SUPPLEMENTAL BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

Nos. 98-CF-1045; 98-CF-1169; 98-CF-1218

MARQUETTE E. RILEY,
SAYID MUHAMMAD,
ANTONIO MARKS, Appellants,

v.

UNITED STATES OF AMERICA, Appellee.

APPEALS FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

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I N D E X

TABLE OF CASES

* Cases chiefly relied upon are marked by an asterisk.

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Introduction

On May 4, 1998, a jury found all three appellants guilty of two counts of first-degree murder, armed assault with intent to kill, and related charges. Appellants' appeals of their convictions were fully briefed and appellants Marks and Muhammad (but not appellant Riley) argued that their confrontation rights were violated by the admission at trial of codefendant statements despite the fact that each statement was redacted to eliminate all references to codefendants and despite the court's repeated instructions to the jury to consider each statement only against the confessing declarant. After briefing but prior to the oral

argument, the Supreme Court decided Crawford v. Washington, 124 S. Ct. 1354 (2004), in which the Court held that the defendant's confrontation rights were violated because "testimonial" hearsay that was not subject to cross-examination was admitted against him at his trial. Appellants' consolidated cases were argued on June 22, 2004. At oral argument, when the Court questioned the parties regarding the applicability of Crawford, no appellant urged the Court to find error under Crawford, and appellee argued that Crawford had no application to this case.

Following oral argument, on June 24, 2004, the Court issued an Order instructing the parties to file supplemental memoranda "discussing the effect on this case, if any, of the recent Supreme Court decision in Crawford . . . ." All three appellants have now filed supplemental briefs arguing that Crawford requires reversal of their convictions. Appellant Marks argues that because appellant Muhammad's confession was inadequately redacted, the jury might have thought it referred to him, and that "the meaning and rationale of Crawford nullifies the Richardson v. Marsh[1/] edict that statements that are only incriminating through linkage to other evidence is not a violation of the confrontation clause" (Marks Supplemental Brief at 6). Appellant Muhammad argues,

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1/ 481 U.S. 200 (1987).

similarly, that Crawford cannot permit the redaction of a confession that changes "we" to "I" where the record reflects 1) "testimony of other witnesses that all three defendants were present and involved" and 2) "the urging of prosecutors to lump the confessions together" (Muhammad Supplemental Brief at 5). Appellant Riley argues, primarily in reliance on Cruz v. New York, 481 U.S. 186 (1987), that because the three confessions were "interlocking," and because the prosecutor argued that all three appellants acted as a team, the redactions were ineffective, Bruton[2/] was violated, and Crawford thus requires reversal (Riley Supplemental Brief at 6-11).

We disagree that Crawford has any application to this case. Crawford held that a defendant's confrontation rights were violated when incriminating testimonial hearsay statements were admitted against him at his trial. In this case, each of appellants' confessions was fully redacted to refer only to the confessing defendant's actions and to eliminate all reference to codefendants. The jury was repeatedly and forcefully told to consider each statement only against the confessing declarant. Thus, there was no hearsay evidence, much less incriminating hearsay evidence, admitted against any appellant. Moreover, the complete redactions

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[2/] Bruton v. United States, 391 U.S. 123 (1968).

and the jury instructions eliminated even the risk that the jury would utilize codefendant confessions against any appellant. The Supreme Court made clear in Richardson and Gray v. Maryland, 523 U.S. 185 (1998), that Bruton error may not be established by way of "contextual analysis," i.e. reliance on other evidence at trial that links appellants with each other, and this Court recognized the binding force of these decisions in Plater v. United States, 745 A.2d 953, 960-961 & n.11 (D.C. 2000). Appellants' arguments notwithstanding, there is nothing in Crawford that calls these holdings into question. Finally, Cruz has no application to this case because the interlocking confessions held inadmissible in Cruz were not redacted; those confessions violated Bruton because they were facially incriminating, whereas the confessions in the instant case were fully redacted to eliminate references to codefendants.

We also note that the instant claims should be reviewable only for plain error because the trial court accommodated appellants' pretrial Bruton concerns when it ruled that the each statement would be redacted, admitted only against the confessing declarant, and subject to a limiting instruction. In failing to challenge the specific redactions thereafter, appellants forfeited any further claims that their confrontation rights were violated.

Argument

Crawford v. Maryland has no application to this case.

A. Factual Background

On September 9, 1996, the day appellants were arrested, all three gave statements implicating themselves and their codefendants in the murders at issue. Appellants moved for severance and/or to suppress codefendant statements on Bruton grounds (98-CF-1045 R. 12; 98-CF-1169 R. 12A; 98-CF-1218 R. 13). The government argued that each confession could be admitted against the confessing defendant as a statement of a party opponent - a point that was never disputed by defense counsel below - and initially argued as well that the confessions were admissible against codefendants as statements against penal interest (98-CF-1045 R.14; 3/4/98 Tr. 13-16; 4/21/98 Tr. 317-318). The court ultimately ruled that each confession would be admissible only against the defendant making the confession (3/4/98 Tr. 19; 4/21/98 Tr. 314-315), rendering moot the discussions and briefing respecting whether any hearsay exception applied to the confessions that would also allow for their admission against co-defendants.

Subsequently, the trial court held a lengthy discussion with the prosecutor and the defense attorneys respecting proposed redactions of the statements (4/21/98 Tr. 315-330). The court and the parties agreed that the prosecutor would retype each

appellant's statement, delete any references to codefendants, and substitute the word "I" whenever the word "we" appeared (id. at 326-330). Each attorney had the opportunity to review and comment on the proposed redactions for each of appellant's statements (id.), and the court directed counsel to meet with the prosecutor outside the courtroom to convey any "specific requests" they had with respect to the redactions (id. at 330- 331). During the trial, the prosecutor accommodated defense requests regarding redactions (e.g., 4/28/98 Tr. 240), and at no point thereafter did any counsel request any redactions that were not made, or object to the prosecutor's redactions of the statements.

At trial, in order to present clearly the content of the three statements to the jury, the prosecutor read the portions of each statement that corresponded to the detectives' questions, and the testifying detectives answered with each appellant's responses (4/24/98 Tr. 381-391 (Muhammad); 4/24/98 Tr. 395-404 (Marks); 4/28/98 Tr. 244-248 (Riley)). With respect to each statement, the trial court instructed the jury to consider it only in determining the guilt or innocence of the confessing declarant, and not as it related to the codefendants (4/24/98 Tr. 379-380 (Muhammad); 4/24/98 Tr. 394 (Marks); 4/28/98 Tr. 242-243 (Riley)). These limiting instructions were repeated during final instructions (4/29/98 Tr. 131-132), were sent to the jury (4/30/98 Tr. 199-202),

and were repeated in response to the jury request to review the (redacted) transcripts of appellants' statements (4/30/98 Tr. 201-202).

1. Appellant Muhammad's Statement

Appellant Muhammad's redacted statement, in pertinent part, read as follows:[3/]

> Q. Okay, Mr. Muhammad, we're investigating an incident that happened on August 20th, at about 9:30, on Pennsylvania Avenue, the 3800 block of Fairfax Village. It was on a Tuesday evening at about 9:30. Could you tell us what happened that particular night?
>
> . . . .
>
> A. I went over there and I had my deuce-deuce. I had turned around and seen these two guys, three dudes. They were standing on Pennsylvania Avenue. They were down by, I think it was by a bank. They were leaning up against a wall. So I seen them. So I knew that since they were out, that they was with Fairfax Village because they were out there. I hopped out of the car . . . with my gun. I chased them. And they laid in the grass. And I just started shooting. That's all that happened. Then I ran back and jumped in the car and went back down Pennsylvania Avenue. But if - But if I had known that the 12 year old, that young, I would not have had shot him because I didn't know he was that young. I really - I couldn't really see because it was dark outside and I was looking from a distance.

[3/] Appellant Muhammad's statement was originally videotaped. At trial, the trial court instructed the jury that the tape contained irrelevant material and that Detective Garvey would read the pertinent portions of the statement to the jury (4/24/98 Tr. 379).

And when I got out of the car, they ran around the corner. I still couldn't tell because they were running around the corner. But when they ran on the grass, I still couldn't tell. That was - that it was happening too fast.

Q. Okay. Let's go back to where you came from over on Gaylord. Where were you before you got to Pennsylvania Avenue?

A. Just standing out on Gaylord.

Q. You got a particular place on Gaylord?

A. No, I was outside for a while, then I was at Tony's house for a minute. But then I just went outside for a while. Then I left from outside.

Q. Okay. You mentioned something about another Tony.

A. Yeah, Tony. I don't know his last name. I just know Tony. Lives on Brookfield.

Q. Brookfield. Okay. Where at on Brookfield; do you know?

A. At the top.

Q. The top, does he have any family members that you know of?

A. He got a sister.

Q. A sister. You know his sister's name?

A. I think her name is Sherry.

Q. Okay. So that Tony was with you?

A. Yeah.

Q. Okay. And what did he do on Pennsylvania Avenue; do you remember?

A. He had the one shot. And he - he ain't really get out. He got out of the car. I think he shot it. But he ain't shoot nobody because he was like too - too far back. And then when he shot, I guess it just hit that - probably the one that hit the sign or whatever, the Fairfax Village sign or whatever.

. . . .

Q. After you came back from the shooting, where - where did you go from there?

A. Came back from the shooting, I went and put my gun in my house. Then I stayed in for a while and then I came back down.

Q. Did you ever go back to Tony's house on Gaylord Drive that night?

A. I don't think that I remember. I think probably I did. I don't know. I can't really remember what I did. But I know I went home and put my gun in the house. Then I came back down later that night.

Q. Do you remember going inside of his house or watching T.V.?

A. No, because there was - matter of fact, I remember because I took my gun in the house and then I went and burnt the car. I went to burn the car. Then I was standing out on Brookfield. (4/24/98 Tr. 384-388).

On cross-examination by counsel for appellant Riley, Detective Garvey agreed that "the Tony that Mr. Muhammad is referring to was in fact James Stroman, the driver of the vehicle that night" and that "James Stroman was also known as Tony" (id. at 409).

2. Appellant Marks's Statement

Appellant Marks's statement provided, in pertinent part, as follows:

> Tuesday night I got into a little blue car. Started driving around D.C. or whatever and w[ent] onto Pennsylvania Avenue at Fairfax shopping center. So James pulled up to the parking lot, turned around and parked. I jumped out, ran to the grass, started shooting. I then jumped back into the car and came back around the way.
>
> . . . .
>
> [James was] [l]ooking out the window, then he pulled out the short joint and he shot it off because I remember hearing a boom. . . .
>
> . . . .
>
> Then he started yelling, get in the car, get in the car. (4/24/98 Tr. at 396-398.)

When he had been asked how he knew to go back to the car, Marks had responded, "Tony . . . . Tony James started yelling . . . Get in the car, get in the car." (Id. at 404.) Marks also stated that James drove him to his home on Gaylord Drive in Suitland (id. at 398).

3. Appellant Riley's Statement

Detective Deloatch testified that when he was talking to appellant Riley, Riley asked him if he could talk to Muhammad to find out what he had said about the case, and the detective accommodated that request. The police heard Muhammad tell Riley

that the police knew what was going on, that Muhammad had "told him his involvement[,] what he had done," and "he told . . . Riley to talk to us" (4/28/98 Tr. 238).[4/] Riley's statement provided, in pertinent part, as follows:

> I was at Tony's house earlier that day. The people from Fairfax tried to run me down. They jumped out of their car with their guns and chased me.
>
> . . . .
>
> I had a 38 caliber and James had the sawed off shotgun.
>
> . . . .
>
> I was just riding. I seen some dudes sitting outside. James pulled the car into the shopping center, made a U-turn, and stopped. I got out of the car. James got out of the car and stood by the car. . . .
>
> I tried my gun and it jammed. I tried to unload it but could not. Then I ran back to the car. I got into the car and went back to Maryland to Tony's house. I got into the Spectrum, . . . drove it to D.C. and burned it. (Id. at 245-246.)

[4/] At this point, Muhammad's counsel requested that the prosecutor delete another portion of Riley's statement and the prosecutor agreed (4/28/98 Tr. 240). Counsel for Marks requested that the prosecutor ensure that the jury not see that portions of the statements had been "blacked out" and the prosecutor agreed to that request as well (id. at 240-241).

B. The Applicable Law

1. Supreme Court Jurisprudence: Bruton and its progeny

In Bruton, 391 U.S. 123, the Supreme Court held that the admission at trial of a statement by a non-testifying codefendant that expressly implicates the defendant violates the defendant's Sixth Amendment right to confront the witness testifying against him. Bruton, 391 U.S. at 126. The rationale of Bruton is that "certain 'powerfully incriminating extrajudicial statements of a codefendant' - those naming another defendant - considered as a class, are so prejudicial that limiting instructions cannot work." Gray, 523 U.S. at 192 (quoting Richardson and Bruton).

Nineteen years after Bruton was decided, the Supreme Court held in Richardson, 481 U.S. 200, that codefendants' statements that have been redacted to "omit all reference" to a defendant fall outside the scope of the Bruton exception. Id. at 203, 211. The Court also ruled that the fact that the facially-neutral statement incriminated the defendant when linked with other evidence at trial did not pose a Confrontation Clause problem. Id. at 208.

On the same day Richardson was decided, the Supreme Court also issued Cruz v. New York, 481 U.S. 186. Overruling a prior

plurality opinion,[5/] the Court in Cruz extended Bruton's holding to a "codefendant['s] [facially incriminating] confessions that 'interlock' with the defendant's own confession." Id. at 192. The Court held: "[W]here a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant, . . . the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him." Id. at 193.

Eleven years later, in Gray, 523 U.S. 185, the Court held that "[r]edactions that simply replace a name with an obvious blank space or a word such as 'deleted' or a symbol or other similarly obvious indications of alteration . . . leave statements that, considered as a class, so closely resemble Bruton's unredacted statements that . . . the law must require the same result." Gray, 523 U.S. at 192. The Court emphasized that "[t]he blank space in an obviously redacted confession . . . points directly to the defendant," distinguishing it from Richardson, in which other evidence was necessary from which to infer the connection between

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[5/] See Parker v. Randolph, 442 U.S. 62, 73 (1979) (plurality opinion) (reasoning that where the defendant has confessed, his case has already been devastated so that the codefendant's facially incriminating confession would be admissible against the defendant because it would seldom be of the devastating character referred to in Bruton).

statement and defendant. Id. at 194-196. The Gray Court stated: "We concede Richardson places outside the scope of Bruton's rule those statements that incriminate inferentially." Id. at 195.[6/]

2. This Court's decisions in Foster and Plater

After Richardson but before Gray, this Court decided in Foster v. United States, 548 A.2d 1370 (D.C. 1988), "that a redacted statement that does not eliminate all references to the existence of a defendant, but substitutes a neutral pronoun in place of an individual's name may be properly admitted at trial, along with limiting instructions, without violating a defendant's right to confrontation, unless a substantial risk exists that the jury will consider the statement when determining the defendant's guilt."

[6/] Significantly, the Gray Court neither recited nor discussed the trial evidence. Instead, the Court merely attached a copy of the codefendant's redacted confession to its Opinion and analyzed the statement standing alone. Use of this analytical framework buttresses the notion that the key inquiry in a Bruton analysis is whether a nontestifying codefendant's statement, viewed alone, falls within a identifiable category considered to facially incriminate - without reference to whether the statement incriminates when considered in the context of the trial evidence.

This bright-line, categorical approach reflects the Supreme Court's efforts and express desire to accommodate the government's right to use a codefendant's statements at a joint trial with the defendant's rights under the Confrontation Clause, while yet permitting prosecutors and trial courts to "easily predict," prior to the trial and before "the introduction of all the evidence, whether or not Bruton [would] bar[] use of the [codefendant's] confession." Gray, 523 U.S. at 197.

Plater, 745 A.2d at 960 (explaining holding of Foster). The Court endorsed using "contextual analysis" to assess that risk, i.e., "consideration of other evidence to determine whether the redaction is effective, when taken in context, to avoid linkage with the defendant." Foster, 548 A.2d at 1379.

Several years later, in Plater, however, this Court embraced the categorical approach of the Bruton-Richardson-Gray line of cases and indicated that "contextual analysis" must be abandoned to the extent its results conflict with those Supreme Court cases. Plater challenged the admission of a redacted codefendant statement which narrated the group beating of the victim by using the pronoun "we." He contended that the statement incriminated him when read in conjunction with the prosecutor's opening statement and the other evidence adduced at trial. This Court rejected this claim, noting that "there was no reference to Plater's existence or participation in the offense because the statements did not introduce the names or descriptions of individual participants," that the use of the pronoun "we" did not link Plater to the crime because there was no dispute that the incident was a group assault. 745 A.2d at 961. In analyzing the evolution of Supreme Court authority, this Court recognized that

> [t]he Supreme Court, interpreting Richardson in its recent Gray opinion, essentially ruled out the

> consideration of other evidence when determining whether a statement inferentially incriminates a defendant ....

Plater, 745 A.2d at 961 n.11. Although this Court in Plater did not explicitly overrule Foster's contextual analysis doctrine, it stopped short of outright rejection of Foster only because the facts in Plater did not compel such a step:

> The government urges in this case that if we conclude that a Foster contextual analysis demands exclusion of the co-defendant's statements, we should reconsider Foster's vitality in light of Gray. As we are satisfied that application of Foster's holding would not require exclusion, we need not make a holding regarding Foster's vitality, but note the evolution and clarification of Bruton principles by the Supreme Court after Foster in the course of holding that, in this case, there was no violation of the Confrontation Clause. If the trial court should face a situation in which the application of Foster's approach would lead to a different result than application of Gray, the [C]ourt of course should follow Supreme Court precedent.

Id. (emphasis added). The Court went on to cite several federal circuit opinions that have interpreted Gray as embracing a categorical approach to Confrontation Clause problems. See id. at 961 n.12 (collecting and citing cases).[7/]

[7/] The Court cited United States v. Akinkoye, 174 F.3d 451, 457 (4th Cir. 1999); United States v. Vejar-Urias, 165 F.3d 337, 340 (5th Cir. 1999); United States v. Verduzco-Martinez, 186 F.3d 1208, 1215 (10th Cir. 1999); United States v. Peterson, 140 F.3d 819, 822 (9th Cir. 1998); United States v. Wilson, 333 U.S. App. D.C. 103, 111 n.5, 160 F.3d 732, 740 n.5 (1998).

Other circuits have since adopted this categorical approach. See, e.g., United States v. Yousef, 327 F.3d 56, 150 (2d Cir.)

(continued...)

3. Crawford

On March 8, 2004, the Supreme Court issued its decision in Crawford v. Washington, altering its prior interpretation of the Confrontation Clause. As to "testimonial" hearsay admitted against a defendant, the Court abandoned its approach in Ohio v. Roberts, 448 U.S. 56 (1980), which had focused on whether the evidence fit within a "firmly rooted exception" to the rule against hearsay or whether there were particularized guarantees of trustworthiness. 124 S. Ct. at 1369-1374. If the hearsay evidence admitted against the defendant is "testimonial" in nature, the Court held, there must be an opportunity to cross-examine the declarant, either at trial or when the prior statement was made. Id. at 1374. Although the Court did not offer a comprehensive definition of the term "testimonial," it made clear that the term applied to statements given during police interrogations. Id. The Court made no reference in its decision to Bruton and its progeny.

7/ (...continued)
("[n]othing in the redacted statement, standing by itself, implicated Yousef or made the fact of redaction obvious, thus meeting the requirements set forth in Gray. . . "), cert. denied, 124 S. Ct. 353 (2003); United States v. Logan, 210 F.3d 820, 822 (8th Cir.) (en banc) (admissibility of confession "is to be determined by viewing the redacted confession in isolation from the other evidence admitted at trial"), cert. denied, 531 U.S. 1053 (2000).

C. Analysis

The Crawford case is not implicated at all by the admission of the redacted confessions in this case. Crawford concerned a testimonial hearsay statement admitted against the defendant without opportunity for cross-examination. None of the redacted statements in this case were admitted against any codefendant; the court told the jury repeatedly to consider each statement only against the confessing declarant. Moreover, there was not even a risk that the statements would be utilized against codefendants because each statement was fully redacted to eliminate all references to the other defendants' participation in the crimes on trial in accordance with the principles of Bruton, Richardson, Gray and Plater.

1. Appellant Marks's claim of error

Although Marks did not object to any of the redactions at trial, he now argues that "the redactions performed on Sayid Muhammad's statement failed to remove incriminating references to the defendant . . . because [it] referenced two different individuals named 'Tony'" and "[t]he method of clarifying these critical portions of Mr. Muhammad's statement were far less effective than cross-examination [of Muhammad] would have been" (Marks Supplemental Brief at 6). But Muhammad's statement did not

mention the name or description of any participant in the shootings other than himself and the driver of the car, "Tony" (Mr. Stroman). At trial, defense counsel for appellant Riley made clear that the reference in appellant Muhammad's statement to an individual named "Tony," who was with him at the shooting, was to Mr. Stroman (4/24/98 Tr. 408-09). Although there was a brief reference in the statement to another "Tony" who lived on Gaylord - appellant Muhammad said in his statement that he went back to that "Tony's" house after the shooting - there was no implication that the "Tony" from Gaylord had participated in the shooting. For this reason, it is unsurprising that appellant Marks's counsel did not object at trial to the reference to "Tony" on Gaylord. After the redactions, the import of the statement was that Mr. "Tony" Stroman was the only other person with appellant Muhammad, while the "Tony" on Gaylord was back in his home in Maryland during the shooting. Thus, appellant Muhammad's statement was not incriminating on its face as to appellant Marks, but only potentially became so when linked with other evidence introduced at trial, which did not pose any confrontation clause issue. Richardson, 481 U.S. at 208-209; Gray, 523 U.S. at 195-196; Plater, 745 A.2d at 960-961 & n.11.

Appellant Marks now argues that "the meaning and rationale of Crawford nullifies the Richardson v. Marsh edict that statements that are only incriminating through linkage to other evidence is

not a violation of the confrontation clause" (Supplemental Brief for Marks at 6). But Crawford did not even mention the Bruton line of cases, much less purport to overrule any of them.[8/] It is well established that only the Supreme Court can overrule its own cases. Agostini v. Felton, 521 U.S. 203, 237 (1997) ("[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions"). Unsurprisingly, appellant cites no authority for the proposition that Crawford overrules Richardson v. Marsh, and what sparse authority we have found on point is to the contrary. See United States v. Gia Le, 316 F. Supp.2d 330, 338 (E.D.Va. 2004) (Crawford does not require severance because redacted statements "do not facially incriminate any of the defendants other than the declarants themselves," will not be "introduced as evidence against

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[8/] The failure of the Crawford Court to discuss Bruton and its progeny is unsurprising, since Crawford was concerned with hearsay statements admitted against a defendant in violation of his confrontation rights, while Bruton concerns statements that pose a risk of misuse, despite not having been admitted against the defendant in question.

Moreover, any notion that Crawford overrules Richardson would be in substantial tension with the Supreme Court's stated "preference . . . for joint trials of defendants who are indicted together." Zafiro v. United States, 506 U.S. 534, 537 (1993).

the co-defendants who did not make them," and co-defendants thus "do not have a corresponding right to confront and cross-examine" the declarants); People v. Khan, 4 Misc.3d 1003(A), ___, 2004 WL 1463027 at *6 (Sup. Ct. Queens County 2004) (because redacted "statements were admitted into evidence against the declarants, the codefendants themselves, not against this defendant, . . . they were not 'testimonial' evidence against this defendant and Crawford is inapplicable").

2. Appellant Muhammad's claim of error

Appellant Muhammad claimed in his initial brief that police testimony indicating that he spoke to appellant Riley prior to appellant Riley making a statement rendered the redactions, which eliminated any reference to appellant Muhammad, "a mere figleaf, pointless and ineffectual" (Brief for Appellant Muhammad at 17). He now contends, similarly, that "[i]t is utter fantasy to suggest that the jury in this case, having heard directly from witnesses such as Wayne Stroman that the co-defendants were present together and acted together . . . failed to detect the fictional revision of each defendant's confession turning each 'we' to 'I'" (Muhammad Supplemental Brief at 3; emphasis in original). But appellant Riley's redacted statement was properly admitted, regardless of any inference of appellant Muhammad's guilt that may have arisen when

the statement was linked with other evidence presented at trial, and his reliance on contextual analysis is directly contrary to the teachings of Richardson, 481 U.S. at 208-209; Gray, 523 U.S. at 195-196; and Plater, 745 A.2d at 960-961 & n.11. Although Muhammad attempts to support his contextual analysis argument by arguing that the prosecutor urged the jurors to "note how the confessions 'fit together'" (Muhammad Supplemental Brief at 4 (citing (4/29/98 Tr. 31-35)), he misreads the record. The prosecutor did not argue the interlocking nature of the confessions; he argued only that the in-court testimony of the "witnesses on the scene" "all fits together" (4/29/98 Tr. 32; emphasis added). With respect to the confessions, he reminded the jury that 'what the defendants said in their statements to the police . . . come in against each individual defendant only" (id. at 25; see also id. at 37 ("each of those statements is to be used by you regarding the individual who made the statement. In other words, it's admissible against the person who made the statement.")).[9/]

[9/] Appellant Riley correctly points out that the prosecutor argued in closing, in support of the government's aiding and abetting theory, "that the defendants acted as a team" (Riley Supplemental Brief at 7-8 (citing 4/29/98 Tr. 40-42)), but he is incorrect if he is suggesting that the prosecutor relied on the redacted confessions to support this argument. Indeed, Marks's counsel's objection to this effect (4/29/98 Tr. at 46) was overruled by the court, who noted that his recollection was "quite the opposite" (id. at 50).

3. Appellant Riley's claim of error

Primarily relying on Cruz v. New York, 481 U.S. 186, Riley argues for the first time in his supplemental brief that "the judge failed to recognize . . . that because the codefendants' statements were interlocking, the method of redaction used to sanitize them was wholly ineffective under Gray. . . . The jurors only needed to insert the word 'we' for 'I' to conclude that Mr. Muhammad and Mr. Marks implicated Mr. Riley in their statements, and the interlocking nature of the statements was an open invitation to do so." (Riley Supplemental Brief at 6.) But appellant Riley's reliance on Cruz is misplaced because the codefendant confession held inadmissible in Cruz was unredacted. The unremarkable holding of Cruz was that admission of this facially incriminating confession violated Bruton principles even though the defendant had himself confessed. Richardson v. Marsh, issued the same day, made clear that had such statement been redacted to eliminate references to the defendant, it would have been admissible against the defendant even if the statement might have inferentially incriminated the defendant when linked to other evidence adduced at trial. Thus, Richardson, not Cruz, governs the instant case.

The Supreme Court has repeatedly affirmed the efficacy of limiting instructions and has found them to be inadequate only in limited circumstances involving admission of facially incriminating

codefendant confessions. See Richardson, 481 U.S. at 211; Bruton, 391 U.S. at 135. Because there is nothing in Crawford which calls these holdings into question, this Court may conclude that the redactions and limiting instructions in this case fully protected appellants' rights under the confrontation clause.[10/]

[10/] Even if the court erred in admitting any of the redacted confessions, the error would be harmless under either a constitutional or a non-constitutional standard, in light of each appellant's confession and the overwhelming independent evidence implicating each appellant in the crimes on trial.

Conclusion

WHEREFORE, the government respectfully requests that this Court affirm the judgments of the Superior Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused two copies of the foregoing Brief for Appellee to be sent by first-class mail to counsel for appellants: Robert S. Becker, Esquire (Counsel for Appellant Riley), 5505 Connecticut Ave., N.W., No. 155, Washington, D.C., 20015; Kenneth H. Rosenau, Esquire (Counsel for Appellant Muhammad), 1304 Rhode Island Ave., N.W., Washington, D.C., 20005; and, Peter N. Mann, Esquire (Counsel for Appellant Marks), 514 Tenth St., Ninth Floor, Washington, D.C., 20004, on this 5th day of August 2004.

Elizabeth Trosman

ELIZABETH TROSMAN
Assistant United States Attorney