APPENDIX A

21 F.4th 1036

United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellant,
v.
Jeffrey OLSEN, Defendant-Appellee.

No. 20-50329

Argued and Submitted March 18, 2021
San Francisco, California

Filed April 23, 2021
Decided January 6, 2022

Murguia, Chief Judge, and Christen, Circuit Judge, filed an opinion concurring in the denial of rehearing en banc.

Bumatay, Circuit Judge, filed an opinion concurring in the denial of rehearing en banc.

Collins, Circuit Court, filed an opinion dissenting in the denial of rehearing en banc in which Forrest, Circuit Judge, joined.

Appeal from the United States District Court for the Central District of California, Cormac J. Carney, District Judge, Presiding, D.C. Nos. 8:17-cr-00076-CJC-1, 8:17-cr-00076-CJC

Charles E. Fowler Jr. (argued) and Bram M. Alden, Assistant United States Attorneys; Scott M. Garringer, Chief, Criminal Division; Tracy L. Wilkison, Acting United States Attorney; United States Attorney's Office, Los Angeles, California; for Plaintiff-Appellant.

James H. Locklin (argued), Deputy Federal Public Defender; Cuauhtemoc Ortega, Federal Public De-

fender; Office of the Federal Public Defender, Los Angeles, California; for Defendant-Appellee.

Katie Hurrelbrink and Vincent J. Brunkow, Federal Defenders of San Diego, Inc., San Diego, California, for Amicus Curiae Federal Defenders of San Diego, Inc.

Before: Mary H. Murguia and Morgan Christen, Circuit Judges, and Barbara M. G. Lynn,* District Judge.

ORDER

The Opinion filed April 23, 2021, and published at 995 F.3d 683, is hereby amended.

The panel has voted to deny the petition for panel rehearing and petition for rehearing en banc. The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are **DENIED** (Doc. 48). A concurrence in the denial by the panel and a separate concurrence by Judge Bumatay are filed concurrently with this order, along with a dissent from the denial by Judge Collins.

Appellee's unopposed motion to take judicial notice is **GRANTED** (Doc. 49).

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* The Honorable Barbara M. G. Lynn, Chief United States District Judge for the Northern District of Texas, sitting by designation.

No further petitions for rehearing or rehearing en banc will be entertained in this case.

OPINION

PER CURIAM

The COVID-19 pandemic has presented courts with unprecedented challenges. Among these challenges is determining when and how to conduct jury trials without endangering public health and safety and without undermining the constitutional right to a jury trial. The United States appeals from the district court's dismissal with prejudice of an indictment against Defendant Jeffrey Olsen. Olsen was indicted in July 2017 on thirty-four counts related to the unlawful distribution of opioids. He has since remained on pretrial release and has obtained eight continuances of his trial date, most recently scheduled for October 13, 2020. After the Central District of California suspended jury trials due to the COVID-19 pandemic in March 2020, Olsen invoked, for the first time, his right to a speedy trial. Because jury trials were suspended, the government requested a continuance of Olsen's trial under 18 U.S.C. § 3161(h)(7)(A)—the Speedy Trial Act's "ends of justice" provision. The district court denied the request and, ultimately, dismissed the charges against Olsen with prejudice, concluding that continuances under the ends of justice provision are appropriate only if holding a criminal jury trial would be impossible. Because the district court erred in its reading of 18 U.S.C. § 3161(h)(7)(A), we reverse with instructions to reinstate Olsen's indictment, grant an appropriate ends of justice continuance, and set this case for trial.

I.

A.

We have jurisdiction under 18 U.S.C. § 3731. We review de novo a district court's decision to dismiss on Speedy Trial Act grounds and its findings of fact for clear error. *United States v. Henry*, 984 F.3d 1343, 1349–50 (9th Cir. 2021) (citing *United States v. King*, 483 F.3d 969, 972 n.3 (9th Cir. 2007)). A district court's ends of justice determination will be reversed only if it is clearly erroneous. *United States v. Murillo*, 288 F.3d 1126, 1133 (9th Cir. 2002).

B.

The Sixth Amendment guarantees all criminal defendants "the right to a speedy and public trial." U.S. Const. amend. VI. Despite this guarantee, however, the Sixth Amendment does not prescribe any specified length of time within which a criminal trial must commence. *See id.* To give effect to this Sixth Amendment right, Congress enacted the Speedy Trial Act, which sets specified time limits after arraignment or indictment within which criminal trials must commence. Pub. L. No. 93-619, 88 Stat. 2076 (1975); *see Furlow v. United States*, 644 F.2d 764, 768–69 (9th Cir. 1981) (per curiam) (describing the Speedy Trial Act as the Sixth Amendment's "implementation").

As relevant here, the Speedy Trial Act requires that a criminal trial begin within seventy days from the date on which the indictment was filed, or the date on which the defendant makes an initial appearance, whichever occurs later. 18 U.S.C. § 3161(c)(1). Recognizing the need for flexibility depending on the circumstances of each case, however,

the Speedy Trial Act "includes a long and detailed list of periods of delay that are excluded in computing the time within which trial must start." *Zedner v. United States*, 547 U.S. 489, 497, 126 S.Ct. 1976, 164 L.Ed.2d 749 (2006); *see* 18 U.S.C. § 3161(h). A court may exclude periods of delay resulting from competency examinations, interlocutory appeals, pretrial motions, the unavailability of essential witnesses, and delays to which the defendant agrees. 18 U.S.C. § 3161(h). The Speedy Trial Act also includes an ends of justice provision, allowing for the exclusion of time where a district court 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." *Id.* § 3161(h)(7)(A). In determining whether the ends of justice outweigh the best interest of the public and the defendant in a speedy trial, the district court must evaluate, "among others," several enumerated factors. *Id.* § 3161(h)(7)(B)(i)–(iv). Most relevant to our analysis is the first enumerated factor: "[w]hether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice." *Id.* § 3161(h)(7)(B)(i).

II.

A.

The global COVID-19 pandemic has proven to be extraordinarily serious and deadly.[1] In response,

[1] As of April 2021, there have been over 141 million confirmed COVID-19 cases and over 3 million COVID-19 related deaths globally. Over 31 million of those cases are from the United States, with well over half a million deaths. And as of April

many state and local governments entered declarations curtailing operations of businesses and governmental entities that interact with the public. Beginning on March 13, 2020, the Central District of California—in light of the exigent circumstances brought on by the pandemic and the emergencies declared by federal and state officials—issued a series of emergency orders.[2] Vital to this appeal is the Central District's suspension of criminal jury trials, which began on March 13, 2020. *See* C.D. Cal. General Order 20-02 (March 17, 2020); *see also* C.D. Cal. General Order 20-05 (April 13, 2020); C.D. Cal. Amended General Order 20-08 (May 28, 2020); C.D. Cal. General Order 20-09 (August 6, 2020); C.D. Cal. General Order 21-03 (March 19, 2021).[3]

Each order was entered upon unanimous or majority votes of the district judges of the Central District with the stated purpose "to protect public

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2021, California alone has confirmed over 3.6 million cases, with nearly 60,000 deaths.

[2] Among these was the Central District of California's declaration of a judicial emergency pursuant to 18 U.S.C. § 3174, which this Circuit's Judicial Council subsequently approved. *See In re Approval of Jud. Emergency Declared in the Cent. Dist. of Cal.*, 955 F.3d 1140, 1141 (9th Cir. 2020) ("*Judicial Emergency*"). The emergency period runs until April 13, 2021 and extends the Speedy Trial Act's 70-day time limit for commencing trial to 180 days for defendants indicted between March 13, 2020 and April 13, 2021 and not "detained solely because they are awaiting trial." *Id.* at 1141–42; 18 U.S.C. § 3174(b). Because Olsen was indicted before the suspension, the 180-day period does not apply, and he is subject to the ordinary Speedy Trial Act time limit.

[3] The General Orders are accessible at https://www.cacd.uscourts.gov/news/coronavirus-covid-19-guidance.

health" and "to reduce the size of public gatherings and reduce unnecessary travel," consistent with the recommendations of public health authorities. C.D. Cal. General Order 20-02 at 1; C.D. Cal. General Order 20-05 at 1; C.D. Cal. Amended General Order 20-08 at 1; C.D. Cal. General Order 20-09 at 1. Most recently, on April 15, 2021, the Central District issued a general order explaining that jury trials will commence in the Southern Division, where the presiding judge in this action sits, on May 10, 2021. C.D. Cal. General Order 21-07.[4]

B.

1.

Jeffrey Olsen, a California-licensed physician, is accused of illegally prescribing opioids. Following an investigation that began in January 2011, Olsen was indicted in July 2017 in the Central District of California on thirty-four counts related to illegal distribution of oxycodone, amphetamine salts, alprazolam, and hydrocodone, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C), (b)(1)(E), and (b)(2), and furnishing false and fraudulent material information to the U.S. Drug Enforcement Administration in violation of 21 U.S.C. § 843(a)(4)(A). According to the government, Olsen was aware that at least two of his patients had died of prescription drug overdoses, while he continued prescribing dangerous combinations and unnecessary amounts of opioids to his patients.

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[4] The Central District of California includes the Western, Eastern and Southern divisions. At all relevant times, Olsen's case was based out of the Southern Division, located in Santa Ana, California.

Olsen made his initial appearance and was arraigned on July 11, 2017. Because the Speedy Trial Act required that Olsen's trial commence on or before September 19, 2017, the district court set trial for September 5, 2017. Olsen pleaded not guilty, and a magistrate judge set a $20,000 unsecured appearance bond; Olsen posted the bond and has since remained out of custody.

2.

Since Olsen's indictment and release on bond in 2017, there have been eight continuances of his trial date, which has postponed trial for over three years. The first five continuances were reached by stipulation with the government. Before the fifth stipulation, Olsen fired his retained counsel who had represented him since his initial appearance, and the district court appointed the Federal Public Defender as replacement counsel. These five stipulations continued Olsen's trial from September 5, 2017 to November 5, 2019. On August 20, 2019, Olsen sought a sixth continuance, which the district court granted over the government's objection, and continued Olsen's trial to May 5, 2020. After the court granted this continuance, the COVID-19 pandemic hit the United States in March 2020. Thereafter Olsen obtained two more continuances via stipulations, which collectively continued his trial from May 5, 2020 to October 13, 2020.

On August 20, 2020, the district court held a status conference on Olsen's case. Olsen, for the first time, invoked his right to a speedy trial and expressed a desire to proceed with a jury trial on October 13, 2020. The government argued that an ends of

justice continuance was appropriate due to the COVID-19 pandemic, the Central District's order suspending jury trials, and the absence of protocols to ensure the safety of jurors, witnesses, court staff, litigants, attorneys, defendants, and the public. The government also highlighted that it had objected to Olsen's request for a continuance a year earlier and had sought to proceed with trial in November 2019. In addition, the government noted, Olsen was out of detention, therefore diminishing any possible prejudice resulting from delay.

On August 28, 2020, the government formally moved to continue the trial from October 13, 2020 to December 1, 2020. The government argued that, given the Central District's suspension of jury trials and the lack of district-approved protocols to safely conduct a jury trial, the ends of justice served by a continuance outweighed the best interest of the public and Olsen in having a speedy trial. Olsen opposed the motion, and the district court denied it on September 2, 2020.

In denying the government's motion, the district judge made clear that, in his view, nothing short of trial impossibility could permit additional delay of Olsen's trial: "Continuances under the 'ends of justice' exception in the Speedy Trial Act are appropriate if without a continuance, holding the trial would be *impossible*" and "*actual impossibility* is key for application of [the ends of justice] exception." The court concluded that the Constitution "requires that a trial only be continued over a defendant's objection if holding the trial is *impossible*" and that "[i]f it is possible for the court to conduct a jury trial, the court is constitutionally obligated to do so. There are

no ifs or buts about it." Because, the district court reasoned, "it is simply not a physical or logistical impossibility to conduct a jury trial," a continuance was forbidden. The district court therefore requested the Chief Judge of the Central District to summon jurors for Olsen's trial. The Chief Judge promptly rejected this request and explained that the majority of the Central District judges had approved a general order to suspend jury trials as "necessary to protect the health and safety of prospective jurors, defendants, attorneys, and court personnel due to the [COVID-19] pandemic."

3.

On September 15, 2020, Olsen moved to dismiss his indictment with prejudice for violations of the Speedy Trial Act and Sixth Amendment. On October 14, 2020, the district court granted the motion. The district court's dismissal order was premised, again, on the theory that the court could not grant a continuance unless "holding [Olsen's] trial would be *impossible*." The district court stated:

> Given the constitutional importance of a jury trial to our democracy, a court cannot deny an accused his right to a jury trial *unless conducting one would be impossible*. This is true whether the United States is suffering through a national disaster, a terrorist attack, civil unrest, or the coronavirus pandemic that the country and the world are currently facing. Nowhere in the Constitution is there an exception for times of emergency or crisis. There are no ifs or buts about it.

In other words, nothing short of "*actual impossibility*" would do. Although, the court reasoned, the pandemic is "serious" and "[o]f course" posed a "public health risk," "it is simply not a physical or logistical impossibility to conduct a jury trial."

The district court observed that grand juries had convened in the federal courthouse and that the Orange County Superior Court, which is across the street from the Santa Ana Courthouse, had resumed jury trials with precautionary measures. "Clearly," the district court reasoned, "conducting a jury trial during this coronavirus pandemic is possible" and the Central District had therefore "[s]adly" denied Olsen his speedy-trial rights by suspending jury trials because they were "*unsafe*," but not "*impossible*." The court noted that "it is not a question of *if* the Court should have held Mr. Olsen's criminal jury trial during this stage of the coronavirus pandemic, but a question of *how* the Court should have held it." The court did not separately address Olsen's Sixth Amendment claim, finding that the analysis of that claim would parallel the Speedy Trial Act analysis.

As for the remedy, the district court dismissed Olsen's indictment with prejudice, pointing to the Central District's suspension of trials and refusal to summon jurors for Olsen's trial. The district court focused on the circumstances leading to dismissal and stated that the Chief Judge decided to suspend jury trials "knowingly and willfully" based on "the risk that people might get sick from the coronavirus," but "with little or no regard" for Olsen's speedy-trial rights. The court explained that "dismissing with prejudice is the only sanction with enough teeth to create any hope of deterring addi-

tional delay in the resumption of jury trials and avoiding further dismissals of indictments," that dismissal without prejudice would let the government reindict "and proceed as if no constitutional violation ever occurred," and that this "meaningless result" would have "no adverse consequences" for the Central District.

Because the seventy-day Speedy Trial Act clock had not yet fully run, and no Speedy Trial Act violation had yet occurred, the court announced that the dismissal would "not take effect until October 28, 2020," when the Speedy Trial Act clock would expire.[5] On that date, the district court entered a short order dismissing the indictment with prejudice and exonerating Olsen's bond.

III.

A.

We are asked to provide guidance on the application of the Speedy Trial Act's ends of justice provision, 18 U.S.C. § 3161(h)(7)(A), in the context of the challenges presented by the COVID-19 pandemic. Olsen urges us to adopt the district court's reading of § 3161(h)(7)(A)—that "[c]ontinuances under the 'ends of justice' exception in the Speedy Trial Act are appropriate if without a continuance, holding the

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[5] The parties do not dispute that the eight continuances in this case postponed Olsen's trial from September 5, 2017 to October 13, 2020. The district court's orders excluded this time from the calculation of the date by which Olsen's trial was required to commence. Based on these exclusions, the seventy-day Speedy Trial Act period ran from July 11, 2017 to September 4, 2017 (fifty-five days) and from October 13, 2020 to October 29, 2020 (fifteen days).

trial would be *impossible*." We decline to do so. At best, this is a strained reading of the Speedy Trial Act, and one without support from the text of the statute or our precedent.

In concluding that literal impossibility is the relevant standard for an ends of justice continuance, the district court evaluated only part of the first ends of justice factor: "[w]hether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding *impossible* ...." 18 U.S.C. § 3161(h)(7)(B)(i) (emphasis added). In support of this interpretation, Olsen points to two of our precedents evaluating the Speedy Trial Act's ends of justice provision. In *Furlow v. United States*, we noted that Mt. St. Helens had erupted two days before the defendant's trial, which "interrupted transportation, communication, etc. (affecting the abilities of jurors, witnesses, counsel, officials to attend the trial)." 644 F.2d at 767–68. Because of the logistical problems caused by the eruption, the district court continued the trial for two weeks past the prior Speedy Trial Act deadline under the ends of justice continuance provision. *Id.* Recognizing the "appreciable difficulty expected with an incident/accident of earth-shaking effect," we held that this "relatively brief" delay did not violate the Speedy Trial Act. *Id.* at 769.

Likewise, we found no Speedy Trial Act violation in *United States v. Paschall*, where the district court granted an eight-day ends of justice continuance of the Speedy Trial Act's charging deadline because the grand jury was unable to form a quorum due to a major snowstorm. 988 F.2d 972, 973–75 (9th Cir.

1993).[6] Specifically, we concluded that an ends of justice continuance was justified because the "interest of justice outweigh[ed] the public's and defendant's interest in a speedy trial" and "the inclement weather made the proceedings impossible." *Id.* at 975.

Contrary to Olsen's argument, nothing in *Furlow* or *Paschall* establishes a rule that an ends of justice continuance requires literal impossibility. In those cases, we simply affirmed ends of justice continuances because the eruption of a volcano and a major snowstorm temporarily impeded court operations. In other words, where it was temporarily impossible to conduct court proceedings for relatively brief periods, we found no Speedy Trial Act violation: but these cases do not stand for the proposition that a finding of impossibility is required in order to exclude time from the 70-day Speedy Trial Act clock. To be sure, the courts faced "appreciable difficulty" in proceeding to trial in *Furlow*, 644 F.2d at 769, and the inclement weather made grand jury proceedings temporarily "impossible" in *Paschall*, 988 F.2d at 975. But we never sanctioned the highly unusual result the district court reached here—that because the district court could physically hold a trial, it was required to deny the government's ends of justice con-

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[6] *Paschall* addressed the time between arrest or service of summons and an indictment, which cannot exceed thirty days. *See* 18 U.S.C. § 3161(b). Olsen's case addresses the time between indictment or arraignment and trial, which cannot exceed seventy days. *See id.* § 3161(c).

tinuance and dismiss Olsen's indictment with prejudice.[7]

A proper reading of 18 U.S.C. § 3161(h)(7)(B)(i) compels the opposite result. This provision directs the district court to consider "*[w]hether the failure to grant*" a continuance would make continuing the proceedings impossible. 18 U.S.C. § 3161(h)(7)(B)(i) (emphasis added). Because not granting the government's continuance meant that the Speedy Trial Act clock would necessarily expire before Olsen could be brought to trial, it follows that the district court's "failure to grant" an ends of justice continuance in this case *did* make "a continuation of [Olsen's] proceeding impossible." *Id.* The district court instead considered only whether it was physically impossible to hold a trial. Nothing in the Speedy Trial Act limits district courts to granting ends of justice continuances only when holding jury trials is impossible. *See id.* This is an unnecessarily inflexible interpretation

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[7] Olsen's reliance on out-of-circuit caselaw fares no better. *See United States v. Hale*, 685 F.3d 522, 533–36 (5th Cir. 2012) (upholding an ends of justice continuance because a key witness was unavailable due to family emergency); *United States v. Richman*, 600 F.2d 286, 293–94 (1st Cir. 1979) (upholding an ends of justice continuance due to a blizzard); *United States v. Stallings*, 701 Fed. App'x. 164, 170–71 (3d Cir. 2017) (upholding an ends of justice continuance based in part on prosecutor's family emergency and scheduling conflicts); *United States v. Scott*, 245 Fed. App'x. 391, 393–94 (5th Cir. 2007) (upholding an ends of justice continuance based in part on Hurricane Katrina); *United States v. Correa*, 182 F. Supp. 2d 326, 327–29 (S.D.N.Y. 2001) (upholding an ends of justice continuance due to the September 11, 2001 terrorist attacks). There is nothing in any of these cases to support the unwarranted reading of trial impossibility into the ends of justice provision that the district court adopted and Olsen advocates here.

of a provision meant to provide necessary flexibility to district courts to manage their criminal cases. *See Bloate v. United States*, 559 U.S. 196, 214, 130 S.Ct. 1345, 176 L.Ed.2d 54 (2010) (citing *Zedner*, 547 U.S. at 498, 126 S.Ct. 1976); *see also* S. Rep. No. 93–1021S. Rep. No. 93–1021, 93d Cong., 2d Sess. 39 (1974) (noting that the ends of justice provision is "the heart of the speedy trial scheme" and provides for "necessary flexibility.").

In sum, the district court committed clear error by reading the word "impossible" from 18 U.S.C. § 3161(h)(7)(B)(i) in isolation. This is enough for us to reverse. *See Murillo*, 288 F.3d at 1133.[8]

B.

By solely focusing on the word "impossible" in 18 U.S.C. § 3161(h)(7)(B)(i), the district court also overlooked the rest of the provision, which requires courts to ask whether the district court's failure to apply an ends of justice continuance "would ... result in a miscarriage of justice." We find the miscarriage-of-justice provision particularly salient in Olsen's case.

Olsen was indicted in July 2017 on thirty-four counts related to his prescribing dangerous combinations and unnecessary amounts of highly regulated pain medications, and was granted pretrial bond. He then obtained eight trial continuances, including one over the government's objection, effectively delaying his trial for well over three years. After the Central District suspended jury trials, Olsen insisted on

[8] Because the basis for the district court's dismissal order was statutory only, we need not separately address Olsen's Sixth Amendment claim.

sticking to his scheduled trial date. By that time, the prosecution had been ready for trial for months and was wholly blameless for the Central District's suspension of jury trials.

The district court's failure to even mention these important facts in its dismissal order—especially the years of continuances while Olsen was on pre-trial release and the absence of any government culpability or minimal prejudice to Olsen—is troubling. Olsen's argument, that the district court's finding that a trial was not impossible "implicitly" includes a finding that there would be no miscarriage of justice, is simply not convincing. We find no difficulty in concluding that the district court's failure to grant the government's motion and subsequent dismissal of Olsen's indictment, under the unique facts of Olsen's case and the Central District's suspension of jury trials, resulted in a miscarriage of justice. 18 U.S.C. § 3161(h)(7)(B)(i).

C.

What is more, the district court failed to consider other, non-statutory factors. Section 3161(h)(7)(B) instructs district courts to consider a list of enumerated factors, "among others," in deciding whether to grant an ends of justice continuance. Although district courts have broad discretion to consider any factors based upon the specific facts of each case, we have reversed rulings where district courts have entirely failed to address relevant non-statutory considerations. *See, e.g., United States v. Lloyd*, 125 F.3d 1263, 1269 (9th Cir. 1997) (finding the district court should have considered whether the parties "actually want[ed] and need[ed] a continuance, how

long a delay [was] actually required, [and] what adjustments [could have been] made with respect to the trial calendars [to avoid a continuance]").

The Speedy Trial Act and our case law are silent as to what non-statutory factors district courts should generally consider. Nevertheless, in the context of the COVID-19 pandemic, we find relevant the following non-exhaustive factors: (1) whether a defendant is detained pending trial; (2) how long a defendant has been detained; (3) whether a defendant has invoked speedy trial rights since the case's inception; (4) whether a defendant, if detained, belongs to a population that is particularly susceptible to complications if infected with the virus; (5) the seriousness of the charges a defendant faces, and in particular whether the defendant is accused of violent crimes; (6) whether there is a reason to suspect recidivism if the charges against the defendant are dismissed; and (7) whether the district court has the ability to safely conduct a trial.[9]

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[9] The district court's order questioned why the Central District of California conditioned its ability to hold jury trials on orders issued by the state government. *See Blueprint for a Safer Economy*, available at https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/CaliforniaBlueprintDataCharts.aspx. Specifically, the district court observed that under California's *Blueprint*, certain essential sectors such as healthcare, emergency services, food, and energy were permitted to continue operations. This overlooks that the *Blueprint*'s color-coded tiers are premised on several factors that influence the risk of viral transmission, including ventilation in particular facilities, whether occupants of a facility can socially distance, and the duration of the gathering. The record in this case does not allow comparison between the federal district court in Santa Ana and nearby state courthouses based on the *Blueprint*'s risk factors.

This non-exhaustive list, in the context of the pandemic, facilitates the proper balancing of whether the ends of justice served by granting a continuance outweigh the best interest of the public and the defendant in convening a speedy trial. *See* 18 U.S.C. § 3161(h)(7)(A); *see also United States v. Engstrom*, 7 F.3d 1423, 1426 (9th Cir. 1993) (noting that that the ends of justice provision promotes "an express balancing of the benefit to the public and defendant from a continuance with the costs imposed" of such a continuance). The record does not show that the district court considered any of these relevant factors. *See* 18 U.S.C. § 3161(h)(7)(A).

Finally, we note that Olsen's reliance on *United States v. Clymer*, 25 F.3d 824, 829 (9th Cir. 1994), is not helpful. It is true "that the ends of justice exclusion ... was intended by Congress to be rarely used, and that the provision is not a general exclusion for every delay." *Clymer*, 25 F.3d at 828 (internal quotation marks and citations omitted); *see also* S. Rep. No. 93-1021, at 39, 41S. Rep. No. 93-1021, at 39, 41 (1974) (reflecting Congress's intent that ends of justice continuances "be given only in unusual cases" and "be rarely used"). But surely a global pandemic that has claimed more than half a million lives in this country, and nearly 60,000 in California alone, falls within such unique circumstances to permit a court to temporarily suspend jury trials in the interest of public health.[10] In approving the Central Dis-

[10] Olsen repeatedly points to state courts in the Central District of California for his position that it is not impossible to conduct a jury trial safely. But just because state courts are holding jury trials does not mean that they are necessarily holding them safely. It is unknown whether jurors, witnesses, court

trict's declaration of judicial emergency, this Court's Judicial Council explained that "Congress did not intend that a district court demonstrate its inability to comply with the [Speedy Trial Act] by dismissing criminal cases and releasing would-be convicted criminals into society." *See Judicial Emergency*, 955 F.3d at 1142–43. That is precisely what the district court did here.

IV.

While it is not necessary to our disposition of this case, we also find it important to briefly highlight the district court's additional error in dismissing Olsen's indictment *with* prejudice. Although the district court recognized the charges against Olsen as "extremely serious," it nevertheless dismissed the indictment with prejudice, concluding that it was the only sanction that would have "enough teeth to create any hope of deterring additional delay in the resumption of jury trials."

We review the district court's decision to dismiss with or without prejudice for abuse of discretion. *United States v. Taylor*, 487 U.S. 326, 332, 108 S.Ct. 2413, 101 L.Ed.2d 297 (1988). A court abuses its dis-

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staff, litigants, attorneys, and defendants are being subject to serious risks and illness. Nothing in the record indicates that the Central District was able to hold a jury trial safely in October 2020, when Olsen's case was set for trial. Indeed, at argument, Olsen's counsel could not point to anything in the district court's dismissal order or the record, aside from noting that the court would have utilized unidentified "similar safety precautions" to those state courts did, to adequately address these safety concerns. The district court in fact acknowledged that even though it was possible to hold trials, there were significant health risks in doing so.

cretion if it "failed to consider all the factors relevant to the choice" and the "factors it did rely on were unsupported by factual findings or evidence in the record." *Id.* at 344, 108 S.Ct. 2413. "In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: [(1)] the seriousness of the offense; [(2)] the facts and circumstances of the case which led to the dismissal; and [(3)] the impact of a reprosecution on the administration of [the Speedy Trial Act] and on the administration of justice." 18 U.S.C. § 3162(a)(2). A court's decision whether to dismiss the charges with or without prejudice depends on a "careful application" of these factors to each particular case. *Clymer*, 25 F.3d at 831.

Here, the district court failed to adequately consider all the relevant factors as applied to Olsen's case. *See Taylor*, 487 U.S. at 344, 108 S.Ct. 2413. The district court primarily based its decision on the perceived need to deter the Central District from continuing its jury trial suspension. Olsen contends that the district court based its dismissal with prejudice on the factors of only "*this particular case*." The record shows otherwise. It appears that the only case-specific factor the court considered was the seriousness of Olsen's crimes, which it properly weighed against a dismissal with prejudice. *See United States v. Medina*, 524 F.3d 974, 986–87 (9th Cir. 2008) (explaining that serious crimes weigh in favor of dismissal without prejudice). The remainder of the district judge's three-page analysis focuses only on the Central District's suspension of criminal jury trials and his disagreement with his colleagues' decision to vote in favor of suspension. Although the

district judge characterized this analysis as the "facts and circumstances" that led to dismissal, the court entirely failed to consider the facts and circumstances of *Olsen's* case, including the years of continuances Olsen obtained while on pre-trial release and the absence of any prosecutorial culpability in causing the delay. *See United States v. Pena-Carrillo*, 46 F.3d 879, 882 (9th Cir. 1995) (looking for evidence of purposeful wrongdoing on part of prosecutor for this factor); *accord United States v. Stevenson*, 832 F.3d 412, 420 (3d Cir. 2016) (explaining that this factor considers whether the delay stemmed from "'intentional dilatory conduct' or a 'pattern of neglect on the part of the Government'") (quoting *United States v. Cano-Silva*, 402 F.3d 1031, 1036 (10th Cir. 2005)). The district court therefore committed legal error in failing to consider key factors relevant to Olsen's case: the absence of prosecutorial culpability and the multiple continuances requested by Olsen. *See Taylor*, 487 U.S. at 344, 108 S.Ct. 2413.

The district court also committed legal error in evaluating the impact of reprosecution on the administration of the Speedy Trial Act and on the administration of justice. *See* 18 U.S.C. § 3162(a)(2). In dismissing Olsen's indictment with prejudice, the district court presumed that any adequate remedy must bar reprosecution. The district judge characterized dismissal with prejudice as "the only sanction with enough teeth to create any hope of deterring additional delay in the resumption of jury trials." The court explained that dismissal without prejudice would let the government reindict "and proceed as if no constitutional violation ever occurred" and con-

cluded that this would be a "meaningless result." This reasoning was incorrect. The Supreme Court has made clear that "[d]ismissal without prejudice is not a toothless sanction: it forces the Government to obtain a new indictment if it decides to reprosecute, and it exposes the prosecution to dismissal on statute of limitations grounds." *Taylor*, 487 U.S. at 342, 108 S.Ct. 2413; *see also United States v. Newman*, 6 F.3d 623, 627 (9th Cir. 1993) (rejecting argument "that dismissal without prejudice renders the Speedy Trial Act meaningless"). Because the district court's ruling was based on an erroneous view of the law, it abused its discretion in dismissing with prejudice. *See United States v. Arpaio*, 951 F.3d 1001, 1005 (9th Cir. 2020).

V.

We reverse the district court's dismissal of Olsen's indictment. The district court's interpretation of the Speedy Trial Act's ends of justice provision—that continuances are appropriate only if holding a criminal jury trial would be impossible—was incorrect. Nothing in the plain text of the Speedy Trial Act or our precedents supports this rigid interpretation.

We are, however, mindful that the right to a speedy and public jury trial provided by the Sixth Amendment is among the most important protections guaranteed by our Constitution, and it is not one that may be cast aside in times of uncertainty. *See Furlow*, 644 F.2d at 769 ("Except for the right of a fair trial before an impartial jury no mandate of our jurisprudence is more important"); *see also Roman Cath. Diocese of Brooklyn v. Cuomo*, —— U.S. ——, 141 S. Ct. 63, 68, 208 L.Ed.2d 206 (2020) ("[E]ven

in a pandemic, the Constitution cannot be put away and forgotten.").

The Central District of California did not cast aside the Sixth Amendment when it entered its emergency orders suspending jury trials based on unprecedented public health and safety concerns. To the contrary, the orders make clear that the decision to pause jury trials and exclude time under the Speedy Trial Act was not made lightly. The orders acknowledge the importance of the right to a speedy and public trial both to criminal defendants and the broader public, and conclude that, considering the continued public health and safety issues posed by COVID-19, proceeding with such trials would risk the health and safety of those involved, including prospective jurors, defendants, attorneys, and court personnel. The pandemic is an extraordinary circumstance and reasonable minds may differ in how best to respond to it. The District Court here, however, simply misread the Speedy Trial Act's ends of justice provision in dismissing Olsen's indictment with prejudice.

The judgment of the district court is REVERSED and REMANDED with instructions to reinstate Olsen's indictment, grant an appropriate ends of justice continuance, and set this case for a trial.

MURGUIA, Chief Judge, and CHRISTEN, Circuit Judge, concurring in the denial of rehearing en banc:

"The correction of legal errors committed by the district courts is the function of the Court of Appeals ...." *Plotkin v. Pac. Tel. & Tel. Co.*, 688 F.2d 1291,

1293 (9th Cir. 1982). Here, the district court erred by denying the government's motion for an ends-of-justice continuance under the Speedy Trial Act based on a physical impossibility standard. That error required reversal. The dissent does not dispute that it was error to dismiss the indictment against Dr. Olsen with prejudice. *See* Dissent at ——— – ———. That error separately required reversal. As a result, our panel reversed the district court's ruling and ordered that the serious charges against Olsen be reinstated on remand. *United States v. Olsen*, 995 F.3d 683, 686 (9th Cir. 2021). We did not predict or foreclose further Speedy Trial Act motions practice in this case. Because the district court clearly misinterpreted and misapplied the Speedy Trial Act, we stand firmly behind our opinion and concur with the denial of rehearing en banc.

I.

The Sixth Amendment provides criminal defendants "the right to a speedy and public trial," U.S. Const. amend. VI, but it does not outline how this right should be safeguarded. As a result, Congress enacted the Speedy Trial Act, setting specified time limits within which criminal trials must commence. Pub. L. No. 93-619, 88 Stat. 2076 (1975); *see Furlow v. United States*, 644 F.2d 764, 768–69 (9th Cir. 1981) (per curiam) (describing the Act as the Sixth Amendment's "implementation").

The Act requires that a criminal trial begin within seventy days from the date on which an indictment is filed, or the date on which the defendant makes an initial appearance, whichever occurs later. 18 U.S.C. § 3161(c)(1). The Act also details "periods of delay

that are excluded in computing the time within which trial must start." *Zedner v. United States*, 547 U.S. 489, 497, 126 S.Ct. 1976, 164 L.Ed.2d 749 (2006); *see* 18 U.S.C. § 3161(h). The Speedy Trial Act's ends-of-justice exception excludes from the seventy days "any period of delay ... based on [the court's] findings that *the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial*." *Id.* § 3161(h)(7)(A) (emphasis added). In other words, the ends-of-justice exception employs a balancing test. *See id.* The Act also requires courts to consider a non-exhaustive list of factors in determining whether to grant an ends-of-justice continuance. *See id.* § 3161(h)(7)(B). In Olsen's case, the most relevant factor was: "Whether the failure to grant such a continuance in the proceeding would be likely to make a continuance of such proceeding impossible, or result in a miscarriage of justice." *Id.* § 3161(h)(7)(B)(i).

II.

In July 2017, Jeffrey Olsen, a physician, was indicted on thirty-four counts of unlawful distribution of opioids to his patients. Four of his patients died from apparently related drug overdoses. Olsen was arraigned in the Central District of California on July 11, 2017, and pleaded not guilty. The same day, the district court set a $20,000 unsecured appearance bond, scheduled his trial for September 5, 2017, and released Olsen. He has remained out of custody ever since.

Over a three-year period, the court continued Olsen's trial date eight times. The parties stipulated to seven of the continuances under § 3161(h)(7)'s ends-

of-justice exclusion and the district court even granted Olsen's sixth continuance over the government's objection. After Olsen's sixth continuance, COVID-19 hit California. In response, the Central District issued the first of a series of emergency general orders based on national, state, and local public health emergency declarations, as well as the Centers for Disease Control and Prevention's ("CDC") recommendations for reducing exposure to the virus and slowing its spread. These orders included the Central District's declaration of a judicial emergency pursuant to 18 U.S.C. § 3174. *See In re Approval of Jud. Emergency Declared in the Cent. Dist. of Cal.*, 955 F.3d 1140, 1141 (9th Cir. 2020). The dissent from denial of rehearing en banc makes no mention of the fact that the Circuit's Judicial Council reviewed the Central District's General Order, thereafter approving its declaration of a judicial emergency. *See id.* (in reference to the Central District's General Order suspending jury trials, the Judicial Council noted that the district court's chief judge "declared a thirty-day judicial emergency" by general order "pursuant to 18 U.S.C. § 3174(e). Finding no reasonably available remedy, the Judicial Council agreed to continue the judicial emergency for an additional one-year period and suspend the time limits of 18 U.S.C. § 3161(c).").

Most relevant here are the Central District's orders suspending all jury trials. Then-Chief Judge Virginia A. Phillips approved the suspension on March 13, 2020. That order was issued in the first uncertain days of the pandemic, and it observed that additional orders might follow. *See* Gen. Ord. 20-02. The General Order was later extended six times. *See*

Gen. Ord. 20-05; Gen. Ord. 20-08; Gen. Ord. 20-09; Gen. Ord. 20-12; Gen. Ord. 20-15; Gen. Ord. 21-08. Each suspension order received unanimous or majority votes of the district judges "to protect public health" and "to reduce the size of public gatherings and reduce unnecessary travel," consistent with the recommendations of public health authorities. *See, e.g.*, Gen. Ord. 20-09. Following the filing of General Order 20-02 on March 17, 2020, Olsen stipulated to two additional continuances under the ends-of-justice exclusion.

Approximately two months before Olsen's trial date, the government expressed its intention to file an *ex parte* application for a continuance, similar to the request the district court granted Olsen prior to the pandemic. For the first time ever, the district court expressed its intention to reject the ends-of-justice continuance request, making plain its sharp disagreement with the other judges in the Central District.

The trial judge's subsequent on-record comments reflect his discontent. Indeed, the trial judge explicitly stated that he disagreed with the decision made by "the great majority of the judges" in the Central District to stay trials during the COVID-19 pandemic. The district judge also made clear that he intended to enforce "*consequences to the judges in the Central District*." In addition, the district judge's comments reflect his misapplication of the standard for determining whether an ends-of-justice continuance should be granted: "It's not an issue of balancing the constitutional right with the danger of conducting a jury trial," and "the way I look at it, *it's not a balancing test*." The record memorializes that the district

court's misguided motive for dismissing Olsen's indictment with prejudice was to force resolution of the trial judge's ongoing disagreement with the Central District's decision to suspend criminal jury trials due to the COVID-19 pandemic: "I think we have to use this case to try to expedite this issue for everybody's sake."

At the outset of the hearing on Olsen's motion to dismiss the indictment, the district court circulated a tentative order denying the motion without prejudice. But after counsel clarified that the applicable extension of the statute of limitations would allow the government to re-file all counts, *see* 18 U.S.C. § 3288, the district court expressed doubt that dismissal without prejudice would have "*teeth*."

The court's written order stated that dismissal *with* prejudice: (1) "is the only sanction with enough teeth to create any hope of deterring additional delay in the resumption of jury trials and avoiding further dismissals of indictments," (2) would prevent the government from reindicting "and proceed[ing] as if no constitutional violation ever occurred," and (3) would not be a "meaningless result" with "no adverse consequences [for] *the Central District*," unlike a dismissal without prejudice.

The order dismissing Olsen's indictment also explained that the court could not grant a continuance unless "holding the trial would be *impossible*," rather than the proper Speedy Trial Act standard allowing for an ends-of-justice continuance when "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). Despite this

sequence of events, the dissent argues that our panel erred in reversing the district court's dismissal.

On March 18, 2021, our panel reversed and remanded "with instructions to reinstate Olsen's indictment, grant an appropriate ends of justice continuance, and set the case for trial." *Olsen*, 995 F.3d at 695. We did not reach this conclusion lightly, nor did we foreclose future motions practice on Speedy Trial Act grounds. We were "mindful that the right to a speedy and public jury trial provided by the Sixth Amendment is among the most important protections guaranteed by our Constitution, and it is not one that may be cast aside in times of uncertainty." *Id.* Still, we could not ignore the district court's legally erroneous interpretation and application of the Speedy Trial Act, particularly its understanding that "nothing short of '*actual impossibility*'" could compel another ends-of-justice continuance in Olsen's case. *Id.* at 689–93. Nor could we overlook the manifest injustice that would result if these serious charges were dismissed, with prejudice, due to an internal dispute between the trial court judges serving in the Central District.

III.

A.

The dissent first asserts that "the applicable General Order here did *not* rest on a proper application of Speedy Trial Act standards." Dissent at —— (emphasis in original). Not only is this incorrect, the dissent misreads what it calls the "applicable General Order"—General Order 20-09—by considering it in a vacuum. General Order 20-09 specifically found that "the increase in reported COVID-19 infections,

hospitalizations, and deaths serve[d] the ends of justice and outweigh[ed] the interests of the public and the defendants in a speedy trial." Gen. Ord. 20-09 at 3. Therefore, applying the correct standard set forth in 18 U.S.C. § 3161(h)(7)(A), the majority of district court judges in the Central District were persuaded that the ends of justice outweighed the best interest of the public and the defendant in a speedy trial due to the COVID-19 pandemic.[1]

Our opinion noted that the Central District of California's emergency general orders clearly applied the Speedy Trial Act standard:

> The Central District of California did not cast aside the Sixth Amendment when it entered its emergency orders suspending jury trials based on unprecedented public health and safety concerns. To the contrary, the orders make clear that the decision to pause jury trials and exclude time under the Speedy Trial Act was not made lightly. The orders acknowledge the importance of the right to a speedy and public trial both to criminal defendants and the broader public, and conclude that, considering the continued public health and safety issues posed by COVID-19, proceeding with such trials would risk the health and safety of those involved, including prospective jurors, defendants, attorneys, and court personnel.

Id. at 695.

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[1] The purpose of a general order is to regulate court operations. Here, a majority of federal judges in the Central District agreed that the general orders were the best response to the burgeoning health and safety risks presented by the pandemic.

The dissent only quotes a subsection of General Order 20-09's Speedy Trial analysis and alleges that the order "mere[ly] recit[es]" the Speedy Trial Act's "ultimate standard." Dissent at ——— – ———. Not so. General Order 20-09 details an increase in COVID-19 infections and deaths, as well as CDC guidance related to in-person gatherings to support its conclusion that the balance weighed in favor of continuing jury trials in the Central District. Gen. Ord. 20-09 at 1–3.

Moreover, the unprecedented danger to health and safety presented by the pandemic, particularly in its earlier days when Olsen sought to try his case, cannot be overstated. The dissent opines that the majority held, "to justify a continuance, it was sufficient that the General Order simply cited the 'risk' to 'health and safety ....'" Dissent at ——— (quoting *Olsen*, 995 F.3d at 695). But our opinion acknowledged that the Central District's broad continuation of jury trials was triggered by "a global pandemic that ha[d] claimed more than half a million lives in this country, and nearly 60,000 in California alone [at the time of our opinion]." *Olsen*, 995 F.3d at 693. The dissent, in hindsight, attempts to support its argument by diminishing the severity of the pandemic during this time, but the numbers speak for themselves.

The dissent next argues that, by allowing General Order 20-09 "to serve as the source of the impossibility that justifies a continuance," our analysis rested "on a bootstrap argument that permits a wholesale evasion of the impossibility standard." Dissent at ——. Again, this is not so. The Speedy Trial Act directs the district court to consider "*[w]hether the failure to*

grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice." 18 U.S.C. § 3161(h)(7)(B)(i) (emphasis added). A basic premise the district court and dissent both miss is that the question presented was whether the *failure to grant* a continuance would make it impossible to continue trial. The district court misinterpreted this factor, believing it asks whether holding trial is physically possible. Section 3161(h)(7)(A) required the district court to *ultimately* decide whether the public's and Olsen's interests in a speedy trial were outweighed by the need for the continuance; in this case, a continuation of jury trials due to pervasive COVID-19 infections and deaths. Accordingly, as noted in our opinion, because not granting the government's continuance rendered trial impossible due to General Order 20-09's suspension of criminal jury trials in light of the pandemic, Section 3161(h)(7)(A) required the district court to balance competing interests and decide whether the public's and Olsen's interests in a speedy trial outweighed the COVID-19-inspired need for the continuance. *Id.* § 3161(h)(7)(A). Though the dissent from the denial of rehearing en banc obliquely suggests the Central District's General Orders are the issue, the question presented to our panel was whether the district court misinterpreted the Speedy Trial Act to require that trials go forward if it is physically possible to conduct them, rather than requiring a balancing of factors. The answer was plainly yes.

In addition to misreading the Speedy Trial Act, the dissent misreads our case law—principally *Furlow v. United States*, 644 F.2d 764 (9th Cir. 1981)

(per curiam), and *United States v. Paschall*, 988 F.2d 972 (9th Cir. 1993)—as support for the district court's conclusion that ends-of-justice continuances may only be granted when a trial court finds it physically impossible to hold trial. *See* Dissent at ——. But *Furlow* and *Paschall* provide no support for the dissent's view. In these two cases, natural disasters made compliance with the Speedy Trial Act deadlines practically impossible, but we have never said that a finding of physical impossibility is a prerequisite to granting an ends-of-justice continuance.[2] Such an interpretation contradicts the plain language of the Speedy Trial Act, which expressly requires that courts consider several factors. 18 U.S.C. § 3161(h)(7)(B).

The dissent's reading of the Speedy Trial Act also defies case law indicating that other considerations may warrant a continuance. *See, e.g., United States v. Apperson*, 441 F.3d 1162, 1180 (10th Cir. 2006) (granting a brief continuance to allow government counsel time to prepare in order to avoid a "miscarriage of justice"); *United States v. Hill*, 197 F.3d 436, 441–43 (10th Cir. 1999) (holding that the "miscarriage of justice" exception was properly applied where the government would otherwise be forced to go to trial without a key witness and without adequate time to effectively prepare).

The district court was required to weigh the logistical problems and public health risks caused by

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[2] *Paschall* noted the impossibility factor in its reasoning for granting an ends-of-justice continuance, but it did not assert that this factor was necessary or sufficient on its own, only that it was "relevant to the present case." *Paschall*, 988 F.2d at 975. And *Furlow* made no mention of impossibility whatsoever.

COVID-19, among other factors, in balancing whether the ends of justice served by continuing trial outweighed the best interest of the public and the defendant in a speedy trial. Accordingly, though it is true that Orange County Superior Court resumed operations during the pandemic, it is just as true that tens of thousands of people have contracted COVID-19—and thousands have died.[3] The district

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[3] We did not "shift[ ] the burden of proof on the issue of impossibility ... from the Government to Olsen" in stating that, "just because the state courts are holding jury trials does not mean that they are necessarily holding them safely." Dissent at ——— (citing *Olsen*, 995 F.3d at 693 n.10). Without record support, the district court announced that it was possible to move forward with trial, apparently because at least some state court trials were going forward. The record makes clear that the district court had made up its mind, despite the government's showing that the General Orders, approved by the Circuit Council, prevented jury trials. This does not "necessarily mean[ ] that the party who had the burden of proof failed to carry it." Dissent at ———. It instead means that, when weighing the relevant factors, the Central District was likely unconvinced or uncertain that the safety protocols instituted by state courts were effective enough to combat the spread of COVID-19, particularly given the novelty of the virus at the time. As the dissent concedes, the "ultimate standard" for granting an ends-of-justice continuance under the Speedy Trial Act involves a balancing test. Dissent at ———; *see also* 18 U.S.C. § 3161(h)(7)(A). The Central District cannot be faulted for reaching a conclusion that is contrary to what the dissent would have desired when deciding how best to protect its citizens during a once-in-a-lifetime pandemic.

It is far from clear that Orange County conducted operations safely. The Los Angeles Times has since reported that four interpreters from the Los Angeles County courthouse died from COVID-19. Matt Hamilton, *State Fines L.A. County Superior Court for Safety Violations during COVID-19 Pandemic*, Los Angeles Times (July 7, 2021), https://www.latimes.com /california/story/2021-07-07/state-issues-25-000-fine-to-l-a-

court was required to balance these realities to determine whether the ends of justice would be served by a continuance under the Speedy Trial Act rather than simply ending its analysis after it decided that holding trial would be physically possible. *See* 18 U.S.C. § 3161(h)(7)(B)(i)–(iv).

The dissent also asserts that we did not "articulate or apply any standard" for determining whether a trial was "impossible." Dissent at ——. This over-

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superior-court-for-safety-violations-during-pandemic (reporting that "at least four people who worked in Los Angeles County courthouse" died due to COVID-19). Orange County has confirmed 336,476 COVID-19 cases to date—an increase of more than 85,000 since the *Olsen* panel heard argument in March 2021—and has registered 5,852 deaths—an increase of nearly 2,000. *See* Los Angeles Times Staff, *Tracking the Coronavirus in California*, Los Angeles Times, https://www.latimes.com/projects/california-coronavirus-cases-tracking-outbreak/ (last visited Dec. 21, 2021).

The number of cases and deaths continue to increase at alarming levels in the counties within the Central District. To date, San Bernardino has seen 385,830 cases and reported 6,023 deaths; Riverside: 398,957 cases and 5,452 deaths; San Luis Obispo: 32,429 cases and 366 deaths; Santa Barbara: 48,861 cases and 562 deaths; Ventura: 106,809 cases and 1,203 deaths; and finally, Los Angeles: 1,555,065 cases and 27,189 deaths. As of today's date, 2,864,427 citizens in the Central District have tested positive for some COVID-19 variant, and 46,647 of those citizens have died as a result. The Central District accounts for *more than half* of all COVID-19 cases and deaths in California: 5,204,641 Californians have tested positive, and 75,167 have died. Los Angeles Times Staff, *Tracking the Coronavirus in California*, Los Angeles Times, https://www.latimes.com/projects/california-coronavirus-cases-tracking-outbreak/ (last visited Dec. 21, 2021); *see also* Tracking COVID-19 in California, California, All, https://covid19.ca.gov/state-dashboard/ (last visited Dec. 21, 2021).

looks our discussion clarifying that the outcomes in *Furlow* and *Paschall* did not depend on a finding of physical impossibility. *See Olsen*, 995 F.3d at 690–91 (discussing *Furlow*, 644 F.2d at 767; *Paschall*, 988 F.2d at 975. Though we did not attempt to define and anticipate every circumstance in which a continuance may outweigh the public's and defendant's interests in a speedy trial, we suggested a list of non-statutory factors to assist district courts in addressing future motions. *Id.* at 690. Some of these factors may aid in determining whether conducting trial would be physically possible, others facilitate "the proper balancing of whether the ends of justice served by granting a continuance outweigh the best interest of the public and the defendant in convening a speedy trial." *Id.* at 693. Consistent with the required balancing test, we sought to suggest guiding principles for assessing the impossibility factor rather than a hardline standard.

B.

The dissent contends that the miscarriage of justice provision does not apply when an indictment is dismissed for failure to conduct a timely trial. *See* Dissent at ——— – ———. But in enacting the Speedy Trial Act, Congress specifically noted that the dismissal of a criminal indictment on speedy trial grounds may constitute a miscarriage of justice under the Act. *See* H.R. Rep. No. 93-1508, *reprinted in* 1974 U.S.C.C.A.N. 7401, 7436. And the 1974 House Committee Report makes clear that the judicial emergency provision § 3174 was adopted because the Committee did not wish to leave the possibility of unjustifiable dismissals to chance:

> [B]ecause of the unique circumstance in which the Congress has placed the courts by enacting speedy trial legislation without providing advanced [*sic*] increases in resources, *it is also providing the courts with a tool that would permit them enough flexibility to prevent a* ***miscarriage of justice*** *by dismissing the indictments or informations against potential criminals because of circumstances beyond the control of an individual court*."

In re Approval of Jud. Emergency Declared in Dist. of Ariz., 639 F.3d 970, 980 (9th Cir. 2011) (emphasis added) (quoting 1974 U.S.C.C.A.N. 7401, 7436).

This Circuit's Judicial Council has treated the miscarriage of justice exception the same way. The Judicial Council's opinion, *In re Approval of Judicial Emergency Declared in District of Arizona*, ratified a one-year extension of judicial emergency, suspending the Speedy Trial Act's seventy-day time limit. *Id.* at 971. The Judicial Council observed that "Congress did not intend that a district court demonstrate its inability to comply with the [Speedy Trial Act] by dismissing criminal cases and releasing would-be convicted criminals into society." *Id.* at 972 (citing 1974 U.S.C.C.A.N. 7401). The Judicial Council also observed: "[T]he emergency provision ha[d] been used twice previously to avoid imminent criminal dismissals as a sanction for non-compliance." *Id.* (first citing *United States v. Bilsky*, 664 F.2d 613, 619–20 (6th Cir. 1981)); then citing *United States v. Rodriguez–Restrepo*, 680 F.2d 920, 921 n.1 (2d Cir. 1982)). Given this Circuit precedent, it is peculiar that the dissent so steadfastly claims jury trials may not be extended under the Speedy Trial Act by gen-

eral order, particularly in times of exceptional crisis pursuant to 18 U.S.C. § 3174.

The dissent attempts to distinguish Olsen's case by noting, as we did in our opinion, that Olsen's indictment preceded the Central District's declaration of judicial emergency. *See* Dissent n. 19 (citing *Olsen*, 995 F.3d at 687 n.2). But as we explained, the timing of Olsen's indictment meant only that he was subject to the 70-day Speedy Trial Act clock rather than the 180-day period instituted during the judicial emergency. *Olsen*, 995 F.3d at 687 n.2. Notwithstanding the general timing of Olsen's Speedy Trial Act clock, Olsen's case was before the Central District of California, and the Central District had declared a judicial emergency. In fact, following the declaration of judicial emergency, Olsen obtained continuances under the ends-of-justice exclusion, citing the COVID-19 pandemic and the judicial emergency as reasons for the continuances. Thus, Olsen invoked the Central District's judicial emergency when it worked to his benefit, and the dissent acknowledged that the Central District's emergency general orders applied to Olsen. Yet the dissent goes on to take a starkly inconsistent position by arguing that the Central District's judicial emergency did not apply to Olsen when it discusses whether the dismissal of his indictment constituted a miscarriage of justice.

C.

Finally, the dissent alleges that we watered down the Speedy Trial Act by enumerating our own set of "*non-statutory* factors" the district court should have considered. Dissent at ——. This is a serious mis-

reading of our opinion. Rather than faulting the district court for failing to consider the factors we identified, we took issue with the court's failure to consider *any* relevant non-statutory factors. We found relevant certain non-exhaustive considerations in the context of the COVID-19 pandemic, *Olsen*, 995 F.3d at 693, and identified them because "[t]he Speedy Trial Act and our case law are silent as to what non-statutory factors district courts should generally consider," *id.* at 692. By suggesting factors trial courts may consider during this pandemic—including whether the defendant is incarcerated while awaiting trial—we did not rewrite the statutory factors in order to "evade their limits," as the dissent asserts. Dissent at ——. Indeed, in their briefs to the district court, the government and Olsen argued other unenumerated factors gleaned from other Speedy Trial Act cases. *See United States v. Loud Hawk*, 474 U.S. 302, 311, 106 S.Ct. 648, 88 L.Ed.2d 640 (1986); *United States v. Harris*, 460 F.Supp.3d 973, 977 (E.D. Cal. 2020); *United States v. Smith*, 460 F.Supp.3d 981 (E.D. Cal. 2020)). Our opinion simply anticipated that many similar cases will be presented as the pandemic wears on and offered guidance for district courts to consider.

The dissent argues that we solely relied on the seventh factor (i.e., whether the district court had the ability to safely conduct trial). *See* Dissent at ——–. Our opinion says otherwise. It explains that Olsen posted bond and has remained out of custody since his initial appearance on July 11, 2017, so he was not detained pending trial and was not detained for a significant period of time (addressing the first and second factors). *Olsen*, 995 F.3d at 688. We noted

there had been eight continuances of Olsen's trial date, seven of which were reached by stipulation with the government, so he had not invoked his speedy trial rights since the case's inception (noting the third factor). *Id.* We explained that Olsen's charges are extremely serious: he is a physician accused of illegally prescribing opioids that allegedly led to the deaths of four patients (invoking the fifth factor). *Id.* at 688–89.

With respect to the seventh factor, the dissent acknowledges that, "[i]n ordinary usage, the term 'impossible' has a range of meanings that extend from 'incapable of being or of occurring' ... to 'extremely and almost insuperably difficult under the circumstances.'" Dissent at —— (quoting Webster's Third New International Dictionary of the English Language 1136 (1981)). Nevertheless, the dissent takes issue with considering the safety of the public, court staff, and counsel in an impossibility analysis. *See* Dissent at —— – ——. Consistent with *Paschall* and *Furlow*, if conducting trial is "extremely and almost insuperably difficult" due to health and safety concerns, this may counsel in favor of continuing trial.

IV.

Our panel was tasked with deciding whether the district court erred by denying the government's motion for an ends-of-justice continuance, and dismissing the defendant's case with prejudice pursuant to 18 U.S.C. § 3161(h)(7)(B) based on its conclusion that it would be possible to hold trial, even if doing so posed public health risks. Nothing in our opinion minimizes the importance of the constitutionally

guaranteed right to a speedy trial, and we will surely be presented with future cases in which the balancing required by the Speedy Trial Act will present different results.

The COVID-19 pandemic presents a once-in-a-lifetime catastrophe that has unfortunately endured for months, causing fear and trepidation, serious illness and injury—from which some will never fully recover—and worst of all, national and worldwide fatalities. The Central District has been one of the hardest hit areas in our country. In *Olsen*, we acknowledged the continuing health and safety issues the COVID-19 pandemic presents, while simultaneously balancing the rights of the accused. The district court's dismissal of the serious charges in this case with prejudice aimed to enforce "*consequences to the judges in the Central District*" rather than apply the balancing required by the Speedy Trial Act. Because the district court misapplied the standard for an ends-of-justice continuance, we stand behind our opinion and concur with the denial of rehearing en banc.

BUMATAY, Circuit Judge, concurring in the denial of rehearing en banc:

These are trying times. The COVID-19 pandemic has forced our nation and our courts to confront novel, difficult issues. In response to COVID-19, governments at all levels have enacted measures to mitigate the spread of the deadly virus. Some of these measures have tested the limits of the Constitution. But "[e]ven in times of crisis," judges must "not shrink from our duty to safeguard th[e] rights" guar-

anteed by the Constitution. *Tandon v. Newsom*, 992 F.3d 916, 939 (9th Cir. 2021) (Bumatay, J., dissenting in part and concurring in part). The Supreme Court has instructed us time and again that our constitutional rights are entitled to the utmost protection—even in a pandemic. Thus, we never "water[ ] down" our examination of alleged constitutional infringements and must always uphold that the Constitution "really means what it says." *Tandon v. Newsom*, —— U.S. ——, 141 S. Ct. 1294, 1298, 209 L.Ed.2d 355 (2021) (simplified). And courts cannot punt on vigorously enforcing the protections of the Constitution because we are grappling with an unquestionably serious crisis. So we must always undertake an exacting look at actions that may violate a constitutional right.

This case falls into the category of difficult matters borne out of the COVID-19 pandemic. Last year, the federal district court in Los Angeles, California indefinitely suspended trials because of COVID-19. Jeffrey Olsen, a defendant out on bail, invoked his speedy trial rights. After the government requested a two-month continuance of his trial, the district court declared a violation of the Speedy Trial Act and the Speedy Trial Clause of the Constitution. What's more, the district court dismissed the charges against Olsen with prejudice. Our court reversed on statutory grounds.

So this case requires us to look to the meaning of our sacred right to a speedy trial as guaranteed by the Sixth Amendment and see what leeway, if any, the Speedy Trial Act grants in the face of COVID-19. While the matter poses some troubling circumstances, Olsen's constitutional speedy trial right was not

violated. At its core, the Speedy Trial Clause ensures that defendants are not locked up in jail indefinitely pending trial. This enforces the guarantee against arbitrary detention. But since Olsen wasn't detained pretrial and the delay here was not long enough to justify dismissal according to our precedent, no violation occurred. That said, this case would be *much different* if Olsen had been incarcerated during the COVID-19 pandemic and did not receive the trial he was entitled to under the Constitution. In that situation, the constitutional analysis would be significantly different in my view. And while I would quibble with the court's statutory analysis, I agree that the Speedy Trial Act does not dictate dismissal here.

For these reasons, I concur with the denial of rehearing en banc.

I.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]" U.S. Const. amend. VI. As the Supreme Court recognized, "the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment." *Klopfer v. North Carolina*, 386 U.S. 213, 223, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967). While the Speedy Trial Clause stands among our most sacred safeguards of individual liberty, its full meaning is less clear. It has been described as both "fundamental" and "amorphous"; both "mechanical" and "slippery."[1]

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[1] *See* Alfredo Garcia, The Sixth Amendment in Modern American Jurisprudence 157 (1992) (simplified); George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 Mich. L. Rev. 145, 153–54 (2001).

The full contours of the right may be unresolved, but the text and history of the Speedy Trial Clause establish an enduring principle: the primary guarantee of the right is to protect against prolonged *pretrial detention* by the government. Olsen was on bail pretrial and, while the indefinite suspension of jury trials is disconcerting, the trial delay doesn't appear to offend the core right as established by the Sixth Amendment.[2]

A.

Like most of our rights, the right to a speedy trial is rooted in English legal tradition. The earliest known expression of the speedy trial right comes from the Assize of Clarendon of 1166—King Henry II's attempt to establish rudimentary rules for criminal procedure.[3] The fourth provision of the Assize provided:

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[2] The panel neglected to analyze Olsen's Speedy Trial Clause claim even though the district court's dismissal also hinged on a constitutional violation. *See United States v. Olsen*, 995 F.3d 683, 691 n.8 (9th Cir. 2021). That was a mistake. What satisfies the Speedy Trial Act may still violate the Sixth Amendment, and vice versa. *See United States v. Thirion*, 813 F.2d 146, 154 (8th Cir. 1987) ("Sixth amendment challenges receive separate review distinct from the Speedy Trial Act."); *United States v. Gonzalez*, 671 F.2d 441, 442 (11th Cir. 1982) ("The rights of criminal defendants under the Speedy Trial Act and the sixth amendment are distinct[.]"); *United States v. Bilsky*, 664 F.2d 613, 617 (6th Cir. 1981) (There is a "critical difference ... between the dismissals available under the Speedy Trial Act and the Supreme Court interpretations [of the Sixth Amendment right].").

[3] Patrick Ellard, Learning from Katrina: Emphasizing the Right to a Speedy Trial to Protect Constitutional Guarantees in Disasters, 44 Am. Crim. L. Rev. 1207, 1209 (2007).

> And when a robber or murderer or thief, or harbourers of them, shall be taken on the aforesaid oath, if the Justices shall not be about to come quickly enough into that county where they have been taken, the sheriffs shall send word to the nearest Justice through some intelligent man, that they have taken such men; and the Justices shall send back word to the sheriffs where they wish those men to be brought before them: and the sheriffs shall bring them before the Justices. And ... there, before the Justice, they shall do their law.[4]

The Assize thus established a prisoner's right to be brought promptly before a judge and have his case heard. And if no royal judge was readily available in the county, the sheriffs had to bring the prisoner elsewhere.

Almost fifty years later, in 1215, King John codified the right in the Magna Carta—the seminal charter of English rights. The charter guaranteed that "[w]e will sell to no man, we will not deny or defer to any man either justice or right."[5] To Sir Edward Coke, these words meant:

> [E]very subject of th[e] realme, for injury done to him ..., be he ecclesiasticall, or temporall, free, or bond, man, or woman, old, or young, or be he outlawed, excommunicated, or any other without exception, may take his remedy by the course of the law, and have justice, and right

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[4] Assize of Clarendon, 1166 ¶ 4, available at https://avalon.law.yale.edu/medieval/assizecl.asp.

[5] Magna Carta, 1215 c. 40, as translated by Edward Coke, The Second Part of the Institutes of the Laws of England 45 (London, Clarke & Sons, 1817).

> for the injury done to him, freely without sale, fully without any deniall, and speedily without delay.[6]

To keep this right, the king dispatched judges to each county of the kingdom with the duty to administer justice for each jailed prisoner "according to the rule of law and custome of England."[7] By arriving in each county at least twice a year, royal judges ensured that they "have not suffered the prisoner to be long detained, but at their next comming have given the prisoner full and speedy justice, by due triall, without detaining him long in prison."[8] Any infringement of the prohibition against long detention without "lawfull deliverance" would lead to the forfeiture of the jail to the king.[9] Coke noted that one of the primary concerns for the law was that "the innocent shall not be worn and wasted by long imprisonment, but ... speedily come to his triall."[10] To him, "speedy" justice meant criminal proceedings without prolonged pretrial detention.

The Habeas Corpus Act of 1679, 31 Car. 2, c. 2 (Eng.), another historical predecessor of the speedy trial right,[11] further reinforced the established right

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[6] Coke, *supra* note 5 at 55. The primary "injury" in this context was "false imprisonment" and other pre-Magna Carta abuses that prevented prisoners from challenging their detention. *See id.* at 52–55.

[7] *Id.* at 56 (describing the commissions of gaol delivery and oyer and terminer).

[8] *Id.* at 42.

[9] *Id.*

[10] *Id.* at 315.

[11] In 1851, the General Court of Virginia characterized the speedy trial right as the "re-affirmance of a principle declared and consecrated by the famous" Habeas Corpus Act. *Common-*

against unreasonable pretrial detentions. Parliament passed the Act after the restoration of Charles II to prevent executive abuses, including the long imprisonment of the Crown's enemies without indictment.[12] The Act addressed "great delays" by jailers "in making Returns to Writts of Habeas Corpus" and sought to remedy the concern that "many of the Kings Subjects have beene and hereafter may be long detained in Prison," when they could have been released on bail.[13]

The Act established timelines for the indictment and trial of prisoners and penalties for the failure to adhere to the requirements. Such mandates were "[f]or the prevention whereof and the more speedy Releife of all persons imprisoned for any such criminall or supposed criminall Matters."[14] In particular, for those persons jailed for "High Treason or Fellony," the Act generally required an indictment within two court terms (a term typically only spanning three-to-six months) or for the prisoner to be "sett at Liberty ... upon Baile."[15] The Act then mandated

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wealth v. Adcock, 49 Va. (8 Gratt.) 661, 676 (Va. Gen. Ct. 1851). At the time, the General Court was Virginia's supreme criminal tribunal. *See* Jurisdiction Information, Library of Virginia, at https://www.lva.virginia.gov/public/guides/burned_juris/Jurisdiction_info.htm.

[12] Amanda L. Tyler, A "Second Magna Carta": The English Habeas Corpus Act and the Statutory Origins of the Habeas Privilege, 91 Notre Dame L. Rev. 1949, 1976 (2016); *see also* Alan L. Schneider, Note, The Right to a Speedy Trial, 20 Stan. L. Rev. 476, 483 (1968).

[13] Tyler, *supra* note 12, at 1976.

[14] *Id.* at 1976.

[15] *Id.* at 1978 (quoting Habeas Corpus Act of 1679 § 7).

that a prisoner not indicted and tried by the third term "shall be discharged from his Imprisonment."[16]

In 1765, William Blackstone wrote that English law commanded that "no subject of England can be long detained in prison, except in those cases in which the law requires and justifies such detainer."[17] Like Coke, Blackstone noted that royal judges traveled to each county in the kingdom to render judgment to every prisoner in the jails, "whenever indicted, or for whatever crime committed."[18] The judges arrived twice every year throughout the kingdom, except for the "four northern" counties where it was held only once a year, and for London and Middlesex where it was held eight times a year.[19] So "one way or other, the [jails] are cleared, and all offenders tried, punished, or delivered, twice in every year[.]"[20] Trials could occur with even greater expediency, when, "upon urgent occasions, the king issues a special or extraordinary commission ..., confined to those offenses which stand in need of immediate inquiry and punishment[.]"[21] But Blackstone observed that at least twice a year, prisoners would be tried or released—setting a general outer limit for pretrial detention. For Blackstone, this right was the "bulwark of [the British] constitution."[22]

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[16] *Id.*
[17] 1 Commentaries on the Laws of England 131 (1st ed. 1765) ("Blackstone").
[18] 4 Blackstone 267 (1st ed. 1769).
[19] 4 Blackstone 266.
[20] 4 Blackstone 267.
[21] 4 Blackstone 267.
[22] 4 Blackstone 431.

B.

It was this core right against prolonged pretrial detention that took hold and flourished in the United States. Several of the colonial States adopted speedy trial provisions in their state constitutions and either adopted the Habeas Corpus Act itself or enacted similar laws. *See Klopfer*, 386 U.S. at 225 n.21, 87 S.Ct. 988 (citing the constitutions of Delaware, Maryland, Pennsylvania, and Virginia); *Petition of Provoo*, 17 F.R.D. 183, 197 n.6 (D. Md. 1955) (collecting habeas laws). Given that many Founders studied Coke's writings, the constitutional expression of the right echoed his formulation. *Klopfer*, 386 U.S. at 226, 87 S.Ct. 988 (noting that Coke's Institutes was "the universal elementary book of law students," widely read by law students in the American colonies including Thomas Jefferson, John Rutledge, and George Mason). For example, the Virginia Declaration of Rights, the first colonial bill of rights, guaranteed "[i]n all capital or criminal prosecutions ... a right to a speedy trial." *Id.* at 225, 87 S.Ct. 988 (simplified).

Of course, and most importantly for us, the People ratified the "right to a speedy ... trial" as part of the Sixth Amendment. U.S. Const. amend. VI. As a delegate to the Massachusetts ratifying convention, Abraham Holmes, observed that the right would protect against a person being

> dragged from his home, his friends, his acquaintance, and confined in prison, until the next session of the court, ... and after long, tedious, and painful imprisonment, though acquitted on trial, may have no possibility to obtain any kind of satisfaction for the loss of his liber-

> ty, the loss of his time, great expenses, and perhaps cruel sufferings.[23]

Thus, "[t]he history of the right to a speedy trial and its reception in this country clearly establish that it is one of the most basic rights preserved by our Constitution." *Klopfer*, 386 U.S. at 226, 87 S.Ct. 988.[24]

Despite this storied history, surprisingly few Founding-era cases illuminate the full meaning and scope of the speedy trial right. But one of the most notorious cases of the Founding era did inform the understanding of the right. Presiding over the arrest and imprisonment of Aaron Burr for treason, Chief Justice Marshall determined Burr was entitled to compulsory process before his indictment. *United States v. Burr*, 25 F. Cas. 30, 33 (C.C.D. Va. 1807). In making that decision, he considered how the speedy trial right informed the issue:

> The right given by this article must be deemed sacred by the courts, and the article should be so construed as to be something more than a dead letter. What can more effectually elude the right to a speedy trial than the declaration

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[23] 2 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787 110 (2d ed. 1891).

[24] Commentators agree that there's a relative "paucity" of historical data surrounding the Founders' adoption of the speedy trial right. Schneider, *supra* note 12, at 484; *see also United States v. Marion*, 404 U.S. 307, 315 n.6, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971) (describing historical evidence surrounding the ratification of the Speedy Trial Clause as "meager"). Perhaps, this reflects the widespread understanding of the common law right as taught by Coke, Blackstone, and other Founding-era sources.

> that the accused shall be disabled from preparing for it until an indictment shall be found against him? It is certainly much more in the true spirit of the provision which secures to the accused a speedy trial, that he should have the benefit of the provision which entitles him to compulsory process as soon as he is brought into court.

Id. Chief Justice Marshall then concluded that "withholding from a prisoner the process of the court" would lead to delays, "which are never desirable, which frequently occasion loss of testimony, and which are often oppressive." *Id.* at 32.

Several early federal and state cases also raised the concern of lengthy pretrial detention. For example, in 1807, a Tennessee court held that the right to a speedy trial mandated the discharge of a prisoner because the resignation of the prosecutor was "no ground to keep the prisoner six months longer in confinement." *State v. Sims*, 1 Tenn. 253, 253 (Tenn. Super. L. & Eq. 1807). Opining on the meaning of Virginia's speedy trial right, the General Court of Virginia noted that the "whole purpose" of the right was to "secure [the accused] against protracted imprisonment." *Adcock*, 49 Va. at 676. And the federal Supreme Court of the Territory of Montana recognized the right's core focus on pretrial incarceration:

> Among the principles that adorn the common law, making it the pride of all English-speaking people, and a lasting monument to the noble achievements of liberty over the encroachments of arbitrary power, are the following: No man can be rightfully imprisoned except upon a charge of crime properly made in pursuance of

> the law of the land. No man, when so imprisoned upon a lawful charge presented in a lawful manner specifying the crime, can be arbitrarily held without a trial.
>
> These principles are in accord with the enlightened spirit of the common law, and form a part of the framework of the English Constitution. They are guaranteed and secured by Magna Charta, the Petition of Rights, the Bill of Rights, and by a long course of judicial decision, and they belong to us as a part of our inheritance from the mother country. These rights were claimed by our ancestors in Colonial times, and they have been engrafted into and secured by our Constitution, the supreme law of the land[.]

United States v. Fox, 3 Mont. 512, 515–16 (1880) (holding that, at common law, a prosecutor's neglect or laches constitutes a denial of a speedy trial).

To be sure, after crossing the Atlantic, the scope of the right began to expand—guaranteeing a right to speedy resolution of criminal prosecutions even without pretrial detention. *See, e.g., State v. Buyck*, 2 S.C.L. 563, 564 (S.C. Const. App. 1804) ("[I]t was the duty of the court to take care that criminal causes should not be unreasonably protracted or delayed" even for defendants discharged from confinement on bail.); *Adcock*, 49 Va. at 677 (noting that the Virginia's 1786 speedy trial statute included a "new and additional provision for a discharge from the crime upon failure to try at the third [term]"); *Fox*, 3 Mont. at 517 ("A person charged with crime, whether in prison or on bail, has the right to demand diligence on the part of the prosecution, to the end that he

may speedily know whether he is to be convicted or acquitted."). But, from its origins, the core right protected the accused from long detention without an adjudication of guilt.

C.

Supreme Court jurisprudence confirms the primacy of the concern against prolonged pretrial detention. Although lower state and federal courts contemplated the meaning of the right to a speedy trial for over a century, the issue did not reach the Court until 1905. *See Beavers v. Haubert*, 198 U.S. 77, 25 S.Ct. 573, 49 L.Ed. 950 (1905). In that case, the Court described the right as "necessarily relative," meaning it is "consistent with delays and depends upon circumstances." *Id.* at 87, 25 S.Ct. 573. While the speedy trial right "secures rights to a defendant," the Court held that it "does not preclude the rights of public justice." *Id.* By framing the right in this way, the Court suggested that the right permits consideration of societal or governmental objectives.[25] But importantly, the defendant in *Beavers* was not incarcerated throughout his charges, so perhaps the Court was more willing to engage in interest balancing given that the defendant was not totally deprived of his liberty for most of his criminal proceedings.

Today, the Court recognizes that the Sixth Amendment's primary guarantee is against "undue and oppressive incarceration prior to trial." *United States v. Ewell*, 383 U.S. 116, 120, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966) (listing the concern for pretrial incarceration above the speedy trial right's other in-

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[25] *See* Garcia, *supra* note 1, at 159.

terests "to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself"). As the Court explained, "the Speedy Trial Clause's core concern is impairment of liberty[.]" *United States v. Loud Hawk*, 474 U.S. 302, 312, 106 S.Ct. 648, 88 L.Ed.2d 640 (1986). Moreover, the Court has said, "[t]he speedy trial guarantee is designed to minimize the possibility of lengthy incarceration prior to trial," in addition to protecting the interest of those on bail and "to shorten[ing] the disruption of life caused by arrest and the presence of unresolved criminal charges." *United States v. MacDonald*, 456 U.S. 1, 8, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982). As Justice Thomas has said, "[t]he touchstone of the speedy trial right, after all, is the substantial deprivation of liberty that typically accompanies an 'accusation[.]'" *Doggett v. United States*, 505 U.S. 647, 663, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992) (Thomas, J., dissenting).

In 1972, the Court introduced the balancing approach still in use today. *See Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). In denying the defendant's speedy trial claim, the Court rejected a bright-line rule, counseling that courts must instead consider such challenges on an "ad hoc basis." *Id.* at 530, 92 S.Ct. 2182. As a result, the Court listed factors that should be considered: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.*

Based on this history and precedent, I see no constitutional violation here. As I've said before, we should always read precedent "in light of and in the

direction of the constitutional text and constitutional history." *Edmo v. Corizon, Inc.*, 949 F.3d 489, 506 (9th Cir. 2020) (Bumatay, J., dissenting from the denial of rehearing en banc) (simplified). Given that the speedy trial right's core historic concern against *prolonged pretrial detention* is not at stake here, I see no reason to depart from modern precedent permitting some reasonable trial delay. And as I read our precedent, Olsen's two-month trial delay is not nearly long enough to justify dismissal under the Constitution. *See Barker*, 407 U.S. at 534, 92 S.Ct. 2182 (declining to find a speedy trial right violation even after a defendant on bail waited four years for trial). Yet, as stated earlier, this case would be very different if Olsen had been detained during the COVID-19 pandemic and had suffered the deprivation of his liberty while the California federal district court shut down indefinitely.[26]

II.

Resolving the constitutional question is only part of this case. The district court also dismissed Olsen's indictment based on the Speedy Trial Act. *See* 18 U.S.C. § 3161. Generally, the Act permits district courts to continue a defendant's trial with a finding that the "ends of justice" outweigh "the best interest of the public and the defendant in a speedy trial." *Id.* § 3161(h)(7)(A). In reaching an ends-of-justice continuance, the court may consider "[w]hether the fail-

[26] Judge Collins misconstrues my constitutional analysis. Contrary to his suggestion, I do not say that the Speedy Trial Clause applies *only* to those in custody. Collins Dissent —— n.20. Rather, I simply attempt to trace the right's original public meaning and show how that meaning should guide our interpretation today.

ure to grant such a continuance ... would ... likely ... make a continuation of such proceeding impossible, or result in a miscarriage of justice." *Id.* § 3161(h)(7)(B)(i). The panel reversed the district court's dismissal because both the "impossib[ility]" and "miscarriage of justice" exceptions justified a continuance here. *Olsen*, 995 F.3d at 691–92.

On the "impossib[ility]" exception, I agree with Judge Collins's persuasive dissent. *See* Collins Dissent, Section III. As the district court found, it was "[c]learly ... possible" to hold jury trials as both federal grand juries and state jury trials had resumed in the area. *Olsen*, 995 F.3d at 689. Like Judge Collins, I would conclude no impossibility excused the delay in Olsen's trial.[27]

But, in the end, I concur in the denial of rehearing because the panel correctly determined that the district court should have considered whether the "miscarriage of justice" exception would have supported a continuance of Olsen's trial. Under an evaluation of that exception, courts may consider the government's interest in seeking a continuance. And given the lack of government culpability and the relatively short two-month continuance at issue, an ends-of-justice continuance would have been appropriate here.

The Speedy Trial Act doesn't define "miscarriage of justice." And there is a dearth of caselaw discussing what constitutes a "miscarriage of justice." But

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[27] Perhaps Judge Collins is correct that we should have called this case en banc to fix the erroneous interpretation of the "impossib[ility]" exception. Ultimately, I opted against that route because I conclude that the "miscarriage of justice" exception justifies the delay here.

that is not fatal—it is illuminating. The lack of bright lines shows that the phrase is context specific. While its precise meaning may be amorphous, "miscarriage of justice" is generally defined as "[a] grossly unfair outcome in a judicial proceeding[.]" Black's Law Dictionary (11th ed. 2019).[28] In codifying this phrase, Congress gave courts some latitude in applying the ends-of-justice continuation, ensuring that justice is served even if a continuance does not fit the precise contours of the other three enumerated factors. *See* 18 U.S.C. § 3161(h)(7)(B)(ii)–(iv). Thus, the miscarriage of justice exception is broad enough to encompass both the interests of the defendant and the government in determining whether a lack of a continuance would lead to a "grossly unfair outcome."

The Act's structure reinforces this view. Other enumerated factors show that the government's interest is to be considered in an ends-of-justice continuance. *See id.* (balancing the "nature of the prosecution," the Government's ability to secure "continuity of counsel," and the "reasonable time" necessary for the Government's "effective preparation" for trial). So the factors listed in § 3161(h)(7)(B) already presuppose weighing the interests of both the government and the defendant in considering a continuance.

And contrary to Judge Collins's dissent, the "miscarriage of justice" exception may consider whether the lack of a continuance would result in unjust *outcomes*. Judge Collins would limit the "miscarriage of

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[28] *See also Miscarriage of Justice*, Black's Law Dictionary (5th ed. 1979) ("Decision or outcome of legal proceeding that is prejudicial or inconsistent with substantial rights of party").

justice" exception to address only "whether more time is needed ... to ensure ... the fairness of the trial proceedings *themselves*." Collins Dissent —— (emphasis original) (citing cases using the "miscarriage of justice" exception to ensure fair trial proceedings, such as granting the government more time to effectively prepare for trial). But there's no textual reason to allow the exception to evaluate only *trial proceedings*, rather than also *trial outcomes*. Indeed, other enumerated factors already concern the fairness of trial proceedings, specifically allowing "the Government the reasonable time necessary for effective preparation." *See* 18 U.S.C. § 3161(h)(7)(B)(ii), (iv). The "miscarriage of justice" exception, then, must mean something different from simply ensuring fair trial proceedings. Tellingly, "miscarriage of justice" is paired with "impossib[ility]." *Id.* § 3161(h)(7)(B)(i). To me, rendering a proceeding "impossible" is an "outcome." So it makes sense that the "miscarriage of justice" and "impossibility" exceptions would both have an "outcome" component. In short, courts don't need to blind themselves to alternative *outcomes* in considering the "miscarriage of justice" exception.

Given this understanding, I don't think the panel was wrong to consider the "absence of any government culpability or [the] minimal prejudice to Olsen" in a two-month continuance of trial to reverse the Speedy Trial Act violation. *Olsen*, 995 F.3d at 692. Of course, "Congress did not intend the 'ends of justice' exclusion to be granted as a matter of course but rather to be used sparingly and only when necessary." *United States v. Lewis*, 980 F.2d 555, 560 (9th Cir. 1992). So we should be careful not to use this

case as a launchpad to expand ends-of-justice continuances.

III.

COVID-19 does not put the Constitution on hold. Courts must always be vigilant in protecting constitutional rights. Yet, because Olsen was not under pretrial detention, I do not believe he suffered a deprivation of his Sixth Amendment speedy trial right. Nor does the Speedy Trial Act compel dismissal of the charges under proper consideration of the "miscarriage of justice" exception. Thus, I concur in the denial of rehearing en banc.

COLLINS, Circuit Judge, with whom FORREST, Circuit Judge, joins, dissenting from the denial of rehearing en banc:

Even in the midst of a pandemic, there are some things that, in a constitutional republic, should be all but unthinkable. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, —— U.S. ——, 141 S. Ct. 63, 68, 208 L.Ed.2d 206 (2020) (noting that, "even in a pandemic, the Constitution cannot be put away and forgotten"). There are measures that, given the scope and duration of their infringement on fundamental rights, may be maintained, if at all, only upon the weightiest of showings. *See id.* (stating that, "[b]efore allowing" pandemic-related measures that "strike at the very heart" of a constitutional guarantee, the courts "have a duty to conduct a serious examination of the need for such a drastic measure"). That category includes ordering the closure of all

houses of worship,[1] prohibiting nearly all in-person instruction at private schools,[2] broadly forbidding people from gathering inside homes for constitutionally protected activities such as Bible studies,[3] and requiring everyone to stay in their homes except to the extent that the government grants them permission to leave.[4] This case presents another such example—the wholesale suspension of criminal jury trials.

Even though the California state courts managed to conduct numerous criminal jury trials during the same time period, the Central District of California issued General Orders that, based on Covid-related concerns, prohibited any federal criminal jury trials for nearly 14 months. In its decision in this case, the panel rejected criminal defendant Jeffrey Olsen's contention that the Central District's suspension of jury trials violated his rights under the Speedy Trial

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[1] *South Bay United Pentecostal Church v. Newsom*, —— U.S. ——, 141 S. Ct. 716, 718, 209 L.Ed.2d 22 (2021) (statement of Gorsuch, J., joined by Thomas and Alito, JJ.) (noting that California had failed "to explain why it cannot address its legitimate concerns with rules short of a total ban"); *id.* at 717 (Barrett, J., joined by Kavanaugh, J., concurring in part) (agreeing with Justice Gorsuch's statement on this point).

[2] *Brach v. Newsom*, 6 F.4th 904, 927–33 (9th Cir. 2021), *vacated on grant of rehearing en banc*, 18 F.4th 1031 (9th Cir. 2021).

[3] *Tandon v. Newsom*, —— U.S. ——, 141 S. Ct. 1294, 1297, 209 L.Ed.2d 355 (2021).

[4] *South Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 944 n.5 (9th Cir. 2020) (Collins, J., dissenting) ("Even the most ardent proponent of a broad reading of *Jacobson* [*v. Massachusetts*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643 (1905),] must pause at the astonishing breadth of [the stay-at-home order's] assertion of government power over the citizenry, which in terms of its scope, intrusiveness, and duration is without parallel in our constitutional tradition.").

Act, which implements the Sixth Amendment's guarantee of a "speedy and public trial." We have previously stated that we are "quick to pay homage to the Sixth Amendment to the Constitution of the United States and its implementation, The Speedy Trial Act," because "[e]xcept for the right of a fair trial before an impartial jury no mandate of our jurisprudence is more important." *See Furlow v. United States*, 644 F.2d 764, 768–69 (9th Cir. 1981). To be sure, the panel here paid lip service to "the importance of the right to a speedy and public trial," which it acknowledged is "among the most important protections guaranteed by our Constitution" and "is not one that may be cast aside in times of uncertainty." *United States v. Olsen*, 995 F.3d 683, 695 (9th Cir. 2021). But then, without ever considering whether there was any way in which criminal jury trials could have been conducted during the pandemic—as the state courts managed to do—the panel proceeded to uphold the Central District's lengthy suspension of jury trials by invoking overall public health concerns: "[S]urely a global pandemic that has claimed more than half a million lives in this country, and nearly 60,000 in California alone, falls within such unique circumstances to permit a court to temporarily suspend jury trials in the interest of public health." *Id.* at 693.

"Stemming the spread of COVID-19 is unquestionably a compelling interest." *Diocese of Brooklyn*, 141 S. Ct. at 67. But even weighty claims of danger to public health must be measured against the demands of the law, and here the relevant provisions of the Speedy Trial Act are fairly stringent. Applying those standards, the district court held that, almost

six months into the pandemic, the Government had failed to show that a further continuance of Olsen's trial was justified. *United States v. Olsen*, 494 F. Supp. 3d 722 (C.D. Cal. 2020). Indeed, the court expressed incredulity that the suspension of jury trials had gone on for so long, despite the wide range of other activities occurring in the same community:

> Quite frankly, the Court is at a loss to understand how the Central District continues to refuse to resume jury trials in the Orange County federal courthouse. The Internal Revenue Service, the Social Security Administration, and other federal agencies in Orange County are open and their employees are showing up for work. Police, firefighters, and other first responders in Orange County are all showing up for work. Hospitals and medical offices in Orange County are open to patients and the medical professionals are showing up for work. Grocery stores, hardware stores, and all essential businesses in Orange County are open and their employees are showing up for work. State courts in Orange County are open and holding jury trials. Orange County restaurants are open for outdoor dining and reduced-capacity indoor dining. Nail salons, hair salons, body waxing studios, massage therapy studios, tattoo parlors, and pet groomers in Orange County are open, even indoors, with protective modifications. Children in Orange County are returning to indoor classes at schools, with modifications. Even movie theaters, aquariums, yoga studios, and gyms in Orange County are open indoors with reduced capacity. Yet the federal

> courthouse in Orange County somehow remains closed for jury trials. The Central District's refusal to resume jury trials in Orange County is indefensible.

Id. at 731. Because the district court refused to grant a further continuance of Olsen's trial, that trial did not occur within the time frame specified by the Speedy Trial Act, and the district court dismissed the indictment with prejudice. *Id.* at 734.

Confident that the pandemic "surely" justified the Central District's extended "suspen[sion] [of] jury trials in the interest of public health," the panel reversed the district court and held that Olsen's trial should have been continued, based on Covid-related concerns, under the Speedy Trial Act's "ends of justice" exception." 995 F.3d at 695. But in its determination to uphold this unprecedented and disturbing suspension of a crucial constitutionally-based right, the panel's decision egregiously misinterpreted the Act's ends-of-justice exception in a way that does serious damage to this critically important statute. These errors, which fundamentally alter and misunderstand how the statute works, have troubling implications that will extend well beyond the pandemic. Under any proper understanding of the Speedy Trial Act, the district court here correctly concluded that the Government had failed to show that a further continuance of Olsen's trial was consistent with the Act's standards. And because Olsen's trial did not take place within the time specified in the Act, the dismissal of Olsen's indictment was mandatory, although the district court had discretion to decide whether that dismissal should be with or without prejudice. *See* 18 U.S.C. § 3162(a)(2). I agree with

the panel's alternative ruling that the district court abused that discretion in dismissing Olsen's indictment *with* prejudice. *See* 995 F.3d at 694–95. But the panel's decision did considerable damage to the Speedy Trial Act when it held that Olsen's trial should have been continued, that there was no violation of the Act, and that Olsen's indictment should not be dismissed without prejudice.

We should not have let the Speedy Trial Act be counted among Covid's latest casualties. I respectfully dissent from our refusal to rehear this case en banc.

I

A

On July 6, 2017, Jeffrey Olsen was indicted on one count of making a false statement on an application to obtain a federal controlled substance registration, *see* 21 U.S.C. § 843(a)(4)(A), and 34 counts of unlawfully prescribing and distributing, as a licensed physician, various controlled substances, *see id.*, § 841(a)(1). At his arraignment on July 11, 2017, Olsen pleaded not guilty, posted bond, and was released from custody. His trial was initially set for September 5, 2017, which is within the 70-day window prescribed by the Speedy Trial Act. *See* 18 U.S.C. § 3161(c)(1) ("In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the

court in which such charge is pending, whichever date last occurs.").

The Speedy Trial Act recognizes that there may be grounds to delay the trial beyond the default 70-day window, and it therefore sets forth eight specific grounds for excluding certain periods of time from the calculation of the 70-day period. 18 U.S.C. § 3161(h)(1)–(8); *United States v. Daychild*, 357 F.3d 1082, 1090 (9th Cir. 2004). Among these grounds are the "unavailability of the defendant or an essential witness," *see* 18 U.S.C. § 3161(h)(3)(A); "other proceedings concerning the defendant," including pretrial motions or interlocutory appeals, *id.* § 3161(h)(1); mental or physical incapacity of the defendant, *id.* § 3161(h)(4); or delays associated with a codefendant with whom the defendant is joined for trial, *id.* § 3161(h)(6). One of the eight exceptions is a residual "ends of justice" exception that authorizes the exclusion of time from the 70-day clock when a continuance is granted by a judge "on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(7)(A). Invoking that exception, Olsen sought (with the Government's concurrence) the following five continuances of his trial, all of which were granted:

- Olsen requested the exclusion of the 148 days from September 5, 2017 until January 30, 2018 on the ground that, in light of the voluminous discovery produced by the Government ("31,181 pages of documents and files"), his counsel's schedule, and the need to prepare for trial "in the event that a pretrial resolution does not occur," a "failure to

grant the continuance will deny him continuity of counsel and adequate representation."

- Noting that the Government's discovery had ballooned to "approximately 197,343 pages of documents and files," including "text messages, pictures, and audio and video recordings," Olsen relied on similar grounds in requesting the exclusion of the 196 days from January 30, 2018 through August 14, 2018.[5]
- Olsen requested the exclusion of the 102 days from August 14, 2018 through December 4, 2018 on the grounds that defense counsel needed additional time to review the discovery and prepare for trial, which included "finding an expert."
- For essentially the same grounds as stated in the prior request, Olsen requested the exclusion of the 196 days from December 4, 2018 until June 18, 2019.
- After Olsen's retained counsel moved to withdraw in February 2019 based on "serious differences of case strategy that cannot be reconciled," the court relieved counsel and appointed the Federal Public Defender as counsel for Olsen. Based on this change of counsel, Olsen requested the exclusion of the 140 days from June 18, 2019 through November 5, 2019.

In August 2019, Olsen sought a sixth continuance, but the Government opposed this request. Olsen's counsel explained that, upon review of the Govern-

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[5] Although the court's order states that the time period is "inclusive" of the starting and ending dates, the same was true of the prior order, and a day covered by both orders (*e.g.*, January 30, 2018) can only be excluded once.

ment's "41 GB" of discovery, including "roughly 77,000 files," she discovered that "the majority of files were either not copied or corrupted." She requested and received replacement files, and she assigned a paralegal to assist in "uploading and cataloguing all files to the CaseMap software." Because the nearly 16,000 pages of handwritten prescriptions were "not easily converted to a searchable format," she explained that these required individual review and processing. She also stated that she needed more time to review the Government's expert disclosures and to identify and retain experts of her own. She further noted that the Government itself spent more than six years investigating Olsen before he was indicted, and she argued that her requests for additional time were warranted in the context of this "document-heavy case." The court held a hearing on this request, during which it expressed disappointment in itself for having "allowed this case to be continued so much." In response, the prosecutor explained that:

> "[P]art of the reason why there has been a number of continuances was because I was having a fairly forthright conversation—or communications with the prior defense counsel. And her belief and my belief was that Mr. Olsen would—will ultimately plead guilty. And that entailed in part [a] reverse proffer that the government conducted with Mr. Olsen.

After hearing from both sides, the court granted the requested continuance and, invoking the ends-of-justice exception, it excluded from the Speedy Trial Act's 70-day clock the 182 days from November 5, 2019 through May 5, 2020.

Based on the ends-of-justice exception, Olsen successfully requested two further continuances, with the Government's concurrence, as follows:

- Due to scheduling conflicts of defense counsel, and the disruption to court operations resulting from the pandemic, Olsen requested exclusion of the 77 days from May 5, 2020 through July 21, 2020.
- Based on essentially the same grounds, Olsen requested exclusion of the 84 days from July 21, 2020 through October 13, 2020.

B

In August 2020, the court called a status conference after it learned that Olsen would not agree to any further continuances of the trial date.[6] At that conference, the Government stated that it would file an opposed application for a continuance. In its ensuing application, the Government moved to continue the trial from October 13, 2020 to December 1, 2020 and to exclude the additional 49 days under the ends-of-justice exception. The gravamen of the application was that "conducting a jury trial during a pandemic without district-wide protocols for conducting jury trials may jeopardize the health of prospective jurors, witnesses, defendant, trial counsel, and court personnel." Olsen opposed the application, arguing that "the courts have had several months to address" the pandemic and that a further blanket and "functionally open-ended" suspension of trials could not be justified.

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[6] The panel is therefore simply wrong in insinuating that the objection to the extension originated with the district court rather than with Olsen. *See* Panel Concurrence at ——— – ———.

On September 2, 2020, the district court denied the Government's application, concluding that, in light of the many criminal jury trials being conducted in the nearby Orange County Superior Court and the successful conducting of grand jury proceedings in the federal courthouse, the Government had not shown that it was impossible to conduct a trial. *See* 18 U.S.C. § 3161(h)(7)(B)(i) (stating that one factor to consider, under the ends-of-justice exception, is whether "the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible"). Accordingly, the court requested that the Chief Judge "direct the Jury Department to summon jurors," but the Chief Judge denied that request the very next day in a written order that relied only on the then-applicable General Order that "suspended jury trials until further notice."

On September 15, 2020, Olsen preemptively moved for dismissal of his indictment on the basis that his Speedy Trial Act and Sixth Amendment rights were violated by the imminent failure to bring him to trial within the Speedy Trial Act's timeframe, which would expire on October 27, 2020. Because dismissal of the indictment, either with or without prejudice, is the mandatory remedy under the Speedy Trial Act for a failure to timely bring the defendant to trial, *see* 18 U.S.C. § 3162(a)(2), the Government's opposition argued only that (1) the motion was premature until the time actually ran out on October 27, and (2) any dismissal should be without prejudice. The district court granted the motion to dismiss the indictment, with prejudice, effective on

the first day after the Speedy Trial Act expired, *i.e.*, October 28, 2020. *Olsen*, 494 F.Supp.3d at 733–34.

C

The Government appealed the dismissal, and the panel reversed and remanded, directing that Olsen's indictment be reinstated, that an appropriate continuance be granted, and that the case be set for trial. *Olsen*, 995 F.3d at 695. The panel relied on three grounds for concluding that the Government's requested continuance under the ends-of-justice exception should have been granted.

First, the panel held that the district court had erroneously proceeded on the assumption that "literal impossibility is the relevant standard for an ends of justice continuance." 995 F.3d at 690. The panel concluded that, under a proper understanding of the Act's reference to whether a proceeding would be "impossible" absent a continuance, the Government's requested continuance was warranted. According to the panel, that was true because, in light of the General Order's complete prohibition of jury trials, a failure to grant the continuance "*did* make 'a continuation of [Olsen's] proceeding impossible.'" *Id.* at 691 (quoting 18 U.S.C § 3161(h)(7)(B)(i)). Second, the panel held that, because the failure to grant the requested continuance would lead to dismissal of the indictment, the result would be a "miscarriage of justice." *Id.* at 691–92. Third, the panel concluded that the district court had erred by failing to consider a set of non-statutory factors that, in light of the

pandemic, the panel thought that it should have addressed. *Id.* at 692.[7]

II

The Speedy Trial Act's ends-of-justice exception provides that the "period of delay resulting from a continuance" is excluded from the Act's 70-day clock "if the judge granted such continuance on the basis of his finding 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). "Realizing that broad discretion would undermine the mandatory time limits of the Act, Congress intended that this provision be 'rarely used' and enumerated four factors to be considered by the judge in granting an ends of justice continuance." *United States v. Nance*, 666 F.2d 353, 355 (9th Cir. 1982) (citation omitted).[8] These factors, howev-

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[7] The panel also alternatively held that, even if the continuance was properly denied, the district court abused its discretion by dismissing the indictment *with* prejudice rather than without prejudice. 995 F.3d at 693–95. I agree with this alternative holding; the indictment should have been dismissed without prejudice rather than with prejudice. *See infra* at ——— – ———.

[8] Specifically, the statute provides:

> The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:
>
> (i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.
>
> (ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

er, are not exclusive. *See* 18 U.S.C. § 3161(h)(7)(B) (stating that, in applying the ends-of-justice exception, the court should consider the four statutory factors, "among others"). In challenging the denial of its requested continuance, the Government relied on only the first of the four statutorily enumerated factors, namely:

> Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

18 U.S.C. § 3161(h)(7)(B)(i).[9]

The panel seriously misconstrued both prongs of this statutory factor, namely, (1) what it means to say that "the failure to grant such a continuance in

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> (iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.
>
> (iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

18 U.S.C. § 3161(h)(7)(B).

[9] Although several of the other factors—such as those focused on adequate preparation time and continuity of counsel—were implicated in some of the *earlier* continuances that were granted in Olsen's case, they provided no support for the Government's final requested continuance. By that point, all parties had had ample time to prepare.

the proceeding would be likely to make a continuation of such proceeding impossible"; and (2) what counts as "a miscarriage of justice" so as to justify a continuance. 18 U.S.C. § 3161(h)(7)(B)(i). The panel also improperly diluted both prongs through its use of novel non-statutory considerations. I will discuss each of these prongs separately.

III

In concluding that the district court's denial of a continuance would make proceeding with a trial "impossible" within the meaning of § 3161(h)(7)(B)(i), the panel erred in three critical respects.

A

In finding that the impossibility standard was met here, the panel reasoned that, "[b]ecause not granting the government's continuance meant that the Speedy Trial Act clock would necessarily expire before Olsen could be brought to trial, it follows that the district court's 'failure to grant' an ends of justice continuance in this case *did* make 'a continuation of [Olsen's] proceeding impossible.'" 995 F.3d at 691. Of course, the only reason why the Speedy Trial Act clock would expire after a denial of the continuance is that the Central District's then-applicable General Order forbade any jury trials from taking place during the remainder of the time left on that clock. The panel's opinion thus treated the General Order *itself* as an externality that rendered a trial "impossible," thereby satisfying the statutory standard. *See* 995 F.3d at 691; *see also id.* at 695 ("The orders acknowledge the importance of the right to a speedy and public trial both to criminal defendants and the

broader public, and conclude that, considering the continued public health and safety issues posed by COVID-19, proceeding with such trials would risk the health and safety of those involved, including prospective jurors, defendants, attorneys, and court personnel."). The panel's analysis is deeply flawed.[10]

By allowing the Central District's General Order to serve as the source of the impossibility that justifies a continuance, the panel's analysis rests on a bootstrap argument that permits a wholesale evasion of the impossibility standard.[11] It should go without saying that, in applying the Speedy Trial Act, the analysis must turn on whether the *Act's*

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[10] The panel's concurrence chastises me for failing to mention "the fact that the Circuit's Judicial Council reviewed the Central District's General Order, thereafter approving its declaration of a judicial emergency." Panel Concurrence at ——. The cited Judicial Council order only approves the declaration of a "judicial emergency" under the separate provisions of 18 U.S.C. § 3174, which has no applicability here. *See In re Approval of Jud. Emergency Declared in the Cent. Dist. of Cal.*, 955 F.3d 1140 (9th Cir. Jud. Council 2020); *see also infra* at —— n.19. That order did not review or approve the Central District's open-ended suspension of criminal jury trials. Indeed, the Judicial Council has no role in making case-specific Speedy Trial Act determinations under § 3161(h).

[11] In its concurrence in the denial of rehearing en banc, the panel expressly denies that it has relied on any such bootstrap argument but then—without apparent awareness of the self-contradiction—the panel's explanation proceeds to make the exact same bootstrap argument. *See* Panel Concurrence at —— – ——. Thus, in explaining why "not granting the government's [requested] continuance rendered trial impossible," the panel again reaffirms that the impossibility was "due to General Order 20-09's suspension of criminal jury trials." *Id.*; *see also id.* at —— n.3 (explaining that the Government had shown that "*the General Orders ... prevented jury trials*") (emphasis added).

standard for impossibility is met, regardless of what any General Order says. If the asserted source of the impossibility is a General Order of the court itself, then *that* order must be subject to, and comply with, the strictures of the Act. *See* Fed. R. Crim. P. 57(a)(1), (b) (local rules and orders must be "consistent with ... federal statutes" and "federal law"). But the panel opinion never even considered whether the General Order made findings sufficient to establish that a trial was "impossible" within the meaning of the Act, nor did it address whether the General Order otherwise complied with the Act's specific standards.

Contrary to what the panel's concurrence in the denial of rehearing en banc now belatedly contends, *see* Panel Concurrence at —— – ——, it is quite clear that the applicable General Order here did *not* rest on a proper application of Speedy Trial Act standards. The panel's contrary assumption is at war with the language of the Speedy Trial Act and with settled precedent construing it. Here is the relevant General Order's analysis that, under the panel opinion, *see* 995 F.3d at 695, substitutes for an adequate application of Speedy Trial Act standards:

> The Center for Disease Control and Prevention has warned that "in the coming months, most of the U.S. population will be exposed to this virus." The COVID-19 rates of infection, hospitalizations and deaths have significantly increased in the Central District of California in the last thirty days such that holding jury trials substantially increases the chances of transmitting the Coronavirus. The Court concludes that conducting jury trials would also likely place

> prospective jurors, defendant, attorneys, and court personnel at unnecessary risk. Therefore, the Court finds that suspending criminal jury trials in the Central District of California because of the increase in reported COVID-19 infections, hospitalizations, and deaths *serves the ends of justice and outweigh the interests of the public and the defendants in a speedy trial.*

Gen. Order No. 20-09 ¶ 6 (C.D. Cal. Aug. 6, 2020) (emphasis added).[12] The mere recital of the Speedy Trial Act's ultimate standard does not establish that the General Order reflects a proper application of the Act's standards. In particular, three essential aspects of any application of the Act's ends-of-justice exception are missing.

First, the "suspending" of jury trials in the General Order was entirely open-ended, even though, under long-settled Ninth Circuit precedent, the Act requires than any "'ends of justice' continuance *be specifically limited in time* and that there be findings supported by the record to justify each 'ends of justice' continuance." *United States v. Jordan*, 915 F.2d 563, 565 (9th Cir. 1990) (emphasis added).[13]

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[12] The panel faults me for not quoting the General Order's "Whereas" clauses, which refer in general terms to the growing number of Covid cases and deaths and to the guidance issued by the Centers for Disease Control and Prevention. *See* Panel Concurrence at ——. But these clauses do not meaningfully add to the above-quoted analysis, nor do they address the various respects in which the General Order does not match up with settled Speedy Trial Act standards.

[13] This Order differs from the initial General Order issued at the onset of the pandemic in March 2020, which specified a fixed 30-day exclusion, subject to the order of the individual judge in the case. *See* Amended Gen. Order 20-02 ¶ 4 (C.D. Cal.

Second, because the General Order is just that—a general order—it does not, and cannot, substitute for the case-specific findings that are required to be made under § 3161 of the the Act. *Zedner v. United States*, 547 U.S. 489, 509, 126 S.Ct. 1976, 164 L.Ed.2d 749 (2006) (noting that § 3161(h)(7) "demands on-the-record findings and specifies in some detail certain factors that a judge must consider in making those findings").[14] Specifically, after reciting the standard for an ends-of-justice continuance, the Act expressly states that "[n]o such period of delay" under the ends-of-justice exception "shall be excludable under this subsection *unless* the court sets forth, *in the record of the case*, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(7)(A) (emphasis added). As flawed as the panel's opinion is, the panel concurrence would make things even worse by explicitly endorsing the remarkable proposition that the judges of a district court, by general

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Mar. 17, 2020). Such an across-the-board 30-day exclusion is arguably authorized by the very limited temporary emergency authority set forth in 18 U.S.C. § 3174(e), but any further such exclusion would have to be individually implemented in each case. *See infra* at 79. In any event, in Olsen's case, that particular 30-day time period had already been excluded for other reasons, and further exclusions of time, early in the pandemic, were made in his case (without objection) in part on Covid-related grounds. *See supra* at 69.

[14] At the time that *Zedner* was decided, the ends-of-justice exception was contained in § 3161(h)(8). In 2008, Congress struck subsection (h)(5) and renumbered the remaining subsections. *See* Pub. L. No. 110-406 § 13(2)–(3), 122 Stat. 4291, 4294 (2008).

order, may issue blanket, district-wide exclusions of time under the ends-of-justice exception of the Speedy Trial Act. *See* Panel Concurrence at ——— – – ———, ——— – ———. That view directly contravenes the Speedy Trial Act's requirement of individualized case-specific consideration, and it also effectively nullifies the carefully drawn limits of the Act's separate provision for district-wide relief in emergency situations. *See* 18 U.S.C. § 3174(b) (stating that, upon declaration of a qualifying judicial emergency within a district, the 70-day clock may be increased to 180 days for subsequently filed indictments).

Third, there is no indication in the General Order that its conclusion rested on a consideration of the relevant statutory factors that "a judge *shall* consider in determining whether to grant a continuance" under the ends-of-justice exception. 18 U.S.C. § 3161(h)(7)(B) (emphasis added); *see also Zedner*, 547 U.S. at 509, 126 S.Ct. 1976. In particular, the General Order was entered without properly considering or applying the impossibility standard of § 3161(h)(7)(B)(i). The order merely states that proceeding with criminal jury trials would "likely place prospective jurors, defendant, attorneys, and court personnel at unnecessary *risk*." *See* Gen. Order 20-09 ¶ 6 (emphasis added). But that unadorned statement says nothing about whether the court had considered whether there were any available measures that might mitigate those risks, such that proceeding with a trial would not be "impossible." 18 U.S.C. § 3161(h)(7)(B)(i). Instead, the order simply declared criminal jury trials—a core constitutional right—to be, for an indefinite period, "unnecessary" and dispensable.

For all of these reasons, the panel opinion was quite wrong in effectively allowing the General Order to serve, without more, as a sufficient justification for finding that "the failure to grant ... a continuance" in Olsen's trial "would be likely to make a continuation of such proceeding impossible." 18 U.S.C. § 3161(h)(7)(B)(i). The General Order did not itself meet the Act's standards, and it therefore cannot excuse non-compliance with those standards in an individual case.

B

Because the panel improperly relied on the General Order to establish that trials were "impossible," the panel failed to articulate or apply any standard of its own for determining whether a trial was "impossible" within the meaning of this statutory factor. Thus, beyond rejecting the strawman argument that "*literal* impossibility" serves as the "relevant standard," 995 F.3d at 690 (emphasis added),[15] the panel

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[15] Contrary to what the panel suggests, the district court did not ignore logistical or practical constraints. In its analysis of the impossibility factor, the district court specifically focused on whether conducting a trial would be a "physical and logistical impossibility" or an "actual" impossibility. *See Olsen*, 494 F. Supp. 3d at 722, 727–28 & n.4. The panel concurrence's similar suggestion that the district court ignored "logistical problems," *see id.* at ——, is flatly belied by the district court's opinion. *See, e.g., Olsen*, 494 F.Supp.3d at 729 (noting the protective measures adopted by the Orange County Superior Court, including "staggering times for juror reporting, trial start, breaks, and concluding for the day, seating jurors during trial in both the jury box and the audience area, marking audience seats, and using dark courtrooms as deliberation rooms," as well as "regularly disinfect[ing] the jury assembly room and restrooms, provid[ing] facial coverings, us[ing] plexiglass

failed to articulate *any* standard for assessing how much practical difficulty would satisfy the Act's "impossible" factor. This, too, was error, because under any reasonable construction of that factor, the district court correctly concluded that it was not met here.

In ordinary usage, the term "impossible" has a range of meanings that extend from "incapable of being or of occurring" (which is closer to the literal impossibility standard that the panel rejects) to "extremely and almost insuperably difficult under the circumstances." *Impossible*, Webster's Third New International Dictionary of the English Language 1136 (1981). The latter definition, of course, avoids the panel's strawman argument while respecting Congress's clear choice of a term that is much more demanding than potential alternatives such as "impracticable," "inconvenient," or, indeed, "unsafe." Moreover, as the panel concedes in its concurrence, *see* Panel Concurrence at ——— – ———, this understanding of "impossible" is consistent with the two cases cited by the panel opinion that apply this factor. *See Furlow*, 644 F.2d at 767–69 ("relatively brief" two-week delay associated with eruption of Mt. St. Helens in 1980 justified ends-of-justice continuance in light of the "paralyzing impact" in the vicinity of the courthouse, "affecting the abilities of jurors,

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shields in courtrooms, and requir[ing] trial participants to use gloves to handle exhibits"). And the panel concurrence's insinuations against the district court's impartiality, *see, e.g., id.* at ——— (questioning court's "misguided motive"); *id.* at ——— n.3 (asserting that it is "clear that the district court had made up its mind" and would not consider any showing by the Government), are refuted by that court's lengthy and considered published opinion.

witnesses, counsel, [and] officials to attend the trial"); *United States v. Paschall*, 988 F.2d 972, 975 (9th Cir. 1993) (eight-day delay due to an inability to form a grand jury quorum because of a major snowstorm fell within the ends-of-justice exception). Here, the district court did not abuse its discretion in concluding that, although the sort of extreme and almost insuperable difficulty described in those cases may have been present at the initial outset of the pandemic in spring 2020, there was an insufficient basis to conclude that the same was true in October 2020.

As the district court noted, "grand juries have been convening for months in the same federal courthouse in Orange County where [Olsen's] trial would take place and state courts just across the street from that federal courthouse are conducting criminal jury trials." *Olsen*, 494 F. Supp. 3d at 724. The district court observed that grand juries must be comprised of at least sixteen people, and such juries had gathered in the very same courthouse to hear from witnesses, evaluate evidence, and deliberate with one another. *Id.* at 728–29. Meanwhile, the Orange County Superior Court had conducted "82 criminal jury trials and 4 civil jury trials" from June 2020 to September 2020. *Id.* at 729. Indeed, more recent statistics confirm that state courts in the counties comprising the Central District ultimately conducted over 500 jury trials by March 2021. In light of these facts, it is clear that conducting federal criminal jury trials in Orange County was *not* "impossible," under any reasonable understanding of that term.

In its concurrence, the panel falls back on the generalized statement that "the unprecedented dan-

ger to health and safety presented by the pandemic, *particularly in its earlier days when Olsen sought to try his case*, cannot be overstated." *See* Panel Concurrence at ——— (emphasis added). This misstates the record. Olsen notably did *not* contend that continuances were unwarranted in the early days of the pandemic, when uncertainties were very high. On the contrary, he expressly stipulated to continuing his trial from May 2020 until October 2020 based in part on the disruption to court operations caused by the pandemic. *See supra* at ———. But by late summer, after the state courts had managed to resume conducting jury trials, Olsen objected that a further continuance was unjustified. At that point, it was no longer true that "the unprecedented danger to health and safety presented by the pandemic ... *cannot be overstated*." *See* Panel Concurrence at ——— (emphasis added). The existence of "risks" to public safety, even significant ones, does not justify the cancellation of jury trials absent some sufficient basis for concluding that, as a practical matter, there are no feasible mitigation measures that would allow a trial to go forward.[16] That showing has not been made on this record; indeed, it was not even attempted. And the panel opinion did not require such a showing, but instead held that, to justify a continuance, it was sufficient that the General Order simply cited the "risk" to "health and safety" that trials would present. *Olsen*, 995 F.3d at 695.

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[16] Accordingly, the panel concurrence is flatly incorrect in asserting that "the dissent takes issue with considering the safety of the public, court staff, and counsel in an impossibility analysis." *See* Panel Concurrence at ———. Of course it is a consideration, but under the proper standards.

Moreover, the panel further watered down the Speedy Trial Act's demanding impossibility standard by relying on the panel's enumeration of seven *non-statutory* factors that it said the district court should have considered in deciding whether to grant a continuance. 995 F.3d at 692. There is no doubt that the four statutory factors for applying the ends-of-justice exception are not exhaustive, because they are introduced by the phrase "among others." 18 U.S.C. § 3161(h)(7)(B). But the fact that other factors may also be considered does not provide a license for rewriting the statutory factors in order to evade their limits. *See Bloate v. United States*, 559 U.S. 196, 208, 130 S.Ct. 1345, 176 L.Ed.2d 54 (2010) (making this same point with respect to the non-exclusive list of "proceedings concerning the defendant" in § 3161(h)(1): "That the list of categories is illustrative rather than exhaustive in no way undermines our conclusion that a delay that falls within the category of delay addressed by subparagraph (D) is governed by the limits in that subparagraph."); *see also California ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States*, 215 F.3d 1005, 1013 (9th Cir. 2000) ("It is fundamental that a general statutory provision may not be used to nullify or to trump a specific provision."); *see also Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228-29, 77 S.Ct. 787, 1 L.Ed.2d 786 (1957) ("Specific terms prevail over the general in the same or another statute which otherwise might be controlling." (citation and internal quotation marks omitted)). But that is effectively what the panel did here.

The panel identified the following seven non-statutory factors that it said the district court should

have considered in deciding whether to grant the Government's-requested continuance "in the context of the pandemic":

> (1) whether a defendant is detained pending trial; (2) how long a defendant has been detained; (3) whether a defendant has invoked speedy trial rights since the case's inception; (4) whether a defendant, if detained, belongs to a population that is particularly susceptible to complications if infected with the virus; (5) the seriousness of the charges a defendant faces, and in particular whether the defendant is accused of violent crimes; (6) whether there is a reason to suspect recidivism if the charges against the defendant are dismissed; and (7) whether the district court has the ability to safely conduct a trial.

995 F.3d at 692–93. However, the panel conspicuously did not remand for the district court to apply these factors; instead, it remanded with explicit instructions to "grant" an appropriate continuance and set a new trial date. *Id.* at 695. The panel thus must be understood to have applied these factors itself. But the only one of them that even plausibly addresses "whether conducting trial would be physically possible" is the last factor, *i.e.*, "whether the district court has the ability to safely conduct a trial," and that is the only one of these factors that the panel opinion actually mentioned in the impossibility portion of its analysis. *Id.* at 693.[17] The panel concurrence like-

[17] The panel opinion adverted to several of the remaining non-statutory factors in its separate analysis of whether failing to grant a continuance would result in a "miscarriage of justice."

wise affirmatively confirms that, in its view, this "safety" factor provides a "guiding principle[ ] for assessing the impossibility factor." *See* Panel Concurrence at ——; *see also id.* at —— (expressly linking the panel's "seventh factor," concerning "safety," with the "impossibility analysis"). Indeed, the panel concurrence goes even further and suggests that non-statutory factors such as safety should be weighed against a finding, under the statutory factor, that "holding trial would be physically possible." *Id.* at —— – ——. And because the panel did not have enough confidence that trials could be conducted "safely," the panel concluded that a continuance was warranted. *Olsen*, 995 F.3d at 693.

The panel's analysis effectively replaced the statute's demanding statutory factor with a much more flexible non-statutory factor: instead of requiring a showing that conducting a trial would be "impossible"—*i.e.*, extremely and almost insuperably difficult under the circumstances, *see supra* at ———the panel held that it is sufficient to show that there is "unnecessary risk" as to whether a trial can be conducted "safely." The statute's use of the term "impossible" confirms Congress's judgment that deferring a criminal jury trial based on logistical considerations must be reserved for situations in which there are no feasible arrangements that would make a trial possible. By creating a much more flexible "safety" exception to the Speedy Trial Act, the panel improperly invoked a non-statutory factor to evade the rigorous standard that Congress wrote in the overlapping *statutory* factor. *See Bloate*, 559 U.S. at 208–09, 130

See Olsen, 995 F.3d at 692. I address the panel's analysis of that issue below. *See infra* at —— – ——.

S.Ct. 1345. This rewrites the Speedy Trial Act and dilutes its protections.

C

In addition to watering down the Act's impossibility standard, the panel opinion committed a third clear error by shifting the burden of proof on the issue of impossibility (or safety) from the Government to Olsen. The panel summarily dismissed the record evidence showing that the California state courts were conducting criminal jury trials, stating that, "just because state courts are holding jury trials does not mean that they are necessarily holding them safely." 995 F.3d at 693 n.10. The *absence* of any evidence in the record on this safety issue, the panel held, was dispositive on this point: "Nothing in the record indicates that the Central District was able to hold a jury trial safely in October 2020, when Olsen's case was set for trial." *Id.* This is completely backwards. Because the *Government* was the one moving for a continuance, it had the burden to establish that the continuance was justified under the Act. *See, e.g., United States v. Burrell*, 634 F.3d 284, 287 (5th Cir. 2011) ("[T]he Government bears the burden of establishing the applicability of this [ends of justice] exclusion as 'the trial court [did not] independently recognize[ ] the need for such a delay' and the Government is 'the party seeking to benefit from the delay.'" (citations omitted)). But rather than hold that the Government—the moving party in seeking a continuance here—had thereby failed to carry its burden of proof to justify the continuance, the panel held that the lack of such evidence weighed *in favor* of a continuance. *Id.*

The panel concurrence vigorously denies that the panel shifted the burden of proof but then, in the very next sentence, it confirms that the panel did just that. The concurrence criticizes the district court, stating that, "*[w]ithout record support*, the district court announced that it was possible to move forward with trial." *See* Panel Concurrence at —— n.3 (emphasis added). But if there was no "record support" on this issue, then that necessarily means that the party who had the burden of proof failed to carry it. Because the Government requested the extension, it had the burden of proof and failed to carry it. By instead treating the absence of proof as a factor in *favor* of a continuance, the panel unquestionably flipped the burden of proof to Olsen. That is a patent legal error.

The panel concurrence also relies on sheer speculation that, in adopting its General Orders, "the Central District was likely unconvinced or uncertain that the safety protocols instituted by state courts were effective enough to combat the spread of COVID-19, particularly given the novelty of the virus at the time." *See* Panel Concurrence at —— n.3. If anything, this comment in the concurrence is even more troubling than the opinion's burden-shifting. According to the concurrence, the Government did not need to present any evidence about safety or mitigation measures, because the Central District General Order indicates that the Central District presumably concluded that "the safety protocols instituted by state courts" were not "effective enough." *Id.* But there is absolutely nothing in the record to support the panel's speculation that the Central District ever weighed or assessed such evidence before

cancelling all jury trials, much less that there is any evidence to justify the federal court's different approach from that of the state courts. The suggestion that *no record* ever needs to be made to justify the wholesale suspension of criminal jury trials only underscored the need for en banc review.[18]

* * *

The district court thus acted within its discretion in concluding that the failure to grant the Government's requested continuance would *not* "be likely to make a continuation of such proceeding impossible." 18 U.S.C. § 3161(h)(7)(B)(i). This prong of the statutory factor in § 3161(h)(7)(B)(i) did not justify an ends-of-justice continuance.

IV

The various significant errors recounted above are alone sufficient to have warranted en banc rehearing. But perhaps the most worrisome aspect of the panel's decision relates to its alternative invocation of the second prong of the statutory factor in § 3161(h)(7)(B)(i), namely, whether a failure to grant a continuance would "result in a miscarriage of justice." In holding that this factor was present here, the panel reasoned that, because the failure to grant a continuance led to the "subsequent dismissal of Olsen's indictment," that "resulted in a miscarriage of

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[18] The panel concurrence speculates that, based on information contained in various *Los Angeles Times* articles, perhaps the federal courts' more extreme response could be justified. *See* Panel Concurrence at —— n.3. But it is wholly improper to go outside the record in this way, especially by citing information drawn from sources that are not subject to judicial notice and that the parties have not had an opportunity to address.

justice." 995 F.3d at 692. This startling holding—that the Speedy Trial Act's own mandatory remedy of dismissal *itself* can constitute the "miscarriage of justice" that requires *granting* a continuance so as to avoid the unjust dismissal—is demonstrably wrong and effectively guts the mandatory nature of the Act's dismissal remedy.

As the panel noted, *see* 995 F.3d at 691, the district court did not separately consider whether there would be a "miscarriage of justice," but that is not surprising. The "miscarriage of justice" exception is addressed to whether more time is needed in order to ensure that the fairness of the trial proceedings *themselves*, including the integrity of the trial's fact-finding, is preserved. *See, e.g., United States v. Martin*, 742 F.2d 512, 514 (9th Cir. 1984) (where Supreme Court had granted certiorari to decide whether to overrule Ninth Circuit precedent that precluded the defendant's principal defense to a felon-in-possession charge, district court properly concluded that continuing the trial pending the Supreme Court's decision would avoid a "miscarriage of justice" that might otherwise result); *United States v. Apperson*, 441 F.3d 1162, 1180 (10th Cir. 2006) (in view of the lack of adequate time for Government counsel to prepare for a hearing, a brief continuance was warranted to avoid a "miscarriage of justice"); *United States v. Hill*, 197 F.3d 436, 441–43 (10th Cir. 1999) ("miscarriage of justice" exception properly applied where Government would otherwise be forced to go to trial without a key witness and without adequate time to effectively prepare). The panel concurrence does not cite any "miscarriage of justice" cases that depart from this understanding. *See* Panel

Concurrence at —— – ——(citing *Apperson* and *Hill*).

The Government here made no such effort to show that, absent an extension, the trial proceedings would have been rendered unfair or the integrity of the trial's fact-finding would have been impaired. Rather, its only argument for invoking the "miscarriage of justice" exception was that *the Speedy Trial Act's remedy of dismissal* is unjust. The panel opinion agreed, but tellingly, it was unable to cite any authority that would support the novel view that continuances may be granted for the purpose of avoiding a supposedly unjust application of the statute's mandatory remedy.[19]

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[19] The panel instead noted that the Speedy Trial Act's judicial-emergency provision, 18 U.S.C. § 3174(b), had been invoked in light of the pandemic in order to avoid "releasing would-be convicted criminals into society." 995 F.3d at 693 (quoting *In re Approval of Jud. Emergency Declared in the Cent. Dist. of Cal.*, 955 F.3d 1140, 1143 (9th Cir. Jud. Council 2020)). But that provision has no application here and, if anything, further undercuts the panel's decision. Section 3174(b) authorizes across-the-board extensions for systemic difficulties in meeting the Act's deadlines, but in doing so, it operates only prospectively and pointedly does *not* provide any relief for cases (such as Olsen's) that are already in the pipeline. Instead, § 3174(b) adds an extra 110 days to the 70-day clock, but only for cases filed within up to one year *after* the emergency is declared (and then only if the defendant is not detained solely due to the federal charges). *See* 18 U.S.C. § 3174(b). There is no doubt that the judicial emergency provision is, on its face, an exception that is intended to avoid dismissals that would otherwise occur under the regular provisions of the Act. But that provides no basis for concluding that the ends-of-justice exception, under the *regular* provisions of the Act that apply here, permits courts to treat the Act's own mandatory remedy of dismissal as the miscar-

Concurring in the denial of rehearing en banc, Judge Bumatay argues that the undefined statutory phrase "miscarriage of justice" is literally broad enough to cover a perceived injustice caused by the Act's own mandatory remedy of dismissal. Bumatay Concurrence at ——— – ———. But this argument ignores the familiar precept that the language of a particular statutory provision should be construed "in light of the statute's structure and purpose." *See United States v. Tinklenberg*, 563 U.S. 647, 655, 131 S.Ct. 2007, 179 L.Ed.2d 1080 (2011) (applying this principle to another Speedy Trial Act exclusion under § 3161(h)); *id.* at 664, 131 S.Ct. 2007 (Scalia, J., concurring in part and in the judgment) (agreeing that a reading of text should be rejected if it "would make little sense in light of the context of the provision and the structure of the statute"). And here, construing the "miscarriage of justice" factor to authorize exclusions of time for the *express* purpose of avoiding the Act's mandatory remedy of dismissal in § 3162 would effectively eliminate the mandatory nature of that remedy. A reading of the Act's substantive provisions that effectively nullifies the central feature of its remedial provision makes little sense and is plainly incorrect.[20]

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riage of justice that justifies an otherwise unlawful continuance.

[20] Because I resolve the issues here on statutory grounds, I do not reach the Sixth Amendment question addressed in Judge Bumatay's concurrence. It seems doubtful, however, that the general interpretive line that Judge Bumatay draws—*i.e.*, that the Speedy Trial Clause is largely limited to avoiding "prolonged *pretrial detention* by the government," *see* Bumatay Concurrence at ———is correct. The text of the Sixth Amendment provides for "the right to a speedy and public trial" in "*all*

The panel's analysis of the miscarriage-of-justice statutory factor, which also draws on the opinion's list of non-statutory factors, underscores how the panel has converted the Speedy Trial Act's mandatory remedy into a discretionary remedy. In explaining why the dismissal of Olsen's indictment that flows from denying a further continuance is unjust, the panel emphasizes that (1) Olsen "was on pretrial-release" for "years"; (2) Olsen's alleged crimes were very serious, involving "his prescribing dangerous combinations and unnecessary amounts of highly regulated pain medications"; (3) Olsen obtained multiple continuances, followed by his later change to "insist[ing] on sticking to his scheduled trial date"; and (4) the prosecution was "blameless" for the Central District's General Order. 995 F.3d at 692. Many of these factors overlap with the non-statutory factors that the panel stated that the district court should have considered. *See supra* at ——— – ———; *see also* 995 F.3d at 692. The panel effectively decided that, based on these considerations, Olsen did not *deserve* the protections of the Speedy Trial Act. That is, because insisting on a speedy trial would lead to

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criminal prosecutions," and not merely those in which the defendant is detained pending trial. U.S. Const. Amend. VI (emphasis added). As the text of the Eighth Amendment confirms, the Framers were well aware of the concept of bail, and had they wanted to limit the protection of the Speedy Trial Clause to those not admitted to bail, they could readily have added language to that effect. They did not. *See also Betterman v. Montana*, 578 U.S. 437, 442, 136 S.Ct. 1609, 194 L.Ed.2d 723 (2016) (noting that the objectives of the clause included, not just avoiding "oppressive incarceration prior to trial," but also "minimizing anxiety and concern accompanying public accusation, and limiting the possibilities that long delay will impair the ability of an accused to defend himself") (simplified).

dismissal, and because Olsen was unworthy of any such dismissal (even without prejudice) in light of the panel's evaluation of his circumstances, a continuance had to be granted in order to avoid the otherwise mandatory (and unjust) dismissal.

I agree that these sorts of considerations may enter into the decision whether, after a Speedy Trial Act violation has occurred, to dismiss the indictment *with or without prejudice.* We know that because the statute says so:

> In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

18 U.S.C. § 3162(a)(2). And I agree that, in light of these factors, the district court abused its discretion in dismissing the indictment with prejudice rather than without prejudice.[21] But it is quite another

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[21] I do not necessarily agree, however, with the panel's assessment of some of the factors in Olsen's case. For example, without reciting any of the details concerning the earlier continuances of Olsen's trial, the panel insinuates that Olsen's opposition to a further continuance of the October 2020 trial date was gamesmanship. 995 F.3d at 692. But as the more complete record of those continuances makes clear, many of them were granted based on issues concerning Olsen's attorneys, as well as counsel's need for sufficient time to prepare in this complex case. *See supra* at —— – ——. That Olsen needed substantial initial time to prepare to defend against his 35-count indictment does not mean that therefore he has to acquiesce in open-

matter to say that, because *any* dismissal of the indictment—even one without prejudice—would supposedly be a "miscarriage of justice," the district court may on that basis continue a criminal jury trial. It is hard to overstate how destructive this holding is to the Act's mandatory dismissal remedy, which is expressed in "categorical terms." *Zedner*, 547 U.S. at 508, 126 S.Ct. 1976. By allowing continuances to be granted—even by the "judge on his own motion," 18 U.S.C. § 3161(h)(7)(A)—on the ground that the defendant does not deserve the Act's mandatory remedy, the panel's decision threatens to destroy a central feature of this singularly important statute.

* * *

For the foregoing reasons, I respectfully dissent from the denial of rehearing en banc.

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ended further continuances long after all parties are ready for trial.

APPENDIX B

995 F.3d 683

United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellant,
v.
Jeffrey OLSEN, Defendant-Appellee.

No. 20-50329

Argued and Submitted March 18, 2021
San Francisco, California
Filed April 23, 2021

Appeal from the United States District Court for the Central District of California, Cormac J. Carney, District Judge, Presiding, D.C. Nos. 8:17-cr-00076-CJC-1, 8:17-cr-00076-CJC

Charles E. Fowler, Jr. (argued) and Bram M. Alden, Assistant United States Attorneys; Brandon D. Fox, Chief, Criminal Section; Tracy L. Wilkison, Acting United States Attorney; United States Attorney's Office, Los Angeles, California; for Plaintiff-Appellant.

James H. Locklin (argued), Deputy Federal Public Defender; Cuauhtemoc Ortega, Federal Public Defender; Office of the Federal Public Defender, Los Angeles, California; for Defendant-Appellee.

Before: Mary H. Murguia and Morgan Christen, Circuit Judges, and Barbara M. G. Lynn,* District Judge.

OPINION

PER CURIAM:

The COVID-19 pandemic has presented courts with unprecedented challenges. Among these challenges is determining when and how to conduct jury trials without endangering public health and safety and without undermining the constitutional right to a jury trial. The United States appeals from the district court's dismissal with prejudice of an indictment against Defendant Jeffrey Olsen. Olsen was indicted in July 2017 on thirty-four counts related to the unlawful distribution of opioids. He has since remained on pretrial release and has obtained eight continuances of his trial date, most recently scheduled for October 13, 2020. After the Central District of California suspended jury trials due to the COVID-19 pandemic in March 2020, Olsen invoked, for the first time, his right to a speedy trial. Because jury trials were suspended, the government requested a continuance of Olsen's trial under 18 U.S.C. § 3161(h)(7)(A)—the Speedy Trial Act's "ends of justice" provision. The district court denied the request and, ultimately, dismissed the charges against Olsen with prejudice, concluding that continuances under the ends of justice provision are appropriate only if holding a criminal jury trial would be impossible.

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* The Honorable Barbara M. G. Lynn, Chief United States District Judge for the Northern District of Texas, sitting by designation.

Because the district court erred in its reading of 18 U.S.C. § 3161(h)(7)(A), we reverse with instructions to reinstate Olsen's indictment, grant an appropriate ends of justice continuance, and set this case for trial.

I.

A.

We have jurisdiction under 18 U.S.C. § 3731. We review de novo a district court's decision to dismiss on Speedy Trial Act grounds and its findings of fact for clear error. *United States v. Henry*, 984 F.3d 1343, 1349–50 (9th Cir. 2021) (citing *United States v. King*, 483 F.3d 969, 972 n.3 (9th Cir. 2007)). A district court's ends of justice determination will be reversed only if it is clearly erroneous. *United States v. Murillo*, 288 F.3d 1126, 1133 (9th Cir. 2002).

B.

The Sixth Amendment guarantees all criminal defendants "the right to a speedy and public trial." U.S. Const. amend. VI. Despite this guarantee, however, the Sixth Amendment does not prescribe any specified length of time within which a criminal trial must commence. *See id.* To give effect to this Sixth Amendment right, Congress enacted the Speedy Trial Act, which sets specified time limits after arraignment or indictment within which criminal trials must commence. Pub. L. No. 93-619, 88 Stat. 2076 (1975); *see Furlow v. United States*, 644 F.2d 764, 768–69 (9th Cir. 1981) (per curiam) (describing the Speedy Trial Act as the Sixth Amendment's "implementation").

As relevant here, the Speedy Trial Act requires that a criminal trial begin within seventy days from the date on which the indictment was filed, or the date on which the defendant makes an initial appearance, whichever occurs later. 18 U.S.C. § 3161(c)(1). Recognizing the need for flexibility depending on the circumstances of each case, however, the Speedy Trial Act "includes a long and detailed list of periods of delay that are excluded in computing the time within which trial must start." *Zedner v. United States*, 547 U.S. 489, 497, 126 S.Ct. 1976, 164 L.Ed.2d 749 (2006); *see* 18 U.S.C. § 3161(h). A court may exclude periods of delay resulting from competency examinations, interlocutory appeals, pretrial motions, the unavailability of essential witnesses, and delays to which the defendant agrees. 18 U.S.C. § 3161(h). The Speedy Trial Act also includes an ends of justice provision, allowing for the exclusion of time where a district court 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." *Id.* § 3161(h)(7)(A). In determining whether the ends of justice outweigh the best interest of the public and the defendant in a speedy trial, the district court must evaluate, "among others," several enumerated factors. *Id.* § 3161(h)(7)(B)(i)–(iv). Most relevant to our analysis is the first enumerated factor: "[w]hether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice." *Id.* § 3161(h)(7)(B)(i).

II.

A.

The global COVID-19 pandemic has proven to be extraordinarily serious and deadly.[1] In response, many state and local governments entered declarations curtailing operations of businesses and governmental entities that interact with the public. Beginning on March 13, 2020, the Central District of California—in light of the exigent circumstances brought on by the pandemic and the emergencies declared by federal and state officials—issued a series of emergency orders.[2] Vital to this appeal is the Central District's suspension of criminal jury trials, which began on March 13, 2020. *See* C.D. Cal. General Order 20-02 (March 17, 2020); *see also* C.D. Cal. General Order 20-05 (April 13, 2020); C.D. Cal. Amended General Order 20-08 (May 28, 2020); C.D.

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[1] As of April 2021, there have been over 141 million confirmed COVID-19 cases and over 3 million COVID-19 related deaths globally. Over 31 million of those cases are from the United States, with well over half a million deaths. And as of April 2021, California alone has confirmed over 3.6 million cases, with nearly 60,000 deaths.

[2] Among these was the Central District of California's declaration of a judicial emergency pursuant to 18 U.S.C. § 3174, which this Circuit's Judicial Council subsequently approved. *See In re Approval of Jud. Emergency Declared in the Cent. Dist. of Cal.*, 955 F.3d 1140, 1141 (9th Cir. 2020) ("*Judicial Emergency*"). The emergency period runs until April 13, 2021 and extends the Speedy Trial Act's 70-day time limit for commencing trial to 180 days for defendants indicted between March 13, 2020 and April 13, 2021 and "detained solely because they are awaiting trial." *Id.* at 1141–42; 18 U.S.C. § 3174(b). Because Olsen was indicted before the suspension, the 180-day period does not apply, and he is subject to the ordinary Speedy Trial Act time limit.

Cal. General Order 20-09 (August 6, 2020); C.D. Cal. General Order 21-03 (March 19, 2021).[3]

Each order was entered upon unanimous or majority votes of the district judges of the Central District with the stated purpose "to protect public health" and "to reduce the size of public gatherings and reduce unnecessary travel," consistent with the recommendations of public health authorities. C.D. Cal. General Order 20-02 at 1; C.D. Cal. General Order 20-05 at 1; C.D. Cal. Amended General Order 20-08 at 1; C.D. Cal. General Order 20-09 at 1. Most recently, on April 15, 2021, the Central District issued a general order explaining that jury trials will commence in the Southern Division, where the presiding judge in this action sits, on May 10, 2021. C.D. Cal. General Order 21-07.[4]

B.

1.

Jeffrey Olsen, a California-licensed physician, is accused of illegally prescribing opioids. Following an investigation that began in January 2011, Olsen was indicted in July 2017 in the Central District of California on thirty-four counts related to illegal distribution of oxycodone, amphetamine salts, alprazolam, and hydrocodone, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C), (b)(1)(E), and (b)(2), and furnishing false and fraudulent material information to the

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[3] The General Orders are accessible at https://www.cacd.uscourts.gov/news/coronavirus-covid-19-guidance.

[4] The Central District of California includes the Western, Eastern and Southern divisions. At all relevant times, Olsen's case was based out of the Southern Division, located in Santa Ana, California.

U.S. Drug Enforcement Administration in violation of 21 U.S.C. § 843(a)(4)(A). According to the government, Olsen was aware that at least two of his patients had died of prescription drug overdoses, while he continued prescribing dangerous combinations and unnecessary amounts of opioids to his patients.

Olsen made his initial appearance and was arraigned on July 11, 2017. Because the Speedy Trial Act required that Olsen's trial commence on or before September 19, 2017, the district court set trial for September 5, 2017. Olsen pleaded not guilty, and a magistrate judge set a $20,000 unsecured appearance bond; Olsen posted the bond and has since remained out of custody.

2.

Since Olsen's indictment and release on bond in 2017, there have been eight continuances of his trial date, which has postponed trial for over three years. The first five continuances were reached by stipulation with the government. Before the fifth stipulation, Olsen fired his retained counsel who had represented him since his initial appearance, and the district court appointed the Federal Public Defender as replacement counsel. These five stipulations continued Olsen's trial from September 5, 2017 to November 5, 2019. On August 20, 2019, Olsen sought a sixth continuance, which the district court granted over the government's objection, and continued Olsen's trial to May 5, 2020. After the court granted this continuance, the COVID-19 pandemic hit the United States in March 2020. Thereafter Olsen obtained two more continuances via stipulations,

which collectively continued his trial from May 5, 2020 to October 13, 2020.

On August 20, 2020, the district court held a status conference on Olsen's case. Olsen, for the first time, invoked his right to a speedy trial and expressed a desire to proceed with a jury trial on October 13, 2020. The government argued that an ends of justice continuance was appropriate due to the COVID-19 pandemic, the Central District's order suspending jury trials, and the absence of protocols to ensure the safety of jurors, witnesses, court staff, litigants, attorneys, defendants, and the public. The government also highlighted that it had objected to Olsen's request for a continuance a year earlier and had sought to proceed with trial in November 2019. In addition, the government noted, Olsen was out of detention, therefore diminishing any possible prejudice resulting from delay.

On August 28, 2020, the government formally moved to continue the trial from October 13, 2020 to December 1, 2020. The government argued that, given the Central District's suspension of jury trials and the lack of district-approved protocols to safely conduct a jury trial, the ends of justice served by a continuance outweighed the best interest of the public and Olsen in having a speedy trial. Olsen opposed the motion, and the district court denied it on September 2, 2020.

In denying the government's motion, the district judge made clear that, in his view, nothing short of trial impossibility could permit additional delay of Olsen's trial: "Continuances under the 'ends of justice' exception in the Speedy Trial Act are appropriate if without a continuance, holding the trial would

be *impossible*" and "*actual impossibility* is key for application of [the ends of justice] exception." The court concluded that the Constitution "requires that a trial only be continued over a defendant's objection if holding the trial is *impossible*" and that "[i]f it is possible for the court to conduct a jury trial, the court is constitutionally obligated to do so. There are no ifs or buts about it." Because, the district court reasoned, "it is simply not a physical or logistical impossibility to conduct a jury trial," a continuance was forbidden. The district court therefore requested the Chief Judge of the Central District to summon jurors for Olsen's trial. The Chief Judge promptly rejected this request and explained that the majority of the Central District judges had approved a general order to suspend jury trials as "necessary to protect the health and safety of prospective jurors, defendants, attorneys, and court personnel due to the [COVID-19] pandemic."

3.

On September 15, 2020, Olsen moved to dismiss his indictment with prejudice for violations of the Speedy Trial Act and Sixth Amendment. On October 14, 2020, the district court granted the motion. The district court's dismissal order was premised, again, on the theory that the court could not grant a continuance unless "holding [Olsen's] trial would be *impossible*." The district court stated:

> Given the constitutional importance of a jury trial to our democracy, a court cannot deny an accused his right to a jury trial *unless conducting one would be impossible*. This is true whether the United States is suffering through

> a national disaster, a terrorist attack, civil unrest, or the coronavirus pandemic that the country and the world are currently facing. Nowhere in the Constitution is there an exception for times of emergency or crisis. There are no ifs or buts about it.

In other words, nothing short of "*actual impossibility*" would do. Although, the court reasoned, the pandemic is "serious" and "[o]f course" posed a "public health risk," "it is simply not a physical or logistical impossibility to conduct a jury trial."

The district court observed that grand juries had convened in the federal courthouse and that the Orange County Superior Court, which is across the street from the Santa Ana Courthouse, had resumed jury trials with precautionary measures. "Clearly," the district court reasoned, "conducting a jury trial during this coronavirus pandemic is possible" and the Central District had therefore "[s]adly" denied Olsen his speedy-trial rights by suspending jury trials because they were "*unsafe*," but not "*impossible*." The court noted that "it is not a question of *if* the Court should have held Mr. Olsen's criminal jury trial during this stage of the coronavirus pandemic, but a question of *how* the Court should have held it." The court did not separately address Olsen's Sixth Amendment claim, finding that the analysis of that claim would parallel the Speedy Trial Act analysis.

As for the remedy, the district court dismissed Olsen's indictment with prejudice, pointing to the Central District's suspension of trials and refusal to summon jurors for Olsen's trial. The district court focused on the circumstances leading to dismissal and stated that the Chief Judge decided to suspend

jury trials "knowingly and willfully" based on "the risk that people might get sick from the coronavirus," but "with little or no regard" for Olsen's speedy-trial rights. The court explained that "dismissing with prejudice is the only sanction with enough teeth to create any hope of deterring additional delay in the resumption of jury trials and avoiding further dismissals of indictments," that dismissal without prejudice would let the government reindict "and proceed as if no constitutional violation ever occurred," and that this "meaningless result" would have "no adverse consequences" for the Central District.

Because the seventy-day Speedy Trial Act clock had not yet fully run, and no Speedy Trial Act violation had yet occurred, the court announced that the dismissal would "not take effect until October 28, 2020," when the Speedy Trial Act clock would expire.[5] On that date, the district court entered a short order dismissing the indictment with prejudice and exonerating Olsen's bond.

III.

A.

We are asked to provide guidance on the application of the Speedy Trial Act's ends of justice provi-

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[5] The parties do not dispute that the eight continuances in this case postponed Olsen's trial from September 5, 2017 to October 13, 2020. The district court's orders excluded this time from the calculation of the date by which Olsen's trial was required to commence. Based on these exclusions, the seventy-day Speedy Trial Act period ran from July 11, 2017 to September 4, 2017 (fifty-five days) and from October 13, 2020 to October 29, 2020 (fifteen days).

sion, 18 U.S.C. § 3161(h)(7)(A), in the context of the challenges presented by the COVID-19 pandemic. Olsen urges us to adopt the district court's reading of § 3161(h)(7)(A)—that "[c]ontinuances under the 'ends of justice' exception in the Speedy Trial Act are appropriate if without a continuance, holding the trial would be *impossible*." We decline to do so. At best, this is a strained reading of the Speedy Trial Act, and one without support from the text of the statute or our precedent.

In concluding that literal impossibility is the relevant standard for an ends of justice continuance, the district court evaluated only part of the first ends of justice factor: "[w]hether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding *impossible* ...." 18 U.S.C. § 3161(h)(7)(B)(i) (emphasis added). In support of this interpretation, Olsen points to two of our precedents evaluating the Speedy Trial Act's ends of justice provision. In *Furlow v. United States*, we noted that Mt. St. Helens had erupted two days before the defendant's trial, which "interrupted transportation, communication, etc. (affecting the abilities of jurors, witnesses, counsel, officials to attend the trial)." 644 F.2d at 767–68. Because of the logistical problems caused by the eruption, the district court continued the trial for two weeks past the prior Speedy Trial Act deadline under the ends of justice continuance provision. *Id.* Recognizing the "appreciable difficulty expected with an incident/accident of earth-shaking effect," we held that this "relatively brief" delay did not violate the Speedy Trial Act. *Id.* at 769.

Likewise, we found no Speedy Trial Act violation in *United States v. Paschall*, where the district court granted an eight-day ends of justice continuance of the Speedy Trial Act's charging deadline because the grand jury was unable to form a quorum due to a major snowstorm. 988 F.2d 972, 973–75 (9th Cir. 1993).[6] Specifically, we concluded that an ends of justice continuance was justified because the "interest of justice outweigh[ed] the public's and defendant's interest in a speedy trial" and "the inclement weather made the proceedings impossible." *Id.* at 975.

Contrary to Olsen's argument, nothing in *Furlow* or *Paschall* establishes a rule that an ends of justice continuance requires literal impossibility. In those cases, we simply affirmed ends of justice continuances because the eruption of a volcano and a major snowstorm temporarily impeded court operations. In other words, where it was temporarily impossible to conduct court proceedings for relatively brief periods, we found no Speedy Trial Act violation: but these cases do not stand for the proposition that a finding of impossibility is required in order to exclude time from the 70-day Speedy Trial Act clock. To be sure, the courts faced "appreciable difficulty" in proceeding to trial in *Furlow*, 644 F.2d at 769, and the inclement weather made grand jury proceedings temporarily "impossible" in *Paschall*, 988 F.2d at 975. But we never sanctioned the highly unusual result

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[6] *Paschall* addressed the time between arrest or service of summons and an indictment, which cannot exceed thirty days. *See* 18 U.S.C. § 3161(b). Olsen's case addresses the time between indictment or arraignment and trial, which cannot exceed seventy days. *See id.* § 3161(c).

the district court reached here—that because the district court could physically hold a trial, it was required to deny the government's ends of justice continuance and dismiss Olsen's indictment with prejudice.[7]

A proper reading of 18 U.S.C. § 3161(h)(7)(B)(i) compels the opposite result. This provision directs the district court to consider "*[w]hether the failure to grant*" a continuance would make continuing the proceedings impossible. 18 U.S.C. § 3161(h)(7)(B)(i) (emphasis added). Because not granting the government's continuance meant that the Speedy Trial Act clock would necessarily expire before Olsen could be brought to trial, it follows that the district court's "failure to grant" an ends of justice continuance in this case *did* make "a continuation of [Olsen's] proceeding impossible." *Id.* The district court instead considered only whether it was physically impossible to hold a trial. Nothing in the Speedy Trial Act limits

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[7] Olsen's reliance on out-of-circuit caselaw fares no better. *See United States v. Hale*, 685 F.3d 522, 533–36 (5th Cir. 2012) (upholding an ends of justice continuance because a key witness was unavailable due to family emergency); *United States v. Richman*, 600 F.2d 286, 293–94 (1st Cir. 1979) (upholding an ends of justice continuance due to a blizzard); *United States v. Stallings*, 701 Fed. App'x. 164, 170–71 (3d Cir. 2017) (upholding an ends of justice continuance based in part on prosecutor's family emergency and scheduling conflicts); *United States v. Scott*, 245 Fed. App'x. 391, 393–94 (5th Cir. 2007) (upholding an ends of justice continuance based in part on Hurricane Katrina); *United States v. Correa*, 182 F. Supp. 2d 326, 327–29 (S.D.N.Y. 2001) (upholding an ends of justice continuance due to the September 11, 2001 terrorist attacks). There is nothing in any of these cases to support the unwarranted reading of trial impossibility into the ends of justice provision that the district court adopted and Olsen advocates here.

district courts to granting ends of justice continuances only when holding jury trials is impossible. *See id.* This is an unnecessarily inflexible interpretation of a provision meant to provide necessary flexibility to district courts to manage their criminal cases. *See Bloate v. United States*, 559 U.S. 196, 214, 130 S.Ct. 1345, 176 L.Ed.2d 54 (2010) (citing *Zedner*, 547 U.S. at 498, 126 S.Ct. 1976); *see also* S. Rep. No. 93–1021S. Rep. No. 93–1021, 93d Cong., 2d Sess. 39 (1974) (noting that the ends of justice provision is "the heart of the speedy trial scheme" and provides for "necessary flexibility.").

In sum, the district court committed clear error by reading the word "impossible" from 18 U.S.C. § 3161(h)(7)(B)(i) in isolation. This is enough for us to reverse. *See Murillo*, 288 F.3d at 1133.[8]

B.

By solely focusing on the word "impossible" in 18 U.S.C. § 3161(h)(7)(B)(i), the district court also overlooked the rest of the provision, which requires courts to ask whether the district court's failure to apply an ends of justice continuance "would ... result in a miscarriage of justice." We find the miscarriage-of-justice provision particularly salient in Olsen's case.

Olsen was indicted in July 2017 on thirty-four counts related to his prescribing dangerous combinations and unnecessary amounts of highly regulated pain medications, and was granted pretrial bond. He then obtained eight trial continuances, including one

[8] Because the basis for the district court's dismissal order was statutory only, we need not separately address Olsen's Sixth Amendment claim.

over the government's objection, effectively delaying his trial for well over three years. After the Central District suspended jury trials, Olsen insisted on sticking to his scheduled trial date. By that time, the prosecution had been ready for trial for months and was wholly blameless for the Central District's suspension of jury trials.

The district court's failure to even mention these important facts in its dismissal order—especially the years of continuances while Olsen was on pre-trial release and the absence of any government culpability or minimal prejudice to Olsen—is troubling. Olsen's argument, that the district court's finding that a trial was not impossible "implicitly" includes a finding that there would be no miscarriage of justice, is simply not convincing. We find no difficulty in concluding that the district court's failure to grant the government's motion and subsequent dismissal of Olsen's indictment, under the unique facts of Olsen's case and the Central District's suspension of jury trials, resulted in a miscarriage of justice. 18 U.S.C. § 3161(h)(7)(B)(i).

C.

What is more, the district court failed to consider other, non-statutory factors. Section 3161(h)(7)(B) instructs district courts to consider a list of enumerated factors, "among others," in deciding whether to grant an ends of justice continuance. Although district courts have broad discretion to consider any factors based upon the specific facts of each case, we have reversed rulings where district courts have entirely failed to address relevant non-statutory considerations. *See, e.g.*, *United States v. Lloyd*, 125

F.3d 1263, 1269 (9th Cir. 1997) (finding the district court should have considered whether the parties "actually want[ed] and need[ed] a continuance, how long a delay [was] actually required, [and] what adjustments [could have been] made with respect to the trial calendars [to avoid a continuance]").

The Speedy Trial Act and our case law are silent as to what non-statutory factors district courts should generally consider. Nevertheless, in the context of the COVID-19 pandemic, we find relevant the following non-exhaustive factors: (1) whether a defendant is detained pending trial; (2) how long a defendant has been detained; (3) whether a defendant has invoked speedy trial rights since the case's inception; (4) whether a defendant, if detained, belongs to a population that is particularly susceptible to complications if infected with the virus; (5) the seriousness of the charges a defendant faces, and in particular whether the defendant is accused of violent crimes; (6) whether there is a reason to suspect recidivism if the charges against the defendant are dismissed; and (7) whether the district court has the ability to safely conduct a trial.[9]

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[9] The district court's order questioned why the Central District of California conditioned its ability to hold jury trials on orders issued by the state government. *See Blueprint for a Safer Economy*, available at https://covid19.ca.gov/safer-economy/. Specifically, the district court observed that under California's *Blueprint*, certain essential sectors such as healthcare, emergency services, food, and energy were permitted to continue operations. This overlooks that the *Blueprint*'s color-coded tiers are premised on several factors that influence the risk of viral transmission, including ventilation in particular facilities, whether occupants of a facility can socially distance, and the duration of the gathering. The record in this case does not allow

This non-exhaustive list, in the context of the pandemic, facilitates the proper balancing of whether the ends of justice served by granting a continuance outweigh the best interest of the public and the defendant in convening a speedy trial. *See* 18 U.S.C. § 3161(h)(7)(A); *see also United States v. Engstrom*, 7 F.3d 1423, 1426 (9th Cir. 1993) (noting that that the ends of justice provision promotes "an express balancing of the benefit to the public and defendant from a continuance with the costs imposed" of such a continuance). The record does not show that the district court considered any of these relevant factors. *See* 18 U.S.C. § 3161(h)(7)(A).

Finally, we note that Olsen's reliance on *United States v. Clymer*, 25 F.3d 824, 829 (9th Cir. 1994), is not helpful. It is true "that the ends of justice exclusion ... was intended by Congress to be rarely used, and that the provision is not a general exclusion for every delay." *Clymer*, 25 F.3d at 828 (internal quotation marks and citations omitted); *see also* S. Rep. No. 93-1021, at 39, 41S. Rep. No. 93-1021, at 39, 41 (1974) (reflecting Congress's intent that ends of justice continuances "be given only in unusual cases" and "be rarely used"). But surely a global pandemic that has claimed more than half a million lives in this country, and nearly 60,000 in California alone, falls within such unique circumstances to permit a court to temporarily suspend jury trials in the interest of public health.[10] In approving the Central Dis-

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comparison between the federal district court in Santa Ana and nearby state courthouses based on the *Blueprint*'s risk factors.

[10] Olsen repeatedly points to state courts in the Central District of California for his position that it is not impossible to conduct a jury trial safely. But just because state courts are holding

trict's declaration of judicial emergency, this Court's Judicial Council explained that "Congress did not intend that a district court demonstrate its inability to comply with the [Speedy Trial Act] by dismissing criminal cases and releasing would-be convicted criminals into society." *See Judicial Emergency*, 955 F.3d at 1142–43. That is precisely what the district court did here.

IV.

While it is not necessary to our disposition of this case, we also find it important to briefly highlight the district court's additional error in dismissing Olsen's indictment *with* prejudice. Although the district court recognized the charges against Olsen as "extremely serious," it nevertheless dismissed the indictment with prejudice, concluding that it was the only sanction that would have "enough teeth to create any hope of deterring additional delay in the resumption of jury trials."

We review the district court's decision to dismiss with or without prejudice for abuse of discretion.

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jury trials does not mean that they are necessarily holding them safely. It is unknown whether jurors, witnesses, court staff, litigants, attorneys, and defendants are being subject to serious risks and illness. Nothing in the record indicates that the Central District was able to hold a jury trial safely in October 2020, when Olsen's case was set for trial. Indeed, at argument, Olsen's counsel could not point to anything in the district court's dismissal order or the record, aside from noting that the court would have utilized unidentified "similar safety precautions" to those state courts did, to adequately address these safety concerns. The district court in fact acknowledged that even though it was possible to hold trials, there were significant health risks in doing so.

United States v. Taylor, 487 U.S. 326, 332, 108 S.Ct. 2413, 101 L.Ed.2d 297 (1988). A court abuses its discretion if it "failed to consider all the factors relevant to the choice" and the "factors it did rely on were unsupported by factual findings or evidence in the record." *Id.* at 344, 108 S.Ct. 2413. "In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: [(1)] the seriousness of the offense; [(2)] the facts and circumstances of the case which led to the dismissal; and [(3)] the impact of a reprosecution on the administration of [the Speedy Trial Act] and on the administration of justice." 18 U.S.C. § 3162(a)(2). A court's decision whether to dismiss the charges with or without prejudice depends on a "careful application" of these factors to each particular case. *Clymer*, 25 F.3d at 831.

Here, the district court failed to adequately consider all the relevant factors as applied to Olsen's case. *See Taylor*, 487 U.S. at 344, 108 S.Ct. 2413. The district court primarily based its decision on the perceived need to deter the Central District from continuing its jury trial suspension. Olsen contends that the district court based its dismissal with prejudice on the factors of only "*this particular case*." The record shows otherwise. It appears that the only case-specific factor the court considered was the seriousness of Olsen's crimes, which it properly weighed against a dismissal with prejudice. *See United States v. Medina*, 524 F.3d 974, 986–87 (9th Cir. 2008) (explaining that serious crimes weigh in favor of dismissal without prejudice). The remainder of the district judge's three-page analysis focuses only on the Central District's suspension of criminal

jury trials and his disagreement with his colleagues' decision to vote in favor of suspension. Although the district judge characterized this analysis as the "facts and circumstances" that led to dismissal, the court entirely failed to consider the facts and circumstances of *Olsen's* case, including the years of continuances Olsen obtained while on pre-trial release and the absence of any prosecutorial culpability in causing the delay. *See United States v. Pena-Carrillo*, 46 F.3d 879, 882 (9th Cir. 1995) (looking for evidence of purposeful wrongdoing on part of prosecutor for this factor); *accord United States v. Stevenson*, 832 F.3d 412, 420 (3d Cir. 2016) (explaining that this factor considers whether the delay stemmed from "'intentional dilatory conduct' or a 'pattern of neglect on the part of the Government'") (quoting *United States v. Cano-Silva*, 402 F.3d 1031, 1036 (10th Cir. 2005)). The district court therefore committed legal error in failing to consider key factors relevant to Olsen's case: the absence of prosecutorial culpability and the multiple continuances requested by Olsen. *See Taylor*, 487 U.S. at 344, 108 S.Ct. 2413.

The district court also committed legal error in evaluating the impact of reprosecution on the administration of the Speedy Trial Act and on the administration of justice. *See* 18 U.S.C. § 3162(a)(2). In dismissing Olsen's indictment with prejudice, the district court presumed that any adequate remedy must bar reprosecution. The district judge characterized dismissal with prejudice as "the only sanction with enough teeth to create any hope of deterring additional delay in the resumption of jury trials." The court explained that dismissal without prejudice

would let the government reindict "and proceed as if no constitutional violation ever occurred" and concluded that this would be a "meaningless result." This reasoning was incorrect. The Supreme Court has made clear that "[d]ismissal without prejudice is not a toothless sanction: it forces the Government to obtain a new indictment if it decides to reprosecute, and it exposes the prosecution to dismissal on statute of limitations grounds." *Taylor*, 487 U.S. at 342, 108 S.Ct. 2413; *see also United States v. Newman*, 6 F.3d 623, 627 (9th Cir. 1993) (rejecting argument "that dismissal without prejudice renders the Speedy Trial Act meaningless"). Because the district court's ruling was based on an erroneous view of the law, it abused its discretion in dismissing with prejudice. *See United States v. Arpaio*, 951 F.3d 1001, 1005 (9th Cir. 2020).

V.

We reverse the district court's dismissal of Olsen's indictment. The district court's interpretation of the Speedy Trial Act's ends of justice provision—that continuances are appropriate only if holding a criminal jury trial would be impossible—was incorrect. Nothing in the plain text of the Speedy Trial Act or our precedents supports this rigid interpretation.

We are, however, mindful that the right to a speedy and public jury trial provided by the Sixth Amendment is among the most important protections guaranteed by our Constitution, and it is not one that may be cast aside in times of uncertainty. *See Furlow*, 644 F.2d at 769 ("Except for the right of a fair trial before an impartial jury no mandate of our jurisprudence is more important"); *see also Ro-*

man Cath. Diocese of Brooklyn v. Cuomo, —— U.S. —— —, 141 S. Ct. 63, 68, 208 L.Ed.2d 206 (2020) ("[E]ven in a pandemic, the Constitution cannot be put away and forgotten.").

The Central District of California did not cast aside the Sixth Amendment when it entered its emergency orders suspending jury trials based on unprecedented public health and safety concerns. To the contrary, the orders make clear that the decision to pause jury trials and exclude time under the Speedy Trial Act was not made lightly. The orders acknowledge the importance of the right to a speedy and public trial both to criminal defendants and the broader public, and conclude that, considering the continued public health and safety issues posed by COVID-19, proceeding with such trials would risk the health and safety of those involved, including prospective jurors, defendants, attorneys, and court personnel. The pandemic is an extraordinary circumstance and reasonable minds may differ in how best to respond to it. The District Court here, however, simply misread the Speedy Trial Act's ends of justice provision in dismissing Olsen's indictment with prejudice.

The judgment of the district court is REVERSED and REMANDED with instructions to reinstate Olsen's indictment, grant an appropriate ends of justice continuance, and set this case for a trial.

APPENDIX C

United States District Court,
Central District of California
Southern Division

UNITED STATES of America, Plaintiff,
v.
Jeffrey OLSEN, Defendant.

Case No.: SACR 17-00076-CJC

ORDER DISMISSING INDICTMENT AND EXONERATING BOND

Defendant Jeffrey Olsen, a physician, was indicted in 2017 with numerous counts of prescribing and distributing substances including oxycodone, amphetamine salts, alprazolam, and hydrocodone without a legitimate medical purpose. (Dkt. 1.) Mr. Olsen's trial was set to begin on October 13, 2020. (Dkt. 46.) The Court asked the Chief Judge of the Central District to summon jurors for Mr. Olsen's October 13, 2020 trial, but the Chief Judge refused to do so. On October 27, 2020, the time required to commence Mr. Olsen's trial under the Sixth Amendment and the Speedy Trial Act expired. The Court has concluded that the appropriate remedy for the Central District's violation of Mr. Olsen's right to a public and speedy trial is dismissal of the indictment against him with prejudice. (*See* Dkt. 98.) In the time since the Court issued its order, it has become even clearer that holding a jury trial is and has been for some time now, possible. Indeed, the Orange County Superior Court just across the street from the federal courthouse has now conducted 100 jury

trials since June of this year. (*See* Ex. 1, attached to this order.) Sadly, the Central District has conducted none. The state court and the terrific citizens of Orange County are to be commended for their commitment to the Constitution. Hopefully, someday, sooner rather than later, the Central District will show that same commitment.

In light of the Central District's violation of Mr. Olsen's constitutional right to a public and speedy trial, the indictment against Mr. Olsen is **DISMISSED WITH PREJUDICE** and his bond is **EXONERATED**.

Dated: October 28, 2020

/s/ Cormac J. Carney
United States District Judge

APPENDIX D

494 F.Supp.3d 722

United States District Court
C.D. California, Southern Division.

UNITED STATES of America, Plaintiff,
v.
Jeffrey OLSEN, Defendant.

Case No.: SACR 17-00076-CJC

Signed 10/14/2020

Bryant Yuan Fu Yang, AUSA—Office of US Attorney General Crimes Section, Los Angeles, CA, for Plaintiff.

David Joseph Sutton, Elena Rose Sadowsky, Office of the Federal Public Defender, Los Angeles, CA, for Defendant.

ORDER DISMISSING WITH PREJUDICE CHARGES AGAINST DEFENDANT FOR VIOLATION OF SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SPEEDY TRIAL ACT

CORMAC J. CARNEY, UNITED STATES DISTRICT JUDGE

I.

I consider the trial by jury as the only anchor, ever yet imagined by man, by which a government can be held to the principles of its constitution.

–Thomas Jefferson[1]

The United States Constitution protects our fundamental freedoms and liberties. One of the most important rights guaranteed by the Constitution is the Sixth Amendment right of the accused to a public and speedy trial. It protects against undue and oppressive incarceration prior to trial and it allows the accused the ability to defend himself against the criminal charges before evidence becomes lost or destroyed and witnesses' memories fade. But the Sixth Amendment protects much more than just the rights of the accused. It also protects the rights of all of us. It gives each of us called for jury service a voice in our justice system. And it holds the government accountable to the principles of the Constitution. Thomas Jefferson and the other Framers of the Constitution wisely recognized that without jury trials, power is abused and liberty gives way to tyranny.

Given the constitutional importance of a jury trial to our democracy, a court cannot deny an accused his right to a jury trial unless conducting one would be impossible. This is true whether the United States is suffering through a national disaster, a terrorist attack, civil unrest, or the coronavirus pandemic that the country and the world are currently facing. Nowhere in the Constitution is there an exception for

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[1] *From Thomas Jefferson to Thomas Paine*, National Archives (July 11, 1789), *available at* https://founders.archives.gov/documents/Jefferson/01-15-02-0259.

times of emergency or crisis. There are no ifs or buts about it.

Sadly, the United States District Court for the Central District of California has denied Defendant Jeffrey Olsen his Sixth Amendment right to a public and speedy trial on the criminal charges that were filed against him in this case. Specifically, the Chief Judge for the Central District refused to summon the jurors necessary to conduct Mr. Olsen's trial that was scheduled for October 13th of this year, believing it was too unsafe to conduct the trial during the coronavirus pandemic even if significant safety precautions were in place. Most troubling, the Chief Judge refused to summon jurors for Mr. Olsen's trial even though grand juries have been convening for months in the same federal courthouse in Orange County where his trial would take place and state courts just across the street from that federal courthouse are conducting criminal jury trials. Clearly, conducting a jury trial during this coronavirus pandemic is possible. Yet the Central District prevented the Court from even trying to do so for Mr. Olsen. Because the Central District denied Mr. Olsen a public and speedy trial under the Sixth Amendment, this Court now must dismiss the indictment against him.

II.

Defendant Jeffrey Olsen, a physician, was indicted in 2017 with numerous counts of prescribing and distributing substances including oxycodone, amphetamine salts, alprazolam, and hydrocodone without a legitimate medical purpose. (Dkt. 1.) Trial was initially set for September 5, 2017. (Dkt. 10.) The

Court has since approved several stipulations between the parties to continue this trial date. (*See* Dkts. 19, 21, 23, 26, 35, 42, 44.) The most recent was approved on June 19, 2020, and continued the trial date to October 13, 2020. (Dkt. 46.) Factoring in the time found excludable in these orders, and assuming no further time is excludable under the Speedy Trial Act, Mr. Olsen's trial must begin on or before October 27, 2020, or his constitutional right to a public and speedy trial will be violated.

On August 6, 2020, Chief Judge Philip S. Gutierrez issued a General Order suspending jury trials indefinitely in the Central District of California. C.D. Cal. General Order No. 20-09, In Re: Coronavirus Public Emergency, Order Concerning Phased Reopening of the Court (Aug. 6, 2020) ("Until further notice, no jury trials will be conducted in criminal cases."). Indeed, no jury has been empaneled in the Central District in nearly 7 months. *See* C.D. Cal. General Order No. 20-08, In Re: Coronavirus Public Emergency, Order Concerning Phased Reopening of the Court (May 28, 2020) (explaining that the Court would reopen in three phases, with Phase 3—resumption of jury trials—being "implemented at a date to be determined"). The General Order stated that to determine when the Central District will resume jury trials, it will use "gating criteria" from the Administrative Office of the United States Courts[2] "designed to determine local COVID-19 exposure risks based on 14-day trends of

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[2] Administrative Office of the U.S. Courts, *Federal Judiciary COVID-19 Recovery Guidelines* (Apr. 24, 2020), *available at* https://www.fedbar.org/wp-content/uploads/2020/04/Federal-Judiciary-COVID-19-Recovery-Guidelines.pdf.

facility exposure, community spread, and community restrictions." *Id.* ¶ 2.

Several weeks later, at an August 20, 2020 status conference in this case, Mr. Olsen's counsel stated that Mr. Olsen wished to go forward with his trial on October 13, 2020, and that he was unwilling to agree to the exclusion of any further time under the Speedy Trial Act. (Dkt. 52 at 3.) The government sought to continue the trial, arguing that the ends of justice would be served by a continuance, especially given the General Order indefinitely suspending jury trials. (*See id.* at 4–6; Dkt. 54.) The Court denied the government's application, concluding that the Constitution and Mr. Olsen's rights under the Speedy Trial Act require that Mr. Olsen's trial go forward on the scheduled date. (Dkt. 67.) Consequently, the Court requested that the Chief Judge direct the jury department to summon jurors for Mr. Olsen's October 13, 2020 trial. (*Id.* at 11.) Relying on the General Order, however, the Chief Judge refused to do so. (Dkt. 68.) The Chief Judge determined that the "continued suspension of jury trials is necessary to protect the health and safety of prospective jurors, defendants, attorneys, and court personnel due to the Coronavirus Disease 2019 pandemic." (*Id.* at 1.)

Almost a month later, the Chief Judge, with "a unanimous vote of the Executive Committee, and without objection from the District Judges of the Court," reopened the Orange County federal courthouse where Dr. Olsen seeks to be tried for criminal hearings and emergency civil hearings, but not for jury trials. C.D. Cal. General Order No. 20-12, In Re Coronavirus Public Emergency, Order Concerning Reopening of the Southern Division (Sept. 14, 2020).

The Chief Judge decided this limited reopening was appropriate because "per the gating criteria, local COVID-19 exposure risks in the Court's Southern Division are decreasing." *Id.* at 2.

More recently, in September of this year, the Chief Judge indicated in an interview with a reporter for the Daily Journal that jurors may soon be summoned for trials in the Orange County federal courthouse. (Dkt. 95-1 [September 23, 2020 Daily Journal Article, hereinafter "Article"].) Specifically, the Chief Judge stated that "decisions on resuming operations are being made in light of state government orders." (*Id.* at 1.) Those orders include California Governor Gavin Newsom's four-tier, color-coded system.[3] That system does not apply to the state judiciary, nor does it restrict essential businesses—in sectors including healthcare, emergency services, food, energy, transportation, and communications—from operating. Indeed, employees in those sectors have been displaying extraordinary courage and dedication by going to work every day during the pandemic, knowing the risks, while protecting themselves and others as best they can. They refuse to let the coronavirus prevent them from providing vital services and supplying essential goods to the public.

The Governor's tier system applies only to non-essential businesses. It outlines when and how those non-essential businesses may operate during the pandemic. Under the system, each California county is ranked in one of four tiers "based on its test positivity and adjusted case rate." In tier 1, also known

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

as purple or widespread, many non-essential indoor businesses are closed. In tier 2, also known as red or substantial, some non-essential indoor businesses are closed. In tier 3, also known as orange or moderate, some indoor businesses are open with modifications. In tier 4, also known as yellow or minimal, most indoor businesses are open with modifications. Orange County is currently in tier 2. The Chief Judge stated that the Central District will start summoning jurors in Orange County once it reaches tier 3. (Article at 1.) He further explained that jury trials will begin approximately 7 weeks later because "that's how long it takes to summon jurors." (*Id.*)

In light of the Chief Judge's refusal to summon jurors for Mr. Olsen's trial and the 7-week turnaround time, Mr. Olsen filed a motion to dismiss the charges against him for violation of his speedy trial rights. (Dkt. 85.) On October 13, 2020, the Court held a hearing and heard argument on Mr. Olsen's motion.

III.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI. The right to a speedy trial "has roots at the very foundation of our English law heritage" and "is one of the most basic rights preserved by our Constitution." *Klopfer v. State of N.C.*, 386 U.S. 213, 224, 226, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967). Indeed, "[e]xcept for the right of a fair trial before an impartial jury, no mandate of our jurisprudence is more important" than a defendant's right to a speedy trial. *Furlow v. United States*, 644 F.2d 764, 769 (9th Cir. 1981). The Sixth Amendment protects defend-

ants by minimizing oppressive pretrial incarceration and ensuring evidence needed to prove the defense remains available at the time of trial. *See Klopfer*, 386 U.S. at 222, 87 S.Ct. 988; *id.* at 226–27, 87 S.Ct. 988 (Harlan, J., concurring); *United States v. Loud Hawk*, 474 U.S. 302, 312, 106 S.Ct. 648, 88 L.Ed.2d 640 (1986). It also protects the public, giving the people a voice, ensuring the government has the evidence needed to prosecute, and holding leaders accountable to the Constitution. *See Barker v. Wingo*, 407 U.S. 514, 519, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) ("In addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused."); *United States v. Lloyd*, 125 F.3d 1263, 1268 (9th Cir. 1997) ("[T]the right to a speedy trial belongs not only to the defendant, but to society as well.").

Congress enacted the Speedy Trial Act in 1974 in order to make effective the Sixth Amendment's guarantee of a speedy trial. Pub. L. No. 93-619; *see Furlow*, 644 F.2d at 798–69 (describing the Speedy Trial Act as the Sixth Amendment's "implementation"). The Act requires that a defendant's trial begin within 70 days of the filing of the indictment or the defendant's initial court appearance, whichever is later. 18 U.S.C. § 3161(c)(1). "The Act recognizes, however, that legitimate needs of the government and of a criminal defendant may cause permissible delays." *United States v. Daychild*, 357 F.3d 1082, 1090 (9th Cir. 2004). Accordingly, it provides that certain periods of time may be excluded from the 70-day deadline. For example, a court may exclude pe-

riods of delay resulting from competency examinations, interlocutory appeals, pretrial motions, the unavailability of essential witnesses, and delays to which the defendant agrees. 18 U.S.C. § 3162(h)(1)–(6). The Act also contains a sort of catchall category of excludable time. This section allows exclusion of time where a judge finds "that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3162(h)(7)(A).

Congress intended the "ends of justice" provision to be "rarely used." *United States v. Nance*, 666 F.2d 353, 355 (9th Cir. 1982) (quoting the Act's legislative history). To ensure that broad discretion does not undermine the Act's important purpose, Congress enumerated factors that courts must consider in determining whether to grant an "ends of justice" continuance. *Id.*; *see United States v. Clymer*, 25 F.3d 824, 829 (9th Cir. 1994) (explaining that "the 'ends of justice' exclusion ... may not be invoked in such a way as to circumvent the time limitations set forth in the Act"). Those factors include, as relevant here, "[w]hether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice." 18 U.S.C. § 3161(h)(7)(B)(i).

Continuances under the "ends of justice" exception in the Speedy Trial Act are appropriate if without a continuance, holding the trial would be *impossible.* 18 U.S.C. § 3161(h)(7)(B)(i). This exception has been used in response to natural disasters and other exigencies, but only where the triggering exigency made the criminal jury trial a physical and logistical impossibility. For example, the Ninth Circuit upheld a

district court's order finding 14 days excludable where Mount Saint Helens erupted 2 days before the scheduled trial date. *Furlow*, 644 F.2d at 767–69. The court began its discussion by noting that "[a] close reading of the Speedy Trial Act ... reveals no reference to the interruptions of nature." *Id.* However, the court explained that the eruption created a "cloud of volcanic dust," and was an incident "of worldwide significance" and "earth-shaking effect" that inflicted a "paralyzing impact on surrounding geographies, including the location of the court where the [defendant] was scheduled for trial." *Id.* at 767. The eruption "obviously interrupted transportation [and] communication," and "affect[ed] the abilities of jurors, witnesses, counsel, [and] officials to attend the trial." *Id.* at 767–68. Given that the physical circumstances precluded holding a jury trial, and "[t]he district court preserved the procedural safeguards and specified a trial date rather than a *sine die* continuance," the court held that the 14-day continuance did not result in a speedy-trial violation. *Id.* at 769.

Similarly, a New York district court applied the ends of justice exception to exclude a 20-day period after the September 11, 2001 terrorist attacks. *United States v. Correa*, 182 F. Supp. 2d 326, 327 (S.D.N.Y. 2001). In that case, the pretrial conference had been set for September 11, 2001, less than half a mile from the World Trade Center. *Id.* However, after the attacks, the courthouse was evacuated and the jail where the defendant was detained was locked down for security reasons. *Id.* The courthouse, United States Attorney's office, and jail were "closed to all non-emergency personnel for nearly a week."

Id. Even when they reopened, telephone, fax, and internet access were disrupted at all three locations. *Id.* Lawyers without access to their offices were less able to communicate effectively with the court and other counsel. *Id.* Law enforcement agents, including those working on that specific case, were "massively redeployed to emergency service work and the pressing needs of the terrorist attack." *Id.* "Security concerns and staffing difficulties at the [jail], which ha[d] also suffered dislocation of critical electronic and communications systems, [made] it virtually impossible, and clearly imprudent, to transport prisoners to [c]ourt." *Id.* Given that these numerous complications made holding a jury trial actually impossible, the court concluded that the ends of justice would be served by excluding the 20-day period after the attacks.[4]

There is no question that the current pandemic is serious, and with little precedent. But under the current circumstances, it is simply not a physical or logistical impossibility to conduct a jury trial. Unlike in the cases where the ends of justice exception has been applied in the wake of a natural disaster or other exigency, travel and communication are functioning. *See Furlow*, 644 F.2d at 767–69; *Correa*, 182 F. Supp. 2d at 327. Although some aspects of the

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

practice of law may be less convenient during this time when many are practicing social distancing, no one contends that it is not possible to perform necessary trial preparations or to attend the trial. Nor does anyone argue that there is insufficient courthouse staff available to facilitate a trial.[5] *See Furlow*, 644 F.2d at 767–69; *Correa*, 182 F. Supp. 2d at 327.

Indeed, if one had any doubt about the possibility of conducting a jury trial during the pandemic, one need look no further than the very courthouse in which Mr. Olsen seeks to have his jury trial in Orange County. There, between June 24 and September 30, 2020, a grand jury convened and returned 41 indictments.[6] (*See* Ex. 1, attached to this order.) That means that the grand jury, which has at least 16 people on it, gathered in person in the Orange County federal courthouse numerous times. While they were gathered, they heard testimony from witnesses and deliberated together. If a grand jury can perform these functions in the exact courthouse where Mr. Olsen seeks to be tried, the Court surely can hold a jury trial for Mr. Olsen in that courthouse.[7]

Even more compelling is the fact that the state court across the street from the Orange County fed-

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[5] Indeed, Defendant notes that his status on bond means that even less courthouse staff will be required to facilitate his trial than would be needed to hold a trial for a defendant in custody. (Dkt. 66 at 6.)

[6] The Santa Ana Grand Jury did not meet between March 5 and June 23, 2020.

[7] This also shows that the government continues to charge people with crimes and seek detention pending trial during the coronavirus pandemic.

eral courthouse resumed jury trials with appropriate precautionary measures *nearly four months ago*. The Orange County Superior Court did not hold any criminal jury trials in April or May of this year because of the pandemic. However, from June to September, it held 82 criminal jury trials and 4 civil jury trials. (*See* Ex. 2, attached to this order.[8]) Notably, in June, July, and September, over 60% of potential Orange County jurors reported to fulfill their civic duty. (*Id.*) Obviously, the state court has accomplished this by taking numerous careful measures to ensure safety. It accommodates social distancing by staggering times for juror reporting, trial start, breaks, and concluding for the day, seating jurors during trial in both the jury box and the audience area, marking audience seats, and using dark courtrooms as deliberation rooms. It also regularly disinfects the jury assembly room and restrooms, provides facial coverings, uses plexiglass shields in courtrooms, and requires trial participants to use gloves to handle exhibits. (Dkt. 67, Ex. 2 at 1–10, 13–25, 34.) Of course, similar safety precautions could have been in place for Mr. Olsen's trial, had the Central District allowed this Court to hold one.[9]

The government continues to cite the Chief Judge's General Order to support its position that the ends of justice exception should be applied to exclude further time under the Speedy Trial Act. (*See*

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[8] These statistics were supplied to the Court by the Assistant Presiding Judge of the Orange County Superior Court, Erick L. Larsh.

[9] Also worth noting is that the Southern District of California and other federal courts throughout the country are holding jury trials.

Dkt. 92 at 8–9; Dkt. 54 at 10–11.) The government's continued reliance on the General Order is misplaced. The General Order—adopted after a majority vote of judges in this district—does not say that it is impossible to conduct a jury trial. Rather, it, like the government in this case, relies on the premise that the pandemic has rendered it *unsafe* to conduct a jury trial at this time. The General Order and the government note that people continue to be infected, hospitalized, and—tragically—die due to the virus, and that holding jury trials will likely put people at increased risk of contracting the virus. C.D. Cal. General Order No. 20-09 ¶ 6.a. The Court, of course, acknowledges the public health risk the virus poses to people. But the Constitution does not turn on this consideration. Instead, to protect the fundamental right to a speedy trial guaranteed by the Sixth Amendment, the Constitution requires that a trial only be continued over a defendant's objection if holding the trial is *impossible*. Holding Mr. Olsen's trial at this time is plainly not impossible.

Particularly troubling about the General Order's suspension of jury trials is that it is indefinite. The Order states that the Central District will determine when to resume jury trials using "gating criteria [that] is designed to determine local COVID-19 exposure risks based on 14-day trends of facility exposure, community spread, and community restrictions." C.D. Cal. General Order 20-09 ¶ 2. However, the Ninth Circuit has repeatedly admonished that "an ends of justice exclusion must be 'specifically limited in time.'" *United States v. Ramirez-Cortez*, 213 F.3d 1149, 1154 (9th Cir. 2000) (quoting *Lloyd*, 125 F.3d at 1268 (quoting *United States v. Jordan*,

915 F.2d 563, 565 (9th Cir. 1990))); *see Furlow*, 644 F.2d at 769 (noting that a *sine die* continuance would be unacceptable). In keeping with this requirement, the periods of time courts excluded under the Speedy Trial Act due to previous natural disasters and other exigencies were brief and definite. *See Furlow*, 644 F.2d at 768 (14 days); *Correa*, 182 F. Supp. 2d at 329 (20 days); *Richman*, 600 F.2d at 294 (3 weeks). The gating criteria—which is completely untethered to the constitutional implications of a criminal defendant's right to a speedy trial—does not make sufficiently certain what is otherwise an unacceptably uncertain end date.

What is more, an "ends of justice" exclusion must be justified with reference to specific factual circumstances in the particular case as of the time the delay is ordered. *Ramirez-Cortez*, 213 F.3d at 1154 (concluding that an ends of justice continuance was not sufficiently justified where the judge made no inquiry into the actual need for a continuance in the particular case, instead checking off boxes on preprinted forms without making findings on statutory factors, and the record showed that the judge "was granting blanket continuances"). By its very nature, the General Order does not justify delays as of the time they are ordered in any particular case. And the government offered no reason why an "ends of justice" exclusion of time was justified in this specific case. For instance, it made no mention of an essential witness being unavailable or an attorney on the case suffering a unique hardship. *See United States v. Pollock*, 726 F.2d 1456, 1461 (9th Cir. 1984) (stating that the "ends of justice" exclusion "was to be based on specific underlying factual circumstances"

and "cannot be invoked without specific findings in the record").[10]

Nor does the Governor's color-coded tier system fix the constitutional problems with the General Order. Apparently, the Chief Judge is now relying on that system to determine when jury trials will resume. That system is for non-essential businesses. It does not apply to state courts, let alone federal courts. It is of no consequence to the constitutional analysis here. The right to a public and speedy trial is guaranteed by the Constitution. *It is and always will be essential.*

Not surprisingly, the Central District's suspension of jury trials has taken its toll on the fair administration of justice in the district. Because of the growing backlog in trials and the delay of many sentencings during the pandemic, jails have become increasingly crowded. The problem has gotten so bad that people charged with crimes in California, and whose families and lawyers are in California, are being transported without notice to Arizona because there is simply no longer bed space in the Central District to house them.[11] *See, e.g., United States v.*

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[10] It should be noted for the record that in July of this year, this Court agreed with all the other judges in the Central District not to conduct jury trials in August. At that time, this Court had no case on its docket in which a defendant was unwilling to exclude time under the Speedy Trial Act because of the coronavirus pandemic. It therefore made no sense to the Court to burden prospective jurors by summoning them to the courthouse when their service was not needed. Circumstances, however, have now changed. Mr. Olsen is unwilling to agree to the exclusion of any further time under the Speedy Trial Act.

[11] Chief Judge Gutierrez has stated that the "real driver behind a massive case backlog" is the Central District's "shortage of

Joshua Jenkins, Case No. 2:20-cr-00068-CJC-1, Dkt. 41 (September 2, 2020 Order Granting Defendant's Ex Parte Application for Immediate Transfer from the San Luis Detention Center in Arizona to the Metropolitan Detention Center in California). These moves interfere with defendants' ability to confer with their counsel and to prepare for trial, impeding not only the defendants' right to a speedy trial, but also their right to effective assistance of counsel. *See, e.g., id.*, Dkt. 36 (Ex Parte Application for Transfer, explaining that "Mr. Jenkins has now been removed from geographic proximity to defense counsel, potential witnesses, and family and friends who can facilitate communication with potential witnesses").

Even more disturbing is the fact that the government is now offering favorable deals to defendants to incentivize them to plead guilty. Reports from the Central District United States Attorney's Office show that the office has nearly three times the number of cases in the pre-trial phase and only about half the cases in the pre-sentencing phase in 2020 as compared to a similar period in 2019. Consequently, it has authorized AUSAs to offer two-level variances under the Sentencing Guidelines to many defendants so long as they waive their right to in-person hearings, sign plea agreements quickly (before October 16, 2020), and enter their plea at the first date ordered by the court. *See, e.g., United States v. Manuel Ignacio Ruiz*, Case No. 5:20-cr-00019-CJC-6, Dkt. 540 (September 17, 2020 Plea Agreement where

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judges – not the court's suspended operations." (Article at 1.) But confirming new judges will not alleviate the backlog in jury trials, nor alleviate the problems occurring because of a lack of bed space. Only holding jury trials will do that.

the defendant consented to video hearings under the CARES Act, and the government agreed to recommend a two-level reduction in the applicable Sentencing Guidelines offense level, a term of imprisonment no higher than the low end of the applicable guideline range, and that the defendant not be required to self-surrender until after February 1, 2021). In other words, the government is now offering very favorable plea deals based not on the defendant's individual circumstances, but rather based on exigencies manufactured by the Central District's refusal to resume jury trials.

Quite frankly, the Court is at a loss to understand how the Central District continues to refuse to resume jury trials in the Orange County federal courthouse. The Internal Revenue Service, the Social Security Administration, and other federal agencies in Orange County are open and their employees are showing up for work. Police, firefighters, and other first responders in Orange County are all showing up for work. Hospitals and medical offices in Orange County are open to patients and the medical professionals are showing up for work. Grocery stores, hardware stores, and all essential businesses in Orange County are open and their employees are showing up for work. State courts in Orange County are open and holding jury trials. Orange County restaurants are open for outdoor dining and reduced-capacity indoor dining. Nail salons, hair salons, body waxing studios, massage therapy studios, tattoo parlors, and pet groomers in Orange County are open, even indoors, with protective modifications. Children in Orange County are returning to indoor classes at schools, with modifications. Even movie theaters,

aquariums, yoga studios, and gyms in Orange County are open indoors with reduced capacity. Yet the federal courthouse in Orange County somehow remains closed for jury trials. The Central District's refusal to resume jury trials in Orange County is indefensible.

In the Court's view, it is not a question of *if* the Court should have held Mr. Olsen's criminal jury trial during this stage of the coronavirus pandemic, but a question of *how* the Court should have held it. If it is not impossible to hold grand juries in the courthouse where Mr. Olsen's trial will take place, and it is not impossible to hold criminal jury trials in the state court across the street from that courthouse, it was clearly not impossible to hold a criminal jury trial for Mr. Olsen. Mr. Olsen's right to a speedy trial is one of the most basic and important rights preserved by our Constitution. *Klopfer*, 386 U.S. at 224, 87 S.Ct. 988; *Furlow*, 644 F.2d at 769. The Central District never should have denied him his right to one.

IV.

In light of the Central District's violation of Mr. Olsen's constitutional right to a public and speedy trial, the question then becomes what the remedy should be for the Central District's violation. The law is clear on this issue. When a defendant is not brought to trial within the 70-day time limit (minus all properly excludable periods of delay) and brings a motion to dismiss, the court *must* dismiss the indictment. 18 U.S.C. § 3162(a)(2); *see United States v. Medina*, 524 F.3d 974, 980 (9th Cir. 2008). The strictness of this remedy highlights the importance

of the rights it protects. *See Lloyd*, 125 F.3d at 1268 ("Congress designed the Speedy Trial Act in part to protect the public's interest in the speedy administration of justice, and it imposed the sanction of dismissal under § 3162 to compel courts and prosecutors to work in furtherance of that goal."). The Court therefore has no choice but to dismiss the indictment against Mr. Olsen.

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

Admittedly, the first factor—the seriousness of the offense—weighs in favor of a dismissal without

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[12] Both parties urge the Court to perform a separate analysis to determine whether Mr. Olsen's Sixth Amendment right was violated (as opposed to his rights under the Speedy Trial Act). Both cite *Barker v. Wingo*, a case decided before the Speedy Trial Act was enacted, which explains that courts should balance the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker*, 407 U.S. at 530, 92 S.Ct. 2182; *see Doggett v. United States*, 505 U.S. 647, 651, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992). The analysis of these factors parallels the analysis the Court now makes, and the Court does not repeat itself to analyze that test separately.

prejudice. There is no doubt that the crimes of which Mr. Olsen is accused—prescribing dangerous combinations and unnecessary amounts of highly regulated pain medications—are extremely serious. *See Medina*, 524 F.3d at 986–87 (explaining that serious crimes weigh in favor of dismissal without prejudice); *Clymer*, 25 F.3d at 831 (describing crimes of conspiracy to distribute and aiding and abetting the manufacture of methamphetamine as "undoubtedly serious"). Indeed, the government contends that Mr. Olsen knew that two of his patients died from overdose on the same pain medications he had previously prescribed, yet continued to prescribe dangerous combinations and unnecessary amounts of pain medication to his patients. (*See* Dkt. 94 [Order denying Mr. Olsen's motion in limine to exclude evidence of uncharged patient deaths].) However, this factor does not outweigh the other two factors the Court must consider. *See, e.g., Clymer*, 25 F.3d at 831 (affirming dismissal with prejudice of conspiracy to distribute methamphetamine); *United States v. Ramirez*, 973 F.2d 36, 37 (1st Cir. 1992) (affirming dismissal with prejudice charges of possession of over 500 grams of cocaine with the intent to distribute, and conspiracy to distribute).

Most important in this case are the facts and circumstances leading to dismissal. The Chief Judge of the Central District—supported by a majority vote of judges in the district—decided not to summon jurors for Mr. Olsen's trial. He made that decision knowing that holding a jury trial in Orange County was possible. He made that decision knowing that a grand jury was convening in the Orange County federal courthouse. He made that decision knowing that Or-

ange County state courts were open for jury trials. And he made that decision knowing that Orange County non-essential businesses were open with appropriate modifications for safety. His decision was knowingly and willfully made. The primary factor driving the Chief Judge's decision was the risk that people might get sick from the coronavirus. (*See* Dkt. 68 at 1.) But his decision was made with little or no regard for Mr. Olsen's constitutional right to a public and speedy trial. Indeed, in his order denying the Court's request to summon jurors for Mr. Olsen's trial, the Chief Judge made no mention of the Constitution at all.

The Central District's constitutional violation here also was not a mere technical one. *See Medina*, 524 F.3d at 987 (affirming dismissal without prejudice where district court found the violations of the Speedy Trial Act were "technical, rather than substantive"). Nor was it isolated and unwitting. *See United States v. Taylor*, 487 U.S. 326, 342, 108 S.Ct. 2413, 101 L.Ed.2d 297 (1988) (indicating that dismissal with prejudice is appropriate where there is "something more than an isolated unwitting violation"); *Medina*, 524 at 987 (explaining that a "culture of poor compliance" with the Speedy Trial Act would weigh in favor of dismissing with prejudice); *United States v. Ramirez*, 973 F.2d 36, 39 (1st Cir. 1992) ("The expansiveness of such a STA violation risk makes it important for a court to correct for the sake of deterrence and more painstaking vigilance."). Rather, it was a substantive policy decision to suspend the constitutional rights of Mr. Olsen and every other defendant unwilling to waive time. *See Taylor*, 487 U.S. at 339, 108 S.Ct. 2413 (finding that even "a

truly neglectful attitude" toward the Speedy Trial Act could weigh in favor of dismissing with prejudice); *Medina*, 524 F.3d at 987; *Ramirez*, 973 F.2d at 39 (explaining that violations "caused by the court or the prosecutor" weigh in favor of granting a dismissal with prejudice).

Finally, barring reprosecution in this case by dismissing with prejudice is the only sanction with enough teeth to create any hope of deterring additional delay in the resumption of jury trials and avoiding further dismissals of indictments for violations of defendants' constitutional rights to a public and speedy trial. *See Taylor*, 487 U.S. at 342, 108 S.Ct. 2413 ("It is self-evident that dismissal with prejudice always sends a stronger message than dismissal without prejudice, and is more likely to induce salutary changes in procedures, reducing pretrial delays."). A dismissal without prejudice, on the other hand, allows the government simply to go before the grand jury, obtain a new indictment, and proceed as if no constitutional violation ever occurred. *See* 18 U.S.C. § 3288 (permitting the government to obtain a new indictment within six calendar months of the date of the dismissal, "which new indictment shall not be barred by any statute of limitations"); *United States v. Bert*, 814 F.3d 70, 86 (2d Cir. 2016) ("The fact that the government must reindict the defendant is not a particularly strong deterrent."). In effect, there would be no adverse consequences from the Central District's knowing and willful decision to violate Mr. Olsen's constitutional right to a public and speedy trial. Such a meaningless result would "send exactly the wrong signal" and foster in the future "a cavalier regard, if

not a concerted disregard" of the Constitution. *Ramirez*, 973 F.2d at 39; *see Bert*, 814 F.3d at 86 (encouraging courts to consider "the likelihood of repeated violations and whether there are potential administrative changes prompted by this violation").[13] This Court will not let that happen.

V.

"*The wisdom of our ages and the blood of our heroes has been devoted to the attainment of trial by jury. It should be the creed of our political faith.*"

–Thomas Jefferson[14]

The Central District denied Mr. Olsen his constitutional right to a public and speedy trial. It did so not because it was impossible to conduct the jury trial as is required by the Sixth Amendment. It did so because it was fearful people would get sick from the coronavirus. But no emergency or crisis, not even the coronavirus pandemic, should suspend the Sixth Amendment or any of our constitutional rights. The Constitution guarantees these rights to us during all times, good or bad. Because Mr. Olsen was denied his Sixth Amendment right to a public and speedy trial, this Court now must dismiss the charges against him, and that dismissal must be with preju-

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[13] That the district judges and the government did not act with malice does not change this analysis. *See Ramirez*, 973 F.2d at 39 ("Even though the oversight was accomplished without malice, that does not ameliorate the gravity of its effects."); *Bert*, 814 F.3d at 80 (affirming that "a finding of 'bad faith' is not a prerequisite to dismissal with prejudice").

[14] *First Inaugural Address*, National Archives (March 4, 1801), *available at* https://founders.archives.gov/documents/Jefferson/01-33-02-0116-0004.

dice. The Court's order dismissing the charges with prejudice will not take effect until October 28, 2020, when the time limit for commencing Mr. Olsen's trial will have expired.[15]

[15] Mr. Olsen raised in reply the possibility that time while Mr. Olsen's motion is pending "could be considered excludable time under 18 U.S.C. 3161(h)(1)(D), which makes excludable "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." (Dkt. 95 at 2 n.1.) But that section excludes only pretrial delay "*resulting from*" a pending motion, not all pretrial delay that merely coincides with the pendency of a motion. *Clymer*, 25 F.3d at 830. No delay in the trial resulted during the time this motion was pending.

EXHIBIT 1

INDICTMENTS RETURNED IN SOUTHERN DIVISION
June 24, 2020 through September 30, 2020

	Date Indictment Filed	Case Number	Case Name	Notes
1	June 24, 2020	8:20-cr-00077-JLS	USA v. Martinez, et al.	
2		8:20-cr-00078-DOC	USA v. Jorgo	
3		8:20-cr-00079-JVS	USA v. Staples	
4		8:20-cr-00002(A)-DOC	USA v. Le, et al.	1st Superseding Indictment
5	REDACTED	REDACTED	REDACTED	Filed Under Seal
6	REDACTED	REDACTED	REDACTED	Filed Under Seal
7		5:20-cr-00123-JGB	USA v. Renteria	
8		5:20-cr-00124-JGGB	USA v. Gil-Carranza, et al.	
9		8:20-cr-00083-DOC	USA v. Do	
10		8:20-cr-00084-DOC	USA v. Tran, et al.	
11	July 22, 2020	8:20-cr-00091-JVS	USA v. Memije	
12		5:20-cr-00132-JGB	USA v. Moore, et al.	
13		8:20-cr-00090-JLS	USA v. Nunez	
14		8:20-cr-00089-JLS	USA v. Rangel	
15		2:19-cr-00756(A)-JAK	USA v. Ryan, et al.	1st Superseding Indictment
16	REDACTED	REDACTED	REDACTED	Filed Under Seal
17		8:20-cr-00097-JLS	USA v. Villa	
18		5:20-cr-00138-PA	USA v. Garcia	
19		8:19-cr-00208(A)-DOC	USA v. Pongsamart	1st Superseding Indictment
20		8:20-cr-00098-JLS	USA v. Gonzalez	
21	Aug. 12, 2020	8:20-cr-00104-DOC	USA v. Flores	
22		8:20-cr-00105-JVS	USA v. Fernandez	
23		8:20-cr-00106-JVS	USA v. Spagnolini	
24		8:20-cr-00107-JLS	USA v. Kuhns	
25		8:20-cr-00108-JVS	USA v. Anderson	
26	REDACTED	REDACTED	REDACTED	Filed Under Seal
27	Sept. 16, 2020	8:20-cr-00133-AB	USA v. Lewis, et al.	
28		8:20-cr-00134-SVW	USA v. Ramirez	
29		8:20-cr-00135-ODW	USA v. Chacon	
30		8:20-cr-00136-SVW	USA v. Mitchell	
31		8:20-cr-00137-DSF	USA v. Van Dyke	
32	REDACTED	REDACTED	REDACTED	Filed Under Seal
33	REDACTED	REDACTED	REDACTED	Filed Under Seal
34	Sept. 30, 2020	8:20-cr-00140-VAP	USA v. Hicks	
35		8:20-cr-00141-JAK	USA v. Jeffries	
36		5:20-cr-00186-DMG	USA v. Jones	
37		5:20-cr-00187-PA	USA v. Lawhead	
38		8:20-cr-00142-SB	USA v. Wampler	
39	REDACTED	REDACTED	REDACTED	Filed Under Seal
40	REDACTED	REDACTED	REDACTED	Filed Under Seal
41	REDACTED	REDACTED	REDACTED	Filed Under Seal

EXHIBIT 2

Jury Trials Completed in Orange County Superior Court

COURTWIDE JURY TRIALS
June 2020 thru September 2020

Month	CJC				HJC			NJC			WJC			COURTWIDE			
	Felony	Misd.	Civil	Total	Felony	Misd.	Total	Felony	Misd.	Total	Felony	Misd.	Total	Felony	Misd.	Civil	Total
June	4	9	0	13	0	0	0	0	0	0	0	2	2	4	11	0	15
July	3	3	0	6	0	2	2	0	0	0	0	5	5	3	10	0	13
August	10	9	0	19	1	1	2	0	0	0	0	6	6	11	16	0	27
September	11	9	4	24	0	3	3	0	0	0	3	1	4	14	13	4	31

* Count represents when a new jury trial is started, regardless if the jury trial is completed during the reporting month.

Juror Reporting Statistics in Orange County Superior Court

	Jurors Summoned	Jurors Asked to Report	Jurors Reported	% Reported
April (Court Closed)	36,212	0	0	**0%**
May (Court Closed)	42,850	0	0	**0%**
June	40,378	3,057	1,943	**64%**
July	61,716	2,047	1,265	**62%**
August	54,008	4,381	1,971	**45%**
September	58,077	4,709	2,865	**61%**
Totals	**293,241**	**14,194**	**8,044**	**57%**

APPENDIX E

2020 WL 5541067

United States District Court, C.D. California.

U.S.A.
v.
Jeffrey OLSEN, Defendant(s):
Case No. SACR 17-00076 CJC

Filed 09/03/2020

Bryant Yuan Fu Yang, AUSA-Office of US Attorney General Crimes Section, Los Angeles, CA, for U.S.A.

David Joseph Sutton, Office of the Federal Public Defender, Elena Rose Sadowsky, Federal Public Defenders Office, Los Angeles, CA, Courtney Elizabeth Pilchman, Pilchman and Kay PLC, Irvine, CA, for Defendant.

Proceedings: (In Chambers) Order DENYING the Honorable Cormac J. Carney's Request for the Chief Judge of the Central District of California to Direct the Jury Department to Summon Jurors

The Honorable Philip S. Gutierrez, Chief United States District Judge

As judges of the Central District of California, we are expected to observe all Local Rules and General Orders when conducting court business. Contrary to this fundamental tenet of court governance, there has been a second request for the Chief Judge to direct the Jury Department to summon jurors in direct contravention of General Order Number 20-09. This

request, like the last one, is **DENIED**. *See United States v. Recinos*, CR19-00724 CJC, Dkt. # 58.

The governance of the Court is vested in the district judges of the Court. On August 6, 2020, the majority of district judges of the Court approved General Order Number 20-09, which suspended jury trials until further notice. *See* General Order No. 20-09 (Aug. 6, 2020). The district judges determined that the continued suspension of jury trials is necessary to protect the health and safety of prospective jurors, defendants, attorneys, and court personnel due to the Coronavirus Disease 2019 pandemic. *See id.* Although I signed the Order in my capacity as Chief Judge, the Order is not mine. It is an Order of the Court. One that reflects the consensus of the majority of district judges.

As Chief Judge, I am responsible for the observance of the rules and orders of the Court. *See* 28 U.S.C. § 137(a). I am also charged with supervising the different units of the Court, including the Jury Department. However, my authority over the Jury Department cannot be exercised at my whim or that of any other judge. It must be exercised under the policies and directives as formulated by the Court's district judges or its Executive Committee. There is no question that the current policies and directives as formulated by the district judges of the Court do not currently allow at the present time for the Jury Department to summon jurors. Accordingly, as Chief Judge, I not only lack authority to overrule or disregard these policies and directives but am expected to implement and enforce them. I will do so here and continue to do so.

Therefore, in accordance with General Order Number 20-09, the request for the Chief Judge to direct the Jury Department to summon jurors for an October 13, 2020 trial in *United States v. Olsen*, SACR 17-00076 CJC, is **DENIED**.

APPENDIX F

467 F.Supp.3d 892

United States District Court,
C.D. California, Southern Division.

UNITED STATES of America, Plaintiff,
v.
Jeffrey OLSEN, Defendant.

Case No.: SACR 17-00076-CJC
Signed 09/02/2020

Bryant Yuan Fu Yang, AUSA—Office of US Attorney General Crimes Section, Los Angeles, CA, for Plaintiff.

ORDER (1) DENYING THE GOVERNMENT'S *EX PARTE* APPLICATION TO CONTINUE TRIAL [Dkt. 54] AND (2) REQUESTING THE CHIEF JUDGE TO DIRECT THE JURY DEPARTMENT TO ISSUE JURY SUMMONS

CORMAC J. CARNEY, UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

The Sixth Amendment provides that in all criminal prosecutions, the accused shall enjoy the right to a speedy trial. An accused's right to a speedy trial is one of the most fundamental rights guaranteed by our Constitution. The right protects against undue and oppressive incarceration prior to trial and it allows the accused the ability to defend himself against the criminal charges before evidence becomes lost or destroyed and witnesses' memories

fade. Unless conducting the jury trial is impossible, a court cannot deny the accused this fundamental constitutional right—not during during a national disaster, not during a terrorist attack, and not during the coronavirus pandemic that the United States and the world are currently facing.

In this case, the government seeks a continuance of Defendant Jeffery Olsen's trial scheduled for October 13, 2020. Specifically, the government believes it is too unsafe to conduct the trial during the coronavirus pandemic even if significant safety precautions are in place, including facial coverings, plexiglass shields, physical distancing and constant cleaning of furniture and surfaces. Most troubling, the government wants to continue Mr. Olsen's trial even though grand juries are convening in the same federal courthouse in Orange County where Mr. Olsen's trial would take place and state courts, just across the street from that federal courthouse, are conducting criminal jury trials. Clearly, conducting a jury trial during this coronavirus pandemic is possible. Yet the government wants the Court not to even try to do so for Mr. Olsen. Because continuing Mr. Olsen's October 13, 2020 trial would deny him a speedy trial under the Sixth Amendment, the government's *ex parte* application to continue the trial (Dkt. 54 [hereinafter "App.]) is **DENIED**.

II. BACKGROUND

Defendant Jeffrey Olsen, a physician, was indicted in 2017 with numerous counts of prescribing and distributing substances including oxycodone, amphetamine salts, alprazolam, and hydrocodone without a legitimate medical purpose. (Dkt. 1 [Indict-

ment].) The case was initially set for trial on September 5, 2017. (Dkt. 10 [Minutes of Post-Indictment Arraignment].) The Court has since approved numerous stipulations between the parties to continue this trial date. (*See* Dkts. 19, 21, 23, 26, 35.) The most recent of those stipulations was approved on June 19, 2020, and continued the trial date to October 13, 2020. (Dkt. 46.)[1]

On August 6, 2020, Chief Judge Philip S. Gutierrez issued a General Order suspending jury trials indefinitely in the Central District of California. C.D. Cal. General Order No. 20-09, In Re: Coronavirus Public Emergency, Order Concerning Phased Reopening of the Court (August 6, 2020) ("Until further notice, no jury trials will be conducted in criminal cases."). Indeed, no jury has been empaneled in the Central District in several months. *See* C.D. Cal. General Order No. 20-08, In Re: Coronavirus Public Emergency, Order Concerning Phased Reopening of the Court (May 28, 2020) (explaining that the Court would reopen in three phases, with Phase 3—resumption of jury trials—"be[ing] implemented at a date to be determined").

On August 20, 2020, at a status conference in this case, Mr. Olsen's counsel stated that Mr. Olsen wished to go forward with his trial on October 13, 2020, and that he was unwilling to agree to the exclusion of any further time under the Speedy Trial Act. (Dkt. 52 [Hearing Transcript] at 3.) The government, however, sought to continue the trial, arguing that the ends of justice would be served by a con-

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[1] Factoring in the time found excludable in those orders, the Speedy Trial Act now requires that trial in this case begin on or before October 27, 2020. (App. at 6.)

tinuance, especially given the General Order indefinitely suspending criminal jury trials in the Central District. (*See id.* at 4–6.) This *ex parte* application followed.

III. LEGAL STANDARD

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. Const. amend. VI. The right to a speedy trial "has roots at the very foundation of our English law heritage" and "is one of the most basic rights preserved by our Constitution." *Klopfer v. State of N.C.*, 386 U.S. 213, 224, 226, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967). Indeed, "[e]xcept for the right of a fair trial before an impartial jury, no mandate of our jurisprudence is more important" than a defendant's right to a speedy trial. *Furlow v. United States*, 644 F.2d 764, 769 (9th Cir. 1981). Congress enacted the Speedy Trial Act in 1974 in order to make effective the Sixth Amendment's guarantee of a speedy trial. Pub. L. No. 93-619. The Act requires that a defendant's trial begin within 70 days of the filing of the indictment or the defendant's initial court appearance, whichever is later. 18 U.S.C. § 3161(c)(1).

"The Act recognizes, however, that legitimate needs of the government and of a criminal defendant may cause permissible delays." *United States v. Daychild*, 357 F.3d 1082, 1090 (9th Cir. 2004). Accordingly, it provides that certain periods of time may be excluded from the 70-day deadline. For example, a court may exclude periods of delay resulting from competency examinations, interlocutory appeals, pretrial motions, the unavailability of essential wit-

nesses, and delays to which the defendant agrees. 18 U.S.C. § 3162(h)(1)–(6). The Act also contains a sort of catchall category of excludable time. This section allows exclusion of time where a judge finds "that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3162(h)(7)(A).

Congress intended the "ends of justice" provision to be "rarely used." *United States v. Nance*, 666 F.2d 353, 355 (9th Cir. 1982) (quoting the Act's legislative history). To ensure that broad discretion does not undermine the Act's important purpose, Congress enumerated factors that courts must consider in determining whether to grant an "ends of justice" continuance. *Id.*; *see United States v. Clymer*, 25 F.3d 824, 829 (9th Cir. 1994) (explaining that "the 'ends of justice' exclusion ... may not be invoked in such a way as to circumvent the time limitations set forth in the Act"). Those factors include, as relevant here, "[w]hether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice." 18 U.S.C. § 3161(h)(7)(B)(i).

IV. ANALYSIS

Mr. Olsen is insistent that his trial go forward on October 13, 2020. In this application, the government seeks to continue the trial over Mr. Olsen's objection. The Court must therefore determine whether the ends of justice served by continuing the trial outweigh the best interest of the public and Mr. Olsen in a speedy trial. 18 U.S.C. § 3162(h)(7)(A).

Continuances under the "ends of justice" exception in the Speedy Trial Act are appropriate if without a

continuance, holding the trial would be *impossible*. 18 U.S.C. § 3161(h)(7)(B)(i). This exception has been used in response to natural disasters and other exigencies, but only where the triggering exigency made the criminal jury trial a physical and logistical impossibility. For example, the Ninth Circuit—noting that the question was "[a]lmost novel" to it—upheld a district court's order finding 14 days excludable where Mount Saint Helens erupted two days before the scheduled trial date, "obviously interrupt[ing] transportation [and] communication," which "affect[ed] the abilities of jurors, witnesses, counsel, [and] officials to attend the trial." *See Furlow*, 644 F.2d at 767–69. Similarly, the exception was applied to exclude a 20 day period after the September 11, 2001 terrorist attacks, when telephone, fax, and internet access were disrupted at the courthouse, law enforcement agents (including those working on the specific case) were redeployed to emergency service work, and lawyers without access to their offices were less able to communicate effectively with the Court and other counsel. *United States v. Correa*, 182 F. Supp. 2d 326, 327 (S.D.N.Y. 2001). Other cases confirm that *actual impossibility* is key for application of this exception. *United States v. Richman*, 600 F.2d 286, 294 (1st Cir. 1979) (finding no Speedy Trial Act violation where trial was continued three weeks after the "paralyzing ... Blizzard of '78" that made it so that "[t]rial could not commence on" the scheduled date); *United States v. Scott*, 245 Fed. Appx. 391 (5th Cir. 2007) (concluding without substantial analysis that there was no Speedy Trial Act violation where some delay was attributable to Hurricane Katrina).

There is no question that the current pandemic is serious, and with little precedent. But under the current circumstances, it is simply not a physical or logistical impossibility to conduct a jury trial. Unlike in the cases where the ends of justice has been applied in the wake of a natural disaster or other exigency, travel and communication are functioning. *See Furlow*, 644 F.2d at 767–69; *Correa*, 182 F. Supp. 2d at 327. Although some aspects of the practice of law may be less convenient during this time when many are practicing social distancing, no one contends that it is not possible to perform necessary trial preparations. Nor does anyone argue that there is insufficient courthouse staff available to facilitate a trial.[2] *See Furlow*, 644 F.2d at 767–69; *Correa*, 182 F. Supp. 2d at 327.

Indeed, if one had any doubt about the possibility of conducting a jury trial during the pandemic, one need look no further than the very courthouse in which Mr. Olsen seeks to have his jury trial in Orange County. There, between June 24 and August 18, 2020, a grand jury convened and returned twenty-six indictments.[3] (*See* Ex. 1, attached to this order [chart of indictments returned in Southern Division of Central District of California from June 24, 2020 through August 18, 2020].) That means that the grand jury, which has at least 16 people on it, gathered in person in the Santa Ana courthouse numer-

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[2] Indeed, Defendant notes that his status on bond means that even less courthouse staff will be required to facilitate his trial than would be needed to hold a trial for a defendant in custody. (Dkt. 66 [Opposition] at 6.)

[3] The Santa Ana Grand Jury did not meet between March 5 and June 23, 2020.

ous times. While they were gathered, they heard testimony from witnesses and deliberated together. If a grand jury can perform these functions in the exact courthouse Mr. Olsen seeks to be tried in, the Court surely can hold a jury trial for Mr. Olsen in that courthouse.[4]

Even more compelling is the fact that the state court across the street from the Orange County federal courthouse has resumed jury trials with appropriate precautionary measures. The Orange County Superior Court did not hold any criminal jury trials in April or May of this year because of the pandemic. However, from the time it began holding criminal jury trials again in June through August 21, 2020, it has held 46 criminal jury trials. (*See* Ex. 2, attached to this order, at 30 [chart of jury trials held in Orange County Superior Court by month for 2019 and 2020][5].) Notably, in the month of July, over 60% of potential Orange County jurors reported to fulfill their civic duty. (Ex. 2 at 26–28 [chart showing failure to appear ("FTA") rates].) Obviously, the state court has accomplished this by taking numerous careful measures to ensure safety. For example, it accommodates social distancing by staggering times for juror reporting, trial start, breaks, and concluding for the day, seating jurors during trial in both the jury box and the audience area, marking audience seats, and using dark courtrooms as delibera-

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[4] This also shows that the government continues to charge people with crimes and seek detention pending trial during the coronavirus pandemic. Yet the government takes the position that jury trials cannot proceed.

[5] These statistics were supplied to the Court by the Assistant Presiding Judge of the Orange County Superior Court, Erick L. Larsh.

tion rooms. It also regularly disinfects the jury assembly room and restrooms, provides facial coverings, uses plexiglass shields in courtrooms, and trial participants use glove for document handling. (Ex. 2 at 1–10, 13–25, 34.) Of course, similar safety precautions will be in place for Mr. Olsen's trial.[6]

In the Court's view, it is not a question of *if* the Court should hold Mr. Olsen's criminal jury trial during this stage of the coronavirus pandemic, but a question of *how* the Court will hold the jury trial during that stage. If it is not impossible to hold grand juries in the courthouse where Mr. Olsen's trial will take place, and it is not impossible to hold criminal jury trials in the state court across the street from that courthouse, it is clearly not impossible to hold a criminal jury trial for Mr. Olsen. Mr. Olsen's right to a speedy trial is one of the most basic and important rights preserved by our Constitution. *Klopfer*, 386 U.S. at 224, 87 S.Ct. 988; *Furlow*, 644 F.2d at 769. This Court cannot and will not deny him his right to one.

The government cites the Chief Judge's General Order to support its position for a continuance. (App. at 10–11.) The government's reliance on the Chief Judge's General Order is misplaced. The Chief Judge's General Order—adopted after a majority vote of judges in this District—does not say that it is impossible to conduct a jury trial. Rather, it, like the government in this case, relies on the premise that the pandemic has rendered it *unsafe* to conduct a jury trial at this time. The General Order and the gov-

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[6] Also worth noting is the fact that a federal jury trial was recently held in the Southern District of California.

ernment note that people continue to be infected, hospitalized, and—tragically—die due to the virus, and that holding jury trials will likely put people at increased risk of contracting the virus. C.D. Cal. General Order No. 20-09 ¶ 6.a.; (App. at 6 [expressing concern over holding a trial "without district-wide protocols for conducting jury trials may jeopardize the health of prospective jurors, witnesses, defendant, trial counsel, and court personnel"]). The Court, of course, acknowledges the public health risk the virus poses to people. But the Constitution does not turn on this consideration. Rather, to protect the fundamental right to a speedy trial guaranteed by the Sixth Amendment of the Constitution, it requires that a trial only be continued over a defendant's objection if holding the trial is *impossible.* Holding Mr. Olsen's trial at this time is plainly not impossible.

Particularly troubling about the General Order's suspension of jury trials is that it is indefinite. The Order states that to inform when the Central District resumes jury trials, it will use "gating criteria [that] is designed to determine local COVID-19 exposure risks based on 14-day trends of facility exposure, community spread, and community restrictions." C.D. Cal. General Order 20-09 ¶ 2; (*see* App. at 2 [referring to the gating criteria]). However, the Ninth Circuit has repeatedly admonished that "an ends of justice exclusion must be 'specifically limited in time.'" *United States v. Ramirez-Cortez*, 213 F.3d 1149, 1154 (9th Cir. 2000) (quoting *United States v. Lloyd*, 125 F.3d 1263, 1268 (9th Cir. 1997) (quoting *United States* v. Jordan, 915 F.2d 563, 565 (9th Cir. 1990)); *see Furlow*, 644 F.2d at 769 (noting that a *sine die* continuance would be unacceptable).

In keeping with this requirement, the periods of time courts excluded under the Speedy Trial Act due to previous natural disasters and other exigencies were brief and definite. *See Furlow*, 644 F.2d at 768 (14 days); *Correa*, 182 F. Supp. 2d at 329 (20 days); *Richman*, 600 F.2d at 294 (3 weeks). The gating criteria—which are guidance and recommendations from the Administrative Office of the United States Courts for reopening courthouses that do not carry any force of law and are completely untethered to the constitutional implications of a criminal defendant's right to a speedy trial—does not make sufficiently certain what is otherwise an unacceptably uncertain end-date. *See* Administrative Office of the U.S. Courts, *Federal Judiciary COVID-19 Recovery Guidelines* (Apr. 24, 2020), *available at* https://www.fedbar.org/wpcontent/uploads/2020/04/Federal-Judiciary-COVID-19-Recovery-Guidelines.pdf (last accessed Sept. 2, 2020).[7]

What is more, an "ends of justice" exclusion must be justified with reference to specific factual circumstances in the particular case as of the time the delay is ordered. *United States v. Ramirez-Cortez*, 213 F.3d 1149, 1154 (9th Cir. 2000) (concluding that an ends of justice continuance was not sufficiently justified where the judge made no inquiry into the actual need for a continuance in the particular case, instead checked off boxes on pre-printed forms without making findings on the statutory factors, and the record showed that the judge "was granting blanket continuances"). By its very nature, the General Order does not justify delays as of the time they are ordered in

[7] Ironically, nor is the government's request for a 5-week continuance consistent with the rules set out in the above cases.

any particular case. And the government offers no reason why an "ends of justice" exclusion of time is justified in this specific case. For instance, it makes no mention of an essential witness being unavailable or an attorney on the case suffering a unique hardship. *See United States v. Pollock*, 726 F.2d 1456, 1461 (9th Cir. 1984) (stating that the "ends of justice" exclusion "was to be based on specific underlying factual circumstances" and "cannot be invoked without specific findings in the record"). Simply put, the General Order is repugnant to the Sixth Amendment and contrary to the "ends of justice."[8]

V. CONCLUSION

The Sixth Amendment guarantees the accused a speedy trial even when circumstances are challenging. The accused has that constitutional right even when a court is faced with a natural disaster, a terrorist attack and a pandemic. If it is possible for the court to conduct a jury trial, the court is constitutionally obligated to do so. There are no ifs or buts about it.

Here, it is certainly possible to conduct a jury trial for Mr. Olsen in the federal courthouse in Orange County. Indeed, the grand jury is convening and re-

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[8] It should be noted for the record that in July of this year, this Court agreed with all the other judges in the Central District not to conduct jury trials in August. At that time, this Court had no case on its docket in which a defendant was unwilling to exclude time under the Speedy Trial Act because of the coronavirus pandemic. It therefore made no sense to the Court to burden prospective jurors by summoning them to the courthouse when their service was not needed. Circumstances, however, have now changed. Mr. Olsen is unwilling to agree to the exclusion of any further time under the Speedy Trial Act.

turning indictments there and state courts across the street from there are successfully conducting jury trials. Contrary to the government's assertion, the pandemic does not allow this Court to deny Mr. Olsen his constitutional right to a speedy trial. Accordingly, the government's ex parte application to continue Mr. Olsen's trial scheduled for October 13, 2020 is **DENIED**. The Court hereby requests the Chief Judge of the Central District of California to direct the Jury Department to summon jurors for the jury trial scheduled for that date.[9]

[9] The Court understands that the jury department requires six weeks to summon prospective jurors. It is therefore necessary that the Court make its request to summon prospective jurors now.

EXHIBIT 1

INDICTMENTS RETURNED IN SOUTHERN DIVISION
June 24, 2020 through August 18, 2020

	Date Indictment Filed	Case Number	Case Name	Notes
1	June 24, 2020	8:20-cr-00077-JLS	USA v. Martinez, et al.	
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25		8:20-cr-00108-JVS	USA v. Anderson	
26	REDACTED	REDACTED	REDACTED	Filed Under Seal **

**Case remains under seal as of 8/24/2020.

EXHIBIT 2

Superior Court of California
County of Orange

MEMO

Date: April 22, 2020

To: Honorable Kirk Nakamura, Presiding Judge
Honorable Erick Larsh, Assistant Presiding Judge
David Yamasaki, Court Executive Officer
Adriaan Ayers, Court Operations Officer

From: Pete Hernandez, Jury Services Manager

Subject: **Resuming Jury Operations**

As the world continues to navigate through the era of COVID-19, it is unknown how long we could expect this pandemic to last. News outlets are reporting the pandemic will peak in California by mid-May. Others are reporting that the pandemic could return for a second round in the fall or winter. As a result of this, social or physical distancing has become the new norm. The latest news reports state that social distancing could last through 2022.

What does this mean for the future of juries? It is expected that prospective jurors will have an increased level of discomfort and/or reluctance reporting to a courthouse to perform their service. As a result, it is imperative that our court take all the necessary precautions to place the public at ease or at least provide an acceptable level of comfort.

Below are recommendations for resuming jury operations while maintaining social or physical distancing practices.

Juror summons:

Effective for June 2020 through September 2020, juror summonses have been modified so that ALL prospective jurors will be on call. There will be no direct reporting jurors at any of the courthouses. The summons allocations for July through September have been increased by 10%.

Juror failure to appear rates:

Prior to the pandemic, Jury Services maintained a 25% failure to appear rate. Prior to closing to the public in March, jurors were vocal about their concerns over social distancing. They became more concerned after the Governor, the CDC and the White House each announced various limits on the number of persons attending large gatherings.

It is anticipated that the failure to appear rate will increase to 50% or more when the Court resumes jury trials. There is no data to support this assumption; however, it is anticipated that an increased number of failures to appear, in conjunction with a higher number of requests to postpone, will affect the number of jurors reporting.

Courtrooms requesting jurors:

- Jury panel size limits:

  As a result of COVID-19, prior to closing to the public, panel size limits were approved. It is recommended that we continue this practice through the foreseeable future.

  Number of prospective jurors a courtroom may request at any one time (additional jurors may be request for a different reporting time (i.e., afternoon or next morning):

  - 80 – Criminal Felony
  - 40 – Criminal Misdemeanor
  - 40 – Civil*

    *Criminal jury panel requests will take priority over civil jury panel requests and the current criminal jury trial backlog will likely lead to an insufficient number of prospective jurors to create a civil jury panel. It will also take time to establish and perfect the social distancing measures for reporting jurors, therefore, it is recommended the Civil Panel be informed not to expect to start civil jury trials before the end of the calendar year.

- Prescreening (time-qualifying) jurors:

  It is recommended that prescreening (time-qualifying) of jurors by Jury Services continue to be suspended due to the large number of jurors required for this practice (4:1 ratio).

- Requesting "will-call" jurors:

  It is recommended that when courtrooms request their panels, they are ready to move forward with the jury trial. At times, courtrooms request panels as "will-call" and end up settling the case even before having the jurors sent to the courtroom. Anticipating the need for staggered juror reporting times, having jurors wait in a jury assembly room will lead to a failure in our ability to enable appropriate social distancing in those rooms.

- Friday Jurors

  Historically, Jury Services does not have prospective jurors reporting on Friday's for courtroom assignments. Also, active jury trials are generally dark on Friday's. Under the current circumstances, we should consider instituting Friday jurors for jury selection and jury trial purposes.

Reporting jurors:

Limit the number of jurors reporting-in at any one time.

Jury Assembly Room Seating		
	Current	Proposed
CJC	650	200-250
HJC	145	40
NJC*	70	40
WJC	140	40

*Temporary room location with outside patio seating available

Due to courtroom size limitations, it may be necessary for prospective jury panels to be split into smaller groups and sent to the courtroom at different times (i.e., 40 jurors for misdemeanor be split to groups of 20 at a time). By doing so, this will alleviate social distancing within the courtroom, hallways and elevators. Courtrooms will be asked to be prepared to advise Jury Services if their request is to be split and provide specific times when to send each smaller group. Note, jurors in smaller groups that are not part of the first-round group will be excused from the jury assembly room and ordered to report back at their designated time directly to the assigned courtroom.

Branch court felony trials:

Due to the proposed limit of 80 jurors for a felony trial and the jury assembly room seating capacity at the branch locations, it is proposed that branch felony trials conduct jury selection in C1. Upon selecting a panel, the trial may resume at the branch location. This will help alleviate social distancing concerns as well as potential parking issues.

Staggered juror reporting times:

Currently, courtrooms request their panels of prospective jurors to be sent to the courtroom by 9:30 am. Due to the proposed reduction in the number of jurors being called-in, it is recommended that courtrooms stagger their requests to 9:30 am and 1:30 pm.

Note: Further staggering reporting jurors by adding additional reporting times, such as 10:30 am may prove to be difficult to maintain social distancing. The jury assembly room may have prospective jurors who were not assigned to the 9:30 am assignment(s). These jurors will be held through the afternoon to possibly be assigned for 1:30 pm assignment(s). By bringing in 10:30 am jurors, we are no co-seating with leftover jurors which further reduces social distancing space.

Jurors assigned to report in the afternoon will generally start checking in at their assigned courthouse at around 12:30 pm. In order to free up the jury assembly room, it is recommended that a second room (i.e., dark courtroom) be made available at the branch locations so that previously reporting jurors (prospective and sworn) may use for breaks/lunch. At CJC, the 1st Floor Jury Assembly Room may be designated for this purpose.

The possibility of adding an additional reporting time of 10:30 am will be assessed at a later time.

Jury Deliberation Rooms:

In today's standards of social distancing, the jury deliberation rooms are no longer practical to house 12 persons with appropriate distancing. Therefore, one or more additional rooms (i.e. dark courtrooms) should be pre-designated to serve as secure, confidential jury deliberation rooms and these courtrooms can be prepared with physical distancing arrangements for deliberation purposes.

Alternatively, it is recommended that the trial courtroom itself, become the deliberation room. In this scenario, the Judge and courtroom staff would need to vacate the courtroom completely in order to allow the jurors to have a secure, confidential meeting space. This option would disallow judges and staff from starting a new trial or conducting other court business while a jury is deliberating. It would also require the judge, counsel and the defendant to conduct any subsequent proceedings (i.e. discuss a question from the jury) that needs to occur outside the presence of the jury to conduct those proceedings in chambers or in another courtroom that may be available for this purpose

Postponement rules:

Prior to closing to the public, Jury Services was granting postponements liberally. Jurors who no longer qualified for postponements were granted an additional 6 months. It is recommended that we discontinue this practice and return to our standard postponement rules.

Disinfecting the jury assembly rooms:

It will be required that all jury assembly rooms and restrooms be disinfected prior, during and after each reporting jury pool.

Jury assembly room security checks:

Due to continued social distancing and possible different views of it by the jurors, it is recommended to have a security presence (periodic walk-through) in all jury assembly rooms throughout the day.

Judge welcome speech:

It is recommended that a short video of the judge welcome speech be created and shown to the jurors during orientation. The video should contain language of juror appreciation during these difficult times. Having the judge welcome speech on video will provide jurors with a consistent message. To convey the Court's appreciation further, the Jury Commissioner may want to participate in the creation of this video as well.

Superior Court of California
County of Orange

April 22, 2020

Press-Release:

It is recommended that an informational press-release be published. The press-release should contain the why (importance to continue jury trials), how (reduction of reporting jurors/disinfecting for safety) and when.

Superior Court of California
County of Orange

MEMO

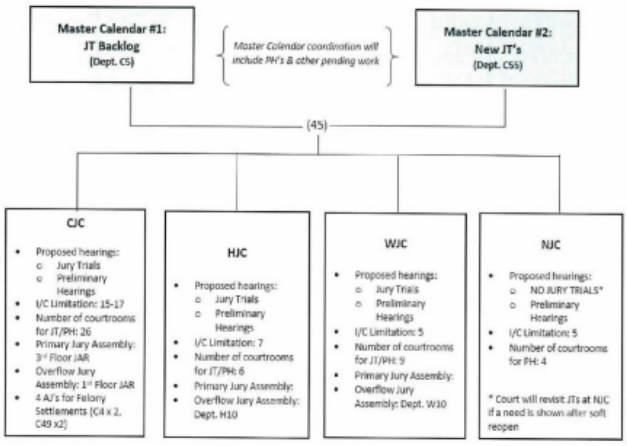
Date: May 21, 2020

To: All Judges and Commissioners

From: Honorable Kirk Nakamura, Presiding Judge

Subject: **Resuming Jury Operations**

As our Court slowly emerges from the crisis phase of the pandemic, we continue to define new priorities and plan for where we go next in terms of a reopening strategy. Below is a model of our soft reopening approach expected to start on May 26, 2020. This approach enables the Court to reopen all justice centers for the limited purpose of conducting criminal jury trials and to expand our felony preliminary hearings capabilities. No longer hearing preliminary hearings only at CJC will allow us to take advantage of more in-custody transportation, courthouse holding and hearing opportunities.



As it relates to this plan, please be aware of the following information which may impact you.

Courtroom personnel:

For various reasons personnel shortages continue as a result of COVID 19. As a result, judges may not have their assigned staff (Court Clerk, Court Reporter or Deputy) working in each courtroom. Your anticipated cooperation and understanding is greatly appreciated.

Juror summons:

Effective June 2020 through September 2020, juror summonses have been modified so that ALL prospective jurors will be on call. There will be no direct reporting jurors at any of the courthouses until Jury Services instructs jurors to report. Summons allocations for July through September have been increased with the possibility of additional increases should this be needed later.

Juror failure to appear rates:

Prior to the pandemic, Jury Services maintained a 25% failure to appear rate. Prior to closing to the public in March, jurors were vocal about their concerns over social distancing. They became more concerned after the Governor, the CDC and the White House each announced various limits on the number of persons attending large gatherings.

It is anticipated that the failure to appear rate will increase to 50% or more when the Court resumes jury trials. There is no data to support this assumption; however, it is anticipated that an increased number of failures to appear, in conjunction with a higher number of hardship requests and requests to postpone, will affect the number of jurors reporting.

Courtrooms requesting jurors:

- Jury panel size limits:

  As a result of COVID-19, prior to closing to the public, panel size limits were approved and will continue through the foreseeable future.

  Number of prospective jurors a courtroom may request at any one time (additional jurors may be requested for a different reporting time (i.e., afternoon or next morning):

  - 80 – Criminal Felony
  - 40 – Criminal Misdemeanor
  - 40 – Civil*

    *Criminal jury panel requests will take priority over civil jury panel requests and the current criminal jury trial backlog will likely lead to an insufficient number of prospective jurors to create a civil jury panel. It will also take time to establish and perfect the social distancing measures for reporting jurors, therefore, it is recommended the Civil Panel not expect to start civil jury trials before the end of the calendar year except for jury trials for civil cases that have been granted preference under CCP 36. Jury panel requests for these civil cases will need to be coordinated in advance with Jury Services and may need to trail if a criminal case requires jurors as a priority matter.

- Prescreening (time-qualifying) jurors:

  Prescreening (time-qualifying) of prospective jurors by Jury Services will continue to be suspended due to the large number of jurors required for this practice (4:1 ratio).

- Requesting "will-call" jurors:

  Settlement hearing discussions should have already taken place before a jury trial is assigned; each trial should move forward with jurors upon receipt of the cases. Jury Services will not be able to accommodate "will-call" orders by courtrooms as we no longer have the luxury of ample seating for jurors to wait in the jury assembly rooms until needed by a courtroom.

- Friday Jurors

  Historically, Jury Services does not have prospective jurors reporting on Friday's. Due to the backlog of criminal jury trials, Jury Services will make prospective jurors available on Friday mornings and afternoons. Likewise, courtrooms may be in trial on Fridays unless the judicial officer has other cases assigned on Fridays.

Reporting jurors:

Limit the number of jurors reporting-in at any one time.

Primary Jury Assembly Room Seating		
	Current	Proposed
CJC	650	160
HJC	145	40
NJC*	70	0
WJC	140	40

*Jury trials will not be held at NJC at this time.

Due to courtroom size limitations, it may be necessary for prospective jury panels to be split into smaller groups and sent to the courtroom at different times (i.e., 40 jurors for misdemeanor be split to groups of 20 at a time). By doing so, this will ensure social distancing within the courtroom, hallways and elevators. Courtrooms will be asked to be prepared to advise Jury Services if their request is to be split and provide specific times when to send each smaller group. Note, jurors in smaller groups that are not part of the first-round group will be excused from the jury assembly room and ordered to report back directly to the courtroom at their designated time. We are currently working on securing other sites to increase our jury capacity.

Juror questionnaires:

To minimize the time prospective jurors are physically present at the Courthouse during voir dire, courtrooms may request that Jury Services provide a brief questionnaire to each assigned juror prior to sending them to the courtroom. Copies of the questionnaire (one per juror requested) must be delivered to Jury Services one day prior of the date requested.

Courtrooms will be responsible for collecting the completed questionnaires. David Yamasaki, as Jury Commissioner, is considering a questionnaire to determine hardship excuses for jurors.

Good cause efforts:

Jury Services will provide judges with an outline of the efforts undertaken to secure prospective jurors should the need to make a good cause finding to continue a trial for a lack of jurors arise. Please contact Pete Hernandez directly for this information.

Branch court and felony trials:

Due to the proposed limit of 80 jurors for a felony trial and the jury assembly room seating capacity at the branch locations, branch felony trials must conduct jury selection in C1. Upon selecting a panel, the trial may resume at the branch location. This will help alleviate social distancing concerns as well as potential parking issues.

Jury selection for felony jury trials at CJC may also be conducted in C1 or another large courtroom that may be available.

Staggered juror reporting times (CJC, HJC & WJC):

Due to the reduction in the number of jurors being called-in, prospective jurors will be asked to report for service in two groups - once in the morning for a 9:30 am courtroom send time and noon for a 1:30 pm courtroom send time.

Overflow jury rooms:

With the anticipated goal to clear and clean the jury assembly rooms between each group of prospective jurors reporting, overflow jury rooms have been identified. The overflow rooms will be staffed by Jury Services. The intent of the overflow rooms is so that sworn (and non-sworn) jurors will have a room for breaks and lunches.

Offsite Jury Assembly Rooms are also being explored which may afford the Court a greater number of jurors to have available daily. More information about these efforts will be communicated when such locations are secured.

Jury deliberation rooms:

In today's standards of social distancing, the jury deliberation rooms are no longer practical to house 12 persons with appropriate distancing. When available, dark courtrooms will be designated as jury deliberation rooms. The courtrooms for deliberation must be secure and remain confidential.

Alternatively, if dark courtrooms are not available, it is anticipated that the trial courtroom itself, will become the deliberation room. In this scenario, the Judge and courtroom staff will need to vacate the courtroom.

Superior Court of California
County of Orange

May 21, 2020

Masks/facial coverings:

Nightly recorded call-in messages will encourage jurors to report for jury service with a mask/facial covering. Should a juror report to a courthouse without a mask/facial covering, one will be provided by the Court.

Disinfecting the jury assembly rooms:

The jury assembly rooms and restrooms will be disinfected prior, during and after each reporting jury pool.

Press-Release:

A marketing campaign with one or more press-releases will be issued before resuming jury trials. The press-release will include language related to the importance of resuming jury trials and actions our court is taking to ensure a safe and healthy environment.

Please feel free to contact me directly if you have any questions.

Best regards,

Kirk H. Nakamura
Presiding Judge

Superior Court of California
County of Orange

MEMO

Date: 6/11/2020

To: Supervising Judge Cheri Pham, Judge Maria Hernandez

CC: Adriaan Ayers, Blanca Escobedo, Gina Mendoza, Justin Mammen, Anthony Palumbo

From: Michael Ford, Emergency Response and Security Services

Subject: Concealing In-Custody Defendant Shackles in Socially Distanced Courtrooms

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At the request of Chief Operations Officer Adriaan Ayers, ERSS was tasked with identifying options to conceal the shackles of an in-custody defendants in a courtroom where social distancing of jurors is taking place.

After providing initial recommendations and speaking extensively with the Honorable Judge Donahue and the Honorable Judge Bromberg, the following option/supplies have been identified to best conform to this unique situation. Additionally, as the order to restrain in-custody defendants is given at the Judicial Officer's discretion, and considering courtrooms have different layouts and counsel table sizes, the provided recommendation is flexible, and can be adapted to work in all courtrooms of all sizes. It should be noted that Judge Donahue has direct experience with inmates being shackled in his courtroom and provided invaluable input.

Upon approval, ERSS will work with Facilities Management and Procurement to obtain the following items:

(3) black table skirts with the following measurements: 20ft 8in wide x 2ft 5in long

(3) smaller black cloth skirts for the defendant's chair with the following measurements: 4ft wide x 2ft 5in long

These items would be used as follows, to conceal the defendant's shackles:

1 black table skirt per courtroom would be wrapped around both counsel tables, covering the sides and front. The table skirt would be attached to table's edge using adhesive Velcro and hang from the table down to the floor.

1 smaller black cloth would be wrapped around the defendant's chair, covering both chair arms and chair back. The skirt would be attached to edge of the chair's arms and middle section of the chair's back using adhesive Velcro and hang from the chair down to the floor.

Running the cloth around the length of the table/chair, down to the floor, allows for shackles to be concealed from all juror vantage points, despite seating arrangements due to social distancing. Additionally, by attaching the cloth with adhesive Velcro strips, no damage would be done to the courtroom's furniture, and the cloth can be relocated as needed. Currently the Court only has one set of black table skirts. Therefore, I recommend purchasing 3 sets of cloth to ensure enough supplies are available, should this occur in multiple courtrooms at overlapping times.

One final consideration is that not all counsel tables have eyebolts fastened to the table legs. I recommend that Facilities Management procure a small number of eyebolts to keep in reserve, should the courtroom in question not already have eyebolts attached.

With these materials, we will be able to successfully conceal the feet and waist shackles of in-custody defendants in any courtroom across all Justice Centers. An estimated cost to purchase the above table/chair skirts and eyebolts is roughly $450, and costs can be absorbed within either the ERSS or Facilities cost center. I thank you in advance for considering these recommendations and I welcome any input or questions.

Michael Ford
Emergency Preparedness Officer

Superior Court of California
County of Orange

Chambers of
KIRK H. NAKAMURA
PRESIDING JUDGE

700 CIVIC CENTER DRIVE WEST
SANTA ANA, CA 92701

ADMINISTRATIVE ORDER NO. 20/19

Procedure for Granting In-Person Public Access to Criminal Jury Trials

This Order establishes the procedure to determine which spectators, if any, may be permitted to be present in the courtroom for criminal jury trials conducted during the next 90 days.

The World Health Organization, the United States Centers for Disease Control and Prevention, the State of California, and the County of Orange have recognized that the world, country, state, and county face a life-threatening pandemic caused by the COVID-19 virus. The CDC, the California Department of Public Health, and the Orange County Health Care Agency have recommended stringent social distancing measures of at least six feet between people to mitigate the spread of the virus.

The Court recognizes that public access to criminal proceedings is a right guaranteed to the press and public by the First Amendment of the United States Constitution and article I, section 29 of the California Constitution, and to the defendant by the Sixth Amendment of the United States Constitution and article I, section 15 of the California Constitution. However, the Orange County Superior Court is committed to protecting the health and safety of jurors, judges, attorneys, staff, law enforcement, other court users, and the general public while performing our constitutional duties, and has implemented protocols designed to protect health and safety. The combined impacts of the COVID-19 pandemic and social distancing measures have significantly impacted the Court's capacity to provide public access to court proceedings.

To comply with six-foot social distancing as advised by the CDC, the California Department of Public Health and the Orange County Health Care Agency, jurors must be seated in both the jury box and the audience area. This practice will significantly reduce the number of seats available in the courtroom

to accommodate members of the public and the media, and the trial court may not be able to admit all members of the public who wish to attend a jury trial.

Before excluding members of the public from any stage of a criminal trial, the trial court will make findings on the record determining whether the risk to public safety from the COVID-19 virus is an overriding interest which requires that restrictions to the attendance of members of the public be imposed in each trial, whether the exclusion of members of the public is a restriction no broader than necessary to protect the interest of public safety, and whether the court has considered reasonable alternatives to excluding members of the public from the proceeding.

In conducting this analysis, on each day that a court is conducting a jury trial the court will make the following findings on the record:

- The number of total seats available to accommodate jurors, alternates, and the public after seats are marked off to ensure social distancing
- The number of seats remaining to accommodate the public after jurors and alternates are seated pursuant to social distancing protocols

If, after jurors and alternates are seated pursuant to social distancing protocols, there remain seats available to accommodate the public, the court will prioritize the attendance of the defendant's family and friends and any victim and his or her support persons over other members of the public and the media. The court will state for the record which spectators are permitted to attend trial proceedings for each session. This process will occur prior to the commencement of jury selection, then again at opening statement, and if necessary, prior to the commencement of proceedings on every day of trial. As these findings are made, the court clerk will notify Court Operations of the seating arrangement for each session of trial.

Spectators who are permitted to remain in the courtroom will be ordered not to speak when in the courtroom, or to make any attempt to communicate with the jurors. If a spectator becomes disruptive or interferes with the jurors in any way, he or she will be excused from the courtroom at that time, and a record will be made of the reason for the excusal.

Each criminal trial court is outfitted with a camera to allow live streaming of courtroom proceedings available to the public on the Orange County Superior Court's public website. It is the policy of the court not to preserve the live streaming for later viewing.

Superior Court of California
County of Orange

June 15, 2020

This Order is effective immediately and shall remain in effect for 90 days. This relief is temporary, intended to address the current COVID-19 pandemic as it poses a challenge to jury trials.

IT IS SO ORDERED.

6/15/20
Date

Kirk H. Nakamura
Presiding Judge

PROTOCOLS FOR COURT PROCEEDINGS (Effective 6/1/20)

The nature and duration of protocols for court proceedings will be determined by the Presiding Judge consistent with the directives of local government and healthcare officials.

1. All courtrooms will follow healthy spacing practices.
   a. Courtrooms are marked for safe spacing (seating and protocol signage).
   b. Court proceedings will be coordinated to monitor number of people at CJC.
   c. Remote appearances should be offered, if possible, to all parties and attorneys.
   d. Public access will be through live-streaming, CourtCall and/or limited audience seating, depending on judicial discretion and only to the extent appropriate security and social distancing measures are maintained at all times.

2. Personal protective equipment ("PPE") will be utilized.
   a. PPE will be provided by OCSC as follows:
      i. Each courtroom will receive 1 box of gloves, 1 spray bottle of disinfectant and a box of paper towels or disinfectant wipes. Disposable masks may be requested from Facilities.
      ii. Each employee/judge will also be issued one bottle of personal hand sanitizer that can be refilled in Facilities.
   b. Facial coverings (FCs) are required at Justice Centers, including court employees.
      i. Attorneys/parties shall provide for their own masks and other PPE.
      ii. Procedures for witnesses vary between criminal and civil.
         a) In criminal cases, OCSC will provide PPE for witnesses, as necessary.
         b) In civil cases, parties shall provide PPE for witnesses they intend to call.
      iii. Whether any witness is required remove their facial covering during actual testimony is within the discretion of the judicial officer.
      iv. Procedures for interpreters will be left to judicial discretion consistent with other procedures for maintaining security and social distancing.
      v. OCSC may provide PPE, if necessary, pursuant to judicial discretion.
      vi. Judicial officers wearing a FC in court is discretionary, but recommended.
   c. Exhibits or other documents and materials will be handled with the use of gloves and, as necessary, other PPE at the discretion of the judicial officer.

3. Daily Sanitizing.
   a. Courtrooms will be sanitized daily during the lunch hour and at day's end.
   b. Sanitizing will be provided upon requested by calling Facilities Management.

4. Court attendants (CAs), court clerks and Sheriff's deputies will enforce protocols.
   a. CAs, court clerks and deputies will receive protocol and enforcement training.
   b. CAs and deputies will provide PPE, as necessary.
   c. CAs and or court clerks will wipe the witness stand/microphone after each witness.

(Rev. 6/1/20)

FAQs FOR JUDICIAL OFFICERS ON JURY TRIAL PROCEDURES

1. Once a jury is selected, who will bring the jury to the courtroom? Should the jurors meet in a designated area on the first floor where the court attendant or bailiff can meet them and bring them to the courtroom?

Judges starting jury trials will be allotted 40 jurors at a time for misdemeanors and civil cases and 80 jurors at a time for felonies. This limitation serves the dual purpose of accommodating more than one jury request and, at the same time, limiting the number of people in any one location around the Justice Center. Additional jurors may be requested thereafter, as necessary.

The first set of prospective jurors (40 or 80) will be sent to a department for trial, pursuant to instructions provided by the department. For example, if a judge requests all 40 at once, all 40 will be ordered to proceed to the department. Alternatively, a judge may request less than the total number, e.g., only the number of jurors that currently fit in the courtroom at one time, and request jury services to instruct the remaining prospective jurors to report to the department at different times.

As a further alternative, a judge may provide a questionnaire for prospective jurors to fill out before coming to the department. Jury Services will provide a judge's panel the questionnaire, but they will need to be collected by the courtroom.

- **Some judges suggest the use of a questionnaire on hardship excuses only.**
- **Some judges suggest a brief questionnaire (two pages) designed to provide basic case information, e.g., a brief statement of the case and witness list, and to obtain answers to basic questions asked by the judge before the attorneys inquire.**
- **Some judges have suggested adding to a questionnaire some of the early judicial instructions and or admonitions on matters like the burden of proof and juror duties and obligations. (Sample questionnaires are available upon request.)**
- **One of the ideas behind suggesting questionnaires is to limit the number of jurors waiting in the halls. Also, a judge may have the option of granting some hardship excuses without requiring jurors to return to the department at all.**

Although they have the discretion to utilize or not utilize juror questionnaires, judges should keep in mind the time and space limitations at the Justice Center, including in the jury assembly room, due to the plan to call jurors to CJC at different times of the day. Prospective jurors will not be allowed to remain in the jury assembly room for any extended period of time beyond approximately 30 minutes after they have been assigned to a department for trial, so that the room can be cleaned in preparation for the afternoon jurors who will report starting at noon.

No matter how they choose to proceed, judicial officers are welcome to send a bailiff or court attendant to jury services to lead the prospective jurors to the department. Safety protocols will be announced at jury services and posted at various locations around the courthouse.

FAQs FOR JUDICIAL OFFICERS ON JURY TRIAL PROCEDURES

Please note if a jury panel needs to use an elevator to get to the assigned courtroom, elevator occupancy will be limited to no more than 2 persons per elevator car. The Sheriff's Department has been tasked to monitor the elevator activity on the 3rd floor at CJC. They will also convert two elevators as "express elevators" in order to get the jurors directly to their respective floors without stops on any other floor. This service will begin the week of June 1, until proven ineffective or no longer needed.

2. Staggered start times, break times, and end times for trials be conducted on the same floor.

The administration is formulating a plan to limit and coordinate court proceedings both in terms of the number of proceedings and the numbers of people, so as to maintain a safe number of people at Justice Centers in general and on each floor of the Justice Centers at any one time. The current discussion includes staggered start times, break times, and end times for each floor.

3. What should a judicial officer do if a potential juror refuses to wear a mask?

Facial coverings are required by everyone who enters a Justice Center as directed by Administrative Order 20/16 (Attachment A):

> *All members of the public entering a court building, including law enforcement, attorneys, parties, and vendors must wear face coverings for the purpose of covering their nose and mouth at all times in the public areas of the court building, including courtrooms. Face coverings may include a mask, scarf, or any other cloth material that covers both mouth and nose.*

This issue may first arise in jury assembly. If this issue arises in the courtroom, judicial officers have the discretion on how they choose to enforce the court-mandated policy, including perhaps reminding the prospective juror of the new safety rules and how they exist for the protection of everyone and or speaking with that juror alone. Judicial offers should exercise caution, so as not to encourage people to seek yet another way out of jury duty.

4. What should a judicial officer do if a sworn juror tells the court that the juror may have been exposed to Covid-19? Should the court interview the other jurors to determine their contact with the exposed juror?

Judicial officers have various tools at their disposal to protect privacy rights and prevent comments from some prospective jurors from having a positive or negative impact on other jurors. One option is for the court to interview the prospective juror out of the presence of the other jurors to determine the potential exposure.

As of May 23rd, the Orange County Healthcare Agency defines an exposure as someone who has been within 6 feet of an infectious COVID-19 person for 15 minutes

or more. A person who is diagnosed with or likely to have COVID-19 is considered infectious from 48 hours before his or her symptoms first appeared until the person is no longer required to be isolated. Current guidance indicates that "exposed persons" should self-quarantine for 14 days.

Depending on the nature and credibility of the explanation provided by the concerned juror, a judicial officer has the discretion to take any necessary action from dismissing that juror, to interviewing all jurors to determining their exposure, to dismissing the entire jury and declaring a mistrial.

5. Should the court require plexiglass shields for witnesses?

Facilities has ordered free standing plexiglass to be placed in front of the witness and judge in all designated trial courtrooms.

Current protocol requires that everyone at a Justice Center, including witnesses, wear a facial covering. (See Attachment A). To the extent a witness in a *criminal* proceeding does not have a facial covering, OCSC will provide one for them. In *civil* proceedings, the party who calls the witness is required to provide that witness with a facial covering and any personal protective equipment ("PPE") reasonably requested by that witness, although judicial officers may provide a witness with a facial covering, as they deem necessary.

A witness in any court proceeding is required to wear the facial covering. Whether a witness is required remove their facial covering during actual testimony is within the discretion of the judicial officer.

6. Informing jurors as to the court's disinfecting procedures because jurors may have questions regarding doors, escalators, bathrooms, stairs, and elevators. Should the court provide gloves to the jurors?

Current protocol does not include OCSC providing prospective jurors with gloves, since we do not anticipate them needing to touch anything. Each department will be equipped with a box of gloves for use by witnesses or sworn jurors who need to handle exhibits.

OCSC has started a "Safe Access to Justice" public relations campaign designed to ensure that prospective jurors understand all of the safety procedures and protocols in place to make them feel safe before they are required to report to a Justice Center. The campaign is on social media and the OCSC website, and informs members of the public, including prospective jurors, about how and when OCSC is sanitizing all areas of the Justice Centers. Judicial officers will be provided with copies of the safety procedures and protocols.

7. What is the role of the court attendant or bailiff in managing the jury?

The role of the bailiff and court attendant remains substantially unchanged in that both are required to inform and remind prospective and actual jurors of their responsibilities, including compliance with current safety protocols and procedures, at all times during the trial and deliberations until they are discharged. Bailiffs and Court Attendants will receive training in the safety protocols and procedures and ways to enforce them.

8. What should a judicial officer do if an attorney or a party refuses to wear a mask?

Current protocol requires everyone, including attorneys and parties, to wear a facial covering while at a Justice Center. (See Attachment A). The Court also may provide an attorney or party with a facial covering, as necessary. Judicial officers have the discretion on how they choose to enforce the court-mandated policy.

9. Evaluating hardship excuses—Financial hardship? Potential jurors in a high-risk category that are uncomfortable being at the courthouse? Childcare issues in light of the schools?

We can expect hardship excuses to be far greater in number and more justifiable than ever. Each judicial officer has the discretion to grant or deny hardship requests with or without a private interview, including, but not limited to: they are out of work and need to be aggressive in looking for a job; they have health issues and, thus do not feel comfortable at the Justice Center; and or they have child care issues at this time and, thus, are now the sole an indispensable caretaker of another.

10. Jurors' use of stairs?

Use of the stairs by everyone, including jurors, will be encouraged, and all will be required to follow all safety rules, including, but not necessarily limited to the rules requiring social distancing by six feet and wearing a facial covering. Pursuant to Attachment A:

> ***Social distancing of at least 6 feet shall be enforced in all courthouses, courtrooms, and public areas to the extent possible.***

Some jurors may not want to use or wait for the elevators. Protocols will allow two people in an elevator at a time. OCSC intends to utilize courtrooms on lower floors to the extent possible, for jury selection and if feasible for many to limit the need for large numbers of jurors to use the elevators and stairs.

11. The use of masks by judicial officers during all phases of a jury trial?

Although strongly encouraged to wear a facial covering while on the bench, each judicial officer has the discretion to wear a facial covering or not while on the bench.

Pursuant to Attachment B ("Judicial Officers Wearing of Face Coverings During Pandemic" dated May 7th, 2020):

> *Judicial Officers are strongly encouraged to wear the mask while on the bench to order to protect the health and safety of all individuals present in the courtroom.*

Everyone, including judicial officers must wear a facial covering while in the judicial elevators, break rooms, conference rooms, and back hallways of the courthouse (Id.)

12. What is the status of technology available for public access and or remote hearings?

Judges are encouraged to explore conducting remote hearings where feasible. Video capability will be set up in all courtrooms by June 15, 2020, or later as coordinated between CTS and each case type.

Criminal departments will be equipped through livestreaming and WebEx.

Civil departments will utilize CourtCall services.

All judicial officers should remain cognizant of when they are livestreaming and when they should mute or turn off the livestreaming, including when they are having private discussions with their staff or when they have completed a hearing.

Attachment A – Administrative Order 20/16

Superior Court of California
County of Orange

Chambers of
KIRK H. NAKAMURA
PRESIDING JUDGE

700 CIVIC CENTER DRIVE WEST
SANTA ANA, CA 92701

ADMINISTRATIVE ORDER NO. 20/16

REQUIRED SAFETY MEASURES AND FACE COVERINGS IN COURT

On March 18, 2020, the Orange County Health Officer issued an amended order and guidance directing the public to operate in compliance with social distancing guidelines issued by the California Department of Public Health.

On March 19, 2020 California Governor Gavin Newsom and the State Public Health Officer issued Executive Order N-33-20, ordering all individuals living in the State of California to stay home or at their place of residence, except as needed, to maintain continuity of operations of essential critical infrastructure sectors. Courts are designated Essential Critical Infrastructure Workers and provide essential services during the stay at home order.

On April 1, 2020, the California Department of Public Health issued guidance regarding the use of face coverings in public.

On April 4, 2020, the Centers for Disease Control and Prevention recommended wearing cloth face coverings in public settings where other distancing measures are difficult to maintain, especially in areas of significant community-based transmission.

On April 9, 2020 County of Orange Health Officer Dr. Nichole Quick issued a recommendation strongly encouraging all employees at essential businesses to wear a face covering while at work and all residents engaged in essential activities outside the home to do the same. The cities of Fullerton, Westminster, and Santa Ana, and others have issued orders strongly encouraging essential service providers to require face coverings for both employees and patrons. (See Director of Emergency Services for the City of Santa Ana Executive Order No. 3; City of Fullerton City Manager Proclamation No. 2020-02; Interim Westminster City Manager Executive Order.)

FAQs FOR JUDICIAL OFFICERS ON JURY TRIAL PROCEDURES

Superior Court of California
County of Orange

May 21, 2020

On April 21, 2020, the Board of Supervisors of the County of Orange issued an order requiring face coverings for all employees of any grocery store, pharmacy/drug store, convenience store, gas station, restaurant, food preparation establishment, or retail store in Orange county who may have contact with the public.[1]

As of May 6, 2020, Orange County has had 2,873 cumulative cases of COVID-19 and 69 deaths from COVID-19.

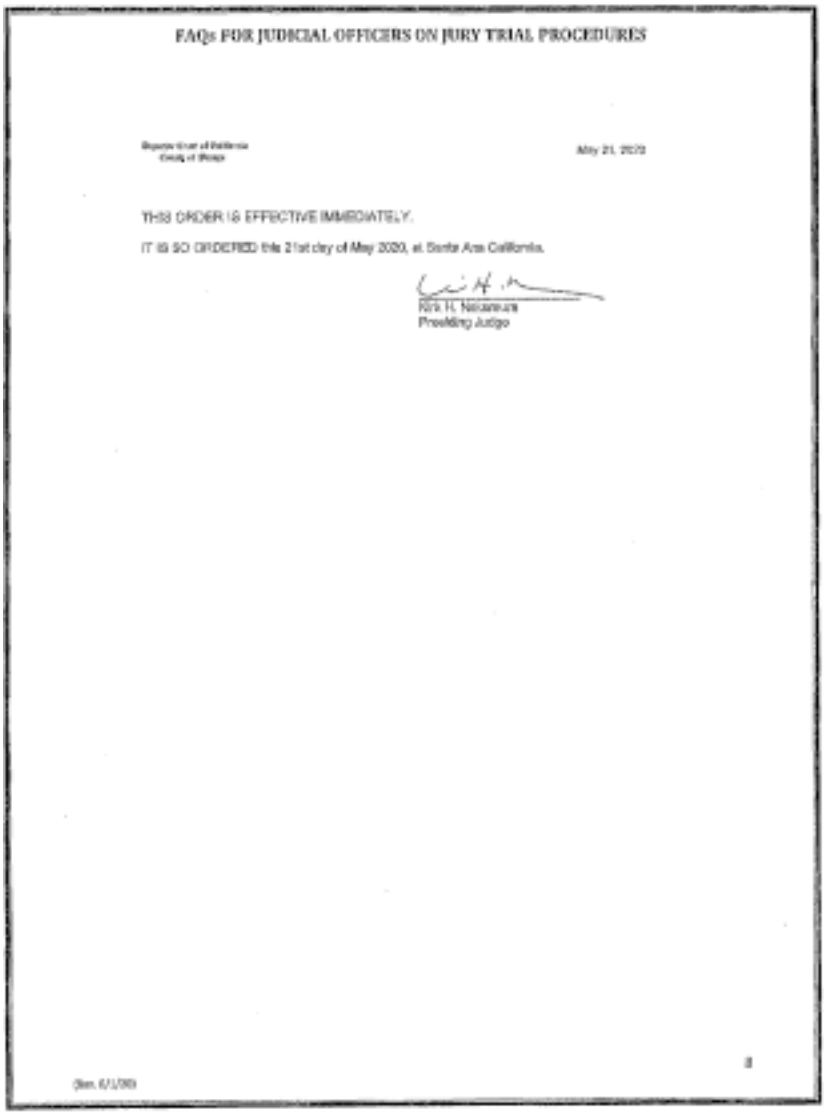
Pursuant to my authority to control matters before the Court (Code Civ. Proc., § 128; Gov. Code, § 68070); my authority as the Presiding Judge (Cal. Rules of Court, rule 10.603); the inherent powers of the Court (*In re Reno* (2012) 55 Cal.4th 428, 522); and in compliance with state and local guidelines and ordinances, I therefore order as follows:

Effective May 21, 2020, to prevent the spread of COVID-19 and to protect public health, all members of the public entering the court are subject to the following restrictions:

- Social distancing of at least six feet (6') shall be enforced in all courthouses, courtrooms, and public areas to the extent possible.
- All members of the public entering a court building, including law enforcement, attorneys, parties, and vendors must wear face coverings for the purpose of covering their mouth and nose at all times in the public areas of any court building, including courtrooms. Face coverings may include a mask, scarf, or any other cloth material that covers both mouth and nose.
- Individuals who are not wearing a mask will be denied entry to the building. Individuals who remove their masks after entering the building will be reminded of this requirement. If compliance is refused, services may not be provided, and the person may be asked to leave the court building immediately. Children under the age of three are exempt from this Order.
- For individuals with disabilities who seek an exemption from this Order as a reasonable accommodation pursuant to the Americans with Disabilities Act or California Rules of Court, rule 1.100, please contact the Court's ADA site coordinator at http://www.occourts.org/general-info/ or at ADAInformation@occourts.org.

This Order will remain in effect until 90 days after the Governor declares that the State of Emergency related to the COVID-19 pandemic is lifted, or until amended or repealed.

(Rev. 6/1/20)



FAQs FOR JUDICIAL OFFICERS ON JURY TRIAL PROCEDURES

Superior Court of California
County of Orange

May 21, 2020

THIS ORDER IS EFFECTIVE IMMEDIATELY.

IT IS SO ORDERED this 21st day of May 2020, at Santa Ana California.

Kirk H. Nakamura
Presiding Judge

(Rev. 5/1/20)

8

FAQs FOR JUDICIAL OFFICERS ON JURY TRIAL PROCEDURES

Attachment B – Judicial Officer Wearing of Face Coverings During Pandemic

POLICY OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE

TITLE: JUDICIAL OFFICERS WEARING OF FACE COVERINGS DURING PANDEMIC

POLICY: Effective May 5, 2020, all judicial officers entering a court building must wear face coverings over their mouth and nose at all times in the public areas of any court building, as well as the judicial elevators, break rooms, conference rooms, and back hallways of the courthouses. Judicial officers are also strongly encouraged to wear the mask while on the bench in order to protect the health and safety of all individuals present in their courtrooms. They are not required to wear the mask while alone in their chambers or alone in any room or elevator. Face coverings may include a mask, scarf, or any other cloth material that covers both mouth and nose.

PURPOSE: This policy was instituted in order to protect the health and safety of all employees, members of the public, and judicial officers who enter our courthouses every day. This policy is necessary during the pandemic to ensure timely access to justice for all members of the public, maximize the use of judicial and other resources, increase efficiency in court operations, enhance service to the public, and assure that our Court has sufficient jurors to conduct jury trials, and sufficient court staff, attorneys and witnesses to conduct our essential functions.

ADOPTED: May 7, 2020

This Order will remain in effect until the Governor declares that the State of Emergency related to the COVID-19 pandemic has lifted, or until amended or repealed.

Reporting Jurors – Preliminary Statistics

CENTRAL JUSTICE CENTER

Date	Day of the Week	Total # Targeted	Total # Called-In	Total # Attended	Total # FTA	FTA Percentage
6/1/2020	Monday	160	295	172	123	42%
6/2/2020	Tuesday	0	0	0	0	0%
6/3/2020	Wednesday	160	300	173	127	42%
6/4/2020	Thursday	80	152	81	71	47%
6/5/2020	Friday	0	0	0	0	0%
6/6/2020	Saturday		0	0	0	
6/7/2020	Sunday		0	0	0	
6/8/2020	Monday	80	152	104	48	32%
6/9/2020	Tuesday	0	0	0	0	0%
6/10/2020	Wednesday	0	0	0	0	0%
6/11/2020	Thursday	0	0	0	0	0%
6/12/2020	Friday	0	0	0	0	0%
6/13/2020	Saturday				0	
6/14/2020	Sunday				0	
6/15/2020	Monday	80	152	125	27	18%
6/16/2020	Tuesday	80	137	87	50	36%
6/17/2020	Wednesday	160	317	207	110	35%
6/18/2020	Thursday	80	145	97	48	33%
6/19/2020	Friday	0	0	0	0	0%
	TOTALS	**880**	**1650**	**1046**	604	**37%**

WEST JUSTICE CENTER

Date	Day of the Week	Total # Targeted	Total # Called-In	Total # Attended	Total # FTA	FTA Percentage
6/17/2020	Wednesday	40	80	54	26	33%
	TOTALS	**40**	**80**	**54**	26	**33%**

Reporting Jurors – July 2020 Statistics

CENTRAL JUSTICE CENTER

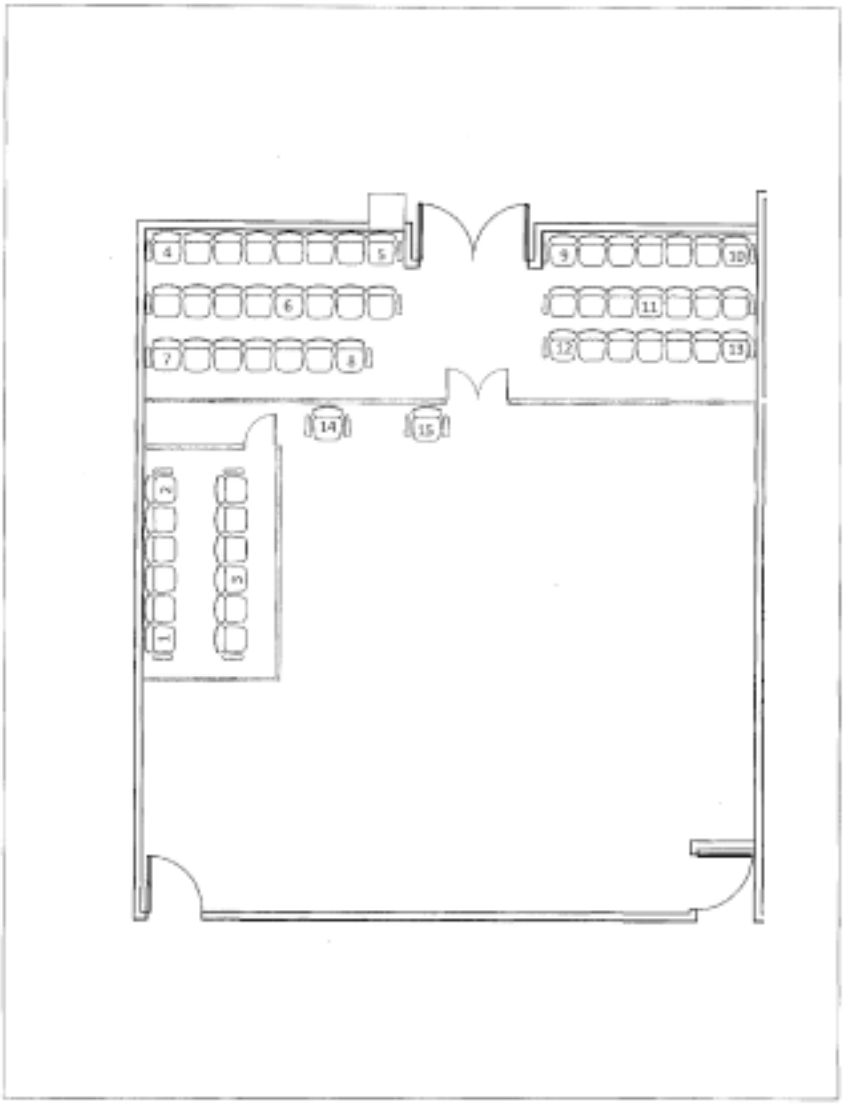
Date	Day of the Week	Total # Targeted	Total # Called-In	Total # Attended	Total # FTA	FTA Percentage
7/1/2020	Wednesday	0	0	0	0	0%
7/2/2020	Thursday	0	0	0	0	0%
7/3/2020	Friday					
7/4/2020	Saturday					
7/5/2020	Sunday					
7/6/2020	Monday	160	276	182	94	34%
7/7/2020	Tuesday	80	157	91	66	42%
7/8/2020	Wednesday	80	158	85	73	46%
7/9/2020	Thursday	80	151	90	61	40%
7/10/2020	Friday	0	0	0	0	0%
7/11/2020	Saturday					
7/12/2020	Sunday					
7/13/2020	Monday	80	152	105	47	31%
7/14/2020	Tuesday	40	82	40	42	51%
7/15/2020	Wednesday	0	0	0	0	0%
7/16/2020	Thursday	0	0	0	0	0%
7/17/2020	Friday	0	0	0	0	0%
7/18/2020	Saturday					
7/19/2020	Sunday					
7/20/2020	Monday	40	86	60	26	30%
7/21/2020	Tuesday	80	199	126	73	37%
7/22/2020	Wednesday	0	0	0	0	0%
7/23/2020	Thursday	0	0	0	0	0%
7/24/2020	Friday	0	0	0	0	0%
7/25/2020	Saturday					
7/26/2020	Sunday					
7/27/2020	Monday	0	0	0	0	0%
7/28/2020	Tuesday	40	83	40	43	52%
7/29/2020	Wednesday	40	83	56	27	33%
7/30/2020	Thursday	24	60	36	24	40%
7/31/2020	Friday	0	0	0	0	0%
	TOTALS	**744**	**1487**	**911**	576	39%

WEST JUSTICE CENTER

Date	Day of the Week	Total # Targeted	Total # Called-In	Total # Attended	Total # FTA	FTA Percentage
7/6/2020	Monday	45	80	57	23	29%
7/13/2020	Monday	40	80	64	16	20%
7/16/2020	Thursday	40	80	40	40	50%
7/21/2020	Tuesday	40	80	48	32	40%
7/27/2020	Monday	40	80	53	27	34%
	TOTALS	**205**	**400**	**262**	138	**35%**

HARBOR JUSTICE CENTER

Date	Day of the Week	Total # Targeted	Total # Called-In	Total # Attended	Total # FTA	FTA Percentage
7/15/2020	Wednesday	40	80	46	34	43%
7/24/2020	Friday	40	80	46	34	43%
	TOTALS	**80**	**160**	**92**	68	**43%**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Superior Court of California, County of Orange

JURY TRIALS

	Measure	Mar	Apr	May	Jun	Jul	*Aug	TOTAL	Monthly Average
2020	Felony	12	0	0	4	3	5	24	4
	Misdmeanor	18	0	0	11	10	13	52	9
	Total	30	0	0	15	13	18	76	13

	Measure	Mar	Apr	May	Jun	Jul	Aug	TOTAL	Monthly Average
2019	Felony	28	22	15	17	25	23	130	22
	Misdmeanor	27	32	28	26	29	29	171	29
	Total	55	54	43	43	54	52	301	50

Comments:

*Jury trial is determined/counted when the jury is sworn.

* Court closed to the public from 03-19-20 and reopened 05-26-20.

* During court closure period:

  * No new jury trial began from 03-19-20 thru 05-31.20.

  * One jury trial (that began before closure) concluded on 04-01-20 at CJC (16NF2748, Judge Manssourian).

  * Six jury trials (that began before closure) concluded in May/June after the Court reopened.

* For 2020 data, August numbers are from 08/01 through 08/21 only.

  * In addition to the felony and misdemeanor jury trials reported above, one was observed for a SVP Petition Case (M-11361) on 08/13/20 (Dept. C29, Judge Murray).

Superior Court of California
County of Orange
News Release

Public Information Office
Contact: Kostas Kalaitzidis, (520) 548-6061
PIO@occourts.org

May 21, 2020

URGENT RELEASE:

Orange County Superior Court Announces Soft Re-Opening

On Tuesday, May 26, 2020, the Superior Court of California, County of Orange will re-open courthouses for limited services, but members of the public should not visit a courthouse unless they have been notified by the Court that they have a hearing scheduled on their matter.

Beginning May 26, 2020, the branch courthouses will begin conducting preliminary hearings on felony matters. Criminal jury trials will start up in June. The number of hearings and trials is expected to grow over the coming weeks, as conditions allow. "We will be resuming four criminal jury trials that were suspended due to the Court closure and we hope to commence additional criminal jury trials in early June," said Orange County Superior Court Presiding Judge Kirk Nakamura.

Public service windows will remain closed, as this is a soft reopening. Since the Court is not yet able to assist parties on a walk-in basis, it will continue to provide drop boxes for filing documents. The Court recommends all persons consult the Court's coronavirus website (https://www.occourts.org/media-relations/CoronaVirusUpdate.html) for more details and the most up-to-date information regarding their case type.

As part of the soft opening, **the Court will be strictly enforcing health protocols. The the use of facemasks or face coverings is mandatory for anyone entering a courthouse. Social distancing rules will also be strictly enforced in all facilities,** thus the number of individuals entering public courtrooms and elevators will be subject to space limitations. **Persons displaying possible coronavirus symptoms will not be allowed in court facilities**.

The gradual reopening is necessary to ensure that the Court, as well all court users, comply with all Federal, State, and local health guidelines. The gradual reopening will enable the Court to slowly increase the caseload and visitor level at each courthouse, while at the same time monitor that health protocols are being followed.

The public is encouraged to visit the OC Health Care Agency website for up-to-date information about COVID-19 symptoms:
http://www.ochealthinfo.com/phs/about/epidasmt/epi/dip/prevention/novel_coronavirus

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Superior Court of California
County of Orange
News Release

Public Information Office
Contact: Kostas Kalaitzidis,
PIO@occourts.org

May 22, 2020

Court to Resume Jury Trials

Santa Ana, CA – The Superior Court of California, County of Orange will resume jury trials, as it begins the process of reopening to the public, on Tuesday, May 26, 2020.

"We will be carefully resuming four criminal jury trials that were suspended due to the Court closure and we hope to commence additional criminal jury trials in early June," said Orange County Superior Court Presiding Judge Kirk Nakamura. Jury trials were suspended when the Court closed to the public on March 17, 2020 due to the COVID-19 pandemic.

As part of the soft re-opening, the Court is kicking off the **"Safe Access to Justice Initiative**," a program designed to assure strict enforcement of safety precautions in order to protect jurors and all members of the public who enter Court facilities. **The use of facemasks or face coverings is mandatory for anyone entering a courthouse. Physical distancing rules will also be strictly enforced in all facilities,** thus the number of individuals entering public courtrooms and elevators will be subject to space limitations. **Persons displaying possible coronavirus symptoms will not be allowed in court facilities.**

To alleviate concerns regarding physical distancing, the Court recently implemented a mobile device-based check-in process for jurors. "Our jurors may now skip the check-in line altogether and take a seat directly in the jury assembly room," said Jury Services Manager Pete Hernandez, adding "by accessing a dedicated Court network for jurors on their mobile device, they can check-in for jury service and obtain access to the free Wifi. All they need to use is their 9-digit juror ID number that is printed on their summons. It's as simple as that." The Juror Mobile-Check-in is currently available at the Central Justice Center in Santa Ana, but will be available at the Harbor, North and West Justice Centers later this year.

"Our court is committed to keeping our community healthy," said Presiding Judge Nakamura, adding "as we begin to resume jury trials, we are implementing strict cleaning procedures and physical distancing protocols to support the health and wellness of everyone that enters Court facilities. We are also significantly reducing the number of jurors being called for service at any one time."

Remember, we cannot do it without the participation of citizens. Trial by jury is more than just a fundamental Constitutional right in the United States and California. It is a critical safeguard of the individual liberties and keep us anchored to our constitutional principles. Along with representative government, "trial by jury [is] the heart and lungs of liberty." –John Adams

In the Orange County Superior Court Justice Centers, and in every courthouse in our nation, jurors set standards of conduct by deciding what is fair, reasonable and tolerable, and what is wrong, unreasonable and intolerable in our society. The Court cannot provide jury trials without the participation of citizens. With the **"Safe Access to Justice Initiative,"** the Court is ready to safely welcome this critical part of the justice system back into our courtrooms.

Jurors are encouraged to follow step one of their summons and complete their online questionnaire before they come to the Court. For more information on jury service, visit www.occourts.org and click on "Jury Service," or call the Office of the Jury Commissioner at (657) 622-7000.

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Superior Court of California
County of Orange

UPDATE – Friday, May 22, 2020 - 9:00 a.m.

JURY SERVICE STARTING MAY 29, 2020 AND AFTER:

In response to the health concerns raised by the coronavirus (COVID-19) pandemic, the Orange County Superior Court has suspended all new jury trials through May 28, 2020.

- Jurors with call-in dates beginning the evening of Friday, May 29, 2020 or after, must follow the instructions on their postcard summons as your service may be required.
- Jurors who are currently impaneled and sitting on a trial should wait for further communication directly from their assigned courtrooms.

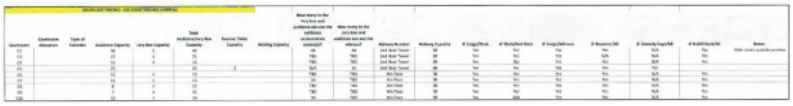
Jurors that are required to report for jury service, the Orange County Superior Court has developed a plan that that puts your health and safety at the center of our priorities.

Reduction in Jurors – We are significantly reducing the number of jurors being asked to report for jury service at any one time.

Mandatory Facial Coverings – Employees and members of the public will be required to wear facial coverings within the courthouse.

Physical Distancing - We have implemented 6-foot physical distancing policies throughout the courthouse with floor and seat guides to assist and remind of physical distancing. Elevator use is being restricted to 1-2 users at a time.

Enhanced Sanitation - We have increased the amount of routine cleaning, with a focus on high-touch surfaces and common areas including elevators, escalator rails, courtrooms, jury assembly rooms and restrooms.



Superior Court of California
County of Orange

News Release

Public Information Office
Contact: Kostas Kalaitzidis,
PIO@occourts.org

June 3, 2020

Citizens of Orange County Step Up and Answer the Call to Serve as Jurors

Santa Ana, CA – Jury trials began once again as Orange County Superior Court initiated the process of reopening last week and a large number of prospective jurors heeded the call of duty and came to the Court to serve our community.

Due to the pandemic, the Court modified juror waiting areas to assure strict enforcement of safety precautions. Prospective jurors expressed their appreciation for the Court's efforts to establish social distancing and keep everyone safe.

Judge Thomas Delaney greeted the prospective jurors, expressed the gratitude of the Court and provided information about the Court's **Safe Access to Justice Initiative**, which is designed to keep all those who enter Court facilities be healthy and safe.

"We are now ready to resume jury trials and resume them safely" Judge Delaney announced to the audience of prospective jurors. "And you are a critical part of that work."

For his part, Orange County Superior Court Presiding Judge Kirk Nakamura, said, "Today is the day that we recognize jurors for their contribution, as they step up to serve our community."

As part of the soft reopening, the Court kicked off the **"Safe Access to Justice Initiative**," a program designed to assure strict enforcement of safety precautions in order to protect jurors and all members of the public who enter Court facilities. **The use of facemasks or face coverings is mandatory for anyone entering a courthouse. Physical distancing rules will also be strictly enforced in all facilities,** thus the

number of individuals entering public courtrooms and elevators will be subject to space limitations. **Persons displaying possible coronavirus symptoms will not be allowed in court facilities.**

"Jurors will continue to be called as needed over the next weeks as we work to normalize our operations," said Jury Services Manager Pete Hernandez.

To alleviate concerns regarding physical distancing, the Court recently implemented a mobile device-based check-in process for jurors. "Our jurors may now skip the check-in line altogether and take a seat directly in the jury assembly room," said Jury Services Manager Pete Hernandez, adding "by accessing a dedicated Court network for jurors on their mobile device, they can check-in for jury service and obtain access to the free Wifi. All they need to use is their 9-digit juror ID number that is printed on their summons. It's as simple as that." The Juror Mobile-Check-in is currently available at the Central Justice Center in Santa Ana, but will be available at the Harbor, North and West Justice Centers later this year.

Jurors are encouraged to follow step one of their summons and complete their online questionnaire before they come to the Court. For more information on jury service, visit www.occourts.org and click on "Jury Service," or call the Office of the Jury Commissioner at (657) 622-7000.

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APPENDIX G

Relevant provisions of the Speedy Trial Act: 18 U.S.C. §§ 3161 and 3162

18 U.S.C. § 3161

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

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

(c)

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

trial shall commence within seventy days from the date of such consent.

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

(d)

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

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical.

The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section. The sanctions of section 3162 apply to this subsection.

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

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

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

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

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

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

(C) delay resulting from any interlocutory appeal;

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

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

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

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

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

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

(3)

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

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

essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(6) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(7)

(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection

unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to

obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

18 U.S.C. § 3162

(a)

(1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The

defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

(b) In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney, as follows:

(A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant to section 3006A of this title in an amount not to exceed 25 per centum thereof;

(B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with his defense of such defendant;

(C) by imposing on any attorney for the Government a fine of not to exceed $250;

(D) by denying any such counsel or attorney for the Government the right to practice before the court considering such case for a period of not to exceed ninety days; or

(E) by filing a report with an appropriate disciplinary committee.

The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

(c) The court shall follow procedures established in the Federal Rules of Criminal Procedure in punishing any counsel or attorney for the Government pursuant to this section.