

No. 21-

IN THE SUPREME COURT OF THE UNITED STATES

ODELL KINARD, JR.

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

=====

MOTION TO PROCEED *IN FORMA PAUPERIS*

Pursuant to Title 28, United States Code, § 1915(a) and Rule 39 of this Court, applicant asks for leave to file the Petition for Writ of Certiorari to the Ninth Circuit Court of Appeals without prepayment of fees or costs *in forma pauperis*. The undersigned counsel was appointed pursuant to 18 U.S.C. § 3006A. Therefore, it is requested that the Court grant leave to file the Petition for Writ of Certiorari without prepayment of fees or costs *in forma pauperis*. I declare under penalty of perjury under the laws of the United States of American, the foregoing is true and correct.

Dated this 29th day of January, 2021.

Respectfully Submitted,

s/Dan B. Johnson

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Docket No. 21-

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RESPONDENT

**ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner expressly did not join several of the motions of his co-defendants in a multi-defendant drug conspiracy case, and objected to a continuance of trial, as well as making repeated attempts to be severed from the other defendants. He did everything he could to assert his right to a speedy trial.

The Question Presented is:

Does Petitioner sacrifice his Sixth Amendment and statutory rights to a speedy trial by the District Court's repeated denial of his motion to sever his trial from that of co-defendants and his repeated objections to continuances thereby delaying Petitioner's trial well beyond the time prescribed by the Speedy Trial Act and any reasonable conclusion of the effect of the Sixth Amendment?

PARTIES TO THE PROCEEDINGS

Mr. Kinard was indicted, along with 22 co-defendants on June 13, 2017. Two superseding indictments were filed which do not affect the issues raised in this Petition. All defendants except Mr. Kinard entered guilty pleas and he was the sole remaining party to go to trial, along with the Plaintiff, United States of America.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

United States vs. Kinard, No. 17-cr-00101-WFN-23. District Court for the Eastern District of Washington; Judgment and Commitment Order entered on March 11th, 2019. App. C.

United States vs. Kinard, No. 19-30050. U. S. Court of Appeals for the Ninth Circuit; Judgment entered on July 9, 2020. App. A; Rehearing denied on September 9, 2020. App. B.

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RESPONDENT

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT**

Petitioner, Odell Kinard, Jr., (hereinafter Kinard or Defendant) respectfully prays that a writ of certiorari issue to review the unpublished memorandum decision of the United States Court of Appeals for the Ninth Circuit entered on September 11, 2020, affirming the district court's order denying Kinard's motion to dismiss.

CITATION OF OPINIONS BELOW

United States vs. Kinard, No. 17-cr-00101-WFN-23. District Court for the Eastern District of Washington; Judgment and Commitment Order entered on March 11th, 2019. App. C.

United States vs. Kinard, No. 19-30050. U. S. Court of Appeals for the Ninth Circuit; Judgment with Memorandum Not for Publication entered on July 9, 2020. App. A; Rehearing denied on September 9, 2020. App. B.

STATEMENT OF JURISDICTION

The Judgment of the Ninth Circuit Court of Appeals was entered on July 9, 2020. A Petition for Rehearing was denied on September 11, 2020. The jurisdiction of this Court is invoked under title 28, United States Code, Section 1254(1). Because the Ninth Circuit's ruling has so far departed from the accepted ruling on the same issue as presented in *United States v. Hall*, 181 F.3d 1057 (9th Cir. 1999), Kinard respectfully requests this Court to exercise its supervisory powers pursuant to Sup. Ct. R. 10(a).

CONSTITUTIONAL AND STATUORY PROVISIONS

CONSTITUTIONAL PROVISIONS

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STATUTES

18 U.S.C. Sect. 3161(c)(1)

18 U.S.C. Sect. 3161(h)(6)

RULES

Fed. R. Crim. P. 8(b)

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(For text of the cited provisions, see Appendix D (6th Amend.); Appendix E (U.S. Code provisions) and Appendix F (Rules), (Sup. Ct. R. 14.1(f) and (i)(v)).

STATEMENT OF THE CASE

On July 26, 2017, the Court held an initial pre-trial conference. The Court granted a motion to declare the case complex. ECF 467-Order; ECF 1396 (Transcript of pre-trial hearing), p. 17, lines 7-14. The Court also stated: “Now I’ll speak to motion practice in general. Any motion filed by any defendant automatically includes all defendants. So other defendants don’t have to file duplicative motions. So if you feel that the motion filed does not apply to your client, you opt out. But you don’t have to opt in”. *Id.*, at p. 36, lines 13-18. The

Court then continued the trial date to February 12th, 2018. *Id.*, at p. 42, lines 2-15. The Court entered an order on July 27, 2017, memorializing the rulings. ECF 467, ER 149-154, Tab 10.

On October 24, 2017, the Court held a pre-trial conference and motion hearing. ECF 577-Minute entry; ECF 1303 (Transcript). The Court granted a Motion to Continue Trial and scheduled the trial for March 19, 2018. ECF 579, (Order). On January 11, 2018, a joint Motion to Continue Trial was filed. ECF 646. On January 18, 2018, Defendant Kinard filed a Notice of Opting Out of Motion to Continue Trial Date. ECF 650.

On January 29, 2018, Co-Defendant Gaines filed a Motion to Suppress Wiretap of Target Telephone 2 (ECF 652), and a Motion to Suppress Wiretap of Target Telephone 3 (ECF 653). On January 30, 2018, Co-Defendant Mendoza-Vaca filed a Sealed Motion (Suppression of Wiretaps, ECF 655), along with a Motion for a Frank's Evidentiary Hearing (ECF 657). Declarations in support of the Motions were filed by attorney, Mark Vovos. (ECF 658, ER 220-222, Tab 15, and ECF 659, ER 223-229, Tab 16, respectively).

On February 5, 2018, Kinard filed a Motion to Sever (ECF 660), along with a Declaration by counsel (ECF 661, ER 206-219, Tab 14). On February 21, 2018, the Court held a pre-trial conference and motion hearing (ECF 819, ER 104-148, Tab 9, Transcript of hearing). The Court heard argument on the Defendant's

Motions to Suppress Wiretaps and the request for a Frank's hearing, as well as argument on Kinard's Motion to Sever. The Court denied the motions and over Kinard's objection, trial was continued until June 4th, 2018. (ECF 705-Order, filed on February 22, 2018, ER 97-103, Tab 8).

On February 21, 2018, the Government filed a Notice of Proposed Trial Groups. ECF 699. Kinard objected. (ECF 715, filed on March 2nd, 2018). On March 14, 2018, Kinard filed a Renewed Motion to Sever, ECF 734. On March 20, 2018, the Court held a pre-trial conference and motion hearing (ECF 820-Transcript, ER 82-96, Tab 7). The Court reserved ruling on Kinard's reserved motion to sever and scheduled a hearing on April 26th, 2018. (ECF 768-Order, filed on March 20th, 2018, ER 79-81, Tab 6).

On April 20, 2018, a Motion to Continue Trial was filed by Co-Defendant Ramirez Mercado. ECF 803. That same day, Kinard filed a Notice of Opting Out of Motion to Continue Trial. ECF 804. On April 26, 2018, a pre-trial conference/motion hearing took place. (ECF 811, Minute Entry; ECF 1304, ER 56-78, Tab 5, Transcript of hearing). The Court entered an Order denying part of the Defendant's Motion to Exclude Evidence, as moot, and denied the remainder with right to renew. Defendant's Motion to Sever (ECF 660) was denied. The Court confirmed the trial date of June 4th, 2018. (ECF 816, Order, filed on May 1, 2018, ER 49-55, Tab 4).

On May 9, 2018, Kinard filed a Motion to Dismiss for Violation of Speedy Trial Act (ECF 828, ER 157-173, Tab 12), along with a Declaration in support (ECF 829, ER 174-205, Tab 13). The Defendant claimed that his right to a speedy trial was violated.

On May 21st, 2018, the Government filed a Motion in Limine for Conditional Admission of Evidence and Notice of Expert Testimony. ECF 838. On May 24th, 2018, at a pre-trial conference/motion hearing the Court heard argument with respect to the Defendant's Motion to Dismiss for Violation of the Speedy Trial Act and denied the Motion. ECF 1401, ER 16-48, Tab 3 (partial transcript of hearing on May 24, 2018). In light of the denial, defense counsel Wall moved for a continuance of trial and it was scheduled for July 23, 2018. (ECF 869-Order, filed on May 29, 2018, ER 4-15, Tab 2). On July 20, 2018, the Government filed an 851 notice (ECF 949).

On July 23, 2018, the Defendant went to trial before a jury and on July 31, 2018, the Court entered an Order granting a mistrial due to a hung jury and scheduled a new trial date of October 29, 2018. (ECF 972-Order, filed on July 31, 2018).

On October 2, 2018, the government file a Second Superseding Indictment naming Kinard as the sole defendant, but alleging he had conspired with previous co-defendants, "Jose Alfredo Mendoza-Vaca (a.k.a "Pepe Ju" or "Manteca"),

Frederico Ramos-Perez, Donald Reed Daniels, Enrique Eduardo Rodriguez-Mercado, Edward Wayne Fedele, Olton Leon Gaines, and Joel Lyman, and with others both known and unknown” to distribute cocaine. (ECF 1045, ER 230-234, Tab 17).

Trial began on October 29, 2018. During the course of trial, government witnesses included multiple law enforcement agents involved in the case, several co-defendants who had entered guilty pleas pursuant to cooperation agreements, and numerous recordings of the wire tapped telephone calls between Mendoza-Vaca and co-defendants, including four that involved Kinard.

On November 2, 2018, guilty verdicts were returned on one count of conspiracy to distribute 500 or more grams of cocaine, one count of maintaining a drug involved premises, and ten counts of use of a communications facility in the commission of a drug felony. ECF 1099-Verdict of jury.

On January 16, 2019, the district court sentenced the Defendant to 144 months each on the conspiracy count and maintaining a drug involved premises charges, and 48 months on each of the 10 counts of use of a communication facility, with all sentences to run concurrently. The 144 month sentence was below the 262-327 months as calculated in the PSR and the 188 months recommended by the government. The defendant was also sentenced to three years of supervised release on each count, concurrent, among other conditions. (Judgment in a

Criminal Case, App. C). Mr. Kinard timely appealed and argued that his right to a speedy trial was violated, among other issues. The Court of Appeals for the Ninth Circuit, affirmed in a decision entered on July 9, 2020, App. A; Rehearing was denied on September 9, 2020. App. B.

REASONS FOR GRANTING THE WRIT

The District Court erred in excluding time based on co-defendant motions to continue trial. The Court of Appeals erred in ruling against the Motion to Dismiss for violation of right to speedy trial. The panel's ruling **disregarded the Court's** holding in *United States v Hall*, 181 F.3d 1057 (9th Cir. 1999), and exalts Fed. R. Crim. P. 14 joinder in derogation of speedy trial rights, thus, consideration by this court is therefore necessary to secure and maintain uniformity of the court's decisions and not allow the court below to ignore precedent. In essence, the Court's holding guts an individual's right to a speedy trial in any conspiracy case involving co-defendants.

Here, Petitioner expressly did not join several of the motions and objected to a continuance of trial, as well as his making repeated attempts to be severed from the other defendants. As a result of these errors, Petitioner's right to a speedy trial was violated. The proper remedy is vacating the conviction and remanding to the District Court for dismissal, with prejudice.

In affirming Kinard's conviction at trial while rejecting the argument that his speedy trial rights had been violated, the Ninth Circuit, in a nutshell, ignored the factual basis of Kinard's conspiracy in that it was not a "wheel conspiracy" where a hub and spokes are connected by a rim, but rather several "hub and spoke" conspiracies where there was no rim to connect the defendants into one single conspiracy. This is important because, given the time the government had to investigate prior to trial and considering cooperating co-defendants, it was or should have been aware of that distinction. Yet, the Court's opinion states "Kinard was properly joined in a multi-defendant case because he was alleged to have participated in the same drug conspiracy as his codefendants. Fed. R. Crim. P. 8(b)." This conclusion ignores the fact that there were multiple conspiracies and not a single conspiracy as charged in the indictment. Customers of a supplier are not by default members of a global conspiracy.

Because this was a hub and spoke, as opposed to a wheel, conspiracy, the only joined trials should have been with the hub tried with the individual spokes (e.g. Kinard) in separate trials. Instead, the government insisted on a single trial and opposed Petitioner's motion for severance. To the extent Mr. Kinard was in any conspiracy, it was only with his supplier, Jose Alfredo Mendoza-Vaca. The government recognized this when it filed a second superseding indictment naming only Kinard as a defendant. ECF 1045. He was charged with conspiring with

Mendoza-Vaca and four other individuals named in the original indictment, Frederico Ramos-Perez (Def. 5), Donald Reed Daniels (Def. 7), Enrique Eduardo Rodriguez-Mercado (Def. 11), Edward Wayne Fedele (Def. 18), Olton Leon Gaines (Def. 20), and Joel Lyman (Def. 21). Following the Court's Order of October 25, 2017, continuing the trial date to March 19, 2018, Kinard opted out of all further motions to continue the trial date filed by his codefendants and moved to sever his trial from the trials of all other defendants. Kinard objected on the record to any continuances beyond March 19, 2018. Thus, Kinard clearly and repeatedly asserted his right to a speedy trial under 18 U.S.C. § 3161. Because Mr. Kinard's speedy trial rights had already been violated, the superseding indictment was not legitimately filed.

Kinard's opening brief discussed previous case law and mandates that Kinard's conviction be vacated and remanded to the District Court for dismissal: "18 U.S.C. § 3161(h) provides that certain "periods of delay" are excluded from the calculation of the time within which a defendant must be brought to trial. Under § 3161(h)(6) a "reasonable period of delay" is excluded when the defendant is joined for trial with a codefendant for whom the time for trial has not run and no motion for severance has been granted. Exclusion under § 3161(h)(6) is not automatic. A period of delay must be "reasonable" as to a defendant who asserts his right to a speedy trial before it can be excluded". *United States v. Hall*, 181

F.3d 1057, 1062 (9th Cir. 1999), citing, *Henderson v. United States*, 476 U.S. 321, 326-27, 106 S.Ct. 1871, 90 L.Ed.2d. 299 (1986). Whether a period of delay was "reasonable" for purposes of exclusion under § 3161(h)(6), is determined on a case-by-case basis considering all relevant circumstances. *United States v. Hall*, Supra., at 1062. In making that determination, the court is to look particularly to whether the delay is necessary to achieve its purpose and whether there is any actual prejudice to the defendant as a result of the delay. *Id.*

In *Hall*, the defendant was joined for trial with a codefendant. The trial court granted a continuance of the trial date to allow additional time for the codefendant to engage in plea negotiations with the government. As a result of the delay, the codefendant was able to reach agreement with the government whereby she agreed to testify against the defendant. Hall's attorney did not move to sever his trial from the codefendant's trial. However, Hall himself repeatedly objected to continuances granted at the request of his attorney, and the codefendant suggested to the district court that the trials be severed in order to preserve Hall's speedy trial rights. Hall was convicted at trial and appealed, claiming his right to a speedy trial under 18 U.S.C. § 3161 had been violated.

The Court of Appeals held that the delay of Hall's trial date to accommodate plea negotiations of his codefendant was not "reasonable" and that the delay was not excludable for purposes of calculating his time for trial. The Court reasoned

that the underlying aim of the delay was to allow the codefendant to negotiate a plea deal, thus eliminating the need for a joint trial and that it was neither necessary nor reasonable to delay Hall's trial for that purpose. The Court also reasoned that the delay clearly prejudiced Hall because it effectively prevented him from going to trial until after the government had secured the cooperation of his codefendant against him. *Id.*, at 1062-63. The Court concluded the district court had failed to meet its responsibility to determine the reasonableness of the delays in light of Hall's repeated objections and the risk of prejudice to him. *Id.*, at 1063. The Court overturned Hall's conviction and remanded to the district court with instructions to dismiss the Indictment.” Appellant’s Opening Brief, pp. 20-22.

Mr. Kinard’s case is a mirror image of that in Hall. A continuance granted to a co defendant or co-defendants does not and cannot erase another defendant’s right to a speedy trial. The typical conclusion that a continuance for one is a continuance for all not only ignores *Hall* but is a violation of the rights of those who do not seek a continuance beyond the speedy trial expiration.

The Speedy Trial Act and the Sixth Amendment bestow the right to a speedy trial to any defendant as an individual. Nothing in the Act or the Amendment permits one or more defendants to control the rights of one or more different defendants. Judicial economy is perhaps a legitimate concern, but that concern similarly cannot eradicate the rights of a defendant, nor society as well. One of the

cornerstones of the Court's findings in *Hall* was its reiteration of part of the reasoning behind the need for a Speedy Trial Act. The Court stated in part" "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 3162 to compel courts and prosecutors to work in furtherance of that goal.' 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". *Id.*

CONCLUSION

The District Court's multiple continuances and subsequent extensions of deadlines in an attempt to comply with the Speedy Trial Act violated Mr. Kinard's right to a speedy trial and the Sixth Amendment. This case is a perfect vehicle for the Court to grant Certiorari, reverse the conviction and remand for dismissal, with prejudice, and to make it clear that the economics of trying multiple defendants together does not trump the right to a speedy trial.

RESPECTFULLY Submitted this 29th day of January, 2021.

s/Dan B. Johnson

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18 U.S.C. § 3161

Appendix F :

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