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 U.S. Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF PETITIONER

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UNOPPOSED MOTION FOR LEAVE TO FILE

Movants, a group of criminal law professors with expertise on the Sixth Amendment, seek leave to file out of time the accompanying brief as amici curiae in support of Petitioner. Amicus briefs in support of Petitioner were due one day ago, on February 1, 2023 (seven days after Petitioner filed his brief). The parties do not oppose the motion, and there is good cause to grant it.

First, Movants and their counsel have been working diligently to prepare their brief for timely filing for the last few weeks. Due to an internal administrative error, counsel mistakenly calendared February 2, 2023, as the due date for the brief. Movants and their counsel became aware of this error only on the morning of February 2, 2023, just after the deadline to file amicus briefs had passed. Movants and their counsel have the deepest respect for this Court and its processes, and regret not filing their brief on time a day ago. Movants and their counsel respectfully ask that their calendaring error not trump their diligence in preparing the accompanying brief to aid the Court.

Second, granting leave to file will not prejudice the parties or the Court. Neither party opposes the motion. Movants' one-day filing delay should not hinder this Court's consideration of the case. Oral argument will not take place until March 29, 2023, and the accompanying brief is intended only to aid the Court in its consideration of the question presented.

Third, Movants' proposed brief would significantly assist the Court in resolving this case. Specifically, in *Crawford v. Washington*, 541 U.S. 36 (2004), this Court found that the Confrontation Clause is only

concerned with "testimonial" statements and has determined that the surrounding context is crucial for determining whether a statement is "testimonial." This amicus brief uniquely addresses the possibility for internal inconsistency in Confrontation Clause jurisprudence.

CONCLUSION

The Court should grant leave to file the accompanying brief one day out of time.

Respectfully submitted,

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FEBRUARY 2, 2023

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INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae included in the list of *amici* are law professors and scholars at U.S. law schools who teach, research, and write about criminal procedure and criminal law. They share a common interest in ensuring the proper application of the *Bruton* doctrine and the protection of defendants' constitutional rights under the Sixth Amendment.

[1] No counsel for a party authored this brief in whole or in part and no person other than Amicus or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court granted certiorari on whether courts can consider surrounding contexts to determine whether non-testifying co-defendant confessions violate the *Bruton* doctrine. The Court should answer this question in the affirmative for two reasons.

First, in *Gray v. Maryland*, 523 U.S. 185 (1998), this Court confirmed its prior assumption in *Harrington v. California*, 395 U.S. 250 (1969), that nicknames and descriptions fall within *Bruton*'s protection. Accordingly, courts across the country have cited *Gray* to find that co-defendant confessions with nicknames and descriptions that need additional evidence to be connected to another violate the *Bruton* doctrine. This Court should reaffirm that *Gray* allows for consideration of other evidence because it is consistent with the rationale behind the *Bruton* doctrine.

Second, consideration of surrounding contexts preserves a consistent approach to Confrontation Clause jurisprudence. In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court found that the Confrontation Clause is only concerned with "testimonial" statements. Following *Crawford*, every court to address the issue has held that the *Bruton* doctrine is only triggered by "testimonial" statements. This Court further clarified in *Davis v. Washington*, 547 U.S. 813 (2006), and *Michigan v. Bryant*, 562 U.S. 344 (2011), that the surrounding context is crucial for determining whether a statement is "testimonial." Holding that the surrounding context is irrelevant for determining whether a co-defendant's confession is sufficiently incriminatory would create an internal inconsistency. Courts would face a conundrum: They would have to consider surrounding context to determine whether

co-defendant confessions are "testimonial" but then turn a blind eye to those same contexts to determine whether those confessions are sufficiently incriminatory.

ARGUMENT

I. This Court has found that the surrounding context is important in the *Bruton* context by assuming that nicknames and descriptions fall inside *Bruton*'s protection.

On two occasions, this Court has held or implied that co-defendant confessions containing nicknames and descriptions fall inside *Bruton*'s protection. Because prosecutors must often link nicknames and descriptions to other defendants based upon surrounding contexts, this Court has already decided that courts must consider contextual evidence when applying the *Bruton* doctrine.

This Court first addressed this issue in *Harrington v. California*, 395 U.S. 250 (1969). The prosecution introduced a non-testifying co-defendant's statement that did not refer to the defendant by name. *Id*. at 253. Instead, the statement referred to the defendant as "the white boy" or "this white guy" and "described him by age, height, and weight." *Ibid*. The Court assumed that the admission of this statement violated the *Bruton* doctrine but was harmless given the otherwise overwhelming case against the defendant. *See id*. at 253–54.

Subsequently, in *Gray v. Maryland*, 523 U.S. 185 (1998), the majority and dissent diverged on this very issue. In rejecting the State's argument that obviously redacting the defendant's name from his co-defendant's confession removed it from *Bruton*'s scope, the Court concluded that such reasoning would also place

confessions that use shortened first names, nicknames, and physical descriptions outside of *Bruton*'s scope. *See id*. at 195. Citing *Harrington*, the Court explained that it "has assumed, however, that nicknames and specific descriptions fall inside, not outside, *Bruton*'s protection." *Id*.

By reaching that conclusion, the Court rejected the dissent's position—which is the same as the government's here—that the *Bruton* doctrine only covers co-defendant statements that are "incriminating independent of other evidence introduced at trial." *Id*. at 201 (Scalia, J., dissenting). On this narrower view, a co-defendant's statement implicating a red-haired, bearded defendant would not violate *Bruton* if the defendant shaved his beard and dyed his hair black before trial, even if the prosecution presented photographs of the defendant with his red hair and beard at the time of the crime. *See id*. Similarly, a co-defendant's statement implicating "Kevin Gray" would not violate *Bruton* if the other defendant's name were Andy Dufresne, even if "evidence was introduced to the effect that he sometimes used 'Kevin Gray' as an alias." *Id*.

The Court's position in *Gray* makes more sense, and should be followed. The *Bruton* doctrine is premised upon the risk that the jury will not, and cannot, follow a jury instruction directing them to ignore the portion of a non-testifying co-defendant's confession that implicates another defendant. *See Bruton v. United States*, 391 U.S. 123, 135 (1968). Imagine the following exchange at court:

> Prosecutor: Who killed the victim?
>
> Police Officer: Co-defendant told me that Kevin Gray and him killed the victim.

> Prosecutor: Did you later learn anything about the name Kevin Gray?
>
> Police Officer: We learned that Kevin Gray is an alias of Andy Dufresne.

Given the proximity of the co-defendant's confession and the police officer's testimony connecting the other defendant to the nickname, jurors would clearly be unable to follow a limiting instruction informing them not to use the co-defendant's confession as evidence against the other defendant. And yet, in the government's view, there would be no Confrontation Clause violation, despite betraying *Bruton*'s core purpose.

Further, if this Court were to adopt the government's stance, it would allow the prosecution to premise its entire case on linking a co-defendant confession to another defendant through other evidence. Consider a trial with these two key facts. *First*, the prosecution introduces a non-testifying co-defendant's confession: "I hacked the computer with my friend Wasp with the dragon tattoo." Second, every other witness for the prosecution testifies that "Wasp" is a nickname for the other defendant, Lisbeth Salander. The prosecution also presents photographs prominently displaying the dragon tattoo on Salander's back. According to the government, the introduction of the confession would not violate the *Bruton* doctrine because other evidence was required to establish that "Wasp" is Salander's nickname and that she has a dragon tattoo on her back. But under *Gray*, the confession would violate *Bruton* because of the risk that the jury could not follow an instruction directing it to ignore the confession that the prosecution spent the rest of the trial tying to the other defendant through documentary evidence and testimony.

In light of *Gray*, courts have consistently found *Bruton* doctrine violations based upon co-defendant confessions when using nicknames of defendants. For example, in *Suggs v. United States*, 513 F.3d 675, 679 n.3 (7th Cir. 2008), the court concluded that there was a *Bruton* doctrine violation against a defendant named Alonzo Suggs based upon admission of a non-testifying co-defendant's statement implicating "Lo." In reaching this conclusion, the court cited *Gray* for the proposition that the statement violated *Bruton* even though it "referred to 'Lo' and not to Suggs directly" because "nicknames fall within *Bruton*'s protection." *Id.*

Other cases underscore that nicknames that are linked to a defendant by other evidence introduced at trial violate the *Bruton* doctrine. For instance, in *Commonwealth v. Miles*, 681 A.2d 1295, 1300 (Pa. 1996), the court found a *Bruton* doctrine violation against a defendant named Kenyatta Miles based on the admission of a non-testifying co-defendant's statement implicating "Yattie." The court found that this nickname implicated Miles because "[t]hroughout the trial, witnesses and counsel repeatedly referred to Miles using his nickname 'Yattie'. Thus, the jury was aware that 'Yattie' is Miles' nickname." *Id.*

Many other courts have followed suit. *See, e.g.*, *Scott v. Bock*, 241 F. Supp. 2d 780, 788 (E.D. Mich. 2003) (finding a *Bruton* violation against a defendant named Clarence Scott based upon admission of a non-testifying co-defendant's confession referencing his nickname, "Six-Nine"); *Hanifa v. State*, 505 S.E.2d 731, 804 (Ga. 1999) (finding a *Bruton* violation against a defendant named Kareemah Hanifa based upon admission of a non-testifying co-defendant's confession referencing her nickname, "K K"); *People v. Sheppard*,

562 N.Y.S.2d 801, 802 (N.Y. App. Div. 1990) ("The prosecutor's use, in his opening statements, of a non-testifying codefendant's statement wherein the defendant was inculpated by use of a nickname which the prosecutor then proceeded to attribute to the defendant, was clearly error which may have negatively impacted upon the defendant's Sixth Amendment right to confront the witnesses against him."); *cf. Commonwealth v. Santos*, 974 N.E.2d 1, 17 (Mass. 2012) (finding a *Bruton* violation against a defendant named William Scott even when the trial court redacted his nickname "Smokey" from his non-testifying co-defendant's confession, because the references to the defendant were still "obvious").

Consistent with *Gray*, courts have also repeatedly found *Bruton* doctrine violations based upon co-defendant confessions with physical descriptions of defendants that are not observable by the jury and that must be connected to them through other evidence. For example, in *People v. Cedeno*, 50 N.E.3d 901, 904 (N.Y. 2016), the New York Court of Appeals found a *Bruton* violation based on the admission of a non-testifying co-defendant's statement that the defendant was "one of the Latin Kings wearing red [and] white trunks" during the crime.

Courts have even applied *Gray* to find *Bruton* doctrine violations based upon co-defendant confessions identifying other defendants based upon their jobs and business ventures, requiring other "connecting-up" evidence. For example, in *United States v. Gillam*, 167 F.3d 1273, 1277 (9th Cir. 1999), the court found a *Bruton* violation against a defendant named Lizzie McGirt based upon admission of a non-testifying co-defendant's statement implicating "someone who 'worked at FDA' who 'was getting ready to retire.'"

Similarly, in *United States v. Schwartz*, 541 F.3d 1331, 1351 (11th Cir. 2008), the court found a *Bruton* doctrine violation based upon admission of a non-testifying co-defendant's statement about loans made to companies that the prosecution later linked to the other defendant "with other evidence." Indeed, the court noted that "[a]ny doubt that the limiting instructions were ineffective was erased when the prosecutor, in his closing argument, expressly linked [the other defendant] to the companies named in [the co-defendant's] statement." *Id*.

II. Requiring courts to ignore surrounding contexts would create an internal inconsistency in Confrontation Clause jurisprudence.

This Court has held that the Confrontation Clause is only triggered by "testimonial" statements and that courts must consider surrounding contexts in deciding whether statements are "testimonial." If the Court were to find that the surrounding context is irrelevant for determining whether a co-defendant confession is sufficiently incriminatory, it would create an internal inconsistency. Courts would then be forced to be centrally focused on the surrounding context to determine whether a co-defendant confession is "testimonial" and then completely ignore that context for determining whether the confession is sufficiently incriminatory.

In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court created a dichotomy between "testimonial" statements and "nontestimonial" statements. This Court held that "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from

Confrontation Clause scrutiny altogether." *Id.* at 68. Conversely, the admission of testimonial statements at a criminal trial violates the Confrontation Clause unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. *Id.*

In *Davis v. Washington*, 547 U.S. 813 (2006), this Court later clarified that the surrounding context is essential for determining whether a statement is testimonial. *Davis* dealt with cases of alleged interpersonal violence in Washington and Indiana, leading the Court to create the following dichotomy:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822.

In finding that the declarant's statement in the Indiana case was testimonial, this Court focused not just on the content of the statement but also on the surrounding context. For example, this Court noted that (1) the interrogating officer heard no arguments or crashing and saw no one throw or break anything; (2) the officer interrogated the declarant in a separate room; and (3) officers forcibly prevented the defendant from participating in the interrogation. *See id.* at 829–30.

Subsequently, in *Michigan v. Bryant*, 562 U.S. 344 (2011), the Court made plain how essential the surrounding context is for determining whether a statement is testimonial. In *Bryant*, this Court reversed the opinion of the Supreme Court of Michigan finding that a declarant's statement was testimonial. In doing so, this Court held that "the Michigan Supreme Court failed to appreciate that whether an emergency exists and is ongoing is a highly context-dependent inquiry." *Id.* at 363. This Court then proceeded to address the context surrounding the statement to deem it non-testimonial. *See id.* at 363–78.

In the wake of *Crawford*, every circuit court to address the issue has held that the *Bruton* doctrine only applies to testimonial statements. *E.g.*, *Lucero v. Holland*, 902 F.3d 979, 988 (9th Cir. 2018) ("Every circuit court to consider the issue—most circuit courts in the federal system, but, until today, not ours—has concluded that *Bruton*'s rule now applies only to testimonial out-of-court codefendant statements.") (collecting cases); *United States v. Vasquez*, 766 F.3d 373, 378 (5th Cir. 2014) ("Many circuit courts have held that *Bruton* applies only to statements by co-defendants that are testimonial under *Crawford v. Washington*."); *see also United States v. DeLeon*, 558 F. Supp. 3d 1105, 1119 (D.N.M. 2021) ("[T]he Courts of Appeal have held that *Crawford v. Washington* limited *Bruton v. United States* to protect co-defendants only from testimonial statements.") (collecting cases). Therefore, when presented with a *Bruton* doctrine challenge, courts must first conduct the same "context-dependent inquiry" to determine whether a co-defendant statement is testimonial.

A good example of such an inquiry can be found in *State v. Norah*, 131 So. 3d 172 (La. Ct. App. 2013). In

Norah, Joseph Norah claimed a *Bruton* doctrine violation based upon admission of jailhouse calls by his non-testifying co-defendant that contained "numerous references to his actions with his counterpart, 'G.I.,' a nickname that c[ould] easily be attributed to Mr. Norah given the context." *Id.* at 189. The court cited *Bryant* for the proposition that a Confrontation Clause analysis is a "highly context-dependent inquiry" and proceeded to use the location and purpose of the calls to conclude that they were non-testimonial. *See id.* at 187–90.

Conversely, in other cases, courts use surrounding contexts to determine that co-defendant statements are testimonial. Under the logic of *Gray*, these courts should then continue to use those surrounding contexts to determine whether those statements are sufficiently incriminatory under *Bruton*, which is what courts have done. For example, in *State v. Vasquez*, 311 P.3d 1115, 1117 (Ariz. Ct. App. 2013), two brothers were subjected to a joint jury trial on charges connected to a home invasion after a third co-defendant reached a plea agreement. Before trial, one of the brothers gave an incriminatory news interview. *See id.* at 1118.

After he was convicted, the other brother appealed, claiming a *Bruton* doctrine violation. *See id.* The court first used the context surrounding the news interview to conclude that it was testimonial. *See id.* According to the court, "although no detective was present, [the brother] made his statements while in custody, pending prosecution for the events that he addressed, and did so in the presence of a video camera that he knew would memorialize anything he said." *Id.*

The court then proceeded to address whether the one brother's news interview sufficiently incriminated the other brother under *Bruton* because he used pronouns such as "we," "us," and "our." *See id.* at 1119–20. In finding the statement sufficiently incriminatory, the court rejected the State's argument that the pronouns could refer to the other defendant who reached the plea deal. *See id.* Specifically, the court did so by relying, in part, on the surrounding context of the third defendant's "cooperation with the police" and plea deal to conclude that the pronouns "consistently and unambiguously" referred to the other brother. *Id.* at 1120.

Another example is *Ardis v. State*, 718 S.E.2d 526 (Ga. 2011). In *Ardis*, Charles West gave a statement to a detective implicating both himself and Jason Ardis in a murder. *See id.* at 528–29. The State subsequently had the detective read a redacted transcript of the statement at their joint jury trial. *See id.* On appeal, the court began by determining that the co-defendant's statement was testimonial given the circumstances surrounding it, including administration of the *Miranda* warning. *See id.* The court then addressed the question of whether the redacted transcript was sufficiently incriminatory under the *Bruton* doctrine. *See id.* at 529. According to the court, "[d]espite the elimination of Ardis' name from West's statement, it was obvious from the questioning that West was referring to Ardis." *Id.* As primary support, the court noted that "the prosecutor interrupted the reading of the transcript by eliciting testimony from the detective that she showed West a photograph of 'Jason Ardis' and asked West to identify him." *Id.*

This consistent approach to the surrounding circumstances preserves the purpose of the *Bruton*

doctrine. If the court focused solely upon the four corners of the confession, there was no reference to Jason Ardis, meaning it was not sufficiently incriminatory. But, by considering the surrounding context—namely, the detective referencing Ardis by name in the middle of her reading of the confession—it becomes clear that the jury could not abide by an instruction directing it to not use the confession against Ardis.

Although the facts relevant to a *Crawford* analysis are often not the same facts relevant to a *Bruton* analysis, both doctrines share the same goal: prohibiting the admission of "core testimonial statements that the Confrontation Clause plainly meant to exclude." *Crawford*, 541 U.S. at 63. Indeed, part of the reason that this Court overruled the *Roberts* regime was that "courts [had] continue[d] routinely to admit" "accomplice confessions implicating the accused." *Id.* at 64. But by requiring courts to consider context for both *Crawford* and *Bruton* analyses, this Court ensures that testimonial co-defendant confessions are not used in violation of the Confrontation Clause.

In sum, the government's approach asks courts to consider context at the *Crawford* testimonial-or-not step but then bury its head in the sand at the *Bruton* step. This Court should reject that position and preserve a consistent approach to Confrontation Clause jurisprudence: Whether a confession is testimonial under *Crawford* and whether a co-defendant's confession implicates another defendant should both be analyzed using surrounding contexts.

CONCLUSION

This Court has already held that the surrounding context is important in the *Bruton* context by

assuming that nicknames and descriptions fall inside *Bruton*'s protection. This Court should continue considering the surrounding context to preserve *Bruton*'s promise of protecting defendants from co-defendant confessions that clearly incriminate them based upon the prosecution's case. Such an approach also maintains consistency in Confrontation Clause jurisprudence rather than allowing courts to consider context in determining whether statements are "testimonial" but precluding them from considering context in determining whether they are sufficiently incriminatory.

The judgement of the court of appeals should be reversed.

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