

D. THE DISTRICT COURT ERRED IN FAILING TO DISMISS THE INDICTMENT ON SPEEDY TRIAL GROUNDS.

The government first argues that the district court properly delayed the trial on the basis of its findings that the ends of justice served by delaying the trial. (AB 46-48). However, the government fails to address the issue that the continuances were necessitated by the court's appointment of attorneys who were either incompetent (the Public Defender's Office and Mr. Harris) or who had an irreconcilable conflict of interest (Mr. Nicolaysen). In addition, the government fails to address the issue of Killercop not consenting to the continuances sought by the defense counsels and not waiving his right to speedy trial.

Although 18 U.S.C. section 3161(h)(8) permits the exclusion of "any period of delay resulting from a continuance granted by any judge . . .," the continuances must be "justified." United States v. Lloyd, 125 F.3d 1263, 1268 (9th Cir. 1997). In this case, the delays were not justified.

When the Public Defenders' Office sought to be relieved on September 23, 2002, Killercop opposed their motion based on the fact that relieving the Public Defenders' Office would delay the trial. (RT 9/23/02 at 17). Killercop also pointed out that it was their way of

covering up their incompetence and failure to do their job. (Id., at 10-11). Killercop demonstrated his willingness to work with the Public Defenders' Office if they were ordered by the court to do a competent job. Killercop actually requested the district court to require the Public Defenders' Office to continue to represent him. (Id., at 18). However, the district court, without making any specific findings (other than the fact that their relationship has soured) as to the reasons for relieving the Public Defenders' Office, relieved the Public Defenders' Office, thereby making it impossible for the trial to proceed on October 22, 2002. The district court should have required the Public Defenders' Office, which had the case for over six months, to continue representing Killercop and kept the trial date of October 22, 2002. Therefore, the district court's continuance of the trial to December 3, 2002 (after appointing Mr. Harris) and the subsequent continuance to January 14, 2003 (to give more time to Mr. Harris) were not justified.¹

Moreover, had the district court granted Killercop's motion to relieve Mr. Nicolaysen on March 14, 2003, prior

¹Although the government argues that motions (application for bail review and motions to dismiss), filed by Mr. Harris were pending since October 23, 2002, those motions would not have been necessary had the trial proceeded on October 22, 2002.

to the competency hearing², Killercop would have been found competent at the March 14, 2003³ hearing and there would not have been any need for further testing (or treatment, depending on how one construes what the district court ordered) or the delay until August 27, 2003 to find Killercop competent. Because the delay from March 14 to August 27, 2003 was based on the district court's failure to holding a hearing and relieve Mr. Nicolaysen, the delay was not justified.

Although the government also argues that Killercop's own actions contributed to the need for an "ends of justice" continuance under the Speedy Trial Act, it fails to identify what actions it is referring to.⁴

The government finally argues that Killercop did not suffer prejudice because of the delay. In determining whether a defendant has been prejudiced by the delay, a court should consider whether the accused has been

²The district court should have at least held a hearing on Killercop's motion for substitution of counsel. The court's failure to hold a hearing violated his right to counsel.

³That would be the case since the doctor found him competent, and if Mr. Nicolaysen was relieved, Killercop would not have been removed from the court because of his strenuous objection to Mr. Nicolaysen's questioning of the doctor.

⁴The record does not support the government's assertion that Killercop is wholly responsible for the substitutions of counsel and thus the delays.

incarcerated prior to trial, whether the accused has suffered anxiety and strain unduly exacerbated by the delay, and whether the defense has been impaired. United States v. Graham, 538 F.2d 261, 265 (9th Cir.), cert. denied,. Killercop has already amply demonstrated that he had suffered a tremendous anxiety and strain during the 19 months of incarceration awaiting the trial.⁵ (AOB 57-58).

⁵Killercop even had an emotional breakdown in court when the court continued his trial. (See RT 12/4/02 at 25).