 73:21,25 74:11</p> <p>prosecutors ^[5] 43:25 49:1 59:2 60:3 91:9</p> <p>protecting ^[1] 45:4</p> <p>protection ^[4] 25:2,3,6 52:16</p> <p>protects ^[1] 5:3</p> <p>prove ^[2] 72:19 74:6</p> <p>provenance ^[1] 108:24</p> <p>provide ^[1] 68:25</p> <p>provided ^[2] 71:1 107:21</p> <p>pure ^[2] 88:16,17</p> <p>purpose ^[3] 29:9 63:24 88:13</p> <p>purposes ^[4] 20:19,20 22:1 52:24</p> <p>pursue ^[1] 16:10</p> <p>push ^[2] 89:14,15</p> <p>put ^[15] 9:25 19:7 22:3,19,20 23:1,14 24:4 41:15 59:4 61:1,2 76:15 89:4 107:13</p> <p>puts ^[3] 101:3,8 103:3</p> <p>putting ^[2] 40:15 84:15</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>qualify ^[2] 6:6 58:12</p> <p>question ^[46] 3:24 9:12 11:12,21 13:9,21 14:15 18:9 24:5 26:17,22 27:21 29:5 32:17 33:13 34:1,13 37:3,16 38:2 39:15 40:13 43:2,22 46:16 49:24 50:3 51:15,21 54:17 70:22 74:24 77:2 78:12 81:10 93:16 96:12 99:16 102:12 103:9,13,14 105:3 107:17,21,24</p> <p>questioning ^[3] 4:9 16:11 20:12</p> <p>questions ^[8] 5:13 28:16 34:23 36:25 37:22 59:12 60:9 76:20</p> <p>quick ^[1] 99:8</p> <p>quickly ^[1] 99:8</p> <p>Quite ^[5] 44:7 49:11 71:3 72:13 100:21</p> <p>quoting ^[1] 13:7</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>raised ^[1] 18:15</p> <p>raising ^[2] 9:14 47:14</p> <p>ramifications ^[1] 75:13</p> <p>rather ^[2] 18:20 79:11</p> <p>rationale ^[5] 25:13 65:24 84:22 89:8,14</p> <p>react ^[1] 99:9</p> <p>read ^[7] 45:22 76:3,4 93:2 97:22 98:13,15</p> <p>readily ^[2] 76:13 90:14</p> <p>reading ^[3] 45:17 98:7,18</p> <p>ready ^[1] 5:8</p> <p>reaffirmed ^[1] 58:9</p> <p>real ^[6] 25:12 26:22 48:19,24 71:1 87:22</p> <p>realistic ^[1] 89:5</p> <p>reality ^[1] 59:1</p>	<p>realization ^[1] 80:7</p> <p>really ^[28] 11:12 15:15 26:6 27:9 28:5 32:13,17 34:20,25 35:2 37:2 44:1 46:11,23 51:1,6,7,8,15 66:23 82:4 87:25 101:20 102:15 107:2,12 109:7,15</p> <p>reason ^[9] 11:16 40:24 50:4 64:16 82:14 87:6 89:1 92:14 103:5</p> <p>reasonable ^[2] 107:14,15</p> <p>reasoned ^[1] 58:8</p> <p>reasoning ^[6] 7:6,24 48:3 64:2 65:8 93:4</p> <p>reasons ^[1] 48:10</p> <p>REBUTTAL ^[3] 2:8 105:11,12</p> <p>received ^[1] 17:24</p> <p>recent ^[1] 92:20</p> <p>recognize ^[4] 9:5 15:25 48:5 88:24</p> <p>recognized ^[6] 21:15 23:4 38:13 46:7 60:13 108:17</p> <p>recognizes ^[2] 8:2 43:10</p> <p>reconsider ^[1] 37:15</p> <p>record ^[2] 87:13 96:3</p> <p>redact ^[10] 13:16 15:10 17:9,17 18:7 28:18 71:13 75:15 92:13 100:12</p> <p>redacted ^[34] 3:21 5:15 7:12,16 11:23 12:1 14:1 33:19 35:1 38:14 43:7 45:12 54:19 61:9 63:11,19 64:12,14,14 67:13 74:15 76:13 77:8 78:19,19 79:9 81:15 83:1 84:6,15 86:2,2,3 98:4</p> <p>redacting ^[3] 11:13 50:10 79:1</p> <p>redaction ^[21] 3:25 7:19 8:1,3 10:20,22 11:9,17 13:1,3 17:3 19:12 28:17 45:5,20 46:2 47:10 50:9 51:2 67:2 97:24</p> <p>redactions ^[9] 16:1,1 29:15 43:24 51:1,3 62:7 86:13 93:1</p> <p>refer ^[7] 15:5 58:17 67:2 79:9 82:22 97:16,24</p> <p>reference ^[8] 15:14 18:2 19:24 33:19 44:20 65:19 81:16,19</p> <p>references ^[5] 8:14,17 44:22,25 47:2</p> <p>referred ^[7] 8:12 10:19 65:14 71:8 83:2 85:11 107:19</p> <p>referring ^[1] 24:15</p> <p>refers ^[5] 15:2 16:13 47:20 73:3 85:1</p> <p>refusing ^[1] 87:21</p> <p>regard ^[1] 23:18</p> <p>regardless ^[2] 53:19 105:1</p> <p>rejecting ^[1] 77:5</p> <p>rejection ^[1] 89:18</p> <p>related ^[3] 71:3 101:4 102:17</p> <p>relative ^[1] 56:24</p> <p>relatively ^[1] 57:1</p> <p>relevant ^[1] 52:8</p> <p>reliably ^[1] 85:8</p> <p>relies ^[1] 95:25</p> <p>relitigation ^[2] 87:11 96:14</p> <p>rely ^[2] 7:6 73:14</p> <p>remark ^[1] 40:21</p> <p>remedy ^[1] 62:8</p>	<p>remember ^[4] 7:2,5 52:10 65:11</p> <p>remove ^[1] 9:13</p> <p>removed ^[2] 19:25 82:4</p> <p>repeated ^[2] 8:13 47:2</p> <p>repeatedly ^[2] 58:1 109:4</p> <p>replace ^[1] 58:4</p> <p>reply ^[7] 11:25 15:9 17:20 18:8 24:6 49:5 107:7</p> <p>represent ^[1] 15:18</p> <p>represents ^[1] 60:2</p> <p>reproduced ^[1] 8:9</p> <p>request ^[1] 58:3</p> <p>require ^[1] 86:13</p> <p>requirement ^[1] 26:10</p> <p>requires ^[2] 43:5 45:9</p> <p>reread ^[1] 107:13</p> <p>resemble ^[1] 71:14</p> <p>resolve ^[1] 80:23</p> <p>respect ^[9] 20:22 22:6 27:12 55:19 65:3 88:3 93:2 95:1,8</p> <p>respectfully ^[1] 62:22</p> <p>respecting ^[1] 21:5</p> <p>respective ^[1] 107:11</p> <p>respects ^[1] 34:5</p> <p>Respondent ^[4] 1:8,23 2:7 57:8</p> <p>response ^[2] 21:13 28:3</p> <p>rest ^[4] 54:9 61:22 64:10 76:2</p> <p>reversal ^[1] 90:25</p> <p>reversals ^[1] 58:24</p> <p>revert ^[1] 109:13</p> <p>review ^[1] 52:19</p> <p>reviewed ^[1] 52:12</p> <p>reviewing ^[1] 87:20</p> <p>revisit ^[1] 33:24</p> <p>revisited ^[1] 92:19</p> <p>rewrite ^[2] 16:12 19:8</p> <p>rewriting ^[2] 15:12,17</p> <p>Richardson ^[60] 33:16 38:10,12,25 39:8,23 40:7 41:17 42:9,11,12,22,24 43:1 47:14,15,16 48:7,12 58:9,22 60:1 63:13 65:8,10,18 66:7,20,24,24 73:9,23 74:10 77:3,7 78:6,14,17 79:15,22 80:10,10,13,14,17 81:9,11,19 82:21 83:5,21 85:23,24,25 91:2,20 92:5 97:11,21 100:1</p> <p>Richardson's ^[4] 92:7 97:15 98:5,21</p> <p>rid ^[3] 71:15 86:14 91:11</p> <p>rightly ^[1] 97:13</p> <p>rights ^[4] 16:21 17:4 18:4,12</p> <p>rise ^[4] 27:2 58:6,21 102:15</p> <p>risk ^[8] 24:20 25:15 27:2 58:24 89:1,22 96:15 108:10</p> <p>risks ^[1] 90:25</p> <p>rob ^[1] 61:1</p> <p>robbed ^[15] 61:4,10,17,18 62:2,3,17,19 63:11 67:14,15 69:8 106:9,12,16</p> <p>ROBERTS ^[24] 3:3 8:19,22 35:16 36:6,23 42:4,7 45:14 49:22 53:23 57:3,6 71:18 74:16 75:23 85:16 91:14 93:15 96:20 98:25 99:4 105:9 109:22</p>	<p>role ^[2] 17:25 86:12</p> <p>rule ^[58] 3:20 4:2,25 5:9 11:18 12:13,15,15,18 14:13,18 23:9,12 24:21,24 30:17 32:19 34:2 38:16,21 40:19 44:8,9 48:16 49:1 50:13 51:12 52:4 53:11 54:6 59:16 63:5 74:22 75:14,24 76:7,9,17,18 77:3 78:3,18 82:5 84:16 85:7 86:11 88:5,21 94:6 97:5 105:17,18 106:22 107:4,4,6 109:15,16</p> <p>rules ^[7] 21:9 25:3 76:21,21 88:7 95:22 96:15</p> <p>ruling ^[2] 37:23 62:5</p> <p>run-of-the-mill ^[1] 29:7</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>sacrificed ^[1] 91:11</p> <p>SAL ^[1] 1:3</p> <p>same ^[19] 7:23 13:2 14:15 15:18 18:9 23:18 34:25 58:21 62:20,24 63:24 64:21,22 65:7 77:10 87:1 91:4,7 92:21</p> <p>SAMIA ^[2] 1:3 3:5</p> <p>SAMIC ^[1] 1:4</p> <p>satisfied ^[1] 36:10</p> <p>saw ^[1] 34:24</p> <p>saying ^[27] 7:14 8:24 13:5 27:10 28:1 31:2 33:6 48:20,23 51:22 54:5 62:11 79:20 87:18 88:10 95:6 101:5,10,13,25 102:2,5,8 103:2,4 104:14,20</p> <p>says ^[32] 13:24 26:3 39:4,6 47:16,21 61:9,16,17 63:10,13 64:14 66:21,22,25 67:13 69:7,22 70:7 72:1,15 79:22 83:16 96:25 97:13,14,20 99:14 101:19 103:17 105:15 106:15</p> <p>scale ^[2] 9:6 24:14</p> <p>Scalia's ^[1] 39:8</p> <p>scattering ^[1] 51:7</p> <p>scenarios ^[1] 73:22</p> <p>school ^[1] 21:8</p> <p>Schwartz ^[1] 96:1</p> <p>science ^[1] 22:22</p> <p>scope ^[3] 53:11 84:16 85:25</p> <p>second ^[18] 8:16 11:7 12:16 29:4 34:8 35:6 44:17 54:5 55:1 74:22 76:6,9 92:18,24 95:13,14,15 109:18</p> <p>see ^[12] 12:4 26:8,9 28:23 34:23 37:2 52:4 63:9 64:18 93:7,25 94:7</p> <p>seem ^[3] 16:19 36:25 54:3</p> <p>seemed ^[2] 37:17 77:6</p> <p>seems ^[17] 13:2 14:12 15:12,19 25:1,21 28:19 40:19 45:19 56:23 77:2 85:20 94:12,18 98:8 105:18 106:8</p> <p>seen ^[1] 97:2</p> <p>self-incrimination ^[1] 36:15</p> <p>seminal ^[1] 31:12</p> <p>sense ^[5] 26:22 45:10 77:12 109:9,10</p> <p>sentences ^[4] 97:22 98:9,16,18</p> <p>separate ^[8] 10:25 12:5,10 20:12</p>
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Official - Subject to Final Review

<p>73:12 74:12 84:21 105:3 separately [1] 29:12 seriously [3] 67:13 83:5,7 serve [1] 63:24 set [1] 92:5 setting [1] 69:13 Seventh [1] 38:6 sever [5] 11:6 16:23 28:21 99:18, 19 several [1] 55:22 severance [8] 11:3 24:8 49:15 62: 6 76:18 86:12 87:20,22 SHANMUGAM [107] 1:19 2:3,9 3: 6,7,9 5:21 6:14,18,23,25 7:5 9:15 11:2,15,24 12:8,11 13:13 14:9,22 15:8,23 16:8,25 17:6,11,16,19 18: 10,16 19:1,6,10,21 20:4 21:12 22: 2,5,8,13,24 23:3,23 24:17 25:7,10 26:13 27:6,17,24 28:2 29:3,20 30: 4,11,14,17 31:7,17,22 32:2,5,11, 16,22 33:2,11,14 34:5,11,16 35:9, 20 36:4,12,19,24 37:6,14,18,25 38: 11 39:21,24 40:23 41:21,24 42:1, 9,24 45:24 47:23 48:2,9,25 50:13, 19 52:9,22 54:13 56:12 57:5 79: 14 105:11,12,14 Shanmugam's [1] 94:6 Shepherd [1] 23:16 short [2] 29:13 82:25 shouldn't [1] 40:22 Show [4] 17:14 42:14 72:17 101:4 sift [1] 85:8 sign [1] 48:14 signed [1] 49:6 significant [3] 29:11 41:7 59:8 similar [3] 38:7 78:21 96:11 simple [4] 11:12,16 34:21 40:24 simply [10] 36:10 37:7 38:13,22 39: 6 45:9 48:3 53:20 57:18 75:24 since [1] 43:19 sitting [6] 62:18 68:13 77:21 83:17 93:23 101:23 situation [11] 7:1 28:23 38:7,8,23 70:24 71:22 97:1 99:19 101:7 102: 5 situations [1] 94:11 six [6] 10:7 34:10 90:18 96:5 107:5, 5 Sixth [6] 24:10,15 25:5 37:5 39:20 52:17 skepticism [1] 42:13 skunk [2] 108:25 109:3 sliding [3] 9:6 24:14 52:16 slightly [3] 78:3 84:21 93:9 smell [1] 109:1 social [1] 22:22 sole [1] 19:1 solely [1] 23:21 Solicitor [1] 1:21 solutions [1] 76:23 somebody [29] 9:1 16:16,17 30: 24 31:2 64:23 65:5,6,6,14,19 66:4, 5 70:21 71:10,12,24 74:3 82:12 85:1,12 99:14 100:13,25 101:2,12,</p>	<p>21 103:6 104:2 somehow [2] 21:6 45:3 someone [10] 6:16,21 38:24 67:3 71:25 72:16 79:12 86:6 93:1 97: 25 sometimes [4] 29:15 44:9 70:7 90: 13 somewhere [1] 48:6 sorry [10] 20:12 24:1 60:19 71:20 84:19 86:8 93:19 102:23 103:18, 20 sort [8] 11:9 34:14 41:4 63:3 74:7 78:10 80:2 93:17 SOTOMAYOR [44] 30:3,5,12,15, 18 31:10,18,24 32:3,7,15,20,23 33: 3,12 34:3,7,12,19 35:14,17 36:3 41:3 42:5,6 50:5 54:25 71:19 72: 11,22,24 73:11,13 74:18 80:9 81: 5 91:18,19,24 92:4,16,22 93:3 97: 13 sounds [3] 19:15,17 59:14 sources [1] 50:24 speaks [1] 6:12 specifically [4] 43:2 51:9 55:8 56: 16 spectrum [3] 15:3,4 44:21 split [1] 80:23 spot [1] 95:3 square [1] 31:11 squarely [1] 31:9 Stacy [1] 13:10 stand [1] 36:11 standard [18] 42:2 52:18,20,25 58: 25 59:5 60:2 74:14 75:2,4 87:5 90: 22,24 94:15,16,17,18,23 standing [1] 68:11 start [2] 90:11 105:14 started [2] 43:21,25 starting [1] 82:9 state [7] 10:8 23:22 43:21 59:10 87:7 88:2 97:1 statement [26] 10:19 25:22,24 30: 19 33:18 39:23 41:10 56:1,3,5 61: 21 64:12 71:14,21 74:15,25 75:4, 7 77:24 79:9 86:8 99:21 100:9 104:11,24 107:23 statements [8] 17:22 40:15 57:19 67:1 78:2 85:2 97:15,23 STATES [19] 1:1,7,16 3:5,12 19:4 23:17 34:10 48:19,20,23 49:5,9 76:23 91:5,6 96:23 97:3 107:6 stay [1] 47:15 staying [1] 45:18 step [3] 6:10 7:10 65:17 still [15] 7:8 10:16 25:6 40:9 52:1 56:13 65:6 68:5,24 69:12 79:17 83:2 103:2,2 104:23 Stillwell [8] 8:12 18:21 36:10 55: 11,12 68:24 72:16 82:16 Stillwell's [2] 17:22 18:11 stood [1] 82:21 stop [1] 82:9 straightforward [2] 59:20 79:24 Straker [1] 44:11</p>	<p>strategic [1] 29:16 strong [3] 46:19,24 67:10 stronger [2] 10:4 105:22 strongly [1] 48:4 structural [4] 41:3 54:22 55:4 56: 14 stuck [2] 65:22 66:5 stylized [1] 62:15 submission [6] 8:3 9:16 33:22 35: 23 37:7 53:20 submit [9] 33:24 48:9 53:3 54:15 55:14 76:18 106:4 107:4 109:1 submitted [2] 109:23,25 subsequent [1] 89:21 substantial [1] 108:10 substantive [3] 21:19 22:9 108:20 substituted [1] 4:4 substitution [1] 15:16 successfully [1] 28:25 sudden [1] 81:24 suffers [1] 105:18 sufficient [10] 11:9,10,17 19:3 24: 7,21 28:11 38:20 51:4 53:11 suggest [4] 13:17 18:7 42:18 50: 21 suggested [3] 38:2 40:1 94:24 suggesting [5] 16:21 54:25 67:8 79:16 101:25 suggestion [3] 35:2 45:2 59:16 suggests [3] 42:13 62:13 106:24 summarize [1] 34:14 support [1] 59:7 supports [1] 48:4 suppose [2] 61:8 100:11 supposed [1] 74:3 suppression [1] 49:14 SUPREME [2] 1:1,15 surely [2] 107:15,16 surrounding [2] 10:10 58:20 survey [1] 97:3 swear [1] 30:24 system [3] 51:6 57:17 91:8 systems [1] 87:8</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>table [2] 83:18 101:24 talked [3] 63:14 84:22 94:1 talks [2] 63:12 66:25 target [1] 82:3 targeting [1] 71:16 task [2] 23:6 108:19 tattoo [2] 106:19,21 teaching [2] 31:8 46:11 tension [1] 25:12 terms [3] 43:15 74:15 84:23 terrible [2] 55:21 94:11 terribly [1] 53:6 test [8] 8:2 34:9,9,21 35:11 53:5,6 58:21 testified [2] 8:7 55:12 testify [1] 30:25 testifying [2] 31:13 32:4 testimonial [9] 5:19 6:2 57:19 68: 7 69:1 77:23 103:2 104:10,24</p>	<p>testimony [12] 4:16,18 5:15,15 6: 12,24 17:22 30:9 39:9,12 81:23, 23 testing [1] 73:17 tests [1] 34:8 Texas [1] 23:9 theory [4] 39:18 50:11 101:1 106: 16 there's [36] 15:6,13,15 16:22 17:9 30:12 42:17 44:2 48:14 53:20 59: 15 61:9 63:18 65:14,18 68:9 69: 20,25 70:3,20,24 71:11,23 76:11 78:12 81:8,9 82:19 87:4 90:2,18 94:7 96:9 100:16,17 101:21 therefore [1] 28:8 they've [1] 49:16 thinking [2] 63:7 82:10 thinks [1] 91:25 third [7] 29:20 55:3,23 56:7 80:20 95:3,5 THOMAS [12] 5:14 6:8,17,19,24 7: 2 31:19 36:8,9,17 59:13 91:16 Thomas's [1] 26:17 though [4] 13:22 20:5,22 63:18 three [6] 21:8 28:2 34:23,25 49:5 107:7 threshold [5] 90:23 94:14,16,17, 18 threw [1] 109:3 throw [1] 108:24 Tjoflat [1] 107:1 today [9] 3:24 11:8 31:23 32:12 33: 23 78:18 89:17 91:6 93:13 together [7] 11:6 14:21 15:21 27: 20 49:15 56:4 61:2 Tong's [1] 50:15 took [7] 4:10 20:10 78:5 82:24 83: 5,6,24 top [2] 87:14 97:14 totality-of-the-circumstances [2] 58:25 90:21 towards [1] 74:13 treat [3] 20:21 21:6 57:24 treated [1] 74:9 treatises [1] 50:25 treatment [1] 58:13 trial [62] 3:15 5:11,24 9:2 10:18,21 11:1,3 12:4,5,10,22,24 21:3 30:10, 25 31:5,14 35:19 39:10 40:18 41: 7,8 43:13 45:9 47:6 54:9 56:6,9, 15 58:12 60:3 61:2,2,22,24 62:5 64:10 65:15 66:16 67:7 69:23 70: 6 71:4 78:9,20 85:5 86:23 87:7,20 91:1,13 93:22 95:6 97:18 98:4,24 99:22 100:24 101:3 109:9,19 trials [8] 28:21 31:21 57:16 59:3 60:11 89:24 91:11 94:10 trigger [2] 24:21 38:20 triggered [1] 40:2 triggering [2] 63:4 77:18 trouble [1] 7:14 true [6] 15:24 17:12 26:7 40:13 88: 15 95:13 trust [6] 48:13 70:9 79:25 80:2 85:</p>
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Official - Subject to Final Review

<p>7 87:6 try ^[13] 14:20 15:20 18:5 27:19 29:12 34:13 56:4 62:12 70:17 93:22 97:11,12 104:21 trying ^[9] 28:20 33:5 47:13,15 77:12 93:11 95:8,17 101:4 turn ^[1] 50:23 turned ^[1] 81:21 twice ^[1] 80:18 two ^[26] 14:11,14,20 15:20 16:23 20:10 21:2,13 34:7 35:11 55:22 56:6,21 61:15 85:15 88:16 89:10 97:22 98:9,15,18 101:23 102:1,2,9 105:19 two-defendant ^[1] 91:12 types ^[1] 53:8</p>	<p>various ^[1] 12:17 vast ^[2] 75:5 105:17 verbatim ^[1] 16:5 versus ^[5] 3:5,11 23:8,16 60:16 victim ^[1] 62:3 victim's ^[1] 62:3 viewed ^[1] 28:10 vindicated ^[1] 36:22 violated ^[1] 81:12 violates ^[1] 3:15 violation ^[6] 13:19 26:16 50:12 62:9 74:15 75:22 violations ^[2] 85:20 87:23 virtue ^[3] 8:4 88:8 108:8 voluntariness ^[1] 23:10</p>	<p>words ^[7] 21:24 38:5,5 47:12 98:6 108:9 109:13 work ^[5] 42:23 63:6 85:13 94:12,19 workability ^[1] 90:10 workable ^[2] 60:2,4 worked ^[1] 47:17 working ^[1] 5:4 works ^[1] 26:1 world ^[7] 27:10 38:25,25 71:2 86:18 90:20 91:7 worried ^[4] 35:17 77:19 78:16 95:24 wrestling ^[1] 43:21 write ^[1] 24:19 writing ^[2] 23:17 107:1</p>
<p style="text-align: center;">U</p> <p>ultimately ^[1] 46:1 unambiguous ^[1] 77:20 unclear ^[2] 95:8 108:24 unconfronted ^[2] 5:12 109:20 under ^[19] 11:16,18 12:13 23:9 24:24 27:21 29:21 53:16 58:25 61:6,11,12,13 68:16 69:11 76:16 87:2 95:21 107:23 undercutting ^[1] 59:18 underlying ^[3] 25:12 28:7 57:16 underscore ^[1] 56:8 understand ^[12] 22:11 27:10 39:25 40:7 50:3 65:23 74:23 75:24 76:8 79:4 100:2 102:16 understanding ^[7] 10:21 39:14 51:23 73:17 85:21 96:25 97:4 understood ^[1] 21:18 undisputed ^[1] 12:24 undo ^[4] 38:3 73:7,21 109:15 unequivocally ^[1] 67:19 unidirectional ^[1] 50:22 unique ^[1] 63:5 uniquely ^[1] 3:17 UNITED ^[8] 1:1,7,15 3:5,12 19:4 23:17 49:9 Unless ^[5] 30:12 31:14 33:23 88:25 90:1 unpackage ^[1] 30:6 unpredictable ^[1] 78:23 unprincipled ^[1] 59:5 up ^[25] 4:18 19:11 22:23 24:2 28:17 29:18 33:9 41:11 44:5 54:16 55:11 60:15 64:18 66:14 68:11 76:11 81:22 84:5 87:11 89:25 91:5 93:22 96:14 100:16 101:20 urge ^[1] 107:12 uses ^[3] 105:1,21 106:1 using ^[14] 63:22 65:19,21 71:20 72:4,5,18 79:1 80:25 94:6,15,16,23 105:24</p>	<p style="text-align: center;">W</p> <p>wake ^[1] 40:10 wanted ^[3] 12:5 30:21 55:23 wants ^[2] 33:23 100:24 Washington ^[3] 1:11,19,22 water ^[1] 37:1 way ^[32] 8:4 11:13,22 16:13 18:6,7,8 19:8 23:15 25:25 28:15 34:2 35:3 39:25,25 44:10 45:22 59:17 68:6 72:20 74:9 76:3,4,19 78:8,21 86:4 87:1 96:12 97:6 98:15 107:22 ways ^[2] 19:22 88:17 weak ^[2] 9:9 45:2 weaker ^[1] 10:5 Wednesday ^[1] 1:12 weigh ^[1] 86:24 welcome ^[2] 5:13 59:12 well-established ^[2] 30:13 31:15 whatever ^[1] 91:25 whenever ^[3] 7:18 89:25 91:12 whereas ^[1] 52:19 Whereupon ^[1] 109:24 whether ^[23] 3:25 26:23 30:19 37:2,4 39:16,17 43:13 45:11 51:3 53:13,16 54:17 70:21,25 74:14 81:3 87:20 103:9 104:5 105:1 107:5 109:11 White's ^[1] 59:14 whole ^[4] 76:1 80:12 84:3 96:3 will ^[25] 7:6 8:23 9:17,24 29:15 49:17 52:2,10 53:8,10 57:22 59:2,6,8 64:4,20 66:17 76:13 79:18 90:12 93:10 103:16 105:20,21 108:10 willing ^[1] 51:11 wisdom ^[1] 32:25 within ^[9] 35:21 39:20 45:18 47:16 53:11 75:13 78:2 82:5 84:15 without ^[8] 5:2,11 15:12 17:18 31:5 50:10 55:16 84:1 witness ^[9] 13:5,6,7 30:24 31:6 39:9,11,19 40:5 witness's ^[1] 41:9 witnesses ^[1] 91:10 woman ^[8] 61:17 62:2,16,23 63:24 67:15 69:8 106:9 wonder ^[4] 8:14,23 16:14 107:16 wondering ^[1] 77:14 word ^[2] 65:20 92:25</p>	<p style="text-align: center;">Y</p> <p>years ^[4] 3:11 21:8 43:19 51:13 York ^[1] 60:16</p> <p style="text-align: center;">Z</p> <p>zero ^[2] 63:1 64:13</p>
<p style="text-align: center;">V</p> <p>vacate ^[2] 12:21 109:17 valid ^[1] 18:17 value ^[1] 92:8 variant ^[1] 74:8</p>		