APPENDIX A

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| UNITED STATES OF AMERICA,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>ALFONSO HERNANDEZ,<br><br>Defendant-Appellant. | Nos. 17-10096<br>17-10320<br><br>D.C. No.<br>1:12-cr-00382-DAD-BAM-1<br><br>MEMORANDUM* |

Appeal from the United States District Court
for the Eastern District of California
Dale A. Drozd, District Judge, Presiding

Submitted October 10, 2018**
San Francisco, California

Before: McKEOWN, W. FLETCHER, and BYBEE, Circuit Judges.

Alfonso Hernandez has appealed his conviction on charges of receipt and distribution of child pornography and his corresponding 210-month prison

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

sentence. Hernandez argues that the district court should have dismissed the indictment against him because the 559-day period between his arraignment and trial violated the Speedy Trial Act. Further, he argues that the district court failed to make adequate findings of fact in support of its sentence. We affirm the district court in full.

## I. SPEEDY TRIAL ACT CLAIM

The Speedy Trial Act guarantees a criminal defendant a trial within 70 days of the later of his indictment or arraignment, subject to certain exclusions. 18 U.S.C. § 3161. Where the Act is violated, the remedy is dismissal of the indictment. *See* 18 U.S.C. § 3162(a)(2). However, dismissal is not automatic: "Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal." *Id.*; *United States v. Brown*, 761 F.2d 1272, 1276–77 (9th Cir. 1985) (holding that defendant's "failure to move for dismissal under the Speedy Trial Act prior to trial results in waiver of the right to dismissal under it" (internal citation and alteration omitted)). Thus, the defendant bears the burden of raising his Speedy Trial Act claim in a timely motion to dismiss, or otherwise sees this argument waived.

Hernandez and his counsel chose not to file a motion to dismiss, and Hernandez's pre-trial statements and actions cannot be construed to override this

decision. In lieu of filing a motion, Hernandez sent an *in propria persona* letter to the district court expressing concern about the Speedy Trial Act, and then informed the court at a hearing that he wanted his counsel to seek dismissal on various non-specific constitutional grounds. The court correctly explained to Hernandez that he needed to discuss these matters with counsel, and then set a trial date. From this point forward, neither Hernandez nor his counsel so much as suggested that he would move to dismiss the indictment. As this court held in *United States v. Lam*, 251 F.3d 852, 854, 858 (9th Cir. 2001), absent a showing of deficient performance of counsel, a defendant's letters to the court and oral expression of a desire for a speedy trial are insufficient to override counsel's decision not to file a motion to dismiss the indictment. *Cf. United States v. Hall*, 181 F.3d 1057, 1060–61 (9th Cir. 1999) (concluding that the defendant preserved his speedy trial right, notwithstanding his lawyer's decision not to move to dismiss, where the defendant filed *in propria persona* a motion for substitution of counsel and a motion to dismiss). Because Hernandez waived his Speedy Trial Act claim by failing to move to dismiss the indictment in the district court, we decline to address the merits of his Speedy Trial Act claim.

## II. SENTENCING CLAIM

Hernandez also asserts that the district court failed to properly support its sentence with findings of fact. We review the district court's sentencing decisions for abuse of discretion. *Gall v. United States*, 552 U.S. 38, 51 (2007). The sentence is reviewed for reasonableness, and only a procedurally erroneous or substantively unreasonable sentence is set aside. *Id.* at 46, 51.

As a matter of procedural due process, "a sentencing judge must explain a sentence sufficiently to communicate that a reasoned decision has been made and permit meaningful appellate review." *United States v. Rudd*, 662 F.3d 1257, 1260 (9th Cir. 2011) (internal quotation marks omitted). Here, the district court more than satisfied this constitutional duty, citing to eight mitigating factors that reasonably support its decision to impose a below-Guidelines sentence. The district court's explanation was sufficient to "permit meaningful appellate review," and we are satisfied that the sentence imposed was not an abuse of discretion. *See id.*

For the forgoing reasons, the judgment and sentence of the district court are **AFFIRMED.**

**APPENDIX B**

# 18 USCS § 3161

Current through PL 115-281, approved 12/1/18

*United States Code Service - Titles 1 through 54 > TITLE 18. CRIMES AND CRIMINAL PROCEDURE > PART II. CRIMINAL PROCEDURE > CHAPTER 208. SPEEDY TRIAL*

## § 3161. Time limits and exclusions

**(a)** In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.

**(b)** Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

**(c)**

**(1)** In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate [United States magistrate judge] on a complaint, the trial shall commence within seventy days from the date of such consent.

**(2)** Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

**(d)**

**(1)** If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

**(2)** If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) [18 USCS § 3161(h)] are excluded in computing the time limitations specified in this section. The sanctions of section 3162 [18 USCS § 3162] apply to this subsection.

**(e)** If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) [18 USCS § 3161(h)] are excluded in computing the time limitations specified in this section. The sanctions of section 3162 [18 USCS § 3162] apply to this subsection.

**(f)** Notwithstanding the provisions of subsection (b) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(a) of this chapter [18 USCS § 3163][,] the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelve-month period such time limit shall be forty-five days and for the third such period such time limit shall be thirty-five days.

**(g)** Notwithstanding the provisions of subsection (c) of this section, for the first twelve-calendar-month period following the effective date of this section as set forth in section 3163(b) of this chapter [18 USCS § 3163(b)], the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelve-month period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

**(h)** The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

**(1)** Any period of delay resulting from other proceedings concerning the defendant, including but not limited to--

**(A)** delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

**(B)** delay resulting from trial with respect to other charges against the defendant;

**(C)** delay resulting from any interlocutory appeal;

**(D)** delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

**(E)** delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

**(F)** delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

**(G)** delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

**(H)** delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

**(2)** Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

**(3)** (A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

**(B)** For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

**(4)** Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

**(5)** If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

**(6)** A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

**(7)** (A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if 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. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

**(B)** The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

**(i)** Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

**(ii)** Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

**(iii)** Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b) [18 USCS § 3161(b)] or because the facts upon which the grand jury must base its determination are unusual or complex.

**(iv)** Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

**(C)** No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

**(8)** Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title [18 USCS § 3292], has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

**(i)** If trial did not commence within the time limitation specified in section 3161 [18 USCS § 3161] because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed

indicted with respect to all charges therein contained within the meaning of section 3161 [18 USCS § 3161] on the day the order permitting withdrawal of the plea becomes final.

**(j)** (1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly--

**(A)** undertake to obtain the presence of the prisoner for trial; or

**(B)** cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

**(2)** If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

**(3)** Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

**(4)** When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

**(k)**

**(1)** If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs more than 21 days after the day set for trial, the defendant shall be deemed to have first appeared before a judicial officer of the court in which the information or indictment is pending within the meaning of subsection (c) on the date of the defendant's subsequent appearance before the court.

**(2)** If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs not more than 21 days after the day set for trial, the time limit required by subsection (c), as extended by subsection (h), shall be further extended by 21 days.

## History

(Added Jan. 3, 1975,P.L. 93-619, Title I, § 101, 88 Stat. 2076; Aug. 2, 1979, P.L. 96-43, §§ 2-5, 93 Stat. 327; Oct. 12, 1984, P.L. 98-473, Title II, Ch XII, Part K, § 1219, 98 Stat. 2167; Nov. 18, 1988, P.L. 100-690, Title VI, Subtitle IV, § 6476, 102 Stat. 4380; Oct. 13, 2008, P.L. 110-406, § 13, 122 Stat. 4294.)

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