No. 15-1792

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, Indianapolis Division
Case No. 1:12-CR-00072-TWP-DML-1
The Honorable Tanya Walton Pratt

Reply Brief of Defendant–Appellant Bruce Jones

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I. The pretrial restraint of Jones's life insurance policies violated his Fifth and Sixth Amendment rights.

Jones challenges the precise Sixth Amendment violation articulated in *Luis*, yet the government skirts it, opting instead to claim Jones forfeited the claim. (Gov't Br. 15–17); *see also Luis v. United States*, 136 S. Ct. 1083, 1088 (2016). Relying on this Court's 1988 decision in *Moya-Gomez*, yet ignoring that decision's Sixth Amendment analysis, the government instead focuses on a Fifth Amendment due process claim that Jones did not even raise on appeal: "a situation where the defendant presents a bona fide need to utilize the assets subject to the restraining order to conduct his defense." *United States v. Moya-Gomez*, 860 F.2d 706, 730 (7th Cir. 1988); *see* (Gov't Br. 21). The Fifth Amendment claims Jones did raise on appeal—regarding the necessity of a pre-restraint hearing, (App. Br. 24)—were not ones Jones could have raised below because the government opted to file its motion ex parte and under seal. (R.201.) Jones first learned of the deprivation after it had already occurred. (R.203.)

After almost three pages of wind-up focusing on the wrong constitutional provision and a due process argument that Jones did not pursue, (Gov't Br. 14–17), the government summarily announces that this Court should employ plain-error review, (Gov't Br. 17). But even if this position had some merit, it would not counsel for a different outcome in this case. "In light of [an] intervening Supreme Court decision," a district court's

error is plain, *United States v. Jumah*, 493 F.3d 868, 875 (7th Cir. 2007), and such an infringement of a defendant's fundamental constitutional rights "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings," *Henderson v. United States*, 133 S. Ct. 1121, 1126 (2013) (alteration in original). *See also Luis*, 136 S. Ct. at 1089 (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006)) (finding this constitutional violation "structural" error that affects the entire framework of trial); *Powell v. Alabama*, 287 U.S. 45, 68 (1932) (the Sixth Amendment right to counsel is "fundamental").

A. The government must demonstrate the taintedness of the assets before they may be restrained consistent with the Sixth Amendment.

Unlike prior precedent on which the government relies (Gov't Br. 15, 19) (citing *Caplin & Drysdale*, *Monsanto*, and *Moya-Gomez*), *Luis* changed the landscape of ***all*** pretrial, postindictment forfeitures, drawing a constitutional line that "distinguishes between a criminal defendant's (1) tainted funds and (2) innocent funds needed to pay for counsel." *Luis*, 136 S. Ct. at 1089–90, 1095. The government's attempt to distinguish the forfeiture statute it chose to use—21 U.S.C. § 853—from the one at issue in *Luis*—18 U.S.C. § 1345—is unavailing. (Gov't Br. 18–19.) The government claims that § 853 only applies to tainted assets, does not permit the use of substitute assets,[1] and therefore does not implicate the Sixth Amendment

[1] The government's interpretation of § 853 is questionable. It reads § 853(p) as not covering the restraint of assets, only later forfeitures. (Gov't Br. 18 n.3.) But given

like § 1345. This is pure question begging because, as discussed below, post-*Luis* the government must prove taintedness, not merely "alleg[e]" as it did here. (Gov't Br. 19.) Thus, § 853 does not operate independent of the Sixth Amendment;[2] all forfeiture statutes are subject to *Luis*'s distinction between tainted and untainted assets.

This difference is critically important because with the former the government holds a substantial interest that justifies the assets' restraint; but with the latter, the government lacks an equivalent property interest. *Id.* at 1092. The natural implication of this holding is that it alters the burdens of proof and their timing. Now the government must first demonstrate that assets are tainted before it can obtain pretrial forfeiture because "the restraint itself suffices to completely deny [the Sixth Amendment] right." *Luis*, 136 S. Ct. at 1094. Thus, although the government has always born the burden of establishing probable cause, *see United States v. $506,231 in U.S. Currency*, 125 F.3d 442, 451 (7th Cir. 1997), what it must do to satisfy that burden post-*Luis* is now more and different. *Luis*, 136 S. Ct. at 1092, 1095. It

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the multiple cross-references to the sections dealing with restraint throughout the statute, that conclusion is ambiguous at best. And under the Rule of Lenity, any ambiguity in the reach of the statute would be construed in the defendant's favor. *United States v. Santos*, 553 U.S. 507, 514 (2008).

[2] Indeed, this Court's prior precedent—on which the government heavily relied—shows that § 853 has long carried Sixth Amendment implications. *See Moya-Gomez*, 860 F.2d at 720–21 ("[W]e cannot say that the forfeiture provision of the indictment did not affect his right to counsel of choice. Under the 'relation back' provision of [853(c)], . . . '[p]re-conviction restraining orders *and, indeed, the mere threat of ultimate forfeiture without any such orders* operate directly and immediately to inhibit a defendant's ability to retain private counsel for his defense.'" (internal citation omitted)).

must, *ab initio*, demonstrate the taintedness of the assets it wants to restrain. *Luis*, 136 S. Ct. at 1094 (rejecting notion of "unfettered, pretrial forfeiture of . . . property with no connection to the charged crime"); *id.* at 1100 (Thomas, J., concurring) (stating forfeiture requires "a nexus . . . between the item to be seized and criminal behavior"). The defendant does not bear the burden either of raising this claim or of proving it. *Luis*, 136 S. Ct. at 1092 ("Here, . . . *the Government seeks to impose* restrictions on Luis' *un*tainted property *without any showing* of any . . . governmental interest in that property.") (emphasis added); *id.* at 1102 (Thomas, J., concurring) ("The Sixth Amendment does not permit the Government's bare expectancy of forfeiture to void [the right to counsel]."); *cf. Moya-Gomez*, 860 F.2d at 720–21 ("[*T*]*he defendant must demonstrate* that he desired to hire counsel of choice and that the threat of forfeiture prevented him from doing so.") (emphasis added). For this reason, the government is wrong to categorize Jones's argument as a mere challenge to the sufficiency of probable cause. (Gov't Br. 19.) The question of proof of probable cause is inextricably bound with the constitutional question decided in *Luis* because only tainted assets may be restrained and the government is the party that must prove that fact. *Luis*, 136 S. Ct. at 1095 (referencing the "tracing rules" that can be used to separate tainted and untainted assets).

Under that standard, the government failed. It never tried to show that the six life insurance policies were tainted assets subject to forfeiture.

The government's ex parte motion conclusorily stated that "there is probable cause to believe that the premiums and contributions made to the following accounts constitute or derived from proceeds obtained from the health care fraud." (R.201.) The government did not employ any well-establish "tracing rules," *Luis*, 136 S. Ct. at 1095, let alone provide any dates, values, or periods of contribution for the six policies.

B. Jones suffered a due process violation because he was not afforded a pre-restraint hearing.

Under the Fifth Amendment, Jones was entitled to a pre-restraint hearing in which the government bore the burden of demonstrating that the frozen assets were tainted and properly restrained. The district court's failure to hold such a hearing in Jones's case deprived him of his liberty interest in his Sixth Amendment right to counsel of his choice and his right not to be deprived of property without due process of law. This precise issue—left open by this Court in *United States v. Kirschenbaum*, 156 F.3d 784, 792–93 (7th Cir. 1998)—was squarely presented here, (App. Br. 24).

The government, however, ignores Jones's **pre**-restraint due process argument and instead argues the **post**-restraint due process right raised and addressed in *Moya-Gomez*. (Gov't Br. 20.) The government casts Jones's argument in this light ostensibly to shift the burden to Jones and to argue he that failed to demonstrate a bona fide need for the restrained assets. By failing to respond at all to the issue that Jones actually raised on appeal, the government has waived any challenge to it. *Bonte v. U.S. Bank, N.A.*,

624 F.3d 461, 466 (7th Cir. 2010) ("Failure to respond to an argument . . . results in waiver.").

Post-*Luis*, a defendant has a constitutional right to a pre-restraint hearing on the deprivation of his liberty interest in securing counsel of choice because the government has no right to the "unfettered, pretrial forfeiture of the defendant's own 'innocent' property—property with no connection to the charged crime." *Luis*, 136 S. Ct. at 1094. *Luis* also strengthens the second property-based due-process claim by emphasizing the defendant's superior property rights in untainted property. *Id.* at 1091–92. Therefore, a defendant does not need to show bona fide need before obtaining a hearing because it is the government's responsibility to show that the assets are tainted. The absence of such a pre-restraint hearing here violated Jones's Fifth and Sixth Amendment rights, and this Court should vacate his healthcare fraud conviction.

II. Jones did not voluntarily waive his right to testify, and the government failed to prove beyond a reasonable doubt that denying Jones this constitutional right was harmless error.

This Court is adamant that the contours of a defendant's waiver of his right to testify are to be gleaned from a totality of the circumstances. *Ward v. Sternes*, 334 F.3d 696, 707 (7th Cir. 2003). Three colloquies over two days of trial show that Jones consistently affirmed his desire to take the stand. (App. Br. 26–32.) Ignoring this, the government focuses exclusively on the final few words of the third colloquy in urging this Court to find that Jones voluntarily

effected a waiver.[3] (Gov't Br. 22.) But far from an extensive, thoughtful conversation that culminated in a valid waiver, these colloquies—when viewed in context—paint a different picture: one where defense counsel and the district court acted in concert to encourage Jones to give up this "fundamental" right. *See Rock v. Arkansas*, 483 U.S. 44, 52 (1987). In short, Jones's purported waiver—despite his repeated requests to testify—stemmed from his attorney's public refusals to permit him to do so, and the district court's tacit suggestion that the defendant refrain from testifying.

A. Jones's capitulation to defense counsel's insistence and the district court's suggestion that he need not testify does not constitute a waiver of his right.

When viewed appropriately in context, Jones did not voluntarily waive his constitutional right. Jones was adamant throughout the short trial that he wanted to testify, and even before. (R.292 at 2) (Oct. 20, 2014 letter to the judge). At the end of the first day of trial, Jones again told the judge he wanted to testify. (10/27/2014 Trial Tr. 168); *see also* (10/28/2014 Trial Tr. 324–25) (Jones reiterating request on second day of trial when defense counsel tried to rest without presenting evidence).

Jones's lawyer, Inman, did not want his client to testify, which he made clear. *E.g.*, (10/27/2014 Trial Tr. 168) ("He is not going to testify if I

[3] The government also suggests that what happened to Jones is not sufficiently egregious to find a constitutional violation when compared to this Court's prior cases. (Gov't Br. 23.) Each case is decided on its own facts under the totality of the circumstances, and this Court has never cabined the situations in which a waiver may be found involuntary. As discussed below, Jones's case is egregious for its own reasons: defense counsel's vociferous campaign to prevent Jones from testifying and the district court's apparent endorsement to Jones of that approach.

have anything to do with it . . . ."). Without the cooperation of his attorney, Jones felt he had no way to testify. (10/28/2014 Trial Tr. 324) ("He won't ask me any questions that I've written down, so it would do no good."); *see also* (R.292 at 2) ("Mr. Inman made it clear today that he will not allow me to testify. I can't ask myself questions. I could have cleared up issues.").

When Jones looked to the judge for guidance, the district court actively advocated for Jones to defer to his counsel and waive his right. The district court failed to explain the consequences of a waiver or to probe Jones for additional information. Instead, it urged the defendant to accede to his lawyer's preferred outcome—to not present evidence:

> **District Court:** Well, you don't necessarily have to go over any questions. Your lawyer—I mean, he knows what questions to ask. . . . And, see, the burden of proof is on the government. Your lawyer has done a— . . . a pretty good job of cross-examining the witnesses and he's made the objections. That was one of your concerns, that he wasn't going to object, but he's objected. He's been able to keep some evidence out. . . . But he's created that doubt. I mean, he can argue that, so—
>
> **Jones:** Your Honor, I bow down to your—I mean, you're the boss. I respect you and your position.
>
> *** * ***
>
> **District Court:** And I respect your position, also, okay? So you're going to concede to the advice of your counsel and not testify. And we're going to go on and send you back to the jail. And you relax this evening and come in bright and early, and we'll see what kind of argument he makes, and we'll see what happens, okay?
>
> **Inman:** Thank you, your honor.

> **District Court:** All right.
>
> *(Open court.)*
>
> **District Court:** Okay. The Court feels comfortable with the defendant's waiver of his right to testify, and so we're going to go ahead and break.

(10/28/2014 Trial Tr. 338–40.)

The district court's expressed comfort with Jones's waiver was short-lived. The next morning, the district court revisited the issue. (10/29/2014 Trial Tr. 343.) When viewed in the totality of the circumstances, this final, depthless exchange—which occurred after the defense had rested and immediately before closing arguments were set to begin—cannot overcome Jones's earlier, steadfast stated desire to testify on his own behalf.

B. Vacatur is warranted here.

The government draws on an unpublished case from 2007 for the proposition that Jones must prove that the outcome of his trial would have been different. *See* (Gov't Br. 24) (citing *Alexander v. United States*, 219 F. App'x 520 (7th Cir. 2007)). However, *Alexander* is a habeas case alleging ineffective assistance of counsel—a high bar that shifts the burden to the defendant, 219 F. App'x at 523, and Jones's case arises on direct review. Moreover, Jones has *not* raised an ineffective-assistance claim, but rather argues that the district court erred in finding that he voluntarily waived his right to testify. Indeed, some courts find this error structural, and although this Court has applied harmlessness review in other habeas cases raising

such claims, it has never done so on direct review. *Compare United States v. Butts*, 630 F. Supp. 1145, 1147 (D. Me. 1986) (applying a structural error standard in granting a defendant's motion for new trial), *with United States v. Ly*, 646 F.3d 1307, 1318 (11th Cir. 2011) (direct appeal holding that district court's failure to correct a pro se defendant's misunderstanding of his right to testify was not harmless error, "[a]ssuming that harmless-error analysis applies"). *See also Ward v. Sternes*, 334 F.3d 696, 708 (7th Cir. 2003); *Ortega v. O'Leary*, 843 F.3d 258, 262 (7th Cir. 1998) (quoting *Delaware v. Van Arsdall*, 485 U.S. 673, 684 (1986)) (applying harmlessness standard that evaluates the importance of the testimony, its cumulativeness, whether the testimony is corroborated or contradicted by other evidence, and the overall strength of the case). The Supreme Court has not decided the issue.

Even if this Court applies the harmlessness test it used in the habeas cases *Ward* and *Ortega*, the government still has not shown that the improper denial of Jones's right to testify was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967). Jones's testimony would have been important to the material issue in his case: whether Jones committed health care fraud by overbilling. The government had to prove beyond a reasonable doubt that Jones "knowingly and willfully" defrauded or fraudulently obtained the program's money. 18 U.S.C. § 1347. Jones's testimony would have countered the government's scienter claims. *See, e.g.*, (10/27/2014 Trial Tr. 168) (Jones telling the judge his billing code process,

which he believed allowed individual billing). Of course, Jones's testimony would not have been cumulative because the defense presented no witnesses. Testifying would have afforded Jones his best—and only—opportunity to rebut the government's case by providing a counter-narrative. Because the district court's denial of this opportunity was not harmless error, this Court should vacate Jones's healthcare fraud conviction.

III. The district court erred in failing to appoint a new lawyer for Jones.

The government deals in irrelevancies in asking this Court to find that the district court did not abuse its discretion in denying Jones's substitute-counsel motion. In truth, Jones has satisfied this Court's test for finding that the district court erroneously denied his request. *See United States v. Volpentesta*, 727 F.3d 666, 673 (7th Cir. 2013).

A. The district court abused its discretion in denying Jones's request for substitute counsel.

1. Jones's request was timely.

Although the government recognizes that Jones's request was timely under this Court's precedent, *see* (Gov't Br. 26) (noting that Jones's request for new counsel three weeks before trial "may have been timely" "[i]n a vacuum"), it then asks this Court take the extraordinary step of considering facts outside the health care trial as part of its timeliness inquiry. Even if this Court were to consider the irrelevant information, however, Jones's request still satisfies this factor. The government points to several facts that

it claims this Court should consider in finding Jones's presumptively timely request invalid: (1) the district court's perceptions of Jones's manipulating the first trial by changes in counsel; (2) Jones's requested continuances in the first trial; and (3) his drug overdose on the eve of the first day of trial. (Gov't Br. 26.) Actually, these facts fail to establish—and in some instances actively undermine—the government's suggestion that Jones was a serial obstructionist.

First, the district court's statement in Jones's first trial that it believed him to be "on his fifth attorney" and thus "manipulating his choice of counsel in order to delay the orderly progress of the case," (6/5/2013 Hr'g Tr. 11), was based on a misapprehension of the record. Jones did not make "multiple changes of counsel in his first trial," as the government alleges. (Gov't Br. 26.) During the adversarial portion of the criminal case, he made one: from Zaki Ali to the firm of Pumphrey & Manley. (7/5/2013 Hr'g Tr. 40–42) (Pumphrey explaining to the district court that once the adversarial portion of the case began, Jones was represented by an appointed defender "for about a minute and a half," then Ali for over a year, and then he immediately hired current counsel, the firm of Pumphrey & Manley). His new lawyers provided the district court with Jones's legitimate concerns with his prior lawyer: he had never been given a full set of pleadings and he did not feel that prior counsel handled the suppression motion adequately. (6/5/2013 Hr'g Tr. 8–9.) Thus,

Jones's decision to replace retained counsel in these circumstances was well within his rights.

Second, although Jones requested multiple continuances in the first trial, the district court granted most of them. If the district court did not view these continuances as problematic, then the government should not now be invoking them as proof of bad faith on Jones's part. Indeed, the district court did deny some of Jones's requested continuances, which shows that it was not merely rubber-stamping a pattern of defense delay. *See, e.g.*, (R.95).

Third, Jones's overdose and hospitalization before his first trial actually undercuts the government's argument. *See* (R.140.) Generally, when a defendant seeks a change in counsel, the court expresses concern that the request is a clandestine attempt delay trial and, thus, incarceration. *See, e.g.*, *Carlson v. Jess*, 526 F.3d 1018, 1026 (7th Cir. 2008) (pointing to petitioner's incarceration leading up to trial as demonstrating that his request for new counsel was not contumacious because he had nothing to gain from a delay). At the time of the overdose, the district court did not find that it was calculated to delay the trial; rather, the court recognized that Jones was in a seriously compromised mental state due to the death of his beloved brother just a few weeks earlier. (7/5/2013 Hr'g Tr. 30) ("Dr. Jones, I want to express my sympathy for your loss. And I do not believe he's malingering. I understand your grief is real . . . ."). And far from prolonging his liberty,

Jones's overdose triggered his entry into custody—in July 2013—where he has remained ever since. (R.141) (order of detention).

2. The district court's cursory inquiry was inadequate to protect Jones's constitutional right to counsel.

The adequacy of the district court's inquiry into Jones's requests is measured by quality, not quantity. *See United States v. Ryals*, 512 F.3d 416, 420 (7th Cir. 2008). That three different judges in the lower court evaluated Jones's request shows not thoroughness but rather disjointedness. *See* (10/15/2014 Hr'g Tr. 1) (pretrial hearing before Magistrate Judge Tim A. Baker); (1/7/2015 Hr'g Tr. 1) (presentencing hearing before Magistrate Judge Mark J. Dinsmore); *see also, e.g.,* (10/20/2014 Hr'g Tr. 10–11) (Judge Pratt entertaining Jones's complaint about counsel). In truth, the district judge—who had presided over the first trial and who was familiar with both the defendant and his lawyer—was far better positioned to evaluate the merits of Jones's request. *See* (10/27/2014 Hr'g Tr. 9) (district court referencing a case Inman tried before her the previous year).

3. Jones and his attorney's disagreements about strategy were the product of a total lack of communication.

The government makes much of what it claims are strategy disputes. (Gov't Br. 28–29.) But the disagreements the government cites actually reflect the complete breakdown in communication between Jones and his counsel, and thus establish the trial court's abuse of discretion. The breakdown in communication between Jones and Inman is at the root of all

the disagreements the government identifies: the plea offer, potential witnesses and evidence, and Jones's right to testify. Jones was "confused" about terms of the plea offer because Inman failed discuss to Jones's satisfaction the offer's terms and implications. *See, e.g.*, (10/15/2014 Hr'g Tr. 7); (10/17/2014 Hr'g Tr. 7). Inman refused to discuss witnesses and evidence because he wanted Jones to accept the plea offer—which Inman made uncomfortably clear in his statements to the court. (10/15/2014 Hr'g Tr. 18–19) (Inman describing the plea offer to the judge, characterizing it as "a very good offer" and explaining that "I think I put [Jones] in a great position, and that's why I'm frustrated about him wanting to go to trial."); *see also* (10/1/2014 Hr'g Tr. 12) (Inman describing the compilation of the defense witness list with Jones as "a fundamental disagreement" they were having). What is more, during trial, Inman refused to ask the questions of the government's witness that Jones requested. (10/27/2014 Trial Tr. 168.) And, as described in Section II, *supra*, Inman refused to work with Jones to fulfill Jones's desire to testify.

4. The government's reliance on defense counsel's repeated, disparaging comments about his client further counsel in favor of granting Jones's request.

The government recounts several statements made by Inman in an attempt to demonstrate that Jones was a troublesome, obstructionist client and to argue that their disagreements were mere strategy disputes. *See, e.g.*, (Gov't Br. 8–9, 10–11, 29). Far from furthering the government's cause,

however, these inflammatory statements—made by a defendant's own lawyer to the court and often in front of the prosecutor—further substantiate the trial court's abuse of discretion in failing to appoint Jones a new lawyer.

As noted in Jones's opening brief, the list of factors used to analyze erroneous denials of substitute-counsel requests is non-exhaustive, (App. Br. 33), and should accommodate any additional reason that weighs in favor of appointing new counsel, *see Volpentesta*, 727 F.3d at 678–79. Appointed counsel and their clients often have rocky relationships. But the vocal condemnations Jones's attorney made about his client before the court, on which the government now capitalizes, is on an entirely different plane.

Inman labeled Jones a "liar" and a person unable to tell the truth. *See* (10/20/2014 Hr'g Tr. 14) ("He's incapable of telling the truth and talking about things."); (10/27/2015 Trial Tr. 168) (Inman telling trial judge that he had not told Jones he could get a consecutive sentence if testifying, explaining: "Judge, that's why we can't have these hearings. He can't tell you the truth, okay?"). Inman repeatedly indicated to the judge that he believed his client would be convicted. (10/28/2014 Trial Tr. 234) ("There's a difference between not defending it and him being indefensible. And that's what it is."). Inman tried to steer Jones into accepting a plea deal. (10/15/2014 Hr'g Tr. 7) ("[I]t would just be absolutely foolish for him to go to trial . . . ."). In a pretrial hearing on the plea offer—where Jones said he didn't fully understand the offer's terms—Inman explained to the judge in no uncertain terms that Jones

was doomed: "He doesn't have a viable defense. That's what I keep telling him, okay? I can't create fiction out of the air." (10/20/2014 Hr'g Tr. 13); *see also* (Gov't Br. 10). Inman's derision of Jones's chances and character continued into trial and the sentencing phase. (10/28/2014 Trial Tr. 232) (". . . I told him when these families would testify, that it was going to be a slam dunk for the government."); (1/7/2015 Hr'g Tr. at 4–5) (describing Jones's first trial to the judge as one where he "faked a heart attack" and "he and his wife got up and concocted a defense" which he was bound to repeat if allowed to testify in sentencing at the health care trial).

Jones perceived Inman's disdain for him, and cited it when asking the court to grant his request for a new attorney. *See* (10/20/2014 Trial Tr. 14) ("He's called me a liar in open court. Please, Your Honor, appoint another attorney to represent me."). The relationship between the two did not improve after trial. *See* (1/7/2015 Hr'g Tr. 3–4) ("And when your attorney doesn't believe in you—I would hate to go to surgery with a surgeon that doesn't believe in me and telling me that—well, I don't want to say those things in court.").

An attorney's disparaging comments about his client and his case undermine the client's faith in his attorney, understandably impeding his ability to work with his attorney to prepare a rigorous defense. An indigent defendant has no recourse other than asking the court to appoint substitute counsel. Thus, whether viewed as a product of the total breakdown in

communication discussed above or as its own independent factor, Inman's on-the-record statements disparaging his client should have been reason enough for the district court to appoint him a new lawyer. The district court abused its discretion by turning a blind eye to manifest illustrations of Jones's need for substitute counsel and denying his requests.

B. This Court should require erroneous denial of new counsel motions satisfy the workable *Chapman* harmless-error standard rather than the *Strickland* test for assessing whether a defendant's lawyer was constitutionally ineffective.

The government tries to twist Jones's substitute-counsel claim into an ineffective-assistance-of-counsel claim. (Gov't Br. 30–31.) But Jones is *not* bringing an ineffective-assistance-of-counsel claim. Rather, Jones asks this Court to revisit its use of *Strickland* as the harmlessness test in erroneous denial of substitute-counsel claims. (App. Br. 40–44.)

First, this Court *did not* recently reject a request to change from a *Strickland* prejudice standard to a more workable one in *United States v. Wallace*, 753 F.3d 671 (7th Cir. 2014), as the government incorrectly claims, (Gov't Br. 31). Rather, the Court in *Wallace* opted to construe the defendant's claim as one for ineffective assistance of counsel, 753 F.3d at 675 ("If communication with the defendant's counsel broke down as a result of neglect or ineptitude by counsel, the defendant may have a claim of ineffective assistance of counsel . . . ."), even though counsel repeatedly emphasized that he was not raising such a claim, *see, e.g.*, Reply Brief of Defendant-Appellant

at 9, *United States v. Wallace*, 753 F.3d 671 (7th Cir. 2014) (No. 13-2160) ("This Court has made clear that it does not wish to hear ineffectiveness claims on direct appeal. . . . And Wallace does not wish to bring one. He challenges instead the district court's decision to force him to go to trial with an attorney with whom he could not effectively communicate. This Court's precedents, however, tether ineffective-assistance claims to every denial-of-new-counsel claim. In the decades since this Court's adoption of this practice, the Supreme Court (implicitly) and three other circuits (explicitly) have cast doubt upon it, and the Court should use this opportunity to reconsider it."). If anything, *Wallace* shows the unworkability of using *Strickland* as the standard for substitute counsel claims: The defendant is unnecessarily forced to choose whether to bring an ineffective-assistance-of-counsel claim on direct review, or forfeit his substitute-counsel claim. *See Wallace*, 753 F.3d at 676 (describing any ineffective-assistance-of-counsel claim on direct appeal as "risky").

The test articulated in *Strickland*, however, is not purely a harmlessness standard. It assesses the merits of the attorney's actions, within the fabric of the entire trial first, and then later looks to the prejudice arising from them. *Strickland v. Washington*, 466 U.S. 688, 690–96 (1984). But a defendant's substitute-counsel claim on direct appeal has its own merits test—one evaluated under an abuse-of-discretion standard. *See* Section III.A, *supra.* Only after a defendant establishes that abuse of

discretion on the merits of the legal error, as Jones has here, should the court move on to decide whether that error is amenable to harmless-error review. If it is not—if it is a structural error—then this Court should automatically reverse. *See Gonzalez-Lopez*, 548 U.S. at 150. If it is, then this Court should employ the same harmlessness test applied to nearly every other constitutional error: the *Chapman* standard, which places the burden on the government to prove harmlessness beyond a reasonable doubt. 386 U.S. at 24–26. In short, a defendant's claim that the trial judge erroneously rejected his motion for new appointed counsel is *not* interchangeable with a habeas petitioner's claim that his lawyer fell below a baseline level of competence that he can show affected the outcome of his trial.

Clinging to the *Strickland* prejudice requirement would cement wholly different tracks for defendants seeking vindication for violations of their Sixth Amendment rights: one for paid defendants, who receive automatic reversal for the erroneous denial of their right to counsel under *Gonzalez-Lopez*; and one for indigent defendants, who are saddled with meeting the burdensome prejudice standard in *Strickland*. The government wholly ignores the gulf that would result between these two kinds of defendants under its harmless-error analysis. Instead, it suggests that any move away from *Strickland* would allow defendants to receive inappropriate reversals by inventing claims. (Gov't Br. 31–32.) This is untrue. Because defendants still

will need to show a threshold abuse of discretion by the trial court, neither test will permit defendants to secure reversals inappropriately.

To be clear, Jones is *not* arguing that indigent defendants, such as Jones, have a right to "counsel of choice[,]" as the government suggests. (Gov't Br. 31.) Jones does not contend he has a right to new, appointed counsel *of his choice*, rendering irrelevant the government's invocation of *Harris*. (Gov't Br. 31.) The trial court errs in denying an indigent defendant's request for new appointed counsel when that request is warranted, as it was here. When the trial court so errs, this Court should *at a minimum* require the government to prove beyond a reasonable doubt that the error was harmless, if not subject to automatic reversal.

IV. The district court incorrectly considered conduct that resulted in an erroneous threefold sentence increase.

The government unsuccessfully tries to have it both ways. To defend the district court's decision to use a nearly 30-year-old prior conviction to impose a threefold increase in Jones's sentence, the government argues that Jones engaged in a single, continuous possession, what it calls a "decades-long amassing" of guns. (Gov't Br. 35.) That possession, however, comprised an element of the convicted offense, which runs afoul of § 1B1.3 as improper double counting. And if Jones engaged in a single, continuous possession, as the government claims, then it cannot also be the separate, iterative "uncharged act" or offense required to trigger a relevant-conduct analysis. Even accepting, *arguendo*, the fiction that Jones's possession could be

segregated into discrete acts, the government never proved—and the district court never found—that the conduct satisfies this Court's three-part test. This Court should reverse and remand for resentencing.

The simplest view of the case is that the district court violated Sentencing Guideline § 1B1.3, which prohibits the district court from using as relevant conduct Jones's possession of these weapons because possession is an element of the offense. U.S.S.G. § 1B1.3 cmt. background ("Conduct that is . . . ***not an element*** of the offense of conviction may enter into the determination of the applicable guideline sentencing range." (emphasis added)). Section 922(g) is a status-based offense, *United States v. Allen*, 383 F.3d 644, 648–49 (7th Cir. 2004), not an episodic crime like individual acts of drug possession or distribution. The Guidelines reflect that understanding, factoring into the sentencing range only certain criteria such as the number or type of guns or the character of the defendant's prior crimes. U.S.S.G. § 2K2.1(b). Yet the fact on which the government premises its argument—the length of the defendant's possession (Gov't Br. 36 n.6)—is not a factor that the Guidelines recognize as warranting an increased sentence, § 2K2.1(b). In short, possession is the element and the Guidelines do not segregate out for separate consideration the length of the defendant's possession;[4] therefore, the district court impermissibly double-counted conduct that comprised the possession element of the offense.

[4] In fact, the government concedes that continuous possession cannot be divided into separate units of prosecution. (Gov't Br. 34–35) (referencing U.S.S.G. § 4A1.2 and

The government's sole remaining salvo is its complaint that defense counsel below did not object to the impermissible double-counting and thus this Court should review for plain error. The defendant did object to the district court's consideration of pre-indictment possession, though counsel did not specifically cite § 1B1.3. (R.184 at 6) (objecting that the "alleged conduct from the United States['s] own indictment" is outside the fifteen-year lookback period). Regardless, even if that objection did not encompass the specific double-counting point raised on appeal, the government never argues that this error would not satisfy the plain-error standard, and for good reason. This Court has repeatedly held that a sentencing based on an incorrect Guidelines calculation rises to plain error and requires a remand for resentencing unless the record indicates that the error in no way affected the district court's choice of sentence. *United States v. Gill*, No. 14-3205, 2016 WL 3064588, at *6 (7th Cir. May 31, 2016) (citing *United States v. Jenkins*, 772 F.3d 1092, 1097 (7th Cir. 2014)). The district court's sentence was guided by its mistaken use of Jones's long-term possession of weapons. (3/25/2014 Sent. Hr'g Tr. 14–15, 18) (raising Jones's base offense level to 20 and finding an ultimate Guidelines range of 87 to 108 months based on relevant conduct finding).

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stating that Jones's possession of guns began in 1996 when his prenuptial agreement referenced his ownership of several firearms). Putting aside the fact that ownership does not necessarily equal possession, *United States v. Landry*, 257 F.2d 425, 431 (7th Cir. 1958) ("Ownership is not proof of possession any more than possession is proof of ownership."), the government's concession is fatal to its argument that the district court did not abridge § 1B1.3.

Before delving into the other potential view of this case—one that applies this Court's three-part test for relevant conduct—it is important to examine the government's position that Jones's commencement of the "instant offense," *see* § 4A1.2, began as early as 1996, but that it is also uncharged relevant conduct under § 1B1.3. *See* (Gov't Br. 35–36, 36 n.6.) Its decision to mix-and-match § 1B1.3 and § 4A1.2, two provisions that are not interchangeable, results in an incoherent and unsustainable interpretation of the Guidelines. Specifically, the government must, and does, argue that Jones engaged in a "continuing offense"[5] of possession that began in 1996 (Gov't Br. 35), in order to defend the district court's decision to use Guideline § 4A1.2 to construe Jones's nearly 30-year-old prior conviction as falling within 15 years of "the instant offense." (Gov't Br. 35.) In the next breath, however, the government paints Jones's prior possession as relevant conduct, (Gov't Br. 35), which under the Guidelines' own definition explicitly encompasses only related, but *separate* offenses. For example, only "two or more offenses" can constitute a common scheme or plan, and the same course of conduct likewise references the "offenses." U.S.S.G. § 1B1.3 cmt. n.9. The "decades-long amassing" of guns that the government attributes to Jones,

[5] The case on which the government relies is inapposite. *United States v. Ellis*, 622 F.3d 784, 793 (7th Cir. 2010). This Court considered continuing possession by a felon in possession only in the context of a double-jeopardy claim when the government alleged that he possessed the same handgun at two moments within the same limitations period. *Id.* at 793–94. But *Ellis* does not support the government's position that Jones's commencement of the instant offense began as early as 1996, but is also uncharged relevant conduct. *See* (Gov't Br. 35–36, 36 n.6).

(Gov't Br. 35), cannot simultaneously constitute a separate offense for purposes of relevant conduct.

Because these were not separate offenses, there is no reason to resort to this Court's three-prong test. But even accepting the district court's flawed interpretation of the prior possession as a separate offense or conduct, the government cannot satisfy the test. To begin, the government concedes that the conduct—which occurred eight to fifteen years before the charges in the indictment—is temporally remote. (Gov't Br. 36.) And its analysis of the remaining two factors, which must be very strong to overcome the absence of the third, *United States v. Acosta*, 85 F.3d 275, 281 (7th Cir. 1996), are legally and factually incorrect, as well as purely speculative. First, the district court engaged in no analysis of this Court's relevant-conduct test, and the government never tried to meet its burden of proving it. *See* (A.13); *see also, e.g.*, *United States v. Johnson*, 643 F.3d 545, 551 (7th Cir. 2011) (government bears burden of establishing relevant conduct). The government's first mention of the factors and the facts that might satisfy them occurred in its brief on appeal. (Gov't Br. 35–36.) The district court's failure to adequately find relevant conduct itself is clear error, meriting a remand for resentencing. *United States v. Locke*, 643 F.3d 235, 244 (7th Cir. 2011).

The government's analysis of the remaining two factors on appeal shows why the district court's holding could not be sustained even if the government had tried to prove them below. The government asserts that

Jones's possession of firearms satisfied the similarity and regularity prongs because it "cannot be characterized as either isolated or sporadic." (Gov't Br. 35–36.) The government begs the question, wholly failing to address the threshold inquiry flagged by Jones in the opening brief, (App. Br. 46), of whether the conduct is separate and iterative. If it is not separate conduct, then it cannot be "similar" to other conduct, and it cannot be regular either. Jones's undifferentiated possession of firearms over the years preceding the indictment meets none of the factors.

Finally, although the district court stated that it would not have awarded the collection reduction under § 2K2.1(b)(2), the record does not support the court's conclusion that there was "substantial evidence" that Jones used two of the firearms for personal protection. *See* (A.14). With respect to the firearm in the bedroom dresser drawer, it was Larissa Jones, *not* Bruce Jones, who testified that the firearm was for personal protection. (10/23/2013 Trial Tr. 613.) Regarding the gun on Jones's waist in Montana, Jones testified that that weapon was a "black powder pistol," (10/23/2013 Trial Tr. 751), a gun that does not violate § 922(g). *See* 18 U.S.C. § 921(a)(3) (excluding an antique firearm from the term "firearm"); § 921(a)(16)(C) (defining "antique firearm" to include "any muzzle loading pistol, which is designed to use black powder"). The government's passing reference to hunting, (Gov't Br. 37), likewise does not automatically disqualify Jones from a collection reduction because it is an exempted sporting purpose under

§ 2K2.1(b)(2). *Cf. United States v. Waggoner*, 103 F.3d 724, 727 (8th Cir. 1997) (government conceding that defendant used "the gun solely for a sporting purpose (i.e., hunting)").

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse his healthcare fraud conviction and remand for a new trial, or, at a minimum, remand for resentencing.

Dated: June 22, 2016

Respectfully submitted,

Bruce Jones
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because this brief contains 6,932 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Certificate of Service

I, the undersigned, counsel for the Defendant-Appellant, Bruce Jones, hereby certify that I electronically filed this brief and appendix with the clerk of the Seventh Circuit Court of Appeals on June 22, 2016, which will send notice of the filing to counsel of record in the case.

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