

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: KEVIN D. GRAY, Petitioner v. MARYLAND  
CASE NO: 96-8653  
PLACE: Washington, D.C.  
DATE: Monday, December 8, 1997  
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IN THE SUPREME COURT OF THE UNITED STATES

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KEVIN D. GRAY, :

Petitioner :

v. : No. 96-8653

MARYLAND :

- - - - -X

Washington, D.C.

Monday, December 8, 1997

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

ARTHUR A. DELANO, JR., ESQ., Baltimore, Maryland; on  
behalf of the Petitioner.

CARMEN M. SHEPARD, ESQ., Deputy Attorney General of Maryland, Baltimore, Maryland; on behalf of the Respondent.

ROY W. McLEESE, III, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondent.

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1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 96-8653, Kevin D. Gray v. Maryland.

5 We'll wait just a minute.

6 Mr. Delano.

7 ORAL ARGUMENT OF ARTHUR A. DELANO, JR.

8 ON BEHALF OF THE PETITIONER

9 MR. DELANO: Mr. Chief Justice, and may it  
10 please the Court:

11 In this case the prosecution was entitled to use  
12 codefendant Bell's confession to prove Bell's guilt and  
13 nothing more. Bell's confession contained two admissions  
14 that completely and fairly accomplished this purpose. In  
15 his confession, Bell admitted both hitting and beating  
16 Stacey Willams.

17 The remaining portion of Bell's confession,  
18 which focused exclusively on establishing the role of and  
19 the identity of Bell's alleged accomplices, served no  
20 legitimate purpose. The remaining portions of Bell's  
21 confession were nothing more than unreliable hearsay. The  
22 remaining portions of Bell's confession should not have  
23 been admitted, because they created for petitioner a  
24 totally unnecessary risk of prejudice for petitioner.

25 The use of the terms, deleted and deletion in

1 this case did not, in the words of the trial judge,  
2 sanitize Bell's confession. The words, if anything, drew  
3 the jury's attention to the fact that a name had been  
4 omitted. They in a sense acted as a red flag to the jury.

5 QUESTION: Mr. Delano, do you take the view that  
6 if this had been redacted a little differently, so that it  
7 didn't show deletion and so that it said, for example, who  
8 was in the group that beat Stacey -- if it just said, me  
9 and a few other guys, for example, that would be okay?

10 MR. DELANO: I do not take that position, Your  
11 Honor.

12 QUESTION: You don't think there's any way this  
13 could have been redacted that would satisfy you.

14 MR. DELANO: Oh, I disagree. It could have been  
15 redacted --

16 QUESTION: What do you disagree with?

17 MR. DELANO: I disagree that it could have been  
18 redacted to allow in the simple statement that I hit and I  
19 struck the victim. That is the only part --

20 QUESTION: But you don't think it could be  
21 redacted to say, me and a few other guys.

22 MR. DELANO: I don't believe that is necessary,  
23 Your Honor.

24 QUESTION: Well, I'm not asking whether it's  
25 necessary. I'm asking whether it can be permitted

1 constitutionally --

2 MR. DELANO: It should not be --

3 QUESTION: -- and it looks to me like that  
4 doesn't point to anybody, if you say, me and a few other  
5 guys.

6 MR. DELANO: It does not point to a specific  
7 person.

8 QUESTION: No.

9 MR. DELANO: What it does --

10 QUESTION: And the evidence in this case showed  
11 there was quite a gang of men who were involved, somehow,  
12 or who at least confronted Stacey at one point.

13 MR. DELANO: In this case it would not --

14 QUESTION: Only two were charged.

15 MR. DELANO: In this case, Justice O'Connor, it  
16 would not have been extremely prejudicial.

17 QUESTION: No.

18 MR. DELANO: But the point I'm trying to make  
19 is, that evidence served no legitimate purpose. Since it  
20 served no legitimate purpose, it should not have been  
21 admitted.

22 QUESTION: What evidence served no legitimate  
23 purpose?

24 MR. DELANO: That several other witnesses  
25 were -- several other persons were involved. In other

1 words, there's no reason that Bell's confession needed to  
2 include that information. That information was not in  
3 dispute at the trial.

4 QUESTION: Well, don't you think it would  
5 unduly favor your client if all they introduce is a  
6 statement that, you know, I beat him up, so it looks as  
7 though there wasn't a crowd of people, and the jury looks  
8 at your client, or at the other defendant and says, gee, I  
9 guess he did it, and looks at your client and says,  
10 according to this fellow there was nobody else there.  
11 Does the court have to let it in on that basis?

12 MR. DELANO: Justice Scalia, my position would  
13 have to be that it is unnecessary. If it were admitted  
14 for -- solely for the purpose of putting the statement in  
15 context --

16 QUESTION: Mr. Delano, why must it -- must your  
17 position --

18 QUESTION: Yes.

19 QUESTION: -- why do you put this in terms of  
20 has to be? I thought you were emphasizing that when the  
21 transcript -- that when what the jury sees says, delete,  
22 blank space, that that juts out. Isn't there a difference  
23 whether you're wrong about the other of a -- something  
24 that shows delete, blank, and something that says, and a  
25 couple of other guys?

1 MR. DELANO: Under the facts of this case,  
2 Justice Ginsburg, it doesn't make a difference. If the --

3 QUESTION: It doesn't, you say?

4 MR. DELANO: It's not a significant difference,  
5 no. Under the facts of this case I believe that the  
6 thrust of my argument is the use of the term, deleted and  
7 deletion, which drew the attention --

8 QUESTION: But you said a moment ago that if  
9 some -- the -- it wasn't necessary for the statement.

10 MR. DELANO: It is not.

11 QUESTION: And why does that figure into the  
12 Bruton-Marsh calculus? I don't recall those cases first  
13 analyzing whether the evidence was "necessary" for the  
14 prosecution.

15 MR. DELANO: Under Bruton and Marsh the  
16 attention seems to be focused towards the end of the  
17 process in terms of using a limiting instruction to --

18 QUESTION: There was no analysis at all of  
19 necessity.

20 MR. DELANO: There is -- in those particular  
21 cases there is no analysis of necessity, that is correct,  
22 Your Honor.

23 QUESTION: So why do you bring it up here? Are  
24 you asking us to extend Bruton?

25 MR. DELANO: No, I'm not asking -- I'm trying to

1 put it in a context that's -- that would show that  
2 although in this case it may not be necessary for the  
3 resolution of this case, because the thrust of my argument  
4 is the use of the term deleted and deletion, that the use  
5 of what this -- the respondent refers to as neutral  
6 pronouns is very misleading.

7 There are -- for example, in this case had there  
8 been no other witnesses and we were simply looking at  
9 Bell's statement, and Bell said that I hit the victim, but  
10 he beat the victim, he dropped the victim on his head, on  
11 its face that statement is neutral, but in that context  
12 the prosecution is unnecessarily benefiting from a  
13 statement that they should not receive any benefit.

14 QUESTION: Well, why do you say, unnecessarily?  
15 I mean, ordinarily evidence is admissible, and you know,  
16 you have to show some reason why it isn't. This certainly  
17 sounds like relevant evidence.

18 MR. DELANO: It's unnecessary because it serves  
19 really no legitimate purpose. It --

20 QUESTION: Well, but where do you get that  
21 analysis from? It doesn't come out of Bruton, it doesn't  
22 come out of Marsh, and yet that is the basis on which the  
23 Maryland Court of Appeals decided this case.

24 MR. DELANO: As I understand -- the reason for  
25 my position is that the parts that are properly admitted

1 are admitted because they incriminate the maker of the  
2 statement. The other parts of the statement that are --  
3 serve no purpose other than to perhaps put the statement  
4 in some sort of a context. Since context is not in  
5 dispute in this case, they seem to me to be superfluous.

6 QUESTION: Well, but you can't make it --

7 QUESTION: Let me ask you something else.

8 Bell's statement strikes me as maybe a declaration against  
9 Bell's penal interest. Is that possible?

10 MR. DELANO: Only a limited --

11 QUESTION: And admissible as a result on that  
12 basis.

13 MR. DELANO: Your Honor's opinion in Williamson  
14 with a declaration of penal interest was very careful to  
15 limit it strictly to declarations against the interest of  
16 the party making the statement. To the extent that he  
17 admitted, I hit the victim, I beat the victim, it is a  
18 declaration against interest. Beyond that, it is not a  
19 declaration against interest.

20 As in Williamson, I believe Justice Ginsburg in  
21 her concurring opinion was -- pointed out the confusion  
22 that exists where a declaration of interest is really not  
23 a declaration against interest, and I think that's what we  
24 have in this situation.

25 We only have a very small portion of Bell's

1 confession that actually deals with his involvement.

2 QUESTION: Well, certainly some of it does, and  
3 I would assume, at least to that extent, it's admissible  
4 on that basis.

5 MR. DELANO: That is correct. I have no quarrel  
6 with the parts that are incriminating only to Bell. The  
7 bulk of the statement, however, is focused on establishing  
8 the role of the other participants. There is no need for  
9 that evidence. It allowed that evidence to be used for  
10 one purpose and one purpose only, to incriminate  
11 petitioner.

12 QUESTION: I would like to go back to the very  
13 first question that Justice O'Connor had, because I want  
14 to be clear about your answer, and I'm not sure I  
15 understood it.

16 The statement is altered so that it says, who  
17 was in the group that beat Stacey, and the redacted  
18 statement does not use the word delete, deleted, it does  
19 not have wite-out, it just says, me and a few other guys.  
20 Should that be admitted by the trial judge, and if not,  
21 why not?

22 MR. DELANO: In -- my position is, it should not  
23 be admitted by the trial judge. If it is, as in this  
24 case, admitted by the trial judge, it would perhaps be  
25 harmless error in light of the other evidence presented at

1 trial.

2 QUESTION: But does the admission of the  
3 statement, as I have described it, violate the  
4 Confrontation Clause?

5 MR. DELANO: The admission does, in my opinion,  
6 violate the Confrontation Clause because it incriminates  
7 other persons. It does not strictly incriminate the  
8 person who made the statement.

9 QUESTION: But the test is not whether it  
10 incriminates other persons. It's whether there's an  
11 inevitable inference that inculcates the nonconfessing  
12 codefendant.

13 MR. DELANO: In --

14 QUESTION: Not other persons. There are no  
15 other persons here before us who are making that argument.  
16 We're not concerned about them. We're concerned about the  
17 codefendant, aren't we?

18 MR. DELANO: Yes, Your Honor.

19 QUESTION: That's the only one. So I don't  
20 understand your answer.

21 MR. DELANO: My answer is that the substantial  
22 risk of prejudice arose from the use of the terms, deleted  
23 and deletion.

24 QUESTION: Prejudice to whom?

25 MR. DELANO: Prejudice to the petitioner. The

1 use of the terms deleted and deletion.

2 QUESTION: Okay, and you agree that the risk of  
3 prejudice is a world apart, a world of difference,  
4 depending upon whether you use the word deleted or whether  
5 you use a generic term like, me and some other guys.  
6 There's a big difference, isn't there?

7 MR. DELANO: Absolutely, Your Honor.

8 QUESTION: Okay.

9 MR. DELANO: In this case, I think common  
10 experience, there's no other reason for the use of the  
11 term, deleted, other than to point to the other defendant.

12 QUESTION: Why is that? I must say, I don't  
13 understand why there's a world of difference.

14 MR. DELANO: Well, Your Honor --

15 QUESTION: Don't these other guys have names?

16 MR. DELANO: The common experience, I think, of  
17 most people today is that whenever there's -- as on  
18 television, there's the blip that censors a word.  
19 Immediately you focus in on the blip. You immediately  
20 think, what was omitted. In this case -- in that case  
21 there may be five or six possible words that were omitted,  
22 but in this case --

23 QUESTION: But don't you -- if you're talking  
24 about redacting it to, instead of putting in the blip  
25 you're putting in a brackets, and some other guys, or is

1 this the actual statement we're talking about?

2 MR. DELANO: This -- in the statement, there  
3 were wited-out spaces --

4 QUESTION: Yes.

5 MR. DELANO: -- and then comma, wited out spaces  
6 and then the other information.

7 QUESTION: Well, no one suggests that instead of  
8 witing them out you could put in, bracket, and some other  
9 guys, close bracket.

10 MR. DELANO: No, Your Honor.

11 QUESTION: You don't know of any redactions --

12 MR. DELANO: No, I do not.

13 QUESTION: I mean, redactions -- that's not an  
14 option, so you either use the statement blanking out  
15 stuff, or you don't use the statement. You can't recreate  
16 the statement with brackets.

17 MR. DELANO: That is correct.

18 QUESTION: Or there's a --

19 QUESTION: In this case --

20 QUESTION: No, there's a third option that  
21 Justice O'Connor questioned. The statement as we have it  
22 is me, deleted, deleted, and a few other guys. The  
23 question put to you was, suppose it just said, me and a  
24 few other guys, without showing any deletion, so that's a  
25 third option.

1 MR. DELANO: That is correct, Your Honor.

2 I do not want to have the Court left with the  
3 impression that my case rises or falls on the several  
4 other guys. The extreme prejudice in this case comes from  
5 the use, deleted and deletion.

6 In context, several other guys is consistent  
7 with other testimony at trial.

8 QUESTION: Was Marsh different in that respect?  
9 Did Marsh have the delete, wite-out --

10 MR. DELANO: Marsh -- in Marsh the -- from the  
11 reading of the statement itself you would have no idea of  
12 the -- even the existence of another person, so it is  
13 quite different from this.

14 This case is not that much different from Bruton  
15 in that it -- the word deleted is not that much different  
16 from the use of a person's actual name, and again focusing  
17 on the use of deleted and several other witnesses, I think  
18 the juxtaposition of those terms aggravates the situation,  
19 because had it been redacted to just say, several other  
20 witnesses, the jury's attention would not have been drawn  
21 to the fact that names were omitted.

22 QUESTION: Well, what do you say the jury would  
23 likely infer from the word deleted?

24 MR. DELANO: I think the jury would be left with  
25 no other conclusion than that it was petitioner's name and

1 Tank's name. Now, which deleted referred to petitioner  
2 and which deleted referred to Tank is some -- a matter  
3 that they could speculate on.

4 QUESTION: And why is that? Why do you say the  
5 jury would most likely have reached that conclusion?

6 MR. DELANO: If -- it calls to the jury's  
7 attention that a name has been removed. In the context of  
8 this trial, there's no need to remove any other name,  
9 other than the defendant's name.

10 QUESTION: Well, but certainly there was  
11 evidence that other people, other than those who were  
12 indicted, had participated, was there not?

13 MR. DELANO: Correct, but there was no reason to  
14 delete the names of those other persons. The only name --

15 QUESTION: Well, but the jury doesn't know that.  
16 The jury isn't apprised of the Bruton rule.

17 MR. DELANO: The jury I think, Mr. Justice  
18 Rehnquist, is aware of common usage of the word deleted,  
19 common usage of blipping on television -- it's the same as  
20 when you receive -- or, at least, when I receive a letter  
21 and something is blacked out on a letter. Your attention  
22 is drawn immediately to the blacked-out portion of the  
23 letter, and you try to figure out what is there. That is  
24 the problem we have here.

25 QUESTION: But here, if the jurors do sit and

1 try to figure out what is there, they could have come to  
2 not just one but it seems to me several conclusions. It  
3 could have referred to any one of the people whom  
4 testimony indicated had participated in this thing, some  
5 of whom were not the codefendant.

6 MR. DELANO: The only testimony that referred to  
7 specific -- there were two witnesses in this case, and  
8 both only identified -- there were only two names ever  
9 used at trial, other than the -- Bell, the name of  
10 petitioner, and the name of Tank. No other names were  
11 mentioned by any other witnesses.

12 QUESTION: But wasn't there testimony that other  
13 people, although perhaps not by name, had participated?

14 MR. DELANO: There was other testimony that  
15 several other witnesses were involved, that is correct.  
16 But the jury, I believe, with the term deleted would be  
17 left to draw no other conclusion than, why put this term  
18 in here if we're not trying to keep something from us.

19 QUESTION: Mr. Delano, would you tell us what  
20 you think the test is for determining a Bruton violation  
21 in these circumstances?

22 As I understand it, the court below applied a  
23 test to the effect that a Bruton violation occurs when a  
24 codefendant's confession, either facially or by compelling  
25 and inevitable inference, inculcates a nonconfessing

1 defendant.

2 Are you satisfied with that test?

3 MR. DELANO: I'm not satisfied with that test.  
4 I believe that test is too stringent. I don't believe  
5 that the defense should have the burden, or that there  
6 should be an inevitable to that conclusion. I think if a  
7 juror could reasonably draw the conclusion, that is  
8 sufficient, because then, if the jury can reasonably draw  
9 that conclusion, that creates a substantial risk.

10 QUESTION: Have we adopted a test here? I mean,  
11 what do you rely on as pointing us to the proper test to  
12 be used?

13 MR. DELANO: The test that the court has thus  
14 far used is the language whether it creates a substantial  
15 risk of prejudice to the other defendant. I believe --

16 QUESTION: And you think that's not as strict as  
17 compelling and inevitable inference.

18 MR. DELANO: Clearly not. The Court of Special  
19 Appeals adopted what I would consider the proper test,  
20 which is the, paraphrasing the test that the Court used in  
21 Bruton, and referred to that there existed in this case a  
22 substantial risk that the jury would be forced to the  
23 conclusion that deleted and deletion referred to  
24 petitioner, and I think that is the test that should be  
25 used.

1           The introduction of the peti -- codefendant's  
2   redacted confession clearly had a devastating effect on  
3   petitioner's case. As I earlier observed, there were only  
4   two witnesses in this case. There was only one eye  
5   witness to the actual beating. The other witness saw the  
6   parties running towards the scene, and that witness'  
7   testimony was consistent with petitioner's defense.

8           The statement as admitted provided corroboration  
9   for that witness' testimony as to the parties involved. I  
10  think prejudice from that was clear.

11           In addition, in the State in prosecution,  
12  whether it was a deliberate or -- deliberate or  
13  unintentional sort of drew together the statement that was  
14  used and the arrest of petitioner to sort of make it very  
15  clear to the jury that this statement actually led to  
16  petitioner's arrest, so in that sense it was also  
17  prejudicial.

18           If the Court has no further questions, I would  
19  reserve the remainder of my time for rebuttal.

20           QUESTION: Very well, Mr. Delano.

21           Ms. Shepard, we'll hear from you.

22           ORAL ARGUMENT OF CARMEN M. SHEPARD

23           ON BEHALF OF THE RESPONDENT

24           MS. SHEPARD: Mr. Chief Justice, and may it  
25  please the Court:

1           The statement, who was in the group that beat  
2       Stacey, me, deleted, deleted, and other guys, communicates  
3       only that Mr. Bell and others committed a crime.

4           QUESTION:   Then why are they bothering to delete  
5       it?

6           MS. SHEPARD:   I'm not entirely clear why they  
7       bothered to delete it.   It was one of the many options.  
8       Certainly, no one asked for the option, me, and then  
9       delete everything until you get to other guys.

10          QUESTION:   No, but isn't the juror's reasonable  
11       reaction, on hearing that, to ask the question, why are  
12       they placing this word deletion in place of whatever it  
13       was he spoke, and isn't the likely answer to that  
14       question, because it refers to this other guy in the other  
15       chair here?

16          MS. SHEPARD:   I disagree, Your Honor.   I believe  
17       that the natural conclusion is, something is missing here.  
18       Beyond that, it is possible a juror might say --

19          QUESTION:   But the juror would never say, gee, I  
20       wonder what it is?

21          MS. SHEPARD:   A juror very well might even say,  
22       I wonder what it is.

23          QUESTION:   And if he did, what would he be  
24       likely to conclude?

25          MS. SHEPARD:   We think that what the juror would

1 be likely to conclude is what the Court noted in  
2 Richardson, which is, maybe it is the name of a person,  
3 but I can't even use that --

4 QUESTION: Well, they take it that it's the name  
5 of a person, don't they?

6 MS. SHEPARD: Well, it could be --

7 QUESTION: I mean, doesn't the context make  
8 that clear beyond doubt?

9 MS. SHEPARD: Perhaps in this case, Your  
10 Honor --

11 QUESTION: This is a really slow jury if they  
12 can't figure out these are names of people.

13 (Laughter.)

14 MS. SHEPARD: But let me give you an example.  
15 Towards the end of the statement, who has Park Heights  
16 jackets, it simply says -- as read by the detective it  
17 just said, deleted. In that instance, for example,  
18 there's not even a mention of whether it's one, two,  
19 three, four names --

20 QUESTION: Well, isn't that -- I mean, what's a  
21 jury supposed to think, that they deleted it because of  
22 John Smith, who's not in the courtroom, his name is in  
23 there? I mean, what is a jury supposed to think?

24 MS. SHEPARD: I think -- I think, Your Honor,  
25 that the jury thinks much like it thinks when there's an

1 objection that's sustained that evidence doesn't come in.  
2 There is something here that we're not allowed to consider  
3 as evidence. It is possible that a juror might go on to  
4 conclude, and that could be a specific name. It could be  
5 a specific person.

6 But there's nothing necessarily in simply the  
7 fact of a redaction or the fact of a deletion that would  
8 necessarily lead a juror to conclude, (a) that it's the  
9 identity of someone and, even further, that it has to be  
10 the identity of this one other person.

11 QUESTION: Well, let me ask you something else.  
12 I mean, I think your inference isn't as generous as it has  
13 to be, but what if the deletion in the one statement that  
14 we're going back to made it read in answer, me and a few  
15 other guys, without deletion and deletion in there.

16 Is that less likely that the jury would draw the  
17 inference that the petitioner was one of the people?

18 MS. SHEPARD: I don't think so, Your Honor.

19 QUESTION: No?

20 MS. SHEPARD: I think that would exalt form over  
21 substance. That is, the statement, me and a few other  
22 guys, me, and then followed maybe by six blanks, five  
23 blanks, both communicate the same thing, or a mixture  
24 thereof, two blanks and then some other guys, or even  
25 three blanks and some other guys.

1 QUESTION: Well, the one communicates simply  
2 there were some other guys. The other communicates not  
3 just that there were some other guys, but that there's  
4 some reason why you can't name one of those guys. It  
5 surely communicates that to the jury.

6 MS. SHEPARD: It --

7 QUESTION: And what do you think the reason  
8 probably is?

9 MS. SHEPARD: Well, Your Honor --

10 QUESTION: That it was the other defendant.

11 MS. SHEPARD: Not necessarily. It could be --

12 QUESTION: No, not necessarily --

13 MS. SHEPARD: -- a confidential informant. It  
14 could be someone who's awaiting trial. There are many --

15 QUESTION: Ms. Shepard, there was a very fine  
16 jurist who once said on this subject, the temptation to  
17 fill in the blanks is high irresistible. I don't think  
18 you have to have a legal mind to see that. The natural --  
19 when one is faced with a blank one thinks, well, which one  
20 was it?

21 MS. SHEPARD: I wouldn't disagree with you, Your  
22 Honor. That is, we don't need to resolve this case by  
23 concluding that a juror would not speculate as to what  
24 could be there. That is, we would concede that a juror  
25 might speculate, that a juror might even speculate there's

1 a name, and that a juror might even wonder --

2 QUESTION: And that that speculation would be  
3 nigh irresistible.

4 MS. SHEPARD: Perhaps.

5 QUESTION: And if the Government could get  
6 across the same information without having, name deleted,  
7 or wite-out, why isn't that the appropriate way to  
8 proceed?

9 MS. SHEPARD: I think, Your Honor, because  
10 ultimately the question of how a statement needs to be  
11 redacted is one that requires a balancing of a great many  
12 factors. Whether in one case it's better in some way to  
13 use a Richardson redaction, or to use a deletion, might  
14 change from statement to statement to statement.

15 QUESTION: May I interrupt with just one  
16 question, if I may?

17 MS. SHEPARD: Yes, Your Honor.

18 QUESTION: The -- on one side of the scale is,  
19 you want to get all of the statement in that tends to  
20 incriminate the maker of the statement, Bell, and you have  
21 no right to put anything in that doesn't incriminate him,  
22 isn't that correct?

23 And you have a statement here, who else has  
24 these jackets, answer, deletion. What possible purpose  
25 could that question serve in terms of the proper purpose

1 for the confession, namely, incriminating Bell?

2 MS. SHEPARD: Your Honor, I wouldn't argue that  
3 that statement is necessary. It simply wasn't redacted.  
4 No one requested that it be redacted. The identities were  
5 redacted.

6 QUESTION: There was no objection to it.

7 MS. SHEPARD: There was no objection to the form  
8 of the redaction in this particular instance.

9 QUESTION: Really? They accepted this without  
10 objection?

11 MS. SHEPARD: Correct, Your Honor. They did not  
12 suggest -- I'm not meaning to suggest that they did not  
13 object to the confession coming in, but they did not  
14 object to this form of redaction, that is, that the use of  
15 blanks or deleted versus a retyping, versus the use of  
16 pseudonyms, for example, there was no suggestion as to  
17 that.

18 QUESTION: Ms. Shepard, did the trial court  
19 charge the jury in this case at the time Bell's -- that it  
20 was to be used only against him?

21 MS. SHEPARD: And did so, Your Honor, in very  
22 clear and unmistakable terms.

23 QUESTION: So if the jury followed that  
24 instruction it would not have used it against Mr. Gray.

25 MS. SHEPARD: That's correct, Your Honor, and

1 that is precisely our argument.

2 QUESTION: Well, I guess the instruction was  
3 given in the Bruton case, too, wasn't it?

4 MS. SHEPARD: True, Your Honor.

5 QUESTION: Yes, but the Court nonetheless held  
6 in that case there was a violation of the Confrontation  
7 Clause.

8 MS. SHEPARD: Because, Your Honor, that  
9 confession on its face expressly inculcated the defendant.  
10 That is, there is a significance --

11 QUESTION: Yes. Well, then I guess this Court  
12 left open in Marsh whether a redacted confession would be  
13 okay, didn't it?

14 MS. SHEPARD: Correct, Your Honor.

15 QUESTION: So that's what we're trying to decide  
16 here. Would you help us with what test you think we ought  
17 to use?

18 MS. SHEPARD: Yes, Your Honor. I believe the  
19 issue of redaction, what to redact, how to redact, should  
20 be left in the first instance to the trial court based on  
21 the feasibility of redaction. In some instance that will  
22 be the practical visibility. Is it a video, for example?  
23 It may make it very difficult to redact without indicating  
24 there has been a deletion.

25 QUESTION: Well, so if it's too difficult to

1 redact, the whole thing comes in? Is that what you're  
2 arguing?

3 MS. SHEPARD: I would be arguing against that.  
4 For example, I'm using a video as a way to suggest that  
5 redactions that indicate there's a deletion are perhaps  
6 inevitable -- for example, through the use of video --  
7 unless, of course, the cost were not to allow video  
8 confessions, which --

9 QUESTION: Excuse me. I thought you were going  
10 to help us with an articulation of what the test is. The  
11 Maryland court below applied this either facially or by  
12 compelling an inevitable inference inculcates the  
13 nonconfessing defendant.

14 MS. SHEPARD: Yes.

15 QUESTION: Is that the right test?

16 The petitioner says no, that it should be  
17 whether there's a substantial risk that it would inculcate  
18 the codefendant, which is drawn from language of our  
19 earlier opinions. What is the test? What should it be?

20 MS. SHEPARD: Your Honor, we share the view of  
21 the Maryland Court of Appeals and the view that you  
22 previously expressed as to the test. It should focus on  
23 whether the confession expressly implicates, identifies  
24 the defendant, or does the equivalent of identifying the  
25 defendant.

1 QUESTION: Why should we adopt anything other  
2 than the most rigorous of tests? I mean, what's the big  
3 deal? If you're worried about the redaction you could try  
4 the other individuals separately.

5 MS. SHEPARD: Well, Your Honor, there is --

6 QUESTION: Then you can get the whole thing in  
7 in its full term. It seems to me that -- I'm not very  
8 sympathetic to your insistence that we have to allow the  
9 redaction unless there's a certainty that the jury's going  
10 to fill it in with the name of the other defendant. Try  
11 the two separately, then you get the whole thing in, word  
12 for word.

13 MS. SHEPARD: The reason for that, Your Honor,  
14 is the judgment, we believe correct in our case, that this  
15 Court has recognized before, that joint trials are of  
16 vital importance to our system, that there is a cost of  
17 foregoing a joint trial, a cost to society, a cost to the  
18 administration of the criminal justice system, sometimes a  
19 cost to one of the codefendants, whose best shot at a  
20 defense is to stand side-by-side with someone who's more  
21 culpable. Those are very real costs that this Court has  
22 previously recognized.

23 QUESTION: And those arguments would have even  
24 greater weight if Bruton itself were somehow questionable,  
25 if we were using this rule because Bruton was too harsh.

1 I have seen nothing in the commentary or in the  
2 briefs to suggest that latter proposition, though. It is  
3 a given, is it not, or maybe I'm incorrect, that Bruton is  
4 absolutely correct. There was a cardinal violation of  
5 confrontation when you cannot examine a witness who  
6 implicates you by a previous statement, or am I incorrect  
7 about that?

8 MS. SHEPARD: Let me answer it this way, Justice  
9 Kennedy. I believe in some ways that is incorrect. That  
10 is, Bruton does rest on a value judgment: What do we  
11 think jurors will do? It is an issue of fact that is  
12 unprovable and unknowable in all likelihood.

13 QUESTION: Well, does it rest on what you call a  
14 value judgment after everyone adopts the premise that  
15 there would be a confrontation problem, that there is a  
16 confrontation violation if the statement comes in and  
17 there can be no cross-examination?

18 MS. SHEPARD: If one assumes that the jury  
19 cannot follow the instruction not to use this evidence  
20 against a particular defendant.

21 QUESTION: Was there statistical evidence in  
22 Bruton indicating juries don't follow instructions like  
23 that?

24 MS. SHEPARD: There was not, and there still is  
25 not. That is, the statistics, or the studies, to the

1 extent they're even capable of divining jury behavior,  
2 indicate that jurors try to follow instructions, that  
3 where the instructions are clear, that's what they will  
4 endeavor to do.

5 And we do know this much from our practical  
6 experience, that day after day in trial courts jurors are  
7 told, not even by a codefendant but by the prosecutor, we  
8 believe, we the State believe this person is guilty of a  
9 crime in opening statements and closing statements. Those  
10 jurors are told that is not evidence, and juries are  
11 capable of making decisions based on the evidence.

12 QUESTION: Well, you didn't --

13 QUESTION: I guess Bruton is wrong, then. Is  
14 that -- I mean, if all that is true, Bruton was wrong.

15 MS. SHEPARD: We don't need to decide --

16 QUESTION: And we've assumed the opposite of  
17 what you're saying.

18 MS. SHEPARD: We don't need to decide that  
19 issue, Your Honor.

20 QUESTION: Well, and Maryland didn't cross-  
21 petition and bring that here, did it?

22 MS. SHEPARD: We did not, and that issue is not  
23 before the Court. We're not urging the Court to --

24 QUESTION: But you certainly could have. Given  
25 your view, it's rather surprising that you didn't, isn't

1 it?

2 MS. SHEPARD: Well, Your Honor, I --

3 QUESTION: How do you explain that?

4 MS. SHEPARD: I explain that, Your Honor, to  
5 this extent. That is, we understand Bruton. Bruton lays  
6 down a rule that can be followed.

7 What we are here today for is to make -- is to  
8 argue that that area, that area where the Court has said  
9 juries cannot be trusted, is not expanded beyond the  
10 statement, this codefendant committed the crime, to an  
11 area where the statement is simply, and all it  
12 communicates is, someone else committed the crime. That  
13 is, a group of people committed the crime. That is not  
14 the kind of statement that Bruton --

15 QUESTION: It isn't just someone else, it's  
16 someone else whose name I am not allowed to tell you in  
17 this trial committed the crime.

18 MS. SHEPARD: Even if you go that far, Justice  
19 Scalia --

20 QUESTION: Yes, okay.

21 MS. SHEPARD: Someone else --

22 QUESTION: But even beyond that, the next  
23 question by the prosecutor after reading the statement,  
24 all right, now officer, after he gave you that information  
25 you subsequently were able to arrest Mr. Kevin Gray, is

1 that correct, didn't that pretty much create an inference  
2 that they'd been talking about Gray?

3 MS. SHEPARD: I think not, Your Honor, and let  
4 me answer that question in two ways. One is, there was no  
5 objection to that at that point in the defense, so that  
6 had to have been preserved.

7 QUESTION: Perhaps it might not have been very  
8 wise tactics to get up and start screaming right at that  
9 point, I don't know.

10 MS. SHEPARD: We think the reason for the lack  
11 of objection --

12 (Laughter.)

13 MS. SHEPARD: The reason for the lack of  
14 objection was another.

15 That is, as we pointed out in our brief, in the  
16 context of the questioning, what actually happened was,  
17 they asked the detective, what information did you  
18 develop? I went, interviewed witnesses.

19 Based on that, what did you do? I got an arrest  
20 warrant. What did you do then? I went to look for Mr.  
21 Bell and Mr. Gray. I found Mr. Bell. I could not find  
22 Mr. Gray. So what did you do next? I brought Mr. Bell  
23 in, I got his statement. Were you subsequently able to  
24 arrest Mr. Gray?

25 There is no tying-in at all of Mr. Gray to the

1 statement of Mr. Bell. It was simply understood in its  
2 context. It's a chronology, and in fact the decision on  
3 the arrest warrant had been made before Mr. Bell's  
4 confession was obtained.

5 Your Honor, we believe that the trial courts  
6 need the discretion to determine what redaction best can  
7 balance the concerns of the Sixth Amendment and the needs  
8 of the trial. In any given case, a court might conclude  
9 that a Richardson redaction is appropriate.

10 QUESTION: There is something disturbing about  
11 giving to the jury a statement which is, in a sense,  
12 fictional, and in some courts counsel and the judge even  
13 agree that there is a completely fictional statement.  
14 They have it made at a different place, when the defendant  
15 was alone in the police car when he really wasn't. This  
16 is at some level somewhat offensive to the system, it  
17 seems to me.

18 MS. SHEPARD: I agree, Your Honor, and that is  
19 one of the factors that ought to be considered in  
20 determining whether a deletion in a particular case should  
21 be used, as opposed to a rewrite of the confession. That  
22 is --

23 QUESTION: Or whether the confession ought to  
24 come in at all in the joint trial.

25 MS. SHEPARD: Well, that is ultimately, Your

1 Honor, also a possibility, certainly, whether the  
2 confession comes in at all, but certainly we should  
3 respect the desire to include confessions in trials, and  
4 we should respect the importance of joint trials.

5 Beyond that, what a trial court may use in  
6 determining how best to redact is both matters of the  
7 practicality of the redaction, matters of the substantive  
8 communication, does it so distort the meaning.

9 A court may also take into account the interests  
10 of the defendant, the interests of the codefendant, the  
11 interest of the State, and in any given confession and in  
12 any given statement, that balance may result in one form  
13 of redaction or another.

14 QUESTION: Ms. Shepard, one problem with leaving  
15 it all up to the discretion of the trial judge is, I've  
16 given you the response of one judge, nigh irresistible  
17 inference. Another one should say, no, there's not any  
18 necessary inference. It could be anybody, Mr. X, could be  
19 Mr. White, Mr. Gray.

20 So it just -- there's a tremendous amount of  
21 disparity if you just say, well, it's up to the trial  
22 judge, and given that range, that one would say, perfectly  
23 okay to have blanks, and the other one says the jury is  
24 going to make that inference, I know they are, so I'm  
25 going to keep it from them.

1 MS. SHEPARD: I think I understand your  
2 question. I'm not sure, beyond giving the trial courts,  
3 that is, the ultimate rule and the ultimate goal. That  
4 is, the responsibility here is to make sure that a  
5 statement or a confession that comes in does not directly  
6 or by compelling or inevitable inference identify the  
7 defendant.

8 It is possible the trial courts might have a  
9 different judgment in a particular statement, but that is  
10 almost impossible to anticipate or correct, and the  
11 judgment may change, depending on the nature of the  
12 statement, too.

13 I believe it might -- it would not be possible  
14 to give more firm guidance than simply making sure that at  
15 the end when a confession is admitted it does not, in  
16 fact, expressly incriminate or inculcate --

17 QUESTION: Well, you certainly could adopt a  
18 rule saying, in redacting we're not going to use the fill-  
19 in-the-blank form of redaction. That would be simple  
20 enough, wouldn't it?

21 MS. SHEPARD: It would, Your Honor, but it would  
22 not accomplish the purposes of the Sixth Amendment,  
23 necessarily, that is, and again --

24 QUESTION: Well, it would go a step in that  
25 direction, wouldn't it?

1 MS. SHEPARD: Not necessarily, Your Honor,  
2 because it will come perhaps -- for example, in this case,  
3 it might change the evidence as to Mr. Bell. Mr. Bell's  
4 best defense may have been here, well, I had a part in it,  
5 but it was really a small part, all I did was this, and so  
6 a codefendant might have an interest in making sure that  
7 the fullness of the story be told, and that the  
8 redaction --

9 QUESTION: But not a sufficient interest to get  
10 on the witness stand.

11 MS. SHEPARD: Absolutely, Your Honor, and we  
12 can't require him to sacrifice that, but he nevertheless  
13 has an interest in making sure that as much of his  
14 confession --

15 QUESTION: Well then, you're really saying this  
16 statement was not a statement against the interest of the  
17 declarant. You're sort of describing it as a self-serving  
18 statement that ought to get in to prove that he's not as  
19 guilty as the other guy.

20 MS. SHEPARD: I believe the defendant, whether  
21 the statement is truthful or not, certainly has an  
22 interest in deciding and determining that as much as  
23 possible of the statement in the form that he gave it  
24 comes in in that fashion, so to avoid, for example, the  
25 prejudice that might occur from a statement that

1 communicates I and Mr. Bell and only Mr. Bell cause this  
2 harm to the victim. That's a legitimate interest, and  
3 that's one that could be balanced out and perhaps might  
4 better be balanced out by use of a deletion or some form  
5 of redaction.

6 QUESTION: Well, would you agree that this is --  
7 would -- If the case turned on the admissibility of this  
8 statement as to whether or not it was against the  
9 declarant's penal interest, would you agree that it  
10 probably does not meet that test, because there are  
11 substantial exculpatory or mitigating reasons why he might  
12 want to make that statement?

13 MS. SHEPARD: That's a little difficult for me  
14 to answer, Justice Kennedy. I suspect because we are the  
15 State we would be in a position to argue that much of that  
16 statement would come in as a declaration --

17 QUESTION: Well, was any objection ever made on  
18 the ground, not the Bruton ground but on the ground that  
19 it was not a permissible exception to the Confrontation  
20 Clause otherwise?

21 MS. SHEPARD: Not otherwise, Your Honor.

22 QUESTION: So the Bruton ground was the only one  
23 asserted?

24 MS. SHEPARD: Yes, Your Honor.

25 The benefits -- I'm sorry, Your Honor.

1 QUESTION: I think your time has expired,  
2 Ms. Shepard.

3 Mr. McLeese, we'll hear from you.

4 ORAL ARGUMENT OF ROY W. McLEESE, III  
5 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,  
6 SUPPORTING THE RESPONDENT

7 MR. McLEESE: Mr. Chief Justice, and may it  
8 please the Court:

9 In Richardson, the Court rejected a  
10 Confrontation Clause challenge to one category of redacted  
11 confession, those which make no mention at all of the  
12 existence of the complaining defendant.

13 Our submission in the present case is that the  
14 Court should reach the same conclusion as to a second  
15 category of redacted confession, those which do not name  
16 or describe the complaining defendant. Such confessions  
17 do not vividly and facially incriminate the complaining  
18 defendant, and thus are quite different from the  
19 confession at issue in Bruton.

20 In addition, the costs of expanding Bruton --

21 QUESTION: Oh, I think we're really talking  
22 about the fill-in-the-blank sort of approach here for  
23 redaction.

24 MR. McLEESE: To answer that question --

25 QUESTION: Why don't we just eliminate that?

1 MR. McLEESE: Well, there would be costs to that  
2 if what you mean is a manner of redaction that would not  
3 be apparent to the jury at all, so the jury would not know  
4 that there had been any redaction at all.

5 QUESTION: To the extent that it's possible you  
6 avoid fill-in-the-blanks. It was sure possible here. You  
7 easily could have redacted this one so that you didn't  
8 leave it deletion, deletion, with an obvious fill-in-the-  
9 blank sort of effect.

10 MR. McLEESE: One could have deleted -- one  
11 could have redacted this confession so that you didn't  
12 have the obvious blanks. I think it would have been  
13 impossible, while still using the signed confession, to  
14 redact it in a way so that it would not have been apparent  
15 to the jury that there had been some kind of redaction  
16 that took place.

17 But to use this case as an example, I don't  
18 think that the fact that the redaction was achieved here  
19 by using deletion, something that was not the subject of  
20 an objection, sufficiently or significantly increased the  
21 risks that the jury would infer that Bell named  
22 petitioner.

23 There were a number of deletions. There were a  
24 number of names that were deleted, so the jury would not  
25 have, had it been inclined to speculate, had it been

1 inclined to disregard its instructions not to do that, it  
2 would not have reached the natural conclusion that these  
3 deletions must be driven by the fact that petitioner must  
4 have -- that declarant must have named petitioner, because  
5 a number of names were deleted. The jury, had it  
6 speculated, could have concluded only --

7 QUESTION: Well, it was the -- Bell and Tank I  
8 think is all that we're talking about.

9 MR. McLEESE: I don't think the jury here, had  
10 it been inclined to speculate, would have had any reason  
11 to speculate that the names in Bell's confession happened  
12 to map on to Bell and Tank as opposed to other names in  
13 this group.

14 QUESTION: Except there would have been no  
15 reason to delete the names of third parties who were not  
16 involved in the courtroom, right?

17 MR. McLEESE: Tank was not involved in this  
18 courtroom, either, and the jury, again had it been  
19 inclined to speculate and disregard instructions, would  
20 have had no reason to surmise that -- had no reason to  
21 think that Tank's name would need to be deleted.

22 I think if the jury had been speculating it  
23 would have been speculating only that whoever Bell named,  
24 there must be some rule that says that all those names  
25 don't come in, and the jury would have had no reason to

1 guess that among the people Bell named was petitioner.

2           There would have been -- on the facts of this  
3 case, that deletion would not have been a red flag that  
4 would have taken the jury anywhere even if the jury had  
5 been inclined to try to follow that up. They had --

6           QUESTION: If we find that there's a powerful,  
7 compelling inference that defendant is a person named in  
8 the confession, disagreeing with your analysis, and if we  
9 were writing on a clean slate, no Bruton, would there be  
10 any way to admit this statement?

11           MR. McLEESE: I think that -- I don't think that  
12 even with a slate that includes Bruton the conclusion you  
13 describe would dictate an unfavorable answer for the State  
14 here, and what I mean by that is the following.

15           I think that Richardson, for example, makes  
16 clear that this area does not turn on the mere, even  
17 certainty that the jury will end up through a chain of  
18 inference reaching a conclusion that evidence is  
19 incriminating but must be set aside.

20           What Richardson says is, even where, through a  
21 chain of inference, the jury may get to that point, we can  
22 trust juries, as we trust them to set aside other things,  
23 many other things, to set that aside, that Bruton is a  
24 very narrow exception to that rule that arises in  
25 circumstances where as a self-contained unit the

1 confession comes in in a form that says this person  
2 committed the offense with me, so it's not -- I don't  
3 think that even if one were to conclude that the inference  
4 is one that the jury would have drawn in a particular case  
5 eventually, had it sat down and done everything, I don't  
6 think that supports the conclusion there was a Bruton  
7 violation.

8 QUESTION: Mr. McLeese, what's the worst kind of  
9 a different situation in which we trust the jury to obey  
10 an instruction from the judge not to consider what it has  
11 just heard. What --

12 MR. McLEESE: Two cases come --

13 QUESTION: Give me another example that's as bad  
14 as this.

15 MR. McLEESE: Well, two come to mind. Spencer  
16 v. Texas is a case in which, at the defendant's murder  
17 trial, the jury is informed that the defendant has a prior  
18 murder conviction and is told, do not consider that in  
19 determining guilt or innocence. Set that aside when you  
20 determine guilt or innocence. Consider it solely for  
21 purposes of the appropriate sentence that you will later  
22 impose in a single guilt and sentencing proceeding.

23 Another comparable example is Harris v. --

24 QUESTION: That may not be as persuasive as it  
25 might have been, because most States after that have taken

1 a different view on separating sentencing from guilt just  
2 because of the obvious risk of prejudice in that very  
3 situation, so you sort of have a general consensus that  
4 that case, maybe there was no constitutional violation,  
5 but there was obvious unfairness there.

6 MR. McLEESE: But the relevant inquiry here is  
7 whether the risk of jury inability to set aside  
8 incriminating evidence is a constitutional violation, and  
9 what Spencer v. Texas said, whatever jurisdiction --

10 QUESTION: Well, if they do -- no doubt about  
11 the fact, if they did treat this as admissible against the  
12 codefendant it would be a blatant constitutional  
13 violation. You would agree with that?

14 MR. McLEESE: I do agree with that.

15 The other answer to your question, Justice  
16 Scalia, is Harris v. New York, where statements that are  
17 taken illegally, in violation of Miranda, are admitted to  
18 the jury and the jury is told, you may consider this  
19 confession, this statement solely for purposes of  
20 assessing the credibility, the testimonial credibility of  
21 the defendant. You must set it aside as it might be  
22 considered substantive evidence of the defendant's guilt,  
23 and I --

24 QUESTION: So what is the -- you can't  
25 substitute for the defendant's name a concrete

1 description. You couldn't say, the man with the red hair  
2 and the limp.

3 MR. McLEESE: No. The rule that we --

4 QUESTION: All right. So what is the rule, in  
5 your opinion, about when a blank separated by commas or  
6 some other pictorial depiction in a written confession is  
7 equivalent to the red-eyed man, or red-haired man with the  
8 limp? What's the -- how would you decide that one?

9 MR. McLEESE: The rule we propose is limited to  
10 confessions which do not contain additional descriptive  
11 information of the kind that you suggest.

12 QUESTION: Why, in fact -- I think one argument  
13 is that a blank separated by commas in the circumstance is  
14 quite close to a particular description because it sets  
15 the jury to thinking, and they see blank, blank, and some  
16 other guys, and they know who that is just as if it said,  
17 the red-haired man with the limp.

18 MR. McLEESE: In this case --

19 QUESTION: So what's the test to decide whether  
20 they're right or not? How would you formulate the test  
21 that would distinguish the blanks, or however you want  
22 to --

23 MR. McLEESE: With respect to confessions,  
24 confessions that are -- even as redacted contain  
25 additional descriptive information. When that descriptive

1 information is so vividly and obviously linked to the  
2 defendant -- the example that comes to mind is this  
3 Court's decision in Harrington --

4 QUESTION: Vivid and obvious, and if not that,  
5 if we accepted their view, are there many, many retrials  
6 that would be necessary throughout the country?

7 That is to say, if this interpretation of the  
8 Constitution of the United States is -- in other words,  
9 has it been a habit of prosecutors simply to redact  
10 through the use of a blank with a comma?

11 MR. McLEESE: I think that that is a widely --  
12 redaction that would be apparent to the jury, perhaps, but  
13 that deletes the names, is a relatively common practice in  
14 the State and Federal system.

15 QUESTION: Well, where you say, physically,  
16 deletion, deletion, as opposed to simply leaving it out --

17 MR. McLEESE: That is less clear.

18 QUESTION: -- so that it says me and other  
19 guys, instead of me, deletion, deletion, and a bunch of  
20 other guys?

21 MR. McLEESE: That is less clear. I think it's  
22 very hard --

23 QUESTION: We don't know.

24 MR. McLEESE: It's very hard to tell how common  
25 a practice that is.

1 QUESTION: I would assume -- is it fair to  
2 assume that if you thought this practice were common you  
3 would have told us that? You would have gotten  
4 complaints --

5 MR. McLEESE: If I were aware that it were  
6 common, I certainly would have.

7 QUESTION: So people haven't been complaining to  
8 you about it. I mean, the case is well-publicized, and  
9 people know about it, prosecutors know about it. Is it a  
10 fair assumption from the fact that you don't know about it  
11 that this is not a common practice?

12 MR. McLEESE: That is -- when you say this is  
13 not a common practice --

14 QUESTION: The use of the word deletion,  
15 deletion.

16 MR. McLEESE: In the Federal system there  
17 certainly is not a lot of lower court case law addressing  
18 that particular method of redaction. There --

19 QUESTION: Could that be because of the warning  
20 that this Court gave in Marsh, the footnote that says, we  
21 express no opinion on the admissibility of a confession in  
22 which the defendant's name has been replaced with a  
23 symbol?

24 MR. McLEESE: I should be clear that, on the  
25 other hand, redactions that continue to describe the role

1 of the unnamed other participants by use of terms other  
2 than deletion, like the other guy, or him, that is an  
3 extremely common practice in the Federal courts areas and  
4 has met widespread acceptance in the lower Federal courts.  
5 In fact, the overwhelming weight of authority in the  
6 Federal courts is to approve that practice.

7 QUESTION: But I think when Justice O'Connor  
8 started reading how this might have been presented and she  
9 said, me and a few other guys, that is a distinction from  
10 me and delete, delete.

11 MR. McLEESE: That's true. We don't think the  
12 constitutional answer turns on that distinction.

13 QUESTION: Thank you, Mr. McLeese.

14 Mr. Delano, you have 11 minutes remaining.

15 REBUTTAL ARGUMENT OF ARTHUR A. DELANO, JR.

16 ON BEHALF OF THE PETITIONER

17 MR. DELANO: Your Honor, in answer to --

18 QUESTION: Is the proper pronunciation of your  
19 name Delano, or Delano?

20 MR. DELANO: That's a source of confusion even  
21 within my own family, but --

22 (Laughter.)

23 MR. DELANO: -- we use the pronunciation Delano.

24 QUESTION: Delano.

25 MR. DELANO: In answer to the Court's question

1 about whether this was preserved or not, counsel at the  
2 end of the hearing on the admissibility of the statement  
3 clearly indicated that they objected to this statement as  
4 admitted, and clearly pointed out to the court that the  
5 statement as redacted strengthened the case of -- against  
6 petitioner.

7 QUESTION: But was objection made on the non-  
8 Bruton ground that it just was a violation of, perhaps the  
9 Confrontation Clause on some other basis?

10 MR. DELANO: No, Your Honor. The only objection  
11 was on the Bruton ground, and at trial petitioner was  
12 granted a continuing objection to any testimony concerning  
13 the statement and it was clear that this point was  
14 preserved, and I would also point out that the  
15 preservation argument had never been presented in any  
16 Maryland court and was not presented to this Court in the  
17 brief in opposition, so I really don't believe that issue  
18 is properly before the Court.

19 In answer to Justice Breyer's question  
20 concerning the use of deletions, in my brief I cited five  
21 State courts that have condemned the practice and three  
22 circuit courts, including Judge Friendly's opinion where  
23 they condemned the practice of deletion. Even in those  
24 States that have adopted the so-called facial implication  
25 doctrine I could find no cases in which --

1 QUESTION: How are they supposed to do it?  
2 Presumably there's a physical document with some writing  
3 on it, and the physical document then has some names on  
4 it, and so how in your opinion is the -- is this piece of  
5 paper supposed to be presented into evidence?

6 MR. DELANO: I would suppose that the piece of  
7 paper would have to be retyped or rewritten.

8 QUESTION: But then you can't submit the  
9 original.

10 MR. DELANO: Perhaps you might not be able to  
11 submit the original.

12 QUESTION: Well, what do you -- when you say  
13 perhaps, I mean --

14 MR. DELANO: Well --

15 QUESTION: -- what precisely do you think is  
16 supposed to happen?

17 MR. DELANO: If it showed a blank space, you  
18 would not be able to present the original. The  
19 prosecution has the option of substituting a typewritten,  
20 but more importantly the prosecution has the option at  
21 trial of testifying as to what the actual statement said,  
22 so that it's not that they're not going to get what the  
23 statement has in evidence. They might not get the actual  
24 statement in.

25 QUESTION: Who would testify?

1 MR. DELANO: The officer -- as in this case, the  
2 officer who took the statement. He's the one who  
3 testified as to what was in the statement, and he's the  
4 one who offered the statement into evidence.

5 QUESTION: And he would testify and slightly  
6 modify what he actually heard.

7 MR. DELANO: Yes. As in this case, he modified  
8 what he heard by saying, deleted and deletion. He could  
9 have modified and omitted the deleted and deletion.

10 QUESTION: Is it the case, going to be the case  
11 when we get into this record and so forth we'll find that  
12 you didn't -- there's no one suggesting that the way to do  
13 this is to simply read the confession and leave the names  
14 out?

15 MR. DELANO: That is correct, Your Honor.

16 QUESTION: How are we supposed to deal with  
17 that, that this alternative wasn't presented to the judge?

18 MR. DELANO: Under Maryland evidentiary law the  
19 Court of Special Appeals and the Court of Appeals were of  
20 the mind that this issue had been preserved and again, the  
21 issue had not been presented by respondent in any form of  
22 a cross-petition, so I don't believe that that's necessary  
23 for the Court to reach that issue. I think it's been  
24 reached by the Maryland courts and decided that this was  
25 preserved as far as Maryland evidentiary law was

1 concerned.

2 QUESTION: You're telling us that when we go to  
3 the objection what we will find is something that says in  
4 so many words the confession ought to be kept out because  
5 this is not good enough under Bruton, something like that,  
6 is that what --

7 MR. DELANO: The objection was entirely under  
8 Bruton. Richardson was not mentioned, and at the end -- I  
9 may be paraphrasing slightly, but the language was that  
10 this clearly strengthens the case that the redactions are  
11 not sufficient, but it still, under Bruton, incriminates  
12 the petitioner, and it strengthens the case against  
13 petitioner.

14 QUESTION: So that the only thing you didn't do  
15 was get up and say, I'll tell you how to do it right.

16 MR. DELANO: That is correct. The counsel,  
17 defense counsel did not suggest an alternative, but I  
18 don't believe the defense counsel had that actual  
19 responsibility under Maryland law.

20 And without trying to lessen the significance of  
21 the deletions, because I agree entirely with the Court  
22 that that is the most damaging part in this case, I would  
23 point out that the way that the deletions were done in  
24 this case, they used the term deletion and, in  
25 juxtaposition to the term, several other witnesses.

1           That language basically paralleled the testimony  
2   at trial. It was always, name, name, and several other  
3   guys, so we're not here strictly with a case of deletion.  
4   We're here with a case of deletion plus several other  
5   guys, and I think that only aggravates the -- or increases  
6   the potential for prejudice.

7           Unless the Court has any other questions, I  
8   would submit.

9           CHIEF JUSTICE REHNQUIST: Thank you, Mr. Delano.

10          The case is submitted.

11          (Whereupon, at 11:59 a.m., the case in the  
12   above-entitled matter was submitted.)  
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## 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:

KEVIN D. GRAY, Petitioner v. MARYLAND  
CASE NO: 96-8653

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BY Donna Maria Fedirko-----

(REPORTER)