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

REPLY BRIEF OF DEFENDANT-APPELLANT PATRICK B. WALLACE

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I. The government's use of the video violated Wallace's confrontation rights.

Andrew Wallace's video was a statement, given directly to government officers, and then used by the government as an inferior substitute for live testimony. It was designed to "establish or prove past events potentially relevant to later criminal prosecution," *Davis v. Washington*, 547 U.S. 813, 822 (2006), and thus strikes at the heart of the Confrontation Clause. It should not have been introduced in court without requiring the government to call Andrew Wallace as a witness so that he could be subjected to cross-examination.

The government agrees that a "statement" includes nonverbal conduct intended as an assertion. Fed R. Evid. 801(a); (Gov't Br. 38); (Br. 19). What matters, then, is Andrew Wallace's intent in making the video. And there can be little dispute that Andrew Wallace made the second video—after police had already secured the search warrant—with the express purpose of capturing Wallace in the possession of drugs and relaying that information to the police. *Cf. United States v. Martinez*, 588 F.3d 301, 311 (6th Cir. 2009) (holding that a silent video made by a doctor was intended as an assertion because it was made in response to an FBI request for the purpose of displaying relevant facts at trial).

Andrew Wallace's video constitutes nonverbal assertive conduct; in short, it was a statement. The government ignores Andrew Wallace's role, choosing instead to

address only the nonverbal conduct of those depicted in the video. From there the government concludes that those individuals did not make statements because they were being surreptitiously filmed (and thus could not intend to make an assertion).[1] (Gov't Br. 38.) The conduct of those depicted on the video is irrelevant—what matters for purposes of this case is that the video itself was Andrew Wallace's method of reporting a past crime to the police and should not have been substituted for his in-court testimony. *See Crawford v. Washington*, 541 U.S. 36, 50 (2004) (holding that the "principal evil" at which the Confrontation Clause was directed was the use of ex parte statements to government officials—including the police—as evidence against the accused).

The government next offers up the general—but inapplicable[2]—platitude that it is not required to call confidential informants to testify when their statements are offered only for context. (Gov't Br. 38–39) (collecting cases establishing this general proposition). After reciting this principle and its supporting cases, the government's argument ends. Significantly, the government does not argue that the video in *this* case was offered for context because it cannot. As Wallace repeatedly pointed out in

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[1] The government argues, (Gov't Br. 38)—and Wallace agrees—that because the individuals on the video were unaware that they were being filmed their nonverbal conduct cannot qualify as testimonial statements under the Confrontation Clause. Wallace did not—and does not now—argue that any of the individuals depicted on the video served as witnesses against him. Rather, Wallace argues that Andrew Wallace served as a witness against him when he made the video.

[2] The government's failure to respond to Wallace's arguments on appeal could be explained by the fact that this portion of its brief was taken verbatim from its motions in limine in the district court. *Compare* (Gov't Br. 38–39) *with* (R.61 at 3); *compare also* (Gov't Br. 39) *with* (R.61 at 4).

his opening brief, the video was offered not for context but instead for the truth of the matters it allegedly depicted: that Patrick Wallace possessed drugs and distributed them to Andrew Wallace. (Br. 19) ("The video was a statement, it was testimonial, and it was made out of court and offered for its truth . . . ."). The video was a testimonial statement offered for its truth, and admitting it at trial violated Wallace's Sixth Amendment right to confrontation.

The district court compounded the confrontation error when it failed to require that the government make any effort to ensure Andrew Wallace showed up to testify at trial. The government again ignores the thrust of the inquiry, focusing instead on who controlled Andrew Wallace. Control is necessary to support a missing witness instruction (which is not at issue in this appeal), *United States v. Tavarez*, 626 F.3d 902, 904–05 (7th Cir. 2010), but this Court's standard does not incorporate control in determining whether the government has taken reasonable efforts to locate and produce an informant accused of misconduct, *United States v. Pizarro*, 717 F.2d 336, 343 (7th Cir. 1983) ("The law in this Circuit has long been that when a defendant asserts a defense based on the alleged misconduct of a confidential government informant, he is entitled to receive reasonable cooperation from the government in securing the informant's appearance at trial."). If an informant disappears before trial and his testimony might substantiate a claim of the defense, "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." *Id*. (citing *United States v. Cansler*, 419 F.2d 952, 954 (7th Cir. 1969), *cert. denied*, 397 U.S. 1029 (1970)); *United States v. Tuck*, 380 F.2d 857, 859 (2d Cir. 1967).

Underlying the government's control argument is the implied suggestion that Wallace did not need the government's help in obtaining Andrew Wallace for trial. But the government's rendition of the facts belies the true nature of the defense's relationship with Andrew Wallace. First, the government seizes on the one instance leading up to the trial where defense counsel stated that Andrew Wallace "is under our control." Yet the district court later explicitly found—as the government admits—that Andrew Wallace was not under either party's control. *See* (Gov't Br. 39–41); (R.69 at 7). A more complete reading of the record reveals Andrew Wallace was uncooperative and unlikely to appear at trial absent assistance from the government:

- June 13, 2012: AUSA Bass indicates Andrew Wallace is not available to the defense. (06/13/2013 Hr'g Tr. at 23) ("And the defendant himself, Mr. Alvarez, doesn't even have the ability to call [Andrew Wallace] here to affirm what he puts in an affidavit.").
- June 13, 2012: Alvarez states that Andrew Wallace is not cooperating with the defense. (06/13/2013 Hr'g Tr. at 53) ("We've reached out, or attempted to, and can not obtain his cooperation.").
- September 20, 2012: Alvarez contradicts himself in back-to-back statements about Andrew Wallace. *Compare* (09/20/2013 Hr'g Tr. at 13) ("The witness, who is under our control, despite being the confidential source in this matter."), *with* (09/20/2013 Hr'g Tr. at 13) ("I've had one conversation with Andrew Wallace . . . . He was suppose to come to my office. He never did.").

- October 2, 2012: Alvarez asserts that Andrew Wallace is under the government's control. (R.64 at 3) ("The confidential source is the government's witness and surely is under its control and can be called as a witness."); (R.65 at 2) ("The defendant does not admit that the CI is under his control. He is unavailable to the Defendant at this time and is the Government's witness.").

- October 5, 2012: AUSA Bass confirms that Andrew Wallace is not cooperating with the defense. (R.68 at 2) ("Wallace failed to meet with defense counsel; and Wallace hung up on counsel during a phone conversation. At best, Wallace is not under the control of either the defendant or the government.").

- October 15, 2012: Alvarez told the district court he had not located Andrew Wallace. (Trial Tr. 758) (Court: "Now, I guess the bottom line then, Mr. Alvarez, is to inquire of you if you've been able to locate the confidential source." Alvarez: "I have not personally been able to do so.").

Given this complete timeline, the government cannot now credibly maintain that Andrew Wallace was cooperating with the defense and could have been called without government assistance.

The government's single-minded focus on control comes at the expense of the test this Court actually applies. *See, e.g.*, *Pizarro*, 717 F.2d at 343. The government addresses neither its burden to show that it was not responsible for Andrew Wallace's disappearance nor its burden to make reasonable efforts to find him before trial. Regardless, the government could not meet this burden even if it had tried, because it was, in fact, responsible for Andrew Wallace's disappearance from the Springfield area. Officer Bonnett gave Andrew Wallace $5,000 to leave town.[3]

[3] Officer Bonnett testified that he gave Andrew Wallace this money because Andrew told him he felt threatened. (06/13/2012 Hr'g Tr. at 58.) Beyond this single statement there is no evidence in the record of any substantiated threats against Andrew Wallace nor did Officer Bonnett attempt to corroborate these threats before giving the informant $5,000 to leave

Cf. Cansler, 419 F.2d at 954 (holding government's efforts to secure an informant's appearance reasonable in part because "there was no evidence introduced indicating that the government played any part in the disappearance of the informer").

The government also cannot show it took any steps to secure Andrew Wallace's presence at trial. The government's minimal effort to locate Andrew Wallace solely for the *Franks* hearing—four months before trial—has no bearing on its obligation to assist in producing him after the defense requested his presence at trial. In fact, the record is devoid of evidence that the government made any effort to assist in the three weeks between the defense's subpoena of Andrew Wallace and trial.

The government's failures are particularly egregious in this case given the crucial role Andrew Wallace played in the investigation and prosecution of Wallace. Both sides repeatedly referenced him throughout trial, and his out-of-court testimonial statement provided the key evidence used to tie Wallace directly to the drugs found in the home.

Thus, although the government should not be required to produce every confidential informant it uses, where, as here, its informant is a key witness, who has recanted prior to trial, and for whose disappearance the government bears at least partial responsibility, it must make every reasonable effort to ensure his appearance if it is desired by the defendant. *See, e.g.*, *United States v. Barnes*, 486

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town a few months prior to trial. Finally, if the government actually believed Andrew Wallace was threatened, its argument that he was cooperating with the defense is all the more implausible.

F.2d 776, 780 (8th Cir. 1973) (finding that the government's use of paid informants and the attendant risks of unreliability demand the government make all reasonable efforts to produce informants accused of wrongdoing) (citing *Velarde-Villarreal v. United States*, 354 F.2d 9, 13 (9th Cir. 1965)).

Andrew Wallace's conspicuous absence was further exacerbated when the court allowed Officer Bonnett to narrate the video. The government contends that Officer Bonnett's testimony was "highly probative," but its brief completely ignores the second half of the test: that it was also highly prejudicial. (Gov't Br. 42–43.) This Court has explicitly warned against the dangers of allowing police officers to narrate the course of their investigations as a replacement for eyewitness, informant testimony, *see United States v. Silva*, 380 F.3d 1018, 1020 (7th Cir. 2004), and the government admits that Officer Bonnett used knowledge he acquired through his investigation to impute facts to the video that are not apparent from the video itself, (Gov't Br. 42–43) (arguing that Officer Bonnett's testimony about the video was probative because it was based on information gleaned from his later investigation).

Furthermore, the government claims that Officer Bonnett's testimony was "highly probative with respect to the identity of the individuals depicted in the video." (Gov't Br. 42.) Yet as discussed in Wallace's opening brief, Officer Bonnett repeatedly identified the individual next to the microwave in the video as Jerome Wallace and then, after a short recess, changed his testimony and identified that

same individual as Patrick Wallace. (Br. 30.) And in response to Wallace's argument that Andrew Wallace's testimony provided a more probative and less prejudicial alternative, the government posits the truism that "Andrew Wallace did not show up to the trial." (Gov't Br. 43.) Andrew Wallace's absence from trial does not change the fact that he made the video, was an eyewitness to the events depicted, and thus, was a better evidentiary alternative.

Finally, the government insists that any error in admitting the video is harmless. "The government bears the burden of showing that a violation of the Confrontation Clause was harmless beyond a reasonable doubt." *United States v. Castelan*, 219 F.3d 690, 696 (7th Cir. 2000). This Court has identified several relevant factors, which primarily focus on the role and importance of the witness's testimony in the government's case, but one factor also examines the overall strength of that case. *United States v. Adams*, 628 F.3d 407, 417 (7th Cir. 2010). The government, however, ignores the factors that evaluate the role of the erroneous evidence and focuses exclusively on the strength of its other evidence at trial. (Gov't Br. 43–44.) Once again the government fails to meet its burden.

Reversal is warranted if an average juror would find the prosecution's case "'significantly less persuasive' had the improper evidence been excluded." *United States v. Eskridge*, 164 F.3d 1042, 1044 (7th Cir. 1998) (quoting *Schneble v. Florida*, 405 U.S. 427, 432 (1972)). In this case an average juror would so find. First, the video was a centerpiece of the government's efforts to show that Wallace—and not

any of the many other people who resided in the house—possessed the drugs. Second, the video was not cumulative because the government had no other eyewitness evidence of the controlled buys. Third, and most significantly, Andrew Wallace was the only individual who could provide contradictory evidence of what transpired during the controlled buys. By allowing the government to introduce the video without calling Andrew Wallace to testify, the district court ensured that only one version of events—the government's—would be heard by the jury. Had Andrew Wallace testified, an average juror would have been significantly less persuaded by the government's case.[4]

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

The district court erred in denying Wallace's multiple motions for new counsel, and Wallace asks this Court to review that error. Resolution of the error, however, depends first on the threshold issue of the applicable standard.

A. A *Strickland* ineffectiveness claim should not serve as a proxy for error in new counsel cases.

This Court has made clear that it does not wish to hear ineffectiveness claims on direct appeal. *See, e.g.*, *United States v. Harris*, 394 F.3d 543, 547 (7th Cir. 2005). And Wallace does not wish to bring one. He challenges instead the district court's

[4] Regardless of what Andrew Wallace testified, it would have weakened the government's case. If he testified in accord with his sworn affidavit, which included a recantation of his earlier reports to the police, it would have directly refuted the government's depiction of the controlled buys. And had he recanted his recantation he could have been impeached with the affidavit, which would have diminished his credibility.

decision to force him to go to trial with an attorney with whom he could not effectively communicate. This Court's precedents, however, tether ineffective-assistance claims to every denial-of-new-counsel claim. In the decades since this Court's adoption of this practice, the Supreme Court (implicitly) and three other circuits (explicitly) have cast doubt upon it, and the Court should use this opportunity to reconsider it. *See* (Br. 40–41.)

As Wallace discussed in his opening brief, this Court's current standard puts defendants between a rock and a hard place and effectively eliminates judicial review of denial-of-new-counsel claims in this circuit. By tying together ineffectiveness and new-counsel claims, the Court requires defendants to prove the unprovable in order to obtain review of their new-counsel claim. *See Harris*, 394 F.3d at 547 ("Reversals of convictions on direct appeal on the grounds of ineffective assistance of counsel are exceedingly rare . . . . [N]one can be found in this Circuit."). If a defendant elects to ask the court on direct appeal to review a lower court's denial of a new-counsel motion, not only does he face a "vertical climb" on the merits, *id.*, but his ability to later bring an ineffectiveness claim on collateral review is automatically foreclosed. And if a defendant instead chooses to wait to bring his ineffectiveness claim on collateral review, where this Court has suggested—and Wallace agrees—that it belongs, his new-counsel claim will be procedurally defaulted for failure to bring it on direct appeal. So in effect, this Court's current approach puts defendants in a lose–lose situation. Indeed, it

forecloses altogether a claim that, if brought in another circuit, would be heard on direct appeal.[5]

The government dodges this issue, burying its two-paragraph case for a *Strickland* standard deep in the middle of its fourteen-page discussion. (Gov't Br. 53–54.) And its analysis merely scratches the surface, focusing solely on *Gonzalez-Lopez* (to the exclusion of other circuits that have departed from *Strickland*) and attempting to distinguish it on two grounds. First, the government argues that "the defendant was represented by appointed counsel, not retained counsel," (Gov't Br. 54), which is nothing more than an uncontested truism. Wallace cited *Gonzalez-Lopez* because its reasoning applies equally to appointed-counsel cases, not just retained-counsel cases, so focusing on the distinction between the defendants misses the point. Second, the argument that Gonzalez-Lopez's preferred counsel was "absent from trial and sentencing proceedings," whereas Wallace's counsel "represented the defendant during every stage of the proceedings" is irrelevant. (Gov't Br. 53–54.) Wallace asked for new counsel before trial and again before sentencing, and was twice denied, forcing him to proceed to trial and sentencing with Alvarez. Indeed, Wallace finds himself in quite the same situation as the *Gonzalez-Lopez* defendant—being denied new counsel and subsequently receiving

[5] Although Wallace felt compelled to satisfy this Court's requirements in his opening brief for purposes of completeness, *see* (Br. 48–51), he emphasizes that if forced to choose between raising the new-counsel claim here and preserving his opportunity to raise an ineffective-assistance claim on collateral review, he chooses the latter. *Cf. Harris*, 394 F.3d at 547 (noting that defendant had declined, after oral argument, the opportunity to remit his new-counsel claim and preserve his ineffective-assistance claim under § 2255 for collateral review).

an inadequate defense. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 142–43 (2006). That the *Gonzalez-Lopez* defendant originally had adequate counsel before he was removed does nothing to distinguish the case. *See id*.

The government's only other argument attempts to dismiss the *Chapman* harmless error standard—a middle ground between *Gonzalez-Lopez* structural error and *Strickland* prejudice—arguing that "the purpose of providing assistance of counsel 'is simply to ensure that criminal defendants receive a fair trial.'" (Gov't Br. 54) (citing *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). But this puts the cart before the horse, assuming at the outset that Wallace's new-counsel claim is nothing more than an ineffective-assistance-of-counsel claim—an assumption the *Gonzalez-Lopez* court rejected in the choice-of-counsel context. The *Fifth Amendment* right governing claims of ineffective assistance of counsel guarantees a fair trial. *Gonzalez-Lopez*, 548 U.S. at 147. But the *Sixth Amendment* right to counsel guarantees not a fair trial, but rather specific procedural protections. *Id.* ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause.").

For the *Gonzalez-Lopez* defendant—who had retained counsel—the Sixth Amendment demanded "not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best." *Id.* What the Sixth Amendment provides to Wallace—who

cannot afford the right to choose his own counsel—is similarly a particular constitutional guarantee: that he be defended by counsel with whom he can communicate and advance an adequate defense. *See United States v. Zillges*, 978 F.2d 369, 372 (7th Cir. 1992) (assessing a Sixth Amendment violation by asking whether "the conflict between the defendant and his counsel was so great that it resulted in a total lack of communication preventing an adequate defense").

That rights to counsel emanate from both the Due Process Clause and the Sixth Amendment Counsel Clause is something of an accident of history, and one that the Supreme Court only recently began to disentangle in *Gonzalez-Lopez*. Sanjay K. Chhablani, *Disentangling the Right to Effective Assistance of Counsel*, 60 Syracuse L. Rev. 1, 11 (2009) [hereinafter Chhablani] (tracing the path of counsel claims, their twin heritage in the Fifth and Sixth Amendments, and the comingling of these sources of authority). As relevant here, the right to counsel under the Due Process Clause came laden with the Clause's attendant prejudice requirements, whereas the Sixth Amendment right did not. *See United States v. Glasser*, 315 U.S. 60, 76 (1942) ("The right [under the Sixth Amendment] to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."). Yet courts—including the Supreme Court in *Strickland*—eventually merged these rights such that defendants alleging ineffective-assistance claims ultimately had to prove prejudice. Chhablani

at 16–19, 34 (lamenting that "each of [the *Strickland* prongs] reflected entanglement with . . . Due Process considerations").

The Supreme Court recently began the process of disentangling the due process and Sixth Amendment analyses by separating the two in the choice-of-counsel context. *See Gonzalez-Lopez*, 548 U.S. at 147. The Court's reasoning in *Gonzalez-Lopez* need not be cabined, however, to choice-of-counsel claims. Though "the right to counsel of choice does not extend to defendants who require counsel to be appointed for them," *id.* at 151, the protections of the Sixth Amendment do, and indigent defendants asserting these protections to remedy judicial error should not be forced to grapple with the unrelated and nearly insurmountable burden of proving ineffective assistance of counsel on direct appeal. Wallace claims on appeal a violation of these Sixth Amendment protections—not a violation of his Fifth Amendment right to effective assistance of counsel—and this Court should disentangle the district court's abrogation of Wallace's Sixth Amendment rights from any due process prejudice requirements.

B. The district court abused its discretion.

The district court abused its discretion in denying Wallace's repeated motions for new counsel. As noted above, Wallace will not pursue this claim if it will result in an inability to pursue an ineffective-assistance claim under § 2255. But if this Court untethers Wallace's claim of judicial error from his valid—though perhaps

premature—claim regarding his attorney's errors, it should reverse the district court's erroneous denial of Wallace's motions for new counsel.

The government apparently concedes the timeliness of Wallace's motions. (Gov't Br. 47) ("[E]ven if the motions were timely, it does not necessarily mean the district court erred in denying them."). With regard to the adequacy of the district court's inquiries, the government argues that the two inquiries into Wallace's new-counsel motions were adequate because Wallace was allowed "full opportunity" to address the substance of his complaints and the district judge followed up with him. (Gov't Br. 47.)

Wallace, representing himself, *did* speak at these hearings. But this speech was limited in quantity and quality. Perhaps because indigent defendants moving for new counsel are proceeding *pro se* by default, the district court has a special duty to make a "thorough investigation of the apparent conflict between the defendant and his attorney," questioning the defendant about the "reasons for the defendant's dissatisfaction with his existing attorney." *Zillges*, 978 F.2d at 372 (citations omitted).

This duty was not met. In the first hearing, rather than probe Wallace to better understand his complaints, as this Court requires, the district court addressed Wallace only summarily, (Br. 34–35), before turning to Alvarez, who did little but divulge confidential trial strategy, (09/20/12 Hr'g Tr. at 5) (Alvarez stating, "[Wallace] wanted to use the video as evidence . . . . My position was it was

hearsay."), which the government later used against Wallace (R.55 at 2) ("[Defendant's] [c]ounsel acknowledged, however, that the video recording is likely hearsay . . . ."). Even after reading Wallace's motion and hearing his oral statements, the district court was confused about the reasons for Wallace's dissatisfaction: "Well, I'm not sure I'm following you at all completely—certainly not completely." (09/20/2012 Hr'g Tr. at 8.) Wallace's attorney similarly did not understand Wallace's complaints. (09/20/2012 Hr'g Tr. at 5) ("I don't know the specific issues he's having reference to."). Notwithstanding this confusion, the court asked no further questions of Wallace.

In the second hearing the court set the stage by reading from Wallace's motion and stating that it "would be glad to hear anything else that [Wallace] would like to add verbally to the written submission that [he had] made." (03/15/2013 Hr'g Tr. at 7.) Wallace's written and oral statements revealed troubling information about the breakdown in attorney-client communication:

- "[H]e concealed evidence from the defendant regarding the confidential source." (03/15/2013 Hr'g Tr. at 6.)
- "Counsel never went over legal materials with the defendant." (03/15/2013 Hr'g Tr. at 7.)
- "He didn't show me any discovery. So I didn't know what the discovery was." (03/15/2013 Hr'g Tr. at 8.)

Rather than follow up on Wallace's generalized contentions concerning the communication problems between Alvarez and Wallace—the very issue the court was tasked with assessing—the court asked *no* questions of Wallace, instead

discussing the issue with Alvarez and the government for nearly four hundred transcript lines. Though "[t]he law does not require the court to engage in endless dialogue with the parties," (Gov't Br. 48), it does require dialogue sufficient to conduct a "thorough inquiry" of the type not present here. *See Zillges*, 978 F.2d at 372.

The third prong of the test—a breakdown in communication such that the attorney could not provide an adequate defense—is not a necessary condition to finding an abuse of discretion, *see Zillges*, 978 F.2d at 372 (finding abuse of discretion based on inadequate inquiry without looking to breakdown in communication), but it is a factor that is nonetheless satisfied in this case. The thrust of the government's contention on this prong is that Wallace and Alvarez *were* communicating, and any communication breakdown was merely a disagreement in strategy. The record is replete with examples—identified in the opening brief (Br. 37–38)—of severe communication lapses. Even when the two exchanged words, the record reflects that most of the time the two simply talked past each other; such misunderstandings epitomize the communication problems that impede an adequate defense. *Compare* (09/20/2012 Hr'g Tr. at 5) and (03/15/2013 Hr'g Tr. 13) (Alvarez construing Wallace's statements to him as Wallace's desire that Andrew Wallace ***not*** be called to the stand) *with* (09/20/2012 Hr'g Tr. at 7) ("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."). As

another example, Alvarez did not effectively communicate to Wallace the fact that he could simultaneously argue that he did not make the statement to Officer Bonnett at all and argue in the alternative that any such statement, if made, should be suppressed. *United States v. Iwegbu*, 6 F.3d 272, 276 (5th Cir. 1993) (denying that a confession was made does not render a defendant's invocation of the involuntary-confession statute inapplicable); *United States v. Barry*, 518 F.2d 342, 346-47 (2d Cir. 1975) ("A defendant may properly claim [both] that he made no incriminating statements and that [alternatively] any statements which the jury might find that he made were coerced."); *see also* (Trial Tr. 367) (Alvarez: "Mr. Wallace refused to cooperate with me in filing the appropriate motion;" Bass: "I think the record is clear . . . Mr. Alvarez indicated it was his wish as counsel to file such a motion to suppress, but his client directed him to [sic] because his position was he never made the statements."). This exchange reflects actual misunderstanding and miscommunication, not mere disagreement over trial strategy as the court and counsel claimed below. Thus, the third prong was likewise satisfied here.

C. The district court's error was not harmless.

To the extent this Court conducts a harmless-error review under *Chapman*, it will find that the district court's decision was not harmless. The breakdown in communication between Wallace and Alvarez, and the district court's subsequent error in declining to replace Alvarez, led to an array of mistakes, most serious of

which was Alvarez's failure to call Andrew Wallace. The government bears the burden under *Chapman* of proving that this mistake was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). In its response the government does not attempt to meet this burden. It does, however, argue against harmless error in the *Strickland* context, contending that Wallace "cannot show that but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different." (Gov't Br. 57.)

Putting aside that under a *Chapman* analysis the burden of proof would lie with the government, not with Wallace, the government's argument on its face still lacks merit. It contends that "it is implausible that [Andrew] Wallace's testimony could have altered the verdict (especially given the video evidence of the second controlled purchase)," and that "the circumstances of the controlled purchases between Wallace and the defendant constituted a fraction of the government's evidence."[6] (Gov't Br. 57.) Perhaps so, but that fraction was *the* pivotal fraction, and it was coupled with Officer Bonnett's erroneous, secondhand narration suggesting that the video depicted Andrew Wallace buying crack from Patrick Wallace. None of the remaining evidence—namely, what was found in the raid of the home—can be directly tied to Wallace.[7] That the only person who definitively knows the content

[6] That the government relies so heavily now on the CI's recorded video statement as evidence of Wallace's guilt further shows that the video is a testimonial statement by Andrew Wallace.

[7] In its response the government attempts to strengthen the link between the defendant and the evidence found at the raid through misrepresentations of the record. The

and context of the video has since denied that it actually links Wallace to the evidence means that Andrew Wallace's testimony to the jury would have directly contradicted (or even replaced entirely, *see supra* Section I) Officer Bonnett's secondhand narration of the otherwise unintelligible frames, and would have called into question the reliability of the government's approach. Alvarez's presence as Wallace's attorney was not harmless error.

III. Wallace's response to direct police questioning should have been suppressed.

The district court failed to suppress the incriminating statements Officer Bonnett elicited from him, and this Court should therefore reverse for three reasons. First, as a threshold matter, this Court can and should reach the merits of the issue that was fully presented by both parties and fully considered and ruled on by the district court. *See Bond v. United States*, 77 F.3d 1009, 1014 (7th Cir. 1996). Second, Wallace was subjected to interrogation. *See United States v. Johnson*, 680 F.3d 966, 976 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 672 (2012). Finally, the extent to which the government emphasized this specific statement to Officer Bonnett

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government notes, for example, that officers found a "wallet in a plastic filing cabinet [t]hat . . . contained two active identification cards for the defendant . . . . In the filing cabinet, officers located $980 of their pre-recorded funds from the second buy. The filing cabinet also contained more than a pound of crack and powder cocaine as well as marijuana." (Gov't Br. 14.) In truth there were two filing cabinets: one with the defendant's IDs, and another, separate cabinet with the drugs and currency. (Trial Tr. 281.) The government further suggests that the bedroom in which the majority of the drugs were found was the defendant's. (Gov't Br. 44) ("During the execution of the search warrant the same day, officers discovered the defendant in his bedroom."). No evidence in the record conclusively shows whose bedroom this was.

shows that the error in admitting it was not harmless. *See United States v. Wysinger*, 683 F.3d 784, 804–05 (7th Cir. 2012).

First, Wallace raised a suppression challenge, the government addressed it on the merits, and the district court ruled solely on the merits. Nothing more is required for this Court's review. *See United States v. Wylie*, 462 F.2d 1178, 1182 (D.C. Cir. 1972) ("[A]lthough a trial judge may disregard as untimely a suppression motion first presented at trial, we will review his ruling on the motion if he exercises his discretion in the direction of entertaining it."); *United States v. Vasquez*, 858 F.2d 1387, 1389 (9th Cir. 1988) (same); *United States v. Contreras*, 667 F.2d 976, 978 n.2 (11th Cir. 1982) (same); *United States v. Hicks*, 524 F.2d 1001, 1003–04 (5th Cir. 1975) (same).[8]

Thus, the cases the government cites in support of its waiver claim are inapposite. *See United States v. Clark*, 657 F.3d 578, 582 (7th Cir. 2011) (argument "never presented" to the district court); *United States v. Combs*, 657 F.3d 565, 567 (7th Cir. 2011) (motion denied based on timeliness); *United States v. Johnson*, 655 F.3d 594, 600 (7th Cir. 2011) (two of three search locations not argued). *Cf. United States v. Milian-Rodriguez*, 828 F.2d 679, 683–84 (11th Cir. 1987) (distinguishing cases in which the district court rules solely on the merits from cases in which the district court rules on the basis of timeliness and, in the alternative, on the merits).

[8] Although this Court has not weighed in on this precise question, it has routinely reviewed issues decided on the merits in the district court. *See, e.g.*, *Bond*, 77 F.3d at 1014 (§ 2255 context) ("[B]ecause the district court addressed the merits of this issue, we will address it.") (citation omitted).

The government's heavy reliance on *United States v. Acox*, 595 F.3d 729 (7th Cir. 2010) is similarly flawed. Unlike Wallace's case, defense counsel in *Acox* never raised an explicit motion to suppress and the district court in *Acox* never entertained one. For the first time on appeal this Court construed defense counsel's trial objection to two witness's testimony about their prior photo-spread identifications as a motion to suppress, and then determined it was tardy and thus waived, not even subject to the plain-error review appellant requested. *Id*. at 730. Here, however, everyone in the proceeding acknowledged and argued the motion to suppress, and the court decided it on the merits. Rule 12's waiver language is, as this Court noted in *Acox*, not mandatory and can yield to the district court's discretion. *See Acox*, 595 F.3d at 731; *see also* Fed. R. Crim. P. 12(d) (allowing the district court discretion to entertain pretrial motions during or after trial); Fed. R. Crim. P. 12(e) (allowing the district court to grant extensions or excuse a waiver for good cause).

Here, the district court, in its discretion, opted to entertain what all parties agreed was a motion to suppress. (Trial Tr. 362–67; 374–76.) The court recognized that the argument was late (Trial Tr. 367), and *both* parties explained why the motion to suppress had not been brought earlier (Trial Tr. 367). The district court then made the decision that "it would be very prudent for us to get this all taken care of on the record right now when it comes up." (Trial Tr. 369–70.) The district court held a suppression hearing, heard testimony from witnesses and arguments

from both parties, and then ruled solely on the merits—all within its discretion. (Trial Tr. 418.) Unlike *Acox*, there is no impediment to this Court's review.[9]

Second, the court erred in admitting a statement that resulted from custodial interrogation. Officer Bonnett's question to Wallace served its precise purpose: to elicit an incriminating response. To call this interaction something other than an interrogation would ignore the question's design and its effect. *See Johnson*, 680 F.3d at 976 (interrogation occurs when an officer initiates questioning that is reasonably likely to elicit an incriminating response). Officer Mazrim fetched Officer Bonnett in order to have Officer Bonnett "go in there and talk to any of them based on the statements that were made." (Trial Tr. 503.) Officer Bonnett's express purpose was reflected in his question, which was both temporally and substantively linked to Wallace's prior statement: "[W]ould you mind stepping out to talk about *this*?" (Trial Tr. 504) (emphasis added).

The government downplays the fact that Bonnett's question was directly responsible for Wallace's incriminating response, and suggests that Wallace's answer was either spontaneous or non-responsive because Bonnett's question was

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[9] Additionally, the government waived its own waiver argument when it did not oppose Wallace's motion to suppress based on timeliness, but rather addressed it on the merits. *See United States v. Whitlow*, 740 F.3d 433, 439 (7th Cir. 2014) ("[T]he government . . . did not argue to the district court that the issues should be considered waived. Instead, the government responded on the merits and waived any waiver.") (citing *United States v. Dunkel,* 927 F.2d 955, 956 (7th Cir. 1991)). The government knew that Wallace's motion was not timely, stating, "the time for raising an issue of admissibility of any statements of the defendant has long since passed." (Trial Tr. 362.) Yet from there it argued solely on the merits; its waiver was intentional. *See United States v. Staples*, 202 F.3d 992, 995 (7th Cir. 2000) (stating that while "forfeiture comes about through neglect," "waiver is accomplished by intent").

phrased in a "yes–no" format. This Court has recognized, however, that such questions—even routine booking questions—can constitute interrogation designed to elicit incriminating responses when viewed in light of all attendant circumstances. *See United States v. Smith*, 3 F.3d 1088, 1099 (7th Cir. 1993) (finding interrogation where officer asked defendant if defendant remembered him).

Finally, the error was not harmless. If a court finds error in admitting a defendant's statement, the court will apply a harmless error analysis looking at the totality of the evidence. *United States v. Westbrook*, 125 F.3d 996, 1003 (7th Cir. 1997) (citing *Arizona v. Fulminante*, 499 U.S. 279, 312 (1991), and *Chapman*, 386 U.S. at 24). A harmless error must have no effect on the outcome of a trial. *Wysinger*, 683 F.3d at 804 (citation omitted).

When the government emphasizes a defendant's coerced statement, the error likely affected the outcome and is thus not harmless. *See id.* at 805; *Smiley v. Thurmer*, 542 F.3d 574, 586 (7th Cir. 2008). For example, this Court found an error was not harmless where "the government managed to refer to [the defendant's] statement no fewer than six times during the trial, and the jury was exposed to it a seventh time . . . during deliberations." *Wysinger*, 683 F.3d at 804; *see also Smiley*, 542 F.3d at 586 ("[F]rom the prosecutor's emphasis, it is evident that the State itself believed that this evidence was critical in obtaining Mr. Smiley's conviction.").

Here the government repeatedly referred to Wallace's alleged statement to Officer Bonnett throughout the trial. At times it even overstated that testimony by

attributing to Wallace an admission he simply did not make: that the southwest bedroom—the one containing most of the drugs—was his. (Trial Tr. 965) (government stated, "Bonnett testified that when he heard the defendant admit that the drugs that—the items, everything in that bedroom, that southwest bedroom, belonged to him."); *Cf.* (Trial Tr. 424) (Bonnett's actual testimony that Wallace said that "everything in the bedroom was his.").

The government now argues that the statement to Officer Bonnett is cumulative because Officer Mazrim overheard "the same" statement minutes earlier. (Gov't Br. 65.) But these statements were not the same. The statement to Bonnett was different—and more harmful—in three important respects. First, Bonnett's testimony was categorically different than Mazrim's because Bonnett said "bedroom" whereas Mazrim said merely "room." *Compare* (Trial Tr. 379) (Bonnett's testimony that Wallace said "everything in the bedroom's mine"), *with* (Trial Tr. 396) (Mazrim's testimony that Wallace said "everything in that room is mine."). Because the cocaine base was mainly found in the bedroom of a multi-room home, the "bedroom" testimony was important to connect Wallace to the drugs. Second, the direct statement to Bonnett was stronger testimony than hushed mutterings that were merely overheard. Finally, the statement to Bonnett could be corroborated by three officers, but Mazrim's testimony could be corroborated by no one. Mazrim was the only one in the room when Wallace whispered to his girlfriend.

The government recognized the relative strength of the statement to Bonnett over the whisper overheard by Mazrim, and it emphasized that statement accordingly. The government's emphasis on and exaggeration of the statement to Bonnett shows that the statement was critical. The error in admitting that statement was not harmless.

Conclusion

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

Respectfully Submitted,

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No. 13-2160

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because this brief contains 6,097, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Certificate of Service

I, the undersigned, counsel for the Defendant-Appellant, Patrick Wallace, hereby certify that I electronically filed the foregoing with the clerk of the Seventh Circuit Court of Appeals on March 13, 2014, which will send notification to counsel of record.

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