No. 13-2160

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

United States of America,
Plaintiff-Appellee,

v.

Patrick B. Wallace,
Defendant-Appellant.

Appeal from the United States District Court
For the Central District of Illinois
Case No. 3:12-CR-30003-RM-BGC
The Honorable Richard Mills

BRIEF AND REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT PATRICK B. WALLACE

Bluhm Legal Clinic
Northwestern University School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

Sarah O'Rourke Schrup
Attorney
Andrew Jaco
Senior Law Student
Trevor Lee
Senior Law Student
Akane Tsuruta
Senior Law Student
Counsel for Defendant-Appellant,
Patrick B. Wallace

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Disclosure Statement

I, the undersigned counsel for the Defendant-Appellant, Patrick B. Wallace, 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:
Patrick B. Wallace

2. This 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'Rourke Schrup (attorney of record), Andrew Jaco (senior law student), Trevor Lee (senior law student), and Akane Tsuruta (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:

Daniel J. Hillis
Federal Public Defender
600 E. Adams
2nd Floor
Springfield, IL 62701

R. John Alvarez

Suite 103
975 S. Durkin Dr.
Springfield, IL 62704

/s/ Sarah Schrup
Date: December 3, 2013

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No

Address: 375 East Chicago Avenue, Chicago, Illinois 60611
Phone Number: (312) 503-0063
Fax Number: (312) 503-8977
E-mail Address: s-schrup@law.northwestern.edu

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Jurisdictional Statement

The United States District Court for the Central District of Illinois had jurisdiction over Appellant Patrick Wallace's (Wallace) federal criminal prosecution pursuant to 18 U.S.C. § 3231 (2012), which states that the "district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States." This jurisdiction was based on a single-count indictment charging Wallace with a violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A) (2012), possession of 280 or more grams of cocaine base with the intent to distribute.

On January 10, 2012, a grand jury returned an indictment against Wallace. (R.13.)[1] On October 16, 2012, the jury found Wallace guilty. (R.75.) The court entered judgment against Wallace on May 24, 2013, sentencing him to 288 months' imprisonment (Sentencing Tr. II 98), and a consecutive 60-month sentence from a separate revocation proceeding (93–CR–30037, R.91). Wallace timely filed this appeal on May 29, 2013. (R.113.)

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 (2012), which grants jurisdiction of "all final decisions of the district courts of the United States" to its courts of appeal.

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[1] References to the sequentially paginated trial transcript shall be denoted as (Trial Tr. __), references to the two sentencing hearing transcripts, which occurred on May 21, 2013 and May 24, 2013, respectively, as (Sentencing Tr. I __) and (Sentencing Tr. II __), and references to the parole revocation hearing transcript as (Revocation Hr'g Tr. __). References to all other transcripts will be denoted as ([DATE] Hr'g Tr. at __). All other references to the Record shall be denoted with the appropriate docket number as (R.__). References to the material in the consecutively paginated Rule 30(a) and Rule 30(b) appendices shall be denoted as (App. __).

Statement of the Issues

I. Whether Wallace's Confrontation Clause rights were violated at trial by the admission of the confidential informant's testimonial video coupled with the informant's absence from trial.

II. Whether the district court abused its discretion in denying Wallace's motions for new counsel.

III. Whether the police violated *Miranda* by questioning him when he was in custody.

Statement of the Case

On December 16, 2011, the government filed a criminal complaint against Wallace in the United States District Court for the Central District of Illinois. (R.1.) The complaint alleged that Wallace knowingly possessed with intent to distribute a mixture containing cocaine base in violation of 21 U.S.C. § 841(a)(1). (R.1.) On January 10, 2012, a grand jury indicted Wallace for knowing possession of a controlled substance with the intent to distribute. (R.13.)

The court appointed attorney John Alvarez to defend Wallace. (01/03/2012 Text Order.) Wallace filed three pro se motions requesting new appointed counsel on May 2, 2012 (R.23), September 14, 2012 (R.42), and December 19, 2012 (R.84). He voluntarily withdrew the first, and the district court denied the other two. (05/14/2012 Hr'g Tr. at 4; App. A.12; App. A.39–40.)

Leading up to trial, both parties filed a series of motions *in limine* regarding the use of evidence generated by the government's confidential informant, Andrew Wallace (the defendant's nephew). First, the district court ruled that Andrew Wallace's video recantation of his statements to police about drugs he purportedly bought from Wallace was inadmissible hearsay. (R.58.) Second, the district court denied as moot Wallace's motion to exclude the audio and video recordings of the alleged drug buys made by Andrew Wallace and his motion to preclude government witnesses from testifying about out-of-court statements made by Andrew Wallace. (App. A.14–17.) The government assured the court that it would not admit any out-of-court

statements made by Andrew Wallace. (R.67; R.68.) Third, the district court reserved ruling on the government's motion to limit defense questioning of Andrew Wallace to the extent that he was called as a defense witness at trial. (App. A.17.)

Wallace's trial ran October 11–16, 2012. (*See* Trial Tr.) During trial, Wallace moved to suppress a non-*Mirandized* statement that Wallace allegedly made to officers after he was arrested and during the search of the home. (Trial Tr. 362.) The district court denied the motion to suppress, finding Wallace's statements non-custodial and voluntary. (App. A.21–22.) On October 16, 2012, the jury found Wallace guilty of possession with intent to distribute cocaine base. (R.75.)

On May 24, 2013, the district court sentenced Wallace to 288 months' imprisonment to be followed by ten years of supervised release. (Sentencing Tr. II 98–99.) In a separate revocation proceeding that same day, the district court sentenced Wallace to a consecutive 60-month sentence for committing a crime while on supervised release. (Revocation Hr'g Tr. 14.) Wallace timely filed this appeal on May 29, 2013. (R.113.) Wallace's judgment of conviction and revocation of supervised release were consolidated on appeal. (7th Cir. Dkt. 2.) Wallace moved to dismiss the revocation appeal on November 25, 2013 (Case No. 13-2161), which this Court granted on November 26, 2013 (7th Cir. Dkt. 29). This appeal concerns only the judgment of conviction (Case No. 13-2160).

Statement of the Facts

In late 2011 serial informant Andrew Wallace contacted the St. Louis DEA, claiming to have incriminating information about his uncle, defendant Wallace. (Trial Tr. 434.) Andrew Wallace told the DEA that his uncle—with whom he was in a feud (06/13/2012 Hr'g Tr. at 9)[2]—had been selling cocaine base (06/13/2012 Hr'g Tr. at 6). Springfield police had been targeting Wallace, and they seized upon the tip as an opportunity to investigate further. (06/13/2012 Hr'g Tr. at 6–7.) Andrew Wallace, no stranger to the criminal justice system himself (06/13/2012 Hr'g Tr. at 10), traveled with a St. Louis agent to Springfield on December 2 (06/13/2012 Hr'g Tr. at 7), and began the process of informing against his uncle.

Less than a week later, on December 7, Springfield police sent Andrew Wallace to attempt an undercover buy from Wallace. (06/13/2012 Hr'g Tr. at 27.) When that attempt failed (06/13/2012 Hr'g Tr. at 27), police tried again the next week, on December 15 (06/13/2012 Hr'g Tr. at 27, Trial Tr. 196). They strapped an audio/video recording device on his shirt (Trial Tr. 206, 209), and gave him $1,250 in DEA money (Trial Tr. 202–03). They searched Andrew Wallace and his car (Trial Tr. 209), and then told him to drive to 700 North 14th Street in Springfield where they thought Wallace was staying (Trial Tr. 210). Officers followed Andrew Wallace to the location and surveilled the home from outside. (Trial Tr. 210.) The lead DEA agent, Officer

[2] The court conducted two hearings on this date, which appear in separate transcripts in the record. All citations to the hearing on this date reference the actual *Franks* hearing—the longer, 69-page document.

Tom Bonnett, parked on the next street over and listened to Andrew Wallace's audio transmitter. (Trial Tr. 210–12.)

From their remote location, officers were only able to see Andrew Wallace park his car, enter the home, and exit the home approximately ten minutes later. (06/13/2012 Hr'g Tr. at 19.) They could not see what occurred inside the home. After leaving the home, Andrew Wallace drove back to the DEA office (Trial Tr. 214–15), produced twenty-two grams of a substance containing cocaine base, and claimed he purchased it from Wallace (Trial Tr. 215; 06/13/2012 Hr'g Tr. at 38). Andrew Wallace no longer had the $1,250 in DEA money. (Trial Tr. 215.)

That night, Officer Bonnett reviewed the audio and video recordings. (06/13/2012 Hr'g Tr. at 13–14.) The recordings reveal that Andrew Wallace pulled into the driveway alongside at least one other vehicle. (06/13/12 Hr'g Tr. at 32.) They show him getting out of the car and speaking to a woman (later identified as Wallace's girlfriend, Sandra Johnson). (06/13/2012 Hr'g Tr. at 15–16.) Andrew Wallace walks to the house and continues his conversation with Johnson (06/13/2012 Hr'g Tr. at 17); she then leaves as he approaches the front door (06/13/2012 Hr'g Tr. at 18). The recordings show him at the front door saying, "Come on, man," and "get real" to an unknown individual (06/13/2012 Hr'g Tr. at 18) before entering the home (06/13/2012 Hr'g Tr. at 19).

The recordings inside the house are dark and blurry and provide little information about what happened inside. (App. B.30–40.) After approximately ten minutes, the recordings show Andrew Wallace leaving briefly, but then returning after having forgotten his keys. (06/13/2012 Hr'g Tr. at 19.) As Andrew Wallace exits the house the second time, the recordings show him encountering two men and interacting with them. (06/13/2012 Hr'g Tr. at 20–21.) It is unclear from the video what transpires between these men. (06/13/2012 Hr'g Tr. at 19–22.)

After watching this video, Officer Bonnett swore out an affidavit for a search warrant that same evening at around 7:30 p.m. (Trial Tr. 223.) In his affidavit, Officer Bonnett included some, but not all, of the facts about the drug buy and his interactions with Andrew Wallace. (06/13/2012 Hr'g Tr. at 9, 22.) He said that Andrew Wallace entered the residence, exited, momentarily returned, and exited again. (R.26-1.) Yet Officer Bonnett did not mention that Andrew Wallace was related to—and upset with—Wallace. And he did not report the fact that Andrew Wallace encountered no fewer than three other individuals at or around the house when he supposedly made the drug purchase from Wallace. (06/13/2012 Hr'g Tr. at 15–17, 20.) The judge issued the warrant later that evening, around 7:50 p.m. (R.1 at 2.)

With the warrant in hand, the police subsequently delayed for over three hours before executing the search. (06/13/2012 Hr'g Tr. at 45.) During that time they decided to send Andrew Wallace back into the house to attempt a

second buy. (Trial Tr. 223–24.) Officer Bonnett's claimed rationale for this extra buy was to confirm that "there [were] still drugs inside the house." (Trial Tr. 223.) Officers again wired Andrew Wallace and observed him enter the house and exit about twenty minutes later. (Trial Tr. 223–26.) When they searched him, he had eighteen grams of a substance containing cocaine base, but none of the buy money. (Trial Tr. 172, 227–228.) The government used the video from the second controlled buy at trial as evidence of Wallace's guilt. (App. B.3–20.)

Around 11 p.m., police and DEA agents raided the home. (Trial Tr. 223.) Inside they found Wallace, his nephew Jerome Wallace, and Sandra Johnson. (Trial Tr. 356.) Police quickly handcuffed them, held them in the front room, and proceeded to exhaustively search the home. (Trial Tr. 356.)

During the search, the police found cocaine, cocaine base, and marijuana. Most of the drugs were found in the southwest bedroom in a filing cabinet. (Trial Tr. 287–88.) Police also found a pair of jeans in the bedroom, and in its pockets were the identification cards for Wallace, his mother, and various other family members (Trial Tr. 273–74), as well as some marijuana and cocaine base (Video Deposition of Kristin Beer).

Agents and police found drug residue in the kitchen, including cocaine residue in the microwave, on a measuring cup, and on a digital scale. (Trial Tr. 314.) Despite the multitude of items seized from the home, Wallace's prints were not found on the microwave, the measuring cup, the digital scale,

or the filing cabinet, which contained the vast majority of the drugs. His prints were found only on a Ziploc bag in the kitchen, on which Sandra Johnson's prints were also found; this bag contained several items including scissors, a small scale, a screwdriver, a small piece of metal, and various pieces of plastic. (Trial Tr. 548, 553–55.)

During the search, two officers—Michael Mazrim and Daniel Weiss—watched the handcuffed trio of Wallace, Jerome Wallace, and Sandra Johnson in the front room. (Trial Tr. 391–92; *see also* App. B.41.) Jerome Wallace was sitting on a chair, and Wallace and Sandra Johnson sat on an adjacent sofa. (Trial Tr. 393.) About halfway through the search, Officer Mazrim heard a commotion coming from south and east of the front room. (App. B.25.)

Officer Mazrim, the only officer in the room at the time, claimed to have heard Wallace twice whisper to Sandra Johnson, "Don't worry, everything in that room is mine." (App. B.26.) Officer Mazrim testified that he "asked the two to stop whispering and to stop talking with one another." (App. B.26.) He then brought Officer Weiss into the front room to watch them while he fetched Officer Bonnett. (App. B.26–27.) Officer Mazrim found Officer Bonnett in the kitchen, told him what he had heard, and asked him "if he wanted to go in there and talk to any of them based on the statements that were made." (App. B.27.) Officer Bonnett immediately stopped his investigation, and both officers went directly to Wallace. (App. B.27.)

When Officer Bonnett entered the front room, he asked Wallace, "[W]ould you mind stepping out to talk about this?" (App. B.28.) Officer Bonnett testified during trial that Wallace got up, walked three or four steps toward him (Trial Tr. 431), and said "[e]verything in the bedroom was his" (App. B.23).[3] It is undisputed that none of the officers read Wallace his *Miranda* warnings before Officer Bonnett approached him in the front room. Wallace was subsequently arrested and charged with possession with intent to distribute cocaine base. (R.13.)

The district court appointed an attorney—R. John Alvarez—to defend Wallace, and their relationship was strained from the start. Wallace raised several concerns with the court, mostly dealing with communication issues. (*See* R.23; R.37; R.42; R.89 at 4–5; R.93.) The problems escalated to the point where Wallace felt compelled, on three separate occasions, to ask for a new lawyer. (R.23; R.42; R.84.) He specifically identified in his motions the problems plaguing their relationship. (R.23; R.42; R.84.) The district court held hearings on two of Wallace's requests (Wallace voluntarily withdrew the other request). (05/14/2012 Hr'g Tr. at 4; 09/20/2012 Hr'g Tr.; 03/15/2013 Hr'g Tr.)

At the first hearing the district court noted that Wallace's written complaints were "brief" and "not very specific." (App. A.1.) After Wallace

[3] Although Wallace never indicated to which of the three rooms to the south and east of the front room he was referring, the government told the jury that Wallace said "southwest bedroom." (Trial Tr. 965.)

verbally articulated his concerns at the hearing, the district court expressed some confusion about Wallace's complaint. (App. A.5.) The district court did not question Wallace to further clarify his position, however, and instead turned to Alvarez and the government for their perspectives before denying Wallace's motion. (App. A.2, 5, 8.)

At the second hearing, the court again allowed Wallace a brief opportunity to speak (App. A.23–26), followed by commentary from Alvarez and the government (App. A.27–39). The district court, again without substantively questioning Wallace, denied his requests. (App. A.39.) In the wake of these denials, however, the district court began to entertain and to rule on Wallace's pro se filings in addition to those filed by Alvarez. *See, e.g.*, (Sentencing Tr. I 16; 04/23/2013 Text Order.)

Against the backdrop of these disagreements over representation, and about six months before trial, Andrew Wallace wrote a sworn affidavit and recorded a video saying that he had lied about receiving drugs from Wallace during the buys before his arrest. (App. B.1–2.) Andrew Wallace said that he had originally "fabricated a story" that Wallace was a drug dealer because the two had had a falling out. (App. B.1.) After this initial lie, Andrew Wallace said the DEA agents "came on strong," and he thus acquiesced to the agents' request that he attempt to film Wallace selling cocaine. (App. B.1.) He was not, however, ever able to "get [Wallace] on video giving [him] drugs" (App. B.1), and in fact, when Andrew Wallace arrived at the residence,

"Patrick stated he didn't have no crack" (App. B.1). The affidavit explained that the drugs found on Andrew Wallace had instead come from a person outside the home. (App. B.1.)

Each party scrambled to figure out what to do with this new information. The defense filed a pretrial motion challenging the sufficiency of Officer Bonnett's affidavit to obtain the search warrant. (R.26.) The magistrate judge conducted a *Franks* hearing on Wallace's motion. (06/13/2012 Hr'g Tr.) Both Officer Bonnett and Alvarez tried to get in touch with Andrew Wallace so that he could testify at the hearing. (06/13/2012 Hr'g Tr. at 53, 56–57.) No one disputed that Andrew Wallace was "a necessary party to [the] . . . proceeding." (06/13/2012 Hr'g Tr. at 53) (Alvarez characterizing Andrew Wallace's role). Yet the parties and the court flip-flopped over who controlled him and was responsible for producing him. (06/13/2012 Hr'g Tr. at 58) (Officer Bonnett testifying that he gave Andrew Wallace $5,000 to leave town); (06/13/2012 Hr'g Tr. at 53) (Alvarez stating that the defense reached out to Andrew Wallace and could not obtain his cooperation); (06/13/2012 Hr'g Tr. at 53; R.30 at 2) (district court noting that Andrew Wallace might be a material witness but that neither party had requested a material-witness warrant). In the end, Andrew Wallace did not show up and the hearing happened anyway. The district court ultimately refused to quash the warrant, and the case proceeded toward trial. (R.36 at 10.)

Thus, the parties' focus turned to whether and how Andrew Wallace could be used at trial. Alvarez recognized the importance of Andrew Wallace's disclosure and potential testimony, which "goes to the issue of guilt or innocence" (R.65 at 5),[4] but also said that he did not believe that the government was obligated to call him (R.65 at 3). Wallace also requested permission to show Andrew Wallace's videotaped recantation (R.43), and asked the court to prohibit the government from using the audio and video evidence obtained from Andrew Wallace unless it also called him as a witness (R.64). The government claimed that the videotaped recantation was hearsay, and should not be admitted. (R.55.) The district court agreed. (R.58.) Based on the government's promise not to introduce Andrew Wallace's out-of-court statement via other witnesses, the district court also denied Wallace's motion to compel the government to call Andrew Wallace as its own witness. (R.69.)

After assuring the court that Andrew Wallace would not be part of its case-in-chief, the government then sought to restrict the extent to which the defense could question Andrew Wallace about his recantation if called as a defense witness. (R.61.) The court forbade Wallace from mentioning Andrew Wallace during opening statements and reserved ruling on the remainder of the government's requests. (R.69.) All of these discussions were rendered moot because, despite a defense subpoena for his presence (R.52), Andrew Wallace never showed up to testify at trial.

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[4] (*See also* R.43 at 2) (defense counsel noting "[t]hat the Defendant believes the aforesaid DVD [of Andrew Wallace's testimony] is relevant as to the issue of his innocence of the charge in the instant matter").

The case went to trial on October 11, 2012. Although Andrew Wallace was never called, the government introduced into evidence the dark and grainy video footage of his second attempted buy. (App. B.30; *see also* App. B.31–40.) Officer Bonnett, who was a block away from the home where Andrew Wallace recorded the video, narrated the video at trial. (App. B.5–20.) He reported facts to the jury that could not be gleaned from the low-quality video, including a description of Wallace allegedly transferring cocaine base to Andrew Wallace (App. B.10), an identification of plastic bags allegedly containing cocaine (App. B.16), and a statement that the video showed Wallace standing next to a microwave with a glass measuring cup with an off-white substance in it (App. B.17–18).

Notably, when subsequently asked to identify Wallace from the dark and grainy video, he was initially unable to do so. (App. B.5–6.) He originally identified the person on the right side of the screen as Wallace. (App. B.5–6.) The government quickly requested a recess, and after a short break, Bonnett returned to the stand and claimed to positively identify that same person as Wallace's nephew, Jerome Wallace. (App. B.5–10; *see also* App. B.34 (grainy photo of two individuals).)

On October 16, 2012, the jury found Wallace guilty of possession with intent to distribute at least 280 grams of cocaine base. (Trial Tr. 1012.) On May 24, 2013, the district court sentenced Wallace to 288 months' imprisonment. (Sentencing Tr. II 98.) In a separate revocation proceeding,

the district court also sentenced Wallace to a consecutive 60-month sentence for committing a crime while on supervised release. (93–CR–30037, R.91.) Wallace timely filed this appeal on May 27, 2013. (R.113.)

Summary of the Argument

The government used Andrew Wallace to build crucial evidence for its investigation, arrest, and prosecution of Patrick Wallace. Indeed, Andrew Wallace was the government's only eyewitness to Wallace's alleged possession and distribution of cocaine base. His story—later recanted—was the centerpiece of the government's case. Yet the jury never saw Andrew Wallace and never heard him tell his story. Instead, Officer Bonnett, the lead officer investigating Wallace, told the story to the jury for him—a story that only Andrew Wallace could truly tell. Andrew Wallace's absence from trial—and Officer Bonnett's overstated role in it—is ultimately responsible for the three errors counseling reversal in this case.

First, the district court erred by admitting a silent video made by Andrew Wallace without requiring him to testify and instead allowing Officer Bonnett to serve as his substitute. The district court's decision denied Wallace his Sixth Amendment confrontation rights. The district court then compounded the problem by failing to require that the government assist Wallace in locating and securing the informant as a defense witness. This dual failure violated Wallace's Sixth Amendment rights to confrontation and compulsory process and his Fifth Amendment due process rights to present a defense and to a fair trial. Finally, even if the district court did not err in allowing the video to be played, it should not have allowed Officer Bonnett to narrate the video when there was a more probative and less prejudicial evidentiary alternative: the testimony of Andrew Wallace.

Second, the district court abused its discretion in refusing to appoint Wallace a new attorney. Wallace filed multiple pro se motions requesting new representation well in advance of trial and sentencing. He presented to the court evidence of a complete breakdown in communication with his attorney, but the court failed to adequately delve into the issue and never fully understood Wallace's complaints. The district court's erroneous denial of these requests was an abuse of discretion. This abuse alone should be enough to merit reversal or, in the alternative, the government should have to show beyond a reasonable doubt that the error was harmless under *Chapman*. But even if this Court were to apply the *Strickland* test, Alvarez's deficiencies were objectively unreasonable and, but for these failings, the outcome of the proceedings would have been different. Wallace's trial counsel was instrumental in Andrew Wallace's absence from trial, a vacancy filled—as noted above—by the improper testimony of Officer Bonnett.

Finally, the district court erred by failing to suppress a statement Wallace allegedly made to officers without the benefit of a *Miranda* warning. Officer Bonnett questioned Wallace while he was undisputedly in custody and therefore violated his *Miranda* rights.

ARGUMENT

I. The district court improperly admitted a video without requiring the testimony of the confidential informant who made it.

Despite the critical role Andrew Wallace played for the government in the investigation, indictment, and conviction of Wallace, he never testified at trial. The district court's decision to admit the video without requiring Andrew Wallace to testify ultimately denied Wallace his Sixth Amendment right of confrontation. The court then compounded the problem by failing to require the government to assist Wallace in locating and securing Andrew Wallace as a defense witness. This subsequent failure violated Wallace's Sixth Amendment rights to confrontation and compulsory process and his Fifth Amendment due process rights to present a defense and to a fair trial. Finally, even if the district court correctly admitted the video without requiring Andrew Wallace's presence at trial, it erred when it allowed Officer Bonnett to narrate significant portions of the video when there was a less prejudicial means to present the same evidence—namely, the testimony of Andrew Wallace.

A. The government's failure to call the confidential informant as a witness violated Wallace's Sixth Amendment right to confront his accuser.

The district court erred when it allowed the government to introduce video evidence made by the informant without requiring him to testify. Testimonial statements of witnesses absent from trial may not be admitted unless the

witness is unavailable and the defendant had a prior opportunity to cross-examine him. *See Crawford v. Washington*, 541 U.S. 36, 68 (2004). This Court has not previously decided whether a silent video filmed by a confidential informant qualifies as a testimonial statement for purposes of confrontation. But the core principles of Confrontation Clause jurisprudence applied here show that the video should not have been introduced without the government calling Andrew Wallace as a witness. The video was a statement, it was testimonial, and it was made out of court and offered for its truth; its admission therefore violated Wallace's Sixth Amendment right to confront his accuser. Evidentiary rulings—such as the one at issue here—that impinge a defendant's Sixth Amendment right to confrontation are reviewed *de novo*. *See United States v. Danford*, 435 F.3d 682, 687 (7th Cir. 2006).

1. The video was a statement.

The video was Andrew Wallace's statement to the police about what transpired during the second controlled buy. A statement is "[a] verbal assertion or *nonverbal conduct* intended as an assertion." *Black's Law Dictionary* (9th ed. 2009) (emphasis added). Black's further defines a statement as "an account of a person's knowledge of a crime, taken by the police during their investigation of the offense." *Id.*

Statements given to law enforcement officers during interrogations were one of the concerns—if not the primary concern—the Court sought to address in *Crawford* and its progeny. *See Crawford*, 541 U.S. at 52 ("Statements taken by police officers in the course of interrogations are . . . testimonial.");

see also Davis v. Washington, 547 U.S. 813, 826 (2006) ("[I]nterrogations by law enforcement officers fall squarely within [the] class of testimonial hearsay" when they are "directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator.") (internal quotation marks omitted). Without the video, the only way police could have obtained the information it contained was by Andrew Wallace reporting it to them. Thus, the video was a proxy for the oral report that Andrew Wallace would have otherwise made to police.

2. The video was testimonial.

The video was testimonial because its primary purpose was to establish evidence that could be used by the government in its investigation and prosecution of Wallace. Testimony is a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford*, 541 U.S. at 51. And a statement is testimonial when its "primary purpose" is to "establish or prove past events potentially relevant to later criminal prosecution." *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2714 n.6 (2011) (quoting *Davis*, 547 U.S. at 822); *see also Michigan v. Bryant*, 131 S. Ct. 1143, 1155 (2011) (A statement is testimonial when its primary purpose is "creating an out-of-court substitute for trial testimony.").

This Court has defined testimonial statements as those "made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial." *United States v. Watson*, 525 F.3d 583, 589 (7th Cir. 2008) (quoting *Crawford*, 541 U.S. at

52). And evidence made "in anticipation of or with an eye toward a criminal prosecution" qualifies as testimonial. *United States v. Gaytan*, 649 F.3d 573, 579 (7th Cir. 2011), *cert. denied*, 132 S. Ct. 1129 (2012) (quoting *United States v. Tolliver*, 454 F.3d 660, 665 (7th Cir. 2006)).

Andrew Wallace's video was a testimonial statement—it was made in anticipation of trial and ultimately used as "a weaker substitute for live testimony." *United States v. Inadi*, 475 U.S. 387, 394 (1986). The police already had a warrant to search the home when they sent Andrew Wallace back in to make the recording. This video therefore served no purpose other than to obtain incriminating evidence for use at trial.[5] And that is precisely what happened: rather than call the informant as a witness and supplement his eyewitness testimony with the video, the prosecution used the video, along with testimony from Officer Bonnett, to tell a story that only the informant was qualified to tell. In doing so, it deprived Wallace of his fundamental right to confront his accuser—who had recanted his entire story—and to subject him to cross-examination.

3. The video was hearsay.

An out-of-court statement, such as a video like the one at issue here, is hearsay when it is introduced for the truth of the matter asserted. *See* Fed. R.

[5] Although Officer Bonnett testified that the second *buy* was made to confirm that there were still drugs in the home before executing the warrant (Trial Tr. 223), this does not explain the officer's decision to make a second *video*, much less to play it at trial. The presence of drugs was confirmed by the fact that Andrew Wallace walked out with drugs and no money. Thus, the video's sole purpose was to collect evidence for the later prosecution of Wallace.

Evid. 801(a); *see also United States v. Allie*, 978 F.2d 1401, 1408–09 (5th Cir. 1992) (finding that a silent video of an illegal alien residing in defendant's house, used to establish that defendant harbored the alien, was hearsay, though its admission was harmless error where government also introduced deposition testimony to establish facts in the video). The Andrew Wallace video was testimonial hearsay because it was an out-of-court statement that was introduced by the government solely to prove the truth of the matters it depicted—*i.e.*, that Andrew Wallace allegedly purchased cocaine from Wallace.

Admission of the video without the opportunity to cross-examine Andrew Wallace strikes at the heart of the Confrontation Clause. The video was, plain and simple, an accusation by Andrew Wallace that Wallace had committed a crime. The government used the video at trial for the sole purpose of proving that Wallace committed that crime. But rather than produce Andrew Wallace as a witness so Wallace's Sixth Amendment right could be vindicated by cross-examination, Andrew Wallace was instead allowed to testify free from cross-examination by making an accusation to a police officer who then narrated it to the jury for him.

B. The government failed to make reasonable efforts to locate the confidential informant, thereby violating Wallace's right to present a complete defense.

The district court first erred by admitting the video without requiring the testimony of Andrew Wallace and then compounded this error by failing to

require the government to produce him at trial for the defense. The government was obligated to provide Wallace with reasonable assistance in locating its informant, which it wholly failed to do. This failure ultimately deprived Wallace of his right to present a full defense. *See Washington v. Texas*, 388 U.S. 14, 19 (1967) ("The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense . . . . This right is a fundamental element of due process of law."). To establish a violation of this right, a defendant must "make some plausible showing of how [the absent witness's] testimony would have been both material and favorable to his defense." *Newell v. Hanks*, 335 F.3d 629, 633 (7th Cir. 2003) (quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982)). This Court reviews *de novo* the question whether an accused's due process rights were violated. *United States v. Presbitero*, 569 F.3d 691, 702 (7th Cir. 2009).

Where, as here, the government opts not to call an informant as its own witness, it is obligated to take reasonable efforts to locate him on behalf of the defense when the defendant claims that the informant engaged in misconduct. *See, e.g.*, *United States v. Pizarro*, 717 F.2d 336, 343 (7th Cir. 1983). Further, where an informant disappears before trial and the defendant has made a proper request for his presence, the government must make a reasonable effort to produce him. *See United States v. Cansler*, 419 F.2d 952, 954–55 (7th Cir. 1969); *see also United States v. Mora*, 994 F.2d 1129, 1139

(5th Cir. 1993) ("When the presence of a confidential informant is required at trial, the government must make a reasonable effort to produce him."). Once this request is made, "the government bears the burden of demonstrating first that it did not cause the disappearance, and second that it made a reasonable effort to locate the informant for trial." *Pizarro*, 717 F.2d at 343. How far the government must go in searching for an informant depends on several factors, including "the extent of the government's control over the witness, the importance of the witness' testimony, the difficulty of finding him, and similar matters." *United States v. Williams*, 496 F.2d 378, 382 (1st Cir. 1974).

The government is under a special burden where, as here, the informant is a material witness. *See United States v. Barnes*, 486 F.2d 776, 779–80 (8th Cir. 1973) (footnote omitted) ("[W]here the informant is shown to be a material witness and the government does not plan to use the informant as a witness it owes a duty to make every reasonable effort to have the informant made available to the defendant to interview or use as a witness, if desired.").

Here, the government had a duty to take reasonable efforts to locate Andrew Wallace. Wallace made a proper request, he alleged improper behavior by Andrew Wallace, and the government failed to show that it did not cause Andrew Wallace's unavailability. First, Wallace properly requested Andrew Wallace's presence when he subpoenaed Andrew Wallace nearly a month before trial. (R.52.) Once this subpoena was filed, the district court

should have required the government to show that it was not responsible for Andrew Wallace's unavailability and that it would take reasonable steps to assist the defense in locating him prior to trial.

Second, Wallace's defense is based in large part on the improper behavior of the informant. Andrew Wallace himself confessed in a sworn affidavit that he lied to Officer Bonnett and other police officers about obtaining cocaine base from Wallace during the controlled buys on December 15, 2011. Were it not for Andrew Wallace fabricating this story to police, they never would have obtained the search warrant that led to Wallace's arrest.

Third, the government failed to show that it did not cause Andrew Wallace's unavailability and also failed to make any reasonable effort to locate him. At the *Franks* Hearing, Officer Bonnett testified that he gave Andrew Wallace $5,000 to leave town after Andrew Wallace told him he felt threatened because of his role in Wallace's arrest and indictment. (06/13/2012 Hr'g Tr. at 58.) The government therefore was at least partially responsible for Andrew Wallace's departure from the Springfield area prior to trial, and it failed to meet its burden at trial of proving otherwise.

Even if the government was not directly responsible for Andrew Wallace's disappearance from the Springfield area, it was obligated to make a reasonable effort to locate him after Wallace filed his subpoena with the court. The government's limited attempts to contact Andrew Wallace did not satisfy its burden. *See, e.g.*, *United States v. Harris*, 570 F. Supp. 2d 1030,

1041 (N.D. Ill. 2008) (holding that the government's efforts to locate an informant were not reasonable where it tried to call him multiple times, went to his apartment and knocked on the door, drove by his address and other known hangouts, and contacted local law enforcement agencies in jurisdictions they suspected he may have gone), *vacated on other grounds sub nom. United States v. Blitch*, 622 F.3d 658 (7th Cir. 2010).[6]

From the record it appears the government's only efforts to locate Andrew Wallace were all made well before the defense filed a subpoena requesting his testimony, and are therefore irrelevant in assessing the government's reasonable efforts to produce him. *See United States v. Montgomery*, 998 F.2d 1468, 1474 (9th Cir. 1993) (finding relevant time period for assessing reasonable efforts by government begins at the time request is made and trial date is set). And although Officer Bonnett tried unsuccessfully to call Andrew Wallace several times in the days leading up to the *Franks* hearing (06/13/2012 Hr'g Tr. at 56–57), no efforts were made to secure his presence at trial. Such cursory attempts at locating Andrew Wallace reveal that the government had very little intention of actually securing his presence at any proceedings and show that it failed to satisfy its burden.

[6] By contrast, in *Pizarro*, this Court held that the government made reasonable efforts to locate an informant by "contacting every DEA office where [the informant] was known to have worked, checking every known former address, phone number and automobile registration, and communicating with the Secret Service, the Bureau of Alcohol, Tobacco and Firearms, and the Immigration and Naturalization Service." *Pizarro*, 717 F.2d at 344. *Cf. Mora*, 994 F.2d at 1139 (holding that government's efforts were reasonable where an officer looked for the informant at his home and place of business).

Finally, Wallace was prejudiced by the government's failure to produce Andrew Wallace. The affidavit Andrew Wallace supplied to Wallace's trial counsel shows how favorable his testimony would have been. That the government's confidential informant had recanted and that he would have testified that he did not actually purchase narcotics from Wallace would certainly have helped the defense. (App. B.1–2.) Further, the testimony would have been material. It was not cumulative and would have made Wallace's conviction less likely.

C. Even if the video was properly admitted, allowing Officer Bonnett to narrate it was more prejudicial than probative.

Even if admitting the video did not run afoul of hearsay and confrontation-clause principles, allowing Officer Bonnett to narrate the video during trial was more prejudicial and less probative than an available evidentiary alternative—Andrew Wallace's testimony. Andrew Wallace was the individual best qualified to testify to what the video depicted. As the only person with actual knowledge of what occurred during the controlled buys, his testimony would have been less prejudicial and more probative than Officer Bonnett's. Because Wallace did not object to the admission of the video on this ground, this Court reviews for plain error, which permits reversal when there was "(1) an error, (2) that was plain, meaning clear or obvious, (3) that affected the defendant's substantial rights in that he probably would not have been convicted absent the error, and (4) that seriously affected the fairness, integrity, or public reputation of judicial

proceedings." *United States v. Christian*, 673 F.3d 702, 707–08 (7th Cir. 2012). But even under this heightened standard of review, reversal nevertheless is required.

Federal Rule of Evidence 403 states that relevant evidence may be excluded when "its probative value is substantially outweighed by a danger of . . . unfair prejudice." Fed. R. Evid. 403. In addition to this general principle, judges are advised to consider "evidentiary alternatives" when calculating the probative value of an item of evidence. *See Old Chief v. United States*, 519 U.S. 172, 184 (1997) (holding that district court abused its discretion by allowing government to introduce details of defendant's prior felony conviction when alternative evidence—a stipulation to the conviction—was available and equally probative without the same risk of prejudice).

Officer Bonnett's testimony had little probative value. During the buy he sat a block away from the home in which the video was made; his only knowledge of the events depicted in the video came from the recanted testimony of Andrew Wallace and his own viewing of the video. And even if some narration was required, there existed a more probative and less prejudicial alternative: Andrew Wallace. Under *Old Chief*, the district court should have considered the alternative evidence before admitting Officer Bonnett's testimony.

Further, Officer Bonnett's testimony was extremely prejudicial. He supplemented his testimony with facts he learned from his investigation—

conducted several hours after the video was taken. For example, he testified that one of the still images from the video—image 13A-9—showed "the sealer that we seized . . . and then in front of that appears to be cocaine in bags." (App. B.16.)

Government Exhibit 13A-9 (App. B.35.)

Again, his only knowledge of that fact came not from the video but from information he obtained independently and after the fact. He then testified that one image—image 13A-33—depicted what "appear[ed] to be crack cocaine" being transferred from Wallace to Andrew Wallace.[7] (App. B.10.)

Government Exhibit 13A-33 (App. B.40.)

[7] *See* App. B.31–40 for a sampling of the images that Officer Bonnett testified about.

Yet video depicts nothing more than a momentary flash of white in the bottom corner of an otherwise black screen. Nothing about this image would lead one to independently conclude that it showed a transfer of crack cocaine.

Perhaps most importantly—and most prejudicially—Officer Bonnett repeatedly identified Wallace as the man standing in close proximity to all the drugs he claimed to see on the video. (App. B.12–14.) Yet, he initially identified this person as Jerome Wallace and then changed his testimony when re-questioned by the government after a short recess. (App. B.6–9.) As evidenced by his changed testimony, an observer who did not know what items had been seized or who had been found in the home during the subsequent search would be hard pressed to identify a single item or person from the grainy video and photographs admitted at trial.

Government Exhibit 13A-5 (App. B.34.)

The government's use of Officer Bonnett's testimony in this way reflects a dangerous and "radical" shift in how criminal cases are tried, an approach "that may be used to conceal substantial factual and legal issues concerning the rights of the accused and the administration of criminal justice." *Lopez v.*

United States, 373 U.S. 427, 445–46 (1963) (Warren, C.J., concurring) (highlighting the dangers of using recorded evidence as a replacement for live testimony rather than as a means to corroborate a witness on the stand). Rather than produce an actual eyewitness to testify about what he saw, the government may hide from the jury witnesses of questionable character and replace their testimony with that of the officer who investigated the case. As then-Chief Justice Warren's concurring opinion in *Lopez* warned, allowing the government to substitute officer narration of recorded transactions in place of eyewitness informant testimony puts criminal defendants in an untenable position. 373 U.S. at 445 (The government may "place on the defense the onus of finding and calling a disreputable witness, who if called, may be impeached on all collateral issues favoring the defense."); *see also United States v. Silva*, 380 F.3d 1018, 1020 (7th Cir. 2004) ("Allowing agents to narrate the course of their investigations, and thus spread before juries damning information that is not subject to cross-examination, would go far toward abrogating the defendant's rights under the sixth amendment and the hearsay rule."). Like Chief Justice Warren's caution in *Lopez*, the video in this case was used not to corroborate Andrew Wallace's testimony, "but rather, to obviate the need to put him on the stand." *Lopez,* 373 U.S. at 443.

II. The district court's erroneous denial of Wallace's motions for new counsel merits reversal.

Wallace's relationship with his appointed lawyer soured under the strain of inadequate communication and serious discord. Yet the district court

denied his two timely requests for new appointed counsel. The court abused its discretion, and this Court should therefore reverse.

A. The district court abused its discretion in refusing to grant Wallace's motions.

Wallace filed three motions for new counsel; the district court denied two, and Wallace voluntarily withdrew the other.[8] This Court weighs several factors in deciding whether a district court erroneously denied a defendant's request for new counsel, including: (1) the timeliness of the motions; (2) the adequacy of the district court's inquiry into the motions; (3) the extent to which the conflict between Wallace and his attorney resulted in a total lack of communication that prevented an adequate defense; and (4) any other factors evidencing abuse. *United States v. Harris*, 394 F.3d 543, 552 (7th Cir. 2005) (citing *United States v. Zillges*, 978 F.2d 369, 372 (7th Cir. 1992)); *United States v. Brown*, 79 F.3d 1499, 1507 (7th Cir. 1996) ("[T]he list of factors elaborated in *Zillges* is not exhaustive."). Taken together, these factors weigh in favor of finding that the district court abused its discretion.

1. Wallace's motions were timely.

Each of Wallace's motions was timely. Timeliness is measured by whether the request is merely "a tactic to secure a continuance on the eve of trial" or some similar measure to manipulate or delay proceedings. *Zillges*, 978 F.2d at 372. Wallace's motions were not designed for delay. His first new-counsel motion fell three weeks before trial and his second six months before

[8] *See* R.23 (05/02/2012) (voluntarily withdrawn); R.42 (9/14/2012) (denied); R.84 (12/19/2012) (denied).

sentencing; this is well within the bounds of what this Court has found reasonable. *See, e.g.*, *United States v. Terrell*, 344 F. App'x 275, 279 (7th Cir. 2009) (motion two weeks before sentencing was timely); *Brown*, 79 F.3d at 1506 (motion two months before trial was timely); *Zillges*, 978 F.2d at 372 (motion one month before trial was timely).

2. The district court's inquiry into Wallace's motions was insufficient.

The district court insufficiently inquired into both of Wallace's substantive motions for new counsel. A showing on appeal of inadequate inquiry is sufficient in itself to find a trial court abused its discretion, though it is not necessary for such a finding. *See, e.g.*, *United States v. Morrison*, 946 F.2d 484, 499 (7th Cir. 1991) (finding abuse of discretion after determining that inquiry was insufficient without looking to other factors); *Harris*, 394 F.3d at 551–52 (noting that even if the district court performed a proper inquiry and defendant was granted an opportunity to be heard, the court would still review for abuse of discretion). The court must make a "thorough investigation of the apparent conflict between the defendant and his attorney" where it looks into the "reasons for the defendant's dissatisfaction with his existing attorney." *Zillges*, 978 F.2d at 372. The court may not, however, merely seek to "elicit a general expression of dissatisfaction" from the defendant, *id.*, nor may it "dismiss the matter in a conclusory fashion," *United States v. Volpentesta*, 727 F.3d 666, 673 (7th Cir. 2013). Rather, its inquiry must be specific and searching. *Zillges*, 978 F.2d at 371–72.

Wallace presented his first substantive motion for new counsel at a pretrial conference three weeks before trial. The court held a hearing on the motion, and opened by noting that Wallace's written submission was "very brief" and "not very specific." (App. A.1.) It asked Wallace to elaborate, listening to one paragraph of record testimony from Wallace before declining Wallace's offer to read his reasons why he needed a new lawyer. (App. A.2.)

Rather than following up with Wallace to ensure that it understood the basis of his dissatisfaction, the district court turned to Alvarez for input, who was seemingly unaware of Wallace's complaints. (App. A.2) ("I don't know the specific issues he's having reference to."). Alvarez launched into an explanation—in front of the government[9]—of the series of disagreements the two had experienced over the decisions to call Andrew Wallace as a witness, to move to suppress Wallace's statements, and to raise or reject various defenses. (App. A.2–4.)

At the end of this statement, the district court asked no follow-up questions of Alvarez or Wallace, and instead sought merely a general

[9] Other courts explicitly require that "[w]hen a trial court is informed of a conflict between trial counsel and a defendant, the trial court should question the attorney or defendant *privately* and in depth, and examine available witnesses." *Daniels v. Woodford*, 428 F.3d 1181, 1200 (9th Cir. 2005) (emphasis added). This Court, too, has approved of district court measures to protect attorney-client confidentiality. *See, e.g.*, *United States v. Golden*, 102 F.3d 936, 940 (7th Cir. 1996) ("[T]he district court properly cleared the courtroom immediately after learning of Golden's concerns about Funk and held an *in camera* hearing to identify the source of Golden's problems."); *United States v. Ryals*, 512 F.3d 416, 420 (7th Cir. 2008) (giving an example of a proper hearing where the "court held a lengthy *in camera* hearing, asking 'specific questions' and receiving 'detailed answers'") (internal citation omitted).

expression of satisfaction from Wallace, asking, "Well, that sounds very reasonable to me. Does it to you, Mr. Wallace?" (App. A.4.) Wallace responded that although it may seem reasonable to the court, it was not reasonable to him. (App. A.4.) He tried to explain why Alvarez's approach did not work and laid bare some of the fundamental problems in their relationship. (App. A.4–5.) At the conclusion of Wallace's second statement, the court again expressed confusion: "Well, I'm not sure I'm following you at all completely—certainly not completely." (App. A.5.) And again, rather than following up with Wallace to ensure that he understood the basis of his complaints, the district court turned its attention to the prosecutor for his views on Wallace's request. (App. A.5.)

The government strenuously defended Alvarez, presenting two reasons Wallace should not receive a new lawyer. (App. A.6–8.) First, it noted that Alvarez had "filed motions." (App. A.6.) Second, it argued that Wallace's and Alvarez's disagreements went to disagreements over strategy, and supported this contention with confidential attorney-client information Alvarez had previously divulged to the government and to the court. (App. A.7) ("It's the lawyer's decision as to the matters of strategy . . . not the defendant's. . . . And as Mr. Alvarez has said, one of the issues the defendant wants . . . is to present a video of a person who's not going to testify at trial. Which, as Mr. Alvarez I think has indicated, is probably hearsay. It certainly is going to be the Government's position that it's hearsay."). According to the government

there was no "basis to grant the defendant's motion to appoint him yet a second lawyer that he's not paying for but the Government is paying for." (App. A.7–8.)

The court gave Alvarez the final word, allowing him to address the court again to defend his actions in the case. (App. A.8–11.). After discussing the matter with the government and Alvarez, the court did not circle back to Wallace. Instead, it assured Wallace that Alvarez had performed well in the past. The court then concluded, "[T]he bottom line is that some things have to give way to the shortness of life. And this is one of them. Your motion is denied." (App. A.12.)

The district court's inquiry into Wallace's second substantive motion was similarly deficient. Though the court conducted a somewhat more thorough inquiry (it read from Wallace's motion a list of reasons supporting his request for new counsel), the court did not engage Wallace, nor did it adequately inquire into the "reasons for his dissatisfaction with counsel." *Zillges*, 978 F.2d at 372. The court instead asked generally whether Wallace had "anything else that [he] would like to add verbally to the written submissions." (App. A.23.) Wallace spoke for three record pages, presenting some of his arguments supplementing his motion. (App. A.23–26.) The court responded with, "All right. Thank you, Mr. Wallace," and made no further inquiry into Wallace's complaints. Instead, it turned to Alvarez, who proceeded (over the course of nine transcript pages) to lament the difficulties

he faced in working with Wallace. (App. A.26–35.) The court again allowed the government to present its own analysis of the Wallace–Alvarez relationship, at which point the government admitted "there's no question that their relations are strained and deteriorated," but suggested that the deterioration had not risen to the level required to "appoint a new taxpayer paid counsel." (App. A.36.) The court, having asked no substantive questions of Wallace, subsequently denied the motion, based not on any discussion of "whether the breakdown in their relationship was beyond fixing," *Ryals*, 512 F.3d at 420, but rather on the fact that "Mr. Alvarez has performed his duties in a most effective manner; especially considering the hand he was dealt" (App. A.39).

3. Wallace and his attorney suffered a breakdown in communication that prevented an adequate defense.

Alvarez was unable to provide Wallace with an adequate defense due to the complete breakdown in communication between them. Mere "personality conflicts" between attorney and counsel do not rise to the level of reversible error; nor do "disagreements over trial strategy." *United States v. Horton*, 845 F.2d 1414, 1418 (7th Cir. 1988). The rift between Wallace and Alvarez, however, ran deeper than petty disagreements; their communication before, during, and after trial deteriorated to the point that Alvarez could not effectively advocate for Wallace.

The record is replete with examples of communication breakdowns:

- May 2, 2012: "I don't feel comfortable going any further with my attorney John Alvarez . . . . Mr. Alvarez has not yet come to sit

down and talk to me about my concerns dealing with my case . . . I want different representation." (R.23.)

- September 14, 2012: "My defense attorney R. John Alvarez and I have not agree[d] on to[o] much in my defense, I will ask this Honorable court to remove Mr. Alvarez from my case." (R.42.)

- December 19, 2012: "Defendant['s] counsel deliberately held evidence back from the defendant . . . . Defendant['s] counsel gave the defendant a copy of the Government's motion in Limine [sic] regarding confidential informant that was not le[gible] and missing numerous pages . . . . [T]he defendant does not want his trial lawyer to represent him for sentencing . . . . The defendant will need a defense attorney that will help him determine what possible sentence he will receive." (R.84 at 2–4.)

- January 16, 2013: "Defendant states from the day Attorney Alvarez took his case he never went over any legal material with the defendant." (R.89 at 4.) "Counsel didn't do any investigative work for the defendant upon request." (R.89 at 5.) "The defendant's defense theory was never introduce[d]." (R.89 at 5.) "Counsel never adhered to the defendant's letters or his suggestions about his defense." (R.89 at 7.)

- March 15, 2013: Alvarez appears to have given up on his relationship with Wallace: "I have my own theory as to . . . [w]hy he's filing his own . . . pro se motions. I was going to bring it up, but I'll keep it to myself at this moment . . . ." (App. A.29.)

- April 2, 2013: Wallace tells the court that "Mr. Alvarez told me that he would call me on Sunday the 17th 2013 of March . . . . I have not heard from Mr. Alvarez . . . . I need to talk to Mr. Alvarez . . . . I don't know what else to do but bring [it] to the court['s] attention." (R.93.)

In short, the story of Wallace's case is that of two defenses proceeding in parallel. Though Alvarez remained Wallace's attorney, Wallace continually filed his own pro se motions, evidencing the growing rift between him and Alvarez. All told, Wallace submitted nearly twenty pro se motions throughout the course of his trial. (*See* R.23; R.31; R.33; R.34; R.37; R.42; R.84; R.85;

R.87; R.89; R.90; R.92; R.93; R.95; R.96; R.99; R.105; R.118; R.122.) The district court, apparently recognizing the conflict between Wallace and Alvarez, allowed this hybrid representation to continue. (*See* Sentencing Tr. I 16) ("I note that this . . . sort of hybrid representation . . . is disfavored . . . but Mr. Wallace deserves the chance to be heard on his pro se objections."). In the end, neither approach afforded Wallace an adequate defense. *See infra* pp 48–51.

4. Other factors evidence abuse of discretion.

Other factors further support finding an abuse of discretion. "Abuses of discretion can come in many forms, not all of which can be anticipated by neat three-part tests." *Brown*, 79 F.3d at 1507. Among these is the fact that the district court grounded its denials on reasoning outside of and irrelevant to Wallace's relationship with Alvarez. In short, the court based both its denials on its favorable perception of Alvarez's past abilities—a factor unrelated to his effectiveness in communicating with and representing Wallace in the present case. In the first hearing, rather than assess "whether the breakdown in their relationship was beyond fixing," *Ryals*, 512 F.3d at 420, the court instead tried to convince Wallace of Alvarez's impressive track record:

> I've been on this bench for 26 years and I knew [Alvarez] back when I was on the state court . . . . And he's always done a superlative job. And I've always been impressed with his preparation and his abilities in the courtroom . . . . I want you to know that you've got very good counsel at your table with you.

(App. A.12.) The court made the same summary remarks at Wallace's second hearing, providing little analysis of Wallace and Alvarez's relationship:

> Mr. Alvarez has done a very good job. And that is a personal observation. I have known Mr. Alvarez for 35 years. He has practiced before me on more than this court. And I know his career and I have seen him in action upon numerous occasions over that period of time. And I think, quite frankly, he did a very good job.

(App. A.39.) The district court's inquiry completely failed the purpose of assessing "the reasons for the defendant's dissatisfaction with his existing attorney." *Zillges*, 978 F.2d at 372. Indeed, the court's personal relationship with Alvarez and its assessment of his performance are of no import in reviewing Wallace's relationship with his attorney. All four factors weigh in favor of finding an abuse of discretion in failing to appoint new counsel for Wallace.

B. The district court's abuse of discretion requires reversal.

The circuit courts are split on how to proceed after finding that a district court abused its discretion on a new-counsel motion. Some automatically reverse. *See, e.g.*, *United States v. Smith*, 640 F.3d 580, 590 (4th Cir. 2011) (holding that erroneous denial of a new-counsel claim is a per se violation of the Sixth Amendment right to counsel, but upholding the district court's decision on factual grounds); *Daniels*, 428 F.3d at 1197–98 (holding that an erroneous denial of a new-counsel claim amounts to constructive denial of counsel). Others apply a *Chapman* harmless-error standard, reversing unless the government can prove beyond a reasonable doubt that the error was

harmless. *Chapman v. California*, 386 U.S. 18, 24 (1967); *see, e.g.*, *United States v. Lott*, 310 F.3d 1231, 1250–52 (10th Cir. 2002). Still others, including this Court, go even further, requiring the defendant not only to show an abuse of discretion, but also to subsequently satisfy the *Strickland* ineffective-assistance standard: that the original attorney's performance was constitutionally deficient, and that but for his deficiencies, the outcome of proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *see, e.g.*, *United States v. Horton*, 693 F.3d 463, 467 (4th Cir. 2012); *Owsley v. Bowersox*, 234 F.3d 1055, 1058 (8th Cir. 2000); *United States v. Calderon*, 127 F.3d 1314, 1343 (11th Cir. 1997); *United States v. Graham*, 91 F.3d 213, 221–22 (D.C. Cir. 1996); *Zillges*, 978 F.2d at 372. For the reasons below, Wallace respectfully requests that this Court revisit its use of the *Strickland* standard in new-appointed-counsel cases.

As an initial matter, the same rationales underlying the Supreme Court's decision to treat denial of a defendant's right to *choice* of retained counsel apply equally to the wrongful denial of new appointed counsel. *See United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). Like *Gonzalez-Lopez*, the constitutional error at issue is the denial of the request itself; it is isolated, unitary, and complete as soon as the district court makes its decision. Therefore, unlike ineffective-assistance claims, which require a prolonged and comprehensive look at prejudice across the span of the whole trial, "[n]o additional showing of prejudice is required to make the violation 'complete.'"

See Gonzalez-Lopez, 548 U.S. at 146. Additionally, like choice-of-counsel cases, the consequences of erroneous denial of new counsel are "necessarily unquantifiable and indeterminate." *Id.* at 150. Any prejudice determination would be purely speculative because "[i]t is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings." *Id.* A prejudice showing is thus neither required nor tenable, and reversal should follow automatically from a district court's erroneous denial of a new-counsel motion. But if this Court declines to adopt a structural-error standard, a *Chapman* harmless-error standard should apply. And finally, even if this Court continues to apply *Strickland*, reversal is still warranted.

1. If this Court requires a harmlessness showing, *Chapman* should apply.

Even if this Court declines to adopt a structural-error standard, it need not fall back on *Strickland*; at a minimum, these questions—like nearly every Sixth Amendment violation—should be governed by the *Chapman* standard. *Gonzalez-Lopez*, 548 U.S. at 148 (noting that "[m]ost constitutional errors" fall under the *Chapman* standard); *see also, e.g.*, *Moore v. Illinois*, 434 U.S. 220, 232 (1977) (applying harmless-error standard to Sixth Amendment denial of counsel at pretrial corporeal identification); *Coleman v. Alabama*, 399 U.S. 1, 10 (1970) (applying harmless-error standard to Sixth Amendment denial of counsel at a preliminary hearing); *Gilbert v. California*, 388 U.S. 263, 268 (1967) (applying harmless-error standard to Sixth Amendment

denial of counsel at a post-indictment lineup). Under the *Chapman* standard, the government is tasked with proving harmlessness beyond a reasonable doubt. *Chapman*, 386 U.S. at 24. This standard, rather than *Strickland*, is appropriate for new-counsel motions for three reasons: (1) it maintains a distinction between ineffective-assistance claims and new-counsel claims, which are substantially different; (2) it avoids additional burdens on defendants and courts arising from shoehorning a post-conviction standard into a direct-appeal proceeding; and (3) it better equalizes the Sixth Amendment rights granted to retained-counsel defendants and appointed-counsel defendants.

First, ineffective-assistance claims and new-counsel claims are distinct. Ineffective-assistance under *Strickland* is not a proxy for the error that defendants claim when raising a new-counsel motion, and the ineffective-assistance standard should therefore not be grafted onto it. Wallace is not challenging the constitutional effectiveness of his attorney. He is challenging an erroneous decision by the district court to deny his repeated requests for new counsel. These claims are not part and parcel; they appear in different procedural postures, allege error by separate actors, and, ultimately, allege distinct errors.

New-counsel claims are procedurally distinct from ineffectiveness claims. They focus on a discrete trial event—a hearing at which the trial court marshals evidence and develops and records its reasoning for the challenged

ruling. This hearing and its attendant motions provide "sufficient evidence on the record to resolve the choice of counsel issue on [direct] appeal." *Brown*, 79 F.3d at 1507 n.6. Ineffective-assistance claims, by contrast, are almost uniformly considered for the first time on collateral review and deal with error permeating the entire trial. They are often unsupported by the existing factual record and thus require additional fact-finding to develop evidence of counsel's generalized ineffectiveness.

Further, these claims allege errors by different actors. Ineffective-assistance claims allege *counsel* error (i.e., counsel's performance was ineffective), while erroneous denial of new-counsel claims allege *judicial* error (i.e., the district court abused its discretion). This difference merits different treatment—"direct governmental interference with right to counsel is a different matter" than a "[c]ounsel . . . depriv[ing] a defendant of his right to effective assistance, simply by failing to render adequate legal assistance." *Perry v. Leeke*, 488 U.S. 272, 279–80 (1989) (quoting *Strickland*, 466 U.S. at 686). Indeed, in *Leeke* the Court relied in part on this distinction to place constructive denial of new-counsel claims (judicial error) and ineffective-assistance-of-counsel claims (counsel error) at opposite ends of the constitutional-error spectrum. 488 U.S. at 279–80 (finding constructive denial to be a structural error). The distinction is probative here as well; the fault of the government in erroneously denying a defendant new counsel should be kept distinct from the fault of the ineffective counsel.

And perhaps most fundamentally, these claims allege different errors. Ineffective-assistance claims allege *defective assistance* by counsel. But the judicial abuse of discretion alleged in a new-counsel claim is based not on a judgment of counsel's performance, but rather on a judgment as to the *relationship* between counsel and client—a judgment as to "whether the breakdown in their relationship was beyond fixing." *Ryals*, 512 F.3d at 420. Though the evidence supporting ineffectiveness allegations may, at times, overlap with that of new-counsel claims, these claims are nonetheless distinct. Yet in this Court and others that use *Strickland*, ineffectiveness claims have become part and parcel of new-counsel claims—a defendant may not in this Court challenge a trial court's assessment of his *relationship* with counsel without also challenging the *effectiveness* of his counsel.

Second, *Strickland* should not be applied to new-counsel claims because it impermissibly intertwines the burdens and procedures of direct appeal and collateral review and creates problems of judicial administration. Direct appeal and collateral review serve different purposes, and the defendant's obligations are different depending on the proceeding:

	Direct Appeal	§ 2255 Collateral Review
Record	Limited to record below	Additional factual development allowed
Ineffective Assistance Claims	Almost never allowed	Proper forum for ineffective assistance claims
Burdens	Government almost always bears the burden of establishing harmlessness, either by a preponderance or beyond a reasonable doubt	Defendant bears the burden of proof

Despite these patent differences between the proceedings and their relative burdens of proof for the defendant, *Strickland* is nevertheless applied on direct appeal, with unfair results. By grafting the ineffective-assistance-of-counsel test onto all new-counsel claims, this Court severely restricts (and effectively forecloses) a defendant's ability to seek review of the erroneous denial of his new-counsel motions. In this Court, "[r]eversals of convictions on direct appeal on the grounds of ineffective assistance of counsel are exceedingly rare"—bringing such a claim is not only an uphill climb, but "a vertical climb." *Harris*, 394 F.3d at 547 (noting that as of 2005, this Court had never reversed on this ground). A defendant wishing to challenge his erroneous denial of new counsel is faced with an untenable choice: either engage in a "vertical climb" by bringing that claim on direct appeal or risk procedural default on collateral review.

Last, *Chapman* is preferable to *Strickland* in this context because it avoids *Strickland*'s inequitable burden shift to direct-appeal defendants. Nearly every court that has applied *Strickland* to new-appointed-counsel motions did so before *Gonzalez-Lopez*.[10] In the post-*Gonzalez-Lopez* landscape, where the bulk of trial errors arising under the Sixth Amendment fall on the spectrum between structural error and *Chapman* error, hewing to

[10] The sole case to apply *Strickland* in the wake of *Gonzalez-Lopez* is *Horton*, but this decision offers little in the way of analysis. *See Horton*, 693 F.3d at 467–68. It seemingly applied an ineffective-assistance rubric to the new-counsel question, but it did not even cite *Strickland* when doing so. *Id*. Further, it did not cite its own prior decision in *Smith*, 640 F.3d at 590, decided just one year earlier, which explicitly found a new-counsel error to be structural.

Strickland for new-appointed-counsel motions creates an anomalous outlier, and situates at opposite ends of the constitutional-error spectrum indigent and paying defendants when they raise new-counsel claims. This vast disparity in treatment makes the need to reexamine the application of *Strickland* in this context even more acute.

Consider, for example, the paying defendant who received impeccable representation but was denied his first choice counsel; this denial results in an automatic retrial with no required showing of prejudice. *See Gonzalez-Lopez*, 548 U.S. at 150. Now consider the indigent defendant whose appointed counsel provided abysmal representation, and whose motion for new counsel was erroneously denied. Under the current state of the law in this circuit, this defendant must not only prove that the district court wrongly denied his motion, but he must further prove that his lawyer was constitutionally ineffective, and that a different lawyer would have caused the jurors to find differently—a burden that this Court has recognized as nearly insurmountable on direct appeal. *United States v. Noel*, 581 F.3d 490, 509 (7th Cir. 2009).[11] Having shown error in the district court's denial of his new-counsel motion, his status as an indigent defendant should not shoulder him with the additional burden of establishing both his lawyer's ineffectiveness

[11] *See also* William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 Wm. & Mary Bill Rts. J. 91, 178 (1995) ("The party who bears the burden of proof [of prejudice in a counsel hearing] of the virtually unprovable, by any standard, can be expected to lose.").

and the prejudicial effect of that ineffectiveness when a paying defendant faces no such burden.

2. Reversal is warranted even under *Strickland*.

Even if this Court applies *Strickland* before reversing an erroneous denial of new counsel, *Zillges*, 978 F.2d at 372, Wallace has satisfied that standard here. To prove ineffective assistance of counsel a defendant must show: (1) his counsel's conduct fell below an objective standard of reasonableness; and (2) his counsel's substandard performance prejudiced him. *Newman v. Harrington*, 726 F.3d 921, 928 (7th Cir. 2013) (citing *Strickland*, 466 U.S. at 687).

Alvarez's performance fell below an objective standard of reasonableness in a number of ways, but most importantly in failing to secure Andrew Wallace's testimony at trial. He failed to hold the government to its burden of producing him, and he failed to make his own reasonable efforts to produce him at trial. Alvarez's decisions on these matters simply "could not be the result of professional judgment," *U.S. ex rel. Thomas v. O'Leary*, 856 F.2d 1011, 1015 (7th Cir. 1988), but rather, amounted to "incompetence under prevailing professional norms," *Harrington v. Richter*, 131 S. Ct. 770, 778 (2011).

Alvarez repeatedly acknowledged that to omit Andrew Wallace's testimony from trial is to "den[y] [Patrick Wallace] a right guaranteed by the Sixth Amendment to the United States Constitution." (R.65 at 5) (emphasis omitted); *see also* (06/13/2012 Hr'g Tr. at 53) (Alvarez "agree[ing] that he's a

necessary party to this . . . proceeding"); (R.65 at 5) (Alvarez stating that Andrew Wallace's testimony "goes to the issue of [Wallace's] guilt or innocence"). Yet Alvarez did not hold the government to the burden of producing him because he erroneously and unreasonably believed that the defense bore the burden of doing so. (R.65 at 3) ("Defendant agrees with the Government's assertion that it is not required to call a confidential informant (CI) as a witness.").

And even if the burden did rest on the defense, Alvarez's failure to call Andrew Wallace, a material witness, was objectively unreasonable. *See Harris v. Thompson*, 698 F.3d 609, 643 (7th Cir. 2012) ("Counsel's failure to discover and present exculpatory evidence that is reasonably available can constitute deficient performance."); *Washington v. Smith*, 219 F.3d 620 (7th Cir. 2000) (defense counsel's failure to adequately investigate several exculpatory witnesses and failure to timely subpoena another exculpatory witness was objectively unreasonable).

Despite recognizing Andrew Wallace as a "necessary party," Alvarez only "had one conversation with him." (App. A.10.) When Andrew Wallace asked Alvarez to meet him in St. Louis (a ninety-minute drive from Springfield), Alvarez "said [he] wasn't going to do that," preferring that Andrew Wallace come to him. (App. A.11.) When Alvarez could not reach Andrew Wallace, (App. A.10–11) ("He was supposed to come to my office. He never did . . . I've asked that he contact me. He never has."), Alvarez refused to hire an

investigator[12] (App. A.11). Such conduct falls below an objective standard of reasonableness.

Alvarez's error both in failing to require the government to secure Andrew Wallace and in failing to call him himself prejudiced Wallace. An error prejudices a defendant when there is a "reasonable probability" that the performance of the defendant's attorney affected the trial's outcome. *Strickland*, 466 U.S. at 694. Wallace need not show his "counsel's deficient conduct more likely than not altered the outcome in the case"; rather, he must merely show "a probability sufficient to undermine confidence in the outcome." *Id.* at 693–94.

Andrew Wallace was the witness on whose testimony the government principally relied from beginning to end. In its opening statement the government assured the jury that it would see Andrew Wallace purchase cocaine base from the defendant. (Trial Tr. 172–73.) And in its closing statement, the government replayed Andrew Wallace's grainy video, telling the jury the video showed "distribution of cocaine by the defendant." (Trial Tr. 955.)

All this the jury saw. What the jury did not see was evidence that when Andrew Wallace arrived at the residence, "Patrick stated he didn't have no crack." (App. B.1.) Andrew Wallace's recantation directly contradicts the

[12] Alvarez contended that he did not need to hire an investigator because Andrew Wallace was "a witness that Mr. Patrick Wallace has been in contact with." (App. A.11.) This is no excuse, however, as "[t]elling a client, who is in custody awaiting trial, to produce his own witness . . . falls painfully short of conducting a reasonable investigation." *Washington*, 219 F.3d at 631.

government's story at trial. Which story to believe is within the province of the jury, but due to Alvarez's inexplicable failure to call Andrew Wallace at trial, the jury never had the opportunity to weigh this exculpatory testimony.

III. The statement Officer Bonnett obtained from Wallace violated his *Miranda* rights.

The district court should have suppressed Wallace's statement to Officer Bonnett—where he supposedly claimed ownership of the contraband—because it was the product of a custodial interrogation and Wallace was never *Mirandized*. Such warnings are required when questioning is "initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *United States v. Westbrook*, 125 F.3d 996, 1002 (7th Cir. 1997) (quoting *Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966)). Wallace moved to suppress this statement (Trial Tr. 362), and the district court denied the motion (App. A.22), a decision that this Court reviews *de novo*, *United States v. Briggs*, 273 F.3d 737, 740 (7th Cir. 2001).

Miranda's requirements apply if two conditions are met: custody and interrogation. *United States v. Johnson*, 680 F.3d 966, 973 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 672 (2012). The district court denied Wallace's motion, finding that the statement was voluntary and "clearly not custodial" (App. A.21–22), even though the government had conceded just moments before that Wallace was in custody (Trial Tr. 366). Wallace's custodial status beyond dispute, the sole remaining question on appeal is whether Wallace was

interrogated for *Miranda* purposes when Officers Bonnett, Mazrim, and Weiss surrounded him in the small front room and Officer Bonnett asked Wallace to come with him and answer questions.

The test for assessing if a defendant is under interrogation is "whether a reasonable objective observer would believe that an officer's express questioning, words, or actions were reasonably likely to elicit an incriminating response." *Johnson*, 680 F.3d at 976. Questioning unrelated to arrest or officer safety is not permitted. *See Westbrook*, 125 F.3d at 1003 (officer asked about identity of associate); *United States v. Smith*, 3 F.3d 1088, 1099 (7th Cir. 1993) (officer asked if defendant remembered him where defendant was handcuffed, outnumbered by police officers, and posed no danger to their safety). If the officers initiate the encounter, then their questioning is indicative of interrogation. *See United States v. Cooper*, 19 F.3d 1154, 1162 (7th Cir. 1994) (citing *Arizona v. Roberson*, 486 U.S. 675, 681 (1988)).

Officer Bonnett initiated this encounter by approaching Wallace, along with two other officers, and asking him a question. (Trial Tr. 430.) Officer Bonnett expressly questioned Wallace with the understanding—and indeed, the hope—that his question would likely elicit an incriminating response. When he approached Wallace, Officer Bonnett "knew that [he was] going to be asking [Wallace] about what Officer Mazrim had told [Bonnett] he overheard him say"—namely, the statement that everything in the room was

his. (Trial Tr. 387.) He entered the room, looked at Wallace, and asked, "[W]ould you mind stepping out to talk about this?" (App. B.28.) This questioning was minutes after Officer Mazrim had heard Wallace allegedly whisper to Sandra Johnson that everything in the room was his; thus, what Officer Bonnett meant when he asked Wallace if he wanted to discuss "this" was quite clear. An objective observer would reasonably believe that Officer Bonnett's question to Wallace was likely to—and designed precisely with the intent to—elicit an incriminating response. But for Officer Bonnett's questioning, Wallace would not have made the statement. The statement was therefore tainted by the lack of *Miranda* warnings, and it should have been suppressed.

Conclusion

For the foregoing reasons, Appellant respectfully requests that this Court vacate Wallace's conviction and remand for a new trial.

Respectfully Submitted,

Patrick B. Wallace
Defendant-Appellant

By: /s/ SARAH O'ROURKE SCHRUP
Attorney
ANDREW JACO
Senior Law Student
TREVOR LEE
Senior Law Student
AKANE TSURUTA
Senior Law Student

Bluhm Legal Clinic
Northwestern University School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

Counsel for Defendant-Appellant,
PATRICK B. WALLACE

No. 13-2160

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

United States of America, Plaintiff-Appellee, v. Andrew Wallace, Defendant-Appellant.	Appeal From the United States District Court for the Central District of Illinois Case No. 3:12-cr-30003-RM-BCG The Honorable Richard Mills

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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 12,963 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.

/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: December 3, 2013

No. 13-2160

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

United States of America,
Plaintiff-Appellee,

v.

Patrick B. Wallace,
Defendant-Appellant.

Appeal From The United States District Court
For the Central District of Illinois
Case No. 3:12-CR-30003-RM-BGC
The Honorable Richard Mills

RULE 30(A) APPENDIX OF DEFENDANT-APPELLANT PATRICK WALLACE

Bluhm Legal Clinic
Northwestern University School of Law
375 East Chicago Avenue
Chicago, IL 60611
Phone: (312) 503-0063

Sarah O'Rourke Schrup
Attorney
Andrew Jaco
Senior Law Student
Trevor Lee
Senior Law Student
Akane Tsuruta
Senior Law Student
Counsel for Defendant-Appellant,
Patrick B. Wallace

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Very good. Well, before we proceed any further then into the details of the final pre-trial conference, I think we need to address a couple of issues.

First, the defendant has filed a pro se motion located at Docket Entry 42 requesting that CJA counsel John Alvarez be removed as counsel in this case.

Mr. Wallace, your motion is very brief. And not very specific. Could you please elaborate upon that motion for me?

You have a microphone there right in front of you. Yeah, that's it, pull that down.

THE DEFENDANT: Yes, Your Honor.

I wrote some things down for I can remember when I come to court today.

And basically what I was -- me and my attorney haven't agreed on a lot of issues that I see in the case that I asked him to file for me and things that I point out to him. We have a difference of agreement on those issues. And I asked him to -- these issues goes towards my innocence. And he refused to do those things. And it kind of upsets me, the fact that my attorney will not proceed in looking at issues that I would like for him to do.

And I wrote some things down, if the Court would like me to read them off, I would.

THE COURT: Well, I can see from your motion that you filed you have one, two, three, four statements that you make.

THE DEFENDANT: Yes, Your Honor.

THE COURT: Is that correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. And as I indicated, it certainly is not very specific at all. It is in broad brush, very, very general terms.

Mr. Alvarez, do you have any comment that you'd like to make on this?

MR. ALVAREZ: Well, only that -- I don't know the specific issues he's having reference to. We did have a disagreement regarding seeking a pre-trial ruling regarding --from the Court regarding the admission of a videotape that contained out-of-court -- obviously out-of-court statements by a potential witness that the defendant did not want to call to testify.

And one of the things that we had -- he wanted to use the video as evidence and we disagreed. My position was it was hearsay. We should call the individual to testify as opposed to using the

videotape. And that was my understanding is one of the primary issues we had a dispute over.

I have since filed that particular motion --

THE COURT: I was going to say, I think I saw that --

MR. ALVAREZ: Yes. Otherwise, we had a disagreement regarding a motion to suppress a statement that I felt went to the issue of the defendant's innocence in this case. And he instructed me I should not file it.

I made a record of that in court last time before Magistrate Cudmore. And I have not. The defendant felt that we should simply deal with that during the trial itself by making objections.

And other than that, I believe that I have addressed Mr. Wallace's difference -- opinions, excuse me, regarding witnesses and how to proceed.

We did have a difference of opinion regarding the type of defense he should offer. But I thought, it was my position or opinion that when I last left him, or a telephone call that I had with him that we agreed I was going to submit the defense he wanted me to submit.

I also advised Mr. Wallace that the training and experience has taught me that I'm not gonna sit

and just simply nod my head up and down at everything he says. I'm going to assert my positions and opinions regarding this case and what I feel is in his best interest. It's his case and ultimately, you know, with some tweaks here and there, we're going to proceed, you know, the way he wants to proceed as far as a defense in this matter.

THE COURT: All right. Well, that sounds very reasonable to me. Does it to you, Mr. Wallace?

THE DEFENDANT: It sound reasonable, but it -- to the Court it sound reasonable, but when I'm talking to my attorney it don't sound reasonable to me. And when me and him go about having our conversations on the phone.

Because the -- the -- for instance, about the videotape. My attorney, I asked my attorney to present the videotape. I didn't tell my attorney that we should -- we wasn't going to call the informant in this case. The informant has spoken to my attorney. And I asked my attorney to come and interview him. But my attorney would not get an investigator to go down there to proceed to interview this witness or present --

I also asked my attorney about get us -- ask the Court -- to ask the Court to get us an

independent fingerprint expert and independent chemist. The drugs they said they seized out of this house. He has not showed me no police records, but he gave me motions with statements that officers have made which is different from the statements that I have. Also about the drugs that they said they seized at this house is different than what I have.

And these are the things that I have issues with my attorney. He won't show me these things, like the reports. He comes to see me with an iPad, what I can't handle at all, and tells me things that's on this iPad.

And I don't appreciate the fact that I have not sit down and read what goes on in this case at all with my attorney. Only what he tells me. And then when he tells me things is strictly different than what I have.

So that's why I'm lost at.

THE COURT: Well, I'm not sure I'm following you at all completely -- certainly not completely.

Mr. Bass, do you have any -- do you have an oar to put in the water here?

MR. BASS: If I may, Your Honor.

THE COURT: Please. I'd like to hear from the Government as well.

MR. BASS: Your Honor, as you know, the defendant is no stranger to this court. He was on supervised release. He's not someone who has -- this is his first time around in Federal Court.

THE COURT: We've worked together before.

MR. BASS: Correct, Your Honor.

And he advised the Court, Judge Cudmore, that he was indigent and requested appointment of counsel and the Court appointed him counsel. And Mr. Alvarez is a competent attorney. He's filed motions.

He's filed a motion to suppress, which we thoroughly presented to Judge Cudmore, an evidentiary hearing at which an officer testified about many of the facts of the case. Your Honor reviewed that decision and affirmed it.

Mr. Wallace has previously asked Judge Cudmore for new counsel. And as Judge Cudmore has instructed the defendant, when you -- when you ask for appointed counsel, you don't get to choose who your lawyer is. Nor, whoever your lawyer is, do you get to dictate the legal strategy, beyond the right to a trial and the right to testify, which certainly

have been protected for the defendant. It's the lawyer's decision as to the matters of strategy and how to present the case, not the defendant's.

And as Mr. Alvarez has said, one of the issues the defendant wants to present is to present a video of a person who's not going to testify at trial. Which, as Mr. Alvarez I think has indicated, is probably hearsay. It certainly is going to be the Government's position that it's hearsay.

But nonetheless, he's filed the motion to at least present the issue to Your Honor. And the Government is going to respond to that and probably file its own motion to present that issue to the Court.

But Your Honor, the bottom line is is that over the past several months as this case has proceeded, it's apparent that there are disagreements between Mr. Alvarez and the defendant about legal strategy. And there's no reason to believe why a new lawyer wouldn't find himself in that exact same situation with the defendant if the Court were to appoint a new lawyer. Because these are issues of legal strategy which at the end of the day are the attorney's decision to make, not the defendants.

So I don't think there's any basis to grant the

defendant's motion to appoint him yet a second lawyer that he's not paying for but the Government is paying for.

So I would ask that his motion for new counsel be denied and we proceed to trial on the 9th.

THE COURT: All right.

MR. ALVAREZ: Your Honor, may I address a point here also?

THE COURT: Yes, you may. Of course, Mr. Alvarez.

MR. ALVAREZ: Your Honor, the defendant has indicated I bring an iPad. I do. I downloaded the discovery documents onto that. When I talk to him, I refer to that.

I bring this pad with me each time I speak to him and when we go over something, I will -- it has the control -- the written discovery in it and we review it.

I don't know what documents he says he has because I haven't given him any copies of any of the disclosures of this matter as a result of an agreement with the Government that the Government wouldn't seek a protective order in this case.

But we have reviewed documentation the discovery. The lab reports, we did not have all of

them. I asked -- I contacted Mr. Bass regarding those. I received them, I reviewed them with the defendant.

When he indicates that he asked about an independent lab analysis -- an analyst, that request was sent to me -- I think I received it in writing about a day before the last hearing before Judge Cudmore. And to be quite honest, I'm working on it now. But I'm also getting ready for another jury trial at the same time, Your Honor.

So those motions, you know, I'm filing -- I'm getting ready to file those. Judge Cudmore addressed that with Mr. Wallace and said, particularly with respect to the fingerprint analysis, it's a little bit premature, only because we just took last week some samples of his that were sent off to the lab.

We accommodated Mr. Wallace's requirements there as far as how they should be taken; I should be present, I should, you know, watch the documents being sealed, sign it. I think I've attempted to accommodate him all along the way.

But my position still is that I still have, as his counsel, and I -- the duties I'm sworn to uphold indicate to me that I have to advise him as to what

is appropriate defense and what may or may not work in this case. He may not like it, but as I've told him repeatedly, I'm going to assert those defenses, or I'm going to make my point with him, I'm not simply going to agree to everything he says because I don't know -- I don't believe; and I told him this quite frankly, the last conversation I believe he's referring to was a little bit heated. My fuse is rather long and on that particular day it had reached my length. And I advised him that, you know, some of the decisions he's asking me, the way he's asking me to proceed, don't make sense. Particularly on the motion to suppress on the videotape.

I never indicated that the -- you know, that we wouldn't address the issues in the videotape during trial, only that to ask to have the videotape introduced without offering the witness, who is under our control, despite being the confidential source in this matter, doesn't make sense.

The confidential source, if he indicated what Mr. Wallace has indicated to him, is misrepresenting the facts to Mr. Wallace. I've had one conversation with Andrew Wallace, who is the individual we're talking about. He was suppose to come to my office.

He never did.

He had delivered a handwritten statement. He then asked me to meet him at some location in either East St. Louis or St. Louis and discuss the case with him. I said I wasn't going to do that. I asked him to come to my office. And I said at that point in time I would take a taped statement that I did have to disclose to the prosecution.

That's not what he represented to Mr. Wallace. He represented to Mr. Wallace that he -- that I had indicated I was going to take -- that I was refusing to take a video statement from him or a taped statement and refusing to see him. You know, I don't -- that's not true.

As to hiring an investigator to go down there and talk to him; neither does that make sense since we have a witness that Mr. Patrick Wallace has been in contact with, and other members of his family. And obviously by providing the videotape to the defense, and his sworn statement, written statement in the past, is cooperating with us.

So it would -- I've asked that he contact me. He never has. One time I did attempt to contact him, he was in a restaurant, he was eating. When I identified myself he started to mumble, then he hung

up. And that's the last contact I've had -- direct contact I've attempted to have with that gentleman.

THE COURT: All right. Well, thank you, Mr. Alvarez.

I have -- I have two observations.

Number one, Mr. Wallace, I have known Mr. Alvarez for a good many years. I've been on this bench for 26 and I knew him back when I was on the state court. And he's appeared before me many, many times. And he's always done a superlative job. And I've always been impressed with his preparation and his abilities in the courtroom.

So from that standpoint, I want you to know that you've got very good counsel at your table with you.

Number two, it seems to me that he's already filed a motion that you wanted to bring up regarding the video. And so this would seem to me to take much of the teeth out of your motion.

But the bottom line is that some things have to give way to the shortness of life. And this is one of them. Your motion is denied.

We're going on to trial. And the jury selection will take place on Thursday, October 4th, 2012, at 9:30. It will be before Judge Cudmore.

E-FILED
Wednesday, 10 October, 2012 11:50:58 AM
Clerk, U.S. District Court, ILCD

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 12-cr-30003
	)	
PATRICK B. WALLACE,	)	
	)	
Defendant.	)	

ORDER

RICHARD MILLS, U.S. District Judge:

Pending before the Court are several motions in limine.

I.

In the Government's First Motion in Limine [d/e 61], the Government seeks to prohibit the confidential source (CS) from being called by the Defendant as a witness "simply to impeach him or as a subterfuge to present otherwise inadmissible impeachment evidence." The Government notes that it has no intention to call the CS as its witness.

III.

The Defendant's Second Motion in Limine [d/e 64] is related to issues raised in the Government's First Motion in Limine [d/e 61]. The Defendant claims that the CS is the Government's witness and that he is under the Government's control. The Defendant believes that the Government may be planning to use the testimony of law enforcement personnel, or audio or video recordings of the CS, to introduce out-of-court statements made by the CS. The Defendant requests that the Government be prohibited from doing so unless it calls the CS as a witness.

The Defendant argues that introducing statements made by the CS without allowing the Defendant to confront the CS is a violation of his Sixth Amendment rights. The Defendant has cited, among other cases, *United States v. Walker*, 673 F.3d 649 (7th Cir. 2012).

The Government filed a Response [d/e 67], confirming that it will not be calling the CS to testify. The Government argued that the law enforcement officers will not testify regarding the CS's statements, but rather his actions. Furthermore, the Government indicated that the

video recordings would not be used to introduce any out-of-court statements made by the CS. (According to the Government, the only portion of the video recording that will be introduced will be a portion showing the Defendant in proximity to a microwave oven that allegedly contained drug residue.)

The Government has requested that the Court deny the Motion as moot.

The Court has carefully reviewed the Motion [d/e 64] and the Response [d/e 67]. In addition, the Court has reviewed *United States v. Walker*, 673 F.3d 649 (7th Cir. 2012), *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), *Crawford v. Washington*, 541 U.S. 36 (2004), and *United States v. Silva*, 380 F.3d 1018 (7th Cir. 2004).

Under certain circumstances, a district court can err if it allows the Government to introduce out-of-court statements made by informants through agent testimony, if the informant was available to testify but was not called, and the defendant did not previously have the opportunity to cross-examine the informant. *See Walker*, 673 F.3d at 655-58.

Here, the Government has represented that it will not introduce the out-of-court statements of the CS through the testimony of law enforcement personnel or through video recordings.

Furthermore, the Court concludes that the CS is not under the control of either party.[2]

[2] The CS was paid by the DEA for his services. After the Defendant was arrested and charged, the CS informed the DEA agent that he had been threatened. *See* Audio Recording of Evid. Hrng., June 13, 2012, Vol. I, 1:02:27-1:08:56, Vol. II, Track 1, 1:14-2:50. The DEA provided the CS with a considerable amount of money ($5,000) to help him leave the Springfield, Illinois, area. *See id.* The CS relocated to St. Louis, Missouri. *See id.* The CS executed an affidavit recanting all statements made to law enforcement. *See* Affidavit [d/e 26-2]. When the DEA agent contacted the CS to arrange for him to testify at an evidentiary hearing, he allegedly feigned telephone problems and hung up on the agent. *See* Audio Recording of Evid. Hrng., June 13, 2012, Vol. I, 1:02:27-1:08:56, Vol. II, Track 1, 1:14-2:50. After that, the CS would not answer telephone calls from the DEA agent. *See id.* The Government and the Defense were unable to produce the CS at the evidentiary hearing. *See id.* The CS recorded a video statement again recanting his statements to law enforcement, and sent same to Defense Counsel. *See* Defendant's First Motion in Limine [d/e 43]; Remark of September 21, 2012. The CS has failed to comply with the requests of Defense Counsel to meet and discuss the case, has failed to follow the requests of Defense Counsel, and has misrepresented to the Defendant his dealings with Defense Counsel. *See* Audio Recording of Final Pre-Trial Conference, September 20, 2012. On one occasion, Defense Counsel contacted the CS telephonically while the CS was in a restaurant. *See id.* After Defense Counsel identified himself, the CS began to mumble and then hung up on Defense Counsel. *See id.* Finally, there are indications that the Defendant has had difficulty securing the CS as a witness. *See* Defendant's Response [d/e 65], ¶ 6 ("The Defendant does not admit that the CI is under his control. He is unavailable to the Defendant at this time . . . "), ¶ 13 ("if the Defendant is able to locate and/or call the CI as a witness in the trial of this matter . . .").

Accordingly, the Court concludes that the Government is not required to produce the CS to either testify or be subjected to cross-examination.

Therefore, based upon the representations of the Government, the Court will deny the Motion [d/e 64] as moot. However, the Government is cautioned that it will be held to the limitations contained in its Reply [d/e 66].

IV.

Ergo, the Government's First Motion in Limine [d/e 61] is ALLOWED IN PART.

The Defendant is prohibited from referring to anticipated testimony from the confidential source in opening statements.

The Court will RESERVE RULING upon the Government's Second Motion in Limine [d/e 62] and the remainder of the Government's First Motion in Limine [d/e 61] until after the Government has concluded its case in chief.

The Defendant's Second Motion in Limine [d/e 64] is DENIED AS MOOT, based upon the representations of the Government.

IT IS SO ORDERED.

ENTER: October 10, 2012

FOR THE COURT: */s/ Richard Mills*

Richard Mills
United States District Judge

Q. Okay. Was anyone seated in the chair?
A. Jerome was, sir.
Q. How long were you in that room?
A. We were there approximately two hours. So I was maybe out of the room five to ten minutes at the absolute most.
Q. So you're aware that Officer Mazrim indicated that Mr. Patrick Wallace had made statements prior; is that correct?
A. He -- I was in the bedroom. He motioned for me, you know, he said, Officer Weiss, can you come in here. I came in there, stood by, and that's when he went and got Officer Bonnett.
Q. You don't know what happened at that time? Now you may, but then you didn't know?
A. He did not tell me at that time, no.
MR. ALVAREZ: I have nothing further, Judge.
THE COURT: All right. Thank you.
MR. BASS: No other questions.
THE COURT: All right. Thank you, Officer, you may step down.
(The witness was excused.)
THE COURT: Mr. Bass.
MR. BASS: Your Honor, that's all the

evidence I have. I assume the objection is still registered. I don't think there's any -- there's not -- the Government doesn't dispute for purposes of this objection that the defendant would have been in custody, handcuffed. The question is was he subjected to custodial interrogation.

I think the record is clear from Officer Mazrim's testimony that the first two statements were not in response to any interrogation whatsoever or any contact whatsoever by police officers. It was a spontaneous statement or volunteered statement by the defendant to Ms. Johnson. That can't be interrogation.

And likewise, with respect to the statement made to Officer Bonnett, that wasn't -- the officer wasn't interrogating. He asked him to come with him so he could talk to him, not that he was interrogating him. And the defendant again made the same voluntary statement he made to Ms. Johnson. It's not -- therefore, it is admissible. The voluntariness for which and the weight for which are for the jury to determine.

But I would suggest to Your Honor that it is not interrogation and therefore is not a violation of Miranda, and therefore admissible.

Thank you, Your Honor.

THE COURT: Thank you, Mr. Bass.

Mr. Alvarez.

MR. ALVAREZ: Well, Your Honor, the objection I made yesterday, I believe I stand on that objection.

I believe that after Officer Mazrim heard the first statement by the defendant, everybody acknowledges, and though the Government has its argument here this morning that the defendant was in -- detained or in custody at that point in time, it's our position that his Miranda warnings should have been given to him before anyone took any action regarding any statements on his part, or Officer; I keep calling him Officer, excuse me; Detective Bonnett attempted to question him.

And it's just our position that his Miranda rights were violated and that the statement should be -- or objection should be sustained and the statements suppressed.

THE COURT: Thank you, Mr. Alvarez.

Anything further, Mr. Bass?

MR. BASS: No, Your Honor.

THE COURT: Very well.

No, this is clearly not custodial and it was

certainly not interrogation. These were voluntary statements. Everything that we've had -- we have before us, all of the testimony, clearly indicates that Mr. Wallace voluntarily made the statements, outbursts, whatever you want to call them.

And I don't think that the Court needs to conclude as to the purpose for any of his comments. They stand alone and they're very concise, very quick. And they were voluntarily made and clearly not as the result of any custodial interrogation or inquiry.

So consequently, that is the Court's ruling. And I think we're ready to proceed again.

Now, Mr. Bass, we had Mr. Bonnett on the stand yesterday at the time that the objection was made. Now, it is my intention that once we have the jury back in the courtroom, that I simply make a ruling. And I don't want to go into any detail with it, because I think, quite frankly, the jury at the end of the day yesterday, this was a very brief moment that took place just before we were going to break for the night anyway. And I don't think that we need to underscore or call attention to this before the jury.

But I am certainly open to any suggestions that

Counsel never went over legal materials with the defendant.

That counsel failed to investigate.

That counsel failed to make clarifications regarding the video of the first controlled purchase.

That counsel failed to effectively cross examine Detective Bonnett regarding the confidential source.

That counsel failed to follow the defendant's proposed defense theories.

And that counsel's performance constituted ineffective assistance of counsel.

Now, the Court has carefully considered the written arguments of the defendant. And so, Mr. Wallace, I would be glad to hear anything else that you would like to add verbally to the written submissions that you have made.

You have -- you have a microphone; don't you; right in front of you --

THE DEFENDANT: Thank you, Your Honor.

THE COURT: -- speak into that. And you may proceed.

THE DEFENDANT: Well, my argument about counsel is everything that me and counsel went over

while he came and visited me in the Macon County Jail about a theory of the defense, I didn't -- I didn't see any discovery that counsel brought to me. He didn't show me any discovery. So I didn't know what the discovery was.

But I did know what my theory of my defense was. And counsel didn't introduce my defense at trial. He didn't meet the prosecutor's evidence at all and he had this evidence.

He talked to the confidential source and he knew that he didn't question the agent, Bonnett, about the grudge that the -- that the confidential source had against me at that time.

He showed a video at trial which was upside down. Didn't explain to the jury what was going on in the video.

One minute.

He didn't introduce none of the family's affidavits at all.

One second, please.

He didn't introduce any of the fingerprints evidence that was -- that I seen that he showed me one time we was in court, which was other people fingerprints on the evidence; the microwave, the scale that had drug residue on it. He didn't -- he

didn't bring that up to the jury or discuss it with the Court.

One second, please.

He didn't talk about the -- that the evidence that the prosecutor said that had my fingerprints on it, the bag with the -- the Ziplock bag or whatever, he didn't discuss the fact that the bag didn't contain any drugs, but made it seem like the evidence that was at trial was -- had drugs in it.

Counsel had my -- my lease, he had my City, Water, Light, and Power bill, he had my U-Haul moving bill. Didn't present any of this evidence to the jury to let the jury see that yes, that's my family home, yes, my mail did come there because I had just moved out three weeks prior. He didn't discuss any of these things to the Court or to the jury.

One second, please.

My whole -- my whole issue with counsel was that he made -- he made the trial unfair. He didn't present any -- any of my evidence whatsoever that he had.

I know -- I know the Constitution don't guarantee a perfect trial, Your Honor, but all I asked my counsel to do was give me a fair trial.

That's all I wanted. And the only way I would have got a fair trial was if counsel would have introduced the evidence that he had in his possession.

And -- so that's pretty much it, Your Honor. I'm just -- these things just steady going in my mind how everything played out. And it been hard for me to sleep. If only I'd have -- if I did have got found guilty, which I did, and the evidence was presented itself that my counsel had, then I would accept that. But it's hard for me to grasp that I didn't get a fair -- a fair shake what counsel had.

And so that's what my concern, Your Honor. Thank you.

THE COURT: All right. Thank you, Mr. Wallace.

Now, Mr. Alvarez, in a moment I'll hear any responses you may have, but I would remind you that a text order was entered earlier this week regarding the garbled or corrupted case filing. I'd appreciate it if you would address that in your response as well, just so we can try to alleviate whatever problems that would arise. All right?

Thank you.

Mr. Alvarez, if you would, please.

MR. ALVAREZ: Thank you, Your Honor.

THE COURT: Would you want to come up here to the podium.

MR. ALVAREZ: Sure.

THE COURT: I find it easier to address you here.

MR. ALVAREZ: Well, first of all, I'll address the -- this garbled document.

I don't know where Mr. Wallace obtained that. Perhaps it's the same source of the documents that he filed today; he had some attachments to a motion. He's had other case material when I visited him. Perhaps someone else fed it to him.

I downloaded the Government's motion in limine; I believe it was the second motion in limine regarding the confidential informant; on September 28th, just like I download every other document. I made -- what is downloaded, I make copies from that.

The copy I have is not garbled. It is not garbled. In 35 years of practice, I don't know that I've ever presented a client with such a document.

I did not mail Mr. Wallace a copy of the Government's motion in limine. The reason I didn't was because, again, it was downloaded -- or filed on

the 28th, downloaded thereafter. I had already scheduled a visit with the defendant on October 4th to discuss trial preparation.

We met at length at that time. I had the motion with me. He was given a copy at that time, offered a copy, in fact; he had no interest in it. And the reason is because he wanted the Government to call Mr. Andrew Wallace as a witness. I've got correspondence I've sent to this man, I've telephoned him regarding the same, I've discussed it with him during meetings with him at the jail, I've discussed it with him during the course of the trial, that I felt that if -- if he believed that Andrew Wallace had exculpatory evidence or was willing to testify that he had lied in the material that he had provided -- in any of the matters in this matter, that we should call him as a witness. It's his nephew.

Mr. Wallace had -- he's talking about taped conversations. I think the Government -- the agents were aware that he was talking to his sister. I was aware of it. He told me he had.

He asked him sister, after I had asked him to, to have Andrew Wallace contact me. Andrew Wallace did ultimately contact me. He was in the State of

Minnesota. Said he was coming down.

I explained to the defendant we could not subpoena him unless I knew where I was. The defendant refused to do that. He was not interested in calling Andrew Wallace as a witness. He said, it's the Government's witness.

I tried to my best to explain to him during all the times I just mentioned that if he -- if he's really going to testify to the matters he stated in the video that the Court examined also during the course of the trial; no, I think it was prior to the trial; then let's have him here. But he refused to do that.

I have my own theory as to why he did that. Why he's filing his own -- his pro se motions. I was going to bring it up, but I'll keep it to myself at this moment, at this time.

So I did not give him any garbled -- he wasn't interested in discussing the Government's motion in limine; that one in particular; because he didn't want -- he didn't care about Andrew Wallace, for us calling him. He was not going to allow that. He did not help me do that one bit. I did not give him any garbled documents. Never have done that.

If I met with him and I'm discussing it with

him, I think it's reasonable to assume that he would have said something during the meeting; hey, I can't read this thing. It didn't happen. It wasn't discussed.

As to the other matters he mentioned; I think Mr. Wallace must have been either not paying attention during the course of his trial or was somewhere else.

Because number one, I don't recall an upside down video being demonstrated to the jury. If that was going to happen, I'm sure the Court, everyone else in the courtroom would have corrected that. I don't recall and upside down video being shown to the jury.

As to fingerprint evidence. I recall cross examining the agents, the fingerprint expert called by the Government, as to the lack of fingerprints by this defendant on the microwave, the bowl, and other items, including the scale that he just referenced. That was brought out during the course of the trial.

I questioned also the -- each of the agents that was involved, I thought; in fact, the Court questioned me at one time to tone it down a little bit during the course of my examination of these witnesses. I believe I did a at least reasonable

professional job of cross examining the Government's witnesses and bringing out the evidence that this gentleman wanted me to bring out within the confines of the rules of evidence in this matter, Judge.

He's -- he's talked about receipts. My recollection is that we brought in evidence regarding whose names the utilities were in that particular residence. I believe they were in his daughter's name. I believe that's one of the exhibits that we introduced.

So -- and then I guess I don't quite understand since he testified -- the witnesses testified that we brought forth that no one -- it was a family sort of residence, that he moved out, he was living at his mother's home. We had one of his -- either his sister or his niece; I can't recall at this time; testify that he was living there, had his own bedroom there. I remember the probation officer was questioned regarding that also. He had clothes and other items there.

So I don't understand the defendant's belief that there was not any evidence brought forth as part of his defense regarding those matters.

As to the affidavits from his family members. He wanted me to introduce affidavits as evidence in

this matter. I explained to him that that's hearsay. That the Government would not have an opportunity to cross examine those affidavits, because they could say anything they wanted within the affidavits and nobody would be able to, you know, to determine their credibility. And so he was aware of that. He understands that. How can I introduce an affidavit as direct evidence in the -- during the court of a trial?

As to him not seeing any discovery. That's not factual. And that's a nice way of putting it, Judge.

I visited this gentleman several times. Each time we reviewed his disclosure, the discovery documents. Different parts of it as I received it. He asked me and he wondered why; if you recall, I think it was brought up during the course of the trial and you admonished him that he cannot receive copies of the discovery documents in this case, because the Government -- I had promised Mr. Bass that I would not do so because he indicated to me that if I couldn't do that then he was going to file an appropriate motion.

So the defendant was -- all of those documents, everything was reviewed with him. I don't know what

defense he's speaking of that he had. We brought up the fact that he did not -- this was not his residence, that it was a family sort of residence. He didn't give me any explanation as to why his name was on the door to the bedroom that he said wasn't his or why his clothes were in there. I tried to explain that away to the jury.

I recall now that the jury wanted a copy or -- I haven't advised the defendant of this, but it's my recollection that they wanted a transcript of my closing arguments in this matter so that they could use that in reviewing the evidence in this matter.

So in my estimation, I must have done a good job in at least recalling the evidence for the jury in this matter.

And I recognize that defendants, particularly after they've been convicted, that this is a regular course of, you know, blaming defense counsel in this matter. But I think I -- based upon what I had and was presented to me, and this defendant refusing to allow me to do certain things in his defense, I think I did a reasonably professional job, at least a good job in representing him.

This defendant, if the Court will recall, I tried to file a motion to suppress certain

statements that he made to Officer -- Detective Bonnett, as well as the other two police officers that were watching him that overheard the statements.

He refused to allow me to do that. He would not sign an affidavit I had prepared to combat or give his side of what happened. He wouldn't do that. He said oh, these two other people will testify to what happened. The two other people who were arrested with him.

Both of them who, after seeking counsel, asserted their 5th Amendment right to not testify in this -- in this matter.

He had other witnesses that we tried to subpoena; family members, names he had given me. They either eluded or would not come to testify on his behalf.

But not only did he not allow me to do that, during the course of the trial; and I took offense at this and I explained that to him; he leaned over to me when the officers were testifying and he said well, I want you to refer to these not as statements anymore, but as confessions. And I told him I'm not going to do that because -- and I quite frankly told him I know why you want me to do that. We didn't

file the motion to suppress your confession as I wanted to do.

The defendant, as far as other evidence he wanted me to present; during the course of the trial there were several tapes referred to that the Government had confiscated. He wanted them -- he wanted me to bring that out. Those are his sex tapes. He wanted me to bring that out during the course of the trial. I refused to do that after considering the matter, because I didn't think it was relevant in the matter.

So again, I believe that all of the matters that he has raised today were either -- he didn't recall correctly or didn't recall the defenses that were presented in his behalf. But based upon the evidence that the Government had in this matter, his witnesses that either would not testify in this matter or a witness, a primary witness that eluded us and refused to come in, are some of the things that contributed to his conviction and were not of my doing in this matter.

So -- and I'm open to questions that the Court may have regarding any of these matters.

THE COURT: No. I don't think that I have any questions at all.

Thank you, Mr. Alvarez.

MR. ALVAREZ: Thank you, Judge.

THE COURT: All right. Now, Mr. Bass, anything you'd like to add here to the discussion and for the good of the order?

MR. BASS: Judge, I think you stated at the outset the issue is the motion to appoint new counsel. And contrary to what the defendant said, as the Court knows, he doesn't have a right to choose counsel; at least in those instances such as here where the taxpayers are paying for his counsel.

So the issue is does the Court discharge his current appointed counsel and appoint a new taxpayer paid counsel?

I think the standard for that motion, Your Honor, is whether the relations between the defendant and Mr. Alvarez have so deteriorated and broken down such that Mr. Alvarez cannot effectively represent the defendant.

Now, there's no question that their relations are strained and deteriorated. But I don't think that it meets the standard of so -- so deteriorated or so broken down that Mr. Alvarez can't represent him. Particularly when you consider the fact that everything that the defendant is talking to you

about and what Mr. Alvarez was forced to respond to with great patience is decisions that Mr. Alvarez made as a matter of trial strategy, which are his to make, not Mr. Wallace's.

And without going through in detail, because really the defendant's claims of ineffective assistance of counsel are for another day. He'll have an opportunity to bring those claims out. But as Your Honor will recall, a lot of the disagreement came about with respect to this confidential source, which the defendant obtained an affidavit from recanting his cooperation with the Government and saying that he lied in the search warrant affidavit filed by Mr. Bonnett.

We had a Franks hearing before Judge Cudmore on the motion to suppress. There was full opportunity to air those claims with the confidential source. The defendant chose not to call the source. Judge Cudmore denied the motion. Your Honor affirmed the denial of that motion.

It was raised again by Mr. Alvarez in a motion to admit. If you recall, Your Honor, the defendant wanted to be able to introduce a tape recorded statement that the defendant's family had obtained from the source recanting his cooperation with the

Government. Mr. Alvarez filed a motion to admit those tapes. Your Honor denied that motion.

And so today it's just a continuation of the -- of the revelation of continuing disagreements between the defendant and Mr. Alvarez about trial strategy. And certainly it reflects a strained relationship, but I don't know that it's so broken down that the Court should find that granting of the motion is appropriate.

Particularly given the fact that there's no reason to believe that a new appointed counsel would come to the -- to any other conclusions than Mr. Alvarez had. Why go back to the beginning and start from scratch. Particularly when, here the guilt phase of the case is over. We're now on to sentencing.

And I think Mr. Alvarez can effectively represent the defendant for purposes of sentencing. And the defendant will have his opportunity to raise his claims about Mr. Alvarez on appeal or in a 2255 motion.

So I'll defer to Your Honor's discretion, Your Honor, but I would suggest that the motion be denied.

THE COURT: Thank you, Mr. Bass.

Well, after carefully considering the written materials and the statements that are made here today, the Court does deny the defendant's pro se motion to appoint a new attorney.

Mr. Wallace, the Court concludes that Mr. Alvarez has performed his duties in a most effective manner; especially considering the hand he was dealt.

You confessed to law enforcement on the day the warrant that all of the contraband in the bedroom was your's. And there was video evidence of the second controlled purchase that corroborated the allegations.

Quite frankly, Mr. Alvarez has done a very good job. And that is a personal observation. I have known Mr. Alvarez for 35 years. He has practiced before me on more than this court. And I know his career and I have seen him in action upon numerous occasions over that period of time. And I think, quite frankly, he did a very good job.

Many of the claims made by the defendant here relate to strategic decisions that are the province of the attorney, as Mr. Bass pointed out. The Court sees no reason to make a change at this point in the proceedings. The defendant's arguments are

unpersuasive.

Indigent defendants have a right to effective assistance of counsel, of course; but that does not mean that they get to choose who that counsel will be. Or that they can dismiss the appointed attorney whenever they see fit.

In addition, Mr. Wallace, you are entitled to your day in court, but you're not entitled to somebody else's. Now, you had a fair jury, a fair trial, and they found you guilty.

Now, we're going to move on. The sentencing hearing remains set for May the 21st, 2013, at 2:00 in the afternoon. And then we will certainly have that hearing.

But in view of the fact that we have a pending motion that was just filed, that will have to be disposed of prior to sentencing. So we will advise everyone as to the next procedure. We will have response, of course, to the motion by the Government, and we'll proceed from there.

Today's motion is denied.

Anything further, Mr. Bass?

MR. BASS: Your Honor, just does the Court wish -- I take it yes, since you just said so; does the Court wish the Government to respond to this pro

AO 245B (Rev. 09/08) Judgment in a Criminal Case
vl Sheet 1

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA
v.
PATRICK B. WALLACE

JUDGMENT IN A CRIMINAL CASE

Case Number: 12-30003-001

USM Number: 09819-026

R. John Alvarez
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☑ was found guilty on count(s) 1 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 USC §§ 841(a)(1) and (b)(1)(A)	Possession with Intent to Distribute 280 or More Grams of Crack Cocaine	12/15/2011	1

☐ See additional count(s) on page 2

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

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 material changes in economic circumstances.

05/24/2013
Date of Imposition of Judgment

s/ Richard Mills
Signature of Judge

RICHARD MILLS, U.S. District Judge
Name of Judge Title of Judge

24 May 2013
Date

DEFENDANT: PATRICK B. WALLACE
CASE NUMBER: 12-30003-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

288 months.

☑ The court makes the following recommendations to the Bureau of Prisons:

That the defendant serve his sentence in FCC Forrest City, AR.

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

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: PATRICK B. WALLACE
CASE NUMBER: 12-30003-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

10 years.

The defendant must report 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 at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

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 a manner and frequency 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 or her 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 at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from ☑ Any ☐ Excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled 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 of the probation officer;
11) the defendant shall notify the probation officer within seventy-two 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; and
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.

DEFENDANT: PATRICK B. WALLACE
CASE NUMBER: 12-30003-001

SPECIAL CONDITIONS OF SUPERVISION

1. You shall refrain from any use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or mood altering substance, or any paraphernalia related to any controlled substance or mood altering substance, except as prescribed by a physician. You shall, at the direction of the probation officer, participate in a program for substance abuse treatment including not more than six tests per month to determine whether you have used controlled substances and or alcohol. You shall pay for these services as directed by the probation office.

2. You shall participate in a program of mental health counseling/treatment, as directed by the probation officer. You shall pay for these services as directed by the probation officer.

3. You shall, at the direction of the probation officer, participate in and successfully complete a cognitive based therapy (CBT) program as approved by the probation officer, if no CBT program is completed in the Bureau of Prisons. You shall pay for this service as directed by the probation office.

4. You shall not own, purchase, or possess a firearm, ammunition, or other dangerous weapon.

DEFENDANT: PATRICK B. WALLACE
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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$ 0.00	$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$0.00	$0.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All crimnal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

No. 13-2160

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

United States of America, Plaintiff-Appellee, v. Patrick B. Wallace, Defendant-Appellant.	Appeal from the United States District Court for the Central District of Illinois Case No. 3:12-cr-30003-RM-BCG The Honorable Richard Mills

Circuit Rule 30(d) Statement

I, the undersigned, counsel for the Defendant-Appellant, Patrick B. Wallace hereby state that all of the materials required by Circuit Rules 30(a) and 30(b) 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: December 3, 2013

No. 13-2160
Certificate Of Service

I, the undersigned, counsel for the Defendant-Appellant, Patrick B. Wallace hereby certify that I electronically filed this brief and appendix with the clerk of the Seventh Circuit Court of Appeals on December 3, 2013, which will send the filing to the person listed below.

Timothy A. Bass
United States Attorney's Office
318 South Sixth Street
Springfield, IL 62701-1806

/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: December 3, 2013