No.

In the Supreme Court of the United States

ADAM SAMIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

KANNON K. SHANMUGAM
Counsel of Record
AIMEE W. BROWN
ELIZABETH A. NORFORD
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

QUESTION PRESENTED

Whether admitting a codefendant's redacted out-of-court confession that immediately inculpates a defendant based on the surrounding context violates the defendant's rights under the Confrontation Clause of the Sixth Amendment.

RELATED PROCEEDINGS

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

United States v. *Hunter*, Crim. No. 13-521 (Nov. 14, 2018) (judgment)

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

United States v. *Hunter*, No. 18-3074 (Apr. 20, 2022) (summary order)

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

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is unreported. The relevant ruling of the district court was delivered orally (C.A. App. 261-267).

JURISDICTION

The judgment of the court of appeals was entered on April 20, 2022. On July 14, 2022, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including September 2, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * * .

STATEMENT

In *Bruton* v. *United States*, 391 U.S. 123 (1968), this Court held that the Constitution prohibits the government from introducing an out-of-court confession of a codefendant that incriminates another defendant in a joint trial. The Court reasoned that allowing such statements to be admitted without the opportunity for cross-examination would violate the Confrontation Clause of the Sixth Amendment. In two later cases, the Court applied that reasoning to redacted confessions; it explained that, where the redaction omits any reference to the defendant, the Sixth Amendment is not violated, but where the statement is incriminating despite the redaction, the violation remains. Following those cases, a clear conflict has developed among federal courts of appeals on the question of how to assess whether a redacted confession is incriminating.

Petitioner was tried along with two codefendants for the murder of a real-estate agent in the Philippines. Both codefendants admitted that they had participated in the murder and disputed only the government's jurisdiction over the crime. Petitioner alone maintained his innocence. The district court denied petitioner's motion to sever his trial and permitted the introduction of an out-of-court confession of petitioner's codefendant that named petitioner as the person who pulled the trigger. To address the obvious Sixth Amendment concern, the district court required the government to redact petitioner's

name and replace it with references to the "other person." The government referred to the confession in its opening statement as some of the "most crucial" evidence that would prove petitioner's guilt. When introducing the confession through the testimony of one of its agents, the government proceeded to question the agent about the "other person," eliciting additional details about that person's role. Despite petitioner's objection, the district court held that the redactions were sufficient to avoid a Sixth Amendment violation.

The court of appeals affirmed. The court applied existing Second Circuit precedent that instructs courts to assess the redacted confession in isolation from the other evidence in determining whether it incriminates the defendant. The court thus declined to consider the redacted confession in the greater context of the trial. The court ignored the fact that the government repeatedly referred to that confession in its opening statement; the fact that petitioner was the only defendant to whom the statement could apply; and the fact that the government elicited information about the "other person" even though the confession could validly be considered only against the confessor.

In assessing only the four corners of the redacted confession, the court of appeals has taken sides in a mature and entrenched circuit conflict. The First, Third, Seventh, Ninth, Eleventh, and District of Columbia Circuits have held that redacted confessions must be considered in the context in which the government proffers those statements to determine if they implicate the defendant. By contrast, the Second Circuit has joined the Fourth, Eighth, and Tenth Circuits in holding that the redacted confession must be viewed in isolation, regardless of any inferences that might be drawn when considering other

evidence introduced at trial. Because there is an intractable conflict on an important question of constitutional law, and because this case presents an excellent vehicle in which to resolve that conflict, the petition for a writ of certiorari should be granted.

A. Background

The Sixth Amendment guarantees a criminal defendant's right "to be confronted with the witnesses against him." This right prevents the government from introducing at trial the statements of an out-of-court witness containing accusations against the defendant unless the witness takes the stand and is available for cross-examination. See *Crawford* v. *Washington*, 541 U.S. 36, 68 (2004).

In *Bruton*, this Court held that the Constitution forbids the use in a joint trial of a codefendant's confession that incriminates another defendant. See 391 U.S. at 137. In that case, two defendants were jointly tried for armed postal robbery. A postal inspector testified that petitioner's codefendant had confessed that he and the petitioner had committed the robbery together. See *id.* at 124. The jury received "concededly clear instructions" that it could not consider the codefendant's confession as to the petitioner. *Id.* at 137. But the Court reversed the conviction, explaining that "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Id.* at 135. Accordingly, the Court held that limiting instructions cannot serve as an "adequate substitute for [the] constitutional right of cross-examination." *Id.* at 137.

In two subsequent cases, the Court considered the application of the *Bruton* rule to redacted confessions. In the first case, *Richardson* v. *Marsh*, 481 U.S. 200 (1987),

the prosecution had redacted the confession of the codefendant so as to "omit all reference" to the defendant. *Id.* at 203. The redacted confession "omit[ted] all indication that *anyone* other than [the codefendant]" and a named third person had "participated in the crime." *Ibid.* Yet when the defendant took the stand in her own case, she made statements that linked her to the confession. The Court held that, because the confession itself was redacted to "eliminate not only the defendant's name, but any reference to his or her existence," it fell outside the scope of the *Bruton* rule. *Id.* at 211.

By contrast, in *Gray* v. *Maryland*, 523 U.S. 185 (1998), the Court held that a redacted confession violated the *Bruton* rule where the fact of redaction was obvious to the jury. In that case, the prosecution had redacted the confession by substituting a blank (or the word "deleted") for the defendant's name. *Id.* at 188. Unlike the confession in *Richardson*, the *Gray* confession "refer[red] directly to the existence of the nonconfessing defendant." *Id.* at 192 (internal quotation marks omitted). Where the fact of redaction is obvious to the jury, the Court explained, the jury will "realize that the confession refers specifically to the defendant," even if the prosecution does not "blatantly link the defendant to the deleted name." *Id.* at 193. Positing an example where defendant Jones and codefendant Smith are tried jointly and Smith's confession is admitted with obvious redactions, the Court explained that a juror wondering whom Smith had in fact named "need only lift his eyes to Jones, sitting at counsel table, to find what will seem the obvious answer." *Ibid.* Making matters worse, "the judge's instruction not to consider the confession as evidence against Jones" will "provide an obvious reason" for the omission. *Ibid.* And a juror would wonder how, if the redaction referred to someone else, "the prosecutor could argue the confession is reliable," given that the

prosecutor "has been arguing that Jones, not someone else, helped Smith commit the crime." *Ibid.* In short, once the fact of redaction becomes obvious to the jury, the concerns animating the *Bruton* rule are implicated with full force.

Following *Gray*, the Court has never addressed whether the inculpatory effect to the defendant must be based on the out-of-court confession alone, or whether that confession may be considered in context with other evidence introduced by the prosecution. This case presents that question.

B. Facts and Procedural History

1. Petitioner lived in North Carolina, where he worked as a security guard and on the family farm. In 2011, he traveled to the Philippines, where he expected to do security work for a company called Echelon Associates. C.A. App. 855-858. As it turned out, Echelon was a front company for Paul LeRoux, a South African citizen who ran a sophisticated criminal empire spanning four continents. See *United States* v. *Hunter*, 32 F.4th 22, 26 (2d Cir. 2022).

LeRoux used Echelon to commit an array of crimes. Among them, LeRoux ordered the murder of Catherine Lee, a Filipina real-estate agent who LeRoux believed stole money from him during an earlier transaction. The murder was orchestrated in the Philippines by Joseph Hunter, a codefendant at trial, and it was carried out in the Philippines by two men Hunter employed. C.A. App. 538-539. The question at trial was whether petitioner was one of those men.

The government's theory of the case was that Hunter hired two men who posed as real-estate buyers named "Tony" and "Bill Maxwell." They visited two properties with Lee on the day of the murder, interacting with at

least six witnesses. After visiting the second property with Lee, the men killed her. The government argued that petitioner was "Tony" and that codefendant David Stillwell was "Bill Maxwell." C.A. App. 227-234, 927-928.

The six witnesses who met Tony and Bill Maxwell gave statements to Philippine and American law enforcement, and their descriptions were used to prepare composite sketches of the killers. Neither sketch resembles petitioner. Three years later, all six witnesses were presented with photo arrays by American law-enforcement agents. Two of them identified photos of codefendant Stillwell as "Bill Maxwell," and two others selected a photo that was very similar to Stillwell's. Critically, none of the six witnesses identified petitioner's photo as that of "Tony." C.A. App. 21-22, 230, 381-382.

In an interview with the police, Stillwell admitted to being in the car when the victim was killed. But Stillwell claimed he was merely the driver, and he identified petitioner as the gunman. C.A. App. 105.

2. Petitioner, Stillwell, and Hunter were indicted in the Southern District of New York on charges of murder for hire and conspiracy to commit murder for hire, in violation of 18 U.S.C. 1958(a); conspiracy to murder and kidnap in a foreign country, in violation of 18 U.S.C. 956; and using and carrying a firearm during a crime of violence, in violation of 18 U.S.C. 924(j). Petitioner and Stillwell were also indicted for conspiracy to commit money laundering, in violation of 18 U.S.C. 1956(h). C.A. App. 285-300.

Petitioner filed a pretrial motion to sever his trial, arguing that, if Stillwell's out-of-court confession were introduced at a joint trial, it would violate his Confrontation Clause rights. See D. Ct. Dkt. 407. The government acknowledged that Stillwell's statements implicated petitioner, and it proposed redactions. See D. Ct. Dkt. 426, at

14-15. After requiring some additional redactions, the district court agreed with the government; in an oral ruling, it held that introducing the confession in a joint trial comported with petitioner's rights under the Sixth Amendment. See C.A. App. 261-267.

During the course of the two-week trial, the government attempted to establish that petitioner was one of the two killers, relying heavily on inferences from e-mails as interpreted by cooperating witnesses (including LeRoux). The government presented no physical evidence that petitioner participated in the killing; apart from Stillwell's confession, the government presented no statements from any individuals with first-hand knowledge of the day's events.

In its opening statement, the government theorized that Stillwell drove a van while petitioner "was in the passenger seat," and that petitioner pulled out a gun, "turned around, aimed carefully and shot [Lee]." C.A. App. 466. The government then listed some of the "most crucial testimony" it would use to support that theory. *Id.* at 468. Referring to the confession that could be considered only against petitioner, the government stated that "Stillwell admitted to driving the car while the man he was with turned around and shot [Lee]." *Ibid.*

Rather than introducing a written version of Stillwell's confession, the government presented oral testimony about the statements through Eric Stouch, an agent with the Drug Enforcement Administration (DEA). C.A. App. 514-515. Despite its complete control over the portions of Stillwell's confession that were presented to the jury, the government elicited extensive testimony specific to petitioner. As is relevant here, Agent Stouch testified as follows:

> Q. During your interview, did you ever ask Mr. Stillwell whether he had ever been out of the country?

A. Yes.

Q. What did he say?

A. He said he had been overseas once.

Q. Did he indicate where he had gone?

A. The Philippines.

Q. Did he say when?

A. Yes.

Q. When was that?

A. Late 2011 or 2012.

* * *

Q. Did Mr. Stillwell indicate whether he had gone [to the Philippines] alone or with someone else?

A. He stated that he had met somebody else over there.

Q. Did he describe where he and the person that he met over there stayed while in the Philippines?

A. Yes, he explained that he and the other person initially stayed at a hotel, but then moved to what he described as a condo or apartment-type complex in the old capital area of the city.

Q. And he stated that they lived together?

A. Yes.

Q. Stayed in the same place?

A. Yes.

Q. To his knowledge, did the person that he was with in the Philippines ever carry a firearm?

A. Yes.

Q. Did he describe what kind of firearm it was?

A. He described it as a full-size, four-inch gun of some nature, but could not recall whether it was a nine millimeter, .22, or .45 caliber.

Q. Did he notice any other features of the firearm?

A. Yeah, he recalled that it had a threaded barrel.

* * *

Q. Was there a particular occasion that he remembered that individual having that gun in their possession?

A. Yes.

Q. When was that?

A. He described a time when he and that other individual had traveled outside of Manila to view a property and that he had observed a gun then.

* * *

Q. Did he say where [the victim] was when she was killed?

A. Yes. He described a time when the other person he was with pulled the trigger on that woman in a van that he and Mr. Stillwell was driving.

C.A. App. 515-516. The district court instructed the jury that this testimony was "only admissible as to Mr. Stillwell and not as to [petitioner] and Mr. Hunter." *Id.* at 520, 973.

Despite petitioner's efforts to procure testimony from the six eyewitnesses, he was unable to do so. Because those witnesses resided in the Philippines, petitioner lacked the power to subpoena them for the trial. The Phil-

ippine government denied letters rogatory seeking to depose the witnesses, see C.A. App. 281, and the district court denied petitioner's motion to introduce the witnesses' statements and the police sketches under Federal Rule of Evidence 807, see *id.* at 423-426.

Petitioner testified in his own defense, explaining that he joined Echelon to perform security work and that in the Philippines he did such work and was often "an errand boy." C.A. App. 872. He denied that he participated in, or was aware of, the murder. *Id.* at 854, 870, 877. By contrast, neither Stillwell nor Hunter disputed that they were part of a conspiracy to murder the victim, making only the jurisdictional argument that they were not in the United States at the time they entered into or participated in the conspiracy. *Id.* at 934, 949-950.

The jury convicted all three defendants on all counts.

3. The court of appeals affirmed in part, vacated in part, and remanded. App., *infra*, 1a-17a. The court first agreed with the parties that it was required to vacate the convictions on three counts based on this Court's decision in *United States* v. *Davis*, 139 S. Ct. 2319 (2019), because those counts were "predicated on conspiracy to commit murder and kidnapping in violation of § 956(a)(1) being a crime of violence under ACCA's risk-of-force clause, § 924(c)(3)." *Id.* at 4a. As the Court held in *Davis*, under the categorical approach, Section 924(c)(3)(B) is unconstitutionally vague. See 139 S. Ct. at 2323. The court of appeals thus vacated the convictions on those counts and remanded for resentencing.

Turning to the defendants' remaining arguments on appeal, as relevant here, the court of appeals recognized that "the admission of a non-testifying defendant's confession incriminating a co-defendant without the opportunity for cross-examination is prejudicial error in violation of

the Sixth Amendment's Confrontation Clause." App., *infra*, 10a. That prejudice "may be avoided, however, by a non-obvious redaction" of the confession that "eliminate[s] any references to the defendant." *Ibid.* (citation omitted). In considering whether a redaction is sufficient, the court asks "whether the neutral allusion [to the codefendant] sufficiently conceals the fact of explicit identification to eliminate the overwhelming probability that a jury hearing the confession at a joint trial will not be able to follow an appropriate limiting instruction." *Id.* at 11a (citation omitted; alteration in original). The court rejected petitioner's argument that, given the context, "jurors would immediately infer that Stillwell's references to 'another person' referred to [petitioner] himself." *Ibid.* Rather, the court cited Second Circuit precedent requiring it to consider the redacted statement "separate and apart from any other evidence admitted at trial." *Ibid.* (citing *United States* v. *Lyle*, 919 F.3d 716, 733 (2019), cert. denied, 140 S. Ct. 846 (2020)). Applying that standard, the court of appeals concluded that the redactions avoided any prejudicial error because the DEA agent used "neutral terms" that did not "explicit[ly] identif[y]" petitioner. *Ibid.* (citation omitted; alterations in original).

REASONS FOR GRANTING THE PETITION

The court of appeals' decision implicates a circuit conflict on the question whether a codefendant's redacted out-of-court confession must be assessed in isolation or in its broader context when determining whether a violation of the Confrontation Clause has occurred. That longstanding conflict, on an important question of constitutional law implicating the fundamental rights of criminal defendants, warrants the Court's review.

A. The Decision Below Implicates A Conflict Among The Courts Of Appeals

1. In considering a codefendant's redacted confession only in isolation, the Second Circuit is in conflict with the First, Third, Seventh, Ninth, Eleventh, and D.C. Circuits. In each of those circuits, a court must consider not only the redacted statements, but the context in which the government proffers the statements, in determining whether a defendant's Confrontation Clause right has been violated.

a. In *United States* v. *Vega Molina*, 407 F.3d 511, cert. denied, 546 U.S. 919 (2005), the First Circuit addressed "[t]he application of *Bruton*, *Richardson*, and *Gray* to redacted statements that employ phraseology such as 'other individuals' or 'another person.'" *Id.* at 520. The court noted that an assessment of such redacted confessions "requires careful attention to both text and context, that is, to the text of the statement itself and to the context in which it is proffered." *Ibid.* If, for example, a case "involve[s] so few defendants that the statement leaves little doubt in the listener's mind about the identity of 'another person,'" there may be a violation. *Ibid.* (citation omitted). Applying that standard, the court concluded that the admission of the redacted confession did not violate the Confrontation Clause because it "raised the distinct possibility that people besides those who were on trial may have been involved in the commission of the crimes." *Ibid.*

b. The Third Circuit has similarly held that context must be taken into account and has found a constitutional violation based on the necessary implication resulting from that context in at least two cases.

In *United States* v. *Richards*, 241 F.3d 335, cert. denied, 533 U.S. 960 (2001), Richards and a codefendant

were tried jointly for the robbery of an armored van. During an interview with law-enforcement officers, the codefendant confessed to participating in the robbery and claimed that Richards and the man driving the armored van planned the robbery. See *id.* at 337. At trial, the van driver testified that he and Richards planned the robbery. See *id.* at 338. Following his testimony, the law-enforcement officer testified and read the codefendant's confession into the record. According to the confession, the codefendant had told the officer that "a friend, whom I do not wish to name," had planned the robbery with "an inside man." *Ibid.*

After discussing this Court's decisions in *Gray* and *Richardson*, the Third Circuit concluded that the introduction of the confession violated the Confrontation Clause. See 241 F.3d at 341. The confession "referred to the existence of three participants in the crime," and the "inside man was easily identified as the driver," leaving the reference to the "friend" to incriminate Richards (as "the only other person involved in the case"). *Ibid.* (internal quotation marks omitted). In addition, the court noted that "the prosecutor called Richards' mother to testify that Richards and [the codefendant] were friends." *Ibid.* The court thus took into account both the number of defendants in the trial, as well as the additional evidence the prosecutor had elicited to connect Richards to the redacted confession. *Ibid.* The court ultimately concluded that, because the error was not preserved, it was reviewable only for plain error and was not so prejudicial as to require reversal. See *id.* at 342.

In *United States* v. *Hardwick*, 544 F.3d 565 (2008), cert. denied, 555 U.S. 1195 (2009), the Third Circuit further elucidated the proper analysis. That case involved disputes between several gangs and drug dealers that led to three deaths and several conspiracy and firearm

charges against four codefendants. See *id.* at 568. Before trial, one defendant, Murray, entered into a proffer agreement with the government and "admitted to planning and participating in the slaying of two individuals." *Id.* at 569. The government sought to introduce Murray's confession at trial, and the district court "ordered that all references to Murray's co-defendants be redacted and replaced with neutral references such as 'others' or 'another person.'" *Ibid.* The district court also "instructed the jury that it could consider the proffered statements only to assess Murray's guilt, and not the guilt of any other defendant." *Ibid.* The redacted confession nonetheless revealed that "another person" rented the van used in the killing and provided the guns that were used; "another person" provided the location of the victims; and "the others in the van," expressly excluding Murray and another named codefendant, "exited their vehicle and started firing their weapons." *Id.* at 576. After the jury found all the defendants guilty, the codefendants appealed, arguing that the admission of the redacted confession violated their rights under the Confrontation Clause.

The Third Circuit agreed. It explained that its precedents "underscore * * * that the nature of the linkage between the redacted statement and the other evidence in the record is vitally important in determining whether a defendant's Confrontation Clause right has been violated." 544 F.3d at 573. In this case, "[a]lthough this trial involved multiple co-defendants, only two—not including Murray—were charged" with the killing at issue. *Ibid.* The "[r]edacted references to 'others in the van' referred directly to their existence," and the "unavoidable inference was that they were the ones" who killed the victim. *Ibid.* Moreover, in expressly excluding Murray and another codefendant from the "others" who left the van, the redacted confession necessarily implicated the remaining

codefendants, "in light of earlier evidence placing them in the van used in the shooting." *Id.* at 572-573. The court thus found a constitutional violation, though it ultimately affirmed the conviction on the ground that the error was harmless. See *id.* at 574.

c. The Seventh Circuit has similarly rejected the rule the court of appeals applied here. In *United States* v. *Hoover*, 246 F.3d 1054, cert. denied, 534 U.S. 1033 (2001), the government had argued that this Court's precedents "permit the use of placeholders when their incriminating nature is not apparent to persons unaware of the other evidence offered at trial." *Id.* at 1059. But in an opinion written by Judge Easterbrook, the Seventh Circuit disagreed, noting that "[v]ery little evidence is incriminating when viewed in isolation" and "[t]o adopt a four-corners rule would be to undo *Bruton* in practical effect." *Ibid.* Turning to the case at hand, the court determined that the substituted references to an "incarcerated leader" and an "unincarcerated leader" were "obvious stand-ins" for the codefendants that did not conceal their identities. *Ibid.*

d. The Ninth Circuit has likewise indicated that the surrounding context may give rise to an impermissible inference that violates the *Bruton* rule. In *United States* v. *Mayfield*, 189 F.3d 895 (1999), the court noted that a redacted confession created an inference that was "unavoidable, if not on its face, then certainly in the context of the previously admitted evidence at trial." *Id.* at 902. The redacted confession referred to "the main man," revealing the individual's sex and position as the drug ringleader. *Ibid.* The court noted that the jurors had already improperly heard that the defendant was a "primary suspect"; that a reliable informant had told police that the defendant was at an apartment when a drug delivery arrived; and that the police officer who obtained the warrant was familiar with the defendant. *Ibid.* And the government

reinforced the implication of the redacted confession by arguing in closing that the defendant was the "main man." *Ibid.* The court relied on that broader context as "reinforc[ing] what was already fairly obvious from the confession itself: [the defendant] was the 'main man.'" *Ibid.*

e. The Eleventh Circuit has articulated a particularly expansive view of the relevant context in determining whether there is a Confrontation Clause violation. In *United States* v. *Schwartz*, 541 F.3d 1331 (2008), cert. denied, 556 U.S. 1130 (2009), the court considered a redacted confession that discussed a "fraudulent scheme to sell high-yield promissory notes" issued to individual investors by companies that the defendant Schwartz and a codefendant owned. *Id.* at 1332. The redacted confession "did not inculpate Schwartz by name" but instead "named corporations he owned or controlled." *Id.* at 1340. In closing arguments, the government referred to the redacted confession and noted that Schwartz was "the person benefitting" from the transactions discussed. *Id.* at 1347.

In holding that the admission of the confession violated the *Bruton* rule, the Eleventh Circuit noted that a "defendant's confrontation right is violated when the court admits a codefendant statement that, in light of the Government's whole case, compels a reasonable person to infer the defendant's guilt." 541 F.3d at 1351. Applying that standard, the court noted that, although the redacted confession "was not incriminating on its face, and became so only when linked with other evidence," the confession nonetheless "compelled an inference" that Schwartz had committed a crime because other trial evidence "was sufficient to link" him to the corporations at issue, and the confession "obviously referred" to Schwartz "without naming him." *Id.* at 1351-1352. The court added that "the inference was made inevitable—and therefore devastat-

ing—when the prosecutor expressly made that connection for the jury in his closing argument." *Id.* at 1353 (internal quotation marks and citation omitted). The court thus found a *Bruton* error and determined that the error was not harmless, necessitating a new trial. *Id.* at 1354.

f. The D.C. Circuit has also declined to consider redacted confessions in isolation. Rather, in *United States* v. *Straker*, 800 F.3d 570 (2015), cert. denied, 577 U.S. 1147 (2016), the court "view[ed] the text of the statements as a whole and in the context of the facts and evidence in the case," before determining that the defendants' Sixth Amendment rights were not violated. *Id.* at 598. The court noted that, "when a confession is redacted with neutral pronouns, a jury, after hearing all of the evidence presented in the case, may still very well be able to draw inferences that the 'other guy' mentioned in the confession was actually one of the defendants." *Id.* at 599. The court concluded that the *Bruton* rule is violated when "the inferences are so strong and obvious that a juror cannot be expected to follow limiting instructions." *Ibid.*

In the case before it, the D.C. Circuit concluded that, because "[t]he evidence identified more than a dozen different men involved in the crimes charged," it was "unlikely" that "the jury would readily link a statement's mention of a 'person' or 'guy' to a specific defendant." 800 F.3d at 599. After carefully assessing how many indicted and unindicted individuals were involved and whether the redacted confessions impermissibly identified the defendants based on their roles in the crime, the court found no violation. See *ibid.* In those circumstances, "[w]hen considered along with the other evidence presented at trial and with appropriate limiting instructions, the redacted confessions * * * created no inevitable association between the persons the declarants described and particular defendants." *Id.* at 601.

2. On the other hand, the court of appeals below—joining the Fourth, Eighth, and Tenth Circuits—has held that a redacted confession must be viewed in isolation, regardless of any inferences that might be drawn when considering other evidence introduced at trial.

a. In the decision below, following its binding precedent, the court of appeals viewed the redacted confession "separate and apart from any other evidence." App., *infra*, 11a (citation omitted). The court of appeals first articulated that rule in *United States* v. *Jass*, 569 F.3d 47 (2d Cir. 2009), cert. denied, 558 U.S. 1159 (2010). There, two defendants—one man and one woman—were charged with and convicted of multiple counts of sexual abuse. The confession substituted "another person" for Jass—the female defendant—but referred to sexual acts between the victim and the two codefendants, as well as attempted sexual intercourse between the male defendant and "another person." See *id.* at 53. Jass argued that the reference clearly suggested that the other person had been a woman and implicated her as the only woman and only other codefendant accused in a two-person trial. See *id.* at 62.

In rejecting Jass's arguments, the court of appeals held that it must "view the redacted statement in isolation to evaluate its likely impact on a jury." 569 F.3d at 62. The court determined that, even if the confession were understood to identify the "other person" as a woman, the court was not obligated to consider that "she was the only woman" on trial with the codefendant. *Id.* at 62-63. As such, the court concluded that the confession did not run afoul of the *Bruton* rule. See *id.* at 63.

b. The Fourth Circuit has similarly declined to consider redacted testimony in the broader context of the evidence at trial. For example, in *United States* v. *Lighty*, 616 F.3d 321, cert. denied, 562 U.S. 1118 (2010), the Fourth Circuit noted that, because a reference to the

three codefendants had been replaced by a neutral term, the confession at issue provided "no way to facially identify" the codefendants "without more information." *Id.* at 377. Because the confession implicated the codefendants "only when * * * linked with in-court testimony," there was no Confrontation Clause violation. *Ibid.*

c. The Eighth Circuit has taken the same view, expressing its rule in terms similar to the court of appeals here. In *United States* v. *Logan*, 210 F.3d 820, cert. denied, 531 U.S. 1053 (2000), the en banc Eighth Circuit declined to consider a redacted confession in any broader context because "the admissibility of a confession under *Bruton* is to be determined by viewing the redacted confession in isolation from the other evidence admitted at trial." *Id.* at 822. Four judges dissented, arguing that this Court in *Gray* "back[ed] away from the narrow, 'four-corners' analysis that the majority now endorses." *Id.* at 825 (Heaney, J., dissenting). In the dissent's view, "[i]f the redacted confession still leads the jury, making ordinary inferences, directly to the codefendant, a *Bruton* violation has occurred." *Ibid.* Because "there was an abundance of evidence linking Logan to [the] redacted confession," the dissent would have found a violation of the *Bruton* rule. *Ibid.*

d. Finally, in *United States* v. *Verduzco-Martinez*, 186 F.3d 1208 (1999), the Tenth Circuit concluded that, "where a defendant's name is replaced with a neutral pronoun or phrase there is no *Bruton* violation, providing that the incrimination of the defendant is only by reference to evidence other than the redacted statement and a limiting instruction is given to the jury." *Id.* at 1214. In that case, the court determined that the use of the neutral phrase "another person" did not directly implicate the defendant or "indicate to the jury that the statements had

been altered." *Ibid.* The court conceded that "it is possible to infer that the 'another person' referred to is Verduzco-Martinez," but that inference "could be made only after additional evidence was considered" and thus did not give rise to a Confrontation Clause violation. *Ibid.*

* * * * *

There is indisputably substantial disarray among the circuits on whether to consider the surrounding context in determining whether the introduction of a redacted confession violates the Sixth Amendment. The Court should intervene to resolve that longstanding conflict on an important question of constitutional law.

B. The Decision Below Is Incorrect

The "four-corners" approach adopted by the court of appeals below is erroneous and cannot be reconciled with this Court's Confrontation Clause precedents. The court of appeals concluded that there is no Confrontation Clause violation where a redaction "sufficiently conceals the fact of explicit identification to eliminate the overwhelming probability that a jury hearing the confession at a joint trial will not be able to follow an appropriate limiting instruction" when viewed "separate and apart from any other evidence admitted at trial." App., *infra*, 11a (citation omitted). That rule does not follow from this Court's precedents, and the concerns underlying *Bruton* demand a more contextual analysis.

1. The court of appeals purported to draw its rule from *Richardson* and *Gray*, but neither case supports it.

In *Richardson*, the out-of-court confession at issue was "redacted to omit all reference to respondent—indeed, to omit all indication that *anyone* other than [two named individuals] participated in the crime." 481 U.S. at 203. The Court concluded that "the Confrontation Clause

is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." *Id.* at 211.

To be sure, in reaching that conclusion, the Court reasoned that the confession became incriminating "only when linked with evidence introduced later at trial"—namely, "the defendant's own testimony." 481 U.S. at 208. The Court recognized that, when "such linkage is involved," it is "a less valid generalization that the jury will not likely obey the instruction to disregard the evidence." *Ibid.* And the Court noted that a rule that all evidence must be taken into account in determining whether a Confrontation Clause violation has occurred "lends itself to manipulation by the defense," which might itself draw out the connection, as was the case there. *Id.* at 209.

Such reasoning makes sense in the context of a confession that does not even acknowledge a defendant's existence. But in a case in which it is obvious that the confession referred to another person and there is only one other person involved in the crime who is standing trial, it would be immediately obvious to any juror that the confession implicates that defendant, regardless of any other evidence set forth at trial. That inference is only stronger where the prosecution expressly connects a particular defendant with the details from the confession.

Indeed, the Court in *Richardson* underscored the limits of its ruling by remanding the case to allow the district court to consider whether the prosecutor's closing argument connecting the confession to the defendant could itself constitute an error that warranted a grant of the writ of habeas corpus. See 481 U.S. at 211. Thus, even when the statement omitted any reference to the defendant's existence, the Court recognized that the prosecutor could

undermine the effectiveness of the jury instruction through his own conduct.

In *Gray*, the Court confirmed *Richardson*'s limits and further clarified the application of the *Bruton* rule to redacted confessions. There, the Court "concede[d] that *Richardson* placed outside the scope of *Bruton*'s rule those statements that incriminate inferentially." 523 U.S. at 195. But at the same time, the Court stressed that the holding in *Richardson* "must depend in significant part upon the *kind* of, not the simple *fact* of, inference." *Id.* at 196. Because the redacted confession in *Gray* "obviously refer[red] directly to someone, often obviously the defendant," the resulting inferences were ones that "a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." *Ibid.*

This Court in *Gray* thus adopted a more nuanced view of the role that juror inferences should play in determining whether a Confrontation Clause violation has occurred than the court of appeals below applied. Where a confession invites such inferential reasoning because it obviously refers to another person, a juror's inferences as to who that person might be should be considered.

2. In applying a "four-corners" rule that considers the redacted confession only in isolation, the court of appeals failed to take account of the obvious inference created by the surrounding context—namely, the confession's evident reference to another person; the limited number of codefendants; and the prosecution's statements directly connecting petitioner to the unnamed person in the confession. In light of that important context, the concerns underlying the *Bruton* rule are plainly implicated, and the court of appeals erred by holding that there was no Confrontation Clause violation.

a. This Court has explained that a violation of the *Bruton* rule depends on three key factors: "the likelihood

that the instruction will be disregarded, the probability that such disregard will have a devastating effect, and the determinability of these facts in advance of trial." *Cruz* v. *New York*, 481 U.S. 186, 193 (1987) (citation omitted). In instances in which the confession plainly refers to another person and there are few defendants; there are few other participants in the criminal enterprise; and the prosecution connects the confession to a particular defendant, all three factors are easily met. Unlike in *Richardson*, where the existence of the defendant was not apparent from the confession, references in a confession to another person will ensure that jurors are left to wonder about whom the confession implicated. And where the prosecution elicits additional evidence directly connecting the defendant to the details in the confession, such speculation will only increase.

b. If the court of appeals had applied the correct analysis, there can be no doubt that the introduction of Stillwell's confession violated petitioner's Confrontation Clause right.

From the very beginning of trial, even before the first piece of evidence was introduced, the government poisoned the well against petitioner. In its opening statement, the government made its case against petitioner by asserting that petitioner "was in the passenger seat" of a car driven by Stillwell when he "turned around, aimed carefully, and shot [the victim]." C.A. App. 466. The government then told the jury of a critical piece of evidence it would introduce: a confession in which "Stillwell admitted to driving the car while the man he was with turned around and shot [the victim]." *Id.* at 468. In this way, the government equated petitioner and "the man [Stillwell] was with," describing, within the span of a few minutes, each as the man who "turned around and shot [the vic-

tim]." That description both emphasized the obvious redaction and handed the jury the answer key to that redaction.

Having primed the jury to identify petitioner as the man identified in Stillwell's confession, the government doubled down on its strategy when it introduced the confession itself. The jury heard the confession as recounted by the DEA agent who had interrogated Stillwell. Rather than omitting all references to petitioner's existence and focusing on the parts of the confession that implicated Stillwell as the driver, the government's direct examination focused heavily on "the person that [Stillwell] was with." C.A. App. 516. The government elicited testimony that Stillwell specified where this other person lived (first at a hotel, then a condo in the old capital area of the city, at the same address as Stillwell); that Stillwell said that "the person he was with" carried a firearm; that Stillwell provided details about this person's firearm (a .22- or .45-caliber handgun with a threaded barrel and silencer); and, ultimately, that "the other person [Stillwell] was with pulled the trigger on that woman." *Ibid.* The government's focus on those details was especially troubling because they were unnecessary to its case against Stillwell, who had conceded his role in the killing and disputed only the jurisdictional question whether he formed the relevant intent when in the United States. See *id.* at 473.

In such circumstances, the detailed descriptions that the government elicited made clear that Stillwell had identified his alleged accomplice in the confession and that the government and its testifying witness were altering the statements to avoid using that person's name. As introduced, the confession effectively "notif[ied] the jury that a name has been deleted." *Gray*, 523 U.S. at 195. And in its opening and closing statements—which re-

peated once again that petitioner was sitting in the "passenger seat," "turned around," and "shot [the victim]," C.A. App. 929—the government effectively confirmed for the jury who the named accomplice was. In light of the government's opening and closing statements and the way it chose to elicit the testimony regarding Stillwell's confession, any juror who wondered who the "other person" must be would "need only lift his eyes" to petitioner. *Gray*, 523 U.S. at 193. The context of the government's introduction of the confession made it immediately obvious that the confession could refer only to petitioner. And because the district court refused to sever the trials, petitioner was unable to confront and cross-examine the witness who provided that damning testimony.

3. This case is an excellent vehicle for the Court's review. The question presented was pressed and passed upon below and is plainly recurring, as evidenced by the enormous number of lower-court decisions addressing the issue. See, *e.g.*, *United States* v. *Candelario*, Crim. No. 21-15, 2022 WL 1081100, at *2 (D. Me. Apr. 11, 2022); *Johnson* v. *Superintendent, Fayette SCI*, 949 F.3d 791, 796 (3d Cir. 2020); *United States* v. *De Leon-De La Rosa*, 17 F.4th 175, 191-193 (1st Cir. 2021); *United States* v. *Padilla-Galarza*, 990 F.3d 60, 75 (1st Cir. 2021); *United States* v. *Bhimani*, 492 F. Supp. 3d 376, 385 (M.D. Pa. 2020); *United States* v. *McArdle*, Crim. No. 20-56, 2021 WL 149411, at *9-*11 (E.D. Tenn. Jan. 15, 2021); *United States* v. *Moss*, Crim. No. 18-2220, 2021 WL 423424, at *4 (D. Ariz. Feb. 8, 2021); *United States* v. *Davis*, Crim. No. 19-50033, 2021 WL 3572670, at *2 (W.D. Ark. Aug. 12, 2021); *United States* v. *George*, Crim. No. 17-201, 2019 WL 4194526, at *4 (E.D. La. Sept. 4, 2019).

The conflict among the courts of appeals is longstanding and widely recognized, and further percolation would serve no purpose. See, *e.g.*, Margaret Dodson, *Bruton on*

Balance: Standardizing Redacted Codefendant Confessions Through Federal Rule of Evidence 403, 69 Vand. L. Rev. 803, 820 (2016). The Court should intervene now and put an end to the decades-old saga of uncertainty about the scope of the *Bruton* rule—a rule that protects one of the most fundamental constitutional rights for criminal defendants.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KANNON K. SHANMUGAM
AIMEE W. BROWN
ELIZABETH A. NORFORD
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
2001 K Street, N.W.
Washington, DC 20006
(202) 223-7300
kshanmugam@paulweiss.com

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