No.

in the

Supreme Court

of the

United States

Term,

BRUCE FELIX,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

In *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101 (1972), this Court held that a period of delay from indictment to trial, at some point, becomes "presumptively prejudicial" for purposes of triggering a constitutional speedy trial analysis. In *Doggett v. United States*, 505 U.S. 647, 652, 112 S. Ct. 2686, 2691, 120 L. Ed. 2d 520 (1992), the Court cited with approval lower court decisions providing that a delay of one year or more meets the "presumptively prejudicial" threshold. Is the threshold for presumptive prejudice modified by delay not attributable to the United States, or is it a calendar calculation?

In *United States v. Tinklenberg*, 563 U.S. 647, 131 S. Ct. 2007, 179 L. Ed. 2d 1080 (2011), this Court held that filing any pretrial motion tolls the Speedy Trial Act clock, regardless of the nature of the motion, and whether or not the motion causes delay. The question presented in this case is: once a pretrial motion is filed, does a district court have unlimited time to resolve that motion?

RELATED CASES

Pursuant to Supreme Court Rule 14(1)(b)(iii), Petitioner submits the following cases which are directly related to this Petition:

none

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The Petitioner, Bruce Felix, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on March 23, 2021.

OPINION BELOW

The Sixth Circuit's opinion in this matter is unpublished, and is attached hereto as Appendix 1. The district court's opinion is unpublished, and attached as Appendix 2.

JURISDICTION

The Sixth Circuit denied Petitioner's appeal on March 23, 2021. This petition is timely filed. The Court's jurisdiction in invoked pursuant 28 U.S.C. § 1291 and Supreme Court Rule 12.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> 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 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.

18 U.S.C. § 3161 provides in part:

> (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.**
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> ---
>
> (c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense **shall commence within seventy days from the filing date** (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant

consents in writing to be tried before a magistrate judge on a complaint, the trial shall commence within seventy days from the date of such consent.

(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—

(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;

(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.

STATEMENT OF THE CASE

On February 4, 2017, Petitioner Bruce Felix was arrested based on an indictment charging him with two counts of bank robbery (18 U.S.C. § 2113), along with one count of using a firearm in relation to one robbery (18 U.S.C. § 924(c)). Petitioner Felix went to trial 876 days later. The district court held, and the Sixth Circuit affirmed, that an in limine motion filed by the United States on June 16, 2017 (the motions deadline date) tolled the Speedy Trial clock for 738 days – from the time of the filing, until the district court finally ruled on the motion. The Sixth Circuit further held that the Sixth Amendment speedy trial guarantee was not violated: "even assuming the trial delay was presumptively prejudicial under the first factor, none of the other factors render a finding that the delay violated Felix's Sixth Amendment right to a speedy trial." (Appendix 1, p.11)

On February 4, 2015, the Cincinnatus Savings and Loan, an FDIC insured bank in Cincinnati Ohio, was robbed. Employees Marilyn Leesman and Cassandra Brown were opening the door of the bank when a man came out of the bushes, put a black gun to Leesman's head, and said "this is a robbery." Ms. Brown was forced to lie on the floor. The robber asked whether the silent alarm was activated. Leesman took him to the vault, where the robber filled a backpack he had with him. He then zip-tied Leesman and Brown, placed them on the ground, and left. The robber made off with $166,015.

On June 17, 2015, the Cheviot Savings Bank, an FDIC insured bank in Harrison Ohio, was robbed. That morning, maintenance worker Tony Phillips was approached after parking his car by a man with a silver revolver. Phillips opened the door for the robber, but could not open the safe. He was therefore zip-tied and placed on the ground. When fellow worker Carol Upchurch arrived, she was confronted by the robber, who had her take him to the vault. After taking money from the vault, the robber zip tied Upchurch and another worker who had arrived, and placed them on the floor. He then left, taking $75,319.

Investigation led the Government to indict Petitioner Felix on two counts of bank robbery, and one count of using a firearm in furtherance of one robbery. The indictment was filed on January 18, 2017, and Felix was arrested on February 4. On June 16, 2017, Felix filed two motions: a motion to suppress evidence obtained from his sister's home, and a motion to suppress voice identifications made by Phillips, Upchurch and Brown. On that same day, the Government filed an in limine motion seeking to introduce evidence from Petitioner's 1996 bank robbery conviction. Responses and replies to these various motions were filed by July 21, 2017.

On November 13, 2017, the district court held a status hearing, whereby the court set a hearing on one of the defense motions to suppress. That hearing was held over two days: January 13 and 19, 2018. The court set post-trial briefing, which was completed by March 13, 2018.

On June 18, 2018, the Government moved for a status conference. In that pleading, the Government stated: "Approximately two weeks remain on the speedy trial clock. A status conference is therefore necessary to allow the Court and the parties to discuss the speedy trial clock and set the matter for trial." The court did not respond to this motion, or set the matter for a hearing. On July 6, 2018, the defense moved to dismiss under the Speedy Trial Act.

Still the district court did nothing. On August 8, 2018, the Government filed a second status conference request, again asking for a conference to set the matter for trial. Again, the court did not act. On September 20, 2018, Felix requested bond pending resolution of the motions.

The court did nothing in response – the court did not set a hearing, or otherwise issue any order. Finally, on January 30, 2019, Felix moved to dismiss based upon the Sixth Amendment speedy trial right. After a response by the Government, on April 8, 2019, the court set a hearing for April 15, 2019.

The hearing held on April 15, 2019, the Government admitted that when it moved for a status conference on June 18, 2018, 52 days had run on the Speedy Trial clock. Further, the Government admitted that it was not their intention, by moving for a status conference, to further toll the clock; rather, were trying to get the court's attention as to the "waning" speedy trial clock.

On May 8, 2019, the court entered an order denying all speedy trial related motions. (Appendix 2) The district court determined that because the court had

never ruled on the Government's in limine motion, filed on June 16, 2017, the Speedy Trial clock remained tolled since the filing of that motion. The court noted that it would be "illogical for the Court to take a motion in limine under advisement before it is reasonably certain that the case will actually proceed to trial." (Appendix 2, p.11) The court reasoned that it did not know whether it would hold a hearing on the in limine motion until the parties had decided whether they wanted to enter into a plea agreement, or whether one of the speedy trial motions resolved the case. Finally, the court found "even assuming that the Court had no intention of holding a hearing on the Government's motion in limine, the motion is not 'actually under advisement' of the Court until Defendant's motions to suppress are resolved and the parties confirm that trial is imminent." (Appendix 2, p.12) Therefore, because the court had not yet set a hearing, time continued to toll.[1]

The district court also held that Felix's Sixth Amendment speedy trial rights were not violated. The court first determined that, although the time period was over a year, the "length of delay" was not one year, and therefore fell short of the presumptive threshold. (Appendix 2, p.18) The court determined that the delay from February, 2017 through May 16, 2018 was the fault of the defense. The court blamed the rest of the delay on the Government, and no delay on itself. Finally, the

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1 Alternatively, the court determined that the Government's June 18, 2018 motion for status conference tolled the time as well up to and including the date of the court's speedy trial decision.

court found there was no prejudice to Felix, other than pre-trial incarceration. (Appendix 2, p.22)

Felix eventually proceeded to trial on July 1, 2019. The jury deliberated a full three days after the conclusion of evidence, but eventually convicted Felix on all three counts. Felix was sentenced to 300 months, one day incarceration.

On appeal, Felix raised three issues:

1. Felix was convicted of bank robbery in 1996. The facts and method of that robbery were unrelated to the allegations here. Did the district court err in allowing admission of that robbery to prove modus operandi and identification?
2. During its investigation, officers found that Felix had been recorded at a traffic stop, in another state, on another occasion. They used the audio from that recording and played it for victims of the bank robberies, asking them if they recognized the voice as the voice of the robber. Should the district court have suppressed this evidence, as the method used for identification was unreliable and prejudicial?
3. Petitioner Felix proceeded to trial on July 1, 2019, 876 days after his initial appearance before the district court. Did this inordinate delay violate Felix's Sixth Amendment and statutory speedy trial rights?

The Sixth Circuit denied Felix's appeal on March 23, 2021. First, the court agreed with the district court that the June 16, 2017 motion in limine tolled the Speedy Trial clock until the court decided to hold a hearing and rule on the motion two years later. The court determined that the motion was never "under advisement", to re-trigger the clock, as the court's belated decision to hold hearing was all that was needed, regardless of when the court held one. (Appendix 1, p.10)

The court further found that the Sixth Amendment was not violated. Sidestepping the district court's decision on the first *Barker* factor, the court determined that none of the other factors weighed in Petitioner Felix's favor. (Appendix 1, p.11)

REASONS FOR GRANTING THE WRIT

1. **The "presumption of prejudice" that accrues after one year, for purposes of the constitutional right to a speedy trial, is a mere calendar calculation, and is not reduced by "excludable delay"**

In *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 2192, 33 L. Ed. 2d 101 (1972), this Court held that an undue period of delay from indictment to trial is "presumptively prejudicial" to trigger a constitutional speedy trial analysis. In *Doggett v. United States*, 505 U.S. 647, 652, 112 S. Ct. 2686, 2691, 120 L. Ed. 2d 520 (1992), this Court cited with approval lower court decisions providing that a delay of one year or more meets the "presumptively prejudicial" threshold. Here, Petitioner Felix asks this Court to decide whether the one year presumption is a calendar year, or, as found by the lower courts, whether the delay is subject to periods of exclusion in the calculation.

"The right to a speedy trial is enumerated in the Sixth Amendment. The Sixth Amendment guarantees a speedy trial, which requires the entire trial, start to finish, be speedy." *United States v. Gould*, 672 F.3d 930, 936 (10th Cir. 2012). To protect this right, this Court in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972) set forth a four factor test for determining whether a Sixth Amendment violation has occurred: (1) whether a delay is "presumptively prejudicial"; (2) the reason for the delay, (3) the assertion of the right to a speedy trial by the defendant, and (4) prejudice to the defendant. 407 U.S. at 532.

At issue is the calculation of the first factor. "Delays of around a year or longer are presumptively prejudicial." *United States v. Lara*, 970 F.3d 68, 81 (1st Cir. 2020). "[W]here the delay is [ ] substantial [ ], the burden is upon the government to prove that the delay was justified and that appellants' speedy trial rights were not violated." *United States v. New Buffalo Amusement Corp.*, 600 F.2d 368, 377 (2d Cir. 1979).

Virtually every circuit to have addressed this issue has held that the "one year" triggering mechanism is a mere calendar inquiry – the time interval between accusation and trial. See *United States v. Irizarry-Colon*, 848 F.3d 61, 70 (1st Cir. 2017); *United States v. Tigano*, 880 F.3d 602, 612 (2d Cir. 2018); *United States v. Battis*, 589 F.3d 673, 678 (3d Cir. 2009)("delay is measured from the date of arrest or indictment, whichever is earlier, until the start of trial"); *United States v. Lozano*, 962 F.3d 773, 780 (4th Cir. 2020); *United States v. Serna-Villarreal*, 352 F.3d 225, 230 (5th Cir. 2003); *United States v. Saenz*, 623 F.3d 461, 464 (7th Cir. 2010); *United States v. Shepard*, 462 F.3d 847, 863 (8th Cir. 2006)(arraignment to trial); *United States v. Brown*, 828 F. App'x 366, 370 (9th Cir. 2020); *United States v. Toombs*, 574 F.3d 1262, 1274 (10th Cir. 2009); *United States v. Ingram*, 446 F.3d 1332, 1336 (11th Cir. 2006)(counting "the interval between accusation and trial").

Breaking from this universal understanding, the district court held "in calculating the length of the delay, only those periods of delay attributable to the government or the court are relevant to [Defendant's] constitutional claim."

(Appendix 2, p.18). The court further determined "excluding the delay attributable to Defendant, the Court finds that the length of the delay falls short of the one-year threshold and is not otherwise presumptively prejudicial under the circumstances of this case." *Id.*

This finding is contrary to every circuit to address this issue, thus creating a circuit split as to the first *Barker* factor. Further, the error was significant, as the district court ultimately determined that less than one year had elapsed (excluding periods the court believed were created by the defense). It also appears to contradict this Court's decision in *United States v. Loud Hawk.* 474 U.S. 302, 106 S. Ct. 648, 88 L. Ed. 2d 640 (1986). In *Loud Hawk*, this Court decided that time in which an indictment was dismissed should not be included in a speedy trial calculation, as the defendant was not subject to any restraint on liberty. 474 U.S. at 310. The Court held, however, that periods of delay attributable to an interlocutory appeal should be included in the constitutional speedy trial calculation. *Id.* at 316. The Court thus affirmed that a mere time interval, without determining the reason for the delay, was all that was necessary for the first *Barker* factor.

The first *Barker* factor is a threshold inquiry: has the delay been presumptively prejudicial? There is no precedent from this Court which suggests carving out exceptions to the raw calendar calculation, and no other circuit has so suggested. The Sixth Circuit's decision to the contrary (following its precedent to this effect first espoused in *United States v. Howard*, 218 F.3d 556,564 (6th Cir.

2000)) creates a circuit split requiring certiorari review. 894 days occurred between indictment and trial. This Court should find the first *Barker* factor met based upon the calendar calculation.

Petitioner Felix would also note that, even if it were proper to attribute delay to the defense, there is no such proof. Petitioner Felix was originally indicted on January 18, 2017. Pre-trial motions were filed on June 16, 2017. The court set no pre-trial motion for a hearing until January 19, 2018. After the hearings, and post-trial briefings occurred, the case sat dormant for another two months. The United States, concerned about the statutory Speedy Trial time running, filed a "motion for status conference," specifically addressing its concerns about the speedy trial clock. About a month later, the defense moved to dismiss on statutory speedy trial grounds. The district court still did not move. Over six months later, the defense filed another motion to dismiss, this time invoking the Sixth Amendment right to a speedy trial. The district court waited an additional three months to hold a hearing on the speedy trial issue. The matter had been pending without a hearing for 301 days since the United States rang the alarm bell, some 379 days since the last in court proceeding, and 801 days since Petitioner's arrest. The delay was due to the district court's inaction, and did not lie at the feet of the defense.

2. **The Speedy Trial Act (18 U.S.C. § 3161) is violated where the district court does not act with due diligence**

This Court should grant certiorari review to correct the Sixth Circuit's misinterpretation of 18 U.S.C. § 3161(a)'s requirement that the district court bears no responsibility in the administration of a speedy trial once a pretrial motion is filed.

At the motions deadline, June 16, 2017, the United States filed a motion in limine regarding the use of other bad acts pursuant to FRE 404(b). The district court did not hold a hearing on this motion until May 28, 2019, and ruled on the motion on June 24, 2019. In denying Petitioner Felix's speedy trial claim, the district court held that it did not want to rule on the motion (or hold a hearing on it) until he was sure the parties were going to trial, and thus, the motion was never under advisement. The Sixth Circuit affirmed this decision, holding "scheduling and completion of the hearing is all that is required to for § 3161(g)(1)(D) to apply", regardless of when the court decides to hold hearing. (Appendix 1, p.10) Thus, the statutory speedy trial clock tolled for the entire time the in limine motion was pending.

"Congress passed the Speedy Trial Act of 1974, 18 U.S.C. § 3161 et seq., 'to give effect to the sixth amendment right.'" *Betterman v. Montana*, 136 S. Ct. 1609, 1616, 194 L. Ed. 2d 723 (2016). "The Speedy Trial Act of 1974 (Act) generally requires a federal criminal trial to begin within 70 days after a defendant is charged

or makes an initial appearance." *Zedner v. United States*, 547 U.S. 489, 489, 126 S. Ct. 1976, 1978, 164 L. Ed. 2d 749 (2006).

The Speedy Trial statute outlines several periods of time in which the 70 day clock is tolled. This includes "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). In *United States v. Tinklenberg*, 563 U.S. 647, 131 S. Ct. 2007, 179 L. Ed. 2d 1080 (2011), this Court rejected the notion that only motions of "consequence" toll the Speedy Trial clock; rather, the "filing of a pretrial motion [tolls the clock] irrespective of whether it actually causes, or is expected to cause, delay in starting a trial." 563 U.S. at 650. But the holding in *Tinklenberg* does not answer the question raised here: whether, once a pre-trial motion is filed, the Speedy Trial clock is tolled *ad infinitum* without a hearing date being set.

A. The plain language of 18 U.S.C. § 3161 supports the notion that the district court has a duty to promptly bring a matter to trial

The plain language of 18 U.S.C. § 3161 requires a district court to promptly dispose of a pretrial motion, and therefore does not give a court an unlimited period of time to set a hearing to dispose of such a motion. The district court's inaction in response to a mundane in limine motion, which the Sixth Circuit held delayed the trial for over two years, violates the spirit and plain language of the Speedy Trial Act.

"In determining the meaning of a statutory provision, 'we look first to its language, giving the words used their ordinary meaning.'" *Artis v. D.C.*, -- U.S. ---, 138 S. Ct. 594, 603 (2018) (internal citation omitted). "[O]ur inquiry into the meaning of the statute's text ceases when 'the statutory language is unambiguous and the statutory scheme is coherent and consistent.'" *Matal v. Tam*, 137 S. Ct. 1744, 1756, 198 L. Ed. 2d 366 (2017), citing *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002). A court is to start with the assumption that the ordinary meaning of the statutory language expresses Congress' intent. *Marx v. General Revenue Corp.*, – U.S.–, 133 S. Ct. 1166, 1173 (2013).

18 U.S.C. § 3161(a) requires a district court to, "at the earliest practicable time . . . . 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." The unambiguous, plain language places an affirmative duty on a district court to set the matter for trial at the "earliest practicable time." This is a function that can only be performed by a district court, as litigants cannot set the court's schedule. Further, "the court and the government owe an 'affirmative obligation' to criminal defendants and to the public to bring matters to trial promptly." *United States v. Black*, 918 F.3d 243, 253 (2d Cir. 2019). "The duty to comply with the Speedy Trial Act lies with the courts, not with defense counsel." *United States v. Williams*, 197 F.3d 1091, 1095 (11th Cir. 1999). "[T]he primary burden is placed on the courts and prosecutors to assure that cases are brought to

trial; the defendant has no duty to bring himself to trial." *United States v. Latimer*, 511 F.2d 498, 501 (10th Cir. 1975). The language of the Act, requiring a district court to set the matter for trial at the earliest practicable time, requires the prompt disposition of pretrial motions.

Yet another phrase in the statute also supports this position. 18 U.S.C. § 3161(h)(1)(D) states that the period of 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" shall be excluded from the Speedy Trial clock. The term "prompt disposition" places a burden on a district court to act with deliberate intentionality in either setting a hearing or placing under advisement a pretrial motion. This Court begins with the presumption that "each word Congress uses is there for a reason." *Advoc. Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659, 198 L. Ed. 2d 96 (2017). Congress intended, with this phrasing, for a district court to act with deliberate speed in resolving any pretrial motions. The Sixth Circuit's decision, that once a pretrial motion is filed there is no duty of prompt disposition by a district court, in effect writes out these words from the statute. Petitioner Felix submits that the plain language of the Speedy Trial act places an affirmative duty on a district court to timely resolve pretrial motions, and thus the district court's decision as to the Speedy Trial clock, and the Sixth Circuit's affirmance, must be vacated.

B. Congress intended, in promulgating the Speedy Trial Act, for the district court to enforce speedy trials, not be a participant in delay

To the extent there lies any ambiguity in the above statutory phrases, Congressional intent clarifies that filing a pretrial motion was never intended to suspend the Speedy Trial clock *ad infinitum*.

Where Congressional intent is not clear from the plain language of a statute, this Court has historically reviewed the legislative history for guidance. See, for example, *United States v. Goodyear Tire & Rubber Co.*, 493 U.S. 132, 140, 110 S. Ct. 462, 468, 107 L. Ed. 2d 449 (1989). As the Court noted in *Haynes v. United States*, 390 U.S. 85, 93, 88 S. Ct. 722, 728, 19 L. Ed. 2d 923 (1968), a review of legislative history can be of assistance in interpreting Congressional intent as to criminal statutes. This Court has cited with approval the use of the legislative history from the Speedy Trial Act to support its interpretation of other portions of the Act. *United States v. Rojas-Contreras*, 474 U.S. 231, 236, 106 S. Ct. 555, 558, 88 L. Ed. 2d 537 (1985).

Beginning with the 1974 Act itself, Congress noted "[t]he Congress, in imposing specific time limits on the period between indictment and trial, has made a legislative decision that defendants are entitled under the Constitution to a trial within 70 days of indictment and that the courts are capable of providing trials within that period of time." 1974 U.S.C.C.A.N. 7401, 7436, 93 H.R. Rep 93-1508. Congress specifically, in creating the exclusion for the disposition of motions, intended the Act to "effectively plug up one of the loopholes which I conceive to now exist whereby a district judge were he prone to do so, could well 'sit on a matter' for

an indefinite period of time and thus rather effectively defeat the purposes of the bill." 1974 U.S.C.C.A.N. at 7425-26.

Congress intended to avoid the exact problem presented by this case – a district court sitting on a motion to defeat the Constitutional Speedy Trial promise. This Court should give effect to Congressional intent, and determine that a district court has responsibility for the prompt administration of justice. As the Ninth Circuit has recognized, "[a]n indefinite 'continuance' of a motion for which no hearing is scheduled is tantamount to an indefinite advisement period." *United States v. Sutter*, 340 F.3d 1022, 1031 (9th Cir. 2003).

Although in *Henderson v. United States*, 476 U.S. 321, 106 S. Ct. 1871, 90 L. Ed. 2d 299 (1986), this Court found nothing in the subsequent legislative history to support a finding that Congress intended a limit on the time between filing a pretrial motion and a hearing ("[t]he provisions of the Act are designed to exclude all time that is consumed in placing the trial court in a position to dispose of a motion," citing S.Rep. No. 96–212), nonetheless, the Court in *Henderson* recognized that "Congress clearly envisioned that any limitations should be imposed by circuit or district court rules rather than by the statute itself." 476 U.S. at 328. Here, some 35 plus years after *Henderson*, and with no circuit or district court rule in place, this Court can make such a rule. A defendant should not have his case hijacked for two years on filing a simple in limine motion. This could not have been the intent of Congress in originally promulgating the Speedy Trial Act. Finally, "post-enactment

legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *United States v. Woods*, 571 U.S. 31, 48, 134 S. Ct. 557, 568, 187 L. Ed. 2d 472 (2013).

In sum, Congress's intent in creating the Speedy Trial Act was to give effect to the Sixth Amendment right to a speedy trial. The reading of § 3161(h)(1)(D) espoused by the Sixth Circuit is directly contrary to Congress's intent in promulgating the Speedy Trial Act.

"[T]he right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment. That right has its roots at the very foundation of our English law heritage." *Klopfer v. State of North Carolina*, 386 U.S. 213, 223, 87 S. Ct. 988, 993, 18 L. Ed. 2d 1 (1967). This Court must put teeth to these sentiments, and hold that the district court's actions require dismissal of the indictment.

CONCLUSION

Felix requests this Court grant certiorari, reverse the Sixth Circuit's decision, and vacate the convictions.

Respectfully submitted,

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APPENDIX

1. COURT OF APPEALS ORDER March 23, 2021
2. DISTRICT COURT ORDER May 8, 2019

NOT RECOMMENDED FOR PUBLICATION
File Name: 21a0150n.06

No. 20-3201

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 23, 2021
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO
	)	
BRUCE LEE FELIX,	)	
	)	
Defendant-Appellant.	)	
	)	

BEFORE: BATCHELDER, GRIFFIN, and BUSH, Circuit Judges.

GRIFFIN, Circuit Judge.

Defendant Bruce Felix robbed two metro-Cincinnati banks within four months in 2015. He raises three discrete issues in this appeal arising out of his multiple convictions in connection with those robberies: (1) the admission into evidence of a prior bank-robbery conviction; (2) the method used to secure witnesses' voice identifications of Felix; and (3) the delay in his trial under the Speedy Trial Act and the Sixth Amendment. We affirm.

I.

This criminal appeal stems from two bank robberies in the western-Cincinnati suburbs, the Cincinnatus Savings & Loan in Colerain, Ohio, and the Cheviot Savings Bank in Harrison, Ohio. The robberies were remarkably similar. Both occurred as the banks were opening on a Wednesday morning around 8:00 am. Both involved a masked and gloved man brandishing a gun who forced

his way inside. And in both instances, the man required the employees to disable the alarm and then restrained them with pre-set zip-ties. The robber netted over $240,000 from the banks' vaults.

Following receipt of a letter penned by Tara Love, law enforcement officials focused on Felix as a suspect. Love was his girlfriend at the time of the robberies and provided authorities with significant information linking him to both. She explained to the police that she and Felix were struggling financially and were without gainful employment before the robberies. According to Love, on the morning of the Cincinnatus robbery, Felix "came running in the house and woke [her] up and showed [her] the bag of money that he had stole," and described how he robbed the bank (including his use of a plastic gun to force his way inside and black zip-ties to neutralize employees). Felix then gave her $15,000, and "packed a bag and went to Tennessee." Felix made several large cash purchases for lavish items after the Cincinnatus robbery, including a Corvette, a Cadillac Escalade, a trailer, a vacation to Myrtle Beach, South Carolina, and a diamond engagement ring. On the morning of the Cheviot robbery, Felix "told [Love] that he had robbed a Cheviot Savings and Loan," and again described his methods (including his use of a silver gun and white zip-ties). Felix again gave her cash and left. Love matched his clothing the day of the Cheviot robbery (a blue jean jacket, a camouflaged hat, and a face mask) and the car he used (Escalade) to what bank employees identified. Love also permitted law enforcement officials to search her residence, where they discovered gloves, black zip-ties, a mask, and a receipt from the Taco Bell located eighty yards from the Cheviot bank dated two weeks before that robbery.

This information led officials to secure a voice recording of Felix from an unrelated traffic stop, which they then presented to bank employees to see if they recognized his voice as the robber's. Some, but not all, employees identified in varying degrees Felix's voice. Law enforcement officials also found at another residence more physical evidence linking Felix to the

robberies—pre-zipped white zip-ties, another pair of gloves, and a facial mask. And they obtained records establishing that within days after the robberies, Love and Felix became current on bills and Felix made significant cash buys at local casinos. Finally, officials discovered that Felix had a previous conviction for armed bank robbery.

Based on this and other evidence, a jury convicted defendant on one count of bank robbery (for the Cincinnatus bank), one count of armed bank robbery (for the Cheviot bank), and one count of using or carrying a firearm during a crime of violence (for the Cheviot bank). The district court sentenced him to serve a total of three hundred months and one day in prison. He timely appeals.

II.

Felix's first claim of appeal deals with a 1996 robbery of another metropolitan-Cincinnati bank (a Huntington Bank in Florence, Kentucky), also on a Wednesday around 8:00 am. With his face covered (this time with a bandana), Felix pointed a gun, forced his way inside, tied up employees, and ultimately netted over three-hundred thousand dollars from the bank's vault. After the robbery, Felix traveled to Las Vegas to gamble. But unlike the instant offenses, that robbery involved two accomplices; one was an employee (at whom Felix pointed his gun) who told Felix that the bank was going to get its cash delivery on the Wednesday morning, and the other (the employee's boyfriend) also entered the bank with him. Felix ultimately pleaded guilty to armed bank robbery and possessing a firearm during a crime of violence and was sentenced to 123 months in prison.

The district court permitted the introduction of this evidence under Federal Rule of Evidence 404(b)(2), which allows the admission of "other crimes, wrongs or acts" for the purpose of "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident," among others. In a comprehensive written opinion, the district court

concluded that Rule 404(b)(2) permitted admission of the prior robbery to show both identity and modus operandi given the 1996 robbery's "sufficient distinct and standard commonalities" with Felix's charged conduct. For the reasons that briefly follow, we agree.

We have adopted a three-step test in reviewing a district court's admission of Rule 404(b) evidence. *See United States v. Mandoka*, 869 F.3d 448, 456–57 (6th Cir. 2017). First, "we review for clear error whether there is a sufficient factual basis for the occurrence of the 'bad act' that is being proffered as evidence (and challenged pursuant to 404(b))." *Id.* at 456 (citation omitted). No one disputes this step, for Felix admitted to (and was convicted of) committing the 1996 robbery.

Second, we examine whether the government proffered the evidence for an admissible purpose. *Id.* Although our review is de novo, *id.*, we find persuasive the district court's thorough reasoning that the 1996 robbery is admissible to show identity and modus operandi, and we adopt it as our own. In brief, the similarities among the three robberies—early Wednesday morning, use of a weapon to force his way into the vault, use of a facial covering, and binding of bank employees—"in combination, present an unusual and distinctive pattern constituting a 'signature'" sufficient for purposes of admission under Rule 404(b). *United States v. Mack*, 258 F.3d 548, 554 (6th Cir. 2001). And although some aspects of the 1996 robbery were distinct (namely, Felix wore different attire, used different binding methods, and had "inside" help), we never require "the crimes be identical in every detail" for admission under Rule 404(b). *United States v. Perry*, 438 F.3d 642, 648 (6th Cir. 2006) (citation omitted).[1]

[1]The main difference between the 1996 robbery and the 2015 robberies was Felix's decision in 2015 to forgo the use of accomplices. But as the district court observed, that decision appears as a refinement of method rather than an abandonment of core technique, given that his arrest in 1996 was the direct result of his accomplices' cooperation with law enforcement.

Third and last, "we review for an abuse of discretion whether the probative value of the proffered evidence is substantially outweighed by any undue prejudice that will result from its admittance." *Mandoka*, 869 F.3d at 456–57 (citation omitted). The district court found this step to also be in the government's favor, focusing on its highly probative nature and the limited evidentiary alternatives available to the government to prove identity. And the district court gave an appropriate limiting instruction with respect to the 1996 robbery. *See United States v. Allen*, 619 F.3d 518, 525 (6th Cir. 2010). On this record, we cannot say the objected-to evidence was "substantially more prejudicial than probative," *United States v. Jackson*, 918 F.3d 467, 483 (6th Cir. 2019), and therefore find no error, let alone an abuse of discretion.

III.

Felix next takes issue with how an investigator obtained pretrial voice identifications from some of the bank employees (and the subsequent introduction of those identifications at trial).

Lieutenant Steven Mathews of the Harrison Police Department obtained a recording of a traffic stop involving Felix and then asked the witnesses in August 2015—two months after the June Cheviot robbery and six months following the February Cincinnatus robbery—whether they could positively identify the recorded voice. Before playing the recording for each witness (and while covering up the video screen), Lt. Mathews read each the following statement:

> You will be asked to listen to the audio portion of a DVD. You will not be shown the video. The fact that the audio is being played for you should not influence your judgment. You should not conclude or guess that the audio contains the voice of any person who committed a crime involving you. You are not obligated to identify anyone. It is just as important to free innocent persons from suspicion as to identify guilty parties. Please do not discuss the case with other witnesses, nor indicate in any way that you have identified someone.

Matthews did not play any other audio for the witnesses. The results varied. One witness told Mathews he "was a hundred percent positive" it was the robber's voice. Two others pegged it at

seventy-five percent, and one of these two "got teary-eyed as the audio was being played. She thought it was the person who robbed the bank," but equivocated because "it was so long ago." The three remaining witnesses could not make a positive identification.

Felix contends the district court clearly erred when it denied his motion to suppress these identifications. *See United States v. Beverly*, 369 F.3d 516, 538 (6th Cir. 2004). A defendant seeking to exclude identification testimony must show that that the process was "both suggestive and unnecessary" so as to give rise to a "substantial likelihood of misidentification." *Perry v. New Hampshire*, 565 U.S. 228, 238–39 (2012) (citation omitted). If a defendant makes that showing, a court must then consider the totality of the circumstances surrounding the identification to evaluate its reliability. *United States v. Sullivan*, 431 F.3d 976, 985 (6th Cir. 2005).

In denying Felix's motion to suppress, the district court found unpersuasive Felix's contention that the process's single-recording nature rendered it impermissibly suggestive. This is because, in the district court's view, the results speak for themselves—only one witness was certain Felix was the robber, and the remaining five either harbored doubts or could not identify Felix at all. The district court also concluded that Lt. Mathews "took appropriate steps to minimize suggestiveness" by giving them the admonition and not otherwise influencing or tainting the process. Finally, the court rejected Felix's argument that because it used audio from a traffic stop, the process suggested Felix "had prior contact with law enforcement for breaking the law" given the circumstances of the traffic stop—the conversation's tone was respectful (and at one point the officer noted his sympathy after hearing Felix was returning from a funeral) and Felix did not receive a citation from the stop. Upon review of the record and Felix's one-paragraph repetition of the arguments he advanced below without critique of the district court's well-reasoned analysis, we discern no clear error in this conclusion. And even though this conclusion means we need not

consider defendant's remaining arguments concerning the recording's alleged unnecessary nature or unreliability, *see, e.g.*, *United States v. Washington*, 714 F.3d 962, 968 (6th Cir. 2013), we agree with the government that both the district court did not clearly err in rejecting those arguments and the overwhelming evidence of Felix's guilt would render any such error harmless, *see, e.g.*, *United States v. Kilpatrick*, 798 F.3d 365, 378–79 (6th Cir. 2015).

IV.

The last issue on appeal is whether the district court erred in concluding neither the Speedy Trial Act nor the Sixth Amendment merited dismissal of Felix's indictment despite there being close to two-and-one-half years between his indictment in January 2017 and trial in July 2019.

A.

We now set forth in more detail the facts and procedural history about this timespan. A grand jury indicted defendant on his three charges on January 18, 2017. Following his initial appearance (February 6, 2017), arraignment and detention hearing (February 9, 2017), and a preliminary pretrial conference (February 10, 2017), Felix moved for, and was granted, two continuances to prepare for discovery and trial. In granting these requests, the district court determined that the time running from March 3, 2017 to June 16, 2017 was excluded for Speedy Trial Act purposes under 18 U.S.C. § 3161(h)(7)(A), (B)(iv). A total of twenty days elapsed on the Speedy Trial Act clock before those dates.

Enter June 16, 2017. This date is important for two reasons. First, defendant filed two separate motions to suppress, one regarding the pretrial voice identifications discussed above, and the other evidence gathered from his sister's house. Second, this is also when the government filed its notice and motion to admit Felix's prior conviction for bank robbery discussed above. Briefing on these motions concluded July 21, 2017.

The case did not advance further until November, when the district court set a January 19, 2018 evidentiary hearing regarding the evidence collected at the home of Felix's sister. Following that hearing, the parties submitted supplemental briefing (and defendant even requested and received briefing extensions) which was finally completed on March 13, 2018. In the meantime, the district court similarly held an evidentiary hearing on the pretrial voice identifications on March 1, 2018, and post-hearing briefs were complete (again with defendant requesting an extension) on March 16, 2018.

Nothing happened from that point until June 18, 2018, when the government filed a motion for a status conference "to allow the Court and the parties to discuss the speedy trial clock and set the matter for trial." Two weeks later and without a response from the district court, Felix moved on July 6, 2018 to dismiss the indictment under the Speedy Trial Act. The government responded by again requesting a status conference for the reasons stated above.

Still, the district court did not act on the government's request. So on January 30, 2019, Felix filed another motion to dismiss, this time under the Sixth Amendment. Briefing on that motion finished on February 26, 2019. On April 8, 2019, the district court set an April 15, 2019 hearing on the motions to dismiss. And on May 14, 2019, it set a May 28, 2019 hearing on the government's 404(b) motion. The district court then resolved the pending motions by June 24, 2019. Following other motions and findings not relevant to this appeal, Felix's trial began July 1, 2019.

B.

We turn first to whether the district court erred in denying Felix's motion to dismiss under the Speedy Trial Act. The Act provides that a trial "shall commence within seventy days" after the public filing of an indictment or initial appearance (whichever comes later), 18 U.S.C.

§ 3161(c)(1), but includes a number of exclusions from this seventy-day period. The district court concluded that the government's June 16, 2017 in limine motion to admit evidence of the prior bank robbery under Federal Rule of Evidence 404(b) tolled the clock at twenty days under § 3161(g)(D), and thus denied defendant's motion.[2] Upon review of the district court's factual findings for clear error and its interpretation of the Act de novo, *see United States v. Stewart*, 729 F.3d 517, 523 (6th Cir. 2013), we agree.

Section 3161(h)(1)(D) provides that any "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" is automatically excluded from consideration. The Supreme Court has interpreted this language to mean that "when a pretrial motion requires a hearing, [it] on its face excludes the entire period between the filing of the motion and the conclusion of the hearing." *Henderson v. United States*, 476 U.S. 321, 329 (1986). Upon completion of the hearing (as well as receipt of supplemental filings related to the heard motion), the Act then requires "prompt disposition" of the motion that is now considered "actually under advisement." *Id.* at 329, 331. But even then, § 3161(h)(1)(H) excludes up to thirty days from that date. *See also United States v. Mentz*, 840 F.2d 315, 326–27 (6th Cir. 1988) (discussing interplay between (h)(1)(D) and (h)(1)(H), as well as those motions not requiring a hearing). Finally, "the filing of a pretrial motion falls within [§ 3161(h)(1)(D)'s exclusion] irrespective of whether it actually causes, or is expected to cause, delay in starting a trial." *United States v. Tinklenberg*, 563 U.S. 647, 650 (2011).

There is no disputing that the government's June 16, 2017 Rule 404(b) motion tolled the Speedy Trial Act clock. Defendant contends it was at most a motion falling under

[2]It also held in the alternative that the government's June 18, 2018 motion tolled the clock at fifty-two days. We need not address this holding.

§ 3161(h)(1)(H)'s thirty-day, "actually under advisement" provision. This is because, he argues, neither party requested a hearing, and the court did not state it was going to hold a hearing upon briefing completion. We disagree.

Section § 3161(h)(1)(D)'s plain language, as interpreted by the Supreme Court in *Henderson*, belies this argument. Here the district court concluded the government's motion "require[d] a hearing," *Henderson*, 476 U.S. at 329, and held one on May 28, 2019. That the district court did not contemporaneously indicate its intent to hold a hearing following the completion of briefing is of no moment—the scheduling and completion of the hearing is all that is required to for § 3161(g)(1)(D) to apply. *Id.* And we refuse to conclude, as defendant implies, that the district court held the hearing in retrospect to cure a Speedy Trial Act issue. We take the district court at its word that it "always schedules motions *in limine* for hearing and fully intended to do so in this case." And following the hearing, it resolved the motion within thirty days (and thus § 3161(h)(1)(H)'s exclusion applied to *that* delay), entering an order granting the government's motion on June 24, 2019. By this point and as set forth above, only twenty days had run. With Felix's trial beginning on July 1, 2019, the district court properly concluded Felix did not establish a violation of the Speedy Trial Act.

C.

That leaves us with Felix's related Sixth Amendment claim. The Sixth Amendment guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]" U.S. Const. amend. VI. In *Barker v. Wingo*, the Supreme Court established four factors for evaluating a speedy-trial claim under the Sixth Amendment: (1) whether the delay was uncommonly long; (2) the reason for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) whether prejudice to the defendant resulted. 407 U.S. 514, 530 (1972). "No

one factor is dispositive. Rather, they are related factors that must be considered together with any other relevant circumstances." *United States v. Sutton*, 862 F.3d 547, 559 (6th Cir. 2017). In determining whether a defendant's Sixth Amendment right to a speedy trial has been violated, we review questions of law de novo and questions of fact for clear error. *United States v. Young*, 657 F.3d 408, 413–14 (6th Cir. 2011). We agree with the district court that even assuming the trial delay was presumptively prejudicial under the first factor, none of the other factors render a finding that the delay violated Felix's Sixth Amendment right to a speedy trial.

"The second *Barker* factor looks at whether the government or the criminal defendant is more to blame for the delay." *United States v. Zabawa*, 719 F.3d 555, 563 (6th Cir. 2013) (internal quotation marks and brackets omitted). "Governmental delays motivated by bad faith, harassment, or attempts to seek a tactical advantage weigh heavily against the government, while neutral reasons such as negligence are weighted less heavily, and valid reasons for a delay weigh in favor of the government." *United States v. Robinson*, 455 F.3d 602, 607 (6th Cir. 2006). Thus, "different weights should be assigned to different reasons[,]" *Barker*, 407 U.S. at 531, and a district court's conclusions regarding these inquiries are entitled to "considerable deference." *United States v. Brown*, 169 F.3d 344, 349 (6th Cir. 1999) (citing *Doggett v. United States*, 505 U.S. 647, 652 (1992)). In finding this factor to be neutral at best, the district court found significant delay attributable to defendant (due to his requests for additional time and his own pretrial motions) and just a "small fraction" attributable to the government. Felix acknowledges his actions contributed to the delay (and finds no fault with the government's conduct here) but contends the district court unnecessarily delayed resolving what he characterizes as uncomplicated pretrial motions. The district court viewed the motions, and their resolution, differently, noting its difficulty in working through the evidence submitted and its decision to defer the resolution of the suppression motions

pending resolution of defendant's speedy-trial motions. On this record, we see no reason to upset the district court's weighing of this factor.

The third *Barker* factor considers "[w]hether and how a defendant asserts his right" to a speedy trial, and "is closely related to the other factors." 407 U.S. at 531. That is, "[t]he strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences." *Id.* As the district court concluded, this factor is again neutral. On the one hand, Felix asserted his Sixth Amendment rights below, but on the other, he did so two years after indictment and after seeking several continuances and extensions of time.

The fourth and final *Barker* factor "requires the defendant to show that substantial prejudice has resulted from the delay." *Zabawa*, 719 F.3d at 563 (citation omitted). We assess prejudice "in the light of the interests of defendants which the speedy trial right was designed to protect . . . : (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Barker*, 407 U.S. at 532. The last is "most serious . . . because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id*. The only prejudice advanced by Felix here is his pretrial incarceration. But "when the government prosecutes a case with reasonable diligence"—as is the case here—"a defendant who cannot demonstrate how his defense was prejudiced with *specificity* will not make out a speedy trial claim no matter how great the ensuing delay." *Young*, 657 F.3d at 418 (brackets and citation omitted). Because the government prosecuted Felix with reasonable diligence and justified the reasons for his delayed trial, Felix has not demonstrated either a presumption of prejudice or oppressive pretrial incarceration sufficient to weigh this factor in his favor. *United States v. Williams*, 753 F.3d 626, 634 (6th Cir. 2014).

In sum, we agree with the district court that upon consideration of the *Barker* factors and the totality of the circumstances, Felix sustained no speedy trial deprivation in violation of the Sixth Amendment.

V.

For these reasons, we affirm the district court's judgment.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA,	:	Case No. 1:17-cr-009
	:	
vs.	:	Judge Timothy S. Black
	:	
BRUCE LEE FELIX,	:	
	:	
Defendant.	:	

ORDER:
(1) DENYING MOTION TO DISMISS UNDER THE SPEEDY TRIAL ACT;
(2) DENYING MOTION FOR BOND; AND
(3) DENYING MOTION TO DISMISS UNDER THE SIXTH AMENDMENT

This criminal case is before the Court on Defendant's motion to dismiss under the Speedy Trial Act (Doc. 33), motion for bond (Doc. 35), motion to dismiss under the Sixth Amendment (Doc. 39), and the parties' responsive memoranda (Docs. 36, 38, 40, 41).

I. BACKGROUND

On January 18, 2017, Defendant Bruce Lee Felix was charged in a three-count indictment with: bank robbery, in violation of 18 U.S.C. § 2113(a) (Count 1); armed bank robbery, in violation of 18 U.S.C. § 2113(a), (d) (Count 2); and using, carrying, and brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A) (Count 3). (Doc. 1).

As charged, Counts 1 and 2 carry terms of imprisonment up to twenty and twenty-five years, respectively. 18 U.S.C. § 2113(a), (d). Additionally, Count 3 carries a mandatory minimum of seven years imprisonment up to life, which term is required to run consecutive to any other term of imprisonment. 18 U.S.C. § 924(c)(1)(A).

Defendant's initial appearance was held on February 6, 2017. (Doc. 6). At that time, the Government moved for Defendant's detention pending trial and, accordingly, the case was scheduled for a detention hearing. (*Id*.)

Defendant's detention hearing and arraignment were held on February 9, 2017, at which time Defendant was ordered detained pending trial. (Docs. 10, 12). The following day, on February 10, 2017, this Court held Defendant's preliminary pretrial conference and established a trial calendar. (Doc. 13). Excluding the day of the initial appearance, the period of time from the Government's motion for detention until the detention hearing, the day of the detention hearing and arraignment, and the day of the preliminary pretrial conference, the first day on the speedy trial clock ran on February 11, 2017. *See* 18 U.S.C. § 3161(c)(1), (h)(1), (h)(1)(D).

On March 3, 2017, the Court held a status conference by telephone, during which Defendant made an oral motion to continue the previously established trial setting and waive speedy trial time. (Min. Entry & Not. Order, Mar. 3, 2017). In moving for a continuance, defense counsel specifically cited the need for additional time to adequately prepare, given the voluminous discovery and the anticipated supplemental discovery. (*Id*.) The Court granted the requested continuance and made an ends-of-justice finding, tolling time until the new trial date of June 12, 2017. (*Id*.)

On May 1, 2017, the Court held another status conference, during which the Court was advised that Defendant required another continuance and a further extension until June 16, 2017 to file pretrial motions. (Min. Entry & Not. Order, May 2, 2017). The Court again granted the requested continuance and made an ends-of-justice finding,

tolling time until the new motion deadline of June 16, 2017. (*Id.*) Given Defendant's need for additional time and his intent to file pretrial motions, the Court also vacated the June 12, 2017 trial date. (*Id.*)

On June 16, 2017, Defendant filed a motion to suppress pretrial identifications (Doc. 15) and a motion to suppress evidence (Doc. 16). Additionally, the Government filed a motion to admit Rule 404(b) evidence. (Doc. 17). The motions were preliminarily briefed, after which Defendant's two motions were set for hearing.[1]

The hearing on Defendant's motion to suppress evidence (Doc. 16) was held on January 19, 2018 (Min. Entry & Not. Order, Jan. 19, 2018).[2] After the transcript was made available (Doc. 23), and after the Court granted Defendant's two requests for extensions of time (Not. Orders, Feb. 13, 2018 & Mar. 5, 2018), the Court received post-hearing briefs on the motion to suppress evidence (Docs. 24, 26, 27).

On March 1, 2018, the Court held a hearing on Defendant's motion to suppress pretrial voice identifications (Doc. 15). (Min. Entry, Mar. 1, 2018). Again, after the transcript was made available (Doc. 28), and after the Court granted another request from Defendant for an extension of time (Not. Orders, Apr. 12, 2018), the Court received post-

[1] The Court received responses in opposition to all motions, *i.e.*, two responses from the Government (Docs. 19, 20) in opposition to Defendant's two motions to suppress, and one response from Defendant (Doc. 21) in opposition to the Government's Rule 404(b) motion. Thereafter, the Court received only one reply (Doc. 22), filed by Defendant in support of the motion to suppress evidence.

[2] The Court was originally scheduled to hear both of Defendant's motions on January 19, 2018, but subsequently granted the Government's unopposed request to bifurcate the hearings, which request was prompted by the unavailability of a witness.

hearing briefs on Defendant's motion to suppress pretrial voice identifications (Docs. 29, 30, 31). The final post-hearing brief was filed on April 16, 2018. (Doc. 31).

On June 18, 2018, the Government filed a motion requesting a status conference, *i.e.*, quite literally, a motion requiring a hearing. (Doc. 32). In that motion, the Government asserted that "[a]pproximately two weeks remain on the speedy trial clock." (*Id*. at 1). Accordingly, the Government requested a conference in order "to discuss the speedy trial clock and set the matter for trial." (*Id*.) The Court, however, believed the Government's speedy trial computation to be in error and thus intended to set the case for a hearing "to discuss the speedy trial clock…," and, if appropriate, establish a trial calendar, just as the Government had requested. Accordingly, the time from the filing of the Government's motion through the date of the anticipated hearing was tolled pursuant to 18 U.S.C. § 3161(h)(1)(D). The Court also considered the appropriate timing of such a hearing and planned to hold the hearing in conjunction with the resolution of Defendant's motions to suppress. From the Court's perspective, waiting to confer with the parties and establish a trial setting was by far the more efficient and logical approach. Thus, any delay in the Court setting a hearing to address the Government's motion for status conference did not merely *outweigh* the interests in a speedy trial, but in fact best served those interests.

However, on July 6, 2017, before the Court had an opportunity to schedule a hearing, Defendant filed a motion to dismiss under the Speedy Trial Act. (Doc. 33). The Court elected to await full briefing on the motion before setting a hearing, which hearing would not only address Defendant's motion to dismiss (Doc. 33), but may also serve to,

at least partially, address the Government's motion for a status conference (Doc. 32). Based on the Court's standard briefing schedule, the Government's response to Defendant's motion to dismiss was due by July 27, 2018, *i.e.*, twenty-one days after Defendant's motion.[3] Although this Court had every reason to believe the Government would prepare a response in opposition to the motion, no such response was filed.[4] Regardless, the Court still intended to set the matter for hearing, given that, from the Court's perspective, the parties' speedy trial computation appeared to be in error.

Before the Court scheduled the hearing, however, on August 8, 2018, the Government filed another motion for a status conference. (Doc. 34). In this second motion, the Government stated that the conference was necessary "to discuss the speedy trial clock and set the matter for trial." (*Id.*) (emphasis added). The Government's contention that the matter should be set for trial was somewhat odd, given the Government's failure to respond to the motion to dismiss. Adding to the perplexity, the Court also received an email from defense counsel on August 8, 2018, stating that

[3] Pursuant to this Court's Criminal Procedures Standing Order, "[a]ll motions shall be briefed according to S.D. Ohio Civ. R. 7.2(a)(2)," which allows twenty-one days for a response in opposition and fourteen days for a reply. Criminal Procedures Form, Judge Timothy S. Black Standing Orders, available at: http://www.ohsd.uscourts.gov/FPBlack.

[4] Despite the fact that the Government did not file a response, Defendant's motion to dismiss nonetheless tolled time from July 6, 2018 until at least July 27, 2018. As an initial matter, the hearing on the motion to dismiss had not yet occurred and, therefore, time was tolled regardless. 18 U.S.C. § 3161(h)(1)(D). Moreover, the Court did not have before it the filings it reasonably expected to receive, nor did the Court have any indication that no filings were forthcoming. Thus, even if the Court had no intention of holding a hearing, the motion was not ripe for decision and could not have been "actually under advisement." *See* 18 U.S.C. § 3161(h)(1)(H); *Henderson v. United States*, 476 U.S. 321, 329-30 (1986) (the Court "has a motion 'under advisement' … from the time the court receives all the papers it reasonably expects").

defense counsel had discussed the matter with the Government and wondered whether a status conference might be an appropriate next step. In short, Defendant now appeared to join in the Government's request to be heard. All of this only further solidified the Court's need to set the case for hearing. Thus, time was tolled, from the date of the motions—*i.e.*, the Government's first motion for status conference (June 18, 2018), Defendant's motion to dismiss (July 6, 2018), and the Government's second motion for status conference (August 8, 2018)—through the date of the hearing.

Before a hearing was scheduled, on September 20, 2018, Defendant filed a motion for bond. (Doc. 35). The Court once again, in an effort to consolidate any necessary hearings on pending motions, awaited full briefing of the motion before proceeding to select a hearing date.

On October 1, 2018, the Court received the Government's response in opposition to the motion for bond. (Doc. 36). In its response, the Government expressed more firmly the position that the speedy trial clock had not yet run. (*Id*.) In other words, the response to the motion for bond also responded, in part, to the motion to dismiss. Defendant filed his reply on October 18, 2018, after requesting and receiving an extension of time. (Doc. 38). On October 25, 2018 and November 1, 2018, the Court received emails from the Government (with copy to defense counsel), asking that the matter be set for a formal conference with the Court within the next few weeks.

On January 30, 2019, Defendant filed a motion to dismiss under the Sixth Amendment. (Doc. 39). On February 12, 2019, the Government filed its response in opposition (Doc. 41) and Defendant filed a reply on February 26, 2019 (Doc. 41).

On April 15, 2019, the Court held a hearing on Defendant's motion to dismiss under the Speedy Trial Act (Doc. 33), motion for bond (Doc. 35), and motion to dismiss under the Sixth Amendment (Doc. 39). Accordingly, Defendant's motions are now ripe for decision.

II. STANDARD OF REVIEW

A. Dismissal for Speedy Trial Act Violations

The Speedy Trial Act provides that, subject to certain periods of exclusion, the trial of a defendant who has pleaded not guilty to a charge in an information or indictment "shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant … [appears before] the court in which such charge is pending, whichever date last occurs." 18 U.S.C. § 3161(c)(1), (h).

In the event that "a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant." 18 U.S.C. § 3162(a)(2). Defendant carries the burden of proof as to the motion. *Id*.

"[I]f a meritorious and timely motion to dismiss is filed, the district court must dismiss the charges, though it may choose whether to dismiss with or without prejudice." *Zedner v. United States*, 547 U.S. 489, 499 (2006). In determining whether to dismiss 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 reprosecution on the administration of [the Speedy Trial Act] and on the administration of justice." 18 U.S.C. § 3162(a)(2).

B. Dismissal for Sixth Amendment Speedy Trial Violation

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial …." U.S. Const. amend. VI.

To determine whether a defendant has been denied his Sixth Amendment right to a speedy trial, the Court must consider four factors: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertions of his right; and (4) prejudice to the defendant. *United States v. Young*, 657 F.3d 408, 414 (6th Cir. 2011) (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). In contrast to the remedies available for violation of the Speedy Trial Act, "the proper remedy for a violation of a defendant's constitutional speedy-trial rights is dismissal of the indictment with prejudice." *Id.* at 413.

III. ANALYSIS

Defendant seeks dismissal of the Indictment with prejudice, arguing that the delay since commencement of this case has violated the Speedy Trial Act and has further deprived him of his Sixth Amendment right to a speedy trial. (Docs. 33, 39). Defendant also moves separately for bond. (Doc. 35).

During the April 15, 2019 motion hearing, the Government made clear its position that the Speedy Trial Act had not been violated and that, in fact, eighteen days remain on the calendar. (Doc. 42 at 11). The Government explained that its June 18, 2018 motion for a status conference (Doc. 32) was filed in order to seek specific action from the Court (*i.e.*, establish a calendar in light of what the Government perceived to be a waning

speedy trial clock) and was not a veiled attempt to subvert the Speedy Trial Act. (Doc. 42 at 8-9). However, the Government further argued that, its own intentions aside, the motion for a status conference was nevertheless a pretrial motion that serves to toll time by operation of law. (*Id*.) Finally, the Government argued that the time elapsing from Defendant's motion to dismiss under the Speedy Trial Act, as well as the motions for bond and dismissal under the Sixth Amendment, also tolled time from the dates of filing through the April 15, 2019 hearing. (*Id*. at 10-11).

In response, Defendant argues that the Government's June 18, 2018 motion for a status conference must be interpreted in only one of two ways: (1) as a motion for a continuance; or (2) as a notice to the Court. (*Id*. at 14). However, Defendant asserts that the motion cannot actually be construed as a motion for a continuance, given that the Government made no such request nor indicated any need for additional time. (*Id*. at 15-16). Therefore, of the two options, Defendant argues that the Court should construe the Government's motion as merely a notice of the waning speedy trial clock, rather than a motion "legitimately seeking some sort of relief from the Court." (*Id*. at 15). Accordingly, Defendant asserts that the motion cannot serve to toll time. (*Id*. at 16).

As stated more fully below, the Court finds no violation of the Speedy Trial Act and, therefore, neither dismissal nor bond are warranted. Moreover, the Court finds that there has been no violation of Defendant's Sixth Amendment right to a speedy trial.

A. The Speedy Trial Act

The Speedy Trial Act requires that trial commence within seventy-days of either the filing of the indictment or a defendant's initial appearance, whichever occurs later.

18 U.S.C. § 3161(c)(1). However, the Act excludes certain periods of time from that seventy-day computation. 18 U.S.C. § 3161(h).

> Some of these delays are excludable only if the district court makes certain findings enumerated in the statute[, pursuant to 18 U.S.C.] § 3161(h)(7). Other delays are automatically excludable, *i.e.,* they may be excluded without district court findings. … [S]ubsection (h)(1) requires the automatic exclusion of 'any period of delay resulting from other proceedings concerning the defendant, including but not limited to' periods of delay resulting from [(h)(1)'s] eight enumerated subcategories of proceedings.

Bloate v. United States, 559 U.S. 196, 203 (2010).

Relevant here, 18 U.S.C. § 3161(h)(1)(D) provides for the automatic exclusion of "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…." Notably, "the phrase 'or other prompt disposition' … does not imply that only 'reasonably necessary' delays may be excluded between the time of filing of a motion and the conclusion of the hearing thereon." *Henderson v. United States*, 476 U.S. 321, 329-30 (1986). Further, "the filing of a pretrial motion falls within [(h)(1)'s automatic exclusion] provision irrespective of whether it actually causes, or is expected to cause, delay in starting a trial." *United States v. Tinklenberg*, 563 U.S. 647, 650 (2011).

Also relevant is 18 U.S.C. § 3161(h)(1)(H), which provides for the automatic exclusion of "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." The Court "has a motion 'under advisement' … from the time the court receives all the papers it reasonably expects[.]" *Henderson*, 476 U.S. at 329.

1. The Government's Rule 404(b) Motion Remains Pending

Here, the Court finds that the speedy trial clock has been tolled since **June 16, 2017**, as the Government's motion *in limine* to admit Rule 404(b) evidence (Doc. 17) remains pending and is neither ripe for consideration yet, nor has a hearing occurred. Based on this computation, only **twenty days** have run against the clock.

First, the Court notes Defendant's contention that the Government's motion *in limine* does not require a hearing. (Doc. 33 at 4). The Court, however, rejects the notion that the parties determine what motions the Court hears. Whether a hearing is helpful or necessary is a matter for the Court to decide, not the parties. And, indeed, this Court always schedules motions *in limine* for hearing and fully intended to do so in this case.

Moreover, a motion *in limine* is a pre-trial motion seeking a the Court's ruling on the admissibility of evidence, which ruling "[t]he parties may then consider … when formulating their trial strategy." *United States v. Luce*, 713 F.2d 1236, 1239 (6th Cir. 1983). In other words, a motion *in limine* is a pre-trial motion that anticipates actually proceeding to trial.

It is, therefore, illogical for the Court to take a motion *in limine* under advisement before it is reasonably certain that the case will actually proceed to trial. This is particularly true when the Court also has pending before it two unresolved motions to suppress, either of which could significantly alter the course of the proceedings. For instance, should the Court grant either of the motions to suppress, the Government may determine that it lacks sufficient evidence to proceed to trial or, at the very least, that the risk of going to trial with a weaker case warrants conceding to a favorable plea deal.

Conversely, if the Court denies the motions to suppress, Defendant may conclude that the risk of going to trial is too great and that accepting a plea is the safer option. Under either scenario, a ruling on the motion *in limine* would never be necessary. Requiring the Court to take the motion under advisement prematurely serves only to impose upon the Court's already severely limited time and resources. Such a burden, in and of itself, undermines the purpose of the Speedy Trial Act. *See Tinklenberg*, 563 U.S. at 657.[5]

Accordingly, even assuming that the Court had no intention of holding a hearing on the Government's motion *in limine*, the motion is not "actually under advisement" of the Court until Defendant's motions to suppress are resolved and the parties confirm that trial is imminent. 18 U.S.C. § 3161(h)(1)(H) (emphasis added).

However, in this case, the Court fully intended (and still intends, at the appropriate time) to hold a hearing on the Government's motion *in limine* and, accordingly, time continues to toll pursuant to 18 U.S.C. § 3161(h)(1)(D).

[5] In *Tinklenberg*, the Supreme Court held that 18 U.S.C. § 3161(h)(1)(D)'s automatic exclusion applies to any pretrial motions, irrespective of whether the motion caused or was expected to cause actual delay of the trial. 563 U.S. at 650. The Supreme Court explained that its holding was consistent with virtually all lower courts and that the interpretation by "the lower courts about the meaning of a statute of great practical administrative importance in the daily working lives of busy trial judges is itself entitled to strong consideration[.]" *Id*. at 657. Moreover, the Supreme Court rejected the 'actual delay' approach, noting that such an "interpretation would make the subparagraph (D) exclusion significantly more difficult to administer. And in doing so, it would significantly hinder the Speedy Trial Act's efforts to secure fair and efficient criminal trial proceedings." *Id*. (citing H.R.Rep. No. 93–1508, p. 15 (1974) ("the Act seeks to achieve 'efficiency in the processing of cases which is commensurate with due process'").

2. The Government's June 18, 2018 Motion Tolled Time

Even absent the Government's motion *in limine*, the Court finds that there are still **eighteen days** remaining on the speedy trial clock, as time tolled on June 18, 2018, when the Government filed its motion for a status conference.

As previously stated, *supra*, the first day to actually run against the speedy trial clock was February 11, 2017, and time then continued to run until March 2, 2017. In total, **twenty days** ran against the speedy trial clock during this time, *i.e.*, February 11, 2017 to March 2, 2017.

Thereafter, the Court's March 3 and May 1, 2017 ends-of-justice findings tolled time until the motion filing deadline of June 16, 2017. 18 U.S.C. § 3161(h)(7)(A), (B)(iv). As of June 16, 2017, time was tolled by the three pending motions: Defendant's motion to suppress pretrial voice identifications (Doc. 15); Defendant's motion to suppress evidence (Doc. 16); and the Government's motion to admit Rule 404(b) evidence (Doc. 17). 18 U.S.C. § 3161(h)(1)(D).

Even excluding the Government motion *in limine*, it is undisputed that Defendant's motions continued to toll time from June 16, 2017 through the date of the hearings and the post-hearings briefs, the last of which was filed on April 16, 2018 (Doc. 31). (Doc. 33 at 4-5) ("Mr. Felix acknowledges that because the Speedy Trial Act excludes delay resulting from pretrial motions, the motions filed in this case tolled the clock from June 16, 2017 until April 16, 2018") (citing 18 U.S.C. § 3161(h)(1)(D)). Moreover, provided that as of April 16, 2018, the Court had received all information necessary to resolve the motions, the thirty-day advisement period began to run on April

17, 2018 and thus expired on May 16, 2018. Accordingly, time would have started running again on May 17, 2018, constituting day **twenty-one** on the speedy trial clock.

However, the Government's June 18, 2018 motion stopped the clock again, such that the last day to run was June 17, 2018, *i.e.*, day **fifty-two** on the speedy trial clock.

The Court rejects Defendant's argument that the Government's motion must be interpreted as either a motion to continue or a mere notice regarding the speedy trial computation. The notion that the Government's pretrial motion would not serve to toll time unless it was a motion for a continuance is patently false. Indeed, "the filing of a pretrial motion falls within [(h)(1)'s automatic exclusion] provision irrespective of whether it actually causes, or is expected to cause, delay in starting a trial." *Tinklenberg*, 563 U.S. at 650 (emphasis added). And, as Defendant admitted during the hearing, nothing about the Government's motion implies that a continuance was sought. Thus, Defendant's assertion that the Court must interpret the motion as a request for a continuance is without merit.

Also without merit is Defendant's position that the Court should treat the Government's motion as a mere notice. The Government's motion expressly requests a conference with the Court in order to address the speedy trial computation and to establish a trial calendar. Thus, the motion is a specific request for action from the Court, which request, by its very terms, requires a hearing. Moreover, as the Court previously noted, the Government's motion also set forth a rough estimation of remaining speedy trial time, which calculation was inconsistent with what the Court perceived. Thus, even

if the Government had not requested a hearing, the motion nonetheless gave rise to the Court's need for a hearing to address the issue.

The Court further rejects any assertion that the Government's motion was a pretext to toll speedy trial time. Indeed, the Government, to its credit, readily admits that it did not intend to toll speedy trial time. Regardless, a party's intent does not override the operation of law. *See* 18 U.S.C. § 3161(h) ("The following periods of delay **shall** be excluded … in computing the time within which the trial … must commence") (emphasis added); *see also Zedner*, 547 U.S. at 500-09 (holding that exclusion of time for a continuance requires a court's ends-of-justice finding, and a defendant cannot waive application of the Speedy Trial Act, "because there are many cases … in which the prosecution, the defense, and the court would all be happy to opt out of the Act, to the detriment of the public interest").

Ultimately, the Government's June 18, 2018 motion for a status conference was a pretrial motion and, as the Speedy Trial Act clearly states, "delay resulting from **any** pretrial motion, from the filing of the motion through … [its] prompt disposition," is automatically excludable. 18 U.S.C. § 3161(h)(1)(D) (emphasis added); *see also Tinklenberg*, 563 U.S. at 657-58 (rejecting an interpretation of (h)(1)(D) that would require a motion-by-motion determination as to which motions should exclude time and which should not, as such an approach would require "considerable time and judicial effort … [as well as] the use of various presumptions," and would "significantly limit the premise of 'automatic application' upon which [(h)(1)(D)] rests"). Accordingly, the Government's motion served to toll time starting on June 18, 2018.

Less than three weeks later, on July 6, 2018, Defendant filed his motion to dismiss under the Speedy Trial Act. (Doc. 33). Because that motion required a hearing, which hearing took place on April 15, 2019, the time elapsing from the filing of the motion through the conclusion of the hearing is tolled pursuant to 18 U.S.C. § 3161(h)(1)(D).[6] The same is true of Defendant's subsequently filed motions, as explained, *supra*.

Accordingly, the Court finds that the speedy trial clock has not run in the instant case. In the first instance, by this Court's computation, only **twenty days** have run on the speedy trial clock to date, based on the Government's pending motion *in limine*. (Doc. 17); 18 U.S.C. § 3161(h)(1)(D). However, even if the Court were to exclude consideration of the Government's motion entirely, only **fifty-two days** have run on the speedy trial clock.

Under either computation, there is no violation of the Speedy Trial Act, and Defendant's motion to dismiss is therefore denied. (Doc. 33).

[6] The Court rejects Defendant's attempt to undermine the need for the hearing. Defendant argues that the hearing is merely the Government's way of "provid[ing] a convenient mechanism whereby the Court could sidestep the requirements of the Speedy Trial Act." (Doc. 38 at 1-2). This is untrue. As this Court has explained, every filing and interaction with the parties only further emphasized the need for the hearing. The Court never denied any request for a hearing and indeed indicated on at least two separate occasions that it intended to schedule a hearing in this case. Moreover, even defense counsel, by email, indicated in August 2018 that a conference may be warranted. Yet Defendant now attempts to call into question the sincerity of the hearing, couching it as nothing more than a pretext suggested by the Government and put on by the Court to circumvent speedy trial. (*Id*.) This assertion is absolutely false. The Court intended to set the case for a hearing to address speedy trial upon the Government's June 2018 motion. Thereafter, Defendant's motion to dismiss on speedy trial grounds became the Court's focus for purposes of the hearing. Later, as Defendant's related motions trickled in weeks apart, the Court awaited briefing in order to address all related motions simultaneously. The Court's intent to hold a hearing is not eviscerated simply because the Court did not expressly and immediately declare it.

B. Motion for Bond

Defendant's motion for bond is brought under 18 U.S.C. § 3164, which requires the release of a pretrial detainee held in custody longer than 90 days, excepting any excluded days under the Speedy Trial Act. Having found that, at most, no more than fifty-two days have expired, Defendant's motion for bond is denied. (Doc. 35).

C. Sixth Amendment Right to a Speedy Trial

Finally, Defendant moves for dismissal, arguing that he has been denied a speedy trial under the Sixth Amendment. (Doc. 39).

To determine whether Defendant has been deprived of his Sixth Amendment right to a speedy trial, the Court must consider: (1) the length of delay; (2) the reason for the delay; (3) Defendant's assertion of his right; and (4) prejudice to Defendant. *Barker*, 407 U.S. at 530. No one factor is a "necessary or sufficient condition to the finding of a deprivation of the right of speedy trial … [but] [r]ather, they are related factors and must be considered together with such other circumstances as may be relevant." *Id*. at 533.

As to the **first** factor, the length of the delay serves as a "triggering mechanism" and, if the length is not "presumptively prejudicial," the Court is not required to undertake the remainder of *Barker* analysis. *Doggett v. United States*, 505 U.S. 647, 651-52 (1992); *Barker*, 407 U.S. at 530–31. "[B]ecause of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case." *Barker*, 407 U.S. at 530. The Sixth Circuit has held "delays over one year are 'uncommonly long.'" *United States v. Baugh*, 605 F. App'x 488, 491 (6th Cir. 2015) (citing *United States v. Bass,* 460 F.3d

830, 836 (6th Cir. 2006)). However, "in calculating the length of the delay, only those periods of delay attributable to the government or the court are relevant to [Defendant's] constitutional claim." *United States v. Howard*, 218 F.3d 556, 564 (6th Cir. 2000).

Here, excluding the delay attributable to Defendant, the Court finds that the length of the delay falls short of the one-year threshold and is not otherwise presumptively prejudicial under the circumstances of this case.

It is without question that any delay from the commencement of the case through May 16, 2018 (*i.e.*, the expiration of the advisement period for the motions to suppress) is attributable to Defendant. Defendant was arrested on Saturday, February 4, 2017. (Doc. 11). His initial appearance was held, without delay, on the first available court date, Monday, February 6, 2017. (Doc. 6). Defendant's detention hearing and arraignment were held just three days later, on February 9, 2017. (Doc. 10). The very next day, this Court held his preliminary pretrial conference and established a trial calendar. (Doc. 13). Thereafter, as fully detailed, *supra*, every day of delay up to May 16, 2018 was the direct result of Defendant's numerous requests for continuances and extensions of time and the resolution of Defendant's pretrial motions to suppress.

From May 16, 2018 to the date of this Order, excluding the time attributable just to briefing and ruling on Defendant's motions to dismiss and motion for bond (*i.e.*, 87 days), only nine months have elapsed.[7] This delay does not trigger a full *Barker* analysis.

[7] The Court's calculation of 87 days attributable to Defendant includes: Defendant's motion to dismiss under the Speedy Trial Act (approximately 30 days for ruling attributable to Defendant); Defendant's motion for bond (29 days for briefing attributable to Defendant); and Defendant's motion to dismiss under the Sixth Amendment (28 days for briefing attributable to Defendant).

However, even assuming *arguendo* that the delay was presumptively prejudicial, based on a *Barker* analysis, this Court finds no Sixth Amendment violation has occurred.

Specifically, the **second** factor under *Barker* questions the reason for the delay. The United States Supreme Court has made clear that "different weights are to be assigned to different reasons for delay." *Doggett*, 505 U.S. at 657. At its core, this factor seeks to determine "whether the government or the criminal defendant is more to blame for th[e] delay." *Vermont v. Brillon*, 556 U.S. 81, 90 (2009) (quoting *Doggett*, 505 U.S. at 651).

As the Supreme Court explained in *Barker*:

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

Barker, 407 U.S. at 531. Naturally, "delay caused by the defense weighs against the defendant," which includes delay attributable to defense counsel. *Brillon*, 556 U.S. at 90-91 (citing *Coleman v. Thompson,* 501 U.S. 722, 753 (1991)).

The initial delay in this case until June 16, 2017 is attributable to Defendant's requests for additional time to review discovery and prepare pretrial motions. Thereafter, the delay until May 16, 2018 is attributable to Defendant's own pretrial motions, which were filed and briefed on Defendant's requested schedule, after the Court granted

Defendant's requested continuances. Moreover, since July 6, 2018, approximately three months of delay are attributable to Defendant's three subsequent motions.

Of the remaining nine months, this Court can attribute only a small fraction directly to the Government, and only on the basis of the Government's motion for a status conference and initial failure to file a response to Defendant's motion to dismiss. However, neither of these instances were deliberate attempts by the Government to cause delay. And, indeed, both instances are overwhelmingly offset by the Government's repeated good-faith efforts to obtain a conference with the Court, all of which demonstrate that the Government was not in any sense attempting to delay the trial or hamper the defense. Indeed, the Government's motion for a status conference was, quite literally, an attempt by the Government to obtain a trial setting, not delay it.

Moreover, the delay between May 16, 2018 and June 16, 2018 was not the result of the Court's oversight or negligence. Rather, the Court was working diligently to resolve Defendant's pending motions to suppress, both of which simply required more time than the mere 30-days allotted.[8] The filing of Defendant's July 6, 2018 motion to dismiss prompted the Court to defer resolution of the motions to suppress, pending the

[8] For example, the Court was required to consider an audio recording submitted by both parties as an exhibit relating to Defendant's motion to suppress evidence. Although the recording was two hours in length, the manner and flow of the conversation made it excruciatingly difficult to follow and often required the Court to re-play large segments over and over again. Indeed, the Court, on a number of occasions, contemplated ordering the parties to produce a transcript of the recording. However, having dedicated extensive time to the recording, and recognizing that the preparation of a transcript would only further delay the proceedings, the Court, in an apparently ironic attempt to *save* the parties time and effort, opted to push through on its own. The Court did not perceive the additional time necessary to resolve the motion as posing a speedy trial issue, given the Court's own computation of the clock.

outcome of the motion to dismiss. Indeed, if the motion to dismiss were granted, it would obviate the need to resolve the motion to suppress. Thus, while Defendant faults the Court for leaving the motions to suppress pending, the Court made a deliberate decision to defer its ruling, which decision was entirely appropriate under the circumstances. And at no point did the Court have a duty to inform Defendant of the Court's rationale for doing so, nor would any such notice have impacted the Court's decision. Thus, Defendant's characterization of the Court allegedly leaving his motions to languish and ignoring the parties without explanation is entirely baseless.

Regardless, even if the entirety of the nine, notably non-consecutive, months were attributable to the Court, the reason would be neutral or, at best, only slightly weigh against the Government. *See Barker*, 407 U.S. at 531. However, as previously indicated, the Government's sincere attempts to secure a conference with the Court, coupled with even defense counsel's acknowledgement in August 2018 that a conference may be fruitful, and the Court's attempts to consolidate the hearings on Defendant's constant motion practice, all render the reason for the delay as neutral. In other words, on the facts, this Court cannot find that the Government "is more to blame" for the delay. *See Brillon*, 556 U.S. at 90.

The **third** factor is Defendant's assertion of his right. "Whether and how a defendant asserts his right is closely related to the other factors," in that "[t]he strength of [a defendant's] efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences." *Barker*, 407 U.S. at 531. Stated simply, "[t]he

more serious the deprivation, the more likely a defendant is to complain." *Id*. Thus, the Supreme Court has "emphasize[d] that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Id*. at 532.

Here, Defendant's only assertion of his right to a speedy trial arises from the filing of his motions to dismiss. Indeed, quite the contrary to asserting his right to a speedy trial, Defendant had sought numerous continuances and extensions of time. And while the Court has received inquiries regarding a hearing from the Government, Defendant has made no such request, save for once acknowledging that a conference may be helpful.

That said, Defendant did promptly file the motion to dismiss when, by his computation, time had run.

Accordingly, in considering the facts and circumstances of this case, the Court finds that the third factor neither weighs in favor of nor against Defendant.

Finally, the **fourth** factor is any resulting prejudice to Defendant. In *Barker*, the Supreme Court explained that:

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect … [including]: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Barker, 407 U.S. at 532.

Notably, "affirmative proof of particularized prejudice is not essential to every speedy trial claim." *Doggett*, 505 U.S. at 656. The Sixth Circuit has elaborated,

however, that "[i]n this circuit, '[w]hen the government prosecutes a case with reasonable diligence, a defendant who cannot demonstrate how his defense was prejudiced *with specificity* will not make out a speedy trial claim no matter how great the ensuing delay.'" *Young*, 657 F.3d at 418 (quoting *United States v. Howard,* 218 F.3d 556, 564 (6th Cir. 2000)) (emphasis in original); *see also United States v. Robinson*, 455 F.3d 602, 608 (6th Cir. 2006) (noting that, in the absence of particularized trial prejudice, "[s]horter delays [(*e.g.*, thirteen and one-half months versus six-years)] attributable to the government's negligence have been held not to give rise to a presumption of prejudice").

Here, Defendant argues that he has suffered both trial and non-trial prejudice. Specifically, Defendant asserts non-trial prejudice arising from his continued incarceration. Pretrial detention is a significant deprivation to any defendant. The Court agrees the delay has contributed to Defendant's non-trial prejudice.

Defendant further argues that he has suffered trial prejudice, asserting that a key defense witness has gone missing. However, as the Court came to learn during the hearing, Defendant had only maintained contact with his "critical witness" around the time the Indictment was filed (February 2017). Thereafter, defense came to learn the witness was allegedly missing in July 2018. So, as an initial matter, the delay at issue here, *i.e.*, after June 2018, cannot be the cause of Defendant's missing witness.

More significantly, however, following the hearing, the Government emailed the Court and defense counsel and provided current contact information for Defendant's witness. Specifically, within a matter of hours, the Special Agent, utilizing the same

database as the defense, had located and contacted the witness, who indicated she was available to the defense any time by telephone.

Accordingly, Defendant's allegations of trial prejudice are entirely without merit. And as non-trial prejudice carries less weight than trial prejudice, the Court deems this fourth factor as weighing neither in favor of nor against either party.

Having considered each of the *Barker* factors, the Court finds the delay has not deprived Defendant of his constitutional right to a speedy trial. Accordingly, dismissal under the Sixth Amendment is not warranted.

IV. CONCLUSION

Based upon the foregoing, Defendant's motion to dismiss under the Speedy Trial Act (Doc. 33), motion for bond (Doc. 35), and motion to dismiss under the Sixth Amendment (Doc. 39) are **DENIED**.

IT IS SO ORDERED.

Date: May 8, 2019

Timothy S. Black
United States District Judge