OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1433

TITLE GLORIA RICHARDSON, WARDEN, Petitioner V. CLARISSA MARSH

PLACE Washington, D. C.

DATE January 14, 1987

PAGES 1 thru 51

ALDERSON REPORTING
(202) 628-9300

IN THE SUPREME COURT OF THE UNITED STATES

- -x

GLORIA RICHARDSON, WARDEN, :

Petitioner :

v. : No. 85-1433

CLARISSA MARSH :

- -x

Washington, D.C.

Wednesday, January 14, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 o'clock p.m.

APPEARANCES:

TIMOTHY A. BAUGHMAN, ESQ., Detroit, Mich.;
on behalf of Petitioner

LAWRENCE S. ROBBINS, ESQ., Washington, D.C.;
on behalf of the United States as amicus curiae, in support of Petitioner

R. STEVEN WHALEN, ESQ., Detroit, Mich.;
on behalf of Respondent

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 85-1433, Gloria Richardson against Clarissa Marsh. Mr. Baughman, you may proceed whenever you're ready. Baughman.

ORAL ARGUMENT OF

TIMOTHY A. BAUGHMAN, ESQ.

ON BEHALF OF PETITIONER

MR. BAUGHMAN: Mr. Chief Justice and may it please the Court:

The constitutional issue before the Court in this case is whether Respondent's right to confront the witnesses against her was violated at her joint trial with Benjamin Williams. Primarily the question is whether or not Benjamin Williams, through the admission of his redacted confession, became a witness against Respondent.

Put another way, the question is whether the ordinary presumption that jurors can understand and will follow instructions should be put aside in this case in favor of a presumption that the jurors here disregarded two strong limiting instructions that Williams' confession was not to be considered against Respondent.

Now, the facts very briefly put are these. Some eight years ago, as the culmination of a robbery,

Ollie Scott, her niece Cynthia Knighton, and Cynthia Knighton's four year old son Koran Knighton were taken to the basement of the Scott home to be executed. Koran Knighton and Ollid Scott were shot to death. Cynthia Knighton, though shot three times, lived and testified.

The trial was a joint trial with Benjamin Williams and Clarissa Marsh. Kareem Martin remained at large at this time, who was the third participant. Williams had confessed and the confession was redacted to remove all reference to Clarissa Marsh. From the confession as admitted, one would not know that any other individual, any third person, was involved in any way in this crime.

At the time of the admission of the confession into evidence, the trial judge gave a limiting instruction including a statement, to the jurors that to consider the confession against Respondent would be most unfair and a violation of their oath as jurors. He repeated this instruction at the time of his full charge to the jury before deliberations.

The Michigan Court of Appeals found no confrontation violation in the admission of the confession, relying on United States versus Bell, a case also cited in our brief.

The Sixth Circuit Court of Appeals, however,

disagreed, finding that there was constitutional error in this case. That court found that the confession as redacted was powerfully incriminating of Respondent when taken in conjunction with her testimony. Particularly, the court found that the confession was powerfully incriminating in that Respondent's testimony placed her in the vehicle with Martin and Williams at a time in which the confession indicated Williams and Martin discussed the plan to rob the house and kill the occupants.

The court therefore held that the jury could not be trusted to follow the limiting instructions and that, since Williams did not testify and Respondent was unable to cross-examine him as to what went on in the car, confrontation rights were violated.

We believe that this holding extends Bruton beyond its limits. It's very difficult, when asking whether the jury followed instructions in a particular set of circumstances, to raise the level of the inquiry beyond that of yes, they did, or no, they didn't, because we really have no way of knowing for certain.

We believe that it is necessary, therefore, to engage in a systems analysis which involves the indulgence of certain presumptions. We venerate trial by jury in our system of justice, and I believe rightly

so. Trial by jury is perhaps the cornerstone of our view of the trial as a truth-seeking adventure, interposing as it does between the Government on the one hand, including the judiciary, and the accused on the other community fact finders.

But the jurors as community fact finders must find the facts within the context of the law as given them by the trial judge, including instructions on such things as the nature of the accusation, the burden of proof, the standard of proof, and in many circumstances the limited consideration that the jurors are to give to certain evidence which has been admitted.

Our theory of justice relies upon the jury to follow all of these instructions. Because we rightly forbid a post-trial inquiry into the character of the jury deliberations, it must be presumed, as this Court has said on many occasions, that jurors are conscious of the gravity of their task, attend closely to particular language of the judge's instructions in a criminal case, and strive to understand, make sense of, and apply those instructions.

The entire concept of limited admissibility, which is codified in the Federal Rules of Evidence, as well as in the Michigan Rules of Evidence, presumes that jurors will follow instructions to put certain evidence

to a particular permissible purpose, or in some cases to consider it only against one of several parties. And we apply these presumptions in very difficult circumstances.

For example, it may well be that in a case a confession has been taken from the defendant and yet is suppressed because it was obtained in violation of Miranda. However, if that same confession is found to be voluntary, under the rule of Harris versus New York it may be admitted for its impeachment value of the defendant's testimony.

In that case then, the jury will hear the very confession of the defendant him or herself as to their guilt in the crime charged before the court, and yet be instructed to consider that confession, not as to the issue of guilt or innocence, but only as to the testimonial credibility of the accused.

If the jury fails to follow that instruction, that confession, the defendant's own confession, will certainly be powerfully incriminating of the accused, in violation of his constitutional rights. Yet we presume that the jury will follow the instruction and has the capacity to follow those instructions.

Other examples are given, I believe, in the Solicitor's brief as well.

This Court has in fact declined to disregard, to set aside, the presumption that jurors follow instructions only very rarely. In Jackson v. Denno this Court held that the jury could not be entrusted with the responsibility of determining whether the defendant's confession is voluntary and then be expected to, in the event the jury found the confession was involuntary, put aside that confession on the question of the defendant's guilt or innocence, even under instructions to do so.

A second circumstance where this Court has found that the presumption should be set aside is Bruton itself, where this Court held that where the non-testifying defendant's confession or a co-defendant's confession is powerfully incriminating of the accused, the jury cannot be trusted to follow the limiting instruction.

We submit that Bruton should be limited to factual situations akin to its own facts. In Bruton, the accused -- the co-defendant's confession was powerfully incriminating of Bruton because it named him in his role in the crime there charged. It was therefore powerfully incriminating, this Court held, and because of that the jury could not follow the limiting instruction.

And the Court noted as an important element of

this conclusion the fact that statements from co-defendants incriminating the accused are looked upon as unreliable, given the recognized motivation of the co-defendant to shift blame. Confrontation rights are thus violated when the accused -- when the co-defendant does not testify.

However, when the factual context is different this Court has found that Bruton does not apply. The plurality of this Court in Parker v. Randolph found that the Bruton exception has no application where the defendant him or herself has also confessed and confessed in a manner which is consistent with or interlocks with the co-defendant's confession.

In that circumstance, this Court said that the danger that the jury will disregard the cautionary instruction is lessened significantly, for the jury has before it the defendant's own confession upon which to focus.

We submit that our system of trial by jury requires that the presumption that jurors are capable of following instructions not be cast aside except in the most compelling of circumstances, and that Bruton represnts the outer limit of how far this Court should go in that regard.

The Sixth Circuit recognized in this case a

doctrine of evidentiary linkage or contextual implication, and we believe that this expands the Bruton doctrine substantially. In Bruton we have a confession which not only mentioned the co-defendant, but mentioned him directly.

In contrast to that situation, we have here a confession which doesn't mention the Respondent directly, indeed which does not even indicate that a third person was in any way involved in the criminal event.

Standing alone, the confession in Bruton was powerfully incriminating of Bruton. Standing alone, the confession in this case is not incriminating of the Respondent one whit.

Moreover, in Bruton this Court, as I indicated, referred to the unreliability of co-defendant's statements due to the recognized motivation to shift blame, which was an important peg of this court's holding in Bruton.

For reasons largely given in part two of our brief, I submit that in this case we have a different situation. It is not entirely accurate to state as a blanket rule that co-defendants' confessions are unreliable because they shift blame. Some are and some aren't.

Some shift blame and some don't. Some lay the responsibility for certain blame, but it is not blame-shifting as we might refer to it. It is an accurate reporting of the events.

Under this Court's confrontation cases -- Lee v. Illinois is a recent one -- this Court has recognized that it is possible for a co-defendant's confession to be reliable, and we submit that the confession in this case was in fact reliable. So that peg of Bruton, as well as the directly incriminatory peg of Bruton, does not exist in this case.

I would hasten to add that it is not my argument that, while jurors are capable of following limiting instructions in some very, very difficult circumstances, they are incapable of putting inferences together. I would concede that it is possible for jurors to take redacted confessions and take other testimony and figure out that there might be some inculpatory inference when the two were taken together.

But that's not the question. The question is whether or not the jurors will regard an instruction not to draw that inference or not to give it any weight in their deliberations.

In every circumstance of limited admissibility, the question we ask --

QUESTION: May I ask, just so you don't overlook it, are you going to address the problem about the prosecutor's argument which purported to tie the --

MR. BAUGHMAN: Yes, I will, Your Honor.

In every circumstance of limited admissibility, we do not ask the question of whether the jury is capable of drawing the impermissible inference or putting the evidence to the impermissible use. We give them an instruction so they will not do that. If we did not think they had the capacity, there would be no need for the instruction.

This case presents a different situation, we submit, from one where the confession itself powerfully incriminates the defendant.

Now, I would like to turn for a moment to your question, Justice Stevens, about the prosecutor's argument. Let me first address that directly and then I have a further point to make regarding it.

The prosecutor in this case I believe did make a comment about Respondent's testimony. She did choose to take the stand and testify that she was in the vehicle with Williams and Martin, in the back seat, she testified, with the radio on and, though there was conversation going on between Williams and Martin, she did not know what it was.

The Petitioner as a preface to his lengthy argument as to how the jury could discern Respondent's involvement in the crime commented on that testimony by saying: Respondent said these things, and of course she said them; it's in her interest to say that she did not hear the conversation.

He then said: But how else do we know she's involved in the plan, in the crime; and then proceeded, with some vigor and quite a bit of detail, to explain how apart from that the jury could know that the Respondent was involved.

She did not act surprised when Martin pulled a gun in the house. She took a position of a lookout by the door at that time.

QUESTION: Mr. Baughman, on that point, it really is pretty obvious she was involved in some of the advanced planning. I don't think there's much doubt about that inference.

But is there evidence that she would have known about the particular statement that one of the two men made to the other about, we have to take the lady out, or I forget the exact language, which would indicate a plan in advance to kill her?

Was there any evidence, other than perhaps her overhearing it from the back seat, that she would have

known about that?

MR. BAUGHMAN: No, there's no other evidence of that in this case.

QUESTION: Okay. The question that troubles me about it is, do you think that particular fact might have affected the degree of culpability that the jury would assign to her?

MR. BAUGHMAN: I think not, and particularly given the nature of the charge in this case. The charge here was felony murder, which does not require either the intent to kill or premeditation. It requires what would amount to a second degree murder, which requires malice, the intent to kill, do great bodily harm, or wanton, willful disregard.

QUESTION: Well, the state didn't have to rely on the confession to put the defendant in the car. She admitted she was there by her own testimony.

MR. BAUGHMAN: That's correct. Had she not, there would have been no evidence that she was in the car. The linking testimony in this case is her own testimony.

QUESTION: Well, it needs the confession to establish what conversation had gone on in the car.

MR. BAUGHMAN: The confession was the only evidence of the conversation in the car and what its

contents were, that's correct.

QUESTION: And if you accept her testimony at face value -- and of course, it may or may not have been true -- that she was in the back seat and there was a radio on, I suppose it is credible that she might not have heard that particular remark.

MR. BAUGHMAN: That -- it is credible. The jury could believe that if they so chose.

QUESTION: And if the person who made the remark had been on the stand and cross-examined, he might have confirmed that the radio was on and she was in the back seat. We really don't know.

MR. BAUGHMAN: That's correct, we don't know.

But again, my point would be that, particularly given the nature of the charge in this case, the evidence from Cynthia Knighton as to Respondent's participation in the crime was more than adequate to convict her of felony murder.

Indeed, if it was not this case should have resulted in either a directed verdict or a reversal for insufficiency. There had to be evidence independent of the confession to support this conviction, and there was in this case.

I would also point out that I would view the prosecutor's closing argument really as a different

issue than the confrontation issue. The question would be whether the prosecutor may have committed constitutional error in his closing argument, which he could do even if the confession on its face in no way, even with other evidence, implicated the Respondent.

The prosecutor could err in the use put to the confession in his closing argument, and in that regard there was no objection made to that statement by the prosecutor. It was never raised.

QUESTION: Your point is that, even if there were no evidence of her advance knowledge of a plan to kill, as opposed to just advance knowledge of a plan to rob, that she still could have been convicted of the same crime?

MR. BAUGHMAN: Absolutely.

QUESTION: I see.

MR. BAUGHMAN: If there had never been a confession in this case by anyone, Cynthia Knighton's testimony would have been ample to convict her of the crime.

Finally, I would like to take just a moment to point out that it is my view that, even if the presumption that jurors can and will follow instructions is viewed as overcome in this case, that is not in and of itself a finding that the Constitution was violated.

It is a finding that Benjamin Williams became a witness against Respondent.

Under this Court's confrontation cases, Lee v. Illinois being the one that I mentioned earlier, the further question remains in order to find constitutional error of whether or not the uncross-examined confession of Williams, even if admitted against Respondent, violated confrontation principles.

We would submit that even if the jury considered the confession as redacted substantively, disregarded the instruction, that constitutional confrontation principles would not be violated because the statement is reliable under this Court's cases, again Lee v. Illinois being the principal one.

The confession was devastating to Mr. Williams. He admitted that he was part of a preconceived plan to rob the dwelling and to kill the victims. He was given a gun by Martin and had one himself.

He does say that it was not himself, but Martin, that carried out shootings. But that testimony is corroborated by Cynthia Knighton. That is not blame-shifting; it is an accurate reporting of what went on.

In large regard, the confession is

corroborated by Cynthia Knighton's testimony. The only point in which the confession is unreliable, we believe, is where Williams states that he was not present in the basement when the shootings occurred. That is inconsistent with Cynthia Knighton's testimony and we believe to be that is untrue.

But that attempt to curry favor on the part of Williams in his confession in no way reduced his culpability for the events, nor did it diminish the reliability of the rest of his statement, again corroborated in large part by Cynthia Knighton.

So we believe this case is distinguishable from Lee v. Illinois and that, even if Benjamin Williams is viewed as a witness against Respondent, for him to be a witness against Respondent through his redacted confession is not a violation of the Constitution in this case.

In conclusion, we believe that --

QUESTION: Did you make this argument earlier? Did you make that argument below?

MR. BAUGHMAN: It was not made in the lower courts.

QUESTION: You haven't tried to get this in as admissible against the defendant?

MR. BAUGHMAN: No. This case was tried in

1978, when the Michigan Rules of Evidence were in existence for several months. Until then, the declaration against penal interest hearsay exception didn't exist in Michigan. I don't believe it existed in the federal system until the Federal Rules were adopted.

But I would point out that this Court has held in Dewey v. Des Moines that a litigant is not restricted to the arguments raised below on a federal question so long as the argument is connected with the issue being raised. What a litigant cannot do is come before this Court on an issue and raise an issue unconnected to the one before it.

If this Court finds Williams was a witness against Respondent, it simply hasn't found constitutional error unless it finds that the admission of the confession against Respondent violates confrontation principles, namely that it was unreliable.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Baughman.

We'll hear now from you, Mr. Robbins.

ORAL ARGUMENT OF LAWRENCE S. ROBBINS, ESQ.,
ON BEHALF OF THE UNITED STATES AS AMICUS

CURIAE, IN SUPPORT OF PETITIONER

MR. ROBBINS: Mr. Chief Justice and may it please the Court:

Justice Stevens, if I could first address the question of the prosecutor's summation that you raised a little earlier. The Sixth Circuit was plainly troubled by what it thought the prosecutor had said. My suggestion is that it is overreading the prosecutor's summation to suggest, as the Court of Appeals did, that he in effect tied together the inadmissible, and the concededly inadmissible, Williams statement with the defendant's testimony in her direct case.

It's clear on its face that he at no time referred to the Williams statement as such in making his argument. Indeed, he gave his own limiting instruction as a preface to the jury, telling them that it would be quite unfair to make that connection.

I think this Court has stressed in cases like Donnelly against DiChristifaro that it is wrong to read an otherwise ambiguous remark in the prosecutor's summation in its worst possible light. But I don't think you even have to rely on that ordinary presumption to read the prosecutor's summation as nothing more than an attack on Ms. Marsh's credibility when she denied having heard what happened in the car.

Now, that was testimony that she freely gave and would not otherwise have been in the case.

QUESTION: But I don't see how -- on its face, it's certainly perfectly credible. She said she was in the back seat, the radio was on, she couldn't hear them. Why would that impeach her credibility, other than relating to the fact that she might have been trying to disassociate herself with the statement in the confession?

MR. ROBBINS: Well, in the context of the summation, I think it's important to be clear that prior to this particular remark by the prosecutor in summation he had been going through various parts of her testimony and the other evidence at trial to show that in fact she did know about a plan in advance: that she had used, for example, coded language that matched others, language that various of the other confederates had used.

QUESTION: Yes, that would all go to the general plan. But the particular fact of an attempt to kill the woman who ran the numbers game, the only evidence of that is the particular remark in the finding, isn't it?

MR. ROBBINS: I don't -- I'm afraid I beg to differ. I think a jury could fairly conclude that what

Ms. Marsh did at the scene of the crime, not only the language that she used, but the way she behaved, is as entirely consistent with having worked out a plan in advance as with the opposite, and given the inference, that inferences ought to be drawn in favor of the verdict.

It seems to me, for example, that her having grabbed Cynthia Knighton and her child when they tried to escape, at a time when she knew that the confederates had drawn guns, had forced people on their knees or face down on the floor, at that point for her to have prevented these two people's escape strikes me as entirely consistent with having been in on a plan to see to it that those people would not live to tell the tale.

QUESTION: Well, it's certainly consistent with that. But it would also be consistent with just wanting to carry out the robbery, I suppose. You don't want people running around telling the neighbors there's a robbery going on in the house.

MR. ROBBINS: There may be, Justice Stevens, a number of available inferences from any piece of proof. But it strikes me that, given the presumptions that attend a jury conviction, a verdict, it seems to me this was sufficient evidence for us not to be concerned that

ambiguous remarks in a prosecutor's summation gave rise to the use of inadmissible evidence.

QUESTION: But you would have to agree, I think, that if she heard that remark in the car before she went in, then it's terribly powerful evidence that she knew in advance someone was going to get killed. I mean, it's stronger than the circumstantial evidence.

MR. ROBBINS: It is powerful evidence if the jury disobeyed its instructions. But I think the premise.

QUESTION: Well, why did the prosecutor make the argument -- I'm sorry, in our dialogue I lost the force of your argument. Why was the prosecutor going on about the fact that she volunteered that she was in the back seat and couldn't hear?

MR. ROBBINS: Well, I think what he had been doing at that point in the transcript -- and I'm referring now to the transcript at page 452, the summation. I think what he had been doing was rather methodically going through her testimony and the other evidence in the case to suggest that she indeed knew about a plan in advance.

Then he turns to her testimony about the car and he says, I think fairly read --

QUESTION: And then he calls the jury's

attention to the fact that that particular statement was made in the confession.

MR. ROBBINS: I'm sorry?

QUESTION: Then he calls the jury's attention to the fact that that particular incident took place while she was in the car. The only evidence of the incident which goes to the plan is in the confession.

MR. ROBBINS: Well, he drew the jury's attention to the fact that she put herself in the car.

QUESTION: Right after he was talking about the evidence concerning the plan.

MR. ROBBINS: That's true.

QUESTION: I'm sorry, I'm taking up more of your time than I should.

MR. ROBBINS: The bottom line I think is that compared in particular to the kinds of cases in which courts have justifiably chastised prosecutors for making that impermissible link -- and I'd suggest as a good comparison the Second Circuit's decision in U.S. against Rodriguez in 555 F.2d at 316 to 317 is an example that really makes this case pale by comparison.

I'd like, however, to turn my focus for a few minutes on the idea of redaction in general. This Court when it decided Bruton in fact indicated that one alternative way of placing a co-defendant's confession

before a jury in a joint trial was through redacting references to the defendant, a point picked up by the American Bar Association in 1968.

And while the Court in terms has never said precisely what kinds of redactions will satisfy the rule in Bruton, a good deal of what the Court has said ought to focus trial courts and courts of appeals' attentions on the appropriate standard.

We take as our point of departure the remarks and the holding of the plurality in Parker against Raldolph: number one, that Bruton is a narrow exception to the premise of jury competence, that juries follow instructions;

And second, that as a narrow exception Bruton ought to be tied closely to its facts, and those facts are important for the purposes of what is a sufficient redaction, because the facts of Bruton deal with a co-defendant's confession that named Bruton by name and made it as clear as could be that he was a participant in the crime.

It seems to us that when you redact a confession and when you move away from the paradigm that Bruton was expressly dealing with, it makes all the difference in the world; and that there's increasingly less reason to fear --

QUESTION: How about all of the difference when they're being tried together and the jury knows that they both are charged with the same crime?

MR. ROBBINS: Well, Justice Marshall, I think --

QUESTION: You recognize that, don't you?

MR. ROBBINS: I'm sorry, Justice Marshall?

QUESTION: You recognize that as a fact, don't you?

MR. ROBBINS: The fact that the jury knows that they are both charged together is of course true.

QUESTION: And that the confession is about that crime.

MR. ROBBINS: That's true as well. But it seems to me that --

QUESTION: Well, I mean, don't we have to recognize that as a fact?

MR. ROBBINS: It is a factor, of course, that the defendants have been charged together and sit at counsel table together. But that fact I take it was equally true in Parker against Raldolph, in which quite a number of confessing defendants were sitting at the same table. And yet, the Court recognized that there were circumstances that were capable of attenuating the powerfully incriminating nature of the co-defendant's

confession.

And I suggest that there are a variety of ways in which redaction can serve the purposes that Bruton was concerned about. At the first level, if redaction goes so far as to eliminate any reference to the existence of another participant in the crime, we believe that there ought to be a per se rule that Bruton is not violated by the admission of that kind of redacted statement, and that rule covers this case.

But it doesn't cover every case because, as this Court recognized in Bruton, as Justice White observed in his Bruton dissent, and as the Court observed in Tennessee against Street, sometimes you can't redact quite that far. And in a great number of cases, the redactions consist of using blanks or symbols or pronouns to take the place of the name of the complaining defendant.

In this area, it's harder to craft a per se rule. But we think again that this Court's decisions point the way to resolving this larger number of cases. We think the general rule should look like this: that redactions that use blanks, symbols, or pronouns or their equivalents are sufficient under Bruton unless the trial court is persuaded by defense counsel in the exercise of its discretion that it is virtually obvious

that the name missing from the redacted confession belongs to the complaining defendant.

QUESTION: Obvious from what? The whole trial or from the confession itself?

MR. ROBBINS: Well, the answer is it depends. In a proper case, it would be appropriate to look beyond the confession itself. I don't think it's possible to take the position that the confession alone has to provide all the clues.

Indeed, I think the plurality in Parker against Raldolph suggested in a footnote that that was a problem in that case.

QUESTION: Once you say that, you're stating nothing but the condition for conviction anyway. That is, you couldn't find beyond a reasonable doubt that this person committed the crime unless you said, well, after hearing all the evidence it's obvious that the blank in this confession was this defendant.

So every time you get a conviction, you're condition would be met.

MR. ROBBINS: I don't believe that's true, Justice Scalia. And I think this case presents the situation in which we have every reason to think that that's not true.

For example, suppose instead of leaving out

Ms. Marsh's name entirely or even her existence in the Williams confession, they had used an A, as the prosecutor had originally planned to do. The only evidence that linked Ms. Marsh to this crime apart from the Williams confession, which was inadmissible, was Cynthia Knighton's testimony.

She said nothing about the car ride, because of course she was not a party to it. So there was no other evidence that put her into the car, and I suggest that the jury would not have ineluctably reached the conclusion that she drove over with the other two people.

And theefore, I think it's not inconsistent to say on the one hand that it may not be perfectly obvious who the missing person is, and yet on the other hand that there's proof beyond a reasonable doubt that the complaining defendant is guilty as charged.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Robbins. Your time has expired.

MR. ROBBINS: Thank you.

CHIEF JUSTICE REHNQUIST: We'll hear now from you, Mr. Whalen.

ORAL ARGUMENT OF

R. STEVEN WHALEN, ESQ.

ON BEHALF OF RESPONDENT

MR. WHALEN: Mr. Chief Justice and may it please the Court:

The issue in this case is whether Bruton versus United States applies to a redacted confession that becomes powerfully incriminating when it's viewed in the context of all of the evidence, even if it may not be so incriminating viewed in isolation.

QUESTION: Well, from your point of view you have to say viewed in the context of the evidence given by the defendant herself in this case.

MR. WHALEN: Actually, Mr. Chief Justice, if you look at the facts of this case you'll see that before the defendant Clarissa Marsh ever testified, there was in fact testimony from the prosecutor's case that linked Ms. Marsh to being present in the car.

Specifically I'm referring to Cynthia Knighton's testimony that Kareem Martin and Ms. Marsh entered the house together. If you link that with that portion of Williams' confession where he says, Williams says that he parked the car and then Kareem went up to the house and went inside, I think that does provide substantial --

QUESTION: But that's only a linkage by implication, whereas your client testified in fact she was in the back seat of the car.

MR. WHALEN: True, that Ms. Marsh's testimony leaves no question. It is an ineluctable inference.

QUESTION: Well, it isn't just an inference; it's a fact.

MR. WHALEN: The problem that I see is that in giving that testimony she found herself in a situation which I believe you alluded to, Mr. Chief Justice, in Parker, which is where an inference is created prior to her testimony here linking Cynthia Knighton's testimony that they entered the house together to Williams' statement.

She is unable to challenge that. She is unable to challenge the existence of this alleged statement of Martin through cross-examination. So the only way that she can challenge it, if at all, is to waive her Fifth Amendment, take the stand, and set forth herself the circumstances of what went on in the car.

Unfortunately, even under those circumstances she can't go to the very heart of the question, which is whether Martin even made the statement. I think there's some question about whether he did. Certainly she could have attacked that.

The key to this case, I believe, is elucidating what Bruton meant by the phrase "powerfully incriminating." It said that, the case said that the

confrontation clause would be violated when a co-defendant's statement was powerfully incriminating as to the non-confessor.

It's our position that Bruton necessarily has to involve looking at the statement in context, because the focus of Bruton was not whether the statement named the defendant, but how much eight it added to the prosecutor's case.

I believe the language was a statement is powerfully incriminating when it adds substantial, perhaps critical, weight to the prosecutor's case in a form not subject to cross-examination.

QUESTION: The trouble with that is you can't tell at the outset of the trial. The prosecutor doesn't know whether to put it in or not, because you can't tell until the whole trial weighs out whether or not it will be overwhelmingly effective, right?

MR. WHALEN: Well, Justice Scalia, in our case, for example, I think the prosecutor should have been aware of the great potential for --

QUESTION: Well, I'm not talking about your case for example. I'm just saying we're talking about framing here a rule that would not allow the prosecution to know beforehand whether it should put in a particular confession or not, because it won't know for sure

whether it will be overwhelmingly persuasive to the jury until all the evidence is in.

Now, if we had a rule that says if it names the defendant it's out, if it doesn't name the defendant it's in, that's something you can predict beforehand.

MR. WHALEN: I think superficially that looks like a workable rule, but it ignores what the Sixth Circuit in this case termed the true incriminating effect of the evidence.

Again, Bruton speaks to how the jury looks at the evidence. If there's a substantial risk that the jury is going to misuse the evidence despite instructions, there's error. It may be very easy for a judge or a lawyer to look at the statement in isolation and say, well, it doesn't name the defendant, there's no problem here. But the jury necessarily looks at it in context.

QUESTION: It's not a perfect world. I mean, there are other kinds of evidence besides confessions which is improperly admitted and in some instances may be overwhelmingly damaging, although not as regularly so as a confession would be.

And what do we say? We say, well, so long as there is an instruction to the jury that you disregard it, you let it go. Now, why couldn't we adopt a similar

principle for those confessions that don't name the defendant?

It won't be perfect. There'll be some cases where it may well persuade the jury. But we're willing to accept that in other areas. Why not in this little corner of the Bruton area?

MR. WHALEN: Because, Justice Scalia, in this corner the end result is that the defendant is denied the right of confrontation. And the result that flows from that is that we have a very serious question about the integrity of the truth-finding process and the reliability of the verdict.

You're right, it's not a perfect world. And I think that's no more than a statement that I believe the Petitioner would agree with, that redaction doesn't work in every case. In any trial, things can happen during the course of the trial which can make an ostensibly neutral statement incriminating in context.

My point is that when we fashion a rule to deal with an imperfect world, we should ask ourselves the question, who should bear the onus if during the course of the trial the redaction blows up? You have to remember, in our case there was a pretrial motion for severance. The defendant consistently challenged -- even after redaction, she continued her objections to

the statement.

And again, referring to the ABA standards that the Solicitor General spoke of, I believe that the correct rule would be that once a defendant makes a motion for severance, challenges the co-defendant's statement, the prosecutor then has an election. There's a number of things that he can do.

He can agree to a separate trial, and in this case I submit that he had good reason to believe that the statement -- that there was a potential for spillover. He could agree to a separate hearing. He could agree to a joint trial where the statement wasn't used, or he could choose the option of redaction.

Now, where he chooses redaction and where the situation blows up because of events that occur later in trial, I think it is the prosecutor who should bear the risk. He is certainly the beneficiary of the joint trial rule, and I think that it is he that should bear the risk if things blow up, particularly if as a result we have powerfully incriminating evidence to add substantial weight to his case that comes in untested by cross-examination.

There are a number of factors in our case that I believe combine to create the risk that Bruton spoke of, that the jury would misuse the evidence in spite of

cautionary instructions.

First of all, the cornerstone of the prosecutor's case in relation to the murder charge was that there was a preconceived and prediscussed plan to not only rob but to kill the victims, and that this discussion, this plan, was hatched before they ever got over to the house.

That was his theory as to both defendants, and arguing Clarissa Marsh's case to the jury I counted new fewer than 13 times that he told the jury that Clarissa Marsh was part of the plan, that she was in on the planning stages of the robbery and the killing.

QUESTION: Mr. Whalen, do you agree with your adversary that if she merely were in on the planning of the robbery and then there were the killings by her co-defendants in the course of the robbery, she could have been convicted of precisely the same offense?

MR. WHALEN: No, I don't agree with that. If she were in on the robbery -- and I believe that there is probably sufficient evidence of, circumstantial evidence of her participation in the robbery, but --

QUESTION: Planning of the robbery.

QUESTION: Planning of the robbery.

MR. WHALEN: I think there's circumstantial evidence of planning of the robbery. The question is,

and this goes to your question, Justice Stevens, about the degree of her culpability, when you get to the question of -- and I'd like to point out that both she and Williams were tried as aiders and abettors, so under Michigan law it was necessary for the prosecutor to show that she had knowledge of the principal's intent, and of course that knowledge is strongly shown by the -- would be shown by a discussion that, yes, we're going to have to take the victims out after we get there.

The question really isn't so much as to whether there is sufficient evidence of even the felony murder. The question is how much weight does the -- does Williams' confession add.

Now, ever court below that's spcken to this issue of the sufficiency has termed the other evidence of intent and knowledge of the plan to murder as barely sufficient. They call it marginal, they've called it a close question. They've talked about the paucity of evidence on intent.

And of course the Sixth Circuit in our case expressly declined to rule on the sufficiency issue. But the issue before this court is not sufficiency. The issue is, in light of what I consider the weak circumstantial evidence --

QUESTION: I think you've gone past -- maybe

-- I'm not sure you answered the precise question I asked. Is it not true, as your opponent contends, that if there is evidence of planning a robbery in which two people are killed, that that will support the felony murder conviction that she received?

MR. WHALEN: The jury --

QUESTION: And maybe the weight would be different. I understand that.

MR. WHALEN: The jury would be permitted to draw that inference.

QUESTION: Yes. So she could have been convicted of precisely the same crime even if the jury did not think she overheard the conversation in the car?

MR. WHALEN: Theoretically possible, yes.

QUESTION: All right.

MR. WHALEN: Again, the point I would make is that --

QUESTION: More precisely, even if they didn't think she specifically intended that anyone would die, but she did specifically intend that the robbery would go forward with the risk of death.

MR. WHALEN: If the jury believed that the killings were a foreseeable consequence.

QUESTION: Correct.

MR. WHALEN: Yes. The problem again being that it's a close question, as the Michigan Court of Appeals termed it. And what Bruton looks to is when you add the co-defendant's confession, which you can't test by cross-examination, how much weight does that add?

And when you get to the point where this is the only direct evidence -- and in fact, when the prosecutor was arguing Williams' case to the jury he, of course and properly so, referred to Williams' statement that Kareem Martin discussed the plan and said, yes, this is direct evidence of intent. He knew that before he ever got over to the house.

So you can imagine a situation where the jury in their discussions begins by discussing Benjamin Williams' case and they say: Well, look, we have this -- he heard about the plan to kill and he knew about it; the prosecutor told us, this is direct evidence. He spent perhaps the better part of a morning discussing that, discussing the statements.

Then when they go over to discuss Clarissa Marsh's case -- and again, she's tried on the same theory, that she's part of the plan, that she was in on the planning stages -- I think it's unavoidable that they're going to -- I think it's unrealistic to think that they're going to be able to put that confession out

of their minds.

And really, that's the whole point of Bruton, that there are circumstances where the evidence is so powerful, adds so much to the prosecutor's case, that it's just not realistic to think, given the limitations of human nature, that the jury would be able to follow the instructions.

QUESTION: Did your client request a severance in this case?

MR. WHALEN: Yes, she did, Your Honor, before trial.

So I think if we look at the totality of the circumstances in this case, the way the prosecutor used the argument, not only to spill over from his argument against Williams but, as you pointed out, Justice Stevens, in impugning Clarissa Marsh's credibility, necessarily implying that, yes, she did hear the confession, she did hear the statement, if you look at the totality of the circumstances, I think there's a substantial risk in this case that the jury did use --

QUESTION: Mr. Whalen, let me ask you one other thing that troubles me about your argument in the case. If one asks himself, why did they feel it necessary to take out the lady who ran the numbers game, one explanation that comes to mind is that your client

is the one who knew her best.

She's the one who was the access to the house and she's the one who most might readily be remembered by the decedent had she not been killed, which would tend to be again circumstantial evidence that maybe it was for that very reason that Respondent would have wanted to have had her killed.

MR. WHALEN: But I think what we have to ask, Justice Stevens, is that what if the jury didn't draw that inference, what if they didn't believe that. Yes, that is a permissible inference.

QUESTION: Because it is clear, is it not, that your client was the only one who knew the victim?

MR. WHALEN: That's clear. That's true, she knew Cynthia Knighton.

QUESTION: Mr. Whalen, let's assume that I thought that a redacted confession would normally be okay, but I felt that the comment of the prosecutor in his summation undid what the redaction had achieved. Why -- accept my hypothesis, that normally I would think the redaction was enough.

Why shouldn't I put the burden on the defense to object at the point that the statement is made by the prosecutor?

MR. WHALEN: The defendant, through the motion

for severance and through the motion to exclude the statement, had already been ruled against by the trial judge. The trial judge had already ruled that Williams' statement was inadmissible.

QUESTION: Yes, but you have an additional factor coming in that, as you argue before us, makes the connection between the confession and your client much clearer, to wit, the statement by the prosecutor. Why shouldn't that have been objected to as supplementing the invalidity?

MR. WHALEN: Well, Justice Scalia, whether it was or not, of course, I don't think is critical in this case. But accepting your hypothesis, I think we have to look at the result of the prosecutor's argument, which was to create a risk which resulted in a denial of the right to confrontation.

Either you have a right to confrontation or you don't. When the prosecutor, the person who has insisted on the joint trial throughout, has insisted on using this evidence throughout, who has assumed the risk that things could blow up, then gets to the point where he stands up and points out the linkage himself to the jury, again, I believe that it's he who created the situation, it's he who should bear the onus.

I think it's putting too great of a burden on

a defendant who has consistently tried to prevent the very situation which occurred.

In our case, in fact, the problem from the very beginning, the problem that the prosecutor created in insisting on the joint trial, I think ineluctably led to the argument that he made. It was difficult for him, if he was going to challenge Clarissa Marsh's testimony, to not say it, to not say, oh, she's not telling the truth, or she has to say that because otherwise you're not going to believe that she's part of the plan.

Not only the defendant, but perhaps he was in somewhat of a trap, of his own making. And again, I think we have to look at the result. The result was that the risk was created. That's all Bruton talks about, the risk that the jury would misuse the evidence.

The rule that I suggest for this Court is analogous to that which Justice Blackmun discussed in his concurrence in Parker v. Randolph, and that is to acknowledge that there are circumstances where redaction doesn't work and where a redacted statement can become powerfully incriminating, violating Bruton, and then subjected to a harmless error analysis.

One can -- Harrington versus California comes to mind, which incidentally did involve a redacted

confession, where this Court made a statement that, well, even though the defendant's statement was taken out, the circumstances of the case could make it as clear as pointing and shouting that the defendant was included in the statement.

I think, at least tacitly, this Court has recognized since Bruton that statements can become incriminating in context. And as long as we subject that to the harmless error rule of Harrington, I think we have a workable rule.

I think we have a rule which fairly protects the right of confrontation and at the same time doesn't put a particularly unworkable burden on the prosecutor. Certainly not only the Sixth Circuit, but the Seventh Circuit, the Second Circuit, the D.C. Circuit, have over the last ten years all endorsed rules which would allow for looking at a redacted statement in context, and life goes on in Chicago and New York, both cities which have their fair share of joint trials.

QUESTION: Well, life goes on in Philadelphia, too, doesn't it, where they don't do that?

MR. WHALEN: Well, life goes on, but unfortunately life goes on without the confrontation clause in these joint trials.

QUESTION: I daresay the citizens scarcely

know it.

MR. WHALEN: My point, Justice Rehnquist, was that the rule is workable in at least four Circuits.

QUESTION: Well, and I suppose people on the other side would say that the Third Circuit rule is equally "workable."

MR. WHALEN: Oh, there's no question that it's workable, in the sense that it's easy to apply. The problem is it's not fair. It may be easy. Trial by affidavit would be easy. But it doesn't satisfy the concerns of the confrontation clause.

QUESTION: You say the Second Circuit's rule is workable. You mean you have trials and you have conclusions to the trials. But do you know for a fact that the rule is being applied with any consistency? I mean, it's a very difficult call.

What is the test that you're proposing?

MR. WHALEN: The test I'm proposing is that --

QUESTION: What we have come to call a totality of the circumstances test, right, which --

MR. WHALEN: That's what I would call it.

QUESTION: That's not a test. That's what you're looking at.

MR. WHALEN: The test I would propose is that

suggested in the ABA standards in joinder and severance: Faced with a pretrial defense motion to sever or to exclude the confession, the prosecutor then has the election of proceeding in any number of ways: joint trial, separate trial, separate juries, redaction.

If he chooses redaction, I'm simply saying that it is the prosecutor who proceeds at his risk.

QUESTION: Well, why should that be? Bruton said that redaction was probably okay. And if you have a rule that applies in hindsight to the totality of the circumstances, you just invite reversals, retrials. You know, let's figure out whether the person is guilty or innocent, get them tried, get that case on, and get to another case, rather than these endless inquiries that your rule would require.

MR. WHALEN: Well, I agree that what we should do is go ahead and let the jury decide the question of guilt or innocence, but let them do so in circumstances which guarantee the trustworthiness of the verdict. Mr. Chief Justice, your own language in United States versus Mechanik suggests that the considerable costs of retrials and appeals are a cost that we have to absorb if the harm done to the defendant goes to the very reliability of the verdict.

QUESTION: Yes, but all I'm suggesting is that you're saying that it's argued on both sides different rules could be adopted, and you're opting for a rule which would be applied by hindsight at the close of the trial, when the severance decision is made before trial, the prosecutor's decisions as to introducing evidence are made at the beginning of trial.

And so it isn't a bright line rule at all. It's simply, how did everything work out, and no one knows in advance how it'll all work out.

MR. WHALEN: Why couldn't the prosecutor in our case have been held to the burden of foreseeing through his own testimony, through Cynthia Knighton's testimony and through the statement, that there was a great risk?

Yes, there are some issues that, especially issues that we're subjecting to a harmless error analysis, that will be looked at by an appellate court. For example, sufficiency of the evidence issues are continually before the courts on appeal.

But as long as we have -- are subjecting the harmless error rule -- on the one hand, I don't think we're going to have wholesale reversals of convictions. I think the problem is going to be fairly infrequent. On the other hand, the per se rule that the Petitioner

is suggesting, that you simply look at the basis of the statement in isolation, is not workable because it doesn't sufficiently answer the concerns of Bruton, it doesn't sufficiently answer the concerns of the confrontation clause.

Yes, let the jury decide the issue of guilt or innocence, but let them do it fairly, let them do it in a way that they can assess the reliability of the evidence before them.

If we're going to send people to prison for the rest of their lives, we have an obligation to make sure that the verdicts are reliable, the process by which those verdicts are reached is reliable. And in our case, I have serious questions about the reliability of this verdict.

QUESTION: Well, did you raise the question of the sufficiency of the evidence in the Michigan courts?

MR. WHALEN: Yes, I did.

QUESTION: And how did they rule?

MR. WHALEN: The Michigan courts ruled against me in that question, although they noted that it was a close question. As well, the federal district court, to paraphrase them, said it's a close question, but legally sufficient. The Sixth Circuit declined to address that issue.

Again, the question for this Court is not sufficiency; it's how much weight in context did that statement of Williams add in terms of the conviction for murder? I think it added critical weight, as much as Evans' confession in Bruton, as much as a confession that would have named her.

If there are no further questions.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Whalen.

Mr. Baughman, I think you have some time remaining.

REBUTTAL ARGUMENT OF

TIMOTHY A. BAUGHMAN, ESQ.

ON BEHALF OF PETITIONER

MR. BAUGHMAN: Very briefly, Your Honor, two quick points.

The first is to the rule. Where the system is based on truth and faith, which is what our system is based on in terms of the jury following instructions, I would submit that bright line rules are justifiable and preferable, and I would argue for a rule, as I think my brief makes clear, that there be no such doctrine as evidentiary linkage or contextual implication under any circumstances.

QUESTION: Mr. Baughman -- am I saying your

name -- "Boffman"?

MR. BAUGHMAN: "Boffman," that's correct.

QUESTION: What would the purpose of an objection by the defense have been?

MR. BAUGHMAN: To the prosecutor's statement?

QUESTION: Yes, to the prosecutor's statement. What could have been done at that point?

MR. BAUGHMAN: He could have asked for a further cautionary instruction or he could have asked for a mistrial at that point. I think these would have been his options. And then at least it would have been -- the issue would have been preserved for a court to find at the end --

QUESTION: Well, a further cautionary instruction would do not good. I mean, after all, the whole point is that this statement makes cautionary instructions useless. If it made one cautionary instruction useless, why, I assume it would have made a second one useless.

MR. BAUGHMAN: And I think that --

QUESTION: So the only thing it could have achieved is you get a mistrial sooner rather than later.

MR. BAUGHMAN: That is correct, I believe. However, as I began to indicate earlier, I think that

the question of whether a prosecutor violates his requirements in closing argument is different than the question before us in terms of confession and redaction.

You can argue facts not in evidence, and I suppose in a sense that's a violation of confrontation because nobody ever even testified to that. We don't usually analyze it in that context, and we require an objection to preserve it and that it be raised in the lower courts.

And I really think it should be viewed as a separate question than in the question right before us, whether the prosecutor erred in his argument as opposed to whether or not severance should have been granted in this case.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Baughman.

The case is submitted.

(Whereupon, at 1:58 p.m., oral argument in the above-entitled case was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-1433 - GLORIA RICHARDSON, WARDEN, Petitioner V. CLARISSA MARSH

---

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)