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## Rebuttal

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## Rebuttal

The Court has struggled to permit the use of both joint trials and confessions in the contexts of the hearsay doctrine, the Confrontation Clause and the Federal Rules of Criminal Procedure. Professor Mueller's contention that *Bruton* represents a compromise in theory rather than a broad principle is absolutely correct. However, while siding with many of Professor Mueller's views, I will address two points where I respectfully differ: (a) distortion and prejudice produced by redaction; and (b) the *Bruton* compromise.

### A. *Distortion and Prejudice Produced by Redaction*

One of the most significant problems with redaction is that it may change the meaning of what was originally said or meant by the confessor of the statement. Just because redaction changes the meaning of a statement, however, does not mean that the redacted statement should not be admitted into evidence. As complex problems often have complex solutions, our analysis must go further than this. As discussed in my Comment, the only form of redaction that passes constitutional muster is redaction that removes all reference to the existence of the codefendants. For example, let us examine a post-arrest statement made by a defendant, Stewart, which reads, "I teamed up with John, Bob and Sam to run heroin." A constitutional redaction similar to the one used in *Richardson*, would read, "I ran heroin." In his analysis, Professor Mueller argues that this type of redaction violates Stewart's rights by suggesting that he alone might be responsible, when in fact he admitted no such thing. Using alternative methods of redaction, the statement may read, "I teamed up with *blank*, *blank*, and *blank* to run heroin," or, "I teamed up with some other people to run heroin." While the prosecutor would prefer to use the latter two redactions in order to benefit from the spill-over effect, the problem is that they violate *Bruton*, *Richardson*, and *Gray*, because they refer to the existence of Stewart's codefendants. Thus, if the prosecutor wants to admit this statement at their joint trial, he must use the first method of redaction which would transform Stewart's original statement—that accused not only himself, but John, Bob and Sam as well—into a statement that now only accuses Stewart. At first glance, this type of redaction may seem unfair, but its use warrants further analysis.

The use of this method of redaction is both fair and constitutional. The redacted statement should be admitted along with the jury instruc-

tion proposed in my Comment. This instruction advises the jury that Stewart's statement does not imply anything regarding the number of individuals involved in the activity described in his statement. Therefore, this instruction cures the distortion that Professor Mueller is concerned with—that the statement will reflect that Stewart alone ran the heroin. If the limiting instruction used in *Richardson* was viewed by the Court as being sufficient to keep the jury from making impermissible inferences from the redacted confession, then the same rationale should apply to the instruction proposed in my Comment. Furthermore, Stewart's statement will not be the only evidence admitted at the joint trial. The government will surely admit evidence that incriminates all of the codefendants and will argue to the jury that the group "ran" the heroin together. Thus, when the redacted statement is viewed in the context of a joint trial, it will not be as damaging to Stewart as it initially seemed, because the jury will weigh *all* of the evidence against Stewart and his codefendants.

Another consideration is that if the statement is admitted in a redacted form, which changes its meaning in some way, one or more parties unavoidably will be prejudiced. Now, even if we assume that our alternative methods of redaction are constitutionally permissible, we must decide whom the statement in its redacted form should prejudice. When questioned by the police, John, Bob, and Sam declined to comment on the charges made against them. Stewart, on the other hand, not only directly implicated himself in the crimes, but accused John, Bob, and Sam as well. Without cross-examination to test the truth of Stewart's statement, it seems clear that the method of redaction that is chosen—if it must prejudice one of the parties—should prejudice the proponent of the statement. If John, Bob, and Sam all exercised their rights to remain silent, why should they be prejudiced by the spill-over effect created by the alternative methods of redaction? Shouldn't fairness dictate that Stewart, who volunteered the information, be the party to bear the prejudice created by the redaction?

Finally, we must look at the statement in the context of both the joint trial and the severed trial. If Stewart's trial was severed and he was tried alone, there is no doubt that his entire statement would be admitted in its original form: "I teamed up with John, Bob and Sam to run heroin." Stewart is clearly not prejudiced here as these were the exact words that he used, and his codefendants, which are not seated next to him, are not prejudiced by a spill-over effect either. When the jury hears the confession, however, we must look at what they are really deciding. Does it matter that Stewart "teamed up with John, Bob, and Sam to run heroin"? The jury in Stewart's trial is not deciding the guilt of John,

Bob or Sam, and it is clear from Stewart's statement that he is guilty of trafficking the heroin whether or not he acted with others. Thus, in actuality, at Stewart's severed trial Stewart's confession really only implicates Stewart—which would be the same effect that a redacted version of his confession that read, "I ran the heroin," would have at the joint trial of Stewart, John, Bob, and Sam.

### B. *The Bruton Compromise*

The *Bruton* doctrine, from its very inception has many times offered more questions than answers. This is because, as Professor Mueller demonstrates, the Court is struggling to permit the use of both joint trials and confessions. This struggle is illustrated in *Richardson*, in which the Court decided that where a defendant's statement is redacted in a manner that all references to his codefendant's existence are removed from the confession, it is valid to suppose that a jury will not disregard a judge's instruction not to consider the defendant's confession as evidence against the codefendant, and thus will not link the codefendant to the confession despite other evidence introduced at trial. This decision, while potentially prejudicial to the codefendant, was deemed necessary by the Court to preserve the use of joint trials. The limits placed on *Bruton* by the *Richardson* decision reflect that *Bruton* is indeed a compromised doctrine—its reach must not be limitless in order for our already over-burdened jury system to persist. However, *how much* must be compromised and *who* must compromise it? Courts are now deciding whether codefendants may be referred to by the use of neutral pronouns in redacted confessions. If codefendants are *again* forced to compromise their rights so that redaction may continue to be a "useful" solution to the *Bruton* problem, then we must admit that this is not a very fair system of compromising. The Court should instead make the prosecution meet the defendants halfway, and allow the inferential incrimination of codefendants *only if* their existence is not referred to in the redacted confession—by the use of neutral pronouns or any other indicators—as the Court already approved of in *Richardson* and discussed in *Gray*.

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