No. 22-196

IN THE

Supreme Court of the United States

ADAM SAMIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RETIRED FEDERAL JUDGES AND FORMER FEDERAL PROSECUTORS AS AMICI CURIAE SUPPORTING PETITIONER

GINGER D. ANDERS
Counsel of Record
XIAONAN APRIL HU
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Ave. NW
Suite 500E
Washington, DC 20001-5369
(202) 220-1100
Ginger.Anders@mto.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

FEDERAL RULES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE

Amici curiae are retired federal judges and former federal prosecutors who have been involved in numerous criminal trials, including joint trials involving two or more defendants, and who maintain an active interest in preserving the fairness of such proceedings.[1] In light of their substantial experience in the area, amici submit this brief to explain how petitioner's proposed context-based approach to determining whether a codefendant's redacted confession can be admitted consistent with *Bruton* v. *United States*, 391 U.S. 123 (1968), will help safeguard a defendant's rights under the Confrontation Clause without unduly burdening either judges or prosecutors.

In particular, amici note that federal district courts already make numerous pretrial evidentiary determinations, often at the motion in limine stage, and those determinations typically require a review of the evidence question in light of the larger context provided by the likely trial evidence. To aid such determinations, prosecutors often submit an evidentiary proffer or otherwise inform the court of what the trial evidence is likely to show. Petitioner's proposal to adopt a context-based assessment of a codefendant's confession is thus of a kind with the type of analysis federal judges and prosecutors already conduct. That approach is both administrable and critical to safeguarding defendants' Confrontation Clause rights and the fairness and legitimacy of the criminal justice system.

---

[1] No counsel for a party authored this brief in whole or in part and no person or entity other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. A full list of amici is included in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has long held that "the right of confrontation and cross-examination" enshrined in the Sixth Amendment "is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer* v. *Texas*, 380 U.S. 400, 405 (1965). That is because a defendant's right to cross-examination has enormous value "in exposing falsehood and bringing out the truth in the trial of a criminal case." *Id*. at 404.

The Court has also recognized that the "truthfinding function of the Confrontation Clause"—and the fairness of the underlying criminal proceeding itself—"is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination." *Lee* v. *Illinois*, 476 U.S. 530, 541 (1986). A codefendant in a joint trial is often incentivized to "implicate the defendant and to exonerate himself," *ibid.*, and without cross-examination, an out-of-court confession by a nontestifying codefendant can be "powerfully incriminating" and "devastating" to the defendant, *Bruton*, 391 U.S. at 135-136. The Court has accordingly held that the Confrontation Clause forbids the introduction in a joint trial of any portion of a codefendant's out-of-court confession that identifies the defendant as an accomplice—whether explicitly or by necessary implication. *Id.* at 137; see also *Gray* v. *Maryland*, 523 U.S. 185, 193 (1998).

When one defendant in a multi-defendant case confesses, therefore, the prosecution must proceed in a manner that accounts for the resulting Confrontation Clause concerns. The prosecution has several options: it can try the defendants separately, introducing the

confession only in the confessing defendant's trial; it can forgo using the confession in a joint trial; or it can try the defendants jointly while redacting the confession to remove references to non-confessing defendants.

When the prosecution opts to introduce a redacted confession in a joint trial, the trial court must ensure that the redactions are sufficient to prevent the confession from implicating the defendant. In that analysis, context is critical: a confession redacted to remove references to the defendant may nonetheless implicate the defendant when considered together with other evidence in the case. And as a logical matter, because the jury is required to consider all of the evidence at trial prior to issuing its verdict, a court evaluating the risk that jurors will draw the prohibited inference from a redacted confession ought to consider at least some of that same surrounding context in its analysis. Yet in this case, both the district court and the court of appeals examined only the "redacted statement 'separate and apart from any other evidence admitted at trial.'" Pet. App. 11a. Based on that blindered review, both courts concluded that redacting petitioner's name and replacing it with a reference to the "other person" was sufficient to overcome any Confrontation Clause concerns.

That truncated review was insufficient to protect petitioner's Confrontation Clause rights. A court's review of a redacted confession must take account of the context provided by other evidence in the trial in order to ensure that the confession does not implicitly inculpate the defendant. That review often occurs before trial, in the context of motions in limine. At that point, the trial court can examine both the confession itself and the likely evidence at trial (which can be explained

in, for instance, a proffer from the prosecution). That inquiry is similar to many other pretrial evidentiary adjudications, such as decisions whether to admit hearsay statements under the co-conspirator exception, that require the court to examine not only the statement itself, but also the context provided by other trial evidence. Indeed, petitioner's proposed analysis, which asks trial courts to consider only those "aspects of the case that are either knowable in advance of trial or wholly within the prosecution's control," Pet. Br. 39, is more cabined than many other evidentiary inquiries. In the view of the amici, petitioner's context-based approach is both necessary to protect a defendant's Confrontation Clause rights in a joint trial and easily administrable. This Court should reverse the judgment of the court of appeals.

ARGUMENT

A. Trial courts can and should assess a redacted codefendant confession before trial in order to ensure that the confession, together with other likely trial evidence, does not implicate the defendant.

1. In *Richardson* v. *Marsh*, 481 U.S. 200 (1987), the Court explained that a defendant's Confrontation Clause right to cross-examine the witnesses against him means that "where two defendants are tried jointly, the pretrial confession of one cannot be admitted against the other unless the confessing defendant takes the stand." *Id*. at 206. The Court further explained that in developing ways to protect a defendant's constitutional right to cross-examination in such circumstances, the court should consider the need for an efficient criminal justice system. In particular, the Court observed that the two ways to "assur[e] compliance" with the Confrontation Clause in every case—

eliminating the use of joint trials or, alternatively, prohibiting the use of codefendant confessions in joint trials—came at "too high" a price to the criminal justice system. *Id.* at 210. "Joint trials generally serve the interests of justice by avoiding inconsistent verdicts" and ensuring that the same victims and witnesses do not need to "repeat the inconvenience (and sometimes trauma) of testifying." *Ibid.* In addition, confessions "are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Ibid.* (citation omitted). Blanket prohibitions of either joint trials or codefendant confessions would intrude upon a prosecutor's "considerable discretion," *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 (1987), in shaping his or her case by actively removing options from the table when other, less sweeping remedies will do.

The Court has therefore held that a codefendant's out-of-court confession can be admitted in certain circumstances, if it is redacted to eliminate references to the other defendant and accompanied by a limiting instruction. *Richardson*, 481 U.S. at 211. Even so, a redacted confession can in some situations raise significant Confrontation Clause concerns. In those circumstances, even when the defendant's name is redacted from the codefendant's confession, the "jury will often realize that the confession refers specifically to the defendant." *Gray*, 523 U.S. at 193. A juror wondering "to whom the [other person in the codefendant's confession] might refer need only lift his eyes" to petitioner, sitting at counsel table, "to find what will seem the obvious answer." *Ibid*. This case presents a stark example. During trial, the jury heard a recording of the third defendant stating that he had hired two men to carry out the murder. JA.227-229. The jury also heard that the codefendant had previously confessed

that both he and "the other person" were in the van at the time the victim was killed, and that "the other person" pulled the trigger. JA.76. Given this, the risk that jurors in this case would connect the codefendant's reference to the "other person" in his extrajudicial confession with petitioner (the "two men" the third defendant said he had hired) was substantial. And the prosecution exacerbated that problem by eliciting testimony that petitioner's codefendant had described the "other person" involved in the crime using descriptors that matched petitioner. JA.74-77, 103-105, 132-133, 135-136.

The courts below were able to conclude that the confession's admission under those circumstances did not violate the Confrontation Clause only by limiting their consideration to the "redacted statement separate and apart from any other evidence admitted at trial." Pet.App.11a (citation and internal quotation marks omitted). But it is evident that the surrounding context—i.e., the other evidence in the case—created a significant danger that the confession would "powerfully incriminat[e]" petitioner. *Gray*, 523 U.S. at 192. When a court limits its analysis to the four corners of the confession, therefore, it renders itself unable to meaningfully evaluate whether the redactions adequately protect the defendant's confrontation rights. The Confrontation Clause demands a more searching review that asks whether the redacted confession is incriminating when considered in the context of the trial evidence.

2. For those reasons, amici support the context-based approach proposed in petitioner's brief. Under that approach, a prosecutor in possession of a codefendant's out-of-court confession may choose any one

of the following options consistent with the Confrontation Clause: (i) try the defendants separately and use the confession only at the codefendant's trial; (ii) try the defendants together without introducing the confession; or (iii) try the defendants together with a redacted confession that does not implicate the defendant, either directly or by inference from context.

When prosecutors choose option (iii), the trial court must ensure that the redacted confession does not implicate the defendant when considered in the context of the evidence at trial. As petitioner explains, the court can assess the impact of the confession in light of "aspects of the case that are either knowable in advance of trial or wholly within the prosecution's control." Pet. Br. 39. From a practical standpoint, effectuating that approach could be as simple as reviewing the prosecution's response to a motion in limine in which the prosecution describes the substance of the confession in the context of the trial evidence. And the court can review drafts of the redacted confession in light of what is known about the other trial evidence—for instance, the other defendants' physical characteristics or role in the offense—to ensure that the confession does not implicitly implicate any other defendant. *United States* v. *Straker*, 800 F.3d 570, 600 (D.C. Cir. 2015) (approving district court's review on that basis).

If the court is concerned that the redacted confession might inculpate the defendant, it can impose trial guardrails to lessen that risk. The court could regulate the prosecution's questioning of witnesses who will discuss the confession, including by reviewing drafts of the prosecution's proposed questions to ensure that the questions do not provide context, or elicit an answer, that implicates the defendant. Cf. *id*. at

600-601 (approving district court's direction that prosecution could not admit redacted confession itself, but could only question witnesses about it).

The experiences of courts outside the Second Circuit demonstrate the feasibility of petitioner's proposal. In *Straker*, for example, the court of appeals approved the district court's assessment of the "statements as a whole and in the context of the facts and evidence in the case." *Id.* at 598-600. Because "[t]he evidence identified more than a dozen different men involved in the crimes charged in this case" and because the defendants' roles in the crime "were not so clear and exclusive" as to render each defendant identifiable in the redacted confession, the district court concluded that the neutral-pronoun redactions of the confession did not violate the defendants' confrontation rights. *Id.* at 599-600.

3. The context-based approach best balances the important principles implicated by multi-defendant cases. Considering a codefendant's confession in context enables judges to fully protect a defendant's right to cross-examination by preventing prosecutors from identifying the defendant in all but name. The approach also facilitates prosecutors' use of joint trials and confessions, both of which contribute to a fair and efficient criminal justice system. *Richardson*, 481 U.S. at 207, 209-210. Moreover, requiring prosecutors to demonstrate that a confession can be redacted so as not to implicate the defendant in light of the evidence in the case will encourage prosecutors to consider upfront whether and to what extent redactions will be effective. That in turn may help prosecutors make a more informed choice about whether to pursue a joint trial in the first place, as well as whether to seek to

admit the codefendant confession or proceed without it.

B. The contextual approach is similar to other pretrial evidentiary determinations, and is readily administrable.

1. Examining the larger context of likely trial evidence in order to assess the admissibility of a redacted confession is no different from numerous similar inquiries that judges and prosecutors undertake in criminal trials. In the mine-run case, both prosecution and defense litigate the admissibility of particularly contentious pieces of evidence in advance of trial, and in resolving those disputes, courts frequently look beyond the four corners of the disputed evidence to assess whether the evidence should come in. See 1 Fed. Evid. § 1:11 (4th ed. 2022); see also *Luce* v. *United States*, 469 U.S. 38, 41 n.4 (1984). And when the prosecution is the proponent of the evidence, courts often require the prosecution to make a proffer of likely trial evidence to aid the court's determination.

For instance, under Federal Rule of Evidence 801(d)(2)(E), a court may admit against the defendant certain out-of-court statements made by the defendant's coconspirator, if there is "evidence that there was a conspiracy involving the declarant and the [defendant], and that the statement was made during the course and in furtherance of the conspiracy." *Bourjaily* v. *United States*, 483 U.S. 171, 175 (1987) (internal quotation marks omitted). Thus, "the existence of a conspiracy and petitioner's involvement in it are *preliminary questions of fact*" that must be adjudicated before or during trial. *Ibid.* (emphasis added). Importantly, "the contents of the declarant's statement do not alone suffice to establish a conspiracy." Fed. R. Evid. 801, Notes of the Advisory Committee, 1997

Amendment. Rather, "[t]he court *must* consider in addition the circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, or evidence corroborating the contents of the statement in making its determination" as to whether there was a "conspiracy in which the declarant and the defendant participated." *Id.* (emphasis added). That contextual analysis is necessary to ensure that the hearsay statement has sufficient objective indicia of reliability to justify offering it against the defendant. See *id.* (citing *United States* v. *Silverman*, 861 F.2d 571, 577 (9th Cir. 1988)).

When the government seeks to admit a co-conspirator statement under Rule 801(d)(2)(E), therefore, district courts have routinely required the government to proffer at the motion in limine stage independent supporting evidence sufficient to establish the existence of a conspiracy. See, *e.g.*, *United States* v. *Ray*, 2022 WL 558146, at *2 (S.D.N.Y. Feb. 24, 2022) ("The Government has proffered evidence that, if established at trial, would support that a conspiracy existed" between the defendant and the declarants); *United States* v. *Hamidullin*, 2015 WL 4393393, at *5 (E.D. Va. July 14, 2015) (considering hearsay dialogue, defendant's statement during interrogation, and defendant's hand-drawn map); *United States* v. *Chaudhry*, 2008 WL 2128197, at *15-17 (N.D. Cal. May 20, 2008) (considering government's proffer of different types of evidence to establish the existence of a conspiracy). That procedure has proven administrable, and its routine use demonstrates that it does not place undue burdens on the prosecution.

Other evidentiary determinations often involve pretrial resolution through motions in limine, and re-

quire contextual consideration of the likely trial evidence. For instance, before admitting evidence of a defendant's other crimes or prior bad acts under Federal Rule of Evidence 404(b), the court must satisfy itself that the defendant committed the "other act" or crime. Here, too, the Court has "emphasize[d] that in assessing the sufficiency of the evidence . . . , the trial court must consider *all* evidence" that would support finding by a preponderance of the evidence that the defendant committed these other acts. *Huddleston* v. *United States*, 485 U.S. 681, 690-691 (1988) (emphasis added). In amici's experience, neither prosecutors nor judges have struggled to undertake the type of holistic analysis required by *Huddleston*. When called upon to do so (and sometimes of their own volition), prosecutors have submitted proffers to substantiate their claims that the defendant committed the other acts in question. See, *e.g.*, *United States* v. *Perry*, 2014 WL 4352311, at *1 (M.D. La. Sept. 2, 2014) (government motion regarding other acts evidence).

Similarly, determining whether the prejudicial impact of particular evidence outweighs its relevance under Rule 403 often entails pretrial consideration of the evidence in question in light of the context of other evidence. Indeed, the Court has described the Rule 403 determination as a "fact-intensive, *context-specific* inquiry." *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 388 (2008) (emphasis added). In *United States* v. *Salameh*, 152 F.3d 88, 111 (2d Cir. 1998), for example, the district court "scrupulously reviewed" each contested piece of evidence in light of the broader context of the trial evidence. That review enabled the court to conclude that materials containing formulae for explosives were more relevant than prejudicial in part because other evidence showed that traces of

those same explosives were found in the defendants' homes. *Ibid*.

2. As these examples demonstrate, trial courts routinely consider the relevant context before making evidentiary determinations that can substantially affect the course of trial—and they do so before or during trial, based on their understanding of what the trial evidence will likely show. Often, the evidentiary question requires evaluating extensive or complex trial evidence. The contextual approach to redacted confessions that petitioner advocates is thus materially similar to numerous evidentiary inquiries that courts already undertake.

It is also just as administrable as those other inquiries. There is no reason to think that a judge or prosecutor would be burdened by a rule that would require courts to take into consideration some of the relevant context surrounding a codefendant's confession in deciding whether a redacted confession can be admitted consistent with the Confrontation Clause. There is even less reason for concern in light of petitioner's proposal, which asks trial courts to consider only those "aspects of the case that are either knowable in advance of trial or wholly within the prosecution's control." Pet. Br. 39.

The court of appeals therefore lacked any justification for approving the district court's refusal to look beyond the four corners of the redacted confession. That refusal undermined the district court's ability to meaningfully ascertain whether the redactions sufficiently protected the petitioner's confrontation rights in the larger context of the likely trial evidence. The importance of context is no doubt why courts decide myriad other evidentiary disputes—even ones that,

unlike here, do not bear directly on a defendant's constitutional rights—by considering the evidence at issue in the larger context of the trial as a whole. Given the uniquely "devastating" effect that a codefendant's out-of-court confession can have on the defendant, *Bruton*, 391 U.S. at 136, Confrontation Clause principles and the fairness of the criminal justice system demand a contextual inquiry.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

GINGER D. ANDERS
Counsel of Record
XIAONAN APRIL HU
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Ave. NW
Suite 500E
Washington, DC 20001-5369
(202) 220-1100
Ginger.Anders@mto.com

Counsel for Amici Curiae

February 1, 2023

APPENDIX

LIST OF AMICI

Jeremy D. Fogel, Judge, U.S. District Court for the Northern District of California (1998-2018); Judge, Superior Court of Santa Clara County (1986-1998); Judge, Municipal Court of Santa Clara County (1981-1986).

William Royal Furgeson Jr., Senior Judge, U.S. District Court for the Northern District of Texas (2008-2013); Judge, U.S. District Court for the Western District of Texas (1994-2008).

Paul S. Grewal, Magistrate Judge, U.S. District Court for the Northern District of California (2010-2016).

James Orenstein, Magistrate Judge, U.S. District Court for the Eastern District of New York (2004-2020); Assistant U.S. Attorney, Eastern District of New York (1990-2001); Associate Deputy Attorney General, U.S. Department of Justice (1999-2001); Attorney-Advisor, Office of Legal Counsel, U.S. Department of Justice (1998-1999); Special Attorney to the Attorney General, Oklahoma City Bombing Task Force, U.S. Department of Justice (1996-1998).

Karen P. Seymour, Assistant U.S. Attorney, Southern District of New York (1990-1996, 2002-2004); Chief, Criminal Division (2002-2004); Chief, General Crimes Unit (1995-1996); Deputy Chief, Narcotics Unit (1993-1995).

Thomas I. Vanaskie, Judge, U.S. Court of Appeals for the Third Circuit (2010-2019); Judge, U.S. District

Court for the Middle District of Pennsylvania (1994-2010); Chief Judge (1999-2006).