No. 22-196

IN THE
Supreme Court of the United States

ADAM SAMIA, PETITIONER

v.

UNITED STATES OF AMERICA

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

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BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. Its nationwide membership of many thousands of direct members—and up to 40,000 with affiliates—includes private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. It is the only nationwide professional bar association for public defenders and private criminal defense lawyers.

NACDL is dedicated to advancing the proper, efficient, and just administration of justice. To that end, NACDL files numerous *amicus* briefs each year in this Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately two million members and supporters dedicated to defending the principles embodied in the Bill of Rights and our nation's civil rights laws. Since its founding in 1920, the ACLU has frequently appeared before this Court, the lower federal courts, and

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party has 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.

state courts in cases defending the fair trial rights of individuals accused of crime.

Amici submit this brief in support of the petitioner because the issue presented in this case is of paramount importance to criminal defense attorneys throughout the country and the fair trial rights of the individuals they represent.

INTRODUCTION AND SUMMARY OF ARGUMENT

Accomplice confessions that shift or spread blame to others present a special threat to the justice system. They are notoriously unreliable, yet wildly prejudicial. Fortunately, in many cases, a defendant can combat such prejudice with "the crucible of cross-examination," *Crawford v. Washington*, 541 U.S. 36, 61 (2004), the "greatest legal engine ever invented for the discovery of truth," *California v. Green*, 399 U.S. 149, 158 (1970). But at a joint trial, "[t]his prejudice cannot be dispelled . . . if the co-defendant does not take the stand." *Bruton v. United States*, 391 U.S. 123, 132 (1968).

In *Bruton*, the Court held that the introduction of an out-of-court confession that implicates another defendant by name violates the Confrontation Clause, even if the jury is instructed not to consider the confession against the nonconfessing defendant. In such cases, the Court explained that "the risk that the jury will not, or cannot, follow [that] instruction[]" is too great, and the threat to liberty too severe. *Id.* at 135. *Bruton* thus excludes "the entire category of codefendant confessions that implicate the defendant in the crime." *Cruz v. New York*, 481 U.S. 186, 191 (1987).

The question presented in this case is whether the same rule should apply where the codefendant's confession is redacted or altered to refer to the nonconfessing defendant only by neutral terms—*e.g.*, "another person"—instead of by name. Here, for example, a codefendant's confession accused petitioner of shooting the murder victim at point-blank range. It also provided details about petitioner, like his travel history, living arrangements, and the weapons he

owned. But, presented through the testimony of a DEA agent at trial, the redacted confession did not refer to petitioner by name. Instead, the DEA agent replaced petitioner's name with phrases like "someone" or "the other person."

In the Second Circuit's view, the introduction of the redacted confession did not violate *Bruton* because it did not identify petitioner by name. That ruling is wrong. For the reasons that follow, the Court should reverse the Second Circuit's decision and hold that, as a class, directly accusatory confessions—that is, confessions that "refer directly to" a nonconfessing codefendant's role in the crime, *Gray v. Maryland*, 523 U.S. 185, 196 (1998)—violate the Confrontation Clause. Because the confession in this case, even as redacted, directly accused another person of committing the crime, and that other person was petitioner, the Court should hold that its introduction violated the Confrontation Clause.

A. The Court's decision in *Bruton* rested on four notable attributes of codefendant confessions. First, codefendant confessions that shift or spread blame are notoriously unreliable and "inevitably suspect." *Bruton*, 391 U.S. at 136. Second, codefendant confessions are—despite their unreliability—singularly prejudicial. They are "so damaging" because juries believe them rather than "give such evidence the minimal weight it logically deserves." *Id.* at 138 (Stewart, J., concurring). Third, the prejudice caused by codefendant confessions is uniquely impervious to limiting instructions. In no other context are juries asked to consider a piece of evidence as direct, substantive, and valid proof of one defendant's guilt, but to completely ignore that same evidence as it pertains to the guilt of

another. And, fourth, the risk of prejudice from a codefendant's confession is inherently avoidable by holding separate trials. That procedure gives the government "the benefit of the confession to prove the confessor's guilt . . . without at the same time infringing the nonconfessor's right of confrontation." *Id.* at 133-34.

B. The Court should hold that the *Bruton* rule categorically applies to any directly accusatory codefendant confession, regardless of any other context, for four reasons.

First and foremost, each of the attributes of codefendant confessions that led this Court to adopt the *Bruton* rule applies to all directly accusatory codefendant confessions. Indeed, codefendant confessions are so dangerous precisely because they are "directly accusatory." Barring all directly accusatory confessions would align the *Bruton* rule with its supporting rationale.

Second, excluding all directly accusatory codefendant confessions comports with the Court's decisions in this area. The Court held that the Confrontation Clause was violated in *Bruton*, *Cruz*, and *Gray*, all of which involved directly accusatory statements. In *Richardson v. Marsh*, 481 U.S. 200, 211 (1987), by contrast, the Court found no *Bruton* violation from the admission of a confession "redacted to eliminate not only the defendant's name, but any reference to his or her existence." With those redactions, the confession was not directly accusatory because it "did not refer directly to the defendant." *Gray*, 523 U.S. at 196.

Third, a rule excluding all directly accusatory codefendant confessions is readily administrable. The

Court has previously emphasized the importance of a trial court's ability to "predict the admissibility of a confession in advance of trial." *Richardson*, 481 U.S. at 209. Petitioner has explained why his context-based rule achieves that goal. But should the Court have any concerns about that rule's administrability, *Amici* submit that the answer is not to adopt a standard that wagers constitutional rights on the notion that a jury may not connect the dots linking a defendant with the "someone" implicated in his codefendant's confession. Instead, the proper solution would be to adopt a rule recognizing that those dots will practically always be connected—and thus all directly accusatory confessions should be excluded.

Fourth, prohibiting all directly accusatory confessions from being admitted at joint trials presents no serious obstacle to the proper functioning of our criminal justice system. To the contrary, it would preserve an important role for separate trials. Given this "viable alternative[]," *Bruton*, 391 U.S. at 126, several States have long prohibited all codefendant confessions that refer to the defendant's existence. Federal defendants and those in other States should likewise not have to bear the inherently avoidable risk of juries "look[ing] to the incriminating extrajudicial statements in determining . . . guilt." *Id.* at 126.

C. In all events, the Court should emphatically reject the Second Circuit's approach. Under that circuit's precedent, "whether a jury might infer" that "a confederate . . . referenced the defendant" is not the "critical inquiry." *United States v. Jass*, 569 F.3d 47, 61 (2d Cir. 2009). Instead, the court asks only whether redactions "sufficiently conceal[] the fact of *explicit* identification." *Id.* (emphasis added). And the

court restricts its analysis to "the redacted statement in isolation." *Id.* at 62. This approach leads to the wooden rule that "introduction of a co-defendant's confession with the defendant's name replaced by a neutral noun or pronoun does not violate *Bruton*." *United States v. Lyle*, 919 F.3d 716, 733 (2d Cir. 2019).

That rule is irreconcilable with the Court's precedents. Indeed, the Second Circuit's approach bypasses the central inquiry under *Bruton*: whether the jury will, in fact, understand that the confessor has implicated a defendant in the crime. And it ignores *Gray*'s holding that "directly accusatory" confessions, as a class, "closely resemble *Bruton*'s unredacted statements" because "the jury will often realize that the confession refers specifically to the defendant." *Gray*, 523 U.S. at 192-94.

Amici urge the Court to clarify that the Confrontation Clause bars unconfronted confessions that are "directly accusatory." *Gray*, 523 U.S. at 194. This standard protects an indispensable constitutional right, is easily administrable before trial, and preserves an important role for separate trials in the few cases ill-suited to *Bruton*-compliant redactions.

ARGUMENT

In *Bruton*, the Court "held that a defendant is deprived of his rights under the Confrontation Clause when his codefendant's incriminating confession is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant." *Cruz*, 481 U.S. at 187-88. Under such circumstances, the practical reality is that juries will virtually always still consider the nontestifying code-

fendant to be, in effect, a "witness against" the defendant. U.S. Const. amend. VI. *Bruton* thus establishes a constitutional rule that trumps "the general rule" of evidence "that jury instructions suffice to exclude improper testimony." *Cruz*, 481 U.S. at 191.

The *Bruton* rule rests on four notable attributes of codefendant confessions. Those same attributes support extending *Bruton* to all directly accusatory codefendant confessions—that is, confessions that implicate a nonconfessing defendant in the crime. This rule follows from this Court's precedents on such confessions, provides a principled and easily administrable standard, and poses no fundamental obstacle to the efficient and just operation of the criminal justice system. The Court should adopt that rule and reject the Second Circuit's flawed approach to codefendant confessions.

A. The *Bruton* Rule Rests on the Unique Harms Presented By Codefendant Confessions that Shift or Spread Blame.

The Court has explained the need for the *Bruton* rule by focusing on four notable attributes of codefendant confessions that shift or spread blame.

1. First, a codefendant's confession is "presumptively unreliable" and "inevitably suspect." *Bruton*, 391 U.S. at 136 & n.12. Indeed, accomplice confessions are among the lowest forms of evidence known to the law. "[T]he source of this evidence is so corrupt, that it is always looked upon with suspicion and jealousy." *Commonwealth v. Bosworth*, 39 Mass. 397, 399 (1839). English common law once disqualified all accomplices as incompetent witnesses. *See* 7 J. Wigmore, *Evidence* § 2056 (3d ed. 1940). And even when

that restriction loosened, the corroboration rule emerged in its place. Under that rule, "the evidence of the accomplice . . . unless it be corroborated by some other evidence, it is not sufficient." H. Fielding, *An Enquiry Into the Causes of the Late Increase of Robbers* 172-73 (London 1751); *see also* John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial*, 50 U. Chi. L. Rev. 1, 96 (1983) (describing the corroboration rule as "The First Rule of Evidence").

American practice has displayed a similar distrust of accomplice confessions. *See Crawford v. United States*, 212 U.S. 183, 204 (1909). In the past, some judges "consider[ed] it their duty to advise a jury to acquit, where there [was] no evidence other than the uncorroborated testimony of an accomplice." *Bosworth*, 39 Mass. at 399. Other courts went further and entered a directed verdict, explaining that the law "will not permit any citizen to be convicted solely by the testimony of the accomplice." *People v. Williams*, 18 Cal. 187, 191 (1861). In the same vein, this Court has "spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants." *Lee v. Illinois*, 476 U.S. 530, 541 (1986).

Past jurists also agreed that the best way to counter the unreliability of accomplice confessions was cross-examination. Courts observed that "[w]hen accomplices are allowed to testify . . . . there is every reason to compel them to submit to the fullest and most searching inquiry." *Foster v. People*, 18 Mich. 266, 276 (1869). And they explained that while exposing flaws in a witness's testimony "is the general office of a cross-examination, . . . this is more especially important in respect to [accomplices]." *Williams*, 18 Cal.

at 191; *see also* William D. Evans, *On the Law of Evidence* 260 (1806) (accomplice testimony "very properly occasions a great degree of caution," requiring "a minute examination of circumstances" through cross-examination). As this Court observed more recently, an accomplice confession "creates a special, and vital, need for cross-examination." *Gray*, 523 U.S. at 194.

2. Second, experience teaches that accomplice confessions are uniquely prejudicial for the simple fact that juries believe them, despite their unreliability. "A confession is like no other evidence." *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (plurality opinion). As even the *Bruton* dissent recognized, it comes "from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct." *Bruton*, 391 U.S. at 140 (White, J., dissenting); *cf. Williamson v. United States*, 512 U.S. 594, 599-600 (1994) ("One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature."). For that reason, confessions "have profound impact on the jury." *Fulminante*, 499 U.S. at 296. In fact, "[t]riers of fact accord confessions such heavy weight in their determinations that 'the introduction of a confession makes the other aspects of a trial in court superfluous.'" *Colorado v. Connelly*, 479 U.S. 157, 182 (1986) (Brennan, J., dissenting) (quoting E. Cleary, *McCormick on Evidence* 316 (2d ed. 1972)).

It is because accomplice confessions that shift or spread blame are "so damaging" that juries cannot always "be trusted to give such evidence the minimal weight it logically deserves." *Bruton*, 391 U.S. at 138 (Stewart, J., concurring). And *Bruton* held that this

prejudice is "intolerably compounded when the alleged accomplice . . . cannot be tested by cross-examination." *Id.* at 136 (majority opinion).

3. Third, codefendant confessions are uniquely ill-suited to limiting instructions. Such instructions ask the jury "to perform the overwhelming task of considering [the confession] in determining the guilt or innocence of the declarant and then of ignoring it in determining the guilt or innocence of any codefendants." *Id.* at 131. And *Bruton* determined that the Confrontation Clause cannot tolerate the fiction that a jury could be expected to "segregate [such] evidence into separate intellectual boxes." *Bruton*, 391 U.S. at 131; *cf. Shepard v. United States*, 290 U.S. 96, 104 (1933) ("It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed.").

Put simply, a jury that credits A's confession that he committed the crime with B when determining A's guilt is highly unlikely to ignore the "inevitable conclusion" that B committed the crime with A when determining B's guilt. *Bruton*, 391 U.S. at 131, 132 n.8. Instead, the jury will almost inevitably "look[] to the incriminating extrajudicial statements in determining" the nonconfessing defendant's guilt. *Id.* at 126. That is so even though the accusation against the nonconfessing defendant will be the *least* reliable portion of the codefendant's confession. *See Lilly v. Virginia*, 527 U.S. 116, 133 (1999) (Stevens, J., concurring) (noting the "presumptive unreliability of the 'non-self-inculpatory' portions" of a confession). And it is so, even though—or perhaps because—the nonconfessing defendant will have no opportunity to subject his accuser to cross-examination.

4. Fourth, the risk of prejudice from a codefendant's unconfronted confession is uniquely avoidable.

In most contexts, when evidence is admitted for a limited purpose, there is no way to present the probative aspects apart from the unfairly prejudicial ones. For example, statements obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), cannot be used to impeach a defendant's trial testimony without risking that the jury will rely on those statements as substantive evidence of a defendant's guilt. After all, the same jury charged with assessing the defendant's guilt must also evaluate his credibility. Because that risk is unavoidable, the Court has reasonably determined that a limiting instruction strikes the right balance between protecting the defendant's constitutional rights and allowing the prosecution to employ un-*Mirandized* statements for a valid purpose. *See Harris v. New York*, 401 U.S. 222, 224 (1971) (reasoning that a contrary rule would let a defendant "resort to perjurious testimony in reliance on the Government's disability to challenge his credibility").

A codefendant's confession, however, does not raise the same dilemma because the government always has the option of holding separate trials for the confessing and nonconfessing defendants. In the confessing defendant's trial, no limits need to be imposed on the jury's consideration of the confession. *See Crawford*, 541 U.S. at 45. But in the trial of the nonconfessing defendant (or defendants), the confession has no legitimate evidentiary value. It is a "presumptively unreliable out-of-court statement of a nonparty who was not a witness subject to cross-examination." *Bruton*, 391 U.S. at 136 n.12. Separate trials thus afford the government "the benefit of the confession . . .

without at the same time infringing the nonconfessor's right of confrontation." *Id.* at 133-34. For that reason, *Bruton* held that any convenience from joint trials gained at the expense of "fundamental principles of constitutional liberty" was too high a price. *Id.* at 134-35.

B. The *Bruton* Rule Should Apply to All Directly Accusatory Codefendant Confessions Regardless of Other Context.

Petitioner persuasively argues that a Confrontation Clause violation occurs not only when a defendant is identified by name in a codefendant's confession, but whenever the jury is likely to ascertain that the codefendant implicated a nonconfessing defendant as an accomplice based on various contextual clues concerning the trial.

For several reasons, however, *Amici* propose a somewhat broader rule. We urge the Court to hold that *Bruton* prohibits all directly accusatory confessions, regardless of other context. Such confessions, as a class, implicate every concern that animated *Bruton*. Excluding all directly accusatory codefendant confessions, moreover, aligns with and harmonizes the Court's precedents. Such a rule is easily administrable. And it would pose no serious obstacle to the efficient operation of the criminal justice system, but rather preserves an important role for separate trials.

1. The origin of *Bruton*-type prejudice is a confession's directly accusatory nature. All confessions that shift or spread blame "function the same way grammatically" in that they "obviously refer directly to someone." *Gray*, 523 U.S. at 194, 196. And with any

such confession, the concerns animating *Bruton* inevitably follow. That is why *Bruton* excluded "the *entire category* of codefendant confessions that implicate the defendant in the crime." *Cruz*, 481 U.S. at 191 (emphasis added).

The exclusion of all directly accusatory confessions flows directly from *Bruton*. All directly accusatory confessions are inherently unreliable given the declarant's "recognized motivation to shift blame onto others." *Bruton*, 391 U.S. at 136. All are uniquely prejudicial because juries view the declarant, having admitted his own guilt, as a "knowledgeable and unimpeachable source of information." *Id.* at 140 (White, J., dissenting). All are uniquely impervious to jury instructions that ask the jury to simultaneously consider and not consider the same evidence as direct, substantive evidence of guilt. And the prejudice that flows from all directly accusatory confessions is uniquely avoidable through separate trials.

In *Bruton,* the Court identified the source of prejudice as the jury's "[in]ability to disregard a codefendant's confession implicating another defendant." 391 U.S. at 130. Thus, a Confrontation Clause violation occurs whenever the jury believes that a codefendant implicated another defendant in his confession—and thus functionally understands the confessor to be a "witness against" the defendant. U.S. Const. amend. VI. Under the Confrontation Clause, *how* the jury draws that connection is immaterial. Once the jury understands that a confession "implicate[s] the defendant in the crime," how that connection was made "cannot conceivably be relevant to whether . . . the jury is likely to obey the instruction to disregard it,"

or whether "the jury's failure to obey is likely to be inconsequential." *Cruz*, 481 U.S. at 193.

Redactions that replace a defendant's name with a phrase like "someone else" do not meaningfully change the calculus. The Court has already explained why efforts to obscure the "someone" referenced in a directly accusatory confession are ill conceived: Too many clues will inevitably lead jurors to "work out the reference." *Gray*, 523 U.S. at 193. To start, the government's case will necessarily depend on the implicit assertion that the defendant alone matches the identity of this "someone." Were it otherwise, the prosecutor could not "argue the confession is reliable." *Id.* Moreover, even if the *fact* of redaction is effectively concealed, a mildly attentive jury will notice the prosecutor's strangely incurious attitude toward the identity of this unnamed accomplice. And if the jury harbored any doubts that the "someone" was the other defendant, his attorney's inaction would erase them. Nothing could be more helpful to a defendant's case than a confessor's admission that he committed the crime with someone *other than the defendant*. If a confession did not implicate a defendant, jurors would expect his lawyer to hammer that point home. And they will inevitably infer from a lawyer's silence that his client was implicated. Finally, those practical realities will be reinforced—not dissipated—when the jury "hears the judge's instruction not to consider the confession as evidence against" the other defendant. *Id.*

These considerations all support the Court's conclusion that "directly accusatory" confessions, "considered as a class, so closely resemble *Bruton*'s unredacted statements that . . . the law must require the same result." *Id.* at 192, 194. As *Gray* explains, what

makes a confession "difficult to thrust out of mind" is that it "obviously refer[s] directly to *someone*." *Id.* at 196 (emphasis added). Nothing in *Bruton* or later cases suggests that a jury's ability to disregard the confession will be enhanced if it has to connect a few dots before concluding that "someone" is the defendant.

2. Excluding directly accusatory codefendant confessions, as a class, comports with this Court's precedents. The statements in *Bruton* and *Cruz* were "directly accusatory" because they "use[d] a proper name to point explicitly to an accused defendant." *Id.* at 194; *see also Cruz*, 481 U.S. at 188-89. But the statement in *Richardson* was not "directly accusatory" because it "d[id] not point directly to a defendant at all." *Gray*, 523 U.S. at 194. That statement was "redacted to eliminate not only the defendant's name, but any reference to his or her existence." *Richardson*, 481 U.S. at 211.

a. The Court explicitly relied on the directly accusatory standard to decide *Gray*. That case resolved the issue *Richardson* left open: "[T]he admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." *Richardson*, 481 U.S. at 211 n.5. *Gray* held that such redactions, "considered as a class, so closely resemble *Bruton*'s unredacted statements that . . . the law must require the same result." 523 U.S. at 192. The Court explained that the confessions "function the same way grammatically" in that they are "directly accusatory." *Id.* at 194. And even when a directly accusatory confession is redacted to remove proper names, it still "obviously refer[s] directly to someone, often obviously the defendant." *Id.* at 196.

Gray acknowledged that the "someone" referenced in a confession may be more or less transparent depending on the method of redaction and other case-specific factors. *See id.* at 194-95. But consistent with its earlier decisions in this area, the Court chose to exclude "directly accusatory" confessions "as a class," rather than invite case-by-case determinations. *Id.*; *see also Cruz*, 481 U.S. at 191 (noting *Bruton*'s rejection of the view that a confession's prejudicial impact "should be assessed on a case-by-case basis").

Of course, trial judges cannot know for certain whether a jury will inevitably make the connection that *Bruton* guards against. *See Cruz*, 481 U.S. at 192 (describing "[t]he infinite variability of inculpatory statements . . . and of their likely effect on juries"). *Gray* thus drew a principled line at "directly accusatory" confessions as a class. 523 U.S. at 194. Such confessions—even when redacted with symbols or pronouns—"obviously refer directly to someone" and "involve inferences" about the identity of the unnamed individual "that a jury ordinarily could make immediately." *Id.* at 196.

b. By contrast, the Court recognized in *Richardson* that confessions "redacted to eliminate not only the defendant's name, but any reference to his or her existence," are different in kind, not just degree. *Richardson*, 481 U.S. at 211. Such confessions might prejudice a nonconfessing codefendant by disclosing unhelpful facts, but they are not directly accusatory. In *Richardson*, for example, Marsh's codefendant confessed that, while driving to the crime scene, he told a third person "that he would have to kill the victims." 481 U.S. at 203. Marsh later testified that she was in

the same car, but denied knowledge of her codefendant's murderous intent. *See id.* at 204. Plainly, if the jury had impermissibly relied on her codefendant's confession about the car conversation in determining Marsh's knowledge, it would have unfairly prejudiced Marsh.

In finding the confession admissible with a limiting instruction, the Court contrasted the prejudice from such "inferential incrimination" with that from a confession implicating a defendant "as [an] accomplice." *Id.* at 208. And while it acknowledged that "it may not always be simple for the members of a jury to obey the instruction that they disregard" the former, it concluded that "there does not exist the overwhelming probability of their inability to do so that is the foundation of *Bruton*[]." *Id.*

Whatever prejudice might have flowed from the confession in *Richardson*, it was not *Bruton* prejudice because Marsh's codefendant had not directly "implicate[d] [her] in the crime." *Cruz*, 481 U.S. at 191. The redacted confession did not "refer directly to the defendant" in any way. *Gray*, 523 U.S. at 196. It merely disclosed a non-accusatory fact that, when connected with other evidence, could have unfairly prejudiced the defendant. As *Richardson* held, mitigating risk of that kind of prejudice is the traditional office of limiting instructions.[2]

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[2] The focus here on whether the codefendant's confession is "accusatory" is unique, for the reasons just elaborated, to the *Bruton* context. In general, a statement by a nontestifying witness need not be accusatory to implicate the Confrontation Clause. *See, e.g.*, *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313-14 (2009).

3. Excluding all directly accusatory codefendant confessions is also readily administrable. Foremost, it aligns with the Court's goal of enabling trial judges to "predict the admissibility of a confession in advance of trial." *Richardson*, 481 U.S. at 209. Whether a redacted confession still "refer[s] directly to someone" else involved in the crime is easily discernable, even when reviewing the confession in isolation. *Gray*, 523 U.S. at 186.

Moreover, barring all directly accusatory confessions would not only offer predictability before trial, but it would also benefit the conduct of trial itself. It is a rare claim of *Bruton* error that does not focus, at least in part, on a prosecutor's comments during opening statements or closing arguments. And that makes sense. A prosecutor's focus at those times is on persuading the jury to convict, not maintaining the dubious pretension that the "someone" referenced in a confession may not be the other defendant. So it is no surprise that prosecutors often "undo the effect of [a] limiting instruction by urging the jury to use [a] confession" against the nonconfessing defendant, *Richardson*, 481 U.S. at 211, particularly given the obvious "windfall" to the government of the jury drawing that very connection, *Bruton*, 391 U.S. at 129. Faithful application of our rule would reduce the occasions for such errors. If nothing in a codefendant's redacted confession implicates the other defendant, then prosecutors will be unlikely to wager their own credibility with the jury by implying the opposite.

4. Finally, excluding all directly accusatory confessions is consistent with the efficient operation of the criminal justice system. This approach would present prosecutors with a clear choice. They will know

long before trial whether a confession can be redacted to remove its directly accusatory elements. Where that is possible, the prosecutor may still decide that the efficiencies of a joint trial are outweighed by the advantage of using the unredacted confession in a separate trial of the confessor. Where not, the government is always free to pursue separate trials without losing any legitimate evidentiary benefit from the codefendant's confession.

To be sure, adoption of our rule might still lead to a marginal increase in the number of separate trials. But the increase would likely be modest. Relatively few trials involve multiple defendants—much less a confession by one defendant implicating another. *See* Andrew D. Leipold & Hossein A. Abbasi, *The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 Vand. L. Rev. 349, 366 (2006). For the small number that do, the confession can usually be redacted to remove its directly accusatory elements, particularly when, as is typical, the confession is introduced through the testimony of the officer who received it.

Some States have long prohibited all codefendant confessions that "refer[] to the defendant's name or existence," with no apparent breakdown in their ability to prosecute crimes. *Hanifa v. State*, 505 S.E.2d 731, 738 (Ga. 1998); *see also State v. Tucker*, 414 S.E.2d 548, 554 (N.C. 1992) ("[I]n joint trials of defendants it is necessary to exclude extrajudicial confessions unless all portions which implicate defendants other than the declarant can be deleted without prejudice either to the State or the declarant."); *cf. Gray*, 523 U.S. at 197 ("[S]everal Circuits have interpreted *Bruton* similarly for many years, yet no one has told us of

any significant practical difficulties arising out of their administration of that rule." (citations omitted)). There is no sound reason to expect a different result in the federal system or other States.

It is of course true that joint trials serve an important function in the criminal justice system. *See Richardson*, 481 U.S. at 209. But courts should be "keenly aware that the claimed 'efficiency' of a joint trial can be a surrogate for the reality that a joint trial of multiple defendants is simply to the advantage of the government." *United States v. Simmons*, 374 F.3d 313, 318 (5th Cir. 2004). By contrast, "[d]efendants gain virtually nothing from a separate trial." Leipold, *supra*, at 389. "They are not entitled to keep out evidence in a separate proceeding that would otherwise be admissible." *Id.* The only real benefit is that a separate trial "avoids the prejudice of joinder." *Id.*

Excluding all directly accusatory confessions accounts for these disparate incentives and helps guard against joint trials serving as "windfall[s]" for the government, at the expense of a defendant's fundamental rights. *Bruton*, 391 U.S. at 129. In a joint trial, the only valid use of a codefendant's confession is to establish one simple fact: The confessor admitted *his* guilt. Thus, if a prosecutor objects to removing a confession's directly accusatory elements, it is fair to question whether that resistance is based, at least in part, on the possibility of the redacted content being used against other defendants.

C. In All Events, the Second Circuit's Approach Should Be Rejected.

Whatever standard this Court ultimately adopts, it must reject the Second Circuit's approach. *Bruton*

explained the ineffectiveness of instructing a jury "to disregard a codefendant's confession implicating another defendant when it is determining that defendant's guilt or innocence." 391 U.S. at 130. And *Gray* held that the confession in that case raised the same concern because, "despite redaction, [it] obviously refer[red] directly to someone." 523 U.S. at 196.

The standard developed by the Second Circuit asks the wrong question and predictably produces wrong answers. It does not even consider whether, as a practical matter, a confession "implicate[s] the defendant in the crime." *Cruz*, 481 U.S. at 191. To the contrary, circuit precedent holds that "whether a jury might infer" that "a confederate . . . referenced the defendant" is *not* "[t]he critical inquiry." *Jass*, 569 F.3d at 61. The Second Circuit instead asks whether replacing a defendant's name with a neutral term "sufficiently conceals the fact of explicit identification." *Id.* And it cabins this analysis to "the redacted statement in isolation." *Id.* at 62. This leads to the wooden rule that the "introduction of a co-defendant's confession with the defendant's name replaced by a neutral noun or pronoun does not violate *Bruton*." *Lyle*, 919 F.3d at 733.

The root flaw in the Second Circuit's approach is its mischaracterization of the prejudice *Bruton* guards against. The Court has identified a codefendant's implication of another defendant as the "context[] in which the risk that the jury will not, or cannot follow instructions is so great . . . that the practical and human limitations of the jury system cannot be ignored." *Bruton*, 391 U.S. at 135. But the Second Circuit recasts this risk as arising only from "explicit identifica-

tion." *Jass*, 569 F.3d at 61. And because explicit identification can only come from the confession itself, the court of appeals "view[s] the redacted statement in isolation." *Id.* at 62.

Redacting confessions to "conceal[] the fact of explicit identification" *does not* "eliminate the overwhelming probability that a jury hearing the confession at a joint trial will not be able to follow an appropriate limiting instruction." *Id.* at 61. If the jury "realize[s] that the confession refers specifically to the defendant," *Gray*, 523 U.S. at 193, then *Bruton* prejudice applies with full force. And *Gray* explains why "directly accusatory" confessions, as a class, "so closely resemble *Bruton*'s unredacted statements that . . . the law must require the same result." *Id.* at 192, 194.

Finally, the Second Circuit's misguided approach is further reflected in the various justifications the court has offered for its rule. For example, the court sometimes indulges dubious theories to explain why a jury might not reach the unavoidable conclusion that the "other person" mentioned throughout a redacted confession is the defendant. Perhaps, one theory goes, the jury will think that the confessor "admitt[ed] his own culpability . . . while shielding the specific identity of his confederate." *Lyle*, 919 F.3d at 734. Even assuming the jury might think that possible, *but see Bruton*, 391 U.S. at 136 (recognizing a confessor's strong "motivation to shift blame onto others"), this Court's precedents do not allow a defendant's constitutional rights to hang on such a doubtful proposition. *See Lee*, 476 U.S. at 545 (noting a confessor's "desire to shift or spread blame, curry favor, avenge himself, or divert attention to another"). In other cases, like the decision below, the court merely observes that "a

juror . . . *could* have concluded" that the confession referred to someone other than petitioner. Pet. App. 11a (emphasis added). That reasoning turns *Bruton* on its head by asking whether it is *possible* that petitioner's Confrontation Clause rights were not violated by his jury "look[ing] to the incriminating extrajudicial statements in determining [his] guilt." *Bruton*, 391 U.S. at 126. That is the precise supposition that *Bruton* forbids. This Court should not countenance it.

CONCLUSION

For the foregoing reasons, *Amici* urge this Court to reverse the decision of the court of appeals and hold that admission of a nontestifying codefendant's directly accusatory confession violates the Confrontation Clause.

Respectfully submitted,

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