# APPENDIX

## TABLE OF CONTENTS


| | | |
|---|---|---|
| Appendix A: | Court of appeals opinion, Nov. 5, 2021 | 1a |
| Appendix B: | District court order, June 14, 2018 | 29a |
| Appendix C: | District court opinion and order, June 19, 2018 | 32a |
| Appendix D: | District court docket entries (with electronic orders) | 62a |
| Appendix E: | District court order of excludable delay, Aug. 2, 2016 | 66a |
| Appendix F: | District court order denying disqualification, Jan. 3, 2019 | 70a |
| Appendix G: | District court order denying disqualification, Jan. 3, 2019 | 71a |
| Appendix H: | District court order denying disqualification, Jan. 3, 2019 | 72a |
| Appendix I: | Court of appeals order, Dec. 30, 2021 | 73a |
| Appendix J: | Statutory provisions | 74a |

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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Nos. 18-1669, 19-1042, 19-1043, 19-1107

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UNITED STATES OF AMERICA,
Appellee,

v.

MARTIN GOTTESFELD,
Defendant, Appellant.

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Filed: November 5, 2021

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Appeals from the United States District Court
for the District of Massachusetts

[Hon. Nathaniel M. Gorton, U.S. District Judge]

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Before HOWARD, Chief Judge, LYNCH and KAYATTA, Circuit Judges.

**OPINION**

**KAYATTA, Circuit Judge.** In March 2014, Martin Gottesfeld and others committed a "Distributed Denial of Service" cyberattack against Boston Children's Hospital and Wayside Youth and Family Support Network, causing both to lose their internet capabilities for three to four

weeks. Gottesfeld targeted Boston Children's and Wayside because of their role in caring for Justina Pelletier, a child whose medical condition and treatment were at the center of a custody dispute that received national attention. Gottesfeld publicly admitted responsibility for the attacks. He was subsequently charged with intentionally causing damage to a protected computer, 18 U.S.C. § 1030(a)(5)(A), and conspiring to do the same, id. § 371. After an eight-day trial, Gottesfeld was convicted on both counts and sentenced to 121 months' imprisonment, to be followed by three years of supervised release.

## I.

### A.

We begin with Gottesfeld's argument that his indictment should be dismissed under the Speedy Trial Act, 18 U.S.C. §§ 3161–3174. In pertinent part, the Speedy Trial Act provides that "[a]ny information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date [of his arrest]." Id. § 3161(b). An indictment filed after the thirty-day period has expired must be dismissed. Id. § 3162(a)(1). But certain periods of delay are not counted toward the thirty-day limit. See id. § 3161(h). Two such exclusions are relevant here.

First, the Act excludes delay resulting from so-called "ends-of-justice continuances." Zedner v. United States, 547 U.S. 489, 498–99 (2006) (describing what is now 18 U.S.C. § 3161(h)(7)(A)). These are "continuance[s] granted by any judge ... on the basis of his findings that the ends of justice served by taking such action outweigh the best interests of the public and the defendant in a

speedy trial," as long as the reasons supporting such findings are "set forth[] in the record of the case, either orally or in writing." 18 U.S.C. § 3161(h)(7)(A). Second, the Act also does not count time "resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." Id. § 3161(h)(1)(D).

In this case, Gottesfeld was arrested on February 17, 2016 and indicted 246 days later, on October 19, 2016. It is undisputed that twenty-six of these days were not excludable under the Speedy Trial Act. The remainder of the delay was initially excluded by the district court as resulting from six ends-of-justice continuances granted by the district court without any contemporaneous objection by Gottesfeld. When Gottesfeld subsequently moved to dismiss the indictment under the Speedy Trial Act, the district court clarified that the same periods of delay were also excludable in part as resulting from the district court's consideration of each of the six predicate motions to continue. See id. § 3161(h)(1)(D).

On appeal, Gottesfeld challenges the exclusion of the time during which six motions to continue were pending and the time covered by three of the ends-of-justice continuances. We address each in turn.

**1.**

Gottesfeld focuses first on the time during which the six motions to continue were pending before the district court. Gottesfeld argues that the time during which these motions were pending was not properly excludable because the motions were not "pretrial motions" within the meaning of section 3161(h)(1)(D). The parties dispute whether Gottesfeld has preserved this argument. While a

defendant cannot prospectively waive the application of the Speedy Trial Act, Zedner, 547 U.S. at 503, a defendant can waive or forfeit a claim of error in the application of the Act by failing to timely raise the claim in the district court, United States v. Valdivia, 680 F.3d 33, 41 (1st Cir. 2012). And a defendant's request for a continuance or his acquiescence in a request can be considered in weighing the propriety of the continuance. United States v. Balsam, 203 F.3d 72, 79–80 (1st Cir. 2000).

In this instance, we need not decide what standard of review applies because we see no error, plain or otherwise, in the district court's decision to exclude time under section 3161(h)(1)(D). Indeed, we have previously treated motions to continue as "pretrial motions" under that statutory provision. See United States v. Richardson, 421 F.3d 17, 27–31 (1st Cir. 2005) (excluding time between the filing of the government's motion to continue and the district court's effective denial of that motion).

Gottesfeld insists that this case is distinguishable, pointing to a provision of the district court's Plan for the Prompt Disposition of Criminal Cases that requires all pre-indictment motions to continue to be filed in what is known as the "miscellaneous business docket." Because any such motion is not filed directly in the docket for a defendant's criminal case, Gottesfeld argues, it cannot be considered a "pretrial motion" within the meaning of section 3161(h)(1)(D). We reject this formalistic argument. We have historically adopted a functional rather than formalistic approach to determining what constitutes a "pretrial motion." See Richardson, 421 F.3d at 28–29 ("'We have read the term "pretrial motion" broadly to encompass all manner of motions' for purposes of tolling the

speedy trial clock, 'ranging from informal requests for laboratory reports to "implied" requests for a new trial date.'" (quoting United States v. Barnes, 159 F.3d 4, 11 (1st Cir. 1998))); see, e.g., United States v. Santiago-Becerril, 130 F.3d 11, 17 (1st Cir. 1997) (construing counsel's notification of availability as an implied motion for a new trial date and therefore treating it as a "pretrial motion" for speedy-trial purposes). And we do not see how continuances granted by way of the miscellaneous business docket would "affect[] the course of trial" any differently than they would if granted on a criminal docket. Barnes, 159 F.3d at 11.[1]

**2.**

Gottesfeld separately advances three arguments challenging the exclusion of sixty-two days resulting from three of the six ends-of-justice continuances. He contends that: (1) the judge who granted the continuances did not make "findings that the ends of justice served by taking such action outweigh[ed] the best interest of the public and the defendant in a speedy trial," as required by section 3161(h)(7)(A); (2) the court's reasons for making such findings were never "set[] forth[] in the record of the case," as required by the same provision; and (3) the continuances were granted on an impermissible basis.

The first two of these arguments largely hinge on our construction of the law, and were raised in the district

[1] We need not address Gottesfeld's suggestion that the miscellaneous business docket is unfair because it only allows for "one-sided" government participation. The fact that Gottesfeld assented to every motion to continue filed below belies any notion that he was unable to participate in or was otherwise prejudiced by the procedures for adjudicating those motions.

court, so we will consider them de novo. See United States v. Irizarry-Colón, 848 F.3d 61, 65 (1st Cir. 2017). Gottesfeld's third argument, however, appears for the first time on appeal. Although we have held that "exclusions of time not specifically challenged in the district court are waived on appeal," United States v. Laureano-Pérez, 797 F.3d 45, 57 (1st Cir. 2015), we have never definitively decided the applicable standard of review where the defendant challenges the same exclusions under a new theory. Without adequate briefing by the parties as to the standard of review, we assume favorably to Gottesfeld that plain-error review applies to the specific arguments he failed to raise below. See Valdivia, 680 F.3d at 41–42 (noting that "there [was] a strong basis for finding [an] argument waived" where the defendant did not present it to the district court in his motion to dismiss under the Speedy Trial Act, but assuming that plain error review applied in any event).

**a.**

Delay resulting from a continuance is excluded only if the judge before granting the continuance finds (even if only in his or her mind) that the ends of justice served by the continuance outweigh the best interests of the defendant and the public in speed. Zedner, 547 U.S. at 506. Additionally, specific facts supporting that determination need be apparent from the order itself or the record. Id. at 495, 505–07. On the other hand, "it is not necessary for the court to articulate the basic facts" underlying its decision to grant an ends-of-justice continuance "when they are obvious and set forth in" the motion to continue. United States v. Pakala, 568 F.3d 47, 60 (1st Cir. 2009) (quoting United States v. Rush, 738 F.2d 497, 507 (1st Cir. 1984)).

Here, the relevant motions asserted that the ends of justice supported the continuances under section 3161(h)(7)(A) because the parties were awaiting a detention decision by the magistrate judge and could not "conclude their discussions of a possible plea agreement and information" without it. By granting each motion, the judge presiding over the miscellaneous business docket "necessarily adopted" these grounds, Pakala, 568 F.3d at 60, which supports the conclusion that she was "persuad[ed] ... that the factual predicate for a statutorily authorized exclusion of delay could be established," id. (quoting Zedner, 547 U.S. at 505). No more was required at the time the challenged continuances were granted.[2]

**b.**

Turning to Gottesfeld's second procedural argument challenging the excludability of delays resulting from the continuances, we are satisfied that the requisite findings were adequately "set[] forth[] in the record of the case" as required by 18 U.S.C. § 3161(h)(7)(A). In denying Gottesfeld's motion to dismiss the indictment under the Speedy Trial Act, the trial judge explained that Gottesfeld, through counsel, sought the continuance because he was "seriously considering" a plea agreement that had been drafted. The court further stated that it found the continuance to be in Gottesfeld's interest. These statements qualify as a statement of reasons set forth "in the record of the case" under section

[2] Gottesfeld argues that the court could not have adopted the contents of the relevant motions to continue because stalled plea negotiations could not justify an exclusion of time. We consider this argument later, when addressing the substance of the district court's ends-of-justice determinations.

3161(h)(7)(A). See Valdivia, 680 F.3d at 39 ("Such findings must be entered into the record by the time a district court rules on a defendant's motion to dismiss under the [Speedy Trial Act]."); Rush, 738 F.2d at 507 ("Both purposes [of the findings requirement] are served if the text of the order [granting the continuance], taken together with more detailed subsequent statements, adequately explains the factual basis for the continuance under the relevant criteria.").

Gottesfeld nevertheless argues that the trial judge's elaboration of reasons supporting the ends-of-justice continuances cannot satisfy section 3161(h)(7)(A) because a different judge actually granted the continuances on the miscellaneous business docket. However, the statute does not require that the judge who grants the continuance must be the same judge who sets forth in the record the reasons for the ultimate decision to exclude time. Indeed, the statute suggests the opposite by using different words to allocate responsibility for these distinct requirements. While it requires the "judge" who grants an ends-of-justice continuance to do so only "on the basis of" the requisite findings, it permits the "reasons" supporting such findings to be "set[] forth[] in the record of the case" by the "court." 18 U.S.C. § 3161(h)(7)(A) (emphases added). Given the plain language of the statute -- and absent any reason to believe that following it would contravene the intent of the Speedy Trial Act in this case in which the motions themselves made obvious the reasons for granting them -- we conclude that the trial judge's order denying Gottesfeld's motion to dismiss sufficiently set

forth the reasons supporting the challenged ends-of-justice determinations.[3]

**c.**

Gottesfeld's third speedy trial argument, that the district court granted the challenged continuances for improper reasons, fares no better. As we have already explained, we review this argument under the plain error standard.

The district court excluded the time resulting from the challenged continuances under section 3161(h)(7)(A) because it agreed with Gottesfeld that serious plea negotiations warranted the continuance. "[W]e have expressly left open the issue whether periods of plea negotiations can properly be excluded," United States v. Souza, 749 F.3d 74, 80 (1st Cir. 2014), and at least two circuit courts have indicated that they can be so excluded under the ends-of-justice provision, see United States v. White, 920 F.3d 1109, 1116 (6th Cir. 2019); United States v. Fields, 39 F.3d 439, 445 (3d Cir. 1994). Thus, the district court did not commit clear or obvious error in finding that the parties' plea negotiations justified an ends-of-justice continuance. Hence, there was no plain error. Valdivia, 680 F.3d at 42; see also United States v. Gonzalez, 949 F.3d 30, 39 (1st Cir. 2020) (finding no plain error where there was no binding authority on point).

[3] Having so concluded, we need not address Gottesfeld's separate argument that the judge who granted the challenged continuances on the miscellaneous business docket failed to adequately set forth such findings.

Even accepting the notion that plea negotiations can support an ends-of-justice determination, Gottesfeld argues that the challenged continuances could not have been granted on that basis because the parties' plea discussions were "on hold" and "stalled" rather than "active" and "ongoing" during the relevant periods. However, he cites no authority that would support distinguishing between "active" and "stalled" phases of a negotiation that the parties still view as open. And such a distinction is not obvious. The utility of plea discussions necessarily depends on the information available to the parties at the time. As such, temporary pauses in genuinely open negotiations might well be expected while the parties wait to receive information that might affect their ongoing negotiation strategy.

Gottesfeld emphasizes that the information on which the parties were waiting was the magistrate judge's decision on detention. As such, Gottesfeld argues, granting the challenged continuances under the guise of plea negotiations effectively extended the amount of excludable time during which the detention decision could be kept "under advisement" from thirty days to ninety-two days, working an end-run around section 3161(h)(1)(H) and frustrating the purposes of the Speedy Trial Act. But this argument merely begs the question of whether the ends-of-justice continuances were properly granted. And it also overlooks that an "ends of justice" continuance can serve as an independent source of excludable time. See Rush, 738 F.2d at 505 (suggesting that time beyond the thirty-day under-advisement period can be excluded if there is some other "source of excludable time such as an 'ends of justice' continuance").

Still, Gottesfeld asserts, the need for additional time for plea negotiations undisputedly depended on the delay in the detention decision. Because that delay was not explained by the district court, Gottesfeld asserts that it must have been caused by "general congestion of the court's calendar," which cannot be used to justify an ends-of-justice continuance. 18 U.S.C. § 3161(h)(7)(C). But it is not obvious that congestion is the only available explanation for the delay. And a district court is not generally required to explain the reasons underlying any delay in issuing an opinion on a contested issue after a hearing. Moreover, Gottesfeld specifically consented to each of the challenged continuances at the time they were proposed and granted. See United States v. Gates, 709 F.3d 58, 67–68 (1st Cir. 2013) (relying in part on defense counsel's consent in affirming the denial of a motion to dismiss under the Speedy Trial Act). For all these reasons, and absent caselaw directly on point, see Gonzalez, 949 F.3d at 39, we find no plain error.[4]

**B.**

Gottesfeld also contends that the district court erroneously denied his motion to suppress evidence collected from his apartment during the execution of a search warrant because the magistrate judge who signed the warrant "was neither neutral nor detached" and because she was "subject to recusal."[5] We review the district court's

[4] Because we find that Gottesfeld's contentions under the Speedy Trial Act do not support vacating or reversing his conviction, we need not address the government's arguments that those contentions were barred by the doctrine of judicial estoppel.

[5] Below, Gottesfeld also moved to suppress evidence obtained pursuant to a trap-and-trace order, which was signed by a different magis-

findings of fact for clear error and legal rulings de novo. See United States v. Tom, 988 F.3d 95, 98 (1st Cir. 2021).

Gottesfeld contends that the magistrate judge was not neutral, detached, or sufficiently impartial because her spouse was a victim of the cyberattack on Boston Children's. In making this argument below, Gottesfeld pointed to: (1) a statement in the affidavit attached to the search warrant application that the cyberattack had also caused disruption to the "network on which [Boston Children's] and other Harvard University-affiliated hospitals communicate," and (2) evidence that the magistrate judge's spouse was employed as a doctor by Brigham and Women's Hospital, which is affiliated with Harvard University, and as a professor by Harvard Medical School. But Gottesfeld identified no evidence to suggest that the magistrate judge's spouse was actually affected by the cyberattack in any substantial manner. For this and other reasons, the district court denied his motion to suppress.

On appeal, Gottesfeld highlights evidence in the trial record that Brigham and Women's was one of the Harvard-affiliated hospitals that lost its internet connection as a result of the cyberattack. He also points to a statement made by the government during his detention hearing that "Harvard hospitals" were unable to complete routine patient-care tasks in the aftermath of the cyberattack. From this evidence, Gottesfeld asserts, it is "clear" that the magistrate judge's spouse was "directly and profoundly affected" by the cyberattack.

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trate judge, on other grounds. On appeal, Gottesfeld does not challenge the district court's denial of his motion to suppress as to that issue, so we do not address it.

Gottesfeld's hyperbole to one side, we agree that one can reasonably infer that the shutdown of 65,000 IP addresses in a network that included the husband's two employers likely had some adverse effect on him. Armed with this inference that the magistrate judge's husband likely experienced some adverse effect, Gottesfeld argues that: (1) recusal was mandatory under both 28 U.S.C. § 455(a) and the Fourth Amendment, see generally United States v. Leon, 468 U.S. 897, 914 (1984); and (2) that evidence gathered pursuant to the warrant issued by the magistrate judge must be suppressed. For the following reasons, we disagree.

First, the inferred harm here is both indirect and, as to its extent, speculative. See United States v. Bayless, 201 F.3d 116, 127 (2d Cir. 2000) ("[D]isqualification [under section 455] is not required on the basis of remote, contingent, indirect or speculative interests."). There is also nothing in the record to compel a finding that the magistrate judge suspected that her husband was a target of the disruption. And while the aggregate effect of the denial-of-service attack was serious and undoubtedly created a substantial risk of significant harm to many persons, especially patients, there is no suggestion in the record that the magistrate judge's husband experienced any untoward effects beyond inconvenience, delay, and likely annoyance.

Gottesfeld points to no precedent at all holding that an effect on a spouse of this type would preclude a magistrate judge from issuing a search warrant. He points only to cases in which a judge's colleagues had been murdered by the defendant or injured by a bomb blast one block away from the judge's courtroom. See, e.g., United States v. Moody, 977 F.2d 1425, 1428 (11th Cir. 1992) (judicial

colleague murdered); Nichols v. Alley, 71 F.3d 347, 350 (10th Cir. 1995) (member of judge's staff injured in Oklahoma City bombing). These cases simply highlight how different and uncertain the indirect effect on the magistrate judge is in this case.

Second, Gottesfeld offers no support for the second part of his argument -- that an issuance by a magistrate with this type of a personal interest would call for application of the exclusionary rule as a remedy. Would harmless error apply? Would good faith affect the calculus? On these and other points Gottesfeld is completely silent. So, the second part of his two-part argument is waived. United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner ... are deemed waived.").

For these reasons, we reject Gottesfeld's mandatory recusal argument. Given that he offers no other challenges to the warrant or to the search, we also reject his challenge to the government's use at trial of evidence gathered pursuant to the warrant.

**C.**

Gottesfeld's next argument revolves around four motions to withdraw that were filed by his trial counsel and denied by the district court. We begin by setting forth the relevant factual background before addressing Gottesfeld's claims on appeal.

**1.**

At his initial appearance in the District of Massachusetts in April 2016, Gottesfeld was represented by hired counsel. Approximately eight months later, that counsel

moved to withdraw due to Gottesfeld's indigency. An Assistant Federal Defender was appointed as a replacement. In March of the following year, another Assistant Federal Defender joined in Gottesfeld's representation. But by November 2017, Gottesfeld claimed that he had "lost faith and trust in the [Federal Public Defender Office] to effectively and zealously represent his best interests," and moved for substitute counsel. The district court granted the motion and appointed yet a fourth attorney to represent Gottesfeld. That attorney later moved, with Gottesfeld's consent, to withdraw as counsel on two separate occasions in March 2018. At the hearing on that attorney's second motion to withdraw, the district court advised Gottesfeld as follows:

> [I]f I allow his motion and appoint new counsel, this will be the last counsel you will get, ... and there will be no further attorneys. The alternative of course is that you agree to represent yourself pro se, which you've told me ... you don't want to pursue.

Gottesfeld indicated that he understood the judge's advice and did not retract his assent to his attorney's motion to withdraw as counsel. The district court granted the motion and appointed David Grimaldi as Gottesfeld's fifth attorney.

Attorney Grimaldi worked on Gottesfeld's case for less than three months before moving to withdraw as counsel at Gottesfeld's request on June 1, 2018, citing Gottesfeld's disagreement with Attorney Grimaldi over trial strategy and his consequent lack of trust in Attorney Grimaldi. The court found that the evidence provided in support of this motion did not constitute good cause for excusing Attorney Grimaldi and did not justify the delay that would inevitably result if the motion were granted.

Gottesfeld does not appear to challenge that decision on appeal.

On June 28, 2018, with trial less than three weeks away, Attorney Grimaldi filed a second motion to withdraw on his own behalf, asserting "an irreparable breakdown in the attorney-client relationship." At a hearing on the second motion to withdraw, Attorney Grimaldi explained that Gottesfeld had made a number of disparaging online posts about him and his legal practice. Because Gottesfeld was "attacking [his] livelihood," Attorney Grimaldi represented that he did not believe he could effectively represent Gottesfeld any longer. Gottesfeld opposed Attorney Grimaldi's motion, stating that he "did not want a new lawyer" and "[did] not want more delay." The district court denied the motion, finding that "no irreparable breakdown in communication had occurred." The district court also noted that "trial [was] quickly approaching," and that Attorney Grimaldi had been able to diligently and zealously represent Gottesfeld up to that point.

The parties continued preparing for trial until July 12, 2018, when Attorney Grimaldi filed a third motion to withdraw as counsel on an emergency basis, given that jury selection was only seven days away. The motion was referred by the trial judge to another judge who was responsible for handling emergencies in the district court. The emergency judge held a hearing, at which Attorney Grimaldi indicated that Gottesfeld had continued to make disparaging public statements about him and his law firm bearing the same name. Based on these events, Attorney Grimaldi represented that he could not "represent Mr. Gottesfeld zealously" and that "Mr. Gottesfeld [did] not

have [his] full and undivided loyalty." Gottesfeld nevertheless stated: "I want this trial date. ... I don't want to delay it. I don't want new counsel. I don't want to waive my right to counsel. I want Mr. Grimaldi to do his job." Based on Gottesfeld's statements and the fact that the motion was filed "on the eve of trial," the emergency judge denied the motion on July 16, 2018.

The next day, just two days before jury selection was scheduled to commence, Attorney Grimaldi filed a fourth motion to withdraw, asking that the trial judge (rather than the emergency judge) consider the grounds asserted in the third motion to withdraw. The trial judge denied the motion that afternoon for substantially the same reasons as the emergency judge. The trial judge also reiterated his earlier warning to Gottesfeld that Attorney Grimaldi was his "last court-appointed attorney" and that further public attacks on Attorney Grimaldi or any other misconduct could be treated as "an implied waiver of counsel."

Trial proceeded as scheduled, and the jury returned a guilty verdict on August 1, 2018. On August 31, one week before post-trial motions were due and seven weeks before sentencing, Attorney Grimaldi filed a fifth motion to withdraw as counsel for the same reasons as before. Gottesfeld assented to the motion, but only "so long as he [would be] provided new counsel (and not ordered to represent himself pro se) and the change of attorneys does not delay future proceedings, including but not limited to his sentencing hearing." The district court held a hearing on the motion and engaged in the following colloquy with Gottesfeld:

> THE COURT: You understand that, if I allow his motion, you are going to represent yourself pro se?

> THE DEFENDANT: That would be over my objection, Your Honor. I don't plan on waiving my right to the effective assistance of counsel.... I would object to having to represent myself. I assent to --
>
> THE COURT: You remember when I appointed him, I told you this was your last lawyer.
>
> THE DEFENDANT: Yep, yep.... [Y]ou know, if I would not be appointed new counsel, that I do not assent to Mr. Grimaldi leaving.

The district court again denied Attorney Grimaldi's motion, finding that he had done "a very creditable and professional job" even as Gottesfeld was "attacking him online ... with frivolous and cockamamy charges" and that appointing substitute counsel would likely delay Gottesfeld's sentencing hearing. Attorney Grimaldi was subsequently permitted to withdraw as counsel at a later date, prior to sentencing, after Gottesfeld initiated a separate legal proceeding against him.

**2.**

With full knowledge of these facts, and after asking the district court to deny each of Attorney Grimaldi's second, third, and fourth motions to withdraw, Gottesfeld now takes the position that the district court should have granted those motions. Although he expressly and repeatedly assured the district court that he wanted to proceed with Attorney Grimaldi as counsel, he now asserts that Attorney Grimaldi should not have been permitted to continue representing him because Attorney Grimaldi's statements at the hearings on the relevant motions to withdraw demonstrated an actual conflict of interest and a "total breakdown in communication" in the attorney-client relationship.

In advancing this argument, Gottesfeld offers no view as to the proper standard of review. The government in its brief makes the case for waiver, to which Gottesfeld offers no opposition in his reply. Waiver of some type would seem to be implicated here. A defendant usually cannot "properly challenge on appeal a proposal he himself offered to the trial court." United States v. Amaro-Santiago, 824 F.3d 154, 160 (1st Cir. 2016) (quoting United States v. Angiulo, 897 F.2d 1169, 1216 (1st Cir. 1990)). The reasons for this rule are clear: Without it, defendants would be able to "sandbag" the district court by taking one position and "gambling on a favorable verdict, knowing [that] if [the] verdict went against them[,] they could seek a new trial." United States v. Hallock, 941 F.2d 36, 45 (1st Cir. 1991) (citing United States v. Costa, 890 F.2d 480, 482 (1st Cir. 1989)); see also United States v. Ocean, 904 F.3d 25, 39 (1st Cir. 2018) (stating that a defendant may not "plant[] an error and nurtur[e] the seed as insurance against an infelicitous result" (quoting United States v. Taylor, 54 F.3d 967, 972 (1st Cir. 1995))).

In any event, even if we were to find Gottesfeld's challenge to the denial of the second, third and fourth motions to withdraw reviewable, we would still reject it. When reviewing a district court's denial of a motion to withdraw, we consider "the timeliness of the motion, the adequacy of the court's inquiry into the defendant's complaint, and whether the conflict between the defendant and his counsel was so great that it resulted in a total lack of communication preventing an adequate defense." United States v. Reyes, 352 F.3d 511, 515 (1st Cir. 2003) (quoting United States v. Woodard, 291 F.3d 95, 107 (1st Cir. 2002)). "We accord 'extraordinary deference' to the district court's decision when 'allowance of the motion would necessitate a

last-minute continuance.'" United States v. Theodore, 354 F.3d 1, 5 (1st Cir. 2003) (quoting Woodard, 291 F.3d at 107). We review preserved objections to decisions on motions to withdraw for abuse of discretion, see Reyes, 352 F.3d at 515, and forfeited objections for plain error, see United States v. Brake, 904 F.3d 97, 99 (1st Cir. 2018).

The second, third, and fourth motions to withdraw were filed a very short time before trial. Given the complexity of Gottesfeld's case, granting any of the challenged motions to withdraw would have almost certainly required a "last-minute continuance." Theodore, 354 F.3d at 5 (quoting Woodard, 291 F.3d at 107). Nevertheless, the district court gave due consideration to all those motions at issue, exhaustively exploring the grounds for each of them through a hearing. The district court also found that Attorney Grimaldi was capable of effectively representing Gottesfeld despite the difficulties of their relationship and that Attorney Grimaldi in fact did "a very creditable and professional job" defending Gottesfeld at trial. Based on our review of the trial record, we see no reason to doubt these findings. For all these reasons, Gottesfeld is not entitled to a new trial, under any standard of review, based on the district court's denials of Attorney Grimaldi's second, third, and fourth motions to withdraw. To rule otherwise would be to rule that a defendant in a criminal case need simply attack his own lawyer online in order to force the court's hand in making rulings that could then themselves be attacked on appeal.

This leaves, to some extent, Gottesfeld's challenge to the district court's denial of the fifth motion to withdraw. It is true that Gottesfeld initially claimed not to oppose Attorney Grimaldi's fifth motion to withdraw, on the con-

dition that he would not have to proceed pro se if the motion were granted. But given the district court's prior admonitions on this score, Gottesfeld was well aware that this condition would not be satisfied. He had been repeatedly advised that he would have to proceed pro se if Attorney Grimaldi withdrew. And when the district court reminded him of this during the hearing on the fifth motion to withdraw, Gottesfeld indicated that he understood and that he wanted Attorney Grimaldi to continue as counsel.[6] In any event, Attorney Grimaldi eventually was allowed to withdraw, and Gottesfeld offers no claim at all that he suffered any prejudice during the period between the post-trial denial of the fifth motion and the presentencing withdrawal of his attorney.

**D.**

Still training his attention on Attorney Grimaldi's motions to withdraw, Gottesfeld contends that the district court violated his Sixth Amendment right to a public trial by not allowing the press or the public to attend the hearings conducted on five of the motions. Gottesfeld in at least four of these instances objected to the exclusion, so we review the challenged decisions to exclude de novo. See United States v. Brown, 669 F.3d 10, 32 (1st Cir. 2012)

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

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[6] Gottesfeld does not assert on appeal that the district court erred in issuing these warnings, and we can find no fault with them. See United States v. Jones, 778 F.3d 375, 388 (1st Cir. 2015) ("In some circumstances, a district court may force a defendant to choose between proceeding with unwanted counsel or no counsel at all.").

That right to a public trial applies at "any stage of a criminal trial," including jury selection. Presley v. Georgia, 558 U.S. 209, 213 (2010). And the Supreme Court has concluded that the right extends to at least one pretrial context: hearings aimed at suppressing evidence proffered for trial. Waller v. Georgia, 467 U.S. 39, 47 (1984). Gottesfeld asks that we further extend the public-trial right to pretrial hearings on motions to withdraw by counsel. Neither party points to any case deciding whether such an extension is warranted. We think it is not, at least absent factors not present here.

As justification for its holding that a defendant has a constitutional right to public suppression hearings, the Supreme Court explained that suppression hearings "often resemble[] a bench trial" where "witnesses are sworn and testify," "counsel argue their positions," and the "outcome frequently depends on a resolution of factual matters." Id. at 47. Notably, the Court cited the fact that suppression hearings often challenge police conduct, which creates a strong interest in public scrutiny. Id.

These withdrawal hearings, by contrast, involved only a dispute between the defendant and his counsel. Public hearings on such motions will not "encourage[] witnesses to come forward" or "discourage[] perjury" because they do not involve the presentation of evidence relevant to the defendant's guilt or innocence. Brown, 669 F.3d at 33 (quoting Waller, 467 U.S. at 46). Indeed, government counsel was also barred from the hearing. The issue -- should defense counsel be allowed to withdraw -- was entirely collateral to the trial or to any issues of guilt or innocence. And the nature of the issue -- antagonism between counsel and the defendant -- raised a serious possibility that public disclosure of the hearing would create

publicity that might find its way into the jury box and would certainly become known to the prosecution. The primary purpose of the Sixth Amendment right, after all, is to "benefit ... the accused." Brown, 669 F.3d at 33 (quoting United States v. Scott, 564 F.3d 34, 38 (1st Cir. 2009)). As to this last point -- benefiting the accused -- Gottesfeld argues that he waived any objection to closing the hearings. But that waiver was itself uncounseled, illustrating how different these hearings are from the adversarial proceedings known as a trial.

All in all, we decline the invitation to hold that the Sixth Amendment public-trial right applied to the pretrial and post-trial hearings on counsel's motions to withdraw in this case.[7] Gottesfeld's trial was held in public; the withdrawal hearings were not part of that trial.

**E.**

Turning from procedure to substance, Gottesfeld challenges the district court's order precluding him from raising at trial the affirmative defense known as "defense of another." A district court "may preclude the presentation of [a] defense entirely" if the defendant does not produce sufficient evidence "to create a triable issue." United States v. Lebreault-Feliz, 807 F.3d 1, 4 (1st Cir. 2015) (quoting United States v. Maxwell, 254 F.3d 21, 26 (1st Cir. 2001)). We review decisions precluding affirmative defenses de novo. Id.

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[7] It is arguable that members of the public have a First Amendment right to attend hearings distinct from Gottesfeld's right to a public trial under the Sixth Amendment. See generally Press-Enter. Co. v. Superior Ct., 464 U.S. 501 (1984). But we need not address that issue, as Gottesfeld does not raise it (nor is it clear he would have standing to do so).

"Use of force is justified when a person reasonably believes that it is necessary for the defense of ... another against the immediate use of unlawful force," so long as the person "use[s] no more force than appears reasonably necessary in the circumstances." United States v. Bello, 194 F.3d 18, 26 (1st Cir. 1999) (quoting First Circuit Pattern Crim. Jury Instr. § 5.04); see also 2 Paul H. Robinson et al., Crim. L. Def. § 133 ("Conduct constituting an offense is justified if: (1) an aggressor unjustifiably threatens harm to another person; and (2) the [defendant] engages in conduct harmful to the aggressor (a) when and to the extent necessary to protect the other person, (b) that is reasonable in relation to the harm threatened."); Model Penal Code § 3.05 (similar).

Gottesfeld sought to argue at trial that his cyberattack on Boston Children's and Wayside was justified because it was necessary to protect Pelletier from remaining under the care of those institutions. In support of this theory, he primarily pointed to news and television reports stating that Pelletier was being "abused" and "tortured" under the care of Boston Children's and Wayside; that Pelletier's custody proceeding might be "compromised"; and that Pelletier's parents had contacted the Federal Bureau of Investigation and other law enforcement agencies regarding Pelletier's plight to no avail.

This evidence would perhaps support a finding that Gottesfeld subjectively believed Pelletier was at some risk of harm. But he marshals no case to support a finding that he reasonably believed that she faced the threat of immediate unlawful force. To the contrary, he knew that

her custody was authorized by a court order.[8] Furthermore, even if he thought that some individual or group of individuals were using or threatening to use unlawful force, that would have provided no justification for Gottesfeld to take hostage thousands of other persons' internet connections.

Nor could a jury have found Gottesfeld's chosen methods reasonably necessary. The issues of Pelletier's custody and treatment were before a court, and all allegations known to Gottesfeld were known to law enforcement authorities. To the extent that Gottesfeld viewed these alternative courses of action as unlikely to succeed, we have previously explained that a defendant's likely inability "to effect the changes he desires through legal alternatives does not mean, ipso facto, that those alternatives are nonexistent." Maxwell, 254 F.3d at 29 (considering a defendant's assertion of the necessity defense); see also Bello, 194 F.3d at 27 (stating that, under federal law, the "absence of lawful alternatives is an element of all lesser-evil defenses" (quoting United States v. Haynes, 143 F.3d 1089, 1090–91 (7th Cir. 1998))). But see United States v. Perez-Jimenez, 219 F. App'x 644, 646–47 (9th Cir. 2007) (availability of alternatives is relevant, albeit

[8] To the extent Gottesfeld contends that he reasonably believed that Pelletier's treatment during her custody was unlawful, that argument is waived multiple times over: Gottesfeld did not clearly assert it before the district court and only now tries to develop it in his reply brief. Even were we to consider this argument, public commentary and opinion comparing Pelletier's treatment to torture -- which is all he cites to support this claim -- does not alone support a finding that he reasonably believed that she was in fact being subjected to torture. To rule otherwise would be to empower every citizen with the ability to simultaneously incite and immunize criminal conduct by another even as a judicial tribunal is available to hear the claims of harm.

not an element). Gottesfeld's opening brief on appeal does not even attempt to argue otherwise; he addresses the issue of necessity only in his reply brief, and even then does so cursorily. This provides yet another independent basis for affirming the district court's decision precluding Gottesfeld from presenting his defense-of-others argument at trial: "[A]n appellant waives any argument not made in his 'opening brief but raised only in [his] reply brief.'" United States v. Pedró-Vidal, 991 F.3d 1, 4 n.3 (1st Cir. 2021) (alterations in original) (quoting United States v. Rivera-Carrasquillo, 933 F.3d 33, 40 n.7 (1st Cir. 2019)).[9]

**F.**

Finally, we address Gottesfeld's argument that the trial judge improperly denied three recusal motions he made pro se after the verdict but before sentencing. As we explained above, under 28 U.S.C. § 455(a), a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Additionally, a judge must recuse himself if he "has a personal bias or prejudice" concerning a party, 28 U.S.C. §§ 144, 455(b)(1); if he "knows that he, individually or as a fiduciary, ... has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding," id. § 455(b)(4); or if he knows that a person "within the third degree of relationship" to him has "an interest that could be substantially affected by

[9] We accordingly need not review the district court's other rationales for precluding Gottesfeld from raising a defense-of-others defense at trial.

the outcome of the proceeding," id. § 455(b)(5). "We review a ruling on a motion to recuse for abuse of discretion." United States v. Torres-Estrada, 817 F.3d 376, 380 (1st Cir. 2016) (quoting United States v. Pulido, 566 F.3d 52, 62 (1st Cir. 2009)). We will uphold the district court's denial of such a motion "unless we find that it cannot be defended as a rational conclusion supported by a reasonable reading of the record." Id. (quoting Pulido, 566 F.3d at 62).

In his motions to disqualify the trial judge below, Gottesfeld alleged that: (1) the trial judge had a financial and personal interest in maintaining the reputation of Boston Children's, which was a target of Gottesfeld's cyberattack; (2) the trial judge was "emotionally compromised" from having presided over the trial of another hacker who committed suicide after being indicted on charges similar to those brought against Gottesfeld; and (3) the judge ruled against him on a number of motions. Having reviewed Gottesfeld's allegations concerning the trial judge's financial disclosures, prior judicial service, and legal rulings in this case, we see nothing to suggest that the trial judge had any bias, prejudice, personal interest, or financial interest that would have required his disqualification from this case. To start, as we mentioned above, section 455 does not require recusal "on the basis of remote, contingent, indirect or speculative interests." Bayless, 201 F.3d at 127. Gottesfeld's allegations of the judge's financial interests in the reputation of Boston Children's -- based on an attenuated series of connections involving non-profits to which the judge had donated -- are far too remote and indirect to suggest even an appearance of partiality, and his allegations concerning the judge's emotional response to the events following a prior

case are similarly too speculative to require disqualification. Finally, his third basis for recusal, which boils down to a bare disagreement with the judge's rulings in this case, runs afoul of the "extrajudicial source" doctrine. See Liteky v. United States, 510 U.S. 540, 544–51 (1994) (explaining that any claim of bias or prejudice -- with limited exceptions -- must "stem from an extrajudicial source" (quoting United States v. Grinnell Corp., 384 U.S. 563, 583 (1966))).

Gottesfeld does not attempt to argue otherwise on appeal. Indeed, he does not even repeat the allegations of judicial bias and impropriety that he asserted in his recusal motions below. Rather, he asserts that the district court exceeded the scope of its discretion by denying his recusal motions without making factual findings on the record to support those decisions. But given our conclusion that Gottesfeld's allegations do not raise any doubt about the trial judge's impartiality, we necessarily hold that each of the district court's orders denying Gottesfeld's recusal motions was "a rational conclusion supported by a reasonable reading of the record." Torres-Estrada, 817 F.3d at 380. No further findings were required.[10]

**II.**

For the foregoing reasons, we affirm Gottesfeld's conviction.

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[10] Insofar as Gottesfeld seeks to challenge the district court's denial of the recusal motion made by his trial counsel after the jury began deliberations, we reject that challenge for the same reasons.

## APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL ACTION NO. 16-10305-NMG

UNITED STATES OF AMERICA

v.

MARTIN GOTTESFELD,
Defendant

Filed: June 14, 2018

### ORDER

Before NATHANIEL M. GORTON, United States District Judge.

On April 20, 2018, defendant Martin Gottesfeld ("Gottesfeld" or "defendant") filed a motion to dismiss pursuant to the Speedy Trial Act, 18 U.S.C. § 3161 (Docket No. 146), which was opposed by the government and which was the subject of extensive oral argument at a hearing yesterday.[1]

[1] Defendant filed two motions to amend or correct his motion to dismiss which were allowed by this Court (Docket Nos. 148 and 157). The operative motion to dismiss was filed on May 3, 2018 (Docket No. 164).

Pursuant to 18 U.S.C. § 3165, each district is required to prepare a plan for the disposition of criminal cases consistent with the time standards of the Speedy Trial Act. Under the plan for the District of Massachusetts, pre-indictment motions for a continuance are properly filed with the judge assigned to "the miscellaneous business docket". Plan for the Prompt Disposition of Criminal Cases, ¶ 5(c)(1)(A). Six assented-to motions to exclude time were filed on the miscellaneous business docket, Case No. 16-mc-91064, and were allowed by the judge presiding over that docket.

The Court finds for the following reasons that those exclusions of time were proper and that, therefore, less than 30 days of non-excluded time elapsed between the date of defendant's arrest and the date the indictment was returned:

1. The government obtained valid consent from Attorney Tor Ekeland, who represented defendant, as documented in the exhibits attached to the government's opposition memorandum.

2. Defendant's contention that, because Attorney Ekeland had no appearance entered in Case No. 16-mc-91064, the motions were sought ex parte is unpersuasive because

    a. Attorney Ekeland's assent on behalf of his client to exclude time during the pendency of ongoing plea negotiations did not constitute "appear[ance] and practice in this Court", District of Massachusetts Local Rule 83.5.6, and

    b. Attorney Ekeland did not purport to file the motions to exclude time jointly but rather he

> assented to their being filed by the government on behalf of his client from whom he had authority.

3. Defendant's further contention that the orders entered on the miscellaneous business docket, 16-mc-91064, violated 18 U.S.C. § 3167(h)(7)(A) because they were granted electronically and did not, therefore,

> > set[] forth, in the record of the case, either orally or in writing, [the] reasons for finding that the ends of justice [were] served by the granting of such continuance[s]
>
> is unavailing because the electronic orders excluding time in this case "necessarily adopted" the grounds submitted in the motions. United States v. Pakala, 568 F.3d 47, 60 (1st Cir. 2009).

4. The plea negotiations at issue here appropriately fit within the ends of justice exclusion. United States v. Fields, 39 F.3d 439, 445 (3d Cir. 1994); 18 U.S.C. § 3161(h)(7)(A).

Accordingly, defendant's motions to dismiss (Docket No. 164) and for release from custody (Docket Nos. 147 and 177) are **DENIED.** A memorandum will follow with a more detailed explanation of this Court's decision but the indictment will not be dismissed and this case will proceed as previously scheduled. **So ordered.**

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
UNITED STATES DISTRICT JUDGE

Dated June 14, 2018

## APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL ACTION NO. 16-10305-NMG

UNITED STATES OF AMERICA

v.

MARTIN GOTTESFELD,
Defendant

Filed: June 19, 2018

## MEMORANDUM & ORDER

Before NATHANIEL M. GORTON, United States District Judge.

This case arises from alleged cyber-attacks against Wayside Youth and Family Support Network ("Wayside") and Boston Children's Hospital ("BCH"). The Grand Jury returned a two count indictment of Martin Gottesfeld ("defendant" or "Gottesfeld") for his alleged involvement in these attacks.

Pending before the Court are (1) defendant's motion to suppress and its supplements (Docket Nos. 78, 128 and 166) and (2) the government's motion in limine to preclude defendant's so-called "torture defense" (Docket No. 116). For the following reasons, the motion to suppress and their supplements will be denied and the motion in limine will be allowed. By order of the Court entered on

June 14, 2018 (Docket No. 205), the defendant's motions to dismiss (Docket No. 164) and for release from custody (Docket Nos. 147 and 177) were denied, with the notation that an explanatory memorandum would follow. This memorandum includes that explanation.

## I. Factual Background

The indictment charges (1) conspiracy under 18 U.S.C. § 371 (Count I) and (2) intentionally causing damage to a protected computer in violation of 18 U.S.C. § 1030(a)(5)(A) (Count II). The indictment also includes forfeiture allegations pursuant to (1) 18 U.S.C. § 981(a)(C)(1) and 18 U.S.C. § 2461 (conspiracy forfeiture allegation) and (2) 18 U.S.C. § 982(a)(2)(B) and 18 U.S.C. § 1030(i) (intentional damage to a protected computer forfeiture allegation).

The government submits that beginning no later than 2013, Gottesfeld became concerned with what he called "the troubled teen industry" and used websites and social media tools to bring attention to his cause. That year, he advocated for the shutdown of an adolescent treatment center in Utah ("the Utah Treatment Center") through various social media accounts. In November 2013, the Utah Treatment Center was the target of intermittent distributed denial of service ("DDOS") attacks for several months.

DDOS attacks flood computer servers with traffic in an attempt to overload the capacity of the server system. This generally involves directing traffic from remotely hijacked, web-enabled devices or access to high capacity internet connections through which thousands of traffic sources are simulated. The cyber attacks are difficult to defend against because they come from so many sources.

In addition to exceeding the capacities of the servers, attacks often force victims to shut down important parts of their websites or to refuse otherwise legitimate and productive traffic.

In March 2014, the company that managed patient records for the Utah Treatment Center ("the Record Management Company") was also targeted with DDOS attacks. Gottesfeld allegedly used his Twitter account while the attacks were occurring to send a message to the Record Management Company: "Website troubles? Drop [the Utah Treatment Center] or we NEVER stop". For more than one month, the attacks disrupted the ability of the Records Management Company to communicate with clients and cost the company approximately $24,000.

In early 2014, the media began reporting on a teenager, Justina Pelletier ("Ms. Pelletier") who had been placed in the custody of the Massachusetts Department of Children and Families ("DCF") because of concerns that her parents were interfering with her treatment for a psycho-somatic disorder by instead insisting on treatment for mitochondrial disease. Ms. Pelletier was reportedly treated at BCH before being transferred to Wayside.

On March 23, 2014, Gottesfeld purportedly sent Twitter messages to an unindicted co-conspirator suggesting targeting Wayside with cyber-attacks. Two days later, Gottesfeld allegedly issued a series of public Twitter messages calling for attacks on the Wayside network. The attacks lasted more than a week, crippled Wayside's website and caused Wayside to spend in excess of $18,000 on response and mitigation efforts.

Also March 23, 2014, Gottesfeld allegedly posted a YouTube video in the name of the hacking organization Anonymous calling for action against BCH. The video stated Anonymous' intent to punish BCH until Ms. Pelletier was released and demanded the termination of a physician involved in Ms. Pelletier's case "or [BCH] too shall feel the full unbridled wrath of Anonymous". The video directed viewers to a website that contained information necessary to initiate a DDOS attack against BCH's computer server.

On April 19, 2014, Gottesfeld and the alleged conspirators purportedly initiated a DDOS attack against BCH's Massachusetts server for at least seven days, taking BCH's website out of service. The attacks disrupted the entire BCH community by impeding the ability of physicians to communicate and access patient records. The cyber attack also occurred during a period of important fundraising which was severely impacted. Responding to and mitigating the damage from the attack purportedly cost BCH more than $300,000 in addition to lost fundraising estimated at $300,000.

## II. Government's Motion in Limine to Preclude Defendant's "Torture Defense" Based on Necessity and Defense of Another (Docket No. 116)

The government moves to preclude evidence on the affirmative defenses of necessity and defense of another that is not otherwise admissible for an appropriate purpose. The government contends that defendant cannot produce competent evidence to show that he acted in defense of Ms. Pelletier because (1) defendant was never in Ms. Pelletier's presence, (2) he cannot show that he acted to prevent imminent harm and (3) there is no evidence of

unlawful force by BCH or Wayside. With respect to defendant's purported necessity defense, the government maintains that the defendant has proffered no competent evidence showing that (1) defendant's actions were in reasonable anticipation of averting the alleged harm or (2) defendant lacked legal alternatives to violating the law.

Defendant first renews his objection to the motion in limine procedure to exclude an affirmative defense. He maintains that requiring a proffer of evidence at this juncture shifts the burden of proof to him and compels self-incrimination by defendant. In support of the imminence-of-harm requirement, defendant proffers his statement to the Huffington Post describing the harm Ms. Pelletier faced in the care of BCH and Wayside. Defendant relies on interviews of Ms. Pelletier's father on television news programs describing Ms. Pelletier's condition. Defendant contends that he has demonstrated the imminent harm element by tendering evidence of Ms. Pelletier's ongoing medical suffering.

Defendant rejects the government's suggestion that the "force" used by BCH and Wayside was not unlawful because it was exerted pursuant to an order by the DCF. He objects to the premise that legally-sanctioned force cannot be unlawful because a state court order with respect to custody can later be overturned. Defendant relies again on news articles, suggesting that the court proceedings themselves may have been compromised.

Gottesfeld argues that it was reasonable to anticipate a direct, causal relationship between his action and the harm to be averted, proffering evidence that the cyber attack largely achieved the intended effect of raising awareness of Ms. Pelletier's story. He submits that after the at-

tack, the state court judge dismissed the case and returned custody of Ms. Pelletier to her parents. Defendant contends that a juror could find that the non-traditional attack was necessary.

To demonstrate that defendant had no legal alternatives to the alleged cyber attack, he proffers evidence that Ms. Pelletier's parents had already notified the FBI and other law enforcement agencies. He contends that he had no standing to seek other legal relief on behalf of Ms. Pelletier and that writing Congress, engaging in public protest or sending private messages to those affected would not have been effective in redressing the ongoing harm.

While a defendant has a "wide-ranging" right to present a defense, that right is not absolute and does not include the right to present irrelevant evidence. United States v. Maxwell, 254 F.3d 21, 26 (1st Cir. 2001) (citing In re Oliver, 333 U.S. 257, 273–74 n.31 (1948)). Before submitting an affirmative defense to the jury,

> it is essential that the testimony given or proffered meet a minimum standard as to each element of the defense so that, if a jury finds it to be true, it would support an affirmative defense.

United States v. Bailey, 444 U.S. 394, 415 (1980). A district court can assess the sufficiency of a defendant's affirmative defense before it is presented to a jury as part of its gate-keeping responsibilities. See United States v. Portillo–Vega, 478 F.3d 1194, 1197 (10th Cir. 2007). It can review the sufficiency of defendant's proffered evidence before trial, during trial or after the close of evidence before an instruction on the defense is given to the jury. See, e.g., United States v. Graham, 663 Fed. App'x 622, 625–

26 (10th Cir. 2016) (citing Portillo–Vega, 478 F.3d at 1202) (precluding duress defense after pretrial hearing)); United States v. Lebreault–Feliz, 807 F.3d 1, 5 (1st Cir. 2015) (affirming district court's decision to exclude duress and necessity defenses during trial).

To establish the affirmative defense of another a defendant must show that he reasonably believed that the use of force was necessary "for the defense of oneself or another against the immediate use of unlawful force". United States v. Bello, 194 F.3d 18, 26 (1st Cir. 1999) (citing First Circuit Pattern Jury Instr. § 5.04 (2017)). The affirmative defense of necessity requires proof that the defendant

> (1) was faced with a choice of evils and chose the lesser evil, (2) acted to prevent imminent harm, (3) reasonably anticipated a direct causal relationship between his acts and the harm to be averted, and (4) had no legal alternative but to violate the law.

Lebreault–Feliz, 807 F.3d at 4.

As to the defendant's proposed affirmative defense based upon defense of another, his proffer of evidence does not demonstrate that Ms. Pelletier was threatened by the immediate use of unlawful force. The alleged force being used against Ms. Pelletier was exerted pursuant to an order of a Massachusetts Juvenile Court judge to the DCF. Defendant contends that a state court order concerning child custody could, at some later point, be determined to be unlawful.

The de minimis possibility that a court order, at some uncertain future point, could be reversed by an appellate court, does not mean that someone acting in accordance

with that court order while it is in effect is somehow acting unlawfully. See, e.g., United States v. Branch, 91 F.3d 699, 714 (5th Cir. 1996) (holding that district court was not obligated to give proposed self-defense instruction and making clear that general availability of affirmative defenses "must accommodate a citizen's duty to accede to lawful government power"); cf. United States v. Dorrell, 758 F.2d 427, 434 (9th Cir. 1985) ("[I]t does not follow that the law should excuse criminal activity intended to express the protestor's disagreement with positions reached by the lawmaking branches of the government."); United States v. Kopp, 562 F.3d 141 (2d Cir. 2009) (affirming district court's exclusion of affirmative defense proposing justification based on contention that defendant was acting to save lives of "innocent third party children by preventing [legal] abortions"). Defendant's subjective opinion that the force was unlawful does not make it so.

With respect to the necessity defense, defendant has not offered competent evidence that it was objectively reasonable to anticipate a causal relationship between the alleged cyber attack and the purported harm to be averted. Defendant has offered no competent evidence to demonstrate that he reasonably expected a DDOS interruption to lead to the release of Ms. Pelletier. In his opposition memorandum, he asserts that the disruption would "certainly get the attention of the alleged abusers", thereby improving Ms. Pelletier's chances for release. Gottesfeld acknowledges that he did not expect the attack would cause the desired effect, as is required, but rather that the attack would lead to publicity which could potentially improve the chances that Ms. Pelletier would get relief at some uncertain time in the future. See, e.g.,

Dorrell, 758 F.2d at 434 (holding that defendant could not establish as a matter of law that his spray-painting of government property could be reasonably anticipated to lead to the termination of a missile program and the aversion of nuclear war and world starvation). That causal connection is too attenuated to meet the requirement of a necessity defense. See Maxwell, 254 F.3d at 28 ("He cannot will a causal relationship into being simply by the fervor of his convictions (no matter how sincerely held).") (citing United States v. Montgomery, 772 F.2d 733, 736 (11th Cir. 1985)).

Defendant also fails to elucidate that there were no legal alternatives to the alleged cyber attack. The necessity defense requires that the defendant show that the emergent crisis precluded all options but the one taken. Maxwell, 254 F.3d at 28. The fact that a defendant is "unlikely to effect the changes he desires through legal alternatives does not mean, ipso facto, that those alternatives are nonexistent". Id. at 29 (citing Dorrell, 758 F.2d at 432). When considering whether there were viable legal alternatives, a court must assess a defendant's proffered evidence about the availability of those alternatives objectively. See United States v. Schoon, 971 F.2d 193, 198 (9th Cir. 1991).

Gottesfeld does not, and presumably cannot, demonstrate that there were no legal alternatives to the alleged cyber attack under the circumstances. In his opposition memorandum, he acknowledges some of those alternatives but complains of their ineffectiveness. For example, he maintains that Ms. Pelletier's parents had already called law enforcement and that public protest and writing a member of Congress "cannot always be counted on

to address a serious, ongoing harm". Although such actions may not always be effective, defendant apparently concedes that legal alternatives did, in fact, exist. The ineffectiveness of available alternatives does not negate their existence. Maxwell, 254 F.3d at 29; see also United States v. Posada–Rios, 158 F.3d 832, 874 (5th Cir. 1998) ("As long as defendant's crises permitted a selection from among several solutions, some of which did not involve criminal acts, ... the necessity defense must fail." (internal citation omitted).

Defendant maintains that other parties had pursued legal alternatives and had failed. Even if the ineffectiveness of such alternatives was sufficient to justify the illegal action, which it was not, Gottesfeld has not proffered evidence that he pursued any legal alternative or communicated with any person who had explored those alternatives. See e.g., United States v. Dicks, 338 F.3d 1256, 1258 (11th Cir. 2003) (affirming district court's exclusion of necessity defense where appellant had not "avail[ed] himself of [a] viable legal alternative").

In his opposition memorandum and throughout oral argument, defendant suggested that his proffered evidence was admissible and sufficient to maintain the proposed affirmative defenses because it would demonstrate defendant's state of mind at the time of the alleged cyber attacks. Defendant's proffered evidence does not, however, show that it was objectively reasonable to believe that (1) Ms. Pelletier had been subjected to unlawful force, (2) there were no viable legal alternatives or (3) that defendant's actions would cause the desired outcome. See, e.g., United States v. Perdomo–Espana, 522 F.3d 983, 987 (9th Cir. 2008) (assessing defendant's proffered necessity defense through an objective framework);

United States v. Acosta–Sierra, 690 F.3d 1111, 1126–27 (9th Cir. 2012) (affirming exclusion of mental health evidence that would have explained defendant's subjective belief that self defense was necessary, but "would not have supported the proposition that his actions were objectively reasonable").

At oral argument, counsel for defendant repeatedly suggested that he "would be willing to find" additional admissible evidence in support of the proposed affirmative defenses. In his opposition memorandum, he similarly states that

> he reserves the right to present additional facts, arguments, and information to the Court at later points in connection with subsequent requests for reconsideration.

Defendant has not proffered any competent evidence that would support his proposed affirmative defenses. The Court will not engage in unlimited dialogue on the subject. If defendant has competent evidence that would support reconsideration of this preclusion of his affirmative defenses, he is directed to submit it forthwith.

Accordingly, the motion in limine will be allowed and defendant will be precluded from introducing evidence of the affirmative defenses of necessity or defense of another. The Court will not, however, preclude the defendant from testifying, if he chooses to do so, as to his version of events. Nor will the Court preclude the introduction of otherwise relevant, non-hearsay testimony in support of Gottesfeld's defense.

### III. Defendant's Motion to Dismiss (Docket No. 164)

Defendant moves to dismiss the indictment for alleged violations of the Speedy Trial Act, 18 U.S.C. § 3161 and the speedy trial provisions of Fed. R. Crim. P. 48(b)(1). He contends that more than 30 non-excludable days elapsed between his arrest on February 17, 2016 in the Southern District of Florida and his indictment on October 19, 2016 in the District of Massachusetts. If he is correct, that would be a violation of 18 U.S.C. § 3161(b). First, defendant suggests that the orders entered by another session of this Court in Case No. 16–mc–91064–ADB are insufficient to exclude the purported days because (1) the orders were not made in the record of this case but rather in a sealed civil docket, (2) the Court did not set forth its reasons for finding that the ends of justice would be served by the continuance, (3) the orders were improperly backdated and (4) Attorney Tor Ekeland had no authority to assent to the motions because he had not entered an appearance on the sealed civil docket.

The government responds that all but 26 days were properly excluded between the time of defendant's arrest and his indictment and that, accordingly, there has been no violation of § 3161(b). The government also maintains that (1) pre-indictment motions to exclude are properly made on the Miscellaneous Business Docket, (2) it properly obtained effective consent from defendant's counsel, (3) there was no improper backdating and (4) the orders on the motions to exclude adopted the content of the assented-to motions thereby satisfying the reason-giving requirements of the Speedy Trial Act.

The Speedy Trial Act provides, in relevant part, that

> [a]ny information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested.

18 U.S.C. § 3161(a). The purpose of the thirty day requirement is to ensure "that the defendant is not held under an arrest warrant for an excessive period without receiving formal notice" of the charge made against him. United States v. Spagnuolo, 469 F.3d 39, 42 (1st Cir. 2006) (quoting United States v. Meade, 110 F.3d 190, 200 (1st Cir. 1997) (internal quotation marks omitted)).

The Speedy Trial Act provides a detailed list of periods of delay that may be properly excluded including, for example, "delay resulting from other proceedings concerning the defendant". 18 U.S.C. § 3161(h); see also Zedner v. United States, 547 U.S. 489, 497 (2006). The statutory scheme also permits a district court to grant a continuance and exclude a delay where the judge finds that

> the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.

18 U.S.C. § 3161(h)(7)(A).

In defendant's case, if more than 30 non-excludable days elapsed between the date of defendant's arrest in the Southern District of Florida on February 17, 2016, and the date of defendant's indictment on October 19, 2016, the case "shall be dismissed". 18 U.S.C. § 3162(a)(1). The parties agree that ten days within the relevant statutory period are properly excluded under § 3161(h)(1)(F), which provides for an exclusion of no more than ten days as a result of delay from transportation of defendant from

another district. That provision applies to defendant by virtue of his transport from the Southern District of Florida to this District and the time between February 17, 2016 and February 27, 2016 is therefore properly excluded. The first motion for excludable delay was filed on March 1, 2016, properly excluding the day of March 1, 2016, pursuant to 18 U.S.C. § 3161(h)(1)(D).

Orders were entered in another session of this Court, Case No. 16–mc–91064, excluding time between:

- March 18, 2016 and April 22, 2016 (Docket No. 2),
- April 22, 2016 and May 27, 2016 (Docket No. 5),
- May 26, 2016 and July 1, 2016 (Docket No. 7),
- July 1, 2016 and August 1, 2016 (Docket No. 9),
- August 1, 2016 to September 9, 2016 (Docket No. 11, 12),
- September 9, 2016 and October 10, 2016 (Docket No. 14).

Non-excluded time elapsed during three periods: (1) February 28, 2016 through February 29, 2016; (2) March 2, 2016 through March 17, 2016 and (3) October 11, 2016 through October 18, 2016, for a total of 26 non-excludable days. The challenges made by defendant to the exclusions entered on the docket are unpersuasive.

**A. Use of the Miscellaneous Business Docket**

Pursuant to 18 U.S.C. § 3165, each district is required to prepare a plan for the disposition of criminal cases consistent with the time standards of the Speedy Trial Act. Under the plan for the District of Massachusetts, pre-indictment motions for a continuance are properly filed with the judge assigned to "the miscellaneous business

docket". Plan for the Prompt Disposition of Criminal Cases, District of Massachusetts, ¶ 5(c)(1)(A).

Defendant contends that the District Plan violates the provision of the Speedy Trial Act that any ends-of-justice continuance include oral or written findings "in the record of the case". 18 U.S.C. § 3161(h)(7(A). The cases relied upon by defendant concern challenges to the Speedy Trial Act's post-indictment provision, 18 U.S.C. § 3161(c)(1), requiring that the trial of a defendant shall commence within 70 days from the filing of the information or indictment. See Zedner, 547 U.S. at 492 ("In this case, petitioner's trial did not begin within 70 days of indictment."); Bloate v. United States, 559 U.S. 196, 199 (2010). This Court declines to second guess the District Plan and its recognition of the importance of the secrecy of grand jury proceedings. Accordingly, the Court finds that pre-indictment continuances were made properly here on the miscellaneous business docket.

**B. Validity of Consent from Predecessor Counsel**

In addition to challenging the docket under which the motions to exclude time were filed, defendant contends that the motions were essentially made ex parte because defendant's attorney, Tor Ekeland, was not authorized to assent thereto. Defendant avers that, because Attorney Ekeland was not a member of the Massachusetts Bar nor admitted to practice in the District in Case No. 16–mc–91064, he was not qualified to act as counsel and assent to any motion to exclude time.

In response, the government contends that defendant improperly conflates an attorney's authority to communicate (or enter into an agreement) with the government on

behalf of a client with an attorney's obligation to file a motion to be admitted to practice before this Court. Attached to the government's opposition memorandum are communications between the government and Attorney Ekeland purporting to assent, on behalf of defendant, to the government filing of motions for excludable delay.

A review of those communications indicate that Attorney Ekeland's assent was valid. Under the local rules of this District, an attorney who is a member of the bar of another United States District Court or the highest court of any state "may appear and practice in this court in a particular case by leave granted in the discretion of the Court". Local Rules of the United States District Court for the District of Massachusetts, Rule 83.5.3. Attorney Ekeland informed the government of his intent to file a motion for admission pro hac vice in this District and was admitted by motion in Case No. 16–mj–4117 by Magistrate Judge Bowler in April, 2015.

The fact that Attorney Ekeland did not file an appearance on the miscellaneous business docket does not negate his assent to excludable delays on behalf of his client or somehow transform such motions into ex parte requests by the government. The assent given to the government to file a motion for excludable delay did not amount to "practice before the Court" under Massachusetts Local Rule 85.5.3.

**C. Alleged Backdating**

Defendant further challenges the exclusions on the grounds that the orders purported to exclude time through improper backdating on two occasions: (1) the second motion to exclude time, filed on April 11, 2016, purported to exclude time from April 22, 2016 through

May 27, 2016, but was not granted until May 5, 2016 and (2) the fifth motion to exclude time, filed on July 26, 2016, purported to exclude time from August 1, 2016 through September 9, 2016 but was not granted until August 2, 2016. Defendant contends that 14 days were improperly backdated which, when added to the additional unexcluded days, puts the total at over 30 days.

The Speedy Trial Act provides that any delay resulting from the filing of a pretrial motion "through the conclusion of the hearing on, or other prompt disposition of, such motion" shall be excluded. 18 U.S.C. § 3161(h)(1)(D). The time between the filing of the motions and the resolution of those motions is properly excluded under that subsection and the orders of the district judge did not therefore improperly allow retroactive exclusions of time. The cases relied on by defendant are inapposite. In United States v. Janik, 723 F.2d 537, 545–46 (7th Cir. 1983), for example, the Seventh Circuit Court of Appeals reversed a district court's order denying a defendant's motion to dismiss where the district judge had retroactively declared an ends-of-justice continuance to exclude time that had elapsed during a period of time in excess of 60 days that the court had a motion to suppress under advisement. In denying a motion to dismiss, the district judge retroactively declared that the time should have been excluded even though there had been no motion to exclude filed during the pendency of the suppression motion. Id. Here, the government had properly filed motions, with defendant's assent, to exclude time and those motions were allowed after the period the parties sought to exclude had begun to run.

**D. Adoption of Content of Motions**

Defendant objects that the orders excluding time are also invalid because they fail to set forth the reasons for finding that the ends of justice would be served by the granting of the requested continuances. The electronic endorsements of the assented-to motions, defendant avers, do not adequately explain their reasoning as is required by statute. The government responds that the electronic endorsements adopted the reasoning set forth in the motions.

Under 18 U.S.C. § 3161(h)(7)(A), a Court may grant a motion for a continuance based on findings that "the ends of justice served by taking such action outweigh the best interest" of the defendant and public in a speedy trial. Pursuant to that subsection, a judge is required to set forth "its reasons for finding that the ends of justice" would be served by such a continuance. Id. The statute lists four factors that a judge can consider in determining whether a continuance would be in the interests of justice but makes clear that the list is non-exhaustive. § 3161(h)(7)(B).

Each of the assented-to motions explains that defendant, through his attorney, was engaged in plea negotiations with the government. With respect to the first motion, defendant was being transported from Florida to this District, necessitating additional time to allow parties to discuss a plea. The third, fourth and fifth motions make clear that the parties agreed to wait for the detention decision of the magistrate judge before resuming plea negotiations. The sixth assented-to motion made the timeline clear, noting that because the detention order was entered the motion was likely the final one.

Defendant's contention that the orders do not properly exclude time because they do not state the reasons for exclusion is unavailing. The First Circuit has made clear that a court need not "articulate the basic facts when they are obvious and set forth in a motion for a continuance". United States v. Pakala, 568 F.3d 47, 60 (1st Cir. 2009) (quoting United States v. Rush, 738 F.2d 497, 507 (1st Cir. 1984)). As in Pakala, it is clear here that the district judge presiding over the miscellaneous business docket "necessarily adopted" the grounds presented in the assented-to motions. Id. (citing United States v. Bruckman, 874 F.2d 57, 62 (1st Cir. 1989)).

Defendant is judicially estopped from adopting a position that is clearly inconsistent with his earlier assent to the motions for exclusion of time. Id. (citing Zedner, 547 U.S. at 504) (finding that defendant was judicially estopped from seeking the advantages of the continuances at one stage and then challenging those continuances at a later stage of the case). When determining whether a party is judicially estopped, a court must consider whether the party "seeking to assert an inconsistent position would derive an unfair advantage" if not estopped. Zedner, 547 U.S. at 504.

The plea negotiations here that served to justify the interest of justice exclusions of time inured to the defendant's potential benefit. The First Circuit has left open the question of whether plea negotiations are appropriate grounds for an exclusion under 18 U.S.C. § 3161(h)(7)(A). United States v. Souza, 749 F.3d 74, 80 (1st Cir. 2014) ("[W]e have expressly left open the issue whether periods of plea negotiations can properly be excluded."). Other courts have accepted plea negotiations as a valid rationale for an ends-of-justice continuance. See e.g., United States

v. Fields, 39 F.3d 439, 445 (3d Cir. 1994) ("We therefore see no reason why an 'ends of justice' continuance may not be granted in appropriate circumstances to permit plea negotiations to continue."); cf. United States v. Mathurin, 690 F.3d 1236, 1242 (11th Cir. 2012) (noting that while a delay resulting from plea negotiations is not automatically excludable under § 3161(h)(1)(G), an ends-of-justice continuance may be appropriate under § 3161(h)(7)(A)).

Defendant here, through counsel, indicated that he was "seriously considering" a plea agreement. The parties had reached an advanced stage of plea negotiations where an agreement was drafted and defendant was considering that agreement. Under the circumstances, the Court finds that the orders excluding time were appropriate under the ends-of-justice provision of the Speedy Trial Act and that defendant is judicially estopped from advancing a position contrary to his earlier assent.

For the foregoing reasons, defendant's motion to dismiss was previously denied.

**IV. Defendant's Motion to Suppress, Supplemental Motion to Suppress and Second Supplemental Motion to Suppress (Docket Nos. 78, 128 and 166)**

Defendant moves to suppress evidence obtained as a result of the execution of a search warrant for defendant's apartment and as a result of a Pen Register/Trap and Trace order. Defendant, through counsel, filed his first motion to suppress in August, 2017. Successor counsel filed a supplemental motion to suppress in March, 2018 and defendant's fourth attorney, who currently represents Gottesfeld, filed a second supplemental motion to

suppress in May, 2018. The government opposes the motion and both its supplements.

**A. Recusal of Magistrate Judge**

In defendant's first and second supplemental motions to suppress, he suggests that evidence seized pursuant to the Pen Register/Trap and Trace order and the search warrant must be excluded because Magistrate Judge Bowler was required to recuse herself from this case by virtue of her spousal relationship and her role in The Boston Foundation ("TBF").[1] Defendant submits that the "good faith" exception does not apply in the absence of a neutral and detached magistrate.

The government responds with an affidavit of TBF Corporate Secretary, Timothy Gassert, confirming that Magistrate Judge Bowler had no role in TBF when the warrant was issued and that the Director Emeritus title conferred weeks later was merely honorific. With respect to Magistrate Judge Bowler's spousal relationship, the government maintains that the fact that her husband has a relationship with Harvard Medical School ("HMS") provided no ground for recusal in this case.

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[1] In his reply memorandum in support of his second supplemental motion to suppress, defendant requests leave "to address additional issues, if not in writing, than [sic] at the scheduled hearing on the matter". At the June 13, 2018 motion hearing, this Court granted leave to Attorney Grimaldi to address additional issues orally at the hearing provided that he did so within the time restrictions imposed for oral argument. In at least one post-hearing pleading, Attorney Grimaldi implies that the Court granted him leave to file a "supplemental brief concerning suppression". That is incorrect. Defendant has, to date, submitted in excess of 70 pages in support of his motion to suppress which is deemed sufficient.

A magistrate judge issuing a search warrant must be a "neutral, detached officer capable of determining whether probable cause existed". United States v. Soule, 908 F.2d 1032 (1st Cir. 1990) (internal citation omitted). Where a magistrate judge does not have the requisite neutrality and detachment she "cannot provide valid authorization for an otherwise unconstitutional search". United States v. Leon, 468 U.S. 897, 914 (1984). Courts have found that a magistrate's involvement violated those requirements where (1) the magistrate had a pecuniary interest in issuing the warrant, Connally v. Georgia, 429 U.S. 245, 251 (1977) or (2) the magistrate had active involvement in the investigation underlying the warrant, Lo–Ji Sales, Inc. v. New York, 442 U.S. 319, 327–28 (2009).

Pursuant to 28 U.S.C. § 455(a), any justice, judge or magistrate judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned". A separate section of that statute sets out specific situations where recusal is required including where the magistrate judge "has personal bias or prejudice", § 455(b)(1) or where the magistrate judge or his/her spouse or minor child "has a financial interest in the subject in controversy", § 455(b)(4). Where the question is a close one, the First Circuit has noted that "the balance tips in favor of recusal". In re Boston's Children First, 244 F.3d 164 (1st Cir. 2001).

Defendant's assertions that Magistrate Judge Bowler was required to recuse herself are unavailing. With respect to her purported involvement in TBF, the affidavit of Mr. Gassert submitted by the government makes clear that Magistrate Judge Bowler had no involvement in the

organization at the time the warrant was issued. Accordingly, that ground for recusal is without merit.

Defendant also contests Magistrate Judge Bowler's neutrality because of her spousal relationship with Dr. Marc A. Pfeffer, a professor of medicine at HMS and a senior cardiologist at Brigham and Women's Hospital ("the Brigham"). Defendant suggests that recusal was required because the affidavit in support of the search warrant referred to

> disruptions to the BCH website and additional disruption to the network on which BCH and other Harvard University-affiliated hospitals communicate.

(emphasis added). He concludes that the reference to "Harvard University-affiliated hospitals" gave Dr. Pfeffer a financial interest in the subject of the warrant. Defendant's attempt to amalgamate distinct legal entities does not create a financial interest where that interest does not exist. The government convincingly demonstrates that HMS is not an affiliate of area hospitals in the sense that there is a business relationship with the hallmarks of legal control, but rather that the affiliation relates to the training of medical students and residents.

Furthermore, under 28 U.S.C. § 455(b)(4), an organizational victim of a crime is not a "party to the proceeding" such that a financial interest in that victim would require recusal. United States v. Rogers, 119 F.3d 1377, 1384 (9th Cir. 1997); United States v. Lauersen, 348 F.3d 329, 336 (2d Cir. 2003) (declining to adopt per se rule requiring recusal in every case where judge has interest in victim of a crime). Accordingly, even if Dr. Pfeffer had a financial interest in one of alleged victims of this case, BCH or Wayside, by virtue of his relationship to HMS

and the Brigham (which it is clear he does not), that interest would not require disqualification here.

Defendant grasps at other potential interests in an attempt to manufacture a rationale requiring recusal. For instance, he notes that Dr. Pfeffer is on the faculty of the Brigham's "Division of Medical Communications", and infers from that title that his work would suffer from a disruption to the network on which BCH and Harvard-affiliated hospitals communicate. The government responds that the Division of Medical Communications focuses on physician communication skills and that defendant has offered no evidence that a cyber attack on a computer network seriously implicates Dr. Pfeffer's work in any way. This Court agrees.

As noted at a May 3, 2018 hearing on an unrelated motion, Magistrate Judge Bowler's recusal in Cabi v. Boston Children's Hospital, Case No. 15–cv–12306, is inapposite. In that case, Magistrate Judge Bowler was assigned to the case for nearly two years during which time she considered and decided a number of pending discovery motions and held seven hearings on those pending motions. Only after HMS became directly involved in the case did Magistrate Judge Bowler recuse herself from the case with the following comment:

> As discovery has progressed, it has become apparent that the connection of this action to the Harvard Medical School is more direct than originally anticipated. For example, plaintiffs are seeking documents directly from Harvard Medical School which defendants move to quash.

Case No. 15–cv–12306 (Docket No. 221). The relationship to HMS here is tenuous, at best, and recusal was not required here. See In re Boston's Children First, 244 F.3d at 167 (finding "disqualification appropriate only when the charge is supported by a factual basis, and when the facts asserted provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality") (quoting In re United States, 666 F.2d 690, 694 (1st Cir. 1981) (internal quotation marks omitted)).

**B. Pen Register/Trap and Trace Order**

On July 17, 2014, the government obtained a Pen Register/Trap and Trace order ("the PRTT order") allowing it to collect IP addresses used to send communications to, and receive communications from, defendant's IP address for a period of 60 days. That order also permitted the collection of subscriber information associated with each communicating IP address. In its search warrant application, the government noted that defendant was using a VPN through the website www.riseup.net and a TOR network, information that it had gathered from the PRTT order. In September, 2014, the government obtained a search warrant to search defendant's apartment.

Defendant seeks to suppress all evidence gathered during execution of the search warrant and any information obtained as a result of the seizure of those items. In his original and first supplemental motions to suppress, he contends that, notwithstanding authority to the contrary, the PRTT order exceeded statutory authority and constituted a search and seizure within the meaning of the Fourth Amendment to the United States Constitution.

The Pen Register/Trap and Trace statute ("the PRTT statute") permits installation of a "pen register", or a device that "records or decodes dialing, routing, addressing, or signaling information" transmitted by an instrument from which a wire or electronic communication is transmitted. 18 U.S.C. § 3127(3). The statutory scheme precludes collection of the "contents of any communication". Id. A "trap and trace" device is a device or process that

> captures the incoming electronic or other impulses which identify the originating number or other dialing, routing, addressing, and signaling information reasonably likely to identify the source of a wire or electronic communication.

Id. § 3127(4). A trap and trace device is also precluded from capturing the "contents of any communication". Id. To apply for an order authorizing either device, the government must certify that the information "likely to be obtained is relevant to an ongoing criminal investigation". 18 U.S.C. § 3122(b)(2).

The PRTT order here permitted the installation of a pen register and trap and trace device to trace the source of electronic communications directed to or originating from the account providing internet service to defendant's apartment. The order authorizing the installation of the pen register/trap and trace device was entered on July 17, 2014 by Magistrate Judge Jennifer C. Boal. Defendant claims that the PRTT order violated the Fourth Amendment because he had a reasonable expectation of privacy in the IP address routing information.

The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Supreme Court has held that a person does not have a legitimate expectation of privacy in information voluntarily turned over to third parties, including phone numbers dialed in placing a telephone call which can be captured by a pen register. Smith v. Maryland, 442 U.S. 735, 743–44 (1979). Courts have extended the third party doctrine to the collection of information by internet service providers such as IP addresses because internet users are similarly relying on third-party equipment. See United States v. Forrester, 512 F.3d 500, 510 (9th Cir. 2008); United States v. Ulbricht, 858 F.3d 71, 97 (2d Cir. 2017) ("The recording of IP address information and similar routing data, which reveal the existence of connections between communications devices without disclosing the content of the communications, are precisely analogous to the capture of telephone numbers at issue in Smith.").

The collection of IP address information here was similarly "devoid of content", Ulbricht, 858 F.3d at 97, and is therefore "constitutionally indistinguishable from the use of a pen register", Forrester, 512 F.3d at 510. This Court declines to accept defendant's invitation to depart from the growing consensus that the collection of IP address information similar to the information collected here does not violate a defendant's Fourth Amendment rights.

Defendant also contends that the IP addresses themselves constitute the content of his communications and that, therefore, the seizure of the information violated his Fourth Amendment rights.

The United States Supreme Court has set out a two-part test to determine whether a person has a legitimate expectation of privacy in the place searched or the item seized: (1) whether the movant has exhibited an actual, subjective expectation of privacy and (2) whether that subjective expectation is "one that society is prepared to recognize as objectively reasonable". Smith v. Maryland, 442 U.S. 735, 740 (1979) (citing Katz v. United States, 389 U.S. 347 (1967)).

Defendant contends that he had a reasonable expectation of privacy and that he demonstrated his subjective expectation by using encryption services. Even if defendant demonstrates that he has a subjective expectation of privacy in the IP addresses, however, he cannot meet his burden with respect to the second part of the test. The recording of IP address information and similar routing data "are precisely analogous to the capture of telephone numbers at issue in Smith" and, therefore, defendant cannot show that "a reasonable person could maintain a privacy interest in that sort of information". Ulbricht, 858 F.3d 71, 97.

Defendant's statutory claim that the collection of IP addresses and port numbers constitutes "content" also falls short. See Forrester, 512 F.3d at 510 (holding that collection of IP address, constituting address information, "do not necessarily reveal any more about the underlying contents of communication than do phone numbers"); Ulbricht, 858 F.3d at 98 n.29 (making clear that

holding is limited to capture of IP addresses and Transmission Control Protocol ("TCP") connection data and does not include "more invasive surveillance techniques that capture more information (such as content)"). Defendant's claims under the Stored Communications Act, 18 U.S.C. § 2703(d) and the Wiretap Act, 18 U.S.C. § 2510 are similarly futile. The PRTT order here provides for the collection of a PRTT device where information obtained will likely be relevant "to an ongoing criminal investigation", 18 U.S.C. § 3122(b)(2) and, as discussed above, the collection did not include any collection of "content".

Because the Court finds that the collection of IP address and port number information does not violate the Fourth Amendment or the statutory scheme, it need not consider whether the good-faith exception applies. Accordingly, all three motions to suppress will be denied.

**V. Defendant's Motions for Release from Custody (Docket Nos. 147 and 177)**

In conjunction with his motion to dismiss, defendant filed two motions for release from custody seeking review, pursuant to 18 U.S.C. § 3145(b) of the order of detention entered by the magistrate judge assigned to this case on July 27, 2016. Defendant moves for revocation of that detention order because of the likelihood that he will prevail on his motions to suppress and to dismiss. As explained above, the Court will deny those motions and therefore finds no grounds to revoke the detention order here. After review of the record, the Court finds that the government has demonstrated, by a preponderance of evidence, that defendant constitutes a serious risk of flight under 18 U.S.C. 3142(f)(2)(A). As stated in the order of the Court entered June 14, 2018 (Docket No. 205), the motions for release from custody are denied.

**ORDER**

For the foregoing reasons, defendant's motions to suppress (Docket Nos. 78, 128 and 166) are **DENIED** and the government's motion in limine (Docket No. 116) is **ALLOWED**.

As noted in the foregoing memorandum, defendant's motions to dismiss (Docket No. 164) and for release from custody (Docket Nos. 147 and 177) were previously denied by order of the Court entered June 14, 2018 (Docket No. 205).

**So ordered.**

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
UNITED STATES DISTRICT JUDGE

Dated June 19, 2018

## APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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CIVIL ACTION NO. 1:16-MC-91064-ADB

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UNITED STATES OF AMERICA,
Plaintiff

v.

MARTIN GOTTESFELD,
Defendant

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DOCKET ENTRIES

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| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 03/01/2016 | 1 | Assented-to Motion to Exclude Time from the 30 Day Indictment Period. Responses due by 3/15/2016 (Danieli, Chris) (Entered: 03/01/2016) |
| | | * * * * * |
| 03/01/2016 | 3 | Judge Allison D. Burroughs: ORDER entered granting 1 Assented-to Motion to Exclude Time From the 30-Day Indictment Period (Montes, Mariliz) (Entered: 03/01/2016) |

| | | |
|---|---|---|
| 04/11/2016 | 4 | SECOND MOTION to Exclude Time from the 30 Day Indictment Period from 4/22/2016 to 5/27/2016 by United States of America. (Danieli, Chris) (Entered: 04/11/2016) |
| 05/05/2016 | 5 | Judge Allison D. Burroughs: ELECTRONIC ORDER entered granting 4 Motion for Excludable Delay. (Folan, Karen) (Entered: 05/05/2016) |
| 05/20/2016 | 6 | MOTION for Excludable Delay from 5/27/16 to 7/1/16 by United States of America, FILED UNDER SEAL. (Flaherty, Elaine) (Entered: 05/20/2016) |
| 05/25/2016 | 7 | Judge Allison D. Burroughs: ELECTRONIC ORDER entered granting 6 Motion for Excludable Delay (Folan, Karen) (Entered: 05/25/2016) |
| 06/30/2016 | 8 | Fourth MOTION to Exclude time for the 30 day indictment period from 7/1/16 to 8/1/16 by United States of America, FILED UNDER SEAL. (Flaherty, Elaine) (Entered: 06/30/2016) |
| 06/30/2016 | 9 | Judge Allison D. Burroughs: ELECTRONIC ORDER entered granting 8 Motion for Excludable Delay (Folan, Karen) (Entered: 06/30/2016) |

| | | |
|---|---|---|
| 07/22/2016 | 10 | Fifth Assented to MOTION to Exclude Time from 3/18/2016 to 8/1/2016 by United States of America. (Montes, Mariliz) (Entered: 07/22/2016) |
| 08/02/2016 | 11 | Judge Allison D. Burroughs: ELECTRONIC ORDER entered granting 10 Fifth Amended Motion for Excludable Delay. In this circumstance, the ends of justice outweigh the usual interest in a speedy trial. A separate order shall issue. (Montes, Mariliz) (Entered: 08/02/2016) |
| 08/02/2016 | 12 | Judge Allison D. Burroughs: ORDER Of Excludable Delay entered. (Montes, Mariliz) (Entered: 08/02/2016) |
| 08/26/2016 | 13 | Sixth Assented-to Motion to Exclude Time from 9/9/2016 through 10/10/2016 from the 30-Day Indictment Period by United States of America. (Montes, Mariliz) (Entered: 08/29/2016) |
| 08/29/2016 | 14 | Judge Allison D. Burroughs: ELECTRONIC ORDER entered granting 13 Sixth Assented-to Motion to Exclude Time from the 30-Day Indictment Period (Montes, Mariliz) (Entered: 08/29/2016) |

| | | |
|---|---|---|
| 09/23/2016 | 15 | Joint Notice Regarding Excluded Time Under the Speedy Trial Act by United States of America (Montes, Mariliz) (Entered: 09/23/2016) |

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## APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 1:16-MC-91064-ADB

UNITED STATES OF AMERICA,
Plaintiff

v.

MARTIN GOTTESFELD,
Defendant

Filed: August 2, 2016

**ORDER OF EXCLUDABLE DELAY**

In accordance with the Speedy Trial Act of 1974, as amended, this Court hereby orders excludable delay for the time period of **8/1/2016 to 9/9/2016** and for the reasons checked below.

8/2/2016 /s/ Allison D. Burroughs
Date United States District Judge

REFER TO DOCUMENT(S)# [10] and [11]

| | | | | |
|---|---|---|---|---|
| [ ] | XA | ____ | Proceedings including examinations to determine mental competency or | 18 U.S.C. §3161(h)(1)(A) |

| | | | | |
|---|---|---|---|---|
| | | | physical capacity | |
| [ ] | XC | _____ | Trial on other charges against defendant | 18 U.S.C. §3161(h)(1)(B) |
| [ ] | XD | _____ | Interlocutory Appeal | 18 U.S.C. §3161(h)(1)(C) |
| [ ] | XE | _____ | Pretrial motions from filing date to hearing or disposition | 18 U.S.C. §3161(h)(1)(D) |
| [ ] | XF | _____ | Transfer (Rule 20) or Removal (Rule 5) proceedings | 18 U.S.C. §3161(h)(1)(E) |
| [ ] | XG | _____ | Proceedings under advisement | 18 U.S.C. §3161(h)(1)(H) |
| [ ] | XH | _____ | Miscellaneous proceedings concerning defendant | 18 U.S.C. §3161(h)(1) |
| [ ] | XI | _____ | Prosecution deferred | 18 U.S.C. §3161(h)(2) |

| | | | | |
|---|---|---|---|---|
| [ ] | XJ | _____ | Transportation from other district | 18 U.S.C. §3161(h)(1)(F) |
| [ ] | XK | | Consideration of proposed plea agreement | 18 U.S.C. §3161(h)(1)(G) |
| [ ] | XM | _____ | Absence or unavailability of defendant or essential government witness | 18 U.S.C. §3161(h)(3) |
| [ ] | XN | _____ | Period of mental or physical incompetency or physical inability to stand trial | 18 U.S.C. §3161(h)(4) |
| [ ] | XP | _____ | Superseding indictment and/or new charges | 18 U.S.C. §3161(h)(5) |
| [ ] | XR | _____ | Defendant joined with co-defendant for whom | 18 U.S.C. §3161(h)(6) |

| | | | | |
|---|---|---|---|---|
| | | | time has not run | |
| [ ] | XU | _____ | Time from first arraignment to withdrawal of guilty plea | 18 U.S.C. §3161(i) |
| [ ] | XW | _____ | Grand Jury indictment time extended | 18 U.S.C. §3161(b) |
| [X] | XT | | Continuance granted in the interest of justice | 18 U.S.C. §3161(h)(7)(A) |

## APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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CRIMINAL ACTION NO. 16-10305-NMG

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UNITED STATES OF AMERICA

v.

MARTIN GOTTESFELD,
Defendant, Pro Se

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Filed: January 3, 2019

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**Motion For Disqualification Pursuant To 28 U.S.C. § 144**

* * * * *

[Endorsed ruling in margin]

Motion denied. N.M. Gorton, USDJ. 1/3/19

**APPENDIX G**

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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CRIMINAL ACTION NO. 16-10305-NMG

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UNITED STATES OF AMERICA

v.

MARTIN GOTTESFELD,
Defendant, Pro Se

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Filed: January 3, 2019

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**Motion For Disqualification Pursuant To 28 U.S.C. §§ 455(a) and 455(b)**

* * * * *

[Endorsed ruling in margin]

Motion denied. N.M. Gorton, USDJ. 1/3/19

## APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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CRIMINAL ACTION NO. 16-10305-NMG

---

UNITED STATES OF AMERICA

v.

MARTIN GOTTESFELD,
Defendant, Pro Se

---

Filed: January 3, 2019

---

**Supplemental Motion For Disqualification Pursuant To 28 U.S.C. §§ 455(a) and 455(b)**

* * * * *

[Endorsed ruling in margin]

Motion denied. N.M. Gorton, USDJ. 1/3/19

## APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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Nos. 18-1669, 19-1042, 19-1043, 19-1107

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UNITED STATES,
Appellee

v.

MARTIN GOTTESFELD,
Defendant - Appellant

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Filed: December 30, 2021

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Before HOWARD, Chief Judge, LYNCH, THOMPSON, KAYATTA, BARRON, and GELPI, Circuit Judges.

**ORDER OF COURT**

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

## APPENDIX J

Section 455 of Title 28 of the United States Code provides in relevant part:

**Disqualification of justice, judge, or magistrate judge**

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

* * * * *

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

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