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

REPLY BRIEF OF DEFENDANT-APPELLANT RODERICK D. SINCLAIR

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

SENTENCING GUIDELINES

OTHER AUTHORITY

ARGUMENT

Six days before his trial was set to begin, Roderick Sinclair wrote a letter from prison making a good-faith request for a 21-day continuance in order to replace his court-appointed attorney with Mark Lenyo, a private attorney whom he wished to retain. In doing so, Sinclair invoked his Sixth Amendment right to counsel of his choice. Yet the district court's findings reveal that it was weighing a different Sixth Amendment right—one that Sinclair had not raised—when it considered Sinclair's request: the right to effective assistance of counsel. Because this was a choice-of-counsel case, not an ineffective-assistance case, "the strongest factor weighing in favor of the continuance" was actually Sinclair's desire to retain a private attorney of his choice. *See* (A.19 at 2–4) (district court identifying "the strongest factor weighing in favor of the continuance" was that Sinclair's court-appointed lawyer was not "giving [him] effective assistance of counsel"). Far from a routine exercise of discretion, the district court's decision rested on an error of law—a per se abuse of discretion that compels reversal here. *See Badger Meter, Inc. v. Grinnell Corp.*, 13 F.3d 1145, 1154 (7th Cir. 1994). This Court should reverse and remand for a new trial. At a minimum, this Court should reverse and remand for resentencing based on the district court's erroneous interpretation of the grouping guidelines.

I. Sinclair's right to counsel of choice

A. The district court's explicit failure to recognize Sinclair's right to counsel of his choice was an error of law amounting to a per se abuse of discretion.

The district court never once recognized the presumptive weight accorded to a defendant's Sixth Amendment right to counsel of his choice. There is no question the district court weighed some set of factors, and it arguably did so while considering *some* constitutional right of Sinclair's. However, with each articulation the district court revealed its error. Over the two hearings where the district court considered Sinclair's request, it never once mentioned his right to counsel of his choice, yet it mentioned the right to effective assistance of counsel no less than eleven times:

- "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." (A.19 at 2–6.)

- "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 . . . ." (A.20 at 10–12.)

- "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." (A.28 at 12–17.)

- " [B]ut I cannot say . . . that [Mr. Lenyo] would be in a position to provide you with the effective assistance of counsel that you're entitled to under the Constitution . . . ." (A.28 at 21–24.)

- "I can't find that [granting the continuance] 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." (A.29 at 2–7.)

- "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." (A.30 at 3–8.)

See also (A.19 at 21–23); (A.20 at 2–4); (A.29 at 8–10); (A.29 at 13–15); (A.29 at 18–20). Far from recognizing this right to choice of counsel—it once even calls it a mere "preference" (A.25 at 16)—the district court explicitly limited its consideration of Mr. Lenyo's representation to the ineffective-assistance context. The district court never acknowledged Sinclair's fundamental Sixth Amendment right to have hired counsel represent him. That alone weighs in favor of reversal, for without this baseline acknowledgement the district court could not, and did not, engage in the proper balancing of interests.

The government blames the district court's single-minded focus on the ineffective-assistance question on what it terms Sinclair's "coordinate request for different appointed counsel." (Appellee Br. 24.) Yet the district court invoked effective-assistance standards no fewer than four times on February 6, a full day *before* Sinclair ever mentioned the alternative of substituting appointed counsel. By weighing the relevant factors against the inapplicable Sixth Amendment right, the district court committed a threshold error of law that irreparably tainted every aspect of its decision-making process. The required balancing was effectively impossible and the court "failed in its duty to look also at the other side of the scale." *United States v. Sellers*, 645 F.3d 830, 839 (7th Cir. 2011).

Even if it had recognized the proper constitutional right, the district court weighed the factors unreasonably and arbitrarily to the extent it balanced them at all. In short, the district court put its calendar first, which contravenes this Court's clear directive that "[e]ven the inconvenience of pushing the trial back a month or so would be *easily outweighed* by [the defendant's] interest in having his counsel of choice properly prepared to defend him." *Carlson v. Jess*, 526 F.3d 1018, 1026 (7th Cir. 2008) (emphasis added). Tellingly, the district court began its findings with a calendar-based concern, stating that "the factors, frankly, weigh a little differently than they might if we were looking at this more removed from the trial date," (A.16 at 21–23), and ended them by balancing Sinclair's request "against the need for the court's calendar to proceed," (A.20 at 22–23). Aside from the district court's failure to identify the interest at the heart of Sinclair's request, these comments demonstrate that the balancing it did engage in was unreasonable and arbitrary.

B. In defending this fundamental error, the government misapplies the factors and saddles the defendant's right to counsel of choice with unconstitutional limitations.

In trying to rehabilitate the district court's flawed approach, the government on appeal engages in many of the same errors, and adds a few new ones. Though giving a cursory nod to the balancing requirement, (Appellee Br. 15), the government instead relies exclusively on the right's limitations—that the presumption is not unyielding and that it must account for the proper administration of justice—in an approach that renders meaningless this interest of constitutional dignity. (Appellee Br. 14.) It then examines the various factors in a

vacuum without regard to the countervailing right to counsel of choice. (Appellee Br. 15–25.) More troublingly, the government inaccurately and misleadingly enumerates the applicable factors, and it advocates for novel and unconstitutional limitations on the right to counsel of choice.

The first problem is how the government opts to articulate the relevant factors. The government initially flags as relevant just four factors, (Appellee Br. 15), an approach that omits three of this Court's bedrock factors:[1] (1) the likelihood the defendant is engaging in dilatory tactics, *see Sellers*, 645 F.3d at 837; (2) the status of the relationship between the defendant and his existing counsel, *see Carlson*, 526 F.3d at 1027; and (3) the needs of the trial court's calendar, *see id.* at 1026. Perhaps their exclusion from the list stems from the fact that they are precisely the factors that overwhelmingly weigh in Sinclair's favor. It is undisputed that the district court explicitly found Sinclair's request to be in good faith, it recognized Sinclair's dissatisfaction with Mr. Stevens, and it never mentioned any calendar concern that would prevent the case from being rescheduled at a later time. *See* (Appellee Br. 21) (noting that "the district court acknowledged that Sinclair's request for a continuance was not being made simply to try to delay his trial or game the system"); (Appellee Br. 19) (noting that "[t]he district court could not provide specific reasons or adequately gauge the length of the delay"); (Appellee Br. 20) (noting that "the court recognized Sinclair's dissatisfaction with Stevens").

[1] Perplexingly, the government does make passing reference to these factors later in its argument even though they did not make its initial four-factor list. (Appellee Br. 19–21.)

Not only did the government omit three bedrock factors, it added, without any authority to support it, a fourth one: "the likelihood that a continuance will assist the defendant." (Appellee Br. 15.) If to "assist" is to improve the quality of counsel's assistance, then this factor mirrors the district court's inappropriate grafting of an effectiveness inquiry onto the right-to-counsel issue. In any event, any such interpretation is dangerous and impracticable. If the district court, when deciding whether to grant a continuance for the defendant to retain private counsel of his choice, is allowed to opine on the relative effectiveness of the attorneys in question, the right of the defendant to counsel of his choice would be nullified. Behind the shield of the abuse-of-discretion standard of review, the district court's opinion that court-appointed counsel is performing above the *Strickland* floor could, in any case, override the defendant's constitutionally protected preference for a hired replacement. Any time a defendant like Sinclair invokes this right, the district court could effectively exercise a veto simply by finding, on the record, that court-appointed counsel is providing effective assistance. Alternatively, the district court could exercise a veto by speculating that retained counsel's assistance would be no better. Indeed, that is precisely what happened here. (A.28.) This is not a veto power the Sixth Amendment allows.

After giving short shrift to some essential factors and adding an irrelevant one, the government then analyzed the remaining three factors. Most significant is its novel treatment of the factor pertaining to the likelihood of new counsel being retained; the government's interpretation imposes strict requirements never

recognized by this Court. The government suggests that the right to counsel of choice is not triggered unless and until the defendant has identified a specific lawyer, actually retained him, and convinced that lawyer to appear in court to "vigorously support[] the continuance request." (Appellee Br. 18); *see also* (Appellee Br. 18) (stating that "the mere fact that preliminary discussions had occurred did not convert Lenyo into 'counsel of choice' for constitutional purposes"); (Appellee Br. 18) (citing Indiana ethics rules about formation of the attorney–client relationship). This Sixth Amendment right is not contingent on a specific lawyer at a specific time and place, but rather requires "a *fair opportunity* to secure counsel of . . . choice." *Powell v. Alabama*, 287 U.S. 45, 53 (1932) (emphasis added). Sinclair was not afforded this fair opportunity in any meaningful way, and the government cannot justify the abridgement of this right by saddling it with onerous preconditions. If this Court adopts the government's radical approach, "fair opportunity" would no longer be a component of the Sixth Amendment right to counsel of choice.

Because the district court failed to recognize the right at stake and because the government's only defense of the district court's approach requires an unprecedented narrowing of that right, this Court should reverse and remand for a new trial.

II. Two of Sinclair's counts should have been grouped for sentencing.

The government attempts to foment ambiguity in what should have been an otherwise straightforward application of guideline § 3D1.2(c). There is no ambiguity here: Sinclair's 18 U.S.C. § 924(c) charge carried a mandatory,

consecutive five-year sentence that was to be "imposed independently" of any other charges, *see* U.S.S.G. § 5G1.2, and those other charges should have been grouped under § 3D1.2(c). In fact, § 3D1.2 only becomes ambiguous under the government's interpretation, which purports to follow a directive from an application note to an *irrelevant* guideline in order to deny the grouping that normally would follow from the *relevant* guideline. *Compare* U.S.S.G. § 3D1.2, *with* U.S.S.G. § 2K2.4 cmt. n.4.

The government's interpretation not only creates unnecessary ambiguity, it defeats the purpose of both guidelines it invokes to achieve this result. The grouping guideline in § 3D1.2 was designed to prevent over-sentencing by double counting. *See United States v. Vucko*, 473 F.3d 773, 776 (7th Cir. 2007) (recognizing the purpose of § 3D1.2 is to prevent double counting). Application note 4 to § 2K2.4 likewise counsels courts not to double count by imposing a firearm enhancement on a defendant's other charges when he has also received a mandatory minimum sentence under § 924. *See United States v. Eubanks*, 593 F.3d 645, 649–50 (7th Cir. 2010) (holding that the application of an enhancement for firearm conduct in a separate charge in addition to a mandatory minimum charge pursuant to § 924(c) represented impermissible double counting). The government would have this Court ignore the dual protections provided by § 3D1.2 and application note 4 to § 2K2.4.

More than defeating the purpose of two relevant portions of the guidelines, the government's approach also leads to absurd results. First, note 4 to § 2K2.4 proscribes additional sentencing enhancements for firearm conduct in other counts

when one of the counts involves a mandatory minimum. Yet, contrary to the government's suggestion, (Appellee Br. at 27), that proscription does not alter the way offense conduct "is treated" for purposes of the grouping guideline. *See United States v. Bell*, 477 F.3d 607, 615 (8th Cir. 2007) (holding that whether or not an enhancement is actually used in a given case has no bearing on how that enhancement is generally treated for the purposes of grouping). By the government's logic, the only time that § 3D1.2(c) could ever be invoked to group closely related charges is when an enhancement is actually used, effectively negating the benefit of grouping for defendants as well as the purpose of enhancing sentences. Indeed, a sentence would never actually be lower when applying § 3D1.2(c) under the government's theory because the only time a district court could apply § 3D1.2(c) to lower a guideline range is after it first *raises* the range by employing an offense characteristic enhancement. This interpretation renders the protections afforded in § 3D1.2(c) a nullity for drug and gun crimes that contain a count with a mandatory minimum, something the Sentencing Commission never could have intended for charges that represent the bread and butter of a prosecutor's practice. *See* Administrative Office of the United States Courts, *Judicial Business of the United States Courts: 2011 Annual Report of the Director Honorable Thomas F. Hogan* 17–19, *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf. (explaining that drug charges are the most commonly charged crimes by federal prosecutors, representing 31 percent of all defendant

filings; firearm charges represent the fourth most commonly charged crime, at 8 percent of all defendant filings).

The government's reading of the application notes to the grouping guideline best illustrates these absurdities. Invoking for the first time application note 5 to § 3D1.2 (actually just an example contained in its middle paragraph) as support for its fact-specific analysis, the government claims that conduct can lose its inherent specific offense characteristics by virtue of a district court's choices during sentencing "*in this case*." (Appellee Br. 27) (emphasis in original). As a threshold matter, the government's approach is riddled with serious administrative difficulties and due-process concerns resulting from a sentencing regime that permits the district court to apply its own characterization of conduct during sentencing and thus delay any decision about grouping until that time. As a general matter, the probation office could not prepare its presentence investigation report—and the defendant could not lodge his objections—prior to the day of sentencing because it would not become clear which conduct would be stripped of its specific offense characteristics until the district court articulated the other conduct allowed to trump it.

Even putting these salient concerns aside, the more fundamental issue is that the application note makes a completely different point, one that is consistent with its purpose of avoiding double counting. The Sentencing Commission in note 5 was simply explaining how grouping would work in the factual scenario—not present here—where there are multiple instances of the same aggravating

enhancement conduct (assaults on various employees, one of which causes bodily injury) that could be attached to the more serious count (bank robbery), but the guideline for the more serious count allows the court to apply an enhancement only once. In that narrow set of factual circumstances, the middle paragraph of note 5 instructs the court to group the bodily-injury assault with the more serious count (the bank robbery)—to avoid over-sentencing for the most serious conduct—and let the other two simple assaults stand separately. Of course, Sinclair's charges did not contain any such repeat conduct, so the application note example simply is not instructive at all to the inquiry.

Third, as foreshadowed in Sinclair's opening brief, (Appellant Br. 29), the government's position is completely unsupported by caselaw. Most courts treat this grouping question as routine and pass on it "without note." *Bell*, 477 F.3d at 615. The government's sole quibble with the one case to have devoted any time to this precise issue is that in addressing the grouping guideline the *Bell* court did not "grapple" with application note 5. (Appellee Br. 30.) But as discussed above, the middle paragraph of application note 5 is irrelevant to the question that faced both the *Bell* court and the district court in Sinclair's case, which is probably why neither addressed it. Regardless, invoking this irrelevant paragraph within note 5 for the first time now achieves only one result: confusion and muddying of the real issue, which is whether the district court erred in denying grouping to Sinclair by cross-referencing and applying an application note from an entirely different guideline.

Finally, as mentioned in the opening brief, the district court found the difference in sentencing ranges was "material" to Sinclair's sentence. (A.3.) This error cannot be harmless, and in any event the government has forfeited any argument that it is by not addressing this issue in its brief. This Court should reverse and remand for resentencing.

CONCLUSION

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

Respectfully Submitted,

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Certificate of Service

I, the undersigned, counsel for the Defendant-Appellant, Roderick D. Sinclair, hereby certify that I electronically filed this brief with the clerk of the Seventh Circuit Court of Appeals on February 4, 2013, which will send notice of the filing to counsel of record.

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,069 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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