ARGUMENT: This case was never designated under the law as a "complex case" by the government. Even if you decided it was designated under the law as a "complex case" nobody from the government followed due process or laws required for a "complex case."

FACTS: The accused was arraigned on 04.15.2002. At that time the case was never designated as a "complex case." [1] In the instant case the trial court made no request for a "Settlement judge" and therefore no "Settlement judge" was randomly assigned to this case by the trial judge under the local rules.[2] Moreover, neither the prosecutor nor the court ever officially made this a "complex case," except by *open-ended declaration.* The government knew this from the beginning when it did not claim "complex" under General Order 224,[3] back in April 15, 2002 when it asked for only seven days for the case-in-chief, not sixteen, or more. Nor did it ever file a NOTICE TO COURT OF COMPLEX CRIMINAL CASE form at the Initial Indictment, or almost one year later at the Superseding Indictment. **See EXHIBIT (Complex_Case_DOJ_AUSA)**

Guidelines for the Appointment of Attorneys Pursuant to the Criminal Justice Act[4] require an "experienced" attorney be appointed to handle a "complex case." Under the Guidelines For the Administration of the Criminal Justice Act the "CJA Committee" had to have recommend the appointment of lawyers found to be *best qualified.* Recommendations of the CJA Committee shall contain the following endorsements: Appointments should be made in a manner which results in both a balanced distribution of appointments and compensation among members of the CJA Panel, **and quality representation for each CJA defendant.** These objectives can be accomplished by making appointments on a rotational basis, **subject to the court's discretion to make**

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[1] LOCAL RULES – CENTRAL DISTRICT OF CALIFORNIA 12/03 (*L.Cr.R)*
L.Cr.R. 57-3.2 Definition. A "**complex case**" is a criminal case as defined in General Order 224 or any successor General Order.

[2] *L.Cr.R. 57-3.4 Settlement Judge.* A settlement judge from the Criminal Settlement Panel **shall be** randomly assigned to any **complex case** upon the filing of a request and the approval of the trial judge. The role of the settlement judge shall be limited to facilitating a voluntary settlement between parties in criminal cases. The settlement judge shall not preside over any aspect of the case other than facilitation of a voluntary settlement according to this Rule. All matters related to the case other than settlement shall be handled by the trial judge. If the settlement judge becomes unavailable or otherwise cannot hear the settlement conference, the case shall be returned to the Clerk for the random assignment to another settlement judge.

[3] TCT (TRIAL COURT TRANSCRIPT) 04.15.2002, JUDGE: "A TRIAL IS SET FOR JUNE 4, 2002 AT 8:00 A.M. I NEED TO OBTAIN A TRIAL ESTIMATE FROM THE GOVERNMENT."
AUSA DUARTE: "**APPROXIMATELY SEVEN COURT DAYS**."

[4] http://www.uscourts.gov/defenderservices/Guide/appointmentofcounsel.html

exceptions due to the nature and complexity of the case, an attorney's experience, and geographical considerations.[5]

The first attorney to handle this case, Hilary Potashner, was fresh out of law school. The next appointed attorney knew nothing about computers. The judge in the case stated he believed a lawyer who had never even seen a computer could effectively represent me and do a "bang-up job.[6]" It appears the trial court was speaking out of the side of his mouth when he made that last statement when the third attorney was “selected.[7]” And that is what I received the first year in jail awaiting a Speedy Trial. By then the damage had been done and a great distrust was instilled within me that none of the above parties were defending or protecting my rights. Especially when *the government used an open-ended declaration to ride the coat-tails of the first Federal Public Defender, one month before trial was to begin, to delay the trial four months.*[8] And they failed turn over the case files to the next appointed attorney “selected” by the FPD and CJA panel who was not selected to defend a “complex case.[9] This was certainly an “unusual case.”[10] It might have been “complicated, but it was not by legal definition a “complex case.” Even if it

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[5] Under the Guidelines for the Appointment of Attorneys Pursuant to the Criminal Justice Act 18 U.S.C. 3006 A(b) as Amended by Order of May 30, 1996 in the United States District Court for the District of Colorado, Section II(B) states in part: B. Duties

The CJA Committee will recommend the appointment of lawyers found to be best qualified, taking due account of the geographic distribution of cases. The recommendations of the CJA Committee shall contain the following endorsements:

1. The identity of the proposed panel lawyer;
2. A brief description of the background, experience, and interests of the proposed panel lawyer;
3. A recommendation that the proposed panel lawyer be considered for appointment to represent defendants in routine, **complex, or extended cases or, in habeas corpus or death penalty cases based on experience, interest, availability, and skill.** See http://www.co.uscourts.gov/cja_plan.html

[6] TCT 12.04.2002, pg 18, Judge, “I don’t think, [as I understand the case, and as I understand these charges that have been filed against Mr. Sutcliffe] that the mechanics, the technology, the capacity in a sophisticated way to use computers is really much of an issue in this case. I don’t think that’s what the trial is likely to focus on at all. So I think you could have somebody who has never see a computer but is a d(sic) fine lawyer and a dedicated and hard working one do a perfectly **competent**, maybe absolutely bang-up job for this defendant. That’s my view.”

[7] TCT 01.17.2003, Pg 3, Judge: “Okay. Mr. Nicolaysen, you were contacted, I think, by the court clerk because of your membership on the **CJA panel**, and *especially because of what I have been informed is your unusually extensive experience with computer law, computer usage and computer technology.*

[8] TCD (TRIAL COURT DOCKET) 05.16.2002, Stipulation to Continue Trial Date And Exclude Time, filed by AUSA and FPD, cites as Ground #1 that “The Case is Complex” at page 2 of Stipulation Time Excluded until 09.03.2007 .

[9] TCT 01.14.2003, Pg 33, Judge: “Mr. Harris, I know you already understand this but I want Mr. Sutcliffe to hear me say it. You have the continuing duty to cooperate completely, openly, and promptly with the successor counsel and turn over not only your file but to make available to that lawyer your work product, to discuss in good faith with that lawyer your own perceptions about the issues in this case and the considerations that could affect the defense of Mr. Sutcliffe.” **SEE footnote 14 below.**

[10] TCT 09.23.2003, 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.”

were a "complex case," the judge and the accused agree he could have benefited from at least one of the three experts paid for and hired previously. [11] It was such an "unusual case" that somehow all "experts" hired for the accused, along with all their reports, were lost. [12] This "astonished" the trial judge. *[13]* This also left the accused and any appeals counsel without the benefit of expert testimony and lost evidence for the defense. Eighteen months of delays later, the prosecutor is still insisting this is a complex case [14] and the court changes it's mind and decides it is not complex, or even complicated. [15] It was just full of Gremlins. [16]

LAW: Where the judge grants a continuance based upon a finding of case complexity, **specific findings must be made.** *United States v. Clymer,* 25 F.3d 824, 828-29 (9th Cir. 1994) (criticizing the trial court for an *open-ended declaration of complexity* as well as for a retroactive invocation of the "*ends of justice*" basis for delay). A bare stipulation by the parties to waive time under the Speedy Trial Act is an inadequate basis for a continuance as "**the right to a speedy trial belongs not only to the defendant, but to society as well**." *United States v. Ramirez-Cortez,* 213 F.3d 1149, 1156 (9th Cir. 2000) (quoting from *United States v. Lloyd*, 125 F.3d 1263, 1268 (9th Cir. 1997)). See also United States v. Aviles, 170 F.3d 863, 869 (9th Cir.) (**"We do not count continuances**

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[11]TCT 08.22.2002, Page 26, Lines 10-13, Judge: "Now if you are relying on and if your lawyers are relying on outside experts to assist in any aspect of the defense, and it wouldn't surprise me if they have to, given the nature of these charges."

[12] Transcript of 09.26.2003, Page 20, Lines 9-20, Judge: "Now, I don't think it is inappropriate for the record to note that I've previously authorized experts, or at least one expert, I don't(sic) go back and check the file but at least one expert, and I think could have been more then one , somebody with specific skill and advanced skill in computer technology as well as to be appointed to represent or assist prior counsel. Have you seen any expert reports?"
Reed: "No. Not at all, Your Honor."
Judge: "Has anybody discussed with you any of Mr. Sutcliffe's prior lawyers, any expert reports that may have been generated?"
Reed: "No, Your Honor."

[13] TCT 09.23.2003, Page 49, Lines 10-25, Judge: "Because I am utterly astonished, 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 10th. 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."

[14] TCT 09.26.2003, Pg 31, Lines 18-22, Prosecutor: "[b]ut part of the reason why in a case like this it has been turned over so far in advance **and the court made this case complex**, **I think rightfully so**,…

[15] TCT 09.26.2003, Pg 74, Lines 6-14, Judge: "[y]ou know, I don't think - - I think I understand this case far better now in part because of certain things I've read recently and it doesn't strike me as that complicated a case . The nature of the evidence is a little bit foreign to me because I'm not good at the - - but the nature of the issues are pretty straightforward and clear. So I think without prejudicing it that it may not be necessary to consume significant amounts of time to assure that Mr. Reed feels in good faith in his mind that he's up to speed."

[16] TCT 09.26.2003, Pg 76, Lines 3-8, Judge: "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."

granted by the district court where it made no specific findings supporting a general mantra of 'complexity.'") (citation omitted), cert. denied, 528 U.S. 848 (1999), amended by 216 F.3d 881 (2000). General Order 224 states: **COMPLEX CRIMINAL CASE ASSIGNMENT**: **If prior to or at the time of arraignment**, the government advises the magistrate judge that the presentation of its **case-in-chief will exceed sixteen (16) trial days,** the case shall be randomly assigned to a judge from a separate Complex Criminal Assignment Wheel.

CONCLUSION: This excuse that this case was used over and over to delay the trial for 18 months until it benefited the trial judge to say it was not complex. IF it was complex nobody followed the process for handling a complex case, which caused irreparable and irrefutable harm to the defense of this case. The finding of this case being a "complex case" was not based on any fact or law to support it and must fail. Even if this court decided it was a "complex case," the trial court, the government and the CJA should have followed due process procedures under the law above and did not, to the prejudice of defense of this case. Moreover, even if this court decided this was a "complex case," which the record does not suppot, then considering the technically complex nature of the evidence held against him, the mere fact that counsel represented Sutcliffe does little to ensure him effective assistance of counsel due to the specialized nature of the evidence. Sutcliffe can only receive effective assistance of counsel if his attorney is able to first, actually review the discovery in confidence and, secondly, consult with someone who can understand and explain the nature of the evidence, such as a computer expert hired for the defense.

If a trial court and government waives Speedy Trial Right time over the objections of the accused under the "interests of justice" instead of the "ends of justice" and there is no such legal entity, doctrine or law known as the "interests of justice," could time lawfully be waived?

ARGUEMENT: Just as there is no "process" to designate a case "complicated" as opposed to "complex," it stands to reason that no court can legally waive an accused's right under the Sixth Amendment to a Speedy Trial by citing "*interests of justice*" as opposed to an "**ends of justice**" and misquoting the law as authority.[17] Ignorance of the law is no excuse, and the court did not follow the law as applied.

FACTS:

The facts show that Judge Matz failed to make the requisite Speedy Trial Act findings at the time he ordered the delays. And that he failed to cite the authority correctly on several occasions by instead citing the "interests of justice," where absolutely no "interests" exist under any law or rule. Where he did make a finding in the "ends of justice," the hearing transcript shows that the court simply approved the continuances "so[the parties] could work on a plea agreement." The Judge made no inquiry into the need for the continuance. Nor does the record indicate any consideration of the "ends of justice" factors. See Lloyd, 125 F.3d at 1269 (the district court "must conduct an appropriate inquiry to determine whether the various parties actually want and need a continuance, how long a delay is actually required, what adjustments can be made with respect to the trial calendars or other plans of counsel, and whether granting the requested continuance would outweigh the best interest of the public and the defendant[s] in a speedy trial.' " (citation omitted)). Not only was a particularized inquiry as to the actual need and reasons for a continuance not made, the transcript reveals that the Judge was granting blanket continuances. Moreover, the court failed to make findings as to the statutory factors underlying his conclusions. Finally, the record is devoid of any basis for concluding that "the failure to grant [the] continuance would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice." See 3161(h)(8)(B)(i).

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[17] There are certain periods of delay, which are excludable under section 3161(h) of the Speedy Trial Act and, thus, do not count in computing whether the thirty-day deadline has run. Id. § 3161(h). For example, the Act allows time to be excluded in specific scenarios, such as when there are "other proceedings" involving the defendant, see 18 U.S.C. § 3161(h), as well as in the broader circumstance where "the judge granted such continuance on the basis of his findings that the **ends of justice** served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. " Id. § 3161(h)(8)(A)). *This discretionary category has come to be known as an* "**ends of justice**" *exclusion*. See, e.g., See United States v. Pollock , 726 F.2d 1456, 1461 (9th Cir. 1984)

LAW: We review factual findings supporting"**ends of justice**" exclusion for clear error. See United States v. Nelson, 137 F.3d 1094, 1108-09 (9th Cir.), cert. denied, 119 S. Ct. 232 (1998). Summarizing the requirements of the Speedy Trial Act, we have stated that an "**ends of justice**" exclusion must be (1) "specifically limited in time" and (2) "justified [on the record] with reference to the facts as of the time the delay is ordered." United States v. Lloyd, 125 F.3d 1263, 1268 (9th Cir. 1997) (quoting United States v. Jordan, 915 F.2d 563, 565-66 (9th Cir. 1990).