No. 12-2604

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

United States of America,

Plaintiff-Appellee,

v.

Roderick D. Sinclair,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division

Case No. 3:11-cr-00105-RLM-1

Hon. Robert L. Miller, Jr., Presiding Judge

BRIEF AND REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT RODERICK D. SINCLAIR

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DISCLOSURE STATEMENT

I, the undersigned counsel for the Defendant-Appellant, Roderick D. Sinclair, furnish the following list in compliance with Fed. R. App. P. 26.1 and Cir. R. 26.1:

1. The full name of every party or amicus the attorney represents in the case: Roderick D. Sinclair.

2. Said party is not a corporation.

3. The names of all law firms whose partners or associates are expected to appear for the party before this Court: Sarah O. Schrup (attorney of record), Michael Lehrman (senior law student), Eric Westlund (senior law student), and Marjorie M. Filice (senior law student), of the Bluhm Legal Clinic at the Northwestern University School of Law. The names of all law firms whose partners or associates have appeared for the party in the district court and are not expected to appear:

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STATEMENT OF JURISDICTION

The government charged Roderick Sinclair in a three-count indictment, alleging violations of 21 U.S.C. § 841(a)(1) (2006), 18 U.S.C. § 924(c) (2006), and 18 U.S.C. § 922(g)(1) (2006). The district court had jurisdiction over this case pursuant to 18 U.S.C. § 3231 (2006), which grants federal courts jurisdiction over cases arising under federal criminal law. After a one-day trial on February 7, 2012, Sinclair was convicted of all three counts of the indictment. (A.38.)[1] He was later sentenced to 117 months' imprisonment. (A.38.) Final judgment was entered on June 25, 2012. (A.38.)

Sinclair filed a timely notice of appeal on June 28, 2012, in compliance with Federal Rule of Appellate Procedure 4(b)(1)(A). (A.45.) This Court has jurisdiction over this appeal from a final criminal judgment pursuant to 28 U.S.C. § 1291 (2006) and 18 U.S.C. § 3742 (2006), which permits review of the sentence imposed.

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[1] References to any hearing transcripts shall be denoted as ([date] Hr'g Tr. ___), and citations to the trial transcript shall be (Trial Tr. ___). References to Sentencing Transcripts shall be denoted as ([date] Sentencing Tr. __). All other references to the Record shall be denoted with the appropriate docket number as (R.__). References to the material in the Appendix shall be denoted as (A.__).

STATEMENT OF THE ISSUES

1. Whether the district court erroneously denied Roderick Sinclair's motion for a continuance because the court improperly weighed the competing interests of the court against Sinclair's Sixth Amendment right to counsel of his choice.

2. Whether the district court erred in increasing Sinclair's base offense level by rejecting the Probation Office's suggestion to group the drug-possession and felon-in-possession counts that resulted from the same conduct.

STATEMENT OF THE CASE

Roderick Sinclair was arrested on June 16, 2011. (A.1.) On August 10, 2011, the government indicted Sinclair on three charges: (1) possession with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1); (2) possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c); and (3) knowing possession of a firearm in or affecting interstate commerce after having been convicted of a crime punishable by imprisonment for a term exceeding one year in violation of 18 U.S.C. § 922(g)(1). (R.1.) Prior to his trial, Sinclair moved for a continuance in order to hire a private attorney, but his motion was denied and he was represented at trial by court-appointed counsel. (A.21.) After a one-day trial, a jury found Sinclair guilty on all three counts. (R.29.)

At sentencing, Sinclair faced a mandatory sixty month sentence for the possession-in-furtherance count, which was to be served consecutively to any other sentence on the remaining charges. (A.2.) With respect to the remaining two counts of conviction—the marijuana possession and the felon-in-possession—the Probation Office recommended, and Sinclair requested, that the district court group them for purposes of sentencing. (A.1.) Relying on the government's suggested interpretation of application note 4 of U.S.S.G. § 2K2.4, the district court concluded that grouping was not warranted. (6/25/12 Sentencing Tr. 27.) This decision, coupled with Sinclair's criminal history category of VI and an obstruction-of-justice enhancement, resulted in a base offense level of 17 and an applicable Guidelines range of 51 to 63 months. (6/25/12 Sentencing Tr. 29–30.) If the district court had

grouped the two counts, Sinclair's base offense level would have been 16 and his Guidelines range would have been 46 to 57 months. (A.35.) The district court sentenced Sinclair to 117 months' imprisonment, which included the sixty month mandatory consecutive sentence for the firearm-in-furtherance count. (A.39.) The district court also sentenced Sinclair to three years' supervised release and issued a $300 fine. (A.40, 43.) This appeal timely followed on June 28, 2012. (A.45.)

STATEMENT OF THE FACTS

In 2011 Roderick Sinclair was a 27-year-old father living in Northwest Indiana. (R.63 at 10.) He was close to his family, the primary caregiver for his seven-month-old daughter, and engaged to be married. (Trial Tr. 101:16; 1/6/12 Hr'g Tr. 39:19.) He was also involved in his community and worked for a promotion company called Finncade Shows. (A.47.) Sinclair had never been convicted of a violent felony or a drug distribution crime. (R.54 at 4.) Apart from traffic-related offenses, his adult record included an assortment of minor infractions, including marijuana possession, disorderly conduct, possession of unlicensed handguns, and one misdemeanor battery. (R.54 at 4.)

On June 16, 2011, Sinclair and his fiancée, Teresa Batts, were delivering his daughter to his stepfather's home in Elkhart, Indiana, (1/6/12 Hr'g Tr. 27–28), when they passed Elkhart police officer Michael Bogart in his squad car. Some minutes later and after driving several blocks in the opposite direction, (1/6/12 Hr'g Tr. 8–10), Bogart circled back to find Batts's car, (1/6/12 Hr'g Tr. 11–12). He immediately arrested Sinclair for driving with a suspended license. (R.13 at 2.) The parties disputed who was driving the car. Sinclair consistently asserted that he was not driving Batts's car at the time Bogart saw them drive past his squad car. (R.12 at 2.) Bogart, on the other hand, maintained that Sinclair was the driver. (R.13 at 1.) The identity of the driver was central to Sinclair's prosecution and conviction because Bogart's only justification for his initial search of Sinclair, which uncovered a small amount of marijuana, was Bogart's belief that Sinclair had committed a

traffic violation. (R.13 at 2.) This initial search created probable cause for the subsequent search of Batts's car, where officers located the remaining contraband that formed the basis of Sinclair's prosecution. (R.13 at 2.)

It is undisputed that by the time Bogart arrived at Batts's parked car, Sinclair was sitting in the driver's seat. (R.12 at 2.) After his arrest, police took Sinclair to the Elkhart Police Station. (Trial Tr. 40.) Bogart's colleague Christopher Snyder and a K-9 unit searched the Cadillac and found approximately 352 grams of marijuana in a backpack, along with scales and plastic baggies. (Trial Tr. 61–67.) In addition, officers found a semi-automatic pistol underneath the driver's seat. (Trial Tr. 63.) Later that day, police advised Sinclair of his rights and then interviewed him. (Trial Tr. 84–85.) During the videotaped interview Sinclair admitted that the marijuana and the gun found in the car belonged to him. (Trial Tr. 88.)

Sinclair moved to suppress the evidence recovered from the search of the car on the grounds that there was no probable cause for the initial arrest for driving with a suspended license because he was not driving the car. (R.12.) The district court held a suppression hearing on January 6, 2012, during which it heard testimony from both Batts and Bogart. (R.20.) Batts testified that she was driving when Bogart saw them and that Sinclair had only moved to the driver's seat after she had parked at his stepfather's home in order to check a problem with her steering wheel. (1/6/12 Hr'g Tr. 34:18, 36.) Bogart testified that he saw Sinclair

driving and knew that he had prior arrests for driving with a suspended license.[2] (1/6/12 Hr'g Tr. 8.) The trial court credited Bogart's testimony, found the initial arrest supported by probable cause, and denied Sinclair's motion to suppress. (1/6/12 Hr'g Tr. 87, 90.)

As the case continued towards trial, Sinclair became increasingly dissatisfied with his court-appointed federal defender. (A.46.) On Wednesday, February 1, 2012, six days before the trial was set to begin, Sinclair sent the district court a handwritten letter requesting a continuance in order to secure private defense counsel. (A.46.) He explained to the court that he found his appointed lawyer inadequate, had already selected a new attorney, and had the means to pay for the new attorney's services. (A.46.) Sinclair informed the court that his family was waiting to receive money from their tax returns, which they would use to hire the private attorney. (A.46.) He asked for no more than twenty-one days, enough time for his family to receive the tax refunds. (A.46.) He also told the court that he had new evidence that might form the basis of a second suppression hearing. (A.46.) The court received the letter on Thursday, February 2. (A.9.)

The district court did not hold a hearing on Sinclair's request until February 6, only one day before Sinclair's trial was scheduled to begin. (A.8.) Sinclair testified under oath that his family had already spoken to private attorney Mark

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[2] Bogart only activated his police lights when he pulled up to Batts's Cadillac. (1/6/12 Hr'g Tr. 10-11.) This activated the police car's camera system, which then recorded the arrest. Had Bogart activated his lights when he first observed the car, it would have captured the driver on the video.

Lenyo and that they would have enough money to pay for his services. (A.11–12.) Furthermore, Sinclair reiterated that he had lost confidence in his lawyer after the January suppression hearing. (A.13.) Finally, Sinclair again told the court that he had newly discovered evidence that he wanted Mr. Lenyo to present. (A.15.)

The court denied Sinclair's request. (A.21.) In doing so, the district court noted the "factors [it had] to take into account" to determine whether to grant the continuance. (A.16:20–21.) The district court weighed Sinclair's desire to hire Mr. Lenyo against the "reasons not to continue the trial." (A.18:14–15.) According to the court, these reasons were that there was "a courtroom available," thirty-four prospective jurors were slated to arrive the following day, and five government witnesses were under subpoena to testify.[3] (A.18:19–20.) While noting that there was no "doubt that [Sinclair] filed [the motion] in good faith," (A.20:17), the district court told Sinclair, "The strongest factor weighing in favor of the continuance is your concern that [the court-appointed lawyer] isn't representing you—giving you effective assistance of counsel. Under the Constitution that's what you're entitled to: effective assistance of counsel. And it's hard for me to find that he hasn't provided that to you," (A.19:2–7).

The district court went on to note that defendants who try to hire private attorneys are often unsuccessful. (A.17.) Sinclair, however, explicitly told the court

[3] The government planned to call six witnesses, but one did not require a subpoena. (A.16:16–18.)

that his family had already secured the funds and had spoken to Mr. Lenyo. (A.11–12.)

The next day, before the start of his trial and before the jury was selected, Sinclair again raised the choice-of-counsel issue. (A.22.) He testified that the money had come in and that his family was ready to hire Mr. Lenyo. (A.22.) The district court, however, asserted that it knew Mr. Lenyo to be involved in another trial at the time. (A.24.) Sinclair renewed his request for a continuance to hire new counsel. But the district court noted that its job under the Constitution was to "try to be sure that you have effective assistance of counsel," again stating, "that's what the Constitution requires." (A.28.) It went on to say, "You don't have the right to have counsel of your choice appointed to represent you." (A.28:15-16.) The court pointed out that since Mr. Lenyo would have such a short amount of time to prepare for the trial if given only a week-long continuance, he may not be able to provide effective assistance of counsel. (A.29.) Again finding Sinclair's court-appointed defense attorney constitutionally adequate, and despite finding that Sinclair was not engaging in delay tactics, the district court denied the request for a continuance and for a change of counsel. (A.30.)

Sinclair's trial lasted one day. (R.29.) During the trial, the government presented six witnesses, each of whom resided in the local community. (R.29 at 30-98.) The list included four members of the Elkhart City Police Department, one forensic scientist working for the Indiana State Police, and a federal agent for the

Bureau of Alcohol, Tobacco, Firearms and Explosives. At the close of evidence the jury deliberated and returned a guilty verdict on all three counts. (Trial Tr. 140.)

At sentencing, the parties raised several objections. Count 2—possession of a firearm in furtherance of a drug crime—carried a mandatory, consecutive sixty-month sentence. The disputed question at sentencing was whether the convictions for drug possession and felon-in-possession—Counts 1 and 3 of the indictment—should be grouped for purposes of sentencing. (A.32.) If so grouped, Sinclair's base offense level, taking into account all other adjustments, would have been 16. Without grouping it was 17, which translated to an increased Guidelines range from 46 to 57 months to 51 to 63 months. (A.2.) The Probation Office had recommended that the two counts be grouped together and Sinclair urged the court to follow this course. (A.2.) The government, on the other hand, claimed that grouping was not permitted because it interpreted application note 4 of a separate guideline, U.S.S.G. § 2K2.4, to prohibit the grouping. (A.3.)

In resolving the issue, the district court recognized that "the disagreement is material," (A.3), and noted that there is no clear answer to the discrepancy. It expressed surprise that in this year, the "silver anniversary" of the Guidelines, the issue was not yet settled. (A.4.) The court recognized that "in most cases, counts one and three would be grouped." (A.2.) Ultimately, however, the district court sustained the government's objection to the presentence report and chose not to group the two offenses. (6/24/12 Sentencing Tr. 27.) The district court sentenced Sinclair to 57 months' imprisonment on both Counts 1 and 3, which were to run

concurrently. (A.39.) Combined with the mandatory sixty month sentence for Count 2, Sinclair was sentenced to a total of 117 months' imprisonment, three years' supervised release, and a $300 fine. (A.39–43.)

SUMMARY OF THE ARGUMENT

Nearly a week before his trial, Roderick Sinclair wrote a letter to the district court requesting a continuance so that he could obtain, with the help of his family, a private attorney to represent him as he faced weapons and drug charges. The Constitution guarantees defendants who are able a fair opportunity to secure counsel of their choice. The district court violated Sinclair's Sixth Amendment right to choice of counsel and abused its discretion in denying Sinclair's request for a continuance. Because this error was a serious structural error, this Court should reverse and remand for a new trial.

The Sixth Amendment guarantees the right of a defendant who does not require appointed counsel to choose who will represent him. In this case, Sinclair's constitutionally protected interest in the counsel of his choice was not outweighed by any factors the district court may consider. The trial was expected to last only a day, the witnesses for the government were all local law enforcement personnel, the timing of the request was reasonable, the district court conceded that the request was made in good faith, communication between Sinclair and his appointed attorney had broken down, and Sinclair's family had taken substantial steps toward hiring a private attorney. All of these factors taken together show that the court's denial of the request was arbitrary and unreasonable.

The district court also erred in sentencing Sinclair. The district court should have grouped Counts 1 and 3, which could have resulted in a lower sentence. Instead, by relying an inapplicable note to an irrelevant guideline, the district court

committed legal error. Specifically, the district court applied note 4 to U.S.S.G. § 2K2.4 to justify denial of grouping. Note 4 is intended to prevent further enhancing of a sentence for a firearm offense characteristic when defendants, such as Sinclair, are sentenced to a mandatory minimum prison term to run consecutively to the term imposed for related charges. The district court misapplied this note and effectively enhanced Sinclair's sentence by failing to apply the required grouping. And because the district court itself recognized that its ruling was "material" to Sinclair's sentence, a remand for resentencing is the proper course.

ARGUMENT

I. The district court violated Roderick Sinclair's Sixth Amendment right to counsel of choice when it denied his request for a continuance.

Denial of Sinclair's continuance motion to obtain a private attorney was a violation of Sinclair's Sixth Amendment right to choice of counsel, and this Court should therefore vacate his conviction. The Sixth Amendment guarantees defendants who do not require appointed counsel the right to choose who represents them. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). Defendants must be afforded a fair opportunity to secure counsel of their choice, *id.* (citing *Powell v. Alabama*, 287 U.S. 45, 53 (1932)), and a court cannot "arbitrarily or unreasonably deny" that choice, *United States v. Sellers*, 645 F.3d 830, 834 (7th Cir. 2011) (citing *Carlson v. Jess*, 526 F.3d 1018, 1024 (7th Cir. 2008)). This Court reviews a district court's denial of a continuance for abuse of discretion by considering two related factors: (1) the circumstances surrounding the request; and (2) the reasons articulated by the judge. *Sellers*, 645 F.3d at 834–35 (citing *United States v. Santos*, 201 F.3d 953, 958 (7th Cir. 2000)).[4] Erroneous deprivation of a defendant's right to counsel of choice is structural error requiring reversal of the defendant's conviction without resort to harmless-error analysis. *Gonzalez-Lopez*, 548 U.S. at 150.

[4] Sinclair refers to these factors as the *Santos* factors throughout the brief.

A. The circumstances surrounding Sinclair's request justified a continuance.

Sinclair's constitutionally protected right to counsel of his choice was not outweighed by any factors the district court was permitted to consider. Therefore, the district court's denial of the continuance was arbitrary and unreasonable, and this Court should vacate Sinclair's conviction.

Factors that a district court may weigh against a defendant's interest in the counsel of his choice—and that this Court analyzes in its inquiry into the first *Santos* factor—include: (1) the needs of the trial court's calendar; (2) the inconvenience to other parties of granting a continuance; (3) the timing of the request; (4) the likelihood that the defendant is engaging in dilatory tactics; (5) the status of the relationship between the defendant and his existing counsel; and (6) the likelihood that the defendant can successfully retain new counsel. *See United States v. Gaya*, 647 F.3d 634, 636 (7th Cir. 2011); *Sellers*, 645 F.3d at 836–38; *Carlson*, 526 F.3d at 1025–27; *Santos*, 201 F.3d at 958–59. Existing counsel's competence under *Strickland v. Washington*, 466 U.S. 668 (1984), is not relevant to the inquiry. *See Carlson*, 526 F.3d at 1027 (noting that the precedent on appointed counsel and the right to effective assistance is distinct from case law on the right to be represented by retained counsel of choice); *see also United States v. Baker*, 432 F.3d 1189, 1248 (11th Cir. 2005) ("It is of no relevance that substitute counsel has not been shown to have performed incompetently or ineptly. The claimed deprivation is an arbitrary encroachment on the right to counsel of choice, not a claim of ineffective assistance rendered in the performance by the substitute

counsel."). When balancing these factors, "the district court must recognize a presumption in favor of petitioner's counsel of choice," *Wheat v. United States*, 486 U.S. 153, 164 (1988), an interest of "constitutional dignity," *Santos*, 201 F.3d at 959. Each of these six factors weighs heavily in Sinclair's favor.

First, nothing in the record suggests that the needs of the district court's calendar justified the denial of Sinclair's request for a continuance. This Court has repeatedly rejected a district court's reliance on generalized calendar concerns and noted that a district court's schedule does not trump all other interests. *Sellers*, 645 F.3d at 838 ("[E]ven the inconvenience of pushing a trial back a month or so can easily be outweighed by a defendant's interest in having counsel of choice"); *Carlson*, 526 F.3d at 1026 (rejecting the district court's calendar as justification for denial of a continuance in part because "trial dates open up all the time"). The weight accorded to the district court's calendaring needs is even less when the defendant's trial is expected to be short. *See Carlson*, 526 F.3d at 1025–26 (stating that the district court's administrative concerns were insignificant in part because "the parties predicted that the trial would take a little over a day"); *see also Sellers*, 645 F.3d at 834, 836 (applying *Carlson*'s reasoning in a case with a three-day jury trial).

Here, the district court alluded to the impact of a continuance on the court's calendar but cited no specific conflicts or reasons that the trial could not be rescheduled. (A.18:18–19) ("[W]e need a courtroom available to do [the trial], and we have a courtroom available to do that."); (A.30:16–18) ("[I]f I continue the trial,

nobody's using the courtroom and there will be more than one trial wanting the courtroom when your case is reset."). Thus, no specific scheduling conflict was present in this case. Furthermore, Sinclair's trial was projected to be very short; the government predicted at the motion hearing that it would last only one day. (A.16:10.)

The second factor also weighs in Sinclair's favor, as granting Sinclair's request for a continuance would not have meaningfully inconvenienced other parties involved in the case. This Court has previously considered the number of witnesses the government intends to call and whether they would be available at a later date. *Carlson*, 526 F.3d at 1026 (noting that the state had only three witnesses, including a police officer, who "could have easily appeared at a later date"). In Sinclair's case, the government was prepared to call six witnesses, all law enforcement personnel who worked in the Elkhart area. Nothing in the record suggests that these witnesses could not have appeared at a later date. In fact, the district court explicitly asked the government about its witness list while making its ruling, and the government never indicated that its witnesses would be inconvenienced by a continuance. (A.16.)

The third factor—the timing of Sinclair's request—likewise weighs in favor of granting a continuance. When the timing of a defendant's request is reasonable, this Court has rejected district courts' "eleventh hour" rationale for denying a continuance with requests made as little as four days before trial. *Carlson*, 526 F.3d at 1020–21, 1026 (finding the timing of a request made four days before trial

understandable, even though the district court did not hear the motion until the day before trial, in part because the defendant had only just retained new counsel). *Contra Gaya*, 647 F.3d at 636 (finding that a continuance was not justified "on the eve of trial" because the defendant had ample opportunity over the prior five months and multiple court appearances to express his desire for a new attorney).

Here, Sinclair requested a continuance in a letter six days before the scheduled trial date. The timing of Sinclair's request was understandable because it followed less than four weeks after the suppression hearing, which provided the "straw that broke the camel's back" in his relationship with his existing counsel. (A.13:23–24.) Sinclair did not wait for his next court appearance to make his request; he wrote a letter to the court from jail, urgently requesting the opportunity to retain private counsel. Indeed, Sinclair did not even wait for the details of his new representation to be finalized. He brought his request to the court's attention as soon as he acquired the means to retain private counsel.

The fourth factor also weighs overwhelmingly in Sinclair's favor because Sinclair had no incentive to delay trial and the court did not suspect he was engaging in dilatory tactics. When a defendant with "no history of 'gaming' the system" requests a continuance to retain new counsel, this factor weighs in favor of granting the request. *Carlson*, 526 F.3d at 1026. This is particularly true when it is the defendant's first request to substitute counsel and when the defendant is incarcerated. *See id.*; *cf. Sellers*, 645 F.3d at 836 (noting that being released on bond may give a defendant incentive to delay trial). Here, the district court

explicitly found that Sinclair made his request in good faith. (A.20:16–19) ("I don't doubt that you filed this in good faith—I don't get the feeling that you've been trying to stall this out since the case was filed or anything of that sort."). In addition, Sinclair's letter was his first request to substitute counsel, and he was incarcerated while awaiting trial.

The next factor this Court examines is the state of the relationship between the defendant and his existing counsel. When communication has broken down and there are significant disagreements over strategy between the defendant and his attorney, this factor weighs in favor of granting the defendant's request for a continuance to retain new counsel. *See Carlson*, 526 F.3d at 1026–27 (noting that the level of deterioration of the attorney–client relationship necessary to justify a continuance to retain new counsel is lower than the level necessary to establish ineffective assistance of counsel). The relationship between Sinclair and his appointed counsel had deteriorated to a degree mirroring the attorney–client relationship in *Carlson*, and the level of their disagreement justified Sinclair's request for a continuance. Here, Sinclair stated, "I don't feel like he's representing me the way that I feel is fit," (A.26:21–22), and he described a strategic disagreement about the suppression hearing as the breaking point in their professional relationship, (A.13:23–24). As in *Carlson*, these were reasonable justifications to seek a continuance.

The final factor also weighs in Sinclair's favor, as Sinclair demonstrated he had taken affirmative steps to retain private counsel. This Court has considered

this factor where it is clear from the circumstances that the defendant is highly unlikely to be successful in retaining new counsel if granted additional time. *United States v. Lyles*, 223 F. App'x 499, 502–03 (7th Cir. 2007) (noting that there was no indication in the record that the defendant would make any progress toward retaining new counsel if granted yet another continuance after she had failed to retain new counsel on numerous prior occasions).

At the motion hearing, the district court initially noted that defendants often experience difficulty in raising funds and hiring a private attorney, but went on to say that Sinclair's situation was "more certain than in some cases" it had seen, and added, "Obviously your family has spoken to Mr. Lenyo. Your family has done what they can until the income tax refunds come in to try to line this up, but it hasn't come to pass yet." (A.17:14–16.) Sinclair's prospects for hiring Mr. Lenyo were seemingly better still the next day when the district court denied the request for a continuance a second time. By that time, Sinclair had raised the full amount of money for a retainer and left a message with Mr. Lenyo's office. (A.23:21–24:1.) The court acknowledged that a scheduling conflict likely caused Mr. Lenyo's delay in responding to Sinclair's message, yet it refused to allow any additional time to await Mr. Lenyo's response. (A.24:2–8.)

Taking the preceding six factors individually and as a whole, there is no doubt that the circumstances surrounding Sinclair's request for a continuance in order to retain Mr. Lenyo as his attorney justified granting that request.

B. The district court abused its discretion by improperly balancing the competing interests at stake.

The second *Santos* factor that this Court considers is the reasoning actually articulated by the district court in the proceedings below. *Santos*, 201 F.3d at 958. This Court generally finds a district court's decision to be unreasonable for one or both of two reasons. First, this Court will find an abuse of discretion if the district court's purported balancing fails to recognize the presumption in favor of the defendant's right to counsel of choice, *see Carlson*, 526 F.3d at 1024 (citing *Wheat*, 486 U.S. at 164), or reveals a myopic insistence on expeditiousness for its own sake, *see Carlson*, 526 F.3d at 1027; *see also Ungar v. Sarafite*, 376 U.S. 575, 589 (1964). Alternatively, this Court will find an abuse of discretion if it deems the district court's reasoning, evaluated as a whole, to be otherwise unreasonable or arbitrary. *See, e.g.*, *Sellers*, 645 F.3d at 835 (finding an abuse of discretion when the district court relied on unlawful rule "that new counsel take the case as they find it"); *Santos*, 201 F.3d at 960 (finding an abuse of discretion when the district court erroneously held that it had a duty to "to rush public officials to trial lest they continue to abuse their office").

In this case, the district court failed to recognize the presumption in favor of Sinclair's right to counsel of choice—indeed, the court completely failed to ascertain the correct Sixth Amendment right at stake. In addition, the district court's repeated discussion of the court's calendar without elaboration reveals a myopic adherence to expeditiousness for its own sake. Each of these errors in itself is

sufficient for this Court to find that the trial court abused its discretion in denying Sinclair's request for a continuance.

1. The district court failed to recognize the presumption in favor of Sinclair's right to counsel of choice.

The district court engaged in two lengthy discussions from the bench weighing the factors for and against granting a continuance—first, at a motion hearing held on February 6, and again on February 7 immediately before trial began. On both occasions, the district court misapprehended the constitutional right implicated by Sinclair's request. Furthermore, even to the extent that the court *did* balance Sinclair's interests against the court's, the reasoning demonstrated a lack of appreciation for the presumption in favor of Sinclair's constitutional right.

Tellingly, the district court stated during an oral ruling at the motion hearing that "the strongest factor weighing in favor of the continuance" was Sinclair's concern that his court-appointed attorney was not giving him effective assistance of counsel. (A.19:2–6.) The following passage from the court's February 7 ruling was even more troublesome:

> [M]y job, right now, under the Constitution, is to try to be sure that you have effective assistance of counsel. That's what the Constitution requires. You don't have the right to have counsel of your choice appointed to represent you, but you do have the right to effective assistance of counsel.

(A.28:12–17.) Of course, by requesting a continuance in order to retain a private attorney, Sinclair was invoking his Sixth Amendment right to choice of counsel, not his Sixth Amendment right to effective assistance of counsel. At no point in the

rulings did the district court acknowledge that Sinclair's right to choose his own attorney is constitutionally protected. When the court briefly discussed the possibility of Mr. Lenyo taking the case, it again referenced the incorrect right, opining that Mr. Lenyo may not be in a position to provide the effective assistance the Constitution requires. (A.28:21–25.) In short, the district court substituted its own variation of a *Strickland* inquiry for Sinclair's constitutionally protected personal preference, thereby eviscerating Sinclair's right to counsel of his choice. Because the district court misapprehended the proper constitutional right in its analysis, and because it disregarded Sinclair's preference between Mr. Lenyo and his court-appointed attorney, this Court should find that its denial was unreasonable and arbitrary and reverse Sinclair's conviction.

2. The district court's reasons for denying the continuance reveal a myopic insistence on expeditiousness for its own sake.

The district court's denial of Sinclair's request for a continuance also was unreasonable and arbitrary because it gave undue weight to concerns about managing its calendar. If it appears from a district court's reasoning that it considered *any* delay unacceptable, without sufficient regard for the defendant's countervailing interests, this Court has determined that "that sort of rigidity can only be characterized as arbitrary." *Carlson*, 526 F.3d at 1026 (finding arbitrary rigidity when the district court failed to inquire how long the substitute attorney would need to prepare for trial); *see also Sellers*, 645 F.3d at 835 (finding a district

court's denial of a continuance arbitrary in part because it was based on rigid reliance on the rule that "new counsel take the case as they find it").

Two main aspects of the district court's reasoning in this case suggest that it considered any delay unacceptable. First, the district court made no serious inquiry into how long Mr. Lenyo would need to prepare for the case. In fact, the court strongly implied that, even if it *had* granted a continuance to allow Mr. Lenyo to replace Sinclair's court-appointed attorney, the continuance would only have been for between a couple of days and one week. (*See* A.28:18–25.) Although the district court here did not go so far as to articulate a "take the case as they find it" rule that this Court has previously rejected, *see Sellers*, 645 F.3d at 835, its apparent default position was that Mr. Lenyo would have to proceed to trial immediately were he allowed to take the case, (*see* A.28:22–25) ("I cannot say, without hearing from Mr. Lenyo, I can't say that he would be in a position to provide you with the effective assistance of counsel that you're entitled to under the Constitution if he came into the case *tomorrow or Thursday or Friday or even next week* and tried to undertake the case at this point.") (emphasis added). By its own admission, the district court was familiar with Mr. Lenyo's work and knew that he had a scheduling conflict at the time. Denying Sinclair even a reasonable opportunity to *hear back* from Mr. Lenyo was unquestionably arbitrary.

Second, the district court's vague discussion of its trial calendar also displayed an unreasonable insistence on expeditiousness. The court offered two primary reasons against granting a continuance. It first noted that the trial was

going to take "anywhere from one to three days—and we need a courtroom available to do that, and we have a courtroom available to do that." (A.18:17–19.) The court then highlighted the fact that there were thirty-four prospective jurors and five subpoenaed government witnesses who were all scheduled to come to court for trial the next day. The court concluded that it could not "ignore them; that's 40 other people, plus whoever might have been able to use the courtroom starting tomorrow, that would be inconvenienced by a continuance now." (A.18:24–19:1.)

These statements were part of the district court's pattern of consistently unreasonable treatment of the factors it weighed. This Court has repeatedly held that "even the inconvenience of pushing a trial back a month or so can *easily* be outweighed by a defendant's interest in having counsel of choice." *Sellers*, 645 F.3d at 838 (citing *Carlson*, 526 F.3d at 1026) (emphasis added); *see also Carlson*, 526 F.3d at 1025–26 (holding that the district court's administrative concerns were minimal when it heard a motion to continue on the day before trial, no jury had yet been impaneled, and three witnesses would have to appear at a later date).

Here, the court pointed out that it needed a courtroom to hold a trial, but did not elaborate. It never discussed other pending cases, nor indicated how soon it could reschedule Sinclair's one-day trial. The court's failure to articulate any specific scheduling conflict indicates that it regarded as unacceptable the notion of an empty courtroom for a day. Meanwhile, the district court did very little to explain how forty witnesses and prospective jurors would be meaningfully inconvenienced by *not* having to come to court the next day. In light of *Carlson*, the

district court's articulated reasoning for denying Sinclair's request for a continuance clearly demonstrated an unreasonable adherence general calendar concerns. Therefore, the denial was an abuse of discretion, and because these errors are structural, this Court should vacate Sinclair's conviction.

II. The district court's failure to group Counts 1 and 3 of Sinclair's indictment was legal error that requires remand for resentencing.

The district court erred when it did not group Counts 1 and 3 of Sinclair's indictment for purposes of sentencing. This error was not harmless. It resulted in an increase in Sinclair's offense level from 16 to 17 and an increased Guidelines range of 51 to 63 months instead of 46 to 57 months. When reviewing district court sentences, this Court "must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range." *Gall v. United States*, 552 U.S. 38, 51 (2007). In this Court, "a mistake in that calculation warrants resentencing." *United States v. Garrett*, 528 F.3d 525, 527 (7th Cir. 2008). This Court "review[s] a district court's application of the Guidelines de novo." *United States v. Samuels*, 521 F.3d 804, 815 (7th Cir. 2008). This Court should remand for resentencing with instructions to group Counts 1 and 3.

A. The district court erred by applying a note from an inapplicable guideline in order to deny Sinclair the requisite grouping of the related Counts 1 and 3 in sentencing.

Count 1 (possession with intent to distribute marijuana) and Count 3 (possession of a firearm having been convicted of a crime punishable by imprisonment for a term exceeding one year) must be grouped at sentencing.

Grouping of these charges is required because the Guidelines explicitly provide that "all counts involving substantially the same harm shall be grouped together into a single Group." U.S.S.G. § 3D1.2. Counts involve substantially the same harm when, as relevant here, one of the counts "embodies conduct that is treated as a specific offense characteristic" of another count. U.S.S.G. § 3D1.2(c). Because the Guidelines require an upward adjustment when a drug-trafficking crime involves a dangerous weapon, *see* U.S.S.G. § 2D1.1(b)(1), the gun-possession charge in Count 3 embodies conduct that is treated as a specific offense characteristic in Sinclair's marijuana-possession-with-intent charge (Count 1). Thus, Counts 1 and 3 involve substantially the same harm and should have been grouped at sentencing. Indeed, the Probation Office explicitly recommended that Counts 1 and 3 be grouped. (A.3.)

Although the district court recognized that "in most cases, counts one and three would be grouped," (A.2), it failed to engage in this straightforward application of the relevant guideline and instead invoked an application note to an entirely unrelated guideline—U.S.S.G. § 2K2.4—to deny grouping. Section 2K2.4 has nothing to do with grouping;[5] it applies only to guide courts who must sentence defendants under certain firearm offenses, including the § 924(c) charge that formed the basis of Sinclair's Count 2. In short, note 4 to § 2K2.4 tells courts that the guideline sentence is the statutory mandatory minimum sentence, so that the court should not engage in a traditional guidelines calculation with all its various adjustments and criminal-history considerations:

[5] Indeed it could not, because the statutes specified in that section all require that the sentences imposed run consecutively from any other term of imprisonment.

> If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, *do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense*. A sentence under this guideline accounts for any explosive or weapon enhancement for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under 1.3 (Relevant Conduct).

U.S.S.G.§ 2K2.4 cmt. n.4 (emphasis added). The district court's mistake was in reading note 4's prohibition on use of the firearms-related "specific offense characteristic[s]" from Count 2 as categorically removing the conduct of a wholly separate count—Count 3—from grouping. The district court concluded that "whatever might be true in other cases, the firearm possession is not treated as an enhancement" of the marijuana-possession count and, therefore, grouping under § 3D1.2(c) was no longer available. (A.3.)

Yet note 4 does not change the way offense characteristics are treated in underlying offenses. To the contrary, whether offense characteristic enhancements are actually applied in a given case is irrelevant to the grouping determination and irrelevant to a determination of how offense characteristics are treated normally. *See United States v. Bell*, 477 F.3d 607, 615 (8th Cir. 2007) ("Grouping of the felon in possession count and the drug count is proper even though the applicable enhancements are not utilized."). In fact, grouping § 841(a) possession charges with § 922(g) weapons charges is so common that "these counts therefore are grouped together pursuant to § 3D1.2, often without note." *Id*.

Similarly situated defendants have consistently been afforded the benefit of grouping of their non-mandatory minimum charges. Although this Court has never

directly confronted the question whether § 841 and § 922 counts arising out of the same conduct should be grouped when § 924(c) counts are also charged, other courts have. Those courts have consistently found that the § 841 and the § 922 counts should be grouped when § 924(c) is also charged. *See Bell*, 477 F.3d at 615 (specifically addressing the application of note 4 and concluding that "each count includes conduct that is 'treated as a specific offense characteristic in' the other offense, and therefore the counts should be grouped"); *see also United States v. Gibbs*, 395 F. App'x 248, 250 (6th Cir. 2010) (analyzing a sentence arising out of several charges including charges requiring a mandatory minimum sentence violating § 924 and finding that "the district court properly grouped together Gibbs's drug and felon-in-possession offenses"); *United States v. King*, 201 F. App'x 715, 718 (11th Cir. 2006) (reviewing a mandatory minimum firearm sentence in conjunction with § 924, and holding that "in the instant case, the district court did not err by grouping Counts One and Two, the drug counts, with Count Three, felon in possession of a firearm"). Courts have consistently required grouping of these charges for similarly situated defendants, and Sinclair has uncovered no case where a court interpreted and applied the Guidelines in the way the district court did here in order to deny grouping.

In interpreting the two Guidelines provisions as it did, the district court actually undermined the purpose of both—to avoid the type of double counting of specific offense characteristics that would lead to an unduly harsh sentence. Thus,

the district court erroneously interpreted note 4, which led it to erroneously deny grouping of Counts 1 and 3.

B. The district court's miscalculation of Sinclair's offense level was not harmless error.

The district court committed reversible error when it miscalculated Sinclair's offense level. This Court engages in a harmless-error analysis when Guidelines are misapplied, but the burden rests with the government to provide affirmative evidence that the defendant's sentence would have been the same without the error. *See United States v. Hill*, 645 F.3d 900, 912 (7th Cir. 2011) ("[T]he district court expressly stated that Hill would have received the same sentence regardless of the guideline calculation and provided ample justification for this conclusion."); *United States v. Abbas*, 560 F.3d 660, 667 (7th Cir. 2009) (noting that "[t]o prove harmless error, the government must be able to show that the Guidelines error did not affect the district court's selection of the sentence imposed," but holding that the burden was satisfied because the district court explicitly stated that it would impose the same sentence) (internal citations and quotations omitted). Based on the record, the government cannot meet its burden of showing that Sinclair would receive an identical sentence, and thus cannot meet its burden of proving that the Guidelines-calculation error was harmless. Unlike both *Abbas* and *Hill*, no such affirmative statements exist in this case, and thus the government cannot show Sinclair would have received the same sentence if not for the error. In fact, the only evidence in the record suggests the contrary—that the discrepancy in Guidelines range is relevant to the sentence imposed by the district court. The district court labeled as

"material" the discrepancy between the Probation Office's calculation, which included grouping, and the government's, which did not. (A.3.) The district court explicitly recognized that the grouping issue "affects Mr. Sinclair's advisory range by anywhere from three to five months." (A.4.) Thus, the error was not harmless and this Court should reverse and remand for resentencing.

CONCLUSION

For the foregoing reasons, the appellant, Roderick D. Sinclair, respectfully requests that the Court grant a new trial or, at a minimum, remand for re-sentencing.

Respectfully Submitted,

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No. 12-2604

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

United States of America, Plaintiff-Appellee, v. Roderick D. Sinclair, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division Case No. 3:11-cr-00105-RLM-1 Hon. Robert L. Miller, Jr., Presiding Judge

CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Plaintiff-Appellant, Roderick D. Sinclair, hereby certify that I electronically filed this brief and appendix with the clerk of the Seventh Circuit Court of Appeals on November 21, 2012, which will send notice of the filing to counsel of record.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because this brief contains 7,367 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 12 point Century Schoolbook font with footnotes in 11 point Century Schoolbook font.

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CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30

I, the undersigned, counsel for the Defendant-Appellant, Roderick D. Sinclair, hereby state that all of the materials required by Circuit Rules 30(a), 30(b), and 30(d) are included in the Appendix to this brief.

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ATTACHED REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT RODERICK D. SINCLAIR

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United States of America,

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v.

Roderick D. Sinclair,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division

Case No. 3:11-cr-00105-RLM-1

Hon. Robert L. Miller, Jr., Presiding Judge

REQUIRED RULE 30(a) SHORT APPENDIX OF DEFENDANT-APPELLANT RODERICK D. SINCLAIR

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

UNITED STATES OF AMERICA	)	
	)	
vs.	)	CAUSE NO. 3:11-CR-00105(01)RM
	)	
RODERICK D. SINCLAIR	)	

SENTENCING MEMORANDUM

An Elkhart police officer found Roderick Sinclair with marijuana intended for distribution and a loaded pistol on June 16, 2011. A jury found Mr. Sinclair guilty of possession with intent to distribute marijuana, 21 U.S.C. § 841(a)(1), possession of a firearm during and in relation to a drug trafficking crime, 18 U.S.C. § 924(c), and possession of a firearm by a felon, 18 U.S.C. § 922(g)(1).

The government objected to ¶¶ 18, 26, and 34 of the presentence report, which address the grouping rules under the sentencing guidelines. Mr. Sinclair objected to ¶¶ 20-23 and 31 of the report concerning obstruction of justice, and to ¶ 93 to the extent it addresses tax liens. The purported tax liens will play no role in the calculation of the advisory guideline range or the selection of the sentence, so the court declines to resolve the objection to ¶ 93. FED. R. CRIM. P. 32(i). The court adopts as its own findings ¶¶ 1-17, 19, 24-25, 27-30, 32-33, and 35-113 of the presentence report (except the references in ¶ 93 to tax liens), specifically including ¶¶ 76-96 (with same exclusion from ¶ 93) concerning Mr. Sinclair's financial condition and earning ability.

A sentencing court must first compute the guidelines sentence correctly, then decide whether the guidelines sentence is the correct sentence for that

defendant. United States v. Santiago, 495 F.3d 820, 825 (7th Cir. 2007). The court applies the 2011 version of the sentencing guidelines.

The mandatory minimum sentence for possession of a firearm in furtherance of a drug trafficking crime is five years consecutive to any other sentence, so the sentencing guidelines recommend a consecutive 60-month sentence for count 2 of the indictment. U.S.S.G. § 2K2.4. The parties disagree over how to handle the other two counts.

The sentencing guidelines contain a series of provisions that govern guideline computations when a defendant is being sentenced on more than one count. In some circumstances, the offense level for one count is increased by a formula based on the offense level of other counts. See U.S.S.G. § 3D1.4. In other circumstances, counts are "grouped" — treated as a single count for purposes of calculating the final adjusted offense level. The parties disagree as to whether counts 1 and 3 should be grouped for Mr. Sinclair.

U.S.S.G. § 3D1.2(c) provides that counts should be grouped for purposes of calculating the offense level, "When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts." Whether counts 1 and 3 are grouped for Mr. Sinclair turns on, to steal a phrase, what the meaning of "is" is. In most cases, counts 1 and 3 would be grouped, and Mr. Sinclair and the presentence report so recommend: possession of a dangerous weapon ordinarily increases the offense level of a drug count by two levels. U.S.S.G. § 2D1.1(b)(1) ("If a dangerous weapon

(including a firearm) was possessed, increase by **2** levels"). The presentence report and Mr. Sinclair reason that count 3 embodies conduct (possession of a firearm) that "is treated as a specific offense characteristic in" count 1.

But while firearm possession generally is treated as a specific offense conduct in drug cases, it isn't so treated with this combination of counts. The guidelines recommend a 60-month consecutive sentence on count 2 pursuant to U.S.S.G. § 2K2.4: "if the defendant . . . was convicted of violating [18 U.S.C. § 924(c)], the guideline sentence is the minimum term of imprisonment required by statute." Application Note 4 to that guideline continues:

> If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply a specific offense characteristic for possession [of a] firearm when determining the sentence for the underlying offense. A sentence under this guideline accounts for any . . . weapon enhancement for the underlying offense of conviction . . ..

So as the government sees it, Application Note 4 prohibits the firearm possession (count 3) from serving as a specific offense characteristic in the drug count (count 1), meaning that count 3 does not embody "conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to" count 1. Whatever might be true in other cases, the firearm possession is not treated as an enhancement in the other count when it comes to Mr. Sinclair.

The disagreement is material. If Mr. Sinclair and the presentence report are correct, counts 1 and 3 are grouped, and the count with the greater offense level applies. U.S.S.G. § 3D1.3(a). Before any Chapter Three enhancements (such as

obstruction of justice), the offense level for count 1 (based on .4536 kilograms of marijuana) would be eight, U.S.S.G. § 2D1.1(c)(16), and the offense level for count 3 would be 14. U.S.S.G. § 2K2.1(a)(6)(A). The final offense level if the counts are grouped would, depending on the obstruction of justice objection, be either 14 or 16. If the two counts are not grouped, as the government contends is correct, count 3, with the higher offense level, would be one "unit" and count 1, with an offense level six levels less serious than count 1, would be half a unit. U.S.S.G. § 3D1.4(b). The presence of 1½ units would increase the greater offense level (14) by one level, producing a final offense level, again depending on the obstruction of justice objection, of 15 or 17. Because Mr. Sinclair's offense level is IV, this issue affects Mr. Sinclair's advisory range by anywhere from three to five months.

One would think that by 2012, the year in which the sentencing guidelines reach their silver anniversary, courts would have decided this issue by now. Yet neither the parties nor the court's own research disclose such a holding.

Grouping is done to avoid double-counting when one act or series of acts could violate several laws and so subject a defendant to separate punishments for the same act. See U.S.S.G § 3D1.2, Application Note 5 ("This provision prevents "double counting" of offense behavior."); United States v. Chavin, 316 F.3d 666, 676 (7th Cir. 2002) (noting that the primary purpose of (c) is avoiding double counting). "Of course, this rule applies only if the offenses are closely related." U.S.S.G. § 3D1.2, Application Note 5. The court's analysis, then, begins with whether the possession of marijuana with intent to distribute is closely related to

possession of a firearm as a felon and whether treating them separately would lead to double counting.

Without a clear directive instructing the court to group these two charges, the question must turn on whether they are closely related and put Mr. Sinclair at risk of being double counted for a single bad act. United States v. Chavin, 316 F.3d at 676. With this purpose in mind, the examination turns on how closely related the two crimes are. Crimes generally aren't closely related if the crimes are distinct, cause different harms, and harm different victims, United States v. Vucko, 473 F.3d 773, 779 (7th Cir. 2007), but when the crimes are against society rather than a specific victim, the analysis turns entirely to the harm avoided by enforcement of the statute. United States v. Salgado-Ocampo, 159 F.3d 322, 328 (7th Cir. 1998) ("[W]hen, as here, the crimes are victimless, the grouping decision must be based primarily upon the nature of the interest invaded by each offense." quoting § 3D1.2, cmt 2).

The court has found no clear directive in the case law as to whether these two charges naturally group together. Neighboring courts are divided. United States v. Gibbs, 395 Fed. Appx. 248 (6th Cir. 2010) ("The district court properly grouped together Gibbs's drug and felon-in-possession offenses."); United States v. Thomas, 545 F.3d 1300, 1301 (11th Cir. 2008) (noting – but not addressing whether it was proper – that "the two drug count convictions and the felon in possession conviction were grouped together under U.S.S.G. § 3D1.2(c) because they involved substantially the same harm."); United States v. Espinosa, 539 F.3d

926, 930 (8th Cir. 2008) (affirming a district judge's decision not to group drug charges with felon in possession charges because "[t]his case is more comparable to United States v. Winters, 411 F.3d 967 (8th Cir. 2005), where we upheld a district court's decision not to group a firearms count and a drug count, because the crimes "did not have a common victim, were not part of the same act or transaction, and did not involve similar conduct."); United States v. Henderson, 129 Fed. Appx. 949, 952 (6th Cir. 2005) (noting that the district court had grouped a felon in possession charge with drug trafficking charges and finding that enhancing the drug charge with the weapon possession did not violate Double Jeopardy).

Mr. Sinclair's convictions on counts one and three aren't closely related and don't put Mr. Sinclair at risk for being double counted when punishment is assessed. Mr. Sinclair's possession of the firearm after having been convicted of a felony is quite distinct from his possession of marijuana with intent to distribute it. The only thing tying the two crimes together is the fact that one traffic stop and search led to both charges and they were tried together. The harm caused by each crime is also distinct: firearm possession by someone who has already been found guilty of a felony potentially makes society more dangerous and increases the likelihood of violence, but possession of marijuana with intent to distribute harms society by adding to the drug problem and degrading neighborhoods. See United States v. Salgado-Ocampo, 159 F.3d at 328.

Even though the possession of a firearm (apart from legality of the possession) could be used to add two base offense levels to the possession of marijuana with intent to distribute charge, the Sentencing Guidelines don't require that these two charges be grouped. The test for grouping, that is whether the crimes are closely related and whether grouping should be used to avoid double counting one crime is not satisfied. The court sustains the government's objection to ¶¶ 18, 26, and 34 of the presentence report, and will not group counts 1 and 3.

As already outlined, the offense level for count 3 is 14 and the offense level for count 1 is eight, producing 1½ units and a one-level increase, to level 15.

The sentencing guidelines require a two-level enhancement for a defendant who attempted to obstruct justice with respect to and relating to the prosecution of the offense of conviction. U.S.S.G. § 3C1.1. The government contends that Mr. Sinclair suborned perjury by presenting Teresa Batts's testimony at the suppression hearing in this case; the presentence report agrees that the enhancement is appropriate. Mr. Sinclair objects to the proposed enhancement because, although the court denied the suppression motion, the court made no finding that Ms. Batts's testimony was perjured or that Mr. Sinclair had influenced her to testify falsely.

Suborning perjury can amount to obstruction of justice within the meaning of U.S.S.G. § 3C1.1. Application Note 4(B), U.S.S.G. § 3C1.1; United States v. Pabey, 664 F.3d 1084, 1094-1096 (7th Cir. 2011). At the suppression hearing, Ms.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

UNITED STATES OF AMERICA,	)	**Cause No.:**
	)	**3:11cr00105-RLM-1**
vs.	)	
	)	
RODERICK D. SINCLAIR,	)	**South Bend, Indiana**
	)	**February 6, 2012**
Defendant.	)	**1:40 p.m.**
	)	
_____	)	

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE ROBERT L. MILLER, JR.

APPEARANCES:

For the Government:
MR. DONALD J. SCHMID
Assistant United States Attorney
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South Bend, Indiana 46601

For the Defendant:
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THE COURT: Next will be Criminal Cause 3:11cr105, *USA v. Roderick Sinclair*.

We will wait a moment until everybody's able to change positions here.

This case is set for trial tomorrow. On Thursday, we received a letter in chambers purporting to be from Mr. Sinclair -- and I will verify that in a moment -- seeking a continuance of tomorrow's trial for what I understand to be three reasons.

Mr. Stevens, I know it may be awkward for you to speak as to the second of the issues, but do you wish to speak with respect to any of the three grounds for continuance, or do you and Mr. Sinclair think it would be more appropriate for him to speak first?

MR. STEVENS: Your Honor, I've discussed this matter with Mr. Sinclair. I am satisfied that this is not -- that his letter was not for the purposes of delay; that he does not appear to have confidence in the representation that I have been giving him and doesn't feel like I've been functioning in his best interest. Obviously I think that I have been doing everything that I can to protect his interest, but Mr. Sinclair does disagree with that. Beyond that, I don't have any further position on it.

THE COURT: Okay. Do I correctly infer from the filing of the stipulation last week and your filing of the

witness list that, but for this, you're prepared to go forward tomorrow?

MR. STEVENS: I'm prepared, Judge. I'm suffering from a pretty virulent chest congestion, so I won't be quite at the top of my game, but I am prepared to go to trial as scheduled tomorrow.

THE COURT: Thank you, sir.

Mr. Sinclair, I do need to ask you about this letter and the things you said in it.

Two things before I do that. First, I'm going to have to have you placed under oath. The attorneys are already under their oath by virtue of being attorneys as they speak to me, but I have to have you placed under oath as I ask you about these things. And, second, I want to be sure you understand that this lady here (indicating) is writing down everything that any of us say, and that will include things you say in a minute; and if you say anything that could be helpful to the government, I'm sure they'll have a copy of whatever it is you said in pretty short order and it would be available to be used at trial against you, whether that trial comes tomorrow or some other time.

Right now Mr. Stevens is your attorney. No matter what happens at this hearing and what the situation is tomorrow or at the end of today, at this moment Mr. Stevens is your attorney, and he owes you the full duties that any attorney

owes a client. So if at any time in the questions that I ask you -- and I'm not going to be asking you about the crime -- but in response to any of my questions you want to talk to Mr. Stevens before answering, I urge you to do that. I don't want my questions to -- my questions aren't intended to produce things that the prosecution will want to read to the jury at trial, but I've had situations where people say things in response to what I have to ask that could be used that way. So, again, I urge you to talk to Mr. Stevens if you've got any question about what you want to say in response to my questions.

Do you understand all of that?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Let me ask you to stand, raise your right hand, and face this gentleman here.

(The defendant was duly sworn.)

THE COURT: You can be seated, sir.

As I read your letter, Mr. Sinclair -- well, first of all, you're the person who sent this letter that we got last week?

THE DEFENDANT: Yes, sir.

THE COURT: As I understand it, you're setting forth three reasons to continue your trial.

First, as I understand it, your family plans to hire an attorney for you, and they plan to do that with an income

tax refund -- or refunds -- that they anticipate receiving in, I guess, about -- sometime about a week from now, give or take, given when you wrote the letter.

Secondly, as I understand it -- and I will come back to that -- do I correctly understand that that's your first ground for the continuance?

THE DEFENDANT: Yes, sir.

THE COURT: Secondly, as I understand it, you think that you're being misrepresented by your Federal Community Defender -- and I'm quoting what you said here -- and that he didn't follow through with a line of questions that you thought was necessary at your suppression hearing.

Again, I will come back to that, but do I understand that correctly?

THE DEFENDANT: Yes, sir.

THE COURT: Then, as I understand it, the third ground that you have for the continuance is that you have some new evidence that might be grounds for another suppression hearing and you anticipate that would be presented to me by whatever attorney your family hires.

Do I understand correctly that's your third ground?

THE DEFENDANT: Yes, sir.

THE COURT: I need to ask you about a couple of these things.

The plans to hire a private attorney; has your

family talked to the attorney that they are going to retain yet, or are they waiting until they get the money from the tax refunds?

THE DEFENDANT: Yeah, they've spoken to him, and he told them what it would take to retain him. His name is Mark Lenyo. They just plan to pay the retainer as soon as they get the money.

THE COURT: They're pretty sure that the amount of the tax refund that they get is going to be enough to cover Mr. Lenyo's services?

THE DEFENDANT: Yes, sir.

THE COURT: All right. Second, asking about your relationship with Mr. Stevens, when you said you're being misrepresented by your Federal Community Defender -- I just want to be sure I understand -- you're not saying he's misrepresenting things to you; you just don't feel like he's representing you the way he should?

THE DEFENDANT: Correct.

THE COURT: Okay. Do you base that on anything other than his decision not to ask the line of questions that you wanted him to ask at the suppression hearing last month, or is that where you lost your confidence in him?

THE DEFENDANT: That pretty much was the straw that broke the camel's back. But before it was a situation where I was pretty much led to believe that between the guidelines I

would be -- if I took a plea, it would be six months less than if I went to trial and lost. So, I mean, that led me to think that, okay, at least I will get to keep my rights if I go to trial and lose. But from what I understand now, it would be something different as far as what a plea would consist of. Because what I've known for plea bargains to consist of is me pleading to some charge and some charge being dropped or some sort of bargain or some sort of deal in the plea. And with going to trial and losing on three charges, wouldn't be the same as taking a plea. It's like saying that I would get a plea bargain that has me pleading guilty to all three charges, and the difference in the time would be six months, according to the guidelines. But I just didn't feel like that was really what was trying to be put across to me or if I took it wrong or was he trying to get it to me in a different way, but I just didn't understand the reason why that was so. And that's partially the reason why we're going to trial.

THE COURT: Okay. Now, let me ask you about the last one. When you say that you have new evidence that might be grounds for another suppression hearing and that would be presented to me by -- my guess would be Mr. Lenyo now that you have identified him -- have you shared that with Mr. Stevens?

THE DEFENDANT: No, I have not.

THE COURT: And when did you come upon that

situation, sir?

THE DEFENDANT: It was about two weeks ago I came upon the information, and I just plan to have you look it over once I retain the attorney. He'll present everything.

THE COURT: Okay. I'll just move on across the courtroom and see if anybody has any additional -- well, I guess before I do that, Mr. Sinclair -- and, again, I urge you to talk to Mr. Stevens before adding anything -- but, at this point, I'm going to turn to the attorneys to see if they have anything to add to the record and stop talking to you directly -- is there anything you want to add to what you've told me and what you've wrote in the letter? And, again, I urge you to talk to Mr. Stevens before saying anything because I don't want to see you get in the position where your words are being used at trial, whenever that trial might be.

THE DEFENDANT: Um, I would just like to thank you for setting the hearing for me. I appreciate that.

THE COURT: Thank you, sir.

Mr. Stevens, is there anything that you wish to add?

MR. STEVENS: Judge, I don't have anything further to add.

THE COURT: Mr. Schmid, I know that the government often doesn't speak, but I know that the closer we get to trial the likelier it is that the government will speak, so let me turn it to you if you do wish to speak.

MR. SCHMID: I do wish to speak, Your Honor. The government is ready to go to trial. This case was indicted last August. The original trial date was set for December 20th. That date was postponed because of the filing of a suppression motion somewhat toward the latter part of the pretrial process, and we had the hearing and Your Honor denied the motion at the hearing.

We are ready to go to trial and would like to get this matter done, and we are prepared to go forward tomorrow. We believe it would be a one-day trial. The government has an exceedingly strong case, and we'll be presenting it briskly if allowed to.

THE COURT: Am I correct in inferring -- without stating names -- that the six people that you listed in your witness list, that they are all under subpoena for tomorrow?

MR. SCHMID: Yes, Your Honor, except for the ATF witness who doesn't need a subpoena, but everyone else is under subpoena ready to go for tomorrow.

THE COURT: Thank you, sir.

Mr. Sinclair, there's a lot of factors I have to take into account, and the factors, frankly, weigh a little differently than they might if we were looking at this more removed from the trial date; a little earlier, in other words, if your trial date was in March, or if we were talking about this two or three weeks earlier than today.

I'm not quite as certain as you are, just having seen how these things go -- knowing nothing about what your family's discussions have been with Mr. Lenyo -- but having seen the way this has played out in other cases -- not with Mr. Lenyo, just other cases where people are going to hire a private attorney -- I'm not as certain as you are that that's going to work out the way you and apparently your family and perhaps Mr. Lenyo expect it to. It may well be that you will not be in a position to hire a private attorney. Now, that does not mean that we couldn't talk about getting a different attorney for you, but it does affect whether I continue tomorrow's trial because it's uncertain as to how that might play out. More certain than in some cases I've seen. Obviously your family has spoken to Mr. Lenyo. Your family has done what they can until the income tax refunds come in to try to line this up, but it hasn't come to pass yet. So, really, what I would be doing in continuing the trial is to be betting on the future as to what's going to happen.

The new evidence for the suppression hearing is troubling in a few ways. Number one, the time has passed for filing motions to suppress. We had the motion; I heard the motion, and I did my best to decide it right. So there's no -- and there are rare cases where people can come in with new information and say, "We need to have this heard." And I don't know what the information is and I'm not asking what the

information is at this point. But for me to continue tomorrow's trial in order to allow the possibility that there might be another suppression hearing -- another suppression motion and another suppression hearing or reconsidering the suppression ruling, again, I'm kind of betting on things that haven't happened yet to continue tomorrow's trial for that.

It's particularly difficult for me to do that when Mr. Stevens can't even address it because he doesn't know what your new evidence is. And I think I understand why you didn't tell him, and I'll come back to that in a moment. But I can't really evaluate it and find whether this is a good reason to continue tomorrow's trial.

Now, when I say that I have to take those things into account, it's because there are reasons not to continue the trial. You're trial is going to take anywhere from the three days we thought at the outset to the one day that Mr. Schmid thinks it will take now -- anywhere from one to three days -- and we need a courtroom available to do that, and we have a courtroom available to do that. We have 34 people who are scheduled to come down here to serve on a -- to be the panel from which your jury would be selected, and the government has five people under subpoena who are planning to come in tomorrow to testify in the trial. And those all weigh, too. I can't ignore them; that's 40 other people, plus whoever might have been able to use the courtroom starting tomorrow,

that would be inconvenienced by a continuance now.

The strongest factor weighing in favor of the continuance is your concern that Mr. Stevens isn't representing you -- giving you effective assistance of counsel. Under the Constitution, that's what you're entitled to: effective assistance of counsel. And it's hard for me to find that he hasn't provided that to you.

I think I know what you're talking about with the guidelines, and I don't get involved in plea bargaining, but I need to state here -- this is part of my ruling, my understanding -- I'm not involved in plea bargaining, don't suggest that you accept or reject any plea offer. But when people plead guilty, it's more likely that they receive -- that their offense level goes down when the guidelines get calculated because of acceptance of responsibility. And that can reduce their guideline range -- the range the sentencing guidelines recommend -- by anywhere from 25 to 35 percent.

So the idea that there would be a six-month difference between what the guidelines would recommend if you plead guilty, as opposed to what they would say if you'd go to trial, doesn't suggest to me that Mr. Stevens is doing anything in the way of ineffective assistance of counsel or providing anything less than effective assistance of counsel.

He also -- and this would be true of Mr. Lenyo or Mr. Rehak or anybody else that might represent you -- he also

has the duty to bring his own professional training and experience to bear. He doesn't provide effective assistance of counsel if he just does whatever you or another client would ask him to do. He has to bring that experience and professional training to bear. And it's not at all unusual that an attorney thinks a line of questioning would be harmful or not helpful or for some other reason might be improper, whether because of rules of procedure or rules of evidence or rules of ethics.

So that standing alone doesn't give me grounds to find that Mr. Stevens has been providing you with anything less than you're entitled to under the Constitution, or that your relationship with him has broken down to the point that you can't work with him at a trial or that he can't represent you effectively at a trial.

So when I come down to all of that -- and I don't doubt that you filed this in good faith -- I don't get the feeling that you've been trying to stall this out since the case was filed or anything of that sort -- there was a continuance, but that was needed to address the suppression motion -- but when I look at this and balance all of that against the need for the court's calendar to proceed and the court's docket to proceed -- in other words, for somebody to be using that courtroom tomorrow, because if it's not you, it's not going to be anybody -- recognizing that we are a day away

from trial and that 34 people are planning to come down to be prospective jurors and five or six people are planning to come in to be prospective witnesses, when I put all of that together, I simply don't think it's the appropriate exercise of my discretion to continue the trial.

For that reason, I will deny the motion and expect to see everybody tomorrow, unless your health takes a dive for the worst, Mr. Stevens, and I hope that it improves. I will show that the motion for continuance that Mr. Sinclair filed on his own behalf -- and which I heard only because it included an expression of dissatisfaction of his counsel -- I will show that that is denied and we will proceed tomorrow.

See everybody then.

(Proceedings adjourned at 2:00 p.m.)

CERTIFICATION

I, Joanne M. Hoffman, Federal Official Court Reporter, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/Joanne M. Hoffman — 08/13/2012
Joanne M. Hoffman — Date

And any preliminary matters for the Defendant?

MR. STEVENS: Your Honor, Mr. Sinclair has requested that I ask the Court to let him address the issue of counsel, again.

THE COURT: All right. Mr. Sinclair, you may. First, again, as with yesterday, I have to have you placed under oath, so, if you could, please, stand, raise your right hand, and face the gentleman behind you.

MR. SINCLAIR: (Complies.)

(Defendant sworn.)

THE COURT: Mr. Sinclair, let me ask you to stand because those monitors get in the way and the sound does a lot better in the courtroom if people are standing, so go ahead.

MR. SINCLAIR: Yes, sir. I appreciate it.

An attorney was -- they called him yesterday. The money did come in yesterday afternoon. They called him yesterday, but he wasn't in his office. From my understanding, they are going to hire him today like they told me, guaranteed. They told me they have the money, but he just wasn't in his office yesterday or they would have had a retainer paid yesterday and he would have been able to make an appearance either by yesterday or early this morning.

I just ask that you give me a chance, at least

until -- the only thing I can figure is until tomorrow because I know for sure that they are going to hire an attorney today. And, with that, I just know that they're going to hire him, and if I can't get -- I want a different court-appointed attorney. I do not intend to go forward with this trial today with Mr. Stevens representing me. I know for sure that they're going to hire the attorney, Your Honor, and I just ask that you give me at least until tomorrow to see that someone will, in fact, file a written appearance or call in, some type of notification to the Court that I will be getting represented by an attorney today.

THE COURT: You've got two things I need to ask you about in what you said. Let's talk, first, about hiring the attorney.

Yesterday, you told me that the family was going to try to hire Mr. Lenyo. Is that who you're talking about now?

MR. SINCLAIR: Yes, sir. That's the person that they contacted.

THE COURT: So the tax refund came in, and they called Mr. Lenyo's office?

MR. SINCLAIR: Yes, sir.

THE COURT: And Mr. Lenyo hasn't called back?

MR. SINCLAIR: He wasn't in his office at the time.

They did leave messages, though.

THE COURT: This is not a thing of which I can take judicial notice. I probably could, if given the proper paperwork, but my understanding just from conversation is that Mr. Lenyo is actually in trial in Superior Court, the trial beginning yesterday and continuing today, which is neither here nor there, but it might be a reason why you haven't heard from him.

So you ask that the trial be continued until tomorrow so that Mr. Lenyo can represent you in a trial this week; is that what you're asking?

MR. SINCLAIR: Yes, sir, because I know -- I know for sure that they are going to hire him or another attorney for sure today to represent me. You will have notification today for another attorney to represent me in this court.

THE COURT: What reason do you have to think that an attorney could step in and try the case tomorrow?

MR. SINCLAIR: By tomorrow?

I just figured that he would be able to at least get a little bit of time to be able to become familiar with the case, and I would figure that would be, at earliest, next week. He should be ready.

THE COURT: Okay. So with respect to hiring Mr. Lenyo or another attorney then, you're not asking that we simply tell the jury to come back -- the prospective

jurors to come back tomorrow and then try the case tomorrow; you're asking for a continuance until next week or whenever the private attorney can be ready; is that what you're saying?

MR. SINCLAIR: Yes, I believe that would be adequate because with him coming and filing an appearance for me, and then, by tomorrow, I don't know if it would have any type of time constraints for him coming to see me and trying to get familiar with what I would say in court or what he intends to do as far as representing me. I don't believe it would be enough time for him to do that, but -- or if it could possibly be continued until the end of this week, I believe that would be adequate, enough time for him to come and file an appearance for me and for him to come see me at the jail and for him to become familiar with the case.

THE COURT: That has to do with your preference for the private attorney to be hired.

Let's take the other side of what you raised this morning. You said that if we can't do that you'd like an attorney other than Mr. Stevens.

MR. SINCLAIR: Yes.

THE COURT: What's your problem with Mr. Stevens? When I say this now, I need to -- yesterday, I told you Mr. Stevens is your attorney. Regardless of what happens after we get done talking, right now, as of whatever it is, 9:41

on February 7th of 2012, Mr. Stevens is your attorney. I don't want to ask -- I'm not asking for privileged communications between you and Mr. Stevens. I'm not asking you to tell anything that the court reporter writes down, Mr. Schmid is going to want a copy of to use at trial. I'm not trying to trap you, and I don't want to trap you with this, but I do need to know what your problem is with Mr. Stevens in order to evaluate this, so I urge you to talk to Mr. Stevens before you answer the question simply because, again, I don't want to see you trapped into saying something that would either tell us all something that we don't have any right to know because it's privileged communication between you and Mr. Stevens or would say something that might wind up being used against you at trial. That's not what I'm looking for, and that's why I suggest you talk to Mr. Stevens before you answer the question, but the question that I need to ask is: What's your problem with Mr. Stevens?

MR. SINCLAIR: I have no personal -- no personal problems, of course, with Mr. Stevens at all. As far as on a professional level, I don't feel like he's representing me the way that I feel is fit because, for one, like I said yesterday, the line of questions into the prosecution's witness, the witness in the suppression hearing, and, also, the fact that about the plea, which I stated, yesterday,

about a plea, and I never received any type of plea or anything about the case, and what I was presented with was something that -- I think it was something about the Guidelines, what would happen if I was to take a plea or what would happen if I was to go to trial in lieu, and, from my understanding, what he told me was that it would be six months, the difference between the plea and going to trial and losing, but I never seen a plea, so there's nothing to compare it to.

And then, three, sometimes when he would come and visit me, it was like he would come with other people's -- like facts from other cases that has nothing to do with my case, so -- and then sometimes he has to be refreshed. He'd ask me, "What is going on," and I would think that he should know what's going on. He would just state that, "Oh, that's the wrong case," or he's talking about the wrong case, and maybe it's the fact that, you know, he may be doing a lot of work or he has a heavy caseload. I don't know what the problem may be, but I feel like when he comes to see me that it should be about me and my case, and other people's cases should not be brought up.

THE COURT: Thank you, sir. You've answered the questions that I had to ask. Is there anything you want to add then before I turn to the other attorneys or the attorneys in the case?

MR. SINCLAIR: No, sir. Thank you.

THE COURT: Thank you, sir.

Mr. Stevens, anything you wish to add to the record?

MR. STEVENS: Nothing that would not be covered by attorney-client privilege, Your Honor.

THE COURT: Thank you, sir.

Mr. Schmid, again, I know that the Government often does not speak to this but often speaks more frequently when the case gets near trial so let me give you the floor.

MR. SCHMID: Your Honor, I don't have anything to add over what I said yesterday.

THE COURT: Mr. Sinclair, my job, right now, under the Constitution, is to try to be sure that you have effective assistance of counsel. That's what the Constitution requires. You don't have the right to have counsel of your choice appointed to represent you, but you do have the right to effective assistance of counsel. And if I were to continue this trial for a day or until the end of the week or even to next week -- Mr. Lenyo is a fine, fine criminal defense attorney. He does a good job for his clients -- but I cannot say, without hearing from Mr. Lenyo, I can't say that he would be in a position to provide you with the effective assistance of counsel that you're entitled to under the Constitution if he came into the case tomorrow or Thursday or Friday or even next week and tried

to undertake the case at this point. So simply telling this jury panel to come back in a day or two or a week, I can't find that that would provide you with effective assistance of counsel, what the Constitution requires, so that isn't a real attractive approach to me because of that, because I might be actually depriving you, costing you the effective assistance of counsel.

Now, the next question is whether going to trial today with Mr. Stevens would provide you with effective assistance of counsel. I suppose that I could find an attorney who only has one criminal case at a time and, therefore, doesn't have facts of different cases to keep straight. My expectation would be that that person isn't as likely to give you effective assistance of counsel as somebody who has more experience and more cases even going at the same time. I can't find, given the number of gun and drug cases that we have in the federal courts at this point in history, I can't find that an attorney confusing the facts during the pretrial interview falls short of what the Constitution requires.

And, again, my understanding of the role of a defense attorney is to sit down with the client and go over the Guidelines and say, "This is what might happen, and this is what might happen if there is acceptance of responsibility, and this is what might happen if there

isn't." A defense attorney cannot procure a plea offer from the Government. I don't know if there was a plea offer.

And based on all that, I can't find that Mr. Stevens has done anything or is about to do anything today or tomorrow that falls below what the Constitution requires or that you and he have had such a complete breakdown in your ability to communicate with each other that would keep him from being able to provide effective assistance of counsel.

So, again, I understand that you're not presenting this to try to delay the trial, for reasons of strategy, just trying to be better off if everybody has to come another day. I understand you're not doing that, and I don't mean to suggest that you are, but given the fact that we've got the jury panel here, given the fact that everybody is, otherwise, ready for trial, given the fact, as we said yesterday, that, if I continue the trial, nobody's using the courtroom and there will be more than one trial wanting the courtroom when your case is reset, given all those issues, and, again, taking into account the spirit with which your making the request, I do deny the request for a continuance, and for a change of counsel, and I think they're two separate requests, so I'll deny them both.

With that, is there anything further for the Defense before we get underway?

MR. STEVENS: Nothing further, Your Honor.

THE COURT: You may bring in the panel.

Each of the prospective witnesses on the witness list that were tendered, are all of them still in play as potential witnesses?

MR. SCHMID: All for the Government are, Your Honor.

MR. STEVENS: Yes, Your Honor.

THE COURT: All right. Oh, I'm sorry. Are there any objections to the proposed voir dire or the proposed preliminary instructions?

MR. SCHMID: No, Your Honor.

MR. STEVENS: No, Your Honor.

(Venire entered, sworn;
Voir Dire Examination;
Jury sworn.)

THE COURT: Mr. Lock will take you back to the jury room. It will be about a fifteen-minute break. It may be just a couple minutes longer because we have to shift gears to the next part of the trial, but he'll take you back there.

(Jury exited courtroom.)

THE COURT: Anything to raise before we break for the Government?

MR. SCHMID: No, Your Honor.

THE COURT: Or for the Defense?

MR. STEVENS: No, Your Honor.

Did you want to address the grouping?

MR. STEVENS: With regard to the grouping, certainly, the Guidelines provide that there is a firearms' enhancement for a drug offense. They provide that there's a drug enhancement for a firearms offense. 924(c) includes both the guns and drugs, and, consequently, those enhancements are not applied. However, they are enhancements, one to the other, and so we believe that they're properly grouped. It's just that you don't apply the enhancements.

THE COURT: Thank you, sir.

Step one in the sentencing process is to figure out what the Sentencing Guidelines recommend.

The mandatory minimum sentence for possession of a firearm in furtherance of a drug-trafficking crime is five years that has to be consecutive to any other sentence, so the Guidelines recommend a consecutive 60-month sentence for Count 2 of the Indictment, and the parties disagree over how to handle the other two counts. As time has gone on, we have, certainly, understood the Guidelines better and found them to be less complex as we go along. This is one where the courts haven't given us much clarification, and it's a pretty complicated area.

The Sentencing Guidelines contain a series of provisions that govern Guideline computations when a

defendant is being sentenced for more than one count. In some circumstances, the offense level is increased by a formula based on the offense level of the other counts. In other circumstances, the counts are grouped and treated as a single count for purposes of calculating the Guideline range, and the parties disagree about whether Counts 1 and 3 should be grouped for Mr. Sinclair. Guideline 3D1.2(c) tells us that counts should be grouped for purposes of calculating offense level "when one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts." Whether Counts 1 and 3 are grouped for Mr. Sinclair turns on, to steal a phrase, what the meaning of "is" is. In most cases, Counts 1 and 3 would be grouped, and the presentence -- Mr. Sinclair and the presentence report both so recommend because possession of a dangerous weapon ordinarily increases the offense level of a drug count by two levels.

The presentence report and Mr. Sinclair reason that Count 3 embodies conduct, possession of a firearm, that "is treated as a specific offense characteristic in" Count 1.

But while firearm possession generally is treated as a specific offense conduct in drug cases, it isn't so treated with this combination of counts. The Guidelines recommend a 60-month consecutive sentence on Count 2 under

Guideline 2K2.4, which says, "if the Defendant ... was convicted of violating Section 924(c), the guideline sentence is the minimum term of imprisonment required by statute." That's the easy part. Application Note 4 to that Guideline continues and says that, "If a sentence under this guideline is imposed" -- 924(c) guideline -- "is imposed in conjunction with a sentence for an underlying offense," the drug count, "do not apply the specific offense characteristic for possession of a firearm when determining the sentence for the underlying offense. A sentence under this guideline accounts for any ... weapon enhancement for the underlying offense of conviction..."

So, as the Government sees it, Application Note 4 prohibits the firearm possession in Count 3 from serving as a specific offense characteristic in the drug count, Count 1, meaning that Count 3 does not embody "conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline Applicable to" Count 1. Whatever might be true in other cases, the firearm possession is not treated as an enhancement in the other count when it comes to Mr. Sinclair.

And the disagreement is material. If Mr. Sinclair and the presentence report are right, Counts 1 and 3 are grouped, and the count with the greater offense level applies. Before any obstruction of justice issue is

reached, the offense level for Count 1 would be eight. The offense level for Count 3 would be fourteen. And, if grouped, the offense level would be, depending on the obstruction of justice resolution, either fourteen or sixteen. If the two counts are not grouped, as the Government contends is correct, Count 3, with the higher offense level, is one unit, and Count 1, with an offense level six levels less serious than Count 1 (sic), would be half a unit, and the presence of one-and-a-half units would increase the greater offense level or fourteen by one level producing an offense level, again, depending on the obstruction of justice objection of fifteen or seventeen. And because Mr. Sinclair's offense level is IV, this issue affects Mr. Sinclair's advisory range by anywhere from three to five months.

You would think that, by 2012, which is the year in which the Sentencing Guidelines reach their Silver Anniversary, courts would have addressed this by now, but neither the parties nor my research have indicated that they've done so, so it's up to me for this case.

The reason we group offenses is to avoid double counting when one act or series of acts could violate several laws and so subject a defendant to separate punishments, basically, for the same act.

Of course, the grouping rule, Application Note 5 to

the grouping rule in 3D1.2 says, "Of course, this rule applies only if the offenses are closely related," so my analysis then begins with whether possession of marijuana with intent to distribute is closely related to possession of a firearm as a felon and whether treating them separately would lead to double counting, and, without a clear directive instructing that these two charges be grouped, the question has to turn on whether they're closely related and put Mr. Sinclair at risk of being double counted for a single bad act. Crimes, generally, aren't closely related if the crimes are distinct, cause different harms and harm different victims, but when the crimes are against society rather than against a specific victim, the analysis turns entirely on the harm to be avoided by enforcement of the statute.

I found no clear directive in the case law as to whether these two charges naturally group together. Neighboring courts are divided. Mr. Sinclair's convictions on Counts 1 and 3 don't seem to me to be closely related and don't seem to put Mr. Sinclair at risk for being double counted when the punishment is assessed. Mr. Sinclair's possession of the firearm after having been convicted of a felony is quite distinct from his possession of marijuana with intent to distribute it. The only thing tying the two crimes together is the fact that one traffic stop and search

led to both charges and the charges were tried together. The harm caused by each crime is, also, distinct: Firearm possession by someone who has already been found guilty of a felony potentially makes society more dangerous and increases the likelihood of violence. On the other hand, possession of marijuana with intent to distribute harms society by adding to the drug problem and degrading neighborhoods.

So even though possession of the firearm, apart from legality of possession, could be used to add two base offense levels to the possession of marijuana with intent to distribute charge, it seems to me that the Guidelines don't require that the two charges be grouped. The test for grouping, that is, whether the crimes are closely related and whether groupings should be used to avoid double counting one crime, is not satisfied, and so, on that basis, I will sustain the Government's objection to Paragraphs 18, 26, and 34 of the presentence report and will not group Counts 1 and 3.

As I already outlined, the offense level for Count 3 is fourteen. The offense level for Count 1 is eight. That produces one-and-a-half units and a one-level increase to Level 15. That's one objection.

The Sentencing Guidelines require a two-level enhancement for a defendant who tried to obstruct justice

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

UNITED STATES OF AMERICA
Plaintiff

v.

Case Number 3:11-CR-00105(01)RM

USM Number 11843-027

RODERICK D SINCLAIR
Defendant

H JAY STEVENS - FCD
Defendant's Attorney

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT was found guilty on count(s) 1,2 and 3 of the Indictment after a plea of not guilty on 2/7/2012.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title, Section & Nature of Offense	Date Offense Ended	Count Number(s)
21:841(a)(1) POSSESSION WITH INTENT TO DISTRIBUTE MARIJUANA	Around June 2011	1
18:924 (c) USE/POSSESSION OF A FIREARM DURING AND/OR IN RELATION TO DRUG TRAFFICKING ACTIVITIES	Around June 2011	2
18:922(g)(1) FELON IN POSSESSION OF A FIREARM	Around June 2011	3

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS ORDERED that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of any material change in economic circumstances.

June 25, 2012
Date of Imposition of Judgment

/s/ Robert L. Miller, Jr.
Signature of Judge

Robert L. Miller, Jr.,
United States District Judge
Name and Title of Judge

June 25, 2012
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for 57 months on Counts 1 and 3 to be served concurrently to each other and a term of 60 months on Count 2 to be served consecutively to terms imposed on Counts 1 and 3 for a total imprisonment term of **117 months**.

The Court makes the following recommendations to the Bureau of Prisons:

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered _____ to _____ at _____ _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By:_____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 years.**

The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance.

The defendant shall submit to one drug test within 15 days of release from imprisonment and two (2) periodic drug tests thereafter, as determined by the Court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the Court or probation officer.
2. The defendant shall report to the probation officer in the manner and as frequently as directed by the Court or probation officer.
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4. The defendant shall support his dependents and meet other family responsibilities.
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6. The defendant shall notify the probation officer within ten (10) days of any change in residence or employment.
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician.
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
11. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer.
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
14. The defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment.
15. The defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay any unpaid amount of restitution, fines, or special assessments.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a substance abuse treatment program and shall abide by all program requirements and restrictions, which may include testing for the detection of alcohol or drugs of abuse at the direction and discretion of the probation officer. While under supervision, the defendant shall not consume alcoholic beverages or any mood altering substances, which overrides the "no excessive use of alcohol" language in Standard Condition #7. The defendant shall not be allowed to work at a tavern or to patronize taverns or any establishments where alcohol is the principal item of sale. The defendant shall pay all or part of the costs for participation in the program not to exceed the sliding fee scale as established by the Department of Health and Human Services adopted by this court.

The defendant shall enroll in an approved job skill training program within the first six (6) months of supervision at the direction of the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in this judgment.

Total Assessment	Total Fine	Total Restitution
$300.00	NONE	NONE

The defendant shall make the special assessment payment payable to Clerk, U.S. District Court, 102 Robert A. Grant Courthouse, 204 South Main Street, South Bend, IN 46601. The special assessment payment shall be due immediately.

Name: RODERICK D SINCLAIR

Docket No.: 3:11-CR-00105(01)RM

ACKNOWLEDGMENT OF SUPERVISION CONDITIONS

Upon a finding of a violation of probation or supervised release, I understand that the Court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

I have reviewed the Judgment and Commitment Order in my case and the supervision conditions therein. These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed)

_____ _____
Defendant Date

_____ _____
U.S. Probation Officer/Designated Witness Date

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

UNITED STATES OF AMERICA

Plaintiff,

v. CASE NUMBER: 3:11-CR-105-RM

RODERICK SINCLAIR

Defendant.
_____/

NOTICE OF APPEAL

Notice is hereby given that Roderick Sinclair Defendant above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the Judgment in a Criminal Case entered in this action on June 26, 2012.

Dated: June 28, 2012 .

Northern District of Indiana
Federal Community Defenders, Inc.

By: /s/ H. Jay Stevens
H. Jay Stevens
227 S. Main Street, Suite 100
South Bend, IN 46601
Phone: (574) 245-7393
Fax: (574) 245-7394
eMail: jay_stevens@fd.org

Honorable Judge Miller, 2-1-12

My name is Roderick Sinclair. I am contacting you in reference to case number 3:11-cr-105RM regarding a request for a continuance. My family plans to hire a private attorney for me. They plan to pay for him by way of income tax refunds, which were filed last week. I was told it will take 7-10 business days, but they will for sure hire him upon the arrival of the funds.

Secondly, I feel as though I am being misrepresented by my Federal Community Defender. I believe he is a good man with a good heart, but he simply did not follow through with a line of questioning that I felt was necessary at my supression hearing, held on 1-6-12.

Third, I have new evidence that may be grounds for another supression hearing. It is definitely something that should be taken into consideration by you, and will be promptly presented to you by the private attorney.

Finally, I feel you are a fair individual and a great judge. I ask that you please grant me 21 days, at most, for the income tax monies to come, so that I may have a fair chance with a paid attorney. I apologize for any inconviences that I may have caused.

Respectfully Submitted,
Roderick Sinclair
Roderick Sinclair

Honorable Judge Miller, 3-8-12

My name is Roderick Sinclair. I'm writing you in reference to cause number 3:11-cr-00105-RLM, requarding a post-trial pre-sentencing bond release.

I have had my family to contact some people that are doing positive, productive things in the community. People such as James Frank of Elkhart, he runs a community outreach program for young adults and charity events for children K-6 grades. Muhammad Khabeer, he works at the Civil Rights Museum here in South Bend on W. Washington. Along with several other foundations and establishments that will allow me to volunteer and do community service work. Places such as the homeless shelters, food banks, and humane societies across Elkhart and St. Joseph counties. Also a professor / director of the Civil Rights Museum says he will work with me on getting me enrolled back in college.

I also plan to become involved in an outpatient substance abuse program to help with my addiction problems. I currently have a job with a promotion company called Pinnacle Shows. I acquired

this job a week after my incarceration.
I take the charges and consequences very seriously. I intend to complete 500 hours of community/volunteer work, get an substance abuse, enroll in school, and work a steady job, or two. I ask that you give me a chance to show you and your court that I am not what the prosecutor is making me out to be. I am a human being that made a mistake out of irrational thinking, substance abuse, and desperation. I will not display anti-social, recidivistic behavior by any means.

I need a shot at redemption. You, and you alone, have the power to grant me a chance at that. Failure is not an option for me, but in the event I do fail, I will willingly accept any subsequent punishment or consequences. Thank you for your time.

Respectfully Submitted

Roderick Sinclair
Robert Sinclair

No. 12-2604

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

United States of America, Plaintiff-Appellee, v. Roderick D. Sinclair, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division Case No. 3:11-cr-00105-RLM-1 Hon. Robert L. Miller, Jr., Presiding Judge

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30(d)

I, the undersigned, counsel for the Defendant-Appellant, Roderick D. Sinclair, hereby state that all of the materials required by Circuit Rules 30(a), 30(b), and 30(d) are included in the Appendix to this brief.

/s/SARAH O'ROURKE SCHRUP
Attorney
BLUHM LEGAL CLINIC
Northwestern University School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

Dated: November 21, 2012

No. 12-2604

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. Roderick D. Sinclair, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division Case No. 3:11-cr-00105-RLM-1 Hon. Robert L. Miller, Jr., Presiding Judge

CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Plaintiff-Appellant, Roderick D. Sinclair hereby certify that I electronically filed this brief and appendix with the clerk of the Seventh Circuit Court of Appeals on November 21, 2012, which will send notice of the filing to counsel of record.

/s/ Sarah O'Rourke Schrup
Attorney
Bluhm Legal Clinic
Northwestern University School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

Dated: November 21, 2012