No. 22-196

IN THE

Supreme Court of the United States

ADAM SAMIA, aka SAL, aka ADAM SAMIC,
Petitioner,

—v.—

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR *AMICUS CURIAE* NEW YORK COUNCIL OF DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of over 300 lawyers, including many former federal prosecutors, whose principal area of practice is the defense of criminal cases in the federal courts of New York. NYCDL's mission includes protecting the rights of the accused guaranteed by the Constitution, enhancing the quality of defense representation, taking positions on important defense issues, and promoting the fair administration of criminal justice. NYCDL offers the Court the perspective of practitioners who regularly defend complex and significant criminal cases in the trial courts in the U.S. Court of Appeals for the Second Circuit, including trials in which redacted hearsay confessions are admitted and relied upon by prosecutors.

NYCDL supports Petitioner Adam Samia in his argument that it violates the Sixth Amendment for a court to permit—as does the Second Circuit—the introduction of a redacted out-of-court confession of a co-defendant so long as the redacted confession, considered in isolation, is not likely to incriminate the defendant. Allowing courts and prosecutors to artificially blind themselves to the possibility that the redacted hearsay confession will be considered by the jury to be proof of the non-confessing defendant's guilt, in the context of *all* the trial evidence, violates the principle established by *Richardson v. Marsh*, 481 U.S. 200 (1987), and *Gray v. Maryland*, 523 U.S. 185 (1998), in interpreting *Bruton v. United States*, 391

[1] No party or counsel for a party in this case authored this brief in whole or in part or made any monetary contribution to its preparation or submission.

U.S. 123 (1968)—namely, that a co-defendant confession likely to be taken by the jury to identify the defendant as an accomplice cannot be admitted without violating the defendant's right to confront his or her accusers.

The rule applied in the Second Circuit implicates NYCDL's core concern of vindicating the constitutional rights of the accused. NYCDL is also in a unique position to describe how prosecutors in the Second Circuit frequently rely on the "standing alone" rule to admit hearsay co-defendant confessions and thereafter use them to inflict the same type of prejudice to defendants prohibited by *Bruton*, *Richardson,* and *Gray*.

INTRODUCTION

In applying *Bruton* and its progeny, the Second Circuit for decades has analyzed the admissibility of a redacted confession of a co-defendant using a standard that rejects any consideration of the context in which the jury will weigh the accomplice confession. *See United States v. Williams*, 936 F.2d 698, 700-01 (2d Cir. 1991) (approving admission of hearsay confession of defendant so long as "names of codefendants [are] replaced by neutral pronouns and 'where the statement standing alone does not otherwise connect [the defendant] to the crimes'") (citation omitted); *see also United States v. Lyle*, 919 F.3d 716, 733 (2d Cir. 2019) ("'[T]he appropriate analysis to be used when applying the *Bruton* rule requires that we view the redacted confession in isolation from the other evidence introduced at trial.'") (quoting *Williams*, 936 F.2d at 700-01).

By contrast, other Courts of Appeals have adopted a more demanding rule for admissibility—namely,

that a court must consider the redacted confession in the "context" of the trial as a whole and assess the likelihood that the confession will be understood by the jury as an impermissible accusation against the non-confessing co-defendant. *See, e.g.*, *United States v. Straker*, 800 F.3d 570, 598 (D.C. Cir. 2015) (viewing "the text of the statements as a whole and in the context of the facts and evidence in the case" in deciding admissibility of redacted confession); *United States v. Vega Molina*, 407 F.3d 511, 520 (1st Cir. 2005) (assessment of redacted confessions "requires careful attention to both text and context, that is, to the text of the statement itself and to the context in which it is proffered"); *United States v. Hoover*, 246 F.3d 1054, 1059 (7th Cir. 2001) (noting "[v]ery little evidence is incriminating when viewed in isolation" and "[t]o adopt a four-corners rule would be to undo *Bruton* in practical effect"); *United States v. Schwartz*, 541 F.3d 1331, 1351 (11th Cir. 2008) ("a defendant's confrontation right is violated when the court admits a codefendant statement that, in light of the Government's whole case, compels a reasonable person to infer the defendant's guilt").

NYCDL submits that this Court should overturn the Second Circuit's "standing alone" rule for assessing the admissibility of confessions in which a defendant's name has been replaced with neutral pronouns, for three principal reasons:

First, the Second Circuit's "standing alone" rule, unlike the "context" rule, fails to comport with this Court's decisions in *Bruton*, *Richardson*, and *Gray*.

Second, as applied in practice, the Second Circuit's erroneous rule can and does inflict the same kind of

prejudice this Court deemed intolerable under the Sixth Amendment in those cases.

Third, concerns about the "workability" or "efficiency" of the "context" rule are—in addition to being irrelevant to the constitutional analysis—unfounded.

ARGUMENT

I. THE "STANDING ALONE" RULE FAILS TO COMPORT WITH THIS COURT'S PRECEDENT.

As Petitioner argues, Pet. Br. 23-32, the Second Circuit's "standing alone" rule cannot be squared with the principle compelled by *Richardson* and *Gray*, as those precedents applied *Bruton*. The very touchstone in all three cases was the likelihood that admitting a confession of a co-defendant would create an unacceptable risk that *the jury*—which necessarily views the evidence in its totality—would disregard the jury instruction mandated by the Sixth Amendment and regard the confession as proof of the non-confessing defendant's guilt.

The Second Circuit rule subverts *Bruton* and its progeny by instead explicitly barring examination of the way in which the proof will likely be heard by the jury. *Bruton* forbade the most obvious use of an accomplice confession as an "accusatory finger," *Gray*, 523 U.S. at 194—a confession naming the non-confessing co-defendant. *Bruton*, 391 U.S. at 137. But the underlying reasoning was that where the jury has learned that the confessing defendant has named the non-confessing defendant as an accomplice, the consequences for the non-confessing defendant are "devastating." *Id.* at 136. The Second Circuit's

"standing alone" rule allows confessions to be admitted that—while not naming the co-defendant—are also likely to be heard by the jury to accuse or inculpate that co-defendant, with the same "devastating" consequences.

While this Court in *Richardson* upheld the admission of a redacted confession that it deemed only inferentially to incriminate a non-confessing co-defendant, the confession under consideration was one redacted of any reference to even the existence of an accomplice. *Richardson*, 481 U.S. at 203, 208, 211. It takes *Richardson* too far to hold that, so long as a confession "standing alone" does not incriminate the non-confessing co-defendant, it can never, when considered along with the other evidence at trial, incriminate the co-defendant to a degree that renders it unreasonable to believe that the jury can follow the *Bruton* limiting instruction.

The inconsistency between the Second Circuit's "standing alone" rule and *Bruton* is clear from *Bruton* itself, where this Court recognized that it was an "unmitigated fiction" to say that the jury could follow an instruction to disregard a confession when considering the guilt of the non-confessing defendant. 391 U.S. at 129. In the Second Circuit, this fiction remains intact whenever a redacted confession does not facially incriminate. Yet this Court in *Gray* weighed how "blatantly" prosecutors had linked a redacted confession to the guilt of the non-confessing defendant in determining whether the defendant's Sixth Amendment right had been violated. 523 U.S. at 193. It noted that *Richardson* had deemed the "*kind* of" inference likely to be drawn from a redacted confession, and not just the "simple *fact* of" the

confession, to be relevant to the same question. *Id.* at 196 (emphasis in original). To determine the admissibility of a redacted confession by looking at the confession, "standing alone," as the Second Circuit does, renders these very inquiries not just irrelevant, but impossible.

The Second Circuit rule is also anomalous in forbidding trial judges from conducting the type of inquiry typically considered not only permissible, but essential for other evidentiary rulings. It is routine for trial courts to consider potential prejudice, in the context of all the evidence, in making any number of admissibility determinations, whether under the Constitution or the Federal Rules of Evidence. These determinations are often made before trial and can be—and are—revisited during trial as necessary.

For example, Federal Rule of Evidence 403 provides that evidence can be excluded "if its probative value is substantially outweighed by the danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." FED. R. EVID. 403. By necessity, this analysis requires the district court to look at the context of the trial; a Rule 403 decision cannot be made by looking at the offered evidence "standing alone." *See, e.g.*, *Old Chief v. United States*, 519 U.S. 182, 182-84 (1997) (noting that no "item of evidence" should be "viewed as an island" when conducting a Rule 403 balancing analysis and that "the question of admissibility" should "take account of the full evidentiary context of the case").

Likewise, Federal Rule of Evidence 404(b), which governs the admission of other-bad-acts evidence, also requires a contextual analysis. The

Advisory Committee explained that the determination of whether to admit such evidence must consider "whether the danger of undue prejudice outweighs the probative value of the evidence *in view of the availability of other means of proof*[.]" FED. R. EVID. 404(b) advisory committee's note to the 1972 proposed rules (emphasis supplied); *see, e.g.*, *United States v. Pruett*, 681 F.3d 232, 244 (5th Cir. 2012) (Rule 404(b) inquiry calls for "a 'commonsense assessment of all the circumstances surrounding the extrinsic offense,'" including the extent to which defendant's intent is established by "other evidence") (citation omitted).

As with other forms of proof, jurors never *receive* a redacted confession "in isolation" from other trial evidence, and this Court has never promoted the fiction that they do. For this reason, the Second Circuit rule is both artificial and unconstitutionally permissive. Consideration of context, by contrast, comports logically with the requirement to assess the likelihood that the confession will be understood as an impermissible accusation against the non-confessing co-defendant by the jury.

II. THE "STANDING ALONE" RULE ALLOWS PROSECUTORS TO USE A CONFESSION AS THE SAME "ACCUSATORY FINGER" THAT *BRUTON* AND ITS PROGENY DISALLOW.

A. The "Standing Alone" Rule Is Often Applied.

Whether this Court permits courts to continue applying the "standing alone" rule matters a great deal. In NYCDL's experience, the rule is routinely invoked in trial courts in the Second Circuit and is frequently the basis for the admission of redacted

confessions.[2] Case law undoubtedly understates prosecutors' reliance on redacted confessions because it excludes oral rulings as well as cases in which the defense elected not to dispute the admission of the confessions.[3] But even within that universe, research discloses more than 50 instances in which trial courts in the Second Circuit have referred to the "standing alone" rule when discussing issues relating to the admissibility of a redacted confession.[4] Objections by

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[2] This is not surprising, given the sheer ubiquity of confessions. *See* Schuyler C. Davis, *No Substitution for Justice: Solving the Bruton Problem through Per Se Trial Severance*, 50 U. MEM. L. REV. 695, 699 (2020) ("roughly 65% of criminal suspects fully or partially confess to the crimes of which they are accused"); Paul Shechtman, *An Essay on* Miranda's *Fortieth Birthday*, 10 CHAPMAN L. REV. 655, 656 (2007) (citing studies showing that approximately 80% of arrestees who received Miranda warnings elected to waive their rights and face questioning).

[3] The Second Circuit rule is so permissive and entrenched that when the government seeks to admit a redacted confession, the defense lawyer's task is often limited to negotiating the form and extent of the redactions. Admissibility in some form is almost a foregone conclusion.

[4] This is a conservative estimate derived only from reviewing search results on Westlaw and LexisNexis; we did not review written orders not published by Westlaw or LexisNexis, or those decisions rendered in pretrial conferences or during trial colloquy. To reach this number, we reviewed all appellate and district court case law within the Second Circuit resulting from the query "bruton! and ('standing alone' or 'in isolation' or 'separate and apart')" between January 1, 1990, and January 30, 2020 (shortly after the Second Circuit's argument in *Samia*) on Westlaw, and from the query "bruton!" within the past three years on LexisNexis and Westlaw. We excluded from our review post-conviction litigation in which the defendant was tried in state court. We also did not review subsequent history from after the reported decisions identified in our searches.

defendants in these cases, or relief sought (such as severance), were overwhelmingly denied.

B. The "Standing Alone" Rule Results In Prejudice To Defendants.

In practice, the "standing alone" rule allows prosecutors to use redacted confessions as the same "accusatory finger" disallowed by *Bruton* and its progeny. After the statement is admitted, on the premise that the jury will hear it only as proof of the declarant's guilt, prosecutors can—and do—rely on the confession to point the finger at the non-confessing defendant to such a degree that it is unreasonable to believe that the jury will follow the instruction not to consider the confession as part of the proof of the defendant's guilt.[5] Trial lawyers well understand that even confessions in which neutral terms have been substituted for the name of a co-defendant are capable of inflicting the same prejudice this Court has said is intolerable under the Sixth Amendment.

Such prejudice can arise in a myriad of ways at trial. A twosome or other small group of alleged participants or defendants makes it more likely that the jury will conclude the "other" to refer to the non-confessing defendant. If the redacted confession identifies attributes of the *role* of the "other"—as confessions that refer to an accomplice in any way are likely to do—it introduces unacceptable risk that the

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[5] The admonition to the jury approved by this Court was, as in the case of *Bruton* itself, that the statement of the confessing defendant, Evans, "if used, can only be used against the defendant Evans. It is hearsay insofar as the defendant George William Bruton is concerned, and you are not to consider it in any respect to the defendant Bruton, because insofar as he is concerned it is hearsay." 391 U.S. at 125 n.2.

jury will infer that the confessor identified the co-defendant shown by other evidence to have played that same role.

This case is an example. The redacted confession of Stillwell described the "other" person as someone who met Stillwell in the Philippines and had a weapon. *See* J.A. 75 ("Q. Did Mr. Stillwell indicate whether he had gone [to the Philippines] alone or with someone else? A. He stated that he had met somebody else over there. . . . Q. To his knowledge, did the person that he was with in the Philippines ever carry a firearm? A. Yes."). This evidence interlocked so closely with other evidence demonstrating that Samia, alone among the other alleged participants, met up with Stillwell in the Philippines and carried a firearm, that the inference that Stillwell had identified Samia was not just likely, but unavoidable.

United States v. Jass, 569 F.3d 47 (2d Cir. 2009), in which the Second Circuit applied the "standing-alone" rule and affirmed the conviction, is another instructive example. The court reasoned that it would not have been "immediately apparent to a jury" that the accomplice, Leight, was inculpating the co-defendant Jass, because, looking at the statement "in isolation," the "other person" "could have been anyone." *Id.* at 62. Yet the inference that Leight had inculpated Jass was inescapable: (1) they were the only defendants charged with the crime; (2) they were the only two participants in the crime, by the government's theory; and (3) Leight's redacted statement included that he and the "other person" attempted to have sexual intercourse and the jury knew that Jass was Leight's long-term live-in girlfriend. *See id.* at 50 n.1, 62. Cases like *Jass* make

manifest that the context in which the jury hears the redacted confession is essential to evaluating whether the confession deprives the defendant of his or her constitutional rights.

United States v. Blaszczak, an insider trading case tried in the Southern District of New York, is another case demonstrating how the "standing alone" rule can fail to safeguard Sixth Amendment rights.[6] There, the trial judge, applying Second Circuit law, ruled admissible a defendant's admissions to law enforcement agents who approached him at his office, over the non-confessing defendant's objection that the structure of the conspiracy and the number of participants made it impossible to use substitutions to mask the fact that the confessing defendant had identified him. *See United States v. Blaszczak*, No. 17 Crim. 357 (LAK), Dkt. No. 176 (Order denying Motion to Sever) (docketed S.D.N.Y. Mar. 24, 2018), Dkt. No. 315 (Apr. 16, 2018 Trial Tr.) at 2208:2-2217:19 (docketed S.D.N.Y. May 16, 2018).

The confessing defendant (Worrall) was the alleged tipper and the objecting defendant (Blaszczak) was the alleged tippee, who was alleged in turn to have provided the inside information to two downstream-tippee defendants who traded on the information. In this scenario, as the defense argued, Worrall's admissions about his "former colleague" and "friend" could only be reasonably interpreted to identify Blaszczak—the sole go-between—no matter the substitutions. *Id.*, Dkt. No. 164 (Memorandum in

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[6] The convictions in *Blaszczak* were ultimately reversed, following this Court's remand of the case in light of *Kelly v. United States*, 140 S. Ct. 1565 (2020). *United States v. Blaszczak*, 56 F.4th 230, 233 (2d Cir. 2022).

Support of Motion to Sever) at 3-6 (docketed S.D.N.Y. Mar. 22, 2018), Dkt. No. 242 (Joint Defense Letter Motion) at 2-4 (docketed S.D.N.Y. Apr. 15, 2018), Dkt. No. 315 (Apr. 16, 2018 Trial Tr.) at 2213:19-2214:22. Yet that context was deemed irrelevant under the Second Circuit rule. *Id.*, Dkt. No. 315 (Apr. 16, 2018 Trial Tr.) at 2215:7-2217:19.

Further exemplifying the impossible quandaries into which the "standing alone" rule puts defendants, *both* Blaszczak and Worrall also objected on the ground that the redacted statements, by substituting "former colleague" and "friend" for Blaszczak's name, falsely made it appear that Worrall had purposefully withheld the name from law enforcement to shield Blaszczak. *E.g.*, *id.*, Dkt. No. 315 (Apr. 16, 2018 Trial Tr.) at 2211:14-20, 2214:4-15 (Blaszczak), 2216:11-24 (Worrall). Indeed, Blaszczak's seasoned defense counsel told the judge that if Worrall's statements came in at all, he would prefer that it *not* be redacted and instead refer to his client by name. *Id.*, Dkt. No. 315 (Apr. 16, 2018 Trial Tr.) at 2214:5-7 ("to anonymize those statements makes it sound like Mr. Worrall was hiding the fact of Mr. Blaszczak's identity, and that's a big problem"). As defense counsel's calculus shows, it is illusory to believe that a confession that explicitly names the co-defendant (*contra Bruton*) is meaningfully less prejudicial than a confession that substitutes a "neutral" pronoun when the jury will infer the name based on the trial context.

Prosecutors in the Second Circuit also have not hesitated in their jury arguments to encourage jurors to draw the inference that the "other person" to whom the confessor referred was the non-confessing

defendant, thus engaging in precisely the conduct this Court cautioned against in *Richardson*, 481 U.S. at 211 (where a prosecutor "sought to undo the effect of the limiting instruction by urging the jury to use [the] confession in evaluating [the non-confessing defendant's] case").

Openings and closings, by their nature, are contextual; they review all the evidence and draw connections between and among testimonial accounts, documents, and other proof. At trial, after the admission of the redacted confession is behind them, prosecutors frequently ask the jury to consider the redacted confession to be part of the evidence establishing the non-confessing defendant's guilt. The "standing alone" rule disregards that the inevitable trial use of the confession is not as proof sealed away from the other evidence but instead as a component in the mix of evidence against the non-confessing defendant.

Again, this case is an example. The prosecutor's opening presented first a chronological account of the planning and carrying out of the charged crimes. In this portion of the jury address, the prosecutor argued that the evidence would show that Samia and Stillwell were in the car with Lee when "Adam Samia pulled out a gun and murdered Catherine Lee[.]" J.A. 56. When, later in the opening, the prosecutor turned to describing the "types of evidence" the jury would hear, and then "some of the most crucial testimony," his list included the agent's account of Stillwell's post-arrest confession, which the prosecutor said would feature Stillwell's admission "to driving the car while the man he was with turned around and shot Catherine Lee." J.A. 57-58. By telling the jury that Samia was the

shooter *before* describing Stillwell's confession that the man he was with shot Lee, the prosecutor invited the jury to infer that among the proof of Samia's guilt was Stillwell's confession.

The summation was no less violative of constitutional limits. There, while paying lip service to the notion that Stillwell's confession was admissible only against him (J.A. 199), the prosecutor described Stillwell's confession *not* in reference to Stillwell's guilt alone, but as part of an overall argument as to why *all* the defendants were guilty. After asking the jury, "How else do you know that these *three men* murdered Catherine Lee?," the prosecutor answered by recounting (among other things) Stillwell's confession and insisting that "Stillwell also told you what happened." J.A. 198-99 (emphasis supplied). The AUSA then followed the discussion of Stillwell's confession by arguing, "Think about all the evidence you've seen. All the evidence lines up." J.A. 199. Thus, the prosecutor used Stillwell's confession not just as evidence of what Stillwell did, but of "what happened" during Lee's murder, including Samia's role as the shooter.

Allowing prosecutors to exploit accomplice confessions to inculpate non-confessing defendants, so long as they do not say in so many words that the accomplice named the non-confessing defendant, is a formalistic game promoted by the "standing alone" rule. Second Circuit prosecutors have even explicitly argued the "nudge and a wink"—that a jury can infer a defendant's guilt because his co-defendant admitted in a redacted confession to committing the crime with "someone else," and "you know who that someone is." Brief for Defendant-Appellant Avinoam Damti at 31,

United States v. Damti, 109 F. App'x 454 (2d Cir. 2004) (Nos. 03-1682, 03-1711) (quoting summation). In the government's view, this argument was proper because it was "based on the other evidence presented in the case" and hence in line with the "standing alone" rule. Brief for the United States at 37, *United States v. Damti*, 109 F. App'x 454 (2d Cir. 2004) (Nos. 03-1682, 03-1711).[7]

As stated above, it is already fictional to deem it possible, without considering the context of the trial evidence, to examine the "kind" of or "directness" of an inference to be drawn from a redacted confession. These inquiries are in turn necessary to assessing the likelihood that one defendant's redacted confession will be taken by the jury as evidence of the non-confessing defendant's guilt. The pretense breaks down completely at the point when the record shows prosecutors urging the impermissible inference and encouraging juries to rely on redacted confessions to find the non-confessing defendant guilty. A standard that approves admission of evidence without consideration of how the proof likely will be (or was) heard, and likely will be (or was) used, cannot help but promote and induce trial unfairness.

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[7] In its unpublished, nonprecedential decision in the case, the Second Circuit indicated that the prosecutor's argument went too far, but found any error harmless. *United States v. Damti*, 109 F. App'x 454, 456 (2d Cir. 2004).

C. An Out-Of-Court Accomplice Confession Is An Especially Prejudicial Form Of Hearsay Incrimination.

The uniquely unreliable species of hearsay involved here poses grave Confrontation Clause concerns beyond the problematic nature of using any type of inadmissible hearsay to convict an accused. This Court's *Bruton* rule is expressly based on the principle that accomplice confessions are "inherently suspect" and the "unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination." 391 U.S. at 136; *see also Lilly v. Virginia*, 527 U.S. 116, 132 (1999) ("'[The] truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination.'") (quoting *Lee v. Illinois*, 476 U.S. 530, 541 (1986)); *id.* at 146-47 (Rehnquist, C.J., concurring) (agreeing that untested custodial confessions should be viewed with "special suspicion").

This unreliability stems from the accomplice's "strong motivation," *Lilly*, 527 U.S. at 132 (quotation and citation omitted), to implicate the defendant and help himself, through a potential cooperation agreement or other form of favorable treatment that reduces or eliminates his own jail time. Appealing to this motivation, government investigators are trained to encourage accomplices to point the finger at their alleged co-conspirators. As recommended in one leading handbook on police interrogation techniques: "[W]hen interrogating a suspect in a case involving

another participant or participants, it is advisable to suggest that the primary blame, or at least some of the blame, belongs to the other person." FRED INBAU, *ET AL.*, CRIMINAL INTERROGATION AND CONFESSIONS 224 (5th ed. 2013); *see also* Welsh S. White, *Accomplices' Confessions and the Confrontation Clause*, 4 WM. & MARY BILL RTS. J. 753, 775 (1996) (noting that "police manuals advise interrogators to 'play on the subject's desire to shift blame'") (cleaned up).

Even when an accomplice testifies at trial as a cooperating witness subject to cross-examination, this Court has long cautioned that the testimony should be "received with suspicion" and analyzed with "the very greatest care and caution." *Crawford v. United States*, 212 U.S. 183, 204 (1909). Examples of cooperating witnesses being thoroughly discredited on cross-examination are hardly unknown.[8] When dealing with a Brutonized statement, a defense lawyer does not even have the opportunity to challenge the statement's reliability—by eliciting, for example, how the co-defendant may have been motivated or induced to falsely incriminate the lawyer's client—because the co-defendant will not be testifying and it would be a poor strategic choice to cross-examine the agent on the subject and thereby tacitly admit to the jury that the "other person" is the lawyer's client. In short, allowing incrimination of a defendant via an *un*sworn, *un*cross-examined hearsay statement of an accomplice is, as *Bruton* rightly recognized, simply "intolerabl[e]." *See* 391 U.S. at 136.

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[8] *See, e.g.,* Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 67 FORDHAM L. REV. 917, 921 (1999) (detailing the pervasiveness of prosecutors' reliance on "inaccurate cooperator testimony").

The only rule consistent with admitting inherently suspect hearsay confessions and simultaneously protecting the non-confessing defendant's Sixth Amendment rights is a rule that requires a consideration of the likely prejudice to that defendant, in the context of all the trial evidence.

III. THE "CONTEXT" RULE ADOPTED IN OTHER CIRCUITS CAN BE APPLIED WITHOUT FEAR OF IMPAIRING THE FAIR AND EFFICIENT ADMINISTRATION OF JUSTICE.

The government's opposition to certiorari in this case suggested that adherence to the "standing alone" rule is necessary to avoid "troubling 'practical effects'" on "'the efficiency and the fairness of the criminal justice system.'" Br. in Opp. 7-8 (quoting *Richardson*, 481 U.S. at 208-09). It is fundamental, however, that no concern of "efficiency" or "workability" can override a constitutional right. *Bruton* itself stated that courts cannot "secure greater speed, economy and convenience in the administration of law at the price of fundamental principles of constitutional liberty." 391 U.S. at 135 (citation omitted). In any event, concerns about the practical impact of requiring courts to consider context when admitting redacted confessions in joint trials are greatly overstated.

First, the fact that other Circuits already apply a rule requiring trial courts to consider the context of the trial evidence when weighing the admissibility of a redacted confession—apparently without undue burden to the administration of justice—itself demonstrates that the "context" rule is workable. In those Circuits, it is already working.

Second, adoption of a rule that permits consideration of "context" will not result in the wholesale exclusion of redacted, out-of-court confessions. Many if not most confessions can be redacted to eliminate any reference to the existence of a coconspirator—as was true, notably, of the confession in *Richardson* itself, 481 U.S. at 203. In the circuits applying the "context" rule, such confessions may still be admitted—just in a different *form* that removes any impermissible hearsay-based incrimination of the non-confessing defendant. *See, e.g.*, *United States v. Veras de los Santos*, 184 F. App'x 245, 256 (3d Cir. 2006) (finding that redacted statement satisfied *Bruton* where "[t]he revised statement eliminated all references to the existence of a coconspirator," only "suggest[ing] obliquely that [the confessing defendant] transferred money from [another coconspirator] to another person).

Third, rather than leading inexorably to more severed trials, application of a "context" rule in many cases will simply result in the prosecutor electing not to offer a confession that is cumulative or unimportant in establishing the declarant's guilt when compared to the benefits of a joint trial. By contrast, the "standing alone" rule green-lights the piling on of a prosecutor's proof. This is because even in a case where the government believes it could convict the declarant easily without the redacted confession, the government suffers no downside from seeking to admit it, and may gain a potential benefit to the extent the jury uses the confession (improperly) as evidence against a non-confessing defendant.[9]

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[9] As a means of preserving a joint trial, prosecutors could also offer the confessing defendant a cooperation agreement or

This case demonstrates vividly how the "standing alone" rule incentivizes prosecutors to admit redacted confessions that are cumulative proof of the declarant's guilt. Stillwell's confession was admitted only as proof of Stillwell's guilt; the jury could not permissibly have considered it proof of Samia's guilt. Yet the confession was also unnecessary to proving Stillwell's guilt: Stillwell never disputed at trial the facts stated in his redacted confession—*i.e.,* that he was "the driver of that vehicle" and was "in the van with the victim" when his companion shot Lee. J.A. 64. Stillwell's defense was not that he did not participate in the murder plot, but that the government failed to prove the jurisdictional element of planning the murder-for-hire in the United States. J.A. 218. Thus, for no gain in the proof against Stillwell, the government heightened the risk that the jury would unfairly convict Samia.

Fourth, in those relatively few cases in which the government needs to offer an accomplice confession and the confession cannot be redacted to comply with the "context" rule, the remedy of severance exists to permit the prosecution to obtain the benefit of using the confession as evidence against the confessor while simultaneously protecting the Confrontation Clause rights of the non-confessing defendant.

As a threshold matter, the specter of "trial proliferation" resulting from severance does not carry the same weight today as in the times in which the *Bruton* line of cases was decided. The clear trend in the

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statutory immunity such that their confession, insofar as it implicated a non-confessing defendant, would be subject to cross-examination.

number of federal criminal trials over the last quarter century is one of dramatic decline; the vast majority of defendants plead guilty and very few go to trial. According to the Administrative Office of the United States Courts, in the twelve-month period ending on September 30, 2022, only approximately 2% of federal criminal defendants proceeded to trial. *See* Admin. Office of U.S. Courts, "U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Offense, During The 12-Month Period Ending September 30, 2022" at 1 (Sept. 30, 2022).[10] In 1997, the percentage of federal criminal defendants that went to trial was more than three times higher—approximately 7%. *See* Admin. Office of U.S. Courts, "U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Offense, During The 12-Month Period Ending September 30, 1997" at 1 (Sept. 30, 1997).[11]

Ordering separate trials when the government elects to rely on an accomplice confession implicating another defendant is consistent with the history and purpose of severance. Throughout the 19th and early 20th centuries, it was common for courts to order trial severance to avoid prejudice to the non-confessing defendant from the admission of an accomplice confession. *See* FRANCIS WHARTON, A TREATISE ON CRIMINAL PLEADING AND PRACTICE § 310 (8th ed. 1880) ("Where the defenses of joint defendants are antagonistic, it is proper to grant a severance. And this is eminently the case where one joint defendant has

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[10] https://www.uscourts.gov/sites/default/files/data_tables/jb_d4_0930.2022.pdf (last visited Jan. 31, 2023).

[11] https://www.uscourts.gov/sites/default/files/statistics_import_dir/d04sep97.pdf (last visited Jan. 31, 2023).

made a confession implicating both, and which the prosecution intends to offer on trial."); JOEL PRENTISS BISHOP, CRIMINAL PROCEDURE; OR, COMMENTARIES ON THE LAW OF PLEADING AND EVIDENCE AND THE PRACTICE IN CRIMINAL CASES § 1019A (3d ed. 1880) ("If evidence to be adduced against one defendant is, while inadmissible against another, calculated to prejudice the cause of the latter with the jury, the court should grant a severance. Of this sort are confessions by one defendant, involving another. They are admissible only against the one, and are calculated to prejudice the jury against the other; therefore, if they are to be introduced, the trials should be separate.") (cleaned up).[12]

It is thus the more recent preference for joint trials that breaks from tradition. But even today, courts hold that the benefits of a joint trial must yield whenever severance is necessary—on *Bruton* grounds or others—to ensure the protection of each defendant's constitutional rights. Fed. R. Crim. P. 14 requires

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[12] *See also, e.g.*, *Commonwealth v. James*, 99 Mass. 438, 440 (1868) ("if the Commonwealth intends to offer in evidence the whole confession of [one defendant], its application to the [co-defendant] as well as to himself may prejudice the [co-defendant], and the motion [for severance] should be granted"); *People v. Buckminster*, 113 N.E. 713, 716 (Ill. 1916) ("where one of several defendants jointly indicted has made admissions or confessions implicating others, a severance should be ordered unless the attorney for the state declares that such admissions or confessions will not be offered in evidence on the trial"); *Flamme v. State*, 177 N.W. 596, 598 (Wis. 1920) ("This clearly presents a case where the confession of a defendant, admissible against her, but not against a codefendant, must inevitably operate to the prejudice of the latter defendant's rights. Under these conditions a denial to grant separate trials is clearly an abuse of discretion.").

severance when there is "a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro v. United States*, 506 U.S. 534, 539 (1993) (stating that severance should be granted where "evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty" or where "essential exculpatory evidence that would be available to a defendant tried alone would be unavailable in a joint trial"). Spillover prejudice is a classic example of unfairness requiring severance. *See id.*; *see also Kotteakos v. United States*, 328 U.S. 750, 774 (1946) ("The dangers for transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial rights has not taken place.").

Courts order severance—including of some of the most complex trials on the federal docket today—when the rights of the defendants cannot be otherwise protected. Several recent trials bear this out:

- The recent trials of Theranos-founder Elizabeth Holmes, and Ramesh Balwani, her former partner and the former president and chief operating officer of the company, were severed over a government objection due to Holmes' intention to defend herself with proof that Balwani abused her when they were partners. *See United States v. Holmes*, No. 18 Crim. 258 (EJD, Dkt. No. 369 (Sealed Order on Motions to Sever) (redacted version at Dkt. No. 977) at 6-15 (docketed N.D. Cal. Mar. 30, 2020) (finding good cause to sever trials because the defense

Holmes planned to advance describing alleged uncharged abusive behavior is too prejudicial to be cured by a limiting instruction to the jury).

- In a recent high-profile securities prosecution in the Eastern District of New York, commenced against the officers of a hedge fund called Platinum Partners, one of the officers (Shulse) successfully moved to sever his trial from that of the other defendants because he intended to finger-point at his co-defendants with "an order of magnitude more severe than routine accusations and blame-shifting between co-defendants." *See United States v. Nordlicht*, No. 16 Crim. 640 (BMC), 2018 WL 1796542, at *2-3 (E.D.N.Y. Apr. 16, 2018) (finding that this effectual "double prosecution" from both the government and the evidence Shulse intended to present at trial, plus the "[s]erious trial management" issues the court anticipated would arise and lead to jury confusion, meant that "the consequences of trying the defendants together outweigh the efficiencies and presumption of a joint prosecution").

- Similarly, the fraud trial of so-called "Pharma Bro" Martin Shkreli was severed from that of his co-defendant and lawyer, Evan Greebel. Shkreli intended to rely on an advice-of-counsel defense and Greebel intended to present evidence and argue at trial that his co-defendant was guilty of charged and other crimes. *See United States v. Shkreli*, 260 F. Supp. 3d 247, 257 (E.D.N.Y. 2017) (ordering that the cases be severed to avoid the substantial prejudice that would manifest by

Shkreli having to "wage a defense on two fronts," and the high risk of jury confusion).

Fifth, in some cases where severance is warranted, the benefits of a joint trial can nonetheless be preserved. The court can conduct a single trial at which it empanels two juries, to whom the same trial proof will be presented, with the exception of the confession, and who are instructed to deliberate separately on the guilt or innocence of the confessing and non-confessing defendants. *See, e.g.*, *United States v. Sidman*, 470 F.2d 1158, 1163 (9th Cir. 1973) (two defendants jointly tried with two juries in the case, one for each defendant; the charge of the court, the attorneys' jury arguments, and the confession of each defendant introduced while the jury for the co-defendant was outside the courtroom).

For all these reasons, the "context" rule, beyond being constitutionally required, will promote rather than undermine the proper administration of justice.

CONCLUSION

For the foregoing reasons, this Court should overturn the Second Circuit's legal standard for determining the admissibility of a redacted confession under the Confrontation Clause.

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Respectfully submitted,

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