No. 11-91

IN THE

Supreme Court of the United States

IAN P. NORRIS

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Third Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a person "corruptly persuades" another by persuading him or her to decline to provide incriminating information where the other person enjoys a privilege or right to decline to provide the information.

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit corporation with more than 12,200 affiliate members in all 50 states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates.

NACDL was founded in 1958 to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and fair administration of justice, with a focus on the role and duties of lawyers representing parties in administrative, regulatory, and criminal investigations. In furtherance of this and other objectives, NACDL files approximately 35 *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal justice issues.[1] NACDL has a particular interest in this case because the decision of the Third Circuit Court of Appeals could interfere with the ability of NACDL's members to represent their clients, pit NACDL's members

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* certifies that counsel of record for both parties received timely notice of *amicus curiae's* intent to file this brief and have consented to its filing in letter on file with the Clerk's office.

against their clients, expose NACDL's members to punishment for fulfilling their ethical duties to clients, and severely undermine the adversarial process essential to fairness in the criminal justice system.

SUMMARY OF ARGUMENT

The context in which the decision below was issued – a prosecution for obstruction of justice through "corrupt persuasion" pursuant to 18 U.S.C. § 1512, and a conviction solely for conspiracy to attempt to obstruct justice through corrupt persuasion – exacerbates and deepens a circuit split that this Court found worthy of a grant of *certiorari* (but did not resolve) in 2005. See *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 702 & n.7 (2005). Under the Third Circuit's decision in this case, a corporate officer, director, or employee can be convicted for obstruction of justice under Section 1512, based on the testimony of counsel and in spite of undisputed evidence that counsel represented the individual as well as the corporation, for discussing, with said counsel, ways in which to head off a criminal investigation. However, this Court has recognized for over a century that this very type of conversation is privileged. See *Alexander* v. *United States*, 138 U.S. 353, 360 (1891) (stating that, had potential client undergone interview with attorney "even for devising a scheme to escape the consequences of his crime, there could be no doubt of its being privileged.").

The critical role played by the attorney-client privilege within the U.S. legal system cannot be gainsaid; this Court has repeatedly recognized the importance of the privilege not just to counsel and their clients, but to the administration of justice as a whole. See *Mohawk Indus., Inc.* v. *Carpenter*, 130

S.Ct. 599, 606 (2009). The attorney-client privilege under federal law is the "oldest of the privileges for confidential communications known to the common law." *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981). Indeed, the privileged nature of communications between an attorney and his client "dates back to the Tudor dynasty at least." *In re Grand Jury Subpoenas*, 454 F.3d 511, 519 (6th Cir. 2006) (citing *Dennis* v. *Codrington*, 21 Eng. Rep. 53 (Ch. 1580); *Onbie's Case*, 82 Eng. Rep. 422 (K.B. 1642)). The privilege "encourages clients to make 'full and frank' disclosures to their attorneys, who are then better able to provide candid advice and effective representation." *Mohawk Indus.*, 130 S.Ct. at 606 (quoting *Upjohn*, 449 U.S. at 389). "This, in turn, serves broader public interests in the observance of law and administration of justice." *Id.* (internal quotation marks and citation omitted).

The Third Circuit's holding – which extended the restrictive five-factor test established in that Court's prior holding in *In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 123 (3d Cir. 1986) ("*Bevill*") to be the *sine qua non* of whether an individual employed by a corporation may assert the attorney-client privilege with respect to conversations with outside counsel for the corporation – effectively eliminates the privilege for such conversations. See *United States* v. *Norris*, No. 10-4658, 2011 WL 1035723 at *4 (3d Cir. Mar. 15, 2011) ("*Norris IV*")[2];

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[2] For the sake of consistency, NACDL adopts and extends the numbering of prior opinions in the instant matter adopted by the District Court below, such that the District Court's opinion on Norris's motion to dismiss the indictment, 719 F. Supp. 2d 557 (E.D. Pa. 2010), is "*Norris I*," the District Court's opinion on Norris's motion to suppress Keany's testimony, 722 F. Supp. 2d 632 (E.D. Pa. 2010), is "*Norris II*," the District Court's opinion

9a-10a.[3] The decision below necessarily destroys the incentives and benefits created by the privilege, and lauded by this Court, that inure to clients, counsel, and the United States legal system as a whole when the privilege is recognized and applied. Even worse, the Third Circuit's ruling renders effective representation of both corporate and individual clients ensnared in a government investigation impossible, and encroaches on the rights embodied in the Sixth Amendment.

In short, the Third Circuit's decision eviscerates the attorney-client privilege. The decision endorses Government efforts to compel counsel to testify against their clients. What's more, when combined with a circuit split that permits defendants in certain parts of the country to be convicted of obstruction for merely attempting to encourage potential witnesses *not to talk* to a grand jury, even where the witnesses are themselves privileged to refuse to speak, the decision below threatens to erect a wall between attorneys and their clients, and thereby strikes at the very heart of our legal system. The Court should grant *certiorari* to once and for all resolve the circuit split recognized in *Arthur Andersen*, and to prevent the inevitable and intolerable burden on the Sixth Amendment, the attorney-client privilege, and the adversarial system created by the Third Circuit's decision.

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on Norris's motion for judgment of acquittal, 753 F. Supp. 2d 492 (E.D. Pa. 2010) is "*Norris III*," and the Third Circuit's opinion is "*Norris IV*."

[3] Citations herein to "__a" refer to the Appendix to the Petition for a Writ of *Certiorari*.

BACKGROUND[4]

On September 28, 2004, a grand jury sitting in the Eastern District of Pennsylvania returned a four-count indictment that charged Ian Norris with: (1) conspiring to fix prices for certain carbon products sold in the United States in violation of the Sherman Act; (2) conspiring to corruptly persuade and attempt to corruptly persuade other persons with the intent of influencing their testimony in an official proceeding, as well as attempting to persuade others to alter and destroy documents; (3) corruptly persuading and/or attempting to corruptly persuade others with intent to influence their testimony; and (4) corruptly persuading others to alter and destroy documents. On March 23, 2010, Norris was extradited to the United States to face the charges in Counts 2-4.[5] See R.178-95.[6]

Prior to the trial, the Government moved for an order permitting Sutton Keany, former counsel to Morgan, to testify at trial. The motion was predicated on Morgan's prior waiver of attorney-client privilege in cooperation with the Antitrust Division of the Department of Justice. As proffered, and as ultimately provided under oath, Keany's testimony was the basis for the Government's

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[4] The record facts recited *infra* are drawn from the proceedings below and set forth in addition to the factual background in the Petition for a Writ of *Certiorari* solely as necessary as context for the arguments presented herein.

[5] Under the United Kingdom's Order for Extradition, the Extradition Act and the extradition treaty between the U.K. and the U.S., Norris could not be prosecuted for the price fixing charge.

[6] Citations to "R." refer to the parties' Joint Appendix in the Third Circuit.

argument that Norris intended to obstruct justice; Keany testified that Norris authorized him to provide certain non-contemporaneous meeting notes to the Antitrust Division, and those notes were later determined to be false. The Government pejoratively termed the meeting notes "scripts," and alleged that the so-called scripts were false and designed to mislead U.S. investigators and conceal the true nature of the alleged price-fixing discussions orchestrated by Morgan. See *Norris II*, 722 F. Supp. 2d at 640; *Norris III*, 753 F. Supp. 2d at 527.

Morganite, a U.S. subsidiary of Morgan, had been served with a subpoena to produce documents on April 27, 1999. R.3177-88. In connection with that subpoena, Morgan retained Keany's firm. R.1507-08. Between August and November 2000, Norris and Keany had a series of conversations related to the investigation generally, as well as the subpoena and the "scripts" specifically. 166a-67a; R.967-68, 1674-75, 1716-19. The summaries were labeled as privileged. R.1716, 1765 3217-44. Based on the Government's proffer, the District Court anticipated that Keany's testimony about these conversations would reveal that: (1) when Keany interviewed Norris and his subordinates in connection with the internal investigation, they all told him the same story they had agreed to tell about their price-fixing meetings; (2) Norris and another Morgan officer authorized Keany to provide the meeting summaries to the Government; and (3) he provided these summaries, later determined to be false, to the Government. See *Norris II*, 722 F. Supp. 2d at 640. The District Court also noted that Keany's testimony was necessary to prove the intent element of the Government's case. See *id.*

The District Court held that Norris had no individual privilege that would bar Keany's testimony given the company's waiver of privilege, and that even if Norris could assert an individual privilege, the crime-fraud exception would apply to permit Keany's testimony. See *id.* at 638-41 & n.3.[7] The District Court applied the five-factor test from the Third Circuit's decision in *Bevill*, 805 F.2d at 123, which requires a valid assertion of attorney-client privilege between an individual and outside corporate counsel to be predicated on proof that: (1) the individual approached counsel for legal advice; (2) when the approach was made, the individual made it clear that s/he was seeking advice in his or her individual, rather than corporate, capacity; (3) counsel saw fit to communicate with the individual in his/her individual capacity; (4) the conversations were confidential; and (5) the substance of the conversations did not concern matters within the

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[7] The District Court did not analyze the crime-fraud exception in detail, but instead noted only that the Government had made a *prima facie* showing that "Norris was intending to commit a fraud and that the attorney-client communications were in furtherance of that crime of fraud." *Norris II*, 722 F. Supp. 2d at 640 n.3. It appears that the District Court believed that Norris's act of authorizing Keany to provide the so-called "scripts" to the Antitrust Division was designed to further Norris's supposed criminal efforts to mislead the Division. However, the District Court did not indicate what evidence had been presented to prove that Norris specifically intended Keany's disclosures to mislead the Government, or why the crime-fraud exception would result in a waiver of privilege for *all* of Norris's communications, as opposed to those specifically designed to further the crime, as required under prior Third Circuit precedent. *See* United States v. *Doe*, 429 F.3d 450, 454 (3d Cir. 2005); *In re Grand Jury Investigation*, 445 F.3d 266, 280 (3d Cir. 2006).

company or the general affairs of the company. See *id.* at 637-38 (quoting *Bevill*, 805 F.3d at 123).

After trial, Norris was convicted on the conspiracy count and acquitted of the two substantive obstruction of justice counts. Norris moved for judgment of acquittal, arguing, *inter alia*, that Keany should never have been permitted to testify because their conversations were privileged. Norris also attacked the fundamental premise of his conviction; namely that he could be convicted of conspiracy to obstruct justice under 18 U.S.C. § 1512(b). The District Court denied Norris's motion, and Norris filed an expedited appeal in the Third Circuit. 4a, 97a. The Court of Appeals rejected Norris's attorney-client privilege in terse terms:

> The District Court in this case held an evidentiary hearing and ultimately determined that Norris failed to meet his burden of asserting his privilege pursuant to the five-factor test set forth in [*Bevill*]. The District Court did not legally err in applying this test, and we see no clear error in the District Court's holding based on the facts elicited at the evidentiary hearing.

Norris IV, 2011 WL 1035723 at *4; 9a-10a.

ARGUMENT

I. THE THIRD CIRCUIT'S DECISION EVISCERATES THE ATTORNEY-CLIENT PRIVILEGE, BURDENS DEFENDANTS' SIXTH AMENDMENT RIGHTS, AND RENDERS IT IMPOSSIBLE FOR OUTSIDE COUNSEL TO FULFILL THEIR ETHICAL DUTIES TO BOTH THE CORPORATION AND ITS OFFICERS

The attorney-client privilege applies to corporations as well as individuals. See *Upjohn*, 449 U.S. at 390. The interposition of the corporate form into the attorney-client context, however, "presents special problems" with which both this Court and the lower federal courts, are regularly confronted. *Commodity Futures Trading Comm'n* v. *Weintraub*, 471 U.S. 343, 348 (1985). In particular, because a corporation can only act through its agents, it "cannot speak directly to its lawyers" and it "cannot directly waive the privilege when disclosure is in its best interest." *Id.* In *Weintraub*, this Court addressed, and resolved in the affirmative, the question of whether a bankruptcy trustee may waive the corporate privilege with respect to pre-bankruptcy communications. See *id.* at 348, 358. As the rulings below demonstrate, the waiver of the corporate privilege in the context of a criminal investigation presents its own "special problems." Unfortunately, the Third Circuit's resolution of those problems nullifies the interests that the attorney-client privilege exists to protect, infringes on the Sixth Amendment right to effective assistance of counsel, and places both outside counsel to corporations that are the subject of an existing or potential criminal investigation, and their clients, in peril.

As the Court recognized in *Weintraub*, the personal attorney-client privileges of individual corporate agents survive the waiver of the corporate privilege. See *id.* at 350. *Weintraub* did not address how to determine the scope of the surviving, individual privilege. In *Bevill*, the Third Circuit addressed that question in a very narrow respect – whether individual corporate agents could "prevent the disclosure of corporate communications with corporate counsel when the corporation's privilege has been waived," and where no evidence of joint representation was presented. 805 F.2d at 124-26. Under those circumstances, the Third Circuit endorsed the five-part test described above. See *id.* at 123.

By its own terms, *Bevill* was never meant to apply to determine the existence of an attorney-client privilege where undisputed evidence of joint representation was presented to the court. Here, however, and in spite of such evidence,[8] the Third

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[8] This evidence included: (1) correspondence from Keany memorializing a conversation with the Government in which he stated that his firm "represents the parent company, its affiliates and its current employees," *see Norris II*, 722 F. Supp. 2d at 636-37; (2) correspondence from Keany to the Government stating that he and his firm "presumptively represent all current employees of the companies in connection with the matter" and advising that if additional employees were to be subpoenaed to testify, Keany "assume[d] that we would also represent those individuals," *see id.* at 636; (3) a memorandum from Keany to Norris stating that, if Norris were contacted by the Government, "[i]t is entirely proper and appropriate for you to simply advise that…you are represented by counsel and expect to cooperate and communicate solely through counsel and that your lawyers are Jerry Peppers, Sutton Keany and Stephen Weiner of Winthrop, Stimson, Putnam & Roberts," *see* R.407; and (4) a letter that Keany provided Norris to hand to U.S. Government officials, if necessary, stating "As you have now

Circuit radically extended the reach of *Bevill* when it held that the five-factor test adopted in that case represents the burden that must be carried to permit assertion of the attorney-client privilege *vel non*. See *Norris IV*, 2011 WL 1035723 at *4; 9a-10a ("Norris failed to meet his burden in asserting his privilege pursuant to the five-factor test set forth in" *Bevill*).

The Third Circuit's extension of *Bevill* upsets established principles of law that govern the scope of the attorney-client relationship, as well as the settled expectations of attorneys and their clients. Every circuit to consider the issue, including the Third Circuit, recognizes the "joint defense" or "co-client" privilege, which extends the traditional attorney-client privilege to protect communications between a lawyer and multiple clients with a common interest. See *F.D.I.C.* v. *Ogden Corp.*, 202 F.3d 454, 461 (1st Cir. 2000); *United States* v. *Schwimmer*, 892 F.2d 237, 244 (2d Cir. 1989); *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 362-63 (3d Cir. 2007); *In re Grand Jury Subpoenas*, 902 F.2d 244, 248-49 (4th Cir. 1990); *In re Auclair*, 961 F.2d 65, 69-70 (5th Cir. 1992); *United States* v. *Evans*, 113 F.3d 1457, 1647 (7th Cir. 1997); *John Morrell & Co.* v. *Local Union 304A*, 913 F.2d 544, 555-56 (8th Cir. 1990); *Cont'l Oil Co.* v. *United States*, 330 F.2d 347, 350 (9th Cir. 1964); *In re Grand Jury Proceedings*, 156 F.3d 1038, 1042-43 (10th Cir. 1998); *United States* v. *Almeida*, 341 F.3d 1318, 1324 (11th Cir. 2003); *In re Sealed Case*, 29 F.3d 715, 719 (D.C. Cir. 1994). Where the

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been informed by our client, Ian Norris, we represent him as his lawyers here in the United States and outside the U.S. This representation specifically includes, but is not limited to, matters of any nature, in connection with any investigation by the U.S. Department of Justice ('DOJ') Antitrust Division." *See* R.409.

co-client privilege exists, it may not be waived without the consent of *all* joint clients; indeed, one of the joint clients may not even unilaterally waive its own privilege with respect to its individual communications with counsel, if said communications relate to other joint clients. See*, e.g.*, *In re Teleglobe*, 493 F.3d at 363 (citing *Restatement (Third) of the Law Governing Lawyers* § 75, cmt. e). This rule serves an identical interest to that noted by this Court in *Upjohn*, albeit applied in a slightly different context; namely, the need to protect the free flow of information from clients with a mutual legal interest to a shared attorney where it is expedient for the clients to have sought and obtained joint representation. See*, e.g.*, *Schwimmer*, 892 F.2d at 243.

The Third Circuit's decision below turns the co-client privilege on its head, and authorizes the invasion of one co-client's (the individual's) privilege unless, *inter alia*, that client can demonstrate that the communications sought to be protected did not relate, in any way, to the other co-client (the corporation). See *Norris IV*, 2011 WL 1035723 at *4; 9a-10a (citing *Bevill*, 805 F.2d at 123 (providing that no privilege exists where the communications at issue "concern matters within the company or the general affairs of the company")).[9] This novel loophole in the attorney-client privilege nullifies the confidentiality that forms the bedrock of the attorney-client relationship, jeopardizes the client's Sixth

[9] Again, this holding was not dictated by *Bevill*, which applies on its face only in situations where there is no evidence of joint representation. In fact, lower courts within the Third Circuit have regularly distinguished *Bevill* on this basis. *See, e.g.*, *In re Benun*, 339 B.R. 115, 124-25 (D.N.J. 2006); *In re Grand Jury*, 211 F. Supp. 2d 555, 559 (M.D. Pa. 2001).

Amendment right to counsel, and renders it impossible, as a practical matter, for outside counsel to competently and ethically represent a corporation faced with a government investigation.

For over a century, this Court has recognized that the "administration of justice" itself depends on the ability of those seeking legal assistance to confide in their attorney without the "apprehension of disclosure." *Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888); see also *Mohawk Indus.*, 130 S.Ct. at 606 (the confidentiality afforded by the attorney-client privilege "serves 'broader public interests in the observance of law and the administration of justice'") (quoting *Upjohn*, 449 U.S. at 389). The Third Circuit's decision eliminates the very confidentiality on which the administration of justice depends. Under *Norris IV*, any communications between outside criminal counsel retained by a corporation and the latter's officers, directors, or employees will not be privileged upon the corporation's waiver of its own privilege if said conversations touch on corporate affairs even generally. Ethical counsel will of course advise the individual corporate officers of this new rule of law. The officers, in turn, will be reluctant to speak to corporate counsel. See *Fisher* v. *United States*, 425 U.S. 391, 403 (1976). As a result of the Third Circuit's decision, the "apprehension of disclosure" which this Court has recognized as threatening to the "administration of justice" will be a constant cloud hanging over discussions between corporate counsel and the company's officers, chilling their ability to cooperate, through full and complete communications, in effectively resisting potential criminal charges. Cf. *Alexander*, 138 U.S. at 360 (where client confers with attorney "even for devising a scheme to escape the consequences of his crime,

there could be no doubt of [the conversation's] being privileged.").

The chilling effect of the decision below will exist even in situations where there is ultimately no conflict between the corporation and its constituent individuals. In some situations, outside counsel will not have detailed information on the scope or nature of an investigation at the outset of the engagement. Thus, outside counsel may be unable to perceive any actual or potential conflict between the corporation and its officers, directors, or employees. Nonetheless, prudent counsel will be obligated to advise the individuals that any conversations related to the corporation may fall outside of the attorney-client privilege depending on the as-yet-unknown course of the investigation.

Exacerbating the problem created by *Norris IV*, criminal counsel has a duty to make reasonable investigations, and the failure to perform such investigations constitutes ineffective assistance of counsel in violation of the Sixth Amendment. See *Strickland* v. *Washington*, 466 U.S. 668, 690-91 (1984); see also *United States* v. *Best*, 426 F.3d 937, 946 (7th Cir. 2005) ("as a general rule an attorney must investigate a case to provide minimally competent professional representation") (internal quotation marks and citation omitted). This Court has noted that whether an investigation is reasonable depends on the attendant circumstances, and is heavily dependent on counsel's conversations with his or her client. See *Strickland*, 466 U.S. at 691. However, because of the fundamental premise that a corporation can speak only through its agents, it "cannot speak directly to its lawyers." *Weintraub*, 471 U.S. at 348. Instead, the corporation must speak through its officers, directors, or employees. See *id.*

Norris IV presents criminal counsel retained by a corporation with an insoluble Catch-22. For the attorney to competently represent the corporation, he must speak to the officers, directors, and relevant employees to determine the proverbial 'who, what, when, where, why, and how' and determine if further investigation is warranted. At the very outset, however, he must also advise the very individuals from whom he is seeking this information that anything they disclose may ultimately be turned over to the Government (or, as in Norris's case, testified to under oath during their criminal prosecution), regardless of how little the attorney may know about the actual scope of the investigation or its likely target.

Rather than fostering the trust and solidarity that are the lifeblood of the attorney-client relationship, *Norris IV* immediately places corporate counsel and his client's officers, directors, and employees at odds. This Court has recognized that the Sixth Amendment right to effective assistance of counsel also contains a concomitant right to representation unimpaired by conflicts of interest or divided loyalties. See*, e.g.*, *Strickland*, 466 U.S. at 688 ("Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest."); *Ferri* v. *Ackerman*, 444 U.S. 193, 204 (1979) (defense counsel's "principal responsibility is to serve the undivided interests of his client"). Indeed, this Court has found the "evil" occasioned by an attorney's conflict of interest between joint clients to be so serious, and so prejudicial, to warrant a finding that such a conflict rises to the level of a constitutional violation in and of

itself. See *Holloway* v. *Arkansas*, 435 U.S. 475, 489-90 (1978).

The Third Circuit's decision renders such conflicts inevitable in any contemplated joint representation of a corporation and its officers, directors, and employees in connection with a criminal investigation and/or ultimate prosecution, and thus renders joint representation impossible. On its terms and as a necessary result of any corporate waiver of privilege, *Norris IV* requires disclosure of all communications that touch on any aspect of corporate affairs, notwithstanding the existence of an individual attorney-client relationship between corporate counsel and a given officer, director, or employee. As a result, the very information required to conduct an investigation to advance counsel's representation of the company immediately places the individual corporate agents in criminal jeopardy.

If the attorney undertakes a joint representation and learns inculpatory information related to, for example, the corporation's CEO, the attorney is presented with an instant conflict of interest. Under the circumstances, the attorney may feel obligated to refrain from cooperating with the Government on behalf of the company, for fear that doing so will lead, inexorably, to the prosecution of the attorney's individual client. That conflict alone is sufficient to implicate a potential Sixth Amendment violation. See *Holloway*, 435 U.S. at 490 ("the evil…is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process") (emphasis in original). Such is the inevitable result of the refusal to honor the co-client privilege, a result that was foreseen (and avoided through recognition of the privilege) by the Fifth Circuit in analogous

circumstances nearly twenty years ago. See *In re Auclair*, 961 F.2d at 70 (to refuse to recognize a joint privilege for pre-engagement consultation with counsel "would present a conundrum whose only acceptable resolution would be that a lawyer may *never* meet with more than one potential client") (emphasis in original).[10]

This very conundrum is what now faces any attorney retained to represent a corporation in connection with a criminal investigation or indictment. The only viable solution would render it practically impossible for counsel to the corporation to effectively assist his client, and would result in the proliferation of counsel for each individual officer, director, or employee of the corporation, at tremendous (perhaps crippling) expense. The decision below stands apart from centuries of precedent establishing that the foundation of our entire system of justice is predicated, at least in part, on the sacrosanct nature of the attorney-client privilege. Instead, *Norris IV* renders suspicion and circumspection between attorney and client, rather than "full and frank [disclosure]," see *Upjohn*, 449 U.S. at 389, the only prudent course in the case of a criminal investigation of a corporation. As a result of the posture in which the Third Circuit's decision places corporate counsel and the corporation's agents, *Norris IV* has the separately pernicious effect of making it impossible for counsel to discharge their

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[10] Indeed, the process of leveraging a criminal investigation to obtain a waiver of privilege from one client and then force counsel to testify about matters that a second client believed were communicated to counsel in confidence resembles the Star Chamber, rather than our criminal justice system. *See Pennsylvania* v. *Muniz*, 496 U.S. 582, 596 (1990).

constitutional and ethical duties, and undermines the privacy of communications with counsel that has been called the "essence of the Sixth Amendment right." *United States* v. *Rosner*, 485 F.2d 1213, 1224 (2d Cir. 1973) (citing *Glasser* v. *United States*, 315 U.S. 60 (1942)).

II. THE THIRD CIRCUIT'S DECISION UNDERMINES THE ADVERSARY PROCESS ON WHICH OUR CRIMINAL JUSTICE SYSTEM IS BASED

The Third Circuit, in addition to expanding the reach of *Bevill*, also affirmed the District Court's employment of a novel "conduit" theory of liability for obstruction of justice. This holding is likely to have equally far-reaching effects.

According to the District Court, a defendant may be convicted of violating 18 U.S.C. § 1512(b)(1) upon proof that the defendant used his attorney as a "conduit" to obstruct grand jury proceedings. See *Norris III*, 753 F. Supp. 2d at 505. However, the most that Norris's counsel can credibly be said to have conveyed to the Antitrust Division and, subsequently, to the grand jury, is truthful, albeit incomplete, information. See Pet. for a Writ of *Certiorari* ("Pet.") at 34-35.[11]

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[11] Exactly how the information was conveyed to the grand jury remains unclear. Petitioner argued below that the Government failed to establish the necessary nexus between any allegedly false information provided by Keany to the Antitrust Division and any witness's testimony before the grand jury. *See* Pet. at 38 (citing *United States* v. *Aguilar*, 515 U.S. 593, 600-01 (1995)). In rejecting this contention, the District Court stated its "conduit" theory without analysis of how the so-called "scripts" obstructed the grand jury, while at the same time acknowledging that a nexus between the alleged obstruction and an official proceeding was required. *See Norris III*, 753 F. Supp.

Forceful and vigorous advocacy is the duty of the lawyer, the right of the client, and the foundation of our adversarial system of justice. That system "is premised on the well-tested principle that truth – as well as fairness – is best discovered by powerful statements on both sides of the question" (internal quotation marks and citation omitted). *Penson* v. *Ohio*, 488 U.S. 75, 84-85 (1988). Especially in the context of criminal representation, zealous advocacy is not simply an aspirational goal, but a constitutional mandate. See *Strickland*, 466 U.S. at 689. Under the Rules of Professional Conduct, defense attorneys must take any and all possible actions, within the bounds of law and ethics, to vindicate their clients. See Model Rules Prof'l Conduct R. 1.3 cmt. 1. As part and parcel of this obligation, criminal defense attorneys must act in opposition to the government. See *Ferri*, 444 U.S. at 204. Accordingly, as the First Circuit has recognized, "[i]t is not enough [to pierce the attorney-client privilege] that the lawyer's work posed an obstacle to the grand jury; perfectly legitimate representation may do this." *In re Grand Jury*, 417 F.3d 18, 24 (1st Cir. 2005). In a very real sense, "obstruction" is the obligation of the zealous defense attorney. See*, e.g.*, Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1288 (1975) ("Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client's cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty.").

2d at 505-07. The Third Circuit, similarly, did not address the nexus requirement. *See Norris IV*, 2011 WL 1035723, at *1-*5; 1a-10a.

It is impossible to harmonize the Third Circuit's "conduit" theory with our adversarial system. As this Court noted in *Arthur Andersen*, it is not "corrupt persuasion" within the meaning of Section 1512 for an attorney to persuade a client "'with intent to…cause' that client to 'withhold' documents from the Government," even if the attorney "surely intended that his client keep those documents out of [the Government's] hands." 544 U.S. at 704. Implicit in this Court's observation (perhaps because the Court felt it too obvious to require explicit treatment) were the facts that defense counsel plays a critical role in our adversary system of justice and that a defendant cannot constitutionally be required to implicate himself in a crime. See U.S. Const. amend. V. *A fortiori*, the principle recognized in *Arthur Andersen* applies with equal force regardless of whether the attorney is viewed as a "conduit" for information from the defendant. In either case, the Government should not be permitted to prosecute a defendant based on counsel's strategic decisions with respect to the timing and content of information that is shared with investigators or prosecutors.

The Third Circuit's decision, in holding that criminal defense attorneys can legally serve as conduits for their clients' alleged efforts to obstruct grand jury investigations, further exacerbates and complicates the circuit split that led to the grant of *certiorari* in *Arthur Andersen* and which has persisted since. See Pet. at 28-29. Now, in addition to the Second and Eighth Circuits, which have held that "corrupt persuasion" means persuasion for an "improper purpose," including the hindering of an investigation, the Third Circuit has held that, while persuading someone to withhold testimony entirely is not "corrupt," persuading them, through counsel, to

provide incomplete testimony if not otherwise prompted *is* corrupt. See *Norris IV*, 2011 WL 1035723, at *4; 8a.

From the perspective of outside counsel, the Third Circuit's new rule will inevitably chill the zealous advocacy that it is their duty to provide. Inherent in advocating for one's client is counsel's ability to address factual gray areas, and to shade those areas for his client's benefit, as well as to advocate for his client's divergent, but *bona fide*, recollection of events in contrast to that proposed by the Government. In effect, *Norris IV* requires counsel to advise their client(s) to either invoke the Fifth Amendment on a blanket basis, or risk a charge of conspiracy to obstruct justice if any information provided to the Government turns out to be viewed by the prosecutor, with the benefit of hindsight, as less than completely forthcoming.

This expansion of the obstruction statute, which continues to be applied by certain circuits in a method that has accurately been described as "circular," see *United States* v. *Doss*, 630 F.3d 1181, 1189 (9th Cir. 2011), only serves to provide additional avenues through which Section 1512 can and will be expanded to conduct it was not designed or intended to reach; the history of obstruction prosecutions demonstrates that the Government will not eschew the opportunity to pursue broad and novel theories upon which to convict. See Pet. at 36-37 (citations omitted). In the absence of definitive guidance from this Court, the split between the circuits is bound to persist, and, due to *Norris IV*, to chill what previously could only have been considered zealous advocacy on behalf of criminal defendants.

CONCLUSION

The Third Circuit's extension of *Bevill* to all claims of attorney-client privilege by an agent of a corporation after that corporation's waiver of its own privilege, regardless of the evidence of joint representation, coupled with the "conduit" theory of liability the Third Circuit endorsed, impermissibly infringes on the Sixth Amendment right to effective assistance of counsel, creates insoluble conflicts between outside criminal counsel to corporations and their clients, and transmutes common aspects of defense advocacy into crimes that may be imputed to the client.

This Court should grant *certiorari*, reverse the erroneous conviction below, and reaffirm over a century of precedent in this Court holding that the preservation of the attorney-client privilege, the right to effective assistance of counsel, and the zealous advocacy of said counsel are essential to the proper administration of justice in the United States.

Respectfully submitted,

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