# EXHIBIT 2

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF INDIANA**
**HAMMOND DIVISION**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff, | ) | No. 2:16-cr-00160-GSL-JEM |
| | ) | |
| v. | ) | |
| | ) | Hon. Gretchen S. Lund |
| JAMES E. SNYDER, | ) | |
| | ) | |
| Defendant. | ) | |

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT JAMES E. SNYDER'S MOTION FOR NEW TRIAL**

**BARNES & THORNBURG LLP**

Joshua J. Minkler (Atty. No. 18483-49)
Neal A. Brackett (Atty. No. 31236-49)
J. Taylor Kirklin (Atty. No. 35474-49)
Jordan M. Oliver (Atty. No. 36922-49)
Barnes & Thornburg LLP
11 South Meridian Street
Indianapolis, IN 46204
Telephone: 317-236-1313

*Attorneys for Defendant James E. Snyder*

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## INTRODUCTION

Based on the law, as well as basic principles of justice and fundamental fairness, this Court should grant Defendant James Snyder a new trial on Count 4, in which the Government charged Mr. Snyder with corruptly interfering with the administration of the Internal Revenue laws in violation of 26 U.S.C. § 7212(a) (the "tax count").[1]

Mr. Snyder's trial on the tax count was joined with Counts 1 and 3 (the "§ 666 counts"), in which the Government alleged that he illegally accepted money, in violation of 18 U.S.C. § 666, in connection with his official duties as Mayor of the City of Portage. As a result of that joinder, the jury was exposed to extensive testimony and exhibits relating to the § 666 counts that never would have been admissible at trial on the tax count alone. Moreover, the appellate litigation following trial has completely changed the complexion of this case. As the Supreme Court's decision last year made clear, the conduct for which Mr. Snyder was charged under 18 U.S.C. § 666 was not a federal crime. Yet despite that, ***nearly 90% of the trial*** was devoted to evidence and testimony on the § 666 counts. Based on the extraordinary circumstances of this prosecution and the Supreme Court's decision following trial, this Court should grant Mr. Snyder a new trial on the tax count based on prejudicial spillover and/or retroactive misjoinder from the § 666 counts.

Mr. Snyder is also entitled to a new trial based on the Government's *Brady* violations. The Government's proof on the tax count focused on IRS Form 433-A (Collection Information Statement for Wage Earners and Self-Employed Individuals). The Government contended that Mr.

[1] The Counts in the Indictment against Mr. Snyder are identified as Counts 1, 3, and 4. ECF No. 1. Co-defendant John Cortina was charged separately in Count 2. *Id.* At Mr. Snyder's trial, the Counts against him were presented to the Jury as 1, 2, and 3. *See, e.g.*, ECF No. 322 at n.1 (Order, explaining this renumbering). The Presentence Report (PSR), however, defaulted to the numbering in the original Indictment. *See* ECF No. 641 at 2 (identifying the tax count as "Count 4"). To avoid confusion, throughout this brief, Mr. Snyder uses the numbering from the Indictment and PSR.

Snyder failed to disclose wage income information for business entities (GVC Mortgage and SRC) on Forms 433-A submitted on his behalf. At trial, however, the IRS agent who served as the Government's primary witness on the tax count agreed that the Forms 433-A admitted into evidence had markings that indicate there were additional documents included as attachments. Those attachments have never been provided to Mr. Snyder—and there is significant reason to believe that the attachments contain exculpatory information that will show Mr. Snyder disclosed to the Government the information he is accused of concealing. The Government's failure to produce the attachments to the forms implicates *Brady* and is independent ground for a new trial on the tax count.

* * *

Courts grant defendants new trials under the doctrine of retroactive misjoinder in limited circumstances where some post-conviction development renders the original trial unfair. It is relief that is extraordinary, but necessary, as the basis that justifies this relief only manifests itself well after the original trial has concluded.

Mr. Snyder was indicted nine years ago and tried nearly seven years ago, and he understands the Government (and perhaps the Court) are weary of the motion and appellate practice that has followed the trial phase. Rest assured, Mr. Snyder experiences the same fatigue every day. But the Government wants to send Mr. Snyder to prison. His liberty is at stake. And he is set to be sentenced on a conviction that resulted from a trial marred by prejudicial spillover, including testimony by Mr. Snyder's own brother on the § 666 counts, and prosecutorial gamesmanship.

Relief for retroactive misjoinder is relatively uncommon. But, as detailed below, the doctrine exists for precisely this sort of situation. There is no time bar on a defendant's right to a

fair trial. The interests of justice require that Mr. Snyder be granted a new, fair, standalone trial on the tax count—untainted by the prejudicial spillover from the § 666 counts.

## I. Background and Relevant Procedural History

In November 2016, the Government sought and obtained an Indictment against Mr. Snyder, the Mayor of the City of Portage, Indiana, for violating 18 U.S.C. § 666, relating to the City's towing contract (Count 1) and purchase of garbage trucks (Count 3). ECF No. 1.

The tax count, Count 4 of the Indictment, also charged Mr. Snyder with corruptly obstructing the federal revenue laws, in violation of 26 U.S.C. § 7212(a). In the tax count, the Government accused Mr. Snyder of attempting to impede the IRS's collection of unpaid business taxes—money that Mr. Snyder paid to his employees instead of the IRS. The heart of the Government's theory on the tax count is that in 2010, 2011, and 2013, Mr. Snyder signed and caused to be submitted to the IRS three Forms 433-A that did not disclose sources of income and the existence of assets that he controlled. *See* ECF No. 1 at 14–15.

Mr. Snyder's first trial began in January 2019. *See* ECF No. 218. The Government overwhelmingly focused its efforts on the § 666 counts throughout the trial. Of the 15 days of trial that involved presentation of evidence, 13 of those days (87%) were devoted to the § 666 counts. Likewise, 16 of the 18 witnesses called by the Government (89%) testified solely on matters relating to the § 666 counts.

By the third day of trial, Judge Van Bokkelen expressed serious doubts about the Government's theory on the tax count. The Court stated that "[The tax count] gives me heartburn to start off with . . ." and that it "[had] some problems with that count." ECF No. 231 at 50–51 (Trial Tr. Vol. 3, 1/16/2019). While Judge Van Bokkelen ultimately decided to "let [the tax count] play out," he suggested that maybe, in the end, "that count may be gone." *Id.* at 51.

The first trial resulted in Mr. Snyder being acquitted of Count 1 and convicted on Counts 3 and 4. Mr. Snyder then filed a motion for new trial. ECF No. 263. The Court granted that motion in part, ordering that Mr. Snyder be re-tried on Count 3 (the § 666 count relating to the garbage trucks). ECF No. 322. The second trial took place in 2021 and resulted in Mr. Snyder being convicted on Count 3. ECF No. 508. Mr. Snyder appealed the convictions. ECF No. 569 (Notice of Appeal as to Judgment relating to Counts 3 & 4, ECF No. 567).

In 2024, the Supreme Court reversed Mr. Snyder's conviction on Count 3. *Snyder v. United States*, 603 U.S. 1 (2024). The Supreme Court observed that the Government had pursued a theory of bribery that suffered from a "phalanx of difficulties" the Government could not square with the statutory language of 18 U.S.C. § 666 and chided the Government for "adopt[ing] an interpretation of § 666 that would radically upend gratuities rules and turn § 666 into a vague and unfair trap for 19 million state and local officials" like Mr. Snyder. *Id.* at 18–19.

On remand, the Seventh Circuit allowed the Government the opportunity to retry Mr. Snyder on Count 3 under a bribery-only theory. *See United States v. Snyder*, No. 21-2986, 2024 WL 4834037, at *2 (7th Cir. Nov. 20, 2024).[2] In its recent status report, the Government represented to the Court that it intends to "move to dismiss Count 3" following sentencing on the tax count. ECF No. 634 at 4.

[2] The Seventh Circuit held that it "do[es] not intend to foreclose a future challenge to the indictment," but held that a new trial on Count 3 would be permissible if the Government opted to pursue it. *Snyder*, 2024 WL 4834037, at *1. Here, it is likely the Government presented Count 3 to the grand jury based on a gratuity theory. *See United States v. Cusimano*, 148 F.3d 824, 829 (7th Cir. 1998) ("A constructive amendment to an indictment occurs when either the government (usually during its presentation of evidence and/or its argument), the court (usually through its instructions to the jury), or both, broadens the possible bases for conviction beyond those presented to the grand jury."). This Motion is filed without prejudice to that argument and other possible challenges to the indictment.

## II. This Court Should Grant Mr. Snyder a New Trial on the Tax Count

Federal Rule of Criminal Procedure 33 provides, "Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). And a "trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear." *Schaffer v. United States*, 362 U.S. 511, 516 (1960). The interests of justice warrant a new trial on the tax count.

In addition, Mr. Snyder was denied material exculpatory evidence that was required to be produced under *Brady* and its progeny when the Government failed to produce the attachments to the Forms 433-A that were admitted into evidence.

### A. Mr. Snyder Is Entitled to a New Trial Based on Prejudicial Spillover and Retroactive Misjoinder

Rule 8 provides that the indictment "may charge a defendant in separate counts with 2 or more offenses if the offenses charged—whether felonies or misdemeanors or both—are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan." Fed. R. Crim. P. 8(a).

But the Government's strategic decision to join multiple counts together in a single trial brings with it a concomitant risk: if some of the counts are invalidated on appeal, the defendant may be entitled to a new trial on the remaining counts. That is the case here.

#### 1. Courts Must Safeguard Against Prejudicial Spillover and Misjoinder

"Retroactive misjoinder arises when joinder of multiple counts was proper initially, but later developments render the initial joinder improper." *United States v. Aldrich*, 169 F.3d 526, 528 (8th Cir. 1999) (quoting *United States v. Jones*, 16 F.3d 487, 493 (2d Cir. 1994)) (cleaned up, other citations omitted).

"When an appellate court reverses some but not all counts of a multicount conviction, the court must determine if prejudicial spillover from evidence introduced in support of the reversed count requires the remaining convictions to be upset." *United States v. Aiello*, 118 F.4th 291, 305 (2d Cir. 2024), *cert. denied sub nom. Ciminelli v. United States*, 145 S. Ct. 2814 (2025) (quoting *United States v. Rooney*, 37 F.3d 847, 855 (2d Cir. 1994)). *See also United States v. Boswell*, 109 F.4th 368, 382–83 (5th Cir. 2024), *cert. denied*, 145 S. Ct. 780 (2024) (citing *United States v. Edwards*, 303 F.3d 606, 639 (5th Cir. 2002)); *see generally Schaffer*, 362 U.S. at 514 (weighing propriety of joinder following dismissal of one count).[3] This issue often arises in multi-defendant cases but applies in single defendant cases, as well. *United States v. Lazarenko*, 564 F.3d 1026, 1044 (9th Cir. 2009) ("We . . . clarify that the doctrine of prejudicial spillover or retroactive misjoinder may apply to a case where there is only one defendant.").

"The Seventh Circuit . . . is consistent with [other] circuits in recognizing that there are circumstances where charges in a trial must be severed to avoid prejudice." *Lazarenko*, 564 F.3d at 1044 (discussing *United States v. Holzer*, 840 F.2d 1343 (7th Cir. 1988) in context of challenge based on prejudicial spillover and retroactive misjoinder) (also citing *United States v. Vebeliunas*, 76 F.3d 1283, 1293–94 (2d Cir. 1996) & *Aldrich,* 169 F.3d at 528).[4] In *United States v. Peterson*,

[3] *See also United States v. Mubayyid*, 658 F.3d 35, 72 n.39 (1st Cir. 2011) (citing *United States v. Deitz*, 577 F.3d 672, 693 (6th Cir. 2009)); *United States v. Murphy*, 323 F.3d 102, 118 (3d Cir. 2003); *United States v. Prosperi*, 201 F.3d 1335, 1345 (11th Cir. 2000).

[4] In *Holzer*, the Seventh Circuit held that "[n]o rule of evidence is violated by the admission of evidence concerning a crime of which the defendant is acquitted, provided the crime was properly joined to the crime for which he was convicted and the crimes did not have to be severed for purposes of trial." 840 F.2d at 1349. While *Holzer* cited earlier decisions that declined to recognize retroactive misjoinder, *see id.* at 1349–50 (citing *United States v. Schwartz*, 787 F.2d 257, 264 (7th Cir. 1986); *United States v. Dounias*, 777 F.2d 346, 348–49 (7th Cir. 1985) *United States v. Velasquez*, 772 F.2d 1348, 1356 (7th Cir. 1985)), it acknowledged that there are "possible exceptions" in which retroactive misjoinder might apply. *Id.* at 1349. *See also United States v. Black*, 625 F.3d 386, 390 (7th Cir. 2010) ("If a count is submitted to the jury under an instruction

the Seventh Circuit explained, "one way in which joinder may result in actual prejudice is by creating a 'spill-over effect'—that is, that the jury relies on evidence presented on one set of counts when reaching a conclusion on the other set." 823 F.3d 1113, 1124 (7th Cir. 2016) (quoting *United States v. Ervin*, 540 F.3d 623, 629 (7th Cir. 2008)) (internal quotation marks omitted, cleaned up).

If the defendant raises this issue, "[the] court must determine whether evidence admitted to support a reversed count prejudiced the remaining counts to warrant their reversal." *United States v. Hornsby*, 666 F.3d 296, 311 (4th Cir. 2012) (citing cases). As the Second Circuit has explained, "to invoke retroactive misjoinder, a defendant must show compelling prejudice." *Vebeliunas*, 76 F.3d at 1293 (quoting *Jones*, 16 F.3d at 493) (cleaned up); *accord Lazarenko*, 564 F.3d at 1043 (quoting *Vebeliunas*). *See also Peterson*, 823 F.3d at 1124 ("To show prejudicial spillover, a defendant 'must overcome the dual presumptions that a jury will capably sort through the evidence and will follow limiting instructions from the court to consider each count separately.'") (quoting *United States v. Turner*, 93 F.3d 276, 284 (7th Cir. 1996)). "Prejudicial spillover from evidence used to obtain a conviction subsequently reversed on appeal may constitute compelling prejudice." *Vebeliunas*, 76 F.3d at 1293 (quoting *Jones*); *accord Lazarenko*, 564 F.3d 1026, 1043.

The overarching question is "whether the totality of the circumstances requires reversal of some or all of the remaining counts." *Rooney*, 37 F.3d at 855. Other circuits have identified specific factors that warrant consideration in evaluating a claim of prejudice based on an invalidated count. *Id.* The Second Circuit, for instance, looks at "(1) whether the evidence introduced in support of the vacated count 'was of such an inflammatory nature that it would have tended to incite or arouse

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apt to poison the jury's consideration of other counts as well, the defendant may be entitled to a new trial.").

the jury into convicting the defendant on the remaining counts,' (2) whether the dismissed count and the remaining counts were similar, and (3) whether the government's evidence on the remaining counts was weak or strong." *United States v. Hamilton*, 334 F.3d 170, 182 (2d Cir. 2003) (quoting *Vebeliunas*, 76 F.3d at 1294) (other citations omitted). The Third Circuit considers whether "(1) the charges are 'intertwined with each other'; (2) the evidence for the remaining counts is 'sufficiently distinct to support the verdict' on these counts; (3) the elimination of the invalid count 'significantly changed the strategy of the trial'; and (4) the prosecution used language 'of the sort to arouse a jury.'" *United States v. Murphy*, 323 F.3d 102, 118 (3d Cir. 2003), *as amended* (June 4, 2003) (quoting *United States v. Pelullo*, 14 F.3d 881, 897–98 (3d Cir. 1994)) (internal quotation marks omitted). These factors have been widely employed by courts in other circuits in assessing whether prejudicial spillover warrants a new trial. *E.g.*, *United States v. Abdelaziz*, 68 F.4th 1, 62 (1st Cir. 2023) (applying Second Circuit factors) (citing *Hamilton*, 334 F.3d at 182); *United States v. Correia*, 55 F.4th 12, 38 (1st Cir. 2022) (applying Third Circuit factors); *Lazarenko*, 564 F.3d at 1044 (noting Second Circuit's factors "reasonably address concerns about prejudicial spillover") (citing *Vebeliunas*, 76 F.3d at 1294); *United States v. Verrusio*, No. 09-CR-00064 (BAH), 2017 WL 2634638, at *7 (D.D.C. June 19, 2017), *aff'd*, 758 F. App'x 2 (D.C. Cir. 2019) (applying Second Circuit factors).

"If [the defendant] makes this showing, then [the Court] must order a new trial on all remaining counts free of the evidentiary taint." *United States v. Hart*, 91 F.4th 732, 741 (4th Cir. 2024). *See also Abdelaziz*, 68 F.4th at 60–62.

**2. Looking at the Totality of the Circumstances and Relevant Factors, This Court Should Grant Mr. Snyder a New Trial**

The extraordinary facts of this case present exactly the situation that warrants a new trial based on prejudicial spillover and retroactive misjoinder.

***a. The § 666 counts and Tax Counts Are Dissimilar and the Evidence on the § 666 Counts Would Not Have Been Admissible on the Tax Count***

The § 666 counts and tax counts shared no proper evidentiary nexus, and the overwhelming volume of gratuity evidence—admitted only because the counts were joined—created the material risk that the jury convicted Mr. Snyder on the tax count based on association, not proof.[5]

The only legal intersection between the tax and the § 666 counts was the level of intent. To convict Mr. Snyder of violating § 666, the Government had to show that he acted "***corruptly*** . . . intending to be influenced or rewarded in connection with any business, transaction, or series of transactions." 18 U.S.C. § 666(a)(1)(B) (emphasis added). And to convict Mr. Snyder of violating § 7212, it had to show that Snyder acted "***corruptly*** . . . endeavor[ing] to obstruct or impede, the due administration" of tax revenue laws. 26 U.S.C. § 7212(a) (emphasis added). That is, these counts required the government to prove that Mr. Snyder acted with some culpable state of mind.

At trial, Mr. Snyder argued that he lacked this mental state and had instead acted in good faith. *See* ECF No. 361 at 150 (Trial Tr. Vol. 17, 2/12/2019). In response, the Government relied on Rule of Evidence 801(d)(2)(E) to introduce evidence of culpable intent by other people, such as John Cortina (body shop and tow yard owner) and Scott Jurgensen (tow truck owner). That maneuvering created a pervasive risk of prejudicing the jury's assessment of Mr. Snyder's own intent. For example, the Government introduced (over objection) a call between Cortina and Jurgensen in which Cortina told Jurgensen that if he paid Snyder, they could get on the tow list. *See* ECF No. 379 at 82 (Trial Tr. Vol. 10, 2/1/2019); Government's Exhibit 52A.

[5] It would be impractical to identify every piece of the trial record relevant to this argument. The examples cited herein are illustrative, not exhaustive. Mr. Snyder expressly reserves the right to reference additional evidence or examples in subsequent briefing or at any hearing on this motion.

Then, in closing, the Government argued that Cortina's intent in that recording demonstrated Mr. Snyder's intent: "John Cortina knows this is going to require more than me picking up the tab at Applebee's. This is going to require me to pay a bribe to the mayor, his own friend. And so they devise this scheme to provide to the mayor donations to his campaign in exchange for getting on the Portage tow list." ECF No. 361 at 81–82 (Trial Tr. Vol. 17, 2/12/2019). The Government continued, "And the question is: Did [Snyder] corruptly receive that benefit? So at this meeting, after telling – Mr. Cortina telling Scott Jurgensen, 'If you give me $6,000, we will give it to the mayor, and we'll get you on the Portage tow list.'" *Id.* at 82.

This recording was just one of ten recorded conversations[6] between Cortina and Jurgensen—none of which Mr. Snyder was a party to—that the Government introduced at trial. All this evidence threatened to influence the jury on the core issue of Snyder's state of mind. *See, e.g.*, *Abdelaziz*, 68 F.4th at 61–62 (retroactive misjoinder created risk that defendant was convicted of substantial federal programs fraud given prejudicial spillover of evidence of mental state of participants in wider college admissions conspiracy alleged in indictment, requiring vacatur of substantive convictions). This evidence could not have been admitted in a tax-only trial and would not have cleared Rules 403 or 404(b) because it would have been irrelevant and only offered to portray Mr. Snyder as generally corrupt so the jury would more readily infer tax wrongdoing. *See* Fed. R. Evid. 403, 404(b).

The jury instructions compounded this spillover risk. Granted, the Court instructed the jury to consider the charges and the evidence separately. *See* ECF No. 254, Instruction No. 18. But the Court's instructions on each count were not sufficiently separate. For example, the Court gave

[6] *See* ECF No. 257, Government Exhibits 51A, 52A, 53A, 54A, 56A, 57A, 59A, 62A, 63, 620A.

instructions on both the tax and § 666 counts that told the jury that, to convict, it had to find that Mr. Snyder acted "corruptly." *See id.* Instruction No. 20 (§ 666 count, Count 1), Instruction No. 21 (§ 666 count, Count 3), & Instruction No. 27 (tax count). Inexplicably, however, even though "corruptly" means something different for each count, the Court provided a single instruction on the term:

> A person acts corruptly when he acts with the understanding that something of value is to be offered or given to reward or influence him in connection with his official duties.

*See id.* Instruction No. 22; *cf.* Instruction No. 24 ("As to the charge contained in Count 1 only") & Instruction No. 30 ("As to Count 3 only").

This instruction—which was applied to *both* the § 666 counts and the tax count, without clarification—invited the jury to import its § 666 conclusions into the tax count. *See, e.g.*, *United States v. Lindberg*, 39 F.4th 151, 164–65 (4th Cir. 2022) (although trial court instructed jury that each charged offense should be considered separately, court provided overlapping instructions on both counts at the same time using the term "official act," so that the erroneous instruction could have influenced jury's consideration of bribery count, and bribery offense did not require proof of official act). No "separate consideration" instruction, regardless of formulation, would have been adequate to defray the prejudice.

This ambiguous instruction was bad on its own. But the Government compounded the prejudice during its closing argument by explicitly blending the tax count and the § 666 counts together, urging the jury to treat them as one and the same. During its closing, the Government told the jury: "How else do we know that James Snyder was acting corruptly when he [accepted a bribe of] $13,000 from Great Lakes Peterbilt? Well, he lied to the FBI ***and the IRS***." ECF No. 361 at 65 (Trial Tr. Vol. 17, 2/12/2019) (emphasis added). In other words, the Government invited the

jury to infer from the evidence on the tax count that Mr. Snyder was guilty on Count 3 and *vice versa*. The Government's presentation of its case reinforced a single, unified theory of guilt, not two distinct theories tied to separate elements and separate crimes.

The Government did the same again when cross-examining defense witnesses on the § 666 counts. For instance, during the cross-examination of Kenard Taylor, the prosecutor asked:

> Q: In your experience with campaign finance reports and candidates, would you find it unusual for a candidate to be lending almost $15,000 to their campaign when they can't pay the taxes to the IRS?
>
> A: Would I find it unusual for candidates to loan their campaign several thousand dollars?
>
> Defense: Your Honor, I'm going to object to this form of the question. Are we talking about personal taxes versus taxes the campaign might owe? I think he needs a little clarification.
>
> Q: I'll rephrase that. Point well taken. In this case, there's no dispute that Mr. Snyder lent his campaign – at least here it says $14,807 for '12, '13, and '14, correct?
>
> A: Correct.
>
> Q: And would you find it unusual at the same time frame in which the individual has significant problems with the IRS outside of his campaign account?
>
> A: I typically would not know about problems with the IRS that candidate would have outside of campaign finance.
>
> Q: Okay.
>
> …
>
> Defense: Would you find it unusual to have problems with the IRS in the form of being indicted six months after you paid those taxes off?

ECF No. 360 at 255–56 (Trial Tr. Vol 14, 2/7/2019). Although the § 666 and tax counts intersected legally only at the level of mens rea, the Government deliberately intertwined them factually—

ensuring the jury would view them both through a single, prejudicial narrative of corruption. *See* ECF No. 230 at 12–13 (Trial Tr. Vol. 2, 1/15/2019).

The trial was dominated by § 666 count evidence: 16 of the government's 18 witnesses and 13 of the 15 trial days focused on the alleged § 666 scheme:

| **Evidence** | **§ 666 Counts** | **Tax Count** |
|---|---|---|
| Trial Days | 13 | 2 |
| Government Witnesses | 16 | 2 |
| Defense Witnesses | 6 | 0 |

Despite that backdrop, however, the Government blended the evidence and painted all the allegations against Mr. Snyder with an exceedingly broad brush. For one, the Government habitually used the term "bribe" throughout the trial. The undersigned counsel has identified approximately **250 times** when some variation on the word "bribe" was said during Mr. Snyder's trial. *See also* ECF No. 361 at 26–27 (instructing the jury that both Count 1 and Count 3 "charge[] the defendant with accepting a bribe"). Similarly, the Government repeatedly invoked SRC and campaign finance evidence to depict Mr. Snyder as someone for whom "the rules did not apply," anchoring its tax theory to the emotional force of its § 666 case. And when the defense questioned the relevance of some of that evidence during trial, the Government conceded that the same evidence would have no relevance, and thus no admissibility, in a tax-only trial. *See* ECF No. 380 at 78 (Trial Tr. Vol. 13, 2/6/2019) ("I would agree with counsel; that wouldn't be relevant to the tax count."). The result of this single storyline is that the jury did not—and could not—compartmentalize the evidence on the § 666 counts from the evidence on the tax count.

The prejudicial structure would have been unacceptable even in a case supported by strong tax evidence. But here, the government's tax proof was notably thin, making the spillover effect even more decisive.[7]

Mr. Snyder acknowledges that Count 1 alleged a quid pro quo involving a towing contract and a campaign contribution. *See* ECF No. 1; ECF No. 254, Instruction No. 20. And, to be sure, the jury acquitted Mr. Snyder of Count 1. ECF No. 256. But that does not alter the appropriate outcome here. The government's presentation of evidence did not meaningfully distinguish between the § 666 counts. Instead, it blended the factual narratives of both counts, creating a cumulative prejudicial effect.

The government may argue that evidence related to Count 1 would have been admissible regardless of Count 3's vacatur. But this argument ignores the structural prejudice created by the joinder. Count 1 was a bribery charge premised on a pre-agreement payment theory, while Count 3 was a gratuity charge that the Supreme Court found did not constitute a criminal offense. The jury's acquittal on Count 1 confirms that it did not find the alleged conduct to be criminal *as a factual matter*, and the vacatur of Count 3 confirms that the conduct charged was not criminal *as a matter of law*. These outcomes underscore the need to treat the counts separately and support the conclusion that joinder was retroactively improper and caused a prejudicial spillover of evidence to the tax count. This prejudice was compounded by the Court's use of a single instruction defining "corruptly" across the § 666 counts and the tax count. *See Lazarenko*, 564 F.3d at 1043 (The trial

[7] While Mr. Snyder acknowledges that the Seventh Circuit concluded the evidence on the tax count was enough to sustain his conviction, *United States v. Snyder*, 71 F.4th 555, 571 (7th Cir. 2023), *cert. granted*, 144 S. Ct. 536 (2023), *and rev'd and remanded*, 603 U.S. 1 (2024), that determination was made without the benefit of the Supreme Court's subsequent decision, which made explicitly clear that the gratuity charges against Mr. Snyder did not involve unlawful conduct.

court's instructions to the jury are a "critical factor" in assessing whether the jury can reasonably be expected to compartmentalize evidence). By failing to distinguish the legal standards applicable to each charge, this instruction risked confusing the jury and undermining its ability to evaluate the tax count independently. A split verdict is only one factor in evaluating a retroactive misjoinder claim—it is not dispositive. *See, e.g.*, *United States v. Dworken*, 855 F.2d 12, 29 (1st Cir. 1988) (although discriminating verdict can support that jury's ability to segregate evidence it is "not dispositive on the question of whether a severance should have been granted"). Here, the remaining factors also weigh in Mr. Snyder's favor.

***b. Mr. Snyder's Trial Strategy Would Have Been Significantly Different If the § 666 Counts Had Not Been Joined***

The joinder of the § 666 counts together with the tax count altered Mr. Snyder's trial strategy, which would have been fundamentally different if he had been correctly tried on the tax count alone. *See Murphy*, 323 F.3d at 118 (citing *Pelullo*, 14 F.3d at 898–99). In assessing this factor, this Court should examine "the extent to which the parties would have called different witnesses and, correspondingly, the extent to which their opening and closing arguments would have differed." *United States v. Wright*, 665 F.3d 560, 577 (3d Cir. 2012), *as amended* (Feb. 7, 2012) (citing *United States v. Lee*, 612 F.3d 170, 182 (3d Cir. 2010) & *Pelullo*, 14 F.3d at 898–99).

Mr. Snyder's trial would have been drastically different if the tax count had been tried separately. As discussed above, the evidence on the § 666 counts "was not admissible to prove the [tax count]." *Pelullo*, 14 F.3d at 899. As courts have recognized, the "elimination of the [gratuity] count would have significantly changed trial strategy" because Mr. Snyder would not have had to wade through and defend against that irrelevant and inadmissible evidence on the tax count. *Id.*

Furthermore, the Government's presentation of evidence at trial overwhelmingly focused on the § 666 counts, and thus severance of those counts would have impacted the presentation of evidence and Mr. Snyder's ability to marshal that evidence in his defense. The overwhelming majority of the trial days and witnesses called by the Government related to the § 666 counts, which swayed Mr. Snyder's defense strategy. Given the extensive focus of the Government's case on the § 666 counts, the defense concentrated its efforts on presenting witness testimony relating to the § 666 counts. *See* ECF Nos. 360, 371, & 372 (trial transcripts of February 7, 8, and 11, 2019).

Similarly, the opening and closing arguments overwhelmingly focused on the § 666 counts, so severance of the tax count would have overhauled the openings and closings. *See Wright*, 665 F.3d at 577. Both the Government and Mr. Snyder devoted most of their opening and closing statements focusing on the § 666 counts, relegating discussion of the tax count to a minor topic. In opening statements, for example, Mr. Snyder's trial counsel only quickly discussed the tax count at all. *See* ECF No. 230 at 34–73 (Trial Tr. Vol. 2, 1/15/2019).[8] The Government also spent less than a third of its opening statement talking about the tax count issues, focusing mainly on the § 666 counts. *See id.* at 12–33.[9] That same division is reflected in the closing statements as well, with the Government spending only around a quarter of its closing statement on the tax count and Mr. Snyder's counsel devoting the bulk of closing to refuting the § 666 counts. ECF No. 361 at 34 *et seq.* (Trial Tr. Vol. 17, 2/12/2019).[10]

[8] Defense counsel's discussion of the tax count in its opening statement appears at pages 37–43 of ECF No. 230.

[9] The Government's discussion of the tax count in its opening statement appears at pages 14–20 of ECF No. 230.

[10] The Government's closing is at pages 34–93 of ECF No. 361, with discussion of the tax count appearing at pages 35–50. Defense counsel's closing is at pages 94–166 of ECF No. 361, with the

Mr. Snyder's trial strategy would have been fundamentally different if defense counsel had not been forced to devote its efforts to countering the § 666 allegations.

***c. The Government's Evidence and Language Were Inflammatory and Intended to Incite and Arouse the Jury Against Mr. Snyder***

At trial, the Government elicited inflammatory testimony from witnesses relating to the § 666 counts and used negative characterizations about Mr. Snyder stemming from the § 666 counts, in an effort to sway the jury to convict on the tax charge. *See Pelullo*, 14 F.3d at 899; *Hamilton*, 334 F.3d at 182.

The Government extensively characterized Mr. Snyder as having received "bribe payment[s]" and repeatedly told the jury that the gratuities that Mr. Snyder allegedly received were "bribe[s]." *E.g.*, ECF No. 230 at 31 (Trial Tr. Vol. 2, 1/15/2019) (Government's opening statement); ECF No. 361 at 79 (Trial Tr. Vol. 17, 2/12/2019) (Government's closing statement). That characterization, however, was facially inaccurate as to Count 3, which charged Mr. Snyder with accepting after-the-fact gratuities. As Justice Gorsuch observed, "any fair reader of [§ 666] would be left with a reasonable doubt about whether it covers" post hoc gratuity payments. *Snyder*, 603 U.S. at 20 (Gorsuch, J., concurring).

In *United States v. Ivic*, the Second Circuit suggested that the prosecution's use of terms with "a decidedly pejorative connotation"—*e.g.*, telling the jury that defendants "conspired to engage in a pattern of 'racketeering' activity"—could constitute inflammatory language that results in prejudicial spillover. 700 F.2d 51, 65 (2d Cir. 1983), *abrogated on other grounds by Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994). Applying that instruction in *Rooney*, the Second Circuit concluded the defendant was entitled to relief where the prosecution told the

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tax count addressed at pages 133–155.

jury that the defendant "was trying to take advantage of people who were less able to control their own destiny than he was." 37 F.3d 847, 856 (2d Cir. 1994) (citing *Ivic*).

The Government's insistence on characterizing Mr. Snyder as having received "bribes" is pejorative language of the same species. As the Supreme Court explained, "American law generally treats bribes as inherently corrupt and unlawful." *Snyder*, 603 U.S. at 5. The Government's relentless focus on talking about "bribes" was language designed to suggest to the jury that Mr. Snyder's conduct was "inherently corrupt." *Id.*

The Government also presented the testimony of Mr. Snyder's brother, Jon Snyder. *See* ECF No. 359 at 206 *et seq.* (Trial Tr. Vol. 9, 1/29/2019). Jon Snyder testified that, after pleading guilty to his own tax offense, he agreed to cooperate with the Government and wear a recording device to intercept Mr. Snyder's communications in order to help the Government build its case on the § 666 counts. *See id.* at 226–27. Again, given that the charged conduct on the § 666 counts was not unlawful in the first place, the only purpose of Jon Snyder's testimony was to incite the jury that Mr. Snyder was so inherently corrupt that his own brother would testify against him.

***d. The Government's Evidence on the Tax Count Was Weak and Does Not Counteract the Significant Risk of Prejudice***

The tax conviction cannot be salvaged by the strength of the government's proof, because the tax case evidence was minimal, underdeveloped, and depended on inferences the jury likely drew from the § 666 allegations—not from actual tax evidence.

For the tax count, the Government presented ***only two witnesses*** in support of its case. First, Elizabeth McQuen, an IRS civil collections agent who was not involved in investigating Mr. Snyder, testified generally about the use of Offers of Compromise and Installment Agreements as legitimate tools the IRS uses to collect taxes. *See* ECF No. 230 at 78 (Trial Tr. Vol. 2, 1/15/2019).

Using blank Forms 433A, 433B, and 656, which were admitted into evidence, Ms. McQuen explained to the jury the type of information that these forms requested. *Id.* at 83–92; 93–102.

The only other witness to testify in the government's case on the tax count was Gerard Hatagan, a special enforcement program revenue agent. *Id.* at 124. Agent Hatagan had no firsthand knowledge of any issues relating to Mr. Snyder's personal or business taxes, nor of any efforts by the IRS to collect the tax debts. Agent Hatagan joined the investigation of Mr. Snyder in 2014. *Id.* at 126. He testified about documents that were received by the IRS and what information was or was not included on the forms.[11] He was not able to testify about when the forms were prepared, only when they were signed. He also did not have the complete forms and attachments that were submitted to the IRS.

The Government did not seek to admit into evidence the full and complete Forms 433-A, including all attachments to those forms, that should have been in its files. Instead, after defense counsel showed the Court a version of the Form 433-A maintained by Mr. Snyder's accountant (Mr. Pickart) that did not omit SRC, the Government introduced Mr. Pickart's version as Exhibit 29C:

> Government: That's why we're putting this on in also to show that copy that Dan [Snyder's Accountant] had, had SRC. And he'll [Hatagan] explain – we're not saying that his [Snyder's] whole copy didn't go the IRS. We're not saying that.
>
> Defense: You just asked him if SRC was listed on these forms.
>
> Government: I'm asking him. I'm going to show him [Hatagan] that he's mistaken, okay, because basically he is. I didn't know that was going to be his answer.

[11] Some of the exhibits introduced by the Government were from Pickart's files and Agent Hatagan and AUSA Benson acknowledged the IRS seemed to be missing pages from the 2013 433A submission (the absence of which is no fault of Mr. Snyder). *See* ECF No. 231 at 74–75 (Trial Tr. Vol. 3, 1/16/2019).

Defense: Okay. With that clarification that's fine.

*See* ECF No. 231 at 74–75 (Trial Tr. Vol. 3, 1/16/2019).

In a close case, inflammatory evidence on unrelated charges is most likely to tip the balance. Here, as noted by the Court at Mr. Snyder's 2021 sentencing, "The case – and I didn't preside over the first trial, but I read the record in it thoroughly, more than once. ***Neither the conviction on the [tax count] nor the conviction [on the bribery count] in the trial that was held in March, neither of those were slam dunk cases. They were anything but***." ECF No. 586 at 173 (emphasis added). The jury, having sat through days of § 666 evidence, would have felt pressure to hold Mr. Snyder accountable for something, even if not convinced by the limited tax proof. Rule 33 exists precisely for this circumstance: where the structure of the trial—not the strength of the evidence—products a verdict unworthy of confidence. *See Abdelaziz*, 68 F.4th at 62 (finding retroactive misjoinder where, *inter alia*, the government's evidence "was insufficiently strong to counteract the pervasive risk of prejudice").

* * *

The Government's tax case was thin, and the jury was flooded with prejudicial evidence on the § 666 counts which would never have been admitted in a severed tax trial. Looking at both the totality of the evidence and the specific factors for identifying prejudice from other circuits, Mr. Snyder should be granted a new trial in light of the retroactive misjoinder and prejudicial spillover from the § 666 counts.

**3. The Interests of Justice Require Consideration of This Motion and Any Delay Is Excusable**

In light of the unique circumstances of this case, this Court should not deny Mr. Snyder his fundamental right to a fair trial based on timing considerations. Mr. Snyder diligently brings this

motion following the Seventh Circuit's remand of this case, and this Court should conclude that any failure to raise these concerns about joinder is the product of excusable neglect.

As noted above, Rule 33 provides that this Court "may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). This Court's obligation to safeguard a criminal defendant against improper joinder of offenses is a "continuing duty" that applies to "all stages of the trial." *Schaffer*, 362 U.S. at 516.

As Mr. Snyder acknowledges, Rule 33 contains timeframes under which a defendant should raise a request for new trial. Rule 33(b)(1) provides, "Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case." Rule 33(b)(2) instructs that a motion for new trial "grounded on any other reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty." Fed. R. Crim. P. 33(b)(2).

Rule 33 operates in conjunction with Rule 45. *United States v. Cates*, 716 F.3d 445, 448 (7th Cir. 2013); *United States v. Brown*, No. 06-30160-DRH, 2010 WL 380701, at *2 (S.D. Ill. Jan. 28, 2010). *See also United States v. Owen*, 559 F.3d 82, 84 (2d Cir. 2009). "[U]nder Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion for new trial within the specified time, the court may nonetheless consider that untimely underlying motion if the court determines that the failure to file it on time was the result of excusable neglect." Fed. R. Crim. P. 33 advisory committee's note to 2005 amendment. Under Rule 45, "[w]hen an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made . . . after the time expires if the party failed to act because of excusable neglect." Fed. R. Crim. P. 45(b)(1)(B).

In conducting that assessment, this Court looks to the factors in *Pioneer Inv. Servs. Co. v. Brunswick Associates Ltd. P'ship*, 507 U.S. 380, 395 (1993). *See Cates*, 716 F.3d at 448. "Under *Pioneer,* the test as to what constitutes excusable neglect is an 'equitable one,' taking account of 'all relevant circumstances surrounding the party's omission.'" *Id.* (quoting *United States v. Brown*, 133 F.3d 993, 996 (7th Cir. 1988)). "The factors to be balanced in making this equitable determination include 'the danger of prejudice to the non-moving party, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.'" *Id.* (quoting *Pioneer*, 507 U.S. at 395) (cleaned up).

Here, Mr. Snyder acted diligently in bringing this motion and any delay is the product of excusable neglect. Mr. Snyder recently changed counsel, and current counsel has worked assiduously to discuss these issues with counsel for the Government and to develop the arguments in this brief.

The *Pioneer* factors also weigh in Mr. Snyder's favor. There is no danger of prejudice to the Government, which would not be harmed by a new trial on the tax count, while Mr. Snyder would be irretrievably harmed if he were denied his right to a fair trial free of prejudicial spillover. True, this case has a long history—but that extensive history is the result of the fact that the Government opted to indict Mr. Snyder on gratuity charges for conduct that, as the Supreme Court has stated, ***was not actually a crime***. The Government's decision to wheel out the heavy artillery of a federal prosecution based on a theory that was inherently defective cannot possibly be considered circumstances within Mr. Snyder's "reasonable control." *Pioneer*, 507 U.S. at 395. Furthermore, Mr. Snyder has acted in good faith in raising this issue in light of the Supreme Court's decision and before sentencing.

Taking all of those factors into account, this Court should not deny Mr. Snyder the right to a fair trial on the tax count based on issues of timing.

### B. Mr. Snyder Is Entitled to a New Trial on the Tax Count Based on the Government's *Brady* Violations

Separately, Mr. Snyder is entitled to relief given the Government's *Brady* violations with respect to key evidence on the tax count. The Government has failed to turn over attachments to the IRS Forms 433-A that are central to the tax charges. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963); *see also United States v. Mackey*, 571 F.2d 376, 388 (7th Cir. 1978).

At trial, the Government, through Agent Hatagan, introduced copies of the Forms 433-A that were held by Mr. Snyder's accountant and elicited testimony that such forms were submitted to the IRS on March 21, 2010, January 20, 2011, and April 2, 2013. ECF No. 231 at 4 *et seq* (Trial Tr. Vol. 3, 1/16/2019). The Government further elicited testimony from Agent Hatagan that Mr. Snyder did not disclose wage income relating to GVC Mortgage or SRC on those forms. *See id.*

Crucially, though, the Government did ***not*** introduce into evidence the actual Forms 433-A that were submitted to the IRS and instead relied on copies of the forms that were in the files of Mr. Snyder's accountant. On cross-examination, moreover, Agent Hatagan confirmed that the boxes checked on the Forms 433-A indicated that documents had been attached to the forms. *See* ECF No. 231 at 170–71 (Trial Tr. Vol. 3, 1/16/2019). Agent Hatagan agreed that maybe "there were attachments to the 433-A that make references to GVC or SRC," and admitted he "d[id] not know" whether documents had been submitted as attachments to the Forms 433-A. *Id.* at 171; *id.* at 187–88.

To date, Mr. Snyder has not been provided with the 433-A attachments, which include potentially exculpatory information. As other courts have found, the Government may have to produce material relating to Forms 433-A where the defendant shows a "particularized need" for

such documents. *See, e.g.*, *United States v. Faller*, No. 1:13CR-00029-JHM, 2014 WL 12691595, at *7–8 (W.D. Ky. May 29, 2014).

Here, Mr. Snyder has a specific and strong basis to believe that the missing attachments to these documents contain exculpatory evidence. Thomas Gunther, the former IRS agent who handled Mr. Snyder's file before it was usurped by criminal investigators, has submitted an affidavit that attests to the highly unusual nature of the IRS's handling of Mr. Snyder's tax affairs. *See* ECF No. 561-1. As Agent Gunther testified, Mr. Snyder was attempting to work cooperatively with the IRS to pay off the tax liabilities at issue here. Indeed, Agent Gunther attests: "During my time working for the IRS and subsequently in my role as a consultant assisting people with IRS issues, ***I have never seen a prosecution brought under Section 7212 under circumstances similar to this case, where there was an on-going effort by the taxpayer to meet his obligations***." *Id.* at 3 (emphasis added).

Agent Hatagan's testimony complements that point. As Agent Hatagan conceded, Mr. Snyder paid off all his individual income tax liabilities to the IRS:

> Q. Agent Hatagan, Mr. Snyder's paid back all of his personal back taxes, agreed?
>
> A. He has.
>
> Q. Plus penalties and interest?
>
> A. Yes.
>
> Q. And that happened -- he got square with the IRS on his personal taxes six months before he was indicted, correct?
>
> . . .
>
> A. The answer to your question is that he did pay off his individual income tax liabilities six months prior to being indicted.

ECF No. 231 at 211 (Trial Tr. Vol. 3, 1/16/2019).

The Government did not present any witnesses or evidence to contradict the fact that Mr. Snyder repaid the federal government for all his personal tax liability. The Government's failure to produce the attachments to the 2013 Form 433-A in Mr. Snyder's trial substantially compromised his right to a fair trial and ability to marshal evidence that demonstrates his innocence. This Court should order a new trial given the Government's violation of *Brady*.[12]

## CONCLUSION

For these reasons, this Court should grant Mr. Snyder a new trial on Count 4.

Date: October 31, 2025

Respectfully submitted,

*/s/ Joshua J. Minkler*

Joshua J. Minkler (Atty. No. 18483-49)
Neal A. Brackett (Atty. No. 31236-49)
J. Taylor Kirklin (Atty. No. 35474-49)
Jordan M. Oliver (Atty. No. 36922-49)
Barnes & Thornburg LLP
11 South Meridian Street
Indianapolis, IN 46204
Telephone: 317-236-1313
Facsimile: 317-231-7433
Email: josh.minkler@btlaw.com
neal.brackett@btlaw.com
taylor.kirklin@btlaw.com
jordan.oliver@btlaw.com

*Attorneys for Defendant James E. Snyder*

[12] The Government has also said that it intends to seek a sentencing enhancement on the tax count. It will have ongoing discovery obligations relating to that enhancement.

**CERTIFICATE OF SERVICE**

The undersigned counsel hereby certifies that a copy of the foregoing has been served on all counsel of record via the Court's ECF filing system on this 31st day of October, 2025.

*/s/ Joshua J. Minkler*
Joshua J. Minkler