UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: JAMES CHRISTOPHER CASTLE; REGINALD LAMONT THOMAS.

JAMES CHRISTOPHER CASTLE; REGINALD LAMONT THOMAS,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, SACRAMENTO,

Respondent.

No. 21-70683

D.C. Nos.
2:15- cr-00190-MCE-2
2:20-cr-00012-MCE
Eastern District of California, Sacramento

ORDER

Before: CLIFTON, MILLER, and BRESS, Circuit Judges.

Petitioners have not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus. *See Bauman v. U.S. Dist. Court*, 557 F.2d 650 (9th Cir. 1977). Accordingly, the petition is denied.

Petitioners' motion to proceed in forma pauperis (Docket Entry No. 3) is denied as moot.

No further filings will be accepted in this closed case.

DENIED.

APPENDIX 'A'

§ 3174. Judicial emergency and implementation

(a) In the event that any district court is unable to comply with the time limits set forth in section 3161(c) [18 USCS § 3161(c)] due to the status of its court calendars, the chief judge, where the existing resources are being efficiently utilized, may, after seeking the recommendations of the planning group, apply to the judicial council of the circuit for a suspension of such time limits as provided in subsection (b). The judicial council of the circuit shall evaluate the capabilities of the district, the availability of visiting judges from within and without the circuit, and make any recommendations it deems appropriate to alleviate calendar congestion resulting from the lack of resources.

(b) If the judicial council of the circuit finds that no remedy for such congestion is reasonably available, such council may, upon application by the chief judge of a district, grant a suspension of the time limits in section 3161 (c) [18 USCS § 3161(c)] in such district for a period of time not to exceed one year for the trial of cases for which indictments or informations are filed during such one-year period. During such period of suspension, the time limits from arrest to indictment, set forth in section 3161(b) [18 USCS § 3161(b)], shall not be reduced, nor shall the sanctions set forth in section 3162 [18 USCS § 3162] be suspended; but such time limits from indictment to trial shall not be increased to exceed one hundred and eighty days. The time limits for the trial of cases of detained persons who are being detained solely because they are awaiting trial shall not be affected by the provisions of this section.

(c) (1) If, prior to July 1, 1980, the chief judge of any district concludes, with the concurrence of the planning group convened in the district, that the district is prepared to implement the provisions of section 3162 [18 USCS § 3162] in their entirety, he may apply to the judicial council of the circuit in which the district is located to implement such provisions. Such application shall show the degree of compliance in the district with the time limits set forth in subsections (b) and (c) of section 3161 [18 USCS § 3161] during the twelve-calendar-month period preceding the date of such application and shall contain a proposed order and schedule for such implementation, which includes the date on which the provisions of section 3162 [18 USCS § 3162] are to become effective in the district, the effect such implementation will have upon such district's practices and procedures, and provision for adequate notice to all interested parties.

(2) After review of any such application, the judicial council of the circuit shall enter an order implementing the provisions of section 3162 [18 USCS § 3162] in their entirety in the district making application, or shall return such application to the chief judge of such district, together with an explanation setting forth such council's reasons for refusing to enter such order.

(d) (1) The approval of any application made pursuant to subsection (a) or (c) by a judicial council of a circuit shall be reported within ten days to the Director of the Administrative Office of the United States Courts, together with a copy of the application, a written report setting forth in sufficient detail the reasons for granting such application, and, in the case of an application made pursuant to subsection (a), a proposal for alleviating congestion in the district.

(2) The Director of the Administrative Office of the United States Courts shall not later than ten days after receipt transmit such report to the Congress and to the Judicial Conference of the United States. The judicial council of the circuit shall not grant a suspension to any district within six months following the expiration of a prior suspension without the consent of the Congress by Act of Congress. The limitation on granting a suspension made by this paragraph shall not apply with respect to any judicial district in which the prior suspension is in effect on the date of the enactment of the Speedy Trial Act Amendments Act of 1979 [enacted Aug. 2, 1979].

(e) If the chief judge of the district court concludes that the need for suspension of time limits in such district under this section is of great urgency, he may order the limits suspended for a period not to exceed thirty days. Within ten days of entry of such order, the chief judge shall apply to the judicial council of the circuit for a suspension pursuant to subsection (a).

HISTORY:

Added Jan. 3, 1975, P. L. 93-619, Title I, § 101, 88 Stat. 2085; Aug. 2, 1979, P. L. 96-43, § 10, 93 Stat. 331

APPENDIX B

§ 3161. Time limits and exclusions

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

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

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

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

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

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

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

section 3162 [18 USCS § 3162] apply to this subsection.

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

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

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

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

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

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

(C) delay resulting from any interlocutory appeal;

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

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

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

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

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

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

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

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of

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Constitution of the United States

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

APPENDIX 'D'

Ronald Bernard Ware March 18, 2021 Appellate Hearing 9th Circuit

(1)

2021 WL 222355
Only the Westlaw citation is currently available.
United States District Court, C.D. California, Southern Division.

UNITED STATES of America, Plaintiff,

v.

Justin Marques HENNING, Defendant.

Case No.: SACR 16-00029-CJC-7
Signed 01/19/2021

Synopsis

Background: Following grant of new trial following conviction on robbery charges, defendant filed motion to dismiss alleging that indefinite suspension of jury trials during COVID-19 pandemic violated Sixth Amendment and Speedy Trial Act.

Holdings: The District Court, Cormac J. Carney, J., held that:
1 "ends of justice" exception setting forth time periods that could be excluded from the 70-day deadline of Act did not apply;
2 exception under Act applicable when holding earlier trial was impractical did not apply; and
3 dismissal with prejudice was appropriate remedy.

Motion granted.

Procedural Posture(s): Pre-Trial Hearing Motion.

West Headnotes (28)

Attorneys and Law Firms

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David J. Kalovanides, David J.P. Kalovanides APLC, Chino, CA, for Defendant Evan Kwan Scott

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necessary to ensure the continuous performance of essential functions and operations of the Court," the most essential function—conducting jury trials—remains suspended indefinitely. *Id.* at 2.

Though 10 months have passed since the Central District suspended jury trials, it remains completely uncertain when the Central District will resume them. [3] The Chief Judge has stated that "decisions on resuming operations are being made in light of state government orders." [4] Those orders include California Governor Gavin Newsom's four-tier, color-coded system. That system does not apply to the state judiciary, nor does it restrict essential businesses—in sectors including healthcare, emergency services, food, energy, transportation, and communications—from operating. [5] Indeed, employees in those sectors have been displaying extraordinary courage and dedication by going to work every day during the pandemic, knowing the risks, while protecting themselves and others as best they can. They refuse to let the coronavirus prevent them from providing vital services and supplying essential goods to the public.

The Governor's tier system applies only to non-essential businesses. That system outlines when and how non-essential businesses may operate during the pandemic by ranking each California county in one of four tiers "based on its test positivity and adjusted case rate." In tier 1, also known as purple or widespread, many non-essential indoor businesses are closed. In tier 2, also known as red or substantial, some non-essential indoor businesses are closed. In tier 3, also known as orange or moderate, some non-essential indoor businesses are open with modifications. In tier 4, also known as yellow or minimal, most non-essential indoor businesses are open with modifications. The Chief Judge has stated that the Central District will start summoning jurors in Orange County once the county reaches tier 3, and that jury trials will begin approximately 7 weeks later because "that's how long it takes to summon jurors." (Article at 1.) [6]

*3 Throughout the pandemic, the government has supported the Central District's indefinite suspension of jury trials. This Court, however, has vehemently opposed it, believing the indefinite suspension is unconstitutional and in violation of the Speedy Trial Act. The Court has five times asked the Chief Judge to summon jurors for jury trials in cases where defendants refuse to waive further time under the Speedy Trial Act. All of the Court's requests—including its request in this case—have been denied. [7]

B.

Mr. Henning was one of 12 defendants charged with committing or attempting to commit numerous jewelry store robberies, most of which were armed, in Orange and Los Angeles counties. In 2017, the Court held a contentious 4-week trial for Mr. Henning and 5 other defendants. (*See* Dkt. 537 [Third Superseding Indictment].) On September 22, 2017, the jury found Mr. Henning guilty of conspiracy to interfere with commerce by robbery, Hobbs Act robbery at Ben Bridge Jeweler in the Del Amo Mall in Torrance, California ("the Del Amo Robbery"), and brandishing a firearm in furtherance of a crime of violence during the Del Amo Robbery. (Dkt. 1009 [Verdict Form].) The jury found Mr. Henning not guilty of charges associated with robberies at three other jewelry stores: Rolex Boutique Geary's in Los Angeles, Manya Jewelry in Woodland Hills, and Westime in West Hollywood. (*Id.*) [8]

Mr. Henning moved to set aside the jury's guilty verdict, arguing that there was insufficient evidence to support it. The Court concluded that the government's evidentiary showing—that Mr. Henning was present at two planning meetings for the Del Amo robbery, present in the general vicinity of the robbery, affiliated with those involved in that robbery, and knew that the robbery would occur—was insufficient to prove guilt beyond a reasonable doubt. (Dkt. 1126.) Consequently, the Court set aside the jury's guilty verdict and entered a judgment of acquittal on all three counts. (*Id.*) In the alternative, the Court granted Mr. Henning a new trial. (*Id.*) On November 21, 2019, the Ninth Circuit reversed the judgment of acquittal but affirmed the grant of a new trial. (Dkt. 1571.) The Ninth Circuit's mandate issued about a year later. (*See* Dkt. 1639.)

3 On remand, Mr. Henning argued that his retrial must begin within 70 days of the date that the mandate issued, and indicated that he is not willing to waive additional time under the Speedy Trial Act. (*See* Dkt. 1646 at 2.) The government, on the other hand, contended that Mr. Henning's retrial must begin not within 70 days of the mandate, but within 100 days [illegible] 18 U.S.C. § 3161(c) which provides that

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Impeachment, shall be by Jury."). The right to a speedy trial "has roots at the very foundation of our English law heritage and is one of the most basic rights preserved by our Constitution." *Klopfer v. State of N.C.*, 386 U.S. 213, 224, 226, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967). Indeed, "[e]xcept for the right of a fair trial before an impartial jury, no mandate of our jurisprudence is more important" than a defendant's right to a speedy trial. *Furlow v. United States*, 644 F.2d 764, 769 (9th Cir. 1981). The Sixth Amendment protects defendants by minimizing oppressive pretrial incarceration and ensuring evidence needed to prove the defense remains available at the time of trial. *See Klopfer*, 386 U.S. at 222, 87 S.Ct. 988; *id.* at 226-27, 87 S.Ct. 988 (Harlan, J., concurring); *United States v. Loud Hawk*, 474 U.S. 302, 312, 106 S.Ct. 648, 88 L.Ed.2d 640 (1986). It also protects the public by giving the people a voice, ensuring the government has the evidence needed to prosecute, and holding leaders accountable to the Constitution. *See Barker v. Wingo*, 407 U.S. 514, 519, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) ("In addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused."); *United States v. Lloyd*, 125 F.3d 1263, 1268 (9th Cir. 1997) ("[T]he right to a speedy trial belongs not only to the defendant, but to society as well."); *United States v. Caparella*, 716 F.2d 976, 981 (2d Cir. 1983) ("It must be remembered that a speedy trial is not only viewed as necessary to preserve the rights of defendants. Just as significant is the protection it accords to society's interest in bringing criminals to justice promptly.").

13 14 15 "The guaranty of trial by jury contained in the Constitution was intended for a state of war as well as a state of peace; and is equally binding upon rules and people, at all times and under all circumstances." *Milligan*, 71 U.S. at 3. The constitutional right "d[oes] not yield to emergency." *Nebbia v. People of New York*, 291 U.S. 502, 545, 54 S.Ct. 505, 78 L.Ed. 940 (1934) (describing the holding in *Milligan*). Courts must always be vigilant to protect and enforce it. They cannot, as the Central District has done here, shelter in place and suspend it. *See Roman Catholic Diocese*, 141 S. Ct. at 71 (Gorsuch, J., concurring) ("[W]e may not shelter in place when the Constitution is under attack."). Indeed, courts have "[n]o higher duty ... than to exert [their] full authority to prevent all violation of the principles of the Constitution." *Downes*, 182 U.S. at 382, 21 S.Ct. 770 (Harlan, J., dissenting).

A.

16 The government asserts that the Speedy Trial Act permits the Central District's indefinite suspension of jury trials. But nothing in the Speedy Trial Act excuses the Central District's indefinite suspension. Congress enacted the Speedy Trial Act in 1974 in order to make effective the Sixth Amendment's guarantee of a speedy trial. Pub. L. No. 93-619; *see Furlow*, 644 F.2d at 768–69 (describing the Speedy Trial Act as the Sixth Amendment's "implementation"). The Act requires that a defendant's trial begin within 70 days of the filing of the indictment or the defendant's initial court appearance, whichever is later. 18 U.S.C. § 3161(c)(1). "The Act recognizes, however, that legitimate needs of the government and of a criminal defendant may cause permissible delays." *United States v. Daychild*, 357 F.3d 1082, 1090 (9th Cir. 2004). The government argues that two types of permissible delay are relevant here.

17 First, the Speedy Trial Act provides that certain periods of time may be excluded from the 70-day deadline. For example, a court may exclude periods of delay resulting from competency examinations, interlocutory appeals, pretrial motions, the unavailability of essential witnesses, and delays to which the defendant agrees. 18 U.S.C. § 3161(h)(1)–(6). The specific category of excludable delay relevant here is a sort of catchall category allowing exclusion of time when a judge finds "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)(7)(A). Congress intended the "ends of justice" provision to be "rarely used." *United States v. Nance*, 666 F.2d 353, 355 (9th Cir. 1982) (quoting the Act's legislative history). To ensure that broad discretion does not undermine the Act's important purpose, Congress enumerated factors that courts must consider in determining whether to grant an "ends of justice" continuance. *Id.*; *see United States v. Clymer*, 25 F.3d 824, 829 (9th Cir. 1994) (explaining that "the 'ends of justice' exclusion ... may not be invoked in such a way as to circumvent the time limitations set forth in the Act"). Those factors include "[w]hether 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." 18 U.S.C. § 3161(h)(7)(B)(i).

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defendant, a witness, an attorney, or a juror tests positive for the coronavirus and has to be quarantined. [14] But the Orange County Superior Court has managed and continues to manage the challenges of conducting a jury trial during the pandemic, protecting everybody associated with the jury trials the best that it can. [15] It has never occurred to the Orange County Superior Court to surrender to those challenges and indefinitely suspend the Sixth Amendment.

*8 Quite frankly, the Court is at a loss to understand how the government can continue to support the Central District's indefinite suspension of jury trials when the government itself has convened the grand jury in the very same courthouse where Mr. Henning's retrial would have occurred had the Central District not prohibited it. From June 24, 2020 through December 9, 2020, the grand jury—which has at least 16 people on it—regularly convened in person in the very Orange County federal courthouse in which Mr. Henning seeks to have his jury trial. The grand jury heard testimony from witnesses, deliberated together, and returned 65 indictments in that time with no coronavirus outbreak. (*See* Ex. 1.) Nevertheless, the government somehow contends that it was impossible to conduct a jury trial during all of these months in the exact same courthouse. [16]

The government continues to cite the Chief Judge's General Order to support its position that the ends of justice exception should be applied to exclude further time under the Speedy Trial Act. The government's continued reliance on the General Order is misplaced. The General Order—issued after a majority vote of district judges in this district—does not say that conducting a jury trial is *impossible.* Rather, it states only that the pandemic has rendered conducting jury trials *unsafe.* The General Order and the government note that people continue to be infected, hospitalized, and—tragically—die due to the coronavirus, and that holding jury trials will likely put people at an increased risk of contracting the coronavirus. C.D. Cal. General Order No. 20-09 ¶ 6.a. The Court, of course, acknowledges the public health risk the coronavirus poses to people. *See Roman Catholic Diocese*, 141 S. Ct. at 68 ("Members of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area."). The Court also is acutely aware of the statistics of how many people continue to be infected, hospitalized, and —tragically—die due to the coronavirus every day, all across the country. But the Constitution does not turn on these considerations. Instead, to protect the fundamental right to a speedy trial guaranteed by the Sixth Amendment, the Constitution requires that a trial only be continued over a defendant's objection if holding the trial is *impossible.* And holding Mr. Henning's retrial during the pandemic is not impossible. The Orange County Superior Court has proven this to be the case.

Particularly troubling, the General Order's suspension of jury trials is indefinite. The Order states that the Central District will determine when to resume jury trials using "gating criteria [that] is designed to determine local COVID-19 exposure risks based on 14-day trends of facility exposure, community spread, and community restrictions." C.D. Cal. General Order 20-09 ¶ 2. However, the Ninth Circuit has repeatedly admonished that "an ends of justice exclusion must be 'specifically limited in time.' " *United States v. Ramirez-Cortez*, 213 F.3d 1149, 1154 (9th Cir. 2000) (quoting *Lloyd*, 125 F.3d at 1268); *see Furlow*, 644 F.2d at 769 (noting that a *sine die* continuance would be unacceptable). In keeping with this requirement, the periods of time courts excluded under the Speedy Trial Act due to previous natural disasters and other exigencies were brief and definite. *See Furlow*, 644 F.2d at 768 (14 days); *Correa*, 182 F. Supp. 2d at 329 (20 days); *Richman*, 600 F.2d at 294 (3 weeks). In contrast, even after *10 months* without jury trials, the Central District's suspension of jury trials remains indefinite. The gating criteria—which are completely untethered to the constitutional implications of a criminal defendant's right to a speedy trial—do not make sufficiently certain what is otherwise an unacceptably uncertain end date.

21 *9 Moreover, an "ends of justice" exclusion must be justified with reference to specific factual circumstances in the particular case as of the time the delay is ordered. *Ramirez-Cortez*, 213 F.3d at 1154 (concluding that an ends of justice continuance was not sufficiently justified where the judge made no inquiry into the actual need for a continuance in the particular case, instead checking off boxes on pre-printed forms without making findings on statutory factors, and the record showed that the judge "was granting blanket continuances"). By its very nature, the General Order does not justify delays as of the time they are ordered in any particular case. *See United States v. Pollock*,

*11 That is precisely what the Orange County Superior Court and providers of essential services in Orange County have done for months now. After closing for two months at the beginning of the pandemic, the Orange County Superior Court held over 130 jury trials and continues to conduct them. (See Exs. 2–4.) The Internal Revenue Service, the Social Security Administration, and other federal agencies in Orange County have been open and their employees have continued to work. Police, firefighters, and other first responders in Orange County have all continued to work. Hospitals and medical offices in Orange County have been open to patients and medical professionals have continued to work. Grocery stores, hardware stores, and all essential businesses in Orange County have been open and their employees have continued to work. [20] Yet the federal courthouse in Orange County somehow still remains indefinitely closed for jury trials.

If it is not impractical for the Orange County Superior Court to conduct over 130 jury trials, and if it is not impractical for every essential business in Orange County to remain open and for their employees to continue to work, it is not impractical to hold a jury trial for Mr. Henning. Admittedly, the pandemic creates numerous challenges to conducting a jury trial. There will be starts and stops. There will be delays. Significant attention and caution will have to be devoted to safety and protection. But none of those challenges justify the Central District's indefinite suspension of a constitutional right. "Even if the Constitution has taken a holiday during this pandemic, it cannot become a sabbatical." *Roman Catholic Diocese*, 141 S. Ct. at 70 (Gorsuch, J., concurring). [21]

B.

26 In light of the Central District's violation of Mr. Henning's constitutional right to a public and speedy trial, the question then becomes what the remedy should be for the Central District's violation. The law is clear on this issue. When a defendant is not brought to trial within the 70-day time limit (minus all properly excludable periods of delay) and brings a motion to dismiss, the court *must* dismiss the indictment. 18 U.S.C. § 3162(a)(2); *see United States v. Medina*, 524 F.3d 974, 980 (9th Cir. 2008); *Lloyd*, 125 F.3d at 1265 ("If retrial following an appeal does not commence within seventy days, not counting excludable delays, the indictment must be dismissed either with or without prejudice."); *United States v. Tertrou*, 742 F.2d 538, 540 (9th Cir. 1984) (explaining that if Congress' strict time requirements in the Speedy Trial Act "are not met, the courts have no discretion but to dismiss"). The strictness of this remedy highlights the importance of the right it protects. *See Lloyd*, 125 F.3d at 1268 ("Congress designed the Speedy Trial Act in part to protect the public's interest in the speedy administration of justice, and it imposed the sanction of dismissal under § 3162 to compel courts and prosecutors to work in furtherance of that goal."). The Court therefore has no choice but to dismiss the indictment against Mr. Henning.

27 *12 The only question remaining is whether to dismiss the indictment with or without prejudice. "In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: [1] the seriousness of the offense; [2] the facts and circumstances of the case which led to the dismissal; and [3] the impact of a reprosecution on the administration of this chapter and on the administration of justice." 18 U.S.C. § 3162(a)(2). [22] A court's decision of whether to dismiss the charges with or without prejudice depends on a "careful application" of these factors to the particular case. *Clymer*, 25 F.3d at 831.

Admittedly, the first factor—the seriousness of the offense—weighs in favor of a dismissal without prejudice. There is no doubt that the crimes of which Mr. Henning is accused—conspiring to commit and participating in armed robberies, including by brandishing a firearm himself—are extremely serious. *See Medina*, 524 F.3d at 986–87 (explaining that serious crimes weigh in favor of dismissal without prejudice); *United States v. Stewart*, 390 F. App'x 657, 658 (9th Cir. 2010) (explaining that the district court correctly determined that robbery was a serious crime). However, this factor does not outweigh the other two factors the Court must consider.

Most important in this case are the facts and circumstances leading to dismissal. The Central District decided to indefinitely suspend jury trials during this pandemic. Faced with the question of whether to continue that policy, it has time and again decided to do so. It made its decisions knowing that holding a jury trial in Orange County is possible. It made its decisions knowing that the Orange County Superior Court is able to conduct jury trials. It made its decisions

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United States v. Henning

United States District Court, C.D. California, Southern Division. • January 19, 2021 • — F.Supp.3d — • 2021 WL 222355 (Approx. 31 pages)

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Oct. 20, 2020

Orange County Superior Court Celebrates Special Juror Appreciation Week October 26–30, 2020

Santa Ana, CA – The Orange County Superior Court will celebrate and recognize our county's citizens who answered the call of duty and stepped up to serve on juries during the pandemic, with a special Juror Appreciation Week from October 26 to October 30.

*15 "The fact that we held 100 jury trials since the partial reopening of the Court in May is a testament to the commitment of our citizens to the Constitution and our shared values. Jurors are an integral part of our justice system, they guarantee the right to a trial where all can be heard and judged by their peers," said **Orange County Presiding Judge Kirk Nakamura**. "We could not have provided access to justice through jury trials during this pandemic if not for the great response of our citizens," he added.

The Court resumed criminal trials in May, kicking off the **"Safe Access to Justice Initiative,"** a program designed to assure strict enforcement of safety precautions in order to protect jurors and all members of the public who enter Court facilities.

"I was impressed by the way everyone went out of their way to do their best during these trying COVID times," said **Jodi Greenbaum, an Orange County citizen,** who answered the call to serve our community as a juror. "First, Judge Cynthia Herrera set a professional and caring tone by speaking to us about our duty as jurors. Twice, Judge Jeannie Joseph called us in to tell us that even though we weren't chosen as jurors, we served an important purpose," Ms. Greenbaum added.

"It wasn't just the judges. Everyone in the courthouse showed kindness, from the deputies at the entrance to the workers, who smiled, cleaned down the courtroom and explained simple directions as if they were doing it for the first time," she stressed.

Judge Thomas Delaney, who leads the **"Safe Access to Justice Initiative,"** noted the Court's commitment to keeping everyone healthy and safe. "As we conduct jury trials, we are also implementing strict cleaning procedures and physical distancing protocols to support the health and wellness of everyone that enters Court facilities," he said.

Meanwhile, the Court is capitalizing on the use of technology to significantly reduce the number of jurors summoned to serve.

"We are using cutting edge technology and data analysis to create efficiencies that will allow the Court to reduce the overall number of jurors needed to provide access to justice," said **Court Executive Officer and Jury Commissioner David Yamasaki**. "We will be able to reduce the numbers of jurors summoned to the point that fairly soon, any citizen who serves in Orange County can expect to be called to serve no more than once every two years."

As the pandemic is continuing to hamper Court operations, and to alleviate concerns regarding physical distancing, the Court recently implemented a mobile device self-check-in process for jurors. "Our jurors may now choose to skip the check-in line altogether and have a seat directly in the jury assembly room," said **Jury Services Manager Pete Hernandez**, adding "By accessing a dedicated Court network for jurors on their mobile device, they can self-check-in for service and obtain access to the free WiFi. All they need to use is their 9-digit juror ID number that is printed on their summons. It's as simple as that."

In pre-COVID times, millions of Californians statewide participated in jury service. Last year:

Sadly, the Chief Judge refused the Court's request to open the courthouse doors for Mr. Henning so he could attend the hearing on his motion to dismiss in person. In denying the Court's request, the Chief Judge relied on the COOP that he reactivated in December of last year which prohibits all in-person hearings, even ones of constitutional importance.

3 The General Order stated that to determine when jury trials will resume, the Chief Judge will use "gating criteria" from the Administrative Office of the United States Courts "designed to determine local COVID-19 exposure risks based on 14-day trends of facility exposure, community spread, and community restrictions." *Id.* ¶ 2. Administrative Office of the U.S. Courts, *Federal Judiciary COVID-19 Recovery Guidelines* (Apr. 24, 2020), *available at* https://www.fedbar.org/wp-content/uploads/2020/04/Federal-Judiciary-COVID-19-Recovery-Guidelines.pdf.

4 Daily Journal, *Central District could soon begin calling jurors in Orange County* (Sept. 23, 2020), *available at* https://www.dailyjournal.com/articles/359682-cental-district-could-soon-begin-calling-jurors-in-orange-county (the "Article").

5 Blueprint for a Safer Economy, *available at* https://covid19.ca.gov/safer-economy/.

6 Though Orange County was in tier 2 for months and seemed close to reaching tier 3, it has since moved back to tier 1. On December 3, 2020, Governor Newsom issued an additional Regional Stay at Home Order requiring "[a]ll individuals living in the Region [to] stay home or at their place of residence except as necessary to conduct activities associated with the operation, maintenance, or usage of critical infrastructure, as required by law, or as specifically permitted in th[e] order."

7 (Dkt. 1656); *United States v. Juan Carlos Recinos*, Case No. 2:19-cr-00724-CJC, Dkt. 58 (Aug. 19, 2020); *United States v. Jeffrey Olsen*, Case. No. 8:17-cr-00076-CJC, Dkt. 68 (Sept. 3, 2020); *United States v. Steven Nicholson*, Case No. 2:16-cr-00470-CJC-1, Dkt. 155 (Nov. 13, 2020); *United States v. Ronald Bernard Ware*, Case No. 8:20-cr-00110-CJC, Dkt. 38 (Dec. 3, 2020).

8 Several of the other defendants were found guilty of the charges associated with those robberies.

9 In its opposition, the government argues for the first time that 21 days should be excluded in computing the time within which Mr. Henning's retrial must commence. Specifically, the government contends that the days between when it filed its motion to continue (December 7, 2020) and the Court's hearing and decision on that motion (December 17, 2020) are excludable, and that the days between when Mr. Henning filed his motion to dismiss (January 8, 2021) and the Court's hearing and decision on it (January 19, 2021) are excludable. (Dkt. 1691 at 7–8.) The government is wrong. The Speedy Trial Act makes excludable "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." 18 U.S.C. § 3161(h)(1)(D). Contrary to the government's assertions, this exclusion applies only to pretrial delay "*resulting from*" a pretrial motion, not to all pretrial delay that merely *coincides* with the pendency of a motion. *Clymer*, 25 F.3d at 830 ("According to its plain terms, [this section] applies only when the delay in bringing the case to trial is the *result* of the pendency of a pretrial motion."). No delay in Mr. Henning's retrial resulted from the government's motion to continue the trial or Mr. Henning's motion to dismiss.

10 Mr. Henning is one of at least six defendants before the Court challenging the Central District's indefinite suspension of jury trials. *See United States v. Juan Carlos Recinos*, Case No. 2:19-cr-00724-CJC; *United States v. Jeffrey Olsen*, Case. No. 8:17-cr-00076-CJC; *United States v. Steven Nicholson*, Case No. 2:16-cr-00470-CJC-1; *United States v. Ronald Bernard Ware*, Case No. 8:20-cr-00110-CJC; *United States v. Jose Reyes*, Case No. 2:19-cr-00740-CJC.

11 In *Harvest Rock Church*, both the district court and the Ninth Circuit had concluded that the church in question failed to show a likelihood of success on the merits of its free exercise challenge to California's restrictions on religious service attendance, citing evidence in the record regarding the risk of spreading the coronavirus in indoor congregate activities. *See Harvest Rock Church, Inc. v. Newsom*, 977 F.3d 728, 730–31 (9th Cir. 2020).

12 Other cases confirm that *actual impossibility* is key to applying the ends of justice exception. *See United States v. Richman*, 600 F.2d 286, 294 (1st Cir. 1979) (finding no Speedy Trial Act violation where trial was continued three weeks after the "paralyzing ... Blizzard of '78" that made it so that "[t]rial could not commence on" the scheduled date); *United States v. Scott*, 245 Fed. Appx. 391 (5th Cir. 2007) (concluding without substantial analysis that there was no Speedy Trial Act violation where some delay was attributable to Hurricane Katrina).

13 Sufficient courthouse staff are also available to facilitate a trial. Indeed, Mr. Henning's status on bond means that even less courthouse staff will be required to facilitate his trial than would be needed to hold a trial for a defendant in custody.

14 In light of the recent surge in coronavirus cases in Orange County, the Orange County Superior Court decided to extend the statutory time period for holding criminal jury trials "by not more than 30 days in cases in which the statutory deadline otherwise would expire from January 11, 2021 to February 5, 2021." (Ex. 4, attached to this order.) The Orange County Superior Court extended the statutory deadline for this limited period to avoid having to dismiss a case if an in-custody defendant could not be transported to the courthouse because of a quarantine at the Santa Ana Jail, or if it turns out there is a temporary shortage of jurors. The Orange County Superior Court, however, fully intends to hold criminal jury trials during the surge. In stark contrast, the Central District indefinitely suspended them long before the surge, in fact nearly 10 months before it.

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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FIRDOS SHEIKH, Defendant.	Case No. 2:18-CR-119-WBS-1 **DEFENDANT'S MOTION TO DISMISS FOR SPEEDY TRIAL VIOLATION** Hearing Date: October 1, 2020 Hearing Time: 10:00 a.m. Trial Date: TBD Judge: Hon. William B. Shubb Courtroom: Five (14th Floor)

At the hearing on September 15, 2020, the Court ordered the Parties to file cross motions requiring briefing on: (i) a precise calculation of speedy trial time that has elapsed; (ii) the challenges in bringing Dr. Sheikh to trial within the remaining speedy trial time; and (iii) how the individual factors in this case bear upon Dr. Sheikh's constitutional and statutory speedy trial rights, including a balancing of the ends-of-justice finding the government requests and resulting prejudice to Dr. Sheikh and the public in granting the government continuance. Defendant therefore files this motion to dismiss for speedy trial violation, which is based upon the attached memorandum of points and authorities, the files and records in this case, and further evidence and argument the Court may permit.

Dated: September 17, 2020

Respectfully submitted,

ALMADANI LAW

/s/ Yasin M. Almadani
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Attorney for Defendant

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I. INTRODUCTION

Defendant Firdos Sheikh's ("Defendant" or "Dr. Sheikh") case presents multiple reasons for a speedy trial dismissal. *First*, the case must be dismissed under the Speedy Trial Act ("STA") (18 U.S.C. § 3161) because the speedy trial clock has already expired. The government allowed 77 to 125 days of speedy trial time to elapse. *Second*, the case must be dismissed also on constitutional grounds. The government's negligence in complying with its constitutional *Brady* obligations delayed the case into the pandemic in the first place, thereby depriving Dr. Sheikh of her Sixth Amendment right to a speedy trial. *Third*, the ends-of-justice continuance the government seeks—a moot point given the statutory and constitutional violations requiring dismissal—must be denied because granting the continuance would not serve the ends of justice but would result in a miscarriage of justice to both Dr. Sheikh and the public.

II. THE SPEEDY TRIAL CLOCK HAS ALREADY EXPIRED

Upon the Court's order, the Defense has re-reviewed the record thoroughly and found that there have been several periods of non-excludable STA time that were previously not addressed. The Defense corrects the record here.

A. The Indisputable Periods of Non-Excludable Time (74 to 77 Days in Total) Require Dismissal

The Ninth Circuit holds that an STA "'ends of justice' exclusion must be (1) specifically limited in time and (2) justified [on the record] with reference to the facts *as of the time the delay is ordered*." *United States v. Ramirez-Cortez*, 213 F.3d 1149, 1154 (9th Cir. 2000) (internal citations and quotation marks omitted) (emphasis in original). Moreover, "monitoring of the limitations period is not the exclusive burden of the district judge. The Government shares the responsibility for speedy trial enforcement." *United States v. Perez-Reveles*, 715 F.2d 1348, 1353 (9th Cir. 1983) (emphasis added). The government did not fulfill that responsibility in this case.

On April 19, 2019, the Court entered an ends of justice exclusion limited in time (from May 20, 2019, to June 24, 2019) and with reference to the facts as of the time the delay was ordered, as *Ramirez-*

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Cortez requires. (DE 33.)[1] At this time, three motions were pending: (i) motion for disclosure of grand jury proceedings (DE 28), (ii) motion to suppress evidence seized in July 2013 from both the warrantless and warrant-based searches (as fruit of the poisonous tree) (DE 29), and (iii) motion to suppress statements (DE 30). On June 24, 2019, the Court held a hearing on these motions, denying the first, ordering supplemental briefing on the latter two, and setting a hearing on July 29, 2019. (DE 53.) On July 29, 2019, the Court ordered additional briefing and reset the hearing date to September 30, 2019. The speedy trial clock remained stopped from June 24, 2019, to September 30, 2019, under section 3161(h)(1)(D) because motions were pending.[2] The hearing went forward on September 30, 2019, but had to be continued mid-hearing because the Parties were still taking testimony at the end of the day. The Court and the Defense were available to come back on October 7, 2019, but the government took a 49-day continuance because one of the two government counsel were not available. The Defense submits that, under Ninth Circuit precedent, this long continuance based exclusively on the unavailability of one government lawyer (whose presence turned out to be unnecessary) violated Dr. Sheikh's speedy trial rights. This issue is briefed at the end of this section because other non-excludable periods caused the clock to expire regardless of this issue.

On December 18, 2019, the Court denied the motions to suppress evidence and statements. However, the agent's testimony led defense counsel to notice that there may be a *Franks* issue with the warrant (which had not been briefed) and counsel highlighted that issue for the Court. The government objected that the issue had not been briefed and was not properly before the Court. (R/T 12/18/2019 at 371.) The Court thus set a motions schedule on the *Franks* issue with Dr. Sheikh's motion to be filed on January 13, 2020. There was no motion pending at this time and the government did not ask for an STA ends of justice time exclusion. Therefore, between the dates of December 18, 2019 (when the Court ruled upon the first set of motions to suppress statements and evidence), and January 13, 2020 (when Dr. Sheikh

[1] "DE" denotes "docket entry" followed by a docket control number.

[2] While Dr. Sheikh filed an *ex parte* application to continue time through September 30, 2019, based upon pending motions and an ends-of-justice finding (DE 59), the proposed order was not entered. Rather, the Court reset the hearing by minute order. This has no effect on the calculation, however, because the Defense agrees that time should be excluded until September 30, 2019. But there was no ends of justice agreement or finding after that date for the relevant period when the speedy trial clock ran and expired.

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filed her *Franks* motion), **twenty-six (26) days** of speedy trial time elapsed.

On February 25, 2020, when the *Franks* hearing was scheduled, the Court learned that there had been a number of undisclosed *Brady* items bearing upon the *Franks* issue. The *Franks* motion was thus taken off calendar and the Court stated, "I hate to do this again, but I'll let you file new briefs on the *Franks* issue, and I'll ask that you put it all together in one place . . . We'll start from scratch on the *Franks* motion." (R/T 2/25/2020 at 26.)[3] The Court ordered the Parties to file supplemental briefing on the Defense's discovery requests to deal with that issue first; the *Brady* violations would be addressed second; the *Franks* briefing schedule and hearing would be reset after that. The government confirmed:

MR. NOLAN: And then at that time, is it at that time we'll then set out a schedule for *Franks*?

THE COURT: Right. We're going to break it down the way I said.

(R/T 2/25/2020 at 34). The government did not request an STA ends of justice time exclusion and no such exclusion with appropriate findings was entered.

While the *Franks* motion was no longer pending, Dr. Sheikh had renewed her motion for *Brady* material. At this point the government was already 20 months late in its self-executing *Brady* obligation with respect to a number of significant *Brady* items relating to both *Franks* and trial. The government filed its response to the renewed discovery requests on March 2, 2020, agreeing to the discovery demands (*see* DE 90), leaving no issue for the Court to decide, and the Court confirmed this on March 16, 2020, ordering that the government's response had rendered the discovery motion moot. (DE 94.) Under prevailing Ninth Circuit precedent, the speedy trial clock runs during the pendency of a discovery motion when there is nothing left for the district court to decide. *United States v. Hardeman*, 249 F.3d 826, 828 (9th Cir. 2000) (holding that even during the pendency of a discovery motion, the speedy trial clock runs when there is nothing left for the district court to decide). Therefore, the speedy trial clock ticked for at least another **eight (8) days** between March 2, 2020 and March 10, 2020, because the government's response to the discovery motion left no discovery dispute for the Court to decide.

It is questionable whether the clock restarted on March 10, 2020, when the Defense requested a *Brady*-based dismissal as part of its reply brief, but the request was not entertained by the Court, as there

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[3] "R/T" denotes "record transcript" followed by the date of hearing and a page number.

was no properly noticed motion. Rather, on March 16, 2020, the Court ordered a fresh briefing schedule for the Parties to file new briefs on the *Brady* issue (DE 94). Regardless of whether the clock ticked between March 10 and 16, 2020, it certainly started ticking again on March 16, 2020, when the Court ordered a fresh briefing schedule on the *Brady* issues. There was no motion pending between the dates of March 16, 2020, and March 24, 2020, and counsel for the government did not request a time exclusion between those dates; the clock thus continued to tick for at least an additional **eight (8) days**, and was stopped only by the filing of Dr. Sheikh's motion to dismiss under *Brady*, on March 24, 2020. (*See* DE 95.) The Court ruled on that particular motion (DE 95) on June 3, 2020. (DE 104). The government did not request a time exclusion and so the STA clock resumed ticking on June 3, 2020. At this point, at least **forty-two (42) days** of speedy trial time (26 + 8 + 8) had already elapsed. That left 28 days on the clock. But with no motion or ends of justice exclusion on the record, the clock continued to tick until July 8, 2020, when Dr. Sheikh filed her *Franks* motion (DE 110), which means that **thirty-five (35) additional days** elapsed during this time, making it **a total of 77 days** that had elapsed.

Two points must be addressed here. First, on June 22, 2020, the Court entered an order setting a new briefing schedule and hearing date for the *Franks* motion. In that order, the Court stated, "Speedy trial time shall be excluded from the date of this Order to August 11, 2020, pursuant to 18 U.S.C. § 3161(h)(1)(D)." However, section 3161(h)(1)(D) did not permit that entire period of exclusion; it permits exclusion of time only for "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." *Id.* (emphasis added). The government did not request, and the parties never agreed to a time exclusion under any other STA provision. Therefore, pursuant to section 3161(h)(1)(D), the Court's order stopped the clock July 8, 2020, when Dr. Sheikh's motion was filed, but not before that.

Second, the government may argue that the time period between June 19 and June 22, 2020 (3 days) was tolled because on June 19, 2020, Dr. Sheikh filed an application to reset the *Franks* briefing schedule and hearing date, which the Court granted on June 22, 2020. While that argument would not save the government from the speedy trial violation, it must be rejected. That is because, on June 3, 2020, the Court had ordered the Parties to work with the Clerk to set up a briefing and hearing schedule on the

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Franks motion. (DE 104). The government provided dates of availability but refused to file a stipulation setting a *Franks* hearing date, despite the Court's clear order to do so. Dr. Sheikh thus filed an application simply to get dates on calendar to which both parties had agreed. However, because the Court's previous order was clear that a *Franks* hearing would be set, there was no actual controversy for the Court to resolve; Dr. Sheikh's application was merely a vehicle to get dates on calendar. Therefore, the application should not be considered a motion for purposes of speedy trial time. *See United States v. Hardeman*, 249 F.3d at 828 (holding that even during the pendency of a discovery motion, the speedy trial clock runs when there is nothing left for the district court to decide). Even if the Court does exclude these three days, the government is still out of time.

B. Additional Period of Non-Excludable Time

For completeness of the record, Dr. Sheikh now returns to the **49-day delay** that occurred during the pendency of the suppression hearing, from September 30, 2019, to November 25, 2019. This unjustified delay also violated Dr. Sheikh's constitutional and statutory speedy trial rights.

The record shows that the 49-day delay in the middle of the proceeding was caused by the unavailability of one government lawyer, Mr. Nolan (whose presence, as it turned out, was not even required), and who insisted on the lengthy delay even after the Court stated, "The Government is always available." The basis for the long delay was captured in two statements: (i) "this being a recusal case and coming from D.C., it's not as easy as asking an AUSA," and (ii) "*I* have cases indicted all over the country. So *my* schedule is a little bit difficult." (R/T 9/30/2019 at 99-100) (emphases added). There was no discussion about Mr. Reese's schedule, who was the other prosecutor there with Mr. Nolan, or anyone else in his office who could have handled the case. The government ultimately agreed to proceed on November 25, 2019, after which the hearing was reset another time to December 17, 2019. However, the time period Dr. Sheikh complains of here is the period from October 7, 2019, to November 25, 2019—the 49-day period that Dr. Sheikh was required to wait in the middle of an evidentiary hearing at Mr. Nolan's insistence.

In the Ninth Circuit, the general rule that speedy trial time is tolled during the pendency of a motion is not without exception. *See United States v. Medina*, 524 F.3d 974, 979 (9th Cir. 2008)

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(identifying two exceptions to the general rule). The Ninth Circuit's holding in *United States v. Lloyd*, 125 F.3d 1263, 1271 (9th Cir. 1997), which addresses delays for continuity of government counsel, is instructive. In *Lloyd*, the Ninth Circuit held that:

> While continuity of counsel for the prosecution may be generally desirable, whether it is a sufficient basis to warrant a delay in any individual case will depend upon a number of factors, including, (1) the size of the prosecutor's office, (2) whether there is another qualified prosecutor available, (3) how much special knowledge the first prosecutor has developed about the case, (4) how difficult the case is, and (5) how different it is from other cases generally handled by the particular United States Attorney's office.

125 F.3d at 1271. The Ninth Circuit reversed the conviction and dismissed the indictment in that case on the basis of an STA violation, because the government had not provided the district court a sufficient basis for "any of the relevant factors, and most of the necessary information [did] not appear on the record. Thus, the district court had no basis for determining whether the government's interest in continuity of counsel was sufficient to necessitate a continuance." *Id.*

The situation here is worse than the scenario in *Lloyd*. Here, the record shows that, not only did the government not provide a sufficient basis for the 49-day delay, the delay itself was completely unnecessary. None of the *Lloyd* factors were addressed by the government, which is problematic in and of itself. Nothing in the record indicates that the Court, Dr. Sheikh, defense counsel, or Mr. Reese (who is also an indicting prosecutor) could not have been available to resume the hearing on October 7, 2019. In fact, upon resumption of the hearing in December 2019, it turned out that Mr. Nolan's presence was not necessary, which was a major factor to consider under *Lloyd*. Mr. Nolan conducted some minimal re-direct of the agent and some minimal cross of two of the Defense's less significant witnesses. In a 412-page transcript, Mr. Nolan substantive participation after the 49-day continuance was less than 14 pages—he was mostly an observer. Mr. Nolan's part could have easily been handled by Mr. Reese, who conducted the cross examination of Dr. Sheikh and her son (the Defense's two primary witnesses) and delivered the government's argument at the conclusion of the hearing. Moreover, contrary to Mr. Nolan's representation to the Court, the U.S. Attorney's Office ("USAO") could have actually made an appearance. As it turned out, the reason for the "recusal" Mr. Nolan identified was long over and the USAO did enter the case just a few months later. The USAO appears to have taken the lead since then,

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along with Mr. Reese, and Mr. Nolan's participation has been minimal. On this record, the 49-day delay for Mr. Nolan's sake is completely unjustified and violated Dr. Sheikh's speedy trial rights. *See Lloyd*, 125 F.3d at 1271.

Adding this 49-day violation to the 77 days calculated above would mean that 125 days of speedy trial time have elapsed. What is worse is that the government's unjustifiable continuance delayed the case into the pandemic, also implicating more general Sixth Amendment protections. Indeed, had the hearing resumed on October 7, 2019, it would have been over by October 8, 2019, and the *Franks* motion could have been brought in early November 2019 (or in April 2019 if the *Brady* violations had not occurred), leaving plenty of time to conduct the trial prior to the pandemic.[4] This unnecessary delay also provides yet another reason to find that granting the government's ends of justice continuance would result in a miscarriage of justice. *See infra* § IV.

III. THE GOVERNMENT'S NEGLIGENCE IN MEETING ITS *BRADY* OBLIGATIONS ALSO VIOLATED DR. SHEIKH'S CONSTITUTIONAL SPEEDY TRIAL RIGHTS

The Sixth Amendment also compels dismissal. In *United States v. Mendoza*, the Ninth Circuit underscored, "The Sixth Amendment guarantees that criminal defendants 'shall enjoy the right to a speedy and public trial . . . .'" 530 F.3d 758, 762 (9th Cir. 2008) (citing U.S. Const. amend. VI). To determine whether a defendant's Sixth Amendment speedy trial right has been violated, courts balance the following four factors: (i) length of delay, (ii) the reason for the delay, (iii) the defendant's assertion of her right, and (iv) prejudice to the defendant. *Id.* (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). "None of these four factors are either necessary or sufficient, individually, to support a finding that a defendant's speedy trial right has been violated. Rather the factors are related and must be considered together with such other circumstances as may be relevant. Further, the balancing of these factors, and other relevant circumstances, must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution." *Mendoza*, 530 F.3d at 762 (internal citations and quotation marks omitted). A case must be dismissed if government negligence violates a defendant's speedy trial rights. *Mendoza*, 530 F.3d at 762 (emphasis added).

[4] The government was in violation of *Brady* this entire time, which deprived Dr. Sheikh's counsel of the ability to properly identify and brief the *Franks* issue in April 2019 along with the other suppression issues. This argument is discussed in detail in the next section.

Length and Reasons for Delay. This case was investigated in July 2013 and indicted in June 2018. The government's *Brady* obligation was triggered at that time, especially with respect to *Brady* material relating to pre-trial motions such as *Franks*, which Defendant has a right to receive at the outset so that pre-trial motions can speedily be brought and the case can speedily move to trial. Here, due to government negligence, the *Brady* material bearing upon *Franks* was not disclosed for a period of almost two years after indictment, which renders the dilatory disclosure presumptively prejudicial. *Mendoza*, 530 F.3d at 762 (holding that a delay of more than one year is generally presumptively prejudicial).

Prejudice. This late disclosure deprived defense counsel of the benefit of the full breadth of significant *Brady* material relating to the *Franks* issue. Indeed, the government was so derelict in meeting its constitutional *Brady* obligation that it required a Court order in July 2019, over a year into the case, and months of subsequent *Brady* discovery litigation. After that, the Court found that numerous undisclosed items were material and significant to the *Franks* issue. (DE 104.) Those items should have been disclosed at the outset of the case. In April 2019, defense counsel did challenge the evidence seized pursuant to the warrant based on a fruit-of-the-poisonous-tree theory, but counsel was deprived of the benefit of the undisclosed *Brady* material relating to the *Franks* issue. And, it was not until testimony started coming out at the December 2019 suppression hearing that defense counsel began to truly appreciate the *Franks* issue. As defense counsel explained to the Court on December 18, 2019, when asked why the *Franks* issue was not raised earlier, "Once the testimony started coming out and yesterday, I went home and started going through all the testimony and reports, [I] felt like there were lots of things in the warrant that I really did need to point out to the Court." (R/T 12/18/2019 at 371.) But had the government timely made the *Brady* disclosures—which should have been at or near the inception of the case because it bore upon *Franks* issues—defense counsel would have had a significantly more complete record impeaching the warrant affidavit and would surely have briefed the issue in April 2019 along with the other suppression issues that were briefed at the time. Undersigned counsel again highlighted this exact problem at the February 25, 2020 hearing when the *Brady* violations were first discovered. (R/T 2/25/2020 at 22 ("If we had these notes earlier, we could have potentially brought the *Franks* motion quite a bit earlier.").) There can be no dispute that Dr. Sheikh should have had the *Brady* materials at or

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near the beginning of the case and not having the materials deprived her counsel of the ability to adequately assess the breadth of suppression issues, especially relating to *Franks*, causing significant delays in the case. Indeed, the materials disclosed were so contradictory to the warrant affidavit that no competent defense attorney would have missed the *Franks* issue with the materials in hand. All suppression issues, including *Franks*, could have been briefed earlier and resolved together in December 2019, and the case could have been set for trial long before the pandemic-based closure, without the need for months of unnecessary *Brady* litigation. That did not happen because the government was at least negligent in meeting its *Brady* obligations.

The prejudice of these delays and the delay the government now seeks is amplified by the possibility of memories being dimmed and loss of witnesses and evidence. It goes without saying that a person of Dr. Sheikh's accomplishments, stature, and position within the community has suffered and continues to suffer incredible anxiety, embarrassment, and ridicule, and her family suffers along with her because of this case. *See infra* pp. 14-15.

Defendant's Assertion of Speedy Trial Right. Dr. Sheikh has vigorously asserted her speedy trial rights, and any continuance previously agreed to was predicated upon the Defense's belief that the government had met its *Brady* obligations (which turned out to be untrue) and that the government was dealing with Dr. Sheikh in good faith (which also turned out to be untrue). Moreover, because the length of delay, reason for delay, and ensuing prejudice are so grave and significant, no STA waiver can justify maintaining this case. *See Mendoza*, 530 F.3d at 764 (case dismissed despite numerous requests for continuances by the defendant because the other factors were significant). Therefore, the case should be dismissed under both the STA and the Sixth Amendment of the United States Constitution.

IV. THE ENDS OF JUSTICE ARE NOT SERVED BY GRANTING A CONTINUANCE

The STA and constitutional violations described above render the government's ends-of-justice request a moot point. Nevertheless, there are additional reasons to deny the request.

A. The Ends-of-Justice Continuance Was Intended to Be Rare and Requires Specific Findings

"The discretion granted to the trial court to invoke the ends of justice exception is narrow. Realizing that broad discretion would undermine the mandatory time limits of the Act, Congress intended

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that the ends of justice continuance be rarely used." *United States v. Perez-Reveles*, 715 F.2d at 1351 (internal citations and quotations marks omitted). In making an ends-of-justice finding, the Court must engage in a balancing test and make findings specific to the case to determine whether the "ends of justice served by [granting the continuance] outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(7)(A). The STA further states that: "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." 18 U.S.C. § 3161(h)(7)(C).

B. The General Orders Are Insufficient for an Ends-of-Justice Continuance

The government's reliance on the District's General Orders is insufficient. An "ends of justice" exclusion must be justified with reference to specific factual circumstances in the particular case as of the time the delay is ordered. *United States v. Ramirez-Cortez*, 213 F.3d at 1154 (concluding that an ends of justice continuance was not sufficiently justified where the judge made no inquiry into the actual need for a continuance in the particular case, instead checked off boxes on pre-printed forms without making findings on the statutory factors, and the record showed that the judge "was granting blanket continuances"); *United States v. Pollock*, 726 F.2d 1456, 1461 (9th Cir. 1984) (stating that the "ends of justice" exclusion "was to be based on specific underlying factual circumstances" and "cannot be invoked without specific findings in the record"); *United States v. Engstrom*, 7 F.3d 1423, 1426 (9th Cir. 1993) ("No exclusion is allowed 'unless the court sets forth in the record of the case, either orally or in writing, its reasons.'"). By their very nature, the General Orders do not justify delays as of the time they are ordered in any particular case and are thus contrary to the Sixth Amendment and the "ends of justice." *See United States v. Olsen*, No. 8:17-cr-00076, Doc. 67 (C.D. Cal. September 2, 2020).

C. Dr. Sheikh's Case Is Beyond the Statutory Reach of the Ninth Circuit's Judicial Emergency Declaration

In Dr. Sheikh's case, the government also cannot rely on the Ninth Circuit's approval of judicial emergency entered pursuant to 18 U.S.C. § 3174. *In re Approval of the Judicial Emergency in the Eastern District of California*, 956 F.3d 1175 (2020). This is because Dr. Sheikh's case does not fall within the ambit of section 3174, which states, "upon application by the chief judge of a district, grant a suspension

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of the time limits in section 3161(c) in such district for a period of time not to exceed one year for the trial of cases for which indictments or informations are filed *during such one-year period*." 18 U.S.C. § 3174(b) (emphasis added). Because the indictment in this case was filed prior to the commencement of the one-year judicial emergency period, this case falls outside the reach of section 3174. Furthermore, even if this case fell within the reach of the statute (which it does not), the statute is clear that "such time limits from indictment to trial shall not be increased to exceed one hundred and eighty [180] days." *Id.* Finally, because the purpose of the statute is "to alleviate calendar congestion resulting from the lack of resources," 18 U.S.C. § 3174(a), it is not clear whether the Ninth Circuit even had statutory authority in the first place to declare an emergency under section 3174 on the basis of a pandemic. The pandemic is not causing court congestion—it may in the future after courts open back up, but it currently is not.

D. The Continuance Should Not Be Granted Because a Dismissal in This Case Would Not Result in a Miscarriage of Justice

Based on the foregoing, in order to grant the government's request for a continuance and exclude time, the Court must make findings specific to this case that the ends of justice served by granting the continuance affirmatively *outweigh* Dr. Sheikh's and the public's interest in a speedy trial. Here, neither a continuance nor a trial would serve the best interest of the public or Dr. Sheikh. The ends of justice compel dismissal.

Among the factors the Court must consider is "[w]hether 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." 18 U.S.C. § 3161(h)(7)(B)(i). The remaining three factors—complex case, preindictment delay, and continuity of counsel—are not at issue. This is not a complex case and counsel have previously expressed that they are willing and ready to try the case.

Impossibility. Conducting trial in this case may be dangerous but it is *not* impossible—after all, there is business being conducted throughout the country. *See United States v. Olsen*, No. 8:17-cr-00076, Doc. 67 (C.D. Cal. September 2, 2020). In this case, the government points to the safety risks to its witnesses but is also agreeable to go to trial, which means that the government's witnesses can appear. Defense counsel and Dr. Sheikh are also ready to go to trial. However, Dr. Sheikh's greatest concern, which the government shares, is that going to trial would put the trial participants, including numerous

jurors chosen from the public, at risk for serious infection potentially leading to mortality. The present wildfires have added to that risk by adversely affecting air quality. The inhalation of the poor-quality air for extended periods can create and/or exacerbate respiratory issues thereby amplifying the threat of mortality from the novel coronavirus, a virus that attacks the lungs. At *voir dire* and trial, the virus may easily be transmitted given the number of people that would be required to congregate in a limited space with virus particles being aerosolized even with face coverings for a trial that is expected to last two to three weeks. Therefore, while not impossible, conducting a trial is dangerous. And as such, the Court must determine, taking into account the specific circumstances in this case, whether not granting a continuance and dismissing the case would result in a miscarriage of justice. It would not. In fact, granting the continuance would cause the miscarriage of justice.

Miscarriage of Justice. Dr. Sheikh maintains her innocence vigorously—she has good reason to, as the Court has observed at past hearings—and she desperately wants to go to trial without delay. But as a physician, it is difficult for her accept the idea of putting so many people at risk. In determining the ends of justice and whether not granting a continuance would cause a miscarriage of justice, the Court should take this into account—that Dr. Sheikh is trying to do the right thing, the selfless thing. Moreover, it cannot be ignored that, at the *Franks* hearing, Dr. Sheikh presented strong evidence to show that she is not a human trafficker and that the government's alleged victims (Prakash and Alfredo) are clearly lying and exaggerating their stories against Dr. Sheikh to obtain T-Visas and other benefits, which amounts to immigration fraud on the part of these alleged victims. After the *Franks* hearing, the Court commented:

> When we finally do get back to trying cases, the experience in other districts has been no matter how many judges you have, no matter how many courtrooms you have, you try one at a time. You basically use the whole courthouse to try a case. You use one courtroom for the jury to deliberate, you use another courtroom for them to come in, in the morning. You spread them throughout the courtroom. Even when we get back to jury trials, it's going to be very, very limited. . . .
>
> [W]hat you have to consider here is who this defendant is, the financial and reputational injury that she's already suffered as a result of this prosecution, the strength of your evidence on the major charge that you started out thinking you were going to be able to prove, obtaining labor by force or threats of force, how strong that is, and whether you really want to go on a 1001 case or a harboring case, whether that's your priority here. Now, I'm going to stop there.
>
> Don't get involved in any discussion. I wouldn't have this discussion with

> you if it wasn't for the peculiar situation that we find ourselves in, but I just thought it had to be said. So we'll leave it at that.

(R/T 8/13/20 at 388-89.)

The Court was very gracious to note some salient issues but not put any pressure on any party. However, the Court's observations are highly relevant to the issue of whether a dismissal here would result in a miscarriage of justice; they must be factored into the ends of justice analysis. With no time remaining on the speedy trial clock, the government is asking the Court to put Dr. Sheikh's life on hold for an incredibly long period of time in order to bring her to trial, while she and her family continue to endure the cost, stigma, and emotional damage of incredibly weak criminal charges.

The continuance is neither in the best interest of Dr. Sheikh nor in the best interest of the public. Any objective observer can see, as this Court has, that it is not just Dr. Sheikh who is suffering prejudice while this unsupported "human trafficking" case continues to linger. The public, the Court, and even the government itself are suffering prejudice. In assessing whether a dismissal would cause a miscarriage of justice, the Court must examine the value of the continuance to the people in this District who pay the price of the resources this case continues to consume. Court records demonstrate that, as of March 31, 2020, this District had over 1,800 defendants with pending felony charges. (*See* Ex. 1.) When the Court opens back up, there will be a backlog of cases ready for trial. A significant number of those cases would involve defendants charged with dangerous crimes and/or in custody. Since the STA does not allow for court congestion to serve as a basis for a continuance, many of these cases would need to be prioritized for trial lest dangerous individuals be released back into the District or individuals who are innocent be detained for prolonged periods of time. Dr. Sheikh is not willing to waive any more time, so her case would be dismissed either now or then, unless the government is prepared to allow the clock to expire on defendants who may be a true danger to the public or prolong the detention of potentially innocent defendants whose liberty is unduly being compromised—such a result would not serve the best interest of the people in this District. The reality is that the pandemic has changed the landscape for everyone and, in this case, there is simply no basis to find that granting a continuance as opposed to dismissing this case serves the ends of justice or is in the interest of the public.

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E. Dr. Sheikh Will Continue to Suffer Extreme Prejudice If This Case Is Continued

This case has caused Dr. Sheikh to suffer depression, anxiety, embarrassment, and even stress-induced physical effects like body rashes and hives. Her diabetes has gone from moderate to severe. Since the inception of the case, which was widely publicized in the Sacramento area, Dr. Sheikh has regularly received phone calls from blocked numbers, telling her that she is a criminal. She is constantly slandered on social media and many friends and colleagues have distanced themselves from her due to the federal human trafficking charges. The case has also drained her financially, and the ranch that she worked so hard to build has fallen into complete disrepair due to the mental and financial stress. Once a self-made woman, she is now forced to ask friends and family for money to pay her legal bills.

Dr. Sheikh's two adult children have also been deeply affected, having people in the community label their mother a criminal. The children have lost friends and opportunities as people have distanced themselves due to this case. Both children were forced to take a break from their higher education as a result of the stress, especially because they know first-hand that Prakash and Alfredo are lying, and their mother is innocent. It has been difficult for them to see their mother unjustifiably dragged through the criminal process for years.

Furthermore, the government put *lis pendens* on numerous properties Dr. Sheikh owns (in addition to the ranch) on the basis of Prakash and Alfredo's bald allegations that they mowed a lawn here and there. The Court has seen evidence that Dr. Sheikh was not even around Prakash and Alfredo six days a week, sixteen to eighteen hours a day, and Prakash and Alfredo did not have a car to drive around to any of these other properties. Nevertheless, on the basis of the paltry allegations, the government obtained numerous, unsubstantiated *lis pendens* that are as abusive as the charges against her. Dr. Sheikh is unable to sell or refinance the properties and is behind on many mortgage payments.

Dr. Sheikh is an accomplished neurologist who worked tremendously hard her entire life to achieve the American dream. The devastation of this case on her life cannot be overstated. A dismissal will not have a negative effect on the government, but it will go a long way in beginning the restoration of Dr. Sheikh's life from a prosecution she never deserved.

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V. THE INDICTMENT SHOULD BE DISMISSED WITH PREJUDICE

Dr. Sheikh has demonstrated that anywhere from 77 to 125 days of speedy trial time have elapsed. In such a case, the indictment "shall be dismissed," and the district court must consider whether to dismiss the case with or without prejudice taking into account the factors described in 18 U.S.C. § 3162(a)(2). *See, e.g., Lloyd*, 125 F.3d at 1271; *Hardeman*, 249 F.3d at 829. Section 3162(a)(2) provides: "In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a re-prosecution on the administration of this chapter and on the administration of justice." 18 U.S.C. § 3162(a)(2).

Seriousness of the Offense. While human trafficking is a serious offense, here the government has no genuine human trafficking case, as the Court itself has surmised. The harboring and false statements/obstruction charges, especially the way they have been charged here, are not all that serious, and also have significant evidentiary shortcomings.[5] Indeed, were these charges considered serious, almost every person in this District would be at risk for prosecution, which is an absurd proposition. This factor compels dismissal with prejudice.

Circumstances That Led to Dismissal. The circumstances that have led to dismissal involve years of delay in producing significant *Brady* material that bore upon both pre-trial motions and trial, and a 49-day mid-hearing delay on the insistence of a government attorney whose presence was actually not necessary for the remainder of the hearing. The government bears significant fault and so this factor also compels dismissal with prejudice.

Impact of Re-Prosecution on the Administration of Justice. In this case more than any other, it goes without saying that re-prosecution would offend justice in every way. Dr. Sheikh has been punished enough for no good reason. *See supra* pp. 1-2. It is not just to allow Prakash and Alfredo to continue

[5] The pre-trial motions focused on the weaknesses in the human trafficking charges because those have been the gravamen of the government's case since its inception and were relevant to the motions. Indeed, it cannot be lost that the case was brought by the "Human Trafficking Section" of the Civil Rights Division, and that section would not have brought a simple harboring or false statements case. Nevertheless, the Defense submits that trial would demonstrate that even the harboring and false statements/obstruction charges are not well-supported by the evidence. It will not benefit the public, the government, the Court, or Dr. Sheikh a single *iota* to litigate these charges. Going to trial simply because the government does not like to lose is in the interest of only ego, not justice.

taking advantage of the system at the expense of Dr. Sheikh. Her life has been destroyed for years and the Court cannot allow the injustice to persist. District courts are gatekeepers given discretion to dismiss with prejudice precisely these types of unusual cases that slip through the cracks. The prosecutor's office normally does wonderful work, but we are all human; mistakes happen every now and then. This case was a mistake and even the government lawyers would benefit by moving on to prosecutions that actually merit their valuable time. All three factors compel a dismissal with prejudice.

VI. CONCLUSION

For the foregoing reasons, Dr. Sheikh requests that the Court dismiss the case with prejudice.

Dated: September 17, 2020

Respectfully submitted,

ALMADANI LAW

/s/ Yasin M. Almadani

Yasin M. Almadani, Esq.

Attorney for Defendant

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Exhibit 1

Table D-1
U.S. District Courts–Criminal Defendants Commenced, Terminated, and Pending (Including Transfers)
During the 12-Month Period Ending March 31, 2020

Circuit and District	Not Terminated as of March 31, 2019¹ Total	Felony	Class A Misdemeanor	Petty Offense	Commenced: Total Commenced	Original Proceedings: Total	Felony	Class A Misdemeanor	Petty Offense	Reopens²	Transfers	Terminated: Total Terminated	Original Proceedings: Total	Felony	Class A Misdemeanor	Petty Offense	Reopens²	Transfers	Not Terminated as of March 31, 2020¹ Total	Felony	Class A Misdemeanor	Petty Offense
Total	110,115	95,814	13,572	1,029	93,213	92,828	87,322	5,348	158	222	163	88,730	88,412	82,181	4,944	1,287	170	148	114,174	99,450	13,652	1,072
DC	1,087	1,067	20	-	489	488	479	8	1	-	1	393	392	385	4	3	-	1	1,184	1,118	26	-
1st	4,103	4,091	11	1	2,458	2,437	2,407	21	9	13	8	2,480	2,463	2,423	27	7	12	5	4,074	4,060	11	3
ME	272	269	3	-	243	242	239	0	-	1	-	209	209	208	1	-	-	-	312	304	8	-
MA	997	995	2	-	715	711	709	2	-	3	4	551	545	540	5	-	4	2	994	990	1	-
NH	241	239	2	-	280	278	275	3	-	-	2	252	251	243	8	-	-	1	270	270	-	-
RI	170	170	-	-	140	140	138	2	-	-	-	139	139	137	2	-	-	-	175	175	-	-
PR	2,320	2,300	4	1	1,078	1,066	1,049	8	9	9	-	1,029	1,019	1,001	11	7	8	2	2,316	2,310	2	3
2nd	10,930	10,248	639	43	3,740	3,717	3,600	116	1	11	12	3,663	3,653	3,519	80	54	5	5	11,039	10,359	636	44
CT	809	797	11	-	404	400	402	4	-	1	2	442	442	438	4	-	-	-	770	763	13	-
NY,N	801	717	70	4	440	436	357	79	1	2	2	407	403	353	24	54	1	3	801	717	78	6
NY,E	2,951	2,907	39	5	735	729	721	5	-	8	3	631	631	623	8	-	-	-	3,069	2,997	69	3
NY,S	5,241	4,909	300	30	1,489	1,477	1,409	11	-	1	8	1,405	1,400	1,400	51	-	4	1	6,291	4,903	350	30
NY,W	780	768	62	-	474	470	461	12	-	1	-	401	400	385	16	-	-	1	811	751	60	-
VT	251	249	2	-	180	180	180	0	-	-	-	177	177	172	5	-	-	-	278	274	4	-
3rd	5,809	5,495	220	44	3,173	3,140	2,967	170	3	20	13	2,820	2,795	2,631	158	8	15	10	6,107	5,826	238	43
DE	191	170	20	1	128	127	127	-	-	1	-	140	147	147	-	-	-	2	179	150	28	1
NJ	1,760	933	131	2	1,142	1,120	980	140	1	0	7	1,000	1,003	878	120	1	4	2	1,409	1,270	132	2
PA,E	1,411	1,390	21	7	720	719	710	8	-	1	4	770	761	751	10	-	4	2	1,411	1,387	22	7
PA,M	1,147	1,121	21	5	411	411	400	0	-	3	-	610	611	600	8	-	0	2	1,068	1,050	10	6
PA,W	938	931	3	-	628	625	619	6	-	9	2	403	405	402	4	-	4	2	1,097	1,092	5	-
VI	912	870	13	29	130	130	121	7	2	-	-	114	114	98	8	7	-	-	930	889	13	20
4th	12,915	7,109	5,315	491	7,507	7,409	5,412	1,905	101	26	19	7,811	7,475	5,509	1,536	430	21	15	12,946	6,975	5,379	592
MD	4,520	1,211	3,205	47	1,577	1,574	700	870	-	2	1	1,551	1,349	705	670	130	2	3	4,537	1,196	3,292	47
NC,E	2,970	1,122	1,107	451	1,230	1,224	933	102	89	4	2	1,126	1,125	883	147	115	2	1	2,272	1,223	999	470
NC,M	516	503	9	4	511	512	500	3	1	1	1	329	505	509	0	-	-	-	489	482	2	5
NC,W	613	597	11	5	688	685	680	5	-	2	1	616	609	599	8	2	4	5	681	663	7	4
SC	1,251	1,231	20	7	710	700	701	2	-	5	2	950	947	941	6	-	0	1	1,210	1,108	21	7
VA,E	2,103	1,180	900	40	1,730	1,701	810	883	-	7	-	1,006	1,009	704	870	177	4	3	2,075	1,019	902	44
VA,W	511	437	60	14	351	349	340	2	-	4	3	320	318	317	2	-	-	1	555	408	92	14
WV,N	410	408	1	-	281	279	269	8	1	1	1	313	312	300	8	-	1	-	375	371	3	1
WV,S	360	358	2	-	328	333	321	4	-	-	9	371	370	365	5	-	-	1	313	312	1	-
5th	19,448	18,203	1,161	80	26,454	26,406	25,915	474	17	34	14	25,149	25,114	24,507	470	87	16	15	20,521	19,330	1,098	93
LA,E	441	433	8	-	329	322	315	17	-	4	-	320	321	300	20	-	4	-	431	420	8	-
LA,M	331	276	51	4	183	183	180	0	-	1	-	303	200	172	28	-	1	2	331	298	29	4
LA,W	441	377	61	-	397	391	390	30	-	2	1	401	403	302	40	1	-	1	409	370	62	-
MS,N	231	220	-	1	147	147	143	5	-	-	-	217	215	212	3	-	-	2	159	151	2	1
MS,S	651	535	2	17	503	500	500	3	-	1	-	512	512	510	2	-	-	-	619	499	3	17
TX,N	1,902	1,820	37	5	1,703	1,703	1,680	21	-	1	6	1,633	1,622	1,597	33	2	-	4	2,211	2,104	42	8
TX,E	1,722	1,700	20	1	1,051	1,051	1,041	3	-	-	-	1,059	1,061	1,052	4	-	-	3	1,808	1,025	8	1
TX,S	7,981	7,783	160	30	11,461	11,442	11,337	98	10	0	3	10,901	10,487	10,401	14	2	1	3	9,008	8,701	227	44
TX,W	6,700	4,500	800	92	10,307	10,479	10,103	315	1	10	4	10,645	10,615	10,253	300	32	10	-	6,674	4,800	719	21
6th	8,212	7,528	650	34	6,232	6,221	5,880	339	2	15	16	5,965	5,808	5,600	320	16	11	18	8,507	7,840	661	56
KY,E	795	783	8	4	617	613	607	5	1	3	1	571	581	501	2	1	5	2	808	801	10	5
KY,W	1,025	972	432	11	601	593	312	281	-	2	4	646	665	411	221	10	-	1	908	500	452	12
MI,E	1,139	1,109	20	4	800	839	814	11	-	3	2	941	800	709	20	-	3	5	1,175	1,150	10	4
MI,W	280	270	6	-	378	374	362	12	-	1	1	417	415	402	13	-	-	2	248	237	7	-
OH,N	801	800	3	1	1,102	1,100	1,093	7	-	1	1	983	880	873	6	1	-	3	1,003	1,004	3	1
OH,S	1,141	1,103	25	6	718	710	685	25	-	3	1	743	742	705	30	4	1	-	1,121	1,010	86	8
TN,E	1,013	1,000	10	3	980	981	974	10	-	1	3	837	811	818	13	-	-	0	1,167	1,158	6	3
TN,M	630	535	1	-	361	330	330	1	-	1	-	302	299	297	2	-	2	1	727	590	1	-
TN,W	1,220	1,103	12	6	630	627	614	12	1	-	3	672	672	663	7	-	-	-	1,200	1,230	97	8
7th	4,994	4,923	66	5	3,061	3,030	2,990	40	2	11	12	2,743	2,725	2,651	70	4	9	9	5,313	5,200	46	5
IL,N	2,070	2,033	25	1	709	709	700	9	-	1	7	730	740	717	20	2	1	1	2,157	2,130	17	-
IL,C	417	393	24	-	340	336	316	20	1	-	1	270	274	250	24	-	-	2	470	440	13	1
IL,S	308	301	3	2	331	331	329	2	-	-	-	281	273	270	2	-	-	3	367	362	3	2
IN,N	607	602	5	-	412	410	401	6	-	4	2	424	403	417	8	-	-	1	603	600	4	-
IN,S	608	604	-	2	590	588	587	1	-	3	1	511	540	540	-	-	1	-	688	686	1	2
WI,E	497	492	6	-	378	372	369	3	-	3	1	292	288	284	4	-	2	2	581	574	7	-
WI,W	262	258	4	-	193	190	184	5	1	3	-	179	174	167	5	2	5	-	277	274	3	-
8th	7,208	7,078	113	18	6,269	6,242	6,015	227	-	20	7	5,702	5,770	5,538	224	10	6	16	7,801	7,436	181	16
AR,E	1,075	1,064	10	-	870	857	700	150	-	1	2	869	853	403	91	-	-	2	1,300	1,239	61	-
AR,W	412	383	27	2	332	331	329	0	-	1	-	286	281	282	9	-	1	0	444	422	20	2
IA,N	330	323	1	-	410	409	407	2	-	1	-	420	422	420	2	-	1	3	319	319	-	-
IA,S	440	439	-	1	500	498	550	-	-	1	1	500	500	495	4	1	-	-	602	592	-	-
MN	411	409	6	-	392	391	380	6	-	-	1	420	423	410	13	-	-	-	380	375	5	-
MO,E	1,510	1,479	30	-	1,370	1,348	1,330	18	-	8	-	1,302	1,308	1,291	31	2	2	4	1,467	1,450	9	-
MO,W	1,202	1,201	11	-	820	820	820	0	-	1	3	720	710	700	9	1	-	2	1,411	1,405	8	1
NE	600	693	9	2	568	911	910	21	-	0	-	573	570	548	10	0	1	2	687	933	17	2
ND	410	412	0	1	338	375	371	4	-	1	-	327	327	317	10	-	-	-	470	460	2	1
SD	660	670	8	12	598	500	592	4	-	3	-	607	600	601	52	3	1	-	694	620	6	10
9th	18,059	16,794	1,940	165	18,104	18,043	16,907	1,118	18	40	21	17,321	17,290	15,332	1,268	640	53	23	19,008	17,513	1,928	168
AK	331	306	20	6	199	199	190	9	1	2	-	180	175	180	4	1	3	14	341	314	23	6
AZ	3,039	3,004	27	8	5,770	5,742	5,403	339	-	10	4	5,641	5,720	5,297	440	83	13	-	3,049	3,015	28	8

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	Not Terminated as of March 31, 2019				Commenced							Terminated							Not Terminated as of March 31, 2020			
CA,N	1,317	1,179	118	-	741	746	701	42	-	-	2	627	601	592	31	1	2	1	1,436	1,212	153	-
CA,E	2,493	1,813	620	13	571	564	509	25	-	0	1	688	603	555	26	1	4	1	2,442	1,798	631	13
CA,C	3,678	3,364	240	61	1,685	1,619	1,472	195	2	10	6	1,437	1,417	1,216	193	9	17	3	3,911	3,524	254	85
CA,S	2,791	2,319	441	31	5,833	5,768	5,773	39	14	3	2	5,212	5,199	4,669	94	436	9	4	3,565	3,416	56	31
HI	468	351	108	4	231	231	223	5	-	-	-	224	224	201	23	-	-	-	467	379	104	4
ID	473	441	17	1	413	411	400	7	-	2	-	397	391	380	6	1	-	1	473	451	21	1
MT	450	430	15	2	378	373	371	2	-	1	2	404	402	395	7	-	1	1	430	413	15	2
NV	1,140	1,127	9	4	305	301	289	12	-	4	-	479	470	409	7	-	1	2	1,000	1,000	27	5
OR	738	709	22	6	634	630	611	19	-	1	0	675	671	644	20	1	9	1	804	780	19	5
WA,E	411	400	4	2	378	378	302	20	-	-	-	450	430	410	8	20	-	-	418	402	10	2
WA,W	1,220	607	608	5	660	608	309	308	1	-	1	1,052	602	571	394	87	-	-	1,140	630	500	8
GUAM	67	63	4	-	51	50	47	3	-	1	-	53	53	51	1	1	-	-	67	62	5	-
NMI	35	35	-	-	20	20	19	1	-	-	-	14	14	13	1	-	-	-	41	41	-	-
10th	7,403	5,248	2,118	34	8,209	8,261	7,830	430	1	16	12	7,917	7,927	7,473	403	51	14	6	7,711	5,478	2,198	35
CO	1,101	877	419	5	937	930	905	17	1	1	3	804	801	800	25	-	2	1	1,151	661	497	6
KS	1,309	722	570	4	631	624	603	79	-	7	2	612	603	490	72	37	4	3	1,263	710	553	4
NM	1,744	1,706	38	-	4,781	4,780	4,701	15	-	1	-	4,721	4,720	4,692	17	11	1	-	1,817	1,781	34	-
OK,N	235	224	9	2	343	343	310	5	-	-	-	290	290	235	2	-	-	-	281	203	14	3
OK,E	121	120	1	-	130	118	118	-	-	2	2	106	105	103	2	-	1	-	153	132	-	-
OK,W	1,222	461	761	-	752	720	491	231	-	-	4	830	610	392	208	-	-	-	1,029	509	780	-
UT	939	908	40	1	886	880	857	23	-	4	1	795	700	700	21	3	5	1	931	882	40	1
WY	700	430	248	22	243	242	213	27	-	1	-	191	169	163	24	-	1	1	782	478	282	22
11th	9,121	7,861	1,220	38	7,419	7,367	6,930	434	3	18	36	6,950	6,922	6,529	306	7	9	20	9,580	8,247	1,278	35
AL,N	871	750	11	2	616	609	558	51	-	1	9	614	612	574	30	1	-	1	873	770	93	2
AL,M	448	374	69	1	228	221	200	18	-	0	-	232	220	210	11	1	2	-	427	351	73	1
AL,S	460	455	5	-	334	334	334	-	-	-	-	374	373	373	-	-	-	1	419	410	9	-
FL,N	670	398	270	4	580	574	460	108	-	3	1	493	491	381	110	-	1	1	727	421	302	4
FL,M	1,721	1,701	21	9	1,078	1,064	1,051	12	1	2	3	1,703	1,677	1,660	14	3	-	5	1,528	1,490	29	8
FL,S	1,760	1,742	13	1	2,032	2,000	2,027	9	2	2	13	2,002	1,998	1,982	12	2	2	4	1,780	1,772	10	2
GA,N	1,361	1,330	29	13	740	730	718	12	-	2	8	673	651	537	17	-	2	3	1,372	1,289	73	10
GA,M	760	637	171	2	606	600	477	119	-	3	2	530	417	410	111	-	1	4	806	630	170	2
GA,S	800	594	203	2	591	577	491	80	-	-	1	670	595	502	73	-	-	1	850	614	217	3

NOTE: This table includes defendants in all cases filed as felonies or Class A misdemeanors, but includes only those defendants in cases filed as petty offenses that were assigned to district judges rather than magistrate judges.
[1] Excludes defendants who had been fugitives more than 12 months before the end of the period indicated.
[2] Includes appeals from magistrate judgments, reopens, remands, and reinstatements.

		Total	Felony	Class A Misd.	Petty off.	Total Commenced	Total (org. proceedings)	Felony	Class A	Petty	Reopens	Transfers	Total Term.	Total	Felony	Class A	Petty	Reopen	Tran	Total	Felony	Class A	Petty
CA E	(47)	2493	1813	620	13	571	564	509	25	—	0	1	688	603	555	26	1	4	1	2442	1798	6 1	13
CA C	(13)	3678	3364	240	61	1685	1619	1472	195	2	10	6	1,437	1,417	1,216	193	9	17	3	3911	3524	254	85
CA N	(20)	1317	1179	118	-	741	746	701	42	—	—	2	627	601	592	31	1	2	1	1436	1212	153	-
CA S	(99)	2791	2319	441	31	5833	5768	5775	39	14	3	2	5212	5199	4669	94	436	9	4	3565	3416	56	31

4 not commenced out of 571

85 not terminated

not Terminated

E	2019	2493	↓51
	2020	2442	
C	2019	3678	↑233
	2020	3911	
S	2019	2791	↑774
	2020	3565	
N	2019	1317	↑119
	2020	1436	

F-22

IN RE APPROVAL OF THE JUDICIAL EMERGENCY DECLARED IN THE EASTERN DISTRICT OF CALIFORNIA
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
956 F.3d 1175; 2020 U.S. App. LEXIS 14079

[NO NUMBER IN ORIGINAL]
April 16, 2020, Decided

Judges: {2020 U.S. App. LEXIS 1}Before: THOMAS, Chief Circuit Judge, BYBEE, IKUTA, N. R. SMITH, MURGUIA, and CHRISTEN, Circuit Judges, HAMILTON, MARTINEZ, PHILLIPS, and SEABRIGHT, Chief District Judges, and LEW, Senior District Judge.

Opinion

Opinion by: Sidney R. Thomas

Opinion

{956 F.3d 1177} **ORDER**

On March 17, 2020, Chief District Judge Kimberly J. Mueller declared a judicial emergency in the Eastern District of California pursuant to 18 U.S.C. § 3174(e). Finding no reasonably available remedy, the Judicial Council agreed to continue the judicial emergency for an additional one-year period and suspend the time limits of 18 U.S.C. § 3161(c). The continued judicial emergency will end on May 2, 2021.

The attached *Report of the Judicial Council of the Ninth Circuit Regarding a Judicial Emergency in the Eastern District of California* constitutes the findings of fact and conclusions of law of the Judicial Council justifying a declaration of judicial emergency pursuant to 18 U.S.C. § 3174. This report was submitted to the Director of the Administrative Office of the U.S. Courts. *See* 18 U.S.C. § 3174(d).

Adopted: April 16, 2020

/s/ Sidney R. Thomas

Hon. Sidney R. Thomas, Chair

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
501 I STREET, SUITE 15-220
SACRAMENTO, CA 95814

Chambers of
KIMBERLY J. MUELLER
Chief United States District Judge

(916) 930-4260

Via e-mail

April 8, 2020

Chief Judge Sidney R. Thomas
Judicial Council of the Ninth Circuit
c/o Libby A. Smith, Circuit Executive
United States Courts for the Ninth Circuit
James R. Browning United States Courthouse
95 Seventh Street
San Francisco, California 94103

RE: Eastern District of California's Request for Suspension of Speedy Trial Act Deadlines Given Judicial Emergency Due to Coronavirus Disease-2019 (COVID-19) Pandemic (18 U.S.C. § 3174)

Dear Chief Judge Thomas:

I write on behalf of the Eastern District of California to request that the Judicial Council of the Ninth Circuit grant a suspension of the time limits provided by the Speedy Trial Act, 18 U.S.C. § 3161(c), for a period of time not to exceed one year, as allowed by 18 U.S.C. § 3174(b).[1] This letter serves as my certification that the Eastern District of California is unable to comply with the time limits set forth in section 3161(c) due to our longstanding emergency circumstances reflected in the status of our court calendars and the limited capabilities of our district with our insufficient number of district judges, despite our efficient use of existing resources. The COVID-19 pandemic has exacerbated our pre-existing emergency such that there simply are no other options for alleviating our calendar congestion, despite the many steps we have been taking to manage the current crisis since its onset.

APPENDIX 'H'-1 8pgs

[1] This is a disingenuous statement as Mueller does not express the full intent and scope of §3174 which says in full, "for a period of time not to exceed one year for the trial of cases for which indictments or informations are filed during such one-year period." Therefore, attempting to give the impression that the declaration applies to all matters, which clearly it does not

Because I know you and the Judicial Council are keenly aware of the circumstances created by the COVID-19 pandemic and the responses of governmental and public health organizations, I refrain from a review of relevant prior events. As of today, however, it is clear that the pandemic is currently advancing in the 34 counties making up the Eastern District of California. In Sacramento County alone, the County Public Health Officer reports 580 confirmed cases and 22 deaths so far; yesterday he extended Sacramento's shelter-in-place order to May 1, 2020, with the possibility of further extensions, and further tightened restrictions to severely limit activities outside residential homes. Fresno County has 156 cases with 3 deaths and also has a shelter-in-place order in effect. Kern County has a total of 309 cases and 2 deaths, and has declared a local health emergency based on COVID-19. Earlier today, we have learned two federal detainees housed in the Kern County Sheriff's Lerdo Detention Facilities have tested positive for the virus. Given the rapid progress of the disease within our district in just the last week, and the best public health information available to us, we expect that our numbers will continue to rise throughout this month, with a plateau beginning on or about May 1, representing a best-case scenario.

Crisis Management: General Orders and Other Initiatives

Along with other districts throughout the Ninth Circuit, the Eastern District of California took steps beginning in mid-March in an effort to respond to public health advisories and get ahead of the curve. Specifically, we have taken the following formal actions, which we have reported on our court's web page, www.caed.uscourts.gov, in an effort to keep the public apprised:

1. On March 12, 2020, in my capacity as Chief Judge, I issued General Order 610, placing restrictions on certain visitors to our courthouses depending on their travel history, health condition or exposure to persons who had traveled to countries experiencing coronavirus outbreaks. The order, which has since been superseded by General Order 612, was intended to protect the safety of courthouse staff and visitors, in light of the coronavirus pandemic and the best available public health information available at that time.

2. On March 17, 2020, I issued General Order 611, placing limitations on court proceedings by suspending civil and criminal jury trials through May 1, 2020, and providing judges with the flexibility to hold hearings to the extent possible by telephone and video conference. In this order I made a general finding that time under the Speedy Trial Act was excluded under 18 U.S.C. § 3161(h)(7)(A) to May 1, 2020, given the circumstances created by the pandemic.[1] I issued this order after receiving a request from our Federal Defender that our court immediately suspend in-person court appearances in criminal cases until May 1, 2020. I made clear that grand juries were not suspended, but would be convened at the discretion of the U.S Attorney.

3. On March 18, 2020, in light of the quickly evolving public health landscape, I issued General Order 612 closing all federal courthouses in the Eastern District of California to the public through May 1, 2020. Persons having official court business could still enter a courthouse with a judge's approval. As relevant here, this order provided that criminal matters remained on calendar unless continued by agreement or by a judge with a Speedy Trial Act exclusion of time; to the extent possible under the law those matters maintained on calendar would be heard by telephone or video conference. On March 20, 2020, I provided an interpretation of General Order 612, defining "persons having official court business" and clarifying methods for members of the media to gain access to court proceedings.

4. On March 25, 2020, I joined with all members of our Magistrate Judge bench to issue General Order 613, providing temporary procedures for providing pretrial services reports by email to assigned counsel appearing at a criminal proceeding telephonically or by video.

[1] While this exclusion serves as a gap-filler covering the period during which we were transitioning to teleworking and virtual court proceedings, individual judges continue to make particularized findings to support exclusions of time in the cases over which they preside.

5. On March 30, 2020, following enactment of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), I issued General Order 614 making the findings required by that Act and authorizing the use of videoconferencing, or teleconferencing if videoconferencing is not reasonably available, for the events specified in section 15002(b) of the Act.

6. On April 6, 2020, after several hearings in which we provided audio access to members of the public, we adopted a protocol for public access and posted detailed instructions on our webpage.

7. Regarding grand jury proceedings, I have remained in close consultation with our United States Attorney's Office and have continued to leave any summoning of the grand jury to that office's sound discretion. Our court has signaled we would allow proceedings, if required in Sacramento, to be held in our large ceremonial courtroom in the Robert T. Matsui Courthouse to promote physical distancing, while at the same time expressing our concerns about the ability for proceedings to go forward without jeopardizing public health and safety, including the health and safety of grand jurors, witnesses, counsel and court reporters. To date our court has not needed to consider overriding any decision of the United States Attorney with respect to grand juries.

Copies of our General Orders are attached, for ease of reference.

Behind the scenes, our Clerk of Court and I have continually monitored what other courts are doing, participated in the helpful Circuitwide and nationwide telephone conferences set up to allow information sharing, monitored the messages and orders issuing from the federal government, State of California and multiple County Health Offices, and stayed in touch on a regular basis with our bench, chambers and Clerk's Office staff, as well as our Chief Probation Officer, Chief Pretrial Services Officer, U.S. Marshal and Chief Bankruptcy Judge. We have responded to innumerable email messages from the U.S. Attorney and Federal Defender and other stakeholders as we facilitate efforts to maintain consensus

– it's all commercial – it's all about the money and the continued 'inflow' against so attorney and courthouses continue to get paid at the expense of those caught up in the system and denied those liberty and STA rights – both USCS and Constitutional H-4 in the system

regarding the design and functionality of our virtual court setup, which has taken longer to deploy than anticipated given the decidedly mixed capabilities at the many local jails in which our federal pretrial detainees are housed. We have piloted telephonic court hearings and videoconference proceedings in which all participants appear remotely, and have recruited other members of the bench and the Clerk of Court's staff to expand the bandwidth of our crisis management team. The Clerk's Office IT staff in particular has worked nonstop to transition us not only to virtual court proceedings but to full teleworking for all staff, helping to address hundreds of infrastructural needs for equipment and the achievement of remote network access. Our IT staff also has helped solve many new problems, such as finding an electronic court reporting (ECRO) solution to ensure a good record for remote court hearings when a live court reporter is not available to telephone in.

Planning Group Consultation; Reasons for Request

As required by 18 U.S.C. § 3174(a), I have consulted with those persons identified by the statute as members of a court's Speedy Trial Planning Group to seek their recommendation. All recommend that our court submit this application requesting suspension of the Speedy Trial Act's time limits. One member observed that ideally the suspension could be revoked, or no longer relied upon, if and when the court is able to return to normal functioning. Having considered the entirety of our court's circumstances, in consultation with Planning Group members and our Clerk of Court, I have concluded the suspension is necessary given that no other remedy for our current greater congestion is reasonably available. The primary reasons for my conclusion are summarized below.

The Eastern District of California is operating with severely limited capabilities during the COVID-19 pandemic. Almost all of our judges and members of court staff are working remotely, dispersed across an extremely large geographic area. As noted all of our courthouses are closed to the public. We are holding only those proceedings that are essential in criminal cases, and only very few time sensitive civil hearings between now and May 1, 2020, a date that appears likely to be extended. While we have functioning telephone and videoconferencing capabilities, conducting our trial court hearings in this way can be very challenging

under the best of circumstances, and does not begin to approximate the quality of proceeding for which we regularly strive. In terms of submitted matters that we can resolve on the papers, while we all are set up now to telework and are getting work done, it is difficult to attain the same level of productivity as we do in chambers, given some remaining technological challenges including intermittent internet connections, many employees' ergonomically inadequate home office setups, and the understandable distractions that can arise in a home where others are sheltering in place as well. As we are adjusting to work in new and imperfect physical circumstances, we are beginning to see a rising stream of new motions and petitions seeking immediate release from confinement in light of COVID-19, for which no established law guides the resolution and there often are no easy answers, particularly given the equitable considerations implicated. These new matters require attention now, with submitted motions set aside in the meantime.

Even once we can return to our courthouses, as we all hope to do as soon as we can, we expect then to need time to regroup. We anticipate a significant backlog of trials, given that at least 52 trials districtwide have been continued since mid-March. The first trials will likely not be held until at least two weeks after our doors open again, given that jury administrators will need time to identify jury pools and summon them in. Realistically, our preexisting backlog of motions and old cases will have grown given the wave of new motions occasioned by the pandemic, making it unlikely we will have been able to use enough of our time away from the courthouse to whittle the backlog down in any meaningful way.

No Other Reasonable Remedy Available Against Backdrop of Pre-existing Emergency

As you know, our district has enjoyed the services of visiting judges on occasion over the last several years. While we appreciate the work these judges have performed for us, it has been clear for some time that there is no visiting judge program that can address our longstanding need for judicial resources; what we need is resident judges that own full caseloads. Under the current circumstances, with the accompanying severe restrictions on travel and movement in the community, obtaining visiting resident judges simply is not a reasonable possibility in any respect. Even if a cadre of visiting judges were available to assist us by

working remotely, our existing staff and technological resources are currently overtaxed to the extent we simply cannot support a visiting judge program at this time.

Even apart from the emergency created by the COVID-19 pandemic, our court has been operating with increasingly limited resources for many years now. All of the crisis management tasks summarized above are in addition to the traditional work of our court, which already is burdened by heavy criminal and civil caseloads with too few judges. Our preexisting dearth of judicial resources is heightened by recent transitions: the taking of active senior status by one judge, District Judge Morrison C. England, and inactive senior status by another, District Judge Garland E. Burrell, at the end of last year. My predecessor, Chief District Judge Lawrence J. O'Neill, also has departed the court, taking inactive senior status at the beginning of February 2020. The two judicial openings created in our Fresno Division as a result of these career transitions continue to remain vacant, with no nominations pending. As the Judicial Council well knows, the Eastern District of California's plight is nothing new. The population of our district is approaching 8.5 million and yet we have only 6 active district judgeships, including our two vacancies. Currently, there is only one active District Judge assigned to our Fresno Division and that judge, District Judge Dale A. Drozd, is the only judge hearing criminal cases. Because of the many pleas and sentencings he must handle, Judge Drozd currently holds two full criminal calendars a week, with trials conducted on the other three days of the week, eliminating his ability to hold civil law and motion calendars. Additionally, Judge Drozd alone reviews all Title III wiretap applications and related proceedings, a not insignificant task in light of the high number of complex, gang-related investigations and prosecutions arising in our Fresno Division.

just did bail hearing as a magistrate judge - who appt.d him as District Court Judge?

Even if our two vacancies are filled at some point during this election year, and the particularly severe congestion in our Fresno Division somewhat relieved, we still will qualify for five additional district judgeships, as the Judicial Conference has once again recommended in its most recent report to Congress. A more complete picture of our District's pressing needs, even before anyone had any sense of the disruptions COVID-19 would cause, is painted in our 2021 Biennial Survey of Article III Judgeships Response, attached.

2012 took over as Chief Judge

why no asst. and now using covid to make case.

• what about previous survey? when? 2019? (every two yrs) Review this

H-7

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

IN RE: FINDINGS AND ORDER AS TO COURT PROCEEDINGS IN LIGHT OF COVID-19, ALSO KNOWN AS CORONAVIRUS.	GENERAL ORDER NO. 611 – Good for 30 days from date of issuance or until April 16 or if within 10 days of issuance (March 27) request submission for one year extension

WHEREAS, the President of the United States of America has declared a national emergency in response to COVID-19, also known as "Coronavirus," and encouraged limitations on gatherings of more than 10 persons;

WHEREAS, the Governor of the State of California has declared a public health emergency throughout the State in response to the spread of COVID-19, and strongly encouraged certain segments of the population to remain at home at the current time;

WHEREAS, the Centers for Disease Control and Prevention, California Department of Public Health and other public health authorities have advised the taking of precautions, including limiting gathering sizes and practice social distancing, to reduce the possibility of exposure to the virus and slow the spread of the disease;

WHEREAS local health officials in the Eastern District of California in particular have declared local health emergencies in light of the presence of persons infected with the coronavirus in their jurisdictions, including in Sacramento and Fresno Counties where the court's two main courthouses are located, and the outbreak of COVID-19 in the Eastern District has reached the point where court operations are affected in that many persons at higher risk of serious or fatal

APPENDIX I-1 11 pgs

illness are involved in court proceedings as attorneys, parties or court staff or being asked to serve the court as jurors;

WHEREAS slowing the transmission of the virus in the community is an important part of mitigating the impact of the disease on vulnerable individuals and reducing the immediate burden on the health care system and the community at large, including members of the federal bar and their clients as well as pro se litigants;

WHEREAS the Eastern District court maintains a robust capacity for conducting business remotely, and essential court operations can and will continue unimpeded, but not all of the court's work can be completed at a distance; and

WHEREAS the need for in-court hearings and trials must be balanced against the risk stemming from the associated interpersonal contact; jury proceedings are inadvisable in the current environment to protect public health and ensure that when juries are seated they represent a cross-section of the community and constitute the required jury of one's peers to which criminal defendants in particular are entitled, *see Thiel v. S. Pac. Co.,* 328 U.S. 217, 220 (1946) ("The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community."); *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975) ("[T]he Sixth Amendment affords the defendant in a criminal trial the opportunity to have the jury drawn from venires representative of the community[.]"); and even if a jury that meets these requirements could be seated at this point notwithstanding public officials' urging certain populations to remain home, there is no assurance the jury's deliberations would be unaffected by continuing health and safety concerns and evolving public health mandates and protocols.

Accordingly, with the concurrence of a majority of the District Judges of the court, in order to protect public health, reduce the size of public gatherings and unnecessary travel, and

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I - 2

ensure the ability to deliver fair and impartial justice to all those who come before the court, the court orders as follows:

1. The United States Courthouses in Sacramento, Modesto (with hearings held in Sacramento during ongoing remodeling), Fresno, Bakersfield, Yosemite and Redding will remain open for business, subject to the following limitations.

2. Effective immediately, the court will not call in jurors for service in civil or criminal jury trials until May 1, 2020. All civil and criminal jury trials in the Eastern District of California scheduled to begin during this time period are continued pending further order of the court. The court may issue other orders concerning future continuances as necessary and appropriate.

3. All courtroom proceedings and filing deadlines in a case will remain in place unless otherwise ordered by the Judge presiding over that case.

4. The time period of any continuance entered in a criminal case as a result of this order shall be excluded under the Speedy Trial Act, 18 U.S.C. § 3161(h)(7)(A), as the court finds based on the recitals above that the ends of justice served by taking that action outweigh the interests of the parties and the public in a speedy trial. Absent further order of the court or any individual judge, the period of exclusion shall be from March 17, 2020, to May 1, 2020. The court may extend the period of exclusion in a subsequent order as evolving circumstances warrant.

5. Individual judges may continue to hold hearings, conferences and bench trials in the exercise of their discretion, including by teleconference or videoconference, consistent with this order.

6. Criminal matters before Magistrate Judges, such as initial appearances, arraignments, detention hearings and the issuance of search warrants, shall continue to take place in the ordinary course, subject to the parties' established ability to seek continuances or, as allowed by law, the holding of telephonic or videoconference appearances.

7. The Bankruptcy Court, Clerk's Office, Probation Office, Pretrial Services Office and all other court services shall remain open pending further order of the court, although the method of providing services may be modified to account for COVID-19 and attendant public health advisories.

E-3

8. This order does not affect grand juries, which are convened by the U.S. Attorney and shall continue to meet as scheduled by his office.

9. This order may be modified, expanded or superseded at any time to account for the developing nature of the COVID-19 public health emergency.

IT IS SO ORDERED.

DATED: March 16, 2020.

CHIEF UNITED STATES DISTRICT JUDGE

I-4

one day after 9th Circuit Emergency Judicial Order 956 F.3d 1175 issued April 16, 2020

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

IN RE:	GENERAL ORDER NO. 617
EXTENDING TEMPORARY RESTRICTIONS ON COURTHOUSE ACCESS AND IN COURT HEARINGS	

WHEREAS, the court previously has issued General Orders addressing the national, regional and local public health emergency posed by the coronavirus (COVID-19) outbreak by continuing all trials and closing its courthouses to the public until May 1, 2020;

WHEREAS, since the issuance of the court's prior orders circumstances related to the outbreak have continued to evolve, with state and local public agencies instituting still further enhanced measures to manage the spread of the virus and limit the potential for the illness and death it can cause;

WHEREAS, this week the President of the United States has announced federal guidelines for reopening the economy, while at the same time deferring to governors to determine when states will resume normal operations;

WHEREAS, this week the Governor of California has outlined six steps for reopening public and private sector operations and lifting restrictions in place throughout the state, without providing a definite date by which restrictions will be lifted;

AND WHEREAS, the Judges of the United States District Court for the Eastern District of California, in consultation with the Clerk of Court, continue to closely monitor developments and balance the various interests implicated by the COVID-19 outbreak and the court's response

to the outbreak, including: the health of jurors, witnesses, parties, attorneys, the public whom it is our privilege to serve, Clerk's Office and all court staff, Probation and Pretrial Services staff, chambers staff and judges; the constitutional rights of criminal defendants and other parties; and the public's interest in, and the court's duty to ensure, the effective and expeditious administration of justice;

NOW THEREFORE, in light of the best information available to the Judges of the Eastern District of California at this time, effective immediately through June 1, 2020, I hereby issue the following Order on behalf of the Court to supplement the prior orders issued on March 12, 17, 18 and 30, 2020, with the findings relied on in those orders incorporated in full herein:

1. In light of the current coronavirus (COVID-19) outbreak, all courthouses of the United States District Court for the Eastern District of California shall remain closed to the public. Only persons having official court business as authorized by a Judge of the District Court or the Bankruptcy Court, or a healthy building tenant having official business on behalf of a tenant agency, may enter courthouse property. This order applies to the following divisional locations:

(1) The Robert T. Matsui United States Courthouse, 501 I Street, Sacramento;

(2) The Robert E. Coyle United States Courthouse, 2500 Tulare Street, Fresno;

(3) The Redding Federal Courthouse, 2986 Bechelli Lane, Redding;

(4) The Bakersfield Federal Courthouse, 510 19th Street, Bakersfield;

(5) The Yosemite Federal Courthouse, 9004 Castle Cliff Court, Yosemite; and

(6) The Modesto U.S. Bankruptcy Court, 1200 I Street, Second Floor, Modesto.

2. The court will not call in jurors for service in civil or criminal jury trials until June 15, 2020, at the earliest, if courthouses reopen to the public on June 1, 2020. All civil and criminal jury trials in the Eastern District of California scheduled to begin before June 15, 2020 are further continued pending further order of the court.

3. All of the court's civil matters will be decided on the papers, or if the assigned Judge believes a hearing is necessary, the hearing will be by telephone or videoconference. This applies

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

IN RE:	GENERAL ORDER NO. 618
FURTHER EXTENDING TEMPORARY RESTRICTIONS ON COURTHOUSE ACCESS AND IN COURT HEARINGS **UNTIL FURTHER NOTICE**	

WHEREAS, the court previously has issued General Orders addressing the national, regional and local public health emergency posed by the coronavirus (COVID-19) outbreak by continuing all trials and closing its courthouses to the public until June 1, 2020;

WHEREAS, since issuance of the court's prior orders, the President of the United States has provided guidelines for reopening public institutions, businesses and the economy generally, accompanied by proposed gating criteria for states or regions to satisfy before proceeding to a phased resumption of services and operations;

WHEREAS, the Governor of California has announced that the statewide stay home order he issued on March 19, 2020 remains in effect until further notice, with modifications as of May 8 and 12 effecting a gradual reopening of lower-risk workplaces, with further reopening subject to compliance with defined readiness criteria;

WHEREAS, many of the 34 counties within the Eastern District of California continue to maintain local public health orders supplementing the State of California's stay home order and requiring measures to manage the spread of the virus and limit the potential for the illness and death it can cause;

AND WHEREAS, the Judges of the United States District Court for the Eastern District of California, in consultation with the Clerk of Court, continue to closely monitor developments and balance the various interests implicated by the COVID-19 outbreak and the court's response to the outbreak, including: the health of jurors, witnesses, parties, attorneys, the public whom it is our privilege to serve, Clerk's Office and all court staff, Probation and Pretrial Services staff, chambers staff and judges; the constitutional rights of criminal defendants and other parties; and the public's interest in, and the court's duty to ensure, the effective and expeditious administration of justice;

NOW THEREFORE, in light of the best information available to the Judges of the Eastern District of California at this time, **until further notice**, on behalf of the Court, I hereby issue the following Order superseding the prior General Order issued on April 17, 2020:

1. In light of the ongoing coronavirus (COVID-19) pandemic, all courthouses of the United States District Court for the Eastern District of California shall remain closed to the public. Only persons having official court business as authorized by a Judge of the District Court or the Bankruptcy Court, or a healthy building tenant having official business on behalf of a tenant agency, may enter courthouse property. This order applies to the following divisional locations:

(1) The Robert T. Matsui United States Courthouse, 501 I Street, Sacramento;

(2) The Robert E. Coyle United States Courthouse, 2500 Tulare Street, Fresno;

(3) The Redding Federal Courthouse, 2986 Bechelli Lane, Redding;

(4) The Bakersfield Federal Courthouse, 510 19th Street, Bakersfield;

(5) The Yosemite Federal Courthouse, 9004 Castle Cliff Court, Yosemite; and

(6) The Modesto U.S. Bankruptcy Court, 1200 I Street, Second Floor, Modesto.

2. The court will not call in jurors for service in civil or criminal jury trials **until further notice.**

3. All of the court's civil matters will continue to be decided on the papers, or if the assigned Judge believes a hearing is necessary, the hearing will be by telephone or videoconference. This applies to all matters including motion hearings, case management conferences, pretrial conferences and settlement conferences.

4. In civil matters and bankruptcy matters in which parties represent themselves (pro se litigants), those parties are strongly encouraged to file documents by mail. For those unable to file by mail the court is providing drop boxes for filing inside the entrances to the Sacramento, Fresno and Modesto courthouses, where Clerk's Offices otherwise previously have accepted hand-delivered pro se filings.

5. In the court's criminal matters all initial appearances, arraignments and other essential proceedings will continue to be held before the duty Magistrate Judges, unless the parties agree to continue them; to the full extent possible matters that are maintained on calendar shall be conducted by telephone or video conference as provided by General Order 614, which remains in effect.

6. In criminal cases before the District Judges, the assigned District Judge may exercise his or her authority to continue matters, excluding time under the Speedy Trial Act with reference to the court's prior General Order 611 issued on March 17, 2020, the court's subsequent declaration of a judicial emergency based on 18 U.S.C. § 3174, and the Ninth Circuit Judicial Council's Order of April 16, 2020 continuing this court's judicial emergency for an additional one-year period and suspending the time limits of 18 U.S.C. § 3161(c) until May 2, 2021, with additional findings to support the exclusion in the Judge's discretion; if any criminal matters are maintained on calendar, to the full extent possible they shall be conducted by telephone or video conference, also as provided by General Order 614.

7. Any Judge may order case-by-case exceptions to any of the above numbered provisions at the discretion of that Judge or upon the request of counsel, after consultation with counsel and the Clerk of the Court to the extent such an order will impact court staff and operations.

IT IS SO ORDERED.

DATED: May 13, 2020.

FOR THE COURT:

KIMBERLY J. MUELLER
CHIEF UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF CALIFORNIA

February 26, 2021

Clerk of Court - Molly C. Dwyer
United States Courts for the Ninth Circuit
James R. Browning United States Courthouse and/or William K. Nakamura U.S. Courthou
95 Seventh Street
San Francisco, CA 94103

125 S. Grand Ave.
Pasadena, CA 91105

Dear Clerk of Court - Ms. Dwyer,

Please find enclosed a Writ of Mandamus for submission and review by the 9th Circuit.

Thank you for your kind attention to this requested relief.

Respectfully yours,

for and on behalf of
JAMES CHRISTOPHER CASTLE

APPENDIX J - 1 16pgs

JAMES CHRISTOPHER CASTLE
REGINALD LAMONT THOMAS
c/o 651 I Street, 7E202
SACRAMENTO, CA 95814
in pro se

9th CIRCUIT COURT OF THE
UNITED STATES

JAMES CHRISTOPHER CASTLE and REGINALD LAMONT THOMAS Petitioners V EASTERN DISTRICT OF CALIFORNIA SACRAMENTO DIVISION Defendant	PETITIONER'S WRIT OF MANDAMUS FOR RELIEF OF 956 F. 3d 1175 (2020) and GENERAL ORDERS 611, 617 and 618

In light of the Coronavirus-19 (COVID-19) pandemic and the subsequent reactions by the Eastern District of California - Sacramento Division Court, petitioner's have concluded that General Orders 610-618, but specifically General Orders 611, 617, 618, are expired.

The following Writ of Mandamus asks the defendant to support its application to the Judicial Council of the 9th Circuit.

Furthermore, petitioner's require clarification from defendant and this court how 956 F. 3d 1175 (2020) can be considered valid given

APPENDIX J-2

the application that gave rise to this order was void upon arrival to the Judicial Council of the 9th Circuit.

Petitioners therefore file this Writ of Mandamus to quash General Orders 611, 617 and 618, and ask the Judicial Council of the 9th Circuit - or appropriate entity - to vacate 956 F.3d 1175 (2020) issued April 16, 2020, based upon the facts, authorities and points contained herein and further evidence and argument the Court may permit.

Dated: February , 2021

Respectfully submitted,

for and on behalf of	for and on behalf of
JAMES CHRISTOPHER CASTLE	REGINALD LAMONT THOMAS
Co-Petitioner	Co-Petitioner

TABLE OF AUTHORITIES

CASES

STATUTES

CONGRESSIONAL REPORTS

GENERAL ORDERS

JAMES CHRISTOPHER CASTLE
REGINALD LAMONT THOMAS
% 651 I Street, 7E202
SACRAMENTO, CA 95814
in pro se

9th Circuit Court of the
UNITED STATES

JAMES CHRISTOPHER CASTLE and REGINALD LAMONT THOMAS Petitioners v EASTERN DISTRICT OF CALIFORNIA SACRAMENTO DIVISION Defendant	PETITIONERS WRIT OF MANDAMUS FOR RELIEF OF 956 F.3d 1175 (2020) and GENERAL ORDERS 611, 617, 618 Judge: Hearing Date: Hearing Time:

WRIT OF MANDAMUS

Petitioners submit this Writ of Mandamus under 28 U.S.C. § 1651, as the facts surrounding the claim are indeed, "extraordinary circumstances" (COVID-19 pandemic). Petitioner's claim also satisfies the mandamus requirement as, "appropriate only when the district court has made a clear and indisputable mistake." (Arthur Young and Co. v U.S., 549 F. 2d, 686 (9th Cir 1977) (U.S. v Mehrmanesh, 652 F 2d 766 (9th Cir. 1980))

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Petitioners will show that the Judicial Council of the 9th Circuit's (JC 9th Cir) approval of the Eastern District of California (EDoC) application[2] for Emergency Judicial Order (EJO) on April 16, 2020, (956 F.3d 1175) is a clear mistake of law. Petitioner's contend the application submitted to the JC 9th Cir is in procedural error and the EDoC General Orders (GO) 617[3] and 618,[4] are plain error of law as a result. (EXHIBITS 1-4)

JURISDICTION

Submission to the 9th Circuit is appropriate as it is the review court for EDoC mistakes of "collateral orders" which affect rights that are independent of the merits of the action and too important to be denied prompt review (28 U.S.C. §1291)(Cohen v. Beneficial Industries Loan Corp., 69 S.Ct. 1221 (1959))(Abney v U.S., 97 S.Ct. 2034, 2039-40 (1977)) 956 F.3d 1175 (2020) is such a collateral order and vital to all EDoC trials. Furthermore, in Bauman v District Court, 557 F.2d 655 (9th Cir) as cited in Mehrmanesh, "Bauman guidelines indicate the appropriateness of mandamus relief... For the reasons set forth in section I, supra[1], the petitioner's have no other adequate means of attaining the relief they desire, and they will be further damaged in a way not correctable on appeal from a conviction (Bauman at 654-55) as it is impossible to turn the clock back to regain the liberty and time petitioner's would be denied as each have been denied bail." "The [next] guideline, which suggests that mandamus is appropriate is if the error is oft-repeated (II) is most assuredly appropriate as the EDoC (Sacramento) continues, daily, to suspend time limits for trials under the false authority of the unlawful 956 F.3d 1175 (2020) order.

"A final guideline... for the appropriateness of mandamus is that

"(t)he district court's order [herein the 9th Circuit's order] raises new and important problems, or issues of law of first impression." (Id. citing Bauman at 655) The unique suspension of time-limits for all trials in the Eastern District satisfies all requirements and is a classic example for mandamus.

SHOW CAUSE

1) Petitioner's require defendant SHOW CAUSE why the April 8, 2020, application for EJO is not in plain error according to 18 U.S.C.[5] §3174(e). (EXHIBIT 5)

2) Petitioner's require defendant SHOW CAUSE why GO's 617 (issued April 17, 2020) and 618 (issued May 13, 2020) are not in procedural error and out of accordance with the ambit provided for in 18 U.S.C. §3174(e).

3) Petitioner's require defendant SHOW CAUSE how the court is able to modify an order not yet given (GO 617) and even more perplexing, how the court can modify an order granted by a superior court without utilizing the same permission process (improperly) used by the ED.C for the initial application (GO 618)?

4) Petitioner's require defendant SHOW CAUSE why their April 8, 2020, application for EJO was not intentionally misleading and disingenuous with its motives.

ARGUMENT (regarding each SHOW CAUSE POINT)

1) WHEREAS, said ED.C EJO application exceeded the ambit application time to the Judicial Council of the 9th Circuit of ten(10) days after issuance of their March 17, 2020, GO[6] 611.[2] (EXHIBIT 2)

Congressional intent is clear quoting Justice Scalia in U.S. v Zedner, 126 S. Ct. 1976 (2006), "We have stated time and again that courts must presume that a legislature says what it means and means in a statute what it says there. When the words of a statute are unambiguous, then,

the first canon is also the last: judicial inquiry is complete."

18 U.S.C. §3174 is clear and unambiguous. The resulting conclusion by this court must uphold the Congressional ambit and intent included: The ED.C application to the JC 9th Cir for EJO of April 8, 2020, was dead upon arrival as it failed to adhere to the mandated ten day application requirement and in fact exceeded that time by 130%. (23 days) (EXHIBIT 1)(EXHIBIT 5)

2) GO 617, specifically states that it is issued, "to supplement the prior orders issued on March 12, 17, 18 and 30, 2020, with the findings relied on in those orders incorporated in full herein." (GO 617, p2, lines 8-9) (EXHIBIT 3)

This verbiage clearly reflects the ED.C intent that GO 617 modify the (now submitted, pre-approval) application to the JC 9th Cir. as quoted above and further verified by its issuance date (April 17, 2020) one day after 956 F.3d 1175 (2020) - JC 9th Cir approval of ED.C's application. (EXHIBIT 2)(EXHIBIT 3)

GO 618, similarily is clearly a modification as well stating, "I hereby issue the following order superseding the prior GO issued on April 17, 2020." (GO 618, p2, line 11) (EXHIBIT 4)

Neither GO 617, nor GO 618, went through JC 9th Cir approval. As modifications to what was approved by JC 9th Cir on April 16, 2020, it would be necessary for any changes to also be approved. The ED.C apparently did not feel additional permission necessary and no need arose to comply with 18 U.S.C. §3174(a)(b)(e). This is procedural error. (EXHIBIT 2)(EXHIBIT 5)

3) While point 2) herein makes it clear both GO 617 and GO 618, are

modifications, we must explore the other alternative as well. If the defendant intended GO's 617 and 618 to, in fact, stand alone, they would be tested upon the same requirements as GO's 611-614, each of which was included in the ED.C application for EJO dated April 18, 2020.[3] These requirements, as provided in 18 U.S.C. §3174(e) specifically state that, "[i]f the chief judge of the district court concludes that the need for suspension of the time in such district under this section is of great urgency, he may order the limits suspended for a period not to exceed thirty days. Within ten days of entry of such order, the chief judge shall apply to the judicial council of the circuit for a suspension pursuant to subsection (a)." (emphasis added) [a one-year extention, subsection (b)]

Neither G.O. 617 nor G.O. 618 (for that matter GO's 615 and 616 as well) were included in the application to the JC 9th Cir, nor were either provided their own application for approval as stated above from section (e) of 18 U.S.C. §3174.

The only conclusion to be drawn is that these GO's are either void on their face for procedural error or if they were meant to stand alone (which they clearly were not) they expired thirty days after their issuance, or May 16, 2020, for GO 617 and June 12, 2020, for GO 618. The statute does not discuss or allow for modifications. "The express mention of one thing implies the exclusion of another." (Broom, Max. 607, 651) 18 U.S.C. §3174(e) very clearly states what is necessary to extend a GO beyond its thirty day initial limit; while very clearly excluding the ability to modify. Both GO 617 and GO 618, are void for plain procedural error.

4) Defendant's application, while specifically referring to 18 U.S.C. §3174(b) (p.1, line 4) it does not quote it. It curiously omits the limiting operative verbiage within the section, the implication being the omission was done knowingly, willingly and intentionally with the purpose of evading drawing attention to the actual section language as it contains prohibitive and counter productive wording to their end goal of blanket time limit suspensions of all jury trials in the Eastern District of California via improper "ends of justice" claims behind a veil of an exaggerated crisis in the court due to covid-19 pandemic.

Specifically, the restrictions of a granted suspension of time limits being limited to, "a period of time not to exceed one-year for the trial of cases for which indictments or informations are filed during such one-year period." (emphasis added) (18 U.S.C. §3174(b))

Instead, the E.D.C. application truncates, thereby obfuscating, this section in an effort to apply a blanket suspension of time limits over ALL CASES both civil and criminal in the E.D.C. regardless of when the informations or indictments were filed. The E.D.C. application reads, "... for a period of time not to exceed one-year, as allowed by 18 U.S.C. §3174(b)." (p.1, lines 3-4)[4] (see also EXHIBIT)

This is a clever and clear intentional misrepresentation of the statute in the E.D.C.'s ongoing pursuit of blanket time limit suspension to avoid the inevitable necessity of case dismissals with prejudice and/or mandated bail.[5]

RELIEF

1) Petitioners request relief for all defendants in E.D.C. whose trial time limit has been erroneously suspended under 956 F.3d 1175.

2) Petitioners request relief in the form of dismissal with prejudice according to U.S.C. §3174(b) as both G.O. 611 and G.O. 617 are expired as of April 15, 2020, and May 15, 2020, respectively. This nullified "ends of justice" claims, therefore, restarting speedy trial clocks wherever they appear on the docket in relation to COVID-19 or an Emergency Judicial Order. To simplify each calculation for Petitioners, their clocks have been running since at least December 12, 2020. (over 70 days as required according to 18 U.S.C. §3161(c)(1).

3) Petitioners request this court quash GO's 617 and 618 and render any action taken by the court in accordance with these G.O.'s null and void.

4) Petitioners request 956 F.3d 1175(2020) be rescinded and all trial clocks in the E.D.C restarted as of March 27, 2020, or no later than April 16, 2020.

CONCLUSION

For all these reasons herein, the Petitioners request the court grant the relief listed above.

Dated: February 26, 2021

Respectfully submitted,

for and on behalf of JAMES CHRISTOPHER CASTLE

for and on behalf of REGINALD LAMONT THOMAS

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FOOTNOTES

1 In Mehrmanesh Judge Fletcher's dissenting opinion, she made clear, "Congress addressed delay as a problem in itself: it sought to insure that there would be no nonspeedy trials."

The majority split decision concluded the defendant did not pass the test for either a Sixth amendment speedy trial claim found in Barker v. Wingo, 92 S.Ct. 2182 (1972): (1) length of delay (2) reason for the delay (3) defendant's assertion of speedy trial rights (4) prejudice - and the three forms of prejudice within, or a Speedy Trial Act claim factors: (1) seriousness of the offense; the facts and circumstances which led to the dismissal; (3) impact of a reprosecution on the administration of the STA and justice. U.S. v Lewis, 518 F.3d 1171 (9th Cir 2008)

Therefore affirming the court position that interlocutory appeals based upon speedy trial claims are "not favored". U.S. v Garner, 632 F.2d 758 (9th Cir. 1980)

However, pre trial review in this instance is appropriate as evidenced within this mandamus. Whereas Petitioner's and all E.D.C defendant's pending trial will continue to be harmed should this mandamus not be heard prior to trial. (2:15-cr-00190-MCE has a GO 618 inspired trial date of April 19, 2021)

This mandamus satisfies the test found in Abney: (1) challenged order will complete the claim; (2) decision not be simple, but a step toward final disposition that would be merged in final judgment; (3) right asserted to be lost irreparably if review must wait for final judgment.

2 The judicial bias of "case by case... judges discretion" in GO 618, is

evidenced by the following examples:

- 2:15-cr-00190-MCE, docket 585, dated July 30, 2020 (EXHIBIT 7), shows both a trial date was set for April 19, 2021, which is void for one or each of the following reasons: 1) GO 618 expired thirty (30) days after its May 13, 2020 issuance - June 12, 2020; and/or 2) GO 618 was void ten days after issuance (if considered a modification or superceding document to the G.O.'s at the basis of what is now 956 F 3d 1175 (2020)) as no application to the 9th Cir was made for a one-year extention.

This trial date is vacate as the indictment was made public in 2015, outside the parameters of cases allowed to be regulated under 18 U.S.C. §3174(b): "a period of time not to exceed one-year for the trial of case for which indictments or informations are filed during such one-year period." (emphasis added) 2:15-cr-00190 obviously is beyond this ambit.

Similarily, in contrast, but equally proceedurally repugnant, 2:20-cr-00012-MCE was denied a trial date (at least twice), citing the 956 F. 3d 1175 (2020) order. See docket 33 (EXHIBIT 8)

This matters information/indictment was made public on January 16, 2020, two months before the EJO application and three months prior to 956 F. 3d 1175 - MCE being ordered, making it equally outside the narrow Congressionally mandated parameters of 18 U.S.C. §3174(b).

Yet, in each instance, the court took it upon themselves to make the determination 956 F. 3d 1175, gave them carte blanche authority to do as they please in the face of an unambiguous statute.

3 The requirements for GO's deemed part of, superceding or related to, "the need for suspension of time limits ... [being] of great urgency"

are : 1) upon issuance, the GO is not to exceed thirty (30) days; 2) if desired, the GO may be extended for an additional one-year period. The chief judge, within ten (10) days of GO issuance, must apply for said extention to their circuit judicial council (18 U.S.C. §3174(e)) EDoC failed to make application for either GO 617 or GO 618. Furthermore, 18 U.S.C. §3174 makes no provisions that allow the inferior district court to amend or modify the 9th circuit court orders. This failure rendered both GO 617 and GO 618 expired thirty (30) days after their issue. Therefore, requiring the trial date set on July 30, 2020, in 2:15-cr-00190-MCE (docket 585 - EXHIBIT 7) vacate for proceedural error.

4 See U.S. v Sheikh, 2:18-cr-00119-WBS (E. Dist of CA), docket 145, p. 9-11, specifically section IV, subsections A, B and especially C, in their entirety. Further disposition of this case was dismissed. (EXHIBIT 9

5 see 956 F. 3d 1175 (2020), specifically EDoC's Request for Suspension of Speedy Trial Act Deadlines Given Judicial Emergency Due to Coronavirus Disease-19 (COVID-19) Pandemic (18 U.S.C. §3174) dated April 8, 2020, p. 1. Reference : 1) date submitted ; 2) lines 3-4 ; 3) line 5. 1) date shows a twenty-three (23) day span between GO 611 (EXHIBIT 6) issuance (March 17, 2020) and the April 8, 2020, application for EJO. This is a full 130% beyond U.S.C. §3174(e) ten (10) day application ambit. 2) shows a purposely truncated 18 U.S.C. §3174(b) to obfuscate the clear and unambiguous narrow parameters required of the chief judge to submit said application. The full operative limiting sentence forbids inclusion of indictments or informations prior to the GO

and potential one-year extention.

3) this sentence is verification the EDoC was fully aware of Speedy Trial violations looming in mass and its desire to create a "work around" scenario for tactical advantage. Thus the actual reason for the April 8, 2020, application to the 9th Cir was "general court congestion".

Therefore the EDoC's abuse of "ends of justice" clause in numerous cases is an error of law as this may not be used in scenarios where general court congestion is claimed.

U.S. v Smith, 588 F. Supp. 1403 (D. Haw. 1984)

EXHIBITS

1. Eastern District of California Application for Emergency Judicial Order, p.1 — 1 pg
2. 956 F.3d 1175 (Order approving E. Dist. of CA application of April 8, 2020) — 1 pg
3. General Order 617 (E. Dist of CA, April 16, 2020) — 3pgs
4. General Order 618 (E. Dist. of CA, May 13, 2020) — 4pgs
5. 18 U.S.C. § 3174 (Judicial Emergency and implementation) — 1 pg
6. General Order 611 (E. Dist. of CA, March 17, 2020) — 4pgs
7. Docket 585 - 2:15-cr-00190-MCE (setting trial date) — 1 pg
8. Docket 33 - 2:20-cr-00012-MCE (denying trial date) — 1 pg
9. United States v Shiehk, sec. IV, subsections A, B, C (pgs. 1, 9-11) — 4pgs

= TOTAL 20 pgs of EXHIBITS* =

* These exhibits are not included as all pertinent exhibits are listed as Appendix already.

Holly W. BAUMAN et al., Petitioners, v. UNITED STATES DISTRICT COURT, Respondent, Union Oil Company, Real Party in Interest
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
557 F.2d 650; 1977 U.S. App. LEXIS 12609; 15 Fair Empl. Prac. Cas. (BNA) 279; 14 Empl. Prac. Dec. (CCH) P7700; 23 Fed. R. Serv. 2d (Callaghan) 990
No. 76-2156
July 1, 1977

Editorial Information: Prior History

{1977 U.S. App. LEXIS 1} Petition for Writ of Mandamus from the United States District Court for the Northern District of California, Hon. Samuel Conti, U.S. District Judge.

Disposition:
WRIT DENIED.

Counsel Mary C. Dunlap, Attorney, San Francisco, California, for Petitioners.
U.S. Attorney, San Francisco, California, for Respondents.

Judges: Hufstedler, Goodwin and Wallace, Circuit Judges. Hufstedler, Circuit Judge, specially concurring.

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner class representatives sought a writ of mandamus commanding respondent, United States District Court for the Northern District of California (trial court), to delete from its order conditionally certifying the class provisions which permitted class members to opt out of the action for injunctive relief and required class members to opt in by making individualized allegations of discrimination in order to be represented.Petition for a writ of mandamus was denied, because class representatives failed to show that their right to a writ was clear and indisputable where they could appeal trial court's order and if trial court had erred, its error was anything but clear.

OVERVIEW: The class representatives filed a motion for class certification in their action alleging sex discrimination in real party in interest employer's employment practices. The trial court issued an order which conditionally certified the class. The class representatives sought a writ of mandamus commanding the trial court to delete provisions that permitted class members to opt out of the action for injunctive relief, and required them to opt in by making individualized allegations of discrimination. The court denied the petition, because the class representatives failed to show that their right was clear and indisputable. It reasoned that: (1) the class representatives might be able to appeal the order directly; (2) requiring the class representatives to appeal would not result in irreparable damage; (3) if the trial court's order contained error, given a split in authority on opt-out provisions, it was anything but clear error; (4) there had been no showing of persistent disregard of the federal rules; and (5) even if the court assumed that the opt-out provisions raised new and important problems and issues of first impression, review then would have been unwise and premature.

OUTCOME: The court denied the petition for a writ of mandamus, because the class representatives failed to show that their right was clear and indisputable. The court reasoned that they could appeal the trial court's order directly; requiring appeal would not result in irreparable damage; the trial court's error, if any, was not clear error; there was no showing of persistent disregard of the rules; and review then would have been unwise and premature.

LexisNexis Headnotes

Civil Procedure > Class Actions > Judicial Discretion

Civil Procedure > Class Actions > Prerequisites > Adequacy of Representation

In the conduct of actions to which this rule applies, the court may make appropriate orders requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action. Fed. R. Civ. P. 23(d)(2).

Civil Procedure > Remedies > Writs > General Overview

The remedy of mandamus is a drastic one, to be involved only in extraordinary situations. Only exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy.

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > Remedies > Writs > Common Law Writs > Mandamus

There are five specific guidelines in determining a party's entitlement to mandamus relief: (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires. (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. (3) The district court's order is clearly erroneous as a matter of law. (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules. (5) The district court's order raises new and important problems, or issues of law of first impression.

Civil Procedure > Remedies > Writs > General Overview

The availability of direct appeal weighs strongly against a grant of mandamus.

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > Remedies > Writs > Common Law Writs > Mandamus

A mandamus petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable.

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > Class Actions > Notices

Any injury occasioned by an order of the district court which effectively reduces the size of a certified class may be corrected on appeal after a final judgment and hence is not irreparable.

Civil Procedure > Remedies > Writs > General Overview

Civil Procedure > Class Actions > Appellate Review

The orderly and efficient administration of justice is not promoted by using the extraordinary writs to correct ordinary errors or to serve as an alternative to ordinary appeals. The writ is not to be used as a substitute for appeal even though hardship may result from delay and perhaps unnecessary trial.

Opinion

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Moore, Federal Practice para. 110.28, at 302. In addition, as the Supreme Court twice stated in *Will*, review by mandamus does not "run the gauntlet of reversible errors." *Will v. United States, supra*, 389 U.S. at 98 n.6, 104, 88 S. Ct. at 275.

Although this admonitory language is helpful in framing the boundaries of section 1651 power, it serves at most only as a starting point in the effort to develop a specific framework which can assist when practical application of the generalities is required. Even more helpful in that task are the judicial directions discernible{1977 U.S. App. LEXIS 11} from an analysis of the cases dealing with mandamus. From those cases we have identified five specific guidelines: (1) The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires. *Kerr v. United States District Court, supra*, 426 U.S. at 403, 96 S. Ct. 2119; *Roche v. Evaporated Milk Ass'n.*, 319 U.S. 21, 26, 27-29, 63 S. Ct. 938, 87 L. Ed. 1185 (1943); *Arthur Young & Co. v. United States District Court, supra*, 549 F.2d at 691-692; *American Fid. Fire Ins. Co. v. United States District Court*, 538 F.2d 1371, 1374 (9th Cir. 1976); *Pan American World Airways, Inc. v. United States District Court*, 523 F.2d 1073, 1076 (9th Cir. 1975); *Kerr v. United States District Court, supra*, 511 F.2d at 196; *Belfer v. Pence*, 435 F.2d 121, 123 (9th Cir. 1970). (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. (This guideline is closely related to the first.) *Arthur Young & Co. v. United States District Court, supra*, 549 F.2d at 691-692; *Pan American World Airways, Inc. v. United States District Court, supra*, 523 F.2d at 1076;{1977 U.S. App. LEXIS 12} *Kerr v. United States District Court, supra*, 511 F.2d at 196; *Belfer v. Pence, supra*, 435 F.2d at 123. (3) The district court's order is clearly erroneous as a matter {557 F.2d 655} of law. *Arthur Young & Co. v. United States District Court, supra*, 549 F.2d at 691-692, 692-697; *Hartland v. Alaska Airlines*, 544 F.2d 992 (9th Cir. 1976); *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335 (9th Cir. 1976); *Commercial Lighting Products, Inc. v. United States District Court*, 537 F.2d 1078, 1079 (9th Cir. 1976); *Pan American World Airways, Inc. v. United States District Court, supra*, 523 F.2d at 1076, 1077-81; *McDonnell Douglas Corp. v. United States District Court*, 523 F.2d 1083 (9th Cir. 1975), *cert. denied*, 425 U.S. 911, 96 S. Ct. 1506, 47 L. Ed. 2d 761 (1976); *Kerr v. United States District Court, supra*, 511 F.2d at 196. (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules. *LaBuy v. Howes Leather Co., supra*, 352 U.S. at 255-60, 77 S. Ct. 309;{1977 U.S. App. LEXIS 13} *McDonnell Douglas Corp. v. United States District Court, supra*, 523 F.2d at 1087. (5) The district court's order raises new and important problems, or issues of law of first impression. *Schlagenhauf v. Holder*, 379 U.S. 104, 111, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964); *Pan American World Airways, Inc. v. United States District Court, supra*, 523 F.2d at 1076.

Although these guidelines are helpful, they of course do not always result in bright-line distinctions. First, the guidelines often raise questions of degree: How clear is it that the lower court's order is wrong as a matter of law? How severe will damage to the petitioner be if extraordinary relief is withheld? Second, rarely if ever will a case arise where all the guidelines point in the same direction or even where each guideline is relevant or applicable. The considerations are cumulative and proper disposition will often require a balancing of conflicting indicators. This last point is borne out by a review of four of the most recent Ninth Circuit cases *granting* extraordinary relief.

In *Green v. Occidental Petroleum Corp., supra*, 541 F.2d 1335, the{1977 U.S. App. LEXIS 14} defendant successfully petitioned for mandamus to reverse certification of a class under Rule 23(b)(1). In granting the extraordinary relief, we noted that the class certification decision was not appealable under either 28 U.S.C. § 1291 or § 1292. Further, the district court's decision, as a matter of law, was quite clearly erroneous, and without extraordinary relief the petitioner would have been prejudiced by "erroneous notice and opt-out procedures."

In *Hartland v. Alaska Airlines, supra*, 544 F.2d 992, we issued a writ of mandamus directing the district judge to release to the petitioners money they had previously been required to pay to a Plaintiffs' Discovery Committee fund. The district judge's assumption of jurisdiction over the petitioners was clearly erroneous and amounted to judicial usurpation of power. Regarding the question of finality, and hence appealability, the majority found the issue close and declined to resolve it, but a concurring member of the panel concluded that the petitioners clearly had no avenue of appeal.

In *Pan American World Airways, Inc. v. United States District Court, supra*, 523 F.2d 1073,{1977 U.S. App. LEXIS 15} we prohibited the district judge in an airline crash case from notifying potential

plaintiffs of the pending actions. Direct appeal under section 1291 or section 1292 was not available to petitioners. Also, as we noted, the petitioners would be severely prejudiced in that they could not "be relieved [on appeal] of the burden of actions filed in response to such notice." *Id.* at 1076. Further, we characterized the trial judge's proposed action as "extraordinary" in that it was both novel and not authorized by any rule.

In *McDonnell Douglas Corp. v. United States District Court, supra*, 523 F.2d 1083, we ordered the trial judge in an air crash case to vacate his certification of a class action under Rule 23(b)(1)(A) - (B) and (b)(2). We found the certification decision clearly wrong in light of a prior case. We also stated our awareness "that the district court has reached an *identical* decision in a prior case. . . . Repeated errors of this magnitude in applying the Federal Rules of Civil Procedure may be corrected by mandamus." *Id.* at 1087 (emphasis added, citations omitted).

{557 F.2d 656} In none of these four decisions did{1977 U.S. App. LEXIS 16} we grant mandamus on the basis of only one of the five guidelines listed above. Also, in none did we grant extraordinary relief where most of the guidelines pointed against such relief.

III

After applying the five guidelines discussed above to the facts of the present case, we conclude that extraordinary relief is not warranted here.

1. Does Bauman have other adequate means, such as a direct appeal, to attain the relief she desires

Bauman argues, citing *Price v. Lucky Stores, Inc.*, 501 F.2d 1177 (9th Cir. 1974), that two portions of the district court's order are so onerous and damaging to the class action that the order amounts to a denial of class certification and injunctive relief and that the order is therefore appealable under 28 U.S.C. § 1292(a)(1). The offending portions of the order are those that direct that the class notice contain opt-out provisions and what Bauman characterizes as opt-in provisions. It is contended that because of Union Oil Company's allegedly retaliatory practices, and because of the class members' alleged lack of sophistication regarding and understanding of their rights, class members will either opt{1977 U.S. App. LEXIS 17} out or not opt in, thus providing a basis for decertification on numerosity grounds, with a resulting diminution in the scope of injunctive relief. 6

Because of our construction of the district court's order, *see* part III, 3 *infra*, we do not believe that the order will have the same damaging effect Bauman ascribes to it. But even if we were to accept her argument, this only leads her further{1977 U.S. App. LEXIS 18} away from her desired goal of demonstrating the prerequisites for extraordinary relief. The availability of a direct appeal would weigh strongly against a grant of mandamus. Moreover, even if the grant of an interlocutory appeal from the order is not a foregone conclusion, the possibility remains - for the very reasons Bauman herself sets forth - that a section 1292(a)(1) appeal may be available. That possibility, or uncertainty, regarding appealability militates against issuance of a writ here. The Supreme Court has repeatedly stated that a mandamus petitioner must "satisfy 'the burden of showing that [his] right to issuance of the writ is "clear and indisputable."'" *Kerr v. United States District Court, supra*, 426 U.S. at 403, 96 S. Ct. at 2124 (citations omitted). This means that Bauman has the burden of showing that a section 1292(a)(1) appeal is *not* available. Because there is substantial uncertainty on that point, her right to the writ is anything but "clear and indisputable," and accordingly she has failed to meet her burden. 7

{1977 U.S. App. LEXIS 19} 2. *Does the district court's order damage Bauman in a way not correctable on appeal*

This question requires analysis in two parts. The order of the district court - specifically that portion permitting class members to opt out - may have the effect of reducing the size of the class. Alternatively, if sufficient people opt out, it may have the effect of foreclosing class certification. In either case, we must determine whether the damage to Bauman arising from the order is correctable on appeal.

31} member to state, in response to the class notice, that "while believing she has a claim against this defendant for discrimination on the basis of sex, [she] does not wish to be represented in this class by these plaintiffs. . . ." Because of explicit language in Rule 23, this particular portion of the order stands on surer legal footing than the balance of the order. Rule 23(d)(2) provides in part that the district court "may make appropriate orders . . . requiring . . . that notice be given in such manner as the court may direct to some or all members of . . . *the opportunity of members to signify whether they consider the representation fair and adequate*. . . ." (Emphasis added.) It would seem to be anything but an abuse of power, or a clear legal error, for the district court to do exactly what the federal rules state it may do. This portion of the order is facially unassailable. *See Hoston v. United States Gypsum Co.*, 67 F.R.D. 650, 658 (E.D.La.1975).

We emphasize that our analysis of the district court's order is based on the following construction of that order: (1) Class members are permitted but not required to respond. (2) Nonresponding class members{1977 U.S. App. LEXIS 32} will not be excluded from the class. (3) Nonresponses will not be used to determine that the numerosity requirement has not been met. If the district court has other intentions than these, our analysis might be different and may lead to a finding of clear error. Our construction of the order, however, follows fairly from its language. Also, we believe it wise to adopt any fair reading of a district court order that enables us to avoid wielding the mandamus club.

4. Is the district court's order an oft-repeated error and does it therefore manifest a persistent disregard of the federal rules

Bauman argues that the present order is part of a recurring pattern of similar and erroneous rulings by the same district judge and that therefore this case is within the scope of the principle articulated by the Supreme Court in *LaBuy v. Howes Leather Co., supra*, 352 U.S. at 257-60, 77 S. Ct. 309, and by us in *McDonnell Douglas Corp. v. United States District Court, supra*, 523 F.2d at 1087. As instances of prior similar and erroneous rulings by the district court, Bauman relies on two orders of the same judge that we reversed on appeal *subsequent* to{1977 U.S. App. LEXIS 33} the entry of the present order. *Gay v. Waiters' and Dairy Lunchmen's Union, supra*, 549 F.2d 1330, *rev'g* 10 FEP Cases (BNA) 864 (N.D.Cal.1975); *Roberts v. Golden Gate Disposal Co.*, No. 75-3114, 556 F.2d 588 (9th Cir. 1977).

We believe that the orders in *Gay* and *Roberts*, even though reversed on appeal, cannot be coupled with the present order to bring this case within the scope of *LaBuy* and *McDonnell Douglas*. Neither *LaBuy* nor *McDonnell Douglas* applied the "persistent disregard of the federal rules" concept to a district judge who had not received, prior to making the objectionable order, warning that such was erroneous. In *LaBuy*, the Supreme Court was careful to point out that the Seventh Circuit had warned its district judges against excessive use of reference to special masters for at least 17 years before Judge LaBuy's improper reference. 352 U.S. at 257-58, 77 S. Ct. 309. In *McDonnell Douglas*, we issued a writ of mandamus against a district judge who had certified a class under Rule 23(b)(1) *after* a decision of this court, *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461 {557 F.2d 661} (9th Cir. 1973), {1977 U.S. App. LEXIS 34} that rendered the certification clearly erroneous. 523 F.2d at 1085-87. Since neither we nor the Supreme Court has yet held that an order of the type being reviewed here is erroneous, and since, as noted above, there is a split of authority regarding the propriety of permitting class members to opt-out of Rule 23(b)(2) actions, the "persistent disregard" concept of *LaBuy* is simply not applicable in the present case.

5. Does the district court's order raise issues of first impression and create new and important problems

As noted above, this petition does not raise the issue whether a district judge may use his Rule 23(d)(2) power as an aid in determining satisfaction of Rule 23(a) requirements. Petitioners are objecting only to the way the district court is using that power in this particular case. The controversy here, therefore, is necessarily tied to the peculiar facts of this action and accordingly is of narrow scope. It does not begin to approach the magnitude of the issues raised by the district court's order in *Schlagenhauf v. Holder, supra*, 379 U.S. 104, 85 S. Ct. 234, 13 L. Ed. 2d 152: (1) Does rule 35 of the Federal Rules of Civil{1977 U.S. App. LEXIS 35} Procedure violate the Constitution or the Enabling Act? (2) Does Rule 35 ever permit the mental or physical examination of a defendant? (3) What is the meaning of the terms "in controversy" and "good cause" in Rule 35?

The order does reveal, however, an intention on the part of the district judge to permit class members to opt out of a Rule 23(b)(2) class. While the question whether class members can opt out of a Rule 23(b)(2) action is open in this circuit, and even assuming, without deciding, that this would constitute the type of new and important issue that could be considered in a mandamus proceeding, it should be remembered that the present order reveals only an *intention* to permit opting out. As we noted when reviewing a somewhat similar order in *Catena v. Capitol Industries, Inc., supra*, 543 F.2d 77, the district judge may change his mind and not carry into effect any intention he may presently have to exclude class members. *Id.* at 78. If the opting-out question is deemed sufficiently new and important to warrant mandamus review, that review may more appropriately be of the order actually excluding opting-out members (if such an order{1977 U.S. App. LEXIS 36} is ever made). Such a course would avoid the risk of reviewing unnecessarily and prematurely an issue of first impression. 15 *See Arthur Young & Co. v. United States District Court, supra*, 549 F.2d at 691-692.

IV

Our final task is to review the guidelines as they apply to the facts of this case and to determine in light of the guidelines whether our writ should issue. In doing so, we find that no close analysis is required. We are not faced here with the more difficult task which would arise when some guidelines suggest one conclusion while others suggest the opposite, thereby requiring us to measure and balance. Here all five guidelines, when applied to the facts of this case, point substantially in the same direction. (1) {1977 U.S. App. LEXIS 37} Bauman may be able to appeal the order directly under 28 U.S.C. § 1292(a)(1). Uncertainty on this point hinders, not helps, her position. (2) Requiring Bauman to appeal will not result in irreparable damage. (3) It is not necessary for us to hold that the district court's order, when narrowly but fairly construed, is clearly erroneous. If the order contains error, it lies in the opt-out provisions, but given the split in authority on this issue, the error would be anything but the required clear error. (4) There has been no showing of a "persistent disregard of the federal rules," especially in light of the absence of any prior warnings to the district judge. (5) Finally, even if we were to assume that the opt-out provisions raise "new and important problems" and {557 F.2d 662} "issues of first impression," review of those issues now would be unwise and premature.

Bauman's failure to meet her burden under the guideline analysis, coupled with the Supreme Court's direction requiring restraint in the use of extraordinary relief, clearly dictates our result. Bauman has failed to establish that her right to a writ of mandamus is "clear and indisputable." *Kerr v. United States District Court, supra*, 426 U.S. at 403, 96 S. Ct. 2119.{1977 U.S. App. LEXIS 38}

WRIT DENIED.

Concur

Concur by: HUFSTEDLER

HUFSTEDLER, Circuit Judge, specially concurring:

On the sole ground that petitioners have an alternative remedy to their petition for an extraordinary writ by way of an interlocutory appeal, I concur in the majority's conclusion that mandamus is inappropriate. I cannot join in the rationale of the majority opinion because, in my view, it rests upon a mischaracterization of the order which is before us.

The majority construes Judge Conti's notice order as if it provided that class members who do not respond to the notice will not be excluded from the class and that nonresponses will not be used to decide that Fed.R.Civ.P. 23(a)(1)'s numerosity requirement has not been met. The language of the order itself, together with Judge Conti's own explanation of his order, forbids that generous construction. Silence, or nonresponse, by members of the class means exclusion from the class. The order states, *inter alia*, that ". . . notice should include a provision that the member can opt out, if they so desire to opt out. If they want to stay in, then they should give a short statement of what the discrimination against them has been." Judge Conti{1977 U.S. App. LEXIS 39} admits to this interpretation of his order in his own explanation of the order:

". . . Any class member here who feels that there was even the remotest incident of sex

6

This argument can be clarified by reference to *Price v. Lucky Stores, Inc.*, 501 F.2d 1177 (9th Cir. 1974). There we held that an order refusing to certify a Rule 23(b)(2) class seeking injunctive relief from violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.*, was appealable. We stated that "the order is an appealable one under 28 U.S.C. § 1292(a)(1) because its *effect* is a 'denial of the broad injunctive relief' which the plaintiffs sought on behalf of the class." *Id.* at 1179 (emphasis added).

7

Because of the peculiar elements of a section 1292(a)(1) appeal, *see* note 6 and accompanying text *supra*, Bauman faces a dilemma. Determination that no other means of relief is open to her may also constitute a determination that she is not entitled to the extraordinary relief of mandamus because of the absence of irreparable damage. Likewise with the converse.

8

See note 6 *supra*.

9

Bauman makes a separate attack on that provision of the district court's order threatening to bind (i.e., exclude from relief) class members whose responses indicate a belief that no "discrimination on the basis of sex has been practiced against [them] by this defendant." Bauman argues that this provision is contrary to an important Title VII principle: "There can be no prospective waiver of an employee's rights under Title VII." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51, 94 S. Ct. 1011, 1021, 39 L. Ed. 2d 147 (1974). A careful reading of *Alexander*, however, reveals a different meaning to "prospective waiver" than that suggested by Bauman. The Court meant that an employee could not contractually waive his Title VII rights to be free of employment discrimination in the same way he could, through a collective bargaining agreement, waive his right to strike or to engage in other activities protected by the National Labor Relations Act. Accordingly, under the district court's order in the present case, a class member does not "prospectively waive" her Title VII rights within the meaning of *Alexander*. Rather, she accepts the same consequences faced by all employees who believe that they have no Title VII claim (whether, in fact, they do or not): she is eventually time barred from bringing a claim. 42 U.S.C. § 2000e-5(e).

10

Bauman's attack on the order appears to proceed on the assumption that the notice must *require* members to respond and that inaction will result in exclusion from the class.

11

We make this conclusion here because the district court's order does *not* threaten exclusion for nonresponse.

12

The court in *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011, 95 S. Ct. 2415, 44 L. Ed. 2d 679 (1975), provided the following reasoning for its view that Rule 23 does not permit members of a (b)(2) class to opt out:

Any resultant unfairness to the members of the [Rule 23(b)(2)] class [caused by the bar against opting out] was thought to be outweighed by the purposes behind class actions: eliminating the possibility of repetitious litigation and providing small claimants with a means of obtaining redress for claims too small to justify individual litigation. *Id.* at 249 (footnote omitted). *See also id.* at 252-53.

13

In *Walker*, blacks claiming employment discrimination brought a Title VII class action. The court concluded that the suit was maintainable as a class action under either Rule 23(b)(2) or (b)(3) because both injunctive relief and money damages were sought. The court noted that if the class were certified

under (b)(2), no notice would be *required* by Rule 23(c). Nevertheless, it pointed to its discretionary power under Rule 23(d)(2) and ordered notice of a type similar to that required by the district court in the present case.

These men and women deserve the right to know that a suit is underway, *to choose to withdraw from it if they wish so to do*, or to be represented by counsel of their own choosing. It is, therefore, the opinion of the court that notice, such as that set forth in Rule 23(c)(2), should be required whether this action is viewed as one arising under Rule 23(b)(2) or 23(b)(3).21 Fed.Rules Service 2d at 358 (emphasis added).

14

The reasoning in *Ostapowicz* is similar to that in *Walker*, see note 13 *supra*. The court in *Ostapowicz* stated:

While defendant calls attention to the fact that plaintiff's complaint only sought to maintain a class action pursuant to Rule 23(b)(2) wherein notice is not required, this overlooks the fact that the court has determined that this class action is properly maintainable under both 23(b)(2) and 23(b)(3) as to which latter type of action notice is required under Rule 23(c)(3). Regardless of this the court has discretionary power to require notice under the provisions of Rule 23(d) and in our discretion we do require that such notice be given so that requirements of due process be satisfied and all members of subclasses a [all present female employees], b [all past female employees] and d [all females who have sought and been denied employment because of sex discriminatory practices] be given an opportunity to join *or opt out*. 54 F.R.D. at 466 (emphasis added).

15

By comparison, the order reviewed by mandamus in *Schlagenhauf* was one actually directing a wide-ranging physical and mental examination of the defendant. Thus in that case there was a need for immediate review in order to protect the interests of the defendant.

1

See Gay v. Waiters' and Dairy Lunchmen's Union (9th Cir. 1977) 549 F.2d 1330, 1333 ("We believe that a trial court's discretion to determine whether a Title VII action shall proceed as a class action is limited by the Congressional purpose expressed in the Act. Employment discrimination based on . . . sex . . . is by definition class discrimination. . . . Since the purpose of Title VII is to eliminate such class based discrimination, class actions are favored in Title VII actions for salutary policy reasons. Other circuits have considered the issue of class litigation of Title VII claims and have reached the conclusions that class actions are consistent with the broad remedial purpose of Title VII." (footnote omitted).); *Wetzel v. Liberty Mutual Ins. Co.* (3d Cir. 1975) 508 F.2d 239, 254 ("Suits brought by private employees are the cutting edge of the Title VII sword which Congress has fashioned to fight a major enemy to continuing progress . . . in our nation, discrimination in employment. . . . Class actions . . . are powerful stimuli to enforce Title VII. The imposition of notice and the ensuing costs often discourage such suits. . . . Therefore, we are reluctant to impose notice requirements . . . for Title VII(b)(2) actions unless Rule 23 so requires or unfairness will result to the parties."); *Manual for Complex Litigation*, 1 (Pt. 2) Moore's Federal Practice § 1.45, p. 47.(1976) (". . . The requirement of 'opting-in' must, therefore, under Rule 23 as it is presently written, be regarded as a clear abuse of discretion."); Miller, Problems of Giving Notice in Class Actions (1973) 58 F.R.D. 313, 325; 118 Cong.Rec. 4942 (1972) (remarks of Sen. Williams); Note, the Rule 23(b)(3) Class Action: An Empirical Study (1974) 62 Geo.L.J. 1123, 1149-50 (". . . The opt in procedure was viewed as unfair in requiring uneducated . . . or fearful class members to take affirmative action at an early stage in the litigation. . . . This partial solution would not solve another problem associated with an opt in device, described by an attorney who successfully prosecuted a Title VII action. He pointed out that whenever a class is composed of employees, members are reluctant to take affirmative action early in the suit for fear of reprisals by the employer." (footnotes omitted).)