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 Judge Tonya Walton Pratt

BRIEF OF THE UNITED STATES

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JURISDICTIONAL STATEMENT

The appellant's jurisdictional statement is complete and correct.

STATEMENT OF THE ISSUES

1. Whether Jones's Sixth Amendment rights were violated by a pre-trial restraint of his tainted funds.

2. Whether the district court abused its discretion when it found that Jones waived his right to testify.

3. Whether the district court abused its discretion when it denied Jones's request for substitute counsel.

4. Whether the district court erred in sentencing Jones.

STATEMENT OF THE CASE

This is a direct appeal of the convictions of Bruce Jones following two trials by jury.[1]

"[H]oarding" $35,000 worth of firearms and ammunition

Despite having been a felon since 1985, Jones amassed an arsenal of 46 firearms spread out over three locations—in both Indiana and Montana—along with over 14,000 rounds of accompanying ammunition. (*See e.g.,* T1.

[1] Throughout this brief, the government will make the following references: (T1. = Gun Trial Transcript); (T2 = Health Care Fraud Trial Transcript); (S1. = Gun Sentencing Hearing Transcript); (S2 = Health Care Fraud Sentencing Transcript); ([Date] T. = Miscellaneous Hearings); (D. = District Court Docket Number); (A. Br. = Appellant's Br.); (A. = Appendix).

40, 43, 302, 305, 503, 649, 732; T1 Ex. 155; D. 49:2-5.) His illegal armory was impressive.

Jones easily circumvented existing background check laws. He used his patients—he was a substance abuse counselor—as "shell purchasers" for firearms. (T1. 44, 187-90, 194, 198, 200, 202-04, 245, 501, 585, 684-85.) No background check was necessary for the ammunition, so he personally bought substantial amounts of ammunition despite being prohibited from doing so. (T1. 147-49, 151-52, 153-54, 154-56, 157-58, 158-60, 161-62, 163, 164-66, 167-68, 169, 169-71, 171-72, 172-74, 174-75, 175-77, 178-79, 179-80, 503, 519-20.)

And thus his illegal arsenal grew. Valued at $12,500 in 1996 (15 pistols worth $5,000, 14 rifles worth $5,500, and nine shotguns worth $2,000), the armory's worth ballooned to $35,000 by April 2009. (T1. 221-23, 332.) He itemized his arsenal in an email to his brother in 2009:

> . . . So far I have as follow[s]: 17mmMach II 2,750; .22 Long Rifle, 3,500; .223, 1,200; .243, 800; .270WSM, 680; .270W, 900; 7mm Remington Magnum, 900; 7mm Westherby Magnum, 200; 30-30 Win, 920; 30-06, 1,000; .300 Win Mag, 500; 45-70, 140; .221 Fireball, 725; 9mm, 1,000 (sic); .38, 100; .38 Special 200 . . . .357, 500, .45 ACP, 420 and 15 pounds of black powder. I have at least one gun for each other caliber and 30-30, four, 30-06, four guns. How does that sound? Brother Bruce. I have been hoarding them for six months.

(T1. 302, 305; T1 Ex. 155.)

When the FBI began investigating Jones, he took various steps to conceal his firearms. When the FBI arrived at his house with a search

warrant on May 10, 2010, Jones claimed that he did not have any guns in his residence (in fact, he had a Remington shotgun, a fully-loaded Smith & Wesson .357 Magnum, hundreds of rounds of ammunition, scopes, gun cleaning supplies, and a handwritten ledger of his firearms). (T1. 44, 46-48, 52-53, 58, 59, 62-64, 71, 96, 102-03, 105.) He then claimed that only his wife knew the combination to unlock the safe in his nearby "treatment lodge," but she was out of the country and difficult to contact. (T1. 76-78.) Yet, minutes later, Jones gave the agents the combination—which was just his house number. (T1. 78.) The gun safe had over 20 firearms, including guns and holsters engraved with his initials. (T1. 76-78, 232, 236, 238, 239.)

He also used his Montana neighbor, Gary Hotchkiss—who had cancer and had suffered a stroke—to courier firearms out of Indiana and away from his Montana cabin. (T1. 223-25, 352, 364-69.) In early May, Jones paid for Hotchkiss to fly to Indianapolis and drive back to Montana with a firearm. (T1. 223-25, 352, 364-66.) Not long after, Jones frantically and repeatedly called Hotchkiss and asked him to remove the guns from his cabin. (T1. 366, 368-69, 372.) Hotchkiss found this a strange request, considering he lived in an old mobile home with missing windows and Jones's cabin had a security system. Also odd was that Jones's request covered only guns, not any other valuables. (T1. 367-69, 372.)

Because Hotchkiss did as Jones asked, when the FBI searched Jones's cabin, they found ammunition and a shooting range but no firearms. (T1. 432-34, 445-46, 450, 464). Once Hotchkiss realized the FBI had searched Jones's cabin, he contacted the FBI and turned over 15 firearms, a safe, a gun belt with bullets, and some cash belonging to Jones. (T1. 377-78, 464-65, 467, 472.)

"[P]eculiar" and "disconcerting" healthcare claims

In addition to using his counseling business as a recruiting ground for shell purchasers, Jones used the business to defraud health care benefit programs. He did so in two principal ways. First, he "up-coded" insurance claims. (T2. 32-33.) Despite typically counseling patients in group/family sessions, he would bill for the more expensive individual sessions for each patient—resulting in four times the amount of pay when seeing a family of four. (T2. 32-33, 36, 40, 278-29, 281.) Second, he filed claims for sessions that never occurred. (T2. 32-33.)

This occurred over the span of several years. Then, in 2009, Wabash American, a third-party administrator of health benefit plans, noticed "peculiar" and "disconcerting" claims from Jones that raised "red flags." (T2. 91, 92, 94, 99, 101.) Wabash American's examiners questioned Jones, were unsatisfied by his answers, and thus spoke directly to patients—who each denied having visited Jones as many times as he had claimed. (T2. 95-96.)

Wabash American moved Jones to its list of ineligible providers. (T2. 96-97.) When FBI agents ultimately reviewed Jones's billing, they did not find a single instance in which Jones billed for a family session. (T2. 42.)

The stories told by Jones's former patients were remarkably similar: family sessions being claimed as individual sessions, claims for longer sessions than ever occurred, and claims for sessions that never occurred. (T2. 117-19, 127-290, 130-31, 178-79, 185, 207, 211-13, 222-23, 225, 237-39, 257-59.) Particularly brazen claims included: billing for more than 24 hours in a day, billing a two-year-old for a 75-minute individual session, billing for sessions when patients were out-of-state, billing because he attended a patient's wife's birthday party, and billing for 237 sessions with a patient who had only attended five session "at the most." (T2. 188, 196, 249-50, 252-53, 256, 259; Ex. 84.)

Jones's fraud caused an estimated loss of $152,453.48. (T2. 320.)

"[M]anipulating his choice of counsel" to "obstruct justice"

On May 15, 2012, a grand jury returned an indictment charging Jones with one count of healthcare fraud, in violation of 18 U.S.C. § 1347, and 47 counts of being a felon in possession of firearms and ammunition, in violation of 18 U.S.C. § 922(g)(1). (D. 1.) A year later, by superseding indictment, the government reduced the gun charges to three, grouping the guns based on the location where they were found (i.e., house, lodge, or cabin). (D. 49.) The

gun and health care fraud charges were severed by the government's motion, with the former to be tried first. (D. 77, 94.)

Soon after proceedings were underway, Jones began changing lawyers repeatedly. (6/15/13 T. 8-9, 11.) After cycling through five lawyers within a year (resulting in multiple continuances), the district court concluded that "Mr. Jones is manipulating his choice of counsel in order to delay the orderly progress of this case. It's like Mr. Jones gets on the diving board as a swimmer, and you're just scared to jump off." (6/5/13 T. 8-9, 11.)

A jury trial was finally set for July 8, 2013. (7/8/13 8:30 a.m. T. 1-3.) Everything was ready to go: a 50-person venire appeared in the courtroom, and the government paid for witnesses to fly in from Montana and Florida. (7/8/13 8:30 a.m. T. 4, 12; 7/8/13 3:00 p.m. Tr. 8, 9.) But Jones did not appear. (7/8/13 8:30 a.m. T. 3.) Instead, Jones was in the hospital as a result of self-overmedication. He had taken a mixture of Lorazepam, Ambien, and Soma—drugs which he prescribed to his clients. (7/8/13 8:30 a.m. T. 14; 7/9/13 3:00 p.m. T. 8, 11, 15.) Although Jones required hospitalization, he had stopped short of taking enough drugs to require a stomach pump. (7/8/13 8:30 a.m. T. 14; 7/8/13 3:00 p.m. T. 2, 4; 10/15/13 T. 33.)

The district court issued a continuance and ordered a competency hearing. According to the judge, although "Mr. Jones may be manipulative; and this may have been his whole plan to get his eighth continuance," the

judge felt obliged to take that step. (7/8/13 3:00 p.m. T. 8, 14.) The court, in later finding Jones competent, expressed "doubts that the suicide attempt was accidental. I think it was an intentional attempt . . . to be manipulative, to obstruct justice." (10/15/13 T. 6, 34-35.) In support of that conclusion, the judge noted that Jones was a licensed substance abuse counselor "in the business of recommending dosage for the exact types of medications that he almost overdosed on." (10/15/13 T. 35.)

A jury trial was eventually held, beginning on October 21, 2013. The jury found Jones guilty of the three gun charges. (D. 153; T1. 866.)

The district court sentenced Jones for these convictions prior to the health care fraud trial. In pronouncing Jones's sentence, the judge reiterated, "I believe he is manipulative, he believes he's above the law. He's very defiant, very obstinate" that he has "blatant disregard for the law" and engaged in "obstructionist acts" throughout his case. (S1. 81, 83, 84.)

The district court found that the base offense level for Jones's firearm offenses was 20, because he committed his offenses subsequent to a felony conviction. (S1. 14.) The court increased that base level by six for the number of firearms Jones possessed and by two for obstruction of justice, resulting in a total offense level of 28. With a category II criminal history, his sentencing range was 87 to 108 months. (S1. 15, 18.) The court

sentenced Jones to 100 months on each firearm count, to be served concurrently. (S1. 76.)

After proceedings concluded on the gun charges, but prior to the health care fraud trial, the government restrained six life insurance policies belonging to Jones under 21 U.S.C. § 853. (D. 49:5-7; D. 201:3.)

"[W]e just can't keep giving you lawyer after lawyer after lawyer"

Jones's obstruction continued into the health care fraud trial. Just three weeks before the scheduled trial date and after the final pretrial motion, Jones wrote a letter to the court requesting a new attorney (Jones had appointed counsel in his second trial). (D. 269; 10/15/14 T. 5, 7.) At a hearing six days later, Jones stated that he wanted a new attorney because his attorney did not want him to go to trial. (D. 269; 10/15/14 T. 8-9.)

His attorney, 32-year criminal law veteran Mark Inman, explained that it was in Jones's best interest to accept a plea deal the government had offered. (*See, e.g.,* 10/15/14 T. 7.) The plea which was "a very good offer" of a below-guideline sentence of 18 months (as opposed to 24 to 30 months) and a loss figure of about $179,000 (as opposed to what could have been over $400,000). (10/15/14 T. 7, 18-19; T. II 8-9.) The deal would also have allowed Jones to retain his real estate. (10/15/14 T. 19.) In light of that, and because "the witnesses [Jones] wants to call are not going to help him," Inman

advised Jones that it "would just be absolutely foolish for him to go to trial." (10/15/14 T. 7.)

As to Jones's desire to go to trial, Inman compared this to his first trial. In that trial, both Jones and his wife testified, but the jury still found him guilty in less than an hour. (10/15/14 T. 18-19.) Inman counseled Jones that he had just "present[ed a] defense that he thinks is going to work and ha[d] it slammed down his throat." (10/15/14 T. 19.)

And short of ignoring Jones's claimed defenses, Inman explained that he had been through "every piece of paper that the government has now," had reviewed everything necessary to understand the case, and had read and followed up on every letter Jones had sent him. (10/15/14 T. 16, 18.) But Jones's beliefs about his case did not square with Inman's investigation. As to one witness Jones wanted him to call, Inman stated that calling that witness would be "one of the biggest cases of malpractice ever" and evidence Jones believed would help would "just come and backfire on him extraordinarily badly." (10/15/14 T. 17.)

The presiding magistrate judge agreed that "many of these things [that Jones wanted Inman to do] may not bear any fruit as it relates to the defense of your case." (10/15/14 T. 9-10.) The magistrate found that, give Inman's "extensive experience with the law," he suspected Inman's advice about the plea was correct. (10/15/14 T. 21.) That Inman and Jones had a

disagreement about trial strategy was "not unusual," the magistrate noted, based on "the impression that [Jones] want[ed] to go down a lot of roads that skilled trial counsel would think would be unnecessary." (10/15/14 T. 21, 22.) The magistrate judge denied Jones's motion. (10/15/14 T. 23-24.)

At a later hearing, Jones again requested a new attorney. (10/20/14 T. 8.) Inman affirmed that he was "prepared to go to trial [but Jones] doesn't have a viable defense . . . [And] I can't create fiction out of the air." (10/20/14 T. 13.) Inman again stressed that the witnesses Jones wanted to call "would hurt him." (*Id.*) Inman noted that he had explained this to Jones multiple times the last month, but Jones was "incapable of telling the truth and talking about things," making meetings with him "counterproductive." (10/20/14 T. 13-14.)

The district court recognized reality: "I don't know of another attorney that can represent you, Mr. Jones, because you're going to have the same problem. You know, we had these same issues in your first trial. You had how many lawyers? About five?" and "you just have lots of problems with lawyers, and we just can't keep giving you lawyer after lawyer after lawyer. You've got to try to work with the lawyer that you have." (10/20/14 T. 14, 15.) Despite that, the judge asked Inman if he could proceed. (10/20/14 T. 16.) Inman stated that he was prepared for trial, despite "just tired of being berated by him" and continuing to believe that the plea was "a gift." (*Id.*)

The morning of trial, Inman reiterated that he was prepared to defend Jones. (T. II 9-10.)

During the government's case-in-chief, Jones again objected to his representation, seemingly complaining about evidence that Inman had not admitted. (T2. 231-23.) Inman explained that "I told him when these families would testify, that it was going to be a slam dunk for the government." (T2. 232.) Further, while Jones claimed to have relevant documentation, Inman had "told him that I'm not introducing this stuff" because "most of what he has is either doctored or misleading or false." (T2. 232-23.) Inman also contested Jones's claims that he was not defending the case, stating "[t]here's a difference between not defending it and him being indefensible. And that's what it is." (T2. 234.)

After the government rested, the judge asked Jones if he was going to testify and Jones claimed that Inman "won't ask me any questions that I've written down, so it would do no good." (T2. 324.) Inman informed the court that he did not believe Jones should testify, for strategy reasons and because he believed Jones would perjure himself. (T2. 324-26.) The court asked Jones if he wanted to testify and Jones said "I have no choice but to stand down." (T2. 327.)

The government, not present during the preceding conversation, asked the court to confirm that Jones affirmatively waived his right to testify. (T2.

326, 332-33.) The court then again explained to Jones his right to testify. (T2. 338.) Jones responded that "I can't testify if I -- we haven't gone over any questions." (*Id.*) The court told Jones that "you don't necessarily have to go over any questions … [Inman] knows what questions to ask. I mean, it's not that complicated of a trial." (T2. 339.) The court recessed for the evening, and Inman and Jones again discussed whether he should testify. (T2. 343.)

The following morning, this final colloquy occurred:

> THE COURT: . . . First of all, Mr. Inman, I need to -- the Court needs to be comfortable that your client is comfortable with his waiver of his right to testify. And you've talked with him about that?
> MR. INMAN: We have, Your Honor. We've talked this morning.
> THE COURT: And, Dr. Jones, are you comfortable with your decision?
> THE DEFENDANT: Yes.

(T2. 343.) The judge accepted the waiver. (*Id.*) The jury ultimately found Jones guilty. (T2. 387.)

Nothing if not consistent, Jones requested a new attorney prior to sentencing on the health care case. (1/7/15 T. 2.) At a hearing before a different magistrate judge, Jones repeated his earlier complaints and stated that he wanted to call witnesses at sentencing. (1/7/15 T. 2-4.) But, as Inman explained, Jones had already been sentenced before the same judge on the gun charges. (1/7/15 T. 4.) Jones had a "full-blown sentencing," had

character witnesses write letters, and already presented this information to the same judge. (1/7/15 T. 4-5.) Perhaps more importantly, the PSR was "even more in our favor that [Inman] thought it would be" because the guideline was much lower than in the gun cases and the PSR had grouped the convictions together, showing "he essentially shouldn't get any more time." (*Id.*) Thus, Inman determined that "we can't help ourselves by presenting stuff." (*Id.*)

The magistrate judge found Inman's "representations entirely credible" and denied Jones's request. (1/17/15 T. 8.)

Later, just as Inman had predicted, the trial court sentenced Jones to a 90 months for the healthcare fraud offense, concurrent to his 100-month sentence. (S2. 40.)

SUMMARY OF THE ARGUMENT

The government's restraint of Jones's tainted assets did not violate the Sixth Amendment. The government restrained *only* tainted assets. In fact, § 853, the provision the government employed here, does not provide for restraint of untainted assets. Nor has Jones proven a bona fide need to use the restrained life insurance policies to hire counsel of choice. This claim is therefore meritless.

Jones affirmatively and unequivocally waived his right to testify. The district court, well aware that Jones initially disagreed with his attorney's

advice that he should not testify, did as this Court has encouraged and explored that disagreement. After that exploration, Jones affirmatively waived his right. Accordingly, this claim too fails.

The district court did not err when it denied Jones's request for substitute counsel. Jones—evidently incapable of being content with any attorney—had consistently engaged in manipulative tactics in order to delay his trials. His counsel request was another such contrivance. Moreover, the disagreements he touts as underlying the purported error were about strategy, which are not grounds for substitution of counsel.

The district court correctly found that Jones's prior unlawful possession of firearms was relevant conduct to his convictions. Jones spent many years amassing his arsenal of weapons, and evidence established that he possessed firearms in 1996 and 2001, within 15 years of his release from custody in 1988. That was relevant to his possession of firearms here.

ARGUMENT

I. Restraint of Jones's Tainted Funds Did Not Violate His Sixth Amendment Right to Choice of Counsel

A. Standard of Review

This Court, in general, reviews constitutional challenges *de novo*. *United States v. Segal*, 495 F.3d 826, 840 (7th Cir. 2007).

But that standard applies only if the defendant has properly preserved his objection. While, at first blush, an argument under *Luis v. United States*, 578 U.S. __, 136 S. Ct. 1083 (2016), might seem to have been unavailable to Jones because *Luis* was decided after his trials, Jones had ample opportunity to raise the same underlying issues under this Court's precedents.

Long before *Luis*, this Court recognized that due process prohibits restraining funds without a hearing when a defendant can show a bona fide need to use the funds to obtain counsel.[2] *United States v. Moya-Gomez*, 860 F.2d 706, 729-30 (7th Cir. 1989). In this Circuit, when a defendant does not have other assets from which payment to an attorney can be made, the district court "must require the government to demonstrate its basis" for restraint. *Id.* at 730. If the government fails in that demonstration, "then the court must order the release of funds in an amount necessary to pay reasonable attorneys' fees for counsel of sufficient skill and experience to handle the particular case." *Id.*

Jones should have been on notice of this process. "Since *Monsanto*, the lower courts have generally provided a hearing to any indicted defendant

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[2] The Supreme Court has left this question open. *United States v. Monsanto*, 491 U.S. 600, 615 n.10 (1989). This Court, while requiring hearings when a bona fide showing of need has been made, has not decided whether such a hearing is required without a bona fide showing of need. *See, e.g., United States v. Kirschenbaum*, 156 F.3d 784, 792-93 (7th Cir. 1998).

seeking to lift an asset restraint to pay for a lawyer," where the defendant may challenge whether that property has the requisite connection to the crime. *Kaley v. United States*, 571 U.S. __, 134 S. Ct. 1090, 1095 (2014).

Indeed, as the cases cited by Jones in his brief show, the standards he could have used to make such a challenge were well established: the government had to show probable cause, *United States v. Santiago*, 227 F.3d 902, 907 (7th Cir. 2000), and "[t]he existence of any sum of money, standing alone," would have been insufficient to do so, *United States v. $506,231 in U.S. Currency*, 125 F.3d 442, 452 (7th Cir. 1997). (A. Br. 22-23.)

The district court even invited Jones to raise the argument in its forfeiture order:

> WHEREAS, the Court notes that this Order is granted to an *ex parte* Motion, however, Defendant may petition for a pre-trial hearing if he can demonstrate that he has no other assets available with which to retain counsel and Defendant makes a *prima facie* showing that the restrained property is not subject to forfeiture. See *United States v. Farmer*, 274 F.3d 800, 804-05 (4th Cir. 2001) and *United States v. Michelle's Lounge*, 39 F.3d 684, 693 (7th Cir. 1994).

(D. 203:2-3.) The order also contemplated the funds being used upon court approval. (D. 203:3.)

Jones thus had an avenue to constitutionally challenge the pre-trial restraint of his assets. But, unlike similarly situated defendants before him, *see, e.g., Kirschenbaum*, 156 F.3d at 792, he did not challenge the restraint of

his funds, request a hearing, or attempt to show that he needed the restrained funds to hire counsel. His failure to bring this to the district court's attention prevented that court from having any occasion to rule on whether the funds were needed (or, in effect, whether the restraint prevented him from exercising his Sixth Amendment right to choice of counsel). He has therefore forfeited such claims. *United States v. Heron*, 721 F.3d 896, 901 (7th Cir. 2013); *United States v. Swan*, 486 F.3d 260, 264 (7th Cir. 2007).

Jones's challenge is thus subject to plain error review. *United States v. LeShore*, 543 F.3d 935, 939 (7th Cir. 2008). Under the plain error standard, this Court "must determine whether there was (1) an error, (2) that was plain, meaning clear or obvious, (3) that affected the defendant's substantial rights in that he probably would not have been convicted absent the error, and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings." *United States v. Christian*, 673 F.3d 702, 708 (7th Cir. 2012).

B. Only Tainted Assets are Subject to Restraint Under § 853

The constitutional infringement that occurred in *Luis* cannot arise under § 853. *Luis* prevents the pre-trial restraint of untainted funds needed to hire counsel of choice. *Luis*, 136 S. Ct. at 1087, 1096. In *Luis*, the government restrained all of Luis's remaining funds—which it stipulated were untainted—under 18 U.S.C. § 1345. *Id.* at 1087-88. That was possible

because, under § 1345(a)(2)(B)(i), when tainted assets are unavailable, the government may restrain "property of equivalent value" to the tainted funds.

Section 853, however, allows restraint only of tainted assets. Under § 853, only the "property described in subsection (a) of this section" may be restrained. § 853(e)(1). Subsection (a) is limited to the following:

> (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;
>
> (2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and
>
> (3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2) any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

21 U.S.C. § 853(a). Subsection (a) does not include substitute assets.[3] Thus, restraint under § 853 does not implicate the concerns expressed in *Luis*.

[3] While only tainted assets may be restrained under § 853, substitute assets may later be forfeited under § 853(p). The government did plan for this contingency here. After alleging that the life insurance policies were tainted and thus subject to restraint, the government noted its intent under § 853(p) to seek forfeiture of substitute assets, specifying Jones's property, if the life insurance policies became unavailable by "any act or omission of the defendant." (D. 49:6-7.) But those were not, and could not be, subject to the restraining order under § 853 as a legal matter. (*See* D. 201; 203.)

And it is uncontroverted that restraining tainted assets remains valid. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 627-28, 631 (1989); *Monsanto*, 491 U.S. at 614-16. That is all that occurred here. Prior to Jones's health care fraud trial, the government requested that his tainted assets (i.e., the life insurance policies) be restrained. (D. 49:5-7; D. 201:3.) The government alleged that probable cause existed that "the premiums and contributions made to [the life insurance policies] constitute or derived from proceeds obtained from the health care fraud." (D. 201:3-4.). The district court found that probable cause existed. (D. 203:2.)

Jones therefore has no argument under *Luis*. Instead, what he couches under *Luis* is instead a challenge to the sufficiency of that probable cause. (A. Br. 22-23.) But that is not an argument created by *Luis*. As Jones's own brief shows (A. Br. 22-23), this was a viable claim pre-*Luis*. *See, e.g., Kaley*, 134 S. Ct. at 1095.

Regardless of the merit of his probable-cause argument, Jones has forfeited any such claim. If Jones believed the indictment and other material in the record was insufficient, he could have and should have said so below. The government offered nothing beyond those materials below because Jones did not make an issue of it. In other words, Jones has forfeited his claim, *and* his failure to make a claim based on pre-*Luis* precedent is the root cause of

any deficiency he now attacks. *Luis* cannot be used as an end-around to resuscitate a forfeited argument.

C. Jones Also Has Not Shown the Necessary Bona Fide Need for the Assets at Issue

In addition to restraining untainted assets, the government in *Luis* also effectively pauperized the defendant by restraining all of her assets. *Luis*, 136 S. Ct. at 1087-88. In contrast, the restraining order here applied only to six life insurance policies. (D. 49:5-6; D. 201:4; 203:1-2.)

Jones had other assets. His financial balance sheet from April 26, 2009, showed a multitude of fungible assets, including: three motor vehicles, two motorcycles, four ATVs, two motorboats, two jet skis, a snowmobile, a golf cart, a sailboat, five trailers, a John Deere tractor, and a grand piano. (T1. Ex. 152; *see also* T1 Exs. 92, 93, 98; T2 Exs. 19, 20.)[4] While dated, the prenuptial agreement calculated Jones's net worth at $300,000. (T1. Ex. 87.)

Jones's financial wherewithal was established at his first trial. He admitted that he "spent over $150,000 on attorney fees." (S1. 62, 83; D. 195:5.) Accordingly, the district court found that Jones "has the means to

[4] Additionally, as listed in the superseding indictment, Jones owned six properties, plus 10 vacant land parcels that Jones described as being 20 to 25 acres each. (D. 49:6-7; T1. 726.) The government had evidently obtained a *lis pendens* restriction on this property. (S1. 83; A. Br. 7, n.2.)

pay" a fine of $12,500 "based upon [his] financial resources and future ability to pay." (S1. 76-77, 83.)

Jones has not shown otherwise. The $150,000 spent on attorney's fees proves that Jones had access to some of his assets. (S1. 62, 83; D. 195:5.) While Jones asserts that the first trial exhausted his funds, his citation does not support that assertion. (A. Br. 7, citing S1. 85.) Instead, that citation merely indicates that Jones's current attorney had received only a portion of that $150,000 and might petition for release of assets. (S1. 85.) Whatever reason existed for Jones's non-payment, it was left unstated—another reason Jones's failure to object hampers review of his argument. Nor should this Court read too much into the district court granting his motion to proceed *in forma pauperis*. (D. 195, 199.) That motion was based only on Jones's self-serving representations (including that he owned no vehicles). (D. 195, 199.) Jones has "simply failed to show a bona fide need to utilize assets subject to the restraining order to conduct his defense." *United States v. Phillips*, 434 F.3d 913, 916 (7th Cir. 2005) (internal quotations omitted).

In short, Jones has failed to established that, without the restrained insurance policies, he was unable to pay for counsel of his choice. His failure to show any such burden is another fatal flaw in his attempt to articulate a Sixth Amendment violation.

II. The District Court Did Not Abuse its Discretion when it Found that Jones Waived His Right to Testify

A. Standard of Review

The district court's determination that Jones waived his right to testify is a mixed question of fact and law, which this Court reviews *de novo*, although underlying factual determinations are reviewed for clear error. *United States v. Stark*, 507 F.3d 512, 516 (7th Cir. 2007).

B. The District Court Thoroughly Explored Jones's Decision About Testifying and Jones Explicitly Waived That Right

The district court did precisely what this Court has suggested district courts should do when attorney and client disagree over whether that client should testify: explore the defendant's decision not to testify. *See id.* at 518-19.

The district court did so three times. The court thoroughly explained to Jones that it was his decision and not that of his attorney. (T2. 325, 338.) The court explained that his attorney would be able to ask him questions. (T2. 325, 338.) After the last explanation, the court recessed and Jones met again with his attorney to discuss the issue. (T2. 343.) The following morning, the judge asked Jones if he was comfortable with his decision not to testify. (*Id.*). Upon further reflection, Jones's earlier misgivings had dissipated, and he answered, unequivocally, "Yes." (*Id.*)

This is quite apart from the "few cases" this Court has found an invalid waiver. *Id.* at 518. Instead, those cases "are interesting only for the way in which they contrast with [Jones's] case." *Id.* Doctor Jones neither suffered from brain injuries that "severely disrupted his ability to think and reason," *Ward v. Sternes*, 334 F.3d 696, 705-06 (7th Cir. 2003), nor gave an ambivalent answer like "I guess, I don't know" (*see* T2. 343), *id.*, nor had his initial request to testify completely ignored by the district court, *Ortega v. O'Leary*, 843 F.2d 258, 261-62 (7th Cir. 1988).

Jones would have this Court elevate statements from the middle of a decision-making process over its ultimate conclusion. While Inman adamantly believed Jones should not testify, the trial court ensured that Jones knew it was his decision alone. (*See* T2. 325, 333, 338). While Jones claimed that Inman had not prepared questions, nothing in the record supports that other than Jones's self-serving statement, Inman never agreed that was true, and the judge rightly noted that an experienced attorney, like Inman, would be prepared. (T2. 325, 338-39). While the district court involved itself in the process, it never implied that the decision was anyone's other than Jones's. (T2. 323-25, 333-39). And, while the district court went over this three times, that shows that the judge was engaged in the process, not trying to exert undue influence. (T2. 323, 339, 342).

C. Jones Suffered No Prejudice

A denial of the right to testify is subject to harmless error analysis. *Alexander v. United States*, 219 Fed. App'x 520, 523 (7th Cir. 2007). Thus, as here, where a defendant "alleges that counsel's malfeasance caused him to forego testifying [he] must still show, as the Supreme Court explained in [*Strickland v. Washington*, 466 U.S. 668, 694 (1984)], that there is a reasonable probability that his failure to testify affected the outcome of the trial." *Id.*

Jones proffers no reason that his testimony would have affected the outcome of the trial. That seems an unlikely proposition anyway. The government's evidence, as Inman predicted, was overwhelming. (T2. 232.) So overwhelming, in fact, that the government took the near-unprecedented step of declining to call patients it had planned to call, because testimony from victims was "starting to get cumulative." (T2. 262.) Nor had Jones proven to be a credible witness. As with his first trial, if he had "decide[d] to testify and deny the charges against him . . . his untruthful testimony [would have] become[] evidence of guilt to add to the other evidence." *United States v. Jocic*, 207 F.3d 889, 893 (7th Cir. 2000). Jones's decision not to testify merely prevented more fuel from being added to the fire.

III. The District Court Did Not Abuse its Discretion When it Denied Jones's Request for Substitute Counsel

A. Standard of Review

Because Jones had the opportunity to explain to the district court the reasons behind his request for substitute counsel, this Court reviews the district court's decision for an abuse of discretion. *United States v. Harris*, 394 F.3d 543, 551 (7th Cir. 2005).

B. Jones's Request was Yet Another Attempt to Manipulate His Choice of Counsel to Cause Delay

The district court was faced with what this Court has called a "common" tactic of defendants "trying to throw a monkey wrench into the proceedings." *United States v. Alden*, 527 F.3d 653, 659 (7th Cir. 2008) (internal quotations omitted). Jones, like countless defendants before him, "express[ed] dissatisfaction with counsel," had an "unreasonable view of what rights" and evidence he possessed, ultimately dismissed (and sought a further dismissal of) his "lawyers because [he] suppose[d] without justification that more should be done to assist [him]," *id.* at 659-60, and attempted "to manipulate his choice of counsel to delay the orderly progress of his case." *United States v. Carrera*, 259 F.3d 818, 825 (7th Cir. 2001) (internal quotations omitted).

When such a defendant moves for a substitute counsel, this Court reviews the district court's decision by analyzing: (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." *Harris*, 394 F.3d at 552.

1. Jones's Requests, Even If Timely, Were Obstructionist

Jones first sent a letter requesting a new lawyer three weeks before his scheduled trial date. (D. 270.) In a vacuum, that request may have been timely. *See, e.g., United States v. Zillges*, 978 F.2d 369, 372 (7th Cir. 1992).

But that request was not made in a vacuum. Instead, his request was made in context of: (1) multiple changes of counsel in his first trial; (2) multiple continuances in his first trial; (3) inducing sickness to delay trial; and (4) the district court's explicit findings that he had "manipulate[ed] his choice of counsel in order to delay the orderly progress of this case." (6/5/13 T. 8-9, 11; 10/15/13 T. 6, 34-35.) It is unsurprising that the district court viewed Jones's request for a new counsel through this obstructionist prism.

The judge also reasonably considered prospective concerns. Considering Jones's past behavior, the judge foresaw that even if she granted this request, it was likely any newly appointed attorney would end up in the same place as Inman: with Jones "berat[ing]" him or her, expressing displeasure, and requesting another lawyer. (10/20/14 T. 16.) The judge knew that what Jones was really asking was for "lawyer after lawyer after

lawyer," (10/20/14 T. 15), in order to interminably delay the proceedings. The judge's decision not to go down that road was clearly reasonable.

2. The District Court's Inquiry Was More Than Adequate

The district court repeatedly covered the grounds of Jones's dissatisfaction with Inman. A magistrate judge held a hearing two weeks before trial. (*See* 10/15/14 T. 5.) The district judge heard Jones's complaints at hearings on October 17 and 20, 2014, before trial on October 27, 2014, and on multiple occasions during trial (Inman noted that it was "every 75 minutes"). (10/17/14 T. 5-7; 10/20/14 T. 8-17; T2. 9-10, 232-34, 324-26, 332-40.) And, before sentencing in the health care case, a different magistrate judge held a hearing for the same reason. (A. 37-44.)

On each occasion, the presiding judge listened to and considered Jones's complaints. But, not surprisingly, each time, the judge found the problem to be Jones's intransigence, not any failing by Inman. Inman had reviewed all relevant documents, met with Jones frequently, and was prepared to defend Jones at trial. (10/15/14 T. 16-17, 18; 10/20/14 T. 13, 14; T2. 9-10.) He communicated with Jones—Jones just did not want to hear what he had to say.

Jones's counter-points are misleading. Far from ignoring Jones's contention about his "charts and graphs," the magistrate judge directly responded by stating that while "that may or may not be effective"—Inman

stated that it would not be—lawyers have "wide discretion in deciding how to present facts and arguments to the jury." (10/15/14 T. 10, 16-17; A. Br. 36.) Similarly, while the magistrate judge did ask Jones to "summarize" the letter he sent, that was only after he explicitly stated "I've read the letter, so you don't need to tell what's in there." (1/7/15 T. 38.) And the letter was especially Quixotic, considering that it was about the second sentencing which promised, and delivered, a concurrent sentence. (1/17/15 T. 4-5.)

The district court handled this matter well. Jones was allowed an opportunity to express his reasons for new counsel, the district court was fully apprised of those reasons, and Jones has not claimed he was prevented from raising any other issues. (A. Br. 35-37); *see Harris*, 394 F.3d at 553.

3. The Disagreements Were About Strategy

While Inman and Jones may have "frequently butted heads," *United States v. Volpentesta*, 727 F.3d 666, 673 (7th Cir. 2013), that is not surprising considering "[c]riminal defendants and their lawyers often do not see eye to eye," *Stark*, 507 F.3d at 516. But, without more, this Court has found such disagreements to be "scant evidence that the gulf of communication so widened as to constitute a total breakdown" requiring substitution of counsel. *Volpentesta*, 727 F.3d at 673.

The disagreements here were prototypical strategy disputes, which do not constitute grounds for substitution of counsel. *Id.* at 673-74. Specifically,

Jones and Inman disagreed about whether Jones should accept a plea offer or proceed to trial, which witnesses to call at trial, what evidence to present, and whether Jones should testify. (*See, e.g.,* 10/15/14 T. 7, 9-10, 18-19; 10/20/14 T. 13-16.)

The record supports Jones's reasoning only if one accepts the word of a "manipulat[ive]" (6/15/13 T. 11) defendant who the district judge and two magistrate judges repeatedly found to lack credibility.[5] Inman hotly disputed essentially everything Jones claimed (e.g., "that's just not true"; "He's incapable of telling the truth"). (1/7/15 T. 7; 10/20/14 T. 13.) Inman did not "acknowledge[]" a failure to communicate as Jones asserts; instead, he merely delayed relaying one piece of information until he was certain he would remain as Jones's attorney. (10/15/14 T. 20; A. Br. 38.)

In the end, the court "believed that [Jones's] motion constituted nothing more than a delay tactic, and the evidence supports that determination."

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[5] And Jones provided ample reason for that. One of many examples of Jones's duplicity is his complaints about the plea offer. As noted in his Brief, Jones asserted that Inman had not "communicated anything" about the plea offer (which, like most things Jones claimed, Inman disputed, stating "That offer has been conveyed to him on more than one occasion."). (A. Br. 37; 10/15/14 T. 7; App. 77.) Yet, on other occasions, Jones claimed the plea offer was "being shoved down my throat." (10/15/14 T. 10.) As this shows, Jones contrived moving targets for complaints. Thus, to whatever extent Jones can now pluck certain complaints that were not directly contradicted, that should not be surprising considering their inconsistent nature.

United States v. Simmons, 582 F.3d 730, 735 (7th Cir. 2009). That was factually correct and legally sound.

C. Under This Court's Well-Established Standard, Any Error Was Harmless

Even if the district court abused its discretion, this Court still affirms unless Jones can establish that he was deprived of the effective assistance of counsel. *Harris*, 394 F.3d at 552; *see also United States v. Morrison*, 946 F.2d 484, 499 (7th Cir. 1991). Jones must therefore demonstrate both that Inman's conduct fell below an objective standard of reasonableness and that this sub-standard performance prejudiced him. *Harris*, 394 F.3d at 554.

Jones can meet neither *Strickland* prong. Other than Jones's self-serving representations about what Inman could have potentially done, nothing exists in the record indicating that Inman performed deficiently. Because the "record is silent," this Court should "decline to fill in the blanks solely on [Jones's] representations in his briefs." *Harris*, 394 F.3d at 555. Nor did Inman's representation cause Jones any prejudice. Jones had, effectively, no viable defense. Inman correctly predicted it was "absolutely foolish" for Jones to proceed to trial. (10/15/14 T. 7.) So it was. The government's evidence was so strong that it essentially cried uncle on Jones's behalf and declined to call further patients who were the subject of false

claims. (T2. 262.) Nothing Inman, or any attorney, could have done would have changed the "slam dunk" nature of this case. (T2. 232.)

Implicitly conceding that he cannot make this showing, Jones requests that this Court alter its well-established standard. (A. Br. 40-44.) This Court has just rejected a similar claim. *United States v. Wallace*, 753 F.3d 671, 675 (7th Cir. 2014). And with good reason.

While the Sixth Amendment includes the right to choice of counsel, it "must be understood with regard to its function in our constitutional scheme, especially where indigent defendants are concerned." *Harris*, 394 F.3d at 552 (internal quotations omitted). Thus, this Court's standard comports with the "essential aim" of the Sixth Amendment to guarantee effective advocacy. Backbreaking efforts to ensure counsel of choice—where perhaps no lawyer could have met with Jones's approval—are not guaranteed by the constitution. *Harris*, 394 F.3d at 552; *see also United States v. Morrison*, 449 U.S. 361, 364 (1981) (Sixth Amendment violations should be tailored to "neutralize the taint.").

This Court should reject Jones's attempt to make substitution of counsel claims subject to structural error analysis. First, "most constitutional errors can be harmless." *Arizona v. Fulminante*, 499 U.S. 279, 306-07 (1991) (Rehnquist, C.J., concurring in part). Structural errors are reserved for "structural defects in the constitution of the trial mechanism,"

id. at 310, which having an effective attorney does not cause such defects. And applying structural error analysis to such cases would incentivize the sort of gum-up-the-works tactics by defendants this Court has warned against. *Alden*, 527 F.3d at 659. It would, in other words, permit defendants to manufacture structural errors and then point to those errors as bases for reversal. Jones's argument serves as a case in point as to why such an approach would lead to absurd results.

Jones's other concerns are overwrought. Jones cites no case where raising this claim prevented a later ineffective assistance of counsel claim (A. Br. 41); a hearing on a defendant's motion obviates the general concern that ineffective assistance claims are ill-suited to direct appeal; while this claim is a judge-made error, some prejudice is required for reversal in most such cases anyway (*see* Fed. R. Crim. P. 52); and comparisons between indigent defendants and those who can afford representation are inapt here because "the right to counsel of choice does not extend to defendants who require counsel to be appointed for them." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006). Thus, *Gonzalez-Lopez* affords Jones no help; neither does *Daniels v. Woodford*, 428 F.3d 1181, 1197-1200 (9th Cir. 2005), considering this Court just found it "contrary to our decisions." *Wallace*, 753 F.3d at 675.

IV. The District Court Correctly Calculated Jones's Sentencing Guidelines Range and Criminal History Category

A. Standard of Review

This Court reviews a district court's interpretations of the Sentencing Guidelines *de novo*, and the court's underlying factual findings for clear error. *United States v. Jin Hua Dong*, 675 F.3d 698, 701 (7th Cir. 2012).

That standard applies only if the defendant has preserved his objection. Jones did so regarding the applicability of his prior conviction under the 15-year "look back" provision under U.S.S.G § 4A1.2(e)(1); however, he failed to preserve his new claim—albeit one made perfunctorily—that because possession was an element of his offense it was improperly "double-count[ed]" under U.S.S.G § 1B1.3. (A. Br. 45.) Jones filed a sentencing memorandum which did not raise this argument; nor did he make this objection at either sentencing hearing. (D. 184; S1. 1-13; S2. 13-14.)

Jones has thus forfeited this argument and his challenge is subject to plain error review. *United States v. Groves*, 470 F.3d 311, 330 (7th Cir. 2006). Under the plain error standard, this Court "must determine whether there was (1) an error, (2) that was plain, meaning clear or obvious, (3) that affected the defendant's substantial rights, and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Christian*, 673 F.3d at 708.

B. The District Court Correctly Sentenced Jones

Jones's sentencing appeal essentially amounts to an argument that his long-term possession of firearms was not relevant to his conviction for possessing firearms. That cannot be.

The district court correctly increased Jones's base offense level of 14 under U.S.S.G. § 2K2.1(a)(6), to 20 under § 2K2.1(a)(4)(A), because Jones "committed any part of the instant offense subsequent to sustaining one felony conviction" of a controlled substance offense. (S1. 14.) Qualifying prior convictions are limited to those that fall within 15 years of the defendant's "commencement of the instant offense." U.S.S.G. § 4A1.2(e). Application Note 8 to § 4A1.2 notes that "commencement of the instant offense" includes "any relevant conduct." Jones was released from custody in October 1988, thus the 15-year "look-back" period extended into 2003. (A. 13.)

Jones commenced this offense almost immediately upon his release. A prenuptial agreement from 1996 indicated that he possessed 15 pistols, 14 rifles, and nine shotguns. (T1. 22-23; Ex. 87; S1. 14; S2. 17-19.) A document from 2001 transferring several guns to his wife further indicated his possession. (T1. 604-06, 613, 628.) The agreement also implied that he had possessed firearms since he "got out" (presumably of custody). (*See* D. 82:2, Attachment A.) And there was at least some overlap of the firearms owned before and after his conviction. Prior to his conviction, he owned a Colt .45

caliber "Gold Cup" pistol. (*See id.*) Jones then referenced carrying that "Gold Cup" pistol in an email dated June 8, 2009. (T1. Ex. 155.) Because possession is a continuing offense, *United States v. Ellis*, 622 F.3d 784, 793 (7th Cir. 2010), Jones's prior possession of firearms actually marked the commencement of the instant offense under § 4A1.2(e). (*See also* S2. 18.)

Jones, though, claims that his possession at that time did not constitute "relevant conduct." To determine whether prior conduct qualifies as relevant conduct under § 1B1.3, this Court looks to the "similarity, regularity, and temporal proximity of the uncharged acts to the offense of conviction." *United States v. Butler*, 777 F.3d 382, 388 (7th Cir. 2015) (internal quotations omitted). "When one of the factors . . . is relatively weak or absent, a stronger showing [of the other factors] will support a finding of relevant conduct." *United States v. Acosta*, 85 F.3d 275, 281 (7th Cir. 1996).

Jones's decades-long amassing of his illicit arsenal was similar and regular conduct. Jones regularly added to his arsenal. (*See, e.g.,* T1. 302, 305; T1. Ex. 155; S2. 19.) And, at least after 1988, he would have had to do so in a similar manner, using straw purchasers to obtain firearms. He similarly kept ledgers of the guns and ammo, stored them in safes (except certain guns left in personal-protection locations), and took steps to conceal his possession

by purportedly transferring the arms to others.[6] (*See* D. 82:2, Attachment A; T1. Exs. 87, 152.)

Contrary to his assertions on appeal, Jones's "hoarding" of firearms and ammunition cannot be characterized as either isolated or sporadic. (T1. 302, 305; T1. Ex. 155; A. Br. 46.) And while the temporal proximity may be less strong, the district court correctly determined that "the similarity and regularity are very, very strong in this case." (S2. 19.) Jones's ongoing possession of an increasing arsenal was "germane" to "demonstrate[e] the seriousness" of his offenses—the very "goal of the relevant conduct guideline." *United States v. Nance*, 611 F.3d 409, 417 (7th Cir. 2010).

Jones also overstates the purported consequences. He implies that the district court would have, without the enhancement, found that he possessed the guns as part of a collection. (A. Br. 48.) That is false. To the contrary, the court stated in no uncertain terms: "even if the Court were allowed under

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[6] It is for these reasons that Jones's possession was not "double-counted" under § 1B1.3, cmt. Background. Similar to drug cases in which the quantity of drugs is not a specific element that the government must prove, *see, e.g.*, *United States v. Ebbole*, 917 F.2d 1495, 1501 (7th Cir. 1990), the government was not required to prove that Jones possessed the guns for such a lengthy time, nor that he possessed such a great number, nor that he took steps to conceal them. 18 U.S.C. § 922(g)(1). Instead, those are factors which weigh on the seriousness of the crime, making them relevant factors for sentencing. *Nance*, 611 F.3d at 417. Even so, it is not entirely clear that Jones possessed the same firearms—much less the more fungible ammunition—throughout this time period.

the guidelines to give the 2K2.1(b)(2) reduction, the Court would not," because at least two of his guns were used for personal protection (Jones also admitted to hunting). (S1. 15; T1. 308-09.) And the district court evinced a desire to sentence Jones at the low end of the range only as it pertained to his health care fraud conviction. The district court was apparently satisfied with the 100-month sentence it had already imposed for the gun charges. (S2. 48; A. Br. 49-50.) In all events, the sentencing suffered from no error, plain or otherwise.

CONCLUSION

For the reasons stated above, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE IN ACCORDANCE WITH FED. R. APP. P. 32(a)(7)(C)

The foregoing BRIEF OF THE UNITED STATES complies with the type volume limitations required under Fed. R. App. P. 32(a)(7)(B)(i) in that there are not more than 14,000 words or 1,300 lines of text using monospaced type in the brief, that there are 9,714 words typed in Microsoft Word word-processing this 27th day of May, 2016.

s/ Brian Reitz
Brian Reitz
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system to the following:

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