

**UNITED STATES COURT OF APPEALS**

**FOR THE SECOND CIRCUIT**

August Term, 2013

Argued: February 4, 2013           Decided: December 4, 2013  
Petition for Rehearing Filed: January 17, 2014  
Decided: March 4, 2014

Docket Nos. 11-2201(L), 11-2426(CON), 11-2639(CON)

- - - - -x

UNITED STATES OF AMERICA,

Appellee,

- v.-

CURTIS TAYLOR, ANTONIO ROSARIO, AKA Chickee, SAMUEL VASQUEZ,  
AKA Rock,

Defendants-Appellants.

- - - - -x

Before:           KEARSE, JACOBS and CARNEY,  
Circuit Judges.

Curtis Taylor, Antonio Rosario, and Samuel Vasquez

appeal the judgments of the United States District Court for  
the Southern District of New York (Marrero, J.), convicting  
them of various charges related to a robbery of a pharmacy  
in midtown Manhattan. Because Taylor's post-arrest  
statements were not voluntary, and were not properly

1 redacted, the convictions are VACATED, and the case is  
2 REMANDED for a new trial.

3 KELLEY J. SHARKEY, Brooklyn, New  
4 York, for Defendant-Appellant  
5 Curtis Taylor.

6  
7 JILLIAN S. HARRINGTON, Monroe  
8 Township, New Jersey, for  
9 Defendant-Appellant Antonio  
10 Rosario.

11  
12 COLLEEN P. CASSIDY, Federal  
13 Defenders of New York, Inc., New  
14 York, New York, for Defendant-  
15 Appellant Samuel Vasquez.

16  
17 CHRISTOPHER D. FREY (Michael  
18 Bosworth, on the brief),  
19 Assistant United States  
20 Attorneys, for Preet Bharara,  
21 United States Attorney for the  
22 Southern District of New York,  
23 New York, New York, for  
24 Appellee.

25  
26 DENNIS JACOBS, Circuit Judge:

27  
28 The United States petitions for rehearing following our  
29 decision in United States v. Taylor, 736 F.3d 661 (2d Cir.  
30 2013). The petition is granted, and the opinion filed  
31 December 4, 2013 is withdrawn. For the reasons that follow  
32 in our revised opinion, we vacate the convictions of the  
33 three defendants and remand for a new trial.

34 Curtis Taylor, Antonio Rosario, and Samuel Vasquez  
35 appeal judgments of conviction entered in the United States

1 District Court for the Southern District of New York  
2 (Marrero, J.) for conspiring to commit Hobbs Act robbery and  
3 brandishing a firearm during a crime of violence, among  
4 other offenses related to the robbery of a pharmacy in  
5 midtown Manhattan. Taylor, who claims to have attempted  
6 suicide by pills as he was arrested, argues that he was  
7 incapacitated when he incriminated himself post-arrest, and  
8 that the court's decision to admit those statements into  
9 evidence violated his rights under Miranda v. Arizona, 384  
10 U.S. 436 (1966), and the Due Process Clause of the  
11 Constitution. Rosario and Vasquez, who raise separate  
12 issues, join Taylor's challenge to the extent that Taylor's  
13 confession was used against them, and appeal the denial of  
14 their motion to sever on the ground that Taylor's statements  
15 caused prejudicial spillover and violated the confrontation  
16 right protected under Bruton v. United States, 391 U.S. 123  
17 (1968).

18 This is a close case. But even assuming that Taylor's  
19 initial waiver of his Miranda rights was knowing and  
20 voluntary, Taylor was largely stupefied when he made his  
21 post-arrest statements, as confirmed by the testimony of the  
22 law enforcement agents and the pretrial services officer who

1 interviewed him, and by the evaluations of staff  
2 psychologists at the Metropolitan Correctional Center  
3 ("MCC"). The agents and officer testified that Taylor fell  
4 asleep repeatedly during questioning and was only  
5 intermittently alert. Although their testimony also  
6 suggests--and the district court found--that Taylor's  
7 incriminating statements were made in relatively lucid  
8 intervals, Taylor was impaired throughout, and his  
9 interrogators took undue advantage of that impairment by  
10 continuing to question him. We therefore conclude that  
11 Taylor's post-arrest statements were not voluntary. We  
12 further conclude that admitting those statements into  
13 evidence was not harmless. His conviction is therefore  
14 vacated and remanded for a new trial. And because Taylor's  
15 statements were redacted in a manner that left obvious  
16 indicia that the co-defendants' names had been deleted,  
17 their convictions are also vacated and remanded for a new  
18 trial.

## 19 I

20 On Christmas Eve 2008, Vasquez drove Taylor and Rosario  
21 from the Bronx to midtown Manhattan to rob a pharmacy. With  
22 them was Luana Miller, a drug addict from Mississippi with  
23 an extensive criminal history.

1           En route, Miller called the pharmacy and asked them to  
2 stay open for a few minutes past 5:00 PM, so that she could  
3 pick up a prescription. At the pharmacy, Miller went in  
4 first, posing as a customer. As she spoke with the  
5 pharmacist, Rosario burst in the door brandishing a gun,  
6 screaming that it was a robbery, and demanding OxyContin: a  
7 powerful opioid for pain that is often resold illegally.  
8 The two took more than \$12,000 of controlled substances, as  
9 well as cash and subway cards, while Taylor stood lookout at  
10 the front door and Vasquez waited in the getaway car. The  
11 crew then drove back to the Bronx. Cell phone records for  
12 Taylor, Rosario, and Vasquez show that they were in the  
13 Bronx that afternoon, traveled to midtown Manhattan just  
14 before 5:00 PM, stayed near the pharmacy until just after  
15 the robbery, and then returned to the Bronx.

16           While executing a warrant at the home of Miller's  
17 boyfriend in January 2009, police arrested her on  
18 outstanding warrants. Fearing extradition to Mississippi,  
19 she offered to cooperate with the government's investigation  
20 of the pharmacy robbery, and led police to Taylor, Rosario,  
21 and Vasquez.

22           Around 6:00 AM on April 9, 2009, over 25 NYPD and FBI  
23 agents came to Taylor's apartment to effect his arrest.

1 Taylor claims that, amid the ensuing chaos, he attempted  
2 suicide by taking a bottle-full of Xanax pills. Taylor's  
3 daughter testified that her mother (who died before trial)  
4 reported the overdose to an officer who dismissed her and  
5 told her to "shut up." Still, the record is less than clear  
6 as to whether Taylor actually took the pills, and as to  
7 whether officers were told of his overdose.

8         Around 9:30 that morning, Taylor was interviewed at FBI  
9 headquarters in downtown Manhattan by New York City Police  
10 Department Detective Ralph Burch, a member of an FBI/New  
11 York health care fraud task force. Taylor signed a form  
12 waiving his Miranda rights, and went on to give a lengthy  
13 statement confessing his involvement in the robbery.

14         Taylor argues that he was falling asleep and was at  
15 times unconscious during the interview. Detective Burch  
16 said that it seemed like Taylor's body was "somewhat  
17 shutting down" during the two- to three-hour interview.  
18 Supplemental App. 51. On the other hand, Burch testified  
19 that, though Taylor nodded off at times, he was "coherent"  
20 and "fluid" when he was awake and speaking:

21                 Mr. Taylor at times was nodding off during the  
22 interview. When we asked Mr. Taylor to listen up,  
23 that we were asking him questions, he would  
24 respond that he knew what he was being asked and  
25 he would repeat the questions back to us to show

1           that he was understanding what was being asked of  
2           him and knew what was going on.

3  
4   Id. at 45. Detective Burch clarified that Taylor did not  
5   need to be awakened during the interview; he just had to be  
6   "refocused." Id. at 46. "He seemed like he was dozing off,  
7   and we had to stress did he understand what was going on.

8   . . . [I]t was my impression that he knew what was going on  
9   then." Id.

10           Taylor was later taken to a hospital for medical  
11   clearance before his transfer into the custody of the  
12   Marshals Service. FBI Special Agent Ian Tomas, who was also  
13   involved in the interrogation, explained that Taylor was  
14   taken to the hospital because "[t]here was some talk about  
15   him on some medication and possibly an injury he had  
16   sustained previous at a construction site." Id. at 137.  
17   Agent Tomas clarified that the hospital visit was necessary  
18   because there was some question as to whether the Marshals  
19   Service would take custody of someone who "might be off":  
20   "We felt that his do[z]ing off might be a reason the  
21   marshals wouldn't accept the custody of Mr. Taylor." Id. at  
22   160. Taylor spent the rest of the day at the hospital  
23   sleeping, but he did not receive medical attention. He was  
24   transferred to the MCC later that evening.

1           The next morning, April 10, Taylor met with MCC staff  
2 psychologists. The MCC's chief psychologist, Dr. Elissa  
3 Miller, explained that they wanted to evaluate Taylor before  
4 his arraignment because they knew of Taylor's earlier  
5 schizophrenia diagnosis and several prior attempts at  
6 suicide. According to Dr. Miller (who reported on findings  
7 by staff psychologists), Taylor "presented with a thought  
8 disorder," drooled, was vague, stared blankly, and "[h]is  
9 thoughts lacked spontaneity." Id. at 110. Miller testified  
10 that "if you asked him questions, he really couldn't  
11 elaborate on them because his thought process was impaired."  
12 Id. at 111.

13           Taylor also told one of the staff psychologists that  
14 "the day he was arrested by the FBI, he took multiple Xanax  
15 pills in an attempt to kill himself because he had promised  
16 himself that he would never go back to jail." Id. at 113.  
17 Taylor told Miller that, "[a]s a result of taking all those  
18 Xanax pills, he . . . wasn't waking up and he went to the  
19 hospital." Id.

20           He was then taken to the courthouse for arraignment.  
21 While awaiting arrival of a pretrial services officer,  
22 Taylor told Agent Tomas that "he wanted to clear up some  
23 issues about the charges that he was presented with." Id.



1 at 139. Agent Tomas took Taylor to an interview room and  
2 again advised him of his Miranda rights; Taylor confessed to  
3 the robbery again.

4 Around 12:30 PM that day, Taylor met with Dennis  
5 Khilkevich, a pretrial services officer. Khilkevich  
6 testified that when he arrived for the interview, Taylor  
7 "appeared sleepy and had to be awakened to be interviewed."  
8 Id. at 319. "He was sitting in a chair and he appeared as  
9 if he was asleep or he was taking a nap." Id. Khilkevich  
10 stopped the interview because Taylor "repeatedly fell asleep  
11 in the chair." Id. at 320. When the interview resumed,  
12 Taylor "was initially responsive maybe for several minutes,"  
13 but "[t]hen he continued to fall asleep." Id. "He had to  
14 be woken up and he would be responsive for a few minutes and  
15 then he would go to sleep again." Id. Khilkevich  
16 eventually finished the interview, explaining that Taylor  
17 was awake and coherent "[a]t times." Id. at 323.

18 As to the other defendants:

- 19 • Rosario was also arrested on April 9, 2009, and  
20 waived his Miranda rights. He claimed at first  
21 that he was in the hospital the day of the  
22 robbery, but then said he had actually been at his  
23 girlfriend's house in Queens. When told that a

1 surveillance video showed a suspect like him,  
2 Rosario laughed and ambiguously said "yeah."  
3 Trial Transcript ("Tr.") 571.

- 4 • Vasquez was arrested a day earlier, on April 8,  
5 after surveillance linked him to the car believed  
6 to have been used in the pharmacy robbery. When  
7 arrested, he was carrying car keys, a cell phone,  
8 and a piece of paper listing various milligram  
9 doses of oxycodone and OxyContin, along with the  
10 number of pills of each dose. Vasquez gave no  
11 statement to police.

12 The indictment charged the three with (1) conspiracy to  
13 commit Hobbs Act robbery, in violation of 18 U.S.C. §  
14 1951(b)(1); (2) Hobbs Act robbery; and (3) use, possession,  
15 and brandishing of a firearm during a crime of violence, in  
16 violation of 18 U.S.C. § 924(c)(1)(A)(ii). Taylor was  
17 additionally charged with (4) fraudulent acquisition of  
18 controlled substances by passing forged prescriptions, in  
19 violation of 21 U.S.C. § 843(a)(3).

20 Taylor moved to suppress his two post-arrest statements  
21 on the ground that his Miranda waivers and his post-arrest  
22 statements were neither knowing nor voluntary. The  
23 testimony summarized above was given at the suppression

1 hearing (starting April 23, 2010, continuing May 4, 2010,  
2 and concluding May 6, 2010). The district court denied  
3 suppression of Taylor's post-arrest statements, finding that  
4 the government sustained its burden of proving that Taylor's  
5 Miranda waivers were "informed and voluntary." Supplemental  
6 App. 385. The court found that the testimony of the law  
7 enforcement agents was consistent, corroborated, and  
8 truthful. Id. at 386-87.

9 The court rejected the argument that Taylor's  
10 incapacitation rendered his post-arrest statements  
11 involuntary:

12 [T]he defense does not allege that the government  
13 failed to read Mr. Taylor [his] rights before  
14 questioning began or any other coercion. Even  
15 were the Court to assume that Mr. Taylor ingested  
16 a large quantity of Xanax shortly before his  
17 arrest, the Court credits the testimony from the  
18 government's witnesses that Mr. Taylor was  
19 sufficiently lucid during the questioning that his  
20 waiver of Miranda rights was knowing and  
21 voluntary.  
22

23 The fact that there is evidence that Mr. Taylor  
24 nodded off from time to time during the  
25 questioning does not persuade the Court that  
26 during those portions of the testimony when he was  
27 awake and lucid he could not have voluntarily and  
28 knowingly waived his Miranda rights.

29 Id. at 387-88. The district court went on to explain that  
30 it did "not equate nodding off intermittently with total  
31 psychotic episodes of hallucination and other extreme

1 circumstances that might throw greater doubt on the  
2 defendant's ability to voluntarily and knowingly waive his  
3 rights." Id. at 388.

4 Taylor's statements, which implicated Rosario and  
5 Vasquez, were redacted at trial to remove their names. The  
6 jury was instructed that Taylor's statements should be  
7 considered only as to Taylor.

8 In December 2010, the jury convicted on all counts.  
9 Taylor was sentenced principally to 200 months'  
10 imprisonment, Rosario was sentenced principally to 180  
11 months, and Vasquez was sentenced principally to 170 months.  
12 They all filed timely notices of appeal.

## 14 II

15 The main issue on appeal is whether Taylor's Miranda  
16 waivers on April 9 and April 10, and his post-arrest  
17 statements on each of those dates, were knowing and  
18 voluntary. "We review a district court's determination  
19 regarding the constitutionality of a Miranda waiver de novo  
20 and a district court's underlying factual findings for clear  
21 error." United States v. Carter, 489 F.3d 528, 534 (2d Cir.  
22 2007).

1           A statement made by the accused "during a custodial  
2           interrogation is inadmissible at trial unless the  
3           prosecution can establish that the accused in fact knowingly  
4           and voluntarily waived [Miranda] rights when making the  
5           statement." Berghuis v. Thompkins, 560 U.S. 370, 382 (2010)  
6           (internal quotation marks omitted). "The existence of a  
7           knowing and voluntary waiver does not, however, guarantee  
8           that all subsequent statements were voluntarily made." In  
9           re Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d  
10          177, 211-12 (2d Cir. 2008); see also Dickerson v. United  
11          States, 530 U.S. 428, 444 (2000) ("The requirement that  
12          Miranda warnings be given does not, of course, dispense with  
13          the voluntariness inquiry.").

14          We look at the totality of circumstances surrounding a  
15          Miranda waiver and any subsequent statements to determine  
16          knowledge and voluntariness. See Oregon v. Elstad, 470 U.S.  
17          298, 309 (1985). In that context, "knowing" means with full  
18          awareness of the nature of the right being abandoned and the  
19          consequences of abandoning it, and "voluntary" means by  
20          deliberate choice free from intimidation, coercion, or  
21          deception. United States v. Plugh, 648 F.3d 118, 127 (2d  
22          Cir. 2011), cert. denied, 132 S. Ct. 1610 (2012). The

1 government bears the burden of proof. Colorado v. Connelly,  
2 479 U.S. 157, 168-69 (1986).

3  
4 The analysis applicable to April 9 differs somewhat  
5 from the analysis applicable to April 10.

6 **April 9.** In general, a suspect who reads,  
7 acknowledges, and signs an "advice of rights" form before  
8 making a statement has knowingly and voluntarily waived  
9 Miranda rights. See Plugh, 648 F.3d at 127-28. Before  
10 making his April 9 statement, Taylor was given Miranda  
11 rights using an "advice of rights" form. He was read every  
12 right, voiced his understanding, and signed the form. At  
13 the time, according to Detective Burch, Taylor had a "fluid"  
14 demeanor, "knew what was going on," and "understood what was  
15 happening." Supplemental App. 15. This evidence, credited  
16 by the district court, supports the conclusion that Taylor  
17 knowingly and voluntarily waived his Miranda rights before  
18 speaking with law enforcement on April 9.

19 But even accepting that Taylor's April 9 Miranda waiver  
20 was knowing and voluntary, we must nonetheless determine  
21 whether the inculpatory statements themselves were  
22 voluntary. Dickerson, 530 U.S. at 444. "A confession is

1 not voluntary when obtained under circumstances that  
2 overbear the defendant's will at the time it is given."  
3 United States v. Anderson, 929 F.2d 96, 99 (2d Cir. 1991).  
4 The voluntariness inquiry should examine "the totality of  
5 all the surrounding circumstances, including the accused's  
6 characteristics, the conditions of interrogation, and the  
7 conduct of law enforcement officials." Id. An individual's  
8 mental state should be considered in the voluntariness  
9 inquiry to the extent it allowed law enforcement to coerce  
10 the individual. Connelly, 479 U.S. at 164-65; see also  
11 United States v. Salameh, 152 F.3d 88, 117 (2d Cir. 1998)  
12 (per curiam).

13 The record indicates that Taylor's April 9 statement  
14 was made when he was unable to summon the will to make a  
15 knowing and voluntary decision; his will was overborne.

16 It is difficult to determine whether a confession is  
17 voluntary; case law "yield[s] no talismanic definition" for  
18 the term. Schneckloth v. Bustamonte, 412 U.S. 218, 224  
19 (1973). It is clear, however, that when "a person is  
20 unconscious or drugged or otherwise lacks capacity for  
21 conscious choice," a confession cannot be voluntary. Id.  
22 (internal quotation marks omitted); see also United States

1 ex rel. Burns v. LaVallee, 436 F.2d 1352, 1355-56 (2d Cir.  
2 1970) (holding a written confession to be involuntary when  
3 given "after over eighteen hours of uninterrupted custodial  
4 interrogation, after he had been without sleep, and almost  
5 without food, for thirty hours").

6 Taylor claims he was mentally incapacitated during the  
7 April 9 interview because of the quantity of Xanax pills he  
8 ingested immediately before his arrest. That claim finds  
9 support in the record. Detective Burch testified that  
10 Taylor's body "was somewhat shutting down," and that "at  
11 that time that he was answering questions . . . his body was  
12 giving up on him." Supplemental App. 51. The district  
13 court credited this testimony. Granted, Burch also  
14 testified that, when Taylor was speaking, he was "coherent"  
15 and understood what was going on when he was not nodding  
16 off. Id. But it nonetheless appears that Taylor fell  
17 asleep at least two or three times during the interview, and  
18 the officers repeatedly had to awaken him, or (to use the  
19 nicer term) "refocus" him--at one point coaxing him, "Mr.  
20 Taylor, you have to answer our questions and focus with us."  
21 Id. at 47. Agent Tomas corroborated that Taylor was "a  
22 little bit out of it" and dozing off. Id. at 158-61.



1           In Mincey v. Arizona, 437 U.S. 385 (1978), statements  
2 by a defendant who was hospitalized were ruled involuntary.  
3 The Court observed that the defendant was in intensive care  
4 for a serious wound and was "evidently confused and unable  
5 to think clearly about either the events of that afternoon  
6 or the circumstances of his interrogation." Id. at 398.  
7 The statements were "the result of virtually continuous  
8 questioning of a seriously and painfully wounded man on the  
9 edge of consciousness." Id. at 401; see also id. ("But  
10 despite [the accused's] entreaties to be let alone, [the  
11 police officer] ceased the interrogation only during  
12 intervals when [the accused] lost consciousness or received  
13 medical treatment, and after each such interruption returned  
14 relentlessly to his task.").

15           On the other hand, in Salameh, we rejected a claim that  
16 a statement was involuntary, even though the accused claimed  
17 that prior to being taken into U.S. custody, he had been  
18 incarcerated in Egypt and tortured for ten days. 152 F.3d  
19 at 117. Despite the accused's weakened mental state, his  
20 statements were voluntary because he did "not contend that  
21 federal agents either mentally or physically coerced his  
22 remarks during that interrogation." Id.; see also Plugh,

1 648 F.3d at 128 (statements voluntary because defendant "was  
2 never threatened physically or psychologically abused in any  
3 manner, or made any type of promises such that his will was  
4 overborne") (internal quotation marks omitted).

5 One difference between Mincey and Salameh is the  
6 presence in Mincey of police overreaching, see Connelly, 479  
7 U.S. at 157 (stressing the "crucial element of police  
8 overreaching" in assessing voluntariness), and that is no  
9 doubt a difficult issue here. Continued questioning of a  
10 sleep-deprived suspect can be coercive, depending on the  
11 circumstances, see, e.g., Mincey, 437 U.S. at 401; LaVallee,  
12 436 F.2d at 1355-56; but the decisive issue is whether the  
13 will was "overborne" by the police, so that the defendant is  
14 not using such faculties as he has. The conditions in which  
15 Taylor was questioned do not appear to have been abusive;<sup>1</sup>  
16 but there is little difference in effect between sleep  
17 deprivation as a technique and the relentless questioning of  
18 a person who is obviously unable to focus or stay awake for  
19 some other reason.

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<sup>1</sup> The law enforcement agents, though persistent in  
interrogating Taylor and summoning him to alertness as he  
continued to fall asleep, do not appear to have acted  
maliciously or abusively during the interrogation.

1           The district court credited testimony that Taylor was  
2 coherent *at times*. One such interval is when Taylor signed  
3 the "advice of rights" form on April 9, a finding that we do  
4 not disturb. But as that interview progressed, it became  
5 clear to the officers (as their testimony confirms) that  
6 Taylor was in and out of consciousness while giving his  
7 statement, and in a trance or a stupor most of the time when  
8 not actually asleep. Thus, the officers' persistent  
9 questioning took undue advantage of Taylor's diminished  
10 mental state, and ultimately overbore his will.  
11 Accordingly, we conclude that Taylor's statement on April 9  
12 was not voluntary and should have been suppressed.

13  
14           **April 10.** On the morning of April 10, Taylor himself  
15 initiated contact with law enforcement by notifying Agent  
16 Tomas that "he wanted to clear up some issues about the  
17 charges that he was presented with." Supplemental App. 139.  
18 He was then orally re-advised of his rights, orally waived  
19 them, and gave an additional statement, altering some  
20 aspects of his April 9 account. Although Taylor continued  
21 to slip in and out of consciousness that day, Agent Tomas  
22 testified that, when Taylor spoke to the agents mid-morning,

1 he was "much more alert" than he had been the day before.<sup>2</sup>  
2 Id. at 139-42. But because Taylor's first confession on  
3 April 9 was the product of coercion, we must determine  
4 whether his second waiver and confession, less than twenty-  
5 four hours later, were rendered involuntary based, at least  
6 in part, on the "taint clinging to the first confession."  
7 Anderson, 929 F.2d at 102.

8 "[T]he use of coercive and improper tactics in  
9 obtaining an initial confession may warrant a presumption of  
10 compulsion as to a second one, even if the latter was  
11 obtained after properly administered Miranda warnings."  
12 Tankleff v. Senkowski, 135 F.3d 235, 245 (2d Cir. 1998)  
13 (internal quotation marks omitted). That is so because,  
14 "after an accused has once let the cat out of the bag by  
15 confessing, no matter what the inducement, he is never  
16 thereafter free of the psychological and practical  
17 disadvantages of having confessed." United States v. Bayer,  
18 331 U.S. 532, 540 (1947).

19 "In deciding whether a second confession has been  
20 tainted by the prior coerced statement, 'the time that  
21 passes between confessions, the change in place of

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<sup>2</sup> As discussed further below, it is not at all clear that Taylor was appreciably more alert.

1 interrogations, and the change in identity of interrogators  
2 all bear on whether that coercion has carried over into the  
3 second confession.'" Anderson, 929 F.2d at 102 (quoting  
4 Elstad, 470 U.S. at 310). Less than a day passed between  
5 Taylor's first and second confessions, and in that interval,  
6 Taylor was hospitalized or unconscious most of the time.  
7 Although the venue of the interrogations differed, Agent  
8 Tomas was present at both--and it was to Agent Tomas that  
9 Taylor addressed his request to "clear up some issues." The  
10 taint of the prior involuntary confession carried over to  
11 Taylor's second waiver and statement, burdening both with a  
12 "presumption of compulsion." Tankleff, 135 F.3d at 245.

13 That presumption is reinforced by uncontradicted  
14 testimony regarding Taylor's lingering mental incapacity on  
15 April 10. Taylor continued to doze off that morning and was  
16 alert only "at times." Supplemental App. 162. Just before  
17 the April 10 interview, FBI Special Agent Steven Jensen saw  
18 Taylor "slouched in his chair, and he appeared to be  
19 sleeping." Id. at 247. When asked for how long Taylor was  
20 asleep, Agent Jensen explained (ambiguously) that it was "in  
21 excess of minutes." Id.

22

1           Although the record does not suggest that Taylor fell  
2 asleep during the April 10 interview, there is evidence  
3 that, throughout the day on April 10, Taylor remained in a  
4 fog. Dr. Miller reported that Taylor was mentally impaired  
5 on the morning of April 10 and could not adequately respond  
6 to questions:

7           When he was seen, he presented with a thought  
8 disorder. He was noted to be picking at his  
9 nails. He was drooling. He was vague in his  
10 responses to questioning. He presented with what  
11 we call a flat affect . . . just kind of flat and  
12 blank-face stare.

13  
14           He could not elaborate on questions asked. His  
15 thoughts lacked spontaneity. His speech was  
16 vague. When we would ask him certain questions  
17 about whether he was hearing voices, he couldn't  
18 really elaborate on his responses.

19  
20           Id. at 110. Dr. Miller also reported the observation made  
21 by psychologists in her division: "[I]f you asked him  
22 questions, he really couldn't elaborate on them because his  
23 thought process was impaired." Id. at 111.

24           Dennis Khilkevich, a pretrial services officer who  
25 interviewed Taylor at around 12:30 PM on April 10, found  
26 Taylor drowsy and in need of rousing. See id. at 319 ("He  
27 was sitting in a chair and he appeared as if he was asleep  
28 or taking a nap."). When Khilkevich tired of waking him up,  
29 he suspended the interview; and when he resumed, Taylor

1 continued to fall asleep between short intervals of  
2 consciousness, so Khilkevich ended the questioning.

3 The district court did not discredit the testimony of  
4 Dr. Miller or Khilkevich.

5 Evidence of Taylor's continued incapacity on April 10,  
6 coupled with the taint of his prior confession, renders his  
7 second waiver and statement involuntary. Considering the  
8 totality of circumstances, we conclude that Taylor's  
9 inculpatory statement on April 10 should have been  
10 suppressed.<sup>3</sup>

### 12 III

13 Next we consider whether the error in admitting those  
14 statements was harmless. Arizona v. Fulminante, 499 U.S.  
15 279, 310-11 (1991) (Rehnquist, C.J., writing for a majority  
16 as to harmless error analysis); see also Zappulla v. New  
17 York, 391 F.3d 462, 466 (2d Cir. 2004). "When reviewing the  
18 erroneous admission of an involuntary confession, the  
19 appellate court, as it does with the admission of other

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<sup>3</sup> When it appears that a defendant is malingering, the calculus should be vastly different. Here, all the witnesses support the account that Taylor was actually slipping in and out of consciousness during the April 9 interview, and immediately before and after the April 10 interview.

1 forms of improperly admitted evidence, simply reviews the  
2 remainder of the evidence against the defendant to determine  
3 whether the admission of the confession was harmless *beyond*  
4 *a reasonable doubt*." Fulminante, 499 U.S. at 310 (emphasis  
5 added).

6 "Is it clear beyond a reasonable doubt that a rational  
7 jury would have found the defendant guilty absent the  
8 error?" Neder v. United States, 527 U.S. 1, 18 (1999).

9 "[T]he court conducting a harmless-error inquiry must  
10 appreciate the indelible impact a full confession may have  
11 on the trier of fact," Fulminante, 499 U.S. at 313 (Kennedy,  
12 J., concurring); "it may be devastating to a defendant,"  
13 Id. at 312 (Rehnquist, C.J., writing for a majority as to  
14 harmless error analysis). The following (nonexclusive)  
15 factors bear on whether the erroneous admission of a  
16 confession was harmless: "(1) the overall strength of the  
17 prosecution's case; (2) the prosecutor's conduct with  
18 respect to the improperly admitted evidence; (3) the  
19 importance of the wrongly admitted testimony; and (4)  
20 whether such evidence was cumulative of other properly  
21 admitted evidence." Zappulla, 391 F.3d at 468.

22 The admission of Taylor's involuntary confessions was  
23 not harmless error beyond a reasonable doubt. (1) Taylor's



1 confessions were a critical part of the prosecution's case.  
2 The case against Taylor otherwise rested on the testimony of  
3 Luana Miller and cell-site records. Miller's testimony was  
4 subject to attack, as Taylor claims, because of her criminal  
5 past and because she had much to gain from cooperating with  
6 the government. Further, while the cell-site records  
7 corroborate Miller's account of their movements, no other  
8 witness or physical evidence links Taylor to the crime. (2)  
9 The prosecution emphasized Taylor's confessions throughout  
10 trial, including at opening and closing, and had both  
11 statements read to the jury in full. (3) & (4) Taylor's  
12 confessions were important to the case, corroborating  
13 Miller's critical testimony. Further, a confession is  
14 recognized to have greater impact than the same testimony  
15 given by another witness. See, e.g., Fulminante, 499 U.S.  
16 at 312-13. Given the weight that a jury may accord a  
17 confession, as well as the other relevant factors, the  
18 admission of Taylor's post-arrest statements was not  
19 harmless.

20 In sum, Taylor confessed while in a stupor, his will  
21 was overborne, his statements were not voluntarily made, and  
22 they should have been suppressed. Considering the other  
23 evidence against Taylor and the important role that his

1 confessions played at trial, this was not harmless error.  
2 We therefore vacate Taylor's conviction and remand for a new  
3 trial.<sup>4</sup>

#### 5 IV

6 Rosario and Vasquez argue that the admission of  
7 Taylor's post-arrest statements violated their rights under  
8 the Confrontation Clause because they had no opportunity to  
9 cross-examine Taylor and because his statements pointed to  
10 them.

11 It matters that the district court gave limiting  
12 instructions. The court instructed that "[s]ome evidence is  
13 admitted for a limited purpose only," and pointed  
14 specifically to "certain statements that law enforcement  
15 agents testified were made to them by Mr. Taylor and Mr.  
16 Rosario and that were admitted only as to the particular  
17 defendant who made the statement." Vasquez App. 220. The  
18 court later reinforced that instruction:

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<sup>4</sup> Aside from Counts One, Two, and Three of the indictment, which stemmed from the pharmacy robbery (of which all three defendants were convicted), Taylor was also convicted of making a misrepresentation to obtain OxyContin (Count Four). The government relied heavily on Taylor's confession in proving this offense. Accordingly, we vacate all of Taylor's counts of conviction, under the same harmless error analysis.

1 As I instructed you previously, evidence of  
2 statements that law enforcement agents testified  
3 were made by a particular defendant was admitted  
4 with respect to that particular defendant alone,  
5 and if you find that the statements were made, may  
6 not be considered or discussed by you in any way  
7 with respect to any other defendant when you begin  
8 your deliberations.  
9

10 Id. at 227; see also id. at 177 ("The evidence of alleged  
11 statements made by Curtis Taylor to law enforcement is  
12 admitted with respect to Curtis Taylor alone and may not be  
13 considered or discussed by you in any way with respect to  
14 either of the other defendants . . . .").

15 We normally assume that jurors follow limiting  
16 instructions. See, e.g., United States v. Jass, 569 F.3d  
17 47, 55 (2d Cir. 2009). But a confession by one co-defendant  
18 in a joint trial poses substantial risk for the other co-  
19 defendants notwithstanding such an instruction. See Bruton  
20 v. United States, 391 U.S. 123, 135-36 (1968). In Bruton,  
21 the Supreme Court recognized the risks posed by "powerfully  
22 incriminating extrajudicial statements of a co-defendant,  
23 who stands accused side-by-side with the defendant," which  
24 are then "deliberately spread before the jury in a joint  
25 trial." Id. Such limiting instructions call for "a mental  
26 gymnastic which is beyond, not only [the jury's] powers, but  
27 anybody's else." Nash v. United States, 54 F.2d 1006, 1007

1 (2d Cir. 1932) (L. Hand, J.). The risk is heightened when  
2 the circumstances deprive a defendant of the constitutional  
3 right to confront the witnesses against him. See Gray v.  
4 Maryland, 523 U.S. 185, 196 (1998).

5 "The crux of [the Confrontation Clause] is that the  
6 government cannot introduce at trial statements containing  
7 accusations against the defendant unless the accuser takes  
8 the stand against the defendant and is available for cross  
9 examination." Jass, 569 F.3d at 55 (internal quotation  
10 marks omitted). When the confession of one defendant  
11 implicates his co-defendants, Bruton demands "a redaction  
12 and substitution adequate to remove the 'overwhelming  
13 probability' that a jury will not follow a limiting  
14 instruction that precludes its consideration of a redacted  
15 confession against a defendant other than the declarant."  
16 Id. at 60. Accordingly, "redacted confessions 'that simply  
17 replace a name with . . . *obvious indications of alteration*'  
18 fall within Bruton because they 'refer[ ] directly to the  
19 "existence" of the nonconfessing defendant.'" Id. at 58  
20 (quoting Gray, 523 U.S. at 192) (emphasis in original).

21 Redactions and substitutions can avoid Bruton error if  
22 the altered statement uses words "that might actually have  
23 been said by a person admitting his own culpability in the

1 charged conspiracy while shielding the specific identity of  
2 his confederate." Id. at 62. Along these lines, we have  
3 previously allowed proper names to be replaced with the  
4 following terms (among others): "another person," id. at 59;  
5 "others," "other people," and "another person," United  
6 States v. Tutino, 883 F.2d 1125, 1135 (2d Cir. 1989); the  
7 pronoun "he," United States v. Kyles, 40 F.3d 519, 526 (2d  
8 Cir. 1994); "this guy," "another guy," and "similar  
9 language," United States v. Williams, 936 F.2d 698, 699, 701  
10 (2d Cir. 1991); and "friend," United States v. Benitez, 920  
11 F.2d 1080, 1087 (2d Cir. 1990). We explicitly left open,  
12 however, "the possibility of a neutral-word substitution  
13 being so conspicuously awkward" that the alteration becomes  
14 obvious. Jass, 569 F.3d at 61; see also Tutino, 883 F.2d at  
15 1135 (upholding redacted statement where "the jury never  
16 knew that [the declarant's] original statement named  
17 names").

18 The redactions here suggest that Taylor's original  
19 statements contained actual names. Throughout, Luana  
20 Miller's name is used--without redaction--conjoined with  
21 reference to persons who are unnamed: "LUANA MILLER and two  
22 other individuals"; "The person waiting with LUANA MILLER  
23 and TAYLOR"; and "TAYLOR, LUANA MILLER, and the driver." If

1 Taylor had been trying to avoid naming his confederates, he  
2 would not have identified one of them--Miller--in the very  
3 phrase in which the names of the other confederates are  
4 omitted.<sup>5</sup> The jurors would notice that Miller is the one  
5 person involved who was cooperating, and would infer that  
6 the obvious purpose of the meticulously crafted partial  
7 redaction was to corroborate Miller's testimony against the  
8 rest of the group, not to shield confederates.

9 Moreover, the wording of the statement suffers from  
10 stilted circumlocutions: "The robbery was the idea of the  
11 person who waited with Luana Miller and Taylor at the gas  
12 station"; "Luana Miller and the other person who had waited  
13 with Taylor at the gas station came up with the plan";  
14 "[A]ll four of them went to the house of the mother of one  
15 of the other individuals." And reference to "two other  
16 individuals" is suspiciously closer to the speech of a  
17 prosecutor than that of a perpetrator.

18 In Jass, we suggested that the following redaction  
19 would be inadequate: "When I realized the guard had pulled  
20 the alarm, I turned and said to another person, 'Look, other

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<sup>5</sup> There was no evidence Taylor knew of Miller's cooperation at the time of his arrest; Miller did not sign a formal cooperation agreement with the government until months later.

1 person, we have to get out of here.'" 569 F.3d at 62.  
2 Taylor's redacted statement betrays a similar flaw in  
3 referencing Vasquez, who drove the car: "the driver was  
4 running late. When the driver got there, he drove the three  
5 of them"; "The driver then drove the car back to the Bronx."  
6 These sentences reflect a mechanical substitution of the  
7 driver's role for the driver's name.

8       Once it becomes obvious that names have been pruned  
9 from the text, the choice of implied identity is narrow.  
10 The unnamed persons correspond by number (two) and by role  
11 to the pair of co-defendants. This "obviously redacted  
12 confession . . . points directly to the defendant[s], and it  
13 accuses the defendant[s] in a manner similar to . . . a  
14 testifying codefendant's accusatory finger." Gray, 523 U.S.  
15 at 194. The jury could immediately infer, on the evidence  
16 of the redacted confession alone, that Taylor had likely  
17 named the co-defendants. See Jass, 569 F.3d at 57 ("The  
18 inferences . . . involve statements that, despite redaction,  
19 obviously refer directly to someone, often obviously the  
20 defendant, and which involve inferences that a jury  
21 ordinarily could make immediately, even were the confession  
22 the very first item introduced at trial." (quoting Gray, 523  
23 U.S. at 196)).





1 and Vasquez on other grounds, we need not reach this claim.<sup>8</sup>

2

3

### CONCLUSION

4 For the foregoing reasons, we vacate the convictions

5 and remand for a new trial.

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<sup>8</sup> It may matter on remand that Rosario's challenge to the admissibility of Miller's testimony under Rule 404(b) is without merit. Miller's testimony about plans to commit a pharmacy robbery related to the crime charged in this case, and the district court did not abuse its discretion by admitting that evidence as relevant background. See United States v. Greer, 631 F.3d 608, 614 (2d Cir. 2011).