SUPREME COURT OF THE UNITED STATES

No. 96–8653

KEVIN D. GRAY, PETITIONER *v.* MARYLAND

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

[March 9, 1998]

JUSTICE SCALIA, with whom the CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE THOMAS join, dissenting.

In *Richardson* v. *Marsh,* 481 U. S. 200 (1987), we declined to extend the "narrow exception" of *Bruton* v. *United States,* 391 U. S. 123 (1968), beyond confessions that facially incriminate a defendant. Today the Court "concede[s] that *Richardson* placed outside the scope of *Bruton*'s rule those statements that incriminate inferentially," *ante*, at 8–9, "concede[s] that the jury must use inference to connect the statement in this redacted confession with the defendant," *ante*, at 9, but nonetheless extends *Bruton* to confessions that have been redacted to delete the defendant's name. Because I believe the line drawn in *Richardson* should not be changed, I respectfully dissent.

The almost invariable assumption of the law is that jurors follow their instructions. *Francis* v. *Franklin,* 471 U. S. 307, 324–325, n. 9 (1985). This rule "is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process." *Richardson*, 481 U. S., at 211. We have held, for example, that the state may introduce evidence of a defendant's prior convictions for the purpose of sentencing enhance-

ment, or statements elicited from a defendant in violation of *Miranda* v. *Arizona,* 384 U. S. 436 (1966), for the purpose of impeachment, so long as the jury is instructed that such evidence may not be considered for the purpose of determining guilt. *Spencer* v. *Texas,* 385 U. S. 554 (1967); *Harris* v. *New York,* 401 U. S. 222 (1971). The same applies to codefendant confessions: "a witness whose testimony is introduced at a joint trial is not considered to be a witness 'against' a defendant if the jury is instructed to consider that testimony only against a codefendant." *Richardson*, *supra,* at 206. In *Bruton*, we recognized a "narrow exception" to this rule: "We held 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, even if the jury is instructed to consider the confession only against the codefendant." 481 U. S., at 207.

We declined in *Richardson*, however, to extend *Bruton* to confessions that incriminate only by inference from other evidence. When incrimination is inferential, "it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence." 481 U. S., at 208. Today the Court struggles to decide whether a confession redacted to omit the defendant's name is incriminating on its face or by inference. On the one hand, the Court "concede[s] that the jury must use inference to connect the statement in this redacted confession with the defendant," *ante*, at 9, but later asserts, on the other hand, that "the redacted confession with the blank prominent on its face . . . '*facially* incriminat[es]'" him, *ibid.* The Court should have stopped with its concession: the statement "Me, deleted, deleted, and a few other guys" does not facially incriminate anyone but the speaker. The Court's analogizing of "deleted" to a physical description that clearly identifies the defendant (which we have assumed *Bruton* covers, see *Harrington* v. *California,* 395 U. S. 250,

253 (1969)) does not survive scrutiny. By "facially incriminating," we have meant incriminating independent of other evidence introduced at trial. *Richardson*, *supra,* at 208–209. Since the defendant's appearance at counsel table is not evidence, the description "red-haired, bearded, one-eyed man-with-a-limp," *ante*, at 9, would be facially incriminating– unless, of course, the defendant had dyed his hair black and shaved his beard before trial, and the prosecution introduced evidence concerning his former appearance. Similarly, the statement "Me, Kevin Gray, and a few other guys" would be facially incriminating, unless the defendant's name set forth in the indictment was not Kevin Gray, and evidence was introduced to the effect that he sometimes used "Kevin Gray" as an alias. By contrast, the person to whom "deleted" refers in "Me, deleted, deleted, and a few other guys" is not apparent from anything the jury knows independent of the evidence at trial. Though the jury may speculate, the statement expressly implicates no one but the speaker.

Of course the Court is correct that confessions redacted to omit the defendant's name are more likely to incriminate than confessions redacted to omit any reference to his existence. But it is also true– and more relevant here– that confessions redacted to omit the defendant's name are *less* likely to incriminate than confessions that expressly state it. The latter are "powerfully incriminating" as a class, *Bruton*, *supra,* at 124, n. 1, 135; the former are not so. Here, for instance, there were two names deleted, five or more participants in the crime, and only one other defendant on trial. The jury no doubt may "speculate about the reference," *ante*, at 7, as it speculates when evidence connects a defendant to a confession that does not refer to his existence. The issue, however, is not whether the confession incriminated petitioner, but whether the incrimination is so "powerful" that we must depart from the normal presumption that the jury follows its instructions.

Richardson, *supra,* at 208, n. 3. I think it is not– and I am certain that drawing the line for departing from the ordinary rule at the *facial identification* of the defendant makes more sense than drawing it anywhere else.

The Court's extension of *Bruton* to name-redacted confessions "as a class" will seriously compromise "society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran* v. *Burbine*, 475 U. S. 412, 426 (1986) (citation omitted). We explained in *Richardson* that forgoing use of codefendant confessions or joint trials was "too high" a price to insure that juries never disregard their instructions. 481 U. S., at 209–210. The Court minimizes the damage that it does by suggesting that "[a]dditional redaction of a confession that uses a blank space, the word 'delete,' or a symbol . . . normally is possible." In the present case, it asks, why could the police officer not have testified that Bell's answer was "Me and a few other guys"? *Ante*, at 10. The answer, it seems obvious to me, is because that is not what Bell said. Bell's answer was "Me, Tank, Kevin and a few other guys." Introducing the statement with full disclosure of deletions is one thing; introducing as the complete statement what was in fact only a part is something else. And of course even concealed deletions from the text will often not do the job that the Court demands. For inchoate offenses– conspiracy in particular– redaction to delete all reference to a confederate would often render the confession nonsensical. If the question was "Who agreed to beat Stacey?", and the answer was "Me and Kevin," we might redact the answer to "Me and [deleted]," or perhaps to "Me and somebody else," but surely not to just "Me"– for that would no longer be a confession to the conspiracy charge, but rather the foundation for an insanity defense. To my knowledge we have never before endorsed– and to my strong belief we ought not endorse– the redaction of a statement by some means other than the deletion of certain words, with the

fact of the deletion shown.[1] The risk to the integrity of our system (not to mention the increase in its complexity) posed by the approval of such free-lance editing seems to me infinitely greater than the risk posed by the entirely honest reproduction that the Court disapproves.

The United States Constitution guarantees, not a perfect system of criminal justice (as to which there can be considerable disagreement), but a minimum standard of fairness. Lest we lose sight of the forest for the trees, it should be borne in mind that federal and state rules of criminal procedure– which can afford to seek perfection because they can be more readily changed– exclude nontestifying-codefendant confessions even where the Sixth Amendment does not. Under the Federal Rules of Criminal Procedure (and Maryland's), a trial court may order separate trials if joinder will prejudice a defendant. See Fed. Rule Crim. Proc. 14; Md. Crim. Rule 4–253(c) (1998). Maryland courts have described the term "prejudice" as a "term of art," which "refers only to prejudice resulting to the defendant from the reception of evidence that would have been inadmissible against that defendant had there been no joinder." *Ogonowski* v. *State*, 589 A. 2d 513, 520, cert. denied, 593 A. 2d 1127 (1991). The federal rule expressly contemplates that in ruling on a severance motion the court will inspect "*in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial." Fed. Rule Crim. Proc. 14. Federal and most state trial courts (including Maryland's) also have the discretion to exclude

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[1] The Court is mistaken to suggest that in *Richardson* v. *Marsh,* 481 U. S. 200 (1987), we endorsed rewriting confessions as a proper method of redaction. See *ante*, at 10. There the parties agreed to the method of redaction, App. in *Richardson*, *supra*, O. T. 1986, No. 85–1433, pp. 100, 107–108, and we had no occasion to address the propriety of editing confessions without showing the nature of the editing.

unfairly prejudicial (albeit probative) evidence. Fed. Rule Evid. 403; Md. Rule Evid. 5–403 (1998). Here, petitioner moved for a severance on the ground that the admission of Bell's confession would be unfairly prejudicial. The trial court denied the motion, explaining that where a confession names two others, and the evidence is that five or six others participated, redaction of petitioner's name would not leave the jury with the "unavoidable inference" that Bell implicated Gray. (App. 8.)

I do not understand the Court to disagree that the redaction itself left unclear to whom the blank referred.[2] See *ante*, at 8. That being so, the rule set forth in *Richardson* applies, and the statement could constitutionally be admitted with limiting instruction. This remains,

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[2] The Court does believe, however, that the answer to a "follow-up question"– "All right, now, officer, after he gave you that information, you subsequently were able to arrest Mr. Kevin Gray; is that correct?" ("That's correct")– "eliminated all doubt" as to the subject of the redaction. *Ante*, at 2, 8. That is probably not so, and is certainly far from clear. Testimony that preceded the introduction of Bell's confession had already established that Gray had become a suspect in the case, and that a warrant had been issued for his arrest, *before Bell confessed*. Brief for Respondent 26, n. 10. Respondent contends that, given this trial background, and in its context, the prosecutor's question did not imply any connection between Bell's confession and Gray's arrest, and was simply a means of making the transition from Bell's statement to the next piece of evidence, Gray's statement. *Ibid.* That is at least arguable, and an appellate court is in a poor position to resolve such a contextual question *de novo*. That is why objections to trial testimony are supposed to be made *at the time*– so that trial judges, who hear the testimony in full, live context, can make such determinations in the first instance. But if the question *did* bring the redaction home to the defendant, surely that shows the impropriety of the question rather than of the redaction– *and the question was not objected to*. The failure to object deprives petitioner of the right to complain of some incremental identifiability added to the redacted statement by the question and answer. Of course the Court's reliance upon this testimony belies its contention that name-redacted confessions are powerfully incriminating "as a class," *ante*, at 8.

insofar as the Sixth Amendment is concerned, the most "reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process." *Richardson*, 481 U. S., at 211. For these reasons, I would affirm the judgment of the Court of Appeals of Maryland.