APPENDIX A

NINTH CIRCUIT MEMORANDUM AFFIRMING CONVICTION

NOT FOR PUBLICATION

FILED

MAY 1 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. EMMANUEL OLUWATOSIN KAZEEM, Defendant-Appellant.	No. 18-30145 D.C. No. 1:15-cr-00172-AA-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, District Judge, Presiding

Submitted March 2, 2020**
Portland, Oregon

Before: WOLLMAN,*** FERNANDEZ, and PAEZ, Circuit Judges.

Emmanuel Oluwatosin Kazeem was found guilty of one count of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. §§ 1349, 1341, and 1343,

* 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 Roger L. Wollman, United States Circuit Judge for the U.S. Court of Appeals for the Eighth Circuit, sitting by designation.

five counts of mail fraud, in violation of 18 U.S.C. § 1341, four counts of wire fraud, in violation of 18 U.S.C. § 1343, and nine counts of aggravated identity theft, in violation of 18 U.S.C. § 1028A(a)(1) and (c)(5). We affirm the judgment and sentence, but we vacate the restitution portion of Kazeem's judgment and remand for clarification regarding Kazeem's payment obligation.

Kazeem argues that the district court clearly erred by excluding certain time under the Speedy Trial Act's "ends of justice" exception. *See* 18 U.S.C. § 3161(h)(7); *United States v. Butz*, 982 F.2d 1378, 1380 (9th Cir. 1993) (reviewing the district court's factual findings regarding speedy trial violations for clear error and questions of law *de novo*). We conclude that the district court had valid reasons for twice granting continuance motions in this complex case involving multiple codefendants. The court did not clearly err in finding the additional time excludable under the "ends of justice" exception. *See Butz*, 982 F.2d at 1381. ("[T]rial delay due to the continuance granted to [a defendant's] codefendants applies to [the defendant] as excludable time.").

Kazeem also challenges his sentence, arguing that the district court incorrectly applied the intended loss instead of actual loss from his tax fraud scheme and used an unverifiable loss amount to determine his base offense level. As to both issues, we disagree. The district court properly used the loss Kazeem intended to cause in his tax returns scheme, rather than the loss Kazeem actually

caused. *See United States v. Santos*, 527 F.3d 1003, 1008 (9th Cir. 2008) ("[T]he district court may reasonably infer that the participants in a counterfeiting scheme intend to take as much as they know they can."). Moreover, the intended loss calculation was verifiable because the Internal Revenue Service's agent testified that it was calculated only from those tax returns directly linked to Kazeem or one of his coconspirators.

The district court ordered Kazeem to pay more than $12 million in restitution to the victims of his crimes. The written judgment states that the entire amount is "due immediately," but it also sets out a schedule of monthly payments that Kazeem must make when released from custody. Because the restitution schedule is "internally inconsistent," we vacate it and remand the case for a clarification of Kazeem's payment obligations. *See United States v. Holden*, 908 F.3d 395, 404 (9th Cir. 2018).

AFFIRMED IN PART, REMANDED IN PART

APPENDIX B

NINTH CIRCUIT ORDER DENYING PETITION FOR REHEARING

FILED

SEP 2 2020

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. EMMANUEL OLUWATOSIN KAZEEM, Defendant-Appellant.	No. 18-30145 D.C. No. 1:15-cr-00172-AA-1 District of Oregon, Medford ORDER

Before: WOLLMAN,* FERNANDEZ, and PAEZ, Circuit Judges.

The panel votes to deny the petition for rehearing.

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 hearing and petition for rehearing en banc are **DENIED**.

* The Honorable Roger L. Wollman, United States Circuit Judge for the U.S. Court of Appeals for the Eighth Circuit, sitting by designation.

APPENDIX C

DOCKET ENTRY 111, NOV. 8, 2016 GRANTING GOVERNMENT'S MOTION TO CONTINUE TRIAL

		Counsel Present for Plaintiff: Byron Chatfield. Counsel Present for Defendant: Michael Levine. (Court Reporter FTR) (rsm) (Entered: 10/31/2016)
11/03/2016	109	Scheduling Order as to Emmanuel Oluwatosin Kazeem Telephone Status Conference is set for 11/8/2016 at 02:00PM before Judge Ann L. Aiken. Order on 11/3/2016 by Judge Ann L. Aiken. (rr) (Entered: 11/03/2016)
11/08/2016	111	**Minutes of Proceedings:**Status Conference before Judge Ann L. Aiken as to Emmanuel Oluwatosin Kazeem. Parties discussed scheduling for trial and status of case. The Court granted a government Motion to Continue for a period 90 days. Jury trial is tentatively set for March 7, 2017 in Medford. This continuance constitutes excludable delay from 11/22/2016 through 3/22/2017, pursuant to 18 U.S.C. § 3161(h)(7)(A). The court specifically finds, in granting the motion, that the ends of justice served by taking such action outweigh the best interests of the public and defendant in a speedy trial because the additional time is necessary to afford counsel sufficient time to investigate the facts of this case, to negotiate with the government, and to prepare for pretrial motions and jury trial, if necessary. Jury Trial is set for 3/7/2017 at 09:00AM in Medford before Judge Ann L. Aiken. Pretrial Conference is set for 2/16/2016 at 01:00PM in Medford before Judge Ann L. Aiken. Ordered on 11/8/2016 by Judge Ann Aiken.Counsel Present for Plaintiff: Byron Chatfield.Counsel Present for Defendant: Mark Levine; Justin Rosas.(Court Reporter Kristi Anderson) (rr) Modified on 11/14/2016; 11/15/2016. Corrected transcription error-Date of PTC(rr). Modified on 6/6/2017 to correct filing date. (rdr). (Entered: 11/14/2016)
02/02/2017	129	ORDER: Granting 125 Motion to Continue as to Oluwamuyiwa Abolad Olawoye (5), Lateef Aina Animawun (3) and Emmanuel Oluwatosin Kazeem (1). The Court finds that the ends of justice served by granting the continuance outweigh the best interest of the public and defendant in a speedy trial. It is Ordered that 90 days are excluded under the Speedy Trial Act, commencing on (03/23/2017). Jury Trial is reset for 5/30/2017 at 09:00AM in Medford before Judge Ann L. Aiken. Ordered by Judge Ann L. Aiken. (rsm) (Entered: 02/02/2017)
02/02/2017	130	Notice of Attorney Appearance Gavin W. Bruce appearing for USA (Bruce, Gavin) (Entered: 02/02/2017)
02/06/2017	131	Objections by Emmanuel Oluwatosin Kazeem *to Court's having continued the trial without notice to the defendant* (Levine, Michael) (Entered: 02/06/2017)
02/08/2017	132	Scheduling Order as to Defendant, Emmanuel Oluwatosin Kazeem. Telephonic Status Conference is set for 2/23/2017 at 10:30AM before Judge Ann L. Aiken. The parties are ordered to call into the hearing using the conference call information provided by the Court. Ordered on 2/8/2017 by Judge Ann L. Aiken. (rdr) (Entered: 02/08/2017)
02/23/2017	133	Scheduling Order as to Emmanuel Oluwatosin Kazeem. Status conference set for 2/23/2017 at 10:30 AM is cancelled. A new telephonic status conference will be scheduled at the earliest convenience of the Court and the parties. Ordered on 2/23/2017 by Judge Ann L. Aiken. (rdr) (Entered: 02/23/2017)
02/27/2017	134	Scheduling Order as to Emmanuel Oluwatosin Kazeem. Telephonic Status Conference is set for 2/28/2017 at 11:30AM in before Judge Ann L. Aiken. The

APPENDIX D

DISTRICT COURT'S ORDER DENYING MOTION TO DISMISS ON GROUNDS OF STA VIOLATION

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MEDFORD DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

EMMANUEL OLUWATOSIN KAZEEM,

Defendant.

No. 1:15-cr-00172-AA-01

OPINION AND ORDER

AIKEN, District Judge.

This matter comes before me on Defendant Emmanuel Kazeem's Motion to Dismiss for violation of the Speedy Trial Act. ECF No. 178. The motion is DENIED.

LEGAL STANDARD

The Speedy Trial Act, 18 U.S.C. § 3161, provides that when a defendant enters a plea of not guilty, the trial of the defendant shall commence within seventy days of either (1) the filing of the indictment or (2) the defendant's first appearance, whichever is later. 18 U.S.C. § 3161(c)(1). In cases involving multiple defendants who are joined for trial, the period of seventy days is deemed to begin on the date of the indictment or arraignment of the latest codefendant. *Henderson v. United States*, 476 U.S. 321, 323 n.2 (1986). The seventy-day period of all codefendants is measured with respect to that of the latest codefendant. *Id.* In cases involving multiple defendants, when the defendants have not been severed, any exclusion or delay that

applies to one defendant will apply to the others. *United States v. Daychild*, 357 F.3d 1082, 1091 (9th Cir. 2004).

The seventy-day period is subject to a number of exclusions. The two exclusions relevant to this motion are:

> 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.

18 U.S.C. § 3161(h)(6) (the "joinder of defendants" exclusion); and

> 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.

18 U.S.C. § 3161(h)(7)(A) (the "ends of justice" exclusion).

In determining whether the "ends of justice" exclusion should apply, the statute sets forth a non-exhaustive list of factors for the court to consider. These include:

> **(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.

18 U.S.C. § 3161(h)(7)(B).

Of particular note, no exclusion may be granted under § 3161(h)(7)(A) "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." 18 U.S.C. § 3161(h)(7)(C).

If a defendant is not brought to trial within seventy days, after tallying the exclusions provided in § 3161(h), then the information or indictment must be dismissed on the defendant's motion. 18 U.S.C. § 3162(a)(2). The defendant must make the motion before trial commences or a guilty plea is entered and the defendant bears the burden on the motion. *Id.*

BACKGROUND

Defendant, along with four codefendants, is charged with Conspiracy to Commit Mail and Wire Fraud, Mail Fraud, Wire Fraud, and Aggravated Identity Theft. ECF No. 3. Defendant was arraigned on May 22, 2015, and was ordered detained on the charges. ECF Nos. 23, 24. The last of the codefendants, Lateef Animawun ("Animawun") and Oluwaseunara Osanyinbi ("Osanyinbi") made their first appearances on June 22, 2015. ECF No. 48, 52.

On July 6, 2015, the Court deemed this case to be complex and set trial for January 26, 2016. Defendant agreed to the continuance. ECF No. 61. Defendants jointly moved to continue the trial date several times. These continuances were granted and have not been challenged. ECF Nos. 90, 97. On July 29, 2016, all defendants once again jointly moved to continue the trial. The Court agreed to the continuance and set trial for November 22, 2016, with a status conference to be held on October 31, 2016. ECF No. 103.

On October 31, 2016, Defendant reported to the Magistrate Judge that he was prepared to go to trial. ECF No. 104. As no pretrial conference had been scheduled and no pretrial motion schedule set, the Magistrate Judge scheduled a status conference with this Court on November 8, 2016.

On November 8, 2016, Defendant reported that he was prepared to proceed to trial. At the time of the status conference, the codefendants had indicated that they would likely enter guilty pleas, although only one of the codefendants had actually accepted a plea agreement at the time of the hearing. The offers made to all other codefendants had expired on August 31, 2016, and no other offers had been extended. Mem. Supp. Ex. B, at 5. ECF No. 179-2. The codefendants had also jointly moved for a continuance. ECF No. 110.

The Court determined that it would not be possible to summon a jury for trial on November 22, 2016. Mem. Supp. Ex. B, at 6-7.

Defendant indicated that he intended to file evidentiary motions and other motions in limine before trial. The Government moved to continue the trial for ninety days, based on the complexity of the case and the number of witnesses and exhibits involved. Mem. Supp. Ex. B, at 10, 12. Defendant objected to the continuance. Mem. Supp. Ex. B, at 10, 13-14. The Court found that in light of the complexity of the case; the need for pretrial conferral between counsel and pretrial motions practice; and the importance of trying all codefendants together, a continuance was warranted and that the time would be excluded for purposes of the Speedy Trial Act. Mem. Supp. Ex. B at 14; ECF No. 111. In deference to Defendant's counsel's schedule, trial was set for March 7, 2017. Mem. Supp. Ex. B, at 13-14.

In December 2016, codefendant Oluwamuyiwa Olawoye ("Olawoye") fired his attorney and, on January 4, 2017, retained new counsel. ECF No. 123. Although it had been anticipated

that Olawoye would accept a plea agreement, the change of counsel cast that understanding into doubt. On January 27, 2017, Olawoye moved to continue the trial date in order to allow his new counsel to review the voluminous discovery materials and properly advise his client on how to proceed. ECF Nos. 125, 126. The Court found that a continuance was once again justified and granted the motion on February 2, 2017. The Court set trial for Defendant and the remaining two codefendants for May 30, 2017. ECF No. 129.

Due to an email filing mistake, Defendant's counsel did not see the electronic notification for Olawoye's motion and did not file an objection before the Court granted the continuance. On February 6, 2017, Defendant filed an objection to the continuance, requesting that the trial go forward on March 7, 2017, as previously scheduled. In the alternative, Defendant moved to sever his case from the remaining codefendants and moved for pretrial release. ECF No. 131. The Court held a hearing on Defendant's objections on February 28, 2017. ECF No. 135. At that hearing, the Court denied Defendant's motion to sever and reaffirmed the earlier-granted continuance. Defendant's counsel represented that he would be on vacation for all of May and June and so the Court set another hearing for March 17, 2017, to pick a new trial date. Mem. Supp. Ex. C, at 20. ECF No. 180.

On March 17, 2017, the Court conferred with the parties and set trial for July 31, 2017, in order to allow time for pretrial motions after Defendant's counsel returned from his vacation. This period was also excluded from the Speedy Trial clock. ECF No. 136. This motion followed on July 10, 2017. ECF No. 178.

DISCUSSION

The Court held a hearing on this motion on July 21, 2017. ECF No. 190. Defendant contends that this Court erred in continuing the trial date on November 8, 2016, and on February 2, 2017, and in excluding that time under the Speedy Trial Act. Defendant contends that those continuances were not properly excluded and that the indictment must be dismissed. As both of the contested periods are longer than seventy days and Defendant does not assert that the Speedy Trial clock was otherwise exceeded, the Court will not include a detailed reckoning of the count of excluded and non-excluded days.

As a preliminary matter, the district court is not required to document the findings supporting a continuance contemporaneously with the granting of the continuance and may record those findings for the first time in response to a motion to dismiss. *See United States v. Bryant*, 726 F.2d 510, 511 (9th Cir. 1984) ("Although the Act requires that the trial court prepare a record, we find nothing in either the language or the purpose of the Act that requires the court to prepare the record at the precise moment it grants a continuance."); *United States v. Medina*, 524 F.3d 974, 986 (9th Cir. 2008) (a district court may document its findings for the first time when ruling on a motion to dismiss).

I. The November 8, 2016 Continuance

Defendant is charged with Conspiracy to Commit Mail and Wire Fraud, along with four codefendants. "Generally, defendants who are indicted together in federal court should be jointly tried." *United States v. Tootick*, 952 F.2d 1078, 1080 (9th Cir. 1991). "It is well established that an exclusion from the Speedy Trial clock for one defendant applies to all codefendants." *United States v. Messer*, 197 F.3d 330, 336 (9th Cir. 1999). In calculating the Speedy Trial clock for a defendant, the court may exclude 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." 18 U.S.C. § 3161(h)(6); *see also United States v. Moniz*, 73 F. App'x 981, 983 (9th Cir. 2003) ("Moniz's delay was caused by the district court's attempt to achieve [§ 3161(h)(6)'s] purpose of effectuating a joint trial.").

To determine the reasonableness of the delay, "courts look particularly to whether the delay was necessary to [effectuate a joint trial] and to whether there was any actual prejudice suffered by" the defendant. *United States v. Hall*, 181 F.3d 1057, 1062 (9th Cir. 1999) (internal quotation marks and citation omitted). However, this is not a simple two-factor test. Rather, "the proper test is whether the totality of the circumstances warrants a conclusion that the delay was unreasonable." *Messer*, 197 F.3d at 338. Delays are unreasonable where the primary purpose of the delay is to permit the codefendant to pursue plea negotiations and where the delay prejudices the defendant's defense. *Hall*, 181 F.3d at 1062.

In this case, the Court's decision to grant the continuance on November 8, 2016, was guided by the principle that Defendant should be tried together with his codefendants. The Court carefully weighed the potential for prejudice before making its decision, noting especially that Defendant remained in custody pending trial. Although the other defendants had indicated a likelihood that they would enter into plea agreements, the Government represented to the Court that only one codefendant had actually done so and that the plea offers for the other defendants had been allowed to expire. Mem. Supp. Ex. B, at 5. Counsel for the other defendants indicated that they were wading through the voluminous discovery materials so that they could advise their clients as to their potential exposure. Mem. Supp. Ex. B, at 4. While the Court was aware of the possibility that codefendants would enter pleas, the continuance was not granted in order to

allow them to pursue those negotiations, but rather to ensure a joint trial.[1] Defendant has not made any showing that his own defense was prejudiced by the delay.[2] Nor did Defendant request a severance at this juncture.[3] Based on the totality of the circumstances, the Court concluded that the continuance was reasonable as to ensure that all codefendants would be tried together.

The Court also noted that Defendant first reported his readiness for trial to the Magistrate Judge on October 31, 2016. The Court determined that there was not enough time for pretrial motions and other trial preparations between the November 8, 2016, hearing and a November 22, 2016, trial date, even taking into account the exercise of due diligence on the part of the attorneys. This assessment has been substantiated by the lengthy trial preparations still underway.[4] The Court was satisfied that this delay was not the result of a lack of diligent preparation on the part of the Government's attorney, or of a failure to obtain available witnesses.

The Court acknowledges that it discussed issues that would not justify a continuance, such as indications that a plea agreement might still be a possibility. *See* Mem. Supp. Ex. B, at 7-9, at 10-11. Plea negotiations are not a valid basis for granting a continuance. *United States v.*

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[1] The Court noted specifically that "[I]t's important, I think, that we proceed to resolve those other defendants and set them all at the same time." Mem. Supp. Ex. B., at 14.

[2] In *United States v. Hall*, 181 F.3d 1057 (9th Cir. 1999), the Ninth Circuit held that a delay was unreasonable because it was granted to allow the codefendant to negotiate a plea agreement that included testifying against the defendant, thereby prejudicing his defense. *Id.* at 1062-63. As previously noted, the continuances in this case were not granted for the purpose of allowing codefendants to proceed with plea negotiations. The codefendants are not expected to testify against Defendant.

[3] Although a defendant is not required to make a motion to sever, the making of such a motion is a factor to be weighed in assessing the reasonableness of the delay. *United States v. Messer*, 197 F.3d 330, 338, 340 (9th Cir. 1999). At oral argument, Defendant contended that the Court should have inferred the existence of an implied motion to sever based on his objection to the continuance.

[4] In particular, the Court notes that Defendant did not request the services of a Yoruba interpreter until June 26, 2017, for the trial to be held on July 31, 2017. ECF No. 165. The Court encountered substantial difficulties in meeting this need, given the lateness of the request and the rarity of qualified Yoruba interpreters. Defendant had not requested this essential service by November 8, 2016, despite his claimed readiness for trial on November 22, 2016.

Medina, 524 F.3d 974, 986 (9th Cir. 2008). While the Court did consider the possibility of a plea agreement as part of a larger strategy of case management, it did not grant the Government's motion to continue the trial on that basis. Similarly, the Court considered and remarked upon general issues of scheduling and the difficulty of summoning a jury by November 22, 2016, but did not grant the continuance based on the congestion of the Court's calendar.

The Court determined that, in light of the complexity of the case, the importance of joint trial for all codefendants, and the need for the parties to prepare, file, and resolve pretrial motions, a continuance was in the best interests of justice and that it outweighed the interests of the public and Defendant in a speedy trial. Accordingly, the Court continued the trial to March 7, 2017, and excluded the period of the continuance from the Speedy Trial clock. Defendant has not met his burden of showing a Speedy Trial Act violation based on the November 8, 2016, continuance.

II. The February 2, 2017 Continuance

As noted above, the Court granted the February 2, 2017, continuance based on the motion of the attorney for Olawoye. The motion indicated that it was not opposed by the Government, but was silent as to Defendant's position. As the Court later discovered, Defendant's counsel had misfiled the email notification alerting him to the motion and only discovered its existence when the Court granted the continuance. Defendant filed objections to the motion on February 6, 2017. The Court recognized that it should have made inquiries as to Defendant's position before granting the motion, *see United States v. Lloyd*, 125 F.3d 1263 (9th Cir. 1997), and promptly set a hearing to rectify the error and resolve Defendant's objections. The Court held the hearing on February 28, 2017, before the previously excluded time had elapsed. After

hearing Defendant's objections, as well as statements from the Government and counsel for the codefendants, the Court reaffirmed the earlier grant of the continuance.[5]

As in the case of the earlier continuance, discussed above, the Court's decision to grant the February 2, 2017, continuance was guided by the principle that Defendant should be tried together with his codefendants. Although all parties had previously understood that Olawoye would enter into a plea agreement with the Government, he fired his attorney in December 2016 and retained new counsel in January 2017. These changes cast doubt on the parties' prior understanding about the disposition of Olawoye's case. The volume of discovery in this case and its complexity was such that Olawoye's new attorney would not be able to adequately prepare for the March 7, 2017, trial date. At the hearing on February 28, 2017, Olawoye's attorney advised the Court that trial remained a possibility and that, despite his diligence and the cooperation of the Government, he required the additional time to prepare for trial and to competently advise his client. Mem. Supp. Ex. C, at 8-9. ECF No. 180.

Defendant moved to sever as part of his objection to the continuance. Joint trials "promote efficiency and serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." *Zafiro v. United States*, 506 U.S. 534, 537 (1993) (internal quotation marks and citation omitted). Federal Rule of Criminal Procedure 14 provides that a court may sever defendants' trials if a consolidation for trial "appears to prejudice a defendant or the government." Fed. R. Crim. P. 14(a). Severance is warranted only when "joinder is so manifestly prejudicial that it outweighs the dominant concern with judicial economy and compels the exercise of the court's discretion to sever." *United States v. Brashier*, 548 F.2d

[5] During the February 28, 2017, hearing, the Court informed the parties that the March 7, 2017, trial date was no longer a possibility. *See* Mem. Supp. Ex. C at 13-14. This should not be interpreted to mean that the Court was not considering Defendant's objections to the continuance, only that the Court would need to set a different trial date, no matter how it resolved the objections.

1315, 1323-24 (9th Cir. 1976). The Ninth Circuit has held that joint trials are "particularly appropriate where the co-defendants are charged with conspiracy, because the concern for judicial efficiency is less likely to be outweighed by the possible prejudice to the defendants when much of the same evidence would be admissible against each of them in separate trials." *United States v. Fernandez*, 388 F.3d 1199, 1242 (9th Cir. 2004). The Supreme Court has further held that severance should not be granted unless "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro*, 506 U.S. at 539. Defendant did not address these requirements, or any legal standards, when he presented his motion to sever. The Court did not find that joinder of defendants was so manifestly prejudicial as to compel severance, especially in light of the conspiracy charges involved, and denied the motion.

Given the complexity of the case and the need for adequate and effective trial preparation, the Court determined that the continuance requested by Olawoye served the ends of justice and that it outweighed the defendant's and the public's interest in a speedy trial. For the purposes of ensuring a joint trial, the Court once again considered the reasonableness of the delay, still cognizant of the fact that Defendant remained in custody pending trial and that Defendant had now moved for severance. The Court heard from Olawoye's counsel and was satisfied that this was not simply a continuance to allow him to negotiate a plea agreement.[6] Defendant did not articulate any prejudice to his own defense that would result from the continuance.

[6] At the February 28, 2017, hearing, the Court asked Olawoye's new counsel for his position and he responded that, although he would prefer to avoid a trial and was trying to work out a settlement, "[I]t is a complex case and the record is reflecting, you know, half a million pages of discovery, I wouldn't know if an offer was made, which one has not been made yet, if it's a reasonable offer or not, and so that's why *I would need additional time, not only to prepare for a trial if that were to occur but even to advise my client*. . . . [Olawoye is] aware of all the proceedings that are going on, and he's—*he's anxious to hear my advice as to how to proceed as well*." Mem. Supp. Ex. C, at 8-9 (emphasis added).

In light of the complexity of the case and the totality of the circumstances, the Court determined that the continuance was justified in order to ensure that Defendant and Olawoye would be tried together. Once again, the Court remarked upon general issues of case management, such as plea agreements or scheduling for specific days, but the Court did not base its decision on those issues. The period covered by this continuance was properly excluded from the Speedy Trial clock. Defendant has not met his burden of showing a Speedy Trial Act violation based on the February 2, 2017, continuance.

CONCLUSION

As the challenged continuances were properly granted pursuant to 18 U.S.C. § 3161(h)(6) and (h)(7)(A), the Court finds no violation of the Speedy Trial Act. Defendant Emmanuel Kazeem's Motion to Dismiss is DENIED.

It is so ORDERED and DATED this 24th of July, 2017.

Ann Aiken
United States District Judge

APPENDIX E

CODEFENDANTS' MOTION TO CONTINUE TRIAL STATING ALL PLEADING GUILTY EXCEPT KAZEEM

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Attorney for Defendant

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, vs. LATEEF ANIMAWUN et al., Defendants.	CASE NO. CR 15-00172 AA CR 16-00062 AA MOTION TO CONTINUE JURY TRIAL AND TO EXCLUDE TIME

Defendant, Lateef Animawun, through his attorney, Terry Kolkey, moves this court for an Order to continue the Jury Trial and the Status Conference.

Attorney Robert Stone on behalf of his client Mr. Olayowe, and attorney Justin Rosas on behalf of his client Mr. Dehinbo join in this motion.

In case number 16-CR-00062 AA, defendant, Michael Kazeem, represented by Donald Scales, is charged separately for allegedly committing most of the same offenses charged against the five defendants in the present case. Michael Kazeem's trial had previously been scheduled for the same date as the trial in the present matter. Attorney Donald Scales joins in this motion for a continuance.

Mr. Kolkey, Mr. Stone and Mr. Scales are requesting a continuance of 120 days. Mr. Rosas requests a continuance of 45 days and objects to a continuance of 120 days.

I left a message for Assistant United States Attorney Byron Chatfield about this motion, but have not yet received a response.

This motion is made upon the grounds stated in the attached declaration of counsel.

Dated: November 8, 2016

Terry Kolkey

Terry Kolkey

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, vs. LATEEF ANIMAWUN, Defendants.	CASE NO. CR-15-00172 AA CR-15-00062 AA DECLARATION OF COUNSEL IN SUPPORT OF MOTION TO CONTINUE TRIAL

I, Terry Kolkey, declare that:

1. I represent Lateef Animawun in the above-entitled matter.

2. A jury trial is scheduled for November 22, 2016.

3. The case has been declared complex.

4. Mr. Animawun and four co-defendants have been charged with one (1) count of conspiracy to commit mail fraud, in violation of 18 U.S.C. 1349; seven (7) counts of mail fraud, in violation of 18 U.S.C. 1341, six (6) counts of wire fraud, in violation of 18 U.S.C. 1343, and thirteen (13) counts of aggravated identity theft, in violation of 18 U.S.C. 1028A.

4. The discovery includes materials with more than 450,000 pages. In addition, there are 39 mirror images of computers, external hard drives,

and cell phones, which contain hundreds of thousands of additional documents and objects. The total data is approximately 2 TB.

5. The government alleges that the six defendants obtained stolen personal identifying information (PII) of more than 250,000 individuals and used that information to file fraudulent federal and state tax returns. It is alleged that the defendants, whether working separately or jointly, attempted to obtain over $25 million dollars in tax refunds and actually obtained over $4.7 million dollars.

6. The government alleges that Emmanuel Kazeem obtained tens of thousands of PII from an overseas hacker, and that Kazeem then divided this information amongst the co-defendants and other individuals. Thousands of PIIs came from an Oregon database, CICS Employment Services in Lincoln City, Oregon.

7. The government claims that the process used by the defendants to file false tax returns required several steps. First, after the defendants acquired PIIs, they obtained E-file PINs from the IRS for each individual whose personal information that they had obtained. Next, they got pre-paid debit cards in the name of each individual or opened a bank account in the name of a third party. They then obtained disposable email accounts and used those accounts to file false tax returns using online tax software such as TurboTax. The IRS paid refunds directly to the pre-paid debit cards the defendants had obtained or to the third party bank accounts they set up. According to the government, the defendants then wired money to Nigeria using Western Union.

8. The government claims that the defendants either separately or jointly filed over 8,000 false tax returns, and that Mr. Animawun filed approximately 900 false tax returns. It claims that Mr. Animawun attempted to obtain millions of dollars in returns. The government,

however, has offered a plea agreement in which the sentence is not limited to the amount of intended loss that the government claims it can prove at the present time. The plea offer allows the government to offer proof at sentencing that Mr. Animawun was responsible for up to five times the intended loss that it claims it now can prove.

9. The defense of course cannot accept the government's offer unless it can verify the government's numbers. The discovery, however, that has been provided is not organized into subjects, types of documents, or categories of objects. It consists of flash drives, discs, and hard drives that contain hundreds of thousand of documents and objects that are labeled only by a number without any identifying information. For example, the first discovery release came as a flash drive with 225,380 pages of PDF documents. Each document was labeled EK 0000001 to EK 00225380. There have now been 14 total discovery releases, and the last number was EK 00478222. The discovery also contains the native file for each of the PDF files. As mentioned above, in addition to the bates-numbered discovery, the defense has also been given 39 mirror images of computers, cell phones, and thumb drives.

10. The defense not only has to locate all of the relevant documents amongst the immense mass of irrelevant documents and objects, but it has to find links from each false tax return to the individual defendants.

11. Recently, the government provided spread sheets that listed each false tax return for which it claims each one of the defendants is individually responsible. A few days ago, an IRS agent personally informed counsel of the best method of finding the links between the tax returns and the defendants using the new spread sheets. The process of

following the links will be a meticulous, time-consuming endeavor. In order to facilitate this process, I am having my database rebuilt to make it easier and quicker to conduct these searches. I have discovered, however, that some of the PDFs are missing very important information that is contained in the native files. I do not know yet how much this issue will slow down the process. It is my understanding that the IRS agent conducts searches using native files.

12. As mentioned above, the government, however, is not limiting its case to what it claims are provable links to the defendant at the present time, but reserves the right to produce far greater numbers at the sentencing hearing. As such, the defense will not only have to verify the information in the government's new speadsheets, but will have to continue its exhaustive search of all of the other documents. In the end, counsel will need to advise his client about the risks that the data contains more exposure.

13. I believe that it will require another 120 days to complete the search of the discovery. Mr. Stone and Mr. Scales on behalf of their clients concur in this request. They informed me that they expect their cases will resolve by plea but that they need additional time to verify or refute the government's data. If co-counsel, however, complete the task sooner, they can request a plea hearing at that time.

14. At the last court hearing on October 31, 2016, Mr. Rosas stated that he needed about 30 to 45 days to complete his efforts to confirm the government's figures. He also stated that he would not be seeking to set a trial date; and that he would be setting a date for entry of a plea. After the hearing, Mr. Rosas informed counsel that he objected to a continuance of 120 days. Mr. Rosas's client, Mr. Dehinbo, however, will not be prejudiced by a continuance of 120 days. He has not stated that he

needs a few extra weeks to prepare for trial and that he wants a trial within 45 days; in fact, he needs additional time to schedule a plea. He does not need to wait 120 days to schedule his plea, and he will not be prejudiced if the remaining defendants need more time.

15. For these reasons, I am requesting a continuance of 120 days for a Jury Trial on behalf of my client, Mr. Animawun, and on behalf of Mr. Olowaye and Michael Kazeem, represented by Mr. Stone and Mr. Scales respectively.

16. This request should not affect Emmanuel Kazeem's request for immediate trial. The other defendants will all be entering guilty pleas, and the court will not be confronted with multiple trials.

17. I left a message for Assistant United States Attorney Byron Chatfield about this motion, but have not yet received a response.

I, Terry Kolkey, declare under penalty of perjury that the foregoing facts are true and correct to the best of my knowledge. Executed in Ashland, Oregon, on November 8, 2016.

Terry Kolkey

_____

Terry Kolkey

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, vs. LATEEF ANIMAWUN, et al., Defendant.	CASE NO. CR 15-00172 AA CR 16-00051 AA ORDER GRANTING MOTION FOR CONTINUANCE OF TRIAL AND EXCLUDING TIME

Based upon the Motion of Defendant, the Court finds that good cause exists to continue the Status Conference to _____ , 2017, and the Jury Trial to _____, 2017. The motion is granted for defendants Animawun, Olowaye, Dehinbo, and Michael Kazeem.

Furthermore, IT IS ORDERED that the time until the jury trial be deemed excludable pursuant to the Speedy Trial Act, 18 U.S.C. section 3161(h)(B)(8)(A).

Dated: _____

_____
United States District Judge

APPENDIX F

TRANSCRIPT OF HEARING OF NOV. 8, 2016 AT WHICH COURT GRANTS GOVERNMENT'S MOTION TO CONTINUE TRIAL 90 DAYS

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

THE HON. ANN AIKEN, JUDGE PRESIDING

UNITED STATES OF AMERICA, Government,	)	
v.	)	No. 1:15-cr-00172-AA-1
EMMANUEL OLUWATOSIN KAZEEM, Defendant.	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

EUGENE, OREGON

TUESDAY, NOVEMBER 8, 2016

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PROCEEDINGS

TUESDAY, NOVEMBER 8, 2016

THE CLERK: Okay. Everyone is here now, so now is the time set for a hearing in the matter of the United States of America v. Emmanuel Oluwatosin Kazeem, Case No. 1:15-cr-00172, time set for status conference.

THE COURT: Mr. Chatfield, could you give me an update as to the status of this case, please.

MR. CHATFIELD: Certainly, Your Honor. This case, we had a status hearing last Monday, and at that particular hearing, all of the defendants' counsel except for Mr. Levine had asked for a continuance of the case. Mr. Levine asked that his case be scheduled for trial.

This particular case was declared a complex case sometime ago, and it involves -- the discovery is voluminous. There is probably over 450,000 items of discovery, including e-mail, instant message, tax information, and so on.

The status right now with respect to the other defendants, I had just noticed that Mr. Kolkey filed a motion to continue that he represented at the last status hearing that he was going to be filing and that he in fact filed that. And he has requested that -- for a 120-day continuance for his client as well as Mr. Stone's client.

And I understand from reading this also that

Mr. Rosas's client, Mr. Dehinbo, was wanting a 45-day continuance, the purpose of which was to continue to go through the particular discovery material.

There was an issue with respect to the plea offers out. There was an indication with respect to going through looking at particular amounts for intended loss that they wanted to go through the discovery material and wanted the extra time in order to do that.

There was a representation made in the motion that was filed today that apparently the defendants other than Mr. Kazeem would all be entering guilty pleas and that in fact the only one asking for a trial would be Mr. Kazeem.

However, I notice that there is reference in the affidavit that -- in the end it mentions that counsel, I am talking about counsel other than Mr. Kazeem, would need to advise their clients about the risks of the data that contains more exposure to them that they wanted to review.

And so we are at the point right now with a trial date that is scheduled for November the 22nd. I would anticipate that if going to trial in this particular case that we would be in the neighborhood of probably approximately 25 witnesses.

There would probably be exhibits in the neighborhood of 200 or so exhibits, and it's considerable documentary evidence. The case involves charges of

conspiracy to commit mail and wire fraud, mail fraud counts, wire fraud counts.

In addition to that, there are aggravated identity theft counts. Part of the conspiracy involves multiple overt acts.

In looking at where the status is, Your Honor, with respect to one of the defendants, Ms. Regan's client, who is Osanyinbi, they have scheduled a change of plea that's been set for December the 8th.

With respect to plea offers, we have extended plea offers out for a period of time. The plea offers expired on August the 31st, I believe, of this year, and there have been no plea offers extended beyond that point.

And I think that summarizes where we are at right now.

THE COURT: So you referenced something in the motion -- well, Mr. Levine, tell me the status from your client's perspective.

MR. LEVINE: Your Honor, we are ready for trial on November the 22nd. When I was at the status hearing last week the codefendants represented that they were all pleading -- going to plead guilty. They did want to check out numbers on -- loss numbers, but they all represented they were going to plead guilty.

My client wants his trial. It's been set for

November 22nd, and we are prepared to go.

THE COURT: Well, how many witnesses do you have and are any motions to be filed?

MR. LEVINE: Only in limine motions. Nothing dispositive. There will be -- nothing dispositive. Just some evidentiary motions.

THE COURT: So here's what I am prepared to tell you: I am sure you have thought about this. That's the Tuesday before Thanksgiving, correct?

MR. LEVINE: Yes, it is.

THE COURT: And I have a full calendar in Eugene that Tuesday. And you are prepared to go to trial starting with 200 exhibits, 25 witnesses, and select a jury starting on the 22nd?

MR. LEVINE: Yes.

THE COURT: And you are not interested in having conversations, additional conversations with the government?

MR. LEVINE: Oh, I didn't say that, Your Honor. That's -- no. I have had ongoing --

THE COURT: I don't know -- hold on. Hold on, Mr. Levine. Let me ask you a question.

MR. LEVINE: Oh, sure.

THE COURT: Mr. Reeves, can you tell me if they have even summoned a jury for this case and if that's even possible for the 22nd?

THE CLERK: I am sorry, Judge. If we can summon a jury? I don't believe -- I am sorry.

THE COURT: I don't -- what I was -- I did some preliminary checking. Correct me if I am wrong. I am told there won't be time to pull a jury for the 22nd.

THE CLERK: Oh. No, Your Honor. I am sorry. Yes, that's correct at this point.

MR. LEVINE: Well, Your Honor, if I may, on a side moment just -- not to digress, but you mentioned plea bargaining. I am not going to get into specifics. I know that's not appropriate.

THE COURT: That's right.

MR. LEVINE: But there is one thing I would like to inquire of the court as a matter of procedure for my own understanding.

Under Rule 11 -- as the court is well aware, under Rule 11(c) -- (c), 11(c)(3), if the parties agree to a specific sentence, they can present that to the court, and the court can defer accepting that upon preparation of a plea agreement -- upon preparation of --

THE COURT: I am perfectly -- I am very knowledgeable about a Rule 11(c)(1)(C) plea.

MR. LEVINE: Oh, okay. Well, I just wanted to know if the court -- I am not clear. Some judges refuse to accept such pleas as a matter of course, for whatever

reason. I don't know the court's position on those type of pleas in general. If the court does accept them or doesn't accept them or --

THE COURT: Mr. Levine, if you have done any work -- I have only been on this bench for 19 years. I have never needed to accept an 11(c)(1)(C) plea. And I have a tradition, and you can ask any defense lawyer and you can ask any plaintiff's lawyer, I respect the plea agreements reached.

If I were going to do something separate from a plea agreement, I generally, before that's done, would allow the defendant to withdraw their plea.

MR. LEVINE: Okay.

THE COURT: I don't feel it's necessary to do 11(c)(1)(C)'s. I have never been asked. It's not been necessary.

MR. LEVINE: Okay.

THE COURT: So if you enter into a deal and there's a range of sentence, I hear everybody out. But I hear everybody out.

And you need to also understand that this was designated a complex case.

MR. LEVINE: Yes.

THE COURT: That there are multiple defendants in this case, and I generally have a history of sentencing

commensurate to responsibility.

MR. LEVINE: Of course. Of course. I understand all that completely.

THE COURT: But I have never --

(The reporter interrupted.)

THE COURT: I am sorry. It's my connection. That's all I have.

MR. LEVINE: Your Honor, I am sorry. I joined late, but can I know who else is present on this call?

THE COURT: Well, you joined late because you called in late. So we called the roll.

Call the roll again.

THE CLERK: Okay.

MR. CHATFIELD: This is Byron Chatfield.

MR. ROSAS: Justin Rosas.

THE COURT: One of the defense counsel for one of the defendants is on the phone. The remainder of the defense counsel did not feel the need to be on this call.

MR. LEVINE: Okay. Okay.

THE COURT: My courtroom deputy is on the call and my court reporter is taking it down. So.

MR. LEVINE: All right. Thank you very much.

THE COURT: So what's your preference?

MR. LEVINE: Well, the government -- as I understand it, the government is not making a motion to

continue the case, and I am ready for trial.

MR. CHATFIELD: We are making a motion to continue the case.

MR. LEVINE: Oh, I didn't know that.

MR. CHATFIELD: It's not realistic to begin this trial on the 22nd of this month.

MR. LEVINE: I haven't received -- have you filed this in writing?

MR. CHATFIELD: I have not filed anything in writing. I think we are dealing with the status, as I understood, with respect to the trial date.

MR. LEVINE: Well, it's the government's motion. We oppose the motion. We are ready to go to trial on November 22nd, but the court -- of course, the court decides these things.

THE COURT: Mr. Chatfield, do you want to say anything further?

I don't know what your question was about the 11(c)(1)(C) plea. You asked if I knew about it, and I explained that we have never needed to use that in the Southern Division. No one has asked us to use that. I don't know -- I assumed what you were implicating by asking me that question is there are still ongoing negotiations and you and your client are interested in certainty with regard to a disposition.

MR. LEVINE: Yes. Yes.

THE COURT: Then you need to negotiate with Mr. Chatfield, and if there is a plea offer, then to be specific in the plea offer and put that in the plea offer.

Am I missing something, Mr. Chatfield?

MR. LEVINE: Well, that's --

THE COURT: Wait. Hold on.

Am I missing something, Mr. Chatfield?

MR. CHATFIELD: I don't believe so. I think that with respect to the (c)(1)(C), obviously it comes into -- with respect to a specific sentence, and that's -- that's the issue.

MR. LEVINE: Well -- I am sorry.

THE COURT: Well, number one, first, Mr. Levine, Mr. Chatfield would need to agree with that.

MR. LEVINE: Of course.

THE COURT: So your preliminary discussion needs to be with him.

MR. LEVINE: Of course.

THE COURT: If you get that far, then you need to approach me.

MR. LEVINE: Yes, that's all I am asking, Your Honor. I understand that.

THE COURT: I don't have -- I mean, if you have a concern, then if that's going to allay your concern and

Mr. Chatfield is agreeable, it doesn't matter to me. I am just telling you no lawyer has needed to do that.

MR. LEVINE: Okay. I appreciate it.

THE COURT: And everything was fine.

MR. LEVINE: Thank you. It does allay my concern. Thank you.

THE COURT: Mr. Chatfield, anything further? Or explain the basis of your motion.

MR. CHATFIELD: The basis of my motion, Your Honor, is because of the complex nature of the case, I think I have outlined that, and with the number of witnesses and the exhibits with respect to the trial date, dealing with Mr. Kazeem's case, it seems that it's reasonable to have this particular case set out approximately 90 days if we are going to actually go to trial and have a firm trial date.

THE COURT: How many days did you ask for?

MR. CHATFIELD: I mentioned 90 days I think would be a reasonable period of time.

THE COURT: 90 days?

MR. CHATFIELD: Yes.

THE COURT: I am having trouble hearing too. That's why I am just trying to make sure I hear.

MR. CHATFIELD: I am sorry. Yes. 90 days.

THE COURT: This has been designated, and I believe I have been involved at least on one occasion that

this discovery was going to be in the amount as indicated, you know, up to 200 exhibits, and I knew there was substantial document review that needed to take place along with the witnesses.

But I am more concerned we didn't -- I mean, to scramble and get a jury next week is very, very -- is not timely and is very difficult for the court.

And we got this hearing on as soon as we learned that there was not an agreement about how to proceed in the complexity of this particular case.

I am happy to set a date 90 days from now.

Is your client in custody?

MR. LEVINE: Your Honor, this is Michael Levine.

My client is in custody. For the record, we object to the continuance.

THE COURT: I'm sorry. I can't hear you. I can't hear you.

MR. LEVINE: All right. My client is in custody. Did the court hear me?

THE COURT: I heard that your client is in custody.

MR. LEVINE: For the record, we object to the motion to continue. However, if the court is going to grant the motion, if the court is going to grant the motion, I would ask the court to set the trial for sometime in March.

The reason is I have already scheduled a trip to Florida to visit my 95-year-old mother-in-law for a week, and I also have a PCR trial on the 21st of February.

So March is wide open for me, and I'd ask the court to set the date somewhere in March.

THE COURT: Anything for the record that you need to say, Mr. Chatfield?

MR. CHATFIELD: No, Your Honor.

THE COURT: I am going to grant the motion to postpone. I don't think it's realistic that people can be ready given the complexity of this case, and it's important, I think, that we proceed to resolve those other defendants and set them all at the same time.

I am going to tentatively set a trial date for the -- how long will this case take to try?

MR. CHATFIELD: My estimate, Your Honor, would be at least five days.

THE COURT: How about the 7th of March?

MR. LEVINE: That's good for me, Your Honor.

MR. CHATFIELD: That's fine with us too, Your Honor.

THE COURT: And when are those change of pleas starting to be scheduled?

MR. CHATFIELD: The first one is scheduled for December the 8th.

THE COURT: And how many are after that?

MR. CHATFIELD: There is no other scheduled dates. That's the only one that has been scheduled, and that's Ms. Regan's -- Mr. Osanyinbi.

THE COURT: And please make sure all those sentencings end up on my calendar, please. All right?

MR. CHATFIELD: Yes.

THE COURT: Once those change of pleas are completed, have them all on my calendar because they need to be with one judge.

So we'll set this out to March 7th.

I would ask -- we'll set a pretrial conference date. I am looking -- I don't think I have -- I am going to be in Medford in February, so we ought to be able to do a pretrial conference in February. I am assuming that will work for you, Mr. Levine?

MR. LEVINE: Yes, it will, Your Honor. February 14th is good or -- yeah, February 14th or that week is very good for me.

THE COURT: I will be in Medford on the 16th and 17th. I will do it on the 16th.

MR. LEVINE: That's good.

THE COURT: We'll --

(The reporter interrupted.)

THE COURT: Schedule accordingly so I have plenty

of time to do it on the 16th.

THE CLERK: Yes, Judge.

MR. LEVINE: And Your Honor, may I appear by telephone? I will try to get down there.

THE COURT: No, not in a pretrial conference. You need to appear in person at a pretrial conference.

MR. LEVINE: Okay. Okay.

THE COURT: Is there anything else I need to take up?

MR. CHATFIELD: Nothing from the government, Your Honor.

MR. LEVINE: Nothing from me, Your Honor. Thank you.

THE COURT: Thank you. We are in recess.

THE CLERK: Thank you all.

(The proceedings were concluded this 8th day of November, 2016.)

I hereby certify that the foregoing is a true and correct transcript of the oral proceedings had in the above-entitled matter, to the best of my skill and ability, dated this 12th day of June, 2017.

/s/Kristi L. Anderson

Kristi L. Anderson, Certified Realtime Reporter

APPENDIX G

EXCERPT FROM KAZEEM'S OPENING BRIEF ON APPEAL

for clear error. *United States v. Martinez-Martinez*, 369 F.3d 1076, 1084 (9th Cir. 2004).

2. The time period resulting from the continuance granted to the government on November 8, 2016, was not excludable under the STA.

Congress passed the STA to effectuate the Sixth Amendment right to a speedy trial. *United States v. Pollock*, 726 F.2d 1456, 1459–60 (9th Cir. 1984). Pursuant to the STA, a defendant must be brought to trial within 70 days of the indictment or of his initial appearance before a judicial officer, whichever is later. 18 U.S.C. § 3161(c*)*; *Bloate v. United States*, 559 U.S. 196, 218 (2010); *United States v. Clymer*, 25 F.3d 824, 827 (9th Cir. 1994).

Of course, the STA sets forth several types of so-called "excludable delay"—periods of time which do not count toward the 70 day limit. *See* 18 U.S.C. § 3161(h). For example, the district court may exclude from the 70-day calculation delay caused by a continuance ordered by the judge *sua sponte* or upon motion of either party "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." 18 U.S.C. § 3161(h)(8)(A). However, no exclusion is allowed under this so-called "ends of justice" provision "unless the court sets forth in the record of the case, either orally or in writing, its reasons." *Id.* This

requirement protects against abuses of this provision. *United States v. Frey*, 735 F.2d 350, 352 (9th Cir. 1984). Congress intended that the ends of justice continuance "be rarely used." *Id*. *See also United States v. Perez–Reveles*, 715 F.2d 1348, 1351 (9th Cir. 1983) (same).

Section 3161(h)(8)(B) of the STA enumerates factors which a judge must consider in determining whether to continue the trial under the ends of justice exception, including whether lack of a continuance "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." 18 U.S.C. § 3161(h)(8)(B)(iv).

At the status conference on November 8, 2016, the government orally moved to continue Mr. Kazeem's trial. The government argued that because its case involved 200 exhibits and 25 witnesses, it was "not realistic" to begin the trial on November 22. When asked by the court to explain its need for the continuance, the government said it was "because of the complex nature of the case . . . and with the number of witnesses and the exhibits with respect to the trial date, dealing with Mr. Kazeem's case." The government added that it was "reasonable to have this particular case set out approximately 90 days if we are going to actually go to trial and have a firm trial date." Apart from its bald assertion that it was "unrealistic" to begin the

trial on November 22, and its reference to the number of witnesses and exhibits, the government offered no specific reasons why trial could not begin on November 22, given that it had been preparing its case for more than four years.

The district court entered findings contemporaneously with its granting of the government's motion to continue. CR 111. The court found that the ends of justice served by continuing the trial outweighed the best interests of the public and defendant in a speedy trial because the additional time was necessary "to afford counsel sufficient time to investigate the facts of this case, to negotiate with the government, and to prepare for pretrial motions and jury trial, if necessary." *Id*. This finding was clearly erroneous because it was not based on the record and was contrary to law.

This "ends of justice" provision was intended by Congress "to be rarely used, and that the provision was not a general exclusion for every delay." *United States v. Jordan*, 915 F.2d 563, 565 (9th Cir. 1990) (citations omitted). A district court may grant an "ends of justice" continuance only if it satisfies two requirements: first, that the continuance be "specifically limited in time"; and, second, that it is "justified [on the record] with reference to the facts as of the time the delay is ordered." *Id.* at 565-66.

This Court has repeatedly made clear that continuances under this section "must be specifically limited in time and supported by clear, specific findings, so that the excludability of any period of time is readily ascertainable from the docket." *United States v. Hardeman*, 249 F.3d 826, 828 (9th Cir. 2000). The reasons justifying the continuance "must be set forth with particularity." *Perez-Reveles*, 715 F.2d at 1352 (citations omitted).

Here, the district court did make specific findings with respect to the government's motion to continue. The court's findings, entered contemporaneously on the docket "with particularity," were that the continuance was necessary "to afford counsel sufficient time to investigate the facts of this case, to negotiate with the government, and to prepare for pretrial motions and jury trial, if necessary." CR 111. However, none of these findings are supported by the record, and each is clearly erroneous.

a. Counsel did not request or need additional time to investigate the facts; there is no "not realistic" exception to the STA.

The district court's first justification was that additional time was necessary "to afford counsel sufficient time to investigate the facts of the case." However, counsel for Mr. Kazeem did not need or ask for any more time to investigate the facts; he repeatedly asserted the defense was ready for

trial. ER 31: 19-20, 25; ER 32: 11-15; ER 36: 1, 12-13; ER 39: 14-15; 22-23. Nor did the government ever say that it needed more time to investigate the case. This is not surprising since the government had already had almost 30 months since the indictment to investigate the facts, not to mention the more than 12 months that elapsed from the beginning of the investigation until the indictment.

The government argued that because it had 200 exhibits and 20 witnesses, it was "not realistic" to proceed to trial on November 22, 2017. However, the government did not give any specific reasons why proceeding on November 22 was "not realistic." The district court "may not simply credit the vague statements by one party's lawyer" as to why a continuance is needed. *Jordan*, 915 F.2d at 566. *See United States v. Gonzales*, 137 F.3d 1431, 1435 (10th Cir. 1998) ("there was no discussion concerning how much time the prosecutor actually needed to prepare for trial and no discussion of what preparations he had already made," and noting that without that information, it could not assess "how the district court adequately could have determined whether denial of a continuance would have deprived the prosecutor of 'reasonable time necessary for effective preparation' [] let alone whether the purported reasons for granting the continuance outweighed the best interests of the public and Gonzales in a speedy trial.").

Here, as in *Gonzales*, "there was no discussion of what preparations [the prosecutor] had already made." Without this information, it is not clear "how the district court adequately could have determined whether denial of a continuance would have deprived the prosecutor of reasonable time necessary for effective preparation . . . let alone whether the purported reasons for granting the continuance outweighed the best interests of the public and [Mr. Kazeem] in a speedy trial."

Most importantly, there is no "not realistic" exclusion to the STA. By saying it was "not realistic" to go to trial in two weeks, the government was saying simply that it was not yet ready for trial, *i.e.*, it had not yet organized its exhibits, had not yet subpoenaed some of its witnesses, or had not yet finalized its trial strategy. In other words, the government sought a continuance because it had not diligently prepared the case. This reason is legally insufficient to justify excludable time under the STA. *See* 18 U.S.C. § 3161(h)(7)(C) ("no continuance under subparagraph (A) of this paragraph shall be granted because of . . . lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government"); *United States v. Harden*, 10 F.Supp.2d 556, 559-60 (D.S.C., 1997) (district court violated STA by granting government's motion for continuance to file indictment based on claim that due to number of defendants and prosecutor's

involvement in ongoing trial, prosecutor would be unable to adequately prepare indictment by time of next available grand jury).

In sum, the district court's finding that a continuance was necessary "to afford counsel sufficient time to investigate the facts of this case" was not based on the record, was clearly erroneous, and was contrary to law.

b. The defense did not need or want additional time to negotiate a plea agreement, which in any event is not excludable time under the STA.

The second justification for the district court's granting the government's motion was to afford defense counsel sufficient time "to negotiate with the government." Defense counsel, however, had repeatedly stated he was ready for trial notwithstanding ongoing negotiations. Nowhere did he (or the government) ever suggest that a continuance was being sought to enable the Mr. Kazeem to reach a plea agreement. Furthermore, time to reach a plea agreement is non-excludable time under the STA. As the Ninth Circuit has held, "[n]egotiation of a plea bargain is not one of the factors supporting exclusion." *United States v. Ramirez-Cortez*, 213 F.3d 1149, 1155 (9th Cir. 2000).

c. The defense did not need or ask for time for additional motions.

The district court's next justification for the continuance was to afford counsel time "to prepare for pretrial motions and jury trial, if necessary." *Id*.

However, defense counsel had stated that he was not going to be filing any motions (apart from *in limine*) and that he was ready for trial. Therefore, the court's finding in this regard is contrary to the record and clearly erroneous.

d. Court congestion and an unavailable judge or jury is not excludable time under the STA.

At the telephone status conference on November 8, 2016, the district Court stated that it could not try the case on November 22, 2016, because it had a "full calendar in Eugene" on that date. However, general court congestion is not a permissible reason to exclude time under the STA. *See* 18 U.S.C. § 3161(h)(8)(C) ("No continuance shall be granted [in the interests of justice] because of general congestion of the court's calendar."); *United States v. Engstrom*, 7 F.3d 1423, 1426–27 (9th Cir. 1993) ("Section 3161(h)(8)(C) clearly forbids granting continuances because of general congestion of the court's calendar.").

The district court also believed it would not be possible to assemble a jury for a trial on November 22, 2017. That trial date, however, had been set by Magistrate Judge Clark on July 29, 2016 more than a year earlier; assembly of the jury pool should have begun then. Moreover, the defense expressly alerted the court at the hearing before Magistrate Judge Clark on

October 31, 2016, three weeks earlier, that Mr. Kazeem was ready for trial, so assembly of a jury should have begun at that time at the latest.

Most importantly, not having time to assemble a jury is not among the time periods listed as excludable delay under the STA. The unavailability of a jury is analogous to the unavailability of a trial judge. This contingency is considered the same as "court congestion" for which time is not excludable. *See United States v. Crane*, 776 F.2d 600, 603-06 (6th Cir. 1985) ("the trial judge's unavailability was caused at least partially by his presiding over another case and was therefore attributable to 'general congestion of the court's calendar' . . . thus, the judge's absence is not a proper reason for an ends of justice continuance."); *United States v. Smith*, 588 F. Supp. 1403, 1405 (D. Ha. 1984) (where fraud trial was continued beyond STA date because of unavailability of judge, case dismissed because "general court congestion" impermissible grounds to continue case); 18 U.S.C. § 3161(h)(8)(C) ("No continuance shall be granted [in the interests of justice] because of general congestion of the court's calendar."). Unavailability of a jury is not grounds for excludable time under the STA.

e. There was no need to keep all the defendants together because all were pleading guilty except Mr. Kazeem.

At the hearing, the District Court stated it was important "to proceed to resolve those other defendants and set them all at the same time." This justification was insufficient to continue Mr. Kazeem's trial because all codefendants had said they were going to plead guilty. Speaking for all of the codefendants, attorney Kolkey had told the court that "all will be entering guilty pleas, and the court will not be confronted with multiple trials." ER 7 ¶ 16. He expressly noted that for that reason the codefendants' request for a continuance "should not affect Emmanuel Kazeem's request for immediate trial." *Id.* Tellingly, the District Court recognized as much by not including this justification in its contemporaneous docket entry granting the continuance.

Furthermore, the continuance sought by the codefendants was unreasonable with respect to Mr. Kazeem. Although Mr. Kazeem did not explicitly move to sever, his objection to the continuance was an implicit motion to sever, and the court should have let his trial proceed as scheduled, postponing the next appearance of the codefendants. It is true that in general "an exclusion from the Speedy Trial clock for one defendant applies to all codefendants." *United States v. Messer*, 197 F.3d 330, 336

(9th Cir. 1991); 18 U.S.C. § 3161(h)(7). However, the attribution of delay to a codefendant "is limited by a reasonableness requirement." *Id.*

Here it was foregone conclusion that only Mr. Kazeem was insisting on trial. Attributing the delay from the codefendants' continuance to Mr. Kazeem was unreasonable because it was not necessary to insure a joint trial. *See United States v. Hall*, 181 F.3d 1057, 1062-63 (9th Cir. 1999) (STA violated because "unlike other cases where carrying along a codefendant is necessary to insure a joint trial [here] it was neither necessary nor reasonable to delay Hall's trial for that purpose."); *Messer*, 197 F.3d at 336 (STA violated because granting continuance on government's motion because of delay in bringing codefendant before the court was unreasonable as to the defendant).

Finally, the government and district court were aware that Mr. Kazeem had repeatedly objected to any further continuances and repeatedly stated that he was ready for trial on November 22. In such circumstances, it is not reasonable to attribute the delay to Mr. Kazeem. *See Hall*, 181 F.3d at 1063 ("The court had a responsibility to determine the reasonableness of carrying [the defendant] along in [the codefendant's] continuances in light of [the defendant's] repeated objections to the continuances").

f. The district court's contemporaneously filed justifications for granting the continuance render irrelevant the court's subsequent justifications entered more than seven months later when it denied the motion to dismiss.

In its opinion denying the defense motion to dismiss, the court gave additional reasons for having granted the government's motion to continue. Preliminarily, the court noted that it was "not required to document the findings supporting a continuance contemporaneously with the granting of the continuance and may record those findings for the first time in response to a motion to dismiss." ER 77. The court cited *United States v. Bryant*, 726 F.2d 510, 511 (9th Cir. 1984), and *United States v. Medina*, 524 F.3d 974, 986 (9th Cir. 2008), to support its statement.

In *Bryant* this Court observed that "Although the Act requires that the trial court prepare a record, we find nothing in either the language or the purpose of the Act that requires the court to prepare the record at the precise moment it grants a continuance." And in *Medina*, this Court observed that a district court may document its findings for the first time when ruling on a motion to dismiss. The district court's reliance on these cases, however, was misplaced because the district court's statement of reasons for the continuances was not "the first time" the court was giving its reasons for

granting the government's motion to continue the case. With respect to the government's oral motion to continue of November 8, 2016, the court had already given its justifications for granting the motion in its docket entry on that date. CR 111. The same is true with respect to Olawoye's motion to continue the case which was granted on February 2, 2017. CR 129.

Furthermore, when giving its reasons for the first time, the reasons stated by the district court must be "the actual reasons that motivated the court at the time the continuance was granted," and not pretextual reasons or reasons developed post hoc. *Engstrom*, 7 F.3d at 1426 (quoting *United States v. Crawford*, 982 F.2d 199, 204 (6th Cir.1993)). *See also Frey,* 735 F.2d at 352 ("*nunc pro tunc* findings failed to demonstrate that [the court] originally based its delay in scheduling Frey's trial on any of the factors relevant to section 3161(h)(8)(A)."); *Jordan,* 915 F.2d at 566 ("a court may not subsequent to the grant of a continuance, undertake for the first time to consider the factors and provide the findings required by section 3161(h)(8)(A)") (internal citation and quotation omitted).

In its order denying Mr. Kazeem's motion to dismiss the indictment under the STA, the court wrote for the first time that its decision to grant the continuance on November 8, 2016, "was guided by the principle that Mr.

Kazeem should be tried together with his codefendants." ER 78. This was a significant overstatement. As shown above, the District Court's contemporaneous docket entry granting the continuance did not justify the granting of the motion on this ground. It is true that at the hearing on the government's motion, the court stated that it was important "to proceed to resolve those other defendants and set them all at the same time." However, as stated above, all codefendants stated they were going to (and ultimately did) plead guilty. The court recognized as much by not including in its contemporaneous order that it was granting the government's motion in order to keep all the defendants together. Furthermore, the court's passing reference to this justification at the status conference does not satisfy the "ends of justice" exclusion. *See Zedner v. United States*, 547 U.S. 489, 507 (2006) ("§ 3161(h)(8)(A) is not satisfied by the District Court's passing reference to the case's complexity in its ruling on petitioner's motion to dismiss. Therefore, the 1997 continuance is not excluded from the speedy trial clock").

As a second post hoc justification, the District Court wrote that Mr. Kazeem could not have been ready for trial on November 22, 2016, because he had not requested a Yoruba interpreter by November 8, 2016,

and did not do so until June 26, 2017. ER 79, n.4. This is a red herring. On November 8, 2016, trial counsel did not believe an interpreter was necessary. Once the court continued the trial, out of an abundance of caution and further reflecting on the matter, he did ask for an interpreter. As it turned out, the interpreter was never used.

In its order the District Court also reiterated its justification for granting the continuance on the ground that there was not enough time for pretrial motions and other trial preparations between the November 8, 2016, hearing and a November 22, 2016, trial date, even taking into account the exercise of due diligence on the part of the attorneys. ER 79. The court reasoned that "[t]his assessment has been substantiated by the lengthy trial preparations still underway." *Id*. This justification is another red herring. Once the trial court granted the continuance over defense objection, of course the defense took advantage of the time to further prepare. The further preparation does not mean that counsel was not ready for trial on November 22, 2019, as he repeatedly asserted he was. Undersigned counsel is not aware of any case authorizing the district court to second-guess and refute trial counsel's own assessment of his readiness for trial, at least for purposes of the STA. This is particularly true where the defendant himself is insisting on trial by a certain date.

The district court also asserts in its opinion that it "was satisfied that this delay was not the result of a lack of diligent preparation on the part of the Government's attorney, or of a failure to obtain available witnesses." ER 79. This is post hoc rationalization and not based on the record of the case. The government's articulated bases for its motion to continue speak for themselves. The government's references to the number of its witnesses and exhibits can mean only that it did not have its witnesses subpoenaed, or had not made travel arrangements for them to attend the trial, or had not reviewed their prospective testimony with them. In short, the paradigmatic example of a failure to diligently prepare for trial.

Tellingly, in its order denying the motion to dismiss, the court gave its true reason for granting the continuance: the court "determined that it would not be possible to summon a jury for trial on November 22, 2016." ER 75. As shown above, however, the time to assemble a jury is not excludable under the STA.

The STA clock began on June 22, 2015. The trial began on July 31, 2017, more than 700 days later. At the very least, the non-excludable time resulting from the 90-day continuance granted the government over the defendant's objection exceeded the 70 days permitted under the STA; therefore, this Court should reverse the conviction below and remand the

case to the district court to determine if the indictment should be dismissed with or without prejudice.

3. The 90-day continuance granted on Mr. Roloff's motion on February 2, 2017, was unreasonable as to Mr. Kazeem and was, therefore, not excludable time under the STA.

Mr. Roloff's motion, not served on Mr. Kazeem, was to continue the trial for his client, Mr. Olawoye. His motion made no mention of any of the other codefendants, much less Mr. Kazeem. In granting, the motion, however, the district court entered the following order on the docket:

> ORDER: Granting [motion 125] Motion to Continue as to Oluwamuyiwa Abolad Olawoye (5), Lateef Aina Animawun (3) and *Emmanuel Oluwatosin Kazeem* (1). The Court finds that the ends of justice served by granting the continuance outweigh the best interest of the public and defendant in a speedy trial. It is Ordered that 90 days are excluded under the Speedy Trial Act, commencing on (03/23/2017). Jury Trial is reset for 5/30/2017 at 09:00AM in Medford before Judge Ann L. Aiken. Ordered by Judge Ann L. Aiken.

C.R. 129 (emphasis added). This finding does not justify 90 days of excludable time for Mr. Kazeem for several independent reasons.

First, Mr. Roloff's motion to continue was made only for his client Mr. Olawoye; the motion did not refer to any other codefendant, much less Mr. Kazeem. Tellingly, the order granting the motion erroneously states that the motion to continue was made also by Mr. Kazeem.

APPENDIX H

EXCERPT FROM GOVERNMENT'S ANSWERING BRIEF ON APPEAL

objections. (ECF Nos. 11, 129). Each of these continuances took into account the complex nature of the case and the preference for joint trials. (ER 80-83).

For example, in November 2016, the court was faced with Kazeem and three other co-defendants who had not resolved their cases. Of those four, only Kazeem said he was ready for trial. (ER 22, 75). Kazeem made that assertion on October 31, less than a month before the proposed trial date, without any prior indication that he intended to proceed to trial in a complex international fraud case. The other defense counsel and the government told the court additional time was needed to adequately prepare the case. (ER 29).

Kazeem's announcement at the October 31 status conference that he was ready to proceed to trial came as a surprise to his co-defendants, the government, and the court. He had not filed any motions or pretrial documents before that status conference. And he made no attempt to file anything before the November 8 status conference with the district court, even though it was scheduled for just two weeks before the trial date. Kazeem had failed to even request an interpreter for trial, which was very difficult to find. (ER 79 at n.4).

When the court found that maintaining the November 22 trial date was not realistic, that finding recognized that Kazeem's pitch was a ploy. (ER 40). This was not a one day, single issue case; it was a complex white collar fraud case. Kazeem was no more prepared to proceed to trial than anyone else in that room despite his

APPENDIX I

EXCERPT FROM KAZEEM'S REPLY BRIEF ON APPEAL

ARGUMENT

A. THE STA WAS VIOLATED WHEN THE COURT GRANTED THE GOVERNMENT'S MOTION TO CONTINUE THE TRIAL OVER KAZEEM'S OBJECTION.

1. In asserting that it was surprised by Kazeem's readiness for trial, the government implicitly concedes it had not diligently prepared for trial.

The government argues that the granting of the government's motion to continue the trial was justified because Kazeem's announcement at the October 31 status conference that he was ready for trial "came as a surprise" to his co-defendants, the government, and the court. Gov. Br. at 13. This was so, in the government's view, because Kazeem had not filed any motions or pretrial documents. *Id*. This argument is unpersuasive because there is no law or rule requiring the defense to file pretrial motions or documents. To the contrary, whether to file a motion is a matter of strategic choice. *See Strickland v. Washington*, 466 U.S. 668, 681 (1984) ("Because advocacy is an art and not a science, and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment."); *see United States v. Mentz*, 840 F.2d 315, 328 (6th Cir. 1988) ("It is clear that Mentz did not need to file a formal motion seeking discovery from the government.").

Furthermore, the government points to nothing in the record showing that Kazeem's decision came as a surprise to the codefendants. On the contrary, the record shows that co-counsel were fully aware of Kazeem's desire to try the case. *See* ER 26 ¶ 16 (attorney Kolkey states that his client and all codefendants would "all be entering guilty pleas, and the court will not be confronted with multiple trials."). Kolkey expressly noted that because all codefendants were pleading guilty, their request for a continuance "should not affect Emmanuel Kazeem's request for immediate trial." *Id*.

Furthermore, the government should not have been surprised. The trial date of November 22 had been set by Magistrate Judge Clark on July 29, 2016, almost four months earlier. (ER 254 (Docket entry 103, setting trial date of November 22, 2016)). Moreover, at the status conference on October 31, 2016 before Judge Clark, Kazeem announced he was ready for trial on November 22. (ER 254 (Docket entry 104); ER 20: 1-9).

In any event, there is no "surprise" exception to the STA. To the contrary, in arguing that the government was surprised the government concedes that it had not "diligentl[y] prepared for trial," a justification that Congress expressly rejected in the STA. *See* 18 U.S.C. § 3161(h) (7) (C) ("no continuance under [the STA] shall be granted because of . . . lack of

diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government").

The government does not claim that Kazeem misled or sandbagged the prosecution into not preparing for trial, for example, by falsely representing or suggesting that the defense was going to move a continuance. *Cf. Zedner v. United States*, 547 U.S. 489, 505 (2006) ("This would be a different case if … defense counsel had obtained a continuance only by [a false representation]"); *United States v. Alvarez-Perez,* 629 F.3d 1053, 1062 (9th Cir. 2010) ("But Alvarez never represented that the period from June 27 to July 18 was excludable, nor did he argue to the court that July 18 was the proper start date…"); *Mentz,* 840 F.2d at 331 (Because defense counsel's conduct "did not cause the trial to be scheduled outside the Act's 70–day time limit, there is no indication he tried to "sandbag" the government….").

In sum, in arguing that it was surprised, the government concedes it had not diligently prepared for trial.

2. Kazeem's statement of readiness for trial was not a ploy; and the government is not a mind-reader.

The government argues that when the trial court stated that maintaining the November 22 trial date was not realistic, "that finding recognized that Kazeem's pitch [that he was ready for trial] was a ploy."

Gov. Br. at 13. This is a false argument. The district court's statement was not a finding of any kind, much less that Kazeem's statement of his readiness for trial was a "ploy."

The government baldly asserts that Kazeem "was no more prepared to proceed to trial than anyone else in that room despite his protestations to the contrary." Gov. Br. at 13-14. It asserts further "ninety days was necessary for everyone, *including Kazeem*, to be ready for trial." *Id*. at 14 (emphasis added). The government arguments are breathtakingly wrong in every respect. The government has many powers, but mind-reading is not yet one of them. To say the Kazeem's counsel was not ready for trial "despite his protestations to the contrary," purports to divine defense counsel's state of mind. Worse, it impugns the integrity of defense counsel, an officer of this Court with 40 years of honorable trial and appellate experience here and district courts of Hawaii, California, and Oregon.[1]

[1] Undersigned counsel was the District of Hawaii's first Federal Public Defender having been appointed and re-appointed by this Court from 1982-1990. He has argued many appeals before this Court, and has been publicly praised by the Court for zealous advocacy. *See United States v. France*, 886 F.2d 223, 228 (9th Cir. 1988) ("Finally, we add a word about the public defender who represented [the defendant]... he has represented his client with vigor and diligence… it seems appropriate to commend exceptional effort in an unusual case. This case was unusual and the public defender's efforts were exceptional."), *aff'd by divided Court*, 498 U.S. 335 (1991).

As an officer of the court, Kazeem's counsel repeatedly asserted he was ready for trial on November 22, 2017. [ER 20: 3-7; ER 31: 19-20, 25; ER 31:25; 32-1; ER 36: 1, 12-13; ER 39: 14-15; 22-23], and he was indeed ready. After all, he had spent two years preparing for trial. Unless the record manifestly demonstrates otherwise, courts should and do credit the statements of defense counsel in such matters. *See Hernandez v. Chappell*, 878 F.3d 843, 850-51 (9th Cir. 2017) (a court should "credit the statements of defense counsel as to whether their decisions at trial were—or were not—based on strategic judgments."); *Amado v. Gonzalez*, 758 F.3d 1119, 1137 (9th Cir. 2014) (California courts have held that "[s]tatements of a responsible officer of the court are tantamount to sworn testimony."); *United States v. Boothe*, 1996 WL 661330, at *3 (5th Cir. 1996) (trial court reasonably relied on defense counsel's "unequivocal statement as an officer of the court that he was ready for trial.").

Finally, to assert, as the government does, that "ninety days was necessary for everyone, *including Kazeem*, to be ready for trial" is to have the government's attorney miraculously transform into defense counsel to

state how much time defense counsel really needed for trial. The government's would-be clairvoyance gives new meaning the term *chutzpah*.

In sum, the government's baseless attack on defense counsel's integrity betrays the weakness of its arguments on the merits.

3. The preference for joint trials yields in this case to the strict demands of the STA.

The government understandably places great reliance on the principle that in cases involving multiple defendants, there is a preference for joint trials. It is certainly true that for this reason reasonable delays as to one defendant are normally excluded as to co-defendants. As the government recognizes, however, whether a delay is reasonable "is decided on a case-by-case basis." Gov. Br. at 12 (citing *United States v. Hall*, 181 F.3d 1057, 1062 (9th Cir. 1999)). Attribution of the excludable delay of one codefendant to another codefendant "is not…automatic; rather, the period of delay must be reasonable." *United States v. Stephens*, 489 F.3d 647, 654 (5th Cir. 2007). When the delay is not reasonable, this Court does not hesitate to find a violation of the STA. *See Hall*, 181 F.3d at 1062-63 (STA violated because "unlike other cases where carrying along a codefendant is necessary to insure a joint trial [here] it was neither necessary nor reasonable to delay Hall's trial for that purpose."); *United States v. Messer*, 197 F.3d 330, 336