SAMIA V. UNITED STATES: THE GHOST OF SIR WALTER RALEIGH HAUNTS AGAIN

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ABSTRACT

In *Samia v. United States*, the United States Supreme Court grappled with whether the admission of a nontestifying codefendant's redacted confession that implicates a nonconfessing codefendant violates that nonconfessing defendant's right to confront opposing witnesses. The Court's majority framed this issue as a conflict between defendants' rights and judicial economy and then declared judicial economy the winner. This resolution threatens to elevate governmental interests over defendants' rights to face their accuser and to test opposing witnesses' memory and sincerity. Moreover, and perhaps more importantly, in holding that introducing such a confession does not violate the Confrontation Clause, the Court endangers defendants' rights to force witnesses into the gaze of twelve jurors who will judge that witness and determine whether they are believable.

The *Samia* Court said that the Confrontation Clause does not protect defendants from codefendant confessions of this kind because doing so would come at too high a price. Through an analysis of the Court's majority, concurring, and dissenting opinions, as well as precedent cases and policy considerations, this Note demonstrates that the Court wrongly decided *Samia* and that the exaltation of judicial economy over the right of confrontation is a price that the Sixth Amendment cannot afford to pay. This Note concludes with a discussion of the implications of the Court's holding in *Samia* as it relates to the growing power of prosecutors in the American judicial system.

TABLE OF CONTENTS

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INTRODUCTION

The right of confrontation is deeply rooted in Anglo-American history.[1] One of the most storied violations of this right was Sir Walter Raleigh's trial for treason in 1603.[2] An alleged accomplice, Baron Cobham, implicated Raleigh for the crime in a letter and interview, but Cobham never appeared in court as a witness.[3] Raleigh protested, "The Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face . . . ."[4] Sir Walter Raleigh was

1. *See Acts* 25:16; WILLIAM SHAKESPEARE, RICHARD II act 1, sc. 1, l. 2–20; WILLIAM SHAKESPEARE, HENRY VIII act 2, sc. 1, l. 17–28; 30 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 6342, at 227 (1997) (quoting statutes enacted under King Edward VI in 1552 and Queen Elizabeth I in 1558); *cf.* Case of Thomas Tong, 84 Eng. Rep. 1061, 1062 (1662) (out-of-court confession may be used against the confessor, but not against his co-conspirators); MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 163–64 (Charles M. Gray ed., 1971); 3 WILLIAM BLACKSTONE, COMMENTARIES 373.

2. Crawford v. Washington, 541 U.S. 36, 44 (2004).

3. *See id.*; *see also* ANNA BEER, PATRIOT OR TRAITOR: THE LIFE AND DEATH OF SIR WALTER RALEIGH 180 (2018) (stating that Raleigh's "*coup de grâce* was to produce a letter of exoneration from Cobham, which had been smuggled to him." The prosecutor then brought out a second statement from Cobham reconfirming the accusations.).

4. 2 WILLIAM COBBETT, *The Trial of Sir Walter Raleigh, knt. at Winchester, for High Treason, 1603*, *in* COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 1, 15–16 (1809).

ultimately beheaded.[5] Over 400 years later, *Samia v. United States*[6] once again imperils a defendant's right to confront opposing witnesses.[7]

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[8] The Court has interpreted this Sixth Amendment confrontation right as ensuring that out-of-court testimonial statements are not admitted as evidence unless the witness is unavailable and the defendant has an opportunity to cross-examine the witness who gave the statement.[9] "[T]his truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination" because the accomplice may have a "strong motivation to implicate the defendant and to exonerate himself."[10] In other words, the Confrontation Clause helps protect innocent defendants from being wrongfully implicated.[11]

The text of the Sixth Amendment does not suggest any exceptions to the confrontation right; therefore, the text only admits—according to Justice Scalia—"those exceptions established at the time of the founding."[12] Justice Scalia enumerated three exceptions: (1) when the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness, (2) when the witness gives a dying declaration, and (3) when the defendant forfeits their confrontation right through purposefully causing the witness's absence ("forfeiture by wrongdoing").[13] Recognizing the narrowness of these exceptions in *Crawford v. Washington*,[14] the Court rejected an additional proposed exception, the "interlocking confession" exception.[15] Interlocking confessions are those made by codefendants that coincide to such a degree as to be "interlocked," and thus, presumably reliable.[16] Not even the apparent reliability of a confession was enough to establish an additional exception to the Confrontation Clause.[17]

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5. King James charged Sir Walter Raleigh with treason. "The court was told that Sir Walter had conspired to deprive the king of his government . . . to raise up sedition within the Realm, to alter Religion . . . . Furthermore, he had sought to place Arbella Stuart on the throne . . . ." BEER, *supra* note 3, at 179. He condemned Raleigh to death but commuted the sentence to imprisonment in the Tower of London in 1603. In 1616, Raleigh was released to search for gold in South America. "He invaded and pillaged Spanish territory when James I was seeking peace with Spain . . . ." Raleigh was again arrested, and his original death sentence was invoked. Soon after, Raleigh was beheaded. *Walter Raleigh*, HIST., https://www.history.com/topics/exploration/walter-raleigh (May 22, 2023).

6. 599 U.S. 635 (2023).

7. *Id.* at 640.

8. U.S. CONST. amend. VI.

9. *Crawford*, 541 U.S. at 68–69.

10. Lee v. Illinois, 476 U.S. 530, 541 (1986).

11. James L. Buchwalter, Annotation, *Construction and Application of Sixth Amendment Confrontation Clause—Supreme Court Cases*, 83 A.L.R. Fed. 2d § 2 (2014).

12. *Crawford*, 541 U.S. at 54.

13. *Id.* at 54, 56 n.6, 62; Giles v. California, 554 U.S. 353, 358–59 (2008).

14. *Crawford*, 541 U.S. at 54, 56 n.6, 62.

15. *Id.* at 58–59.

16. *Id.* at 41.

17. *Id.* at 59.

Before the 2018 trial, federal prosecutors charged codefendants Carl David Stillwell and Adam Samia in connection with an alleged murder-for-hire scheme.[18] Stillwell confessed to being in a van with Samia when Samia shot and killed the victim.[19] The trial judge admitted Stillwell's out-of-court confession as evidence after replacing references to Samia with the phrase "the other person" and instructing the jury that the out-of-court confession was admissible as to Stillwell but not Samia.[20] The U.S. Supreme Court in *Samia* held that a limiting instruction, combined with a redaction that replaces a defendant's name so that reference to the nonconfessing defendant is indirect, eliminates any Sixth Amendment concern.[21] Further, the Court said that there is a difference between a confession that directly implicates a defendant and a confession that indirectly implicates a defendant—a distinction that determines whether a nontestifying codefendant's confession may be admitted into evidence without violating the nonconfessing defendant's Sixth Amendment rights. The Court's category of direct implication did not include redacted confessions where the nonconfessing defendant's identity is immediately obvious when the confession is read to the jurors.[22] By eliminating immediately obvious references to the codefendant from the direct implication category, the Court diminishes the scope of the Confrontation Clause and awakens the ghost of Sir Walter Raleigh by accepting the judicial shortcut that put him in his grave.

However, in *Samia*, the Supreme Court admitted that the confession by Stillwell "falls within the Clause's ambit" but, nevertheless, the Court created a fourth exception to the right to confrontation: where the confession is redacted in such a way as to reference the codefendant only indirectly and where the court offers a limiting instruction.[23] The Court argued that the solutions Samia proposed—that is, severing joint trials or conducting pretrial hearings when the nontestifying codefendant's confession makes an immediately obvious reference to the nonconfessing defendant—would be "impractical," "unnecessary," and too costly.[24] As former California Supreme Court Justice Torbriner aptly observed, "Legal history shows that artificial islands of exceptions, created from the fear that the legal process will not work, usually do not withstand the waves of reality

18. Samia v. United States, 599 U.S. 635, 640 (2023).
19. *Id.* at 640–42.
20. *Id.* at 641–42.
21. *Id.* at 653, 655.
22. *Id.* at 648.
23. *Id.* at 643–44. Admittedly, this exception is not one the Court claims was established at the time of the Founding. Though, because the Court in *Crawford* only accepts those exceptions that were established at the time of the Founding and rejects all others, it stands to reason that any exception created conflicts with *Crawford*.
24. *Id.* at 654.

and, in time, descend into oblivion."[25] While the *Samia* Court ignored this warning, a future Supreme Court hopefully will heed Justice Torbriner's foreshadowing in order to defend the fundamental rights of individuals over governmental interests.

I. CONFRONTATION CLAUSE CASE LAW

The Confrontation Clause has two main purposes.[26] First, the Clause allows the defendant to test a witness's memory and sincerity, and second, it allows the jury to judge the witness's credibility.[27] "[T]he Confrontation Clause applies whenever the prosecution in a criminal trial attempts to introduce the out-of-court testimony of a witness."[28] The majority in *Samia* uses three prior cases to evaluate when the admission of a nontestifying codefendant's confession implicates the Confrontation Clause. *Bruton v. United States* (1968),[29] *Richardson v. Marsh* (1987),[30] and *Gray v. Maryland* (1998)[31] each presented a new set of facts but the same dilemma: how to address a codefendant's confession that implicates a fellow defendant when the confessor does not testify and the confession is presented as evidence.

The earliest of the three, *Bruton,* established "that when codefendants are tried jointly, the pretrial confession of one defendant shifting blame to another codefendant is inadmissible unless the confessing defendant testifies."[32] *Bruton* involved the joint trial of codefendants Bruton and Evans.[33] A postal inspector interrogated Evans at the city jail where Evans was being held, and the trial judge admitted Evans's confession—which implicated Bruton by name—into evidence.[34] The jury convicted both Bruton and Evans.[35] Subsequently, the Court of Appeals for the Eighth Circuit set aside Evans's conviction because it deemed the confession, which was

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25. Dillon v. Legg, 441 P.2d 912, 925 (Cal. 1968) (explaining that exceptions and mechanical rules do more harm than good while resorting to the general rules of tort law would serve not only recovery but also the judicial process).

> When the Government attempted to nonetheless introduce Stillwell's inculpatory confession notwithstanding Samia's inability to cross-examine him, it sought an *exception* from the Confrontation Clause's exclusion mandate. Before today, this Court had never held that a limiting instruction, combined with a redaction that merely replaces the defendant's name, sufficiently "cures" the constitutional problem.

Samia, 599 U.S. at 668 (Jackson, J., dissenting).

26. David W. Stuart, *Hearsay and the Confrontation Clause: A Case for Constitutionalizing the Federal Rules of Evidence*, 41 FED. BAR NEWS J. 133, 133 (1994).

27. *Id.*

28. *Id.* at 134.

29. 391 U.S. 123 (1968).

30. 481 U.S. 200 (1987).

31. 523 U.S. 185 (1998).

32. Dale B. Durrer, *A State Court Trial Judge's Thoughts on* Samia v. United States*: Not Entirely Consistent with* Crawford v. Washington, GEO. WASH. L. REV.: ON THE DOCKET (Aug. 6, 2023), https://www.gwlr.org/a-state-court-trial-judges-thoughts-on-samia-v-united-states-not-entirely-consistent-with-crawford-v-washington/.

33. *Bruton*, 391 U.S. at 124.

34. *Id.*

35. *Id.*

garnered without reading Evans his *Miranda* rights, unconstitutional.[36] But the Court of Appeals affirmed Bruton's conviction by relying upon the holding in *Delli Paoli v. United States*.[37] In *Delli Paoli*, the Court maintained that courts could expect jurors to follow clear instructions from the judge to disregard a confession that names a codefendant when considering the codefendant's guilt.[38] In *Bruton*, instead of relying on the *Delli Paoli* rule, the Supreme Court expressly overturned *Delli Paoli*, asserting instead that "because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans's confession in this joint trial violated [Bruton's] right of cross-examination secured by the Confrontation Clause of the Sixth Amendment."[39] Thus, after *Bruton*, a defendant's Confrontation Clause rights were violated if a nontestifying codefendant's confession expressly naming the defendant was admitted at their joint trial.

Nineteen years after the Court decided *Bruton*, *Richardson* established that when a nontestifying codefendant's confession is redacted to eliminate any reference to the other defendant's existence and admitted along with a limiting instruction, there is no Confrontation Clause violation.[40] In *Richardson*, prosecutors charged Marsh and Williams with assault and murder.[41] At their joint trial, prosecutors introduced a confession by Williams, but redacted the confession to omit any indication that anyone other than Williams and a third defendant (who was a fugitive at the time of trial) participated in the crime.[42] Marsh's existence was never mentioned. Williams's confession aligned with the account that the surviving victim provided and detailed the activities that took place in the house where the crime occurred.[43] The judge, at both the time the confession was presented and after closing arguments, instructed the jury not to use the confession in determining Marsh's guilt.[44] However, sometime after the confession was introduced, Marsh took the stand.[45] She testified that she was with Williams and the third defendant in a car, she drove with them to the victims' house, and she prevented the victims from escaping.[46] The jury convicted Marsh of two counts of felony murder and one count of assault with intent to commit murder.[47] The district court denied Marsh's petition for writ of habeas corpus, but the Court of Appeals for the Sixth

36. *See* Evans v. United States, 375 F.2d 355, 361, 363 (8th Cir. 1967), *rev'd*, 391 U.S. 123 (1968); *see also Bruton*, 391 U.S. at 124 n.1.

37. *Evans*, 375 F.2d at 361–62. *See generally* Delli Paoli v. United States, 352 U.S. 232 (1957), *overruled by* Bruton v. United States, 391 U.S. 123 (1968).

38. *Delli Paoli*, 352 U.S. at 233.

39. *Bruton*, 391 U.S. at 126.

40. Richardson v. Marsh, 481 U.S. 200, 211 (1987).

41. *Id.* at 202.

42. *Id.* at 203.

43. *Id.* at 203–04.

44. *Id.* at 204–05.

45. *Id.* at 204.

46. *Id.*

47. *Id.* at 205.

Circuit reversed, holding that "in determining whether *Bruton* bars the admission of a nontestifying codefendant's confession, a court must assess the confession's 'inculpatory value' by examining not only the face of the confession, but also all of the evidence introduced at trial."[48] However, the Supreme Court declined to apply an "evidentiary linkage" or "contextual implication" approach, asserting that *Bruton* does not authorize this type of analysis.[49] The *Richardson* Court refused to apply the *Bruton* rule where the confession inculpated the defendant due to evidence later admitted despite efforts to redact statements and provide limiting instructions.[50]

Over a decade later, *Gray* established that when a redacted confession substitutes the defendant's name with the word "deleted" or includes other obvious indications of the implicated defendant's identity, the *Bruton* rule applies.[51] *Gray* involved the use of a confession by a man named Bell that implicated his codefendant, Gray.[52] Prosecutors charged Bell and Gray jointly with murder.[53] The judge permitted the admission of Bell's confession as long as prosecutors redacted it, so the police detective who read the confession at trial used the word "deleted" or "deletion" whenever Gray's name appeared.[54] The prosecutor then asked the police detective, "[A]fter he gave you that information, you subsequently were able to arrest Mr. Kevin Gray; is that correct?"[55] The police detective answered in the affirmative.[56] After the judge gave a limiting instruction,[57] the jury convicted both defendants.[58] The Supreme Court held that substituting the word "deleted" for the codefendant's name so closely resembled *Bruton* that it required the same result for three main reasons: (1) the jury would have realized that the substituted word referred specifically to the defendant at the time the confession was presented, (2) the obvious deletion may have placed even more emphasis on the redacted name than if Gray's own name had been used, and (3) the blank space pointed directly to the defendant and accused Gray of the murder just as directly accusatory as when Evans used Bruton's name.[59] The *Gray* Court asserted that *Richardson* did not control in this case, even though the redaction in *Gray* incriminated inferentially.[60] *Richardson*, the *Gray* Court claimed, sought to place

48. *Id.* at 205–06.
49. *Id.* at 206; *see* United States v. Belle, 593 F.2d 487, 493–94 (3d Cir. 1979) (An "evidentiary linkage" or "contextual implication" approach refers to situations where, for example, the codefendant's confession makes no reference whatsoever to any other defendant and only implicates fellow codefendants "when combined with considerable other evidence.").
50. *Richardson*, 481 U.S. at 208. Limiting instructions are often referred to as "admonitions."
51. Gray v. Maryland, 523 U.S. 185, 192 (1998).
52. *Id.* at 188.
53. *Id.*
54. *Id.*
55. *Id.* at 188–89.
56. *Id.* at 189.
57. *Id.* ("When instructing the jury, the trial judge specified that the confession was evidence only against Bell; the instructions said that the jury should not use the confession as evidence against Gray.").
58. *Id.*
59. *Id.* at 193–94.
60. *Id.* at 195.

inferential incrimination outside the *Bruton* rule.[61] Yet "inference pure and simple cannot make the critical difference."[62] Instead, the *Gray* Court held that *Richardson* "must depend in significant part upon the *kind* of, not the simple *fact* of, inference."[63] Because the word "deleted" served to incriminate Gray by specifically referring to Gray's existence, the accusation was similar enough to the one in *Bruton* to create a Confrontation Clause violation.[64]

II. *SAMIA V. UNITED STATES*

A. Facts

Paul Calder LeRoux, who operated various illegal businesses around the world, hired Adam Samia and Carl David Stillwell to perform "asset security" work.[65] LeRoux believed that Catherine Lee, a real estate agent in the Philippines, had stolen money from him in connection with a real estate transaction.[66] In 2011, LeRoux sent members of his security team, which included Samia and Stillwell, to carry out Lee's murder.[67] According to prosecutors, on February 12, 2012, Lee met with Samia and Stillwell to show them several real estate properties, including a farm property owned by a husband and wife.[68] The sellers' real estate agents, Lee, Samia, and Stillwell met at a restaurant parking lot and traveled together to the farm property.[69] After viewing the property, the sellers and their real estate agents left in one vehicle while Lee, Samia, and Stillwell left in a van.[70] Allegedly, "as Stillwell drove the van, Samia shot Lee twice in the face, and they dumped her body on a pile of garbage."[71]

Following their arrests, both Samia and Stillwell waived their *Miranda* rights and made video-recorded statements.[72] Samia stated that he had traveled to the Philippines alone.[73] Stillwell, on the other hand, stated that he (Stillwell) was driving the van when Samia shot Lee.[74] While Stillwell admitted that he had participated in the murder, "Samia maintained his innocence."[75] The defendants were tried jointly in the Southern District of New York.

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61. *Id.*
62. *Id.*
63. *Id.* at 196.
64. *Id.* at 197.
65. Government's Motion in Limine at 10, United States v. Samia, No. 13-CR-521 (RA) (S.D.N.Y. July 31, 2017); *see also* Samia v. United States, 599 U.S. 635, 640 (2023).
66. *Samia*, 599 U.S. at 640.
67. Government's Motion in Limine, *supra* note 65, at 11.
68. *Id.* at 13.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 16; *see also* Samia v. United States, 599 U.S. 635, 640 (2023).
73. Government's Motion in Limine, *supra* note 65, at 16.
74. *Id.*; *see also Samia*, 599 U.S. at 640.
75. *Samia*, 599 U.S. at 641.

B. Procedural History

Before the codefendants' joint trial, the prosecution filed a motion in limine seeking to admit Stillwell's post-arrest statements where he confessed to being party to Lee's murder and implicated Samia.[76] Stillwell declined to testify, citing his Fifth Amendment privilege against self-incrimination.[77] Recognizing that the introduction of Stillwell's statements might invoke the *Bruton* rule, prosecutors sought to modify Stillwell's statements to eliminate Samia's name and avoid any obvious redactions.[78] During the trial, a DEA agent who had previously interviewed Stillwell provided the following oral testimony regarding Stillwell's statements:

> Q. Did Mr. Stillwell indicate whether he had gone [to the Philippines] alone or with someone else?
>
> A. He stated that he had met somebody else over there.
>
> Q. Did he describe where he and *the person that he met over there* stayed while in the Philippines?
>
> A. Yes, he explained that he and *the other person* initially stayed at a hotel, but then moved to what he described as a condo or apartment-type complex in the old capital area of the city.
>
> . . . .
>
> Q. To his knowledge, did *the person that he was with in the Philippines* ever carry a firearm?
>
> A. Yes.
>
> . . . .
>
> Q. Was there a particular occasion that he remembered *that individual* having that gun in their possession?
>
> A. Yes.
>
> Q. When was that?
>
> A. He described a time when he and *that other individual* had traveled outside of Manila to view a property and that he had observed a gun then.
>
> Q. Did he say where [the victim] was when she was killed?

76. Government's Motion in Limine, *supra* note 65, at 6.
77. *See Samia*, 599 U.S. at 641.
78. Defendant Stillwell's Motion in Limine at 1, United States v. Samia, No. 13-CR-521 (RA) (S.D.N.Y. July 31, 2017).

> A. Yes. He described a time when *the other person he was with* pulled the trigger on that woman in a van that he and Mr. Stillwell was [sic] driving.[79]

During testimony and before jury deliberations, the judge instructed the jury that the DEA agent's testimony was admissible as to Stillwell but not to Samia.[80] The jury convicted Samia and Stillwell of murder-for-hire, conspiracy to commit murder-for-hire, conspiracy to murder and kidnap in a foreign country, using and carrying a firearm during and in relation to a crime of violence constituting murder, and conspiracy to commit money laundering.[81] The district court sentenced Samia to a combined term of life plus ten years imprisonment.[82]

On appeal, Samia argued that "the fact of redaction [was] obvious and . . . immediately inculpated Mr. Samia."[83] Allowing this evidence, Samia claimed, violated his rights under the Confrontation Clause of the Sixth Amendment.[84] The Court of Appeals for the Second Circuit found that no violation had occurred.[85] Instead, "the court of appeals concluded that the redactions avoided any prejudicial error simply because [the testifying DEA agent] used 'neutral terms' that did not 'explicit[ly] identif[y]' [Samia]."[86] The Supreme Court "granted certiorari to determine whether the admission of Stillwell's altered confession, subject to a limiting instruction, violated Samia's rights under the Confrontation Clause."[87]

C. Opinion of the Court

Justice Thomas authored the majority opinion.[88] Chief Justice Roberts and Justices Alito, Gorsuch, and Kavanaugh joined.[89] The Court affirmed the Second Circuit's ruling and held that admission of a nontestifying codefendant's confession implicating the other defendant does not violate the Confrontation Clause if (1) the testimony is redacted to not directly inculpate the other defendant and (2) a limiting instruction is given.[90]

Justice Thomas first explained that the Confrontation Clause only applies to "testimonial" statements and only to witnesses "against the

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79. Brief for Petitioner at 9–11, Samia v. United States, 599 U.S. 635 (2023) (No. 22-196) (emphasis added).
80. *Id.* at 11.
81. Superseding Indictment at 3–17, United States v. Samia, No. 13-CR-521 (LTS) (S.D.N.Y. Feb. 24, 2016).
82. Brief for the United States at 9, Samia v. United States, 599 U.S. 635 (2023) (No. 22-196).
83. Brief for Appellant at 2, United States v. Stillwell, 986 F.3d 196 (2d Cir. 2019) (No. 18-3074-CR).
84. *Id.*
85. Brief for Petitioner, *supra* note 79, at 12–13.
86. *Id.* at 13.
87. Samia v. United States, 599 U.S. 635, 643 (2023).
88. *Id.* at 639.
89. *Id.* at 638.
90. *Id.* at 653, 655.

accused."[91] Thus, if the court provides a limiting instruction to the jury to use the testimonial confession only against the confessor, then the witness's testimony is not considered "against" the other defendant.[92] According to Justice Thomas, "[t]his general rule is consistent with the text of the Clause, historical practice, and the law's reliance on limiting instructions in other contexts."[93] In other words, the majority asserted that in most situations, nontestifying codefendant confessions do not violate the Confrontation Clause as long as the judge provides a limiting instruction.

The majority opinion emphasized several cases from the 1800s and treatises from 1816 and 1904 to demonstrate that historical evidentiary practice considered the use of redactions (either omitting the defendant's name or referring to "another person") and appropriate limiting instructions as adequate protections for defendants' Sixth Amendment rights.[94] In particular, the Court cited *Ball v. United States*,[95] where the judge provided a limiting instruction during the murder trial of three codefendants.[96] The trial judge had said, "[O]f course, [the one defendant's declarations] would be only evidence against him."[97] The 1816 and 1904 treatises explained that in England, judges would either omit the nonconfessing defendant's name or would retain the name and deliver a limiting instruction.[98] The 1904 treatise also described that judges in the United States favored retaining the nonconfessing defendant's name and giving a limiting instruction.[99] Because longstanding practice recognized both approaches, Justice Thomas claimed that the historical texts authorize the use of codefendant confession redactions, but the texts do not suggest that redactions are necessary as a categorical matter.[100]

The Court next focused on "the law's broader assumption that jurors can be relied upon to follow the trial judge's instructions."[101] Utilizing case law from the late 1900s and early 2000s, the majority established that the law presumes jurors follow instructions in order to admit certain types of evidence, enhance sentences—even in a joint capital trial—and ensure that jurors do not make an adverse inference from a defendant's Fifth Amendment right not to testify.[102] Moreover, in some situations, the presumption that jurors will follow limiting instructions operates in even more inculpatory contexts than a codefendant's confession.[103] "For example, this Court has held that statements elicited from a defendant in violation of *Miranda*

91. *Id.* at 643–44.
92. *Id.* at 644.
93. *Id.*
94. *Id.* at 644–45.
95. 163 U.S. 662, 672 (1896).
96. *Id.*
97. *Samia*, 599 U.S. at 645 (quoting *Ball*, 163 U.S. at 672).
98. *Samia*, 599 U.S. at 644–45.
99. *Id.* at 645.
100. *Id.* at 644.
101. *Id.* at 646.
102. *Id.* at 646–47.
103. *Id.*

can be used to impeach the defendant's credibility, provided the jury is properly instructed not to consider them as evidence of guilt."[104] Emphasizing that nontestifying codefendant confessions produce less harm compared to other contexts in which limiting instructions are deemed adequate, Justice Thomas asserted that there was no reason to disrupt the status quo.[105] According to the majority, the presumption that jurors follow limiting instructions credits jurors with having intelligence and prevents making "inroads into the entire complex code of criminal evidentiary law [that] would threaten other large areas of trial jurisprudence."[106]

Working from this presumption that jurors follow judges' instructions, the majority transitioned to evaluating more recent case law that directly speaks to codefendant confessions.[107] The majority asserted that the Court's precedents "distinguish between confessions that directly implicate a defendant and those that do so indirectly."[108] A codefendant confession that directly implicates another defendant violates the Confrontation Clause, while a codefendant confession that only indirectly implicates another defendant does not violate the Confrontation Clause.[109] Thus, introduction of a redacted confession that indirectly implicates the codefendant coupled with a limiting instruction, as in *Samia*, does not violate the Confrontation Clause.[110] The Court began with *Bruton*, which stated "that a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial."[111] In other words, when the nontestifying confessor explicitly names a nonconfessing defendant, introducing the confession at trial violates the nonconfessor's Confrontation Clause rights. However, the Court in *Richardson* would not extend the *Bruton* rule to "confessions that do not name the defendant."[112] Later, in *Gray*, the Court loosened its *Richardson* stance and stated that the *Bruton* rule may apply where the codefendant is not explicitly named but the codefendant's confession is still "directly accusatory."[113]

After a lengthy discussion of the facts and holdings in *Bruton*, *Richardson*, and *Gray*, the Court analyzed the facts from *Samia* in conjunction with those cases.[114] According to the majority, not only was Stillwell's redacted testimony sufficient to satisfy *Bruton* but the redaction was not an obvious redaction like the one in *Gray* because the phrase "'other person' w[as] not akin to an obvious blank or the word 'deleted.'"[115]

104. *Id.* at 647 (citing Harris v. New York, 401 U.S. 222, 223–25 (1971)).
105. *See generally Samia*, 599 U.S. at 647.
106. *Id.* (quoting Spencer v. Texas, 385 U.S. 554, 562 (1967) (cleaned up)).
107. *Samia*, 599 U.S. at 647–53.
108. *Id.* at 648.
109. *Id.* at 647–48.
110. *Id.* at 648.
111. *Id.* at 647 (quoting Richardson v. Marsh, 481 U.S. 200, 207 (1987)).
112. *Samia*, 599 U.S. at 647 (quoting *Richardson*, 481 U.S. at 211).
113. *Samia*, 599 U.S. at 651–52.
114. *Id.* at 652–55.
115. *Id.* at 653.

Furthermore, the Court asserted that the redacted testimony could not have been further altered to make it appear that Stillwell had acted alone, like in *Richardson*.[116] If the trial court had not insinuated that another person was present with Stillwell and Lee (the victim), then the jurors may have been led to "conclude that Stillwell was the shooter, an obviously prejudicial result."[117]

Last, for policy reasons related to judicial efficiency, the majority rejected Samia's position because the rule Samia proposed[118] would impose unnecessary burdens on judicial resources through extensive pretrial hearings or severance of joint trials.[119] Samia's proposed rule "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."[120] Because the prosecution's case is mutually reinforcing, policing juror inferences would likely require severance of any joint trial where the prosecution introduces a confession of a nontestifying codefendant.[121] "[J]oint trials encourage consistent verdicts and enable more accurate assessments of relative culpability."[122] According to the majority, an increase in severed joint trials was "'too high' a price to pay."[123] Thus, the majority rejected the notion that Samia's constitutional rights were violated by citing the Court's adherence to longstanding practice, precedent, and procedural policy.[124]

D. Justice Barrett's Concurring Opinion

Justice Barrett authored a concurring opinion.[125] The concurrence affirmed that admission of Stillwell's redacted confession coupled with a limiting instruction did not violate the Confrontation Clause.[126] Yet Justice Barrett asserted that the nineteenth- and early twentieth-century historical

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116. *Id.*
117. *Id.*
118. *Id.* at 654. Samia proposed that the courts determine the admissibility of a nontestifying codefendant's confession in advance of trial. Brief for Petitioner, *supra* note 79, at 16–17 ("The Court can ensure that a pretrial determination of admissibility remains possible by limiting the relevant context to those aspects of the case knowable in advance of trial or wholly within the prosecution's control: in particular, the number of defendants on trial; the prosecution's opening and closing arguments; the line of questioning surrounding the introduction of the confession; and the other evidence the prosecution presents in its case in chief. Under such a rule, the prosecution would have at least three options if a court were to determine, after considering the relevant context, that admission of a proposed redacted confession would present a Confrontation Clause problem. The prosecution could redact the confession to eliminate any reference to the existence of an unnamed accomplice; try the confessing defendant individually; or proceed in a joint trial without the confession. Putting the prosecution to that choice is a modest price to pay in order to protect a fundamental constitutional right.").
119. *Samia*, 599 U.S. at 654.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 655.
125. *Id.* (Barrett, J., concurring).
126. *Id.*

evidence the majority used was superfluous.[127] First, she claimed that while the majority used historical cases like *Ball* as evidence of "longstanding practice," the cases it used did not represent the meaning of the Confrontation Clause "at the time of the founding," nor were they representative of the wide swath of cases from the founding to the present.[128] Recognizing the majority's inconsistent use of precedent, she asked, "[I]f we are going to pick up the thread in 1878, why drop it in 1896?"[129] Justice Barrett argued that the cases the majority used represent "only a snapshot" and were not reflective of longstanding practice.[130]

Second, Justice Barrett pointed out that, in addition to timing issues, the substance of the cases the majority used raised concerns.[131] These nineteenth- and early twentieth-century cases addressed only rules of evidence, not the Confrontation Clause, and "do not discuss the effectiveness of limiting instructions, much less any need for redaction."[132] The first, *Sparf v. United States*,[133] did not address either limiting instructions or redactions.[134] The trial court merely explained that the testimony of a codefendant should have been admitted only against the one who made the statement.[135] In the second, *Ball*, the trial court used a limiting instruction, but none of the defendants challenged the judge's admonition,[136] so the Supreme Court did not explore the case's Confrontation Clause implications.[137] The state cases the majority cited endorsed the use of a limiting instruction, but once again, the cases made no reference to defendants' Confrontation Clause rights.[138] Justice Barrett argues that, because the cases the majority used did not invoke the Confrontation Clause, their importance is diminished.[139] Had the defendants in these cases invoked the Confrontation Clause, the courts "might have gone to greater lengths" (e.g., redaction) to ensure no constitutional violation would occur.[140] Therefore, the most favorable reading of the cases cited by the majority is that a limiting instruction would sufficiently protect a codefendant from a declaration that would otherwise be inadmissible on hearsay grounds, not constitutional grounds.[141] According to Justice Barrett, nothing more could be inferred from these cases (i.e., one cannot infer Confrontation Clause application), so they were not a worthy use of historical analysis.[142]

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127. *Id.*
128. *Id.* at 655–56.
129. *Id.* at 656.
130. *Id.*
131. *Id.*
132. *Id.*
133. 156 U.S. 51 (1895).
134. *Id.* at 56, 58; *see also Samia*, 599 U.S. at 656.
135. *Sparf*, 156 U.S. at 56, 58.
136. "Admonition" and "limiting instruction" are used synonymously.
137. Ball v. United States, 163 U.S. 662, 672 (1896).
138. *Samia*, 599 U.S. at 656–57 (Barrett, J., concurring).
139. *Id.* at 657.
140. *Id.*
141. *Id.*
142. *Id.*

E. Justice Kagan's Dissenting Opinion

Justice Kagan authored a dissenting opinion.[143] Justices Sotomayor and Jackson joined.[144] The dissent set the stage with examples of two theoretical codefendants in situations that mirror the facts of *Bruton*, *Richardson*, *Gray*, and *Samia*.[145] In the first example, prosecutors used the confessing codefendant's unredacted testimony at trial without giving the other defendant the opportunity to cross-examine the confessor.[146] This example, the dissent said, would clearly violate the Confrontation Clause.[147] In the second example, the government redacted the confession to eliminate the implicated defendant ("Mary") from the testimony by replacing the defendant's name with the word "deleted," so the jury hears "deleted and I went out Saturday night and robbed Bill."[148] This redaction, even with a limiting instruction, is clearly inadmissible under Supreme Court precedent.[149] In the last example, instead of replacing the implicated defendant's name with the word "deleted," the government swapped the defendant's name with the words "a woman."[150] The jury thus hears, "A woman and I went out Saturday night and robbed Bill."[151] According to Justice Kagan's dissent, this last example is obvious and creates the same risk as the first two hypotheticals.[152] Jurors would rely on the codefendant's confession when assessing the nonconfessing defendant's guilt.[153] However, Justice Kagan observed that the majority attempted to distinguish the last example by claiming that when prosecutors replace a defendant's name with a placeholder that shows no sign that a name was omitted, there is no Sixth Amendment violation, "no matter how obvious the reference to the defendant."[154]

Emphasizing substance over form, Justice Kagan's dissent next turned to how *Bruton*, *Richardson*, and *Gray* compare to the facts of the *Samia* case.[155] In his opening statement, the prosecutor claimed that Samia was riding in the backseat of the van with Lee when Samia opened fire, shooting Lee twice in the face.[156] The next day, the DEA agent took the stand and testified about Stillwell's confession using placeholder terms to replace Samia's name.[157] Justice Kagan insisted, "Any reasonable juror would have realized immediately—and without reference to any other

143. *Id.* at 657 (Kagan, J., dissenting).
144. *Id.*
145. *Id.* at 657–58.
146. *Id.* at 658.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 659.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* at 660–61.
156. *Id.* at 662.
157. *Id.*

evidence—that 'the other person' who 'pulled the trigger' was Samia."[158] Where the majority went wrong, Justice Kagan asserted, is where it held that Samia was not directly implicated because his name was redacted, and the redaction was "not akin to an obvious blank or the word 'deleted.'"[159] In contrast, the *Bruton* rule has always turned on a "confession's inculpatory impact."[160] The Court in *Gray* likewise emphasized substance over form.[161] The *Gray* Court allowed the redacted phrase "me and a few other guys" instead of "me, deleted, deleted, and a few other guys" because the crime involved six perpetrators, only one of whom was on trial with the confessing defendant.[162] Thus, the phrase "me and a few other guys" did not point a finger directly at the nonconfessing codefendant, whereas the phrase "the other person" pointed directly at Samia.[163]

Next, Justice Kagan's dissent evaluated the majority's practical concern.[164] The practical concern involved the fear that a ruling for Samia would require future courts to conduct "extensive pretrial hearings" requiring judges to review "the Government's case in its entirety."[165] However, the dissent believed that *Gray* assuaged this fear.[166] There, the Court stated that the *Bruton* rule requires the courts only to "consider 'in advance of trial' such matters as the content of the confession, the number of defendants, and the prosecution's general theory of the case."[167] Justice Kagan remarked that administrative convenience cannot come at the expense of "fundamental principles of constitutional liberty."[168]

Last, Justice Kagan's dissent addressed the majority's use of two "props": (1) the presumption that jurors follow limiting instructions and (2) the alleged existence of controlling historical evidentiary practice.[169] Justice Kagan rebutted the first "prop" by relying on *Bruton*, where the Court refused to apply the presumption that jurors follow limiting instructions "when the evidence at issue is an accusatory codefendant confession."[170] Justice Kagan rebutted the second "prop" using the logic that if the majority's historical precedent was controlling, then *Bruton* would have been wrongly decided.[171] In other words, if the majority was correct that its historical evidence indicated that a limiting instruction adequately protects defendants' rights, then the *Bruton* Court should not have held that limiting instructions are an inadequate protection against a

158. *Id.*
159. *Id.* at 663.
160. *Id.*
161. *Id.* at 664.
162. *Id.* (cleaned up).
163. *Id.* (cleaned up).
164. *Id.*
165. *Id.*
166. *Id.* at 665.
167. *Id.*
168. *Id.*
169. *Id.* at 665–66. The dissent gives the majority's supporting reasons a negative connotation by using term "prop."
170. *Id.* at 665.
171. *Id.* at 666.

nontestifying codefendant's confession that explicitly implicates the nonconfessing defendant.

F. Justice Jackson's Dissenting Opinion

Justice Jackson authored a dissenting opinion in addition to joining Justice Kagan's dissent in full.[172] Justice Jackson asserted that the *Bruton* rule raises two distinct issues: (1) whether the facts of a case present a Confrontation Clause issue and (2) if so, whether there are any remedies (e.g., redactions and limiting instructions) available for curing that Confrontation Clause issue.[173] She asserted that the majority skipped over the first question completely and that its framing "inverts the constitutional principles that govern this case."[174] Instead, the majority's analysis should have started from the premise that Samia's constitutional rights were threatened unless he had a prior opportunity to cross-examine Stillwell.[175] Because Stillwell's statement was testimonial and thus satisfied *Crawford*,[176] the "default presumption" should have been that Stillwell's confession was not admissible—not the majority's initial presumption that jurors follow instructions—"because the statement implicated Samia on its face."[177] According to Justice Jackson, the majority flipped the rule and the exception.[178] The Confrontation Clause should be the rule, and any deviation from its protections should be the exception.[179]

III. *SAMIA* VIOLATES THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE

The Court incorrectly decided *Samia* because the use of a nontestifying codefendant's confession that makes an immediately obvious reference to the nonconfessing defendant violates the Confrontation Clause. Neither redactions nor limiting instructions will satisfy the demands of the Sixth Amendment when an immediately obvious reference to the nonconfessing defendant is made. Proper framing of the issue, evaluation of Supreme Court precedent, and important policy considerations favor a different outcome in *Samia*.

The Confrontation Clause protects criminal defendants' rights to be confronted with the witnesses against them. As explained below in Section A, when the nature of a case implicates the Confrontation Clause, the starting presumption should not be that jurors follow judges' instructions, but

172. *Id.* at 667 (Jackson, J., dissenting).
173. *Id.* at 668.
174. *Id.* at 667.
175. *Id.* at 667–68.
176. *Crawford* held that the Confrontation Clause applies to "witnesses" against the accused—those who "bear testimony." Crawford v. Washington, 541 U.S. 36, 51 (2004). The *Crawford* Court included interrogations by law enforcement officers within the scope of "testimonial statements." *Id.* at 53–54. Stillwell's confession qualifies as testimonial because it was made post-arrest during a law enforcement interrogation.
177. *Samia*, 599 U.S. at 668 (Jackson, J., dissenting).
178. *Id.* at 668.
179. *Id.*

instead must be that defendants have a right to confront the witnesses against them. As Justice Jackson's dissenting opinion stated, "[T]he Court's analysis must, instead, *start* from the premise that the introduction of Stillwell's inculpatory confession during the joint trial threatened Samia's Confrontation Clause rights."[180] Section B argues that this framing is correct because it places an individual's rights above the government's efficiency interests, a prioritization that is well-established and valued in American history—and, indeed, central to the point of constitutionally-enshrined rights.[181] From the starting presumption that Samia's constitutional rights were violated unless his case falls within an exception, this Note demonstrates (1) in Section C, that the majority incorrectly defines the direct/indirect implication distinction, (2) in Section D, that the jurors' inevitable use of inference and context means that limiting instructions in codefendant cases are ineffective, and (3) in Section E, that the majority's emphasis on form over substance disregards the fact that using context to determine a Confrontation Clause violation is unavoidable. Last, by constraining the effectiveness of the Sixth Amendment, the decision in *Samia* enhances the already enormous power that prosecutors wield. In Section F, this Note maintains that because efforts to reform prosecutorial overreach have been largely ineffective, upholding defendants' confrontation rights is a modest means by which the judiciary can help rein in prosecutorial power.

A. Proper Framing Begins with the Confrontation Clause

When a defendant invokes a constitutional right, a court's first step is to evaluate the constitutional text at issue. The very nature of interpreting a document requires interpreters to evaluate the text itself.[182] Moreover, in *McCulloch v. Maryland*,[183] the Court held, "The government of the Union, though limited in its powers, is supreme within its sphere of action, and its laws, when made in pursuance of the [C]onstitution, form the supreme law of the land."[184] Because the Constitution is the supreme law of the land, a court's most appropriate starting point for an analysis of a constitutional issue begins with the text itself, as opposed to statutes, rules, regulations, or case law.[185]

This framing aligns with the purposes of writing a constitution rather than creating a different form of governance. With fear of tyranny ever-present in their minds, the Framers created the Constitution for the

180. *Samia*, 599 U.S. at 667–68 (Jackson, J., dissenting).

181. *See* Dennis G. LaGory, *Federalism, Separation of Powers, and Individual Liberties*, 40 VAND. L. REV. 1353, 1353 (1987).

182. *See* BRANDON J. MURRILL, CONG. RSCH. SERV., R45129, MODES OF CONSTITUTIONAL INTERPRETATION 5 (2018).

183. 17 U.S. 316 (1819).

184. *Id.* at 317.

185. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 576 (2008) (beginning the Court's interpretation with the text of the Second Amendment).

purpose of holding fast to certain values that society held dear.[186] "A constitution is society's attempt to tie its own hands, to limit its ability to fall prey to weaknesses that might harm or undermine cherished values. History teaches that the passions of the moment can cause people to sacrifice even the most basic principles of liberty and justice."[187] In *Samia*, the majority pays lip service to the Sixth Amendment text and instead begins its analysis (after discussing historical evidentiary practices) with the "broader assumption that jurors can be relied upon to follow the trial judge's instructions."[188] As Justice Jackson pointed out, "[t]hat approach inverts the constitutional principles that govern this case."[189] Jury efficacy is a central presumption of the U.S. criminal justice system.[190] Nevertheless, a Confrontation Clause analysis should begin with the Clause itself, not with precedent about whether jurors can compartmentalize their knowledge of inculpatory evidence when instructed to do so. In *Samia*, the analysis should have started with the presumption that Samia's right to confrontation was jeopardized, not with the presumption that jurors will follow instructions well enough to prevent constitutional violations.

The Supreme Court itself has emphasized the importance of starting with the proper premise, including when it expressly overturned *Delli Paoli* in *Bruton*.[191] *Delli Paoli* held that it is "'reasonably possible for the jury to follow' sufficiently clear instructions to disregard the confessor's extrajudicial statement that his codefendant participated with him in committing the crime."[192] Subsequently, the *Bruton* Court admitted that the starting presumption that jurors follow limiting instructions is not effective in joint trials where a confession is "facially incriminating" of the other defendant.[193] In other words, the two presumptions—that jurors follow limiting instructions and that a defendant's right to confront the witness against them is violated when a nontestifying codefendant's confession is admitted into evidence at a joint trial—are mutually exclusive when the confession of one defendant facially incriminates the other (i.e., names the nonconfessing defendant). In *Bruton*, the Court explained, "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the

186. New York v. United States, 505 U.S. 144, 206 (1992) (White, J., concurring).

187. Donna Bader, *The Case Against the Supreme Court by Erwin Chemerinsky: A Book Review*, PLAINTIFF, Feb. 2015, at 1.

188. Samia v. United States, 599 U.S. 635, 646 (2023).

189. *Id.* at 667 (Jackson, J., dissenting).

190. After all, the right to a jury trial is guaranteed by the Sixth Amendment. U.S. CONST. amend. VI.

191. Bruton v. United States, 391 U.S. 123, 126 (1968).

192. *Id.* (quoting Delli Paoli v. United States, 352 U.S. 232, 239 (1957), *overruled by* Bruton v. United States, 391 U.S. 123 (1968)).

193. Richardson v. Marsh, 481 U.S. 200, 207 (1987). Of note, the *Bruton* Court does not use the term "facially incriminating." In *Richardson*, the term is used to describe confessions in which the defendant is expressly named. *Id.*

defendant, that the practical and human limitations of the jury system cannot be ignored."[194]

To demonstrate the severity of this risk, the *Bruton* Court explained the issues that can arise when starting an analysis from the presumption that jurors follow limiting instructions.[195] Roughly a decade after *Delli Paoli*, prosecutors charged Bruton and Evans with armed postal robbery.[196] Evans orally confessed and expressly implicated his accomplice, Bruton.[197] In their joint trial, the judge instructed the jury to use Evans's confession as evidence against Evans but not Bruton.[198] The jury convicted both defendants, but at a new trial, a different jury acquitted Evans.[199] Recognizing how much weight the jury placed on Evans's confession to determine Bruton's guilt ("the other evidence against [Bruton] is not strong"), the Court suggested that the starting presumption for any joint trial must be that the defendant has a right to cross-examine the confessing codefendant, not that jurors follow instructions.[200]

B. Placing Defendants' Rights Before the Government's Interests

In the context of allocating burdens between individuals and society, "courts and commentators repeatedly affirmed that an individual's liberty interest was valued over society's interest in obtaining a conviction."[201] As William Blackstone famously opined, "[T]he law holds, that it is better that ten guilty persons escape, than that one innocent suffer."[202] "Evidence of this value, as a reflection of the presumption of innocence, may be seen in the reasonable doubt rule, as well as a series of substantive and procedural safeguards that arguably presuppose legal innocence, e.g., . . . the right to confront adverse witnesses . . . ."[203] Placing a higher burden on the prosecution—not only to prove the defendant is guilty beyond a reasonable doubt but also to prove that the evidence the prosecution wishes to present to the jury is not unjust or unduly prejudicial—helps to protect individuals from false convictions. "By not affording a defendant [their] right to confrontation in these cases, the Court precludes the defendant from testing the reliability and accuracy of particularly suspect testimony."[204] Placing a higher burden on the government with a starting presumption that favors the defendant ensures that courts protect defendants' Confrontation Clause rights.

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194. *Bruton*, 391 U.S. at 135.
195. *Id.* at 124–26.
196. *Id.* at 124.
197. *Id.*
198. *Id.* at 125.
199. *Id.* at 124–26.
200. *Id.* at 126.
201. William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 332–33 (1995).
202. 4 WILLIAM BLACKSTONE, COMMENTARIES 352.
203. Laufer, *supra* note 201, at 333–34.
204. Aviva Jezer, *The Right to Confrontation in Codefendant Confession Cases:* Richardson v. Marsh *and* Cruz v. New York, 74 CORNELL L. REV. 712, 737 (1989).

C. The Terms: The Majority's Direct/Indirect Distinction Misconstrues a Key Category

The *Samia* majority stated, "Viewed together, the Court's precedents distinguish between confessions that directly implicate a defendant and those that do so indirectly."[205] This is a distinction that could be a useful tool for future courts as long as the categories of "direct" and "indirect" are properly defined. The *Samia* Court determined that a direct implication would violate the Sixth Amendment, but an indirect implication would not violate the Sixth Amendment. The *Samia* Court erred because they miscategorized immediately obvious inferences as an indirect implication. If immediately obvious inferences had been categorized as a direct implication, the Court's decision would have better aligned with precedent cases and would have upheld Samia's confrontation rights.

To better understand this direct/indirect distinction, it helps to evaluate how the Supreme Court's holdings in *Bruton*, *Richardson*, and *Gray* categorized codefendant confessions as either direct or indirect. The *Bruton* Court introduced the category of direct implication, using "direct" simply to refer to expressly naming the nonconfessing defendant. In *Bruton*, Evans's confession implicated Bruton in a robbery by directly stating his name within the confession.[206] *Gray* identified another form of direct implication, expanding the category to include confessions in which the nonconfessing defendant's name is obviously redacted. In *Gray*, prosecutors redacted Bell's confession to use the word "deleted" or "deletion" whenever Gray's name was mentioned.[207] After a detective read the confession on the stand, the prosecutor asked the detective to confirm that he was, "subsequently . . . able to arrest Mr. Kevin Gray."[208] Last, *Richardson*, as analyzed by the *Gray* Court, illuminated what qualifies as an indirect implication. Importantly, the redaction in *Richardson* did not "refer directly to the 'existence' of the nonconfessing defendant" at the time the confession was read to jurors, and thus the confession only indirectly implicated Marsh.[209]

The *Samia* Court errs in determining that the redaction in Stillwell's confession did not obviously refer to Samia's existence at the time the confession was read to jurors, and, thus, did not directly implicate Samia. The "other person" obviously referred to Samia.[210] This placeholder phrase, "other person," would cause jurors to "lift [their] eyes to [the defendant], sitting at counsel table, to find what will seem the obvious answer, at least if the juror hears the judge's instruction not to consider the confession as evidence against [the defendant], for that instruction will

205. Samia v. United States, 599 U.S. 635, 652 (2023).
206. *Id.* at 648.
207. *Id.* at 650–51.
208. *Id.* at 651.
209. *Id.* (quoting Gray v. Maryland, 523 U.S. 185, 192 (1998) (internal quotations altered for readability)).
210. *Samia*, 599 U.S. at 642.

provide an obvious reason [for the missing identity of the 'other person'].'"[211]

Richardson clarified that a redacted confession refers to the defendant's existence when it includes enough information or context that it becomes immediately obvious at the time the confession is introduced that, for example, the phrase "other person" refers to the nonconfessing defendant.[212] If evidence later introduced at trial inferentially incriminates the nonconfessing codefendant, as in *Richardson* where the codefendant placed herself at the crime scene through her own testimony, then there is no Confrontation Clause violation.[213] There must be a balance between introducing useful evidence and protecting the defendant's rights. The Supreme Court should acknowledge that immediately obvious inferences are direct implications and therefore an inadmissible form of evidence. Including the category of immediately obvious inferences within the scope of direct implications appropriately weighs the balance in favor of the defendant.

In her dissenting opinion, Justice Kagan stated that the jury knew from the start of the trial that there were three defendants on trial for a death in the Philippines, and the jury knew the role each defendant allegedly played as soon as the prosecutor gave his opening statement[214]—"[s]o when the [DEA] agent took the stand on day two of the trial, it didn't make a lick of difference that he didn't identify the shooter by name, but instead used placeholder terms."[215] The prosecutor theorized that Samia was sitting in the passenger seat of the van, pulled out a gun, and shot Lee.[216] Then, the prosecutor listed the "most crucial testimony" they would use, such as testimony "that Stillwell and [Samia] had coordinated their travel, met shortly after their arrival in the Philippines, and lived together there."[217] There is little doubt that when the prosecution admitted Stillwell's redacted confession into evidence, it was immediately obvious that the "other person" was Samia. By not including immediately obvious inferences within the scope of direct implications, the *Samia* Court erected an analytical Potemkin Village[218] to conceal its elevation of judicial economy over defendants' constitutional rights.

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211. *Gray*, 523 U.S. at 193.
212. *Id.* at 196.
213. Richardson v. Marsh, 481 U.S. 200, 208 (1987).
214. *Samia*, 599 U.S. at 662 (Kagan, J., dissenting).
215. *Id.*
216. Brief for Petitioner, *supra* note 79, at 8–9.
217. *Id.* at 9, 11.
218. Grigory Potyomkin was a Russian nobleman who erected pasteboard facades of pretty towns and set them up at a distance on riverbanks to show Catherine the Great the "best face of the empire" during her 1783 tour of new Russian possessions in Crimea. Today, "[a] 'Potemkin village' signifies any deceptive or false construct, conjured . . . to deceive both those within the land and those peering in from outside." Ishaan Tharoor, *Top Ten Weird Government Secrets*, TIME MAG. (Aug. 6, 2010), https://content.time.com/time/specials/packages/article/0,28804,2008962_2008964_2009010,00.html.

D. The Limiting Instruction: Inference Is Not Only Essential but Also Unavoidable.

In the context of joint trials, limiting instructions are mostly ineffective.[219] Thus, the presumption that jurors follow limiting instructions violates due process when those instructions ask jurors to ignore a direct implication in codefendant confessions. "[A] large body of research indicates that jurors have great difficulty ignoring information once they have become aware of it."[220] Moreover, numerous justices and judges recognize that limiting instructions are just that: limited. Justice Jackson stated, "The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be an unmitigated fiction."[221] Justice Frankfurter, in his dissenting opinion in *Delli Paoli*, explained, "[T]oo 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. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection . . . ."[222] Judge Learned Hand described limiting instructions as a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody else's."[223] Judge Jerome Frank called limiting instructions "a kind of 'judicial lie': [They] undermine[] a moral relationship between the courts, the jurors, and the public; like any other judicial deception, it damages the decent judicial administration of justice."[224] Professor Josephine Ross illustrated the practical nature of limiting instructions' ineffectiveness, describing a hypothetical situation where a jury is instructed to consider past physical abuse by a husband as proof of the husband's pattern of behavior but not as evidence of the likelihood that he would beat his wife again.[225] Professor Ross concluded that this "is like telling a jury they can examine the elephant in the room, and consider its weight, but they may not consider its size. Prior bad acts often operate as bad character evidence, and of the most persuasive kind."[226]

The ineffectiveness of limiting instructions is not simply anecdotal. Limiting instructions are also practically inconsistent with other facets of jurors' responsibilities. Federal pattern jury instructions define "inference" for jurors: "It is a reasoned, logical decision to conclude that a disputed

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219. *See* Minn. L. Rev. Editorial Board, *The Limiting Instruction—Its Effectiveness and Effect*, 51 MINN. L. REV. 264, 277–81 (1966).

220. Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions*, 6 PSYCH., PUB. POL'Y, & L. 677, 678 (2000).

221. Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (internal citation omitted).

222. Delli Paoli v. United States, 352 U.S. 232, 247 (1957) (Frankfurter, J., dissenting), *overruled by* Bruton v. United States, 391 U.S. 123 (1968).

223. Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932).

224. United States v. Grunewald, 233 F.2d 556, 574 (2d Cir. 1956) (Frank, J., dissenting), *rev'd*, 353 U.S. 391 (1957).

225. Josephine Ross, *"He Looks Guilty": Reforming Good Character Evidence to Undercut the Presumption of Guilt*, 65 U. PITT. L. REV. 227, 252 (2004).

226. *Id.*

fact exists on the basis of another fact that you know exists."[227] Inferences, the judge would explain, can be drawn from either direct or circumstantial evidence. Jurors must use their "common sense" and draw inferences "as would be justified in light of [their] experience."[228] This charge tells jurors to use contextual analysis when considering evidence. For jurors, the judge would explain, circumstantial evidence is just as good as direct evidence. On the other hand, the starting presumption that jurors follow limiting instructions implies the opposite approach, as limiting instructions preclude the use of context. The majority argued the presumption that jurors follow instructions credits jurors' intelligence.[229] In fact, this presumption coupled with the jury instructions described above indicates that jurors should use their own life experiences and circumstantial evidence, but when it comes to nontestifying codefendant confessions that incriminate a nonconfessing codefendant, jurors should ignore their intuition. The Court might as well say, "Please use your life experiences and common sense with every other piece of evidence, but not this piece."

Not only do common sense and research tell us that limiting instructions are mostly ineffective, but sometimes those instructions backfire.[230] A 1966 study "presented participants with pretrial newspaper crime reports that varied in terms of crime seriousness, confessions or denials made by the suspect, information regarding whether the suspect was held in custody or released, and either favorable or unfavorable statements made by the district attorney toward the defendant."[231] Participants playing the role of jurors found the defendant guilty more often when they heard unfavorable evidence—but the most damaging form of evidence was a police report of a confession.[232] In other words, a secondhand reference to a defendant's confession had a more unfavorable impact on jurors than any other form of evidence.

A 1997 study suggested that jurors are selective with the information they use.[233] When one group of jurors was told to ignore a confession because it had been obtained illegally while the other group was told a confession was admissible, both groups rendered guilty verdicts equally as often.[234] However, when a judge told jurors to disregard a confession because of the poor quality of the tape upon which the confession was recorded, jurors successfully disregarded the inadmissible evidence.[235] This study seemed to indicate that "[i]f mock jurors are given a logical reason for the judge's decisions that they believe is legitimate, then there is

227. 1 LEONARD B. SAND, MODERN FEDERAL JURY INSTRUCTIONS-CRIMINAL § 6.01 (2023).
228. *Id.*
229. Samia v. United States, 599 U.S. 635, 647 (2023).
230. Lieberman & Arndt, *supra* note 220, at 678.
231. *Id.* at 680.
232. *Id.* at 680–81.
233. *Id.* at 688.
234. *Id.*
235. *Id.*

evidence that they are able to obey the admonitions."[236] Yet when judges give their limiting instructions in codefendant confession cases, they simply state that the evidence should not be used against the other defendant.[237] Not only does the judge not give a reason for this limit on jurors' use of contextual analysis but the judge also tells jurors that the confession is valid evidence as to the confessing defendant. This limitation on the use of contextual analysis undermines, not promotes, juror efficacy by nonsensically telling jurors that the Court trusts them not to use common sense.

A 2017 study suggested that the effectiveness of limiting instructions may be individual-specific.[238] Those who enjoy cognitive activity were more likely to heed limiting instructions and can disregard emotional evidence when rendering a verdict decision.[239] But the limiting instructions backfired for those jurors who "are not motivated to engage in cognitive activity spontaneously."[240] These jurors, who the study called low in "NFC," or the "need for cognition," were persuaded by emotional evidence and "seemed to pay more attention to the information they were instructed to disregard."[241] The study demonstrated that limiting instructions only work for select people (i.e., those with high NFC).[242] Further, while it is impractical to "pre-screen potential jurors in terms of their cognitive predisposition,"[243] the study indicates that the risk that some jurors will render a guilty verdict simply because they are unable to obey limiting instructions is too great, especially when a defendant's life or liberty is in jeopardy.

E. The Redaction: Context Is Not Only Essential but Also Unavoidable.

The *Samia* majority's emphasis on form over substance ignores the fact that using context to determine a Confrontation Clause violation is unavoidable. Using context refers to the use of evidence to make an inference. In the majority opinion, Justice Thomas warned against the use of context, concluding that, "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."[244] The majority's argument fails for two reasons. First, trial courts already must use context when assessing what evidence will be introduced to determine whether a confession is testimonial and falls under

236. *Id.*
237. S2 LEONARD B. SAND, MODERN FEDERAL JURY INSTRUCTIONS-CRIMINAL § 2.15 (2023).
238. Kayo Matsuo & Yuji Itoh, *The Effects of Limiting Instructions About Emotional Evidence Depend on Need for Cognition*, 24 PSYCHIATRY, PSYCH. & L. 516, 516 (2017).
239. *Id.* at 525.
240. *Id.*
241. *Id.* at 525–26.
242. *Id.* at 527.
243. *Id.*
244. Samia v. United States, 599 U.S. 635, 653 (2023). Flyspeck means "any minute spot." *Flyspeck*, DICTIONARY.COM, https://www.dictionary.com/browse/flyspeck (last visited July 28, 2024).

the *Bruton* rule.[245] Second, because juries must make an inference to leap from "deleted" to "Gray" and *Gray* fell under the direct implication category, courts must evaluate all redacted confessions in context.

1. Context Is Already Used to Determine Whether a Confession Is Testimonial

Considering the first point, *Crawford* established that "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" are considered testimonial.[246] That definition demands the use of context to determine whether a statement is testimonial in nature.[247] As the defense in *Samia* identified, if the Supreme Court was to find that context is irrelevant for determining whether a confession is sufficiently incriminatory to fall under *Bruton*, "it would create an internal inconsistency."[248] Courts would focus on the surrounding context to determine whether a codefendant's confession is testimonial and then completely ignore that context to determine whether the confession implicates the nonconfessing defendant directly enough to bring the confession under the *Bruton* rule.[249] This analytical gymnastics would require a court to consider context when determining if a confession is testimonial under *Crawford* "but then bury its head in the sand at the *Bruton* step."[250]

To elaborate on the need for context, the Court in *Bruton* utilized a contextual analysis to determine the risk that admitting a nontestifying codefendant's confession might prejudice the jury.[251] The *Bruton* Court drew comparisons to the circumstances in *Douglas v. Alabama*[252] to determine the effect of Evans's confession.[253] Through the use of context—looking at how jurors in each case perceived the confessions—the Court found that Evans's confession was even more prejudicial than the confession that violated the Confrontation Clause in *Douglas*. In *Douglas*, prosecutors tried Loyd and Douglas separately for assault with intent to murder.[254] Douglas's trial began after a jury convicted Loyd.[255] The judge granted the prosecutor permission to put Loyd on the stand and ask him to confirm or deny statements in which he confessed to the crime and inculpated Douglas.[256] Loyd refused to answer the prosecutor's questions to avoid self-incrimination while his appeal was pending.[257] The Court held

245. *See* Motion for Leave to File Brief of Amici Curiae at 8, *Samia*, 599 U.S. 635 (2023) (No. 22-196).
246. Crawford v. Washington, 541 U.S. 36, 52 (2004).
247. Motion for Leave to File Brief of Amici Curiae, *supra* note 245, at 8.
248. *Id.*
249. *Id.*
250. *Id.* at 12–13.
251. Bruton v. United States, 391 U.S. 123, 126–27 (1968).
252. 380 U.S. 415 (1965).
253. *Bruton*, 391 U.S. at 126.
254. *Id.* at 126–27.
255. *Id.* at 127.
256. *Id.*
257. *Id.*

that Douglas's inability to cross-examine Loyd violated Douglas's Confrontation Clause rights.[258] Comparing *Douglas* with Bruton's case, the Court stated that the risk of prejudice in *Bruton* was even more serious than in *Douglas* because in *Douglas*, Loyd's refusal to answer the prosecutor's questions was not technically testimony.[259] Even then, prosecutors had violated Douglas's constitutional rights because the prosecutor's reading of Loyd's statements:

> may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement; and Loyd's reliance upon the [Fifth Amendment] privilege [against self-incrimination] created a situation in which the jury might improperly infer both that the statement had been made and that it was true.[260]

Even though Loyd's refusal to answer questions on the stand was not testimony, the Court considered the effect Loyd's actions would have had on the jury.

On the other hand, in *Bruton*, prosecutors admitted Evans's confession as testimonial evidence.[261] "Even greater, then, was the likelihood that the jury would believe Evans made the statements and that they were true . . . ."[262] The Court's use of context was crucial in its determination that the confession in *Bruton* was even more incriminating than the confession in *Douglas*. The Court analyzed how the jury would perceive the confession and how they might draw inferences from it in both cases.[263] This is a clear use of context to determine the incriminating effect of a confession. Considering context is necessary to maintain consistency in Confrontation Clause jurisprudence. If courts allow context to determine whether statements are "testimonial" or whether confessions are unduly prejudicial, it would be illogical to preclude courts from considering context to determine whether confessions are sufficiently incriminatory to violate *Bruton*.[264]

2. Context Is Used to Evaluate All Redacted Confessions

Second, all redacted confessions (whether they include direct or indirect implications) must evaluate context. The Supreme Court calls the confession used in *Gray* an immediately obvious redaction;[265] this is where the majority in *Samia* draws the line between direct and indirect

258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.* at 127–28.
264. *Id.* at 130.
265. The term "immediately obvious redaction" differs from this Note's use of "immediately obvious" reference or inference. According to the *Samia* Court, an "immediately obvious redaction" occurs when the jurors can tell that the defendant's name was obviously redacted, whereas an "immediately obvious inference" occurs when the jurors can tell that the defendant has been implicated at the time the confession is read. Samia v. United States, 599 U.S. 635, 648–50 (2023).

implications.[266] The Court asserts that direct implications include obviously redacted confessions, such as those containing blanks, the words "deleted" or "deletion," shortened first names, nicknames, and other unique descriptions, such as "red-haired, bearded, one-eyed man-with-a-limp."[267] Indirect implications, according to the majority, cover everything else.[268] This definition of direct implications is too narrow to align with precedent because the definition disregards how the Court distinguished *Gray* from *Richardson*.

The practical effect of the majority's argument in *Samia* is to reframe *Richardson* as holding that whenever a jury must draw an inference (even an immediately obvious inference), the *Bruton* rule does not apply at all.[269] However, *Gray* stated, "*Richardson* must depend in significant part upon the *kind of*, not the simple *fact of*, inference. *Richardson*'s inferences involved statements that did not refer directly to the defendant himself [sic] and which became incriminating 'only when linked with evidence introduced later at trial.'"[270] *Richardson* did not involve a Confrontation Clause violation because at the time the confession was read, the codefendant's involvement in the crime was not immediately obvious. Despite the *Samia* majority framing any inferences that a juror draws as outside the scope of *Bruton*, inferences and the use of context are unavoidable if courts must look to the *kind of* inference, not just the simple *fact of* inference. Therefore, whether a jury must infer something cannot be the difference between direct and indirect implication. The *Samia* Court attempted to distinguish use of the phrase "deleted" in *Gray* from use of the phrase "the other person" in *Samia*. The distinction between "deleted" and "the other person" is specious because the reference to Samia was immediately obvious at the time the confession was read. Claiming that jurors cannot see through a veil that thin insults jurors' intelligence.

Starting from the presumption that admitting Stillwell's redacted confession potentially jeopardized Samia's Confrontation Clause rights (instead of the majority's initial presumption that jurors follow instructions), only one result logically follows. Consider this statement from the *Gray* Court: "[t]he inferences at issue here involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences a jury ordinarily could make immediately, even were the confession the very first item introduced at trial."[271] Therefore, the reviewing court must use context to determine whether a redacted confession specifically referred to the defendant's existence and whether the jury might have been able to infer, at the time the confession was introduced as evidence, that the confession implicated the

266. *Id.* at 653.
267. *Id.* at 651–52.
268. *See id.* at 652.
269. *Id.* at 652–53.
270. Gray v. Maryland, 523 U.S. 185, 196 (1998).
271. *Id.*

nonconfessing codefendant. This "immediately obvious" distinction better recognizes that once a codefendant's confession creeps into evidence and risks falling within the *Bruton* rule, courts must utilize context. Describing some inferences as inferring too far or some redactions as "not-as-obvious" is too arbitrary of a distinction. Instead, the Court should adopt the "immediately obvious" distinction so that courts consider context when determining whether a confession impermissibly refers to a codefendant's existence at the time the confession is delivered to jurors. If it does, a Confrontation Clause violation exists.

Thus, the majority should have held that a properly redacted codefendant confession should make no reference to the nonconfessing defendant either expressly or by immediately obvious implication. Both of these implication types should fall under the majority's "direct implication" category. That is, at the time the confession is delivered to the jury, it should not be immediately obvious that the nonconfessing defendant was involved in the crime.

F. Final Considerations: Reigning in Prosecutorial Power

Prosecutorial accountability straddles a precarious line. Prosecutors are accountable both to the public, as elected officials, and to the law, as legal officers.[272] And yet, in practice, they sometimes appear accountable to neither.[273] "[T]he technical nature of their work helps to make public assessments of their performance superficial and often perfunctory," and "they escape close supervision by the judiciary in part because they are advocates, not judges, and 'amenable to professional discipline' by the bar."[274] Prosecutors wield an enormous amount of power and are granted almost "boundless" discretion.[275] They exercise this discretion at different stages of criminal litigation, including making charging decisions, entering into cooperation agreements, accepting pleas, and dictating sentences or sentencing ranges.[276] While it is certainly not the case that all prosecutors use their discretionary powers in an arbitrary or abusive manner, broad discretion can facilitate abuse.[277] In a system where pleas outnumber trials, the prosecutor serves not only as an enforcer but also as a final adjudicator.[278] "In a national government whose hallmark is supposed to be the separation of powers, federal prosecutors are a glaring and dangerous exception. They have the authority to take away liberty, yet they are often

272. David Alan Sklansky, *Criminology: The Nature and Function of Prosecutorial Power*, 106 J. CRIM L. & CRIMINOLOGY 473, 512 (2016).
273. *Id.*
274. *Id.*
275. Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 821, 832 (2013).
276. Maximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 248–49 (2006).
277. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871 (2009).
278. *Id.*

the final judges in their own cases."[279] Their power extends not only into the executive and judicial realms but also into the legislative realm by "setting the penal code's effective scope."[280] One simple way that the judiciary can rein in this prosecutorial power is to better uphold defendants' constitutional rights by forbidding the prosecution to admit immediately obvious inferences to nonconfessing codefendants in redacted confessions.

The sentiment that prosecutors have immense and barely restrained power is not new. Former U.S. Attorney General Robert H. Jackson noted that prosecutors can investigate individuals, order arrests, have individuals indicted and held for trial, dismiss a case, take a case to trial, make sentencing recommendations, and recommend whether an individual is fit for parole.[281] "The prosecutor has more control over life, liberty, and reputation than any other person in America. . . . While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst."[282]

Moreover, prosecutorial power is growing[283] and many attempts at reform have been unsuccessful.[284] For an example of how prosecutorial power is growing, take the Court's narrowing of what constitutes "testimonial" hearsay, which allows prosecutors to admit more hearsay into evidence. After *Crawford*, *Davis v. Washington*[285] held that "while 'testimonial' hearsay [i]s inadmissible absent confrontation, 'nontestimonial' hearsay—a broad category of admissible hearsay—[i]s 'not subject to the Confrontation Clause' at all."[286] In *Michigan v. Bryant*,[287] the Court further

279. *Id.*

280. Sklansky, *supra* note 272, at 513; *see also* Erik Luna, *Prosecutor King*, 1 STAN. J. CRIM. L. & POL'Y 48, 57 (2014) ("Practice demonstrates a concentration of authority in a single office, where prosecutors not only *execute* the law in the conventional sense, but also effectively *adjudicate* matters by their decisions in individual cases. From another vantage point, prosecutors may even *legislate* criminal law, setting the penal code's effective scope over an entire caseload through collective decision making of varying levels of coordination.").

281. Robert H. Jackson, Att'y Gen. of the U.S., Speech at the Second Annual Conference of United States Attorneys: The Federal Prosecutor 1 (Apr. 1, 1940), https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf.

282. *Id.*

283. Barkow, *supra* note 277, at 921.

284. Sklansky, *supra* note 272, at 513 ("Faced with the difficulty of reconciling the realities of prosecutorial power with the aspirations of a constitutional democracy, reformers generally have pursued one of two paths—or, most often, some combination of them. The first is to make prosecutors more responsive to the public. The typical strategy for achieving this is either increased transparency or, less commonly, some combination of decentralization and community outreach. The second path is to make prosecutors more accountable to law, either through outside oversight (to courts, bar associations, or special disciplinary boards) or by strengthening of rule-of-law norms inside prosecutors' offices. The first path tries to enhance democratic control of prosecutors; the second is often (but not always) motivated in part by a desire to insulate prosecutors from politics. The two paths actually do not diverge very far. In fact, the three most striking things about the reform programs that have been put forward over the past half-century for addressing prosecutorial power are how similar they have been to each other, how relatively modest they have been in their ambitions, and how unsuccessful they have been in achieving even their limited goals.").

285. 547 U.S. 813 (2006).

286. Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. REV. 1865, 1867 (2012) (citing *Davis*, 547 U.S. at 821).

287. 562 U.S. 344 (2011).

narrowed "testimonial" statements to only include statements "procured with a primary purpose of creating an out-of-court substitute for trial testimony."[288] *Bryant* held that statements admitted under many commonly utilized hearsay exceptions (e.g., excited utterances, present sense impressions, co-conspirator statements, and statements for medical diagnosis or treatment) will rarely be testimonial and are thus unregulated by the Confrontation Clause.[289]

"It is hard to overstate the power of federal prosecutors."[290] The number of federal criminal laws has exploded, and the punishments attached to those laws have increased dramatically.[291] "There are now approximately 200,000 federal prisoners, making the federal prison system the largest in the country, eclipsing each and every state."[292] Moreover, joint trials grant prosecutors dangerous tactical weapons.[293] Multiple defendants arguing their cases at the same time in front of the same jurors inevitably attempt to exculpate themselves at their codefendants' expense.[294] While each defendant usually relies on their own independent counsel, prosecutors can develop a coordinated attack.[295]

One modest way that the judiciary can rein in this prosecutorial power is to better uphold defendants' constitutional rights. One of the most important of these constitutional rights is the right to confront opposing witnesses. By forbidding the prosecution to admit redacted confessions containing immediately obvious inferences to nonconfessing codefendants, courts could better defend individuals' Sixth Amendment rights. "If it is to do nothing else, the Clause must prevent the prosecution, with its inherent advantage in structuring criminal trials, from procuring admissible out-of-court substitutes for live testimony and thereby extinguishing the defendant's right to cross examination."[296] If the primary goal of evidence rules and trial process is "factual accuracy,"[297] then judicial economy cannot stand in the way of finding the truth or protecting constitutional rights. "The evidence rules play as prominent a role in the flawed convictions unearthed by the Innocence Movement[298] as any of the more widely-criticized levers of the criminal justice system. And yet the

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288. *Id.* at 358.
289. Bellin, *supra* note 286, at 1868.
290. Barkow, *supra* note 277, at 870.
291. *Id.*
292. *Id.*
293. Richard F. Dzubin, *The Extension of the Bruton Rule at the Expense of Judicial Efficiency in* Gray v. Maryland, 33 U. RICH. L. REV. 227, 241 (1999).
294. *Id.*
295. *Id.*
296. Bellin, *supra* note 286, at 1869.
297. Jeffrey Bellin, *The Evidence Rules That Convict the Innocent*, 106 CORNELL L. REV. 305, 315 (2021).
298. The Innocence Movement is "a coalition of lawyers, activists, exonerated individuals, and others who have revealed the troubling reality and likely causes of erroneous convictions. The Movement's core work has been exonerating wrongfully convicted individuals by proving their innocence and implementing legislative and other policy reforms designed to prevent future miscarriages of justice." Jenny Roberts, *The Innocence Movement and Misdemeanors*, 98 B.U. L. REV. 779, 780 (2018).

implicated rules escape notice both in debates about wrongful convictions and critiques of evidence policy generally."[299] There are ways in which the judiciary could rein in prosecutorial power—from reevaluating the testimonial/nontestimonial distinction, to requiring proof of nonavailability of witnesses, to evaluating the context of evidence in codefendant confession cases to determine if an immediately obvious reference to a nonconfessing defendant exists. Courts should utilize these strategies to uphold defendants' constitutional rights and better ascertain the truth.

CONCLUSION

The Supreme Court's decision in *Samia* is a triumph for prosecutors and judicial economy. But it is a threat to defendants' Sixth Amendment right to cross-examine the witnesses against them. In *Samia*, the Court held that using a limiting instruction and substituting a nonconfessing defendant's name with "the other person" when admitting a nontestifying codefendant's confession sufficiently protects defendants' constitutional rights. Further, the Court held that whether there is a Confrontation Clause violation hinges on whether a defendant is directly or indirectly implicated in a codefendant's confession. The Court improperly created its direct/indirect implication rubric to exclude fact patterns like *Samia* from the "direct" category. The *Samia* decision does not align with the Court's prior decisions in *Bruton*, *Gray*, and *Richardson*. *Bruton* demonstrates that a confession that expressly implicates a codefendant is not admissible, even with a limiting instruction.[300] *Richardson* demonstrates that a confession that makes no mention of the codefendant's existence and only implicates the codefendant if linked with the codefendant's own testimony later in the trial is admissible with a limiting instruction.[301] *Gray* demonstrates that when, in context, a redacted confession refers to the existence of the nonconfessing defendant and implicates them in an immediately obvious way at the time the confession is delivered, that redaction is unsuccessful and is a violation of the Confrontation Clause.[302] In those cases, the Supreme Court focused on whether the nontestifying codefendant's

299. Bellin, *supra* note 297, at 313; *see, e.g.*, Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 87 ("Verneal Jimerson brought [a] fabrication claim regarding a codefendant, and he received a reversal on it. In Jimerson's case, police concealed that they obtained the testimony of codefendant Paula Gray by offering her inducements. Gray's testimony is now known to be false: She was a juvenile, mentally [disabled], innocent, and also wrongly convicted along with three others in what became known as the Ford Heights Four case."). While codefendant Gray did testify, Jimerson's case provides an example where a nonconfessing defendant (Jimerson) was wrongfully convicted of first-degree murder, aggravated kidnapping, and rape because of a codefendant's confession. *See* People v. Jimerson, 652 N.E.2d 278, 281 (Ill. 1995). Jimerson was sentenced to death. *Id.* "Paula Gray's testimony was the *only* evidence to link the defendant [Jimerson] to these crimes. In 1978, after Gray recanted her grand jury testimony, the charges against the defendant [Jimerson] were dismissed." *Id.* at 286. "On June 24, 1996, the prosecution dismissed the case against Jimerson." Maurice Possley, *Verneal Jimerson*, THE NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3439 (last visited Sept. 7, 2024).

300. Bruton v. United States, 391 U.S. 123, 137 (1968).

301. Richardson v. Marsh, 481 U.S. 200, 211 (1987).

302. Gray v. Maryland, 523 U.S. 185, 192 (1998).

confession, at the time it was read to the jurors, made an "immediately obvious" reference to the nonconfessing defendant.

The Court should revise its direct/indirect implication distinction to align with precedent and common sense so that codefendant confessions that include "immediately obvious" references to a nonconfessing defendant violate the Confrontation Clause. Declaring that immediately obvious references to the defendant fall under the heading of direct implication would remove the artificial demarcation the *Samia* Court created. An immediately obvious categorization would elevate the protections of the Sixth Amendment above governmental convenience. Further, recognizing immediately obvious references as direct implications would acknowledge that courts' use of context is unavoidable when evaluating inferences. Categorizing immediately obvious references as direct implications would recognize that jurors' use of context is inevitable even if the trial court provides limiting instructions. Finally, such a categorization would better uphold the delicate balance between prosecutorial power and defendants' constitutional rights.