COMMENT

AVOIDING THE PRISONER'S DILEMMA: REFINING THE *BRUTON* RULE TO RESOLVE THE SPLIT OVER NEUTRAL TERM SUBSTITUTION

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Imagine three men—Alex, Brian, and Chris—who rob and kill a young woman in the parking lot of a Pennsylvania shopping mall. Once a subsequent investigation begins to tighten, Alex (the lookout) turns himself in, helping police arrest Brian (the driver) and Chris (the shooter). After an interrogation mimicking the classic Prisoner's Dilemma, Brian partially confesses, exposing himself and Chris to criminal liability. At arraignment, Alex pleads guilty; Brian and Chris proceed to a joint trial in state court, where both decline to testify.

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This is standard fare for courts, prosecutors, and defense attorneys. The Supreme Court has expressed a preference for joint trials, praising the resultant benefits for judicial economy and for avoiding inconsistent verdicts.[1] And although somewhat dated, a study from the 1990s suggests nearly half of felony defendants invoke the privilege against self-incrimination.[2]

Yet these dueling propensities for joint trials and for not taking the stand put Chris on the wrong side of a collision with another constitutional provision: the Sixth Amendment's Confrontation Clause.[3] The right to confrontation means defendants must have the opportunity to crossexamine the witnesses against them.[4] But what should the court do in this situation? Since Brian's confession is admissible under the hearsay exception for a statement by an opposing party,[5] the jury will hear evidence that incidentally incriminates Chris. And with Brian not testifying, Chris is unable to challenge the incrimination.

This constitutional collision iterates daily in state and federal courts across the country. The solution—developed over three Supreme Court decisions: *Bruton v. United States*, *Richardson v. Marsh*, and *Gray v. Maryland*—is to redact the confession so it remains fair and useful evidence against the declarant (Brian) without unfairly prejudicing the nonconfessor (Chris). But jurisdictions vary considerably in applying this doctrine, and the fractured approach has left trial courts and prosecutors with a Gordian knot.

In particular, this doctrinal confusion has caused a circuit split over neutral term substitution—a specific type of redaction that discretely replaces references to codefendants' names with a nonspecific term or adjective to prevent incidental incrimination. And while the federal courts disfavor circuit splits generally, this split's particular harm amplifies when federal courts review state judgments under 28 U.S.C. § 2254. Suppose three other men—David, Ed, and

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1 *E.g.*, Zafiro v. United States, 506 U.S. 534, 537 (1993); *see also* Andrew D. Leipold & Hossein A. Abbasi, *The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 VAND. L. REV. 349, 353-55 (2006). *But see* Robert O. Dawson, *Joint Trials of Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices*, 77 MICH. L. REV. 1379, 1382-91 (1979) (casting doubt on the actual savings to judicial economy presented by joint trials). Under the Federal Rules, multiple defendants can be charged jointly if alleged to have engaged in the same criminal activity. *See* FED. R. CRIM. P. 8(b).

2 Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 329-30 (1991).

3 U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."). The right of confrontation is among the oldest principles of criminal procedure, stretching back to the beginning of Western civilization. *See Acts* 25:16 ("[I]t is not the Roman custom to hand over anyone before they have faced their accusers and have had an opportunity to defend themselves against the charges."); *see also* WILLIAM SHAKESPEARE, THE LIFE OF KING HENRY THE EIGHTH, act 2, sc. 1 (recounting the trial of Edward Stafford, the third Duke of Buckingham, and noting that the Duke exercised his right to have the witnesses "brought viva voce to his face"). *See generally* California v. Green, 399 U.S. 149, 173-74 (1970) (Harlan, J., concurring) ("[T]he Confrontation Clause comes to us on faded parchment.").

4 *See* Pointer v. Texas, 380 U.S. 400, 404 (1965).

5 *See, e.g.*, FED. R. EVID. 801(d)(2)(A); 225 PA. R. EVID. 803(25).

Frank—rob and kill a woman in New Jersey, independent of Alex, Brian, and Chris's crime in Pennsylvania. Although both states of course follow *Bruton*, Pennsylvania courts take a slightly more flexible tack: Pennsylvania allows neutral term substitution in all cases; New Jersey only allows it if there are many criminal actors, requiring more thorough redaction in other cases.[6] After the respective prosecutors redact each confession according to their state's standard, both sets of codefendants are convicted; the state intermediate appellate courts affirm; the state supreme courts deny review; and the U.S. Supreme Court denies certiorari. So far, so good—similar defendants similarly committed similar crimes, so they deserve similar results. But if the defendants file habeas petitions in the Third Circuit, the similarity turns on its head: the New Jersey petitioners are denied collateral relief, yet their Pennsylvania doppelgängers prevail (unless the state can show harmless error or a procedural bar), solely because the Third Circuit disfavors Pennsylvania's approach to neutral term substitution.[7] To be sure, this outcome raises deference questions under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), but it also reveals a thorny upshot to the debate over *Bruton*: *intra*circuit splits.

This Comment seeks to resolve these jurisprudential conflicts. Part I retraces the rule's evolution to reveal the foundation laid by the Supreme Court and its relationship to the current divide over neutral term substitution. Part II examines ways to resolve this disagreement by comparing *Bruton*'s functionalist approach to confrontation to the more recent formalist understanding exemplified by *Crawford v. Washington*.[8] In the end, this Comment calls for the Supreme Court to adopt a rebuttable presumption allowing neutral term substitution.

I. REDEFINING THE *BRUTON* TRILOGY

The fractured approach of lower courts makes it difficult to precisely map the split over neutral term substitution. Even more difficult is ascertaining the reasons behind the jurisdictional disagreement. Yet this Part attempts to accomplish both objectives by charting *Bruton*'s doctrinal development and by focusing on how lower courts have operationalized the rule since *Gray*. Proceeding in two Sections, this Part first casts *Bruton*, *Richardson*, and *Gray* as a hierarchy reconciling a redacted confession's incidental incrimination with the obviousness of its redaction. But as Section I.A indicates, the Supreme Court has only partly fleshed-out this hierarchy, twice punting on the constitutionality of neutral term substitution. Section I.B divines a

6 *See infra* app.; *see also* discussion *infra* subsection I.B.1.

7 *See infra* notes 60-62 and accompanying text; *see also* discussion *infra* subsection I.B.2.

8 *See* discussion *infra* subsection II.1.

taxonomy to understand the various approaches lower courts have taken to answer this question, which guides Part II's search for a uniform solution.

A. Bruton*'s Hierarchy of Incrimination*

Bruton v. United States marked a fundamental change for confessions in joint criminal trials. Although the case is often imprecisely cited for the broad proposition that confessions by nontestifying defendants that implicate their codefendants violate the Confrontation Clause,[9] the opinion's actual language was somewhat less sweeping. *Bruton* held a confession by a nontestifying defendant that incidentally incriminates a codefendant violates the Confrontation Clause only when the incidental incrimination is "*powerfully* incriminating," a rare situation in which there is an unusually high risk jurors will be unable to disregard references to a codefendant.[10] Put differently, *Bruton* did not hold all codefendant confessions per se unconstitutional—only those so incriminating a jury could not be trusted to discard them when deliberating over other codefendants.

Bruton acknowledged "alternative ways" the prosecution could use a confession with potential incidental incrimination while avoiding intrusions on the nonconfessor's confrontation rights.[11] Specifically, the Court pointed to prosecutors' ability to redact a confession to make any incidental incrimination less powerful.[12] But in framing redaction as a de facto requirement, *Bruton* precipitated uncertainty by failing to indicate what kinds of redaction were acceptable, or how extensive the redaction needed to be.

Recognizing the constant potential for spillover prejudice, lower courts fractured over how incriminating this prejudice could be before a confession became powerfully incriminating and thus violated *Bruton*. Courts settled into four main groups, each allowing a different degree of incidental incrimination before finding the confession powerfully incriminating. This hierarchy—with subsequent refinements by *Richardson* and *Gray*—remains the foundation for understanding *Bruton* today.[13]

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9 *See, e.g.*, Blackman v. Commonwealth, 613 S.E.2d 460, 463 (Va. Ct. App. 2005).

10 Bruton v. United States, 391 U.S. 123, 135 (1968) (emphasis added); *see also* United States v. Donahue, 948 F.2d 438, 443 (8th Cir. 1991) (characterizing *Bruton* as a "narrow exception to the general rule that the jury is conclusively presumed to follow the court's instructions"); FED. R. EVID. 105 advisory committee's note to 1972 proposed rules ("[*Bruton*] does not, however, bar the use of limited admissibility with an instruction where the risk of prejudice is less serious . . . ."). It is worth noting that *Bruton*'s holding applies not only to formal confessions given to police, but to any admissible statement acknowledging involvement in the crime. *See, e.g.*, Appellee's Answering Brief at 32-33, State v. Romero, 2011 WL 578599 (Ariz. Ct. App. 2011) (No. 2 CA-CR 2009-0355) (discussing *Bruton*'s application to rap lyrics written by a codefendant).

11 391 U.S. at 133-34.

12 *Id.*

13 For a visual representation of this hierarchy, see *infra* fig.1.

At the top of the hierarchy was the most incriminating form of spillover incrimination: direct incrimination explicitly identifying a codefendant as a criminal cohort. Returning to the opening hypothetical, Brian's confession would directly incriminate if it read "Chris and I drove to get the gun." After *Bruton*, this group was a null set: *Bruton* disallowed directly incriminating confessions.[14]

Slightly less incriminating was an inferentially incriminating confession—a confession referring to the existence of, but not identifying, a criminal cohort. A directly incriminating confession could be mitigated to inferential incrimination through two main redaction methods: neutral term substitution or symbol substitution. In the former, a nondescript term replaced the codefendant's name, allowing the confession to maintain syntactical integrity and the nonconfessor to remain unidentified, but leaving the statement not obviously altered. The nondescript term could be a pronoun ("we" or "they"), indefinite word ("someone" or "them"), or even a description of the codefendant's role in the crime ("the driver" or "the guy with the gun").[15] Returning to the opening hypothetical, Brian's confession that "Chris and I drove to get the gun" would only inferentially incriminate if redacted to read "a friend and I drove to get the gun." Alternatively, symbol substitution exchanged the nonconfessor's name for a symbol or other obvious redaction mark—changing "Chris and I drove to get the gun," to "*X* and I drove to get the gun," or "[Omitted] and I drove to get the gun."[16] Immediately after *Bruton*, many courts admitted inferentially incriminating

14 *See, e.g.*, United States v. Cook, 530 F.2d 145, 149-51 (7th Cir. 1976); Townsend v. Henderson, 405 F.2d 324, 329 (6th Cir. 1968); Johnson v. Yeager, 399 F.2d 508, 510-11 (3d Cir. 1968); Atwell v. United States, 398 F.2d 507, 510-11 (5th Cir. 1968).

15 Some courts approving of neutral term substitution required prosecutors to ensure that the neutral terms were *completely* nondescriptive, finding *Bruton* error if the redaction was at all suggestive of a codefendant's gender or physical attributes. *Compare* Harrington v. California, 395 U.S. 250, 252-54 (1969) (finding *Bruton* error where a codefendant's name was substituted with "the white boy," "this white guy," "blonde-headed fellow," "the Patty," and the confession described the codefendant by age, height, and weight), *and* State v. Taylor, 451 P.2d 312, 315 (Ariz. 1969) (en banc) (finding *Bruton* error where a codefendant's name was replaced with "another Negro male"), *with* United States v. Holleman, 575 F.2d 139, 143 (7th Cir. 1978) (finding no *Bruton* error where male codefendants' names were replaced with the phrase "male individuals"). Some scholars have suggested using a definite pronoun should be a per se *Bruton* violation. *See* Margaret Dodson, Note, Bruton *on Balance: Standardizing Redacted Codefendant Confessions Through Federal Rule of Evidence 403*, 69 VAND. L. REV. 803, 825 (2016) ("Any description replacing the defendant's name with descriptors more specific than 'person' is always more incriminating, as it matches the defendant to a narrower universe of people."); *cf.* Bryant M. Richardson, Note, *Casting Light on the Gray Area: An Analysis of the Use of Neutral Pronouns in Non-Testifying Codefendant Redacted Confessions Under* Bruton*,* Richardson*, and* Gray, 55 U. MIAMI L. REV. 825, 843-55 (2001) (drawing an analytical distinction between the use of singular and plural pronouns in redacted confessions, but offering no explanation why courts should treat one type differently).

16 At least one contemporaneous commentator described symbol substitution as the "usual practice." *See* Comment, *Codefendants' Confessions*, 3 COLUM. J.L. & SOC. PROBS. 80, 88 (1967).

confessions redacted through either method, including the First, Third, Fifth, Seventh, Eighth, and Ninth Circuits.[17]

Less incriminating still were facially nonimplicating confessions, in which redaction eliminated any reference to the existence of a cohort. A facially nonimplicating confession could thus only become incriminating if considered alongside other evidence; looking at the four corners of the confession, a juror would be unable to tell anyone else participated in the criminal activity. To classify as facially nonimplicating, Brian's hypothetical confession "Chris and I drove to get the gun," would be redacted to "I drove to get the gun," and could only incriminate Chris given other evidence placing Chris in the car. Two prominent adherents to this standard were the Second and Eleventh Circuits.[18]

Finally, some commentators suggested an additional—and even less incriminating—standard for incidental incrimination: contextual nonimplication. According to these scholars, a confession became contextually nonimplicating only after any evidence connecting the codefendant to the confession was purged both from the confession and from the entire evidentiary record.[19] Put differently, this standard goes beyond the four corners of the redacted confession to prohibit *any* evidence linking the nonconfessor to the redacted confession. So not only would Brian's confession need to be redacted to "I drove to get the gun," but the prosecutor could not admit any other evidence placing Chris in the car. This standard creates obvious problems: by requiring prosecutors to disclaim potentially dispositive evidence regarding a codefendant's criminal activity, it precipitates inconsistent—and potentially incorrect—verdicts, to say nothing of its effect on judicial economy. It is thus unsurprising that few, if any, jurisdictions adopted such a constrained approach. The most prominent application was the Sixth Circuit case *Marsh v. Richardson*, a one-time departure from that Circuit's usual practice swiftly overturned by the Supreme Court in the sequel to *Bruton*.[20] The other cases sometimes cited as examples of the

17 *See, e.g.*, United States v. Greenleaf, 692 F.2d 182, 189 (1st Cir. 1982); English v. United States, 620 F.2d 150, 152-53 (7th Cir. 1980); United States v. Hicks, 524 F.2d 1001, 1003 (5th Cir. 1975); United States v. Panepinto, 430 F.2d 613, 615-16 (3d Cir. 1970); Cortez v. United States, 405 F.2d 875, 876 (9th Cir. 1968); State v. Wing, 294 A.2d 418, 419, 422-23 (Me. 1972).

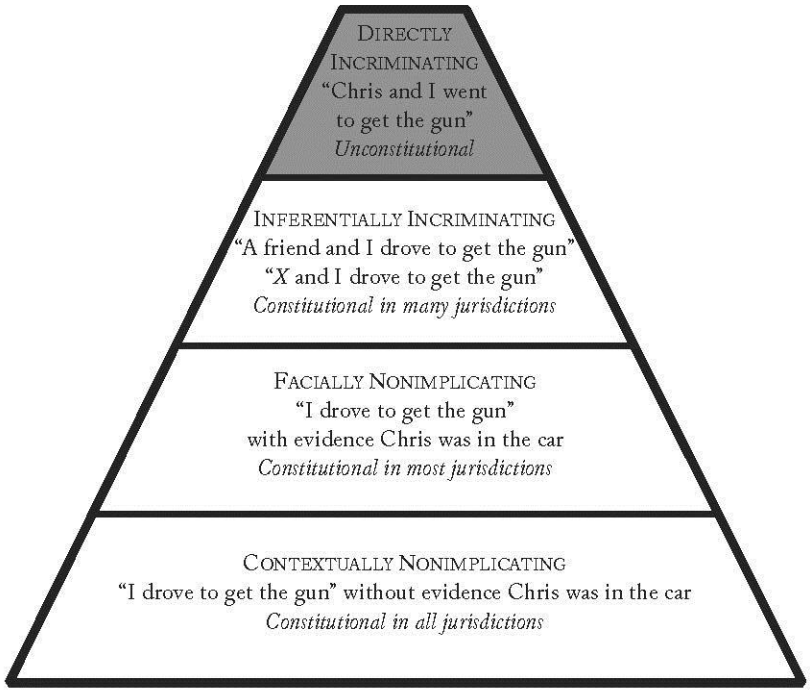
18 *See, e.g.*, United States v. Pendegraph, 791 F.2d 1462, 1465 (11th Cir. 1986); United States v. Slocum, 695 F.2d 650, 655 (2d Cir. 1982).

19 *See, e.g.*, Judith L. Ritter, *The X Files: Joint Trials, Redacted Confessions and Thirty Years of Sidestepping* Bruton, 42 VILL. L. REV. 855, 873 (1997).

20 *See* 781 F.2d 1201, 1212 (6th Cir. 1986), *rev'd*, 481 U.S. 200 (1987). Other cases had tacitly employed similar logic, though never articulated it with the same concreteness. *See, e.g.*, United States v. Gonzalez, 555 F.2d 308, 316-17 (2d Cir. 1977) (finding *Bruton* error where a facially nonimplicating confession provided the factual basis for the only direct evidence against the codefendant).

standard—*Clark*,[21] *English*,[22] and *Serio*[23]—merely include dicta acknowledging the standard as a theoretical possibility. And most interestingly, the standard did not receive serious scholarly treatment until *after* the Supreme Court's *Richardson* opinion,[24] suggesting scholarship describing the contextual nonimplication standard was shaded by hindsight bias.

Figure 1: Post-*Bruton* Hierarchy of Incrimination



The Supreme Court twice refined this original hierarchy. First, almost two decades after *Bruton*, the Court used *Richardson v. Marsh* to nip the bud of the rarely followed contextual nonimplication standard. The Supreme Court "decline[d] to extend" *Bruton* beyond the face of a codefendant's confession and reversed the Sixth Circuit's one-off holding to the contrary, holding spillover incrimination incidental to a facially nonimplicating

21 Clark v. Maggio, 737 F.2d 471, 477-79 (5th Cir. 1984), *noted in, e.g.*, Ritter, *supra* note 19, at 876.

22 English v. United States, 620 F.2d 150, 152 (7th Cir. 1980), *noted in, e.g.*, Ritter, *supra* note 19, at 876.

23 Serio v. United States, 401 F.2d 989, 990 (D.C. Cir. 1968), *noted in, e.g.*, Ritter, *supra* note 19, at 876.

24 The standard was first articulated by the academy in a 1988 analysis of *Richardson v. Marsh*. *See* William G. Dickett, *Sixth Amendment—Limiting the Scope of* Bruton, 78 J. CRIM. L. & CRIMINOLOGY 984, 989-1013.

confession could never be powerfully incriminating.[25] Significantly, the Court did not require facially nonimplicating confessions. In fact, the Court acknowledged the possibility of inferential incrimination, expressly declining to decide whether it could ever amount to powerful incrimination.[26]

In doing so, the Court sidestepped the real controversy. Few lower courts had adopted the contextual nonimplication standard that *Richardson* rejected.[27] More divisive was whether an obviously redacted statement constituted spillover prejudice powerful enough to violate *Bruton* by signaling to the jury that the statement was altered.[28] Lower courts had to wait another decade for the Court to answer this question in *Gray v. Maryland*.

In *Gray*, five justices held symbol substitution—and the obviously redacted, inferentially incriminating confession that results—violates *Bruton*.[29] Yet in rejecting symbol substitution, the *Gray* court was motivated not by the degree of incrimination imposed by the alteration, but by the conspicuousness of the alteration itself.[30] In doing so, *Gray* drew a distinction different in kind from that drawn by *Bruton* and *Richardson*, where the degree of incrimination was dispositive. And in dicta, *Gray* suggested nonobviously redacted, inferentially incriminating confessions—in other words, confessions redacted through neutral term substitution—were not powerfully incriminating.[31]

The confluence of *Bruton*, *Richardson*, and *Gray* is less than immediately obvious. Though *Gray* clearly did not overrule *Bruton–Richardson*, it also did not directly follow from those cases' emphasis on incidental incrimination. Even still, two areas of clarity have emerged. First, nonobviously redacted, facially nonimplicating confessions are constitutional under *Richardson*. And second, obviously redacted, inferentially incriminating confessions are unconstitutional under *Gray*. But lower courts remain deeply divided on the constitutionality of nonobviously redacted, inferentially incriminating statements—in other words, statements redacted via neutral term substitution. And the *Gray* court did not even contemplate the possibility of obviously redacted, facially nonimplicating confessions: confessions fully redacted to contain no reference to the existence of

25 Richardson v. Marsh, 481 U.S. 200, 208-11 (1987).

26 *Id.* at 212 n.5.

27 *See supra* notes 20–24 and accompanying text.

28 *Compare, e.g.*, Clark v. Maggio, 737 F.2d 471, 477 (5th Cir. 1984) (finding *Bruton* error where it was revealed to jurors that the statement was redacted to remove the identity of a codefendant), *with* Posey v. United States, 416 F.2d 545, 550-51 (5th Cir. 1969) (upholding substitution of the names of seventeen codefendants with the word "blank," since there was no way for a jury to determine which codefendant was referred to in the eighty-two different times the word "blank" was used).

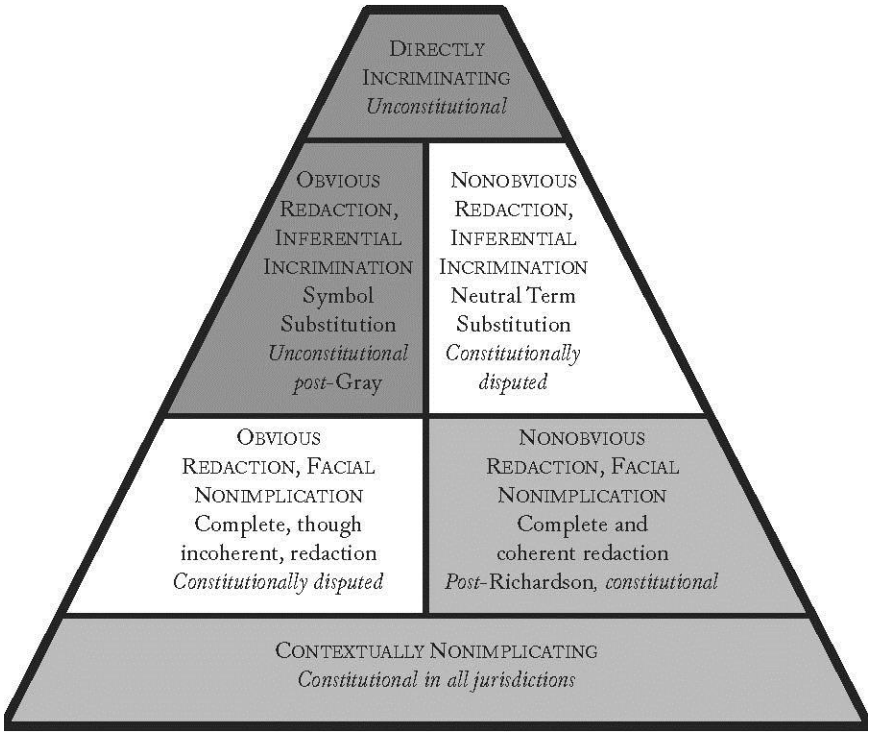
29 Gray v. Maryland, 523 U.S. 185, 195 (1998).

30 *See id.* at 194-96.

31 *See id.* at 196 (suggesting that, in a joint trial of two codefendants where an additional known coconspirator was dead, that instead of redacting the confession as "Me, deleted, deleted, and a few other guys," the confession should have been redacted to read "Me and a few other guys").

a cohort, yet lacking in narrative and logical coherence enough to render them obviously altered.[32] Figure 2 illustrates these areas of present doctrinal tension.

Figure 2: Post-*Gray* Hierarchy of Incrimination



Though it seems like two issues require resolution—what to do about neutral term substitution and what to do about obviously redacted but facially nonimplicating confessions—there is really just one, since allowing neutral term substitution obviates the need for prosecutors to reach for obviously redacted but facially nonimplicating confessions. These complete but incoherent redactions occur when courts and prosecutors contort to avoid

32 *See, e.g.*, United States v. Gonzalez-Garcia, 73 F. Supp. 2d 819, 822 (W.D. Mich. 1999) (finding *Bruton* error even though a fully redacted confession "d[id] not have a literal blank or asterisk, [since] it ha[d] a *logical* blank and asterisk" (emphasis added)); Harris v. State, 861 So. 2d 1003, 1023 (Miss. 2003) (finding *Bruton* error where "it [wa]s fair to say that the jury knew that they were not told everything," even though, "[u]nlike *Gray*," the redaction did not "obviously lead the jury to conclude that the defendant's name was . . . missing"). In the context of the opening hypothetical, this situation could arise if Brian confessed "I drove to get the gun" while later claiming—honestly, given the facts of the hypothetical—that he never touched the gun.

relying on neutral term substitution; given the choice, all courts would prefer coherent redactions to incoherent redactions. Resolving the debate over neutral term substitution would neatly tie up both loose ends.

B. *The Debate Over Neutral Term Substitution*

The remainder of this Part inventories how lower courts use neutral term substitution to thread the needle between powerful incrimination and obvious redaction. As subsection I.B.2 makes clear, lower courts need a uniform approach to restore consistency to the *Bruton* rule and to maintain federal–state comity.

1. The Lower Court Split Over Neutral Term Substitution

In the two decades since *Gray*, lower courts have disagreed on neutral term substitution's constitutionality. But characterizing this dispute into a simple majority and minority approach fails to capture the full extent of disagreement. More precisely, jurisdictions fall within five distinct groups:

- Jurisdictions categorically allowing neutral term substitution;
- Jurisdictions allowing neutral term substitution except where there is a "one-to-one equivalence";
- Jurisdictions allowing neutral term substitution in theory, though rarely in practice;
- Jurisdictions allowing neutral term substitution only in cases with many criminal actors; and
- Jurisdictions never allowing neutral term substitution.

Each will be discussed in turn, and a complete classification of jurisdictions is included as an appendix.

First, jurisdictions categorically allowing neutral term substitution. These jurisdictions view directly incriminating confessions as narrow exceptions to the general rule presuming juries follow their instructions, and thus find inferential incrimination sufficient to take a confession outside this exception.

Jurisdictions adhering to this standard include the Second,[33] Fourth,[34] Eighth,[35] and Tenth Circuits.[36]

Second, jurisdictions allowing neutral term substitution except where there is a "one-to-one equivalence": where redaction merely swaps out the sole codefendant's name with an unchanging substitute. This can be considered symbol substitution on steroids—instead of replacing a codefendant's name with *X*, the prosecutor mechanically replaces the codefendant's name with "the man" or "the friend," allowing the confession to achieve syntactical coherence, though perhaps not colloquial articulacy. If there is more than one codefendant, however, or if the substitution involves a more ambiguous pronoun, one-to-one equivalence does not result and these jurisdictions accordingly hold neutral term substitution sufficiently nonincriminating.[37] So in the hypothetical joint trial of Brian and Chris after Alex pleads guilty, a one-to-one equivalence would result if the government redacted Brian's confession by replacing every mention of Chris to "my friend": "I met my friend at the corner of Fourth and Arch," "my friend and I drove to get the gun," "my friend and I waited outside the mall." Such rote and unvaried redaction, which can only reasonably be taken to refer to a lone codefendant, comes too close to direct incrimination for these jurisdictions. But, in a counterfactual joint trial of Alex, Brian, *and* Chris, a one-to-one equivalence

33 *E.g.*, United States v. Jass, 569 F.3d 47, 59-61 (2d Cir. 2009) (finding no *Bruton* error when the sole nonconfessor's name was redacted to "another person," stating that "[t]he critical inquiry is . . . . whether the neutral allusion sufficiently conceals the fact of explicit identification to eliminate the overwhelming probability that a jury hearing the confession at a joint trial will not be able to follow an appropriate limiting instruction"). The *Jass* court insisted that the confession not "signal[] to the jury that the statements had originally contained actual names." *Id.* at 62. But aside from the requirement of nonobviousness, the court was undeterred by one-to-one equivalence, *see generally infra* text accompanying note 37, and even by the fact that the confession made clear that the "person" was a woman, since "[a] simple gender reference . . . lacks the specificity necessary to permit a jury to draw an immediate inference that the [co]defendant is the person identified in the confession." *Id.* at 63.

34 *E.g.*, United States v. Akinkoye, 185 F.3d 192, 198 (4th Cir. 1999) (holding admissible a confession where a codefendant's name was substituted with the neutral terms "another person" or "another individual").

35 *E.g.*, United States v. Edwards, 159 F.3d 1117, 1125-26 (8th Cir. 1998) ("Unlike use of the word 'deleted,' which directs the jury's attention to an obvious redaction, referring to joint activity by use of the pronouns 'we' and 'they,' or by use of indefinite words such as 'someone,' does not draw attention to the redaction and thus [complies with *Bruton*] . . . .").

36 *E.g.*, Spears v. Mullin, 343 F.3d 1215, 1232 (10th Cir. 2003) ("[N]eutral pronouns are proper, if a defendant's incrimination is by reference to evidence other than the modified statement and the jury receives a proper limiting instruction.").

37 Some pre-*Gray*—and even pre-*Richardson*—courts implicitly recognized the potential for a one-to-one equivalence to increase the incriminatory value of a redacted confession. *See, e.g.*, United States v. Pickett, 746 F.2d 1129, 1133-34 (6th Cir. 1984). And disapproval of one-to-one equivalence can be read out of *Gray*, which disapproved of redacting a confession as "me, deleted, deleted, and a few other guys" and suggested "me and a few other guys" in a trial where there were three known coconspirators. *See* Gray v. Maryland, 523 U.S. 185, 196 (1998).

would not result since "my friend" could just as easily refer to either Alex or Chris. A plurality of lower courts draw the line at one-to-one equivalence, including the Fifth,[38] Sixth,[39] Seventh,[40] Ninth,[41] Eleventh,[42] and D.C. Circuits.[43]

Third, jurisdictions allowing neutral term substitution in theory but rarely in practice. Though hard to generalize, these jurisdictions generally consider context determinative and strictly prefer facially nonimplicating confessions to neutral term substitution.[44] As a result, in these jurisdictions neutral term substitution has yet to emerge as an operative alternative.

Fourth, jurisdictions allowing neutral term substitution only in cases with many codefendants. If one takes the *Gray* court's tacit approval of neutral term substitution seriously, this position is puzzling—*Gray* concerned a joint trial of just two codefendants, where a third coconspirator was known but died before trial. Even still, the danger of obviousness resulting from maladroit neutral term substitution leads these courts to categorically ban neutral term substitution except for trials with so many codefendants a jury cannot possibly determine which defendant matches up to which neutral

38 *E.g.*, United States v. Vejar-Urias, 165 F.3d 337, 340 (5th Cir. 1999).

39 *Compare* United States v. Vasilakos, 508 F.3d 401, 408 (6th Cir. 2007) (permitting "the introduction of [one codefendant's confession] in a joint trial, where the [other codefendant's] name is redacted and a neutral term is substituted"), *with* Stanford v. Parker, 266 F.3d 442, 456 (6th Cir. 2001) (finding *Bruton* error where the sole nonconfessor's name was merely substituted with the phrase "the other person").

40 *Compare* United States v. Hoover, 246 F.3d 1054, 1059 (7th Cir. 2001) (holding that the use of "incarcerated leader" and "unincarcerated leader" in a case where only one of two alleged principals was incarcerated violated *Bruton* since the redactions were "obvious stand-ins" for defendants' names), *with* United States v. Green, 648 F.3d 569, 575 (7th Cir. 2011) (finding no *Bruton* error where the other codefendant's name was redacted as "straw buyer," since "unlike an alias or a pseudonym . . . 'straw buyer' is more similar to an anonymous reference such as 'another person' or 'an individual'"), *and* United States v. Souffront, 338 F.3d 809, 829 (7th Cir. 2003) (finding no *Bruton* error where multiple codefendants were referred to as "members of the street gang").

41 *E.g.*, United States v. Peterson, 140 F.3d 819, 822 (9th Cir. 1998) ("*Gray* clarifies that the substitution of a neutral pronoun or symbol in place of the defendant's name is not permissible if it is obvious that an alteration has occurred to protect the identity of a specific person."). *Peterson* rolled back the Ninth Circuit's pre-*Gray* approach that neutral term substitution was always sufficient to comply with *Bruton*. *Id.* at 821.

42 *E.g.*, United States v. Taylor, 186 F.3d 1332, 1336 (11th Cir. 1999).

43 *E.g.*, United States v. Straker, 800 F.3d 570, 595-98 (D.C. Cir. 2015) ("[A]t least when 'all references to the defendant in a codefendant's statement are replaced with indefinite pronouns or other general terms, the Confrontation Clause is not violated by the redacted statements admission if, when viewed together with other evidence, the statement does not create an inevitable association with the [other] [co]defendant . . . .'" (quoting United States v. Washington, 952 F.2d 1402, 1406-07 (D.C. Cir. 1991))).

44 *See, e.g.*, United States v. Vega Molina, 407 F.3d 511, 520-21 (1st Cir. 2005); People v. Burney, 212 P.3d 639, 665 (Cal. 2009) (noting neutral term substitution "will not invariably be sufficient" to comply with *Bruton*, though "eliminat[ing] references" to the existence of a codefendant would always suffice (internal quotation marks omitted) (quoting People v. Fletcher, 917 P.2d 187, 197 (Cal. 1996))).

term.[45] Although jurisdictions differ on the threshold number of codefendants necessary to trigger this exception, most allow neutral term substitution in cases with at least fifteen criminal actors. The Third Circuit follows this standard,[46] and several commentators have urged its adoption.[47]

Fifth, jurisdictions holding neutral term substitution to categorically violate *Bruton*. This approach—the most restrictive—considers neutral term substitution akin to symbol substitution,[48] forcing prosecutors to sail between the Scylla of facial nonimplication and the Charybdis of severance. Even though this position seems contrary to *Gray*'s implicit approval of neutral term substitution, it is not wholly unjustified. For one, *Gray*'s suggestion to change "me, deleted, deleted, and a few other guys," to "me and a few other guys"[49] does not really substitute a neutral term, but rather deletes indicia of redaction, which coincidentally allowed the confession to retain syntactical coherence and factual integrity. These courts take an exceedingly narrow view of nonobvious redaction, sometimes even taking into account other evidence admitted at trial.[50] This analysis—relied on by surprisingly many courts[51]—relapses quickly into the contextual implication standard rejected by *Richardson*.

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45 *See, e.g.*, Washington v. Sec'y Pa. Dep't of Corr., 801 F.3d 160, 167 (3d Cir. 2015) (holding that neutral term substitution is unacceptable where the jury needs "only to lift [its] eyes to [the nonconfessor], sitting at counsel table, to find what will seem the obvious answer").

46 *Compare* Vazquez v. Wilson, 550 F.3d 270, 281-82 (3d Cir. 2008) (finding *Bruton* error when confession included the term "the other guy"), United States v. Hardwick, 544 F.3d 565, 573 (3d Cir. 2008) (finding *Bruton* error in a trial of four codefendants where the names of two nonconfessors were redacted to "others in the van"), *and* United States v. Richards, 241 F.3d 335, 341 (3d Cir. 2001) (finding *Bruton* error where the statement referred to a "friend" and there were two nonconfessors), *with* Priester v. Vaughn, 382 F.3d 394, 400-01 (3d Cir. 2004) (approving use of neutral term substitution because at least fifteen people were involved in the crime).

47 *See, e.g.*, Ritter, *supra* note 19, at 883 n.199 (arguing that when many codefendants are involved—particularly when there are people who participated in the crime but are not on trial—"the risk that a jury will automatically fill in the blanks with the names of specific co-defendants is diminished").

48 *See, e.g.*, Thomas v. State, No. W2008-01941-CCA-R3-PD, 2011 WL 675936, at *24 (Tenn. Crim. App. Feb. 23, 2011) ("The question of whether the use of a symbol or neutral pronoun would violate the *Bruton* rule was resolved in *Gray v. Maryland*.").

49 *See* Gray v. Maryland, 523 U.S. 185, 196 (1998).

50 *See, e.g.*, State v. Boucher, 718 A.2d 1092, 1096 (Me. 1998); State v. Bunch, No. 02 CA 196, 2005 WL 1523844, at *15 (Ohio Ct. App. June 24, 2005) ("The *Bruton* rule applies with equal force to all statements that tend significantly to incriminate a co-defendant, whether or not he is actually named in the statement. The fact that the incrimination amounts to a link in a chain of circumstances rather than a direct accusation cannot dispose of the applicability of the *Bruton* rule. Just as one can be convicted on circumstantial evidence, one can be circumstantially accused." (quoting Fox v. State, 384 N.E.2d 1159, 1170 (Ind. App. 1979))), *rev'd in part on other grounds by In re* Ohio Criminal Sentencing Statutes Cases, 847 N.E.2d 1174, 1177 (Ohio 2006).

51 *See infra* app.

2. The Problem of Intracircuit Splits

This Section has so far focused on how lower courts divide in their interpretation of *Bruton*. Yet this focus reveals a potential corollary to the jurisdictional dispute: intracircuit splits. State courts resolve most criminal convictions—and by extension, most confrontation clause determinations—in the first instance. When a *Bruton* issue surfaces in federal court, it often does so in the context of habeas review. And this collateral proceeding precipitates a conflict between a state supreme court (which may take a more flexible approach to neutral term substitution) and its corresponding federal circuit (which may take a stricter approach).[52] Eight such conflicts currently exist across the country:

- the First Circuit conflicts with Massachusetts;
- the Third Circuit conflicts with Delaware, Pennsylvania, and the Virgin Islands;
- the Fifth Circuit conflicts with Louisiana and Texas;
- the Sixth Circuit conflicts with Michigan; and
- the Seventh Circuit conflicts with Indiana.[53]

When taken to their theoretical extreme, these intracircuit splits threaten judicial comity and disrupt the finality of state court judgments.

Under AEDPA, federal habeas courts will defer to a state court's judgment unless the state decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[54] The Supreme Court has described this standard as "difficult to meet."[55] For one, "clearly established law" includes only the holdings of the Supreme Court—not dicta.[56] And to be an unreasonable application of these holdings, the state court must be "'objectively unreasonable,' not merely wrong; even 'clear error' will not suffice."[57] When no Supreme Court cases "confront 'the specific question presented'" by a habeas petitioner, the state court's decision can thus "not be

52 The reverse conflict—between a more flexible circuit and a stricter state—is far less problematic, due to the one-way relationship of the approaches to neutral term substitution and to the nature of collateral review. For an example, see Mason v. Yarborough, 447 F.3d 693, 696 (9th Cir. 2006).

53 *See infra* app.

54 28 U.S.C. § 2254(d)(1) (2012).

55 Metrish v. Lancaster, 133 S. Ct. 1781, 1786 (2013).

56 *See* Howes v. Fields, 565 U.S. 499, 505 (2012).

57 White v. Woodall, 134 S. Ct. 1697, 1702 (2014) (quoting Lockyer v. Andrade, 538 U.S. 63, 75-76 (2003)); *see also* Harrington v. Richter, 131 S. Ct. 770, 786-87 (2011) ("As a condition for obtaining habeas corpus . . . a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.").

'contrary to' any holding from" the Supreme Court.[58] Relatedly, "if the circumstances of a case are only 'similar to' [Supreme Court] precedents, then the state court's decision is not 'contrary to' the holdings in those cases."[59]

With such a deferential standard, one would think even the strictest federal circuit would defer to the most flexible state court on neutral term substitution. After all, the Supreme Court has neither asked nor answered the question. Put simply—even excluding the *Gray* dicta implicitly supporting neutral term substitution—none of the approaches to neutral term substitution smacks of clear error considering the holdings of *Bruton*, *Richardson*, or *Gray*.[60]

But that is not the case. In the Third Circuit, where the intracircuit tension is greatest,[61] the federal courts routinely discard Pennsylvania Supreme Court decisions as unreasonable, citing Third Circuit precedent to allow neutral term substitution only in cases with many criminal actors.[62] This intracircuit conflict has reached a point where almost any state court's use of neutral term substitution will result in habeas relief for a Third Circuit petitioner unless the state can demonstrate harmless error or a procedural bar to relief.[63]

This result should be disfavored by anyone who favors federal–state comity and finality of criminal convictions. Jurisdictions with intracircuit splits leave prosecutors guessing whether following the directives of their state supreme court will be sufficient, forcing them to decide between severing the trials ex

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58 Woods v. Donald, 135 S. Ct. 1372, 1377 (2015) (per curiam) (quoting Lopez v. Smith, 135 S. Ct. 1, 4 (2014)).

59 *Id.*

60 *Cf.* United States v. Marino, 833 F.3d 1, 8 (1st Cir. 2016) ("[C]lear error (for those not in the know) means the judge got things wrong with the force of a 5 week old, unrefrigerated, dead fish . . . ." (internal quotation marks omitted)).

61 The Third Circuit has adopted one of the most restrictive interpretations (allowing neutral term substitution only if there are many criminal actors), while the Pennsylvania and Delaware Supreme Courts have adopted the least restrictive view (categorically allowing neutral term substitution). By contrast, the jurisprudential divide is narrower in the other intracircuit splits: the First Circuit, for instance, follows an intermediate approach (allowing neutral term substitution in theory, but rarely in practice), while Massachusetts takes only a slightly less restrictive stance (allowing neutral term substitution as long as there is no one-to-one equivalence).

62 *See, e.g.*, Vazquez v. Wilson, 550 F.3d 270, 278-82 (3d Cir. 2008) (citing United States v. Hardwick, 544 F.3d 565, 573 (3d Cir. 2008); Priester v. Vaughn, 382 F.3d 394, 399-400 (3d Cir. 2004); United States v. Richards, 241 F.3d 335, 341 (3d Cir. 2001)) ("In [granting the writ] we, of course, have not overlooked *our* opinions under *Bruton*." (emphasis added)).

63 *See, e.g.*, Waller v. Varano, 562 Fed. App'x 91, 93 (3d Cir. 2014); Eley v. Erickson, 712 F.3d 837, 859-61 (3d Cir. 2013); Pabon v. Mahanoy, 654 F.3d 385, 397 (3d Cir. 2011); Petition for Writ of Certiorari at 28, Rozum v. Colon, No. 16-708 (Nov. 21, 2016) (collecting cases); *see also* Oral Argument at 11:58, Bey v. Superintendent Greene SCI, No. 15-2863 (3d Cir. Nov. 8, 2016), http://www2.ca3.uscourts.gov/oralargument/audio/15-2863SaleemBayv.SuperintendentGreeneSCI.mp3 [https://perma.cc/8EL5-EL37] (during oral argument, a Third Circuit judge characterized AEDPA as "schmedpa"). Most shockingly, in *Wetzel v. Washington*, 134 S. Ct. 1935, 1936 (2014), the Supreme Court—citing *White v. Woodall*'s articulation of AEDPA's high bar—GVR'd a habeas writ the Third Circuit granted on *Bruton* grounds. Yet a year later, the Third Circuit merely regranted the writ. *See* Washington v. Sec'y Pa. Dep't of Corr., 801 F.3d 160, 170 (3d Cir. 2015).

ante or risking de facto reversal on collateral appeal. This burdens state and federal dockets while increasing the chances for mistrials or inconsistent verdicts. Moreover, insightful defense counsel can shepherd a losing *Bruton* objection through the more flexible state system, only to leverage the objection for relief in the stricter federal forum. And although the federal–state divide is most acute in the Third Circuit, the potential for the same result exists in the First, Fifth, Sixth, and Seventh Circuits. This is plainly a substantial question dividing courts and requiring Supreme Court intervention.

II. RESTORING CONSISTENCY TO THE *BRUTON* RULE

Simply put, lower courts need guidance from the Supreme Court in applying *Bruton* to neutral term substitution. But before it can offer this guidance, the Court must place *Bruton* within its larger constellation of Sixth Amendment jurisprudence, particularly *Crawford*'s originalist recalibration of the Confrontation Clause. As subsection II.1 indicates, *Crawford*'s inflexible formalism cannot easily incorporate *Bruton*'s necessarily functionalist approach. But as subsection II.2 shows, although the two doctrines are in philosophic tension, they avoid direct collision by solving different problems: *Crawford* preserves confrontation's heartland while *Bruton* protects codefendants at confrontation's frontier.

This Part concludes by advocating for a solution combining both *Crawford* formalism and *Bruton* functionalism: a rebuttable presumption allowing neutral term substitution. The need for national uniformity and for clear guidance to lower courts provides strong footing for the Court to use such a presumption to fill-in *Bruton*'s doctrinal inconsistencies and to restore consistency to codefendant confessions in joint trials.

Confronting Crawford

Since 2004, one cannot discuss the Confrontation Clause without mentioning *Crawford v. Washington*. A tectonic shift in the Court's Sixth Amendment jurisprudence, *Crawford* recast the Confrontation Clause on originalist grounds, transforming what had long been a mere "preference" for live-witness testimony into an all but insurmountable requirement for testimonial statements.[64] *Crawford* represents a highly formalist view of confrontation: as its author, Justice Scalia, once remarked, "For good or bad, the Sixth Amendment requires [face-to-face] confrontation, and we are not at liberty to ignore it."[65]

But *Bruton*—written decades before *Crawford* at a time when the Court "flounder[ed]" to discern a stable "conception of what the [Confrontation]

64 Crawford v. Washington, 541 U.S. 36, 68 (2004) (abrogating Ohio v. Roberts, 448 U.S. 56 (1980)).

65 Maryland v. Craig, 497 U.S. 836, 870 (1990) (Scalia, J., dissenting).

Clause meant"[66]—takes a different tack. Unlike *Crawford*, *Bruton* springs from a functionalist well, expressing concern, but not a per se objection, for unchallenged incidental incrimination.[67]

So what does *Crawford* mean for *Bruton*? Subsection II.1 examines *Crawford*'s originalist understanding of the Sixth Amendment's text and operation, probing the differences between the paradigmatic confrontation imagined by *Crawford* and the less-obvious situation governed by *Bruton*. Subsection II.2 applies these approaches to nonobviously redacted, inferentially incriminating confessions, identifying a solution incorporating the best of both: a rebuttable presumption allowing neutral term substitution. Though outwardly formal, this solution holds open a pragmatic backdoor for exceptional cases where neutral term substitution falls short in mitigating spillover prejudice.

1. Reconciling *Bruton* and *Crawford*

Though both flow from the Confrontation Clause, *Bruton* and *Crawford* do not neatly converge. *Crawford* defensively walls off the traditional core of confrontation; *Bruton* offensively advances the protections of the Sixth Amendment by attenuating incidental incrimination. Though this can be partly chalked up to historical upshot—*Bruton* would undoubtedly look different if decided after *Crawford*—it is also true the doctrines reach in diverging substantive directions.

The different ways each doctrine relates to the hearsay rule illustrates this divergence. *Crawford* is the logical antecedent of the hearsay exceptions: it is the first hurdle out-of-court testimony must clear before a hearsay exception renders it admissible.[68] By contrast, *Bruton* is hearsay's logical *post*cedent: if the out-of-court statement were to not fall within the hearsay exception for statements by an opposing party, the statement would be excluded independent of any incidental incrimination. Indeed, but for *Bruton*'s invocation of the Confrontation Clause, one could imagine these issues falling within Federal Rule of Evidence 403 or as a separate hearsay exception altogether.[69]

Viewing *Bruton* as logically downstream from *Crawford* means the Court ought to take a hard look at *Bruton* given *Crawford*'s upriver effect. But the

66 Richard D. Friedman, Crawford, Davis, *and Way Beyond*, 15 J.L. & POL'Y 553, 554 (2007).

67 *See* Bruton v. United States, 391 U.S. 123, 126 (1968) ("If it were true that the jury disregarded the reference to the codefendant, no question would arise under the Confrontation Clause . . . ."); *see also* Richardson v. Marsh, 481 U.S. 200, 211 (1987) ("[T]he calculus changes when confessions that do not name the defendant are at issue.").

68 The lone exception is the hearsay exception for dying declarations. *See Crawford*, 541 U.S. at 56 n.6 (describing the dying declaration as "*sui generis*" and affirming its continued validity "on historical grounds").

69 Compounding this irony, the Confrontation Clause went unmentioned in the *Bruton* petitioner's filings and at oral argument. *See* Transcript of Oral Argument, *Bruton*, 391 U.S. 123 (No. 705); Brief for Petitioner, *Bruton*, 391 U.S. 123 (No. 705).

problem with reconsidering *Bruton* in light of *Crawford* is the latter's "frustratingly vague" definition of a testimonial statement.[70] Until the Court settles on a clearer definition, *Crawford* could overturn *Bruton* just as easily as it could extend it. Suppose a court with a relatively narrow understanding of "testimonial." That court could hold a codefendant's confession nontestimonial for other codefendants—after all, the confession is offered "for the purpose of establishing or proving" only the declarant's guilt, not their codefendants' guilt.[71] And when evidence is nontestimonial, *Bruton* arguably does not apply.[72] Unredacted confessions with directly incriminating spillover prejudice would therefore be perfectly admissible, a result effectively interpreting *Bruton* out of the U.S. Reports. Alternatively, a court with a broad understanding of "testimonial" could consider a codefendant's confession given to police indistinguishable from the police interrogations *Crawford* considered testimonial. This is a strong argument, too: since the declarant likely did not know his confession would be redacted, if the declarant incriminated the witness in his initial confession, he plausibly meant the incrimination to factor into the prosecution. And taken to its full breadth, this broad construction could also functionally abrogate *Bruton* by excluding confessions by declarants who decline to take the stand.[73]

The text of the Sixth Amendment makes it even harder to fit *Bruton*'s square peg into *Crawford*'s round hole. The Confrontation Clause contains three textual hooks: the right is held only by the "accused"; the right applies only to "witnesses *against*" the accused; and the right entitles the accused only to "*be* confronted" with those witnesses.[74] In *Crawford*, these talons extended fully: a nonparty witness offered testimony intending to incriminate the defendant. But the hooks retract in the *Bruton* context for three main reasons: a redacted confession does not clearly "accuse" a codefendant; a redacted confession is not directly adverse to a codefendant; and the declarant, even though not subject to crossexamination, is still present in the courtroom. Each consideration will be discussed in turn.

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70 Andrew W. Eichner, Note, *Preserving Innocence: Protecting Child Victims in the Post-*Crawford *Legal System*, 38 AM. J. CRIM. L. 101, 108 (2010). Instead of propounding a single definition, *Crawford* merely recites several articulations "at various levels of abstraction." *See* 541 U.S. at 52.

71 *See Crawford*, 541 U.S. at 51 (internal quotation marks omitted) (quoting N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). *But cf.* Commonwealth v. Stone, 291 S.W.3d 696, 701 (Ky. 2009) (holding that *Crawford* bars a confession where the declarant is attempting to incriminate a codefendant).

72 *See, e.g.*, United States v. Neveaux, No. 14-20, 2016 WL 6024529, at *3 (E.D. La. Oct. 14, 2016).

73 *See also* Mark A. Summers, *Taking Confrontation Seriously: Does* Crawford *Mean That Confessions Must Be Cross-Examined?*, 76 ALB. L. REV. 1805, 1819 (2012–2013) ("It is a fair question whether there is a principled way the Court could avoid coming to th[e] conclusion [that all confessions must be cross-examined.]").

74 *See* U.S. CONST. amend. VI. (emphasis added).

First, to apply the Confrontation Clause to the *Bruton* context, there is an important threshold question: is a codefendant implicated through incidental incrimination really being accused at all? Perhaps, if the spillover prejudice is directly incriminating, since prosecutors could use these confessions to sneak in first-order evidence against a codefendant. But when the spillover prejudice is merely inferential, the risk seems less obvious. And if inferentially incriminating confessions fall outside formal accusation, *Crawford* is irrelevant to neutral term substitution.

Second, a redacted codefendant confession is not an adverse witness as understood by *Crawford*. A codefendant confession is neither testimony from a nonparty nor testimony from an opposing party—it is friendly fire coming from the same side of the "v." It is not offered to adversely affect the codefendant; even unredacted, it is offered primarily to self-incriminate the declarant.[75] And once the codefendant's name is redacted, any adverse effect is even more attenuated.

Third, even a formal understanding of the Sixth Amendment's explicit right to "be confronted" with adverse witnesses need not graft *Crawford*'s live-witness requirement onto the *Bruton* rule. The purpose of the Confrontation Clause, according to *Crawford*, is to prohibit using "ex parte examinations as evidence against the accused" and to guarantee "live testimony in court subject to adversarial testing."[76] But the declarant is not absent from the courtroom in a joint trial—she must sit next to the very codefendant being incidentally incriminated. Nor does the government hide her from the jury—she shields herself with the Fifth Amendment privilege. The jury can still observe her demeanor as the confession is read. And her trial counsel should be highly motivated to undermine the confession's credibility or to characterize it as improper, effectively doing the work a prejudiced codefendant's counsel would be doing on crossexamination. Though *Bruton* strictly fails to provide live witness testimony, the requirement seems less relevant since the traditional dangers of an absent declarant are less problematic.

2. The Need for a Rebuttable Presumption

The relational differences between *Crawford* and *Bruton* support keeping the doctrinal lines uncrossed; the former's formal constraints should not displace the latter's pragmatic considerations, particularly given the nearly infinite potential joint trial conformations. Yet national uniformity—a strong desideratum for criminal procedure—is unlikely without a rule to guide courts and prosecutors

75 *Cf.* United States v. Lafferty, 387 F. Supp. 2d 500, 511 (W.D. Pa. 2005) ("Inherent in Justice Scalia's analysis in the *Crawford* opinion was the idea that the right of confrontation exists as to accusations of third parties implicating a criminal defendant, not a criminal defendant implicating herself.").

76 *See Crawford*, 541 U.S. at 43-50.

in future cases. This Comment proposes one such solution: a rebuttable presumption allowing neutral term substitution except where a nonconfessor can plead and prove powerfully incriminating spillover prejudice.

Four observations inform this proposal. First, a uniform rule is unlikely to be found in the gulf between allowing neutral term substitution and disallowing neutral term substitution. Though some courts have crafted intermediate standards, the tortured distinctions between them and the nearly infinite potential codefendant arrangements would ensnare jurisdictions in endless rounds of linedrawing. Second, disallowing neutral term substitution would deprive the prosecutor of the ability to present a multiple-defendant theory of the case where the only admissible evidence of collusion is a codefendant confession. Third, although the literature lacks conclusive empirical research on how effectively jurors compartmentalize evidence admissible against one party but not against another party, our system's considerable reliance on these limiting instructions suggests a relatively high degree of confidence in their ability to do so.[77] Fourth, and relatedly, disallowing neutral term substitution would risk confusing the jury in unpredictable ways.[78] Would jurors suspect the unmentioned codefendant is innocent, and thus come to distrust the prosecution's entire case? Or would jurors conclude the confessor must have been lying, coloring their consideration of mitigating evidence?

A rebuttable presumption would effectively bridge these tensions. Barring all but the most exceptional circumstances, nonobviously removing a codefendant's name does not alert the jury something is amiss, and it waters down any incidental incrimination by forcing the jury to make multiple inferences before incriminating the codefendant. Put differently, replacing the codefendant's name with a neutral term does not impermissibly narrow the universe such that it directly accuses a codefendant, but it narrows the universe enough to lessen the risk of a juror becoming confused or suspecting sleight-of-hand. And the trial judge retains the ability to exclude the redacted confession in rare cases where neutral term substitution incriminates the nonconfessor without inference—for example, if the neutral term substitution makes the inference unavoidably obvious, as it would if the substituted term amounted to a physical description of the codefendant, or to a patent one-to-one equivalence.

What is more, this presumption provides an efficient procedural mechanism to address potential *Bruton* errors. Many confessions are already subject to a suppression motion; the attendant hearing offers a convenient

77 *See, e.g.*, FED. R. EVID. 105; *id.* notes of advisory committee on proposed rules (recognizing "the practice of admitting evidence for a limited purpose and instructing the jury accordingly").

78 *Cf.* FED. R. EVID. 403 (noting courts must consider the risk of confusing the juror before admitting evidence).

forum for a codefendant to rebut the presumption outside the presence of the jury. An in camera discussion when the government offers the redacted confession could serve a similarly expedient function at trial. And unlike solutions proposed by other commentators, this presumption has the benefit of being a rule—not some contrived, novel, but equally indeterminate alternative to the "powerful incrimination" standard.[79]

In sum, this rebuttable presumption goes a long way to equipoise the Sixth Amendment's functional and formal concerns. As a rule, it hearkens *Bruton*'s pragmatism by providing lower courts and prosecutors with clear guidance and an effective mechanism to mitigate incidental incrimination. And it can coexist with—if not fully embrace—*Crawford*'s formalism, because when neutral term substitution mitigates spillover prejudice's incriminatory effect, it is not clear that a codefendant is still being accused, or that the redacted confession is still actually adverse, or that the defendant's presence in the courtroom doesn't effectively provide the safeguards of traditional crossexamination. The Court would stand solidly on both formalist and functionalist grounds in adopting this principled yet pragmatic approach to neutral term substitution.

CONCLUSION

Following *Bruton*, the Court waited almost two decades to refine its reach in *Richardson*. The Court waited another decade to provide further guidance in *Gray*. And now, two decades on, the time has come for the Court to definitively resolve the constitutionality of neutral term substitution. The Court has ducked recent opportunities to do so, declining even to answer the narrower question whether neutral term substitution is an unreasonable application of the *Bruton* rule.[80] Such a holding would provide a Band-Aid fix for the intracircuit conflicts in five circuits.

But a broader pronouncement on neutral term substitution is necessary to guide prosecutors and state courts seeking to ensure stable judgments and adequate protections for codefendant rights. This Comment advocates for a rebuttable presumption allowing neutral term substitution absent an

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79 For alternative standards proposed by commentators, see Dodson, *supra* note 15, at 826-43 (suggesting courts should import the reverse-403 balancing test from the Federal Rules of Evidence into the *Bruton* context); Jennifer S. Lue, Note, Gray v. Maryland*, The Revival of Confrontation or the Maintenance of Judicial Efficiency?*, 34 WAKE FOREST L. REV. 1205, 1224 (1999) (arguing for the adoption of a "compelling and inevitable inference" standard); Peter Rosenthal, Note, *"He Said, She Said": Partially Redacted Confessions and the State of* Bruton *After* Gray v. Maryland, 1998 ANN. SURV. AM. L. 103, 122 (arguing for a flexible case-by-case approach). The only other rule-based proposal from the literature calls for a mandatory jury instruction accompanying codefendant confessions to instruct the jury "not [to] imply anything regarding the number of individuals involved in the activity that was described" in the confession. *See* Richardson, *supra* note 15, at 863. But this proposal swings too far and risks impermissibly confusing the jury. *See supra* note 78.

80 *See, e.g.*, Wetzel v. Washington, 801 F.3d 160 (3d Cir. 2015), *cert. denied*, 136 S. Ct. 1713 (2016); *cf. infra* note 81 and accompanying text.

exceptional connection between the redaction and the codefendant. But ultimately, the decision will be left up to the Supreme Court, which has so far declined to address the issue.[81] A clear and definitive decision on the merits would end the debate over neutral term substitution and restore principle and consistency to the *Bruton* rule.

APPENDIX

Survey of Circuit & State Approaches to Neutral Term Substitution

Circuit	Redaction Method	Example	State	Redaction Method	Example[82]
1st	Acceptable in theory, but rarely in practice	United States v. Vega Molina, 407 F.3d 511 (2005)	Mass.	Acceptable if no 1:1	Commonwealth v. Mitchell, 45 N.E.3d 111 (2016)
			Me.	Unacceptable	State v. Boucher, 718 A.2d 1092 (1998)
			N.H.	Unknown	—
			P.R.	Unknown	—
			R.I.	Unknown	—
2d	Acceptable	United States v. Jass, 569 F.3d 47 (2009)	Conn.	Unknown	—
			N.Y.	Acceptable	People v. Cedeno, 50 N.E.3d 901 (2016)
			Vt.	Unknown	—
3d	Acceptable only if large number of codefendants	Pabon v. Mahanoy, 654 F.3d 385 (2011)	Del.	Acceptable	Floudiotis v. State, 726 A.2d 1196 (1999)
			N.J.	Acceptable only if large number of codefendants	State v. Weaver, 97 A.3d 663 (2014)
			Pa.	Acceptable	Commonwealth v. Brown, 925 A.2d 147 (2007)
			V.I.	Acceptable	Gov't of V.I. v. Bryan, 334 F. Supp. 2d 822 (2001)

81 *See* Rozum v. Colon, 649 Fed. App'x 259 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 1579 (2017); Petition for Writ of Certiorari, *Rozum*, 137 S. Ct. 1579 (Nov. 21, 2016) (No. 16-708); *see also* Brief of the Pennsylvania District Attorneys Ass'n as *Amicus Curiae* in Support of Petitioners, *Rozum*, 137 S. Ct 1579 (Nov. 21, 2016) (No. 16-708). *Rozum* inspired this Comment's recurring hypothetical about Alex, Brian, and Chris.

82 Unless otherwise noted, the state court decisions cited refer to that jurisdiction's highest appellate tribunal.

4th	Acceptable	United States v. Akinkoye, 185 F.3d 192 (1999)	Md.	Unacceptable	State v. Hines, 2016 WL 6651891 (2016)
			N.C.	Unacceptable	State v. Brewington, 532 S.E.2d 496 (2000)
			S.C.	Unacceptable	State v. Henson, 754 S.E.2d 508 (2014)
			Va.	Unknown	—
			W. Va.	Unknown	—
5th	Acceptable if no 1:1	United States v. Vejar-Urias, 165 F.3d 337 (1999)	La.	Acceptable	State v. Brooks, 758 So.2d 814 (1999)
			Miss.	Unknown	—
			Tex.	Acceptable	Trevino v. State, 2004 WL 34871 (Tex. App. 2004)
6th	Acceptable if no 1:1	United States v. Vasilakos, 508 F.3d 401 (2007)	Ky.	Unacceptable	Barth v. Commonwealth, 80 S.W.3d 390 (2001)
			Mich.	Acceptable	People v. Campbell, 2016 WL 6127576 (Mich. Ct. App. 2016)
			Ohio	Unacceptable	State v. Bunch, 2005 WL 1523844 (Ohio Ct. App. 2005)
			Tenn.	Unacceptable	Thomas v. State, 2011 WL 675936 (Tenn. Crim. App. 2011)
7th	Acceptable if no 1:1	United States v. Green, 648 F.3d 569 (2011)	Ill.	Unsettled	—
			Ind.	Acceptable	Riley v. State, 42 N.E.3d 586 (Ind. Ct. App. 2015)
			Wis.	Unacceptable	State v. Nieves, 881 N.W.2d 358 (2016)
8th	Acceptable	United States v. Edwards, 159 F.3d 1117 (1998)	Ark.	Acceptable only if large number of codefendants	Jefferson v. State, 198 S.W.3d 527 (2004)
			Iowa	Unacceptable	State v. Leutfaimany, 585 N.W.2d 200 (1998)
			Minn.	Acceptable if no 1:1	State v. Blanche, 696 N.W.2d 351 (2005)
			Mo.	Unknown	—
			Neb.	Unknown	—
			N.D.	Unknown	—
			S.D.	Unknown	—

9th	Acceptable if no 1:1	United States v. Nash, 150 Fed. App'x 683 (2005)	Alaska	Unclear, probably acceptable	Pease v. State, 54 P.3d 316 (Alaska Ct. App. 2002)
			Ariz.	Acceptable only if large number of codefendants	*Compare* State v. Vasquez, 311 P.3d 1115 (Ariz. Ct. App. 2013), *with* State v. Blackman, 38 P.3d 1192 (Ariz. Ct. App. 2002)
			Cal.	Acceptable in theory, but rarely in practice	People v. Burney, 212 P.3d 639 (2009)
			Guam	Unknown	—
			Haw.	Unknown	—
			Idaho	Unknown	—
			Mont.	Unknown	—
			Nev.	Unacceptable	Rueda-Denvers v. State, 381 P.3d 658 (2012)
			N. Mar. I.	Unknown	—
			Or.	Unacceptable	State v. Johnson, 111 P.3d 784 (2005)
			Wash.	Acceptable if no 1:1	State v. Wilcoxon, 373 P.3d 224 (2016)
10th	Acceptable	Spears v. Mullin, 343 F.3d 1215 (2003)	Colo.	Unknown	—
			Kan.	Acceptable if no 1:1	State v. White, 67 P.3d138 (2003)
			N.M.	Unclear, probably unacceptable	State v. Wilson, 2009 WL 6608189 (2009)
			Okla.	Unknown	—
			Utah	Unknown	—
			Wyo.	Unknown	—
11th	Acceptable if no 1:1	United States v. Taylor, 186 F.3d 1332 (1999)	Ala.	Unknown	—
			Fla.	Unclear, probably unacceptable	Jones v. State, 739 So.2d 1220 (Fla. Dist. Ct. App. 1999)
			Ga.	Unacceptable	Davis v. State, 528 S.E.2d 800 (2000)

D.C.	Acceptable if no 1:1	United States v. Straker, 800 F.3d 570 (2015).	D.C.	Acceptable	Thomas v. United States, 978 A.2d 1211 (2009)

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