Case No. 23-1278

In the United States Court of Appeals
for the Tenth Circuit

United States of America,
Plaintiff-Appellee,

v.

Lawrence Rudolph,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Colorado
Case No. 1:22-CR-00012-WJM-1
The Honorable William J. Martinez

Brief of Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of over 10,000 lawyers, many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files several amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

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[1] All parties have consented to this filing. No party's counsel authored this brief in whole or in part, and no person or entity other than amici, their counsel, or their members made a monetary contribution intended to fund the brief's preparation or submission.

NACDL has a particular interest in cases that involve the protection of criminal defendants' trial rights, especially the rights protected by Rule 14 of the Federal Rules of Criminal Procedure. NACDL believes that if this Court does not clarify the standard by which district courts should assess Rule 14 motions to sever, district courts will continue to undervalue the prejudice implicated in a particular case, just as the district court did here.

SUMMARY OF THE ARGUMENT

Joint trials threaten a myriad of trial rights, including the constitutional right to confront witnesses, the constitutional right to present a defense, evidentiary rights, and the right to not be punished for a codefendant's misdeeds. To avoid the undue prejudice associated with joint trials, a defendant can move to sever his trial under Federal Rule of Criminal Procedure 14. And district courts should grant those motions if the threat of prejudice outweighs the administrative benefits of a joint trial.

The Tenth Circuit has not provided district courts with a comprehensive statement about the sorts of prejudice posed by

joint trials. Lacking a comprehensive statement, district courts often overlook some of the types of prejudice at issue and erroneously deny defendants' Rule 14 motions to sever.

That is exactly what happened here. Mr. Rudolph moved to sever based on multiple types of prejudice. In denying his motion, the district court considered only one type of prejudice. And even then, the district court included in its decision factors that it should not have considered. Those two errors amount to an abuse of discretion.

But while this case demands vacatur and a new trial, it provides this Court with an opportunity to provide a more comprehensive statement regarding the sorts of prejudice district courts should consider when ruling on Rule 14 motions to sever. Such guidance would help protect defendants' interests under Rule 14. A more comprehensive standard would also ensure that district courts' Rule 14 decisions are not vulnerable on appeal, thereby preserving the administrative benefits of joint trials.

STANDARD OF REVIEW

A district court should grant a Rule 14 motion to sever "if there is a serious risk that 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 v. United States*, 506 U.S. 534, 539 (1993).

A motion to sever under Rule 14 is left to the sound discretion of the trial court, but that discretion is not boundless. This Court should hold that the trial court abused its discretion, and order a new trial, if the trial court "fail[ed] to consider a factor that should have been given significant weight, consider[ed] and g[ave] significant weight to an improper or irrelevant factor, or commit[ed] a clear error of judgment in considering and weighing only proper factors." *United States v. Davis*, 534 F.3d 903, 912 (8th Cir. 2008).

ARGUMENT

This Court's current caselaw does not address the multiple types of prejudice that defendants face when they are subjected to joint trials. *See* Section I. This Court should

articulate a clearer standard so future courts do not commit the same error as the trial court in this case. *See* Section II.

I. This Court has not yet articulated a comprehensive standard for prejudice.

Rule 14 motions to sever implicate at least four types of prejudice, all of which must be considered before ruling on the motion. *See* Section I.A. But this Court has not articulated a comprehensive Rule 14 standard that addresses these many forms of prejudice. So, trial courts routinely and mistakenly deny Rule 14 motions to sever without addressing each possible type of prejudice. *See* Section I.B.

A. Rule 14 motions implicate at least four kinds of prejudice.

A district court should grant a Rule 14 motion to sever "if there is a serious risk that 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 v. United States*, 506 U.S. 534, 539 (1993). Rule 14 does not limit the sort of prejudice district courts should consider, and neither has the Supreme Court. *See* Fed. R. Crim. P. 14 (authorizing severance for any sort of prejudice

to the defendant); *Zafiro*, 506 at 539 (authorizing severance for harm to any trial right of the movant). Caselaw reveals that Rule 14 motions implicate at least four types of prejudice.

1. Prejudice to constitutional confrontation rights.

Joint trials often interfere with a defendant's constitutional right to confront their codefendant(s).

The Sixth Amendment's Confrontation Clause guarantees criminal defendants the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. Joint trials threaten this right when the prosecution introduces an incriminating statement by a codefendant, but the defendant cannot cross-examine the codefendant because the codefendant invokes their Fifth Amendment right to not testify. *See, e.g.*, *Bruton v. United States*, 391 U.S. 123, 127 (1968).

To guard against this prejudice, the Supreme Court fashioned a broad, prophylactic rule: at a joint trial, the prosecution cannot bring a "facially incriminating confession of a nontestifying codefendant." *Richardson v. Marsh*, 481

U.S. 200, 207 (1987) (discussing the holding of *Bruton*). And even if the prosecution redacts certain parts of the statement so it no longer *facially* incriminates the defendant, the prosecution cannot introduce the nontestifying codefendant's statement if it implies the defendant's guilt. *See Gray v. Maryland*, 523 U.S. 185, 194 (1998).

This threat is so great, and the right to confrontation so weighty, that the Supreme Court has held that limiting instructions cannot erase this prejudice. *Bruton*, 391 U.S. at 132 ("Limiting instructions to the jury may not in fact erase the prejudice.").

The only adequate protection against nontestifying codefendant's statements is to 1) sever the trial, or 2) prohibit the admission of the statement. *See id.*

2. Prejudice to the constitutional right to present a defense.

Joint trials also threaten a defendant's constitutional right to present a complete defense, as defendants cannot force their codefendants to testify.

The Sixth Amendment "constitutionalizes the right in an adversary criminal trial to make a defense as we know it." *Faretta v. California*, 422 U.S. 806, 818 (1975). The Amendment "guarantee[s] that a criminal charge may be answered . . . through the calling and interrogation of favorable witnesses." *Id.* Joint trials threaten this right.

At a solo trial, a defendant could compel testimony from any witnesses who could provide relevant testimony. *See id.* And even though alleged collaborators might be inclined to invoke their Fifth Amendment right to not testify, a solo trial presents a way around this: the defendant can move to immunize the collaborator—thereby stripping their Fifth Amendment right to not testify—and compel their testimony. *See United States v. Dalton*, 918 F.3d 1117, 1131 (10th Cir. 2019).

Joint trials present no such opportunity. The defendant cannot use immunization to force a codefendant to take the stand. *See Roach v. Nat'l Transp. Safety Bd.*, 804 F.2d 1147, 1151 (10th Cir. 1986) (noting a defendant has an "absolute

right not to take the stand" at their own trial). At a joint trial, a defendant is necessarily stripped of their ability to compel their codefendants to testify. As this Court has recognized, the inability to call a codefendant to the stand represents a substantial interference with the constitutional right to form a defense and should be avoided where feasible. *See United States v. McConnell*, 749 F.2d 1441, 1445 (10th Cir. 1984) (noting that the inability to a call a codefendant to the stand can justify severance).

3. Evidentiary prejudice.

Joint trials also threaten a defendant's rights under the Federal Rules of Evidence.

For instance, a codefendant might confess to the crime. That statement—even those portions inculpatory to the defendant—would be admissible against the codefendant as an admission and would therefore come in at the joint trial. *See United States v. Yellowhorse*, 86 F.4th 1304, 1308 (10th Cir. 2023). This statement by the codefendant, which is inculpatory of both the defendant and his codefendants, would

not otherwise come in at a solo trial of the defendant. *See* Fed. R. Evid. 801(d)(2) (prosecution can get hearsay admitted under Rule 801(d)(2) only if the declarant is an opposing party). So joint trials threaten the protections that are otherwise afforded to defendants by the Federal Rules of Evidence.

Despite the inherent risk of evidentiary prejudice, this Court has permitted joint trials so long as the district court administered a limiting instruction. For instance, this Court permits district courts to admit admissions against a declarant-codefendant so long as the district court directs the jury to consider it only as to the declarant-codefendant's guilt. *See United States v. Eads*, 191 F.3d 1206, 1210 (10th Cir. 1999). Courts rely on limiting instructions because, as a practical matter, joint trials would be impossible without them. But that does not mean limiting instructions cure all prejudice.

The Supreme Court itself has recognized that limiting instructions have limited value. The Court has held that

limiting instructions cannot cure violations of the Confrontation Clause. *Bruton v. United States*, 391 U.S. 123, 132 (1968) ("Limiting instructions to the jury may not in fact erase the prejudice."); *see also Nash v. United States*, 54 F.2d 1006, 1007 (2d Cir. 1932) (characterizing limiting instructions as mere "recommendation[s] to the jury of a mental gymnastic which is beyond, not only their own powers, but anybody's else" (Hand, J.)). Implicit in that holding is recognition by the Court that while limiting instructions are useful mitigation tools, it should not be presumed that they erase all harm.

Cognitive studies confirm that the Supreme Court is right to question the effectiveness of limiting instructions. One study found that limiting instructions can exacerbate the problem, as they emphasize the prejudicial evidence for the jury, but jurors rarely follow the instruction. Dale W. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 754 (1959).

Limiting instructions have value in joint trials. And if a district court decides to hold a joint trial, the court should

administer limiting instructions liberally to attempt to mitigate the evidentiary prejudice imposed by the joint trial.[2]

But the availability of limiting instructions does not obviate district courts' obligation to consider evidentiary prejudice while ruling on a motion to sever. The above legal and scientific authorities confirm that joint trials pose an inherent risk of evidentiary prejudice, even when the district court administers limiting instructions. District courts should consider this prejudice—just as Rule 14 requires them to consider other kinds of prejudice—when deciding whether to grant a Rule 14 motion to sever.

4. Prejudice by false implication.

Joint trials pose the related risk of prejudice by false implication. Specifically, the risk that jurors may assume that

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[2] Indeed, after his Motion for Severance was denied, Mr. Rudolph sought and received a limiting instruction in this case. (Appellant's App'x vol. 2, p. 331 (Motion for Proposed Curative Instruction); Appellant's App'x vol. 2, p. 339 (Order Granting Proposed Curative Instruction)).

if the codefendant committed a crime, the defendant must have committed one as well. Empirical studies confirm the threat of prejudice by implication.

A study measured the conviction rates for defendants accused of first-degree murder when tried alone versus when they were tried with a codefendant charged with being an accessory-after-the-fact—the exact circumstances of Mr. Rudolph's case. MIKO M. WILFORD, ET AL., *Not Separate But Equal? The Impact of Multiple-Defendant Trials on Juror Decision-Making*, 24(1) PSYCHOLOGY, CRIME & LAW, 14, 18–22 (2018). Certain populations convicted the defendant 49.3% of the time in a solo trial. *Id.* But that conviction rate increased to 75% when he was tried with the codefendant. *Id.* That means holding other variables constant, a defendant is *over 50% more likely* to be convicted in a joint trial. *See id.* That was true even though the study administered a limiting instruction. *See id.* at 28 ("[I]t is clear, as predicted, that instructions fail to eliminate this bias"). These studies indicate that joint trials pose a significant risk of causing

guilt by implication; i.e., assuming one defendant is guilty because his codefendant is.

As of now, trial courts get around this concern by administering instructions, directing the jury to consider each defendant's guilt individually. But as discussed above, these limiting instructions are inadequate. *See above*, pp. 10–11; (explaining how the Supreme Court has recognized the inefficacy of limiting instructions); pp. 11–12 (discussing an empirical study showing bias despite limiting instructions). Because there is a residual risk of prejudice by implication in every joint trial—even when limiting instructions are administered—trial courts should consider this prejudice on the front end, when considering a motion to sever.

B. ***United States v. McConnell*** **addressed only one form of prejudice.**

In deciding to deny Mr. Rudolph's Rule 14 motion, the district court relied on this Court's statement from *United States v. McConnell*. (Appellant's App'x vol. 1, pp. 209–214 (citing 749 F.2d 1441)). But *United States v. McConnell* addresses only one type of prejudice: the defendant's inability

to call his codefendant to testify. *See McConnell*, 749 F.2d at 1445. *McConnell* did not address the other forms of prejudice associated with joint trials, including prejudice to a defendant's confrontation rights, evidentiary prejudice, and prejudice by false implication. *See above*, pp. 5–14. Because it relied on *McConnell*'s narrow discussion of prejudice, the district court overlooked these other forms of prejudice.

And the district court's error is understandable. *McConnell* states that "where a defendant bases his motion for severance upon a claim that he needs a [co]defendant's testimony," seven factors control the inquiry. 749 F.2d at 1445. At first glance, that statement could imply that whenever a defendant moves to sever based on the need for a codefendant's testimony, the motion as a whole turns on the seven *McConnell* factors, even if the defendant's motion to sever is based also on other forms of prejudice. Indeed, that appears to be the district court's understanding, as it denied Mr. Rudolph's Rule 14 motion after considering the *McConnell*

factors, without considering whether other forms of prejudice would infect a joint trial. *See below*, pp. 17–19.

But that reading is an error. *McConnell* involved a motion to sever that was based only on an argument that the defendant would be prejudiced if he could not call his codefendant. *See id.* at 1444 (noting that this prejudice was the only prejudice implicated on appeal). *McConnell* did not address the other factors that may compel severance. When a defendant moves to sever based on multiple types of possible prejudice, the seven *McConnell* factors do not address those other sorts of prejudice. The seven *McConnell* factors may be necessary to properly evaluate a motion to sever, but even they are not sufficient.

II. Without a clearer statement from this Court, district courts will continue to err.

So long as this Court does not issue a comprehensive Rule 14 standard, district courts—like the district court here—will continue to underestimate the possible prejudice from joint trials. *See* Section A. The NACDL proposes a standard that will address all possible prejudice and warn

against impermissible considerations, without conflicting with existing precedent. *See* Section B.

A. The district court's error here.

The district court's error was three-fold. It overlooked types of prejudice that were absent from *McConnell* but at issue in Mr. Rudolph's motion. *See* Section 1. The district court improperly faulted Mr. Rudolph for invoking his Fifth Amendment rights. *See* Section 2. The district court failed to consider that prejudicial statements may be made during opening and closing statements, without the benefit of limiting instructions. *See* Section 3.

1. Failing to consider certain kinds of prejudice.

The district court began by recognizing that "[i]n determining the merits of a motion for severance, 'the court must weigh the prejudice to a particular defendant caused by the joinder against the important considerations of economy and expedition in judicial administration.'" (Appellant's App'x vol. 1, 207 (quoting *United States v. Mabry*, 809 F.2d 671, 681 (10th Cir. 1987) (emphasis added)). The district court then enumerated seven factors that should guide this evaluation,

including "the extent of prejudice caused by the absence of [the codefendant's testimony]." (Appellant's App'x vol. 1, 208 (quoting *McConnell*, 749 F.2d at 1445)).

But the district court did not directly consider all the types of prejudice that Mr. Rudolph would endure if he was forced into a joint trial. The district court considered only:

- the likelihood that Ms. Milliron would testify in a separate trial, (*Id.* at 210–211);
- whether Ms. Milliron's declaration was conclusory, (*Id.* at 211);
- whether Ms. Milliron's testimony had sound factual basis, (*Id.* at 212);
- whether the jury would find Ms. Milliron credible, (*Id.* at 212–213); and
- the administrative costs of severance, (*Id.* 213–214).

At no point did the district court's order consider:

- The harm to Mr. Rudoph's constitutional right to confrontation if he could not cross examine Ms. Milliron.
- The harm to Mr. Rudolph's constitutional right to present a defense if he could not call Ms. Milliron as a witness.
- The harm to Mr. Rudolph's case if the jury were to hear evidence against Ms. Milliron that would have otherwise been inadmissible in a solo trial against Mr. Rudolph.

- The harm to Mr. Rudolph's case if the jury were to assume that the guilt of Ms. Milliron necessarily implied the guilt of Mr. Rudolph.

The district court's error is a symptom of *McConnell*'s broad language. *See above,* pp. 14–16. So long as the Court does not clarify *McConnell*, district courts will be prone to misreading it, and relying exclusively on *McConnell*'s seven factors when deciding a Rule 14 motion, even though *McConnell* did not address the several other forms of prejudice that could infect a case. *See above,* pp. 14–16.

2. Including improper considerations.

It is not just the district court's omissions that give cause for vacatur. In its order denying severance, the district court faulted Mr. Rudolph for invoking his Fifth Amendment right against self-incrimination. (Appellant's App'x vol. 1, p. 212, n.3 (discounting Mr. Rudolph's concerns about the omission of Ms. Milliron's testimony, because that argument "overlooks the fact that *Defendant Rudolph* can also waive his Fifth Amendment privilege against self-incrimination to testify regarding his recollections of certain conversations and the nature of his relationship with Defendant Milliron" (emphasis

in original))). By faulting Mr. Rudolph for not waiving his Fifth Amendment rights, the district court (i) violated the privilege against self-incrimination, and (ii) incorrectly assumed that Mr. Rudolph could testify about the same topics as Ms. Milliron.

i. The district court improperly pressured Mr. Rudolph to waive his Fifth Amendment rights.

In its order, the district court pressured Mr. Rudolph to waive his Fifth Amendment right to not testify.

The Constitution "guarantee[s] that a criminal charge may be answered . . . through the calling and interrogation of favorable witnesses." *Faretta v. California*, 422 U.S. 806, 818 (1975). To be sure, the prosecution does not violate this right just because a codefendant invokes their Fifth Amendment at a joint trial. Still, the right to form a defense is so important that joint trials are disfavored when a defendant would be unable to call a codefendant to testify because the codefendant intends to invoke their Fifth Amendment right to not testify. *See Zafiro v. United States*, 506 U.S. 534, 539 (1993) ("[A] defendant might suffer prejudice if essential exculpatory

evidence that would be available to a defendant tried alone were unavailable in a joint trial.").

Concurrent with the right to present a complete defense, a Defendant has an absolute right to not testify at trial. *Kastigar v. United States*, 406 U.S. 441, 444 (1972). And courts cannot form an adverse inference, or otherwise "penal[ize]" a defendant for his decision to not testify. *Griffin v. California*, 380 U.S. 609, 614 (1965).

The district court offended both these rights while denying Mr. Rudolph's motion to sever. The district court discounted Mr. Rudolph's concerns about the omission of Ms. Milliron's testimony, noting that these concerns "overlook[] the fact that *Defendant Rudolph* can also waive his Fifth Amendment privilege against self-incrimination to testify regarding his recollections of certain conversations and the nature of his relationship with Defendant Milliron." (Appellant's App'x vol. 1, p. 212 n.3 (emphasis in original)).

That reasoning put Mr. Rudolph in an impossible position: he could either (1) waive his Fifth Amendment rights

and testify about what Ms. Milliron said in the bar or (2) forgo his right to include such testimony altogether. Pressuring Mr. Rudolph to waive one right to salvage another in effect imposed an unlawful penalty on Mr. Rudolph's invocation of his Fifth Amendment right to not testify.

In imposing that penalty, the district court "consider[ed] and g[ave] weight to an improper or irrelevant factor[]," thereby abusing its discretion. *United States v. Davis*, 534 F.3d 903, 913 (8th Cir. 2008).

ii. Mr. Rudolph could not have testified to the same facts as Ms. Milliron.

The district court incorrectly assumed that Mr. Rudolph could present a defense without Ms. Milliron's testimony. That incorrect assumption amounts to an abuse of discretion.

At a separate trial, Ms. Milliron would have provided key testimony about two conversations: (1) the conversation between Ms. Milliron and Mr. Rudolph that the bartender overheard; (2) a conversation between Ms. Milliron and a coworker, Anna Grimley. (Appellant's App'x vol. 1, p. 173).

Contrary to the district court's assumption, Mr. Rudolph could not testify about the conversation between Ms. Milliron and Ms. Grimley because he was not present for that conversation. The *only* person who could rebut Ms. Grimley's conversation was Ms. Milliron. And, according to her declaration, she would have rebutted it. (Appellant's App'x vol. 1, p.173 (Ms. Milliron stating that her recollection of the conversation with Ms. Grimley "flatly contradict[s] and is entirely inconsistent with" Ms. Grimley's recollection)).

The district court's reasoning was based on the erroneous view that Mr. Rudolph could testify about conversations about which he had no personal knowledge and was therefore an abuse of discretion. *See United States v. Becerril-Lopez*, 541 F.3d 881, 889 (9th Cir. 2008) (holding that a district court abused its discretion when it admitted testimony by a witness who had no personal knowledge of the matter).

3. Exacerbation during opening and closing arguments.

This Court has recognized that the prejudicial impact of improper evidence is exacerbated when prosecutors emphasize it during their opening and closing remarks.

This Court held that the risk of unlawful prejudice is amplified when prosecutors stress the prejudicial evidence in opening or closing remarks. In *United States v. Hill*, the defendant-appellant challenged the court's decision to admit expert testimony on credibility. 749 F.3d 1250 (10th Cir. 2014). Because the appeal was for plain error, this Court had to consider whether the defendant had shown "a reasonable probability that but for the error claimed, the result of the proceeding would have been different"—which is an even more burdensome standard than is implicated in a Rule 14 motion to sever. *See id.* at 1263. The *Hill* Court emphasized that the prosecution had highlighted the improper evidence during its closing remarks. *Id.* at 1265–66. Based in part on that emphasis, the Court held that the improper evidence had likely prejudiced the defendant, and therefore, vacated the conviction and remanded for a new trial. *Id.* at 1267. *Hill*

shows that the risk of prejudice is enhanced when the prosecution decides to emphasize the prejudicial evidence during its opening and closing remarks. That is exactly what happened here.

In the beginning of its opening statement — in the very first statement the prosecution raised to the jury — the prosecution raised the conversation that occurred in the steakhouse between Mr. Rudolph and Ms. Milliron. (Appellant's App'x vol. 7, pp.1738–1740). And the prosecution ended on this same conversation, again. (Appellant's App'x vol. 19, pp. 4942–4943).

In doing so, the prosecution put the conversation with Ms. Milliron at the center of their strategy. That made it all the more important that Mr. Rudolph have a chance to present testimony from Ms. Milliron about that conversation. And it made it all the more prejudicial when the district court denied severance, effectively denying Mr. Rudolph the opportunity to present testimony from Ms. Milliron. *Cf. Hill*, 749 F.3d at 1265.

But the district court never considered the weight of this possible prejudice. In walking through the *McConnell* factors, the district court never considered the possibility that the prosecution would exacerbate the possible prejudice by emphasizing this conversation during opening and closing. By failing to consider that risk, or failing to reconsider severance when it occurred, the district court overlooked an important aspect of the problem.

The district court's failure is understandable. *United States v. McConnell* leaves open the possibility that district courts can consider factors other than the seven it articulated. *see* 749 F.2d at 1445 (calling the factors relevant, but not asserting that they are conclusive). But so long as this Court does not direct district courts to consider the possible emphasis that the prosecution will place on the prejudicial testimony, district courts will fail to consider this emphasis in their rulings.

* * *

By overlooking the impact of these prejudices on Mr. Rudolph's case, the district court failed to consider an important aspect of the problem. The district court further erred in faulting Mr. Rudolph for exercising his Fifth Amendment rights. And this error was exacerbated by the prosecution's emphasis on prejudicial testimony during opening and closing.

Any one of these failures would, on their own, amount to reversible error. *See United States v. Davis*, 534 F.3d 903, 913 (8th Cir. 2008) (a district court abused its discretion if it "fail[ed] to consider a factor that should have been given significant weight, considers and gives weight to an improper or irrelevant factors."). In the face of all three, a new trial is even more deserved.

B. The proposed standard.

Given the failures that plagued the district court's evaluation of Mr. Rudolph's Rule 14 motion, Mr. Rudolph's conviction needs to be vacated and a new trial ordered. But this Court can help district courts avoid future errors by

articulating a more comprehensive standard than the one set forth in *United States v. McConnell*, 749 F.2d 1441 (10th Cir. 1984). That standard should include at least four parts:

- The Court should recognize the at least four types of prejudice that may infect joint trials. *See above*, pp. 5–14 (discussing the multiple forms of prejudice). By recognizing these multiple types of prejudice, the Court will ensure district courts do not commit the same error as the district court here by focusing on one form of prejudice to the exclusion of others.
- The Court should direct district courts to consider the prejudice that may persist even after the administration of a limiting instruction. Certain forms of prejudice cannot be cured by limiting instructions. To be sure, this Court assumes that limiting instructions are a necessary tool in complex cases. But the Supreme Court's reasoning and empirical studies show that prejudice persists even when district courts administer limiting instructions. The Court should craft a rule that recognizes the possibility of this residual prejudice and gives district courts the chance to account for it in making a holistic determination.
- The Court should direct courts not to penalize defendants for invoking their Fifth Amendment rights to not testify. The district court assumed that Mr. Rudolph was not prejudiced by being unable to call Ms. Milliron because he could just testify to those same facts. But that reasoning pressured Mr. Rudolph to waive his Fifth Amendment right to not testify, and incorrectly assumed that Mr. Rudolph could testify about the same issues as Ms. Milliron. The Court should reaffirm that defendants are still prejudiced when they are denied the right to call a

witness, even if the defendant *could* waive his Fifth Amendment rights and testify in the potential witness's place.

- The Court should direct district courts to consider whether the prosecution intends to emphasize the prejudicial statements during the opening and closing. This Court has elsewhere recognized that otherwise harmless error can demand vacatur if the prosecution emphasizes the statements during opening and closing. *Compare United States v. Hill*, 749 F.3d 1250, 1267 (10th Cir. 2014) (vacating a conviction in part because the prosecution emphasized the statement during closing remarks) *with United States v. Griffith*, 65 F.4th 1216, 1222–23 (10th Cir. 2023) (affirming, in part because the prejudice was lessened when the prosecutors did not emphasize the prejudicial evidence during their closing remarks).

- The Court should reaffirm that trial courts should reconsider their denial of severance if circumstances change during the trial and the threat of prejudice is heightened. This Court has already recognized that "trial courts have a 'continuing duty at all stages of the trial to grant severance if prejudice does appear.'" *United States v. Peveto*, 881 F.2d 844, 857 (10th Cir. 1989) (quoting *Schaffer v. United States*, 362 U.S. 511, 516 (1960)). Reconsideration of a denial of severance is justified if the prosecution emphasizes prejudicial evidence during their opening or closing. *See Hill*, 749 F.3d at 1266 (recognizing that prejudice is heightened if the prejudicial evidence is emphasized during opening or closing). Or if the prosecution introduces evidence not considered by the trial court during its initial denial of severance. *See Nat'l Bus. Brokers, Ltd. v. Jim Williamson Prods, Inc.*, 115 F. Supp. 2d 1250,

1256 (D. Colo. 2000). This Court should reemphasize this continuing obligation for trial courts.

CONCLUSION

District courts have the duty to protect the constitutional rights of the accused even when there is a resulting burden on their dockets. Courts should not rely on joint trials as a tool to alleviate docket pressure in cases such as this when there is undue prejudice to the defendant. And before a district court decides to proceed to a joint trial, the court must evaluate whether the joint trial would unduly prejudice the defendant. The district court below did not properly engage in this inquiry, and therefore Mr. Rudolph's conviction must be vacated.

This case provides this Court with the opportunity to articulate a comprehensive Rule 14 standard that better describes the sorts of prejudice at risk and ensures district courts do not weigh improper considerations in deciding the Rule 14 motions. Such a standard would provide crucial guidance to district courts to ensure that defendants receive a

constitutionally fair trial in those cases in which the government seeks joint trials.

Dated: March 20, 2024

Respectfully submitted,

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Dated: March 20, 2024.

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