

THE DISTRICT COURT ERRED IN DENYING THE INDICTMENT ON SPEEDY TRIAL GROUNDS.

Procedural Background

On April 5, 2002, an indictment was filed against Mr. Killercop, charging him with four counts of making threats to injure in interstate commerce and five counts of transferring social security numbers with intent to aid and abet the false use of a social security number. On April 9, 2002, Mr. Killercop made his initial appearance. (RT 4/9/02).

On May 16, 2002, parties filed a stipulation, requesting a continuance of the trial date and to exclude the time from May 16, 2002 to September 3, 2002.<sup>1</sup> On page 4 the attorney, Ms. Potashner, represents that she has spoken with the defendant ...and that the defendant represented that he is willing to waive his right to a speedy trial. However the defendant's signature is not on this document. Nor is there any proof that defendant "understands" his right and "knowingly and voluntarily waives and gives up his right." (ER ) The district court granted the request and cites "ends of justice" provision. (Ibid).

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<sup>1</sup> The Defendant never signed this stipulation or was informed of it by the Federal Public Defender who was later recused.

On August 22, 2002, at a status conference, the defendant objected to delay of his right to a speedy trial. (RT 8/22/02 at 21). The judge gave his personal "guarantee" the trial would take place on October 22, 2003, "absent compelling circumstances." (Id. at 26). The district court then continued the trial date to October 22, 2002 at the request of defense counsel, with the defense counsel representing to the court that she will be ready to try the case on October 22, 2002. (Id. at 31-34). The court finished by expressing its "intent on getting this case to trial." (Id. at 35).

However, on September 23, 2002, Mr. Killercop's counsel sought to be relieved. Mr. Killercop objected on the ground that relieving the Public Defender's Office would jeopardize his speedy trial rights and insisted that the counsel continue to represent him. (RT 9/23/02 at 17-18). The district court granted the Public Defender's request to be relieved over Mr. Killercop's objection and continued the trial to December 3, 2002. (Id. at 29-30). The court stated, however "*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. Killercop's rights to a speedy trial.*" (Id. at 30).

On November 24, 2002, Assistant U.S. Attorney 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<sup>2</sup> 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.<sup>3</sup>

On November 27, 2002, parties submitted a stipulation to continue the trial date from December 3, 2002 to January 14, 2003.<sup>4</sup> (ER ). The district court granted the request. (Ibid).

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<sup>2</sup>The case was never deemed or filed as complex.

<sup>3</sup>"In ruling that a defendant has some responsibility to assert a speedy trial claim, we do not depart from our holdings in other cases concerning the waiver of fundamental rights, in which we have placed the entire responsibility on the prosecution to show that the claimed waiver was knowingly and voluntarily made." Barker v. Wingo, 407 U.S. 514, 529.

<sup>4</sup>Again, the defendant did not sign this waiver knowingly and intelligently. In fact, his knowledge of this stipulation is

On December 4, 2002, Mr. Killercop filed a motion to dismiss the indictment on the ground that his right to speedy trial has been violated. (ER ). He contended that the incompetence of his court appointed attorneys have resulted in the delay and that he has not and does not consent to the continuances. (Ibid). Mr. Killercop cried the last time the court waived his right to a speedy trial over his objection and called any delay a "nightmare." (Id. at 25). The district court denied Mr. Killercop's motion to dismiss the indictment. (RT 12/4/02 at 28-29).

On January 14, 2003, Mr. Killercop moved to relieve his second appointed counsel, Mr. Harris, for incompetence. (RT 1/14/03 3-4; ER ). The district court relieved Mr. Harris from representing Mr. Killercop and ordered a competence evaluation of Mr. Killercop. (Id. at 12-13, 20-21). The court informed the defendant the proceeding "is going to have to be continued and *probably indefinitely*. Not for very long." (Id. at 29).

On January 17, 2003, the district court set March 25, 2003 as the trial date. (RT 1/17/03 at 16). The court appointed Gregory Nicolaysen over the defendant's objections and informed counsel to use "the all purpose interest of

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void from the record.

justice<sup>5</sup> provision." (RT 1/17/03 at 13). Mr. Nicolaysen then proceeded to suggest the court ship the defendant off to Rochester, Minnesota, for the competency exam.<sup>6</sup> On January 21, 2003, the district court issued an order excluding the period between January 14, 2003 and March 25, 2003. (ER ).

On March 14, 2003, at the competency hearing, the district court concluded that Mr. Killercop should be examined further. (RT 3/14/03 at 61). Again, the court invoked the "interest of justice" provision<sup>7</sup>. (Id. at 63 & 68).

On March 20, 2003, the district court ordered further examination of Mr. Killercop, vacated the March 25, 2003 trial date, set a competency hearing for August 6, 2003, rescheduled the trial for September 9, 2003, and excluded the time period from March 14, 2003 until such time as Mr. Killercop is found competent. (sic).<sup>8</sup> (ER ).

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<sup>5</sup>The actual term is "ends of justice." § 3161(h)(8)(A).

<sup>6</sup>For the purposes of an examination pursuant to an order under section 4241, 4244, or 4245, the court may commit the person to be examined for a reasonable period, but *not to exceed thirty days. The exam is to be conducted at the "nearest" facility where the prisoner is housed.* 18 U.S.C. § 4241-4247.

<sup>7</sup> Speedy Trial Act imposes strict specificity requirements for 'ends of justice' exception; if district court fails to comply with them, period of time covered by continuance will not constitute excludable delay." U.S. v. Lloyd, 125 F.3d 1263 (9th Cir. 1997)

<sup>8</sup>The defendant was never legally or lawfully found incompetent during a secret hearing on April 7, 2003.

On August 27, 2003, the district court found Mr. Killercop competent to stand trial and relieved Nicolaysen as Mr. Killercop's appointed counsel. (RT 8/27/03 at 45-46, 50-51). The court decided that Mr. Killercop would represent himself with a hybrid form of the assistance of counsel called "standby" counsel. (Id. at 60-61, 64-65). The district court then reset the trial date to September 30, 2003 over Mr. Killercop's objection but commented that *the time between September 9 and September 30 would not be excluded.* (Id. at 72).

On the same date, the government filed a status report regarding speedy trial calculations and exclusions. (ER ). In it, the government reported that 31 days remained from the 70-day period. (Ibid). Mr. Killercop again demanded his right to speedy trial under the Sixth Amendment to no avail. (RT 8/27/03 at 69-70).

On September 2, 2003, the district court relieved one standby counsel, Mr. Brennen, because of schedule conflict and appointed another standby counsel, Mr. Reed. (RT 9/2/03 at 5-7, 11).

On September 26, 2003, the government stated the last day for trial would be October 10, 2003. (RT 9/26/03 at 49). The court told the defendant "Now, we're not going to go 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." The district court then appointed Mr. Reed as Mr. Killercop's counsel (RT 9/26/03 at 63, 68) and continued the trial to October 7, 2003. (Id. at 73).

On September 29, 2003, the government filed a supplemental status report regarding speedy trial time remaining. (ER ). In it, the government reported that the time since September 9, 2003 is excluded because of pending motions. (ER ).

On October 1, 2003 , Mr. Reed moved to be relieved as Mr. Killercop's counsel, which the court granted pending successful transfer of all discovery. (RT 10/1/03 at 21, 38-41). The court then continued the trial to a date to be determined later and noted that *the continuance was without Mr. Killercop's explicit consent* and, again, citing the "interests of justice" provision.<sup>9</sup> (Id. at 43).

On October 7, 2003, the court issued an order granting Mr. Reed's motion to be relieved, finding that Mr. Killercop has waived his right to appointed counsel, and continuing the trial to November 12, 2003, while excluding the time

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<sup>9</sup>U.S. v. Ramirez-Cortez, 213 F.3d 1149 (9th Cir. 2000) "Congress did not intend the 'ends of justice' exclusion ... to be granted as a matter of course but rather to be used **sparingly and only when necessary.**" Id. at 1155

from October 8 to November 12, 2003. (ER ). On November 12, 2003, a jury was impaneled and voir dire began.

#### Standard of Review

This Court reviews a district court's application of the Speedy Trial Act de novo. United States v. Daychild, 357 F.3d 1082, 1089 n.5 (9<sup>th</sup> Cir. 2003). This Court also reviews the district court's ruling on a motion to dismiss an indictment de novo. Ibid.

#### Argument

It is well settled that a criminal defendant's trial must normally commence within seventy days of the filing of the indictment or the defendant's initial court appearance, whichever is later. Id., at 1090 n.6; 18 U.S.C. section 3161(c)(1). However, time for delays caused by filing and disposing of motions, time for delays from continuances, and time for delays from proceedings to determine a defendant's competence to stand trial are excluded from the calculation of the seventy-day limit. 18 U.S.C. section 3161(h)(1)(F), (h)(8)(A), and (h)(1)(A). "If trial does not commence within the seventy-day limit, after setting aside excluded time, the court must dismiss the indictment upon the

defendant's motion filed before trial." United States v. Daychild, 357 F.3d at 1090.

In addition to the time limit set by federal statute, there is a Sixth Amendment right precluding excessive pretrial delay after charges have been leveled against a defendant. Barker v. Wingo, 407 U.S. 514, 530 (1972). In determining whether a defendant has been deprived of his speedy trial right under Sixth Amendment, courts must balance the length of the delay, the reason for the delay, the defendant's assertion of his right to a speedy trial, and the prejudice to the defendant. United States v. Daychild, 357 F.3d at 1090.

Since Mr. Killercop made his initial appearance on April 9, 2002, the speedy trial clock began to run on April 9, 2002.<sup>10</sup>

In this case, all four factors identified in Barker weigh in favor of Mr. Killercop. The delay in bringing Mr. Killercop to trial in this case was approximately 19 months, which is "presumptively prejudicial." See United States v. Murillo, 288 F.3d 1126, 1132 (9<sup>th</sup> Cir. 2002) ("A delay of

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<sup>10</sup>The First Superseding Indictment filed on January 10, 2003 does not affect the start time since the "Speedy Trial Act . . . does not require that the 70 day speedy trial period be restarted upon the filing of a superseding indictment when the superseding indictment charges the same offenses as the original indictment." United States v. Karsseboom, 881 F.2d

thirteen months between arrest and trial is 'presumptively prejudicial.'). Also, the reason for the delay cannot be attributed to Mr. Killercop. The reason for the delay was mostly because all five (two from the Public Defender's office) court-appointed attorneys were incompetent and were not prepared to proceed with the trial. Mr. Killercop repeatedly requested the court to appoint competent counsel.

The record clearly demonstrates that Mr. Killercop demanded his right to speedy trial (RT 9/23/02 at 17-18; RT 12/4/02 at 28-29; RT 10/1/03 at 28; ER ), and nothing in the record shows that Mr. Killercop joined the defense counsel's request for continuance.

"Actual prejudice is typically demonstrated in three ways: 'oppressive pretrial incarceration, anxiety and concern of the accused, and the possibility that the [accused's] defense will be impaired.'" United States v. Gregory, 322 F.3d 1157, 1163 (9<sup>th</sup> Cir. 2003)(quoting Doggett v. United States, 505 U.S. 647, 654 (1992). **My note:**

Let me know what I can argue. ARGUE:

**anxiety:** See crying above, frustration, competency exam(s), loss of discovery, misplaced motions, my yelling at the court and boobs appointed who didn't understand computers. Example: November-December 2002, Matz refused to

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604, 606 (9<sup>th</sup> Cir. 1989).

remove Harris because "I don't think, as I understand the case, and as I understand these charges that have been filed against Mr. Killercop 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 bank-up job for this defendant. That's my view."

Matz whistled a different tune on Jan. 17, 2003, page 3: "Page 3

"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.**"