

No. 11-1060

---

---

**In the Supreme Court of the United States**

---

JAMES PERSFULL, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

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

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

DONALD B. VERRILLI, JR.  
*Solicitor General  
Counsel of Record*

LANNY A. BREUER  
*Assistant Attorney General*

VIJAY SHANKER  
*Attorney  
Department of Justice  
Washington, D.C. 20530-0001  
SupremeCtBriefs@usdoj.gov  
(202) 514-2217*

---

---

### **QUESTION PRESENTED**

Whether a prosecutor's reference in opening statement to a nontestifying co-defendant's statement that was neither admitted into evidence nor incriminating on its face violated petitioner's rights under the Confrontation Clause of the Sixth Amendment.

TABLE OF CONTENTS

Page  
Opinions below . . . . . 1  
Jurisdiction . . . . . 1  
Statement . . . . . 1  
Argument . . . . . 9  
Conclusion . . . . . 22

TABLE OF AUTHORITIES

Cases:

*Bruton v. United States*, 391 U.S. 123 (1968) . . . . . 5, 9, 12  
*Crawford v. Washington*, 541 U.S. 36 (2004) . . . . . 12  
*Davis v. Washington*, 547 U.S. 813 (2006) . . . . . 12  
*Frazier v. Cupp*, 394 U.S. 731 (1969) . . . . . 8, 9, 10, 12, 13  
*Gray v. Maryland*, 523 U.S. 185 (1998) . . . . . 9, 14, 18, 19, 20  
*Guzzardo v. Bengston*, 643 F.2d 1300 (7th Cir.),  
cert. denied, 452 U.S. 941 (1981) . . . . . 13  
*Harrington v. California*, 395 U.S. 250 (1969) . . . . . 21  
*Hicks v. Straub*, 377 F.3d 538 (6th Cir. 2004),  
cert. denied, 544 U.S. 928 (2005) . . . . . 13  
*Lilly v. Virginia*, 527 U.S. 116 (1999) . . . . . 11  
*Richardson v. Marsh*, 481 U.S. 200 (1987) . . . . . *passim*  
*United States v. Arambula-Ruiz*, 987 F.2d 599  
(9th Cir. 1993) . . . . . 13  
*United States v. Arias-Villanueva*, 998 F.2d 1491  
(9th Cir.), cert. denied, 510 U.S. 937, and 510 U.S.  
1001 (1993) . . . . . 16  
*United States v. Brazel*, 102 F.3d 1120 (11th Cir.),  
cert. denied, 522 U.S. 822 (1997) . . . . . 19

IV

Cases–Continued:	Page
<i>United States v. Coleman</i> , 349 F.3d 1077 (8th Cir. 2003), cert. denied, 541 U.S. 1080 (2004) . . . . .	16
<i>United States v. Comeauz</i> , 955 F.2d 568 (8th Cir.), cert. denied, 506 U.S. 845 (1992) . . . . .	21
<i>United States v. Espinosa</i> , 771 F.2d 1382 (10th Cir.), cert. denied, 474 U.S. 1023 (1985) . . . . .	13
<i>United States v. Glass</i> , 128 F.3d 1398 (10th Cir. 1997) . . .	21
<i>United States v. Green</i> , 648 F.3d 569 (7th Cir. 2011) . . . .	21
<i>United States v. Guajardo-Melendez</i> , 401 F.2d 35 (7th Cir. 1968) . . . . .	16
<i>United States v. Hardwick</i> , 544 F.3d 565 (3d Cir. 2008), cert. denied, 555 U.S. 1200 (2009) . . . . .	20
<i>United States v. Hoover</i> , 246 F.3d 1054 (7th Cir. 2001), cert. denied, 536 U.S. 958 (2002) . . . . .	20
<i>United States v. Jass</i> , 569 F.3d 47 (2d Cir. 2009), cert. denied, 130 S. Ct. 2128 (2010) . . . . .	19
<i>United States v. Lage</i> , 183 F.3d 374 (5th Cir. 1999), cert. denied, 528 U.S. 1163 (2000) . . . . .	19
<i>United States v. Logan</i> , 210 F.3d 820 (8th Cir.), cert. denied, 531 U.S. 1053 (2000) . . . . .	19
<i>United States v. Lopez</i> , 649 F.3d 1222 (11th Cir. 2011) . . . . .	13, 14, 15
<i>United States v. Peterson</i> , 140 F.3d 819 (9th Cir. 1998) . . . . .	15
<i>United States v. Quintero</i> , 38 F.3d 1317 (3d Cir. 1994), cert. denied, 513 U.S. 1195 (1995) . . . . .	14
<i>United States v. Sandini</i> , 888 F.2d 300 (3d Cir. 1989), cert. denied, 494 U.S. 1089 (1990) . . . . .	12

Cases–Continued:	Page
<i>United States v. Schwartz</i> , 541 F.3d 1331 (11th Cir. 2008), cert. denied, 556 U.S. 1130, and 556 U.S. 1174 (2009) . . . . .	15, 19, 20
<i>United States v. Taylor</i> , 509 F.3d 839 (7th Cir. 2007) . . . .	14
<i>United States v. Vega Molina</i> , 407 F.3d 511 (1st Cir.), cert. denied, 546 U.S. 919 (2005) . . . . .	19
<i>United States v. Wilson</i> , 605 F.3d 985 (D.C. Cir.), cert. denied, 131 S. Ct. 841 (2010) . . . . .	13, 14
<i>Wisniewski v. United States</i> , 353 U.S. 901 (1957) . . . . .	17
 Constitution, statutes and rules:	
U.S. Const. Amend. VI (Confrontation Clause) . . . .	<i>passim</i>
18 U.S.C. 152(1) . . . . .	2, 5
18 U.S.C. 157(3) . . . . .	2, 5
18 U.S.C. 1001 . . . . .	5
18 U.S.C. 1503 . . . . .	5
Fed. R. Crim. P. 33(a) . . . . .	7

**In the Supreme Court of the United States**

---

No. 11-1060

JAMES PERSFULL, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

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

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 660 F.3d 286. The order of the district court denying petitioner's motion for a new trial (Pet. App. 27a-33a) is unreported.

**JURISDICTION**

The judgment of the court of appeals was entered on October 6, 2011. A petition for rehearing was denied on November 29, 2011 (Pet. App. 34a-35a). The petition for a writ of certiorari was filed on February 24, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner

was convicted on one count of committing bankruptcy fraud, in violation of 18 U.S.C. 157(3), and three counts of concealing assets in a bankruptcy proceeding, in violation of 18 U.S.C. 152(1). Judgment 1. He was sentenced to 39 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-26a.

1. a. On March 14, 2003, petitioner filed a Chapter 7 Bankruptcy Petition, Schedules of Assets and Liabilities, and a Statement of Financial Affairs. At the initial meeting of creditors shortly thereafter, petitioner told the bankruptcy trustee that he was not currently entitled to receive any type of inheritance, and petitioner was informed that if he learned within the next six months that he was entitled to receive an inheritance, he was to notify his attorney and the trustee. Petitioner's attorney noted that petitioner's mother, Eileen, was very ill and that petitioner was aware that if he received an inheritance or an interest in property he was required to disclose it to his attorney. Pet. App. 2a-3a; Gov't C.A. Br. 2-3.

Two days after the creditors' meeting, Eileen died testate, leaving petitioner and his brother, Joseph, equal shares in her estate. The same day, the bankruptcy trustee filed a No Asset Report discharging petitioner's debts. Petitioner, who never notified the trustee that he was entitled to an inheritance, signed a document disclaiming his interest in any type of property that he would receive as a result of his mother's death, as well as a document declining his appointment as co-executor of Eileen's estate. The irrevocable disclaimer stated that it had been delivered to Joseph, who, as a result of petitioner's declination, was serving as sole executor. Pet. App. 3a; Gov't C.A. Br. 3-4.

Despite signing the disclaimer, petitioner received proceeds from Eileen's life insurance policy issued by Metropolitan Life Insurance Company. He also received benefits from Eileen's fixed-annuity death benefit policy issued by Jackson National Life Insurance Company. He used the latter to pay over \$22,000 on a mortgage loan and thereby stop foreclosure proceedings on his home. Petitioner also paid an additional \$140,000 on his home loan, reducing the mortgage to \$8406. The source of that money was a bank account jointly owned by Joseph and Eileen before her death. That account had in turn been funded in part by the Metropolitan Life Insurance benefits paid to Joseph and redemption proceeds from Treasury bills owned by Eileen with petitioner and Joseph. Petitioner also received distributions from savings bonds that his mother owned. And he and Joseph changed the ownership of stocks that they had owned jointly with Eileen such that the two brothers owned them jointly. Pet. App. 6a-10a; Gov't C.A. Br. 7-12, 15-16.

Petitioner also failed in his bankruptcy schedules to (1) disclose several brokerage accounts, (2) report income from electrical work he performed outside of his regular job, (3) identify the trade name he used for the electrical work, and (4) disclose the electrical company's bank account. Pet. App. 10a-12a; Gov't C.A. Br. 4-7.

b. Over a year and a half after petitioner's debts were discharged, the bankruptcy trustee learned that petitioner had an interest in two parcels of real estate and was entitled to an inheritance. The bankruptcy case was reopened, and petitioner then admitted that he had received two loans from Joseph—one for approximately \$28,000 and another which allowed him to retire the mortgage on his residence. Later in the conversation,

however, petitioner told the trustee to check with Joseph about the source of the money because he was not sure if it was a loan or had something to do with his inheritance. For the first time, petitioner mentioned that his mother had died, but he denied knowing anything about his mother's estate. Pet. App. 4a; Gov't C.A. Br. 13-14.

After obtaining copies of Eileen's will and petitioner's disclaimer, the trustee requested that petitioner quit claim his interest in his residence to the trustee. Petitioner never complied with that request, nor did he amend his bankruptcy schedules to disclose any inheritance, life insurance benefits, annuity interests, joint interests in stocks, Treasury bills, or savings bonds. Instead, knowing that the trustee wanted to sell petitioner's home, petitioner obtained a mortgage loan on the home and deposited the proceeds (\$79,908.90) in his bank account. He used approximately \$15,000 of the proceeds to buy a car, and he transferred \$55,000 to a brokerage account he owned. Pet. App. 4a; Gov't C.A. Br. 14.

The bankruptcy trustee tried unsuccessfully to contact Joseph by phone. He then informed Joseph by letter that he had filed a lien against Eileen's home. Joseph did not respond. Pet. App. 5a; Gov't C.A. Br. 16.

Petitioner subsequently paid the trustee \$50,000, and the trustee received an additional \$8,231.86 from the proceeds of the sale of Eileen's home. During the closing of that sale, petitioner and Joseph provided a signed, handwritten document indicating that the proceeds were to be split between them equally. In addition, an attorney helped prepare a handwritten "Affidavit of Heirship" falsely stating that Eileen died "leaving no last will and testament." Petitioner provided the infor-

mation for, and signed, the affidavit. Pet. App. 5a; Gov't C.A. Br. 16-17.

2. On December 16, 2008, a grand jury in the Northern District of Illinois returned a superseding indictment charging petitioner with committing bankruptcy fraud, in violation of 18 U.S.C. 157(3) (Count 1); three counts of concealing assets in a bankruptcy proceeding, in violation of 18 U.S.C. 152(1) (Counts 2, 4, and 5); and one count of obstructing justice, in violation of 18 U.S.C. 1503 (Count 3). Joseph was charged in the same indictment with committing bankruptcy fraud, in violation of 18 U.S.C. 157(3) (Count 1), and making a false statement, in violation of 18 U.S.C. 1001 (Count 6). See Gov't C.A. Br. 1-2; Judgment 1.

3. At petitioner and Joseph's joint trial, the government stated during its opening statement that Joseph told the Federal Bureau of Investigation (FBI) that he had not provided petitioner with any gifts or loans since Eileen's death. Trial Tr. 230 (Tr.); see Pet. App. 20a. At the time, the government intended to call an FBI agent to testify to Joseph's statement. See Pet. App. 28a. Petitioner did not object. Tr. 230; see Pet. App. 20a.

The next day, petitioner argued that Joseph's statement would be inadmissible. The government responded that the statement was admissible against Joseph as evidence of his participation in a scheme, and it would not object to an instruction that the statement could be considered only against Joseph. Tr. 279-284. Petitioner moved for a mistrial, arguing that the government's references to Joseph's statement during its opening violated *Bruton v. United States*, 391 U.S. 123 (1968), in which this Court held that a defendant's rights under the Confrontation Clause were violated by the admission of a nontestifying co-defendant's confession

inculping the defendant at a joint trial, notwithstanding an instruction to the jury not to consider the confession when adjudging the defendant's guilt. The district court denied the motion on the ground that the statement was neither facially incriminating nor inconsistent with petitioner's innocence and that a limiting instruction would suffice. Tr. 503-506; see Pet. App. 20a-21a.

Because of evidentiary difficulties not at issue here, the government decided not to call the FBI agent. At the end of its case in chief, the government moved to dismiss the false statement count against Joseph. Accordingly, Joseph's statement was never introduced at trial. See Pet. App. 21a, 28a.

In addition to the court's standard opening instructions cautioning that statements and arguments by the lawyers are not evidence and that the jury must follow an instruction that an item of evidence is received for a limited purpose only, the court gave the following instruction at the end of the government's case in chief:

The United States has moved and I have agreed to dismiss Count 6, which charged only defendant Joseph Persfull with making a false statement to the FBI. I have dismissed that allegation because the government has failed to produce any evidence supporting it. While the government has not offered any evidence of making a false statement, it was referred to in opening statement. As I told you then, opening statements by the attorneys are only predictions of what the parties expect the evidence to be and are not evidence. I further instructed you to rely on the evidence you hear from the witness stand, the exhibits admitted into evidence, and any stipulations between the parties and not on what the parties' predictions in their opening statements might have

been. I now instruct you to disregard entirely any statements made by the parties concerning the false statement count which is now dismissed, including references to any statements allegedly made by Joseph Persfull concerning gifts or loans to his brother James. As I have said, those statements are not evidence and should not be considered by you in any way.

Pet. App. 21a-22a. Neither petitioner nor Joseph objected to that instruction. See *id.* at 22a.

The jury found petitioner guilty on all the counts against him, but the district court later dismissed Count 3. Joseph was convicted on Count 1.

4. The district court denied petitioner's post-verdict motion for a new trial under Federal Rule of Criminal Procedure 33(a), which argued, as relevant here, that the government's reference to Joseph's statement violated *Bruton*. Pet. App. 27a-33a. The court explained that because the government dismissed the false statement count against Joseph, "no statement of Joseph was admitted at trial, let alone a statement that violated the rule stated in *Bruton*." *Id.* at 28a-29a. The court further noted that, even assuming a prosecutor's remarks during opening statement could violate *Bruton*, "no such violation occurred in this case" because Joseph's statement "was not facially incriminating and therefore did not fall under *Bruton*." *Id.* at 29a (citing *Richardson v. Marsh*, 481 U.S. 200, 207 (1987)). The court explained that Joseph's statement that he did not give petitioner any gifts or loans after Eileen's death "was consistent with [petitioner's] innocence and only when linked with other evidence did the statement contradict [petitioner's] defense." *Id.* at 29a. Accordingly, the court concluded it could presume that the jury followed its

instruction to disregard statements made during opening that were not supported by the evidence presented at trial and its instruction to disregard entirely any statements on Count 6. *Ibid.*

The district court sentenced petitioner to 39 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

5. The court of appeals affirmed. Pet. App. 1a-26a. As relevant here, it found no *Bruton* violation because “Joseph’s statement was never admitted into evidence and was not facially incriminating.” *Id.* at 22a.

The court observed that in *Frazier v. Cupp*, 394 U.S. 731, 735 (1969), this Court “held that a *Bruton* error did not occur where the prosecutor in his opening statement summarized inculpatory testimony he expected the defendant’s accomplice to give, and the accomplice later refused to testify.” Pet. App. 22a. The court noted that, here too, Joseph’s statement was referenced in opening statement but never admitted into evidence. In addition, the court of appeals explained, the statement “was not facially incriminating” because, notwithstanding that the statement contradicted petitioner’s theory of his defense (*i.e.*, that the money from Joseph was a gift), “the statement alone did not implicate [petitioner] in a crime.” *Ibid.*

Under those circumstances, the court of appeals concluded, the district court’s limiting instructions were sufficient to safeguard against any possible infringement of petitioner’s constitutional rights. Pet. App. 23a. The court found support in *Frazier*’s observation that “it does not seem at all remarkable to assume that the jury will ordinarily be able to limit its consideration to the evidence introduced during the trial.” *Ibid.* (quoting 394 U.S. at 736). The court of appeals added that the

“substantial evidence [against petitioner] apart from any statement made in the opening” further counseled against reversal. *Ibid.*

#### ARGUMENT

Petitioner argues (Pet. 6-14) that *Bruton v. United States*, 391 U.S. 123 (1968), can require reversal when a nontestifying co-defendant’s statement is referenced by a prosecutor in opening statement but never admitted into evidence; he further argues (Pet. 15-22) that a nontestifying co-defendant’s statement requires reversal under *Bruton* whenever it “refers to the defendant” (Pet. 17), even if it is not incriminating on its face. Petitioner’s arguments lack merit individually and, as the court of appeals recognized, taken together (as they must be for petitioner to obtain relief) are particularly unpersuasive. No conflict exists among lower courts on either issue, let alone on the issues presented in combination as they are here. Further review is not warranted.

1. The Confrontation Clause provides that “[i]n all criminal prosecutions, the accused shall enjoy the right \* \* \* to be confronted with the witnesses against him.” U.S. Const. Amend. VI. In *Bruton*, this Court held that a defendant’s confrontation rights were violated when a nontestifying co-defendant’s confession directly incriminating the defendant was introduced at their joint trial, even though the trial judge had instructed the jury to consider the confession only against the co-defendant. 391 U.S. at 135-137. In *Gray v. Maryland*, 523 U.S. 185 (1998), the Court extended that rule to apply to a statement that did not specifically name the defendant but referred to his existence through an obvious indication of redaction. *Id.* at 192. In *Richardson v. Marsh*,

481 U.S. 200 (1987), however, this Court approved the admission of a nontestifying co-defendant’s statement at a joint trial where that statement did not explicitly or necessarily implicate the other defendant. Although the statement may have incriminated the defendant when linked with other evidence (which in *Richardson* included the defendant’s own testimony), the Court reasoned that because the statement did not on its face implicate the defendant, it was “a less valid generalization [than in *Bruton*] that the jury will not likely obey the instruction to disregard the evidence.” *Id.* at 208. Accordingly, the Court found no Sixth Amendment violation in such circumstances, provided that the district court issues a proper limiting instruction to the jury. *Id.* at 211.

Here, the court of appeals found no *Bruton* violation both because Joseph’s statement was never admitted into evidence and because it was not facially incriminating. The court did not squarely hold that a prosecutor’s statement can never violate the Confrontation Clause. Cf. *Frazier v. Cupp*, 394 U.S. 731, 736 (1969) (“It may be that some remarks included in an opening or closing statement could be so prejudicial that a finding of error, or even constitutional error, would be unavoidable.”). Nor did the court of appeals opine on the precise boundary between *Gray*’s holding about statements that obviously refer to the defendant and *Richardson*’s holding about statements that do not necessarily implicate the defendant. The court of appeals held only that, “under the circumstances of this case, the limiting instruction was sufficient to safeguard any possible infringement of [petitioner’s] constitutional rights.” Pet. App. 23a.

Petitioner contends this case presents two *Bruton*-related questions—a first question relating to *Bruton*’s

applicability to a prosecutor's remarks about a non-testifying co-defendant's statement that is ultimately not admitted into evidence and a second question relating to the treatment under *Bruton* of statements that do not directly state that the defendant committed the crime charged. See Pet. i, 8, 15. This case is an unsuitable vehicle for addressing either question in isolation precisely because the prosecutor's statement here both was not evidence and did not recount a statement that itself incriminated petitioner. Either would have been a sufficient basis for the court of appeals' holding, see pp. 11-21, *infra*, but the court of appeals' decision is particularly well-supported because the court grounded its analysis on both of the foregoing considerations (Pet. App. 22a) plus the district court's limiting instruction (*id.* at 23a) and the substantial independent evidence against petitioner (*ibid.*). The lower courts do not disagree over how to treat such a combination of circumstances; indeed, petitioner does not even assert that any court has previously addressed a case with similar facts.

2. Petitioner argues (Pet. 8-14) that this Court should grant review to decide whether the *Bruton* rule applies when a nontestifying co-defendant's statement is never offered or admitted into evidence, but is nonetheless mentioned by a prosecutor during an opening statement. Even if that issue were squarely presented here, it would not warrant further review.

a. *Bruton*, *Richardson*, and *Gray* each involved the admission into evidence of incriminating out-of-court statements made by a nontestifying co-defendant. See *Lilly v. Virginia*, 527 U.S. 116, 128 (1999) ("In the years since *Bruton* was decided, we have reviewed a number of cases in which one defendant's confession has been *introduced into evidence* in a joint trial pursuant to in-

structions that it could be used against him but not against his codefendant.”) (emphasis added). That limitation traces to *Bruton*’s roots in the Confrontation Clause. See 391 U.S. at 126-128. That Clause prohibits “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” *Davis v. Washington*, 547 U.S. 813, 821 (2006) (quoting *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004)) (emphasis added); see *Crawford*, 541 U.S. at 50 (“[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations *as evidence* against the accused.”) (emphasis added); *United States v. Sandini*, 888 F.2d 300, 311 (3d Cir. 1989) (“*Bruton* is directed toward preserving a defendant’s right to cross-examination, and thus has nothing to do with arguments of counsel based on their interpretation of the evidence.”), cert. denied, 494 U.S. 1089 (1990).

Juries, including the one here, are routinely instructed that opening statements and closing arguments are not evidence. Thus, this Court held in *Frazier* that *Bruton* was not violated when an accomplice’s statement was mentioned by the prosecutor during opening statement but the jury was told that the opening statement should not be considered as evidence. 394 U.S. at 735-736. Although it may be “unreasonable to assume that a jury can disregard a coconspirator’s statement when introduced against one of two joint defendants, it does not seem at all remarkable to assume that the jury will

ordinarily be able to limit its consideration to the evidence introduced during the trial.” *Id.* at 736.\*

Petitioner asserts (Pet. 11-12) that this Court in *Richardson* and *Gray* considered prosecutors’ statements in determining whether *Bruton* had been violated. That is incorrect. In *Richardson*, the co-defendant’s confession was admitted into evidence, not merely referenced by the prosecutor. 481 U.S. at 203. The Court nonetheless found that a limiting instruction could have alleviated any Confrontation Clause concerns because the confession did not explicitly or necessarily implicate the other defendant. *Id.* at 208-211. The Court remanded the case for a determination whether the prosecutor’s effort in closing argument “to undo the effect of the lim-

---

\* See, e.g., *United States v. Lopez*, 649 F.3d 1222, 1237 (11th Cir. 2011) (explaining that co-defendant’s attorney “was not a witness, and the statements he made in his closing arguments were neither testimony nor any other kind of evidence”); *United States v. Wilson*, 605 F.3d 985, 1017 (D.C. Cir.) (finding no *Bruton* violation because “[t]he opening statement and closing argument made by [co-defendant’s] counsel \* \* \* neither were admitted into evidence nor were they testimony”), cert. denied, 131 S. Ct. 841 (2010); *Hicks v. Straub*, 377 F.3d 538, 554 (6th Cir. 2004) (noting that opening statement is not evidence), cert. denied, 544 U.S. 928 (2005); *United States v. Arambula-Ruiz*, 987 F.2d 599, 606-607 (9th Cir. 1993) (finding no *Bruton* violation when witness did not answer question and thus the challenged statement was never admitted as evidence); *United States v. Espinosa*, 771 F.2d 1382, 1398-1399 (10th Cir.) (finding no *Bruton* violation when nontestifying pro se defendant’s comments in opening statement inculpated co-defendants and jury was instructed that it was to consider only the evidence introduced at trial and that nothing said in opening statements was evidence in the case), cert. denied, 474 U.S. 1023 (1985); *Guzzardo v. Bengston*, 643 F.2d 1300, 1303 (7th Cir.) (“The jury was instructed that it was to consider only the evidence introduced at trial, and that the remarks of counsel were not evidence.”), cert. denied, 452 U.S. 941 (1981).

iting instruction” warranted relief, *id.* at 211, but the analytically distinct question of the effectiveness of a limiting instruction does not suggest that a prosecutor’s remark, unlinked to any admitted evidence, can support a *Bruton* claim.

Similarly, in *Gray*, the nontestifying co-defendant’s redacted confession was admitted into evidence. 523 U.S. at 188. The prosecutor then questioned a witness in a manner that effectively negated the redaction by “blatantly link[ing] the defendant to the deleted name.” *Id.* at 193; see *id.* at 188-189. This Court considered the prosecutor’s statement not as a freestanding basis for a *Bruton* claim but rather for the effect it had in rendering the redaction of the admitted confession essentially meaningless. See *id.* at 193-197.

b. Petitioner asserts (Pet. 12-14) that the courts of appeals are divided on the question whether a prosecutor’s remark standing alone can violate *Bruton*. No conflict exists among lower courts on that question.

As petitioner acknowledges (Pet. 12-13), several circuits have held that a prosecutor’s remark in opening statement or closing argument cannot form the basis of a *Bruton* claim because it is not evidence. See *United States v. Lopez*, 649 F.3d 1222, 1237 (11th Cir. 2011) (finding no Confrontation Clause violation based on attorney’s remark in closing argument when jury was instructed that lawyers’ statements and arguments are not evidence); *United States v. Wilson*, 605 F.3d 985, 1017 (D.C. Cir.), cert. denied, 131 S. Ct. 841 (2010); *United States v. Taylor*, 509 F.3d 839, 850 (7th Cir. 2007); *United States v. Quintero*, 38 F.3d 1317, 1342 (3d Cir. 1994), cert. denied, 513 U.S. 1195 (1995); see also note \*, *supra* (citing cases).

The cases petitioner claims (Pet. 13-14) are to the contrary do not, on examination, hold that a prosecutor's comment in opening statement or closing argument can violate *Bruton*. In *United States v. Schwartz*, 541 F.3d 1331 (11th Cir. 2008), cert. denied, 556 U.S. 1130, and 556 U.S. 1174 (2009), the court noted that, when addressing a *Bruton* claim, it "look[s] at everything the Government presented to the jury, not just admissible evidence, because a statement violating *Bruton* by definition is inadmissible as evidence, and a limiting instruction does not cure it." *Id.* at 1351 n.62. The *Schwartz* court was not suggesting that attorney statements not admitted into evidence can violate *Bruton*; rather, it was stating that in determining whether a co-defendant's statement obviously refers to the defendant, it considers the government's entire case, not just admissible evidence. See *id.* at 1351-1352. In any case, the statement at issue in *Schwartz* was introduced into evidence, *id.* at 1340, so any comment on whether a prosecutor's statement alone could violate *Bruton* would be dicta. And if there were any doubt about *Schwartz's* meaning, the Eleventh Circuit later made explicit in *Lopez*, 649 F.3d at 1237-1238, that an attorney's statements do not implicate the Confrontation Clause.

In another case petitioner relies on, *United States v. Peterson*, 140 F.3d 819, 821-822 (9th Cir. 1998), a co-defendant's statement was read into evidence after being redacted, but the redaction ("person X") was insufficient under *Gray*. *Id.* at 820, 822. The Ninth Circuit found a *Bruton* violation on that basis. *Ibid.* The court also noted that the prosecutor's argument during closing that the defendant was "person X" "further compounded the constitutional violation," *id.* at 822, but that plainly is not a holding that a prosecutor's statement alone,

untethered to any admitted evidence, can violate *Bruton*.

Another Ninth Circuit case petitioner cites, *United States v. Arias-Villanueva*, 998 F.2d 1491, cert. denied, 510 U.S. 937, and 510 U.S. 1001 (1993), also involved a prosecutor’s characterization of admitted evidence of a nontestifying co-defendant’s confession. In particular, although the nontestifying co-defendant’s confession (as related at trial) did not implicate the defendant, the prosecutor asserted in closing argument that it did. The court carefully distinguished between the argument (which it found improper but harmless) and testimony about the confession: “The problem is with the prosecutor’s argument, not the underlying testimony. The closing argument’s characterization of [the nontestifying co-defendant’s] confession explicitly incriminated [the defendant], and *had the confession itself done so*, [the defendant’s] Sixth Amendment right of confrontation would have been violated.” *Id.* at 1507-1508 (emphasis added). That analysis thus did not find a Confrontation Clause violation based solely on a prosecutor’s statements in argument.

The other cases petitioner cites also do not establish a division of authority. In *United States v. Coleman*, 349 F.3d 1077, 1086-1087 (8th Cir. 2003), cert. denied, 541 U.S. 1080 (2004), the court explicitly declined to decide whether the co-defendant’s attorney’s closing argument violated *Bruton* because any error was harmless. And in *United States v. Guajardo-Melendez*, 401 F.2d 35 (7th Cir. 1968)—a case decided before *Frazier*—the court acknowledged that *Bruton* was not “literally applicable.” *Id.* at 38. And given that the Seventh Circuit rejected petitioner’s *Bruton* claim here, if any tension existed between that holding and *Guajardo-Melendez*,

it would be for the Seventh Circuit to resolve. See *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam).

3. Petitioner also asserts (Pet. 15-22) that this Court should decide whether the statement at issue here was facially incriminating and thus should be treated under *Gray* rather than *Richardson*. The court of appeals would have been correct to rest its judgment on its factbound conclusion that the statement was not facially incriminating, and was thus fully addressed by the district court's limiting instructions. And in any event, petitioner does not identify a division of authority over the boundary between *Gray* and *Richardson*.

a. This Court in *Richardson* approved the admission (subject to a limiting instruction) of a nontestifying co-defendant's statement at a joint trial where that statement did not explicitly or necessarily implicate the other defendant. 481 U.S. at 208-210. The court of appeals here applied *Richardson* and found that Joseph's statement that he did not provide any gifts or loans to petitioner did not explicitly or necessarily implicate petitioner but rather depended on other evidence to do so.

That factbound determination was correct, and, in any event, would not warrant this Court's review. Joseph's statement did not "facially incriminat[e]" petitioner because the assertion that Joseph did not provide any gifts or loans to petitioner did not implicate petitioner in any criminal conduct. It was incriminating, if at all, only when considered against petitioner's theory of his defense, which was that Joseph's transfers to him were in fact gifts. Indeed, the statement was not necessarily incriminating at that point—or at least not "powerfully" so, see *Richardson*, 481 U.S. at 208—because it was not inconsistent with petitioner's defense that he

*believed* the payments from Joseph were gifts. Thus, if Joseph's statement was incriminating at all, it required "linkage," and it therefore "differ[ed] from evidence incriminating on its face in the practical effects which application of the *Bruton* exception would produce." *Id.* at 208.

*Gray* does not alter that analysis. In *Gray*, this Court held that *Bruton* controls when a co-defendant's confession is redacted to replace the defendant's name with the word "deleted." 523 U.S. at 197. Defendants Gray and Bell were tried together for the beating death of Stacey Williams. Bell's confession, which named Gray and another individual as participants in the beating, was admitted into evidence with a limiting instruction that it was not to be used against Gray. The police officer who read the confession into evidence said the word "deleted" or "deletion" each time Gray's name appeared. *Id.* at 188. A redacted version of the written confession was also admitted into evidence, in which Gray's name was replaced with blank white spaces separated by commas. *Id.* at 189. The Court held that the introduction of this evidence violated Gray's Sixth Amendment rights.

This Court explained that redacted confessions that "replace[] a defendant's name with an obvious indication of deletion, such as a blank space, the word 'deleted,' or a similar symbol, still fall[] within *Bruton*'s protective rule." *Gray*, 523 U.S. at 192. The Court reasoned that "the jury will often realize" that confessions redacted in such a manner "refer[] specifically to the defendant," and that such redactions "may well call the jurors' attention specially to the removed name" and encourage the jurors "to speculate about the reference." *Id.* at 193. For those reasons, "*Bruton*'s protected statements [expressly implicating the defendant] and statements re-

dacted to leave a blank or some other similarly obvious alteration function the same way grammatically. They are *directly accusatory*.” *Id.* at 194 (emphasis added). Such a “redacted confession with the blank prominent on its face, in *Richardson*’s words, ‘*facially* incriminat[es]’ the codefendant.” *Id.* at 196 (quoting 481 U.S. at 209). But *Gray* does not disturb *Richardson*’s rule that a co-defendant’s statement must facially incriminate the defendant or be directly accusatory to be uncontrollable by a limiting instruction.

b. The courts of appeals are not divided on the appropriate standard to apply in this context. Courts have consistently held that a co-defendant’s statement must be facially incriminating standing alone to implicate *Gray*. See, e.g., *United States v. Jass*, 569 F.3d 47, 62 (2d Cir. 2009), cert. denied, 130 S. Ct. 2128 (2010); *United States v. Vega Molina*, 407 F.3d 511, 521 (1st Cir.), cert. denied, 546 U.S. 919 (2005); *United States v. Logan*, 210 F.3d 820, 822 (8th Cir.) (stating that “the admissibility of a confession under *Bruton* is to be determined by viewing the redacted confession in isolation from the other evidence admitted at trial” and that “[n]umerous opinions from our sister circuits support this view of the law”) (citing cases), cert. denied, 531 U.S. 1053 (2000); *United States v. Lage*, 183 F.3d 374, 387-388 (5th Cir. 1999), cert. denied, 528 U.S. 1163 (2000); *United States v. Brazel*, 102 F.3d 1120, 1140 (11th Cir.), cert. denied, 522 U.S. 822 (1997).

The cases petitioner cites (Pet. 19) are not to the contrary. In *Schwartz*, *supra*, the Eleventh Circuit stated that, when addressing a *Bruton* claim, it “look[s] at everything the Government presented to the jury, not just admissible evidence, because a statement violating *Bruton* by definition is inadmissible as evidence, and

a limiting instruction does not cure it.” 541 F.3d at 1351 n.62. But the court was not discussing how to determine whether a nontestifying co-defendant’s statement *incriminates* the defendant but rather how to determine whether a statement that does not expressly name the defendant nonetheless obviously *refers* to the defendant, in violation of *Gray*. See *id.* at 1352 (“In light of the foregoing [summary of the evidence], [the co-defendant’s] affidavit ‘obviously refer[ed]’ to Schwartz without naming him.”) (quoting *Gray*, 523 U.S. at 196); *id.* at 1353 (“[T]he Government was relying on the jury to *equate* Schwartz with the corporations named in the codefendant statement.”) (emphasis added).

Likewise, the Third Circuit’s statement in *United States v. Hardwick*, 544 F.3d 565, 573 (2008), cert. denied, 555 U.S. 1200 (2009), that “the nature of the linkage between the redacted statement and the other evidence in the record is vitally important in determining whether a defendant’s Confrontation Clause right has been violated” was intended merely to restate *Gray*’s holding that redactions that obviously refer to the defendant do not satisfy the concerns of *Bruton* and *Richardson*. The *Hardwick* court found that redactions referred directly to two defendants; it did not rely on other evidence to determine whether an otherwise noninculpatory statement became inculpatory. *Id.* at 573.

The same is true of *United States v. Hoover*, 246 F.3d 1054 (7th Cir. 2001), cert. denied, 536 U.S. 958 (2002). The court there stated only that it could consider other evidence in determining whether alterations to a co-defendant’s confession obviously referred to the defendants. See *id.* at 1059 (“[T]he proposition that replacing a name with a pseudonym is proper unless the

identity of the alias can be deduced within the four corners of the confession is incompatible with *Gray*.”); see also *United States v. Green*, 648 F.3d 569, 575 (7th Cir. 2011) (“The *Hoover* court found that ‘incarcerated leader’ and ‘unincarcerated leader’ functioned the same way ‘deleted’ or another similarly obvious indication of alteration would.”).

Finally, petitioner relies on *United States v. Glass*, 128 F.3d 1398, 1404-1405 (10th Cir. 1997). The court there appears to have conflated the question whether a statement is facially incriminating and the question whether a *Bruton* error is harmless; with that distinction in mind, *Glass*’s analysis of the other evidence against the defendant appears directed largely to the question of harmlessness, not incrimination. See *id.* at 1405 (“Because the relationship of the defendants was so obviously important to the prosecution, we cannot say its introduction in violation of *Bruton* was harmless beyond a reasonable doubt.”).

4. Even if the questions petitioner presents otherwise warranted review, this case would be an unsuitable vehicle because any error here was harmless in light of the strength of the evidence against petitioner. See *Harrington v. California*, 395 U.S. 250, 254 (1969) (*Bruton* violation subject to harmless-error review); *United States v. Comeaux*, 955 F.2d 586, 590 (8th Cir.) (same), cert. denied, 506 U.S. 845 (1992). Indeed, the court of appeals itself noted that the “substantial evidence [against petitioner] apart from any statement made in the opening” convinced it there was “no basis for reversing the district court’s decision.” Pet. App. 23a.

**CONCLUSION**

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

DONALD B. VERRILLI, JR.  
*Solicitor General*

LANNY A. BREUER  
*Assistant Attorney General*

VIJAY SHANKER  
*Attorney*

MAY 2012