**IN THE**
**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

**NO. 13-2160**

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | Appeal from the |
| | ) | United States District Court |
| Plaintiff-Appellee, | ) | Central District of Illinois |
| | ) | At Springfield |
| v. | ) | |
| | ) | No. 12-CR-30003 |
| PATRICK B. WALLACE, | ) | |
| | ) | Honorable Richard Mills |
| Defendant-Appellant. | ) | United States District Judge |

# BRIEF OF PLAINTIFF-APPELLEE


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## JURISDICTIONAL STATEMENT[1]

The jurisdictional summary in the defendant's brief is complete and correct.

## ISSUES PRESENTED FOR REVIEW

I. Whether the defendant's Confrontation Clause rights were violated by the admission of a silent video recording taken by a confidential informant without the presence of the confidential informant at the trial.

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

III. Whether the defendant waived his argument that his statement was inadmissible by failing to raise it before trial.

[1]Our citations to the record use the following abbreviations: "d/e" means "docket entry"; "R." followed by a number refers to the document bearing that number on the district court's docket sheet; ""Def.Br." and "Def.App." refer to the defendant's brief and appendix; "Gov't.Ex." refers to the government's trial exhibits; "Tr." refers to the transcript of the trial; "Tr.I." refers to the transcript of the June 13, 2012, hearing on the defendant's motion to suppress ; "Tr.II." refers to the August 29, 2012 pre-trial status hearing; "Tr.III." refers to the September 20, 2012, pre-trial status hearing; "Tr.IV." refers to the March 15, 2013, hearing on the defendant's motion for appointment of new counsel; References to all other transcripts are denoted as ([DATE] at ___).

## STATEMENT OF THE CASE

### I. Indictment

On January 10, 2012, the defendant, Patrick Wallace, was charged with possession with intent to distribute 280 grams or more of crack cocaine after police officers conducted two controlled buys from him (using a confidential source) and executed a search warrant at his house. (R.13)

### II. Pre-Trial Motions

#### A. Motion to Suppress Search Warrant

Prior to trial, on May 14, 2012, the defendant filed a motion to suppress evidence obtained during the execution of the search warrant. (R.26) In it, he claimed that the government's confidential source, Andrew Wallace, had sworn out an affidavit and recorded a video saying he had lied about receiving drugs from the defendant during the controlled drug buys before his arrest. (R.26;Def.App.Br.1-2)

Magistrate Judge Cudmore conducted a *Franks* hearing on the defendant's motion. (d/e 06/13/12) During the hearing, Detective Bonnett testified that the DEA had been paying Andrew Wallace for his services as a confidential source. (Tr.I.52) Bonnett also testified that, after the defendant was indicted, Andrew Wallace became concerned about his safety because he was receiving threats.

(Tr.I.52) After the defendant's counsel objected to the answer on hearsay grounds, the prosecutor explained that he elicited the testimony to establish "the circumstances around the credibility of the affidavit itself and the fact of the source's state of mind and the reason why he's not here." (Tr.I.53) Defense counsel responded,

> [T]o be quite honest, and I hate to do this, but I'm kind of agreeing with [the prosecutor] in the sense that we've had the same problem as he has of not being able to produce the CS. We've reached out, or attempted to, and cannot obtain his cooperation, just as he has. [We] [w]ould agree that he's a necessary party to this proceeding.

(Tr.I.53)

The Magistrate responded, "Well, no one has come to the Court for any kind of material witness warrant. We discussed that in the telephone conversation. Gentlemen, you're both veteran litigators." (Tr.I.53) The Magistrate overruled the objection and allowed the prosecutor to continue to question Detective Bonnett about Andrew Wallace's concerns for his safety. (Tr.I.55)

Detective Bonnett testified that, due to Andrew Wallace's safety concerns, the DEA provided him with $5,000 to leave town. (Tr.I.55,58) After learning that Andrew Wallace was in St. Louis, Bonnett advised Wallace by phone that he intended to serve him with a subpoena to appear at the suppression hearing. (Tr.I.56) As soon as Detective Bonnett mentioned the subpoena, Wallace hung up

the phone. (Tr.I.56) Bonnett tried to call back several times, but Wallace would not answer. (Tr.I.56)

On June 18, 2012, the Magistrate Judge issued his Report and Recommendation. (R.30) With respect to Andrew Wallace's absence from the hearing, the court noted:

> The CS did not appear at the hearing, although both parties attempted to secure the CS's voluntary attendance. The Court held a status conference on June 11, 2012, during which the Court discussed the possibility of either party requesting a material witness warrant, but neither party requested such a warrant.

(R.30,p.2)

The Magistrate explained he had allowed a limited evidentiary hearing to see if any law enforcement information existed that would support or negate the allegations in Andrew Wallace's affidavit and his retraction of evidence concerning the defendant. (R.30,p.16,n.4) The Magistrate concluded that the "evidence introduced at the hearing actually negated [Wallace's] retraction" and found that Wallace's affidavit lacked credibility. (R.30,pp.16-17)

The Magistrate recommended that the motion be denied. (R.30,pp.2-3) On August 28, 2012, the district court adopted the Magistrate Judge's Report and Recommendation. (R.36)

**B. Motions in Limine**

Leading up to trial, both parties filed a series of motions in limine regarding the use of evidence generated by Andrew Wallace. On September 17, 2012, the defendant filed a motion in limine asking the district court to rule on the admissibility of the videotape of Andrew Wallace, in which he recanted statements he made to the government during its initial investigation and claimed he did not sell drugs to the defendant on December 15, 2012. (R.43)

Three days later (at a pretrial status hearing), the defendant's counsel -- in the context of providing the district court background about a divergence of opinion he was having with the defendant -- told the court that Andrew Wallace was under the control of the defense and was not being truthful:

> I never indicated 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 . . . 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 supposed 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 . . . I was . . . refusing to take a video statement from him or a taped statement and refusing to see him. [T]hat'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 [the defendant] 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. . . .
>
> I've asked that he contact me. He never has. One time I did attempt to contact him. . . . When I identified myself he started to mumble, then he hung up. And that's the last . . . direct contact I've attempted to have with that gentleman.

(Tr.III.14-15)

On September 26, 2012, the district court ruled that the videotape was inadmissible as hearsay and did not fall under any of the exceptions listed in Federal Rule of Evidence 803. (R.58)

Two days later, the government filed a motion in limine asking the court to prohibit the defendant from calling Andrew Wallace as a witness simply to impeach him. (R.61) The defendant filed a second motion in limine on October 2, 2012, asking the court to prohibit the government from playing for and referencing to the jury the video and audio recording made by Wallace during the controlled buys unless the government called Wallace as a witness. (R.64) That same day, the defendant filed a response to the government's first motion in

limine. (R.65) In it, he agreed "with the Government's assertion that it is not required to call a confidential informant as a witness," and argued instead that he should not be prohibited from calling the confidential informant. (R.65,p.3)

After the parties filed three additional (R.66,67,68) responses and replies to one another's motions in limine, the district court issued a written order. In it, the court: (1) ruled the defendant was prohibited from referring during opening statements to any anticipated testimony from Andrew Wallace; (2) reserved ruling (until the close of the government's case) on the government's motion to preclude the defendant from calling Wallace as a witness; (3) denied as moot the defendant's motion to exclude the audio and video recordings of the drug buys made by Wallace as well as his motion to preclude the government witnesses from testifying about out-of-court statements made by Wallace, after the government represented that it would not admit any of Wallace's out-of-court statements, but would merely play a portion of the video recording without the accompanying audio. (R.69)

Reviewing the history of the case in a lengthy footnote, the court specifically found that Andrew Wallace was not under the control of either party. (R.69,p.7 n.2)

**III. The Trial**

The four-day jury trial concluded on October 16, 2012, when the jury found the defendant guilty. (d/e 10/16/12;R.75) The government's evidence at trial consisted of law enforcement witnesses (who testified about the controlled drug purchases and the execution of the search warrant) and various exhibits, including a portion of the silent video. The following narrative summarizes that evidence.

**A. The First Controlled Buy**

On December 15, 2011, police investigators used Andrew Wallace (a CI) to make a controlled purchase of crack cocaine from his uncle, the defendant, out of a residence located at 700 North 14th Street in Springfield, Illinois. (Tr.196-97,608,875)

Officers met with Wallace at the Drug Enforcement Administration Office that morning and provided him with $1,250 of pre-recorded Official Advance Funds. (Tr.202,204-05,222;Gov't.Ex.19) Officers searched Wallace and placed an audio/video recorder on his body. (Tr.206,208,608-09,875)

Officers searched Wallace's car and maintained surveillance of it as Wallace drove directly to 700 North 14th Street, where officers had set up perimeter surveillance around the house. (Tr.209-10, 213,577,609,627-30,656-57,722-23,876) Officers, including the lead DEA agent, Detective Tom Bonnett, also positioned

themselves outside of the house in order to monitor the audio portion of the recording. (Tr.188,211)

Officers saw Andrew Wallace enter the house and exit about 20 minutes later. (Tr.213,578-80,582,631-32,877) They followed him back to their office where they searched him again. (Tr.215,610-11,657,723) Wallace turned over the 22 grams of crack cocaine he had just purchased. (Tr.215-16;Gov't.Ex.2) He no longer had the pre-recorded funds. (Tr.215)

Officers sought and obtained a search warrant for the residence at 700 North 14th Street. (Tr.223)

**B. The Second Controlled Buy**

Prior to executing the search warrant, the officers arranged for Wallace to conduct another controlled purchase of crack cocaine to ensure that there were still drugs in the house. (Tr.223,244)

At around 8:30 p.m. on December 15, officers met with Wallace at the DEA Office. They searched his car and his person, placed on the front of his body the same audio/video recording device he had used earlier, and provided him with $1,250 of pre-recorded Official Advance Funds. (Tr.224-25,724-25)

Following the same protocol used in the first controlled buy, officers set up surveillance around the perimeter of 700 North 14th Street, followed Wallace to the house, and watched him enter. (Tr.226,584-85,658,723,725-26)

Officer Bonnett again monitored the audio recording from outside of the house. (Tr.230) He recognized Andrew Wallace's voice and the defendant's voice as they were speaking. (Tr.231-234) Detective Bonnett was familiar with the defendant's voice because he had spoken with him in the past. (Tr.232-34)

Once again, Wallace exited the house about 20 minutes after arriving. (Tr.227,585) Officers followed Wallace back to the DEA office, searched him, found crack cocaine, and found none of the pre-recorded funds. (Tr.227-28,243,659,725;Gov't.Ex.3)

Detective Bonnett reviewed the audio/video recording and testified that he was able to identify by sight Andrew Wallace – and the defendant -- and Jerome Wallace, whom he believed to be the defendant's nephew. (Tr.232-34;Gov't. Ex.13)

During the trial, the government played part of the video recording of the second controlled buy.[2] (Tr.236) Defense counsel stated twice that he had no objection "as long as we're just . . . publishing the video portion . . . ." (Tr.236-37)

As the prosecutor played and paused the video, Detective Bonnett testified that, while he could see Jerome Wallace and the defendant, the video does not show anyone else entering the house during the time of the controlled buy. (Tr.237,241-42,245) Bonnett testified that the video shows Jerome Wallace and the defendant standing close to the microwave in the kitchen. (Tr.242-43,259) He also testified that the video shows the defendant just prior to what appears to be Andrew Wallace receiving crack cocaine. (Tr.242-43,259,458)

The government introduced several still photographs taken from the video. (Gov't.Exs.13A-1 through 13A-24) Detective Bonnett identified the defendant in several of the photographs, and testified that the photographs depict the defendant standing in the kitchen next to a microwave containing a measuring cup with an off-white substance in it, a food sealer, and what appears to be

[2]On the morning of trial, the district court reiterated its pre-trial ruling that, while the government could play the video portion of the recording, it would not be allowed to elicit any testimony or play any audio recording containing out-of-court statements of Andrew Wallace. (Tr.159) The defendant's counsel asked for a standing objection to the playing of the video recording and the prosecutor responded, "I certainly would concede that [defense counsel] has preserved his objections." (Tr.161)

cocaine in bags. (Tr.253-56;Gov't.Exs.13A-3 through 13A-13) Bonnett testified that one of the photographs (Gov't.Ex.13A-21) depicts the defendant looking at the microwave while it is lit up with a green light. (Tr.257)

### C. The Execution of the Search Warrant

About an hour after the second controlled buy was completed, the officers executed the search warrant. (Tr.244,589-90)

When the Springfield SWAT team entered the house, they found the defendant in the home's only bathroom (accessible through the southwest bedroom), wearing boxer shorts and shaving his head. (Tr.356-57,466,591-92;Gov't.Ex.P-97) Upon seeing the officers, the defendant ran into an adjacent room. (Tr.592-93) The officers apprehended the defendant and secured him in the front room along with two other occupants: Jerome Wallace, and Sandy Johnson. (Tr.245,355-56) Officers searched every room in the house. (Tr.262)

#### 1. the security surveillance system

The officers discovered an active security surveillance system in and outside of the house. In the southwest bedroom, officers found a 20-inch surveillance monitor displaying the outside of the house, a surveillance clock with a mini camera in it, and an activated a DVR recorder in a closet, which was recording

the security camera footage. (Tr.260-63,294-95,299-303,333,707-08; Gov't.Exs.32,34,P-8-9,P-41) In the kitchen, officers found cabling, a monitor, and a remote control. (Tr.332;Gov't.Ex.24) In the living room, a 73-inch television was showing the surveillance of the outside of the house. (Tr.333,341-43)

**2. the southwest bedroom**

On the front door of the southwest bedroom, officers observed a sign that said "No matter what, always knock before you enter this room. Wait on a come in. Thanks, P.J." (Tr.268)

On the bed in the southwest bedroom, officers found a pair of jeans[3] containing a wallet. (Tr.269,271-72,593,644-45,648,665,704;Gov't.Ex.22) The wallet contained the defendant's driver's license and Social Security card and identification documents for the defendant's mother, Dorothy Wallace. (Tr.274,276,666-67,706) In one of the jeans' pockets, the officers found marijuana and crack cocaine. (Tr.267-80,594-95,646-47,705;Gov't.Exs.4-5,38,P-16 through P-18)

[3] Detective Bonnett testified that the jeans, which had a waist size of 44 and an inseam of 32, appeared to be consistent with the defendant's height and weight. (Tr.272-73)

The jeans also contained $160 of the pre-recorded funds – one bill from the first controlled buy and six bills from the second buy. (Tr.736-40;Gov't.Ex.36A-1-A-4)

In the same bedroom, officers found a second wallet in a plastic filing cabinet. (Tr.272,281;Gov't.Ex.22-A) That wallet contained two active identification cards for the defendant: one with an address of 700 North 14th Street in Springfield and one with an address of 150 South Durkin Drive in Springfield. (Tr.283-85) The wallet also contained the defendant's driver's license with the South Durkin address, the defendant's voter registration card, and receipts for purchases and checking deposits. (Tr.282-83,285) The officers also located mail addressed to the defendant. (Tr.306-311;Gov't.Ex.20,49)

In the filing cabinet, officers located $980 of their pre-recorded funds from the second buy. (Tr.285-86,615,647,741-42;Gov't.Exs.36A-5 through 36A-9) The filing cabinet also contained more than a pound of crack and powder cocaine as well as marijuana. [4] (Tr.287-93,313-14,616,647,667-72;Gov't.Exs.6,7.01-7.03,8,38,P-106, P-107,P-108,P-109) In addition to the drugs and cash, officers located watches and DVDs in the cabinet. (Tr.295)

[4]Throughout the house, the officers found a total of 697 grams of cocaine and crack cocaine, worth roughly $70,000. (Tr.709-11)

Inside of a closet in the southwest bedroom, officers found more than 20 pairs of shoes and several items of men's clothing sized to fit a large man. (Tr.305,706-07;Gov't.Ex.P-45) In the same bedroom, the officers located two cell phones, four laptop computers, an empty Smith and Wesson gun case, handgun holsters hanging on the back of the bathroom door, and a total of $5,430 in cash. (Tr.286,296-99;Gov't.Exs.12,33,35,P-24)

**3. the kitchen**

In the kitchen area, officers observed and photographed a note on the refrigerator door that said, "To people that don't buy food or soda, don't touch anything without asking. P.J."(Tr.728;Gov't.Ex.P-55) A photograph on the refrigerator depicted the defendant and two women. (Tr.317)

The officers observed two microwaves: one above the stove and one next to the sink. (Tr.251,318,729;Gov't.Exs.12,P-56,P-57,P-58) The interior of the microwave next to the sink appeared to be splattered with cocaine and cocaine residue. (Tr.319-20;Gov't.Ex.12,38,P-57-58)

In the bottom of a kitchen cabinet, officers located a measuring cup that appeared to be the same measuring cup captured in the video recording of the second controlled buy. (Tr.322-23;Gov't.Exs.P-59,13A-15)

Officers also located a food sealer, and several boxes of plastic Ziploc bags (including bags sized 1.5 inch by 1.5 inch that were stamped with a picture of a marijuana leaf), a plastic bowl and a glass measuring cup that contained cocaine residue, a digital scale covered with white residue, and box of baking soda. (Tr.323-32,712,730-35;Gov't.Exs.9,10,26,27,38,P-61,P-62,P-67) The defendant's fingerprint was found on one of the Ziploc bags.[5] (Tr.552-65,567;Gov't.Exs.9,10, 15,16)

**4. the living room**

In addition to the 73-inch television displaying the surveillance of the outside security cameras, officers located in the living room a diploma in the name of Patrick Bovia Wallace, photographs of the defendant on the wall, and a police scanner. (Tr.333-44;Gov't.Exs.29,P-88,P-89,P-90,P-91)

**5. the middle and back bedrooms**

In the middle bedroom, officers found documents in the name of Dominque Brown with an address of 700 North 14th Street. (Tr.345-47,595;Gov't.Exs.31,P-84,P-85)

[5] The government presented the testimony of a Supervisory Special Agent with the DEA, who participated in the search of the house and described it as "a typical drug house." (Tr.713) He explained that crack cocaine manufacturers most commonly use a microwave to convert cocaine powder into crack cocaine. (Tr.694,700) He also testified that it is common to find baking soda, glass or plastic containers, Ziploc bags, home security surveillance systems, and firearms when investigating cocaine cases. (Tr.699-703)

In the back (or southeast) bedroom, officers found Jerome Wallace's prescription medications and driver's license and a lanyard with cards containing his name. (Tr.348-50,354,596;Gov't.Exs.P-67 through P-83) Officers also located a digital scale, a loaded .380 handgun inside of a clothes' hamper, a box containing .380 caliber ammunition, an additional magazine for the handgun, and a .45 caliber round for a different type of handgun. (Tr.49-352,597-99;Gov't.Exs.P-69,P-70,P-71,P-73,P-81)

**D. The Defendant's Statements on the Scene**

The defendant made admissions while the officers were executing the search warrant. When Detective Bonnett began to testify about the statements, defense counsel moved (for the first time during the trial) to suppress the statements:

> For various reasons, Your Honor, I'm going to object. I believe, number one, that the defendant was in custody, he was being questioned by this officer. And I believe that certain rights of his were not waived to remain silent during that time period. Specifically, his Miranda warnings were not provided to him. And I believe that that testimony should not be allowed . . . into evidence.

(Tr.362)

The prosecutor responded, "Your Honor, this case was indicted several months ago. The discovery has been provided to the defendant long ago. And

the time for raising an issue about the admissibility of any statements of the defendant has long pas[sed]." (Tr.362)

The district court excused the jury and allowed the prosecutor to voir dire Detective Bonnett. (Tr.364-66) Bonnett testified that, during the execution of the search warrant, the officer in charge of securing the suspects in the front room, Officer Mazrim, informed Bonnett that he overheard the defendant say to Sandy Johnson "not to worry about it" because everything in the bedroom was his. (Tr.364) In response, Detective Bonnett approached the defendant and asked him to come and talk with him. (Tr.364-65) The defendant said, "I don't want to waste your time, everything in there's mine." (Tr.364) After the defendant made the statement, Detective Bonnett left the room. (Tr.364)

At the conclusion of Bonnett's testimony, the defendant's counsel stated, "That was my understanding as to how the evidence was going to come out, Your Honor. But I still, for the record, have made the same objection." (Tr.367) When the district court pointed out that counsel's objection to the statements "comes a little late," defense counsel responded that he had attempted to raise the issue prior to trial with Magistrate Judge Cudmore, but the defendant refused to cooperate in filing the motion." (Tr.367) The prosecutor clarified by stating that defense counsel wanted to file a motion to suppress but the

defendant directed him against it because he took the position that he never made the statements. (Tr.367) Defense counsel verified that the prosecutor's statements were accurate and part of the record before Judge Cudmore.[6] (Tr.367-68) The district court asked that the prosecutor have the other two officers who witnessed the statements testify first thing the next morning. (Tr.371)

The next morning, the prosecutor noted that the defendant's objection to the admission of his statement to Detective Bonnett was tantamount to a motion to suppress those statements. (Tr.374-75) He suggested to the district court that it receive (outside of the presence of the jury) the testimony of the officers who heard the defendant make the statement at the scene and to rule on the defendant's objection outside of the presence of the jury. (Tr.374-77) The defendant's counsel and the court agreed to so proceed. (Tr.377)

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[6]At a pre-trial status hearing held before Judge Cudmore, the defendant's counsel explained why he had not filed a motion to suppress his client's statements:

> When we left here last . . . it was my understanding I was gonna be filing an additional motion to suppress regarding statements from Mr. Wallace.
>
> Mr. Wallace and I have had spirited discussions regarding the same. And as of Friday, he had withdrawn his permission for me to file the motion and does not want me to file a motion to suppress two statements that he allegedly made. And I want to just make that of record.

(Tr.II.5) The defendant responded that he told his attorney there was no sense in filing the motion because he did not make the statements at issue. (Tr.II.5)

The prosecutor first re-called Detective Bonnett, who testified consistently with his testimony the previous day. (Tr.378-89) The prosecutor then called Officer Mazrim, who testified that, during the execution of the search warrant, he, along with Officer John Weiss, was tasked with securing and watching over the occupants seated in the living room. (Tr.391,393)

Officer Mazrim testified that, while he was standing guard over the three, agents and officers were walking in and out of the bedroom directly east of the front porch. (Tr.396,405) Officer Mazrim heard the defendant say to Sandy, "Don't worry, everything in that room is mine." (Tr.396) About five minutes later, as agents continued to walk in and out of the southwest bedroom, Officer Mazrim heard the defendant repeat to Sandy that everything in the bedroom was his. (Tr.396-97)

Officer Mazrim relayed to Detective Bonnett what he had heard. (Tr.397) Officer Mazrim and Officer Weiss, who was also guarding the three occupants of the living room, then heard Bonnett ask the defendant to step out of the room and talk to him. (Tr.398,408-410) According to Officers Mazrim and Weiss, the defendant responded, "I don't want to waste your time, everything in that room is mine" after which Detective Bonnett asked the defendant no further questions. (Tr.398,410-11)

At the conclusion of the testimony, the defendant's counsel argued that, after the defendant made the two statements in front of Officer Mazrim, Officer Bonnett should not have approached the defendant without first reading him his *Miranda* rights. (Tr.417)

The district court denied the motion, finding that the defendant's statements were non-custodial and voluntary:

> No, this is clearly not custodial and it was certainly not interrogation. These were voluntary statements. Everything that . . . 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.

(Tr.417-18)

When the jury re-entered the courtroom, the district court advised the jury that it had overruled the defendant's objection to the testimony. (Tr.422) Detective Bonnett then resumed his testimony, which tracked the testimony he had provided to the district court regarding the defendant's statement. (Tr.423-24) Officers Mazrim and Weiss testified as well, and their testimony also closely

tracked the testimony given to the judge outside of the presence of the jury. (Tr.500-22)

### E. The parties' discussion about Andrew Wallace at the conclusion of the government's case

At the conclusion of the government's case, the district court re-visited the issue of whether the government should be required to call Andrew Wallace as a witness:

> I note that in a lengthy footnote in my previous order I found that the confidential source is not under the control of either party. In light of the way the Government has presented its case . . . I conclude that the defendant . . . does not have a right under the confrontation clause of the 6th Amendment to have the Government call the confidential source to testify.
>
> Now, we've thoroughly reviewed the case law cited by both parties. And I conclude that the defendant has the right to call . . . the confidential source as a witness. However, if the Defendant Wallace does call the confidential source, I will grant the Government' request to conduct voir dire outside the presence of the jury before he be allowed to testify before the jury.

(Tr.757)

The district court then inquired of the defendant's counsel whether he had been able to locate Andrew Wallace. (Tr.758) The defendant's counsel explained that the defendant's family members had been in contact with Andrew Wallace, he intended to show up to the trial the following day, and the defendant wanted

to call him as a witness. Counsel also stated he had no idea what Andrew Wallace might say and strongly disagreed with the decision to call him:

> [D]uring the recess . . . I was confronted by . . . Andrew Wallace's sister, who advised that Mr. Andrew Wallace desires to testify. He's in the state of Minnesota at this point in time, but . . . has advised her that he has consulted counsel in Minnesota, understands what ramifications he may suffer as a result of his testimony, but he desires to testify and would be willing to be here in the morning.
>
> I have not spoken to him to be able to confirm that, or what he would testify to. I have discussed it with my client and as we have on other occasions we have a differing opinion as to whether he should be called.
>
> I've advised him that I do not believe that based upon my interpretation of matters and the evidence as I view it, that it would be in my client's best interest to call Andrew Wallace as a witness. And we had a vigorous discussion regarding the same . . . before we re-adjourned. And he has insisted that . . . he wants Mr. Andrew Wallace to testify.
>
> I understand I make decisions about how to proceed. I have done so throughout the trial thus far. He's disagreed on some of the things that I've allowed in or . . . inquiries I've made. But . . . it's his . . . cab ride, so to speak, Judge. And he's insisting that Mr. Andrew Wallace be called as a witness.
>
> However, I've cautioned him that I may – depending on my ability to communicate with him this evening . . . again, strongly disagree with him.
>
> [S]o, it's my understanding that he will be here tomorrow. . . . I have not had a chance to voir dire him. I don't know what mental state or what . . . he's ultimately going to testify to. And that's what I've cautioned my client about.

(Tr.758-59)

The district court responded: "Well, I think you're very prudent in cautioning . . . the defendant in this regard . . . . T]hese things can explode with very little effort and turn out exactly the opposite way we think they're going to. But both of you are presumably quite able to make the decisions for yourselves." (Tr.760)

The next morning, the defendant's counsel updated the court regarding his communication the previous evening with Andrew Wallace:

> Yesterday evening I also spoke three times . . . with Andrew Wallace.
>
> He advised me that he was prepared to testify. He indicated that he was in Minneapolis . . . and that he was going to be here today. . . . [T]o be frank, he kept asking me questions about legal implications of him testifying. . . . I said look, you indicated to me earlier you had spoken to an attorney. I believe you need to discuss that issue with him, because your testimony could have some persuasion upon the government to take certain action against you.
>
> But in either event, the last word I had from him, which was close to 9:00 yesterday evening . . . he was going to be here this morning. . . .
>
> But, I don't have anything further than that. He's not here that I've seen out in the hallway at all, Judge.

(Tr.808-09)

After calling three witnesses to testify for the defense, defense counsel informed the court, "I haven't made a decision on Andrew Wallace, but nor have I seen him. So unless he is lurking around the courthouse someplace, I don't know if we'll be calling him." (Tr.880) After calling an additional witness, the defense rested. (Tr.906)

The jury convicted the defendant on October 16, 2012. (d/e 10/16/12;R.75) On January 3, 2013, the defendant filed a motion for new trial (R.85) which the district court denied the same day. (d/e 1/3/13;R.86)

## IV. Relationship Between the Defendant and His Attorney

Twice before trial and once after it, the defendant sought to replace his appointed counsel John Alvarez. (R.23,42,84) This section of our brief summarizes the facts relevant to those requests in chronological order.

### A. The First Motion, Subsequently Withdrawn

The first motion came in the form of a letter to the clerk of court on May 2, 2012. (R.23) The defendant said he wanted a new lawyer because Mr. Alvarez had not yet met with him to discuss the defendant's concerns about the case.

(R.23) At a hearing twelve days later, the defendant voluntarily withdrew his request:

> THE COURT: If you hire someone, then it's your decision. When I appoint someone, it's my decision.
>
> And the test is not someone feeling uncomfortable, it's whether there are irreconcilable differences. And I've already seen the good work Mr. Alvarez has done for you already, the pending motion that's there.
>
> Do you stand and continue in your request to have new counsel appointed or do you withdraw your request?
>
> THE DEFENDANT: I withdrew that request.
>
> THE COURT: Very well. Is that what you want to do?
>
> THE DEFENDANT: Yes, sir.

(Tr. 5/14/12,p.4)

**B. The Second Motion**

More than four months later, on September 14, 2012, the defendant filed a motion asking the court to remove Mr. Alvarez from his case. (R.42) In the motion, the defendant said Mr. Alvarez had not ethically and actively defended him. (R.42) He also listed a number of responsibilities of defense attorneys (including preparing his client for each step in the legal process, reviewing possible evidence and defenses, and interviewing witnesses) but did not claim that his attorney had failed to fulfill these responsibilities. (R.42)

Magistrate Judge Cudmore, deferred the defendant's motion for new counsel to district court Judge Mills, but noted that "Mr. Alvarez is very competent in my opinion . . . ." (d/e 9/14/12)

The district court took up the issue at the final pre-trial status conference on September 20, 2012. (d/e 9/20/12) The court characterized the motion as "very brief" and "not very specific" and then asked the defendant to elaborate on it. (Tr.III.4)

The defendant responded:

> [M]e 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.

(Tr.III.4)

Mr. Alvarez responded that he did not know what issues the defendant was referring to, except that the defendant had asked him to file a motion with the court asking the court to allow Andrew Wallace's videotaped statement. Mr. Alvarez explained that, although he disagreed with filing the motion because it obviously constituted inadmissible hearsay, he nevertheless filed the motion on behalf of the defendant. (Tr.III.5-6) Mr. Alvarez also noted that he wanted to file

a pre-trial motion to suppress the defendant's statements made on the scene, but the defendant instructed him not to file it. (Tr.III.6)

Mr. Alvarez represented that, although he and the defendant initially had a difference of opinion about a particular defense that his client wished to offer, that Mr. Alvarez had ultimately agreed to present the defense. (Tr.III.6) Finally, Mr. Alvarez represented that he had discussed with the defendant the nature of the attorney-client relationship between the two:

> 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 . . . with some tweaks here and there, we're going to proceed . . . the way he wants to proceed as far as a defense in this matter.

(Tr.III.7)

The district court responded, "All right. Well, that sounds very reasonable to me. Does it to you Mr. Wallace?" (Tr.III.7) The defendant then listed a number of more specific complaints about Mr. Alvarez's representation, including: (1) his attorney had failed to obtain an investigator to travel to interview the confidential source; (2) his attorney failed to ask the district court to provide an independent fingerprint expert and chemist; and (3) his attorney failed to

provide him with the police records in the case, but instead showed him the documents on an I-Pad. (Tr.III.8)

Mr. Alvarez responded that he had downloaded the discovery documents onto an I-Pad, which he brought to all meetings with the defendant so that he could show those items to him. (Tr.III.11) He also noted that he was in the process of preparing the motions asking for an independent fingerprint expert and chemist. (Tr.III.12) He then reiterated his understanding of his responsibilities as the defendant's counsel:

> [T]he 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 . . . some of the . . . ways he's asking me to proceed, don't make sense. Particularly on the motion to suppress the videotape.

(Tr.III.13)

Finally, as detailed in Section II (B) of our Statement of the Case, Mr. Alvarez responded to the defendant's allegation that he failed to obtain an investigator to travel to interview Andrew Wallace. (Tr.III.14-15)

At the conclusion of defense counsel's representations, the court denied the defendant's motion for new counsel:

> 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.

(Tr.III.15)

**C. The Third Motion**

The defendant filed a third motion after the trial and prior to the sentencing, on December 19, 2012, seeking new counsel for his sentencing hearing. The motion reiterated previous complaints and raised a litany of new complaints about his attorney's performance before and during the trial, including that defense counsel: (1) failed to introduce evidence of tape-recorded telephone calls between the defendant and Andrew Wallace; (2) failed to make numerous objections during trial; (3) failed to investigate the case, present any defense, or make strategic decisions on behalf of the defendant; (4) deliberately withheld

evidence from the defendant; (5) provided the defendant with an illegible and incomplete copy of the government's September 28, 2012, motion in limine; (6) failed to review all of the discovery with the defendant; and (7) failed to confront the witnesses against the defendant. (R.84)

On March 15, 2013, the district court held a hearing on the defendant's motion for new counsel. (Tr.IV) The court reviewed the allegations contained in the defendant's motion and provided the defendant with an opportunity to address or supplement his allegations. (Tr.IV.8) The defendant responded that his counsel failed to show him the discovery in the case, failed to present a defense at trial, failed to explain to the jury what was going on in the video, failed to introduce affidavits from his family members, failed to introduce evidence that other people's fingerprints were found on items in the house, failed to make the point that his fingerprint was found on a Ziploc bag that did not contain drugs, and failed to present to the jury bills in his name. (Tr.IV.8-9)

Mr. Alvarez addressed the defendant's written and oral allegations. He denied that he provided the defendant with a garbled or incomplete copy of the government's motion in limine. He explained that he attempted to give the defendant a copy of the motion but the defendant was not interested because he did not want to call Andrew Wallace. (Tr.IV.12-13)

Mr. Alvarez noted that he had cross-examined the governments' fingerprint expert as to the lack of the defendant's fingerprints on various items in the kitchen. (Tr.IV.14) According to Mr. Alvarez, he visited the defendant several times and each time the two reviewed the discovery and documents in the case. (Tr.IV.16) He also reiterated that the defendant refused to allow him to file a motion to suppress the statements he made during the execution of the search warrant. (Tr.IV.18-19) With respect to the defendant's claim that Mr. Alvarez failed to present all of the evidence as requested by the defendant, Mr. Alvarez explained that the defendant wanted to present evidence regarding sex tapes that were confiscated during the search. Mr. Alvarez refused because he did not think they were relevant. (Tr.IV.19)

After hearing from Mr. Alvarez and the prosecutor, the district court denied the defendant's motion:

> 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 . . . that all of the contraband in the bedroom was yours. 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 . . . . 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.

(Tr.IV.23-24)

**V. Sentencing**

On May 24, 2013, the district court sentenced the defendant to a term of 288 months of imprisonment to be followed by 10 years of supervised release. (d/e 5/24/13;R.108) In a separate revocation proceeding held that same day, the court sentenced the defendant to a consecutive 60-month sentence for committing a crime while on supervised release. (Revocation Hr'g Tr.14)

On May 29, 2013, the defendant filed a timely notice of appeal. (R.113) On appeal, this Court consolidated the defendant's appeal of his conviction and revocation of his supervised release. The defendant later moved to dismiss the

revocation appeal (Case. No. 13-2161), and this Court granted his request. Thus, this appeal concerns only the judgment of conviction. (Case. No. 13-2160)

## SUMMARY OF THE ARGUMENTS

First, the district court did not violate the defendant's right to confront witnesses by allowing the government to play a portion of a silent video without requiring the informant who filmed the video to testify at trial. The silent video did not constitute a testimonial statement and therefore did not implicate the Confrontation Clause.

Second, the district court did not abuse its discretion in denying the defendant's motions for new appointed counsel. The court held hearings on the motions and correctly determined that the defendant and his counsel were consistently communicating and merely disagreeing about trial strategy, which is

not an appropriate basis for granting a motion for new counsel.

Finally, the defendant waived his argument that the statements he made on the scene were inadmissible under *Miranda* by intentionally declining to file a motion to suppress prior to trial.

## ARGUMENTS

### I. The District Court Did Not Err in Admitting a Video Without Requiring the Testimony of the Confidential Informant Who Made It

The defendant argues (Def.Br.18-22) that the district court's decision to admit a portion of a silent video of the second controlled drug purchase without requiring Andrew Wallace to testify violated his Sixth Amendment right of confrontation. He cites no case, however, finding that a silent video qualifies as a testimonial statement. The video contains no statements – testimonial or otherwise – and the district court did not err in admitting it.

#### A. Standard of Review

Generally, this Court reviews a district court's evidentiary rulings for an abuse of discretion. *United States v. Plato*, 629 F.3d 646, 651 (7th Cir. 2010). When the issue is whether an evidentiary ruling violates the Confrontation Clause of the Sixth Amendment, however, this Court's review is de novo. *United States v. Wright,* 651 F.3d 764, 773 (7th Cir. 2011). Even where admission of evidence violates a defendant' Sixth Amendment right to confront witnesses, this Court need not correct the error if it deems the error harmless. *United States v. Adams*, 628 F.3d 407, 417 (7th Cir. 2010).

#### B. Analysis

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." As the Supreme Court explained in *Crawford v. Washington*, 541 U.S. 36, 68 (2004), the Confrontation Clause prohibits the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." The critical inquiry, then, is whether the statements in question are "testimonial," as because only testimonial statements make a declarant a "witness" under the Confrontation Clause. *Id.* at 51. "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." *Davis v. Washington,* 547 U.S. 813, 821 (2006).

*Crawford* did not attempt to provide a comprehensive definition of "testimonial statements," but did note that "[m]ost of the hearsay exceptions covered statements that by their nature were not testimonial . . . ." 541 U.S. at 56.

Here, because the silent videotape did not amount to testimonial hearsay, the defendant's argument stalls at the gate. First, the silent videotape played for the jury did not include statements, let alone testimonial statements. The video contains nothing but nonverbal conduct. Although the Supreme Court has not

ruled on when nonverbal conduct constitutes hearsay under *Crawford,* it seems safe to assume that it will adopt the same view as the Federal Rules of Evidence. Federal Rule of Evidence 801(c) defines hearsay as a "statement," and Rule 801(a) defines a "statement" as "a person's oral assertion, written assertion, or nonverbal conduct, *if* the person intended it as an assertion." As the 1972 advisory committee's note to Rule 801(a) clarifies, the "key to the definition" of an assertion "is that nothing is an assertion unless intended to be one." *See United States v. Love*, 706 F.3d 832, 839 (7th Cir. 2013). "Rule 801 places the burden upon the party claiming that the intention to make an assertion existed." *United States v. Jackson*, 88 F.3d 845, 848 (10th Cir. 1996).

Here, Andrew Wallace's nonverbal conduct does not appear on the video (as the camera was attached to the front of his body) and the other individuals appearing on the video are unaware that they are being filmed, so it is hard to see how they could be intending their nonverbal conduct as an assertion. *Cf. United States v. Hendricks*, 395 F.3d 173, 181 (3d Cir. 2005) (surreptitiously recorded conversations are not testimonial statements as they are more similar to casual remarks than formal statements).

The defendant argues (Def.Br.22-27) that the district court erred by admitting the video without requiring the government to produce Andrew Wallace at trial.

For purposes of the admissibility of evidence relating to controlled purchases by a confidential informant (CI), including any related audio tape or video recording, the law is well-established that the government is not required to call a CI to testify at trial. *See United States v. Douglas*, 408 F.3d 922, 926-27 (7th Cir. 2005); *United States v. Woods*, 301 F.3d 556, 559-61 (7th Cir. 2002).

This Court has repeatedly rejected the claim that a defendant has a right to cross-examine a non-testifying confidential source, even in cases (unlike this case) where audio recordings of the CI are presented, if the statements of the CI are offered not for their truth but to provide context so as to make the defendant's statements intelligible as admissions. *See, e.g., United States v. Davis*, 890 F.2d 1373, 1379 (7th Cir. 1989); *United States v. McClain*, 934 F.2d 822, 832 (7th Cir. 1991); *United States v. Wright*, 722 F.3d 1064, 1067 (7th Cir. 2013).

The defendant claims (Def.Br.24-26) that the district court failed to require the government to show that it was not responsible for Wallace's unavailability and that it took reasonable steps to assist the defense in locating Wallace prior to trial. The defendant's argument does not square with the record.

The district court correctly found that Andrew Wallace was not under the control of either party. (R.69,p.7,n.2) A witness is peculiarly within a party's power to produce if he either: (1) is physically available to only that party; or (2)

has such a relationship with one party as to effectively make him unavailable to the opposing party, regardless of actual physical availability. *United States v. Tavarez*, 626 F.3d 902, 905 (7th Cir. 2010). Here, Andrew Wallace was unavailable to the government – it had tried and failed to secure his appearance. In fact, both pre-trial and during trial, the defendant's counsel acknowledged that Andrew Wallace was not in the control of the government, further acknowledged that the defendant and his family members were in contact with Andrew Wallace, and represented that he was unsure about whether calling Wallace was in the defendant's best interest.

For example, during the pre-trial hearing on the defendant's motion to suppress evidence, defense counsel stated, "[T]o be quite honest . . . I'm kind of agreeing with [the prosecutor] in the sense that we've had the same problem as he has of not being able to produce the CS." (Tr.I.53) The Magistrate responded by saying, "Well, no one has come to the Court for any kind of material witness warrant. We discussed that in the telephone conversation. Gentlemen, you're both veteran litigators." (Tr.I.53)

On September 20, 2012, at a pretrial status hearing, the defendant's counsel told the court that Andrew Wallace was not being truthful and was under the control of the defense: "the witness . . . *is under our control*, despite being the

confidential source in this matter"; "The confidential source . . . is misrepresenting the facts to Mr. Wallace"; "As to hiring an investigator to go down there and talk to him; neither does that make sense since *we have a witness that [the defendant] 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*. . . .". (Tr.III.14-15)

Finally, at the conclusion of the government's case, the district court inquired of the defendant's counsel whether he had been able to locate the confidential source. (Tr.758) Counsel explained that the defendant's family members had been in contact with Wallace and that Wallace intended to show up to the trial the following day. He also represented that he had no idea what Wallace might say and strongly counseled the defendant against calling him as a witness. (Tr.758-59) The next morning, defense counsel represented to the court that he had spoken with Andrew Wallace three times the previous evening and, although Wallace agreed to testify, he asked several questions about the legal implications of his testimony. (Tr.808-09) Defense counsel repeated that he had not made a decision whether or not to call Andrew Wallace as a witness. (Tr.880)

Thus, the record fails to support the defendant's assertions on appeal that Andrew Wallace was under the control of the government, that he asked for the

government's assistance in securing Wallace's testimony, and that Andrew Wallace (had he shown up) would have been called by the defense, let alone provided truthful or helpful information for the defense. In fact, the record supports the opposite: the defendant did not ask for the government's assistance in locating Andrew Wallace, the defendant did not ask for a material witness warrant despite prompting from the Magistrate, and defense counsel repeatedly stated both that Wallace was under the control of the defense and that he was not being truthful.

Finally, the defendant argues (Def.Br.27-29) that allowing Detective Bonnett to testify about the video was more prejudicial than probative. He acknowledges, however, that he never raised this objection below, so this Court's review is for plain error only. *United States v. Christian*, 673 F.3d 702, 707-08 (7th Cir. 2012). This argument lacks traction. Detective Bonnett merely identified the individuals depicted in the video (Tr.237,241-42,245), testified that they appeared to be standing in the kitchen (Tr.242-43,259), and testified that the video showed the defendant just prior to what appears to be Andrew Wallace receiving crack cocaine. (Tr.242-43,259,458) Detective Bonnett's testimony was highly probative with respect to the identity of the individuals depicted in the video and where they were standing in the house: information that he and other officers were able

to corroborate when, during their search of the home, they found the cocaine-splattered items depicted in the video.

The defendant claims (Def.Br.28) that even if narration was required, it would have been more probative and less prejudicial to have Andrew Wallace provide that narration. Yet, as discussed above, Andrew Wallace did not show up to the trial. Moreover, just because the video could have been authenticated by more than one witness does not lead to the conclusion that the district court plainly erred in allowing Detective Bonnett to authenticate it and describe for the jury what and whom he recognized in the video.

Even if the district court erred in admitting the silent videotape, that error was harmless. *See Adams*, 628 F.3d at 417. Whether an error is harmless beyond a reasonable doubt depends upon factors such as: (1) the importance of a witness's testimony in the prosecution's case; (2) whether the testimony was cumulative; (3) the presence or absence of corroborating or contradictory evidence; and (4) the overall strength of the prosecution's case. *Id.* (citing *United States v. Castelan*, 219 F.3d 690, 696 (7th Cir. 2000)).

Here, the evidence was overwhelming that the defendant possessed crack cocaine on December 15, 2011. The officers watched as Andrew Wallace entered and exited the defendant's house two times that day to purchase drugs from the

defendant. Each time, Wallace entered the house with pre-recorded funds and exited with drugs and no money. During the execution of the search warrant the same day, officers discovered the defendant in his bedroom. In that same bedroom (including in the defendant's pants pocket), the officers located crack cocaine and Official Advance Funds from both of the earlier controlled buys. The officers also found several of the items (including a cocaine-residue splattered microwave and measuring cup) that were depicted on the video taken by Wallace during the controlled buys. Finally, during the execution of the search warrant, the defendant admitted three times that everything in the bedroom where the drugs and pre-recorded funds were found belonged to him. Given this evidence, any error in introducing a portion of the silent video was harmless.

## II. The District Court Did Not Abuse Its Discretion In Denying Wallace's Motions for New Counsel

The defendant next takes issue (Def.Br.31-51) with the district court's refusal to appoint new counsel. The hearings held by the district court on the defendant's motions for new counsel, during which the court allowed the defendant and his attorney to address the court at length, demonstrated that the

defendant and his counsel were consistently communicating. Their differences centered on trial strategy, which does not constitute a ground for new counsel. The district court therefore did not abuse its discretion in denying the defendant's request.

**A. Standard of Review**

Where, as here, a defendant has explained to the court his reasons for requesting new counsel, the district court has substantial discretion on requests for substitute appointed counsel, and this Court will review the court's decision only for an abuse of that discretion. *See United States v. Burgos*, 539 F.3d 641, 645-46 (7th Cir. 2008); *United States v. Volpentesta*, 727 F.3d 666, 672 (7th Cir. 2013); *Martel v. Clair*, 132 S.Ct. 1276, 1287 (2012).

**B. Legal Framework**

The Sixth Amendment guarantees a felony defendant the assistance of counsel at all critical stages of criminal proceedings. *See Montejo v. Louisiana*, 129 S.Ct. 2079, 2085 (2009). If the defendant cannot afford an attorney, he is entitled to appointed counsel. *Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1963). An indigent defendant, however, has no right to counsel of his choosing. *Caplin v.*

*Drysdale Chartered v. United States*, 491 U.S. 617, 624 (1989); *see also Wheat v. United States*, 486 U.S. 153, 159 (1988) (noting that "a defendant may not insist on representation by an attorney he cannot afford"); *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). Nor does a defendant have a right to a "meaningful relationship" with his counsel, so long as he is receiving adequate representation. *Morris v. Slappy*, 461 U.S. 1, 12, 14 (1983).

In deciding whether a district court abused its discretion in denying a motion for substitute counsel, this Court conducts a three-part inquiry, in which it considers: (1) the timeliness of the motion; (2) the adequacy of the court's inquiry into the motion; and (3) whether the conflict was so great that it resulted in a total lack of communication preventing an adequate defense. *Volpentesta*, 727 F.3d at 673; *see also United States v. Simmons,* 582 F.3d 730, 735 (7th Cir. 2009); *Burgos,* 539 F.3d at 646*; United States v. Harris*, 394 F.3d 543, 552 (7th Cir. 2005); *United States v. Bjorkman*, 270 F.3d 482, 500 (7th Cir. 2001).

If this Court finds an abuse of discretion, it will nevertheless uphold the district court's decision unless the defendant establishes that he was deprived of his Sixth Amendment right to effective assistance of counsel. *See Volpentesta*, 727 F.3d at 673*; United States v. Harris*, 481 F.3d 951, 959 (7th Cir. 2007).

**C. Analysis**

**1. timeliness**

As to the timeliness of the defendant's motions, he moved for new counsel on September 14, 2012, less than a month before trial and again after trial, on December 19, 2012, seeking new counsel for his sentencing hearing. (R.42) In denying the defendant's motions, the district court did not comment on the timing of the motions. However, as this Court made clear in *Volpentesta*, "even if the motions were timely, it does not necessarily mean the district court erred in denying them." 727 F.3d at 673; *see also Bjorkman*, 270 F.3d at 501 ("[E]ven if we find Bjorkman's request timely, a consideration of the two remaining factors convinces us that the district court did not abuse its discretion in denying it."). An analysis of the remaining two factors demonstrates that substitution of counsel was not warranted.

**2. adequacy of the court's inquiry**

The district court held a hearing after the filing of each motion: one on September 20, 2012, and the other on March 15, 2013. As detailed in our Statement of the Case, at each hearing, the court provided a full opportunity for both the defendant and Mr. Alvarez to address at length their relationship, the substance of the defendant's complaints, and the efforts taken by Mr. Alvarez to

accommodate the defendant's concerns. The court also made generous efforts at trying to understand the basis for the defendant's requests.

According to the defendant (Def.Br.34), at the September 20, 2012, hearing, after Mr. Alvarez responded to the defendant's complaints, the court asked no follow-up questions of the defendant. The record belies this claim. In fact, after allowing Mr. Alvarez to address the defendant's concerns, the district court turned back to the defendant and said, "All right. Well, that sounds very reasonable to me. *Does it to you Mr. Wallace*?" (Tr.III.7) The court then allowed the defendant (without interruption) to catalog at length a number of more specific complaints about Mr. Alvarez's representation. When the defendant finished, the district court allowed Mr. Alvarez an opportunity to respond to each charge. This Court has endorsed this approach. *Harris*, 394 F.3d at 553. ("Ideally, the court should have . . . questioned [the defendant's lawyer as well."). Although the defendant complains (Def.Br.36) that the district court did not "circle back to Wallace," the record demonstrates that the court gave the defendant a full opportunity to express his concerns. The law does not require the court to engage in endless dialogue with the parties.

Likewise, at the March 15, 2013, hearing, the court reviewed the allegations contained in the defendant's motion and provided the defendant with a full

opportunity to address or supplement his allegations. The defendant characterizes (Def.Br.36) this inquiry as "more thorough" than the inquiry at the September 20 hearing, but nevertheless criticizes the district court for asking generally whether the defendant had anything to add verbally to his written submissions. The defendant cites no case authority suggesting that the district court's open-ended invitation to the defendant was somehow deficient. *See id.* at 552 (inquiry adequate where "[a]lthough the colloquy may not be a model of probing inquiry, the district court elicited from [the defendant] all the major reasons he sought new counsel.").

In addition, the defendant acknowledges (Def.Br.36) he spoke for three additional record pages, presenting arguments to supplement his motion. Significantly, he makes no claim on appeal (*See* Def.Br.33-37) that he had additional reasons he wished to express but was prevented from raising. *See id.* at 553. The record demonstrates that, with respect to both motions, the district court provided the defendant every opportunity to state his reasons, gave ample consideration to the defendant's doubts regarding Mr. Alvarez's diligence in representing him (Tr.III.4-6), and did not merely seek to "elicit a general expression of satisfaction" by the defendant, *see United States v. Zillges*, 978 F.2d 369, 372 (7th Cir. 1992), or to dismiss the matter in a conclusory fashion.

*Bjorkman*, 270 F.3d at 501. Accordingly, the district court's inquiries into the defendant's motions were more than sufficient.

**3. ability to communicate and formulate a defense**

Finally, the defendant's allegations and his counsel's response demonstrate that the two were able to communicate and formulate a defense. Although it is apparent from the record that the defendant and Mr. Alvarez sometimes engaged in vigorous debate about how to best present the case, the record does not demonstrate that the two ever stopped communicating. To the contrary, as this Court found in *Volpentesta*, the defendant and his attorney "were communicating, but simply disagreeing." 727 F.3d at 673.

For example, the two disagreed about whether to present evidence that the defendant created sex tapes in his home, which the defendant thought would help to explain the sophisticated surveillance system but defense counsel believed lacked relevance. (Tr.IV.19) Presumably, had it been admitted, the sex-tape evidence could have unduly prejudiced the defendant. The jurors could have easily concluded that the defendant operated a crack house *and* made sex tapes.

The defendant and Mr. Alvarez also disagreed about whether Alvarez should file a motion in limine seeking admission of a videotaped statement that was

obviously hearsay and that surely would be –- and was -- denied.[7] (Tr.III.5-6) They disagreed about whether to file a motion to suppress the statements the defendant made while officers executed the search warrant. Mr. Alvarez wanted to file the motion, but the defendant insisted that he refrain from filing it and instead merely object during trial to the introduction of the statements. (Tr.III.6) In spite of these disagreements, Mr. Alvarez filed the motion in limine and refrained from filing the motion to suppress, just as the defendant instructed.

As the defense attorney, prosecutor, and district court all noted (Tr.III.4,6-7,9-10,13,15;Tr.IV.18-19,23-24) the disagreements between the defendant and his attorney boiled down to arguments over trial strategy, which do not constitute grounds for substitution of counsel. *Volpentesta,* 727 F.3d at 674*; United States v. Van Waeyenberghe*, 481 F.3d 951, 959 (7th Cir. 2007) ("differences in strategy do not constitute grounds for new counsel"); *Woods v. McBride*, 430 F.3d 813, 827-28 (7th Cir. 2005) ("personality conflicts and disagreements over trial strategy . . . do not constitute reversible error"); *United States v. Horton,* 845 F.2d 1414, 1418 (7th Cir. 1988); *United States v. Hillsberg,* 812 F.2d 328, 333-34 (7th Cir. 1987).

[7]At the conclusion of the first hearing on the defendant's motion for new counsel, the court found that Mr. Alvarez had already filed the motion in limine to allow the videotaped statement, which took "much of the teeth" out of the defendant's motion. (Tr.III.15)

In determining whether a total breakdown in communication occurred between defense counsel and client, courts consider whether, notwithstanding any disagreement between lawyer and client, counsel was still able to provide a vigorous defense." *United States v. Ryals*, 512 F.3d 416 (7th Cir. 2008). Here, in spite of disagreements over strategy, Mr. Alvarez vigorously represented the defendant at several pre-trial hearings, the trial itself, and at the defendant's sentencing. Mr. Alvarez provided a spirited and robust defense to what was a straightforward case. The district court therefore did not abuse its discretion in declining to appoint the defendant a new attorney.

**4. Mr. Alvarez provided effective assistance of counsel**

The defendant acknowledges (Def.Br.41) that, even if he were to establish that the district court abused its discretion in denying his motions, he must also satisfy the *Strickland* ineffective-assistance standard by demonstrating that his attorney's performance was constitutionally deficient and, but for his deficiencies, the outcome of proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *see also Simmons,* 582 F.3d. at 735 (defendant must demonstrate that he was denied the effective assistance of counsel in order to show that he was prejudiced by the denial of his motion for new counsel); *Van Waeyenberghe*, 481 F.3d at 959 ("notwithstanding an abuse of discretion, we will

affirm the district court's decision unless [the defendant] can establish that he was deprived of his Sixth Amendment right to effective assistance of counsel); *Harris*, 394 F.3d at 552 (same).

Perhaps because the defendant recognizes that the *Strickland* test presents an insurmountable hurdle on this record, he invites (Def.Br.41-45) this Court to change its analysis. He argues that this case presents a vehicle for addressing an asserted conflict in the lower courts regarding the proper remedy for a district court's erroneous denial of a motion to substitute counsel. But, the district court did not abuse its discretion in denying the motions, so no error occurred and this Court need not address the defendant's argument. Even if this Court were to consider defendant's invitation to adopt a new analysis, it should decline as the defendant presents no sound reason for this Court to veer from its well-reasoned precedents.

First, citing to *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), the defendant argues (Def.Br.42) that reversal should follow automatically from a district court's denial of a new-counsel motion. The defendant's reliance (Def.Br.41-42,46-47) on *Gonzalez-Lopez* is misplaced for two reasons. First, *Gonzalez-Lopez*'s holding that a denial of the right to counsel of choice is not subject to harmless-error review does not apply here because the defendant was

represented by appointed counsel, not retained counsel. Second, in *Gonzalez-Lopez*, the trial court disqualified the defendant's retained counsel before trial. That counsel was therefore absent from the trial and sentencing proceedings. In marked contrast, Mr. Alvarez represented the defendant during every stage of the proceedings, from pre-trial hearings through the sentencing hearing.

The defendant argues (Def.Br.42-48) in the alternative this Court should apply a harmless-error standard once it determines that a district court abused its discretion in denying a defendant's motion for new appointed counsel. But, the Supreme Court had made clear that the purpose of providing assistance of counsel "is simply to ensure that criminal defendants receive a fair trial," *Strickland*, 466 U.S. at 689, and that in evaluating Sixth Amendment claims, "the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such." *United States v. Cronic*, 466 U.S. 648, 657, n.21 (1984). "Thus, while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat*, 486 U.S. at 153 (citing *Morris*, 461 U.S. at 13-14; *Jones v. Barnes,* 463 U.S. 745 (1983)). As this Court has made clear, although the

Sixth Amendment right to counsel includes the right to choice of counsel, "this right must be understood with regard to its function in our constitutional scheme, especially where indigent defendants are concerned." *United States v. Brown*, 79 F.3d 1499, 1505 (7th Cir. 1996).

So, to succeed on a claim of attorney ineffectiveness, the defendant must demonstrate both that his counsel's conduct fell below an objective standard of reasonableness and that his counsel's substandard performance prejudiced him. *Strickland,* 466 U.S. at 687. To satisfy the first prong of the *Strickland* test, the defendant must show that his attorney's "representation fell below an objective standard of reasonableness." *Id.* In assessing the adequacy of counsel's performance, the court's scrutiny must be highly deferential, allowing ample room for differences of professional opinion among attorneys as to how one might best represent the defendant. *Harris*, 394 F.3d at 555.

The defendant raises no complaint about his attorney's performance at his sentencing. With respect to Mr. Alvarez's performance at trial, he raises a single claim: his attorney was ineffective in failing to secure Andrew Wallace's testimony. (Def.Br.48) In advancing this claim, the defendant incorrectly says (Def.Br.49) Mr. Alvarez had only one conversation with Andrew Wallace. The record shows that, prior to trial, counsel asked Wallace to contact him, but to no

avail. Eventually, counsel telephoned Wallace, but when he identified himself as the defendant's attorney, Wallace hung up. (Tr.III.14-15) During trial, the defendant's family was in contact with Wallace, who represented he would testify for the defendant. The morning he was slated to be called, Mr. Alvarez represented to the court that he had spoken with Wallace three times the night before. Wallace advised Mr. Alvarez that he was prepared to testify and that he would be present that morning. Wallace, however, kept asking questions about the legal implications of testifying and then failed to show up. (Tr.808-09)

Despite his repeated efforts to locate Wallace, Mr. Alvarez maintained he had serious concerns about calling Wallace to testify because it was unclear what he would say. (Tr.758-59) Contrary to the defendant's claim, Mr. Alvarez simultaneously attempted to secure Wallace's appearance at trial while protecting his client's interests by continuously evaluating whether it was prudent to call him as a witness. With respect to Mr. Alvarez's performance, after the trial, the district court remarked. "Mr. Alvarez has performed his duties in a most effective manner; especially considering the hand he was dealt." (Tr.IV.23-24)The court also observed "Quite frankly, Mr. Alvarez has done a very good job." (Tr.IV.23-24)

Even if the defendant could somehow show that his counsel's performance was deficient, he cannot show that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. *Strickland,* 466 U.S. at 687. That Wallace repeatedly changed his story[8], hung up on lawyers and detectives, and failed to show up to testify on the defendant's behalf as promised, undermines the defendant's argument that Mr. Alvarez's failure to secure Wallace's appearance at trial probably affected the trial's outcome.

On this record, it is implausible that Wallace's testimony could have altered the verdict (especially given the video evidence of the second controlled purchase). Given Wallace's concerns about the legal implications of his testimony, it is far more likely he would have done more harm than good to the defendant had he testified.

Moreover, the circumstances of the controlled drug purchases between Wallace and the defendant constituted a fraction of the government's evidence. Again, the officers caught the defendant with the drugs and buy money in his

[8]Although Wallace confessed in a sworn affidavit that he lied to Officer Bonnett about purchasing cocaine from the defendant during the controlled buys, the Magistrate Judge found that the evidence introduced at the hearing on the defendant's motion to suppress evidence "factually negated [Wallace's] retraction" and Wallace's affidavit "lacked credibility." (R.30,pp.16,n.4,17)

bedroom – a bedroom he occupied when they entered his house to execute the search warrant. Then, while officers searched the home, the defendant confessed three times that the damning evidence in that bedroom all belonged to him.

In sum, the district court did not abuse its discretion in denying the defendant's motion for new appointed counsel. In any event, the defendant has failed to show that his counsel was ineffective in securing the testimony of Andrew Wallace.

## III. The Defendant Waived His Argument That His Statement Was Inadmissible By Failing to Raise it Before Trial

Lastly, the defendant argues (Def.Br.51-53) that the district court should have suppressed his statement to Detective Bonnett made at the scene because, according to the defendant, it was the product of a custodial interrogation and he was not *Mirandized*. The defendant, however, failed to raise this argument pre-trial, so it is waived and this Court should decline to review it.

### A. Standard of Review

When reviewing a district court's determination on a motion to suppress, this Court normally reviews conclusions of law de novo and factual determinations for clear error. *United States v. Lee*, 618 F.3d 667, 673 (7th Cir. 2010). Arguments that have been waived, however, are not reviewable under any standard. *United States v. Acox*, 595 F.3d 729, 730 (7th Cir. 2010).

### B. Analysis

Federal Rule of Criminal Procedure 12(e) provides: "A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides." Rule 12(b)(3), titled "Motions That Must Be Made Before Trial", includes a "motion to suppress evidence". Fed. R. Crim. P. 12(b)(3)(C).

In *Acox*, this Court explained the reasoning behind the rule: "A mid-trial motion to suppress may require a delay of days or weeks while evidence is marshaled and presented. Requiring all suppression motions to be made in advance allows the trial itself to be conducted without interruption and serves a second function as well: it ensures that, if the judge excludes evidence, the prosecutor can obtain appellate resolution free from any problem under the . . . double jeopardy clause." 595 F.3d at 730-31.

The foundation for the defendant's objection – a contention that his statement was the product of a custodial interrogation before he had received his *Miranda* warnings – amounted to a motion to suppress that was required to be made before trial. *See id.* at 732 (the term "motions to suppress" covers efforts to invoke the *Miranda* doctrine). The defendant does not argue otherwise. In fact, he acknowledges (Def.Br.51) that his mid-trial objection (Tr.362) amounted to a motion to suppress. Because the defendant failed to file a pre-trial motion to suppress his statement, he has waived his objection to use of the evidence. *Id.* at 731.

Although Rule 12(e) allows a district court to excuse the waiver for "good cause," the defendant did not ask the district court to do so. When, as here, trial counsel never tries to show good cause, a court of appeals "may still inquire

whether, if a motion for relief had been made and denied, the district court would have abused its discretion in concluding that the defense lacked good cause." *Id.* at 732.

Here, the defendant does not address the issues of waiver or "good cause" in his brief. Below, the defendant's counsel represented to the court that he had intentionally declined to file a motion to suppress his client's statement prior to trial because that was his client's directive. But a disagreement with counsel over pre-trial strategy cannot amount to good cause for failing to file a timely motion. It certainly cannot lead to the conclusion that the district court would have abused its discretion by finding the absence of good cause had a motion to set aside the waiver been made.

By failing to file pre-trial a motion to suppress his statement, the defendant waived the argument and this Court should decline to address it. *United States v. Combs,* 657 F.3d 565, 568 (7th Cir. 2011) (A defendant waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets unless the court grants relief from the waiver for good cause); *United States v. Clark,* 657 F.3d 578, 582-83 (7th Cir. 2011); *United States v. Johnson,* 655 F.3d 594, 600 (7th Cir. 2011).

In any event, the defendant's argument is meritless. To protect an individual's right against self-incrimination, the Supreme Court held in *Miranda v. Arizona,* 384 U.S. 436 (1966), that a suspect must be advised of certain rights before being subjected to custodial questioning. To implicate *Miranda*, the suspect must be both "in custody" and subject to "interrogation." *United States v. Yusuff*, 96 F.3d 982, 987 (7th Cir. 1996*); United States v. Shlater*, 85 F.3d 1251, 1256 (7th Cir. 1996) (*Miranda* applied only to "custodial interrogation" of the defendant).

A person is "in custody" when his movement is restrained to the degree comparable to a formal arrest. *Yusuff*, 96 F.3d at 987; *United States v. Murray*, 89 F.3d 459, 461 (7th Cir. 1996). The only relevant inquiry is "how a reasonable man in the suspect's shoes would have understood his situation." *United States v. James*, 113 F.3d 721, 726 (7th Cir. 1997). In other words, would a reasonable person have felt free to leave? *Yarborough v. Alvarado*, 541 U.S. 652, 663 (2004). The defendant was handcuffed in the living room during the execution of the search warrant and we concede that a reasonable person in his situation would not have felt free to leave.

Although the defendant was in the custody of the police at the time he made the statements, his response was not "the product of [an] interrogation." *Rhode Island v. Innis*, 446 U.S. 291, 299 (1980). The term "interrogation," refers to express

questioning or its functional equivalent "that the police should know [is] reasonably likely to elicit an incriminating response from the suspect." *Id.* at 309; *Pennsylvania v. Muniz*, 496 U.S. 582, 600 (1990). The Supreme Court has recognized that not "all statements obtained by the police after a person has been taken into custody are to be considered the product of interrogation." *Innis*, 446 U.S. at 299. The court asks whether an objective observer would have viewed the questioning as reasonably likely to elicit an incriminating response. *United States v. Shlater*, 85 F.3d 1251, 1256 (7th Cir. 1996).

The record shows that Detective Bonnett, after learning that the defendant was making incriminating statements to Ms. Johnson, simply asked if the defendant would step into another room to talk to him. (Tr.410) That invitation to engage in conversation, which called for a simple "yes" or "no" answer, was neither likely to nor designed to elicit an incriminating response. *See South Dakota v. Neville*, 459 U.S. 553, 564 (1983) (In the context of an arrest for driving while intoxicated, a police inquiry of whether a suspect will take a blood-alcohol test is not an interrogation within the meaning of *Miranda*).

The risk of incrimination here was limited to a non-responsive answer, which is what the defendant gave. *United States v. Evans,* 581 F.3d 333, 343 (6th Cir. 2009) (verbal threat to kill made post-arrest against federal law enforcement

office was spontaneously made and unresponsive to officer's question and thus did not implicate *Miranda)*; *Innis*, 446 U.S. at 291 (*Miranda* inapplicable when suspect's incriminating comments came in response to officers' statements that could not have reasonably been expected to elicit an incriminating response); *United States v. Castro*, 723 F.2d 1527, 1532 (11th Cir. 1984)( statements that are voluntary or unresponsive to the questions posed are not protected by *Miranda*.). The defendant's unexpected and unresponsive reply to the officer's question cannot retroactively turn a non-interrogation inquiry into an interrogation for *Miranda* purposes. *See United States v. Woods*, 711 F.3d 737, 742 (6th Cir. 2013). The district court properly found, therefore, that the defendant's statements were voluntarily made and not made in response to interrogation. (Tr.417-18)

Finally, the first two times the defendant stated "everything in the bedroom is mine" (Tr.396-97), he said it (within earshot of Officer Mazrim) to Ms. Johnson while the two were sitting together in the living room. The defendant does not challenge the admissibility of these statements. Nor could he. Volunteered statements, such as statements not given in response to any question, are admissible. *United States v. Ambrose*, 668 F.3d 943, 955 (7th Cir.), *cert. denied*, 133 S.Ct. 249 (2012); *United States v. Abdulla*, 294 F.3d 830, 834 (7th Cir. 2001); *Andersen v. Thieret*, 903 F.2d 526, 532 (7th Cir. 1990); *McGowan v. Miller*, 109 F.3d

1168, 1175 (7th Cir. 1997). Given that the defendant made the same statement two times just minutes before, and those statements were clearly admissible, the statement to Officer Bonnett was cumulative and any error in admitting it was harmless. *See Lee*, 618 F.3d at 673 (an error is harmless if the prosecution can prove beyond a reasonable doubt that the constitutional error did not contribute to the verdict).

In sum, the defendant's statement was voluntary and non-responsive to the officer's invitation to engage in conversation and thus was not covered by *Miranda.* Accordingly, the district court properly denied the defendant's motion to suppress the statement.

## CONCLUSION

For the reasons presented above, this court should affirm the district court's judgment.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32 in that it contains 14,739 words and 1,349 lines of text as shown by Microsoft Word 2010 used in preparing this brief.

/s/ Linda L. Mullen
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**CERTIFICATE OF SERVICE**

I hereby certify that on February 26, 2014, I caused the Brief of Plaintiff-Appellee to be electronically filed with the Clerk of the Court using the ECF system which will send a notification to counsel of record, Sarah O'Rourke Schrup.

/s/ Linda L. Mullen
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