IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12-2604

UNITED STATES OF AMERICA,	)	Appeal from the
	)	United States District Court
Plaintiff-Appellee,	)	for the Northern District of Indiana
	)	South Bend Division
	)	
v.	)	
	)	No. 3:11-CR-105
	)	
RODERICK SINCLAIR,	)	Honorable Robert L. Miller, Jr.,
	)	Judge
Defendant-Appellant.	)	

BRIEF OF THE PLAINTIFF-APPELLEE

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JURISDICTIONAL STATEMENT

Defendant-Appellant Roderick Sinclair's jurisdictional statement is complete and correct.

STATEMENT OF THE ISSUES

I. Whether the district court abused its discretion when it denied Sinclair's motion for a continuance that was filed two business days before the first day of trial.

II. Whether the district court erred when it did not group two of Sinclair's convictions for purposes of determining his recommended sentencing range.

STATEMENT OF THE CASE

In August 2011, a grand jury returned a three-count indictment against Sinclair. R. 1.[1] Count 1 charged Sinclair with possession with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1). Id. Count 2 alleged that Sinclair possessed a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c), while Count 3 charged Sinclair with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Id. After Sinclair's first motion for a continuance was granted, trial was set to begin on Tuesday, February 7, 2012. R. 16.

On Friday, February 3, 2012, the district court received a letter from Sinclair expressing dissatisfaction with his appointed counsel and asking for a 21-day continuance while his family attempted to hire a private attorney. R. 22; Def. App. 46. The district court held a hearing regarding Sinclair's letter on February 6, 2012—the next business day. R. 25. After hearing from Sinclair, the court denied both his request for a continuance and his request to discharge his appointed counsel. Def. App. 20-21.

The next morning, just before trial was to begin, Sinclair renewed his request for a continuance. Def. App. 22-23, 25. The district court again denied

[1] Citations to the district court docket are marked as "R." The trial transcript (R. 71) is cited as "TTr." The transcript from the sentencing hearing (R. 73) is referred to as "STr." Sinclair's brief is cited as "Def. Br." and his appendix is identified as "Def. App." "PSR" refers to the presentence investigation report (R. 52).

Sinclair's request. Def. App. 28-30. At the end of the day, the jury convicted Sinclair on all three counts. R. 30.

At Sinclair's sentencing hearing on June 25, 2012, the district court declined to group Sinclair's convictions on Counts 1 and 3 for purposes of determining his recommended guideline range. Def. App. 35-37; STr. 25-27. It sentenced Sinclair to an aggregate term of 117 months' imprisonment—the sentence consisted of concurrent 57 month terms of imprisonment for Counts 1 and 3 and a consecutive 60 month term of imprisonment for Count 2. R. 64; Def. App. 39. The court also ordered a three-year term of supervised release. R. 64; Def. App. 40.

STATEMENT OF THE FACTS

I. Offense Conduct

The afternoon of June 16, 2011, Corporal Michael Bogart was on patrol in Elkhart, Indiana, when he saw Sinclair driving a blue Cadillac westbound on Blaine Avenue. TTr. 30-31. Bogart recognized Sinclair from previous encounters and believed that Sinclair was unlicensed or had a suspended license. TTr. 31-32, 43. After confirming that Sinclair did have a suspended license due to a prior conviction, Bogart circled around and pulled up behind the Cadillac, which was now parked on Roys Avenue. TTr. 32-33.

When Bogart activated the lights in his patrol car, he saw Sinclair lean forward as though he was retrieving an item from or concealing an item

under the driver's seat. TTr. 33-34. Bogart then requested backup assistance. TTr. 33. After Corporal Christopher Snyder arrived, Bogart approached Sinclair and arrested him for driving with a suspended license. TTr. 34, 61, 70. During a pat down search, Bogart found a clear plastic baggie containing a small amount of marijuana in Sinclair's front pants pocket. TTr. 34-35, 61.

Bogart next looked inside the Cadillac. TTr. 35. Teresa Batts was sitting in the front passenger seat, and a small child was in a carseat in the back. TTr. 35-36. Leaning against the child's carseat was a black backpack which contained a large, clear plastic bag full of marijuana, some smaller clear plastic baggies, and a digital scale. TTr. 36, 38-39, 49, 66. Bogart found another large clear plastic bag containing marijuana on the floorboard in front of the child's carseat and a second digital scale in the center console of the front seat. TTr. 37, 40, 50.

While Bogart was searching the back of the Cadillac, Snyder searched the front. TTr. 40, 63. He located a handgun under the driver's seat. TTr. 40, 63-64, 73. One round was in the chamber ready to fire, with three additional rounds in the magazine. TTr. 64.

Sinclair was transported to the Elkhart Police Station. TTr. 40. While there, he asked to speak to Bogart. TTr. 40-41. In a video-recorded interview (played for the jury at trial) Sinclair admitted that the marijuana in the car belonged to him. TTr. 41, 85-86, 88-91; Ex. 1. He purchased it the day before,

paying $1,050 for one pound, and planned to sell and deliver it to customers in quarter-ounce, half-ounce, and one-ounce increments. TTr. 86. Sinclair admitted he was hiding the marijuana and the handgun when Bogart pulled up behind him. TTr. 87. He stated that he had owned the handgun for approximately one year and that he carried it for protection. TTr. 88.

II. Pre-trial Proceedings

At the initial appearance on October 13, 2011, a magistrate judge granted Sinclair's request for appointed counsel. R. 5. That day, public defender H. Jay Stevens entered his appearance. R. 6. Trial was set at arraignment for December 20, 2011; it was expected to last two days. R. 8.

Stevens then filed a motion to suppress and a motion to continue the trial. R. 12, 14. The district court granted the motion to continue, and Sinclair's trial—which was now expected to last three days—was rescheduled to start on Tuesday, February 7, 2012. R. 16. On January 6, 2012, the district court held a hearing on the motion to suppress. R. 17. It orally denied the motion at the end of the hearing. Id.

A. First Motion to Continue

Four weeks after the suppression hearing and two business days before trial, on February 3, 2012, the district court docketed a one-page letter from

Sinclair dated February 1.[2] Def. App. 46; R. 22. The letter contained three requests. First, Sinclair asked the court to grant him a twenty-one day continuance because:

> 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 <u>for sure</u> hire him upon the arrival of the funds.

Def. App. 46. Second, Sinclair expressed dissatisfaction with Stevens for failing to "follow through with a line of questioning" at the January 6 suppression hearing. Id. Finally, Sinclair informed the court that he had new evidence that he hoped the private attorney would present in a second motion to suppress. Id.

The district court scheduled a hearing regarding Sinclair's letter for Monday, February 6, which was the day before trial was scheduled to start. R. 25. At the hearing, the court characterized Sinclair's letter as presenting three reasons for a continuance: Sinclair wanted to retain a private attorney, Sinclair thought he was being misrepresented by Stevens, and Sinclair had new evidence he wanted to present in a second motion to suppress. Def. App. 11-12.

[2] The letter was apparently received in chambers on Thursday, February 2. Def. App. 9. It is unclear from the record whether the letter first came to the attention of the district court on February 2 or February 3.

Sinclair agreed with the court's characterization. Def. App. 12. He told the court that his family had spoken with an attorney, Mark Lenyo, who had "told them would it would take to retain him," and that they intended to pay Lenyo's retainer fee as soon as they received their tax refund. Def. App. 13. He further claimed that he was dissatisfied with Stevens' representation during the suppression hearing and plea negotiations. Def. App. 13-14. Finally, he informed the court that he received the new evidence that he wanted to present in a second motion to suppress approximately two weeks prior to the hearing. Def. App. 15.

After also hearing briefly from Stevens and the government, Def. App. 9, 16, the district court denied Sinclair's request for a continuance. Def. App. 16-21. The court first recognized that there were "a lot of factors I have to take into account" in deciding the motion and that those factors weighed "a little differently" because the trial date was the next day rather than weeks or months in the future. Def. App. 16.

Next, the court expressed to Sinclair that, based on its experience from past cases, it was "not as certain as you are" that Lenyo would actually be hired or appear in the case. Def. App. 17. It concluded that granting a continuance would be tantamount to "betting on the future" because Sinclair's family had not yet retained Lenyo, nor had they received their tax refund to do so. Def. App. 17. Weighing against the continuance was the fact

that the trial was expected to last anywhere from one to three days, the courtroom had already been reserved for that timeframe, and the court had asked thirty-four prospective jurors as well as five government witnesses under subpoena to be at the courthouse the next day. Def. App. 18. Sinclair's dissatisfaction did weigh in favor of a continuance, but the court noted that, based on its observations, Stevens had represented Sinclair competently and the attorney-client relationship had not broken down. Def. App. 19-20. Balancing all of these circumstances, as well as the fact that the court believed Sinclair was not trying to delay the trial in bad faith, the court ultimately concluded that

> 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.

Def. App. 20-21.

B. Second Motion to Continue

The next morning, as trial was about to begin, Sinclair renewed his request for a continuance. Def. App. 22. He told the district court that his family received their tax refund the afternoon before and unsuccessfully tried to contact Lenyo. Id. He represented that his family would "for sure . . . hire an attorney today," and requested a continuance "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." Def. App. 23. Sinclair also told the court that, if his family could not get him an attorney, he wanted "a different court-appointed attorney." Id.

After the district court informed Sinclair that Lenyo was currently in trial in state court, Sinclair reiterated that his family was "going to hire [Lenyo] or another attorney for sure today to represent me." Def. App. 24. As to his request for a different appointed attorney, Sinclair reiterated that he was dissatisfied with Stevens' representation during the suppression hearing and plea negotiations and felt that Stevens was insufficiently familiar with the facts of his case when he visited him. Def. App. 26-27.

The district court denied Sinclair's renewed request for a continuance.[3] Def. App. 28-30. It acknowledged that Lenyo was a fine attorney, but held that "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." Def. App. 28. Even were Lenyo to enter his appearance, it would be doubtful that a short continuance would be sufficient for him to effectively represent Sinclair. Def. App. 28-29. Moreover, the jury venire was assembled,

[3] The district court also denied Sinclair's request for a new appointed attorney. Def. App. 29-30. It found that Stevens had provided effective assistance and that there was not a "complete breakdown in [their] ability to communicate with each other." Def. App. 30. Sinclair on appeal does not challenge this factual finding or the court's denial of his request for new appointed counsel.

the parties to the case were ready for trial, and the courtroom was available. Def. App. 30. Balancing those factors, the court again denied the request. Id.

Trial proceeded as scheduled, and the jury convicted Sinclair on all three counts. R. 30. Neither Lenyo nor any other private counsel filed an appearance in the district court proceedings that day or at any other time.

III. Sentencing

A presentence investigation report ("PSR") was prepared before Sinclair's sentencing hearing. R. 52. The PSR recommended grouping Sinclair's convictions on Count 1 (possession with intent to distribute marijuana) and Count 3 (felon in possession of a firearm) to determine his offense level.[4] PSR ¶ 26. The government objected to this recommendation, arguing that the two counts should not be grouped. R. 55.

The district court sustained the government's objection. Def. App. 32-37; STr. 22-27. It first recognized that, under Sentencing Guidelines § 3D1.2(c), multiple counts of conviction should be grouped for purposes of determining a defendant's offense level when one count includes conduct that is considered a specific offense characteristic or other adjustment for the guideline applicable to another count. Def. App. 33; STr. 23. Although possession of a firearm is generally a specific offense characteristic in the

[4] Because the conviction on Count 2 (possession of a firearm in furtherance of a drug trafficking offense) required a consecutive sentence of at least five years, *see* 18 U.S.C. § 924(c), it was not part of the offense level calculations.

guidelines governing drug offenses, *see* U.S. Sentencing Guidelines Manual §2D1.1(b)(1) (2011), the court noted that it was not treated as a specific offense characteristic here because Application Note 4 to Guideline § 2K2.4 directed that the specific offense characteristic not apply. Def. App. 34; STr. 24. The court further noted that the "grouping rule" only applies to closely related offenses. Def. App. 35-37; STr. 25-27. With that focus, the court concluded that the crime of possession with intent to distribute marijuana is not closely related to the crime of felon in possession of a firearm because the harm caused by both crimes is distinct. Def. App. 36-37; STr. 26-27. Possession of a firearm by a felon "increases the likelihood of violence" while possession of marijuana with intent to distribute "add[s] to the drug problem and degrad[es] neighborhoods." Def. App. 37; STr. 27.

With this ruling, Sinclair's total offense level was 17 and his criminal history category was VI. STr. 29-30; PSR ¶ 60. The advisory term of imprisonment was 51 to 63 months for Counts 1 and 3, with a consecutive 60-month sentence for Count 2. STr. 30. Had the counts grouped, Sinclair would have faced an imprisonment range on Counts 1 and 3 of 47 to 56 months. *See* Def. App. 35. After reviewing the factors listed in 18 U.S.C. § 3553(a), the court sentenced Sinclair to a total imprisonment term of 117 months. STr. 43.

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion when it denied Sinclair's two requests for a continuance. A court has broad discretion to manage its calendar, and only exceptional circumstances will justify eve of trial continuance requests. Consequently, this Court will only reverse when the district court acted in an unreasoning or arbitrary fashion. Far from acting arbitrarily, the district court fully and carefully weighed the timeliness of Sinclair's request (received less than three business days before trial), his relationship with Stevens, and the likelihood that Sinclair would actually retain private counsel. The court then examined the inconvenience to the other individuals involved and the demands of its own calendar. On balance, it rationally concluded that a continuance was not warranted. The court did not exhibit an insistence on proceeding with trial, but rather considered all of the pertinent factors and made a discretionary decision.

The court exercised the same discretion when Sinclair requested a continuance on the morning of trial. It considered the fact that Sinclair's preferred private counsel was not available and thus the length of any continuance was unknown, the fact that there was not a complete breakdown in the relationship between Sinclair and Stevens, and the inconvenience to the witnesses and jury venire already present at the courthouse. Even if some

judges might have granted a continuance, the district court's decision was not arbitrary and did not constitute an abuse of discretion.

The district court did not err when it refused to group Sinclair's convictions on Counts 1 and 3 for purposes of determining his recommended guideline range. Sinclair contends that his counts should have grouped under Sentencing Guidelines § 3D1.2(c) which provides for grouping when conduct involved in one conviction "is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable" to the other grouped count. Although the guideline itself is ambiguous, its commentary suggests that grouping applies only when the conduct in one conviction is in fact treated as a specific offense characteristic to the grouped count, not merely when the applicable guideline makes reference to that conduct. Here none of the conduct embodied in Count 1 adjusted the guideline calculation for Count 3, or vice versa. Consequently, the convictions should not be grouped.

ARGUMENT

I. The district court did not abuse its discretion when it denied either of Sinclair's continuance requests.

A. Standard of Review

The Sixth Amendment guarantees a financially solvent defendant the right "to choose who will represent him," *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). But "[t]he right to counsel of one's choice . . . is not

absolute," *United States v. Carrera*, 259 F.3d 818, 824 (7th Cir. 2001). "A court retains wide latitude to balance the right to choice of counsel against the needs of fairness to the litigants and against the demands of its calendar." *United States v. Sellers*, 645 F.3d 830, 834 (7th Cir. 2011); *Gonzalez-Lopez*, 548 U.S. at 152. District courts are tasked with the burden of "assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons." *United States v. Gaya*, 647 F.3d 634, 636 (7th Cir. 2011) (quoting *Morris v. Slappy*, 461 U.S. 1, 11 (1983)). Consequently, "trial courts have broad discretion to grant or deny a request for a continuance to substitute new counsel." *Sellers*, 645 F.3d at 834. And in the absence of "exceptional circumstances," a motion for a continuance to seek new retained counsel filed on the "[e]ve of trial is usually too late." *Gaya*, 647 F.3d at 636.

While the denial of a continuance may infringe upon a defendant's right to counsel of choice, "only an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel." *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983) (quotation marks and citation omitted); *Carrera*, 259 F.3d at 825. When determining whether the district court abused its discretion, this Court "must consider both the circumstances of the ruling and the reasons given by the judge for it." *United States v. Santos*, 201 F.3d 953, 958 (7th Cir. 2000);

Carrera, 259 F.3d at 825. The key inquiry is whether the district court has indeed balanced a defendant's right to counsel of choice against the demands of its calendar or instead has acted arbitrarily. *Sellers*, 645 F.3d at 835-36.

The district court did not act arbitrarily in this case. Sinclair identifies six factors that a district court should consider when deciding whether to grant a continuance. Def. Br. 15. While the cases of this Court do not set these factors out in checklist fashion as Sinclair does, the government does not dispute that district courts weighing continuance requests should consider such factors as the timing of the request, the likelihood that a continuance will assist the defendant, the likelihood that new counsel will be retained, and the inconvenience a continuance would cause the parties and the court. Here the record reflects that the district court discussed all of these factors at both the hearing on February 6 and the hearing on February 7. The fact that Sinclair believes the court should have exercised its discretion to grant a continuance does not mean that its denial of a continuance on either occasion was, in fact, an abuse of that discretion.

B. The district court did not err in denying Sinclair's February 1 letter request for a continuance.

First, the district court did not err in denying Sinclair's request for a continuance contained in his letter of February 1. At its February 6 hearing

on the letter, [5] the court explicitly began its analysis by recognizing that the factors "weigh[ed] a little differently than they might" had Sinclair made the request sooner—it was considering the timeliness of Sinclair's motion. Def. App. 16.

The timeliness of a defendant's request for a continuance is a critical factor in assessing the merits of a continuance request. *See Gaya*, 647 F.3d at 636 (noting that the defendant's delay weighed against granting a continuance, especially in light of his ample opportunities to file a motion sooner). A reasonable jurist could easily agree with the district court that Sinclair's request was far from timely. Stevens had represented Sinclair from the time Sinclair was arraigned the prior October. R. 6, 8. Sinclair waited until less than a week before trial to write to the court requesting a continuance to allow him time to retain a different attorney. Def. App. 46.

Although Sinclair asserts that his request was timely because the suppression hearing was the "straw that broke the camel's back," Def. App. 13, he waited twenty-six days (and seventeen business days) after the January 6 suppression hearing to ask the court for a continuance. *Compare*

[5] While Sinclair appears to fault the district court for scheduling the hearing for February 6, the day before trial, *see* Def. Br. 7, the record reflects that the court did not receive the letter in chambers until sometime on February 2, and that the letter was not docketed until February 3. Under these circumstances, and considering the need to assemble both side's lawyers and the incarcerated defendant, the scheduling of the hearing for the business day after the letter's docketing does not appear to be the product of unnecessary delay.

R. 17 *with* Def. App. 46. Sinclair's delay meant that his request was not docketed by the district court until two business days before his trial was scheduled to begin. R. 22. Sinclair had ample opportunity throughout the month of January "to express to the court his dissatisfaction with his lawyer and desire for a different one." *Gaya*, 647 F.3d at 636. The district court explicitly noted that it would have viewed the continuance motion differently had it been filed "two or three weeks earlier than today," Def. App. 16, and Sinclair offers no reason to suggest he could not have complied with such a timeframe to at least alert the court that he was dissatisfied with Stevens and taking steps to retain his own counsel.

In addition to timeliness, the district court also addressed the likelihood that Sinclair could successfully retain private counsel. Drawing on his decades on the bench, the experienced district judge rationally expressed skepticism that Sinclair would successfully retain Lenyo or any other paid counsel. Def. App. 17. He thus recognized that granting a continuance without adequate assurance that a private attorney would in fact enter an appearance would be tantamount to "betting on the future." Id.

The district court's reservations and its ultimate decision not to accept the bet were well-founded and far from an abuse of discretion. While Sinclair strives to parallel his case to decisions such as *Carlson v. Jess*, 526 F.3d 1018, 1020-21 (7th Cir. 2008), and *Sellers*, 645 F.3d at 834, in which this Court

found lower court abuses of discretion in denying continuance motions, he overlooks one critical difference: in those cases, new counsel had already been retained and was present in court vigorously supporting the continuance request. On the other hand, Sinclair had not yet hired Lenyo, nor did Lenyo appear at the February 6 hearing. Def. App. 13. In fact, Sinclair admitted that, at that time, he did not even have funds in hand to pay Lenyo's initial retainer. Id. While Sinclair represented the next day that the funds had in fact arrived, nothing in his letter or statements as of February 6 compelled the district court to conclude that Lenyo's appearance in the case was truly imminent.

Indeed, the record suggests that, while Lenyo had disclosed his retainer fee to Sinclair's family, no further discussions about the case had occurred. Private attorneys are not obligated to accept every prospective client who walks in the door with cash. *See* Ind. Rule of Prof. Conduct 1.18, n.1 ("A lawyer's discussions with a prospective client … leave both the prospective client and the lawyer free (and sometimes required) to proceed no further."). The mere fact that preliminary discussions had occurred did not convert Lenyo into "counsel of choice" for constitutional purposes. This means both that the decision to deny the continuance here had less potential to interfere with Sinclair's constitutional right to "counsel of choice" than it did in *Carlson* or *Sellers*, and that it was not an abuse of discretion for the district

court to assess the likelihood that Lenyo would timely become such "counsel of choice" as relatively low.

It was not until after looking at the timing of Sinclair's request and the likelihood that Sinclair would in fact retain private counsel that the district court considered its own calendar and any inconvenience a continuance would cause. The court noted that trial had been estimated to last from one to three days, and that the courtroom had been reserved for that purpose. Def. App. 18. In addition, thirty-four people were scheduled to come the next morning to serve on the jury venire, and the government had subpoenaed five witnesses for trial. Id. The district court recognized that Sinclair's request therefore would inconvenience at least forty individuals. Def. App. 18-19.

Sinclair faults the district court for not citing "specific conflicts or reasons that the trial could not be rescheduled." Def. Br. 16-17. The district court could not provide specific reasons or adequately gauge the length of the delay, however, because Lenyo was not yet in the case, and there was thus no way to know when or if he, or some other paid counsel, could accommodate a trial setting. *Compare Sellers*, 645 F.3d at 837-38 (faulting the district court for failing to discuss how a continuance would specifically burden other litigants and the court where the court could have asked substitute counsel how long it would take him to prepare). In his letter to the court, Sinclair requested a continuance of 21 days, which would allow his family to receive

their tax refund and hire Lenyo. Def. App. 46. At the February 6 hearing, Sinclair informed the court that he wanted Lenyo to present a second motion to suppress, which would presumably delay trial for an even longer period. Def. App. 15. The district court's inability to determine the exact length of any delay, and thus to determine what conflicts would exist at that time, does not mean that it abused its discretion when it denied Sinclair's request.

The district court also considered the status of the relationship between Sinclair and Stevens. Def. App. 19-20. It discussed the matter with both men. Stevens represented that he had "discussed this matter with Mr. Sinclair," that he believed he had been "doing everything that I can to protect his interest," and that he was "prepared to go to trial as scheduled." Def. App. 9-10. Sinclair raised vague, non-specific complaints about Stevens' questions at the suppression hearing and handling of plea negotiations. Def. App. 13-14.

In its ruling, the court recognized Sinclair's dissatisfaction with Stevens, but noted that it was not uncommon for defendants and counsel to disagree on strategic matters. Def. App. 20. It found that Stevens had provided effective assistance and that no breakdown in communication had occurred. Id. Thus, Sinclair's dissatisfaction with Stevens did not constitute a "justifiable request for delay." *Morris*, 461 U.S. at 11-12. This case is thus again far from the factual scenario either in *Carlson*, 526 F.3d at 1021-22, where both the defendant and current counsel testified and documented a

complete breakdown in communication; or in *Sellers*, 645 F.3d at 837, where the parties were all well aware the defendant had never wanted current counsel to represent him at trial and current counsel was understandably underprepared for trial. The district court was well within its discretion to conclude that Sinclair's dissatisfaction with Stevens weighed, at best, only slightly in favor of a continuance.

Finally, 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, *see* Def. App. 20, another factor this Court has asked district courts to consider. *Sellers*, 645 F.3d at 836.

As the above recitation reflects, the district court at the February 6 hearing carefully considered and weighed all of the factors this Court deems pertinent before exercising its discretion to deny a continuance. The district court did not, as the defendant suggests, Def. Br. 23-26, express a "myopic insistence on expeditiousness," but rather examined all of the pertinent factors to determine whether Sinclair had presented a "compelling reason[]" to continue his trial. *Gaya*, 647 F.3d at 636. While it is certainly likely that some district judges would have balanced those factors differently, the question of whether to grant a continuance here would have to be considered at least a close question and "the existence of a close question logically implies that the district court does not abuse its discretion when it chooses

one result over another." *Christian Legal Society v. Walker*, 453 F.3d 853, 871 (7th Cir. 2006); *see also United States v. Williams*, 81 F.3d 1434, 1437-38 (7th Cir. 1996). Given Sinclair's multi-week delay in making his request, the low likelihood that Sinclair would successfully retain Lenyo, the lack of a significant breakdown in communication between Stevens and Sinclair, and the inconvenience to the court, venire, and witnesses, the district court's denial of a continuance simply does not constitute an abuse of discretion.

C. The district court did not err in denying Sinclair's oral request for a continuance on the morning of his February 7 trial.

The above analysis applies with equal force to Sinclair's second request for a continuance, made on the morning trial was scheduled to start. Again, the district court took time to listen to the new facts Sinclair wished to present weighing in favor of a continuance. At that time, Sinclair informed the court that his family now had the money to pay Lenyo's retainer, but they had been unable to contact him. Def. App. 22-23. The court itself professed knowledge that Lenyo was in trial in state court, and Sinclair asked for a continuance "until the end of this week" so that his family could "hire [Lenyo] or another attorney." Def. App. 24-25. In the alternative, he requested a new appointed attorney. Def. App. 25.

When addressing Sinclair's request for a continuance, the court recognized that, without actually hearing from Lenyo, the court could not

"say that he would be in a position to provide you with the effective assistance of counsel that you're entitled to." Def. App. 28. If Lenyo did enter the case (which was of course still not a given and in fact never came to pass), he would likely need more than a few days to prepare. Def. App. 28-29. Moreover, the court again found that there was not a complete breakdown in Sinclair's ability to communicate with Stevens, so that Sinclair's dissatisfaction with Stevens presented insufficient reason to grant a continuance. *See* Def. App. 30. Although the court believed Sinclair's request was not meant to delay trial, it denied the continuance because the jury panel was by that point assembled at the courthouse, the courtroom was reserved, Stevens and the government were both prepared to proceed, and there would be a future inconvenience to any parties otherwise wishing to use the courtroom when Sinclair's trial was reset. Def. App. 30.

Once again, even if some district judges might have been inclined to send the jurors and parties home to see if Sinclair could successfully form an attorney-client relationship with Lenyo or some other criminal defense counsel, the district court's decision not to do so was not arbitrary. As it had the afternoon before, the court balanced Sinclair's "right to choice of counsel against the needs of fairness to the litigants and against the demands of its calendar." *Sellers*, 645 F.3d at 834. Because the district court did not know when Lenyo could or would try the case and Sinclair did not establish a

breakdown in his relationship with Stevens that might have justified a continuance, *see Carlson*, 526 F.3d at 1025, the court chose to proceed with the trial. Its decision was not an abuse of discretion.

Sinclair contends that the district court's denial of his request for a continuance on the morning of trial was an abuse of discretion in part because the court "misapprehended the constitutional right implicated by Sinclair's request." Def. Br. 22-23, *citing* Def. App. 28. But nothing the district court said in the cited passages was erroneous. Sinclair did not have the right to have counsel of choice appointed to represent him, and without hearing from Lenyo himself, who was not yet and never became counsel of choice, it was impossible to determine when—or even if—he could provide effective assistance. Moreover, the district court's discussion of the effectiveness of Stevens' assistance was not directed solely at whether to grant the continuance, but also toward resolving Sinclair's coordinate request for different appointed counsel. *See* Def. App. 25-27. To the extent that it discussed Stevens' effectiveness while considering Sinclair's request for a continuance, the court was determining whether there had been a breakdown in communication between Sinclair and Stevens, a factor that this Court has held would favor a continuance. *See Carlson*, 526 F.3d at 1025.

A district court "retains wide latitude" to balance the factors affecting a continuance motion. *Sellers*, 645 F.3d at 834. Consequently, this Court's

review of a district court's ruling is deferential. *Santos*, 201 F.3d at 958. In this case, the district court twice listened to Sinclair's reasons for wanting to obtain his own counsel and balanced those reasons against the countervailing concerns such as the court's calendar, the inconvenience to the other parties involved, the timeliness of Sinclair's request, and the likelihood that Sinclair would retain private counsel. It was not an abuse of discretion for the court to conclude both the day before and the day of trial that the requested continuance was not justified and to proceed with the trial.

II. The district court did not err when it did not group Sinclair's convictions on Counts 1 and 3.

Sinclair challenges the district court's conclusion that his convictions on Counts 1 and 3 should not be grouped for purposes of determining his total offense level. Def. Br. 26-31. Although the Sentencing Guidelines "are advisory rather than mandatory," a district court commits procedural error when it improperly calculates the advisory guideline range. *Gall v. United States*, 552 U.S. 38, 46, 51 (2007); *see also United States v. Garrett*, 528 F.3d 525, 527 (7th Cir. 2008) ("When sentencing a defendant, the first step is to calculate the Guidelines range correctly, and a mistake in that calculation warrants resentencing."). Consequently, this Court reviews the district court's application of the Sentencing Guidelines de novo. *United States v. Gonzalez-Lara*, No. 11-3892, 2012 WL 6155928, *3 (7th Cir. Dec. 11, 2012).

Because Sinclair was convicted of multiple counts, the Sentencing Guidelines instructed the district court to first determine the base offense level and "appropriate specific offense characteristics" for each count of conviction, and then to apply Part D of Chapter Three to determine whether any of the convictions grouped for purposes of calculating Sinclair's total offense level. U.S. Sentencing Guidelines Manual § 1B1.1(a)(1)-(4) (2011). Section 3D1.2 sets out the rules for determining whether multiple convictions should group. *See id.* § 3D1.1(a)(1). The general provision of § 3D1.2 states that convictions "shall be grouped" if they "involv[e] substantially the same harm." *Id.* § 3D1.2. Counts involve "substantially the same harm" if they fall into one of the four categories specified in § 3D1.2(a)-(d). *Id.*

Sinclair argued below and contends again on appeal that his convictions on Counts 1 and 3 group under § 3D1.2(c).[6] That provision specifies that convictions group if conduct embodied in one conviction "is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to" the other conviction. *Id.* § 3D1.2(c).

The question presented here is whether the phrase "is treated as a specific offense characteristic in . . ." is to be considered at the general or the specific level. If § 3D1.2(c) is asking whether, as a general matter, the

[6] Sinclair has never argued (and has thus forfeited) any claim that any of the other three sections of § 3D1.2 apply to his case.

guideline pertaining to one of Sinclair's offenses lists, as a specific offense characteristic, conduct that relates to the other offense, then Sinclair is quite correct that it does. Sinclair's conviction for being a felon in possession of a firearm (Count 3) involves conduct that is a specific offense characteristic in the guideline applicable to his conviction for possessing with intent to distribute marijuana (Count 1). *See id.* § 2D1.1(b)(1) (directing courts to apply a 2-level enhancement "[i]f a dangerous weapon (including a firearm) was possessed"). Likewise, Sinclair's conviction for Count 1 involves conduct that is a specific offense characteristic in the guideline applicable to his conviction for Count 3. *See id.* § 2K2.1(b)(6)(B) (instructing courts to apply a 4-level enhancement if a defendant used a firearm "in connection with another felony offense").

If, however, § 3D1.2(c) is asking, at the specific level, whether, *in this case*, either Count 1 or Count 3 "embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable" to the other count, *id.* § 3D1.2(c), then the answer is equally clearly no. As the district court recognized, firearm possession is not treated as a specific offense characteristic "with this combination of counts" because of Sinclair's conviction in Count 2 of a violation of 18 U.S.C. § 924(c). Def. App. 3. Application Note 4 to § 2K2.4 directs that when a defendant is convicted of violating § 924(c), the court should "not apply any specific offense

characteristic for possession . . . of an explosive or firearm when determining the sentence for the underlying offense." U.S. Sentencing Guidelines Manual § 2K2.4 cmt. n.4 (2011). Thus, the final PSR did not apply an enhancement under § 2K2.1.1(b)(6)(B) when setting Sinclair's offense level for Count 3. PSR ¶¶ 27-34. Similarly, had Sinclair's offense level been calculated under § 2D1.1, the guideline applicable to Count 1, the enhancement found in § 2D1.1(b)(1) would not have applied pursuant to Application Note 4.

Section 3D1.2(c) is ambiguous as to whether the court should look at the general guideline or the specific facts in deciding whether counts should group. In such cases, the court typically consults the Guidelines Commentary and Application Notes to resolve the ambiguity. *Stinson v. United States*, 508 U.S. 36, 44-45 (1993); *United States v. Raupp*, 677 F.3d 756, 758-59 (7th Cir. 2012).

Application Note 5 to § 3D1.2 addresses the application of subsection (c). U.S. Sentencing Guidelines Manual § 3D1.2 cmt. n.5 (2011). The second paragraph of the note provides a specific, on-point example of how the guideline is to apply. It states:

> Sometimes there may be several counts, each of which could be treated as an aggravating factor to another more serious count, but the guideline for the more serious count provides an adjustment for only one occurrence of that factor. In such cases, only the count representing the most serious of those factors is to be grouped with the other count. For example, if in a robbery of a credit union on a military base the defendant is also convicted of

> assaulting two employees, one of whom is injured seriously, the assault with serious bodily injury would be grouped with the robbery count, while the remaining assault conviction would be treated separately.

Id. Thus, the Guidelines commentary instructs that, in deciding whether a count has been "treated as a specific offense characteristic," the district court does not look at whether the guideline ordinarily could include or embody the conduct, but looks instead at whether on the specific facts of the case it in fact *does* embody the conduct. In the hypothetical in Application Note 5, the second assault would normally be treated as a specific offense characteristic, *see* U.S. Sentencing Guidelines Manual § 2B3.1(b)(3)(A) (2011), but it is not so treated in that specific case due to the first assault, and therefore does not group. Similarly here, the enhancements in § 2D1.1(b)(1) and § 2K2.1(b)(6)(B) are not applied because of another application note. Following the logic of the hypothetical, § 3D1.2(c) does not apply, and the counts do not group.

Sinclair relies on three out-of-circuit cases to support his contention that his convictions should have grouped. Def. Br. 28-29. Two of those cases, however, reviewed district court decisions to group where the government did not cross-appeal, and the courts merely stated the general rule of § 3D1.2(c) without detailed analysis. *United States v. Gibbs*, 395 F. App'x 248, 250 (6th Cir. 2010); *United States v. King*, 201 F. App'x 715, 718 (11th Cir. 2006). Those decisions are thus of little help in deciding the question presented.

The third case, *United States v. Bell*, 477 F.3d 607 (8th Cir. 2007), reversed a district court decision not to group under the same factual circumstances presented here. The Eighth Circuit adopted the position espoused by Sinclair that courts should merely look at the Guidelines in the abstract in deciding whether the counts embody conduct treated as a specific offense characteristic "even though the applicable enhancements are not utilized" on the basic ground that the counts at issue are "intertwined." *Id.* at 615-16. But the court in *Bell* did not grapple with Application Note 5, and its analysis is inconsistent both with that note and the text of § 3D1.2(c), which asks whether "one of the counts embodies conduct that is treated as a specific offense characteristic in . . . the guideline applicable to another of the counts," not whether the counts are closely intertwined or whether they could be treated as specific offense characteristics under other hypothetical circumstances.

In Sinclair's case, Count 1 did not embody conduct treated as a specific offense characteristic in Count 3, nor did Count 3 embody conduct treated as a specific offense characteristic in Count 1. As a result, § 3D1.2(c) does not direct that the counts should group. The district court therefore properly refused to group the convictions and committed no procedural error at sentencing.

CONCLUSION

For the foregoing reasons, Sinclair's convictions and sentence should be affirmed.

Respectfully submitted,

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Certificate of Compliance with Fed. R. App. P. 32(a)

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 7,248 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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Certificate of Service

I hereby certify that on January 22, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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