

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KENNETH PETTWAY, JR.,

PETITIONER,

v.

THE UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When the government successively supersedes an indictment, fails to appoint Article III judges, does not run a thorough conflict check of a protected witness that it chooses not to disclose to the defense, and the district court takes years to decide pretrial motions – all of which delays the time it takes to bring the defendant to trial – should the government, rather than the defendant, bear responsibility for such delay?
2. Can a defendant making a speedy trial claim still show “prejudice” under the Fourth Factor in *Barker v. Wingo* when the defendant is not incarcerated for the majority of time he awaits his trial?

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PETITION FOR WRIT OF CERTIORARI

Kenneth Pettway, Jr., an inmate currently incarcerated at Orleans County Jail, New York, by and through his counsel, Robert C. Singer, Esq., of Singer Legal PLLC, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The summary order of the Second Circuit is reported at 845 Fed. Appx. 42 (2d Cir. Feb. 26, 2021), and is attached at pages 1-8 of the Appendix to this petition. The order of the Second Circuit denying panel rehearing and rehearing *en banc* is attached at page 9 of the Appendix. The District Court's decisions and orders denying the defendant-appellant's speedy trial motions reported at No. 12-CR-103S, 2017 U.S. Dist. LEXIS 128093 (W.D.N.Y. Aug. 11, 2017) and No. 12-CR-103S, 2018 U.S. Dist. LEXIS 173475, 2018 WL 4901063 (W.D.N.Y. Oct. 7, 2018) are attached at pages 10-16 and 11-22 of the Appendix, respectively.¹

JURISDICTION

Mr. Pettway's petition for rehearing/rehearing *en banc* on the Speedy Trial issue raised in this petition for writ of certiorari was denied by the Second Circuit on June 2, 2021. Mr. Pettway invokes this Court's jurisdiction under 28 USC § 1254(1), having timely filed this petition for a writ of certiorari within 150 days² of the Second Circuit's order denying panel rehearing/rehearing *en banc*.

¹ Hereinafter, the "Appendix" will be referred to as "A.____"

² This Court extended the 90-day filing deadline in Rule 13 to 150 days from final judgement or decision on panel rehearing/rehearing *en banc* due to the COVID-19 pandemic.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI:

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

STATEMENT OF THE CASE

This case presents two questions involving a defendant's right to a speedy trial, but both are related. Mr. Pettway waited more than *six years* to get to trial, a time period the District Court said was "almost unconscionable." A.63. While some of the delays in getting to trial should properly be attributed to Mr. Pettway, other delays resulting from acts and omissions of the government and the District Court should not. The District Court and the Second Circuit dismissed Mr. Pettway's claim of prejudice primarily because he was not in pretrial confinement for a majority of the time prior to trial and he filed motions along with his codefendants that took years to adjudicate. This Court has never held that being out on bail and filing motions excuses *per se* all acts and omissions of the government or courts when poor case management and "institutional" reasons delay a trial; instead, prior cases decided by this Court hold that such delays are weighed against the government. Furthermore, the courts below never addressed how the government's failure to appoint district judges to a busy trial court like the Western District of New York contributed to "institutional" delays that should be weighed

against the government. If this Court does not reinforce the principle that the government, not the defendant, is responsible for poor case management and “institutional” delays, then criminal defendants will suffer a deprivation of their Sixth Amendment right to a speedy trial, just like Mr. Pettway.

Moreover, this case highlights the cost of inaction by the Executive and Legislative branches when appointing, confirming, and allocating Article III judges in a proper and timely manner. This Court, which speaks for the Judicial Branch of government, can use this case to emphasize how such delay impacts the Constitutional rights of criminal defendants and all litigants. This Court should dismiss this case not only because it is legally the right thing to do, but also because this important message needs to be delivered to the two other coordinate branches of our federal government, which are not fulfilling their Constitutional duty.

A. It took Mr. Pettway more than six years to get to trial.

Petitioner Kenneth Pettway, Jr. was arrested by federal and state authorities on January 18, 2012. Thereafter, Mr. Pettway waited **6 years, 4 months, and 4 days** to get to trial. He remained in some form of custody/supervision (prison, home incarceration, home detention, electronic monitoring) awaiting trial ever since his arrest on January 18, 2012. **2316 days. 76 months.** An exceedingly long time.

During this period, Mr. Pettway filed pretrial motions and aggressively pursued a suppression motion. So did his co-defendants. There was litigation over discovery and protective orders. There were several evidentiary hearings. All of

these defense-driven motions and requests contributed to delay. However, Mr. Pettway and his co-defendants were not the only cause of delay.

The government delayed the progression of this case to trial by: superseding the indictment *four times*; assigning *seven different* prosecutors to handle the case; seeking death penalty referrals for multiple defendants that ultimately were *not approved*; seeking RICO charges against the defendants that ultimately were *dismissed*; on several occasions, *failing to respond timely* to pretrial motions (necessitating extensions); moving (unsuccessfully) to consolidate another unrelated case with Mr. Pettway's based on a flawed reading of the law; filing at least two motions to reconsider adverse pre-trial rulings of the district court that ultimately were unsuccessful; attempting to amend the *fourth* superseding indictment *on the eve of trial* and, when that effort was unsuccessful, filing an interlocutory appeal to challenge that ruling; and, when this interlocutory appeal gave the government time they otherwise did not have before, prosecutor's introduced a late addition to its witness list that, *on the eve of trial*, caused Mr. Pettway's attorney to have to withdraw due to an unwaivable conflict of interest, delaying this case yet again. The government also delayed this case by failing to perform its Constitutional duty by leaving a district judgeship vacant in the Western District of New York and by not appointing an adequate number of district judges to one of the busiest districts in the Nation.

The District Court contributed to delays, too: it announced its frustration with the government's successive superseding of the indictment, but did

not impose a penalty; it took months to schedule evidentiary hearings; it took months and years to decide motions; and, it scheduled the proceedings in a manner that did not ensure the swift progression of this case to trial.

B. The District Court denies Mr. Pettway’s Speedy Trial challenge.

Mr. Pettway first asserted his request for a speedy trial in a September 2016 letter sent to his counsel, the district court, and the government, but his defense counsel did not file a motion to dismiss until several months after this request. Thereafter, Mr. Pettway twice moved for dismissal of the charges based on a violation of the Speedy Trial Clause of the Sixth Amendment. A.10-22. The District Court considered and denied both challenges, the second and final decision being delivered months *after* his trial was concluded. A.10-22. The District Court denied his challenges based on the fact that Mr. Pettway was not in pretrial detention, co-defendants filed rounds of pretrial motions, Mr. Pettway did not assert his right to a speedy trial until four years into the case, Mr. Pettway did not suffer any specific “trial-related prejudice,” and the government’s acts and omissions, if any, constituted negligence rather than intentional conduct. A.10-22. The District Court did not comment on or take responsibility for any delays it may have caused in the case or how a lack of available Article III judges caused delays. A.10-22.

C. The Second Circuit affirms the District Court’s denial of Mr. Pettway’s speedy trial challenge.

Following his 2018 conviction, Mr. Pettway challenged his conviction on direct appeal before the Second Circuit. The lead issue in his brief was the

denial of his right to a speedy trial. In denying Mr. Pettway's claim, the Second Circuit opined that it was important that Mr. Pettway "did not assert his right to a speedy trial until more than four years after he was arrested . . . [and] the fact that it took him so long to raise the issue weighs heavily in the government's favor."³

A.6. The Second Circuit also opined that Mr. Pettway did not show that he was "significantly prejudiced" by the delay to get to trial because he was not incarcerated for the vast majority of time, was selling music and making videos to earn money, and did not show that his defense was "significantly hindered" by the delay.⁴ A.6. And while the Second Circuit did find that the government's error in the Fourth Superseding Indictment "delayed the trial significantly" and the addition of Confidential Witness #1 – that led to the conflict issue and withdrawal of Mr. Pettway's original counsel – added "further delay" to the case, according to the Second Circuit, neither of these reasons tipped the scale in Mr. Pettway's favor.

A.6. The Second Circuit did not comment on whether the government's and the district court's management decisions in this case contributed to delay. The Second Circuit also did not opine whether a vacant judgeship contributed to slow-processing of the case and should be held against the government.

³ This petition will not address the merits of this finding, but Mr. Pettway disputes it. While it is true that Mr. Pettway did not request a speedy trial until September 2016, after he requested one, it took from September 2016 until May 2018 – a period of 20 months – to get to trial, and this was after the case existed for more than four years following the January 2012 arrest/March 2012 indictment. The delay during this 20-month period was caused by the government's interlocutory appeal, the CW#1 conflict issue, and a congested court docket, facts that weigh in Mr. Pettway's favor.

⁴ Mr. Pettway disputes this as well. His affidavit shows the hardships he faced on pretrial release, A.32-36. He also raised below how Dorothy Brown, a favorable witness, passed away after he asserted his right to a speedy trial. So, while this Court has made clear that death of a witness is not always required to prove prejudice, *see* Section I(E), *infra*, Mr. Pettway made this showing.

REASONS FOR GRANTING THE WRIT

- I. This case presents an opportunity to reinforce why the Executive, Legislative, and Judicial branches have a collective duty to move a case forward to trial in a speedy, orderly manner and how each coordinate branch must execute its duty to fulfill this important responsibility.**

Speedy Trial Clause jurisprudence has disproportionately commented on the actions of the defendant rather than the government and the courts when evaluating whether a defendant suffered harm. This disproportionate focus on the defendant – often in the context of a direct appeal following a conviction for a serious felony – has led case law to develop in a way that does not often evaluate (and hold accountable) the government and the courts for delays prior to trial. Mr. Pettway’s case contains several examples of government and “institutional” delay, but rather than addressing those concerns or holding actors accountable, the District Court and the Court of Appeals either dismissed those claims or failed to comment on them. This was a disservice to the Constitution and every Citizen.

This Court should hear this case to reimpose balance in Speedy Trial case law and, more importantly, to hold the government and the courts accountable. If someone does not, criminal defendants like Mr. Pettway will continue to suffer and have their legitimate concerns ignored by bureaucracy and unelected judges appointed for life.

A. The Sixth Amendment and the Right to a “Speedy Trial.”

Following passage of the Bill of Rights, the Constitution enshrined the right to a speedy trial for all criminal defendants “to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless

substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges.” *United States v. MacDonald*, 456 U.S. 1, 8 (1982). Over time, this Court has “distilled the defendant’s interest in a speedy trial to three ingredients”:

- 1) To prevent undue and oppressive incarceration prior to trial;
- 2) To minimize anxiety and concern accompanying public accusation; and,
- 3) To limit the possibilities that long delay will impair the ability of an accused to defend himself.

See United States v. Loud Hawk, 474 U.S. 302, 312 (1986).

Because the Sixth Amendment does not establish a specific number of days for a defendant to proceed to trial, what “speedy” means depends upon the defendant’s and public’s interests in an efficient, fair, and effective justice system.

See, e.g., Loud Hawk, 474 U.S. at 312-13. When a defendant raises a challenge under the Sixth Amendment to the length of delay it took to get his case to trial, courts evaluate that claim using four factors:

- 1) The length of the delay;
- 2) The reasons for the delay;
- 3) Whether the defendant asserted his right in the run-up to the trial; and,
- 4) Whether the defendant was prejudiced by the failure to bring the case to trial more quickly.

See Barker v. Wingo, 407 U.S. 514, 530 (1972). This Court has made clear that “none of the four factors identified above [are] either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they

are related factors and must be considered together with such other circumstances as may be relevant.” *Id. at 533.* As this Court remarked:

these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused’s interest in a speedy trial is specifically affirmed in the Constitution.

Id.

B. Successively superseding an indictment for more than a year is not negligent conduct – it is intentional government conduct employed to gain a tactical advantage at trial. The government should be charged for such delay and this Court should make clear that this unfair practice has consequences when it delays a trial, up to and including, dismissal of an indictment.

One of the ways this case languished for six years was prosecutors’ practice of successively superseding the indictment to add new charges and codefendants. As a result, what began as a rather common drug and gun case in 2012, later ballooned into a ten-defendant RICO conspiracy involving death penalty referrals in 2013, and then shrank back to the same drug and gun case involving Messrs. Pettway and Black as trial approached in 2016, 2017, and 2018. The District Court and Second Circuit did not find fault with this practice. This Court should. As set forth below, prosecutors abused their discretion in successively bringing new charges when they were not ready to try Mr. Pettway for his crimes in January 2012. This practice, while permissible under the rules of procedure, is nevertheless impermissible under the Sixth Amendment when it delays the trial of the defendant.

1. How successive indictments ground this case to a halt.

Mr. Pettway was arrested with another codefendant, Mr. Black, on January 18, 2012. A.24. Both were charged via criminal complaint with possession of illegal narcotics (cocaine and heroin) and firearms. The original charges concerned Messrs. Pettway and Black *only*. The charges stemmed from a search warrant conducted at Mr. Black's apartment in which Mr. Pettway was present and was alleged to have occupied frequently. On March 27, 2012, Messrs. Pettway and Black – and *only Messrs. Pettway and Black* – were indicted for these offenses. A.24. In June 2012 and July 2012, Mr. Pettway filed his pretrial motions, but these motions were never heard because the government chose to convert this case into a multi-defendant RICO conspiracy involving death penalty referrals by filing a superseding indictment in July 2012. A.24. Making matters worse, from July 31, 2012 until April 23, 2013, prosecutors chose to successively supersede the superseding indictment *four times*. A.24-26.

By superseding, prosecutors added eight new codefendants, two of which were charged with murder and had their cases referred to the Justice Department for death penalty consideration. A.25-26. Prosecutors added RICO Conspiracy charges to the drug and gun charges Mr. Pettway faced in the original indictment. These actions not only increased the complexity of the case (which impacted processing times in court), but also distracted prosecutors so much that they failed to file responses to Mr. Pettway's motions and briefs. A.26-28. Prosecutors even ventured to add more codefendants by consolidating this case with another one. A.27-28.

The most difficult part was that Mr. Pettway could do nothing to prevent these delays. Notwithstanding the Magistrate Judge's frustration with having to reset hearings and deadlines because of prosecutors' choices to successively supersede the indictment⁵, the district court is vested with little authority to prevent the practice (other than dismissal under Fed. R. Crim. P. 48), so all it did was verbally chastise prosecutors on the record. This did nothing. And when it was all said and done, the motions that Mr. Pettway filed in July 2013 were not given an evidentiary hearing until May 2015, were not decided by the Magistrate Judge until October 2015, and were not finally decided by the District Court until March 2016. A.26-29. In other words, it took the court nearly *three years* to process this case during the pretrial motions phase.

2. The government must bear responsibility for this delay.

The second *Barker* factor concerns the "reason for the delay." Different weights are assigned to different reasons for delay. *Barker*, 407 U.S. at 531. If the

⁵ For example, when prosecutors failed to return the third superseding indictment when promised, the Magistrate Judge expressed his frustration, stating to the prosecution at a status conference:

[AUSA] Parisi, I got to say, I'm not happy -- and you can relay the message to [your lead prosecutor] Mr. Bruce -- with the fact that I think it was everybody's understanding that there was going to be a superseding indictment by this time. [The Court was]n't given any notice that it hasn't been returned. [The Court] had to actually do our own digging to find out what the status was. Now, I can't control what the government does in terms of superseding, but, I mean, if it's expected that a superseding indictment is going to be returned, then essentially today is a waste of time.

And when the government explained that there was a "hold-up" because of coordination problems between the grand jury, the U.S. Attorney's Office – WDNY, and DOJ, the Magistrate Judge griped, "I mean, if I could control what the government's timing of this, I certainly would, because I think we all got to move this forward. But I can't, so --."

government deliberately delays the case to gain a tactical advantage at trial, then such delay is weighed heavily against the government. *See id.* “A more neutral decision such as negligence or overcrowded courts” is weighed less heavily against the government, *see id.*, however even “neutral” delays are counted against the government because the “ultimate responsibility” for such circumstances – whether “government[] inaction,” “over-crowded dockets,” a “court’s failure to rule expeditiously on [a defendant’s] motions,” or “institutional delays” – “must rest with the government rather than the defendant.” *United States v. New Buffalo Amusement Corp.*, 600 F.2d 368, 377 (2d Cir. 1979) (quoting *Barker*, 407 U.S. at 531).

Here, the government’s act of successively superseding the indictment caused multiple delays in this case. The District Court excused these delays because this case had multiple codefendants who litigated detention and other matters and filed pretrial motions during this phase, but that justification is unconvincing and simplistic.⁶ It fails to recognize the fact that prosecutors were not ready to try Mr. Pettway in January 2012 and does not make clear how rather than dismissing the original complaint/indictment against Mr. Pettway so that it could get its act together and reintroduce a thought-out, complete indictment (the right thing to do), prosecutors chose to pursue this case piecemeal (the wrong thing to do). If this Court does not make clear that such action, when it delays a trial, will be charged to the government, then, in the future, prosecutors will continue to abuse

⁶ The Second Circuit did not address this point in its Summary Order.

their authority and use the tactic of successively superseding an indictment to build a case when the case continues to be investigated and they are not prepared to proceed. This is an important federal question this Court should answer.

C. The failure of the Executive and Legislative branch to appoint and confirm an adequate number of district judges in the WDNY delayed the processing of Mr. Pettway's case. This delay is chargeable to the government and this Court must make that clear.

It took the District Court nearly *three years* to decide pretrial motions in this case. Regrettably, the District Court was unwilling to admit that this was a judicial failure and, instead, placed blame on the defendants for filing motions. The filing of motions, even “complex” ones in a multi-defendant case, does not excuse taking three years to adjudicate pretrial motions. The unwillingness of the Second Circuit to address this failure is equally disappointing.

Much of this case was processed during a time period where the Executive and Legislative branches consistently failed to fill a vacant judgeship in the WDNY.⁷ The President's and Congress' failure to act was political. And the judicial branch in the WDNY had difficulty making up for the lack of resources when nothing was done. The statistics do not lie. Between 2012-2017, the WDNY:

⁷ See, e.g., Editorial, “Federal Court Vacancy Must Be Filled Promptly,” *Buffalo News*, Sep. 9, 2017, available at: <http://buffalonews.com/2017/09/21/editorial-federal-court-vacancy-must-filled-promptly/> (last accessed: Oct. 18, 2021) [hereinafter, “Vacancy Editorial”]; see also P. Fairbanks, “Is eight years too long to wait for federal trial?,” *Buffalo News*, Jul. 9, 2018, available at: https://buffalonews.com/news/local/crime-and-courts/is-8-years-too-long-to-wait-for-federal-trial/article_01171b9b-8c34-52fb-b6dc-d0fa87ecd436.htm (last accessed Oct. 18, 2021) (discussing speedy trial dismissals and concerns in three other WDNY cases); Editorial, “Fix the Federal Courts,” *Buffalo News*, Jul. 10, 2018, available at: https://buffalonews.com/opinion/editorial/editorial-fix-the-federal-courts/article_c6c1fdf6-b2e9-5d57-a0a0-e0de2980e21c.html (last accessed Oct. 18, 2021) (same).

had some of the slowest processing times for civil and criminal cases in the nation; had the most pending cases of any district within the Second Circuit; ranked as the seventh busiest judicial district nationally; had the most criminal felony filings of any district in the Second Circuit; and, had the second slowest median average processing time for criminal cases in the Second Circuit, ranking 87 out of 94 districts nationally (i.e., the seventh slowest) for this metric. A.31⁸; *see also* Vacancy Editorial, *supra* note 4.

Making matters worse, the Executive Branch has not expanded the size of the judiciary in the WDNY *for thirty years* notwithstanding the fact that the WDNY consistently is ranked as one of the busiest in the nation. To their credit, the judiciary in the WDNY undertook several initiatives to improve case processing times, such as spearheading a program to bring District Judges from other districts to sit on cases within the WDNY⁹ and persuading Senior-Status Judges to keep very active dockets.¹⁰ *See* Vacancy Editorial, *supra* note 4. The judiciary's efforts to solve this crisis should be commended. Without them, the plight of Mr. Pettway (and others similarly situated to him) would be far worse. However, notwithstanding the fact that each Judge is doing his and her best given the limited resources the government has offered to him and her to complete a difficult job, the

⁸ This page in the Appendix includes data from the Federal Court Management Statistics, New York Western, September 2017, available at: <http://www.uscourts.gov/file/22297/download> (last accessed: Oct. 18, 2021).

⁹ In this case, the District Judge asked another District Judge to sit the trial of Mr. Pettway in 2018 because the District Judge was double booked and did not want to delay Mr. Pettway's trial again.

¹⁰ The District Judge in this case assumed senior status in 2015.

stressors placed on the system continue to exact a toll on defendants. That is not Mr. Pettway's fault, *it is the government's fault.*

As case law makes clear, court congestion is the responsibility of the government, not the accused. If the district court is unable to meet its Constitutional obligations, even if not by design, such failure cannot emasculate an accused's right to a speedy trial. *See United States v. McAfee*, 780 F.2d 143, 146 (1st Cir.1985), *vacated and remanded on other grounds*, 107 S. Ct. 49 (1986); *United States v. Dennard*, 722 F.2d 1510, 1513 (11th Cir.1984); *Terry v. Duckworth*, 715 F.2d 1217, 1220 (7th Cir. 1983); *New Buffalo Amusement Corp.*, 600 F.2d at 377; *United States v. Carini*, 562 F.2d 144, 149–50 (2d Cir.1977). Indeed, “elimination of delays caused by court congestion and administrative red tape was a major, if not the major, concern of Congress in passing the [federal Speedy Trial] Act,” *McAfee*, 780 F.2d at 146, citing S. Rep. No. 1021, 93d Cong. 2d Sess. 22, *reprinted in A. Partridge, Legislative History of Title I of the Speedy Trial Act of 1974*, at 160 (Fed. Judicial Center 1980), codified at 18 U.S.C. § 3161. That is why the Act directed courts to give preference to criminal cases and to establish speedy trial plans to accomplish this mandate.

Here, those expectations were not met. This case *quadrupled* the median average for a criminal case to get to trial in the WDNY (a number that is excessive to begin with). The processing time of this case *exceeded by a factor of six* the median average in the majority of the other districts in the Second Circuit. Government action (and inaction) was the principal driver of this delay. Since the

President and Congress neither appointed and confirmed judges nor allocated sufficient resources to help lower the median average processing time from charge to trial, then the government was left with a binary choice: 1) respect the speedy trial rights of an accused by focusing on existing cases and not charging new cases that place a strain on limited resources or 2) dishonor the speedy trial rights of an accused by continuing to charge new cases that divert limited resources and increase demands on an already overburdened system. Here, the government's choice was clear: it left a judgeship vacant by failing to confirm a new district judge in the WDNY, did not expand the judiciary in the WDNY, and continued filing felony cases knowing how overburdened the system is. Then, the government injected further inefficiency into the process by superseding the indictment in this case multiple times (another poor choice). Mr. Pettway is a victim of these choices. He should not be held accountable for them. The government should.

#

This Court's jurisprudence shaped opinions in the Courts of Appeal which have opined that “[b]oth the [district] court and the government” have an “affirmative obligation” to the defendant and the public generally “to bring [a case] on for trial promptly, rather than permitting delay for whatever reason to drag on . . . [because] the duty is upon the state, in the interest of the public, to bring prosecutions to a swift conclusion.” *See, e.g., New Buffalo Amusement Corp.*, 600 F.2d at 377-78; *see also United States v. Vispi*, 545 F.2d 328, 334 (2d Cir. 1976) (“We have repeatedly emphasized that affirmative action by the government in bringing

cases to trial is mandated and that it cannot escape this duty on the ground that the delay is for institutional reasons.”). Presidential and Congressional inaction created the lack of resources in this case that delayed Mr. Pettway’s opportunity to get to trial. This Court – a coordinate branch of our divided government – must hold the other branches accountable for their failure to do their job. While it is true that this check and balance comes at the cost of this conviction, it also is true that the Executive and Legislative branches need a “wake up call.” Dismissal of this case on Speedy Trial grounds will serve that important purpose.

D. The government’s failure to investigate the conflict issue that caused Mr. Pettway’s counsel to get removed and the trial to get delayed for a second time is chargeable to the government. When the government refuses to disclose the name of a protected government witness, it assumes the responsibility to perform a conflict check. When it does not exercise such diligence, this Court needs to emphasize that consequences will follow.

A month before Mr. Pettway’s arrest, the government used a confidential informant (“CW#1”) to conduct three controlled buys at Mr. Black’s apartment. Following Mr. Pettway’s 2012 arrest, the government resisted disclosing the identity of CW#1 to the defense. This carried through years of motion practice on the search warrant and continued through the Interlocutory Appeal. It was not until the eve of Trial Date #2 that the government finally disclosed the name of CW#1 to counsel for Mr. Pettway. And that did not occur but for a threat of preclusion from the District Judge. When CW#1’s name finally was disclosed, the conflict issue quickly was identified. This derailed trial for almost another year.

As the District Court correctly identified, “everybody’s got egg on their face. And, you know, that’s okay sometimes, but when it impinges on a constitutional right, that’s another matter.” A.49. Yet, the bad optics of this situation pale in comparison to the affect this has had on Mr. Pettway’s Constitutional rights. His trial was delayed. His choice of counsel was affected. All of this could have been avoided if the U.S. Attorney’s Office had in place a simple, common-sense protocol to screen for this conflict. As we know, it did not.

In fact, this was not the first time this conflict issue occurred within the WDNY. At oral argument on the conflict issue, the District Court recalled *at least four instances* of the same thing happening in the past and at least one of those instances was in a recent case. A.41-42. And despite the existence of this institutional problem, the government continued to do nothing because, in prosecutors’ estimations, it was beyond their control and unavoidable. A.49; A.60-61. This position was not good enough for the District Court, at first. That changed when the District Judge denied Mr. Pettway’s motion to dismiss. Yet, Mr. Pettway urges this Court to take the opposite view.

If a procedure was put in place by the government to identify conflicts like this – something the government was on notice of happening in the past – this last-minute disqualification issue could have been avoided years ago. If CW#1’s identity was disclosed to counsel for Mr. Pettway years ago, the 2017 trial delay could have been avoided. If the government did not call this witness – a witness they seemingly forgot about in 2016 because CW#1 was not on the government’s

witness list in 2016 when it delayed trial to file the interlocutory appeal – this issue could have been avoided. A.62. Even if this delay was not deliberate and just “neutral” or “administrative,” this delay did not arise because of happenstance – the government’s negligence in failing to check for a potential conflict on a self-proclaimed essential witness that it refused to disclose to the defense *was the root cause of the delay in these segments*. That is why the delay in this segment should fall on the government’s shoulders, not Mr. Pettway’s.

This is an important issue that requires clarity. Every year, the government withholds the names of protected witnesses in thousands of criminal cases. What we know from this case is that prosecutors choose not to investigate potential conflicts with a defendant’s counsel because they do not have a procedure in place and do not care to create one. So, the same thing that happened to Mr. Pettway can (and will) happen to other defendants. To prevent such prejudice, this Court needs to make clear to prosecutors that while the law permits them not to disclose the identity of a protected witness, when the government withholds the identity of that witness, it assumes the responsibility to perform a conflict check against defense counsel. If it does not and a conflict later arises that delays trial, then the government should be responsible for the delay and the delay should weigh in favor of dismissal.

E. Speedy Trial violations still occur in cases where a defendant is released on bail and a critical defense witness does not die or prejudice is difficult to define. This Court needs to make clear that existing precedent does not excuse violations because a defendant posts bail. Bail is not a prophylactic for poor case management and “institutional” delays. Prejudice need not always be clear cut.

The Second Circuit ruled against Mr. Pettway because, according to the court, he did “not show[] that he was significantly prejudiced by the delay” in bringing him to trial. A.6. In making this conclusion, the panel cited to the facts that Mr. Pettway “was primarily on home confinement while awaiting trial,” sold his music and made “a rap video in which he showed off his ankle bracelet,” and “did not show that his defense was significantly hindered because of the delay.” A.6. These conclusions are flawed and conflict with Supreme Court precedent.

The fact that Mr. Pettway was on home confinement rather than in pretrial confinement is inapposite. This Court has never expressed a black-and-white view that pretrial confinement is a requirement to find speedy trial prejudice. And while Mr. Pettway did not spend the majority of time awaiting trial in a prison cell, he spent almost six years on restrictive terms of pretrial supervision. All the while, he had this case hanging over his head. His business and social opportunities dried up. There was no evidence in the record that Mr. Pettway made a lot of money from the video he shot of his ankle monitor. As he explained to the District Court, he suffered from anxiety, concern, isolation, and personal and financial hardship throughout this period. A.32-36. This six-year depravation of liberty and freedom should not be dismissed as “no big deal” like it was by the District Court and the Second Circuit – it constitutes exactly the type of prejudice

this Court envisioned in *Barker*. See *Barker*, 407 U.S. at 538 (noting how in *Klopfer v. North Carolina*, 386 U.S. 213, 221-222 (1967), the Supreme Court indicated that a defendant awaiting trial on bond might be subjected to public scorn, deprived of employment, and chilled in the exercise of his right to speak for, associate with, and participate in unpopular political causes). The concept that pretrial incarceration is not a perquisite to finding Speedy Trial prejudice also was echoed by this Court in *United States v. Marion*:

Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense. **But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense.** To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. **Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.**

United States v. Marion, 404 U.S. 307, 320, 92 S. Ct. 455, 463 (1971) (emphasis added). Why did this Court state this? Because when a person is accused of a crime, the accusation itself carries consequences whether the person is in a jail cell or not.

This is why the District Court's and Second Circuit's reasoning is problematic. The same is true of other Courts of Appeal to take up this issue. Too often, our lower courts disregard claims of Speedy Trial prejudice because a defendant is not subject to pretrial incarceration or require significant confinement

to find prejudice.¹¹ Yet, this was never a requirement to a successful Speedy Trial claim. This Court must make that clear or defendants like Mr. Pettway, who have valid Speedy Trial claims but were released from pretrial custody, will continue to have their Speedy Trial objections ignored.

Likewise, the Second Circuit's conclusion that Mr. Pettway "did not show that his defense was significantly hindered because of the delay" also conflicts with this Court's precedent. No speedy trial cases published by this Court require a defendant to show that his defense was "significantly hindered." As this Court has cautioned, "*Barker* explicitly recognized that impairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony 'can rarely be shown.'" *See Doggett v. United States*, 505 U.S. at 655 (citing *Barker* 402 U.S. at 532). For this reason, affirmative evidence of impairment *is not required* in order to find a Sixth Amendment violation. *See id.*

For example, as this Court made clear in *Doggett v. United States*, in some cases "excessive delay presumptively compromises the reliability of a trial in

¹¹ See, e.g., *United States v. De Rong Shang*, No. 12-10551, 583 F. App'x 801, 802 (9th Cir. 2014) ("Shang has not demonstrated any prejudice arising out of the delay — he was not in custody, he has not submitted evidence of any particular anxiety or concern, and he has failed to show impairment of his defense."); *United States v. Saenz*, 623 F.3d 461, 465 (7th Cir. 2010) ("We have stated that "[s]ignificant pretrial incarceration may support a presumption of prejudice, but this prejudice 'unenhanced by tangible impairment of the defense function and unsupported by a better showing on the other factors than "was made here, does not alone make out a deprivation of the right to [a] speedy trial."') (internal citation omitted); *United States v. Gadson*, No. 94-5490, 1995 U.S. App. LEXIS 2097, at *6 (4th Cir. Feb. 1, 1995) ("Here Gadson was free on bond during the entire nineteen months he was under indictment . . . [and made] no showing of . . . actual and substantial . . . prejudice [to his defense]."); *United States v. Koller*, 956 F.2d 1408, 1414 (7th Cir. 1992) ("[Defendant] must show that his defense was impaired such that he suffered actual and substantial prejudice as a result of the delay").

ways that neither party can prove or, for that matter, identify.” *See Doggett*, 505 U.S. at 655. As a result, it is not always necessary for a defendant to pinpoint with specificity how the delay prejudiced his defense. *See id.* at 648 (finding that an affirmative showing of actual prejudice was not necessary given that the length of delay was six years, which is six times as long as that generally sufficient to trigger judicial review). As *Doggett* made clear, “[w]hile not compelling relief in every case where bad-faith delay would make relief virtually automatic, neither is negligence automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him. It was on this point that the Court of Appeals erred” *Id.* at 657.

This is why the Second Circuit’s new and higher standard of “significant hindrance” (or something akin to it) is not in conformance with this Court’s prior precedent.¹² This Court should correct this misstatement of the law.

CONCLUSION AND PRAYER FOR RELIEF

By Mr. Pettway’s count, ***over 700 days of delay*** can be attributed directly to the government and the district court in getting his case to trial. When you tack on the weight of other delays – neutral, administrative, or deliberate – that number easily balloons to ***1000 days or more***. In a case that existed for more than

¹² In its jurisprudence, the Second Circuit continues to push a higher (and differing) standard to establish a Sixth Amendment violation. *See, e.g., United States v. Reyes-Batista*, No. No. 19-4052-cr, 844 F. App’x 404, 408 (2d Cir. Feb. 9, 2021) (“**We generally require a ‘showing of some significant trial-related disadvantage’ to establish a constitutional violation.”**) (internal citations omitted) (emphasis added). This goes beyond what this Court says is necessary to establish a violation under *Barker* and its progeny.

2300 days, that equates to more than half of the time it took to get to trial. In 2017, the District Court expressed how the delays in this case were “unconscionable.”

A.63. Mr. Pettway would choose another word: Unconstitutional.

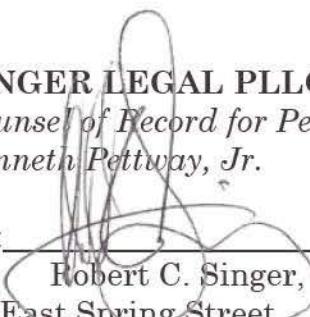
Not only does the Second Circuit’s reasoning on “prejudice” conflict with established Supreme Court precedent, but the Second Circuit’s unwillingness to address the structural and tactical problems that led to some of the delays in this case is inexplicable. When prosecutors cause delays by prosecuting a case piecemeal, not complying with deadlines, and failing to check for conflicts on a protected witness they refuse to disclose, those delays are not “neutral” and must be held against the government. When the Executive and Legislative branches fail to appoint, confirm, and properly allocate judges to complete necessary judicial work, those delays are not “neutral” and must be held against the government. Furthermore, *Barker* and its progeny has never required a showing of inhuman incarceration or “significant” trial prejudice to prevail on a Speedy Trial violation. Granting certiorari in this case will afford a mechanism to reinforce all of these important principles and provide a mechanism to hold the criminal justice system (and the government players inside the system) accountable for the missteps that led to this case taking more than six years to get to trial.

Consequently, this Court should grant certiorari to review the Second Circuit’s summary order, summarily reverse the decision below on Mr. Pettway’s

speedy trial objection, or grant such other relief as justice requires.

Dated: October 28, 2021
Williamsville, New York

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CERTIFICATE OF COMPLIANCE

The foregoing reply brief contains 6,889 words, including headings, footnotes and quotations and is in accordance with the length restrictions in S. Ct. R. 33. This brief complies with the typeface requirements and the type style requirements of S. Ct. R. 33 because it has been prepared in proportionately spaced typeface using Microsoft Word 2010 in 12-point Century Schoolbook font.

Dated: October 28, 2021
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APPENDIX

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As of: October 19, 2021 4:37 AM Z

United States v. Black

United States Court of Appeals for the Second Circuit

February 26, 2021, Decided

18-3316-cr

Reporter

845 Fed. Appx. 42 *; 2021 U.S. App. LEXIS 5745 **; 2021 WL 753430

UNITED STATES OF AMERICA, Appellee, -v-
DEMETRIUS BLACK, DEE BLACK, TYRONE BROWN,
AKA Ty Boog, TARIQ BROWN, AKA Reek, AKA Reek
Havick Boog, AKA Tyriq Brown, QUINTON
THOMPSON, AKA Q, EDDIE ALLEN, AKA Pow Pow,
AKA Bundles, MONTELL JONES, AKA Telly, RAYMEL
WEEDEN, AKA Ray Deuce, DERRICK RAMOS, AKA
Little D, Defendants, KENNETH PETTWAY, JR., AKA
KPJ, Defendants-Appellants.*

Notice: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: [**1] Appeal from the United States District Court for the Western District of New York (Skretny, J.).

[United States v. Smitherman, 2014 U.S. Dist. LEXIS 163016, 2014 WL 6609648 \(W.D.N.Y., Nov. 20, 2014\)](#)

Core Terms

district court, sentence, convictions, counts, speedy trial, indictment, vacated, gun, de novo, First Step Act, firearm, leader, drug trafficking, enhancement, proceedings, suppress, cocaine, factors

Case Summary

Overview

HOLDINGS: [1]-The district court committed plain error under Rehaif when it failed to charge the jury that the government had to prove that defendant knew of his

* The Clerk of the Court is respectfully requested to amend the official caption of this action to conform to the caption listed above.

status because the record did not contain sufficient evidence to show that defendant was on notice of his status as a person who was convicted of a felony punishable by a sentence exceeding one year, and the error affected defendant's substantial rights, as well as the fairness and integrity of the judicial proceedings; [2]-The district court did not err in finding that defendant's right to a speedy trial was not violated because the delay was attributable to both defendant and the government, defendant did not assert his right to a speedy trial until more than four years after he was arrested, and defendant had not shown that he was significantly prejudiced by the delay.

Outcome

Judgment affirmed in part and vacated in part. Case remanded.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Possession of Weapons > Unregistered Firearm > Elements

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

[HN1](#) Unregistered Firearm, Elements

In Rehaif, the United States Supreme Court held that the word "knowingly" as used in [18 U.S.C.S. § 924\(a\)](#) applies both to the defendant's conduct and to the defendant's status. Accordingly, to convict a defendant in accordance with Rehaif, the government must show that the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

Criminal Law & Procedure > ... > Appeals > Standards of Review > Plain Error

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Jury Instructions

HN2 Plain Error, Definition of Plain Error

Where the defendant did not object to the district court's charge, the appellate court reviews under the plain error standard: whether (1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

Criminal Law & Procedure > Sentencing > Multiple Convictions

HN3 Sentencing, Multiple Convictions

The First Step Act amended [18 U.S.C.S. § 924\(c\)\(1\)\(C\)](#) to eliminate the stacking of multiple convictions arising from the same indictment.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Findings of Fact

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Speedy Trial

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

HN4 Criminal Process, Speedy Trial

The appellate court reviews the district court's findings of fact as they pertain to a speedy trial challenge for clear error and its legal conclusions de novo. To determine whether a defendant's right to a speedy trial has been violated, the court considers four factors: the length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. No

one factor is dispositive.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Preliminary Proceedings > Speedy Trial > Constitutional Right

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

HN5 Criminal Process, Speedy Trial

Where a delay in a case was presumptively prejudicial to the defendant, this alone cannot carry a speedy trial violation. Instead, the court is required to examine the remaining Barker factors.

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Findings of Fact

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Motions to Suppress

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Motions to Suppress

HN6 Clearly Erroneous Review, Findings of Fact

On appeal from the denial of a motion to suppress, the appellate court reviews the district court's conclusions of law de novo and its factual findings for clear error, viewing the evidence in a light most favorable to the government.

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Exclusionary Rule

Criminal Law & Procedure > ... > Exclusionary Rule > Exceptions to Exclusionary Rule > Good Faith

Criminal Law & Procedure > Search &

Seizure > Exclusionary Rule > Rule Application & Interpretation

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Scope of Protection

Constitutional Law > ... > Fundamental Rights > Search & Seizure > Warrants

HN7 Search & Seizure, Exclusionary Rule

A judge who determines whether there is probable cause to issue a warrant makes a practical, common-sense decision whether, given all of the circumstances set forth in the affidavit there is a fair probability that contraband or evidence of a crime will be found in a particular place. Because the *Fourth Amendment* exclusionary rule is intended to deter intentional conduct that is patently unconstitutional, evidence seized by officers who carried out a warrant that issued without probable cause need not be excluded if those officers relied on the warrant in good faith.

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Jury Instructions

HN8 De Novo Review, Jury Instructions

The appellate court review a claim of error in the district court's jury instructions de novo, disturbing the district court's judgment only if the appellant shows that the error was prejudicial in light of the charge as a whole. A jury charge is adequate if taken as a whole, it is correct and sufficiently covers the case so that a jury can intelligently determine the questions presented to it. A jury instruction is erroneous if it if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law.

Criminal Law & Procedure > ... > Use of Weapons > Commission of Another Crime > Elements

Criminal Law & Procedure > Sentencing > Ranges

Criminal Law & Procedure > ... > Use of Weapons > Commission of Another Crime > Penalties

HN9 Commission of Another Crime, Elements

Defendants who use or carry a firearm in furtherance of a drug trafficking crime face certain mandatory minimum sentences. *18 U.S.C.S. § 924(c)*. The mere presence of a weapon at the scene of a drug crime, without more, is insufficient to prove that the gun was possessed in furtherance of the drug crime. Instead, there needs to be a nexus between the possession or use of the gun and the furtherance of the crime. Ultimately, the test is whether a reasonable jury could, on the evidence presented at trial, find beyond a reasonable doubt that possession of the firearm facilitated a drug trafficking crime by affording some advantage relevant to the vicissitudes of drug trafficking.

Criminal Law & Procedure > ... > Appeals > Standards of Review > Clear Error Review

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Sentences

Criminal Law & Procedure > ... > Appeals > Standards of Review > De Novo Review

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Findings of Fact

HN10 Standards of Review, Clear Error Review

The appellate court reviews a district court's application of an enhancement under the United States Sentencing Guidelines de novo and factual determinations underlying a district court's Guidelines calculation for clear error.

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Aggravating Role

HN11 Adjustments & Enhancements, Aggravating Role

Under *U.S. Sentencing Guidelines Manual § 3B1.1*, the leader/organizer enhancement applies if the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive. *§ 3B1.1(a)*.

Criminal Law & Procedure > ... > Use of Weapons > Commission of Another Crime > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Penalties

HN12 Commission of Another Crime, Elements

The appellate court reviews whether multiple [18 U.S.C.S. § 924\(c\)](#) counts should be treated as furthering the same conspiracy, which is a question of law that requires the appellate court to determine whether a defendant committed separate crimes, *de novo*. To convict a defendant of multiple [§ 924\(c\)](#) counts, the evidence that serves as the basis for each [§ 924\(c\)](#) count must differ. It is not determinative whether the same conduct underlies the counts; rather, it is critical whether the offense, in the legal sense, as defined by Congress, complained of in one count is the same as that charged in another.

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FOR Kenneth Pettway, Jr., DEFENDANT-APPELLANT: Robert C. Singer, Singer Legal PLLC, Williamsville, New York.

Judges: PRESENT: DENNY CHIN, SUSAN L. CARNEY, STEVEN J. MENASHI, Circuit Judges.

Opinion

[*45] SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **VACATED** and the case is **REMANDED** for further proceedings.

Defendant-appellant Kenneth Pettway, Jr., appeals from a judgment of the district court entered November 9, 2018 convicting him, after a jury trial, of two counts of narcotics violations (Counts 1 and 3), possession of firearms and ammunition by a convicted felon (Count 5), and two counts of possession of firearms in furtherance of a drug trafficking crime (Counts 2 and 4), in violation of [21 U.S.C. §§ 846, 841\(a\)\(1\), \(b\)\(1\)\(A\)\(iii\), \(b\)\(1\)\(C\)](#) and [18 U.S.C. §§ 922\(g\)\(1\), 924\(a\)\(2\), \(c\)\(1\)\(A\)\(i\),](#)

[\(c\)\(1\)\(C\)\(i\), 2](#). He was sentenced to 480 months' imprisonment and five years' supervised release. On appeal, Pettway argues that (i) his right to a speedy trial was violated; (ii) [\[**2\]](#) the district court erred in denying his motion to suppress; (iii) the district court improperly instructed the jury on the definition of "in furtherance" of; (iv) he is entitled to a sentence reduction based on the First Step Act of 2018, see Pub. L. No. 115-391, 132 Stat. 5194 (2018) (the "First Step Act"); (v) the government failed to prove that he had sufficient knowledge of his prior gun conviction, as required by the Supreme Court's subsequent decision in [Rehafif v. United States, 139 S. Ct. 2191, 204 L. Ed. 2d 594 \(2019\)](#); (vi) the district court erred in giving him a leader enhancement at sentencing; and (vii) he should have been charged with only one [§ 924\(c\)](#) offense. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We delayed our decision in this case because the *Rehafif* issue had been raised in several cases in this Court preceding this one.¹ Those cases have now been decided, [\[*46\]](#) and in accordance with those decisions, we conclude that the felon-in-possession conviction must be vacated and the case remanded. We affirm as to the remaining claims, except that we do not reach the First Step Act issue. As we are remanding in light of *Rehafif*, we leave it to the district court to decide the applicability of the First Step Act [\[**3\]](#) in the first instance.

BACKGROUND

Pettway was the leader of the Bailey Boys, a violent street gang that sold drugs and committed robberies in Buffalo, New York. Another gang member, Demetrius Black, lived in an apartment at 23 Roosevelt Avenue ("23 Roosevelt"), which served as Pettway and Black's stash house. The two sold drugs out of 23 Roosevelt. On January 9, 2012, Erie County Deputy Sheriff-Detective Warren Hawthorn of Erie County secured a search warrant for 23 Roosevelt. The warrant was based on Hawthorn's affidavit and an *in camera* interview of a cooperating witness. The witness admitted to having purchased cocaine from Pettway

¹ In a summary order filed August 6, 2020, we severed and resolved the appeal of the co-defendant Rayshod Washington. See [United States v. Washington, 814 F. App'x 664 \(2d Cir. 2020\)](#) (summary order).

over the prior several months, and he explained that Pettway sold cocaine out of 23 Roosevelt. The warrant was executed on January 18, 2012, and local law enforcement recovered small amounts of cocaine and heroin, a razor blade, roughly 50 small Ziploc bags, two digital scales, a loaded 9 mm pistol, and a loaded .32 caliber pistol, as well as ammunition. Pettway and Black were arrested.

Pettway was indicted on March 27, 2012, and prosecutors superseded his indictment four times, with the fourth and final indictment being issued on April 23, 2013. For [**4] the years following the initial indictment, the parties engaged in extensive motion practice. Pettway brought motions to compel discovery and other substantive motions, including motions to suppress the evidence recovered at 23 Roosevelt. Throughout this period, time was excluded for speedy trial purposes, and trial was scheduled for October 2016. Shortly before trial, however, the government discovered that it made a mistake describing a gun in the fourth superseding indictment and, after the district court did not allow it to offer the correct gun as [Rule 404\(b\)](#) evidence, it filed an interlocutory appeal. We upheld the government's appeal in part and denied it in part. [United States v. Brown, 691 F. App'x 666 \(2d Cir. 2017\)](#).

In January 2017, while the government's appeal was pending, Pettway invoked his right to a speedy trial for the first time. On June 16, 2017, Pettway moved to dismiss the indictment on speedy trial grounds. The district court denied his motion and set trial for September 2017. In the summer of 2017, the government located a missing witness ("CW#1"). As a consequence, the district court postponed the trial to allow the defense to investigate and prepare. On October 5, 2017, after learning the witness's identity, defense counsel [**5] revealed there was a conflict because he had previously represented the witness. Accordingly, he was replaced by a new attorney. On May 1, 2018, a few weeks before the rescheduled trial, Pettway once again moved to dismiss his case on speedy trial grounds. His motion was denied, and he was tried and convicted later that month. Pettway was sentenced on October 15, 2018. This appeal followed.

DISCUSSION

1. *Rehaif*

[HN1](#)[] In *Rehaif*, the Supreme Court held that "the

word 'knowingly' [as used in [§ 924\(a\)](#)] applies both to the defendant's conduct and to the defendant's status." [139 F.471 S. Ct. at 2194](#). Accordingly, to convict a defendant in accordance with *Rehaif*, the government must show that "the defendant knew he possessed a firearm and also that he knew he had the relevant status when he possessed it." *Id.* The district court did not charge the jury that the government had to prove that Pettway knew of his "status."

[HN2](#)[] Pettway did not object to the district court's charge, and thus we review under the plain error standard: "whether (1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights; and (4) the error seriously affects the fairness, [**6] integrity or public reputation of judicial proceedings." [United States v. Miller, 954 F.3d 551, 557-58 \(2d Cir. 2020\)](#) (internal quotation marks and citation omitted).

Our decisions applying *Rehaif* in this context have focused on the third and fourth prongs of plain error review, and considered whether the record contained sufficient evidence to show that the defendant was aware of his "status." In *United States v. Walker*, we affirmed the conviction because the evidence showed that Walker had at least five prior felony convictions, including one for felon-in-possession of a firearm, and four of the prior convictions resulted in sentences of more than a year. [974 F.3d 193, 202-03 \(2d Cir. 2020\)](#). Hence, we concluded that the evidence showed that Walker was "well aware" of his status. *Id. at 202*. In contrast, in *United States v. Morales*, we found plain error and remanded where Morales's stipulation "did not mention the duration of her sentence or anything else indicative of her subjective knowledge at the time she possessed a gun as to whether she had been convicted of a crime punishable by a term of imprisonment exceeding on[e] year." [819 F. App'x 53, 54 \(2d Cir. 2020\)](#) (summary order); accord [United States v. Johnson, 820 F. App'x 29 \(2d Cir. 2020\)](#) (summary order) (vacating and remanding in light of *Rehaif*). Further, Morales was sentenced for the predicate offenses "to a conditional [**7] discharge, meaning she served no carceral or probationary sentence." [Morales, 819 F. App'x at 55](#). Hence, it was not at all apparent from the record that Morales knew of her "status."

This case is more like [Morales](#) than [Walker](#). Pettway stipulated that he had been convicted of "a felony offense, that is, a crime punishable by imprisonment for a term exceeding one year," App'x at 2569, but this

language is similar to the language in Morales's stipulation, which we found non-dispositive. Moreover, Pettway's predicate offense resulted only in a six-month term of imprisonment, not a year. And unlike Walker, Pettway does not have a history of serious convictions. Accordingly, we conclude that the record did not contain sufficient evidence to show that Pettway was on notice of his status as a person who was convicted of a felony punishable by a sentence exceeding one year. This error affected Pettway's substantial rights, as well as the fairness and integrity of the judicial proceedings. Finding plain error, we therefore vacate the judgment of conviction as to Count 5 and remand for the district court to consider the issue in light of the recent caselaw.

2. First Step Act

Prior to December of 2018, a defendant was subject to a twenty-five-year ^{**8} mandatory minimum for two § 924(c) convictions even when they arose from the same indictment. *Deal v. United States*, 508 U.S. 129, 132, 113 S. Ct. 1993, 124 L. Ed. 2d 44 (1993) (interpreting earlier version of § 924(c)). On December 21, 2018, Congress passed ^{HN3} the First Step Act, which, *inter alia*, amended § 924(c)(1)(C) to eliminate ^{*48} the stacking of multiple convictions arising from the same indictment.²

In these proceedings, Pettway was convicted of two § 924(c) counts and sentenced to five years for the first conviction (Count 2) and twenty-five years for the second conviction (Count 4), to run consecutively to each other and to all other sentences. He argues that, pursuant to the First Step Act, he is entitled to have the twenty-five year sentence on Count 4 vacated.

As we are vacating Pettway's conviction on Count 5 and remanding for a *de novo* resentencing in light of *Rehafif*, we leave it to the district court to decide, after consulting with the parties on remand, the applicability of the First Step Act to this case. In the meantime, we vacate the sentences on all ^{**9} counts.

² The relevant language of the First Step Act provides:

Section 924(c)(1)(C) of Title 18, United States Code, is amended, in the matter preceding clause (i), by striking "second or subsequent conviction under this sub-section" and inserting "violation of this subsection that occurs after a prior conviction under this subsection becomes final."

132 Stat. 5221-22 (emphasis added). *Id.* at § 403 (emphasis added).

3. Remaining Claims on Appeal

A. Speedy Trial

^{HN4} "We review the district court's findings of fact as they pertain to a speedy trial challenge for clear error and its legal conclusions *de novo*." *United States v. Lynch*, 726 F.3d 346, 351 (2d Cir. 2013). To determine whether a defendant's right to a speedy trial has been violated, "[w]e consider four factors: the '[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *United States v. Black*, 918 F.3d 243, 254 (2d Cir. 2019) (citing *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972)). No one factor is dispositive. *Id.*

^{HN5} The delay in this case -- over six years -- was presumptively prejudicial to Pettway. But this alone cannot carry a speedy trial violation. Instead, we are required to examine the remaining *Barker* factors. *Black*, 918 F.3d at 254. Here, the delay is attributable to both Pettway and the government. For his part, Pettway filed numerous motions and requested several adjournments. For its part, the government's error on the fourth superseding indictment delayed the trial significantly, and further delay resulted when the government located a witness who had previously been represented by Pettway's attorney, resulting in the attorney's disqualification. Importantly, Pettway did not assert his right to a speedy trial until more than four years after ^{**10} he was arrested, having agreed in the interim to delays that were of his own making. Although he asserted this right again shortly before trial, the fact that it took him so long to raise the issue weighs heavily in the government's favor.

Finally, Pettway has not shown that he was significantly prejudiced by the delay. See *Barker*, 407 U.S. at 532. Pettway was not incarcerated for a vast majority of the time that he was awaiting trial. And while the specter of going to prison was undoubtedly stressful, Pettway was primarily on home confinement while awaiting trial. Although Pettway asserted that he and his family suffered stress and economic harm, his actions, which included selling his music and making a rap video in which he showed off his ankle bracelet, tell a different story. Lastly, Pettway did not show that his defense was significantly hindered because of the delay. Accordingly, we conclude ^{*49} that the district court did not err in finding that Pettway's right to a speedy trial was not

violated.

B. Motion to Suppress

HN6 [↑] On appeal from the denial of a motion to suppress, we review the district court's "conclusions of law *de novo* and its factual findings for clear error, viewing the evidence in a light most [**11] favorable to the government." *United States v. Ramos*, 685 F.3d 120, 128 (2d Cir. 2012). **HN7** [↑] A judge who determines whether there is probable cause to issue a warrant "make[s] a practical, common-sense decision whether, given all of the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). Because the *Fourth Amendment* exclusionary rule is intended to deter "intentional conduct that [is] patently unconstitutional," evidence seized by officers who carried out a warrant that issued without probable cause need not be excluded if those officers relied on the warrant in good faith. *Herring v. United States*, 555 U.S. 135, 143-44, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009).

Here, the state judge who issued the warrant interviewed the cooperating witness *in camera*. Two federal judges reviewed the state judge's notes and also found probable cause for the issuance of the warrant. Hence, three judges independently found there was "a fair probability that contraband or evidence of a crime [would] be found" at 23 Roosevelt. See *Gates*, 462 U.S. at 238. But even assuming, *arguendo*, that the warrant issued without probable cause because it could have been more specific, Pettway has put forth no evidence or argument that the officers who executed the warrant acted in bad faith. [**12] See *Herring*, 555 U.S. at 143-44. Accordingly, the district court properly denied Pettway's motion to suppress.

C. Jury Instructions

HN8 [↑] "We review a claim of error in the district court's jury instructions *de novo*, disturbing the district court's judgment only if the appellant shows that the error was prejudicial in light of the charge as a whole." *Sheng v. M&TBank Corp.*, 848 F.3d 78, 86 (2d Cir. 2017). A jury charge is adequate if "taken as a whole, [it] is correct and sufficiently covers the case so that a jury can intelligently determine the questions presented to it." *Garnett v. Undercover Officer C0039*, 838 F.3d 265, 280

(2d Cir. 2016). "A jury instruction is erroneous if it if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law." *Sheng*, 848 F.3d at 86.

HN9 [↑] Defendants who use or carry a firearm "in furtherance of" a drug trafficking crime face certain mandatory minimum sentences. 18 U.S.C. § 924(c). "[T]he mere presence of a weapon at the scene of a drug crime, without more, is insufficient to prove that the gun was possessed in furtherance of the drug crime." *United States v. Snow*, 462 F.3d 55, 62 (2d Cir. 2006) (internal quotation marks and emphasis omitted). Instead, there needs to be a "nexus" between the possession or use of the gun and the furtherance of the crime. *Id.* "Ultimately, the test is whether a reasonable jury could, on [**13] the evidence presented at trial, find beyond a reasonable doubt that possession of the firearm facilitated a drug trafficking crime" by "afford[ing] some advantage . . . relevant to the vicissitudes of drug trafficking." *United States v. Lewter*, 402 F.3d 319, 322 (2d Cir. 2005).

The district court's jury instruction accurately reflected the law, as it made [*50] clear that, to convict, the jury had to find that "the firearm helped forward, advance or promote the commission of the crime," and that the gun "played some part in furthering the crime in order for this element to be satisfied." App'x at 2351. During the jury's deliberations, however, the jury asked for a definition of "in furtherance of." In response, the district court gave the jury an additional instruction that provided a non-exhaustive list of factors that the jury could consider in determining whether a gun was used in furtherance of drug trafficking. This list tracked language from *Snow*. See *462 F.3d at 62-63*.

Pettway argues that this instruction was improper, based on our observation in *Lewter* that relying on a list of factors to understand whether a gun was used in furtherance of a crime "is of limited utility" because "each case has its own wrinkles." *Lewter*, 402 F.3d at 322. The statement in *Lewter*, however, was only dicta and [*51] it does not preclude a district court from listing factors that may be helpful to a jury. Additionally, the district court here made it clear that its list was not exhaustive. Accordingly, the district court did not err in its jury instructions.

D. Leader Enhancement

HN10 [↑] We review a district court's application of an

enhancement under the Guidelines *de novo* and factual determinations underlying a district court's Guidelines calculation for clear error. United States v. Rowland, 826 F.3d 100, 116 (2d Cir. 2016). **HN11** Under U.S.S.G. § 3B1.1, the leader/organizer enhancement applies if the defendant "was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." USSG § 3B1.1(a). Here, several witnesses testified that Pettway was the leader of the Bailey Boys, an organization with more than five participants. Accordingly, the district court did not err when it applied the leader enhancement.

E. § 924(c) Convictions

HN12 We review whether multiple § 924(c) counts should be treated as furthering the same conspiracy -- which is a question of law that requires us to determine whether a defendant committed separate crimes -- *de novo*. United States v. Mejia, 545 F.3d 179, 204 (2d Cir. 2008). To convict a defendant of multiple § 924(c) counts, the evidence that serves as the basis for each § 924(c) count must differ. United States v. Arline, 835 F.3d 277, 279, 282-283 (2d Cir. 2016). "It is not ****15** determinative whether the same conduct underlies the counts; rather, it is critical whether the offense - in the legal sense, as defined by Congress - complained of in one count is the same as that charged in another." United States v. Chacko, 169 F.3d 140, 146 (2d Cir. 1999) (internal quotation marks omitted).

Pettway argues that the government separated the same § 924(c) offense into two separate offenses to use the "harsh sentencing provision[] . . . to force a plea." Appellant's Br. at 73. He contends that Counts 2 and 4 of the fourth superseding indictment cover the same conduct -- a two-year narcotics conspiracy that spanned from 2010 to 2012 -- and that therefore Count 4 should be vacated. Although the two counts Pettway complains of are similar, they are sufficiently different to allow the government to have charged two separate crimes. Importantly, they involve two distinct drug charges -- one for cocaine base and the other for heroin and cocaine. See Mejia, 545 F.3d at 183-84, 205-06 (defendants properly charged with two § 924(c) counts based on shootings of two victims in one location and a shooting of a third victim 40 minutes later at a separate location). Accordingly, we are not persuaded.

[*51] ***

For the foregoing reasons, we **VACATE** the judgment of

the district court and **REMAND** ****16** for further proceedings. While we affirm the convictions as to all counts except Count 5, we **VACATE** the sentences on all counts. As Count 5 remains unresolved, the district court shall conduct a *de novo* resentencing after resolving the open issues.

End of Document

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 2nd day of June, two thousand twenty-one.

United States of America,

Appellee,

v.

Demetrius Black, Dee Black, Tyrone Brown, AKA Ty Boog, Tariq Brown, AKA Reek, AKA Reek Havick Boog, AKA Tyriq Brown, Quinton Thompson, AKA Q, Eddie Allen, AKA Pow Pow, AKA Bundles, Montell Jones, AKA Telly, Raymel Weeden, AKA Ray Deuce, Derrick Ramos, AKA Little D,

Defendants,

Kenneth Pettway, Jr., AKA KPJ,

Defendants-Appellants.

ORDER

Docket No: 18-3316

Appellant, Kenneth Pettway, Jr., filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk


Catherine O'Hagan Wolfe



 Neutral
As of: October 19, 2021 4:49 AM Z

United States v. Pettway

United States District Court for the Western District of New York

August 11, 2017, Decided; August 11, 2017, Filed

12-CR-103S (1)

Reporter

2017 U.S. Dist. LEXIS 128093 *

UNITED STATES OF AMERICA, v. KENNETH PETTWAY, JR., Defendant.

Subsequent History: Reconsideration denied by, Motion denied by [United States v. Pettway, 2018 U.S. Dist. LEXIS 173475, 2018 WL 4901063 \(W.D.N.Y., Oct. 7, 2018\)](#)

Prior History: [United States v. Smitherman, 2014 U.S. Dist. LEXIS 163016, 2014 WL 6609648 \(W.D.N.Y., Nov. 20, 2014\)](#)

Core Terms

speedy trial, indictment, weighs, speedy trial right, superseding, reasons, factors

Case Summary

Overview

HOLDINGS: [1]-Defendant's motion seeking dismissal of his fourth superseding indictment on Speedy Trial Act grounds was denied because he did not specifically challenge any of the exclusions of time that were made over the course of the prosecution, nor does he point to any instances in which proper exclusions were not made; [2]-An interlocutory appeal by the government did not count against the speedy trial timeline; [3]-Defendant's [Sixth Amendment](#) speedy trial rights had not been violated because although the delay was nearly 67 months, the delay was mostly attributable to defendant's and his 10 co-defendants' motion practice. Moreover, he waited until almost five years to assert his right to speedy trial and he did not identify any specific trial-related prejudice or disadvantage.

Outcome

Motion denied.

LexisNexis® Headnotes

Criminal Law & Procedure > Preliminary Proceedings > Speedy Trial > Statutory Right

[HN1](#) Speedy Trial, Statutory Right

The Speedy Trial Act requires the government to bring criminal defendants to trial within 70 days of their first appearance before a judicial officer or the filing of an indictment, whichever is later. [18 U.S.C.S. § 3161\(c\)\(1\)](#). In the event the defendant is not brought to trial within the 70 prescribed days, the indictment shall be dismissed on motion of the defendant. [18 U.S.C.S. § 3162\(a\)\(2\)](#). On such a motion, the defendant is the one who bears the burden of proving a violation of the Speedy Trial Act. [18 U.S.C.S. § 3162\(a\)\(2\)](#).

Criminal Law & Procedure > ... > Speedy Trial > Statutory Right > Excludable Time Periods

[HN2](#) Statutory Right, Excludable Time Periods

The Speedy Trial Act excludes certain periods of delay from the Speedy Trial clock. For instance, the 70-day period is automatically tolled for the duration of any delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or the other prompt disposition of, such motion. [18 U.S.C.S. § 3161\(h\)\(1\)\(D\)](#). It is also tolled for delay attributable to a co-defendant and to interlocutory appeals. [18 U.S.C.S. §§ 3161\(h\)\(6\)](#) and [\(h\)\(1\)\(C\)](#). Also excludable is any period of delay if the judge finds that the ends of justice served by taking such action outweigh the best interest of the public and the

defendant in a speedy trial. [18 U.S.C.S. § 3161\(h\)\(7\)\(A\)](#). Under this exclusion, the court must set forth, in the record of the case, either orally or in writing, its reasons for so finding. [18 U.S.C.S. § 3161\(h\)\(7\)\(A\)](#).

Criminal Law & Procedure > ... > Speedy Trial > Statutory Right > Excludable Time Periods

[HN3](#) Statutory Right, Excludable Time Periods

Delay resulting from any interlocutory appeal is automatically excludable from the statutory speedy trial calculation by operation of law. [18 U.S.C.S. § 3161\(h\)\(1\)\(C\)](#).

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Preliminary Proceedings > Speedy Trial > Constitutional Right

Criminal Law & Procedure > Preliminary Proceedings > Speedy Trial > Statutory Right

[HN4](#) Criminal Process, Speedy Trial

The [Sixth Amendment](#) provides that in all criminal prosecutions, the accused shall enjoy the right to a speedy trial. [U.S. Const. amend VI](#). Although unusual, it is possible for a delay that does not violate the Speedy Trial Act to run afoul of the [Sixth Amendment's](#) guarantee of a speedy trial.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Preliminary Proceedings > Speedy Trial > Constitutional Right

[HN5](#) Criminal Process, Speedy Trial

There are four factors that courts must assess when conducting [Sixth Amendment](#) right to speedy trial analysis: the length of delay; the reason for the delay; the defendant's assertion of his right; and prejudice to the defendant. These factors must be considered together, as none alone has the talismanic quality sufficient to find deprivation of the right of speedy trial. The balancing process is difficult and sensitive, but must

be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Preliminary Proceedings > Speedy Trial > Constitutional Right

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

[HN6](#) Criminal Process, Speedy Trial

In the context of the right to speedy trial, delays approaching 12 months are presumptively prejudicial.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Preliminary Proceedings > Speedy Trial > Constitutional Right

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

[HN7](#) Criminal Process, Speedy Trial

In a [Sixth Amendment](#) Speedy Trial analysis, closely related to length of delay are the reasons given by the government to justify the delay. Courts weigh the reasons alongside the defendant's conduct, and give different justifications differing weights. For example, prosecutorial negligence is weighed less heavily than a deliberate attempt to delay the trial to hamper the defense; but it would nevertheless be weighed against the government because it has the ultimate responsibility for bringing the defendant to trial.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Preliminary Proceedings > Speedy Trial > Constitutional Right

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

[HN8](#) [down] Criminal Process, Speedy Trial

A defendant's claim that the government violated her right to a speedy trial is seriously undermined when the defendant, and not the government, is the cause of the delay.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Preliminary Proceedings > Speedy Trial > Constitutional Right

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

[HN9](#) [down] Criminal Process, Speedy Trial

The efforts a defendant makes to assert the speedy trial right are closely related to the other factors in the [Sixth Amendment](#) right to speedy trial test. If a defendant is seriously being deprived of his right, he is more likely to vigorously assert it, and such an assertion is given strong evidentiary weight. But the inverse is also true: failure to assert the right in a timely manner will be weighed against the defendant.

Constitutional Law > ... > Fundamental Rights > Criminal Process > Speedy Trial

Criminal Law & Procedure > Preliminary Proceedings > Speedy Trial > Constitutional Right

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Speedy Trial

[HN10](#) [down] Criminal Process, Speedy Trial

Prejudice to the defendant is assessed in light of the interests the speedy trial right was designed to protect. The U.S. Supreme Court has identified three such interests: to prevent oppressive pretrial incarceration; to minimize anxiety and concern of the accused; and to limit the possibility that the defense will be impaired. The most serious of these interests is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. Despite these considerations, however, courts are generally reluctant to find a speedy trial right violation in the absence of specific prejudice. The Court of Appeals for the Second

Circuit has generally required a showing of some significant trial-related disadvantage in order to establish a speedy-trial violation.

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Judges: WILLIAM M. SKRETNY, United States District Judge.

Opinion by: WILLIAM M. SKRETNY

Opinion

DECISION AND ORDER

I. INTRODUCTION

Presently before this Court is Defendant Kenneth Pettway, Jr.'s motion to dismiss the fourth superseding indictment on speedy trial grounds under the Speedy Trial Act, 18 U.S.C. § 3161 et seq., and the Sixth Amendment to the United States Constitution. (Docket No. 823.) For the reasons discussed below, Pettway's motion is denied.

II. DISCUSSION

Pettway argues that dismissal of the fourth superseding indictment is required because his rights to a speedy trial under the Speedy Trial Act and the Sixth Amendment have been violated. The government maintains that no such violations have occurred and that a full 70 days remain in which to bring Pettway to trial.

A. Pettway's Speedy Trial Act Claim

HN1 The Speedy Trial Act requires the government to bring criminal defendants to trial within 70 days [*3] of their first appearance before a judicial officer or the filing of an indictment, whichever is later. See 18 U.S.C. § 3161 (c)(1); see also United States v. Oberoi, 295 F. Supp. 2d 286, 289 (W.D.N.Y. 2003), aff'd, 547 F.3d 436 (2d Cir. 2008).

In the event the defendant is not brought to trial within the 70 prescribed days, the indictment "shall be dismissed on motion of the defendant." 18 U.S.C. § 3162 (a)(2). On such a motion, the defendant is the one who bears the burden of proving a violation of the Speedy Trial Act. See 18 U.S.C. § 3162 (a)(2) (providing that "[t]he 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)"); United States v. Adams, 448 F.3d 492, 503 (2d Cir. 2006).

HN2 The Speedy Trial Act excludes certain periods of delay from the Speedy Trial clock. For instance, the 70-day period is automatically tolled for the duration of any "delay resulting from any pretrial motion, from the

filings of the motion through the conclusion of the hearing on, or the other prompt disposition of, such motion." 18 U.S.C. § 3161 (h)(1)(D). It is also tolled for delay attributable to a co-defendant and to interlocutory appeals. 18 U.S.C. §§ 3161 (h)(6) and (h)(1)(C). Also excludable is "any period of delay . . . if the judge . . . find[s] that the ends of justice served by taking such action outweigh the best interest [*4] of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(7)(A). Under this exclusion, the court must "set[] forth, in the record of the case, either orally or in writing, its reasons [for so finding]." Id. Again, it is the defendant's burden to prove a violation of the Speedy Trial Act.

Here, Pettway has failed to meet his burden and has made little attempt to do so. Although he spends a good portion of his motion recounting the history of this case (dating back to January 19, 2012, and including more than 840 docket entries), he does not specifically challenge any of the exclusions of time that were made over the course of this prosecution, nor does he point to any instances in which proper exclusions were not made.

Instead, Pettway offers only non-specific, speculative assertions, such as "counsel believes that there are numerous times within which the speedy trial time clock should not be attributable to [Pettway]" (Affidavit of Herbert L. Greenman, Esq. ("Greenman Aff."), Docket No. 823, ¶ 47); "[a]ny adjournments granted to [Pettway's co-defendants] should not, *in toto*, be attributed to [Pettway]" (Greenman Aff., ¶ 48); and "[b]ecause the excludable time exceeds the time allowable, counsel believes that [*5] [Pettway] was deprived of his rights to a statutory speedy trial" (Greenman Aff., ¶ 51).

These assertions are wholly insufficient to meet Pettway's burden. In the absence of any meaningful allegation or showing that a Speedy Trial Act violation has occurred—Pettway does not allege even a single error in the application of the Speedy Trial Act¹—

¹ To the extent Pettway asserts that the time excluded under 18 U.S.C. § 3161(h)(1)(C) was improper because the government's interlocutory appeal was frivolous, his argument fails for two reasons. First, **HN3** delay resulting from any interlocutory appeal is automatically excludable by operation of law. See 18 U.S.C. § 3161 (h)(1)(C). Second, the government's appeal was not frivolous, as evidenced by the fact that the Second Circuit ruled at least partly in its favor. See United States v. Brown, 16-3468-cr, 691 Fed. Appx. 666.

Pettway's motion seeking dismissal of the fourth superseding indictment on Speedy Trial Act grounds must be denied.

B. Pettway's *Sixth Amendment* Claim

HN4 The *Sixth Amendment* provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial" *U.S. Const. amend VI*. "Although unusual, it is possible for a delay that does not violate the [Speedy Trial Act] to run afoul of the *Sixth Amendment's* guarantee of a speedy trial." *United States v. Stone*, No. 05-CR-401, 2006 U.S. Dist. LEXIS 8710, 2006 WL 436012, at *6 (E.D.N.Y. Feb. 22, 2006).

In *Barker v. Wingo*, the United States Supreme Court, for the first time, attempted to set out the criteria by which the *Sixth Amendment* right is to be judged. *407 U.S. 514, 515, 92 S. Ct. 2182, 33 L. Ed. 2d 101*. The Court began by noting that the right to a speedy trial is different than other rights enshrined in the Constitution because it embodies a societal interest in securing a defendant for trial; this interest exists separately, and sometimes in opposition, to the interest of the accused. [*6] *Id. at 519-22*. It is also different, according to the *Barker* Court, because it is "necessarily relative" and "impossible to determine with precision when the right has been denied." *Id. at 521*. Ultimately then, courts must engage in a balancing test that considers cases on an *ad hoc* basis. *Id. at 522, 530*.

HN5 The *Barker* Court outlined four factors that courts must assess when conducting this analysis: the length of delay; the reason for the delay; the defendant's assertion of his right; and prejudice to the defendant. *Id. at 530*. These factors must be considered together, as none alone has the "talismanic" quality sufficient to find deprivation of the right of speedy trial. *Id. at 533*. The balancing process, to which this Court will now turn, is difficult and sensitive, but must be carried out with "full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution." *Id.*

1. Length of Delay

The delay in this multi-defendant case, nearly 67 months, is presumptively prejudicial and triggers further analysis of the three *Barker* factors. See *Doggett v.*

2017 U.S. App. LEXIS 9804, 2017 WL 2378195 (2d Cir. June 1, 2017) (affirming in part, vacating in part, and remanding).

United States, 505 U.S. 647, 652, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992) (**HN6**) delays approaching 12 months are presumptively prejudicial); *Flowers v. Warden, Conn. Corr. Inst.*, 853 F.2d 131, 133 (2d Cir. 1988) (delay of 17 months is presumptively prejudicial). Still, while presumptively prejudicial, the delay here [*7] remains within a time period where the Second Circuit has found no violation. See *Flowers*, 853 F.2d at 133 (collecting cases with delays ranging from 24 months to six years where no speedy trial violation was found); *United States v. Saglimbene*, 471 F.2d 16 (2d Cir. 1973) (six years). Nonetheless, this factor weighs in favor of finding a *Sixth Amendment* violation.

2. Reasons for the Delay

HN7 Closely related to length of delay are the reasons given by the government to justify the delay. *Barker*, 407 U.S. at 531. Courts weigh the reasons alongside the defendant's conduct, and give different justifications differing weights. *Id. at 530-31*. For example, prosecutorial negligence is weighed less heavily than a deliberate attempt to delay the trial to hamper the defense; but it would nevertheless be weighed against the government because it has the ultimate responsibility for bringing the defendant to trial. *Id. at 531*.

Here, the reasons for the delay are predominantly attributable to Pettway and his 10 co-defendants. They heavily litigated this case at all stages, as is, of course, their right to do. This necessarily resulted in protracted proceedings before the magistrate judge. There were multiple rounds of detention proceedings, defense motions, and pretrial hearings, none of which is the government's fault.

But Pettway argues that [*8] two periods of delay are attributable to the government—the time between the start of the case (January 2012) and the return of the fourth superseding indictment (April 2013), and the time between the filing of the government's "frivolous" interlocutory appeal (October 2016) and its resolution (June 2017). (Greenman Aff., ¶¶ 53, 72.) Neither of these periods of delay weigh in favor of dismissal.

First, while it is true that the government repeatedly superseded the indictment, the fourth superseding indictment was returned just over a year after this case began. (Docket No. 139.) During that time, this case continued to be actively litigated, with detention proceedings and motion practice. Thus, in the context of

the overall proceedings, the government's conduct in seeking multiple superseding indictments over the course of little more than one year did not impact the progress of this case as significantly as Pettway contends. Second, as noted previously, there is no merit to Pettway's contention that the government's interlocutory appeal was frivolous, as the Second Circuit ruled partially in its favor. See United States v. Brown, 16-3468-cr, 691 Fed. Appx. 666, 2017 U.S. App. LEXIS 9804, 2017 WL 2378195 (2d Cir. June 1, 2017).

Consequently, this is not a case where [*9] the government is solely responsible for unreasonable delay. Rather, the majority of delay is attributable to the defendants' motion practice and the delay attendant to multi-defendant criminal trials. Upon review of the docket, this Court finds no periods of unreasonable delay,² and certainly none solely attributable to the government. Thus, this factor weighs against finding a Sixth Amendment violation. See United States v. Blanco, 861 F.2d 773, 778 (2d Cir. 1998) (HN8[] "A defendant's claim that the government violated her right to a speedy trial is seriously undermined when the defendant, and not the government, is the cause of the delay.")

3. Defendant's Assertion of the Right

HN9[] The efforts a defendant makes to assert the speedy trial right are closely related to the other factors in the test. Barker, 407 U.S. at 532. If a defendant is seriously being deprived of his right, he is more likely to vigorously assert it, and such an assertion is given strong evidentiary weight. Id. But the inverse is also true: failure to assert the right in a timely manner will be weighed against the defendant. See id.; see also Rayborn, v. Scully, 858 F.2d 84, 93 (2d Cir. 1988). The Supreme Court makes clear that this inquiry is sensitive and complex, and must take into account how and when a defendant knew of the charges against him, if a defendant [*10] has obtained counsel, and if a delay benefits the defendant and thus dissuades him from invoking his right. Barker, 407 U.S. at 528-29.

Here, Pettway did not begin objecting to exclusions of

² Pettway accuses the government of "a deliberate attempt to delay proceedings in order to hamper the defense and the defendant's liberty." (Greenman Aff., ¶ 66.) Other than perhaps his contention that the government's partially successful interlocutory appeal was frivolous, Pettway offers nothing to support this accusation.

time until almost five years into this case, in January 2017, after the government filed its interlocutory appeal. And while Pettway now suggests that he moved for severance earlier in November 2013 to preserve his speedy trial rights, see Greenman Aff., ¶ 59 ("Pettway recognized the necessity of gaining a severance from his other defendants"), review of that motion reveals that it was a boilerplate, protective request in which Pettway simply sought leave "to move for severance once court ordered discovery has been completed." (Docket No. 224.)

Accordingly, this Court finds that this factor weighs against a finding of a Sixth Amendment violation. See United States v. Vasquez, 918 F.2d 329, 338 (2d Cir. 1990) (third factor "weighs heavily" against petitioners where they "waited roughly 22 months before advancing their speedy trial claims and this hardly renders plausible their contention that an expeditious resolution of their cases was a matter of pressing constitutional importance for them"); United States v. McGrath, 622 F.2d 36, 41 (1980) (weighing fact that the defendant waited until immediately before trial to file a motion to dismiss [*11] on speedy trial grounds against the defendant); United States v. Abouhalima, 961 F. Supp. 78, 83 (S.D.N.Y. 1997) (waiting many months before raising Sixth Amendment speedy trial objection weighs against a violation).

4. Prejudice to Defendant

HN10[] Prejudice to the defendant is assessed in light of the interests the speedy trial right was designed to protect. Barker, 407 U.S. at 532. The Supreme Court identified three such interests: to prevent oppressive pretrial incarceration; to minimize anxiety and concern of the accused; and to limit the possibility that the defense will be impaired. Id.

The most serious of these interests is the last, because "the inability of a defendant adequately to prepare his case skews the fairness of the entire system." Id. Despite these considerations, however, courts are generally reluctant to find a speedy trial right violation in the absence of specific prejudice. See United States v. Abad, 514 F.3d 271, 275 (2d Cir. 2008) (per curiam); Rayborn, 858 F.2d at 94; McGrath, 622 F.2d at 41. Indeed, the Second Circuit has affirmed that it has "generally required a showing of some significant trial-related disadvantage in order to establish a speedy-trial violation." United States v. Cain, 671 F.3d 271, 297 (2d Cir. 2012); see United States v. New Buffalo

Amusement Corp., 600 F.2d 368, 379 (2d Cir. 1979)

(violation where witnesses crucial to defense could no longer be located, and other witnesses who previously had agreed to testify refused to do so); United States v. Vispi, 545 F.2d 328, 334-35 (2d Cir. 1976) (violation where delay made locating old [*12] records and dealing with dimmed recollections "a formidable task"); United States v. Roberts, 515 F.2d 642, 646 (2d Cir. 1975) (violation where government's delay disqualifies defendant for youthful offender status).

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Here, Pettway does not identify any specific trial-related prejudice or disadvantage. He claims prejudice instead based on the specter of these criminal charges for five years, his previous home confinement and recent detention, and his inability to travel and further his music career. While Pettway is understandably displeased with these aspects of being under indictment, they do not sufficiently establish a constitutional violation, particularly where the government has not unreasonably caused delay. This factor therefore weighs against finding a Sixth Amendment violation.

Having fully considered and balanced the four Barker factors, this Court finds that Defendant's Sixth Amendment speedy trial rights have not been violated.

IV. CONCLUSION

For the reasons stated above, this Court finds that Pettway's rights to a speedy trial under the Speedy Trial Act and the Sixth Amendment have not been violated. Defendant's Motion to Dismiss the indictment on speedy trial grounds is therefore denied.

V. ORDERS

IT HEREBY IS ORDERED, that Defendant's Motion to Dismiss the Indictment (Docket [*13] No. 823) is DENIED.

SO ORDERED.

Dated: August 11, 2017

Buffalo, New York

/s/ William M. Skretny

WILLIAM M. SKRETNY

United States District Judge

A Neutral
As of: October 19, 2021 4:48 AM Z

United States v. Pettway

United States District Court for the Western District of New York

October 7, 2018, Decided; October 9, 2018, Filed

12-CR-103S (1)

Reporter

2018 U.S. Dist. LEXIS 173475 *, 2018 WL 4901063

UNITED STATES OF AMERICA, v. KENNETH PETTWAY, JR., Defendant.

DECISION AND ORDER

Prior History: [United States v. Pettway, 2017 U.S. Dist. LEXIS 128093 \(W.D.N.Y., Aug. 11, 2017\)](#)

Core Terms

speedy-trial, reconsideration, factors, speedy trial right, speedy trial, delays, controlling law, indictment, pretrial, parties, reconsideration motion, new counsel, circumstances, incarceration, rights, cases

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Judges: WILLIAM M. SKRETNY, United States District Judge.

Opinion by: WILLIAM M. SKRETNY

Opinion

I. INTRODUCTION

Presently before this Court is Defendant Kenneth Pettway, Jr.'s second motion to dismiss the indictment against him on speedy-trial grounds. (Docket No. 980.) Pettway seeks both dismissal of the indictment and reconsideration of this Court's previous decision denying his first speedy-trial motion. [See United States v. Pettway, No. 12-CR-103S \(1\), 2017 U.S. Dist. LEXIS 128093, 2017 WL 3475434 \(W.D.N.Y. Aug. 11, 2017\)](#). For the reasons discussed below, Pettway's [*2] motion is denied in its entirety.

II. BACKGROUND

On May 22, 2018, Pettway proceeded to trial before the Honorable Thomas J. McAvoy¹ on a 5-count indictment that charged him with controlled substances and firearms offenses, in violation of [21 U.S.C. §§ 841 \(a\)\(1\), 846](#), and [18 U.S.C. §§ 922 \(g\)\(1\), 924 \(a\)\(2\), 924 \(c\)\(1\)](#). (Docket No. 1033.) Nine days later, the jury convicted Pettway on each count. (Docket Nos. 1026, 1034, 1036.) Pettway is currently scheduled to be sentenced before Judge McAvoy on October 15, 2018.

¹Judge McAvoy of the Northern District of New York presided over the trial of this matter as a visiting judge after it was determined that an ongoing criminal trial before this Court would prevent it from trying this case as scheduled. (Docket No. 998.) With Judge McAvoy's consent, however, this Court retained Pettway's instant speedy-trial motion in the interests of judicial economy given its familiarity with the issues and because the motion seeks reconsideration of this Court's previous decision. (Docket No. 1028.) This Court is grateful to Judge McAvoy for his service to this district in this and other cases.

(Docket No. 1098.)

Three weeks before trial, Pettway filed his second speedy-trial motion. (Docket No. 980.) This Court immediately directed the government to respond. (Docket No. 982.) In the interim, Pettway supplemented his motion. (Docket No. 993.) The government thereafter moved to extend its time to respond, which this Court granted. (Docket Nos. 997, 998.)

On May 22, 2018, the date of jury selection, the government timely filed its response to Pettway's motion. (Docket No. 1013.) After unsuccessfully moving to strike the government's response (see Docket Nos. 1025, 1028), Pettway filed a reply on June 15, 2018; the government filed a sur-reply on June 25, 2018; and Pettway filed a sur-sur-reply on August 31, 2018. (Docket Nos. 1043, 1047, [*3] 1103.) Upon the completion of this full briefing, this Court took the motion under advisement without oral argument. (Docket No. 1028.)

III. DISCUSSION

A. Sixth Amendment Right to a Speedy Trial

The Sixth Amendment to the United States Constitution guarantees that in all criminal prosecutions "the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI. The speedy trial guarantee "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). This right "is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten 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); see United States v. Ewell, 383 U.S. 116, 120, 86 S. Ct. 773, 776, 15 L. Ed. 2d 627 (1966) (describing the speedy-trial guarantee as "an important safeguard to prevent undue and oppressive incarceration prior to trial, 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").

Society has an interest in speedy trials as well. Speedy trials limit an accused's ability to leverage a court's

backlog of cases to obtain a more advantageous plea resolution; protect the community [*4] by reducing a non-detained accused's opportunity to commit other crimes; shorten the time available to abscond; increase the opportunity for effective rehabilitation by minimizing delay between arrest and punishment; and reduce the expense and overcrowding concerns attendant to pretrial incarceration. See Barker v. Wingo, 407 U.S. 514, 519-20, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972) (explaining the societal interest as "exist[ing] separate from, and at times in opposition to, the interests of the accused"); United States v. Ghailani, 733 F.3d 29, 41 (2d Cir. 2013) (recognizing that "the public has an interest in quickly bringing defendants to trial to prevent a backlog of cases that might permit dangerous criminals to linger unsupervised for extended periods of time while on bail, delay rehabilitation, and otherwise hinder the criminal justice system").

Partly because of these often-dueling interests, the speedy-trial right has been described as "amorphous," "slippery," and "necessarily relative." Barker, 407 U.S. at 522 (quoting Beavers v. Haubert, 198 U.S. 77, 87, 25 S. Ct. 573, 576, 49 L. Ed. 950 (1905)). "It is consistent with delays and depends upon circumstances." Beavers, 198 U.S. at 87. The right therefore cannot be measured in a finite number of days, months, or years, "largely because what may be considered 'speedy' is necessarily dependent on the nature of the trial and the parties' interests in the given case." Ghailani, 733 F.3d at 41; see Barker 407 U.S. at 521 ("It is [*5] . . . impossible to determine with precision when the right has been denied. We cannot definitively say how long is too long in a system where justice is supposed to be swift but deliberate."); Ewell, 383 U.S. at 120 ("A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself."); United States v. Ray, 578 F.3d 184, 191 (2d Cir. 2009) (noting that the right "neither prohibits all delays, nor establishes a strict time limit between the announcement of a charge and the commencement of trial").

Rather, a balancing test is employed to shape the contours of the speedy-trial right. The United States Supreme Court first set forth this test in Barker, where it outlined four factors to be weighed in assessing a speedy-trial claim: the length of delay; the reason for the delay; the defendant's assertion of his right; and prejudice to the defendant. 407 U.S. at 530. These factors must be considered together, as none alone has the "talismanic" quality sufficient to find deprivation of

the speedy-trial right. *Id. at 533*. The Barker balancing process is difficult and sensitive but must be carried out with "full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution." [*6] *Id.* If the speedy-trial right is violated, dismissal of the charges with prejudice is mandatory. *Strunk v. United States*, 412 U.S. 434, 440, 93 S. Ct. 2260, 37 L. Ed. 2d 56 (1973).

Finally, the government and the court share the burden of bringing criminal cases to trial promptly. See *United States v. New Buffalo Amusement Corp.*, 600 F.2d 368, 378 (2d Cir. 1979); *United States v. Vispi*, 545 F.2d 328, 334 (2d Cir. 1976). And where the delay is substantial, the government bears the burden of proving that the delay was justified and that the defendant's speedy-trial rights were not violated. *New Buffalo Amusement*, 600 F.2d at 378; *United States v. Tigano*, 880 F.3d 602, 612 (2d Cir. 2018).

B. Pettway's Request for Reconsideration

On August 11, 2017, this Court denied Pettway's first motion to dismiss asserting violations of his speedy-trial rights under the Speedy Trial Act, 18 U.S.C. § 3161 et seq. and the Sixth Amendment. See *Pettway*, 2017 U.S. Dist. LEXIS 128093, 2017 WL 3475434, at *5. This Court first found that Pettway's "non-specific, speculative assertions" were "wholly insufficient" to meet his burden of demonstrating a Speedy Trial Act violation. *2017 U.S. Dist. LEXIS 128093, [WL] at *2*. Second, as it relates to the Sixth Amendment, this Court found relative to the Barker factors that (1) the 67-month delay to that point was presumptively prejudicial; (2) the government was not solely responsible for any period of unreasonable delay, but rather, the defendants' litigation strategy was predominantly the cause of the protracted delays; (3) Pettway did not begin meaningfully asserting his speedy-trial rights until January 2017; and (4) Pettway [*7] did not demonstrate prejudice or disadvantage arising from the delay sufficient to establish a constitutional violation. See *2017 U.S. Dist. LEXIS 128093, [WL] at *2-5*. This Court therefore found that consideration of the Barker factors counseled against finding a Sixth Amendment speedy-trial violation. See *2017 U.S. Dist. LEXIS 128093, [WL] at *5*. Pettway now seeks reconsideration.

Generally, a district judge may modify pre-trial rulings and interlocutory orders at any time before final judgment. See *In re United States*, 733 F.2d 10, 13 (2d Cir. 1984). Reconsideration of a prior decision is

generally justified in any one of the following three circumstances: (1) an intervening change in controlling law; (2) new evidence; or (3) the need to correct a clear error of law or to prevent manifest injustice. See *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992); see also *Shrader v. CSX Transp.*, 70 F.3d 255, 257 (2d Cir. 1995) ("reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court"); *Amerisure Ins. Co. v. Laserage Tech. Corp.*, No. 96-CV-6313, 1998 U.S. Dist. LEXIS 23679, 1998 WL 310750, *1 (W.D.N.Y. Feb. 12, 1998) (citing *United States v. Adegbite*, 877 F.2d 174, 178 (2d Cir. 1989)).

The decision whether to grant or deny a motion to reconsider lies in the court's discretion. See *McCarthy v. Manson*, 714 F.2d 234, 237 (2d Cir. 1983). Parties bringing motions to reconsider "should evaluate whether what may seem to be a clear error of law is in fact simply a point of disagreement between the Court and [*8] the litigant." *Duane v. Spaulding & Rogers Mfg.*, No. 92-CV-305, 1994 U.S. Dist. LEXIS 12814, 1994 WL 494651, *1 (N.D.N.Y. Aug. 10, 1994) (quoting *McDowell Oil Serv. v. Interstate Fire and Cas.*, 817 F. Supp. 538, 541 (M.D.Pa. 1993)). Motions for reconsideration are not to be used as a means to reargue matters already disposed of by prior rulings or to put forward additional arguments that could have been raised before the decision. See *Duane*, 1994 U.S. Dist. LEXIS 12814, 1994 WL 494651 at *1. After all, a "motion for reconsideration is not a device intended to give an unhappy litigant one additional chance to sway the judge." *Nossek by Nossek v. Board of Educ.*, No. 94-CV-219, 1994 U.S. Dist. LEXIS 17686, 1994 WL 688298, *1 (N.D.N.Y. Nov. 10, 1994).

Pettway maintains that reconsideration is warranted on the basis that two decisions from the United States Court of Appeals for the Second Circuit—*United States v. Pennick* and *United States v. Tigano*—constitute intervening changes in controlling law concerning how delay should be attributed under the Barker factors. *713 Fed.Appx. 33 (2d Cir. 2017); 880 F.3d 602 (2d Cir. 2018)*. Pettway also seeks to reopen and reargue issues already decided.

To begin, *Pennick* and *Tigano* are not intervening changes in controlling law. At best, they reiterate and apply existing law, as Pettway appears to concede. (Docket No. 980-1, p. 12 (describing *Pennick* and

Tigano as "clarif[ying] controlling law regarding a defendant's speedy trial rights".) Pennick reiterated that institutional delay under the Barker factors must be attributed to the government, including the court's delay in deciding motions. [*9] See Pennick, 713 Fed. Appx. at 35. Similarly, Tigano addressed administrative delays, noting that "[a]dministrative delays are counted against the government." Tigano, 880 F.3d at 614-15. These cases did not break new ground or change controlling law, as evidenced by both the Pennick and Tigano courts' citations to cases dating back to 1977. See Pennick, 713 Fed. Appx. at 35 (citing New Buffalo Amusement, 600 F.2d at 377; United States v. Carini, 562 F.2d 144, 149-50 (2d Cir. 1977); United States v. Bert, 814 F.3d 70, 85 (2d Cir. 2016)); see Tigano, 880 F.3d at 614 (citing Carini, 562 F.2d at 149-50). Consequently, there is no basis for reconsideration based on an intervening change in controlling law.

The other grounds that Pettway asserts for reconsideration are improper attempts to gain a second bite at the apple. See Nossek, 1994 U.S. Dist. LEXIS 17686, 1994 WL 688298, at *1. In voicing his disagreement with this Court's previous decision, Pettway maintains that this Court (1) failed to properly consider institutional and administrative delays, (2) afforded too little weight to his arguments concerning the effect of the government superseding the indictment, (3) discounted his argument concerning whether the government's appeal was frivolous, (4) overemphasized his failure to file a severance motion, (5) concluded incorrectly that he failed to raise speedy-trial objections before January 2017, and (6) failed to properly consider prejudice. (Docket No. 980-1, pp. 13-14.)

It is well settled that "[a] party may not . . .[*10] . use a motion for reconsideration to re-argue issues that have already been decided, present 'new theories' or arguments that could have been raised earlier, seek a new hearing 'on the merits, or [to] otherwise tak[e] a second bite at the apple.'" See Groomes v. Fazir, No. 3:17CV1072(JCH), 2018 U.S. Dist. LEXIS 20283, 2018 WL 745954, at * (D. Conn. Feb. 7, 2018)) (citing Analytical Surveys, Inc. v. Tonga Partners, L.P., 684 F.3d 36, 52 (2d Cir. 2012), in turn quoting Sequa Corp. v. GBJ Corp., 156 F.3d 136, 144 (2d Cir. 1998)). Here, Pettway clearly disagrees with the previous decision, but this Court properly considered and assessed his speedy-trial motion under the Barker framework and gave each of his arguments full and fair consideration. None of the circumstances warranting reconsideration apply here; Pettway simply seeks to relitigate his motion with new counsel. Such is not the proper use of a

motion for reconsideration. See Duane, 1994 U.S. Dist. LEXIS 12814, 1994 WL 494651, at *1. Consequently, there being no valid basis for reconsideration, Pettway's motion is denied.

C. Pettway's Request for Dismissal

With the finding that reconsideration is not warranted, the question becomes whether the additional 9-month delay between August 11, 2017 (the date of the first speedy-trial decision) and May 22, 2018 (the date trial began), considered alone or in conjunction with the previous delay, violated Pettway's constitutional [*11] right to a speedy trial.

At the time this Court denied Pettway's first speedy-trial motion, trial had already been scheduled to commence on September 26, 2017. (Docket No. 820.) In addition, time had been excluded under the Speedy Trial Act through September 26, 2017, for continuity of counsel and trial preparation, under 18 U.S.C. § 3161 (h)(7)(B)(iv); due to pending motions, under 18 U.S.C. § 3161 (h)(1)(D); and in the interests of justice, under 18 U.S.C. § 3161 (h)(7)(A). (Docket No. 820.)

The parties appeared before this Court on August 14, 2017, at which time several pretrial issues were discussed, including Pettway's pending suppression motion. (Docket No. 844.)

The parties next appeared on September 20, 2017, at which time Pettway requested that the trial date be adjourned to allow for further trial preparation. (Docket No. 862). Numerous other trial-related matters were also discussed, including this Court directing the government to disclose the identity of its final undisclosed witness by September 25, 2017. (Docket No. 862.) At Pettway's request, this Court rescheduled trial for September 29, 2017, and excluded time through that date in the interests of justice under 18 U.S.C. § 3161 (h)(7)(A). (Docket No. 862.)

Additional pretrial matters were discussed at an appearance on September [*12] 25, 2017, but the government had not yet disclosed its witness. (Docket No. 873.)

Trial was then adjourned until October 5, 2017, to permit additional time for Pettway to prepare for trial and to ensure continuity of counsel, with accompanying exclusions of time under 18 U.S.C. §§ 3161 (h)(7)(A) and (h)(7)(B)(iv). (Docket No. 872.) The parties appeared on October 5, 2017, at which time a recently

discovered possible conflict concerning Pettway's attorney and the government's just-disclosed witness was discussed. (Docket No. 887.) In light of the need to resolve this conflict, this Court adjourned the trial, appointed independent counsel to advise Pettway, and conducted further status conferences with appropriate exclusions of time. (Docket Nos. 887, 891, 898, 903.)

On December 20, 2017, after full proceedings, this Court determined that Pettway's attorney suffered from an actual, non-waivable conflict-of-interest that required his replacement as trial counsel. (Docket No. 910.) This Court therefore indicated that new counsel would be assigned, and it directed the parties to appear again for a status conference on January 24, 2018, with an exclusion of time for continuity of counsel and interests of justice under 18 U.S.C. §§ 3161 (h)(7)(A) and (h)(7)(B)(iv). (Docket [*13] No. 910.) Two days later, this Court granted Pettway's motion for release on conditions. (Docket No. 911.)

On January 24, 2018, this Court assigned new counsel to represent Pettway and re-scheduled trial to begin on May 22, 2018, with exclusions of time through that date under 18 U.S.C. §§ 3161 (h)(7)(A), (h)(7)(B)(iv), (h)(1)(D). The parties thereafter appeared regularly for status conferences to discuss trial preparation and trial readiness, until trial commenced before Judge McAvoy on May 22, 2018. (Docket Nos. 956, 962, 976, 998, 1014.)

Pettway argues that this additional period of delay, alone and in conjunction with the preceding 67-month period of delay, violated his Sixth Amendment right to a speedy trial. As noted above, this argument requires examination of the Barker factors: the length of delay; the reason for the delay; the defendant's assertion of his right; and prejudice to the defendant. 407 U.S. at 530.

First, taken together with the previous 67-month delay, this additional delay of nine months or so adds to the presumption of prejudice triggering further analysis under Barker. See Doggett v. United States, 505 U.S. 647, 652, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992) (delays approaching 12 months are presumptively prejudicial); Flowers v. Warden, Conn. Corr. Inst., 853 F.2d 131, 133 (2d Cir. 1988) (delay of 17 months is presumptively prejudicial).

Second, the delay here, while largely attributable to [*14] the government, was not intentional. The delay was occasioned by the unwaivable conflict-of-interest that prevented Pettway's trial counsel from continuing in

the case. This conflict-of-interest was not discovered until the identity of the government's witness, which had previously been withheld for security reasons, was disclosed to Pettway. It was then discovered that Pettway's lawyer had previously represented the witness, resulting in the conflict. At the time, this Court heavily criticized the government for not having procedures in place to avoid such last-minute circumstances, but there is no indication that the government ever concealed the witness's identity for any reason other than witness safety. In other words, the government did not act intentionally to avoid discovery of the conflict or to delay or derail Pettway's defense. Consequently, while the majority of this period of delay is rightly charged to the government, it is weighed less heavily than if the government acted intentionally to Pettway's detriment. See Barker, 407 U.S. at 531 (instructing that prosecutorial negligence is weighed less heavily than a deliberate attempt to delay the trial to hamper the defense).

Third, the record reflects [*15] that Pettway continually asserted his rights to a speedy trial during this time. See Barker, 407 U.S. at 532 (noting that a defendant's assertion of his speedy trial rights is given strong evidentiary weight).

Fourth, Pettway has not suffered significant prejudice by the additional delay. Prejudice to the defendant is assessed in light of the interests the speedy trial right was designed to protect. Id. at 532. The Supreme Court identified three such interests: to prevent oppressive pretrial incarceration; to minimize anxiety and concern of the accused; and to limit the possibility that the defense will be impaired. Id. The most serious of these interests is the last, because "the inability of a defendant adequately to prepare his case skews the fairness of the entire system." Id. Here, Pettway was not subjected to pretrial incarceration for a majority of the additional period of delay. Moreover, there is no indication of any heightened anxiety or concern during this period. And while the conflict situation required that Pettway be appointed new counsel, his new counsel was a zealous advocate who quickly familiarized himself with the record and provided sound representation, resulting in no material impairment to Pettway's [*16] defense.

In the end, having considered and balanced the Barker factors, this Court finds that the circumstances of the additional delay, considered alone or in conjunction with the previous delay, do not sufficiently establish a constitutional violation. Pettway's motion to dismiss on speedy trial grounds is therefore denied.

IV. CONCLUSION

For the reasons stated above, this Court finds no basis to reconsider its previous speedy-trial decision, and further finds that Pettway's rights to a speedy trial under the Sixth Amendment have not been violated. Defendant's Motion to Reconsider and to Dismiss the Indictment is therefore denied.

V. ORDERS

IT HEREBY IS ORDERED, that Defendant's Motion for Reconsideration and to Dismiss the Indictment (Docket No. 980) is DENIED.

SO ORDERED.

Dated: October 7, 2018

Buffalo, New York

/s/ William M. Skretny

WILLIAM M. SKRETNY

United States District Judge

End of Document

USCS Const. Amend. 6, Part 1 of 16

Current through the ratification of the 27th Amendment on May 7, 1992.

United States Code Service > Amendments > Amendment 6 Rights of the accused.

Amendment 6 Rights of the accused.

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

United States Code Service
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End of Document

Exhibit D

No.	Segment	Start Date	End Date	Total Days	Total Months	Delays During Segment
1	Arrest to Arraignment	1/18/2012	1/19/2012	1	-	
2	Arraignment to Indictment	1/19/2012	3/27/2012	68	2 1/4	Dkt 9 (2/14/2012 Status Conference) - Rule 48b date set (3/30/12) based on Gov't proffer of likelihood of indictment being returned "very high"
3	Indictment to Arraignment	3/27/2012	4/3/2012	7	1/4	
4	Arraignment on Indictment to 6/27/2012 Status Conference on Pretrial Motions	4/3/2012	6/27/2012	85	3 3/4	Dkt 14 (Scheduling Order) - Voluntary Discovery 4/17/12, Pretrial motions due 5/15/12, Responses due 6/18/12, Replies due 6/25/12, Oral Argument 8/2/12. Evidentiary Hearing 8/2/12, Status Conference 5/18/12 before Hon. William M. Skretny, U.S.D.J.
5	6/27/2012 Status Conference on Pretrial Motions to First Superseding Indictment	6/27/2012	7/31/2012	34	1	Dkts 16, 19, 21, 23, 28 (Scheduling Order Reset) – Pettway Counsel filed motion in different docket and government could not respond. Schedule Reset. Voluntary discovery 7-20-12, suppl' pretrial mtgs deadline 8-20-12, Gov't response. 8-30-12, Deft reply (disputed issues). Oral argument 9-4-12.
						Dkt 26 – Pettway Motions Refiled (7/24/2012)
6	First Superseding Indictment to Second Superseding Indictment	7/31/2012	8/14/2012	14	1/2	Dkt 30 – First Superseding Indictment adding Defendants Tyrone Brown, Tyriq Brown (sic) Montell Jones, Eddie Allen, Quinton Thompson
						Dkt 31, 32 – Writs for Allen and Thompson signed
						Dkt 33 – Arraignment – Gov't notes seeking death penalty. Moves to detain all defendants. Detention hearings Ordered as to new defendants.
						Dkt 49 (8/8/2012 Detention hearing for Pettway) – Govt moves for detention. Defense opposes. Court orders Pettway to remain in Rochester, NY.
						Dkt 48 (8/9/2012) – Arraignments for Allen and Thompson. Gov't agreed to complete voluntary discovery by 9-10-12 and a status conference re: scheduling order deadlines is set for 9-18-12
						Dkt 55 (8/13/2012) – New scheduling order Voluntary Discovery 9/10/2012, Status Conference 9/18/2012 to discuss Motion practice.

Exhibit D

No.	Segment	Start Date	End Date	Total Days	Total Months	Delays During Segment
7	Second Superseding Indictment to Third Superseding Indictment	8/14/2012	3/19/2013	217	7 1/4	Dkt 65 – Second Superseding Indictment Dkt 72 – Arraignment as to Second Superseding Indictment. Scheduling conference for 9/18/2012. Dkt 78, 77, 79 (9/18/2012) – Scheduling Conference held. Court excludes time between 9/18/2012 until 12/11/2012 to adjudicate government motion for protective order (84 days).
8	Third Superseding Indictment to Fourth Superseding Indictment	3/19/2013	4/23/2013	35	3/4	Dkt 102, 103 (12/11/2012) – Oral Argument on Protective Order. Court orders govt to advise defendant by 12/31/2012 what items are protected. Gov't advises Grand Jury investigation is continuing, considering further charges impacting on at least one of the defts before the court and possibly others. Gov't anticipates 3rd s'seding indictment return on 12-18-12. Discussion re: deferring scheduling order deadlines until thereafter. Status Conference and new scheduling order deadlines as to pending indictment set for 1-3-2013 (23 Days). Dkt 106 – Adjournment of 1/3/2013 conference until 1/10/2013 on request of Pettway. Indictment still not returned. Dkt 109 (1/10/2013) – Status Conference as to Scheduling. Gov't expectation of another s'seding indictment now not until mid-February 2013. Upon court query, Gov't states no further s'seding indictments beyond aforementioned s'seding indictment. Scheduling deferred. Time Excluded until 2/22/2013 (43 days). Dkt 113 (2/22/2013) – Status Conference as to Scheduling and third s'seding indictment. Now Govt advises mid-March 2013. Court defers setting scheduling order deadlines one last time. Excludes time to 3/26/2013 (32 days). Dkt 115 – Third Superseding Indictment adding defendants Raymel Weeden, Rayshod Washington, and Derrick Ramos Dkt 117, 118, 119 – Writs for Allen, Washington, Weeden Dkt 120 (3/26/2013) – Arraignment. Gov't advises death penalty considered for Brown Washington and Weeden. Court orders all defendants to refile motions. Excludes time to 6/14/2013 (80 days).

Exhibit D

No.	Segment	Start Date	End Date	Total Days	Total Months	Delays During Segment
						Dkt 123 (3/28/2013) – New Scheduling Order sets Motions 6/14/2013, Trial Date Status Conference 6/21/2013 before Hon. William M. Skretny, Responses 7/26/2013, Replies 8/2/2013, Oral Argument 8/13/2013. (add'l 60 days from 6/14/2013).
						Dkt 128, 130 – Motion filed regarding extensions of time to death penalty review process.
						Dkt 137, 138 – Learned Counsel appointments for Weeden
9	Fourth Superseding Indictment to Issuance of R&R on Pretrial Motions	4/23/2013	12/16/2014	602	19 3/4	Dkt 139 – Fourth Superseding Indictment
						Dkt 141, 142, 143 – Writs for Weeden, Washington, and Allen
						Dkt 147, 148 – Arraignment. Upon discussion re: scheduling order deadlines, court sets a status conference to address deadlines on 7-9-13 at 2 pm. THE ONLY SCHEDULING ORDER DEADLINE COURT SETS AT THIS TIME IS DEADLINE FOR GOVT TO PROVIDE VOLUNTARY DISCOVERY, TO WT: 6-21-13.
						Dkt 173 (7/9/ 2013) – Status Conference on Scheduling, resets scheduling order.
						Dkt 175 (7/10/2013) – New Scheduling order Pretrial Discovery Motions due by 8/8/2013; Responses 9/3/2013, Replies 9/10/2013. Oral Argument 9/16/2013
						Dkt 207 (9/13/2013) – Gov't Motion to file Responses to Defendant's discovery motions out of time (Responses were due on 9/3/2013).
						Dkt 208 – Court grants govt motion and resets reply deadline to 9/17/2013 and Oral Argument 10/1/2013 (add'l 15 days from 9/16/2013)
						Dkt 220 (10/1/2013) – Oral Argument on Discovery Motions. Court Order some disclosures. Court permits all Defendants to file any additional pretrial motions 11/4/2013; response 12/6/2013; replies 12/16/2013, Oral Argument 12/23/2013.
						Dkt 224 (11/4/2013) – Petway's motions

Exhibit D

No.	Segment	Start Date	End Date	Total Days	Total Months	Delays During Segment
						Dkt 238, 239 (12/17/2013) – Gov't motion to file responses out of time (Responses due 12/6/13) and reset deadline for responses to 2/3/2014. Granted 12/18/13. (add't 59 days from 12/6/2013).
						Dkt 250, 251, 252 – Govt Motion to Adjourn Oral Argument to 3/5/2014 because both prosecutors were in trial/ unavailable granted by court (add't 13 days).
						Dkt 256 (3/5/2014) – Oral Argument on motions. Court notes that Gov't failed to respond to parts of Pettway's motion. Court to conduct <i>in camera</i> review of warrant materials.
						Dkt 262 – Court order directing defendants to provide supplemental authority for warrant materials by 4/9/2014.
						Dkt 267 – Govt request for extension (add't 1 day).
						Dkt 318, 325, 330, 336, 347 (8/8/2014 – 10/10/2014) – Govt moves for <i>Carcio</i> Hearing believing conflict exists between counsel for Pettway and Ramos. Briefing required and oral argument delayed once by Ramos refusing transport. Court finds no conflict (63 days required to determine issue).
						Dkt 331, 332, 338, 345, 346, 348, 363 (9/9/2014 – 11/20/2014) – Govt moves to consolidate <i>Smitherman</i> case. Briefing required. Court denies motion to consolidate. (72 days required to adjudicate issue).
						Dkt 369 (12/16/2014) – R&R on pretrial Motions
10	Government's Motion to Reconsider R&R	12/16/2014	3/3/2015	77	2 1/2	Dkt. 372, 373, 374, 375 (12/23/2014) – Govt Motions for extensions to file objections and a reconsideration motion. Court grants request for extension to 1/16/2015. (add't 31 days)
						Dkt 378, 379, 380 (1/16/2015 – 1/20/2015) - Second Gov't Motion for extension of time to file motions for reconsideration. Court grants motion and extends deadline to 1/23/2015. Govt files motion on 1/20/2015. (add't 5 days)
						Dkt 381 – Scheduling Order on Reconsideration motion setting responses February 4, 2015; reply February 11, 2015; and oral argument February 18, 2015.

Exhibit D

No.	Segment	Start Date	End Date	Total Days	Total Months	Delays During Segment
						Dkt 382, 385 – Govt moves to extend time because of vacation/other business. Court grants motion and resets schedule: responses February 18, 2015; reply February 25, 2015; and oral argument March 2, 2015. (add't 12 days)
11	Objections to R&R and continued practice on pending motions	3/3/2015	3/8/2016	371	12	Dkt 399 – Decision and Order denying Gov't motion to reconsider. Dkt – 401, 403 (3/5/2015) – Govt motion for extension of time to file objections to R&R because of trial schedule. Court grants request and resets schedule: Objections/Appeals April 1, 2015; Responses April 21, 2015; Replies May 1, 2015. Oral Argument June 3, 2015. (Gov't request adds 15 days) Dkt 405, 426 – R&R on motion regarding search warrant materials issued 4/24/2015/

Dkt 431 (5/4/2015) – Court orders evidentiary hearing on motion to suppress statement because of invalid arrest (Motion to Suppress originally filed 11/4/2013). Hearing set by Court for May 12, 2015 (554 days after motion was filed and 147 days after the 12/16/2014 order granting the request for hearing).

Dkt 441, 467, 469, 475 – Court sets post-hearing briefs due 30 days after transcript produced. Transcript returned to parties on 8/11/2015 (91 days). Court sets briefing schedule on PHBs: September 10, 2015, and reply September 17, 2015. Petway requests 4-day extension and court resets schedule: September 14, 2015, reply September 21, 2015.

Dkt 455 (6/2/2015) – District Court issues D&O on objections to R&R 369.

Dkt 493, 495, 496, 506 (10/16/2015) – Court issues R&R on 224 Motion to Suppress. Objections to R&R due by 11/2/2015. Petway requests 30 day extension. Court grants 60 day extension to 12/2/2015. Petway asks for further extension of a few days. Court grants until 12/9/2015

Dkt 508, 510, 519 – Petway files objections to 224 R&R on 12/9/2015 (64 day delay). Court orders response due 1/5/2016, Reply 1/19/2016. Government fails to respond to objection, Court orders response due February 5, 2016, reply February 12, 2016. (add't 24 days from 1/19/2016).

Dkt 523 (3/8/2016) – Court issues D&O on objections.

Exhibit D

No.	Segment	Start Date	End Date	Total Days	Total Months	Delays During Segment
12	Decision on Pretrial Motions to Trial Date #1 Postponement for Government's Interlocutory Appeal	3/8/2016	10/13/2016	219	7	Dkt 524 – 3/9/2016 Status Conference to discuss trial dates Dkt 529, 567 – 3/18/2016 Status Conference to discuss trial dates. Based on the schedule of all parties, Jury selection and Jury trial scheduled for 10/4/2016 at 9:30 am with a backup date of 11/1/2016. (7 month delay for trial)
						Dkt 561 – Gov't provided until 6/14/2016 to disclose Jenks material. Dkt 633 – Trial moved to October 11, 2016.
						Dkt 660, 673 (10/5/2016) – Govt Motion to Amend/Correct the Fourth Superseding Indictment. Court denied motion. Jury selection moved to 10/13/2016.
						Dkt 672, 674 (10/11/2016) – Govt Motion to Reconsider Denial of 660 Motion to Amend/Correct Indictment. Court denies motion to reconsider.
						Dkt 675 (10/13/2016) – Govt files interlocutory appeal.
13	Government Interlocutory Appeal	10/13/2016	5/30/2017	229	7 1/2	Dkt 675 (10/13/2016) – Govt files interlocutory appeal.
14	Remand to Suspension of Trial Date #2 because of conflict issue	5/30/2017	10/5/2017	128	4	Dkt 815, 820 (6/12/2017) – Status conference as to scheduling. New Trial date set for 9/26/2017. Dkt 862 – Court grants Pettway request for brief adjournment. New Trial date 9/29/2017. Dkt 873 (9/25/2017) – Govt ordered to identify CW#1. Dkt 872 – Trial date adjourned until 10/5/2017 Dkt 887 (10/5/2017) – Conflict issue identified and brought to the Court's attention

Exhibit D

No.	Segment	Start Date	End Date	Total Days	Total Months	Dlays During Segment
15	Resolution of Conflict Issue to Disqualification Decision	10/5/2017	12/20/2017	76	2 1/2	Dkt 890 (10/11/2017) – Status Conference regarding conflict issue and opinion of conflict counsel. Orders government to file brief regarding appointment of second counsel.
						Dkt 898 (10/27/2017) – Status conference on conflict issue. Conflict counsel opines that actual, severe, non-waivable conflict exists. Court takes matter under advisement. Time excluded until 11/29/2017.
16	Appointment of New Counsel	12/20/2017	1/24/2018	35	1	Dkt 903 – Court adjourns status conference until 12/20/2017 at Pettway request (21 days)
17	Appointment of New Counsel to Trial Date #3	1/24/2018	5/22/2018	118	3 3/4	Dkt 910 – Court disqualifies Mr. Greenman.
						At 1/8/2018 conference issues bench statement on disqualification and new status conference date for 1/24/2018 for assignment of counsel.
						Dkt 931 – Appointing Robert Singer and Setting new trial date for 5/22/2018.

U.S. District Court — Judicial Caseload Profile

NEW YORK WESTERN

Numerical
Standing
Within

U.S. Circuit

9 1

10 1

11 1

29 1

3 1

7 1

28 2

11 1

73 6

87 5

83 6

67 5

81 4

		12-Month Periods Ending						
		Sep 30 2012	Sep 30 2013	Sep 30 2014	Sep 30 2015	Sep 30 2016	Sep 30 2017	
Overall Caseload Statistics	Filings ¹	3,020	3,187	2,890	2,988	2,803	3,119	
	Terminations	3,009	3,054	2,978	2,838	2,931	2,878	
	Pending	3,598	3,715	3,621	3,764	3,631	3,865	
	Percent Change in Total Filings Current Year Over Earlier Year	3.3	-2.1	7.9	4.4	11.3		
Number of Judgeships		4	4	4	4	4	4	
Vacant Judgeship Months ²		12.0	9.5	2.3	15.6	12.8	12.0	
Actions per Judgeship	Filings	Total	755	797	723	747	701	780
		Civil	461	519	452	490	458	540
		Criminal Felony	179	137	116	119	96	103
		Supervised Release Hearings	116	141	154	138	148	137
	Pending Cases		900	929	905	941	908	966
	Weighted Filings ²		607	580	483	512	469	509
	Terminations		752	764	745	710	733	720
	Trials Completed		9	10	13	11	10	12
	From Filing to Disposition	Criminal Felony	10.8	10.7	16.3	14.2	18.0	17.4
		Civil ²	8.5	8.5	10.9	10.4	11.7	12.3
Median Time (Months)	From Filing to Trial ² (Civil Only)		-	69.1	58.5	66.3	60.3	62.2
	Number (and %) of Civil Cases Over 3 Years Old ²		372 16.2	362 14.6	356 14.3	384 14.3	415 15.6	404 13.6
	Average Number of Felony Defendants Filed per Case		1.4	1.2	1.2	1.3	1.3	1.2
Other	Jurors	Avg. Present for Jury Selection	69.3	56.4	68.1	56.2	74.9	74.4
		Percent Not Selected or Challenged	40.5	31.5	43.1	40.4	41.4	41.0

2017 Civil Case and Criminal Felony Defendant Filings by Nature of Suit and Offense

Type of	Total	A	B	C	D	E	F	G	H	I	J	K	L
Civil	2,161	770	59	533	46	33	58	88	102	23	229	-	220
Criminal ¹	409	1	161	66	49	54	14	31	1	13	6	1	12

NOTE: Criminal data in this profile count defendants rather than cases and therefore will not match previously published numbers.

¹ Filings in the "Overall Caseload Statistics" section include criminal transfers, while filings by "Nature of Offense" do not.

² See "Explanation of Selected Terms."

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 12-CR-103-001-WMS

KENNETH PETTWAY,

Defendant.

DECLARATION

I, KENNETH PETTWAY, make this Declaration under penalty of perjury pursuant to 28 U.S.C. § 1746:

1. I am the defendant in the above captioned case. I submit this declaration in support my motion to dismiss for violation of my right to a speedy trial.

2. On January 18, 2012, I was arrested by the police regarding the charges alleged in the this case. I have remained under indictment ever since. Spending the last 75 months in and out of jail, under restrictive conditions of release, and having this case hanging over my head has had a negative impact on my life and my personal and emotional well-being

3. In the beginning stages of this case in 2012, I was forced to agree to refrain from coming to Buffalo (Erie County) and stay in Rochester (Monroe County) in order to be

released on bail. This removed me from my son's life (he resided in Buffalo, NY). This continued until I was removed from the ankle monitor and allowed to travel in 2013.

4. Even though I was already charged, on bail, and on house arrest, my Rochester home was raided in August 2012 when the government superseded the indictment. My daughter who was 8 months at the time was with me. This was troubling and traumatic. Prosecutors superseded and charged me with RICO only to drop those charges before the 2016 trial was set to start. I was told that if I go to trial on these RICO charges I would do life in prison if convicted. The RICO charges changed everything. They wrapped my case up with many other codefendants who were charged with murders and that were facing the death penalty. Had that not happened, I could've enjoyed my rights to a speedy trial on the original charges that stemmed from the search of co-defendant Black's residence. That did not happen. Having the RICO charges hanging over my head for so much time was very stressful. They should have never charged me with RICO. The fact the government dropped those charges is evidence as to why those charges were unjustified.

5. In 2015, police raided the home on my children in Lackawanna, NY. Both of my daughters (my youngest was 3 months and my oldest was 3 years old at the time) were there. I was not charged with anything at this time. My oldest daughter who's 6 years old now is traumatized by these raids. Anytime she sees the police she says "please don't take my dad." She doesn't like police because she witnessed them kick the door of our home in and place me in handcuffs. She doesn't like loud noises or any banging at the door. When this happens, I have heard her say, "Dad, hide, that's the police."

6. This whole situation has caused my family members stress and has caused me to lose my family. My ex-girlfriend/daughter's mother whom I was with for 16 years, kicked me out of the house because she said she didn't want the police to keep kicking the doors in while her and my kids were there. She is also traumatized. My son who is now 15 years old has always asked me why do I have to wear that black box on my ankle, why I can't leave the house to take him places, and cries and asks me if I am going to leave him and go to jail for a long time. This also stresses me out. I cannot sleep at night. I constantly have flashbacks and nightmares about my door getting kicked by the government. I become stressed out and depressed just thinking about how much time I can possibly be put in jail and taken out of my kid's lives. Any knocking at the door or loud noise, I think it's the police.

7. This case has destroyed me economically. In 2013, I was released from the ankle monitor in order to travel to market my music. Later that year I had a meeting with Atlantic Records in order to negotiate a recording contract. However, the Record company denied signing me under contract after asking me if I was still under indictment on these charges. I answered "yes" and that ended everything. Throughout the last 6 1/2 years, I was never able to obtain or maintain consistent employment due to these charges. Any application that I filled out, I would never get a response. I believe this is because when the RICO charges were first brought against me, my name was in newspapers, on the news, on USA Today website, and all over the internet claiming I was the leader of "The Bailey Boys," one of the most violent street gangs in Buffalo. I had to make a living to try and provide for my 3 kids and help my ex pay the bills. I tried music. I tried to run my own collection agency which was not a success. I tried working from home, but that was difficult.

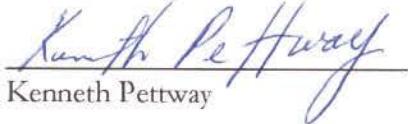
8. Throughout the course of this case I have served about 8 months total incarcerated and 16 months total on ankle monitor. This has been difficult. The Niagara County Jail was not able to offer me any worthwhile programs. While incarcerated, I was unable to work. While detained at home, I also am unable to find steady employment.

9. Since being released from jail after the conflict issue was resolved, I have been on home confinement. I have been denied the right to obtain employment by both the government and probation. I've even been denied the right to educate myself in order to try and get my Realtor license. I've asked my probation officer for permission to go to BETC in order to get help obtaining employment and he denied me stating that I can apply for jobs from my home computer. I also asked him if I can get time out to sell my cds and merchandise (Shirts, hats, posters) and he denied me of that privilege. When I discuss these requests with him and the need to support my kids and myself, he chuckles and says that if I was in jail, I would not be able to get a job anyway. Because I am unable to help provide or help pay for my kid's tuition, I am labeled a deadbeat. It's embarrassing. It also is hurting my brand as a Music artist/company. This whole case has hurt my brand.

10. I've been asserting my right to a speedy trial since September 2016 (in a letter to the court) and since then my trial has been passed by two times due to the government's negligence. If they gave us the name of CW#1 when my attorney asked, this conflict issue would have been identified years ago. Since they did not, my trial got delayed and I lost my lawyer. I wonder whether that was intentional. As I told Mr. Grable, the government put me in a position with no good choices. That is unfair. All of this happened because they now want to call a witness that they never had when this case was supposed to go to trial in 2016. This is unfair because the

government gained an unfair tactical advantage when they filed the interlocutory appeal and delayed the trial in 2016 in order to obtain this witness that was not going to be used during the 2016 trial, but now they claim that this is their “key witness” and a trial can’t proceed without him. This entire situation frustrates me a lot. It happened because of nothing I did. Also, I am frustrated that it took the court a while to resolve the conflict issue and assign me a new lawyer. During that time, the clock was ticking and this case still hung over my head. After our last hearing in October 2017, what had to happen seemed clear cut to me. I should have gotten a new lawyer much sooner than I did.

Dated: April 30, 2018
Buffalo, New York


Kenneth Pettway

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

1 Court Reporter: LYNNE E. DiMARCO
2 Notary Public
3 Jack W. Hunt & Associates, Inc.
4 1120 Liberty Building
5 Buffalo, New York 14202
6 (716) 853-5600

7 THE COURT: Good morning. Please have a seat. Okay.
8 Ms. Labuzzetta, call the case.

9 THE CLERK: Criminal case 12-103-S, United States of
10 America versus Kenneth Pettway and Demetrius Black.

11 THE COURT: Okay. For record purposes let's start
12 with the government's counsel table, identify yourselves for the
13 record, please.

14 MR. FELICETTA: Good morning, Judge. Michael
15 Felicetta and Scott Allen on behalf of the government.

16 THE COURT: All right. Gentlemen, good morning.
17 For Defendant Pettway, please.

18 MR. GREENMAN: Judge, Herbert Greenman on behalf of
19 Mr. Pettway. James Grable is here I believe at the request of
20 the Court.

21 THE COURT: Okay. And Kenneth Pettway is here. James
22 Grable I've asked to be here to serve as independent conflict
23 counsel and we'll take a little while before we get to that
24 issue. But, Mr. Grable, thank you very much for coming here on
25 short notice.

26 MR. GRABLE: I'm happy to do what I can to help the
27 case, Your Honor.

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10:15:46 1 THE COURT: All right. Thank you. And then that
10:15:46 2 second table Defense.

10:15:49 3 MR. HILL: Good morning, Your Honor. Sean Hill on
10:15:51 4 behalf of Demetrius Black.

10:15:53 5 THE COURT: All right. Mr. Hill, good morning. And,
10:15:55 6 of course, Demetrius Black, good morning as well. Mr. Pettway,
10:15:55 7 good morning as well.

10:15:55 8 MR. BLACK: Good morning, Your Honor.

10:15:58 9 THE COURT: Okay. Let's talk about where we are at.
10:16:02 10 And, frankly, it's a little bit disturbing to me in terms of
10:16:06 11 having this issue come up at this point in time. And I'm
10:16:11 12 talking about the possibility of a conflict issue, but let's
10:16:18 13 start with this.

10:16:22 14 Mr. Felicetta, why don't you let me know if there are
10:16:28 15 any updated plea offer matters that we should address before we
10:16:32 16 go forward this morning.

10:16:38 17 Now, today was set as a continuance day for purposes
10:16:38 18 of starting jury selection. When the matter of conflict came
10:16:45 19 up, I think it was mid afternoon yesterday around 3 o'clock or
10:16:52 20 so is when I learned about it, I determined that to be safe it
10:16:57 21 would be better to defer bringing the jury venire in today until
10:17:08 22 we resolved a number of issues that relate to the start of
10:17:11 23 trial. And so the jury was called off. It is set -- at least
10:17:19 24 panel one is to be brought in tomorrow, depending on the outcome
10:17:24 25 of today's proceedings.

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10:17:26 1 Let's start, though, with the matter of any updated
10:17:29 2 plea discussions. The last discussion we had was that there was
10:17:25 3 a plea offer with respect to each Defendant on the table. And
10:17:45 4 the government made clear in terms of I thought was a plea offer
10:17:52 5 as to each Defendant, both Defendant Black and Defendant
10:18:00 6 Pettway. And if you want to address that at this point,
10:18:02 7 Mr. Felicetta, please.

10:18:02 8 **MR. FELICETTA:** Of course, Your Honor. Is it all
10:18:08 9 right if I stay seated or would you like me to approach?

10:18:09 10 **THE COURT:** I'd prefer the podium, please, if you
10:18:14 11 would. And the last information that I had, and correct me if
10:18:21 12 my recollection is not correct, but the government had on the
10:18:24 13 table an offer of a plea to Defendant Kenneth Pettway which was
10:18:32 14 to be an 11(c)(1)(c) plea in the range of 120 to 240 months and
10:18:35 15 there was a on-the-table offer to Defendant Demetrius Black
10:18:40 16 again an 11(c)(1)(c) plea offer to a range of 60 to 151 months.
10:18:51 17 Now, that's what my records reflect. Go ahead.

10:18:53 18 MR. FELICETTA: Yes, Judge, to clarify at our last
10:18:57 19 appearance what the government placed on the record was that
10:18:58 20 there were no plea offers available to the Defendants that were
10:19:01 21 currently tendered.

10:19:02 22 What we did place on the record, though, I think what
10:19:07 23 the Court is referring to, is that when we had an interrogatory
10:19:09 24 appeal filed in October of 2016 immediately after that the
10:19:13 25 government on October 19th of 2016 tendered an offer to

10:19:18 1 Mr. Black. It's an 11(c)(1)(c) plea with an arranged 60 months
 10:19:23 2 to 151 months.
 10:19:25 3 Thereafter on October 24th we had discussed but not
 10:19:28 4 tendered an offer of 120 to 240 months to Kenneth Pettway, Jr.
 10:19:34 5 under 11(c)(1)(c). It was my understanding from speaking with
 10:19:38 6 Mr. Greenman that Mr. Pettway was not interested in that plea,
 10:19:40 7 that the numbers were not acceptable to him, so we never
 10:19:44 8 formally tendered that offer.
 10:19:47 9 **THE COURT:** Yeah, but didn't you say that you would
 10:19:50 10 renew that previous plea offer if the Defendants were
 10:19:50 11 interested?
 10:19:51 12 **MR. FELICETTA:** That's exactly what we said in our
 10:19:51 13 last appearance, Judge. And since our last appearance
 10:19:54 14 Mr. Black's attorney, Mr. Hill, contacted our office yesterday.
 10:19:58 15 We had been in discussions in the days leading up to yesterday,
 10:20:02 16 but Mr. Hill called me yesterday and said that he believes his
 10:20:07 17 client if offered that plea again, would be amenable to it.
 10:20:11 18 So thereafter I contacted the supervisors in our
 10:20:12 19 office and acting U.S. attorney and the offer is now available
 10:20:16 20 again under the previous terms as to Mr. Black, 11(c)(1)(c) of
 10:20:23 21 60 to 151 months. The offer is open until next Friday,
 10:20:24 22 October 13th, 2017.
 10:20:26 23 As far as Mr. Pettway, informal discussions have taken
 10:20:30 24 place with Mr. Greenman.
 10:20:32 25 **THE COURT:** Well, let me ask you this. October 13th

10:20:36 1 you're during the course of trial.
 10:20:38 2 **MR. FELICETTA:** Well, assuming that the trial is
 10:20:38 3 adjourned. If the trial is not adjourned, then obviously once
 10:20:42 4 we start jury selection the offer is gone. So to be clear,
 10:20:45 5 Judge, we don't know when the trial is going to commence. If we
 10:20:47 6 commence tomorrow, if we're able to resolve this issue, then the
 10:20:50 7 offer is available till tomorrow.
 10:20:52 8 **THE COURT:** All right. Were you going to go beyond
 10:20:55 9 that as far as your discussions with Mr. Hill on behalf of
 10:20:59 10 Demetrius Black?
 10:21:02 11 **MR. FELICETTA:** Nothing more with respect to Mr. Hill
 10:21:04 12 and Defendant Black. With respect to Defendant Pettway all I
 10:21:12 13 can say is we've had -- me and Mr. Greenman have had informal
 10:21:12 14 conversations and I don't think we're any closer than we were in
 10:21:14 15 October of last year.
 10:21:15 16 **THE COURT:** Okay. All right. And with respect to
 10:21:17 17 that one limited issue, Mr. Sean Hill, you can stay -- well,
 10:21:25 18 actually come on up to the podium, please. It makes it easier
 10:21:29 19 for my court reporter and myself as well.
 10:21:35 20 All right. Give me your understanding of where we are
 10:21:38 21 as far as the interest of the Defendant Demetrius Black in what
 10:21:45 22 appears now to be a plea offer that is on the table if there is
 10:21:51 23 demonstrated interest by Demetrius Black.
 10:21:55 24 **MR. HILL:** Yes, there is, Your Honor.
 10:21:58 25 **THE COURT:** Okay. Has a final determination been made

10:22:02 1 with respect to the 11(c)(1)(c) plea offer?
 10:22:07 2 **MR. HILL:** Well, we were waiting to see to make sure
 10:22:10 3 that we -- it would be able to be put back on the table if
 10:22:13 4 Mr. Felicetta had approval of that. And I'm expecting that, you
 10:22:17 5 know, there'll be another discussion with Mr. Black and there'll
 10:22:21 6 be a decision. I think that's where we're headed, Your Honor.
 10:22:25 7 **THE COURT:** All right. So your client is
 10:22:26 8 not -- Mr. Black has not committed to the plea offer at this
 10:22:31 9 point. The inquiry was whether or not that plea offer is back
 10:22:36 10 on the table?
 10:22:38 11 **MR. HILL:** That's where we are at this point, but I
 10:22:41 12 think that there's sincere interest there. I met with Mr. Black
 10:22:45 13 and some members of his family yesterday and that's where we
 10:22:50 14 are.
 10:22:50 15 **THE COURT:** Okay. And you've discussed that with not
 10:22:53 16 only the family members but Mr. Black?
 10:22:56 17 **MR. HILL:** Yes.
 10:22:56 18 **THE COURT:** Okay. All right. You understand, and I
 10:22:59 19 know Mr. Black is here, and I don't know if you heard everything
 10:22:02 20 that was going on, because I think you and Mr. Pettway and
 10:22:07 21 Mr. Black were having a little bit of a conversation there, did
 10:22:07 22 you hear what Mr. Hill was saying?
 10:22:15 23 **MR. BLACK:** Yes.
 10:22:16 24 **THE COURT:** Okay. And you are currently on notice
 10:22:18 25 that there is that plea offer on the table. If we start trial,

10:23:24 1 the plea offer leaves the table if you do not accept it and we
 10:23:30 2 then commence trial.
 10:23:33 3 Otherwise, if we don't start trial tomorrow, for
 10:23:38 4 example, with jury selection, the offer is on the table only
 10:23:43 5 until either we start trial or Friday -- is it Friday the 13th?
 10:23:49 6 **MR. FELICETTA:** Yes, Your Honor.
 10:23:51 7 **THE COURT:** Okay. Friday, October 13th.
 10:23:52 8 **MR. BLACK:** Yes.
 10:23:52 9 **THE COURT:** All right. Anything more that I can know
 10:23:55 10 about, Mr. Hill?
 10:23:55 11 **MR. HILL:** No, Your Honor, not at this point.
 10:23:57 12 **THE COURT:** Okay. Mr. Black -- I'm sorry.
 10:23:59 13 Mr. Greenman, I get callers mixed up here, but if you
 10:24:04 14 want to take the podium and just give me your take on where we
 10:24:09 15 are as far as what Mr. Felicetta has put on the record.
 10:24:17 16 **MR. GREENMAN:** I will say that when I learned about
 10:24:19 17 what the situation was, I spoke briefly with Mr. Felicetta about
 10:24:23 18 what the government's position might be, but I was told that the
 10:24:27 19 government's position is still the same as it was before, which
 10:24:31 20 had basically been rejected by Mr. Pettway.
 10:24:35 21 I actually went up to Niagara County jail last night
 10:24:38 22 and spent quite a bit of time with Mr. Pettway. A lot of it had
 10:24:43 23 to do with this issue why the conflict was out there.
 10:24:44 24 And I told him that because Mr. Grable would be here I
 10:24:49 25 would not give him advice. I didn't think it was my position to

10:24:53 1 give him advice. But we did have some conversations
 10:24:58 2 about -- some discussions. I wouldn't say they we're at
 10:25:00 3 anywhere close to a resolution at this point, but we did have
 10:25:05 4 conversations about that.

10:25:06 5 **THE COURT:** About the plea offer?

10:25:09 6 **MR. GREENMAN:** Yes, Your Honor.

10:25:10 7 **THE COURT:** Okay. And is there any difference in what
 10:25:15 8 was just articulated through Mr. Felicetta in terms of the terms
 10:25:19 9 of the plea agreement and what could be back on the table if
 10:25:24 10 there was demonstrated interest in that plea offer?

10:25:28 11 **MR. GREENMAN:** Well, essentially what the plea offer
 10:25:30 12 is, Your Honor, is that it's a Rule 11(c) type of plea where
 10:25:32 13 there would be limits to where Mr. Pettway could not ask for
 10:25:37 14 less and the government could not ask for more than 10 years for
 10:25:42 15 Mr. Pettway and up to 20 years that the government has indicated
 10:25:46 16 that they would advocate for 20 years.

10:25:48 17 Obviously if there was a plea, Mr. Pettway would
 10:25:51 18 advocate for the lower end, but that's what has been discussed
 10:25:54 19 with Mr. Pettway. He understands, I believe he understands the
 10:25:57 20 parameters of the plea.

10:25:58 21 **THE COURT:** All right. There's a low end 10 years,
 10:26:01 22 high end 20 years?

10:26:03 23 **MR. GREENMAN:** That's correct, Your Honor.

10:26:04 24 **THE COURT:** The sentencing is within my discretion
 10:26:05 25 under the plea agreement structure that we're talking about

10:26:11 1 right now.

10:26:12 2 **MR. GREENMAN:** That's correct, Your Honor.

10:26:14 3 **THE COURT:** All right. Mr. Pettway, you understand
 10:26:16 4 that?

10:26:16 5 **MR. PETTWAY:** Yes, I understand.

10:26:18 6 **THE COURT:** All right. And you've discussed that at
 10:26:20 7 least to that extent in terms of what the terms are with
 10:26:23 8 Mr. Greenman as recently as last evening and before that from
 10:26:26 9 time to time; is that a fair statement?

10:26:30 10 **MR. PETTWAY:** Yeah, we spoke about it.

10:26:36 11 **MR. GREENMAN:** Okay. He said we spoke about it.

10:26:39 12 **THE COURT:** Yes, thank you. Okay. Don't leave. I
 10:26:42 13 think we're going to get into the matter of conflict. And we've
 10:26:47 14 got several issues that I'm prepared to resolve as far as
 10:26:52 15 wrapping up everything that I think is still unresolved in terms
 10:26:58 16 of motions and 1(a) and the like.

10:27:02 17 I'll take care of those in short order, but I think
 10:27:05 18 before we do that so that I don't hold Mr. Grable up longer than
 10:27:12 19 necessary I think we should get into what was called to my
 10:27:16 20 attention and what occasion of putting off jury selection until
 10:27:23 21 possibly tomorrow.

10:27:24 22 And I think the premise for putting off jury selection
 10:27:31 23 has to do with the revelation by the government that at this
 10:27:36 24 late stage of the confidential source witness in this particular
 10:27:45 25 case.

10:27:45 1 And apparently that took place yesterday. And upon a
 10:27:49 2 disclosure of that confidential source witness, Mr. Greenman,
 10:27:54 3 that triggered in your mind the possibility that there may be a
 10:28:04 4 potential conflict in this particular case for your continued
 10:28:11 5 representation?

10:28:16 6 **MR. GREENMAN:** Yes, Your Honor. Judge, actually, when
 10:28:14 7 we were here last Monday, Your Honor, we had been pushing to try
 10:28:18 8 to get this person's name.

10:28:20 9 And when we appeared last Monday, Your Honor ordered
 10:28:23 10 the government to provide us with the name of that individual
 10:28:27 11 who the government says they're going to call by midnight and **it**
 10:28:31 12 **was 11:54, 11:55 we got the name** and --

10:28:34 13 **THE COURT:** On Monday?

10:28:36 14 **MR. GREENMAN:** 25th, Your Honor, of September. A week
 10:28:40 15 ago last Monday.

10:28:41 16 **MR. FELICETTA:** Yes.

10:28:42 17 **THE COURT:** Okay.

10:28:43 18 **MR. GREENMAN:** So there was some other additional
 10:28:46 19 information there. And I was going to be out of town, so I had
 10:28:51 20 asked before I left a soon to be associate to get certain
 10:28:58 21 records, which are the records of the underlying conviction,
 10:29:03 22 which I wanted to have.

10:29:04 23 He was not able to do it. So I came back to Buffalo
 10:29:09 24 yesterday. When I learned he didn't have it, I appeared before
 10:29:13 25 you on an unrelated case and from there went right over to

10:29:18 1 County Hall to look up the papers. It was a little bit
 10:29:21 2 difficult to get it for some reason, but the bottom line was
 10:29:25 3 that we wound up being given -- there were two that I was
 10:29:28 4 looking for.

10:29:29 5 One had to do with Rayshod Washington, who's another
 10:29:31 6 recently disclosed witness to us. So I was given the court file
 10:29:38 7 and immediately found upon opening it based on a letter that
 10:29:41 8 appeared right on top of the file was from me to the judge. I
 10:29:45 9 realized that I was his attorney.

10:29:47 10 And I contacted Mr. Felicetta pretty quickly and we
 10:29:52 11 talked about it for some time through the lunch hour. And we
 10:29:56 12 both decided that it needed to be disclosed to Your Honor,
 10:30:00 13 because there is at the very least, my opinion at least,
 10:30:04 14 potential conflict here.

10:30:06 15 So that's why I sent an e-mail to Ms. Labuzzetta
 10:30:11 16 yesterday and she talked to Your Honor.

10:30:14 17 **THE COURT:** I have limited information that relates to
 10:30:16 18 what you just told me, but my understanding is that you may have
 10:30:21 19 twice represented this confidential source.

10:30:27 20 **MR. GREENMAN:** It seemed like there were two cases.
 10:30:27 21 There's reference to two cases. A letter that I sent to the
 10:30:30 22 judge that triggered this revelation to me that there was a
 10:30:33 23 violation of probation proceeding that I was representing him on
 10:30:40 24 as well as substantive case that is still pending, a felony,
 10:30:43 25 multiple felony charges that were still pending in New York

10:30:49 1 Supreme Court.
 10:30:49 2 And my letter referenced both cases to the judge.
 10:30:54 3 What we were doing at that point in time, Your Honor, he was on
 10:30:57 4 probation from a case in Chautauqua County. We learned that
 10:31:00 5 this case the jurisdiction could be transferred to Erie County.
 10:31:05 6 And what I was trying to do is to make sure that if we took a
 10:31:10 7 plea, that he could get the current sentencing and I believe
 10:31:13 8 that that's basically what wound up happening.
 10:31:15 9 The jurisdiction was transferred to Erie County. And
 10:31:19 10 from what I recollect he was sentenced through currently.
 10:31:22 11 **THE COURT:** Well, how current is this or has this
 10:31:26 12 representation of this confidential source been?
 10:31:31 13 **MR. GREENMAN:** The conviction was 2002, Your Honor,
 10:31:34 14 but there's some issues that, you know, we will want to raise
 10:31:35 15 about using it, but I guess use it during cross-examination.
 10:31:41 16 I talked to Mr. Felicetta yesterday about this and the
 10:31:44 17 issue was one of waiver. And apparently as of last night that
 10:31:48 18 witness has indicated to the government that he did not want to
 10:31:52 19 waive, because of revelations he made to me, so.
 10:31:56 20 **THE COURT:** All right. And in your mind that's a
 10:31:59 21 conflict?
 10:32:00 22 **MR. GREENMAN:** It is, Your Honor.
 10:32:01 23 **THE COURT:** All right. Now, your first knowledge, I
 10:32:03 24 mean for all practical purposes of this at least potential
 10:32:09 25 conflict, was the result of your efforts in obtaining the case

10:32:16 1 file on this particular individual after this eleventh hour
 10:32:21 2 disclosure by the government?
 10:32:23 3 **MR. GREENMAN:** Yes, Your Honor. Normally we would run
 10:32:26 4 a conflicts check from our office and for all the other
 10:32:30 5 witnesses that they had we did, but I don't know. It was the
 10:32:32 6 lateness of the time, some issues that I had to take care of, so
 10:32:37 7 I didn't run a conflicts check, probably should have, I would
 10:32:40 8 have learned maybe on Wednesday or Thursday of last week, maybe
 10:32:44 9 Friday, but I did the best that I could do, Your Honor.
 10:32:46 10 I learned yesterday. As soon as I got back in town I
 10:32:50 11 wanted to get it anyway because it was important to have, but
 10:32:53 12 since we have recently learned his identity, that's why I went
 10:32:57 13 over and pulled the papers and I realized that my name was all
 10:33:01 14 over the file.
 10:33:01 15 **THE COURT:** All right. And do you have an independent
 10:33:03 16 recollection of representing this individual?
 10:33:06 17 **MR. GREENMAN:** Yeah, I do. I did not at first, but I
 10:33:10 18 do now.
 10:33:10 19 **THE COURT:** All right.
 10:33:10 20 **MR. GREENMAN:** It triggered -- something in the file
 10:33:12 21 that I read last night triggered my recollection of this case,
 10:33:16 22 because it was something unusual about the case.
 10:33:19 23 **THE COURT:** All right. And did you have substantial
 10:33:22 24 contact in your judgement with this individual in terms of your
 10:33:26 25 representation of him or her, whomever?

10:32:29 1 **MR. GREENMAN:** I think so, Your Honor. If
 10:32:32 2 Mr. Felicetta doesn't mind me quoting him a little bit during
 10:32:35 3 our conversation he advised Mr. Felicetta that he had told me
 10:32:40 4 everything about him, which was why he apparently was saying he
 10:32:46 5 didn't want to waive the conflict.
 10:32:49 6 **THE COURT:** I know you have substantial independent
 10:32:50 7 recollection as a general rule, but I take it that you had made
 10:32:53 8 notes to that effect that are accessible in the file?
 10:32:59 9 **MR. GREENMAN:** Judge, because of this issue I did not
 10:34:02 10 ask -- the file is in a warehouse. I did not ask that the file
 10:34:08 11 be returned to me yet. I'm very uncomfortable with the whole
 10:34:12 12 situation. And I thought it would really be pushing a button if
 10:34:17 13 I had the file brought back until we get a resolution from the
 10:34:18 14 court.
 10:34:19 15 **THE COURT:** Okay. So at least to this point in time
 10:34:23 16 your memory has been refreshed with respect to your relationship
 10:34:28 17 with this confidential source witness?
 10:34:31 18 **MR. GREENMAN:** Yes, sir.
 10:34:33 19 **THE COURT:** And let me ask you this. In terms of
 10:34:35 20 exercising due diligence in terms of trial preparation, is it
 10:34:38 21 your opinion that you would have to review in all likelihood the
 10:34:45 22 file for the purposes of preparing your defense for Mr. Pettway?
 10:34:51 23 **MR. GREENMAN:** I would think, Judge, that if he waives
 10:34:55 24 the conflict, and the Court would probably have to rule on that,
 10:34:59 25 but I would interpret that to mean totally waives the conflict,

10:35:01 1 which would then allow me to go back and review the file for the
 10:35:05 2 purposes of cross-examination, sure, what was in the file and
 10:35:10 3 the notes that I would have made.
 10:35:11 4 Your Honor knows I'm a note taker, so but I was
 10:35:15 5 hesitant to go get the file, have my secretary to have it
 10:35:17 6 retrieved yet, because I'm just -- I don't know want to do
 10:35:22 7 anything until we have some resolution here.
 10:35:25 8 **THE COURT:** What if there's no waiver?
 10:35:27 9 **MR. GREENMAN:** I'm sorry, Your Honor.
 10:35:29 10 **THE COURT:** What if there is no waiver? Is it a
 10:35:32 11 severe conflict in your judgment?
 10:35:35 12 **MR. GREENMAN:** I believe it is. Judge, I just had a
 10:35:37 13 chance this morning very briefly to start looking at some case
 10:35:41 14 law and cases sort of go both ways, but that's on appeal.
 10:35:45 15 I read a case this morning where I think the Court
 10:35:48 16 said, well, defendant raised the issue for the first time on
 10:35:52 17 appeal apparently. And the distinction was that the Court, I
 10:35:57 18 think it was Judge Curtis, found that the lawyer did not
 10:36:01 19 represent -- the lawyer who wound up representing him was not
 10:36:04 20 the one who had represented the witness previously and that he
 10:36:06 21 had no conversation with the other attorney about it. In other
 10:36:11 22 words, he didn't have any confidential information, which I do.
 10:36:15 23 **THE COURT:** Yeah, I mean, it's unlike your present
 10:36:18 24 situation.
 10:36:18 25 **MR. GREENMAN:** Right.

10:36:19 1 THE COURT: All right. So how do you characterize
10:36:23 2 this, at least potential conflict.
10:36:26 3 MR. GREENMAN: Yeah, I was just going to say, Judge, I
10:36:28 4 would -- and, again, this is without a whole lot of research,
10:36:32 5 but I would characterize it at least as a potential conflict of
10:36:36 6 interest. And what the cases seem to say that triggers the
10:36:41 7 Court's obligation once you're notified to go into the inquiry
10:36:46 8 stage. And that is through independent counsel, which you've
10:36:50 9 already done.
10:36:51 10 THE COURT: Yeah, I mean, I have to make a
10:36:53 11 determination as to whether or not there is at least an actual
10:36:55 12 or potential or no genuine conflict at all. And at least in
10:37:01 13 your comfort zone in terms of representing Mr. Pettway you see
10:37:05 14 this as a potential conflict at this point?
10:37:08 15 MR. GREENMAN: I do, Judge. This is not an excuse or
10:37:12 16 anything like that. This is something I wish it hadn't come up.
10:37:16 17 Everybody was ready to go, but it's here, so.
10:37:19 18 And I hope the Court can understand we notified you at
10:37:23 19 the first possible time. We did not have his identity. And the
10:37:27 20 first possible time I learned of it was yesterday, which was
10:37:30 21 shortly before we notified you.
10:37:32 22 THE COURT: All right. If Mr. Pettway does waive any
10:37:36 23 conflict here, other than an actual conflict so severe that no
10:37:45 24 rational Defendant could do so without impacting on his
10:37:52 25 constitutional right of fair representation, are you ready to

10:37:58 1 go?
10:38:00 2 MR. GREENMAN: Well, we would be ready to do whatever
10:38:01 3 you tell us to do, Judge.
10:38:03 4 THE COURT: Okay. All right. Don't leave the podium.
10:38:07 5 Mr. Felicetta, I'm going to be honest with you, this
10:38:11 6 is disturbing to me, because -- well, let me ask you this. Did
10:38:13 7 you do a conflict check on this particular confidential source
10:38:18 8 witness?
10:38:19 9 MR. FELICETTA: I'm sorry, Judge. What is the
10:38:22 10 question?
10:38:23 11 THE COURT: Did you do a conflicts check on this
10:38:26 12 confidential source witness before disclosing the witness to the
10:38:32 13 Defendant?
10:38:32 14 MR. FELICETTA: The witness and I had never discussed
10:38:34 15 whether he had been represented by either Mr. Hill or
10:38:35 16 Mr. Greenman.
10:38:36 17 THE COURT: Why? Explain to me, is there no protocol
10:38:39 18 in your office requiring that, because it is problematic and it
10:38:42 19 happens. This may be the third or fourth time on the eve of
10:38:46 20 trial where a situation like this has come to my attention.
10:38:52 21 It would seem to me that proper prosecutorial protocol
10:38:58 22 should require in an instance where you're requesting from the
10:39:04 23 Court that I give you the opportunity to withhold a witness's
10:39:07 24 identity from the defense to protect that particular witness.
10:39:13 25 The protocol should be that the government checks to

10:39:17 1 make sure that on the eve of trial this kind of situation
10:39:22 2 doesn't arise, three or four times this has happened.
10:39:23 3 MR. FELICETTA: Judge, I apologize. It's never
10:39:25 4 happened to me, but --
10:39:26 5 THE COURT: Well, maybe not, but what's the protocol
10:39:30 6 in the office? Is there one with respect to doing conflicts
10:39:32 7 checks on potential undisclosed witnesses where there is a
10:39:37 8 government's view that there's risk to that particular witness?
10:39:41 9 MR. FELICETTA: I'm not aware of any. What I can tell
10:39:44 10 the Court is that, you know, I didn't meet with this witness
10:39:47 11 until most recently about a week before our final pretrial. And
10:39:52 12 that's when we had discussions about his testimony and about the
10:39:56 13 safety concerns that we put on the record last Monday.
10:39:59 14 And, of course, the Court directed me to turn over his
10:40:03 15 name last Monday, which we complied with. And we had turned
10:40:07 16 over before that his criminal history record and the case that
10:40:09 17 involved his cooperation deal.
10:40:12 18 THE COURT: Did you ask him to him?
10:40:14 19 MR. FELICETTA: Yes.
10:40:15 20 THE COURT: Okay. Did you ask that witness whether or
10:40:18 21 not he had ever been represented by anybody associated with this
10:40:21 22 case or any member of an attorney's firm?
10:40:25 23 MR. FELICETTA: No, Judge, it never occurred to me
10:40:29 24 that that would come up as an issue and it's never happened to
10:40:29 25 me before, Judge. And not to say that maybe in the future I

10:40:34 1 shouldn't do that, but it's just unfortunate. I mean, I don't
10:40:36 2 think it's anyone's fault.
10:40:38 3 THE COURT: No, no, I think there's maybe an office
10:40:41 4 fault here if there is not a protocol that has been communicated
10:40:46 5 to you. And I take your word without question, all right, that
10:40:50 6 you didn't know that a conflicts check should be done in a
10:40:56 7 scenario like this.
10:40:57 8 I can't imagine that good prosecutorial process would
10:41:04 9 not call for conflicts checks of critical witnesses like you
10:41:08 10 have in your particular case. And I'm not faulting you for not
10:41:12 11 doing it if you didn't know or you weren't mentored in that
10:41:16 12 respect, there should be an office protocol in that regard.
10:41:19 13 Because, I mean, it derails so many things. And it's
10:41:23 14 not only an inconvenience to me, but it's not fair fundamentally
10:41:26 15 I think in many respects to the parties in this case. It's very
10:41:32 16 disturbing to me.
10:41:35 17 MR. FELICETTA: I understand, but let's assume for a
10:41:38 18 moment that I had done that.
10:41:38 19 THE COURT: Yeah.
10:41:39 20 MR. FELICETTA: We're talking about a difference of a
10:41:39 21 few days. I mean, I turned over the witness's identity as
10:41:44 22 directed by the Court on September 25th. We didn't find out
10:41:49 23 about a conflict until nine days later.
10:41:51 24 But if I had asked them three days earlier when we had
10:41:54 25 met on September 20th or 21st, that's when we would have found

10:41:58 1 out.

10:41:58 2 THE COURT: All right. Hold on now. How long have

10:41:59 3 you been associated with this case?

10:42:01 4 MR. FELICETTA: How long have I been associated with

10:42:04 5 this case, since May of last year I believe.

10:42:06 6 THE COURT: Okay. And when was this case indicted?

10:42:10 7 MR. FELICETTA: 2012, Your Honor.

10:42:11 8 THE COURT: Okay. Five years ago.

10:42:12 9 MR. FELICETTA: Right.

10:42:14 10 THE COURT: Somebody should have done that. Somebody

10:42:16 11 should have done what you haven't done, because you didn't know

10:42:18 12 about it, but it just seems to me --

10:42:21 13 MR. FELICETTA: In fairness.

10:42:23 14 THE COURT: -- it's the normal course, it should be

10:42:24 15 done.

10:42:24 16 MR. FELICETTA: This witness didn't develop, and we

10:42:27 17 know this from our record here before this court until

10:42:29 18 October 2016, and I didn't meet with him until the middle of

10:42:32 19 September of 2017. So I understand what the Court is saying,

10:42:37 20 but I can't -- even if there was such a policy, I wouldn't have

10:42:41 21 been able to effect it until the middle of September 2017 when I

10:42:44 22 finally located the witness and brought him to my office and got

10:42:48 23 a chance to meet with him.

10:42:50 24 Now, I understand what the Court is saying. Maybe

10:42:52 25 that's a good procedure. That would have notified us on

10:42:53 1 September 20th that there was a conflict.

10:42:55 2 THE COURT: Excuse me. You could have found out,

10:42:58 3 somebody could have found out in October of 2016 possibly,

10:43:02 4 possibly, right?

10:43:04 5 MR. FELICETTA: Well, we had to have found the witness

10:43:07 6 first before we could ask him if he was represented by

10:43:11 7 Mr. Greenman.

10:43:12 8 THE COURT: No, you would know who you were looking

10:43:14 9 for, right?

10:43:15 10 MR. FELICETTA: Right.

10:43:16 11 THE COURT: So at that point in time, I mean,

10:43:17 12 conceivably that could have been done then, right, if the

10:43:23 13 prosecutorial decision was that that was a material witness.

10:43:26 14 And if you found that witness, you'd want to know whether there

10:43:31 15 were any conflicts. You do this all the time.

10:43:31 16 MR. FELICETTA: I understand that, but I don't think

10:43:32 17 you know that until you talk to the witness.

10:43:37 18 THE COURT: Well, all right. You know, you said this

10:43:40 19 might be a good policy for your office. No, not that it might

10:43:46 20 be. It is a good policy for the prosecutor's office to do this

10:43:51 21 so this doesn't happen, not four times in recent memory. It's

10:43:56 22 just not right in my judgment.

10:44:00 23 Okay. I mean, I take it you don't disagree that

10:44:05 24 there's a potential conflict here.

10:44:07 25 MR. FELICETTA: It's a difficult thing to -- as a

10:44:10 1 legal matter to decide without delving further. I mean, the

10:44:13 2 question here is can Mr. Greenman cross-examine this witness

10:44:14 3 effectively.

10:44:15 4 And the context of what his representation was was

10:44:19 5 over 15 years ago. So would the Court allow Mr. Greenman to

10:44:23 6 even delve into this in the first instance. It may be barred by

10:44:27 7 the rules as to cross-examination anyhow, in which case none of

10:44:32 8 the facts that Mr. Greenman learned through his representation

10:44:33 9 would even be admissible for purposes of impeachment.

10:44:38 10 So I think that's an inquiry we have to make first to

10:44:39 11 see if the Court would allow this to be an area in which he

10:44:43 12 could cross-examine the witness with instances of potential

10:44:47 13 knowledge Mr. Greenman has as to the witness's ability to tell

10:44:52 14 the truth.

10:44:54 15 THE COURT: Before it happens.

10:44:54 16 MR. FELICETTA: I'm sorry, Judge.

10:44:57 17 THE COURT: How can you determine that before it

10:44:59 18 happens.

10:44:59 19 MR. FELICETTA: Well, the Court can make a ruling

10:45:01 20 under Federal Rules as to whether or not a conviction from over

10:45:03 21 15 years ago is fair game for Mr. Greenman. That could be

10:45:06 22 decided today.

10:45:07 23 THE COURT: Is that the only issue that you see in

10:45:09 24 terms of representation.

10:45:11 25 MR. FELICETTA: No, I think that's the first step.

10:45:13 1 And then there's a -- the question is whether or not there is a

10:45:15 2 conflict which can be waived or there's an actual conflict which

10:45:20 3 cannot be waived.

10:45:22 4 And so I think that that turns out whether or not the

10:45:22 5 Court is going to allow cross-examination in this area in the

10:45:24 6 first instance. But assuming the Court allows cross-examination

10:45:28 7 into this area, I agree there's a conflict.

10:45:31 8 Mr. Greenman having represented the witness in a prior

10:45:36 9 occasion is in a unique situation where he can know information

10:45:41 10 about the witness that the witness is entitled to not have in

10:45:45 11 the person who is cross-examining him, because that information

10:45:46 12 was protected when given under the attorney/client privilege.

10:45:50 13 THE COURT: There'll be no issue here if the

10:45:53 14 government chose not to call this witness; is that a

10:45:56 15 possibility?

10:45:56 16 MR. FELICETTA: Judge, he's such a critical witness

10:46:00 17 it's not even a discussion that we've talked about. He's such a

10:46:05 18 critical witness to this case. I mean, we're talking about an

10:46:10 19 indictment that charges the Defendant with a period of time of

10:46:10 20 drug conspiracy and this is the one person who was involved with

10:46:16 21 law enforcement, directing law enforcement to this activity, and

10:46:19 22 had purchased drugs from the subject premises from the Defendant

10:46:24 23 in his own words more times than I can count.

10:46:26 24 THE COURT: Well, I mean, you located him in

10:46:29 25 September, right, when you --

10:46:32 1 MR. FELICETTA: Correct.
 10:46:32 2 THE COURT: -- first had a conversation with him.
 10:46:32 3 MR. FELICETTA: Right.
 10:46:36 4 THE COURT: All right. Prior to that the government
 10:46:37 5 had represented time and again that it was ready for trial.
 10:46:42 6 MR. FELICETTA: That's right.
 10:46:48 7 THE COURT: So you could proceed to trial without this
 10:46:48 8 witness.
 10:46:48 9 MR. FELICETTA: That's correct, Judge.
 10:46:50 10 THE COURT: But your choice at this point in time is
 10:46:52 11 obviously from what you've said not to go to trial without that
 10:46:57 12 witness.
 10:46:58 13 MR. FELICETTA: Judge, in good faith, I mean, I can't
 10:47:00 14 possibly say on behalf of the party I represent that we're going
 10:47:05 15 to go forward without this key piece of evidence that we have.
 10:47:07 16 I mean, it's so critical to proving what the
 10:47:08 17 allegations are in the indictment. We can't just for purposes
 10:47:12 18 of expediency say we'll just do without him.
 10:47:18 19 THE COURT: Well, I'm not asking for that reason.
 10:47:20 20 Expediency is not the critical part in this, it's fairness among
 10:47:25 21 other things.
 10:47:26 22 MR. FELICETTA: And we've tried to, we've tried to be.
 10:47:28 23 As the Court knows, we've done anything we can to be as fair and
 10:47:32 24 as open and we've worked really well with opposing counsel.
 10:47:32 25 This is just unfortunate. And I understand the

10:47:40 1 Court's frustration, I mean, no one wants this trial to go more
 10:47:42 2 than us.
 10:47:45 3 THE COURT: Well, Mr. Pettway has been demanding a
 10:47:49 4 trial for a long time. And obviously he does that because he
 10:47:57 5 views his position to be a position that is likely to exonerate
 10:48:08 6 him after trial and that's basically where we've been.
 10:48:13 7 Mr. Greenman, based on what Mr. Felicetta has said.
 10:48:20 8 MR. GREENMAN: Well, I just spoke to Mr. Hill. The
 10:48:24 9 problem with the whole situation now, Judge, from what
 10:48:29 10 Mr. Felicetta stated is that my recollection if I can look at my
 10:48:34 11 notes is that the government was aware of this man, that a
 10:48:37 12 decision pretty much had been made, although maybe not
 10:48:42 13 finalized, that they were going to call him right around the
 10:48:44 14 time that the first trial was supposed to start in October.
 10:48:50 15 To that extent the government gave Mr. Hill and myself
 10:48:54 16 a DEA six under a protective order that outlined this
 10:48:54 17 informant's involvement in I think it was either December 11th
 10:48:57 18 or December 12th of 2011.
 10:49:00 19 So it's not like he just sort of popped up here, you
 10:49:03 20 know. What the government did, I don't know. I have no idea
 10:49:06 21 what they did or what efforts they made or didn't make, but in
 10:49:11 22 fairness this is something that was discussed I think even in
 10:49:18 23 front of you.
 10:49:17 24 I don't recall if it was on the record, but I know
 10:49:19 25 that this was going to be an issue right around the time that

10:49:24 1 the case was -- it was either right around the time that the
 10:49:27 2 case was going to be tried or it was right after the government
 10:49:27 3 filed its appeal.
 10:49:27 4 MR. FELICETTA: It was after.
 10:49:31 5 THE COURT: Yeah, it might have been.
 10:49:31 6 MR. GREENMAN: As I was just going to say that. As
 10:49:33 7 I'm thinking to myself, it was probably about two weeks after
 10:49:36 8 that this came up in our conversations.
 10:49:39 9 So I think Mr. Felicetta is right about the timing,
 10:49:42 10 because I do recollect recently seeing some information that he
 10:49:46 11 gave to us either October 12th, 13th, or 16th or somewhere
 10:49:50 12 around there of last year.
 10:49:52 13 THE COURT: Well, let me ask you this. I mean, do you
 10:49:55 14 view -- and you've termed the conflict in your judgment a
 10:50:01 15 potential conflict. All right.
 10:50:03 16 And you're basing that on a limited recollection that
 10:50:10 17 you have of your relationship with this confidential source
 10:50:18 18 witness, right?
 10:50:19 19 MR. GREENMAN: Well, limited yesterday, you know.
 10:50:20 20 Once I saw one of the affidavits, I read them last night in the
 10:50:23 21 file, and I remembered the case and I remembered handling it. I
 10:50:26 22 remember some things about him.
 10:50:28 23 I mean, obviously, it's 15 years ago. But, you know,
 10:50:31 24 I mean, what's going to be -- what's happening here is that if
 10:50:35 25 everything goes that way, I'm going to have to cross-examine a

10:50:39 1 former client and I think that's a problem to me.
 10:50:42 2 I'd have to look at the ethics rules that we have in
 10:50:48 3 the New York State law to see whether I'm supposed to even do
 10:50:52 4 that. But whatever you order, Judge, I'm going to do.
 10:50:56 5 But it's not a comfortable situation to think ahead of
 10:50:57 6 time that I've got to cross-examine a guy I represented some
 10:51:00 7 years ago.
 10:51:01 8 THE COURT: Well, sure, but that may not be so severe
 10:51:06 9 that it constitutes an actual conflict.
 10:51:09 10 MR. GREENMAN: I'm not suggesting, Judge, and I don't
 10:51:11 11 know that it is an actual conflict, because I think in my mind
 10:51:14 12 it's absolutely a potential conflict, which I believe requires a
 10:51:21 13 waiver of both the Defendant, Mr. Pettway, and the witness.
 10:51:25 14 So, you know, again, that's just my thinking, Judge.
 10:51:28 15 And if I'm wrong, I haven't had time to really formalize
 10:51:30 16 anything in a short time.
 10:51:33 17 THE COURT: All right. At this point in time, I mean,
 10:51:38 18 what you would have to do in terms of cross-examining the
 10:51:42 19 witness that the government now states is absolutely material to
 10:51:46 20 its prosecuting Mr. Pettway and Mr. Black in this case; is that
 10:51:53 21 a fair statement?
 10:51:54 22 MR. FELICETTA: That's a fair statement.
 10:51:57 23 THE COURT: All right. That it's only -- we can only
 10:51:59 24 speculate what you might have to get into in cross-examination,
 10:52:02 25 whether it's impeachment by the conviction. I mean, the

10:52:05 1 conviction may not under the rules be admissible for impeachment
10:52:12 2 purposes, but you don't even know that.
10:52:16 3 Well, you know that from a legal standpoint, but in
10:52:19 4 terms of what that might mean to defense you can only speculate
10:52:24 5 getting into that or not. You know, what this witness is going
10:52:27 6 to testify to you don't really know at this point in time I
10:52:31 7 guess, other than whatever materials have been disclosed to you.
10:52:35 8 So you don't know where -- having not had any direct
10:52:39 9 examination where you might have to go with your
10:52:42 10 cross-examination; is that a fair statement?
10:52:44 11 MR. GREENMAN: That's always the case. Yes, Judge,
10:52:46 12 that is a fair statement.
10:52:50 13 THE COURT: Well, we certainly by way of finding this
10:52:53 14 is a potential conflict. Is it one so severe that there's an
10:52:01 15 obligation on me to disqualify the attorney or as an alternative
10:52:08 16 preclude the testimony of that particular witness.
10:52:12 17 MR. FELICETTA: Or preclude it, the cross-examination
10:52:16 18 in the area that there's a conflict, which is already outside
10:52:21 19 the range that's allowed in the Federal Rules.
10:52:23 20 THE COURT: How would that be done, you tell me.
10:52:25 21 MR. FELICETTA: The same as any other witness, Judge.
10:52:28 22 It's too old, you can't cross-examine that area, Mr. Greenman,
10:52:29 23 move on. I mean, that's what the rules state.
10:52:32 24 THE COURT: Well, I mean, in terms of what's relevant
10:52:35 25 to a lot of things, I mean, materiality of the testimony, the

10:53:40 1 credibility of the witness, and the like. But how can you
10:53:44 2 determine that now what's going to be relevant by way of
10:53:49 3 cross-examination to what's material to the government's case,
10:53:57 4 what's relevant to the matter of credibility, how do you make
10:54:00 5 that determination now?
10:54:01 6 MR. FELICETTA: Well, I think the way -- the typical
10:54:04 7 way that I'm accustomed to doing it is the Court upon
10:54:08 8 application by the party makes a ruling that the conviction is
10:54:10 9 too old to cross-examine about or impeach with.
10:54:14 10 THE COURT: Sure. Maybe that's the conviction, but
10:54:16 11 what about everything else, I mean, in terms of whatever
10:54:19 12 knowledge may come to the attention of Mr. Greenman with respect
10:54:22 13 to information derived from his relationship with that witness
10:54:27 14 from 10 or 12 or 15 years ago.
10:54:30 15 MR. FELICETTA: Right, so veracity, that's what I was
10:54:33 16 getting at before, that's the other issue. If there's specific
10:54:36 17 information that Mr. Greenman has that relates to veracity, it
10:54:36 18 doesn't necessarily matter that it's true, oh, we may be able to
10:54:42 19 cross-examine or impeach onto that area.
10:54:46 20 But that's something that needs to be then vetted by
10:54:49 21 the Court to determine, first of all, will Mr. Pettway waive
10:54:54 22 that, will the witness waive it. And, secondly, can the Court
10:54:54 23 adopt or accept that those waivers are valid in light of what
10:54:55 24 the area of testimony might be.
10:55:00 25 I think there's a way to navigate through this, but

10:55:04 1 there's steps that have to be taken to first determine will the
10:55:05 2 Court allow it, what does Mr. Greenman intend to cross-examine
10:55:09 3 on or impeach with, and can Mr. Grable then speak to the
10:55:12 4 Defendant to see if on that area he will waive.
10:55:17 5 THE COURT: Well, part of the reason for this colloquy
10:55:18 6 is so that Mr. Pettway can hear this discussion so that his
10:55:21 7 independent conflict counsel can talk about the potential for
10:55:26 8 areas opening up that we can't be specific about right now that
10:55:39 9 might relate to the matter of the veracity or credibility of the
10:55:44 10 witness or may go further into impugning the integrity of the
10:55:51 11 substance of that particular evidence in a certain respect.
10:55:57 12 We just can't determine that until that witness is
10:56:01 13 called by you and direct-examination complete, right?
10:56:05 14 MR. FELICETTA: I don't think that's true, Judge. I
10:56:08 15 mean, what we're talking about here is impeachment, that's all
10:56:11 16 we're talking about.
10:56:12 17 The witness is going to testify as to certain facts
10:56:16 18 that we've already laid out as to what his relationship with the
10:56:19 19 Defendants.
10:56:20 20 The question then becomes on cross-examination to
10:56:21 21 impeach his credibility, what can counsel cross-examine on. Can
10:56:24 22 he impeach on prior conviction that's too old, yes or no. Can
10:56:28 23 he impeach him on the underlying facts, yes or no. And does he
10:56:30 24 have other areas of instances of truth telling, veracity, that
10:56:36 25 he wants to go with that he has in his file that he believes

10:56:41 1 would be proper to question the witness about.
10:56:41 2 I think all of that can be determined before the
10:56:43 3 witness testifies just like any other case.
10:56:45 4 MR. GREENMAN: Just so you know, Judge, on that issue
10:56:49 5 it's not that simple. And in addition to other issues -- and I
10:56:54 6 thought I brought the DEA six with me that Mr. Felicetta gave
10:56:58 7 me. I left it back on my desk.
10:57:01 8 We received a DEA six yesterday that I had requested.
10:57:04 9 THE COURT: Hold on one second. Do you have the DEA
10:57:07 10 six here?
10:57:07 11 MR. FELICETTA: Which one are you referring to?
10:57:10 12 MR. GREENMAN: It's the one from the arrest of the CI
10:57:13 13 if you've got it.
10:57:14 14 MR. FELICETTA: Yes, I do.
10:57:15 15 THE COURT: All right. Would you mind disclosing that
10:57:18 16 again, please.
10:57:21 17 MR. GREENMAN: I'm not offering this, Judge, at this
10:57:24 18 point in time. But the references in here that apparently
10:57:36 19 there's some talk in here that he mentions in here that he's not
10:57:40 20 been employed for a long time, all this money, they seized
10:57:49 21 \$35,000 from him, is money that he obtained. And it goes over a
10:57:52 22 long period of time obviously from hustling.
10:57:58 23 He says at that time they asked him if he had an
10:58:01 24 attorney, he said no. And he said due to the fact that he was
10:58:05 25 such a good drug dealer. This is going back. I mean, this is

10:58:08 1 going to go right back to what happened right from the
 10:58:09 2 beginning.
 10:58:10 3 So I don't think it's an easy issue about --- and
 10:58:13 4 there's other ways I think that the prior conviction would be
 10:58:17 5 admissible or should be admissible. It's not easy, it's not an
 10:58:17 6 easy situation.
 10:58:21 7 And we're all going to have to do a lot of work to
 10:58:25 8 give you whatever information we can give you, I suppose, at
 10:58:29 9 this point.
 10:58:29 10 **THE COURT:** All right. Mr. Felicetta, you had a
 10:58:31 11 conversation with this witness with respect to this likely or
 10:58:36 12 slash potential conflict issue involving a former attorney who
 10:58:42 13 represented your witness and you discussed this matter with that
 10:58:46 14 witness?
 10:58:47 15 **MR. FELICETTA:** Yes, I've learned from Mr. Greenman
 10:58:50 16 around 1 p.m. yesterday about the conflict. I met with the
 10:58:53 17 witness at 2:00 p.m. I had him come down to my office and we
 10:58:57 18 talked about it and I told him what the issue was that the trial
 10:59:01 19 may be delayed or it may not, but there's a conflict issue as it
 10:59:01 20 relates to you.
 10:59:04 21 **And I said do you remember an attorney by the name of**
 10:59:06 22 **Herb Greenman. And he said, yes, he represented me on my 2002**
 10:59:11 23 **case. And he explained it was about a gun and drugs and that**
 10:59:14 24 **Mr. Greenman represented him. And it was in front of a County**
 10:59:18 25 **Court judge and ultimately sentenced to a year of jail on that.**

10:59:22 1 I told him -- I framed the issue for him. I told him
 10:59:25 2 what the issue was that Mr. Greenman would actually be allowed
 10:59:30 3 to cross-examine you and challenge your veracity, your truth
 10:59:31 4 telling on the witness stand.
 10:59:33 5 **And he expressed concern that Mr. Greenman knows**
 10:59:36 6 **things about him that he disclosed privately and confidentially**
 10:59:42 7 **under the attorney/client privilege.**
 10:59:45 8 And I said, I don't want you to tell me whether or not
 10:59:46 9 you would feel comfortable going forward, because that's not for
 10:59:47 10 us to discuss. You need private counsel in that regard, but
 10:59:50 11 first we have to determine if the Defendant would even waive it,
 10:59:54 12 because if he's not going to waive it, it's not an issue. We're
 10:59:59 13 going to have a new attorney on the case unless something else
 11:00:02 14 is done about it.
 11:00:02 15 So I explained that to him and he seems to understand
 11:00:03 16 the issue. I said just wait and stand by. I asked him about
 11:00:07 17 whether he could afford counsel. He said, no.
 11:00:09 18 I said if the court assigns counsel, it will be for
 11:00:13 19 that purpose, because he was concerned about if he was in
 11:00:16 20 trouble. I said, no, it's for purposes of you determining
 11:00:17 21 whether you would waive this conflict so that we could go
 11:00:20 22 forward with the final.
 11:00:21 23 **THE COURT:** All right. Has the government made an
 11:00:24 24 effort to retain independent counsel for your witness?
 11:00:24 25 **MR. FELICETTA:** No, Your Honor. I wanted to clear

11:00:27 1 with the Court whether the Court would assign counsel to
 11:00:30 2 represent him as an indigent.
 11:00:33 3 **THE COURT:** Thank you. All right.
 11:00:53 4 Mr. Greenman and Mr. Felicetta. Thank you.
 11:00:56 5 Mr. Grable, and I don't recall specifically, I know
 11:01:01 6 I've asked you in the past to serve as independent backup
 11:01:06 7 counsel. I don't know if it's ever been independent conflict
 11:01:09 8 counsel, has it been?
 11:01:13 9 **MR. GRABLE:** Yes, I think the most recent one was last
 11:01:16 10 December. I assisted on one that was a lot less thorny than
 11:01:19 11 this one.
 11:01:19 12 **THE COURT:** Okay. All right. Maybe that's why I
 11:01:22 13 don't have a clear recollection. I'm hoping that's it,
 11:01:26 14 Mr. Grable. Given the colloquy that we gave and I know you've
 11:01:32 15 been taking notes and you know the specific reason why you are
 11:01:39 16 here for court assignment to serve as independent conflict
 11:01:44 17 counsel to Mr. Pettway. Do you know Mr. Pettway?
 11:01:49 18 **MR. GRABLE:** I do not. Although I met him this
 11:01:52 19 morning and we've had some preliminary discussions.
 11:01:56 20 **THE COURT:** Okay. And as far as you know, you or your
 11:01:56 21 firm has never represented him previously?
 11:01:59 22 **MR. GRABLE:** Correct.
 11:02:00 23 **THE COURT:** Okay. And you would be in a position to
 11:02:02 24 serve and willing to serve as independent conflict counsel if
 11:02:06 25 required or requested?

11:02:09 1 **MR. GRABLE:** Yes.
 11:02:09 2 **THE COURT:** All right. What I'm going to do is I'm
 11:02:13 3 going to take a couple minute break. I want to reflect on just
 11:02:16 4 what your respective positions are. Is there anything more that
 11:02:20 5 you want to add at this time, Mr. Greenman?
 11:02:24 6 **MR. GREENMAN:** Judge, I don't know what else I can
 11:02:26 7 add, you know. Obviously some of the issues that Mr. Felicetta
 11:02:29 8 raised will be dealt with one way or the other whoever comes
 11:02:33 9 into the case.
 11:02:34 10 **THE COURT:** All right. Mr. Felicetta, anything more
 11:02:36 11 from the government?
 11:02:37 12 **MR. FELICETTA:** No, Your Honor. Thank you.
 11:02:39 13 **THE COURT:** I'll be back out probably 11:15 or so.
 11:02:45 14 **MR. GREENMAN:** Judge, I have a matter. Judge Wolford
 11:02:49 15 asked me to step in yesterday afternoon on a case. I didn't
 11:02:51 16 represent to see this man. She said when I'm finished with you
 11:02:55 17 she would like me to come down. I can hold off. She said
 11:02:57 18 there's a trial going on. That trial is going on. It had to do
 11:02:01 19 with I guess a prospective witness. And the Federal defender's
 11:02:06 20 office represented him, so I'll leave it up to you.
 11:03:07 21 **THE COURT:** So what are you asking me?
 11:03:11 22 **MR. GREENMAN:** You're a senior judge, Your Honor. You
 11:03:15 23 know, I thought Mr. Felicetta was going to add what else the
 11:03:18 24 informant said about me, but he chose not to add something else.
 11:03:18 25 **MR. FELICETTA:** He was very happy with his

11:02:21 1 representation.
 11:02:21 2 MR. GREENMAN: Better than that, but that's okay.
 11:02:25 3 THE COURT: These collateral matters are driving me
 11:02:29 4 bananas here, but so what are you asking.
 11:02:32 5 MR. GREENMAN: No, I'll stick around for you. Maybe
 11:02:36 6 I'll just let her or her clerk know that this took a little
 11:02:42 7 longer that I thought.
 11:02:43 8 THE CLERK: They were in touch with me at 10:15 right
 11:02:48 9 when we were getting started. Judge Wolford inquired as to when
 11:02:49 10 we expected Herb to be available, we need him for a short
 11:02:55 11 matter. I said we just started our proceedings so I have no way
 11:02:59 12 of knowing right now.
 11:04:00 13 THE COURT: She has to interrupt her chrono for that.
 11:04:07 14 MR. GREENMAN: She said she was going to.
 11:04:07 15 THE CLERK: She said, okay, thanks. I will let them
 11:04:10 16 know. And then I let her know at quarter to that our proceeding
 11:04:12 17 was still ongoing and her clerk said thank you. I can tell her
 11:04:18 18 we're taking a short break.
 11:04:20 19 THE COURT: Mr. Grable, do you have a little bit of
 11:04:24 20 time or do you have to get back to your office.
 11:04:29 21 MR. GRABLE: I have time.
 11:04:32 22 THE COURT: Okay. Do you want to go over to Judge
 11:04:34 23 Wolford's on the eighth floor. I mean, you have to do what you
 11:04:35 24 have to do and you have to do it properly. I don't want to rush
 11:04:39 25 it to the extent in any way jeopardizes your relationship with

11:04:41 1 that attorney.
 11:04:43 2 MR. GREENMAN: All it involves is putting something on
 11:04:46 3 the record, which would take probably three or four minutes.
 11:04:50 4 THE COURT: Okay. Why don't you do that and then
 11:04:54 5 notify Ms. Labuzzetta when you back here, but I won't be back on
 11:04:57 6 the bench until at least 11:20 or so or 11:30.
 11:04:59 7 MR. GREENMAN: Thanks, Judge.
 11:05:01 8 THE COURT: Okay. All right. Okay.
 11:05:01 9 MR. FELICETTA: Judge, that will also take us out
 11:05:01 10 because we're going to be with that Defendant who has
 11:05:01 11 Mr. Greenman.
 11:05:10 12 THE COURT: Okay. That works. Thank you.
 11:05:10 13 THE CLERK: But then he can't have access to
 11:05:14 14 Mr. Pettway, so it doesn't work. They have to access the other
 11:05:19 15 Defendant.
 11:05:20 16 THE COURT: Right, but you're going to take him
 11:05:23 17 downstairs, right. So if you needed to access Mr. Pettway, he
 11:05:26 18 could go downstairs, is that okay.
 11:05:31 19 MR. GRABLE: Yes.
 11:05:33 20 (A recess was then taken.)
 11:05:36 21 THE CLERK: All rise.
 11:05:40 22 THE COURT: Okay. Thank you. Please have a seat.
 11:05:40 23 Okay. We are resumed in the case of Kenneth Pettway, Jr. and
 11:05:40 24 Demetrius Black. The attorneys for both Defendants and the
 11:05:40 25 Defendants are present as is independent conflict counsel James

11:55:39 1 Grable.
 11:55:40 2 We do have government Mr. Allen and Mr. Felicetta here
 11:55:52 3 present also here. Okay. I'm going to ask you, Mr. Grable, in
 11:56:02 4 just a moment or two for a preliminary report on your
 11:56:09 5 discussions with Mr. Pettway if you are comfortable with
 11:56:15 6 presenting the Court with one.
 11:56:19 7 My thought at least at this point, and I can change
 11:56:23 8 course on this as to perhaps have you come back for a report
 11:56:28 9 back tomorrow at least for some additional preliminary
 11:56:40 10 discussion on this issue of conflict before I continue with the
 11:56:47 11 pressing the matters that would enable us to otherwise start
 11:56:52 12 this trial we would not have jury selection tomorrow.
 11:56:58 13 I'll take your input on that after we get through with
 11:57:02 14 this discussion and you tell me what your feelings are. And I
 11:57:08 15 say that because both sides have indicated to me in our earlier
 11:57:14 16 discussions that they have not had the full opportunity to do
 11:57:18 17 serious research on this conflict issue and it might be
 11:57:25 18 productive for all of us to have some additional time on that.
 11:57:29 19 Let me tell you where my head is at least at this
 11:57:33 20 point. And, you know, for particular points of interest that
 11:57:36 21 are I think standout issues for me in getting to a determination
 11:57:44 22 of whether we have a conflict potential or one that is of so
 11:57:51 23 serious a nature that it cannot be waived is -- and I'll relate
 11:57:58 24 what essentially has been provided by our discussions earlier.
 11:58:04 25 And, you know, I start with Mr. Greenman's statement,

11:58:12 1 you know, without exploring it in more detail that this
 11:58:17 2 relationship and the representation with the material witness
 11:58:21 3 who was recently disclosed by the government has some unique
 11:58:28 4 circumstances or unique aspects to it. And that factors into a
 11:58:38 5 determination of the seriousness and the extent of the potential
 11:58:46 6 conflict here.
 11:58:47 7 You know, from your standpoint, Mr. Grable, you know,
 11:58:52 8 I don't know what you've discussed with Mr. Pettway, but
 11:58:58 9 certainly the lead-in probably should take into account that you
 11:59:05 10 need a set of circumstances without being able to identify what
 11:59:10 11 they are that Mr. Greenman alluded to.
 11:59:16 12 And I can further pursue that, but I probably would
 11:59:22 13 not do that until tomorrow if you deem it necessary. You know
 11:59:28 14 what I see out there is the potential for the situation that
 11:59:36 15 might call for divided loyalties and the process of
 11:59:44 16 cross-examination of a material witness.
 11:59:46 17 I mean, again, those are terms that I know you know
 11:59:51 18 arise in these discussions of conflict cases. And in order for
 11:59:59 19 a Defendant to have at least adequate defense representation
 12:00:10 20 every precaution has to be taken to make sure that to the extent
 12:00:15 21 possible his or her attorney is not confronted with a divided
 12:00:24 22 loyalty situation during examination.
 12:00:27 23 And that's, you know, a difficult situation to
 12:00:30 24 guarantee, because one doesn't know in what direction direct
 12:00:36 25 and/or cross will actually take during the course of trial.

12:00:41 1 And then that goes hand-in-hand with the zealousness
 12:00:50 2 the Defendant has a right to expect from his or her attorney in
 12:00:56 3 the process of cross-examination. And, you know, that might be
 12:01:04 4 confidence in a situation where there was actual representation
 12:01:12 5 of a material witness by the same defense lawyer who is
 12:01:20 6 representing the Defendant in this particular case.

12:01:28 7 You know, I think there's a real risk here from the
 12:01:32 8 conversations that we've had and discussions that we've had that
 12:01:42 9 a situation will arise from the examination that inevitably we
 12:01:49 10 could not predict.

12:01:50 11 And especially in light of the fact that the material
 12:01:54 12 witness and his representation by Mr. Greenman was involved with
 12:02:08 13 the same types of charges that are involved in this particular
 12:02:07 14 case, that is drug charges and gun charges. All of those things
 12:02:13 15 I think have to be weighed in, Mr. Grable, in terms of
 12:02:19 16 determining whether we have a waivable conflict here and whether
 12:02:26 17 Mr. Pettway is inclined to waive conflict in this particular
 12:02:37 18 case.

12:02:40 19 And I don't know how much of that you have covered. I
 12:02:45 20 assume generally speaking you would have gone into those
 12:02:49 21 particular areas. You know, we look at the government's
 12:02:56 22 position here and, Mr. Felicetta, I accept what I perceive to be
 12:03:02 23 an adamancy in terms of the materiality of this particular
 12:03:07 24 witness in this upcoming prosecution. And it's such that the
 12:03:14 25 government's clear preference is not to proceed with the

12:03:17 1 prosecution absent that particular witness.
 12:03:18 2 Irrespective of the fact that even before the witness
 12:03:23 3 was discovered the government had asked -- had taken the
 12:03:28 4 position that it was ready to proceed to trial. You know, I
 12:03:37 5 personally feel and I know you advocated the fact that the
 12:03:45 6 conflict potential is not irresolvable, because the focus should
 12:03:54 7 be impeachment by the prior convictions.

12:03:59 8 I don't think that's really the determinative factor.
 12:04:06 9 I think certainly that is an issue, but it seems to me that
 12:04:13 10 there are just countless potential areas of substantive
 12:04:19 11 questioning that may be impacted by defense counsel having
 12:04:25 12 represented the material witness on a prior occasion.

12:04:31 13 I mean, again, it's difficult to be specific in that
 12:04:37 14 regard because obviously nobody at this point knows precisely
 12:04:45 15 what the direct examination will be and how it will unfold.
 12:04:50 16 That I guess is only determinable at trial.

12:04:58 17 But we are then confronted with a situation of, you
 12:05:06 18 know, what happens if your witness and you've given me a
 12:05:08 19 preliminary indication, and this is without having provided
 12:05:10 20 independent conflict counsel to your witness, that he's not
 12:05:14 21 inclined to waive. He's not inclined to waive. That puts us in
 12:05:20 22 a position where that witness's view may well be that
 12:05:25 23 Mr. Greenman cannot cross-examine him in any respect and that he
 12:05:29 24 will not waive that right to conflict-free attorney/client
 12:05:42 25 representation going back to 2002 and carried forward to this

12:05:50 1 particular trial.

12:05:51 2 So I don't know if there's a way that anyone can say
 12:05:58 3 that the material witness's testimony can be tailored basically
 12:06:09 4 by agreement or at the directive of the Court, me, such that
 12:06:14 5 there would be no risk of spilling over to an attorney/client
 12:06:25 6 relationship on charges that are very similar to charges here
 12:06:29 7 albeit 15 years removed.

12:06:33 8 I don't know if there is authority that says such a
 12:06:39 9 tailoring can take place. And I'll give the government the
 12:06:43 10 opportunity to look at that and see if there's a way over the
 12:06:47 11 objection of your witness to structure testimony such that it
 12:06:50 12 would not be violative of the non-waiver and the attorney/client
 12:06:58 13 privilege that your client may -- or your witness may be alleging.

12:07:07 14 This becomes a very tangled web and those are the
 12:07:15 15 things that basically from my standpoint are cause for pause
 12:07:22 16 certainly. And I think there's no doubt that we have, as we
 12:07:28 17 started out, a potential conflict, you know. And that it's
 12:07:33 18 certainly beginning more or less to appear to be an actual
 12:07:41 19 conflict that may well not be waivable.

12:07:47 20 But I guess with that as a background, Mr. Grable,
 12:07:50 21 where are you as far as discussions with Mr. Pettway?

12:07:56 22 MR. GRABLE: Your Honor, I have discussed with
 12:08:00 23 Mr. Pettway that in my judgement this is at bare minimum a
 12:08:01 24 potential conflict. I agree with the Court's conclusion. I
 12:08:05 25 also share the Court's concern that it may be a conflict that

12:08:11 1 cannot be waived for the reasons the Court has just stated.

12:08:12 2 I don't know that it's as simple as an impeachment
 12:08:15 3 under Rule 609 and 10 to your question. As Your Honor knows
 12:08:19 4 that rule applies for use of information beyond 10 years and I'm
 12:08:22 5 not sure that there aren't other rules that are implicated in
 12:08:27 6 Mr. Greenman's possession as a result of his prior
 12:08:30 7 representation of this confidential informant who is essential
 12:08:33 8 to the government's case.

12:08:35 9 And so I would like with the Court's indulgence to do
 12:08:39 10 some research on this. Mr. Pettway asked very good questions
 12:08:42 11 and he's focused in on issues of concern and rightfully so. I'd
 12:08:47 12 like to be able to answer those questions for him.

12:08:51 13 I had to be candid with him and share with him that
 12:08:53 14 some of these questions I don't quite know the answer yet. It's
 12:08:56 15 going to take a little bit of research on my part to look at
 12:09:00 16 this difference between an actual and potential conflict and
 12:09:05 17 conflict that cannot be waived.

12:09:07 18 And I'll want to do that in the context of reviewing
 12:09:08 19 the information that Mr. Greenman received from County Court so
 12:09:12 20 I can try to give Mr. Pettway an accurate assessment as to
 12:09:16 21 whether this is, in fact, the sort of conflict that could be
 12:09:20 22 addressed in the manner the government suggests or whether it is
 12:09:25 23 as it appears to be more complicated than that.

12:09:29 24 THE COURT: All right. In order to be comfortable
 12:09:31 25 with your continued role as independent conflict counsel how

12:09:35 1 much time do you think you need.
 12:09:38 2 MR. GRABLE: Well, I will immediately obtain the
 12:09:41 3 information from Mr. Greenman that he obtained from County
 12:09:46 4 Court. I will review that this afternoon and this evening. I
 12:09:50 5 know that the Court wants to proceed quickly. I don't know that
 12:09:53 6 the Court has made any decisions with the jury, the panel that
 12:09:58 7 is in waiting.
 12:09:54 8 I could be available tomorrow to at a minimum report
 12:09:57 9 back to the Court on the status of the efforts to examine these
 12:10:02 10 conflict issues. I can't promise the Court that I'll have
 12:10:06 11 answers illuminated by thoughtful research by tomorrow, but I'll
 12:10:10 12 certainly be further along tomorrow than I am right now.
 12:10:14 13 THE COURT: What about giving you until the beginning
 12:10:17 14 part of next week.
 12:10:18 15 MR. GRABLE: That would give me a greater opportunity
 12:10:22 16 to dig into these research issues.
 12:10:22 17 THE COURT: I mean, I think this is a very serious
 12:10:27 18 issue fraught with all kinds of problems. You know, I'm well
 12:10:31 19 aware of the fact that Mr. Pettway has been persistent in
 12:10:37 20 wanting a speedy trial, but I'm also aware of the fact that he's
 12:10:42 21 very interested in having constitutionally private counsel from
 12:10:47 22 the standpoint of an attorney who is not compromised and
 12:10:52 23 conflict-free representation.
 12:10:54 24 So, Mary, Monday or Tuesday?
 12:10:59 25 THE CLERK: Monday is a holiday, Judge.

12:11:03 1 THE COURT: Yeah.
 12:11:04 2 THE CLERK: Monday is a holiday, Judge.
 12:11:15 3 THE COURT: What's our calendar like on Wednesday?
 12:11:19 4 THE CLERK: Or you could do it Wednesday at 11.
 12:11:23 5 THE COURT: What's the date on that?
 12:11:26 6 THE CLERK: That's the 11th.
 12:11:43 7 MR. GREENMAN: Your Honor, may I briefly address the
 12:11:45 8 Court regarding this issue?
 12:11:47 9 THE COURT: Yes, but just hold on Mr. Greenman.
 12:11:47 10 Certainly. Come on up to the podium.
 12:11:54 11 Mr. Grable, are you checking your calendar?
 12:11:54 12 MR. GRABLE: I am. We're talking about Wednesday the
 12:12:00 13 11th?
 12:12:01 14 THE COURT: Yes.
 12:12:02 15 MR. GRABLE: I have a matter scheduled with
 12:12:04 16 Mr. Tripi's office beginning in the early afternoon that's
 12:12:07 17 expected to go most of the day, but I could be here at 11.
 12:12:11 18 THE CLERK: Or we could do it at 9:30 and then just
 12:12:18 19 everything else can -- we don't have a lot on, Judge. We have
 12:12:23 20 attorney admissions at 9. And then you have a case with
 12:12:27 21 Mr. Grable's office at 9 that they had asked for an adjournment
 12:12:33 22 on. So if they come in at 9:30 and there's a couple matters at
 12:12:36 23 10.
 12:12:36 24 THE COURT: What's at 10?
 12:12:38 25 THE CLERK: You have a couple matters at 10. You have

12:12:40 1 a plea and a sentence. And then at 11 you have a final pretrial
 12:12:47 2 conference, so.
 12:12:49 3 THE COURT: What about Tuesday? Well, we want to give
 12:12:52 4 you until Wednesday, I think. Would that be helpful?
 12:12:55 5 MR. GRABLE: Yes, the extra time would certainly be
 12:12:59 6 helpful, and I can make Wednesday morning work.
 12:13:02 7 THE COURT: Okay. Let me just hear Mr. Tripi out
 12:13:02 8 first and then -- thank you, Mr. Grable.
 12:13:07 9 MR. TRIPI: Judge, as you may know, I'm the de facto
 12:13:11 10 third chair. I'm on the case. I'm also the supervisor in
 12:13:15 11 charge of the file, so three things very briefly.
 12:13:17 12 One, we previously revoked plea offers. We are open
 12:13:22 13 to continuing those negotiations during the time period so that
 12:13:26 14 we could potentially avoid some of these issues.
 12:13:30 15 I have talked with Mr. Greenman and asked for a
 12:13:34 16 defense position. I'm not saying we'll be able to do exactly
 12:13:39 17 what the defense wants, but we're open to try and bridge
 12:13:41 18 whatever gaps there may be, but we need to begin that dialog and
 12:13:45 19 there needs to be a willingness.
 12:13:46 20 But we are willing on our end and I've asked
 12:13:50 21 Mr. Greenman to have those conversations. Secondly, and this is
 12:13:53 22 just by way of suggestion, and I understand I came into it late,
 12:13:55 23 but and I briefly spoke with the trial counsel from the
 12:13:59 24 government's side who will be trying the case, and this is just
 12:14:02 25 a suggestion for everyone to consider the next time this comes

12:14:07 1 back, but perhaps the Court could consider assigning Mr. Grable
 12:14:10 2 or some other CJA lawyer as a second chair who would be tasked
 12:14:17 3 with cross-examining the confidential witness with an order
 12:14:22 4 directing Mr. Greenman not to provide any confidences that he's
 12:14:25 5 learned through his prior representation.
 12:14:29 6 That would eliminate the ethical issue for
 12:14:31 7 Mr. Greenman. I believe it would protect Mr. Pettway, because
 12:14:37 8 the second counsel would not have this dual obligation to
 12:14:39 9 potentially pull punches. And it would also protect the witness
 12:14:41 10 who would be testifying.
 12:14:43 11 So just something for everyone to look into and
 12:14:47 12 consider. It's just something that occurred to me while I heard
 12:14:50 13 the Court's concerns. Obviously knowing that the government is
 12:14:54 14 not in a position of asking the Court to assign counsel, but I
 12:14:56 15 think this is a unique circumstance.
 12:14:58 16 THE COURT: Yeah, it's an interesting point. And,
 12:15:01 17 frankly, we did discuss it during the break. I think that there
 12:15:10 18 are issues that are involved with that. And, you know, one, you
 12:15:17 19 know, a Defendant obviously has the right to his or her choice
 12:15:22 20 of counsel for all aspects of defense.
 12:15:26 21 Secondly, whoever does the cross-examination would
 12:15:31 22 have to have full knowledge of the case in my judgment in order
 12:15:36 23 to ensure that there would be effective and thorough
 12:15:42 24 cross-examination.
 12:15:48 25 It's not a matter of just plucking somebody out and

12:15:46 1 saying here's the witness, you know, without knowing virtually
12:15:50 2 all aspects of the case being prepped just as, for example,
12:15:54 3 Mr. Greenman would be. I'm not sure you could guarantee that
12:15:59 4 that would be constitutionally the same.

12:16:05 5 MR. TRIPPI: Again, I just propose it as something to
12:16:07 6 look into.

12:16:09 7 THE COURT: I think it's a suggestion that maybe can
12:16:12 8 be put on the table, but we'd have to discuss that fully with
12:16:17 9 the Defendant.

12:16:18 10 MR. TRIPPI: I thought Mr. Greenman was assigned, but
12:16:21 11 he would be free to brief the co-counsel on every aspect of the
12:16:25 12 case, just not his confidences that he might have shared with
12:16:29 13 the witness in 2002.

12:16:30 14 THE COURT: Yes.

12:16:31 15 MR. TRIPPI: And then just a third thing, Judge. I was
12:16:33 16 just informed that an issue arose as to office protocols and
12:16:35 17 procedures. So I understand the Court's frustration after six
12:16:40 18 years to have this bubble up. So I don't come in here with any
12:16:45 19 type of righteous indignation, but I just wanted to speak to
12:16:47 20 there are some things that we are able to do and we can do.

12:16:52 21 We do have a database, we're able to check our
12:16:57 22 databases to see if a witness has ever been prosecuted by our
12:16:58 23 office. The second part is checking with the witness, and
12:17:02 24 that's what happened in this case at a certain point in time.

12:17:07 25 But at the same time you're also relying on people,

12:17:13 1 you know. When we run a criminal history check going back
12:17:14 2 dozens of years, you're relying on people to potentially
12:17:17 3 remember. And it's a flawed system no doubt. We don't have the
12:17:22 4 capacity to go back and pull City Court files, especially if
12:17:27 5 they're voluminous. And we don't have anything like that in
12:17:32 6 place. I'm not aware that any office does.

12:17:35 7 Certainly we'll try to do our job better, but I wanted
12:17:36 8 to come over here and just briefly address that as well.
12:17:39 9 Because I can say to Mr. Felicetta I would put him up against
12:17:42 10 any first year assistant that we've ever had in the office in
12:17:45 11 terms of his diligence and preparation.

12:17:46 12 So I wanted to come over here and just let you know
12:17:51 13 that we do have certain protocols in place, but we are not
12:17:56 14 perfect and this was an oversight that I don't think we could
12:18:00 15 have uncovered through our normal procedures. So I just wanted
12:18:04 16 to speak to that. We apologize for not being able to figure it
12:18:08 17 out earlier.

12:18:10 18 THE COURT: All right. Fair enough, Mr. Tripri. I do
12:18:15 19 make the point again, though, that it's not impossible to do
12:18:23 20 conflict checks. And line assistants should know that to the
12:18:28 21 extent possible they should make the inquiry. And there are
12:18:32 22 ways of checking the Court's records, you know, without over
12:18:38 23 encumbering trial preparation to find out if there is the
12:18:47 24 possibility of a conflict.

12:18:51 25 But, of course, it should be something that's on every

12:18:57 1 prosecutor's checklist to do whatever he or she can so that we
12:19:03 2 don't have a recurring problem like this. And I don't want this
12:19:07 3 to cloud whatever else we're discussing.

12:19:09 4 I have no doubt that Mr. Felicetta did the best he
12:19:17 5 could under the circumstances and without being specifically
12:19:18 6 told to do a conflicts check, but this may be the fourth time
12:19:22 7 that something like this has happened over the years with me at
12:19:26 8 least in casual conversation.

12:19:29 9 THE CLERK: And we've just had it come up in the Green
12:19:32 10 case as well scheduled for trial at the end of the month.

12:19:36 11 THE COURT: All right. And, you know, particularly
12:19:38 12 where you have a situation where counsel have been adamant about
12:19:43 13 disclosure of material witnesses and the Court has been asked to
12:19:51 14 safeguard the witness on the basis of the government's
12:19:56 15 representation.

12:19:57 16 That's where I think the government should be
12:20:00 17 committed to extending itself to make sure that this doesn't
12:20:05 18 arise, where you protect the witness, you don't do anything to
12:20:10 19 make sure -- or to do whatever you can to eliminate the
12:20:15 20 possibility that there may be a last minute conflict that arises
12:20:20 21 because you didn't do the homework with respect to that
12:20:22 22 particular witness.

12:20:24 23 And everybody's got egg on their face. And, you know,
12:20:26 24 that's okay sometimes, but when it impinges on a constitutional
12:20:31 25 right, that's another matter. Okay.

12:20:35 1 MR. TRIPPI: I will relay the concerns.

12:20:42 2 THE COURT: All right. Given that, we will reconvene
12:20:48 3 on this at 9:30.

12:20:54 4 THE CLERK: Yes, if that works, 9:30 on Wednesday.

12:20:58 5 THE COURT: Does that work?

12:21:00 6 MR. GRABLE: Yes, thank you.

12:21:02 7 THE COURT: From the government's standpoint?

12:21:05 8 MR. FELICETTA: Yes, Judge. Thank you.

12:21:06 9 MR. GREENMAN: You didn't ask me, Judge.

12:21:09 10 THE COURT: Every time I ask you something,
12:21:12 11 Mr. Greenman, things become more complicated. So I think I'm
12:21:12 12 beginning to learn my lesson.

12:21:13 13 But, you know, this is serious business. And I know
12:21:19 14 you appreciate that as much as anybody else and perhaps more.

12:21:23 15 MR. GREENMAN: I do, Your Honor.

12:21:24 16 THE COURT: But I think we've made some considerable
12:21:29 17 progress in terms of reopening dialog, please do that. And,
12:21:36 18 again, Mr. Pettway, I think if this shows one thing, it's that
12:21:41 19 every effort is being made to make sure that you get the best
12:21:46 20 representation possible, but also that you get a trial that is
12:21:54 21 fair as that can be made through efforts like this.

12:21:58 22 I mean, everybody is doing their absolute best, nobody
12:22:02 23 is sandbagging, everybody is trying to play by the rules. And,
12:22:07 24 you know, you're no different than anybody else. That's what
12:22:10 25 you're entitled to. And we're trying to make sure that you get

12:22:14 1 the benefit of everybody's best efforts.
 12:22:17 2 You have to make certain very intelligent decisions.
 12:22:22 3 You're a bright guy, an intelligent guy, and you've got two of
 12:22:23 4 the best lawyers that we could find.
 12:22:26 5 And my suggestion is listen to them, ask those
 12:22:32 6 pointed, intelligent questions of Mr. Grable. Because, you
 12:22:37 7 know, this all right now is about conflict, potential conflict,
 12:22:42 8 real conflict, waivable conflict, and not waivable conflict.
 12:22:50 9 But the government is going to do its part. If it's
 12:22:54 10 going to seek independent counsel for your witness in the
 12:22:59 11 interim, you should do that. You have to appear before the
 12:23:03 12 magistrate judge, you know. I think the process on that and the
 12:23:08 13 Court will provide independent counsel to your witness.
 12:23:14 14 We first have to determine, however, what your
 12:23:19 15 decision is, Mr. Pettway, and it really has to be -- well, it
 12:23:26 16 doesn't have to be, but you can make it be exclusively your
 12:23:32 17 intelligent choice. Whatever you need to help you make that
 12:23:36 18 important decision, to the extent practicable, we will provide
 12:23:41 19 you with that.
 12:23:42 20 And Mr. Grable I know will make every best effort to
 12:23:45 21 make sure that you fully understand, that he covers all the
 12:23:50 22 bases that the law requires, so that when you go to trial,
 12:23:54 23 assuming that's what you choose to do, you don't have to worry
 12:23:59 24 about the representation.
 12:24:01 25 Now, Mr. Greenman has prepared this case inside out

12:24:06 1 and would not have -- you know, and an indicator of that is the
 12:24:10 2 fact that we're here now with this particular issue.
 12:24:14 3 But my suggestion is make your decision whether you
 12:24:20 4 choose to waive or not based on the fact that we have at least a
 12:24:25 5 potential conflict here, keep your mind open to whatever can be
 12:24:34 6 negotiated.
 12:24:35 7 I'm not telling you to accept any plea, but -- and I
 12:24:39 8 will not accept a plea if you tell me that you are not guilty,
 12:24:44 9 and that's where we've been this entire time, but I think you
 12:24:49 10 know and I'd represent to you that should you choose to accept a
 12:24:53 11 plea that whatever sentence that I impose will be a fair
 12:24:59 12 sentence. It will be sufficient, but not greater than necessary
 12:25:04 13 within the parameters that I'm allowed to work within the law.
 12:25:09 14 So you've got, I think, a lot. I'm sure you've been
 12:25:13 15 thinking about all these things for the most part, right?
 12:25:17 16 MR. PETTWAY: Right.
 12:25:18 17 THE COURT: All right. But we'll see you back here
 12:25:21 18 with the two attorneys. Now, they're independent of each other.
 12:25:23 19 Your attorney is Mr. Greenman until otherwise determined, but
 12:25:27 20 your counsel on the waiver issue is Mr. Grable, and he's not to
 12:25:32 21 overlap with Mr. Greenman's representation.
 12:25:37 22 It gets to be kind of a sticky wicket. But, I mean,
 12:25:40 23 when you just keep it in mind, you've got to make this decision
 12:25:44 24 on waiver, you've got one attorney for that. For your trial
 12:25:48 25 you've got Mr. Greenman. Okay?

12:25:50 1 MR. PETTWAY: Yes, Your Honor.
 12:25:51 2 THE COURT: All right. Mr. Hill, you're going to be
 12:25:54 3 continuing to dialog with Mr. Black?
 12:25:54 4 MR. HILL: Yes, in this case. You want us here
 12:25:57 5 Wednesday also?
 12:25:57 6 THE COURT: You should be here for these proceedings,
 12:26:01 7 because they affect the overall case.
 12:26:01 8 MR. GREENMAN: Judge, consistent with your request, I
 12:26:06 9 gave the papers over to Mr. Grable already. I just want the
 12:26:08 10 record to reflect that what I gave him is what came from the
 12:26:11 11 County Clerk's office that were a matter of public record.
 12:26:16 12 Those documents did not come from my private file.
 12:26:20 13 THE COURT: Okay. And at this point in time your
 12:26:23 14 private file is to remain undisclosed to you. Okay?
 12:26:31 15 MR. GREENMAN: It's in a warehouse. From what I -- I
 12:26:34 16 haven't even checked. I know it's not in our building. It
 12:26:38 17 would not be in our building. Worst-case scenario it would be
 12:26:41 18 in a warehouse, so.
 12:26:42 19 THE COURT: All right. Well, don't do anything to
 12:26:44 20 impact the integrity of that file.
 12:26:47 21 MR. GREENMAN: I won't, Your Honor.
 12:26:48 22 THE COURT: Anything more from the government?
 12:26:52 23 MR. FELICETTA: No, Your Honor, thank you.
 12:26:56 24 THE COURT: All right. Anything more from defense?
 12:26:56 25 MR. GREENMAN: No. Thank you very much, Your Honor.

12:26:56 1 THE COURT: You're welcome. Thank you very much.
 12:26:57 2 THE CLERK: I have one more thing.
 12:26:57 3 THE COURT: Yes.
 12:26:57 4 THE CLERK: The juror -- the jury list that you were
 12:27:01 5 given should remain confidential. I'm not sure at this point
 12:27:05 6 that if the trial is delayed after next week whether that jury
 12:27:12 7 list will be the jury list that will be used, just so you're
 12:27:16 8 aware. Okay. I don't know.
 12:27:20 9 MR. GREENMAN: I understand.
 12:27:22 10 THE COURT: Okay. Thank you very much.
 12:27:22 11 MR. GREENMAN: As far as Mr. Pettway asked me to
 12:27:26 12 indicate that he does not consent, we've been through this
 12:27:31 13 before, but he does not consent to the continued exclusion of a
 12:27:33 14 speedy trial.
 12:27:38 15 THE COURT: All right. I will note that.
 12:27:39 16 MR. FELICETTA: Judge, I believe there are motions
 12:27:39 17 timely before this court, motions that were filed by the defense
 12:27:42 18 and motions filed by the government. Time should be excluded
 12:27:44 19 pursuant to 3161(h)(3), I believe.
 12:27:48 20 THE COURT: Yeah, well --
 12:27:51 21 MR. FELICETTA: I'm sorry. (h)(1)(d).
 12:27:57 22 THE COURT: (h)(1)(d)?
 12:27:57 23 MR. FELICETTA: Yes, sir.
 12:27:58 24 THE COURT: All right. But just so we keep this case
 12:28:01 25 on track, we do have an outstanding government's motion already

12:26:09 1 filed to preclude the cross-examination of Rayshod Washington.
 12:26:15 2 I don't have the defense response to that.
 12:26:17 3 **MR. GREENMAN:** Judge, Your Honor did not -- I don't
 12:26:19 4 think we have a text order yet. So if you want to give it to us
 12:26:25 5 now, if I'm going to be here on Wednesday, I'm sure I could have
 12:26:29 6 it filed by Wednesday at least, if that's okay with you.
 12:26:32 7 **THE COURT:** Yes, why don't you do that so that way
 12:26:36 8 I'll have a complete record on that. Let me just double-check.
 12:26:42 9 All right. And we still have a number of issues that I think
 12:26:46 10 can be resolved in short order, including the audibility
 12:26:52 11 hearing.
 12:26:52 12 And I know I have a bench statement prepared, which
 12:26:58 13 I'm going to hold until it's more practical to release it. And
 12:26:59 14 that has to do among other things with the preclusion of
 12:26:62 15 evidence involving the Bailey Boys and that's a defense motion
 12:26:66 16 and other opposition to that from the government.
 12:26:71 17 I think that's it. All right. Those are the two
 12:26:75 18 matters that, you know, we will address once we get through --
 12:26:46 19 **MR. GREENMAN:** Judge, concluding in our motion, I know
 12:26:50 20 you went through it, but Mr. Pettway reminded me that one of the
 12:26:54 21 issues we raised was the spoliation or destruction of the
 12:26:58 22 evidence. That's the DEA six -- as far as he's concerned, the
 12:26:62 23 DEA six and the destruction of the drugs. And as far as
 12:26:66 24 Mr. Black was concerned was the destruction of the drugs and
 12:26:70 25 they don't have the Kel recording anymore. So that's just in

12:26:09 1 the motion.
 12:26:13 2 **THE COURT:** No, no, it is. And I prepared my bench
 12:26:17 3 statement to address that as well. So that's already done, but
 12:26:21 4 we'll talk about that perhaps next week. Okay.
 12:26:24 5 **MR. GREENMAN:** Thank you very much, Your Honor.
 12:26:27 6 **MR. FELICETTA:** Is the court excluding the time, then,
 12:26:29 7 Your Honor?
 12:26:30 8 **THE COURT:** You're moving to exclude it?
 12:26:32 9 **MR. FELICETTA:** Yes, Your Honor.
 12:26:35 10 **THE COURT:** Over objection of Defendant Pettway I am
 12:26:36 11 going to exclude time at this point through and including the
 12:26:42 12 12th.
 12:26:43 13 **THE CLERK:** The 11th, Judge.
 12:26:45 14 **THE COURT:** Okay. The 11th in the interest of justice
 12:26:50 15 and under 3161(h)(1)(d) the interest of justice being
 12:26:54 16 3161(h)(7)(a). And I do find that under the circumstances here,
 12:26:58 17 and I guess, you know, it also relates to continuity of counsel
 12:26:62 18 under 3161(h)(7)(b)(iv), that in the aggregate those exclusions
 12:26:66 19 are in the interest of justice and that the ends of justice
 12:26:70 20 outweigh the interests of both Defendants to a speedy trial.
 12:26:74 21 **MR. FELICETTA:** Thank you, Your Honor.
 12:26:78 22 **THE COURT:** You're welcome.
 12:26:82 23 **MR. GREENMAN:** Thank you, Judge.
 12:26:86 24 (Proceedings concluded at 12:31 p.m.)

25 * * *

1 "I certify that the foregoing is a correct transcript from the
 2 record of proceedings in the above-entitled matter."

Lynne E. DiMarco

April 25, 2018

Date

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bringing [p] - 32,1;	41,2, 42,10, 42,16;	choose [p] - 24,14;	choose [p] - 24,14;	constitutional [p] -	38,7, 38,8, 38,24;	confidence [n] - 30,1;	53,46;	418, 5, 13, 4, 11,	
business [n] - 52,13;	42,18, 43,18, 44,16;	choose [p] - 24,14;	choose [p] - 24,14;	constitutional [p] -	38,8, 38,9, 38,24;	confidence [n] - 30,1;	53,47;	418, 5, 13, 4, 11,	
button [p] - 15,12;	44,18, 45,12, 47,5;	choose [p] - 24,14;	choose [p] - 24,14;	constitutional [p] -	38,9, 38,10, 38,24;	confidence [n] - 30,1;	53,48;	418, 5, 13, 4, 11,	
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2,25, 10,25, 11,4;	2,25, 10,25, 11,4;	concerned [p] - 34,19;	continuity [n] - 5,14;						
27,1, 27,2, 27,21;	27,1, 27,2, 27,21;	concerned [p] - 34,19;	continuity [n] - 5,14;						
28,23, 24,23, 25,23;	28,23, 24,23, 25,23;	concerned [p] - 34,19;	continuity [n] - 5,14;						
29,21, 29,17, 30,3;	29,21, 29,17, 30,3;	concerned [p] - 34,19;	continuity [n] - 5,14;						
30,3, 31,21, 34,3;	30,3, 31,21, 34,3;	concerned [p] - 34,19;	continuity [n] - 5,14;						
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48,14;	48,14;	concerned [p] - 34,19;	continuity [n] - 5,14;						
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53,14;	53,14;	concerned [p] - 34,19;	continuity [n] - 5,14;	continuity [n] - 5,14;	continuity [n] -				

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1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF NEW YORK

1 Court Reporter: KATHLEEN COON
2 Notary Public
3 Jack W. Hunt & Associates, Inc.
4 1120 Liberty Building
5 Buffalo, New York 14202
(716) 853-5600

THE COURT CLERK: Criminal case 12-103, United States of America versus Kenneth Pettway and Demetrius Black.

THE COURT: Let's start with the prosecutor in this case. If you would state your full name.

MR. FELICETTA: Good morning, Your Honor. Michael Felicetta and Scott Allen for the Government.

THE COURT: All right. Gentlemen, good morning.

MR. GREENMAN: Good morning, Your Honor.

THE COURT: Okay. Table number two, Mr. Hill, tell us who you are and who you represent.

MR. HILL: Good morning, Your Honor. Sean Hill appearing for Demetrius Black.

THE COURT: And Demetrius Black is present in the court this morning. Good morning. Okay. For Defendant Kenneth Pettway who is present in court this morning, good morning.

MR. PETTWAY: Good morning.

THE COURT: All right. Your attorney is --

MR. GREENMAN: Herbert Greenman, Your Honor.

THE COURT: Okay. And conflict counsel?

MR. GRABLE: Good morning, Your Honor. James Grable

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09:56:43 1 as conflict counsel for Mr. Pettway.

09:56:48 2 THE COURT: Okay. Thank you. Mr. Grable, have you

09:56:47 3 had an opportunity to advise and discuss the matter of conflict

09:56:54 4 in this case with Mr. Pettway?

09:56:58 5 MR. GRABLE: I have, Your Honor.

09:56:59 6 THE COURT: Tell me specifically what you've done.

09:57:02 7 Okay?

09:57:02 8 MR. GRABLE: Okay. Well, I approached the issue, Your

09:57:04 9 Honor, by asking the question is this a potential waivable

09:57:09 10 conflict, a potential unwaivable conflict or an actual conflict.

09:57:13 11 I think we're past the point of saying is there no conflict.

09:57:13 12 There's certainly at a minimum a potential conflict.

09:57:18 13 From that starting point, I reviewed the information

09:57:20 14 from the County Court records that Mr. Greenman provided to me

09:57:25 15 and shared with me related to the County Court case involving

09:57:29 16 the confidential informant. I looked at the conflict case law

09:57:33 17 and I did that side by side with the New York Rules of

09:57:36 18 Professional Conduct, especially Rule 1.9 and the commentary

09:57:41 19 thereto.

09:57:42 20 Rule 1.9's commentary talks about whether a matter is

09:57:47 21 substantially related or not as a -- as a point in the analysis

09:57:52 22 and I was attempting to ascertain so that I could advise

09:57:56 23 Mr. Pettway whether the prior matter is in fact substantially

09:58:01 24 related to the current matter.

09:58:02 25 THE COURT: All right. And that prior matter involved

09:58:05 1 a conviction about 15 years ago or so and that matter had to do
09:58:13 2 with both drugs and guns, as I recall. Is that a fair
09:58:18 3 statement?

09:58:16 4 **MR. GRABLE:** That is correct. I -- yes, that's all
09:58:22 5 correct, Your Honor.

09:58:26 6 So, from there, looking at the rules, I am of the
09:58:30 7 opinion that it is substantially related. The reason I feel
09:58:35 8 that way is the commentary to Rule 1.9 states that a matter is
09:58:38 9 substantially related if under the circumstances a reasonable
09:58:40 10 lawyer would conclude that there is otherwise a substantial risk
09:58:46 11 that confidential factual information that would normally have
09:58:49 12 been obtained in the prior representation would materially
09:58:54 13 advance the client's position in the current matter.

09:58:57 14 Having satisfied myself that it appears to me that
09:59:01 15 these matters are substantially related, I met with Mr. Pettway
09:59:06 16 at the Niagara County Jail to go over my findings and the
09:59:09 17 research that I had conducted and particularly the various
09:59:13 18 cases, some Second Circuit cases and some from other courts.

09:59:16 19 **THE COURT:** All right. Just for purposes of the
09:59:20 20 record, I mean we did have a discussion about this the last time
09:59:24 21 we were in court and I gave you the additional time to do the
09:59:28 22 research and to formulate an opinion with respect to the
09:59:30 23 conflict issue and then to have the opportunity to further
09:59:33 24 discuss this matter with Mr. Pettway.

09:59:36 25 **MR. GRABLE:** That's correct. And that's what I did.

09:59:38 1 So I was reassured to see when I met with Mr. Pettway at the
 09:59:42 2 Niagara County Jail that he had done his own independent
 09:59:45 3 research and the reason I say I'm reassured and was reassured to
 09:59:51 4 see that was that his research matched up with mine. He had
 09:59:54 5 found many of the same cases that I looked at. It made our
 09:59:59 6 discussion easier and it made me reassured that he's
 09:59:59 7 well-informed.

09:59:59 8 I know that The Court is trying to ascertain among
 10:00:02 9 many questions whether it's possible for Mr. Pettway to make a
 10:00:08 10 knowing, voluntary and intelligent waiver and I'll get to that
 10:00:14 11 momentarily.

10:00:15 12 I think it would be helpful both for The Court and for
 10:00:17 13 the parties if I talk just briefly about a few of these cases.
 10:00:20 14 I gather from the last appearance and some of the things that
 10:00:22 15 The Court alluded to that The Court is familiar with these
 10:00:25 16 cases, that some of the phrases that The Court used come
 10:00:27 17 directly from these cases, but I don't know that all the parties
 10:00:31 18 are as familiar with it and this is a conflict dilemma that has
 10:00:36 19 no easy answers, so hopefully this will be helpful to everybody.

10:00:40 20 The first case that I talked to Mr. Pettway about is
 10:00:44 21 United States versus Kliti, K-L-I-T-I, and it's 156 F 3rd 150,
 10:00:54 22 Second Circuit case from 1998. In particular, at page 153 of
 10:00:59 23 that case, it suggests that the analysis should be exactly
 10:01:03 24 what's happening here. First, whether there's an actual or
 10:01:07 25 potential conflict which is on one side or no conflict. Again,

10:01:12 1 we're past the point of no conflict. Then, if an actual or
 10:01:15 2 potential conflict can it be waived or would no rationale
 10:01:21 3 Defendant waive it. That's the question that's posed by that
 10:01:25 4 case.

10:01:27 5 That took me to Wheat versus United States, 486 United
 10:01:32 6 States 153. It's a 1988 Supreme Court decision, an opinion
 10:01:39 7 authored by Judge Rehnquist and the particular pages that are
 10:01:42 8 helpful are 162 to 163.

10:01:46 9 That case talks about the murky pretrial context where
 10:01:49 10 it's more difficult to sort out if you have an actual or a
 10:01:53 11 potential conflict and I thought that was especially appropriate
 10:01:57 12 analysis because I do see this as murky analysis.

10:02:00 13 **THE COURT:** Yes, because, I mean, the point being that
 10:02:06 14 the legal proceedings have to appear fairly.

10:02:11 15 **MR. GRABLE:** Correct. That's exactly right. That's
 10:02:11 16 the point of Wheat and really all of these conflict cases.

10:02:15 17 So Wheat talks about when you're in this posture that
 10:02:19 18 we're in here it's difficult to ascertain whether a conflict is
 10:02:22 19 in fact actual or potential and whether or not a potential
 10:02:27 20 conflict may -- this is a quote from the case. May or may not
 10:02:36 21 burgeon into an actual conflict as the trial progresses.

10:02:38 22 From there, I looked at United States versus Iorizzo,
 10:02:46 23 that's I-O-R-I-Z-Z-O, 786 F 2nd 52, 2nd Circuit case from 1986.
 10:02:50 24 In particular, pages 58 to 60 are helpful. That picks up where
 10:02:55 25 Wheat left off -- or, it actually predates Wheat, but it talks

10:02:00 1 about how these conflicts can blossom into a problem as the
 10:02:05 2 trial goes on.
 10:02:06 3 **THE COURT:** Yes, because you can't really predict what
 10:02:09 4 the testimony is going to show until it happens.
 10:02:12 5 **MR. GRABLE:** That's exactly what Judge Rehnquist
 10:02:15 6 describes in Wheat and Iorizzo develops that same point in
 10:02:18 7 helping people who read it try to sort out whether we have an
 10:02:24 8 actual or potential conflict and whether if potential is it
 10:02:26 9 waivable.

10:02:27 10 That case, Iorizzo, talks about the notion of
 10:02:31 11 ineffective assistance of counsel. If during the course of a
 10:02:34 12 trial a strong and serious potential conflict were to blossom
 10:02:39 13 into an actual conflict, there would be no need for a showing of
 10:02:42 14 prejudice by a Defendant were he to challenge his conviction
 10:02:48 15 later on. This is presumed in that scenario.

10:02:51 16 For a lot of reasons, this is a really important
 10:02:55 17 question that The Court will be grappling with. The most
 10:03:00 18 fundamentally important reason is because Mr. Pettway is
 10:03:04 19 entitled to a fair trial.

10:03:08 20 **THE COURT:** So is the only alternative at that point
 10:03:07 21 to declare a mistrial sua sponte or -- do you know?

10:03:08 22 **MR. GRABLE:** I would think so. I would think so.
 10:03:11 23 It's I suppose helpful that we're trying to grapple with this
 10:03:15 24 now as opposed to after a jury were impaneled and in the middle
 10:03:20 25 of a trial. I can't see a way out other than a mistrial at that

10:04:24 1 stage.

10:04:28 2 **THE COURT:** All right. That would result in double
 10:04:33 3 jeopardy.

10:04:34 4 **MR. GRABLE:** It would be a mess I guess is the easiest
 10:04:37 5 way to say it. That's why I think it's important that -- and I
 10:04:41 6 know that's what everybody is up to here is trying to sort this
 10:04:44 7 out and make sure that there's not error created and problems
 10:04:47 8 created and, again, most fundamentally, that we don't deprive
 10:04:52 9 Mr. Pettway of his right to a fair trial and to conflict-free
 10:04:54 10 counsel which the Sixth Amendment guarantees him.

10:04:57 11 From there, I looked at United States versus Malpiddi,
 10:05:04 12 M-A-L-P-I-D-D-I, 62 F 3rd 465, it's a 2nd Circuit 1995 case,
 10:05:10 13 pages 468 to 470, and in particular page 468 footnote two gives
 10:05:18 14 some guidance about whether to disqualify counsel or whether a
 10:05:24 15 valid waiver can in fact be obtained from the Defendant.

10:05:28 16 Lastly, the case that I found to be helpful in terms
 10:05:30 17 of some of its discussion to illuminate these issues is United
 10:05:35 18 States versus Falzone, 766 F Sup 1265. That's a Judge Arcara
 10:05:42 19 decision from 1991.

10:05:44 20 **THE COURT:** Is that still good law?

10:05:46 21 **MR. GRABLE:** It's still good law. In particular,
 10:05:49 22 pages 1271 and 1272 have a good and helpful discussion about
 10:05:54 23 balancing a Defendant's right to counsel of choice with his
 10:05:57 24 right to a fair trial and it talks about how the right to
 10:06:00 25 counsel of choice must yield to concerns about a fair trial if

10:06:09 1 there's a demonstration of an actual conflict or there's serious
10:06:16 2 potential for conflict which I take to be another way of saying
10:06:20 3 a non-waivable conflict. If you have an actual or a
10:06:23 4 non-waivable conflict, I think the only remedy is
10:06:26 5 disqualification of counsel.

10:06:27 6 THE COURT: All right. Now, the waivable part, does
10:06:30 7 that relate to the subject witness or the subject Defendant?

10:06:33 8 MR. GRABLE: Both. My reading of the New York Rules
10:06:38 9 of Professional Conduct would require if a conflict is waivable,
10:06:41 10 which is step one, if in fact it's waivable, you need waivers to
10:06:46 11 be safest from both. It would really be to the best protection
10:06:52 12 of the attorney in the current representation for there to be
10:06:57 13 waivers from both.

10:06:57 14 THE COURT: All right. With respect to Kliti and
10:07:00 15 Iorizzo, Malpiddi and Falzone, are those all witness conflict
10:07:03 16 cases?

10:07:04 17 MR. GRABLE: Yes. In my judgment, having reviewed all
10:07:10 18 of these cases, I believe we have what I would describe as a
10:07:14 19 non-waivable serious potential conflict. I don't believe that
10:07:19 20 any rationale Defendant could waive this conflict in light of
10:07:23 21 all of the case law, in light of my review of the County Court
10:07:26 22 records related to this confidential informant. I do not regard
10:07:30 23 this as a waivable conflict. I laid that out for Mr. Pettway.

10:07:36 24 THE COURT: Is that the same thing as saying this is
10:07:40 25 an actual conflict?

10:07:42 1 MR. GRABLE: The cases seem to treat the two things as
10:07:46 2 being close cousins, but not the same thing. I say close
10:07:50 3 cousins because if it's a serious potential conflict the cases
10:07:54 4 lead you down the path that it's not waivable.

10:07:57 5 Wheat and other cases give me the sense that the
10:08:00 6 safest course under those circumstances is to treat it as though
10:08:05 7 it's an actual conflict because of what we talked about a few
10:08:08 8 minutes ago.

10:08:09 9 Here pretrial we don't know where the trial will take
10:08:13 10 us, so given that we don't know where the trial will take us we
10:08:18 11 don't want to deprive Mr. Pettway of his right to effective,
10:08:23 12 conflict-free counsel, so -- but that of course has to balance
10:08:27 13 with his other Sixth Amendment right to counsel of his choosing.

10:08:31 14 THE COURT: If there's this somewhat overlap in terms
10:08:37 15 of actual versus non-waivable potential conflict, does it have a
10:08:43 16 bearing on how it's to be looked at by The Court if in fact the
10:08:48 17 witness himself were to waive any attorney/client privilege?

10:08:58 18 MR. GRABLE: I don't think so, Judge. I don't -- I
10:08:57 19 think the first step is it in fact waivable and then you get to
10:09:02 20 the point about who might or might not be willing to waive.

10:09:05 21 As I look at the analysis, Falzone and the other cases
10:09:12 22 I've cited recognize the notion that a Defendant isn't always in
10:09:17 23 the best position to know when a conflict is waivable or not
10:09:21 24 waivable. I suppose that's the reason for this process that
10:09:25 25 we're in right now.

10:09:26 1 THE COURT: It's different here, right, because your
10:09:28 2 client knows a lot -- not your client, but certainly --
10:09:32 3 MR. GRABLE: He is my client for purposes of this
10:09:34 4 conflict analysis and, yeah, he's -- he looked at this research
10:09:38 5 carefully himself and he has a good sense of it and he -- and I
10:09:44 6 can tell Your Honor that when I met with him I laid this
10:09:48 7 out for him and he agreed with my analysis, but I would say
10:09:52 8 that he agreed reluctantly because his counsel of choice is
10:09:56 9 Mr. Greenman --

10:09:56 10 THE COURT: Right.

10:09:58 11 MR. GRABLE: -- and he also wants a speedy trial, as
10:10:00 12 you know. He doesn't want to wait.

10:10:04 13 If he were -- and he put it to me in these terms. His
10:10:09 14 Sixth Amendment right to conflict of choice would be exercised
10:10:14 15 in favor of keeping Mr. Greenman. He feels as though he's
10:10:18 16 losing that right when I explained this case law to him. He
10:10:22 17 feels as though he's losing that right. To be perfectly frank,
10:10:25 18 he blames the Government for the loss of that right. He is of
10:10:29 19 the view having -- he read Malpiddi and the cases that I cited.
10:10:34 20 There's some language in Malpiddi and Iorizzo that talk about
10:10:46 21 the Government's role in conflict analysis and the Government's
10:10:52 22 role in trying to avoid having a Defendant have to make this
10:10:58 23 obstant choice between forfeiting a Sixth Amendment right to
10:11:02 24 conflict of choice or proceeding with counsel that is burdened
10:11:07 25 with a conflict, a serious potential conflict, so he -- I say to

10:11:12 1 him, well, okay, you have a Sixth Amendment right to conflict of
10:11:19 2 choice, but the case law says must yield to the right to a fair
10:11:23 3 trial, so we're really in a dilemma here. He says, if in
10:11:28 4 fact -- he says, well -- and he's thought about this carefully.
10:11:31 5 He says, well, isn't it true, Mr. Grable, that this isn't a
10:11:38 6 problem if the Government can't call that witness? I said,
10:11:37 7 yeah, I think that eliminates the conflict issue, but it's a --
10:11:42 8 the Government has stated it's a material witness essential to
10:11:48 9 its case.

10:11:46 10 THE COURT: Is it exacerbated in any way by the fact
10:11:50 11 that the Government delayed as long as it did in bringing this
10:11:58 12 matter to the attention of the Defendant?

10:11:58 13 MR. GRABLE: Well, certainly I didn't -- one thing I
10:11:59 14 didn't do in my analysis is go back and look at the docket and
10:12:06 15 try to get a sense as to when the Government knew or reasonably
10:12:06 16 should have known.

10:12:09 17 Whatever the answer to that question might be, I could
10:12:10 18 tell you that Mr. Pettway's view is that there were extensive
10:12:18 19 pretrial proceedings. I believe he made -- he and his attorney
10:12:18 20 made an application for a Franks hearing that was denied.

10:12:22 21 If I understand correctly, those Franks proceedings
10:12:26 22 involved or the request for a Franks proceeding involved a
10:12:26 23 warrant that rested in large part on this confidential
10:12:31 24 informant. Mr. Pettway's of the view that it was never a secret
10:12:35 25 to anybody that this witness was going to be an essential

10:12:38 1 witness in the trial, that the case got close to trial before
 10:12:41 2 and didn't quite go, but that I think he would say that in the
 10:12:44 3 exercise of reasonable diligence the Government -- and he's
 10:12:48 4 certainly of the view there was no reason to protect the
 10:12:51 5 identity of the witness. I mean, he's incarcerated, so he
 10:12:54 6 doesn't -- he can't imagine a scenario where the witness would
 10:12:57 7 have been in danger. He -- he is of the strong view that the
 10:12:02 8 position that he's in is a position that could have been avoided
 10:12:06 9 if there had been the better exercise -- better mechanisms to
 10:12:12 10 identify a potential conflict or some step that could have been
 10:12:15 11 taken sooner than now especially given that he's in custody. He
 10:12:19 12 says to me, well, okay, if the Government can't call that
 10:12:22 13 witness that solves the problem. I say, I think that's probably
 10:12:27 14 true, that seems to me that it would eliminate the conflict if
 10:12:32 15 the witness were not called by the Government. Then I think
 10:12:35 16 Mr. Greenman would not be burdened with a conflict that would
 10:12:38 17 give him divided loyalties at a trial.

10:12:40 18 The other option I'm sure The Court is thinking of and
 10:12:44 19 the parties are thinking of is you appoint conflict-free
 10:12:50 20 counsel, not burdened by this conflict, but of course they would
 10:12:53 21 need time to get up to speed. This is not a case given the
 10:12:58 22 stakes involved that a lawyer would walk into and try on short
 10:14:02 23 notice.

10:14:02 24 I talked to Mr. Pettway about that and he said,
 10:14:04 25 Greenman's the lawyer I want, if I can't have Greenman I want a

10:14:09 1 lawyer who's at least as well-prepared as Greenman and who knows
 10:14:13 2 the case as well as Greenman. I said, well, that could be six
 10:14:16 3 months, a year, who knows how long. He says, well, then that
 10:14:19 4 time should be charged to the Government, it's not my fault this
 10:14:20 5 happened, so if I can't keep Greenman whatever time it takes for
 10:14:25 6 me to get a new lawyer that's as good as Greenman ought to be
 10:14:27 7 charged to the Government.

10:14:28 8 THE COURT: So then you look at it under Barker versus
 10:14:31 9 Wingo in terms of speedy trial?

10:14:34 10 MR. GRABLE: I did not look at that law, Your Honor,
 10:14:36 11 but that's the status of my discussions with Mr. Pettway. As I
 10:14:40 12 said during my discussions with The Court here this morning, I
 10:14:43 13 haven't done a lot of these conflict analysis cases, but of the
 10:14:46 14 ones I've done this one is the trickiest.

10:14:56 15 THE COURT: Well, the cases talk about fairness to
 10:15:00 16 both sides, do they not?

10:15:01 17 MR. GRABLE: Yes.

10:15:02 18 THE COURT: Okay. What do I do?

10:15:04 19 MR. GRABLE: Well, as I see it, Your Honor, you have
 10:15:07 20 two options and I think Mr. Pettway is seized on both of those.

10:15:11 21 You either relieve Mr. Greenman, appoint new counsel
 10:15:15 22 with time to get up to speed and prepare for what will be a
 10:15:21 23 challenging trial and in the process of doing that it's going to
 10:15:26 24 take some time. I don't know what the answer is on what the
 10:15:29 25 speedy trial solution would be, but I do know that Mr. Pettway

10:15:34 1 says, if the Government had come forward and done its diligence
 10:15:39 2 sooner I wouldn't be in this position, that time should be
 10:15:42 3 charged to the Government. That's -- so that's option one.

10:15:46 4 Option two is The Court -- the Government elects not
 10:15:49 5 to call that witness, which I understand from the prior
 10:15:51 6 proceedings we had last week that that's not an option.

10:15:54 7 THE COURT: Well, I don't know if that's final, a
 10:15:57 8 final. I mean, the Government had answered readiness for trial
 10:16:04 9 even before they located this so-called material witness, right?
 10:16:09 10 I mean, I think we discussed that in your presence the last time
 10:16:12 11 that you were here.

10:16:15 12 MR. GRABLE: I remember that discussion.

10:16:14 13 THE COURT: Okay. So you don't have an answer for me,
 10:16:19 14 but you've highlighted the complexity?

10:16:21 15 MR. GRABLE: Correct.

10:16:24 16 THE COURT: And you stopped short of saying that this
 10:16:28 17 is an actual conflict, but it's at least a non-waivable
 10:16:32 18 potential conflict?

10:16:34 19 MR. GRABLE: I see it as a non-waivable serious
 10:16:36 20 potential conflict that given what's in the County Court records
 10:16:41 21 is likely to develop into an actual conflict during the course
 10:16:45 22 of the trial.

10:16:48 23 THE COURT: Okay. Are there any questions that
 10:16:48 24 Mr. Pettway asked you relative to the discussion we're having
 10:16:52 25 right now that you were unable to answer for him that would

10:16:57 1 require any additional research work on your part?

10:17:03 2 MR. GRABLE: No. There were -- he had a -- he had a
 10:17:04 3 speedy trial question about how the speedy trial time would be
 10:17:12 4 computed if he were to get new counsel and I did not have that
 10:17:17 5 analysis handy and I have not discussed it with him, but I'm not
 10:17:21 6 sure that relates as much to the conflict issue as to what
 10:17:26 7 happens once The Court resolves the conflict issue.

10:17:29 8 I did tell him, and he is well-aware of this, that I'm
 10:17:33 9 not his substantive counsel on the underlying charges and all of
 10:17:37 10 that, although it factors into all of this analysis to be
 10:17:40 11 certain, but I -- we talked about the fact that I'm his conflict
 10:17:44 12 counsel and my role I view it as giving him as much information
 10:17:48 13 as I can about the conflict and what should best be done to make
 10:17:54 14 certain to the extent that it can be made certain that he gets a
 10:17:58 15 fair trial.

10:17:55 16 THE COURT: I take it, then, that your position is
 10:17:58 17 there's nothing to be gained in terms of the opinion that you
 10:18:02 18 just rendered to give you more time to take a look at the docket
 10:18:07 19 entries which you didn't have the opportunity to do up to this
 10:18:11 20 point in time?

10:18:12 21 MR. GRABLE: The only -- the only -- the only thing
 10:18:16 22 that could be accomplished I suppose by me looking at the docket
 10:18:21 23 entries and some of the prior file documents in the case would
 10:18:24 24 be this assessment of whether the conflict should have been
 10:18:30 25 detected sooner.

10:18:32 1 I'm not -- I would leave that I suppose to The Court
10:18:36 2 and the parties to hash out. If The Court wants my assistance
10:18:39 3 on that, I'll be happy to do it, but I don't view it as -- I
10:18:46 4 don't view it as integral to the decision as to whether there's
10:18:51 5 a waivable conflict or not.

10:18:52 6 **THE COURT:** Okay. And that was really my question.
10:18:53 7 All right. Thank you, Mr. Grable. I appreciate it.

10:18:55 8 Before I get to you, Mr. Felicetta, Mr. Greenman, what
10:19:22 9 is your sense in terms of the conflict that we have to recognize
10:19:37 10 here in terms of whether it's a potential conflict, an actual
10:19:42 11 conflict, a serious, non-waivable or a waivable conflict issue?

10:19:48 12 **MR. GREENMAN:** Judge, Mr. Grable and I have spoken at
10:19:51 13 length about what he's talked about here. I think he's right in
10:19:55 14 his assessment of the law. I think it's fairly close to what we
10:20:01 15 talked about last week. I think he actually goes a little bit
10:20:04 16 further in terms of talking about that a potential can actually
10:20:04 17 develop into an actual conflict at trial which is something we
10:20:09 18 did not discuss, but I think he's right given the law, so I
10:20:16 19 really don't have much to add.

10:20:17 20 I will say that I met with Mr. Pettway over the
10:20:20 21 weekend. We had a very long discussion. On the other hand,
10:20:26 22 Judge, I stayed away from -- I talked with Mr. Grable about this
10:20:28 23 before I met with Mr. Pettway and I decided to stay away from
10:20:31 24 the legal aspect of the conflict issue and the waivability on
10:20:37 25 his part. I thought that that would best -- everyone would best

10:20:40 1 be served by having Mr. Grable take it up with Mr. Pettway,
10:20:43 2 which I know he has since Mr. Pettway and I spoke this weekend.
10:20:48 3 I don't have much more to add, Your Honor. I don't
10:20:52 4 think that there is anything more to add.

10:20:54 5 **THE COURT:** But you're prepared to proceed to trial if
10:20:58 6 it's deemed that the conflict is not an actual conflict?

10:21:02 7 **MR. GREENMAN:** Yes. I would think that we'd need a
10:21:06 8 week or two to get back on track, to be perfectly honest with
10:21:11 9 you.

10:21:11 10 **THE COURT:** All right. Given with what Mr. Greenman
10:21:15 11 just said, Mr. Grable, I have a couple of other questions.

10:21:16 12 You stopped short of saying this is an actual
10:21:19 13 conflict, but it's a conflict that can evolve into an actual
10:21:20 14 conflict. My question to you is that still potentially means
10:21:28 15 that this conflict is waivable. What if the confidential source
10:21:32 16 waived his attorney/client privilege? Doesn't that empower
10:21:40 17 Mr. Greenman to proceed forward and not impact on doing any
10:21:48 18 jeopardy to the right of conflict-free counsel to Mr. Pettway?

10:21:52 19 **MR. GRABLE:** A full waiver of the duty Mr. Greenman
10:21:58 20 owes to maintain confidentiality to the confidential informant I
10:22:00 21 could -- I suppose that could vitiate the conflict and eliminate
10:22:11 22 the need and then we would want to make certain I suppose for
10:22:18 23 safety sake that Mr. Pettway would waive under those
10:22:18 24 circumstances, but if there was a full and complete waiver of
10:22:22 25 the attorney/client privilege by the CI I do -- I suppose then

10:22:35 1 Mr. Greenman would not be operating under conflicting duties.
10:22:41 2 Now --
10:22:41 3 **THE COURT:** No constraints, right?
10:22:44 4 **MR. GRABLE:** Correct. Now, the case law I looked at
10:22:45 5 and the New York Rules of Professional Conduct make it pretty
10:22:52 6 clear that the prior client should also have the benefit of
10:22:55 7 independent counsel to advise him so that he makes a knowing and
10:23:00 8 intelligent waiver, as well.

10:23:01 9 **THE COURT:** All right. But is your recollection the
10:22:04 10 same as mine, I think it came up in our last court discussions,
10:22:09 11 that the CI was not inclined at least up to that point in time
10:22:12 12 to waive?

10:22:13 13 **MR. GRABLE:** Correct. That is my recollection, yes.

10:22:17 14 **MR. FELICETTA:** Well, I could speak to that, Judge.

10:22:21 15 **THE COURT:** Okay. Hold on for a second,

10:22:24 16 Mr. Felicetta.

10:22:24 17 **MR. FELICETTA:** All right.

10:22:40 18 **MR. GRABLE:** Your Honor, could I just add to the prior
10:22:42 19 question that The Court asked me about a waiver from the
10:22:45 20 confidential informant?

10:22:47 21 Mr. Pettway is concerned that in the event that there
10:22:52 22 were a waiver from the prior client that given what he knows
10:22:56 23 about Mr. Greenman and Mr. Greenman's ethical practice of law
10:22:58 24 that Mr. Greenman would not even with a waiver from the CI, a
10:24:10 25 full waiver of the attorney/client privilege, that he would not

10:24:15 1 have divided loyalties, so he is not of the view that he would
10:24:20 2 waive under those circumstances because he himself --

10:24:22 3 **THE COURT:** He being Mr. Pettway?
10:24:24 4 **MR. GRABLE:** Mr. Pettway would continue to have
10:24:26 5 reservations.
10:24:27 6 I have not done the analysis, Judge, on if you have a
10:24:30 7 waiver from -- a knowing and intelligent waiver from the CI
10:24:34 8 whether you would then need -- still need a waiver from
10:24:38 9 Mr. Pettway.

10:24:39 10 I could tell you that preliminarily my read of the New
10:24:44 11 York Rules of Professional Conduct suggest that the safest
10:24:48 12 course would be to have a waiver from both, but I would want
10:24:51 13 another bit of time to look at that issue if The Court views it
10:24:54 14 as needing additional analysis.

10:24:54 15 **THE COURT:** Yes. It's based on the premise that there
10:24:58 16 can't be any certainty at least from what Mr. Pettway says now
10:25:03 17 in his mind that his representation remains totally
10:25:09 18 conflict-free irrespective of any waiver from the CI?

10:25:15 19 **MR. GRABLE:** That's right, Your Honor. That's right.
10:25:22 20 **THE COURT:** Again, that's a -- that's a gut argument
10:25:26 21 if you will. I mean, there's no basis that's been obvious from
10:25:31 22 the discussions that we've had that Mr. Greenman could not be
10:25:37 23 and I assume he would say given a waiver from the CI that
10:25:43 24 empowers me to proceed without constraints and in a
10:25:48 25 conflict-free fashion, that I could render my best defense to

10:25:54 1 Mr. Pettway without reservation.

10:25:59 2 MR. GRABLE: That's -- again, that's an area where I
10:26:01 3 didn't dig as deeply as I should have given what I saw in the
10:26:05 4 cases about what I regarded to be a non-waivable conflict, but I
10:26:09 5 would -- I would ask for The Court's indulgence for a few more
10:26:12 6 days of research.

10:26:18 7 If we get to the point where the CI is prepared and
10:26:16 8 able to make a knowing and intelligent waiver of the
10:26:21 9 attorney/client privilege, I'd want to visit the issue that The
10:26:23 10 Court's talking about.

10:26:24 11 THE COURT: All right. If I were to obtain from
10:26:28 12 Mr. Felicetta the indication that the CI is still not inclined
10:26:32 13 to waive, do I still need to appoint conflict counsel to make
10:26:41 14 certain that there's not an issue with respect to his
10:26:45 15 understanding of what it means to not waive?

10:26:50 16 MR. GRABLE: I don't think you would need to do that,
10:26:51 17 but The Court -- The Court is always free to appoint counsel to
10:26:57 18 assist somebody with a matter as difficult to understand as this
10:27:02 19 one is.

10:27:04 20 THE COURT: Okay. Thank you. Mr. Greenman, thank
10:27:04 21 you.

10:27:07 22 Mr. Felicetta, you've kind of gotten the benefit of
10:27:10 23 everybody's opining on where we are at. I want you to address
10:27:20 24 what we've discussed to the extent that you can including the
10:27:24 25 Government's willingness to proceed without the material witness

10:27:28 1 CI, how you view the conflict, what the last best information is
10:27:36 2 that you have with respect to what the CI will do if asked about
10:27:44 3 waiver and the Government's position with respect to conflict
10:27:51 4 counsel to get this matter resolved as far as CI is concerned.

10:27:56 5 MR. FELICETTA: Thank you, Your Honor. Judge, if I
10:27:58 6 could ask Miss Labuzzetta -- I'm expected in front of Judge
10:28:02 7 Schroeder for an initial appearance at this time. If I could
10:28:06 8 ask Miss Labuzzetta if she wouldn't mind letting him know that
10:28:11 9 I'm going to be late. I appreciate that.

10:28:12 10 THE COURT: Again, another conflict.

10:28:13 11 MR. FELICETTA: Right. Judge, thank you for giving me
10:28:15 12 the opportunity to speak here on this issue.

10:28:18 13 With respect to the cooperating source, let me start
10:28:21 14 with this. We were ready to go to trial in October of 2016
10:28:26 15 knowing that this evidence was out there.

10:28:28 16 We the Government knew that there was a cooperating
10:28:31 17 source who initially helped police get to the search warrant,
10:28:35 18 that the source had apparently purchased drugs from Pettway and
10:28:39 19 Black at that residence.

10:28:40 20 We knew that information was out there, but as The
10:28:44 21 Court's aware of the history of this case Miss Iokash and I who
10:28:49 22 were Government counsel at that time did not have the
10:28:55 23 opportunity, we didn't have enough time to locate that evidence
10:28:58 24 and to prepare that evidence for the trial. Because we came on
10:28:58 25 late, it took us a long time to get up to speed on a very big

10:29:03 1 case.

10:29:03 2 We had about four months from beginning to end to get
10:29:07 3 ready for this thing and we didn't have the opportunity. We
10:29:07 4 learned about it late in the game.

10:29:09 5 THE COURT: And you didn't have your CI located in
10:29:12 6 October of 2016, right?

10:29:14 7 MR. FELICETTA: Correct. We didn't even know who the
10:29:16 8 individual was, we didn't know what the evidence was, we didn't
10:29:20 9 know what the DEA reports might say, we didn't have laboratory
10:29:22 10 reports. These are all things that we just didn't have because
10:29:26 11 it wasn't something that was brought to our attention until late
10:29:27 12 in the game when we were prepping with the sheriff's office. We
10:29:31 13 were prepared to go to trial at that time.

10:29:33 14 Now, since October of '16, there was, as you know, a
10:29:36 15 delay in the trial and immediately when the delay took place I
10:29:40 16 began work to try to identify that evidence, that individual,
10:29:44 17 find out more about it because I thought this was a pretty
10:29:47 18 important piece of evidence that we're leaving out there that
10:29:51 19 could directly relate to the elements of the indictment, so then
10:29:54 20 I began the process of looking for that individual and all that
10:29:58 21 evidence.

10:29:58 22 As that information trickled in, I provided it to
10:30:05 23 defense counsel. It came in first in October of '16 and
10:30:08 24 continued in in the months that followed.

10:30:10 25 I sort of -- in having a conversation with a colleague

10:30:12 1 about this, I kind of equate it to having a murder case where
10:30:15 2 you're ready to go, you've got sufficient evidence to go forward
10:30:19 3 charging a person with murder and for some reason there's a
10:30:21 4 delay in the trial and in between you find the murder weapon.
10:30:25 5 Are you going to give up that weapon? You're going to proceed
10:30:30 6 without it? Of course not.

10:30:32 7 This couldn't have been a more critical find for the
10:30:36 8 Government in locating this witness and locating this evidence
10:30:39 9 and that's why when I was here last time I represented that this
10:30:41 10 was a material piece of evidence that the Government is simply
10:30:45 11 not willing to ignore. We have a duty and obligation to our
10:30:48 12 party to bring forth all relevant and credible evidence before
10:30:51 13 the jury to prove these charges.

10:31:03 14 I mean, the analogy that I'm making here is in regards
10:31:07 15 to the quality of the evidence and what we found, not whether or
10:31:12 16 not the gun had a conflict. That's what we're talking here,
10:31:14 17 quality of the evidence of what we found, so we're not willing
10:31:18 18 to simply ignore that evidence.

10:31:17 19 Now, with regards to the determination of this
10:31:21 20 conflict, there is no policy in the Department of Justice that
10:31:25 21 says that we should do this.

10:31:26 22 I understand what The Court's position is. Trust me,
10:31:28 23 it did not fall on deaf ears. There was a very robust
10:31:33 24 conversation about it after we left court here at the office, so
10:31:36 25 it did not fall on deaf ears.

10:31:38 1 Perhaps there are better things that we could do that
10:31:40 2 we should do just in a duty of professionalism, in fairness, to
10:31:45 3 try to work harder to make these issues apparent earlier because
10:31:49 4 it calls on Government resources to bring jurors here and for
10:31:53 5 these trials to proceed in a busy court.

10:32:01 6 The Government didn't fail in its duty here. There's
10:32:01 7 no legal precedent, there's absolutely no case law out there,
10:32:05 8 there's no policy out there that says we're under some
10:32:05 9 obligation to go with each individual witness in our case and
10:32:10 10 ask them do you know Mr. Greenman, do you know Mr. Hill, do you
10:32:12 11 know Mr. Greenman, do you know Mr. Hill. That's simply not our
10:32:16 12 duty.

10:32:16 13 Now, with respect to the determination of the
10:32:22 14 conflict, I think Mr. Grable did a fine job of outlining what
10:32:27 15 the relevant case law is and I appreciate his efforts. I would
10:32:31 16 disagree with him. I think he has somewhat overstated what the
10:32:36 17 conflict is because I still get back to the original issue here.

10:32:39 18 Let's just step back for a second. Mr. Greenman
10:32:42 19 didn't recognize the source's name when he received it. It
10:32:45 20 wasn't until nine days later when he got ahold of a file and he
10:32:49 21 saw a letter from himself in the file that he said, oh, I must
10:32:53 22 have represented this witness before, so the fact when we talk
10:32:57 23 about these things being substantially related as it's defined
10:32:57 24 under the rules and under these cases the facts of one don't
10:32:07 25 affect the facts of the other. What we're talking about here is

10:33:11 1 whether Mr. Greenman can effectively impeach a witness who he
10:33:15 2 has prior information on. Mr. Greenman doesn't remember this
10:33:18 3 witness.

10:33:19 4 THE COURT: Well, he represented that particular
10:33:22 5 witness --

10:33:22 6 MR. FELICETTA: He did.

10:33:22 7 THE COURT: -- in a similar type case to this, drugs
10:33:26 8 and guns.

10:33:26 9 MR. FELICETTA: I don't think that's what they mean
10:33:28 10 when they say substantially related, Judge. Whether he
10:33:30 11 represented him on a murder, a rape or drugs and guns, the issue
10:33:31 12 is still there. The question is did you learn stuff about this
10:33:34 13 man that would divide your obligations and give you basically a
10:33:39 14 leg up, give you an unfair advantage to delve into
10:33:45 15 cross-examination that no other lawyer would possibly know.

10:33:46 16 THE COURT: Mr. Greenman himself feels that he might
10:33:49 17 be incumbent in examining given what he knows.

10:33:54 18 MR. FELICETTA: But he said he doesn't even remember
10:33:57 19 the man. The issue is what is in his file and he has said --

10:34:01 20 MR. GREENMAN: Excuse me, Mike. I apologize. That's
10:34:02 21 not what I said, Judge. I said that initially I did not
10:34:05 22 recognize his name. When I went over and looked at the file, I
10:34:09 23 remembered the case, I remembered who this man is because -- I
10:34:13 24 know you don't know everything about the case, Judge, but there
10:34:18 25 was a lot of factors in this case that would bring my

10:34:23 1 recollection back, so I don't want to go on the premise that I
10:34:25 2 don't remember anything about it. That's -- respectfully to Mr.
10:34:30 3 Felicetta, that's not accurate.

10:34:31 4 THE COURT: Okay.

10:34:32 5 MR. FELICETTA: Well, my point in saying that -- I
10:34:33 6 apologize if I misspoke about what Mr. Greenman said. That was
10:34:37 7 my understanding is the reason why there was a nine day delay in
10:34:43 8 noticing conflict.

10:34:44 9 THE COURT: He was pre-occupied with other matters.

10:34:46 10 MR. FELICETTA: I understand that. Trust me, I'm not
10:34:46 11 calling out on Mr. Greenman. He is as diligent and is prepared
10:34:51 12 as a lawyer as I've ever come across and I've had many cases
10:34:52 13 before this one with him, but my point in saying that is what
10:34:57 14 information does he actually have, what information does he
10:35:00 15 actually possess on this witness, because the cases talk about
10:35:06 16 this.

10:35:06 17 If he represented the witness on a traffic matter,
10:35:08 18 Judge -- and this just happened in Judge Arcara's part last
10:35:14 19 week. If he represented the witness on a traffic matter, we
10:35:19 20 would all agree this is not a conflict. If he represented the
10:35:20 21 witness in a matrimonial, we might agree there's a conflict
10:35:21 22 potentially, but we still have not gotten to the ultimate issue
10:35:26 23 in this court on this case what does Mr. Greenman know about
10:35:29 24 this witness, what's in his file which he still hasn't reviewed,
10:35:34 25 what personal information does he have that makes this a

10:35:36 1 conflict.

10:35:36 2 THE COURT: Well, doesn't that put us right where
10:35:39 3 Mr. Grable said the red flags are, that this situation is a
10:35:42 4 serious matter that's likely to evolve into an actual conflict?

10:35:47 5 MR. FELICETTA: I don't think he said likely and I
10:35:49 6 don't think that's what it is. It could. It potentially could.
10:35:52 7 I think we first have to note, A -- and I mentioned
10:35:55 8 this last time. A, what is The Court going to allow defense
10:35:59 9 counsel to impeach on on a 15 year old case and, B, assuming The
10:35:59 10 Court's going to say I'm not going to give you any restrictions,
10:35:59 11 have that.

10:36:06 12 THE COURT: But it doesn't have to be strictly on the
10:36:08 13 case. It can be what he learned in the context of those charges
10:36:14 14 which are similar to the charges in this case.

10:36:15 15 MR. FELICETTA: It could be information he learned in
10:36:19 16 private consultation about this man. He could have said to
10:36:23 17 Mr. Greenman, by the way, Mr. Greenman, I've always been a liar,
10:36:26 18 I lie about everything, it's a disease I have. That would be a
10:36:30 19 fair line of questioning, but we don't know. We still don't
10:36:33 20 know what is the information that Mr. Greenman possesses that
10:36:36 21 would make this a potential conflict because if it was a traffic
10:36:39 22 case we would all agree there isn't one.

10:36:43 23 MR. GRABLE: I could just say on that because I have
10:36:47 24 the same and had the same question in my own mind in trying to
10:36:50 25 analyze the conflict issue, so I -- I read the papers from the

10:36:55 1 County Court proceedings where Mr. Greenman represented the
 10:36:59 2 confidential informant and in particular there's a supporting
 10:37:02 3 deposition in the file that -- Mr. Greenman of course can't
 10:37:08 4 violate his duty of confidentiality owed to the prior witness to
 10:37:12 5 tell me what he learned or became aware of during confidential
 10:37:18 6 communications with the CI, but trying to piece all this
 10:37:22 7 together without that information what I read in the supporting
 10:37:26 8 deposition from the County Court file plus the confidential
 10:37:30 9 informant's reluctance to waive causes me to be concerned that
 10:37:37 10 the contents of this supporting deposition suggest that what we
 10:37:42 11 have here is not merely impeachment material, that it is --
 10:37:47 12 relates to the confidential informant's veracity and the
 10:37:52 13 truthfulness or untruthfulness of the confidential informant as
 10:37:57 14 that phrase is used in Rule 608 and 609. I'm not clear this is
 10:38:03 15 easy enough -- it may even implicate Rule 404B.
 10:38:07 16 It's complicated enough that reading the supporting
 10:38:10 17 deposition gave me grave concerns that this is not something
 10:38:15 18 that is unrelated and I -- and that's what took me back to the
 10:38:21 19 Rule 1.9 in the New York Rules of Professional Conduct and its
 10:38:27 20 definition of what is or is not a matter that is substantially
 10:38:32 21 related.
 10:38:38 22 The rule, again, defines it as is there substantial
 10:38:36 23 risk that confidential factual information that would normally
 10:38:40 24 have been obtained in the prior representation would materially
 10:38:48 25 advance the client's position in the subsequent matter, meaning

10:38:48 1 is there something from that prior case that would materially
 10:38:52 2 advance Mr. Pettway's position in the current case. I view this
 10:38:54 3 as clearly being substantially related not from Mr. Greenman
 10:38:54 4 having told me anything that would be covered by the
 10:39:04 5 confidentiality obligation he's owed to the CI, but from my read
 10:39:07 6 of the supporting deposition in trying to piece all of this
 10:39:10 7 together.
 10:39:10 8 **THE COURT:** All right. What's troubling to me is the
 10:39:15 9 holding in Wheat where to the casual observer the proceedings
 10:39:20 10 have to appear to be fair. With all these loose ends,
 10:39:27 11 Mr. Felicetta, how is that requirement satisfied?
 10:39:31 12 **MR. FELICETTA:** Well, with respect to the cooperating
 10:39:37 13 source, Judge, again, there's been a lot of representations made
 10:39:42 14 about the reluctance to waive. I could tell you I'm the one
 10:39:45 15 that had the conversation with him, all right, so it's been --
 10:39:46 16 let me say exactly what took place.
 10:39:48 17 I explained to the source what the issue was. I
 10:39:51 18 framed the issue for him and I said, I don't want you to tell me
 10:39:54 19 because I can't consult with you on this issue. You need
 10:39:57 20 independent counsel. If you can't afford counsel, I will make
 10:40:01 21 an application to The Court for you to get counsel. You are the
 10:40:04 22 one that has to make a decision with your independent counsel
 10:40:06 23 about whether you'll waive. His initial reluctance was, you're
 10:40:11 24 telling me that one of my prior lawyers could cross-examine me
 10:40:16 25 about stuff that I've told him in the past? I told him -- I

10:40:19 1 says, this is obviously something that you need to talk about
 10:40:22 2 with a lawyer and then The Court needs to make some rulings as
 10:40:24 3 to what exactly is fair game and I think that could be resolved
 10:40:26 4 not by sharing it with Mr. Grable, but by sharing it with The
 10:40:28 5 Court ex parte to allow The Court to make those decisions to
 10:40:28 6 see -- you know. If this were a traffic matter, that's what The
 10:40:38 7 Court wold do and The Court would say there's nothing here,
 10:40:39 8 there's no conflict, I've reviewed what information Mr. Greenman
 10:40:42 9 has on this witness and there simply is no conflict, but I'm not
 10:40:47 10 getting to the substantive issue here because we're talking
 10:40:50 11 about this as an academic exercise, is it possible, can it be a
 10:40:52 12 conflict, would it evolve into one, can it be waived. Without
 10:40:57 13 getting into the substance here, how do we know all these? How
 10:40:59 14 could we make a determination as to this?
 10:41:01 15 **THE COURT:** How do we then proceed without the
 10:41:04 16 possibility that this may evolve into an actual conflict? What
 10:41:07 17 do we do with it?
 10:41:08 18 **MR. FELICETTA:** I think The Court has to review it to
 10:41:10 19 find out what's there and find out if there is a possible
 10:41:17 20 conflict. I could tell The Court what the testimony is and
 10:41:24 21 we've written it in our memorandum. I don't think it's any
 10:41:24 22 surprise what we're going to ask this witness.

10:41:25 23 Let me get to the other question you asked, Judge,
 10:41:26 24 about fairness. It is interesting that we're sitting here today
 10:41:30 25 after Mr. Pettway has filed grievances against Mr. Greenman. He

10:41:38 1 has complained about Mr. Greenman repeatedly over these last six
 10:41:39 2 years. Mr. Greenman himself has filed a motion to get off this
 10:41:41 3 case. The Government has filed a motion which is still being
 10:41:45 4 held in abeyance to get Mr. Greenman off the case because we
 10:41:48 5 believe that the Defendant is defrauding the CJA panel and yet
 10:41:54 6 here we are today and now this issue arises. Mr. Pettway wants
 10:41:57 7 no one else except Mr. Greenman.

10:42:00 8 He'd be wise to take Mr. Greenman as a lawyer. He's
 10:42:03 9 one of the best, in my opinion, in the district, but isn't it
 10:42:07 10 interesting now that when this issue comes up and he's saying,
 10:42:10 11 well, if this witness would disappear the problem would
 10:42:12 12 disappear, it becomes I'm being denied Mr. Greenman, the only
 10:42:18 13 lawyer in the world I could ever want.

10:42:18 14 **THE COURT:** Would you agree with me that if the
 10:42:21 15 witness disappears the problem disappears?

10:42:24 16 **MR. FELICETTA:** Well, I would agree, Judge, but in my
 10:42:27 17 opinion this is gamesmanship. This is not a legitimately held
 10:42:30 18 belief by the Defendant. This is a gamesmanship and he's smart
 10:42:31 19 enough to know that it is.

10:42:33 20 Judge, I still get back to the third option. Mr.
 10:42:36 21 Grable's posed two options; the witness disappears, I think
 10:42:40 22 suggesting that either we give up, which we're not going to do,
 10:42:45 23 or you preclude, or that Mr. Pettway gets new counsel. What
 10:42:49 24 about the option Mr. Tripi brought up?
 10:42:52 25 **THE COURT:** You're talking about having an independent

10:42:55 1 lawyer do the examination of the CI at trial?

10:42:00 2 MR. FELICETTA: Right.

10:42:00 3 THE COURT: How can a lawyer do that without being

10:42:03 4 fully apprised of all aspects of this particular case and do it

10:42:07 5 right?

10:42:07 6 MR. FELICETTA: Well, assuming -- all right. Assuming

10:42:09 7 that you're going to assign a completely new attorney and get

10:42:13 8 Mr. Greenman off the case, that attorney would have to get up to

10:42:16 9 speed not just on this witness, but every witness --

10:42:16 10 THE COURT: Yes.

10:42:19 11 MR. FELICETTA: -- as opposed to having a lawyer like

10:42:22 12 Mr. Grable who is an accomplished litigator in this district,

10:42:23 13 who's already familiar with the issues. How long would it take

10:42:26 14 Mr. Grable to get up to speed on one witness' cross as opposed

10:42:30 15 to every witness' cross?

10:42:33 16 If we're talking about judicial resources, if we're

10:42:35 17 talking about the easiest way forward and the fastest to ensure

10:42:39 18 a speedy trial, why wouldn't that make more sense than getting

10:42:42 19 everybody off and getting a new lawyer for the entire case?

10:42:46 20 THE COURT: How old is this case?

10:42:49 21 MR. FELICETTA: Six years.

10:42:49 22 THE COURT: Six years?

10:42:50 23 MR. FELICETTA: Nearly six years.

10:42:57 24 THE COURT: I mean, you must agree that's almost

10:44:01 25 unconscionable, isn't it, in a criminal case setting?

10:44:04 1 MR. FELICETTA: Why it's so long?

10:44:07 2 THE COURT: Yes. I'm not blaming you. I'm not

10:44:07 3 blaming you.

10:44:10 4 MR. FELICETTA: I think there's plenty of good

10:44:12 5 reasons why this thing got delayed on all sides.

10:44:16 6 THE COURT: Plenty of bad reasons, too, correct?

10:44:20 7 MR. FELICETTA: Plenty of bad reasons, but we're

10:44:21 8 talking about what is the fairest thing going forward. In my

10:44:24 9 opinion, Judge, respectfully, my recommendation is that we

10:44:27 10 appoint Mr. Grable or some other attorney of The Court's

10:44:32 11 choosing to represent the Defendant for purposes of

10:44:34 12 cross-examining this witness and give him as much time as he

10:44:37 13 needs to get to speed. I mean, this witness is not complicated.

10:44:41 14 This is not a complicated matter. A junior lawyer could come in

10:44:48 15 and do this much less someone who is experienced as Mr. Grable.

10:44:48 16 THE COURT: Yes, you can make that argument, but if

10:44:50 17 your livelihood is on the line like Mr. Pettway it becomes

10:44:54 18 complicated, right? I mean, you don't have the same interest in

10:44:57 19 the outcome of this case that Mr. Pettway does. Your interest

10:45:00 20 is the People of the United States.

10:45:03 21 MR. FELICETTA: Judge, I don't think that's true. I'm

10:45:06 22 an equal party here. I have just as much interest as he does.

10:45:10 23 THE COURT: Well, not equal self-interest. Let's put

10:45:12 24 it that way.

10:45:18 25 MR. FELICETTA: Of course. I represent the

10:45:15 1 Government. I'm not the Government.

10:45:16 2 THE COURT: Okay. Based on your last contact with the

10:45:22 3 CI, what is he inclined to do with respect to waiver?

10:45:26 4 MR. FELICETTA: What I said, Judge, is exactly the

10:45:30 5 conversation I had. I just told him, just hold off. Let's wait

10:45:30 6 to hear what The Court tells us to do. If you need counsel,

10:45:34 7 we'll get you counsel. If you can't afford counsel, I'll ask

10:45:38 8 for assignment. He said he is unable to afford counsel.

10:45:42 9 At the last appearance, The Court told me that he

10:45:44 10 would make arrangements with the duty magistrate if and when

10:45:48 11 that became necessary, so if The Court believes that now is an

10:45:51 12 appropriate time we'll get them in here immediately.

10:45:54 13 THE COURT: All right. The last time that you were in

10:45:55 14 court you did say that the witness told you that he was inclined

10:46:00 15 not to waive?

10:46:00 16 MR. FELICETTA: Well, he had concerns about it. What

10:46:03 17 I said to him is, don't discuss it with me. I stopped him.

10:46:06 18 Mr. Allen and I were there.

10:46:06 19 THE COURT: I don't think you said that the last time.

10:46:08 20 I think the last time you said the witness was not going to

10:46:11 21 waive.

10:46:11 22 MR. FELICETTA: I -- think what I said is -- actually,

10:46:12 23 it was Mr. Greenman who brought it up because I had told him

10:46:15 24 about the conversation and Mr. Greenman relayed what he thought

10:46:19 25 he heard from me, so I'm telling The Court I had a conversation

10:46:23 1 with him and when I framed the issue for him I told him that in

10:46:27 2 order for this to happen both sides need to waive the conflict.

10:46:27 3 He said, I have concerns about allowing a prior lawyer to

10:46:35 4 cross-examine me. I told him, you can't make this decision here

10:46:38 5 in this room with me because I can't advise you as to it, so he

10:46:42 6 needs a lawyer to advise him.

10:46:42 7 THE COURT: All right.

10:46:43 8 MR. FELICETTA: He might waive. I don't know. He

10:46:45 9 needs an attorney to talk to him about it.

10:46:47 10 THE COURT: All right.

10:46:48 11 MR. GREENMAN: Judge, I think in fairness I have

10:46:50 12 issues here personally I guess, but in terms of this witness

10:46:56 13 waiving I know what Mr. Felicetta told me last week when we

10:47:01 14 talked about what the informant said and it was more than what

10:47:06 15 he's saying here. He said to me that he told me everything he

10:47:11 16 knows about me, everything that he told me --

10:47:13 17 THE COURT: Who's he? Is that the CI?

10:47:16 18 MR. GREENMAN: The informant. That's what he told Mr.

10:47:19 19 Felicetta. I wasn't there. Then Mr. Felicetta advised me that

10:47:22 20 he did not want to waive.

10:47:23 21 I have a real problem here because it's to the

10:47:27 22 Government's advantage for him to waive. On the other hand,

10:47:27 23 this is an informant who's under their thumb.

10:47:40 24 He was arrested and unarrested a number of years ago.

10:47:43 25 He agreed to cooperate with the Government. I've asked the

10:47:48 1 Government to provide all of the cooperation that he's provided,
 10:47:51 2 but the Government has at this point in time not provided that
 10:47:54 3 to me, but it's gone over a long period of time. I don't even
 10:47:58 4 know if he's still cooperating. He may be. There's a case out
 10:48:02 5 there that's open and I know what he was charged with and he was
 10:48:06 6 again -- he was arrested, then unarrested I guess is the best
 10:48:12 7 way to put it and then he agreed to cooperate based on the
 10:48:16 8 papers that we have and I can't get into details because we're
 10:48:19 9 still under protective orders which is unfair to my client.

10:48:22 10 We dealt with this whole thing. We had tape
 10:48:27 11 recordings where we were unallowed, we were disallowed to play
 10:48:30 12 these tape recordings for our client. Mr. Hill and I went over
 10:48:34 13 and listened to them ourselves, but we could not even play them
 10:48:37 14 until maybe a week or two ago. We played them to our clients
 10:48:37 15 when the Government then said, okay, you can do it, otherwise
 10:48:43 16 we're not going to give it to you, so we were stuck in the
 10:48:44 17 middle, but how honest and forthright this person's waiver is
 10:48:54 18 going to be I think something that you have to take a longer
 10:48:57 19 look at, Your Honor, because is it really true, is it really
 10:49:01 20 going to be a waiver? I mean, he could say it is, but is it
 10:49:06 21 really true that he's doing it or is he doing something that the
 10:49:09 22 Government wants him to do against his own predilection at the
 10:49:16 23 beginning?

10:49:15 24 **MR. FELICETTA:** I don't see how it serves our
 10:49:17 25 interests.

10:49:18 1 **THE COURT:** I guess you're asking me can I get into
 10:49:21 2 his head to the point where I know if it's a fully advised
 10:49:26 3 waiver and if it's a sincere waiver and if it's a credible
 10:49:30 4 waiver. I guess trying to get into your head --
 10:49:35 5 **MR. GREENMAN:** It's a little difficult.

10:49:37 6 **THE COURT:** That's -- there's a lot of obstacles in
 10:49:40 7 doing that.

10:49:41 8 In terms of a question that I would ask, assuming for
 10:49:47 9 the moment that there is a waiver from the witness and
 10:49:51 10 addressing the concerns expressed by Mr. Pettway to Mr. Grable,
 10:49:56 11 can you proceed with cross-examination in a fashion that you do
 10:50:00 12 not in any way feel constrained?

10:50:04 13 **MR. GREENMAN:** Now, absolutely not. I can't do that
 10:50:08 14 right now obviously.

10:50:09 15 **THE COURT:** I'm talking against the backdrop of a
 10:50:12 16 waiver from the CI?

10:50:15 17 **MR. GREENMAN:** I've had a little bit of experience
 10:50:17 18 over the years and I know disappointments that come out of
 10:50:20 19 trials and one of the problems that you get is I could do my
 10:50:23 20 best -- and I expressed to you last week, Judge, that my concern
 10:50:27 21 is that we're talking about the witness, we're talking about
 10:50:29 22 Mr. Pettway and I'm also concerned about my own obligations
 10:50:35 23 because what if I fall flat on my face, what if Mr. Pettway
 10:50:40 24 looks at me and at the end of the day looks at himself and says,
 10:50:44 25 you know, now I really have doubts that you did what you're

10:50:47 1 supposed to have done because of your former relationship with
 10:50:49 2 this man, et cetera. These are all issues, Judge, that just go
 10:50:52 3 into the mix. I don't know --
 10:50:53 4 **THE COURT:** Well, you know that's not likely to
 10:50:55 5 happen. I mean, you're experienced as they come. If you fall
 10:50:58 6 flat on your face, it's not because of lack of trying and for
 10:51:03 7 lack of preparation, so I think I'll put an end to that because
 10:51:09 8 that's too speculative. I mean, we open up all kinds of Pandora
 10:51:16 9 boxes here and we'll never get it resolved, but the -- what I'm
 10:51:21 10 going to do is this.

10:51:22 11 Mr. Grable, I do want you to explore further research
 10:51:28 12 on this matter relative to what you haven't researched and that
 10:51:36 13 is the precise issue we're talking about, the mindset of
 10:51:39 14 Mr. Pettway with respect to his uncomfortableness with whether
 10:51:47 15 or not there can be conflict representation where there is a
 10:51:56 16 waiver by the CI assuming he were to waive after consultation
 10:52:06 17 with conflict counsel and under the scenario where Mr. Pettway
 10:52:12 18 doesn't waive. Okay?

10:52:14 19 **MR. GRABLE:** Yes.

10:52:15 20 **THE COURT:** So we need to crystalize that research
 10:52:21 21 that I'm going to ask you to come back with and I need to know
 10:52:24 22 how much time.

10:52:27 23 **MR. GRABLE:** Your Honor, would it be unreasonable to
 10:52:29 24 have a week to do that because in addition to the research I'd
 10:52:33 25 want to go back out to Niagara County and talk to Mr. Pettway

10:52:36 1 some more.

10:52:36 2 **THE COURT:** No, it's not unreasonable. I mean, it's
 10:52:39 3 been six years practically that we've been involved in this.
 10:52:45 4 It's more than reasonable. If you think that's enough time,
 10:52:48 5 fine. If you need more time, I'll give you more time.

10:52:51 6 I am inclined to while all this is ongoing to assign
 10:52:54 7 conflict counsel for the CI.

10:53:01 8 **THE COURT CLERK:** You're going to assign it or go in
 10:53:04 9 front of the magistrate? He needs a magistrate number, so
 10:53:09 10 they're going to have to go in front of the magistrate at some
 10:53:12 11 point. I can look, but --

10:53:15 12 **THE COURT:** All right. If there's enough time for the
 10:53:16 13 magistrate to do that, to go back before the magistrate, get a
 10:53:24 14 conflict-free counsel assigned and work with the CI until we get
 10:53:27 15 back here with Mr. Grable.

10:53:30 16 **MR. FELICETTA:** Okay.

10:53:32 17 **MR. GRABLE:** Your Honor, just on the point of informed
 10:53:34 18 consent, and forgive me because I heard Mr. Felicetta talking
 10:53:39 19 about appointment of counsel for the CI, something climbed
 10:53:47 20 against my ear on the rule of confidentiality and there is a
 10:53:51 21 commentary in the rules. It's under Rule 1.7, the New York
 10:53:57 22 Rules. It's numbered paragraph 19. It says under some
 10:54:03 23 circumstances it may be impossible to make a disclosure
 10:54:06 24 necessary to obtain consent meaning informed consent when
 10:54:09 25 there's conflict to be waived by both sides. It says, for

10:54:14 1 example, when a lawyer represents different clients in related
10:54:18 2 matters, I again come back with the notion that this is a
10:54:22 3 substantially related matter, and one client refuses to consent
10:54:25 4 to the disclosure necessary to permit the other client to make
10:54:30 5 an informed decision the lawyer cannot properly ask the latter
10:54:36 6 to consent.

10:54:37 7 I know that there's a suggestion that maybe The Court
10:54:39 8 could do some type of in camera review involving the CI's
10:54:45 9 decision whether or not to waive. I would just caution whoever
10:54:48 10 will be representing him advising the CI to be mindful of that
10:54:52 11 requirement that I'm not sure that it's appropriate to say to
10:54:55 12 the CI you should waive the duty of confidentiality that you
10:55:01 13 possess as between you and Mr. Greenman in order to allow The
10:55:05 14 Court to make an assessment of whether there is a conflict that
10:55:10 15 can or could not be waived. The CI I think -- my reading of
10:55:15 16 these rules is that it would be inappropriate for a lawyer to
10:55:18 17 request the CI to waive his privilege in order to facilitate the
10:55:24 18 conflict analysis here.

10:55:27 19 Judge, whoever ends up getting appointed to represent
10:55:30 20 the CI I would be happy to confer with that lawyer and try to
10:55:33 21 bring him or her up to speed quickly, I know we got speedy trial
10:55:39 22 issues here, so that we could avoid duplication of effort and
10:55:42 23 see if we can resolve these very tricky problems.

10:55:46 24 **THE COURT:** Okay. I mean at this point in time I
10:55:51 25 assume, Mr. Pettway, you're not in a position until we conclude

10:56:54 1 all of these proceedings to make a determination that you're of
10:56:00 2 the mindset to waive or not at this point? Is that a fair
10:56:03 3 statement?

10:56:07 4 **MR. PETTWAY:** Yes, that's a fair statement.

10:56:07 5 **THE COURT:** Okay. All right. That's what we're going
10:56:09 6 to do. We're going to set another date. We'll exclude the time
10:56:14 7 in the interest of justice.

10:56:16 8 I understand that, Mr. Greenman, there is a demand by
10:56:21 9 your client for a speedy trial and Mr. Pettway; is that right?

10:56:24 10 **MR. PETTWAY:** Yes, Your Honor.

10:56:27 11 **THE COURT:** All right. And I will find that in the
10:56:31 12 interest of justice the Defendant is assigned to a speedy trial
10:56:35 13 through and including the next day. We will not proceed with
10:56:39 14 jury selection or trial. I think this Friday is when we
10:56:46 15 tentatively were thinking.

10:56:48 16 **THE COURT CLERK:** Tomorrow, Judge.

10:56:48 17 **THE COURT:** Tomorrow?

10:56:48 18 **THE COURT CLERK:** Tomorrow.

10:56:48 19 **THE COURT:** All right. Tomorrow. So we will put that
10:56:53 20 starting date aside. I will keep this on a track where I'm
10:57:02 21 continually mindful of your speedy trial right, Mr. Pettway,
10:57:09 22 yours as well, Mr. Black.

10:57:13 23 Depending on the outcome of representation in this
10:57:18 24 particular case, that could resolve the issues of the type of
10:57:25 25 conflict that would determine whether we can proceed forward or

10:57:31 1 not.

10:57:33 2 I know you're in custody. You've asked for
10:57:36 3 re-examination of your custodial status. I will take a look at
10:57:41 4 that at the appropriate time. For now, no. The status remains
10:57:45 5 the same.

10:57:49 6 Whatever needs to be done so that, Mr. Greenman, you
10:57:56 7 maintain access with Mr. Pettway for purposes of ongoing trial
10:58:00 8 preparation, you, Mr. Grable, with respect to your role as
10:58:04 9 conflict counsel, all of that is ongoing and the status of
10:58:08 10 matters will not change until we get a final decision on who's
10:58:16 11 going to represent you, Mr. Pettway, and I'll look at it in
10:58:24 12 terms of when we can at the earliest practical time such that
10:58:30 13 your defense will not be in any way impaired. We could set a
10:58:34 14 new trial date.

10:58:39 15 Could we have another date, please?

10:58:42 16 **THE COURT CLERK:** I don't think Mr. Greenman was
10:58:44 17 available. He's not available the 18th.

10:58:48 18 **MR. GREENMAN:** Right. If we could have the same date
10:58:52 19 you put McCabe down.

10:58:56 20 **THE COURT CLERK:** October 25th we could put it on at
10:58:58 21 9:30.

10:59:25 22 **THE COURT:** That's what we're going to do, 9:30, and
10:59:28 23 we'll try to get to it as soon as we can. Time is excluded
10:59:31 24 through and including the 25th. Thank you very much.

10:59:36 25 **MR. FELICETTA:** Thank you, Your Honor.

10:59:39 1 **THE COURT:** Mr. Hill, I'm sorry. I didn't mean to
10:59:41 2 ignore you.

10:59:42 3 **MR. HILL:** As to Mr. Black, at this point we're under
10:59:45 4 a deadline for him to decide whether or not he wants to take a
10:59:52 5 plea that's on the table by either Friday or jury selection,
10:59:57 6 whichever comes first. Could we get it extended out now?

11:00:02 7 **MR. FELICETTA:** I'll contact Mr. Hill after today. I
11:00:05 8 need to talk to my supervisor about that.

11:00:07 9 **MR. HILL:** Thank you.

11:00:07 10 **THE COURT:** Okay. Advise The Court, please.

11:00:09 11 **MR. FELICETTA:** Thank you.

11:00:10 12 **THE COURT:** All right. Thank you. Time is excluded
11:00:12 13 for Mr. Black, as well.

11:00:19 14 **MR. GREENMAN:** Judge, just for the record, I don't
11:00:20 15 know if I heard you correctly, but Mr. Pettway has continued to
11:00:27 16 object on the exclusion of speedy counsel.

11:00:29 17 **THE COURT:** Right. Right. And that's noted for the
11:00:31 18 record, but over that objection I find that the interest of
11:00:31 19 justice outweighs the interest of the Defendant exercising a
11:00:31 20 speedy trial.

11:00:37 21 **MR. GREENMAN:** Thank you, Your Honor.

22 (Proceedings adjourned at 11:00a.m.)

23 * * *

1 "I certify that the foregoing is a correct transcript from the
 2 record of proceedings in the above-entitled matter."

Kathleen Carr

April 25, 2018

Signature

Date

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