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## Johnson v. Superintendent Fayette SCI: Severing Ties with Pronoun Substitutions in Bruton Cases

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*JOHNSON v. SUPERINTENDENT FAYETTE SCI*: SEVERING TIES  
WITH PRONOUN SUBSTITUTIONS IN *BRUTON* CASES

“You had instructed us that Tyrone Wright’s statement may only be used against Tyrone Wright and not against Arthur Johnson. We also recall the Commonwealth saying that we are not being asked to turn off our common sense.”<sup>1</sup>

INTRODUCTION

The American criminal justice system places immense trust and faith in juries.<sup>2</sup> A panel of twelve random citizens has the duty to weigh the guilt or innocence of a defendant, and in some cases, to choose whether that person lives or dies.<sup>3</sup> However, there are circumstances where the courts step in and decide that jury members are not perfect, and that even a judge’s instruction is insufficient to ensure fairness in a defendant’s trial.<sup>4</sup> One such set of circumstances is called a *Bruton* situation.<sup>5</sup>

In *United States v. Bruton*,<sup>6</sup> the district court tried two defendants jointly for the same crime.<sup>7</sup> One defendant confessed to their involve-

1. *Johnson v. Superintendent Fayette SCI*, 949 F.3d 791, 797–98 (3d Cir. 2020). This is a note sent from jurors to the judge in this case. *See id.*

2. *See, e.g.*, Arthur L. Burnett, Sr., *Jury Reform for the 21st Century: A Judge’s Perspective*, 20-SPG CRIM. JUST. 32, 32 (2005) (“Jury service in our federal and state judicial systems is absolutely essential to ensure the proper functioning of our democracy, just as important as our voting for our elected officials.”); Anne Bowen Poulin, *The Jury: The Criminal Justice System’s Different Voice*, 62 U. CIN. L. REV. 1377, 1383 (1994) (“The jury in a criminal trial relieves the discomfort of adhering strictly to the ideal of a system of abstract laws, bringing a different framework of analysis to the trial and injecting a different, more human, voice into the trial.”).

3. *See* Andrew Guthrie Ferguson, *The Jury as Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105, 1107 (2014) (“Jurors must decide the case, and they must do so within a special constitutional role.”). *See generally* Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 MICH. J. RACE & L. 57, 63 (2009) (discussing the “[l]ife and [d]eath [c]onsequences” of a jury’s decision and how race affects those decisions).

4. *See Johnson*, 949 F.3d at 794 (“This asks the impossible of our jurors. . . . [T]he Supreme Court held that in these circumstances we cannot rely on a juror’s ability to put such an inculpatory statement out of their minds.”); *see also Bruton v. United States*, 391 U.S. 123, 129 (1968) (“[W]e expressly rejected the proposition that a jury, when determining the confessor’s guilt, could be relied on to ignore his confession of guilt should it find the confession involuntary.” (citing to *Jackson v. Denno*, 378 U.S. 368, 388–89 (1964))).

5. *See Bruton*, 391 U.S. at 128 (holding defendant was deprived of a constitutional right).

6. *Id.*

7. *Id.* at 123–24.

ment, implicating the other defendant.<sup>8</sup> The jury was instructed not to use the one defendant's confession against the other defendant, who exercised his right not to take the stand.<sup>9</sup> However, because he did not take the stand, he could not cross-examine his co-defendant or repudiate his co-defendant's confession with his own testimony.<sup>10</sup> The Supreme Court determined that the non-confessing defendant was denied his constitutional right of confrontation under the Sixth Amendment.<sup>11</sup>

Following the *Bruton* decision, there has been a series of cases that have continued to deal with this particular situation and what solutions are acceptable to remedy the issue.<sup>12</sup> In *Richardson v. Marsh*,<sup>13</sup> the Supreme Court held that because the confession was redacted to the point that all references to the other defendant were eliminated completely, the non-confessing defendant's Sixth Amendment rights were protected.<sup>14</sup> This, however, does not mean that a simple deletion of the non-confessing defendant's name is sufficient.<sup>15</sup> The Court in *Gray v. Maryland*<sup>16</sup> determined that when the redaction leaves the word "deleted" in place of the defendant's name, it is too easy for jurors to associate that blank with the defendant.<sup>17</sup> Therefore, the simple deletion still violates a defendant's Confrontation Clause rights.<sup>18</sup>

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8. *Id.* at 124.

9. *Id.* at 126.

10. *Id.*

11. *Id.* at 128 (holding in favor of the non-confessing defendant); see also U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .").

12. See Margaret Dodson, Note, *Bruton on Balance: Standardizing Redacted Codefendant Confessions Through Federal Rule of Evidence 403*, 69 VAND. L. REV. 803, 811–12 (2016) ("The *Bruton* Court thus chose to favor the constitutional rights of a non-confessing codefendant over efficacy, administrability, and even accuracy . . . based on the considerable potential harm associated with admitting such confessions at a joint trial. The next line of cases on the subject test how far the doctrine extends—or, the extent to which the Court would prioritize insulating codefendants from potential harm over accuracy and reliability." (footnote omitted)).

13. 481 U.S. 200 (1987).

14. *Id.* at 203 ("The confession was redacted to omit all reference to respondent—indeed, to omit all indication that *anyone* other than Martin and Williams participated in the crime.").

15. See Bryant M. Richardson, *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, 828 (2001) ("Recently, in *Gray v. Maryland*, the United States Supreme Court held that a redacted confession where the defendant's name was replaced with the term 'deleted' was unconstitutional." (citing *Gray v. Maryland*, 523 U.S. 185, 188 (1998))).

16. 523 U.S. 185.

17. *Id.* at 192 (holding that the government cannot simply replace the defendant's name with "deleted" in a *Bruton* situation).

18. See *id.* ("We therefore must decide a question that *Richardson* left open, namely, whether redaction that replaces a defendant's name with an obvious indication of deletion, such as a blank space, the word 'deleted,' or a similar symbol, still falls within *Bruton's* protective rule. We hold that it does.").

With a lack of further concrete Supreme Court guidance, the Court of Appeals for the Third Circuit began to establish its own precedent in regards to other proposed solutions.<sup>19</sup> In a case where there were only three names mentioned in the confession and only two defendants on trial, a neutral pronoun substituted for the non-confessing defendant's name was insufficient to protect the non-confessor's Sixth Amendment rights.<sup>20</sup> However, when there were at least fifteen people involved in a crime and "the other guy" was substituted for the non-confessor's name, there was no Confrontation Clause violation.<sup>21</sup> The question of whether a neutral term substitution such as "the other guy" would be sufficient to protect a non-confessing defendant in a trial with only two defendants was ripe for a decision; that ripeness was realized in *Johnson v. Superintendent Fayette SCI*.<sup>22</sup>

While the Third Circuit ultimately reached the correct decision that Johnson's Sixth Amendment rights were violated, its holding continued the pattern of retroactive justice that does not solve the larger issue. This Casebrief posits that the best solution to avoiding a *Bruton* violation is to prevent the situation in the first place through severing the joint trial. Part I outlines the new applicable legal standard of *Johnson*. Part II details the facts of *Johnson* and briefly explains the court's reasoning. Part III will succinctly introduce proposed solutions for *Bruton* cases in the current scholarship on the subject and will argue that severance is the best solution moving forward. Lastly, Part IV will discuss the impact of the *Johnson* decision on future Third Circuit cases.

## I. APPLICABLE LEGAL STANDARD

*Johnson* adds to the ever-growing body of case law attempting to bring clarity to *Bruton* situations.<sup>23</sup> *Bruton* situations are context specific, so every unique set of case facts establishes precedent in this area.<sup>24</sup> The

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19. See Kevin Wynosky, Comment, *Avoiding the Prisoner's Dilemma: Refining the Bruton Rule to Resolve the Split Over Neutral Term Substitution*, 166 U. PA. L. REV. ONLINE 205, 219–20 (2018) (discussing the Third Circuit's approach to the Confrontation Clause).

20. See *United States v. Richards*, 241 F.3d 335, 338–39 (3d Cir. 2001) (holding that a neutral pronoun substitution in a *Bruton* trial with two defendants created a violation of the defendant's Sixth Amendment rights).

21. *Priester v. Vaughn*, 382 F.3d 394, 401–02 (3d Cir. 2004) (determining that the use of neutral pronoun substitution in a trial with a large number of co-defendants did not lead to a *Bruton* violation).

22. 949 F.3d 791, 794–95 (3d Cir. 2020) (holding neutral term substitutions can violate a defendant's Sixth Amendment rights).

23. See e.g., *Richardson v. Marsh* 481 U.S. 200 (1987); *Gray*, 523 U.S. 185; *Richards*, 241 F.3d 335; *Priester*, 382 F.3d 394; see also *Johnson*, 949 F.3d at 797–98 (providing the background on the facts that led to the case).

24. See David Aram Kaiser, *Entering onto the Path of Inference: Textualism and Contextualism in the Bruton Trilogy*, 44 U.S.F. L. REV. 95, 96–97 (2009):

Prior commentary has been practically unanimous in criticizing the confusion and uncertainty in *Bruton* doctrine that has followed the Supreme

Third Circuit had previously left open the question of whether a generic pronoun substitution would be sufficient to protect the Sixth Amendment rights of a defendant in a joint trial with a co-defendant who is entering their own confession.<sup>25</sup> After *Johnson*, in cases where there are only two defendants in a joint trial and one defendant offers a confession that implicates the other defendant, a substitution of the non-confessing defendant's name with a neutral pronoun is not adequate to avoid the Sixth Amendment violation.<sup>26</sup>

Additionally, *Johnson* establishes that certain errors can make a habeas corpus writ more likely to succeed.<sup>27</sup> For instance, if a prosecuting attorney fails to use the pronouns and uses the defendant's actual name in the opening and closing arguments, this error will make it more likely that the court will grant the writ.<sup>28</sup> Also, if the jury introduces a note to the judge that illustrates potential prejudice, that is a factor that weighs in favor of the writ.<sup>29</sup> Ultimately, *Johnson* provides that in joint trials with two defendants where one co-defendant's confession implicates the other, a simple pronoun substitution is not sufficient to avoid a *Bruton* violation.<sup>30</sup>

## II. FACTS AND BRIEF NARRATIVE ANALYSIS

In *Johnson*, petitioner Arthur Johnson was charged alongside his co-defendant Tyrone Wright for the murder of Donnie Skipworth.<sup>31</sup> The shooting occurred as part of a drug deal gone wrong in North Philadel-

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Court's decisions in *Richardson* and *Gray* . . . . [T]o ignore the role of context in considering the meaning a jury will find in a codefendant's statement is to completely undermine the validity of the court's determination of prejudice to the defendant from the admission of that evidence.

*Id.* (footnote omitted).

25. See *Commonwealth v. Travers*, 768 A.2d 845, 848 (Pa. 2001) (refusing to create a standard rule regarding the substitution of a co-defendant's name with a pronoun in a *Bruton* context). “[W]e reaffirmed this holding and explicitly rejected a blanket rule that would prohibit the introduction of redacted confessions that implicate the defendant by contextual implication . . . .” *Id.*; see also *Richardson*, 481 U.S. at 203 (holding omitting all mention of the co-defendant in the confession during a joint trial successfully avoided a Sixth Amendment violation, but leaving the neutral pronoun substitution question unanswered).

26. See *Johnson*, 949 F.3d at 806 (“In such situations, it is incumbent upon courts to protect defendants against the devastating effects of these egregious errors.”).

27. See *id.* (noting errors that would require the jury to attempt “mental gymnastic[s]” to pretend the errors never happened signal the case is likely prejudiced).

28. See *id.*

29. See *id.* (“The jury sought guidance from the trial judge and grappled with what to do about Wright’s inculpatory confession, which they could not unhear.”).

30. See *id.* (holding pronoun substitutions can violate the Sixth Amendment).

31. *Id.* at 794 (noting that Skipworth was dealing drugs at the time of his murder).

phia.<sup>32</sup> Before the trial began, Wright admitted he took part in the crime.<sup>33</sup> During his confession, Wright also identified Johnson as the one who shot Skipworth.<sup>34</sup> The prosecution decided to proceed with a joint trial for Johnson and Wright and introduced Wright's confession at trial.<sup>35</sup> In an attempt to avoid a Sixth Amendment Confrontation Clause issue when introducing Wright's confession, the prosecution substituted "the other guy" in place of Johnson's name.<sup>36</sup>

A series of errors followed which made it obvious to the jury that Johnson necessarily had to be "the other guy."<sup>37</sup> For instance, Wright's confession detailed the presence of two people: a named participant, Abbas Parker, and "the other guy."<sup>38</sup> Because Parker was not on trial, it followed that Johnson appeared to be "the other guy" who pulled the trigger.<sup>39</sup> Furthermore, Johnson was "*explicitly*" connected to "the other guy" substitution at both the start and finish of the trial.<sup>40</sup> In the prosecution's opening and closing statements, the attorney for the Commonwealth stated directly that Wright confessed "Arthur and Abbas" were present and shot the victim.<sup>41</sup> The judge issued an instruction to the jury that the jurors should not consider Wright's confession in determining Johnson's guilt.<sup>42</sup> However, the jury struggled to follow this instruction.<sup>43</sup>

The jury conveyed to the judge that the substitution affected its deliberations.<sup>44</sup> After an attempted deliberation of six days, the jury submitted a note to the bench asking for guidance in regards to Wright's confession.<sup>45</sup> The judge confirmed that the jury was not to consider Wright's

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32. *Id.*

33. *Id.*

34. *Id.* Wright's redacted confession at the trial was read as an officer asking Wright if the third man involved shot Skipworth, to which Wright responded: "No. He had a gun, but all he said was that *the other guy* shot [Skipworth]." *Id.* at 796.

35. *Id.* at 794, 796.

36. *Id.*

37. *See id.*

38. *Id.* at 797.

39. *Id.*

40. *Id.*

41. *Id.* ("Wright . . . writes down something to the effect of, oh, yes, I know that Arthur and Abbas went there to shoot Donnie Skipworth. . . . [Wright] tells you in his very own statement. He tells you that he knows that Art is going to go around' . . . ." (alteration in original) (internal quotation marks omitted)).

42. *Id.* at 798.

43. *Id.* at 797–98 (quoting the jury members' note to the trial judge where they asked for clarification on the judge's "instruction regarding Tyrone Wright's statement").

44. *Id.* at 798 ("The jury knew all too well that Johnson was the other guy.").

45. *See id.* at 797–98. The jury wrote in a note to the trial judge: You had instructed us that Tyrone Wright's statement may only be used against Tyrone Wright and not against Arthur Johnson. We also recall the Commonwealth saying that we are not being asked to turn off our common sense. We would like to confirm that in order to comply with your instruction, we must not make any inferences stemming from the

confession against Johnson and eventually, the jury convicted Johnson of first-degree murder.<sup>46</sup> Johnson then applied for habeas corpus relief in the federal district court.<sup>47</sup> The district court found that there had been a Sixth Amendment violation, but that the error was harmless.<sup>48</sup> On appeal, the Third Circuit reversed the district court and granted the petition for habeas relief because the error was not harmless.<sup>49</sup> As a result, the government owed Johnson a new trial.<sup>50</sup>

In its analysis, the Third Circuit emphasized the trust the judicial system places in juries, but the court acknowledged the fallibility of jury members.<sup>51</sup> Referring to *Bruton*, the court highlighted that a Confrontation Clause issue is present when a co-defendant's confession is introduced in a joint trial because the jury cannot be expected to ignore the highly prejudicial testimony.<sup>52</sup> After this introduction, the court discussed the major cases in the *Bruton* case law, elucidating Supreme Court precedent in this area.<sup>53</sup> Citing *Richardson*, the court acknowledged that a *Bruton* issue can be avoided when there is absolutely no evidence of the defendant's existence in the co-defendant's confession.<sup>54</sup> Additionally, the court addressed the insufficiency of simply deleting a defendant's name in avoiding a *Bruton* issue.<sup>55</sup>

The court then turned to previous Third Circuit cases and Pennsylvania precedent.<sup>56</sup> The court noted the facts of *Johnson* were extremely similar to the facts of *Vazquez v. Wilson*,<sup>57</sup> in which there were "only two possible shooters" and only one of the possible people was on trial with

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statement, or use the statement to help draw a more complete picture of the alleged crime in our minds when considering the case against Arthur Johnson.

*Id.* (citation omitted).

46. *Id.* at 794, 798.

47. *Id.*

48. *See id.* ("[T]he Pennsylvania Superior Court's ruling to the contrary was an unreasonable application of federal law.")

49. *Id.* at 794–95.

50. *Id.* at 794 ("[I]ts admission violates the non-confessing co-defendant's rights under the Confrontation Clause of the Sixth Amendment and requires a new trial if he has been prejudiced by such damaging evidence.")

51. *See id.* ("Although we generally rely on jurors to follow a court's instructions, we cannot expect the superhuman from them.")

52. *See id.* ("[I]n these circumstances we cannot rely on a juror's ability to put such an inculpatory statement out of their minds.")

53. *See id.* at 795 (describing *Bruton* and its progeny).

54. *See id.* ("[N]o constitutional violation exists where a confession is redacted to eliminate 'not only the defendant's name, but any reference to his or her existence.'" (quoting *Richardson v. Marsh*, 481 U.S. 200, 211 (1987))).

55. *See id.* at 795–96 (quoting *Gray v. Maryland*, 523 U.S. 185, 195 (1998)) (noting that the government still violates the Sixth Amendment when it simply deletes a defendant's name from a co-defendant's confession).

56. *See id.* at 797 (comparing the facts of *Johnson* to relevant cases).

57. 550 F.3d 270 (3d Cir. 2008).

the confessor.<sup>58</sup> In *Vazquez*, the defendant's name was substituted with "the other guy" and "my boy," which is identical to the purpose of the use of "the other guy" in the *Johnson* case.<sup>59</sup> Because there were only two defendants—as opposed to fifteen, for example—the *Vazquez* court emphasized that the jury would likely be prejudiced by the co-defendant's confession.<sup>60</sup>

Turning to the individual facts of the *Johnson* case, the court focused on the prosecution's errors in its opening and closing statements, in which it directly named Johnson.<sup>61</sup> The court found this alone would have been cause for a *Bruton* concern, but the jury also confirmed through a note to the bench that it was struggling to deliberate without using Wright's confession against Johnson.<sup>62</sup> Although the judge clarified that Wright's confession must not be considered against Johnson, the note itself was evidence enough for the court to conclude that Wright's confession tainted Johnson's trial.<sup>63</sup>

The court then had to determine whether the Sixth Amendment violation had a "substantial and injurious effect or influence in determining the jury's verdict[.]"<sup>64</sup> A finding of "actual prejudice" is necessary to grant the relief of reversal.<sup>65</sup> Holding that there was "grave doubt" that the error was harmless, the court determined that reversal was appropriate in this case.<sup>66</sup> In its considerations, the court looked to factors articulated by the Supreme Court.<sup>67</sup> In particular, the court focused on the lack of other evidence tying Johnson to the crime.<sup>68</sup> Besides Wright's confession, the

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58. *Johnson*, 949 F.3d at 797 (noting similarities between *Johnson* and *Vazquez*).

59. *Vazquez*, 550 F.3d at 274.

60. *See Johnson*, 949 F.3d at 797 (contrasting facts of *Vasquez* with those of other cases).

61. *See id.* ("Johnson's identity as the 'other guy' was also *explicitly* revealed both at the beginning and the end of trial.")

62. *See id.* at 797–98 ("Our understanding is that our instruction is to push the statement from our minds and pretend it never existed when we are considering the case against Arthur Johnson. Is this correct?").

63. *See id.* at 798 ("After these identifications, any attempts to conceal Johnson's identity were futile; the cat was already out of the bag. This is a clear *Bruton* violation and we could end our analysis there.")

64. *Id.* (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993)) (describing legal test for Confrontation Clause).

65. *Id.* at 799 (quoting *Davis v. Ayala*, 576 U.S. 257, 267 (2015)).

66. *Id.* (quoting *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995)). Even in cases where the judge finds the case "so evenly balanced" that a decision is impossible, the case must be resolved for the petitioner. *See O'Neal*, 513 U.S. at 437.

67. *See Johnson*, 949 F.3d at 799 ("[T]he importance of the witness[s] testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." (second alteration in original) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986))).

68. *See id.* at 803 (considering the weight of the evidence admitted against Johnson).

prosecution offered only shaky testimony from an unreliable witness and no physical evidence.<sup>69</sup> The court found the other evidence underwhelming, “unconvincing,” and “confusing.”<sup>70</sup> To support this conclusion, the court emphasized the length of the jury deliberations, which was longer than the trial.<sup>71</sup> Considering these factors together, the court found that the Sixth Amendment violation was prejudicial and that the government owed Johnson a new trial.<sup>72</sup>

### III. CRITICAL ANALYSIS

The ultimate decision to grant the writ of habeas corpus was appropriate in *Johnson* due to the violation of Johnson’s Sixth Amendment Confrontation Clause rights, but this solution is a temporary fix to an ongoing problem.<sup>73</sup> This Part will explore other proffered solutions to the *Bruton* dilemma and ultimately argue that the best method to resolve the issue is to avoid it in the first place through severance.<sup>74</sup>

The court in *Johnson* held that the defendant was entitled to a new trial because his rights were violated and the court’s error was not harmless.<sup>75</sup> The public policy rationale driving joint trials is typically that they are expeditious because they conserve resources and time.<sup>76</sup> Courts favor

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69. *See id.* (“The prosecution presented no physical evidence that directly implicated Johnson in the shooting.”).

70. *Id.* at 805 (criticizing the government’s evidence against Johnson).

71. *Id.* (“Here, we find the deliberation period considerable, particularly since it lasted longer than the trial itself.”).

72. *See id.* at 806.

73. *See* Colin Miller, *Avoiding a Confrontation?: How Courts Have Erred in Finding that Nontestimonial Hearsay is Beyond the Scope of the Bruton Doctrine*, 77 BROOK. L. REV. 625, 676–78 (2012) (arguing the solution to *Bruton* situations is a Rule 403 prejudice weighing test). “[W]hen the prosecution has presented an entire case against a codefendant—including that codefendant’s confession, in which he claims that the defendant and he committed the crime—it is simply too much to ask the jury to disregard that confession as evidence of the other defendant’s guilt.” *Id.* at 636.

74. *See* FED. R. CRIM. P. 14 (allowing for severance of trials).

75. *See Johnson*, 949 F.3d at 806.

76. *See Bruton v. United States*, 391 U.S. 123, 134 (1968) (“Joint trials do conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial.”); *see also* Richardson, *supra* note 15, at 864–66 (arguing for a bright-line rule to *Bruton* cases to provide more clarity in the area). “[T]hey promote efficiency and serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts. For these reasons, the Supreme Court has repeatedly approved of joint trials.” *Id.* at 830–31 (footnote omitted); *see also* Richard F. Dzubin, *The Extension of the Bruton Rule at the Expense of Judicial Efficiency in Gray v. Maryland*, 33 U. RICH. L. REV. 227, 240 (1999) (arguing that the *Bruton* decision harms the interests of judicial efficiency by limiting the circumstances where a joint trial is appropriate). “Public policy adamantly favors joint trials. Both from an administrative and prosecutorial perspective, joint trials ensure efficiency. Because of the tactical, social, and economic advantages of utilizing this adjudicatory method, joint trials are enjoying immense popularity both at federal and state levels.” *Id.* at 241 (footnote omitted).

joint trials because the witnesses only have to testify at one trial, only one judge and jury are required, and it encourages similar results for all jointly-tried defendants.<sup>77</sup> However, in a *Bruton* situation, these public policy desires for efficiency are weighed against the defendant's constitutional rights.<sup>78</sup>

Due to the judicial system's strong preference for joint trials, courts have attempted creative solutions to avoid the Sixth Amendment issue and keep the trials joined with varying degrees of success.<sup>79</sup> Some look to the Federal Rules of Evidence for an answer and argue that a 403 probative versus prejudice analysis should be the standard for admitting a co-defendant's confession.<sup>80</sup> Under this standard, the court would consider whether the probative value of the confession outweighs the prejudice the information would cast upon the defendant in the eyes of the jury.<sup>81</sup> This solution, however, is still not a bright line rule and leads to a "case-by-case consideration" which can make it difficult for defendants and attorneys to know what result to expect.<sup>82</sup> Additionally, the evidence system places the burden on the defendant to prove prejudice, making it more difficult to exclude the testimony.<sup>83</sup> To avoid this, some scholars suggest a "Reverse Rule 403" analysis, which keeps the same probative versus prejudice balancing test, but places the burden on the party seeking to enter the evidence (in this case, the government) to prove the evidence is more probative than it is prejudicial.<sup>84</sup> This solution is more protective of the

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77. See Dzubin, *supra* note 76, at 255 ("Separate trials often prove cumbersome for prosecutors, witnesses, and judges." (citing *Richardson v. Marsh*, 481 U.S. 200, 210 (1987))).

78. See Bryan M. Shay, "So I Says to 'the Guy,' I Says. . .": *The Constitutionality of Neutral Pronoun Redaction in Multidefendant Criminal Trials*, 48 WM. & MARY L. REV. 345, 395 (2006) ("Although these reasons for joinder may be compelling in some circumstances, the fact remains that joint trials can often work to the detriment of the rights of a defendant.").

79. See Wynosky, *supra* note 19, at 224 ("[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.").

80. See Miller, *supra* note 73, at 628 ("[C]ourts should still find that the admission of nontestimonial statements by codefendants violates Federal Rule of Evidence 403 because their probative value is substantially outweighed by the danger of unfair prejudice."); see also FED. R. OF EVID. 403.

81. See Miller, *supra* note 73, at 628 (internal quotation marks omitted) (describing the balancing inherent in Rule 403).

82. Dodson, *supra* note 12, at 821 (quoting *United States v. Green*, 648 F.3d 569, 575 (7th Cir. 2011)) (discussing challenges in applying a 403 probative versus prejudice analysis).

83. See FED. R. OF EVID. 403 (detailing procedures for excluding evidence).

84. See Dodson, *supra* note 12, at 832 ("This standard would certainly trend toward exclusion, which better protects defendants' Confrontation Clause rights. Furthermore, it properly allocates the burden of proof in a criminal case—it is the responsibility of the government, not the accused, to present the state's case constitutionally.").

defendant's rights, but it still has the detriment of avoiding a bright-line rule and errors with its application could still lead to a retrial.<sup>85</sup>

Another proposed solution is the use of dual juries.<sup>86</sup> This is a middle-ground solution that still promotes economy with the use of the same witnesses, judges, and attorneys, but preserves the defendant's rights through the use of two sets of jurors.<sup>87</sup> However, this solution has its own challenges.<sup>88</sup> For this system to work, a defendant's counsel would have to inform the court whenever they planned to present evidence that could be harmful for the codefendant, making the jury naturally curious about what they are not allowed to hear.<sup>89</sup> Additionally, it places an immense administrative burden on the judge to oversee both juries.<sup>90</sup> Furthermore, there is a greater chance of jury confusion through missing testimony and shuffling in and out of the courtroom.<sup>91</sup>

In attempting to find a clear solution to this problem, most practitioners immediately discount the simplest solution out-of-hand because it is perceived as disfavored: severance.<sup>92</sup> This is largely due to the fact that severance is difficult to obtain because there is no right to a separate trial, and because both the judge and prosecutor must sign off on the separation.<sup>93</sup> Additionally, courts cling to the perception that joint trials are

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85. *See id.* at 821 (noting that the Reverse Rule 403 analysis presents challenges for defendants and attorneys).

86. *See* Kaitlin A. Canty, Note, *To Each His Own Jury: Dual Juries in Joint Trials*, 43 CONN. L. REV. 321, 334–38 (2010) (advocating for the use of dual juries when there is a *Bruton* issue as a middle ground between joint trials and severance).

87. *See id.* at 321 (“In addition to remedying the dilemma stemming from *Bruton*, impaneling dual juries also is a way to promote judicial economy and grant partial severance based on antagonistic defenses.”).

88. *See id.* at 338 (detailing concerns that courts have over dual juries).

89. *See id.* (“In order to prevent inadmissible evidence from being presented, each defendant's counsel must inform the court whenever he or she is about to present evidence or a defense antagonistic to a codefendant so that the court may remove the codefendant's jury.” (citing *Brown v. Sirmons*, 515 F.3d 1072, 1079 (10th Cir. 2008))). *See generally* Shay, *supra* note 78, at 395 (“Jurors are human beings, and it is sometimes impossible for them to suppress their natural inclination to try to discover the identity of the redaction in a defendant's confession . . .”).

90. *See* Canty, *supra* note 86, at 339 (discussing challenges trial judges face with the dual jury system).

91. *See id.* at 342 (“Finally, to the extent that the procedure may infringe upon defendants' right to a fair trial, courts have expressed concern over potential jury confusion.” (first citing *United States v. Rimar*, 558 F.2d 1271, 1273 (6th Cir. 1997); then citing *People v. Rainge*, 445 N.E.2d 535, 551 (Ill. App. Ct. 1983))).

92. *See* Shay, *supra* note 78, at 348 (“Courts have rejected this ‘sever or never’ approach, however, and have chosen to permit the introduction of confessions in joint trials provided the references to nonconfessing defendants are redacted.”); *see also* Dzubin, *supra* note 76, at 241 (1999) (“[T]here is no denying that the joinder of criminal proceedings has become deeply rooted within the modern American justice system.” (citing William G. Dickett, *Sixth Amendment—Limiting the Scope of Bruton*, 78 J. OF CRIM. L. & CRIMINOLOGY 984, 992 (1988))).

93. *See* FED. R. CIV. P. 14 (allowing trial courts to sever trials); *see also* Paul Marcus, *Re-Evaluating Large Multiple-Defendant Criminal Prosecutions*, 11 WM. & MARY

more efficient.<sup>94</sup> Considering the appeals and new trials that are granted in *Bruton* cases where there is a violation, the efficiency of joint trials in this particular situation is largely illusory.<sup>95</sup> In *Bruton*, the defendant went through the initial trial, multiple appeals, and a retrial.<sup>96</sup> In *Johnson*, Arthur Johnson went through trial, appealed to the Superior Court and then to the federal district court, and his case was finally considered in the Third Circuit—all before the Third Circuit granted him a new trial.<sup>97</sup> If Johnson’s trial had been severed from the start, there would have been two trials: a trial for Johnson and a trial for Wright. Instead, there are now five proceedings stemming from the same crime, promoting the very opposite of efficiency.<sup>98</sup>

Moreover, separate trials do not require separate investigations and joint trials do not encourage plea bargains more than separate trials; the “efficient” aspects of a joint trial are retained even after they are severed.<sup>99</sup> In preparing for the trials, the prosecutor must interview the same witnesses and go over the same information as would be required in a joint

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BILL RTS. J. 67, 72 (2002) (“With no automatic right of severance, those defendants linked to a criminal scheme usually are tried together. Securing a severance will be difficult. This is true in most cases, even with the extreme situation in which defendants offer defenses which apparently are contradictory.” (footnotes omitted)).

94. See Dzubin, *supra* note 76, at 255 (“Given the aforementioned advantages of joint trials, severance is utilized with great reluctance by prosecutors.”); see also *Richardson v. Marsh*, 481 U.S. 200, 209 (1987) (“One might say, of course, that a certain way of assuring compliance would be to try defendants separately whenever an incriminating statement of one of them is sought to be used. That is not as facile or as just a remedy as might seem. Joint trials play a vital role in the criminal justice system, accounting for almost one-third of federal criminal trials in the past five years.”).

95. See Dzubin, *supra* note 76, at 241 (“[S]ome scholars have argued that the efficiency justifications for joint trials are merely illusory . . . .” (first citing Robert O. Dawson, *Joint Trials of Defendants in Criminal Cases: An Analysis of Efficiencies and Prejudices*, 77 MICH. L. REV. 1379 (1979); then citing *United States v. Baker*, 10 F.3d 1374, 1389 (9th Cir. 1993))); see also Marcus, *supra* note 93, at 90 (“These rules as to joinder—coupled with the venue principles—do not make sense in today’s world. Before turning to specific problems created by such joinder, it is important to note that the supposed benefits offered by large trials are often illusive.”).

96. See *Bruton v. United States.*, 391 U.S. 123, 124–25, 137 (1968) (recounting procedural history of case); see also *United States v. Bruton*, 416 F.2d 310, 312 (8th Cir. 1969) (affirming lower court’s ruling against the defendant); Paul Shechtman, *Marking the 50th Anniversary of ‘Bruton v. United States’*, LAW.COM, (May 21, 2018, 10:00 AM), <https://www.law.com/newyorklawjournal/2018/05/21/marking-the-50th-anniversary-of-bruton-v-united-states/> [<https://perma.cc/U685-4M59>] (discussing *Bruton*’s legacy and reviewing what happened to *Bruton* after the Supreme Court case).

97. See *Johnson v. Superintendent Fayette SCI*, 949 F.3d 791, 794–95 (3d Cir. 2020) (remanding for new trial).

98. See *id.*

99. See Dawson, *supra* note 95, at 1383 (“[W]hether the trial is joint or individual affects only a small portion of the prosecutor’s investment of time. It does not affect police investigation, which is usually completed before the prosecutor decides on charging and joinder.”).

trial.<sup>100</sup> Additionally, proponents of joint trials frequently offer that multiple trials inconvenience witnesses.<sup>101</sup> This is true in cases regarding regular people, but most often witnesses in criminal trials are professionals.<sup>102</sup> While severing trials may put a strain on judicial economy, that time lost is balanced against the time saved in removing the complexities of a joint trial and the lengthy explanations that ensue.<sup>103</sup> Furthermore, even if the joint trials are more efficient, *Bruton* and its progeny signal that the courts appropriately value a defendant's rights over judicial efficiency<sup>104</sup> Although efficiency is a venerable quality that the system should strive for, it cannot come at the cost of a defendant's constitutional right to a fair trial.<sup>105</sup>

Severance also has the benefit of a bright-line rule. In situations where there are only two defendants and one defendant confesses, implicating the non-confessing co-defendant, there should be a presumption that the trial should be severed.<sup>106</sup> Currently, Federal Rule of Civil Procedure 14 allows the court to sever the trial, leaving the decision at the discretion of the court.<sup>107</sup> Like flossing teeth to prevent a cavity, joint trials with these factors should be severed to prevent the Sixth Amendment violation from happening in the first place.<sup>108</sup>

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100. See *id.* ("Whether trials are joint or separate, the prosecutor must review the evidentiary file and interview the witnesses.").

101. See *id.* at 1384 (detailing the burden that multiple trials place on witnesses).

102. See *id.* 1384–85 (noting that the government often calls laboratory specialists, investigators, and other professionals as witnesses).

103. See *id.* at 1386 ("[O]nce begun, joint trials are more complicated to conduct and take longer to complete than individual trials.").

104. See *Bruton v. United States*, 391 U.S. 123, 128 (1968) (holding in favor of non-confessing defendant who was denied Sixth Amendment rights); see also *Richardson v. Marsh*, 481 U.S. 200, 218 (1987) (Stevens, J., dissenting) ("The concern about the cost of joint trials, even if valid, does not prevail over the interests of justice."); *People v. Fisher*, 249 N.Y. 419, 432 (1928) (Lehman, J., dissenting) ("We secure greater speed, economy and convenience in the administration of the law at the price of fundamental principles of constitutional liberty. That price is too high.").

105. See *Bruton*, 391 U.S. at 128 (holding that the government cannot deny a non-confessing defendant's Sixth Amendment rights).

106. See *Marcus*, *supra* note 93, at 72 ("The problem has become quite complicated and continues to vex the courts; it is not so easily solved with the broad notion of redaction." (footnote omitted)). While this Casebrief focuses on large joint trials with multiple co-defendants, the same principle applies to trials with only two co-defendants.

107. See FED. R. CIV. P. 14 (allowing for severance of trials); *Commonwealth v. Travers*, 768 A.2d 845, 846 (Pa. 2001) ("The decision of whether to sever trials of co-defendants is within the sound discretion of the trial court." (citing *Commonwealth v. Lopez*, 739 A.2d 485 (1999))).

108. See *Wynosky*, *supra* note 19, at 226 ("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.").

## CONCLUSION

*Johnson* adds to the ever-growing list of case law that uses a case-by-case basis to establish what testimony is admissible in a *Bruton* scenario.<sup>109</sup> Before *Johnson*, the Third Circuit was uncertain whether neutral pronoun substitution would be sufficient to avoid the Sixth Amendment Confrontation Clause violation.<sup>110</sup> However, the previous case law leaned toward the insufficiency of this substitution.<sup>111</sup> Unfortunately, while precedential, *Johnson* is not a definitive answer to this quandary because the decision is particular to the facts of this case.<sup>112</sup> While it signals an unwillingness by the Third Circuit to accept terms like “the other guy” as sufficient to avoid the *Bruton* issue, the court’s decision applies narrowly to cases where the facts are similar to *Johnson*—where there was only one other defendant and the prosecutor committed extraordinary errors that revealed Johnson was “the other guy.”<sup>113</sup>

Moving forward, *Johnson* is a warning for prosecutors to be cautious when attempting to use pronouns in a *Bruton* case.<sup>114</sup> However, unless the facts are fairly similar to those of *Johnson*, *Johnson* alone may not be enough to rule out all future uses of the neutral pronoun in a *Bruton* situation.<sup>115</sup> While Arthur Johnson’s rights were protected and he was granted a new trial, this is only a band-aid remedy for a deeper wound in the criminal justice system.<sup>116</sup> In order to prevent the violation of other criminal defendants’ Sixth Amendment rights and the resulting appeals and retrials,

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109. See *Johnson v. Superintendent Fayette SCI*, 949 F.3d 791, 797 (3d Cir. 2020) (making a factual determination on whether it was appropriate to admit testimony in a *Bruton* scenario). See e.g., *Priester v. Vaughn*, 382 F.3d 394 (3d Cir. 2004) (relying on the facts particular to the case — namely that there were 15 defendants—to make a determination); *Travers*, 768 A.2d 845 (specifying that each case should be determined on its own facts); *Richardson*, 481 U.S. 200 (finding that the specific redactions in the case were sufficient based on the facts, but may not be in another factual scenario).

110. See *Wynosky*, *supra* note 19, at 224 (suggesting that the neutral pronoun substitution could avoid constitutional violations).

111. See *id.* at 219 (“In the Third Circuit, where the intracircuit tension is greatest, 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. 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.” (footnotes omitted)).

112. See *Johnson*, 949 F.3d at 806 (recognizing that courts must protect defendants when defendants are deprived of their constitutional rights).

113. See *id.* at 796.

114. See generally *id.* at 806.

115. See *Marcus*, *supra* note 93, at 94 (“The problem has become quite complicated and continues to vex the courts; it is not so easily solved with the broad notion of redaction.” (footnote omitted)).

116. See *Richardson*, *supra* note 15, at 864 (“The question of when and how to admit a nontestifying codefendant confession at a joint trial does not have a simple answer.”).

there needs to be a more definitive solution.<sup>117</sup> The simplest solution lies in severance reform, so that in *Bruton* cases, there is a presumption that the joint trials will be severed.<sup>118</sup> Although this approach is disfavored due to its supposed inefficiency, it is the surest way to ensure that a defendant's Sixth Amendment rights are protected.<sup>119</sup> While defendants may be guaranteed only a "fair trial, but not a perfect one," protecting the constitutional rights of defendants at the expense of some efficiency is the minimum the system must provide.<sup>120</sup>

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117. See Wynosky, *supra* note 19, at 226 ("A clear and definitive decision on the merits would end the debate . . .").

118. See FED. R. CIV. P. 14 (allowing trial courts to sever trials).

119. See *Richardson v. Marsh*, 481 U.S. 200, 209–10 (1987) ("One might say, of course, that a certain way of assuring compliance would be to try defendants separately whenever an incriminating statement of one of them is sought to be used. That is not as facile or as just a remedy as might seem. Joint trials play a vital role in the criminal justice system . . . It would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again . . ."); *Commonwealth v. Travers*, 768 A.2d 845, 846–47 (Pa. 2001) ("The decision of whether to sever trials of co-defendants is within the sound discretion of the trial court." (citing *Commonwealth v. Lopez*, 739 A.2d 485 (1999))).

120. Dzubin, *supra* note 76, at 245 (describing defendants' rights in criminal trials).