

APPENDICES

Appendix A: Court of Appeals Memorandum opinion (July 9, 2020)

Appendix B: Court of Appeals order denying petition for rehearing and for rehearing en banc. (Sept.11, 2020)

Appendix C: District Court Sentencing Order (Judgment in a Criminal Case) (No. 17-cr-00101-WFN-23. District Court for the Eastern District of Washington; Judgment and Commitment Order entered on March 11th, 2019).

Appendix D: U. S. Const. 6th Amend.

Appendix E: U. S. Code provisions

18 U.S.C. § 3161

Appendix F :

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

Fed. R. Crim. P. 14

APPENDIX A

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUL 9 2020

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

UNITED STATES OF AMERICA,

No. 19-30050

Plaintiff-Appellee,

D.C. No.
2:17-cr-00101-WFN-23

v.

ODELL KINARD, Jr.,

MEMORANDUM*

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Washington
Wm. Fremming Nielsen, District Judge, Presiding

Submitted July 6, 2020**
Seattle, Washington

Before: CLIFTON and M. SMITH, Circuit Judges, and DONATO,*** District Judge.

Odell Kinard, Jr. appeals the district court's denial of his motion to dismiss his indictment pursuant to 18 U.S.C. § 3161 (Speedy Trial Act of 1974) and

* 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).

*** The Honorable James Donato, United States District Judge for the Northern District of California, sitting by designation.

motions to suppress wiretap evidence pursuant to 18 U.S.C. § 2518 (Title III of the Omnibus Crime Control and Safe Streets Act of 1968). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

1. Reviewing the district court’s application of the Speedy Trial Act de novo, and its underlying findings for clear error, *United States v. Nelson*, 137 F.3d 1094, 1108 (9th Cir. 1998), we conclude that the district court properly excluded the trial continuance from March 19 to June 4, 2018 pursuant to 18 U.S.C. § 3161(h). 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). He admitted to evidence linking him to a codefendant, from whom the FBI had purchased significant quantities of drugs. “Joint trials are the rule rather than the exception,” *United States v. Brashier*, 548 F.2d 1315, 1324 (9th Cir. 1976), and are “particularly appropriate” for conspiracy charges, *United States v. Jenkins*, 633 F.3d 788, 807 (9th Cir. 2011).

Because joinder was proper, the district court did not err in denying Kinard’s motions to sever. The court considered Kinard’s arguments that there was insufficient evidence of his participation in the conspiracy and that he was likely to be convicted based on his association with his codefendants. The court fashioned appropriate relief by ordering Kinard to go to trial with a particular subset of codefendants so as to avoid prejudice from joinder. It was not an abuse of

discretion to attempt to mitigate any purported prejudice to Kinard by structuring trial groups to avoid that risk, rather than severing. *See Fed. R. Crim. P. 14(a); Zafiro v. United States*, 506 U.S. 534, 538–39 (1993) (Rule 14 “does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court’s sound discretion.”).

Consequently, the 11-week period of the continuance was excludable. *See United States v. Butz*, 982 F.2d 1378, 1381 (9th Cir. 1993). The court granted a motion to continue the trial made by all codefendants except Kinard only after postponing the pretrial motions deadline to accommodate motions to suppress wiretap evidence, in which Kinard joined. Following the denial of those motions, it became clear that postponing that deadline, in addition to forthcoming discovery, would have implications on the defendants’ ability to prepare for trial. To allow the defendants more time to prepare their defenses, the court continued the trial, stating that the case was complex, the codefendants’ motion for the continuance was reasonable, and “the ends of justice required it.” The delay thus was excludable pursuant to 18 U.S.C. § 3161(h)(6) because Kinard was properly joined for trial with codefendants who sought the continuance, and pursuant to §§ 3161(h)(7)(A) and (B)(ii), where counsel for codefendants required additional time to adequately prepare for trial in a complex case and the court made an express “ends of justice” finding.

Kinard contends that the delay was unreasonable and prejudicial because a primary purpose of the continuance was to allow his codefendants to pursue plea negotiations, one of whom pled guilty and later testified against him. *See United States v. Hall*, 181 F.3d 1057, 1062 (9th Cir. 1999). We disagree. Where, as here, the primary purpose of granting the continuance is not to allow codefendants to pursue plea negotiations, and the case involves several codefendants who ultimately do *not* testify against the defendant, an extension is reasonable “because the importance of allowing [] codefendants time to prepare for trial further[s] the policy of favoring joint trials, and, thus, outweigh[s] any prejudice that may [result] from having one of those codefendants eventually decide to plead guilty and testify against” the defendant. *United States v. Lewis*, 611 F.3d 1172, 1178 (9th Cir. 2010) (citation omitted). Accordingly, we conclude that the delay was reasonable as to Kinard and excludable pursuant to 18 U.S.C. §§ 3161(h)(6) and (7)(B)(ii). We thus affirm the district court’s denial of Kinard’s motion to dismiss pursuant to the Speedy Trial Act.

2. The district court did not err in denying Kinard’s motions to suppress wiretap evidence. On de novo review, we conclude that the wiretap applications complied with 18 U.S.C. § 2518(1). *See United States v. McGuire*, 307 F.3d 1192, 1197 (9th Cir. 2002). The affidavits submitted in support of wiretap applications for Target Telephones 2 and 3 (TT2 and TT3), belonging to codefendant Mendoza-

Vaca, did not omit material information regarding Ramirez-Mercado that law enforcement had obtained to that point. Although the affidavits did not explicitly name Ramirez-Mercado as a “source of supply,” they contain evidence that supports the conclusion that he was Mendoza-Vaca’s supplier. In addition, the affidavits contain a discussion of tried and failed investigative techniques, as well as those techniques unlikely to succeed. The affidavits thus contain the “full and complete statement” § 2518(1) requires.

It was not an abuse of discretion to authorize the wiretaps even if law enforcement understood Ramirez-Mercado to be Mendoza-Vaca’s supplier. *See McGuire*, 307 F.3d at 1197 (reviewing necessity determination for abuse of discretion). A wiretap may still be necessary if it gives the government the ability to develop “an effective case,” meaning “evidence of guilty beyond a reasonable doubt.” *Id.* at 1199. In addition, the goals of the wiretaps were not limited to seeking information about Ramirez-Mercado. They also sought information about additional co-conspirators, as well as information about the operation and organization of the drug conspiracy. Taking a “common sense approach” in evaluating the reasonableness of the government’s investigative methods, *United States v. Rodriguez*, 851 F.3d 931, 944 (9th Cir. 2017), where a months-long investigation did not present sufficient evidence of Ramirez-Mercado’s role, and that evidence was not the sole purpose of the wiretap, it was not an abuse of

discretion to authorize the wiretap.

AFFIRMED.

APPENDIX B

FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SEP 11 2020

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

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ODELL KINARD, Jr.,

Defendant-Appellant.

No. 19-30050

D.C. No.
2:17-cr-00101-WFN-23

Eastern District of Washington,
Spokane

ORDER

Before: CLIFTON and M. SMITH, Circuit Judges, and DONATO,* District Judge.

The panel has unanimously voted to deny the petition for panel rehearing. Judge M. Smith voted to deny the petition for rehearing en banc, and Judge Clifton and Judge Donato so recommended. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc is **DENIED**.

* The Honorable James Donato, United States District Judge for the Northern District of California, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
Eastern District of Washington

MAR 11 2019

SEAN F. MCARDY, CLERK
DEPUTY
SPOKANE, WASHINGTON

UNITED STATES OF AMERICA

v.

ODELL KINARD, JR.

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:17-CR-00101-WFN-23

USM Number: 07091-085

Richard D. Wall

Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) _____

pleaded nolo contendere to count(s) _____ which was accepted by the court.

was found guilty on count(s) after a plea of not guilty. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12 of the Second Superseding Indictment

The defendant is adjudicated guilty of these offenses:

Title & Section	/	Nature of Offense	Offense Ended	Count
21 U.S.C. 846, 841(a)(1), (b)(1)(B)(ii)(II)		Conspiracy to Distribute 500 Grams or More of a Mixture and Substance Containing a Detectable Amount of Cocaine	06/15/2017	1s
21 U.S.C. 850(a)(1)		Maintaining a Drug Involved Premises	06/15/2017	2s
21 U.S.C. 843(b)		Use of a Communication Facility in the Commission of a Drug Felony	04/26/2017	3s
21 U.S.C. 843(b)		Use of a Communication Facility in the Commission of a Drug Felony	04/26/2017	4s
21 U.S.C. 843(b)		Use of a Communication Facility in the Commission of a Drug Felony	05/01/2017	5s

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count(s) 1 and 13 of underlying Indictment is are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

3/8/2019

Date of Imposition of Judgment


Signature of JudgeThe Honorable Wm. Frenning Nielsen Senior Judge, U.S. District Court
Name and Title of Judge3/11/19
Date

DEFENDANT: ODELL KINARD, JR.
Case Number: 2:17-CR-00101-WFN-23

ADDITIONAL COUNTS OF CONVICTION

<u>Title & Section</u>	<u>/</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 U.S.C. 843(b)		Use of a Communication Facility in the Commission of a Drug Felony	05/07/2017	6s
21 U.S.C. 843(b)		Use of a Communication Facility in the Commission of a Drug Felony	05/07/2017	7s
21 U.S.C. 843(b)		Use of a Communication Facility in the Commission of a Drug Felony	05/31/2017	8s
21 U.S.C. 843(b)		Use of a Communication Facility in the Commission of a Drug Felony	05/31/2017	9s
21 U.S.C. 843(b)		Use of a Communication Facility in the Commission of a Drug Felony	05/31/2017	10s
21 U.S.C. 843(b)		Use of a Communication Facility in the Commission of a Drug Felony	06/06/2017	11s
21 U.S.C. 843(b)		Use of a Communication Facility in the Commission of a Drug Felony	06/06/2017	12s

DEFENDANT: ODELL KINARD, JR
Case Number: 2:17-CR-00101-WFN-23

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **144 Months** each as to Counts 1s and 2s; and **48 Months** each as to Counts 3s, 4s, 5s, 6s, 7s, 8s, 9s, 10s, 11s, and 12s; all terms imposed as to each Count to run **CONCURRENT** with all other Counts.

With credit for any time served.

The court makes the following recommendations to the Bureau of Prisons:

That Defendant be allowed to participate in the 500 hour RDAP Program as well as be designated to the Sheridan, Oregon facility.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ODELL KINARD, JR.
Case Number: 2:17-CR-00101-WFN-23

SUPERVISED RELEASE

Upon release from imprisonment, you shall be on supervised release for a term of: **5 Years** as to Count 1s; **3 Years** as to Count 2s; and **1 Year** each as to Counts 3s through 12s; all terms to run **CONCURRENT** to one another.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance, including marijuana, which remains illegal under federal law.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
5. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
6. You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: ODELL KINARD, JR.
Case Number: 2:17-CR-00101-WFN-23

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must be truthful when responding to the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If this judgment imposes restitution, a fine, or special assessment, it is a condition of supervised release that you pay in accordance with the Schedule of Payments sheet of this judgment. You shall notify the probation officer of any material change in your economic circumstances that might affect your ability to pay any unpaid amount of restitution, fine, or special assessments.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature

Date

DEFENDANT: ODELL KINARD, JR.
Case Number: 2:17-CR-00101-WFN-23

SPECIAL CONDITIONS OF SUPERVISION

1. You must submit your person, residence, office, or vehicle and belongings to a search, conducted by a probation officer, at a sensible time and manner, based upon reasonable suspicion of contraband or evidence of violation of a condition of supervision. Failure to submit to search may be grounds for revocation. You must warn persons with whom you share a residence that the premises may be subject to search.
2. You must undergo a substance abuse evaluation and, if indicated by a licensed/certified treatment provider, enter into and successfully complete an approved substance abuse treatment program, which could include inpatient treatment and aftercare upon further order of the court. You must contribute to the cost of treatment according to your ability to pay. You must allow full reciprocal disclosure between the supervising officer and treatment provider.
3. You must abstain from the use of illegal controlled substances, and must submit to urinalysis and sweat patch testing, as directed by the supervising officer, but no more than 6 tests per month, in order to confirm continued abstinence from these substances.
4. You must not enter into or remain in any establishment where alcohol is the primary item of sale. You must abstain from alcohol and must submit to urinalysis and Breathalyzer testing as directed by the supervising officer, but no more than 6 tests per month, in order to confirm continued abstinence from this substance.

DEFENDANT: ODELL KINARD, JR
Case Number: 2:17-CR-00101-WFN-23**CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$1,200.00	\$0.00	\$0.00	\$0.00

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	---------------------	----------------------------	-------------------------------

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

<input type="checkbox"/> the interest requirement is waived for the	<input type="checkbox"/> fine	<input type="checkbox"/> restitution
<input type="checkbox"/> the interest requirement for the	<input type="checkbox"/> fine	<input type="checkbox"/> restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: ODELL KINARD, JR
Case Number: 2:17-CR-00101-WFN-23**SCHEDULE OF PAYMENTS**

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A Lump sum payments of \$ _____ due immediately, balance due _____, or
 - not later than _____, or
 - in accordance with C, D, E, or F below; or
- B Payment to begin immediately (may be combined with C, D, or F below); or
- C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F Special instructions regarding the payment of criminal monetary penalties:

Defendant shall participate in the BOP Inmate Financial Responsibility Program. During the time of incarceration, monetary penalties are payable on a quarterly basis of not less than \$25.00 per quarter.

While on supervised release, monetary penalties are payable on a monthly basis of not less than \$25.00 per month or 10% of the defendant's net household income, whichever is larger, commencing 30 days after the defendant is released from imprisonment.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the following address until monetary penalties are paid in full: Clerk, U.S. District Court, Attention: Finance, P.O. Box 1493, Spokane, WA 99210-1493.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA Assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

APPENDIX D

U. S. Const. 6th Amend:

The Sixth Amendment guarantees the rights of criminal defendants, including the right to a public trial without unnecessary delay, the right to a lawyer, the right to an impartial jury, and the right to know who your accusers are and the nature of the charges and evidence against you. It has been most visibly tested in a series of cases involving terrorism, but much more often figures in cases that involve (for example) jury selection or the protection of witnesses, including victims of sex crimes as well as witnesses in need of protection from retaliation.

APPENDIX E

18 U.S.C. § 3161 - U.S. Code - Unannotated Title 18. Crimes and Criminal

Procedure § 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 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) are excluded in computing the time limitations specified in this section. The sanctions of section 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) are excluded in computing the time limitations specified in this section. The sanctions of section 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 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, 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) , 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, 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 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, 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.

APPENDIX F

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

(b) JOINDER OF DEFENDANTS. The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

(As amended Apr. 29, 2002, eff. Dec. 1, 2002.)

Fed. R. Crim. P. 14:

(a) RELIEF. If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

(b) DEFENDANT'S STATEMENTS. Before ruling on a defendant's motion to sever, the court may order an attorney for the government to deliver to the court for in camera inspection any defendant's statement that the government intends to use as evidence.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 29, 2002, eff. Dec. 1, 2002)