No. 18-14654

In the United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOEL IVERSON GILBERT AND DAVID LYNN ROBERSON,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Alabama
Case No. 2:17-CR-00419 (Hon. Abdul K. Kallon, J.)

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT DAVID LYNN ROBERSON, SUPPORTING REVERSAL

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit, voluntary professional bar association that works on behalf of criminal defense attorneys to ensure the proper, efficient, and fair administration of justice for those accused of crime or misconduct. Founded in 1958, NACDL has thousands of direct members nationwide, as well as approximately 90 state, local, and international affiliate organizations with up to 40,000 members. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. It is the only nationwide professional bar association for both public defenders and private criminal defense lawyers.

NACDL files numerous *amicus* briefs each year in federal and state courts, providing assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in ensuring that criminal defendants' rights to seek and rely on the advice of counsel are not compromised by joint trials.

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[1] No counsel for a party authored this brief in whole or in part; no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief; and no person other than *amicus curiae*, its members, and its counsel made such a contribution. All parties have consented to the filing of this brief.

STATEMENT OF ISSUES

Whether the district court erred when it declined to sever David Roberson's trial from that of his attorney co-defendants, despite Roberson's resulting inability to present a complete advice-of-counsel defense.

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief addresses a narrow but vitally important question: when, if ever, a criminal defendant may be tried alongside an attorney on whose advice he relied with respect to the alleged offense.

A motion for severance under Federal Rule of Criminal Procedure 14(a) always requires a careful balancing of competing interests. But joint trials of attorneys and their clients raise unique concerns that weigh heavily in favor of severance. The right to seek and rely on the advice of counsel is fundamental to our system of justice. For that reason, the law has long recognized that a defendant's good-faith reliance on the advice of counsel may serve as a complete defense to many criminal charges. And the importance of the advice-of-counsel defense has only grown with time, as our world and our legal codes have become increasingly complex. Yet joint trials of attorneys and their clients risk undermining that defense by precluding client-defendants from presenting at trial the advice they obtained from their lawyer co-defendants. Courts should view such joint trials with a healthy dose of skepticism.

The facts of this case vividly illustrate the danger such trials create. David Roberson, a mid-level executive at Drummond, was indicted and tried on charges of federal bribery along with two of Drummond's attorneys. At trial, the prosecution successfully introduced a portion of a statement Roberson made to investigators admitting his concerns about retaining the consulting services of the state legislator the trio was accused of bribing. But when Roberson sought to introduce the rest of his statement—explaining that he had resolved his concerns by obtaining advice from Drummond's lawyers—that evidence was excluded to protect his co-defendants' Confrontation Clause rights. That ruling appropriately sought to safeguard the other defendants' constitutional rights under *Bruton v. United States*, 391 U.S. 123 (1968). But it did so at the expense of Roberson's own constitutional right to present a complete advice-of-counsel defense. Rather than subordinate Roberson's interests to those of his attorneys, the district court should have granted Roberson a separate trial where his critical exculpatory evidence could be properly explored.

Joint trials of attorneys and their clients will often present such problems. Advice of counsel is a commonly raised defense—and one essential to the smooth functioning of highly regulated fields. But joint trials pose inherent obstacles to asserting the defense successfully: It is particularly likely that attorney and client co-defendants will have irreconcilable defenses, or that exculpatory evidence for

one defendant will inculpate another and be rendered inadmissible because of the resulting prejudice. And because trials of this sort are often lengthy—perhaps implicating corporate activities governed by complex laws and regulations—there is a significant risk that prejudice against a defendant will manifest well into the trial. Accordingly, courts should exercise special care when considering the fundamental fairness of trials implicating the attorney-client relationship. By their nature, such trials present heightened risks of prejudice and inefficiency that should tip the balance in favor of prompt severance.

ARGUMENT

JOINT TRIALS OF ATTORNEYS AND CLIENTS RAISE SPECIAL CONSIDERATIONS THAT TIP THE BALANCE OF INTERESTS IN FAVOR OF SEVERANCE

The right to seek and rely on the advice of counsel is central to our legal system. That right can be undermined, however, when prosecutors seek to try a criminal defendant and his attorneys at the same trial. A joint trial in these circumstances may—as here—lead to the exclusion of evidence critical to an advice-of-counsel defense. And where such prejudice requires a do-over of a lengthy trial, insisting on a joint trial at the outset may end up hindering rather than promoting judicial efficiency. Thus, while courts must weigh severance motions on a case-by-case basis, in this specific context the balance tips sharply in favor of prompt severance.

A. Courts Evaluating Severance Must Balance the Prejudice of a Joint Trial Against Judicial Efficiency

Federal Rule of Criminal Procedure 14 allows courts to "order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires" where "joinder of offenses or defendants . . . appears to prejudice a defendant or the government." Fed. R. Crim. P. 14(a). Although joint trials can often "conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays," courts cannot "'secure greater speed, economy and convenience in the administration of the law at the price of fundamental principles of constitutional liberty.'" *Bruton v. United States*, 391 U.S. 123, 134, 135 (1968).

Accordingly, in considering whether severance is warranted, courts must "balance the right of defendants to a fair trial, absent the prejudice inherent in a joint trial, against the interests of judicial economy and efficiency." *United States v. Gonzalez*, 804 F.2d 691, 694 (11th Cir. 1986). Such balancing occurs on a case-by-case basis, as "[t]he risk of prejudice will vary with the facts in each case." *Zafiro v. United States*, 506 U.S. 534, 539 (1993). "'Ultimately, the test is whether the defendant received a fair trial'"—that is, whether the trial achieved "[f]undamental fairness." *Gonzalez*, 804 F.2d at 695, 696.

Undue prejudice may occur where "a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro*, 506 U.S. at 539. That prejudice may

take many forms, but two are particularly relevant here. First, a joint trial may cause unfair prejudice "when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant." *Id.*; *see United States v. Doherty*, 233 F.3d 1275, 1281-82 (11th Cir. 2000). Second, a defendant may be prejudiced where "essential exculpatory evidence that would be available to a defendant tried alone [is] unavailable in a joint trial." *Zafiro*, 506 U.S. at 539.

The Supreme Court addressed the first type of prejudice in *Bruton*. That case involved the admission of a non-testifying co-defendant's confession that also inculpated the defendant. The Court held that admitting such a statement violated the defendant's Sixth Amendment confrontation rights, because the co-defendant's right against self-incrimination rendered the statement immune from cross-examination. 391 U.S. at 126. In so holding, the Court rejected the argument that the prejudice could be cured by a "sufficiently clear" jury instruction "to disregard" the statement's reference to the defendant. *Id*. Accordingly, "where two defendants are tried jointly, the pretrial confession of one [non-testifying defendant] cannot be admitted against the other." *Richardson v. Marsh*, 481 U.S. 200, 206 (1987).

To comply with that rule, the defendants can be tried separately. *See United States v. Avery*, 760 F.2d 1219, 1223 (11th Cir. 1985) (introduction of statement by

"non-testifying co-defendant that implicates another co-defendant can present the compelling prejudice that requires a severance"), *abrogated on other grounds by United States v. Lane*, 474 U.S. 438, 449 (1986). Or the prosecution can refrain from using the co-defendant's statement at all. Or, as the Supreme Court explained in *Richardson*, the statement may be redacted "to eliminate not only the defendant's name, but *any reference to his or her existence*." 481 U.S. at 211 (emphasis added). A redaction that still implicates the defendant, despite not naming her directly, will not suffice. *See Gray v. Maryland*, 523 U.S. 185, 195 (1998).[2]

Another kind of prejudice can occur where being tried with others prevents a defendant from presenting "essential exculpatory evidence" of his own. *Zafiro*, 506 U.S. at 539. That situation calls for severance because it compromises a defendant's constitutional right to advance a complete defense. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a

[2] *See also United States v. Schwartz*, 541 F.3d 1331, 1351 (11th Cir. 2008) (*Bruton* violation where "court admit[ted] a codefendant statement that, in light of the Government's whole case, compels a reasonable person to infer the defendant's guilt" (footnote omitted)); *United States v. Ramirez-Perez*, 166 F.3d 1106, 1111 (11th Cir. 1999) (*Bruton* violation where "a jury reasonably could have concluded from [co-defendant's] statement that [defendant] was guilty").

complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (internal quotation marks omitted).

That right finds expression in (among other places) the "rule of completeness" embodied in Federal Rule of Evidence 106. *See United States v. Kerley*, 784 F.3d 327, 341-42 (6th Cir. 2015) (analyzing right to present a defense in light of rule of completeness). "Under that long-standing rule, 'the opponent, against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance.'" *United States v. Burns*, 162 F.3d 840, 852-53 (5th Cir. 1998). Thus, when the prosecution seeks to offer *inculpatory* parts of a defendant's prior statement, the defendant generally is entitled to introduce related *exculpatory* portions of the same statement. *See United States v. Range*, 94 F.3d 614, 621 (11th Cir. 1996) (applying "fairness standard").

In a joint trial, however, efforts to safeguard one defendant's confrontation rights under *Bruton* can impermissibly impede another defendant's right to offer exculpatory evidence. This "'reverse Bruton' problem" occurs where "redacting [a] defendant's own pretrial statement to exclude references to a codefendant in a joint trial" may "den[y] the [defendant a] chance to present a complete defense." 1A Charles A. Wright *et al.*, *Federal Practice and Procedure* §224 (4th ed. rev.

2018). For example, redactions mandated by *Bruton* might "'effectively distor[t] the meaning of the statement'" or exclude information that is "'substantially exculpatory'" of a defendant. *United States v. Lopez*, 898 F.2d 1505, 1510 n.11 (11th Cir. 1990); *see Burns*, 162 F.3d at 852 ("strict compliance with *Bruton* may at times violate the evidentiary rule of completeness").[3] In such situations, the proper solution is not to subordinate one defendant's rights to the other's, but to afford each a separate and fair trial.

B. Joint Trials of Attorneys and Their Clients Inherently Present Heightened Risks of Prejudice

By their nature, joint trials of attorneys and their clients pose a heightened risk of unfairness. Most significantly, they risk prejudicing a client-defendant's right to present a complete advice-of-counsel defense.

Defendants charged with crimes requiring willful or knowing misconduct commonly "attempt to negate proof of specific intent by establishing the defense of good faith reliance on advice of counsel." *United States v. Eisenstein*, 731 F.2d

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[3] *See also United States v. Childs*, No. 1:05-CR-160, 2006 WL 3257048, at *1 (W.D. Mich. Nov. 9, 2006) (ordering severance where *Bruton* redactions would "prevent [the defendant] from effectively cross-examining . . . witnesses on the entire statement"); *United States v. Lagunes*, No. 3:12-CR-067, 2013 WL 139817, at *1 (N.D. Ind. Jan. 10, 2013) (ordering severance where *Bruton* redactions would "distort the actual content of [defendant's] statement [such] that he will be unable to effectively place the statement into context on cross-examination"); *cf. United States v. Pacquette*, 557 F. App'x 933, 937 (11th Cir. 2014) (holding, outside *Bruton* context, that "prohibiting cross-examination and excluding [defendant's exculpatory] statement" rendered defendant's admission "incomplete").

1540, 1543 (11th Cir. 1984). That defense "has been recognized in various contexts for well over a century." Susan B. Heyman, *Corporate Privilege and an Individual's Right to Defend*, 85 Geo. Wash. L. Rev. 1112, 1128 (2017). It is based on the recognition that "[m]ost [clients] are not competent to discern error in the substantive advice of an . . . attorney," and that requiring a client "to challenge the attorney" and disregard her advice "would nullify the very purpose of seeking the advice of a presumed expert in the first place." *United States v. Boyle*, 469 U.S. 241, 251 (1985). The advice-of-counsel defense is particularly apt to arise in cases where clients are accused of committing crimes in concert with—or at the direction of—their attorneys.

But the advice-of-counsel defense often pits the interests of attorney and client co-defendants against each other. Indeed, the conflict is nearly inevitable. Since the defense requires *the client* to have "disclosed all relevant facts to his attorney," *Eisenstein*, 731 F.2d at 1543-44, establishing the defense will tend to show that *the attorney* was aware of the circumstances that allegedly made the conduct criminal. Likewise, concern about both criminal and civil liability (such as a malpractice claim) creates an incentive for an attorney-defendant to discredit a contention that he *erroneously* advised a client that criminal acts were lawful. The same evidence thus may be *exculpatory* of one defendant and *inculpatory* of the other. This potential for conflict favors severance, as it "presents a heightened

likelihood of antagonistic defenses and a near certainty that a defendant will seek to introduce evidence that incriminates one or more of his co-defendants." *United States v. W.R. Grace*, 439 F. Supp. 2d 1125, 1148 (D. Mont. 2006) (ordering severance where counsel's "attempt to show his innocence must necessarily put him at odds with those he advised").[4]

Still greater dangers arise where the evidence supporting an advice-of-counsel defense appears in the client's prior out-of-court statements. Such cases are not hard to imagine; few people are likely to speak voluntarily with criminal investigators yet withhold that their lawyers said their conduct was lawful. But those cases set up the client for a reverse-*Bruton* trap: Attorney co-defendants may demand that "any reference to [their] existence" be redacted, *Richardson*, 481 U.S. at 211, leaving the client with the near-impossible task of showing advice of counsel without referring to counsel. In such cases, the attorneys' interests are not merely *antagonistic* to the client's interests—they effectively *override* the client's interests by blocking a potentially winning defense. And even if there is other evidence that might support the defense, the client still suffers from the forced redaction. Jurors who hear that a defendant made inculpatory statements to

[4] *See also United States v. Shkreli*, 260 F. Supp. 3d 247, 256 (E.D.N.Y. 2017) (ordering severance where client argued advice of counsel, while attorney argued client defrauded him); *United States v. Alexander*, 736 F. Supp. 968, 998 (D. Minn. 1990) (ordering severance of attorney and client because "[e]ither or both is so likely to suffer some prejudicial consequence").

investigators will naturally conclude that, if the defendant had *actually* consulted with counsel, he surely would have shared that fact with the authorities too.

Beyond the specific context of an advice-of-counsel defense, joint trials of attorneys and clients also raise a heightened risk of prejudice due to inherent differences in their statures. As one court explained, "common sense tells us that an attorney, like a public official, lives in the public eye and thus may well be held to a higher standard of conduct by [a] jury regardless of any cautionary instructions." *United States v. Tsanges*, 582 F. Supp. 237, 241 (S.D. Ohio 1984). Trying attorney and non-attorney defendants together raises an impermissible risk that "the jury might also hold the [non-attorney] defendants to this higher standard because of their association with" the attorney defendant. *Id.* Accordingly, despite "the burden . . . plac[ed] upon the Government and the judicial system by ordering separate trials," it will often be that "justice requires severance." *Id.*[5]

[5] Other joint trials implicating the attorney-client relationship raise similarly grave concerns. For example, when two clients of the same attorney are tried together, one defendant may assert an advice-of-counsel defense based on privileged communications that inculpate the other defendant. Those communications may have "significant exculpatory value" to the first defendant, but admitting them would be "incompatible with [the other defendant's] right to a fair trial." *W.R. Grace*, 439 F. Supp. 2d at 1148. The other defendant would be forced to surrender his privilege, watch as "intimate discussions to which he had been a party" are laid out in open court, and "skittle along behind" his co-defendant rather than "pursu[ing] his own defense." *United States v. Walters*, 913 F.2d 388, 393 (7th Cir. 1990).

For all of these reasons, courts must take special care when considering severance of joint trials between attorneys and their clients. By their nature, those cases present a heightened risk of prejudice that shifts the balance sharply toward severance. That is particularly true where one defendant's ability to assert an advice-of-counsel defense conflicts with another defendant's trial rights. *All* defendants have the fundamental right to mount a complete defense at trial. Courts should not be in the business of choosing some defendants to take the steering wheel and relegating others to the back seat. Once a defendant exercises his right to "pursu[e an] advice-of-counsel defense" at odds with another defendant's interests, the defendants "must [be] provided the option of a separate trial." *United States v. Walters*, 913 F.2d 388, 393 (7th Cir. 1990).[6]

Cases like these also favor *early* severance. Courts considering severance motions generally weigh the risk of prejudice a joint trial poses against the benefits it offers for judicial economy. But where the parties and the court are faced with the prospect of a lengthy trial, judicial efficiency is better served by severing the trial at the outset. Early severance mitigates the risk that "[i]rreconcilable conflicts between the [d]efendants' trial rights could emerge weeks into the proceeding, necessitating retrial of some [d]efendants at a huge cost in terms of time and

[6] *Cf. United States v. White*, 887 F.2d 267, 269 (D.C. Cir. 1989) (reversing conviction because defendant was prejudiced by admission of his privileged communications in support of co-defendant's advice-of-counsel defense).

resources." *W.R. Grace*, 439 F. Supp. 2d at 1148. In those situations, a "joint trial does not serve its intended purpose of promoting judicial economy where there is so great a likelihood of unfair prejudice to at least one [d]efendant." *Id.* The balance of interests lies entirely on the side of severance.

C. The Advice-of-Counsel Defense Is Critical to Promoting Well-Counseled Decisions in Complex Fields

The advice-of-counsel defense is particularly important in our modern economy, where reliance on legal advice is critical to sound decisionmaking and compliance. Increased obstacles to advancing such a defense—like those presented by joint trials of clients and their attorneys—make it riskier for actors in complex fields to rely on legal advice and make well-counseled decisions, to the detriment of entire industries.

The value our legal system attaches to the advice of counsel is undeniable. Indeed, it lies at the heart of the attorney-client privilege—"the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). As the Supreme Court has explained, "full and frank communication between attorneys and their clients" serves to "promote broader public interests in the observance of law and administration of justice." *Id.* "[T]he giving of professional advice to those who can act on it," *id.* at 390—and consequent reliance on that advice by the advised—is an essential part of our legal order.

The right to seek and rely on attorney advice is particularly critical "[i]n light of the vast and complicated array of regulatory legislation confronting the modern corporation" and others involved in highly regulated areas of life. *Upjohn*, 449 U.S. at 392. "[T]he extensiveness and complexity of the laws governing" corporate affairs "have made legal advice a crucial element of [not only] major business decisions," but also of "more mundane kinds of corporate activity." Douglas W. Hawes & Thomas J. Sherrard, *Reliance on Advice of Counsel as a Defense in Corporate and Securities Cases*, 62 Va. L. Rev. 1, 5 (1976).

"[U]nlike most individuals," companies and individuals engaged in complex fields "'constantly go to lawyers to find out how to obey the law,' particularly since compliance with the law in [those fields] is hardly an instinctive matter." *Upjohn*, 449 U.S. at 392 (citation omitted). Indeed, acts the law deems criminal are "often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct" the law permits—and sometimes even encourages. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 (1978); *see Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 889-95 (2007) (recognizing "procompetitive justifications" for vertical price-fixing despite "the risks of unlawful conduct"). As a result, "[q]uestions of compliance . . . are ever present." *SEC v. Spectrum, Ltd.*, 489 F.2d 535, 542 (2d Cir. 1973). That means

"[t]he legal profession plays a unique and pivotal role in the effective implementation of" myriad regulatory schemes central to our economy. *Id.*

Attorney advice is also important to navigating modern anticorruption and public-integrity laws. There is an "intricate web of regulations, both administrative and criminal, governing the acceptance of gifts and other self-enriching actions by public officials." *United States v. Sun-Diamond Growers of Cal.,* 526 U.S. 398, 409 (1999). Those complexities have only grown in light of the Supreme Court's recent interpretation of the bribery laws in *McDonnell v. United States*, 136 S. Ct. 2355 (2016), "which upended the world of political corruption prosecutions," *United States v. Mangano*, No. 16-CR-540, 2018 WL 851860, at *12 (E.D.N.Y. Feb. 9, 2018). The Department of Justice accordingly encourages parties to seek attorney advice for compliance with anti-bribery laws, and it considers the availability of "continuing advice" when determining whether to bring criminal charges.[7]

Likewise, "public and private corporations are the subject of numerous statutes and regulatory regimes that . . . require them to adopt programs designed to ward off internal misconduct." Miriam H. Baer, *Governing Corporate Compliance*, 50 B.C. L. Rev. 949, 951 (2009). Organizations and individuals face

[7] *See* U.S. Dep't of Justice & U.S. Sec. and Exch. Comm'n, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* 59 (Nov. 14, 2012), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf; U.S. Dep't of Justice, *Foreign Corrupt Practices Act* (Feb. 3, 2017), https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act.

"highly punitive consequences" for failing to meet those obligations, including increased risks of prosecution. *Id.* Attorney advice thus plays an integral role in "educat[ing] employees, improv[ing] ethical norms, and detect[ing] and prevent[ing] violations of law." *Id.* at 949.

Given the "increasing exposure of management to potential liability," the advice-of-counsel defense has become a critical means for clients "to prove that [they] acted in good faith or with due care." Hawes & Sherrard, *supra*, at 5, 7 (footnote omitted). The availability of that defense fulfills the fundamental purpose of the attorney-client relationship by encouraging clients to seek—and rely upon—their attorneys' advice. Conversely, "if the public cannot rely on the expertise proffered by an attorney when he renders an opinion on such matters," "the smooth functioning of [regulated industries] will be seriously disturbed." *Spectrum*, 489 F.2d at 542. Clients involved in "complex area[s]" would be "afraid to seek legal advice," resulting in "harm[ful]" decisions made "'in a legal vacuum.'" *Searls v. Sandia Corp.*, No. 1:14-CV-578, 2015 WL 1321517, at *2 (E.D. Va. Mar. 24, 2015).

Given those far-reaching consequences, the risk of frustrating a defendant's advice-of-counsel defense should weigh heavily against trying clients and their attorneys together. Weakening the defense threatens serious consequences for whole sectors that rely on legal advice for day-to-day operations. And it would

work fundamental unfairness against non-lawyer defendants who have no choice but to depend on their attorneys to help them navigate the modern regulatory maze.

D. The Balance of Interests Favors Severance in This Case

The facts here vividly illustrate the perils of trying defendants jointly with their attorneys—and the heightened importance of severance in such cases. David Roberson found himself at the intersection of two highly regulated and complex fields: environmental protection and public-integrity law. Faced with potential environmental cleanup liability, Roberson's employer, Drummond, retained counsel with expertise in the area—Joel Gilbert and Steven McKinney of the law firm Balch & Bingham. To spearhead the company's community outreach efforts, counsel retained a consultant, Oliver Robinson. And because Robinson also served as a part-time state legislator, government anticorruption laws were implicated too.

Given the potential legal landmines littering the terrain, Roberson—who is not a lawyer—understandably sought counsel's assistance. As he later told investigators, Roberson questioned whether the consulting arrangement complied with applicable "'ethics law[,] but determined that the area targeted by the [outreach] campaign was not in Robinson's district.'" Roberson Brief 17 (first alteration in original) (quoting Doc.284 at 3479). Roberson did not simply trust his gut, though. Faced with legal doubts, he did exactly what the law encourages: He consulted attorneys and followed their advice. As he told investigators, "'Roberson had a

conversation with Gilbert about ethics considerations. Roberson wanted to know if it was a problem for him (Roberson) to be associated with the effort because he was a lobbyist. Gilbert later told Roberson that he checked with [public-integrity lawyers at his law firm], and there was no problem with what they were doing.'" *Id.* (quoting Doc.266-2 at 6). That statement was powerful evidence that Roberson acted in good-faith reliance on the advice of counsel and lacked the criminal *mens rea* needed for conviction.

But the jury never heard that evidence. The FBI agent who interviewed Roberson relayed the first part of his statement—that Roberson had "ethics law" qualms and "determined that the area targeted by the [outreach] campaign was not in Robinson's district." At that point, the rule of completeness ordinarily would have allowed Roberson to introduce the remainder of his statement describing his "conversation with [counsel] about ethics considerations" and counsel's advice that "there was no problem." Because Roberson's counsel was also a co-defendant, however, Roberson was barred from introducing those portions of his statement. Instead, to avoid a *Bruton* violation, the prosecution was permitted to redact from Roberson's statement any material suggesting Gilbert's or McKinney's guilt—or indeed "any reference to [their] existence," *Richardson*, 481 U.S. at 211.

As to the attorneys, the redaction was an entirely proper means of protecting their confrontation rights. But it crippled Roberson's advice-of-counsel defense by

omitting any indication that he had resolved his concerns about "ethics law" based on attorney advice. The jury was left with a wholly misleading statement suggesting that Roberson had consulted only his own intuitions about the propriety of his conduct. The exclusion of those exculpatory statements, which were central to Roberson's advice-of-counsel defense, impaired his constitutional right to present a complete defense.

In these circumstances, it was "probably impossible to achieve" a joint trial that would simultaneously allow the government to offer Roberson's inculpatory prior statements, safeguard Gilbert's and McKinney's *Bruton* rights, and honor Roberson's right to present a complete defense. *Childs*, 2006 WL 3257048, at *1. As we have seen, that trilemma will predictably arise whenever attorneys and clients are accused of committing crimes in concert. The answer is not to declare one defendant's rights less important than another's, but to grant them separate trials in which each defendant's rights can be honored. Fundamental fairness requires no less.

Nor do considerations of judicial economy suggest otherwise. To the contrary, the prospect of a long trial (the trial here lasted nearly a month) militated in *favor* of severance. Long-term judicial economy would have been better served by trying the defendants separately from the outset—avoiding the high risk of conflict, re-trial, and substantial motions practice that comes with trying attorneys

and clients together. Because "[e]ither or both" of the defendants are "likely to suffer some prejudicial consequence" in a joint trial of an attorney and client, "the interests of fair trial and long-run judicial economy require a severance." *Alexander*, 736 F. Supp. at 998.

CONCLUSION

The district court's judgment should be reversed.

March 21, 2019

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 4,808 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

s/ Lucas M. Walker
Lucas M. Walker

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I certify that on March 21, 2019, this brief was filed and served on all parties by ECF, and seven paper copies were mailed to the Clerk of the Court by overnight Federal Express.

s/ Lucas M. Walker
Lucas M. Walker