[J-18-2024] [MO: Donohue, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 31 EAP 2021
	:	
Appellee	:	Appeal from the Judgment of
	:	Superior Court entered on April 12,
	:	2021, at No. 803 EDA 2020,
v.	:	affirming the Judgment of Sentence
	:	entered on February 28, 2017, in the
	:	Court of Common Pleas of
MICHAEL JONES,	:	Philadelphia County, Criminal
	:	Division, at No. CP-51-CR-0003755-
Appellant	:	2016.
	:	
	:	ARGUED: May 18, 2022
	:	
	:	RESUBMITTED: January 31, 2024

CONCURRING OPINION

JUSTICE WECHT **DECIDED: October 24, 2024**

I join the Majority Opinion. I write separately to highlight the United States Supreme Court's disruption in *Samia v. United States*[1] of a formerly well-struck balance between prosecutorial prerogatives and individual rights.

I. The Confrontation Clause and the *Bruton* Trilogy[2]

At issue is one among several procedural rights that the United States Constitution expressly guarantees to criminal defendants. Its Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the

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[1] 599 U.S. 635 (2023).

[2] Taken together, *Bruton v. United States*, 391 U.S. 123 (1968), *Richardson v. Marsh*, 481 U.S. 200 (1987), and *Gray v. Maryland*, 523 U.S. 185 (1998), form a coherent account from which *Samia* to some extent departed. Hence, I refer often to the former three as a trilogy, while setting *Samia* off separately.

> crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him*; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.[3]

The United States Supreme Court has held:

> [T]he confrontation guarantee serves not only symbolic goals. The right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials. In *California v. Green*, 399 U.S. 149, 158 (1970), we identified how the mechanisms of confrontation and cross-examination advance the pursuit of truth in criminal trials. Confrontation, we noted,
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> > "(1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross examination, the 'greatest legal engine ever invented for the discovery of truth'; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness making his statement, thus aiding the jury in assessing his credibility" . . . .[4]

This confrontation right was important enough to the Framers that they constitutionalized it alongside the rights to notice of the crimes charged, speedy trial by jury, and assistance of counsel, as well as the Fifth Amendment guarantee of due process of law and the prohibitions of double jeopardy and self-incrimination.[5]

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[3] U.S. CONST. amend. VI (emphasis added).

[4] *Lee v. Illinois*, 476 U.S. 530, 540 (1986) (quoting *Green*, 399 U.S. at 158). This Court has observed that "[m]any people possess the trait of being loose tongued or willing to say something behind a person's back that they dare not or cannot truthfully say to his face or under oath in a Court room." *Commonwealth v. Russo*, 131 A.2d 83, 88 (Pa. 1957).

[5] The Fifth Amendment provides, in relevant part:

> No person . . . shall be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .

The question before us today is whether a co-defendant's prior, unsworn statement implicating another defendant in criminal conduct may be admitted in a joint trial when the accusing co-defendant exercises his Fifth Amendment right not to testify. When the person who made the statement exercises his right not to testify, the accused is denied his right to test the credibility of the accuser and the accusation by cross-examination. The problem is that, in the context of a joint trial, the right to confrontation conflicts with the accuser's right not to testify against himself and also with the prosecution's general prerogative to try two or more defendants together. *Bruton* and the cases that followed it, including in particular *Richardson* and *Gray*, reflected the United States Supreme Court's effort to balance these competing constitutional rights. Accordingly, any discussion of this issue best begins with *Bruton*.

Bruton and Evans were tried jointly and convicted for armed postal robbery. Although Evans declined to testify at trial, he previously had confessed to a postal inspector that he and Bruton committed the robbery together. That confession was admitted at trial. The Court of Appeals affirmed Bruton's conviction, emphasizing that the trial court had instructed the jury that Evans' confession could be used only against Evans but not against Bruton. The Court of Appeals deemed this approach constitutionally adequate under the then-controlling precedent of *Delli Paoli v. United States*.[6]

The Supreme Court reversed Bruton's conviction and overturned *Delli Paoli*. The Court noted that, in the years between its decisions in *Delli Paoli* and *Bruton*, a series of cases had undermined *Delli Paoli*'s reliance upon jury instructions as a cure for Confrontation Clause violations. In *Pointer v. Texas*, the Court confirmed that cross-

[6] 352 U.S. 232 (1957) (holding that any confrontation-related prejudice to a defendant caused by admitting his non-testifying co-defendant's confession was cured by the provision of an instruction directing the jury to consider the confession as evidence only against the confessor), *overruled by Bruton*, 391 U.S. at 123.

examination is an essential component of the right of confrontation.[7] And in *Douglas v. Alabama*,[8] the Court found a Confrontation Clause violation under circumstances that the *Bruton* Court would soon deem "analogous."[9] Douglas and Loyd were tried separately for an assault. Loyd was first to trial, and he was convicted. Loyd was called as a witness in Douglas' trial, where he invoked his privilege against self-incrimination due to his pending appeal. Treating him as a hostile witness, the prosecution introduced entire passages from Loyd's purported confession and read them before the jury, including those implicating Douglas, and asked Loyd to confirm or deny those statements. Loyd continued to invoke the privilege and decline to answer. Because Douglas could not effectively cross-examine Loyd, the Court held that the introduction of the statements violated Douglas' right of confrontation.

The Court observed that "the risk of prejudice" in *Bruton* was "even more serious than in *Douglas*."[10] Whereas, Loyd's alleged statement in *Douglas* had been deemed non-testimonial, Evans' statement in *Bruton* unequivocally *was* testimonial, and also was "legitimate evidence against Evans and to that extent was properly before the jury during its deliberations. Even greater, then, was the likelihood that the jury would believe Evans made the statements and that they were true—not just the self-incriminating portions but those implicating [Bruton] as well."[11]

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7 380 U.S. 400, 404 (1968) ("It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him.").

8 380 U.S. 415 (1968).

9 *Bruton*, 391 U.S. at 127.

10 *Id*.

11 *Id*.

The Court noted that, in *Jackson v. Denno*,[12] it had expressly rejected the proposition that "a jury, when determining the confessor's guilt, could be relied upon to ignore his confession of guilt should it find the confession involuntary."[13] Thus, the confession in *Jackson* was inadmissible. The *Bruton* Court also relied upon the four-Justice dissent in *Delli Paoli*, which

> challenged the basic premise . . . that a properly instructed jury would ignore the confessor's inculpation of the nonconfessor in determining the latter's guilt. "The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a nonadmissible declaration cannot be wiped from the brains of the jurors."[14]

The Court also invoked the lesson of skeptical wisdom and practical experience that Justice Robert Jackson expressed in 1949: "The naïve assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."[15]

These words of warning reflected a sweeping, if context-specific caveat to the general principle that jurors are expected to follow instructions to disregard evidence when instructed to do so. But *Bruton* went still farther, rejecting the efficiencies often cited in support of joint trials—that they "conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to

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12 387 U.S. 368 (1964).

13 *Bruton*, 391 U.S. at 129; *see Jackson*, 378 U.S. at 368.

14 *Bruton*, 391 U.S. at 129 (quoting *Delli Paoli*, 352 U.S. at 247 (Frankfurter, J., dissenting)).

15 *Id*. (quoting *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring)). To similar effect, the Court in *Richardson* explained: "The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process." 481 U.S. at 211.

trial"—as a basis for intruding upon the right of confrontation.[16] The *Bruton* Court quoted a New York Court of Appeals Judge's rebuttal of the argument from convenience:

> We destroy the age-old rule which in the past has been regarded as a fundamental principle of our jurisprudence by a legalistic formula, required of the judge, that the jury may not consider any admissions against any party who did not join in them. We secure greater speed, economy, and convenience in the administration of the law at the price of fundamental principles of constitutional liberty. That price is too high.[17]

Agreeing that "[a] defendant is entitled to a fair trial but not a perfect one,"[18] the *Bruton* Court nonetheless held that there are "contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."[19] The Court opined that the trial in that case exemplified the circumstance

> where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice . . . does not testify

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16 *Bruton*, 391 U.S. at 134.

17 *People v. Fisher*, 164 N.E. 336, 341 (N.Y. 1928) (Lehman, J., dissenting); *see Bruton*, 391 U.S. at 134-35. To similar effect, we have held that "The constitutional right of confrontation . . . cannot be sidestepped because it happens to be convenient for one of the parties . . . . Expediency is not a sound ground upon which a denial of a constitutional right may be based." *Commonwealth v. McCloud*, 322 A.2d 653, 657 (Pa. 1974) (cleaned up). In *Commonwealth v. Overby*, 809 A.2d 295 (Pa. 2002), Justice Newman in concurrence observed that "the goal of our system of criminal justice is to ensure that criminal defendants receive fair trials. Administrative concerns, while uncontrovertibly important, must not work to deprive a defendant in jeopardy of losing his or her life or liberty from his or her fundamental right to cross-examine adverse witnesses." *Id*. at 311 (Newman, J., concurring).

18 *Lutwak v. United States*, 344 U.S. 604, 619 (1953).

19 *Bruton*, 391 U.S. at 135.

> and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed.[20]

Thus, "in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all."[21]

Two subsequent cases validated *Bruton*'s clear and forcefully stated premises in disparate contexts. In *Richardson*, the Court found no Confrontation Clause violation when the statement that the jury had heard neither named the appellant nor so much as implied her existence. There, the statement at issue in a three-defendant case was redacted to omit any reference whatsoever to Richardson.[22] However, Richardson's testimony, which was given some time after the statement's introduction, effectively inserted her into the events depicted in the statement, rendering it incriminating after the fact. She argued that the *post hoc* implication required exclusion of the redacted statement.

The Court disagreed. What distinguished *Richardson* from *Bruton* was that, in *Bruton*, the confession was "incriminating on its face" and "expressly implicated" Bruton.[23] The confession in *Richardson* only became incriminating "when linked with evidence

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20 *Id*. at 135-36 (emphasis added; footnotes omitted).

21 *Id*. at 137 (emphasis added).

22 *See Bruton*, 391 U.S. at 134 n.10 (acknowledging that "[s]ome courts have required deletion of references to codefendants where practicable"). Interestingly, the *Bruton* Court also cited several commentators' criticism of redaction as a preventative measure, including one commentator's assertion that, "[w]here the confession is offered in evidence by means of oral testimony, redaction is patently impractical. To expect a witness to relate X's confession without including any of its references to Y is to ignore human frailty. Again, it is unlikely that an intentional or accidental slip by the witness could be remedied by instructions to disregard." *Id*. (quoting Note, *Codefendant's Confessions*, 3 COLUM. J. LAW & SOC. PROB. 80, 88 (1967)).

23 *Richardson*, 481 U.S. at 208.

introduced later at trial."[24] "Where the necessity of such linkage is involved," and the confession is attended with a limiting instruction, "it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence" *vis-a-vis* the accused.[25] With regard to a specific, incriminating statement, "the only issue is, plain and simply, whether the jury can possibly be expected to forget it in assessing the [accused's] guilt; whereas with regard to inferential incrimination the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place."[26] Notably, this passage suggested that the Court was concerned for the experience of the jury at the time the statement is introduced.

Then came *Gray*, in which the Court articulated a more fluid understanding of the distinction between contextually inferred inculpation and direct accusation of the sort the *Bruton* Court deemed unacceptable in a joint trial. In *Gray*, the Court continued to foreground jurors' perception of evidence at the time of a statement's introduction and their ability to adhere to instructions restricting their consideration of that evidence. In *Gray*, a man named Bell told police that he, Gray, and a third man participated in the fatal beating of the victim, Stacey Williams. After the third alleged participant died, Bell and Gray were indicted and tried together for the killing. Bell did not testify, but a detective read Bell's confession to the jury. Following *Bruton*'s suggestion that redaction might cure the problem,[27] the detective modified the confession in an effort to replace all

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[24] *Id*.

[25] *Id*. Notably, in the case *sub judice*, no cautionary instruction was given until the final jury charge.

[26] *Id*.

[27] *Bruton*, 391 U.S. at 133-34 & n.10 (citing, as an "alternative way[] of achieving" the "benefit of the confession to prove the confessor's guilt," the "deletion of references to codefendants where practicable").

mentions of Gray and the third man with "deleted" or "deletion."[28] The prosecution also introduced a copy of Bell's confession that replaced the names of the two other men with blank spaces.

The Court acknowledged that the redactions distinguished the case from *Bruton*, but noted that, unlike in *Richardson*, the confession still "refer[red] directly to the 'existence' of the nonconfessing defendant."[29] The Court held that the statement, albeit redacted, was a "powerfully incriminating extrajudicial statement[] of a codefendant" in the sense that drove *Bruton* but was absent from *Richardson*.[30]

Like *Bruton*, *Gray* stressed the real-time effect on a jury of such confessions:

> For one thing, a jury will often react similarly to an unredacted confession and a confession redacted in this way, for the jury will often realize that the confession refers specifically to the defendant. *This is true even when the State does not blatantly link the defendant to the deleted name*, as it did in this case by asking whether Gray was arrested on the basis of information in Bell's confession as soon as the officer had finished reading the redacted statement. Consider a simplified but typical example, a confession that reads "I, Bob Smith, along with Sam Jones, robbed the bank." To replace the words "Sam Jones" with an obvious blank will not likely fool anyone. A juror somewhat familiar with criminal law would know immediately that the blank . . . refers to defendant Jones. A juror who does not know the law and who therefore wonders to whom the blank might refer *need only lift his eyes to Jones, sitting at counsel table, to find what will seem the obvious answer* . . . . A more sophisticated juror, wondering if the blank refers to someone else, might also wonder how, if it did, the prosecutor could argue the confession is reliable, for the prosecutor, after all, has been arguing that Jones, not someone else, helped Smith commit the crime.
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> For another thing, the obvious deletion may well call the jurors' attention specially to the removed name. By encouraging the jury to speculate about the reference, the redaction may overemphasize the importance of the confession's accusation—once the jurors work out the reference. That is why Judge Learned Hand, many years ago, wrote in a similar instance that blacking out the name of a codefendant not only "would have been

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28 *Gray*, 523 U.S. at 188.

29 *Id*. at 192.

30 *Id*. (quoting *Bruton*, 481 U.S. at 135).

> futile . . . . [T]here could not have been the slightest doubt as to whose names had been blacked out," but "even if there had been, that blacking out itself would have not only laid the doubt, but underscored the answer." *United States v. Delli Paoli*, 229 F.2d 319, 321 (2d. Cir. 1956). . . .[31]

Distinguishing *Richardson*, the *Gray* Court explained that not all contextually inferred accusations are created equal, as *Richardson* taken in isolation might suggest. "[I]nference pure and simple cannot make the critical difference, for if it did, then *Richardson* would also place outside *Bruton*'s scope confessions that use shortened first names, nicknames, [and] descriptions as unique as the 'red-haired, bearded, one-eyed man-with-a-limp . . . ."[32] The fact that connecting the accused to oblique references in an accusatory statement requires an inference is not, by itself, incompatible with the determination that the statement was "directly" accusatory in the sense that *Bruton* had held impermissible under the Sixth Amendment.

The *Bruton* trilogy was a model of internal consistency and gimlet-eyed pragmatism, striking a delicate balance between prosecutorial expedience and what the *Bruton* Court recognized as "a fundamental principle of our jurisprudence": "an accused is entitled to confrontation of the witnesses against him and the right to cross-examine them."[33] And the trilogy's thrust heavily favored exclusion over redaction, as reflected in the emphasis in both *Richardson* and *Gray* on the distinction between a "directly accusatory" statement and one that does not refer to *any* co-defendant at all. But twenty-

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31 *Id*. at 193-94 (emphasis added; citation omitted). Here, as in *Bruton*, the Court signaled its forceful rejection of *Delli Paoli* by again embracing the dissenting view in that case. *See supra* n.14 and accompanying text.

32 *Id*. at 195 (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 591 (1966) (Fortas, J., dissenting)); *see Commonwealth v. Miles*, 681 A.2d 1295, 1301 (Pa. 1996) (holding that the appearance of the defendant's nickname in a non-testifying co-defendant's statement violated the Confrontation Clause).

33 *Bruton*, 391 U.S. at 134 (quoting *Fisher*, 164 N.E. at 341 (Lehman, J., dissenting)); *see Pointer*, 380 U.S. at 403 ("[T]he Sixth Amendment's right of an accused to confront the witnesses against him is likewise a fundamental right . . . .").

five years is a long time, and when the Court finally returned to the subject last year in *Samia*, it upset the prevailing balance.

II. Then Came *Samia*

Samia, Hunter, and Stillwell were accused of murdering a woman named Lee. The three men were tried together, and the prosecution sought to admit Stillwell's confession. In that confession, Stillwell put himself in the van where Lee was shot to death, but he named Samia as the shooter.[34] Stillwell's statement was introduced through a DEA agent, who redacted it to eliminate Samia's name by substituting the facially neutral term "other person." The testimony was followed by an instruction that limited the jury's consideration of the statement to Stillwell only, a limitation that the trial court repeated during the final jury charge. After Samia was convicted, he appealed, challenging the admission of Stillwell's statement. The Court of Appeals, endorsing the substitution of neutral terminology, affirmed. The United States Supreme Court granted *certiorari*, and it ultimately agreed.

The Court led with a reference to older authorities that approved admission of the confessions of non-testifying co-defendants so long as the jury was instructed to consider those confessions as inculpatory evidence only as to the defendants who made them, all from long before the Court's consonant decision in *Delli Paoli* and the Court's stern rejection of that case in *Bruton*.[35] In addition to 1816 and 1904 treatises, the Court cited several nineteenth century cases. "Notably," the Court explained, "none of the early treatises or cases to which the parties have referred . . . suggests that a confession

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[34] Hunter allegedly hired the other two to kill Lee, but he was not present at the time of the killing.

[35] *Samia*, 599 U.S. at 644-45 (citing, *inter alia*, 3 J. Wigmore, EVIDENCE §§ 2100, 2841 & n.5 (1904); S. Phillipps, LAW OF EVIDENCE 82 (1816)) ("For most of our Nation's history, longstanding practice allowed a nontestifying codefendant's confession to be admitted in a joint trial so long as the jury was properly instructed not to consider it against the nonconfessing defendant.").

naming a codefendant *must* in *all* cases be edited to refer to 'another person' (or something similar) such that the codefendant's name is not included in the confession."[36] This, the Court added, is in keeping with "the law's broader assumption that jurors can be relied upon to follow the trial judge's instructions,"[37] a point it went on to reinforce by reference to various cases that did not involve confrontation and were contrary in tone to *Bruton* and *Gray*.[38] Further distancing itself from *Bruton* and its progeny, the Court dedicated an entire subsection of *Samia* to the pre-*Bruton* law's solicitude for prosecutorial prerogatives even to the detriment of constitutional rights.

Only after this effort in preemptively re-framing a half-century of jurisprudence did the Court turn to the *Bruton* trilogy, but by then the writing was on the wall. What followed was a brief, arm's-length summary of those cases that is technically, if begrudgingly compatible with my earlier account and that of the Majority. The Court concluded its review of *Gray* with the following observation: "the [*Gray*] Court stressed that its holding, which addressed only obviously redacted confessions, was sufficiently narrow to avoid unnecessarily leading prosecutors to abandon the relevant confession or joint trial"[39]—again reaffirming the Court's renewed solicitude, inconsistent with *Bruton*, of prosecutorial convenience.

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[36] *Samia*, 599 U.S. at 645-46. Given the facts of *Samia*, which concerned the sufficiency of the redactions, this passing statement is a *dictum*. Because it subverts the prevailing consensus that such statements should *at least* be redacted, it is a troubling *dictum*.

[37] *Id*. at 646.

[38] *See Kansas v. Carr*, 577 U.S. 108 (2016) (instructing jurors in a capital case to consider mitigation evidence only for the benefit of one defendant but not another); *Marshall v. Lonberger*, 459 U.S. 422 (1983) (instructing jurors to consider a defendant's prior conviction only for purposes of sentencing, not for assessing guilt); *Lakeside v. Oregon*, 435 U.S. 333 (1978) (instructing jurors not to hold decision not to testify against defendant).

[39] *Samia*, 599 U.S. at 652 (cleaned up).

The *Samia* Court read the *Bruton* trilogy cases first and foremost as

> distinguish[ing] between confessions that directly implicate a defendant and those that do so indirectly. *Richardson* explicitly declined to extend *Bruton*'s narrow exception to the presumption that jurors follow their instructions beyond those confessions that occupy the former category. *Gray* qualified but confirmed this legal standard, reiterating that the *Bruton* rule applies only to directly accusatory incriminating statements, as distinct from those that do not refer directly to the defendant and become incriminating only when linked with evidence introduced *later* at trial. Accordingly, neither *Bruton*, *Richardson*, nor *Gray* provides license to flyspeck trial transcripts in search of evidence that could give rise to a collateral inference that the defendant had been named in an altered confession.[40]

The majority worried that "[t]he Confrontation Clause rule that Samia proposes would require federal and state trial courts to conduct extensive pretrial hearings to determine whether the jury could infer from the Government's case in its entirety that the defendant had been named in an altered confession."[41]

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[40] *Id*. at 652-53 (cleaned up; emphasis added).

[41] *Id*. at 654. The Court's aversion to pretrial assessments of the likely effects of inculpatory confessions in original or redacted form is in tension with Federal Rule of Criminal Procedure 14. That rule provides that, where a joint trial "appears to prejudice a defendant . . ., the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." Fed.R.Crim.P. 14(a). In service of that assessment, "the court may order an attorney for the government to deliver to the court for *in camera* inspection any defendant's statement that the government intends to use as evidence." *Id*. 14(b). In the commentary to a 1966 amendment to the rule, the Advisory Committee described the *Bruton* scenario, noting that, in such a case, the prejudice "cannot be dispelled by cross-examination if the co-defendant does not take the stand. Limiting instructions to the jury may not in fact erase the prejudice." In *Commonwealth v. Johnson*, this Court recognized that "[t]he practical application of the theory [of redaction] may be difficult and in many cases it may be decided that separate trials are necessary." 378 A.2d 859, 860 (Pa. 1977). Consequently, this Court proposed a similar procedure: "[W]hen it is not clear that a confession can be redacted without prejudice to defendant, the confession should be excluded. It is incumbent upon district attorneys who plan to redact a confession to raise the issue at pretrial . . . so that if redaction is unwarranted, separate trials can be ordered." *Id*. at 861. *Gray* itself, in recognizing circumstances where the necessity of inference would not preclude exclusion, arguably invited some measure of pre-trial guesswork. And it did so without reservation.

Having thus set the table, the *Samia* Court made quick work of the case before it. The Court noted that Stillwell's confession was redacted to omit any reference to Samia by name, which redactions, in the Court's estimation, "satisf[ied] *Bruton*'s rule."[42] And the redactions—substituting "the other guy" instead of a blank or its equivalent—were not as explicit as those in *Gray.* Moreover, the confession could not have been modified to omit any reference whatsoever to Samia (as in *Richardson*) because doing so could have created the impression that Stillwell was alone in the van with the victim. From there, the Court proceeded to extol the virtues of joint trials, again focusing primarily on the hardship imposed upon prosecutors by severances, confounding *Bruton*'s studied refusal to subordinate the right of confrontation to "greater speed, economy, and convenience in the administration of the law."[43]

The shift in *Samia* augurs significant consequences for the *Bruton* framework. Recall that *Bruton* specifically rejected *Delli Paoli*'s unqualified reliance on jury instructions, and that both *Bruton* and *Gray* sounded cautionary notes about jurors' presumptive ability to disregard directly incriminating statements while deemphasizing concerns for prosecutorial convenience. In *Samia*, *Delli Paoli*'s abiding confidence in the effectiveness of jury instructions reemerged, as did the Court's outsized concern for prosecutorial convenience.

Importantly, even though *Samia* challenged core aspects of *Bruton*'s reasoning, it harmonized the facts and circumstances of *Samia* with the *Bruton* trilogy. Unlike in *Bruton*, the statement in *Samia* did not name the accused co-defendant. Unlike in *Richardson*, the statement in *Samia* could not have been redacted to eliminate all reference to the co-defendant. Unlike in *Gray*, the statement in *Samia* did not contain blank spaces, uses of words like "redacted" or "deleted," or symbols to signal redactions

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42 *Samia*, 599 U.S. at 653.

43 *See Bruton*, 391 U.S. at 135.

of a name from the statement. Put simply, the *Samia* Court gave other courts bound by its ruling on federal constitutional law no cause to believe that the *Bruton* trilogy is defunct in practice, even if its foundations have been undermined. Those three cases presumably remain good law. Thus, I share Justice Donohue's view that *Gray* compels reversal in this case.

III. *Gray, Samia, and Jones*

For all the reasons related by the Majority and more, any juror awake during Jones' trial understood at the time of its introduction that Wilson's statement fingered Jones as the shooter.

First and most plainly, three co-defendants sat before the jury, and three people were alleged to have committed the crimes charged. In the courtroom were two men and a woman. One of the men was, of course, the man who gave the statement. Insofar as that statement named one male and one female as his companions during the events that culminated in the shooting, and very clearly accused the male of pulling the trigger, the implication couldn't have been clearer: Wilson accused Jones of the shooting.

The testimony and photographic evidence that preceded the reading of Wilson's statement made things more obvious. All three defendants were identified repeatedly in a SEPTA photo shown to the jury immediately before the statement was admitted. Jones was the man in the gray jacket, whom the victim specifically identified as the man in the front seat who shot him. Moreover, of the three defendants, two were male and one female.

Wilson's statement did not entail denying the validity of the evidence placing him in the company of the other two defendants or, ultimately, in the taxi. He sought only to deny responsibility for shooting the victim. In doing so, he described the alleged shooter as his friend and co-worker, echoing Houston's testimony. And, in describing the criminal episode, Wilson repeatedly identified the shooter as the "he" who was in the front seat, reinforcing this description by situating his female cohort in the backseat, behind the

shooter. Paraphrasing the *Gray* Court, which coincidentally referred to a hypothetical "Jones," "a juror . . . [who] wonders to whom the [male pronoun] might refer need only lift his eyes to Jones, sitting at counsel table, to find what will seem the obvious answer."[44]

That jurors must infer (rather than directly hear) a name does not immunize a trial against *Bruton* violations. *Gray* noted that to validate such a proposition would be to allow such directly identifying descriptions as "shortened first names, nicknames, [and] descriptions as unique as the 'red-haired, bearded, one-eyed man-with-a-limp."[45] Though they do not use the individual's proper name, such statements are every bit as direct in their accusation, and they run afoul of *Bruton* for precisely the same reason.[46] To hold that this isn't a confrontation violation, *Gray* teaches, requires the Court to pretend that jurors didn't hear what they heard, that the bell can be un-rung.

Such an inference suffices to violate the right of confrontation. Jurors connect in real time what their eyes see and their ears hear in the courtroom to the descriptive terms used in the recorded statement. If there is a material distinction between this scenario and the one that *Gray* deemed impermissible in precisely the same way, I am not clever enough to find it. It is only natural that jurors would have speculated about the identify of Wilson's "friend," particularly after being made aware that something in the statement had been redacted. They could have reached no other conclusion than that Wilson had named Jones as the shooter.

Courts often refer in these cases to redaction of names in favor of "neutral" substitutions. But here, "neutral" is a loaded word. In a scenario like this, where the

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44 *Gray*, 523 U.S. at 193.

45 *Id*. at 195 (quoting *Grinnell Corp.*, 384 U.S. at 591 (Fortas, J., dissenting)).

46 *See Bruton*, 391 U.S. at 129 (quoting *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring)) ("The naïve assumption that prejudicial effects can be overcome by instructions to a jury . . . all practicing lawyers know to be unmitigated fiction.").

number, physical location, and gender of the co-defendants combined leave no wiggle room in the jury's interpretation of the statement, there is nothing neutral about the use of gendered pronouns.[47] In this regard, this case is more of a *Gray* case than *Gray* itself. In *Gray*, there were two other people whose names were redacted, and only one of them was present in the courtroom.[48] Thus, the *Gray* statement on its face was marginally ambiguous in a way that Wilson's statement is not.

Despite any contrary suggestion in *Samia*, *Gray* was not limited to instances of obvious deletion. On any fair reading of that case, "obvious" meant *obvious* to the jury *in its context at the time of the statement's presentation*. The *Gray* Court believed its reasoning extended to other instances when inferences available to the jury at the moment of the statement's introduction ineluctably implicated a particular defendant—the defendant identified by a nickname, or the "red-haired, bearded, one-eyed man-with-a-limp" scenario. Wilson identified the shooter as his male co-employee and friend. This was the man who, according to the statement, sat in the front seat of the car, while Wilson and the female co-defendant (named in the statement and identified as "she") sat in the back seat next to the defendant.

For these reasons, *Gray* clearly controls, precisely as the Majority concludes.

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[47] Dissenting in *Samia*, Justice Kagan opened with a similar hypothetical, in which a man and a woman stand trial together, and the non-testifying man's statement is admitted, modified by swapping the woman's name for "the woman." Justice Kagan castigated the majority for "elevating form over substance" in blessing this scenario. *See Samia*, 599 U.S. at 657-659 (Kagan, J., dissenting).

[48] In *Commonwealth v. Wharton*, 607 A.2d 710 (Pa. 1992), we observed that "there were two 'other guys' who, the jury had heard, had participated in the reign of terror against the Harts . . ., [thus] the use of 'the other guy' in Eric Mason's statement did not necessarily refer to appellant." *Id*. at 718. But, as in *Gray*, even though there were two potential people referred to as "the other guy," this was not enough to clear the Sixth Amendment. Under *Wharton*'s circumstances, we held, relying on this fact alone would be "facile," and we agreed that, under all the circumstances, including the introduction of corroborating co-defendant confessions, the relevant use of the "other guy" impliedly identified Wharton. *Id*.

IV. Confrontation and the Pennsylvania Constitution

Having ventured my misgivings as to the downstream effects of *Samia*, I close by touching upon an additional subject that is worthy of consideration. Pennsylvania's Constitution has its own Confrontation Clause, one that parallels the Sixth Amendment right of confrontation. The language of Pennsylvania's clause is materially the same as that of the Sixth Amendment: "In all criminal prosecutions the accused hath a right . . . to be confronted with the witnesses against him."[49] But speaking broadly, and allowing that the language of our Confrontation Clause has changed over time and in recent years, we have not interpreted these clauses identically.

It is true that, in the *Bruton* context, we have adhered generally to the United States Supreme Court's jurisprudence. But that is because we appear never to have addressed a *Bruton*-style Confrontation Clause challenge raised squarely under Pennsylvania's Constitution.[50] Importantly, we have on other occasions characterized Pennsylvania's Confrontation Clause as affording greater protection than the Sixth Amendment provides.[51]

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[49] PA. CONST. art I, § 9.

[50] The closest we appear to have come to applying Article I, § 9's Confrontation Clause in a *Bruton* case was in *Commonwealth v. Robins*, 812 A.2d 514 (Pa. 2002). But there, having granted relief under the Sixth Amendment, we declined to go further. *Id*. at 519 n.8 ("While this Court previously has distinguished state confrontation clause jurisprudence from that prevailing under federal constitutional precepts . . ., as we find that Appellant prevails under his Sixth Amendment argument, and state constitutional law can provide no greater relief, we will not engage in a distinct state constitutional analysis."); *cf. Commonwealth v. Lambert*, 603 A.2d 568, 575 n.8 (Pa. 1992) ("We hold . . . that the *Bruton* rule is in accord with our state constitution . . . .").

[51] In *Commonwealth v. Lloyd*, 567 A.2d 1357 (Pa. 1989), this Court held under the state Confrontation Clause that the defendant was entitled to unlimited access to a victim's psychotherapy records. This Court had held similarly under the Sixth Amendment in *Commonwealth v. Ritchie*, 502 A.2d 148 (Pa. 1985), but the United States Supreme Court reversed that decision, distinguishing confrontation as strictly a trial right, not a tool for discovery. *See Commonwealth v. Ritchie*, 480 U.S. 39 (1987). Had this Court extended the Supreme Court's reasoning in *Ritchie* to the analysis of our own (continued…)

There is no obvious reason to assume that we might (or could) not adopt a more expansive view of the scope of our Confrontation Clause's protections with respect to the statements of non-testifying co-defendants. This Court has never shied away from applying the Pennsylvania Constitution with fidelity to its own animating principles. Especially in light of *Samia*'s apparent retrenchment in the degree of protection afforded the right of confrontation under the Sixth Amendment, perhaps a future defendant will bring this Court a developed argument that Article I, Section 9, of our Constitution provides greater protection under Pennsylvania's Confrontation Clause than the post-*Samia* United States Supreme Court chooses to discern in the United States Constitution.[52]

Confrontation Clause, it would have reached the contrary result in *Lloyd*. *Cf. Commonwealth v. Rivera*, 296 A.3d 1141, 1158 n.17 (Pa. 2023) (noting, in the context of the Fifth Amendment, that "this Court has often interpreted Article 1, Section 9 of the Pennsylvania Constitution to supply weightier armor than the Fifth Amendment to the United States Constitution").

[52] As the Majority notes, Jones paid our state Confrontation Clause lip service in his framing of the question for review. But he has provided no meaningful state law argument that requires or warrants our consideration at this time. *See* Maj. Op. at 11 n.9.