No._____

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM JAMES JONAS, III,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
To the Fifth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit Court of Appeals erred in holding that the district court did not violate Petitioner William James Jonas, III's right to counsel, as provided by the Sixth Amendment to the United States Constitution, when it denied substitute counsel, and failed to notify Petitioner that his current court appointed counsel would remain as counsel of record, before advising him that the option other than the denied substitution was for Petitioner to proceed *pro se* in preparation for his sentencing hearing?

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PRAYER

The petitioner, WILLIAM JAMES JONAS, III, (Petitioner) respectfully prays that a writ of certiorari be granted to review the judgment and opinion of the Fifth Circuit Court of Appeals against the petitioner, reverse the judgment of the Fifth Circuit Court of Appeals, and remand this case for resentencing with the assistance of court appointed counsel, as provided by the Sixth Amendment to the United States Constitution.

OPINIONS BELOW

On August 14, 2020, the Fifth Circuit Court of Appeals issued an order affirming the denial of Petitioner's appeal, in *William James Jonas, III, v. United States*, 824 F. App'x 224 (5th Cir. 2020).

JURISDICTION

On August 14, 2020, the Fifth Circuit Court of Appeals entered its judgment and opinion affirming the order of the United States District Court for the Western District of Texas, Del Rio Division, denying petitioner's appeal in *William James Jonas, III, v. United States*, 824 F. App'x 224 (5th Cir. 2020), and its order denying his motion for rehearing on September 14, 2020.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). This case was brought as a federal criminal prosecution. The District Court therefore had jurisdiction pursuant to 18 U.S.C. § 3231.

CONSTITUTIONAL PROVISION INVOLVED

Petitioner's questions implicate the Sixth Amendment's right to effective assistance of counsel, which provides in relevant part as follows:

> In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

STATEMENT OF THE CASE

I. Procedural History of the Case

On June 26, 2017, William James Jonas, III (Petitioner) was tried and convicted of bribery (Counts 2-4) and conspiracy to commit bribery (Count 1); wire fraud involving theft of honest services (Counts 6-14) and conspiracy to commit wire fraud involving theft of honest services (Count 5); and wire fraud (Counts 15-18). He was sentenced to 35 years (420 months) in the Bureau of Prisons, the result of an upward departure from Jonas's calculated guideline sentence. Jonas appealed his sentence to the Fifth Circuit Court of Appeals, which affirmed in all respects, on August 14, 2020. On September 14, 2020, the Fifth Circuit denied Jonas's motion for rehearing. Mr. Jonas's petition is due to be filed by Monday, December 14, 2020.

II. Facts

After Jonas's conviction by a jury, at a hearing on September 26, 2017, the district court heard Jonas's court appointed counsel, Rogelio Muñoz's motion to withdraw as Jonas lawyer. ROA.2849. Muñoz explained that he received a letter from Jonas, asking that Muñoz take actions to have new counsel appointed for him, specifically, "Please end your representation of me. I am asking you to assist in

seeking new counsel." ROA.2850. [1] Muñoz explained that he and Jonas had a "difference of opinion. Mr. Jonas would like me to file certain motions that…I won't file, and so we have a disagreement. As such, I think our relationship, at this point, is unworkable such that I would urge the Court to grant my motion for withdrawal as his attorney." ROA.2850-51.

When asked to explain his request, Jonas testified that he had "most pressing actions that he would like to take to preserve certain things prior – and those need to be filed prior to sentencing. ROA.2851 Jonas added other complaints about his counsel, including Muñoz's refusal to file certain motions, which the district court admonished were not timely, after which Jonas asked for the district judge to remove herself from his case. ROA2052-56. The tone of the discussions between the Court and Jonas then turned acrimonious.

The court told Jonas that he "playe[d] a lot of games. This system is not one for playing games. It – it does not inure to your benefit." ROA.2856. Jonas responded that the Court had "accused" him of that before, and that she could not point to any such games. *Id*. The Court responded "[y]ou being right now, Mr. Jonas. *I have given you I don't know how many attorneys. Mr. Muñoz is the last in*

[1] The letter was made part of the appellate record by agreement of the parties. *See Appendix*

a list of a lot of attorneys…[y]ou've had problems with every single one of them." ROA.2856-57 (emphasis added). Jonas responded that he'd only had one attorney, and that his first counsel, Mr. Joseph Anthony Florio, "withdrew before he even started…" [2] The Court interjected: "he withdrew after he went to initial appearance, so he was your attorney in this case." ROA.2857. A recitation from the record of this exchange follows:

> THE COURT: *It doesn't matter, Mr. Jonas. He was your counsel of record*. The problem is you don't understand the federal system and you don't want to listen. You want out and you want to be acquitted. I get that, Mr. Jonas. And I don't – I'm not saying that you are not going to get a chance to make those arguments. I'm just saying that we've got to get to sentencing, we've got to complete that part of the case before you can get to the next part, which would be a motion for a new trial, a motion for judgment of acquittal, and/or an appeal. I cannot get to that -- we cannot get to that if I continue to have these hearings because you don't agree with what the attorneys are doing.
>
> *Now, if you want to represent yourself –*
>
> JONAS: I do, Your Honor. *And in lieu of that*, I'm asking to represent myself.
>
> THE COURT: I – that's fine with me, Mr. Jonas. You're an attorney.
>
> JONAS: Thank you.
>
> THE COURT: I know that you are smart, I know that you are capable and so I don't have a problem with that.
>
> JONAS: Thank you, Your Honor.

[2] Florio made an appearance for Jonas at a preliminary examination hearing, but withdrew soon after. Muñoz was appointed to substitute Florio, and remained until Jonas assumed *pro se* status.

> THE COURT: However, you've got to understand, there are times for filing motions. Some of them are pretrial motions. Listen to the word. "Pretrial," not "post-trial," motions. At this point, we've got to get to your sentencing and we've got to complete that. [3]
>
> JONAS: Thank you for -- am I to understand that I am appointed *pro se* -- to represent myself *pro se*?
>
> THE COURT: As long as you understand what you're getting into, Mr. Jonas. Do you understand?
>
> JONAS: Yes, Your Honor.
>
> THE COURT: You understand that you – you're going to be held to the same standard as any other attorney licensed to practice in federal court, to know the rules of federal court and the rules of procedure.
>
> JONAS: Yes. Your Honor, I'm admitted to practice in this district.
>
> THE COURT: Okay. So that's my --
>
> JONAS: Or was.
>
> THE COURT: I was going to say, I thought you were at one time. So you are well aware of the procedures.
>
> JONAS: Yes, Your Honor.
>
> THE COURT: Okay. So you're well aware that filing a motion to dismiss or a new trial based on prosecutorial misconduct, we're – we're down the road from that?
>
> JONAS: Understood, Your Honor.
>
> THE COURT: We're down the road from one; we're – we need to finish the process for the other.
>
> JONAS: Understood, Your Honor.

ROA.2858-2860. The Court then asked Munoz, if he had any reservations about Jonas representing himself, to which Muñoz explained that, while Jonas was

[3] Jonas's sentencing would not take place until another 7 months after this hearing.

"extremely articulate and intelligent, it's usually better to have another person representing you, simply because they're detached from the factual situation, they're detached from what happened, and so they can often look at the case differently, and sometimes give a better assessment or judgment than the individual who's accused, having said that." ROA.2860. Muñoz reiterated that, while Jonas appeared capable, intelligent and articulate, Muñoz twice expressed that he wouldn't recommend Jonas go solo, though Jonas possessed high intelligence and legal training as a lawyer. ROA.

The Court then voiced her concern that Jonas would make emotional, heat of the moment, or passionate decisions, which could get him into trouble, ROA.2861, an ironic observation, considering that it was the district court who gave Jonas the only choice to represent himself. Muñoz added that there were pitfalls to proceeding *pro se*, and that Jonas would be putting himself in "precarious and unchartered territory." ROA.2862. Muñoz explained his own experience practicing before that Court, Muñoz knew the procedures, understood how you object to a presentence report, how to analyze the guidelines, all of which were CRITICALLY important for Mr. Jonas, considering that he would be facing sentencing. Muñoz then commented that he had explained all that to Jonas, this time commenting,

however, not that Jonas wanted substitute counsel, as denoted in Jonas's letter and Muñoz's announcement of that written request for substitute counsel to the court at the beginning of the hearing, but that Jonas indicated that he wanted to represent himself. ROA.2862. Muñoz explained that Jonas was clearly unsatisfied by the representation he received through trial. ROA.2862-63 Muñoz added that, "in light of Mr. Jonas's comments here today and his -- his request to represent himself, I ask that I be relieved of my duties in this case. It now puts me in an extremely difficult situation to represent Mr. Jonas when I know he's, in fact, very unsatisfied with my representation of him. I understand that it puts the Court, I guess, in a difficult situation, but I think he's entitled to represent himself if that's what he chooses." ROA.2863.

The Court interjected that Jonas "has a right to represent himself." But while true, Jonas never asked to represent himself. He wanted substitute counsel, which was denied outright. And the issue for the Court was not his mental, but rather his "legal competence to represent himself. And I'm not doubting that he has the competency to represent himself in terms of being a lawyer. I agree with you, I'm not so sure it's the smartest thing in the world to do, to represent yourself, especially in this particular case because there are so many different parts --moving

parts to it." *Id.* Again, the Court expresses concerns about *pro se* representation, despite the fact that it was the Court who determined that *pro se* representation was the only choice available to Jonas.

The prosecutor suggested that the Court conduct a *Faretta* waiver colloquy, to ensure a voluntary waiver. ROA.2850. The Court then admonished Jonas:

> THE COURT: All right. Mr. Jonas, come back to the -- to the podium. All right, Mr. Jonas, you are wanting to represent yourself.
>
> JONAS: Yes, Your Honor.
>
> THE COURT: You understand you have the right to have counsel to represent you?
>
> JONAS: Yes, Your Honor.
>
> THE COURT: And you have the right that if you cannot afford counsel, one will be appointed to represent you, which has been done with Mr. Munoz. Do you understand?
>
> JONAS: Yes, Your Honor.
>
> THE COURT: Do you understand that while it would not be counsel of your choice, it would be effective counsel, as you have received so far? Do you understand?
>
> JONAS: Yes, Your Honor.
>
> THE COURT: And I'm not prejudging any such motion, Mr. Jonas. I'm just talking generally. And do you understand that if you waive this right you will be representing yourself and there will be, at this point, no attorney to assist you? Do you understand?
>
> JONAS: I understand, Your Honor.
>
> THE COURT: And you're telling me that you are waiving this right knowingly and intelligently?
>
> JONAS: I am, Your Honor.

THE COURT: And that you are doing it understanding the consequences of the waiver?

JONAS: Yes, Your Honor.

THE COURT: Has anybody forced you, threatened you, or coerced you in any way to get you to give up your right to have counsel to represent you?

JONAS: No, Your Honor.

THE COURT: Has anybody promised you anything to get you to give up the right to have counsel to represent you?

JONAS: No, Your Honor.

THE COURT: Are there any factors -- other factors, Mr. Jonas, that I need to take into account before I recognize whether you have knowingly and intelligently waived your right to counsel?

JONAS: No other factors, Your Honor.

THE COURT: All right. Mr. Munoz and Mr. Harris, any other factors, any other questions?

PROSECUTOR: No, Your Honor. Thank you.

MR. MUNOZ: No, Your Honor.

THE COURT: Okay. All right, Mr. Jonas, the Court finds that you knowingly and intentionally waive – you understand your right to counsel and you knowingly and intentionally waive the right to have counsel represent you. And the reason the Court is going through this process is because the Court does find that you are legally competent to represent yourself. You are a licensed attorney. You had -- you practiced law for many years before this became an issue in terms of the charges and the now convictions.

ROA.2868. After a brief *Faretta* colloquy, the Court determined that Jonas was "legally able to represent [himself]," and "grant[ed]" Jonas's "motion" to represent himself, again despite Jonas never having made any motion to proceed *pro se. Id.*

Jonas did not move to represent himself, he requested that his lawyer be removed, and that he be substituted with new appointed counsel. His agreement to proceed *pro se* came only after a realization, that, *in lieu* of new counsel, he would be left with no option but to accept *pro se* status.

During the course of seven months after the September, 2017 status hearing, Jonas filed numerous motions, mailed correspondence to the court and the government, filed lawsuits – including a mandamus actions, and lodged several complaints about access to legal authority at his place of detention, and certain other items.

On April 25, 2018, a hearing originally scheduled for Jonas's sentencing, the following transpired:

> THE COURT: …we need to take care of some preliminary matter -- matters in terms of the volume of motions that you have filed with the court. So let's take them up in terms of categories. Let's take up, first, the various allegations that you have included in some of your filings that you were forced to proceed *pro se*, Mr. Jonas. Let me begin by saying that we had a hearing on a motion to withdraw by Mr. Munoz at your – he filed a motion at your request. The hearing was held September the 26th of 2017. The reasons given for the motion for withdrawing, Mr. Munoz did not know other than there was some conflict in terms of legal strategy between you and him, that you wanted him to file some motions that he did not feel were beneficial to you. And so it was a difference in terms of legal strategy on whether or not something should be filed. *At that point, it was the Court's -- as we were talking, it was the Court's understanding that*

> *there was no legal reason for granting the motion to withdraw, so Mr. Munoz would have remained as your counsel.* (emphasis added) At that point, Mr. Jonas, you opted to go *pro se*. And I've got the transcript. And beginning on Page Ten, we had been talking about different matters that needed to occur, that you couldn't file certain -- you couldn't object to certain information until we finished with the sentencing so you could take the case on appeal. *And we were talking about that, and I told you that we could not continue with the hearing if you -- we didn't have an attorney, if there wasn't an agreement with the attorneys unless you wanted to represent yourself.* (emphasis added). And at that point you said to the Court, "I do, Your Honor. And *in lieu* of that, I'm asking to represent myself." So you requested it, Mr. Jonas. Nobody forced it on you.

ROA.2876. Contrary to its representations at this hearing, the district court did not tell Jonas at the September hearing that it could not continue with the hearing if Jonas did not have counsel, or that *pro se* representation would ensue if there was no "agreement with the attorneys." The Court then revisited the proceedings in the previous hearing, including the *Faretta* waiver. ROA.2877. She added that the implication and the tone of all of Jonas's filings was that he was coerced into going *pro se*. ROA.2879. The Court then transitioned and asked Jonas whether he wanted counsel to represent him, to which Jonas responded that his assent to proceed *pro se* was *in lieu* of new counsel. However, Jonas's election to represent himself was the only choice given to him, other than to remain with Muñoz. The Court then responded, "[i]n lieu of counsel. I'm asking you today, do you want counsel to

represent you?" Here the Court appears to offers Jonas counsel, but not still, not *new* counsel. Jonas then asks for counsel at the appellate level, but again, his request does not presuppose that he is rejecting new, substitute counsel as the Court's offering, versus Muñoz's possible reinstatement. The court suggested that Jonas desist from claiming that he was coerced into proceeding *pro se*, but Jonas "disagree[d]." ROA.2880.

The Court then brought up Jonas' constant references to being forced to proceed *pro se*, in all of his motions, including in the objections to the presentence report. ROA.2881. [4] The Court then tells Jonas, "there's no *in lieu*, do you want counsel, yes or no?" Despite saying "no *in lieu*," it is still not clear that the Court is offering new counsel. Jonas responded that he did not want counsel for that proceeding. *Id.*

Later in that hearing, Jonas expressed wanting a lawyer who "is really committed." ROA.2911. There is an additional conversation about whether Jonas would prefer "full counsel," to which Jonas expressed having mixed feelings, given "opinions [he] formed over 16 months." ROA.2938. Jonas then accepted the

[4] Jonas repeatedly documented the district court's refusal to appoint him substitute counsel, in a number of *pro se* pleadings, following the September hearing. *See* ROA.328, 341, 431, 437, 439, 475, 485-86, 488 and 518.

appointment of standby counsel. ROA.2939. The district court rescheduled Jonas's sentencing hearing.

It was not until Jonas's actual sentencing that the Court acknowledged (contrary to her previous assertions about Jonas's abilities to represent himself in a federal criminal matter) "…as this Court well sees, you are not well versed in federal criminal law – and criminal procedure." ROA.3015

REASON FOR GRANTING THE WRIT

> The Court should grant certiorari and hold that the Fifth Circuit Court of Appeals erred in ruling that the district court did not violate Petitioner William James Jonas, III's right to counsel, as provided by the Sixth Amendment to the United States Constitution, when it denied substitute counsel, and failed to notify Petitioner that his current court appointed counsel would remain as counsel of record, before advising him that, other than the denied substitution, Petitioner's only remaining option was to proceed to his sentencing *pro se*.

I. The Right to Counsel Under the Sixth Amendment

The right to counsel is grounded in the Bill of Rights, which provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. The primacy of that right was eloquently explained by Justice Sutherland in *Powell v. Alabama*, 287 U.S. 45 (1932):

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. . . . If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

Powell v. Alabama, 287 U.S. 45 at 68-69 (1932); *United States v. Pollani*, 146 F.3d 269, 272-273 (5th Cir. 1998) (citing *Powell*). *Gideon v. Wainwright*, 372 U.S. 335 (1963), and its progeny establish an absolute right to counsel at any stage of criminal proceedings where substantial rights of an accused may be affected, in this case, Jonas's sentencing proceedings. *Turnbow v. Beto*, 477 F.2d 1151, 1154 (5th Cir. 1973) (citing *Mempa v. Rhay*, 389 U.S. 128 (1967) (specifically applied *Gideon* to sentencing proceedings); *Worts v. Dutton*, 395 F.2d 341 (5th Cir. 1968) (string omitted).

II. The District Court Violated Jonas's Right to Counsel

A. Jonas Did Not Request Pro Se Status, But Was Forced to Represent Himself through a Fatally Flawed Waiver Process.

The district court denied Jonas substitute counsel at the September hearing, which was within the Court's discretionary authority. However, the district court did not advise Jonas at the September hearing that his appointed counsel would remain as his lawyer. Indeed, the district judge caught herself admitting at the subsequent, April hearing, that *in her mind*, she had decided to deny Muñoz's request to withdraw during the September hearing. Rather, at the April hearing, the Court had given Jonas the lone choice of proceeding *pro se*, which Jonas accepted, *in lieu* of substitute counsel.

The Court thus did not properly consider the possibility that Jonas would have agreed to continue to work with his appointed counsel, and perhaps mend their contentious relationship. This is important because before a district court can delve into a consideration of *pro se* counsel, it must ensure that either substitute counsel is a viable alternative, or if not, that a Defendant is given the opportunity to continue working with current counsel, and determine later whether a substitution of counsel is merited. The crux of this argument is that Jonas never requested *pro se* counsel. It was the district court that injected this idea and advised

Jonas of it as the only available option, without even discussing what the district court later admitted was appointed counsel's continued status as Jonas's lawyer. The district court's flawed determination process therefore represents a violation of Jonas's Sixth Amendment right to counsel.

B. The Supreme Court Requires a Full, and Exhaustive Faretta Hearing Before it Can Allow a Defendant a Request for Pro Se Status.

True, the district court conducted a *pro forma* Faretta hearing, at the urging of the prosecutor. *See Faretta v. California*, 422 U.S. 806 (1975). But here's the rub. The Faretta colloquy failed to take into account the district court's as yet unannounced decision to keep Muñoz as court appointed counsel. The district court did not tell Jonas that it had decided to keep Muñoz on as Jonas's counsel, and thus eliminated Jonas and Muñoz's opportunity to salvage their relationship. [5] This represents a material flaw to the waiver process under *Faretta's* dictate, which requires that "[w]hen an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel," and "[f]or this reason, in order to represent himself, the accused must

[5] The undersigned has been privy to this process from a three-year stint as an Asst. Federal Public Defender with a daily appearance before now retired U.S. District Court Judge George P. Kazen, of the Southern District of Texas, Laredo Division. Judge Kazen would deny most requests for substitution of counsel, and would instruct the parties to make all attempts to restore the attorney-client relationship. Only when this was fully exhausted, did Judge Kazen consider - and would generally grant - a first request for substitute counsel.

'knowingly and intelligently' forgo those relinquished benefits." *Faretta*, 422 U.S. 806 at 835 (citing *Johnson v. Zerbst*, 304 U.S. 458 at 464-465 (1938) *Cf. Von Moltke v. Gillies*, 332 U.S. 708, 723-724 (1948) (plurality opinion of Black, J.)). Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Id*. (citing *Adams v. United States ex rel. McCann*, 317 U.S. 269, at 279 (1942)). The Fifth Circuit has fully espoused this concept in its own precedent, in the context of a Defendant's own conduct during this process. *See United States v. Mesquiti*, 854 F.3d 267, 272 (5th Cir. 2017) (Explaining that "[w]here a fundamental constitutional right, such as the right to counsel, is concerned, courts indulge every reasonable presumption against waiver.") (citing *United States v. Cano*, 519 F.3d 512, 517 (5th Cir. 2008) (quoting *Burton v. Collins*, 937 F.2d 131, 133 (5th Cir. 1991)). While true that "[a] defendant can waive his right to counsel implicitly, by his clear conduct, as well as by his express statement, because "indigent defendants have no right to appointed counsel of their choice…a defendant's refusal without good cause to proceed with able appointed counsel

constitutes a voluntary waiver of" the right to counsel. *Mesquiti*, 854 F.3d at 272. (citation omitted). But to constitute waiver, such a refusal must take the form of "a persistent, unreasonable demand for dismissal of counsel." *Id*. (citation omitted). The process conducted by the district court when addressing Jonas's request for substitute appointed counsel did not allow for an exhaustion of the opportunity for Jonas and Muñoz to mend their relationship. This was key, in light of the district court's unannounced determination at the September hearing that the conflict expressed by the parties did not justify removing Muñoz. Moreover, it cannot be overstressed that Jonas did not seek *pro se* representation. Jonas's request for substitute counsel did not remotely approximate conduct by a Defendant that reaches the equivalent of a waiver, described in *Mesquiti* as a persistent, unreasonable demand for dismissal of counsel. It's possible, despite their misgivings, that Jonas and Muñoz could have restored their relationship. The process afforded by the district court prevented this possibility from becoming a reality, and thus rendered the Faretta waiver materially insufficient to ensure that Jonas would accept to represent himself, in accordance with well-established precedent from this Court.

There is an additional caveat that merits discussion, which Jonas submits may put the process leading to Jonas's acceptance of *pro se* status in a clearer

context. Among the issues considered by the district court was Jonas's intelligence, and his 30-year "experience" in federal matters. But what was never inquired into by the district court, or even discussed was Jonas's experience handling *federal criminal* matters. That said, the district court was well-aware of Jonas's criminal law inexperience. It was, after all, Jonas's incessant and legally clueless filings which caught the attention of the Court even before the September hearing. These filings continued, and were practically ridiculed by the district court when Jonas was finally sentenced, and during which, for the first time, the district court told Jonas "…as this Court well sees, you are not well versed in federal criminal law – and criminal procedure." But this was seven months too late. In fact, the district court's expressed observation that Jonas was woefully equipped to represent himself at his sentencing hearing should have prompted it to revisit Jonas's initial request for the assistance of counsel. In truth, what the Court considered and described as annoying and harassing conduct, were Jonas's desperate efforts at presenting some semblance of a legal defense in anticipation of his sentencing hearing. The district court should have acknowledged that Jonas was abjectly ignorant of federal criminal law and criminal procedure in the first instance, and before it denied Jonas substitute counsel, or at the very least, during the Faretta waiver colloquy. Jonas received a top of the guideline sentence of 360

months, upwardly varied to 35 years. 35 years, in a case involving $17,000.00 in bribes, a wire fraud charge that he argues in this appeal, was legally unsustainable, or alternatively, as also argued in this brief, with loss calculations that were vastly overstated. A review of the September 2017, April and May 2018 hearings demonstrate that Jonas sought substitute court appointed counsel, but was not allowed to receive this much needed assistance.

C. Prejudice

Even after being asked again, at the April hearing, whether Jonas wanted counsel – though never expressly substitute counsel – Jonas expressed wanting a lawyer who was "really committed." When discussing whether Jonas would want "full counsel," Jonas expressed having mixed feelings, given "opinions [he] formed over 16 months." Jonas then settled for the appointment of standby counsel. This subsumes what can happen when a district court fails to exhaust all possible avenues, including the restoration of the attorney-client relationship, before effectively compelling a Defendant to accept *pro se* status. At first blush, it would seem that Jonas did not seize the opportunity to obtain counsel, some 7 months after he initially requested it. But this decision would not be made in a vacuum. By the time that the district court confessed its decision to keep Muñoz as Jonas's counsel at the September hearing, Jonas's spirit was broken. Jonas was a

lawyer, and probably a "really smart" one, but was wholly ignorant in the field of criminal law, the equivalent of a family doctor who performed surgery on himself for 7 months, and felt literally hopeless in obtaining necessary and proper legal advice. *Compare Neal v. Texas*, 870 F.2d 312, 315 (5th Cir. 1989) ("competence in the law evidenced by licensure as an attorney *and years of experience in criminal litigation*, obviously carries with it an awareness of the dangers of self-representation.") (emphasis added). *Accord Sealed Appellee v. Sealed Appellant*, 900 F.3d 663, 671 (5th Cir. 2018) (observing, in the context of a waiver of a conflict of interest related to his lawyer's representation, McGinty's knowledge "[o]ver his decades-long career as an attorney…*prosecutor, criminal defense attorney, and a judge*.") (emphasis added)). It was thus perfectly logical and justified for Jonas to have declined the district court's belated and unclear offer for representation (whether substitute counsel, or Muñoz, the Court never told) at the April hearing, and to settle for standby counsel. Jonas needed counsel assistance, but was left effectively on his own with standby counsel, [6] the result of a fatally flawed process by the district court.

Lastly, Jonas was left to his own devices at his sentencing hearing, which

[6] *See United States v. Taylor*, 933 F.2d 307, 313 (5th Cir. 1991) (holding that "[a]s useful as standby counsel may be when a defendant wishes to represent himself…standby

resulted in a sentence of 35 years – which included an upward adjustment - an exceedingly high sentence in a white-collar prosecution. It bears repeating that, in an almost cruel twist, before she imposed Jonas's sentence, the district court elaborated on Jonas's sheer incompetence in the field of criminal law. Jonas's experience is "Exhibit A" as to why this Court should grant *certiorari*, reverse Jonas's sentence, and remand this case for the opportunity to have a different district court resentence him.

CONCLUSION

For the foregoing reasons, the Petitioner, William James Jonas, III, respectfully prays that this Court grant certiorari, and that it reverse the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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DATED: December 14, 2020.

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counsel is not 'counsel' within the meaning of the Sixth Amendment."

APPENDIX

LexisNexis

Neutral
As of: December 14, 2020 9:39 PM Z

United States v. Jonas

United States Court of Appeals for the Fifth Circuit

August 14, 2020, Filed

No. 18-50257

Reporter
824 Fed. Appx. 224 *; 2020 U.S. App. LEXIS 25874 **

UNITED STATES OF AMERICA, Plaintiff - Appellee v. ***WILLIAM JAMES JONAS***, III, Defendant - Appellant

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [**1] Appeal from the United States District Court for the Western District of Texas. USDC No. 2:16-CR-135-1.

United States v. Lopez, 2020 U.S. App. LEXIS 20334 (5th Cir. Tex., June 29, 2020)

Core Terms

district court, certificate, sentencing, proceeds, appoint, substitute counsel, indictment, wire-fraud, offenses, promises, Guidelines, infrastructure improvement, financing, charges, federal tax, scheme to defraud, public offering, good cause, pro se, schemes, wire, official statement, sentencing range, enhancement, waived

Case Summary

Overview

HOLDINGS: [1]-There was sufficient evidence of defendant's scheme to defraud under *18 U.S.C.S. § 1343* where all of the formal documents associated with the public offering of the municipal bond promised that the proceeds would be kept separate from the city's other funds and defendant's subordinate, acting pursuant to his instructions, broke those promises almost as soon as they were made; [2]-The district court's denial of defendant's motion for substitution of counsel did not violate the *Sixth Amendment* because defendant and his

attorney maintained a functional working relationship; [3]-The court upheld the district court's loss calculation and 16-level enhancement under *U.S.S.G. § 2B1.1(b)(1)(I)* because payments received by the city contractor reduced the actual loss but did not necessarily reduce the loss that defendant purposely sought to inflict by diverting the bond proceeds.

Outcome

Judgment affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

HN1[↓] **Plain Error, Definition of Plain Error**

To qualify as plain, the legal error must be clear or obvious, rather than subject to reasonable dispute.

Criminal Law & Procedure > ... > Accusatory Instruments > Joinder & Severance > Joinder of Defendants

Criminal Law & Procedure > ... > Accusatory Instruments > Joinder & Severance > Joinder of Offenses

HN2[↓] **Joinder & Severance, Joinder of Defendants**

For the purposes of *Fed. R. Crim. P. 8*, whether joinder is proper normally depends on the allegations in the indictment, which are taken as true. A single indictment may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. *Fed. R. Crim. P. 8(b)*. The terms of *Rule 8* are construed broadly in favor of joinder.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Sufficiency of Evidence

Evidence > Weight & Sufficiency

HN3[↓] **De Novo Review, Sufficiency of Evidence**

When considering a properly preserved challenge to the sufficiency of the evidence, an appellate court reviews the district court's decision de novo, but it affords considerable deference to the jury's verdict. The appellate court views the evidence in the light most favorable to the verdict, and will affirm if any reasonable trier of fact could have found every element of the offense beyond a reasonable doubt.

Criminal Law & Procedure > ... > Fraud > Wire Fraud > Elements

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Criminal Law & Procedure > ... > Fraud > False Pretenses > Elements

HN4[] **Wire Fraud, Elements**

Federal law makes it a crime to effect (with use of the wires) any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises. *18 U.S.C.S. § 1343*. While the wire-fraud statute refers to two categories of schemes, i.e., schemes to defraud and schemes to obtain money or property, the Supreme Court has held that those categories are coextensive. Consequently, in a wire-fraud prosecution, the government must prove: (1) a scheme to defraud; (2) the use of, or causing the use of, wire communications in furtherance of the scheme; and (3) a specific intent to defraud.

Criminal Law & Procedure > ... > Fraud > Wire Fraud > Elements

Criminal Law & Procedure > ... > Fraud > False Pretenses > Elements

HN5[] **Wire Fraud, Elements**

The scheme-to-defraud element of *18 U.S.C.S. § 1343* means that the wire-fraud statute prohibits only deceptive schemes to deprive the victim of money or property. The deception does not need to be targeted at the victim, so a scheme to defraud may involve deceiving one person to deprive someone else of money or property. And a scheme to defraud does not need to involve a personal benefit for the perpetrator. That said, a property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme.

Criminal Law & Procedure > ... > Fraud > Wire Fraud > Elements

HN6[] **Wire Fraud, Elements**

The statutory phrase "scheme or artifice to defraud" under *18 U.S.C.S. § 1343* contains an implicit materiality requirement. A false statement is material if it has a natural tendency to influence or is capable of influencing the decisionmaker to which it is addressed. The natural-tendency test is an objective one focused on whether the statement is of a type capable of influencing a reasonable decision maker, not on the particular circumstances in which a statement is made.

Civil Procedure > Attorneys > Substitution of Counsel

Criminal Law & Procedure > Appeals > Standards of

Review > Abuse of Discretion

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Right to Counsel

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Counsel

Criminal Law & Procedure > Counsel > Right to Self-Representation

HN7[⬇] **Attorneys, Substitution of Counsel**

An appellate court reviews *Sixth Amendment* claims de novo. Absent a *Sixth Amendment* violation, a court's refusal to appoint substitute counsel is reviewed for an abuse of discretion. If a defendant waives his or her right to counsel and elects to proceed pro se, the appellate court reviews de novo whether that decision was knowing and intelligent.

Criminal Law & Procedure > Counsel > Substitution & Withdrawal

HN8[⬇] **Counsel, Substitution & Withdrawal**

An indigent defendant who cannot afford to retain an attorney has an absolute right to have counsel appointed by the court. But a defendant is not entitled to appointed counsel of his or her choice, so district courts are constitutionally required to appoint substitute counsel only upon a showing of good cause, such as a conflict of interest, a complete breakdown in communication or an irreconcilable conflict.

Criminal Law & Procedure > Counsel > Substitution & Withdrawal

HN9[⬇] **Counsel, Substitution & Withdrawal**

The mere fact that a defendant is not satisfied with an attorney's performance does not qualify as good cause. Similarly, differences of opinion between appointed counsel and a defendant regarding strategic choices do not constitute good cause for the appointment of substitute counsel.

Criminal Law & Procedure > Sentencing > Sentencing Guidelines > Adjustments & Enhancements

HN10[⬇] **Sentencing Guidelines, Adjustments & Enhancements**

Under the Sentencing Guidelines, the offense level for offenses involving fraud is increased based on the amount of the loss inflicted by the defendant. An appellate court reviews the district court's finding regarding the amount of loss for clear error, but reviews the district court's method for determining that amount de novo.

Criminal Law & Procedure > Sentencing > Sentencing

Guidelines > Adjustments & Enhancements

Evidence > Burdens of Proof > Preponderance of Evidence

HN11[⬇] **Sentencing Guidelines, Adjustments & Enhancements**

For the purposes of the Guidelines, loss is the greater of actual loss or intended loss. *U.S. Sentencing Guidelines Manual § 2B1.1*, cmt., application n. 3(A). Actual loss means the reasonably foreseeable pecuniary harm that resulted from the offense. *§ 2B1.1*, cmt., application n. 3(A)(i). Intended loss, on the other hand, means the pecuniary harm that the defendant purposely sought to inflict. *§ 2B1.1*, cmt., application n. 3(A)(ii). Accordingly, intended loss does not mean a loss that the defendant merely knew would result from his scheme or a loss he might have possibly and potentially contemplated. Put another way, case law requires the government to prove by a preponderance of the evidence that the defendant had the subjective intent to cause the loss that is used to calculate his offense level.

Criminal Law & Procedure > ... > Appeals > Standards of Review > Abuse of Discretion

Criminal Law & Procedure > Sentencing > Appeals > Proportionality & Reasonableness Review

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

Criminal Law & Procedure > Sentencing > Ranges

HN12[⬇] **Standards of Review, Abuse of Discretion**

An appellate court reviews the substantive reasonableness of the sentence under an abuse-of-discretion standard. While a sentence outside of a defendant's sentencing range under the Guidelines does not enjoy a presumption of reasonableness, the appellate court still gives due deference to the district court's decision that the *18 U.S.C.S. § 3553(a)* factors, on a whole, justify the extent of the variance. A district court imposing an upward variance must, however, thoroughly articulate its reasons, which should be fact-specific and consistent with the sentencing factors enumerated in *18 U.S.C.S. § 3553(a)*.

Counsel: For United States of America, Plaintiff - Appellee: Joseph H. Gay Jr., Assistant U.S. Attorney, U.S. Attorney's Office, Western District of Texas, San Antonio, TX; Richard Louis Durbin Jr., Assistant U.S. Attorney, U.S. Attorney's Office, Western District of Texas, San Antonio, TX.

For ***William James Jonas***, III, Defendant - Appellant: George ***William*** Aristotelidis, San Antonio, TX.

William James Jonas III, Defendant -

Appellant, Pro se, Glenville, WV.

Judges: Before KING, GRAVES, and OLDHAM, Circuit Judges.

Opinion

PER CURIAM:*

[*226] ***William James Jonas***, III, was the city attorney and city manager for Crystal City, Texas. During ***Jonas***'s tenure, Crystal City issued certificates of obligation—a kind of municipal bond—and certified that the proceeds would be kept separate from the city's other funds and would be used to pay for energy-saving infrastructure improvements. Notwithstanding that certification, ***Jonas*** directed city employees to place the proceeds into Crystal City's general **[*227]** fund and to use those proceeds for other purposes, including paying his own salary. A jury found ***Jonas*** guilty of four wire-fraud offenses, **[**2]** and the district court sentenced him to 420 months of imprisonment. On appeal, ***Jonas*** challenges both his wire-fraud convictions and his sentence. For the following reasons, we AFFIRM the judgment of the district court.

I.

In 2013, Crystal City began discussions with Siemens Industry, Inc. regarding potential energy-saving infrastructure upgrades. Even though these upgrades were designed to pay for themselves over time, Siemens knew that Crystal City would have to borrow money to be able to afford the upfront costs. Siemens therefore approached Crews and Associates, an Arkansas-based investment bank that Siemens had worked with previously, about Crystal City's financing options. Crews declined to provide financing for the contemplated infrastructure improvements, however.

Notwithstanding Crews's decision, Siemens and Crystal City executed a contract in May 2014. Siemens agreed to make the infrastructure improvements and guaranteed that Crystal City would save approximately $200,000 per year for fifteen years, subject to fluctuations in energy prices.[1] In return, the city agreed to deposit the full contract price—$2,124,389—in an escrow account within ninety days and to pay that money to **[**3]** Siemens in a series of installments as work on the infrastructure upgrades progressed.

Because Crystal City did not obtain financing, it was not able to meet its contractual obligation to fund an escrow account within ninety days. Siemens and the city therefore modified their contract such that an escrow account did not need to be funded until ninety days after Crystal City's city council approved a financing

* Pursuant to *5TH CIR. R. 47.5*, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in *5TH CIR. R. 47.5.4*.

[1] The contract guaranteed that the infrastructure improvements would save Crystal City a certain amount of energy and then used a schedule of utility rates, not Crystal City's actual costs, to evaluate Crystal City's cost savings.

arrangement. The addendum modifying the contract was executed by Siemens and ***Jonas***—acting on behalf of Crystal City—in September 2014.

While it was negotiating that addendum, Siemens approached Crews a second time regarding financing for Crystal City. After reviewing additional information about the city's finances, Crews decided that it would be willing to arrange financing if and only if Crystal City was willing to fund its infrastructure improvements by issuing certificates of obligation secured by its property-tax revenue. Given the city's financial condition, Crews did not believe that more-commonly-used lending facilities—which would be subject to annual appropriations by Crystal City and secured only by the equipment installed by Siemens—were a viable alternative.

Crystal **[**4]** City agreed to finance the infrastructure improvements via a public offering of certificates of obligation, but doing so was no simple matter. Crystal City hired a law firm to serve as bond counsel, and that firm—with input from Crews and ***Jonas***—drafted the required documents. These documents included: (i) an official statement describing the certificates and how they would be used; (ii) an ordinance authorizing the issuance of the certificates of obligation and approving the official statement; (iii) a contract retaining Crews as the underwriter for the public offering of the certificates and indicating that Crews would purchase the certificates from Crystal City for resale to investors; and (iv) a federal tax certification assuring investors that all the conditions required **[*228]** for the certificates to be exempt from federal income taxation had been met. On December 9, 2014, the city council enacted the ordinance, approved the official statement, and agreed to the contract with Crews. Three weeks later, on December 30, ***Jonas*** executed the federal tax certificate, the certificates of obligation were issued, and the city received the proceeds of the certificates of obligation.

The ordinance, **[**5]** the official statement, the contract with Crews, and the federal tax certificate all represented that the proceeds of the certificates of obligation would be kept in a separate fund, not the city's general fund. Those documents also represented that the proceeds would be used to pay for the infrastructure improvements and the costs of the public offering, as opposed to other city business. In fact, the federal tax certificate expressly provided that the city would not use the proceeds as working capital.

As it turns out, these representations were false. The certificate proceeds were immediately placed—at ***Jonas***'s direction and contrary to the city's usual practice—in Crystal City's general fund instead of in a separate account. And over the next five months, Crystal City spent substantially all of the proceeds,[2] but Siemens received only

[2] Because the certificate proceeds were commingled with Crystal City's other funds, it is impossible to say precisely when the proceeds were spent. *See, e.g.*, *Hawes v. Stephens, 964 F.3d 412, 417 (5th Cir. 2020)* ("Because Mr. Hawes's VA benefits were commingled with . . . sizeable deposits by a private individual, it is impossible to know whether the medical co-payment was charged against funds that originated from the Department of the Treasury."). Bank records show, however, that there was only $7,936.42 in the general fund as of May 6, 2015, so the rest of the certificate proceeds must have been spent on or before that date. *See, e.g., United States v. Miller, 911 F.3d 229, 234 (4th Cir. 2018)* ("The [lowest-

$1,210,926.05 during that period. The rest of the proceeds were used for to pay for expenses that were not related to the infrastructure improvements, such as ***Jonas***'s salary. Even with the certificate proceeds, Crystal City could not afford to pay its bills as they became due, and ***Jonas*** decided which bills would be paid and when those payments would **[**6]** occur.

Although Siemens was not paid on time or in full, it completed the infrastructure upgrades in Crystal City by October 2015. In total, Crystal City paid Siemens $1,404,340.21. This amount allowed Siemens to recoup its costs, but it was paid about $700,000 less than the contract price.

II.

On February 3, 2016, ***Jonas*** was indicted as part of a federal investigation into public corruption in Crystal City. Among other things, ***Jonas*** was charged with four counts of wire fraud under *18 U.S.C. § 1343*, which were based on the misapplication of the certificate proceeds.[3] The indictment **[*229]** identified three other schemes involving public corruption in Crystal City: (i) ***Jonas*** solicited bribes from a contractor named Daniel Hejl and facilitated bribes from Hejl to three corrupt members of the city council in exchange for lucrative contracts with the city; (ii) ***Jonas*** asked a lawyer to represent another contractor in its dealings with the city and to pay a portion of that lawyer's fee to ***Jonas*** as a kickback; and (iii) as part of a corrupt arrangement between Crystal City's mayor, Ricardo Lopez, and local businessman Ngoc Tri Nguyen, ***Jonas*** directed city officials to shut down one of Nguyen's **[**7]** competitors and to waive some of Nguyen's taxes. *See generally United States v. Lopez, No. 18-50465, 2020 U.S. App. LEXIS 20334, 2020 WL 3524552 (5th Cir. June 29, 2020)*. With respect to these three schemes, ***Jonas*** and Lopez were charged with federal-programs bribery under *18 U.S.C. § 666*, honest-services wire fraud under *18 U.S.C. §§1343*, *1346*, and conspiracy to commit those offenses under *18 U.S.C. §§ 371*, *1349*.

The district court held a six-day trial regarding the charges against ***Jonas*** and Lopez. Neither defendant asked the district court to sever the trial. At the close of the United States's case, ***Jonas*** moved for a judgment of acquittal under *Rule 29 of the Federal Rules of Criminal Procedure*. The district court denied that motion, and the jury found ***Jonas*** guilty on all charges.

After the jury returned its verdict, ***Jonas***'s court-appointed attorney asked—at ***Jonas***'s request—the district court for leave to withdraw from the case. The district court held a hearing on September 26, 2017. At

intermediate-balance rule] provides that where the balance of an account into which tainted proceeds are deposited subsequently dips below the amount of those tainted proceeds, the only tainted funds thereafter traceable to the account are funds equal to that lowest account balance. This is true even if the account balance later grows through the deposit of legitimate funds."); *see also Swor v. Bartley Tex. Builders Hardware Inc. (In re Swor), 347 F. App'x 113, 117 (5th Cir. 2009)* (applying the lowest-intermediate-balance rule).

[3] Three of the wire-fraud counts were based on emails that ***Jonas*** sent to Crews in December 2014; these emails transmitted executed copies of documents associated with the certificates, such as the ordinance and Crews's contract with the city. The fourth count was based on the wire transfer sending the certificate proceeds to Crystal City. Each use of wire communications was charged as a separate offense, because "[i]t is not the scheme to defraud but the use of the mails or wires that constitutes mail or wire fraud." *United States v. St. Gelais, 952 F.2d 90, 97 (5th Cir. 1992)*.

the hearing, ***Jonas*** explained that he wanted to make certain motions, such as a motion for a new trial based on alleged prosecutorial misconduct, that his attorney was not willing to file. The district court indicated that it was not willing to appoint a new lawyer to represent ***Jonas*** during sentencing, but it would allow him to proceed pro se. After the district court set out these options, ***Jonas***'s attorney **[**8]** indicated that he had already discussed the dangers of proceeding pro se with his client. Nevertheless, ***Jonas*** decided that he would rather represent himself at sentencing.

Six months after this hearing, the United States Probation Office completed its Presentence Investigation Report (PSR). Pursuant to the United States Sentencing Guidelines, the PSR treated all of ***Jonas***'s convictions as a single group of closely related counts. *See U.S. Sentencing Guidelines Manual § 3D1.2 cmt. n.6* (U.S. Sentencing Comm'n 2016) (U.S.S.G.) (stating, as an example, that "five counts of mail fraud and ten counts of wire fraud" should be grouped together even if they "arise from various schemes"). The PSR calculated ***Jonas***'s offense level to be 40, which included a 16-level enhancement for causing a loss of more than $1,500,000 but less than $3,500,000. This enhancement was based on "an intended loss to Crystal City of $2,172,102.51," the amount of certificate proceeds received by the city, because the "misallocation of these funds and Crystal City's late payments to Siemens . . . (from the outset) show that ***Jonas*** was unconcerned with paying the contracted amounts and rather was interested in using the borrowed money to fund (amongst other things) his **[**9]** salary and expenses." Given ***Jonas***'s offense level and criminal-history category, the PSR concluded that ***Jonas***'s sentencing range was 292-365 months.

At the district court's sentencing hearing on May 16, 2018, ***Jonas*** objected to the PSR's 16-level enhancement based on intended loss. ***Jonas*** argued that there was no intended loss, because—per ***Jonas***—Crystal City could have paid Siemens out of its tax revenues notwithstanding the **[*230]** misappropriation of the certificate proceeds. ***Jonas*** further argued that there was no intended loss to Siemens, because he intended to pay Siemens eventually, as evidenced by the payments actually made to Siemens. The district court overruled ***Jonas***'s objection, finding that ***Jonas*** did not initially intend to pay Siemens and that the intended loss was therefore the full contract price owed to Siemens. Accordingly, the district court concluded that the PSR correctly calculated ***Jonas***'s sentencing range under the Guidelines.

After hearing a victim-impact statement from the woman who took over as Crystal City's city manager following ***Jonas***'s arrest and indictment, the district court decided that a sentence within ***Jonas***'s sentencing range was not adequate "to reflect the seriousness **[**10]** of the offense, to promote respect for the law, and to provide just punishment for the offense." *18 U.S.C. § 3553(a)(2)(A)*. Consequently, the district court imposed a 420-month sentence.[4]

[4] Because the statutory maximum sentence for a wire-fraud offense is

Jonas filed a timely notice of appeal.

III.

Jonas, who is represented by appointed counsel on appeal, argues that the district court violated *Rule 8(b) of the Federal Rules of Criminal Procedure* by trying the wire-fraud charges against him alongside the federal-programs-bribery, honest-services-wire-fraud, and conspiracy charges against himself and Lopez. According to ***Jonas***, these two groups of charges were not sufficiently related to be charged in a single indictment. ***Jonas*** did not present his *Rule 8(b)* argument to the district court or otherwise move for severance, so we review—at most—for plain error. *See United States v. Mann, 161 F.3d 840, 862 (5th Cir. 1998)*.[5] ***HN1***[↑] To qualify as plain, "the legal error must be clear or obvious, rather than subject to reasonable dispute." *Puckett v. United States, 556 U.S. 129, 135, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009)*.

HN2[↑] For the purposes of *Rule 8*, whether joinder is proper normally depends on the allegations in the indictment, which are taken as true. *United States v. McRae, 702 F.3d 806, 820 (5th Cir. 2012)*; *United States v. Faulkner, 17 F.3d 745, 758 (5th Cir. 1994)*. A single indictment "may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses." *Fed. R. Crim. P. 8(b)*. We construe the **[**11]** terms of *Rule 8* broadly in favor of joinder. *United States v. Butler, 429 F.3d 140, 146 (5th Cir. 2005)*.

Whether the wire-fraud charges against ***Jonas*** were part of the same series of acts or transactions as the other charges against ***Jonas*** and Lopez is at least subject to reasonable dispute. In connection with the wire-fraud charges, the indictment alleges that the certificate proceeds were used to "pay certain favored contractors, **[*231]** including [Hejl]." Other portions of the indictment indicate that Hejl enjoyed his favored status—and therefore received a portion of the certificate proceeds—because he paid bribes to ***Jonas*** and others. Read together, these allegations indicate that ***Jonas***'s wire-fraud offenses were used to fund other offenses charged in the indictment, so the district court did not plainly err by failing to make a sua sponte severance.

IV.

Jonas also argues that there was insufficient evidence introduced at trial to support the jury's verdict regarding the wire-fraud offenses. ***HN3***[↑] When considering a properly preserved challenge to the

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20 years, *18 U.S.C. § 1343*, the district court had to impose consecutive sentences in order to impose a total sentence of 420 months, *see U.S.S.G. § 5G1.2(d)* ("If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment.").

[5] *Mann* states that, in cases where defendants "have failed to show any cause for failing to move for severance prior to trial," we have held that "we need not even address the merits of their [*Rule 8(b)*] argument." *161 F.3d at 862*. *Mann* also states, however, that in other cases "we have limited review to plain error review in such circumstances." *Id.*

sufficiency of the evidence, we review the district court's decision de novo, but we afford considerable deference to the jury's verdict. *United States v. Curtis, 635 F.3d 704, 717-18 (5th Cir. 2011)*. We view the evidence in the light most favorable to the verdict, and we **[**12]** will affirm if any reasonable trier of fact could have found every element of the offense beyond a reasonable doubt. *Id.* Applying this standard, we conclude that the district court correctly rejected ***Jonas***'s challenge to the sufficiency of the evidence.

A.

HN4[↑] Federal law "makes it a crime to effect (with use of the wires) 'any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.'" *Kelly v. United States, 140 S. Ct. 1565, 1571, 206 L. Ed. 2d 882 (2020)* (quoting *18 U.S.C. § 1343*). While the wire-fraud statute refers to two categories of schemes, i.e., schemes to defraud and schemes to obtain money or property, the Supreme Court has held that those categories are coextensive. *McNally v. United States, 483 U.S. 350, 359, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987)*.[6] Consequently, in a wire-fraud prosecution, "the government must prove: (1) a scheme to defraud; (2) the use of, or causing the use of, wire communications in furtherance of the scheme; and (3) a specific intent to defraud." *United States v. Harris, 821 F.3d 589, 598 (5th Cir. 2016)*.

HN5[↑] The scheme-to-defraud element means that the wire-fraud statute "prohibits only deceptive schemes to deprive the victim of money or property." *Kelly, 140 S. Ct. at 1571* (cleaned up). The deception does not need to be targeted at the victim, so a scheme to defraud may involve deceiving one person to deprive someone else of **[**13]** money or property. *United States v. McMillan, 600 F.3d 434, 449 (5th Cir. 2010)*. And a scheme to defraud does not need to involve a personal benefit for the perpetrator. *United States v. Blaszczak, 947 F.3d 19, 35-36 (2d Cir. 2019)*; *see also Kelly, 140 S. Ct. at 1573* (a deceptive scheme by a mayor to get on-the-clock city workers to renovate his daughter's house could "undergird a property fraud prosecution"); *United States v. Baker, 923 F.3d 390, 404 (5th Cir. 2019)* ("*Section 1343* does not require an intent to obtain property directly from a victim."), *cert. denied, 140 S. Ct. 2565, 206 L. Ed. 2d 496 (2020)*. That said, "a property fraud conviction **[*232]** cannot stand when the loss to the victim is only an incidental byproduct of the scheme." *Kelly, 140 S. Ct. at 1573*.

HN6[↑] Additionally, the statutory phrase "scheme or artifice to defraud" contains an implicit materiality requirement. *Neder v. United States, 527 U.S. 1, 25, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)* ("We hold that materiality of falsehood is an element

[6] Congress responded to this holding by enacting *28 U.S.C. § 1346*, which states that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." To avoid constitutional difficulties, the Supreme Court has limited this provision so that it criminalizes only bribes and kickbacks. *Skilling v. United States, 561 U.S. 358, 408-09, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010)*. Since ***Jonas***'s wire-fraud convictions are not based on bribes or kickbacks, *§ 1346* does not affect our analysis.

of the federal mail fraud, wire fraud, and bank fraud statutes."). A false statement is material if it has a natural tendency to influence or is capable of influencing the decisionmaker to which it is addressed. *Id. at 16*. The natural-tendency test is "an objective one focused on whether the statement is of a type capable of influencing a reasonable decision maker," not on the particular circumstances in which a statement is made. *United States v. Evans, 892 F.3d 692, 712 (5th Cir. 2018)* (cleaned up); *see also United States v. Abrahem, 678 F.3d 370, 376 (5th Cir. 2012)* (concluding that "delivery of the statement in a manner not likely to persuade does not affect **[**14]** the materiality of the statement"). *But see United States v. Davis, 226 F.3d 346, 358-59 (5th Cir. 2000)* (rejecting the argument that "a misrepresentation is only material if a reasonable person would rely on it" because "a statement could indeed be material, even though only an unreasonable person would rely on it, if the maker knew or had reason to know his victim was likely so to rely").

B.

Jonas contends that there was no evidence that a scheme to defraud existed, but we reject that contention. The official statement, the federal tax certificate, and other formal documents associated with the public offering of the certificates promised that the proceeds would be kept separate from Crystal City's other funds and would be used to pay for infrastructure improvements. One of ***Jonas***'s subordinates, acting pursuant to his instructions, broke those promises almost as soon as they were made. A reasonable jury could therefore infer that ***Jonas*** knew that the promises were false all along but used them to obtain money from the investors anyway—in other words, that ***Jonas*** engaged in a scheme to defraud. *See Corley v. Rosewood Care Ctr., Inc. of Peoria, 388 F.3d 990, 1007 (7th Cir. 2004)* ("Fraud requires much more than simply not following through on contractual or other promises. It requires a showing of deception at the time the **[**15]** promise is made."); *see also United States ex rel. O'Donnell v. Countrywide Home Loans, Inc., 822 F.3d 650, 658 (2d Cir. 2016)* (holding, in a civil action premised on an alleged violation of *§ 1343*, that "where allegedly fraudulent misrepresentations are promises made in a contract, a party claiming fraud must prove fraudulent intent at the time of contract execution; evidence of a subsequent, willful breach cannot sustain the claim").

We likewise reject ***Jonas***'s contention that there was no evidence before the jury indicating that the false promises about where the certificate proceeds would be kept and how they would be spent were material. The jury heard testimony from a Crews representative indicating that the investment bank would not have been willing to participate in the public offering if it had known that Crystal City's promises about the certificate proceeds were false. Indeed, if ***Jonas*** had not signed the federal tax certificate—or if that document had accurately described how the certificate proceeds would be used—the public offering would not have occurred, and

Crystal City would not have obtained the certificate proceeds. We therefore conclude that the jury could have reasonably concluded that the false promises contained in the federal tax certificate were material, so **[**16]** **[*233]** ***Jonas***'s wire-fraud convictions were supported by sufficient evidence.

V.

In his third point of error, ***Jonas*** contends that the district court deprived him of his right to counsel at sentencing by failing to appoint substitute counsel and by allowing him to proceed pro se. *HN7*[] We review *Sixth Amendment* claims de novo. *United States v. Romans, 823 F.3d 299, 312 (5th Cir. 2016)*. "Absent a *Sixth Amendment* violation, a court's refusal to appoint substitute counsel is reviewed for an abuse of discretion." *Id.* If a defendant waives his or her right to counsel and elects to proceed pro se, we review de novo whether that decision was knowing and intelligent. *United States v. Tate, 535 F. App'x 359, 361 (5th Cir. 2013)*.

A.

The district court did not violate the *Sixth Amendment* by refusing to appoint substitute counsel for ***Jonas***. *HN8*[] "An indigent defendant who cannot afford to retain an attorney has an absolute right to have counsel appointed by the court." *Romans, 823 F.3d at 312*. But a defendant is not entitled to appointed counsel of his or her choice, *United States v. Fields, 483 F.3d 313, 350 (5th Cir. 2007)*, so district courts are constitutionally required to appoint substitute counsel only upon a showing of "good cause, such as a conflict of interest, a complete breakdown in communication or an irreconcilable conflict," *Romans, 823 F.3d at 312* (quoting *United States v. Young, 482 F.2d 993, 995 (5th Cir. 1973)*).

HN9[] The mere fact that a defendant is not satisfied with an attorney's performance does not qualify as good cause. **[**17]** *United States v. Sarfraz, 683 F. App'x 268, 269 (5th Cir. 2017)*. Similarly, differences of opinion between appointed counsel and a defendant regarding strategic choices do not constitute good cause for the appointment of substitute counsel. *See United States v. Moore, 706 F.2d 538, 540 (5th Cir. 1983)* ("A defendant is entitled to appointment of an attorney with whom he can communicate reasonably, but has no right to an attorney who will docilely do as he is told.").

Jonas testified that he wanted substitute counsel because his court-appointed attorney would not file certain motions that ***Jonas*** requested. ***Jonas*** also testified that he was not satisfied with his lawyer's performance at trial and in connection with an unsuccessful motion for release on bond pending sentencing. Additionally, ***Jonas***'s lawyer stated: "It now puts me in an extremely difficult situation to represent Mr. ***Jonas*** when I know he's, in fact, very unsatisfied with my representation of him."

These issues do not amount to good cause for appointment of substitute counsel. Far from evidencing a complete breakdown in communication or an irreconcilable conflict,

the record indicates that ***Jonas*** and his attorney maintained a functional working relationship. For example, ***Jonas***'s attorney told the district court that he had explained to ***Jonas*** the **[**18]** dangers of proceeding pro se at sentencing. Since there was not good cause for appointing substitute counsel, the district court's failure to do so did not violate the *Sixth Amendment*.

B.

Jonas argues, in the alternative, that even if the district court did not violate the *Sixth Amendment* by failing to appoint substitute counsel, it abused its discretion by failing to do so. The district court denied substitute counsel to ***Jonas*** because it was concerned that appointment **[*234]** of new counsel would unduly delay ***Jonas***'s sentencing and because it believed that ***Jonas***'s request was an attempt "to play games with the system." ***Jonas*** has not established that the district court's consideration of these factors involved "an error of law or a clearly erroneous assessment of the evidence." *Romans, 823 F.3d at 312* (quoting *United States v. Teuschler, 689 F.3d 397, 399 (5th Cir. 2012)*). Consequently, we conclude that no abuse of discretion took place.

C.

Jonas validly waived his right to counsel when he elected to proceed pro se at sentencing. Because there was not good cause to appoint substitute counsel for ***Jonas***, this case does not involve "the constitutionally repugnant choice between representation by disqualified court-appointed counsel and self-representation." *Dunn v. Johnson, 162 F.3d 302, 307 (5th Cir. 1998)*. It follows that the district court's decision to deny **[**19]** substitute counsel to ***Jonas*** did not render his subsequent "waiver of the right to counsel involuntary." *Id.* While ***Jonas***'s decision to represent himself at sentencing appears unwise in retrospect, the district court adequately warned ***Jonas*** about the danger of representing himself, and ***Jonas*** confirmed that he was knowingly and intelligently waiving his right to court-appointed counsel. Given ***Jonas***'s education and experience practicing law, we are willing to take him at his word and therefore conclude that ***Jonas*** knowingly and intelligently waived his right to counsel.

VI.

As his next point of error, ***Jonas*** asserts that the district court erred when it calculated his Guidelines sentencing range by incorrectly quantifying the loss associated with his offenses. ***HN10***[↑] "Under the Sentencing Guidelines, the offense level for offenses involving fraud is increased based on the amount of the loss inflicted by the defendant." *United States v. Harris, 597 F.3d 242, 249 (5th Cir. 2010)*. We review the district court's finding regarding the amount of loss for clear error, but we review the district court's method for determining that amount de novo. *United States v. Harris, 821 F.3d 589, 601 (5th Cir. 2016)*.

HN11[↑] For the purposes of the Guidelines, "loss is the greater of actual loss

or intended loss." U.S.S.G. § 2B1.1 cmt. n.3(A). Actual loss "means the [**20] reasonably foreseeable pecuniary harm that resulted from the offense." *Id.* cmt. n.3(A)(i). Intended loss, on the other hand, "means the pecuniary harm that the defendant purposely sought to inflict." *Id.* cmt. n.3(A)(ii). Accordingly, intended loss "does not mean a loss that the defendant merely *knew* would result from his scheme or a loss he might have *possibly and potentially* contemplated." United States v. Manatau, 647 F.3d 1048, 1050 (10th Cir. 2011); *see also* Amendment 792 to the United States Sentencing Guidelines (adopting the view articulated by then-Judge Gorsuch in *Manatau*). Put another way, "our case law requires the government [to] prove by a preponderance of the evidence that the defendant had the subjective intent to cause the loss that is used to calculate his offense level." United States v. Sanders, 343 F.3d 511, 527 (5th Cir. 2003).

The district court found that ***Jonas***'s intended loss was greater than $1,500,000 and less than $3,500,000, so it applied a 16-level enhancement to the offense level. *See* U.S.S.G. § 2B1.1(b)(1)(I). The district court found that, when ***Jonas*** placed the certificate proceeds in Crystal City's general fund, he did not intend to pay Siemens anything, even though Siemens was contractually entitled to over two million dollars from the city. ***Jonas*** [*235] contends that this finding is clearly erroneous [**21] because Siemens received partial payment from Crystal City. But while the payments received by Siemens reduced the actual loss that it suffered, those payments did not necessarily reduce the loss that ***Jonas*** purposely sought to inflict.[7] We therefore conclude that the district court did not clearly err when determining the amount of loss attributable to ***Jonas*** and applying a 16-level enhancement.

VII.

Finally, we conclude that the 420-month sentence imposed by the district court was substantively reasonable. ***HN12***[↑] "We review the substantive reasonableness of the sentence under an abuse-of-discretion standard." United States v. Simpson, 796 F.3d 548, 557 (5th Cir. 2015). While a sentence outside of a defendant's sentencing range under the Guidelines does not enjoy a presumption of reasonableness, we still "give due deference to the district court's decision that the [18 U.S.C.] § 3553(a) factors, on a whole, justify the extent of the variance." Gall v. United States, 552 U.S. 38, 51, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007). A district court imposing an upward variance must, however, "thoroughly articulate its reasons," which "should be fact-specific and consistent with the sentencing factors enumerated in [18 U.S.C. § 3553(a)]." United States v. Hebert, 813 F.3d 551, 562 (5th Cir. 2015) (quoting

[7] For the first time on appeal, ***Jonas*** argues that the partial payments to Siemens should reduce the intended loss because those payments qualify as "money returned . . . by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected." U.S.S.G. § 2B1.1 cmt. n.3(E)(i). The fatal flaw with this argument—beyond ***Jonas***'s failure to present it to the district court—is that the record does not indicate that ***Jonas***'s wire-fraud offenses were undetected when the partial payments to Siemens occurred. On the contrary, the PSR indicates that the federal investigation into public corruption in Crystal City began in 2014, whereas the first payment to Siemens took place in April 2015.

United States v. Smith, 440 F.3d 704, 707 (5th Cir. 2006)).

At the sentencing hearing, the woman who took over as Crystal City's city manager following ***Jonas***'s arrest and indictment gave a **[**22]** victim impact statement. In that statement, she described how ***Jonas***'s mismanagement of Crystal City led to "financial ruin," how ***Jonas***'s arrest and indictment led the city to be "red-flagged by the state . . . from receiving any grants whatsoever," and how the issuance of the certificates of obligation "sealed the city's death" because the city was "never financially viable for that" much debt. Additionally, the city manager alleged that ***Jonas*** fired city employees who would not do the "[i]llegal things" that ***Jonas*** "wanted them to do," which caused Crystal City to lose "a lot of good people that would have kept the city going if he had not terminated them."

The district court found this victim impact statement "very persuasive," and the statement convinced the district court that a sentence within the Guidelines range would not be adequate. The district court explained: "To hear how badly you left that city is shocking at best, Mr. ***Jonas***. . . . But to fire people from their jobs because they wouldn't engage in the conduct that you wanted, that's -- that definitely wasn't taken into account by the guidelines." The district court tied these considerations to some of the *§ 3553(a)* sentencing factors, **[**23]** specifically "the nature and circumstance of the offenses, the seriousness of the offenses, the history and characteristics of the defendant, the need to promote respect for the law, and to **[*236]** provide just punishment for the offenses." Given the district court's clear articulation of its reasoning and the deference we owe to its evaluation of the *§ 3553(a)* factors, we cannot conclude that the district court abused its discretion when sentencing ***Jonas*** to 420 months of imprisonment.

VIII.

For the foregoing reasons, we AFFIRM the judgment of the district court.

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20 days ??

Roy –

Please end your representation of me. I am asking you to assist in my request for new counsel.

Thank you,

William James Jonas III

United States Court of Appeals for the Fifth Circuit

No. 18-50257

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

WILLIAM JAMES JONAS, III,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 2:16-CR-135-1

ON PETITION FOR REHEARING

Before KING, GRAVES, and OLDHAM, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.