No. 14-1665

United States Court of Appeals
for the Seventh Circuit

United States of America,
Plaintiff–Appellee,

v.

Bruce Jones,
Defendant–Appellant.

Appeal from the United States
District Court for the Southern
District of Indiana

Case No. 1:12-Cr-00072-TWP-DML-1
The Honorable Tanya Walton Pratt

Appeal from the United States District Court
For the Southern District of Indiana, Indianapolis Division
Case No. 1:12-cr-72-TWP-DML-1
The Honorable Tanya Walton Pratt

Petition for Rehearing with Suggestion for Rehearing En Banc

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Disclosure Statement

I, the undersigned counsel for the Defendant–Appellant, Bruce Jones, furnish the following list in compliance with Fed. R. App. P. 26.1 and Cir. R. 26.1:

1. The full name of every party or amicus the attorney represented in the case:

   Bruce Jones.

2. This party is not a corporation.

3. The names of all law firms whose partners or associates are expected to appear for the party before this Court:

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Federal Rule of Appellate Procedure 35 Statement of Reasons for Rehearing

This Court should grant rehearing en banc on the question whether appellate courts have jurisdiction over some counts in a criminal case when they are fully resolved in the district court while others remain pending. This Court's approach is confusing and internally inconsistent. Additionally, this Court should rehear the case to more fully consider its minority approach in the broader split of authority nationwide. The panel's decision conflicts with at least four federal courts of appeals and two state courts. Finally, this case is of exceptional importance because some defendants are permitted to proceed with their appeals, while others are not, solely depending on the circuit in which they were convicted. Finally, at a minimum, the panel should clarify the final sentence of its order regarding the district court's consideration of Mr. Jones's sentence on the first set of severed counts that were the subject of this appeal. This Court retains jurisdiction to determine whether it has jurisdiction over Jones's appeal. *See Citizens for a Better Env't v. Steel Co.*, 230 F.3d 923, 926 (7th Cir. 2000).

Argument

I. Background

Jones was initially indicted on May 5, 2012. (R.1.) After several changes to the indictment, the government charged Jones with one count of healthcare fraud, 18 U.S.C. § 1347 (2012), and three counts of being a felon in possession of a firearm and ammunition, 18 U.S.C. § 922 (g)(1). (R.49.) The district court severed the healthcare-fraud count from the felon-in-possession counts, (R.94), and Jones was tried and convicted of the felon-in-possession charges in October 2013, (R.219–22). He was subsequently sentenced in March 2014 (R.224), and filed his Notice of Appeal the same day, (A.21). The district court entered judgment on those charges on March 25, 2014. (R.187.) In October 2014 Jones was separately tried and convicted of the

healthcare fraud charge. (*See* R.286, 290, 295.) Jones is currently awaiting sentencing on that charge.

On January 13, 2015, the government moved to suspend briefing, to vacate Jones's sentence as to counts 2, 3, and 4, and to remand for sentencing on all counts. (Gov.'s Mot., Jan. 13, 2015, ECF No. 26.) In its motion, the government argued that Jones's appeal on counts 2, 3, and 4 should ultimately be considered "in tandem" with any appeal of count 1 on appeal. (Gov.'s Mot. 2.) Relying on this Court's decision in *Kaufmann I*, the government contended that consolidating the counts for purposes of sentencing reduces confusion when applying the grouping rules of the U.S. Sentencing Guidelines Manual § 3D1.1. (Gov.'s Mot. 3) (citing *United States v. Kaufmann* (*Kaufmann I*), 951 F.2d 793, 795 (7th Cir. 1992)). The government pointed to *United States v. Wilson* as an example of a case in which this Court recently suspended briefing under similar circumstances at the parties' request. (Gov.'s Mot. 4) (citing Order, *United States v. Wilson*, No. 13-2461 (7th Cir. Sept. 5, 2013)).

Jones opposed the government's motion, and asked this Court to allow his appeal of counts 2, 3, and 4 to proceed. (Resp. in Opp'n, Jan. 20, 2015, ECF No. 27.) Jones noted that the district court expressly severed—under Federal Rule of Criminal Procedure 14(a)—the felon-in-possession counts at both parties' request. (Resp. in Opp'n 2.) After severance, the jury tried and convicted Jones, he was subsequently sentenced on those counts, and the district court entered judgment on them. (Resp. in Opp'n 1–2.) Jones also stressed that he could be substantially prejudiced if this Court dismissed his appeal and allowed resentencing. Jones argued that there were sentencing errors with his felon-in-possession charges, independent of his healthcare-fraud charge, that improperly increased his sentencing guideline range. (Resp. in Opp'n 4–5); *see also* (Jones Br. 28–32). Because the Probation Office sought to use the exact same calculations in its

proposed grouping of the felon-in-possession counts with the healthcare-fraud count, it was possible that these underlying errors could be masked by the subsequent sentence. (Resp. in Opp'n 4–6.)

The motions panel denied the government's motion and dismissed for lack of jurisdiction, finding that there was as of yet no final judgment. (Order 2, Jan. 29, 2015, ECF No. 28.) The panel held that although all of the counts in *Kaufmann I* "were considered together in a single criminal trial," *Kaufmann I*, 951 F.2d at 795, "it doesn't follow that counts tried separately should necessarily be treated as two cases." (Order 2). The panel further noted that although the district court severed the counts into two separate trials, all of the counts remained under the same docket number, and the severance order did not note that the case was to be separated into entirely separate proceedings. (Order 2.) Thus, it concluded that there is no final judgment, and it dismissed Jones's appeal. (Order 2.) In its final paragraph, this Court also noted that "when sentencing Jones on his conviction for healthcare fraud, the district court can take into account the sentence imposed on the firearms counts." (Order 2.)

II. Reasons for Granting Panel Rehearing and Rehearing En Banc

A. This Court's approach is inconsistent and confusing

This Court has not clearly articulated its approach to appellate jurisdiction when a criminal defendant has obtained final judgment on some counts but where other counts remain pending in the trial court. In *Kaufmann I*, this Court has found that there was no final judgment to appeal—and thus no appellate jurisdiction—when the defendant was convicted on some counts, but granted a mistrial on others. *United States v. Kaufmann* (*Kaufmann I*), 951 F.2d 793, 795 (7th Cir. 1992) ("the mistrial leaves counts three and four unresolved. Therefore, there is no final, appealable judgment."). The Court was explicit, however, that in that case "all of the

counts [were] considered in a single criminal trial." *Id.* A year later, this Court considered the same jurisdictional issue in *United States v. Kaufmann* (*Kaufmann II*), 985 F.2d 884 (7th Cir. 1993). Citing to other circuits' approach, this Court concluded that *Kaufmann I* was a "novel" approach to finality in criminal cases, and "decline[d] to extend it any further." *Id.* at 891 (citing *United States v. Cicco,* 938 F.2d 441, 442 n.1 (3d Cir. 1991); *United States v. Bay State Ambulance & Hosp. Rental Serv., Inc.*, 874 F.2d 20, 22 (1st Cir. 1989); *United States v. Richardson,* 817 F.2d 886, 887 (D.C. Cir. 1987)). More recently, in *Wilson*, this Court implicitly agreed with the parties' joint assertion that appellate jurisdiction existed when it stayed briefing, rather than outright dismissing for lack of jurisdiction. Order, *United States v. Wilson*, No. 13-2461 (7th Cir. Sept. 5, 2013) (suspending briefing and ordering status report but not dismissing for lack of jurisdiction). Yet in its order in Mr. Jones's case, the panel expressed its belief that the single criminal trial in *Kaufmann I* was not a dispositive fact in its ruling that no appellate jurisdiction existed. (Order 2) (internal citation omitted) ("It's true, as Jones points out in his response, that all the counts in *Kaufmann* 'were considered together in a single criminal trial.' But although *Kaufmann* noted that fact, it doesn't follow that counts tried separately should necessarily be treated as two cases.").

This Court's divergent approach prejudices defendants and confuses district courts. Defendants here do not definitively know when their time for appeal is triggered in the situation where some counts are final and others remain pending. And although defendants may know that sentencing signals final judgment in a criminal case, *Berman v. United States*, 302 U.S. 211, 212 (1937) ("Final judgment in a criminal case means sentence."), this principle may not apply in this Court. The same confusion impacts district courts that may have intended to allow an immediate appeal from some counts, but have not engaged in the requisite formalities that it

appears this Court considers dispositive. (Order 2) ("Although the district court in this case ordered separate trials, all counts remain under the same docket number . . . ."). Defendants may pursue issues on appeal, such as the Rule 11 violation that Mr. Jones raised here,[1] that could prejudice them before the lower court if the case is dismissed without the benefit of this Court's review. In short, the law of the circuit will be furthered by a full rehearing and a published opinion establishing this Court's approach.

B. *The federal courts of appeals, as well as some state courts, are split on this jurisdictional question.*

At least six circuits and two state courts have weighed in on this issue and have reached varied results. The Second, Eighth, Ninth and DC Circuits, along with the Nebraska Supreme Court and the Oregon Court of Appeals, have permitted defendants to appeal some counts even though other remain pending in the trial court. *See United States v. Anderson*, 759 F.3d 891, 893 (8th Cir. 2014) (citing *Abrams* and finding that it had jurisdiction); *United States v. King*, 257 F.3d 1013, 1021 (9th Cir. 2001) (same); *United States v. Abrams*, 137 F.3d 704, 707 (2d Cir. 1998) (explicitly rejecting this Court's approach in *Kaufmann I*, finding that it had jurisdiction to consider an appeal despite the fact that not all of the counts of a single indictment had received final judgment); *United States v. Powell*, 24 F.3d 28, 30 (9th Cir. 1994) ("[E]ach conviction on severed counts should be separately appealable upon the imposition of sentence."); *Richardson*, 817 F.2d at 887 (internal citations omitted) (permitting appeal on two counts even though other count, on which the jury was hung, remained in the lower court); *State v. McCave*, 805 N.W.2d

[1] In his brief on appeal, Jones argued that the district court had improperly participated in the plea negotiation process. Had this Court considered the question and agreed, the remedy would have been a remand before a different district court judge. *See, e.g.*, *United States v. Hemphill*, 748 F.3d 666, 677 (5th Cir. 2014) (finding that the appropriate remedy for a Rule 11 violation is vacatur of the judgment and remand for proceedings before a different district court judge).

290, 301–04 (Neb. 2011) (same); *State v. Smith*, 785 P.2d 1081, 1081–82 (Or. 1990) (internal citation and footnote omitted) (noting that "[a] clerical act that leaves severed counts under the same trial court number does not change the fact that, after severance, the counts were separate cases. The judgments here are final, and the first notice of appeal did not affect the trial court's jurisdiction over the remaining charges.").

Notably, the Second Circuit in *Abrams* explicitly addressed this Court's approach. *Abrams*, 137 F.3d at 707. The court found that *Kaufmann I* represented "the minority approach," and rejected it, reasoning that if it were to adopt this Court's approach, the defendant would be severing his sentence with no right to appeal it, an unfair result. *Id.* The court concluded that the Seventh Circuit's approach in *Kaufmann I* would "substantially delay the execution of a valid conviction and sentence, force trials that may never be needed, and impose expense and burden on the prosecution and the defense—undesirable results that are not mandated by the jurisdictional statute." *Id.*

Conversely, the First Circuit adopted the approach that the panel employed in Jones's case. *United States v. Leichter*, 160 F.3d 33, 37 (1st Cir. 1998). In *Leichter*, the government charged several defendants with manufacturing and selling non-FDA-approved heath catheters in more than a 390-count indictment. *Id.* at 34. The district court chose to try the defendant on count one first, and delay further proceedings on the other counts. *Id.* The defendants were convicted and the district court sentenced them on count one. *Id*. On appeal, the First Circuit held that it lacked jurisdiction and dismissed the appeal. *Id.* at 37. It reasoned that the district court did not sever the counts into two separate cases under Federal Rule of Criminal Procedure 14, but instead separated the charges into two separate trials under its case management authority. *Id.* at 35–36. The court further stated that "[w]hile the separation of defendants, or less often counts,

into two separate cases is a form of relief commonly granted under Rule 14, nothing in the rule says or means that every action taken under Rule 14 to remedy prejudice necessarily involves the separation of a case into two separate cases." *Id.* at 36. And finally, the court noted that it was not "confront[ing] a situation in which appellants are languishing in jail awaiting trial on the remaining counts." *Id.* at 37.

As these cases illustrate, the courts are in conflict about when an appellate court has jurisdiction when some counts remain pending below. Although *Kaufmann I* and *Leichter* ultimately found that their courts did not have jurisdiction, these cases are the minority. Most other circuits recognize the fundamental fairness of allowing a criminal defendant the right to immediately appeal his judgment when he receives final judgment.

C. *This Court should consider en banc review to resolve this jurisdictional issue in fairness to criminal defendants in the Seventh Circuit.*

Preventing Jones and other similarly-situated defendants from timely adjudication of their appeal is unfair. *King*, 257 F.3d at 1021 (noting that "the court's interest in ensuring a defendant has the right to appeal a sentence when he begins serving it outweighs the government's concerns about piecemeal appellate review."). Significantly, in the two cases employing the minority approach, *Leichter* and *Kaufmann I*, the lower courts stayed the execution of the defendants' sentences, so they were not "languishing in jail" awaiting the termination of their cases. *See Leichter*, 160 F.3d at 37; *Kaufmann I*, 951 F.2d at 795. Jones, however, does remain in jail while he awaits sentencing on his remaining healthcare-fraud count. In such instances, "[t]he insistence on final disposition of all counts, treating the entire prosecution as a single judicial unit," works an unfairness when, as here, "an attempt is made to enforce the sentence on the counts that have been finally resolved." 15B Charles Alan Wright et al., Federal Practice and Procedure § 3918.7 (2d. 1992).

Second, a ruling resting on a failure to comply with technical requirements—like the fact this case was not separated into two separate dockets, on which the panel relied—does not divest this Court of jurisdiction. As a threshold matter, the district court below seemingly did intend to separate the counts; in granting both parties' motions to sever it explicitly stated that count 1 was severed from count 2–4, and that the counts would be tried separately. (R.94.) Therefore, given the evidence of this contrary intent, the lack of a formal separation into two separate docket entries should not be the sole determinant of this Court's jurisdiction. In an analogous civil context, the Supreme Court considered whether the Second Circuit had jurisdiction despite failing to find "any document that looks like a judgment." *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 382 (1978). Construing the Federal Rules of Civil Procedure to "secure the just, speedy, and inexpensive determination of every action," the Court found that the appellate court had jurisdiction. *Id.* at 387. The Court reasoned that because the lack of a separate judgment did not mislead or prejudice the respondent, a "commonsense interpretation" led the Court to conclude that "the technical requirements for a notice of appeal were not mandatory." *Id.* Applying just such a "commonsense" approach to this jurisdictional question is preferable to defeating jurisdiction based on a technicality, particularly when incarcerated criminal defendants are involved.

Conclusion

For the foregoing reasons, this Court should grant rehearing en banc. At a minimum, Jones respectfully requests that the panel clarify its statement that "when sentencing Jones on his conviction for healthcare fraud, the district court can take into account the sentence imposed on the firearms counts." (Order 2.) It is unclear whether the panel intended to allow the district court to amend its previously imposed sentence, to resentence Jones alongside the upcoming

healthcare-fraud sentence, or to merely allow the district court to account for those convictions in calculating his separate healthcare-fraud sentence. (Order 2.)

Respectfully Submitted,

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Certificate of Compliance with Federal Rule of Appellate Procedure 32(a) and 40 and Seventh Circuit Rules 32 and 40.

1. This petition complies with the type-volume limitation of Fed. R. App. 40(b) and Circuit Rule 40 because this petition contains 9 pages, excluding the parts of the petition exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32 because this petition has been prepared in a proportionally-spaced typeface using Microsoft Word 2010, in 12-point Equity Text A font with footnotes in 11-point Equity Text A font.

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Dated: February 11, 2015

Certificate of Service

I, the undersigned, counsel for the Defendant–Appellant, Bruce Jones, hereby certify that I electronically filed this brief and appendix with the clerk of the Seventh Circuit Court of Appeals on February 11, 2015, which will send the filing to counsel of record in the case.

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