

**See “Ends of Justice” Waivers and Continuances by Matz, AUSA And Previous Counsel.**

**Arrested 03.26.02, Tried 11.12.03**

**EIGHTEEN MONTHS TO BRING A RIGHT TO A SPEEDY AND PUBLIC TRIAL**

Tolling of Speedy Trial Act

### **See knowingly and voluntarily waiver of rights**

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In *Barker v. Wingo*, 407 U.S. 514, 531-33, 92 S.Ct. 2182, 2192-93, 33 L.Ed.2d 101 (1972), the Supreme Court enunciated the factors to be considered in determining whether the sixth amendment right to a speedy trial has been denied:

(1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right; and (4) the prejudice resulting from the delay. See *United States v. Saunders*, 641 F.2d 659, 665 (9th Cir. 1980).

We review questions of law under the [Speedy Trial Act](#) de novo. See *United States v. George*, 85 F.3d 1433, 1436 (9th Cir. 1996). In so doing, we note, as did the House Judiciary Committee in its Report recommending passage of the Speedy Trial Act that "the right to a speedy trial belongs not only to the defendant, but to society as well." H.R. Rep. 93-1508, at 15 (1974), reprinted in 1974 U.S.C.C.A.N. 7401,7408. Indeed, "Congress designed the Speedy Trial Act in part to protect the public's interest in the *speedy administration of justice*, and it imposed the sanction of dismissal under S 3162 to compel courts and prosecutors to work in furtherance of that goal." *Lloyd*, 125 F.3d 1263 at 1268 (9<sup>th</sup> Cir. 1997). Accordingly, regardless of the willingness of counsel to accept pretrial delay, the Speedy Trial Act assigns district courts an independent responsibility to protect both the defendant's and the public's strong interest in the timely administration of justice.<sup>1</sup>

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<sup>1</sup> On Nov. 24, 2002, Elena Duarte sent a letter to [William Harris](#), counsel for defendant. Therein she stated "This letter is in response to your proposal that we stipulate to a continuance of the trial... I am uncomfortable doing so unless you know of some authority that indicates that you may request and receive a continuance **over your client's objection**. I am comfortable with the exclusion of time under the Speedy Trial Act even without your client's concurrence, however, [as the case is complex](#) and motions are pending." Thereafter Harris filed a stipulation on November 27, 2002, without informing me and therein he "represented that the defendant has 'represented' that he is willing to waive his right to a speedy trial..."

Everyone signed it but the defendant. Trial was set for December 5, 2002. On 1/3//03 Judge reminded all parties (See docket # 80) that a "firm date" is "set for trial" on 1/14/03.

**Barker v. Wingo**, 407 U.S. 514 (1972) states that the 'entire responsibility' is on the prosecution to **show claimed waiver was knowingly and voluntarily made**. Further, Courts should "*indulge every reasonable presumption against waiver.*" *Id.*

## Transcript of 10.21.2003

Error on page 41, Line 1. This is defendant speaking, not court.

Page 42, Lines 9-25

Judge: "If you make a motion to continue the trial because you don't think you're ready to proceed to trial on whatever date I set, assuming that you're representing yourself, which I think is a strong likelihood, I will entertain that motion."

Defendant: "This reminds me of my choice given to me by - - between the U.S. Court and Mr. Harris<sup>2</sup> - - you either go with ineffective assistance of counsel, who's going to violate your rights, or you can represent yourself. That's like saying to me, do you want me to kick you in the head, or do you want me to kick you in the teeth? Neither one are very appealing to me, Your Honor, at this point. I've demanded effective assistance - - emphasis on assistance - - of counsel. That's all I've asked for. I've worked with these - - with this gentleman here, as the other lawyers, and the record clearly reflects that. However, I don't like having my rights violated, and I will not allow...

Page 43, Lines 17-23

Judge: "The trial date will be continued beyond October 7<sup>th</sup> to a date I will set. **It's continued without Mr. Sutcliffe's explicit concurrence.** *I'm not making a finding that his conduct doesn't constitute implicit assent to a continuance of the trial.* I will look into the authorities that have been presented to me concerning the application of extensions under the Speedy Trial Act and set another date.

Page 41, Lines 1-4

Defendant: "Okay. I believe right in there I said on page 3 November 12, to make sure there is no delay. Yeah, I sure did. I stated again on page 2 to ensure that she's available for my trial, November 12."

Lines 12-14

Judge: "Well, it will arrive, but is your choice November 12<sup>th</sup>?"

Defendant: "Oh, You bet."

## Transcript of 10.01.2003

Lines 17-23

Judge: "The trial date will be continued beyond October 7<sup>th</sup> to a date I will set. **It's continued without Mr. Sutcliffe's explicit concurrence.** *I'm not making a finding that his conduct doesn't constitute implicit assent to a continuance of the trial.* I will look into the authorities that have been presented to me concerning the application of extensions under the Speedy Trial Act and set another date."

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<sup>2</sup> Previous counsel #2, removed for incompetence.

Page 33, Lines 14-25

Prosecutor: "I do know that when I spoke to Mr. Reed earlier about the case we talked about the possibility of going in I believe it was three or **four weeks**, and whether he could be ready. If he has represented to the court that he would be ready in three to four weeks, I think it's well within the court's discretion, absent even a motion from him and over the defendant's objection, to exclude time in the **interests of justice** based on the need for defense preparation, knowing that defense counsel just got the evidence this past Monday. And even had he had it earlier, your Honor, he needed time to confer with his client about it."

Page 34, Lines 1-8

Judge: "Okay. Well, I don't think I have to be persuaded that neither Mr. Reed nor any other lawyer on such short notice would feel subjectively or objectively ready to proceed to trial in the short time frame that an October 7<sup>th</sup> trial would contemplate. I also don't think that Mr. Sutcliffe would be ready, if he represents himself, because he has to have the evidence, maybe not all of it and maybe all of it."

Page 39 to 40

## Transcript of 09.26.2003

Page 49, Lines 10-25

Judge: "Because I am utterly **astonished**<sup>3</sup>, baffled, and upset that despite my efforts and orders that the material has not been transferred from one lawyer to the successive lawyer and is not in the current possession of the **standby lawyer** or the defendant. I don't see how we can proceed to trial, even putting aside the issues of who represents Mr. Sutcliffe under the state of affairs and I don't intend to do so. What is(sic) the calculations on the Speedy Trial Act that I asked you to look into?"

Prosecutor: "Your Honor, when I had done it previously, I had said that according to my calculations, **the last day that we could start trial would be October 10<sup>th</sup>**. That has not changed because you did not exclude time last time."

Judge: "Yeah. Mr. Sutcliffe did not waive time and that was his right."

Page 55

Judge: "[y]ou're not responsible for the fact that one lawyer didn't turn over to the next lawyer what **the lawyer was instructed<sup>4</sup> to turn over to by me and agreed to turn over**. I'm going to get to the root of this one way or another

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<sup>3</sup> There is only one other time the judge used this phrase, See Docket 383. Judge states he is "Disappointed and Astonished by the intemperate tone and utterly unprofessional content of Gregory Nicolaysen's Response ..."

<sup>4</sup> ORDERED

because it's absolutely unacceptable.<sup>5</sup> Mr. Reed is in no position to provide even **Standby** position that would be informed in terms of the evidence, if not in terms of the conduct a lawyer goes through and maneuvers and steps and strategies and conduct that a lawyer displays in representing a person at trial because he doesn't even have the evidence. Now, we're not going to trial on Tuesday. If you don't waive any of your rights, we'll go to trial a week later and I don't think the **Speedy Trial Act** will be violated, but you have to tell me what you want to do."

Page 59, Lines 9-13

Judge: "***This is an unusual case*** and a lot of difficulties in this case,..."

Page 59, Lines 19-25 and Page 60, Lines 1-2

Prosecutor: "As a matter of fact, given the situation, if Mr. Sutcliffe or the court were going to continue the trial and **exclude Speedy Trial time**, we would agree to that because I don't really know as I expressed to the court exactly what's gone on."

"Judge: "You're invited to file [another] memorandum as to grounds and authorization, if they exist, and I don't know if they exist, under these circumstances or tailored circumstances like this, **EVEN AGAINST THE DEFENDANT'S WISHES**. That would be a lawful thing for me to do. I don't have a view one way or the other."

Page 62, Lines 13-20

Judge: "Now, Mr. Reed, I don't know whether consistent with the law and the application of the Speedy Trial Act that the rights of a defendant would be protected if a jury were impaneled and the actual prosecution of the case, the opening statements, and the submission of evidence were to follow at some relatively brief interval after that. **You are sitting here with a understandable worried look, if not a scowl on your face, and I understand why and I'm concerned about that.**

Page 75, Lines 3-8

Judge: "You<sup>6</sup> can arrange for all **subpoenas**. I want the jury instructions that were previously agreed to, to make sure you make those available to Mr. Reed and I need a diskette, because I lost the one or we can't find the one. **There seems to be a goblin surrounding this case**, and I want to fiddle with it so I would benefit from the diskette.

## 08.27.2003 Minute Order

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<sup>5</sup> The court never did get to the root of it but instead covered it up by later modifying its order by omitting several of the previous lawyers from the order.

<sup>6</sup> Standby Counsel David Reed.

Court accommodates defendant by agreeing to GRANT defendant's motion to recuse counsel. Court finds defendant has waived his right to appointed counsel. Further, Defense "**specifically did not agree to the continuation.**" "**On courts own motion**, the trial is continued from September 9, 2003 to September 30<sup>th</sup>, 2003."  
See page 69-70

## Transcript Of 01.14.2003

Page 26-27

Judge: "If I wanted to avoid consuming that amount of time for a new lawyer, I could order the government to turn over the 52 CD's all over again, right?"

Harris: "That would solve the problem."

Page 31-32

Judge: "**I'm ORDERING the government**, as an entirely pragmatic solution to an otherwise potentially tangled supposed issue, to make available to the new counsel, anew, each and every one of the computer drives, and apparently there were 52, but what ever was produced previously and obtained or generated or created thereafter is to be made available a new to the lawyer who will be appointed to represent Mr. Sutcliffe." "I want the lawyer to get it all right away." "**I don't want anymore incremental providing of discovery.**" "**But I don't want anything coming in in bits and pieces.**"

Page 32, Lines 22-25

Judge: **I make a finding, an explicit finding, constitute a waiver of the right to a speedy trial by Mr. Sutcliffe, even though he does not necessarily agree with that.**"

## Docket 78

See Attached ORDER and Letter to Judge:

Court DENIES defendant's 'requests' ands ORDERS defendant not to communicate directly with the court.

See Letter attached, which also deals with DISCOVERY ISSUES, and Competency of Counsel, page 4:

Defendant: "I again, respectfully renew my request for dismissal and, again, object to any continuances that continue to prejudice my right to a speedy trial."

## Transcript of 11.21.2002

Docket # 65

Page 19, Lines 6 Judge: "[And the problem is I'm going to be in trial.](#)"<sup>7, 8</sup>  
Lines 13-15

Judge: "So I think you need to consult with Mr. Sutcliffe and with my court clerk, and see what dates are available to you and the prosecution."<sup>9</sup>

"Overcrowded courts should be weighed less heavily ([then government's deliberate attempt to delay](#))."<sup>9</sup> Barker v. Wingo, 407 U.S. 514 (1972)(cite omitted).

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<sup>7</sup> *Court may not grant continuance for delays caused by congestion of court's calendar.* U.S. v. Stroudenmire, 74 F.3d 60, 64 (4th Cir. 1996); U.S. v. Ortega-Mena, 949 F.2d 156, 159-160 (5<sup>th</sup> Cir. 1991)

<sup>8</sup> *Continuances due to general congestion of courts' calendars are forbidden* by the Act. §3161(h)(8)(C); U.S. v. Engstrom, 7 F.3d 1423, 1427 (9<sup>th</sup> Cir. 1993).

<sup>9</sup> Judge set this date of December 3<sup>rd</sup> himself; back on September 23, 2002, page 28, lines 7-8 and page 31, lines 7-8, *specifically* **requesting and requiring** December 3<sup>rd</sup>.

## Transcript of 09.25.2002

Page 5, Lines 4-9

Judge: "Mr. Harris, are you aware of the trial date on this case?"

Harris: "Yes, December 3, Your Honor."

Judge: "Okay. And I intend to do my best along with my staff, and I expect the lawyers will be doing the same to make sure that we are ready to go on December 3<sup>rd</sup>.<sup>10</sup>

Page 4, Lines 10-15

Judge: "[I] really doubt very much whether under the circumstances that you are currently proceeding in this case that you will be able to find, no matter how difficult it may be, to have all your wishes accommodated a lawyer better equipped and more dedicated to serving your interest than Mr. Harris.

## Transcript of 09.23.2002

Page 32, Lines 9-10

Judge: "If we have to change that [date of trial of December 3<sup>rd</sup>], it won't be something I'm going to be pleased about."

Page 30, Lines 10-13

Judge: "That's when I wanted to reset this date for trial. I don't want the continuance that's necessitated by this substitution of counsel to delay Mr. Sutcliffe's rights to a speedy trial."

Page 28, Lines 7-8

Judge: "So even though I undoubtedly have a zillion trials, I am inclined to set it for December 3."

Page 27, Lines 8-15

Judge: "How long would you need?"

Bednarski: "It's - - that's a hard thing to say because I know what has taken time in the last six months. That's a different question - -"

Judge: "Yeah. *But he needs a lot less than the usual amount of time* because you've done whatever you've done."

Bednarski: "I would say at least six to eight weeks."

Page 22, Lines 22-25

Judge: "It will require a continuance. You're right that somebody can't take on your defense and do the job for you in four weeks."<sup>11</sup>

Defendant: "May I interrupt you for one second?"

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<sup>10</sup> See RT of 11.21.2002, page 19, lines 6 and 13-15.

<sup>11</sup> See Transcript of 09.02.2003, Page 10, Lines 1-7. Reed: "There's one month to go before that date."

Page 17, Lines 15-17

Defendant: “[t]o grant this request would be to further jeopardize my right to a **speedy trial**, representation, and/or assistance of **competent counsel** and right to my freedom.

Page 12, Lines 19-21

Judge: “[y]ou want to make sure that at all times you have lawyers who are in a **position to represent you effectively and zealously.**”

Page 12, Lines 7-11

Judge: “But I think what we all have to do is get to the real issue that’s before me today. Your lawyers don’t want to be your lawyers. Whatever their reasons are, I can only guess at. *It’s not entirely a wild guess.* But the record is the record and I only have the record to rely upon.”

## Transcript of 08.22.2002

Page 26, Lines 10-13

Now if you are relying on and if your lawyers are relying on outside **experts**<sup>12</sup> to assist in any aspect of the defense, and it wouldn't surprise me if they have to, given the nature of these charges.<sup>13</sup>

Page 26, Lines 18-23

JUDGE: "But I will guarantee you that I will set this down for trial and stick to the date, unless there is absolutely compelling conflicts that I can't get out of, to get you to trail as quickly as possible. But I don't want you to start the trial before you're ready. That means your lawyers are ready. And that means the experts are lined up."

Page 18, Lines 16-17

Judge: "He has an interest in proceeding to trial as quickly as in his interest."

Page 19, Lines 6-8

Judge: "And that is the defense that Mr. Sutcliffe's entitled to, and the continued and efficient prosecution and defense of this case."

Page 27, Lines 13-14

Judge: "Now the question is when do you want to go to trial? And you don't have final say on that."

Page 28, Lines 2-12

Judge: "September 3<sup>rd</sup> is less then two weeks. And the declaration that Ms. Postashner filed relating to her assessment and that of her office as to what they have to do to complete their analysis of the evidence that the government got and gave them, approximately ten hard drives, four zip drives, 29 floppy discs, approximately 1500 pages of written discovery. And she mentions an expert, I don't know who it is, who's already begun to analyze this evidence but won't complete it. Now you say he won't complete his analysis by the middle of October. **That strikes me as surprising, Ms. Potashner.**"

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<sup>12</sup> The next lawyer, William Harris, did not utilize the so-called expert, hired and paid for by the FPD office. Further, the next lawyer, Nicolaysen didn't hire the FPD lawyer until 2 days after the trial was set to begin. Furthermore, no reports of any expert were ever turned over to defendant for trial. See **September 26, 2003, Page 20, Lines 9-20**

<sup>13</sup> See **September 26, 2003, Page 20, Lines 9-20** where judge asks Reed if he has seen any expert's reports of any nature and Reed says no.

Page 31, Lines 22-23

Judge: "But the question is how much of a **continuance**. And I would be willing to put some pressure on the government."<sup>14</sup>

Page 33, Lines 14-20

Judge: "Ms. Duarte, I have been pursuing and exploring various matters with the defendant and with Ms. Potashner, including the **request for a continuance**<sup>15</sup> of the trial. I have taken into account a whole host of factors; **including what was set forth in your letter dated August 20<sup>th</sup>**. And I'm going to Order that the trial is continued until October 22<sup>nd</sup>."

Line 23

Judge: "**I want that to be a firm date.**"

Page 34, Lines 1

Judge: "**We're going to go to trial on October 22<sup>nd</sup>.**"

Lines 16-18

Judge: "I want a Stipulation and Order on the continuance with all necessary recitals with findings, on the Speedy Trial Act."

Page 35, Lines 1-2

Judge: "[t]ell them that **I'm intent on getting this to trial on the 22<sup>nd</sup>.**"

The right to a speedy trial is fundamental and constitutionally protected by the Sixth Amendment. [Doggett v. U.S., 505 U.S. 647 \(1992\)](#); [U.S. v. MacDonald, 456 U.S. 1, 6 \(1982\)](#). In MacDonald, the Supreme Court stated that the Sixth Amendment speedy trial guarantee is "**designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.**" Id. at 8.

18 U.S.C. §§ 3161-3174 requires that a trial commence within 70 days from the later of the filing of an indictment or his first appearance, barring excludable time. [Henderson v. United States, 476 U.S. 321, 326 \(1986\)](#) (Henderson); 18 U.S.C. § 3161(c)(1)

**The district court on remand should determine whether a dismissal with or without prejudice is appropriate. See 18 U.S.C. S 3162(a)(2); United States v. Lloyd, 125 F.3d 1263, 1271 (9th Cir. 1997) [REVERSED AND REMANDED.](#)**

**70 DAY PERIOD DOESN'T RESET UNLESS INDICTMENT DISMISSED IN IT'S ENTIRETY. See U.S. v. Karsseboom, 881 F.2d 604, 606 (9<sup>th</sup> Cir. 1989)**

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<sup>14</sup> Se Page 33, Lines 14-20. No pressure applied at all, in fact judge used letter from prosecutor to justify continuance.

<sup>15</sup> **No request or motion for a continuance was ever made. Read that again.**

United States v. Lloyd, 125 F.3d 1263 (9th Cir. 1997) (112-day continuance was not justified).

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