

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

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P R O C E E D I N G S

(10:03 a.m.)

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

Mr. Shanmugam.

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

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

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

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

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

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

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

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

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

25 In applying the Bruton rule, lower

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

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

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

13 I welcome the Court's questions.

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

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

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

25 And I would point in particular to

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

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

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

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

17 JUSTICE THOMAS: Yeah.

18 MR. SHANMUGAM: And where the --

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

23 MR. SHANMUGAM: Correct. And --

24 JUSTICE THOMAS: -- in the testimony?

25 MR. SHANMUGAM: Correct. And so this

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

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

4 (Laughter.)

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

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

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

24 Our argument is that exactly the same
25 reasoning applies here. And, of course, there

1 is a factual difference, which is that the
2 redaction was not apparent on its face.

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

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

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

20 CHIEF JUSTICE ROBERTS: Well, that's
21 --

22 JUSTICE BARRETT: But --

23 CHIEF JUSTICE ROBERTS: -- that's
24 debatable, I guess. Maybe they will wonder,
25 well, why are they saying another person if it

1 was this guy, and it must be because it's
2 somebody else that they don't -- you know,
3 haven't brought -- brought to trial.

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

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

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

22 And the Court is well familiar with
23 what those concerns are, the concern that a
24 jury, once it concludes that the nonconfessing
25 defendant was identified in the confession, will

1 not be able to put that confession out of its
2 mind even in the face of a limiting instruction.

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

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

18 JUSTICE BARRETT: But would that be --

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

1 all, which meant that there had to be a separate
2 trial. Is that correct?

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

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

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

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

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

25 MR. SHANMUGAM: So we do believe, as

1 we say in our reply brief, that the confession
2 here could have been redacted further. And
3 because the confession came in --

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

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

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

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

20 Now, obviously, our preferred option
21 -- and now this is an academic point because, of
22 course, if this Court were to vacate, there
23 would be a new trial -- but our preferred option
24 then, as now, would be to have an individual
25 trial in which it is undisputed this confession

1 could not come in.

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

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

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

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

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

23 I would further note, though, Justice
24 Alito, that when you look at a confession like
25 that, a confession that just says "me and a few

1 other guys," a jury would be much less likely to
2 think that that confession had been redacted or,
3 critically, to link that confession to a
4 particular defendant.

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

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

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

20 MR. SHANMUGAM: I -- I -- I -- I think
21 that it is one of the contextual factors. And
22 when you look at what lower courts have done, I
23 think lower courts have differentiated between
24 cases where, for instance, you have a confession
25 that refers to multiple people and there are

1 multiple defendants on one end of the spectrum
2 and on the other end of the spectrum a case like
3 this, where you refer to "the other person," and
4 there's only one person who that could plausibly
5 be.

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

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

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

1 feasible or less feasible.

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

6 JUSTICE GORSUCH: Well --

7 MR. SHANMUGAM: But we do think --

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

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

23 What's wrong with that?

24 MR. SHANMUGAM: I -- I think that
25 there could be cases, and I believe the

1 government cites one such lower court case in
2 its brief, where the manner of redaction could
3 affect the rights --

4 JUSTICE GORSUCH: How?

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

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

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

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

15 MR. SHANMUGAM: So --

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

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

25 JUSTICE GORSUCH: Yeah. Again, it --

1 it eliminates any reference to any other
2 person's involvement, and that implicates the
3 other defendant's due process rights.

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

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

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

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

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

24 JUSTICE GORSUCH: Sure.

25 MR. SHANMUGAM: His sole defense in

1 this case was the jurisdictional defense that
2 there was not a sufficient nexus to the
3 United States.

4 JUSTICE GORSUCH: You have -- just --

5 MR. SHANMUGAM: But --

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

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

14 JUSTICE BARRETT: That sounds like a
15 no.

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

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

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

25 Now I would also add one thing --

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

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

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

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

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

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

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

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

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

1 MR. SHANMUGAM: Yes.

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

4 MR. SHANMUGAM: But --

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

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

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

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

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

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

23 MR. SHANMUGAM: This Court --

24 JUSTICE GORSUCH: -- that one is more
25 impossible for a person to put out of his mind

1 than the other?

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

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

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

22 JUSTICE JACKSON: Mr. Shanmugam, if we
23 were --

24 JUSTICE BARRETT: But that's
25 prejudicial, right, but -- sorry, I'll just

1 finish this up, Justice Jackson.

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

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

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

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

24 JUSTICE BARRETT: Would it be
25 possible? Because, I mean, it seems to me,

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

6 MR. SHANMUGAM: I --

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

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

16 JUSTICE BARRETT: Thank you.

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

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

1 is to ensure that it's not being used against
2 him, because the Court says don't use this
3 against you.

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

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

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

1 rise to the very risk of circumvention that this
2 case well illustrates.

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

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

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

16 MR. SHANMUGAM: Mm-hmm.

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

23 MR. SHANMUGAM: Correct.

24 JUSTICE JACKSON: Is that what you're
25 saying?

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

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

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

1 him.

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

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

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

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

1 implicated the nonconfessing defendant.

2 JUSTICE SOTOMAYOR: Counsel --

3 MR. SHANMUGAM: And let me --

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

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

10 MR. SHANMUGAM: Yeah.

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

13 MR. SHANMUGAM: Yes.

14 JUSTICE SOTOMAYOR: -- hearsay
15 exception.

16 MR. SHANMUGAM: The rule of Crawford.

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

25 So they can't use -- we think of

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

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

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

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

16 MR. SHANMUGAM: Correct.

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

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

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

1 MR. SHANMUGAM: Correct.

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

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

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

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

14 JUSTICE SOTOMAYOR: Exactly.

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

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

21 MR. SHANMUGAM: And --

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

1 MR. SHANMUGAM: And --

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

10 MR. SHANMUGAM: And this Court --

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

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

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

1 implement the Bruton rule in a way that --

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

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

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

10 MR. SHANMUGAM: Correct. And --

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

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

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

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

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

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

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

15 CHIEF JUSTICE ROBERTS: Thank --

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

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

1 particular, the number of defendants.

2 JUSTICE SOTOMAYOR: All right.

3 MR. SHANMUGAM: And that just accords

4 --

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Thomas?

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

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

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

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

22 CHIEF JUSTICE ROBERTS: Justice Alito?

23 JUSTICE ALITO: Mr. Shanmugam, your --
24 my colleagues' questions seem to me to have led
25 you into deeper and deeper water, and I want to

1 see whether you really want to go there.

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

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

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

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

16 JUSTICE ALITO: Well, it seemed --

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

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

23 Did you agree to that?

24 MR. SHANMUGAM: I -- I think what I
25 would say, consistent with what Justice Jackson

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

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

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

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

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

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

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

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

20 MR. SHANMUGAM: So even if --

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

23 MR. SHANMUGAM: I -- I -- I think that
24 the better way to understand it is the way that
25 I suggested earlier, which is that the

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

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

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

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

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

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

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

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

19 JUSTICE ALITO: All right.

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

22 JUSTICE ALITO: Thank you.

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

24 JUSTICE ALITO: Thank you.

25 MR. SHANMUGAM: -- problem

1 administering that standard.

2 JUSTICE ALITO: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you.

4 Justice Sotomayor?

5 JUSTICE SOTOMAYOR: No, thank you.

6 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

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

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

23 MR. SHANMUGAM: Sure. So Richardson,
24 first and foremost, obviously predated this
25 Court's decision in Gray. In Richardson, the

1 Court specifically left open the question that
2 this Court decided in Gray.

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

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

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

25 And I think lower courts have really

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

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

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

23 And I think the more you have those
24 references, the more details you have about what
25 "the other person" did, which belies the

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

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

13 CHIEF JUSTICE ROBERTS: Justice
14 Gorsuch?

15 Justice Kavanaugh?

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

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

23 MR. SHANMUGAM: I -- I -- I would
24 grant, Justice Kavanaugh, that in Gray itself,
25 what I think the Court ultimately said is that

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

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

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

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

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

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

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

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

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

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

8 JUSTICE KAVANAUGH: Mm-hmm.

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

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

25 MR. SHANMUGAM: I have no doubt that

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

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

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

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

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett?

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

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

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

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

18 JUSTICE BARRETT: Right.

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

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

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

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

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

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

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

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

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

1 complicating factor.

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

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

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

23 CHIEF JUSTICE ROBERTS: Justice
24 Jackson?

25 JUSTICE JACKSON: So can I just have

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

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

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

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

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

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

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

25 You said the government could not

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

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

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

1 relatively high-profile cases.

2 JUSTICE JACKSON: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 MR. SHANMUGAM: Thank you.

6 CHIEF JUSTICE ROBERTS: Ms. Flynn?

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

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

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

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

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

1 repeatedly declined to extend it.

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

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

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

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

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

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

12 I welcome the Court's questions.

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

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

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

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

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

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

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

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

22 (Laughter.)

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

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

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

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

7 MS. FLYNN: Correct.

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

12 MS. FLYNN: Inadmissible under Gray.
13 Yes.

14 JUSTICE KAGAN: Inadmissible under
15 Gray.

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

20 What do we do with that?

21 MS. FLYNN: Because you would have to
22 look outside the corners of the statement itself
23 and look at the rest of the evidence at trial to
24 form the inferential connection that
25 incriminates the other defendant on trial, no,

1 that's not a Bruton issue.

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

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

23 MS. FLYNN: I would respectfully
24 disagree. I think "the woman and I" does not --
25 is not the same thing as a direct accusation of

1 the kind this Court was confronting in Bruton,
2 where there was zero ambiguity about who the
3 co-defendant was naming.

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

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

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

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

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

1 MS. FLYNN: Well, so a few things in
2 there that I'd like to address if I could, but
3 to first focus on Gray and what reasoning it
4 used to get to the holding in that case.

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

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

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

22 But that's not the same --

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

1 MS. FLYNN: Because the --

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

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

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

13 MS. FLYNN: Right.

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

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

24 And I -- I'm not sure I understand the
25 rationale for that. If we're talking about the

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

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

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

20 JUSTICE KAGAN: But here's what --

21 MS. FLYNN: And the Richardson --

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

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

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

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

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

1 JUSTICE JACKSON: And why wouldn't
2 that be a Confrontation Clause problem even if
3 the defendant said exactly what -- said -- said
4 exactly that? Why -- why would there be no
5 Confrontation Clause problem?

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

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

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

1 the limiting instruction to provide the
2 testimonial.

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

7 MS. FLYNN: Right.

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

11 MS. FLYNN: Yes.

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

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

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

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

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

13 JUSTICE JACKSON: Right.

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

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

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

25 In this situation, there's at least

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

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

18 JUSTICE KAVANAUGH: Do you use --

19 CHIEF JUSTICE ROBERTS: Counsel --

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

1 did -- he and someone else did this -- so it's
2 not a she -- and then the detective says after
3 the -- after the conversation, I went and
4 investigated the co-defendant?

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

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

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

22 MS. FLYNN: Right. So --

23 JUSTICE SOTOMAYOR: Isn't that use --

24 MS. FLYNN: I think --

25 JUSTICE SOTOMAYOR: -- against the

1 defendant, and why isn't that a Bruton problem?

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

11 But this --

12 JUSTICE SOTOMAYOR: Exactly.

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

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

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

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

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

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

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

1 four corners of the statement, does the
2 government think that's correct?

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

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

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

24 CHIEF JUSTICE ROBERTS: Well, that's
25 why -- I didn't understand the rule simply to

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

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

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

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

1 interests.

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

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

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

1 And that's also the phrase that the
2 Court used in Gray to say what kind of
3 statements they were bringing within the Bruton
4 rule but only slightly expanding it.

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

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

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

25 And the Court even later in the

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

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

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

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

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

9 JUSTICE KAVANAUGH: And can you --

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

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

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

23 But the logic the Court used -- and
24 this is the split it granted cert to resolve --
25 was about this contextual implication doctrine

1 that lower courts were using where they -- or
2 what was also called the evidentiary linkage
3 doctrine, where they would look at greater
4 context to decide whether an inference could be
5 made.

6 JUSTICE SOTOMAYOR: I -- I -- I -- I
7 --

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

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

1 involved in that thing that the confession was
2 talking about too.

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

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

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

19 The other thing I'd say about the
20 actual holding of Gray, of course, there's the
21 footnote and, of course, it was about an
22 existence, but, if all that Richardson stood for
23 was the confessions that don't refer to the
24 existence another person, if that is all that
25 the Court took from it, then I think Gray could

1 have been a very short opinion. There is no
2 dispute in that case that the redacted
3 confession still referred to the existence of
4 other people. But that wasn't the basis.

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

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

24 MS. FLYNN: I guess what I would say
25 to that is that Gray took pains to say the kind

1 of inference there is one that arises instantly
2 without jurors having to know anything else
3 about the government's case.

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

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

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

18 JUSTICE BARRETT: Ms. Flynn --

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

20 JUSTICE BARRETT: Sorry. Finish.

21 MS. FLYNN: I was going to move on to
22 a slightly separate point, but just that, I
23 mean, Bruton's animating rationale, as I talked
24 about, was a direct accusation, but in terms --
25 if the danger here is just the fact that we

1 don't want a jury to ever hear a co-defendant
2 confession that refers to somebody else's
3 participation, I mean, we have those statements
4 all the time.

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

15 JUSTICE BARRETT: Can you imagine --

16 JUSTICE ALITO: There are two --

17 CHIEF JUSTICE ROBERTS: Justice
18 Barrett?

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

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

11 I mean, is that right?

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

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

21 JUSTICE BARRETT: It doesn't matter?

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

1 interests --

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

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

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

1 really narrowing Bruton down.

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

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

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

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

25 The other is to recognize that this

1 issue is never going to arise unless there is
2 some risk or some reason to fear that the
3 confession is going to be held by the jury
4 against the nontestifying co-defendant because
5 they just can't put that out of their minds.
6 It's not realistic to expect them to do that.

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

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

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

1 whenever this issue pops up.

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

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

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

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

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Justice Thomas?

18 Justice Alito?

19 Justice Sotomayor?

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

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

25 JUSTICE SOTOMAYOR: And so what --

1 whatever Justice Alito thinks the line should
2 have been originally, we take the line as it
3 exists, correct?

4 MS. FLYNN: Of course.

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

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

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

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

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

25 MS. FLYNN: I think the Second Circuit

1 is taking this Court at its word about neutral
2 redactions like "other guys" or "someone" if you
3 read into Gray in any respect.

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

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

9 (Laughter.)

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

16 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

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

21 Do you have any evidence to the
22 contrary?

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

1 offering here.

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

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

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

24 But, to point to an example of what
25 we're kind of worried about with Petitioner's

1 approach, Petitioner relies on a case from the
2 Eleventh Circuit called *Schwartz*, and there, the
3 Eleventh Circuit did say we have to look at the
4 whole record to figure out what are the
5 inferences the juries can draw.

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

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

21 JUSTICE KAGAN: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Gorsuch?

24 Justice Kavanaugh?

25 JUSTICE KAVANAUGH: Most of the states

1 haven't been doing anything like what Petitioner
2 says here. Is that your understanding of the
3 state court situation?

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

9 JUSTICE KAVANAUGH: And I just want to
10 look at Gray again and --

11 MS. FLYNN: Mm-hmm.

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

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

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

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

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

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

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

1 trial are outside of Bruton.

2 CHIEF JUSTICE ROBERTS: Justice
3 Barrett?

4 JUSTICE KAVANAUGH: I'll leave it
5 there.

6 CHIEF JUSTICE ROBERTS: Oh. Justice
7 Barrett?

8 Justice Jackson?

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

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

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

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

1 MS. FLYNN: That is an option the
2 government would have. I would say that in
3 Richardson the Court --

4 JUSTICE JACKSON: No, I understand,
5 but I'm just --

6 MS. FLYNN: Yeah. Okay. Yes, of
7 course it's an option.

8 JUSTICE JACKSON: -- I'm just
9 exploring the --

10 MS. FLYNN: Right.

11 JUSTICE JACKSON: So the government
12 could not use that statement at all.

13 MS. FLYNN: Yes.

14 JUSTICE JACKSON: I suppose the
15 government could redact it so it just said, I
16 killed her, period, and not -- but somebody else
17 helped me, right?

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

22 JUSTICE JACKSON: Okay.

23 MS. FLYNN: -- to just something that
24 they didn't quite say that actually changes
25 the degree of culpability.

1 JUSTICE JACKSON: All right. So, if
2 the government wants to use in the joint trial,
3 I killed her, but somebody else helped me, what
4 if the government's theory of the case is that
5 the defendant is the somebody else and the
6 government puts on all kinds of trial evidence
7 trying to show that related to the confession?

8 Are you saying the court could not --
9 that -- that we don't have a Bruton problem in
10 that situation?

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

17 JUSTICE JACKSON: So they don't say
18 that --

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

20 JUSTICE JACKSON: -- but, if they say
21 the confession is the most important piece of
22 evidence in this case, the confession says, and
23 they blow it up really big, I killed her, but
24 somebody else helped me, and there's nobody else
25 involved in this at all, the government is very

1 clear there are only two people sitting at the
2 table, and they keep playing a confession and
3 saying -- and -- and suggesting that we have,
4 you know, two people and a confession that links
5 or -- or implicates two people, you're saying no
6 Bruton problem.

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

14 JUSTICE JACKSON: All right. Final
15 question. Do we need a jury instruction for
16 that confession and, if so, why?

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

22 MS. FLYNN: My position is that you
23 need a --

24 JUSTICE JACKSON: A limiting
25 instruction.

1 MS. FLYNN: Sorry.

2 JUSTICE JACKSON: Why do we need a
3 limiting instruction in that case?

4 MS. FLYNN: Because the confession is
5 still testimonial and it's still saying
6 something that puts the --

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

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

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

21 JUSTICE JACKSON: I'm sorry, can you
22 just answer? So --

23 MS. FLYNN: Sorry.

24 JUSTICE JACKSON: -- if the
25 hypothetical is as I say --

1 MS. FLYNN: Yes.

2 JUSTICE JACKSON: -- do we need a
3 limiting instruction?

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

10 MS. FLYNN: Yes, we -- you need the
11 limiting instruction.

12 JUSTICE JACKSON: Why?

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

17 JUSTICE JACKSON: But you're saying --

18 MS. FLYNN: -- as to guilt more or
19 less likely.

20 JUSTICE JACKSON: -- it can only --
21 but it can only be admitted as evidence against
22 the defendant if it has his name in it?

23 MS. FLYNN: No. We're saying -- so,
24 to try to illustrate my point, if -- even if the
25 confession just said, I killed her, you would

1 still need the limiting instruction because it's
2 a testimonial statement that can't be
3 cross-examined, that can't be evidence against
4 the defendant regardless of whether it uses
5 another defendant's name.

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

11 JUSTICE JACKSON: Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Rebuttal, Mr. Shanmugam?

15 REBUTTAL ARGUMENT OF KANNON K. SHANMUGAM
16 ON BEHALF OF THE PETITIONER

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

21 But that rule it seems to me suffers
22 from two problems. The first is that it's
23 arbitrary because there will be circumstances in
24 which a confession that uses a placeholder will
25 actually create a much stronger inference that

1 the confession implicated the nonconfessing
2 defendant than a confession using brackets.
3 Take the example, for instance, of a confession
4 that uses brackets but in a case involving
5 multiple defendants.

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

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

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

25 And so the government's rule doesn't

1 have the benefit of clarity that the government
2 suggests.

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

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

18 A reasonable juror would surely --
19 surely wonder why the interviewing agent here
20 didn't ask the question, who is this other
21 person who you keep talking about, and if the
22 individual had, in fact, referred to "the other
23 person," either the agent would have asked that
24 question, which would have provided clarity one
25 way or the other, or defense counsel, equipped

1 with a copy of the prior statement under Jencks,
2 would have asked as the first question, did you
3 ask who this person was, and if the answer is
4 no, that would obviate the Bruton problem. But,
5 obviously, defense counsel could not have done
6 that here.

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

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

25 I'm minded of a familiar phrase from

1 a -- a -- a Fifth Circuit opinion, the exact
2 provenance of which is unclear. "If you throw a
3 skunk in the jury box, you can't instruct the
4 jurors not to smell it." And I would submit
5 that this is a case in which the government not
6 only threw a skunk into the jury box but pointed
7 to it repeatedly, and the jury could hardly be
8 expected to ignore it.

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

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

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

24 Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel. The case is submitted.

2 (Whereupon, at 11:42 a.m., the case
3 was submitted.)

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